

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff,

-v-

TYRONE NOLING,

Defendant.

: CASE NO. 2011-0778  
:  
: On Appeal from the Portage  
: County Court of Common Pleas  
: Case No. 95-CR-220  
:  
: Pursuant to R.C. § 2953.73(E)(1)  
:  
: **This is a capital case.**

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Merit Brief of Appellant Tyrone Noling

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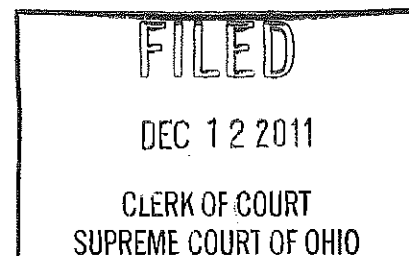
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## **I. INTRODUCTION**

This appeal concerns the trial court's failure to consider the Ohio General Assembly's (the "Legislature") change in the acceptance criteria for post-conviction DNA testing, which went into effect on July 6, 2010, when it denied Noling's Second Application for Post-Conviction DNA Testing ("Second Application"). In particular, this appeal addresses the trial court's erroneous conclusion that R.C. § 2953.72(A)(7) precludes consideration of an inmate's subsequent application for DNA testing, when (1) the inmate's prior application was rejected solely on the basis of the old acceptance criteria and (2) the new application was filed after the revised (and currently governing) acceptance criteria went into effect. In simplest terms, the trial court's conclusion was wrong because it failed to take into consideration the new statutory definition of "definitive DNA test," which was enacted in July 2010, and failed to recognize the critical link between "definitive DNA test" and R.C. § 2953.72(A)(7), the statutory provision on which it based its denial of Noling's Second Application. As this Brief will demonstrate, the plain language of Ohio's post-conviction DNA testing statute, as well as the well-documented legislative intent behind the statute, require reversal.

### **A. Overview of the development of Ohio's legislation on post-conviction DNA testing**

The Legislature established a statutory scheme for post-conviction DNA testing in Ohio. One of the key components of this statutory scheme was the development of "acceptance criteria," i.e., the baseline requirements that must be met in order for a court to grant an inmate's application for DNA testing. *See*, R.C. §§ 2953.72(A)(4), 2953.74. The first acceptance criteria was developed and implemented in 2003 as part of Senate Bill 11 ("SB11"). After being in force for just two years, it became clear that the

statutory scheme set up by SB11 was flawed. The flaws were evident by the fact that only 15 of the more than 300 Ohio inmates who applied for testing were ultimately given a chance to prove their innocence through DNA testing under SB11.

Recognizing these flaws, the Legislature enacted new acceptance criteria, effective as of July 11, 2006, under Senate Bill 262 ("SB262"). The major difference between SB11 and SB262 was that the Legislature made the acceptance criteria of SB262 easier to fulfill by redefining "outcome determinative." (SB262's revisions to the "outcome determinative" standard are discussed in detail in Section III.A.2 below.) The impact of the new criteria was immediately obvious, evidenced by the fact that many of the inmates who were rejected under SB11's acceptance criteria reapplied and were accepted under the criteria contained in SB262. *See, e.g. State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, *appeal denied*, 125 Ohio St.3d 1439, 2010-Ohio-2212; *State v. Prade*, Summit County Court of Common Pleas, Case No. CR:1998-02-0463, Order on Defendant's Application for Post-Conviction DNA Testing, J. Hunter, Sept. 23, 2010.

Under SB262, as courts began to interpret more provisions within Ohio's post-conviction DNA testing statute, new flaws surfaced. As a result, the Legislature again revised the acceptance criteria through Senate Bill 77 ("SB77"), enacted in July 2010.<sup>1</sup> Specifically, SB77 changed R.C. § 2953.74(A) of the acceptance criteria. (SB77's revisions to the statute are discussed in detail in Section III.A.3 below.) In brief, SB77

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<sup>1</sup> SB77 also contained provisions to ensure fair line up procedures, and incentives to ensure recording of confessions in order to prevent false confessions. Faulty eyewitness identification and false confessions are among the leading causes of wrongful convictions. <http://www.dispatch.com/content/stories/local/2010/04/06/DNA-defendant-testing-bill-signed-Ohio.html> (Nov. 26, 2011).

changed R.C. § 2953.74(A) by defining the term “definitive DNA test” in order to correct flawed interpretations of the Legislature’s intended meaning. R.C. § 2953.71(U).

**B. Overview of procedural history with respect to Tyrone Noling’s efforts to obtain post-conviction DNA testing**

Tyrone Noling first applied for DNA testing in 2008, under SB262. Tyrone Noling’s Application for Post-Conviction DNA Testing, September 25, 2008 (“First Application”) was denied solely on the basis of R.C. § 2953.74(A), which requires the court to reject an inmate’s application for DNA testing if there was a prior “definitive DNA test” on the same material “the inmate now seeks to have tested.” In December 2010, after the acceptance criteria had been changed through SB77, Noling reapplied for DNA testing (Second Application). Noling’s decision to file a second application was based on (1) the existence of new acceptance criteria and (2) the emergence of new information as to the possible identity of a strong alternate suspect in the crime for which Noling was sentenced to death.

In denying Noling’s Second Application, the trial court issued a one-page opinion concluding that, because the trial court had previously rejected Noling’s First Application, R.C. § 2953.72(A)(7) barred the court from considering Noling’s Second Application. As discussed in detail in Section III.B below, the trial court’s wooden reading of R.C. § 2953.72(A)(7) runs afoul of canons of statutory interpretation and construction. First, the trial court focused exclusively on R.C. § 2953.72(A)(7), wholly failing to consider the other related (and essential) sections of the Revised Code in opposition to this Court’s clear guidance. *See, State v. Buehler*, 2007-Ohio-1246, ¶ 29, 863 N.E.2d 124. Second, the trial court completely ignored the Legislature’s new acceptance criteria set forth in R.C. §§ 2953.74(A) and 2953.71(U). And third, the trial

court's denial conflicts with the DNA testing statute's fundamental purpose, which is problematic given that the Ohio Supreme Court has repeatedly held that a statute's fundamental purpose is the "paramount concern" in cases of statutory construction. *See, e.g., Buehler*, 2007-Ohio-1246, ¶ 29, *citing, State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, P21.

In addition to the legal errors underlying the trial court's denial of Noling's Second Application, its conclusion that R.C. § 2953.72(A)(7) prohibits a subsequent application for DNA testing—when the subsequent application was filed under new acceptance criteria—has far reaching implications. Simply put, the trial court's reading of the statute would bar potentially innocent inmates from having a court consider their reapplication under the acceptance criteria the Legislature intended. Indeed, this is not just a hypothetical concern, as illustrated by the recent cases of Robert McClendon and Raymond Towler. (*See*, Section III.A.2, fn. 8 below). Both McClendon and Towler gained access to post-conviction DNA testing, even without the new revelation of a strong alternate suspect, because the Legislature's change in the acceptance criteria permitted the filing of a second application. Unlike the present case, R.C. § 2953.72(A)(7) was not raised as a bar to McClendon or Towler's reapplication. Had this trial court's incorrect reading of R.C. § 2953.72(A)(7) been applied to either McClendon's or Towler's reapplication—two innocent men would still be sitting in prison, serving out life sentences. If the trial court's denial of Noling's application is upheld, potentially innocent inmates, previously barred under a flawed definition of "definitive DNA test," will languish in prison, or worse, on death row.



Tyrone Noling is on death row. The Legislature changed the acceptance criteria under which Noling's First Application for DNA testing was previously rejected, and Noling has applied and was improperly denied consideration by the trial court below. Ohio's governing law now mandates that Noling's application must be accepted or denied under the criteria of SB77. In other words, Noling's current application of post-conviction DNA testing should be decided on the merits.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

### **A. Procedural history**

For more than three years, Appellant Tyrone Noling has unsuccessfully sought DNA testing on a cigarette butt found outside the home of Bearnhardt and Cora Hartig. Noling filed his First Application for DNA testing, under SB262, on September 25, 2008. R.C. § 2953.74(A) requires the court to reject an inmate's application for DNA testing if there was a prior "definitive DNA test" on the same material "the inmate now seeks to have tested." Prior to 2010 amendments made by SB77, the lower courts set a high standard for definitive DNA test by failing to consider a number of factors that SB77 now requires the courts to consider. The trial court denied Noling's application, holding that prior testing was definitive under § 2953.74(A), thereby excluding him from eligibility for further testing under R.C. § 2953.72. Judgment Entry, March 11, 2009.

