

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>

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**MERIT BRIEF OF  
APPELLANT TYRONE NOLING**

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<b>Ohio Revised Code 2953.73(E)(1) violates both the Eighth and Fourteenth Amendments of the United States Constitution as it: (1) discriminates between capital and non-capital criminal defendants, (2) fails to provide appellate review, and (3) results in the arbitrary and capricious application of the death penalty. Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution.</b> .....	20
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## INTRODUCTION

The Legislature has given applicants, whose requests for postconviction DNA testing have been denied, the right to appellate review. As such, that appellate review must comport with due process, equal protection, and the Eighth Amendment. Death row prisoners are treated differently from other prisoners seeking DNA testing; they face a truncated process, including appealing without transcripts of expert testimony and a limited appellate review. This does not comport with the Due Process and Equal Protection Clauses and the Eighth Amendment. At a bare minimum, prior to being executed by the State of Ohio, an individual must be afforded the most basic constitutional requirements.

The underlying questions in this appeal carry equally great weight and importance. With the rapid advancements in DNA technology, the question of what lab, or testing authority, performs testing and makes determinations based on that testing is a crucial one. When there is but one chance to obtain DNA results in a case, the selection of the testing authority can be a life-or-death decision. Indeed, in the case sub judice, the testing authority selected by the trial court lacked the appropriate technology and experience to perform the necessary testing; and, in fact, did not perform any testing before declining to test items touched by the actual perpetrator. Instead, the testing authority decided *just by reviewing BCI protocol from the time of trial* that the evidence was not testable, and performed no actual testing in making its scientific determinations. Additionally, the trial court denied Tyrone Noling's request to run the shell casings that had been collected from the original crime scene through the NIBIN database—which assists in identifying murder weapons and the crimes with which they are associated—because no statute expressly authorized the trial court to do so. Linking the shell casings to the murder weapon is crucial in this case, as no murder weapon was ever recovered.

The trial court's selection of a testing authority that did not have the advanced DNA technology appropriate for assessment and testing undermined Ohio's DNA testing statute. The trial court's failure to justify or issue reasons for its decision was equally troubling. If Noling had not been sentenced to death, an appellate court would be required to review these critical and important questions. However, because Mr. Noling has been sentenced to death, this will not occur.

### **STATEMENT OF THE CASE AND FACTS**

The underlying facts are necessary to understand the importance of Tyrone Noling's current appeal of the trial court's denial of his application for DNA testing with respect to certain pieces of critical evidence—and why mandatory appellate review is necessary.

#### **A. Background case facts**

On April 7, 1990, in Atwater, Ohio, Bearnhardt and Cora Hartig were found shot to death in their kitchen. A neighbor had become concerned and sent her son to the Hartigs' house to check on them. He found them lying on their kitchen floor and called the authorities. Tr. 657-60.

At the time of these murders, Noling was barely eighteen years old. He had left home and was staying at a house in Alliance, Ohio with four other youths, aged fourteen to twenty, including: Gary St. Clair, Butch Wolcott, Joseph Dalesandro, and Johnny Trandafir. Around this time, Noling committed two robberies (one with St. Clair) in the Trandafir's neighborhood in Alliance. Tr. 949-50, 836-37. The robberies in Alliance were of homes 1/10 of a mile from the Trandafir's house in Alliance. Tr. 949-950, 1036. In contrast, the Hartig murders occurred in Atwater, which is in another county, and over a twenty-minute drive away. During the second Alliance robbery, Noling accidentally fired his gun, after which he immediately checked on the

victim's well-being. Tr. 1370. Noling's actions are wholly inapposite of the actions of the perpetrator in the Hartig murders.

It did not take long for the police to figure out who the perpetrators of the Alliance robberies were, and Noling—along with St. Clair, Dalesandro, and Wolcott—was arrested. Tr. 1062. At the time of their arrest for the robberies, detectives from the Portage County Sheriff's Office questioned the youths about the Hartig murders. Initially, nothing came of the questioning. Noling and St. Clair pleaded guilty to the Alliance robberies and began serving their prison terms.

Approximately two years after the Hartigs' murders, in June of 1992, Ron Craig, an investigator from the Portage County Prosecutor's Office, began questioning the youths about the unsolved murders. Tr. 877-78, 1095. St. Clair, Wolcott, and Dalesandro now all gave statements inculcating Noling in the Hartig murders—Dalesandro in exchange for a plea deal and Wolcott in exchange for immunity. St. Clair was already serving a sentence for one of the Alliance robberies, and he also received a plea deal and avoided a death sentence. Tr. 940. After Noling's conviction, St. Clair, Wolcott, and Dalesandro said these statements were the product of lies, manipulation, and coercion. Second Application, Ex. H, December 28, 2010. For example, Wolcott, the youngest of the four boys, discussed Craig's efforts to convince him that he had "repressed memories." *Id.* At his June 1995 re-sentencing hearing, Dalesandro hinted that any statements that he made pertaining to the Hartig murders were coerced.<sup>1</sup> However, after the State revoked his plea agreement, Dalesandro eventually decided to cooperate. Tr. 1007-1020; 1071; Court Exhibit 1.

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<sup>1</sup> Dalesandro told the Court at his June 1995 re-sentencing: "They want to throw words in my mouth and I can't let them do that. I told them my story once. They want me to go in there, you know, and try to yell at me to say stuff and I ain't going to say nothing that ain't true, you know." Court Exhibit 1.

Noling was initially indicted for the Hartig murders in 1992. But in June of 1993, following a hearing, the court entered a *nolle prosequi*. It was not until 1995 that Noling was indicted again.

Noling's trial began in January of 1996. The State offered the testimony of 24 witnesses. The State's real case against Noling however, was offered via his co-defendants. Wolcott, Dalesandro, and St. Clair were all called as prosecution witnesses. Wolcott and Dalesandro both testified, albeit inconsistently, as to significant details that supported the State's theory of the case. Dalesandro and Wolcott testified that after the second Alliance robbery, all four drove to Atwater, Ohio, where Noling chose a house to rob. Tr. 842-43, 1047-50. Dalesandro and Wolcott further testified that once they were at the home of Bearnhardt and Cora Hartig, they waited in the car, while Noling and St. Clair went to the front door. Tr. 846-47, 1050-52. Dalesandro and Wolcott testified that, sometime later, Noling and St. Clair came running from the Hartig home and got back into Dalesandro's car. Tr. 848, 1053. Dalesandro testified that he smelled smoke coming from Noling's gun. Tr. 1054. And Wolcott testified that he saw the gun smoking. Tr. 851. They also testified that Noling admitted to the Hartigs' murders. Tr. 850-51.

St. Clair, however, did not follow suit. He recanted his statement prior to trial. On the stand, and despite his plea agreement, St. Clair denied that they had ever gone to Atwater, let alone committed the murders. Tr. 940, 961, 972. The trial court granted the State's request to treat St. Clair as a hostile witness and impeached St. Clair via a complete reading of his prior incriminating statement. Tr. 963, 968-88. St. Clair maintained that investigators and his attorneys had coached him in giving the incriminating statement. Tr. 996-1000. The State's theory at trial was that St. Clair was initially in the kitchen with Noling and the Hartigs. Tr. 971. Then, St. Clair left the kitchen and went to the bedroom. *Id.* The State contended that St. Clair

rifled through drawers in the back bedroom. Tr. 978-9. The State even played a video tape for the jury, which depicted several open drawers. Tr. 713-4; State's Exhibit 44. In the right side of the top open drawers were several open ring boxes. State's Exhibit 44; State's Exhibits 14, 16.

Additionally, there were a total of ten shell casings collected from inside the Hartigs' home. Tr. 737, 717-35, 1381; State's Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 13, and 17. These casings were from a .25 caliber semi-automatic gun. Although this was the same type of gun that Noling had stolen in the first Alliance robbery ("Hughes robbery") (Tr. 834, 1038), and accidentally shot in the second Alliance robbery ("Murphy robbery") (Tr. 837, 1043, 1094), the weapon stolen from the Hughes robbery was eventually found. (Tr. 1240). Police confirmed that it was the gun stolen during the Hughes robbery and fired during the Murphy robbery. (Tr. 1256).

Furthermore, a ballistics test revealed that this was **not** the same weapon used to kill the Hartigs. (Tr. 1241-43). The weapon used to murder the Hartigs has never been recovered.

Noling was not indicted until five years after the Hartigs' murders when a new local prosecutor took office. That new prosecutor pursued the cold murder case with suspicious vigor according to Noling's accusers [co-defendants], who have since recanted their stories and now claim that they only identified Noling as the murderer in the first place because they were threatened by the prosecutor. In addition to the identifications being potentially coerced, there is absolutely no physical evidence linking Noling to the murders, and there are other viable suspects that the prosecutor chose not to investigate or did not know of at the time. Furthermore, that St. Clair switched courses before trial, deciding not to testify against Noling, gives rise to even more suspicion.

*Noling v. Bradshaw (In re Noling)*, 651 F.3d 573, 575-577 (6th Cir.2011). As indicated by the Sixth Circuit, no physical evidence links Noling to the murders. The only .25 caliber handgun Noling possessed is not the murder weapon. *See, e.g.*, Tr. 1240, 1241-43. Other than the age of the victims, the Alliance robberies shared little in common with the Hartig murders.

## **1. Innocence Claim Further Develops Post-Trial**

Post-trial, all of Noling's co-defendants have recanted. As previously mentioned, St. Clair recanted his statement prior to trial and again on the witness stand. All three provided affidavits in support of a prior postconviction petition that was denied. *See* Second Application, Ex. H, Dec. 28, 2010.

## **2. Public records provide previously unknown information about alternate suspects**

In 2006, the *Plain Dealer* investigated Noling's case, including accessing public records related to Noling's case. That investigation turned up a number of documents pointing to alternative suspects. Police reports indicated that the Hartigs were shot at their kitchen table with the perpetrator seated across from them (which indicate that either the Hartigs knew the perpetrator or that this crime was committed by someone who had committed such crimes numerous times before). The *Plain Dealer* investigation also uncovered coercion and lying by various witnesses, and impeachment evidence materials that were either not turned over to Noling's counsel or that counsel possessed but failed to use to defend Noling. *See* Noling's Reply to the State's Response to his Application for Leave to File a Motion for New Trial, p. 8, Feb. 23, 2011 ("Reply in Support of Application for Leave"). In addition, Noling obtained documents that supported the theory that one of the Hartigs' insurance agents committed the murders. One agent owned a .25 Titan handgun (one of only four models that could have been the murder weapon), which he claimed he sold years prior to an unknown person. *Id.* at Ex. E. However, the Hartigs' other insurance agent saw the gun only four years before the murders. *Id.* at Ex. F. When authorities requested that the insurance agent who owned the .25 Titan take a lie detector test, he refused. *Id.* at Ex. N.

In addition, when police questioned the second insurance agent, he told police that he typically conducted business with the Hartigs at the kitchen table where their bodies were found. *Id.* at Exs. G and H. Given the location of the bullets and where the Hartigs' bodies were found, police concluded that the Hartigs were seated at the kitchen table when they were shot. *Id.* Mr. Hartig still had his wallet—even though the Hartigs' desk, lockbox, and drawers were ransacked. *Id.* These documents were the subject of a Motion for Leave to File a Motion for New Trial filed on November 3, 2006.

Then, in 2009, Noling's counsel made a public records request for documents in his co-defendants' files. This request resulted in a number of additional, previously undisclosed documents. The records revealed suspicious activity related to a missing .25 caliber handgun. But, among the most important outcomes of these new documents was support for the theory that Daniel Wilson was a strong alternate suspect in the Hartig murders. This evidence included police notes that revealed that Wilson's foster brother, Nathan Chesley, claimed in 1990 that "his brother" committed the Hartig murders. Second Application, Ex. J, Dec. 28, 2011. Noling obtained an affidavit from Chesley confirming that he made the statements in reference to his foster brother Daniel Wilson.<sup>2</sup> *Id.*, Ex. K.

It is well-documented that Wilson had a history of committing home invasions and victimizing the elderly. *Wilson v. Mitchell*, 498 F.3d 491, 496 (6th Cir.2007). And, Wilson lived

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<sup>2</sup> As reported in the *Plain Dealer*, "Nathan Chesley wants the world to know that an innocent man is sitting on Ohio's death row." Regina Brett, *Nathan Chesley needs to be heard in Tyrone Noling's death row case*, *The Plain Dealer* (Mar. 6, 2011). The article continues, "[i]t didn't bother Nathan that his foster brother had been executed in that June of 2009. He believed that Dan deserved to die for killing Bearnhardt and Cora Hartig. Nathan never forgot the day Dan told him that he had shot the elderly couple." *Id.* The *Plain Dealer* column goes on to provide a detailed account of Chesley's knowledge about the Hartig murders and Dan Wilson's responsibility therefore. *See id.*

a little over a mile away from the Hartigs' Atwater, Ohio, home. Wilson was sentenced to death for burning a woman alive in the trunk of her car. *Id.*

The prosecution also withheld the results of a test of the cigarette butt found outside of the Hartigs' home. That test failed to exclude Wilson as a contributor to the genetic material on this cigarette butt. DNA Application, Ex. I, Dec. 28, 2010. Neither Noling nor his alleged "co-conspirators" matched the DNA found on the cigarette butt. Tr. 721. However, when tested against a saliva sample taken from Wilson, the test could not exclude Wilson as a possible match. Second Application, Ex. I, Dec. 28, 2010. While the prosecution disclosed Noling's DNA results to counsel, the prosecution withheld both the fact that they tested Wilson against the cigarette butt, and that the results of Wilson's test failed to exclude him.

The 2009 public records request also revealed other previously undisclosed documents which point to members of the VanSteenberg family as other alternate suspects. Just days after the Hartig murders, Detectives Doak and Kaley interviewed Larry Clementson; Raymond VanSteenberg; and Dennis VanSteenberg, Raymond's son. Each of the interview reports includes details about a missing .25 caliber automatic gun, the same type of gun that was used to shoot and kill the Hartigs. *Id.* The prosecution disclosed these interview reports to defense counsel, but the prosecution did not disclose a statement provided by Marlene VanSteenberg, Raymond VanSteenberg's sister-in-law. Exhibit M, Amended Application for Postconviction DNA Testing, *State v. Noling*, Portage County C.P. No. 95 CR 220 (Dec. 4, 2013) ("Amended Second Application").

Based on the newly discovered evidence, Noling's attorneys filed a Motion for Leave to File a Motion for New Trial on June 21, 2010. Although the trial court denied this motion, the

Eleventh District Court of Appeals remanded the case for the purpose of taking further evidence. *State v. Noling*, 11 Dist. Portage No. 2011-P-0018, 2014-Ohio-1339.

**B. Tyrone Noling’s pursuit of postconviction DNA testing**

Tyrone Noling first applied for DNA testing in 2008, under Senate Bill 262 (“SB262”). His Application for Post-Conviction DNA Testing, September 25, 2008 (“First Application”) requested DNA testing of the cigarette butt collected from a location on the Hartigs’s driveway, not far from the entrance to the Hartigs’s kitchen—where the murders occurred. *See*, Application for Postconviction DNA Testing, *State v. Noling*, Portage County C.P. No. 95 CR 220, Sept. 25, 2008; *see also* Exhibit B1 and B2 to Noling’s Notice of Service and Compliance with th[e Trial] Court’s October 24, 2013 Amended Judgment Entry (Nov. 1, 2013). 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 Portage County Court of Common Pleas 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<sup>3</sup> had been changed through Senate Bill 77 (“SB77”), Noling reapplied for DNA testing (“Second Application”). *See* Application for Postconviction DNA Testing, *State v. Noling*, Portage County C.P. No. 95 CR 220, Dec. 28, 2010. Noling’s decision to file a second application was based on: (1) the existence of new acceptance criteria; and (2) the emergence of new information

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<sup>3</sup> Ohio Rev. Code 2953.74 sets out the acceptance criteria for an application for postconviction DNA testing. R.C. 2953.72(A)(4). Before a trial court can accept an application for postconviction DNA testing, one criteria that the trial court must evaluate is whether there was a prior “definitive DNA test. R.C. 2953.74(A). SB77 changed the “definitive DNA test.” *See* R.C. 2953.71(U).

as to the possible identity of alternate suspects—Daniel Wilson and the VanSteenburgs—in the crime for which Noling was sentenced to death.

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

The trial court found that the earlier DNA testing was definitive because it had excluded Noling and his codefendants as smokers of the cigarette. Under R.C. 2953.71(U), however, a prior test is not definitive and Noling would be entitled to further testing of the DNA if he could show “by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover.” Thus, the trial court could not reject without further inquiry Noling’s second application solely because he and his codefendants were excluded as smokers of the cigarette. The DNA-testing statutes now permit testing to positively identify the DNA’s source. R.C. 2953.74(E) allows the trial court to order biological material from the crime scene to be compared to the combined DNA index system maintained by the Federal Bureau of Investigation or compared to any identified person to determine whether that person is the DNA source.

In support of his second application for DNA testing, Noling had submitted evidence that Wilson and other individuals were alternative suspects in the Hartig murders. But neither Wilson’s DNA, **nor that of any of the other suspects**, was compared to the DNA on the cigarette. The trial court failed to consider Noling’s application in the context of the new statutory requirements—whether there is a possibility of discovering new biological material that is potentially from the perpetrator that the prior DNA test may have failed to discover. Therefore, the court erred by failing to apply the definition set forth in R.C. 2953.71(U) before dismissing Noling’s second application under R.C. 2953.72(A)(7).

(Emphasis added.) *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 35. This Court stated that the questions for the trial 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. *Id.* at ¶ 35, 44.

Specifically, this Court held that the trial court had to consider whether the evidence regarding Wilson or the other suspects, coupled with the advancements in DNA technology, could provide more information regarding Noling's actual-innocence claim. *Id.* at ¶ 42; R.C. 2953.71(U).

In addition, this Court addressed the Ohio Constitution's language outlining the jurisdiction of this Court, and whether R.C. 2953.73(E)(1)'s limiting this Court's jurisdiction to solely discretionary review rather than mandatory review, as in direct appeals in death penalty cases, was constitutional in light of *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516. *Noling*, 2013-Ohio-1764, at ¶ 11-21, 25-28. This Court held that R.C. 2953.73(E)(1)'s jurisdictional limits were permissible under Ohio's Constitution. *Id.* at ¶ 25-28.

On remand, the trial court immediately scheduled a hearing. During a status conference, the trial court indicated that the hearing would encompass both: (a) whether there had been prior definitive DNA testing under the new statutory definition; and (b) whether, with advanced DNA testing, postconviction DNA testing would be outcome determinative. Status Conference, Oct. 8, 2013 ("Oct. Status Conf."), p. 10-11. The hearing was eventually scheduled for 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 testing of: (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 granted be due to the advancements in DNA technology and testing since the filing of 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 [was] 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 an agreement as to what items would be subjected to DNA testing and the testing authority that would conduct the DNA testing. 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—Dr. Rick Staub,<sup>4</sup> Dr. Richard Ofshe,<sup>5</sup> Jim

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<sup>4</sup> Dr. Staub is an expert in forensic DNA testing and analysis. Exhibits A1 and A2 to Noling’s Notice of Service and Compliance with th[e Trial] Court’s October 24, 2013 Amended Judgment Entry (Nov. 1, 2013).

<sup>5</sup> Dr. Ofshe is an expert in social psychology—in particular the subject area of influence of decision making and extreme forms of influence. Additionally, Dr. Ofshe is an expert in the field of police interrogations, the use of influence and psychological techniques in police interrogations and their impact on reliability and the accuracy of the statements obtained as a result, influence in psychotherapy leading to pseudo memories, and organization and influence procedures used in high control groups—and, more generally, the subject of false confessions.

Trainum,<sup>6</sup> and Nina Morrison.<sup>7</sup> The State did so with respect to one expert—Dr. Lewis Maddox.<sup>8</sup>

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.”), p. 2-3. The trial court ordered that, since the State previously agreed to test the cigarette butt,<sup>9</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—BCI—to determine whether there was a “scientifically sufficient quantity of the parent sample to test, whether the parent sample [was] so minute or fragile that there [was] 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 had been degraded or

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Exhibits C1, C2, and C3 to Noling’s Notice of Service and Compliance with th[e Trial] Court’s October 24, 2013 Amended Judgment Entry (Nov. 1, 2013).

<sup>6</sup> Mr. Trainum is an expert in police investigative techniques – specifically processing crime scenes and use of DNA and CODIS in crime scene investigation. Exhibits B1 and B2 to Noling’s Notice of Service and Compliance with th[e Trial] Court’s October 24, 2013 Amended Judgment Entry (Nov. 1, 2013).

<sup>7</sup> Ms. Morrison is an expert in post-conviction DNA testing litigation and exonerations, and the standard of care for evaluation and litigation of a case for post-conviction DNA testing, the use of results in obtaining an exoneration or new trial, and evaluating the outcome determinative standard. Exhibits A1 and A2 to Noling’s Notice of Service and Compliance with th[e Trial] Court’s October 24, 2013 Amended Judgment Entry (Nov. 15, 2013).

<sup>8</sup> Although the State did not provide a curriculum vitae, Dr. Maddox is an expert in forensic DNA testing and analysis. Expert’s Report Pursuant to October 24, 2013 Order (Dec. 2, 2013).

<sup>9</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.

contaminated to the extent that it had become scientifically unsuitable for testing, and to file a report. *Id.*

Noling objected to the selection of BCI as the testing authority for the shell casings and the ring boxes, as those items required advanced DNA testing methods not in use at BCI. Dec. Hrg., 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.”), 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., 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 Th[e Trial] 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 trial court held a hearing on March 15, 2014. Journal Entry, Jan. 15, 2014. At the March hearing, Dr. Staub testified and explained why advanced DNA testing capabilities were necessary to make the court’s requested determinations on the shell casings and the ring boxes.

March Hrg., 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 type of DNA testing kit available at Cellmark but not BCI,<sup>10</sup> provided 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 Th[e Trial] 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 Identifiler 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<sup>11</sup> was to perform DNA testing. March Hrg., p. 53-56, 119-120, 128-129. The

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<sup>10</sup> At the time of the hearing, BCI utilized a type of DNA testing kit called Identifiler. This is produced by a company called Applied Biosystems. This kit is an STR kit. In other words, it produces the type of DNA profile that could be eligible for CODIS upload. Following the creation of Identifiler, this same company—Applied Biosystems—created Identifiler Plus. As described by Dr. Staub in his testimony, Identifiler Plus was an improvement on the previous Identifiler kit. *See also* pp. 7-11, Noling's Reply to State's Response to Noling's Motion to Amend his Application for Postconviction DNA Testing (Nov. 14, 2013).

<sup>11</sup> In the case sub judice, the State contends that the contamination that has occurred could be the presence of the DNA of the detective that collected the shell casings and the ring boxes on those

trial court also noted, prior to the start of the hearing, that his understanding of DNA testing was that “[c]ontamination means that you’re going to get more than one DNA sample from more than one person, and the only way you can tell if it’s contaminated is to test it.” *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 individuals who 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 only partial profiles were obtained from the shell casings and ring boxes. *Id.* at 62-63. Finally, Dr. Staub discussed the Raymond Towler case. Mr. Towler was convicted of the rape of an 11-year-old girl in Cleveland in 1981.<sup>12</sup> Dr. Staub testified that the evidence in the case of exoneree Raymond Towler—the underwear of the victim, specifically the crotch area—had been rubbed by an analyst’s bare hands as part of the testing done at the time of trial as part of the way a search for semen was performed at the time of Mr. Towler’s trial. *Id.* at 106-108. Although DNA testing revealed an allele from the analyst, it was below threshold. *Id.* at 107. More importantly, the DNA from the perpetrator was still present. *Id.* 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

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items, the presence of the analyst that handled the shell casings when a ballistics comparison was performed, and potential secondary transfer from the brushes that were used to dust both the shell casings and the ring boxes for latent prints following the use of cyanoacrylate ester fuming (often referred to as “super glue”). *But see*, pp. 13-14, Noling’s Reply to State’s Response to Noling’s Motion to Amend his Application for Postconviction DNA Testing, (Nov. 14, 2013).

<sup>12</sup> <http://www.innocenceproject.org/cases-false-imprisonment/raymond-towler> (accessed Dec. 3, 2015).

authority in that case because of the limited technology for both extraction and testing at BCI.<sup>13</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. Mr. Elkins was convicted in 1999 of the rape of his six-year-old niece, and the rape and murder of his 68-year-old mother-in-law.<sup>14</sup> In 2004, Cellmark performed DNA testing in the case. Specifically, the vaginal swab from Elkins’ mother-in-law, a thumbnail scraping from his mother-in-law, and the underwear of his niece. Initial DNA testing found the same male profile on the vaginal swab and under the thumbnail of Elkins’ mother-in-law, and it was not Mr. Elkins. Elkins’ Reply to SCPO’s Post-Hearing Brief, *State v. Elkins*, Summit County C.P. No. 1998 06 1415 (April 21, 2005). Additional testing was performed in late 2005. Despite the fact that the State had argued that the underwear of Elkins’ niece had been handled during the trial, the testing showed the profile from the skin cells of the perpetrator when he grabbed the underwear. *Id.* at 87-88, 104-106. Specifically, Dr. Staub testified that the same profile was found on the niece’s panties, as on the vaginal swab and under the thumbnail of Elkins’ mother-in-law. *Id.* at 104-106. Mr. Elkins was exonerated on December 15, 2005. Order, (Hunter, J.), *State v. Elkins*, Summit County C.P. No. 1998 06 1415 (Dec. 15, 2005). The State did not call any witnesses to refute the deficiencies of BCI outlined by Dr. Staub.

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<sup>13</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>14</sup> <http://www.innocenceproject.org/cases-false-imprisonment/clarence-elkins> (accessed Dec. 3, 2015).

