[Cite as *State v. Noling*, 2026-Ohio-4336.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - TYRONE LEE NOLING, Defendant-Appellant.	**CASE NO. 2026-P-0031** Criminal Appeal from the Court of Common Pleas Trial Court No. 1995 CR 00220

OPINION AND JUDGMENT ENTRY

Decided: November 2, 2026
Judgment: Reversed and remanded

Connie J. Lewandowski, Portage County Prosecutor, and *Timothy P. Bogner*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Brian C. Howe, The Ohio Innocence Project, University of Cincinnati College of Law, P.O. Box 210040, Cincinnati, OH 45221, *Eamon P. Joyce*, Sidley Austin, L.L.P., 787 7th Avenue, New York, NY 10019, and *Daniel Nadratowski*, Weil, Gotshal & Manges, L.L.P., 2001 M Street, N.W., Suite 600, Washington, DC 20036 (For Defendant-Appellant).

SCOTT LYNCH, J.

{¶1} Defendant-appellant, Tyrone Noling, appeals the denial of his Motion to Allow Defense Expert Access to Physical Evidence for Testing at Defendant's Expense. We find that the trial court erred in denying Noling's Motion pursuant to Criminal Rule 42(C) which provides that a defense attorney "shall" have access to file material subject to certain conditions not applicable in the present case. Accordingly, we reverse the judgment of the court below and remand for further proceedings consistent with this Opinion.

Substantive and Procedural History

{¶2} Noling is currently incarcerated under the penalty of death following his convictions for, *inter alia*, Aggravated Murder with specifications of aggravating circumstances.

{¶3} On September 3, 2025, Noling filed a Motion to Allow Defense Expert Access to Physical Evidence for Testing at Defendant's Expense pursuant to Criminal Rule 42(C). Noling requested the trial court to "grant his defense expert, Bode Technology, access to physical evidence for DNA testing," specifically, "permission to access and conduct independent DNA testing on the ten .25 caliber cartridge casings and ring boxes recovered from [the victims'] home, along with access to any documentation related to the chain of custody of this evidence."

{¶4} On March 25, 2026, the trial court denied Noling's Motion. The court ruled as follows:

> Defendant previously requested post-conviction DNA testing be conducted on a cigarette butt, the cartridge casings, and ring boxes in September 2008. The trial court ultimately ordered that BCI perform DNA testing on the cigarette butt. The results were provided March 11, 2014, which indicated the DNA profile was from an unknown male.
>
> Regarding the casings and ring boxes, pursuant to R.C. 2953.76, on May 2, 2014 the trial court ordered BCI to determine the quantity and quality for potential testing of these items. The Portage County Sheriff was ordered to transport these exhibits to BCI for examination consistent with the court's order. Specifically, BCI was ordered to determine:
>
> > 1. The quantity and quality of the parent sample of biological material found at the crime scene in this case;
> >
> > 2. Whether there is a scientifically sufficient quantity of the parent sample to test;

3. Whether the parent sample is so minute or fragile that there is a substantial risk that the parent sample could be destroyed;

4. Whether the parent sample has been degraded or contaminated to the extent that it has become scientifically unsuitable for testing;

5. Whether testing would consume any DNA sample.

The trial court further ordered that the written BCI report be filed after examination of the exhibits at issue.

The BCI report dated June 10, 2014 details BCI's findings and rationale that BCI found the items were contaminated to the extent that they were scientifically unsuitable for testing. The report describes the differences from 1990 to the present-day technology, and precautions taken to avoid or prevent the contamination of items handled and processed. Specifically, the investigators and analysts collecting and processing evidence in 1990 did not follow current and modernized sterile techniques and procedures to minimize contamination.

The trial court issued an order on June 27, 2014 dismissing the Defendant's amended application for DNA testing of these items determining that the same did not meet the requirements of R.C. 2953.74(C)(2)(c).

The Ohio Supreme Court affirmed the trial court's decision, only remanding on a limited issue to ensure that the Defendant was provided the results of the testing on the cigarette butt.

In the present motion before the Court, Defendant's arguments are two-fold. First, he argues that DNA testing has improved over the last decade in that the sensitivity of modern testing has increased, and is "so sensitive that it can detect a DNA profile from as little as a single cell." (Defendant's motion filed September 3, 2025, p. 2[.]) Second, Defendant argues that his request to conduct testing at his own expense negates any prior ruling of the trial court related to R[.]C. 2953.74(C)(2)(c).