In December 2010, the acceptance criteria were changed through SB77, and Noling reapplied for DNA testing. Noling's decision to file a second application for post-conviction DNA testing was based on (1) the change in the acceptance criteria and (2) the emergence of new information as to the possible identity of a strong alternate suspect in the crime for which Noling was convicted. In denying Noling's Second

Application, the trial court issued a one-page opinion concluding that, because the trial court had previously rejected Noling's First Application, R.C. § 2953.72(A)(7) barred the court from considering Noling's Second Application. Judgment Entry/Order, March 28, 2011.

### **B. Statement of facts**

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

At the time of these murders, Noling was barely eighteen years old. He had left home and was staying at a house in Alliance, Ohio with four other youths, aged fourteen to twenty, including: Gary St. Clair, Butch Wolcott, Joseph Dalesandro, and Johnny Trandafir. Around this time, Noling committed two robberies (one with St. Clair) in the Trandafir's neighborhood in Alliance. (Tr. 949-50, 836-37.) The robberies in Alliance were of homes 1/10 of a mile from the Trandafir's house in Alliance. (Tr. 949-950, 1036.) In contrast, the Hartig murders were Atwater, which is in another county, and over a twenty minute drive away. During the second Alliance robbery, Noling accidentally fired his gun, after which he immediately checked on Mrs. Murphy's well-being. (Tr. 1370.) Noling's actions are wholly in opposite of the actions of the perpetrator in the Hartig murders.

It did not take long for the police to figure out who the perpetrators of the Alliance robberies were, and Noling—along with St. Clair, Dalesandro, and Wolcott—was arrested. (Tr. 1062.) At the time of their arrest for the robberies, detectives from the Portage County Sheriff's Office questioned the youths about the Hartig murders.

Initially, nothing came of the questioning. Noling and St. Clair pled guilty to the Alliance robberies and began serving time. Then two years after the Hartig's murders, in June of 1992, Ron Craig, an investigator from the Portage County Prosecutor's Office again began questioning the youths about the unsolved murders. (Tr. 877-78, 1095.) St. Clair, Wolcott, and Dalesandro now all gave statements inculcating Noling in the Hartig murders—Dalesandro in exchange for a plea deal and Wolcott in exchange for immunity. St. Clair was already serving a sentence for one of the Alliance robberies, and he also received a plea deal and avoided a death sentence. (Tr. 940.) After Noling's conviction, St. Clair, Wolcott, and Dalesandro said these statements were the product of lies, threats, and coercion—most of which was directed at them by Investigator Ron Craig. Second Application, Ex. H, December 28, 2010. Dalesandro gave some indication that this was going on at his June 1995 re-sentencing hearing.<sup>2</sup> However, after the State revoked his plea agreement, Dalesandro eventually decided to cooperate. (Tr. 1007-1020; 1071.); Court Exhibit 1.

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

Noling's trial began in January of 1996. The State offered the testimony of 24 witnesses but it was apparent that the State's real case against Noling was offered via his co-defendants. Wolcott, Dalesandro, and St. Clair were all called as prosecution witnesses. Wolcott and Dalesandro both gave testimony, albeit inconsistent, on

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<sup>2</sup> Dalesandro told the Court at his June 1995 re-sentencing: "They want to throw words in my mouth and I can't let them do that. I told them my story once. They want me to go in there, you know, and try to yell at me to say stuff and I ain't going to say nothing that ain't true, you know." Court Exhibit 1.

significant details that supported the State's theory of the case. Dalesandro and Wolcott testified that after the second Alliance robbery, all four drove to Atwater, Ohio where Noling chose a house to rob. (Tr. 842-43, 1047-50.) Dalesandro and Wolcott testified that once they were at the home of Bearnhardt and Cora Hartig, they waited in the car, while Noling and St. Clair went to the front door. (Tr. 846-47, 1050-52.) Dalesandro and Wolcott testified that, sometime later, Noling and St. Clair came running from the Hartig home and got back into Dalesandro's car. (Tr. 848, 1053.) Dalesandro testified that he smelled smoke coming from Noling's gun. (Tr. 1054.) And Wolcott testified that he saw the gun smoking. (Tr. 851.) They also testified that Noling admitted to the Hartig's murders. (Tr. 850-51.)

St. Clair, however, did not follow suit. He recanted his statement prior to trial. On the stand, and despite his plea agreement, St. Clair denied that they had ever gone to Atwater, let alone committed the murders. (Tr. 940, 961, 972.) The trial court granted the State's request to treat St. Clair as a hostile witness and impeached St. Clair via a complete reading of his prior incriminating statement. (Tr. 963, 968-88.) St. Clair maintained that investigators and his attorneys had coached him in giving the incriminating statement. (Tr. 996-1000.)

"Noling was not indicted until five years after the Hartigs' murders when a new local prosecutor took office. That new prosecutor pursued the cold murder case with suspicious vigor according to Noling's accusers [co-defendants], who have since recanted their stories and now claim that they only identified Noling as the murderer in the first place because they were threatened by the prosecutor. In addition to the identifications being potentially coerced, there is absolutely no physical evidence linking Noling to the

murders, and there are other viable suspects that the prosecutor chose not to investigate or did not know of at the time. Furthermore, that St. Clair switched courses before trial, deciding not to testify against Noling, gives rise to even more suspicion.” *Noling v. Bradshaw (In re Noling)*, 651 F.3d 573, 575-577 (6th Cir. Ohio 2011). No physical evidence links Noling to the murders. The only .25 caliber handgun Noling possessed is not the murder weapon. (See, e.g., Tr. 1240, 1241-43.) The Alliance robberies he committed were amateurish, sharing little in common with the Hartig murders other than the age of the victims.

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

Post-trial all of Noling’s co-defendants have recanted. As previously mentioned, St. Clair recanted his statement prior to trial and again on the witness stand. All three provided affidavits in support of a prior post-conviction petition that was denied. See, Second Application, Ex. H, Dec. 28, 2010. All three recounted how Portage County Investigator Ron Craig crafted their statements through lies, manipulation, and coercion. *Id.* For example, Wolcott, the youngest of the four boys, discussed Craig’s efforts to convince him that he had repressed memories and to keep his father away from the interrogations. *Id.*

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

In 2006, the *Plain Dealer* investigated Noling’s case, including accessing public records related to Noling’s case. That investigation turned up a number of documents pointing to alternative suspects. This also included police reports indicating the Hartigs were shot at their kitchen table with the perpetrator seated across from them (which indicate that either the Hartigs knew the perpetrator or that this crime was not committed

in the amateurish manner the State's witnesses testified to at trial); coercion and lying by various witnesses, and impeachment evidence materials that were either not turned over to Noling's counsel or that counsel possessed but failed to use to defend Noling. *See*, Noling's Reply to the State's Response to his Application for Leave to File a Motion for New Trial, p. 8, Feb. 23, 2011 ("Reply in Support of Application for Leave"). In addition, Noling obtained additional documents supporting one of the Hartigs' insurance agents as a viable alternative suspect. One agent owned a .25 Titan handgun (one of only four models that could have been the murder weapon), which he claimed he sold years prior to an unknown person. *Id.* at Ex. E. However, the Hartigs' other insurance agent, saw the gun only four years before the murders. *Id.* at Ex. F. When authorities requested that the insurance agent who owned the .25 Titan take a lie detector test, he refused. *Id.* at Ex. N.

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

Then, in 2009, Noling's counsel made a public records request for documents in his co-defendants' files. This request resulted in a number of additional, previously undisclosed documents. The records reveal suspicious activity related to a missing .25 caliber handgun. But, among the most important outcomes of these new documents was

support for the theory that Daniel Wilson was a strong alternate suspect in the Hartig murders. This evidence included police notes that reveal that Wilson's foster brother, Nathan Chesley, claimed in 1990 that "his brother" committed the Hartig murders. Second Application, Ex. J, Dec. 28, 2011. Noling obtained an affidavit from Chesley that confirms that he made the statements in reference to his foster brother Daniel Wilson.<sup>3</sup> *Id.*, Ex. K.

It is well-documented that Wilson had a history of home invasion and victimizing the elderly. *Wilson v. Mitchell*, 498 F.3d 491, 496 (6th Cir. 2007). And, Wilson lived a little over a mile away from the Hartig's Atwater, Ohio home. Wilson was sentenced to death for burning a woman alive in the trunk of her car. *Id.* As a result of his conviction in that case, Wilson's STR DNA profile is in CODIS.<sup>4</sup> (As discussed in Section II.A.2, the fact that Wilson's DNA is in CODIS is significant because it is available for comparison to any DNA profile obtained from the cigarette butt collected at the crime scene.)