Prior to the start of the March hearing in this case, the trial court noted that, with BCI's testing procedures, they would have to perform DNA testing to accurately determine the quantity of DNA in the sample. *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>15</sup> and evaluation.<sup>16</sup>

On March 11, 2014—just one day before 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>17</sup> BCI Report, filed March 11, 2014 (“March

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<sup>15</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 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>16</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”).

<sup>17</sup> Following the hearing, Noling filed a motion requesting that BCI review only the shell casings collected from the Hartig home. In addition, Noling asked that all shell casings from the Hartig home be evaluated, and not just those that were exhibits at trial. Noling raised concerns because the evidence bags contained within some of the trial exhibits in the instant case were labeled “Canton-Stark County Crime Laboratory”—the lab associated with Noling's Stark County cases but not with the instant case. Shell casings were collected and evaluated in Noling's Stark County cases. In its May 2, 2014 order, the Portage County Court of Common Pleas ordered all exhibits containing shell casings to BCI for review. Shell casings from the Stark County case should not be a part of, nor should they impact, any evaluation for DNA testing in the instant case. The trial court never ruled on this motion, and BCI never indicated that it reviewed any chain-of-custody documents when it issued its report on the shell casings and the ring boxes

BCI Report”). BCI confirmed that Dan Wilson was in CODIS, that a new profile on Wilson had been generated, and that the new sample was compared 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 in the trial court requesting the complete test results, which the court denied. Journal Entry, June 27, 2014.

On June 10, 2014, BCI issued a report stating that it had *visually* inspected the shell casing and ring boxes, and listed some potential sources of contamination for the shell casings and ring boxes—e.g. that the items had been handled by a lab analyst. BCI Lab Report, docketed June 26, 2014 (“June BCI Report”). BCI also stated that its policy was not to DNA test fired shell casings unless the forensic question was for handling after firing. *Id.*; But see, *State v. Jones*, 6th Dist. Lucas No. L-09-1002, 2010-Ohio-4054, ¶ 24, 32. Based on the above, BCI concluded that the submitted items were scientifically unsuitable for testing. June BCI Report. However, BCI did not perform any testing on the submitted items. *Id.* BCI’s report gave the agency’s general protocols for handling evidence submitted for fingerprint and ballistics testing, but did not discuss how the specific evidence in Noling’s case was handled. *Id.* BCI filed this report on June 26, 2014, and did not provide a copy to Noling or his counsel. *Id.* The very next day, the trial court dismissed Noling’s Amended Application. Journal Entry, June 27, 2014.

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submitted to through the trial court’s May 2, 2014 Judgment Entry and Order. BCI Report, filed June 26, 2014 (“June BCI Report”).

Noling filed a timely appeal with this Court from the trial court. *State v. Noling*, Case No. 2014-1377. In addition, Noling filed a timely appeal in the trial court and requested transcripts of those hearings. Notice of Appeal, July 24, 2014. In the Eleventh District Court of Appeals, Noling asked that the court address the jurisdictional question prior to proceeding to briefing. Motion to Determine Constitutionality of R.C. 2953.73(E)(1), July 31, 2014. However, the Eleventh District Court of Appeals ordered that briefing proceed. On June 1, 2015, the Eleventh District Court of Appeals requested that Mr. Noling explain why his appeal should not be dismissed for lack of jurisdiction. June 1, 2015 Show Cause Order. On June 10, 2015, Mr. Noling filed his response to the order to show cause. On June 22, 2015, the Eleventh District Court of Appeals issued an opinion dismissing Mr. Noling's appeal. Memorandum Opinion, June 22, 2015. Noling filed a motion to strike the portion of the appellate court's decision stating that he had not filed a response.<sup>18</sup> Subsequently, Noling filed a timely appeal and Memorandum in Support of Jurisdiction in this Court from the Eleventh District's June 22, 2015 order. As of the date of this merit brief being filed, this Court has neither accepted nor declined jurisdiction in that case.

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### PROPOSITION OF LAW

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

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

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<sup>18</sup> The Eleventh District subsequently struck that portion of its decision.

5028, 959 N.E.2d 516. Accordingly, this Court held that R.C. 2953.73(E)(1), which conferred exclusive jurisdiction upon this Court to consider Noling’s appeal, was constitutional. *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 8, 11-27.<sup>19</sup> 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, un-briefed constitutional questions:

R.C. 2953.73(E) also raises significant concerns regarding due process and equal protection in that it divides offenders who are similarly situated into two different classes: offenders who have been sentenced to death may seek leave to appeal the denial of postconviction DNA testing directly to this court while all other offenders may appeal as of right to the court of appeals and then seek discretionary review in this court if the appellate court affirms denial of the testing. Thus, the General Assembly has denied offenders sentenced to death—and only those offenders—an appeal as of right from the denial of postconviction DNA testing.

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

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<sup>19</sup> 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.

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 (O'Donnell, J., dissenting).

As both the State and Noling noted in prior briefing to this Court, proper severance of R.C. 2953.73(E)(1), in order to salvage the statute and render it constitutional, would provide death row inmates with the same appellate process as all other inmates whose applications for postconviction DNA testing have been denied. 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. This would confer jurisdiction on the Eleventh District Court of Appeals. *Id.*

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

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

**1. Equal Protection**

The equal protection of law requires that all litigants similarly situated be able to 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. Indeed, capital inmates are denied the right of appeal if this Court declines jurisdiction, while non-capital defendants are entitled to an appeal of right to the county's court of appeals. Consequently,

similarly-situated defendants, all challenging their conviction through the same mechanism, and all claiming their innocence, are not similarly-treated.

**a. Appellate review is critical in non-capital appeals where the trial court has denied postconviction DNA testing**

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 discretionary appellate process in this Court to settle questions arising under the constitutions of the United States and/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).

Since the General Assembly passed R.C. 2953.71 et seq. in 2003, non-capital defendants have appealed trial court denials of postconviction DNA applications 73 times. Of those 73, 46 were affirmed by intermediate appellate courts:

**Denial Affirmed**

	<b>Case citation</b>	<b>MISJ information</b>
<b>1</b>	<i>State v. Ruiz</i> , 8th Dist. Cuyahoga No. 84899, 2005-Ohio-759 <sup>20</sup>	Not filed.
<b>2</b>	<i>State v. Hayden</i> , 2d Dist. Montgomery No. 20747, 2005-Ohio-4025	Not filed.
<b>3</b>	<i>State v. Combs</i> , 11th Dist. Portage No. 2004-P-0058, 2005-Ohio-4211	Not filed.
<b>4</b>	<i>State v. Blackburn</i> , 5th Dist. Fairfield No. 05 CA 3, 2005-Ohio-4710	Filed. Jurisdiction granted. Affirmed pursuant to <i>State v. Buehler</i> , 113 Ohio St. 3d. 114, 2007-Ohio-1246, 863 N.E.2d 124. <i>See</i> 2007-Ohio-1381.
<b>5</b>	<i>State v. James</i> , 3rd Dist. Hardin No. 6-05-02, 2005-Ohio-4445 <sup>21</sup>	Filed. Jurisdiction declined.

<sup>20</sup> Defendant appealed denial of postconviction DNA application, but the only error he assigned was the denial of a separate motion to withdraw his guilty plea. The court of appeals affirmed the trial court’s decision, but only because the defendant failed to assign any reviewable errors.

<b>6</b>	<i>State v. Waire</i> , 1st Dist. Hamilton No. C-040782, 2005-Ohio-4853	Filed. Jurisdiction declined.
<b>7</b>	<i>State v. Wilkins</i> , 9th Dist. Summit No. 22493, 2005-Ohio-5193	Filed. Jurisdiction granted. Affirmed pursuant to <i>State v. Buehler</i> , 113 Ohio St. 3d. 114, 2007-Ohio-1246, 863 N.E.2d 124. See 2007-Ohio-1382
<b>8</b>	<i>State v. Swanson</i> , 5th Dist. Ashland No. 05 CA 13, 2005-Ohio-5471	Filed. Jurisdiction granted. Affirmed pursuant to <i>State v. Buehler</i> , 113 Ohio St. 3d. 114, 2007-Ohio-1246, 863 N.E.2d 124. See 2007-Ohio-1383
<b>9</b>	<i>State v. Nelson</i> , 8th Cuyahoga No. 85930, 2005-Ohio-5969	Not filed.
<b>10</b>	<i>State v. McCall</i> , 5th Dist. Muskingum No. CT2005-0006, 2006-Ohio-225	Not filed.
<b>11</b>	<i>State v. Schlee</i> , 11th Dist. Lake No. 2004-L-207, 2006-Ohio-2391	Filed. Jurisdiction declined.
<b>12</b>	<i>State v. Call</i> , 2d Dist. Montgomery No. 21184, 2006-Ohio-2905	Filed. Jurisdiction declined.
<b>13</b>	<i>State v. Lemke</i> , 7th Dist. Columbiana No. 05 CO 42, 2006-Ohio-3481	Filed. Jurisdiction declined.
<b>14</b>	<i>State v. Hatton</i> , 4th Dist. Pickaway No. 05CA38, 2006-Ohio-5121	Not filed.
<b>15</b>	<i>State v. Roberts</i> , 5th Dist. Guernsey No. 2006-CA-02, 2006-Ohio-5018	Not filed.
<b>16</b>	<i>State v. Mason</i> , 5th Dist. Ashland No. 2006-COA-18, 2006-Ohio-6388	Filed. Jurisdiction declined.
<b>17</b>	<i>State v. Hamilton</i> , 2d Dist. Clark No. 2006 CA 24, 2007-Ohio-434	Filed. Jurisdiction declined.
<b>18</b>	<i>State v. Nalls</i> , 2d Dist. Montgomery No. 21558, 2007-Ohio-1676	Not filed.
<b>19</b>	<i>State v. Travis</i> , 8th Dist. Cuyahoga No. 88636, 2007-Ohio-2379	Filed. Jurisdiction declined.
<b>20</b>	<i>State v. Carter</i> , 10th Dist. Franklin No. 07AP-323, 2007-Ohio-6858	Not filed.
<b>21</b>	<i>State v. Caulley</i> , 10th Dist. Franklin No. 07AP-338, 2007-Ohio-7000	Filed. Jurisdiction declined.
<b>22</b>	<i>State v. Taylor</i> , 6th Dist. Erie No. E-07-035, 2007-Ohio-7105	Filed. Jurisdiction declined.
<b>23</b>	<i>State v. Mayrides</i> , 10th Dist. Franklin No. 07AP-658, 2008-Ohio-2290	Filed. Jurisdiction declined.

<sup>21</sup> Defendant appealed denial of postconviction DNA application, but the only error he assigned was the denial of a separate motion to withdraw his guilty plea. The court of appeals affirmed the trial court's decision, but only because the defendant failed to assign any reviewable errors.

<b>24</b>	<i>State v. Madden</i> , 10th Dist. Franklin No. 08AP-172, 2008-Ohio-2653	Filed. Jurisdiction declined.
<b>25</b>	<i>State v. Galloway</i> , 10th Dist. Franklin No. 07AP-611, 2008-Ohio-3470	Not filed.
<b>26</b>	<i>State v. Ayers</i> , 8th Dist. Cuyahoga No. 90907, 2008-Ohio-5475	Filed. Jurisdiction declined.
<b>27</b>	<i>State v. Smith</i> , 8th Dist. Cuyahoga No. 90749, 2008-Ohio-5581	Filed. Jurisdiction declined.
<b>28</b>	<i>State v. Gibson</i> , 2d Dist. Champaign No. 2007 CA 38, 2008-Ohio-5904	Not filed.
<b>29</b>	<i>State v. Prade</i> , 9th Dist. Summit No. 24296, 2009-Ohio-704	Filed. Jurisdiction granted. Reversed.
<b>30</b>	<i>State v. Constant</i> , 11th Dist. Lake No. 2008-L-100, 2009-Ohio-3936	Not filed.
<b>31</b>	<i>State v. Caulley</i> , 10th Dist. Franklin No. 09AP-172, 2009-Ohio-5801	Filed. Jurisdiction declined.
<b>32</b>	<i>State v. Hatton</i> , 4th Dist. Pickaway No. 09CA4, 2010-Ohio-1245	Filed. Jurisdiction declined
<b>33</b>	<i>State v. Thomas</i> , 2d Dist. Montgomery No. 23544, 2010-Ohio-3534	Filed. Jurisdiction declined.
<b>34</b>	<i>State v. Hayden</i> , 2d Dist. Montgomery No. 23620, 2010-Ohio-3908	Not filed.
<b>35</b>	<i>State v. Foster</i> , 10th Dist. Franklin No. 10AP-317, 2010-Ohio-5155	Filed. Jurisdiction declined.
<b>36</b>	<i>State v. Broadnax</i> , 2d Dist. Montgomery No. 24121, 2011-Ohio-2182	Filed. Jurisdiction declined.
<b>37</b>	<i>State v. Clemmons</i> , 2d Dist. Montgomery No. 24377, 2011-Ohio-4447	Not filed.
<b>38</b>	<i>State v. Ingram</i> , 9th Dist. Summit No. 25843, 2012-Ohio-333	Not filed.
<b>39</b>	<i>State v. Lucas</i> , 9th Dist. Lorain No. 11CA100050, 2012-Ohio-2826	Not filed.
<b>40</b>	<i>State v. Hayden</i> , 2d Dist. Montgomery No. 24992, 2012-Ohio-6183	Not filed.
<b>41</b>	<i>State v. Richard</i> , 8th Dist. Cuyahoga No. 101135, 2014-Ohio-4838	Filed. Dismissed, vexatious litigator.
<b>42</b>	<i>State v. Curtis</i> , 12th Dist. Brown No. CA2014-10-019, 2015-Ohio-2460	Not filed.
<b>43</b>	<i>State v. Bronczyk</i> , 8th Dist. Cuyahoga No. 102317, 2015-Ohio-2765	Not filed.
<b>44</b>	<i>State v. Hayden</i> , 2d Dist. Montgomery No. 26524, 2015-Ohio-3262	Not filed.
<b>45</b>	<i>State v. Upton</i> , 8th Dist. Cuyahoga No. 101815, 2015-Ohio-3341 <sup>22</sup>	Not filed.

<sup>22</sup> Insufficient record on appeal to assess merits of application.

<b>46</b>	<i>State v. Bunch</i> , 7th Dist. Mahoning No. 14 MA 168, 2015-Ohio-4151	Not filed.
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Of the 46 appeals in which the denial was affirmed, jurisdictional memorandums were filed with this Court in 24 cases. Of those, only one was accepted. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287. Three additional cases were accepted and held for *State v. Buehler*, 113 Ohio St.3d. 114, 2007-Ohio-1246, 863 N.E.2d 124.

In non-capital appeals of a trial court’s denial of postconviction DNA testing, 25 of those 73 appeals resulted in reversals by intermediate appellate courts:

### Denial reversed

	<b>Case citation</b>	<b>MISJ information</b>
<b>1</b>	<i>State v. Rossiter</i> , 9th Dist. Wayne No. 03CA0078, 2004-Ohio-4727	Not filed.
<b>2</b>	<i>State v. Hickman</i> , 9th Dist. Summit No. 22279, 2005-Ohio-472 <sup>23</sup>	Not filed.
<b>3</b>	<i>State v. Newell</i> , 8th Dist. Cuyahoga No. 85280, 2005-Ohio-2853 <sup>24</sup>	Not filed.
<b>4</b>	<i>State v. Hightower</i> , 8th Dist. Cuyahoga Nos. 84248, 84398, 2005-Ohio-3857	Not filed.
<b>5</b>	<i>State v. Buehler</i> , 8th Dist. Cuyahoga No. 85796, 2005-Ohio-5717	Certified conflict. Granted. Reversed (trial court’s denial affirmed)
<b>6</b>	<i>State v. Sterling</i> , 11th Dist. Ashtabula No. 2003-A-0135, 2005-Ohio-6081	Jurisdiction granted. Affirmed. 2007-Ohio-1790
<b>7</b>	<i>State v. Nalls</i> , 2d Dist. Montgomery No. 20848, 2005-Ohio-6260	Not filed.
<b>8</b>	<i>State v. Thomas</i> , 1st Dist. Hamilton No. C-050245, 2005-Ohio-6823 <sup>25</sup>	Filed. Jurisdiction declined.
<b>9</b>	<i>State v. Ayers</i> , 8th Dist. Cuyahoga No. 86006, 2005-Ohio-6972	State filed. Jurisdiction granted. Reversed pursuant to <i>Buehler</i> . On remand, 8th remands to trial court. 2007-

<sup>23</sup> Appeal dismissed because trial court’s failure to state reasons for denying application meant denial was not a final appealable order.

<sup>24</sup> Appeal dismissed because trial court’s failure to state reasons for denying application meant denial was not a final appealable order.

<sup>25</sup> Appeal dismissed because trial court’s failure to state reasons for denying application meant denial was not a final appealable order.

		Ohio-5939
10	<i>State v. Price</i> , 1st Dist. Hamilton No. C-050154, 2006-Ohio-180	Not filed.
11	<i>State v. Ustaszewski</i> , 6th Dist. Lucas No. L-05-1226, 2006-Ohio-329	Not filed.
12	<i>State v. Collier</i> , 10th Dist. Franklin No. 05AP-716, 2006-Ohio-2605	State filed. Jurisdiction declined.
13	<i>State v. Henderson</i> , 8th Dist. Cuyahoga No. 86933, 2006-Ohio-2876 <sup>26</sup>	Not filed.
14	<i>State v. Elliott</i> , 1st Dist. Hamilton No. C-050606, 2006-Ohio-4508	Not filed.
15	<i>State v. Emerick</i> , 2d Dist. Montgomery No. 21505, 2007-Ohio-1334	State filed. Jurisdiction declined.
16	<i>State v. Smith</i> , 8th Dist. Cuyahoga No. 87937, 2007-Ohio-2369 <sup>27</sup>	Not filed.
17	<i>State v. Reynolds</i> , 2d Dist. Montgomery No. 23163, 2009-Ohio-5532	State filed. Jurisdiction declined.
18	<i>State v. Ayers</i> , 8th Dist. Cuyahoga No. 91847, 2009-Ohio-6096 <sup>28</sup>	State filed. Jurisdiction declined.
19	<i>State v. Lemons</i> , 11th Dist. Trumbull No. 2010-T-0008, 2010-Ohio-1445 <sup>29</sup>	Not filed.
20	<i>State v. Cordell</i> , 2d Dist. Greene No. 2010 CA 19, 2011-Ohio-1735	Not filed
21	<i>State v. Emerick</i> , 2d Dist. Montgomery No. 24215, 2011-Ohio-5543	State filed. Jurisdiction declined.
22	<i>State v. Long</i> , 1st Dist. Hamilton No. C-110139, 2011-Ohio-6381 <sup>30</sup>	Not filed.

<sup>26</sup> Appeal dismissed because trial court's failure to state reasons for denying application meant denial was not a final appealable order.

<sup>27</sup> Remanded to trial court for more detailed reasoning for denial of application for postconviction DNA testing.

<sup>28</sup> After postconviction DNA testing was granted by the Eighth District Court of Appeals, but before testing proceeded, David Ayers's conviction was reversed by the Sixth Circuit Court of Appeals. *Ayers v. Hudson*, 623 F.3d 301 (6th Cir.2010). Prior to dismissing the indictment, the State conducted DNA testing on the hair(s), the bloody towel, and the rape kit. That testing revealed a male profile from the hair that excluded Mr. Ayers. The State dismissed the indictment. Unfortunately, due to lab contamination when DNA testing was attempted at the time of the original trial in 2000, the male profile could not be run through CODIS to see if it could be matched to an alternate suspect. Mr. Ayers subsequently filed a U.S.C. § 1983 lawsuit. The matter went to trial with respect to Detectives Cipo and Kovach, and the jury awarded Mr. Ayers more than \$13 million in damages. *Ayers v. City of Cleveland*, N.D. Ohio No. 1:12-CV-753, 2013 U.S. Dist. LEXIS 25992 (Feb. 25, 2013); *Ayers v. City of Cleveland*, 773 F.3d 161 (6th Cir. 2014).

<sup>29</sup> Appeal dismissed because trial court's failure to state reasons for denying application meant denial was not a final appealable order.

<b>23</b>	<i>State v. Richard</i> , 8th Dist. Cuyahoga No. 99449, 2013-Ohio-3918	Not filed.
<b>24</b>	<i>State v. Johnson</i> , 8th Dist. Cuyahoga No. 100503, 2014-Ohio-2646	Not filed.
<b>25</b>	<i>State v. Bunch</i> , 7th Dist. Mahoning No. 14 MA 141, 2014-Ohio-4921 <sup>31</sup>	Not filed.

Of the 25 appeals in which the denial was reversed, jurisdictional memorandums were filed with this Court in 9 cases. Of these cases, this Court only accepted two. *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630; *State v. Buehler*, 113 Ohio St.3d. 114, 2007-Ohio-1246, 863 N.E.2d 124. Eight of the 25 cases were reversed because the trial court did state reasons for the denial of postconviction DNA testing or did not provide sufficient detail as to the reasons for denial.

More importantly, in other states which have a similar two-tiered appellate process, reversals of intermediate courts of appeals have proven critical to exoneration. For example, Texas has such a two-tiered appellate process for non-capital defendants, wherein review by the intermediate appellate court is mandatory and review by the state’s highest court is discretionary.<sup>32</sup> In the case of Michael Morton, the trial court had denied Mr. Morton’s application for postconviction DNA testing. Mr. Morton had been convicted in 1987 for the murder of his wife, Christine Morton. *In re Michael Wayne Morton*, 326 S.W.3d 634, 636 (Tex.Crim.App. 2010). Christine Morton’s body was found by the Mortons’ next-door neighbor shortly after noon on Wednesday, August 13, 1986, when the neighbor noticed the Mortons’ three-year-old son Eric alone outside the Mortons’ house. *Id.* at 637.

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<sup>30</sup> Appeal dismissed because trial court’s failure to state reasons for denying application meant denial was not a final appealable order.

<sup>31</sup> Appeal dismissed because trial court’s failure to state reasons for denying application meant denial was not a final appealable order.

<sup>32</sup> As discussed below, capital defendants appeal denials of applications for postconviction DNA testing to the state’s highest court. However, this is an appeal of right and is not discretionary.

The neighbor entered the Morton home to look for Eric's mother Christine and eventually discovered her dead body in the master bedroom. The body was under a comforter on the bed, and a wicker basket and suitcase were piled on the body at the headboard. Christine had suffered a massive blunt injury to the head caused by at least eight blows. Her entire upper body was covered in blood. After an autopsy, the medical examiner identified a defense-type injury on Christine's left little finger and an abrasion on her right little finger, and collected a number of wood chips found embedded in her head and hair.

*Id.*

In 2005, Mr. Morton applied for postconviction DNA testing. *Id.* Specifically, he sought testing of the following:

- (1) vaginal, oral, and rectal swabs collected from Christine's body at her autopsy, hairs found entwined in her right hand at the crime scene, fingernail clippings taken from her hands, and the nightgown recovered from her body;
- (2) a blood-stained bandana recovered from behind the Mortons' house;
- (3) certain biological material collected from Mildred McKinney, who was the victim of a murder that occurred in the Mortons' neighborhood approximately six years before Christine's murder; and
- (4) fingerprints recovered from both the McKinney and Morton crime scenes for purposes of comparative analysis.

*Id.* The trial court denied Morton's motion for testing on the bandana, the McKinney biological evidence, and the fingerprint evidence. *Id.* After the ordered testing proved inconclusive, Mr. Morton appealed the trial court's denial of the additional items. *Id.* at 638. The intermediate appellate court reversed the trial court's decision with respect to the bandana. *Id.* 638-645. In reaching this conclusion, the intermediate appellate court considered additional, intervening evidence. *Id.* The intermediate appellate court denied testing of evidence from the McKinney crime and Mr. Morton's request to have the fingerprint evidence re-evaluated. *Id.* at 645-647. Essentially, the intermediate appellate court's opinion was error correction of the lower court. This proved crucial to Mr. Morton's exoneration.

DNA testing on the bandana revealed both Christine Morton's DNA and the DNA of an unknown male. The unknown male DNA profile was run through the CODIS databank (a DNA database system) and matched Mark Norwood, a convicted felon from California, who had a criminal record in Texas and who lived in Texas at the time of Christine Morton's murder. Further investigation by Morton's lawyers and the Travis County District Attorney revealed that a hair from Norwood was also found at the scene of the murder of Debra Masters Baker in Travis County. Baker was, like Christine Morton, bludgeoned to death in her bed; her murder occurred two years after Christine's death, while Michael Morton was in prison.

Michael Morton was released on October 4, 2011, after spending nearly 25 years in prison. He was officially exonerated on December 19, 2011.<sup>33</sup>

New Jersey also has a similar two-tiered appellate review system to that of Ohio and Texas. Again, the review of the intermediate appellate court proved crucial to the exoneration of Larry Peterson. *State v. Peterson*, 364 N.J. Super. 387; 836 A.2d 821 (N.J. App. Div. 2003). Mr. Peterson had been convicted of felony-murder and four counts of sexual assault in 1989. *Id.* at 823. After New Jersey passed its statute providing access to postconviction DNA testing, Mr. Peterson filed an application. *Id.* The trial court denied the application, specifically stating that Mr. Peterson had not met the statutory requirements that identity must have been a "significant issue" at trial, and that if the DNA test results were "favorable" to defendant, there would be a "reasonable probability" a motion for new trial would be granted. *Id.* Mr. Peterson appealed to the intermediate appellate court. *Id.* On appeal, the State argued that identity had not been a significant issue at trial and that the State had presented overwhelming evidence of guilt at the original trial. *Id.* at 824. The intermediate appellate court disagreed and remanded the case with an order for DNA testing. *Id.* at 826-8. Again, the appellate review was largely one of error correction.

The pubic hairs collected from the victim's pubic combings and stick from the crime scene all matched the victim. Although the New Jersey State Police

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<sup>33</sup> <http://www.innocenceproject.org/cases-false-imprisonment/michael-morton> (accessed Dec. 2, 2015).

