IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO Plaintiff, v. TYRONE NOLING Defendant.	Case No. 1995 CR 220 JUDGE ENLOW STATE'S RESPONE TO NOLING'S SUBSEQUENT APPLICATION FOR DNA TESTING

Now comes plaintiff, the State of Ohio, by and through the undersigned counsel, and submits its response in opposition to Noling's subsequent application for DNA testing pursuant to R.C. 2953.73(C).

NO STATUTORY AUTHORITY TO ACCEPT OR CONSIDER SUBSEQUENT APPLICATIONS

As a threshold matter, the State notes that R.C. 2953.72 governs the application for postconviction testing and does not provide for a subsequent application for postconviction testing. R.C. 2953.72(A)(7), states "[t]hat, 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**[.]" (emphasis added) R.C. 2953.72(A)(7). *State v. Madden* (June 3, 2008), Franklin App. No. 08AP-172, 2008-Ohio-2653, at ¶13; *State v. Hayden* (Aug. 20, 2010), Montgomery App. No. 23620, 2010-Ohio-3908, at ¶12-14.

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 this Court on September 25, 2008. This 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." (March 11, 2009 Judgment Entry) (Exhibit 2).

Noling sought leave to appeal this Court's decision with both the Eleventh District Court of Appeals and the Supreme Court of Ohio. As R.C. 2953.73(E)(1) clearly limits a death row inmate's appellate review to the Supreme Court, the Eleventh District granted the State's motion to dismiss Noling's appeal in the Appellate Court for lack of jurisdiction. *State v. Noling* (Aug. 3, 2009), Portage App. No. 2009-P-0025. (Exhibit 3).

After the Supreme Court had released its decision in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, on May 4, 2010, the Court denied Noling's leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (Supreme Court Case No. 2009-0773, September 29, 2010 Entry) (Exhibit 4).

A review of this recent procedural history reveals that Noling can not satisfy the threshold burden of R.C. 2953.72(A)(7). This Court 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)" and therefore the statute expressly dictates "**the court will not accept or consider subsequent applications**[.]" (emphasis added) R.C. 2953.72(A)(7). As this Court is without

statutory authority to accept or consider Noling's subsequent application, Noling's December 28, 2010 must be rejected.

Assuming arguendo that this Court decides to exercise authority beyond that provided in the governing statute, the State submits the following response to his subsequent application for DNA testing.

NOLING'S ALLEGED NEW GROUNDS FOR SUBSEQUENT APPLICATION ARE WITHOUT MERIT

In support of his subsequent application, Noling asserted three allegedly new grounds including: 1) the Supreme Court of Ohio's decision in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842; 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. Even though the statutes governing applications for postconviction testing provide no mechanism to submit subsequent applications due to new case law, changes in statutory law or claims of newly discovered evidence, the State submits that each of the grounds asserted by Noling are without merit.

1) *STATE V. PRADE* NO EFFECT ON NOLING'S CASE

In support of his subsequent application, Noling misrepresented the holding of the *Prade* case as "that a prior DNA test is not definitive when a new DNA technology can reveal new information about the perpetrator." (Noling p.g. 3). The actual syllabus law in *Prade* provided "[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.

In *Prade*, Dr. Margo Prade was shot and killed in her van while parked outside of her medical office. The defendant, Akron Police Captain Douglas Prade was

convicted of her murder and sentenced to life in prison. "The key physical piece of evidence at trial was the bite that the killer made on Dr. Prade's arm through her lab coat and blouse." *Prade*, 2010-Ohio-1842, at ¶3.

In 1998, several pieces of biological evidence were tested for DNA including fingernail clippings from Dr. Prade, the fabric of her lab coat and a bloodstained bracelet. The most significant was the lab coat fabric over the area of the bite mark. *Id.*, 2010-Ohio-1842, at ¶17. It was believed that Dr. Prade had attempted to defend herself with her arm and instead received the bite mark from the killer. *Id.* Cuttings from this fabric were taken and a polymerase chain reaction testing was performed on the samples. *Id.*, 2010-Ohio-1842, at ¶18. Although the 1998 sample may have contained DNA from the biter, "the DNA from Dr. Prade's blood overwhelmed or diluted the DNA from the biter's skin cells." *Id.* Accordingly, the fabric sampled from the area over the bite mark showed only DNA from Dr. Prade thereby excluding the defendant. *Id.*

In response to the defendant's applications for postconviction DNA testing, the Summit County Court of Common Pleas concluded that the 1998 DNA testing was definitive "[b]ecause the defendant was excluded as a contributor of the DNA that was typed in this case." *Prade*, 2010-Ohio-1842, at ¶19. On appeal, the Ninth District Court of Appeals observed that the Revised Code did not define the phrase "definitive DNA test" and therefore looked to the common usage of the terms. *State v. Prade* (Feb. 18, 2009), Summit App. No. 24296, 2009-Ohio-704, at ¶8. The Appellate Court held that an exclusion result of a DNA test "provides a final, conclusive solution" and since all of the defendant's 1998 DNA tests produced exclusion results they

"constituted prior, definitive DNA tests within the meaning of R.C. 2953.74(A)." *Prade* -Ninth District, 2009-Ohio-704, at ¶12.

The Supreme 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.

The Court reasoned that in 1998, "the only information that the DNA testing on the lab coat revealed was that Dr. Prade's blood was present on her lab coat." *Prade*, 2010-Ohio-1842, at ¶19. The 1998 DNA test results did not give any information about the killer. *Id.* The defendant was excluded as a contributor of the DNA found on the lab coat because the only DNA found on the lab coat was Dr. Prade's DNA, "[b]ut the 'exclusion' excluded everyone other than the victim in that the victim's DNA overwhelmed the killer's DNA due to the limitations of the 1998 testing methods." *Id.* "Therefore, the exclusion was meaningless, and the test cannot be deemed to have been definitive." *Id.*

The Supreme Court's opinion then reviewed the effect of new testing methods on the biological evidence tested in 1998. As the fabric on Dr. Prade's lab coat over the bite mark was saturated with Dr, Prade's blood, a rich source of her DNA, the killer's DNA would have been a minor contributor of DNA in a two-person mixture of DNA with DR. Prade. *Id.*, 2010-Ohio-1842, at ¶22. In 1998, the 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 ¶21. Short tandem re-peat (STR) testing and y-chromosome STR (Y-STR) are two new testing methods that

have "the potential to identify any male DNA that might be contained within the lab coat bite mark sample." *Id.*, 2010-Ohio-1842, at ¶22.

As new DNA testing methods were now available to provide new information (a profile of the minor contributor to the DNA mixture on the lab coat sample) that was not able to be detected at the time of the defendant's trial (only had major contributor to DNA profile - Dr. Prade), the Court found the defendant's 1998 DNA testing was not definitive within the meaning of R.C. 2953.74(A). *Id.*, 2010-Ohio-1842, at ¶23.

In *Prade*, the Court expressly limited its decision 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.

Contrary to Noling's misrepresentations, *Prade* stands for the proposition that a prior DNA test is not definitive 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. The Supreme Court reversed the decisions of the Ninth District and the trial court because the 1998 DNA testing of the lab coat fabric over the bite mark resulted in only one DNA profile, the victim. There was no DNA profile of the killer to compare with the defendant's DNA. Accordingly, the 1998 DNA test results excluded the defendant after comparing his DNA with the DNA profile of the victim, the only DNA profile detected in the lab coat sample. Although the 1998 DNA test results were technically

an exclusion of the defendant, he was only being compared against the victim's DNA profile and not the DNA profile of biter rendering the exclusion meaningless.

Unlike *Prade* where the 1998 DNA tests of the lab coat detected no information regarding the biter, the cigarette butt collected from the Hartig's driveway, detected 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. (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. (Exhibhit 5). The SERI report concluded, "Joseph Dalesandro, Gary E. St. Clair, Butch Wolcott, and Tyrone Noling could <u>not</u> be the person who smoked the Cigarette." (Emphasis original) (Exhibit 5).

Noling's reliance on *Prade* to support his argument that the emergence of new DNA technology warrants a DNA retest in his case is misplaced. The *Prade* Court specifically limited its holding to avoid just these situations where an inmate would attempt to use the decision as a basis to get a new test using the latest testing methods, "[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." *Id.*, 2010-Ohio-1842, at ¶29. Meaningful information was provided from the 1993 SERI DNA test in Noling's case, he was excluded as the smoker of the cigarette butt. A cigarette butt <u>not</u> found at the scene of the crime, the Hartig's kitchen, but was collected from the driveway of the Hartig's house.

As the cigarette butt, was subjected to DNA testing in 1993 where specific DNA information regarding the smoker of the cigarette butt was detected, compared against DNA information supplied by Noling and his co-defendants resulting in an exclusion of Noling and his co-defendants as the smoker of the cigarette butt, the biological material at issue in Noling's initial application, was subjected to definitive DNA testing within the meaning of R.C. 2953.74(A). *Prade*, 2010-Ohio-1842, at syllabus. Accordingly, *Prade* offers no support for DNA retesting in Noling's case.

2) STATUTORY AMENDMENTS NO EFFECT ON NOLING'S CASE

Noling also relies on 2010 S 77 amendments to R.C. 2953.71, effective July, 6, 2010 that added the following definition for "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.

R.C. 2953.71(U).

Also included in the statutory amendments to the definitional section was a change to the definition of "outcome determinative." R.C. 2953.71(L). Under the prior version of R.C. 2953.71(L), "outcome determinative" meant that had "the results of DNA testing been presented at the trial * * * and been found relevant and admissible with respect to the felony offense for which the inmate * * * is requesting the DNA testing * * * no reasonable factfinder would have found the inmate guilty of that offense." Former version of R.C. 2953.71(L).

Under the amended statute, outcome determinative means, "that had the results of DNA testing of the subject inmate been presented at the trial * * * and been found relevant and admissible with respect to the felony offense for which the inmate * * * 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 inmate's case * * *, there is a strong probability* that no reasonable factfinder would have found the inmate guilty of that offense." (Emphasis added.) R.C. 2953.71(L). The State notes that the amendments to R.C. 2953.71 did not contain a statement of legislative intent.

Noling asserted that these amendments to R.C. 2953.71, warranted a DNA retest in his case. As described in greater detail in the section titled "Further DNA Testing Not Outcome Determinative," Noling is still not able to demonstrate how a DNA retest of a cigarette butt collected from the Hartig's driveway would be outcome determinative in his case. Therefore, the amendments to the statute do not present grounds warranting a subsequent application or a DNA retest in this case.

