IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

STATE OF OHIO Plaintiff-Appellee vs. TYRONE NOLING Defendant-Appellant.	)	CASE NO. 2011-P-18 Oral Argument Requested

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

STATEMENT OF FACTS

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

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

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

STATEMENT OF PROCEDURAL HISTORY

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

With regards to Dan Wilson and Raymond VanSteenberg, the Court found, "[a] man with a trouble past may have smoked a cigarette left in the Hartig's yard, and another man owned the same type of gun used in the murder and could not account for its whereabouts at an inopportune time. This newly discovered evidence, even when viewed with the other evidence, does not prove that one of the other suspects committed the murders. It merely opens the possibility, a very slight one we might add, that one of them did." *Id.*

The Sixth Circuit held, "[m]ore importantly, it does not prove that Noling did not commit the murders, or clearly and convincingly nullify the evidence at trial supporting his conviction." *Id.*

The Sixth Circuit opinion is the most recent decision in a case that has a very long procedural history. Following a jury trial in February 1996, Noling was convicted on two counts of aggravated murder and the accompanying death penalty specifications, two counts of aggravated robbery and aggravated burglary. (T.d. 173).

The Supreme Court of Ohio affirmed Noling's conviction and death sentence on direct appeal. *State v. Noling* (2002), 98 Ohio St.3d 44, certiorari denied *Noling v. Ohio* (2003), 539 U.S. 907, 123 S.Ct. 2256, 156 L.Ed.2d 118.

On July 23, 1997, Noling filed his first petition for postconviction relief with the trial court. In his petition, he raised four claims: actual innocence, prosecutorial misconduct, *Brady* violations, and the ineffective assistance of counsel. The trial court dismissed Noling's first petition for postconviction relief finding that, "there [were] no substantive grounds for relief." On September 2, 2003, this Court affirmed the decision. *State v. Noling* (Sept. 2, 2003), Portage App. No. 98-P-0049, 2003-Ohio-5008, at ¶74. The Supreme Court of Ohio denied jurisdiction. *State v. Noling* (2004), 101 Ohio St.3d 1424, 2004-Ohio-123.

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

The trial court then dismissed Noling's successive petition and first motion for a new trial finding that his "new evidence presented does not meet the standards for granting a new trial or a successive petition for post conviction relief." (T.d. 287). The trial court further found that a Civ.R. 60(B) motion was an improper remedy for relief, (T.d. 287), and Noling's motion to appoint an expert witness and motion for additional discovery were rendered moot. (T.d. 288). On May 19, 2008, a unanimous panel of

this Court affirmed the trial court's dismissal of Noling's successive petition for postconviction relief. *State v. Noling* (May 19, 2008), Portage App. No. 2007-P-0034, 2008-Ohio-2394, at ¶114. ("*Noling Successive PCR*"). On December 31, 2008, the Supreme Court of Ohio declined jurisdiction to hear the case.

On September 25, 2008, Noling filed his first application for additional DNA testing pursuant to R.C. 2953.71 to 2953.81. (T.d. 296). Following the State's timely response, the trial court overruled the application on March 11, 2009; finding that Noling's previous 1993 DNA testing that excluded him and his co-defendants was a definitive DNA test. (T.d. 299). The Supreme Court denied Noling's leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (T.d. 318).

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

Noling's assignments of error will be considered out of order for ease of discussion.

LAW AND ARGUMENT

Response to Noling's Assignment of Error No. 2: The trial court properly exercised its discretion in denying leave to file a successive

> motion for new trial as Noling failed to establish that he was unavoidably prevented from discovering the evidence. Noling either had knowledge of the existence of this information or could have learned of it by exercising reasonable diligence.

In his second assignment of error, Noling alleged the trial court abused it's discretion in denying leave to file and overruling his successive motion for a new trial. Noling requested an order from the trial court allowing him to file his untimely motion for new trial pursuant to Crim.R. 33 and R.C. 2945.80. According to his application, Noling's motion for a new trial was based upon newly discovered evidence, Crim.R. 33(A)(6), and prosecutorial misconduct, Crim.R. 33(A)(2). As Noling's application was filed more than thirteen years after his February 23, 1996, sentence, he has to obtain leave from this Court to seek a new trial. Crim.R. 33(B).

Standard of Review

Crim.R. 33(B) dictates the procedure for filing an untimely motion for a new trial and anticipates a two step procedure. *State v. Valentine* (May 23, 2003), Portage App. 2002-P-0052, 2003-Ohio-2838, at ¶9. The first step required a showing by "clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely[.]" Crim.R. 33(B). The second step required the defendant to file his motion within seven days of the Trial Court's determination. *Id.*

"A party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Walden* (1984), 19 Ohio App.3d 141, 145-146.

Clear and convincing proof is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt: it "produce[s] in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus. Black's Law Dictionary defines due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." Black's Law Dictionary (8 Ed.Rev.2004) 488.