Laboratory had reported that there was no semen in the victim's rape kit, SERI identified sperm on her oral, vaginal, and anal swabs. Two different male profiles were found. One of the males was one of the victim's consensual partners, and his profile was found on her underwear, jeans, and rape kit. The other unknown male was found on all of the swabs in her rape kit. Significantly, this unknown male profile was not found on the victim's underwear or jeans, indicating that she did not put these items of clothing back on before she was killed, consistent with the fact that she was found partially nude. Further, the victim's fingernail scrapings were subjected to testing and SERI found the profile of the same unknown male that deposited the sperm found in the victim's mouth, vagina, and anus.

Based on this evidence, Peterson's conviction was vacated in July 2005.<sup>34</sup>

Both of the above examples demonstrate the critical importance of appellate review when applications for postconviction DNA testing have been denied. Both of the intermediate appellate court decisions involved error correction and did not contain constitutional questions or issues would necessarily be ones of "of public or great general interest." These intermediate appeals were mandatory in the above cases.

#### **b. Capital appeals in postconviction DNA testing**

Conversely, R.C. 2953.73(E)(1) provides that capital defendants "may seek leave" from this Court to appeal the denial of their DNA applications. Any argument that capital defendants are treated more favorably than non-capital defendants because they have an appeal to this Court must fail.<sup>35</sup> This Court may deny jurisdiction to hear Noling's appeal, thus totally denying him any appeal of his DNA application.

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<sup>34</sup> <http://www.innocenceproject.org/cases-false-imprisonment/larry-peterson> (accessed Dec. 2, 2015).

<sup>35</sup> This Court so hypothesized in dicta, in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997), the first capital case decided after Issue One. Noling's case differs significantly. Issue One eliminated the capital offender's direct appeal of right to the court of appeals, but provided a **mandatory** appeal to the Ohio Supreme Court. Revised Code 2953.73(E)(1) eliminates the capital offender's direct appeal to the court of appeals, and provides a **discretionary** appeal to this Court.

There is no easy way to track the number of jurisdictional memoranda in which capital defendants have filed with this Court when a trial court has denied an application for postconviction DNA testing. However, this Court has only previously accepted one. *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095. This case makes two.

As this Court noted in *State v. Smith*, 80 Ohio St.3d 89, 100, 684 N.E.2d 668 (1997), “[o]nly two to three percent of all noncapital defendants who seek review by this court even have their cases heard.” The high threshold that this Court sets for granting a jurisdictional appeal is also demonstrated in more recent statistics:

Year	Total Jurisdictional Appeals Filed	Total number of death penalty post-conviction jurisdictional appeals filed in listed year (included in number from prior column)	Total Jurisdictional Appeals Accepted for Review in listed year	Total Jurisdictional Appeals declined in listed year	Total number of death penalty post-conviction jurisdictional appeals accepted for review in listed year	Total number of death penalty post-conviction jurisdictional appeals declined in listed year
2003 <sup>36</sup>	1686	13	229	1460	0	18
2004 <sup>37</sup>	1650	15	118	1459	0	10
2005 <sup>38</sup>	1922	15	254	1552	0	21
2006 <sup>39</sup>	1789	17	276	1564	1	18
2007 <sup>40</sup>	1927	10	176	1647	0	11
2008 <sup>41</sup>	2004	13	163	1868	not available	9

<sup>36</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2003.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2003.pdf) (accessed Dec. 2, 2015).

<sup>37</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2004.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2004.pdf) (accessed Dec. 2, 2015).

<sup>38</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2005.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2005.pdf) (accessed Dec. 2, 2015).

<sup>39</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2006.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2006.pdf) (accessed Dec. 2, 2015).

<sup>40</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2007.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2007.pdf) (accessed Dec. 2, 2015).

<sup>41</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2008.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2008.pdf) (accessed Dec. 2, 2015).

Year	Total Jurisdictional Appeals Filed	Total number of death penalty post-conviction jurisdictional appeals filed in listed year (included in number from prior column)	Total Jurisdictional Appeals Accepted for Review in listed year	Total Jurisdictional Appeals declined in listed year	Total number of death penalty post-conviction jurisdictional appeals accepted for review in listed year	Total number of death penalty post-conviction jurisdictional appeals declined in listed year
2009 <sup>42</sup>	1817	11	131	1823	not available	12
2010 <sup>43</sup>	1714	6	164	1510	not available	5
2011 <sup>44</sup>	1667	8	157	1589	not available	3
2012 <sup>45</sup>	1629	8	99	1512	not available	3
2013 <sup>46</sup>	1492	7	67	1484	not available	7
2014 <sup>47</sup>	1623	5	71	1306	not available	3

The first version of Ohio’s DNA testing statute was passed in 2003, so these statistics are critically important and demonstrate the heavy burden that capital defendants bear in trying to obtain appellate review when their application for postconviction DNA testing is denied.

In addition, limiting death-sentenced defendants to a memorandum in support of jurisdiction requires indigent defendants to file critical appeals without the benefit of transcripts. Furthermore, this truncated appellate process prevents indigent defendants from obtaining state-funded transcripts entirely.

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<sup>42</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2009.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2009.pdf) (accessed Dec. 2, 2015).

<sup>43</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2010.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2010.pdf) (accessed Dec. 2, 2015).

<sup>44</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2011.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2011.pdf) (accessed Dec. 2, 2015).

<sup>45</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2012.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2012.pdf) (accessed Dec. 2, 2015).

<sup>46</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2013.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2013.pdf) (accessed Dec. 2, 2015).

<sup>47</sup> [http://www.supremecourt.ohio.gov/Publications/annual\\_reports/annualreport2014.pdf](http://www.supremecourt.ohio.gov/Publications/annual_reports/annualreport2014.pdf) (accessed Dec. 2, 2015).

**c. Separate and unequal processes violate Equal Protection**

The Supreme Court of the United States has stated, “[a]lthough the Federal Constitution guarantees no right to appellate review, once a State affords that right, the State may not ‘bolt the 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).<sup>48</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 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 that M.L.B. would suffer (termination of parental rights) without review. In the case *sub judice*, 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,

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<sup>48</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.

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 appeal.”). Most critically, in *Lindsey*, the Supreme Court reviewed the constitutionality of an appellate process that singled out a particular group—who was given additional and heavy burdens—in order to have the right to appellate review. *Lindsey v. Normet*, 405 U.S. 56, 74-9, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). And, the burdens—given to indigent defendants like M.L.B.—were far beyond what others, not in the particular group singled out, had to undertake to obtain appellate review. *Id.* The Court concluded that the additional burden placed on the particular group were arbitrary, irrational, and violated the Equal Protection Clause. *Id.* at 79.

Noling’s situation is analogous to the aforementioned cases: he is being denied his fundamental right to appeal, based entirely on the fact that he is sentenced to death. This is discriminatory, arbitrary, and a violation of Noling’s constitutional right to equal protection of the laws. This is especially true when all non-capital defendants, who are likewise challenging their conviction through the exact same DNA statute, do have an appeal of right. Additionally, non-capital, indigent defendants have a right to transcripts of any critical expert testimony provided in support of their application for postconviction DNA testing. Moreover, non-capital, indigent defendants can utilize these transcripts in their direct 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

to Noling.<sup>49</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 and Article I, Section 16 of the Ohio Constitution.

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 S.B. 11, or R.C. 2953.73(E)(1), meets this standard.<sup>50</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

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<sup>49</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, pled to murder and received a sentence of 15-life; George Henderson, convicted of aggravated murder, given 20-life; David Hill, convicted of aggravated murder, aggravated robbery, and felonious assault, received 29.5-life; Marvin Martin, convicted of aggravated murder and received LWOP; Willie Hightower, convicted in 1972 of rape, abduction, and murder in perpetration of rape, and given a life sentence by a jury trial; Fredrick Springer, convicted in 1973 (when Ohio did not have the death penalty) by a bench trial of a double murder, rape, incest, abduction for immoral purposes, rape under 12, and assault with intent to kill, rape, or rob and sentenced to 39 years-life; Robert Caulley, convicted of a double murder and originally indicted with death, but found guilty of murder and voluntary manslaughter and sentenced to 15-life; Mark Barclay, convicted of murder, kidnapping, and abuse of a corpse, and sentenced to 20-life.

<sup>50</sup> 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. *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

the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the legislature's actions were irrational. *Dickerson*, 872 F.2d at 1120. Here, it appears that the legislature's only reasoning for foregoing Noling's right to direct appeal of his DNA application was to follow in Issue One's<sup>51</sup> footsteps. The State's rationale for the passage of Issue One concerned eliminating delay to execution; this rationale cannot overcome Noling's constitutional rights. Moreover, other provisions of Ohio's postconviction DNA testing statute prevent delay. For example, R.C. 2953.72(A)(7) bars acceptance or consideration of subsequent applications postconviction DNA testing. In addition, if the General Assembly's rationale was not to follow Issue One, then it was solely to mimic the procedure of Issue One (to pass over review by the intermediate court of appeal). And this is absolutely no justification at all.

## 2. Due Process

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

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matters). However, the State cannot even meet the lowest level of scrutiny, rational basis, and that level will be used for purposes of this argument.

<sup>51</sup> *State v. Smith*, 80 Ohio St. 3d 89, 95-97, 684 N.E.2d 668 (1997) ("On November 8, 1994, Ohio voters approved Issue I, which amended Section 2(B)(2)(c), Article IV of the Ohio Constitution to provide for direct appeal to this court 'as a matter of right in cases in which the death penalty has been imposed.' Concurrently, Section 3(B)(2), Article IV of the Ohio Constitution was amended to eliminate any jurisdiction of the courts of appeals 'to review on direct appeal a judgment that imposes a sentence of death.'").

*North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), more process is due in death penalty cases because of the severity of the punishment involved.

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

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

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

The Ohio General Assembly acknowledged that innocent people are sometimes wrongfully convicted when it enacted Senate Bill 11 (“SB11”), Senate Bill 262 (“SB262”), and Senate Bill 77 (“SB77”) to offer an avenue of relief and provide an opportunity for exoneration.<sup>52</sup> Concerns of human fallibility in the legal process always linger, especially in

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<sup>52</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 that 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. Four Ohioans have been exonerated based on DNA testing granted under SB 262: Raymond Towler, Robert McClendon, David Ayers, and Dewey Jones. [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) (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; *State v. Jones*, 9th Dist. Summit No. 26568, 2013-Ohio-2986; <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4369> (accessed Dec. 2, 2015).

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), 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).

A review of the postconviction DNA testing statutes of other states demonstrates that no other state reduces appellate review in death penalty cases when such review is given to non-death penalty appeals:

<b>ALABAMA</b>	<b>Ala.Code 1975 § 15-18-200</b>	The statute does not set out its own appellate procedure .
<b>ALASKA</b>	<b>AS § 12.73.010</b>	The statute does not set out its own appellate procedure.
<b>ARIZONA</b>	<b>Ariz. Rev. Stat. § 13-4240</b>	The statute does not set out its own appellate procedure.
<b>ARKANSAS</b>	<b>Ark. Code Ann. §§ 16-112-201 to 16-112-208</b>	Ark. Code Ann. § 16-112-206. No differentiation in appellate procedure.
<b>CALIFORNIA</b>	<b>Cal. Penal Code § 1405</b>	Cal. Penal Code § 1405(k): An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. The petition shall be filed within 20 days after the court’s order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeal. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeal or California Supreme Court shall expedite its review of a petition for writ of mandate or prohibition filed under this

		subdivision.
<b><i>COLORADO</i></b>	<b>Colo. Rev. Stat. Ann. §§ 18-1-410 to 417</b>	The statute does not set out its own appellate procedure.
<b><i>CONNECTICUT</i></b>	<b>Conn. Gen. Stat. § 54-102-kk</b>	The statute does not set out its own appellate procedure.
<b><i>DELAWARE</i></b>	<b>Del. Code Ann. 11 § 4504</b>	No discussion of appellate procedure for applicant. Makes clear that State has a right to appeal.
<b><i>DISTRICT OF COLUMBIA</i></b>	<b>D.C. Code Ann. §§ 22-4133, 22-4135</b>	The statute does not set out its own appellate procedure.
<b><i>FLORIDA</i></b>	<b>Fla. Stat. Ann. §§ 925.11, §§ 925.12, 943.3251 and Fla. R. Crim. P. 3.853</b>	§§ 925.11 (3) Right to appeal; rehearing.-- (a) An appeal from the court's order on the petition for postsentencing DNA testing may be taken by any adversely affected party. (b) An order denying relief shall include a statement that the sentenced defendant has the right to appeal within 30 days after the order denying relief is entered. <sup>53</sup>
<b><i>GEORGIA</i></b>	<b>Ga. Code Ann. § 5-5-41</b>	Ga. Code Ann. § 5-5-41 (13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section.
<b><i>HAWAII</i></b>	<b>H.R.S. §§ 844D-121 to 133</b>	§ 844D-129. Appeal In accordance with applicable rules of court, the defendant may appeal to the supreme court and intermediate court of appeals from an order denying a motion made pursuant to this part.
<b><i>IDAHO</i></b>	<b>Idaho Code §§ 19-4901, 19-4902</b>	The statute does not set out its own appellate procedure.
<b><i>ILLINOIS</i></b>	<b>725 Ill. Comp. Stat. Ann. 5/116-3</b>	The statute does not set out its own appellate procedure.
<b><i>INDIANA</i></b>	<b>Ind. Code Ann. §§ 35-38-7-1 to 19</b>	The statute does not set out its own appellate procedure.
<b><i>IOWA</i></b>	<b>I.C.A. § 81.10</b>	The statute does not set out its own appellate procedure.
<b><i>KANSAS</i></b>	<b>Kan. Stat. Ann. § 21-2512</b>	The statute does not set out its own appellate procedure.

<sup>53</sup> Florida R. App. P. 9.141 governs postconviction appeals in non-capital cases. Florida R. App. P. 9.142 governs postconviction appeals in capital cases. Both provide for non-discretionary review, but non-capital cases go to the courts of appeals and capital cases go to the Florida Supreme Court.

<b>KENTUCKY</b>	<b>Ky. Rev. Stat. Ann. §§ 422.285, 422.287</b>	The statute does not set out its own appellate procedure.
<b>LOUISIANA</b>	<b>La. Code Crim. Proc. §§ 924 thru 926.1</b>	The statute does not set out its own appellate procedure.
<b>MAINE</b>	<b>Me. Rev. Stat. Ann. 15 §§ 2136-2138</b>	Me. Rev. Stat. Ann. 15 §§ 2138(6). Appeal from court decision to grant or deny motion to order DNA analysis. An aggrieved person may not appeal as a matter of right from the denial of a motion to order DNA analysis. The time, manner and specific conditions for taking that appeal to the Supreme Judicial Court, sitting as the Law Court, are as the Supreme Judicial Court provides by rule. The State may not appeal as a matter of right from a court order to grant a motion to order DNA analysis. The time, manner and specific conditions for taking that appeal to the Supreme Judicial Court, sitting as the Law Court, are as the Supreme Judicial Court provides by rule.
<b>MARYLAND</b>	<b>Md. Code Ann., Crim. Proc. §§ 6-232, 8-201</b>  See also MD public safety article 2-508(B)(2)	§ 8-201(j)(6) An appeal to the court of appeals may be taken from an order entered under subsection (c), (h)(2), or (j)(4) of this section.
<b>MASSACHUSETTS</b>	<b>ALM GL, ch. 278A, § 18</b>	§ 18. Appeals An order allowing or denying a motion for forensic or scientific analysis filed under this chapter shall be a final and appealable order. If the moving party appeals an order denying a motion for forensic or scientific analysis the moving party shall file a notice of appeal with the court within 30 days after the entry of the judgment
<b>MICHIGAN</b>	<b>Mich. Comp. Laws Ann. § 770.16</b>	M.C.L.A. § 770.16 (10) The court shall state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the defendant a new trial under this section. Notwithstanding section [770.]3 of this chapter, an aggrieved party may appeal the court's decision to grant or deny the petition for DNA testing and for new trial by application for leave granted by the court of appeals.
<b>MINNESOTA</b>	<b>Minn. Stat. Ann.</b>	590.06. Appeals

	<p><b>§§ 590.01 to 590.06</b></p>	<p>An appeal may be taken to the Court of Appeals or, in a case involving a conviction for first degree murder, to the Supreme Court from the order granting relief or denying the petition within 60 days after the entry of the order.</p> <p>The appealing party shall, within the 60 days, serve a notice of appeal from the final order upon the court administrator of district court and the opposing party. If the appeal is by the petitioner, the service shall be on the county attorney and the attorney general. If the appeal is by the state, the service shall be on the petitioner or the petitioner's attorney. No fees or bond for costs shall be required for the appeal.</p>
<p><b>MISSISSIPPI</b></p>	<p><b>Miss. Code Ann. § 99-39-3 thru § 99-39-29</b></p>	<p>§ 99-39-25. Appeals; stay of judgment; bail</p> <p>(1) A final judgment entered under this article may be reviewed by the supreme court of Mississippi on appeal brought either by the prisoner or the state on such terms and conditions as are provided for in criminal cases.</p> <p>(2) A perfection of appeal by the state shall act as a supersedeas and shall stay the judgment until there is a final adjudication by the supreme court.</p> <p>(3) When the appeal is brought by the state, the prisoner may be released on bail pending appeal under the terms and conditions provided for in</p> <p>Rule 7.02, Mississippi Uniform Criminal Rules of Circuit Court Practice.</p> <p>(4) When the appeal is brought by the prisoner, bail shall not be allowed.</p> <p>(5) The attorney general shall represent the state in all appeals under this article, whether the appeal is brought by the prisoner or by the state</p> <p>§ 99-39-28. Death penalty proceedings</p> <p>If application to proceed in the trial court is granted, post-conviction proceedings on cases where the death penalty has been imposed in the trial court and appeals from the trial court shall be conducted in accordance with rules established by the Supreme Court</p>
<p><b>MISSOURI</b></p>	<p><b>Mo. Ann. Stat. §§ 547.035</b></p>	<p>The statute does not set out its own appellate procedure.</p>
<p><b>MONTANA</b></p>	<p><b>Mont. Code Ann. §§ 46-21-</b></p>	<p>The statute does not set out its own appellate procedure.</p>

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<b>NEBRASKA</b>	<b>Neb. Rev. Stat. § 29-2101 and §§ 29-4119 thru 29-4125</b>	The statute does not set out its own appellate procedure.
<b>NEVADA</b>	<b>N.R.S. 176.0918</b>	The statute does not set out its own appellate procedure.
<b>NEW HAMPSHIRE</b>	<b>RSA 651-D:1 - D:4</b>	The statute does not set out its own appellate procedure.
<b>NEW JERSEY</b>	<b>N.J. Stat. Ann. § 2A:84A-32a</b>	N.J. Stat. Ann. § 2A:84A-32a(h). An order granting or denying a motion for DNA testing pursuant to this section may be appealed, pursuant to the Rules of Court.
<b>NEW MEXICO</b>	<b>N.M. Stat. Ann. § 31-1A-2</b>	N.M. Stat. Ann. § 31-1A-2(K). The petitioner shall have the right to appeal a district court's denial of the requested DNA testing, a district court's final order on a petition or a district court's decision regarding relief for the petitioner. The state shall have the right to appeal any final order issued by the district court. An appeal shall be filed by a party within thirty days to the court of appeals.
<b>NEW YORK</b>	<b>N.Y. Crim. Pro. § 440 et al</b>	The statute does not set out its own appellate procedure for appeals of DNA testing.
<b>NORTH CAROLINA</b>	<b>§ 15A-269. Request for postconviction DNA testing;</b> <b>N.C. Gen. Stat. § 15A-267 et al</b>	§ 15A-270.1. Right to appeal denial of defendant's motion for DNA testing  The defendant may appeal an order denying the defendant's motion for DNA testing under this Article, including by an interlocutory appeal. The court shall appoint counsel upon a finding of indigency.
<b>NORTH DAKOTA</b>	<b>ND ST 29-32.1-15</b>	The statute does not set out its own appellate procedure.
<b>OHIO</b>	<b>R.C. §§ 2953.21-2953.23; 2953.71 - 2953.84</b>	2953.73(E) A judgment and order of a court entered under division (D) of this section 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,

		<p>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.</p> <p>(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</p>
<b>OKLAHOMA</b>	<b>OK ST T. 22 § 1373</b>	<p>§ 1373.7. Appeals An appeal under the provisions of the Postconviction DNA Act may be taken in the same manner as any other appeal.</p>
<b>OREGON</b>	<b>O.R.S. § 138.005 et al., O.R.S. § 138.510</b>	<p>138.697. Denial or limitation of DNA testing; appeal (1) A person described in ORS 138.690 may appeal to the Court of Appeals from a circuit court's final order or judgment denying or limiting DNA (deoxyribonucleic acid) testing under ORS 138.692, denying appointment of counsel under ORS 138.694 or denying a motion for a new trial under ORS 138.696. (2) The state may appeal to the Court of Appeals from a circuit court's final order or judgment granting a motion for DNA testing under ORS 138.692 or granting a motion for a new trial under ORS 138.696. (3) The time limits described in ORS 138.071, the notice requirements described in ORS 138.081 and and the provisions of ORS 138.225, 138.227, 138.240, 138.250, 138.255 and 138.261 apply to appeals under this section unless the context requires otherwise. (4) A circuit court shall appoint counsel to represent a person described in ORS 138.690 on appeal in the same manner as for criminal defendants under ORS 138.500.</p>
<b>PENNSYLVANIA</b>	<b>Pa. Stat. Ann. 42 § 9541 et al</b>	The statute does not set out its own appellate procedure.
<b>RHODE ISLAND</b>	<b>R.I. Gen. Laws §§ 10-9.1-10 thru</b>	The statute does not set out its own appellate procedure for appeals of DNA testing.

	<b>10-9.1-12</b>	
<b><i>SOUTH CAROLINA</i></b>	<b>Codified Laws S.C. § 17-28-20 thru § 17-28-120</b>	The statute does not set out its own appellate procedure.
<b><i>SOUTH DAKOTA</i></b>	<b>S.D. Codified Law 23-5B-1 thru 23-5B-17</b>	The statute does not set out its own appellate procedure.
<b><i>TENNESSEE</i></b>	<b>Tenn. Code Ann. §§ 40-30-301 thru 40-30-313</b>	The statute does not set out its own appellate procedure.
<b><i>TEXAS</i></b>	<b>Tex. Crim. Proc. Ann. §§ Art. 64.01 to 64.05</b>	Art. 64.05. Appeals An appeal under this chapter is to a court of appeals in the same manner as an appeal of any other criminal matter, except that if the convicted person was convicted in a capital case and was sentenced to death, the appeal is a direct appeal to the court of criminal appeals. <sup>54</sup>
<b><i>UTAH</i></b>	<b>Utah Code Ann. §§ 78-35a-301 thru 304</b>	The statute does not set out its own appellate procedure.
<b><i>VERMONT</i></b>	<b>13 V.S.A. § 5561 et al</b>	§ 5567. Appeals An order entered on the petition may be appealed to the Vermont supreme court pursuant to the Rules of Appellate Procedure.
<b><i>VIRGINIA</i></b>	<b>Va. Code Ann. § 19.2-327.1</b>	The statute does not set out its own appellate procedure.
<b><i>WASHINGTON STATE</i></b>	<b>Wash. Rev. Code Ann. § 10.73.170</b>	The statute does not set out its own appellate procedure.
<b><i>WEST VIRGINIA</i></b>	<b>W. Va. Code Ann. § 15-2B-14</b>	(j) An order granting or denying a motion for DNA testing under this section is not to be appealable and is subject to review only through a petition for writ of mandamus or prohibition filed with the supreme court of appeals by the person seeking DNA testing or the prosecuting attorney. The petition shall be filed within twenty days of the court's order granting or denying the motion for DNA testing. The court shall expedite its review of a petition for writ of mandamus or prohibition filed under this subsection.

<sup>54</sup> In Texas, the intermediate appellate courts are called “Courts of Appeals.” The highest court for criminal appeals in the State of Texas is the “Court of Criminal Appeals.” [http://www.txcourts.gov/media/654201/Court-Structure-Chart-for-publication9\\_1\\_14b.pdf](http://www.txcourts.gov/media/654201/Court-Structure-Chart-for-publication9_1_14b.pdf) (accessed Dec. 2, 2015).

<b>WISCONSIN</b>	<b>Wis. Stat. Ann. §§ 974.02, 974.06 &amp; 974.07</b>	§ 974.027(13) An appeal may be taken from an order entered under this section as from a final judgment.
<b>WYOMING</b>	<b>W.S. 7-12-302 through 7-12-315</b>	<p>§ 7-12-313. Appeal.</p> <p>(a) An order granting or denying a motion for DNA testing filed under W.S. 7-12-303(c) shall not be appealable, but may be subject to review only under a writ of review filed by the movant, the district attorney or the attorney general. The petition for a writ of review may be filed no later than twenty (20) days after the court's order granting or denying the motion for DNA testing.</p> <p>(b) Any party to the action may appeal to the Wyoming supreme court any order granting or denying a motion for a new trial under W.S. 7-12-310(b).</p>

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 capitalily-convicted inmates. Noling sought testing in the county in which he was convicted, and now he has no redress for the additional errors raised to this Court. This State action constitutes a violation of Noling's constitutional rights under the due process clause of the Fourteenth Amendment of the United States Constitution.

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

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

*Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The litmus test for constitutionality is that the death penalty not be imposed arbitrarily or capriciously. *Furman*, 408 U.S. 238

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

The Ohio General Assembly enacted SB11, SB262, and SB77 in recognition of the fact that there are innocent people wrongfully incarcerated who could be exonerated by advanced DNA technology. Even the most aggressive prosecutor and strictest judge would agree that an inmate, able to establish his innocence by exclusion DNA test results, should be granted relief.<sup>55</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

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<sup>55</sup> Consider *State v. Elkins*, CR. 1998-06-1415, Summit County. Pursuant to R.C.2953.73(C), in which Ohio Attorney General Jim Petro filed a response in support of Mr. Elkins' DNA application, arguing "in light of the newly available evidence, [DNA test results] no reasonable fact finder would find Elkins guilty beyond a reasonable doubt." *Attorney General Jim Petro's Response to Clarence Elkins Application for DNA testing*, at 12.

