

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO
CRIMINAL DIVISION

FILED
LUCAS COUNTY

2019 AUG -1 P 4: 20

STATE OF OHIO,
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:
PLAINTIFF,
:
VS.
:
ERIC MISCH,
:
DEFENDANT.:

CASE No. G4801-CR-199306298
COMMON PLEAS COURT
CLERK OF COURT
JUDGE G. Cook

**DEFENDANT ERIC MISCH'S MEMORANDUM IN SUPPORT OF HIS APPLICATION FOR
POSTCONVICTION DNA TESTING**

I. Introduction

Since his 1993 conviction for the aggravated murder and aggravated robbery of [REDACTED], Eric Misch has consistently maintained his innocence. Eric's conviction rests largely on the unreliable testimony of two witnesses—neither of which testified to being present during the commission of the crime—and Eric's own incriminating statement. A combination of inconsistencies in Eric's statement, as well as the statements of the other witnesses, the physical evidence, and our current understanding of false confessions among unrepresented children, casts doubt on the confession of the then 16-year-old child.

DNA evidence, in direct contrast to the evidence supporting Eric's conviction, is recognized as scientifically reliable and unbiased. The nature of DNA evidence is such that it is systematically used to apprehend the guilty and identify the wrongfully accused and convicted. In fact, many states rely on local and national databases that store DNA profiles to solve cases, both old and new. DNA evidence has conclusively demonstrated the actual innocence of at least 483

was cracked with blood all over, which he finished breaking and threw away in the garbage. (Exhibit F, p. 9). ██████ told detectives that ██████ bragged about beating up a “n*****.” (Exhibit F, p. 10). But, they did not specify where they did it or who the victim was; all she knew was it was a black man and they beat him up real bad. (Exhibit F, p. 13). She also told Detective Leiter that the group came back with about four wallets that night, and they were getting money out of the wallets for beer. (Exhibit F, p. 18). ██████ said the incident occurred two or three days before she saw a report on TV about a man in Wilson Park. (Exhibit F, p. 13). She also told detectives that ██████ is a “chronic liar” who “brags a lot about stuff he doesn’t do.” (Exhibit F, p. 10-11).

After speaking with detectives at least three times without being recorded, detectives brought ██████ back to provide a taped statement on January 29, 1993. (See Exhibit G). At the time, he was 17 years old. (Exhibit G, p. 1). ██████ stated he went to Wilson Park with ██████ ██████ and possibly Eric Misch. (Exhibit G, p. 3). He said that they saw a man walking across the park when ██████ “clotheslined” him and the others began kicking him while he was on the ground. (Exhibit G, p. 3). ██████ said he did not remember whether ██████ had his club with him. (Exhibit G, p. 5). ██████ told detectives that when the group had finished beating the man, they approached ██████ and punched him for not participating. (Exhibit G, p. 5). ██████ also told detectives that he saw ██████ later at the dining room table looking through a wallet. (Exhibit G, p. 5).

D. The Interrogation and Arrest of Eric Misch

Detectives Leiter and Anderson interviewed Eric, who was then only 16 years old, on February 2, 1993. (See Exhibit H). Eric was cooperative from the start, but adamantly denied any involvement in ██████ murder. After multiple interviews with the police and a visit to the crime scene, during which the detectives provided Eric detailed information about ██████

death, Eric, fearful of what may occur if he did not confess, made a statement inculcating both himself and several of his friends. Soon after, he recanted.

1. Eric waived his *Miranda* rights and went to the police station without a parent.

Detectives Leiter and Anderson's initial interaction with Eric took place in Eric's home. Tr. 399-400. At the time, the detectives considered Eric a suspect, but never conveyed that to Eric or his mother, who was present when her teenage son first spoke with the detectives. Tr. 414. They also did not tell Eric or his mother that other witnesses had implicated him in the homicide. Motion Tr. 27.⁵ Instead, the detectives merely said they wanted to talk to him about a homicide investigation and asked that he accompany them to the police station. Motion Tr. 7. After Eric agreed, Detective Anderson informed Eric of his *Miranda* rights. *Id.* Though Detective Anderson testified that Eric understood the waiver, Eric, in fact, did not: Detective Anderson went through the components of the waiver in less than one minute and then asked Eric to sign his name. Tr. 738; Motion Tr. 32-33. Eric did not pay close attention to what was being read to him, and instead looked to his mother for guidance. Tr. 739. His mother, Ezma, encouraged Eric to cooperate; she was taught to trust police and had no qualms about him talking to them about a homicide, believing that as long as he told the truth, there would be no cause for concern. Tr. 696.

After both Eric and his mother signed the waiver, the detectives escorted Eric, alone, to the police station. Motion Tr. 7, 13. While in the car, they told Eric that they were investigating the beating of a black man in Wilson Park, and that Eric's name had come up in the investigation. Tr. 717-18.

⁵ The transcript of the hearing on Eric's motion to suppress his statement to police will be cited as "Motion Tr. ___."

2. Eric's initial interview with police was not recorded.

After arriving at the Safety Building, the detectives took Eric to a small, windowless interview room. Tr. 415-16. Both Detective Anderson and Detective Leiter provided Eric with a summary of ██████ murder and gave him some "prethoughts" or ideas of their investigation and what Eric's involvement was. Tr. 417. Though they had the ability to do so, they chose not to record the interview, even after they began discussing the "guts" of the case. Motion Tr. 36.

Eric persistently denied that he knew anything about the murder. Motion Tr. 14; Tr. 418. The detectives provided Eric with the names of people who they believed to be involved, and Eric told them that he was not with them the night ██████ was killed. Motion Tr. 14-15. During the initial interview, Eric became "upset and loud" as he insisted he was not involved. Motion Tr. 75; Tr. 406. Despite Eric's assertion of innocence, Detective Anderson presumed Eric was lying. Motion Tr. 37.

