

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii-iii

I. Introduction

II. The State does not contest Noling’s arguments regarding statutory interpretation, and raises arguments that are wholly without merit or are unrelated to the Proposition of Law before this Court.....1

A. The State’s Separation of Powers argument is without merit.....1

B. The State does not contest Noling’s arguments with respect to statutory interpretation.....2

C. The State’s discussion of the outcome determinative analysis and related legal issues is unrelated to the Proposition of Law before this Court, and the State’s arguments with respect to these issues are fundamentally flawed.....3

1. Collection of the cigarette butt and its relevance to the Hartig murders.....4

2. The State concedes that today’s DNA technology can discover new information about the perpetrator from the biological material collected – the perpetrator’s identity.....5

3. Daniel Wilson’s confession to his foster brother, and the impact of new DNA technology’s ability to place Wilson at the Hartigs’ home.....8

4. The State’s discussion of *State v. Prade* again highlights the State’s failure to include Wilson in its analysis of “definitive DNA test” and “outcome determinative”.....10

III. Conclusion14

CERTIFICATE OF SERVICE.....15

TABLE OF AUTHORITIES

Cases	Page
<i>Noling v. Bradshaw (In re Noling)</i> , 651 F.3d 573, 575-577 (6th Cir. Ohio 2011).....	8
<i>State v. Ayers</i> , (8 th Dist. 2009) 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, <i>appeal denied</i> , 125 Ohio St.3d 1439, 2010-Ohio-2212.....	2, fn. 2, 3
<i>State v. Buehler</i> , 113 Ohio St. 3d 136, 2007-Ohio-1246, 863 N.E.2d 124.....	1
<i>State v. Emerick</i> , Ohio Attorney General’s Response to Defendant’s Application for a DNA Test, <i>State v. Emerick</i> , Case No. 94.CR-1548, Montgomery County Court of Common Pleas, Judge Gorman (Nov. 8, 2006).....	2, fn. 1
<i>State v. Petro</i> , 148 Ohio St. 505 (1947), 76 N.E.2d 370.....	9
<i>State v. Prade</i> , 126 Ohio St. 3d 27 (Ohio 2010), 2010 Ohio 1842, 930 N.E.2d 287.....	1, 10, 11
<i>State v. Sterling</i> , 113 Ohio St.3d 255, 2007-Ohio-1790 (2007).....	1
 Ohio Laws	
Senate Bill No. 11, 125 th Gen. Assem., Reg. Sess. (Ohio 2003-04).....	2
Senate Bill No. 262, 126 th Gen. Assem., Reg. Sess. (Ohio 2005-06).....	2
Senate Bill No. 77, 128 th Gen. Assem., Reg. Sess. (Ohio 2009-10).....	2, 3, 4, 6, 14, 6, fn. 5
 Ohio Revised Code	
R.C. 2953.71(L).....	10
R.C. 2953.71(U).....	2, 4, 5, 11

R.C. 2953.72(A)(7).....1, 2, 3

R.C. 2953.74(D)10

Ohio Rules of Criminal Procedure

Crim. R. 33.....9

Federal Statutes

28 U.S.C.S. § 2244.....9

Other Authorities

Columbus Dispatch, “Ohio’s DNA-testing law key in 132 cold cases, DeWine says,”
February 16, 2012).....6, fn. 5, 14, fn. 16, 14, fn. 17

Ohio Attorney General, Law Enforcement, Bureau of Identification
and Investigation, Laboratory Division (2011).....6, fn. 5

Fundamentals of Forensic DNA Typing, Butler, John M., Chapter 8,
Short Tandem Repeat Marker, pp. 154-166 (2010).....6, fn. 4

The Innocence Project, Understanding the Causes of Wrongful Conviction,
Unreliable or Improper Science (2012).....6, fn. 6

The Innocence Project, Know the Cases, Search Profiles,
Real Perpetrator found (2012).....6, fn. 5

The Innocence Project, Know the Cases, David Allen Jones (2012).....11, fn. 9, 12, fn. 10

