

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

Appellee,

v.

**TYRONE NOLING**

Appellant.

Case No. 14-1377

On Appeal From the  
Court of Common Pleas,  
Portage County

Court of Common Pleas  
Case No. 1995-CR-220  
This is a Death Penalty Case

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**MERIT BRIEF OF THE STATE OF OHIO**

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

ATTORNEYS FOR APPELLEE

ERIC E. MURPHY (0083284)  
State Solicitor General  
Counsel of Record  
PETER T. REED (0089948)  
Deputy Solicitor General  
30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

THOMAS E. MADDEN (0077069)  
Assistant Attorney General  
150 East Broad Street, 16th Floor  
Columbus, Ohio 43215

ATTORNEYS FOR AMICUS CURIAE  
OHIO ATTORNEY GENERAL

MARK GODSEY (0074484)  
Counsel of Record  
University of Cincinnati  
College of Law  
P.O. Box 210040  
Cincinnati, Ohio 45221-0040  
(513) 556-0752  
(513) 556-0702 (fax)

CARRIE WOOD (0087091)  
Assistant State Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 644-0708 (fax)  
[carrie.wood@opd.ohio.gov](mailto:carrie.wood@opd.ohio.gov)

ATTORNEYS FOR APPELLANT

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## STATEMENT OF THE CASE AND FACTS

### PROCEDURAL HISTORY

Twenty-five and half years ago, Tyrone Noling (“Noling”), murdered an 81-year-old-couple, Bearnhardt and Cora Hartig, inside their home in Atwater Township. On December 20, 2002, this Court affirmed Noling’s conviction and death sentence on direct appeal. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88.

In 2013, this Court reviewed Noling’s second application for postconviction DNA testing under R.C. 2953.71 to 2953.81. *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 3. This Court remanded the case and ordered the trial court to determine, “[W]hether prior definitive DNA testing, as defined in R.C. 2953.71(U), precludes Noling’s second application. If not, the trial court should consider whether new DNA testing would be outcome determinative.” *Id.* at ¶ 44. On remand, the state agreed to test the cigarette butt in question with the Ohio Bureau of Criminal Identification and Investigation (“BCI”), and run the results against the Combined DNA Index System (“CODIS”). (Transcript of the docket, journal entries and original papers hereinafter “T.d.” 415).

On February 10, 2014, BCI provided a laboratory report with the results of the testing. (T.d. 436). The report indicated DNA profiling was performed on the cigarette butt and the, “DNA profile from the cutting from the cigarette butt (Item 1.1.1.) is from an unknown male.” *Id.* The DNA profile was entered into the CODIS database and, “No investigative information has been obtained as of this date.” *Id.* Contrary to Noling’s previous assertions to this Court and the trial court, the DNA profile of the unknown male from the cutting of the cigarette butt did not match that

of anyone in the CODIS database which included the DNA profile of an alleged alternative suspect, Daniel Wilson.

During the remand proceedings, Noling moved to amend his postconviction DNA application to include the following additional items for DNA testing, “[T]he shell casings in State’s Exhibits 2, 3, 4, 5, 6, 7, 13, 14 and 17, and the ring boxes in State’s Exhibit 16.” (T.d. 377). Over the state’s objections, the trial court granted Noling’s motion. (T.d. 391). The trial court selected BCI as the testing authority for these additional items and sought a R.C. 2953.76, determination regarding the quantity and quality of the parent sample of the biological material of the additional items. (T.d. 416). Despite Noling’s multiple attempts to challenge the trial court’s decision, BCI’s findings were filed with the trial court on June 26, 2014. (T.d. 450).

On June 27, 2014, the trial court denied Noling’s amended application finding, “B.C.I. has filed a report indicating that all of these items are contaminated to the extent that they are scientifically unsuitable for testing; therefore, the Court would find that those exhibits do not comply with Ohio Revised Code section 2953.74(C)(2)(c); therefore, the amended application cannot be accepted and is therefore dismissed.” (T.d. 451). Noling filed a memorandum in support of jurisdiction with this Court, an appeal with the Eleventh District Court of Appeals and a motion challenging the constitutionality of R.C. 2953.73(E)(1), in the Eleventh District. (T.d. 453, 458).

After the parties had submitted briefs and the matter was scheduled for oral argument, the Eleventh District dismissed Noling’s appeal sua sponte. *State v. Noling*, 11th Dist. No. 2014-P-0045, 2015-Ohio-2454, ¶ 16. The court found that

under R.C. 2953.73(E)(1), Noling may only seek review of the trial court's rejection of DNA testing to this Court. *Id.* Moreover, the Eleventh District's review revealed that the judgments on appeal were silent regarding the constitutional issue and the appellate court's review of the record indicated the constitutional issue was never raised, litigated or adjudicated in the trial court. *Id.* at ¶ 9.

This Court accepted discretionary appeal on Noling's First Proposition of Law:

Ohio Revised Code 2953.73(E)(1) violates both the Eighth and Fourteenth Amendments of the United States Constitution as it: (1) discriminates between capital and non-capital criminal defendants, (2) fails to provide appellate review, and (3) results in the arbitrary and capricious application of the death penalty. Fourteenth Amendments [*sic*] to the United States Constitution and Article I, Section 16 of the Ohio Constitution. (T.d. 469).

#### STATEMENT OF FACTS

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

Prior to the Hartig murders, Noling, Wolcott, Dalesandro and St. Clair, had devised a plan to rob elderly people. (T.p. 827). They agreed that the simplest approach would be to park their car outside of an elderly person's house and feign car trouble. Seeking assistance they would ask to use the phone to gain entry into

the house and then rob the individual. (T.p. 827-828). Despite two previously successful robberies of elderly couples at the Hughes and Murphy residences, the plan failed at the Hartig's residence and the couple was murdered because they resisted. Noling explained, "[T]he old man wouldn't stop, that he kept coming at him." (T.p. 851). At trial, Wolcott testified Noling, "[H]ad a gun, he pulled the trigger" he continued, "[E]verything went wrong \* \* \* we killed them." (T.p. 926).

### **ARGUMENT**

**State of Ohio's Response to Noling's Proposition of Law:** R.C. 2953.73(E)(1), confers exclusive jurisdiction on this Court consistent with the Fourteenth and Eighth Amendments to the United States Constitution.

It is important to remember, "DNA testing alone does not always resolve a case." *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62, 129 S.Ct. 2308, 2316, 174 L.E.2d 38 (2009). In *Osborne*, the Court recognized, "The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt." *Id.* Rather, "The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice. *Id.* According to *Osborne*, "That task belongs primarily to the legislature." *Id.*

At issue here is whether R.C. 2953.73(E)(1), violates the Fourteenth and Eighth Amendments to the United States Constitution. R.C. 2953.73(E) provides:

(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)(1) and (2).

The challenged provision is part of the statutory scheme that governs the applications for postconviction DNA testing in Ohio. R.C. 2953.71 to 2953.83. The postconviction DNA statutes expressly provide that the provisions do not confer any constitutional right upon an offender and that the state established guidelines and procedures for the provisions, “[T]o ensure that they are carried out with both justice and efficiency in mind.” R.C. 2953.72(A)(9). The statutes also provide, an offender who files an application for DNA testing that is rejected or one that is accepted and produces unfavorable test results, “[D]oes not gain as a result of the participation any constitutional right to challenge, or, except as provided in division 8(A) of this section, any right to any review or appeal of, the manner in which those provisions are carried out.” R.C. 2953.72(A)(9).

Noling’s amended postconviction DNA application contained the requisite R.C. 2953.72(A), Acknowledgment. (T.d. 394). Noling acknowledged that he had no additional constitutional right and, “[T]he court had no duty or obligation to provide postconviction DNA testing to” him. R.C. 2953.72(A)(8). The court of common pleas

had sole discretion to determine whether: 1) Noling was an eligible offender, 2) Noling's application satisfied the acceptance criteria of R.C. 2953.74(C)(1)-(6) and 3) Noling's application should be accepted or rejected. *Id.* Noling's application contained the language of the statute that specifically provided, "[N]o determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court." *Id.* Therefore, the only issue reviewable on appeal under this statutory scheme was the trial court's June 27, 2014, rejection of Noling's application. (T.d. 451).

Noling was an eligible offender who submitted an amended application for postconviction DNA testing. (T.d. 394). The trial court rejected his application on June 27, 2014. (T.d. 451). As Noling was sentenced to death, he was subject to R.C. 2953.73(E)(1), and "[M]ay seek leave of the supreme court to appeal the rejection to the supreme court." Noling filed a notice of appeal and memorandum in support of jurisdiction with this Court. (T.d. 458).

