Commonwealth of Kentucky
Supreme Court

File No. 2013-SC-000423-MR

GREGORY WILSON — **APPELLANT**

v.

Appeal from Kenton Circuit Court
Hon. Gregory M. Bartlett, Judge
Indictment No. 1987-CR-00166

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Commonwealth's Brief

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CERTIFICATE OF SERVICE

I hereby certify that the record on appeal was returned to the Clerk of this Court and that a copy of the foregoing Brief for the Commonwealth was mailed, first class, U. S. Mail, postage pre-paid to: Hon. Gregory M. Bartlett, Judge, Kenton Circuit Court, First Division, Kenton County Judicial Center, 230 Madison Avenue, Covington, Ky. 41011; and to Hon. Daniel T. Goyette, Hon. Leo G. Smith, and Hon. Bruch P. Hackett, Asst. Public Advocates, Office of the Louisville Metro Public Defender, 717-719 West Jefferson St., Advocacy Plaza, Louisville, Ky. 40202; and via electronic mail to: Hon. Rob Sanders, Kenton Co. Commonwealth's Attorney, on this 11th day of July, 2014.

Heather M. Fryman
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INTRODUCTION

Gregory Wilson appeals the Kenton Circuit Court's denial of his motion for DNA testing, despite testing performed at his request during federal proceedings.

STATEMENT CONCERNING ORAL ARGUMENT

This matter involves questions that were previously considered by this Court. The Commonwealth does not believe that oral argument will assist the Court.

CITATIONS TO THE RECORD

The Commonwealth utilizes several abbreviations to cite to the record in this matter and the record in other proceedings that concern the Appellant. The abbreviation OTR is for the original trial record. TTR is the original trial transcript. TR is for the record of the Kenton Circuit Court that pertains to the motions now at bar.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellant, Gregory Wilson ("the Appellant" or "Wilson"), brutally kidnapped, robbed, raped, and murdered a young woman that he happened to see getting out of her car. At the time of the murder Wilson had been out of jail for less than one year, after serving time in Ohio for rape. A Kenton County jury heard the case and recommended a death sentence in 1988. This Court summarized the crime in its Opinion affirming on direct appeal of that sentence in *Wilson v. Commonwealth*, 836 S.W.2d 872, 876-77 (Ky. 1992), *cert. denied*, 507 U.S. 1034 (1993). That young woman, Debbie Pooley, was forced into her own car at knife point and begged Wilson to spare her life.

A. Trial Proceedings Before the Kenton Circuit Court

This Court summarized the facts of this case during the direct appeal.

> The victim was a restaurant employee in Newport. On Friday, May 29, 1987 at 11:45 p.m., she left her best friend's house and said she was going straight home. The prosecution presented evidence that she had just parked her car outside of her apartment in Covington when she was abducted by Wilson and co-defendant Humphrey at knife point.
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> Testimony at trial from various sources, including Humphrey, indicated that the victim was forced into the back seat of her own car. Humphrey drove the car to the flood wall in Covington. Wilson took the victim out of the car and took her up on the flood wall and made her lie down with her eyes closed while Humphrey went to put gas in the car. After Humphrey returned from the gas station, Wilson again forced the victim into the back seat of the car.
>
> Wilson made the victim unbutton her blouse. Wilson finished undressing the victim and raped her. He then tied her hands with a lamp cord, and the victim began begging for her life. Wilson told her she would have to die. Humphrey said, "You have seen us. You know who we are, and you have to die." The victim kept begging, "Please don't kill me. I don't want to die." Wilson robbed her and strangled her to death before they crossed the state line into Indiana.

Wilson and Humphrey disposed of the victim's naked corpse in a wooded thicket in rural Hendrix County, Indiana. Later that same morning, Saturday, May 30, Wilson and Humphrey stopped at a Holiday Inn in Crawfordsville, Indiana. According to a registration card, Humphrey and a guest checked into the hotel at 4:19 a.m. Two of the maids there identified the pair as Wilson and Humphrey.

Wilson and Humphrey proceeded to a Payless Shoe Store in Danville, Illinois where the victim's credit card was used to purchase two pairs of women's shoes and some hosiery. Later that same day, May 30, 1987, Wilson and Humphrey went to a K–Mart in Danville where the victim's credit card was used to make purchases totalling $227.46. Included in these purchases *877 were a man's Seiko watch and a woman's Gruen watch for $68.00 each. Wilson and Humphrey also paid cash for a number of cosmetic items and some clothing. Later that day, the victim's credit card was used to make a $24.50 purchase at an Amoco gas station in Urbana–Champaign, Illinois.

On Sunday, May 31, Wilson and Humphrey returned to the home of Humphrey's best friend, Beverly Finkenstead. Finkenstead testified that Humphrey had a K–Mart bag with a blouse in it. They both had a watch on and were each wearing a necklace. On Sunday, June 7, Humphrey visited Finkenstead and told her details of the crimes in which she and Wilson had participated the previous weekend. Eight days later, on June 15, Finkenstead reported to the police what Humphrey had told her. Also on June 15, the Hendrix County, Indiana Sheriff's Department was summoned to a wooded thicket where a corpse had been discovered.

Authorities were able to determine the identity of the corpse only by comparing its remaining teeth with the victim's dental X-rays. The cause of death could not be determined due to the absence of internal organs. A forensic entomologist testified that, based on the extent of blowfly maggot development in and on the corpse, the estimated time of death had occurred 15 to 19 days prior to his June 16 examination of the corpse.

