COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2008-SC-000901-MR

THOMAS CLYDE BOWLING — APPELLANT

VS. ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
INDICTMENT NO. 90-CR-00363

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT THOMAS CLYDE BOWLING

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CERTIFICATE OF SERVICE:

I hereby certify that a true copy of this Brief for Appellant has been mailed via first-class postage prepaid to the Honorable Kimberly N. Bunnell, Judge, Fayette Circuit Court, 120 North Limestone Street, Lexington, Kentucky 40507, to the Hon. Ray Larson, Commonwealth Attorney, 116 N. Upper Street, Suite 300, Lexington, Kentucky 40507 and to the Hon. James Daryl Havey, Assistant Commonwealth Attorney, 116 N. Upper Street, Suite 300, Lexington, Kentucky 40507 on this the 26th day of March, 2008. I hereby further certify that the record on appeal has been returned to Ms. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 700 Capital Avenue, Frankfort, Kentucky 40601-3488 on or before this date.

David Barron
COUNSEL FOR THOMAS CLYDE BOWLING

INTRODUCTION

Thomas Clyde Bowling petitioned the Fayette Circuit Court for DNA testing in his capital case, and the Court denied testing on a car linked to the crime, but it granted testing pursuant to KRS 422.285(2) and (3) on a jacket also linked to the crime; however, the Court stopped the DNA testing on the jacket midstream and dismissed Bowling's Petition once the initial testing results showed more than one person's DNA present – something that was expected when the testing was granted and something that is consistent with Bowling's theory that someone else committed the murders in a jacket with which he also had contact. Bowling now appeals both the denial of testing on the car and the cessation of the testing on the jacket.

STATEMENT CONCERNING ORAL ARGUMENT

Bowling's case is the second of at least three death penalty cases in which DNA testing has been granted under K.R.S. 422.285,[1] and the first of those cases to be briefed before this Court. Although K.R.S. 422.285 applies to all death-sentenced inmates and although the statute has now been in existence for approximately seven years,[2] this Court has yet to interpret the meaning or application of the statute as a whole, or the terminology within it. Both because K.R.S. 422.285 has never been interpreted by this Court and issues involving how to correctly interpret the statute will likely continue to arise as more death-sentenced inmates seek DNA testing and because this Court has not addressed the federal constitutional right to DNA testing, this Court should grant oral

[1] In *Taylor v. Commonwealth*, 175 S.W.3d 68 (Ky. 2005), this Court addressed whether K.R.S. 422.285 violates the separation of powers doctrine, but this Court did not otherwise interpret the statute beyond stating how DNA testing in general is conducted. *Id.* at 75-77. The other two death-sentenced inmates who have obtained DNA testing under K.R.S. 422.285 are Brian Keith Moore and Roger Epperson. Moore's DNA action is now pending before this Court in case numbers, 2008-SC-000860, 2008-SC-000925, and 2008-SC-000957. Although authorized, the DNA testing in Epperson's case has yet to begin. It remains pending before the Warren Circuit Court. *Epperson v. Commonwealth*, 97-CR-000016 (Warren Cir. Ct.).

argument to assist it in interpreting for the first time a now oft-used statute and in determining the scope of the statutory and federal constitutional rights to DNA testing.

ISSUES

I. Has Bowling satisfied the reasonable probability standard for DNA testing under K.R.S. 422.285 or the federal grounds for DNA testing on a car directly linked to the murders when he claims he did not commit the murders, alleges an alternative person(s) used the car to commit the murders, and presented an affidavit saying it is reasonable to conclude that DNA could be found on the interior of the car and linked to the time period of the crime? In the alternative, did the presentation of an affidavit saying DNA that might be found on the interior of the car that could be traceable to the time period of the crime entitle Bowling to an evidentiary hearing on whether DNA results that could be linked to the time period of the crime could be found in the interior of the car?

II. Does a finding that the reasonable probability standard for obtaining DNA testing automatically mean that DNA found on the tested evidence must be compared to that of the convicted individual as this Court held in *Taylor v. Commonwealth*, 175 S.W.3d 68, 76 (Ky. 2005), or can a circuit court then prevent that comparison from taking place merely because more than one person's DNA has been found on the tested piece of evidence? If a circuit court has the authority to prevent the comparison from taking place, can it do so without first holding an evidentiary hearing and providing funds for expert assistance when both a hearing and funds for an expert are sought and a factual dispute exists over whether the DNA lab could differentiate between the multiple DNA profiles, eliminate potential sources of the DNA, or determine if one DNA sample is more prevalent than another?

CITATIONS TO THE RECORD

The following symbols will be used in this appeal:

TR -- Transcript of the Record – the written pleadings in the instant action.

VR -- Video Proceedings in this action

[2] K.R.S. 422.285 was enacted in 2002. *Taylor*, 175 S.W.3d at 76.

STATEMENT OF POINTS AND AUTHORITIES

PAGES

STATEMENT OF THE CASE

Bowling believes that DNA testing on a car and/or jacket will show that he did not murder Tina and Eddie Earley. At a minimum, Bowling believes DNA test results will show a reasonable probability that he would not have been convicted or sentenced to death or that such testing would provide exculpatory evidence, which includes evidence that implicates another person or evidence that impeaches testimony/evidence presented against him at trial.

Bowling was not the original suspect in the case.[3] There was no evidence presented at the trial that Bowling knew the victims.[4] No confession was obtained. The gun presented at trial could not be directly linked to the murders, and was not any more likely than hundreds of thousands of other guns to have fired the bullets that killed two people.[5]

The gunshots alerted two witnesses.[6] They gave conflicting descriptions of the shooter. One witness described a man wearing a hat and jacket like those that Bowling owned, and which turned out to allegedly be like the jacket the prosecution introduced into evidence at Bowling's trial, but he could not pick Bowling out of a line-up.[7] The other witness described a man that looked nothing like Bowling.[8] At trial, Bowling's sister testified that she never saw the jacket before and that it did not belong to Bowling.[9] And, no motive for the killings was presented to the jury.