The prosecution also withheld the results of a test of the cigarette butt found outside of the Hartig's home. That test failed to exclude Wilson as a contributor to the genetic material on this cigarette butt. DNA Application, Ex. I, Dec. 28, 2010. Neither

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<sup>3</sup> As reported in the *Plain Dealer*, "Nathan Chesley wants the world to know that an innocent man is sitting on Ohio's death row." Regina Brett, *Nathan Chesley needs to be heard in Tyrone Noling's death row case*, The Plain Dealer (Mar. 6, 2011). The article continues, "[i]t didn't bother Nathan that his foster brother had been executed in that June of 2009. He believed that Dan deserved to die for killing Bearnhardt and Cora Hartig. Nathan never forgot the day Dan told him that he had shot the elderly couple. *Id.* The *Plain Dealer* column goes on to provide a detailed account of Chesley's knowledge about the Hartig murders and Dan Wilson's responsibility therefore. *See, Id.*

<sup>4</sup> R.C. § 2907.01(B)(2). Daniel Wilson was executed on June 3, 2009. [http://www.dispatch.com/content/stories/local/2009/06/03/wilson\\_dies.html](http://www.dispatch.com/content/stories/local/2009/06/03/wilson_dies.html) (Nov. 26, 2011).

Noling nor his co-conspirators matched the DNA found on the cigarette butt. (Tr. 721.) However, when tested against a saliva sample taken from Wilson, the test **could not exclude Wilson as a possible match**. Second Application, Ex. I, Dec. 28, 2010. While the prosecution disclosed Noling's DNA results to counsel, the prosecution **withheld both** the fact that they tested Wilson against the cigarette butt and that the results of Wilson's test failed to exclude him.

In sum, the newly discovered evidence, not available to Noling at the time of his First Application for DNA testing, included police notes establishing Wilson as a strong alternate suspect and the test results of the cigarette butt in relation to Wilson. These facts have tremendous relevance to the present case since Noling is seeking to obtain DNA testing of the cigarette butt. A conclusive DNA match to Wilson, using DNA testing techniques not available in 1991, would have significant implications for the present case.

Based on the newly discovered evidence, Noling's attorneys filed a Motion for Leave to File a Motion for New Trial on June 21, 2010. Although the trial court denied this motion, this denial is currently on appeal. *State v. Noling*, No. 2011-P-00018 (Portage Ct. App.). For the purposes of the appeal before this Court, it is important to note that the trial court did not consider the information concerning Daniel Wilson in considering Noling's First Application for DNA testing.



### III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

**Proposition of Law: When a prior application for post-conviction DNA testing is rejected under the old acceptance criteria, an application for post-conviction DNA testing filed under the Legislature's new acceptance criteria must be considered rather than procedurally barred by R.C. § 2953.72(A)**

The trial erroneously concluded that it was precluded from considering Noling's Second Application because R.C. § 2953.72(A)(7) states that "[i]f the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance criteria described in Division (A)(4) of this section, the court will not accept or consider subsequent applications." Judgment Entry March 11, 2009. However, the trial court failed to consider SB77's change, made after Noling's First Application, to the acceptance criteria for post-conviction DNA testing.

The trial court's denial of Noling's Second Application for DNA testing on March 28, 2011 can only be understood through a close reading of its denial of Noling's First Application on March 11, 2009. Noling's First Application was denied under R.C. § 2953.74(A) alone. Entry March 11, 2009. Revised Code § 2953.74(A) provides that an application for DNA testing does not meet the acceptance criteria (and, therefore, will be denied) if there was a prior "definitive DNA test." In 2009, the trial court determined that the 1991 testing of the cigarette butt was a prior "definitive DNA test" and rejected Noling's First Application. *Id.* Noling's Second Application was denied based on R.C. § 2953.72(A)(7), providing that "[i]f the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance criteria described in Division (A)(4) of this section, the court will not accept or consider subsequent applications." Using this provision, the trial court held:

In this case Defendant Tyrone Noling submitted a properly filed application for post conviction DNA testing on September 25, 2008, the

Court rejected that application and the Defendant appealed to the Supreme Court. Therefore, as this is a statutory action, the Court must reject Defendant's second filing of the application for DNA testing based on Ohio Revised Code § 2953.72(A)(7).

Judgment Entry/Order March 28, 2010. The trial court's brief opinion failed to address: (1) the Legislature's revisions to the "acceptance criteria" subsequent to the denial of the First Application and (2) the essential connections between R.C. § 2953.72(A)(7) and related provisions of the DNA testing statute.

In the sections below, the language of the DNA testing statute and the history of the revisions to the statute are discussed in detail. When the plain language of the statute is considered together with the statutory revisions that occurred between Noling's first and Second Applications, it is clear that the trial court's application of R.C. § 2953.72(A)(7) was in error.

**A. Changes in Ohio's post-conviction DNA testing statute's acceptance criteria and their impact**

Ohio's DNA testing statute has undergone numerous revisions since 2003 when the first DNA testing bill was passed. A review of the specific statutory changes in regard to DNA testing is essential to illustrate the trial court's failure to properly apply the current "acceptance criteria" in its denial of Noling's Second Application.

**1. In 2003, Ohio's General Assembly passed Ohio's first post-conviction DNA testing bill, SB11**

In 2003, the Ohio General Assembly passed a DNA testing bill, commonly known as SB11, which afforded a one-year window for inmates to apply for DNA testing to prove their innocence through post-conviction DNA testing. SB11 was set to expire on October 29, 2004, but House Bill 525 extended the sunset provision in the original bill for an additional year. SB11 ultimately expired on October 29, 2005.

SB11, while well-intended, contained numerous substantive deficiencies. *See*, Second Application, Ex. C, Dec. 28, 2010. First, SB11 set forth the strictest standard for DNA testing of any state DNA testing bill in the United States. *See, Id.* at 3-7 (comparing Ohio's SB11 to DNA testing statutes from other states). As a result of this strict standard, it was very difficult for inmates to meet the testing criteria. Only 15 of the more than 300 Ohio inmates who applied for testing were ultimately given a chance to prove their innocence through DNA testing under SB11. *Id.*

Second, and perhaps most problematic, SB11 did not allow for inmates to take advantage of any of the new advances in DNA testing that have been developed in recent years. *Id.* at 8-12. This fact made SB11 a legal irony: the law purported to offer inmates a chance to prove their innocence through DNA testing, but it did not allow them to use the latest technologies or other tools which are necessary for the vast majority of post-conviction innocence cases. *Id.*

Another flaw in SB11 was the failure to allow inmates a chance to prove their innocence by making a comparison of the DNA from the crime scene to alternative suspects or to known felons in the FBI's CODIS database of DNA profiles. *Id.* at 12-14.

After the expiration of SB11, the many flaws that became glaringly visible in that law prompted the General Assembly to pass Ohio's new and improved DNA testing law, commonly referred to as SB262. SB262 is significantly different than SB11 in many important respects. Most relevant to the issue before this Court is SB262's change in the

acceptance criteria, specifically the outcome determinative standard found in R.C. § 2953.71(L).<sup>5</sup>

**2. In 2006, SB262 changed the acceptance criteria by redefining “outcome determinative” and making CODIS available for post-conviction DNA testing in Ohio**

Revised Code § 2953.74 sets out the acceptance criteria for post-conviction DNA testing. Among the determinations a trial court makes under the acceptance criteria, when deciding whether to grant or deny an application for post-conviction DNA testing, is whether that testing will be “outcome determinative.” R.C. §§ 2953.74(B) and (C). SB262 changed the language and application of the “outcome determinative” standard from its predecessor law, SB11, in several important ways. First, SB262, unlike SB11, offers an inmate several different tools and avenues with which to meet the standard. Specifically, an inmate can meet the standard and prove his innocence by matching the DNA from the crime scene to an alternative suspect, or by getting a “cold hit” to a felon whose DNA profile is in the FBI’s CODIS database. *See*, R.C. § 2953.74(E); *State v. Reynolds* (2nd District), 2009-Ohio-5532 at ¶22; *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, ¶ 31, 923 N.E.2d 654, *appeal denied*, 125 Ohio St.3d 1439, 2010-Ohio-2212; *See, also* DNA Application at Ex. C, pp. 12-14, Dec. 28, 2010 (explanation as to how this mechanism works in practice).

