ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO Appellee, v. **TYRONE NOLING** Appellant.	Case No. 11-0778 On Appeal From the Portage County Court of Common Pleas Common Pleas Case No. 95-CR-220 Death Penalty Case

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STATE OF OHIO'S MERIT BRIEF

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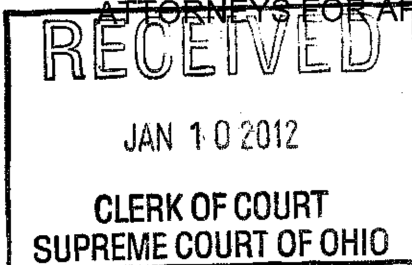

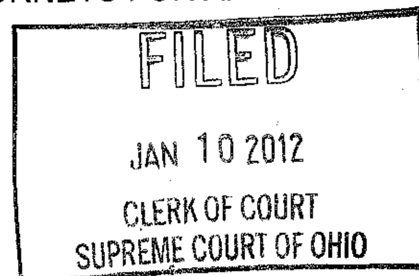

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STATEMENT OF THE CASE AND FACTS

FACTS

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

Prior to the Hartig's murders, the foursome, Noling, Wolcott, Dalesandro and St. Clair, had devised a plan to rob elderly people. (T.p. 827). They agreed that the simplest approach would be to park their car outside of an elderly person's house feigning car trouble. Seeking assistance they would ask to use the phone to gain entry into the house and then rob the individual. (T.p. 827-828). Despite two previously successful robberies of elderly couples at the Hughes and Murphy residences, the plan failed at the Hartig's residence and the couple was murdered because they resisted, Noling explained, "the old man wouldn't stop, that he kept coming at him." (T.p. 851).

Following the murders, Wolcott confided in a friend. At trial, Jill Hall testified that Wolcott came to her house and implicated Noling in the murders. (T.p. 923). Wolcott said Noling, "had a gun, he pulled the trigger" he continued, "everything went wrong * * * we killed them." (T.p. 926).

PROCEDURAL HISTORY

On June 29, 2011, a unanimous panel of the Sixth Circuit Court Appeals affirmed the decision of the District Court finding that no constitutional error occurred as to warrant habeas relief. *Noling v. Bradshaw* (C.A.6, June 29, 2011), Case Nos. 07-3989, 08-3258 and 10-3884. The Sixth Circuit assumed for purposes of its analysis that Noling had established a *Brady* violation and that he could not have discovered his alleged newly discovered facts through due diligence and then held, "[n]everless, the newly discovered facts and all the other evidence do not establish clearly and convincingly that a reasonable factfinder could not have found Noling guilty." *Id.*

With regards to alleged possible alternative suspects, Dan Wilson and Raymond VanSteenberg, the Court found, "[a] man with a trouble past may have smoked a cigarette left in the Hartig's yard, and another man owned the same type of gun used in the murder and could not account for its whereabouts at an inopportune time. This newly discovered evidence, even when viewed with the other evidence, does not prove that one of the other suspects committed the murders. It merely opens the possibility, a very slight one we might add, that one of them did." *Id.* The Sixth Circuit held, "[m]ore importantly, it does not prove that Noling did not commit the murders, or clearly and convincingly nullify the evidence at trial supporting his conviction." *Id.*

The Sixth Circuit opinion is the most recent decision in a case that has a very long procedural history. Following a jury trial in February 1996, Noling was convicted on two counts of aggravated murder and the accompanying death penalty

specifications, two counts of aggravated robbery and aggravated burglary. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 173). This Court affirmed Noling's conviction and death sentence on direct appeal. *State v. Noling* (2002), 98 Ohio St.3d 44, certiorari denied *Noling v. Ohio* (2003), 539 U.S. 907, 123 S.Ct. 2256, 156 L.Ed.2d 118.

On July 23, 1997, Noling filed his first petition for postconviction relief with the trial court. In his petition, he raised four claims: actual innocence, prosecutorial misconduct, *Brady* violations, and the ineffective assistance of counsel. (T.d. 205). The trial court dismissed Noling's first petition for postconviction relief finding that, "there [were] no substantive grounds for relief." (T.d. 242). On September 2, 2003, the Eleventh District Court of Appeals affirmed the decision. *State v. Noling* (Sept. 2, 2003), Portage App. No. 98-P-0049, 2003-Ohio-5008, at ¶74. This Court denied jurisdiction. *State v. Noling* (2004), 101 Ohio St.3d 1424, 2004-Ohio-123.