The Innocence Project, Know the Cases, James Ochoa (2012).....14, fn. 15

The Innocence Project, Know the Cases, Chaunte Ott, (2012).....14, fn 15

The Innocence Project, Know the Cases, Frank Sterling (2012).....12, fn. 11,
13, fn. 12, 13, fn. 13, 13, fn. 14

I. Introduction

The Proposition of Law before this Court addresses whether, when a prior application for post-conviction DNA testing has been rejected under the old acceptance criteria, an application for post-conviction DNA testing filed under the Legislature's new acceptance criteria must be considered on the merits rather than procedurally barred by R.C. § 2953.72(A). The State's Merit Brief only confirms that the trial court's reading of the statute is untethered from legislative intent, fairness, or logic. The State does not contest Noling's reading of the statutory provisions at issue, and simply raises the meritless argument of "separation of powers." The State also delves into numerous issues related to post-conviction DNA testing itself, which are unrelated to the Proposition of Law before this Court. As set forth below, this Court should reverse.

II. The State does not contest Noling's arguments regarding statutory interpretation, and raises arguments that are wholly without merit or are unrelated to the Proposition of Law before this Court

A. The State's Separation of Powers argument is without merit

In the State's response to the Proposition of Law before this Court, the State argues that this Court cannot decide the question of statutory interpretation raised in this case because of "the separation of powers issue." State's Merit Brief, pp. 5-7. This argument is wholly without merit. Noling is asking this Court to interpret the statutory language of Ohio's post-conviction DNA testing statute and implement its intent, just as this Court has done on three prior occasions with Ohio's DNA testing statute. *See State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246 (2007); *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790 (2007); *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842 (2010).

Even former Ohio Attorney General Jim Petro previously conceded that this was a matter of statutory interpretation when he filed a brief on behalf of DNA Applicant Edmund Emerick in

2006. Attorney General Petro's brief stated that Ohio's post-conviction DNA testing statute, on its face, does not bar subsequent re-applications after the statute's acceptance criteria has been changed by the legislature.¹ If the Legislature, when it passed SB77, had changed the statutory language of O.R.C. 2953.72(A)(7) to specifically bar those inmates rejected under old acceptance criteria as well as current acceptance criteria, then the State's separation of powers argument might have some merit. However, the reading of the plain language of O.R.C. 2953.72(A)(7) to this point says quite the opposite² – that the courts should consider an application for post-conviction DNA testing on the merits unless a previous application has been denied under the acceptance criteria currently referred to in the statute. Thus, the trial court must consider Noling's December 28, 2010 DNA Application ("Second Application") on the merits (under the new acceptance criteria).³ Instead, the trial court disregarded the Legislature's intent in passing SB77, specifically O.R.C. 2953.71(U), as well as the plain language of the statute. As such, the State's argument is wholly without merit and should be disregarded by this Court.

B. The State does not contest Noling's arguments with respect to statutory interpretation

The State asks this Court to agree with the trial court's reading of O.R.C. 2953.72(A)(7), but cites no support for the trial court's reading of the statute. In addition, the State did not contest any of the following: (1) Noling's reading of the statutory provisions at issue; (2) that inmates whose SB11 applications were rejected under the outcome determinative standard could and can still re-apply under SB262 because of the change in the acceptance criteria; (3) that

¹ Ohio Attorney General's Response to Defendant's Application for a DNA Test, *State v. Emerick*, Case No. 94.CR-1548 (Montgomery C.P., Judge Gorman (Nov. 8, 2006) (The Ohio Attorney General's office filed an opinion in this case that no statutory provision in Ohio's DNA testing statute prevented Emerick's re-application under the new acceptance criteria.).

² *State v. Ayers* (8th Dist. 2009) 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, *appeal denied*, 125 Ohio St.3d 1439, 2010-Ohio-2212, also supports this reading of the statute.

³ Noling's September 25, 2008 DNA Application ("First Application") was denied by the trial court on the sole basis that the trial court found that there had been a prior "definitive DNA test."