This is the third time that Noling has sought an appeal to this Court under R.C. 2953.73(E)(1). After the trial court overruled Noling's first application for postconviction DNA testing on March 11, 2009 (T.d. 299), Noling filed an appeal and memorandum in support of jurisdiction with this Court pursuant to R.C. 2953.73(E)(1). (T.d. 300, 301). *State v. Noling*, 2009-0773. This Court found Noling's first appeal did not involve any substantial constitutional question and denied leave to appeal on Sept. 29, 2010. (T.d. 318). Three months later, Noling filed his second application for postconviction DNA testing. (T.d. 321). On March 28, 2011, the trial

court rejected Noling's second application and Noling filed a notice of appeal and memorandum in support of jurisdiction with this Court under R.C. 2953.73(E)(1). (T.d. 347). This Court accepted Noling's second appeal (T.d. 352), and remanded the case and ordered the trial court to determine, "[W]hether prior definitive DNA testing, as defined in R.C. 2953.71(U), precludes Noling's second application. If not, the trial court should consider whether new DNA testing would be outcome determinative." *Noling*, 2013-Ohio-1764 at ¶ 44. His amended application for postconviction DNA testing was filed in the trial court on December 4, 2013 (T.d. 394). The present appeal is Noling's third appeal under R.C. 2953.73(E)(1). (T.d. 458). Although Noling included five propositions of law in his memorandum in support of jurisdiction, this Court accepted appeal on his the First Proposition of Law. (T.d. 469).

Contrary to Noling's assertion on brief that "[t]here 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," pages 16-18 of the Ohio Attorney General's 2013 Capital Crimes Annual Report indicates that eight capital inmates have filed postconviction DNA applications in the trial court. A link to this publication is provided on the Ohio Public Defender's website. Of those eight capital inmates, three have sought an appeal in this Court: *State v. Bonnell*, Supreme Court Nos. 05-2284 and 06-1739; *State v. Durr*, Supreme Court No. 09-2117; and *State v. Noling*, Supreme Court Nos. 09-0773, 11-0778 and 14-1377. This Court rejected the appeals in *Bonnell* and *Durr* and twice accepted Noling's appeals.

Noling's current proposition of law raises two lines of inquiry. First, whether a constitutional violation has occurred and second, whether Noling has successfully challenged the constitutionality of the statute either on its face or as applied to a particular set of facts.

I.

**NO VIOLATION OF OHIO CONSTITUTION IN LIGHT OF STATE V. DAVIS**

In Noling's prior appeal to this Court, the parties were ordered to brief the following issue, "In view of *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, whether R.C. 2953.73(E)(1), which confers jurisdiction on this court to consider Noling's appeal, is constitutional." *Noling*, 2013-Ohio-1764, at ¶ 8. In response, the state presented several arguments opposing a constitutional analysis of R.C. 2953.73(E)(1), and proposed a severance remedy based solely on the *Davis* Court's narrow interpretation of the appellate jurisdiction provided in Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution:

[t]he State notes that this severance remedy is necessary due to the *Davis* interpretation of the Ohio Constitution and not because of any violation of the protections of due process or equal protection. Neither a suspect class nor a fundamental right is involved in the present case. (State's Supplemental Brief, Case No. 2011-0778, pg. 9).

In *Noling*, this Court did not interpret *Davis* narrowly and found R.C. 2953.73(E)(1)'s statutory limit on a court of appeals' jurisdiction was constitutional. *Noling*, 2013-Ohio-1764 at 27.

**NO VIOLATION OF FEDERAL CONSTITUTION**

Consistent with its position under the *Davis* constitutional inquiry, the state maintains that R.C. 2953.73(E)(1), does not violate Equal Protection or Due

Process. Moreover, Noling's case still does not involve a suspect class or fundamental right.

#### DUE PROCESS

Noling's proposition of law claimed the statute, "[F]ails to provide appellate review," resulting in a due process violation of the federal constitution. In support of this claim, Noling compared the appellate process of capital and noncapital litigants, argued the severity of the punishment in death penalty cases warranted more process, and asserted Ohio reduced and/or blocked an appeal of right for capital litigants.

The Due Process Clause of the Fourteenth Amendment states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Fourteenth Amendment to the U.S. Constitution. "Due process does not require a State to provide appellate process at all." *Goeke v. Branch*, 514 U.S. 115, 120, 115 S.Ct. 1275, 1278, 131 L.E.2d 152 (1995). "There can hardly be, therefore, a fundamental right to appellate review of a trial court's post-conviction rulings." *Dickerson v. Latessa*, 872 F.2d 1116, 1119 (1st Cir.1989).

Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay v. Noia*, 372 U.S. 391, 423-424, 83 S.Ct. 822, 841, 9 L.E.2d 837 (1963). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, cf. *United States v. MacCollom*, 426 U.S. 317, 323, [96 S.Ct. 2086, 2090-2091, 48 L.E.2d 666] (1976) (plurality opinion), and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well. *Pennsylvania v. Finley*, 481 U.S. 551, 556-557, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1987).

“A postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment.” *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67, 76 (1994). There is a difference between a capital defendant’s appeal from the trial court’s decision imposing a sentence of death and an appeal from postconviction relief proceedings. “The State accordingly has more flexibility in deciding what procedures are needed in the context of postconviction relief.” *Osborne*, 557 U.S. at 69, 129 S.Ct. at 2320, 174 L.E.2d 38. “When a State chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume.” *Id.* quoting *Finley* at 559, 107 S.Ct. at 1995, 95 L.E.2d 539.

There is no constitutional right to obtain postconviction access to the State’s evidence for DNA testing. *Osborne* at 74-75, 129 S.Ct. at 2323, 174 L.E.2d 38. Ohio had no constitutional obligation to create a postconviction DNA testing statute or an appellate process under that statutory scheme. Applications for postconviction DNA testing under R.C. 2953.73 to 2953.83, are not a continuation of activities related to a criminal defendant’s direct appeal or his original criminal proceedings.

The United States Supreme Court has imposed heightened procedural requirements on capital trials and sentencing proceedings. E.g. *Lockett v. Ohio*, 438 U.S. 586, 604-605, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978) (holding Eighth and Fourteenth Amendments require individualized consideration of mitigating factors in capital cases); *Turner v. Murray*, 476 U.S. 28, 36-37, 106 S.Ct. 1683, 1688, 90 L.Ed.2d (1986) (holding a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and

questioned on racial bias). However, the Court has not expanded those heightened procedures into other aspects of the capital defendant's proceedings, including appeals.

The Supreme Court found no Eighth Amendment violation when an appellate court did not perform a proportionality review of a death sentence. *Pulley v. Harris*, 465 U.S. 37, 53-54, 104 S.Ct. 871, 881, 79 L.Ed.2d 29 (1984). The Court applied a regular harmless error standard to review a constitutional claim in a capital case. *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988). Similarly, the Court refused to hold that the fact that a death sentence had been imposed required a different standard of review on federal habeas. *Smith v. Murray*, 477 U.S. 527, 538, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986).

Death is different. However, the difference in the severity of punishment has been recognized and addressed by decisions imposing heightened procedures at the trial and sentencing of a capital defendant's case. Contrary to Noling's assertions, these heightened procedures are not required beyond the trial and sentencing stages, even by the United States Supreme Court. Accordingly, this Court should not expand the statutory appellate process of the postconviction proceeding provided in R.C. 2953.73(E)(1), under a proposition of law asserting a federal constitutional right that the United States Supreme Court does not recognize.

#### EQUAL PROTECTION

Noling's proposition of law next claimed that R.C. 2953.73(E)(1), "[D]iscriminates between capital and non-capital criminal defendants," violating the Equal Protection Clause of the federal constitution. In support of this claim, Noling

argued capital and noncapital defendants were similarly situated defendants challenging their convictions or proclaiming their innocence with the same mechanism without receiving the same appellate process. He asserted that eliminating the delay to a capital defendant's execution could not serve as a sufficient basis for the alleged disparate treatment. Noling also relied heavily on the line of cases that has developed regarding the rights of indigent people on appeal.

The Equal Protection Clause of the Fourteenth Amendment provides, "No State shall \* \* \* deny to any person within its jurisdiction the equal protection of the laws." Fourteenth Amendment to the U.S. Constitution. The Equal Protection Clause prevents legislation from burdening a fundamental right, targeting a suspect classification or treating similarly situated individuals in a dissimilar manner. *Vacco v. Quill*, 521 U.S. 793, 799, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834 (1997).

No fundamental right is burdened by R.C. 2953.73(E)(1). The right to a direct appeal in state courts is not a fundamental right. *Mckane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 915, 38 L.Ed. 867 (1894) ("Whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.") cited as still good law in *Lopez v. Wilson*, 426 F.3d 339, 355 (6th Cir.2005). "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal." *Murray v. Giarratano*, 492 U.S. 1, 10, 109 S.Ct. 2765, 2770, 106 L.Ed.2d 1 (1989). Accordingly, there is nothing in the constitution that requires a state to provide an appeal from the rejection of a postconviction DNA testing application.

No suspect class is involved in R.C. 2953.73(E)(1). The United States Courts of Appeals for the First, Fourth, Fifth and Sixth Circuits have all held that capital defendants are not a suspect class for equal protection purposes. *Dickerson v. Latessa*, 872 F.2d at 1119 (“We conclude that the ‘rational basis test’ is the appropriate standard of review in this case. Dickerson does not and could not successfully contend that, as a person convicted of first degree murder, he is a member of a suspect class.”); *Evans v. Thompson*, 881 F.2d 117, 121 (4th Cir.1989) (capital defendants not a suspect class for equal protection purposes), cert. denied, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir.1987), cert denied, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987); and *Smith v. Mitchell*, 567 F.3d 246, 262 (6th Cir.2009).

