APPENDIX

APPENDIX A

2018-Ohio-3551

STATE of Ohio, Appellee

v.

Douglas PRADE, Appellant

No. 28193

Court of Appeals of Ohio,
Ninth District, Summit County.

Dated: September 5, 2018

APPEAL FROM JUDGMENT, ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO, CASE No. CR 1998-02-0463.

DAVID BOOTH ALDEN, LISA B. GATES, and EMMETT E. ROBINSON, Attorneys at Law, for Appellant.

MARK B. GODSEY and BRIAN C. HOWE, Attorneys at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

DECISION AND JOURNAL ENTRY

TEODOSIO, Judge.

Defendant-Appellant, Douglas Prade, appeals from the judgment of the Summit County Court of Common Pleas, denying his motion for a new trial. This Court affirms.

I.

Almost twenty years ago, a jury convicted Mr. Prade for the aggravated murder of his ex-wife, Dr. Margo Prade. In 2013, a trial court found him actually innocent due, in large part, to new DNA evidence. The court granted Mr. Prade's motion for post-conviction relief, but also found that he was entitled to a new trial "should [its] order granting post-conviction relief be overturned pursuant to appeal * * *." On appeal, this Court did, in fact, overturn the post-conviction ruling. *See State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072. We did not address the alternative ruling for a new trial, however, because it was conditional in nature and, as such, did not constitute a final, appealable order. See *id.* ¶ 15, fn. 3. *See also State v. Prade*, 9th Dist. Summit No. 26814 (Mar. 27, 2013) (dismissing State's first attempted appeal from the new trial order). It was our mandate that the post-conviction ruling be reversed and the cause remanded for further proceedings consistent with our opinion.[1] *Prade*, 2014-Ohio-1035, at ¶ 131, 9 N.E.3d 1072.

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[1] Mr. Prade sought to appeal from this Court's judgment, but the Ohio Supreme Court declined jurisdiction over his appeal. *See State v. Prade*, Ohio Supreme Court Case No. 2014-0432, 139 Ohio St.3d 1483, 12 N.E.3d 1229 (July 23, 2014). He also later sought a writ of prohibition in the Ohio Supreme Court, arguing that this Court lacked jurisdiction to review and overturn a finding of actual innocence. Upon review, the Ohio Supreme

Following our remand, the State immediately appealed from the new trial ruling to protect its appellate rights in the event that our decision had rendered the trial court's conditional ruling final. This Court dismissed the appeal, however, and reiterated that the new trial ruling was not final and appealable.[2] *See Sate v. Prade*, 9th Dist. Summit No. 27323 (Aug. 14, 2014). The State then filed a motion in the trial court, requesting reconsideration of the new trial ruling. Though Mr. Prade opposed that request and asked the court to simply reenter the new trial ruling on an unconditional basis, the court refused to do so.[3]

Subsequently, Mr. Prade filed a supplemental memorandum in support of his motion for a new trial. The trial court accepted numerous briefs from both parties and ultimately set the matter for an evidentiary hearing, limited to testimony from the four DNA experts who had testified at the post-conviction hearing. When the hearing concluded, the court took the matter under advisement and allowed the parties to file post-hearing briefs. Upon review of all the motions, briefs, testimony, and evidence in the

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Court denied his writ. *See State ex rel. Prade v. Ninth Dist. Court of Appeals*, 151 Ohio St.3d 252, 2017-Ohio-7651, 87 N.E.3d 1239.

[2] Though Mr. Prade attempted to appeal this Court's finality determination, the Ohio Supreme Court declined jurisdiction over his appeal. *See State v. Prade*, Ohio Supreme Court Case No. 2014-1992, 142 Ohio St.3d 1449, 29 N.E.3d 1004 (Apr. 29, 2015).

[3] Notably, the trial judge who had awarded Mr. Prade a new trial on a conditional basis was no longer on the bench when this matter was remanded. Another trial judge, who had not heard the post-conviction evidence, inherited the case.

case, the court then denied Mr. Prade's motion for a new trial.

Mr. Prade now appeals from the trial court's judgment and raises one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN RECONSIDERING, AND ABUSED ITS DISCRETION IN DENYING, THE MOTION FOR A NEW TRIAL.

In his sole assignment of error, Mr. Prade argues that the trial court erred when it reconsidered and denied his motion for a new trial. He argues that, upon remand from this Court, the trial court should have simply reentered the 2013 new trial ruling on an unconditional basis. Alternatively, he argues that the court abused its discretion when it rejected his motion on its merits. We disagree with both propositions.

Reconsideration of the New Trial Ruling

When the question presented on appeal is strictly one of law, this Court applies a de novo standard of review. *State v. Fry*, 9th Dist. Medina No. 16CA0057-M, 2017-Ohio-9077, 2017 WL 6459869, ¶ 4. "A de novo review requires an independent review of the trial court's decision without any deference to [its] determination." *State v. Consilio*, 9th Dist. Summit No. 22761, 2006-Ohio-649, 2006 WL 335646, ¶ 4.

"The law-of-the-case doctrine provides that legal questions resolved by a reviewing court in a prior appeal remain the law of that case for any subsequent proceedings at both the trial and appellate levels."

Giancola v. Azem, Slip Opinion No. 2018-Ohio-1694, –— N.E.3d ——, ¶ 1, citing *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). "[T]he doctrine functions to compel trial courts to follow the mandates of reviewing courts" such that trial court are "without authority to extend or vary the mandate given." *Nolan* at 3–4, 462 N.E.2d 410. Yet, the doctrine " 'comes into play only with respect to issues previously determined * * *.' " *Giancola* at ¶ 16, quoting *Quern v. Jordan*, 440 U.S. 332, 347, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), fn. 18. It does not bind trial courts with respect to issues that fall outside the compass of a reviewing court's mandate. *Giancola* at ¶ 16, quoting Quern at 347, fn. 18, 99 S.Ct. 1139, quoting *Sprague v. Ticonic Natl. Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

Mr. Prade argues that the trial court erred when it reconsidered his motion for a new trial because, in doing so, it ignored a mandate from this Court. According to Mr. Prade, this Court ordered the trial court, on remand, to reenter the 2013 new trial ruling on an unconditional basis so as to generate a final, appealable order. He argues that the trial court acted without authority when it chose to disregard that mandate and reconsider the ruling.

The record does not support Mr. Prade's contention that this Court issued a mandate, ordering the trial court to reenter the 2013 new trial ruling. This Court has referenced the 2013 new trial ruling, in varying degrees, on three separate occasions. On the first occasion, the State attempted to appeal from the ruling, and this Court dismissed its appeal. *See State v. Prade*, 9th Dist. Summit No. 26814 (Mar. 27, 2013). In doing so, we unequivocally held that the new trial

ruling was not a final, appealable order. *See id*., citing 46 Am. Jur. 2d Judgments § 168 ("If a judgment looks to the future in an attempt to judge the unknown, it is wholly void because it leaves to speculation and conjecture what its final effect may be."). Because the ruling was not final, it was not properly before us, so we did not issue any mandate.

On the second occasion, this Court referenced the new trial ruling in the procedural history portion of our decision on the trial court's post-conviction ruling. *See Prade*, 2014-Ohio-1035, at ¶ 13, 9 N.E.3d 1072. We specifically noted, however, that the new trial ruling itself was not at issue in the appeal. *Id*. at ¶ 15, fn. 3. Accordingly, we issued no mandate with respect to that ruling.

The third occasion arose when the State once again attempted to appeal from the new trial ruling, following this Court's decision on the post-conviction/actual innocence ruling. *See State v. Prade*, 9th Dist. Summit No. 27323 (Aug. 14, 2014). In dismissing the State's second attempted appeal, we (1) reiterated our prior determination that the new trial ruling was "conditional and, therefore, not final and appealable," and (2) found that determination to be "the law of the case with respect to this proceeding." *Id*., citing *State v. Prade*, 9th Dist. Summit No. 26814 (Mar. 27, 2013). We then went on to discuss the actual language the trial court had employed in its entry and why that language was problematic. We noted, in dicta, alternative language that the court could have used to achieve a final order. In summarizing that discussion, we wrote: "Thus, in order to make its decision to grant the motion for new trial a final order, the trial court must simply reenter its order granting

the motion for new trial on an unconditional basis." *Prade*, 9th Dist. Summit No. 27323, at *2 (Aug. 14, 2014). That language, however, did not equate to a mandate ordering the trial court to take that action on remand. *Compare* App.R. 27. Because the State's attempted appeal stemmed from a non-final order, our jurisdiction was limited. *See* Ohio Constitution, Article IV, Section 3(B)(2) (appellate court jurisdiction limited to reviewing final orders of lower courts). Consistent with that limited jurisdiction and our prior determination, our decisive ruling was that the matter be dismissed for lack of a final, appealable order. Any additional language in our journal entry was, at best, dicta and was not binding authority on the lower court. *See Giancola*, 2018-Ohio-1694, —— N.E.3d ——, at ¶ 16 (law of the case doctrine only pertains to issues previously decided by a superior court and matters within the compass of its controlling mandate).

This Court has long held that "interlocutory orders are the proper subject of motions for reconsideration." *State v. Ford*, 9th Dist. Summit No. 23269, 2006Ohio-6961, 2006 WL 3825194, ¶ 5. *Accord Stow v. Sexton*, 9th Dist. Summit No. 17263, 1996 WL 11985, *1, 1996 Ohio App. LEXIS 43, *4 (Jan. 10, 1996). When this Court reversed the trial court's post-conviction ruling and remanded this matter, the parties were placed in the position of being back before the trial court without it having issued an unconditional ruling on Mr. Prade's motion for a new trial. *See Giancola* at ¶ 21, quoting State *ex rel. Douglas v. Burlew*, 106 Ohio St.3d 180, 2005-Ohio-4382, ¶ 11, 833 N.E.2d 293, quoting State *ex rel. Stevenson v. Murray*, 69 Ohio St.2d 112, 113, 431 N.E.2d 324 (1982) (" ' '[U]pon remand from an appellate court, the lower court is

required to proceed from the point at which the error occurred.' ' "). The trial court, therefore, had the authority to reconsider the initial ruling on Mr. Prade's motion for a new trial. *See Ford* at ¶ 5; *Sexton* at *4. Mr. Prade's argument to the contrary lacks merit.

Denial of the Motion for New Trial

Crim.R. 33(A) allows a defendant to move for a new trial when his substantial rights have been materially affected. The rule enumerates several grounds upon which a defendant may seek a new trial, including newly discovered evidence. Crim.R. 33(A)(6).

> To warrant the granting of a motion for a new trial based upon newly discovered evidence, the defendant must show that the evidence:
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> "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence."

State v. Tolliver, 9th Dist. Lorain No. 16CA010986, 2017-Ohio-4214, 2017 WL 2541224, ¶ 18, quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. This Court applies an abuse of discretion standard of review when reviewing a trial court's decision to grant or deny a motion for new trial based on newly discovered evidence. *Tolliver* at ¶ 18. An abuse of discretion indicates that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217,

219, 450 N.E.2d 1140 (1983). When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

The last judgment we issued in this matter outlined, in exhaustive detail, the evidence that emerged at Mr. Prade's trial. *See Prade*, 2014-Ohio-1035, at ¶ 2070, 9 N.E.3d 1072. Rather than reproduce that discussion, we incorporate it herein and merely highlight certain pieces of evidence for purposes of context.

Dr. Margo Prade was murdered on the morning of November 26, 1997, in the parking lot of her medical office. A lone assailant waited for her, approached her mini-van, entered on the front passenger's side, and shot her six times before fleeing. Signs of a struggle were evident from the scene inside the van, but none of Dr. Prade's personal belongings were taken. The murder weapon was never found and there were no witnesses to the actual murder. Yet, a bite mark, evidently left by the killer, was found on the underside of Dr. Prade's upper, left arm. She was wearing her lab coat at the time of her murder, so the section of the coat that encompassed the bite mark ("the bite mark section") was removed for DNA testing. At trial, the jury heard testimony from DNA experts as well as bite mark identification experts.

With regard to the DNA testing, the jury heard from Thomas Callaghan, a forensic DNA examiner for the FBI. He explained that the FBI used polymerase chain reaction testing ("PCR testing") to test three cuttings from the bite mark section. Because the bite mark section was saturated with Dr. Prade's blood,

however, the PCR testing only uncovered a single DNA profile consistent with her DNA. No additional profile that might have belonged to the killer emerged. Consequently, even if the killer had left DNA on the bite mark section, the FBI's tests were unable to detect it.

With regard to bite mark identification, the jury heard from three dental experts. *See Prade*, 2014-Ohio-1035, at ¶ 63–70, 9 N.E.3d 1072. Dr. Lowell Levine, the State's first expert, testified that the bite mark pattern left on Dr. Prade was consistent with Mr. Prade's dentition, meaning that he could have caused it. Dr. Thomas Marshall, the State's second expert, testified that the bite mark pattern left on Dr. Prade matched Mr. Prade's dentition, meaning that he definitively caused it. Finally, Dr. Peter Baum, Mr. Prade's expert, testified that it was virtually impossible for Mr. Prade to bite anything due to a poorly fitted upper denture. Each expert was subjected to rigorous cross-examination and each made various concessions. For instance, Dr. Levine readily admitted that Dr. Prade's clothing could have affected the bite mark impression, that someone other than Mr. Prade could have caused it, and that he could only say, based on the limited value of the impression, that Mr. Prade might have been responsible for it. Accordingly, the jury heard a range of testimony on the issue of bite mark identification.

The jury also heard a wealth of circumstantial evidence tending to implicate Mr. Prade. *See id.* at ¶ 121–127. There was evidence that he was verbally and physically abusive towards Dr. Prade during their marriage and engaged in stalking behavior both before and after they separated (e.g., wiretapping her calls,

tracking her whereabouts, and accessing her medical office in the middle of the night). There was evidence that her murder occurred at a time when: (1) she was contemplating a new marriage and more children; (2) she planned on seeking a child support increase; (3) Mr. Prade's finances were in jeopardy; and (4) an insurance policy on her life, for which Mr. Prade was the sole beneficiary, was set to expire. With regard to the latter, there was evidence that, shortly before the murder, Mr. Prade handwrote a tally sheet, subtracting his debts from that policy amount.

Two witnesses placed Mr. Prade at the murder scene. The first witness said he saw Mr. Prade walking in an area adjacent to Dr. Prade's medical building shortly before the murder. The second witness said he saw Mr. Prade driving a car and speeding from the medical building's parking lot at a time when the murder would have just occurred. The gym where Mr. Prade claimed he was exercising during the murder was only a six minute drive from the murder scene, and Mr. Prade was unable to tender a solid alibi witness. Moreover, there was evidence that he appeared to have just showered when he arrived at the murder scene some two hours after the murder, despite his claim that he had spent the last two hours exercising.

Dr. Prade's murder itself "was premeditated and very personal," *id.* at ¶ 125, as her killer shot her six times at close range and delivered a severe bite mark during the struggle. The evidence also "refuted any theory that a stranger had killed [her]," *id.*, as her killer approached her van in full view and entered in spite of the van's auto-lock feature (meaning that she either unlocked the door or her killer had keys to the

van). Her killer was familiar with her schedule and lay in wait for her arrival. Additionally, there was significant testimony, from multiple sources, that the only person Dr. Prade feared and repeatedly had issues with was Mr. Prade.

New DNA results that Mr. Prade obtained in 2012, more than 14 years after Dr. Prade's murder, were the catalyst behind his request for a new trial. The new tests were conducted using Y chromosome short tandem repeat testing ("Y-STR testing") and, for the first time, male DNA was discovered within an area of the bite mark section. Because Mr. Prade was definitively excluded as the source of that male DNA, he argued that there was a strong probability the new DNA evidence would result in a different verdict, if submitted to a jury. He further argued that he was entitled to a new trial because, since 1998, bite mark identification testimony had undergone significant criticism. For ease of analysis, we separately address the new DNA evidence and the new bite mark identification evidence that Mr. Prade presented.

DNA Evidence

Prior to Mr. Prade's trial, two laboratories examined the bite mark section: the FBI and the Serological Research Institute ("SERI"). As noted, the FBI originally tested three areas of the bite mark section using PCR testing and only obtained a single DNA profile consistent with Dr. Prade's DNA. Because Y-STR testing did not exist at the time, the FBI was unable to test the three cuttings solely for the presence of male DNA. Nevertheless, the FBI swabbed the three cuttings it made to create three extracts and retained those extracts for future use.

When the FBI completed its testing, SERI received the bite mark section and tested it for amylase, a component of saliva. SERI mapped the entire bite mark section for amylase, meaning that its serologist (1) placed the entire bite mark section face down on a petri dish prepared with a hardened, gel solution, (2) weighed down the bite mark section to ensure proper contact, (3) left the bite mark section in place for several minutes, (4) lifted the bite mark section away, and (5) stained the gel solution in the petri dish with iodine to identify positive amylase patterns. The mapping test gave rise to three areas of "probable amylase activity," so SERI took cuttings from the bite mark section at each of those three areas. SERI then took two actions: it microscopically examined the three cuttings and it performed an amylase diffusion test in an attempt to extract and quantify any amylase in those three areas. The results of the diffusion test were that "[n]o amylase activity was detected." Meanwhile, the microscopic examination of the three cuttings showed "few nucleated epithelial cells" (i.e., cells from the surface of one's body, including the mouth) on two of the cuttings and none on the third.

Following the FBI and SERI's respective tests, the bite mark section was introduced as an exhibit at Mr. Prade's trial and admitted into evidence. There was testimony that, at trial, it was placed in an unsealed envelope before being admitted into evidence. It was then stored in that same unsealed envelope for more than ten years.

At the end of 2010, the DNA Diagnostics Center ("DDC") took possession of the bite mark section as well as the three extracts that the FBI originally had created and retained. For reasons unknown, DDC was

not able to obtain any DNA from the FBI's three extracts (i.e., not even Dr. Prade's). As to the bite mark section, DDC made a new cutting, extracted the DNA contained therein, and performed Y-STR testing on it. As explained in much greater detail in this Court's prior opinion, DDC obtained a partial male profile from that extract (19.A.1) and was able to exclude Mr. Prade as the source of that DNA. *See Prade*, 2014-Ohio-1035, at ¶ 74, 9 N.E.3d 1072. That test, however, only returned limited results. It was estimated that the 19.A.1 extract only contained about three to five cells (a far cry from the ideal testing amount of 150 cells), and DDC was only able to identify three out of possible sixteen genetic markers. Seeking to capture more DNA and achieve a better result, DDC decided to perform another test.

