ORIGINAL

NO. 87-1674

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

-vs.-

ROMELL BROOM

Defendant-Appellant

BRIEF IN OPPOSITION TO MOTION TO STAY

WILLIAM D. MASON
Cuyahoga County Prosecutor

Matthew E. Meyer (#0075253)
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellee
1200 Ontario Street
Courts Tower – Justice Center
Cleveland, Ohio 44113
(216) 443-7800
(216) 443-7602 *fax*
mmeyer@cuyahogacounty.us *email*

Counsel for Plaintiff-Appellee

S. ADELE SHANK
3380 Tremont Rd., 2nd Floor
Columbus, Ohio 43201

TIMOTHY F. SWEENEY
820 W. Superior Ave.
Cleveland, Ohio 44113

Counsel for Defendant-Appellant

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Now comes Cuyahoga County Prosecuting Attorney William D. Mason on behalf of the State of Ohio, by and through his undersigned assistant, and respectfully submits the State's Brief in Opposition to defendant's August 20, 2009 Motion to Stay.

Introduction and summary.

Romell Broom was sentenced to death in 1985 for kidnapping, raping, and murdering 14 year-old Tryna Middleton. This Honorable Court has set his execution for September 15, 2009.

Broom has received extensive postconviction review in federal and state court, the most recent of which concern allegations of withheld evidence pursuant to *Brady v. Maryland.* Although Broom argues that he has never received a full hearing on his *Brady* claims and that the federal courts failed to examine their merits in habeas proceedings, a careful review of those decisions demonstrates the opposite. The District Court even allowed Broom a two-day hearing to develop these *exact same Brady* claims. Indeed, inculpatory DNA results that Broom himself obtained in District Court (semen from the victim's body corresponds with Broom's own DNA)

further demonstrate his guilt as well as the lack of materiality behind his *Brady* allegations.

Using R.C. 149.43, Broom obtained the public records that he uses to advance his *Brady* claims in 1993 and 1994. Although both the United States District Court and the Sixth Circuit U.S. Court of Appeals have held that Ohio law did not preclude Broom from using public records in a postconviction petition, the Eighth District has disagreed and excused Broom's fourteen-year delay. Specifically, the court below held that this Honorable Court's decision in *State ex rel. Steckman v. Jackson* not only precluded use of R.C. 149.43 to obtain discovery, but also acted as a liminal bar to introducing public records already in the defendant's possession. Therefore, according to the Court below, Broom was "unavoidably prevented" from filing a timely postconviction petition.

In sum, Broom's *Brady* claims do not have any legal or factual merit, he cannot establish *cause and prejudice* to stay his execution, and Ohio law should not condone Broom's deliberate choice to bypass state courts in lieu of federal courts and then forgive the delay as being "unavoidably prevented" from bringing the claim in the first place.

Within the last two years, Broom has been scheduled for execution twice, and had two clemency hearings before the parole board. During the most recent clemency hearing that took place on August 20, 2009, Tryna's mother expressed great distress over the length of time that has elapsed since Broom killed her daughter.

Because Broom has not presented valid legal or factual reasons for further delay and review, the State respectfully requests that this Honorable Court decline to stay Broom's sentence and allow his execution to proceed.

Factual background.

In 1985, a Cuyahoga County Jury found Romell Broom guilty of aggravated murder with two capital punishment specifications, rape, kidnapping, and two counts of attempted kidnapping. Broom ultimately received the death penalty for the aggravated murder, rape, and kidnapping of fourteen year-old Tryna Middleton, and received a fifty-four to eighty year prison term on the remaining counts.

The Eighth District Court of Appeals affirmed Broom's conviction and death sentence *in State v. Broom* (July 23, 1987), Cuyahoga App. No. 51237, 1987 WL 14401. This Honorable Court the affirmed on direct appeal and offered a definitive rescitation of the salient facts, which will be referred to in this memorandum (although not reproduced for brevity). *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682. Broom then unsuccessfully sought a writ of certiorari from the Supreme Court of the United States. *Broom v. Ohio* (1989), 490 U.S. 1075.

