SUPREME COURT OF KENTUCKY
NO. 2008-SC-000901

THOMAS CLYDE BOWLING — APPELLANT

VS. — Appeal from Fayette Circuit Court
Honorable Kimberly N. Bunnell, Judge
No. 90-CR-00363

COMMONWEALTH OF KENTUCKY — APPELLEE

APPELLANT THOMAS CLYDE BOWLING'S REPLY BRIEF

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CERTIFICATE OF SERVICE:

I hereby certify that a true copy of this Reply Brief for Appellant Thomas Clyde Bowling 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, and by messenger mail to Wm. Robert Long, Jr. Asst. Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on December 21, 2009. I hereby further certify that the record on appeal was checked out in preparing this reply brief.

COUNSEL FOR THOMAS CLYDE BOWLING

Purpose of reply brief

Thomas Clyde Bowling files this reply brief to explain that: 1) the United States Supreme Court has not rejected the argument that the Eighth Amendment provides the right to DNA testing in capital cases; 2) Kentucky's post conviction DNA statutes, as applied in Bowling's case, violate the federal Due Process Clause; 3) the Commonwealth conceded that DNA testing would be appropriate if it could place someone else as the driver of the car linked to the murder, and the uncontested evidence presented to the circuit court establishes that DNA testing could do this; 4) a person can be excluded as the source of DNA on an item even when only a partial mixed DNA profile was found on the item; 5) the significance of excluding Bowling as the source of the DNA on the jacket or at least showing that the amount of his DNA on the jacket is extremely limited; and, 6) why Bowling is entitled to an evidentiary hearing and funding for expert witnesses before the circuit court could conclude that any DNA results from the car could not be linked to the time frame of the crime and that a partial mixed DNA profile meant that the jacket was so "contaminated" that no reliable DNA results could be obtained.

Statement of points and authorities

Federal and state legal basis for DNA testing

A. *Osborne* did not resolve whether there is an Eighth Amendment right to DNA testing in capital cases, and Kentucky's post conviction DNA law, as applied in Bowling's case, violates procedural due process.

The Commonwealth argues that the United States Supreme Court's decision in *Dist. Attorney's Office for the Third Jud. Cir. v. Osborne*[1] rejected the Eighth Amendment right to DNA testing in capital cases.[2] *Osborne*, however, was not a death penalty case and did not address the Eighth Amendment prohibition against executing an innocent person, which the Supreme Court recently recognized in *In re Davis*.[3] Thus, although *Osborne* rejects the right to access evidence for DNA testing in non-capital cases, it does not address DNA testing in capital cases – leaving the issue open.

Osborne held that a state's post conviction DNA statutes can violate the federal Due Process Clause as written or as applied when it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental or transgresses any recognized principle of fundamental fairness in operation."[4] The Commonwealth ignores Bowling's argument that Kentucky's DNA law did that in Bowling's case by failing to allow testing to determine if Bowling's DNA is on the evidence. Upholding the circuit court's order would also violate due process because Bowling was not granted an evidentiary hearing and was not provided with his constitutional right to funds for expert assistance to refute the Commonwealth's arguments that would be presented at an evidentiary hearing.

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[1] 129 S.Ct. 2308 (2009).
[2] Commonwealth's Brief at 47.
[3] 130 S.Ct. 1, 1-2 (2009) (Stevens, J. concurring) (noting that "decisions of this Court clearly support the proposition that it would be an atrocious violation of our Constitution and the principles upon which it is based to execute an innocent person," and noting that the majority rejects the argument that the Constitution allows an innocent person to be put to death) (internal quotations omitted).

B. Texas's DNA law is materially different from Kentucky's DNA law. Thus, this Court should not adopt Texas's definition of "reasonable probability."

The Commonwealth urges this Court to adopt Texas's narrow definition of "reasonable probability" under a statute authorizing DNA testing only if the results would prove innocence.[5] Texas has chosen to limit DNA testing to where a showing has been made that the defendant *would not be convicted* if the results had been available at trial.[6] Thus, the "reasonable probability" definition used in Texas is a creation of its narrow DNA statute limited to cases of actual innocence. Kentucky's legislature decided to adopt a much less restrictive DNA statute – it allows DNA testing not just when the evidence can show the defendant would have been acquitted, but also where it might have impacted what the defendant was convicted of or the sentence imposed, or when it could serve as exculpatory evidence.[7] In other words, the legislature chose to not limit DNA testing to where the evidence could, to a reasonable probability, prove the inmate innocent, thereby making Texas's DNA statute and interpretations of it inapplicable to anything in this case. Thus, this Court should rule that "reasonable probability" in this context means the same as in the ineffective assistance of counsel context.