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

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

**C. Severance cannot be limited solely to R.C. 2953.73(E)(1) because, standing alone, (E)(2) violates the United States Constitution's Equal Protection Clause.<sup>56</sup>**

If subsection (E)(1) alone is stricken as unconstitutional, that action will leave Noling with no means to appeal the denial of his DNA application. This is so because the plain language of subsection (E) limits a defendants' rights to appeal a denial of a DNA application to those avenues delineated in subsection (E)(1), addressing the appellate rights of capital defendants, and subsection (E)(2), addressing the appellate rights of non-capital defendants.<sup>57</sup> Thus, if this Court finds that R.C. 2953.73(E)(1) is unconstitutional, it must then consider the constitutionality of subsection (E)(2). That subsection, *insofar as it applies only to applicants*

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<sup>56</sup> This severance also violates Due Process and the Eighth Amendment. Striking (E)(1) without addressing the constitutional implications of leaving (E)(2)'s limitation of appellate rights to solely non-capital defendants would be an even greater Constitutional violation than the current form of the statute.

<sup>57</sup> R.C. §2953.73(E) uses the term "offender" rather than "defendant."

*who are not under sentences of death*, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and must be stricken.

**1. Standing alone, R.C. 2953.73(E)(2) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.**

As discussed at length above, providing a two-tiered appellate process to a non-capital defendant, which consists of an appeal of right and a discretionary appeal, and providing only a discretionary appeal to capital defendants when their applications for postconviction DNA testing have been denied violates equal protection, due process, and the Eighth Amendment. By extension, the removal of any appellate process or review for capital defendants when their applications for postconviction DNA testing have been denied violates equal protection, due process, and the Eighth Amendment. Therefore, as R.C. 2953.73(E)(2) applies only to non-capital defendants following severance, it cannot stand.

**2. Proper severance will preserve the DNA testing statute while removing the unconstitutional portions of R.C. 2953.73(E)**

This Court presumes that compliance with the United States and Ohio Constitutions is intended and that that an entire statute is intended to be effective. *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, ¶ 93, *citing* R.C. 1.47(A) and (B). Also, if a provision of a statute is found to be invalid, “the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application . . .” R.C. 1.50. To this end, the offending portions of R.C. 2953.73(E) should be severed from the rest of the statute.

The test for severance is set out in *Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28, 33 (1927). To determine if severance is appropriate, three questions must be answered:

(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?

(2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?

(3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

*Id.*

Here, excising the offending parts of subsection (E), as follows, is the appropriate remedy:

(E) A judgment and order of a court entered under division (D) of this section 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.~~

R.C. 2953.73(E).

Additionally, other portions of the statute, which reference R.C. 2953.73(E), should also be excised:

(8) 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;

R.C. 2953.72(A)(8).

Removing the offending language from the statute does not affect the remaining subsections nor does it “detract from the overriding objectives of the General Assembly” as the mechanism for obtaining DNA testing for eligible inmates remains. *See Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, ¶ 98. Moreover, there is no need to insert words or terms to give effect to the remaining portions of the statute. Thus, severance of the unconstitutional portions of subsection (E) comports with the requirements of *Geiger*.

This severance would provide a constitutional result, giving all applicants for DNA testing under R.C. 2953.73(E) the ability to appeal the denial of an application to the courts of appeals. *See State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790, 864 N.E.2d 630, ¶ 36-43.

## CONCLUSION

Tyrone Noling respectfully requests that this Court find that R.C. 2953.73(E)(1) violates both the Eighth and Fourteenth Amendments of the United States Constitution as it: (1) discriminates between capital and non-capital criminal defendants, (2) fails to provide appellate review, and (3) results in the arbitrary and capricious application of the death penalty. Should this Court find R.C. 2953.73(E)(1) unconstitutional, Mr. Noling requests that this Court sever the unconstitutional portions of subsection (E) from R.C. 2953.73 and R.C. 2953.72(A). Noling

further asks that this Court transfer Noling's appeal to the Eleventh District Court of Appeals to review the final appealable order denying his application for DNA testing.

Respectfully submitted,

Office of the Ohio Public Defender

/s/ Carrie Wood

Carrie Wood - 0087091

Assistant State Public Defender

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(513) 556-0752

(513) 556-1236 – fax

Counsel for Tyrone Noling

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief of Appellant Tyrone Noling** 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 7th day of December 2015.

*/s/ Carrie Wood*

\_\_\_\_\_  
Carrie Wood (0087091)  
Assistant State Public Defender

Co-Counsel for Tyrone Noling

#455329

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.**

---

**APPENDIX TO**

**MERIT BRIEF OF  
APPELLANT TYRONE NOLING**

---

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

TYRONE NOLING,

DEFENDANT-APPELLANT.

:  
: CASE No. 14-1377  
:  
: ON DISCRETIONARY APPEAL FROM THE  
: PORTAGE COUNTY COURT OF COMMON  
: PLEAS PURSUANT TO R.C. 2953.73(e)(1),  
: CASE No. 95-CR-220  
: THIS IS A CAPITAL CASE.  
:

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NOTICE OF APPEAL OF APPELLANT TYRONE NOLING

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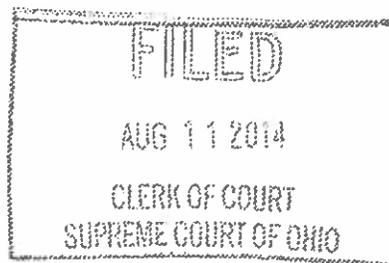
Victor V. Vigluicci (0012579)  
Portage County Prosecutor  
Pamela Holder (0042727)  
Assistant Prosecuting Attorney  
Counsel of Record  
466 South Chestnut Street  
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COUNSEL FOR APPELLANT  
STATE OF OHIO

Professor Mark Godsey (00744840)  
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COUNSEL FOR APPELLANT  
TYRONE NOLING



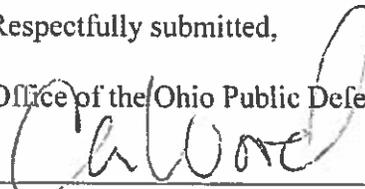
**NOTICE OF APPEAL OF APPELLANT AXEL INGERSOLL**

Appellant Axel Ingersoll hereby gives notice of appeal to the Supreme Court of Ohio from the judgments of the Portage County Court of Common Pleas, entered in Court of Common Pleas Case number 95-CR-220 on June 27, 2014 and November 25, 2013.

This case raises a substantial constitutional question and is of public or great general interest.

Respectfully submitted,

Office of the Ohio Public Defender



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Carrie Wood - 0087091

Assistant State Public Defender

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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 11th day of August 2014.

---

Carrie Wood (0087091)  
Assistant Public Defender

Counsel for Tyrone Noling

#424208

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

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,  
Defendant-Appellant.

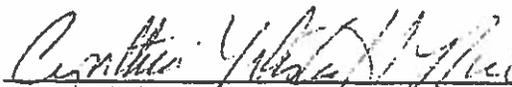
JUN 22 2015

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

IN THE COURT OF COMMON PLEAS  
PORTAGE COUNTY, OHIO

STATE OF OHIO,

Plaintiff, **FILED**  
COURT OF COMMON PLEAS

CASE NO.: 1995 CR 00220

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

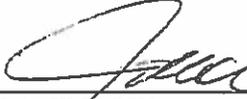
JUDGE JOHN A. ENLOW

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,

FILED )  
Plaintiff, 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."

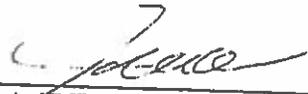
The Court would further find that, for judicial economy, and in the interest of justice, it is

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 Vigluicci  
Attorney Carrie Wood

**AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

**AMENDMENT VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## **AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

### **AMENDMENT XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## CONSTITUTION OF THE STATE OF OHIO

### ARTICLE I: BILL OF RIGHTS

#### § 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

# CONSTITUTION OF THE STATE OF OHIO

## ARTICLE IV: JUDICIAL

### § 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;
- (f) In any cause on review as may be necessary to its complete determination;
- (g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

- (a) In appeals from the courts of appeals as a matter of right in the following:
  - (i) Cases originating in the courts of appeals;
  - (ii) Cases involving questions arising under the constitution of the United States or of this state.
- (b) In appeals from the courts of appeals in cases of felony on leave first obtained,
- (c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;
- (d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

# CONSTITUTION OF THE STATE OF OHIO

## ARTICLE IV: JUDICIAL

### § 3 Court of Appeals.

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

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\*\*\* This document is current for urgency legislation through the end of \*\*\*  
the 2015 Legislative Session (Chapter 807)

PENAL CODE  
Part 2. Of Criminal Procedure  
Title 10. Miscellaneous Proceedings  
Chapter 11. Errors and Mistakes in Pleadings and Other Proceedings

*Cal Pen Code § 1405 (2015)*

**§ 1405. Right to motion for DNA test; Hearing; Counsel; Grounds for granting motion; Identification of evidence and technology; Disclosure of results; Cost; Appeal and review; Testing; Disclosure to public; Duties of Prosecutor; Entitlement to ultimate relief; Severability**

(a) A person who was convicted of a felony and is currently serving a term of imprisonment may make a written motion, pursuant to subdivision (d), before the trial court that entered the judgment of conviction in his or her case, for performance of forensic deoxyribonucleic acid (DNA) testing.

(b)

(1) An indigent convicted person may request appointment of counsel in order to prepare a motion pursuant to subdivision (d) by sending a written request to the court. The request shall include the person's statement that he or she was not the perpetrator of the crime and shall explain how the DNA testing is relevant to his or her assertion of innocence. The request also shall include the person's statement as to whether he or she previously has had counsel appointed under this section.

(2) If any of the information required in paragraph (1) is missing from the request, the court shall return the request to the convicted person and advise him or her that the matter cannot be considered without the missing information.

(3)

(A) Upon a finding that the person is indigent, he or she has included the information required in paragraph (1), and counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel to investigate and, if appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(B) Upon a finding that the person is indigent, and counsel previously has been appointed pursuant to this subdivision, the court may, in its discretion, appoint counsel to investigate and, if

appropriate, to file a motion for DNA testing under this section and to represent the person solely for the purpose of obtaining DNA testing under this section.

(4) This section does not provide for a right to the appointment of counsel in a postconviction collateral proceeding, or to set a precedent for any such right, in any context other than the representation being provided an indigent convicted person for the limited purpose of filing and litigating a motion for DNA testing pursuant to this section.

(c) Upon request of the convicted person or convicted person's counsel, the court may order the prosecutor to make all reasonable efforts to obtain, and police agencies and law enforcement laboratories to make all reasonable efforts to provide, the following documents that are in their possession or control, if the documents exist:

(1) Copies of DNA lab reports, with underlying notes, prepared in connection with the laboratory testing of biological evidence from the case, including presumptive tests for the presence of biological material, serological tests, and analyses of trace evidence.

(2) Copies of evidence logs, chain of custody logs and reports, including, but not limited to, documentation of current location of biological evidence, and evidence destruction logs and reports.

(3) If the evidence has been lost or destroyed, a custodian of record shall submit a report to the prosecutor and the convicted person or convicted person's counsel that sets forth the efforts that were made in an attempt to locate the evidence. If the last known or documented location of the evidence prior to its loss or destruction was in an area controlled by a law enforcement agency, the report shall include the results of a physical search of this area. If there is a record of confirmation of destruction of the evidence, the report shall include a copy of the record of confirmation of destruction in lieu of the results of a physical search of the area.

(d)

(1) The motion for DNA testing shall be verified by the convicted person under penalty of perjury and shall include all of the following:

(A) A statement that he or she is innocent and not the perpetrator of the crime.

(B) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(D) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(E) Reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known.

(F) State whether any motion for testing under this section previously has been filed and the results of that motion, if known.

(2) Notice of the motion shall be served on the Attorney General, the district attorney in the county of conviction, and, if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within 90 days of the date on which the Attor-

ney General and the district attorney are served with the motion, unless a continuance is granted for good cause.

(e) If the court finds evidence was subjected to DNA or other forensic testing previously by either the prosecution or defense, it shall order the party at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing.

(f) If the court determines that the convicted person has met all of the requirements of subparagraphs (A) to (F), inclusive, of paragraph (1) of subdivision (d), the court may, as it deems necessary, order a hearing on the motion. The judge who conducted the trial, or accepted the convicted person's plea of guilty or nolo contendere, shall conduct the hearing unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion. Either party, upon request, may request an additional 60 days to brief issues raised in subdivision (g).

(g) The court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect.

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime, special circumstance, or enhancement allegation that resulted in the conviction or sentence. The convicted person is only required to demonstrate that the DNA testing he or she seeks would be relevant to, rather than dispositive of, the issue of identity. The convicted person is not required to show a favorable result would conclusively establish his or her innocence.

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial. In determining whether the convicted person is entitled to develop potentially exculpatory evidence, the court shall not decide whether, assuming a DNA test result favorable to the convicted person, he or she is entitled to some form of ultimate relief.

(6) The evidence sought to be tested meets either of the following conditions:

(A) The evidence was not tested previously.

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(7) The testing requested employs a method generally accepted within the relevant scientific community.

**(8)** The motion is not made solely for the purpose of delay.

**(h)**

**(1)** If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used.

**(2)** The testing shall be conducted by a laboratory that meets the FBI Director's Quality Assurance Standards and that is mutually agreed upon by the district attorney in a noncapital case, or the Attorney General in a capital case, and the person filing the motion. If the parties cannot agree, the court shall designate a laboratory that meets the FBI Director's Quality Assurance Standards. Laboratories accredited by the following entities have been determined to satisfy this requirement: the American Association for Laboratory Accreditation (A2LA), the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), and Forensic Quality Services (ANSI-ASQ National Accreditation Board FQS).

**(3)** If the accredited laboratory selected by the parties or designated by the court to conduct DNA testing is not a National DNA Index System (NDIS) participating laboratory that takes or retains ownership of the DNA data for entry into the Combined DNA Index System (CODIS), the laboratory selected to perform DNA testing shall not initiate analysis for a specific case until documented approval has been obtained from an appropriate NDIS participating laboratory's technical leader of acceptance of ownership of the DNA data from the selected laboratory that may be entered into or searched in CODIS.

**(i)** In accordance with the court's order pursuant to subdivision (h), the laboratory may communicate with either party, upon request, during the testing process. The result of any testing ordered under this section shall be fully disclosed to the person filing the motion, the district attorney, and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes.

**(j)**

**(1)** The cost of DNA testing ordered under this section shall be borne by the state or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the ability to pay. However, the cost of any additional testing to be conducted by the district attorney or Attorney General shall not be borne by the convicted person.

**(2)** In order to pay the state's share of any testing costs, the laboratory designated in subdivision (h) shall present its bill for services to the superior court for approval and payment. It is the intent of the Legislature to appropriate funds for this purpose in the 2000-01 Budget Act.

**(k)** An order granting or denying a motion for DNA testing under this section shall not be appealable, and shall be subject to review only through petition for writ of mandate or prohibition filed by the person seeking DNA testing, the district attorney, or the Attorney General. The petition shall be filed within 20 days after the court's order granting or denying the motion for DNA testing. In a noncapital case, the petition for writ of mandate or prohibition shall be filed in the court of appeal. In a capital case, the petition shall be filed in the California Supreme Court. The court of appeal or California Supreme Court shall expedite its review of a petition for writ of mandate or prohibition filed under this subdivision.

**(l)** DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is nec-

essary in the interests of justice to give priority to the DNA testing, a DNA laboratory shall be required to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

**(m)** DNA profile information from biological samples taken from a convicted person pursuant to a motion for postconviction DNA testing is exempt from any law requiring disclosure of information to the public.

**(n)** Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.

**(o)** The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

**HISTORY:**

Added Stats 2000 ch 821 § 1 (SB 1342). Amended Stats 2001 ch 943 § 1 (SB 83); Stats 2004 ch 405 § 16 (SB 1796); Stats 2014 ch 554 § 1 (SB 980), effective January 1, 2015.

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Title XLVII. Criminal Procedure and Corrections. (Chs. 900-985).  
Chapter 925. Miscellaneous Provisions of Criminal Procedure.

*Fla. Stat. § 925.11 (2015)*

**§ 925.11. Postsentencing DNA testing.**

**(1) Petition for examination.**

(a) 1. A person who has been tried and found guilty of committing a felony and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced that may contain DNA (deoxyribonucleic acid) and that would exonerate that person or mitigate the sentence that person received.

2. A person who has entered a plea of guilty or nolo contendere to a felony prior to July 1, 2006, and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced that may contain DNA (deoxyribonucleic acid) and that would exonerate that person.

(b) A petition for postsentencing DNA testing under paragraph (a) may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

**(2) Method for seeking postsentencing DNA testing.**

(a) The petition for postsentencing DNA testing must be made under oath by the sentenced defendant and must include the following:

1. A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how it was originally obtained;

2. A statement that the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result establishing that the petitioner is not the person who committed the crime;

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence received by the defendant for that crime;

4. A statement that identification of the defendant is a genuinely disputed issue in the case, and why it is an issue;

5. Any other facts relevant to the petition; and

6. A certificate that a copy of the petition has been served on the prosecuting authority.

(b) Upon receiving the petition, the clerk of the court shall file it and deliver the court file to the assigned judge.

(c) The court shall review the petition and deny it if it is insufficient. If the petition is sufficient, the prosecuting authority shall be ordered to respond to the petition within 30 days.

(d) Upon receiving the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the petition or set the petition for hearing.

(e) Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary and makes the requisite finding of indigency.

(f) The court shall make the following findings when ruling on the petition:

1. Whether the sentenced defendant has shown that the physical evidence that may contain DNA still exists;

2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

3. Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(g) If the court orders DNA testing of the physical evidence, the cost of such testing may be assessed against the sentenced defendant unless he or she is indigent. If the sentenced defendant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(h) Any DNA testing ordered by the court shall be carried out by the Department of Law Enforcement or its designee, as provided in *s. 943.3251*.

(i) The results of the DNA testing ordered by the court shall be provided to the court, the sentenced defendant, and the prosecuting authority.

**(3) Right to appeal; rehearing.**

(a) An appeal from the court's order on the petition for postsentencing DNA testing may be taken by any adversely affected party.

(b) An order denying relief shall include a statement that the sentenced defendant has the right to appeal within 30 days after the order denying relief is entered.

(c) The sentenced defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(d) The clerk of the court shall serve on all parties a copy of any order rendered with a certificate of service, including the date of service.

**(4) Preservation of evidence.**

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

(b) In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved or retained.

**HISTORY: HISTORY:**

S. 1, ch. 2001-97; s. 1, ch. 2004-67; s. 1, ch. 2006-292, eff. June 23, 2006.

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Title XLVII. Criminal Procedure and Corrections. (Chs. 900-985).  
Chapter 925. Miscellaneous Provisions of Criminal Procedure.

*Fla. Stat. § 925.12 (2015)*

**§ 925.12. DNA testing; defendants entering pleas.**

(1) For defendants who have entered a plea of guilty or nolo contendere to a felony on or after July 1, 2006, a defendant may petition for postsentencing DNA testing under *s. 925.11* under the following circumstances:

(a) The facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney at the time the plea was entered and could not have been ascertained by the exercise of due diligence; or

(b) The physical evidence for which DNA testing is sought was not disclosed to the defense by the state prior to the entry of the plea by the petitioner.

(2) For defendants seeking to enter a plea of guilty or nolo contendere to a felony on or after July 1, 2006, the court shall inquire of the defendant and of counsel for the defendant and the state as to physical evidence containing DNA known to exist that could exonerate the defendant prior to accepting a plea of guilty or nolo contendere. If no physical evidence containing DNA that could exonerate the defendant is known to exist, the court may proceed with consideration of accepting the plea. If physical evidence containing DNA that could exonerate the defendant is known to exist, the court may postpone the proceeding on the defendant's behalf and order DNA testing upon motion of counsel specifying the physical evidence to be tested.

(3) It is the intent of the Legislature that the Supreme Court adopt rules of procedure consistent with this section for a court, prior to the acceptance of a plea, to make an inquiry into the following matters:

(a) Whether counsel for the defense has reviewed the discovery disclosed by the state and whether such discovery included a listing or description of physical items of evidence.

(b) Whether the nature of the evidence against the defendant disclosed through discovery has been reviewed with the defendant.

(c) Whether the defendant or counsel for the defendant is aware of any physical evidence disclosed by the state for which DNA testing may exonerate the defendant.

(d) Whether the state is aware of any physical evidence for which DNA testing may exonerate the defendant.

(4) It is the intent of the Legislature that the postponement of the proceedings by the court on the defendant's behalf under subsection (2) constitute an extension attributable to the defendant for purposes of the defendant's right to a speedy trial.

**HISTORY: HISTORY:**

S. 2, ch. 2006-292, eff. June 23, 2006.

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Title XLVII. Criminal Procedure and Corrections. (Chs. 900-985).  
Chapter 943. Department of Law Enforcement.

*Fla. Stat. § 943.3251 (2015)*

**§ 943.3251. Postsentencing DNA testing.**

(1) When a court orders postsentencing DNA testing of physical evidence, pursuant to *s. 925.11*, the Florida Department of Law Enforcement or its designee shall carry out the testing.

(2) The cost of such testing may be assessed against the sentenced defendant, pursuant to *s. 925.11*, unless he or she is indigent.

(3) The results of postsentencing DNA testing shall be provided to the court, the sentenced defendant, and the prosecuting authority.

**HISTORY: HISTORY:**

S. 2, ch. 2001-97.

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\*\*\* Current Through the 2015 Regular Session \*\*\*

TITLE 5. APPEAL AND ERROR  
CHAPTER 5. NEW TRIAL  
ARTICLE 3. PROCEDURE

*O.C.G.A. § 5-5-41 (2015)*

§ 5-5-41. Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c) (1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(3) The motion shall be verified by the petitioner and shall show or provide the following:

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

(6) (A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

(8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and bond forfeiture fund as provided in Article 3 of Chapter 21 of Title 15.

(9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, *Section 14131 of Title 42 of the United States Code*, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.

(11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.

(13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section.

**HISTORY:** Orig. Code 1863, § 3645; Code 1868, § 3670; Ga. L. 1873, p. 47, § 1; Code 1873, § 3721; Code 1882, § 3721; Civil Code 1895, § 5487; Penal Code 1895, § 1064; Civil Code 1910, § 6092; Penal Code 1910, § 1091; Code 1933, § 70-303; Ga. L. 2003, p. 247, § 1; Ga. L. 2011, p. 264, § 1-2/SB 80; Ga. L. 2012, p. 775, § 5/HB 942; Ga. L. 2015, p. 693, § 3-4/HB 233.

## Maine Revised Statutes Annotated by LexisNexis(R)

\*\*\* Current with Legislation through the 2015 First Regular Session of the 127th Legislature. The Regular Session convened December 3, 2014 and adjourned July 16, 2015. The general effective date is October 15, 2015 \*\*\*

TITLE 15. COURT PROCEDURE--CRIMINAL  
PART 4. JUDGMENT AND PROCEEDINGS  
CHAPTER 305-B. POST-JUDGMENT CONVICTION MOTION FOR DNA ANALYSIS

*15 M.R.S. § 2136 (2015)*

§ 2136. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. CODIS. "CODIS" means the Federal Bureau of Investigation's national DNA identification index system that allows for storage and exchange of DNA records submitted by state and local forensic DNA laboratories and is derived from the Combined DNA Index System.

2. CRIME LAB. "Crime lab" means the Maine State Police Crime Laboratory located in Augusta.

3. DNA. "DNA" means deoxyribonucleic acid.

4. DNA ANALYSIS. "DNA analysis" means DNA typing tests that derive identification information specific to a person from that person's DNA.

5. DNA RECORD. "DNA record" means DNA identification information obtained from DNA analysis and stored in the state DNA data base or CODIS.

6. DNA SAMPLE. "DNA sample" means a blood sample provided by a person convicted of one of the offenses listed in this chapter or submitted to the crime lab for analysis pursuant to a criminal investigation.

7. STATE DNA DATA BASE. "State DNA data base" means the DNA identification record system administered by the Chief of the State Police.

8. STATE DNA DATA BANK. "State DNA data bank" means the repository of DNA samples maintained by the Chief of the State Police at the crime lab collected pursuant to chapter 194 and this chapter.

## Maine Revised Statutes Annotated by LexisNexis(R)

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TITLE 15. COURT PROCEDURE--CRIMINAL  
PART 4. JUDGMENT AND PROCEEDINGS  
CHAPTER 305-B. POST-JUDGMENT CONVICTION MOTION FOR DNA ANALYSIS

*15 M.R.S. § 2137 (2015)*

§ 2137. Postjudgment of conviction motion for DNA analysis; new trial based on analysis results

1. MOTION. A person who has been convicted of and sentenced for a crime under the laws of this State that carries the potential punishment of imprisonment of at least one year and for which the person is in actual execution of either a pre-Maine Criminal Code sentence of imprisonment, including parole, or a sentencing alternative pursuant to *Title 17-A, section 1152*, subsection 2 that includes a term of imprisonment or is subject to a sentence of imprisonment that is to be served in the future because another sentence must be served first may file a written postjudgment of conviction motion in the underlying criminal proceeding moving the court to order DNA analysis of evidence in the control or possession of the State that is related to the underlying investigation or prosecution that led to the person's conviction and a new trial based on the results of that analysis as authorized by this chapter. For criminal proceedings in which DNA testing was conducted before September 1, 2006, the person may file a written postjudgment of conviction motion in the underlying criminal proceeding moving the court for a new trial based on the results of the DNA testing already conducted using the standard set forth in this chapter if the DNA test results show that the person is not the source of the evidence.