On November 3, 2006, Noling filed a second round of actions with the Portage County trial court including a successive postconviction petition, leave to file a motion for a new trial pursuant to R.C. 2945.79(B), (F) and Crim.R. 33, a motion for a new trial pursuant to R.C. 2945.79(B), (F) and Crim.R. 33, a motion for relief from judgment pursuant to Civ.R. 60(B), a motion for discovery and a motion for funds for an expert witness. (T.d. 258, 259, 260, 261, 264).

The trial court then dismissed Noling's successive petition and first motion for a new trial finding that his "new evidence presented does not meet the standards for granting a new trial or a successive petition for post conviction relief." (T.d. 287). The trial court further found that a Civ.R. 60(B) motion was an improper remedy for relief,

(T.d. 287), and Noling's motion to appoint an expert witness and motion for additional discovery were rendered moot. (T.d. 288). On May 19, 2008, a unanimous panel of the Eleventh District affirmed the trial court's dismissal of Noling's successive petition for postconviction relief. *State v. Noling* (May 19, 2008), Portage App. No. 2007-P-0034, 2008-Ohio-2394, at ¶114. ("*Noling Successive PCR*"). On December 31, 2008, this Court declined jurisdiction to hear the case.

On September 25, 2008, Noling filed his first application for additional DNA testing pursuant to R.C. 2953.71 to 2953.81. (T.d. 296). Following the State's timely response, the trial court overruled the application on March 11, 2009; finding that Noling's previous 1993 DNA testing that excluded him and his co-defendants was a definitive DNA test. (T.d. 299). After this Court had released its decision in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287, on May 4, 2010, the Court denied Noling's leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (T.d. 318).

On June 21, 2010, more than thirteen years after his February 23, 1996, sentence, Noling sought to obtain leave from the trial court to seek a new trial by filing an application for leave to file a second motion for new trial. (T.d. 304). Noling's motion for a new trial was based upon alleged newly discovered evidence, Crim.R. 33(A)(6), and alleged prosecutorial misconduct, Crim.R. 33(A)(2). (T.d. 304). Following a hearing on Noling's application for leave to file his second motion for a new trial, the trial court denied leave and Noling filed a timely notice of appeal with the Eleventh District Court of Appeals. (T.d. 337, 341). An oral argument scheduled

for January 19, 2012, was continued sua sponte by the appellate court upon this Court's decision granting jurisdiction in the case at bar.

On December 28, 2010, Noling filed his second application for additional DNA testing. (T.d. 321). In support of his second application for DNA testing, Noling asserted three allegedly new grounds including: 1) this Court's decision in *Prade*; 2) 2010 S 77 amendments to R.C. 2953.71, effective July, 6, 2010 that added "definitive DNA test" to the definitions; and 3) alleged newly discovered evidence. On March 28, 2011, the trial court rejected Noling's application pursuant to R.C. 2953.72(A)(7). (T.d. 347).

ARGUMENT

State of Ohio's Response to Noling's Proposition of Law: When an eligible offender's application for DNA testing has been rejected for failing to satisfy the acceptance criteria described in R.C. 2953.72(A)(4), the trial court is without statutory authority to accept or consider subsequent applications. R.C. 2953.72(A)(7).

Effective October 29, 2003, the legislature enacted a procedure available to inmates seeking postconviction DNA testing of evidence. R.C. 2953.71 et. seq. Amendments to the procedure have occurred in 2006 and again in 2010. Contrary to Noling's assertions on appeal, nothing in the plain language of the procedure provided in R.C. 2953.71 et. seq. authorized the Portage County trial court to accept or consider Noling's December 28, 2010 subsequent application for DNA testing.

This Is a Separation of Powers Issue

"While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that

define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 158-159, 28 OBR 250, 503 N.E.2d 136. It "represents the constitutional diffusion of power within our tripartite government. The doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches." *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 114.

The struggle between finality of judgments and the developing nature of technology accounts for the seeming incongruent nature of the 2006 and 2010 amendments with R.C. 2953.72(A)(7)'s procedural bar to subsequent applications. However, all arguments going to the soundness of legislative policy choices should be directed outside the door of the courthouse. This Court "has nothing to do with the policy or wisdom of a statute. That is the exclusive concern of the legislative branch of the government." *State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. of Edn.* (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 498, 40 N.E.2d 913, 919.