Argument

I. Bowling is entitled to DNA testing of the car interior linked to the murders.

The Commonwealth concedes that Bowling would be entitled to DNA testing if the testing "could place someone else as the driver of the car at the time of the murders."[8]

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[4] *Osborne*, 129 S.Ct. at 2320, *quoting*, *Medina v. California*, 505 U.S. 437, 446, 448 (1992).
[5] *Commonwealth's Brief* at 13.
[6] Tex. Code Crim. P. Art. 64.03(a)(1)(B), (2)(A).
[7] KRS 422.285(2)(a), (3)(a)(1), (3)(a)(2).
[8] *Commonwealth's Brief* at 15 ("Bowling attempts to meet [the burden for obtaining DNA testing] by arguing that the outcome of his trial would have been different if DNA testing on the car could determine

Expert affidavits filed in the circuit court and cited in Bowling's appellate brief establish that DNA testing of the car could do that. Five forensic scientists, including Norah Rudin, found that DNA testing of the car was both practical and worthwhile under the circumstances of Bowling's case. Rudin opined that "[w]hile it is expected that DNA from Mr. Bowling would be present in a car which he owned and habitually drove, it is also possible that another person who drove the car could have left DNA. That DNA could potentially be detectable, especially if that person drove the car immediately prior to impound. The most likely place to find such DNA would be for example, the steering wheel, inside and outside door handles, and the gear shift. . . . Even a partial or mixed profile could provide probative information."[9] She continued, by noting that DNA testing "might be able to provide at least some information about persons who had the most recent contact with surfaces in the driver's area of the car."[10] She then concluded that "[i]t is entirely possible that probative, possible exculpatory evidence could be removed from the vehicle in this case."[11] Once this affidavit was filed, the Commonwealth failed to introduce any expert testimony or counter-affidavit refuting it. Thus, the only evidence before the circuit court established one could ascertain the proximity of any DNA found in the car to the time of the crime. Thus, the circuit court erred in concluding "there was no credible proof to establish the age of the DNA,"[12] without making any findings on Rudin's affidavit and without citing to anything contradicting the statements in Rudin's affidavit.

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that someone else was driving the car. This assertion would appear to have merit only if one assumes DNA testing could in fact place someone else as the driver of the car at the time of the murders.").

[9] TR, Vol. XI at 1495; exhibit 5 to Bowling's merits brief.

[10] *Id.*

[11] *Id.* at 1496.

[12] TR, Vol. XV at 2092-93.

Curiously, the Commonwealth completely ignores Rudin's affidavit. Rather than address it, the Commonwealth asserts, without any affidavits or citations to authority, that DNA testing on the car "would prove only that someone besides Bowling was in that car at some unknown time in the past."[13] This conclusion is refuted by Rudin's affidavit. Thus, this Court is left with uncontested expert opinion that DNA testing on the car could yield DNA results that could be linked to the driver of the car around the time of the crime. Accordingly, DNA testing on the interior of the car should have been authorized.

At a minimum, Rudin's affidavit establishes a disputed issue of fact that cannot be resolved on the record, namely whether DNA found in the interior of the car could be linked to the time period of the crime. Thus, Bowling was at least entitled to an evidentiary hearing.[14] Bowling would have then been entitled to funds for Norah Rudin or another expert to testify on his behalf.[15] The circuit court, however, ruled on this matter before this Court overruled *Stopher v. Conliffe*,[16] which had held that funds for expert assistance are not available in post conviction matters. Because Bowling's DNA case has not been decided on appeal before *Stopher* was overruled, at a minimum, this Court should remand this case to the circuit court for an evidentiary hearing on whether DNA found in the interior of the car could be linked to the time period of the crime and for rulings on the reasonable necessity of funds for experts at the evidentiary hearing.

The Commonwealth presents two additional arguments as to why this Court should affirm the circuit court's ruling and should not remand for an evidentiary hearing: 1) Bowling has not established that the car is in a condition that allows DNA testing and

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[13] *Commonwealth's Brief* at 15.
[14] *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001).
[15] *Mills v. Messer*, 268 S.W.3d 366, 367 (Ky. 2008).

analysis to be completed;[17] and, 2) Bowling presented no evidence to support his theory that someone else committed the murders.[18] Neither of these arguments is properly before this Court and both are refuted by the record.

