

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2013-SC-000423-MR



GREGORY WILSON

APPELLANT

v.

Appeal from Kenton Circuit Court  
Action No. 87-CR-00166  
Hon. Gregory M. Bartlett, Judge

COMMONWEALTH OF KENTUCKY

APPELLEE

**BRIEF FOR APPELLANT, GREGORY WILSON**

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**Certificate of Service**

This is to certify that a copy of this brief was mailed, first class postage prepaid, to Hon. Gregory M. Bartlett, Judge, Kenton Circuit Court, First Division, Kenton County Judicial Center, 230 Madison Avenue, Covington, KY 41011, Hon. Heather M. Fryman and Hon. Julie Scott-Jernigan, Assistant Attorneys General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and Hon. Robert Sanders, Commonwealth's Attorney, 303 Court Street, Suite 605, Covington, KY 41011, on February 24, 2014. I further certify that the record on appeal was returned to the office of the Clerk of the Supreme Court of Kentucky.

  
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## **INTRODUCTION**

This appeal is from the order of the Kenton Circuit Court that denied Gregory Wilson's request for DNA testing [KRS 422.285] of semen, blood, saliva, hairs and related biological substances that were recovered from the car where various offenses were alleged to have occurred.

## **STATEMENT CONCERNING ORAL ARGUMENT**

The appellant believes that oral argument would be helpful to the Court. This appeal presents questions about the methodology that a court should use to decide whether post-conviction DNA testing is warranted when the available and testable biological evidence is large in number and widely varied in kind. The appellant requests that oral argument be scheduled.

## **NOTE CONCERNING CITATIONS**

The court proceedings in Kenton Circuit Court were recorded on videotape. References to that record will be in accordance with CR 98: (VR, month/day/year, hour:minute:second).

References to the Kenton Circuit Court Clerk's record will be: (TR, volume, page; Box \_\_ of 8).<sup>1</sup> The Appendix to this brief will be designated: (App., page).

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<sup>1</sup> There are eight boxes of Kenton Circuit Court records that are numbered "Box 1 of 8" through "Box 8 of 8."

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## STATEMENT OF THE CASE

### **I. Introduction**

The issue presented in this appeal was remanded to the Kenton Circuit Court in this Court's decision in *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012). This court specifically remanded the case for a determination of whether semen on a car seat should be tested. In the 2012 appeal, this Court had denied the request for testing of hairs that had been recovered from the same vehicle at the same time that the semen was recovered and preserved. But at the time of this Court's ruling, based upon representations made by the Commonwealth, this Court and the parties were under the impression that the hairs were no longer in existence. *Wilson v. Commonwealth*, 381 S.W.3d at 191.

After remand from this Court, through a series of Open Records requests, internal investigations by the Crime Lab, the Kentucky State Police and the Justice Cabinet, it became apparent that the hairs were in storage at the Lab, that they were always being stored at the Lab since the trial, and that the Commonwealth's contrary representations to the federal and state courts since 2001, were simply not accurate. Mr. Wilson filed a "Motion for DNA Testing and Hearing on Hair Evidence and Other Substances Retained as Evidence." (TR II, 177-197; Box 8 of 8). In that motion, Mr. Wilson specifically requested that the court order DNA testing of the semen, hairs, blood, saliva and fingernails that had been recovered by investigators and stored at the KSP Lab. (TR II, 177, 185; Box 8 of 8).

The Kenton Circuit Court denied DNA testing of the hairs based upon its finding that this Court's ruling in *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012),

regarding the hairs was the “law of the case.” (TR V, 600; Box 8 of 8; App. A2).

Regarding the semen, the circuit court ruled, “this Court finds and concludes as a matter of law that, in light of the substantial and compelling evidence of the Defendant’s guilt on all charges, including rape, a DNA test result that the semen was not from the Defendant would not amount to a reasonable probability that the Defendant would not have been charged or convicted or have received a more favorable sentence.” (TR V, 605; Box 8 of 8; App. A7). The Court denied testing of the blood, saliva and fingernails for the same reason. (TR V, 605; Box 8 of 8; App. A7).

## **II. Procedural History of Mr. Wilson’s case**

Mr. Wilson was charged, tried and convicted together with Brenda Humphrey in a joint trial in Kenton Circuit Court in 1988. Both co-defendants were charged with murder, robbery, kidnapping, conspiracy to commit robbery and rape in an indictment returned in June 1987. (TR I, 1; Box 1 of 8). The trial began in September 1988. Humphrey was convicted of kidnapping, conspiracy and facilitation of both murder and rape. Humphrey’s sentence was life without parole for 25 years on kidnapping and a total of 50 years on other offenses. *Humphrey v. Commonwealth*, 836 S.W.2d 865, 867 (Ky. 1992). Mr. Wilson was convicted of all the charged offenses and was sentenced to death for kidnapping and murder.

On direct appeal, Mr. Wilson’s convictions were affirmed as were the sentences, with the exception of the kidnapping death sentence that was vacated and remanded for resentencing. *Wilson v. Commonwealth*, 836 S.W.2d 872 (Ky. 1992). After he was resentenced to 20 years for kidnapping, Mr. Wilson filed a post-conviction motion to vacate the judgment, raising numerous claims, most of which related to ineffective



assistance of trial counsel. A final order denying all relief was entered on March 5, 1997. This Court affirmed the Kenton Circuit Court. *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky. 1998). The United States Supreme Court denied certiorari. *Wilson v. Kentucky*, 526 U.S. 1023 (1999).

Mr. Wilson's petition for a writ of habeas corpus, filed in the United States District Court for the Eastern District of Kentucky, was denied on September 30, 2004. A panel of the Sixth Circuit Court of Appeals affirmed. *Wilson v. Parker*, 515 F.3d 682 (6<sup>th</sup> Cir. 2008). The United States Supreme Court denied certiorari. *Wilson v. Simpson*, 130 S.Ct. 113 (2009). Thereafter, Mr. Wilson filed a "Motion for DNA Testing" and a "Memorandum of Law in Support of Motion for DNA Testing," along with an Appendix. (TR I, 24-38, 57-70; Box 7 of 8). The Kenton Circuit Court denied testing of hairs that had been the subject of expert testimony at trial, but failed to rule on DNA testing of semen. (TR IV, 533-540; Box 7 of 8). On appeal, this Court upheld the denial of DNA testing of the hairs but remanded to the Kenton Circuit Court for a determination of whether the semen should be tested. *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012). This appeal is from the order denying relief upon remand.

### **III. The Commonwealth's case against Mr. Wilson**

The Commonwealth's theory of the case at trial was that Brenda Humphrey and Gregory Wilson forced Deborah Pooley, a waitress, into her own car in Covington, abducted and robbed her and that Mr. Wilson later raped and killed Pooley while Humphrey drove the car. Ms. Pooley's body was dumped in Crawfordsville, Indiana, near the Illinois border. Ms. Pooley's credit cards were later used to make various purchases in Illinois. The Commonwealth argued that a watch in Mr. Wilson's

possession at the time of his arrest along with other merchandise in the possession of Humphrey linked them to the crimes because the items were purchased with Ms. Pooley's credit cards.

At trial, co-defendant Brenda Humphrey and jailhouse snitch Willis Maloney were the two main witnesses against Mr. Wilson. Maloney claimed that Wilson confessed to killing Pooley, but Maloney was not cross-examined by Wilson's attorney (despite Mr. Wilson's request that he do so, and despite the fact that Wilson told the judge that he did not know how to cross-examine). As a result, the jury never heard that Maloney, a paid professional snitch, was receiving special treatment from the prosecutor in exchange for his testimony, special treatment that went above and beyond any assistance with his various pending federal and state charges. Brenda Humphrey told the jury that she witnessed Wilson raping and killing Pooley, but the jury never heard that Humphrey had actually confessed to her sister that Humphrey herself had killed Pooley by cutting her throat.

Willis Maloney, an admitted convicted felon and chronic alcoholic, claimed that while he and Wilson were in the Kenton County Jail, Wilson told him about his involvement in the abduction, rape and murder of the victim. (TE V, 733, 736; Box 1 of 8). Maloney was in the Kenton County Jail because he had been arrested for a domestic violence assault charge in which the victim was his girlfriend. That charge was dismissed by the prosecutor, who also told Maloney that a felony theft charge pending in Cincinnati might be amended to a misdemeanor. (TE V, 733-734; Box 1 of 8). At the time of his incarceration, Maloney was also on federal parole. After his release from the Kenton County Jail, Maloney was taken to court in Ohio, where the prosecutor helped him get

released on his own recognizance. (TE V, 734; Box 1 of 8). At the time of trial, he was facing a theft charge and the prosecutor told him he would advise the court about Maloney's cooperation. Although eligible, he was not charged as a persistent felony offender. (TE VI, 782-785; Box 1 of 8).

