

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**REPLY BRIEF OF
APPELLANT TYRONE NOLING**

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TABLE OF CONTENTS

	<u>Page No.</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	6
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 to the United States Constitution and Article I, Section 16 of the Ohio Constitution.	6
CONCLUSION	25
CERTIFICATE OF SERVICE	26
APPENDIX:	
42 U.S.C. § 1983.....	A-1
App.R. 3	A-2
App.R. 9	A-5
Sup.Ct.Prac.R. 7.01.....	A-9
Sup.Ct.Prac.R. 7.02.....	A-14

TABLE OF AUTHORITIES

	<u>Page No.</u>
CASES:	
<i>Burger v. Kemp</i> , 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)	8
<i>DA's Office v. Osborne</i> , 557 U.S. 52, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).....	12, 22, 23
<i>Dickerson v. Latessa</i> , 872 F.2d 1116 (1 st Cir. 1989)	21
<i>Douglas v. California</i> , 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).....	21, 22
<i>Evitts v. Lucey</i> , 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985)	21
<i>Grier v. Klem</i> , 2011 U.S. Dist. LEXIS 124053, 2011 WL 4971925 (W.D. Pa. Sept. 19, 2011)	23
<i>Griffin v. Illinois</i> , 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).....	<i>passim</i>
<i>In re Smith</i> , 349 Fed. Appx. 12 (6th Cir. 2009).....	23
<i>Lindsey v. Normet</i> , 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972).....	20
<i>Massachusetts Bd. of Retirement v. Murgia</i> , 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).....	12
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996)	20
<i>People v. Morales</i> , 2d Dist., Division 6, No. B225733, 2012 Cal. App. Unpub. LEXIS 368 (Jan. 18, 2012).....	5
<i>Rinaldi v. Yeager</i> , 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966).....	15
<i>Ross v. Moffitt</i> , 417 U.S. 600, 41 L.Ed.2d 341, 94 S.Ct. 2437 (1974).....	21
<i>Sexton v. Barry</i> , 233 F.2d 220 (6th Cir.1956).....	24
<i>Skinner v. Switzer</i> , 562 U.S. 521, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011)	23, 24
<i>Speet v. Schuette</i> , 726 F.3d 867 (6th Cir. 2013)	7
<i>State v. Antoine Watkins</i> , Court of Appeals No. COA13-56, 752 S.E.2d 256, 2013 N.C. App. LEXIS 1009 (Oct. 1, 2013)	6

TABLE OF AUTHORITIES

Page No.

CASES: (cont'd)

<i>State v. Ayers</i> , 185 Ohio App. 3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.)	19
<i>State v. Craig</i> , 9th Dist. Summit No. 24580, 2010-Ohio-1169	16, 20
<i>State v. Davis</i> , 131 Ohio St. 3d 1, 2011-Ohio-5028, 959 N.E.2d 516	18
<i>State v. Emerick</i> , 170 Ohio App. 3d. 647, 2007-Ohio-1334 (2d Dist.).....	18
<i>State v. Emerick</i> , 2d Dist. Montgomery No. 24215, 2011-Ohio-5543	20
<i>State v. Noling</i> , 11th Dist. Portage No. 2011-P-0018, 2014-Ohio-1339	18
<i>State v. Noling</i> , 11 Dist. Portage No. 96-P-0126, 1999 Ohio App. LEXIS 3095, 1999 WL 454476 (June 30, 1999)	18
<i>State v. Noling</i> , 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095.....	19
<i>State v. Norman</i> , Court of Appeals, Division One No. 63913-7-I, 65211-7-I, 2011 Wash. App. LEXIS 1582 (July 11, 2011).....	5
<i>State v. Peoples</i> , 102 Ohio St.3d 460, 2004-Ohio-3823, 812 N.E.2d 963.....	9, 12
<i>State v. Smith</i> , 80 Ohio St.3d 89, 684 N.E.2d 668 (1997)	<i>passim</i>
<i>State v. Stephen Dragasits</i> , 4th Dist., Division 1, No. D064288, 2015 Cal. App. Unpub. LEXIS 861 (Feb. 6, 2015).....	6
<i>Young v. Ragen</i> , 337 U.S. 235, 69 S. Ct. 1073, 93 L. Ed. 1333 (1949).....	16

CONSTITUTIONAL PROVISIONS:

Eighth Amendment, United States Constitution.....	1, 6, 24, 25
Fourteenth Amendment, United States Constitution	6, 7, 21, 25
Article I, Section 16, Ohio Constitution	6
Article IV, Section 2, Ohio Constitution	17, 18

TABLE OF AUTHORITIES

	<u>Page No.</u>
STATUTES:	
R.C. 2953.71	<i>passim</i>
R.C. 2953.72	19, 25
R.C. 2953.73	<i>passim</i>
R.C. 2953.74	18, 19
R.C. 2953.76	2, 3
R.C. 2953.78	10, 15
RULES:	
42 U.S.C. § 1983	23
App.R. 3	11
App.R. 9	11
Sup.Ct.Prac.R. 7.01	11, 15
Sup.Ct.Prac.R. 7.02	11
OTHER AUTHORITIES:	
http://www.ascl-d-lab.org/cert/ALI-181-T.pdf (accessed Feb. 1, 2016)	5
http://wjla.com/news/crime/national-board-suspends-dna-testing-at-d-c-s-new-crime-lab-113547 (accessed Jan. 31, 2016)	6
http://www.sfgate.com/crime/article/DNA-lab-irregularities-may-endanger-hundreds-of-6165643.php (accessed Jan. 31, 2016)	6
https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_198_9_2012_full_report.pdf (accessed Jan. 31, 2016)	11, 14
http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (accessed Jan. 31, 2016)	11

TABLE OF AUTHORITIES

Page No.

OTHER AUTHORITIES: (cont'd)

http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c5=OH (accessed Jan. 31, 2016).....	11, 14
https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Fed-OH (accessed Jan.31, 2016).....	14
http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Law-Enforcement/Capital-Crimes-Annual-Reports/2014-Capital-Crimes-Annual-Report (accessed Feb. 1, 2016).....	19
www.asclab.org/cert/ALI-280-T.pdf (accessed Feb. 1, 2016).....	5
www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf (accessed Feb. 3, 2016).....	14

INTRODUCTION

The Ohio Legislature gave applicants, whose requests for postconviction DNA testing have been denied, the right to appellate review. By doing so, the legislature signaled that such review was necessary to carry out the intent of the statute. As such, the group of “similarly situated” persons, for purposes of a Constitutional challenge, are all applicants whose request for postconviction DNA testing has been denied. When the Legislature has determined that appellate review is necessary, there can be no proper reason to wholly eliminate appellate review for applicants who may benefit the most from exoneration: those who are sentenced to death. While the Legislature may remove a tier of appellate review in order to eliminate concerns of delay, it cannot—and should not—remove appellate review entirely. *See State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). Mandatory appellate review is crucial, because only an appellate court can review and address all issues raised by the denied applicant who has not been sentenced to death, and correct errors that may have occurred in the trial court. Under R.C. 2953.71(E)(1), applicants sentenced to death do not have access to any of these rights. Additionally, in contrast to capitally sentenced applicants, applicants not sentenced to death are able to request and produce transcripts to assist their appeal in both the intermediate appellate court as well as this Court. This does not comport with the Due Process and Equal Protection Clauses and the Eighth Amendment.

STATEMENT OF THE CASE AND FACTS

The Attorney General, counsel for Bureau of Criminal Investigation (“BCI”) and amicus for the State, discusses some DNA technology issues in its statement of facts. As this discussion is placed in the Attorney General’s statement of facts, Mr. Noling will respond here. Otherwise, Mr. Noling relies upon the Statement of the Case and Facts contained in his merit brief.

The Attorney General asserts that BCI currently employs the most advanced testing technology and notes that the basis for this assertion is not in the record. Attorney General's Merit Brief, p. 11. The Attorney General then goes on to make a number of arguments which demonstrate a lack of understanding of the issues surrounding the advancements in DNA technology. *Id.* at pp. 11-12. As an initial matter, although the Portage County Prosecutor could have called an analyst from the BCI to testify in March of 2014 (as they had intended in December 2013), they chose not to do so. Even if an analyst from BCI had testified, that analyst would not have testified about GlobalFiler, a kit that BCI became validated on approximately a year prior to the filing of the Attorney General's Merit Brief. *Id.* at p. 12. This means that BCI was not using GlobalFiler, as noted by Dr. Maddox in his affidavit to the trial court, at the time the trial court was selecting the testing authority. Expert's Report Pursuant to October 24, 2013 Order, Dec. 2, 2013.