2. TIME FOR FILING. A motion under this section must be filed by the later of:

A. September 1, 2008, including a motion pertaining to criminal proceedings in which DNA testing was conducted before September 1, 2006;

B. Two years after the date of conviction; and

C. In cases in which the request for analysis is based on the existence of new technology with respect to DNA analysis that is capable of providing new material information, within 2 years from the time that the technology became commonly known and available.

**HISTORY:** P.L. 2005 ch. 659, § 1 (NEW).

## Maine Revised Statutes Annotated by LexisNexis(R)

\*\*\* Current with Legislation through the 2015 First Regular Session of the 127th Legislature. The Regular Session convened December 3, 2014 and adjourned July 16, 2015. The general effective date is October 15, 2015 \*\*\*

TITLE 15. COURT PROCEDURE--CRIMINAL  
PART 4. JUDGMENT AND PROCEEDINGS  
CHAPTER 305-B. POST-JUDGMENT CONVICTION MOTION FOR DNA ANALYSIS

*15 M.R.S. § 2138 (2015)*

§ 2138. Motion; process

1. **FILING MOTION.** A person authorized in section 2137 who chooses to move for DNA analysis shall file the motion in the underlying criminal proceeding. The motion must be assigned to the trial judge or justice who imposed the sentence unless that judge or justice is unavailable, in which case the appropriate chief judge or chief justice shall assign the motion to another judge or justice. Filing and service must be made in accordance with Rule 49 of the Maine Rules of Criminal Procedure.

2. **PRESERVATION OF EVIDENCE.** If a motion is filed under this chapter, the court shall order the State to preserve during the pendency of the proceeding all evidence in the State's possession or control that could be subjected to DNA analysis. The State shall prepare an inventory of the evidence and submit a copy of the inventory to the defense and the court. If evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions.

3. **COUNSEL.** If the court finds that the person filing a motion under section 2137 is indigent, the court may appoint counsel for the person at any time during the proceedings under this chapter.

4. **REPEALED.** Laws 2005, c. 659, § 2, eff. Sept. 1, 2006.

4-A. **STANDARD FOR ORDERING DNA ANALYSIS.** The court shall order DNA analysis if a person authorized under section 2137 presents prima facie evidence that:

- A. A sample of the evidence is available for DNA analysis;
- B. The evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in a material way;
- C. The evidence was not previously subjected to DNA analysis or, if previously analyzed, will be subject to DNA analysis technology that was not available when the person was convicted;

D. The identity of the person as the perpetrator of the crime that resulted in the conviction was at issue during the person's trial; and

E. The evidence sought to be analyzed, or the additional information that the new technology is capable of providing regarding evidence sought to be reanalyzed, is material to the issue of whether the person is the perpetrator of, or accomplice to, the crime that resulted in the conviction.

5. COURT FINDING; ANALYSIS ORDERED. The court shall state its findings of fact on the record or shall make written findings of fact supporting its decision to grant or deny a motion to order DNA analysis. If the court grants a motion for DNA analysis under this section, the crime lab shall perform DNA analysis on the identified evidence and on a DNA sample obtained from the person.

6. APPEAL FROM COURT DECISION TO GRANT OR DENY MOTION TO ORDER DNA ANALYSIS. An aggrieved person may not appeal as a matter of right from the denial of a motion to order DNA analysis. The time, manner and specific conditions for taking that appeal to the Supreme Judicial Court, sitting as the Law Court, are as the Supreme Judicial Court provides by rule. The State may not appeal as a matter of right from a court order to grant a motion to order DNA analysis. The time, manner and specific conditions for taking that appeal to the Supreme Judicial Court, sitting as the Law Court, are as the Supreme Judicial Court provides by rule.

7. PAYMENT. If the person authorized in section 2137 is able, the person shall pay for the cost of the DNA analysis. If the court finds that the person is indigent, the crime lab shall pay for the cost of DNA analysis ordered under this section.

8. RESULTS. The crime lab shall provide the results of the DNA analysis under this chapter to the court, the person authorized in section 2137 and the attorney for the State. Upon motion by the person or the attorney for the State, the court may order that copies of the analysis protocols, laboratory procedures, laboratory notes and other relevant records compiled by the crime lab be provided to the court and to all parties.

A. If the results of the DNA analysis are inconclusive or show that the person is the source of the evidence, the court shall deny any motion for a new trial. If the DNA analysis results show that the person is the source of the evidence, the defendant's DNA record must be added to the state DNA data base and state DNA data bank.

B. If the results of the DNA analysis show that the person is not the source of the evidence and the person does not have counsel, the court shall appoint counsel if the court finds that the person is indigent. The court shall then hold a hearing pursuant to subsection 10.

1) to (3). Deleted. Laws 2005, c. 659, § 4, eff. Sept. 1, 2006.

9. REQUEST FOR REANALYSIS. Upon motion of the attorney for the State, the court shall order reanalysis of the evidence and shall stay the person's motion for a new trial pending the results of DNA analysis.

10. STANDARD FOR GRANTING NEW TRIAL; COURT'S FINDINGS; NEW TRIAL GRANTED OR DENIED. If the results of the DNA testing under this section show that the person is not the source of the evidence, the person authorized in section 2137 must show by clear and convincing evidence that:

A. Only the perpetrator of the crime or crimes for which the person was convicted could be the source of the evidence, and that the DNA test results, when considered with all the other evidence in the case, old and new, admitted in the hearing conducted under this section on behalf of the person show that the person is actually innocent. If the court finds that the person authorized in section 2137 has met the evidentiary burden of this paragraph, the court shall grant a new trial;

B. Only the perpetrator of the crime or crimes for which the person was convicted could be the source of the evidence, and that the DNA test results, when considered with all the other evidence in the case, old and new, admitted in the hearing conducted under this section on behalf of the person would make it probable that a different verdict would result upon a new trial; or

C. All of the prerequisites for obtaining a new trial based on newly discovered evidence are met as follows:

1) The DNA test results, when considered with all the other evidence in the case, old and new, admitted in the hearing conducted under this section on behalf of the person would make it probable that a different verdict would result upon a new trial;

2) The proffered DNA test results have been discovered by the person since the trial;

3) The proffered DNA test results could not have been obtained by the person prior to trial by the exercise of due diligence;

4) The DNA test results and other evidence admitted at the hearing conducted under this section on behalf of the person are material to the issue as to who is responsible for the crime for

which the person was convicted; and

5) The DNA test results and other evidence admitted at the hearing conducted under this section on behalf of the person are not merely cumulative or impeaching, unless it is clear that such impeachment would have resulted in a different verdict.

The court shall state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the person authorized in section 2137 a new trial under this section. If the court finds that the person authorized in section 2137 has met the evidentiary burden of paragraph A, the court shall grant a new trial.

For purposes of this subsection, "all the other evidence in the case, old and new," means the evidence admitted at trial; evidence admitted in any hearing on a motion for new trial pursuant to Rule 33 of the Maine Rules of Criminal Procedure; evidence admitted at any collateral proceeding, state or federal; evidence admitted at the hearing conducted under this section relevant to the DNA testing and analysis conducted on the sample; and evidence relevant to the identity of the source of the DNA sample.

**11. APPEAL FROM A COURT DECISION TO GRANT OR DENY A MOTION FOR NEW TRIAL.** The State or an aggrieved person may appeal as a matter of right from a court decision to grant or deny the person a new trial to the Supreme Judicial Court, sitting as the Law Court. The time, manner and specific conditions for taking that appeal to the Supreme Judicial Court, sitting as the Law Court, are as the Supreme Judicial Court provides by rule.

**12. EXHAUSTION.** A person who has taken a direct appeal from the judgment of conviction is not precluded from utilizing the remedy of this chapter while the appeal is pending. The resolution of the motion is automatically stayed pending final disposition of the direct appeal unless the Supreme Judicial Court, sitting as the Law Court, on motion otherwise directs.

A person who has initiated a collateral attack upon the judgment of conviction under chapter 305-A is not precluded from utilizing the remedy of this chapter while that post-conviction review proceeding is pending. The resolution of the motion is automatically stayed pending final disposition of the post-conviction review proceeding unless the assigned justice or judge in the post-conviction review proceeding otherwise directs.

**13. VICTIM NOTIFICATION.** When practicable, the attorney for the State shall make a good faith effort to give written notice of a motion under this section to the victim of the person described in subsection 1 or to the victim's family if the victim is deceased. The notice must be by first-class mail to the victim's last known address. Upon the victim's request, the attorney for the State shall give the victim notice of the time and place of any hearing on the motion and shall inform the victim of the court's grant or denial of a new trial to the person.

**14. PRESERVATION OF BIOLOGICAL EVIDENCE.** Effective October 15, 2001, the investigating law enforcement agency shall preserve any biological evidence identified during the investigation of a crime or crimes for which any person may file a postjudgment of conviction motion for

DNA analysis under this section. The evidence must be preserved for the period of time that any person is incarcerated in connection with that case.

15. REPORT. Beginning January 2003 and annually thereafter, the Department of Public Safety shall report on post-conviction DNA analysis to the joint standing committee of the Legislature having jurisdiction over criminal justice matters. The report must include the number of postjudgment of conviction analyses completed, costs of the analyses and the results. The report also may include recommendations to improve the postjudgment of conviction analysis process.

**HISTORY:** 2005 ch. 659, §§ 2, 3, 4, 5 (AMD); 2011 ch. 230, §§ 1, 2 (AMD); 2011 ch. 601, § 13 (AMD); 2013, ch. 266, § 6 (AMD).

Annotated Laws of Massachusetts  
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PART IV CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES  
TITLE II PROCEEDINGS IN CRIMINAL CASES  
Chapter 278A Post Conviction Access to Forensic and Scientific Analysis

*ALM GL ch. 278A, § 18 (2015)*

**§ 18. Appeal.**

An order allowing or denying a motion for forensic or scientific analysis filed under this chapter shall be a final and appealable order. If the moving party appeals an order denying a motion for forensic or scientific analysis the moving party shall file a notice of appeal with the court within 30 days after the entry of the judgment.

**HISTORY: HISTORY:**

2012, 38.

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Chapter 760-777 Code of Criminal Procedure  
Act 175 of 1927 The Code of Criminal Procedure  
Chapter X New Trials And Right of Appeal

*MCLS § 770.16*

**§ 770.16. DNA testing; petition; filing; availability of biological material; court order; findings; costs; results; granting or denying request for new trial; notice of petition to victim; preservation of biological material identified.**

Sec. 16. (1) Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing. Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing:

- (a) That DNA testing was done in the case or under this act.
- (b) That the results of the testing were inconclusive.
- (c) That testing with current DNA technology is likely to result in conclusive results.

(2) A petition under this section shall be filed not later than January 1, 2016. The petition shall be filed in the circuit court for the county in which the defendant was sentenced and shall be assigned to the sentencing judge or his or her successor. The petition shall be served on the prosecuting attorney of the county in which the defendant was sentenced.

(3) A petition under this section shall allege that biological material was collected and identified during the investigation of the defendant's case. If the defendant, after diligent investigation, is unable to discover the location of the identified biological material or to determine whether the biological material is no longer available, the defendant may petition the court for a hearing to determine whether the identified biological material is available. If the court determines that identified biological material was collected during the investigation, the court shall order appropriate police agencies, hospitals, or the medical examiner to search for the material and to report the results of the search to the court.

**(4)** The court shall order DNA testing if the defendant does all of the following:

**(a)** Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.

**(b)** Establishes all of the following by clear and convincing evidence:

**(i)** A sample of identified biological material described in subsection (1) is available for DNA testing.

**(ii)** The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.

**(iii)** The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

**(5)** The court shall state its findings of fact on the record or shall make written findings of fact supporting its decision to grant or deny a petition brought under this section.

**(6)** If the court grants a petition for DNA testing under this section, the identified biological material and a biological sample obtained from the defendant shall be subjected to DNA testing by a laboratory approved by the court. If the court determines that the applicant is indigent, the cost of DNA testing ordered under this section shall be borne by the state. The results of the DNA testing shall be provided to the court and to the defendant and the prosecuting attorney. Upon motion by either party, the court may order that copies of the testing protocols, laboratory procedures, laboratory notes, and other relevant records compiled by the testing laboratory be provided to the court and to all parties.

**(7)** If the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material, both of the following apply:

**(a)** The court shall deny the motion for new trial.

**(b)** The defendant's DNA profile shall be provided to the department of state police for inclusion under the DNA identification profiling system act, 1990 PA 250, *MCL 28.171* to *28.176*.

**(8)** If the results of the DNA testing show that the defendant is not the source of the identified biological material, the court shall appoint counsel pursuant to *MCR 6.505(a)* and hold a hearing to determine by clear and convincing evidence all of the following:

**(a)** That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material.

**(b)** That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation described in subsection (1).

**(c)** That the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial.

## MCLS § 770.16

(9) Upon motion of the prosecutor, the court shall order retesting of the identified biological material and shall stay the defendant's motion for new trial pending the results of the DNA retesting.

(10) The court shall state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the defendant a new trial under this section. Notwithstanding section 3 of this chapter, an aggrieved party may appeal the court's decision to grant or deny the petition for DNA testing and for new trial by application for leave granted by the court of appeals.

(11) If the name of the victim of the felony conviction described in subsection (1) is known, the prosecuting attorney shall give written notice of a petition under this section to the victim. The notice shall be by first-class mail to the victim's last known address. Upon the victim's request, the prosecuting attorney shall give the victim notice of the time and place of any hearing on the petition and shall inform the victim of the court's grant or denial of a new trial to the defendant.

(12) The investigating law enforcement agency shall preserve any biological material identified during the investigation of a crime or crimes for which any person may file a petition for DNA testing under this section. The identified biological material shall be preserved for the period of time that any person is incarcerated in connection with that case.

**HISTORY:** Pub Acts 1927, No. 175, Ch. X, § 16, as added by Pub Acts 2000, No. 402, imd eff January 8, 2001, by enacting § 1 eff January 1, 2001; Amended by Pub Acts 2005, No. 4, imd eff April 1, 2005; 2008, No. 410, imd eff January 6, 2009; 2011, No. 212, imd eff November 8, 2011.

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Remedies Controlling Personal Action  
Chapter 590. Postconviction Relief

*Minn. Stat. § 590.01 (2015)*

**590.01 AVAILABILITY, CONDITIONS**

**Subdivision 1. *Petition.*** -- Except at a time when direct appellate relief is available, a person convicted of a crime, who claims that:

(1) the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state; or

(2) scientific evidence not available at trial, obtained pursuant to a motion granted under subdivision 1a, establishes the petitioner's actual innocence;

may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate. A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or sentence. Nothing contained herein shall prevent the Supreme Court or the Court of Appeals, upon application by a party, from granting a stay of a case on appeal for the purpose of allowing an appellant to apply to the district court for an evidentiary hearing under the provisions of this chapter. The proceeding shall conform with sections 590.01 to 590.06.

**Subd. 1a. *Motion for fingerprint or forensic testing not available at trial.***

(a) A person convicted of a crime may make a motion for the performance of fingerprint or forensic DNA testing to demonstrate the person's actual innocence if:

(1) the testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and

(2) the evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial.

The motion shall be filed before the district court that entered the judgment of conviction. Reasonable notice of the motion shall be served on the prosecuting attorney who represented the state at trial.

(b) A person who makes a motion under paragraph (a) must present a prima facie case that:

(1) identity was an issue in the trial; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The court shall order that the testing be performed if:

(1) a prima facie case has been established under paragraph (b);

(2) the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; and

(3) the testing requested employs a scientific method generally accepted within the relevant scientific community. The court shall impose reasonable conditions on the testing designed to protect the state's interests in the integrity of the evidence and the testing process.

**Subd. 2. Remedy.** -- This remedy takes the place of any other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition.

**Subd. 3. Application for relief.** -- A person who has been convicted and sentenced for a crime committed before May 1, 1980, may institute a proceeding applying for relief under this chapter upon the ground that a significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively, including resentencing under subsequently enacted law.

No petition seeking resentencing shall be granted unless the court makes specific findings of fact that release of the petitioner prior to the time the petitioner would be released under the sentence currently being served does not present a danger to the public and is not incompatible with the welfare of society.

**Subd. 4. Time limit.**

(a) No petition for postconviction relief may be filed more than two years after the later of:

(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or

(2) an appellate court's disposition of petitioner's direct appeal.

(b) Notwithstanding paragraph (a), a court may hear a petition for postconviction relief if:

(1) the petitioner establishes that a physical disability or mental disease precluded a timely assertion of the claim;

(2) the petitioner alleges the existence of newly discovered evidence, including scientific evidence, that could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted;

(3) the petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a Minnesota appellate court and the petitioner establishes that this interpretation is retroactively applicable to the petitioner's case;

(4) the petition is brought pursuant to subdivision 3; or

(5) the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice.

(c) Any petition invoking an exception provided in paragraph (b) must be filed within two years of the date the claim arises.

**HISTORY:** 1967 c 336 s 1; 1969 c 491 s 1; 1981 c 366 s 1; 1983 c 247 s 201; 1986 c 444; 1Sp1986 c 3 art 1 s 65; 1999 c 216 art 3 s 2,3; 2005 c 136 art 14 s 12,13.

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Remedies Controlling Personal Action  
Chapter 590. Postconviction Relief

*Minn. Stat. § 590.02 (2015)*

**590.02 PETITION; FILING; SERVICE; COSTS**

**Subdivision 1. *Petition.*** -- The petition filed in the district court pursuant to section 590.01 shall be entitled in the name of the petitioner versus the state of Minnesota and shall contain:

(1) a statement of the facts and the grounds upon which the petition is based and the relief desired. All grounds for relief must be stated in the petition or any amendment thereof unless they could not reasonably have been set forth therein. It shall not contain argument or citation of authorities;

(2) an identification of the proceedings in which the petitioner was convicted including the date of the entry of judgment and sentence or other disposition complained of;

(3) an identification of any previous proceeding, together with the grounds therein asserted taken on behalf of the petitioner to secure relief from the conviction and sentence or other disposition;

(4) the name and address of any attorney representing the petitioner. In the event the petitioner is without counsel, the court administrator shall forthwith transmit a copy of the petition to the state public defender and shall advise the petitioner of such referral.

**Subd. 2. *Costs.*** -- The filing of the petition and any document subsequent thereto and all proceedings thereon shall be without costs or any fees charged to the petitioner.

**Subd. 3 *Filing.*** -- When a petition is filed pursuant to section 590.01 it shall be signed by the petitioner or signed by the petitioner's attorney with proof of service on the attorney general and county attorney. It shall be addressed to the district court of the judicial district in the county where the conviction took place.

In those cases in which the petitioner is represented by counsel or in which the petitioner has filed a written waiver of right to counsel, the court administrator of the district court shall immediately direct attention of the filing thereof to the chief judge or judge acting in the chief judge's behalf who shall promptly assign the matter to a judge in said district.

**HISTORY:** 1967 c 336 s 2; 1986 c 444; 1Sp1986 c 3 art 1 s 82; 2014 c 245 s 1.

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Remedies Controlling Personal Action  
Chapter 590. Postconviction Relief

*Minn. Stat. § 590.03 (2015)*

**590.03 PLEADINGS AND PRACTICE AFTER FILING A POSTCONVICTION PETITION**

Within 20 days after the filing of the petition pursuant to section 590.01 or within such time as the judge to whom the matter has been assigned may fix, the county attorney, or the attorney general, on behalf of the state, shall respond to the petition by answer or motion which shall be filed with the court administrator of district court and served on the petitioner if unrepresented or on the petitioner's attorney. No further pleadings are necessary except as the court may order. The court may at any time prior to its decision on the merits permit a withdrawal of the petition, may permit amendments thereto, and to the answer. The court shall liberally construe the petition and any amendments thereto and shall look to the substance thereof and waive any irregularities or defects in form.

**HISTORY:** 1967 c 336 s 3; 1Sp1986 c 3 art 1 s 82.

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Remedies Controlling Personal Action  
Chapter 590. Postconviction Relief

*Minn. Stat. § 590.04 (2015)*

#### **590.04 HEARINGS ON PETITION; EVIDENCE; ORDER**

**Subdivision 1. *Early hearing.*** -- Unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, the court shall promptly set an early hearing on the petition and response thereto, and promptly determine the issues, make findings of fact and conclusions of law with respect thereto, and either deny the petition or enter an order granting appropriate relief.

**Subd. 2. *Open court hearing.*** -- Hearings on a petition filed pursuant to section 590.01 shall be in open court in the judicial district in which the conviction took place or in the Second, Fourth, Seventh, or Tenth Judicial Districts in the discretion of the judge to whom the proceeding has been assigned.

**Subd. 3. *Hearing.*** -- The court may order the petitioner to be present at the hearing. If the petitioner is represented by an attorney, the attorney shall be present at any hearing.

A verbatim record of any hearing shall be made and kept.

Unless otherwise ordered by the court, the burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence.

In the discretion of the court, it may receive evidence in the form of affidavit, deposition, or oral testimony. The court may inquire into and decide any grounds for relief, even though not raised by the petitioner.

The court may summarily deny a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition when the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case.

**HISTORY:** 1967 c 336 s 4; 1969 c 491 s 2; 1977 c 190 s 1; 1983 c 247 s 202.

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Remedies Controlling Personal Action  
Chapter 590. Postconviction Relief

*Minn. Stat. § 590.05 (2015)*

**590.05 INDIGENT PETITIONERS**

A person financially unable to obtain counsel who desires to pursue the remedy provided in section 590.01 may apply for representation by the state public defender. The state public defender shall represent such person under the applicable provisions of sections 611.14 to 611.27, if the person has not already had a direct appeal of the conviction. The state public defender may represent, without charge, all other persons pursuing a postconviction remedy under section 590.01, who are financially unable to obtain counsel.

**HISTORY:** 1967 c 336 s 5; 1991 c 345 art 3 s 1; 1993 c 13 art 2 s 1; 1Sp2003 c 2 art 3 s 2; 2007 c 61 s 2.

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Remedies Controlling Personal Action  
Chapter 590. Postconviction Relief

*Minn. Stat. § 590.06 (2015)*

**590.06 APPEALS**

An appeal may be taken to the Court of Appeals or, in a case involving a conviction for first degree murder, to the Supreme Court from the order granting relief or denying the petition within 60 days after the entry of the order.

The appealing party shall, within the 60 days, serve a notice of appeal from the final order upon the court administrator of district court and the opposing party. If the appeal is by the petitioner, the service shall be on the county attorney and the attorney general. If the appeal is by the state, the service shall be on the petitioner or the petitioner's attorney. No fees or bond for costs shall be required for the appeal.

**HISTORY:** 1967 c 336 s 6; 1983 c 247 s 203; 1986 c 444; 1Sp1986 c 3 art 1 s 82.

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\*\*\* Current through the 2015 Regular Session \*\*\*

TITLE 99. CRIMINAL PROCEDURE  
CHAPTER 39. POST-CONVICTION PROCEEDINGS  
ARTICLE 1. MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT

*Miss. Code Ann. § 99-39-28 (2015)*

§ 99-39-28. Supreme Court to establish rules for post-conviction proceedings in capital cases

If application to proceed in the trial court is granted, post-conviction proceedings on cases where the death penalty has been imposed in the trial court and appeals from the trial court shall be conducted in accordance with rules established by the Supreme Court.

**HISTORY:** SOURCES: Laws, 2000, ch. 569, § 16, eff from and after July 1, 2000.

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\*\*\* This section is current through New Jersey 216th Second Annual Session, L. 2015, c. 115 and J.R. 7 \*\*\*

Title 2A. Administration of Civil and Criminal Justice  
Subtitle 9. Evidence  
Chapter 84A. The Evidence Act, 1960  
Article II. Privileges

*N.J. Stat. § 2A:84A-32a (2015)*

**Legislative Alert:** LEXSEE 2015 N.J. ALS 127 -- See section 1.

**§ 2A:84A-32a. Motion for performance of forensic DNA testing, certain circumstances**

**a.** Any person who was convicted of a crime and is currently serving a term of imprisonment may make a motion before the trial court that entered the judgment of conviction for the performance of forensic DNA testing.

(1) The motion shall be verified by the convicted person under penalty of perjury and shall do all of the following:

(a) explain why the identity of the defendant was a significant issue in the case;

(b) explain in light of all the evidence, how if the results of the requested DNA testing are favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted;

(c) explain whether DNA testing was done at any prior time, whether the defendant objected to providing a biological sample for DNA testing, and whether the defendant objected to the admissibility of DNA testing evidence at trial. If evidence was subjected to DNA or other forensic testing previously by either the prosecution or the defense, the court shall order the prosecution or defense to provide all parties and the court with access to the laboratory reports, underlying data and laboratory notes prepared in connection with the DNA testing;

(d) make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought; and

(e) include consent to provide a biological sample for DNA testing.

(2) Notice of the motion shall be served on the Attorney General, the prosecutor in the county of conviction, and if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within 60 days of the date on which the Attorney General and the prosecutor are served with the motion, unless a continuance is granted. The Attorney General or prosecutor may support the motion for DNA testing or oppose it with a state-

ment of reasons and may recommend to the court that if any DNA testing is ordered, a particular type of testing be conducted.

**b.** The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

**c.** The court shall appoint counsel for the convicted person who brings a motion pursuant to this section if that person is indigent.

**d.** The court shall not grant the motion for DNA testing unless, after conducting a hearing, it determines that all of the following have been established:

(1) the evidence to be tested is available and in a condition that would permit the DNA testing that is requested in the motion;

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;

(3) the identity of the defendant was a significant issue in the case;

(4) the convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the offender;

(5) the requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted. The court in its discretion may consider any evidence whether or not it was introduced at trial;

(6) the evidence sought to be tested meets either of the following conditions:

(a) it was not tested previously;

(b) it was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the offender or have a reasonable probability of contradicting prior test results;

(7) the testing requested employs a method generally accepted within the relevant scientific community; and

(8) the motion is not made solely for the purpose of delay.