State v. Ayers, (8th Dist. 2009) 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, *appeal denied*, 125 Ohio St.3d 1439, 2010-Ohio-2212, is instructive on the question of the current statutory interpretation question before this Court; (4) that Noling's First Application was filed prior to the passage of SB77 (effective date of the relevant provision is July 6, 2010), and Noling's Second Application was filed after SB77 went into effect, and (5) that Daniel Wilson's confession to his foster brother, and the serology report that could not exclude Wilson as the smoker of the cigarette are currently available, admissible evidence and were never considered by the jury in Noling's case, or the trial court in Noling's First Application.

Despite the State's failure to contest most of Noling's Merit Brief to this Court, the State goes on to ask this Court to use O.R.C. 2953.72(A)(7) as a sword to keep potentially innocent inmates from gaining access to DNA testing, rather than a shield to protect potentially innocent inmates from wrongful incarceration. Protecting potentially innocent inmates from wrongful incarceration is the true intent and purpose of Ohio's post-conviction DNA testing statute. The State ignores this purpose and, instead, attempts to divert this Court's attention from the Proposition of Law this Court accepted. The diversion includes an unwarranted dismissal of an alternate suspect who confessed to the crime and who cannot be excluded as the source of biological material from the cigarette butt recovered at the crime scene, and an evaluation of post-conviction DNA testing in this case that wholly fails to consider this alternate suspect and his potential link to biological evidence from the crime scene.

C. The State's discussion of the outcome determinative analysis and related legal issues is unrelated to the Proposition of Law before this Court, and the State's arguments with respect to these issues are fundamentally flawed

The State takes the Court through the history of the collection and testing of the cigarette butt found at the Hartig home. The State also discusses Daniel Wilson and his confession to his foster brother Nathan Chesley. However, in its discussion of these issues, the State makes no

attempt to discuss their relevance to the Proposition of Law at issue. The State goes onto to discuss whether DNA testing will be outcome determinative – yet another issue unrelated to the Proposition of Law before this Court. Interestingly, the State, after spending four pages discussing Daniel Wilson, his confession to his foster brother, and the serology tests that could not exclude Wilson as the source of the biological material from the cigarette butt found at the crime scene, completely fails to discuss Daniel Wilson in their outcome determinative analysis and gives no explanation for his dismissal as a suspect, or an explanation as to why Daniel Wilson is conspicuously absent from the State’s outcome determinative analysis of DNA testing. As these issues are all interrelated in that they demonstrate (1) that there has not been a definitive DNA test per SB77’s new definition under O.R.C. 2953.71(U), and (2) that DNA testing would be outcome determinative, Noling will discuss these issues together.

1. Collection of the cigarette butt and its relevance to the Hartig murders

The cigarette butt was collected from the driveway of the Hartig household. (Tr. 721). The cigarette butt was not collected on the curb, or on the street in front of the Hartigs house. The cigarette butt was collected from the middle of the Hartigs’ driveway. *Id.* Presumably, the Hartigs were not smokers, as their blood and saliva standards were not submitted to SERI, the lab in California, for comparison at the time of trial. (Tr. 333; Exhs. 16, 17, 18). Police collected the cigarette butt from the driveway during their investigation of the murders – more specifically, while police were processing the crime scene and collecting evidence after the bodies of the Hartigs were found. (Tr. 721). The Portage County Prosecutors Office sent the cigarette butt to BCI for serology testing, ostensibly because of the possibility that the cigarette butt would provide some physical proof of the killer’s identity. (Tr. 333; Exhs. 16, 17, 18). When basic serology testing showed that the youths could not be excluded, the State sent the

cigarette butt and comparison samples from Noling, Wolcott, Dalesandro, and St. Clair all the way out to a lab in California because that lab had DQ Alpha DNA testing. *Id.* Clearly, the cigarette butt was viewed as important evidence.

In addition, investigators for Portage County repeatedly asked Wolcott whether he and the other youths were smoking, and Wolcott said that they had been. *State v. Noling*, Motion for New Trial, Ex. PP, Nov. 3, 2006 (6/8/92 interview of Wolcott, p. 87). Wolcott repeated his “assertion” at trial that he was smoking in the car while outside the Hartigs’ house. (Tr. 848-49, 878-902). It was when DNA testing excluded Noling, Dalesandro, Wolcott, and St. Clair that the State decided that the cigarette butt had no significance and could provide no information. Simply because the cigarette butt does not provide inculpatory test results with respect to the persons the State believes were the perpetrators of the crime, does not mean that the cigarette butt does not have more information to provide through new DNA technology.