The United States Supreme Court has identified suspect classifications as race, alienage, national origin and allowed heightened standards of review for classifications based on gender and illegitimacy. *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-441, 105 S.Ct. 3249, 3254-3255, 87 L.Ed.2d 313 (1985). However, the Court has refused to extend suspect classification status and refused to apply a heightened standard of review to classifications based on age or mental retardation. *Id.* at 441-442, 105 S.Ct. at 3255-3256, 87 L.Ed.2d 313.

Noling claimed that similarly situated individuals were being treated in a dissimilar manner. He stated the disparate treatment between capital and noncapital offenders was the appellate process provided in the statute. He described the noncapital appellate process as, “[A] two-tiered level,” including an appeal of right to the court of appeals and then a discretionary appeal to this Court. (Brief, pg. 23).

Conversely, a capital defendant's discretionary appeal to this Court was described as, "[T]otally denying him any appeal of his DNA application," when this Court denies jurisdiction. (Brief, pg. 31).

In *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997), this Court reviewed the constitutionality of different appellate procedures for capital and noncapital defendants. *Smith* involved a constitutional challenge to amendments to the Ohio Constitution providing capital defendants an appeal of right directly from the trial court decision imposing a sentence of death to this Court. *Id.* at paragraph two of the syllabus. This Court found the amendments constitutional, reasoning that "the reality is that capital and noncapital defendants were not treated similarly even before the amendments at issue took effect." *Id.* at 100, 684 N.E.2d 668. Meaning that capital defendants always had a guaranteed right to have all issues whether capital or noncapital reviewed by the Supreme Court while noncapital defendants only had a discretionary right to seek review of their issues by the Court. *Id.* The amendments merely streamlined the process.

This Court also identified the dissimilarity between the great interest in expediting the appeals of a noncapital defendant serving his prison term and the prolonged delay tactics used by a capital defendant to extend the appellate process. *Smith*, 80 Ohio St.3d at 100, 684 N.E.2d at 681-682. Lengthy delays in enforcing death penalty sentences in Ohio resulted. Voters had a rational basis to decide that the Supreme Court of Ohio would directly review all capital cases in a single appeal from the trial court. *Id.* at 101, 684 N.E.2d at 682-683. "The constitution does not require things which are different in fact \* \* \* to be treated in law as though they were

the same.” *Tigner v. Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1124 (1940).

Unlike *Smith*, Noling’s constitutional challenge is to a statutory provision providing capital applicants a discretionary appeal from the trial court’s rejection of a postconviction DNA testing application directly to this Court. However, this Court’s decision in *Smith* demonstrates that differing appellate processes for capital and noncapital litigants can be constitutional. *Smith* also held the state had a, “[D]irect, legitimate and compelling interest in ensuring that the final judgments of its courts are expeditiously enforced.” *Smith* at 101, 684 N.E.2d at 682.

When neither a fundamental right nor suspect classification is at issue, the legislation is reviewed under a rational basis test. This test requires that a statute be upheld if it is rationally related to a legitimate government purpose. Under the rational basis standard, the state has no obligation to produce evidence to sustain the rationality of a statutory classification. *Am. Ass. Of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ*, 87 Ohio St.3d 55, 58, 717 N.E.2d 289, 291 (1999). Rather, the challenger of the legislation is required to demonstrate that the law is not rationally related to any legitimate government interest. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 82; see also *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.E.2d 989 (1925).

“Legislation is presumed to be valid.” *Cleburne Living Center* at 440, 440, 105 S.Ct. at 3254, 87 L.Ed.2d 313. Additionally, the legislation will not be overturned,

“[U]nless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.” *Pennell v. City of San Jose*, 485 U.S. 1, 14, 108 S.Ct. 849, 859, 99 L.E.2d 1 (1988).

In *Smith*, this Court stated, “The distinction drawn between appellate rights in capital and noncapital cases must bear ‘some relevance to the purpose for which the classification is made.’” *Smith* at 101, 684 N.E.2d at 682, citing *Estelle v. Dorrough*, 420 U.S. 534, 539, 95 S.Ct. 1173, 1176, 43 L.Ed.2d 377 (1975). This Court found the state had a, “[D]irect, legitimate and compelling interest in ensuring that the final judgments of its courts are expeditiously enforced.” *Smith*, 80 Ohio St.3d at 101, 684 N.E.2d at 682. “When those procedural safeguards are used to thwart judgments \* \* \*, citizens will also lose confidence in the ability of the criminal justice system to enforce its judgments.” *Id.* quoting *Steffen*, 70 Ohio St.3d at 406, 639 N.E.2d at 73. *Id.*

The statutory provision challenged by Noling is presumed valid. Under a rational basis standard, the state has no obligation to produce evidence to sustain the rationality of a statutory classification. Rather, Noling must demonstrate that R.C. 2953.73(E)(1), is not rationally related to any legitimate government interest. The legitimate government interest identified in *Smith* is applicable here. R.C. 2953.73(E)(1), is rationally related to ensuring that the final judgments of its courts are expeditiously enforced, identified as a legitimate government interest in *Smith*. *Smith*, 80 Ohio St.3d at 101, 684 N.E.2d at 682. Accordingly, R.C. 2953.73(E)(1), is

valid legislation under the Equal Protection Clause because the classification drawn by the statute is rationally related to a legitimate state interest.

In support of his equal protection claim, Noling also referred this Court to the long line of federal cases regarding the rights of indigent people on appeal for the proposition that his, “[S]ituation is analogous” because, “[H]e is being denied his fundamental right to appeal.” (Brief, pg. 35). The premise of Noling’s proposed analogy is flawed as he has no fundamental right to appeal a postconviction proceeding and his referenced cases dealt with the direct appeal from criminal convictions.

*Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), marks the start of these indigent fee, transcript and counsel cases. In *Griffin*, the high Court invalidated an Illinois rule that charged criminal defendants a fee for a trial transcript necessary to secure direct appellate review of their criminal convictions. *Id.* at 13-14, 76 S.Ct. at 588. The Court unanimously held that “a State is not required by the federal Constitution to provide appellate courts or a right to appellate review at all.” *Id.*, 351 U.S. at 18, 76 S.Ct. at 590; *Id.* at 21, 76 S.Ct. at 591-592 (Frankfurter, J., concurring in judgment); *Id.* at 27, 76 S.Ct. at 594 (Burton, J., dissenting); and *Id.* at 36, 76 S.Ct. at 599 (Harlan, J., dissenting). Moreover, Justice Frankfurter, who provided the fifth vote for the majority in *Griffin*, wrote separately that it was invidious discrimination, and not the denial of adequate, effective, or meaningful access to the courts, that made the Illinois regulation unconstitutional. *Id.* at 23, 76 S.Ct. at 593 (Frankfurter, J., concurring in judgment).

In the *Griffin* line of cases is *U.S. v. MacCollom*, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976). Noling did not cite this case. In *MacCollom*, the Court found a federal habeas statute constitutional that allowed a judge to deny free transcripts to an indigent petitioner who raised frivolous claims. *Id.* at 327-328, 96 S.Ct. at 2092-2093, 48 L.Ed.2d 666. Even an indigent defendant's right to free transcripts could be statutorily limited to deter certain behavior. In *MacCollom*, that behavior was the filing of a frivolous habeas claim. *Id.*

*Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), dealt, "[O]nly with the first appeal, granted as a matter of right to rich and poor alike from a criminal conviction." *Id.* at 356, 83 S.Ct. at 816, 9 L.Ed.2d 811. The Court held that states are required to appoint counsel for an indigent defendant's first appeal of right. *Id.* The Court reasoned that the first appeal of right involved the merits of the case differing from subsequent levels of review where another appellate court had already reviewed the claims. *Id.*

In the *Douglas* line of cases is *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Another case not cited by Noling. In *Ross*, the Court refused to extend *Douglas* and held indigent defendants were not entitled to counsel in discretionary state appeals or a discretionary review in the U.S. Supreme Court. *Id.* at 616-618, 94 S.Ct. at 2446-2447, 41 L.Ed.2d 341.

Even though Noling sought an expansion of the appellate process provided in a state's postconviction, collateral proceeding he did not cite to other relevant cases in the *Griffin/Douglas* line. Not cited was *Finley*, where the Court declined to extend *Douglas* and held indigent defendants were not entitled to counsel in state

postconviction proceedings. *Id.* at 556-557, 107 S.Ct. at 1994, 95 L.Ed.2d 539. Noling did not cite to *Murray*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1. In *Murray*, the Court held capital defendants were not entitled to counsel in state collateral proceedings. *Id.* at 10, 109 S.Ct. at 2770-2771, 106 L.Ed.2d 1. Also absent was a citation to the United State's Supreme Court's decision finding that there is no constitutional right to obtain postconviction access to the State's evidence for DNA testing. *Osborne* at 62, 129 S.Ct. at 2316, 174 L.E.2d 38.

Noling's reliance on the *Griffin/Douglas* line of cases is misplaced. As Noling has no fundamental right to postconviction proceedings, he has no fundamental right to an appeal from a postconviction proceeding. Moreover, Noling failed to cite any cases from the *Griffin/Douglas* line that dealt with secondary appeals, postconviction proceedings or other collateral proceedings.

