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Commonwealth of Kentucky
Supreme Court
No. 2008-SC-000901-MR

THOMAS CLYDE BOWLING — **APPELLANT**

v.

Appeal from Fayette Circuit Court
Hon. Kimberly N. Bunnell, Judge
Indictment No. 90-CR-00363

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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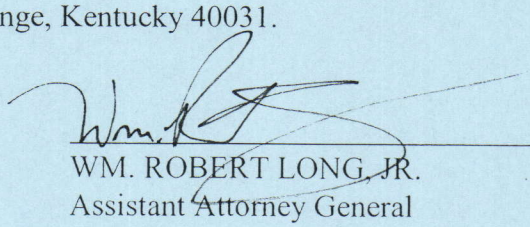
CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been mailed this 13th day of November, 2009, to Hon. Kimberly N. Bunnell, Judge, Fayette Circuit Court, 120 North Limestone Street, Lexington, Kentucky 40507; sent via electronic mail to Honorable Ray Larson, Commonwealth's Attorney, 116 North Upper Street, Suite 300, Lexington, Kentucky 40507; via messenger mail to Honorable David Barron, Assistant Public Advocates, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; and via first class mail to Hon. David H. Harshaw, III, Assistant Public Advocate, 207 Parker Drive, Suite 1; LaGrange, Kentucky 40031.



WM. ROBERT LONG, JR.
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INTRODUCTION

The Commonwealth responds to the direct appeal of Thomas Clyde Bowling taken from the Fayette Circuit Court's orders denying DNA testing on the interior of appellant's car and refusing to order DNA comparison testing of the mixed DNA sample obtained from appellant's jacket.

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary in this appeal because the issues are sufficiently addressed in the parties' briefs.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The facts and trial evidence underlying appellant's convictions have been summarized many times by many courts. *See* Bowling v. Commonwealth, 873 S.W.2d 175, 176-77 (Ky. 1993); Bowling v. Parker, 138 F.Supp.2d 821, 834-839 (E.D.Ky. 2001). The United States Court of Appeals for the Sixth Circuit, when affirming the denial of appellant's petition for habeas corpus, summarized the relevant facts underlying appellant's convictions as follows:

> **A. Factual Background**
>
> Early in the morning on April 9, 1990, Eddie and Tina Earley were shot to death in their automobile in a parking lot outside a Lexington dry-cleaning establishment. Their two-year-old son Christopher was also shot, but not fatally. Police arriving at the scene found several witnesses offering varied observations of the shooter, collected several bullets from inside and outside the vehicle, and recovered debris consistent with a car collision. After analyzing the debris, the police determined that the Earleys' car must have been hit by a 1981 light blue Chevrolet Malibu. They also determined that a 1981 Malibu was registered in the county to Bowling. The police, however, did not seek to arrest Bowling at that point; instead they pursued several theories of who could have murdered the Earleys.
>
> On the following day, April 10, 1990, police received a telephone call from Bowling's sister, Patricia Gentry. Gentry and her mother, Iva Lee Bowling, were worried because they had not seen Bowling, who was affectionately known as T.C., since approximately 6:00 a.m. the preceding day. Watching the news reports, they realized that Bowling's car matched the description of the suspected killer's car. Searching for Bowling, the two women drove to property owned by the family in rural Powell County. There they discovered Bowling's car. Bowling, however, was not there. When they returned to Gentry's Knoxville home, they

discovered Bowling asleep on the couch. After consulting with their minister, they called the police, who came and picked Bowling up without incident. The police then recovered Bowling's car from the Powell County property, where they also discovered a buried .357-magnum revolver.

Bowling was represented at trial by three attorneys: Baldani, Summers, and Richardson. Prior to trial, these attorneys had Bowling undergo a neurological and psychological evaluation by Dr. Donald Beal.

The Trial

On December 10, 1990, the trial began. The court's stated goal in voir dire was to qualify forty-four of the ninety-nine summoned jurors. Qualifying forty-four jurors would allow the defendant to have eighteen peremptory challenges and the government twelve, with twelve people remaining to be jurors and two to be alternates. Later, however, the court realized that it was worried that the jury pool would be too small, so it ended up qualifying forty-eight jurors, but then struck the four extra jurors.

