March 1, 2005

The Honorable William F. Schenck
Greene County Prosecuting Attorney
61 Greene Street, 2nd Floor
Xenia, Ohio 45385

SYLLABUS: 2005-009

1. After the expiration of the period of time prescribed in R.C. 2953.73(A) or R.C. 2953.82(B) for the filing of applications for DNA testing, a court of common pleas or law enforcement agency having supervisory control over the disposition of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must maintain and preserve the property until the court or agency determines that the property is no longer needed as evidence.

2. Pursuant to R.C. 2953.81(A) and R.C. 2953.82(C)(2), the parent and inmate samples of the biological material used for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must be maintained and preserved until after the expiration of the period of time established by the court of common pleas that decided the application for DNA testing. The period of time established by a court of common pleas shall not be less than 24 months after the prison term relative to the testing expires or the inmate who applied for the testing is executed.

3. R.C. 2953.71-.81 and R.C. 2953.82 are not the exclusive means by which an inmate may obtain post-conviction DNA testing.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3400
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

March 1, 2005

OPINION NO. 2005-009

The Honorable William F. Schenck
Greene County Prosecuting Attorney
61 Greene Street, 2nd Floor
Xenia, Ohio 45385

Dear Prosecutor Schenck:

You have requested an opinion whether Sub. S.B. 11, 125th Gen. A. (2003) (eff. Oct. 29, 2003) sanctions the destruction of evidence from which biological material[1] was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 after the expiration of the period of time prescribed in R.C. 2953.73(A) or R.C. 2953.82(B) for the filing of applications for DNA testing.[2] In addition, you wish to know whether R.C. 2953.71-.81 and R.C. 2953.82 prescribe the sole means by which an inmate may obtain post-conviction DNA testing.

A review of Sub. S.B. 11 indicates that, after the expiration of the period of time prescribed in R.C. 2953.73(A) or R.C. 2953.82(B) for the filing of applications for DNA testing, a court of common pleas or law enforcement agency having supervisory control over the disposition of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must maintain and preserve the property until the court or agency determines that the property is no longer needed as evidence. However, pursuant to R.C. 2953.81(A) and R.C. 2953.82(C)(2), the parent and inmate samples of the biological material used for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must be maintained and preserved until after the expiration of the period of time established by the court of common pleas that decided the application for DNA testing. The period of time established

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[1] As used in R.C. 2953.71-.83, "'[b]iological material' means any product of a human body containing DNA[,]" R.C. 2953.71(B), which is deoxyribonucleic acid, *Webster's New World Dictionary* 413 (2nd college ed. 1986); *see also* R.C. 109.573(A)(1).

[2] Under Sub. S.B. 11, 125th Gen. A. (2003) (eff. Oct. 29, 2003), the deadline for filing applications for DNA testing under R.C. 2953.71-.81 and R.C. 2953.82 was October 29, 2004. Legislation recently enacted by the General Assembly, which was signed by the Governor on February 15, 2005, extends the deadline to October 29, 2005. Sub. H.B. 525, 125th Gen. A. (2004) (eff. May 18, 2005).

by a court of common pleas shall not be less than 24 months after the prison term relative to the testing expires or the inmate who applied for the testing is executed.

Finally, R.C. 2953.71-.81 and R.C. 2953.82 are not the exclusive means by which an inmate may obtain post-conviction DNA testing.

Statutory Scheme Established in Sub. S.B. 11 for the DNA Testing of Inmates

Before turning to your specific questions, it is helpful to first review Sub. S.B. 11, which enacted R.C. 2953.71-.83 for the purpose of establishing a mechanism and procedures for the DNA testing of certain inmates serving a prison term for a criminal offense that is a felony or under a sentence of death. Under Sub. S.B. 11, an inmate[3] may request the state to do DNA testing under either R.C. 2953.71-.81 or R.C. 2953.82. We will first examine the statutory scheme established for DNA testing under R.C. 2953.71-.81, then the provisions governing DNA testing under R.C. 2953.82.

DNA Testing of Inmates Under R.C. 2953.71-.81

DNA testing under R.C. 2953.71-.81 may be requested by an inmate when all of the following apply:

> (a) The offense for which the inmate claims to be an eligible inmate[4] is a felony that was committed prior to the effective date of this section,[5] and the inmate was convicted by a judge or jury of that offense.
>
> (b) The inmate was sentenced to a prison term or sentence of death for the felony described in [R.C. 2953.72(C)(1)(a)] and, on the effective date of this section, is in prison serving that prison term or under that sentence of death.
>
> (c) On the date on which the application is filed, the inmate has at least one year remaining on the prison term described in [R.C. 2953.72(C)(1)(b)], or the inmate is in prison under a sentence of death as described in that division. (Footnotes added.)