#### EIGHTH AMENDMENT

Lastly, Noling's proposition of law claimed that R.C. 2953.73(E)(1), "[R]esults in the arbitrary and capricious application of the death penalty," in violation of the Eighth Amendment of the federal constitution. Noling sought to extend the limited categories of recognized protections of the Eighth Amendment in capital cases to postconviction DNA testing. See E.g. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1976); *Gregg v. Georgia*, 428 U.S. 153, 204-206, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

The Eighth Amendment to the Constitution, applicable to the states through the Due Process Clause of the Fourteenth Amendment, see *Robinson v. California*, 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.E.2d 758 (1962), provides that

"[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Capital punishment is constitutional. *Gregg* at 177, 96 S.Ct. at 2927 (joint opinion of Stewart, Powell, and Stevens, JJ.) (citing two centuries of case law upholding the constitutionality of capital punishment). "It necessarily follows that there must be a means of carrying it out." *Baze v. Rees*, 553 U.S. 35, 47, 128 S.Ct. 1520, 1529, 170 L.Ed.2d 420 (2008). "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct" and that a process for, "[C]hanneling th[e] instinct [for retribution] in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law." *Gregg* at 183, 96 S.Ct. at 2923 (joint opinion) quoting *Furman* at 308, 92 S.Ct. at 2761 (Stewart, J., concurring).

The United States Supreme Court's capital punishment cases under the Eighth Amendment have placed two categories of limitations on a state's capital sentencing system. First, the state must narrow the class of individuals eligible for the death penalty, either by statutory definitions of capital murder or with statutory specification of aggravating circumstances. E.g. *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 1773, 95 L.Ed.2d 262 (1982) quoting *Gregg* at 196, 96 S.Ct. at 2936 and *Proffitt v. Florida*, 428 U.S. 153, 196, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). Second, the sentencer must be permitted to give effect to all relevant mitigating evidence offered by the defendant when making the final sentencing decision. E.g. *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964, 57 L.Ed.2d 973.

The Supreme Court has rejected the type of extension proposed by Noling of these two categories of Eighth Amendment protections. For example, in *Murray*, the Court found,

The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases. 492 U.S. at 10109 S.Ct. at 2770-2771, 106 L.Ed.2d 1.

Contrary to Noling's position on appeal, the Eighth Amendment does not guarantee a capital defendant the right to a specific appellate process in connection with postconviction DNA proceedings.

## II.

### R.C. 2953.73(E)(1) IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO NOLING

Although challenging the constitutionality of R.C. 2953.73(E)(1), Noling failed to address that a statute can be challenged as unconstitutional on its face or as applied to a particular set of facts. *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), paragraph four of the syllabus. There is a rebuttable presumption that a statute is constitutional until it is shown beyond a reasonable doubt that it is in violation of a constitutional provision. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 352, 639 N.E.2d 31, 33 (1994).

### FACIAL CONSTITUTIONAL CHALLENGE FAILS

A statute is facially unconstitutional when there is no set of facts under which the statute may be applied without violating the constitutional provision at issue. *Members of the LA City Counsel v. Taxpayers for Vincent*, 466 U.S. 789, 797, 104

S.Ct. 2118, 2124-2125, 80 L.E.2d 772 (1984). To prevail, Noling must show there is no set of facts where a capital defendant sought leave to appeal a rejected postconviction DNA application in this Court without violating the federal constitution. Conversely, if a set of facts exists where a capital defendant obtained an appeal in this Court after seeking leave from a rejected postconviction DNA application, Noling's facial constitutional challenge fails.

Noling's procedural history of three filings with this Court under R.C. 2953.73(E)(1), and two accepted appeals belies a finding that the statutory provision at issue is facially unconstitutional. In Case No. 11-0778, Noling sought an appeal from his rejected application. (T.d. 321). This Court accepted the appeal, all of his propositions of law were accepted, briefed and argued to this Court and a decision was rendered from this Court in that appeal. Case No. 11-0778, is a set of facts where a capital defendant obtained an appeal in this Court after seeking leave from a rejected postconviction DNA application. Accordingly, Noling has failed to demonstrate that R.C. 2953.73(E)(1), is unconstitutional on its face.

"AS APPLIED" CONSTITUTIONAL CHALLENGE FAILS

In an "as applied" challenge, the burden is on the party making the constitutional attack to present clear and convincing evidence of a presently existing state of facts which makes the act unconstitutional and void when applied thereto. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188, 191 (1988). Clear and convincing evidence, "[P]roduce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State v. Schiebel*,

55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60 (1990), quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

There is no presently existing state of facts which makes the act unconstitutional and void when applied to Noling. Noling sought leave of his rejected application raising five propositions of law. (T.d. 458). This Court accepted the appeal on Noling's first proposition of law. (T.d. 469). The postconviction DNA statutes provide, an offender who files an application for DNA testing that is rejected or one that is accepted and produces unfavorable test results, "[D]oes not gain as a result of the participation any constitutional right to challenge, or, except as provided in division (A)(8) of this section, any right to any review or appeal of, the manner in which those provisions are carried out." R.C. 2953.72(A)(9).

Noling had an adequate opportunity to present his claims fairly in the context of the State of Ohio's appellate process for postconviction DNA applications. As this Court accepted his appeal pursuant to R.C. 2953.73(E)(1), the present appeal demonstrates a set of facts under which the statute may be applied without violating the federal constitution. Noling's "as applied" constitutional challenge fails.

### **CONCLUSION**

R.C. 2953.73(E)(1), a statutory provision governing a capital applicant's appellate process following the rejection of his application for postconviction DNA testing is constitutional. Noling's claim that the statute is unconstitutional, "[R]ests on a premise that we [the United States Supreme Court] are unwilling to accept when a State chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Finley* at 559,

107 S.Ct. at 1995, 95 L.Ed.2d 539. "On the contrary, in this area States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Id.*

Recognizing the dissimilarity between the great interest in expediting the appeals of a noncapital defendant serving his prison term and the prolonged delay tactics used by a capital defendant to extend the appellate process, R.C. 2953.73(E), provided an appeal of right to the courts of appeals for noncapital defendants and a discretionary appeal to this Court for capital defendants. R.C. 2953.73(E)(1)(2). The appellate process provided in R.C. 2953.73(E)(1), is neither unconstitutional on its face nor as applied to Noling. The discretionary appeal directly to this Court is rationally related to the government's interest in ensuring that the final judgments of its courts are expeditiously enforced, identified as a legitimate government interest by this Court in *Smith*. 80 Ohio St.3d at 101, 684 N.E.2d at 682.

Noling murdered Bearnhardt and Cora Hartig twenty-five and a half years ago. This Court affirmed his conviction and sentence of death fourteen years ago. This is Noling's third appeal under R.C. 2953.73(E)(1). There is no evidence left for DNA testing. The cigarette butt was tested and did not match the alleged alternative suspect, Daniel Wilson. The remaining items are too contaminated for DNA testing. R.C. 2953.73(E)(1), was designed to combat prolonged delay tactics of capital defendants, like Noling who has prolonged his appellate process for over a decade. The Court should allow the statute to function as it was created and find R.C. 2953.73(E)(1), constitutional, rejecting Noling's proposition of law and affirming the decision of the trial court.

Respectfully submitted,

VICTOR V. VIGLIUCCI (0012579)  
Portage County Prosecuting Attorney

*/s Pamela J. Holder*

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PAMELA J. HOLDER (0072427)  
Assistant Prosecuting Attorney  
Attorney for State of Ohio  
Counsel of Record  
241 South Chestnut Street  
Ravenna, Ohio 44266  
(330) 297-3850  
(330) 297-4594 (fax)

#### **CERTIFICATE OF SERVICE**

I certify that a copy of this Merit Brief of the State of Ohio was sent by ordinary U.S. mail to MARK GODSEY at University of Cincinnati, College of Law, P.O. Box 210040, Cincinnati, Ohio 45221-0040; CARRIE WOOD at Office of Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; THOMAS MADDEN at the Office of the Ohio Attorney General, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215 and PETER REED at the Office of the Solicitor General, 30 East Gay Street, 17th Floor, Columbus, Ohio 43215 on January 14, 2016.

*/s Pamela J. Holder*

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PAMELA J. HOLDER (0072427)  
Assistant Prosecuting Attorney

**APPENDIX**

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.  
:

NOTICE OF APPEAL OF APPELLANT TYRONE NOLING

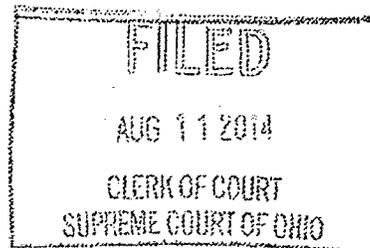
Victor V. Vigluicci (0012579)  
Portage County Prosecutor  
Pamela Holder (0042727)  
Assistant Prosecuting Attorney  
Counsel of Record  
466 South Chestnut Street  
Ravenna, OH 44266  
(330) 297-3850  
(330) 297-4595 (Fax)

COUNSEL FOR APPELLANT  
STATE OF OHIO

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

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

COUNSEL FOR APPELLANT  
TYRONE NOLING



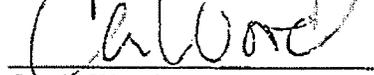
**NOTICE OF APPEAL OF APPELLANT AXEL INGERSOLL**

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

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

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

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by 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 COMMON PLEAS  
PORTAGE COUNTY, OHIO

STATE OF OHIO,

)  
)  
**FILED**)  
Plaintiff, 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.