For its second test, DDC took three additional cuttings from the bite mark section, extracted DNA from them, and combined that extracted DNA with the 19.A.1 extract to form a new extract (19.A.2). When DDC tested the new extract (19.A.2), it uncovered about ten cells and achieved results at seven genetic markers, but detected the partial profiles of at least two males. *See id.* at ¶ 75–76. Mr. Prade was excluded as a source of any of the DNA found within the 19.A.2 extract. Importantly, however, the predominant male profile that emerged when DDC tested its first extract (19.A.1) was different than the predominant male profile that emerged when it tested its second extract (19.A.2). *See id.* at ¶ 74–75, 115. Accordingly, questions arose as to whether DDC had uncovered any DNA that actually belonged to Dr. Prade's killer or whether it had only uncovered low-level DNA that was present due to contamination and/or transfer.

Following DDC's tests, the bite mark section was sent to the Bureau of Criminal Investigation ("BCI") for additional testing. BCI took one additional cutting from the bite mark section and performed Y-STR testing on the cutting itself, a swab from the front side of the cutting, and a swab from the back side of the cutting. BCI was unable to obtain any DNA profile from the cutting itself, but the swabs of the cutting produced a partial male profile. Even so, the swabs returned results on so few genetic markers that BCI did not have enough information to draw any conclusions about the DNA it detected. *See id*. at ¶ 90.

Apart from testing the bite mark section, BCI also conducted tests on other areas of Dr. Prade's lab coat to address the concern of widespread contamination. BCI took cuttings from four other areas of the lab coat and performed Y-STR testing on each area. *See id*. at ¶ 91. Its analyst failed to find any male DNA on any of the four tested areas.

In reconsidering Mr. Prade's motion for a new trial, the trial court reviewed and heard anew a significant amount of testimony from experts who attempted to interpret all of the foregoing results. It was Mr. Prade's contention that at least some of the male DNA found within the bite mark section belonged to Dr. Prade's killer, so a new jury, hearing for the first time that he was not the source of any of that DNA, would exonerate him. Upon review of the evidence, however, the trial court rejected his contention. While the court agreed that Mr. Prade had set forth newly discovered DNA evidence, it found that he had failed to satisfy his burden under *State v. Petro*. *See Petro*, 148 Ohio St. 505, 76 N.E.2d 370 at syllabus. The court determined that the new DNA results were cumulative of the old

results to the extent that both excluded Mr. Prade. Further, it determined that the new results were of questionable value because "more likely than not the existence of the two partial male DNA profiles [that DDC discovered] occurred due to incidental transfer and/or contamination rather than containing the true DNA from [the] killer." When considering the new results in light of the overwhelming, circumstantial evidence against Mr. Prade at his trial, the court did not find there to be a strong probability that the new results would be outcome determinative if a new trial was granted. See *id*. Consequently, it refused to award Mr. Prade a new trial on the basis of the new DNA results.

Mr. Prade argues that the court abused its discretion when it concluded that the new DNA results did not warrant a new trial. He argues that the new results are not cumulative in nature and create a strong probability that a new jury would reach a different result. As to the latter point, he maintains that multiple experts agreed it was highly likely that Dr. Prade's killer left DNA on her lab coat when biting her. He asserts that it was unreasonable for the court, in reviewing all the expert testimony, to conclude that all of the new DNA results were attributable to contamination and/or transfer DNA. Because the new results create reasonable doubt as to his guilt, Mr. Prade argues, the court ought to have granted his motion for a new trial.

One of the experts Mr. Prade presented in support of his motion for a new trial was Dr. Rick Straub, a Ph.D. in genetics and independent consultant on forensic DNA testing. It was Dr. Straub's opinion that Dr. Prade's killer left his DNA on her lab coat and that

the new DNA found within the bite mark section was "highly likely to be from the killer." He reasoned that the mouth is such a rich source of DNA that one would expect to find the killer's DNA " 'before one would find the Y-STR profile of a male who engaged in incidental touching of the lab coat before or after the attack.' " *Prade*, 2014-Ohio-1035, at ¶ 80, 9 N.E.3d 1072. While SERI was unable to detect any quantifiable amount of amylase during its diffusion test in 1998, Dr. Straub had no doubt that its initial mapping test detected amylase. He explained that both the serologist's notes and a photograph of the completed mapping test supported that conclusion, as did the fact that the microscopic examination of two of the cuttings had revealed epithelial cells. Even so, he acknowledged that the serologist only saw a "few" epithelial cells and ultimately reported that "[n]o amylase activity was detected."

Dr. Straub conceded that the second extract DDC tested (19.A.2) uncovered the partial profiles of at least two males. He further conceded that there was not a significant difference in the amount of cells attributable to each male. Dr. Straub believed that one of the males was the killer, but he was unable to say which male it was. He also was unable to say when or how at least one additional male's DNA came to be deposited on the bite mark section, other than to say that "[i]t would have had to have gotten on that lab coat in some way, shape or form."

Assuming that the killer did deposit his DNA on the bite mark section, Dr. Straub testified to a number of factors that could have affected how much of that DNA remained by 2010. He indicated that DNA naturally degrades over time and the fact that both the FBI and

SERI had already taken a total of six cuttings from the bite mark section "definitely de-crease[d] [the] chances of finding a significant amount of DNA * * *." He also agreed that SERI's amylase mapping test was destructive in nature. He testified that "once you run that test, there's a really high probability that most of [the DNA] cells are removed from the material * * *." Given the limited results that DDC obtained, Dr. Straub agreed that any rich supply of DNA left by the killer had been removed or degraded. He further agreed that if all of the new DNA results were attributable to contamination Mr. Prade's exclusion result "would be meaningless."

The second DNA expert that Mr. Prade presented in support of his motion for a new trial was Dr. Julie Heinig, the Assistant Laboratory Director for DDC. In Dr. Heinig's opinion, it was "highly probable" that Dr. Prade's killer left DNA on her lab coat and that DDC uncovered it when testing the bite mark section. Much like Dr. Straub, she described the mouth as a rich source of DNA. She relied on that fact and the fact that a serologist had seen epithelial cells on cuttings taken from the bite mark section in 1998 to reach her conclusion that the male DNA found within the bite mark section was "substantially more likely" to have come from the killer than from another male who had incidentally come into contact with that area. Prade, 2014-Ohio-1035, at ¶ 76, 9 N.E.3d 1072. Although DNA naturally degrades over time, Dr. Heinig was of the opinion that at least some of the killer's DNA still would have been present when DDC tested the bite mark section. She indicated multiple times that she found it unlikely DDC had only uncovered male DNA

that was present due to contamination and/or transfer.

Dr. Heinig acknowledged that the type of mapping test SERI performed on the bite mark section in 1998 was no longer routinely employed because it was a "very destructive" test. In fact, she stated that she "would expect [that test] to remove all of the cellular material" on an item. With respect to contamination, she agreed that the bite mark section was placed in an unsealed envelope at trial, was entered as an exhibit, and was stored in the unsealed envelope until DDC's technicians received it more than ten years later. She also agreed that the bite mark section had been tested numerous times over the years, thereby increasing the risk of possible contamination. She conceded that contamination and/or transfer DNA is one explanation for the appearance of below-threshold results at genetic markers within a tested sample.

As to the test DDC performed on the extract labeled 19.A.2, Dr. Heinig agreed that the extract contained the DNA of at least two males. She admitted that she was unable to label either male's profile as the major or minor one due to the limited results her lab obtained. Indeed, she could not even quantify the extremely low number of cells that DDC had obtained from its tests. *See id.* at ¶ 78. Assuming that one of the profiles belonged to the killer, she was unable to say which one it was or when any of the DNA associated with those profiles had been deposited. She "conceded that, in order to have two different male profiles, either contamination or DNA from transfer DNA had to have occurred." *Id.* Further, she agreed that Mr. Prade's exclusion result was meaningless if

all of the new DNA results were attributable to contamination.

One of the experts the State presented in opposition to Mr. Prade's motion for a new trial was Dr. Elizabeth Benzinger, the Director of Research, Training, and Development at BCI. Dr. Benzinger opined that the male DNA found within the bite mark section was "'most easily explained by incidental transfer (patients, police, lab workers, court officials).'" *Id*. at ¶ 85. She reached that conclusion based on the extremely limited results that DDC and BCI obtained and the fact that, within those low-level results, DDC uncovered the partial profiles of multiple males. She testified that there is currently no mechanism for dating DNA, so it was impossible to determine when the DNA that DDC found was deposited. Though SERI reported probable amylase activity when conducting its mapping test in 1998, Dr. Benzinger opined that the lack of results on its subsequent, diffusion test cast doubts on the serologist's interpretation of the first test. Even if Dr. Prade's killer did leave behind some quantity of amylase and DNA on the bite mark section, however, Dr. Benzinger testified that it may not have been a high quantity to begin with and other factors such as degradation and destruction due to previous testing may have affected that quantity.

The second witness to testify for the State was Dr. Lewis Maddox, the DNA technical leader for BCI. Much like Dr. Heinig, Dr. Maddox opined that the male DNA found within the bite mark section was best explained by contamination and/or transfer. He noted that, even back in 1998, SERI only observed "a few nucleated epithelial cells on two of the sampled areas

and none on the third area." He also noted that SERI was unable to confirm the presence of amylase within the bite mark section through quantification. He could not say if that was because there was so little there or because the mapping test had resulted in a false positive. Either way, however, Dr. Maddox would have expected to see quantifiable results "had there been a 'slobbering killer,' as suggested by one of the defense witnesses at trial." *Prade*, 2014-Ohio-1035, at ¶ 89, 9 N.E.3d 1072.

As to the results of DDC's tests, Dr. Maddox confirmed that they were all "low level" results and "definitely [from] more than one contributor * * *." He explained that no strong profile emerged such that there was "not a great difference between [the] two profiles" detected within the 19.A.2 extraction. Had the killer left a significant amount of DNA on the bite mark section, Dr. Maddox indicated that he would have expected " 'a male profile of strong significant signal' " to have emerged. *Id.* He was unable to say with any degree of confidence that the male DNA found within the bite mark section came from the killer. He noted that BCI had not detected any male DNA on four other areas of Dr. Prade's lab coat (i.e., areas outside the bite mark section). According to Dr. Maddox, that fact caused him concern as an analyst because it suggested that the reason the bite mark section gave rise to inconsistent, low-level results while the lab coat did not was that the bite mark section had been "the primary focus of attention" over the years and handled by a significant number of individuals. He indicated that, overall, the results DDC obtained did not appear to be very useful.

Having reviewed the record, this Court cannot conclude that the trial court abused its discretion when it rejected Mr. Prade's request for a new trial on the basis of the new DNA results. *See Tolliver*, 2017-Ohio-4214, at ¶ 18. That is because, even if the new results are not cumulative of the old ones, Mr. Prade has not shown that there is a *strong probability* the new results would lead to a different outcome if introduced at a new trial. *See State v. Holmes*, 9th Dist. Lorain No. 05CA008711, 2006-Ohio-1310, 2006 WL 709100, ¶ 15 (new trial petitioner "has the burden of demonstrating that the newly discovered evidence created a strong probability of a different result if a new trial was granted"). The " 'mere possibility' " that a new trial might lead to a different outcome is an insufficient basis upon which to grant a motion for a new trial. *State v. Murley*, 2d Dist. Champaign No. 08-CA-26, 2009-Ohio-6393, 2009 WL 4547850, ¶ 26, quoting 90 Ohio Jurisprudence 3d, Trial, Section 665 (2009). *See also State v. Pannell*, 9th Dist. Wayne No. 96CA0009, 1996 WL 515540, *4–5, 1996 Ohio App. LEXIS 3967, *13–14 (Sept. 11, 1996).

Although both of Mr. Prade's experts were of the opinion that it was "highly likely" or "highly probable" that DDC discovered the killer's DNA within the bite mark section, both made several critical concessions. For example, both conceded that DDC detected the partial profiles of at least two males within the bite mark section and that neither one emerged as the significantly stronger profile. *See Prade*, 2014-Ohio-1035, at ¶ 115, 9 N.E.3d 1072. There was testimony that, for that to have happened, some degree of contamination had to have occurred. Further, while Mr. Prade's experts rejected the notion that all of

DDC's results were attributable to contamination, they both conceded that, within a year of the murder, SERI was unable to detect any quantifiable amount of amylase. *See id*. at ¶ 117 (noting that SERI's failure to detect any quantifiable amount of amylase "undercut[ ] the assumption * * * that there had to be DNA from the biter on the lab coat due to the large amount of DNA in saliva."). They also both agreed that SERI subjected the entire bite mark section to a very destructive mapping test. Indeed, Dr. Heinig went so far as to say that she "would expect [that test] to remove *all* of the cellular material" on an item. (Emphasis added.) That portion of her testimony was inconsistent with her foundational logic that the killer's DNA must have endured due to the wealth of DNA contained in one's mouth. Moreover, she conceded that contamination is one explanation for the type of low-level results that DDC's and BCI's tests produced. In reviewing all of the evidence, the trial court reasonably could have questioned the ultimate opinions of Mr. Prade's experts.

Neither Mr. Prade's experts, nor the State's experts could say when or how the male DNA that DDC uncovered was deposited on the bite mark section. The trial court heard testimony that DNA naturally degrades over time and that, by 2010, the bite mark section had already been highly sampled and subjected to several rounds of testing. Not even the three original extracts that the FBI sealed and retained produced any results when DDC tested them, despite widespread agreement that, at the very least, Dr. Prade's DNA should have been present. As such, there was ample reason for the trial court to conclude that both the passage of time and the amount of

exposure the bite mark section had endured over the years were factors that bore upon the meaningfulness of the new DNA results. Given that fact and the fact that the State's experts both attributed the new results to contamination, the court reasonably could have concluded that the new results were of questionable value. It also reasonably could have concluded that those results would not be outcome determinative if introduced at a new trial. *See Petro*, 148 Ohio St. 505, 76 N.E.2d 370 at syllabus.

This Court has recognized that "a new trial is an extraordinary measure and should be granted only when the evidence presented weighs heavily in favor of the moving party." *State v. Gilcreast*, 9th Dist. Summit No. 21533, 2003-Ohio-7177, 2003 WL 23094873, ¶ 54. As detailed in our prior opinion, the State set forth an overwhelming amount of evidence against Mr. Prade at his trial. *See Prade* at ¶ 20–70, 121.

> The picture painted by that evidence was one of an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the house, found happiness with another man, and threatened his dwindling finances. The evidence, while all circumstantial in nature, came from numerous, independent sources and provided answers for both the means and the motive for the murder.

Id. at ¶ 121. Although Mr. Prade's DNA profile did not match either of the partial profiles that DDC discovered, the partial profiles were of an entirely

questionable value, given the significant and valid concerns that they all stemmed from contamination. *Compare State v. Jones*, 9th Summit No. 26568, 2013-Ohio-2986, 2013 WL 3486843, ¶ 15–21 (retrial warranted where new DNA testing uncovered clear major and minor male DNA profiles and none of the tests identified the defendant as a contributor); *State v. Georgekopoulos*, 9th Dist. Summit No. 22491, 2005-Ohio-5106, 2005 WL 2374938 (retrial warranted where new photographic evidence showed that the State's theory of the case was an impossibility). As noted, " '[t]he mere possibility of a different outcome is insufficient' " to warrant the granting of a motion for new trial. *Murley*, 2009-Ohio-6393, at ¶ 26, quoting 90 Ohio Jurisprudence 3d, Trial, Section 665 (2009). Bearing in mind the deferential standard of review that applies in this matter, we must conclude that the trial court acted within its sound discretion when it refused to award Mr. Prade the extraordinary measure of a new trial. *See Tolliver*, 2017-Ohio-4214, at ¶ 18; *Gilcreast* at ¶ 54. Because Mr. Prade did not show that the new DNA results "disclose[d] a strong probability that [they] [would] change the result if a new trial [was] granted,' " the trial court's decision to deny his motion for a new trial on that basis was neither unreasonable, nor arbitrary, nor unconscionable. *Petro* at syllabus. This Court rejects his argument to the contrary.

Bite Mark Identification

As noted, three dental experts testified at Mr. Prade's trial and offered a range of testimony related to the bite mark impression left on Dr. Prade's lab coat and the bruising pattern left on her skin. In his original motion for a new trial, Mr. Prade included a

request for relief based on evidence that, since 1998, the science behind bite mark identification had sustained significant criticism. He presented the testimony of Dr. Mary Bush, an expert in forensic odontology research, who testified in great detail that neither the uniqueness of human dentition, nor its ability to transfer onto human skin in a unique way had been scientifically proven. *See Prade*, 2014-Ohio-1035, at ¶ 92–95, 9 N.E.3d 1072. Additionally, he pointed the court to a number of scholarly works, including a 2009 report from the National Academy of Sciences, questioning the reliability of bite mark identification testimony.

In response to Mr. Prade's motion, the State offered the testimony of Dr. Franklin Wright, Jr., an expert in forensic odontology. *Id*. at ¶ 96–101. Dr. Wright criticized several aspects of Dr. Bush's research methodology and the conclusions she drew therefrom. He opined that "bite mark evidence is generally accepted within the scientific community, but its value in any specific case depends upon the subjective interpretation of the analyst examining it." *Id*. at ¶ 96. He testified that bite mark evidence was best used "as part of * * * the total evidence[ ] that exists in [a] case" and cautioned against its use as the sole piece of evidence in a case. As to the bite mark testimony that the State presented at Mr. Prade's trial, Dr. Wright acknowledged that it was problematic in several respects. *Id*. at ¶ 101. In particular, he took issue with (1) Dr. Marshall's decision to testify in absolute terms that Mr. Prade was the biter, and (2) Dr. Lowell's ultimate conclusion that Mr. Prade's dentition was consistent with the bite mark. He explained that he was critical of Dr. Lowell's

conclusion because Dr. Lowell admitted that he had struggled to identify individual characteristics when studying pictures of the bite mark.

Following this Court's remand in response to the trial court's actual innocence ruling, Mr. Prade supplemented his motion for a new trial with additional evidence. First, he supplied the court with a DVD recording of a television broadcast interview, wherein three of the jurors from his trial discussed how the State's bite mark evidence had influenced their verdict. Second, he supplied the court with the affidavit of another expert, Dr. Iain Alastair Pretty. Dr. Pretty attested to recent, significant changes to the guidelines for forensic bite mark analysis, as established by the American Board of Forensic Odontology ("the ABFO"). He stated that, under the new guidelines, the ABFO would disavow *any* expert opinion that purported to identify a specific individual as the one who actually caused a bite mark in an open population case (i.e., a case where "the universe of potential suspects is unknown"). He reviewed several photographs of the bite mark injury to Dr. Prade's arm and noted that he was unable to discern any individual tooth characteristics. He opined that, if the case were retried today, "there could be no opinion presented, consistent with ABFO guidelines, that pur-port[ed] to link the victim's injury to Mr. Prade's (or anyone else's) dentition."