Sensitivity of modern DNA testing is not a determinative issue. Rather, the issue is the contamination of the items from which the Defendant requests to attempt to extract a DNA profile. The quantity needed to detect DNA is not the issue, but the quality of the sample and contamination is. Advancements in extraction sensitivity to detect DNA from small samples [do] not un-contaminate evidence.

> Nor does the expense of testing, no matter who pays for it, change the result due to contamination, the items remain scientifically unsuitable for DNA tests no matter who pays for it.
>
> Therefore, this Court denies the Defendant's Motion to Test Evidence at Defendant's Expense, consistent with the prior ruling from the trial court in 2014, and the Ohio Supreme Court in 2018.

Assignments of Error

{¶5} On April 23, 2026, Noling filed a Notice of Appeal. On appeal, he raises the following assignments of error:

> [1.] The Court of Common Pleas erred by denying defendant-appellant Tyrone Noling's request for access to physical evidence to conduct DNA testing at Mr. Noling's own expense, based on factors not enumerated in Crim.R. 42(C).
>
> [2.] The Court of Common Pleas abused its discretion by not exercising its equitable authority to allow defendant-appellant Tyrone Noling to access potentially exculpatory evidence for purposes of independent DNA testing.

Criminal Rule 42(C)

{¶6} Criminal Rule 42(C), effective July 1, 2017, provides:

> In a capital case and post-conviction review of a capital case, the prosecuting attorney and the defense attorney shall, upon request, be given full and complete access to all documents, statements, writings, photographs, recordings, evidence, reports, or any other file material in possession of the state related to the case, provided materials not subject to disclosure pursuant to Crim.R[.] 16(J) shall not be subject to disclosure under this rule.

Standard of Review

{¶7} The only decision of which this Court is aware that directly addresses appellate review of a Criminal Rule 42(C) request is *State v. Clinton*, 2024-Ohio-4720 (6th Dist.). The Sixth District held that "[w]e review a trial court's order denying a Crim.R. 42 request for discovery for an abuse of discretion." *Id.* at ¶ 159. For authority, the court

cited *State v. Powell*, 2019-Ohio-4286 (6th Dist.), which applied the abuse of discretion standard to a request for the appointment of an expert for an indigent defendant pursuant to Criminal Rule 42(E). *Id.* at ¶ 48.

{¶8} We disagree with the application of an abuse of discretion standard to decisions made pursuant to Criminal Rule 42(C) on the grounds that discovery under the Rule is mandatory rather than discretionary. As has been observed, the abuse of discretion standard has no application in contexts where the court's duty to act is mandatory rather than discretionary. *N. Park Retirement Community Ctr., Inc. v. Sovran Cos., Ltd.*, 2011-Ohio-5179, ¶ 7 (8th Dist.) ("[t]he abuse of discretion standard of review has no application in the context of the court deciding to stay proceedings pending the outcome of arbitration because a stay in such circumstances is mandatory, not discretionary").

{¶9} Rather, when a court is mandated by a particular statute or rule to act, the court's compliance with the mandate is reviewed *de novo*. *State ex rel. Ellis v. Cleveland Police Forensic Laboratory*, 2021-Ohio-4487, ¶ 9 (decision to grant or deny mandatory statutory damages under the Public Records Act is reviewed *de novo*); *State ex rel. DiFranco v. S. Euclid*, 2014-Ohio-539, ¶ 11 ("this case presents the issue of *mandatory* attorney fees under specific statutory criteria; the entitlement to damages and fees under these circumstances is not a discretionary decision of the court below, but rather a legal determination that lies within this court's authority to review legal issues de novo on appeal"); *State v. Young*, 2026-Ohio-2603, ¶ 7 (5th Dist.) ("[w]hether a trial court correctly applied a mandatory designation is a question of statutory interpretation, which this Court reviews de novo").

{¶10} The foregoing, of course, presupposes that Noling's defense attorneys were

entitled to full and complete access to all file material in the State's possession as provided in the Rule without the exercise of judicial discretion. This point depends on the merits of the appeal and is discussed below. Here, it is observed that, if discovery pursuant to Criminal Rule 42(C) is mandatory, then even under an abuse of discretion standard a court errs by failing to allow it. This was the result reached in *Clinton* under the abuse of discretion standard. *Clinton*, 2024-Ohio-4720, at ¶ 159-161 (6th Dist.).