Wilson told cell mate Willis Maloney details of the crimes including that the initial intent had been to "snatch" the victim and rob her; that the victim was still alive when her money was taken from her; that the victim was killed before they crossed the state line into Indiana; that the corpse would be so badly decomposed that no sperm would show up; and that they had used the victim's credit card to purchase, among other things, a watch Wilson was wearing at the time of his arrest which Humphrey later obtained by signing it out from one of the jailers. Wilson also told Maloney, "I bet they can't find what I used to strangle her with."

> Maloney's and Humphrey's account of the rape was corroborated by the presence of semen on the back seat of the victim's car. Head hairs similar to those belonging to Humphrey were found inside the victim's car. Pubic and head hairs similar to those belonging to Wilson were also found inside the victim's car. A handwriting expert established that Humphrey had authored the forged credit card receipts. A search of the hotel room where Wilson and Humphrey were arrested produced various items of clothing, all bearing K–Mart price tags.
>
> Humphrey was the only defense witness during the guilt/innocence phase of the trial. Wilson gave his own closing argument in which he told the jury he was not guilty, he "never met nor knew the victim" and that Humphrey told her sister that she killed the victim. The jury returned guilty verdicts against both defendants. After the penalty phase, Wilson was sentenced to death for kidnapping and murder. He was sentenced to consecutive prison terms of 20, 20 and 10 years respectively for first-degree rape, first-degree robbery and criminal conspiracy to commit robbery.
>
> Wilson, through appellate counsel, raises twenty-four assignments of alleged error in this appeal. We have carefully reviewed all the issues presented by Wilson and this opinion will concentrate on the question of whether Wilson was denied his right to counsel or effective assistance by the appointment of volunteer counsel William Hagedorn and John Foote. Allegations which we consider to be without merit will not be addressed here.

Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992).

Contrary to the allusion created by Wilson's description of the trial, ***no*** testimony identified any hair, blood, or semen found in the victim's car as Wilson's hair, blood, or semen. Instead, the testimony was that semen was found on the back seat of the vehicle, but it was not tested to determine a blood type for the possible contributor. TTR, Vol. IV, p. 541 -543. The hairs found in the car were examined using a comparison microscope. TTR, Vol. IV, p. 552.

The testimony was quite clear that no hair could be positively matched to any person involved in the case. For example, when asking about the victim's hair samples the Commonwealth Attorney stated, "are you saying that those were in fact Deborah Pooley's hairs?" The examiner replied, "No, sir, the statement that we can make in a hair comparison is that the hairs have the same microscopic characteristics and color but we are not saying that these are exclusively from that one individual." TTR, Vol. IV, p. 558. Thus, the testimony was NEVER that Gregory Wilson's hairs were found inside the vehicle, instead it was that "hairs which were similar in microscopic color and characteristics to the pubic hair standard from Gregory Wilson were found in the area of the passenger side front seat, in the seat on the floorboard in front of the seat and also one negroid origin pubic hair was found in the back, hatch back carpet mounting assembly area which is behind the rear seat." TTR, Vol. IV, p. 565.

Trial testimony also revealed that the car had been abandoned for days before it was discovered in a scrap yard. It was evident that many people had interacted with the car in the interim. TTR Vol. III, p. 315 -322. The car was messy at first, with trash and cigarette butts - but someone removed those items while the car was parked at the scrap yard. TTR, Vol. III, p. 320 -321. The car was discovered by employees on May 31st, but was not removed from the premises until June 4th. TTR Vol. III, p. 329 -335. Oil had been poured in the floorboard and in the back at some point. TTR Vol. III, p. 336-337. On June the 4th, when the car was recovered by police, it was missing turn signals, ash trays, radio controls, heater controls, a mirror, and the glove box had been emptied. TTR Vol. III, p. 347. Thus, given the condition of the car, the absence of any of Wilson's DNA would not conclusively

demonstrate that he had not been inside the car. Likewise, the presence of unknown DNA inside the car would not prove that there was an alternate suspect.

Instead of resting on some revelation of DNA (as DNA analysis was only a blossoming technology in 1988), Wilson's conviction was based upon a virtual mountain of circumstantial evidence that tied him to the brutal crimes against Debbie Pooley. As noted by the federal court, and referenced above, the scientific testimony was only a very small part of the testimony that established Wilson's guilt. Wilson and Humphrey both confessed to acquaintances. Wilson made multiple detailed statements to his cellmate, Willis Mahoney. TTR Vol. 5, p. 741-748. Wilson and Humphrey were seen and identified as a couple that stayed at an Indiana hotel just after the murder. TTR Vol. 3, p. 406, 411, 416 -424. They used Ms. Pooley's credit cards for a shopping spree. They were caught with items identical to those purchased with the credit cards. They proudly displayed their loot and Wilson even bragged about the crime. In considering DNA testing as part of Wilson's federal habeas corpus petition, the federal court has called this testimony the "overwhelming" evidence of Wilson's guilt. *Wilson v. Parker*, 2:99-cv-0078-DLB, DN 197 pg. 113.