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[3] TR Vol. VII at 943; TR Vol. XIV at 2094.
[4] *See, id.* at 941 (interview with Tina Earley's brother wherein he says Bowling did not know the Earleys).
[5] VR: Tape 6; 12/13/90; 11:35:00.
[6] VR: Tape 5; 12/12/90; 11:12:45, 11:29:00.
[7] *Id.* at 11:17:00 – 11:21:00, 11:28:00.
[8] *Id.* at 11:29:00 – 11:45:00.
[9] VR: Tape 6; 12/12/90; 16:25:30 – 16:26:35.

Bowling was linked to the murders solely because his car, which had no blood in it, had been identified as being in the parking lot at the time of the shooting through paint scratches, and had a shattered headlight caused by a collision with the victims' car.[10] Although Bowling argued at trial that his car being at the crime scene did not mean he was at the crime scene, based on this evidence, Bowling was convicted and sentenced to death in 1990 for the murders of the Earleys.[11]

On the day of the murders, the Earleys were shot as they arrived at their dry cleaning business in Lexington.[12] Bowling drank heavily that day, and all he now remembers is John Ed Adams telling him to get his car out of town and hide it.[13] He obeyed and drove his car to his parents' property in Powell County.[14] Bowling then went to his sister's house in Tennessee, where he was eventually arrested.

John Ed Adams or another member of the Adams family, who knew the victims, could have easily taken Bowling's car to commit the murder and then set Bowling up for it. The Adams were a family of drug dealers in Lexington, Kentucky.[15] In fact, the Chief of Police's first instinct was that one of the Adams had been involved in the murders.[16] Eddie Earley reported the Adams' drug dealings to the police,[17] and Tina Earley had been having an affair with one of the Adams.[18] Thus, unlike Bowling, the Adams family had a motive to kill the Earleys. Eddie Earley had informed the police of the Adams family

[10] VR: Tape 6; 12/13/90; 10:55 – 11:08.
[11] TR Vol. III at 392-395.
[12] VR: Tape 5; 12/12/90; 13:59 – 14:05.
[13] TR Vol. X at 1407.
[14] *Id.*
[15] TR Vol. VI at 936-38.
[16] TR Vol. VII at 943 and TR Vol. XIV at 2094; exhibit 4 to merits brief.
[17] TR Vol. VII at 943.
[18] TR Vol. VI at 936-38.

drug dealings. However, once Bowling's car was linked to the scene, no other suspects were investigated. Thus, the car is the essential link tying Bowling to the crime.

In August 2006, armed with this information, Bowling filed a motion for DNA testing under K.R.S. 422.285 and multiple provisions of the United States Constitution.[19] Numerous pleadings concerning the DNA testing were filed, including two supplements to Bowling's original motion for testing.[20] In those pleadings, Bowling requested DNA testing on numerous items, only two of which are the subject of this appeal: the interior of the car linked to the murders; and, a jacket allegedly worn by the killer when committing the murders. Bowling's theory, in the DNA pleadings, was that another person, namely a member of the Adams family, used Bowling's car to commit the murders and then had Bowling dispose of the car and the jacket in an attempt to cover up the crime and/or set Bowling up to take the fall for the murders.[21]

Shortly after the DNA pleadings were filed, an issue arose over whether reliable DNA results could be obtained from the interior of an automobile that has been exposed to extremes of temperature for sixteen years.[22] Bowling provided additional briefing and five affidavits from DNA experts that refuted the Commonwealth's initial blanket statement that reliable DNA results could not be obtained under these circumstances.[23] After reviewing the affidavits, the circuit court decided it did not need to decide the issue because any attempts to extract DNA from the car would answer the question.[24] But, the circuit court still denied DNA testing on the car, finding that the requirements of K.R.S.

[19] TR Vol. X at 1406-1421.
[20] TR Vol. XII at 1746-47, 1776-77.
[21] TR Vol. X at 1406-21.
[22] *Id.* at 1462-73, 1478-79.
[23] TR Vol. XI at 1482-1634.
[24] TR Vol. XIII at 1865.

422.285 were not satisfied with regard to it.[25] In so finding, the court said "there is no credible proof to establish the age of the DNA. Thus, there would be no proof to connect the evidence to the time period of the crime."[26] This finding was made without holding an evidentiary hearing, and despite an unrefuted and uncontradicted affidavit from Norah Rudin, a forensic DNA expert who has been qualified as an expert in forensic DNA and/or criminalistics at least twenty-two times.[27] She opined, after reviewing the pleadings filed in Bowling's case and an affidavit from the Commonwealth concerning the status of the car, that one might be able to reliably determine information on persons who had the most recent contact with a car that had been impounded for sixteen year: "even if standard STR testing should fail, more sensitive systems such as Y-STR testing (specifically tests only the Y-chromosome found in males) or even mitochondrial DNA (mtDNA) testing *might be able to provide at least some information about persons who had the most recent contact with surfaces in the driver's areas of the car. It is entirely possible that probative, possible exculpatory evidence could be recovered from the vehicle in question in this case.*"[28] The Fayette Circuit Court made no credibility or other findings concerning this affidavit.[29]

Although denying DNA testing on the interior of the car, the circuit court did find Bowling had satisfied the reasonable probability standard for DNA testing on the jacket and thus ordered DNA testing to take place on it.[30] The court, however, limited the testing to the neck and underarm area.[31] Testing ensued and the results were obtained.