Not long after the interview began, Detective Leiter exited the interview room, stating that he was going to "book" Eric. Motion Tr. 16; Tr. 720. At that point, Detective Anderson attempted to "reason with Eric" and "tried to get him to cooperate and talk to [them] about what [they] knew was his involvement in the homicide." Tr. 407. Detective Anderson said, "Well, your friends already said that you were there. You might as well just say you were there." Tr. 720. Later, Detective Anderson would describe the "reasoning" process he employed:

I tried to say to him that we know you're involved. We know you were there. It's in your best interest to talk to us about this, to come forward and talk to us and tell us what you know. You're only hurting yourself, you know, and things like that. Just continued on with that.

Id. Initially, Eric resisted Detective Anderson's efforts to persuade him to implicate himself. But Detective Anderson persisted because, despite Eric's denials, he felt that Eric was not telling the truth. Motion Tr. 38. According to Detective Anderson, after he reasoned with Eric, Eric made a

statement. Motion Tr. 18. The detectives did not record his statement. Though Detective Anderson was sure Eric admitted to being involved, he could not remember the specifics of what Eric said. Motion Tr. 47. He also did not know whether Eric's unrecorded statement was consistent with his later, recorded statement. Motion Tr. 48.

3. After the police took Eric to the crime scene and provided him with details about Mr. Huggins's murder, he made an inculpatory statement.

After the initial, unrecorded interview with Eric, Detectives Anderson and Leiter took Eric to Wilson Park to view the crime scene. Motion Tr. 42. They asked Eric to identify where [REDACTED] was beaten and Eric identified a location approximately 60 feet from where [REDACTED] was found. Tr. 471-73. In response, Detective Anderson asked if he was sure it wasn't over in another area, closer to the basketball courts. Tr. 724.

After walking through the park with Eric, the detectives drove him back to the police station. Tr. 410. On the car ride, they told him that if he did not make a statement admitting his involvement, they would "lock [him] up" until he was 50 years old. Tr. 729-30. Scared, Eric agreed to make a tape-recorded statement. *Id.* In the statement, Eric alleged that he approached [REDACTED] in Wilson Park and asked him for either the time or a cigarette, after which [REDACTED] emerged from hiding and assaulted [REDACTED]. (Exhibit H, p. 6-8). Afterward, the young men went to their friend [REDACTED] home on [REDACTED] Street. (Exhibit H, p. 8). The detectives had previously told Eric they believed he and his friends went to [REDACTED] home after the assault. Tr. 445.

After taking his recorded statement, the detectives took Eric home. Tr. 450.

4. Eric immediately recanted his statement.

During the interview with detectives, Eric agreed to testify before the grand jury if necessary. Motion Tr. 83. A day or two later, Detective Leiter called Eric to let him know that the

grand jury hearing would occur soon. Motion Tr. 84. At the time, Eric had not been charged with a crime. *Id.* During the call, Eric recanted his statement, telling Detective Leiter that he was not there when [REDACTED] was killed, knew nothing about the crime, and that the statements he made to police were false. *Id.* Eric refused to swear on the Bible and testify to something that was a lie. Tr. 729-30.

After initially interviewing him, the detectives viewed Eric as a credible witness against other parties. Tr. 477. However, within a day of his recantation, a warrant was issued for Eric's arrest. Tr. 474.

E. The Trial of Eric Misch

Eric Misch went to trial on December 7, 1993. Tr. 1. [REDACTED] and [REDACTED] testified at Eric's trial, while [REDACTED] did not. [REDACTED] testified that she used to be a member of the Bishops. Tr. 510-11. The other members of the group that she could remember were [REDACTED].
[REDACTED].
Tr. 511. She testified that on the night of August 4, 1992,⁶ she was hanging out at [REDACTED] house with several other members of the Bishops, who arrived around 5:00 or 6:00, when it was still daylight but getting dark. Tr. 511-14. She drank "maybe a forty and a half or a little more" of beer and was also smoking marijuana. Tr. 513-14. Around 9:00 or 10:00 pm, several members of the Bishops left the home and returned around 12:00 am or later. Tr. 516. [REDACTED] identified the individuals that left and later returned as L [REDACTED] [REDACTED] and "two other ones I don't remember actually who they were." Tr. 515-

⁶ The body of [REDACTED] was found on the morning of August 4, 1992. (Exhibit A, p. 1-2). When the State later questioned [REDACTED] about whether this occurred on August 4th or August 3rd, she responded: "It was somewhere between there. I'm not really sure the dates. I didn't even know the date until Detective Leiter told me the date." Tr. 523.

19. When they left, [REDACTED] testified [REDACTED] was carrying a stick, and she thinks [REDACTED] and a couple of the other ones had sticks as well, but she was not sure. Tr. 518.

[REDACTED] testified that [REDACTED] was there, but “he never really left with any of them. He was mostly sitting in a corner by himself. He didn’t really do nothing.” Tr. 516. When asked if Eric was among those that came back, [REDACTED] testified “I recollect him being there the second time, but I don’t – I don’t know if he got out of the car with them or not. I don’t remember.” Tr. 517.

According to [REDACTED] when the group returned, they were celebrating. Tr. 518-19. [REDACTED] (who Michelle referred to as “Josh” throughout her testimony) had little reddish-brown spots on his arms and hands, which he said was paint. Tr. 519-20. [REDACTED] shirt was wet, and he had spots on his hands and knees. Tr. 520. [REDACTED] bragged that they beat up a black man. Tr. 521. Michelle testified [REDACTED] told her they were driving in [REDACTED] car and saw three black people walking through a park or some area, and they said something out the window. Tr. 562. [REDACTED] told her they went over and “beat the s*** out of them that was left.” Tr. 562. [REDACTED] also testified that the group came back with three wallets that night. Tr. 572. The next day, [REDACTED] saw something on television regarding a beating at Wilson Park. Tr. 523.

[REDACTED] testified that the boys in the group would beat up drunk people coming from bars and take their money to get beer. Tr. 525. [REDACTED] further testified that she did not know Eric Misch to be a member of the Bishops, and she did not know his name until it was told to her by detectives. Tr. 526-27, 538-39. [REDACTED] was shown a photo array and was asked to identify anyone who looked familiar. Tr. 538-40. She identified Eric and another person in the array. Tr. 540. She testified that both looked familiar but did not say they were at [REDACTED]’s house on the night in question. Tr. 540-41.

