IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	CASE NO. 95-CR-220
Plaintiff,	:	JUDGE JOHN A. ENLOW
-v-	:	**NOLING'S REPLY TO STATE'S RESPONSE IN OPPOSITION OF NOLING'S APPLICATION FOR POST-CONVICTION DNA TESTING**
TYRONE NOLING,	:	
Defendant.	:	**This is a capital case.**

Tyrone Noling has filed an Application for Post-Conviction DNA Testing (the "Second Application"), on the grounds that (1) new DNA testing technology has developed since the time of Noling's trial that makes it possible to learn new information about the DNA evidence and the perpetrator; (2) the statutory standards governing Ohio's post-conviction DNA testing statutes have been revised since the time he filed his First Application in 2008 (the "First Application"); and (3) newly discovered evidence points to strong alternate suspects, who were investigated by the police at the time of the crime and can be matched to the physical evidence recovered from the crime scene through new advances in DNA technology.

In its Response to Noling's Second Application, the State presents an incomplete picture of the governing statutes and then argues that Noling's Second Application is barred based on statutory language alone. In addition, the State argues that Noling's Second Application is barred by *res judicata* and fails to meet the requirements of R.C. 2953.74. The State's arguments disregard or simply ignore Ohio's recent legislative amendments and relevant case law. In addition, the State fails to address any of the alternate suspects, and specifically, Daniel Wilson,

whose potential tie to the physical evidence in this case is fundamental to establishing "outcome determinative" under R.C. 2953.74(C)(5).

Both the statute and relevant case law require that this Court review Noling's Second Application. Noling has established that he is entitled to post-conviction DNA testing under R.C. 2953.71 et seq. because a DNA test could reveal the true perpetrator of the crimes for which he was convicted and for which he maintains his innocence.

I. R.C. 2953.72(A)(7) is not a bar to this Court's consideration of Noling's Second Application because the statutory standards governing R.C. 2953.72(A)(7) were revised by the Ohio legislature after Noling's First Application was denied.

The State contends that this Court is barred from considering Noling's Second Application based on the statutory provisions contained in R.C. 2953.72(A)(7) and 2953.72(A)(4). Although the state properly quotes the language of these statutes, it fails to recognize the important fact that the Ohio legislature changed the statutory standard of R.C. 2953.74, which is essential to a correct application of R.C. 2953.72(A)(7) and 2953.72(A)(4). A close examination of the statutory language demonstrates the essential links between these provisions.

First, R.C. 2953.72(A)(7) provides:

> [I]f the court rejects an eligible offender's application for DNA testing because the offender does not satisfy (A)(4) of this section, the court will not accept or consider subsequent applications.

The "(A)(4) of this section" refers to R.C. 2953.72(A)(4). This section, in turn, provides:

> [T]he 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.

Finally, R.C. 2953.74 is subdivided into sections (A) through (E). Noling's First Application was denied under 2973.74(A), which provides 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. 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 (emphasis added).

The key phrase in 2973.74(A) is "definitive DNA test." In 2010, the Ohio legislature passed Senate Bill 77 ("SB77"), which, for the first time, specifically defined the term "definitive DNA test" in order to correct prior court rulings that had improperly applied an overly restrictive definition of the term. R.C. 2953.71(U). As a result of the new law, the underlying standard governing R.C. 2953.72(A)(7) and 2953.72(A)(4) was changed.

This Court denied Noling's First Application prior to the 2010 revisions contained in SB77 – and Noling's Second Application must be considered under the current, less restrictive definition. More importantly, R.C. 2953.72(A)(7) does not bar this Court's consideration of Noling's Second Application because the change in the underlying standard – which is essential for a correct application of R.C. 2953.72(A)(7) – is qualitatively different than the standard that governed Noling's First Application. As such, this Court has not yet made a decision under the current criteria discussed in R.C. 2953.72(A)(7) and 2953.72(A)(4). Therefore, this Court has the authority under the statute to review Noling's Second Application.

In its Response, the State fails to connect the necessary provisions of Ohio's DNA testing statutes. As a result, the State's argument that this Court is statutorily barred from considering Noling's Second Application fails.