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[25] TR Vol. XIII at 1864.
[26] *Id.*
[27] TR Vol. XI at 1493-1502 (exhibit 5 to merits brief).
[28] *Id.* at 1495-96 (emphasis added).
[29] TR Vol. XIII at 1863-65.
[30] TR Vol. X at 1864.
[31] *Id.*

The state crime lab found a mixture of at least two people's DNA on the jacket.[32] The next step in DNA testing, as this Court noted in *Taylor v. Commonwealth*,[33] would have been to compare the DNA found on the jacket to Bowling's DNA. Although they did not believe it necessary, counsel for Bowling then filed a motion to allow Bowling's DNA to be compared to that found on the jacket,[34] and, if necessary, to DNA from members of the Adams family.[35]

In that motion, Bowling noted that the DNA results found on the jacket should be sufficient in itself to grant Bowling a new trial,[36] or at least a new sentencing hearing, but that the court should await taking that step until the DNA testing process under K.R.S. 422.285 and *Taylor* had been completed.[37] Specifically, Bowling requested that this Court not stop the testing process that had already begun but instead allow Bowling's DNA to be compared to that found on the jacket.[38] Then, Bowling urged, if his DNA is found on the jacket, the court should order elimination testing from members of the Adams family, whom Bowling had already identified to the court as the only individuals he had identified as alternative suspects.[39] Finally, Bowling argued that if the court had any concerns about whether comparison/elimination testing could be conducted and yield reliable results on whose DNA is or is not on the jacket, the court should grant Bowling

[32] TR Vol. XIV at 1970 (exhibit 3 to merits brief).
[33] 175 S.W.3d at 76.
[34] Bowling's motion also addressed other items of evidence. But, because the jacket is the only piece of evidence that is the subject of this appeal, he only discusses the jacket.
[35] After DNA was found on the jacket, the Commonwealth informed Bowling's attorneys that they would object to any further DNA testing. That precipitated the motion to allow the comparison/elimination testing.
[36] TR Vol. XIV at 1992-94.
[37] *Id.* at 1995-97.
[38] *Id.*
[39] *Id.*

an evidentiary hearing and authorize funds for him to retain experts to testify at the evidentiary hearing.[40]

The step-by-step process for conducting DNA testing that Bowling advocated for is fully consistent with this Court's description, in *Taylor*, of the four step process for DNA testing: "First samples from a known or unknown source are isolated. Second, testing is conducted on each sample. Third, the DNA type is determined by analyzing particular regions of each sample's DNA. Finally, the results are compared between samples to verify whether the samples originated from a common source. After the testing process, once of three results will be reached: that the samples originated from a common donor, that the samples do not originate from a common donor, or that the test is conclusive."[41]

Although *Taylor* succinctly lays out the steps of the DNA testing process and the possible results when the testing is completed, the circuit court did not allow Bowling's DNA to be compared to that found on the jacket or for the DNA on the jacket to be compared to any member of the Adams family,[42] even though the court had already found Bowling met the reasonable probability standard for DNA testing on the jacket.[43] In stopping the testing without holding an evidentiary hearing and without providing Bowling with funds to retain an expert to testify on the viability of obtaining reliable DNA results that could differentiate between samples or eliminate potential donors when a mixture of at least two individual's DNA is found on a piece of evidence, the Fayette Circuit Court held that the fact that more than one person's DNA being on the jacket

[40] *Id.* at 1998-99.
[41] *Taylor*, 175 S.W.3d at 76.
[42] TR Vol. XV at 2092-93.
[43] TR Vol. XIII at 1864.

meant the jacket was "highly" contaminated.[44] The court found the contamination could have been by any person who touched the jacket, including "the owner of the jacket, the investigating officers, the evidence collection individuals, the jurors, the clerk, etc."[45] From that, the court "refuse[d] to order DNA comparison testing to the Defendant or to all of the innocent people who could have touched the jacket."[46] Bowling never asked for comparison testing of everyone who may have touched the jacket, but instead asked for comparison testing to members of the Adams family and even that only after the DNA found on the jacket was compared to Bowling.[47] Further, the court's order makes no reference that it considered the unlikelihood that any of the individuals the court said may have "contaminated" the jacket would have touched the underarm where the DNA had been located.[48]

Nonetheless, with Bowling's DNA action having then been dismissed by the circuit court, Bowling lodged this appeal, and now argues that DNA testing on the jacket should have been allowed to continue, as well as that he satisfied the reasonable probability standard for DNA testing on the interior of the car and that federal constitutional rights entitle him to DNA testing on the car. In the alternative, Bowling argues the circuit court erred in its ruling on these issues without first holding an evidentiary hearing to resolve disputed issues of fact and that the court also erred in failing to provide Bowling with funds to retain expert services to further present scientific evidence in support of his arguments and to testify at an evidentiary hearing.

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[44] TR Vol. XV at 2092-93.
[45] *Id.* at 2093.
[46] *Id.*
[47] TR Vol. XIV at 1995-97.

STANDARD OF REVIEW

Questions of law are reviewed de novo.[49] Mixed questions of fact and law are also reviewed de novo.[50] The reasonable probability standard contained in K.R.S. 422.285 is identical in application to the reasonable probability of a different outcome standard used in ineffective assistance of counsel cases. That standard has been held, by this Court, to be a mixed question of fact and law.[51] Because K.R.S. 422.285 involves the same reasonable probability standard and because the factual and legal aspect of a K.R.S. 422.285 claim is as intertwined as it is with ineffective assistance of counsel claims, this Court should rule that whether to grant DNA testing under K.R.S. 422.285 is also a mixed question of fact and law. If this Court so rules, the circuit court's ruling as to whether the requirements of K.R.S. 422.285 have been satisfied is reviewed de novo.

Where an evidentiary hearing is held, pure findings of fact by the circuit court are reviewed under the clearly erroneous standard.[52] The circuit court did not hold an evidentiary hearing on any of Bowling's claims. Thus, the circuit court's findings of fact are also subject to de novo review.[53] Finally, "a[n evidentiary] hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record."[54]

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[48] *See, generally*, TR Vol. XV at 2092-93.
[49] *Coleman v. Commonwealth*, 100 S.W.3d 745, 750 (Ky. 2002).
[50] *Brown v. Commonwealth*, 253 S.W.3d 490, 500 (Ky. 2008); *Groseclose v. Bell*, 130 F.3d 1161, 1163-64 (6th Cir. 1997).
[51] *Brown*, 253 S.W.3d at 500.
[52] *Adams v. Commonwealth*, 424 S.W.2d 849, 851 (Ky. 1968) ("The trial court heard and saw the witnesses, therefore, it is in a better position than this court to evaluate the testimony and the other evidence. Its findings are included in the judgment. There is nothing that convinces us that they are clearly erroneous, therefore, we cannot set them aside.").
[53] CR 52.01; *Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