Any DNA profile recovered from the evidence should be submitted to the CODIS database. “CODIS is a database that contains the digital profiles of DNA from crime

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<sup>5</sup> SB262 also fixed the other problems that were apparent with SB11. Among other improvements, it allows inmates: (1) to use cutting edge, advanced testing to prove their innocence; and (2) to meet the outcome determinative standard by comparing the biological material at the crime scene to third parties or to known felons in the CODIS database. Unlike SB11, SB262 has no sunset provision. Thus, it is a permanent law.

scenes and convicted felons. Through CODIS, DNA profiles from convicted offenders can be linked to evidence from unsolved crimes and serial crimes.”<sup>6</sup> “The success of CODIS is demonstrated by the thousands of matches that have linked serial cases to each other and cases that have been solved by matching crime scene evidence to known convicted offenders.”

Most importantly, however, SB262 expressly lowered the “outcome determinative” standard from the rigid manner in which it had been defined in SB11. *State v. Ayers*, 2009-Ohio-6096, ¶26. This redefining of the “outcome determinative” language makes it easier for an inmate to obtain DNA testing under SB262’s acceptance criteria.

Prior to SB262, DNA testing was “outcome determinative” if “had the results of DNA testing been presented at the trial of the subject inmate . . . no reasonable factfinder would have found the inmate guilty of that offense . . .” Former R.C. § 2953.71(L). In 2006, the definition was changed through SB262 so that a DNA test was “outcome determinative” if “had the results of DNA testing been presented at the trial of the subject offender . . . there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense.” R.C. § 2953.71(L).

Former Attorney General Jim Petro explained the differences in the new “outcome determinative” standard in a brief that he filed in *State v. Emerick* in the Montgomery County Court of Common Pleas. Second Application, Ex. H, 12/28/2010. *Emerick* involved the denial of an application for DNA testing under SB262, filed after the inmate had been denied DNA testing by the trial court pursuant to the former, and

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<sup>6</sup> <http://www.ohioattorneygeneral.gov/Enforcement/BCI/Laboratory-Division> (Nov. 26, 2011).

more restrictive, “outcome determinative” standard of SB11. The former Attorney General explained the changes in the “outcome determinative” standard as follows:<sup>7</sup>

Under the former version of R.C. 2953.71(L) (SB11), “outcome determinative” meant that

had the results of DNA testing been presented at the trial of the subject inmate . . . no reasonable factfinder would have found the inmate guilty of that offense . . .

Under the new version of R.C. 2953.71(L), enacted by SB 262 in 2006, “outcome determinative” means that

had the results of DNA testing been presented at the trial of the subject inmate . . . there is a strong probability that no reasonable factfinder would have found the inmate guilty of that offense.

The former “outcome determinative” standard required a court to find that no reasonable factfinder would have found the inmate guilty of the offense in order to grant the DNA application. Under the new “outcome determinative” standard, a court need only find a strong probability that no reasonable factfinder would have found the inmate guilty. Further, in determining whether the new “outcome determinative” criterion has been satisfied, the court is to consider all available admissible evidence related to the inmate’s case. **Because the legislature has changed the standard to be used for the “outcome determinative” finding, the Attorney General does not believe that a DNA application filed under the revised statutes is barred from consideration on the basis that the previous DNA application was denied because it did not meet the “outcome determinative” standard under the former statutes.** (emphasis added)

Second Application, Ex. H, 12/28/2010.

In other words, SB262 changed the acceptance criteria’s “outcome determinative” language to make it more in line with Ohio’s long standing Criminal Rule 33 for a motion

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<sup>7</sup> Then Attorney General Jim Petro did not represent Mr. Emerick, nor the prosecution. The Montgomery County Prosecutor opposed Emerick’s DNA Application under SB262. The Ohio Attorney General, whose DNA Testing Unit is copied on all DNA requests filed in state court, filed this brief encouraging the court of common pleas in Montgomery County to hear Emerick’s SB262 DNA Application on the merits.

for new trial. Indeed, Ohio Crim. R. 33(A)(6) allows a defendant to seek a new trial upon a showing that new evidence exists. Cases interpreting this rule have upheld new trials in post-conviction, after the deadline has elapsed, upon a showing of a “strong probability” that the new evidence would change the outcome of the trial. *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d. 370 (1947). Under this standard a defendant is not required to demonstrate that the new evidence alone would definitively and absolutely prevent a jury from convicting, as SB11 required, but rather, that the evidence presented in the context of the case creates a “strong probability” that the jury would acquit.<sup>8</sup>

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<sup>8</sup> The practical impact of the change in the acceptance criteria from SB11 to SB262, and the impact of modern DNA testing itself, is clearly illustrated through “Operation 262” – an ongoing, joint project of the *Columbus Dispatch*, Ohio Innocence Project, and Ohio Public Defender. After reviewing the cases of more than 300 prisoners whose applications for DNA testing had been denied under SB11, “Operation 262” selected thirty cases that had particular merit under Ohio’s 2006 revised DNA testing statute, Senate Bill No. 262. <http://www.dispatch.com/content/stories/local/2008/01/31/dna5.html> (Nov. 26, 2011).

To date, testing has been granted either through the agreement of the county prosecutor or by court order in 21 of the 30 cases. Testing has been ordered for the following Operation 262 inmates: David Wayne Allen, Chanan Aqu-Simmons, David Ayers, Joseph Bennett, Melvin Bonnell, Robert Caulley, Rex Clinger, Leroy Davis, Phillip Gammalo, Glen Haynie, Larry Jerido, Dewey Jones, Carlton Manning, Robert McClendon, Douglas Prade, David Purnell, Dwight Reynolds, Marion Reynolds, Ray Smith, Jr., Raymond Towler, and Clarence Weaver. Two of the thirty inmates have already been exonerate. A third inmate’s case was dismissed by the county prosecutor. A DNA test showed that Robert McClendon was not the individual who raped an eight-year old girl in 1990. He was officially freed from prison on August 11, 2008. <http://www.dispatch.com/content/stories/local/2007/07/06/mcclendon.html> (Nov. 26, 2011). In addition, in May 2010, DNA testing showed that Raymond Towler was not the individual who raped an eleven year old girl in 1981. Towler was released May 5, 2010. [http://blog.cleveland.com/metro/2010/05/ramond\\_towler\\_freed\\_after\\_29.html](http://blog.cleveland.com/metro/2010/05/ramond_towler_freed_after_29.html) (Nov. 26, 2011). As a result of McClendon’s exoneration, the Franklin County Prosecutor conducted DNA testing on other cases not specifically featured in the series. The result was another exoneration.

David Ayer’s case was dismissed after a new trial was granted by the Sixth Circuit Court of Appeals and DNA testing was conducted. A DNA test showed that David Ayers was excluded from a pubic hair found in the victim’s mouth and that it belonged to another male (the victim was female, elderly, lived alone, and was not known

**3. SB77 created a new acceptance criteria in R. C. 2953.74(A) by defining the term “definitive DNA test”**

When the Ohio Legislature passed SB11, and subsequently SB262, they did not define the phrase “definitive DNA test.” See, *State v. Prade*, 2009-Ohio-704 (“*Prade I*”); Second Application, Ex. F, Dec. 28, 2010 (Ohio Rev. Code 2953.71 current through March 16, 2010, incorporating SB11 and SB262, and prior to the changes of SB77). As a result, some Ohio courts defined “definitive DNA test” improperly. The Ninth District Court of Appeals in *Prade I*, for example, improperly concluded, in part because of the lack of a clear definition from the Legislature, that the prior DNA test at the time of trial was “definitive.” *State v. Prade*, 2009-Ohio-704, ¶ 12-13.

The lack of a clear definition from the Legislature allowed courts to ignore what new DNA testing methods and technologies could detect or how these new methods could be used to match or identify profiles of individuals, similar to prosecutors’ use of these same technologies and methods to solve cold cases.<sup>9</sup> The Legislature recognized

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to have a significant other). [http://blog.cleveland.com/metro/2011/09/cleveland\\_man\\_released\\_from\\_pr.html](http://blog.cleveland.com/metro/2011/09/cleveland_man_released_from_pr.html) (November 25, 2011). Ayers was officially released on September 12, 2011.

It is also important to note that DNA testing has also proven guilt in some cases featured in the “Operation 262” series, and put long standing innocence claims to rest.

An applicant for post-conviction DNA testing must meet the requirements of R.C. § 2953.72 in order to qualify for DNA testing. Although implicit in the granting of post-conviction DNA testing, all “Operation 262” inmates who were granted testing met the requirements of R.C. § 2953.72 - the broader section of the statutory provision currently at issue. Nine “Operation 262” inmates were denied testing. Of those nine inmate, none were denied under the current provisions at issue, R.C. §§ 2953.72(A)(7) and (A)(4). In fact, those inmates who were denied post-conviction DNA testing when they reapplied under SB262, after being rejected under SB11, and were not on parole at the time of their reapplication— all met the requirements of R.C. § 2953.72. See, e.g. *State v. Quarnail Thomas*, Decision Order and Entry Overruling Defendant’s Application for DNA Testing, Montgomery County Court of Commons Pleas, 1989-CR-0121, June 19, 2009.