On December 12, the guilt phase of the trial began. The Commonwealth produced twenty-five witnesses. There were three eye-witnesses to the crime. The first, Larry Simpson, never saw the shooter; he went to the crime scene after hearing what he thought was a car backfiring. By the time he reached the car, the killer had already fled, and Simpson observed only the Earleys' dented car, the dead bodies, and the child crying. David Boyd testified that while stopped at a stoplight, he looked back to see two cars in the parking lot and a man firing a gun into one of them. According to Boyd, the shooter then stood and looked at the scene before driving off. Boyd described the car as being a light blue 1979 or 1980 Malibu and described the shooter as being six feet tall with a medium build, wearing a black jacket and a brimmed hat. The third eyewitness, Norman Pullins, who had seen the events from a nursing home across the street, could not be found by either party. By agreement of the parties, the police played their

audiotape of an interview with Pullins that took place the morning of the shootings. The police next testified regarding the crime scene and presented to the jury photographs and a videotape depicting the scene in considerable detail.

The Commonwealth then focused on the evidence discovered at the Bowling property in Powell County. One officer testified that he found Bowling's Malibu in the thicket, and an orange jacket, an orange Little Caesar's T-shirt from Bowling's workplace, and a black Rangers' hat in a small shed. The officer also found an unused outhouse on the property into which several empty alcohol bottles had been thrown. Another officer testified to finding the gun on the property. Lastly, an officer testified that he retrieved Bowling's personal effects from his sister's house, including a black jacket.

The state then introduced expert testimony. A forensic pathologist testified that the Earleys had no chance of surviving the injuries that they sustained. A police automotive expert testified that the glass, plastic, and chrome debris from the crime scene matched Bowling's car. Another expert testified that paint from the Earleys' car had rubbed off (because of the accident) onto Bowling's car, and that paint from Bowling's car had also rubbed off on the Earleys' car. The expert unambiguously stated that tests on the paint samples demonstrated that it was Bowling's car that had rammed into the Earleys' vehicle. A state ballistics expert identified the recovered gun as a Smith and Wesson .357 and stated that the bullets shot from it would have identical markings to those recovered from the crime scene. On cross-examination, however, he admitted that there may be millions of guns that would have left marks like those on the bullets found at the crime scene.

The Commonwealth also presented testimony from Clay Brackett that he had sold a similar-looking Smith and Wesson .357 to Bowling a few days before the killings. There were also two witnesses, Jack Mullins and Jack

Strange, who placed Bowling on the road in front of the property in Powell County the evening of the murders.

The Commonwealth then called Bowling's family to testify to the events leading up to the telephone call that they made to the police. Bowling's family testified that Bowling had been seriously depressed in the weeks before the shootings. Bowling was also obsessed with death. During a drive with his mother a few days before the shooting, Bowling told her that his time had run out and that she should look for him at the family property in Powell County if he disappeared. During this drive, Bowling had stopped for approximately thirty minutes in a parking lot, behind the nursing home property across from the dry-cleaning place where the Earleys worked. Bowling had also shown to his family the gun that he had recently purchased from Brackett.

The defense presented no witnesses, choosing not to present the expert testimony of Dr. Beal. Bowling's counsel asked for time to inform Bowling again of his right to testify, but after consulting with Bowling, counsel announced that Bowling would not testify.[FN1]

> FN1. In an interview with a mental health worker held while Bowling was in jail, Bowling claimed that he "had no recollection of the day of the crime." J.A. at 54 (Pet. Br. in Dist. Ct.).

The defense rested on their cross-examinations of the witnesses. The defense had brought out Bowling's erratic behavior during the weekend before the shootings. Brackett admitted, while he was being cross-examined, that he traded in handguns without keeping records and had poor memory and hearing. David Boyd admitted that he may have told a police detective that the shooter had long brown hair, a dark complexion, and possibly a mustache-none of which describe Bowling. Though defense counsel did not gain much ground from the expert witnesses, the Commonwealth's ballistics expert did concede that the .357-magnum was one of perhaps millions of guns that could have fired the bullets that killed the Earleys. Defense

counsel also established that none of Bowling's possessions, including his car, had any blood on them, that there were no fingerprints found on the gun or at the crime scene, and that the only lead residue on Bowling's belongings was inside the left pocket of his jacket and could have come from a gun or from bullets.

The defense asked for jury instructions on extreme emotional disturbance, circumstantial evidence, and reckless homicide. The trial court denied these instructions. The jury found Bowling guilty of intentionally murdering Tina and Eddie Earley and assaulting their son Christopher.