As the trial court wished to move forward with testing at the time, Mr. Noling was requesting that the best DNA technology available be utilized. Noling's Motion for Hearing, Dec. 20, 2013; Noling's Motion for Cellmark to be Designated the Testing Authority for the Assessment of the Shell Casings and Ringboxes Ordered by th[e Trial] Court Pursuant to R.C. 2953.76 on December 19, 2013, Dec. 30, 2013. Specifically, Identifiler Plus. Ironically, the Attorney General now makes the same argument that Mr. Noling made to the trial court regarding the Identifiler Plus testing kit at the time the trial court was selecting the testing authority—that BCI's GlobalFiler is the most sensitive. Attorney General's Merit Brief, p. 12. In Mr. Noling's argument before the trial court (and the Attorney General's argument in its amicus brief), the phrase "most sensitive" is made in reference to the particular DNA testing kit and denotes that the particular kit is most likely to produce the most complete information about

a profile from a small amount of DNA—more so than other DNA testing kits. *See, e.g.* March 12, 2014 Hearing, (“March Hrg.”), p. 58-61; Exhibit B to Noling’s Motion for Cellmark to be Designated the Testing Authority for the Assessment of the Shell Casings and Ringboxes Ordered by th[e Trial] Court Pursuant to R.C. 2953.76 on December 19, 2013, Dec. 30, 2013. As GlobalFiler was not available at the time, among Mr. Noling’s arguments that Cellmark was the appropriate testing authority for the shell casings and the ring boxes was that a lab with the most sensitive kit was necessary as there was a small amount of DNA and there would likely only be one opportunity to test. Hearing, Dec. 19, 2013 (“Dec. Hrg.”), pp. 4-5, 8. Mr. Noling requested and even offered to pay for Cellmark¹—a larger private lab utilized by prosecutors’ offices across the country and validated on the most sensitive kit at the time, Identifiler Plus. Dec. Hrg., pp. 4-18.

The Attorney General then claims that Mr. Noling argued that BCI’s kit was outdated and unreliable compared to Identifiler Plus. Attorney General Merit Brief, p. 12. The Attorney General misreads the record. Mr. Noling had no issue with the “reliability” of BCI’s Identifiler Kit—in fact, it was Mr. Noling that provided the trial court with the appropriate orders and motions to send the cigarette butt to BCI for testing with the Identifiler Kit. Noling’s Motion to Send Cigarette Butt to Testing Authority, Establish Chain of Custody Protocol, and Provide for Simultaneous Notification to All Parties with Information Obtained During the Testing Process, Dec. 26, 2013. Mr. Noling did not object to BCI as the testing authority for the cigarette butt because saliva is a rich source of DNA², and this makes the cigarette butt a rich source of DNA. A high-sensitivity kit is not necessary when there is a rich source of DNA. Additionally, BCI

¹ Subsequent to the proceedings in this case, Cellmark was purchased by LabCorp. Following that purchase and consolidation, LabCorp and LabCorp/Cellmark were all purchased by Bode.

² This is why buccal swabs are used to collect DNA samples for comparison standards.

made no representations that it did not perform DNA testing on cigarette butts. However, as there is likely *not* a rich source of DNA (like saliva or blood) associated with the shell casings and ring boxes, there is likely only a small amount of DNA left behind. Mr. Noling presented expert testimony describing the limitations of some of BCI's standard testing procedures and a study done comparing, among other things, the sensitivity between Identifiler and Identifiler Plus. March Hrg., pp. 36-67, 104-122. All of those demonstrate that, for a small sample of DNA—like that on the shell casings and ring boxes—Cellmark was the testing authority most likely to produce the clearest result as well as a result with the most information about the DNA left behind on the shell casings and the ring boxes by the perpetrator.

The Attorney General also stated that BCI made findings of contamination. Attorney General's Merit Brief, pp. 12-13. The implication is presumably that no DNA testing could possibly be done on those items. However, as the Attorney General is aware, BCI stated that, because "the extraction method to be used was one of the topics of discussion [in the litigation,] BCI will not swab or extract any of the items" and, instead, would only perform a visual inspection. This statement was made in an email from BCI analysts on which BCI's counsel, the Ohio Attorney General, was copied. Attorneys for the Portage County Prosecutor's Office were also copied on this email. This could not be made part of the record because the trial court denied Mr. Noling's Amended Application for Postconviction DNA testing the day after BCI issued the report.³ As a result, Mr. Noling did not refer to it in his initial brief. However, as the Attorney General has taken up this issue in its statement of facts and is also counsel for BCI, Mr. Noling is compelled to respond, as this email explains why BCI would state that extraction and testing would be necessary to answer the questions posed by the trial court in its December 18,

³ Undersigned counsel will supplement the record with a copy of this email upon any order of this Court.

2013 entry and not undertake those analyzation methods and, instead, conduct only a visual inspection. *Compare* March Hrg., pp. 5-6, 8-9, 132 with BCI Laboratory Report Filed, June 26, 2014. BCI was cognizant of the questions in the litigation and did not want to consume the sample as that would moot the questions raised by Mr. Noling. However, BCI wanted to comply with the trial court's order. The result was the report based only upon a visual inspection.

Finally, while BCI is the largest forensics lab in the State of Ohio—and therefore, the most frequently relied upon—“leading” may not be the correct characterization. Both Miami Valley Regional Crime Lab and Cuyahoga County's Forensic DNA lab are nationally certified⁴ and both perform DNA testing on fired shell casings.⁵ Importantly, unlike BCI, these labs do not limit DNA testing of fired shell casings to only cases where the forensic question is related to handling after firing. *See*, Expert's Report Pursuant to October 24, 2013 Order, Dec. 2, 2013. Miami Valley and Cuyahoga labs are not alone in testing fired shell casings for the DNA of the person that handled the casing prior to firing. The State of Washington's crime lab linked DNA from both a cigarette butt found near the victim's body and a fired shell casing found near the victim's body as evidence of the defendant's guilt. *State v. Norman*, Court of Appeals, Division One No. 63913-7-I, 65211-7-I, 2011 Wash. App. LEXIS 1582 (July 11, 2011). In a homicide prosecution in California, the State utilized DNA testing of fired shell casings from the crime scene. *People v. Morales*, 2d Dist., Division 6, No. B225733, 2012 Cal. App. Unpub. LEXIS 368, *6 (Jan. 18, 2012) (“A DNA profile obtained from one of the spent shell casings recovered from the crime scene was found to match appellant's profile by a probability of one in 48 million Hispanic persons.”). More recently, DNA testing of the fired shell casings recovered from the

⁴ www.ascl-d-lab.org/cert/ALI-280-T.pdf (accessed Feb. 1, 2016); <http://www.ascl-d-lab.org/cert/ALI-181-T.pdf> (accessed Feb. 1, 2016).

⁵ Undersigned counsel makes this representation based on cases that undersigned counsel either worked on directly or on which undersigned counsel was consulted.

crime scene produced a CODIS-eligible profile—which resulted in a hit and eventual conviction. *State v. Stephen Dragasits*, 4th Dist., Division 1, No. D064288, 2015 Cal. App. Unpub. LEXIS 861, * 6-7, 11-12, 25-27 (Feb. 6, 2015). In North Carolina, the State lab performed DNA analysis on three 9 mm casings recovered from inside an apartment where a shooting homicide had occurred. *State v. Antoine Watkins*, Court of Appeals No. COA13-56, 752 S.E.2d 256, 2013 N.C. App. LEXIS 1009, *3-4 (Oct. 1, 2013). DNA analysis detected the presence of the defendant’s DNA on the fired casings. *Id.* On one of the shell casings, only the defendant’s DNA was present. *Id.* On the second casing, however, a mixture of the defendant’s DNA and that of another person was present. *Id.* BCI is not the leading lab when it comes to subjecting fired shell casings to testing in order to obtain the DNA of the person that handled the casing prior to firing. Finally, while certification is a minimal requirement, it does not provide meaningful insight into the quality of the work performed by the lab, relative to other labs.⁶

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

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

⁶ After a U.S. Attorney noted errors in DNA results coming out of a D.C. crime lab, the national accrediting agency performed an audit. That audit found that analysts were not properly trained and the lab has inadequate standards. The same accrediting agency had reviewed the D.C. lab the prior year, found no problems, and provided them with accreditation. <http://wjla.com/news/crime/national-board-suspends-dna-testing-at-d-c-s-new-crime-lab-113547> (accessed Jan. 31, 2016). Similarly in San Francisco, an analyst did not follow department standards and her supervisor did not intervene, but the accreditation process was “going well.” <http://www.sfgate.com/crime/article/DNA-lab-irregularities-may-endanger-hundreds-of-6165643.php> (accessed Jan. 31, 2016).

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

1. Equal Protection

The State, through the Prosecutor and the Attorney General, argues that the Equal Protection Clause does not apply in the case sub judice, and that even if it does, the analysis is a rational basis review rather than strict scrutiny. Further, the State argues that there is no equal protection violation under rational basis review. As described below, each of these arguments fail.

First, as a threshold matter, the Prosecutor's brief complains that Mr. Noling did not specify if he was making a "facial" constitutional challenge or an "as applied" challenge. Prosecutor Merit Brief, p. 21. A facial challenge to a law's constitutionality is an effort to invalidate the law in each of its applications and to take the law off the books completely. *Speet v. Schuette*, 726 F.3d 867, 871 (6th Cir.2013). In contrast, an "as applied" challenge is unconstitutional as enforced against the individual(s) before the court. *Id.* at 872. While there are cases where the distinction between these two types of challenges is not so well defined, this is not one of those cases. Mr. Noling is clearly challenging the facial constitutionality of R.C. 2953.71(E)(1). The Prosecutor argues that since this Court twice accepted Mr. Noling's case for review, a facial constitutional challenge must fail. Prosecutor's Merit Brief, p. 22. The fact that Mr. Noling has (twice) overcome the hurdles put in front of him and has been able to do what appears to have occurred only once since 2003—i.e., have this Court accept jurisdiction of a capital case during postconviction proceedings—speaks to the State's refusal to test and the troubling aspects of Mr. Noling's conviction. Additionally, this Court only accepted one of the five propositions of law raised in Mr. Noling's most recent jurisdictional appeal to this Court.