<sup>9</sup> Prosecutors’ offices in Ohio use new DNA technologies and the ability to match a DNA profile from a crime scene to a perpetrator through CODIS to solve cold cases in Ohio.



that advancements in DNA technology are critical to obtaining new information from the evidence about the perpetrator, and the legislature set out to define “definitive DNA test” and prevent courts from ignoring the ability of new DNA technology to detect information, including the identity of the perpetrator, which previous technology could not. *See*, R.C. § 2953.71(U).<sup>10</sup>

The Legislature reacted to the Ninth District’s decision in *Prade* (and other Ohio courts that followed the Ninth District’s reasoning) by defining “definitive DNA test.” The new definition takes into account advancements in DNA technology, but also sets other requirements that must be considered by the trial court. The Legislature’s definition, signed into law on April 5, 2010, overrode the Ninth District’s decision in *Prade I*, as well as any other cases denied under the old acceptance criteria of § 2953.74(A). SB77 added R.C. § 2953.71(U),<sup>11</sup> which defines “definitive DNA test” as:

**A DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not that biological material is that of the eligible offender. A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because advances in DNA technology there is a possibility of discovering new**

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e.g.,

<http://www.prosecutormason.com/Unit.aspx?uid=32&uname=Cold%20Case%20Unit> (Nov. 26, 2011); <http://www.lakecountypProsecutor.org/crimelab/crime3.html> (Nov. 26, 2011). Since 2005, Ohio has obtained over one million dollars in federal funding to solve cold cases using new DNA technology. [http://www.dna.gov/funding/cold\\_case/](http://www.dna.gov/funding/cold_case/) (Nov. 26, 2011).

<sup>10</sup> This Court also recognized the importance of advancements in DNA technology in obtaining new information from the evidence about the perpetrator. *See, State v. Prade*, 2010-Ohio-1842, ¶ 29 (“*Prade II*”). In *Prade II*, this Court ruled that the so-called prior “exclusion results” were meaningless and not an exclusion result at all. The Court limited its holding “to situations in which advances in DNA testing have made it possible to learn information about DNA evidence that could not even be detected at the earlier trial.” *Id.*

<sup>11</sup> R.C. § 2953.71(U) went into effect on July 6, 2010. Exhibit G, R.C. 2953.71, as of July 6, 2010.

**biological material from the perpetrator that the prior DNA may have failed to discover.** Prior testing may have been a prior “definitive DNA test” as to some biological evidence but may not have been a prior “definitive DNA test” as to other biological evidence. (emphasis added).

This new definition significantly changed the acceptance criteria under R.C. § 2953.74(A). Among the changes, this new language establishes that even if the prior DNA test “excluded” the eligible offender, the test could be shown not to be definitive if advances in DNA technology could discover new biological material of the perpetrator—for example, all 13 STR loci of the perpetrator, which would make the profile eligible to upload to CODIS to establish the identity of the perpetrator. In addition, effective July 1, 2011, SB77 began expanding the pool of persons in Ohio whose DNA is collected and uploaded to CODIS.<sup>12</sup>

**B. Revised Code 2953.72(A)(7) and (A)(4) are not a bar to Noling’s Second Application for DNA testing**

An analysis of Ohio’s post-conviction DNA statute, and the previous change in the acceptance criteria, shows that when the acceptance criteria changes, a subsequent DNA application is not barred by R.C. § 2953.72(A)(7). By enacting a new definition for “definitive DNA test” through SB77, the Legislature changed one of the fundamental, underlying standards of R.C. §§ 2953.72(A)(7) and 2953.72(A)(4)—the trial court ignored these changes. Accordingly, the trial court’s conclusion that the statute barred Noling’s second DNA application was in error.

Revised Code § 2953.72(A)(7), the sole provision under which the trial court denied Noling’s Second Application, provides no subsequent applications will be

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<sup>12</sup> R.C. § Section 2901.07(B)(1); *See*, [http://www.legislature.state.oh.us/bills.cfm?ID=128\\_SB\\_77](http://www.legislature.state.oh.us/bills.cfm?ID=128_SB_77) (December 19, 2010); *contra*, R.C. 2901.07(B)(2); *See*, [http://www.legislature.state.oh.us/bills.cfm?ID=128\\_SB\\_77](http://www.legislature.state.oh.us/bills.cfm?ID=128_SB_77) (December 19, 2010).

accepted where the court rejects a DNA application because it does not satisfy the acceptance criteria set out in “(A)(4) of this section.” The “(A)(4) of this section” refers to R.C. § 2953.72(A)(4). This section, which was not referenced by the trial court in its denial, states that the screening of eligible DNA applications will be based on the criteria set forth in “section 2953.74 of the Revised Code.”

Finally, R.C. § 2953.74, which was also not included in the trial court’s denial, is subdivided into sections (A) through (E). Noling’s First Application was denied under § 2953.74(A), providing in relevant part:

If an eligible offender submits an application for DNA testing under section 2953.73 of the Revised Code and a prior definitive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested, the court shall reject the offender’s application. (emphasis added).

The trial court did not reject Noling’s First Application under the current acceptance criteria set out in R.C. § 2953.72(A)(4). The trial court rejected Noling’s First Application under the old acceptance criteria that was in place before the passage of SB77. The key phrase in 2953.74(A) is “definitive DNA test.” Some of the new statutory criteria set out by the Legislature through the passage of SB77 for definitive DNA test make it clear that the “criteria” for definitive DNA test has been significantly and substantively changed since the denial of Noling’s First Application. In its denial of Noling’s First Application, the trial court, relying on *Prade I*, found that the 1991 test of the cigarette butt was a prior “definitive DNA test.” However, the 1991 DNA test of the cigarette butt, and the serology test<sup>13</sup>, which did not exclude Dan Wilson as the smoker of

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<sup>13</sup> The serology test, which could not exclude Dan Wilson at the time of trial, clearly shows that the testing done at the time of trial was **not** definitive under the legislature’s new definition.

the cigarette butt, did not clearly establish “that biological material from the perpetrator of the crime was recovered from the crime scene” as the Legislature now requires. More significantly, SB77’s new definition of “definitive DNA test” specifically states that “[a] prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA may have failed to discover.” R.C. § 2953.71(U).

As discussed at length in Noling’s Second Application, advances in DNA testing since 1991 would allow for the discovery of new biological material.<sup>14</sup> However, the principal problem is that the trial court simply failed to consider the Legislature’s amendments to the key statutory terms upon which it based its denial of the Second Application. The Legislature’s change in definition of “definitive DNA test” altered one of the fundamental, underlying standards of R.C. §§ 2953.72(A)(7) and 2953.72(A)(4), but the trial court below ignored these changes.

The trial court denied Noling’s First Application prior to the 2010 revisions contained in SB77. Noling’s Second Application must be considered under the current, less restrictive definition, just as those inmates rejected under SB11 were permitted to reapply under the less restrictive standard of SB262. When the Legislature acts to lower the standard an applicant must meet to obtain DNA testing, it would undermine the purpose of the statutory amendments to bar an applicant who was denied testing under

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<sup>14</sup> In addition, counsel for Noling continues to search for the existence of other pieces of evidence collected in Noling’s case. Specifically, fingerprint lifts taken at the crime scene by Detective Doak and fingerprint lifts taken by Ohio’s Bureau of Criminal Identification and Investigation from the shell casings and ring boxes collected at the crime scene. No prior DNA testing was done on any of the items whose existence Noling is still trying to establish.

the more restrictive standard from reapplying after the standard is eased. This conclusion is supported by then Ohio Attorney General Jim Petro's 2006 brief in *State v. Emerick*, when he stated that **"the current version of the DNA statutes, R.C. 2953.71 through R.C. 2953.83, revised by SB262 in 2006, does not bar consideration of a DNA application on the basis that a previous application, filed pursuant to SB11, was denied based on a finding that the test would not be 'outcome determinative.'"** 12/28/2010 Second Application, Ex. H) (emphasis added).