Maloney said he met Wilson in the Kenton County Jail, where they shared a cell. Maloney claimed that Wilson confessed to all of the following: 1) His biggest mistake was to involve Humphrey in the murder; 2) the car had been wiped clean; 3) he told Humphrey not to use the credit cards; 4) the body was left in a remote area; 5) the motive was robbery; 6) the victim was dead before they crossed into Indiana; 7) Humphrey used the victim's credit cards; 8) they went to St. Louis; 9) when they returned to Covington, he took the license plates off the car and abandoned it; 10) he strangled the victim; and 11) after the abduction, he stayed with Ms. Pooley on the floodwall while Humphrey went to get gas in Ms. Pooley's car. Maloney said that, at night, he took notes about what Wilson supposedly told him and he contacted the prosecutor's office and gave those notes to Detective Denham after speaking to him at the prosecutor's office. (TE V, 732-778; TE VI, 782-808; Box 1 of 8).

Because Maloney was not cross-examined, except by Humphrey's attorney, the jury never heard about how Maloney had the opportunity to learn all of these alleged "facts" by speaking to the representatives of the Commonwealth on numerous occasions. Not coincidentally, the "facts" related by Maloney supplied the necessary jurisdictional and venue foundations that the Commonwealth's Attorney needed for the Kenton County prosecution of the offenses, especially the murder charge.

Humphrey testified that on the day of the abduction, she had money, about \$60, so she and Wilson, her friend, were not broke. She claimed that they were walking along and approached a lady (Ms. Pooley). While talking to her, Wilson suddenly took out a knife and put it to the victim's throat. Wilson ordered Humphrey and Ms. Pooley into Ms. Pooley's car and told Humphrey to drive. Humphrey said she stopped to fill the car with gas while Wilson kept the knife to Ms. Pooley's throat, threatening he would kill both of them. Humphrey then drove into Ohio while Wilson tied Ms. Pooley's hands with a lamp cord. Eventually, Wilson and Ms. Pooley got into the back seat while Humphrey continued to drive. Humphrey stated that Wilson raped Ms. Pooley in the back seat and then choked her to death with something. She said Wilson told her to take the next exit and they dumped the body. They stayed at a motel and Humphrey used Ms. Pooley's credit cards to make purchases of gas, clothing and other items. After they returned to the Covington area, they abandoned the car. Humphrey denied ever telling Beverly Finkenstead that she (Humphrey) had told Ms. Pooley that she had to die because Ms. Pooley had seen Humphrey and Wilson. (TE VI, 874-914; TE VII, 917-1017; Box 1 of 8).

Although Humphrey was cross-examined by the prosecutor, the prosecutor took issue with very little of what Humphrey had said on direct examination because Humphrey said what the prosecutor wanted her to say and expected her to say consistent with the Commonwealth's theory, i.e., that Wilson was responsible for everything. Because Mr. Wilson's attorneys did not cross-examine Humphrey and because Wilson was incapable of conducting a cross-examination, there was never a challenge to Humphrey's credibility and no real adversarial testing of the Commonwealth's case.

Although the prosecutor was aware that Humphrey had confessed to her sister, Lisa Maines, that she (Humphrey) had actually killed Pooley, the prosecutor never questioned Humphrey about her confession nor did he call Maines as a witness.

Predictably, Mr. Wilson was convicted and, equally predictably, sentenced to death when his attorneys, who had conducted no mitigation investigation, presented no evidence at all in the penalty phase of the trial.

#### **IV. Kenton Circuit Court Proceedings Relating to DNA Testing**

After Mr. Wilson filed his Motion for DNA testing, the presiding judge in Kenton Circuit Court, First Division, Hon. Martin J. Sheehan, entered an order certifying the need for the assignment of a special judge due to docket congestion. (TR I, 81; Box 7 of 8). Hon. Steven Jaeger was then appointed as Special Judge-Senior Status to Mr. Wilson's case. (TR I, 84; Box 7 of 8). The Commonwealth filed a response to Mr. Wilson's motion for DNA testing. (TR I, 85; Box 7 of 8). Mr. Wilson filed a motion to strike said response. (TR I, 108, 114; Box 7 of 8).

Eventually, after several status conferences, Special Judge-Senior Status Steven Jaeger recused himself from the case. (VR, 5/18/10, 01:35:24, 01:48:12; VR, 6/8/10, 01:26:20; VR, 7/20/10, 01:22:50, 01:41:20; TR III, 379-381; TR IV, 492; TR IV, 492-494, 495-496; Box 7 of 8). Chief Regional Judge Gregory M. Bartlett, Sixth Region of Kentucky, then assigned himself to the case. (TR IV, 497; Box 7 of 8).

Judge Bartlett scheduled a hearing for September 1, 2010. (TR IV, 498, 533; Box 7 of 8). After listening to the arguments of counsel, Judge Bartlett ruled that the motion for DNA testing should be denied without an evidentiary hearing. (VR, 9/1/10, 04:29:59,

04:32:23). In his written order, Judge Bartlett denied DNA testing of the hairs, but failed to rule on whether the semen should be tested. (TR IV, 533-537; Box 7 of 8).

As noted above, this Court remanded for a ruling on the motion to test the semen. *Wilson v. Commonwealth*, 381 S.W.3d at 191. Also, as noted above, after the defense-prompted investigations into what evidence was or was not being retained at the KSP Lab, Mr. Wilson filed a motion for DNA testing of semen, hairs, blood, saliva and fingernails. (TR II, 177-197; Box 8 of 8).

The problem with the hairs was that, beginning in 2001, the Attorney General insisted that the hairs that were collected from the car, from Mr. Wilson, from Ms. Humphrey and from Ms. Pooley could not be found and that there was no explanation for the absence of the hairs and the lack of records to document what happened to the hairs.

In an order entered on October 2, 2001, the United States District Court for the Eastern District of Kentucky at Covington granted Mr. Wilson's motion for DNA testing of the hairs that were identified at trial as having characteristics matching Mr. Wilson's hair, to wit: "Petitioner's motion for an order for DNA testing of hairs recovered from Deborah Pooley's car (doc. # 74-1) be, and it is hereby, granted as to hairs to which hair comparison testimony at petitioner's trial indicated the hairs were similar or had the same characteristics of petitioner." *Gregory Wilson v. Phil Parker, Warden*, No. 99-78. (See Box 6 of 8; "Record of 99-CV-78, Gregory Wilson v. Phil Parker, Warden"). That same order granted Mr. Wilson's motion for a complete inventory of physical evidence recovered in the case. The Attorney General had opposed the request for an inventory, but eventually, on October 17, 2001, the Attorney General filed an inventory after being ordered to do so by the federal court. In proceedings on October 25, 2001, the Attorney

General told the presiding federal judge that “our investigation as to the hairs was continuing and, indeed, it is, but I thought I should go ahead and mention to the Court now that I’m getting every indication that those hairs are inexplicably gone from the Jefferson Regional Crime Lab.” (Transcript of Evidentiary Hearing, United States District Court, October 25, 2001, p. 72; TR I, 1-59 (Appendix); Box 8 of 8).

After Mr. Wilson filed his KRS 422.285 “Motion for DNA Testing” on April 23, 2010, the Attorney General was required by KRS 422.285(6) to file an inventory of physical evidence. (“The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the defense and the court.”). The initial inventory was filed on July 12, 2010. (TR IV, 478-486; Bob 7 of 8). The first page of the inventory filed by Assistant Attorney General Heather Fryman on July 8, 2010, addresses what the Commonwealth claimed was still in existence at the “Kentucky State Police Jefferson Regional Lab.” According to that pleading, “Counsel contacted the Jefferson Regional Laboratory and had several conversations with a forensic specialist familiar with the case. That specialist reported to counsel that she conducted an extensive inquiry, and had in inventory six cotton threads of the type that were previously used by the laboratory to collect samples. She did not know what was on the threads, but stated that the results were reported in lab report 87-2-2076 as Exhibits 25A and 25B. Those reports were filed in Wilson’s federal habeas proceeding. One thread was labeled ‘phen(+)’ which means blood. Lab report 87-2-2076, attached hereto, indicates that Exhibit 25 was the rear seat of the automobile. The report indicates that human sperm in a quantity too limited to conduct ABO grouping determination was present on Exhibit 25. Blood and saliva were



also found on Exhibit 25. Presumably, the threads now in inventory were used to collect the fluids identified in the report.” (TR IV, 478-486; Box 7 of 8).

After this Court remanded the case to the Kenton Circuit Court, counsel for Mr. Wilson made Open Records requests [KRS 61.870 et seq] in order to determine whether the hairs were still being stored at the Lab and also to determine what other items collected as evidence, particularly biological materials, were still available for testing. On or about January 24, 2013, the Official Custodian of Records for the Kentucky State Police sent to counsel for Mr. Wilson a letter with copies of eighty-six documents relating to the Crime Lab’s involvement in Mr. Wilson’s case. Mr. Wilson filed those documents, along with correspondence between counsel for Mr. Wilson and the Custodian, with the Kenton Circuit Court on February 6, 2013. *See* “Inventory of Documents Released on January 24, 2013, By the Kentucky State Police Pursuant to an Open Records Request.” (“KSP Inventory”). (TR II, 198-293; Box 8 of 8). In an earlier letter, the Custodian responded to an inquiry about practices in 1987 relating to the destruction or disposal of evidence by stating, “Upon information and belief, it was common practice to retain all evidence samples, and no evidence was destroyed. Items of evidence were either maintained at the lab or returned to the investigative agency.” (TR II, 204; Box 8 of 8).