In 1990, Broom filed a petition for postconviction relief before the Court of Common Pleas, which denied the petition on April 24, 1997. While his postconviction petition was pending, Broom sued the City of Cleveland to obtain investigatory records. *State ex rel. Broom v. Cleveland* (Aug. 27, 1992), Cuyahoga App. No. 59571, 1992 WL 20957, and did obtain some sought-after records. Although Broom sought discretionary review from this Honorable Court following his lawsuit, this Honorable Court dismissed Broom's appeal for want of prosecution in *State ex rel. Broom v. Cleveland,* (1993), 66 Ohio St.3d 1406, 605 N.E.2d 1263.

The Eighth District Court of Appeals affirmed the Common Pleas Court's denial of Broom's postconviction petition in *State v. Broom* (May 7, 1998), Cuyahoga App. No. 72581, 1998 WL 230425, and this Honorable Court subsequently declined to exercise jurisdiction in *State v. Broom* (1998), 83 Ohio St.3d 1430, 699 N.E.2d 946.

Broom filed a petition for a writ of habeas corpus before the United States District Court for the Northern District of Ohio in 1999 before United States District Court, which denied the petition in a 137 page written opinion issued on August 28, 2002. *Broom v. Mitchell* (N.D. Ohio, August 28, 2002), Case No. 1:99 cv 0030, *unreported.* Within Broom's thirty grounds for relief, Broom alleged that the State had failed to turn over exculpatory evidence, (an argument he based on records that he had obtained from the East Cleveland Police Department). Specifically, Broom argued that:

> [t]he State failed to disclose: (1) illegal drug usage by Tryna Middleton, Tammy Sims, and Bonita Callier; (2) that this drug usage affected these three girls on the night of Tryna Middleton's abduction; (3) that the three girls had a "habit" of taking rides with strange men; (4) that the three girls had a practice of lying to manipulate others; (5) that the first individual that Tammy Sims and Bonita Callier approached after Tryna Middleton's abduction did not believe their story; (6) that the police had doubts about the two girls' story; (7) that Bonita Callier was hypnotized in an effort to improve her memory; and (8) that Tryna Middelton was sexually active.

Id., at 42. The District Court, in the interests of efficiency, allowed Broom a hearing "regarding the substance of Broom's Brady claim, but reserved ruling on its admissibility until Broom could establish the cause and prejudice necessary to excuse his procedural default." *Id.,* at 49. The hearing lasted two days.

The District Court disagreed with Broom's conclusions regarding the purported *Brady* material:

> These are [Broom's] characterizations of the "facts" allegedly disclosed by, primarily, the East Cleveland Police Department records. While the Court takes issue with most of these characterizationas and does not agree that they are, in most instances, supported by a careful review of these records, in light of the Court's other conclusions, the Court finds no need to parse these claims in detail or to debate their factual accuracy.

Id., at 42, fn 16. The District Court further found that "The material allegedly withheld appears to constitute largely inadmissible hearsay, often in the form of conjecture and rumor." *Id.,* at 53.

"To the extent it would have been admissible or have altered Broom's trial strategy, moreover, it only would have been used for impeachment purposes." *Id.* "Given the profound evidence of Broom's guilt, the Court cannot conclude that Broom has shown by clear and convincing evidence that no reasonable jury would have convicted him." *Id.*

The District Court found that Broom had procedurally defaulted on his *Brady* claims because he had deliberately chosen to pursue them in federal court, rather than first doing so in the Cuyahoga Court of Common Pleas. Finding that Broom been in possession of the alleged exculpatory material for eight years, the District Court ruled that Broom had intentionally bypassed the state courts and could not satisfy the "cause and prejudice" or "miscarriage of justice" prongs of *Coleman v. Thompson* (1991), 501 U.S. 722, 750; FN4. *Id.*, at 41-46.

The dispute behind Broom's procedural default centered on whether Broom was legally precluded from using evidence he obtained pursuant to the public records act, R.C. 149.43, following this Honorable Court's decision in *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 639 N.E.2d 83. The District Court found that Ohio law was not so unsettled as to have precluded Broom's use of the records, which he obtained in 1993 and 1994. *Broom v. Mitchell, supra,* at 42-46. Further, Broom had obtained the records before this Court's decision in *Steckman,* and the District Court found that he could have either amended his initial postconviction petition (which had been pending until 1997) or filed a successive petition. *Id.*, at 41-52

The District Court nevertheless went on to address the merits of Broom's *Brady* claims, and found that the prosecutors had been unaware of the existence of the East Cleveland records, and had been unaware of the fact that the East Cleveland Police Department had conducted an independent investigation concurrent to the Cleveland Police Department's investigation. *Id.*, at

