No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DOMINIQUE SWOPES,

Petitioner,

v.

THE STATE OF OHIO

Respondent.

PETITON FOR WRIT OF CERTIORARI

Dominique Swopes respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth District Court of Appeals of Ohio.

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CAPITAL CASE (PRE-TRIAL)

QUESTION PRESENTED

When a trial court's discovery order regarding scientific testing of evidence will result in the total consumption of the evidence and thus preclude any testing by a defendant in a capital case, does Fourteenth Amendment due process guarantee a defendant the right to take an interlocutory appeal of that decision, particularly when there is a state-created right to take an interlocutory appeal from pretrial orders that finally determine a matter that is ancillary to the action on trial and from which there is no meaningful post-trial appeal?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties thereon have a corporate interest in the outcome of this case.

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The December 16, 2020, order and opinion of the trial court in Cuyahoga County, Ohio Common Pleas Court Case No. CR 19-638518-A, denying the defendant the opportunity to independently test evidence and instead allowing that evidence to be consumed in testing by a court-ordered expert is unpublished and included in the Appendix to this petition.

The February 8, 2021, order and opinion of the Eighth District Court of Appeals of Ohio, Case No. CA 110172, dismissing the interlocutory appeal taken from the aforementioned trial court order is unpublished and included in the Appendix to this petition. The March 8, 2021 order without opinion of the Eighth District of Ohio, denying reconsideration of its February 8, 2021 order in Case No. CA 110172, is unpublished and included in the Appendix to this petition.

The July 6, 2021 decision of the Ohio Supreme Court, without opinion, in Case No. 2021-0394, declining to exercise jurisdiction is published at.163 Ohio St.3d 1493, 169 N.E.3d 1277 (Table), 2021-Ohio-2270 (2021). The September 14, 2021, decision of the Ohio Supreme Court, without opinion, in Case No. 2021-0394, denying reconsideration of its July 6, 2021 declination, is published at 164 Ohio St.3d 1433, 173 N.E.3d 515 (Table), 2021-Ohio-3091.

Mr. Swopes has also filed in the Eighth District Court of Appeals, Case No. CA 110860, a complaint in mandamus seeking relief on the same issue for which his

appeal was dismissed. The January 28, 2022, decision of the Eighth District, without opinion, dismissing the mandamus action is published electronically at 2022-Ohio-306. A timely appeal of right from that decision will be noted in the Ohio Supreme Court during the week of February 14, 2022 (which has not yet occurred at the time this petition is being filed).

JURISDICTION

The Ohio Supreme Court declined to exercise discretionary review of the instant case on July 6, 2021, and then denied reconsideration on September 14, 2021. On December 10, 2021, this Court extended the time to file a petition for writ of certiorari to February 11, 2022. Case No. 21A261 (Kavanaugh, J.).

Jurisdiction is invoked under 28 U.S. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Mayfield Heights, Ohio, police and other law enforcement entities investigated a suspected homicide occurring at the scene of a residential fire. A swab of the rear door of the residence was taken for DNA testing; the swab was cataloged by the Ohio Bureau of Criminal Investigation (BCI) as "Item 9.1." Nothing about the shipment or storage of Item 9.1. raised a concern about the integrity of the swab and the examining forensic scientists from the Ohio Bureau of Criminal Investigation (BCI) observed no evidence of degradation of the sample at any time.

BCI testing of Item 9.1 started with the extraction of 50 microliters of DNA evidence. That 50-microliter quantity was divided in half, with 25 microliters kept by BCI for its testing and the remaining 25 microliters being designated as "the defense half" by BCI. The 50-microliter quantity extracted by BCI was the standard quantity extracted by BCI.

From the 25 microliters intended for its own use, BCI used two microliters for pre-testing quantification. BCI then performed STR DNA testing on 15 microliters. That testing did not reveal that Dominique Swopes' DNA matched the DNA present on Item 9.1.

BCI performed YSTR testing on 8 microliters of its Item 9.1. sample. YSTR testing is used to analyze DNA mixtures and focuses solely on the male contributions of the sample. The result of the YSTR testing was that no male profile was detected. The BCI scientist who performed YSTR testing testified that, prior to testing he employed a DNA amplification process to take the 8 microliters and generate 10 microliters, the standard amount for YSTR testing. In his opinion, his testing was reliable.

The two tests performed by BCI completely consumed the half of Item 9.1. reserved for prosecution testing.

After the BCI testing was complete, a private company hired by the prosecution, Cybergenetics, analyzed the data generated from the STR testing conducted by BCI. Cybergenetics concluded it was inconclusive as to whether Dominique Swopes' DNA was on Item 9.1 and also concluded that Item 9.1. exhibited some signs of degradation. Cybergenetics recommended that a different type of DNA analysis, called Minifiler, be employed for further testing.

Because the prosecution no longer had any of its half of Item 9.1 to test, the prosecution filed a motion with the trial court to be allowed to consume the entire 25 microliters of Item 9.1. that had been reserved for DNA testing. The defense objected to not being allowed to conduct any testing of its own.

Litigation of the motion proceeded. The prosecution asked the court to appoint Bode Technology, a private company, to perform further testing. The prosecution presented the testimony of Catharine Roller, a case work supervisor at Bode. Roller testified that Bode has Minifiler capability. However, Roller did not indicate that, should Bode be given the 25 microliters of item 9.1, it would utilize Minifiler (which was contrary to the recommendation of Cybergenetics). Instead, Roller testified that her recommendation would be that all 25 microliters be used to perform a single test which would be either the same STR or YSTR testing already performed by BCI. In this regard, Roller's initial recommendation would be that YSTR be the testing employed by Bode. Roller noted that BCI conducted its YSTR testing with 8 microliters instead of the ten microliters that would have been ideal for BCI. Roller believed that new YSTR testing, using Bode's YSTR kit and consuming all 25 microliters, might make a difference; but Roller did not opine that it would make a difference:

> Again, I do want to clarify, I'm not guaranteeing that we will get any different results. I just believe that because we would be able to input a higher concentration or quantity of DNA into the amplification,

> that we'd have a better chance than they [BCI] did on the initial amplification to possibly obtain some comparable results.

Roller was not critical of BCI and did not question the scientific reliability of BCI's testing. Roller noted that BCI's STR profile, while based on a low amount of DNA, "still generated data suitable for comparison." With respect to BCI's YSTR testing, Roller testified:

> I am not suggesting that they did anything incorrect. I was just suggesting that -- it's not necessarily better. It just -- you'll have more DNA data to analyze if there's more DNA available. That is essentially all I'm saying. I'm not saying it's better or worse. It just is what it is.