B. <u>Twenty-five Years of Litigation</u>

During the twenty-five year interim since conviction, the Pooley family has waited for justice for Debbie while Wilson pursued multiple post conviction and civil remedies. All of Wilson's claims were rejected. Following the direct appeal, set out above, Wilson sought certiorari, which was denied by the U.S. Supreme Court. *Wilson v. Kentucky*, 507 U.S. 1034 (1993). Wilson pursued an RCr 11.42 Motion in the Kenton Circuit Court, which was rejected. Wilson appealed that decision in *Wilson v. Commonwealth*, 975 S.W.2d 901 (Ky.

1998) *cert. denied*, 526 U.S. 1023 (1999). Wilson also sought to intervene in his co-defendant's CR 60.02 proceeding, and that effort was likewise unsuccessful. Wilson's appeal on that matter was considered in *Humphrey v. Commonwealth*, No. 2003-SC-0671-TG, 2003-SC-0672-TG, 2005 WL 924188 (Ky. 2005). Ultimately, Wilson's petition for habeas corpus was rejected by the Sixth Circuit in *Wilson v. Parker*, 515 F.3d 682 (6th Cir. 2008) *cert. denied*, 130 S.Ct. 113 (2009). Shortly after Wilson's habeas petition was rejected by the Federal District Court, Wilson filed a suit pursuant to 42 U.S.C. § 1983, alleging that Kentucky's lethal injection protocol violated his constitutional rights. That matter was appealed to the Sixth Circuit and also failed. *Wilson v. Rees*, 620 F.3d 699 (6th Cir. 2010) *cert. denied*, 10-800, 2011 WL 589005 (2011).

C. Wilson Chooses to Test A Letter Opener Instead of Other Evidence, Like Samples from the Car

Wilson requested and received DNA testing as part of the federal habeas proceeding. In the habeas proceeding Wilson sought and was granted an order to test the hairs that were the subject of comparison testimony at trial. Wilson also requested and received a complete inventory of all evidence that remained in existence. When it was determined that the hairs could not be found, Wilson requested and received serology and DNA analysis of a letter opener found inside Ms. Pooley's apartment on the presumption that the presence of blood would give tenuous support to an alternative theory (despite witness identification of Wilson in Indiana, Wilson's confessions, and his spending spree with Ms. Pooley's credit cards). In considering the issue of the hair in the Judgment denying habeas relief, the Eastern District stated, "[e]ven assuming that a mtDNA analysis would show that the hair was not

Petitioner's (keeping in mind that Mr. Dublin never said it was Petitioner's– only that it had characteristics the same as Petitioner), there is still overwhelming testimony of Petitioner's guilt." *Wilson v. Parker*, 2:99-cv-0078-DLB, DN 197 pg. 113.

D. Wilson Delays

Thus, in November of 2009, Wilson had exhausted all of his matter of right appeals. On November 23, 2009, the Attorney General asked the Governor to set an execution date for Wilson and two other convicted murderers that were serving death sentences. Wilson realized that his chances of obtaining a stay of execution based upon the federal § 1983 were slim, given that the matter was substantially similar to issues addressed by the U.S. Supreme Court in *Baze and Bowling v. Rees, et al.*, 553 U.S. 35 (2008). Wilson decided to file motions, including a motion for DNA testing, presumably to give him something on which to premise a request for a stay should an execution date be set. He informed the Governor by letter that he would be filing these motions. However, another year passed without any action on the part of Wilson. Wilson waited until April 23, 2010, the proverbial eve of the effective date of the new Kentucky administrative regulations, to file his motion for further DNA testing. TR 1, 24.

E. Wilson's Execution Warrant

On August 25, 2010, the Governor signed an Executive Order setting Wilson's execution date for September 16, 2010. Wilson immediately filed a motion for stay of execution based upon his two pending motions before the Kenton Circuit Court. TR 4, 498. On September 1, 2010, the Kenton Circuit Court heard the parties' extensive arguments. The Commonwealth disclosed to the Kenton Circuit Court that DNA testing had already been conducted in the habeas proceeding, and that testing (by the Appellant's own choice) had been on a letter opener. Wilson argued that he should be entitled to a hearing to determine what had happened to the hairs, that had been missing since 2001. The Commonwealth conducted an inventory (TR 4, 478) and determined that those hairs could not be located by the Kentucky State Police Laboratory. The Commonwealth also reported that Wilson, in fact, had affirmative knowledge that the hairs were lost and had possessed that knowledge since the Federal District Court Habeas proceedings.

As a result, Judge Bartlett denied the motion for stay of execution from the bench and later, on September 2, 2010, entered a written order denying the motions. TR4, 533. The Court found that Wilson "failed to establish to the satisfaction of the Court that a reasonable probability exists that the Defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing[.]" TR 4, 535. The Court further found that "the Defendant has failed to establish that the verdict or sentence would have been more favorable had DNA testing of hairs revealed they did not belong to the Defendant. TR 4, 535.

As this Court is aware, the Appellant later sought to convince the Franklin Circuit Court that he did, in fact, have a mental deficiency, despite the rulings of the Kenton Circuit Court. Wilson is now one of the Plaintiffs challenging Kentucky's second set of administrative regulations on the execution protocol. This Court took no action on the injunction issued by the Franklin Circuit Court as a part of that case, and Wilson's execution date passed. Wilson eventually abandoned his claims concerning his mental capacity, as the claim was not supported by any evidence. However, Wilson remains a Plaintiff in the Franklin Circuit Court asserting that the administrative regulations do not protect those with mental disabilities (although he now admits that he does not suffer from a mental deficiency).