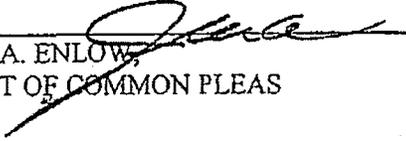
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This matter is before the Court on remand from the Supreme Court to determine whether or not the cigarette butt was to be tested. The Court did allow the Defendant to amend his request to include State's Exhibits 2, 3, 4, 5, 6, 7, 13, 14, 16 and 17. 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 Viguicci  
Attorney Carrie Wood  
BCI Richfield  
Mike DeWine, Ohio Attorney General  
PCSO

**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 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.

**Baldwin's Ohio Revised Code Annotated**  
**Title XXIX. Crimes--Procedure (Refs & Annos)**  
**Effective: July 6, 2010**  
**R.C. § 2953.72**

**2953.72 Application for postconviction 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.

**CREDIT(S)**

(2010 S 77, eff. 7-6-10; 2006 S 262, eff. 7-11-06; 2003 S 11, eff. 10-29-03)

**Baldwin's Ohio Revised Code Annotated**

**Title XXIX. Crimes--Procedure (Refs & Annos)**

**Effective: July 6, 2010**

**R.C. § 2953.73**

**2953.73 Submission of application**

(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 determination 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.

#### **CREDIT(S)**

(2010 S 77, eff. 7-6-10; 2006 S 262, eff. 7-11-06; 2004 H 525, eff. 5-18-05; 2003 S 11, eff. 10-29-03)

2015 WL 3823948

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,  
Eleventh District, Portage County.

STATE of Ohio, Plaintiff–Appellee,

v.

Tyrone Lee NOLING, Defendant–Appellant.

No. 2014–P–0045.

Decided June 22, 2015.

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

**Attorneys and Law Firms**

Victor V. Viglucci, Portage County Prosecutor, and Pamela J. Holder, Assistant Prosecutor, Ravenna, OH, for Plaintiff–Appellee.

Carrie E. Wood, Assistant Public Defender, Office of the Ohio Public Defender, Columbus, OH, Mark Godsey, Ohio Innocence Project, University of Cincinnati, Cincinnati, OH, for Defendant–Appellant.

**Opinion**

CYNTHIA WESTCOTT RICE, J.

\*1 {¶ 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:

\*2 {¶ 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.

\*3 {¶ 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.

\*4 {¶ 16} For the reasons discussed in this memorandum opinion, the instant appeal is sua sponte dismissed.

COLLEEN MARY O'TOOLE, J., concur.

#### All Citations

Slip Copy, 2015 WL 3823948, 2015 -Ohio- 2454

136 Ohio St.3d 163  
Supreme Court of Ohio.

The STATE of Ohio, Appellee,

v.

NOLING, Appellant.

No. 2011-0778.

Submitted Jan. 8, 2013.

Decided May 2, 2013.

### Synopsis

**Background:** After his capital murder conviction was affirmed on direct appeal, 98 Ohio St.3d 44, 781 N.E.2d 88, defendant filed application for postconviction forensic DNA testing of physical evidence discovered near the scene of murder. The Common Pleas Court denied application and appeal was dismissed by Court of Appeals and declined by Supreme Court. Defendant thereafter filed a second application for postconviction DNA testing based on newly-discovered evidence. The Court of Common Pleas, Portage County, No. 95 CR 220, denied application. Defendant appealed.

**Holdings:** The Supreme Court, Lanzinger, J., held that:

[1] General Assembly was authorized to limit jurisdiction of Court of Appeals and recognize Supreme Court as having exclusive jurisdiction to hear appeals from the rejection of postconviction DNA testing in cases in which the death penalty had been imposed;

[2] original postconviction DNA test results that excluded defendant as the source of cigarette butt found near scene of murder was not a "definitive DNA test" that would preclude successive application for DNA testing; and

[3] Supreme Court's resolution of issue as to whether capital defendant could file a second application for postconviction forensic DNA testing of physical evidence discovered near scene of murder did not encroach on the Legislature's policy choices in violation of separation of powers doctrine.

Reversed and remanded.

O'Donnell, J., issued dissenting opinion in which French, J., joined.

### \*\*1097 SYLLABUS OF THE COURT

1. R.C. 2953.73(E)(1), which grants exclusive jurisdiction to the Supreme Court of Ohio to review rejections of applications for DNA testing in cases in which the death penalty is imposed, is constitutional.

2. Before dismissing a subsequent application for postconviction DNA testing under R.C. 2953.72(A)(7), a trial court must apply the definition of "definitive DNA test" set forth in R.C. 2953.71(U) and the criteria of R.C. 2953.74.

### Attorneys and Law Firms

Victor V. Vigluicci, Portage County Prosecuting Attorney, and Pamela J. Holder, Assistant Prosecuting Attorney, for appellee.

Ohio Innocence Project, Mark A. Godsey, and Carrie Wood; and Timothy Young, Ohio Public Defender, and Jennifer A. Prillo, Assistant State Public Defender, for appellant.

### Opinion

LANZINGER, J.

\*163 ¶ 1 Tyrone Noling, the defendant-appellant in this capital case, has appealed from an order of the Court of Common Pleas of Portage County rejecting his second application for postconviction DNA testing. Two issues are presented: (1) whether R.C. 2953.73(E)(1) is constitutional in conferring appellate jurisdiction upon this court from a trial court's denial of postconviction DNA testing in a case in which the death penalty was imposed and (2) whether R.C. 2953.72(A) bars a subsequent application for postconviction DNA testing when a prior application was rejected under previous versions of the DNA-testing statutes.

¶ 2 We hold that R.C. 2953.73(E)(1) is constitutional. We also hold that before dismissing a subsequent application for postconviction DNA testing under \*164 R.C. 2953.72(A)(7), a trial court must apply the definition of "definitive DNA test" set forth in R.C. 2953.71(U) and the criteria of R.C. 2953.74.

### I. Factual Background

¶ 3 Noling was found guilty of the April 1990 aggravated murders of Bearnhardt and Cora Hartig in Portage County, Ohio. He was sentenced to death on two counts. Both the court of appeals and this court affirmed the convictions and death sentences. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88. Although this case has an extensive postconviction history, the only issue now before us is Noling's request for postconviction DNA testing under R.C. 2953.71 to 2953.81.

¶ 4 In his first postconviction application on September 25, 2008, Noling sought DNA testing of a cigarette butt found on the driveway of the Hartig home. Noting that a DNA test conducted before trial had already excluded Noling as well as each codefendant as the person who had smoked the cigarette, the trial court rejected Noling's application because it found the earlier DNA test to be definitive.

¶ 5 On April 10, 2009, Noling appealed the entry rejecting his application to the Eleventh District Court of Appeals. The court of appeals dismissed the appeal for lack of jurisdiction under R.C. 2953.73(E)(1). *State v. Noling*, 11th Dist. No. 2009-P-0025, 2009-Ohio-3789, 2009 WL 2356799, ¶ 9. Noling also filed a notice of appeal of the trial court's rejection of his DNA application with this court while his appeal was pending in the Eleventh District. On September 29, 2010, we declined to accept Noling's appeal of the trial court's decision. *State v. Noling*, 126 Ohio St.3d 1582, 2010-Ohio-4542, 934 N.E.2d 355.

\*\*1098 ¶ 6 On December 28, 2010, Noling filed a second application for DNA testing of the cigarette butt based on newly discovered evidence that he asserted identifies other suspects in the Hartig murders. First, Noling alleged that the prosecution had failed to disclose a statement made by Nathan Chesley that inculpated his foster brother, Daniel Wilson, in the Hartig murders. Chesley, in an affidavit supporting the application, described Wilson as a heavy drinker and a violent person who had committed thefts and broken into homes at the time of the Hartig murders. He also stated that Wilson drove a blue Dodge Omni—a dark blue, midsize car was seen by another witness near the Hartig residence on the day of the murders. According to Noling, previous analysis of the cigarette butt and of Wilson's saliva did not exclude Wilson as the source of the DNA on the cigarette. Second, Noling's application alleged that documents that were previously undisclosed by the state identified other possible suspects, including the Hartigs' insurance agent, who had borrowed money from the Hartigs but had defaulted on the

loan. Noling also claimed that because of advances in DNA technology, it is now possible to positively identify the individual whose DNA is \*165 on the cigarette butt and that DNA identification of one of the previously undisclosed suspects would be “outcome determinative,” because it would identify the true killer.

{¶ 7} On March 28, 2011, the trial court denied Noling's second application, stating:

Revised Code 2953.72(A)(7) states 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.”

In this case Defendant Tyrone Noling submitted a properly filed application for post conviction testing on September 25th 2008, the Court rejected that application and the Defendant appealed to the Supreme Court. Therefore, as this is a statutory action, the Court must reject Defendant's second filing of the application for DNA testing based on Ohio Revised Code § 2953.72(A)(7).

{¶ 8} We accepted jurisdiction of Noling's appeal on October 19, 2011, on the following proposition of law: “Whether an application for post-conviction DNA testing rejected under the old acceptance criteria set by the Legislature must be considered under the Legislature's new acceptance criteria rather than be procedurally barred by R.C. 2953.72(A)(7).” 129 Ohio St.3d 1503, 2011-Ohio-5358, 955 N.E.2d 386. Later, in light of *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, we ordered the parties to address the constitutionality of R.C. 2953.73(E)(1), which confers exclusive jurisdiction upon this court to consider Noling's appeal. 131 Ohio St.3d 1471, 2012-Ohio-896, 962 N.E.2d 802.