STATE AND FEDERAL LEGAL BASIS FOR DNA TESTING

I. The right to DNA testing under K.R.S. 422.285.

K.R.S. 422.285(1) provides, "at any time," a person who has been sentenced to death may request DNA testing of "any evidence that is in the possession or control of the court or the Commonwealth, that is related to the investigation or prosecution that resulted in the judgment of conviction and may contain biological evidence." Subsection 2 provides that the court *shall* order DNA testing if "a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis." Subsection 3 provides that the court *may* order DNA testing if "a reasonable probability exists that either the petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis has been available at the trial leading to the judgment of conviction; or DNA testing and analysis will produce exculpatory evidence." Both sections also require that the evidence still be "in existence and...in a condition that allows DNA testing and analysis to be conducted," and that the evidence not have been previously subjected to DNA testing. Finally, K.R.S. 422.285(7) expressly states that a circuit court can order "[e]limination samples from third parties."

K.R.S. 422.285 does not define "reasonable probability," but as it is a term of art used regularly to address ineffective assistance of counsel claims, it is thus presumably what the legislature looked to when deciding to use the term "reasonable probability." This Court should interpret it consistently with that use of reasonable probability. In that circumstance, it is less than a preponderance and satisfied when the DNA results would be sufficient to undermine confidence in the outcome. In making that determination of

[54] *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).

whether the reasonable probability standard is satisfied, the court must presume the DNA results would be favorable.

II. The federal substantive due process right to DNA testing.

The substantive due process clause of the Fourteenth Amendment "bars certain government actions regardless of the procedures used to implement them."[55] Substantive due process prevents state actors from engaging in conduct which "shocks the conscience."[56] It prohibits action which does not "comport with traditional ideas of fair play and decency."[57] In addition, where a fundamental right is involved, governmental action must withstand strict scrutiny; those wishing to uphold such action must establish that their actions are necessary to promote a compelling state interest.[58]

A death-sentenced inmate has a clear constitutional interest in his life, which is protected by the Due Process Clause of the Fourteenth Amendment. Five members of the United States Supreme Court have recognized this fundamental right. Writing for herself, Justice Souter, Justice Ginsburg, and Justice Breyer, Justice O'Connor stated: "a prisoner under sentence of death remains a living person and consequently has an interest in his life."[59] Justice Stevens agrees: "There is no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does...it is abundantly clear that [a living human being] possesses a life interest protected by the Due Process Clause."[60]

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[55] *Daniels v. Williams*, 474 U.S. 327, 332 (1986).
[56] *Rochin v. California*, 342 U.S. 165, 172 (1952).
[57] *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957).
[58] *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 775 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).
[59] *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1997).

There is no compelling state interest to be advanced by prohibiting DNA testing in this case. Indeed, there is no legitimate interest at all to justify a denial of DNA testing, when such evidence "could prove him absolutely innocent of the crime."[61] There is "patent arbitrariness [in] denying access to such evidence in absence of any governmental interest whatsoever in the withholding of such."[62] In other words, "it shocks the conscience" not to conduct DNA testing which could exonerate Bowling. Finding the truth and exonerating the innocent is in the interest of all involved. It does not "comport with traditional ideas of fair play and decency" to allow an execution to proceed when a simple test can establish the inmate's actual innocence.[63]

A death-sentenced inmate also has a substantive due process right to DNA testing to support his request for clemency: a process that is guaranteed by the Kentucky Constitution.[64] This right, however, is undermined if the inmate is denied access to the most important evidence for clemency purposes: evidence that could prove his innocence.[65] Thus, the withholding of evidence that could be tested for DNA and potentially exonerate an inmate, or at least cast substantial doubt on his guilt, violates substantive due process.

The United States Supreme Court has made it clear that, absent relief through the judicial process, executive clemency proceedings are the failsafe mechanism for preventing the continued incarceration or execution of the innocent.[66] Because clemency is employed in part to ensure the protection of the innocent, a death-sentenced inmate

[60] *Id.* at 291-92 (Stevens, J., dissenting).
[61] *Harvey v. Horan*, 285 F.3d 298, 320 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing).
[62] *Id.* at 319.
[63] *Breithaupt*, 352 U.S. at 435.
[64] Section 77 of the Kentucky Constitution.
[65] The most common reason for granting clemency to death-sentenced inmates is doubts about the inmate's guilt.

cannot be denied the ability to establish his innocence through the testing of the evidence at issue here. This fundamental truth has been clearly expressed by Judge Luttig, formerly of the United States Court of Appeals for the Fourth Circuit. As Judge Luttig explained:

> [C]lemency constituting the safety net of our criminal justice system for the prevention of miscarriages of justice, *see generally Herrera v. Collins*, 506 U.S. 390, 411-15, the non-capital prisoner retains (as does the capital prisoner, I believe), at least a residual, substantive liberty interests in meaningful access to existing mechanisms of executive clemency, which access would enable him to pursue his freedom from confinement from the executive based upon the claims that he is factually innocent of the crime for which he was convicted. *See id.* at 411-12 & n.13 (explaining that clemency is the 'historic mechanism' for obtaining relief based upon factual innocence). This interest exists, I believe, even if there is no independent liberty interest in these mechanisms themselves; in the particular processes by which the executive exercises his discretion to grant or deny clemency; or in the freedom that would result from favorable executive action obtained through these mechanisms....[67]

Judge Luttig's analysis makes eminent sense. The Constitution cannot, on one hand, require a prisoner to show actual innocence through proceedings for executive clemency, but on the other hand prohibit him from showing actual innocence at those proceedings. To give an innocent person an essentially meaningless remedy is not to provide any remedy at all. As Judge Luttig recognizes, substantive due process prohibits putting Bowling in such an unwinnable situation, which can only be described as arbitrary. Substantive due process prohibits such arbitrary action.

[66] *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993).