██████████ testified at Eric's trial that he formed the Bishops. Tr. 649-50. ██████████ testified that on August 4, 1992—his mother's birthday—he went to Cedar Point with ██████████ ██████████, and his wife and nephew, and that he returned home around 11:30 pm. Tr. 649, 663-64. ██████████ testified that in the early morning of August 4 or August 5, 1992, between midnight and 2:00 am, he had a conversation with ██████████ ██████████ and Eric Misch, in which they were bragging about beating up a black man. Tr. 649-52. ██████████ stated he's not quite sure of the date that everyone came over; it could have been three, four, or five days later. Tr. 672. ██████████ testified they were arguing about who tore the victim's pocket off. Tr. 651-52. ██████████ explained that members of the Bishops would beat up and rob people on a regular basis. Tr. 673.

On cross examination, ██████████ admitted when he gave a statement to Detective Anderson in January 1993, he never mentioned a trip to Cedar Point, and rather told the police he was at his mother's house all day. Tr. 664. ██████████ further testified that if ██████████ gave a conflicting statement that he was with Eric and others that day, that would be incorrect because he was with ██████████ at Cedar Point all day. Tr. 667.

Eric took the stand in his own defense at his trial. Eric testified when he was in the car with Detective Leiter, he was told they were investigating the beating of a black male at Wilson Park. Tr. 717. Eric testified at first, he thought they were just playing around, but they kept pushing him, and he started crying, saying he did not have anything to do with it. Tr. 718. Once they arrived at the Safety Building, Detective Leiter said, "Eric, we know you were there. ██████████ already stated that you were there" and ██████████ said he was there as well. Tr. 719. Eric insisted they were lying and offered to take a polygraph. Tr. 719. The detectives said they don't have money to pay for a lie detector test, and Eric said he would help pay for it. Tr. 719.

Eventually, after being provided information about the offense, including the race and sex of the victim and who the detectives thought was involved, Eric made an unrecorded statement, which implicated himself and the others. Tr. 721. Eric testified that they said if he didn't say he was there they were going to lock him up until he was 50, and he was getting scared and didn't want to go to jail for something he didn't do. Tr. 729. Eric testified that the story he told detectives was not true, and he had nothing to do with the killing of ██████████ at Wilson Park. Tr. 732. Everything that he said on the tape was made up based on what the police officers told him. Tr. 743.

III. Eric satisfies the statutory requirements for DNA testing under R.C. 2953.71 et seq.

A. Eric meets the definition of eligible offender under R.C. 2953.72.

A person is eligible to request DNA testing if he was convicted by a judge or jury of a felony and one of the following applies:

(i) The offender was sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, and the offender is in prison serving that prison term or under that sentence of death, has been paroled or is on probation regarding that felony, is under post-release control regarding that felony, or has been released from that prison term and is under a community control sanction regarding that felony.

(ii) The offender was not sentenced to a prison term or sentence of death for the felony described in division (C)(1)(a) of this section, but was sentenced to a community control sanction for that felony and is under that community control sanction.

(iii) The felony described in division (C)(1)(a) of this section was a sexually oriented offense or child-victim related offense, and the offender has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code relative to that felony.

R.C. 2953.72(C)(1). Following a jury trial, Eric was convicted of one count of aggravated murder, an unclassified felony, and one count of aggravated robbery, a felony of the first degree. He was sentenced to a prison term of 20 years to life and is currently incarcerated as inmate number

A286977 at Allen Correctional Institution. Therefore, he is an eligible offender pursuant to R.C. 2953.72(C)(1).

B. Eric qualifies for DNA testing under R.C. 2953.74.

Pursuant to R.C. 2953.74, when an eligible offender submits an application for DNA testing, the Court may accept the application only under the following circumstances. First, one of the following must apply:

- (1) The offender did not have a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at that trial stage in that case, and, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.
- (2) The offender had a DNA test taken at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing regarding the same biological evidence that the offender seeks to have tested, the test was not a prior definitive DNA test that is subject to division (A) of this section, and the offender shows that DNA exclusion when analyzed in the context of and upon consideration of all available admissible evidence related to the subject offender's case as described in division (D) of this section would have been outcome determinative at the trial stage in that case.

R.C. 2953.74(B). In addition, all of the following must apply as well:

- (1) The court determines pursuant to section 2953.75 of the Revised Code that biological material was collected from the crime scene or the victim of the offense for which the offender is an eligible offender and is requesting the DNA testing and that the parent sample of that biological material against which a sample from the offender can be compared still exists at that point in time.
- (2) The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section:
 - a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.

- b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction described in division (C)(2)(a) of this section; provided that the court may determine in its discretion, on a case-by-case basis, that, even if the parent sample of the biological material so collected is so minute or fragile as to risk destruction of the parent sample by the extraction, the application should not be rejected solely on the basis of that risk.
 - c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.
- (3) The court determines that, at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing, the identity of the person who committed the offense was an issue.
- (4) The court determines that one or more of the defense theories asserted by the offender at the trial stage in the case described in division (C)(3) of this section or in a retrial of that case in a court of this state was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative.
- (5) The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that offender.
- (6) The court determines pursuant to section 2953.76 of the Revised Code from the chain of custody of the parent sample of the biological material to be tested and of any test sample extracted from the parent sample, and from the totality of circumstances involved, that the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected.

R.C. 2953.74(C). For the following reasons, Eric meets the statutory requirements and this Court should accept his application for DNA testing.

1. **At the time of trial, DNA testing was not performed, and DNA testing was not generally accepted, the results of DNA evidence were not generally admissible in evidence, or DNA testing was not yet available.**⁷ R.C. 2953.74(B)(1).

