

ARGUMENT SUPPORTING DNA ANALYSIS TO BE CONDUCTED
OF THIS CASE:

For a convicted person to obtain DNA Testing under the Ohio Revised Code § 2953.74, the court must find in pertinent part:

1. DNA testing which was not performed at time of trial when at that time DNA was not generally accepted, the results of DNA Evidence, or DNA Testint was not yet available. R.C. § 2953.71 (B)(1).
2. Biological material was collected from the crime scene or victim of the offense for which the inmate is eligible and is requesting testing and this evidence still exists. R.C. § 2953.74(C)(1).
3. The sample contains scientifically sufficient material to extract a test sample, the parent sample is not so minute to risk destruction, is not degraded or contaminated to the extent it is scientifically unsuitable for DNA Testing. R.C. § 2953.74(C)(2).
4. At the trial stage, the identity of thge person committed the offense was an issue, R.C. § 2953.74(C)(3), and one or more of the defense theories asserted at trial was of such a nature that, if DNA Testing is conducted and an exclusion obtained, the exclusion result will be outcome determinative. R.C. § 2953.74(C)(4).
5. If DNA Testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative. § R.C. 2953.74(C)(5).
6. With respect to the Chain of Custody of the Biological samples, there is not reason to believe.

that the parent and the extracted test samples have been out of State custody or would have been tampered with or contaminated since they were collected. R.C. § 2953.74(C)(6).

As demonstrated below, Roberts meets the requirement of the statute, and accordingly, his application for DNA Testing should be granted.

A. DNA Testing was performed at the time of trial; at time of trial DNA Testing was not generally accepted, the results of DNA Evidence was generally admissible in evidence, DNA was not totally accepted. R.C. 2953.74(B)(1).

Roberts was tried in 1997, there is no question that DNA Testing was generally admissible at the time. *State v. Pierce*, (1992), 64 Ohio St.3d 490 (holding for the first time DNA Evidence is admissible in a criminal proceeding in Ohio).

B. Biological material was collected from the scene of the crime or victim of the offense for which the inmate is eligible and is requesting testing and this evidence still exists. R.C. 2953.74(C)(1).

Leo Sinnett was examined within hours of the alleged attack, and Biological Material was recovered from his body and crime scene. Evidence from this case may be in the possession of the following entities.

The Hospital/Coroner's own files, or other location where such records could be stored where Mr. Leo Sinnett was examined; in the laboratory, Pathology Department; the Guernsey County Sheriff's Department Property Room and/or the prosecutor's office/evidence room. This is not an exhaustive list, no inquiries have been made regarding the existence vel non of crime scene Biomaterial.

Once a request for Post-Conviction DNA Testing is filed,

"[T]he Court shall require the prosecuting attorney to use reasonable diligence¹ to determine whether Biological Material was collected from the crime scene or victim of the offense for which the inmate is an eligible inmate and is requesting the DNA Testing against which a sample of that Biological Material still exists at that point in time. In using reasonable diligence to make those determinations, the prosecuting attorney shall reply upon all

relavant sources, including, but not limited to, all of the following.

1. All prosecuting authorities in the case in which the inmate was convicted of the offense for which the inmate is an eligible inmate and is requesting the DNA Testing and in Appeals of, and Post-Conviction proceeding related to the case;
2. All Law Enforcement Authorities involved in the investigation of the offense for which the inmate is an eligible offender and the inmate is requesting the DNA Testing;
3. All custodian agencies involved at any time with Biological Material in question;
4. The custodian of all custodian agencies described in Division(A)(3) of this section;
5. All crime laboratories involved at any time with the Biological Material in question;
6. All other reasonable sources.

R.C. 2953.75(A), the prosecuting attorney must file a report with the Court demonstrating such reasonable diligence and provide a copy of that report to the eligible inmate and the Attorney General. R.C. 2953.75(B).