Based upon this statement by the Custodian, counsel for Mr. Wilson argued at the February 13, 2013 hearing that the hairs were likely still in existence despite the reports by the Attorney General that they were nowhere to be found and were lost or destroyed. At that hearing, the Assistant Attorney General maintained her position that the hairs could not be found:



Judge Bartlett: Is the hair in existence or not?

Fryman: I don't know, Your Honor. The inventory, I've searched, I've contacted every state agency that might have retained evidence from this case. And as I've stated in my inventory, no one has the hair. I don't know whether that means the hair was destroyed or whether the hair was lost. The hair could have been lost when the courthouse here was moved into the new courthouse. We simply don't know what happened to it.

(VR 2/13/13, 2:51:35-2:52:05). At the time of the February 13, 2013 hearing, counsel for Mr. Wilson was not aware that the hairs were and, in fact, still are being stored at the Jefferson Regional Lab ("Jefferson Laboratory Branch").

After an investigation by the Justice Cabinet, Kentucky State Police and the KSP Crime Lab into what became of the hairs and other evidence that had been collected and stored in Mr. Wilson's case, a second hearing concerning the evidence was held in Kenton Circuit Court. At that hearing, on May 2, 2013, Laura B. Sudkamp, Laboratory Director, Kentucky State Police, Forensics Laboratories, testified about what items of evidence collected in Mr. Wilson's case were being stored at the Lab. (VR, 5/2/13, 01:42:19). Dawn M. Bayless, Crime Scene Investigation Technician from the Covington Police Department, testified about evidentiary items stored at the Covington Police Department. (VR, 5/2/13, 02:04:14). Counsel then agreed that a meeting would take place at the Covington Police Department with representatives of the Commonwealth and defense present to inspect the items.

After making the representations in circuit court on February 13, 2013, and after the defense filed a "Supplement to 'Motion for New Inventory Based Upon KSP Crime

Lab Documents Received in January 2013” and a “Second (2<sup>nd</sup>) Defense Inventory of Documents (Relating to the DNA Claim) Released by Kentucky State Police Which Confirms that Hair and Other Evidence is Currently Stored at the Jefferson Laboratory Branch, Contrary to the Representations of the Assistant Attorneys General Made Since 2001,” the Commonwealth filed a response. (TR IV, 445-505, 506-522, 551-565; Box 8 of 8).

In that response, the Commonwealth noted several conversations that counsel for the Commonwealth had with lab personnel in “May-July of 2010” prior to filing an inventory in Kenton Circuit Court on July 12, 2010. (TR IV, 551; Box 8 of 8). Additionally, counsel said she had “personally visited the Covington Police Department on Tuesday May 18, 2010.” *Id.* Counsel then stated, “It is a vast understatement to say that counsel is shocked to hear that the Office of the Attorney General has apparently been misinformed regarding the existence of items of evidence retained by the Jefferson Regional Laboratory in this matter.” (TR IV, 552; Box 8 of 8).

Two months later, on May 20, 2013, the Commonwealth filed a “Second Inventory” in which the Commonwealth explained that all items in the possession of the Kentucky State Police Crime Labs had been transferred to the custody of the KSP Laboratory Director, Ms. Laura Sudkamp, at the Kentucky State Police Central Laboratory facility. (TR IV, 585; Box 8 of 8). A list of the items of evidence in Ms. Sudkamp’s custody was attached to the Second Inventory, and a copy of Ms. Sudkamp’s list, along with a copy of Covington Police Department Evidence Tech Dawn Bayless’s inventory of evidence stored at the Covington Police Department is included in Appendix B to this brief. (TR IV, 591, 593-594; Box 8 of 8; App. B1-3).

When this case was on appeal, this Court “disapprove[d] of the Commonwealth’s apparent lack of diligent efforts to locate the hairs ....” *Wilson v. Commonwealth*, 381 S.W.3d 180, 192 (Ky. 2012). Further, the Court said:

In 2001, in Wilson’s habeas proceedings, a federal district court ordered DNA testing of the hairs. The Attorney General testified that the hairs could not be found but that they were continuing to search for them. There is nothing in the record indicating that the Commonwealth continued its search. Present counsel for the Commonwealth has confirmed the lab that conducted the original testing on the hairs cannot locate the hairs but has looked no further. So the Commonwealth only claims that the hairs “may not be in existence.” In different circumstances, an apparently cursory search would not be adequate.

*Wilson v. Commonwealth*, 381 S.W.3d at 192, fn. 51. In the Commonwealth’s “Second Inventory,” the Commonwealth suggested that, due to the controversies relating to the Commonwealth’s representations regarding the evidence, the interest of justice may demand that testing be ordered. (TR IV, 553; Box 8 of 8). Specifically, counsel said, “However, in the event that this Court believes that the recent developments **require DNA testing in the interest of justice**, the Commonwealth requests that any order for DNA testing entered by the Court include certain provisions [relating to collection of samples, chain of custody and reporting of results].” (TR IV, 553; Box 8 of 8) [emphasis added]. In conclusion, the Commonwealth said that it “submits this matter to the Kenton Circuit court for further determination and proceedings as justice requires.” (TR IV, 553; Box 8 of 8). The Appellant submits that, under the circumstances, fundamental fairness requires that DNA Testing be ordered.

At the conclusion of the February 13<sup>th</sup> hearing, the court ordered the parties to file simultaneous memoranda on March 14<sup>th</sup> addressing the testimony and evidence that was

in the trial record that was relevant to the question of DNA testing. (VR, 2/13/13, 03:25:20). Both parties filed memoranda. (TR III, 434-444; TR IV, 523-550, 577-580). Testing of the relevant items (semen, hairs, blood, saliva and fingernails) was denied in the order entered on June 18, 2013. That order is the subject of this appeal. (TR V, 599-607; Box 8 of 8; App. A1-9).

**V. Evidence held by the Commonwealth that is subject to DNA Testing**

Based upon the list supplied by Ms. Sudkamp of stored evidence, the following items are available for testing:

- a) As to standards for comparison, the list indicates that available are: pubic (exhibit #3) and hair (exhibits # 41 & # 42) standards of the victim; pubic (exhibit # 40B) and hair (exhibit # 40C) standards of the defendant Gregory Wilson; and, pubic (exhibit # 60) and hair (exhibit # 39C) standards of the co-defendant Brenda Humphrey;
- b) Exhibit # 1 is described as “Hairs from carpet (6)” and “Hairs from carpet (2)” and reference “Lab # 87-2-1796” and “Lab # 87-2-2076”. Lab report # 87-2-1796, is dated 6-15-87 and signed by W.M. Durbin (see document 000016, attached and filed in this court on February 6, 2013, to the “Inventory of Documents Released on January 24, 2013, by the Kentucky State Police Pursuant to an Open Records Request.”) According to the notes of Mr. Durbin (000019) these hairs, include “1 Cauc [assume this stands for Caucasian] pubic hair” and are from the “carpet from automobile rear floorboard” (000017). Furthermore, the report states, “Caucasian head and pubic hairs ...are being retained on file at the lab for future comparisons, if necessary” (000017);
- c) Exhibit # 4 is described as “Seat cover (3)” and references “Lab # 87-2-2076”. Lab report # 87-2-2076 is dated 10-21-87 and signed by W.M. Durbin (000020). Exhibit # 4 is described as “Seat cover, right front” (000021). His notes (000055) seem to indicate “short negroid pubic hair and also severed Cauc head hairs”;
- d) Exhibit # 5 is described as “Front driver seat (2)” and references Lab # 87-2-2076. The notes indicate “several cauc hairs recovered, one of those being a Cauc pubic hair....” (000055);

- e) Exhibit # 6 is described as "Front pass. Seat (6)" and references Lab # 87-2-2076. The notes indicate "Negroid pubic & head hair fragments recovered from it" and "Cauc head & pubic hairs recovered from it" (000054);
- f) Exhibit # 7 is described as "Floor mat (4)" and references Lab # 87-2-2076. According to the notes, "Caucasian head & pubic hair fragments recovered from it... ..No Negroid hairs found" (000054);
- g) Exhibit # 8 is described as "Hatch back carpet (4)" and references Lab # 87-2-2076. The notes state, "possible Negroid pubic hairs recovered. Nope. Just dark Cauc hairs. Cauc head & pubic hairs recovered" (000053);
- h) Exhibit # 9 is described as "Rear carpet (2)" and references Lab # 87-2-2076. The notes state, "Cauc head hair recovered. White to blond colors. (1) Negroid hair & 1 fiber" (000053);
- i) Exhibit # 10 is described only as "Fibers (2)" but the notes indicate "Rear speaker platform, drivers side" and "Cauc hair & Fibers. Hairs mounted on 1 slide" (000052);
- j) Exhibit # 11 is described only as "Fiber (3)" but the notes indicate "Rear speaker platform, pass side" and "Cauc hair & Fibers. Hairs mounted on 2 slides.".....No Negroid hair" (000052);
- k) Exhibit # 12 is described as "Fibers (2)" but the notes indicate "Rear half of trunk area" and "Cauc hair" (000052);
- l) Exhibit # 18 is described as "Fibers (2)" but the notes indicate "Spare tire area under carpet" and "Cauc hairs & fibers. 3 Cauc head hairs, mounted on 1 slide. No Negroid hairs" (000051);
- m) Exhibit # 19 is described as "Hair (2)" and references Lab # 87-2-2076. According to the notes that is the "Rear wheel cover driver's side inside" and recovered were, "Cauc head hair & Cauc dark pubic hair. Each hair mounted on individual slides. No Negroid hairs" (000051);
- n) Exhibit # 20 is described as "Hairs" and references Lab # 87-2-2076. The notes then indicate "Rear wheel cover pass side inside" and recovered were "2 white hairs. Animal. Mounted on 1 slide. No Negroid hairs. No Cauc hairs. No fibers" (000051);
- o) Exhibit # 21 is described as "Fibers (2)" but the notes state "Pass side door (bottom rocker panel area)" and "Cauc hairs& fibers.....No Negroid hairs" (000051);