The Commonwealth alleges the circuit court "found it unlikely that any DNA evidence would still be in existence or that such evidence would be in a condition that would allow DNA testing and analysis to be completed."[19] That is incorrect. After Bowling presented five affidavits from DNA experts opining that reliable DNA results could be obtained from a car exposed to extreme heat, cold, and other weather conditions for more than eighteen years, the Commonwealth conceded the issue. The circuit court even noted that in its order denying DNA testing on the interior of the car. After explaining DNA testing would be denied on the car because "there is no credible proof to establish the age of the DNA,"[20] the circuit court noted that "*[b]y agreement of the parties*, there will not be a hearing to determine whether viable DNA evidence can be obtained from a car 16 years after a crime. The results of the DNA testing should address that."[21] By agreeing to this, the Commonwealth waived the right to ague on appeal that DNA testing should not be allowed because Bowling failed to establish that reliable DNA results could be obtained from a car exposed to weather elements for over eighteen years.

Likewise, the Commonwealth's failure to cross-appeal the circuit court's ruling denying DNA testing on the car, but granting DNA testing on other items, waives any argument that DNA should have been denied because Bowling did not establish that

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[16] 170 S.W.3d 307 (Ky. 2005).
[17] *Commonwealth's Brief* at 19-20.
[18] *Id.* at 16-18.
[19] *Id.* at 19.
[20] TR, Vol. XIII at 1864.
[21] *Id.* at 1865 (emphasis added).

reliable DNA testing could be found in the car and because no evidence exists supporting the theory that another person committed the murders. Under this Court's recent decision in *Leonard v. Commonwealth*, a party who ultimately prevails in a case must still file a cross-appeal for this Court to have jurisdiction over an issue decided adversely to the prevailing party.[22] The circuit court denied DNA testing on the car solely because the court did not believe any DNA results could link DNA found in the car to the time of the crime.[23] In the same order, the circuit court granted DNA testing on other items.[24] Bowling's only argument to the circuit court in favor of DNA testing was that someone else, such as a member of the Adams' family, committed the murders. Thus, to conclude that the reasonable probability standard for granting DNA testing was satisfied, as the circuit court did by granting DNA testing on some items, the circuit court must have accepted Bowling's argument that someone else may have committed the murders and that evidence he presented (or at least argued) supported that theory. Shortly after DNA testing was granted, the Commonwealth attempted to appeal to this Court,[25] thereby recognizing the need to do so in order to preserve these issues for appellate review. This Court, however, dismissed the appeal as being taken from a non-final decision.[26] The Commonwealth never filed a cross-appeal when this case properly arrived before this Court. Thus, the Commonwealth's current arguments that Bowling did not establish that reliable DNA results could be obtained from the car and that no evidence suggests someone else may have committed the murders is not properly before this Court.

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[22] *Leonard v. Commonwealth*, 279 S.W.3d 151, 161, n. 6 (Ky. 2009) (refusing to address an issue the Commonwealth raised on appeal that the circuit court decided adversely to the Commonwealth but for which the Commonwealth never cross-appealed).
[23] TR, Vol. XIII at 1863-65.
[24] *Id.*
[25] TR, Vol. XIII at 1875.

Finally, even if the Commonwealth properly preserved these issues for appeal, they should be denied. Bowling presented five affidavits from DNA experts opining that reliable DNA results could be obtained from a car exposed to the weather elements to which the car had been exposed for over eighteen years. One of those affidavits noted that the article cited in the Commonwealth's affidavit from Marci Adkins, which is the only evidence the Commonwealth relies upon or even cites to this Court,[27] "is out of date and entirely irrelevant to current STR typing systems. It is misleading to suggest that the limitations of RFLP testing inform us about the capabilities of PCR-based STR typing systems."[28] Thus, the overwhelming weight of the evidence presented to the circuit court establishes that, as the Commonwealth conceded in the circuit court by agreeing that the court need not resolve the issue, reliable DNA results could be obtained from the car.