To fulfill its duties under R.C. 2953.75 (and for this Court to determine whether any Biological Material Evidence from this case still remains), the State must conduct physical searches for the evidence at all sites that once possessed it and account for the Chain of Custody of the evidence through production of all contemporaneous Business Records and Documents (e.g., Log Books, Chain of Custody Forms, Evidence Receipts) from all agencies that once possessed the evidence indicating the transfer, release and/or destruction of the evidence. In addition, the State must provide

¹ "Reasonable Diligence" is defined as "The diligence a reasonable person would employ in searching for information regarding an important matter in persons own life." R.C. §2953.71(C)

the protocol that was in place for the storage, retention, and destruction of evidence during the time of the trial.

C. The sample contains scientifically sufficient material to extract a test sample, the parent sample is not so minute to risk, is not degraded or contaminated to the extent it is scientifically unsuitable for DNA Testing. R.C. § 2953.74(C)(2).

The biological Evidence from the case would be in a condition that would permit the **Short Tandem Repeat (STR)** analysis that Roberts seeks. Such DNA toying "can be routinely achieved from typical forensicspecimens, including degraded and low quality DNA sample," and it is "Robust, Accurate, Highly Sensitive, and Suitable for Forensic Application." Tamyra R. Morre, Ph.D., and Bruce Bud Owle, Ph.D, **The Codis STR Project: Evaluation of Fluorescent Multiplex STR System**, presented at the 50th Annual American Academy of Forensic Science Meeting, February 9-14, 1998.

STR Analysis can generate profiles from evidence that has been stored, for decades, in Police or Clerk Storage Rooms, or in slide boxes in Hospital/Coroners Laboratories. To illustrate, California Authorities recently arrested convicted rapist Phillip Thompson for the 1971 murder of a 21 year old woman. The murder went unsolved for 32 years, until a detective pulled some clothing from an evidence bag and sent it for STR Analysis. The DNA Profile obtained from the clothing was run through the STATE DNA DATABASE and matched Thompson, an inmate serving an 18 year sentence to life for a series of Kidnappings and Rapes in the early 1980's. "Authorities say DNA Solves Case from '71", Register-Guard (Eugene, Or.) November 5, 2003 at D-1.

D. "At the trial stage, the identity of the person who committed the offense was an issue, and one or more of the defense theories asserted at trial was of such a nature that, if DNA Testing is conducted and an exclusion result will be outcome determinative. R.C. § 2953.74(C)(3) and (4).

Whether identity is a significant issue depends entirely on how defendant has defended against the charges. The defendant can either dispute that he is the person who perpetrated the crime (as did LaFollett), or admit to the charged conduct and defend on

other grounds.

The issue of identity is present in every criminal case, in that to warrant conviction, the evidence must establish beyond a reasonable doubt, the identity of the accused as the person who committed the crime. However, when a defendant asserts a defense, such as consent, self-defense, necessity, or insanity, the defendant admits that he was a perpetrator, but because the defendant admits that he perpetrated the charged act. Identity is not a genuinely contested issue. Conversely, when the defense is one of misidentification, alibi, actual innocence, or any other defense in which the defendant disputed that he was the person who perpetrated the charged acts-identity is a significant issue.²

In the Post-conviction DNA Testing context, the identity-at-issue requirement is a common sense limitation on DNA Testing requests.³ "When the legislature required a showing that identity was the issue at the trial that led to the conviction, it sought to guard against frivolous requests by limiting the remedy to those cases where identity was truly at issue, cases where the use of new technology could test properly preserved genetic material to either confirm or decisively negate other identification evidence that produced conviction. *People v. Urioste* (Ill. App. 2000), 736 N.E.2d 706, 711-712. The very purpose of the Post-Conviction DNA Statute is to use advanced scientific technology to test the State's identification proof-proof a jury has already determined beyond a reasonable doubt-to-determine if a wrongful conviction has occurred. See also, *State v. Peterson* (N.J. Super. A.D. 2003), 836 A.2d 821 (describing why strength of the State's case is irrelevant to the question of whether identity is "at issue").

² See, generally, *State v. Hood* (Dec. 16, 1999), Civ. App. No: 75210, 1999, Ohio Lexis 6066 at *18. (When appellant was implicated in murder by the confession of his alleged co-conspirator, court found "Appellant placed the issue of the perpetrator's identity squarely in issue' as at trial he denied committing the murder), *State v. Morgan* (Sept. 17, 1993), Greene App. No: 92CA123, 1993 Ohio App. Lexis 4512 at *4 (identity in issue when defendant denied burglarizing victims home and offered an alibi), *State v. Morgan*, Ham. App. No: C-010517, 2002 Ohio at ¶37, 2002 Ohio App. Lexis 3197 at **20-**21 (Smith placed himself at identity issue when, despite his identification by the State's witness' he denied his involvement in the crime)".