**e.** If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used.

(1) If the parties agree upon a mutually acceptable laboratory that is accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board or a laboratory that has a certificate of compliance with national standards issued pursuant to 42 U.S.C.A. s.14131 from the National Forensic Science Technology Center, the testing shall be conducted by that laboratory.

(2) If the parties fail to agree, the testing shall be conducted by the New Jersey State Police Forensic Science Laboratory. For good cause shown, however, the court may direct the evidence to an alternative laboratory that is accredited by the American Society of Crime Laboratory Directors

Laboratory Accreditation Board or a laboratory that has a certificate of compliance with national standards issued pursuant to 42 U.S.C.A. s.14131 from the National Forensic Science Technology Center.

f. The result of any testing ordered pursuant to this section shall be fully disclosed to the person filing the motion, the prosecutor and the Attorney General. If requested by any party, the court shall order production of the underlying laboratory data and notes.

g. The costs of the DNA testing ordered pursuant to this section shall be borne by the convicted person.

h. An order granting or denying a motion for DNA testing pursuant to this section may be appealed, pursuant to the Rules of Court.

i. DNA testing ordered by the court pursuant to this section shall be done as soon as practicable.

j. DNA profile information from biological samples taken from a convicted person pursuant to a motion for post-conviction DNA testing in accordance with the provisions of this section shall be treated as confidential and shall not be deemed a public record under P.L.1963, c.73 (*C.47:1A-1 et seq.*) or the common law concerning access to public records; except as provided in section 2 of P.L.2001, c.377 (*C.53:1-20.37*).

k. As used in this act, the terms "DNA," "DNA sample," "DNA databank," "CODIS" and "FBI" shall have the meaning set forth in section 3 of P.L. 1994, c. 136 (*C. 53:1-20.19*).

**HISTORY:** L. 2001, c. 377, § 1, eff. July 7, 2002.

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\* Statutes current through the 2015 First Regular and First Special Sessions of the Fifty-Second Legislature (all 2015 legislation). \*

Chapter 31 Criminal Procedure  
Article 1A DNA Evidence

*N.M. Stat. Ann. § 31-1A-2 (2015)*

**31-1A-2. Procedures for post-conviction consideration of DNA evidence; requirements.**

**A.** A person convicted of a felony, who claims that DNA evidence will establish his innocence, may petition the district court of the judicial district in which he was convicted to order the disclosure, preservation, production and testing of evidence that can be subjected to DNA testing. A copy of the petition shall be served on the district attorney for the judicial district in which the district court is located.

**B.** As a condition to the district court's acceptance of his petition, the petitioner shall:

- (1) submit to DNA testing ordered by the district court; and
- (2) authorize the district attorney's use of the DNA test results to investigate all aspects of the case that the petitioner is seeking to reopen.

**C.** The petitioner shall show, by a preponderance of the evidence, that:

- (1) he was convicted of a felony;
- (2) evidence exists that can be subjected to DNA testing;
- (3) the evidence to be subjected to DNA testing:
  - (a) has not previously been subjected to DNA testing;
  - (b) has not previously been subjected to the type of DNA testing that is now being requested; or
  - (c) was previously subjected to DNA testing, but was tested incorrectly or interpreted incorrectly;
- (4) the DNA testing he is requesting will be likely to produce admissible evidence; and
- (5) identity was an issue in his case or that if the DNA testing he is requesting had been performed prior to his conviction and the results had been exculpatory, there is a reasonable probability that the petitioner would not have pled guilty or been found guilty.

**D.** If the petitioner satisfies the requirements set forth in Subsection C of this section, the district court shall appoint counsel for the petitioner, unless the petitioner waives counsel or retains his own counsel.

**E.** After reviewing a petition, the district court may dismiss the petition, order a response by the district attorney or issue an order for DNA testing.

**F.** The district court shall order all evidence secured that is related to the petitioner's case and that could be subjected to DNA testing. The evidence shall be preserved during the pendency of the proceeding. The district court may impose appropriate sanctions, including dismissal of the petitioner's conviction or criminal contempt, if the court determines that evidence was intentionally destroyed after issuance of the court's order to secure evidence.

**G.** The district court shall order DNA testing if the petitioner satisfies the requirements set forth in Subsections B and C of this section.

**H.** If the results of the DNA testing are exculpatory, the district court may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief.

**I.** The cost of DNA testing ordered pursuant to this section shall be borne by the state or the petitioner, as the district court may order in the interest of justice. Provided, that a petitioner shall not be denied DNA testing because of his inability to pay for the cost of DNA testing. Testing under this provision shall only be performed by a laboratory that meets the minimum standards of the national DNA index system.

**J.** The provisions of this section shall not be interpreted to limit:

- (1) other circumstances under which a person may obtain DNA testing; or
- (2) post-conviction relief a petitioner may seek pursuant to other provisions of law.

**K.** The petitioner shall have the right to appeal a district court's denial of the requested DNA testing, a district court's final order on a petition or a district court's decision regarding relief for the petitioner. The state shall have the right to appeal any final order issued by the district court. An appeal shall be filed by a party within thirty days to the court of appeals.

**L.** The state shall preserve all evidence that is secured in relation to an investigation or prosecution of a crime and that could be subjected to DNA testing, for not less than the period of time that a person remains subject to incarceration or supervision in connection with the investigation or prosecution.

**M.** The state may dispose of evidence before the expiration of the time period set forth in Subsection K of this section if:

- (1) no other law, regulation or court order requires that the evidence be preserved;
- (2) the evidence must be returned to its rightful owner;
- (3) preservation of the evidence is impractical due to the size, bulk or physical characteristics of the evidence; and
- (4) the state takes reasonable measures to remove and preserve portions of the evidence sufficient to permit future DNA testing.

**N.** As used in this section, "DNA" means deoxyribonucleic acid.

## **HISTORY:**

Laws 2003, ch. 27, §§ 1, 3; 2005, ch. 28, § 1.

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\*\*\* Statutes current through the 2014 Regular Session \*\*\*

CHAPTER 15A. CRIMINAL PROCEDURE ACT  
SUBCHAPTER 02. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES  
ARTICLE 13. DNA DATABASE AND DATABANK

*N.C. Gen. Stat. § 15A-267 (2015)*

§ 15A-267. Access to DNA samples from crime scene

(a) A criminal defendant shall have access before trial to the following:

(1) Any DNA analyses performed in connection with the case in which the defendant is charged.

(2) Any biological material, that has not been DNA tested, that was collected from the crime scene, the defendant's residence, or the defendant's property.

(3) A complete inventory of all physical evidence collected in connection with the investigation.

(b) Access as provided for in subsection (a) of this section shall be governed by *G.S. 15A-902* and *G.S. 15A-952*.

(c) Upon a defendant's motion made before trial in accordance with *G.S. 15A-952*, the court shall order the Crime Laboratory or any approved vendor that meets Crime Laboratory contracting standards to perform DNA testing and, if the data meets NDIS criteria, order the Crime Laboratory to search and/or upload to CODIS any profiles obtained from the testing upon a showing of all of the following:

(1) That the biological material is relevant to the investigation.

(2) That the biological material was not previously DNA tested or that more accurate testing procedures are now available that were not available at the time of previous testing and there is a reasonable possibility that the result would have been different.

(3) That the testing is material to the defendant's defense.

(d) The defendant shall be responsible for bearing the cost of any further testing and comparison of the biological materials, including any costs associated with the testing and comparison by the Crime Laboratory in accordance with this section, unless the court has determined the defendant is indigent, in which event the State shall bear the costs.

**HISTORY:** 2001-282, s. 4; 2007-539, s. 1; 2009-203, s. 3; 2013-360, s. 17.6(f).



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\*\*\* Statutes current through the 2014 Regular Session \*\*\*

CHAPTER 15A. CRIMINAL PROCEDURE ACT  
SUBCHAPTER 02 . LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES  
ARTICLE 13. DNA DATABASE AND DATABANK

*N.C. Gen. Stat. § 15A-269 (2015)*

§ 15A-269. Request for postconviction DNA testing

(a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence meets all of the following conditions:

- (1) Is material to the defendant's defense.
- (2) Is related to the investigation or prosecution that resulted in the judgment.
- (3) Meets either of the following conditions:
  - a. It was not DNA tested previously.
  - b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

(b) The court shall grant the motion for DNA testing and, if testing complies with FBI requirements, the run of any profiles obtained from the testing, upon its determination that:

- (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
- (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
- (3) The defendant has signed a sworn affidavit of innocence.

(b1) If the court orders DNA testing, such testing shall be conducted by a Crime Laboratory-approved testing facility, mutually agreed upon by the petitioner and the State and approved by the court. If the parties cannot agree, the court shall designate the testing facility and provide the parties with reasonable opportunity to be heard on the issue.

(c) In accordance with rules adopted by the Office of Indigent Defense Services, the court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If

the petitioner has filed pro se, the court shall appoint counsel for the petitioner in accordance with rules adopted by the Office of Indigent Defense Services upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

(d) The defendant shall be responsible for bearing the cost of any DNA testing ordered under this section unless the court determines the defendant is indigent, in which event the State shall bear the costs.

(e) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that DNA testing is necessary in the interests of justice, the court shall order a delay of the proceedings or execution of the sentence pending the DNA testing.

(f) Upon receipt of a motion for postconviction DNA testing, the custodial agency shall inventory the evidence pertaining to that case and provide the inventory list, as well as any documents, notes, logs, or reports relating to the items of physical evidence, to the prosecution, the petitioner, and the court.

(g) Upon receipt of a motion for postconviction DNA testing, the State shall, upon request, reactivate any victim services for the victim of the crime being investigated during the reinvestigation of the case and pendency of the proceedings.

(h) Nothing in this Article shall prohibit a convicted person and the State from consenting to and conducting postconviction DNA testing by agreement of the parties, without filing a motion for postconviction testing under this Article.

**HISTORY:** 2001-282, s. 4; 2007-539, s. 3; 2009-203, s. 5; 2011-326, s. 12(d); 2013-360, s. 17.6(k).

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Ohio Revised Code General Provisions  
Chapter 1: Definitions; Rules of Construction  
Construction

**Go to the Ohio Code Archive Directory**

*ORC Ann. 1.47 (2015)*

**§ 1.47 Intentions in the enactment of statutes.**

In enacting a statute, it is presumed that:

- (A) Compliance with the constitutions of the state and of the United States is intended;
- (B) The entire statute is intended to be effective;
- (C) A just and reasonable result is intended;
- (D) A result feasible of execution is intended.

**HISTORY:** 134 v H 607. Eff 1-3-72.

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Ohio Revised Code General Provisions  
Chapter 1: Definitions; Rules of Construction  
Construction

*ORC Ann. 1.50 (2015)*

**§ 1.50 Severability of Code section provisions.**

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

**HISTORY:** 134 v H 607. Eff 1-3-72.

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Title 29: Crimes -- Procedure  
 Chapter 2953: Appeals; Other Postconviction Remedies  
 Postconviction Remedies

*ORC Ann. 2953.21 (2015)*

**§ 2953.21 Petition for postconviction relief.**

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of *section 2953.74 of the Revised Code* provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of *section 2953.74 of the Revised Code*, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former *section 2953.82 of the Revised Code*" means *section 2953.82 of the Revised Code* as it existed prior to July 6, 2010.

(2) Except as otherwise provided in *section 2953.23 of the Revised Code*, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five days after the date

on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in *section 2953.23 of the Revised Code*, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

**(3)** In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

**(4)** A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in *section 2953.23 of the Revised Code*, any ground for relief that is not so stated in the petition is waived.

**(5)** If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

**(B)** The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

**(C)** The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

**(D)** Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

**(E)** Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of *28 U.S.C. 154* with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or *section 120.06, 120.16, 120.26, or 120.33 of the Revised Code* and those appointed counsel meet the requirements of division (I)(2) of this section.

**(J)** Subject to the appeal of a sentence for a felony that is authorized by *section 2953.08 of the Revised Code*, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

**HISTORY:** 131 v 684 (Eff 7-21-65); 132 v H 742 (Eff 12-9-67); 141 v H 412 (Eff 3-17-87); 145 v H 571 (Eff 10-6-94); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v S 258 (Eff 10-16-96); 149 v H 94. Eff 9-5-2001; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10; 2014 HB 663, § 1, effective March 23, 2015.

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Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction Remedies

*ORC Ann. 2953.22 (2015)*

**§ 2953.22 Hearing.**

If a hearing is granted pursuant to *section 2953.21 of the Revised Code*, the petitioner shall be permitted to attend the hearing. Testimony of the prisoner or other witnesses may be offered by deposition.

If the petitioner is in a state correctional institution, he may be returned for the hearing upon the warrant of the court of common pleas of the county where the hearing is to be held. The approval of the governor on the warrant shall not be required. The warrant shall be directed to the sheriff of the county in which the hearing is to be held. When a copy of the warrant is presented to the warden or other head of a state correctional institution, he shall deliver the convict to the sheriff, who shall convey him to the county. For removing and returning the convict, the sheriff shall receive the fees allowed for conveying convicts to the correctional institution.

**HISTORY:** 132 v H 742 (Eff 12-9-67); 145 v H 571. Eff 10-6-94.

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*ORC Ann. 2953.23 (2015)*

**§ 2953.23 Time for filing petition; appeals.**

(A) Whether a hearing is or is not held on a petition filed pursuant to *section 2953.21 of the Revised Code*, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of *section 2953.21 of the Revised Code* or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of *section 2953.74 of the Revised Code*, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of *section 2953.21 of the Revised Code*, and "former *section 2953.82 of the Revised Code*" has the same meaning as in division (A)(1)(c) of *section 2953.21 of the Revised Code*.

(B) An order awarding or denying relief sought in a petition filed pursuant to *section 2953.21 of the Revised Code* is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

**HISTORY:** 132 v H 742 (Eff 12-9-67); 146 v S 4. Eff 9-21-95; 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 24 (HB 238)\*\*\*

Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.71 (2015)*

**§ 2953.71 Definitions.**

As used in *sections 2953.71 to 2953.83 of the Revised Code*:

(A) "Application" or "application for DNA testing" means a request through postconviction relief for the state to do DNA testing on biological material from the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing under *sections 2953.71 to 2953.81 of the Revised Code*.

(B) "Biological material" means any product of a human body containing DNA.

(C) "Chain of custody" means a record or other evidence that tracks a subject sample of biological material from the time the biological material was first obtained until the time it currently exists in its place of storage and, in relation to a DNA sample, a record or other evidence that tracks the DNA sample from the time it was first obtained until it currently exists in its place of storage. For purposes of this division, examples of when biological material or a DNA sample is first obtained include, but are not limited to, obtaining the material or sample at the scene of a crime, from a victim, from an offender, or in any other manner or time as is appropriate in the facts and circumstances present.

(D) "Custodial agency" means the group or entity that has the responsibility to maintain biological material in question.

(E) "Custodian" means the person who is the primary representative of a custodial agency.

(F) "Eligible offender" means an offender who is eligible under division (C) of *section 2953.72 of the Revised Code* to request DNA testing to be conducted under *sections 2953.71 to 2953.81 of the Revised Code*.

(G) "Exclusion" or "exclusion result" means a result of DNA testing that scientifically precludes or forecloses the subject offender as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the offender is an eligible offender and for which the sentence of death or prison term was imposed upon the offender.

**(H)** "Extracting personnel" means medically approved personnel who are employed to physically obtain an offender's DNA specimen for purposes of DNA testing under *sections 2953.71 to 2953.81 of the Revised Code*.

**(I)** "Inclusion" or "inclusion result" means a result of DNA testing that scientifically cannot exclude, or that holds accountable, the subject offender as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the offender is an eligible offender and for which the sentence of death or prison term was imposed upon the offender.

**(J)** "Inconclusive" or "inconclusive result" means a result of DNA testing that is rendered when a scientifically appropriate and definitive DNA analysis or result, or both, cannot be determined.

**(K)** "Offender" means a criminal offender who was sentenced by a court, or by a jury and a court, of this state.

**(L)** "Outcome determinative" means that had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and is requesting the DNA testing, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the offender's case as described in division (D) of *section 2953.74 of the Revised Code*, there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense or, if the offender was sentenced to death relative to that offense, would have found the offender guilty of the aggravating circumstance or circumstances the offender was found guilty of committing and that is or are the basis of that sentence of death.

**(M)** "Parent sample" means the 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*.

**(N)** "Prison" and "community control sanction" have the same meanings as in *section 2929.01 of the Revised Code*.

**(O)** "Prosecuting attorney" means the prosecuting attorney who, or whose office, prosecuted the case in which the subject offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing.

**(P)** "Prosecuting authority" means the prosecuting attorney or the attorney general.

**(Q)** "Reasonable diligence" means a degree of diligence that is comparable to the diligence a reasonable person would employ in searching for information regarding an important matter in the person's own life.

**(R)** "Testing authority" means a laboratory at which DNA testing will be conducted under *sections 2953.71 to 2953.81 of the Revised Code*.

**(S)** "Parole" and "post-release control" have the same meanings as in *section 2967.01 of the Revised Code*.

(T) "Sexually oriented offense" and "child-victim oriented offense" have the same meanings as in *section 2950.01 of the Revised Code*.

(U) "Definitive DNA test" means a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible offender. A prior DNA test is not definitive if the eligible offender proves 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. Prior testing may have been a prior "definitive DNA test" as to some biological evidence but may not have been a prior "definitive DNA test" as to other biological evidence.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 24 (HB 238)\*\*\*

Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.72 (2015)*

**§ 2953.72 Eligible offender may submit application and acknowledgment for DNA testing.**

(A) Any eligible offender who wishes to request DNA testing under *sections 2953.71 to 2953.81 of the Revised Code* shall submit an application for the testing to the court of common pleas specified in *section 2953.73 of the Revised Code*, on a form prescribed by the attorney general for this purpose. The eligible offender shall submit the application in accordance with the procedures set forth in *section 2953.73 of the Revised Code*. The eligible offender shall specify on the application the offense or offenses for which the offender is an eligible offender and is requesting the DNA testing. Along with the application, the eligible offender shall submit an acknowledgment that is on a form prescribed by the attorney general for this purpose and that is signed by the offender. The acknowledgment shall set forth all of the following:

(1) That *sections 2953.71 to 2953.81 of the Revised Code* contemplate applications for DNA testing of an eligible offender at a stage of a prosecution or case after the offender has been sentenced, that any exclusion or inclusion result of DNA testing rendered pursuant to those sections may be used by a party in any proceeding as described in *section 2953.81 of the Revised Code*, and that all requests for any DNA testing made at trial will continue to be handled by the prosecuting attorney in the case;

(2) That the process of conducting postconviction DNA testing for an eligible offender under *sections 2953.71 to 2953.81 of the Revised Code* begins when the offender submits an application under *section 2953.73 of the Revised Code* and the acknowledgment described in this section;

(3) That the eligible offender must submit the application and acknowledgment to the court of common pleas that heard the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing;

(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;

(5) That the results of DNA testing conducted under *sections 2953.71 to 2953.81 of the Revised Code* will be provided as described in *section 2953.81 of the Revised Code* to all parties in the postconviction proceedings and will be reported to various courts;

(6) That, if DNA testing is conducted with respect to an offender under *sections 2953.71 to 2953.81 of the Revised Code*, the state will not offer the offender a retest if an inclusion result is achieved relative to the testing and that, if the state were to offer a retest after an inclusion result, the policy would create an atmosphere in which endless testing could occur and in which postconviction proceedings could be stalled for many years;

(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 2953.81 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;

(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;

(10) That the most basic aspect of *sections 2953.71 to 2953.81 of the Revised Code* is that, in order for DNA testing to occur, there must be an offender sample against which other evidence may be compared, that, if an eligible offender's application is accepted but the offender subsequently refuses to submit to the collection of the sample of biological material from the offender or hinders the state from obtaining a sample of biological material from the offender, the goal of those provisions will be frustrated, and that an offender's refusal or hindrance shall cause the court to rescind its prior acceptance of the application for DNA testing for the offender and deny the application.

**(B)** The attorney general shall prescribe a form to be used to make an application for DNA testing under division (A) of this section and *section 2953.73 of the Revised Code* and a form to be used to provide the acknowledgment described in division (A) of this section. The forms shall include all information described in division (A) of this section, spaces for an offender to insert all information necessary to complete the forms, including, but not limited to, specifying the offense or offenses for which the offender is an eligible offender and is requesting the DNA testing, and any other information or material the attorney general determines is necessary or relevant. The attorney general shall distribute copies of the prescribed forms to the department of rehabilitation and correction, the department shall ensure that each prison in which offenders are housed has a supply of copies of the forms, and the department shall ensure that copies of the forms are provided free of charge to any offender who requests them.

**(C) (1)** An offender is eligible to request DNA testing to be conducted under *sections 2953.71 to 2953.81 of the Revised Code* only if all of the following apply:

**(a)** The offense for which the offender claims to be an eligible offender is a felony, and the offender was convicted by a judge or jury of that offense.

**(b)** One of the following applies:

**(i)** The offender was sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, and the offender is in prison serving that prison term or under that sentence of death, has been paroled or is on probation regarding that felony, is under post-release control regarding that felony, or has been released from that prison term and is under a community control sanction regarding that felony.

**(ii)** The offender was not sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, but was sentenced to a community control sanction for that felony and is under that community control sanction.

**(iii)** The felony described in division (C)(1)(a) of this section was a sexually oriented offense or child-victim oriented offense, and the offender has a duty to comply with *sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code* relative to that felony.

**(2)** An offender is not an eligible offender under division (C)(1) of this section regarding any offense to which the offender pleaded guilty or no contest.

**(3)** An offender is not an eligible offender under division (C)(1) of this section regarding any offense if the offender dies prior to submitting an application for DNA testing related to that offense under *section 2953.73 of the Revised Code*.

**HISTORY:** 150 v S 11, § 1, eff. 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.73 (2015)*

**§ 2953.73 Submission of application; response; court determination as to whether to accept or reject application; appeals.**

(A) An eligible offender who wishes to request DNA testing to be conducted under *sections 2953.71 to 2953.81 of the Revised Code* shall submit an application for DNA testing on a form prescribed by the attorney general for this purpose and shall submit the form to the court of common pleas that sentenced the offender for the offense for which the offender is an eligible offender and is requesting DNA testing.

(B) If an eligible offender submits an application for DNA testing under division (A) of this section, upon the submission of the application, all of the following apply:

(1) The eligible offender shall serve a copy of the application on the prosecuting attorney and the attorney general.

(2) The application shall be assigned to the judge of that court of common pleas who was the trial judge in the case in which the eligible offender was convicted of the offense for which the offender is requesting DNA testing, or, if that judge no longer is a judge of that court, it shall be assigned according to court rules. The judge to whom the application is assigned shall decide the application. The application shall become part of the file in the case.

(C) If an eligible offender submits an application for DNA testing under division (A) of this section, regardless of whether the offender has commenced any federal habeas corpus proceeding relative to the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting DNA testing, any response to the application by the prosecuting attorney or the attorney general shall be filed not later than forty-five days after the date on which the eligible offender submits the application. The prosecuting attorney or the attorney general, or both, may, but are not required to, file a response to the application. If the prosecuting attorney or the attorney general files a response under this division, the prosecuting attorney or attorney general, whoever filed the response, shall serve a copy of the response on the eligible offender.

(D) If an eligible offender submits an application for DNA testing under division (A) of this section, the court shall make the determination as to whether the application should be accepted or rejected. The court shall expedite its review of the application. The court shall make the determina-

tion in accordance with the criteria and procedures set forth in *sections 2953.74 to 2953.81 of the Revised Code* and, in making the determination, shall consider the application, the supporting affidavits, and the documentary evidence and, in addition to those materials, shall consider all the files and records pertaining to the proceedings against the applicant, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript and all responses to the application filed under division (C) of this section by a prosecuting attorney or the attorney general, unless the application and the files and records show the applicant is not entitled to DNA testing, in which case the application may be denied. The court is not required to conduct an evidentiary hearing in conducting its review of, and in making its determination as to whether to accept or reject, the application. Upon making its determination, the court shall enter a judgment and order that either accepts or rejects the application and that includes within the judgment and order the reasons for the acceptance or rejection as applied to the criteria and procedures set forth in *sections 2953.71 to 2953.81 of the Revised Code*. The court shall send a copy of the judgment and order to the eligible offender who filed it, the prosecuting attorney, and the attorney general.

(E) A judgment and order of a court entered under division (D) of this section 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.

(F) Notwithstanding any provision of law regarding fees and costs, no filing fee shall be required of, and no court costs shall be assessed against, an eligible offender who is indigent and who submits an application under this section.

(G) If a court rejects an eligible offender's application for DNA testing under division (D) of this section, unless the rejection is overturned on appeal, no court shall require the state to administer a DNA test under *sections 2953.71 to 2953.81 of the Revised Code* on the eligible offender.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 150 v H 525, § 1, eff. 5-18-05; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.74 (2015)*

**§ 2953.74 Grounds for accepting or rejecting application; comparing test results to federal combined DNA index system.**

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and a prior definitive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested, the court shall reject the offender's application. If an eligible offender files an application for DNA testing and a prior inconclusive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested, the court shall review the application and has the discretion, on a case-by-case basis, to either accept or reject the application. The court may direct a testing authority to provide the court with information that the court may use in determining whether prior DNA test results were definitive or inconclusive and whether to accept or reject an application in relation to which there were prior inconclusive DNA test results.

(B) 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 one of the following applies:

(1) The offender did not have a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at that trial stage in that case, and, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.

(2) The offender had a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the test was not a prior definitive DNA test that is subject to division (A) of this section, and the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at the trial stage in that case.

(C) 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 following apply:

(1) The court determines pursuant to *section 2953.75 of the Revised Code* that biological material was collected from the crime scene or the victim of the offense for which the offender is an eligible offender and is requesting the DNA testing and that the parent sample of that biological material against which a sample from the offender can be compared still exists at that point in time.

(2) 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:

(a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.

(b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction described in division (C)(2)(a) of this section; provided that the court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.

(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.