The trial court, on remand, declined to receive any oral testimony on the issue of bite mark evidence when it conducted additional hearings on the new DNA results. Instead, it allowed the parties to brief the issue and reviewed their written materials in conjunction with the testimony produced at the

original hearings on Mr. Prade's motion for a new trial. The trial court ultimately determined that Mr. Prade's newly submitted evidence did not warrant a new trial. The court found that "[t]he reliability of bite mark evidence [had] been a matter of contention for decades – long before the 1998 trial[–]" and that Mr. Prade's evidence merely reiterated the "same basic criticisms" that had existed at the time of trial. It found that Mr. Prade's evidence was largely cumulative of the specific expert testimony offered at the trial, as the jury had heard a wide range of testimony on the reliability of bite mark identification. *See Petro*, 148 Ohio St. 505, 76 N.E.2d 370 at syllabus. Further, it found that the evidence merely impeached certain aspects of that testimony, *see id*., and did not eclipse the staggering amount of circumstantial evidence that had implicated Mr. Prade. The court concluded that Mr. Prade was not entitled to a new trial because he had failed to set forth newly discovered evidence or show that there was a strong probability his newly submitted evidence would lead to a different result if a new trial was granted. *See id*.

Mr. Prade's argument on appeal is two-fold. First, he argues that the trial court abused its discretion when it refused to consider the television broadcast interview that he attached to his supplemental motion for a new trial. He argues that the interview evidenced the fact that at least three of the jurors who convicted him did so solely on the basis of the State's bite mark evidence. According to Mr. Prade, the interview was admissible in support of his motion for a new trial because he introduced it to show how the new bite mark evidence would change the result in

this matter, not to "invalidate or challenge the original verdict in the sense Evid.R. 606(B) contemplates."

Second, Mr. Prade argues that the trial court abused its discretion by denying his motion for a new trial on its merits. He argues that the evidence he submitted about the reliability of bite mark identification casts serious doubts upon the expert testimony that the State introduced at his trial. He asserts that it was unreasonable for the court to portray the newly submitted evidence as cumulative of the old evidence because the newly submitted evidence demonstrated that, if the matter were retried today, the State would be unable to offer *any* expert testimony linking him to the bite mark. Because unreliable bite mark testimony resulted in his conviction, he argues, there is a strong probability that the newly submitted evidence would change the result in this matter if a new trial was granted.

Upon review, this Court cannot address the merits of Mr. Prade's first argument that the trial court abused its discretion by excluding the television broadcast interview. That is because he has not provided us with an adequate record for our review. *State v. Farnsworth*, 9th Dist. Medina No. 15CA0038-M, 2016-Ohio-7919, 2016 WL 6948079, ¶ 16 ("It is the appellant's responsibility to ensure that the record on appeal contains all matters necessary to allow this Court to resolve the issues on appeal."). According to Mr. Prade, the court conducted a hearing on June 12, 2015, and, at that hearing, entered its ruling on the admissibility of the interview. The record, however, does not contain a transcript from that hearing. Nor does it contain any oral or written ruling from the trial court, addressing the admissibility of the interview.

As such, we cannot say whether the court found the interview inadmissible, or, if it did, whether it committed reversible error in doing so. *See State v. Ecker*, 9th Dist. Summit No. 28431, 2018-Ohio-940, 2018 WL 1320743, ¶ 20 (absent an issue of law, an appellate court generally applies the abuse of discretion standard when reviewing evidentiary determinations). Because Mr. Prade has not supplied this Court with an adequate record, we cannot review his argument on that point. *See State v. Milano*, 9th Dist. Summit No. 28674, 2018-Ohio-1367, 2018 WL 1750475, ¶ 15, fn. 1, quoting *State v. Knox*, 9th Dist. Lorain No. 16CA010985, 2018-Ohio-43, 2018 WL 327831, ¶ 12 (an appellant "may not hope to 'predicate reversal upon the basis of a silent record' "). Accordingly, we must presume regularity in the proceedings below insofar as Mr. Prade's argument concerns the television broadcast interview. *See State v. Burden*, 9th Dist. Summit No. 28367, 2017-Ohio-4420, 2017 WL 2672460, ¶ 7.

Having reviewed the record, we must conclude that the trial court acted within its discretion when it refused to award Mr. Prade a new trial on the basis of the bite mark evidence he presented. *See Tolliver*, 2017-Ohio-4214, at ¶ 18. Crim.R. 33(A)(6) only permits a defendant to seek a new trial upon the discovery of "new evidence" that he or she "could not with reasonable diligence have discovered and produced at the trial." *Accord Petro*, 148 Ohio St. 505, 76 N.E.2d 370 at syllabus. If a defendant could have discovered and produced evidence for trial, then that evidence is not the proper subject of a motion filed under Crim.R. 33(A)(6). *State v. Patton*, 9th Dist. Summit No. 17432, 1996 WL 63028, *3–4, 1996 Ohio

App. LEXIS 482, *9 (Feb. 14, 1996). Likewise, a defendant cannot prevail upon a Crim.R. 33(A)(6) motion if the motion rests upon evidence that is merely cumulative of former evidence or merely impeaches/contradicts it. *Petro* at syllabus. *Accord Jalowiec*, 2015-Ohio-5042, at ¶ 40, 52 N.E.3d 244; *State v. Diaz*, 9th Dist. Lorain No. 02CA008069, 2003-Ohio-1132, 2003 WL 1038143, ¶ 32. Because Mr. Prade failed to set forth "new evidence" that was neither cumulative of the trial testimony, nor served merely to impeach or contradict it, he was not entitled to relief under Crim.R. 33(A)(6).

In essence, Mr. Prade set forth evidence that, since 1998, additional research has resulted in amended guidelines, recommendations, and opinions about the reliability of bite mark identification evidence and the conclusions that an expert might reliably draw in any given case. As noted, however, the original jury in this matter heard a wide range of testimony on bite mark identification. *See Prade*, 2014-Ohio-1035, at ¶ 63–70, 129, 9 N.E.3d 1072. That testimony included significant criticisms about the reliability of bite mark identification, as elicited by defense counsel on cross-examination. Indeed, even on direct examination, the State's first expert (Dr. Levine) drew attention to the limitations of such evidence, stressed that it should not be used as the only evidence in any case, and indicated that, at best, he could only say that Mr. Prade could have made the bite mark in this case. Given the nature of the testimony introduced at trial, it was not unreasonable for the trial court to reject Mr. Prade's motion on the basis that his newly submitted evidence was merely cumulative of the trial testimony or merely served to impeach or contradict portions of

it (e.g., Dr. Marshall's opinion that Mr. Prade definitively caused the bite mark). *See Petro*, 148 Ohio St. 505, 76 N.E.2d 370 at syllabus. More importantly, however, it was not unreasonable for the court to reject Mr. Prade's motion because it was unsupported by any newly discovered evidence.

As noted, Crim.R. 33(A)(6) only provides an avenue for relief when a defendant uncovers "new evidence." The record supports the trial court's determination that Mr. Prade's newly submitted evidence merely spoke to the "same basic criticisms" that had plagued bite mark identification evidence "for decades." While the specific experts or studies Mr. Prade identified in his motion for new trial might not have been available to him in 1998, there was nothing to prevent him from discovering and producing for trial other similar opinions and studies about the unreliability of bite mark identification evidence.[4] He chose not do to so. Instead, he relied upon vigorous cross-examination and a defense expert who opined that he was incapable of inflicting the bite mark in this case. Mr. Prade cannot now attempt to cast additional criticisms about the reliability of bite mark evidence as "new evidence." *See* Crim.R. 33(A)(6); *Petro*, 148 Ohio St. 505, 76 N.E.2d 370 at syllabus. Moreover, even assuming that he did, in fact, introduce some "new evidence" in support of his motion, the trial court reasonably could have determined that it was unlikely to change the outcome here. *See Jalowiec*, 2015-Ohio-5042, at ¶ 38,

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[4] Notably, in opposing Mr. Prade's request for a new trial, the State offered a wealth of citations to articles and other literature that predated Mr. Prade's trial and criticized the reliability of bite mark identification.

52 N.E.3d 244 ("Evidence that impeaches or contradicts the evidence at trial is not excluded from consideration per se, but the character of that evidence is relevant to whether a different result is a strong probability [under *Petro*].").

The State set forth an overwhelming amount of evidence against Mr. Prade at trial. *See Prade*, 2014-Ohio-1035, at ¶ 20–70, 121, 9 N.E.3d 1072. It is not clear that any one piece of evidence, including the bite mark testimony, led the jury to convict him. His argument that, if this matter were retried today, the State would be unable to offer any admissible, inculpatory expert testimony linking him to the bite mark in this case is wholly speculative. That determination would be left to the sound discretion of the trial court in its gatekeeping function under *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and this Court is not at liberty to predict which experts the State would actually tender or what testimony the trial court would or would not allow in the event of a retrial. *See*, *e.g.*, *State v. Jackson*, 9th Dist. Summit Nos. 27132, 2015-Ohio-5246, 2015 WL 9048666, ¶ 51–54; *State v. Reives-Bey*, 9th Dist. Summit No. 25138, 2011-Ohio-1778, 2011 WL 1378939, ¶ 18. Even if it is possible that the new bite mark evidence would lead to a different result upon retrial, " '[t]he mere possibility of a different outcome is insufficient' " to warrant the granting of a motion for new trial. *Murley*, 2009-Ohio-6393, at ¶ 26, quoting 90 Ohio Jurisprudence 3d, Trial, Section 665 (2009). Having carefully reviewed the record and continuing to bear in mind the deferential standard of review that applies in this matter, we must conclude that the trial court

acted within its sound discretion when it refused to award Mr. Prade the extraordinary measure of a new trial. *See Tolliver*, 2017-Ohio-4214, at ¶ 18; *Gilcreast* at ¶ 54. Accordingly, his sole assignment of error is overruled.

III.

Mr. Prade's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

SCHAFER, P. J.

HENSAL, J.

CONCUR.

APPENDIX B

The Supreme Court of Ohio

FILED
MAR 20 2019
CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

Douglas Prade

Case No. 2019-0019

E N T R Y

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).

(Summit County Court of Appeals; No. 28193)

Sharon L. Kennedy
SHARON L. KENNEDY
Acting Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

APPENDIX C

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
SANDRA KURT
2018 NOV 26 AM 10: 49
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO	)	
	)ss:	
COUNTY OF SUMMIT	)	
	)	
STATE OF OHIO,	)	
	)	
Appellee,	)	C.A. No. 28193
	)	
v.	)	
	)	JOURNAL ENTRY
DOUGLAS PRADE,	)	
	)	
Appellant.	)	

Appellant has moved this Court to reconsider its September 5, 2018 judgment, affirming the trial court's decision to deny his motion for a new trial. The State has responded in opposition, and Appellant has filed a reply brief.

In determining whether to grant an application for reconsideration, a court of appeals must review the application to see if it calls to the attention of the court an obvious error in its decision or if it raises issues not considered properly by the court. *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App.3d 117, 127 (10th Dist.1992). On appeal, this Court presumed regularity in these proceedings insofar as Appellant's

argument concerned the trial court's ruling on the admission of a television broadcast interview (Exhibit 61). *State v. Prade*, 9th Dist. Summit No. 28193, 2018-Ohio-3551, § 51. Because the record did not contain a transcript of a hearing that took place on June 12, 2015, we concluded that we were unable to review Appellant's argument. *Id.* Appellant argues that this Court committed an obvious error in that decision because the trial court reached its admissibility determination at a hearing that occurred on November 5, 2015, not June 12th. According to Appellant, at the June 12th hearing, the trial court simply heard arguments from the parties on the admissibility of the exhibit and took the matter under advisement. Because the court's ultimate admissibility determination on November 5th was part of the record, Appellant argues, this Court erred by not considering his argument on its merits.

Appellant is correct that, on November 5th, the trial court referenced Exhibit 61 and noted that it was excluded. Specifically, it stated:

> Defense Exhibit 50 * * * [t]hat's being excluded. So is 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, and 61. All not admitted for today and yesterday's proceeding.

Yet, the court did not otherwise discuss Exhibit 61 or the basis for its ruling. On appeal, Appellant asserted that he introduced Exhibit 61 at a hearing that occurred on June 12th. He asserted that the State objected to the admission of the exhibit because its admission violated Evid.R. 606(B), and the trial court sustained the State's objection. He then argued

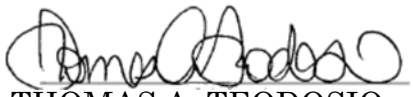
at length that the admission of the exhibit did not violate the evidence aliunde rule.

Because the record on appeal did not contain a transcript from the June 12th hearing, this Court had no way to determine what occurred at that proceeding. When referencing Exhibit 61 at the November 5th hearing, the trial court made no reference to the evidence aliunde rule. Nor did it indicate that it had taken Exhibit 61's admissibility under advisement such that it had yet to rule on that issue. Appellant essentially asked this Court to infer that the trial court had excluded Exhibit 61 on the basis of the evidence aliunde rule. Without the June 12th transcript, however, this Court lacked any context for the trial court's ruling, could not confirm that the evidence aliunde rule was the basis for its ruling, and was unable to determine that its ruling took place on November 5th rather than June 12th. While Appellant might have thought otherwise at the time, the June 12th transcript was necessary for this Court to conduct an adequate review.

We must conclude that Appellant it not entitled to reconsideration. On appeal, we ultimately determined that we could not review Appellant's argument because he failed to supply us with an adequate record. *See Prade*, 2018-Ohio-3551, at ¶ 51. Appellant has not shown that this Court committed an obvious error in reaching that conclusion. *See Garfield Hts. City School Dist.*, 85 Ohio App.3d at 127. To the extent Appellant moves to supplement the record with the missing transcript pursuant to App.R. 9(E), the motion is denied. Appellant chose not to file the June 12th transcript on direct appeal. Its omission was not inadvertent or due to an error on the part of

the court reporter. *Compare Reichert v. Ingersoll*, 18 Ohio St.3d 220, 222 (1985). Given that Appellant had an opportunity to submit the transcript and that his appeal has already been decided, his request to supplement the record is denied.

For the foregoing reasons, the application for reconsideration is denied.



THOMAS A. TEODOSIO
JUDGE

Concur:
Schafer, P. J.
Hensal, J.

APPENDIX D

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO	)	**CASE NO.: CR 1998-02-0463**
	)	
Plaintiff,	)	**JUDGE CHRISTINE CROCE**
v.	)	
	)	
DOUGLAS PRADE	)	**ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL**
	)	
Defendant	)	

This matter comes before the Court on Defendant Douglas Prade's Motion for New Trial. The Court has been advised, having reviewed the Motion; pre-hearing and post-hearing briefs; the DNA expert testimony and exhibits from the November 2015 hearing; the transcripts and exhibits from the October 2012 hearing; the transcripts and exhibits from the underlying trial; the applicable Ninth District Court of Appeals and Ohio Supreme Court decisions relating to this Defendant; and applicable law.

PROCEDURAL HISTORY

This Court will not address the full procedural history of this case, but rather, it will address the history as it relates to the pending Motion for New Trial. On January 29, 2013, the Honorable Judge Judy Hunter issued a 25 page decision regarding the Defendant Douglas Prade's Petition for Post Conviction Relief and Motion for New Trial. Judge Hunter granted the Petition for Post Conviction Relief and, in the alternative, held that the Motion for New Trial be granted should the Petition be overturned on appeal.

The State separately appealed the Order granting the Petition for Post Conviction Relief (C.A. No. 26775) and the Motion for New Trial (C.A. No. 26814 and C.A. No. 27323). With respect to the Petition for Post Conviction Relief, the Ninth District Court of Appeals reversed the trial court — concluding that, based upon the enormity of evidence in support of the Defendant's guilt, and the fact that the meaningfulness of DNA exclusion was far from clear, this Defendant did not meet his burden of establishing by clear and convincing evidence his actual innocence. *State v. Prade*, 9th Dist. No. 26775, 2014-Ohio-1035, ¶145. With respect to the Motion for New Trial, the Ninth District Court ultimately found that the trial court's order granting the Motion for New Trial was not a final and appealable order, but rather, a conditional order. As such, the Ninth District Court determined that the Order on the Motion for New Trial needed to be issued on an unconditional basis. *Id.* The Ohio Supreme Court declined to hear the appeals on either the Petition for Post Conviction Relief or the Motion

for New Trial. (Case No. 2014-0432 and Case No. 2014-1992).

At an oral hearing on June 12, 2015, the Defendant argued that this Court should grant a new trial based on newly discovered DNA evidence; newly discovered evidence in the area of forensic odontology, as well as eyewitness identification; and be permitted to submit testimony and argument as to each of those issues during any subsequent hearings. After hearing oral arguments, this Court ruled that in deciding the issue of a new trial, it would only take testimony; as it related to newly discovered DNA evidence. Further, this Court held it would accept written briefs as to whether it should grant a new trial on newly discovered evidence in the area of forensic odontology and any other arguments for a new trial based solely on newly discovered evidence.

The parties have fully briefed the issues, as well as provided testimonial evidence at a hearing regarding the DNA Y - Chromosome Short Tandem Repeat (Y-STR) testing. This matte is now ripe for ruling.

MOTION FOR NEW TRIAL STANDARD – THE PETRO TEST

Crim.R. 33(A)(6) provides that a new trial may be granted "when new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial."

> To warrant the granting of a motion for a new trial in a criminal case, based upon the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new

> trial is granted, (2) has been discovered since the trial, (3) is such that could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Petro (1947), 148 Ohio St. 505, syllabus.

And finally, in order to properly address a motion for new trial, the trial court must look at the new evidence in the context of all the former evidence at trial. *State v. Gillispie,* 2nd Dist. No. 24456, 2012-Ohio-1656, ¶35.

> In general, the stronger the evidence of guilt adduced at trial, the stronger the newly discovered evidence would have to be in order to produce a strong probability of a different result. Conversely, the weaker the evidence of guilt at trial, the less compelling the newly discovered evidence would have to be in order to produce a strong probability of a different result. In view of the beyond-a- reasonable-doubt burden of proof, newly discovered evidence need not conclusively establish a defendant's innocence in order to create a strong probability that a jury in a new trial would find reasonable doubt.

Id.

STRONG PROBABILITY

"A new trial is an extraordinary measure and should be granted only when the evidence presented weighs heavily in favor of the moving party." *State v. Gilcreast*, 9th Dist. No. 04CA0066, 2005-Ohio-2151, ¶55. "To warrant the granting of a new trial, the new

evidence must, at the very least, disclose a strong probability that it will change the result if a new trial is granted." *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶49[1] In other words there must be a strong probability that the new evidence would change the verdict. *State v. Brown*, 9th Dist. No. 26309, 2012-Ohio-5049, ¶4; and *State v. Jalowiec*, 9th Dist. No. 14CA010548, 2015-Ohio-5042, ¶30. A defendant bears the burden of demonstrating this strong probability. *Cleveland*, at ¶49. See also *State v. Gilliam*, 9th Dist. No. 14CA010558, 2014-Ohio-5476, ¶12.