R.C. 2953.72(C)(1).[6]

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[3] "Inmate," as used in R.C. 2953.71-.83, "means an inmate in a prison who was sentenced by a court, or by a jury and a court, of this state." R.C. 2953.71(K).

[4] As used in R.C. 2953.71-.83, "[e]ligible inmate" means "an inmate who is eligible under [R.C. 2953.72(C)] to request DNA testing to be conducted under [R.C. 2953.71-.81]." R.C. 2953.71(F).

[5] R.C. 2953.72 was effective on October 29, 2003. Sub. S.B. 11.

An eligible inmate who wishes to request DNA testing to be conducted under R.C. 2953.71-.81 must submit an application for such testing and a signed acknowledgement[7] to the court of common pleas that sentenced him for the offense for which he is an eligible inmate and is requesting DNA testing.[8] R.C. 2953.72(A); R.C. 2953.73(A). The application must be submitted to the court no later than one year after the effective date of R.C. 2953.73, which is October 29, 2003, *see* Sub. S.B. 11. R.C. 2953.72(A); R.C. 2953.73(A). *But see generally* note two, *supra* (Sub. H.B. 525, 125th Gen. A. (2004) (eff. May 18, 2005) extends the application deadline to two years after October 29, 2003).

If an application is accepted,[9] the DNA testing shall proceed in accordance with R.C. 2953.77-.81.[10] Upon completion of the DNA testing under R.C. 2953.71-.81, the results of the testing and the parent and inmate samples of biological material are maintained as follows:

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[6] An inmate is not an eligible inmate under R.C. 2953.72(C)(1) "regarding any offense to which the inmate pleaded guilty or no contest." R.C. 2953.72(C)(2).

[7] The forms used to make an application for DNA testing under R.C. 2953.71-.81 and to provide the acknowledgement are prescribed by the Attorney General. R.C. 2953.72; *see* R.C. 2953.73(A).

[8] Upon the submission of an application for DNA testing under R.C. 2953.71-.81, "[t]he eligible inmate shall serve a copy of the application on the prosecuting attorney and the attorney general." R.C. 2953.73(B)(1). "The prosecuting attorney or the attorney general, or both, may, but are not required to, file a response to the application." R.C. 2953.73(C).

[9] A court of common pleas shall make the determination whether to accept or reject an application in accordance with the criteria and procedures set forth in R.C. 2953.74-.81. R.C. 2953.73(D). *See generally* R.C. 2953.74 (setting forth grounds for accepting or rejecting an application for DNA testing under R.C. 2953.71-.81). In making this determination the court must consider the materials, files, and records listed in R.C. 2953.73(D), "unless the application and the files and records show the applicant is not entitled to DNA testing, in which case the application may be denied." R.C. 2953.73(D).

An eligible inmate whose application is rejected by the court of common pleas may appeal the court's order as prescribed in R.C. 2953.73(E). If the court's order rejecting the application is not overturned on appeal, no court shall require the state to administer a DNA test under R.C. 2953.71-.81 on the eligible inmate. R.C. 2953.73(G).

[10] DNA testing that relates to ongoing criminal investigations or prosecutions have priority over DNA testing conducted under R.C. 2953.73 or R.C. 2953.82. R.C. 109.573(I).

> (A) The court or a designee of the court shall require the state to maintain the results of the testing and to maintain and preserve both the parent sample[11] of the biological material used and the inmate sample of the biological material used. The testing authority[12] may be designated as the person to maintain the results of the testing or to maintain and preserve some or all of the samples, or both. The results of the testing remain state's evidence. The samples shall be preserved during the entire period of time for which the inmate is imprisoned relative to the prison term or sentence of death in question and, if that prison term expires or the inmate is executed under that sentence of death, for a reasonable period of time of not less than twenty-four months after the term expires or the inmate is executed. The court shall determine the period of time that is reasonable for purposes of this division, provided that the period shall not be less than twenty-four months after the term expires or the inmate is executed.
>
> (B) The results of the testing are a public record.
>
> (C) The court or the testing authority shall provide a copy of the results of the testing to the prosecuting attorney, the attorney general, and the subject inmate.
>
> (D) If the postconviction proceeding in question is pending at that time in a court of this state, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to any court of this state, and, if it is pending in a federal court, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to that federal court.
>
> (E) The testing authority shall provide a copy of the results of the testing to the court of common pleas that decided the DNA application.
>
> (F) The inmate or the state may enter the results of the testing into any proceeding. (Footnotes added.)

R.C. 2953.81.