As such, Mr. Noling's success in no way removes the unconstitutional barrier to appellate review put in place by R.C. 2953.71(E)(1).

- a. **The Legislature determined that all offenders whose application for postconviction DNA testing were entitled to appeal; any subsequent language that limits or bars a particular group from this process is subject to equal protection analysis**

The Attorney General contends that the Equal Protection Clause does not apply here because "capital offenders and non-capital offenders are not similarly situated simply by the nature of their sentences." Attorney General Merit Brief, p. 23. Specifically, the Attorney General tries to turn the "death is different" argument on its head by arguing that because death-sentenced inmates have had greater protections, such as two trial attorneys and individualized sentencing, that they are deserving of less protection than non-capital offenders if they are requesting postconviction DNA testing. *Id.* at 23-25. This argument is nonsensical.

None of the rights listed by the Attorney General in their brief are related to the proper enforcement of Ohio's postconviction DNA testing statute. The fact that Mr. Noling had two trial attorneys in 1996 has nothing to do with the proper application or enforcement of a postconviction DNA testing statute with DNA technology that was not available in 1996. When the Legislature passed the statute providing for postconviction DNA testing in Ohio, presumably their hope was for the statute to be carried out the same manner for all applicants and as the Legislature intended. In order to ensure this, the Legislature provided for appellate review. If anything, the fact that "death is different" should require a *more* searching appellate review for a denial of a capital offender's rejected application for postconviction DNA testing. *Burger v. Kemp*, 483 U.S. 776, 785, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987).

The Attorney General also points out that capital offenders have an additional right to postconviction DNA testing under the statute. Attorney General's Merit Brief, p. 24.

Specifically, the Attorney General argues that because the Legislature gave death-sentenced prisoners the ability to apply for testing which could demonstrate that they were not actually eligible for the death penalty, this shows that death-sentenced prisoners are not similarly situated. *Id.* p. 25.⁷ However, in its argument, the Attorney General essentially is looking at all death-sentenced prisoners in Ohio and arguing that they are not similarly situated to those not sentenced to death in Ohio—and avoids comparing the categories set out under R.C. 2953.73(E). This is not the comparison at issue here. The group of persons that the Legislature deemed entitled to appellate review under R.C. 2953.73(E) are those offenders whose applications for postconviction DNA testing under Ohio’s DNA testing statute have been denied, and the question is whether those applicants who have been sentenced to death and those not sentenced to death are similarly situated. *See State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3823, 812 N.E.2d 963. And the answer is yes, they are similarly situated.

The Attorney General is correct—there is broader definition of outcome determinative under Ohio’s postconviction DNA testing statute for an offender sentenced to death. R.C. 2953.71(L). But, this does not render a capital offender whose application for DNA testing has been rejected any different than a non-capital offender whose application for DNA testing has been rejected. If anything, it demonstrates a need for mandatory appellate review that is even greater than that of non-capital offenders. The Attorney General’s arguments that equal protection analysis should not apply in the case sub judice are wholly without merit.

⁷ While the Attorney General highlights this “additional right” under the statute, in subsequent pages, the Attorney General argues that ambiguities in Ohio’s postconviction DNA testing statute come up first in non-capital cases so capital offenders can rely on litigation in non-capital appeals to work out any problems with the statute. Attorney General’s Merit brief, p. 30. Not so for this “additional right.” In fact, the lack of an appellate process could render this additional right meaningless.

Additionally, both the Prosecutor and the Attorney General attempt to differentiate *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), as well as other cases on the same subject. Both the Attorney General and the Prosecutor note that the statutes in those cases protect indigent defendants when the statute discriminates between “the rich and poor.” Attorney General’s Merit Brief, pp. 25-6; Prosecutor’s Merit Brief, pp. 17-19. The Attorney General argues that because these cases are based on wealth, the cases do not apply here unless there is a “similarly situated comparator.” Attorney General’s Merit Brief, pp. 25-6; *see also* Prosecutor’s Merit Brief, pp. 17. This argument misses the point. In *Griffin*, the Illinois legislature provided a right to appeal to all criminal defendants. *Griffin*, 351 U.S. at syllabus. As the Court noted, Illinois, like all other states, recognized the importance of appellate review to a correct adjudication of guilt or innocence. *Griffin*, 351 U.S. at 18. The Court found that “[s]tatistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.” *Id.* at 18-19. However, the Illinois legislature also required payment for trial transcripts—a necessity when pursuing an appeal. *Id.* at 13-14. The Court described the denial of the transcript, which effectively denied the right to appeal as provided in the statute, as a “misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.” *Id.* at 19.

In the instant case, the Ohio Legislature has similarly recognized the importance of appellate review of any denial for an application for postconviction DNA testing (as well as the right to appeal the selection of a testing authority) to ensure the correct and even application of Ohio’s postconviction DNA testing statute. R.C. 2953.73(E); R.C. 2953.78(B). Thirty-four

percent of the denials of postconviction DNA testing in non-capital cases in Ohio resulted in reversals. *See* Noling Merit Brief, pp. 23-28. In addition, the error correction inherent in the intermediate appellate review has proven crucial in the exoneration of the innocent. *Id.* at 28-31. However, the Ohio Legislature has required that capital offenders can only obtain review on constitutional questions or questions of public or great general interest via a jurisdictional appeal to this Court. R.C. 2953.73(E)(1); Sup.Ct.Prac.R. 7.02(C)(2). Non-capital offenders are entitled to a mandatory appeal to the intermediate court of appeals and may also file a jurisdictional appeal with this Court. R.C. 2953.73(E)(2). In addition, the Ohio Legislature requires indigent capital offenders, unlike indigent, non-capital offenders, to file their jurisdictional appeal without transcripts from any hearings related to the application for postconviction DNA testing.

Compare R.C. 2953.73(E)(1); Sup.Ct.Prac.R. 7.01 *with* R.C. 2953.73(E)(2); App.R. 3 and 9.

Given that, from 2000-2010, the average number of DNA exonerations per year in the United States is 21,⁸ and the current total of nationwide DNA exonerations is 337⁹ and rising (with 10 of those in Ohio),¹⁰ denying someone sentenced to death the right the same appellate review as those non-capital offenders is a “misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.” *Griffin*, 351 U.S. at 19. As a result, *Griffin* and its rationale are wholly applicable to the case sub judice.

The Prosecutor also takes pains to point out that Mr. Noling did not cite to cases involving the appointment of counsel in discretionary appeals and postconviction proceedings.

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https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (accessed Jan. 31, 2016). The average number of non-DNA exonerations per year during that same time period is 31. *Id.*

⁹ http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (accessed Jan. 31, 2016).

¹⁰ http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c5=OH (accessed Jan. 31, 2016).

Prosecutor's Merit Brief, pp. 18-19. However, the Prosecutor fails to explain why such citations are even relevant to the instant case. *Id.* They are not. Statutes passed by the legislature, even when they pertain to postconviction proceedings must comport with the Equal Protection Clause. *See State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3823, 812 N.E.2d 963 (concluding that barring those sentenced to five years from applying for judicial release while permitting those sentenced to a term of five to ten years, excluding any five year term, violates equal protection). The Prosecutor also noted that Mr. Noling does not cite to *DA's Office v. Osborne*, 557 U.S. 52, 129 S.Ct. 2308, 174 L.Ed. 2d 38 (2009). As explained in Section A.2, *Osbourne* is inapplicable to the question before this Court.

b. Ohio Rev. Code 2953.71(E)(1) fails under both strict scrutiny and rationale basis review

The Prosecutor and the Attorney General argue that strict scrutiny does not apply to an Equal Protection analysis of R.C. 2953.73(E)(1). Instead, they argue that rational basis review applies, and that R.C. 2953.73(E)(1) survives rational basis review. As demonstrated below, these arguments fail.

i. Strict Scrutiny applies because R.C. 2953.73(E)(1) burdens a fundamental right

Although Mr. Noling mentions strict scrutiny in a footnote, both the Prosecutor and the Attorney General spend pages arguing that this level of review does not apply to R.C. 2953.73(E)(1). Strict scrutiny applies only when the classification at issue impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

First, both the Prosecutor and the Attorney General state that capital defendants are not a suspect class for purposes of equal protection. Prosecutor’s Merit Brief, pp. 13, 15; Attorney General’s Merit Brief, pp. 20, 21, and 22. Mr. Noling agrees.

Second, the Prosecutor and Attorney General also argue that a fundamental right is not implicated. Prosecutor’s Merit Brief, pp. 12, 15, 17-19; Attorney General’s Merit Brief, pp. 20, 21, and 22. Specifically, the Prosecutor characterizes the fundamental right at issue as the right to appeal. *Id.* at p. 17. Based on this characterization, the Prosecutor argues that no fundamental right is implicated and strict scrutiny does not apply. However, this mischaracterizes what Mr. Noling is being deprived of when his application for postconviction DNA testing is denied, simply because his sentence is death. The State’s mischaracterization is of minimal consequence here, as the statute ultimately fails under a rational basis review. However, the mischaracterization is worth noting as the Prosecutor and the Attorney General repeatedly fail to understand the question at issue throughout their briefs to this Court. And this mischaracterization has greater implications in later analysis for rational basis and due process. *See* pp. 15-21, 23-24, *infra*; *see also*, pp. 8-11 *supra*.