A motion for a new trial, made pursuant to Crim.R. 33, is addressed to the sound discretion of the trial court. *Schiebel*, 55 Ohio St.3d at paragraph ten of the syllabus. A Trial Court's ruling on a Crim.R. 33(B) motion will not be disturbed by a reviewing court absent an abuse of that discretion. *Id.* Furthermore, the discretionary decision to grant a motion for a new trial is an extraordinary measure which should be used only when the evidence presented weighs heavily in favor of the moving party. *State v. Otten* (1986), 33 Ohio App.3d 339.

Evidence Adduced at Hearing

On February 18, 2011, the trial court heard evidence regarding Noling's motion for leave to file his successive motion for a new trial. Noling presented testimony and evidence from his original trial team, George Keith and Pete Cahoon. The State presented testimony and evidence from Assistant Prosecutor Muldowney. Additionally, the parties stipulated that the following four documents at issue, identified at the Hearing as Noling 2, 3, 4, and 5, were received pursuant to a public records request on August 13, 2009:

Noling 2 Dale Laux's June 19, 1991 BCI Laboratory Report, results of blood analysis, (1 page).

Noling 3 Hand written notes regarding Nathan Chesley, dated April 24, 1990, (1 page).

Noling 4 Voluntary Statement of Marlene M. VanSteenberg, dated April 1, 1990, (2 pages).

Noling 5 Document titled "Transcript of Marlene M Van Steenberg [*sic*] Voluntary Statement 04-01-91 J.R." (1 page).

(Hearing T.p. 32, Noling 2, 3, 4, and 5).

Keith informed the Court that during his representation of Noling he filed several requests for discovery. (Hearing T.p. 39, Noling 1). Keith admitted that at least one box of discovery was provided by the state, although he could not recall if it had been picked up or delivered. (Hearing T.p. 44). He had no recollection of receiving any of the four documents at issue. (Hearing T.p. 46, 51-52, Noling 2, 3, 4 and 5).

On cross-examination, Keith revealed that he had been diagnosed with viral meningitis and encephalitis five months ago and "[o]ne of the effects of that disease process was some damage to my temporal lobe and it affects short term memory into long term memory." (Hearing T.p. 62). He informed the court that his Noling files were destroyed by water damaged six years ago. (Hearing T.p. 60). However, prior to the water destruction, Keith had not looked at his Noling files since closing them up in 1995. (Hearing T.p. 62). Keith did recall a visit to the Portage County Jail to review the physical evidence in the Noling case, but did not recall going through any paperwork. (Hearing T.p. 71). Keith also stated that his secretary "very thoroughly reads the Akron Beacon Journal every day from cover to cover." (Hearing T.p. 68).

Cahoon described that Portage County's normal custom was open file discovery, meaning "the prosecutor gives you full access to everything in their file and the normal professional courtesy in this county is if you want the file copied they will copy it for you." (Hearing T.p. 77). Cahoon recalled receiving the whole file copied. (Hearing T.p. 77). With regards to the specific four documents at issue in the hearing, Cahoon was unable to state whether or not he had previously seen any of the four documents. (Hearing T.p. 80-82, Noling 2, 3, 4 and 5).

On cross-examination, Cahoon stated that he did recall reviewing physical evidence at the Sheriff's Office, but did not "recall if there was documentation with the physical evidence." (Hearing T.p. 87). After closing his Noling files, he was contacted by the direct appeal attorney who did not request to review of his file. (Hearing T.p. 90). Cahoon did not recall any other requests to review this file, although his files still exist. (Hearing T.p. 90). Although a daily reader of the Beacon Journal newspaper, Cahoon could not recall if he had read any articles regarding Dan Wilson prior to Noling's trial. (Hearing T.p. 93).

Cahoon further stated on cross-examination that after being approached by Noling's counsel about a year ago, with a pre-drafted affidavit regarding the four documents at issue, he requested an additional line of text be inserted into the affidavit before signing the document. (Hearing T.p. 89, 92). The additional line, "was to the effect that I do not at this time recall receiving those documents but I can't state that with certainty." (Hearing T.p. 92).

Assistant Prosecutor Muldowney testified he took eight months off his regular felony schedule in 1995 to work exclusively preparing and prosecuting Noling.

(Hearing T.p. 106). Muldowney was not directly involved with the prosecution of Noling's originally indicted October 8, 1992 case (Portage County Case No. 92 CR 261). And although nothing was formally filed with the Court, there is a receipt containing 34 items copied for discovery in Noling's case that was signed by George Keith and dated April 8, 1993. (T.d. 333, Exhibit 4). A review of this list reveals the following descriptions for Items Nos. 31, 33 and 34, "31. Miscellaneous Hartig papers * * * 33. Miscellaneous: reports – calendar – personal papers" and "34. Blood analysis reports." (T.d. 333, Exhibit 4).