NEW EVIDENCE DISCOVERED SINCE TRIAL/ DUE DILIGENCE

"New evidence is that which has been discovered since trial was held and could not in the exercise of due diligence have been discovered before that." *State v. Lather*, 6th Dist. No. OT-03-041, 2004-Ohio-6312, ¶11, citing *Petro*.

MATERIALITY

Evidence is "material to the issues" when there is a "reasonable probability," that had the evidence been disclosed or available at trial, the result of the trial would have been different. *State v. Roper*, 9th Dist. No. 22494, 2005-Ohio-4796, ¶22. "Reasonable probability" of a different trial result is demonstrated by showing that the omission of new evidence would "undermine the confidence in the outcome of the trial." *Id.*

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[1] There appears to be no Ohio case law that specifically defines "strong probability."

CUMULATIVE

While there appears to be no Ohio case law that specifically defines "not merely cumulative to former evidence", "cumulative – in law" has been defined as "designating additional evidence that gives support to earlier evidence. *Webster's New World Dictionary of the American Language* (College Ed. 1966).

"Science is an ever-evolving field, and criminal defendants should not be afforded a new trial every time the scientific testing methods for forensic evidence change." *State v. Johnson*, 8th Dist. No. 93635, 2014-Ohio-4117, ¶26.

IMPEACHMENT

With respect to impeachment, "newly discovered evidence that merely impeaches or contradicts the former evidence 'very well could have resulted in a different verdict,' but that is not enough to satisfy the test for granting a new trial." *Brown*, at ¶4, quoting *State v. Pannell*, 9th Dist. No. 96CA0009, 1996 Ohio App. LEXIS 3967, 1996 WL 515540, *3 (Sept. 11, 1996). Rather, the character of that evidence is relevant as to whether a different result is a strong probability. *Jalowiec*, at ¶38.

ANALYSIS

EYEWITNESS IDENTIFICATION EVIDENCE

Dr. Goodsell, the Defendant's expert in the area of eyewitness memory and identification, testified at the October 2012 hearing regarding the three stages of memory (encoding, storage, and retrieval), as well as several factors that can affect memory and the accuracy of eyewitness identification.

The validity of eyewitness memory and identification has been questioned for years both Defense attorneys and experts alike. The accuracy of eyewitnesses in describing the height, weight, eye color and physical description of a suspect/defendant, as well as cross-racial identification, have been the subject of vigorous cross examinations and many appeals.

In analyzing everything before the Court, this Court finds that the expert eyewitness identification testimony does not disclose a strong probability that a different verdict would be reached if a new trial is granted. While Dr. Goodsell's testimony and opinions did not exist in 1998, and his opinions could not have been discovered in the exercise of due diligence before trial, there is no reasonable probability that had Dr. Goodsell's 2012 opinions been disclosed or available in 1998 the result of the trial would have been different.

During the 1998 trial, counsel for the Defendant cross-examined the two eyewitnesses or the majority of the weaknesses raised by Dr. Goodsell. *Prade*, 2014-Ohio-1035, ¶128. The 'Ninth District Court held, "the jury, therefore, was well aware of the possible problems with the identifications of the respective eyewitnesses and chose, nonetheless, to believe them." *Id*. The defendant's theory at trial was that the eyewitnesses' testimony was unreliable based on the timing of when they came forward, the ability to see Margo Prade's killer, as well as the accuracy of their description of the suspect. Dr. Goodsell's opinions are merely cumulative of the answers he Defendant's trial attorney elicited during cross examination of the two eyewitnesses during he 1998 trial and further, only tend impeach and/or contradict the testimony of the

two eyewitnesses. Simply stated, Dr. Goodsell's testimony is similar to evidence that was presented n 1998 by a different expert and therefore this Court finds Dr. Goodsell's expert opinions are not newly discovered evidence and clearly fails the *Petro* test.

BITE MARK EVIDENCE

This Court previously limited the hearing on the Motion for New Trial to the newly discovered DNA evidence and Y-STR testing procedures but provided the parties the opportunity to address the bite mark evidence by written briefs subsequent to the November 4, 2015 hearing.

As background, the 1998 jury trial included expert testimony from Dr. Lowell Levine an Dr. Thomas Marshall (experts in forensic odontology/dentistry for the State) and Dr. Peter Baum (a maxillofacial prosthodontist for the Defendant). *Prade*, 2014-Ohio-1035, ¶63–70. The Ninth District Court of Appeals held:

> As for the dental experts, the jury was essentially presented with the entire spectrum of opinions on the bite mark at trial. That is, one expert testified that Prade was the biter, one testified that the bite mark was consistent with Prade's dentition, but that there was not enough there to make any conclusive determination, and the third testified that Prade lacked the ability to bite anything. Moreover, the expert who definitively said Prade was the biter, Dr. Marshall, also said that the expert who determined a definitive inclusion could not be made (Dr. Levine) was "one of the leading bite mark experts in the country." The jury also heard

> testimony during cross-examination that dental experts often disagree and that bite mark testimony has led to wrongful convictions.

Prade, 2014-Ohio-1035, ¶129.

In support of his Motion for New Trial and a request for hearing, the Defendant argues that the developments in bite mark science that have occurred since 1998 completely discredit the State's reliance on the bite mark evidence at trial to link the Defendant to the crime. Defendant asserts that multiple highly credible authorities have since concluded that "the fundamental scientific basis for bite mark analysis [has never been established]" – citing:

- 1 Paul Giannelli & Edward Inwinkelreid, Science Evidence §13.04 (4th ed. 2007);
- National Academy of Sciences' 2009 Report titled "Strengthening Forensic Science in the United States: A Path Forward";
- 11 separate studies from 2009 to 2012 authored by Dr. Mary Bush and her testimony at the October 2012 hearing;
- Letter posted on the American Board of Forensic Odontology's website; and Dr. Wright's testimony at the October 2012 hearing;
- Professor Iain Pretty's 2015 Construct Validation Study; and
- Video recording of the February 12, 2016 meeting of the Texas Forensic Science Commission.

In October 2012, Dr. Mary Bush, an expert in forensic odontology research, testified for the Defendant, and Dr. Franklin Wright, Jr., also an expert in forensic odontology, testified on behalf of the

State. Both experts were completely at odds with each other as to the reliability o: bite mark evidence at trial. The Defendant maintains that Dr. Bush's expert testimony on bite mark identification is far more credible and better grounded in science than that of Dr. Wright, especially when Dr. Wright conceded at the October 2012 hearing that the numerous questions raised in the National Academy of Sciences' (NAS) 2009 Report regarding the basis for bite mark identification have not been answered in the affirmative.

Dr. Bush testified that, based upon her studies on cadavers, skin has not been "scientifically established as an accurate recording medium of the biting dentition." On the other hand, Dr. Wright testified that, based upon his review of hundreds of actual bite marks throughout his career, that human dentition is unique and capable of transferring to human skin. Both experts also admitted to certain shortcomings in their own research. Dr. Bush admitted: 1) that cadavers differ from real people in certain respects related to her testing, and 2) that she did not have a statistician determine a rate of error for the placement of the dots on the bite mark molds. Dr. Wright admitted: 1) that although bite mark evidence is generally accepted within the scientific community, that an opinion regarding the evidence is only as good as the bite mark evidence available and the subjective interpretation of the analyst examining the evidence, and 2) that there have been instances where bite mark testimony has helped to convict individuals who were later exonerated based upon other evidence such as DNA. See also generally, *Prade*, 2014 Ohio-1035, ¶92–101.

In analyzing everything before the Court, this Court finds that the bite mark evidence does not disclose a strong probability that a different verdict would be reached if a new trial is granted, and that while the opinions of Dr. Bush and Dr. Wright did not exist in 1998 and could not have been discovered before trial, the only thing newly discovered is the Defendant's awareness of these particular experts. The new bite mark opinions are not material to the issues since there is no reasonable probability that had these differing opinions from 2012 been disclosed or available in 1998, the result of the trial would have been different. The expert opinions of Dr. Bush and Dr. Wright, while differing between each other, address many of the various differences that were testified to by Dr. Levine, Dr. Marshall and Dr. Baum during the 998 trial. In light of those differing opinions, the 1998 jury still found the Defendant guilty.

The reliability of bite mark evidence has been a matter of contention for decades – long before the 1998 trial. Even though new possible guidelines, published articles, and other studies critical of the use of bite mark evidence have arisen since the Defendant's trial in 1998, those name basic criticisms existed at the time of trial. The Defendant's theory at trial was that the bit mark identification was unreliable. This Court finds Dr. Bush's opinion post-trial, the other abolished articles and studies, as well as the affidavit of Dr. Iain Alastair Pretty along with the proposed changes to the American Board of Forensic Odontology (AFBO) are nothing more than emulative evidence to what was previously presented on the subject at trial through the testimony of Dr. Levine, Dr. Marshall and

Dr. Baum—different experts with the same opinions, e.g. *State v. Graff*, 8th Dist. No. 102073, 2015-Ohio-1650, ¶12; and Johnson, at ¶25 ("this is not a case where advancements in scientific research allow evidence to be disproved").

In conclusion, while there has been a sea of changing opinions in the science of bite mark identification, the evidence submitted by the Defendant is merely additional criticisms and/or impeachment of the testimony presented at trial in 1998. The bite mark evidence clearly fails the *Petro* test, and therefore is not newly discovered evidence.

Y-STR DNA EVIDENCE – POST TRIAL

The Defendant argues that Y-STR DNA testing completed in 2012 is newly discovered evidence and that the existence of male DNA at or near the bite mark of the lab coat conclusively excludes the Defendant as the contributor, and as such, he should be granted a new trial. The defendant asserts that one of the more significant partial male profiles from 19.A.1 and 19.A.2 must be that of Margo Prade's killer and that no other male DNA was found on other parts of the lab coat.

While the State concedes that Y-STR DNA testing was not available at the time of trial, maintains that the Defendant was excluded as a possible DNA contributor in the 1998 trial, and that the new Y-STR test results did not bring about a different result. Alternatively, the State argues that even if the Court determines that Y-STR DNA testing and results are newly discovered evidence, the DDC test results relating to the bite-mark section of the lab coat are meaningless due to contamination, transfer or touch

DNA, and/or analytical error. In support, the State asserts that the male DNA found on the bite mark section included extremely low level of trace DNA, i.e. from 19.A.1 (3–5 cells) and 19.A.2 (approximately 10 cells), from possibly two up to five male persons, and that how or when that male DNA was deposited is unknown.

The State argues that no expert who testified at the October 2012 and November 2015 hearings could opine with any certainty as to when these new DNA profiles were deposited on the swatch of the lab coat, rather, each side merely provided expert opinions in support of their respective positions and against the opposing experts' positions.[2] Thus, the State argues, at best, the DNA bite-mark evidence testing results provide inconclusive results, not new evidence to support the Defendant's request for a new trial.

DNA Diagnostic Center (DDC) performed the initial Y-STR DNA testing from extracts of a large cutting from the center of the bite-mark section of the lab coat (around where the FBI previously had taken two of the three cuttings from 1998), which became DDC 19.A.1; and from three additional cuttings within the bite-mark section of the lab coat that were then combined with the remaining extract from DDC 19.A.1 to make DDC 19.A.2. It is undisputed that (1) DDC's testing of 19.A.1 identified a single, partial male DNA profile; (2)

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[2] Dr. Julie Heinig, the Assistant Laboratory Director for Forensics for DNA Diagnostic Center (DDC) and Dr. Richard Staub, prior Director for the Forensic Laboratory for Orchid Cellmark, testified for the Defendant; and both Dr. Lewis Maddox and Dr. Elizabeth Benzinger from the BCI&I testified for the State.

DDC's testing of 19.A.2 identified a mixture that included partial male profiles of a least two men; and (3) that both 19.A.1 and 19.A.2 conclusively excluded the Defendant (and also Timothy Holston – Margo's then current boyfriend) from having contributed male DNA in these two samples. Also it is undisputed that these DNA exclusions of both the Defendant and Timothy Holston as contributors to the partial DNA profiles obtained from the bite-mark area of the lab coat were not expressed in terms of probabilities; but rather in certainties.

A second laboratory, Ohio Bureau of Criminal Identification & Investigation (BCI&I), performed further Y-STR testing on additional material – one new cutting from the bite-mark section of the lab coat; swabs from the sides of the lab coat; cuttings from the right and left underarm, left sleeve, and back of the lab coat; buttons from the lab coat; fingernail clippings; and a piece of metal from Margo Prade's bracelet – all at the State's request. From all the item tested by BCI&I the Defendant was also excluded as a source of the male DNA.

This Court has performed an independent review of the Y-STR DNA testing and results. The testimony of Dr. Staub, Dr. Heinig, Dr. Benzinger, and Dr. Maddox and all admitted exhibits from October 2012 hearing before Judge Hunter, as well as the testimony from the same four experts and all newly admitted exhibits from this Court's two-day hearing in November 2015.[3]

[3] As this Court had the benefit of reviewing the prior transcripts and exhibits from the 2012 hearing in advance of the

First, this Court finds that Y-STR DNA testing was not in existence at the time of the 1998 trial, and therefore, the Defendant could not in the exercise of due diligence have discovered it before trial. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 22 and 29; and *Prade*, 2014-Ohio-1035, ¶¶7–8.

Second, this Court finds that the Y-STR DNA test results conclusively exclude the Defendant as a contributor of the DNA on the "bite mark" – the same exclusion as in the 1998 criminal trial. During the 1998 trial and post trial hearings no expert ever testified or indicated that the Defendant's DNA was ever found anywhere on the lab coat including at or near the bite mark.

Third, with respect to the meaning of the Y-STR DNA results as it relates to whether the two other partial males DNA profiles are that of Margo Prade's killer, this Court finds that the results remain inconclusive. None of the four experts could opine with any degree of certainty as to when these two partial male profiles were deposited on the fabric swatch. This well worn lab coat and swatches traveled at various times to at least five different laboratories and were handle by an undetermined number of individuals. This Court therefore concludes that more likely that the existence of the two partial male DNA profiles occurred due to incidental transfer and/or contamination rather than containing the true DNA from Margo Prade's killer.

November 2015 hearing, it was well cognizant of the complexity of the issues at hand.

Although the Ninth District Court of Appeals addressed the Y-STR testing results along with the testimony from the Defendant and State's experts under the "clear and convincing/actual innocence" standard found in R.C. 2953.21 (A)(1)(b) and the other "available admissible evidence" standard found in R.C. 2953.21(A)(1)(b) and R.C. 2953.23(A)(2), their observations, as well as their methodology and analysis of the evidence with respect to the Y-STR testing results, remain instructive and pertinent herein.

In the Ninth District Court's analysis and conclusion section of that decision, it determined that "while the results of the post-1998 DNA testing appear at first glance to prove Prade's innocence, the results, when viewed critically and taken to their logical end, only serve to generate more questions than answers." *Prade*, 2014-Ohio-l035, ¶112. The Court went on to state:

> Without a doubt, Prade was excluded as a contributor of the DNA that was found in the bite mark section of Margo's lab coat. The DNA testing, however, produced exceedingly odd results. Of the testing performed on the bite mark section, one sample (19.A.1) produced a single partial male profile, another sample (19.A.2) produced at least two partial male profiles, and a third sample (111.1) failed to produce any male profile. All of the foregoing samples were taken from within the bite mark, some directly next to each other, but each sample produced completely different results. Meanwhile, the testing performed on four other

areas of the lab coat also failed to produce any male profiles.

There was a great deal of testimony at the PCR hearing that epithelial cells from the mouth are generally plentiful. Indeed, Dr. Maddox testified that buccal swabs from the mouth are the preferred method for obtaining DNA standards from people due to the high content of cells in the mouth and that, because a buccal swab typically contains millions of cells, it is usually necessary for BCI to either take a smaller cutting or to dilute a sample so that its testing equipment can handle the amount of DNA that is being inputted for testing. Dr. Benzinger testified that the ideal amount of cells for DNA testing is about 150 cells and that the threshold amount for testing is about four cells. There is no dispute that the testing that occurred here was at or near the threshold amount. Specifically, Dr. Benzinger testified that 19.A.1 only contained about three to five cells and 19.A.2 only contained about ten cells. Thus, despite the fact that there are usually millions of cells present when the source of DNA is a person's mouth, the largest amount of DNA located here was ten cells. Moreover, those ten cells were not from the same contributor.

When DDC tested 19.A.2, it discovered at least two partial male profiles. More importantly, the major profile that had emerged when DDC tested 19.A.1, was different than the major profile that emerged when DDC tested 19.A.2. While the results from 19.A.1 showed a 15 allele at the DYS437 locus, the results from

19.A.2 showed a 14 allele at the DYS437 locus, with the 15 shifting to a minor allele position that fell below DDC's reporting threshold. Thus, in addition to the fact that two different partial profiles emerged in DDC's tests, the major profile that emerged was not consistent. It cannot be said, therefore, that even though multiple profiles were uncovered, there was one consistent, stronger profile that emerged as the profile of the biter.

The inconsistency in the major profile in DDC's tests calls into question several of the conclusions that Prade's DNA experts made. For instance, Dr. Heinig stated:

> [B]ased on everything that I've testified [to], I believe that the major DNA that we obtained from [19.A.2] is very likely from the saliva, and that if there is contamination the minor alleles, for instance, could be from contact from another individual or more than one individual * * *.

Because the minor allele in 19.A.2 was the major allele in 19.A.1, however, it is difficult to understand how Dr. Heinig could distinguish between the two and rely on one as "the major DNA" while attributing the other to contamination. Similarly, Dr. Staub testified that he felt "that the biting activity should leave a lot more cellular material than touch would; and, therefore, if they're getting any result, now certainly some of that should be from the biting event." Yet, DDC did not find "a lot more cellular

material" from one profile. Instead, it uncovered *inconsistent major profiles within an extremely low amount of DNA cells*.

Another significant reality about the bite mark section of Margo's lab coat is that amylase testing resulted in a negative test result. Even back in 1998, therefore, it was determined that *no amylase* (*saliva*) *was present on the bite mark section*. That fact rebuts any assertion that there was a "slobbering killer." It also undercuts the assumption made by both the defense witnesses and the trial court that there had to be DNA from the biter on the lab coat due to the large amount of DNA in saliva. Quite simply, there was never a shred of evidence in this case that the killer actually deposited saliva on the lab coat. Even back in 1998, Dr. Callaghan testified that "if someone bites someone else or that fabric, they *may have left* DNA there. It can be of such a low level that it's not detected. *Or they may have left no DNA there*" (Emphasis added.) The only enzyme test conducted to determine whether saliva was present, the amylase test, was negative. And while the preliminary test showed probable amylase activity, Dr. Benzinger specified: "[i]f the confirmatory test is negative, then your results are negative."