- p) Exhibit # 23 is described as "Fibers (12)" and references Lab # 87-2-2076. Even though it only states "Fibers," the notes indicate for exhibit # 23, "Rear floor driver's side," and that recovered were "Cauc head & pubic hairs" with a "Total of 9 slides for Ex 23" (000051);
- q) Exhibit # 24 is only described as "Fibers (4)" but the notes indicate "Rear seat" and "Cauc head hairs & 1 Cauc brown pubic hair" (000048);
- r) Exhibit # 25 is described as "Fibers/Hair (8)" and references Lab # 87-2-2076. The notes state exhibit # 25 is the "Bench seat" and "Hairs recovered from end of seat" (000049);
- s) Exhibit # 27 is described as "Fibers (4)" but the notes indicate "Driver seat" and "Cauc hairs & fibers, 2 hair slides" (000048);
- t) Exhibit # 28 is described as "Front floor driver (6)." It references Lab # 87-2-2076. The notes indicate "Two (2) Cauc pubic hairs.....and Two (2) short fine dark hair frags. Several Cauc head hairs" (000048);
- u) Exhibit # 29 is described as "hair and fibers (2)" and references Lab # 87-2-2076. The notes indicate "Cauc head hair frags" (000048); Exhibit # 30 is only described as "Fibers (2)". However the notes state "Pass floor front" and "Cauc head hairs & fibers" and "No Negroid hairs" (000048);
- v) Exhibit # 31 is described as "Fibers (3)." The notes state "Area between seats & console area" and "Cauc head hairs" and "No Negroid hairs" (000048);
- w) Exhibit # 34 is described as "Vacuum (5)" and references Lab # 87-2-2076. The notes indicate "Vacuum sweepings of auto. Cauc head & pubic hairs, fibers" (000047);
- x) Exhibit # 43 is described as "Hairs off plastic" and references Lab # 87-2-2076. The notes indicate "Cauc head hairs" (000043);
- y) Exhibit # 46 is described as "Hair" and references Lab # 87-2-2076. The notes state "Hair found in Brenda Humphrey's clothing box" (000043);
- z) Exhibit # A is described as "hairs under body (11)" and references Lab # 87-2-2121. The notes state "Numerous Cauc pubic hairs" and "Cauc pubic hairs recovered were mounted on 8 slides" and "Cauc head hairs recovered were mounted on 3 slides" (000060).

The inventory filed by Dawn M. Bayless, Crime Scene Investigation Technician from the Covington Police Department, reflects that the following items of evidence are currently being stored at the Covington Police Department:

List of evidence compiled 5.1.13 – 5.2.13 by Tech.  
Dawn Bayless, Crime Scene Investigator,  
Covington Police Department.

Box 1

(Submitted to Allotype Genetic Testing,  
Atlanta, GA, also marked with FBI/KSP case  
numbers)

- Carpet from rear floorboard of victim's auto  
– Passenger side
- Fm Rear Seat driver's side  
(Foam/Upholstery)
- Rear seat passenger side  
(Foam/Upholstery)

Box 2

(Various KSP/FBI case numbers listed on items)

- Norelco Shaver/Curling Iron (Curling iron  
missing from bag)
- Knife
- Hair Under Body
- Fingernail
- Can Marked Trace Evidence Items 23 - 31
- Can Marked Trace Evidence Items 10 – 13,  
16 – 21
- Fluid off Carpet (Test tube  
w/liquid/bottle w/liquid)
- Bra
- Purse
- Misc. Kmart Items (Bag Empty)
- 2pr White Pantyhose
- 3pr footies
- Left Hand Fingernails
- Bag w/slides

### Box 3

(Various KSP/FBI case numbers listed on items)

- Bag Marked “Received from Chief Weaver”;
  - Vial of Liquid w/KSP tag
  - Make Up Kit
  - Clothesline Wrapper
- 3 Bath Towels
- 2 Wash Cloths
- Plastic Baggie
- Piece of Trim
- Bag Labeled as Containing;
  - White Uniform Shoes
  - (Illegible handwriting) highlighter  
(Missing From Bag)
  - Dress Shoes (Missing From Bag)
- Bag Labeled “D. Pooley Personal Property”;
  - Washcloth
  - Medication Bottles (2)
- Box Containing (Received From KSP)
  - Can w/Trace Evidence Items 35 – 38
  - Soil Sample in Coffee Can

### Large Box Containing Seat From Vehicle

Long Packaged, Sealed Item (No Markings  
as to Contents)

(TR IV, 591, 593-594; Box 8 of 8; App. B1-3). The most important items being stored at the Covington Police Department are the items submitted to the “Allotype Genetic Testing” laboratory (i.e., the semen, blood and saliva) and the fingernails, hair, fluid from the carpet, the bag with slides, “trace evidence items” and the car seat.



## ARGUMENT

### **I. Mr. Wilson was entitled to DNA Testing under KRS 422.285 and the United States and Kentucky Constitutions.**

#### **A. Preservation**

In his original Motion for DNA Testing, Mr. Wilson requested that the hairs recovered from the victim's car and the semen found on the back seat of the car be tested. (TR I, 24; Box 7 of 8; VR, 9/1/10, 04:00:40, 04:06:11). The request for testing was made pursuant to KRS 17.176, KRS 422.285 (DNA testing in capital cases), the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Sections Eleven and Seventeen of the Kentucky Constitution.

After remand by this Court and the discovery that the hairs were still being stored at the KSP Crime Lab, Mr. Wilson filed a "Motion for DNA Testing and Hearing on Hair Evidence and Other Substances Retained as Evidence." (TR II, 177-197; Box 8 of 8). In that motion, Mr. Wilson specifically requested that the court order DNA testing of "the hairs recovered from the victim's car and those obtained from Deborah Pooley, Brenda Humphrey and Gregory Wilson as part of the investigation of this case." (TR II, 177; Box 8 of 8). In addition, Mr. Wilson requested "that the blood, saliva, and objects thought to contain biological materials, like the fingernails, also be DNA tested along with the semen." (TR II, 177; Box 8 of 8). In the motion, Mr. Wilson also stated:

The documents from the Kentucky State Police found in the "Inventory of Documents Released on January 24, 2013, by the Kentucky State Police Pursuant to an Open Records Request" (filed today in this Court) list several categories of substances and items that "could be subjected to DNA testing and analysis" under KRS 422.285(6), including the following: "one section of carpet from the passenger's side of the rear floor of the victim's automobile," one vial of a liquid sample from this carpet,"

“a piece of material from the back of the front passenger’s seat containing a small spot of blood,” rear seat out of automobile,” “knife,” “two (2) fingernails,” “Deborah Pooley’s right hand fingernails,” and “Deborah Pooley’s left hand fingernails.” (Inventory, pp. 000012, 000017, 000022, 000024, 000058, 000060, 000063). Any and all of these items of evidence could contain skin, bodily fluids or other biological substances that could be DNA tested. In the interests of justice and finality, this Court should order that they be tested.

(TR II, 185; Box 8 of 8).

Along with his motion for DNA testing, Mr. Wilson filed an “Inventory of Documents Released on 1/24/13 by the Kentucky State Police Pursuant to an Open Records Request” and a “Motion for New Inventory Based Upon KSP Crime Lab Documents Received in January 2013” and a “Motion for Authorization to Retain the Services of Defense DNA Expert.” (TR II, 198-293; TR III, 294-306, 307-321; Box 8 of 8). In his memorandum filed on March 14, 2013, in Kenton Circuit Court, Mr. Wilson advised the court:

As to DNA testing, the following motions and issues are before the Court for a ruling:

- a) Defendant’s Motion for authorization to retain the services of a defense DNA expert;
- b) Whether to order DNA testing of the entire car seat, including an area identified as having semen;
- c) Whether to order DNA testing of all hair evidence;
- d) Whether to order DNA testing of fingernails belonging to Deborah Pooley;
- e) Whether to order DNA testing of blood;
- f) Whether to order DNA testing of saliva; and,
- g) Defendant’s Motion for a New Inventory under KRS 422.285 to be filed by the prosecutor.

(TR IV, 523-524; Box 8 of 8).

Thus, the issue of whether Mr. Wilson was erroneously denied DNA testing of the semen, hairs, blood, saliva and fingernails was properly preserved for review.