F. <u>This Court Remands the DNA Issues</u>

The matters that were the subject of the Kenton County motions were then brought before this Court in *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012). This Court affirmed the trial court's denial of testing on the hairs and held that Wilson was not entitled to "an evidentiary hearing to determine if the hairs are in existence or if they were destroyed after the preservation order." *Wilson* at 190. This Court remanded the issues of DNA testing of semen because the trial court order "erroneously failed to address" the issue. *Id.* at 192.

G. <u>Missing Evidence Recovered</u>

Despite asserting to the Office of the Attorney General that evidence in Wilson's case could not be found, the Kentucky State Police Forensics Laboratories communicated with Wilson's counsel and told a different story. TR 506. On March 14, 2013, counsel filed copies of correspondence with the lab that identified many items that had previously been

reported as lost when the AG made inquiries. Undersigned counsel immediately took action to attempt to clarify the lab's inventory. On March 22, 3013, counsel filed a response outlining her communications with the lab. TR 551. At that time the Kentucky State Police launched an investigation into the cause of the discrepancy. TR 572. On March 19, 2013, Major Eddie Johnson sent counsel a Memorandum setting out his preliminary findings. TR 573.

The Court held a hearing on May 2, 2013 and heard testimony from KSP laboratory director Laura Sudkamp. VR 5/2/13, 1:43:40. At that hearing Ms. Sudkamp reported that certain laboratory staff had "dropped the ball" in 2010 in responding to the Attorney General's request for an inventory. Although she did not know why the evidence was also reported missing in 2001 (as Ms. Sudkamp was not the director and different attorneys were assigned to Wilson's case then) she was attempting to ascertain how the mistake had been made. She identified a list of 144 total slides that she stated were now in her custody at the Central Laboratory facility. The list was placed in the Court record. VR 5/2/13, 1:38:58 - 2:10:00.

Dawn Bayless, the Covington Police Department's evidence custodian also testified at the May 2, 2013 hearing. Id. at 2:05:40. She stated that the undersigned counsel visited her at the evidence locker in 2010. *Id.* at 2:06:20. The evidence log from 1988 listed three items of evidence from the Wilson case, but only the automobile seat was present in the evidence locker in 2010. In 2010 Ms. Bayless believed that the other two items must have been removed for court proceedings in 1988, and placed in the record. VR 5/2/13, 2:07:05. She stated that she and counsel searched all of the items that were there at the time.

However, she later discovered another case file on Wilson during a renovation of the facility. *Id.* at 2:08:50. She notified counsel of that discovery when she arrived for the hearing on May 2, 2013. *Id.* at 2:10:58.

At the hearing on May 2, 2013 the parties agreed to a new order to preserve the evidence that had now been located. That Order was entered June 12, 2013. TR 595. The parties also agreed to meet and inspect the items now recovered by the Covington Police Department. TR 597.

H. Trial Court's Findings and Conclusions on Hair Samples

The trial court entered new Findings of Fact and Conclusions on Law on June 18, 2013. The trial court again denied the Appellant's motion to test the newly located hair samples, as this Court had already ruled that testing would not result in exculpatory evidence. TR 600. The trial court found that, even if the hair was not Wilson's hair, it would not prove that he was never inside the car. TR 600. The trial court also noted that this finding was the law of the case. *Id.*

I. Trial Court's Findings and Conclusions on Semen Sample

The trial court noted that it had reviewed the trial transcript in order to "analyze the significance of the evidence of semen[.]" TR 603. The trial court found that even if the semen on the back seat was not Wilson's, "it does not prove that the Defendant did not commit the rape, but would only prove that someone else's semen was left in the vehicle at some time." TR 603. The court went on to find that "there is no reasonable probability that the Defendant would not have been prosecuted or convicted if DNA testing would have established that the semen from the car seat was not the Defendant's." TR 604. The trial

court also stated, "this Court finds that there is no reasonable probability that the verdict or sentence would have been more favorable had DNA testing of the semen not matched the Defendant." TR 604.

J. Trial Court's Findings and Conclusions on Blood, Saliva, and Fingernails

The trial court also considered the trace amounts of blood and saliva collected from the car, as well as Debbie's fingernails. TR 605-606. The court found that "no reasonable probability exists that the Defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing[.]" TR 606. "Likewise, [the court found] that no reasonable probability exists that the Defendant's verdict or sentence would have been more favorable if DNA testing and analysis had been available at trial or that DNA testing and analysis will produce exculpatory evidence." TR 606. The Court concluded that even if the DNA failed to prove a match to Wilson, it would not mean that he was not in the car. TR 606. Likewise, the fingernails could not exclude Wilson as the perpetrator of the murder and rape, given the eye witness testimony at trial. Id.

The trial court's findings and conclusions should be affirmed.

ARGUMENT

WILSON IS NOT ENTITLED TO ANOTHER POST CONVICTION DNA TEST

Wilson is not entitled to another post conviction DNA test. Kentucky's DNA testing statute, KRS 422.285 and KRS 422.287, are premised upon the assumption that no prior DNA testing was conducted. In addition, Wilson also failed to meet his burden under either the mandatory or permissive portions of KRS 422.285. Thus, Wilson is not entitled to additional DNA testing- especially considering the fact that he already had one round of post conviction DNA testing on an item of his own choice.