Before the penalty phase began, Bowling, his defense counsel, and the prosecution met because Bowling had filed a *pro se* motion to discharge his attorneys. Bowling stated that he was angry with his attorneys because they had essentially presented no defense on his behalf. Bowling claimed that he did not have ample opportunity to meet with his attorneys; Bowling told the state court judge that his attorneys had not spent more than a total of one hour with him throughout the litigation. Bowling said that there were many witnesses who could have been called to testify-although, when questioned, he could not give the names of any such witnesses or list any particular act that his attorneys failed to do. Bowling stressed, however, that he had no time to tell his attorneys of witnesses who might have been called, because his attorneys had not met with him. Bowling said that he felt that his attorneys did not take his case seriously, and that they once remarked to another person in front of Bowling that they did not have a defense. The district court denied his motion to discharge his attorneys.

The penalty phase then began. The defense called six witnesses to testify. There were three non-family members: a former co-worker of Bowling and two jail employees, all of whom spoke kindly of Bowling. The defense also called Bowling's mother, his sister, and his son, who discussed their love for Bowling, his mental and emotional deterioration in the weeks before the killings, his failed

> marriage, and his having only a ninth-grade education and being of low mental ability. Bowling did not testify.
>
> The trial court denied Bowling's request for specific mitigating instructions on extreme emotional disturbance, mental illness, intoxication, and model jail conduct, but gave a general mitigating instruction. The trial court also instructed the jurors on one statutory aggravating factor, that of intentionally causing multiple deaths. The jury found that the aggravating factor applied and recommended two death sentences. The trial judge sentenced Bowling to death.

Bowling v. Parker, 344 F.3d 487, 493 -496 (6th Cir. 2003).

On August 9, 2006, Bowling made, pursuant to KRS 422.285, a motion for DNA testing of the car he used when murdering Tina and Eddie Earley. (TR 10 at 1406). Subsequent to that motion, Bowling made another motion pursuant to KRS 422.285(6) requesting the Commonwealth to inventory of all evidence that could be subjected to DNA testing. (TR 10 at 1457). On January 31, 2007, Bowling supplemented his request for DNA testing on the automobile to include testing on a thermos bottle and black jacket. (TR 12 at 1746). On February 5, 2007, a second supplement to the motion for DNA testing was filed requesting that the black "Raiders" baseball type cap, upholstery of the car, and carpet from the car be subjected to DNA testing. (TR 12 at 1776). A hearing on Bowling's original motion for DNA testing and subsequent motions was heard by the Fayette Circuit Court on February 21, 2007. (TR 13 at 1863). Thereafter, the circuit Court on February 22, 2007, issued a written order overruling Bowling's request for DNA testing of the interior of the car, but sustaining his request for testing on the thermos

bottle (if it could be located), the neck and underarm area of black jacket, and the inside band of the baseball style cap. (TR 13 at 1864). The Commonwealth attempted to appeal the February 22, 2007, order, but that appeal was dismissed by this Court as an appeal of a non-final decision. (TR 13 at 1875; TR 14 at 1958).

On July 11, 2008, Bowling noticed the Court that partial DNA results were obtained from testing performed on baseball style cap and black jacket. (TR 14 at 1964). Thereafter, Bowling moved on July 29, 2008, for the partial DNA results obtained from the baseball cap and jacket to be compared with his DNA and DNA samples he sought to be compelled from third parties. (TR 14 at 1987). On November 12, 2008, the Fayette Circuit Court overruled Bowling's motion for DNA comparison. (TR at 15 2092). In relevant part the circuit Court's order found as follows:

> The Court was previously incorrectly advised [by Bowling's counsel] that the baseball cap was in fact connected to the murderer or the murder scene. The hat that the suspect was wearing during the murder was a brimmed hat, not a baseball cap. As such, even though this court had previously ordered DNA testing of the Cap, this Court denies any comparison testing based upon the results being irrelevant.
>
> As to the jacket, the results of the touch DNA testing revealed that there were in fact multiple donors. The Court finds that based on the DNA results, there is now proof that the jacket was highly contaminated. This contamination could have been by any of the persons who touched the jacket, i.e. the owner of the jacket, the wearer(s) of the jacket, anyone who moved the jacket, the investigating officers, the evidence collection individuals, the jurors, the clerk, etc. Therefore, this Court refuses to order DNA

comparison testing to the Defendant or to all of the innocent people who could have touched the jacket.

(TR 15 at 2092). This Order effectively ended the DNA testing litigation in circuit court thereby clearing the way for this appeal. Bowling's Notice of Appeal was filed December 8, 2008, and referenced three orders in addition to the November 10, 2008 Order resolving the DNA litigation: (1) a non-final order of November 12, 2008 ruling that Jefferson Circuit Court rulings should not be cited as precedent; (2) a non-final order of May 2, 2007 denying DNA testing on cigarette butts found in the car; and (3) the non-final February 22, 2007 order denying DNA testing on the interior of the car. (TR 15 at 2095). However, in his brief the only issue addressed are those stemming from the November 10, 2008 Order overruling his motion for DNA comparison testing and the February 22, 2007 Order denying DNA testing on the interior of the car. Additional facts will be developed below as needed to support the Commonwealth's arguments.