- a. **No prior DNA testing was performed.**

Although biological evidence was collected from the crime scene, DNA testing was not performed at the time of Eric's trial. Detective Chad Culpert from the Scientific Investigation Unit of the Toledo Police Department testified that he took a number of samples of what appeared to be blood from the wall of the service building and the garbage cans. Tr. 498. (Exhibit B, p. 2). However, he did not request to have them analyzed. Tr. 498. At the time of the initial investigation, he indicated to Detective Leiter that the quantity of blood in these spatters individually would not be enough to test for DNA; it was only enough to determine that it was human blood. Tr. 498. To get a match of blood type or potential DNA, he would have needed a larger sample of blood. Tr. 498. In addition, no prior DNA testing was performed on the broken glass bottle found near [REDACTED] body or the victim's clothing.

- b. **Although DNA testing was admissible at the time of trial, it was not yet available in this case given the minute samples.**

One month after [REDACTED] was killed, and a little more than one year before Eric went to trial, the Supreme Court of Ohio ruled that DNA evidence may be admissible in a criminal trial, and questions regarding the reliability of DNA evidence go the weight, rather than the admissibility, of the evidence. *State v. Pierce*, 64 Ohio St.3d 490, 597 N.E.2d 107 (1992), syllabus.

The first methodology used to compare the variation in the DNA nucleotide sequence of two different samples was restriction fragment length polymorphism ("RFLP") technology, which was created in 1984. Victoria Kawecki, *Comment: Can't Touch This? Making a Place for Touch*

⁷ There is a separate option if the offender had a DNA test taken and the test was not a prior definitive DNA test. R.C. 2953.74(B)(2). Since no prior DNA testing was performed in this case, that section is not applicable here.

DNA in Post-Conviction DNA Testing Statutes, 62 CATH. U.L. REV 821, 826 (2013). However, RFLP technology required a large amount of DNA to produce an accurate result, which led to problems in cases in which the perpetrator left only a small amount of DNA, or in cases where the DNA sample had degraded over time. *Id.* at 826, fn 42.

As such, the DNA technology available 26 years ago, when Eric went to trial, was insufficient to obtain a definitive result in this case. Detective Culpert explained that if he had compiled all of the swabs taken from various locations together, DNA testing may have been a possibility. Tr. 498. But, by doing so the original source would have been contaminated. Tr. 498. “In and of themselves the pieces are very small and minute and would not offer enough of a positive link to any one person.” Tr. 498.

Since 1993, DNA technology has advanced tremendously. New and highly sensitive testing methods have been developed, and all forms of testing, both old and new, have continued to evolve and become more sensitive with each passing year. RFLP has been discontinued in favor of Polymerase Chain Reaction (“PCR”) and Short Tandem Repeat (“STR”) analysis. Kawecki at 826-27. It is also now possible to obtain a DNA profile using Y-Chromosome Short Tandem Repeat (“Y-STR”) DNA Analysis. *See, e.g., State v. Emerick*, 170 Ohio App.3d 647, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 18 (2d Dist.). And, “[w]hile Y-STR testing allows DNA technicians to differentiate between male and female DNA from a mixed source, mini-STR and touch DNA permit technicians to obtain a DNA profile from very small degraded, and compromised samples.” *State v. Reynolds*, 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 315, ¶ 18 (2d Dist.).

“Touch DNA refers to the genetic information recovered from epithelial (skin) cells left behind when a person makes contact with an object.” Kawecki at 828. During the commission of an offense, a perpetrator may leave DNA samples on the victim’s clothing or murder weapon when

using a large amount of force. *Id.* at 828-29. Recently, courts across the country have granted post-conviction DNA testing to analyze items recovered from a crime scene for touch DNA. In 2008, Timothy Masters was exonerated of a 1987 murder when DNA testing revealed microscopic skin cells left behind by the real killer on the victim's clothing. *Id.* at 821-22, citing *Masters v. People*, 58 P.3d 979, 983 (Colo. 2002).

In 2014, the Eighth District Court of Appeals reversed the trial court's denial of an inmate's application for postconviction DNA testing. *State v. Johnson*, 8th Dist. Cuyahoga No. 100503, 2014-Ohio-2646, ¶ 2. The Court of Appeals summarized the drastic evolution of DNA testing since the applicant's trial 13 years prior, and found that Johnson fulfilled the requirement that "at the time of the trial stage in [his] case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available." *Id.* at ¶ 16-20. The court noted that, as opposed to the technology available in 2001, current testing could reveal DNA in biological material such as sweat or skin cells on a jacket and cap worn by the robber. *Id.* at ¶ 20. Further, the DNA on the jacket and cap could be compared to an alternative suspect's DNA or the DNA in the Combined DNA Index System ("CODIS"). *Id.*, citing *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 1992 N.E.2d 1095 (requiring trial courts to consider whether there is a possibility of discovering new biological material that is potentially from the perpetrator that the prior DNA test may have failed to discover).

Notably, Eric's trial occurred eight years before Johnson's, and Eric is also seeking to test clothing and very small biological samples, including the blood spatter on the trash cans and broken, clear glass bottle, which would have been impossible in 1993. And, as the Masters case reveals, it is possible to obtain DNA from a murder victim's clothing, assuming sufficient force

had been used to deposit the offender's skin cells on the clothing, even after more than 20 years have elapsed since the crime took place.

2. Biological evidence was collected from the crime scene or the victim of the offense and the parent sample of that biological material still exists. R.C. 29.53.74(C)(1).

In addition to the blood samples from the service building and garbage cans discussed above, Detective Culpert also collected a broken clear glass bottle with what appeared to be dried blood on it and clumps of hair and small skull fragments near the broken bottle. Tr. 367-69, 371-73, 378. (Exhibit C, p. 1-2). The victim's clothing was also collected during the autopsy. (Exhibit C, p. 2). According to Detective Culpert's Evidence Technician Report dated August 5, 1992, these items were stored in the Toledo Police Department's Property Room, along with the swabs of dried blood. (Exhibit C, p. 2).