II. The State's contention that the Ohio Supreme Court's decision in *State v. Prade* has no impact on Noling's Second Application is flawed.

A. *State v. Prade* is applicable to this Court's consideration of Noling's Second Application.

This Court's decision to bar Noling's First Application was based on the Ninth District Court of Appeals' decision in *State v. Prade*, 2009-Ohio-704 ("*Prade I*") which was overturned by the Ohio Supreme Court in *State v. Prade,* 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287 (2009) ("*Prade II*"). The central issue of *Prade II* was whether a prior DNA test should be deemed "definitive" when a new DNA testing method could reveal information that the prior DNA testing method could not. *Id.* at ¶29. In the State's Response, it argues that the decision in *Prade II* has no impact on Noling's Second Application because (1) the type of new DNA technology discussed in *Prade II* sought new information from the DNA that is different from the new information sought by Noling in his Second Application, and (2) the Ohio Supreme Court did not address whether a prior DNA test was definitive when that test provided "meaningful information." This argument is incorrect.

In *Prade II*, the Court held that a "prior DNA test is not 'definitive' within the meaning of R.C. 2953.74(A) when a new DNA testing method can detect information that could not be detected by the prior DNA test." *Id.* at syllabus. This holding was much broader than the facts of the underlying case – which involved a "prior exclusion result" that was deemed "meaningless" by the Ohio Supreme Court due to the poor DNA testing technology existing at the time of the trial. Rather than limit its holding to only such future cases that involved 'meaningless prior exclusion results', the Court specifically stated that its holding addressed

situations where advances in DNA testing made it possible to learn information about DNA evidence that could not have been detected at the earlier trial. *Id.* at ¶ 29.[1]

In its Response, the State focuses on what the *Prade II* Court did not address. In particular, the State highlights and analyzes the following language:

> *[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 under the latest testing methods (emphasis added). *Prade,* 2010-Ohio-1842, ¶ 29 (emphasis added).

Based on this quote, the State contends that *Prade II* is not applicable in situations where "meaningful information" was obtained from a prior test – regardless of whether new DNA testing technology could reveal previously undetectable information. Taking this argument one step further, the State claims that the prior testing done in Noling's trial produced a "meaningful result" (i.e., it excluded a number of individuals as DNA contributors to the cigarette butt) and, therefore, *Prade II* is not applicable to a consideration of Noling's Second Application.

The fundamental problem with the State's argument is that it ignores the core of *Prade II*'s holding, which permits subsequent DNA testing when a new DNA testing method can detect information that could not be detected by the prior DNA test. As discussed at length in Noling's Second Application, there are numerous new DNA testing methods that could detect information that the testing done at trial could not. In other words, contrary to the State's argument, Noling's situation is closely analogous to the situation in *Prade II.* Furthermore, the State presents a contradictory argument with regard to its claim that "meaningful information" was derived from the earlier tests. First, the State argues that the DNA testing at Noling's trial was meaningful

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[1] Although SB77 clearly provides a new statutory definition for "definitive DNA test," the reasoning of the Ohio Supreme Court in *Prade II* continues to provide important guidance on the "definitive" nature of prior DNA testing.

because "meaningful information was provided from the 1993 SERI DNA test in Noling's case, he was excluded as the smoker of the cigarette butt." (State's Response, p. 7.) Then, in the very next sentence, the State argues that the results were meaningless because the evidence was merely "[a] cigarette butt not found at the scene of the crime, the Hartig's kitchen, but collected from the driveway of the Hartig's house." (Id.) The State cannot have it both ways. As stated in Noling's Second Application, Section IV.B.5, "meaningful information" in this case would be matching the profile on the cigarette butt to the perpetrator of the crime. But more importantly, the State's arguments with regard to the "meaningfulness" of the cigarette butt test results ignore the holding of *Prade II*. As a result, the State's argument that *Prade II* is inapplicable to Noling's case fails.

B. The advances in DNA testing, crucial to the holding *Prade II*, have the potential to identify the perpetrator in Noling's case.