III. The procedural due process right to DNA testing.

The standard for determining what process is due requires application of the familiar *Mathews v. Eldridge* balancing test.[68] As the Supreme Court of the United States recently reaffirmed: "the requirements of due process are flexible and call for such procedural protections as the particular situation demands."[69] Thus, the Supreme Court has adopted a framework that requires the balancing of three separate factors:

> First the private interest that will be affected by official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedure safeguards; and finally, the Government's interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[70]

First, there is no question that a death-sentenced inmate's interest in life is of paramount value. There is no higher interest recognized by our Constitution and laws.

Second, there is a serious risk of erroneous deprivation of life if evidence is not released for testing, where the death-sentenced inmate may be innocent of the murder for which he has been sentenced to death. That risk of erroneous deprivation, however, will be eliminated as much as possible through the release of the evidence for DNA analysis. The "probable value" of allowing release of the evidence for testing is immeasurable: DNA analysis of forensic evidence has revolutionized the justice system. It has the ability to dictate with pinpoint accuracy the identity of a person who committed an offense. Release of evidence for testing has immeasurable value precisely because such process will provide the unquestioned accuracy necessary to make a determination whether the death-sentenced inmate's life will be wrongly extinguished in what the

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[67] *Harvey v. Horan*, 285 F.3d at 315 (Luttig, J.).
[68] 424 U.S. 319 (1976).
[69] *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005).

United States Supreme Court has declared would be a "quintessential miscarriage of justice."[71] All involved have an interest in ensuring the accuracy of a conviction and death sentence, and that interest will be manifestly served through the process requested - - DNA testing - - whose accuracy far exceeds any other process.

Third, there are no burdens on the government. Testing could be conducted expeditiously and then the evidence could be returned to the government. If the evidence is unfavorable, the government could proceed with the execution with little or no delay.

Therefore, the procedural due process clause entitles death-sentenced inmates to DNA testing when innocence is at stake. The right to life is paramount, the release of evidence for DNA testing is of exceptional value because it will provide the most accurate determination of guilt – or - innocence, and there is no burden on the government. "Concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[72] For that reason, under the *Mathews* test, there is only one conclusion to draw: a death-sentenced inmate is entitled to DNA testing because in the balance of interests, such test "is constitutionally required...as a matter of basic fairness."[73]

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[70] *Id., quoting, Mathews*, 424 U.S. at 335.
[71] *Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent.").
[72] *Schlup*, 513 U.S. at 325.
[73] *Harvey v. Horan*, 285 F.3d 298, 315 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing) (*citing Mathews v. Eldridge*).

IV. The due process right to DNA testing based on the right to exculpatory evidence.

The constitutional requirement that a defendant be provided with evidence that is exculpatory and material to the defense[74] applies to evidence discovered in post conviction.[75] Thus, even after conviction, where state actors have in their possession forensic evidence which, upon further inspection through DNA analysis, can provide material, exculpatory evidence, the Fourteenth Amendment demands that the evidence be turned over for DNA testing.[76] The Commonwealth cannot shield itself from the obligation to disclose such evidence by remaining willfully blind to the exculpatory nature of the evidence by preventing DNA testing. Accordingly, there is a Fourteenth Amendment right to DNA testing on the requested evidence that could exonerate a death-sentenced inmate, or at least, cast doubt on the Commonwealth's theory of the case.

V. The Eighth Amendment right to DNA testing.

The Eighth and Fourteenth Amendments, regardless of the verbal formula employed, categorically prohibit the execution of an innocent person as a "constitutionally intolerable event."[77] Thus, when evidence exists that could establish that an innocent person is about to be executed, the Eighth Amendment requires that the evidence be investigated. Here, that investigation is in the form of DNA testing. Thus, the Eighth Amendment grants the right to DNA testing that could establish his innocence

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[74] *United States v. Bagley*, 473 U.S. 667 (1985).

[75] *See, e.g., Royal v. Taylor*, 288 F.3d 239, 245-46 (4th Cir. 1999); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) (stating that the duty to disclose exculpatory evidence "extends to all stages of judicial process"); *Thomas v.Goldsmith*, 979 F.2d 747, 749-50 (9th Cir. 1992) (state under obligation to come forward with exculpatory evidence in its possession during habeas corpus proceedings).

[76] *Godschalk v. Montgomery County District Attorney's Office*, 177 F.Supp.2d 366, 368-70 (E.D.Pa. 2001); *Jenner v. Dooley*, 590 N.W.2d 463, 471 (S.D. 1999).

[77] *Herrera v. Collins*, 506 U.S. 390, 419 (O'Connor and Kennedy, JJ., concurring); *Id.* at 431-32 (Blackmun, Stevens, Souter, JJ., dissenting) (It is "crystal clear" that the execution of an innocent person

and prevent the constitutionally intolerable event of the execution of an innocent person.

VI. Kentucky courts have the inherent authority to grant DNA testing.

As this Court ruled in *Smothers v. Lewis,*[78] section 109 of the Kentucky Constitution authorizes a court to enter any order necessary to proper disposition of a case once a court has jurisdiction over the case. The circuit court where an inmate was convicted and sentenced to death, has authority over motions filed in that action, and this Court has appellate authority over all rulings by a circuit court in death penalty cases. By filing a motion under KRS 422.285, a death-sentenced inmate properly invokes the circuit court's authority. Thus, under section 109 of the Kentucky Constitution, the circuit court presiding over a K.R.S. 422.285 action has the authority to grant DNA testing in the interest of fairness and out of a concern about the correctness of the conviction and sentence, as does this Court on appeal of a K.R.S. 422.285 action. This authority exists regardless of KRS 422.285 and the federal Constitution.

ARGUMENT

I. Under K.R.S. 422.285 and the federal constitution, Bowling is entitled to DNA testing of the interior of the car that was linked to the murderer.

This issue is preserved for appeal. TR X 1406-1421, TR XI 1482-1491, TR XIII 1785-1793.

As explained below, Bowling satisfied the requirements under Kentucky and federal law to obtain DNA testing on the interior of the car. In addition, the circuit court erred by finding that any DNA results from the car could not be linked to the time period surrounding the crime without making any findings about, or even mentioning, an

violates the Eighth Amendment, because such action "is at odds with any standard of decency that I can imagine.").