On June 21, 2013, undersigned counsel spoke with a representative of the Toledo Police Department, who confirmed the Department is still in possession of several items of biological evidence, including the broken clear glass bottle, the victim's clothing, several swabs of dried blood, and a toothbrush. (Exhibit I). That same day, undersigned counsel sent a certified letter to the Toledo Police Department requesting that any biological evidence be retained and asking the Department to notify the Ohio Public Defender's Office in advance of any intended destruction so that a court order prohibiting its destruction can be secured. (Exhibit I). At this time, the Toledo Police Department has not indicated its intent to destroy or dispose of the evidence.

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

The burden is on the State to determine which items are still available for testing. R.C. 2953.75. The prosecuting attorney must consult with the testing authority and prepare findings

regarding the quantity and quality of the parent sample of the biological material, and the chain of custody and reliability regarding the parent sample. R.C. 2953.76. But, it is the sole responsibility of the testing authority to determine whether the parent sample of the biological evidence collected is of sufficient quantity and in suitable scientific condition to be submitted for testing. R.C. 2953.74(C)(2); *Reynolds*, 186 Ohio App.3d 1, at ¶ 22.

4. At the trial stage, the identity of the person who committed the offense was an issue. R.C. 2953.74(C)(3).

The perpetrator's identity was a primary issue at the trial stage of this case. Eric testified that he did not participate in the murder of ██████████, and in fact was never in Woodrow Wilson Park on the night ██████████ was beaten to death. Tr. 732. Eric was convicted largely on the testimony of two individuals, as well as his own statement, despite the significant inconsistencies among each person's story. No physical evidence connected Eric or any of his co-defendants to the crime. Because the identity of the perpetrator was at issue in Eric's trial, R.C. 2953.74(C)(3) is satisfied.

5. One or more of the defense theories asserted at trial was of such a nature that, if DNA testing is conducted and an exclusion result obtained, the exclusion result will be outcome determinative. R.C. 2953.74(C)(4).

At his trial, Eric's defense theory was that he was not present at Woodrow Wilson Park on the night of ██████████ murder, and was not in any way involved in his death. Eric testified that he did not participate in the robbery and murder of ██████████, but rather made up the story he told detectives because he was afraid of going to prison for 50 years, and then promptly recanted. Tr. 732, 743. As such, and for the reasons more fully developed below, if a DNA profile is found on ██████████ clothing, the broken glass bottle, the blood swabs collected from the trash barrel near ██████████ body, or other crime scene evidence, and Eric and his co-

defendants are excluded as the contributor of that DNA, the result would be outcome determinative.

6. If DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative for Eric Misch. R.C. 2953.74(C)(5).

A DNA result excluding Eric and his four co-defendants as contributors to the biological evidence at the crime scene would be outcome determinative. Given the nature of [REDACTED] murder, the killer must have been in close proximity to [REDACTED] body during the violent struggle, depositing DNA in the way of sweat, blood, or skin cells onto [REDACTED] clothing, the overturned garbage cans, the broken, clear glass bottle, and other evidence collected from the crime scene.

In addition, up until now, there has been no physical evidence connecting Eric and his co-defendants to the murder of [REDACTED]. And the remaining evidence, including the witnesses' statements and Eric's own alleged confession, is unreliable and inconsistent with the physical evidence. Finally, potential alternative suspects were provided to the lead detective in this case, but for unknown reasons, these leads were never explored, nor was information about these alternative suspects turned over to defense counsel in this case.⁸

For these reasons, DNA testing that may exclude Eric and his co-defendants as contributors of the DNA from the blood spatter at the crime scene, the broken bottle, [REDACTED] clothing, and other crime scene evidence—and perhaps identify one of the known alternative suspects as the contributor of the DNA—would be outcome determinative in this case.

⁸ Eric is contemporaneously filing a motion for leave to file a motion for new trial on this basis.

a. Based on the intimate nature of the murder, the killer's DNA should be present on the victim's clothing and the broken bottle.

This is not a case where the perpetrator killed the victim from a distance. Rather, [REDACTED] murder was up close and personal. He was severely beaten using at least two different methods, and possibly more. According to Dr. Scala-Barnett, the forensic pathologist who performed the autopsy, [REDACTED] suffered 26 external injuries. Tr. 613. Of these injuries, the pathologist testified that both injuries to the skull were caused by a weapon. Tr. 620-27. She did not hypothesize as to the cause of the other injuries. *Id.* In the trial of two of Eric's co-defendants, Dr. Scala-Barnett testified that she did not think the injuries to the victim's torso and limbs were caused by the same instrument that caused the head injuries. [REDACTED] Tr. 87-88. She did not state what kind of instrument she believed caused these injuries, only that it was not the same as the head injuries. *Id.*

Some of [REDACTED] injuries could have been caused by the broken, clear glass bottle found at the crime scene. This bottle—located only four feet from [REDACTED] body and covered in what appeared to be dried blood—has never been tested for DNA or latent prints, even though it could very likely be the murder weapon. (Exhibit C, p. 1). The perpetrator's DNA may have been deposited on the bottle in at least three different manners: (1) in using the glass bottle to strike [REDACTED], the bottle could have broken, slicing the killer's hand; (2) [REDACTED] may have fought back during the assault, causing injury to the killer, who then bled on the bottle; or (3) the killer may have deposited "touch" DNA on the bottle by handling it. As such, it is possible that both [REDACTED] DNA, as well as the DNA of the perpetrator, is on the glass bottle stored in the Toledo Police Department's Property Room, waiting to be tested.

It is also possible [REDACTED] additional injuries were caused by physical contact between the perpetrator and [REDACTED]. In his unrecorded statement to detectives, [REDACTED]

claimed that when the group came to his house to brag about the beating, [REDACTED] stated that he hit the man with a bat, Eric “sucker punched” him, and [REDACTED] kicked the man. (Exhibit C, p. 2). In [REDACTED] [REDACTED] unrecorded statement, he told detectives no weapons were used. Rather, the group all stood around the victim and kicked and beat him for about six minutes. (Exhibit C, p. 2). [REDACTED] said [REDACTED] had a club, but he did not see him use it. (Exhibit C, p. 2).