2. The State concedes that today’s DNA technology can discover new information about the perpetrator from the biological material collected – the perpetrator’s identity.

“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.” O.R.C. 2953.71(U).

The State acknowledges that the only DNA technology available in 1993 was at SERI, a lab in California, and that 1993 technology could only be used to exclude someone – stating that “an identification to the exclusion of all others is not possible.” State’s Merit Brief, p. 9. In other words, DNA technology in 1993 could not identify an individual perpetrator’s identity.

Today's DNA technology that can identify a single individual is what allowed the FBI to develop the CODIS system.⁴ It is this system that allows law enforcement to solve cold cases, and to identify the true perpetrator when an innocent person has been wrongfully incarcerated.⁵ In essence, the State, by acknowledging the limitations of the DNA testing at the time of Noling's trial, concedes that today's DNA technology can provide more information about the perpetrator based on the biological material recovered – the perpetrator's identity. This is an important consideration under SB77's new definition of "definitive DNA test."

While the State does not explicitly concede that modern DNA technology can provide more information than the serological comparison to Daniel Wilson done on the cigarette butt, it is implicit in its concession that new DNA technology can provide more information about the perpetrator than the DNA testing technology that was available at the time of trial. In addition, the passage of the post-conviction DNA testing statute and the many cases where DNA testing corrects erroneous serology demonstrate that new DNA technology can provide more information about the perpetrator than serology testing.⁶

The State reminds this Court that Noling, Wolcott, Dalesandro, and St. Clair were excluded via primitive DQ Alpha DNA testing. However, the State continues to ignore that the

⁴ Fundamentals of Forensic DNA Typing, Butler, John M., Chapter 8, Short Tandem Repeat Marker, pp. 154-166 (2010).

⁵ In fact, SB77 expanded the pool of people in Ohio whose DNA can be submitted to CODIS. Current Ohio Attorney General credited this expanded CODIS database, made possible by SB77, with the State of Ohio's ability to solve cold cases. <http://www.dispatch.com/content/stories/local/2012/02/16/ohios-dna-testing-law-key-in-132-cold-cases-dewine-says.html> (February 17, 2012); *See also*, <http://www.ohioattorneygeneral.gov/Enforcement/BCI/Laboratory-Division> (February 18, 2012); <http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=&perpetrator=Yes&compensation=&conviction=&x=35&y=4> (February 18, 2012) (DNA exonerations where the real perpetrator was found).

⁶ <http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php> (February 17, 2012).

serology testing done could not exclude Daniel Wilson as the smoker of the cigarette butt, and that serology is more like “blood typing” and is not DNA analysis. *See State v. Noling*, Feb. 18, 2011, Motion Hearing Tr., pp. 7-8 (the State clarifies for the trial court that the analysis done with respect to Daniel Wilson is not DNA testing). Therefore, modern DNA technology, unavailable at the time of Noling’s trial, makes it possible to discover more information from the biological material collected from the crime scene – namely, a complete STR DNA profile which would provide the DNA profile of a single individual and, therefore, could potentially be used to identify the perpetrator.

While the State asserts that all these lab results were available to Noling’s trial counsel, the submission of Daniel Wilson’s blood or saliva sample to SERI for comparison was notably absent from the parties on the record, pre-trial discussion of the submission of the cigarette butt and the standards of Noling, Wolcott, Dalesandro, and St. Clair for comparison.⁷ This absence is curious given the State’s assertions that these reports were turned over to trial counsel for Noling. This is even more curious in light of the fact that one of Noling’s trial attorneys testified that he had a rape case at the time with similar serological tests, would have understood the significance of those test results, and would have raised this issue had he seen the test results. *State v. Noling*, Feb. 18, 2011 Motion Hearing Tr., pp. 7-8, 51, 113-14 (similar serology tests exonerated the client arrested for rape). However, even if DQ Alpha DNA analysis was performed and could not exclude Daniel Wilson, this is vastly different from identifying Daniel Wilson as the only possible smoker of the cigarette butt – something that is now attainable with modern DNA technology.