The trial court granted the prosecution's motion: "The State's motion to consume the remaining 25 µL of Item 9.1 for submitting it to Bode Technology is granted."

A timely appeal was noticed. The prosecution moved to dismiss the appeal for want of a final appealable order. The motion to dismiss was granted, over defense objection on February 8, 2021. The defense objections had addressed the constitutional issues raised in this petition for a writ of certiorari.

The Eighth District dismissal, rendered by two judges, states as follows:

> Motion by appellee to dismiss appeal for lack of a final appealable order is granted. The trial court's pretrial discovery order allowing the State's consumption of the remaining DNA source does not constitute an order pursuant to Crim.R. 42(E), which allows for appeal of the trial court's refusal to appoint an expert in a capital case. Here, the trial court is permitting the appellant to have an expert observe the testing

> of the DNA. The order also does not constitute a provisional remedy. Should appellant be convicted, he will be afforded a meaningful and effective remedy upon review of his direct appeal. See State v. Gaines, 8th Dist. Cuyahoga No. 91179, 2009-Ohio-622; State v. Abercrombie, 8th Dist. Cuyahoga No. 88625, 207-Ohio-5071, P23-26; State v. Warren, 11th Dist. Trumbull No. 2010-T-027, 27-29 (sic). Appeal dismissed. Notice issued.

A timely motion for reconsideration was denied without opinion on March 8, 2021.

A timely discretionary appeal was noted in the Ohio Supreme Court on March 30, 2021. The memorandum in support of Mr. Swopes' discretionary appeal also raised the constitutional questions presented in this application for a writ of certiorari. The Ohio Supreme Court declined to hear the case on July 6, 2021 and denied reconsideration of its declination on September 14, 2021.

On December 10, 2021, this Court granted a sixty day extension of time, to February 11, 2021, for Mr. Swopes to file a petition for a writ of certiorari. Case No. 21A261 (Kavanaugh, J.).

REASONS FOR GRANTING THE PETITION

Can Dominique Swopes be required to go to trial, and possibly to his death, without having the opportunity to meaningfully challenge on appeal a trial court order that denies him the opportunity to conduct his own scientific testing of evidence that he believes is exculpatory -- even after the prosecution has twice conducted its own testing of the same evidence? The best the trial court will provide

Mr. Swopes is the opportunity to have his own expert watch a court-appointed expert (nominated by the prosecution) conduct a third round of testing -- a round of testing that will completely consume the remainder of what evidence is left to test.

This Court is not being asked to review the propriety of the trial court's ruling. The issue before this Court is more narrow: Does due process guarantee Mr. Swopes the opportunity to appeal the trial court's ruling via Ohio appellate courts. The answer to this important question is "yes" for two reasons. First, because Ohio's already-existing procedures for interlocutory appeals is such that Mr. Swopes is denied due process by the refusal of the Ohio Eighth District Court of Appeals to hear an appeal of the trial court's decision. Second, even if Ohio did not have an already-existing procedure for interlocutory appeals, Fourteenth Amendment due process requires that an interlocutory appeal be available before a trial court orders total consumption/destruction of evidence in a criminal case that is potentially exculpatory.

The Ohio courts must allow Mr. Swopes to avail himself of their State-created right to an interlocutory appeal

This Court has recognized that Fourteenth Amendment due process applies to the manner in which States administer State-created appellate rights:

> Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane v. Durston*, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894). Nonetheless, if a State has

> created appellate courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illino*is, 351 U.S., at 18, 76 S.Ct., at 590, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

Evitts applied this principle to ensure that a defendant has a right to the effective assistance of counsel when the State guarantees a right to appeal. *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), similarly recognized that a defendant has a right to a transcript at State's expense.

This case asks this Court to apply *Evitts* to the total destruction/consumption of evidence in those situations where a defendant is being precluded from the defendant's own testing of potentially exculpatory evidence. Mr. Swopes has consistently maintained that Item 9.1. has DNA evidence that will demonstrate that he never touched the doorknob in question. The best the prosecution has demonstrated is that the results are inconclusive. In that the prosecution has had two strikes at testing, Mr. Swopes desires an appeal of the trial court's determination that he never even get up to bat.

Moreover, Ohio appellate procedure provides for interlocutory appellate review of discovery orders that determine how discovery will proceed in those

circumstances where there is no meaningful post-conviction appellate remedy.[1] Here, once Item 9.1. is destroyed, it cannot be resurrected for defense testing should a post-conviction appeal determine that the trial court erred.

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[1] Under R.C. 2505.02, the order from which this appeal is noted is a "provisional remedy." A "provisional remedy is defined as follows:

> "Provisional remedy" means a proceeding ancillary to an action, *including, but not limited to,* a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

R.C. 2505.02(A)(3) (emphasis added). The cited examples are not an exhaustive list. *State v. Muncie,* 91 Ohio St.3d 440, 446, 746 N.E.2d 1092 (2001).

To be final and appealable, a provisional remedy must meet two additional criteria:

> (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
>
> (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

O.R.C. 2505.02(B)(4).

In capital cases, due process guarantees a right to a pretrial defense appeal of the total destruction of evidence that precludes scientific testing by the defendant.

Even if Ohio did not have an interlocutory appellate procedure, Mr. Swopes should be allowed to take such an appeal in this case. In this regard, Mr. Swopes asks this Court to look to the Due Process Clause and find a right to an interlocutory appeal of a trial court's decision that will completely destroy evidence in a capital case and thus preclude defense scientific testing. Obviously, this goes beyond what due process guarantees under *Evitts*. But, as this Court has repeatedly recognized, "death is different." *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). In capital cases, more process is due, not less. *See Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This Court has previously recognized that the higher stakes of death require protections not guaranteed in noncapital cases. *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (right to instruction on lesser included offenses in capital, but not noncapital, cases).

Consistent with this authority, this Court is asked to find a Fourteenth Amendment right to an interlocutory appeal independent of Ohio's appellate procedure. In so doing, this Court will also be addressing a matter that is not isolated to the instant case. DNA testing and other scientific testing that can be

consumptive occurs daily throughout the United States. And its impact in capital cases is particularly acute.