ARGUMENT

I.

THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO POST-CONVICTION DNA TESTING AND ANY RIGHT BOWLING HAS TO TESTING IS STRICTLY GOVERNED BY STATE STATUTE.

A. **Federal Law -** In the recent case of District Attorney's Office for the Third Judicial Circuit v. Osborne, 129 S.Ct. 2308 (2009), the United States Supreme Court held that there is no substantive due process right to post-conviction DNA testing or to receive

evidence for outside, post-conviction DNA testing. Id at p. 2313 - 2323. See also, Young v. Philadelphia County District Attorney's Office, 2009 WL 2445084 (3rd Cir. 2009); McDaniels v. Suthers, 2009 WL 1784000 (10th Cir. 2009); Fuentes v. Superintendent, Great Meadows Correctional Facility, 2009 WL 2424206 (E.D.N.Y., 2009). Thus, Bowling's substantive due process rights were not violated in any manner.

If a state decides to create a mechanism for post-conviction DNA testing, which is certainly not required, that mechanism need only meet minimal procedural due process requirements. In creating such discretionary testing mechanisms, the states are accorded great "flexibility in deciding what procedures are needed in context of post-conviction relief." Osborne at p. 2320. "'[W]hen a State chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the exact form such assistance must assume.'" Id, quoting Pennsylvania v. Finley, 481 U.S. 551, 559 (1987). The high Court held that Osborne's right to procedural due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial and that he has only a limited interest in post-conviction relief. Id.

As the Court in Osborne noted, "the question is whether consideration of Osborne's claim within the framework of the State's procedures for post-conviction relief 'offends some principle of justice so rooted in the traditions and conscience of out people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation'." Id, quoting Medina v. California, 505 U.S. 437, 446, 448 (1992).

A state's post-conviction relief procedures will be disturbed only if they are fundamentally inadequate to vindicate the substantive rights provided. Id.

Thus, the Court in Osborne held that Osborne's procedural due process rights were not violated when he was denied access to the evidence for evidence of testing of his own choice. The Court also found that Alaska's post-conviction DNA testing procedure complied with procedural due process holding that,

> Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence. It exempts such claims from otherwise applicable time limits. The State provides for discovery in postconviction proceedings, and has-through judicial decision-specified that this discovery procedure is available to those seeking access to DNA evidence. Patterson, 2006 WL 573797, at *4. These procedures are not without limits. The evidence must indeed be newly available to qualify under Alaska's statute, must have been diligently pursued, and must also be sufficiently material. These procedures are similar to those provided for DNA evidence by federal law and the law of other States, see, e.g., 18 U.S.C. § 3600(a), and they are not inconsistent with the "traditions and conscience of our people" or with "any recognized principle of fundamental fairness." Medina, supra, at 446, 448, 112 S.Ct. 2572 (internal quotation marks omitted).

Osborne, 129 S.Ct. at 2320 -2321.

Likewise, Kentucky's statutory scheme provides for the right to be release on a sufficiently compelling showing of new evidence that establishes innocence, *See* KRS 422.285(9); it contains no statute of limitation, *See* KRS 422.285 (1); and it provides for discovery to those seeking access to DNA evidence, *See* KRS 422.285(5),(6), (7) and (9).

Kentucky's statutory scheme fully complies with all requirements of procedural due process. Further, it will be demonstrated in the argument's below that Bowling's limited rights to DNA testing were not violated in any way.

Bowling also argues that the Eighth Amendment entitles him to DNA testing. Since there is no federal constitutional right to DNA testing per Osborne, there is likewise no Eighth Amendment right to such testing. Young v. Philadelphia County District Attorney's Office, 2009 WL 2445084 (3rd Cir. 2009). Bowling's substantive and procedural due process rights were not violated. His Eighth Amendment rights were not violated.

B. Kentucky's Statutory Scheme - Bowling has completed the Kentucky post-conviction process as well as federal habeas corpus review. This appeal concerns post-conviction DNA testing for condemned inmates per KRS 422.285, 422.287 and 17.176. In relevant part KRS 422.285 (1) provides that, "[a]t any time, a person who was convicted of an sentenced to death for a capital offense and who meets the requirements of this section may request. . ." DNA testing on evidence retained by the Commonwealth and related to investigation or prosecution that led to the person's conviction and death sentence. Subsection (2) of KRS 422.285 provides that a court "shall" order DNA testing if it finds that all of the following apply:

> (a) 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;

(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be completed; and

(c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.