(3) The court determines that, at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing, the identity of the person who committed the offense was an issue.

(4) The court determines that one or more of the defense theories asserted by the offender at the trial stage in the case described in division (C)(3) of this section or in a retrial of that case in a court of this state was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative.

(5) The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that offender.

(6) The court determines pursuant to *section 2953.76 of the Revised Code* from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample, and from the totality of circumstances involved, that the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected.

(D) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court, in determining whether the "outcome determinative" criterion described in divisions (B)(1) and (2) of this section has been satisfied, shall consider all available admissible evidence related to the subject offender's case.

(E) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and the court accepts the application, the eligible offender may request the court to order, or the court on its own initiative may order, the bureau of criminal identification and investigation to compare the results of DNA testing of biological material from an unidentified person other than the offender that was obtained from the crime scene or from a victim of the offense for which the offender has been approved for DNA testing to the combined DNA index system maintained by the federal bureau of investigation.

If the bureau, upon comparing the test results to the combined DNA index system, determines the identity of the person who is the contributor of the biological material, the bureau shall provide that information to the court that accepted the application, the offender, and the prosecuting attorney. The offender or the state may use the information for any lawful purpose.

If the bureau, upon comparing the test results to the combined DNA index system, is unable to determine the identity of the person who is the contributor of the biological material, the bureau may compare the test results to other previously obtained and acceptable DNA test results of any person whose identity is known other than the eligible offender. If the bureau, upon comparing the test results to the DNA test results of any person whose identity is known, determines that the person whose identity is known is the contributor of the biological material, the bureau shall provide that information to the court that accepted the application, the offender, and the prosecuting attorney. The offender or the state may use the information for any lawful purpose.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.75 (2015)*

**§ 2953.75 Determinations by prosecuting attorney as to whether biological material was collected and whether parent sample still exists.**

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court shall require the prosecuting attorney to use reasonable diligence to determine whether biological material was collected from the crime scene or victim of the offense for which the offender is an eligible offender and is requesting the DNA testing against which a sample from the offender can be compared and whether the parent sample of that biological material still exists at that point in time. In using reasonable diligence to make those determinations, the prosecuting attorney shall rely upon all relevant sources, including, but not limited to, all of the following:

- (1) All prosecuting authorities in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing and in the appeals of, and postconviction proceedings related to, that case;
- (2) All law enforcement authorities involved in the investigation of the offense for which the offender is an eligible offender and is requesting the DNA testing;
- (3) All custodial agencies involved at any time with the biological material in question;
- (4) The custodian of all custodial agencies described in division (A)(3) of this section;
- (5) All crime laboratories involved at any time with the biological material in question;
- (6) All other reasonable sources.

(B) The prosecuting attorney shall prepare a report that contains the prosecuting attorney's determinations made under division (A) of this section and shall file a copy of the report with the court and provide a copy to the eligible offender and the attorney general.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.76 (2015)*

**§ 2953.76 Findings and determinations concerning quantity, quality, chain of custody, and reliability of parent sample.**

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

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

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

(C) The court shall determine, from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample and from the totality of circumstances involved, whether the parent sample and the extracted test sample are the

same sample as collected and whether there is any reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected. Upon making its determination under this division, the court shall prepare and retain a written document that contains its determination and the reasoning and rationale for that determination.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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\*\*\* Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 24 (HB 238)\*\*\*

Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.77 (2015)*

**§ 2953.77 Precautions concerning chain of custody and against contamination during transport or testing; documentation.**

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and if the application is accepted and DNA testing is to be performed, the court shall require that the chain of custody remain intact and that all of the applicable following precautions are satisfied to ensure that the parent sample of the biological material collected from the crime scene or the victim of the offense for which the offender is an eligible offender and requested the DNA testing, and the test sample of the parent sample that is extracted and actually is to be tested, are not contaminated during transport or the testing process:

(1) The court shall require that the chain of custody be maintained and documented relative to the parent sample and the test sample actually to be tested between the time they are removed from their place of storage or the time of their extraction to the time at which the DNA testing will be performed.

(2) The court, the testing authority, and the law enforcement and prosecutorial personnel involved in the process, or any combination of those entities and persons, shall coordinate the transport of the parent sample and the test sample actually to be tested between their place of storage and the place where the DNA testing will be performed, and the court and testing authority shall document the transport procedures so used.

(3) The testing authority shall determine and document the custodian of the parent sample and the test sample actually to be tested after they are in the possession of the testing authority.

(4) The testing authority shall maintain and preserve the parent sample and the test sample actually to be tested after they are in the possession of the testing authority and shall document the maintenance and preservation procedures used.

(5) After the DNA testing, the court, the testing authority, and the original custodial agency of the parent sample, or any combination of those entities, shall coordinate the return of the remaining parent sample back to its place of storage with the original custodial agency or to any other place determined in accordance with this division and *section 2953.81 of the Revised Code*. The court shall determine, in consultation with the testing authority, the custodial agency to maintain

any newly created, extracted, or collected DNA material resulting from the testing. The court and testing authority shall document the return procedures for original materials and for any newly created, extracted, or collected DNA material resulting from the testing, and also the custodial agency to which those materials should be taken.

**(B)** A court or testing authority shall provide the documentation required under division (A) of this section in writing and shall maintain that documentation.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.78 (2015)*

**§ 2953.78 Selection of testing authority; effect of offender's objection; approval or designation of testing authorities.**

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and if the application is accepted and DNA testing is to be performed, the court shall select the testing authority to be used for the testing. A court shall not select or use a testing authority for DNA testing unless the attorney general approves or designates the testing authority pursuant to division (C) of this section and unless the testing authority satisfies the criteria set forth in *section 2953.80 of the Revised Code*.

(B) 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.

(C) The attorney general shall approve or designate testing authorities that may be selected and used to conduct DNA testing, shall prepare a list of the approved or designated testing authorities, and shall provide copies of the list to all courts of common pleas. The attorney general shall update the list as appropriate to reflect changes in the approved or designated testing authorities and shall provide copies of the updated list to all courts of common pleas. The attorney general shall not approve or designate a testing authority under this division unless the testing authority satisfies the criteria set forth in *section 2953.80 of the Revised Code*. A testing authority that is equipped to handle advanced DNA testing may be approved or designated under this division, provided it satisfies the criteria set forth in that section.

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

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
 Chapter 2953: Appeals; Other Postconviction Remedies  
 Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.79 (2015)*

**§ 2953.79 Obtaining biological material from offender; offender's refusal or hindrance.**

(A) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code* and if the application is accepted and DNA testing is to be performed, a sample of biological material shall be obtained from the offender in accordance with this section, to be compared with the parent sample of biological material collected from the crime scene or the victim of the offense for which the offender is an eligible offender and requested the DNA testing. The offender's filing of the application constitutes the offender's consent to the obtaining of the sample of biological material from the offender. The testing authority shall obtain the sample of biological material from the offender in accordance with medically accepted procedures.

(B) If DNA testing is to be performed for an offender as described in division (A) of this section, the court shall require the state to coordinate with the department of rehabilitation and correction or the other state agency or entity of local government with custody of the offender, whichever is applicable, as to the time and place at which the sample of biological material will be obtained from the offender. If the offender is in prison or is in custody in another facility at the time the DNA testing is to be performed, the sample of biological material shall be obtained from the offender at the facility in which the offender is housed, and the department of rehabilitation and correction or the other state agency or entity of local government with custody of the offender, whichever is applicable, shall make the offender available at the specified time. The court shall require the state to provide notice to the offender and to the offender's counsel of the date on which, and the time and place at which, the sample will be so obtained.

The court also shall require the state to coordinate with the testing authority regarding the obtaining of the sample from the offender.

(C) (1) If DNA testing is to be performed for an offender as described in division (A) of this section, and the offender refuses to submit to the collection of the sample of biological material from the offender or hinders the state from obtaining a sample of biological material from the offender, the court shall rescind its prior acceptance of the application for DNA testing for the offender and deny the application.

(2) For purposes of division (C)(1) of this section:

(a) An offender's "refusal to submit to the collection of a sample of biological material from the offender" includes, but is not limited to, the offender's rejection of the physical manner in which a sample of the offender's biological material is to be taken.

(b) An offender's "hindrance of the state in obtaining a sample of biological material from the offender" includes, but is not limited to, the offender being physically or verbally uncooperative or antagonistic in the taking of a sample of the offender's biological material.

(D) The extracting personnel shall make the determination as to whether an eligible offender for whom DNA testing is to be performed is refusing to submit to the collection of a sample of biological material from the offender or is hindering the state from obtaining a sample of biological material from the offender at the time and date of the scheduled collection of the sample. If the extracting personnel determine that an offender is refusing to submit to the collection of a sample or is hindering the state from obtaining a sample, the extracting personnel shall document in writing the conditions that constitute the refusal or hindrance, maintain the documentation, and notify the court of the offender's refusal or hindrance.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
 Chapter 2953: Appeals; Other Postconviction Remedies  
 Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.80 (2015)*

**§ 2953.80 Criteria for approval, designation, selection, or use of testing authority.**

(A) The attorney general shall not approve or designate a testing authority for conducting DNA testing under *section 2953.78 of the Revised Code*, and a court shall not select or use a testing authority for DNA testing under that section, unless the testing authority satisfies all of the following criteria:

(1) It is in compliance with nationally accepted quality assurance standards for forensic DNA testing or advanced DNA testing, as published in the quality assurance standards for forensic DNA testing laboratories issued by the director of the federal bureau of investigation.

(2) It undergoes an annual internal or external audit for quality assurance in conformity with the standards identified in division (A)(1) of this section.

(3) At least once in the preceding two-year period, and at least once each two-year period thereafter, it undergoes an external audit for quality assurance in conformity with the standards identified in division (A)(1) of this section.

(B) As used in division (A) of this section:

(1) "External audit" means a quality assurance review of a testing authority that is conducted by a forensic DNA testing agency outside of, and not affiliated with, the testing authority.

(2) "Internal audit" means an internal review of a testing authority that is conducted by the testing authority itself.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 151 v S 262, § 1, eff. 7-11-06.

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Title 29: Crimes -- Procedure  
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Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.81 (2015)*

**§ 2953.81 Maintaining of results and samples; access to results and distribution of copies; use as evidence.**

If an eligible inmate submits an application for DNA testing under *section 2953.73 of the Revised Code* and if DNA testing is performed based on that application, upon completion of the testing, all of the following apply:

(A) 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. The results of the testing remain state's evidence. The samples shall be preserved during the entire period of time for which the offender is imprisoned or confined relative to the sentence in question, is on parole or probation relative to that sentence, is under post-release control or a community control sanction relative to that sentence, or has a duty to comply with *sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code* relative to that sentence. Additionally, if the prison term or confinement under the sentence in question expires, if the sentence in question is a sentence of death and the offender is executed, or if the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with *sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code* under the sentence in question ends, the samples shall be preserved for a reasonable period of time of not less than twenty-four months after the term or confinement expires, the offender is executed, or the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with *sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code* ends, whichever is applicable. The court shall determine the period of time that is reasonable for purposes of this division, provided that the period shall not be less than twenty-four months after the term or confinement expires, the offender is executed, or the parole or probation period, the period of post-release control, the community control sanction, or the duty to comply with *sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code* ends, whichever is applicable.

(B) The results of the testing are a public record.

(C) 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.

(D) If the postconviction proceeding in question is pending at that time in a court of this state, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to any court of this state, and, if it is pending in a federal court, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to that federal court.

(E) The testing authority shall provide a copy of the results of the testing to the court of common pleas that decided the DNA application.

(F) The offender or the state may enter the results of the testing into any proceeding.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.82 (2015)*

**§ 2953.82 Repealed.**

Repealed, 153 v S 77, § 2 [150 v S 11, § 1, Eff 10-29-03; 150 v H 525, § 1, eff. 5-18-05; 151 v S  
262, § 1, eff. 7-11-06]. Eff 7-6-10.

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Title 29: Crimes -- Procedure  
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*ORC Ann. 2953.83 (2015)*

**§ 2953.83 Application of Rules of Criminal Procedure.**

In any court proceeding under *sections 2953.71 to 2953.81 of the Revised Code*, the Rules of Criminal Procedure apply, except to the extent that *sections 2953.71 to 2953.81 of the Revised Code* provide a different procedure or to the extent that the Rules would by their nature be clearly inapplicable.

**HISTORY:** 150 v S 11, § 1, Eff 10-29-03; 153 v S 77, § 1, eff. 7-6-10.

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Title 29: Crimes -- Procedure  
Chapter 2953: Appeals; Other Postconviction Remedies  
Postconviction DNA Testing for Eligible Offenders

*ORC Ann. 2953.84 (2015)*

**§ 2953.84 Effect on other means of obtaining postconviction DNA testing.**

The provisions of *sections 2953.71 to 2953.81 of the Revised Code* by which an offender may obtain postconviction DNA testing are not the exclusive means by which an offender may obtain postconviction DNA testing, and the provisions of those sections do not limit or affect any other means by which an offender may obtain postconviction DNA testing.

**HISTORY:** 151 v S 262, § 1, eff. 7-11-06; 153 v S 77, § 1, eff. 7-6-10.

OKLAHOMA STATUTES, ANNOTATED BY LEXISNEXIS (R)

\*\*\* Current through chapter 399 (end) of the first session \*\*\*

TITLE 22. CRIMINAL PROCEDURE  
CHAPTER 25. MISCELLANEOUS PROVISIONS  
DNA FORENSIC TESTING ACT

*22 Okl. St. § 1373 (2015)*

§ 1373. Short title--Postconviction DNA Act

This act shall be known and may be cited as the "Postconviction DNA Act".

**HISTORY:** Laws 2013, ch. 317 (HB 1068), § 1, eff. Nov. 1, 2013.

LexisNexis(R) Oregon Annotated Statutes  
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\*\*\* Updated through all Legislation passed during the 2015 Regular Session (Chapters 1-848). Some sections may have multiple variants due to amendment by multiple acts. For sections added to the ORS by legislation or ballot measures but not yet codified by the Legislative Counsel, see Newly Added Sections in the Table of Contents. Revisions made by the Legislative Counsel will be updated once they become available, see ORS 173.111 et seq. \*\*\*

Title 14 Procedure in Criminal Matters Generally  
Chapter 138- Appeals; Post-Conviction Relief  
Post-Conviction Motion for DNA Testing

*ORS § 138.697 (2015)*

**Second of two versions of this section.**

**138.697 Appeal of court order.**

(1) A person described in *ORS 138.690* may appeal to the Court of Appeals from a circuit court's final order or judgment denying or limiting DNA (deoxyribonucleic acid) testing under *ORS 138.692*, denying appointment of counsel under *ORS 138.694* or denying a motion for a new trial under *ORS 138.696*.

(2) The state may appeal to the Court of Appeals from a circuit court's final order or judgment granting a motion for DNA testing under *ORS 138.692* or granting a motion for a new trial under *ORS 138.696*.

(3) The time limits described in *ORS 138.071*, the notice requirements described in *ORS 138.081* and *138.090* and the provisions of *ORS 138.225*, *138.227*, *138.240*, *138.250* and *138.255* apply to appeals under this section unless the context requires otherwise.

(4) A circuit court shall appoint counsel to represent a person described in *ORS 138.690* on appeal in the same manner as for criminal defendants under *ORS 138.500*.

**HISTORY: History.**

2013 c.152 § 1, effective May 16, 2013; 2015 c.564 § 5, effective January 1, 2016.

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\*\*\* Current through the 2015 Regular Session of the West Virginia Legislature \*\*\*

Chapter 15. Public Safety.  
Article 2B. Dna Data.

*W. Va. Code § 15-2B-14 (2015)*

**§ 15-2B-14. Right to DNA testing.**

(a) A person convicted of a felony currently serving a term of imprisonment may make a written motion before the trial court that entered the judgment of conviction for performance (DNA) testing.

(b) (1) An indigent convicted person may request appointment of counsel to prepare a motion under this section by sending a written request to the court. The request must include the person's statement that he or she was not the perpetrator of the crime and that DNA testing is relevant to his or her assertion of innocence. The request must also include the person's statement as to whether he or she previously had appointed counsel under this section.

(2) If any of the information required in subdivision (1) of this section is missing from the request, the court shall return the request to the convicted person and advise him or her that the matter cannot be considered without the missing information.

(3) (A) Upon a finding of indigency, the inclusion of information required in subdivision (1) of this section, and that counsel has not previously been appointed pursuant to this subdivision, the court shall appoint counsel. Counsel shall investigate and, if appropriate, file a motion for DNA testing under this section. Counsel represents the indigent person solely for the purpose of obtaining DNA testing under this section.

(B) Upon a finding of indigency, and that counsel has been previously appointed pursuant to this subdivision, the court may, in its discretion, appoint counsel. Counsel shall investigate and, if appropriate, file a motion for DNA testing under this section. Counsel represents the person solely for the purpose of obtaining DNA testing under this section.

(4) Nothing in this section provides for a right to the appointment of counsel in a post-conviction collateral proceeding or sets a precedent for any such right. The representation provided an indigent convicted person under this article is solely for the limited purpose of filing and litigating a motion for DNA testing pursuant to this section.

(c) (1) The motion shall be verified by the convicted person under penalty of perjury and must do the following:

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(C) Make every reasonable attempt to identify both the evidence that should be tested and the specific type of DNA testing sought.

(D) Reveal the results of any DNA or other biological testing previously conducted by either the prosecution or defense, if known.

(E) State whether any motion for testing under this section has been filed previously and the results of that motion, if known.

(2) Notice of the motion shall be served on the prosecuting attorney in the county of conviction and, if known, the governmental agency or laboratory holding the evidence sought to be tested. Responses, if any, shall be filed within sixty days of the date on which the prosecuting attorney is served with the motion, unless a continuance is granted for good cause.

(d) If the court finds evidence was subject to prior DNA or other forensic testing, by either the prosecution or defense, it shall order the party at whose request the testing was conducted to provide all parties and the court with access to the laboratory reports, underlying data, and laboratory notes prepared in connection with the DNA or other biological evidence testing.

(e) The court, in its discretion, may order a hearing on the motion. The motion shall be heard by the judge who conducted the trial or accepted the convicted person's plea, unless the presiding judge determines that judge is unavailable. Upon request of either party, the court may order, in the interest of justice, that the convicted person be present at the hearing of the motion.

(f) The court shall grant the motion for DNA testing if it determines all of the following have been established:

(1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect;

(3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case;

(4) The convicted person has made a prima facie showing that the evidence sought for testing is material to the issue of the convicted person's identity as the perpetrator of or accomplice to, the crime, special circumstance, or enhancement allegation resulting in the conviction or sentence;

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if DNA testing results had been available at the time of conviction. The court in its discretion may consider any evidence regardless of whether it was introduced at trial;

(6) The evidence sought for testing meets either of the following conditions:

(A) The evidence was not previously tested;

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results;

(7) The testing requested employs a method generally accepted within the relevant scientific community;

(8) The evidence or the presently desired method of testing DNA were not available to the defendant at the time of trial or a court has found ineffective assistance of counsel at the trial court level;

(9) The motion is not made solely for the purpose of delay.

(g) If the court grants the motion for DNA testing, the court order shall identify the specific evidence to be tested and the DNA technology to be used. Testing shall be conducted by a DNA forensic laboratory in this State.

(h) The result of any testing ordered under this section shall be fully disclosed to the person filing the motion and the prosecuting attorney. If requested by any party, the court shall order production of the underlying laboratory data and notes.

(i) If testing was requested by the State or the individual is an indigent, the cost of DNA testing shall be borne by the State.

(j) An order granting or denying a motion for DNA testing under this section is not to be appealable and is subject to review only through a petition for writ of mandamus or prohibition filed with the supreme court of appeals by the person seeking DNA testing or the prosecuting attorney. The petition shall be filed within twenty days of the court's order granting or denying the motion for DNA testing. The court shall expedite its review of a petition for writ of mandamus or prohibition filed under this subsection.

(k) DNA testing ordered by the court pursuant to this section shall be done as soon as practicable. However, if the court finds that a miscarriage of justice will otherwise occur and that it is necessary in the interests of justice to give priority to the DNA testing, the court may require the DNA laboratory to give priority to the DNA testing ordered pursuant to this section over the laboratory's other pending casework.

(l) DNA profile information from biological samples taken from a convicted person pursuant to a motion for post-conviction DNA testing is exempt from any law requiring disclosure of information to the public.

(m) Notwithstanding any other provision of law, the right to file a motion for post-conviction DNA testing provided by this section is absolute and may not be waived. This prohibition applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.

**HISTORY:** 2004, 3rd Ex. Sess., c. 9.

Wyo. Stat. § 7-12-302

Wyoming Statutes Annotated  
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Title 7 Criminal Procedure  
Chapter 12 Appeal, Exceptions and New Trial  
Article 3. New Trial

*Wyo. Stat. § 7-12-302 (2015)*

**§ 7-12-302. Short title.**

This act shall be known and may be cited as the "Post-Conviction DNA Testing Act."

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
 Chapter 12 Appeal, Exceptions and New Trial  
 Article 3. New Trial

*Wyo. Stat. § 7-12-303 (2015)*

**§ 7-12-303. New trial; motion for post-conviction testing of DNA; motion contents; sufficiency of allegations, consent to DNA sample; definitions.**

**(a)** As used in this act:

- (i)** "DNA" means deoxyribonucleic acid;
- (ii)** "Movant" means the person filing a motion under subsection (c) of this section;
- (iii)** "This act" means *W.S. 7-12-302* through *7-12-315*.

**(b)** Notwithstanding any law or rule of procedure that bars a motion for a new trial as untimely, a convicted person may use the results of a DNA test ordered pursuant to this act as the grounds for filing a motion for a new trial.

**(c)** A person convicted of a felony offense may, preliminary to the filing of a motion for a new trial, file a motion for post-conviction DNA testing in the district court that entered the judgment of conviction against him if the movant asserts under oath and the motion includes a good faith, particularized factual basis containing the following information:

- (i)** Why DNA evidence is material to:
  - (A)** The identity of the perpetrator of, or accomplice to, the crime;
  - (B)** A sentence enhancement; or
  - (C)** An aggravating factor alleged in a capital case.
- (ii)** That evidence is still in existence and is in a condition that allows DNA testing to be conducted;
- (iii)** That the chain of custody is sufficient to establish that the evidence has not been substituted, contaminated or altered in any material aspect that would prevent reliable DNA testing;
- (iv)** That the specific evidence to be tested can be identified;
- (v)** That the type of DNA testing to be conducted is specified;
- (vi)** That the DNA testing employs a scientific method sufficiently reliable and relevant to be admissible under the Wyoming Rules of Evidence;

(vii) That a theory of defense can be presented, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support;

(viii) That the evidence was not previously subjected to DNA testing, or if the evidence was previously tested one (1) of the following would apply:

(A) The result of the testing was inconclusive;

(B) The evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing; or

(C) The requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice.

(ix) That the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the movant's actual innocence.

(d) The court may not order DNA testing in cases in which the trial or a plea of guilty or nolo contendere occurred after January 1, 2000 and the person did not request DNA testing or present DNA evidence for strategic or tactical reasons or as a result of a lack of due diligence, unless the failure to exercise due diligence is found to be a result of ineffective assistance of counsel. A person convicted before January 1, 2000 shall not be required to make a showing of due diligence under this subsection.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
Chapter 12 Appeal, Exceptions and New Trial  
Article 3. New Trial

*Wyo. Stat. § 7-12-304 (2015)*

**§ 7-12-304. Service of process; response by the state; preservation of evidence.**

(a) Notice of the motion filed under *W.S. 7-12-303(c)* shall be served upon the district attorney in the county in which the conviction occurred and, if applicable, the governmental agency or laboratory holding the evidence sought to be tested.

(b) The district attorney who is served shall within sixty (60) days after receipt of service of a copy of the motion, or within any additional period of time the court allows, answer or otherwise respond to the motion requesting DNA testing.

(c) The district attorney who is served may support the motion requesting DNA testing or oppose the motion with a statement of reasons and may recommend to the court, if any DNA testing is ordered, that a particular type of testing should be conducted, or object to the proposed testing laboratory, or make such other objections, recommendations or requests as will preserve the integrity of the evidence, including, but not limited to, requests for independent testing by the state or procedures in the event that the proposed testing will deplete the DNA sample.

(d) If a motion is filed pursuant to *W.S. 7-12-303(c)*, and the motion asserts the evidence is in the custody of the state or its agents, the court shall order the state to preserve during the pendency of the proceeding all material and relevant evidence in the state's possession or control that could be subjected to DNA testing and analysis. The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the movant and to the court. If the state determines that the evidence is no longer available, the state shall notify the court and the movant of the loss or destruction of the evidence and explain its loss or destruction. The state shall provide copies of chain of custody documentation or other documents explaining the loss or destruction of the evidence. After a motion is filed under *W.S. 7-12-303(c)*, prosecutors in the case, law enforcement officers and crime laboratory personnel shall cooperate in preserving material and relevant evidence and in determining the sufficiency of the chain of custody of the evidence which may be subject to DNA testing.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
 Chapter 12 Appeal, Exceptions and New Trial  
 Article 3. New Trial

*Wyo. Stat. § 7-12-305 (2015)*

**§ 7-12-305. Review by the court; hearing on motion, findings; order.**

(a) If the court determines that a motion is filed in compliance with the requirements of *W.S. 7-12-303(c)* and the state has had opportunity to respond to the motion, the court shall set a hearing for not more than ninety (90) days after the date the motion was filed. If the court finds that the motion does not comply with the requirements of *W.S. 7-12-303(c)*, the court may deny the motion without hearing.

(b) The hearing under subsection (a) of this section shall be heard by the judge who conducted the trial that resulted in the movant's conviction unless the judge is unavailable.

(c) The movant and the state may present evidence by sworn and notarized affidavits or by testimony; provided, however, any affidavit shall be served on the opposing party at least fifteen (15) days prior to the hearing.