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[11] For purposes of R.C. 2953.71-.83, R.C. 2953.71(M) defines "[p]arent sample" as follows:

> "Parent sample" means the biological material first obtained from a crime scene or a victim of an offense for which an inmate is an eligible inmate or for which the inmate is requesting the DNA testing under [R.C. 2953.82], and from which a sample will be presently taken to do a DNA comparison to the DNA of the subject inmate under [R.C. 2953.71-.81] or [R.C. 2953.82].

[12] R.C. 2953.71(R) defines "[t]esting authority," for purposes of R.C. 2953.71-.83, as "a laboratory at which DNA testing will be conducted under [R.C. 2953.71-.81] or [R.C. 2953.82]."

DNA Testing of Inmates Under R.C. 2953.82

The second procedure whereby an inmate may request the state to do DNA testing is set forth in R.C. 2953.82. An inmate who pleaded guilty or no contest to a felony offense that was committed prior to October 29, 2003, may request DNA testing under R.C. 2953.82 when all of the following apply:

> (1) The inmate was sentenced to a prison term or sentence of death for that felony and, on the effective date of this section,[13] is in prison serving that prison term or under that sentence of death.
>
> (2) On the date on which the inmate files the application requesting the testing with the court as described in [R.C. 2953.82(B)], the inmate has at least one year remaining on the prison term described in [R.C. 2953.82(A)(1)], or the inmate is in prison under a sentence of death as described in [R.C. 2953.82(A)(1)]. (Footnote added.)

R.C. 2953.82(A).

An inmate who wishes to request DNA testing to be conducted under R.C. 2953.82 must submit an application for such testing and a signed acknowledgement "with the court of common pleas not later than one year after the effective date of [R.C. 2953.82,]" which is October 29, 2003, *see* Sub. S.B. 11, and serve a copy of the application on the prosecuting attorney.[14] R.C. 2953.82(B). *But see generally* note two, *supra* (Sub. H.B. 525 extends the application deadline to two years after October 29, 2003). If the prosecuting attorney agrees that the inmate should be permitted to obtain DNA testing under R.C. 2953.82,[15] all of the following apply:

> (1) The application and the written statement shall be considered for all purposes as if they were an application for DNA testing filed under [R.C.

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[13] R.C. 2953.82 was effective on October 29, 2003. Sub. S.B. 11.

[14] The application and acknowledgment required under R.C. 2953.82 are the "same application and acknowledgment as are used by eligible inmates who request DNA testing under [R.C. 2953.71-.81]." R.C. 2953.82(B).

[15] A prosecuting attorney who is served a copy of an application for DNA testing under R.C. 2953.82 is required to file a statement with the court of common pleas that indicates whether he agrees or disagrees that the inmate should be permitted to obtain the testing. R.C. 2953.82(C). If the prosecuting attorney disagrees that the inmate should be permitted to obtain the DNA testing, "the prosecuting attorney's disagreement is final and is not appealable by any person to any court, and no court shall have authority, without agreement of the prosecuting attorney, to order DNA testing regarding that inmate and the offense or offenses for which the inmate requested DNA testing in the application." R.C. 2953.82(D).

> 2953.73] that the court accepted, and the court, the prosecuting attorney, the attorney general, the inmate, law enforcement personnel, and all other involved persons shall proceed regarding DNA testing for the inmate pursuant to [R.C. 2953.77-.81] in the same manner as if the inmate was an eligible inmate for whom an application for DNA testing had been accepted.
>
> (2) Upon completion of the DNA testing, [R.C. 2953.81] applies.

R.C. 2953.82(C). Thus, upon completion of the DNA testing under R.C. 2953.82, the results of the testing and the parent and inmate samples of biological material are maintained in the same manner as if the testing had been conducted for an inmate under R.C. 2953.71-.81.

Maintenance and Preservation of Property that Is Evidence from which Biological Material Was Obtained for DNA Testing

Let us now proceed to your first question, which asks whether Sub. S.B. 11 sanctions the destruction of evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 after the expiration of the period of time prescribed in R.C. 2953.73(A) or R.C. 2953.82(B) for the filing of applications for DNA testing. A review of Sub. S.B. 11 discloses that, after the expiration of the period of time prescribed in R.C. 2953.73(A) or R.C. 2953.82(B) for the filing of applications for DNA testing, a court of common pleas or law enforcement agency having supervisory control over the disposition of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must maintain and preserve the property until the court or agency determines that the property is no longer needed as evidence. However, pursuant to R.C. 2953.81(A) and R.C. 2953.82(C)(2), the parent and inmate samples of the biological material used for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must be maintained and preserved until after the expiration of the period of time established by the court of common pleas that decided the application for DNA testing. The period of time established by a court of common pleas shall not be less than 24 months after the prison term relative to the testing expires or the inmate who applied for the testing is executed.