On June 2, 1993, with only 35 days remaining to try Noling for the Hartig murders, the State was forced to nolle the charges to have time to react to information belatedly provided in discovery by Defense Counsel. August 18, 1995, the Portage County Grand Jury again indicted Noling with the same charges, Portage County Case No. 95 CR 220. On the record at Noling's arraignment, the following discovery discussion occurred:

> MR. MULDOWNEY: Your Honor, there is one more issue I would like to bring up and that is the issue of discovery. This case had been set for trial before and there had been discovery before with the prior administration between the Prosecutor's Office and Mr. Keith and Mr. Cahoon. I believe there are several new items of discovery that we have, and at this time, me and Mr. Keith have discussed a little about it and Mr. Cahoon, and my understanding is that they're willing to accept what we had given them in the prior case and come to our office and go over our file, plus the new developments, the new discovery that we have, and if that is agreeable with Mr. Keith, I would like to put something on the record to that effect.
>
> MR. KEITH: Your Honor, I would state for the record that we had received considerable discovery, running at a minimum of three very large binders for the last trial and we still have those. The Prosecutor's Office has talked to us about this. Certainly we cannot by some stipulation waive the right to discovery in this matter or suggest at this time it is complete. However, I would state for the record we have

> that discovery, we have had conversations. I believe we can resolve the issue of discovery without further involvement. If there is some reason we can't, we would approach the Court at the earliest possible moment, but certainly the Prosecutor's Office has voluntarily and deliberately done everything they can up to this point to resolve that particular issue. I suppose that is what they want their record to reflect and I don't disagree with that.
>
> THE COURT: All right, put it in the record.

(T.d. 333, Exhibit 11). Accordingly, the order and journal entry of Noling's arraignment provided in relevant part, "[t]he Court further finds that the Assistant Prosecuting Attorney, Eugene L. Muldowney, stated that they have additional discovery that they will make available to the Attorney for the Defendant, along with the discovery that was previously obtained for this matter." (T.d. 333, Exhibit 5).

In preparation for the 1995 trial, Muldowney testified that he went through all the files, met with the Sheriff and went through his files along with two investigators from the prosecutor's office, "[t]here was three of us going through to make sure we had everything, everything was copied and put into binders and provided to the defense counsel." (Hearing T.p. 106). The defense attorneys had received binders of discovery in the first case and "they did not request it be duplicated but they did go to the sheriff's office to look over the original file to make sure they had everything." (Hearing T.p. 107). Assistant Prosecutor Muldowney then supplemented this discovery with any additional information that the prosecutor's office had or that was received from the Sheriff's Department. (Hearing T.p. 107).

Muldowney specifically recalled meeting with Keith at the Justice Center after December 13, 1995, "and the purpose of getting together was to go over all the discovery to make sure they had everything, number one, and, number two, and

probably primarily what initiated this was there was all these exhibits and they wanted to see the exhibits." (Hearing T.p. 104, Exhibit A). On re-direct, Muldowney clarified that while the prosecutor would have had separate files for Noling and each of his co-defendants, the Sheriff maintained one file regarding their entire investigation of the murders. (Hearing T.p. 115).

Analysis

As a threshold matter, Noling had the burden of demonstrating that his motion for a new trial was in fact based on newly discovered evidence. In other words that the four documents at issue Noling 2, 3, 4 and 5, was not part of the State's open file discovery in his case. A review of the evidence adduced at the hearing and the affidavits presented by both sides in support of their positions reveals that Noling has failed to satisfy this threshold requirement.

In the present case, discovery was conducted by open file. Defense Counsel signed a discovery receipt dated April 8, 1993, and acknowledged receipt of, "considerable discovery, running at a minimum of three very large binders for the last trial and we still have those." (T.d. 333, Exhibits 4 and 11). Accordingly, Noling has not satisfied his initial burden of demonstrating that Noling 2, 3, 4 and 5 were not among the materials provided by the State in the course of its open file discovery. Without newly discovered evidence, Noling's application for leave to file his motion for a new trial was moot and was properly dismissed by the trial court.

Clear and Convincing Evidence Lacking to Demonstrate Unavoidably Prevented From Discovery of Evidence Supporting Noling's Motion for a New Trial

Assuming arguendo that this Court determines Noling satisfied his threshold showing that the four documents identified as Noling 2, 3, 4 and 5, were not included

in the State's discovery materials, the State submits that the trial court did not abuse its discretion in denying leave to file his successive motion for a new trial. The trial court properly found that Noling failed to establish that he was unavoidably prevented from discovering the evidence, because, as the State argued, Noling either had knowledge of the existence of this information or could have learned of it by exercising reasonable diligence.

DAN WILSON SUSPECT WAS COMMON KNOWLEDGE

Noling's another man innocence theory was based upon the alleged newly discovered evidence in Noling 2 and 3. Noling alleged that said evidence was "suppressed" and suggested "Dan Wilson as an alternative suspect." (T.d. 304). However, the State notes that the same public records request that contained Noling 2 and 3 also contained copies of numerous newspaper articles detailing Daniel Wilson as a suspect in the Hartig murder investigation. (T.d. 333, Exhibits 23-33).

Within a year of the Hartig murders, media coverage of the investigation was reporting Daniel Wilson as a suspect in the Hartig murders. (T.d. 333, Exhibit 23). Portage County along with other authorities were anxious to question Wilson regarding his possible involvement in their pending investigations. (T.d. 333, Exhibit 23).

As the year continued, the media continued to report Dan Wilson as a suspect in the case and that fluids were taken from Wilson for testing. (T.d. 333, Exhibits 24, 25, 26, 27, 28, 29). Two years after the murders, Dan Wilson remained a possible suspect in the Hartig murders. (T.d. 333, Exhibits 30, 31).