{¶ 9} The threshold question in this case is whether we have jurisdiction to consider Noling's direct appeal of the trial court's rejection of his second application for DNA testing.

## II. Analysis

### A. Appellate Jurisdiction in Death–Penalty Cases

[1] [2] {¶ 10} As we recently stated, “Subject-matter jurisdiction cannot be waived and is properly raised by this court sua sponte. *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249, ¶ 17.” \*\*1099 *Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 11.

{¶ 11} On November 8, 1994, Ohio voters approved amendments to the Ohio Constitution that give this court appellate jurisdiction in direct appeals from courts of common pleas in cases in which the death penalty has been imposed. \*166 Ohio Constitution, Article IV, Section 2(B)(2)(c). Before the amendments, a trial court's judgment could be appealed—as in any criminal case—to a district court of appeals. A second appeal as of right could then be filed in this court. The amendments eliminated review by the courts of appeals of judgments that sentenced a defendant to death for a crime that occurred on or after January 1, 1995. Ohio Constitution, Article IV, Section 3(B)(2). According to the joint resolution that placed the issue on the ballot, the amendments to Article IV, Sections 2 and 3 of the Ohio Constitution were intended “to give the Supreme Court jurisdiction in direct appeals in death penalty cases as a matter of right, thus removing the jurisdiction of the courts of appeals on direct review in death penalty cases.” Sub.H.J.Res. No. 15, 145 Ohio Laws, Part IV, 7811.

{¶ 12} The Ohio Constitution, Article IV, Section 2(B)(2)(c) now provides: “The supreme court shall have appellate jurisdiction as follows: \* \* \* 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.” The following section, Article IV, Section 3(B)(2), which relates to the jurisdiction of the courts of appeals, states:

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.

Thus, courts of appeals were excluded from the direct appellate review of death sentences.

{¶ 13} We first addressed the 1994 amendments in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). In *Smith*, this court upheld the constitutionality of the amendments and also held that we have jurisdiction over both the capital and noncapital aspects of a case:

[T]he plain language of the amendments speaks of “cases in which the death penalty has been imposed” and “judgment that imposes the sentence of death.” \* \* \* Section 2(B)(2)(c), Article IV and Section 3(B)(2), Article IV, Ohio Constitution. Thus the Supreme Court has jurisdiction over the whole case, instead of counts, charges, or sentences.

(Emphasis deleted.) *Id.* at 104, 684 N.E.2d 668.

[3] {¶ 14} Next, we considered whether the constitutional provision granting this court appellate jurisdiction over cases in which the death penalty was imposed \*167 precludes a court of appeals' review of a trial court's ruling on postconviction motions. *Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516. We rejected the argument that this court “has exclusive jurisdiction over *all matters* relating to a death-penalty case” and held that “a court of appeals has jurisdiction to consider a trial court's denial of a motion for leave to file a motion for new trial based on newly \*\*1100 discovered evidence in a case in which the death penalty was previously imposed.” (Emphasis sic.) *Id.* at ¶ 22. We recognized that the constitutional amendments prohibited a court of appeals from reviewing a judgment imposing a sentence of death. Ohio Constitution, Article IV, Section 3(B)(2). But the amendments did not prohibit a court of appeals from exercising jurisdiction in other aspects of death-penalty cases.

{¶ 15} *Davis* involved a motion for new trial. Therefore, we focused on whether the courts of appeals retained *any* jurisdiction in cases in which the death penalty had been imposed because the constitutional amendments had removed the courts of appeals' jurisdiction over the direct appeal of a death sentence. We held that they did. *Id.* at ¶ 22. Now, the question is whether the General Assembly may limit the courts of appeals' jurisdiction in a statute that specifies that this court has exclusive jurisdiction to hear appeals of the rejection of DNA testing in cases in which the death penalty has been imposed. We hold that it may.

{¶ 16} Under the Ohio Constitution, in cases in which the death penalty has been imposed, our jurisdiction overlaps with that of the courts of appeals. Article IV, Section 2(B)(2)(c) provides that we have appellate jurisdiction over direct appeals from the courts of common pleas “in *cases* in which the death penalty has been imposed.” (Emphasis added.) In contrast, Article IV, Section 3(B)(2) states that courts of appeals have jurisdiction “as may be provided by law” over all judgments and final orders but then continues with the specific exception that those courts do not have jurisdiction “to review on direct appeal a judgment that imposes a sentence of death.”

{¶ 17} The dissent contends that the Ohio Constitution limits the jurisdiction of this court in death-penalty cases to review only the appeal of a judgment imposing a sentence of death. In support of this interpretation, it repeatedly cites a single sentence from our decision in *Davis*: “The *foregoing language* limits the jurisdiction of the Supreme Court to the appeal of a judgment sentencing a defendant to death.” (Emphasis added.) *Davis* at ¶ 15. The dissent attributes the phrase “The foregoing language” solely to Article IV, Section 2(B)(2)(c) of the Ohio Constitution. This is incorrect. The paragraph immediately before the sentence in *Davis* quoted R.C. 2953.02 rather than the Ohio Constitution. Although this statute was amended to reflect the changes to Sections 2(B)(2)(c) and 3(B)(2), it does not mirror the language of the Constitution. \*168 R.C. 2953.02 provides,

“In a capital case in which a sentence of death is imposed \* \* \*, the *judgment or final order* may be appealed from the trial court directly to the supreme court as a matter of right.” (Emphasis added.) In contrast, Article IV, Section 2(B)(2)(c) states that we have appellate jurisdiction 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.” (Emphasis added.) To the extent that the statute appears to limit our review solely to the actual judgment entry imposing death rather than to all final orders or judgment entries in capital cases, it conflicts with the Constitution, and the constitution will control.

{¶ 18} Even if *Davis* were read to mean that “foregoing language” referred to all previous 14 paragraphs, *Davis* addressed the court of appeals' jurisdiction, not this court's jurisdiction, over an appeal of an order denying a motion for new trial. The dissent's interpretation that our jurisdiction is limited to reviewing judgments of \*\*1101 death on direct appeal from the trial court rests on dicta.

[4] {¶ 19} The dissent's interpretation is not consistent with the intent behind the amendments to the Ohio Constitution. “It is a generally accepted premise that courts must interpret the Constitution broadly in order to accomplish the manifest purpose of an amendment.” *State ex rel. Sweland v. Kinney*, 69 Ohio St.2d 567, 570, 433 N.E.2d 217 (1982). The general public's dissatisfaction with the long delays that pervaded the death-penalty system was the background for the constitutional change. See *Smith*, 80 Ohio St.3d at 95, 684 N.E.2d 668. The constitutional amendments to grant the Supreme Court jurisdiction over direct appeals from the trial court in cases in which the death penalty was imposed was the solution adopted by Ohio voters to eliminate that delay.

[5] [6] {¶ 20} Therefore, when reading Article IV, Sections 2(B)(2)(c) and 3(B)(2) of the Ohio Constitution in pari materia, we conclude four things. First, the Ohio Constitution grants the Supreme Court exclusive appellate jurisdiction for direct review of judgments in which the sentence of death is imposed. Second, the Constitution specifically excludes the courts of appeals from the direct review of those same judgments. Third, this court has concurrent appellate jurisdiction with courts of appeals to review postconviction judgments and final orders in cases in which the death penalty has been imposed. Fourth, because grants of jurisdiction to the courts of appeals in death-penalty cases are only “as provided by law,” the General Assembly may limit the court of appeals' jurisdiction.

[7] {¶ 21} We have previously interpreted Article IV, Section 3(B)(2) to mean that “the state has no absolute right of appeal in a criminal matter unless [it has been] *specifically granted such right by statute.*” (Emphasis added.) *State v. Fisher*, 35 Ohio St.3d 22, 24, 517 N.E.2d 911 (1988). For example, the state's right to appeal in criminal cases is governed by R.C. 2945.67(A):

\*169 A prosecuting attorney \* \* \* may appeal as a matter of right any decision of a trial court in a criminal case \* \* \*, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case \* \* \*.

Because the state has no statutory right to appeal a final verdict, a court of appeals does not have subject-matter jurisdiction to entertain appeals from not-guilty verdicts. See *State v. Lomax*, 96 Ohio St.3d 318, 2002-Ohio-4453, 774 N.E.2d 249. We have also issued a writ of prohibition to prevent a court of appeals from exercising jurisdiction over the state's claimed appeal as of right of the grant of a motion for a new penalty-phase trial. See *State ex rel. Steffen v. Court of Appeals, First Appellate Dist.*, 126 Ohio St.3d 405, 2010-Ohio-2430, 934 N.E.2d 906. We concluded that the court of appeals lacked jurisdiction because the state did not have an appeal as of right and its request for leave to appeal was untimely filed. *Id.* at ¶ 35.

{¶ 22} R.C. 2953.08(D)(1) is another example of a statutory limit on a court of appeals' jurisdiction to hear an appeal. \*\*1102 That section provides that “[a] sentence imposed upon a defendant is not subject to review under this section if the sentence

is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.”