Despite the State's argument that *Prade II* is not applicable to Noling's case, the State does not dispute the fact that, just like the situation in *Prade II*, new DNA testing methods exist that were not available at the time of Noling's trial. The new information sought by Noling is the same type of new information sought by prosecutors' offices to solve "cold cases."[2] As described in Sections II.C and IV.A of Noling's Second Application, DQα testing and blood typing cannot identify a single individual, or be run through CODIS and, therefore, cannot provide "meaningful information" for solving cold cases. In fact, the profile generated by DQα testing can belong to as much as ten percent of the population.[3] Current DNA technology can

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[2] http://blog.cleveland.com/metro/2008/07/cold_case_squad_reexamines_uns.html ("A common thread may help solve these mysteries: DNA. That's why the Cold Case Squad is looking at slides with microscopic fibers, swabs with body fluids, blood-stained clothes, cigarette butts with traces of saliva -- any crime-scene object with a possible speck of evidence left behind by the killers") (March 19, 2011).

[3] Fundamentals of Forensic DNA Typing, Butler, John M., p. 57 (2010) ("...it was only capable of a power of discrimination in the range of 1 in 10,000 unrelated individuals. Problems were also noted with the potential for

provide new information to those working cold cases in the form of a single individual, with accuracy in the realm of one in 5,938,000,000,000,000.[4] *See*, Exhibit A. This ability of DNA technology to identify a single perpetrator makes the CODIS system, a uniquely useful and efficient tool for law enforcement to identify and match crime scene DNA to those, mostly known felons, already in the CODIS system.[5]

The central question asked by the Court in *Prade II* was whether "advances in DNA testing have made it possible to learn information about DNA evidence that could not even be detected at the earlier trial." In the present case, there is no dispute that such advances have been made. DNA technology at the time of Noling's trial was only able to reveal that the DNA of a few individuals was not present, but it could reveal more important information – such as whether the DNA on the cigarette butt belonged to the strong alternate suspect, Daniel Wilson.[6] Now, DNA technology can provide that information. Therefore, just as the *Prade II* Court stated that such information was crucial to its holding, recent advances in DNA technology merit this Court's consideration of Noling's Second Application.

III. *Res Judicata* is not a bar to Noling's Application, because *res judicata* does not apply to cases involving post-conviction DNA testing where the defendant has made a threshold showing that such testing would be outcome determinative.

The State argues that the doctrine of *res judicata* bars Noling's Second Application. In support of this proposition, the State cites *State v. Hall*, 2009-Ohio-6379, which did not involve a

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PCR product renaturation that sometimes impacted the ability to obtain reliable results. While the polymarker and DQ alpha tests helped introduce PCR-based methods into the U.S. Court system, they were insufficient in terms of their ability to differentiate people on a large enough scale to be useful in a national DNA database").

[4] Per the U.S. Census, the current population of the earth is 6.9 billion. http://www.census.gov/ipc/www/popclockworld.html (March 13, 2011).

[5] Fundamentals of Forensic DNA Typing, Butler, John M., *supra*, fn. 3, p. 6.

[6] Daniel Wilson's role as a strong alternate suspect in this case is discussed at length in Noling's Second Application, pp. 19-21. The role DNA test results play with respect to this information is also discussed at length in Noling's Second Application, pp. 34-40.

change in the statutory DNA testing requirements. The State, then, merely "notes" the 2009 case, *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, which 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. The State does not dispute the essential holding of *Ayers*, which is that *res judicata* does not apply to post-conviction DNA testing applications upon a showing that the outcome determinative standard had been met. (State's Response, p. 12). Instead, the State merely argues that Noling has not shown that DNA testing would be outcome determinative and therefore *res judicata* applies.

In *Ayers*, the defendant initially applied for DNA testing under SB11. The trial court denied his application because Ayers failed to demonstrate that DNA testing would be outcome determinative. Then, in 2008, Ayers filed a second application for DNA testing of the same evidence under SB262. 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. The trial court also held that Ayers' application failed to demonstrate that DNA testing would be outcome determinative.

On appeal, the Eighth District reversed the trial court, holding that *res judicata* is not a bar to a subsequent DNA testing application, stating that post-conviction 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. If that showing is made, *res judicata* will not bar testing even though an earlier application for DNA testing was denied. Because Ayers's first application was considered and rejected under the earlier, more restrictive statute, we find that principles of *res judicata* are inapplicable to preclude consideration of this petition. Ayers, ¶ 26.