On August 6, 1992, both the Akron Beacon Journal and the Record Courier reported that Prosecutor Norris had re-opened the Hartig murders investigations following Dan Wilson's conviction and sentence of death for the murder of an Amherst woman. (T.d. 333, Exhibits 32, 33). In 1987, Wilson had lived with a foster mother on a farm in Portage County located about a mile from the Hartig's home and public opinion had linked Wilson as a possible suspect in the case. (T.d. 333, Exhibits 32, 33). Although the Prosecutor Norris "never felt he (Wilson) was a suspect, we could not eliminate him as a suspect without further investigation." (T.d. 333, Exhibit 33). It was this further investigation into Wilson that led the Prosecutor's Office to St. Clair, Dalesandro, Wolcott and Noling. (T.d. 333, Exhibits 32, 33).

Noling's attempt to characterize Daniel Wilson as a possible alternate suspect that the prosecution somehow failed to disclose is a complete misrepresentation of the facts in existence at the time of Hartig murder investigation and Noling's prosecution. Noling can hardly show by clear and convincing proof that he was unavoidably prevented from the discovery of evidence upon which he must rely, as this evidence was featured in both the Akron Beacon Journal and the Record Courier. The Beacon is the paper read daily by Cahoon and cover to cover by Keith's secretary. (Hearing T.p. 68, 93). Furthermore, the fact that counsel for Noling had these very newspaper articles provided to them in response to a public records request along with Noling 2 and 3, demonstrated the lack of merit in the filing and that the application for leave to file a motion for a new trial was nothing more than another attempt to delay Noling's sentence.

Even if the trial court had overlooked the obvious, that the fact that Daniel Wilson was a suspect in this case could be learned by simply reading the newspaper for the two years following the Hartig murders, the State also offered the following arguments in response to Noling 2 and 3.

DAN WILSON - OTHER AVENUES OF REASONABLE DILIGENCE

Contrary to Noling's repeated reference to Noling 2 as a DNA analysis, Noling 2 is a June 19, 1991, BCI laboratory report indicating that blood tests, not DNA tests, were conducted on an extract of a cigarette butt. (Noling 2). The results of the blood tests were, "elevated levels of amylase which is indicative of the presence of saliva. *Typing of the extract failed to reveal detectable levels of secreted blood group substances*. The cigarette may have been smoked by a non-secretor." (Emphasis added). (Noling2). The findings provided by the BCI Forensic Scientist Dale Laux also contained the following sentence, "[t]yping of the blood from Daniel E. Wilson, BCI & I case number 91-31692-D, revealed him to be a type A non-secretor." (Noling 2).

Noling 3 is hand written notes dated April 24, 1990, regarding an individual named, Nathan Chesley. (Noling 3). Chesley, a foster child, was 18 years old at the time of the Hartig murders and was living with foster parent, Shirley Spinney, along with two other foster children. (Noling 3). The notes contain the following, "Nathan made the statement he thought it was cool what happened to the Hartigs. Nathan made the statement his brother did it." (Noling 3). Noling 3 also contains contact information for Ms. Spinney at her place of employment and Chesley's case worker's information. (Noling 3).

In preparation for filing his application for leave to file a motion for new trial, Noling procured an affidavit from Chesley in which Chesley averred that Dan Wilson was one of Shirley Spinney's foster children who was moving out when Chesley was moving in. (T.d. 304, Exhibit E).

Contrary to Noling's assertions, the clear and convincing evidence in this case establishes that Noling would have learned of the existence of Noling 2 in the exercise of reasonable diligence. Dale Laux, the BCI Forensic Scientist who performed the blood test and authored the report indicating the results of his testing, Noling 2, appeared as a witness on the State's witness list filed on April 12, 1993, in the original case 92 CR 261 (T.d. 333, Exhibit 12), and again as a witness on the State's witness list filed on December 6, 1995, after Noling was re-indicted in Case No. 95 CR 220. (T.d. 333, Exhibit 13). As Laux appeared on the State's witness list, contacting and simply inquiring what reports Laux had authored in connection with the Hartig murder investigation, BCI Lab Number 90-31768, would have led to the discovery of Noling 2.

Another avenue of reasonable diligence that would have led to the discovery of Noling 2 is researching the chain of evidence supporting a serological report Defense Counsel was considering using at trial. The record reflects that as the trial date approached, the matter proceeded to a hearing on Noling's motion to suppress and motion in limine to exclude similar acts evidence. After the substantive portion of the hearing concluded, the Court attended to some housekeeping matters:

MR. CAHOON: Judge, I have a couple of brief things, terms of housekeeping.

THE COURT: Lot of housekeeping things to straighten out.

* * *

MR. CAHOON: The other thing, I would like to mention previously had some discussion with Attorney Muldowney about this. There had been some DNA testing of a cigarette butt, if I could call it that, the remnants of a cigarette, quite a long time ago. The report of that is provided to us. That issue may or may not become important during trial. The thing that concerns me is the laboratory that did that is the Seres [*sic*] Lab in California. I would hate to have to bring an individual concerning that issue; it's pretty exculpatory evidence, your honor, shows that the saliva on the cigarette was inconsistent with any of the individuals involved in this case, so - -

MR. MULDOWNEY: We'll stipulate to that report.