3) NO ALLEGED NEWLY DISCOVERED EVIDENCE

A subsequent application for postconviction DNA testing is not the forum to re-litigate Noling's case. On March 2, 2011, this Court denied Noling's application for leave to file his motion for a new trial where he raised the same arguments regarding alleged newly discovered evidence. (Exhibit 6). The Portage County Prosecutor's Office had an open file discovery policy at the time of Noling's Case No. 92 CR 261 and Case No. 1995 CR 220. Fifteen years after his conviction, Noling cannot

demonstrate that the items he now characterizes as alleged newly discovered evidence were not provided in the open file discovery. (Exhibit 6).

Furthermore, Noling misrepresents a June 19, 1991, BCI laboratory report as "results from a DNA test of a cigarette butt found at the scene (Ex. I)" (Noling p.g. 21). The June 19, 1991, BCI laboratory report indicated that blood typing tests were conducted on an extract of a cigarette butt. There was only one DNA test performed on the cigarette butt and that was in 1993 by SERI. (Exhibit 5).

The statutes governing postconviction DNA testing do not provide for subsequent applications or the submission of alleged newly discovered evidence in support of subsequent applications.

REJECT NOLING'S APPLICATION

Sections 2953.71 to 2953.81 of the Revised Code govern an inmate's application for DNA testing. A review of these code sections reveals several grounds to reject Noling's subsequent application: 1) there is no statutory authority to accept or consider subsequent applications pursuant to R.C. 2953.72(A)(7); 2) the doctrine of res judicata bars re-litigation of issues that were raised or could have been raised in the initial application; 3) Noling cannot demonstrate that DNA retesting would be outcome determinative in his case and 4) the mandatory requirements of R.C. 2953.74(C)(4) and (5) are not present in Noling's case and prevented this Court from accepting Noling's original or any subsequent application for DNA retesting.

1) LACK OF STATUTORY AUTHORITY

The State's initial section regarding the statutory prohibition against accepting or even considering subsequent applications is incorporated by reference and therefore will not be repeated. R.C. 2953.72(A)(7).

2) DOCTRINE OF RES JUDICATA

In the civil law context, res judicata is the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and acts as an absolute bar to a subsequent action involving the same claim. *Holzemer v. Urbanski* (1999), 86 Ohio St.3d 129, 132. In civil proceedings, the doctrine of res judicata is an affirmative defense, and by rule, is raised in responsive pleadings at the trial court level of the proceedings. See Civ.R. 8. This case, though, is criminal in nature, not civil. "In the criminal law context, [the Ohio Supreme Court] has held that issues that could have been raised on direct appeal and were not are res judicata and not subject to review in subsequent proceedings." *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, at ¶6.

The Eleventh District Court of Appeals has held that a subsequent "application for DNA extraction" was barred by the doctrine of res judicata, as the defendant had filed an identical motion, which was denied by the trial court. *State v. Hall* (Dec. 4, 2009), Trumbull App. No. 2008-T-0051, 2009-Ohio-6379, at ¶100. In *Hall*, the Eleventh District stated that that several of the defendant's arguments had been raised in prior motions to the trial court and/or appeals to the Eleventh District Court and therefore found many of his claims were without merit pursuant to the doctrine of res judicata. As stated by the Supreme Court of Ohio:

> [u]nder the doctrine of *res judicata,* a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

Hall, 2009-Ohio-6379, at ¶32, quoting *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus.

The State notes that the Eighth District Court of Appeals has held that if an eligible offender's application made "a threshold showing that DNA testing could be outcome determinative * * * res judicata will not bar testing even though an earlier application for DNA testing was denied." *State v. Ayers* (Nov. 19, 2009), 185 Ohio App.3d 168, 2009-Ohio-6096, at ¶26. However, even under this test Noling cannot satisfy the threshold requirement that a DNA re-test would be outcome determinative and therefore, res judicata would still bar his subsequent application.

3) FURTHER DNA TESTING NOT OUTCOME DETERMINATIVE

Noling was unable to establish under his initial application and is still unable to demonstrate that further DNA testing would be outcome determinative in his case. R.C. 2953.74(B)(2) provides that a trial court can only accept a postcoviction application for DNA retesting if, "the test was not a prior definitive DNA test that is subject to division (A) of this section [statutory rejection of the application], and the inmate shows that DNA exclusion when analyzed in the context of and upon consideration of all admissible evidence related to the subject inmate's case * * * would have been outcome determinative at the trial stage in that case." R.C. 2953.74(B)(2).

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.

R.C. 2953.71(L).

In support of his subsequent application requesting a retesting of the cigarette butt for DNA material, Noling attached all of same exhibits from his September 25, 2008 application and added these few new exhibits: 1) this Court's March 11, 2009 Judgment Entry denying his September 29, 2008 application; 2) images of various DNA testing information and 3) alleged newly discovered evidence.[1]

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[1] Noling Exhibit I - Dale Laux's June 19, 1991 BCI Laboratory Report,results of blood analysis, (1 page); Noling Exhibit J - Hand written notes regarding Nathan Chesley, dated April 24, 1990, (1 page); Noling Exhibit K – Affidavit of Nathan Chesley, dated January 13, 2010, (3 pages); Noling Exhibit L - Affidavit of Kenneth Amick, dated January 13, 2010 (2 pages); Noling Exhibit M - Voluntary Statement of Marlene M. VanSteenberg, dated April 1, 1990 and Document titled "Transcript of Marlene M VanSteenberg [*sic*] Voluntary Statement 04-01-91 J.R." (3 pages).

Nothing in Noling's original or subsequent application for DNA testing challenged SERI's 1993 DNA testing as inconclusive with respect to the scientific conclusion that Noling was not the smoker of the cigarette. The parties agree that Noling was excluded as the contributor of the biological material, DNA tested by SERI before Noling's trial. Although advancements in DNA testing have occurred since 1993, a DNA re-test result would still provide the same exclusion result with regards to Noling and the cigarette butt.

As Noling has already been excluded as the individual who smoked the cigarette that was collected from the Hartig's driveway, Noling's approach in his subsequent application was to rely on the Supreme Court of Ohio's decision in *Prade* and new DNA testing procedures as a means of providing information regarding the true identity of the smoker of the cigarette. Noling argued that a new DNA profile from retesting could produce a "cold hit" to a felon whose DNA profile was in the FBI's CODIS database or be used to compare to DNA samples from alternative suspects or their male heirs. In essence, Noling is again attempting to use the DNA application process provided for under sections 2953.71 to 2953.81 of the Revised Code as a fishing expedition.

Even if a new DNA profile could produce a "cold hit" in CODIS or to an alternative suspect's DNA sample that would not render SERI's original DNA testing inconclusive with regards to Noling's exclusion as the contributor of the biological material.

Furthermore, Noling cannot establish that DNA retesting would be outcome determinative in his case. The fact that some person known or unknown to the

Hartig's flicked a cigarette butt onto their driveway is irrelevant. 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 Hartig's it could have been left on a visit or if it was left by an unknown person, there was nothing preventing the public's access to their driveway. The cigarette butt proves nothing and is not outcome determinative with regards to this case.

Accordingly, Noling cannot demonstrate that DNA retesting 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 the his case would render a strong probability 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.

4) R.C. 2953.74(C)(4), (5) – PREVENT ACCEPTANCE OF NOLING'S APPLICATION

Assuming *arguendo* that this Court was not statutorily required to reject Noling's subsequent application pursuant to R.C. 2953.72(A)(7), the mandatory requirements of R.C. 2953.74(C)(4) and (5) prevented this Court from accepting Noling's initial and subsequent application for DNA retesting.

R.C. 2953.74(C) states that if an eligible inmate submits an application for DNA testing under R.C. 2953.73, "the court may accept the application only if all of the following apply" and then lists six requirements. (Emphasis added). R.C. 2953.74(C)(1)-(6). A review of this statutory list of requirements reveals that neither item four nor five apply in Noling's case, therefore preventing this Court's acceptance of any application for postconvition testing.

R.C. 2953.74(C)(4) provides, "[t]he 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 * * * was of such a nature that, DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative."

A review of Noling's trial transcripts reveals that none of the defense theories asserted at trial was of such a nature that an exclusion result from DNA testing would be outcome determinative. The defense theory of the case at trial was that the State lacked physical evidence connecting Noling to the crime scene and coerced or offered deals to the co-defendants to concoct enough circumstantial evidence to charge Noling with the murders of the Hartigs. Accordingly, another DNA test result again excluding Noling as the smoker of the cigarette collected at the crime scene would not result in a strong probability that no reasonable factfinder would have found Noling guilty of the two counts of aggravated murder and the accompanying death penalty specifications. R.C. 2953.71(L).

In support of his application, Noling directed this Court to two lines of text from over nine volumes of trial transcripts as evidence that the defense theory at trial centered on the identity of perpetrator. (Noling, p.g. 31). Noling's two incomplete citations to the record are to defense counsel's opening statement. In context, the first reference is:

> [w]hat we know for a fact is that there have been two awful homicides, grisly homicides committed 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) (T.p. 642-643, Exhibit 8). However, in the very next section of the opening statement defense counsel expressly stated it's position at trial, "it's our position the State cannot prove this case beyond a reasonable doubt, and that Tyrone Noling is not guilty of these homicides. That is why we're here today. That is why we're here." (T.p. 643, Exhibit 8).

In context, the second reference is:

> [a]ccording to the prosecution's opening statement, there were four people present - - Tyrone Noling, Gary St. Clair, Joey Dalesandro, Butch Wolcott - - at the time of the Hartigs' homicide.
>
> We're not here to dispute that these folks all knew each other, we're here to dispute that Tyrone Noling had anything to do with the homicides of these folks.

(T.p. 644-645, Exhibit 8). This is a line from a twelve page opening statement in which eight pages were devoted to challenging the State's case for a lack of physical evidence connecting Noling to the crime. (T.p. 644-650, Exhibit 8). Throughout the opening statement, defense counsel attacked the credibility of the State's witnesses and presented the chronology of a case where the murders occurred in April of 1990, followed by an investigation that did not result in charges against Noling until the co-defendants were offered and accepted deals almost five years after the crimes. (T.p. 644-650, Exhibit 8). Defense counsel's opening statement analyzed the State's lack of physical evidence to the three little pigs' house of straw, concluding with the defense theory that, "the State's evidence doesn't measure up in this case." (T.p. 651, Exhibit 8).

The defense developed its theory of a lack of physical evidence throughout the trial, the defense attacked the State's case for a lack of physical evidence, challenged

the credibility of the State's witnesses, criticized the police investigation techniques and presented Noling and his co-defendants as nothing more than a bunch of little boys living in a house without any resources or parental supervision. (T.p. 1486, Exhibit 9).