CONCLUSION

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Erika Cunliffe

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APPENDIX

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

DOMINIQUE C SWOPES
Defendant

Case No: CR-19-638518-A

Judge: TIMOTHY MCCORMICK

INDICT: 2903.01 AGGRAVATED MURDER /CCS /FMS /FMS /FMS /V13M
2903.01 AGGRAVATED MURDER /CCS /FMS /FMS /FMS /V13M
2903.01 AGGRAVATED MURDER /CCS /FMS /FMS /FMS /V13M
ADDITIONAL COUNTS...

JOURNAL ENTRY

THE STATE'S OF OHIO MOTION TO ALLOW TESTING AND CONSUMPTION OF DEFENSE PORTION OF DNA EXTRACT IS GRANTED.
SEE ATTACHED ORDER.

12/16/2020
CPEFF 12/16/2020 14:03:41

OSJ

Judge Signature Date

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HEAR
12/16/2020

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

State of Ohio,	)	
	)	Case No. CR-19-638518-A
Plaintiff;	)	
	)	Judge Timothy P. McCormick
-v.-	)	
	)	**Order**
Dominique C. Swopes,	)	
	)	
Defendant.	)	
	)	

Background

In this capital case, the State of Ohio has moved for an order permitting it to consume the remainder of a DNA sample that is in the possession of the Ohio Bureau of Criminal Investigation. BCI had previously designated the portion the State seeks to consume as the "defense portion." BCI set this portion aside for Defendant Dominque Swopes to conduct independent testing. The State had previously filed a motion to consume this same sample, but for reasons explained in detail below, withdrew it.

The Court held a hearing on the State's motion on November 18, 2020 and November 23, 2020. It had held a hearing on the State's earlier motion prior to its withdrawal, and the Court entered that testimony as an exhibit. It heard arguments of counsel and took the testimony of the following witnesses:

- Jennifer Bracamontes from Cybergenetics;
- Catharine Roller from Bode Technology;
- Lindsey Nelsen-Rausch from BCI;

- Hristina Lekova from the Cuyahoga County Regional Forensic Science Laboratory;
- Timothy Augsback from BCI.

Following the hearing, Swopes and the State of Ohio submitted proposed findings of fact and conclusions of law to the Court.

Findings of Fact

The Mayfield Heights Police Department used a cotton swab on the rear door exterior handle of 1531 Longwood Avenue to obtain any potential DNA samples that existed there. The Department submitted the cotton swab to the Ohio Bureau of Criminal Investigation. It gave it BCI Case No.: 2018-310294, CCRFSL Case No. 2018-010833: Item 9.1 Swab of rear door (exterior).

I. STR Testing by BCI

Upon obtaining Item 9.1, BCI began its testing procedures on sample 9.1 and took the following steps on May 16, 2019:

- The BCI performed an "extraction" of DNA from the swab and termed that extraction Item 9.1. The extracted material had a volume of 50 µL. This is the standard amount that BCI extracts from any swab received.
- BCI divided Item 9.1 into two portions: 25 µL were to be used for its own testing, and 25 µL were to be set aside for any potential defense testing.
- BCI then generated two 25 µL "blanks" for its testing and for the defense. A blank is a clean cotton swab that BCI uses as a control. All tests performed on the swab are performed on the blank in the same manner to ensure the accuracy of the tests on the sample.

- BCI took 2 μL of its 25 μL to perform "quantification." This is a process where it determines how much DNA is contained in a sample overall.
- After quantification, BCI then performed a Short Tandem Repeat ("STR") test on 15 μL.
- The remaining 8 μL was set aside for potential Y-STR testing.
- After running an STR test on the 15 μL, BCI concluded that it contained a major DNA profile. BCI compared this profile to other profiles that it had and determined that it matched the profile of Rebecca Pletnewski.
- BCI also determined there was a minor profile on the sample but it could not conclude that it matched the profile of any other person, including Dominique Swopes.

II. TrueAllele

On October 21, 2019, the State filed a notice of its intent to consume the remainder of Item 9.1 so that it could send data to Cybergenetics. Cybergenetics is a company that owns and operates a computer program known as TrueAllele. TrueAllele is a probabilistic genotyping software that re-analyzes the data from testing done on previously extracted DNA samples. It does not conduct any tests on any samples. Instead, it takes data generated from the laboratory that actually runs genetic tests on DNA samples and then runs it through an algorithm to determine match probabilities.

The State contended that it needed to consume the sample to perform tests in such a way to generate data that would be compatible with the TrueAllele program. It turned out, however, that re-testing was unnecessary.

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The State could submit the data it already had to Cybergenetics for TrueAllele analysis. It subsequently withdrew the notice of intent to consume.

Cybergenetics conducted TrueAllele analysis based on the data submitted from BCI regarding Item 9.1. Using TrueAllele, Cybergenetic determined that:

- It was 244 quadrillion times more probable that the major profile matched that of Rebecca Pletnewski than a coincidental match.
- It was only 2.91 times more probable that the minor profile matched that of Defendant Domique Swopes than a coincidental match. This result is neither inclusionary nor exclusionary. It is inconclusive.
- TrueAllele also accounted for possible degradation of the sample, and its modeling accounted for that.

III. Y-STR Testing

While it was awaiting TrueAllele results, The State sent the remaining 8 µL for Y-STR testing with BCI. Y-STR testing is an STR testing protocol that focuses exclusively on loci in Y-chromosomes. Therefore, the test will reveal if there is any DNA with a male profile. Typically, Y-STR uses a 10 µL sample, but in this test, there was only an 8 µL sample available. Although it is less than what is normally used, testimony revealed that it is "not abnormal" to use this amount. After running the Y-STR test, BCI did not identify a male profile on Item 9.1.

Timothy Augsback, who conducted the test, indicated that everything was properly stored and transported. Notably, however, he indicated that

there would be no particular notation as to whether the sample was degraded or not.

IV. Bode Technology

The State subsequently filed a new motion on June 6, 2020 to consume the remaining 25 μL of Item 9.1. The State intends to submit this sample to Bode Technology for further testing. The State in its motion to consume indicates it would like Bode to conduct a Minifiler STR testing on the sample. This testing protocol is an STR test that amplifies material suitable for testing on degraded DNA samples. Bode also utilizes a probabilistic genotyping software similar to TrueAllele known as STRMix.

Bode Technology is an independent forensics laboratory in Virginia. It conducts tests on behalf of Prosecutor's offices and law enforcement, defense attorneys and Project Innocence or other exoneration projects.