A. The Trial Court's Jurisdiction to Order Testing is Limited

In bringing this issue before the circuit court, Wilson was asking the trial court to reopen a judgment. A court may do the same only to the extent authorized by statute or court rule. *Commonwealth v. Gross*, 936 S.W.2d 85 (Ky. 1996). While the trial courts are authorized to grant very limited post conviction testing in very limited situations (as further explained below), no statute or court rules authorize a trial court to order testing of the defendant's choice, at a facility of his choice. KRS 422.285 and 422.287 limit the testing to that selected and performed by a KSP Lab, or its agent, and only if the movant has met the requirements of the statute. Thus, as an initial matter, some parts of Wilson's requests for DNA testing far exceeded the permissible scope of the trial court's post conviction jurisdiction. As such the Kenton Circuit Court was correct to deny the motion to the extent that the testing requested exceeded that permitted by the statute.

B. The Testing Would be Repetition of the Pre-Statutory Testing that Occurred in the Habeas Proceeding

Further, as testing actually did occur in the habeas proceeding to no avail, this procedure should not be repeated. It is long-settled that the doctrines of *res judicata* and "law of the case" apply to criminal cases. *Commonwealth v. Stephenson*, 82 S.W.3d 876, 885 (Ky. 2002) citing *United States v. Oppenheimer*, 242 U.S. 85 (1916); *Barnett v. Commonwealth*, 348 S.W.2d 834 (Ky. 1961). The same rules of issue preclusion apply in both criminal and civil cases. *Id. See also, Thomason v. Commonwealth*, 332 S.W.2d 104 (Ky. 1959); *Parrott v. Commonwealth*, 287 S.W.2d 440 (Ky. 1956); *Ex parte Mote*, 275 S.W.2d 48 (Ky. 1955).

In the habeas proceeding Wilson sought and was granted an order to test the hairs that were the subject of comparison testimony at trial. Wilson also requested and received an inventory of all evidence that remained in existence. When it was determined that the hairs could not be found, Wilson requested and received serology and DNA analysis of a letter opener found inside Ms. Pooley's apartment on the presumption that the presence of blood would give tenuous support to an alternative theory (despite witness identification of Wilson in Indiana, Wilson's confessions, and his spending spree with Ms. Pooley's credit cards). Given Wilson's lack of success in this attempt, he now wants a proverbial second bite to identify more items for testing. In fact, Wilson asserts in his brief that he could have, and still may, file successive petitions for testing under KRS 422.285. Brief of Appellant at 23. However, this Court should rule that post conviction testing is limited. The state statute is premised upon the assumption that testing would not be a repetitious procedure. Both the

permissive and mandatory sections state that the issue must be one "not previously resolved" and that the evidence was not "previously subjected to DNA testing and analysis" KRS 422.285(2)(c) and (3)(c).

C. <u>The Law of the Case Doctrine Applies to the Hair</u>

The Appellant's brief discounts this Court's decisions concerning the hair. However, this Court's 2012 decision made certain decisions concerning the hair that were binding on the trial court. *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012). This court affirmed the trial court's first ruling on the hair. *Wilson*, 381 S.W.3d at 189. This Court explained,

> Assuming that DNA testing would reveal the hairs are not Wilson's, there is not a reasonable probability that Wilson would not have been prosecuted or convicted, that the evidence would lead to a more favorable verdict or sentence, or be otherwise exculpatory. Even if the hairs were not Wilson's, it would not prove that he was never inside the car. At most, it would only show that other people had been inside the car, which the jury already knew because numerous hairs did not match Wilson, his co-defendant, or the victim. And despite the prosecutor's statement in closing argument, the examiner testified that comparison testing could not positively identify the hairs as Wilson's.

Id. at 190. Nothing has changed to make this reasoning any less applicable.

Regardless, this decision concerning the hair is now the law of the case. The "law of the case doctrine is 'an iron rule, universally recognized, that an opinion or decision of an appellate court in the same cause is the law of the case for a subsequent trial or appeal however erroneous the opinion or decision may have been.'" *Brooks v. Lexington-Fayette Urban County Housing Authority*, 244 S.W.3d 747, 751 (Ky. App. 2007) quoting *Union Light Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539, 542 (Ky. 1956). A final decision by this Court, in this case, is conclusive of the questions that the decision set out to

resolve. Thus, the trial court correctly denied Wilson's renewed motions concerning the newly found hair.

D. Wilson Failed to Make the Showing Required by KRS 422.285 for all samples obtained from the car, including Hair, Saliva, Semen, and Blood

Without waiving prior argument herein, the trial court should be also be affirmed concerning all of the samples that originated inside the car. Wilson has failed to make the showing mandated by KRS 422.285. A favorable DNA result would have little effect on this matter because testimony established that the car was dirty, that the car had been abandoned, and several people were inside the car. Even if none of the samples matched Wilson, it cannot exclude Wilson or exonerate him in any way. It simply means that someone else was also in the car- a fact that the jury heard during the trial.

1. KRS 422.285

KRS 422.285(2)(emphasis added) provides that a court "shall" order DNA testing if it finds that all of the following apply:

> (a) ***A reasonable probability exists*** that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis;
> (b) The evidence is still in existence and is in a condition that allows DNA testing and analysis to be completed; and
> (c) ***The evidence was not previously subjected to DNA testing*** and analysis or was not subjected to the testing and analysis that is now requested and may resolve an issue not previously resolved by the previous testing and analysis.