In closing arguments, defense counsel stated that Dalesando and Wolcott's deals with the prosecution were important in connection with the chronology of the case because following the Hartig's murder in April 1990, Noling was not charged. Defense counsel argued that only after Noling's co-defendant's were offered and accepted deals from the prosecution did the State then have enough bring Noling to trial for the Hartig's murders:

> [t]he homicides happened in April of 1990. The case was immediately investigated by Portage County Sheriffs. Tyrone Noling was certainly spoken to at that time, certainly there was information brought to the authorities of Tyrone Noling. He wasn't charged in 1990 because there wasn't a case. There is no evidence, no fingerprints, nothing taken out of the house traced to him. Nothing showing physically Tyrone Noling was there.

(T.p. 1477, Exhibit 9).

To further emphasize the fact that no physical evidence linked Noling to the crime scene, defense counsel then turned to the results of the SERI DNA testing in his closing argument:

> [t]he State was so determined about trying to get evidence they even picked up a cigarette butt off the Hartig property. They were so concerned they took that cigarette butt - - you'll see the lab report from SERI Laboratory in California - - sent the cigarette butt sealed up to California where it was tested and came back it was not consistent with having been smoked by any of the suspects in this case.

(T.p. 1477-1478, Exhibit 9). And to focus the jury's attention on the scientific value of SERI's DNA test results, defense counsel argued, "[t]here are what are called

secretors and nonsecretors. You will see the report. Did not match up, the saliva, any of the defendants in this case, any of the suspects in this case." (T.p. 1478, Exhibit 9). Concluding that without this DNA evidence linking Noling to the scene, "[t]he State didn't have much of a case. What the State decided to do is go back and reinvestigate some more." (T.p. 1478, Exhibit 9).

Defense co-counsel also referred to the SERI DNA test results in his portion of the closing argument. As an emphasis on the lack of physical evidence connecting Noling to the crime scene, co-counsel argued, "[n]o fingerprints, no physical evidence. * * * No hair, fiber. Take a cigarette butt hoping to connect it to some human being. That doesn't turn out. They don't have any other physical evidence. There is just nothing." (T.p. 1487, Exhibit 9).

Defense co-counsel summed up the trial strategy and defense theory of the case at the end of his portion of the closing argument, "originally in the investigation nobody could figure out what happened. Somebody went back and said 'I know what happened. I put it together.' And then they went back and a witness at a time they put the pieces together and squeezed each one of them into their place with whatever it took - - immunity, the threat of going to the electric chair, whatever it took." (T.p. 1495, Exhibit 9). As the record reflects that the nature of Noling's defense theories at trial were the lack of physical evidence connecting him to the crime scene, co-defendants who provided evidence against Noling after receiving deals or alleged coercive police tactics and State's trial witnesses that lacked credibility, none of these defense theories, "was of such a nature that, DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative." R.C.

2953.74(C)(4). Accordingly, R.C. 2953.74(C)(4) does not apply to Noling's case and prevents this Court's acceptance of Noling's application.

R.C. 2953.74(C)(5) provides, "[t]he 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." R.C. 2953.74(C)(5). As previously discussed, an additional DNA test result again excluding Noling from the crime scene would not be outcome determinative in the present case. Accordingly, R.C. 2953.74(C)(5) does not apply to Noling's case and also prevents this Court's acceptance of Noling's application.

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, this Court is 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 misrepresentation of the holding in *Prade*, that decision does not affect Noling's case. Further, the *Prade* decision was released four months before the Supreme Court rejected jurisdiction to review this 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 State respectfully moves that this Court reject Noling's subsequent application for DNA testing.

Respectfully submitted,

VICTOR V. VIGLUICCI (0012579)
Portage County Prosecuting Attorney

PAMELA J. HOLDER (0072427)
Assistant Prosecuting Attorney
241 South Chestnut Street
Ravenna, Ohio 44266
(330) 297-3850
(330) 297-3856 (fax)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been sent to Carrie Wood and Mark Godsey at Ohio Innocence Project, P.O. Box 210040, Cincinnati, Ohio 45221 this 3rd day of March 2011.

PAMELA J. HOLDER
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO, Plaintiff, vs. TYRONE NOLING Defendant.	)	CASE NO. 1995 CR 220 AFFIDAVIT

AFFIDAVIT OF AUTHENTICATION

STATE OF OHIO)
) ss:
COUNTY OF PORTAGE)

I, Pamela J. Holder, being first duly cautioned and sworn, state the following:

1. That I am over 18 years old, and have firsthand knowledge of the facts set forth in this Affidavit.

2. That I am the Assistant Prosecuting Attorney handling the response to Noling's Subsequent Application for DNA Testing in the above captioned matter.

3. I hereby swear that the copies of documents attached to the State's Response are true and accurate copies of the originals.

4. Labeled as Exhibit 2 is a true and accurate copy of Portage County Court of Common Pleas Case No. 1995 CR 220 Judgment Entry dated March 11, 2009, (2 pages).

5. Labeled as Exhibit 3 is a true and accurate copy of *State v. Noling* (Aug. 3, 2009), Portage App. No. 2009-P-0025, Memorandum Opinion, (4 pages).

Exhibit 1

6. Labeled as Exhibit 4 is a true and accurate copy of the Supreme Court of Ohio Case No. 2009-0773 Entry, dated September 29, 2010, (1 page).

7. Labeled as Exhibit 5 is a true and accurate copy of the Serological Research Institute Report dated February 19, 1993, (5 pages).

8. Labeled as Exhibit 6 is a true and accurate copy of Portage County Court of Common Pleas Case No. 1995 CR 220 Judgment Entry/Order dated March 2, 2011, (2 pages).

9. Labeled as Exhibit 7 is a true and accurate copy of Dale Laux's June 19, 1991 BCI Laboratory Report,results of blood analysis, (1 page).

10. Labeled as Exhibit 8 is a true and accurate copy of Defense Counsel's opening statement from the transcript of proceedings of Noling's criminal trial, volume three, pages 639-651.

11. Labeled as Exhibit 9 is a true and accurate copy of Defense Co-Counsels' closing arguments from the transcript of proceedings of Noling's criminal trial, volume seven, pages 1467-1499.

12. All of the foregoing is true to the best of my knowledge, information, and belief.

FURTHER AFFIANT SAYETH NAUGHT

Pamela J. Holder
Affiant

SWORN to before me and in my presence this 3 day of March 2011.

Krista K. Keller-Groves
NOTARY PUBLIC

KRISTA K. KELLER-GROVES
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION EXPIRES 12-7-2013

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

STATE OF OHIO

Plaintiff

-v-

TYRONE LEE NOLING

Defendant

CASE NO. 95 CR 220

JUDGE ENLOW

JUDGMENT ENTRY

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.
8 East Long Street, 11th Floor
Columbus, OH 43215

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

Dennis Lager, Portage County Public Defender

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**MEMORANDUM OPINION**
Plaintiff-Appellee,	:	
		CASE NO. 2009-P-0025
- vs -	:	
TYRONE LEE NOLING,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 95 CR 0220.

Judgment: Appeal dismissed.

Victor V. Vigluicci, Portage County Prosecutor and Pamela J. Holder, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

David M. Laing, and *Mark Godsey,* Ohio Innocence Project, University of Cincinnati, P.O. Box 210040, Cincinnati, OH 45221-0040 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} This matter is before this court upon appellee's motion to dismiss for lack of jurisdiction filed June 12, 2009. No brief or memorandum in opposition to the motion has been filed.

{¶2} In 1995, appellant was indicted on two counts of aggravated murder. Death specifications in each count charged murder in the course of "Aggravated Robbery and/or Aggravated Burglary (spec. 1)," R.C. 2929.04(A)(7), and murder to escape "detection or apprehension or trial or punishment" for another offense (spec. 2),

R.C. 2929.04(A)(3). Counts Three and Four both charged aggravated robbery, and Count Five charged aggravated burglary. All five counts included gun specifications. In February of 1996, the trial jury found appellant guilty as charged.

{¶3} After the penalty hearing, the trial court accepted the jury's recommendation and sentenced appellant to death on Counts One and Two. Appellant was further sentenced to consecutive prison terms for Counts Three, Four, and Five and for the firearms specifications. The convictions and sentences were affirmed on appeal. See *State v. Noling* (June 30, 1999), 11th Dist. No. 96-P-126, 1999 Ohio App. LEXIS 3095 and *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044.

{¶4} Appellant subsequently filed two petitions for post conviction relief, each of which was denied by the trial court and affirmed on appeal. See *State v. Noling*, 11th Dist. No. 98-P-0049, 2003-Ohio-5008 and *State v. Noling*, 11th Dist. No. 2007-P-0034, 2008-Ohio-2394, respectively.

{¶5} Appellant has recently filed an application for DNA testing pursuant to R.C. 2953.71 through R.C. 2953.81 in the Portage County Court of Common Pleas. On March 11, 2009, the trial court overruled appellant's application. On April 10, 2009, appellant sought leave to appeal the trial court's decision. Pursuant to governing statute, this court is without jurisdiction to consider appellant's appeal.

{¶6} R.C. 2953.73(E)(1) provides:

{¶7} "(E) A judgment and order of a court entered under division (D) of this section is appealable only as provided in this division. If an eligible inmate submits an application for DNA testing under section 2953.73 of the Revised Code and the court of

common pleas rejects the application under division (D) of this section, one of the following applies:

{¶8} "(1) If the inmate was sentenced to death for the offense for which the inmate claims to be an eligible inmate and is requesting DNA testing, the inmate may seek leave of the supreme court to appeal the rejection to the supreme court. Courts of appeals do not have jurisdiction to review any rejection if the inmate was sentenced to death for the offense for which the inmate claims to be an eligible inmate and is requesting DNA testing."

{¶9} Appellant was sentenced to death for the offenses for which he asserts eligibility for DNA testing. As a result, this court does not possess jurisdiction to review the trial court's judgment overruling his application. Appellant evidently recognized this statutory directive subsequent to filing his original notice with this court as, on April 27, 2009, he filed his notice of appeal and memorandum in support of jurisdiction with the Supreme Court of Ohio.

{¶10} Therefore, because this court is without jurisdiction to entertain appellant's appeal, appellee's motion to dismiss is granted, and the appeal is hereby dismissed.

MARY JANE TRAPP, P.J.,

DIANE V. GRENDELL, J.,

concur.

STATE OF OHIO)
)SS.
COUNTY OF PORTAGE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

TYRONE LEE NOLING,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2009-P-0025

For the reasons stated in the memorandum opinion of this court, this court is without jurisdiction to entertain appellant's appeal. Therefore, it is ordered that appellee's motion to dismiss is granted, and this appeal is hereby dismissed.

Pursuant to this entry, any other pending motions are hereby overruled as moot.