**B. DNA Testing of the semen**

This Court specifically remanded this case for a ruling on whether Mr. Wilson had met the criteria for post-trial DNA testing of the semen found on the back seat of the victim's car. *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012). At trial, Morris Durbin, a forensic examiner with the Kentucky State Police Crime Lab, testified that the substance on the seat was human semen but he could not determine the blood group type. (TE IV, 541-543; Box 1 of 8). This Court found that testimony about the semen was a particularly important part of the evidence against Mr. Wilson, especially as it related to the rape charge, a statutory aggravator:

Wilson's claim for DNA testing of the semen also appears to be stronger than testing of the hairs. Wilson was convicted of rape, one of the statutory aggravating circumstances necessary for the death penalty verdict. The evidence at trial supporting this conviction was largely testimonial. And the only physical evidence corroborating the testimony was human semen found in the backseat of the victim's car. Wilson asserts that in closing argument, the prosecutor mentioned the presence of the semen as proof that Wilson raped the victim.

*Wilson v. Commonwealth*, 381 S.W.3d at 192. [Footnote omitted]. As explained below, in subsection F. 2, the semen evidence cannot be evaluated in isolation, especially because the hairs, blood, saliva and fingernails are also directly related to the rape charge.

**C. DNA Testing of the hairs**

As explained in the "Motion for DNA Testing," hairs were collected and retained as evidence by police investigators. (See DNA Appendix, 119-133; TR I, Box 7 of 8).

Head and pubic hair samples for comparison were obtained from Mr. Wilson. (Lab Report No. 87-2-2076). The hairs were examined, and Morris Durbin, forensic serologist, testified that, microscopically, the hairs matched those from Mr. Wilson. (DNA Appendix, 1-70; TR I, Box 7 of 8).

As noted above in subsection I of the Statement of the Case, after remand the Kenton Circuit Court denied DNA testing of the hairs based upon its finding that this Court's ruling in *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012), regarding the hairs was the "law of the case." (TR V, 600; Box 8 of 8; App. A2). Although this Court affirmed the ruling of the Kenton Circuit Court that denied the request that the hairs should be subjected to DNA testing, this Court's decision was made in conjunction with this Court's perception that "Wilson has offered scant evidence that the hairs were still in existence even before the 1996 preservation order." *Wilson v. Commonwealth*, 381 S.W.3d 180, 192 (Ky. 2012). [Footnote omitted]. But, it is now clear that the hairs were never destroyed. There is evidence (including the hairs) currently being stored at the Kentucky State Police Central Laboratory facility in the custody of the KSP Laboratory Director, Ms. Laura Sudkamp, and at the Covington Police Department in the custody of Covington Police Department Evidence Tech Dawn Bayless. (TR IV, 585, 591, 593-594; Box 8 of 8; App. B1-3).

The hairs, especially the pubic hairs, are as important to the charge of rape as the semen and they should be subjected to DNA testing. Mr. Wilson will explain further in subsection F. 2, below, why the semen evidence cannot be evaluated in isolation.

#### **D. DNA Testing of the blood and saliva**

After remand from this Court, it became apparent through a series of Open Records requests, internal investigations by the Crime Lab, the Kentucky State Police and the Justice Cabinet that the hairs that had been previously reported as missing were in storage at the Lab. The investigations also revealed that there was much more additional biological evidence that existed and was still being stored. As a result, Mr. Wilson filed a “Motion for DNA Testing and Hearing on Hair Evidence and Other Substances Retained as Evidence.” (TR II, 177-197; Box 8 of 8). In that motion, Mr. Wilson specifically requested that the court order DNA testing of the semen, hairs, blood, saliva and fingernails that had been recovered by investigators and stored at the KSP Lab. (TR II, 177, 185; Box 8 of 8).

Because nothing in KRS 422.285 limits the right to request testing to the filing of only one petition, Mr. Wilson could have simply waited and filed a second or third request for DNA testing in the future. The statute does not preclude multiple requests for DNA testing. But Mr. Wilson chose to make a comprehensive request for testing of all of the biological evidence that was relevant to the charges, especially the rape charge. In addition to the semen, Mr. Wilson identified the blood and saliva on the car seat(s), the blood on the carpet and the fingernails. Thus, Mr. Wilson requested the examination of all available bodily fluids, biological materials or other items that may yield positive results from the current technology of DNA testing. Mr. Wilson submits that, given the advances in DNA technology in the past twenty-five years, each item of evidence in this case that is still “in existence and ... in a condition that allows DNA testing and analysis to be conducted” [KRS 422.285(5)(b)], must be tested as a matter of fairness and finality.

Furthermore, all of the identified evidence meets the requirement that it “was not previously subjected to DNA testing and analysis” under KRS 422.285(5)(c). Therefore, the blood and saliva meet the criteria for testing under KRS 422.285. Mr. Wilson will explain further in subsection F 2, below, why the blood and saliva, along with the semen evidence must be evaluated together and not in isolation from each other.

**E. DNA Testing of the fingernails**

The arguments and statements made in the previous subsections (I.C and I.D) regarding the hairs, blood and saliva apply equally to the fingernails. The fingernails in question are those of the victim, and they are currently being stored at the Covington Police Department in the custody of Covington Police Department Evidence Tech Dawn Bayless. (TR IV, 585, 591, 593-594; Box 8 of 8; App. B1-3).

As explained in the “Motion for DNA Testing and Hearing on Hair Evidence and Other Substances Retained as Evidence,” because DNA testing was not available at the time of trial, there was no reason for the investigators and forensic examiners and experts to examine the fingernails. But advances in DNA technology would allow the testing of any skin cells, bodily fluids or other biological substances that were trapped under the victim’s fingernails during a struggle. (TR II, 186; Box 8 of 8). At the February 13, 2013, hearing, counsel for Mr. Wilson made the same point about the need for testing of any skin tissue that may be found with the fingernails. (VR, 2/13/13, 02:59:10-03:00:30). In subsection F 2, below, Mr. Wilson will address the significance of testing the fingernails in conjunction with testing of the blood, saliva and semen.

**F. Mr. Wilson has met the standard for DNA testing under KRS 422.285**

**I. Relevant Trial Testimony**

The transcribed trial testimony (September 13-28, 1988) is reported in nine volumes (TE I through TE IX; Box 1 of 8). This Court directed the Kenton Circuit Court, upon remand, to review the trial testimony when ruling on the DNA testing request.

*Wilson v. Commonwealth*, 381 S.W.3d at 193) (“To make this determination, the trial court will need to review the trial transcript and analyze the significance of the semen in Wilson’s conviction.”). As a result, Judge Bartlett ordered the parties to file memoranda in which the parties would advise the court about what trial testimony and evidence was relevant to the DNA testing issue. (VR, 2/13/13, 03:05:25, 03:08:32). Mr. Wilson’s memorandum cited the following trial testimony:

**TE Volume I**

**Tom Wood**

Mr. Wood testified that he was the boyfriend of the victim. Among other things, he testified that he and Ms. Pooley were living together. They had not engaged in sex in the car. (TE I, 53-54, 64).

**Walter Pooley**

Mr. Pooley testified he was the father of the victim. He had given the car to Ms. Pooley. To his knowledge, no one had sex in the car. (TE I, 88-89). He testified about Ms. Pooley’s blood type. (TE I, 89-90).

**Beverly Finkenstead**

Ms. Finkenstead testified that she had known Brenda Humphrey for 18 years and they were best friends. Humphrey and Wilson were at her house on May 29, 1987. She next saw them on May 31, 1987. They had K-mart bags and each had a watch. (TE I, 94-100). Humphrey came to her house on Sunday morning, June 7, 1987, drunk and upset. Humphrey told her about an abduction, rape, murder, dumping of the body, use of the credit cards, and dumping of the car near Latonia Auto Parts in Latonia. (TE I, 106-113).

### **Ralph Schawe**

Detective Schawe of the Covington Police Department investigated the disappearance of Ms. Pooley. He participated in processing the car for evidence, interviewing Finkenstead, searching the motel room where Humphrey was staying, gathering evidence from Finkenstead's house and obtaining search warrants for blood and hair samples from Humphrey and Wilson. (TE I, 135-156).

### **TE Volume II**

### **Tom Robinson**

Officer Robinson of the Covington Police Department picked up the boxes of evidence from Finkenstead's house and accompanied Detective Schawe to process the car. (TE II, 168-170).

### **Dr. Dean Hawley**

Dr. Hawley, a forensic pathologist testified about the recovery of the body on June 15, 1987, and the subsequent autopsy. He estimated that the victim had been dead for weeks before the body was discovered. There was no indication of the cause of death. If the victim's throat had been slit, he would expect to find much blood outside the body, whereas if death was by strangulation, there might be a little blood and it might be mixed with saliva. Hair was collected and given to Detective Clark Fine of the Hendrix County Sheriff's Office. There was no evidence of rape. (TE II, 186, 193, 196, 200, 202-203, 208).

### **Clark Fine**

Detective Clark Fine of the Hendrix County Indiana Sheriff's Office testified that he reported to scene of the discovered body on June 15, 1987. He was also present at the autopsy where he took custody of the hairs found with the body and he gave the hair to Lt. Mike Nelson. (TE II, 273, 286).