The Legislature decided to provide access to postconviction DNA testing. Over the years, the Legislature has worked to increase access to postconviction DNA testing—e.g. Senate Bill 262 lowered the outcome determinative standard from its original set out in SB11; Senate Bill 77 defined “definitive DNA test” to provide for more testing when new technology can provide more information than old technology. This access is critical when the data shows that, during the years 2000 to 2010, there was an average of 21 DNA based exonerations each year in

the U.S., and 31 non-DNA based exonerations.¹¹ To date, Ohio has 10 DNA exonerations¹² and 55 non-DNA based exonerations.¹³ And 2015, set a record of an average of nearly 3 exonerations per week nationwide.¹⁴

As importantly, the Legislature also provided for appellate review in order to provide oversight for the use and enforcement of the rules laid out in the statute. The Legislature specifically provided appellate review for all those whose DNA applications were rejected by the trial court. R.C. 2953.73(E). However, after deciding appellate review of rejected postconviction DNA applications was necessary, the Legislature not only removed the intermediate appellate court from the appeal of a death row inmate whose DNA application was rejected by the trial court, it removed any mandatory appellate review altogether. R.C. 2953.73(E)(1). Mandatory appellate review includes not only addressing constitutional questions or questions of public or great interest, but also issues of first impression, error correction, and ensuring that the lower courts are making the appropriate findings. *See* Noling's Merit Brief, pp. 23-31.

Instead of mimicking the process that this Court found constitutional in *Smith*, the Legislature added R.C. 2953.73(E)(1). The language of this section states that appellate review can only take place if the applicant could convince this Court his or her case involved a

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https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (accessed Jan. 31, 2016).

¹² http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA&c5=OH (Jan. 31, 2016).

¹³ <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Fed-OH> (accessed Jan. 31, 2016); <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Ohio> (accessed Jan. 31, 2016).

¹⁴ www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf (accessed Feb. 3, 2016).

substantial constitutional question or was one of public or great general interest. *See* S.Ct.Prac.R. 7.01(B). Additionally, by failing to follow the process in *Smith*, 80 Ohio St.3d 89, appellants under R.C. 2953.73(E)(1) have to surmount this obstacle without the same case-related materials that are available to non-death sentenced appellants (such as transcripts). Simply put, the inclusion of appellate review for applications of DNA testing that have been denied demonstrates the import the Legislature placed of having access to this process. And, R.C. 2953.73(E)(1) denies similar access to those applicants sentenced to death.

There is no question that applicants whose DNA applications were rejected by the trial court should have appellate review. *See* R.C. 2953.73(E); R.C. 2953.78(B). The question, for purposes of determining the level of scrutiny, is whether R.C. 2953.73(E)(1)'s denial of that access to the courts implicates the fundamental right of access to the courts. The United States Supreme Court has held that, although States are not required to establish avenues of appellate review, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966). As such, strict scrutiny applies.

However, even under a rational basis review, R.C. 2953.73(E)(1) fails to pass constitutional muster.

ii. Ohio Rev. Code 2953.73(E)(1) fails rational basis review

Both the Prosecutor and the Attorney General argue that R.C. 2953.73(E)(1) fails rational basis review. Although their arguments have some overlap, their individual arguments merit each being addressed separately:

*Below is a list of the Prosecutors arguments in support of R.C. 2953.73(E)(1) and why they fail.*¹⁵

<p>P1</p>	<p><i>Smith</i>, 80 Ohio St.3d 89, demonstrates that different appellate processes for capital and non-capital litigants can be constitutional. Prosecutor’s Merit Brief, p. 14-15.</p>	<p>Simply because different appellate processes for capital and non-capital litigants can be constitutional, this does not mean that they are always constitutional. This argument is not a justification for R.C. 2953.73(E)(1) surviving rational basis review.</p>
<p>P2</p>	<p><i>Smith</i>, 80 Ohio St.3d 89, held that the State had a “direct, legitimate and compelling interest in ensuring that final judgments of its courts are expeditiously enforced.” Prosecutor’s Merit</p>	<p>Here, the interest of the Legislature is in providing postconviction DNA testing to those that are eligible under the terms set forth in R.C. 2953.71 <i>et seq.</i> It also determined that appellate review was necessary for appropriate enforcement.¹⁶</p>

¹⁵ The first column on the chart contains a reference number (P for Prosecutor), the second column is the argument set forth by the Prosecutor in their merit brief, and the third column is an explanation as to why the Prosecutor’s proffered justification for providing an offender whose DNA application has been denied no appellate review because he or she has been sentenced to death fails.

¹⁶ The State fails to address the concern underlying Ohio’s postconviction DNA testing statute. *See, generally, State v. Craig*, 9th Dist. Summit No. 24580, 2010-Ohio-1169, ¶ 45-48, (Belfance, J., concurring.) (“The laudable goal of postconviction relief is to allow a person convicted of a crime a method to argue that he was denied his constitutional rights. *Young v. Ragen*, 337 U.S. 235, 239, 69 S.Ct. 1073, 93 L.Ed. 1333 (1949). The underlying concern is that due to the denial of such rights, an innocent person may have been convicted of the crime, while the guilty person is still at large ready to victimize others. *** The simple fact that there are recent examples of wrongful convictions throughout this state suggests not only the necessity for postconviction relief but the need for access to the means of pursuing such relief. *** I understand that the interests in finality of judgments and protecting scarce judicial resources are central concerns in considering postconviction relief. However, I hope we do not lose sight of the important rights that should be protected in the postconviction relief process. When a final judgment is overturned through this process because an innocent person’s conviction is vacated, the courts are protecting the rights of both the individual and the people; this is so because when the wrong person is incarcerated or even worse, executed for the commission of a crime of which he was innocent, it means that a guilty person has not been punished and is free to inflict further harm upon others while an innocent person will wrongfully suffer an irreversible fate.”).

	Brief, p. 15.	
P3	Avoiding lengthy delays in enforcing a death sentence. Prosecutor's Merit Brief, p. 14.	See No. 7 in the Attorney General's arguments listed below as to why the listed justification fails.

*Below is a list of the Attorney General's arguments in support of R.C. 2953.73(E)(1) and why they fail:*¹⁷

AG1	R.C. 2953.73(E)(1) parallels direct appeals for capital cases. Attorney General Merit Brief, p. 26-7. This appellate review process makes sense because the Supreme Court, if the inmate is diligent in seeking DNA testing, is familiar with the facts of the case.	R.C. 2953.73(E)(1) does not parallel direct appeals in capital cases. This Court has never approved of the complete removal of appellate review for those sentenced to death. Prior to Ohio Const. Art. IV(B)(2) and <i>Smith</i> , 80 Ohio St.3d 89, those sentenced to death were provided appellate review to not one, but two appellate courts. The intermediate appellate court and this Court. In <i>Smith</i> , 80 Ohio St.3d 89, this Court found that the removal of appellate review by an intermediate court and leaving in place the mandatory appellate review of this Court was Constitutional. In 2003, when Senate Bill 11 passed the first version of Ohio's postconviction DNA testing statute, this Court accepted approximately 13.6% of the jurisdictional appeals filed. See, Noling's Merit Brief, pp. 32-33. When the Ohio Legislature made Ohio's postconviction DNA testing law permanent in 2006 with Senate Bill 262, this Court accepted 15.6% of the jurisdictional appeals filed. <i>Id.</i> The Legislature most recently amended Ohio's DNA testing law in 2010. In 2010, this Court accepted approximately 9.5% of the jurisdictional appeals filed. <i>Id.</i> In 2014, this Court accepted 4.3% of jurisdictional appeals. <i>Id.</i> It is also important to note that the numbers do not track the number of separate issues in each memo that were accepted or rejected for review. For example, in the case sub judice, Mr. Noling submitted five (5) propositions of law. <i>State v. Noling</i> , Case No. 2014-1377, Memorandum in Support of Jurisdiction, Aug. 11, 2014. One was accepted, one was rejected with only two votes, and the remainder were rejected with no votes. <i>State v. Noling</i> , Case No. 2014-1377, Entry, Sept. 30, 2015; <i>09/30/2015 Case</i>
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¹⁷ The first column on the chart contains a reference number (AG for Attorney General), the second column is the argument set forth by the Attorney General in their merit brief, and the third column is an explanation as to why the Attorney General's proffered justification for providing an offender whose DNA application has been denied no appellate review because he or she has been sentenced to death fails.