Although the current COVID-19 pandemic has resulted in some restrictions, Bode has indicated that it can accommodate defense expert observation of any testing they perform. While, the State has suggested that Minifiler is the test they would like to conduct, Catharine Roller testified that she might recommend doing a Y-STR test on the entire sample to increase the odds of determining whether a male profile existed. No determination has been made as to what test or tests to conduct.

Analysis

Swopes raises three arguments as to why the Court should deny the State's motion. First, he argues that giving the state the remaining 25 would

violate Crim. R. 42 and Crim. R. 16, second that it would violate his due process rights, and third, it would deny him equal protection of the laws.

I. Criminal Discovery Rules

Swopes argues that the State's consumption of Item 9.1 would violate Crim. R. 16 and Crim. R. 42. Swopes argues that Crim. R. 42(C) gives a defendant in a capital case heightened protections beyond constitutional due process guarantees. He argues that this is rule is "harmonious" with the general criminal discovery rules enumerated in Crim. R. 16.

Crim. R. 16 is the general rule governing criminal discovery in Ohio. It was substantially amended in 2010 to permit "open file" discovery. *State ex rel. Caster v. City of Columbus*, 2016-Ohio-8394, ¶ 37, 151 Ohio St. 3d 425, 435, 89 N.E.3d 598, 607. Its express purpose is to:

> "provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures." Crim. R. 16(A).

The rule does have some limitations, however. While Crim. R. 16(B)(4) requires the State to turn over all scientific testing results to the defense, Crim. R. 16(H) only requires the defense to disclose scientific testing results it intends to introduce at trial. Crim. R. 16(J) states that attorney work-product is not subject to disclosure.

The Supreme Court of Ohio adopted Crim. R. 42 in 2017. The rule "shall apply to all capital cases *and* post-conviction review of a capital case." Crim. R. 42(B)(1) (emphasis added). The use of the conjunctive "and" indicates that the rule is not limited to issues on post-conviction review, but also includes the trial stage of a capital case.

Crim. R. 42 provides that, "[i]n 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." Ohio Crim. R. 42(C)(emphasis added).

Like every criminal discovery rule, "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay." Crim. R. 1(B).

Furthermore, [t]he fundamental goal of any trial, including a criminal one, is to determine the truth. See *State v. Jeffries*, 160 Ohio St.3d 300, 2020-Ohio-1539, 156 N.E.3d 859, ¶ 23. "While the search for truth is an integral part of the adversary process, due process and fundamental individual rights sometimes override the truth-finding function." *State v. Gilden*, 144 Ohio App. 3d 69, 73, 759 N.E.2d 468, 472 (2001).

With these broad principles in mind, the Court turns to what Crim. R. 42 actually requires. The rule, gives "access" to both the prosecuting attorney and the defense attorney of file with the exception of materials listed in Crim. R. 16(J). Swopes contends that complying with this rule means that he must have full access to the portion of Item 9.1 that was originally designated for the defense for independent testing.

The plain meaning of the term "access" is the "freedom or ability to obtain or make use of something." Merriam-Webster.com Dictionary, s.v. "access," accessed December 15, 2020, https://www.merriam webster.com/dictionary/access. Swopes contends that he would make use of Item 9.1 by subjecting it to independent testing. He also implicitly concedes in his references to Crim. R. 16(H) and Crim. R. 16(J) in his proposed conclusions of law that he would not be obligated to turn over any report he did not intend to introduce at trial.

The Court declines to interpret "access" in such a way that would allow a defendant to make use of evidence in such a way that it would severely impair the truth-finding functions of the criminal process. Had that Supreme Court of Ohio intended to prohibit further testing by the State when initial results were inconclusive, it would have made a clearer statement to that effect. This interpretation is consistent with Crim. R. 1(B)'s mandate that the rules are to provide for a "just determination" and the "fair" "impartial" and "sure administration of justice."

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The word "access" is not meaningless, however. The Court is mindful of the stakes involved in capital case. It would not permit the State to consume the evidence without a legitimate scientific basis, nor would it permit the State to shield a defense expert from some form of observation.

Here, the State has offered legitimate scientific reasons for consuming the sample. Although there is some debate about whether degradation of DNA on Item 9.1 occurred, and if so how much, it is apparent that this is a legitimate concern of the State. For instance, the TrueAllele software compensated for degradation and simply reached an inconclusive result. Although Augsback testified that everything was stored properly, he also testified that there was no notation made regarding whether the sample was degraded. Additionally, it was apparent from the testimony, that while using an 8 μL sample for Y-STR testing was not abnormal, it was less than the standard amount that is used to generate a profile. The Court considers these sufficient reasons to give Bode an opportunity to generate a report that reaches a result.

Further, the use of an independent laboratory with defense observation of testing would grant defendants a meaningful opportunity to have access and make use of the evidence without impairing the truth finding process. The Court is sufficiently convinced of Bode Technology's independence as it is an out-of-state lab that does testing for various clients including for defense and exoneration projects.

In the interests of ensuring that Swopes has meaningful access to this evidence however, it will order that Bode permit a defense expert to be able to observe the testing to the maximal extent possible.

II. Due Process

Swopes next argues that permitting the court to consume the sample would deny him due process under the United States and Ohio Constitutions. U.S. Const. Amends. V, VI, XIV, Ohio Const. Art, I, Secs. 10 and 16.

As an initial observation, Ohio recognizes that the suppression of materially exculpatory evidence violates a defendant's due process regardless of the good faith or bad faith on the part of the State. *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1, ¶ 7 (citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). But, "[i]f the evidence in question is not materially exculpatory, but only potentially useful, the defendant must show bad faith on the part of the state in order to demonstrate a due process violation." *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 77 (quoting *Geeslin*, at ¶ 10.) "'The Due Process Clause of the Fourteenth Amendment does not require the prosecution to preserve samples for independent analysis unless the sample possesses an exculpatory value that is apparent before the sample is destroyed, and the defendant is unable to obtain comparable evidence by other reasonably available means.'" *State v. Abercrombie*, 8th Dist. Cuyahoga No. 88625, 2007-Ohio-5071, ¶ 24 (quoting *State v. Estep*, 73 Ohio App.3d 609, 612, 598 N.E.2d 96 (10th Dist.1991)).