In contrast subsection (3) of the statute indicates that the court "may" order DNA testing if:

(a) A reasonable probability exits that either:

1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or

2. DNA testing and analysis will produce exculpatory evidence;

(b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be completed; and

(c) The evidence was not previously subjected to DNA testing and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.

Within Kentucky's statutory scheme the phrase "reasonable probability" is crucial to determining whether a defendant, like Bowling, possess any mandatory or permissive right to post-conviction DNA testing.

Unfortunately, the phrase "reasonable probability" is not defined in KRS 422.285 or 422.287 and this Court has not yet defined "reasonable probability" within the context of KRS 422.285 or 422.287. Thus, there is no controlling authority for the definition of

"reasonable probability." However, the term "reasonable probability" is found in and routinely defined criminal post-conviction jurisprudence when addressing ineffective assistance of counsel claims. In that context, a reasonable probability is, "the probability sufficient to undermine the confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). See also, United States v. Bagley, 473 U.S. 667, 683 (1985). And, the defendant must show that the jury would have reached a different result at trial. Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003) *cert. denied* 541 U.S. 911 (2004).

Texas follows a similar definition for "reasonable probability" for purposes of post-conviction DNA testing in capital cases. "The term 'reasonable probability' means a probability sufficient to undermine confidence in the outcome." In re Gonzales, 2009 WL 2195421 (Tex.App.-Austin 2009). A defendant is entitled to DNA testing only if he establishes, by a preponderance of the evidence, that "a reasonable probability exists that exculpatory DNA tests would prove their innocence. That showing has not been made if exculpatory tests would 'merely muddy the waters'." Rivera v. Texas, 89 S.W.3d 55, 59 (Tex.Crim.App. 2002) citing Kutzner v. State, 75 S.W.3d 427, 439 (Tex.Crim.App. 2002)[1]. And, in Texas, the standard of review is *de novo*. Id.

The Commonwealth urges the Court to follow the Texas standard in interpreting KRS 422.285 and 422.287. A defendant convicted and sentence in fundamentally fair

[1] The Texas Court of Criminal Appeals is Texas' highest criminal court.

trial. Like Bowling, must make a preliminary showing, by a preponderance of the evidence, that a reasonable probability exists that DNA results in his favor would have undermined confidence in the outcome of his trial before Kentucky's statutory scheme gives either a mandatory or permissive right to DNA testing. It is not sufficient for Bowling, or other similarly situated defendants, to "muddy the waters." Bowling fell woefully short of this standard, or any lesser standard and the trial court correctly determined in its final November 12, 2008 Order that Bowling was not entitled to further DNA comparison testing.

II.

BOWLING HAS NO RIGHT TO DNA TESTING OF THE INTERIOR OF THE VEHICLE HE DROVE WHEN MURDERING THE EARLEYS.

Bowling argues that the trial court erred by denying his request for DNA testing on the vehicle he drove on the day of the murders. Specifically, Bowling claims he satisfies the criteria of both KRS 422.285 (2) and (3). However, it is evident from the record that Bowling is neither entitled to the mandatory nor permissive DNA testing as there is no reasonable probability that he "would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis" or that his "verdict would have been more favorable." KRS 422.285 (2) and (3).

Given that the permissive standard articulated in KRS 422.285 (3) is a lesser standard than the mandatory testing criteria found in subsection (2), the appellee will focus its arguments on that lesser standard. In order to prevail on his motion for DNA

testing of the vehicle used in the murders, Bowling must show a "reasonable probability" that his verdict would have been more favorable had DNA testing and analysis been available. Bowling attempts to meet this criteria/standard by arguing that his car was single most important piece of evidence linking him to the murders and that the outcome of his trial would have been different if DNA testing on the car could determine 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. However, that is simply not the case.

"The relevance of the profile to a particular crime activity is often difficult to assess and the importance of considering the DNA evidence in relation to all of the other evidence in the case is emphasized." A. Lowe, C. Murray, J.P. Whitaker, G. Tully, P. Gill, The Propensity of Individuals to Deposit DNA and Secondary Transfer of Low Level DNA From Individuals to Inert Surfaces, 129 Forensic Sci. In'l. 25 (2002). The mere presence of some other person's DNA in the car, assuming only for argument that such DNA could be found, does absolutely nothing to exculpate Bowling. The DNA of another, if present, would prove only that someone besides Bowling was in that car at some unknown time in the past. Thus, DNA testing and analysis, if possible, would do nothing to negate what this Court has called the "overwhelming" evidence of Bowling's guilt. Bowling v. Commonwealth, 981 S.W.2d 545, 550 (Ky. 1998).