First Assignment of Error: Access to File Material pursuant to Criminal Rule 42(C) is Mandatory and May Not be Conditioned on Circumstances Dehors the Rule

{¶11} Noling argues that the trial court erred by denying his request to access the cartridge casings and ring boxes recovered from the victims' home based on the June 27, 2014 order dismissing an earlier application for DNA testing on these items pursuant to R.C. 2953.74(C)(2)(c). We agree.

{¶12} Under a plain reading of Criminal Rule 42(C), the defense attorney "shall" be given "full and complete access" to file material unless the material is not subject to disclosure pursuant to Criminal Rule 16(J) which concerns work product, grand jury testimony, and privileged and/or confidential material. The Rule is silent with respect to whether the material must be suitable for DNA testing. That being so, the suitability of the material for DNA testing is not a valid reason for denying a request. *Clinton* at ¶ 161 ("[u]nlike a request for discovery under R.C. 2953.21(A)(1)(e), Clinton did not need to establish 'good cause' in order to 'access' file materials [pursuant to Rule 42(C)]").

{¶13} The mandatory nature of the access is demonstrated by the word "shall." In a prior appeal of Noling's efforts to obtain postconviction DNA testing, the Ohio Supreme Court expounded upon the import of "shall":

> R.C. 2953.81(C) provides that "[t]he court or the testing authority *shall* provide a copy of the results of the testing to the

> prosecuting attorney, the attorney general, and the subject offender." (Emphasis added.) "'Shall' means must." *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶ 13, quoting *Application of Braden*, 105 Ohio App. 285, 286, 148 N.E.2d 83 (1st Dist.1957). "[W]e repeatedly have recognized that use of the term 'shall' in a statute connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary." *Id.*, citing *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 28.
>
> There is no indication that the word "shall" in R.C. 2953.81(C) means anything other than "must." The use of the word "shall" demonstrates, therefore, that the subject offender is entitled to "the results of the testing" and that the trial court does not have discretion to deny the subject offender those results.

State v. Noling, 2018-Ohio-795, ¶ 64-65.

{¶14} Likewise in the present appeal, there is no indication that the word "shall" means anything other than "must" nor is there clear and unequivocal language evidencing a contrary intent except for the circumstances described in Criminal Rule 16(J).

{¶15} We note the State's contention that "[n]othing in the text of the statute 'forbids' a trial court from placing reasonable limitations on the handling of the evidence." Brief of the State at 11. This proposition is not before this Court, and we express no opinion either in support of or in opposition to it. The issue before this Court is limited to the denial of access to the file material. *Compare State v. Gavin*, 2022-Ohio-3027, ¶ 48 (4th Dist.) (motion for expert access to physical evidence "should have been granted provided there is a sufficient parent sample and the chain of custody can be maintained").

{¶16} In a similar vein, the State argues that the statute permits access to file material but does not mention genetic or DNA testing, implying that such testing exceeds what the statute allows. Again, the question of what limitations the trial court may place on the use of material to which access is mandated is not before this Court.

Noling's Request is Not Barred by Res Judicata

{¶17} Both the trial court and the State argue for the application of *res judicata* to bar Noling's request for file material, although their arguments are not identical.

{¶18} "Under the doctrine of *res judicata,* a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk*, 1996-Ohio-337, syllabus. *Res judicata* applies to motions for new trial as well as petitions for postconviction relief. *State v. Hatton*, 2022-Ohio-3991, ¶ 22.

{¶19} The trial court relied on the earlier dismissal of an application by Noling to have the cartridge casings and ring boxes tested for DNA pursuant to R.C. 2953.71 to .81. *See Noling*, 2018-Ohio-795, at ¶ 10-26. The court dismissed the earlier application on the grounds that it failed to satisfy the requirements of R.C. 2953.74(C)(2)(c) ("the court may accept the application only if," *inter alia*, "[t]he parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing"). The present request was denied "consistent with the prior ruling from the trial court in 2014."