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Swopes does not contend that it would constitute bad faith for the State to consume the sample. "Unless a criminal defendant can show bad faith, the State's failure to preserve potentially useful evidence--of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant--does not constitute a violation of the due process clause of the United States Constitution's Fourteenth Amendment." *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)

As previously stated, the State has offered legitimate scientific justifications for its reasons to consume the evidence, and courts in Ohio and other jurisdictions have determined that permitting consumptive testing does not constitute bad faith and accordingly does not violate due process. *State v. Abercrombie*, 8th Dist. Cuyahoga No. 88625, 2007-Ohio-5071, ¶ 25; *State v. Warren*, 11th Dist. Trumbull No. 2010-T-0027, 2011-Ohio-4886, ¶ 25; *United States v. Haight*, 153 F. Supp. 3d 240, 241 (D.D.C.2016); *United States v. Burns*, D.D.C. No. 16-0023-1 (ABJ), 2016 U.S. Dist. LEXIS 184584, at *4 (Sep. 9, 2016); *United States v. Gardner*, E.D.N.C. No. 4:14-CR-61-H, 2015 U.S. Dist. LEXIS 56038, (Apr. 29, 2015).

Moreover, the Court is sufficiently convinced the State has a legitimate scientific justification for further testing. As a result it is not acting in bad faith or violating Swopes's right to due process. Again, the Court is sufficiently convinced of Bode's independence, but will also take further steps to create procedural safeguard to ensure that independence and preserve Swope's

opportunity to provide a complete defense. See *United States v. Gardner*, 2015 U.S. Dist. LEXIS 56038, at *6.

III. Equal protection

Finally Swopes argues that denying him the ability to independently test the sample would violate the Equal Protection Clause of the United States and Ohio Constitutions. U.S. Const. Amend. XIV, Ohio Const. Art. I, Secs. 2, 10 and 16. He points to R.C. 2925.51(E) which states that a defendant accused of drug crimes under R.C. 2925 or R.C. 3719 are "entitled, upon written request made to the prosecuting attorney, to have a portion of the substance that is, or of each of the substances that are, the basis of the alleged violation preserved for the benefit of independent analysis performed by a laboratory analyst employed by the accused person."

Swopes argues that because the State provides a statutory right to defendants in drug cases to have the substance at issue tested independently, he should have the right to have a portion of any DNA samples at issue to be tested independently. He argues that to hold otherwise would be a violation of the Equal Protection Clause because it would be an "irrational" distinction.

In *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 27, the Ohio Supreme Court outlined how rational basis analysis works under both the federal and state constitutions:

> "Under a federal rational-basis analysis, The appropriate standard of review is whether the difference in treatment between [the affected class and those outside the class] rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a

plausible policy reason for the classification, see *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174, 179, 101 S.Ct. 453, 459, 461, 66 L.Ed.2d 368 (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, see *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, see *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. [432] at 446, 105 S.Ct. [3249] at 3257 [87 L.Ed.2d 313]. *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992).

Similarly, under the Ohio Constitution, 'The rational-basis test involves a two-step analysis. We must first identify a valid state interest. Second, we must determine whether the method or means by which the state has chosen to advance that interest is rational.'" *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 9, citing *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St. 3d 260, 267, 1995-Ohio-136, 652 N.E.2d 952.

'Under the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification.' *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 91, citing *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter*, 87 Ohio St.3d at 58, 60, 717 N.E.2d 286. '[S]tatutes are presumed to be constitutional and * * * courts have a duty to liberally construe statutes in order to save them from constitutional infirmities." *Eppley [v. Tri-Valley Local School Dist. Bd. of Edn.]*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 12, citing *Desenco, Inc. v. Akron* (1999), 84 Ohio St.3d 535, 538, 1999-Ohio-368, 706 N.E.2d 323. The party challenging the constitutionality of a statute 'bears the burden to negate every conceivable basis that might support the legislation.'" *Columbia Gas Transm. Corp.* at ¶ 91, citing *Lyons v. Limbach* (1988), 40 Ohio St.3d 92, 94, 532 N.E.2d 106.

Here, Swopes has not met his burden to establish that this classification fails the rational basis test. He has not shown there is no conceivable basis for the State to treat defendants in drug cases differently than defendants in capital cases. Each type of case involves different chemical substances with unique testing protocols. Swopes has not demonstrated that the General Assembly was acting arbitrarily when setting out this classification.

Conclusion and Order

The State's motion to consume the remaining 25 µL of Item 9.1 for submitting it to Bode Technology is granted. Bode is to inform the defense in writing what specific test they will be conducting two weeks prior to conducting it. The defense is permitted to have its DNA analyst observe the testing in in-person or via video.

It is so ordered.

Judge Timothy P. McCormick

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

STATE OF OHIO

Appellee

COA NO. 110172

LOWER COURT NO. CR-19-638518-A

COMMON PLEAS COURT

-vs-

DOMINIQUE C. SWOPES

Appellant

MOTION NO. 543556

Date 02/08/21

Journal Entry

Motion by appellee to dismiss appeal for lack of a final appealable order is granted. The trial court's pretrial discovery order allowing the State's consumption of the remaining DNA source does not constitute an order pursuant to Crim.R. 42(E), which allows for appeal of the trial court's refusal to appoint an expert in a capital case. Here, the trial court is permitting the appellant to have an expert observe the testing of the DNA. The order also does not constitute a provisional remedy. Should appellant be convicted, he will be afforded a meaningful and effective remedy upon review of his direct appeal. See State v. Gaines, 8th Dist. Cuyahoga No. 91179, 2009-Ohio-622; State v. Abercrombie, 8th Dist. Cuyahoga No. 88625, 207-Ohio-5071, P23-26; State v. Warren, 11th Dist. Trumbull No. 2010-T-027, 27-29. Appeal dismissed.

Judge Sean C. Gallagher, Concurs

Mary J. Boyle
Administrative Judge

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Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Byrd, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.	LOWER COURT NO.
110172	CR-19-638518-A

COMMON PLEAS COURT

-vs-

DOMINIQUE C. SWOPES

Appellant

MOTION NO. 544343

Date 03/08/21

Journal Entry

Motion by Appellant for reconsideration is denied.

Judge Sean C. Gallagher, Concurs

Mary J. Boyle
Administrative Judge

A17

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The Supreme Court of Ohio

State of Ohio

v.

Dominique C. Swopes

Case No. 2021-0394

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Cuyahoga County Court of Appeals; No. 110172)

Maureen O'Connor
Chief Justice

A18

The Supreme Court of Ohio

State of Ohio

v.