Although the trial court rejected the State's contamination theories as "highly speculative and implausible," the results of the DNA testing speak for themselves. The fact of the matter is that, while it is indisputable that there was only one killer, at least two partial male profiles were uncovered within the bite mark. Even Dr. Heinig

admitted that, for that to have occurred, there had to have been either contamination or transfer. And, while the lab coat itself was not contaminated, as evidenced by the negative results obtained on the four other locations cut from the coat, the inescapable fact, once again, is that the bite mark section itself produced more than one partial male profile. Whatever the explanation for how more than one profile came to be there, the fact of the matter is that the profiles are there.

Both the defense experts and the trial court concluded that the only logical explanation for the low amount of DNA found in the bite mark section was that a substantial amount of the biter's DNA was lost due to the various testing that occurred over the years and/or the DNA simply degraded with time. Dr. Straub, in particular, deemed it "somewhat far-fetched and illogical" to suggest that all of the partial profiles DDC discovered came from people other than the biter. To conclude that one of the partial profiles DDC discovered belonged to the biter, however, one also must employ tenuous logic. That is because the three to five cells from 19.A.1 uncovered one major profile, and the ten cells from 19.A.2 uncovered a different major profile and at least one minor profile. The total amount of cells for each major profile, therefore, had to be very close in number. For one of those major profiles to have been the biter, that DNA would have had to either degrade at exactly the right pace or have been removed in exactly the right amount to make it mirror the

transfer/contamination DNA attributable to the other partial profile(s) DDC found. It is no more illogical to conclude that all the partial profiles DDC discovered were from transfer/contamination DNA, than it is to conclude that degradation or cellular loss occurred to such a perfect degree. The former conclusion also comports with both Drs. Maddox and Benzinger's opinion that "[t]he presence of multiple low-level sources of DNA is most easily explained by incidental transfer."

As previously noted, there is no dispute that Trade was definitively excluded as the source of the partial male profiles that DNA testing uncovered. The problem is, if none of the partial male profiles came from the biter, that exclusion is meaningless. Having conducted a thorough review of the DNA results and the testimony interpreting those results, this Court cannot say with any degree of confidence that some of the DNA from the bite mark section belongs to Margo's killer. Likewise, we cannot say with absolute certainty that it does not. For almost 15 years, the bite mark section of Margo's lab coat has been preserved and has endured exhaustive sampling and testing in the hopes of discovering the true identity of Margo's killer. The only absolute conclusion that can be drawn from the DNA results, however, is that their true meaning will never be known. A definitive exclusion result has been obtained, but its worth is wholly questionable. Moreover, that exclusion result must be taken in context with all of the other

> "available admissible evidence" related to this case. R.C. 2953.21(A)(1)(b); R.C. 2953.23(A)(2).

Prade, 2014-Ohio-1035, ¶113–120 (emphasis therein).

Thus, this Court concludes that the Y-STR DNA results are not material to the issues since there is not a strong probability that had the two partial male Y-STR DNA profiles been disclosed or available at trial the result of the trial would have been different. While the Y-STR DNA results are not cumulative as to the discovery of the two male partial DNA profiles, the results are cumulative as to the exclusion of the Defendant as a contributor to either of the partial profiles. In fact, the jury heard expert testimony at trial that DNA from an unknown third person was found on the bite mark of the lab coat and the jury still found the Defendant guilty of aggravated murder. The Defendant has failed to introduce any new evidence that the jury had tot already considered during the 1998 trial.

OVERWHELMING "OTHER CIRCUMSTANTIAL EVIDENCE"

Finally, when analyzing the overwhelming other circumstantial evidence in this case, this Court is firmly convinced that when considering the Defendant's alleged motive, i.e. his financial problems, the impending divorce, his jealousy as evidenced by the taped conversations of Dr. Prade, as well as testimonial statements from Dr. Prade's acquaintances, the Defendant has failed to meet his burden of proving a strong probability exists that the eyewitness expert opinions, bite mark expert opinions and the Y-STR DNA test results would change the

result if a new trial is granted. As succinctly stated by the Ninth District Court of Appeals:

> "The amount of circumstantial evidence that the State presented at trial in support of Prade's guilt was overwhelming. The picture painted by that evidence was one of an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the house, found happiness with another man, and threatened his dwindling finances. The evidence, while all circumstantial in nature, came from numerous, independent sources and provided answers for both the means and the motive for the murder."

Prade, 2014-Ohio-l035, ¶21.

CONCLUSION

In conclusion, the Defendant has failed to demonstrate that the alleged new bite mark an eyewitness evidence establishes a strong probability that it would change the result (verdict) had to been available and/or presented at trial. From a review of the 2012 testimony "...each of the defense's experts had critical things to say about the experts and eyewitnesses who testified at trial." *Prade*, 2014-Ohio1035, ¶128.[4] Therefore, this testimony is cumulative of the other testimony presented during the 1998 trial and, if introduced at a new trial, would

[4] The Court further noted that witness and expert credibility determinations and the weight to afford those determinations fall within the province of the jury as they are in the best position to weigh said issues. *Prade*, 2014-Ohio-1035, ¶112 & 128.

merely impeach or contradict the evidence presented at the original trial. Furthermore, in considering all of the other evidence presented during the 1998 trial, this Court finds that the bite mark evidence was not the sole basis for the jury's guilty verdicts. Therefore, the Defendant has failed to demonstrate a strong probability that the introduction of any "new" expert testimony regarding the bite mark and eye witness evidence would change the result (verdict) if a new trial was granted.

After analyzing the DNA evidence presented at the original criminal trial in 1998, this Court concludes the Defendant was excluded as the source of the DNA that was found on the three cuttings from the bite mark section of the lab coat.

In analyzing the Y-STR test results post-trial, the bite mark area of the lab coat was the most focused on portion of the lab coat from the time of Margo Prade's death until 2012. The fact that the only male DNA found on the lab coat was near the bite mark and not anywhere else in the lab coat demonstrates that neither of the two partial male DNA profiles are that of the killer but more likely the product of incidental transfer and/or contamination, rendering those profiles meaningless.

In considering the significance of the above mentioned Y-STR DNA evidence, and strong probability that the existence of two partial male profiles is from incidental transfer and/or contamination in conjunction with the enormity of the remaining circumstantial evidence presented at the 1998 trial, this Court finds the Defendant has failed to demonstrate a strong probability that the introduction

of the Y-STR DNA test results would change the result (verdict) if a new trial was granted.

Based on the foregoing, the Defendant's Motion for New Trial is not well taken and is denied on all grounds.

IT SO ORDERED,

JUDGE CHRISTINE CROCE

cc: Attorney David Alden
Attorney Mark Godsey
Assistant Prosecutor Brad Gessner
Assistant Prosecutor Richard Kasay

APPENDIX E

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO	)	
	)ss:	
COUNTY OF SUMMIT	)	
	)	
STATE OF OHIO,	)	
Appellee,	)	C.A. No. 27323
v.	)	
DOUGLAS PRADE,	)	JOURNAL ENTRY
Appellant.	)	

The State of Ohio has moved this Court for leave to appeal the trial court's January 29, 2013, order which conditionally granted Douglas Prade's motion for new trial. Mr. Prade has responded in opposition. This is the State's second attempted appeal of this order. This Court previously determined in C.A. No. 26814 that the order is conditional and, therefore, not final and appealable. This Court's determination is the law of the case with respect to this proceeding.

In its order, the trial court considered Mr. Prade's petition for postconviction relief and alternatively, his motion for new trial. The trial court granted the

petition for postconviction relief. In the decisional portion of the order, it also decided to grant his motion for new trial. However, at the conclusion of the entry where the trial court set forth the actual order of the court, it unequivocally granted the petition for postconviction relief and granted the motion for a new trial on a conditional basis as follows:

> Therefore, the Defendant's Petition for Post-conviction Relief for aggravated murder with a firearms specification is approved. In the alternative, should this Court's order granting post-conviction relief be overturned pursuant to appeal, then the Motion for New Trial is granted.

Given the above, the trial court essentially granted the motion for new trial in its decision but then did not enter a final order consistent with its decision. Instead, it conditioned its order upon the occurrence of a future event, namely, this Court's reversal of the trial court's granting of postconviction relief. Thus, the trial court did not actually enter a final order with respect to the motion for new trial.

It appears that the trial court may have taken this step because it recognized in its analysis of the new trial motion that its order granting the new trial could become moot if, on appeal, this Court affirmed its grant of the petition for postconviction relief. However, the trial court could have unconditionally granted the motion for new trial and, on appeal, assuming that the grant of postconviction relief was affirmed, that portion of the appeal contesting the propriety of granting the motion for a new trial would have been rendered moot.

As this Court previously determined, the trial court's conditional order is not sufficient to constitute a final judgment or order that the State may appeal pursuant to R.C. 2945.67. *See Goering v. Schille*, 1st Dist. No. C-110525, 2012-Ohio-3330. Thus, in order to make its decision to grant the motion for new trial a final order, the trial court must simply reenter its order granting the motion for new trial on an unconditional basis.

Accordingly, the motion for leave to appeal is denied. The appeal is dismissed. Costs are taxed to appellant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30, and to provide a certified copy of the order to the clerk of the trial court. The clerk of the trial court is ordered to provide a copy of this order to the judge who presided over the trial court action.

Judge

Concur:
Whitmore, J.
Moore, J.

APPENDIX F

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO **Plaintiff,** **v.** **DOUGLAS PRADE** **Defendant**	**Case No.:** **1998-02-0463** **Judge Judy Hunter** **ORDER ON DEFENDANT'S PETITION FOR POST-CONVICTION RELIEF OR MOTION FOR NEW TRIAL**

– – – – –

This matter comes before the Court on Defendant Douglas Prade's Petition for Post-conviction Relief, or alternatively, Motion for New Trial. The Court has reviewed the Petition/Motion; amicus curiae, response, reply, and post-hearing briefs; the extensive expert testimony and exhibits at hearing over the course of four days in October of 2012; this Court's September 23, 2010, Order granting the Defendants Application for Post-conviction DNA Testing; and applicable law.

FACTS AND PROCEDURAL HISTORY

On November 26, 1997, Dr. Margo Prade was fatally shot in the front seat of her van parked outside of her

medical office in Akron, Ohio. She died from multiple gunshot wounds to her chest. In February of 1998, her ex-husband, Akron Police Captain Douglas Prade, was indicted for aggravated murder, a firearms specification, wiretapping, and possession of criminal tools. Prade raised an alibi defense at trial. On September 24, 1998, then sitting Judge Mary Spicer sentenced Prade to life in prison after he was found guilty by jury of aggravated murder, among the other counts. Prade is currently incarcerated and has consistently maintained his innocence. On August 23, 2000, Defendant's conviction was affirmed on appeal. *State v. Prade* (2000), 139 Ohio App.3d 676. Later that year, the Ohio Supreme Court declined a discretionary review of his conviction. *State v. Prade* (2000), 90 Ohio St.3d 1490.

In 2004, Defendant filed his first Application for Post-conviction DNA Testing pursuant to a newly enacted Ohio DNA testing statute, R.C. 2953.71. On May 2, 2005, Judge Spicer denied his Motion, in part, finding that DNA testing had been done before trial that had excluded him as the source of the DNA samples taken from the victim. As such, the Court determined that Prade did not qualify for DNA testing because a prior definitive DNA test had previously been conducted. The Ninth District Court of Appeals dismissed his appeal of this denial as untimely. *State v. Prade* (June 15, 2005), 9th Dist. C.A. No. 22718. Defendant did not appeal this denial to the Ohio Supreme Court.

In 2008, Defendant filed his Second Application for Post-conviction DNA Testing based on the Ohio DNA testing statute, as amended in 2006. On June 2, 2008, Judge Spicer again denied his Application, finding

that he did not qualify because (1) prior definitive DNA testing had been conducted and (2) he failed to show that additional DNA testing would be outcome determinative. The Ninth District Court of Appeals affirmed this Court's decision. *State v. Prade,* 9th Dist. C.A. No. 24296, 2009 Ohio 704. *(Prade*, 9th Dist.). On May 4, 2010, the Ohio Supreme Court overturned both the trial Court and Court of Appeals, finding that new DNA methods have become available since 1998, and that, as such, the prior DNA test was not "definitive" within the meaning of R.C. 2953.74(A), i.e., new DNA testing methodology could detect information that could not have been detected by the prior DNA test. *State v. Prade,* 126 Ohio St.3d 27, 2010 Ohio 1842, syllabus number one. *(Prade*, S.Ct.) Based on initial DNA testing, the Ohio Supreme Court determined that Prade's exclusion was "meaningless": the 1998 testing methods have limitations because the victim's own DNA overwhelmed the killer's DNA. *Id.*, at ¶ 19. Upon remand, this Court determined that the results of new Y-STR DNA testing would have been outcome determinative at the underlying trial, pursuant to the current DNA testing statute.

Since the remand, the parties initially utilized the services of DNA Diagnostics Lab to test numerous items, including:

1. A piece of metal and swab from Dr. Prade's bracelet (DDC # 01.1 and 01.2),
2. Cutting from Dr. Prade's blouse (DDC # 02),
3. Bite mark swabs (DDC # 05, 22 and 23),
4. Swabs from Dr. Prade's right cheek (DDC # 06, 21, and 24),

5. Microscope slides and vial specimens (DDC # 07.1 – 10.11),
6. Saliva samples from Timothy Holsten (Dr. Prade's fiance) and Defendant (DDC # 13 and 14),
7. Three buttons from Dr. Prade's lab coat (DDC # 18),
8. Cuttings from the lab coat (DDC # 19 - 20),
9. Fingernail clippings from Dr. Prade (DDC # 25),
10. DNA extracts, blood tubes, and blood cards from Dr. Prade, the Defendant, and Timothy Holsten (DDC # 27 – 33, 37 and 38),
11. DNA extracts from LabCorp (the original DNA Testing facility from the underlying case) (DDC # 34, 35, and 39), and
12. Aluminum foil with DQA cards (DDC # 36).

At the State's request, BCI&I subsequently tested the following additional items:

1. A piece of metal from Dr. Prade's bracelet (BCI Item 102.1),
2. Three buttons from Dr. Prade's lab coat (BCI Items 105.1 – 105.3),
3. 10 fingernail clippings from Dr. Prade (BCI Items 106.1 – 106.10),
4. An additional cutting from the bite mark area from the lab coat (BCI Item 111.1),
5. Swabbing samples taken from the bite mark area (BCI Items 111.2 and 111.3),
6. Samples taken from outside of the bite mark area of the lab coat (BCI Items 114.1 – 114.4).

The DNA testing is now complete. The parties disagree about the meaning/outcome of the test results, particularly results concerning the cuttings from the bite mark area of the lab coat - DDC #19.A.1 and 19.A.2. The Court will address these test results and their meaning below.

PETITION FOR POST-CONVICTION RELIEF

Defendant seeks to have his conviction for aggravated murder vacated and to be released from prison pursuant to his Petition for Post-conviction Relief.[1] Under R.C. 2953.23(A), a petitioner may seek post-conviction relief under only two limited circumstances:

(1) The petitioner was either "unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief," or "the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation," and "[t]he petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted."

(2) The petitioner was convicted of a felony * * * and upon consideration of all available evidence related to the inmate's case * * *, the results of the DNA testing establish, *by clear and convincing*

[1] Defendant's convictions on six counts of interception of communications and one count of possession of criminal tools are not affected by either the Petition for Post-conviction Relief or Motion for New Trial as these convictions are not in any way related to the DNA evidence. Mr. Prade has now served the sentence imposed on these crimes.

evidence, actual innocence of that felony offense* * *." (Emphasis added.)

"Actual innocence" under R.C. 2953.21(A)(l)(b) "means that, had the results of the DNA testing * * * been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case * * * *no reasonable factfinder would have found the petitioner guilty of the offense* of which the petitioner was convicted * * *. (Emphasis added.)

Although R.C. 2953.71(L), the outcome-determinative test for granting an application for post-conviction DNA testing, and R.C. 2953.21(A)(l)(b), the actual innocence test for granting a petition for post-conviction relief, do resemble each other, they are not the same. *State v. King*, 8th Dist. No. 97683, 2012 Ohio 4398, P13. R.C. 2953.71(L) requires only a "strong probability" that no reasonable factfinder would have found the defendant guilty, while R.C. 2953.21(A)(l)(b) requires that "no reasonable factfinder would have found the defendant guilty, without exception." *Id.* Furthermore, the trial court's statements in its findings of fact and conclusions of law for a defendant's application for post-conviction DNA testing are not binding on the court's later determination regarding the petition for post-conviction relief. *Id.*

The Court will now address the Defendant's conviction for aggravated murder and the available admissible evidence, including the new Y-STR DNA evidence. The available evidence includes the evidence at the underlying trial. The law of the case applies with respect to subsequent proceedings, including hearings to determine whether the

defendant has proven actual innocence based upon the new Y-STR DNA test results.[2] *King*, at P16–17.

DNA EVIDENCE

In the underlying trial, a number of items were tested for DNA, including Dr. Prade's fingernail clippings, fabric from the sleeve of Dr. Prade's lab coat in the area surrounding the bite mark, and a broken bloodstained bracelet. *Prade* (S.Ct.), at P16. Of this evidence, the most significant was the fabric from the lab coat where the bite mark occurred because it contained "the best possible source of DNA evidence as to her [Dr. Prade] killer's identity." *Id.*, at Pl 7 (quoting Dr. Thomas Callaghan, the State's DNA testing expert). Dr. Callaghan tested several cuttings from the cloth from the lab coat, including one from the bite-mark area on the sleeve in the biceps area. *Id.*, at P18. Within the bite-mark area, he analyzed the cutting in three samples – the right side, the left side, and the center of the bite mark. *Id.* Dr. Callaghan testified that, if the biter's tongue came into contact with this area, some skin cells from the biter's lips or tongue may have been left on the fabric of the lab coat. *Id.* Ultimately, the Defendant was excluded as a contributor to the DNA that was typed in this case. *Id.*

Worth noting at the onset of this analysis is that the Defendant's exclusion in the underlying trial as a contributor to the DNA found on the bite mark or anywhere else on Dr. Prade's lab coat is "meaningless":

> "[T]he testing excluded defendant only in the sense that DNA *found* was not his, because it was

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[2] The law of the case is considered a rule of practice rather than a binding rule of substantive law. *King*, at P16.

> the victim's. But the "exclusion" excluded everyone other than the victim in that the victim's DNA overwhelmed the killer's DNA due to the limitations of the 1998 testing methods." *Prade,* at P20 (Emphasis therein.)

Testing is now complete on the above list of items, using Y-Chromosome Short Tandem Repeat Testing (Y-STR Testing), a testing procedure that was not available in 1998. Significantly, the Defendant has been excluded as the DNA contributor on all the tested items, including the samples from the bite-mark areas of the lab coat, by use of the Y-STR Testing method.