[78] 672 S.W.2d 62, 64 (Ky. 1984).

unrefuted affidavit in the record saying one might be able to not only find DNA in the interior of the car but also link it to the time period surrounding the crime. Finally, the circuit court erred in failing to hold an evidentiary hearing and in failing to grant funds for expert assistance at an evidentiary hearing to resolve the factual issue of whether any DNA results obtained from the interior of the car could be linked to the time period surrounding the crime.

A. Bowling satisfies the criteria of KRS 422.285(2) and (3), and also of the federal constitution, for obtaining DNA testing on the interior of the car.

Bowling is entitled to have the evidence used against him at trial tested. His own car was the most important evidence used against him. It was what made him a suspect and the most damaging evidence at trial. At trial, Bowling argued that his car being linked to the murders did not mean Bowling committed the murders.[79] In other words, someone else could have borrowed his car. That someone else, as Bowling alleged in his DNA pleadings, could easily have been a member of the Adams family. DNA results showing someone else's DNA in the interior of the car would show that someone else had been in the car around the time of the crimes, and, if on the steering wheel, it would show someone else had driven the car. If that DNA turned out to belong to a member of the Adams family, it would provide substantial support to Bowling's argument that a member of the Adams family used Bowling's car to commit the murders. Thus, DNA testing on the interior of the car is appropriate to determine whether that evidence could exonerate him, or create a reasonable probability that he would not have been convicted or that he would have received a lesser sentence. It is also appropriate because another person's DNA in the driving compartment would be in and of itself exculpatory. It

would have suggested an alternative suspect and could have been used to refute the Commonwealth's arguments. The DNA of an Adams family member in the driver's compartment would have profoundly changed the calculus of the evidence in this case.

Whoever shot the Earleys drove Bowling's car. Just before the shooting, Bowling's car and the Earleys' car collided in the parking lot, leaving identifiable paint smears on both cars, as well as shattered headlight glass on the ground. That glass was identified as coming from Bowling's car. On the day of the murder, Bowling had been drinking heavily at John Ed Adams' house and had fallen asleep. Given that Bowling was staying with John Ed at the time, It is plausible that one of the Adams borrowed Bowling's car and committed the murders.

Of note, is a police report in the record. John Ed Adams told the police that Bowling never let anyone else drive his car.[80] If that is true, DNA testing of the driver's compartment will only yield inculpatory results. However, John Ed Adams could have easily been gilding the lily of the Commonwealth's case. Interestingly, in the same statement to the police, John Ed claimed to not know where Bowling got his gun.[81] However, Clay Brackett, an underground gun dealer, testified at the trial that it was John Ed who introduced Bowling to him.[82] Thus, a fair reading of the police report, is that John Ed, a person with a motive for the killings, because his son had been informed upon by Eddie Earley, was affirmatively distancing himself from both the car and the gun.

DNA testing could prove or disprove all of this. Of course, Bowling's DNA should be on his own car. However, if someone else's DNA is also present, it would

[79] VR: Tape 7; 7/14/90; 9:07:40.
[80] TR Vol. VII at 1055.
[81] *Id.*
[82] VR: Tape 6; 12/13/90; 8:53:00 ("Adams said, 'here is the guy who wants to buy a gun from you.'").

indicate that someone else, such as one of the Adams, drove the car shortly before the murders. Thus, DNA testing should be granted on the driver's side compartment of the car (steering wheel, front seat, gears, window, door) because results showing someone else's DNA would have undermined the Commonwealth's theory that Bowling was the driver of the car and thus satisfies the requirements of K.R.S. 422.285.

KRS 422.285(2) states that DNA testing "shall" be ordered if "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing." If the car had been tested and the DNA of one of the Adams had been found, Bowling's contention that someone took his car would have received more credence. Favorable DNA results obtained from the car would support the theory that someone borrowed his car and set him up. If the car had been linked to someone else, there is a reasonable probability that Bowling would not have been prosecuted or convicted. This is particularly so in light of the fact that a member of the Adams family was an original suspect in this case.[83]

Similarly, under KRS 422.285(3), DNA testing is permissible if "a reasonable probability exists that either the petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis has been available at the trial leading to the judgment of conviction; or DNA testing and analysis will produce exculpatory evidence." Here, for the reasons just given, that test is met.

Finally, for the constitutional reasons discussed in the section laying out the federal constitutional basis for DNA testing, the discussion above demonstrates that the federal constitution entitles Bowling to DNA testing of the interior of the car.

B. The circuit court erred when it found that DNA found in the interior of the car could not be linked to the time period of the crime, despite undisputed evidence that it could be linked to that time period.

Bowling provided the circuit court with expert evidence that detailed the efficacy of testing the car.[84] Five forensic scientists found that testing of the car was a practical and worthwhile pursuit under the circumstances of Bowling's case, and that DNA could be found on the interior of the car.[85] Being that the car was towed to the police impound lot,[86] any DNA found in the car would almost certainly have gotten into the car before the car was impounded. As expert Norah Rudin said in the affidavit she provided to the circuit court, "even if standard STR testing should fail, more sensitive systems such as Y-STR testing (specifically tests only the Y-chromosome found in males) or even mitochondrial DNA (mtDNA) testing *might be able to provide at least some information about persons who had the most recent contact with surfaces in the driver's areas of the car. It is entirely possible that probative, possible exculpatory evidence could be recovered from the vehicle in question in this case.*"[87] In light of this affidavit, which was neither impugned nor contradicted, the circuit court erred - - particularly with making any findings concerning the affidavit - - in holding "there would be no credible proof to establish the age of the DNA."[88]

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[83] *See*, TR VII at 943; TR Vol. XIV at 2094.
[84] TR Vol. XI at 1495, 1504-5, 1518, 1530, 1538.
[85] *Id.*
[86] TR Vol. X at 1474.
[87] TR Vol. XI at 1495-96 (emphasis added).
[88] TR Vol. XV at 2092-93.