### **Janet Radenheimer**

Sergeant Radenheimer of the Covington Police Department collected pubic hair samples from Humphrey and gave them to Specialist Gary Linn. (TE II, 297-298).



### **TE Volume III**

#### **Roger Schroder**

Mr. Schroder, Vice President of Foreign Auto Salvage, on Sunday, May 31, 1987, noticed the victim's car, full of junk, parked in front of his business. Thinking that a wrecker driver who had been in the habit of dumping cars at his business had done it again, Mr. Schroder drove it up to the highway and parked it, hoping that it would be picked up. Robert Ratermann put a sign in the car saying it was free for the taking. On June 4, 1987, when the police came to take the car, it had been cleaned out. (TE III, 315-321).

#### **Robert Ratermann**

Mr. Ratermann, a salvage broker who leased to Roger Schroder the property where Foreign Auto Salvage is located, testified that when he put the sign in the car, it was full of junk. (TE III, 329-330).

#### **Ron Baker**

Mr. Baker was employed as an evidence photography specialist by the Covington Police Department. On June 4, 1987, he took photographs of the car, took a sample of an oily substance from the carpet and cut part of the carpet out. (TE III, 335-337). Mr. Baker also took head hair, pubic hair and saliva samples from Wilson and gave them to Specialist Linn along with the oil sample and blood and hair samples from Humphrey. (TE III, 339-341).

#### **Gary Linn**

Mr. Linn, of the Bureau of Identification of the Covington Police Department, testified that he was involved in the gathering of evidence from the car when it was brought to the evidence garage by Ron Baker on June 4, 1987. (TE III, 344). He received the oil and carpet sample from Baker. (TE III, 345). Mr. Linn also began collecting hair and fiber samples from the car on June 12, 1987. He took those items of evidence, along with other evidence to Morris Durbin at the State Police Crime Lab in Louisville. (TE III, 349-350, 370-372). He lifted one fingerprint from the car, which was not that of Wilson or Humphrey. (TE III, 383-384). Mr. Linn testified that Wilson's blood type was "A-B secretor." (TE III, 392). A blood type could not be determined from the sperm found in the car. (TE III, 393). Caucasian pubic hairs that did not belong to Deborah Pooley were found in the car. (TE III, 396). Caucasian head and facial hairs were also found in the car, along with white animal hairs. (TE III,

398-399). None of the fibers found in the car matched any of Wilson's or Humphrey's clothes. (TE III, 399-402).

#### **TE Volume IV**

##### **David Hauber**

Mr. Hauber, of the Northern Kentucky Crime Lab, testified that Gary Linn brought a piece of carpet and a vial of liquid to him for testing. (TE IV, 505-506). A phenolphthalein test was positive for blood on the carpet and a weak positive for the substance in the vial. (TE IV, 507-508). He sent both to Morris Durbin of the crime lab in Louisville. (TE IV, 508).

##### **William Morris Durbin<sup>2</sup>**

Mr. Durbin was a forensic serologist at the Louisville Crime Lab. He determined the blood type of Wilson to be group A/B secretor and that of Humphrey to be group A secretor. (TE IV, 528-530). Group A blood was found on the carpet, but he could not tell if it was from a secretor or non-secretor. (TE IV, 533-534). Group A blood was also found on the back of the front passenger seat. (TE IV, 537). There was blood in the fluid taken from the carpet but he could not tell if it was human or what type it was. There was human blood mixed with saliva on the back seat but he could not determine the blood type or if the saliva was human or animal. (TE IV, 538-541).

Mr. Durbin found human semen on the back seat but he could not determine the blood group type. (TE IV, 541-543). "Allo typing" of blood was done at Allo Type Genetic Testing in Atlanta, Georgia.<sup>3</sup> (TE IV, 547). Mr. Durbin tested the saliva on the back seat and found "blood group 'A' factors." (TE IV, 538-541). No DNA testing was done. (TE IV, 550).

Mr. Durbin did microscopic hair comparison analysis of about 1,000 hairs. (TE IV, 552). He found head hairs similar to Deborah Pooley's throughout the car. (TE IV, 557). Mr. Durbin said that in hair comparison, he can say that "the hairs have the same microscopic characteristics and color, but we are not saying that these are exclusively from that one individual." (TE IV, 558-559). Mr. Durbin testified that theoretically two people could have the same hair or same type of hair characteristics. He also testified:

Prosecutor: In your seven years in performing these type of things in analyzing hairs and determining their

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<sup>2</sup> Mr. Durbin's entire testimony was included in the Appendix to the original "Motion for DNA Testing" filed in the Kenton Circuit Court in April of 2010. (Appendix, pp. 001-070; Box 7 of 8).

<sup>3</sup> The report from Allo Type Genetic Testing was included with the documents attached to Mr. Wilson's memorandum. (TR IV, 547-550; Box 8 of 8).

microscopic characteristics, have you ever run into the situation where there have been two individuals with the identical microscopic characteristics of hair?

Durbin: No, sir.

(TE IV, 559). Mr. Durbin also said that to his knowledge, it had never been reported that two individuals had the same type of microscopic characteristics and hair. (TE IV, 559).

Mr. Durbin found hairs on the front and back seat areas that were similar to Humphrey's head hairs but he found none of Humphrey's pubic hairs. (TE IV, 561-563). He also found Caucasian pubic hairs that were dissimilar to those of Humphrey and Pooley. (TE IV, 563). Negroid head hairs similar to Wilson's were found on the back of the front passenger seat. (TE IV, 565). Pubic hairs similar to Wilson's were found on the front passenger seat and in the hatchback area behind the rear seat. (TE IV, 565). One Negroid hair fragment was too limited for hair comparison analysis. (TE IV, 566). Two Caucasian facial hairs were found behind the driver's seat. (TE IV, 569).

## **TE Volumes V and VI**

### **Willis Maloney**

Willis Maloney, an admitted convicted felon and chronic alcoholic, was the jailhouse snitch who claimed that while he and Wilson were in the Kenton County Jail, Wilson had told him about his involvement in the abduction, rape and murder of the victim. (TE V, 733, 736). Maloney was in the Kenton County Jail because he had been arrested for a domestic violence assault charge in which the victim was his girlfriend. That charge was dismissed by the prosecutor, who also told Maloney that a felony theft charge pending in Cincinnati might be amended to a misdemeanor. (TE V, 733-734). At the time of his incarceration, Maloney was also on federal parole. After his release from the Kenton County Jail, Maloney was taken to court in Ohio where the prosecutor helped to get him a release on his own recognizance. (TE V, 734). At the time of trial, he was facing a theft charge and the prosecutor told him he would advise the court about Maloney's cooperation. He was not being charged as a PFO. (TE VI, 782-785).

Maloney said he met Wilson in the Kenton County Jail, where they shared a cell. Maloney said that Wilson told him that his biggest mistake was to involve Humphrey in the murder, that the car had been wiped clean, that he told Humphrey not to use the credit cards, the body was left in a remote area, the motive was robbery, the victim was dead before they crossed into Indiana, Humphrey used the victim's credit cards, they went to St. Louis, when they returned to Covington, he took the plates off the

car and abandoned it, and Wilson said he strangled the victim. Wilson told him that after the abduction, he stayed with Pooley on the floodwall while Humphrey went to get gas in Pooley's car. Maloney said that at night he took notes about what Wilson was telling him and he contacted the prosecutor's office and gave those notes to Detective Denham after speaking to him at the prosecutor's office. (TE V, 732-778; TE VI, 782-808).

## **TE Volume VI**

### **Jack Denham**

Detective Denham was a detective in the Commonwealth's Attorney Office. He met with Maloney on a number of occasions, took his statement and took possession of Maloney's notes. (TE VI, 811-812).

## **TE Volume VI and VII**

### **Brenda Humphrey**

Humphrey testified that on the day of the abduction, she had money, about \$60.00, so she and Wilson, her friend, were not broke. When they were walking along, they approached a lady (Pooley) and while talking to her, Wilson suddenly took out a knife and put it to the victim's throat. Wilson ordered Humphrey and Pooley into Pooley's car and ordered Humphrey to drive. Humphrey filled the car with gas while Wilson kept the knife to Pooley's throat, threatening he would kill both of them. Humphrey then drove into Ohio while Wilson tied Pooley's hands with a lamp cord. Eventually, Wilson and Pooley got into the back seat while Humphrey continued to drive. Wilson raped Pooley in the back seat and then choked her to death with something. Wilson told Humphrey to take the next exit and they dumped the body. They stayed at a motel and Humphrey used Pooley's credit cards to make purchases of gas, clothing and other items. After they returned to the Covington area, they abandoned the car. Humphrey denied ever telling Beverly Finkenstead that she (Humphrey) had told Pooley that she had to die because Pooley had seen Humphrey and Wilson. (TE VI, 874-914; TE VII, 917-1017).

## **TE Volume VIII**

Closing argument of prosecutor Donald Buring. (TE VIII, 1094-1147).

In his closing argument, the prosecutor stated, "We know too, also from 'Mo' Durbin, that hairs of both Deborah Pooley and Gregory Wilson were there, and so we know that both of them, or we know that Gregory

Wilson likewise was in that car.” Further, the prosecutor’s argument stressed the importance of the semen and hair evidence:

We then come to what happened in Deobrah Pooley’s car, and we heard from Willis Maloney, Beverly Finkenstead, Brenda Stith, Brenda Humphrey, Moe Durbin and Dr. Hawley.