54. Imputing that evidence to the State, however, the District Court found that *Broom* had satisfied the first element of *Brady,* that the information had been suppressed by the State. On the question of whether the records were material, the District Court found the issue to be a "close question" which it declined to explicitly resolve. *Id.*, at 57-58. Elsewhere in its opinion, however, the District Court concluded that the evidence of Broom's guilt was "profound" and held that even if the jury had the East Cleveland records, "the evidence of kidnapping and rape would still greatly outweigh the evidence of their absence." *Id.*, at 52, 95-6.

During the federal habeas proceeding, Broom sought and obtained permission to DNA test semen samples taken from Tryna Middleton's body. The District Court explained:

> Broom's free-standing claim of actual innocence was essentially gutted when the Court permitted DNA testing during the discovery phase of this habeas proceeding. The results of this testing most definitely did not prove that Broom is "probably innocent." On that contrary, the test results determined that:
>
> Broom and the killer share DNA statistics that occur in one of 3.2[sic][1] million African-Americans [Ajccording to the United States Census Bureau there were 235,405 African-Americans in Cleveland as of 1992. As of 1990, there were 154.826 African-Americans living in Ohio and 29.986.060 in the entire country. Thus, Broom's [DNA] profile statistically eliminates other African-Americans in Cleveland and Ohio. . . . Broom shares a genetic profile with eight or nine other African-Americans in the country.
> * * *
> While the Court acknowledges the malleability of statistical evidence, **it finds the statistical elimination of all but eight or nine other African-Americans in the country from the list of potential perpetrators staggering**. The Court finds, in such circumstances, that any claim of actual innocence must fail.

Id., at 92-5 (emphasis added). The District Court then went on to completely reject Broom's freestanding and gateway actual innocence claims, holding that:

> There is no meaningful evidence supporting Broom's claim of innocence with respect to the murder with which he was charged-indeed, compelling evidence elicited by Broom himself during the course of this proceeding seems to confirm

[1]The Cellmark report to the District Court indicates that the statistical probability is 1 in 2.3 million.

> the contrary. There is, moreover, substantial probative evidence from which reasonable jurors could conclude that the murder occurred during the course of and in conjunction with a kidnapping and rape; the mere fact that some new evidence could be offered to rebut those conclusions is insufficient. Here, **even if the jury had all of the East Cleveland Police Department records before it, the Court finds that the evidence of kidnapping and rape would still greatly outweigh evidence of their absence.** Accordingly, the Court finds that Broom has failed to establish by clear and convincing evidence that "no reasonable juror would have found [him] eligible for the death penalty."

Id., at 95-6 (emphasis added).

Broom appealed the District Court's denial of a writ of habeas corpus to the Sixth Circuit Court of Appeals, which unanimously affirmed. *Broom v. Mitchell* (C.A. 6, 2006), 441 F.3d 392. The Sixth Circuit agreed that Broom could have used the East Cleveland records to support a postconviction petition notwitshanding *Steckman,* and upheld the District Court's determination that Broom had procedurally defaulted his claims. *Id.,* at 402-3, *passim.*

On the State's motion, this Honorable Court then set an execution date of October 18, 2007. On August 6, 2007, Broom filed a successive petition for postconviction relief before the Court of Common Pleas, raising the exact same *Brady* arguments that he raised before the District Court and Sixth Circuit Court of Appeals. As a result of the execution date, the Ohio Parole Board conducted an extensive clemency hearing on September 7, 2007. The Parole Board issued a detailed report recommending against clemency on September 14, 2007, which is available for download at http://www.drc.state.oh.us/Public/Broom%20Clemency%20Report.pdf (last viewed August 20, 2009).

Broom also became one of the plaintiffs in the federal lawsuit challenging Ohio's lethal injection procedures, *Cooey et al. v. Strickland,* United States District Court for the Southern District of Ohio Case No. 2:04-cv-1156. On August 25, 2008, the District Court dismissed Romell Broom as a plaintiff in the *Cooey* lawsuit pursuant to the judgment of the Sixth Circuit

Court of Appeals in *Cooey et al. v. Strickland* (C.A. 6, 2007), 479 F.3d 412, thereby lifting any remaining stay of execution.