MR. CAHOON: That is what we're asking for. Thank you. That is all we have today, your Honor. Thank you.

(T.d. 333, Exhibit 14). At issue in this stipulation was the Serological Research Institute report dated February 19, 1993. (T.d. 33, Exhibit 15). Exhibit 13 contained the results of a forensic serological comparison between blood samples from Noling, St. Clair, Dalesandro, Wolcott, the cigarette butt and Noling's saliva. (T.d. 333, Exhibit 15). The results of the testing indicated that "the smoker of the cigarette butt is a nonsecretor of unknown ABO type" and that two samples from the cigarette butt "had HLA Dq*a* results of 3, 4." (T.d. 333, Exhibit 15).

In 1993, only two types of DNA testing were available, one that detected the presence of Restriction Fragment Length Polymorphisms (RFLPs) in the DNA and a second method which relied on identifying a small specific section of DNA known as the HLA Dq*a* locus. (T.d. 333, Exhibit 15). The HLA Dq*a* analysis required less DNA and "[a]lthough there may be an elimination of a person using this system clearly an identification to the exclusion of all others is not possible." (T.d. 333, Exhibit 15). Using the HLA Dq*a* analysis, Noling, St. Clair, Wolcott, and Dalesandro were excluded as persons who could have smoked the cigarette. (T.d. 333, Exhibit 15).

As the record in the present case indicated that Defense Counsel considered the findings of the Serological report "exculpatory evidence," reasonable diligence of this allegedly exculpatory piece of evidence would have included research in the chain of evidence of who had handled the cigarette butt before it underwent testing in California. The inventory list from the crime scene indicated that the cigarette butt (filter) was collected from the driveway, placed into inventory at the Portage County Sheriff's Department and then submitted to BCI on April 18, 1990. (T.d. 333, Exhibits 16, 17, 18).

A BCI laboratory report dated April 23, 1990, also authored by Dale Laux, indicated the following results from his initial testing of the cigarette butt, "[e]xamination of the contents of item #1 revealed the presence of a cigarette butt filter which had been burned. The only marking is a thin dark line approximately 3 cm. From the tip. A portion of the end of the cigarette was removed and will be retained in the event that typing of the secretions is desired." (T.d. 333, Exhibit 19). Typing of the secretions was desired and performed by Laux, the results which appear in Noling 2.. Furthermore, research into whether DNA testing was a possibility in 1991 was also discussed with Laux. (T.d. 333, Exhibit 20).

As the exercise of reasonable diligence would have led to the discovery of Noling 2, a blood test and typing of the cigarette butt and comparison with an individual identified as "Daniel E. Wilson, BCI & I case number 91-31692-D" (Noling 2), Noling has failed to meet his burden of proof by clear and convincing evidence that he was unavoidably prevented from the discovery of the evidence upon which he must rely for his another man innocence theory and therefore was not entitled to leave from

the trial court to file his motion for an untimely motion for a new trial pursuant to Crim.R. 33(B).

VANSTEENBERG – AVENUES OF REASONABLE DILIGENCE

Noling's questionable gun activity innocence theory was based upon the alleged newly discovered evidence labeled Noling 4 and 5. Noling 4 is Marlene VanSteenberg's written statement to the police dated April 1, 1991. (Noling 4). Noling 5 is a typed document titled "Transcript of Marlene M. Van Steenberg" that appears to be a typed version of Marlene's statement with three additional paragraphs not contained in Marlene's hand written statement. (Noling 5). When Marlene came in to pick up her husband's .25 caliber pistol, she provided the statements. (Noling 4 and 5).

Noling 4 provides in relevant part:

> On April 8, 1990 I was at work, when I got home Richard L. Van Steenberg told me that his brother Raymond Van Steenberg was at the house and got the gun. We only have one pistol. Raymond wanted to show the gun to somebody. My husband took the clip out because Raymond had just been charges for domestic violence on Friday, April 6, 1990.
>
> On April 8, 1990 at about 5:00 p.m. When I got home from work, Raymond called on the phone. He was calling from the Sheriff's Department and said the detectives wanted him to turn in a gun. Raymond didn't say why. He told me he turned in our gun, and I'm to tell the detectives that he had our gun for at least three or four months. I told him I would not do that and asked where his gun was at. He told me he threw it away. I asked why he threw the gun away and he said he just had to do it. He was upset that I wouldn't lie for him.
>
> On April 9, 1990 while I was on my way to work I heard on the radio about the double murder. When I got to work (Portage County Muni Court) I contacted a detective at the Sheriff's department and talked to Detective Don Doak. I told him everything about Raymond getting the gun from my husband and turning it into the Sheriff's Office.

(Noling 4). This Exhibit also contains information that Marlene had learned, second hand, that Raymond's son, Dennis, had been seen throwing a gun out of a truck near the skating rink on State Route 224 and Alliance Road in Deerfeild, Ohio. (Noling 4).

