ORIGINAL

IN THE SUPREME COURT OF OHIO

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

STATE OF OHIO'S SUPPLEMENTAL BRIEF

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ARGUMENT

Supplemental Issue Presented: In view of *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, whether R.C. 2953.73(E)(1), which confers jurisdiction on this court to consider Noling's appeal, is constitutional.

NO NEED TO REACH CONSTITUTIONALITY OF R.C. 2953.71(E)(1)

It is well established that where a case can be resolved upon other grounds the constitutional question will not be determined. *State ex rel. Hofstetter v. Kronk*, 20 Ohio St.2d 117, 119, 254 N.E.2d 15 (1969). See also, *State v. Weissman*, 69 Ohio St.2d 564, 433 N.E.2d 216 (1982); *Greenhills Home Owners Corp. v. Greenhills*, 5 Ohio St.2 207, 215 N.E.2d 403 (1966), paragraph one of the syllabus; *Rucker v. State*, 119 Ohio St. 189, 162 N.E. 802 (1928), paragraph one of the syllabus.

In response to Noling's proposition of law, the State argued that when an eligible offender's application for DNA testing has been rejected for failing to satisfy the acceptance criteria described in R.C. 2953.72(A)(4), the trial court is without statutory authority to accept or consider subsequent applications. R.C. 2953.72(A)(7). Noling's present appeal is from a subsequent application for DNA. Unless and until the legislature deems fit to revisit the language of R.C. 2953.72(A)(7), the trial court was without statutory authority to accept or consider Noling's subsequent application.

In addition to the grounds presented in the State of Ohio's first brief filed with this court, the State submits it is unnecessary to reach the constitutional question presented by this court's supplemental issue due to the law-of-the-case doctrine and

this court's "cause on review" original jurisdiction found in Section 2(A)(f), Article IV of the Ohio Constitution.

Law-of-the-Case Doctrine

The "law-of-the-case" doctrine holds that "decisions of a reviewing court in a case remains the law of that case on the legal question involved in all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). This doctrine prevents a litigant from relying on arguments at retrial that were fully litigated, or could have been fully litigated, in a first appeal. See *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 659 N.E.2d 781 (1996).

In his supplemental brief to this court, Noling admitted in footnote 1, pp. 4, that he challenged the constitutionality of the appeals provision of R.C. 2953.73 in the appeal of the denial of his first DNA application. Specifically, he raised the constitutionality of the statute in his memorandum in support of jurisdiction to this court, Case No. 09-0773, which was not accepted for review. *State v. Noling*, 126 Ohio St.3d 1582, 2010-Ohio-4542, 934 N.E.2d 355. However, Noling admitted also raising the constitutionality of R.C. 2953.73 in an appeal to the Eleventh District Court of Appeals that he sought following the trial court's denial of his first DNA application, Case No. 2009-P-0025.

The record reflects the following procedural history of Noling's Eleventh District appeal, Case No. 2009-P-0025. After the March 11, 2009, denial of Noling's first DNA application, he filed a timely notice of appeal to the Eleventh District Court on April 10, 2009. (Appendix A). The record was transmitted to the Eleventh District

and on June 9, 2009, Noling requested an extension of time to file his brief stating "Appellant has also filed with the Ohio Supreme Court, but has filed in this Court to preserve the procedural integrity of his appeal." (Appendix B).

The State responded that under R.C. 2953.73(E)(1), the Appellate Court was without jurisdiction over the matter and moved to dismiss Noling's appeal. Noling filed his appellant brief in the Eleventh District on July, 8, 2009. On August 3, 2009, a unanimous panel of the Eleventh District Court of Appeals dismissed Noling's appeal holding "because this court is without jurisdiction to entertain appellant's appeal, appellee's motion to dismiss is granted, and the appeal is hereby dismissed." *State v. Noling*, 11th Dist. No. 2009-P-0025, ¶ 10. (Appendix C).

In its opinion, the Eleventh District reviewed Noling's procedural history, the governing statute R.C. 2953.75(E)(1) and stated

> 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. *State v. Noling*, 11th Dist. No. 2009-P-0025, ¶ 9. (Appendix C).