JUDGE CYNTHIA WESTCOTT RICE
FOR THE COURT

The Supreme Court of Ohio

State of Ohio

v.

Tyrone Lee Noling

Case No. 2009-0773

ENTRY

Upon consideration of the motion for admission pro hac vice of Ralph I. Miller, Stephen A. Gibbons, and Jennifer Wine by Kelly L. Schneider,

It is ordered by the Court that the motion for admission pro hac vice is granted.

This cause is pending before the Court as an appeal of denial of DNA testing in a capital case pursuant to R.C. 2953.73. Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

(Portage County Court of Appeals; No. 95CR220)

ERIC BROWN
Chief Justice

SEROLOGICAL RESEARCH INSTITUTE

February 19, 1993

Portage County Sheriff's Department
203 W. Main Street
Ravenna, OH 44266
ATTN: Lt. John Ristity

SERI Case No: M'3449'93
BCI Lab No: 90-31768
Agency No: 90-2674
Victims: Bearnhardt Hartig
Cora Hartig
Suspects: Butch Wolcott
Tyrone Noling
Gary E. St. Clair
Joseph Dalesandro

ANALYTICAL REPORT

On February 10, 1993, five (5) items of evidence were received and on February 17, 1993, one (1) item of evidence was received at the Serological Research Institute from Lt. John Ristity, via Federal Express (6593403946 and 6507769321). A forensic serological comparison of these items was requested on a rush basis.

ITEM 1 BLOOD SAMPLE FROM JOSEPH DALESANDRO

This item consists of a single tube of liquid blood in fair condition. A portion of the blood was sampled and tested for ABO and for secretor status by the Lewis genetic marker. DNA was extracted from this sample, amplified by the Polymerase Chain Reaction (PCR), and grouped for the HLA DQα genetic marker. The results are in the table.

ITEM 2 BLOOD SAMPLE FROM GARY E. ST. CLAIR

This item consists of a single tube of liquid blood in good condition. A portion of the blood was sampled and tested for ABO and for secretor status by the Lewis genetic marker. DNA was extracted from this sample, amplified by the Polymerase Chain Reaction (PCR), and grouped for the HLA DQα genetic marker. The results are in the table.

3053 RESEARCH DRIVE • RICHMOND, CA 94806 • (510) 223-7374 (SERI) • FAX (510) 222-8887

ITEM 3 BLOOD SAMPLE FROM BUTCH WOLCOTT

This item consists of a single tube of liquid blood in good condition. A portion of the blood was sampled and tested for ABO and for secretor status by the Lewis genetic marker. DNA was extracted from this sample, amplified by the Polymerase Chain Reaction (PCR), and grouped for the HLA DQα genetic marker. The results are in the table.

ITEM 4 BLOOD SAMPLE FROM TYRONE NOLING

This item consists of a single tube of liquid blood in good condition. A portion of the blood was sampled and tested for ABO and for secretor status by the Lewis genetic marker. DNA was extracted from this sample, amplified by the Polymerase Chain Reaction (PCR), and grouped for the HLA DQα genetic marker. The results are in the table.

ITEM 5 CIGARETTE BUTT

This item consists of a flattened, smoked, white filtered cigarette butt. No logo is visible on the burnt end. A trimmed portion of the smoked end had been removed and placed in a separate container (Item 5A). A portion of this paper was sampled and tested. The remaining filter (Item 5B) was also examined and three (3) areas were sampled. One next to the trimmed filter paper over wrap (Item 5B-2), a portion of the filter element at the smoked end (Item 5B-1) and an area near the burnt end for a blank control. The pieces were extracted and a small portion of the debris pellet from each of the extracts was examined microscopically for nucleated epithelial cells (oral cavity cells). Nucleated epithelial cells were identified in the debris pellets from the smoked areas. The liquid extract was tested for the enzyme amylase, ABO, and secretor status. The remaining cellular pellets and control were digested for their DNA content. The DNA solutions were subjected to the PCR test and grouped for the HLA DQα genetic marker. The genetic marker results are in the table.

ITEM 6 SALIVA FROM TYRONE NOLING

This item consists of a dried saliva sample on gauze. A portion was extracted and tested for ABO and secretor status. The results are in the table.

TABLE OF RESULTS

ITEM NO.	DESCRIPTION	ABO	LEWIS	SECRETOR STATUS	HLA DQα
1	Blood from J. Dalesandro	O	a-b+	Secretor	2,4
2	Blood from G. St. Clair	O	a-b+	Secretor	2,4
3	Blood from B. Wolcott	O	a+b-	Nonsecretor	1.1,3
4 and 6	Blood and Saliva from T. Noling	O	a-b-	Secretor	1.2,1.2
5A	Trimmed Filter Paper	NA	a+b-	Nonsecretor	NA
5B-1	Filter Element	NA	a+b-	Nonsecretor	3,4 (wk)
5B-2	Filter Paper Over Wrap	NA	a+b-	Nonsecretor	3,4
5 Control	Control Area from Burnt End	NA	NA		NA

KEY: NA = No activity (wk) = Weak activity

EXPLANATION

The enzyme amylase is found in many body fluids including saliva, urine, blood serum, perspiration and vaginal secretion. The highest concentration of amylase is found in saliva followed by perspiration, urine and vaginal secretion. Amylase can be separated into two types: Amy 1 and Amy 2. Amy 1 is found in saliva and perspiration. Amy 2 is found in urine and vaginal secretion. Vaginal secretion can also contain Amy 1. A small amount of amylase activity was detected in Items 5B-1 and 5B-2, but none in Item 5A or the blank control.

A secretor is a person who secretes his ABO blood group substances together with H substance into his body fluids (e.g. semen, saliva, vaginal secretion, etc.). Therefore, an A secretor will secrete A plus H, a B secretor B plus H and an O secretor just H. The method for detecting the blood group substances in body fluids is known as absorption inhibition. Body fluids from ABO nonsecretors give test results of no activity by the inhibition test. The more sensitive absorption elution test is used for detecting the small amount of ABO blood group substances which are found in nonsecretors and also in dilute stains from secretors.

The four (4) samples from the Cigarette Butt (Item 5) had no activity for the ABO absorption inhibition and absorption elution tests.

The Lewis inhibition test can indicate ABO secretor status. A Lewis a-b+ is an ABO secretor, an a+b- is an ABO nonsecretor and a type a-b- can be either an ABO secretor or nonsecretor.

The Cigarette Butt (Item 5A, 5B-1 and 5B-2) extracts all had Lewis inhibition results of a+b-. Therefore, the smoker of the cigarette butt is a nonsecretor of unknown ABO type.

Deoxyribonucleic acid or DNA is found in nucleated cells, e.g. white blood cells, spermatozoa, salivary, vaginal and tissue epithelial cells. The DNA can be extracted and the amount obtained is proportional to the number of cells present.

Two types of DNA testing are presently available. One detects the presence of Restriction Fragment Length Polymorphisms (RFLPs) in the DNA. This is commonly known as "DNA Profiling" or "DNA Fingerprinting" and in most cases results in either a positive identification or exclusion of an individual as a donor. This analysis requires approximately 100 ngs of high quality DNA for a successful determination.

The second method relies on identifying a small specific section of DNA known as the HLA DQα locus wherein there are twenty-one (21) different phenotypes. Although there may be an elimination of a person using this system clearly an identification to the exclusion of all others is not possible. The advantage of this method is that it requires substantially less DNA as the recovered DNA can be amplified (increased in amount) in order to obtain successful typing. The amplification uses the Polymerase Chain Reaction (PCR) method.

The Human Leukocyte Antigen Class II (HLA-D) genes are located on chromosome 6. The HLA-D genes are organized into three regions: HLA-DR,-DQ,-DP, each of which encodes an alpha and beta glycopeptide. The sequence of DNA found in the HLA DQ alleles is known.

The typing is performed by hybridizing the amplified DNA to nylon strips containing specific probes which will recognize the six common DQα alleles detected (DQα 1.1, 1.2, 1.3, 2, 3 and 4). These alleles will give rise to 21 possible types. The end result is the visualization of an enzymatically detected dye giving rise to a series of colored dots. The number and position of the dots determines the type.

Because DQα is a genetic marker following the normal rules of genetics, a maximum of two alleles only are expressed in any one individual. Therefore, the detection of more than two alleles indicates a mixture of body fluids from more than one individual.

The Cigarette Butt (Item 5B-1 and 5B-2) had HLA DQα results of 3,4.

CONCLUSIONS

1. Joseph Dalesandro and Gary E. St. Clair are both ABO type O secretors and HLA DQα type 2,4. Butch Wolcott is an ABO type O, a nonsecretor, and an HLA DQα type 1.1,3. Tyrone Noling is an ABO type O secretor and an HLA DQα type 1.2,1.2.

2. The smoker of the Cigarette Butt (Item 5) is a nonsecretor of unknown ABO type and an HLA DQα type 3,4. The combination of groups present in Item 5B occurs in approximately 2.3% (or 2 in 86 persons) of the Caucasian population, in approximately 1.9% (or 1 in 53 persons) of the African-American population, and in approximately 2.8% (1 in 36 persons) of the Mexican-American population.

3. Joseph Dalesandro, Gary E. St. Clair, Butch Wolcott, and Tyrone Noling could **not** be the person who smoked the Cigarette (Item 5).

SEROLOGICAL RESEARCH INSTITUTE

Gary C. Harmor
Senior Forensic Serologist

GCH/par

cc: Robert Durst, Chief Criminal Prosecutor

Noling
Motion hearing 2/18/11
JAE/rp

FILED
COURT OF COMMON PLEAS
MAR 02 2011
LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

STATE OF OHIO

Plaintiff

CASE NO. 95 CR 220

-v-

JUDGE ENLOW

TYRONE LEE NOLING

JUDGMENT ENTRY/ORDER

Defendant

This matter came on for hearing on February 18, 2011 before the Honorable John A. Enlow on the Defendant's motion for leave to file a motion for new trial.

The defense filed a request for public records on August 13, 2009; the motion for leave to file for a new trial was subsequently filed on June 21, 2010, almost a year later.

The parties stipulated that Exhibits 2, 3, 4 and 5 were discovered in a public records request for Sheriff's records as to codefendants

Exhibit 2 is a handwritten statement of Nathan Chesley indicating his brother committed the crime.

Exhibit 3 is a blood test conducted by Dale Laux of BCI.

Exhibits 4 and 5 are statements by Marlene Van Steenberg.

In the Tyrone Noling case the State of Ohio conducted open file discovery. Attorneys George Keith and Peter Cahoon testified they had no recollection of seeing

State's Exhibits 2, 3, 4 and 5. Attorney Cahoon testified he did not know whether or not he saw State's Exhibits 2, 3, 4 and 5.