With only 120 days to file a motion for a new trial based upon newly discovered evidence, reasonable diligence following the verdict and sentence in Noling's case would lead one to investigate the issue of the missing murder weapon. At the very least, a review the Sheriff's investigation into the weapons that were tested as possible matches for the murder weapons would have led to the discovery of Marlene VanSteenberg's visit to the Sheriff's Department on April 1, 1991, to pick up Evidence Items No. 72 and 73, the .25 caliber pistol and holster turned over by her brother-in-law, Raymond VanSteenberg. (T.d. 333, Exhibit 21). The evidence disposition report for these items reveals, "[o]n 04-01-91 Lt. John Ristity released the items to: Marlene Van Steenberg, (Richard's wife). Note: Marlene made a written statement about the gun." (T.d. 333, Exhibit 22).

As the exercise of reasonable diligence would have led to the discovery of Noling 4 and 5, Noling failed to meet his burden of proof by clear and convincing evidence that he was unavoidably prevented from the discovery of the evidence upon which he must rely for his questionable gun activity innocence theory and therefore was not entitled to leave from the Court to file his motion for an untimely motion for a new trial pursuant to Crim.R. 33(B). Accordingly, the trial court properly denied Noling's motion for leave to file his successive motion for a new trial.

As Noling failed to make a threshold showing that the four documents at issue were in fact newly discovered items and further failed to establish he either had no

knowledge of the existence of this information or could not have learned of it by exercising reasonable diligence, the trial court did not abuse its discretion in denying his application for leave to file a successive motion for a new trial. Noling's second assignment of error is without merit and should be overruled.

> **Response to Noling's Assignment of Error No. 1**: Although failure to raise a specific objection to the constitutionality of a statute at the trial level constitutes waiver on appeal, even a properly preserved "as applied" constitutional challenge to R.C. 2945.80 would fail under Noling's facts.

In his first assignment of error, Noling baldly asserted that "[t]here is evidence that casts doubt on his conviction, but which no court has reviewed." (Brief, p.g. 14). Such an assertion is not accurate following the release of the Sixth Circuit's unanimous opinion on June 29, 2011, more than two weeks before Noling submitted his brief to this Court. *Noling v. Bradshaw*, (Appendix A). As previously reviewed, the Sixth Circuit assumed Noling had established a *Brady* violation, reviewed the Dan Wilson and Raymond VanSteenberg evidence that Noling relied on as the foundation of his successive motion for a new trial and found, "[n]everless, the newly discovered facts and all the other evidence do not establish clearly and convincingly that a reasonable factfinder could not have found Noling guilty." *Noling v. Bradshaw* (C.A.6, June 29, 2011), Case Nos. 07-3989, 08-3258. 10-3884.

Additionally, Noling alleged on appeal that the clear and convincing standard in R.C. 2945.80 presented a barrier to pursuing a *Brady* challenge. However, a review of the record reveals that Noling did not pursue this constitutional challenge in the trial court. In closing, counsel for Noling stated:

> And we believe we have met our burden under clear and convincing evidence to show that we were unavoidably prohibited from presenting

> this evidence earlier. We also believe under the *Brady* standard, Your Honor, that actually imposing a special burden on us is probably unconstitutional. *But we don't have to reach that issue* because we think we have met the burden and we ask that you would give us some time to bring these witnesses before you and let you decide on the record whether a new trial is warranted or not.

(Emphasis added) (Hearing T.p. 119).

Standard of Review

"Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. See, also, *State v. Bey* (1999), 85 Ohio St.3d 487, 502.

Analysis

Although the trial court was apparently aware that Noling had a challenge to the statute, Noling made no specific objection before the trial court and the trial court made no ruling for this Court to review. Accordingly, Noling waived any challenge to the constitutionality of R.C. 2945.80.

Even if Noling's challenge to the constitutionality of R.C. 2945.80 had been preserved, this Court would find it without merit. Noling alleged on appeal that R.C. 2945.80, "unconstitutionally raised the burden of proof established by the Supreme Court and adds additional legal burden upon an appellant who seeks a new trial on the basis of newly discovered *Brady* evidence." (Noling Brief, p.g. 12).

It is difficult to prove that a statute is unconstitutional. All statutes have a strong presumption of constitutionality. *State v. Gill* (1992), 63 Ohio St.3d 53, 55. Before a court may declare unconstitutional an enactment of the legislative branch, "it must

appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus.

A party seeking constitutional review of a statute may proceed in one of two ways: present a facial challenge to the statute as a whole or challenge the statute as applied to a specific set of facts. *Harold v. Collier,* 107 Ohio St.3d 44, 2005-Ohio-5334, at ¶37, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph four of the syllabus.

When a statute is challenged on its face, the challenger must demonstrate that no set of circumstances exists under which the statute would be valid. *Id.*, citing *United States v. Salerno* (1987), 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697. The fact that the statute could operate unconstitutionally under some given set of facts or circumstances is insufficient to render it wholly invalid. *Id.*

Conversely, when a statute is challenged as applied, the challenger must establish by clear and convincing evidence a "presently existing set of facts that make the statute unconstitutional and void when applied to those facts." *Harrold*, 2005-Ohio-5334, at ¶38, citing *Belden*, 143 Ohio St. at paragraph six of the syllabus.