Bowling's attempt to limit the requested DNA testing to the driver's compartment of the vehicle and to only compare any profile found to himself and members of the

Adams family, does not somehow create a reasonable probability of a more favorable verdict. There is absolutely no evidence to support a theory that John Ed Adams or some member of his family committed the murders as Bowling suggest.

Before creating a tale of alternative perpetrators, Bowling tried to attack his conviction and sentence on the grounds he was mentally ill and /or acting under an extreme emotional disturbance when he murdered the Earleys. Implicit in such an attack is an admission of guilt. When reviewing Bowling's case on direct appeal, this Court found that, "Bowling's counsel states that the overriding question is why did Bowling react in such a violent way. Evidence presented in his defense indicates that his wife had left him, that he had been unable to gain employment and that he had exhibited overt signs of suicide prior to the shooting." Bowling v. Commonwealth, 873 S.W.2d 175, 176 (Ky. 1993). In his direct appeal brief Bowling conceded that he told social worker Judith Rhodus on April 12, 1990, that after he left his mother's house the morning of the murders he did not recall a thing up until waking up in the woods in Estill County. (Brief for Appellant, direct appeal, A-13). He later told Dr. Harwell Smith that he did not recall speaking to Rhodus and that next thing he remembered after leaving his mother's house on the morning of the murders was being awaken at his brother-in-laws house in Knoxville. (Id.). Bowling also conceded that he knew of no one else who had access to his car, and that he hadn't given it to anyone, that he knew of. (Id.).

After failing in his attempts to excuse or justify the murders of Tina and Eddie Earley by arguing insanity and/or extreme emotional disturbance, Bowling began to

allege someone else could have committed the crime. During the appeal of the denial of an RCr 11.42 motion Bowling alleged some identified person (not John Ed Adams or some member of his family) committed the crime. This Court dismissed that allegation out hand holding,

> Appellant further contends that defense counsel failed to adequately investigate several other people who had a motive to commit the murders. However, Appellant's argument is based upon vague rumors and unsupported claims. Regardless of counsel's actions in this particular area, we are of the opinion that the mere existence of other potential suspect could do nothing to diminish the impact of the Commonwealth's overwhelming proof against Appellant. Moreover, we agree with the Commonwealth that such claim is particularly offensive when Appellant alleges to know the identity of the actual killer year continues to withhold the information.

Bowling v. Commonwealth, 981 S.W.2d 545, 550 (Ky. 1998).

A theory which included a name and motive for the alternative perpetrator later came to light in an action involving the quashing of Bowling's improperly issued subpoena and denial of certain open records request. This Court addressed this more detailed, but factually unsupported, theory when reviewing that action stating that,

> Appellant theorizes that either Donald or John Ed Adams, alleged members of the "Adams Family" that Appellant characterizes as a Lexington-based drug and theft cartel, killed the Earleys in retaliation for Edward Earley's having informed the police about the family's criminal activities. He also theorizes that a member of the Adams family was having an affair with Ernestine Earley. According to the Appellant, members of the Adams family "framed" him by arranging for him to purchase the murder weapon the week before the crime, getting him drunk, and–without his

> knowledge–borrow his car, his jacket, and his hat, and then murdering the Earleys with his pistol while driving his car and wearing his clothes. Nothing in the record of Appellant's criminal convictions supports these theories; thus, he seeks such support in the record of the Lexington Police Department (LPD), an agency of the LFUCG.

Bowling v. Lexington-Fayette Urban County Government, 172 S.W.3d 333, 335 (Ky. 2005). Bowling's theory now includes a specific, but apparently secret, list of Adam's family members who may have committed or been involved in the crime. (TR 14 1997). However, there still fails to be any evidence in the record to support Bowling's wild claims and attempts by Bowling's counsel to suggest that his "alterative perpetrator" claims were contained in the trial record were rebuffed by the Fayette Circuit Court. (TR 14 at 2057; VR-CD; Hearing 2/21/07, 14:37:45).

Apparently, Bowling's motions for DNA testing are part of his ongoing fishing expedition for the alternative perpetrator. Factually unsupported conjecture does not create a reasonable probability that Bowling's verdict would have been more favorable if DNA testing had been available. Failing the permissive standard of KRS 422.285(3), Bowling has, by definition, failed the mandatory criteria as well. There is simply no reasonable probability that Bowling "would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis" or that his "verdict would have been more favorable," because finding DNA in the car would not exculpate Bowling. KRS 422.285 (2) and (3).