Property that is evidence in a criminal proceeding is kept by the court or a law enforcement agency.[16] R.C. 2933.26; R.C. 2933.27; R.C. 2933.41(A)(1); Ohio R. Crim. P. 41(D); *see* 1991 Op. Att'y Gen. No. 91-021. Such property is kept by the court or a law enforcement agency until the property is no longer needed as evidence. *See* R.C. 2933.41(A)(1); Ohio R. Crim. P. 12(G); Ohio R. Crim. P. 26; 1991 Op. Att'y Gen. No. 91-021.

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[16] Property that tends to prove or disprove the existence of an alleged fact in a criminal prosecution is evidence that may be kept by a court or law enforcement agency. *See generally Black's Law Dictionary* 576 (7th ed. 1999) (defining "evidence" as "[s]omething … that tends to prove or disprove the existence of an alleged fact"). Property that may be evidence in a criminal proceeding includes, but is not limited to, weapons, clothing, condoms, rape kits, swabs, and slides containing DNA specimens from crime scenes or victims of criminal offenses.

The determination that property is no longer needed as evidence is made by the court when the property is seized pursuant to a warrant, introduced to the court as evidence in a criminal proceeding, or unclaimed or forfeited. 1991 Op. Att'y Gen. No. 91-021; *see* R.C. 2933.41. *See generally City of Cincinnati v. Flaherty*, 71 Ohio App. 539, 541, 50 N.E.2d 373 (Hamilton County 1943) ("a court having jurisdiction to hear and decide issues of fact, has as a part of that jurisdiction the power and authority to control and dispose of tangible property introduced in evidence and thereby placed in its custody for the purposes of the action"). In other instances, absent a statute to the contrary, this determination is made by the law enforcement agency having supervisory control over the disposition of the property. 1991 Op. Att'y Gen. No. 91-021 (syllabus, paragraph seven); *see* R.C. 2933.41. *See generally City of Cincinnati v. Jasper*, 46 Ohio App. 2d 276, 349 N.E.2d 332 (Hamilton County 1975) (property lawfully seized by law enforcement personnel without a warrant that is not introduced in evidence is not subject to the court's supervisory power to dispose of property in evidence); *State v. Johnson*, 112 Ohio App. 124, 165 N.E.2d 814 (Cuyahoga County 1960) (R.C. 2933.26, which permits a judge, clerk, or magistrate to control evidence seized pursuant to warrant, does not extend to property seized by law enforcement officers without a warrant).

The discretion of a court or law enforcement agency when making this determination must be exercised to preserve the evidentiary value of the property and the constitutional rights of the criminal defendant. *See State v. Wells*, 2004-Ohio-1026, 2004 Ohio App. LEXIS 902, at ¶49 (Greene County 2004); *State v. Acosta*, 2003-Ohio-6503, 2003 Ohio App. LEXIS 5805, at ¶5 (Hamilton County 2003); 1991 Op. Att'y Gen. No. 91-021 at 2-111 through 2-115. *See generally MacDonald v. Bernard*, 1 Ohio St. 3d 85, 88, 438 N.E.2d 410 (1982) ("the rudiments of due process of law in criminal proceedings must be observed"); Brent G. Filbert, Annotation, *Failure of Police to Preserve Potentially Exculpatory Evidence as Violating Criminal Defendant's Rights under State Constitution*, 40 A.L.R.5th 113 (1996) (discussing whether a failure to preserve potentially exculpatory evidence violates a defendant's state constitutional rights). Thus, a court or law enforcement agency having supervisory control over the disposition of property that is evidence may determine that the property is no longer needed as evidence when the property no longer has evidentiary value and there is no significant effect on the criminal defendant's constitutional rights by its disposal. *See* 1991 Op. Att'y Gen. No. 91-021 at 2-114 and 2-115. *See generally California v. Trombetta*, 467 U.S. 479, 488-89 (1984) ("[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means" (footnote and citation omitted)); *State v. Wells*, 2004-Ohio-1026, 2004 Ohio App. LEXIS 902, at ¶49 (same); *State v. Purdon*, 24 Ohio App. 3d 217, 219, 494 N.E.2d 1154 (Brown County 1985) (same).