**B. Constitutionality of R.C. 2953.73(E)(1)**

{¶ 23} R.C. 2953.73(E)(1) governs the appellate procedure for a death-row inmate to seek leave of this court to appeal the rejection of an application for DNA testing and excludes the court of appeals from hearing those appeals.

{¶ 24} R.C. 2953.73(E) states:

A judgment and order of a court \* \* \* 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 \* \* \*, 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 \*170 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.

[8] [9] {¶ 25} Statutes are presumed to be constitutional. *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, ¶ 8; *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991). A statute will be upheld unless the challenger meets the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, 872 N.E.2d 894, ¶ 29; *Collier* at 269, 581 N.E.2d 552.

[10] [11] {¶ 26} “It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution.” *ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, ¶ 3, quoting *Smith v. State*, 289 N.C. 303, 328, 222 S.E.2d 412 (1976). “[N]either statute nor rule of court can expand our jurisdiction beyond the constitutional grant.” *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St.3d 39, 41, 577 N.E.2d 1077 (1991).

{¶ 27} As discussed earlier, the 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 \*\*1103 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.

{¶ 28} The dissent also contends that R.C. 2953.73(E)(1) is unconstitutional because it appears to violate basic guarantees of due process and equal protection. \*171 Yet neither party raised this issue,<sup>1</sup> and in *Smith*, we held that the direct appeal from the trial court in cases in which the death penalty is imposed did not violate the Equal Protection and Due Process Clauses of the United States Constitution. *Smith*, 80 Ohio St.3d at 100–102, 684 N.E.2d 668.

**C. Postconviction DNA testing**

{¶ 29} In 2003, the General Assembly passed Sub.S.B. No. 11 (“S.B. 11”), 150 Ohio Laws, Part IV, 6498, “to establish a mechanism and procedures for the DNA testing of certain inmates serving a prison term for a felony or under a sentence of death.” The original DNA-testing statutes were only a temporary measure. Eligible inmates had one year after the effective date of S.B. 11 to submit applications for DNA testing. Former R.C. 2953.73(A), 150 Ohio Laws at 6512. That deadline was later extended by one year. Sub.H.B. No. 525, 150 Ohio Laws, Part IV, 6262, 6278. In 2006, the General Assembly made the DNA-testing program permanent with the passage of Sub.S.B. No. 262 (“S.B. 262”), 151 Ohio Laws, Part I, 1716. An application for postconviction DNA testing could be submitted by an eligible inmate without any time restriction.

{¶ 30} Noling's first application for DNA testing of the cigarette butt was filed when S.B. 262 was in effect. R.C. 2953.74 at that time provided:

(A) If an eligible inmate 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 inmate seeks to have tested, the court shall reject the inmate's application. If an eligible inmate files an application for DNA testing and a prior inconclusive DNA test has been conducted regarding the same biological evidence that the inmate 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 inmate 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:

\*172 \* \* \*

\*\*1104 (2) The inmate had a DNA test taken at the trial stage in the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing regarding the same biological evidence that the inmate seeks to have tested, the test was not a prior definitive DNA test that is subject to division (A) of this section, and the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject inmate's case as described in division (D) of this section would have been outcome determinative at the trial stage in that case.

151 Ohio Laws, Part I, at 1732–1733. Thus, Noling's first application could be accepted only if there was no prior definitive DNA test and if he showed that the test results from the cigarette butt would have been outcome-determinative at trial. The term “definitive DNA test” was not defined in S.B. 262. The trial court denied Noling's application, holding that the DNA test prior to his trial was definitive because the analysis had excluded Noling and his codefendants as the source of the DNA on the cigarette butt.

**D. Interpretation of R.C. 2953.72(A)(7)**

[12] {¶ 31} The DNA-testing statutes were amended for a fourth time when 2010 Sub.S.B. No. 77 (“S.B. 77”) was enacted on July 6, 2010. The term “definitive DNA test” was defined in this amendment. R.C. 2953.71(U) now provides:

“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.

(Emphasis added.)

{¶ 32} Noling's second application for DNA testing of the cigarette butt was submitted after S.B. 77 was enacted. The trial court denied the application under R.C. 2953.72(A)(7), which provides, “[I]f the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance \*173 criteria described in division (A)(4) of this section, the court will not accept or consider subsequent applications.”

{¶ 33} Noling argues that the trial court failed to consider the legislative changes that defined “definitive DNA testing” before it denied his second application under R.C. 2953.72(A)(7). Noling contends that R.C. 2953.71(U) significantly changed and expanded the criteria for permitting further DNA testing. We agree.

{¶ 34} The trial court rejected Noling's second application for testing on grounds that R.C. 2953.72(A)(7) required rejection of the second application because his first application had been denied. But a subsequent application is barred under R.C. 2953.72(A)(7) if a previous application was rejected because the offender did not satisfy \*\*1105 the acceptance criteria described in R.C. 2953.72(A)(4). Division (A)(4) refers to the criteria established in R.C. 2953.74 to determine whether to accept or reject the application. The threshold criterion requires a court to reject the application if a prior definitive DNA test has been conducted. R.C. 2953.74(A). Therefore, the new definition of “definitive DNA test” is relevant in determining whether Noling's previous application was properly denied.

{¶ 35} 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.

{¶ 36} 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 \*174 R.C. 2953.71(U) before dismissing Noling's second application under R.C. 2953.72(A)(7). We reverse and remand to the trial court for consideration of the second application under the current versions of the statutes.

#### ***E. State's Remaining Arguments***

{¶ 37} [13] The state argues that by enacting R.C. 2953.72(A)(7), the General Assembly exercised its legislative prerogative in establishing a procedural bar that prohibits subsequent DNA applications. The state asserts that the doctrine of the separation of powers precludes the trial court from accepting Noling's second application for DNA testing unless the legislature deems fit to revisit the language of R.C. 2953.72(A)(7).

{¶ 38} In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 48, we discussed the doctrine of the separation of powers and the interaction between the legislative and judicial branch:

[T]he doctrine \* \* \* recognizes that our government is composed of equal branches that must work collectively toward a common cause. And in doing so, the Constitution permits each branch to have some influence over the other branches in the development of the law. For example, the legislative branch plays an important and meaningful role in the criminal law by defining offenses and assigning punishment, while the judicial branch has its equally important role in interpreting those laws.

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{¶ 39} The resolution of the issues in this case does not encroach on the legislature's policy choices. Amendments to the DNA-testing statutes expanded the criteria for permitting DNA testing. The primary issue in the present case is whether the trial court correctly applied R.C. 2953.72(A)(7) to deny Noling's second application after these amendments were passed. This is a matter of statutory interpretation, which is a responsibility of the judicial branch. Thus, the state's separation-of-powers argument lacks merit.

{¶ 40} The state also argues that Noling's second application for DNA testing should be denied because he cannot demonstrate that DNA retesting would be outcome-determinative. The trial court, however, did not consider whether DNA testing would be outcome-determinative because the court had summarily rejected Noling's second application on the basis of R.C. 2953.72(A)(7). On remand, this will be a matter for the trial court to determine in the first instance.

{¶ 41} This decision is also consistent with our holding in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287. Although *Prade* was decided after S.B. 77 was enacted, we did not consider the recent amendments to the \*175 DNA-testing statutes in that opinion, because that appeal predated the passage of S.B. 77. *Id.* at ¶ 9, fn. 1. In *Prade*, we held that the trial court erred in rejecting a second application on the ground that the trial-stage DNA test was definitive. *Id.* at ¶ 30. The test excluded the defendant as a contributor to the DNA found on evidence from the crime scene only in the sense that the victim's DNA had overwhelmed the killer's DNA—because of the limitations of 1998 testing methods. *Id.* at ¶ 19. In *Prade*, we concluded:

[N]ew DNA testing methods are now able to provide new information that was not able to be detected at the time of defendant's trial. We hold that a prior DNA test is not “definitive” within the meaning of R.C. 2953.74(A) when a new DNA testing method can detect information that could not be detected by the prior DNA test.

*Id.* at ¶ 23.

{¶ 42} The state argues that unlike the situation in *Prade*, the prior DNA testing in this case provided “meaningful information,” *id.* at ¶ 29, by excluding Noling and his codefendants as smokers of the cigarette. Noling's second application, however, sought to identify Wilson or other named suspects as the actual perpetrator. Therefore, the trial court must consider whether the evidence regarding Wilson or the other suspects and the advances in DNA testing submitted in support of Noling's second application show by a preponderance of the evidence that there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover.

### III. Conclusion

{¶ 43} Because the Ohio Constitution, Article IV, Section 2(B)(2)(c) grants this court appellate jurisdiction over direct appeals from the court of common pleas in cases in which the death penalty has been imposed, we hold that R.C. 2953.73(E)(1), which

grants exclusive jurisdiction to the Supreme Court of Ohio to review rejections of applications for DNA testing in cases in which the death penalty is imposed, is constitutional. We also hold that before dismissing a subsequent application for postconviction DNA testing under R.C. 2953.72(A)(7), a trial court must apply the definition of “definitive DNA test” set **\*\*1107** forth in R.C. 2953.71(U) and the criteria of R.C. 2953.74.

{¶ 44} The judgment of the trial court is reversed, and the cause is remanded for the trial court to consider whether prior definitive DNA testing, as defined in **\*176** R.C. 2953.71(U), precludes Noling's second application. If not, the trial court should consider whether new DNA testing would be outcome-determinative.