Furthermore, Bowling's motion also fails to satisfy the requirements of KRS 422.285 (2)(B) and (3)(B). Before he is entitled to testing under Kentucky's statutory scheme, Bowling must also show a reasonably probability that "[t]he evidence is still in existence and is in a condition that allows DNA testing and analysis to be completed." Id. In the present case the 1981 Chevrolet Malibu, that was seized on April 11, 1990, has been stored with the windows up and doors shut at an outside impound lot and exposed to the elements for more than eighteen years now. (TR 10 at 1470 and 1474). Over the sixteen years predating Bowling's request for DNA testing the temperature ranged from a high of 103 degrees Fahrenheit to a low of -20 degrees. (TR 10 at 1470 and 1475-1477). In the proceeding below Marci L. Adkins, Forensic Scientist Specialist II and Serology Technical Leader of the Kentucky Stat Police Central Forensic Laboratory, provided an affidavit regarding heat exposure and degradation of DNA. (TR 10 at 1478). In that affidavit she indicated that in her expert opinion, and based on an article published in the Journal of Forensic Science, "[i]t is unreasonable to believe that any viable DNA would remain [in the vehicle] after 16 years of exposure," to heat and ultraviolet light. (TR 10 at 1478). Based on this evidence the Fayette Circuit Court reasonably 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. (TR 13 at 1863 1864).

The likely degradation of any DNA would alone be a proper basis for denying Bowling's request for DNA testing on the car; however, the fact that DNA, if found,

could only indicate the presence of someone other than Bowling in the car at some unknown time in the past and thus, would not exculpate Bowling is truly fatal. The record below is clear that there is absolutely no reasonable probability that Bowling "would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis" or that his "verdict would have been more favorable." KRS 422.285 (2) and (3). Thus, the denial of DNA testing on the car Bowling drove when murdering the Earleys must be affirmed.

III.

THE FAYETTE CIRCUIT COURT CORRECTLY DENIED COMPARISON TESTING ON THE CONTAMINATED AND WEEK PARTIAL DNA PROFILE FOUND ON THE BLACK JACKET.

Bowling argues that because the Fayette Circuit Court initially allowed to the black "Palm Court" jacket to be subject to DNA testing he is somehow entitled to further comparison testing. However, according to the Report of Forensic Laboratory Examination, human DNA profile obtained from the jacket was only a partial mixed DNA profile– with results obtained at only three of thirteen loci. (TR 14 at 2063-2066). Those results confirmed what the Commonwealth argued prior to testing–that the items were contaminated by contact with numerous people before and during Bowling's trial. Because of contamination of the DNA profile there is no reasonable probability that Bowling "would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis" or that his "verdict would have been more

favorable." KRS 422.285 (2) and (3). Thus, the trial court correctly found that further testing or analysis was not warranted.

Bowling claims that Court's initial decision to permit testing for DNA on the jacket equated to a decision that the criteria found in KRS 422.285 (2) and (3) had been met and that Court essentially lost jurisdiction or power to further act with regard to this evidence. However, this view of the February 22, 2007, Order sustaining Bowling's request to have the jacket subjected to DNA testing conflicts with this Court's rulings in this very case.

Following the entry of the February 22, 2007, Order the Commonwealth attempted to appeal the decision to grant DNA testing by filing its Notice of Appeal on March 20, 2007. (TR 13 at 1875). On November 20, 2007, this Court granted Bowling's motion to dismiss this appeal holding that the February 22, 2007, decision was a non-final decision. (TR 14 at 1959). As a non-final decision, the Fayette Circuit Court retained jurisdiction to alter, amend, or even outright reverse its initial holding. Thus, when reviewing the February 22, 2007 Order in connection with the final and appealable Order extinguishing the DNA testing litigation it is evident that the circuit court's initial ruling was aimed at determining whether DNA evidence existed, "in a condition that allows DNA testing and analysis to be conducted." *See* KRS 422.285(2)(b) and (3)(b).