Noling appears to be asserting an as applied challenge to the constitutionality of R.C. 2945.80. Accordingly, he had the burden of proof of establishing by clear and convincing evidence that this existing set of facts make R.C. 2945.80 unconstitutional and void when applied to his set of facts. As previously discussed under the prior assignment of error, the set of facts presently existing in Noling's case does not support a finding that any materials were withheld. Rather, the record supports a

finding that open file discovery was conducted in his case, voluminous discovery was provided and supplemented, a signed receipt by defense counsel exists, care was taken to ensure all materials contained in the prosecutor's and sheriff's files were provided to defense counsel and defense counsel took advantage of the opportunity to review the prosecutor's and sheriff's files. Accordingly, Noling's second assignment of error is without merit and should be overruled.

CONCLUSION

Noling failed to meet his threshold requirement that the four documents at issue were not provided in open file discovery. Even assuming that there were four allegedly newly discovered documents, Noling failed to establish that he was unavoidably prevented from filing a motion for a new trial because he had no knowledge of the existence of the grounds supporting his motion and could not have learned of the grounds within the time limits in the exercise of reasonable diligence. For these reasons, this Court should overrule Noling's two assignments of error and affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellee has been sent on this 3rd day of August 2011, to the following:

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 11a0167p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 07-3989; 10-3884

In re TYRONE NOLING,

Movant.

No. 08-3258

TYRONE NOLING,

Petitioner-Appellant,

v.

MARGARET BRADSHAW, Warden,

Respondent-Appellee.

Nos. 07-3989; 08-3258; 10-3884

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 04-01232—Donald C. Nugent, District Judge.

Argued: March 9, 2011

Decided and Filed: June 29, 2011

Before: MARTIN, COLE, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Kelly L. Schneider, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Phoenix, Arizona, for Appellant. Thomas E. Madden, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Respondent. **ON BRIEF:** Kelly L. Schneider, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Phoenix, Arizona, Ralph I. Miller, WEIL, GOTSHAL & MANGES, Washington, D.C., James A. Jenkins, Cleveland, Ohio, for Appellant. Laurence Snyder, OFFICE OF THE OHIO ATTORNEY GENERAL, Cleveland, Ohio, for Respondent.

MARTIN, J., delivered the opinion of the court, in which COLE, J., joined. GRIFFIN, J. (p. 7), delivered a separate opinion concurring in the judgment.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. The United States District Court for the Northern District of Ohio denied the habeas petition of Tyrone Noling, who is facing the death penalty. Noling then filed with this Court a petition to file a successive petition (No. 07-3989) and a petition for a certificate of appealability (No. 08-3258). We consolidated these matters, denied the successive petition, and granted a certificate of appealability on four distinct issues. Before oral argument, Noling filed another petition to file a successive petition (No. 10-3884). For the following reasons, we **AFFIRM** the judgment of the district court and **DENY** Noling's latest motion to file a successive petition.

I. BACKGROUND

For a full description of the facts of this case, we point to the thorough order of the district court. *Noling v. Bradshaw*, No. 04-1232, 2008 WL 320531 (N.D. Ohio Jan. 31, 2008). We detail here only the facts necessary for our discussion.

A grand jury indicted Noling on August 18, 1995 for the murder and robbery of Bearnhardt and Cora Hartig, which occurred in the spring of 1990. Two of the counts in the indictment asserted that Noling had murdered the Hartigs while committing an aggravated robbery, in violation of Ohio Rev. Code § 2929.04(A)(7), and in an attempt to escape apprehension or punishment for committing aggravated robbery, in violation of Ohio Rev. Code § 2929.04(A)(3). These are capital charges, allowing the jury to sentence Noling to death if convicted of either of those specific counts.

At trial, the district court permitted the prosecution to impeach its own witness, Gary St. Clair. Before trial, St. Clair had agreed to testify against Noling for the prosecution, but he changed his mind and his story before trial. The prosecution called him to testify nevertheless, and elicited that he had originally accused Noling of the

Hartigs' murders. Additionally, two other witnesses, Butch Wolcott and Joseph Dalesandro testified against Noling. They recanted their testimony after trial.

A jury found Noling guilty on all counts, including the two capital counts. Based on the separate recommendation of the jury, the trial court sentenced Noling on February 20, 1996 to death.

II. DISCUSSION

A. Habeas Petition

We granted a certificate of appealability for the following of Noling's claims: (1) whether Noling's actual innocence claim would excuse any procedural defaults accompanying his constitutional claims; (2) whether the district court erred in allowing the prosecution to treat its own witness as hostile and to impeach the witness with a prior inconsistent statement; (3) whether the prosecution acted improperly by calling its hostile witness solely to introduce the prior inconsistent statement; and (4) whether one of the capital counts in Noling's indictment was faulty. The district court addressed these issues below and rejected them. *See Noling*, 2008 WL 320531 at *17-24, 29-31, 33, 47-50. We find the district court's conclusions and supporting analysis persuasive. Noling has not shown that the Ohio Supreme Court's rejection of these claims "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," or that it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1)-(2). Accordingly, we must affirm the district court's denial of habeas relief.