If the State’s theory is correct—that the group surrounded [REDACTED] and beat him with a bat or club, as well as their fists and feet, while [REDACTED] was on the ground, then trace amounts of their DNA (through blood, sweat, or skin cells) should be found on [REDACTED] clothing. [REDACTED] T-shirt, jeans, belt, socks, and loafers were collected during his autopsy and are stored in the Property Room. (Exhibit B, p. 2; Exhibit J, p. 1; Exhibit K, p. 3)

Eric, unlike his co-defendants, was also convicted of aggravated robbery. [REDACTED] testified at Eric’s trial that when the group came over to his house to brag about beating up a black man, they were playing with a wallet and said they took it from their victim’s pants. Tr. 651-52, 677-78. If [REDACTED] was indeed robbed of a wallet on the night of his murder, the killer’s DNA would have been deposited on or around [REDACTED] jeans pocket.

b. There is no forensic evidence connecting Eric or his co-defendants to [REDACTED] murder.

Although [REDACTED] was beaten so severely that pieces of his skull were found scattered next to his body, there is no physical evidence that connects either Eric or any of his four co-defendants to the crime scene. Law enforcement never tested any of the biological evidence or the victim’s clothing for DNA. The broken, clear glass bottle covered in what appeared to be dried blood was never tested for latent prints. And, there is no record that the shoe impressions found in the mud next to [REDACTED] body were ever compared to any of the suspects’ shoes. No murder weapon was ever uncovered, and law enforcement did not find any of [REDACTED] belongings

(such as a wallet) in the homes of any of the suspects. If DNA testing of [REDACTED] clothing, the blood swabs collected from the trash can and service building, and the glass bottle was ordered, it would provide the first forensic clue to the true identity of [REDACTED] murderer.

In *State v. Emerick*, the Second District Court of Appeals held that if all the items found at the crime scene were analyzed for DNA and the applicant was excluded as the donor, the results would be outcome determinative. *State v. Emerick*, 170 Ohio App.3d 647, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 22-25 (2d Dist.). In that case, the State's theory was that the offense was committed by a single perpetrator, there was no DNA evidence that placed Emerick at the scene of the crime, and he maintained his innocence throughout his trial. *Id.* at ¶ 25. If the fingernail scrapings of the victims, swabs of blood on the bathroom walls at the crime scene, and genetic material on the murder weapons demonstrated the existence of a third party at the crime scene that did not match Emerick or the victims, that individual would be the actual murderer. *Id.* Further, where it is undisputed that no physical evidence was found at the scene that linked the defendant to the crime, "DNA test results implicating a third party as the source of the biological material would be outcome determinative." *Reynolds*, 186 Ohio App.3d 1, at ¶ 10.

And, in *Johnson*, the Eighth District Court of Appeals held that even though the victims picked Johnson out of a live line up and photo array, if his DNA is not on the robber's clothing, and an alternative suspect's DNA is found on the clothing, this would make the victims' identification suspect, especially because another individual confessed to committing the robbery. *Johnson*, 2014-Ohio-2646 at ¶ 25. As such, the DNA testing requested would be outcome determinative, despite the victims' multiple identifications. *Id.* at ¶ 26.

Here, although the State's theory is that five individuals, rather than one, beat [REDACTED] to death, the reasoning is still the same: if a DNA profile is found on the items at the crime scene

f. Eric’s statement to police was unreliable.

The cursory investigation into ██████████ death provides the context for Eric’s coerced confession. “It is widely accepted in the scientific and law enforcement community that false and unreliable confessions do occur.” (Exhibit O, p. 2). Though it is difficult to measure the prevalence of false confessions, analysis of known wrongful convictions sheds some light on the extent of the problem. For example, the National Registry of Exonerations collects data about all known exonerations in the United States from 1989 to the present. *Id.* at 3. Among the 2,145 known exonerations through 2017, 12% involved a false confession. *Id.* Among cases of documented false confessions, juveniles are overrepresented. *Id.* In studies of the National Registry of Exoneration’s data in both 2005 and 2012, 42% of juvenile exonerees had confessed, compared to 8% of adults with no known disabilities. *Id.*

Table 17: False Confessions by Age and Mental Disability

Age and Mental Status of the Exonerated Defendant	Proportion Who Falsely Confessed
Juveniles – under 18 at time of crime (39/92)	42%
11 – 14 year olds (14/19)	74%
15 – 17 year olds (25/73)	34%
Mentally Ill or Mentally Retarded (53/70)	75%
Adults Without Known Mental Disabilities (56/719)	8%
ALL CASES (135/873)	15%

SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989 – 2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 60 (2012).⁹ Juvenile false confessors are not limited to very young children. Rather, studies show that juveniles ages 14-17 are also highly susceptible to making false confessions. (Exhibit O, p. 3).

⁹ Available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (last visited July 10, 2019).

Despite Eric's persistent assertions at trial that his confession was false, he was convicted, likely as a result of jurors' and laypeople's misunderstanding of the extent and nature of false confessions. *Id.* at 4. As a general matter, people have difficulty accepting that someone would confess to a crime that they did not commit, and believe that they, themselves, would never confess to something they did not do. *Id.* Moreover, jurors regularly demonstrate an insufficient understanding of the police interrogation techniques that are associated with false confessions. *Id.* The inability to appreciate the prevalence of false confessions or the ways in which interrogation may result in false confessions is especially problematic because confessions are especially influential in jurors' decision making. *Id.* at 5. Studies regularly show that mock jurors rank confession evidence as more probative than other forms of inculpatory evidence. *Id.*

In Eric's trial, the state relied heavily on the confession he made to police implicating himself and his friends in ██████████ murder. Tr. 333-34, 338-39, 752-53. Dr. Hayley Cleary, a professor and psychologist who specializes in adolescent development in legal contexts, police interrogation, and the interrogation of juvenile suspects, has recently reviewed Eric's confession and issued a report detailing many factors that undermine its credibility. (*See* Exhibit O). Because Eric's confession – the centerpiece of the state's case – is not reliable proof of guilt, an exclusion result would be outcome determinative.