More importantly, R.C. § 2953.72(A)(7) does not bar the trial court's consideration of Noling's Second Application because the change in the underlying standard of "definitive DNA test"—which is essential for a correct application of R.C. § 2953.72(A)(7) and its related provisions—is qualitatively different than the standard that governed Noling's First Application. In its denial of Noling's Second Application, the trial court failed to apply and connect all of the necessary provisions of Ohio's DNA testing statute. As a result, the trial court's ruling that Noling's Second Application is statutorily barred is in error.

Moreover, this reading of the statutory provisions is supported by the cases in which inmates whose cases were rejected under SB11's outcome determinative standard later won DNA testing when they reapplied under SB262.<sup>15</sup> For example, under their SB11 applications, Raymond Towler and Robert McClendon did not obtain DNA testing of the victims' underwear in their respective cases.<sup>16</sup> In both Towler and McClendon's

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<sup>15</sup> *Supra*, n.8.

<sup>16</sup> Robert McClendon and Raymond Towler were both represented by the Ohio Innocence Project in their eventual successful quest to obtain post-conviction DNA testing under SB262. Their records (and therefore, their docket information) have been expunged as a result of their exoneration. Undersigned counsel makes these statements as an attorney

cases, this was the piece of evidence which contained the DNA evidence which would eventually exonerate them.<sup>17</sup> R.C. § 2953.72(A)(7) was not a bar in Towler's, McClendon's, or any of the other cases highlighted in the "Operation 262."<sup>18</sup> The lower courts did not provide a specific rationale for their findings that all the "Operation 262" inmates met the requirements of R.C. § 2953.72(A)(7). However, it is reasonable to infer that when the Legislature changes the acceptance criteria for post-conviction DNA testing in order to remedy those cases where inmates were denied post-conviction DNA testing due to the Legislature's previous flawed acceptance criteria, the Legislature does not simultaneously intend to bar those previously denied under the flawed standard from reapplying for post-conviction DNA testing.

As R.C. § 2953.72(A)(7) did not apply to subsequent DNA applications when they were re-filed under SB262, after being rejected under SB11, the trial court erred when it applied this section of the statute to Noling's Second Application filed under SB77's new acceptance criteria after rejection of Noling's First Application under SB262's acceptance criteria.

**C. Revised Code § 2953.72(A)(7) embodies the legal principle of *res judicata*, but does not bar Noling's Second Application for DNA Testing**

Revised Code § 2953.72(A)(7) embodies the legal principle of *res judicata* in the sense that it precludes "readjudication" of a subsequent DNA testing application. As there is no guiding case law interpreting R.C. § 2953.72(A)(7), this Court should look to

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employed with the Ohio Innocence Project, which represented Towler and McClendon. In addition, Towler and McClendon were highlighted in the *Columbus Dispatch's* "Operation 262" series because their prior SB11 applications for DNA testing were unsuccessful in obtaining the DNA testing which would eventually lead to their exoneration.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

those cases addressing *res judicata* and Ohio's post-conviction DNA testing statute for guidance. It should be noted that *res judicata* was not a bar to "Operation 262" applicants who applied under the new outcome determinative standard set out by SB262. *See, State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, *appeal denied*, 125 Ohio St.3d 1439, 2010-Ohio-2212; *See, also, Id.* at n.8. As set forth below, *res judicata*, and thus R.C. § 2953.72(A)(7), is not a bar to Noling's Second Application being considered on the basis of the new acceptance criteria.

*State v. Ayers*, 2009-Ohio-6096, directly addressed the applicability of *res judicata* when there is a change in the statutory standard for acceptance of a post-conviction DNA testing application. In *Ayers*, the defendant initially applied for DNA testing under SB11. *Ayers*, ¶ 3. The trial court denied his application because Ayers failed to demonstrate that DNA testing would be outcome determinative. *Ayers*, ¶ 5. Then, in 2008, Ayers filed a second application for DNA testing of the same evidence under SB262. *Ayers*, ¶ 6. The trial court denied the second application on the basis of *res judicata* stating that the court had previously held that DNA testing would not be outcome determinative. *Ayers*, ¶ 7. The trial court also held that Ayers' application failed to demonstrate that DNA testing would be outcome determinative. *Ayers*, ¶ 8.

On appeal, the Eighth District reversed the trial court, holding that *res judicata* is not a bar to a subsequent DNA testing application. Rather the Eighth District held that DNA testing motions should be considered "on a case by case basis, and those motions must make a threshold showing that DNA testing would be outcome determinative." *Ayers*, ¶ 26. Where the applicant can make this showing "*res judicata* will not bar testing even though an earlier application for DNA testing was denied." *Id.* The court

specifically rejected application of *res judicata* because Ayers' first application "was considered and rejected under the earlier, more restrictive statute."<sup>19</sup> *Id.*

Noling's Second Application is closely analogous to *Ayers* on two central points. First, Noling has made a threshold showing that DNA testing would be outcome determinative. See, DNA Application, Section IV.B.5, Dec. 28, 2010. For example, if DNA on the cigarette butt matched that of Daniel Wilson (through CODIS), combined with the statement made by Chesley that Wilson confessed to the Hartig murder—this would be outcome determinative. Second, like the defendant<sup>20</sup> in *Ayers*, Noling's first application was considered and rejected under an earlier, more restrictive standard. Subsequent to the denial of Noling's first application, the Ohio Legislature amended the definition of "definitive DNA test," creating a less restrictive standard than that which governed his first application, and Noling filed his Second Application after this amendment to the statute. Therefore, like *Ayers*, the "principles of *res judicata* are inapplicable to preclude consideration of this petition." *Ayers*, ¶ 26. Resultantly, while R.C. § 2953.72(A)(7) embodies the principles of *res judicata* in its statutory language, it does not operate as a bar to the trial court's consideration of Noling's Second Application.

#### IV. CONCLUSION

For all the above-mentioned reasons, this Court should reverse and remand for the trial court to consider Noling's Second Application on the merits under the Legislature's new, SB77 acceptance criteria.

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<sup>19</sup> The Eighth District Court of Appeals also found that DNA testing would be outcome determinative for Ayers. *Ayers*, ¶ 42-43.

<sup>20</sup> David Ayers is no longer a "defendant." The Cuyahoga County Prosecutor's Office dismissed charges against Mr. Ayers on September 12, 2011.



Respectfully Submitted,

 (by Jennifer Prillo per authority)

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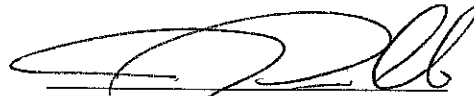
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief of Appellant Tyrone Noling was delivered by U.S. Mail to Victor V. Vigluicci, Prosecuting Attorney, 241 South Chestnut Street, Ravenna, OH 44266 and to Mike DeWine, Ohio Attorney General, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 12<sup>th</sup> day of December, 2011.



Jennifer Prillo (0073744)

Attorney for Tyrone Noling

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On Appeal from the Portage  
County Court of Common Pleas  
Case No. 95-CR-220

Pursuant to R.C. 2953.73(E)(1)

-Y-

**This is a capital case.**

Defendant.

## Appendix to Merit Brief of Appellant Tyrone Noling

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ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff,

-v-

TYRONE NOLING,

Defendant.

CASE NO.

11-0778

On Appeal from the Portage  
County Court of Common Pleas  
Case No. 95-CR-220

Pursuant to R.C. 2953.73(E)(1)

This is a capital case.

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Appellant Tyrone Noling's Notice of Appeal

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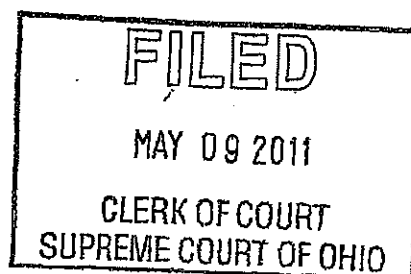
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Portage County Prosecutor  
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Assistant Prosecuting Attorney  
Counsel of Record  
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COUNSEL FOR APPELLEE  
TYRONE NOLING



IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff,

-v-

TYRONE NOLING,

Defendant.

CASE NO.

On Appeal from the Portage  
County Court of Common Pleas  
Case No. 95-CR-220

Pursuant to R.C. 2953.73(E)(1)

This is a capital case.

---

Appellant Tyrone Noling's Notice of Appeal

---

Appellant Tyrone Noling hereby gives notice of appeal to the Ohio Supreme Court from the judgment of the Portage County Court of Common Pleas, entered in the Court of Common Pleas Case No. 95 CR 220, on March 28, 2011 pursuant to R.C. 2953.73(E)(1).

This case involves a felony and involves an issue of public and great general interest. Counsel of Record, Carrie Wood, is temporarily certified to practice law in the State of Ohio as an employee of the Ohio Innocence Project. A copy of this certificate is attached.