		<p><i>Announcements</i>, 2015-Ohio-3958. Jurisdictional appeals to this Court in no way parallel a mandatory appeal.</p> <p>In <i>Smith</i>, 80 Ohio St.3d 89, this Court also found that, as a practical matter, it made sense that the mandatory appellate review for the direct appeal in a death penalty case went to this Court. This Court reviews all capital sentences from across the state and would be in a better position than intermediate appellate courts to determine the proportionality of the capital sentence imposed in a particular case.</p> <p>An inmate seeking DNA testing under the statute must show that, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, DNA testing was not yet available, or the type of DNA technology necessary to obtain a result was not yet available. R.C. 2953.74(B)(1); <i>State v. Emerick</i>, 170 Ohio App. 3d. 647, 2007-Ohio-1334, ¶ 18 (2d Dist.). Based on the statute, it is unlikely that those on this Court who reviewed a direct appeal, would be the same as those reviewing the appeal of a death-sentenced inmate seeking DNA testing. For example, this Court issued a decision Mr. Noling’s direct appeal in 2002. <i>State v. Noling</i>, 11 Dist. Portage No. 96-P-0126, 1999 Ohio App. LEXIS 3095, 1999 WL 454476 (June 30, 1999). Only one justice from the 2002 Court serves on the current Court. The Attorney General’s rationale for the selection of this Court as the Court of review does not track with the language of the statute.</p>
AG2	<p>Providing discretionary appeal versus a mandatory appeal reflects the limited resources of the Ohio Supreme Court. Attorney General Merit Brief, p. 27.</p>	<p>If the Legislature was concerned with this Court’s resources, then it could have left the mandatory appellate review to the intermediate courts of appeals. Intermediate appellate court review would make more sense in the case sub judice since the intermediate appellate court recently reviewed Mr. Noling’s appeal of the trial court’s denial of a new trial motion. The Eleventh District Court of Appeals remanded the case for further hearings. <i>State v. Noling</i>, 11th Dist. Portage No. 2011-P-0018, 2014-Ohio-1339. Providing a mandatory appeal to the court of appeals is the best way to conserve resources.</p>
AG3	<p>The Legislature tried to comply with Article IV(B)(2)(i). However, R.C. 2953.73(E)(1) was passed before this Court ruled in <i>State v. Davis</i>, 2011-Ohio-5028. Attorney</p>	<p>This is incorrect. Article IV(B)(2)(i) provided mandatory appellate review by this Court. Ohio Rev. Code 2953.73(E)(1) does not track Article IV(B)(2)(i). Additionally, given that intermediate courts of appeals have been hearing postconviction appeals of death row prisoners for decades before <i>State v. Davis</i>, 2011-Ohio-5028, this argument is disingenuous.</p>

	General Merit Brief, p. 27.	
AG4	Death row inmates have “broader access” to testing, which will result in more appeals. Attorney General Merit Brief, p. 28.	There is simply no basis for this assertion. One of the acceptance criteria for an application for postconviction DNA testing is that the results of that testing could be outcome determinative. R.C. 2953.74(C)(5). The definition of outcome determinative is contained in R.C. 2953.71(L). An inmate files an application for postconviction DNA testing asserting how DNA testing would be outcome determinative. The statute makes clear when an appeal can take place. Additionally, the statute states when a subsequent application is barred. Moreover, principles of res judicata are still applicable to DNA applications and appeals. However, nothing about which outcome determinative “theory” a death-sentenced inmate pursues creates more appeals.
AG5	Capital offenders are more likely to file multiple DNA applications in order to engage in delay and single-tiered discretionary review is less susceptible to delay. Attorney General Merit Brief, p. 28.	The only time that subsequent DNA applications have been permitted is when an acceptance criteria changes. For example, the change in outcome determinative from Senate Bill 11 to Senate Bill 262 (<i>State v. Ayers</i> , 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654 (8th Dist.)) or the change in definitive DNA test from Senate Bill 262 to Senate Bill 77. <i>Noling</i> , 136 Ohio St. 3d 163, 2013-Ohio-1764, 992 N.E.2d 1095. The Legislature already addressed the concern of multiple applications without a change in the acceptance criteria with R.C. 2953.72(A)(7). Additionally, as noted by the Prosecutor’s Merit Brief, by the State’s own tracking, oftentimes courts grant testing or the State consents to testing. There have only been three death row inmates that have appealed DNA testing denials in state court. Prosecutor’s Merit Brief, p. 7. ¹⁸
AG6	This appellate process promotes consistency in the application of the death penalty. Attorney General Merit Brief, p. 29.	The current structure actually promotes inconsistency in the application and enforcement of Ohio’s DNA testing statute. It is the consistent application of Ohio DNA testing statute that is at issue here. Not, as the State contends, the proportional application of the death penalty. For example, a death row inmate was awarded postconviction DNA testing of fired shell casings in Montgomery County and Mr. Noling’s request was denied. ¹⁹

¹⁸ See also, <http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Law-Enforcement/Capital-Crimes-Annual-Reports/2014-Capital-Crimes-Annual-Report> (accessed Feb. 1, 2016), pp. 14-21.

¹⁹ See, <http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Law-Enforcement/Capital-Crimes-Annual-Reports/2014-Capital-Crimes-Annual-Report> (accessed Feb. 1, 2016), pp. 16-17.

Ohio's postconviction DNA testing statute was to provide an avenue for those wrongfully convicted to access DNA testing in order to assist in demonstrating actual innocence along with all other available admissible evidence. This is in line with the ultimate goal of our justice system, to prevent the conviction of the innocent:

Judge Learned Hand once famously observed that “[o]ur procedure has been always haunted by the ghost of the innocent man.” *United States v. Garsson* (S.D.N.Y 1923), 291 F. 646, 649. But he then concluded that “[i]t is an unreal dream.” *Id.* Unfortunately, more recent cases — particularly those involving DNA exoneration even with eyewitness testimony — have brought this ghost back to the justice system's consciousness. A jury found Emerick guilty, and we appreciate the frustration and even anguish that the apparent lack of finality engenders in law enforcement and, especially, the victims' families. However, we believe the legislature and the courts, while perhaps in most cases not able to be 100% certain of guilt or innocence, have established procedures to be followed regarding biological evidence to approach the “ultimate objective” that “the guilty be convicted and the innocent go free.” *Herring, supra.*

State v. Emerick, 2d Dist. Montgomery No. 24215, 2011-Ohio-5543, ¶ 59; *see also State v. Craig*, 9th Dist. Summit No. 24580, 2010-Ohio-1169, ¶ 45-48, (Belfance, J., concurring.). With these goals and concerns in mind, the denial of appellate process to those sentenced to death when it is provided to all others whose applications for postconviction DNA testing has been denied cannot survive a rational basis review.

As the Legislature has afforded a right to appeal the denial of an application for postconviction DNA testing, it violates the Equal Protection Clause when that right to appeal is granted to some and arbitrarily denied to others. *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), citing *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). Here, the Legislature's granting of a mandatory appeal to non-capital offenders while denying that right to those sentenced to death is arbitrary and without any rational basis. Therefore, R.C. 2953.73(E)(1) violates the Equal Protection Clause of both the U.S. and Ohio Constitutions.

2. Due Process

The Attorney General notes that Mr. Noling's arguments that R.C. 2953.71(E)(1) violates due process, repeat his arguments that the statute also violates equal protection. This is because a violation of equal protection can implicate violations of due process safeguards as well. For example, the United States Supreme Court decisions in *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) and *Douglas v. California*, 372 U.S. 353, 358, 83 S.Ct. 814, 9 L. Ed.2d 811 (1963) rest on the Due Process Clause as well as the Equal Protection Clause. See *Evitts v. Lucey*, 469 U.S. 387, 404, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (commenting that the denial of free transcripts at issue in *Griffin* "violated due process principles because is decided the appeal in a way that was arbitrary with respect to the issues involved"); *Ross v. Moffitt*, 417 U.S. 600, 608-09, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) ("The precise rationale for the *Griffin Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of the Amendment."); *Dickerson v. Latessa*, 872 F.2d 1116, 1120 (1st Cir.1989) (stating that *Griffin* and *Douglas* "appear not only to implicate equal protection concerns but also due process safeguards as well"). While the Attorney General is correct when it points out that Mr. Noling only mentions *Griffin* and *Douglas* in his equal protection argument, the case law suggests that, under certain facts, these claims are intertwined. See Attorney General's Merit Brief, p. 19. In Mr. Noling's case, the violation of equal protection also serves to violate due process and thus, the analyses are necessarily intertwined.

The arguments from the Attorney General and Prosecutor with respect to equal protection and due process are similarly intertwined. And, much like the Attorney General's and Prosecutor's arguments with respect to R.C. 2953.73(E)(1) and whether it violates equal

protection, the arguments with respect to R.C. 2953.73(E)(1) and whether it violates due process also miss the point. The Attorney General argues that there is no constitutional right to appeal, that the right to appeal is not essential to due process, and that postconviction review is not a constitutional right. Attorney General's Merit Brief, p. 15; *see also* Prosecutor's Merit Brief, p. 9. Both the Attorney General and the Prosecutor would very much like for the question to be whether a death-sentenced offender, whose application for postconviction DNA testing has been denied, is entitled to an appeal. However, that question has been settled by the Legislature. The Legislature has answered yes—all offenders whose applications for postconviction DNA testing have been denied under the statute are entitled to appeal. The question presented here is whether the appellate process that has been provided comports with the Constitution and due process. It does not. Noling's Merit Brief, pp. 37-46.

Both the Attorney General and the Prosecutor make much of the fact that a convicted person is not entitled to counsel in a collateral attack on his or her conviction. Attorney General's Merit Brief, p. 16; Prosecutor's Merit Brief, p. 9, 18-19. However, the Legislature has not provided for the appointment of counsel to either capital offenders or non-capital offenders for any aspect of trying to obtain postconviction DNA testing. Therefore, the right to counsel in these cases is not at issue.