⁷ State’s Merit Brief, p. 8, *citing*, Tr. 333, Exhibit 14, and Exhibit 15.

3. Daniel Wilson's confession to his foster brother, and the impact of new DNA technology's ability to place Wilson at the Hartigs' home

In addition to the State's discussion of collection and testing of the cigarette butt, the State discusses Daniel Wilson and his confession to his foster brother Nathan Chesley at length. Wilson's confession and the inclusion of Daniel Wilson as the possible smoker of the cigarette butt are two pieces of available admissible evidence in Noling's Second Application that were not available at the time of his First Application.⁸ The State offers no factual explanation as to why Daniel Wilson was ruled out as the perpetrator of the Hartig murders. Instead, the State attempts to use the opinion of the Sixth Circuit Court of Appeals to discount the confession of Daniel Wilson to his foster brother, and the serology results that could not exclude Wilson. State's Merit Brief, pp. 9-10, *citing, Noling v. Bradshaw (In re Noling)*, 651 F.3d 573 (6th Cir. 2011). While the Sixth Circuit stated that the "newly discovered facts" do not "clearly and convincingly" establish that a reasonable factfinder could not have found Noling guilty, the State neglects to cite to the next sentence which refers to Daniel Wilson as a "man with a troubled past who *may* have smoked a cigarette left in the Hartigs' yard." *Noling v. Bradshaw (In re Noling)*, 651 F.3d 573 (6th Cir. 2011). In other words, the Sixth Circuit, in their use of the word "may," stated that the testing performed on the cigarette butt around the time of Noling's trial was not definitive in that the testing could not conclusively place Daniel Wilson at the Hartig home. Modern DNA technology can do just that. Modern DNA technology can say that Wilson, and only Wilson, smoked the cigarette butt left in the Hartigs driveway. DNA evidence definitely

⁸ Noling's attorneys filed a Motion for Leave to File a Motion for New Trial on June 21, 2010. Although the trial court denied this motion, this denial is currently on appeal. *State v. Noling*, No. 2011-P-00018 (Portage Ct. App.). This provides a more detailed history of why the information regarding Daniel Wilson, Wilson's confession to foster brother Nathan Chesley, and Wilson's serological inclusion on the cigarette butt were not included in Noling's First Application.

linking Wilson to the Hartig home, coupled with Wilson's confession to his foster brother, changes the analysis.

The State's use of the "clear and convincing" standard from the Sixth Circuit's opinion in its analysis is also flawed. State's Merit Brief, p. 10. SB262 changed the acceptance criteria's "outcome determinative" language to make it more in line with Ohio's long standing Criminal Rule 33 for a motion for new trial. This is the current standard governing the granting of post-conviction DNA testing. *See*, Second Application, Ex. H. As the State is well aware, the "clear and convincing" standard used by the Sixth Circuit in its review of this evidence is not the standard for granting a new trial under Ohio law. The Sixth Circuit was guided by 28 U.S.C.S. § 2244, which governs successive habeas petitions in federal court. The standard for consideration of newly discovered evidence in Ohio state court, in a motion for new trial is governed by *State v. Petro*, 148 Ohio St. 505 (1947), 76 N.E.2d 370. Under *Petro*, new trials were upheld in post-conviction, after the deadline has elapsed, upon a showing of a "strong probability" that the new evidence would change the outcome of the trial. The "strong probability" language of *Petro* also governs the granting of post-conviction DNA testing.

While the State takes the time to discuss Daniel Wilson in relation to the standard for federal courts granting successive habeas petitions (State's Merit Brief, pp. 8-10), the State's discussion of whether DNA testing would be outcome determinative is simply devoid of any discussion of Daniel Wilson. *Id.* at 10-11. Again, the State leaves many questions unanswered. Daniel Wilson was a suspect during the investigation of the Hartig murders – so much so that the State compared him serologically to the cigarette butt. However, the State now discounts Wilson as a suspect without explanation. There are certainly no police records, or documents to explain why Wilson is not a suspect, or why he was never questioned when Wolcott, Dalesandro, St.