KRS 422.285(3)(emphasis added) provides a court "may" order DNA testing if it finds that all of the following apply:

(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.

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

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

2. The Reasonable Probability Standard

The term "reasonable probability" is found in both KRS 422.285(2) and (3). A reasonable probability is "the probability sufficient to undermine the confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). See also, *United States v. Bagley*, 473 U.S. 667, 683 (1985). The defendant must show that the jury would have reached a different result at trial. *Hodge v. Commonwealth*, 116 S.W.3d 463, 468 (Ky. 2003) *cert. denied* 541 U.S. 911 (2004). A defendant is entitled to DNA testing only if he establishes, by a preponderance of the evidence, that "a reasonable probability exists that exculpatory DNA tests would prove their innocence. That showing has not been made if exculpatory tests would 'merely muddy the waters'." *Rivera v. Texas*, 89 S.W.3d 55, 59 (Tex.Crim.App. 2002) citing *Kutzner v. State*, 75 S.W.3d 427, 439 (Tex.Crim.App. 2002). Wilson only seeks to muddy the waters in this case with a duplicative procedure.

3. Scientific Testimony at Trial Never Matched Wilson to Anything in the Car

Here, despite Wilson's assertion to the contrary, no testimony ever identified any hair, blood, or semen found in the victim's car as Wilson's hair, blood, saliva, or semen. The testimony stated that someone with hair that appeared similar to Wilson's hair was inside the car at some point in time. The testimony was that there was semen in the car. Thus, at most,

a DNA test that excluded Wilson would mean that someone other than Wilson was inside a car that had been abandoned for days before being discovered, and used regularly by a busy couple prior to its abandonment. No test can state that Wilson was not inside the car. No technology exists that would allow even the most advanced laboratory to siphon out the DNA of Ms. Pooley's rapist and murderer and positively say that it was deposited inside the car at the time of the crime. "The relevance of the profile to a particular crime activity is often difficult to assess and the importance of considering the DNA evidence in relation to all of the other evidence in the case is emphasized." A. Lowe, C. Murray, J.P. Whitaker, G. Tully, P. Gill, *The Propensity of Individuals to Deposit DNA and Secondary Transfer of Low Level DNA From Individuals to Inert Surfaces*, 129 Forensic Sci. In'l. 25 (2002). Thus, DNA testing and analysis, if possible, would do nothing to negate what the federal court has called the "overwhelming" evidence of Wilson's guilt. *Wilson v. Parker*, 2:99-cv-0078-DLB, DN 197 pg. 113 (Appx. A).

As noted by the federal court and referenced above, the scientific testimony was only a very small part of the testimony that established Wilson's guilt. Wilson and Humphrey both confessed to acquaintances. Wilson and Humphrey were seen and identified as a couple that stayed at an Indiana hotel just after the murder. They used Ms. Pooley's credit cards for a shopping spree. They were caught with items identical to those purchased with the credit cards. They proudly displayed their loot and Wilson even bragged about the crime. "DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent." *District Attorney's Office for Third Judicial Dist. v. Osborne*, ----- U.S. -----, 129

S.Ct. 2308, 2316 (2009).

4. The Overwhelming Evidence of Guilt Did Not Come From the Body or the Car

The overwhelming evidence of Wilson's guilt was not scientific. It was the result of his co-defendant's testimony as corroborated by his own confessions to his cell mate. In addition, Wilson's co-defendant, Brenda Humphries, also made statements to her friend. Combined with the credit card use, Wilson's possession of items purchased with the credit cards, and identifications of Wilson from the area where the body was dumped, the conclusion is unavoidable.

a. Wilson's Confession to Willis Maloney

At trial, Willis Maloney testified that Wilson discussed the murder and rape with him while the two were incarcerated together at the Kenton County jail after Wilson's arrest. (TTR V, 733). The two shared a cell. Id. at 737. Maloney stated that on June 16, 1987, Mr. Wilson was served with a search warrant for blood, hair, and saliva samples. Id. at 738. Wilson showed the warrant to his cell-mate, Maloney, and told Maloney that the car had been wiped clean. Id. at 738.

Later, the two saw a news broadcast on television that discussed the murder. Maloney said to Wilson, "I guess it is starting to look bad for you." (TTR V, 740). Wilson did not respond at that time. *Id.* However, about ten to twenty minutes later, Wilson said, "Do you know what my greatest mistake in life was?" *Id.* at 740 -741. Wilson went on to explain that his mistake was involving "Brenda" in the murder. *Id.* at 741. Wilson stated that if he had been by himself he would not have been caught. *Id.* He stated that Brenda had

gotten mad at him because he wanted "to be with other women like that." *Id.* A few days later he said that he made Brenda drive because the car was a standard shift and he could not drive a standard shift. *Id.* at 759.

Wilson told Maloney that Brenda, his co-defendant, had confessed to her friend, Beverly Finkenstead (who also testified at trial). (TTR V, 742). Wilson stated that he should have killed Beverly, her husband, and her two children. *Id.* Wilson said that he told Brenda not to use Debbie Pooley's credit cards, but she did anyway. *Id.* at 745 -746. He said that they had purchased the watch he was wearing when he was arrested. *Id.* at 746. When the police came to the jail to take pictures of Wilson he told Maloney that he assumed that the police wanted to show them to store clerks in Illinois. *Id.* at 752. Wilson said that the motive was robbery. *Id.* at 751. He said they "snatched her in the first place" because they wanted to rob her. *Id.*

Wilson expressed to Maloney that he did not believe that police would find physical evidence against him. He said that the body would be decayed and that they would not be able to find his sperm on it. TR V, 743-744. Wilson stated that Pooley did not scratch him so they would not find anything under her fingernails. *Id.* at 745. Wilson said that, "he hoped that when they found the body, that it was so decayed it had maggots crawling out her ass." *Id.* at 752.