In the present case, the record reflects that Noling, who met the definition of an eligible offender under R.C. 2953.72(C), submitted a properly filed application for postconviction testing and accompanying acknowledgement with the trial court on September 25, 2008. (T.d. 296). The trial court overruled Noling's application for DNA testing on the basis of R.C. 2953.74(A), that a prior definitive DNA test had been conducted regarding the same biological evidence Noling sought to be tested, finding "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." (T.d. 299).

Despite seeking review of the decision in this Court, after releasing the *Prade*, 2010-Ohio-1842, decision on May 4, 2010, this Court denied Noling's leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (T.d. 318).

As the trial court had rejected Noling's September 25, 2008 application for DNA testing, "because the offender d[id] not satisfy the acceptance criteria described in division [R.C. 2953.72](A)(4)," the statute expressly dictated "the court will not accept or consider subsequent applications[.]" R.C. 2953.72(A)(7). Unless and until the legislature deems fit to revisit the language of R.C. 2953.72(A)(7), the trial court remains without statutory authority to accept or consider Noling's subsequent application. Accordingly, the trial court's denial of Noling's subsequent application was proper and should be affirmed by this Court.

<u>Collection and Prior Testing of Cigarette Butt</u>

The cigarette butt (filter) was collected from the driveway, placed into inventory at the Portage County Sheriff's Department and then submitted to BCI on April 18, 1990. (T.d. 333, Exhibits 16, 17, 18). A BCI laboratory report dated April 23, 1990, authored by BCI Forensic Scientist Dale Laux, indicated the following results from his initial testing of the cigarette butt, "[e]xamination of the contents of item #1 revealed the presence of a cigarette butt filter which had been burned. The only marking is a thin dark line approximately 3 cm. From the tip. A portion of the end of the cigarette was removed and will be retained in the event that typing of the

secretions is desired." (T.d. 333, Exhibit 19). Typing of the secretions was desired and performed by Laux. Furthermore, research into whether DNA testing was a possibility in 1991 was also discussed with Laux. (T.d. 333, Exhibit 20).

June 19, 1991, a BCI laboratory report indicating that blood tests, not DNA tests, were conducted on an extract of a cigarette butt. (T.d. 337, Exhibit 3). The results of the blood tests were, "elevated levels of amylase which is indicative of the presence of saliva. *Typing of the extract failed to reveal detectable levels of secreted blood group substances*. The cigarette may have been smoked by a non-secretor." (Emphasis added). (T.d. 337, Exhibit 3). The findings provided by BCI Forensic Scientist Laux also contained the following sentence, "[t]yping of the blood from Daniel E. Wilson, BCI & I case number 91-31692-D, revealed him to be a type A non-secretor." (T.d. 337, Exhibit 3). After testing at BCI, the cigarette butt was sent to the Serological Research Institute located in California for DNA testing.

The record further reflects that the parties stipulated to SERI's February 19, 1993, DNA analysis of the cigarette butt at a pre-trial hearing. (T.d. 333, Exhibit 14). The SERI Report, State's Trial Exhibit No. 128, contained the results of a forensic serological comparison between blood samples from Noling, St. Clair, Dalesandro, Wolcott, the cigarette butt and Noling's saliva. (T.d. 333, Exhibit 15). The results of the testing indicated that "the smoker of the cigarette butt is a nonsecretor of unknown ABO type" and that two samples from the cigarette butt "had HLA Dq*a* results of 3, 4." (T.d. 333, Exhibit 15).

In 1993, only two types of DNA testing were available, one that detected the presence of Restriction Fragment Length Polymorphisms (RFLPs) in the DNA and a

second method which relied on identifying a small specific section of DNA known as the HLA Dq*a* locus. (T.d. 333, Exhibit 15). The HLA Dq*a* analysis required less DNA and "[a]lthough there may be an elimination of a person using this system clearly an identification to the exclusion of all others is not possible." (T.d. 333, Exhibit 15). Using the HLA Dq*a* analysis, Noling, St. Clair, Wolcott, and Dalesandro were excluded as persons who could have smoked the cigarette. (T.d. 333, Exhibit 15).