When a court or law enforcement agency having supervisory control over the disposition of property determines that the property is no longer needed as evidence, the court or agency may dispose of the property. *See* 1991 Op. Att'y Gen. No. 91-021; *see, e.g.*, R.C. 2933.41; 1994

Op. Att'y Gen. No. 94-064. Accordingly, a court or law enforcement agency may dispose of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 when the court or agency having supervisory control over the disposition of the property determines that the property is no longer needed as evidence.[17]

A review of Sub. S.B. 11 discloses nothing that prohibits a court of common pleas or law enforcement agency from disposing of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 when the court or agency having supervisory control over the disposition of the property has determined that the property is no longer needed as evidence. Instead, pursuant to R.C. 2953.81(A) and R.C. 2953.82(C)(2), upon completion of DNA testing under R.C. 2953.71-.81 or R.C. 2953.82, the court or a designee of the court is required to "maintain and preserve both the parent sample of the biological material used and the inmate sample of the biological material used" until after the expiration of the period of time established by the court of common pleas that decided the DNA application. *See generally* R.C. 2953.77(A)(5) ("[a]fter the DNA testing, the court, the testing authority, and the original custodial agency of the parent sample, or any combination of those entities, shall coordinate the return of the remaining parent sample back to its place of storage with the original custodial agency or to any other place determined in accordance with this division and [R.C. 2953.81]"). These statutes also provide that the period of time established by the court of common pleas shall not be less than 24 months after the prison term relative to the testing expires or the inmate who applied for the testing is executed.

For purposes of these statutes, the "parent sample" is the biological material first obtained from a crime scene or a victim of an offense for which an inmate is requesting DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 and from which a sample will be taken to do a DNA comparison to the DNA of the inmate. R.C. 2953.71(M). The "inmate sample" is the biological material obtained from an inmate requesting DNA testing under R.C. 2953.71-.81 or R.C. 2953.82. R.C. 2953.79. Accordingly, upon completion of DNA testing under R.C. 2953.71-.81 or R.C. 2953.82, a court of common pleas or a designee of the court is required to maintain and preserve the biological material first obtained from a crime scene or a victim of an offense and from which a sample was taken for DNA testing and the biological material obtained from an inmate until after the expiration of the period of time established by the court of common pleas that decided the DNA application.

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[17] A court or law enforcement agency must comply with its internal policies and procedures governing the maintenance and preservation of evidence when determining whether to dispose of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82. *See also* R.C. 2933.41(A) (a law enforcement agency that has lost, abandoned, stolen, seized, or forfeited property as described in R.C. 2933.41(A)(1) in its custody must comply with its written internal control policy relative to the disposition of the property).

Therefore, in response to your first question, after the expiration of the period of time prescribed in R.C. 2953.73(A) or R.C. 2953.82(B) for the filing of applications for DNA testing, a court of common pleas or law enforcement agency having supervisory control over the disposition of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must maintain and preserve the property until the court or agency determines that the property is no longer needed as evidence. However, pursuant to R.C. 2953.81(A) and R.C. 2953.82(C)(2), the parent and inmate samples of the biological material used for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must be maintained and preserved until after the expiration of the period of time established by the court of common pleas that decided the DNA application.[18] The period of time established by a court of common pleas shall not be less than 24 months after the prison term relative to the testing expires or the inmate who applied for the testing is executed.

Other Methods by which Inmates May Obtain Post-Conviction DNA Testing

Your second question asks whether R.C. 2953.71-.81 and R.C. 2953.82 prescribe the sole means by which an inmate may obtain post-conviction DNA testing. R.C. 2953.71-.81 and R.C. 2953.82 are not the exclusive means by which an inmate may obtain post-conviction DNA testing.

As explained previously, Sub. S.B. 11 establishes a mechanism and procedures for the DNA testing of certain inmates serving a prison term for a criminal offense that is a felony or under a sentence of death. Upon completion of DNA testing under R.C. 2953.71-.81 or R.C. 2953.82, either "[t]he inmate or the state may enter the results of the testing into any proceeding." R.C. 2953.81(F). *See generally* R.C. 2953.81(A) ("[t]he results of [DNA] testing [under R.C. 2953.71-.81 and R.C. 2953.82] remain state's evidence"); R.C. 2953.81(D) ("[i]f the postconviction proceeding in question is pending at that time in a court of this state, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to any court of this state, and, if it is pending in a federal court, the court of common pleas that decided the DNA application or the testing authority shall provide a copy of the results of the testing to that federal court").

R.C. 2953.21(A)(1)(a), which authorizes the filing of post-conviction petitions for relief, further provides, in part:

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[18] In some instances property that is evidence may constitute the parent sample of the biological material used for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82. For example, slides of biological material from crime scenes or victims of criminal offenses and from which a sample was taken for DNA testing are included within the definition of "parent sample," as used in R.C. 2953.71-.83, R.C. 2953.71(M), and, as such, these slides must be maintained and preserved until after the expiration of the period of time established by the court of common pleas that decided the DNA application.

> [A]ny *person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under* [*R.C. 2953.71-.81*] *or* [*R.C. 2953.82*] *provided results that establish, by clear and convincing evidence, actual innocence*[19] *of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death,* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief. (Emphasis and footnote added.)