{¶20} We reject the proposition that the 2014 order is sufficient to deny the present request. The prior application was made pursuant to R.C. 2953.71 to .81 and, therefore, subject to the criteria contained therein. The present application was made pursuant to Criminal Rule 42(C), which, as indicated above, does not condition access to material on its suitability for testing.

{¶21} Moreover, the statutory scheme for obtaining DNA testing pursued by

Noling in 2013-2014 expressly states that it does not preclude an offender from obtaining testing by other means: "The provisions of sections 2953.71 to 2953.81 of the Revised Code by which an offender may obtain postconviction DNA testing are not the exclusive means by which an offender may obtain postconviction DNA testing, and the provisions of those sections do not limit or affect any other means by which an offender may obtain postconviction DNA testing." R.C. 2953.84.

{¶22} Therefore, the trial court erred by relying on Noling's efforts to obtain DNA testing pursuant to R.C. 2953.71 to .81 to foreclose similar efforts pursuant to Criminal Rule 42(C).

{¶23} The State also argues for the application of *res judicata*. The State notes that in 2019 Noling filed three motions[1], two of which were pursuant to Criminal Rule 42(C), requesting access to "the Portage County prosecutor's and Sheriff's files relating to both Noling and his co-defendants." The State asserts that, because Noling could have requested access to the cartridge casings and ring boxes as part of these earlier motions, he is prevented from doing so now by *res judicata*. The State emphasizes that the issue of DNA testing has been litigated to completion and that no new information regarding the cartridge casings or ring boxes has been discovered since the 2019 motions.

{¶24} We decline to apply *res judicata* to Noling's current Motion to Allow Defense Expert Access to Physical Evidence for Testing. We do not find the request for access to be akin to a claim for relief such as a defense or lack of due process. Moreover, the

1. A Motion to Access Materials pursuant to Crim.R. 42(C) filed on April 12, 2019; an Amended Motion to Access Materials pursuant to Crim.R. 42(C) filed on April 19, 2019; and a Motion for Nondestructive Access to State Files filed on October 25, 2019. The Amended Motion was denied on the grounds that it was not "properly presented." The Motion for Nondestructive Access was filed pursuant to an order of remand from this Court. The trial court's denial of the Motion for Nondestructive Access was reversed in *State v. Noling*, 2022-Ohio-759 (11th Dist.).

2019 requests for access were not for the purpose of DNA testing and did not, apparently, encompass access to the cartridge casings or ring boxes. Nor were the two motions filed pursuant to Criminal Rule 42(C) decided on their merits. Finally, the application of *res judicata* to a rule such as Criminal Rule 42(C) would effectively limit attorneys to a single opportunity of gaining access to file material, substantially curtailing the "full and complete access" to all file material upon request. While *res judicata* may certainly be asserted against claims raised in a new trial motion or postconviction petition, it would be premature to apply the doctrine to prevent the discovery of evidence to support such proceedings.

{¶25} The first assignment of error is with merit.

The Second Assignment of Error is Moot

{¶26} In the second assignment of error, Noling argues that, were this Court to find Criminal Rule 42(C) inapplicable, the trial court should be found in error for not exercising its equitable authority over evidence submitted into the record to grant Noling access. Inasmuch as Noling is entitled to access pursuant to Criminal Rule 42(C), arguments regarding the court's equitable authority are rendered moot and need not be addressed.

{¶27} For the foregoing reasons, the judgment of the Portage County Court of Common Pleas is reversed, and the matter is remanded for further proceedings consistent with this Opinion. Costs to be taxed against the appellee.

MATT LYNCH, P.J.,

JOHN J. EKLUND, J.,

concur.

JUDGMENT ENTRY

For the reasons stated in the Opinion of this court, the first assignment of error is with merit and the second assignment is moot. The order of this court is that the judgment of the Portage County Court of Common Pleas is reversed, and this matter is remanded for further proceedings consistent with this Opinion.

Costs to be taxed against appellee.

JUDGE SCOTT LYNCH

PRESIDING JUDGE MATT LYNCH,
concurs

JUDGE JOHN J. EKLUND,
concurs

THIS DOCUMENT CONSTITUTES A FINAL JUDGMENT ENTRY

A certified copy of this opinion and judgment entry shall constitute the mandate pursuant to Rule 27 of the Ohio Rules of Appellate Procedure.