By affidavit filed with the circuit court, Stacy Cary Warnecke, the DNA Database Supervisor fo the Kentucky State Police Forensic Laboratory, essentially informed the lower court that mixed DNA profile obtained from the jacket was contaminated and not

suitable for further analysis or comparison testing. (TR 14 at 2065-2066). Specifically, Ms. Warnecke informed the circuit court as follows:

> DNA testing on the jacket revealed a partial, mixed DNA profile. **A partial profile results when a sample is compromised, such as by degradation, to the point that full results can not be obtained**. In this case the testing of 13 loci, or locations in the DNA, was attempted. **A mixed profile is one which has an indication of more than one contributor. In her analysis Phelps obtained results at only 3 of 13 loci**. The Kentucky State Police Central Forensic Lab's minimum requirement for placing a profile in the CODIS database is five (5) loci. This five loci minimum has been established to reduce the number of partial matches that can occur in attempting to compare DNA profiles with more limited genetic information. For this reason, comparing the mixed, partial DNA profile recovered from the jacket with CODIS offender profiles would be outside the normal practice of the Kentucky State Police Central Forensic Laboratory.

(TR 14 at 2065, emphasis added). This testimony comports with scientific literature that indicates "touch" DNA is particularly susceptible to contamination– "When a DNA profile is obtained from a touched object found at a crime scene, it usually not possible to determine when the DNA was transferred to the item. For example, it might have originated forma contact that occurred some time previous to (or some time after) the crime event itself." A. Lowe, C. Murray, J.P. Whitaker, G. Tully, P. Gill, The Propensity of Individuals to Deposit DNA and Secondary Transfer of Low Level DNA From Individuals to Inert Surfaces, 129 Forensic Sci. Int'l. 25 (2002).

Further, contamination of DNA profiles greatly limit the samples usefulness and risk erroneous findings or conclusions.

> [T]he most likely outcome of a contamination event is false exclusion because contamination DNA material can be preferentially amplified over extremely low levels of original material present from the casework sample or may mask the perpetrators profile in a resulting mixture.
>
> While this contamination possibility might only rarely impact a careful forensic DNA laboratory, it can have potential significance on old cases under review including the Innocence Project. For example, if biological evidence from a 20-year-old case was handled by ungloved police officers or evidence custodians (prior to knowledge regarding the sensitivity of modern DNA testing), then the true perpetrators DNA might be masked by contamination from the collecting officer. Thus, when a DNA test is performed, the police officer's or evidence custodian's DNA would be detected rather than the true perpetrator. In the absence of other evidence, the individual in prison might then be falsely declared 'innocent' because his DNA profile was not found on the original crime scene evidence. This scenario emphasizes the importance of considering DNA evidence as an investigative tool within the context of a case rather than the sole absolute proof of guilt or innocence.

John. M. Butler, Forensic DNA Typing, Biology, Technology, and Genetics of STR Markers, 154, (2nd 2005).

The contamination of the partial DNA profile obtained from the jacket in this case essentially confirmed that evidence in existence was not in a condition that would allow for further DNA testing and analysis. Based on this evidence that Fayette Circuit Court correctly found that:

> . . .based on the DNA results, there is not proof that the jacket was highly contaminated. This contamination could have been by any of the persons who touche the jacket, i.e. the owner of the jacket, the wearer(s) of the jacket, anyone

> who moved the jacket, the investigating officers, the evidence collections individuals, the jurors, the clerk, etc.

(TR 15 at 2093).

Further, the relevance of the partial DNA profile is suspect given what this Court has held to be overwhelming evidence of Bowling's guilt. Based on the facts as a discerned from factual findings made by this Court, the U.S. District Court, and the Sixth Circuit Court of Appeals, it is well settled that Bowling wore a black jacket when he murdered the Earleys, according to two witnesses who were far enough away that they were unable to identify him as the shooter. Bowling concedes that he transported the black jacket when he drove from Lexington to Powell County, and when he hitchhiked from there to Knoxville. Jack Strange, who spoke to Bowling while he was in Powell County, then saw him again on the Richmond Bypass the following day, and positively identified him at trial, testified that Bowling wore a black jacket that resembled the one in evidence. That jacket was seized, along with Bowling's other personal items, when he was arrested in Knoxville. Thus, according to either the actual evidence in the record or the fictitious narrative presented by Bowling's counsel, Bowling had significant physical contact with the jacket. The absence or presence of his or anyone else's DNA on the swab recently obtained would not affect what this Court has described as the "overwhelming" evidence of Bowling's guilt.

It is not reasonable to believe that the mixed partial DNA profile obtained from the black jacket had any exculpating value and thus, there is absolutely no reasonable

probability that Bowling "would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis" or that his "verdict would have been more favorable." KRS 422.285 (2) and (3). Thus, the denial of further DNA testing or analysis on the partial mixed DNA profile obtained from the jacket was correct and must be affirmed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commonwealth respectfully requests that the Fayette Circuit Court's orders denying DNA testing on the interior of appellant's car and refusing to order DNA comparison testing of the mixed DNA sample obtained from appellant's jacket be affirmed.

Respectfully submitted,

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