(d) The movant shall be required to present a prima facie case showing that the evidence supports findings consistent with the facts asserted under *W.S. 7-12-303(c)* and DNA testing of the specified evidence would, assuming exculpatory results, establish:

(i) The actual innocence of the movant of the offense for which the movant was convicted;  
 or

(ii) In a capital case:

(A) The movant's actual innocence of the charged or uncharged conduct constituting an aggravating circumstance; or

(B) A mitigating circumstance as a result of the DNA testing.

(e) If the court finds that the movant has presented a prima facie case showing that the evidence supports findings consistent with *W.S. 7-12-303(c)* and the evidence would establish actual innocence, the court may order testing, subject to *W.S. 7-12-306*.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
Chapter 12 Appeal, Exceptions and New Trial  
Article 3. New Trial

*Wyo. Stat. § 7-12-306 (2015)*

**§ 7-12-306. Designation of testing laboratory.**

(a) If the court orders DNA testing pursuant to *W.S. 7-12-305(e)*, the DNA test shall be performed by the Wyoming state crime laboratory unless the movant establishes that the state crime laboratory has a conflict of interest or does not have the capability to perform the necessary testing.

(b) If the court orders that the DNA testing under *W.S. 7-12-305(e)* shall be conducted by a laboratory other than the state crime laboratory, the court shall require that the testing be performed:

(i) Under reasonable conditions designed to protect the state's interests in the integrity of the evidence;

(ii) By a laboratory that:

(A) Meets standards that at minimum comply with the standards of the DNA advisory board established pursuant to *42 U.S.C. 14131*; and

(B) Is accredited by the American society of crime laboratory directors accreditation board.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
Chapter 12 Appeal, Exceptions and New Trial  
Article 3. New Trial

*Wyo. Stat. § 7-12-307 (2015)*

**§ 7-12-307. Discovery.**

(a) If the DNA evidence being tested under this act has been previously subjected to DNA analysis by either the state or defense prior to the hearing conducted under *W.S. 7-12-305*, the court may order the state or defense to provide each party and the court with access to the laboratory reports prepared in connection with the DNA analysis, as well as the underlying data and laboratory notes. If DNA or other analysis was previously conducted by either the state or defense without the knowledge of the other party, all information relating to the testing shall be disclosed by the motion filed under *W.S. 7-12-303(c)* or any response thereto.

(b) The results of any DNA testing ordered under *W.S. 7-12-305(e)* shall be fully disclosed to the movant, the district attorney, the attorney general and the court. If requested by any party, the court shall order production of the underlying laboratory data and notes or chain of custody documents.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
Chapter 12 Appeal, Exceptions and New Trial  
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*Wyo. Stat. § 7-12-308 (2015)*

**§ 7-12-308. Right to counsel.**

A convicted person is entitled to counsel during a proceeding under this act. Upon request of the person, the court shall appoint counsel for the convicted person if the court determines that the person is needy and the person wishes to submit a motion under *W.S. 7-12-303(c)*. Counsel shall be appointed as provided in *W.S. 7-6-104(c)(viii)*.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
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*Wyo. Stat. § 7-12-309 (2015)*

**§ 7-12-309 Costs of testing.**

(a) The person filing a motion under *W.S. 7-12-303(c)* shall bear the cost of the DNA testing unless:

- (i) The person is serving a sentence of imprisonment;
- (ii) The person is needy; and
- (iii) The DNA test supports the person's motion.

(b) In the case of a person meeting the criteria specified in paragraphs (a)(i) through (iii) of this section, the costs of testing shall be paid by the state.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Article 3. New Trial

*Wyo. Stat. § 7-12-310 (2015)*

**§ 7-12-310. Order following testing.**

(a) If the results of the DNA analysis are inconclusive or show that the movant is the source of the evidence, the court shall deny any motion for a new trial based upon the DNA evidence and shall provide the results to the board of parole.

(b) If the results of the DNA analysis are consistent with assertions contained in the movant's motion, the court shall set the matter for hearing on the motion for a new trial.

(c) Upon the stipulation of both parties or a motion for dismissal of the original charges against the movant by the state in lieu of a retrial, the court shall:

(i) Vacate the movant's conviction consistent with the evidence demonstrating the movant's actual innocence;

(ii) Issue an order of actual innocence and exoneration; and

(iii) Issue an order of expungement.

(d) In the event a retrial is pursued and conducted and the movant is acquitted at the retrial, the court shall:

(i) Issue an order of actual innocence and exoneration; and

(ii) Issue an order of expungement.

**HISTORY:** Laws 2008, ch. 92, § 1.

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*Wyo. Stat. § 7-12-311 (2015)*

**§ 7-12-311. Victim notification.**

Following any motion filed under this act, the district attorney shall provide notice to the victim that the motion has been filed, the time and place for any hearing that may be held as a result of the motion, and the disposition of the motion. For purposes of this section, "victim" means as defined in *W.S. 1-40-202(a)(ii)*.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
Chapter 12 Appeal, Exceptions and New Trial  
Article 3. New Trial

*Wyo. Stat. § 7-12-312 (2015)*

**§ 7-12-312. Rights not waived; refiling of uncharged offenses.**

(a) Notwithstanding any other provision of law, the right to file a motion under *W.S. 7-12-303(c)* shall not be waived. The prohibition against waiver of the right provided under this section applies to, but is not limited to, a waiver that is given as part of an agreement resulting in a plea of guilty or nolo contendere.

(b) If a movant is granted a new trial under this act, any offense that was dismissed or not charged pursuant to a plea agreement that resulted in the conviction that has been set aside as a result of this act may be refiled by the state.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
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*Wyo. Stat. § 7-12-313 (2015)*

**§ 7-12-313. Appeal.**

(a) An order granting or denying a motion for DNA testing filed under *W.S. 7-12-303(c)* shall not be appealable, but may be subject to review only under a writ of review filed by the movant, the district attorney or the attorney general. The petition for a writ of review may be filed no later than twenty (20) days after the court's order granting or denying the motion for DNA testing.

(b) Any party to the action may appeal to the Wyoming supreme court any order granting or denying a motion for a new trial under *W.S. 7-12-310(b)*.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Title 7 Criminal Procedure  
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*Wyo. Stat. § 7-12-314 (2015)*

**§ 7-12-314. Subsequent motions.**

The court shall not be required to entertain a second or subsequent motion under *W.S. 7-12-303(c)* on behalf of the same movant, except where there is clear and compelling evidence that the evidence sought to be tested was wrongfully withheld from the movant by the state or its agents.

**HISTORY:** Laws 2008, ch. 92, § 1.

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*Wyo. Stat. § 7-12-315 (2015)*

**§ 7-12-315. Consensual testing.**

Nothing in this act shall be interpreted to prohibit a convicted person and the state from consenting to and conducting post-conviction DNA testing without filing a motion under *W.S. 7-12-303(c)*. Notwithstanding any other provision of law governing post-conviction relief, if DNA test results are obtained under testing conducted upon consent of the parties and the results are favorable to the convicted person, the convicted person may file, and the court shall adjudicate, a motion for a new trial based on the DNA test results.

**HISTORY:** Laws 2008, ch. 92, § 1.

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Florida Rules of Criminal Procedure  
XVII. Postconviction Relief

*Fla. R. Crim. P. 3.853 (2015)*

Review Court Orders which may amend this Rule

Rule 3.853. Motion for Postconviction DNA Testing

(a) *Purpose.* --This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under *sections 925.11 and 925.12, Florida Statutes.*

(b) *Contents of Motion.* --The motion for postconviction DNA testing must be under oath and must include the following:

(1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;

(2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;

(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

(c) *Procedure.*

(1) Upon receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is facially insufficient. If the motion is facially sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) Upon receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon a determination of indigency pursuant to *section 27.52, Florida Statutes*.

(5) The court shall make the following findings when ruling on the motion:

(A) Whether it has been shown that physical evidence that may contain DNA still exists.

(B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.

(C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services, Inc. (FQS) if requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

(d) *Time Limitations.* --The motion for postconviction DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

(e) *Rehearing.* --The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(f) *Appeal.* --An appeal may be taken by any adversely affected party within 30 days from the date the order on the motion is rendered. All orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered.

**HISTORY:** Amended *eff. Sept. 21, 2006 (938 So. 2d 977); Mar. 29, 2007 (953 So. 2d 513); Jan. 1, 2010 (26 So. 3d 534); Sept. 2, 2010 (43 So. 3d 688)*

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Florida Rules of Appellate Procedure

*Fla. R. App. P. 9.141 (2015)*

Review Court Orders which may amend this Rule

9.141. Review Proceedings In Collateral Or Post-Conviction Criminal Cases

(a) *Death Penalty Cases.* --This rule does not apply to death penalty cases.

(b) *Appeals from Post-Conviction Proceedings Under Florida Rule of Criminal Procedure 3.800(a), 3.801, 3.850, or 3.853.*

(1) *Applicability of Civil Appellate Procedures.* --Appeal proceedings under this subdivision shall be as in civil cases, except as modified by this rule.

(2) *Summary Grant or Denial of All Claims Raised in a Motion Without Evidentiary Hearing.*

(A) *Record.* --When a motion for post-conviction relief under rule 3.800(a), 3.801, 3.850, or 3.853 is granted or denied without an evidentiary hearing, the clerk of the lower tribunal shall electronically transmit to the court, as the record, the motion, response, reply, order on the motion, motion for rehearing, response, reply, order on the motion for rehearing, and attachments to any of the foregoing, together with the certified copy of the notice of appeal.

(B) *Index.* --Unless directed otherwise by the court, the clerk of the lower tribunal shall not index or paginate the record or send copies of the index or record to the parties.

(C) *Briefs or Responses.*

(i) Briefs are not required, but the appellant may serve an initial brief within 30 days of filing the notice of appeal. The appellee need not file an answer brief unless directed by the court. The appellant may serve a reply brief as prescribed by rule 9.210.

(ii) The court may request a response from the appellee before ruling, regardless of whether the appellant filed an initial brief. The appellant may serve a reply within 20 days after service of the response. The response and reply shall not exceed the page limits set forth in rule 9.210 for answer briefs and reply briefs.

(D) *Disposition.* --On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.

(3) *Grant or Denial of Motion after an Evidentiary Hearing was Held on One or More Claims.*

(A) *Transcription.* --In the absence of designations to the court reporter, the notice of appeal filed by an indigent pro se litigant in a rule 3.801, 3.850, or 3.853 appeal after an evidentiary hearing shall serve as the designation to the court reporter for the transcript of the evidentiary hearing. Within 5 days of receipt of the notice of appeal, the clerk of the lower tribunal shall request the appropriate court reporter to transcribe the evidentiary hearing and shall send the court reporter a copy of the notice, the date of the hearing to be transcribed, the name of the judge, and a copy of this rule.

(B) *Record.*

(i) When a motion for post-conviction relief under rule 3.801, 3.850, or 3.853 is granted or denied after an evidentiary hearing, the clerk of the lower tribunal shall index, paginate, and electronically transmit to the court as the record, within 50 days of the filing of the notice of appeal, the notice of appeal, motion, response, reply, order on the motion, motion for rehearing, response, reply, order on the motion for rehearing, and attachments to any of the foregoing, as well as the transcript of the evidentiary hearing.

(ii) Appellant may direct the clerk to include in the record any other documents that were before the lower tribunal at the hearing. If the clerk is directed to include in the record a previously prepared appellate record involving the appellant, the clerk need not reindex or repaginate it.

(iii) The clerk of the lower tribunal shall serve copies of the record on the attorney general (or state attorney in appeals to the circuit court), all counsel appointed to represent indigent defendants on appeal, and any pro se indigent defendant. The clerk of the lower tribunal shall simultaneously serve copies of the index on all nonindigent defendants and, at their request, copies of the record or portions of it at the cost prescribed by law.

(C) *Briefs.* --Initial briefs shall be served within 30 days of service of the record or its index. Additional briefs shall be served as prescribed by rule 9.210.

(c) *Petitions Seeking Belated Appeal or Belated Discretionary Review.*

(1) *Applicability.* --This subdivision governs petitions seeking belated appeals or belated discretionary review.

(2) *Treatment as Original Proceedings.* --Review proceedings under this subdivision shall be treated as original proceedings under rule 9.100, except as modified by this rule.

(3) *Forum.* --Petitions seeking belated review shall be filed in the court to which the appeal or discretionary review should have been taken.

(4) *Contents.* --The petition shall be in the form prescribed by rule 9.100, may include supporting documents, and shall recite in the statement of facts

(A) the date and nature of the lower tribunal's order sought to be reviewed;

(B) the name of the lower tribunal rendering the order;

(C) the nature, disposition, and dates of all previous court proceedings;

(D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;

(E) the nature of the relief sought; and

(F) the specific acts sworn to by the petitioner or petitioner's counsel that constitute the basis for entitlement to belated appeal or belated discretionary review, as outlined below:

(i) A petition seeking belated appeal must state whether the petitioner requested counsel to proceed with the appeal and the date of any such request, or if the petitioner was misadvised as to the availability of appellate review or the status of filing a notice of appeal. A petition seeking belated discretionary review must state whether counsel advised the petitioner of the results of the appeal and the date of any such notification, or if counsel misadvised the petitioner as to the opportunity for seeking discretionary review, or

(ii) A petition seeking belated appeal or belated discretionary review must identify the circumstances unrelated to counsel's action or inaction, including names of individuals involved and date(s) of the occurrence(s), that were beyond the petitioner's control and otherwise interfered with the petitioner's ability to file a timely appeal or notice to invoke, as applicable.

(5) *Time Limits.*

(A) A petition for belated appeal shall not be filed more than 2 years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath with a specific factual basis that the petitioner was unaware a notice of appeal had not been timely filed or was not advised of the right to an appeal or was otherwise prevented from timely filing the notice of appeal due to circumstances beyond the petitioner's control, and could not have ascertained such facts by the exercise of reasonable diligence. In no case shall a petition for belated appeal be filed more than 4 years after the expiration of time for filing the notice of appeal.

(B) A petition for belated discretionary review shall not be filed more than 2 years after the expiration of time for filing the notice to invoke discretionary review from a final order, unless it alleges under oath with a specific factual basis that the petitioner was unaware such notice had not been timely filed or was not advised of the results of the appeal, or was otherwise prevented from timely filing the notice due to circumstances beyond the petitioner's control, and that the petitioner could not have ascertained such facts by the exercise of reasonable diligence. In no case shall a petition for belated discretionary review be filed more than 4 years after the expiration of time for filing the notice to invoke discretionary review from a final order.

(6) *Procedure.*

(A) The petitioner shall serve a copy of a petition for belated appeal on the attorney general and state attorney. The petitioner shall serve a copy of a petition for belated discretionary review on the attorney general.

(B) The court may by order identify any provision of this rule that the petition fails to satisfy and, pursuant to rule 9.040(d), allow the petitioner a specified time to serve an amended petition.

(C) The court may dismiss a second or successive petition if it does not allege new grounds and the prior determination was on the merits, or if a failure to assert the grounds was an abuse of procedure.

(D) An order granting a petition for belated appeal shall be filed with the lower tribunal and treated as the notice of appeal, if no previous notice has been filed. An order granting a petition for belated discretionary review or belated appeal of a decision of a district court of appeal shall be filed with the district court and treated as a notice to invoke discretionary jurisdiction or notice of appeal, if no previous notice has been filed.

(d) *Petitions Alleging Ineffective Assistance of Appellate Counsel.*

(1) *Applicability.* --This subdivision governs petitions alleging ineffective assistance of appellate counsel.

(2) *Treatment as Original Proceedings.* --Review proceedings under this subdivision shall be treated as original proceedings under rule 9.100, except as modified by this rule.

(3) *Forum.* --Petitions alleging ineffective assistance of appellate counsel shall be filed in the court to which the appeal was taken.

(4) *Contents.* --The petition shall be in the form prescribed by rule 9.100, may include supporting documents, and shall recite in the statement of facts:

(A) the date and nature of the lower tribunal's order subject to the disputed appeal;

(B) the name of the lower tribunal rendering the order;

(C) the nature, disposition, and dates of all previous court proceedings;

(D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;

(E) the nature of the relief sought; and

(F) the specific acts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel.

(5) *Time Limits.* --A petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than 2 years after the judgment and sentence become final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel. In no case shall a petition alleging ineffective assistance of appellate counsel on direct review be filed more than 4 years after the judgment and sentence become final on direct review.

(6) *Procedure.* --A petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than 2 years after the judgment and sentence become final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel. In no case shall a petition alleging ineffective assistance of appellate counsel on direct review be filed more than 4 years after the judgment and sentence become final on direct review.

(A) The petitioner shall serve a copy of the petition on the attorney general.

(B) The court may by order identify any provision of this rule that the petition fails to satisfy and, pursuant to rule 9.040(d), allow the petitioner a specified time to serve an amended petition.

(C) The court may dismiss a second or successive petition if it does not allege new grounds and the prior determination was on the merits, or if a failure to assert the grounds was an abuse of procedure.

**HISTORY:** *Added eff. Jan. 1, 2001 (780 So.2d 834); amended eff. Oct. 18, 2001 (807 So.2d 633); Nov. 15, 2007 (969 So.2d 357); Sept. 25, 2008 (2008 Fla. Lexis 1632, 33 Fla. L. Weekly S 706); Jan. 29, 2009 (2009 Fla. Lexis 127); July 1, 2011 (2011 Fla. Lexis 1483); amended eff. Dec. 1, 2012 (SC11-399); amended eff. July 1, 2013 (SC11-1679); eff. Jan. 1, 2015 (SC14-227)*

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Florida Rules of Appellate Procedure

*Fla. R. App. P. 9.142 (2015)*

Review Court Orders which may amend this Rule

9.142. Procedures for Review in Death Penalty Cases

(a) *Procedure in Death Penalty Appeals.*

(1) *Record.*

(A) When the notice of appeal is filed in the supreme court, the chief justice will direct the appropriate chief judge of the circuit court to monitor the preparation of the complete record for timely filing in the supreme court. Transcripts of all proceedings conducted in the lower tribunal shall be included in the record under these rules.

(B) The complete record in a death penalty appeal shall include all items required by rule 9.200 and by any order issued by the supreme court. In any appeal following the initial direct appeal, the record that is electronically transmitted shall begin with the most recent mandate issued by the supreme court, or the most recent filing not already electronically transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and shall exclude any materials already transmitted to the supreme court as the record in any prior appeal. The clerk of the lower tribunal shall retain a copy of the complete record when it transmits the record to the Supreme Court.

(C) The supreme court shall take judicial notice of the appellate records in all prior appeals and writ proceedings involving a challenge to the same judgment of conviction and sentence of death. Appellate records subject to judicial notice under this subdivision shall not be duplicated in the record transmitted for the appeal under review.

(2) *Briefs; Transcripts.* --After the record is filed, the clerk will promptly establish a briefing schedule allowing the defendant 60 days from the date the record is filed, the state 45 days from the date the defendant's brief is served, and the defendant 30 days from the date the state's brief is served to serve their respective briefs. On appeals from orders ruling on applications for relief under *Florida Rule of Criminal Procedure 3.851* or *3.853*, and on resentencing matters, the schedules set forth in rule 9.140(g) will control.

(3) *Sanctions.* --If any brief is delinquent, an order to show cause may issue under *Florida Rule of Criminal Procedure 3.840*, and sanctions may be imposed.

(4) *Oral Argument.* --Oral argument will be scheduled after the filing of the defendant's reply brief.

(5) *Scope of Review.* --On direct appeal in death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief.

(b) *Petitions for Extraordinary Relief.*

(1) *Treatment as Original Proceedings.* --Review proceedings under this subdivision shall be treated as original proceedings under rule 9.100, except as modified by this rule.

(2) *Contents.* --Any petition filed pursuant to this subdivision shall be in the form prescribed by rule 9.100, may include supporting documents, and shall recite in the statement of facts

(A) the date and nature of the lower tribunal's order sought to be reviewed;

(B) the name of the lower tribunal rendering the order;

(C) the nature, disposition, and dates of all previous court proceedings;

(D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;

(E) the nature of the relief sought.

(3) *Petitions Seeking Belated Appeal.*

(A) *Contents.* --A petition for belated appeal shall include a detailed allegation of the specific acts sworn to by the petitioner or petitioner's counsel that constitute the basis for entitlement to belated appeal, including whether petitioner requested counsel to proceed with the appeal and the date of any such request, whether counsel misadvised the petitioner as to the availability of appellate review or the filing of the notice of appeal, or whether there were circumstances unrelated to counsel's action or inaction, including names of individuals involved and date(s) of the occurrence(s), that were beyond the petitioner's control and otherwise interfered with the petitioner's ability to file a timely appeal.

(B) *Time limits.* --A petition for belated appeal shall not be filed more than 1 year after the expiration of time for filing the notice of appeal from a final order denying rule 3.851 relief, unless it alleges under oath with a specific factual basis that the petitioner

(i) was unaware an appeal had not been timely filed, was not advised of the right to an appeal, was misadvised as to the right to an appeal, or was prevented from timely filing a notice of appeal due to circumstances beyond the petitioner's control; and

(ii) could not have ascertained such facts by the exercise of due diligence.

In no case shall a petition for belated appeal be filed more than 2 years after the expiration of time for filing the notice of appeal.

(4) *Petitions Alleging Ineffective Assistance of Appellate Counsel.*

(A) *Contents.* --A petition alleging ineffective assistance of appellate counsel shall include detailed allegations of the specific acts that constitute the alleged ineffective assistance of counsel on direct appeal.

(B) *Time limits.* --A petition alleging ineffective assistance of appellate counsel shall be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under *Florida Rule of Criminal Procedure 3.851*.

(c) *Petition Seeking Review of Nonfinal Orders in Death Penalty Postconviction Proceedings.*

(1) *Applicability.* --This rule applies to proceedings that invoke the jurisdiction of the supreme court for review of nonfinal orders issued in postconviction proceedings following the imposition of the death penalty.

(2) *Treatment as Original Proceedings.* --Review proceedings under this subdivision shall be treated as original proceedings under rule 9.100 unless modified by this subdivision.

(3) *Commencement; Parties.*

(A) Jurisdiction of the supreme court shall be invoked by filing a petition with the clerk of the supreme court within 30 days of rendition of the nonfinal order to be reviewed. A copy of the petition shall be served on the opposing party and furnished to the judge who issued the order to be reviewed.

(B) Either party to the death penalty postconviction proceedings may seek review under this rule.

(4) *Contents.* --The petition shall be in the form prescribed by rule 9.100, and shall contain

(A) the basis for invoking the jurisdiction of the court;

(B) the date and nature of the order sought to be reviewed;

(C) the name of the lower tribunal rendering the order;

(D) the name, disposition, and dates of all previous trial, appellate, and postconviction proceedings relating to the conviction and death sentence that are the subject of the proceedings in which the order sought to be reviewed was entered;

(E) the facts on which the petitioner relies, with references to the appropriate pages of the supporting appendix;

(F) argument in support of the petition, including an explanation of why the order departs from the essential requirements of law and how the order may cause material injury for which there is no adequate remedy on appeal, and appropriate citations of authority; and

(G) the nature of the relief sought.

(5) *Appendix.* --The petition shall be accompanied by an appendix, as prescribed by rule 9.220, which shall contain the portions of the record necessary for a determination of the issues presented.

(6) *Order to Show Cause.* --If the petition demonstrates a preliminary basis for relief or a departure from the essential requirements of law that may cause material injury for which there is

no adequate remedy by appeal, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted.

(7) *Response.* --No response shall be permitted unless ordered by the court.

(8) *Reply.* --Within 20 days after service of the response or such other time set by the court, the petitioner may serve a reply, which shall not exceed 15 pages in length, and supplemental appendix.

(9) *Stay.*

(A) A stay of proceedings under this rule is not automatic; the party seeking a stay must petition the supreme court for a stay of proceedings.

(B) During the pendency of a review of a nonfinal order, unless a stay is granted by the supreme court, the lower tribunal may proceed with all matters, except that the lower tribunal may not render a final order disposing of the cause pending review of the nonfinal order.

(10) *Other pleadings.* --The parties shall not file any other pleadings, motions, replies, or miscellaneous documents without leave of court.

(11) *Time Limitations.* --Seeking review under this rule shall not extend the time limitations in rule 3.851 or 3.852.

(d) *Review of Dismissal of Post-Conviction Proceedings and Discharge of Counsel in Florida Rule of Criminal Procedure 3.851(i) Cases.*

(1) *Applicability.* --This rule applies when the circuit court enters an order dismissing postconviction proceedings and discharging counsel under *Florida Rule of Criminal Procedure 3.851(i)*.

(2) *Procedure Following Rendition of Order of Dismissal and Discharge.*

(A) *Notice to Lower Tribunal.* --Within 10 days of the rendition of an order granting a prisoner's motion to discharge counsel and dismiss the motion for post-conviction relief, discharged counsel shall file with the clerk of the circuit court a notice seeking review in the supreme court.

(B) *Transcription.* --The circuit judge presiding over any hearing on a motion to dismiss and discharge counsel shall order a transcript of the hearing to be prepared and filed with the clerk of the circuit court no later than 25 days from rendition of the final order.

(C) *Record.* --Within 30 days of the granting of a motion to dismiss and discharge counsel, the clerk of the circuit court shall electronically transmit a copy of the motion, order, and transcripts of all hearings held on the motion to the clerk of the supreme court.

(D) *Proceedings in Supreme Court.* --Within 20 days of the filing of the record in the supreme court, discharged counsel shall serve an initial brief. Both the state and the prisoner may serve responsive briefs. All briefs must be served and filed as prescribed by rule 9.210.

**HISTORY:** *Added eff. Jan. 1, 2003 (837 So.2d 911); amended eff. Feb. 3, 2005 (894 So.2d 202); Nov. 15, 2007 (969 So.2d 357); Oct. 15, 2009 (2009 Fla. LEXIS 1793); July 1, 2011 (2011 Fla. Lexis 1483); Dec. 1, 2012 (SC11-399); amended eff. Jan. 1, 2015 (SC13-2381) (SC14-227)*