On June 18th the two saw another news story about the crime. Wilson said, "They finally found the body, and it is in bad shape and decomposed, and I don't think they will be able to get anything from it." (TTR V, 754). He discussed more details of the crime and stated that Debbie Pooley was dead before they crossed the border into Indiana. *Id.* at 754.

He told Maloney that he should have killed Brenda Humphrey too, poured gas in the car, and burned it. *Id.* at 755.

Wilson described to Maloney his efforts to hide and destroy any evidence from the car. He said that they bought gloves and cleaner to clean the blood and evidence out of Pooley's car. (TTR V, 758). They poured motor oil and bleach on the carpet and floor mats to cover the evidence. *Id.* at 758. Wilson had wanted to burn the car. *Id.* at 759.

On July 3, 1987, Wilson explained to Maloney that Debbie Pooley's boyfriend lived across the street from the unemployment office. (TTR V, 766). He said that Pooley had told him that. *Id.* This was a fact that was verified by other witnesses at trial and that Maloney was unlikely to have heard from any other source.

On July 10, 1987, Wilson talked more about the crime. Wilson said that he and Brenda had walked into Newport looking for someone to rob. (TTR V, 768). They came back into Covington and found Debbie Pooley parking her car next to the unemployment office. *Id.* at 769. He said that he put Pooley into the back seat of the car and that Brenda drove. *Id.* At 769. They went to the flood wall at first and he made Debbie Pooley lay down while Brenda got gas for the car. *Id.* at 769. They then put Pooley back into the car and drove down the Kentucky side of the river. *Id.* at 770. They ultimately crossed into Indiana. *Id.* He strangled Debbie Pooley and bragged to Maloney, "I bet they cant' find what I used to strangle her with." *Id.* They then dumped the body in a remote area and

then checked into a Holiday Inn. Id. at 770 -771. The Holiday Inn was near the area where they dumped the body. Id. at 771. Humphrey registered for the room. *Id.*

On July 17, 1987 Wilson said that they left the body, "Bare ass naked." (TTR V, 75). He told Maloney that he didn't know why Brenda's conscience bothered her because he was the one that killed Pooley and cleaned up good. *Id.* He said that all Brenda had to do was keep her mouth shut. *Id.* at 776.

A month later, on August 17, 1987, Wilson stated that Brenda had made Pooley take pills because she wanted Pooley to go to sleep. TTR V, 779.

b. Humphrey's Confession to Beverly Finkenstead

Beverly Finkenstead told the jury that she was friends with Brenda Humphrey, and that she saw and talked to Brenda often. She saw Humphrey and Wilson on May 29, 1987, at her house where Brenda often stayed. (TTR I, 97). They left and did not return until Sunday May the 31st. *Id.* They told her that they had been camping. *Id.* at 98. However, they had a K-Mart bag, new watches, and they both had on a new necklace[1]. *Id.* at 100. She wondered where they had gotten these items since they didn't have any money.

On June 7th Humphrey called Beverly upset. Brenda came over and told her that they had robbed a girl, and that Wilson had raped her in the backseat of her own car. (TTR I, 109-111). Humphrey said that the girl had begged for her life. *Id.* Humphrey said that they kidnaped her near the unemployment office on Garrard Street in Covington. *Id.* at 109. They dumped the body on the Indiana/Illinois border and parked the car at Latonia Auto Parts. *Id.*

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[1] It was established during the trial that these necklaces were taken from Debbie Pooley. See e.g. TTR I, 43; TTR II, 164, and TTR VI, 825.

at 112.

5. Testimony Established that Several People Were Inside the Car

Multiple witnesses established that Debbie Pooley was not in the habit of keeping a clean car. Her friend, the last person beside the co-defendants to see her alive, stated that the car was always "untidy" with food wrappers and cigarettes. (TTR I, 43, 51). Debbie never seemed to have time to vacuum the car. *Id.* at 51. She stated that if there were no food wrappers in the car when it was found, then it was not in the same condition that it was in when Debbie left her. *Id.* at 52.

Tom Wood was Debbie's boyfriend. He used the car often and the car was always messy. (TTR I, 52-58). On June 4, 1987 (six days after Debbie disappeared), he heard that her car was seen at Latonia Auto Parts. *Id.* at 59. He went there and saw a sign in the window that said, "This car or any parts free for the moving." *Id.* at 60. He actually got inside the car and saw that it was cleaned out, and that parts were gone from the inside. *Id.* at 60 -63.

Thus, it was established that multiple people were inside the car before the police took it and processed the evidence inside. The testimony established that Tom Wood was inside the car. Also, workers from the salvage yard rolled down the windows because it smelled bad. (TTR III, 325). They drove the car to the end of the driveway and parked it so it would be out of the way. *Id.* at 325. The owner put the sign in the car. Id. at 330. The police cut out samples from the carpet. *Id.* at 337. A sperm sample was taken but was too limited to allow for any conclusive A/B/O determination. *Id.* at 393. There were Caucasian pubic hairs that were not similar to standards from either Pooley or Humphrey. There were

lots of these. (TR IV, 563). There were also animal hairs in the car. *Id.* at 569.