The Court heard four days of expert testimony relating to the meaning/outcome of the DNA test results and related issues. Defendant's experts were Dr. Julie Heinig, Assistant Laboratory Director for Forensics for DNA Diagnostic Center (DDC), and Dr. Richard Staub, Director for the Forensic Laboratory for Orchid Cellmark (until very recently). The State's experts were Dr. Lewis Maddox and Dr. Elizabeth Benzinger from the Ohio Bureau of Criminal Identification & Investigation (BCl&I). All are well qualified experts in their fields. The primary focus of the tests and testimony from these experts related to the bite-mark cuttings from the lab coat. The Court also has in its possession letters from Jim Slagle, Criminal Justice Section Chief for the Ohio Attorney General, and from Dr. Benzinger, each providing an independent review of the evidence relating the Defendant's request for post-conviction DNA testing.

For this Court's analysis, it is undisputed that (1) Dr. Prade's killer bit her on the left underarm hard

enough to leave a permanent impression on her skin through two layers of clothing; (2) her killer is highly likely to have left a substantial quantity of DNA on her lab coat over the bite mark when he bit Dr. Prade; (3) the recent testing identified male DNA on the lab coat bite-mark section; and (4) none of the male DNA found is the Defendant's DNA.

DDC performed the initial Y-STR testing of DNA extracts from a large cutting from the center of the bite-mark section of the lab coat (around where the FBI previously had taken two of the three cuttings from 1998), which became DDC 19.A.1; and from three additional cuttings within the bite-mark section of the lab coat that were then combined with the remaining extract from DDC 19.A.1 to make DDC 19.A.2. It is undisputed that (1) DDC's testing of 19.A.l identified a single, partial male DNA profile; (2) DDC's testing of 19.A.2 identified a mixture that included partial male profiles of a least two men; and (3) that both 19.A.1 and 19.A.2 conclusively excluded Defendant (and also Timothy Holston) from having contributed the DNA from these two samples. Also undisputed is that these DNA exclusions are not expressed in terms of probabilities; they are certainties – both Defendant and Timothy Holston are excluded as contributors to the partial DNA profiles obtained from the bite-mark area of the lab coat.

A second laboratory at BCI&I performed further Y-STR testing on additional material - one new cutting from the bite-mark section of the lab coat; swabs from the sides of the lab coat; cuttings from the right and left underarm, left sleeve, and back of the lab coat; buttons from the lab coat; fingernails clippings; and a piece of metal from the bracelet — all at the State's

request. It remains undisputed that the Defendant can be excluded as a source of the male DNA from all items tested from BCI&I.

The State argues that the DDC test results relating to the bite-mark section are meaningless due to contamination, transfer touch DNA, or analytical error. In support, the State asserts that the male DNA found on the bite mark section included extremely low levels of trace DNA, i.e. from 19.A.1 (3–5 cells) and 19.A.2 (approximately 10 cells), from possibly two up to five male persons, and that how or when that male DNA was deposited is unknown. As such, the State argues that the testing of the DNA bite-mark evidence provided at best inconclusive results that in no way bear on the Defendant's claims for exoneration. Defendant argues the opposite – that the more significant partial male profiles from 19.A.1 and 19.A.2 are more likely than not the DNA from Dr. Prade's killer. Each side provides expert opinion in support of its positions and against the opposing positions.

Upon review, the Court makes the following findings of fact relating to bite-mark evidence from the lab coat:

(1) Because saliva is a rich source of DNA material, while touch DNA is a weak source of DNA material, it is far more plausible that the male DNA found in the bite-mark section of the lab coat was contributed by the killer rather than by inadvertent contact;

(2) The Y-STR DNA testing of various areas of the lab coat other than the bite-mark section was expressly designed by the State to test for

contamination or for touch DNA and that testing failed to find any male DNA, thereby suggesting a low probability of contamination or touch DNA;

(3) The ways in which the State suggested that the bite-mark section of the lab coat could have been contaminated with stray male DNA are highly speculative and implausible;

(4) The small quantity of male DNA found on DDC 19.A.1 and 19.A.2 does not mean that the Y-STR profiles obtained from these samples are invalid or unreliable;

(5) Earlier testing and treatment of the bite-mark section of the lab coat by the FBI and SERI from 1998 explains the small quantity of male DNA remaining from the crime, and the simple passage of time causes DNA to degrade; and

(6) The Defendant has been conclusively excluded as the contributor of the male DNA on the bite mark section of the lab coat or anywhere else.

BITE MARK IDENTIFICATION EVIDENCE

As this Court previously found in its September 23, 2010 Order:

> Forty-three witnesses testified for the State at trial. Lay witnesses provided detail concerning the relationship between the decedent and the Defendant. Police officers testified concerning the results of their investigation. No weapon or fingerprints were found. Nobody witnessed the killing. *Bite mark evidence, however, provided the basis for the guilty verdict on the count for aggravated murder. State v. Prade*, 2010 Ohio 1842, ¶¶ 3 and 17. (emphasis added).

To obtain conviction on the murder charge at trial, the State focused on convincing the jury that Defendant Prade bit the victim so hard through two layers of clothing that he left an impression of his teeth on her skin. Such evidence was crucial because no other physical, non-circumstantial evidence existed to suggest Prade's guilt. In support of this theory, the State offered testimony from two dentists with training in forensic odontology, Dr. Marshall and Dr. Levine. In refutation, the Defense called Dr. Baum, a maxillofacial prosthodontist. The respective opinions of these three experts covered the spectrum. To sum up, Dr. Marshall believed the bite mark was made by Prade; Dr. Levine testified there was not enough to say one way or another; and Dr. Baum opined that such an act was a virtual impossibility for Prade due to his loose denture.[3]

Several explanations exist for the disparate opinions. First, the autopsy photographs depict a bite mark impression without clear edge definition. Obviously, the experts' interpretations of the observed patterns of the dental impression depended on the clarity and quality of the bite mark image. Further, the experts' opinions were not only based on differing methodologies but also were without reference to scientific studies to support the validity of the respective opinions. And this is to say nothing of

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[3] Marshall trial transcript, page 1406
Levine trial transcript, page 1219
Baum trial transcript, page 1641

> the potential for expert bias. Surely the jury struggled assigning greater weight to the testimony of these witnesses. (Order, pages 10 – 11).

While not nearly as dramatic as with DNA testing procedures, some advancement in protocol for bite-mark identification analysis has occurred since the trial. In fact, the Court has recently heard testimony from two new experts relating to the field of Forensic Odontology – Dr. Mary Bush for the Defendant and Dr. Franklin Wright for the State. Neither Dr. Bush nor Dr. Wright rendered an opinion on whether the Defendant's dental impression was or was not the source of the bite mark on Dr. Prade's lab coat or arm.

Dr. Bush, D.D.S., a tenured professor at the School of Dental Medicine, State University of New York at Buffalo, testified about the original scientific research that she, working with others, has published in peer-reviewed scientific journals concerning two general issues: namely, (1) the uniqueness of human dentition; and (2) the ability of that dentition, if unique, to transfer a unique pattern to human skin to maintain that uniqueness.

Dr. Wright, D.D.S., a practicing family dentist who is also a forensic odontologist, the past president of and a Diplomate in the American Board of Forensic Odontology (ABFO), and author of several literature reviews and scientific articles addressing dental photography, testified on behalf of the State.

In addition, excerpts from authorities on bite-mark identification analyses were admitted into evidence at these proceedings by stipulation of the parties, specifically excerpts from Paul Giannelli & Edward

Imwinkelreid, *Scientific Evidence* (4th ed. 2007) (Giannelli & Imwinkelreid) and from the National Academy of Sciences, *Strengthening Forensic Science In The United States, A Path Forward* (2009).

In 2007, Giannelli & Imwinkelreid stated that "the fundamental scientific basis for bitemark analysis ha[s] never been established." Similarly, the 2009 National Academy of Sciences (NAS) Report observed: "(1) The uniqueness of the human dentition has not been scientifically established. (2) The ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established. (i) The ability to analyze and interpret the scope or extent of distortion of bite mark patterns on human skin has not been demonstrated. (ii) The effect of distortion on different comparison techniques is not fully understood and therefore has not been quantified." According to the 2009 NAS Report: "Some research is warranted in order to identify the circumstances within which the methods of forensic odontology can provide the probative value."

As detailed below, Drs. Bush and Wright hold differing opinions regarding the scientific foundation for bite-mark identification evidence. Specifically, Dr. Bush's view is that the scientific basis for bite-mark identification has not been established and, further, that the existing scientific record shows that it likely cannot be, while Dr. Wright's view is that, although it admittedly is subjective and prone to evaluator error, bite-mark identification evidence can be useful adjunctive evidence in limited circumstances *(i.e.*, a closed population of 2 or 3 potential biters where the bite mark has individual characteristics and the

potential biters' dentitions are not similar), so long as the conclusions are appropriately qualified.

Dr. Bush testified that her original scientific research relating to bite-mark identification was, in general, exploring areas that the 2009 NAS Report identified as requiring research. She testified concerning the results of eleven studies that she (with others) has conducted concerning the issues identified in the 2009 NAS Report, all of which were published in peer-reviewed scientific journals. None of Dr. Bush's research detailed above was available at the time of Douglas Prade's 1998 trial. Dr. Bush testified that her research shows that human dentition, as reflected in bite marks, is not unique and that human dentition does not reliably transfer unique impressions to human skin through biting. In Dr. Bush's opinion, "these scientific studies raise deep concern over the use of bitemark evidence in legal proceedings."

Conversely, Dr. Wright expressed criticisms of and reservations about Dr. Bush's original scientific research. Dr. Wright testified that, in his view, Dr. Bush's practice of using stone dental models attached to vise grips and applying them to human cadavers, rather than living skin, does not accurately replicate how bite marks leave imprints on human skin during violent crimes. Dr. Wright's view is that it is impossible to meaningfully study bite marks as they occur in violent crimes in a rigorous, controlled, and scientific manner.

While the Court appreciates Dr. Bush's efforts to study the ability of human dentition to transfer unique patterns to human skin, the Court finds the premises

and methodology of her studies problematic. Rather, the Court agrees with Dr. Wright's view that it is impossible to study in controlled experiments the issues that the NAS Report says need more research. Nonetheless, both experts' opinions call into serious question the overall scientific basis for bite-mark identification testimony and, thus, the overall scientific basis for the bite-mark identification testimony given by Drs. Marshall and Levine in the 1998 trial.

Although the Court finds Dr. Wright to be an expert in the current field of bite-mark identification, Dr. Wright admitted at the hearing that in his view bite-mark inclusions or exclusions (1) are appropriately based on observation and experience, which necessarily entails subjectivity and a lack of reproducibility under controlled scientific conditions, and (2) are to be used in a very limited set of circumstances – closed populations of biters with significantly different dentitions. Furthermore, Dr. Wright was unable to reconcile the 2009 National Academy of Sciences (NAS) Report finding that unresolved scientific issues remain. These issues require more research before the basis for bite-mark identification can be scientifically established. Lastly, Dr. Wright's testimony raises serious questions about the reliability of the specific bite-mark opinions that Drs. Marshall and Levine offered in the 1998 trial, as they both provided opinions that are not consistent with the ABFO guidelines.[4]

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[4] Dr. Levine's opinion on bite mark evidence has been subsequently discredited in the case of *Burke v. Town of Walpole,* 405 F.3d 66 (1st Cir. 2005) where Dr. Levine's identification ofa

In light of the testimony from Drs. Bush and Wright, the bite-mark evidence in the 1998 trial, as in *State v. Gillispie*, "is now the subject of substantial criticism that would reasonably cause the fact-finder to reach a different conclusion," in that "the new research and studies cast serious doubt to a degree that was not able to be raised by the expert testimony presented at the original determination of guilt by the fact-finder." *State v. Gillispie,* 2d Dist. No. 22877, 2009-Ohio-3640, P150. Bottom line, forensic odontology is a field in flux, and the new evidence goes to the credibility and the weight of the State's experts' testimony at the underlying trial.

As previously stated in this Court's September 23, 2010 Order, "[u]pon hearing from a forensic analyst describing updated and reliable methodology used to determine that Douglas Prade was not a contributor to the biological material from skins cells (lip and tongue) found on the sleeve of Dr. Prade's lab coat, the jurors would reconsider the credibility of the respective bite mark experts' testimony." (Order, page 11). This statement remains true today.

EYEWITNESS EVIDENCE

In this Court's Order from September 23, 2010, the Court expressed some skepticism concerning the reliability of the testimony from the State's two key eyewitnesses – Mr. Robin Husk and Mr. Howard Brooks - who both purportedly placed the Defendant near the scene at around the time of the murder.

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defendant as the biting perpetrator in a criminal case was shown to be erroneous, based upon subsequent DNA testing.

Mr. Husk, who worked for the car dealership next to the crime scene, testified at trial that he saw the Defendant in Dr. Prade's office parking lot in the morning of the murder. However, Mr. Husk did not come forward with this information to the police until nine months after the murder and only after months of press coverage that featured the Defendant's photo. *Prade*, 9th Dist., at P4. Mr. Brooks, a patient of Dr. Prade's, testified that as he was standing at the edge of the parking lot and heard a car "peeling off." Brooks testified that the car that exited the parking lot contained a man with a mustache and wearing a Russian-type hat, and a big-chested passenger. Mr. Brooks did not identify the Defendant as the suspected killer until his third police interview. *Id.*

At hearing, Defendant presented the testimony of Dr. Charles Goodsell, an expert in the area of eyewitness memory and identification. Dr. Goodsell testified regarding the three stages of memory – encoding, storage, and retrieval; several factors that can affect memory; and the accuracy of eyewitness identifications.

Based upon his review of the two witnesses' testimony at trial, he determined that a number of factors could have had an adverse impact on the accuracy of Mr. Husk's and Mr. Brooks' identification of the Defendant. Dr. Goodsell testified that Mr. Husk's admittedly brief casual encounter at the dealership prior to the murder, and the significant delay in time between the encounter and his coming forward with the information to the police, all the while seeing the Defendant's image on television and in the newspapers, are factors that may have affected

the accuracy and/or altered Mr. Husk's memory of the man he saw.

Dr. Goodsell testified that he found Mr. Brooks' statements to be contradictory - he "didn't pay it [the encounter] no attention," yet was able to provide specific details of the people in the car that was "peeling off." Further, he was not able to identify the Defendant until his third police interview. Both factors could have adversely affected the accuracy of Mr. Brooks' memory of the driver.

Lastly, Dr. Goodsell testified that a person's confidence level can be unduly influenced by comments from the police or repeated exposure to the suspect's image in the media, thereby calling into question the accuracy of this testimony. The State counters that Dr. Goodsell did not consider the possible reasons for Mr. Husk's and Mr. Brooks' delay in coming forward to the police, including not wanting to get involved, and their certainty that the Defendant was the person they saw at Dr. Prade's office on the morning of the murder.

In its September 23, 2010 Order, this Court initially questioned the reliability and accuracy of Mr. Husk's and Mr. Brooks' testimony at trial with respect to seeing the Defendant at the murder scene. Dr. Goodsell' s testimony and affidavit with respect to memory and accuracy of witness identifications in general, and his opinion as to factors that could have a negative effect on the accuracy and/or memory of Mr. Husk's and Mr. Brooks' identification of the Defendant, support this Court's initial concerns. Based upon the Y-STR DNA test results, and after reviewing Dr. Goodsell' s testimony and affidavit, the

Court believes that a reasonable juror would now conclude that these two witnesses were mistaken in their identification of the Defendant.

OTHER CIRCUMSTANTIAL EVIDENCE

The State asserts that other circumstantial evidence from the trial remains admissible and relevant for this Court's determination whether Defendant has met his burden of proving actual innocence. The State points to evidence relating to the Defendant's alleged motive – his financial problems, the impending divorce, his jealousy as evidenced by the taped conversations of Dr. Prade – as well as testimonial statements from Dr. Prade's acquaintances.

To review, Brenda Weeks, a friend of Dr. Prade's, testified concerning her efforts to convince Margo to leave home with her daughters. Annalisa Williams, Dr. Prade's divorce attorney, recounted the Defendant's tone of voice and statements that he made about Margo, namely, calling her a "slut." Al Strong, a former boyfriend of Dr. Prade's, testified that Margo became very upset over a telephone call she received regarding the Defendant's daughters and his current girlfriend, and that Margo resolved to take more extreme action with regard to divorce proceedings. Timothy Holston, Dr. Prade's fiancé, testified that Margo became upset after receiving a phone call while they were away on a Las Vegas trip and learning that the Defendant had not only entered her house, but stayed with their daughters. Dr. Prade had recently changed the door locks to her house and installed a security system. Lastly, Joyce Foster, Dr. Prade's office manager, testified that Margo was afraid of the

Defendant. (State's Post hearing brief, pages 7 – 8, *State v. Prade* (2000), 139 Ohio App.3d. 676, 690 – 694). The Court notes that statements from two other individuals were admitted in error. *Prade*, 139 Ohio App.3d, supra at 694. The Court does not want to minimize the meaning of this evidence and testimony at trial. That said, this Court's experience is that friction, turmoil, and name calling are not uncommon during divorce proceedings.

The Court next considers evidence relating to the Defendant's alibi and the motive for murder. The State argues that Defendant provided a faulty alibi at trial. When the Defendant initially arrived on the scene of the murder at 11:09 a.m., having been paged by his girlfriend and fellow police officer Carla Smith and subsequently informed of the murder, officers on the scene interviewed him. *Prade*, 139 Ohio App.3d, at 698. The Defendant initially told the police officers that he had gone to the gym at his apartment complex to work out at 9:30 a.m. *Id.* At trial, he attempted to show as his alibi that he was working out at the time of the murder between 9:10 a.m. and 9:12 a.m. *Id.,* at 699. One alibi witness at trial confirmed seeing him in the workout room the morning of the murder but was unable to establish the specific time. *Id.* The other alibi witness denied ever seeing the Defendant in the workout room on any date. *Id.* Also, when the Defendant arrived at the scene he was very calm and appeared to have just stepped out of the shower, arguably not the appearance of someone who had left the gym and rushed to the crime scene. *Id.*, at 698. Lastly, both the interviewing officer and Dr. Prade's mother testified that the Defendant had a scratch on his chin the day of the murder. *Id.*

The State also argues that the Defendant's serious financial problems and debts were motives for the murder. A detective testified at trial that a bank deposit slip belonging to the Defendant was found during a search of financial documents allegedly hidden at his girlfriend's home. *Id.*, at 699. The deposit slip was dated October 8, 1997, a month and a half before the murder. *Id.* On the back of the slip was a list of handwritten calculations that tallied the approximate amounts the Defendant allegedly owed creditors in October, the sum of which was subtracted from $75,000, the amount of life insurance policy proceeds for Dr. Prade. *Id.* The Defendant was still listed as the beneficiary of the policy at that time. *Id.*

The Defendant counters twofold – first, that the amounts listed on the back of the deposit slip do not add up to the amounts owed in October of 1997, but rather, more accurately, add up to amounts owed in the months following the murder; and second, that other evidence casts doubt on the notion that the Defendant had money problems at that time.