1. Eric's age

It is now widely recognized by scientists that the human brain is not fully developed until adulthood. (Exhibit O, p. 6). Adolescents' ability to process information, regulate their emotions and behavior, and make decisions under stress is directly impacted by structural and functional changes in their brains. As explained further by Dr. Cleary:

[T]he brain's different systems develop along different timetables; the brain structures that govern sensitivity to reward develop earlier than systems that govern

self-regulation. In other words, adolescents are primed to act on impulses, seek rewards, and engage in risks before they have developed adult-like capacities for self control.

Id. at 6.

The ability of adolescents to process information and make decisions is especially relevant in the interrogation context. Compared to adults, adolescents are more susceptible to psychologically coercive interrogation techniques and more likely to make false statements. *Id.* at 7. A number of additional developmental and psychosocial constructs, including future orientation, compliance, and suggestibility, further impact juveniles' decision-making capabilities.

"Future orientation is the ability to think and reason about the future or connect current behavior with future events." *Id.* In the context of false confessions, future orientation is implicated in the tendency of juveniles to make inculpatory statements in an effort to extricate themselves from a stressful situation, i.e., an interrogation. *Id.* at 7-8. Juveniles are also more likely to exhibit compliance-oriented behaviors in interrogations, as a result of the "power asymmetry" between them and the police. *Id.* at 8. Compliance may lead juveniles to engage in behaviors that are against their interest, such as waiving *Miranda* rights.

Just as children tend to be more compliant than adults, they may also be more suggestible. Specifically, youths are more likely to be impacted by "interrogative suggestibility," or "the tendency to change one's narrative account of events in response to misleading information or perceived pressuring during formal questioning." *Id.* at 9. In interviews or interrogations, interrogator suggestibility may manifest as yielding to an interrogator's questions or changing answers in response to negative feedback. *Id.*

Eric voluntarily waived his rights, went to the police station, and spoke to police. He later explained that during the interrogation, he felt threatened and scared. Tr. 729, 736. Those feelings

may have resulted in Eric making an inculpatory statement, as a means to end the interrogation and go home.

There is also evidence that Eric was vulnerable to suggestion. Dr. Cleary identified multiple times when Eric's answers shifted in response to negative feedback. For example, Eric stated, "[REDACTED] said let's jack this dude." (Exhibit H, p. 5). In response, Detective Leiter inquired, "Was it [REDACTED] that said that?" and Eric changed his answer to C.J. Moments later, Eric again changed his narrative due to negative feedback. When describing the incident, Eric stated that he asked the victim for the time. (Exhibit H, p. 6). Detective Leiter then asked him if he asked for the time or a cigarette, and Eric responded that he asked for a cigarette. *Id.* These instances demonstrate the "statement shifts" that occurred during Eric's interrogation. (Exhibit O, p. 9).

Eric was 16 years old when he was interrogated by police. Though youth, alone, is not definitive proof that a person falsely confessed, it is widely agreed upon that juveniles have "increased vulnerability to police pressure and false confessions." *Id.* Many of the youth-specific factors that result in false confessions impacted Eric's interrogation and statement.

2. Eric's comprehension of his rights

Though the detectives read Eric his *Miranda* rights, it is unlikely that Eric understood them. "A mature body of research consistently demonstrates that youth fail to understand the words and content comprising *Miranda* warnings and do not grasp the inherent rights the warnings convey." (Exhibit O, p. 10). Moreover, because the ability to comprehend *Miranda* warnings is a function of youths' conceptual capacity rather than the warnings' language, the use of juvenile-specific warnings, as were used here, does not solve the issue.

The factors that make juveniles more susceptible to false confessions – compliance and suggestibility – along with time pressure, stress, and the ability to comprehend complex

information, impact a juvenile's ability to understand his rights. Further, the way that the rights are presented to a child may affect his understanding; if the importance of the warnings is downplayed, a juvenile may not perceive them as serious.

Detectives only spent about a minute explaining Eric's rights to him. Eric, admittedly, did not pay attention, but instead looked to his mother for guidance. However, that was likely of little help. Studies show that adults, too, lack a functional understanding of the rights and protections afforded by *Miranda*, as well as the risks inherent in an adversarial interrogation. *Id.* at 12. Eric's mother "may not have fully grasped the gravity of the situation or the potential outcomes of Eric's conversation with police." *Id.* at 14. She trusted the police, and thus approved of Eric waiving his rights, going to the police station, and speaking to detectives without her or an attorney present.

3. Coercive interrogation tactics

Though police may not intend to elicit a false confession, a number of psychological factors and interrogation tactics may, nonetheless, result in a confession that is believed by police but ultimately false. When police go into an interview with the presumption that a suspect is guilty, the result is interviewer bias: the "interrogators' tendency to dismiss evidence or statements that are inconsistent with their beliefs about the suspect's guilt." *Id.* at 15. Interview bias may shape the questions that an interrogator asks, the pressure they exert, and how they perceive a suspect's statements. *Id.*

Without question, Detectives Leiter and Anderson presumed that Eric was guilty before their interview with him began. When they arrived at his house, the detectives already viewed Eric as a suspect. Tr. 414. And although Eric denied any involvement in the crime, Detective Anderson testified that he presumed he was lying. Motion Tr. 37.

Their presumption of Eric's guilt may have impacted Detective Leiter's and Anderson's interrogation techniques. Two recognized psychologically coercive interrogation techniques are minimization and maximization. (Exhibit O, p. 15). As Dr. Cleary describes:

[M]aximization refers to a collection of confrontational interrogation techniques designed to emphasize the seriousness of the situation, overcome the suspect's denials, or make the suspect feel as though they have no choice but to confess. By contrast, minimization techniques involve downplaying the severity of the offense or situation or offering sympathy, excuses, or justifications for the crime. Research indicates both maximization and minimization techniques can change the suspect's view about what might happen if they confess.