Dominique C. Swopes

Case No. 2021-0394

RECONSIDERATION ENTRY

Cuyahoga County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Cuyahoga County Court of Appeals; No. 110172)

Maureen O'Connor
Chief Justice

A19

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JAN 28 2022

STATE OF OHIO, EX REL.,
DOMINIQUE SWOPES, :

Relator, :

No. 110860

v. :

HONORABLE TIMOTHY
MCCORMICK, :

Respondent. :

JOURNAL ENTRY AND OPINION

JUDGMENT: COMPLAINT DISMISSED
DATED: January 28, 2022

Writ of Mandamus
Motion Nos. 550835 and 551874
Order No. 552053

Appearances:

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, *for relator.*

Flowers & Grube, Paul W. Flowers, and Louis E. Grube, *for respondent.*

EILEEN T. GALLAGHER, J.:

{¶ 1} Dominique Swopes has filed a complaint for a writ of mandamus. Swopes seeks an order from this court that requires Judge Timothy McCormick to

overturn his judgment with regard to a discovery matter and DNA testing as rendered in *State v. Swopes*, Cuyahoga C.P. No. CR-19-638518. Specifically, Swopes seeks: 1) a reversal of Judge McCormick's discovery order that granted the request by the Cuyahoga County Prosecuting Attorney ("prosecutor") to conduct additional DNA testing on genetic material preserved on behalf of Swopes; and 2) issue an order that requires Judge McCormick to allow Swopes to independently test the preserved genetic material. Judge McCormick has filed motions to dismiss that are granted for the following reasons.

I. Procedural History and Factual Background

{¶ 2} On March 29, 2019, Swopes was indicted for five counts of aggravated murder with felony murder specifications (R.C. 2903.01(A)), two counts of aggravated burglary (R.C. 2911.12(A)(1)), two counts of aggravated arson (R.C. 2909.02(A)(1)), one count of aggravated robbery (R.C. 2911.01(A)(3)), one count of tampering with evidence (R.C. 2921.12(A)(1)), one count of receiving stolen property (R.C. 2913.51(A)), one count of murder (R.C. 2903.02(B)), and one count of felonious assault (R.C. 2903.11(A)(1)). Swopes remains incarcerated while he awaits trial on the charged offenses.

{¶ 3} As part of a criminal investigation, a DNA swab was taken from the doorknob of the home where two victims died in a suspected arson fire. The DNA sample was processed by the Ohio Bureau of Criminal Investigation ("BCI") and 50 microliters of genetic material were extracted and equally divided for testing purposes. BCI engaged in genetic testing, on behalf of the prosecutor, of 25

microliters while the remaining 25 microliters were preserved on behalf of Swopes. All 25 microliters of BCI's extracted DNA sample were consumed during testing.

{¶ 4} On June 2, 2020, the prosecutor filed a motion requesting permission to conduct additional DNA testing on the sample preserved on behalf of Swopes. The trial court conducted two hearings, on November 12, 2020, and November 23, 2020, at which times testimony and evidence was adduced with regard to various testing procedures that could be employed to further analyze the remaining sample. On December 16, 2020, Judge McCormick granted the prosecutor's motion to conduct additional testing on the DNA sample preserved for Swopes and held that

> [t]he State's motion to consume the remaining 25 [microliters] of Item 9.1 for submitting it to Bode Technology is granted. Bode is to inform the defense in writing what specific test they will be conducting two weeks prior to conducting it. The defense is permitted to have its DNA analyst observe the testing in-person or via video.

{¶ 5} On December 20, 2020, Swopes filed an interlocutory appeal from Judge McCormick's order allowing for additional testing on the preserved DNA sample. On February 8, 2021, this court dismissed Swopes interlocutory appeal and held that

> [m]otion by appellee to dismiss appeal for lack of a final appealable order is granted. The trial court's pretrial discovery order allowing the State's consumption of the remaining DNA source does not constitute an order pursuant to Crim.R. 42(E), which allows for appeal of the trial court's refusal to appoint an expert in a capital case. Here, the trial court is permitting the appellant to have an expert observe the testing of the DNA. The order also does not constitute a provisional remedy. Should appellant be convicted, he will be afforded a meaningful and effective remedy upon review of his direct appeal. See *State v. Gaines*, 8th Dist. Cuyahoga No. 91179, 2009-Ohio-622; *State v. Abercrombie*, 8th Dist. Cuyahoga No. 88625, 207-Ohio-5071, P23-26; *State v.*

Warren, 11th Dist. Trumbull No. 2010-T-027, 27-29 [2011-Ohio-4886]. Appeal dismissed.

State v. Swopes, 8th Dist. Cuyahoga No. 110172, motion No. 543556 (Jan. 19, 2021).

{¶ 6} On July 21, 2021, the prosecutor filed a notice of intent to proceed with the additional testing of the DNA sample preserved on behalf of Swopes. On September 21, 2021, Judge McCormick issued an order that provided "[t]he state shall refrain from consuming the remaining DNA evidence pending further order of the court." On September 28, 2021, Swopes filed his complaint for a writ of mandamus. On November 29, 2021, Judge McCormick filed a motion to dismiss. On January 5, 2022, Swopes filed an amended complaint for mandamus. On January 6, 2022, Swopes filed a brief in opposition to Judge McCormick's motion to dismiss. On January 12, 2022, Judge McCormick filed a renewed motion to dismiss and reply in support of motion to dismiss action in mandamus.

II. Procedural Defects

{¶ 7} A review of Swopes's original complaint for mandamus fails to reveal compliance with R.C. 2969.25. R.C. 2969.25(A) requires Swopes to file an affidavit listing each civil action or appeal of a civil action he has filed in the previous five years in any state or federal court, as well as information regarding the outcome of each civil action or appeal. Compliance with R.C. 2969.25(A) is mandatory, and the failure to comply subjects Swopes's complaint to dismissal. *State ex rel. Bey v. Loomis*, Slip Opinion No. 2021-Ohio-2066; *State ex rel. Ware v. Pureval*, 160 Ohio

St.3d 387, 2020-Ohio-4024, 157 N.E.3d 714; *State ex rel. McDougald v. Greene*, 155 Ohio St.3d 216, 2018-Ohio-4200, 120 N.E.3d 779.