Noling's Second Application is closely analogous to *Ayers* on two central points. First, as discussed at length in the Second Application, Noling has made a threshold showing that DNA testing would be outcome determinative. (See Noling's Second Application, Section IV.B.5).[7] Second, just like the defendant 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 the First Application. Noling's Second Application was filed after this amendment to the statute. Therefore, just like the Court held in *Ayers*, the "principles of *res judicata* are inapplicable to preclude consideration of this petition." *See*, *Ayers*, ¶ 26. As a result, the State's argument that *res judicata* bars this Court's consideration of Noling's Second Application fails.

IV. The Court does not have to find that the materials submitted by Noling are newly discovered evidence in order to consider them as part of Noling's Second Application.

Under 2953.74(D), this Court does not have to find that any of Noling's exhibits are newly discovered evidence in order to consider them in the Court's outcome determinative finding. In its Response, the State argues that Noling's Exhibits I-M are <u>not</u> newly discovered

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[7] Exhibits I-M, attached to Noling's Second Application, contain police and serology reports which indicate strong alternate suspects in the Hartig murders. For instance, the exhibits include statements by Nathan Chesley that indicate that Daniel Wilson confessed to being the perpetrator of the Hartig murders and blood test results which did not exclude Wilson as the smoker of the cigarette left at the Noling's house. Noling contends that Exhibits I-M are newly discovered evidence. This newly discovered evidence helps to establish a threshold showing that DNA testing would be outcome determinative, whereas prior to its discovery it is not clear whether the outcome determinative standard was met as this Court did not rule on that portion of Noling's First Application. Under *Ayers*, should newly discovered evidence now be able to make a threshold showing that DNA testing would be outcome determinative, *res judicata* will not bar testing even though the earlier application was denied.

The State does not dispute the holding in *Ayers*. The State simply argues that Noling has not established that DNA testing would be outcome determinative. In other words, the State concedes that had this Court believed Noling's trial counsel and found that Noling's Exhibits I-M are newly discovered evidence, and these exhibits establish that DNA testing would be outcome determinative, then Noling's Second Application could not be barred by *res judicata* based solely on Exhibits I-M.

evidence and suggests, through a complete failure to acknowledge the exhibits in their arguments, that this Court should not consider them in deciding Noling's Second Application. The State's position ignores 2953.74(D), which provides:

> 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 (emphasis added).

The exhibits attached to Noling's Second Application, as well as the potential testimony of those witnesses, are available admissible evidence.[8] The plain language of R.C. 2953.74(D) does not limit the evidence that this Court "shall consider" to evidence adduced at Noling's original trial. Therefore, this Court "shall consider" all Noling's exhibits, and potentially witness testimony, in determining whether the outcome determinative standard has been satisfied.

V. The State's arguments fail to show that Noling has not met the requirements of R.C. 2953.74.

As Noling previously set forth in his Second Application, (specifically, Section IV) he meets all of the statutory requirements of R.C. 2953.74 necessary for this Court to grant post-conviction DNA testing. In its Response, the State fails to offer legally supportable arguments that refute Noling's position. The relevant sub-parts of R.C. 2953.74 are discussed in the following sections.

A. Noling meets the requirements of 2953.74(A) as neither the prior DQα testing, nor the blood typing are prior definitive DNA tests under SB77's newly enacted definition.

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[8] The State has not contested that the police and serologist reports were not a part of the State's records. *See*, February 18, 2011, Hearing on Noling's Motion for Leave to File Motion for New Trial; *See also,* State's Response, Exhibit I.

R.C. 2953.74(A) provides that a defendant must not have had a "prior definitive DNA test" in order for the Court to consider the remaining requirements of R.C. 2953.74. In 2010, SB77 enacted R.C. 2953.71(U), which states:

> "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.

The State does not even attempt to argue there was that a prior "definitive DNA test" under SB77's newly enacted definition. In fact, the State makes clear that "blood typing" was the only prior testing done with respect to Daniel Wilson. (State's Response, p. 10.) As such, the State concedes that under SB77, there was not a prior "definitive DNA test."