Respectfully Submitted,

*Carrie Wood (per authority by  
J. William Pella)*

Carrie Wood (Temporarily Certified in  
Ohio)  
Counsel of Record

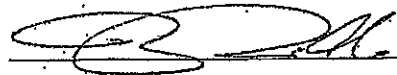
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Attorneys for Tyrone Noling

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was delivered by U.S. Mail to Victor V. Vigluicci, Prosecuting Attorney, 466 South Chestnut Street, Ravenna, OH 44266 and to Richard Cordray, Ohio Attorney General, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 9<sup>th</sup> day of May, 2011.

A handwritten signature in black ink, appearing to read 'Jennifer Prillo', written over a horizontal line.

Jennifer Prillo (0073744)

Attorney for Tyrone Noling

# The Supreme Court of Ohio

## CERTIFICATE

BE IT REMEMBERED, that on the 16th day of November, 2010, upon having fulfilled and complied with the requirements set forth in Rule IX of the Supreme Court Rules for the Government of the Bar of Ohio,

CARRIE ELIZABETH WOOD

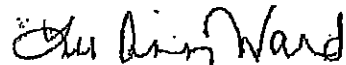
has received

TEMPORARY CERTIFICATION

TO PRACTICE LAW IN OHIO

and is hereby authorized to appear and practice in any of the Courts of Record within the State of Ohio to the extent permitted by Rule IX of the Rules for the Government of the Bar of Ohio. This certificate authorizes the certified to practice law in Ohio only to the extent such practice is conducted by the certified as an employee or associate of The Ohio Innocence Project. The certified is subject to all provisions of the Code of Professional Responsibility and has submitted to the jurisdiction of the Supreme Court for disciplinary purposes under Gov. Bar R. V.

IN TESTIMONY WHEREOF, I have heretinto subscribed my name and caused the seal of the Supreme Court to be affixed at Columbus, Ohio, this 16th day of November, 2010.



DIRECTOR OF BAR ADMISSIONS

This certificate shall expire on November 16, 2011, or upon the occurrence of one of the events listed in Gov. Bar R. IX, Sec. 5, Div. (A). This certificate may be revoked before expiration in accordance with Gov. Bar R. IX, Sec. 4 or Sec. 5.



**IN THE COURT OF COMMON PLEAS**

**FILED  
COURT OF COMMON PLEAS**

**PORTAGE COUNTY, OHIO**

**MAR 28 2011**

**LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO**

**STATE OF OHIO**

**Plaintiff**

**CASE NO. 95 CR 220**

**-v-**

**JUDGE ENLOW**

**TYRONE LEE NOLING**

**JUDGMENT ENTRY**

**Defendant**

This matter came on for hearing on Defendant's application for post conviction relief DNA testing pursuant to Ohio Revised Code §2953.73. The procedural history regarding this is as follows:

On September 25<sup>th</sup>, 2008, Tyrone Noling filed a post conviction application for DNA testing. The Court overruled Defendant's application ruling that it was a definitive DNA test in that Tyrone Noling and all co-defendants were excluded as the person whose cigarette butt was left in the driveway of the victims' home. Defendant Tyrone Noling appealed to the Eleventh District Court of Appeals. On August 3<sup>rd</sup>, 2009, that court dismissed that appeal for lack of jurisdiction. Subsequent to the opinion issued on May 4<sup>th</sup>, 2010, in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, the Ohio Supreme Court denied defendant's leave to appeal and on September 29<sup>th</sup>, 2010 dismissed his appeal in that Court.

Revised Code 2953.72 (A) (7) states that "If the court rejects an eligible offender's application for DNA testing because the offender does not satisfy the acceptance criteria described in Division (A) (4) of this section, the court will not accept or consider subsequent applications."

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

**IT IS SO ORDERED.**



JOHN A. ENLOW, JUDGE

C:

Portage County Prosecutor's Office  
Attn: F. M. Ricciardi, Chief of the Criminal Division  
And Pamela Holder, Staff Attorney

Ralph Miller, Esq.  
1300 Eye Street NW Suite 900  
Washington, DC 20005

James A. Jenkins, Esq.  
1370 Ontario Street, Suite 2000  
Cleveland, OH 44113

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

FILED  
COURT OF COMMON PLEAS

MAR 11 2009

LINDA K. FANKHAUSER, CLERK  
PORTAGE COUNTY, OHIO

STATE OF OHIO

Plaintiff

CASE NO. 95 CR 220

-v-

JUDGE ENLOW

TYRONE LEE NOLING

JUDGMENT ENTRY

Defendant

In February of 1996 in a jury trial Tyrone Noling was convicted of two counts of aggravated murder and accompanying death specifications, two counts of aggravated robbery and aggravated burglary. The defendant was sentenced to death. Numerous appeals have been filed including two applications for post conviction relief, all of which have been denied. The defendant has filed application pursuant to RC §2953.71 through §2953.81 for additional DNA testing.

At the scene of the crime a smoked, flattened, white filtered cigarette butt was found, collected as evidence, and subsequently tested for DNA. That DNA test is attached to the prosecutor's brief and marked Exhibit B. Blood samples were taken from all co-defendants, including Tyrone Noling, and the DNA test concluded that none of the co-defendants including Tyrone Noling smoked that cigarette.

Revised Code §2953.74 states:

*(A) If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and a prior definitive DNA test has been conducted regarding the same biological evidence that the inmate seeks to have tested, the court shall reject the inmate's application.*

The threshold issue presented to this court is whether or not the DNA test previously allowed in 1993 was a definitive test. In *State of Ohio versus Douglas Prade*, 2009-Ohio-704, the Ninth District Court of Appeals discussed what constituted a definitive DNA test and they concluded that the test excluding Douglas Prade from DNA samples taken from his deceased ex-wife was a definitive test. Their analysis basically used the plain meaning of definitive in that if it would exclude the individual defendant from the item tested; it was a definitive test. Many times DNA tests are inconclusive and if that were the case then it would not be a definitive test.

In this case as Tyrone Noling and all his co-defendants were excluded as not being the person who had smoked that cigarette, therefore, it was a definitive DNA test.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Defendant Tyrone Noling's application for DNA testing be and is hereby **OVERRULED.**

  
JOHN A. ENLOW, JUDGE

cc:

Portage County Prosecutor's Office  
Attn: Pamela Holder, Staff Attorney

Ohio Public Defender's Office  
Attn: Kelly L. Culshaw, Esq.  
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Dennis Lager, Portage County Public Defender

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Current through Legislation passed by the 129th Ohio General Assembly  
and filed with the Secretary of State through file 54

\*\*\* Annotations current through August 19, 2011 \*\*\*

The provisions of 2011 HB 194 are not yet in effect as they are subject  
to a referendum upon verification of petition signatures

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES  
POSTCONVICTION DNA TESTING FOR ELIGIBLE OFFENDERS

Go to the Ohio Code Archive Directory

ORC Ann. 2953.71 (2011)

§ 2953.71. Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

(M) "Parent sample" means the biological material first obtained from a crime scene or a victim of an offense for which an offender is an eligible offender, and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject offender under *sections 2953.71 to 2953.81 of the Revised Code*.

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

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

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

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

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

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

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

(U) "Definitive DNA test" means a DNA test that clearly establishes that biological material from the perpetrator of the crime was recovered from the crime scene and also clearly establishes whether or not the biological material is that of the eligible offender. A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover. Prior testing may have been a prior "definitive DNA test" as to some biological evidence but may not have been a prior "definitive DNA test" as to other biological evidence.

#### HISTORY:

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

3 of 9 DOCUMENTS

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\*\*\* ARCHIVE DATA \*\*\*

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND  
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 16, 2010 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH FEBRUARY 22, 2010 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES  
POSTCONVICTION DNA TESTING FOR ELIGIBLE INMATES

*ORC Ann. 2953.71 (2010)*

§ 2953.71. Definitions

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

(A) "Application" or "application for DNA testing" means a request through postconviction relief for the state to do DNA testing on biological material from whichever of the following is applicable:

(1) The case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing under *sections 2953.71 to 2953.81 of the Revised Code*;

(2) The case in which the inmate pleaded guilty or no contest to the offense for which the inmate is requesting the DNA testing under *section 2953.82 of the Revised Code*.

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

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

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

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

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

(G) "Exclusion" or "exclusion result" means a result of DNA testing that scientifically precludes or forecloses the subject inmate as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the inmate is an eligible inmate and for which the sentence of death or prison term was imposed upon the inmate or, regarding a request for DNA testing made under *section 2953.82 of the Revised Code*, in relation to the offense for which the inmate made the request and for which the sentence of death or prison term was imposed upon the inmate.