Clair, or Noling were questioned. The State only offers conclusory statements that Daniel Wilson is not an alternate suspect, or simply fails to mention him at all. Without anything more than conclusory statements, the evidence regarding Daniel Wilson is part of the outcome determinative analysis.

A piece of physical evidence linking Daniel Wilson to the Hartig home – a home that he otherwise has no connection to – and Wilson’s confession to his foster brother are indeed outcome determinative with respect to post-conviction DNA analysis. Second Application, pp. 31-40. As all available admissible evidence should be considered, this outcome determinative DNA analysis should also be considered in light on the recantations of Wolcott, St. Clair, and Dalesandro – the original centerpiece of the State’s case against Noling. *See*, O.R.C. 2953.71(L); O.R.C. 2953.74(D). In light of the problems with the crux of the State’s case, the State’s argument that Wilson’s confession plus a piece of physical evidence linking him to the Hartigs does not qualify as outcome determinative for purposes of DNA testing is fundamentally flawed.

4. The State’s discussion of *State v. Prade* again highlights the State’s failure to include Wilson in its analysis of “definitive DNA test” and “outcome determinative”

Finally, the State addresses this Court’s decision in *State v. Prade*, 126 Ohio St. 3d 27 2010 Ohio 1842, 930 N.E.2d 287. State’s Merit Brief, pp. 11-13. Based on the narrow ruling by the trial court, which simply cited the statute, it is unclear why the State has chosen to discuss *Prade* in its Merit Brief to this Court, but fails to discuss the actual statutory interpretation issue before this Court. However, since the State has chosen to discuss *Prade*, Noling will respond.

This Court correctly foresaw some of the concerns that the Legislature had with the Ninth District’s decision in *Prade*. One of the requirements set forth by the Legislature in its new definition of “definitive DNA test” echoed the concerns addressed in this Court’s *Prade* opinion.

One of the requirements now set out in the statute states that “[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.” However, it is important to note that this was not the only statutory requirement set out by the Legislature for determining whether there was a prior definitive DNA test. O.R.C. 2953.71(U). It is even more important to note that this Court, in limiting the holding in *Prade*, said that its holding was limited to the facts before the Court and that the issue of a prior DNA match or some other similarly meaningful information was not before the Court.

The State is asking that this Court, based on its limited holding in *Prade* and the issues this Court did not address, to find that a prior serology test that INCLUDED alternate suspect Daniel Wilson – a convicted murderer who confessed guilt to the Hartig murders to his foster brother and who had previously robbed the home of an elderly man and caused his death – be considered a prior definitive DNA test (because there was a prior “meaningful result” in that Noling was excluded from the cigarette butt). Using *Prade* to support this logic is flawed. More importantly, looking to the statutory definition of definitive DNA test under which Noling filed his Second Application, the State’s logic clearly fails.

Practical examples, in the form of other exonerations based on post-conviction DNA testing, further illustrate that the State’s application of *Prade* is flawed. In order to provide additional information in some of these cases, DNA testing had to provide more than an exclusion result. DNA testing had to identify the perpetrator. The case of David Allen Jones is a prime example.⁹ Mr. Jones was convicted of four homicides in California in 1992. All four

⁹ http://www.innocenceproject.org/Content/David_Allen_Jones.php (February 20, 2012).

victims were believed to be prostitutes. Mr. Jones, after being arrested on an unrelated crime, was questioned by detectives. The detectives took Jones to each of the four crimes scenes. Jones eventually “confessed.” This confession was the centerpiece of the State’s case. The Los Angeles Police Department (“LAPD”) had rape kits from all four victims. Biological material in the rape kits was type A blood. Jones was type O, meaning that Jones was excluded. The jurors heard this information, and convicted Jones anyway. In 2002, Jones sought post-conviction DNA testing. However, two of the four rape kits had been destroyed by that time. Jones’ counsel also learned that police were investigating the murders, between 1990 and 2000, of other women in the same neighborhood where the victims in Jones’ case were killed. The LAPD had obtained cold hits in these other murders through the state’s DNA database, and identified Chester D. Turner. DNA testing was conducted on the remaining two rape kits in Jones’ case. Testing again excluded Jones, but, this time, also pointed to Mr. Turner. Jones was exonerated in March of 2004.¹⁰