The record further reflects that Noling did not seek an appeal to this court of the Eleventh District's dismissal of his appeal. Having failed to challenge the Eleventh District's dismissal of his appeal for lack of jurisdiction under R.C. 2953.73(E)(1), it remains the law of the case on the legal question involved in all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d at 3, 462 N.E.2d 410.

A court should not reach out to express an opinion on constitutionality unless necessary to adjudicate a concrete dispute between adverse litigants. *New York City Transit Authoirty v. Beazer*, 440 U.S. 568, 572, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979). It has long been the practice in Ohio that when the record presents other and satisfactory grounds upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted and the question of constitutionality will be left for consideration until a case arises which cannot be adjudicated without considering it. As it is unnecessary to reach the constitutional issue "In view of *State v. Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, whether R.C. 2953.73(E)(1), which confers jurisdiction on this court to consider Noling's appeal, is constitutional," in Noling's case, the issue should be left for consideration in another case.

"Cause on review" Original Jurisdiction

This court has already accepted Noling's case for review, it is currently a cause on review and properly before this court. In addition to the appellate jurisdiction reviewed in *Davis*, the Ohio Constitution confers original jurisdiction on this court "In any cause on review as may be necessary to its complete determination." Section 2(A)(f), Article IV of the Ohio Constitution. This court has held that the term "cause on review" is not limited to cases currently pending on direct appeal. *State v. Steffen*, 70 Ohio St.3d 399, 399-405, 639 N.E.2d 67 (1994) and *State v. Berry*, 80 Ohio St.3d 371, 373-374, 686 N.E.2d 1097 (1997). In *Steffen*, this court cited the "cause on review" constitutional language to support the exercise of its jurisdiction in ten capital cases that were not before the court on direct appeal.

Steffen, 40 Ohio St.3d at 407-408, 639 N.E.2d 67. All ten capital cases had completed their direct review and nine of the ten capital cases had completed one round of postconviction proceedings. *Id.*

In *Berry*, this court again relied on the "cause on review" constitutional language to support the exercise of its jurisdiction to determine Berry's competency. *Berry*, 80 Ohio St. at 373-374, 686 N.E.2d 1097. Although the public defender argued the court lost jurisdiction over the case when it decided Berry's direct appeal, this court responded "we have regularly set execution dates and granted stays of execution well after issuing our mandate in capital appeals. Were the Public Defender correct, we could do neither. *Id.* at 374.

The *Davis* court's narrow interpretation of this court's appellate jurisdiction regarding death penalty cases following the amendments to Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution, did nothing to diminish this court's original jurisdiction under Section 2(A)(f), as *Steffen* and *Berry* still remain good law and precedents in this court after *Davis*. Accordingly, this court has jurisdiction to review the present appeal under its "cause on review" original jurisdiction establishing grounds other than the constitutional question upon which this case may be resolved.

ASSUMING ARGUENDO THE COURT REACHES THE MERITS OF THE CONSTITUTIONAL QUESTION

Assuming arguendo that this court reaches the merits of the constitutional question raised in the supplemental issue, the *Davis* Court's narrow interpretation of the appellate jurisdiction provided in Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution renders R.C. 2953.73(E)(1), unconstitutional.

The issue before the *Davis* court was "whether the constitutional requirement that we review all direct appeals of cases in which the death penalty was imposed includes review of appeals from a trial court's order denying a defendant's motion for a new trial." *Davis*, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, at ¶ 17. In *Davis*, this court quoted Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution, the 2005 amended version of R.C. 2953.02 and stated "The foregoing language limits the jurisdiction of the Supreme Court to the appeal of a judgment sentencing a defendant to death." *Id.*, at ¶ 15.