(H) "Extracting personnel" means medically approved personnel who are employed to physically obtain an inmate DNA specimen for purposes of DNA testing under *sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code*.

(I) "Inclusion" or "inclusion result" means a result of DNA testing that scientifically cannot exclude, or that holds accountable, the subject inmate as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the inmate is an eligible inmate and for which the sentence of death or prison term was imposed upon the inmate or, regarding a request for DNA testing made under *section 2953.82 of the Revised Code*, in relation to the offense for which the inmate made the request and for which the sentence of death or prison term was imposed upon the inmate.

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

(K) "Inmate" means an inmate in a prison who was sentenced by a court, or by a jury and a court, of this state.

(L) "Outcome determinative" means that had the results of DNA testing of the subject inmate been presented at the trial of the subject inmate requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the inmate is an eligible inmate and is requesting the DNA testing or for which the inmate is requesting the DNA testing under *section 2953.82 of the Revised Code*, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of *section 2953.74 of the Revised Code*, there is a strong probability that no reasonable factfinder would have found the inmate guilty of that offense or, if the inmate was sentenced to death relative to that offense, would have found the inmate guilty of the aggravating circumstance or circumstances the inmate was found guilty of committing and that is or are the basis of that sentence of death.

(M) "Parent sample" means the biological material first obtained from a crime scene or a victim of an offense for which an inmate is an eligible inmate or for which the inmate is requesting the DNA testing under *section 2953.82 of the Revised Code*, and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject inmate under *sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code*.

(N) "Prison" has the same meaning as in *section 2929.01 of the Revised Code*.

(O) "Prosecuting attorney" means the prosecuting attorney who, or whose office, prosecuted the case in which the subject inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA testing or for which the inmate is requesting the DNA testing under *section 2953.82 of the Revised Code*.

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

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

(R) "Testing authority" means a laboratory at which DNA testing will be conducted under *sections 2953.71 to 2953.81 or section 2953.82 of the Revised Code*.

#### HISTORY:

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



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TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES  
POSTCONVICTION DNA TESTING FOR ELIGIBLE OFFENDERS

Go to the Ohio Code Archive Directory

ORC Ann. 2953.72 (2011)

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

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

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

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

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

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

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

(6) That, if DNA testing is conducted with respect to an offender under *sections 2953.71 to 2953.81 of the Revised Code*, the state will not offer the offender a retest if an inclusion result is achieved relative to the testing and that,

if the state were to offer a retest after an inclusion result, the policy would create an atmosphere in which endless testing could occur and in which postconviction proceedings could be stalled for many years;

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

(8) That the acknowledgment memorializes the provisions of *sections 2953.71 to 2953.81 of the Revised Code* with respect to the application of postconviction DNA testing to offenders, that those provisions do not give any offender any additional constitutional right that the offender did not already have, that the court has no duty or obligation to provide postconviction DNA testing to offenders, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an offender is an eligible offender and whether an eligible offender's application for DNA testing satisfies the acceptance criteria described in division (A)(4) of this section and whether the application should be accepted or rejected, that if the court of common pleas rejects an eligible offender's application, the offender may seek leave of the supreme court to appeal the rejection to that court if the offender was sentenced to death for the offense for which the offender is requesting the DNA testing and, if the offender was not sentenced to death for that offense, may appeal the rejection to the court of appeals, and that no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court;

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

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

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

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

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

(b) One of the following applies:

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

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

(iii) The felony described in division (C)(1)(a) of this section was a sexually oriented offense or child-victim oriented offense, and the offender has a duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* relative to that felony.

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

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

**HISTORY:**

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

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\*\*\* ARCHIVE DATA \*\*\*

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND  
FILED WITH THE SECRETARY OF STATE THROUGH MARCH 16, 2010 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2010 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH FEBRUARY 22, 2010 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES  
POSTCONVICTION DNA TESTING FOR ELIGIBLE INMATES

ORC Ann. 2953.72 (2010)

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

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

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

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

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

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

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

(6) That, if DNA testing is conducted with respect to an inmate under *sections 2953.71 to 2953.81 of the Revised Code*, the state will not offer the inmate a retest if an inclusion result is achieved relative to the testing and that, if the

state were to offer a retest after an inclusion result, the policy would create an atmosphere in which endless testing could occur and in which postconviction proceedings could be stalled for many years;

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

(8) That the acknowledgment memorializes the provisions of *sections 2953.71 to 2953.81 of the Revised Code* with respect to the application of postconviction DNA testing to inmates, that those provisions do not give any inmate any additional constitutional right that the inmate did not already have, that the court has no duty or obligation to provide postconviction DNA testing to inmates, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an inmate is an eligible inmate and whether an eligible inmate's application for DNA testing satisfies the acceptance criteria described in division (A)(4) of this section and whether the application should be accepted or rejected, that if the court of common pleas rejects an eligible inmate's application, the inmate may seek leave of the supreme court to appeal the rejection to that court if the inmate was sentenced to death for the offense for which the inmate is requesting the DNA testing and, if the inmate was not sentenced to death for that offense, may appeal the rejection to the court of appeals, and that no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an inmate or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court;

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

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

(11) That, if the inmate is an inmate who pleaded guilty or no contest to a felony offense and who is using the application and acknowledgment to request DNA testing under *section 2953.82 of the Revised Code*, all references in the acknowledgment to an "eligible inmate" are considered to be references to, and apply to, the inmate and all references in the acknowledgment to "*sections 2953.71 to 2953.81 of the Revised Code*" are considered to be references to "*section 2953.82 of the Revised Code*."

(B) The attorney general shall prescribe a form to be used to make an application for DNA testing under division (A) of this section and *section 2953.73 of the Revised Code* and a form to be used to provide the acknowledgment described in division (A) of this section. The forms shall include all information described in division (A) of this section, spaces for an inmate to insert all information necessary to complete the forms, including, but not limited to, specifying the offense or offenses for which the inmate is an eligible inmate and is requesting the DNA testing or for which the inmate is requesting the DNA testing under *section 2953.82 of the Revised Code*, and any other information or material the attorney general determines is necessary or relevant. The forms also shall be used to make an application requesting DNA testing under *section 2953.82 of the Revised Code*, and the attorney general shall ensure that they are sufficient for that type of use, and that they include all information and spaces necessary for that type of use. The attorney general shall distribute copies of the prescribed forms to the department of rehabilitation and correction, the department shall ensure that each prison in which inmates are housed has a supply of copies of the forms, and the department shall ensure that copies of the forms are provided free of charge to any inmate who requests them.

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

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

(b) The inmate was sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section and is in prison serving that prison term or under that sentence of death.

(c) On the date on which the application is filed, the inmate has at least one year remaining on the prison term described in division (C)(1)(b) of this section, or the inmate is in prison under a sentence of death as described in that division.

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

**HISTORY:**

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

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Current through Legislation passed by the 129th Ohio General Assembly  
and filed with the Secretary of State through file 54

\*\*\* Annotations current through August 19, 2011 \*\*\*

The provisions of 2011 HB 194 are not yet in effect as they are subject  
to a referendum upon verification of petition signatures

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES  
POSTCONVICTION DNA TESTING FOR ELIGIBLE OFFENDERS

Go to the Ohio Code Archive Directory

ORC Ann. 2953.74 (2011)

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

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

(B) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court may accept the application only if one of the following applies:

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

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

(C) If an eligible offender submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court may accept the application only if all of the following apply:

(1) The court determines pursuant to *section 2953.75 of the Revised Code* that biological material was collected from the crime scene or the victim of the offense for which the offender is an eligible offender and is requesting the

DNA testing and that the parent sample of that biological material against which a sample from the offender can be compared still exists at that point in time.

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

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

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

(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.

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

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

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

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

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

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

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

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

#### HISTORY:



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

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

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

(B) If an eligible inmate submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court may accept the application only if one of the following applies:

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

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

(C) If an eligible inmate submits an application for DNA testing under *section 2953.73 of the Revised Code*, the court may accept the application only if all of the following apply:

(1) The court determines pursuant to *section 2953.75 of the Revised Code* that biological material was collected from the crime scene or the victim of the offense for which the inmate is an eligible inmate and is requesting the DNA

testing and that the parent sample of that biological material against which a sample from the inmate can be compared still exists at that point in time.

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

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

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

(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.

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

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

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

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

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

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

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

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

#### HISTORY:

ORC Ann. 2953.74

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