The term of DNA Testing is unassailable as a Forensic Tool establishing identity. DNA Testing cuts to the truth; it is a method of establishing identity that is far more reliable and precise than nearly any other type of identification proof, including eyewitness' identification, confessions, admission or inculpatory statements, and rudimentary forensic science such as conventional serology or hair comparison. See, generally, *Zollman v. State* (Fla. Dist. Ct. App. 2002) 820 So.2d 1059, 1062 (noting that the Florida Supreme Court has recognized there is a substantial body of academic work challenging the reliability of eyewitness' identification in criminal cases and finding that the fact that the eyewitness' identified Roberts, does not mean that the identity was not genuinely disputed at trial for purposes of Post-Conviction DNA Testing. *Huffman v. State*, (Fla. Dist. Ct. App. 2003), 837 So.2d 1147, 1148 (Identity, a genuine issue despite "significant circumstantial evidence" of defendant's guilt, including a fingerprint from the crime scene matched the defendant's prints; phone calls traced to the defendant's house that were made to the victim's house after the attack; and the victim's in-court-identification of defendant's voice, as that of her assailant).

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Generally, there would be little point to post-conviction DNA testing in cases in which the defendant admits that he perpetrated the charged acts, but maintains he nevertheless legally innocent. This is because DNA testing would not resolve the primary question of facts. For example, when a rape defendant maintains that the victim consented to consensual sexual intercourse, the main question of facts at issue—rather than whether or not the defendant had sexual intercourse. In this example, DNA Testing of rape kit evidence would not be probative of the defendant's guilt or innocence because DNA testing cannot resolve the question of whether or not the victim consented to the act. Rather it would be expected that DNA Testing would simply confirm what the defendant already admits—that he did have intercourse with the victim.

In the instant case, Roberts' defense was actual innocence to the robbery and murder. He does admit that he was on the outside of the crime scene. The State's forensic witness testified that there were hairs, a latent finger print, and blood, that was never tested. Thus, based on the evidence presented at trial, only the true perpetrator could have left this evidence. Yet, the blood, hairs, and print were never completely tested. DNA Testing of this vital evidence will irrefutably identify their actual donor, and ultimately, Sinnett's killer. There can be no doubt that a test result excluding Roberts as the donor would be outcome determinative under these facts.

E. If DNA Testing is conducted and an exclusion is obtained, the result of the testing will be outcome determinative. R.C. 2953.74(C)(5).

LaFollett's testimony, actually the sole evidence upon which Roberts was convicted of this crime. There is no physical evidence connecting Roberts to this crime.

1. No fingerprints were recovered from the Sinnett home linking Roberts to these crimes.
2. Clothing described by the investigating officer's which appeared to have blood on them were tested.
3. No physical evidence from Sinnett's home supports the description given by the prosecutor.

Indeed, the only physical evidence that can be irrefutably identify the perpetrator is the latent print, blood, and hairs recovered from the scene but were never tested completely.

Roberts did not rob and murder Leo Sinnett. DNA Testing in this case would be outcome determinative. STA DNA Testing that reveals a DNA Profile that does not belong to Roberts, would constitute proof of his innocence of this crime. Moreover, an exclusion result as to Roberts would not only demonstrate his factual innocence of these offenses, but may also lead to the revelation of the actual perpetrator's identity. The DNA profile created from the crime scene Biomaterial could be searched in the local, State, and Federal Database System. Ohio's Database System

has over 30,000 offender profiles and it is part of the FBI-Managed National Database System, combined DNA Index System (CODIS).⁴

There are over 1.7 million convicted offender profiles and over 78,000 forensic samples (unsolved cases) in the Federal Data-banks. See, <http://www.fbi.gov/hq/lab/codis/aidemap.htm>.