After reviewing various appellate courts' treatment of post judgment appeals in death penalty cases, *Davis* found "A holding that the Supreme Court has exclusive jurisdiction over all matters relating to a death-penalty case would be contrary to the language of the constitutional amendments and the statute and would have the effect of delaying the review of future cases, a scenario that the voters expressly rejected in passing the constitutional amendments." *Id.* at ¶ 22. Seeing no reason why "the courts of appeals may not currently entertain all appeals from the denial of postjudgment motions in which the death penalty was previously imposed" the court held "that pursuant to Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution, a court of appeals has jurisdiction to consider a trial court's denial of a motion for leave to file a motion for a new trial based on newly discovered evidence in a case in which the death penalty was previously imposed." *Id.*

There are only two ways to challenge the constitutionality of a statute (1) that the statute is unconstitutional on its face or (2) that the statute is unconstitutional as applied to a particular set of facts. *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St.

329, 55 N.E.2d 629 (1944), paragraph four of the syllabus. Further, there is a rebuttable presumption that a statute is constitutional until it is shown beyond a reasonable doubt that it is in violation of a constitutional provision. *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 352, 639 N.E.2d 31 (1994). However, after this court's *Davis* decision, R.C. 2953.73(E)(1), fails under both an "as applied" and facial constitutional challenge.

In an "as applied" challenge, the burden is on the party making the attack to the constitutionality of the statute to present clear and convincing evidence of a presently existing state of facts which makes the act unconstitutional and void when applied thereto. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Clear and convincing evidence "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,* 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990), quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

A statute is facially unconstitutional when there is no set of facts under which the statute may be applied without violating the constitutional provision at issue. *Members of the LA City Counsel v. Taxpayers for Vincent*, 466 U.S. 789, 797, 104 S.Ct. 2118, 80 L.E.2d 772 (1984).

As interpreted by *Davis*, 3(B)(2), Article IV of the Ohio Constitution confers appellate jurisdiction on the courts of appeal in all matters except the appeal of a judgment sentencing a defendant to death. In Noling's case, a direct appeal to this court violates 3(B)(2), Article IV of the Ohio Constitution, as interpreted by *Davis*, by eliminating the appellate review of the Eleventh District Court of Appeals. If this court

chooses to determine the case based on the constitutional issue, the matter should be dismissed as an improvidently accepted appeal. Further, the unconstitutional portion of the statute should be severed to bring the statute in line with the Ohio Constitution.

"In order to sever a portion of a statute we must first find that such a severance will not fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." *State ex re. Maurer v. Sheward*, 71 Ohio St.3d 513, 523, 644 N.E.2d 369 (1994).

The severance test was first pronounced in *Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28 (1927). Three questions are to be answered before severance is appropriate. "(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?" *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 95.

With the above severance test in mind, the State suggests the following to render subsection (E) constitutional

> (E) A judgment order of a court entered under division (D) of this section is appealable only as provided in this division. If an eligible offender submits an application for DNA testing under 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:~~

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

~~(2) If the offender was not sentenced to death for the offense for which the offender claims to be an eligible offender and is requesting DNA testing,~~ the rejection is a final appealable order, and the offender may appeal it to the court of appeals of the district in which is located that court of common pleas. R.C. 2953.73(E).

The State notes that this severance remedy is necessary due to the *Davis* interpretation of the Ohio Constitution and not because of any violation of the protections of due process or equal protection. Neither a suspect class nor a fundamental right is involved in the present case.

The right to a direct appeal in state courts is not a fundamental right. *Mckane v. Durston*, 153 U.S. 684, 687, 14 S.Ct. 913, 38 L.Ed. 867 (1894) ("Whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself.") cited as still good law in *Lopez v. Wilson*, 426 F.3d 339, 355 (6th Cir.2005). "Due process does not require a State to provide appellate process at all." *Goeke v. Branch*, 514 U.S. 115, 120, 115 S.Ct. 1275, 131 L.E.2d 152 (1995). "There can hardly be, therefore, a fundamental right to appellate review of a trial court's post-conviction rulings." *Dickerson v. Latessa*, 872 F.2d 1116, 1119 (1st Cir.1989).