\* \* \* \* \*

The evidence in this case then is that the only evidence in this case is that sperm came from the defendant Wilson.

\* \* \* \* \*

In addition, when we talk about the sperm, it is consistent -- we didn’t find a great amount of sperm, or excuse me, semen in that car -- that’s consistent whether it is from her drippings from her vaginal area, whether it is drippings from the defendant Wilson, we don’t know, but where it is found in the car is consistent with what would be the position where Miss Pooley’s vagina would be during the course of that intercourse. That her head was lying on the passenger side of the car; her body, her legs were extending to the driver’s side of the car in the back seat, and it was at that place, and at that point in time where Mr. Wilson raped Deborah Pooley, and that’s where the intercourse took place. The pubic hairs are around. The wind can blow those. They can get there by virtue of activity, by virtue of the cleaning activities of the defendant, but that proof is very clear.

(TR IV, 533-538; Box 8 of 8).

## **2. Significance of the trial testimony and evidence**

### **a. Standard to be applied**

In deciding whether a prisoner is entitled to DNA testing under KRS 422.285, a court is generally governed by the standard set out in KRS 422.285. Under KRS 422.285(2), a court “shall order” DNA testing if:

- (a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;

A court “may order” DNA testing under 422.285(3) if:

- (a) A reasonable probability exists that either:
  - 1. The petitioner's verdict or sentence would have been more favorable if the results of DNA testing and analysis had been available at the trial leading to the judgment of conviction; or
  - 2. DNA testing and analysis will produce exculpatory evidence;

*See Wilson v. Commonwealth*, 381 S.W.3d at 189. In remanding, this Court advised the circuit court that it should assume that DNA testing would produce “quasi-exculpatory” results and that the court should apply the “reasonable probability” of a “more favorable verdict or sentence” test. “Upon remand, the trial court must assume the DNA results would be quasi-exculpatory and determine whether a reasonable probability exists that the evidence would result in a more favorable verdict or sentence, particularly with respect to Wilson's rape conviction.” *Wilson v. Commonwealth*, 381 S.W.3d at 193. In its order denying DNA testing, the circuit court stated that it was applying the statutory test. (TR V, 599-607; Box 8 of 8; App. A1-9).

In *Taylor v. Commonwealth*, 175 S.W.3d 68 (Ky. 2005), this Court declared KRS 422.285 to be unconstitutional. “Finally, we hold that KRS 422.285 is an unconstitutional encroachment of the Court's rule-making prerogatives. However, we extend comity to that statute.” *Taylor v. Commonwealth*, 175 S.W.3d at 77. In extending comity to the statute, this Court noted its own power to supersede or modify the statute. “[W]e uphold, under principles of comity, KRS 422.285, until superseded or modified by this Court.” *Taylor v. Commonwealth*, 175 S.W.3d at 77. [footnote omitted]. Because comity is exclusively this Court's domain, the circuit court was obligated to follow the statute. *See O'Brien v. Hedgespeth*, 892 S.W.2d 571, 577 (Ky. 1995) (“ The decision whether to give



life through comity to a statute otherwise unconstitutional because it violates separation of powers doctrine is one of institutional policy reserved for the Supreme Court level. SCR 1.010; 1.020(1)(a).”).

The circuit court was also under a duty to follow this court’s directives on how to decide the DNA testing issue by applying the KRS 422.285 standard. Supreme Court Rule (SCR) 1.040(5). Therefore, the circuit court was not in a position to take the potential approach suggested by the Commonwealth and “require DNA testing in the interest of justice.” (TR IV, 553; Box 8 of 8). On the other hand, as this Court recognized in *Taylor*, it retains the power and authority to order DNA testing “in the interest of justice” in lieu of applying the standard set out in the unconstitutional statute. This Court may do so simply by “superseding or modifying” KRS 422.285. *Taylor v. Commonwealth*, 175 S.W.3d at 77. This Court is free to employ whatever standard it deems proper, so long as it comports with fundamental fairness and due process of law. Given the the controversies relating to the Commonwealth’s representations regarding the evidence in Mr. Wilson’s case, there is ample justification for ordering DNA testing as a matter of justice and fundamental fairness. Nonetheless, as explained below, Mr. Wilson has met the standard set out in KRS 422.285 and is therefore entitled to DNA testing.

**b. Analysis of the evidence**

This Court already determined that the semen evidence appears to have been a significant factor in the convictions, especially the rape conviction:

Wilson's claim for DNA testing of the semen also appears to be stronger than testing of the hairs. Wilson was convicted of rape, one of the statutory aggravating circumstances necessary for the death penalty verdict. The evidence at trial supporting this conviction was largely testimonial. And the only physical evidence corroborating

the testimony was human semen found in the backseat of the victim's car. Wilson asserts that in closing argument, the prosecutor mentioned the presence of the semen as proof that Wilson raped the victim.

*Wilson v. Commonwealth*, 381 S.W.3d at 192. [footnote omitted]. But in evaluating whether favorable DNA test results on the semen would have created a “reasonable probability” of a “more favorable verdict or sentence,” the circuit court made the same crucial errors that this Court did in evaluating the hairs.

Before addressing the mutual errors, appellant will first address the circuit court’s discussion of two important DNA testing cases, *Bedingfield v. Commonwealth*, 260 S.W.3d 805 (Ky. 2008), and *Hardin v. Commonwealth*, 396 S.W.3d 909 (Ky. 2013). On pages 5 and 6 of its order denying relief, the circuit court discusses *Bedingfield* and *Hardin*, finding both cases distinguishable from Mr. Wilson’s case. (TR V, 603-604; Box 8 of 8; App. A5-6). The circuit court found *Bedingfield* to be vastly different from Mr. Wilson’s case because “[p]roof that the semen was not the Defendant’s was clearly exculpatory and resulted in a new trial.” But this Court, in *Bedingfield*, did not describe the DNA test results as exculpatory. In fact, the Court said, “For clarity’s sake we emphasize: the presence of sperm which DNA testing proves did not belong to Appellant does not exonerate him; however, the presence of this new evidence does cast a long shadow and assuredly merits consideration in the form a new trial.” *Bedingfield v. Commonwealth*, 260 S.W.3d at 814-815. Also, the prosecutor in *Bedingfield*, like the prosecutor in Mr. Wilson’s case, argued to the jury that the presence of the semen corroborated the witness’s trial testimony. *Bedingfield v. Commonwealth*, 260 S.W.3d at 813.



The circuit court said that the *Hardin* case was distinguishable from Mr. Wilson's case because, "as opposed to the *Hardin* case, there is no other rape suspect and there is no one else who has admitted to raping the victim." (TR V, 604; Box 8 of 8; App. A5). But the proof against the defendant in *Hardin*, like the proof against Mr. Wilson, included testimony from a jailhouse snitch, who testified that the defendant had confessed to him while they were in jail. "The most incriminating testimony was offered by Clifford Capps, who had shared a cell with Clark at the Meade County jail. Capps claimed that Clark confessed twice to the murder, once jokingly and once seriously." *Hardin v. Commonwealth*, 396 S.W.3d at 911.

Mr. Wilson will now address the mutual errors made by this Court and the circuit court in denying DNA testing of the hairs and the semen. The first error made by this Court and the circuit court when analyzing KRS 422.285 was looking at the hairs and semen in isolation and not considering both of the evidentiary items together and in conjunction with the other biological evidence (blood, saliva and fingernails) that is also available for testing. The second error was merely assuming that the only possible relevant "quasi-exculpatory" test result from DNA testing would be that the semen, hairs, blood, saliva and any skin tissue from the fingernails are not Mr. Wilson's. The third error was concluding that favorable test results would only be "quasi-exculpatory" and not truly exculpatory. The fourth error was concluding that the testimony of a co-defendant and a jailhouse snitch amounts to overwhelming evidence of guilt that could not possibly be affected by exculpatory test results.

The first error was based upon weighing only favorable hair testing results (and favorable semen testing results) individually and in isolation against the trial evidence to

see if there was a “reasonable probability” of a “more favorable verdict or sentence.” The scientific evidence that the Commonwealth used to corroborate the testimony of Humphrey and Maloney was the semen test results, the hair comparison results and the blood test results. (TE VIII, 1094-1147). In order to properly evaluate the probable effect of favorable test results, the court must consider whether it was possible that the verdicts or sentence could have changed if Mr. Wilson was not the source of the semen and the hairs that were said to be his were not his and the blood was not Mr. Wilson’s and the saliva was not Mr. Wilson’s and there were skin cells under the fingernails of the victim and those skin cells were not Mr. Wilson’s and not the victim’s. But that analysis is not complete because of error number two and error number three

Error two by the court was limiting the inquiry by assuming that the only “quasi-exculpatory” test results from DNA testing would be that the substances (semen, hairs, blood, saliva and skin tissue) are not Mr. Wilson’s. But this limited analysis ignores the real power of DNA testing. Error two and error three go hand in hand because they both are premised on limited and flawed assumptions. As noted above, among the hairs in the car were pubic hairs, head hairs and facial hairs. DNA test results could very well prove that the semen is not Mr. Wilson’s and that the semen and pubic hairs (and even head and facial hairs) are a match to a third person. On top of that, favorable DNA testing of the blood and saliva could match up to a third person in addition to eliminating Mr. Wilson as the source. With those kinds of test results, the prosecutor could not have made the closing argument that he made, an argument in which he insisted that the forensic evidence supported Ms. Humphrey’s damning testimony. (TE VIII, 1094-1147).