A person who has been convicted of a criminal offense that is a felony thus may file a petition for post-conviction relief when DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 provided results that establish either of the following by clear and convincing evidence: (1) "actual innocence of that felony offense" or, (2) "if the person was sentenced to death, … actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death." Accordingly, the provisions of Sub. S.B. 11 establishing DNA testing under R.C. 2953.71-.81 and R.C. 2953.82 provide a means by which certain inmates serving a prison term for a criminal offense that is a felony or under a sentence of death may obtain DNA testing and use the results of such testing in judicial proceedings.

However, a review of Sub. S.B. 11 discloses no legislative intent to make R.C. 2953.71-.81 and R.C. 2953.82 the exclusive means by which inmates may obtain post-conviction DNA testing. Nothing in Sub. S.B. 11 forecloses or limits the right of an inmate who is unable to obtain DNA testing under R.C. 2953.71-.81 or R.C. 2953.82[20] to file a petition or motion that is

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[19] R.C. 2953.21(A)(1)(b) defines "actual innocence" for purposes of R.C. 2953.21(A)(1)(a) as follows:

> "[A]ctual innocence" means that, had the results of the DNA testing conducted under [R.C. 2953.71-.81] or [R.C. 2953.82] been presented at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

[20] There are various reasons why an inmate may be unable to obtain DNA testing under R.C. 2953.71-.81 or R.C. 2953.82. An inmate may not be eligible for such testing, *see* R.C. 2953.72(C); R.C. 2953.74; R.C. 2953.82(A), or the inmate's application for such testing may be

permitted by statute or rule with a state or federal court for the purpose of seeking post-conviction relief that is predicated on obtaining and using the results of post-conviction DNA testing. *See Cowans v. Bagley*, 236 F. Supp. 2d 841, 855 (S.D. Ohio 2002) ("a defendant who is convicted in Ohio of a criminal offense has available to him more than one method of challenging that conviction"); *see also* R.C. 2901.04(B) ("[r]ules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice"); Ohio R. Crim. P. 1(B) (same). *See generally, e.g.*, 28 U.S.C. § 2242 (authorizing the filing of an application for a writ of habeas corpus); R.C. 2953.21(A)(1) and Ohio R. Crim. P. 35 (authorizing the filing of post-conviction petitions for relief); R.C. 2945.80 and Ohio R. Crim. P. 33 (authorizing the filing of a motion for a new trial). Nor does Sub. S.B. 11 affect the right of an inmate who is able to obtain DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 to file such a petition or motion.[21] *See also* R.C. 2901.04(B); Ohio R. Crim. P. 1(B). *See generally State v. McGuire*, Case No. CA2000-10-011, 2001 Ohio App. LEXIS 1826, at *17-18 (Preble County Apr. 23, 2001) ("since the state has created a right to postconviction relief, it may not deprive the petitioner of that right"), *appeal not allowed*, 93 Ohio St. 3d 1411, 754 N.E.2d 259 (2001).

In addition, Sub. S.B. 11 does not prevent an inmate from obtaining DNA testing in a post-conviction judicial proceeding when such testing will assist a court in ruling on a post-conviction motion or petition. *See generally, e.g., State v. Luckett*, 144 Ohio App. 3d 648, 761 N.E.2d 105 (Cuyahoga County 2001) (concerning the granting of a motion, which was filed seventeen years after the defendant's trial, seeking a court order requiring the release of a slide containing a specimen so that DNA analysis could be conducted), *appeal not allowed*, 93 Ohio St. 3d 1474, 757 N.E.2d 772 (2001). We are aware of two situations[22] in which post-conviction

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rejected, *see* R.C. 2953.73; R.C. 2953.82. Also, pursuant to R.C. 2953.73(A) and R.C. 2953.82(B), an inmate must have requested DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 no later than October 29, 2004. *But see generally* note two, *supra* (Sub. H.B. 525 extends the application deadline for applying for DNA testing under R.C. 2953.71-.81 and R.C. 2953.82 to two years after October 29, 2003). After October 29, 2004, a court of common pleas may not accept an application for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82. R.C. 2953.73(A); R.C. 2953.82(B). Inmates who have not filed an application for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 before October 29, 2004, thus are unable to obtain DNA testing by means of R.C. 2953.71-.81 or R.C. 2953.82. *But see generally* note two, *supra*.

[21] An inmate who is eligible for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 is not required to obtain such testing in lieu of filing a petition or motion that is permitted by statute or rule with a state or federal court for the purpose of seeking post-conviction relief that is predicated on obtaining and using the results of post-conviction DNA testing.