Despite claims to the contrary by Wilson's current counsel, the scientific testimony concerning samples removed from the car was limited and inconclusive. William Morris Durbin testified as an employee of the Kentucky State Police Crime Lab in Louisville. (TR IV, 522). He found blood on the parts of the automobile submitted - such as the backseat. Id. at 522-532. In order to test for the presence of blood, a cutting was taken. Id. at 532. Brenda Humphrey has Type A blood. *Id.* at 522. Wilson has Type A/B blood. Id. at 530. Debbie Pooley had Type A blood. (TR I, 90). The blood inside the car was from group A and was human blood. (TR IV, 534). There was Type A human blood on the back of the passenger seat, on the rear seat, the bench area, and there was blood and saliva on the seat. *Id.* at 537 -538. ***However, testing on the back passenger seat consumed the entire sample.*** *Id.* at 537. Notably, there was no test at the time to distinguish between human saliva and animal saliva. (TR IV, 538). The saliva had factors from blood group A. *Id.* at 549.

There was semen found on the rear seat. (TR IV, 543). However, DNA analysis was a new test at the time of trial, and Mr. Durbin was not qualified to perform DNA testing. *Id.* at 551. There was no blood left to perform any testing. *Id.*

Around one thousand hairs were submitted for comparison. (TR IV, 552). It took approximately one month to complete this work. *Id.* at 556. Mr. Durbin explained to the jury that hair comparison cannot say whether hair came from a particular person. The most that he could say was that hair had similar characteristics. *Id.* at 558-559). There were Caucasian pubic hairs that were not similar to standards from either Pooley or Humphrey. There were lots of these. (TR IV, 563). There were also head hairs and pubic hairs similar

to Wilson's standards. (TR IV, 565).

On cross examination Mr. Durbin explained that a car that is not cleaned out would have lots of hair in it. (TR IV, 572). The presence of pubic hair does not imply that there was a sex act in the car. *Id.* at 573. He did not believe that there was enough of a sample to do any DNA testing. *Id.* at 580. Also, there was no way to determine the age of any samples. *Id.* at 582. The testimony suggested that the hair could have accumulated over many years. It was also possible that someone was inside the car while it was abandoned before discovery.

The very condition of the vehicle prior to its discovery in 1987 make it impossible for Wilson to make the showings of "reasonable probability" required by the statute for any samples obtained inside the car. As set out above, under either the mandatory or the permissive portion of the statute, a condemned inmate is required to make a showing by "reasonable probability". In this matter Wilson cannot make such a showing because even favorable results would not be exculpatory, nor would such results have affected the verdict in any way. In fact, the federal courts have agreed. In the Judgment denying habeas relief the Eastern District stated, "Even assuming that a mtDNA analysis would show that the hair was not Petitioner's (keeping in mind that Mr. Dublin never said it was Petitioner's– only that it had characteristics the same as Petitioner), there is still

overwhelming testimony of Petitioner's guilt." *Wilson v. Parker*, 2:99-cv-0078-DLB, DN 197 pg. 113 (Appx. B).

At most, a result that excluded Wilson as the source of hair or semen in the car would only show that another person was also in the car at some point in time. This fact was already solidly established at trial. The jury heard that the car was abandoned, that anyone could have been inside the car, that people were inside the car, and they still found Wilson guilty and sentenced him to death. In the Judgment denying habeas relief the Eastern District stated, "Even assuming that a mtDNA analysis would show that the hair was not Petitioner's (keeping in mind that Mr. Dublin never said it was Petitioner's– only that it had characteristics the same as Petitioner), there is still overwhelming testimony of Petitioner's guilt." *Wilson v. Parker*, 2:99-cv-0078-DLB, DN 197 pg. 113.

E. <u>Wilson has Failed to Make the Required Showing for the Fingernails</u>

The same arguments apply to the testing of the fingernails. Debbie was missing several days before her very badly decomposed body was found lying in a field. Although the Appellant suggests that cells, fluids, and tissues might have been found on the nails, it should not be forgotten that the body was reduced to a dark spot on the grass before the unfortunate girl was found. Given this condition, and the fact that the nails have been apparently stored in an evidence locker for twenty-five years, the condition of the nails is highly questionable.

Further, even assuming that the nails were in a condition to be tested, the absence of Wilson's DNA would not be exculpatory in any manner. Just as in the case of the car, it cannot be ever proven from the DNA evidence that Wilson was not the man that raped and

killed Debbie. This case is distinguished from cases of rape, where the victim goes to the hospital and semen sample and nail scraping are immediately taken from the victim.

Nor will DNA explain away Wilson's possession of Debbie's necklace and presence in a hotel near the dump site. DNA doesn't explain how Wilson got items that were purchased at a K-Mart with Debbie's credit cards, including the watch that he was wearing upon arrest. DNA doesn't explain where Wilson and Brenda were in the days following Debbie's disappearance. Nor, can DNA explain how Wilson's cellmate knew intimate details of the crime. These items of testimony are explained, however, by the conclusion that the Kenton County jury reached. Wilson raped and killed Debbie Pooley because he wanted to rob someone and she was in the right place at the right time.

CONCLUSION

Wherefore, for the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the ruling of the Court of Appeals.

Respectfully submitted,

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