The Attorney General argues that due process is designed to ensure a fair trial and that due process provided in *Griffin* and *Douglas* does not extend to postconviction. Attorney General's Merit Brief, p. 13, 16. But the Attorney General does acknowledge that there is a limited due process interest in postconviction relief. *Id.* at p. 14. And both the Attorney General and the Prosecutor point out that there is no constitutional right to postconviction DNA testing, and cite to *DA's Office v. Osborne*, 557 U.S. 52, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).

Attorney General's Merit Brief, p. 14; Prosecutor's Merit Brief, p. 10, 19. *Osbourne* denies a substantive due process right to postconviction DNA testing. However, *Osbourne* left open the question as to whether there is a procedural due process right. *Osbourne*, 557 U.S. at 2319 (States are afforded great flexibility in crafting their post-conviction relief process and a federal court may only "upset a State's post-conviction relief procedures [...] if they are fundamentally inadequate to vindicate the substantive rights provided."); *Skinner v. Switzer*, 562 U.S. 521, 524, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011). That question is answered in the affirmative in *Skinner*, where the petitioner challenged Texas's postconviction DNA testing statute "as construed" by the Texas Courts as denying him procedural due process. *Skinner*, 562 U.S. at 530. The Court found that the federal courts did have subject matter jurisdiction over Skinner's complaint and that his claims were cognizable under 42 U.S.C. § 1983. *Id.* at 522-3, 531. Specifically, the Court held that there was federal jurisdiction over a defendant's challenge to the adequacy of state-law procedures for postconviction DNA testing. *Id.* at 532, citing *In re Smith*, 349 Fed. Appx. 12, 18 (6th Cir.2009). Following *Skinner*, a federal district court in Pennsylvania found that trial judge's use of Grier's confession as an absolute prohibition on access to DNA evidence was fundamentally unfair and demonstrated that the procedures afforded him by the state court were fundamentally inadequate and violated his right to procedural due process. *Grier v. Klem*, 2011 U.S. Dist. LEXIS 124053, 2011 WL 4971925 (W.D. Pa. Sept. 19, 2011).

The Attorney General also asserts that because Ohio's postconviction DNA testing statute is better than those in other states, that Mr. Noling and other Ohio inmates that have been sentenced to death have been provided with more than enough Due Process. Attorney General's Merit Brief, p. 13 and 19. Again, the question is whether Ohio's postconviction DNA testing

statute, as written by the legislature, comports with due process. The Ohio Legislature crafted a statute that provided more access to postconviction DNA testing by, for example, not imposing time limits on when testing could be requested, than some other states. However, it does not follow that this means that the right to appeal provided to applicants comports with due process. The Attorney General's assertion is that, simply by writing the statute, the legislature has provided death row inmates more than enough due process. This does not track with the case law or the Attorney General's prior statements that there is a due process right—albeit somewhat limited—in postconviction relief. *Skinner*, 562 U.S. at 532; *Griffin*, 351 U.S. at syllabus; *Sexton v. Barry*, 233 F.2d 220, 224 (6th Cir.1956); Attorney General's Merit Brief, p. 14. The Attorney General's argument is flawed. The inclusion of statutes from other states shows that, while other states may, unlike Ohio, provide limited appellate or provide the same appellate review just in different appellate courts, they do not differentiate between capital and non-capital offenders.

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

Both the Attorney General and the Prosecutor dismiss Mr. Noling's claim that R.C. 2953.73(E)(1) results in the arbitrary and capricious application of the death penalty. Attorney General's Merit Brief, p. 31-2; Prosecutor's Merit Brief, p. 19-21. However, adequate appellate review can lead to exonerative DNA test results. *See* Noling Merit Brief, pp.28-31. Similarly, it could lead to results that might not exonerate the offender from culpability, but might exonerate the offender from eligibility to be sentenced to death. When that is not provided to those sentenced to death in Ohio when their applications for postconviction DNA testing are denied, it can only follow that the application of the death penalty will be arbitrary and capricious. Additionally, the Legislature has shown that it deems appellate review necessary, but the

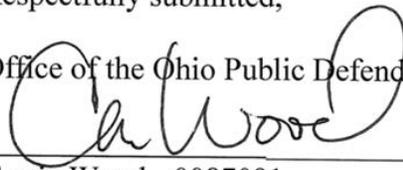
jurisdictional appeal provided to those sentenced to death in Ohio is constitutionally inadequate. See Sections A.1 and A.2., *supra*. Therefore, R.C. 2953.73(E)(1) violates the Eighth Amendment.

CONCLUSION

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

Respectfully submitted,

Office of the Ohio Public Defender



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief of Appellant Tyrone Noling** was forwarded by first class U.S. mail to Pamela J. Holder, Assistant Prosecuting Attorney, 241 South Chestnut Street, Ravenna, Ohio 44266, and to Mike DeWine, Ohio Attorney General, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215 on this 3rd day of February 2016.



Carrie Wood (0087091)
Assistant State Public Defender

Co-Counsel for Tyrone Noling

#459303

IN THE SUPREME COURT OF OHIO

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

APPENDIX TO

REPLY BRIEF OF
APPELLANT TYRONE NOLING

42 USCS § 1983

Current through PL 114-114, approved 12/28/15, with gaps of PL's 114-94, 114-95, and 114-113

United States Code Service - Titles 1 through 54 > TITLE 42. THE PUBLIC HEALTH AND WELFARE
> CHAPTER 21. CIVIL RIGHTS > GENERALLY

Notice

▶ *Part 1 of 13.* You are viewing a very large document that has been divided into parts.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

History

(R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284; Oct. 19, 1996, P.L. 104-317, Title III, § 309(c), 110 Stat. 3853.)

UNITED STATES CODE SERVICE

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Ohio App. Rule 3

Rules current through rule amendments received through November 22, 2015

Ohio Court Rules > Ohio Rules Of Appellate Procedure > Title II. Appeals from judgments and orders of court of record

Rule 3. Appeal as of right -- How taken

- (A) **Filing the notice of appeal.** An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by leave of court shall be taken in the manner prescribed by Rule 5.
- (B) **Joint or consolidated appeals.** If two or more persons are entitled to appeal from a judgment or order of a trial court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.
- (C) **Cross appeal.**
- (1) **Cross appeal required.** A person who intends to defend a judgment or order against an appeal taken by an appellant and who also seeks to change the judgment or order or, in the event the judgment or order may be reversed or modified, an interlocutory ruling merged into the judgment or order, shall file a notice of cross appeal within the time allowed by App.R. 4.
- (2) **Cross appeal and cross-assignment of error not required.** A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal or to raise a cross-assignment of error.
- (D) **Content of the notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. The title of the case shall be the same as in the trial court with the designation of the appellant added, as appropriate. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.
- (E) **Service of the notice of appeal.** The clerk of the trial court shall serve notice of the filing of a notice of appeal and, where required by local rule, a docketing statement, by mailing, or by facsimile transmission, a copy to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the party at the party's last known address. The clerk shall mail or otherwise forward a copy of the notice of appeal and of the docket entries, together with a copy of all filings by appellant pursuant to App.R. 9(B), to the clerk of the court of appeals named in the notice. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal.

Service shall be sufficient notwithstanding the death of a party or a party's counsel. The clerk shall note in the docket the names of the parties served, the date served, and the means of service.

(F) Amendment of the notice of appeal.

(1) **When leave required.** A party may amend a notice of appeal without leave if the time to appeal from the order that was the subject of the initial notice of appeal has not yet lapsed under *App.R. 4*. Thereafter, the court of appeals within its discretion and upon such terms as are just may allow the amendment of a notice of appeal, so long as the amendment does not seek to appeal from a trial court order beyond the time requirements of *App.R. 4*.

(2) **Where filed.**

An amended notice of appeal shall be filed in both the trial court and the court of appeals.

(G) Docketing statement.

(1) If a court of appeals has adopted an accelerated calendar by local rule pursuant to Rule 11.1, the appellant shall file a docketing statement with the Clerk of the trial court with the notice of appeal. (See Form 2, Appendix of Forms.)

The purpose of the docketing statement is to determine whether an appeal will be assigned to the accelerated or the regular calendar.

A case may be assigned to the accelerated calendar if any of the following apply:

- (a) No transcript is required (e.g., summary judgment or judgment on the pleadings);
- (b) The length of the transcript is such that its preparation time will not be a source of delay;
- (c) An agreed statement is submitted in lieu of the record;
- (d) The record was made in an administrative hearing and filed with the trial court;
- (e) All parties to the appeal approve an assignment of the appeal to the accelerated calendar; or
- (f) The case has been designated by local rule for the accelerated calendar.

The court of appeals by local rule may assign a case to the accelerated calendar at any stage of the proceeding. The court of appeals may provide by local rule for an oral hearing before a full panel in order to assist it in determining whether the appeal should be assigned to the accelerated calendar.

Upon motion of appellant or appellee for a procedural order pursuant to *App.R. 15(B)* filed within seven days after the notice of appeal is filed with the clerk of the trial court, a case may be removed for good cause from the accelerated calendar and assigned to the regular calendar. Demonstration of a unique issue of law which will be of substantial precedential value in the determination of similar cases will ordinarily be good cause for transfer to the regular calendar.

- (2) If the appeal is expedited under App.R. 11.2, the appellant shall file a docketing statement with the clerk of the trial court with the notice of appeal indicating the category of case under App.R. 11.2 and the need for priority disposition.