C. The circuit court erred in deciding that any DNA evidence could not be linked to the time period of the crime without first holding an evidentiary hearing and without provided Bowling with funds to retain an expert to testify at the evidentiary hearing.

An evidentiary hearing is not necessary when there is no factual dispute or when a party cannot prevail as a matter of law regardless of how the factual issues are resolved. That, however, is not the situation here. As stated above, Bowling provided an affidavit saying that one might be able to link any DNA found in the interior of the car to the time period surrounding the crime. No counter-affidavit or testimony refuting it was presented. Thus, while the affidavit was sufficient to rule in Bowling's favor that DNA found in the car could be linked to the crime, without additional evidence, the court could not reach the opposite conclusion as it did.

"A[n evidentiary] hearing is required if there is a material issue of fact that cannot be conclusively resolved, *i.e.*, conclusively proved or disproved, by an examination of the record."[89] That could not be done unless the circuit court was ruling in Bowling's favor. It did not. Thus, an evidentiary hearing was necessary.[90]

At that hearing, Bowling is entitled to funds for expert assistance. Aside from the fact that the scientific nature of the issue before the circuit court should mean Bowling should be entitled to funds for expert assistance to get beyond the threshold issue of whether DNA found in the car could be linked to the time period of the crime, Kentucky law entitles post-conviction litigants to funds for expert services when an evidentiary hearing is to be held and the expert's assistance is reasonably necessary.[91] Undoubtedly, testimony from a DNA expert would be reasonably necessary at an evidentiary hearing

[89] *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).
[90] *Stanford v. Commonwealth*, 854 S.W.2d 742, 744 (Ky. 1993) ("This Court would emphasize that trial courts generally should hold such hearings to determine material issues of fact presented.").

on whether DNA found in a car impounded for sixteen years could be linked to the crime of the crime. Thus, Bowling was also entitled to funds for expert assistance before the circuit court could deny Bowling's claim on the basis that the DNA in the car could not be linked to the time period of the crime.

For these reasons, the circuit court erred in holding that any DNA found in the car could not be linked to the time frame of the crime: 1) in light of the unrefuted affidavit to the contrary; and, 2) without first holding an evidentiary hearing on the issue and without providing Bowling with funds for expert assistance at the evidentiary hearing.

II. The circuit court ruling that Bowling satisfied the reasonable probability standard for obtaining DNA testing on the jacket means Bowling was entitled to have his DNA compared to that on the jacket and, if necessary, to already identified alternative suspects. That more than one person's DNA was found on the jacket does not change that, particularly without first holding an evidentiary hearing on whether a person's DNA could be identified from a "mixed" profile.

This issue was preserved for appeal. TR XIV 1987-2001.

Bowling has maintained that he was told to get his car of the county. If this was the case, then it would seem logical that the murderer's clothing, such as the black jacket, would also have been sent away with the car. The black jacket tested positive for gunshot residue and a witness testified that the killer was wearing a black jacket, but that only connects it with the crime, not directly with Bowling. Bowling's sister, Pat Gentry, was asked by the prosecution during trial to identify the jacket as Bowling's. She did the exact opposite, stating that she never saw the jacket before and that Bowling's jacket was larger, with some kind of collar and an emblem on it.[92] Thus, while the jacket may be linked to the murders, there is substantial doubt as to whether the jacket belonged to

[91] *Mills v. Messer*, 268 S.W.3d 366 (Ky. 2008).
[92] VR: Tape 6; 12/12/90; 16:25:30 – 16:26:35.

Bowling and as to whether someone else wore the jacket. DNA testing would resolve this. And if DNA test results came back positive for someone else's DNA, that would raise substantial questions about whether another person committed the murder. Based on these arguments, the circuit court found that the reasonable probability standard under K.R.S. 422.285 for DNA testing on the jacket had been satisfied. As a result, she authorized DNA testing on the collar and underarm of the jacket. DNA testing under K.R.S. 422.285 includes comparing any DNA results on the crime scene evidence to that of the person convicted of the offense. Thus, the circuit court erred in stopping the testing once the jacket showed that more than one person's DNA was on it.

As this Court recognized, in *Taylor v. Commonwealth*,[93] DNA testing under K.R.S. 422.285 is a four step process. "First samples from a known or unknown source are isolated. Second, testing is conducted on each sample. Third, the DNA type is determined by analyzing particular regions of each sample's DNA. Finally, the results are compared between samples to verify whether the samples originated from a common source. After the testing process one of three results will be reached: that the samples originated from a common donor, that the samples do not originate from a common donor, or that the test is inconclusive."[94]

Here, despite the obtaining of DNA results, this case never proceeded to the comparison stage of DNA testing - - where a known sample is obtained from the condemned inmate and compared to that from the evidence (unknown sample) in an attempt to eliminate Bowling as the source of the DNA - - which is the sole purpose of DNA testing under K.R.S. 422.285. That comparing the death-sentenced inmate's DNA

[93] 175 S.W. 3d at 76.
[94] *Id.*

to that found on the crime-related evidence is such a basic part of DNA testing under K.R.S. 422.285 that it is certainly an expected component of any DNA testing authorized under K.R.S. 422.285. That is true even where more than one person's DNA is on the crime scene evidence.

At its simplest terms, the number of people's DNA on a piece of evidence does not mean a person cannot be excluded as the source of the DNA. A DNA profile is comprised of genetic information on thirteen loci. To find that a person's DNA profile is consistent with the unknown sample, the profile of both the known and unknown sample must match on all thirteen loci. If not, the person's DNA profile (in this case, Bowling) is excluded. "When the results obtained from the standard sample from a known individual are not all present in the results from the unknown crime scene sample, the results are considered an exclusion. With limited exceptions, an exclusion of an individual at any one genetic region eliminates that individual as a source of the DNA found in the sample."[95] Thus, if Bowling's DNA profile does not match any one of the thirteen loci of the DNA on the jacket, his DNA is not on the jacket. That would strongly suggest that Bowling did not wear the jacket that the prosecution introduced at trial as clothing worn by the killer when committing the murders. As a result, such findings would create a reasonable probability of a different outcome or at least constitute exculpatory evidence in the sense that it would be evidence that someone else wore the clothing and committed the murders, requiring vacation of Bowling's convictions and/or death sentences. And, such a finding could be made even though more than one person's DNA is on the evidence.