Attached to Mr. Wilson's "Memorandum on DNA Testing and Related Issues" were several pages from a forensic report dated November 13, 1987, and sent to Detective Gary Linn of the Covington Police Department by Dr. Moses S. Schanfield, Ph.D., the Laboratory Director of Allo-Type Genetic Testing, Inc. (TR IV, 547-550; Box 8 of 8). There were six items sent to the Allo-Type lab for analysis: 1) blood standards from Gregory Wilson; 2) blood standards from Brenda Humphrey; 3) "carpeting from the rear floor of the victim's car"; 4) "blood stain 25B from rear seat of victim's automobile"; 5) "cloth from rear seat passenger side 25D"; and 6) "cloth from rear seat driver passenger side 25C." (TR IV, 547-548; Box 8 of 8). Items 25B, 25C and 25D were cuttings from the carpet in the rear seat area of the car and from the back of the front passenger seat and from the rear seat itself. (TR IV, 520-522; Box 8 of 8). On page 3 of the Allo-Type lab report, in the "Explanation/Comments" section, Dr. Schanfield explains that the tests performed can produce indications of the race of the person who is the source of the tested substance. (TR IV, 549; Box 8 of 8).

It should be noted that in his report, Forensic Serologist Morris Durbin of the KSP Lab identified the rear seat of the car as Exhibit 25. Based upon the report from Dr. Schanfield and his own testing, Mr. Durbin documented that Brenda Humphrey was "a blood group A secretor" and that "Group A human blood was found on Exhibit 22." (TR IV, 563; Box 8 of 8). Exhibit 22 was "[a] piece of material from the back of the front passenger seat containing a small spot of blood." (TR IV, 562; Box 8 of 8). Mr. Durbin also reported that "human spermatozoa were found on Exhibit 25" and that "[c]hemical tests indicate the presence of blood and saliva on Exhibit 25." (TR IV, 563; Box 8 of 8).

Perhaps the most significant part of Dr. Schanfield's report was the "Conclusion" in which he explained the meaning of some of the test results:

No known standard for the victim Deboara (sic) Pooley is available. The allotypes of the suspects Greg Wilson and Brenda Humphrey are not consistent with each other or with the blood stains found on the carpet and rear seat of the victim's automobile.

It is reasonable to assume that the blood stains found in the automobile in proximity to where the victim's head was present the victim, and that the victim's phenotype was IGH F N BO 1, KM 1,3.

**Only allotypes consistent with the victim's proposed phenotype were detected in the semen stains.** Therefore, no conclusions about the nature of the semen donor are possible.

(TR IV, 562; Box 8 of 8). [emphasis added]. With current technology DNA testing, it is certainly possible that forensic scientists will be able to reach "conclusions about the nature of the semen donor."

The probabilities for a different, more favorable outcome at trial would have increased tremendously with the testing of the semen, blood and saliva. All of these items were found in the back of the car. The prosecutor said that this evidence proved the positioning of the victim and the assailant at the time of the assault. As this Court will recall, Humphrey had confessed to her sister that she, Humphrey, had killed the victim by cutting her throat, something the jury never knew. If DNA testing eliminated Mr. Wilson as the source of the semen, blood and saliva, then the prosecutor's argument that he was the assailant simply would not work.

The fourth error committed by the circuit court and this Court was to view the case against Mr. Wilson as "overwhelming" or even so "substantial and compelling" that

favorable DNA testing results would have made no difference. As this Court is well aware, Mr. Wilson was represented by attorneys who did nothing to prepare for trial. But no court ever judged the overall performance of those attorneys and certainly no court ever concluded that the pretrial preparation of those attorneys met the constitutional standard of effective assistance. *Strickland v. Washington*, 466 U.S. 668 (1984). On direct appeal, this Court only evaluated the trial performance of counsel (and not the lack of pretrial preparation) and found no constitutional violation. “The record indicates that to the extent that Hagedorn was permitted to participate by Wilson, his performance was effective.” *Wilson v. Commonwealth*, 836 S.W.2d 872, 879 (Ky. 1992). In post-conviction, after the record was developed to show just how ineffective counsel had been, the “law of the case” kept this Court from engaging in any meaningful evaluation of counsel’s performance. *Wilson v. Commonwealth*, 975 S.W.2d 901, 903 (Ky. 1998).

Given the deficient performance of Mr. Wilson’s appointed counsel and the inability of Mr. Wilson to conduct his own defense, it cannot be said that the Commonwealth’s case was subjected to the testing that the Sixth Amendment requires.

To be sure, the [Confrontation] Clause’s ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

*Crawford v. Washington*, 541 U.S. 36, 61 (2004). See also *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”). Mr. Wilson was denied an adversarial proceeding that met Sixth Amendment constitutional standards.

Under the circumstances, the only fair way to weigh the mandatory assumption of favorable DNA results against the strength of the Commonwealth's case at trial is for this Court to assume that Mr. Wilson was represented by competent, prepared attorneys at trial who vigorously contested the Commonwealth's proof. In that vein, the Court should imagine that counsel effectively cross-examined jailhouse snitch Willis Maloney, exposing his lies, impeaching his credibility with the evidence that the jury never heard – that Maloney was a paid professional snitch who was receiving special treatment from the prosecutor, that the details that Maloney claimed came from Mr. Wilson's confessions to him actually came from the law enforcement officers that he was secretly meeting. The Court should consider that confrontation of Maloney severely damaged his credibility before the jury. Then the Court should weigh favorable DNA testing results.

The Court should do the same with the testimony of co-defendant Brenda Humphrey and assume that the "cross-examination" of her by the prosecutor was followed up by a real confrontation and challenge to her credibility that let the jurors know something that they that they never knew – Humphrey had actually confessed to her sister, Lisa Maines, that Humphrey herself had killed Pooley by cutting her throat. The Supreme Court has recognized that the statements made by an accomplice (like Ms. Humphrey) are "presumptively unreliable," are "viewed with special suspicion," and are "inevitably suspect." *Lilly v. Virginia*, 527 U.S. 116, 131 (1999), citing and quoting from *Lee v. Illinois*, 476 U.S. 530, 541 (1986), *Cruz v. New York*, 481 U.S. 186, 195 (1987) and *Bruton v. United States*, 391 U.S. 123, 136 (1968).

The testimony of a jailhouse snitch (like Willis Maloney) is equally suspect. See *Fulcher v. Motley*, 444 F.3d 791, 810, 823 (6<sup>th</sup> Cir. 2006), citing *Zappulla v. New York*,

391 F.3d 462 (2<sup>nd</sup> Cir. 2004), and recognizing the inherent unreliability of jailhouse snitches. “As a general matter, we note that numerous scholars and criminal justice experts have found the testimony by “jail house snitches” to be highly unreliable.” *Zappulla v. New York*, 391 F.3d at 470, fn 3.

In Burke and Mertz, *A Uniquely Dispositive Power: How Postconviction DNA Testing Impeached Accomplice Testimony, Implicated A Lone Killer, And Exonerated The Beatrice Six*, 42 Creighton L. Rev. 549 (June, 2009), the authors detail how DNA testing in 2008 exonerated five individuals who had been convicted of a 1985 rape and murder. In the “Beatrice Six” case, a large part of the state’s case came from an accomplice. DNA testing ultimately destroyed the credibility of that accomplice. The authors point out:

Prosecutors routinely rely upon the incriminating testimony of accomplices--when little, if any, other evidence supports the prosecution of a charged criminal. While police and prosecutors know obtaining and using accomplice testimony will bolster a case and increase the likelihood of obtaining a conviction, the use of accomplice witness testimony has led to convictions of innocent people. A recent study of wrongful convictions in 111 capital case exonerations revealed accomplice testimony was involved in 46% of the wrongful convictions.

42 Creighton L. Rev. at 561. [footnotes omitted]. Mr. Wilson was convicted on the basis of testimony from two witnesses that fall in the category of the most unreliable and untrustworthy of all witnesses – the accomplice and the jailhouse snitch. Because DNA testing and analysis does not suffer from the same type of credibility problems that co-defendants and professional liars do, a death row inmate should be given the benefit of unbiased and trustworthy scientific evidence before facing the death chamber.

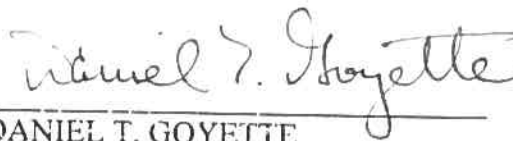


## CONCLUSION

WHEREFORE, Mr. Wilson respectfully requests that this Court reverse the June 18, 2013, order of the Kenton Circuit Court and remand this case to the Kenton Circuit Court with directions that the circuit court order DNA testing of the semen, hair, fingernails, blood and saliva recovered from the car and from the body of the victim.



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