Upon review, it is clear that the State presented evidence at trial that finds fault with the Defendant's, and that support's the Defendant's motive for murder – the life insurance policy. To what extent the jury was swayed by this circumstantial evidence this Court does not know. Suffice it to say that Ninth District discussed this evidence on appeal as part of sufficiency of the evidence assignment of error. *Prade*, 139 Ohio App.3d., at 698–699.

DEFENDANT'S BURDEN HEREIN

The Court will now address the two requirements that the Defendant must prove in order to obtain post-

conviction relief: the petition must be timely, and the Defendant must show by clear and convincing evidence that, upon consideration of all available evidence, including the results of the recent Y-STR DNA testing, he is actually innocent of the felony offense of aggravated murder.

The Ohio Supreme Court initially remanded this matter to this Court to determine whether new Y-STR DNA testing would have been outcome determinative at the underlying trial, pursuant to his Second Application for Post-conviction DNA Testing. The Defendant's Motion was granted within this Court's September 23, 2010 Order. The Y-STR test results are now back.

R.C. 2953.23(A) governs the timeliness of post-conviction petitions. It provides that a DNA-testing-based petition for post-conviction relief is timely when "the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense." Based upon this Court's determination below that the new DNA testing establishes by clear and convincing evidence his actual innocence of the felony offense of aggravated murder, the Defendant's Petition for Post-conviction Relief is timely.

This Court had previously determined that the evidence at trial (the bite-mark evidence, the primary basis for the guilty verdict, as opined to by State's trial experts Dr. Marshall and Dr. Levine; and the eyewitness testimony by Mr. Husk and Mr. Brooks) would be compromised should the DNA tests come back excluding the Defendant as the killer of Dr. Prade. This finding remains true today.

The parties presented expert testimony at hearing regarding the field of Forensic Odontology – Dr. Mary Bush for the Defendant and Dr. Franklin Wright for the State. As previously stated, neither Dr. Bush nor Dr. Wright rendered an opinion on whether the Defendant's dental impression was or was not the source of the bite mark on Dr. Prade's lab coat or arm. The Court does not find that Dr. Wright's opinions on the field of forensic odontology in any way bolster the State's case with respect to the opinions of Dr. Marshall or Dr. Levine in the underlying trial. Dr. Wright admitted at the hearing that in his view bite-mark inclusions or exclusions (1) are appropriately based on observation and experience, which necessarily entails subjectivity and a lack of reproducibility under controlled scientific conditions, and (2) are to be used in a very limited set of circumstances – closed populations of biters (obviously, not the situation in the matter) with significantly different dentitions.

The other circumstantial evidence remains tenuous at best when compared to the Y-STR DNA evidence excluding the Defendant as the contributor of the male DNA on the bite mark section of the lab coat or anywhere else. The accuracy of the two eyewitnesses' testimony at trial remains questionable. The remaining evidence – the testimony by friends and family of Dr. Prade's that she was in fear and/or mistreated by the Defendant, the arguably faulty alibi and the deposit slip — is entirely circumstantial and insufficient by itself to support inferences necessary to support a conviction for aggravated murder.

Lastly and most important, the Y-STR DNA test results undisputedly exclude the Defendant as the

contributor of the male DNA found in the bite-mark section of the lab coat or under Dr. Prade's fingernails. The State's new experts opined that the test results are meaningless due to contamination, transfer touch DNA, or analytical error. This Court is not convinced. The Court concludes that the more probable explanations for the low level of trace male DNA found on the bite-mark section of the lab coat are due to natural deterioration over the years, and to the testing of the saliva DNA from the bite-mark section of the lab coat back in 1998. The saliva from those areas was consumed by the testing procedure, and unfortunately, these areas cannot be retested at this time.

What are we left with now that the Defendant has been conclusively excluded as the male DNA contributor on Dr. Prade's lab coat and elsewhere? We have bite-mark identification testimony from Drs. Marshall and Levine that has been debunked; the eyewitness testimony of Mr. Husk and Mr. Brooks that is highly questionable; the testimony from Dr. Prade's acquaintances that Margo was afraid of the Defendant and that friction existed between the two pending their divorce; the arguably faulty alibi; and the controversy concerning the October 8, 1997, deposit slip as it relates to the Dr. Prade's life insurance policy.

The Court is not unsympathetic to the family members, friends, and community who want to see justice for Dr. Prade. However, the evidence that the Defendant presented in this case is clear and convincing. Based on the review of the conclusive Y-STR DNA test results and the evidence from the 1998 trial, the Court is firmly convinced that no reasonable juror would convict the Defendant for the crime of

aggravated murder with a firearm. The Court concludes as a matter of law that the Defendant is actually innocent of aggravated murder. As such, the Court overturns the Defendant's convictions for aggravated murder with a firearms specification, and he shall be discharged from prison forthwith. The Defendant's Petition for Post-conviction relief is granted.

MOTION FOR NEW TRIAL

Alternatively, Defendant seeks a new trial for aggravated murder. Under Rule 33 of the Ohio Rules of Civil Procedure, "[a] new trial may be granted on motion of the defendant...[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial." Crim.R. 33(A)(6).

"To warrant the granting of a motion for a new trial in a criminal case, based upon the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such that could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro* (1947), 148 Ohio St. 505, syllabus.

Evidence is "material" if the there is a "reasonable probability" that, had the evidence been disclosed or been available, the result of the trial would have been different. *State v. Roper*, 9th Dist. C.A. No. 22494, 2005 Ohio 4796, P22. "Reasonable probability" of a different trial result is demonstrated by showing that the

omission of new evidence would "undermine the confidence in the outcome of the trial." *Id.*

The State asserts that "probability" means something greater than 50% chance (citing a civil decision from the 10th Appellate District), and as such, the Court must side with the Defendant's expert testimony over the State's in order to grant the Motion for New Trial. (Post-hearing Brief, page 2). This Court notes two fold. First, neither Crim.R. 33 itself, nor any criminal case decisions interpreting Crim.R. 33, define "probability" as "over 50%." Second, the newly discovered evidence is not looked at in a vacuum – the Court must look at the new evidence in conjunction with evidence from the underlying trial in order to determine whether the new evidence would change the outcome of the trial.[5]

The State also asserts that Crim.R. 33 is not a substitute for R.C. 2953.21. Crim.R. 33 appears to exist independently from R.C. 2953.21. *State v. Lee*, 10th Dist. No. 05AP-229, 2005 Ohio 6374, P13; *State v.*

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[5] "While the granting of a new trial based on newly discovered evidence obviously involves consideration of newly discovered evidence, the requirement that there be a strong probability of a different result less obviously requires consideration of the evidence adduced at trial. In general, the stronger the evidence of guilt adduced at trial, the stronger the newly discovered evidence would have to be in order to produce a strong probability of a different result. Conversely, the weaker the evidence of guilt at trial, the less compelling the newly discovered evidence would have to be in order to produce a strong probability of a different result. In view of the beyond-a-reasonable- doubt burden of proof, newly discovered evidence need not conclusively establish a defendant's innocence in order to create a strong probability that a jury in a new trial would find reasonable doubt." *State v. Gillispie*, 2nd Dist. No. 24556, 2012 Ohio 1656, P35.

Georgekopoulos, 9th Dist. C.A. No. 21952, 2004 Ohio 5197; and *Roper*, at P14. R.C. 2953.21 is a collateral civil attack on a criminal judgment as "a means to reach constitutional issues that would otherwise be impossible to reach because the trial court record does not contain evidence supporting those issues." *Lee*, at ¶ 11. Under Crim.R. 33, a motion for new trial exists with or without constitutional claims. *Id.* at P13. Crim.R. 33 merely requires a determination that prejudicial error exists to support the motion - basically newly discovered evidence exists that could not with reasonable diligence have been discovered and produced at trial. *Id.*

The Court will now address the two requirements that the Defendant must prove in order for him to obtain a new trial – the Motion must be timely and the Defendant must show that the new evidence, here the DNA test results, in conjunction with the other evidence from the underlying trial, would show a strong probability or reasonably probability that the result of a new trial would be different, is material, not cumulative, and does not merely impeach or contradict the trial evidence. The State has stipulated to the timeliness of the Motion for New Trial. Needless to say the Y-STR DNA evidence and test results are newly discovered and could not have been ascertained at trial.

With respect to the substantive matter of the Motion, this Court has previously determined, bite-mark evidence aside, that the evidence of guilt at trial lacked strength – it was largely circumstantial and, of course, then-available DNA testing did not link the Defendant to the bite mark on Dr. Prade's lab coat, her bracelet, or fingernail scrapings. The Y-STR DNA test

results are now complete and, significantly, exclude the Defendant as the contributor of the DNA found on those items.

The Court's findings of fact as stated above relating to the Defendant's petition for post-conviction relief are also relevant for the Court's analysis with respect to the Defendant's Motion for New Trial and the, analysis is incorporated herein. Upon review, the Court concludes as a matter of law that the Defendant is entitled to a new trial under Crim.R. 33 for aggravated murder and the related firearms specification. The Y-STR DNA test results are material, not cumulative, and do not merely impeach or contradict the circumstantial evidence available in the underlying trial; rather, they exclude the Defendant as the contributor of the newly tested male DNA. Thus, a strong probability exists that had these new Y-STR DNA test results been available in the 1998 trial, that the trial results would have been different – the Defendant would not have been found guilty of aggravated murder.

This Court is cognizant that, should the Defendant's Petition for Post-conviction Relief be upheld on appeal, this Court's ruling on the Defendant's Motion for New Trial will be rendered moot. On the other hand, should this Court's ruling on the Defendant's Petition be overturned, then this Court's analysis and ruling on the Defendant's Motion will be pertinent.

CONCLUSION

At trial, jurors are instructed that they are the sole judges of the facts, the credibility of the witnesses, and the weight to be assigned to the testimony of each witness and the evidence. Introduction of additional

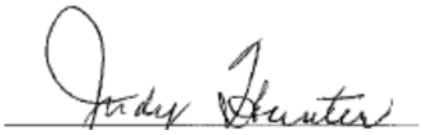
expert testimony indicates that new Y-STR DNA test results exclude Douglas Prade as a contributor to DNA collected from the lab coat at the area of the bite mark and other places. This new evidence necessarily requires a re-evaluation of the weight to be given to the evidence presented at trial. Jurors would be prompted to reconsider, as set forth above, the credibility of the key trial witnesses and the forcefulness of their testimony in the underlying trial, along with the other circumstantial evidence.

The Court finds that no reasonable juror, when carefully considering all available evidence in the underlying trial in light of the new Y-STR DNA exclusion evidence, would be firmly convinced that the Defendant Douglas Prade was guilty of aggravated murder with a firearm. Given such a scenario, the outcome of the deliberation on these offenses would be different – the verdict forms would be completed with a finding of not guilty.

Based primarily upon the test results excluding the Defendant Douglas Prade as the contributor of the Y-STR DNA in the area of the bite mark and elsewhere, the Court finds Defendant's Petition for Post-conviction Relief, and alternatively, his Motion for New Trial, both well taken. Therefore, the Defendant's Petition for Post-conviction Relief for aggravated murder with a firearms specification is approved. In the alternative, should this Court's order granting post-conviction relief be overturned pursuant to appeal, then the Motion for New Trial is granted.

This is a final and appealable under in accordance with R.C. 2953.23(B) and Crim.R. 33. There is no just reason for delay.

SO ORDERED.



JUDGE JUDY HUNTER

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APPENDIX G

THE CONSTITUTION OF THE UNITED STATES

* * *

Amendment XIV

Section 1. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation

therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

APPENDIX H

OHIO RULES OF CRIMINAL PROCEDURE

* * *

RULE 33. New Trial

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with

reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

(B) Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from

an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(C) Affidavits required. The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

(D) Procedure when new trial granted. When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted.

(E) Invalid grounds for new trial. No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(1) An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.

(2) A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;

(3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;

(4) A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;

(5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

(F) Motion for new trial not a condition for appellate review. A motion for a new trial is not a prerequisite to obtain appellate review.

* * *

APPENDIX I

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. DOUGLAS PRADE, Defendant-Appellant.	)	Supreme Court Case No. 2019-_____ On Appeal From The Summit County Court of Appeals Ninth Appellate District Court of Appeals Case No. 28193 Filed January 07, 2019

APPELLANT DOUGLAS PRADE'S MEMORANDUM IN SUPPORT OF JURISDICTION

* * *

THIS CASE PRESENTS ISSUES OF PUBLIC AND GREAT IMPORTANCE

This case presents two important issues relating to the seminal decision setting forth the requirements that criminal defendants in Ohio must satisfy when seeking a new trial based on newly discovered evidence—*State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. *First*, *Petro* established a daunting burden of proof—a "strong probability" that, in a new trial, the defendant would be acquitted. *Id*. A "strong probability" burden of proof is "one of clear and convincing evidence." *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 21 (8th Dist.). But the burden of proof set forth in *Petro* was *dictum* that, in turn, relied on *dictum* from *State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319 (1917). There, without analysis or comment, the court elevated the burden of proof from "probable" to a "strong probability." *Compare Gandolfo v. State*, 11 Ohio St. 114, 119 (1860). Today, no other U.S. jurisdiction—federal or state—applies a burden of proof in this context that is higher than a preponderance (*see* n.2 & n.3 *infra* at page 11). Thus, except in Ohio, defendants are granted a new trial when newly discovered evidence make it more likely than not that, in a new trial where a jury would hear all of the admissible evidence, there would be reasonable doubt. Ohio's elevated burden of proof is unfair, illogical, and a denial of fundamental fairness and Due Process.

Second, courts confronted with advances in forensic science showing that material opinions offered by trial experts are groundless or would be inadmissible have taken widely divergent approaches when assessing whether, under *Petro*, this type of new evidence is

merely cumulative of, impeaches, or contradicts evidence admitted at trial. The Second District found that a new trial may be warranted "where subsequent research and studies demonstrate that the expert testimony admitted at trial should not have been admitted or is now the subject of substantial criticism that would reasonably cause the fact-finder to reach a different conclusion." *State v. Gillispie*, 2d Dist. Montgomery No. 22877, 2009-Ohio-3640, ¶ 150. The courts below, however, dismissed post-trial advances in scientific knowledge that show that the State's key forensic expert opinions tying the bite mark on the victim's arm to Mr. Prade's teeth would be inadmissible today, characterizing them as "merely cumulative of the trial testimony or merely serv[ing] to impeach or contradict portions of it." *State v. Prade*, 2018-Ohio-3551, 107 N.E.3d 1268, ¶ 53 (9th Dist.) ("*Prade II*"); *see also* 3/11/16 Order at 10. Fundamental fairness and Due Process require that, when post-trial scientific advances prove trial experts' opinions to be false or inadmissible, those scientific advances are not merely cumulative, impeaching, or contradicting under *Petro* and, instead, may warrant a new trial.

Further, the court should accept jurisdiction here because these issues were central to the wrongful denial of former Akron Police Captain Prade's new trial motion. Both lower courts premised their rulings on the rigorous "strong probability" burden of proof. Moreover, Mr. Prade has presented compelling new evidence of his innocence; namely, (1) male DNA over the killer's bite mark from which Mr. Prade was definitively excluded and (2) new research and professional standards that bar the trial experts' bite

mark opinions tying Mr. Prade to the bite on Dr. Prade's arm—opinions without which the actual jurors said they would not have convicted. Thus, while the State's 1998 closing argued that the bite mark "[a]bsolutely" was Mr. Prade's and that "[b]ecause Douglas Prade did the biting, Douglas Prade did the killing" (TT 2302:7–17), the bite mark—the State's key physical evidence at trial—now points to innocence, not guilt.

The new evidence here convinced a judge that there is clear and convincing evidence that Mr. Prade is innocent. It prompted *The Plain Dealer*, the *Akron Beacon Journal*, and Dr. & Mr. Prade's children to call for a new trial.[1] "The people of Ohio and [Mr.] Prade are entitled to a fair trial . . . [t]hat still has not happened, and it should." *State ex rel. Prade v. Ninth Dist. Ct. App.*, 151 Ohio St.3d 252, 2017-Ohio-7651, 87 N.E.3d 1239, ¶¶ 31–33 (O'Neill, J., dissenting).

STATEMENT OF THE CASE AND FACTS

A. Dr. Prade's Murder And Mr. Prade's Trial And Conviction

On November 26, 1997, Dr. Margo Prade was fatally shot in her van outside her Akron medical

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[1] *The Plain Dealer* (Aug. 1, 2014) (https://www.cleveland.com/opinion/index.ssf/2014/08/douglas_prade_should_not_go_ba.html) (last visited Dec. 29, 2018); *Akron Beacon Journal* (Aug. 15, 2015) (available at https://www.ohio.com/akron/editorial/logic-of-a-new-trial-for-douglas-prade https://www.ohio.com/akron/editorial/logic-of-a-new-trial-for-douglas-prade) (last visited Dec. 29, 2018); *Akron Beacon Journal* (Jan. 4, 2016) (https://www.ohio.com/akron/news/top-stories-news/douglas-prade-s-daughters-stand-by-their-father-as-he-fights-for-new-trial-in-1997-murder-of-his-ex-wife-dr-margo-prade) (last visited Dec. 29, 2018).

offices. No one witnessed the murder. The gun was not found. But, during the struggle, Dr. Prade's killer bit her arm so hard that, through two layers of clothing—her lab coat and blouse—his teeth left a bite mark impression on her skin. (TT 1164:3–1165:8; 1211:10–17).

In February 1998, Dr. Prade's ex-husband, Akron Police Captain Douglas Prade, was charged with Dr. Prade's murder. At his September 1998 trial, much of the State's case focused on the Prades' difficult relationship before and after their April 1997 divorce. In terms of direct physical evidence, the State's DNA testing expert agreed that the small area of the lab coat over the killer's bite mark was "the best possible source of DNA evidence as to [Dr. Prade's] killer's identity." (TT 1125:13–22). A defense dental expert testified that the killer "probably slobbered all over" the lab coat over the bite mark. (TT 1629:5–10). This testimony was confirmed by both a positive test for amylase—an enzyme in saliva—and microscopic observation of human epithelial cells on the bite mark section of the lab coat. But, in 1998, DNA testing technology could not identify trace amounts of one person's DNA within large quantities of another person's DNA, and, here, Dr. Prade's lab coat was soaked with her blood, which meant that the 1998 DNA test results yielded no information about the killer.