Assistant Prosecuting Attorney Eugene Muldowney testified he gave full discovery of everything in his possession and further that he met with defense counsel at the Sheriff's Office to allow them to examine the file. Assistant Prosecutor Muldowney also testified that the Sheriff's Office only had one file for all of the co-defendants.

The defendant has the burden of proving by clear and convincing evidence that he was unavoidably prevented from discovering the exculpatory evidence.

Based upon the evidence presented at the hearing as to this motion and the briefs in the file, the Court finds that the defendant failed to establish that he was unavoidably prevented from discovering the exculpatory evidence, therefore, the Court finds the motion is not well taken.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion for new trial be and is hereby not well taken and is, therefore, **DENIED.**

IT IS SO ORDERED.

JOHN A. ENLOW, JUDGE

cc:

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

Attorney General
Lee Fisher

BCI-30 (Rev. 3-91)

Bureau of Criminal Identification and Investigation **Laboratory Report**

To: Sheriff P.K. Howe
Portage County Sheriff's Office
213 W. Main Street
Ravenna, Ohio 44266
ATTN: Det. John Ristity

BCI Lab Number: 90-31768

Analysis Date: June 19, 1991

Agency No: 90-2674

Re: Double Homicide
Victims: Bearnhardt Hartig
Cora Hartig

FINDINGS:

Analysis of an extract made from the cigarette butt in item #1 revealed 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.

Typing of the blood from Daniel E. Wilson, BCI & I case number 91-31692-D, revealed him to be a type A non-secretor.

Dale L. Laux
Forensic Scientist

DLL/cn
T061991

Please address inquiries to the office indicated, using the BCI lab number.

[ ] BCI & I - Fremont Office
405 Pine Street
Fremont, Ohio 43420
Phone: (419) 334-3851

[ ] BCI & I - London Office
P.O. Box 365
London, Ohio 43140
Phone: (614) 466-8204

[X] BCI & I - Richfield Office
P.O. Box 336
3333 Brecksville Road
Richfield, Ohio 44286
Phone: (216) 659-4600

[ ] BCI & I - Cambridge Office
60788 Southgate Road
Byesville, Ohio 43723
Phone: (614) 439-3655

Exhibit 7

red tractor, old people, method of entry, not only independent witnesses but law enforcement officers, and it came from his mouth, no one else's.

So when you look at this evidence, you look at all of it, not only the physical evidence, but the statements, statements of all these witnesses, you'll find the defendant guilty of all these charges, beyond a reasonable doubt.

Thank you very much.

*****.

MR. CAHOON: Thank you, your Honor. Your Honor, Mr. Ricciardi, Mr. Muldowney, Mr. Keith, Mr. Noling.

Good morning, again, ladies and gentlemen. This is our fourth day here, most trials don't take this long to get a jury empanelled. As you know, there is a special reason it took a long time to get a jury in this case, that is because of the nature of the charges.

Four attorneys in this case spent a lot of time with each one of you, each person was talked to alone, and the reason is some folks had some strong feelings one way or another about the

red tractor, old people, method of entry, not only independent witnesses but law enforcement officers, and it came from his mouth, no one else's.

So when you look at this evidence, you look at all of it, not only the physical evidence, but the statements, statements of all these witnesses, you'll find the defendant guilty of all these charges, beyond a reasonable doubt.

Thank you very much.

*****.

MR. CAHOON: Thank you, your Honor. Your Honor, Mr. Ricciardi, Mr. Muldowney, Mr. Keith, Mr. Noling.

Good morning, again, ladies and gentlemen. This is our fourth day here, most trials don't take this long to get a jury empanelled. As you know, there is a special reason it took a long time to get a jury in this case, that is because of the nature of the charges.

Four attorneys in this case spent a lot of time with each one of you, each person was talked to alone, and the reason is some folks had some strong feelings one way or another about the

death penalty. Technically the process of choosing jurors in a death penalty case, where that is being sought by the State, the process of talking to the jurors one by one to find out their views about the death penalty, that is known as a death qualifying process. I also consider it a life qualifying process because just as some jurors can't sit in a death penalty case and ever vote for the death penalty under any circumstances, some other prospective jurors have told us and in this case it was the case that they could never give a life sentence to somebody in an aggravated murder case. Some people couldn't give a death sentence, some people couldn't give a life sentence under any circumstances, those were the people excused for cause from the jury, people could not consider everything that was put before them at the sentencing phase and that is why we talked to you each one individually.

You learned some of the law during that process back in Judge Kainrad's jury room, about the fact that for any count of aggravated murder with a death penalty specification that the sentence is either capital punishment, the death penalty, or life with no parole eligibility before

twenty full years are served, day to day, or life with no possibility of any parole eligibility before twenty full years are served per count. That applies per count, there are two counts. You folks know this is a capital murder charge in this case so that is essentially what we have been doing for the last three days.

One of the things that Attorney Keith and I, and I think counsel for the State, as well, tried to make clear to each of you, is that it's a little bit backwards the way we started in this case, because we spent a lot of time talking about sentencing before we talked about a trial, and a number of you frankly just asked us right off the bat, seems pretty strange because we haven't heard any evidence yet and here we are talking about sentencing. And it is strange, but that is the way the law works, because both sides need a jury that can be able to follow the law in a capital case.

The fact is you haven't heard any evidence yet and the reason we're here is so that you can hear the evidence. Mr. Muldowney has made some statements about what he thinks the evidence will show, I'm going to make some statements in

behalf of Mr. Noling about what we submit the evidence will show. As you know, the burden of proof in this case is upon the State of Ohio, upon these two attorneys for the prosecutor's office to try and show, if they can, that Mr. Noling is guilty of these charges beyond a reasonable doubt as to each and every element of the charges in this case. Only if you are able to find after you hear all the evidence that Mr. Noling is guilty of each element, any particular charge here, beyond a reasonable doubt, would you be able to find Tyrone Noling guilty. Only if the proof is to that level of proof, that is the highest standard of proof under the law. Proof beyond a reasonable doubt.

As Mr. Noling sits here today he's presumed innocent, he's presumed innocent as we selected you as prospective jurors and he's presumed innocent now. What I'm asking you folks to do on behalf of Mr. Noling is to listen to the evidence, to consider it carefully. What we know for a fact is that there have been two awful homicides, grisly homicides committed 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.

Mr. Noling has asserted his innocence in this case and I'm asking you folks to grant him the presumption of innocence, to put the State to its burden of proof, because it's our position the State cannot prove this case beyond a reasonable doubt, and that Tyrone Noling is not guilty of these homicides. That is why we're here today. That is why we're here.

The State has talked about what the evidence will show. The State has talked about what some of the alleged facts are concerning who did what, how certain things happened. What you have to consider, though, is not just the words that are being said to you, but who is saying them to you, and how credible are those people.

Anybody that sits up on that witness stand there, next to Judge Martin, will take an oath. And they will bring with them certain baggage and that is their background. Everybody has their own background they bring in. What you have to do with each witness is assess the credibility of each individual witness. Now the reasons we're here in this case is because we're submitting to you that many of the State's

witnesses don't have any credibility at all. We're asking that you really look at these witnesses carefully to see what each one has to gain or thinks he has to gain, to see how good people's memories are, see how good their perceptions are. We're asking you to look at each witness really carefully in this case.

You have heard a lot of things about what happened in April of 1990. Here we are in January of 1996. And there is a reason for that, ladies and gentlemen. We submit to you, ladies and gentlemen, that the reason for that, this is not quite the open and shut case the State is portraying to you, that we're here six years later.

Portage County sheriff's office started an investigation in this case, April of 1990, and yet here we are more than five years later at trial because there are some serious problems with this case, ladies and gentlemen. You're going to hear about those problems.

According to the prosecution's opening statement, there were four people present -- Tyrone Noling, Gary St. Clair, Joey Dalesandro, Butch Wolcott -- at the time of the Hartigs'

homicide.

We're not here to dispute that these folks all knew each other, we're here to dispute that Tyrone Noling had anything to do with the homicides of these folks.

Butch Wolcott may testify in this case. In April of 1990 Butch Wolcott was 14 years old. He's a juvenile, didn't have much of a life, was kind of all over the place, hanging out with some people who were a little faster company than he was, getting himself in trouble. Not too much going for him unfortunately at that time. Near the middle part of 1992 Butch Wolcott had occasion to speak with a number of people representing the State of Ohio, including an investigator named Ron Craig, a prosecutor, family lawyer, public defender, I believe his dad. Folks investigating the case wanted to talk to Butch Wolcott. They made a deal. They made a deal through the prior prosecutor's office, David Norris, then they made another deal which was essentially the same deal, Butch Wolcott with Victor Vigluicci, present Portage County prosecutor.

Last Friday there was a judgment filed in Court and you'll hear about it and that was a

judgment granting Butch Wolcott what is called transactional immunity which means that whatever he testifies about, he can't get charged with. Not only that his own words can't be used against him, but if he talks about it, he can't get charged with it. Free pass. That judgment granting him transactional immunity says that the only thing Butch Wolcott can get prosecuted for, no matter what he says on that witness stand, is perjury, lower degree felony offense. That is the only thing he can get in trouble for. This is that judgment, I think you'll hear a little bit about it.

I think you will also hear about this document which is several pages long, which is an application to grant immunity to a witness.

It's pretty interesting, says that Butch Wolcott will have to testify truthfully. If he doesn't testify truthfully, states in number paragraph five, in the event the material witness--

MR. MULDOWNEY: Your Honor, I'm going to -- I'll object to this. We'll stipulate we gave Mr. Wolcott immunity, but as to the -- he can

cross examine Mr. Wolcott.

THE COURT: Overruled.

MR. CAHOON: (continuing) Paragraph five states in the event the material witness fails to meet the test of truthfulness set forth above, the State of Ohio agrees not to use the proffered statement against said witness in any prosecution of the witness.

He agrees to tell the truth but if he doesn't tell the truth, whatever he says won't be used against him.

So that is Mr. Wolcott's deal, a free pass.

Joey Dalesandro. Joey Dalesandro got in some serious trouble up in Defiance County. He ended up pleading guilty in February of 1992 to aggravated trafficking of more than the bulk amount of cocaine. That is a second degree felony in Ohio. It's an aggravated second degree felony. He was sentenced to three to fifteen years in prison, this is in February of 92, with the first three years of that sentence to be actual incarceration, no possibilities of shock parole or shock probation or any early release.

The only time off he could get for those three years is time off for good behavior. He would essentially have to sit for the first two years of that sentence no matter what, he was a little behind the eight ball in February of 1992, Joey Dalesandro was.