Nevertheless, we pause for a moment to highlight our concern about Noling's death sentence in light of questions raised regarding his prosecution. Noling was not indicted until five years after the Hartigs' murders when a new local prosecutor took office. That new prosecutor pursued the cold murder case with suspicious vigor according to Noling's accusers, who have since recanted their stories and now claim that

they only identified Noling as the murderer in the first place because they were threatened by the prosecutor. In addition to the identifications being potentially coerced, there is absolutely no physical evidence linking Noling to the murders, and there are other viable suspects that the prosecutor chose not to investigate or did not know of at the time. Furthermore, that St. Clair switched courses before trial, deciding not to testify against Noling, gives rise to even more suspicion. This worrisome scenario is not enough to create a constitutional claim cognizable under habeas and the Antiterrorism and Effective Death Penalty Act. Other evidence considered by the trial court, such as the witness testimony of Wolcott and Dalesandro, prevents us from questioning the jury's decision that Noling was guilty beyond a reasonable doubt. However, reasonable doubt is a legal standard, and given the serious questions that have been raised regarding Noling's prosecution, we wonder whether the decision to end his life should not be tested by a higher standard.

> An execution is not simply death. It is just as different from the privation of life as a concentration camp is from prison. It adds to death a rule, a public premeditation known to the future victim, an organization which is itself a source of moral sufferings more terrible than death. Capital punishment is the most premeditated of murders, to which no criminal's deed, however calculated can be compared. For there to be an equivalency, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.
>
> Albert Camus, *Reflections on the Guillotine*, *in* Resistance, Rebellion & Death (1956).

In *Baze v. Rees*, 553 U.S. 35, 85-87 (2008) (Stevens, J., concurring), Justice Stevens brings to mind the fact that many innocent people are convicted of crimes they did not commit before being vindicated by the timely revelation of exculpatory facts. Some of those people are capital defendants. *Id.* at 86 (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & C. 761 (2007)). Sadly, if serendipity tarries too long before interjecting, those

individuals die as innocent men; a travesty that society can avoid altogether in the future by foregoing the "monster" of capital punishment. As Justice Stevens said simply, "[t]he risk of executing innocent defendants can be entirely eliminated by treating any penalty more severe than life imprisonment without the possibility of parole as constitutionally excessive." *Id.* As long as our justice system depends on men and women to make decisions, it will invariably make mistakes. We know not whether it has made one here where Ohio sends Noling to his final reckoning, but our duty requires us to soberly affirm the district court where no constitutional error occurred as to warrant habeas relief.

B. Motion to File Successive Petition

Noling requests that we permit him to file a successive petition based on newly discovered evidence that police did not originally turn over to his defense counsel, and that suggests other potential suspects that might have murdered the Hartigs. Police found a cigarette butt in the Hartigs' yard, and DNA testing showed that the cigarette was not Noling's, but could have belonged to a man named Dan Wilson. As a child, Wilson had once broken into an elderly man's home and attacked him. Complications of the injuries killed the man after he was not found for two days. Wilson's cousin told police that Wilson probably committed the Hartig murders, but provided no proof of this. Additionally, police questioned another man, Raymond VanSteenberg, about his .25 caliber automatic pistol. VanSteenberg's sister-in-law stated that the gun, which was the same type used to murder the Hartigs, had mysteriously gone missing for a time around the murders. Noling claims that this evidence supports an actual innocence claim and a *Brady* claim.

These claims do not rely upon a new constitutional law, so we must dismiss this petition unless (1) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and (2) "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no

reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2).

For the sake of this analysis, we will assume the existence of a *Brady* violation, and further assume that Noling could not have discovered these facts earlier through due diligence. Nevertheless, the newly discovered facts and all the other evidence do not establish clearly and convincingly that a reasonable factfinder could not have found Noling guilty. A man with a troubled past *may* have smoked a cigarette left in the Hartigs' yard, and another man owned the same type of gun used in the murder and could not account for its whereabouts at an inopportune time. This newly discovered evidence, even when viewed with the other evidence, does not prove that one of the other suspects committed the murders. It merely opens the possibility, a very slight one we might add, that one of them did. More importantly, it does not prove that Noling did not commit the murders, or clearly and convincingly nullify the evidence at trial supporting his conviction. Multiple witnesses involved in the Hartig robbery testified that Noling killed the Hartigs. Other witnesses testified that Noling admitted to robbing the Hartigs in their home and that he had access to the type of gun used in the murder. Noling has not established that the entire sum of evidence, new and old, could not allow a reasonable factfinder to find him guilty. Accordingly, we must deny the motion to file a successive petition.

III. CONCLUSION

We **AFFIRM** the judgment of the district court and **DENY** Noling's second motion to file a successive petition.

CONCURRING IN THE JUDGMENT

GRIFFIN, Circuit Judge, concurring. I concur in the judgment, only. I agree that pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the district court correctly denied Noling's petition for a writ of habeas corpus. Further, I agree that the motion to file a successive petition lacks merit for the reasons stated in section II.B. of the majority opinion.

However, I do not join Judge Martin's obiter dicta regarding the death penalty.