Noling has relied on the June 19, 1991 BCI report along with April 24, 1990 handwritten notes from an individual named Nathan Chesley as one reason for filing his subsequent DNA application and although not an issue presently before this Court, as support for his leave to file a subsequent motion for a new trial. (T.d. 304). Chesley's hand written notes dated April 24, 1990, indicated that he was 18 years old at the time of the Hartig murders and living with foster parent, Shirley Spinney, along with two other foster children. (T.d. 337, Exhibit 2). The Chesley notes contain the following, "Nathan made the statement he thought it was cool what happened to the Hartigs. Nathan made the statement his brother did it." (T.d. 337, Exhibit 2). Chesley's notes also contains contact information for Ms. Spinney at her place of employment and Chesley's case worker's information. (T.d. 337, Exhibit 2). In preparation for filing his application for leave to file a motion for new trial, Noling procured an affidavit from Chesley in which Chesley averred that Dan Wilson was one of Shirley Spinney's foster children who was moving out when Chesley was moving in. (T.d. 337, Exhibit 2).

With regards to these matters, the State notes, the Sixth Circuit having already reviewed this case at length and assuming that Noling had established a *Brady*

violation, reviewed the Dan Wilson alternative suspect evidence that Noling is partially relying on as support for filing his subsequent application for DNA testing in this matter and found, "[n[everless, the newly discovered facts and all the other evidence do not establish clearly and convincingly that a reasonable factfinder could not have found Noling guilty." *Noling v. Bradshaw* (C.A.6, June 29, 2011), Case Nos. 07-398908-3258, 10-3884.

New DNA Test Result Will Not Be Outcome Determinative

In his brief to this Court, Noling stated for the past three years he has "sought DNA testing on a cigarette butt found outside the home of Bearnhardt and Cora Hartig." (Noling Brief, p.g. 5). However, as Noling correctly provides later in his brief, the scene of the crime was inside the Hartig's residence, "Bearnhardt and Cora Hartig were found shot to death in their kitchen." (Noling Brief, p.g. 6). Rather than seeking DNA testing of evidence gathered at the scene of the crime, the Hartig's kitchen, Noling is requesting this Court expand the legislative authority of the trial court and grant a subsequent application for DNA testing of an item located at the edge of the Hartig's driveway and Moff Road.

On appeal, Noling characterized the 2006 amendments as offering an inmate different avenues to meet the statutory term "outcome determinative" including that an "inmate can meet the standard and prove his innocence by matching the *DNA from the crime scene* to an alternate suspect, or by getting a "cold hit" to a felon whose DNA profile is in the FBI's CODIS database." (emphasis added) (Noling Brief, p.g. 16).

The fact that some person known or unknown to the Hartigs flicked a cigarette butt onto their driveway is irrelevant to the identity of the perpetrator of this crime. There is no information indicating when the cigarette butt was left in the driveway or how long it had been there. If the cigarette butt was from a person known to the Hartigs it could have been left on a visit. Alternatively, if an unknown person left the cigarette butt, there was nothing preventing the public's access to the Hartig's driveway. Therefore, the cigarette butt proves nothing and is not outcome determinative with regards to this case.

Noling cannot demonstrate that retesting the cigarette butt under current DNA technology would render a result that would be relevant or when analyzed in the context of and upon consideration of all available admissible evidence related to this case would render a strong possibility that no reasonable factfinder would have found him guilty of aggravated murder and the accompanying specifications. R.C. 2953.74(B)(2). In other words, a new DNA test result would not be outcome determinative.

Noling is Seeking an Unwarranted Expansion of *Prade*

In support of his subsequent application for DNA testing, Noling asserted under the authority of this Court's holding in *Prade*, "that a prior DNA test is not definitive when a new DNA technology can reveal new information about the perpetrator." (T.d. 321). In addition to misrepresenting the holding of *Prade*, Noling disregarded that this Court expressly limited its decision in *Prade* as follows, "[w]e do not have before us the issue of whether to allow new DNA testing in cases in which a prior DNA test provided a match or otherwise provided meaningful information and

the inmate is simply asking for a new test using the latest testing methods. Rather, our holding is limited 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.*, 2010-Ohio-1842, at ¶29.