In the late spring of 1992, Joey Dalesandro had occasion to talk to the prosecuting attorneys, investigators. He also talked to them in July of 1992. And his first statement, Joey Dalesandro essentially said he didn't know anything about the Hartigs' homicide. Later on, in his second statement, he goes on at great detail about it.

As you can guess, he cut himself a deal, too, it was a pretty good deal. You're going to hear about the details of that deal. You're also going hear his deal included pleading guilty to conspiracy to commit aggravated robbery, and the State would recommend a five to fifteen year sentence for that. This is concerning the Hartig incident, concurrent, to be served at the same time, the Defiance County case. That was his deal.

In 1992, he pleaded guilty to conspiracy

to commit aggravated robbery. That sentence was not imposed. There was no sentence imposed on Mr. Dalesandro until 1995.

On June eighth, 1995, Joey Dalesandro was sentenced to eight to fifteen years for conspiracy to commit aggravated robbery, the maximum.

There is an argument on the record between the -- I shouldn't say between, but there were statements on the record made by the prosecutor about a lack of cooperation. There is statements by Mr. Dalesandro about how he was mistreated. You will hear about that in his testimony. And that sentence was ordered to be served consecutively, back to back, and not concurrently with his Defiance County sentence. So he got slammed really hard.

So what did Mr. Dalesandro do? After being slammed on June eighth, 1995, did the only intelligent thing he could do for himself, he wrote a letter to the Portage County prosecutor, Mr. Vigluicci, mailed it on or about June 14, 1995. I have seen the post mark. That is how I can tell you the date. Wrote a letter to Mr. Vigluicci, starts out, Victor Vigluicci, I would

like to know if I could get a deal with your office.

That is how that letter started out. Realize, well, I better start taking care of myself again. I think you might hear from Mr. Dalesandro, because he's trying to take care of himself.

I don't know if you'll hear from Mr. St. Clair or not, but if you do, I think you'll hear how he's trying to take care of himself.

Each one of these were three individuals, if they testify, it's very strong motivation to lie, to save their own hides. Each one of these people, ladies and gentlemen, I submit, lacks credibility. It's one of the reasons that we're here. Because when you look at a house, ladies and gentlemen, you have to look at what the house is built from. We have all heard about the three little pigs. Is the house made of bricks or is the house made of straw or is the house of cards, you just blow it over.

We're asking you, ladies and gentlemen, to look very, very carefully, as I know from our prior conversations you will, at the State's evidence because we submit that the State's

evidence doesn't measure up in this case.

For that reason, ladies and gentlemen, we submit to you that after you have heard all the evidence, a proper verdict in this case is not guilty.

Thank you.

*****

THE COURT: Ladies and gentlemen, it's twenty after ten, we'll take our mid morning recess. We're going to recess for twenty minutes. Remind you now when we recess you're not to discuss this case among yourselves, not permitted to let anyone discuss it with you or in your presence.

You should form or express no opinions concerning the outcome until you've heard all the evidence and the law as I give it to you.

The bailiff will now take you down to your jury rooms. I think your coats, you'll probably have to get your coats.

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(BRIEF RECESS)

MR. CAHOON: Thank you, your Honor.

CLOSING ARGUMENT:

By Mr. Cahoon.

Your Honor, Mr. Keith, Mr. Noling, Mr. Ricciardi, Mr. Muldowney.

Ladies and gentlemen of the jury, Mr. Keith and I are both going to speak to you for a little while this afternoon. This is the last chance we have to speak to you.

The State of Ohio in a criminal case, the State has the burden of proof and because the State has the burden, it gets to speak first and gets to speak last in closing argument. This is the last chance we'll have to speak with you.

The prosecutor will have the right to get up in rebuttal to make a final statement after Mr. Keith and I finish speaking. No matter what the State says, we can't get up and try to rebut that. We may be able to object to some things, we can't rebut it. When you listen to the State's final portion of its closing argument, when you go back and discuss it in your deliberations, I ask you to think what responses might be appropriate to some of the things that the prosecutor will

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tell you during the end part of its argument.

We have talked about a lot of things during this trial. One of the things we talked about was presumption of innocence. The judge will instruct you about presumption of innocence, instruct you about burden of proof, he'll instruct you about proof beyond a reasonable doubt. The Court will tell you that a person in Ohio is presumed innocent until and unless proven guilty, by proof beyond a reasonable doubt, and the State has to prove each and every element of its case by proof beyond a reasonable doubt. Not nine out of ten but each and every element of its case by proof beyond a reasonable doubt.

The State has all the burden of proof in this case. The defense has to prove nothing, the burden is on the State. They bring the charge, they have to prove it, because it's a criminal case, they have to prove it by the highest standard of proof under the law. That is their obligation. The question you will have as to each count, each element of each count when you go back to deliberate, is whether or not the State has proven its case. We submit that the State hasn't. That is why we're here.

There are certainly things beyond dispute in this case. Beyond dispute that a terrible homicide, two terrible homicides occurred. Mr. and Mrs. Hartig, you've seen their picture as recently as a couple minutes ago. We're not here to minimize that.

We are here to discuss the question of whether or not Tyrone Noling is guilty of these offenses. I have heard a lot of witnesses testify. One of the things you have to consider, looking at each witness is credibility that each witness brings. What kind of demeanor, background, how do the witnesses handle themselves on the witness stand, how do they answer questions, how they look you in the eye. All those kinds of things. The Court will instruct you as to the things you consider on credibility.

The Court will also instruct you as to what proof beyond a reasonable doubt is. What I tell you is not the instructions, it's what Judge Martin tells you.

I believe the Court will instruct you in part that a doubt based on reason and common sense is a reasonable doubt. Doubt based on reason and common sense. If you have doubt in this case, as

to the honesty of the State's case, based on your reason and common sense, then it's your duty to find Tyrone Noling not guilty.

The Court will instruct you that you have to be firmly convinced of the truth of each charge or any charge. Before you can find Mr. Noling guilty, you have to be firmly convinced. Again, if you have a doubt based on reason and common sense, then you can't be firmly convinced. The Court will also instruct you, I believe, that in trying to resolve whether or not there has been proof to the standard of beyond a reasonable doubt, you have to apply the same standard when you look at the State's evidence that you would in the most important of your own affairs and your own lives.

It's a pretty high standard. Most important of your own affairs. Do you trust the evidence to that standard? Those are some of the things involved that the Court will talk about. Proof beyond a reasonable doubt.

On behalf of Mr. Noling I would like to thank you all for sitting here listening to this evidence for close to two weeks now.

It's a little dismaying to sit back

there and see a picture of Mr. and Mrs. Hartig flashed in your faces during closing argument because that is not the issue in this case. The issue is whether or not that man is guilty. That is why we're here. This is not a case to be decided because of prejudice or sympathy or passion or anger. It's a question to be decided based on the evidence.

On behalf of Mr. Noling, that is what we're asking you to do, decide this case based on the evidence with your head, not with your hearts. With your heads based on the evidence.

I believe you will do that.

The State talked about Detective Mucklo. The State has very highly emphasized Detective Mucklo.

Detective Mucklo testified about statements allegedly made by Gary St. Clair saying, referring to two people they saw, Portage County Detective Doak, Detective Kaley, do they want to talk to me about the two old people killed in the Atwater area, that is what the witness testified, which point Mr. Noling allegedly said: Keep your mouth shut about that. Don't say another word.

Let's look at the background a little bit. Detective Mucklo put together a confidential police report. We're talking about an incident from April 11th, 1990, by the Alliance courts. April 11th, 1990. You heard Detective Mucklo's testimony.

Obviously Detective Mucklo was spoken to during the course of the investigation, later in the course of the investigation. In fact, after Mr. Noling had been charged.

Detective Mucklo made a police confidential about this conversation he told you about. Mr. Noling said, "Keep your mouths shut about that", or "Keep your mouth shut". He made that confidential on June 22nd, 1995. More than five years later. I think our reason and common sense tell us if a police detective hears something important, we're going to write it down and memorialize it pretty quickly and make sure it doesn't get lost. Apparently none of that happened because apparently wasn't too important, whatever was said five years before. I don't think what Detective Mucklo says is very trustworthy other than a vague recollection more than five years ago.

More importantly, any conversation about Atwater on April 11th wouldn't be abnormal because Detective Doak and Detective Kaley talked to Tyrone Noling about the Atwater incident on April ninth. You heard Detective Kaley testified about that. Mr. Noling was spoken to about two days before, wasn't sure about the dates, thought it was prior to the 11th, he was pretty darn sure about that, prior to the 11th. I don't think whatever Detective Mucklo says is too relevant in this case.

Deputy Kouri's testimony. He made a police report about an incident that happened on or about May third, 1990, roughly a month or so after the apparent date of the Hartig homicides. He said that Mr. Noling told him, when he talked to him, that he had been given certain information that Gary St. Clair might be trying to frame him for a double murder and certainly was clear that both St. Clair and Noling had already been talked to by the Portage County authorities, certainly, who is going to do what to whom when people are being investigated. If guilty or innocent they're going to talk about it. Certainly will be nervous and upset. They know they have been and continue

to get investigated. That is what happened here.

There was friction between Noling and St. Clair, they had an arguments and led to Tyrone Noling talking to Deputy Kouri. According to Deputy Kouri -- you have to listen, I submit, to what he says Tyrone Noling told him. Says Mr. Noling claimed he was willing to give other information about the whereabouts of evidence including a television, VCR, a shirt bloodied by the scene, things like that. Television, VCR. There was no television or VCR. As far as we heard from the testimony, anything else stolen from the Hartig residence doesn't make any sense at all because that man wasn't at the Hartig residence. Shooting his mouth off to a deputy when he was having an argument with his friends, that is what that was about.

Concerning Ronnie Gantz, Mr. Muldowney said -- I tried to write it down as accurately as I could -- Mr. Muldowney said you're the judge of his credibility. Now listen to this. That's right, you are the judge of his credibility and I think you shouldn't listen to this if it's anything Ronnie Gantz says and I don't think you should listen to anything Ronnie Gantz says.

He's a man sentenced five to twenty-five years for an aggravated robbery and kidnapping; Mr. Noling in jail, May of 1990, Stark County Jail. What does he say? 19 years old, wants to be a federal agent. Fourth degree black belt. Wants to be a lawyer while he's sitting in jail waiting to go down for serious felonies.

Wants to help certain agents make the bust of their lives, he's been to law school. He could not have been to law school; he admitted that on the witness stand.

I submit that you can't trust anything Ronnie Gantz tells you, it's completely unreliable. As the State says, you're the judge of his credibility. I say don't listen to him. He doesn't have credibility.

When the State brings witnesses in this courtroom before you, I submit either has to vouch for the credibility, or not vouch for the credibility. In this case, apparently the State is not vouching for Mr. Gantz' credibility because he has none.