On March 17, 2008, the Court of Common Pleas ("trial court") denied Broom's successive petition, filing its findings of fact and conclusions of law on that date. The trial court found that although Broom's records might have been newly discovered in 1994, but were not by the time Broom filed his successive petition in 2007. The trial court held that *Steckman* "did not act to bar Broom from filing a petition for post conviction relief in 1994." (March 17, 2009 Op. at 9, concl. 4). The court held that it lacked jurisdiction to hear the successive petition under R.C. 2953.23 because Broom failed to meet the time requirements for filing that petition. The trial court also found that Broom "had failed to overcome his burden of showing clear and convincing evidence that no reasonable factfinder would have found Broom guilty of aggravated murder or that no reasonable factfinder would have found Broom eligible for the death sentence." (March 17, 2009 Op. at 9, concl. 4).

On the State's motion, this Honorable Court set an execution date of September 15, 2009. As a result, the Ohio Parole Board held a supplemental clemency hearing on August 20, 2009. A clemency recommendation from the Parole Board will be forthcoming on August 28, 2009.

On July 30, 2009, the Eighth District reversed the trial court, holding that the Sixth Circuit (and by implication, the District Court) had misinterpreted Ohio law vis-à-vis *Steckman,* and that Broom could therefore be excused (for purposes of R.C. 2953.23) for holding back his successive petition *Brady* claims until 2007. *State v. Broom,* Cuyahoga App. No. 91297, 2009-Ohio-3731, at ¶¶ 18, 30-32. The Eighth District then found that the trial court's opinion offered no specific findings on the *Brady* claims, and remanded the case for another hearing in the trial court on that question. *Id.,* at ¶ 36. The State filed a motion for reconsideration on August 10,

2009, which remains pending before the Eighth District. Should the Eighth District decline to reconsider, the State intends to file a notice of appeal and request for discretionary review before this Honorable Court.

Broom sought a stay of execution before this Honorable Court on August 20, 2009.

Broom's Brady claims, which have already been litigated, do not warrant staying Broom's execution or conducting a duplicative hearing.

The State respectfully requests that this Honorable Court decline to stay Broom's execution. The State submits that the Eighth District Court of Appeals, in its July 30, 2009 decision, erroneously concluded that Broom was "unavoidably prevented" from filing a timely postconviction petition based on public records evidence he already possessed, and also erroneously excused Broom's fourteen-year delay in filing the claims. At the outset, it must be stressed that there is absolutely no dispute that Broom obtained the public records forming the basis for his *Brady* claims in 1993 and 1994 (several months before *Steckman* was decided), and that he did not supplement or file a new postconviction petition based on those records before the Court of Common Pleas. *Broom v. Mitchell, supra,* at 41-46; *Broom v. Mitchell, supra,* at 441 F.3d 404; see also *State v. Broom, supra,* at 2009-Ohio-3731, ¶ 7.

- ***Ohio law did not bar Broom from filing a timely postconviction petition when he obtained the underlying public records evidence in 1993 and 1994.***

The Eighth District has held that Broom was "unavoidably prevented" from submitting his successive petition for postconviction relief under R.C. 2953.21 or R.C. 2953.23 because (for many years) Ohio law effectively precluded him from relying on evidence obtained through the public records statute, R.C. 2953.23. *Broom, supra,* at 2009-Ohio-3731, ¶¶ 17-32. Specifically, it held that Honorable Court's judgment in *Steckman, supra,* effectively barred such evidence from postconviction proceedings, and that Ohio law did not become "unsettled" on this point

until 2003, when the Eighth District upheld a criminal defendant's use of public records in postconviction proceedings in *State v. Larkins,* Cuyahoga App. No. 82325, 2003-Ohio-5928. This Honorable Court subsequently declined discretionary review of *Larkins* in *State v. Larkins,* 102 Ohio St.3d 1410, 806 N.E.2d 562, 2004 -Ohio- 1763.