The case of Frank Sterling also highlights the importance of alternate suspects in considering the meaning and use of DNA testing.¹¹ The victim in this case was a 74 year old woman. In 1998, she was shot twice in the head with a BB gun, struck with a railroad tie, and beaten to death. Frank Sterling was an early suspect because of his connection to the victim – Frank’s brother was in prison for the attempted sexual assault of the victim three years earlier. Sterling denied involvement in police interviews and had an alibi. The investigation stalled for more than two and a half years. In 1991, the sheriff’s office formed a new investigative team in an effort to solve the case. Sterling again agreed to be interviewed by police. Sterling’s interrogation by police included a number of highly suggestive methods – including hypnosis

¹⁰ *Id.*

¹¹ http://www.innocenceproject.org/Content/Frank_Sterling.php (February 20, 2012).

and police discussion of details of the crime with Sterling. After eight hours of interrogation, Sterling confessed. Police demanded a videotaped confession, and Sterling complied. The confession contained many inconsistencies. Despite the fact that Sterling later recanted his confession, he was charged and eventually convicted of the murder.¹²

Prior to sentencing, Sterling and his attorneys learned about a man named Mark Christie. Christie has been an early suspect in the murder, but was not investigated further after he gave police a false alibi that they took at face value. Friends of Christie's told Sterling's attorneys that Christie bragged about having committed the murder. The judge did not find Christie's confession to his friends to be credible, and declined to set aside the verdict. In 1992, Sterling was sentenced to 25 years to life.

In 1996, Christie pled guilty to the 1994 killing of a four year old girl. After Christie's conviction, Sterling's attorneys learned more information about Christie's possible connection to the murder for which Sterling had been convicted. Sterling's attorneys again sought to overturn the verdict on the basis of new evidence, but were again denied.¹³

In 2006, at the urging of the Innocence Project, prosecutors agreed to test numerous pieces of crime scene evidence. DNA testing yielded results on two key areas of the victim's clothing – areas the perpetrator likely would have grabbed on the victim while beating her. These results excluded Sterling, and implicated Christie. Sterling was officially exonerated in 2010.¹⁴

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

There are numerous other cases where DNA's ability to identify the perpetrator, where technology previously could not, was crucial.¹⁵ However, modern DNA technology's ability to identify the perpetrator is equally lauded by law enforcement.¹⁶ Also lauded by law enforcement is SB77, which, in addition to the new acceptance criteria discussed here, expanded those whose DNA should be uploaded to the state's CODIS database. Ohio Attorney General Mike DeWine credits SB77 with the ability to solve 132 "cold cases." "We hit to an average of 127 unsolved crimes per month now, giving law enforcement agencies around the state and the country the break in their cold case that will hopefully lead to more victims finding justice."¹⁷

III. CONCLUSION

This Court should reverse and remand for the trial court to consider Noling's Second Application on the merits under the Legislature's new, SB77 acceptance criteria.

Respectfully Submitted,

Carrie Wood (per authority by Jennifer Prillo)

Carrie Wood (0087091)
Mark Godsey (0074484)
Ohio Innocence Project
PO Box 210040
Cincinnati, OH 45221
(513) 556-0752
(513) 556-0702 – fax
Attorneys for Tyrone Noling

Jennifer A. Prillo (0073744)
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (Fax)

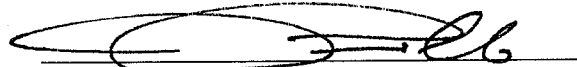
¹⁵ See, e.g., http://www.innocenceproject.org/Content/James_Ochoa.php (February 20, 2012); http://www.innocenceproject.org/Content/Chaunte_Ott.php (February 20, 2012).

¹⁶ fn. 3, *supra*.

¹⁷ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant Tyrone Noling was delivered by U.S. Mail to Victor V. Vigluicci, Prosecuting Attorney, 241 South Chestnut Street, Ravenna, OH 44266 and to Mike DeWine, Ohio Attorney General, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 21st day of February 2012.

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

Jennifer A. Prillo (0073744)
Attorney for Tyrone Noling