As discussed at length in Noling's Second Application (specifically Sections II.C and IV.A) and in this brief, *supra*, Section II, neither DQα nor blood typing is a prior definitive DNA test under SB77. Specifically, under SB77's newly enacted definition in 2953.71(U), DQα and blood typing are such primitive testing methods 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." Furthermore, DQα and blood typing were unable to identify a single individual, and, as such, were unable to connect the cigarette butt with the perpetrator of the Hartig murders. Noling has shown, by a preponderance of the evidence, that, because of advances in DNA technology, (specifically, its current ability to identify a single individual and provide a match via the CODIS system), there is a possibility of discovering new biological material from the perpetrator that the prior DNA test (or the prior blood test) may have

failed to discover. R.C. 2953.71(U); *See,* Noling's Second Application, Sections II.C and IV.A; *supra,* Section II.

B. Under 2953.74(C)(5)'s outcome determinative standard, the State fails to address the ability to match the DNA profile on the cigarette butt to Daniel Wilson, one of the alternate suspects and ignores available admissible evidence.

In his Second Application, Noling discusses at length the scenario in which a match of the DNA profile on the cigarette butt to Daniel Wilson would be outcome determinative under R.C. 2953.74 and its relevant case law. The State wholly ignores this argument – indicating that it either concedes the point, or simply does not have an argument in opposition. Finding Daniel Wilson's DNA on the cigarette butt found outside the Hartig home would put Wilson, someone who had previously killed an elderly man during the course of a burglary and subsequently killed a woman by burning her alive, at the Hartig house. In the context of Wilson's criminal history and Nathan Chesley's statements that Daniel Wilson told Chesley that he (Wilson) had killed the Hartig's, a test result showing Wilson's DNA would be outcome determinative.

C. Under 2953.74(C)(5)'s outcome determinative standard, the State's contention that a CODIS match with the DNA profile on the cigarette butt is a "fishing expedition" is in direct contradiction to the holdings in *Ayers* and *Reynolds.*

The State argues that running the DNA profile that is recovered from the cigarette butt through CODIS, or comparing the yet to be generated profile with the DNA of an alternate suspect, is a "fishing expedition." This argument runs counter to both Ohio's post-conviction DNA testing statute and current case law.

An inmate can meet the outcome determinative 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(C)(5), (E). In

addition to the statute, case law makes clear that CODIS can be used in establishing the outcome determinative standard, even when a specific alternate suspect is not named. *State v. Reynolds*, 186 Ohio App. 3d 1, 2009-Ohio-5532, ¶ 20 (holding that once a third party's DNA is uncovered, R.C. 2953.74(E) "specifically permits an applicant to have the unknown DNA result uploaded into CODIS in order to search for a match to a known felon"); *State v. Ayers,* 185 Ohio App.3d 168, 2009-Ohio-6096, ¶ 42, *appeal denied, State v. Ayers*, 2010-Ohio-0323 (holding that [a]lthough none of this evidence matched the defendant's DNA profile, it was possible that refinements in testing could identify the source of the DNA and perhaps establish proof that another person had been in the victim's apartment at the time of the murder).

In sum, the State's "fishing expedition" argument is in direct contradiction to recent Ohio case law. Both *Ayers* and *Reynolds* make clear that the ability to match a known felon to the recovered DNA profile(s) is not a "fishing expedition" and, moreover, is plainly permissible pursuant to both the statute and the governing case law.

D. The State's assertion that Noling's defense theory at trial now prevents him from meeting the requirements of 2953.73(C)(3) and (4) lacks the support of case law.

R.C. 2953.74(C)(3) provides that a defendant must make his identity an issue at trial in order to qualify for DNA testing. In its Response, the State argues that Noling failed to meet the requirements of 2953.74(C)(3), which states:

> 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 (emphasis added).

At trial, Noling's Counsel clearly stated:

> [what] we know for a fact is that there have been two awful homicides, grisly homicides in this case. We're not here to argue about that. We're not here to

> argue about how Mr. and Mrs. Hartig were found. What we're here to argue about is who committed these crimes (emphasis added). (Tt. 642-43).