History

Amended, eff 7-1-72; 7-1-77; 7-1-82; 7-1-91; 7-1-92; 7-1-94; 7-1-13; 7-1-15.

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Ohio App. Rule 9

Rules current through rule amendments received through November 22, 2015

Ohio Court Rules > Ohio Rules Of Appellate Procedure > Title II. Appeals from judgments and orders of court of record

Rule 9. The record on appeal

(A) Composition of the record on appeal; recording of proceedings.

- (1) The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases.
- (2) The trial court shall ensure that all proceedings of record are recorded by a reliable method, which may include a stenographic/shorthand reporter, audio-recording device, and/or video-recording device. The selection of the method in each case is in the sound discretion of the trial court, except that in all capital cases the proceedings shall be recorded by a stenographic/shorthand reporter in addition to any other recording device the trial court wishes to employ.

(B) The transcript of proceedings; discretion of trial court to select transcriber; duty of appellant to order; notice to appellee if partial transcript is ordered.

- (1) Except as provided in App.R. 11.2(B)(3)(b), it is the obligation of the appellant to ensure that the proceedings the appellant considers necessary for inclusion in the record, however those proceedings were recorded, are transcribed in a form that meets the specifications of App. R. 9(B)(6).
- (2) Any stenographic/shorthand reporter selected by the trial court to record the proceedings may also serve as the official transcriber of those proceedings without prior trial court approval. Otherwise, the transcriber of the proceedings must be approved by the trial court. A party may move to appoint a particular transcriber or the trial court may appoint a transcriber sua sponte; in either case, the selection of the transcriber is within the sound discretion of the trial court, so long as the trial court has a reasonable basis for determining that the transcriber has the necessary qualifications and training to produce a reliable transcript that conforms to the requirements of App.R. 9(B)(6).
- (3) The appellant shall order the transcript in writing and shall file a copy of the transcript order with the clerk of the trial court.
- (4) If no recording was made, or when a recording was made but is no longer available for transcription, App.R. 9(C) or 9(D) may be utilized. If the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion.
- (5) Unless the entire transcript of proceedings is to be included in the record, the appellant shall file with the notice of appeal a statement, as follows:
 - (a) If the proceedings were recorded by a stenographic/shorthand reporter, the statement shall list the assignments of error the appellant intends to present on the appeal and shall

either describe the parts of the transcript that the appellant intends to include in the record or shall indicate that the appellant believes that no transcript is necessary.

- (b) If the proceedings were not recorded by any means, or if the proceedings were recorded by non-stenographic means but the recording is no longer available for transcription, or if the stenographic record has become unavailable, then the statement shall list the assignments of error the appellant intends to present on appeal and shall indicate that a statement under *App.R. 9(C)* or *9(D)* will be submitted.

The appellant shall file this statement with the clerk of the trial court and serve the statement on the appellee.

If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order transcription of the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant to do so. At the time of ordering, the party ordering the transcript of proceedings shall arrange for the payment to the transcriber of the cost of the transcript of proceedings.

- (6) A transcript of proceedings under this rule shall be in the following form:
- (a) The transcript of proceedings shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;
 - (b) The transcript of proceedings shall be firmly bound on the left side;
 - (c) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;
 - (d) The transcript of proceedings shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;
 - (e) An index of witnesses shall be included in the front of the transcript of proceedings and shall contain page and line references to direct, cross, re-direct, and re-cross examination;
 - (f) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;
 - (g) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits

offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;

- (h) No volume of a transcript of proceedings shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening statements, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length;
 - (i) An electronic copy of the written transcript of proceedings should be included if it is available;
 - (j) The transcriber shall certify the transcript of proceedings as correct and shall state whether it is a complete or partial transcript of proceedings, and, if partial, indicate the parts included and the parts excluded.
- (7) The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court under App.R. 10(A).

(C) Statement of the evidence or proceedings when no recording was made, when the transcript of proceedings is unavailable, or when a recording was made but is no longer available for transcription.

- (1) If no recording of the proceedings was made, if a transcript is unavailable, or if a recording was made but is no longer available for transcription, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to App.R. 10 and the appellee may serve on the appellant objections or propose amendments to the statement within ten days after service of the appellant's statement; these time periods may be extended by the court of appeals for good cause. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.
- (2) In cases initially heard in the trial court by a magistrate, a party may use a statement under this division in lieu of a transcript if the error assigned on appeal relates solely to a legal conclusion. If any part of the error assigned on appeal relates to a factual finding, the record on appeal shall include a transcript or affidavit previously filed with the trial court as set forth in Civ.R. 53(D)(3)(b)(iii), Juv.R. 40(D)(3)(b)(iii), and Crim.R. 19(D)(3)(b)(iii).

(D) Agreed statement as the record on appeal.

- (1) In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record under App.R. 10, may prepare and sign a statement of the case showing how the issues raised in the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or

sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised in the appeal, shall be approved by the trial court prior to the time for transmission of the record under *App.R. 10* and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by *App.R. 10*.

- (2) In cases initially heard in the trial court by a magistrate, a party may use a statement under this division in lieu of a transcript if the error assigned on appeal relates to a legal conclusion. If the error assigned on appeal relates to a factual finding, the record on appeal shall include a transcript or affidavit previously filed with the trial court as set forth in Civ.R. 53(D)(3)(b)(iii), *Juv.R. 40(D)(3)(b)(iii)*, and *Crim.R. 19(D)(3)(b)(iii)*.
- (E) **Correction or modification of the record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the trial court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified, filed, and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

History

Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92; 7-1-11; 7-1-13; 7-1-14; 7-1-15.

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Ohio S. Ct. Prac. R 7.01

Rules current through rule amendments received through November 22, 2015

Ohio Court Rules > Rules Of Practice Of The Supreme Court Of Ohio > Section 7. Jurisdictional appeals

S.Ct. Prac. R. 7.01. Institution of jurisdictional appeal

(A) Perfection of appeal.

(1) Time to file and documents required

(a)

- (i)** To perfect a jurisdictional appeal from a court of appeals to the Supreme Court as defined by S.Ct.Prac.R. 5.02(A), the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed. The date the court of appeals filed its judgment entry for journalization with its clerk, in accordance with App.R. 22, shall be considered the date of entry of the judgment being appealed.
- (ii)** Except as provided by S.Ct.Prac.R. 7.01(A)(3), the appellant shall also file a memorandum in support of jurisdiction, in accordance with S.Ct.Prac.R. 7.02, at the time the notice of appeal is filed.
- (b)** Except as provided in divisions (A)(2), (3), (4), (5), and (6) of this rule, the time period designated in this rule for filing a notice of appeal and memorandum in support of jurisdiction is mandatory, and the appellant's failure to file within this time period shall divest the Supreme Court of jurisdiction to hear the appeal. The Clerk of the Supreme Court shall refuse to file a notice of appeal or a memorandum in support of jurisdiction that is received for filing after this time period has passed.

(2) Subsequent notices of appeal and cross-appeal.

- (a)** If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal or cross-appeal in the Supreme Court within the time prescribed by division (A)(1) of this rule or ten days after the first notice of appeal was filed, whichever is later.
- (b)** A notice of appeal shall be designated and treated as a notice of cross-appeal if both of the following requirements are met:
 - (i)** It is filed after the original notice of appeal was filed in the case;
 - (ii)** It is filed by a party against whom the original notice of appeal was filed.
- (c)** If a notice of cross-appeal is filed, a combined memorandum both in response to appellant/cross-appellee's memorandum and in support of jurisdiction for the cross-appeal shall be filed by the deadline imposed in S.Ct.Prac.R. 7.05.

(3) Motion for stay in advance of filing a memorandum in support of jurisdiction.

- (a)** In a jurisdictional appeal, if the appellant seeks from the Supreme Court an immediate stay of the court of appeals' judgment that is being appealed, the appellant may file a

notice of appeal in the Supreme Court without an accompanying memorandum in support of jurisdiction, provided both of the following conditions are satisfied:

- (i) A motion for stay of the court of appeals' judgment is filed with the notice of appeal;
 - (ii) A copy of the court of appeals' opinion and judgment entry being appealed is attached to the motion for stay.
- (b) If pursuant to S.Ct.Prac.R. 7.01(A)(3)(a) a memorandum in support of jurisdiction is not filed with the notice of appeal, then a memorandum in support of jurisdiction shall be filed no later than forty-five days from the date of the entry of the court of appeals' judgment being appealed. The Supreme Court will dismiss the appeal if the memorandum in support of jurisdiction is not timely filed pursuant to this provision.

(4) Motion for a delayed appeal in felony cases

- (a) In a felony case, when the time has expired for filing a notice of appeal in the Supreme Court, the appellant may file a delayed appeal by filing a notice of appeal and a motion for delayed appeal that complies with the following requirements:
- (i) The motion shall state the date of entry of the judgment being appealed and the reasons for the delay;
 - (ii) Facts supporting the motion shall be set forth in an affidavit;
 - (iii) A copy of the court of appeals' opinion and the judgment entry being appealed shall be attached to the motion.
- (b) A memorandum in support of jurisdiction shall not be filed at the time a motion for delayed appeal is filed. If the Supreme Court grants a motion for delayed appeal, the appellant shall file a memorandum in support of jurisdiction within thirty days after the motion for delayed appeal is granted. If a memorandum in support of jurisdiction is not timely filed after a motion for delayed appeal has been granted, the Supreme Court will dismiss the appeal.
- (c) The provision for delayed appeal does not apply to appeals involving postconviction relief or appeals brought pursuant to App.R. 26(B). The Clerk shall refuse to file motions for delayed appeal involving postconviction relief or App.R. 26(B).