[95] *Post Conviction DNA Testing: Recommendations for Handling Requests*, National Institute of Justice (1999) at 29.

Similarly, Bowling's DNA being on the jacket does not automatically link him to the murders, as other people's DNA - - possibly that of the alternative suspect - - may also be on the jacket. The alternative suspect is a member of the Adams' family, not some unknown hypothetical person. Thus, the issue with regard to the jacket is not generally whose DNA is on the jacket but instead whether: 1) Bowling's DNA is on the jacket; and, 2) whether a member of the Adams family's DNA is on the jacket. Because this case involves searching for DNA of particular individuals, as opposed to any DNA belonging to anyone other than Bowling, the fact that more than one person's DNA is on the jacket does not mean that the purpose on which DNA on the jacket was granted cannot still be satisfied. Regardless of whether one person's or a hundred person's DNA had been on the jacket, it remains scientifically possible to attempt to exclude Bowling and to determine if the DNA is consistent with that of a member of the Adams family. In fact, Norah Rudin's affidavit concerning the car would apply here. In her affidavit, she said that DNA testing might be able to provide information about persons who had the most recent contact with portions of the car. By using the phrase persons, she recognized that DNA from more than one person could be found in the car, but still opined that a forensic DNA specialist might be able to determine whose DNA was or was not in the car. The same science would hold true for the jacket. Thus, Rudin's affidavit itself supports Bowling's argument that the purpose on which DNA testing had been granted on the jacket can served even though DNA from two people were found on the jacket.

Despite this, the circuit court concluded, without hearing any testimony, that two peoples DNA being found on the jacket automatically meant the jacket was too contaminated to test any further, including any attempt to exclude Bowling's DNA from that found on the jacket. It does nothing of the sort.

DNA from two people is exactly what might be anticipated in this case. At trial, the Commonwealth established that the jacket was transported by Bowling to Powell County and subsequently to Tennessee. Thus, one might anticipate that Bowling's DNA is on the jacket. And, if someone else wore the jacket to commit the crime, that person's DNA would also be on the jacket. As a result, the current results are in line with Bowling's allegations, and the continuation of the testing could show that some of the DNA on the jacket belongs to the person Bowling alleges committed the murders.

Failing to recognize this and the limited scope of the comparison testing Bowling sought from the outset of this DNA action, the circuit court noted the possibility that clerks, jurors, and other individuals could have touched the jacket. That, however, is irrelevant because Bowling identified particular people's DNA whom he was looking for on the jacket. There would be no need to take elimination samples from clerks, jurors, or the like. The issue is much more refined.

Bowling's DNA and that of a member of the Adams family is what Bowling has been looking for and what the circuit court originally thought could be the result when it authorized DNA testing. Thus, elimination testing by comparing the DNA found on the jacket to that of Bowling, and if necessary, to members of the Adams family is all that remains left as far as testing and all that would likely be necessary in this case. It is part of the process of DNA testing that this Court mentioned and *Taylor* and remains part of

that testing process. It should have been allowed to take place, after which the circuit court could have analyzed the results and determined what, if any, relief was demanded by the outcome of the DNA results.

At a minimum, the circuit court erred in concluding, without any expert testimony to support it, that more than one person's DNA on the jacket automatically meant it was contaminated and that, as a result, DNA testing should stop before the DNA on the jacket was even compared to Bowling's DNA - - a necessary step for any DNA testing to be meaningful. In Bowling's motion concerning comparing the DNA results found on the jacket to that of Bowling, he expressly asked the circuit court to grant him an evidentiary hearing and provide funds for expert assistance, if it was inclined to find that more than one person's DNA being on the jacket posed a potential problem to continuing the DNA testing. The circuit court declined to do so. Instead, it dismissed Bowling's DNA action.

Norah Rudin's affidavit alone provides sufficient factual basis to prevent the circuit court from having concluded that no factual issue was in dispute concerning whether, when more than one person's DNA is on an item, Bowling could be eliminated as a source of the DNA or whether the DNA on the item could be found consistent with that of a member of the Adams family. But, at a minimum, the record before the circuit court, which did not contain any testimony on the issue and for which Bowling disputed the Commonwealth's argument, did not refute Bowling's allegation that reliable DNA results that could exclude Bowling or include a member of the Adams family could still be obtained. Thus, Bowling was at least entitled to an evidentiary hearing with funds to retain the assistance of a DNA expert before the circuit court could have reached its conclusion to stop testing of the jacket. That the court stopped DNA testing of the jacket

and did not provide Bowling with the necessary resources and an evidentiary hearing requires this Court to reverse the circuit court and remand for further DNA testing on the jacket or at least an evidentiary hearing on whether further testing should take place.

CONCLUSION

Bowling has satisfied the requirements for DNA testing on the interior of the car. Thus, this Court should reverse the circuit court and authorize DNA testing on the interior of the car linked to the murders for which Bowling was sentenced to death. Similarly, the grant of DNA testing on the jacket allegedly worn by the killer automatically includes comparing the DNA found on the jacket to that of Bowling, and, if necessary, to the limited number of alternative suspects Bowling identified to the circuit court. At a minimum, the fact that two people's DNA was found on the jacket, as opposed to one person's DNA, is insufficient to stop the DNA testing or to conclude that the jacket was too contaminated to allow DNA testing to proceed to its natural conclusion. Thus, this Court should also reverse the circuit court and order that DNA testing on the jacket be allowed to continue.

In the alternative, this Court should hold that factual issues concerning the viability of linking any DNA found in the car to the time period of the crime and concerning whether the jacket is too contaminated for a continuation of the DNA testing are in dispute, and thus remand for an evidentiary hearing on those issues at which Bowling would be entitled to funding for expert assistance.

Respectfully Submitted,

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