{¶ 8} In addition, Swopes has failed to comply with R.C. 2969.25(C), which requires that an inmate file a certified statement from his prison cashier setting forth the balance in his private account for each of the preceding six months. The failure to comply with R.C. 2969.25(C) constitutes sufficient reason to deny a writ claim, deny indigency status, and assess costs against Swopes. *State ex rel. Pamer v. Collier*, 108 Ohio St.3d 492, 2006-Ohio-1507, 844 N.E.2d 842; *State ex rel. Hunter v. Cuyahoga Cty. Court of Common Pleas*, 88 Ohio St.3d 176, 2000-Ohio-285, 724 N.E.2d 420. Finally, noncompliance with R.C. 2969.25(A) and 2969.25(C) cannot be cured by amendment of the original complaint:

> The requirements of R.C. 2969.25 are mandatory and failure to comply with them requires dismissal of an inmate's complaint. *State ex rel. Washington v. Ohio Adult Parole Auth.*, 87 Ohio St.3d 258, 259, 1999-Ohio-53, 719 N.E.2d 544 (1999), citing *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 422, 1998-Ohio-218, 696 N.E.2d 594 (1998). As held by the court of appeals, the affidavit required by R.C. 2969.25(A) must be filed at the time the complaint is filed, and an inmate may not cure the defect by later filings. *Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, ¶ 9, 797 N.E.2d 982 (an inmate's "belated attempt to file the required affidavit does not excuse his noncompliance. See R.C. 2969.25(A), which requires that the affidavit be filed '*[a]t the time that an inmate commences a civil action or appeal against a government entity or employee*'" [emphasis sic]).
>
> Nor is this a dismissal on the merits requiring prior notice, as asserted by [the inmate]. Because the failure to comply with the mandatory requirements of R.C. 2969.25 cannot be cured, prior notice of the dismissal would have afforded [the inmate] no recourse.

State ex rel. Hall v. Mohr, 140 Ohio St. 3d 297, 2014-Ohio-3735, 17 N.E.3d 581, ¶ 4; *see also Fuqua v. Williams*, 100 Ohio St.3d 211, 2003-Ohio-5533, 797 N.E.2d 982; *State v. Wilson*, 8th Dist. Cuyahoga No. 110527, 2021-Ohio-2778. Thus, based upon *Hall*, *Fuqua*, and *Wilson*, Swopes was not permitted to amend his original complaint for mandamus by attempting to comply with R.C. 2969.25(A) and 2969.25(C).

III. Substantive Analysis

A. Original Jurisdiction in Mandamus

{¶ 9} This court possesses original jurisdiction over a complaint for a writ of mandamus pursuant to Article IV, Section 3(B)(1) of the Ohio Constitution, R.C. 2731.01 and 2731.02. The requisites for mandamus are well established: 1) Swopes must establish a clear legal right to the requested relief, 2) Swopes must establish that Judge McCormick possesses a clear legal duty to perform the requested relief, and 3) Swopes possesses no other adequate remedy in the ordinary course of the law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 515 N.E.2d 914 (1987). Mandamus is an extraordinary remedy that is to be exercised with great caution and granted only when the right is absolutely clear. Mandamus should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977); *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 113 N.E.2d 14 (1953); *State ex rel. Connole v. Cleveland Bd. of Edn.*, 87 Ohio App.3d 43, 621 N.E.2d 850 (8th Dist.1993).

{¶ 10} In addition to the aforesaid basic requirements that must be established by Swopes, the following principles of law guide this court's

determination as to whether a writ of mandamus should be issued. Mandamus lies only to enforce the performance of a ministerial duty or act. A ministerial duty or act has been defined as one that a person performs in a given state of facts in a prescribed manner in the obedience to the mandate of legal authority, without regard to, or the exercise of, his or her own judgment upon the propriety of the act being done. The duty to be enforced must be specific and definite, clear, and concise, must be specifically enjoined by law, must be incident to the office, trust, or station that the respondent holds, and it may not be one of a general character that is left to the respondent's discretion. *State ex rel. Council President v. Mayor of E. Cleveland*, 8th Dist. Cuyahoga No. 110221, 2021-Ohio-1093; *State ex rel. E. Cleveland v. Norton*, 8th Dist. Cuyahoga No. 98772, 2013-Ohio-3723; *State ex rel. Neal, Jr. v. Moyer*, 3d Dist. Allen No. 1-84-44, 1985 Ohio App. LEXIS 5380 (Jan. 9, 1985).

B. Claim for Mandamus

{¶ 11} In support of his claim for mandamus, Swopes argues that he possesses constitutional rights that have been violated, Judge McCormick possesses a duty to protect Swopes's constitutional rights, and there exists no other adequate remedy in the ordinary course of the law. Specifically, Swopes argues that allowing the prosecutor to test the remaining 25 microliters of the preserved DNA: 1) violates Crim.R. 16 and 42; 2) violates Swopes's due process rights; 3) denies Swopes the right to equal protection of the law; and 4) there exists no other remedy in the ordinary course of the law.

{¶ 12} The current version of Crim.R. 16 constitutes a general rule that controls criminal discovery and allows for "open file" discovery. Crim.R. 42 was adopted by the Supreme Court of Ohio in 2017 and applies to all capital murder cases and postconviction reviews of capital murder cases. When read in para materia, we find no basis to support the claim that the judgment to allow the prosecutor to conduct further testing on the remaining DNA sample prejudices Swopes.

{¶ 13} A review of the transcripts attached to the complaint for mandamus demonstrates that the prosecutor offered legitimate scientific reasons for the need to consume the remaining DNA sample. It must also be noted that the order of Judge McCormick provided for the use of an independent testing laboratory and that counsel for Swopes would be allowed to observe the testing and have full access to all results obtained from the additional DNA testing. We find no violation of Crim.R. 16 and 42 and further find that Swopes has not established a clear legal right to his own testing of the preserved DNA sample or that Judge McCormick possesses a duty to allow Swopes to conduct independent testing of the preserved DNA sample. *State ex rel. McQueen v. Weibling-Holliday*, 150 Ohio St.3d 17, 2016-Ohio-5107, 78 N.E.3d 825; *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967).

{¶ 14} Swopes has failed to establish that his right to due process, under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 10 and 16, have been violated by Judge McCormick's

judgment to allow for additional testing of the preserved DNA sample. The suppression of materially exculpatory evidence violates a defendant's due process rights. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *State v. Geeslin*, 116 Ohio St.3d 252, 2007-Ohio-5239, 878 N.E.2d 1. Swopes does not allege that the additional testing of the preserved DNA will result in the destruction of exculpatory evidence, nor has he alleged that the prosecutor is acting in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); *State v. Abercrombie*, 8th Dist. Cuyahoga No. 88625, 2007-Ohio-5071.