[22] There are many different types of post-conviction motions and petitions that an inmate may file with the courts. *See, e.g.*, 28 U.S.C. § 2242 (application for a writ of habeas corpus);

DNA testing may assist a court in ruling on a motion or petition filed by an inmate who is unable to obtain DNA testing under R.C. 2953.71-.81 or R.C. 2953.82. *See generally State v. Pierce*, 64 Ohio St. 3d 490, 597 N.E.2d 107 (1992) (syllabus, paragraph one) ("DNA evidence may be relevant evidence which will assist the trier of fact in determining a fact in issue, and may be admissible").

First, Ohio R. Crim. P. 33(A) provides that an inmate may file a motion for a new trial on the basis of newly discovered evidence:

> A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> …;
>
> (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

See R.C. 2945.79(F). A motion for a new trial on the basis of newly discovered evidence must be filed within the period of time specified in Ohio R. Crim. P. 33(B).[23] *See also* R.C. 2945.80.

R.C. 2953.21 and Ohio R. Crim. P. 35 (petition for post-conviction relief); R.C. 2945.80 and Ohio R. Crim. P. 33 (motion for a new trial). It is, therefore, not possible, by means of a formal opinion, to list all of the situations in which a court may need to obtain post-conviction DNA testing in order to rule on a motion or petition filed by an inmate who is unable to obtain DNA testing under R.C. 2953.71-.81 or R.C. 2953.82.

[23] Ohio R. Crim. P. 33(B) states, in part:

> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

An inmate thus has a right under Ohio R. Crim. P. 33 to file a motion for a new trial on the basis of newly discovered evidence and a court has a duty to ascertain and consider the facts supporting the motion so as to rule on the inmate's motion.[24] *See also* R.C. 2945.79-.83.

The second situation concerns the safeguarding of an inmate's constitutional rights. R.C. 2953.21(A)(1)(a) states that a person who has been convicted of a criminal offense may file a petition for post-conviction relief when he "claims that there was such a denial or infringement of [his] rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." *See* Ohio R. Crim. P. 35. The time for filing a post-conviction petition for relief under R.C. 2953.21(A)(1)(a) is governed by R.C. 2953.21(A)(2) and R.C. 2953.23. R.C. 2953.21(A)(2) provides:

> *Except as otherwise provided in* [*R.C. 2953.23*], a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in [R.C. 2953.23], the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal. (Emphasis added.)

R.C. 2953.23 further provides as follows:

> (A) Whether a hearing is or is not held on a petition filed pursuant to [R.C. 2953.21], a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:
>
> (1) Both of the following apply:
>
> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in [R.C. 2953.21(A)(2)] or to the filing of an earlier petition, the United States Supreme

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See also R.C. 2945.80.

[24] A court is not required to order DNA testing when considering a motion for a new trial under Ohio R. Crim. P. 33. *See, e.g., State v. Wogenstahl*, Appeal No. C-980175, 1999 Ohio App. LEXIS 546 (Hamilton County Feb. 19, 1999) (a court may refuse to allow definitive, identity-specific DNA testing to completely exclude the victim as the source of a bloodstain when considering a motion for a new trial under Ohio R. Crim. P. 33), *appeal not allowed*, 85 Ohio St. 3d 1497, 710 N.E.2d 716 (1999).

> Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
>
> (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.[25] (Footnote added.)

An inmate thus has a right under R.C. 2953.21(A)(1)(a) to file a petition for post-conviction relief on the basis that "there was such a denial or infringement of [his] rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States" and a court has a duty to ascertain and consider the facts supporting the petition so as to rule on the inmate's petition.[26] *See* Ohio R. Crim. P. 35.

Because an inmate has a right under various statutes and rules to file post-conviction motions and petitions and a court has an obligation to ascertain the facts supporting the motions and petitions, it follows that, absent specific language in Sub. S.B. 11 indicating that R.C. 2953.71-.81 and R.C. 2953.82 are the exclusive means by which an inmate may obtain post-conviction DNA testing, an inmate is not foreclosed from obtaining DNA testing through a properly filed post-conviction motion or petition. *See generally Hale v. State*, 55 Ohio St. 210, 213, 45 N.E. 199 (1896) ("powers as are necessary to the orderly and efficient exercise of jurisdiction … must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the

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[25] R.C. 2953.23(A)(2) states that a court may entertain a petition for post-conviction relief filed after the expiration of the period prescribed in R.C. 2953.21(A) or a second petition or successive petitions for similar relief on behalf of an inmate who was convicted of a felony "for whom DNA testing was performed under [R.C. 2953.71-.81] or [R.C. 2953.82], and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death."