Id. When coupled with a suspect's youth, maximization techniques may be especially effective and result in an unreliable or false statement. *Id.* at 16.

Both the detectives' and Eric's description of his interrogation show that maximization techniques were utilized. Eric testified that the detectives "kept on pushing [him]" in the police car despite his repeated denials of involvement, and he began crying. Tr. 718. Not long after the interrogation began, Detective Anderson began "reasoning" with Eric, attempting to persuade him to implicate himself. He told Eric that it was in his best interest to talk, and when Eric still refused, he persisted. Tr. 407. Eric was also told that if he did not give a statement, he could be incarcerated until he was 50 years old. Tr. 729. Afterward, Eric agreed to make a recorded statement.

4. Contamination by the police

Although Eric's confession was somewhat detailed, much of what he described may have been the result of inadvertent contamination by the detectives. "Confession contamination occurs when non-public information about the crime – details known only to police and the true perpetrator – are provided to the suspect and become incorporated into the suspect's eventual (false) confession." (Exhibit O, p. 16). Contamination may occur both before and after a suspect makes an admission of guilt. *Id.* at 17. Oftentimes, as detectives endeavor to document a thorough

statement, they may inadvertently convey information about the case to the suspect. When utilizing a question-and-answer format to elicit a statement, interrogators may use leading or suggestive questions or negative feedback. The result may be a contaminated confession that is detailed and accurate, albeit false. *Id.* Contamination may be especially difficult to detect when, as here, the post-admission confession statement is recorded, but not the initial interview.

Detectives Anderson and Leiter provided Eric with details about the crime. During the car ride from Eric's home to the police station, the detectives told Eric that they were investigating the beating of a black man in Wilson Park. Tr. 717-18. Once at the station, they provided Eric with a summary of the murder and provided him the names of the other individuals they believed to be involved. Tr. 418, 441, 445. Detective Leiter also told Eric that he believed the young men went to their friend ██████ home after the murder, a fact which Eric later repeated in his statement. Tr. 445. After the initial, unrecorded interview, the detectives took Eric to Wilson Park, where he had the opportunity to view the scene and incorporate details from what he saw into his later statement. Each of these interactions "occurred before Eric's recorded statement in which he offered few details spontaneously, and for much of the interview simply verbally affirmed the narrative outlined by the detective." (Exhibit O, p. 18).

5. Discrepancies between Eric's statement and the evidence

The truthfulness of Eric's confession is further undermined as many of the facts he reported were inaccurate. For example, while at the park with detectives, Eric pointed out an area where the crime allegedly occurred. However, ██████ body was actually found 60 feet away from that location. Tr. 473. Likewise, although Eric reported, as he was told by police, that after the beating he and the others went to ██████ home, ██████ testified that Eric and his co-defendants came to ██████ home after the robbery and spoke of the offense. Tr. 653-54.

Eric's statement is also entirely inconsistent with [REDACTED] testimony in [REDACTED] [REDACTED] trial. In his statement, Eric told the police he was unsure if [REDACTED] was present that night. (Exhibit H, p. 4). Joey, however, testified that he was there. [REDACTED] Tr. 141-42. [REDACTED] never mentioned meeting up with [REDACTED] in the cemetery, as Eric did. *Compare* Exhibit H, p. 4 *with* [REDACTED] Tr. 141-42. Nor did [REDACTED] mention Eric asking [REDACTED] for a cigarette or the time. Notably, while [REDACTED] claimed that he was at [REDACTED] most of the day with [REDACTED] Eric Misch, and the [REDACTED] brothers, and that he later participated in the beating, [REDACTED] testified that [REDACTED] was actually with [REDACTED] at Cedar Point all day. *Compare* [REDACTED] Tr. 135-39, *with* Tr. 663.

Eric was a scared 16-year-old child when he was questioned by police, and his confession was the likely result of his youth, coercive interrogation tactics, and contamination. Dr. Cleary's careful analysis of Eric's confession establishes that it is unreliable and would be insufficient to support Eric's conviction if DNA testing excluded Eric and his co-defendants.

g. Alternative suspects were never explored.

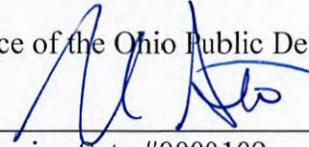
The Toledo Police Department received several calls to their Crime Stopper line in the days that followed [REDACTED] murder, pointing to a number of alternative suspects, including Lee A. Jeffries, who had just been arrested for the murder of a woman on the same night that [REDACTED] [REDACTED] was killed. (Exhibit P). An article printed in the Toledo Blade on August 5, 1992 discusses both murders, noting that the body of [REDACTED] was found just six blocks away from where [REDACTED] was found near the Wilson Park Pool on the very same night. (Exhibit Q). Although the two murders had never been connected, apparently a call to the Crime Stopper line on August 19, 1992 provided the missing link: an informant stated that two individuals told him they observed [REDACTED], and Mr. Jeffries together at a bar the same night that both were

In 1993, Eric Misch, based solely on the testimony of two unreliable witnesses, as well as his own false confession at the age of 16, was convicted of the brutal murder of [REDACTED]. No physical evidence connected Eric or his four co-defendants to the crime. For unknown reasons, viable alternative suspects were never investigated. Eric, as well as each of his co-defendants, have consistently maintained their innocence for the past 26 years.

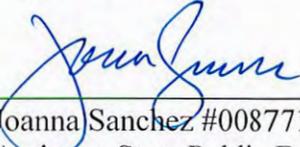
Eric asks this Court to order the testing of the biological evidence collected at the crime scene, including [REDACTED] clothing, blood swabs taken from the trash barrel and service building, and the bloody, broken glass bottle found four feet from the victim's body. If an unknown DNA profile is found on these items, and Eric and his co-defendants are excluded as contributors, Eric asks this Court to order the DNA profile to be compared to other profiles in CODIS to identify the real killer of [REDACTED].

Respectfully submitted,

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