Despite defense counsel's statement, the State argues in its Response that the identity of the perpetrator was not an issue at trial. In support of this argument, the State quotes the following language from Noling's counsel at trial:

> [I]t's our position the State cannot prove this case beyond a reasonable doubt, and that Tyrone Noling is not guilty of these homicides. (Tt. 643).

The State fails to explain how this statement does not make the identity of the perpetrator an issue. More importantly, even if this Court can identify some underlying logic to the State's argument, Ohio law dictates that the defendant need only to put his identity as the perpetrator at issue to meet the requirements of 2953.74(C)(3). *State v. Collier*, 2006-Ohio-2605, ¶ 21. The defendant does not have to make identity the primary focus of his defense. *Id.* In quoting Noling's trial counsel as stating that they were there "to argue about is who committed these crimes," the State concedes that Noling's defense theory at trial put Noling's identity as the perpetrator at issue. *See,* Tt. 642-43, 645. Therefore, Noling has met the requirements of 2953.74(C)(3).

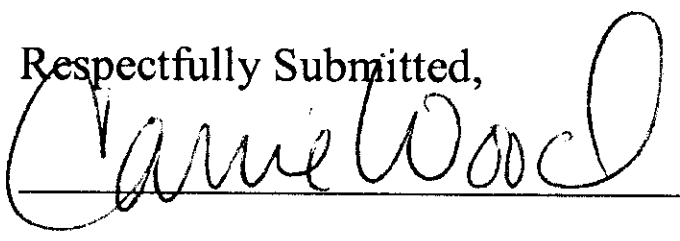
The State also argues that Noling fails to meet the requirements of R.C. 2953.74(C)(4), which provides that the court must determine that one or more of Noling's defense theories, either from his original trial or in a possible retrial, are of such a nature that DNA testing would be outcome determinative. The State's argument regarding to this provision, is based on the bizarre theory that, at trial, Noling's counsel argued that the State lacked any physical evidence tying Noling to the crime scene. And, therefore, any additional testing of the cigarette butt would not somehow add to the Defendant's theory that someone else was the perpetrator of the crime. (State's Response, pp. 16-19.) In addition to being confusing, the State's argument

ignores the existence of an important defense theory, based on available, admissible evidence, that one of the alternate suspects – specifically, Daniel Wilson – committed the crime. This theory is discussed at length in Noling's Second Application, which devotes almost three pages to a detailed, evidence-based argument describing the scenario under which a positive DNA test result for Daniel Wilson would be outcome determinative. Although it is unnecessary to repeat that argument here, it is worth stating that if the physical evidence ties Daniel Wilson to the Hartig crime scene, as one news reporter put it – "it's a game changer."[9]

CONCLUSION

The newly enacted statutory standard for "definitive DNA test," enacted by SB77, precludes the application of *res judicata* or R.C. 2953.72(A)(7) as a bar to this Court's consideration of Noling's Second Application. In addition, Noling has clearly shown, in the context of all the available admissible evidence, including the recantations of all Noling's co-defendants and the evidence of strong alternate suspects, that DNA testing would be outcome determinative. Noling's outcome determinative showing also bars the application of *res judicata* and makes clear that Noling should be granted post-conviction DNA testing. Therefore, this Court should grant Noling's Second Application, or, in the alternative, hold a hearing on the application. The State does not object to Noling's request for a hearing. Therefore, Noling requests a hearing so that Noling, as well as the State, if they wish, can present evidence and witnesses, and make argument on Noling's Second Application.

Respectfully Submitted,



Carrie Wood (Temporarily Certified in Ohio)

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[9] http://www.cleveland.com/brett/blog/index.ssf/2011/02/question_in_death_row_inmates.html (March 12, 2011).