Likewise, a wealth of evidence suggesting someone else could have committed the murders exists and was presented to the circuit court, including the following: 1) Bowling was not the original suspect in the case; 2) there was no evidence at the trial that Bowling knew the victims; 3) Bowling never confessed; 4) the gun presented at trial was no more likely than hundreds of thousands of other guns to have fired the bullets that killed two people; 5) neither witness to the murders could identify Bowling, and one of them identified someone who did not look like Bowling; 6) a witness testified at trial that the jacket the Commonwealth attempted to link to the killer was not Bowling's jacket; 7) the prosecutor presented no motive for Bowling to commit the murders, while it was known that others had a motive to kill the victims; 8) Bowling was linked to the murders

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[26] *Id.* at Vol. XIV at 1958.
[27] *Commonwealth's Brief* at 19.
[28] TR, Vol. XI at 1495; exhibit 5 to Bowling's merits brief.

solely because his car had been identified as being in the parking lot at the time of the murders.[29] The circuit court did not abuse its discretion in ruling that all of this information is sufficient support for the conclusion that someone else may have committed the murders. In fact, the Commonwealth does not even directly argue that the circuit court abused its discretion in this regard. Thus, the circuit court did not err in holding that reliable DNA results could be obtained from the car and that sufficient information had been presented supporting the theory that someone else committed the murder. The circuit court, however, did err in holding that DNA testing could not establish the age of any DNA found in the car and in making this ruling without first holding an evidentiary hearing and providing Bowling with funds to retain an expert to testify at the evidentiary hearing. In light of the evidence presented to the circuit court, including the unrebutted affidavit of Norah Rudin, this Court should hold that Bowling is entitled to DNA testing on the interior of the car. In the alternative, this Court should remand this case for an evidentiary hearing on the matter.

II. Bowling is entitled to have his DNA compared to the mixed DNA profile found on the jacket to see if Bowling could be excluded as a source of the DNA found on the jacket.

The Commonwealth argues, and the circuit court below ruled, that the fact that more than one person's DNA is on an item of evidence means the evidence was contaminated by contact with numerous people before and during trial.[30] This argument would mean that DNA testing has value only when a single DNA profile is found on the item of evidence. In support of this argument, the Commonwealth cited a chapter from a book saying "contamination possibly might only rarely impact a careful forensic DNA

[29] *Bowling's merits brief* at 1-2.

laboratory."[31] In other words, "contamination" should only matter here if the State Crime Lab is not "careful" or adequately qualified to perform DNA testing. Norah Rudin's affidavit concerning the car, which neither the circuit court nor the Commonwealth addressed with regard to mixed DNA profiles, confirms this. In that affidavit, Rudin opines that "[e]ven a partial or mixed profile could provide probative information."[32] Thus, the fact that the DNA profile obtained from the jacket was a mixed profile does not automatically mean the profile was contaminated or that it is of no value.

Even if the fact that only a mixed DNA profile was obtained from the jacket generally made a difference, it would not matter with regard to potentially excluding Bowling as the source of the DNA on the jacket. If Bowling's DNA profile does not match any of the loci on which DNA results were obtained from the jacket, Bowling is not the source of the DNA on the jacket. Thus, even with a partial mixed DNA profile, Bowling can still be excluded as the source of the DNA. This would be of great importance. As explained to the circuit court and as noted in his brief to this Court, Bowling's sister testified at trial that she had not seen the jacket before and that the jacket did not belong to Bowling.[33] Thus, the jacket in evidence may not be the one Bowling was allegedly to seen to have worn or the one worn by the killer. And, if it was the one worn by the killer, it still may have never been worn by Bowling and thus would not have his DNA on it, or at least would have such a low concentration of Bowling's DNA on it that an expert could opine that Bowling likely did not wear the jacket. If so, this would undermine a crucial aspect of the Commonwealth's case – the jacket the Commonwealth

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[30] *Commonwealth's Brief* at 20.
[31] *Id.* at 23.
[32] TR, Vol. XI at 1495 (exhibit 5 to Bowling's merits brief).

uncovered was the one the killer was seen to have been wearing when committing the murders.

As this shows, the fact that the DNA profile from the jacket was a partial mixed profile does not mean Bowling's DNA should not be compared to the DNA profile found on the jacket to see if Bowling can be excluded as a source of the DNA or to see if the concentration of Bowling's DNA is so low that it is unlikely that he wore the jacket. At an absolute minimum, in light of Rudin's affidavit and Bowling's assertions calling into question the affidavit submitted by the Commonwealth and the reliability of the out-dated resource cited in that affidavit, Bowling was entitled to an evidentiary hearing on the matter and funds for expert assistance at the evidentiary hearing. Thus, this Court should rule that Bowling is entitled to have his DNA compared to that found on the jacket. In the alternative, this Court should remand this case for an evidentiary hearing on whether comparing Bowling's DNA to the partial mixed profile from the jacket could exclude Bowling as a source of the DNA or otherwise provide reliable DNA results that could suggest Bowling did not wear the jacket in question.

RESPECTFULLY SUBMITTED,

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[33] *Bowling's merits brief* at 1.