Paul Garner, Paul Garner was sentenced 1988 to a year for aggravated assault. 1990, five to fifteen year sentence for aggravated robbery.

He's still not out. He's been turned down by the Parole Board, by his testimony, four or five times, he's coming up again and testified in about three weeks. He said, no, I'm not looking for a nice letter of the Parole Board or anything. I'm gonna get out anyhow, after he's turned down all these times.

You saw Paul Garner's demeanor on the witness stand, you saw how he handled himself. You saw how he got cleaned up by the State. Gave him normal clothes to wear instead of prisoner clothes before he hit the witness stand. I submit he's not reliable either.

Anthony Travise, been in prison for aggravated trafficking and theft and talked to Gary St. Clair a lot. There had obviously been conversation about the nature of these charges, about the type of evidence Tyrone Noling and Gary St. Clair were being faced with. You use your recollection, not anything any of the attorneys tell you, it's your recollection that counts.

Ladies and gentlemen, I submit to you that nowhere in Mr. Travise' testimony does he have Tyrone Noling telling him he did anything in Atwater.

He talked about the evidence. People in prison talk about stuff. People in jail talk about stuff. That doesn't mean he's talking about he did it. Because Tyrone Noling didn't say that to Mr. Travise because he did not do these homicides.

I'm going to talk just a couple minutes to you about Butch Wolcott and Joey Dalesandro.

Listen to their dealings, if you would. I'm not going to belabor them but it's important you look at the chronology here. The homicides happened in April of 1990. The case was immediately investigated by Portage County Sheriffs. Tyrone Noling was certainly spoken to at that time, certainly there was information brought to the authorities of Tyrone Noling. He wasn't charged in 1990 because there wasn't a case. There is no evidence, no fingerprints, nothing taken out of the house traced to him. Nothing showing physically Tyrone Noling was there. The State was so determined about trying to get evidence they even picked up a cigarette butt off the Hartig property. They were so concerned they took that cigarette butt -- you'll see the lab report from SERI Laboratory in

California -- sent the cigarette butt sealed up to California where it was tested and came back it was not consistent with having been smoked by any of the suspects in this case. There are what are called secretors and nonsecretors. You will see the report. Did not match up, the saliva, any of the defendants in this case, any of the suspects in this case.

So the State didn't have much of a case. What the State decided to do is go back and reinvestigate some more. Portage County Prosecutor's Office, Ron Craig particularly, went into further investigation. Butch Wolcott lived with a man named Bruce Brubaker who was a lawyer. In 1990, he was 14 years old. In 1992, he was about 16 years old.

Butch Wolcott was certainly put on notice by the State of Ohio that he was being looked at as a suspect in this homicide.

The State properly talked to the adult people in his life. Talked to his father. Talked to the family lawyer that he lived with. They got him to a public defender, made sure he got to a public defender, and what did they do? They talked to him about what he was charged with. And

they told him you can have immunity, and ultimately you will see the judgment entry. He got transactional immunity. Whatever he talked about, as long as the State determined it wasn't perjury, he wouldn't be charged. If they determined it was perjury, he could be charged but only perjury, not any other crimes he talked about. Things they talked about, even if they had evidence other sources besides his own words, he wouldn't be charged.

Butch Wolcott was a mixed-up young man. 1990. Hanging out with the wrong people, drinking. You can imagine what else he was doing. I submit 1990 Butch Wolcott was about halfway out of it. I don't think Butch even probably remembered too much about where he was in April of 1990.

Just in case, Butch Wolcott decided, if I can get complete immunity, and the adults around him decided, it was clear -- common sense tells you there -- he didn't want to risk anything, he wanted a statement for immunity. In his statement, contrary to what he said on that witness stand brought out on cross examination. He said, "I was pretty toasted before we left.

Drank a whole lot of something, pretty sure it was champagne. When we left I was pretty toasted."

Went on in the statement, June eighth, 1992, says, "I'm pretty drunk at the time."

He says, "Before I got out of the car, like I told you, I'm dying. I'm at the point I'm not totally there but I'm not totally gone".

He says, "I'm pretty toasted in the back of the car so not exactly easy for me to come up off the seat."

Says, as well, he remembered shots being fired contrary to the testimony on the witness stand. I submit Butch Wolcott, and with his immunity, he tells the State of Ohio what they wanted to hear.

Joey Dalesandro first made a statement shortly after Butch Wolcott's on June 12 which he said, "I don't know even know anything about that." Tyrone hurt no one. That was Joe Dalesandro's first statement.

Excuse me.

Joey Dalesandro had already been in prison for aggravated trafficking, just three -- I'm sorry -- four months before he was sentenced in April of 1992. Three to fifteen year

sentence. He was gone, he's doing time. Anyhow, here he is yesterday on a murder. June of 1992 he said, I don't know anything about that, Tyrone Noling, that is his statement. Obviously finds out that Wolcott is getting ready to testify about him. He's cooperating. July 29, make another statement. Little closer what the State wants to hear. Doesn't talk about any blood or bloody shirts or anything like that or any smoking gun. Saves that, ladies and gentlemen of the jury, for a letter of June, 1995, in essence to Mr. Vigluicci after he didn't get his five to fifteen year concurrent time plea agreement, he got the maximum. Because he stopped cooperating. He got eight to fifteen years consecutive. Right after that writes to Victor Vigluicci, County Prosecutor. You'll see the letter, by the way. He says, "I would like to know if I could get a deal with your office".

Then he says, "I remember smelling gun smoke when Tyrone got in the car. Plus Tyrone had blood on his clothes." Volunteers that very conveniently this past summer.

He told you from the witness stand he would say what he felt needed to be said when it

needed to be said. That is because he's making it up. Doing whatever he can to help himself. Right now he needs a lot of help.

What is Joey Dalesandro looking for? Ladies and gentlemen, he's looking for a break. He's looking for some time off on his sentence. Turned down once by the Parole Board, that according to his testimony, he's looking for a break.

Dalesandro testified that he said in a prior statement that Gary St. Clair would not have pleaded guilty unless he had pleaded guilty.

Gary St. Clair got on the witness stand and said, "I didn't have anything to do with anything in Atwater." He said, "Neither did he". Neither did Tyrone Noling. Why would he do that? Because he's scared of Tyrone? Is Tyrone going to go find him in prison? A guy doing life? That is not because of fear. That man, Gary St. Clair, had nothing to gain and, in fact, probably a lot to lose by testifying the way he did in this trial. I submit to you he felt it was time the truth come out in this case.

I submit to you when you have considered all the evidence in the case, hope that the

credibility of the State's witnesses really was tested in this case, among yourselves, that a proper verdict in this case would be a verdict of not guilty.

Mr. Keith will speak to you as well for a few minutes, thank you.

CLOSING ARGUMENT:

By Mr. Keith.

Your Honor, if it please the Court, Mr. Noling, Mr. Cahoon, Mr. Ricciardi, Mr. Muldowney, ladies and gentlemen.

This is closing argument. As Mr. Cahoon has said, it's our only chance to speak to you. It's where the lawyers talk about what they think is important. The twelve of you are going to decide eventually what is important, I happen to believe in the jury system. I happen to think that jurors do what is right. I think that, you know, for elected judges who have to stand before the media and all those things, it's very difficult sometimes. You, as jurors, people seem to work very hard. I always appreciated as a lawyer the jury system.

My remarks, some of them will agree with

what Mr. Cahoon said and some probably will not. You have seen enough of us to know we're different people as this goes on. Each of the twelve of you will also remember that evidence or parts of it, depending on your personal experience or whatever -- that is one of the reasons there are twelve of you -- if I say anything not exactly correct, probably not to mislead you, probably because I don't remember exactly.

One of the things happens, we all take out that which we look at, that we could see. There is a car accident, six witnesses, all have six different stories. Mr. Muldowney has a different point of view. He mentioned Paul Garner's testimony. He asked or he said Mr. Keith asked some questions. Paul Garner said, "Is that a joke?" I saw that as him being contemptuous of the system. He wasn't there as a good citizen. He wasn't there to talk about things and simply answer the questions asked. He wasn't eager to do that at all. He wanted to tell his narrow story and get out of here before something bad happened. Heard what he had to say, didn't make any sense. Bodies in the basement. Bodies in the bedroom. Safes ripped out of the wall. Didn't

make any sense.

We have a series of people in jail need help, each one says "I don't need any help, I don't care, I don't want it". The consistency among these witnesses is that these stories are inconsistent for major points.

When you go in the jury room to consider this case, your job, ladies and gentlemen, is to stand between the government and Mr. Noling. Your job is to consider this evidence. If I tried to mislead you or something, your job as a jury is to sort that out and to figure out, not with your hearts but with your heads, what the government had been able to prove, what they are able to present.

I don't want to put words in Mr. Muldowney's mouth, although we've told you what we're going to say. He's going to tell you that Mr. Noling was accused of some other robberies. You heard that in the beginning. We got some gratuitous stuff about his being pumped up.

We have to come back what the government is able to prove. They have some real problems, ladies and gentlemen. Let's go back to April of 1990, bunch of little boys. Not the people came

here and testified -- they are eighteen years old. Throwaway kids, street kids, don't have jobs, education, people who care about them. They don't have anything.

Memory, perception and bias, the elements of a witness. The elements of a witness' testimony. We have a bunch of little boys living in a house. They don't have anything. They don't have any resources. They are just throwaway kids. They probably haven't developed very much. We think about our own experiences at eighteen, how we solved problems, what happened to us. A lot of what goes on here begins to make sense. A lot of what the government's problem is begins to make sense. Butch Wolcott, he's a 14-year-old. He's around, commit some armed robberies, come home with a gun. The government wants to tell you all this because of what happened at the Hartig residence. Doesn't make any sense Mr. Noling would be terrified because he committed a couple of burglaries and be terrified the police would be driving up and down the street anyway. Doesn't make any sense he would be afraid of a 14-year-old, anyway.

Doesn't make any sense Mr. Davis calls

the police on that Saturday. If there is anything on the radio waves, any police scanner, anybody would know something bad happened in Atwater, Ohio.

I don't care what comes out on TV or radio. April 7 at six o'clock, if you had a radio or a scanner, you couldn't miss it.

We have some little boys do some things, police go to the Hartig residence. No fingerprints, no physical evidence. Don't look for blood patterns or anything like that. Pick up some bullets, take some pictures and that is all there is. No hair, fiber. Take a cigarette butt hoping to connect it to some human being. That doesn't turn out. They don't have any other physical evidence. There is just nothing.

They immediately talk to Mr. Noling and Mr. St. Clair on Monday, the ninth. Okay, these people were involved in some robberies, maybe potential witnesses, and they talk to them and leave.