Judgment reversed and cause remanded.

O'CONNOR, C.J., and PFEIFER, KENNEDY, and KLATT, JJ., concur.

O'DONNELL and FRENCH, JJ., dissent.

WILLIAM A. KLATT, J., of the Tenth Appellate District, sitting for O'NEILL, J.

O'DONNELL, J., dissenting.

{¶ 45} Respectfully, I dissent.

{¶ 46} In my view, the Ohio Constitution mandates that in cases in which the death penalty has been imposed, the Supreme Court has appellate jurisdiction only over a direct appeal from the judgment imposing the sentence of death. And, because the Ohio Constitution vests jurisdiction in courts of appeals to review the final judgments of courts inferior to a court of appeals, the General Assembly does not have authority to grant that jurisdiction to this court to review a direct appeal from a trial court's denial of postconviction DNA testing sought by an offender who has been sentenced to death. Thus, R.C. 2953.73(E), which purports to grant authority to this court to review a direct appeal from the denial of postconviction DNA testing, is unconstitutional.

{¶ 47} As we recently indicated in *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 15, Article IV, Section 2(B)(2)(c) of the Ohio Constitution “limits the jurisdiction of the Supreme Court to the appeal of a judgment sentencing a defendant to death.” Because the legislature lacks authority to enlarge or modify that jurisdiction through a statute that provides for direct appeals to this court from postconviction judgments in death-penalty cases, I am unable to join the majority in today's holding, which expands the jurisdiction of this court.

#### Appeals of Judgments Imposing the Death Penalty

{¶ 48} In 1994, Ohio voters approved an amendment to the Ohio Constitution that eliminated the two-tiered review of judgments imposing the death penalty that previously afforded direct appeals as of right first to the court of appeals and then to this court. *State v. Smith*, 80 Ohio St.3d 89, 95, 684 N.E.2d 668 (1997).

{¶ 49} The amendment modified Article IV, Section 2(B)(2)(c) of the Ohio Constitution, which now provides: “The supreme court shall have appellate jurisdiction as follows: \* \* \* In direct appeals from the courts of common pleas **\*177** 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.*” (Emphasis added.)

{¶ 50} In *Davis*, we rejected the argument that “every judgment in a case in which the death penalty was imposed must be appealed directly to the Supreme Court of Ohio.” 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, at ¶ 18. We explained that

such a holding “would be contrary to the language of the constitutional amendments and the statute and would have the effect of delaying the review of future cases, a scenario that the voters expressly rejected in passing the constitutional amendments.” *Id.* at ¶ 22.

{¶ 51} Thus, recognizing that the Ohio Constitution “limits the jurisdiction of the **\*\*1108** Supreme Court to the appeal of a judgment sentencing a defendant to death,” *id.* at ¶ 15, we held that the courts of appeals retain jurisdiction to “entertain all appeals from the denial of postjudgment motions in which the death penalty was previously imposed,” *id.* at ¶ 22.

### Postconviction DNA Testing

{¶ 52} R.C. 2953.71 et seq. authorize eligible offenders to apply for postconviction DNA testing, and R.C. 2953.73(D) sets out the process by which common pleas courts are to determine whether an application should be accepted.

{¶ 53} At issue here is R.C. 2953.73(E), which purports to vest this court with exclusive appellate jurisdiction to review the denial of postconviction DNA testing:

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.

**\*178** {¶ 54} The difficulty for me with this statute is that the denial of postconviction DNA testing by the common pleas court is not a judgment sentencing a defendant to death. Our jurisdiction in death-penalty cases is established in the Ohio Constitution, and the General Assembly cannot enlarge, modify, or diminish it. *See ProgressOhio.org v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-4101, 953 N.E.2d 329, at ¶ 3, quoting *Smith v. State*, 289 N.C. 303, 328, 222 S.E.2d 412 (1976) (“ ‘It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution’ ”). The state concedes in its supplemental brief that “the *Davis* Court’s narrow interpretation of the appellate jurisdiction provided in Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution renders R.C. 2953.73(E)(1), unconstitutional.”

{¶ 55} The majority takes issue with this view of *Davis*, asserting that it is R.C. 2953.02—not the Constitution—that “limits the jurisdiction of the Supreme Court to the appeal of a judgment sentencing a defendant to death.” *Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, at ¶ 15. However, the problem with this assertion is that the legislature lacks authority to limit our jurisdiction when it has been expressly established by the Constitution. The majority also makes much of this dissent’s reference to ¶ 15 of *Davis*, which begins with the phrase “[t]he foregoing language.” Notably, that phrase is **\*\*1109** preceded by *two paragraphs* of quoted material, one referring to Article IV, Sections 2(B)(2)(c) and 3(B)(2) of the Ohio Constitution and the other to R.C. 2953.02. Hence, the phrase necessarily refers to each provision.

{¶ 56} The majority's author, who also authored *Davis*, now suggests that the language in *Davis* meant that R.C. 2953.02 unconstitutionally limits our jurisdiction. Majority opinion at ¶ 17. No such language appears in *Davis*, and in fact the court applied the constitutional amendments and the statute in harmony. See *Davis* at ¶ 22. The majority's reasoning is, in any case, unpersuasive, because it is premised on the mistaken belief that R.C. 2953.02 "does not mirror the language of the constitution." Majority opinion at ¶ 17. A comparison of these two provisions, however, reveals no material differences. Article IV, Section 2(B)(2)(c) of the Ohio Constitution, states, "The supreme court shall have appellate jurisdiction as follows: \* \* \* 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.*" (Emphasis added.) R.C. 2953.02 similarly provides, "*In a capital case in which a sentence of death is imposed* for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the Supreme Court as \*179 a matter of right." (Emphasis added.) Both provisions apply to cases in which the death penalty has been imposed. Although the majority concedes that "the statute appears to limit our review solely to the actual judgment entry imposing death rather than to all final orders or judgment entries in capital cases," majority opinion at ¶ 17, it fails to recognize that because there are no substantive differences between the statutory and constitutional language, both necessarily have the same meaning.

{¶ 57} The majority also erroneously maintains that language in *Davis* stating that our jurisdiction is limited in these circumstances is dicta. But setting forth the limits of our jurisdiction in death-penalty cases was necessary to resolve a legal issue framed by the court: "whether the constitutional requirement that we review all direct appeals of cases in which the death penalty was imposed includes review of appeals from a trial court's order denying a defendant's motion for a new trial." *Davis* at ¶ 16. Notably, the court explained that "[w]e see no reason why the courts of appeals may not currently entertain *all appeals* from the denial of postjudgment motions in which the death penalty was previously imposed." (Emphasis added.) *Id.* at ¶ 22. The conclusion in *Davis* that the courts of appeals may "entertain *all appeals* from the denial of postjudgment motions" follows from the holding that the jurisdiction of this court is limited in death-penalty cases to direct appeals of the sentence. Rather than being dicta, this holding is essential to the resolution of the case.

{¶ 58} The majority then falls back on the assertion that this interpretation is "not consistent with the intent behind the amendments to the Ohio Constitution." Majority opinion at ¶ 19. Yet in *Davis*, the author of today's majority opinion expressly relied on the intent of the electorate and the policy of accelerating review of capital cases in deciding that the courts of appeals do have jurisdiction over appeals from the denial of postjudgment motions in death-penalty cases. Notably, the court reasoned in *Davis* that "[a] holding that the Supreme Court has exclusive jurisdiction over *all matters* relating to a death-penalty case would be contrary to the language of the constitutional amendments \*\*1110 and the statute and would have the effect of delaying the review of future cases, a scenario that the voters expressly rejected in passing the constitutional amendments." (Emphasis sic.) *Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, at ¶ 22.

{¶ 59} In addition, R.C. 2953.73(E)(1) purports to vest this court *with discretion* to accept or deny the direct appeal from a denial of postconviction DNA testing, stating that the offender "may seek leave of the supreme court to appeal the rejection to the supreme court." Article IV, Section 2(B)(2)(c) of the Ohio Constitution, however, provides that the appeal from the common pleas court to this court in death-penalty cases is "as a matter of right." And because the General Assembly cannot enlarge, modify, or diminish our jurisdiction in death-penalty \*180 cases, it necessarily lacks authority to grant this court discretion to deny an appeal that the Ohio Constitution allows as of right.

{¶ 60} 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.

{¶ 61} 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.

{¶ 62} The majority's citation of *State v. Smith*, 80 Ohio St.3d 89, 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.

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

### Conclusion

{¶ 64} The Ohio Constitution, Article IV, Section 2(B)(2)(c) establishes the appellate jurisdiction of this court “[i]n direct appeals from the courts of common pleas \* \* \* as a matter of right in cases in which the death penalty has been imposed.” R.C. 2953.73(E) purports to enlarge the constitutionally defined \*\*1111 \*181 jurisdiction of this court, and because the legislature lacks authority to amend the Constitution, I would hold that this statute is unconstitutional.

FRENCH, J., concurs in the foregoing opinion.

### All Citations

136 Ohio St.3d 163, 992 N.E.2d 1095, 2013 -Ohio- 1764

### Footnotes

1 Noling argued merely that if R.C. 2953.73(E)(1) is severed from the remainder of the statute, but R.C. 2953.73(E)(2) is left intact, that subsection would then violate the United States Constitution's Equal Protection Clause.