The United States Courts of Appeals for the First, Fourth, Fifth and Sixth Circuits have held that capital defendants are not a suspect class for equal protection purposes. *Dickerson v. Latessa*, 872 F.2d at 1119 ("We conclude that the

'rational basis test' is the appropriate standard of review in this case. Dickerson does not and could not successfully contend that, as a person convicted of first degree murder, he is a member of a suspect class."); *Evans v. Thompson*, 881 F.2d 117, 121 (4th Cir.1989) (capital defendants not a suspect class for equal protection purposes), cert. denied, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir.1987), cert denied, 484 U.S. 935, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987); and *Smith v. Mitchell*, 567 F.3d 246, 262 (6th Cir.2009).

Further, R.C. 2953.73(E)(1), is not the only reference to the distinction between offenders sentenced to death and other offenders seeking DNA testing in the statutes regarding DNA testing of eligible offenders:

> (8) That the acknowledgment memorializes the provisions of sections 2953.71 to 2953.81 of the Revised Code with respect to the application of postconviction DNA testing to offenders, that those provisions do not give any offender any additional constitutional right that the offender did not already have, that the court has no duty or obligation to provide postconviction DNA testing to offenders, that the court of common pleas has the sole discretion subject to an appeal as described in this division to determine whether an offender is an eligible offender and whether an eligible offender's application for DNA testing satisfies the acceptance criteria described in division (A)(4) of this section and whether the application should be accepted or rejected, **that if the court of common pleas rejects an eligible offender's application, the offender may seek leave of the supreme court to appeal the rejection to that court if the offender was sentenced to death for the offense for which the offender is requesting the DNA testing and, if the offender was not sentenced to death for that offense, may appeal the rejection to the court of appeals, and that no determination otherwise made by the court of common pleas in the exercise of its discretion regarding the eligibility of an offender or regarding postconviction DNA testing under those provisions is reviewable by or appealable to any court**; (Emphasis added) R.C. 2953.72(A)(8).

and

> (9) That the manner in which sections 2953.71 to 2953.81 of the Revised Code with respect to the offering of postconviction DNA testing to offenders are carried out does not confer any constitutional right upon any offender, that the state has established guidelines and procedures relative to those provisions to ensure that they are carried out with both justice and efficiency in mind, and that an offender who participates in any phase of the mechanism contained in those provisions, including, but not limited to, applying for DNA testing and being rejected, having an application for DNA testing accepted and not receiving the test, or having DNA testing conducted and receiving unfavorable results, **does not gain as a result of the participation any constitutional right to challenge, or, except as provided in division (A)(8) of this section, any right to any review or appeal of, the manner in which those provisions are carried out**; (Emphasis added) R.C. 2953.72(A)(9).

Therefore, if the court reaches the merits of the constitutional question, it will also have to review R.C. 2953.72(A)(8) and (9), and determine whether severance is also required to conform with the *Davis* interpretation of Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution. This court will also have to determine if severance of R.C. 2953.73(E) and possibly portions of R.C. 2953.72(A)(8) and (9) conforms with *Geiger* and does not detract from the overriding objectives of the General Assembly expressed in the legislative history below as a single, expedited appeal from the denial of an application for DNA testing.

R.C. 2953.73 originated as Senate Bill 11, and throughout its seven hearings in the Senate Criminal Justice committee the provisions providing for an appeal were controversial. In testimony, former section chief of the Capital Crimes division for the Attorney General's office stated "A DNA appeal may delay the process for a period but it will also provide more credibility to a case once all other avenues of appeal are exhausted. * * * To this end, the Attorney General believes that an appropriate state appeal may ultimately benefit the state's case and in the perseverance of justice."

(Jim Canepa Testimony to House Criminal Justice Committee, June 3, 2003). A representative of the Ohio Judicial Conference testified that "One, expedited appeal will safeguard against abuse of judicial discretion that could result in wrongful imprisonment – at a minimum. Although allowing an expedited appeal will increase the workload of the courts, the substantive benefits of a single, expedited appeal, far outweigh the procedural burdens." (Judge William J. Corzine Testimony to House Criminal Justice Committee, June 3, 2003). The sponsor of Senate Bill 11, Senator David Goodman, testified "Senate Bill 11 provides for an appeals process, which is critical to sustaining the integrity of the process that this legislation will set forth." (Senator Goodman Testimony to House Criminal Justice Committee, May 27, 2003).