- ***The trial court and federal courts have properly rejected Broom's arguments on identical grounds.***

The Eighth District referred to its 2003 decision in *Larkins* as the leading precedent for the proposition Ohio law became "unsettled" over whether a criminal defendant "could support a motion for a new trial with public records that were lawfully obtained by a third party." *Broom, supra,* at 29. The Eighth District specifically described *Larkins* as a decision in which this Court held that a criminal defendant could use evidence obtained through the public records act in a postconviction proceeding. *Id.* In so doing, it rejected the Sixth Circuit's conclusion (and by implication that of the District Court) that *Steckman* did not bar Broom from filing his petition based on evidence he already possessed, finding that it "disagree[d] with the conclusions reached by the Sixth Circuit." *Broom, supra,* at 2009-Ohio-3731, at ¶ 18. On this point, the Sixth Circuit explained its reasoning:

> The State and the district court both relied on *State v. Apanovitch,* 107 Ohio App.3d 82, 667 N.E.2d 1041 (1995) as support for the fact that Broom was not barred from bringing his claim in the Ohio state courts. Appellee Br. at 29-30; I J.A. at 209 (Mem. & Order at 45). In *Apanovitch,* the petitioner argued that the state trial court had improperly prevented him from seeking further discovery in the course of his postconviction relief, and the state court of appeals found that Apanovitch's previous public-records request pursuant to § 149.43 barred him from seeking the same materials because the issue had already been litigated. *Apanovitch,* 667 N.E.2d at 1051. The *Apanovitch* court noted the *Steckman* and *Walker* decisions, but concluded that "[w]e have no occasion to consider the import of these decisions, since the successor petition for postconviction relief predated *Steckman,* and then-applicable law permitted the use of the Public Records Act." *Apanovitch,* 667 N.E.2d at 1051-52.
> * * *

> Regardless of the timing of the filing in the *Apanovitch* case, that case supports the general proposition that *Steckman* may not bar the use of records already in the petitioner's possession. Rather, *Steckman* may only bar efforts to obtain new information pursuant to the public-records statute during postconviction proceedings. Because *Steckman* does not directly address this issue, there was a reasonably available "legal basis" for Broom either to file another petition for postconviction relief or to amend the petition that he had already filed. *Carrier,* 477 U.S. at 488, 106 S.Ct. 2639.
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> * * *
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> FN18. The State raised the idea at oral argument before this court that Broom's trial counsel may have deliberately chosen not to file the *Brady* claim, and that *Steckman* was offered as a belated excuse for the failure to do so. Vickers first mentioned at the federal evidentiary hearing that the *Steckman* decision was a motivating factor for not filing a *Brady* claim with the state courts. XVIII J.A. at 8162-63 (Evidentiary Hr'g Tr. at 37-38) (Vickers Test.). Prior to the federal evidentiary hearing, Vickers filed at least one affidavit stating that he did not file a claim because he believed that Judge Matia-who was the state trial judge in Broom's case-would not have been receptive to further filings. XVIII J.A. at 8161-62 (Evidentiary Hr'g Tr. at 36-37) (Vickers Test.). Vickers also testified that he thought that the documents might be of more use to Broom during his federal habeas litigation. XVIII J.A. at 8154-55 (Evidentiary Hr'g Tr. at 29-30) (Vickers Test.).

Broom v. Mitchell, supra, at 441 F.3d 403-4 (footnotes 15-17omitted). The Eighth District, however, rejected the Sixth Circuit's reliance on the 1995 *Apanovitch* decision as supportive of using public records in a postconviction petition, finding that the *Apanovitch* Court's discussion of the issue to be "dicta." *Broom, supra,* at 2009-Ohio-3731, at ¶ 29.

The Eighth District panel itself, however, has not even been internally consistent on the question of whether *Steckman* barred the use of public records in postconviction proceedings. In an earlier 2002 decision in the same *Larkins* case, one of the Eighth District panel members (then a Cuyahoga County Court of Appeals Judge) issued a written opinion granting a criminal defendant's motion for new trial on the basis of public records evidence. See *State v. Larkins* (Ohio Ct. Com. Pl, Dec. 13, 2002), Cuy. Ct. Comm. Pl. CR 166827, unreported, at 1 ("[t]he Court finds that the Defendant's Brady claim is valid and warrants a new trial. The Defendant

received police reports via public records in 1999 that were not included in discovery provided prior to trial.").