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EXHIBIT A

Request for Laboratory Examination

Department of Public Safety
Division of Police
Columbus, Ohio

◆ **Please make three copies** ◆

Date 6-24-02

- ❑ Adult Arrested
- ❑ Juvenile Arrested
- ❑ Payable Citation

Ticket No. _____

Please examine the following articles in the case of :

Suspect [redacted] Victim [redacted]

Location [redacted] Offense RAPE

Offense Report Number 65618-96 Property number 96-[redacted]; 96-[redacted]
020[redacted]; 020[redacted]

Check Type Or Types Of Laboratory Examination

( ) Latent Fingerprints	( ) Firearms Examination	( ) Test For Semen
( ) Alcoholic Beverage Analysis	( ) Bullet/Casing Comparison	( ) Test for Blood
( ) Urine Alcohol Analysis	( ) Serial Number Restoration	(X) DNA Analysis
( ) Urine Drug Screen	( ) Distance Determination	( ) Glass Comparison
( ) Drug Analysis *(Specify below)*	( ) Toolmark Comparison	( ) Paint Comparison
( ) Photo Lab *(Specify below)*	( ) Shoeprint Comparison	( ) Other Examination *(Specify below)*

USE THE KNOWN SALIVA STANDARDS OF [redacted] (PROPERTY #: 020[redacted]) AND [redacted] (PROPERTY #: 02[redacted]) TO DETERMINE THE CONTRIBUTOR OF SPERMATOZOA FROM THE RAPE KIT (SLIDES/SWABS) (PROPERTY #: 96-[redacted]) AND SEMEN FOUND ON THE TISSUES (PROPERTY #: 96-[redacted])

List Articles Submitted

RAPE KIT (SLIDES/SWABS) - PROPERTY #: 96-[redacted]
TISSUES - PROPERTY #. 96-[redacted]
ORAL SWABS - [redacted] - PROPERTY #: 02[redacted]
ORAL SWABS - [redacted] - PROPERTY #: 02[redacted]

Investigating Officer J.A. WEEKS Badge Number 470

Assignment SAS Telephone Extension 4701

Submitting Officer SAME Badge Number _____

Assignment _____ Telephone Extension _____

(Over)

1-10.101 (Rev. 1-94)

CRIME LABORATORY REPORT

Log # 4134-96 Property # 02-[redacted]02-[redacted] 96-[redacted] Date Received: 6-24-02

Received from: Weeks Date Completed: 7-2-02

RESULTS OF EXAMINATION:

DNA was extracted and STR typing was performed on the items listed below using the polymerase chain reaction (PCR) at the loci D3S1358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317, D7S820, D16S539, THO1, TPOX, CSF1PO and Amelogenin.

PR# 02-[redacted] Oral swab standard from [redacted]
PR# 02-[redacted] Oral swab standard from [redacted]

The DNA types previously obtained from the female fraction of the vaginal swab, PR#96-[redacted], match the DNA types obtained from the oral swab standard from [redacted], PR#02-[redacted].

The DNA types previously obtained from the male fraction of the vaginal swab, PR#96-[redacted], match the DNA types obtained from the oral swab standard from [redacted], PR#02-[redacted]

Based on the DNA types obtained from the male fraction of the vaginal swab, the approximate frequencies in the population are as follows:

Database	Frequency
Caucasian	1 in 5,938,000,000,000,000
African-American	1 in 35,960,000,000,000,000
Southeastern Hispanic	1 in 953,300,000,000,000
Southwestern Hispanic	1 in 7,087,000,000,000,000

No DNA analysis was performed on the tissues, PR#96-[redacted]

The remaining evidence has been returned to the property room for storage.

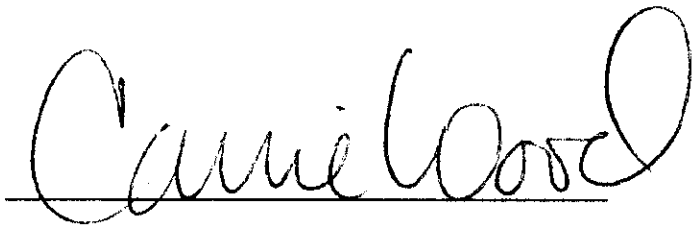
Report sent 7 5 02 Articles returned to PR

Reviewed by [illegible] 7 3 02 By Amanda L Clinton

WIR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Application for Post-Conviction DNA Testing was delivered by U.S. Mail to Victor V. Vigluicci, Prosecuting Attorney, 466 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 21st day of March, 2011.



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