Furthermore, the court will need to consider how finding R.C. 2953.73(E)(1), unconstitutional due to *Davis'* interpretation of the constitution will impact any previously denied capital defendant's DNA applications who sought appellate review in this court. Are capital defendant's that were denied jurisdiction by this court under R.C. 2953.73(E)(1), now permitted to seek a direct appeal to the court of appeals, opening a new avenue of appeals regardless of where their case may be in the stage of death penalty litigation? Are the decisions rendered by this court in a capital defendant's case after being accepted for review under R.C. 2953.73(E)(1), now suspect for lack of jurisdiction?

CONCLUSION

Reaching the merits of the constitutional question presented in this court's supplemental issue is not necessary to resolve Noling's case. The legislature created the remedy of postconviction DNA testing and as a statutory creation, the

trial court was without authority to accept or consider Noling's subsequent application because it rejected Noling's September 25, 2008 application for not satisfying the acceptance criteria described in division [R.C. 2953.72](A)(4). R.C. 2953.72(A)(7).

Noling failed to seek an appeal of the Eleventh District Court of Appeals August 3, 2009 dismissal of his appeal of his first DNA application for lack of jurisdiction under R.C. 2953.73(E)(1), therefore, it remains the law of the case on the legal question involved in all subsequent proceedings in the case at both the trial and reviewing levels.

And although *Davis* narrowly interpreted Sections 2(B)(2)(c) and 3(B)(2), Article IV of the Ohio Constitution, the decision did nothing to diminish this court's "cause on review" original jurisdiction under Section 2(A)(f), establishing grounds other than the constitutional question upon which this case may be resolved.

Accordingly, State of Ohio, respectfully moves this Court to overrule Noling's proposition of law and affirm the judgment of the Portage County Court of Common Pleas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental brief of the State of Ohio has been sent by ordinary U.S. mail to counsel for the Appellant: Carrie Wood at Ohio Innocence Project, University of Cincinnati, P.O. Box 210040, Cincinnati, Ohio, 45221-0040 and Jennifer A. Prillo at the Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, this 10th day of April 2012.

PAMELA J. HOLDER (0072427)
Assistant Prosecuting Attorney

FILED
COURT OF COMMON PLEAS

APR 10 2009

LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

NOTICE OF APPEAL

Court of Common Pleas, Portage County
(ENTER NAME OF TRIAL COURT)

State of Ohio

Plaintiff-Appellee

- vs -

Tyrone Lee Noling

Defendant-Appellant

Trial Court No. 95CR220

Court of Appeals No. 2009PA00025

Notice is hereby given that (name each Appellant) Tyrone Lee Noling

appeals to the Eleventh District Court of Appeals from the trial court Judgment Entry time-stamped March 11, 2009 (describe it and attach a copy of each Judgment Entry being appealed) denying his application for post-conviction DNA testing.

_____ Check here if court-appointed and attach copy of appointment and Financial Disclosure/Affidavit of Indigency.

_____ Check here if any co-counsel for Appellant and attach a separate sheet indicating name, address, telephone no. and fax no.

TRANSCRIPT INFORMATION - App. R. 9(B)

_____ I have ordered a complete transcript from the court reporter
Estimated completion date: _____ Estimated number of pages: _____

_____ I have ordered a partial transcript from the court
Estimated completion date: _____ Estimated number of pages: _____

_____ A statement pursuant to App. R. 9 (C) or (D) is to be prepared in lieu of a transcript.

_____ Videotapes to be filed. See App. R. 9(A) or (B)

_____ No transcript or statement pursuant to either App. R. 9(C) or (D) is necessary.

X Transcript has been completed and already made part of the record.