Then on the 11th -- and, again, these are eighteen-year-olds, they know they have done a bad thing, arrested for couple robberies. Why wouldn't somebody accuse them of another robbery?

Why won't you tell somebody to keep your mouth shut? Why wouldn't you do that anyway? When I say doesn't make any sense, I'm being sarcastic. Why wouldn't you do those things? These are little boys. They are just kids. Don't have too much.

Detective Mucklo hears one say to the other, "Keep your mouth shut about that." Maybe there is a glimmer of understanding, whatever. Something is going to be repeated in the courtroom here. We come full circle to Anthony Travise. January of 1993, Mr. Travise is in the jail, in this building. He wants to tell you he doesn't need a deal. Hasn't bothered to show up for trial, in a lot of trouble. He's celled with a guy, aggravated murder, death penalty specification. That guy talks about his fear, beliefs, what he knows about the evidence. Mr. Travise eventually admits that the guy never tells him anything. He does say they'd never prove it because he wasn't there, that is the one statement he makes, and the prosecutor will tell you that wasn't a denial of the entire matter. You judge what it was. A guy in a cage can't leave. Charged with something they can put you to death

for. What will he talk about, how nervous he will be, what it will mean to him then. You be judge of Anthony Travise. You look what he told you, his credibility. He comes into a courtroom, this building, April nine. I asked yesterday, you sat there sitting in jail and this courtroom until after June first when Mr. Noling's trial was originally set. He didn't say a word.

No, that is because I fired my lawyer.

The lawyer, according to the file . . . April 21st. The truth is he expected to be a witness, he wanted his deal. He could help himself in a big hurry, he needed it.

Joey Dalesandro is just great as far as I'm concerned, he doesn't know anything about it. They go to the prison and talk to him great lengths. They go through each and every element what they think their case is. This isn't April or May or June of 1990. This is 24 months later. June of 92. They go and tell him the story and he disagrees with all of it. He gets his deal, essentially a free pass. May be better than that.

This is the boy with the big bag of cocaine. He didn't think he did anything wrong.

We want to talk about consistency, what they said. He said he didn't think he did anything wrong. I don't know whether to judge that or not. What is right and what is wrong, I think that is a real flexible subject for that individual.

Comes to Court on June or July 29th -- if I get the date wrong, I apologize. And comes at that time and gets his deal, thinks this is a free pass plus a letter to the Parole Board to get him out. He tells and ain't much, just a bare minimum. Well, that is great. That is not so bad. Later, February of 1993, they bring him back. About eight months. They bring him to the second floor. Ask some questions and it's fascinating, all they get out of that story is a second gun. You know why. The government needs a second gun.

In the exhibits you're going to see an exhibit -- I think it's exhibit number 52 -- and I want you to remember this, ladies and gentlemen. You're going to see it as evidence, a report from a Richard Turbok who is a forensic scientist and you will recall that the gun that came out of the house and put a bullet in the floor of the Murphy

residence was not the gun at the Hartig house. What is fascinating is that that is not submitted to the Bureau of Criminal Investigation until June eighth, 1992.

He makes a record on June 12, we don't know when the government hears it but then they need a second gun. Suddenly have a problem. They have a murder weapon, long time until they look and then they don't. Then we bring Joey Dalesandro back so he can tell us about the murder weapon. Then we need a guy with a cap on his head. First thing he did in this trial, first thing he did, volunteer this guy on the floor, looked like outdoor clothing and a cap on his head. We need a gun. In February he adds the gun. Suddenly we find out we have an extra gun. We go back to Detective Kaley with that gun and suddenly there is a story about a different gun from Mr. Noling here.

You saw Detective Kaley testify. You saw how he would clean up his testimony for the prosecutor by looking at some statement, this or that. He wasn't going to do that for us, didn't refresh his memory for the defendant, just for the prosecutor. You saw what he could remember, the

depth of the conversation. He had that conversation with Mr. Noling May four, 1990. If he said there was a second gun, number of other things going on, what happened. They go to Kenneth Garcia. We don't know if Mr. Garcia bought a second gun. We know Joey Dalesandro said he sold the second gun. That is all we know, what Joey Dalesandro said. I tell you why Mr. Turbok makes it a big problem.

On the fourth they are planing a robbery and counting the guns. They have a .25 -- no, they don't yet, they have a BB gun and a shotgun. That is all anybody ever talks about and that is at 4:30 on the fourth. And at that time we get a .25 and that .25 goes to the Murphy residence on the fifth and leaves a bullet in the floor. You heard the gun went off accidentally, scared Mr. Noling to death. He was solicitous of the woman's health, he wanted to know was she all right.

He told Detective Anderson about that immediately. We don't find out until two years later we need another .25.

Joey Dalesandro, who tailors his testimony, whatever they need -- if they needed a pink elephant they could interview him about an

hour and he could remember a pink elephant. He tells us about the plans and the guns. He tells us, well, we got some bullets somewhere, really wouldn't know.

Where did you get them? The store at the corner? He's the driver, folks. Where did the bullets come from? A vinyl bag shows up at the trial nobody ever heard of before. There is not a second gun; we find out when the government needs it.

You heard from Mr. Wolcott. We hear his testimony that some of this they asked him about, going on to describe the garage, says just seems some reason it's another house in another dream.

He knows exactly what he's doing when he gives his first statement in June of 92 after he's given complete immunity. They're told, hey, you're going to be charged for the most awesome crime there is and you will be in more trouble than you know what to do about. You can sign this paper, tell us a story and you can go home. They do it with him and then Dalesandro. They say you are really going to be in trouble.

We only get to ask about the statements somebody recorded. We hear about a whole lot of

statements somebody made weren't recorded. We don't know, we don't get to ask about those. The defendant doesn't control that, the government does. You heard about Mr. Dalesandro. You heard Mr. Dalesandro talk about Gary St. Clair. "St. Clair wouldn't have pled without me".

They get Mr. Wolcott, give him complete immunity, and get a psychologist to power up his story a little bit. Wonder why. Why did they need to hire a psychologist for him and pay him? If he remembered at all on that first statement, but he just happened to enhance him. He was real drunk, real high. Couldn't get most of the details straight, couldn't remember.

Five years later he could remember. He got his deal. Dalesandro wants his deal back. See the letters in there. That is part of the evidence. You talk about consistency, look at his consistency. Mr. St. Clair, well, they come to him and say, hey, we can fry you, you can ride the lightning bolt, we can put you in the electric chair. We have this evidence or you can make a deal to control what is happening to you.

He makes that deal and controls it. But his attorneys want him to, his parents want him

to. He's a young man, what does he know?

Once again, and the government is going to come back and say these guys committed these other robberies; that is probably part of his decision. The government will say he was willing to do it. That is what they're trying to argue to you. He gets on the witness stand where the pressure is the most, where it's the most important and the bad letter goes to the Parole Board. Eventually he gets indicted for perjury, whatever else happened. He says I didn't do it and that gentleman didn't either. You examine the credibility of that and see what it means.

I submit to you, ladies and gentlemen, there are more things than I can begin to cover. I submit to you what happened, originally in the investigation nobody could figure out what happened. Somebody went back and said "I know what happened. I put it together." And then they went back and a witness at a time they put the pieces together and squeezed each one of them into their place with whatever it took -- immunity, the threat of going to the electric chair, whatever it took.

When you examine this case, ladies and

gentlemen, nobody we have seen tells us what goes on inside the Hartig residence and certain theories emerge. Certainly that is horrible. As Mr. Cahoon said there when he began, think with your heads, not your hearts. You examine that. You will find that the government has not proven its case beyond a reasonable doubt.

A reasonable doubt is that standard of proof that an ordinary person would employ in the most important of their own affairs. Butch Wolcott is not going to watch your kids. Joey Dalesandro is not going to watch your kids. Those people and that evidence, if you had a child who was sick and went to a doctor -- I don't know, I'm not sure, changed my story. What will you pay me to tell you what you want to hear? You would not accept that evidence.

Ladies and gentlemen, it would not be acceptable to you. Another lawyer who I will plagiarize talks about a parachute.

MR. MULDOWNEY: Objection, your Honor.

Are we talking about evidence or telling stories?

THE COURT: Both.

MR. MULDOWNEY: Comments on the evidence. Objection.

THE COURT: Final argument, Mr. Prosecutor. Go ahead.

MR. KEITH: (continuing) Talks about if a witness, if you looked at these witnesses, if you were going to get on an airplane and jump out with a parachute and you were told Joey Dalesandro packed your parachute, you wouldn't get on the airplane, let alone jump out of it. The fact they come in here draped in the robe of being government witnesses doesn't make them any better.

Mr. Muldowney will tell you he doesn't get to pick his witnesses. I don't disagree. He doesn't have to choose to put Paul Garner on. He doesn't make any sense to anybody. If you look at the crime scene, what obviously can be proven, he doesn't make any sense. The reality is regardless whether or not those people are credible, regardless what they are -- I submit they are not credible -- the government continues to bear the burden of proof. Does not excuse the burden because the evidence is not there. Their burden

continues and I submit to you, ladies and gentlemen, they have not been able to meet it. There is doubt all over this record.

Gary St. Clair got on the witness stand. He tells it didn't happen, "I wasn't there and neither was he". There is your doubt. This is a gentleman has a lot to lose and has lots to gain and there is your doubt.

Now, ladies and gentlemen, if I've said anything or done anything myself that offends you, please excuse me or tell me in the hallway. We get precious little feedback as lawyers as it is. You have a terrible burden and a very difficult decision to deal with. You will go through a lot of evidence. Years ago as a young lawyer, in a murder case I heard a lawyer make an argument about car salesmen or something. A juror said, "I would have found the guy not guilty but I was offended by you."

We're offended two old people were murdered. We're all hurt and saddened by this crime but that doesn't make it possible for you to ignore the objective evidence in this case.

Comment -- you go back to it. I think the most salient factor of all of this, somehow

the government one day finds out it has to come up with a second gun. We don't know that to start with but once they do, then we have Mr. Dalesandro able to give us another gun. We have these people able to add what they need as time goes on.

BAILIFF: Time, George.

MR. KEITH: Thank you.

MR. KEITH (continuing): We appreciate your time and attention and patience. Thank you very much.

THE COURT: Ladies and gentlemen, do you want to get up and take a little recess?

BAILIFF: 12 minutes.

STATE'S REBUTTAL CLOSING ARGUMENT:

By Mr. Muldowney.

If it please the Court, ladies and gentlemen.

I don't really understand what Mr. Keith is talking about. He refers to a second gun coming up two years later, but if you remember the testimony, uhm, that second gun came up as early