(5) Effect of a timely filed application for reconsideration with court of appeals

- (a) When a party timely files an application for reconsideration in the court of appeals pursuant to App.R. 26(A)(1), the time for filing a notice of appeal from the court of appeals' entry of judgment shall be tolled.
- (b) If a timely application for reconsideration is filed in the court of appeals, and the appellant seeks to appeal from the court of appeals' entry of judgment, the appellant shall file a notice of appeal within forty-five days of the court of appeals' decision denying the application for reconsideration, or if reconsideration is granted, from the subsequent entry of judgment.
- (c) To file an appeal from the court of appeals' opinion and judgment entry after the court of appeals has ruled on an application for reconsideration, the appellant shall comply

with the time frame imposed by S.Ct.Prac.R. 7.01(A)(5)(b) and shall include both of the following:

- (i) A notice of appeal that complies with the requirements of S.Ct.Prac.R. 7.01(B) and that indicates the date of the filing of the application for reconsideration, the date of the court of appeals' decision on the application for reconsideration, and the date of the court of appeals' opinion and judgment entry that is being appealed;
- (ii) A memorandum in support of jurisdiction that complies with the requirements of S.Ct.Prac.R. 7.02 and that also has attached a date-stamped copy of the court of appeals' decision denying the application for reconsideration, or if reconsideration is granted, the subsequent entry of judgment.

(6) Effect of en banc consideration by the court of appeals

- (a) When a party timely files an application for en banc consideration in the court of appeals pursuant to App.R. 26(A)(2), the time for filing a notice of appeal from the court of appeals' entry of judgment shall be tolled.
- (b) If a timely application for en banc consideration is filed in the court of appeals and the appellant seeks to appeal from the court of appeals' entry of judgment, the appellant shall file a notice of appeal within forty-five days of the court of appeals' decision denying the application for en banc consideration, or if en banc consideration is granted, the subsequent entry of judgment.
- (c) To file an appeal from the court of appeals' opinion and judgment entry after the court of appeals has ruled on an application for en banc consideration, the appellant shall comply with the time frame imposed by S.Ct.Prac.R. 7.01(A)(6)(b) and shall include both of the following:
 - (i) A notice of appeal that complies with the requirements of S.Ct.Prac.R. 7.01(B), and that indicates the date of the filing of the application for en banc consideration, the date of the court of appeals' decision on the application for en banc consideration, and the date of the court of appeals' opinion and judgment entry that is being appealed;
 - (ii) A memorandum in support of jurisdiction that complies with the requirements of S.Ct.Prac.R. 7.02, and that also has attached a date-stamped copy of the court of appeals' decision denying the application for en banc consideration, or if en banc consideration is granted, the subsequent entry of judgment.
- (d) If a timely sua sponte en banc consideration is initiated by the court of appeals but an appeal to the Supreme Court has not been perfected, the appellant may file a notice of appeal within forty-five days of the court of appeals' final en banc decision.
- (e) To file an appeal from the court of appeals' opinion and judgment entry after the court of appeals completes the sua sponte en banc consideration process, the appellant shall comply with the time frame imposed by S.Ct.Prac.R. 7.01(A)(6)(d) and shall include both of the following:
 - (i) A notice of appeal that complies with the requirements of S.Ct.Prac.R. 7.01(B) and that indicates the date of the decision of the court of appeals initiating the sua

sua sponte en banc consideration, the date of the court of appeals' final decision on the sua sponte en banc consideration, and the date of the court of appeals' opinion and judgment entry that is being appealed;

- (ii) A memorandum in support of jurisdiction that complies with the requirements of S.Ct.Prac.R. 7.02 and that also has attached a date-stamped copy of the court of appeals' decision initiating the sua sponte en banc consideration process and a date-stamped copy of the court of appeals' final en banc consideration decision.
 - (f) If a party perfected a jurisdictional appeal with the Supreme Court in accordance with S.Ct.Prac.R. 7.01(A), and the court of appeals subsequently initiates timely sua sponte en banc consideration, the party shall file a notice with the Supreme Court that an en banc decision is forthcoming from the court of appeals. The Supreme Court will stay consideration of the jurisdictional memoranda until after the court of appeals' en banc decision.
- (B) Contents of notice of appeal.** *[See Appendix C for a sample notice of appeal from a court of appeals.]*
- (1) The notice of appeal for a jurisdictional appeal shall contain all of the following:
 - (a) The name of the court of appeals whose judgment is being appealed;
 - (b) The case name and number assigned to the case by the court of appeals;
 - (c) The date of the entry of the judgment being appealed;
 - (d) A statement that one or more of the following are applicable:
 - (i) The case raises a substantial constitutional question;
 - (ii) The case involves a felony;
 - (iii) The case is one of public or great general interest;
 - (iv) The case involves termination of parental rights or adoption of a minor child, or both;
 - (v) The case is an appeal of a court of appeals' determination under App.R. 26(B);
 - (vi) The case involves death-penalty postconviction proceedings.
 - (2) In a jurisdictional appeal, if a party has timely moved the court of appeals to certify a conflict under App.R. 25, the notice of appeal shall be accompanied by a notice of pending motion to certify a conflict, in accordance with S.Ct.Prac.R. 7.07(A), stating that a motion to certify a conflict is pending with the court of appeals.
- (C) Notice to the court of appeals.** The Clerk of the Supreme Court shall send a copy of any notice of appeal or cross-appeal to the clerk of the court of appeals whose judgment is being appealed.
- (D) Jurisdiction of court of appeals after appeal to Supreme Court is perfected.**
- (1) After an appeal is perfected from a court of appeals to the Supreme Court, the court of appeals is divested of jurisdiction, except to take action in aid of the appeal, to rule on an

application timely filed with the court of appeals pursuant to *App.R. 26*, or to rule on a motion to certify a conflict pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution.

- (2) In all appeals from a court of appeals, the court of appeals retains jurisdiction to appoint counsel to represent indigent parties before the Supreme Court when a judgment of the court of appeals is being defended by a defendant or when the Supreme Court has ordered that counsel be appointed in a particular case.

History

Eff 1-1-94. Amended, eff 4-1-96; 4-1-00; 6-1-00; 7-1-04; 8-1-04; 1-1-08; 1-1-10; 7-1-10; 10-1-11; amended 12-5-12, effective 1-1-13.

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OH S.CT. PRAC. R. 7.02

Rules current through rule amendments received through November 22, 2015

Ohio Court Rules > Rules Of Practice Of The Supreme Court Of Ohio > Section 7. Jurisdictional appeals

S.Ct. Prac. R. 7.02. Memorandum in support of jurisdiction

[See Appendix D following these rules for a sample memorandum.]

- (A) **Filing.** In a jurisdictional appeal, unless otherwise provided in S.Ct.Prac.R. 7.01, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal.
- (B) **Page limitation.**
- (1) Except in postconviction death-penalty cases, a memorandum in support of jurisdiction shall not exceed fifteen numbered pages, exclusive of the table of contents and the certificate of service.
 - (2) In a postconviction death-penalty case there is no page limit for the memorandum in support of jurisdiction.
- (C) **Parts of the memorandum.** A memorandum in support of jurisdiction shall contain all of the following:
- (1) A table of contents, which shall include numbered propositions of law arranged in order;
 - (2) A thorough explanation of why a substantial constitutional question is involved, why the case is of public or great general interest, or, in a felony case, why leave to appeal should be granted;
 - (3) A statement of the case and facts;
 - (4) A brief and concise argument in support of each proposition of law.
- (D) **Required Attachments.**
- (1) A date-stamped copy of the court of appeals' opinion and judgment entry being appealed shall accompany the memorandum in support of jurisdiction. If a delayed appeal was granted, a date-stamped copy of the court of appeals' opinion and judgment entry is not required to accompany the memorandum in support of jurisdiction. For purposes of this rule, a date-stamped copy of the court of appeals' judgment entry shall mean a copy bearing the file stamp of the clerk of the court of appeals and reflecting the date on which the court of appeals filed its judgment entry for journalization with its clerk under App.R. 22.
 - (2) In postconviction death-penalty cases, the appellant shall also attach the findings of fact and conclusions of law issued by the trial court or a notice that no findings of fact or conclusions of law were issued by the trial court.
 - (3) The appellant may also attach any other judgment entries or opinions issued in the case, if relevant to the appeal. The memorandum shall not include any other attachments.

(E) Refusal to file.

Except as otherwise provided in S.Ct.Prac.R. 7.01(A), if the appellant does not tender a memorandum in support of jurisdiction for timely filing along with the notice of appeal, the Clerk of the Supreme Court shall refuse to file the notice of appeal.

History

Eff 6-1-94. Amended, eff 4-1-96; 4-1-00; 4-1-02; 7-1-04; 1-1-08; 1-1-10; amended 12-5-12, effective 1-1-13; amended 12-9-14, effective 1-1-15.

OHIO RULES OF COURT SERVICE

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