4/10/09
Date

per authority Klasek 4/10/09
David Laing
Signature of Attorney or Appellant

David Laing
Name
Ohio Innocence Project, UC College of Law, PO Box 210040
Address
Cincinnati, OH 45221
City, State, Zip Code
0083409
Atty. Regis. No.
513-556-0752 513-556-1236
Telephone No. Fax No.
Laingd@gmail.com
E-Mail Address

FILED
COURT OF APPEALS

APR 10 2009

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

Admin/Forms/New NA.3
Revised 05/10/2007

Certificate of Service

This is to certify that a copy of the foregoing Notice of Appeal was forwarded by regular U.S. Mail, postage prepaid to the offices of Victor Vigluicci, Prosecuting Attorney, 466 S. Chestnut Street, Ravenna, Ohio 44266 and Richard Cordray, Ohio Attorney General, DNA testing unit, 150 East Gay Street, Columbus, Ohio 43215 this 10th day of April, 2009.

David Laing per authority Klesch 4/10/09

Counsel for Appellant

FILED
COURT OF COMMON PLEAS

APR 10 2009

LINDA K. FANKHAUSER, CLERK,
PORTAGE COUNTY, OHIO

ELEVENTH DISTRICT COURT OF APPEALS
DOCKETING STATEMENT
(To be attached to and filed with Notice of Appeal)

State of Ohio

Plaintiff-Appellee

- vs -

Tyrone Lee Noling

Defendant-Appellant

Name of Trial Court Portage County Court of Common Pleas

Trial Court No. 95CR220

Court of Appeals No. 2009PA00025

FILED
COURT OF APPEALS

APR 10 2009

LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

REGULAR CALENDAR

X Case should be assigned to the Regular Calendar with full briefing.

ACCELERATED CALENDAR – (Check if this applies)

___ I have read Loc.App.R. 11. This appeal meets those requirements, and I request that it be briefed and decided on the Accelerated Calendar.

EXPEDITED APPEAL

___ This case should be heard as an expedited appeal as defined under App.R. 11.2 because: (State provision of App.R. 11.2 or applicable statute): _____

ORAL ARGUMENT

X To expedite oral argument, I am willing to travel to whichever adjoining county in which the Eleventh District has the first available date.

___ I want oral argument in this appeal set in the county in which the appeal originates.

CASE TYPE

___ **A. Criminal.**
Specify nature of offense(s) (e.g., assault, burglary, rape): _____

(1) Is the defendant presently in jail? _____Yes _____No. If the answer is "Yes," give date of incarceration _____. When is he/she due to be released (if you know)? _____

(2) Has a stay been filed in the trial court? _____Yes _____No. If granted, what are the terms? _____

(3) Does the judgment entry comply with Crim.R. 32(C) by including the plea, verdict or findings, and a sentence? _____Yes _____No. If the answer is "No," this is not a final appealable order.

X **B. Post-Conviction Relief.** Date of conviction: January 24, 1996

___ **C. Civil.**
Specify cause(s) of action: _____

____ D. App.R. 11.2 (Abortion, Adoption, or Termination of Parental Rights Appeal).

PROBABLE ISSUE FOR REVIEW (1) whether DNA testing constituted a prior definitive test under R.C. 2953.74

THE FOLLOWING QUESTIONS APPLY TO ALL CIVIL AND ADMINISTRATIVE APPEALS

1. FINAL APPEALABLE ORDER

(a) Has the trial court disposed of all claims by and against all parties?
_____ Yes **(Attach copies of all judgments and orders indicating that all claims against all parties have been concluded.)**
_____ No

(b) If the answer to (a) is "No," has the trial court made an express determination that there is "no just reason for delay," pursuant to Civ.R. 54(B), with respect to the judgment or order from which the appeal is taken?
_____ Yes (Attach a copy of that order.)
_____ No

(c) Is the judgment or order subject to immediate appeal under R.C. 2505.02? If so, set forth the specific provision(s) that authorize this appeal: _____

(d) Does the right to an immediate appeal arise from a provision of a statute other than R.C. 2505.02? If so, identify that statute: _____

2. MEDIATION

(a) Would a pre-hearing conference or mediation assist in the resolution of this matter?
_____ Yes _____ No _____ Maybe