As the District Court found, there is nothing in the language of this Honorable Court's *Steckman* decision that "discuss[ed] the effect, if any, this decision had on individuals already in possession of public records obtained through § 149.43." *Broom v. Mitchell, supra,* at 45, citing *Steckman, supra.* A careful reading of *Steckman* discloses that it simply imposed a bar to using R.C. 149.43 as a discovery tool, and did not establish a liminal rule excluding evidence that a defendant already obtained. *Steckman, supra, passim.*

Any doubt over whether Broom could have filed a postconviction petition using public records got erased by the 2003 decision in *Larkins,* as well as this Honorable Courts subsequent decision declining discretionary review. Thus, as of 2003, there is no doubt whatsoever that Broom could have filed his successive postconviction petition.[2] Even if one accepts the argument that the Sixth Circuit was wrong when it concluded that Ohio law was unsettled in the mid-1990s on whether Broom was able to use his records (which the State does not concede), Broom can make no such excuse post-*Larkins.* See *Broom, supra,* at ¶ 18. Yet Broom chose to wait several more years, until practically the eve of execution, to pursue his successive petition. Broom's execution date was initially set on June 6, 2007. Broom filed his successive petition before the trial court on August 16, 2007.

There is absolutely no dispute that Broom actually possessed the disputed records as early as 1993. In spite of the fact that Broom was found by the United States District Court to

[2]That is not to say that the State agrees with the notion that *Steckman* prevented Broom from even trying to file his petition as soon as he obtained the necessary records. Obviously Ronald Larkins tried, and succeeded, in using the evidence he obtained from the Public Records Law in support of postconviction litigation. There is absolutely nothing that prevented Broom from likewise *trying* to use the records in a timely fashion, other than to obtain a more favorable forum. See *Steffen, infra,* at 411-412.

have "intentionally bypassed the state courts" with his *Brady* claim, the State submits that *at the very least,* Broom should not be excused from waiting several more years after the 2003 *Larkins* decision to file his successive postconviction petition. *Broom, supra,* at ¶ 29, citing *Broom v. Mitchell* (Aug. 2, 2002), N.D.Ohio No. 1:99 CV 0030, unreported at 41-46.

Without a valid excuse, the only reasonable explanation for Broom's failure to bring his petition is that Broom's successive postconviction petition—filed on the eve of his execution date—was interposed solely for delay and to prevent his lawful sentence from being carried out.

- ***Broom does not meet the necessary cause and prejudice standard to stay his execution.***

The Eighth District also suggested in its opinion that its decision to excuse Broom's delay was made to prevent "a procedural default in a capital case upon a very tenuous application of the law." *Broom, supra,* at ¶ 31. Yet the federal courts have not found anything in the facts of Broom's *Brady* claim to trigger the "cause and prejudice" failsafe. As this Honorable Court explained in *State v. Steffen* (1994), 70 Ohio St.3d 399, 411, 639 N.E.2d 67, the federal "cause and prejudice" standard allows the federal courts to excuse procedural default to prevent a miscarriage of justice:

> The cause and prejudice standard also includes a failsafe. When a petitioner is unable to make a showing of just cause for failure to raise the claim previously, a federal court may nevertheless entertain the petition in a narrow class of cases where there exist extraordinary circumstances that have probably caused the conviction of one who is not guilty of the crime. The court described this class of cases as those "implicating a fundamental miscarriage of justice."

Id., quoting *McCleskey v. Zant* (1991), 499 U.S. 467, 111 S.Ct. 1454. The fact that the Federal Courts have not found "cause and prejudice" in defendant's claims should weigh directly against Brooms' current attempt to re-litigate his claims in State court. Broom's *Brady* claims simply do not rise to the level of persuasively or reasonably suggesting any fundamental miscarriage of justice.

- ***Postconviction DNA results further inculpate Broom and disprove his Brady claims.***

The conclusion that there is no miscarriage of justice by holding Broom to his conviction and failing to excuse his procedural default is even further buttressed by the fact that Broom sought and received postconviction DNA testing (of biomaterial taken from the victim's body) during his federal habeas litigation, the results of which confirmed Broom's guilt. Upon receiving the inculpatory DNA results in 2001, Broom immediately began arguing that the results were inconclusive. "Far from being 'inconclusive,' *the DNA test results strongly implicate Mr. Broom as only 1 in 2.3 million for Black males.*" See Ohio Parole Board Broom Clemency Report, available at www.drc.ohio.gov/Public/Broom%20Clemency%20Report.pdf (last viewed August 20, 2009, emphasis added). In a recent decision the United States District Court for the Northern District Ohio held that it is proper to use postconviction DNA evidence to analyze an inmate's *Brady* claims in federal habeas litigation. *Apanovitch v. Houk* (N.D. Ohio, August 14, 2009), Case No. 1:91-cv-02221, *unreported,* at 14, 20:

> Apanovitch does not believe that this Court has the authority to consider the DNA results, in any manner, in resolving his petition. The Court disagrees. The Circuit made clear that Apanovitch could not evade the review of the DNA results. "Apanovitch cannot first claim actual innocence before the district court, and subsequently drop those claims, simply to suit his tactical needs[.]" *Apanovitch,* 466 F.3d at 489, n.10. Furthermore, other courts have considered the inculpatory nature of DNA test results based on tests that were conducted during a habeas proceeding. *See In re Wright*, 298 Fed. Appx. 342 (5th Cir. 2008).

Id. Similarly, Broom's DNA results disprove his *Brady* claims. The District Court has properly concluded that the evidence of Broom's guilt was "profound" and held that even if the jury considered the East Cleveland records, "the evidence of kidnapping and rape would still greatly outweigh the evidence of their absence." *Broom v. Mitchell, supra,* at 52, 95-6.

Indeed, the attack on the victim and her friends' sobriety / reputations was contradicted by credible (and verifiable) evidence. The autopsy performed on Tryna (who was killed the

same night as the alleged drinking) showed not even a trace of alcohol in her system. *Corrected Transcript of Proceedings* (Vol. II, Tr. 1067, Apx. at p. 7164) (testimony of coroner Balraj); *(Copy of Bound Volume of Trial Exhibits*, State's Exhibit 7, 6th Cir. J.A. at p. 8540). Second, the very first police officer to respond to Bonita and Tammy testified at the evidentiary hearing that there was no odor of alcohol or marijuana and no indications of intoxication whatsoever. District Court Evidentiary Hearing, Tr. 354-55, 6th Cir. J.A. at pp. 8479-8480. The fact that the victim might have been reputed to accept rides from strange men on prior occasions means little when contrasted with what the District Court found was "profound evidence" that Broom kidnapped and raped the victim. Similarly, the fact that a neighbor declined to open the door for the girls at 11:30 at night (in East Cleveland) impeaches little, if anything. Further, a trial strategy seeking to assassinate this young victim's character would have backfired as being counterproductive and offensive because it does not impeach or disprove Broom's own affirmative conduct. See generally, *Mickens v. Taylor* (2002), 535 U.S. 162, 174, 122 S.Ct. 1237 (trial counsel's failure to attack murder victim's character / sexual history would have backfired where defendant professed innocence and to having had no contact with victim).

Given that there is no sound legal or factual basis to excuse Broom's delay under R.C. 2953.23, this case squarely falls under this Honorable Court's holding in *Steffen, supra*:

> "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands. * * * There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners (1963), 76 Harv.L.Rev. 441, at 452-453.
>
> The Supreme Court acknowledged a state's inherent power to impose finality on its judgments. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass

laws means little if the State cannot enforce them." Id., 499 U.S. at 491, 111 S.Ct. at 1468, 113 L.Ed.2d at 543.

Steffen, supra, at 411-412.

It should be further noted that this Honorable Court adopted the "cause and prejudice" standard in *McCleskey, supra,* for obtaining a stay of execution. *Id.,* at 412. Given that the United States District Court and Sixth Circuit U.S. Court of Appeals have already found no "cause and prejudice" to excuse Broom's procedural default, the State submits that Broom has no sound legal basis to obtain a stay of execution.

CONCLUSION

Accordingly, the State respectfully requests that this Honorable Court decline Broom's request to stay his execution.

Respectfully submitted,

WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney

(0072768) for MEM
Matthew E. Meyer (#0075253)
Assistant Prosecuting Attorney
Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7821
(216) 443-7602 *fax*
mmeyer@cuyahogacounty.us *email*

CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition to Motion to Stay was sent by regular U.S. mail this _____ day of August, 2009 to S. Adele Shank, Esq., 3380 Tremont Rd., 2nd Floor, Columbus, Ohio 43201 and Timothy F. Sweeney, Esq., 820 W. Superior Ave., Suite 430, Cleveland, Ohio 44113.

(0072768) for MEM
Matthew E. Meyer (0075253)
Assistant Prosecuting Attorney