{¶ 15} Swopes, with regard to his claim of the right to equal protection, argues that a person charged with a drug offense under R.C. Chapters 2925 or 3719, is entitled to have a portion of the alleged drug preserved for the benefit of independent analysis performed by a laboratory analyst selected by the defendant. Swopes argues that equal protection requires the preservation of the DNA sample and further testing by a laboratory analyst of his own choice similar to a person charged with a drug offense per R.C. 2929.51(E).

{¶ 16} Generally, the unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944). The unsupported argument that a defendant charged with a drug offense is entitled to the testing of an alleged contraband drug and the simple statement that "[t]o not allow his own testing when

his life hangs in the balance and yet allow him testing when confronted with a first-degree misdemeanor (or less) drug charge is irrational," without citation to existing case law to demonstrate the existence of purposeful discrimination against Swopes, fails to establish the claim of a denial of equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In addition, Swopes has failed to demonstrate that there exists no rational basis for the state legislature, in legislating drug laws, to treat the offense of capital murder differently. *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368; *State ex rel. Doersam v. Indus. Comm.*, 45 Ohio St.3d 115, 543 N.E.2d 1169 (1989). We find that Swopes has failed to establish his right to equal protection has been violated by Judge McCormick's judgment for additional DNA testing.

{¶ 17} Because Swopes has failed to demonstrate a clear legal right to the relief requested or that Judge McCormick possesses a clear legal duty, we need not address whether there exists an adequate remedy at law. *State ex rel. Daimler Chrysler Corp. v. Self-Insuring Emp. Evaluation Bd.*, 10th Dist. Franklin No. 04AP-1222, 2006-Ohio-425.

C. Mandamus and Control of Judicial Discretion

{¶ 18} Although a writ of mandamus may require an inferior tribunal to exercise its judgment or to proceed to the discharge of its function, it may not control judicial discretion, even if such discretion is grossly abused. *Ney, supra*, citing R.C. 2731.03; *State ex rel. Sawyer v. O'Connor*, 54 Ohio St.2d 380, 377 N.E.2d 494 (1978). Herein, Swopes is attempting to control the judicial discretion of Judge

McCormick by seeking an order that requires the vacation of his judgment with regard to the prosecutor's request for additional testing. Judge McCormick has fulfilled his obligation to render a ruling with regard to the prosecutor's request for additional DNA testing by granting it and placing additional requirements with regard to the testing. Judge McCormick has exercised his discretion in making that determination, and mandamus will not lie to control that judicial discretion. *O'Connor*; *Patterson v. Cuyahoga Cty. Common Pleas Court*, 8th Dist. Cuyahoga No. 107755, 2019-Ohio-110; *State ex rel. Jones v. Friedland*, 8th Dist. Cuyahoga No. 81226, 2002-Ohio-2757.

D. Prohibitory Injunction and Declaratory Judgment

{¶ 19} Finally, if the allegation of a complaint for a writ of mandamus demonstrates that the real object sought is a prohibitory injunction and a declaratory judgment, the complaint does not state a cause of action in mandamus and must be dismissed for lack of jurisdiction. *State ex rel. Esarco v. Youngstown City Council*, 116 Ohio St.3d 131, 2007-Ohio-5699, 876 N.E.2d 953; *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070; *State ex rel. Grendell v. Davidson*, 86 Ohio St.3d 629, 716 N.E.2d 704 (1999).

{¶ 20} As previously discussed, this court possesses, in an action for mandamus, the jurisdiction to require a respondent to comply with a clear and specific legal duty. R.C. 2731.01 and 2731.02. This court, however, does not possess the jurisdiction to prohibit or enjoin a respondent from acting in a manner that may cause injury to the relator. The request, through mandamus, to prevent an expected

injury, constitutes a prohibitory injunction that does not fall within the realm of mandamus. *State ex rel. Gadwell-Newton v. Husted*, 153 Ohio St.3d 225, 2018-Ohio-1854, 103 N.E.3d 809; *State ex rel. Evans v. Blackwell*, 111 Ohio St.3d 437, 2006-Ohio-5439, 857 N.E.2d 88; *State ex rel. Smith v. Indus. Comm.*, 139 Ohio St. 303, 39 N.E.2d 838 (1942). Herein, it is abundantly clear that the purpose of Swopes's complaint for a writ of mandamus is to prevent the prosecutor from conducting additional testing of the preserved DNA sample, the function of a prohibitory injunction.

{¶ 21} In addition, this court does not possess the jurisdiction to issue a declaratory judgment through the complaint for mandamus. *Wright v. Ghee*, 74 Ohio St.3d 465, 659 N.E.2d 1261 (1996); *State ex rel. Coyne v. Todia*, 45 Ohio St.3d 232, 543 N.E.2d 1271 (1989). Here, it is abundantly clear that the true objects of Swopes's claims, in support of the complaint for mandamus, are a declaratory judgment that his rights to due process and equal protection have been denied by the judgment of Judge McCormick to allow the prosecutor to conduct additional testing on the preserved DNA. Thus, the complaint for mandamus does not state a cause of action in mandamus and must be dismissed for want of jurisdiction. *State ex rel. Youngstown v. Mahoning Cty. Bd. of Elections*, 72 Ohio St.3d 69, 647 N.E.2d 769 (1995); *State ex rel. Governor v. Taft*, 71 Ohio St.3d 1, 640 N.E.2d 1136 (1994); *State ex rel. Walker v. Bowling Green*, 69 Ohio St.3d 391, 632 N.E.2d 904 (1994); *State ex rel. Ohio Mechanical Contracting Industry, Inc. v. Cleveland*, 65 Ohio St.3d 1210, 605 N.E.2d 386 (1992).

E. Conclusion

{¶ 22} Accordingly, we grant Judge McCormick's motion to dismiss and renewed motion to dismiss. Motion No. 549552, which granted a sua sponte alternative writ on September 29, 2021, and ordered that the trial court shall continue to maintain the stay order issued on September 21, 2021, in *State v. Swopes*, Cuyahoga C.P. No. CR-19-638518, is vacated. Costs to Swopes. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶ 23} Complaint dismissed.

Eileen T. Gallagher

EILEEN T. GALLAGHER, JUDGE

MARY J. BOYLE, P.J., and
EILEEN A. GALLAGHER, J., CONCUR