Please explain (optional) _____

CERTIFICATE OF SERVICE: I certify that I have mailed or otherwise delivered a copy of this Docketing Statement to all counsel of record, or to the parties if unrepresented. The following is a listing of the name, address and telephone number of all counsel and the parties they represent and any parties not represented by counsel: (attach extra sheet if necessary)

Victor Vigluicci
Prosecuting Attorney
466 S. Chestnut St.
Ravenna, OH 44266

Richard Cordray
Ohio Attorney General, DNA Testing Unit
150 East Gay Street
Columbus, OH 43215

DATE 4/10/09 SIGNATURE David Raing per authority KLSole 4/10/09

Admin/Forms/New Dkt Stmt.3
Revised 05/10/2007

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

STATE OF OHIO

Plaintiff

CASE NO. 95 CR 220

JUDGE ENLOW

-v-

TYRONE LEE NOLING

JUDGMENT ENTRY

Defendant

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

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

vs. : Case No. 95 CR 220

TYRONE NOLING, :

Defendant-Appellant. :

AFFIDAVIT OF INDIGENCY

I, Tyrone Noling, do hereby solemnly swear that I have presently this 9th day of April, 2009, no means of financial support and no assets of any value and, therefore, cannot afford to secure costs for prepayment in accordance with Local Rule 2, Local Rules of the Eleventh District Court of Appeals, to pay for any legal services, fees or costs in the above-styled case.

Tyrone Noling
Defendant-Appellant - Tyrone Noling

Sworn to and subscribed in my presence this 9th day of April, 2009.

Scott Nowak
NOTARY PUBLIC
Expires: March 27, 2010

FINANCIAL DISCLOSURE/AFFIDAVIT OF INDIGENCY

($25.00 application fee may be assessed—see notice on reverse side)

I. PERSONAL INFORMATION

Name/Applicant	Party Represented *(if applicant, enter "same")*	D.O.B.
Tyrone Noling		

Mailing Address	City	State	ZIP
878 Coitsville-Hubbard Rd	Youngstown	Ohio	44505

Case No.	Phone ( )	Message Phone (within 48 hour ( )

II. OTHER PERSONS LIVING IN HOUSEHOLD

Name	D.O.B	Relationship	Name	D.O.B	Relationship
1)			3)		
2)			4)		

III. MONTHLY INCOME/EMPLOYMENT INFORMATION

Type of Income	Applicant	Spouse (or Parents if applicant is a juvenile)	Other Household Members	Total
Employment (Gross)	PRISON JOB $16.00	X	X	$16.00
Unemployment				
Worker's Comp.				
Pension/Social Security				
Child Support				
Works First/TANF				
Disability				
Other				

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PORTAGE COUNTY, OHIO

Employer's Name (for all household members)	O.S.P PRISON	A. TOTAL INCOME	$
Employer's Address	SAME ABOVE		Phone ( )

IV. ALLOWABLE EXPENSES

Type of Expense	Amount
Child Support Paid Out	
Child Care (if working only)	
Transportation for Work	
Insurance	
Medical/Dental	
Medical & Associated Costs Of Caring for Infirm Family Members	
B. EXPENSES	$

V. TOTAL INCOME

Total Income – Allowable Expenses = Adjusted Total Income

	A. TOTAL INCOME	$ 16.00
-	**B. EXPENSES**	$ X
	C. ADJUSTED TOTAL INCOME	$ 16.00

VI. ASSET INFORMATION

Type of Asset	Describe / Length of Ownership / Make, Model, Year (where applicable)	Estimated Value
Real Estate / Home	Price:$ Date Purchased: Amt. Owed:$	
Stocks / Bonds / CD's		
Automobiles		
Trucks / Boats / Motorcycles		
Other Valuable Property		
Cash on Hand		
Money Owed to Applicant		
Other		
Checking Acct. (Bank / Acct. #)		
Savings/MM Acct. (Bank / Acct. #)		
D. TOTAL ASSETS		$