[26] "Ohio law is clear that discovery is not available in the initial stages of a postconviction proceeding." *State v. Dean*, 149 Ohio App. 3d 93, 2002-Ohio-4203, 776 N.E.2d 116, at ¶10 (Delaware County 2002). However, where a petition for post-conviction relief "states a substantive ground for relief and which relies upon matters outside the record, the court should thus proceed to a prompt evidentiary hearing, unless the prosecuting attorney files a motion for summary judgment in accordance with Civ. R. 56." *State v. Milanovich*, 42 Ohio St. 2d 46, 51, 325 N.E.2d 540 (1975). Thus, a court may in certain instances, but is not required to, order DNA testing when considering a post-conviction petition for relief under R.C. 2953.21(A)(1)(a).

attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised"); *State ex rel. Nagy v. City of Elyria*, 54 Ohio App. 3d 101, 102, 561 N.E.2d 551 (Lorain County 1988) ("[j]udges have the inherent power to do those things necessary to carry out the due administration of justice"). Therefore, R.C. 2953.71-.81 and R.C. 2953.82 are not the exclusive means by which an inmate may obtain post-conviction DNA testing.

Although an inmate may obtain post-conviction DNA testing by means other than under R.C. 2953.71-.81 and R.C. 2953.82, under the doctrine of res judicata, a valid, final judgment of conviction bars an inmate from raising and litigating in any proceeding, except on an appeal from that judgment, any defense or any claim that was raised or could have been raised by the inmate at trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967) (syllabus, paragraph nine); *State v. Avery*, 2004-Ohio-4165, 2004 Ohio App. LEXIS 3794, at ¶16 (Union County Aug. 9, 2004); *State v. Gammalo*, 2004-Ohio-482, 2004 Ohio App. LEXIS 432, at ¶¶12, 15 (Cuyahoga County Feb. 5, 2004), *appeal denied*, 102 Ohio St. 3d 1472, 2004-Ohio-2830, 809 N.E.2d 1159 (2004). Accordingly, an inmate who obtains DNA testing under R.C. 2953.71-.81 and R.C. 2953.82 may be precluded under the doctrine of res judicata from obtaining further DNA testing through the filing of a petition or motion that is permitted by statute or rule with a state or federal court for the purpose of seeking post-conviction relief that is predicated on obtaining and using the results of post-conviction DNA testing. *See, e.g., State v. Wogenstahl*, Appeal No. C-980175, 1999 Ohio App. LEXIS 546 (Hamilton County Feb. 19, 1999) (syllabus) ("[t]he doctrine of res judicata barred consideration of the defendant's motion for leave to file a motion for a new trial based upon newly discovered evidence (testing of a bloodstain under newly available DNA screening), where the claim advanced in support of the motion had already been considered and rejected by the court of appeals and the state supreme court in connection with the defendant's efforts to reopen the direct appeal of his convictions"), *appeal not allowed*, 85 Ohio St. 3d 1497, 710 N.E.2d 716 (1999). *See generally Cowans v. Bagley*, 236 F. Supp. 2d at 862 ("[i]n determining whether *res judicata* applies to a constitutional claim, the inquiry is properly focused on whether the claim genuinely relies on the evidence that was not a matter of record. Thus, non-record evidence submitted during postconviction proceedings to support a constitutional claim cannot be superfluous or cumulative to the evidence of record; rather, that evidence must genuinely support the claim in a manner that no record evidence could" (citation omitted)). *See generally also* R.C. 2953.72(A)(6) (the acknowledgement submitted by an inmate with his application for DNA testing under R.C. 2953.71-.81 and R.C. 2953.82 sets forth the following: "[t]hat, if DNA testing is conducted with respect to an inmate under [R.C. 2953.71-.81 or R.C. 2953.82], the state will not offer the inmate a retest if an inclusion result is achieved relative to the testing and that, if the state were to offer a retest after an inclusion result, the policy would create an atmosphere in which endless testing could occur and in which postconviction proceedings could be stalled for many years").

Conclusions

In summary, it is my opinion, and you are hereby advised as follows:

1. After the expiration of the period of time prescribed in R.C. 2953.73(A) or R.C. 2953.82(B) for the filing of applications for DNA testing, a court of common pleas or law enforcement agency having supervisory control over the disposition of property that is evidence from which biological material was obtained for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must maintain and preserve the property until the court or agency determines that the property is no longer needed as evidence.

2. Pursuant to R.C. 2953.81(A) and R.C. 2953.82(C)(2), the parent and inmate samples of the biological material used for DNA testing under R.C. 2953.71-.81 or R.C. 2953.82 must be maintained and preserved until after the expiration of the period of time established by the court of common pleas that decided the application for DNA testing. The period of time established by a court of common pleas shall not be less than 24 months after the prison term relative to the testing expires or the inmate who applied for the testing is executed.

3. R.C. 2953.71-.81 and R.C. 2953.82 are not the exclusive means by which an inmate may obtain post-conviction DNA testing.

Respectfully,

JIM PETRO
Attorney General