At issue in *Prade* was the saturated fabric of Dr. Prade's lab coat over the area of her arm where she received a bite mark from the killer. *Id.*, 2010-Ohio-1842, at ¶17. Testing performed on a sample of the lab coat fabric in 1998, revealed nothing more than the DNA from Dr. Prade's blood had overwhelmed or saturated any DNA from the biter's skin cells. This Court accepted jurisdiction and reversed the decisions of the Ninth District and the trial court finding, "[a] prior DNA test is not 'definitive' within the meaning of R.C. 2953.74(A) when a new DNA testing method can detect information that could not be detected by the prior DNA test." *Prade*, 2010-Ohio-1842, at syllabus.

This Court reasoned that the 1998 a DNA profile of the killer could not be detected in the mixture of DNA containing such a substantial quantity of Dr. Prade's DNA. *Id.*, 2010-Ohio-1842, at ¶22. As new technology now existed that could provide a profile of the minor contributor to the mixture on the lab coat sample, the 1998 DNA test would not have been definitive within the meaning of R.C. 2953.74(A). *Id.*, 2010-Ohio-1842, at ¶23.

Unlike the DNA profile in *Prade* that provided no information about the biter, the cigarette butt from the Hartig's driveway provided the following information regarding the smoker of the cigarette butt: the smoker was a nonsecretor (Lewis inhibition results of a+b-) of unknown ABO type with a HLA DQa results of 3,4. (T.d.

333, Exhibit 5). Noling's saliva and blood, St. Clair's blood, Wolcott's blood, and Dalesandro's blood were all compared with the cigarette smoker's detected DNA information. (T.d. 333, Exhibit 5). The SERI report concluded, "Joseph Dalesandro, Gary E. St. Clair, Butch Wolcott, and Tyrone Noling could not be the person who smoked the Cigarette." (Emphasis original) (T.d. 333, Exhibit 5). As Noling's prior DNA test provided, "meaningful information," he is attempting to expand *Prade* beyond its express limitations. Noling is nothing more than an inmate "simply asking for a new test using the latest testing methods." *Prade*, 2010-Ohio-1842, at ¶29.

CONCLUSION

A review of Noling's subsequent application for DNA testing, attached affidavits, documentary evidence, and all files and records pertaining to his proceedings including but not limited to the indictment, journal entries, journalized records of the clerk of courts, transcripts of proceedings does not alter the plain language of the statute which provides, "**the court will not accept or consider subsequent applications**." (emphasis added). R.C. 2953.72(A)(7). The legislature created the remedy of postconviction DNA testing and as a statutory creation, the trial court was without authority to accept or consider Noling's subsequent application because it rejected Noling's September 25, 2008 application for not satisfying the acceptance criteria described in division [R.C. 2953.72](A)(4). R.C. 2953.72(A)(7).

Despite Noling's attempt to expand the holding in *Prade*, that decision does not affect Noling's case. Further, the *Prade* decision was released four months before this Court rejected jurisdiction to review the trial court's denial of Noling's

September 25, 2008 application. If *Prade* affected Noling, his case would have been remanded under the authority of *Prade* for further considerations consistent with that opinion.

No additional DNA testing of the cigarette butt collected from the Hartig's driveway is required because Noling can not demonstrate that DNA retesting would be outcome determinative in his case. As the cigarette butt proves nothing and is not outcome determinative with regards to this case, it is disingenuous to suggest that learning the identity of an individual who smoked a cigarette that ended up on the Hartig's driveway at some unknown time prior to being collected by the police would have changed the outcome of Noling's trial or sentence.

On April 5, 1990, Noling entered the home of Bearnhardt and Cora Hartig, fired multiple shots from a .25 caliber gun, left the elderly couple dead on the kitchen floor and fled the scene of the crime. The Appellee, State of Ohio, respectfully moves this Court to overrule Noling's proposition of law and affirm the judgment of the Portage County Court of Common Pleas.

Respectfully submitted,

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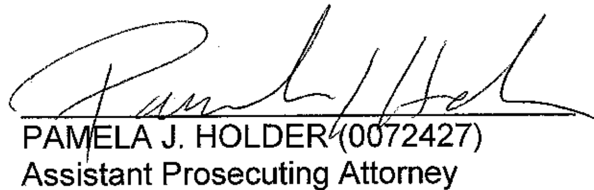
I hereby certify that a copy of the foregoing Merit brief of the State of Ohio has been sent by ordinary U.S. mail to counsel for the Appellant: Carrie Wood at Ohio Innocence Project, University of Cincinnati, P.O. Box 210040, Cincinnati, Ohio, 45221-0040 and Jennifer A. Prillo at the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, this 9th day of January 2012.



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