VII. MONTHLY LIABILITIES/OTHER EXPENSES

Type of Liability	Amount
Rent / Mortgage	
Food	
Electric	
Gas	
Fuel	
Telephone	
Cable	
Water / Sewer / Trash	
Credit Cards	
Loans	
Taxes Owed	
Other	
E. LIABILITIES & OTHER EXPENSE	

VIII. GRAND TOTALS

C. ADJ. TOTAL INCOME 16.00

D. TOTAL ASSETS X

E. LIABILITIES & OTHER X

$25.00 APPLICATION FEE NOTICE

By submitting this Financial Disclosure Form/Affidavit of Indigency Form, you will be assessed a non-refundable $25.00 application fee unless waived or reduced by the court. If assessed, the fee is to be paid to the clerk of courts within seven (7) days of submitting this form to the court, the public defender, your appointed counsel or any other party who will make a determination regarding your indigency.

IX. AFFIDAVIT OF INDIGENCY

I, Tyrone Noling (affiant) being duly sworn, say:

1. I am financially unable to retain private counsel without substantial hardship to me or my family.
2. I understand that I must inform the public defender or appointed attorney if my financial situation should change before the disposition of the case(s) for which representation is being provided.
3. I understand that if it is determined by the county, or by the Court, that legal representation should not have been provided, I may be required to reimburse the county for the costs of representation provided. Any action filed by the county to collect legal fees hereunder must be brought within two years form the last date legal representation was provided.
4. I understand that I am subject to criminal charges for providing false financial information in connection with the above application for legal representation pursuant to Ohio Revised Code Sections 120.05 and 2921.13.
5. I hereby certify that the information I have provided on this financial disclosure form is true to the best of my knowledge.

Tyrone Noling 4-9-2009
Affiant's Signature Date

Notary Public/Individual duly authorized to administer oath:
Subscribed and duly sworn before me according to law, by the above named applicant this 9th day of April, 2009, at Youngstown, County of Mahoning and State of Ohio.

Scott Nowar Case manager / Notary
Signature of person administering oath Title

expires: March 27, 2010

X. JUDGE CERTIFICATION

I hereby certify that above-noted applicant is unable to fill out and/or sign this financial disclosure/ affidavit for the following reason: _____.

I have determined that the applicant meets the criteria for receiving court appointed counsel.

Judge's Signature Date

OPD-206R rev. 9/2005

ORIGINAL

IN THE ELEVENTH DISTRICT COURT OF APPEALS
PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	CASE NO. 2009 PA 00025
Plaintiff,	:	
-v-	:	**APPELLANT'S MOTION TO EXTEND TIMETO FILE BRIEF**
TYRONE NOLING,	:	
		This is a capital case.
Defendant.	:	

Now comes the Appellant Tyrone Noling, by and through counsel, and requests that this Honorable Court grant him an extension of thirty (30) days to July 8, 2009 to file his brief. The justification for this request is that Appellant's appeal involves complicated jurisdictional issues which require further study by counsel. In particular, Appellant has also filed with the Ohio Supreme Court, but has filed in this Court to preserve the procedural integrity of his appeal. Counsel would like to ensure that the basis for this Court's review is adequately researched prior to the filing of Appellant's brief. This Court has authority to grant such an extension under App. R. 14(B).

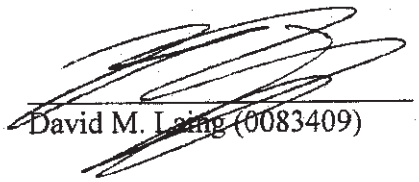
Respectfully submitted,

David M. Laing (0083409)
Ohio Innocence Project
University of Cincinnati, College of Law
P.O. Box 210040
Cincinnati, OH 45221
P: 513-556-4276
F: 513-556-1236
laingd@gmail.com

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Motion to Extend Time to File Brief was delivered by U.S. Mail to Victor V. Vigluicci, Prosecuting Attorney, 466 South Chestnut Street, Ravenna, OH 44266 and to Richard Cordray, Ohio Attorney General, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 8th day of June, 2009.



David M. Laing (0083409)

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