In over 30 of the now 143 Post Conviction DNA exonerations, DNA Testing has not only cleared the wrongfully convicted, but led to the identification of the true assailant, many of whom are serial offenders. For example, Ray Krone was convicted of a sexual assault and murder that occurred in Phoenix, Arizona in 1991 and initially sentenced to death. The body of the thirty-six year old victim was found nude, in the men's restroom of the bar where she worked. Krone became a suspect in the crime after police learned the victim told a friend that a regular customer named Ray Krone was to help her close up the bar the night of the murder. Krone was convicted primarily on the basis of expert testimony that impressions taken of his teeth matched the bite-marks found on the victim's body.

In 2002, Post-Conviction Testing conducted on saliva and blood found on the victim excluded Krone as the source. Instead, the DNA matched a man named Kenneth Phillips, who was in the convicted-offender-DNA Database, due to committing a similar crime. Krone was ultimately released from prison; Phillips was charged. <http://www.innocenceproject.org/case/searchprofile.php>.

F. With respect to the chain of custody of Biomaterial samples, there is no reason to believe that the parent sample and extracted test samples have been out of state custody or would have been tampered with or contaminated since they were collected. R.C. 2953.74(C)(6).

Counsel for the State and the defendant does not dispute to the chain of custody of this Biomaterial. There is no reason to believe that the evidence has or was contaminated or tampered with, the only dispute was on the testing of all involved in the instant case.

¹

The CODIS Database has three tiers: Local, State, and National. All DNA

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CONCLUSION

There can be no question that STR DNA Testing of the evidence in this case is capable of proving Roberts' innocence of the crime in which he was convicted and is currently incarcerated for. If Roberts is excluded through testing, DNA Test results could also identify the true perpetrator. Fairness to Roberts and concern for public safety mandates testing in this case.

WHEREFORE, for the reasons stated in Roberts' application and the instant Memorandum In Support thereof, Roberts, through pro se, respectfully requests that this Honorable Court:

A. Order the State, in accordance with Ohio Revised Code 292953.75, to use reasonable diligence to locate any remaining Bio-material Evidence from the case that could be suitable for DNA Testing. Such diligence must include a thorough physical search for evidence from all custodian agencies, including, but not limited to, the Guernsey County Sheriff's Department property room, and Forensic Laboratory, the prosecutor's evidence room, and the Hospital/Coroner's where Mr. Sinnett was examined, and the production of all chain of custody documents and contemporaneous business records, (i.e., log books, chain of custody forms, evidence receipts) from all agencies that once possessed and/or destruction of evidence at the time of trial;

B. If agents for the State respond to Roberts' application by saying they cannot find any relevant Biomaterial suitable for DNA Testing, this Honorable Court should grant Roberts the right to conduct discovery, under the Ohio Revised Code of Civil Procedures in order to vindicate his adversarial rights to engage in the process of determining whether relevant Biomaterial exists that is suitable for DNA Testing. Those rights are protected by the Ohio and the United States Constitution. U.S. Const. Amends. V, VI, VIII, and XIV; Ohio Const. Sections 1,2,5,9,10,16, and 20, Article I.

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profiles originate at the local level (LDIS). Then, according to the legal parameters set by local legislatures, the profiles may be shared with the State (SDIS) and national levels (NDIS). NDIS permits participating laboratories to exchange and compare DNA profiles on a national level, while SDIS allows laboratories within the states to exchange DNA profiles.
<http://www.fbi.gov/hq/lab/codis/programs.htm> . .

C. If relevant Biomaterial is discovered, this Honorable Court should order the release of this Biomaterial Evidence to a reputable laboratory for Post-Conviction DNA Analysis;

D. If Biomaterial is discovered, that it be compared to that of John LaFollett, after its exclusion from such results, where Roberts has claimed his innocence to this crime;

E. In addition to, or in the alternative to, relief sought above, this Honorable Court should grant Roberts an Evidentiary Hearing, or resentence him to that of his co-defendants, to that of the lesser included offense of involuntary manslaughter.

F. Order such other and further relief to which Roberts may and is entitled to.

Respectfully Submitted,

Clarence D. Roberts
/s/ Clarence Roberts
Clarence Roberts
A351-300
P.O. Box 4501
Allen Correctional Inst.
Lima, Ohio 45802-4501

Defendant, pro se