"The key physical evidence at trial" was testimony from the State's two forensic dentists—odontologists—about "the bite mark that the killer made on Dr. Prade's arm through her lab coat and blouse." *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287, ¶ 3 ("*Prade I*"). One testified that the

killer's bite mark "was made by Captain Prade." (TT 1406:12–14). The other said the mark was "consistent with" Mr. Prade's teeth. (TT 1219:5–10). The State argued in closing that Mr. Prade "[a]bsolutely" made the bite mark and "[b]ecause Douglas Prade did the biting, Douglas Prade did the killing." (TT 2302:7–17). Jurors interviewed on television said they could not have convicted without the bite mark.

The State also offered testimony from two eye witnesses. One testified that he saw Mr. Prade near the murder scene before the murder, but admitted that, although he learned of the murder the day it occurred, he only came forward nine months later after months of press coverage that had featured Mr. Prade's picture. (TT 1263:4–1265:17; 1273:7–23; 1278:9–22). Another was in the parking lot as the killer's car "peel[ed] off" and, while he "didn't pay it no attention" and could not identify anyone when interviewed shortly after the murder, identified Mr. Prade months later. (TT 1058:24–1059:22; 1424:14–1426:1; 1791:6–1792:11). An alibi witness testified that Mr. Prade was exercising at about the time of the murder. (TT 1527:2–22). The jurors interviewed after the trial said they dismissed the eyewitnesses' testimony.

The jury convicted and, on direct appeal, the Ninth District affirmed, noting at length testimony from one of the State's forensic bite mark experts that purportedly "established that the bite mark . . . was made by defendant" in its findings on the weight and sufficiency of the evidence. *State v. Prade*, 139 Ohio App.3d 676, 699–700, 745 N.E.2d 475 (9th Dist. 2000).

B. Post-Trial Advances In Forensic Science

There have been two major advances in forensic science that are relevant here. First, the DNA testing method that yielded only meaningless results at the time of Mr. Prade's 1998 trial has been replaced by Y-chromosome STR or "Y-STR" testing, which has an "unparalleled ability . . . to exonerate the wrongly convicted." *Maryland v. King*, 569 U.S. 435, 442, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013) (citation omitted). Y-STR DNA testing technology detects only the male Y-chromosome and, thus, can provide information about male DNA within large quantities of female DNA, such as the male DNA on Dr. Prade's lab coat over her killer's bite mark.

Second, odontology—the "science" underlying the State's experts' opinions tying Mr. Prade to Dr. Prade's killer's bite mark—has been proven to be highly unreliable at matching biters to bite marks on skin, and the scope of permissible bite mark identification opinions has been dramatically narrowed. The National Academies of Science concluded in 2009 for the first time that a basis for bite mark identification "has not been scientifically established." NAS, *Strengthening Forensic Science in the United States: A Path Forward*, at 175 (2009). Specifically, odontology's scientific premises—that (1) dentition is unique and (2) human skin records dental impressions with enough sensitivity to be accurately matched to an individual—are "not supported by foundational research" and "the only rigorous studies are recent—and undercut the technique's validity." Paul Giannelli, "*Forensic Science: Daubert's Failure*," 68 Case W. Res. L. Rev. 869, 878 (2018) (footnotes omitted). Texas imposed a

moratorium on bite mark evidence in 2016. *See id*. at 880–81. A study of experts certified by the American Board of Forensic Odontology ("ABFO")—the only accrediting entity in the field—found that their bite mark opinions did not agree with one another over 95% of the time. (10/15/15 Iain Pretty Aff. at ¶ 13 (hereafter "Pretty Aff.") (Ex. A to Def s Mot. to Supp. Record (filed 10/26/15)). Significantly, ABFO's guidelines now bar the bite mark opinions presented at Mr. Prade's 1998 trial. (*Id*. at ¶ 23). Indeed, they "prohibit[] individualization testimony entirely." *Ex parte Chaney*, No. WR-84, 091-01, 2018 Tex. Crim. App. LEXIS 1243, at *32 (Dec. 19, 2018).

C. Newly Discovered Evidence In Mr. Prade's Case And The Rulings Below

On February 5, 2008, Mr. Prade filed an application for new DNA testing under R.C. 2953.72. The trial court denied the application because the 1998 DNA testing over the killer's bite mark purportedly was a "prior definitive DNA test" that barred new DNA testing under R.C. 2953.74(A). The court of appeals affirmed, but this court reversed because the DNA test results using outdated methods were "meaningless" and did not bar new testing that might "provide new information that [previously] was not able to be detected." *Prade I*, 2010-Ohio-1842, ¶¶ 19, 23. This court remanded for a determination of whether "new DNA testing would be outcome-determinative" under R.C. 2953.74(B)(2). *Id*. at ¶ 28.

On remand, Common Pleas Judge Judy Hunter found that new DNA test results could be "outcome determinative" and directed that new DNA testing should go forward. DNA Diagnostics Center then

tested samples from a small cutting from Dr. Prade's lab coat over the killer's bite mark that had been excised by the FBI's forensic laboratory in early 1998 and then stored in an evidence envelope. A sample from the center of the bite mark revealed a single, partial male DNA profile from which Mr. Prade was definitively excluded. Another sample consisting of the remaining extract from the first sample and extract from three other areas within the bite mark showed two partial male DNA profiles from which, again, Mr. Prade was definitively excluded. At the State's request, Judge Hunter then directed Ohio BCI&I to test samples from the lab coat outside the killer's bite mark to determine if the lab coat was contaminated with stray male DNA. Ohio BCI&I found no traces of stray, contaminating DNA.

On June 29, 2012, Mr. Prade filed a petition for postconviction relief or, in the alternative, a motion for a new trial. In a November 2012 evidentiary hearing before Judge Hunter, two defense DNA experts testified that Dr. Prade's killer is the most likely source of the newly discovered male DNA over the bite mark, which would mean that Mr. Prade is innocent. The State's DNA experts testified that, although the newly discovered male DNA may be the killer's, which would mean that Mr. Prade is innocent, they thought it was better explained as contamination. A defense dental expert testified that her then-recent, peer-reviewed scientific articles demonstrate that bite mark identification lacks a scientific basis, and a forensic odontologist called by the State testified that, while bite mark identification can be useful in some circumstances, then-current professional standards would not permit either of the bite mark identification

opinions given at Mr. Prade's trial. In a January 29, 2013, order, Judge Hunter found the State's circumstantial evidence at trial—evidence the actual jurors said they largely dismissed—to be "tenuous at best when compared to the Y-STR DNA evidence." (1/29/13 Order at 20). She concluded that the newly discovered evidence clearly and convincingly showed that Mr. Prade is actually innocent (the "Exoneration Order") and, as alternative relief, granted Mr. Prade's motion for a new trial. (*Id*. at 21, 25). He was released from prison that day.

The State appealed the Exoneration Order, and the Ninth District (1) rejected the defense DNA experts' opinions that the killer was a likely source of the male DNA found over his bite mark; (2) excused the admission of the now-inadmissible bite mark identification evidence because the jury was "presented with the entire spectrum of opinions;" (3) weighed the circumstantial evidence and, unlike the actual jurors and Judge Hunter, found it compelling; and (4) reversed. *State v. Prade*, 2014-Ohio-1035, 9 N.E.3d 1072, ¶¶ 18, 112, 121, 129, 130 (9th Dist.), *rev. denied*, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229. After over 17 months of freedom, Mr. Prade was reincarcerated. The State then appealed Judge Hunter's new trial order, but the Ninth District dismissed the appeal *sua sponte* because, although there was no contingency, the order purportedly was conditional. *State v. Prade*, 9th Dist. Summit No. 27323, 8/14/14 J.E. at 2, *rev. denied*, 142 Ohio St.3d 1449, 2015-Ohio-1591, 29 N.E.3d 1004.

Judge Hunter retired and was succeeded by Judge Christine Croce who, after Judge Hunter's Exoneration Order was reversed and her new trial

order was deemed non-final, reconsidered the new trial motion. In an October 2015 hearing, the four DNA experts who testified before Judge Hunter provided the same opinions they previously had provided. Further, and contrary to the Ninth District's finding in the exoneration appeal that "there was never a shred of evidence . . . that the killer actually deposited saliva on the lab coat," 2014-Ohio-1035, ¶ 117, they agreed that, in 1998 testing of the lab coat over the bite mark, both the enzyme in saliva and human epithelial cells were identified. Judge Croce also considered the bite mark testimony from the November 2012 hearing and an affidavit from an odontologist, Dr. Iain Pretty, describing his recent bite mark research and explaining that, today, ABFO guidelines do not permit the bite mark opinions offered at Mr. Prade's 1998 trial. (Pretty Aff. at ¶¶ 13, 23).

In a March 11, 2016, order, Judge Croce, applying a "strong probability" burden of proof (at 3,4, 9, 16, 17, 18) over objection, denied the new trial motion that Judge Hunter had granted. (*Id*. at 18). She found that the new DNA test results excluding Mr. Prade from male DNA found over the killer's bite mark were "the same exclusion as in the 1998 criminal trial" and that the fact that the DNA testing elsewhere on the lab coat was negative somehow showed that the male DNA over the bite mark was mere contamination. (*Id*. at 12, 18). Ignoring the request that she analyze the admissibility of the trial bite mark opinions in light of the new scientific understanding and professional standards, she determined that the "sea of changing opinions in the science of bite mark identification" was

"merely additional criticism[] and/or impeachment of the testimony presented at trial." (*Id*. at 10).

In a September 5, 2018, decision and journal entry and a November 26, 2018, ruling denying a motion for reconsideration, the Ninth District affirmed. *Prade II*, 2018-Ohio-3551, ¶ 1; 11/26/18 J.E. As to the new DNA evidence, the Ninth District emphasized the burden of proof, observing that "Mr. Prade has not shown that there is a *strong probability* the new results would lead to a different outcome if introduced at a new trial." 2018-Ohio-3551, at ¶ 41 (emphasis in original); *id*. at ¶ 44 (same). As to the new research showing that the trial bite mark opinions have no scientific basis and the new bite mark guidelines that prohibit them, the court agreed with Judge Croce that they were the "merely cumulative of the trial testimony or merely served to impeach or contradict portions of it." *Id*. at ¶ 53.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

In 1947, this court outlined the requirements that newly discovered evidence must satisfy to warrant a new criminal trial in *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947):

> [I]t must be shown that the new evidence (1) discloses a *strong probability* that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not *merely cumulative* to former evidence, and (6) does not *merely impeach or contradict* the former evidence. (*State v. Lopa*, 96

> Ohio St. 410, 117 N.E. 319 (1917), approved and followed.)

Syllabus (emphasis added). The first issue here focuses on *Petro*'s first element—the "strong probability" burden of proof—while the second focuses on *Petro*'s, last two elements—when newly discovered evidence is "merely cumulative" or "merely impeach[es] or contradict[s]."

Proposition of Law No. 1: The burden of proof when a criminal defendant seeks a new trial based on newly discovered evidence under Crim.R. 33 should be a preponderance of the evidence, not a strong probability.

Under *Petro*, newly discovered evidence warrants a new trial only when it "discloses a *strong probability* that it will change the result if a new trial is granted." *Id*. (emphasis added). A "strong probability" burden of proof is "one of clear and convincing evidence." *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 21 (8th Dist.). As Justice Stewart observed when she sat on the Eighth District, it is "more than a preponderance of the evidence and less than beyond a reasonable doubt—in other words, functionally equivalent to the clear and convincing evidence standard." *State v. King*, 8th Dist. Cuyahoga No. 97683, 2012-Ohio-4398, ¶ 39 (Stewart, J., dissenting) (citations omitted). Courts use the "strong probability" and "clear and convincing" burdens interchangeably or together. *E.g.*, *State v. Anderson*, 10th Dist. Franklin No. 13AP-831, 2014-Ohio-1849, ¶ 16; *State v. Vinzant*, 2d Dist. Montgomery No. 22383, 2008-Ohio-4399, ¶ 9; *State v. Dejohn*, 8th Dist.

Cuyahoga No. 69297, 1996 Ohio App. LEXIS 2353, *18 (June 6, 1996).

But the burden of proof was neither at issue nor analyzed in *Petro*, and *Petro*'s listing of requirements for a new trial based on newly discovered evidence followed and approved *State v. Lopa*, 96 Ohio St. 410, 411, 117 N.E. 319 (1917). *Lopa*—another case where the burden of proof was neither at issue nor analyzed—asserted that it "has been frequently announced by this court" that, to grant a new trial based on newly discovered evidence, the trial court must find, among other things, "a strong probability that the newly discovered evidence will result in a different verdict." *Id.* *Lopa*, however, cited no authority for this proposition, which is not surprising because there was none. This court previously had applied a lower, "probable" burden of proof. *Gandolfo v. State*, 11 Ohio St. 114, 119 (1860). Thus, Ohio's "strong probability" burden of proof for granting a criminal defendant a new trial based on newly discovered evidence (1) rests on *dictum* in a decision issued shortly after World War II—*Petro*—(2) that relied on *dictum* in a decision issued during World War I—*Lopa*—(3) where, without comment or explanation, the court elevated the burden of proof from "probable" to a "strong probability."

Today, Ohio stands alone as the *only* U.S. jurisdiction that applies a burden of proof higher than a preponderance of the evidence to new trial motions based on newly discovered evidence in criminal cases. Federal courts uniformly apply a preponderance of the

evidence burden of proof.[2] Likewise, every other state applies a burden of proof in this context that equates to either a preponderance or a still-lower burden.[3]

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[2] *E.g.*, *United States v. Flores-Rivera*, 787 F.3d 1, 15 (1st Cir. 2015) (new evidence "will probably result in an acquittal upon retrial of the defendant") (quotation marks and citation omitted); *United States v. Chapman*, 851 F.3d 363, 381 (5th Cir. 2017) (same); *see generally*, 3 C.A. Wright *et al.*, *Fed. Prac. & P.: Crim.* § 584 (4th ed. Thomson Reuters 2018) (new evidence must be such that it "would probably produce an acquittal") (footnote omitted).

[3] Five states apply burdens lower than a preponderance—a reasonable probability, substantial possibility, or substantial risk of a different verdict. MA: *Commonwealth v. Moore*, 109 N.E.3d 484, 504 (Mass. 2018); MD: *Thompson v. State*, 985 A.2d 32, 43–44 (Md. Ct. App. 2009); MT: *State v. Clark*, 197 P.3d 977, 980 (Mont. 2008); OK: *Underwood v. State*, 252 P.3d 221, 254–5 (Okla. Crim. App. 2011); WI: *State v. McAllister*, 911 N.W.2d 77, 86 (Wis. 2018). All remaining states except Ohio apply a preponderance standard of proof—probable, probably, likely, ought to, or should have. AL: *Banks v. State*, 845 So. 2d 9, 16 (Ala. Crim. App. 2002); AK: *Hensel v. State*, 604 P.2d 222, 231 (Alaska 1979); AR: *Johnson v. State*, 515 S.W.3d 116, 118 (Ark. 2017); AZ: *State v. Valenzuela*, 426 P.3d 1176, 1193–94 (Ariz. 2018); CA: *People v. O'Malley*, 365 P.3d 790, 844 (Cal. 2016); CO: *Farrar v. People*, 208 P.3d 702, 707 (Colo. 2009); CT: *Asherman v. State*, 521 A.2d 578, 581 (Conn. 1987); DE: *Hicks v. State*, 913 A.2d 1189, 1194 (Del. 2006); FL: *Sweet v. State*, 248 So. 3d 1060, 1068 (Fla. 2018); GA: *Anthony v. State*, 807 S.E.2d 891, 896 (Ga. 2017); HI: *State v. Caraballo*, 615 P.2d 91, 93 (Haw. 1980); IA: *Moon v. State*, 911 N.W.2d 137, 151 (Iowa 2018); ID: *State v. Drapeau*, 551 P.2d 972, 978 (Idaho 1976); IL: *State v. Molstad*, 461 N.E.2d 398, 402 (Ill. 1984); IN: *Kubsch v. State*, 934 N.E.2d 1138, 1145 (Ind. 2010); KS: *Beauclair v. State*, 419 P.3d 1180, 1189 (Kan. 2018); KY: *Commonwealth v. Clark*, 528 S.W.3d 342, 344–45 (Ky. 2017); LA: *State v. McKinnies*, 171 So. 3d 861, 868 (La. 2014); ME: *State v. Twardus*, 72 A.3d 523, 531–32 (Me. 2013); MI: *People v. Grissom*, 821 N.W.2d 50, 63 (Mich. 2012); MN: *State v. Fort*, 768 N.W.2d 335, 344 (Minn. 2009); MO: *State v. Taylor*, 589 S.W.2d 302, 305 (Mo. 1979); MS: *Roach v. State*,

Thus, criminal defendants in Ohio state courts, unlike those in any other U.S. jurisdiction, are denied a new trial even when new evidence that could not have been discovered before trial makes it "likely," makes it "probable," or creates a "reasonable probability" that, in a new trial with a complete record including the new evidence, there would be reasonable doubt and they would be acquitted. That is a denial of fundamental fairness and Due Process because "[t]he near-uniform application of a [burden of proof] that is more protective of the defendant's rights than a . . . clear and convincing [standard] supports [the] conclusion that the heightened standard offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.'" *Cooper v. Oklahoma*, 517 U.S. 348, 362, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)

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116 So. 3d 126, 131 (Miss. 2013); NC: *State v. Rhodes*, 743 S.E.2d 37, 39 (N.C. 2013); ND: *Kovalevich v. State*, 915 N.W.2d 644, 646 (N.D. 2018); NE: *State v. Oldson*, 884 N.W.2d 10, 69 (Neb. 2016); NH: *State v. Breest*, 155 A.3d 541, 549 (N.H. 2017); NJ: *State v. Herrerra*, 48 A.3d 1009, 1030 (N.J. 2012); NM: *State v. Garcia*, 125 P.3d 638, 640 (N.M. 2005); NV: *Sanborn v. State*, 812 P.2d 1279, 1284-85 (Nev. 1991); NY: *State v. Marino*, 99 A.D.3d 726, 730, 951 N.Y.S.2d 740 (2012); OR: *State v. Arnold*, 879 P.2d 1272, 1276 (Ore. 1994); PA: *Commonwealth v. Pagan*, 950 A.2d 270, 292 (Pa. 2008); RI: *State v. Drew*, 79 A.3d 32, 38 (R.I. 2013); SC: *State v. Mercer*, 672 S.E.2d 556, 565 (S.C. 2009); SD: *State v. Corean*, 791 N.W.2d 44, 51 (S.D. 2010); TN: *State v. Nichols*, 877 S.W.2d 722, 737 (Tenn. 1994); TX: *State v. Arizmendi*, 519 S.W.3d 143, 148–49 (Tex. Crim. App. 2017); UT: *State v. Pinder*, 114 P.3d 551, 564 (Utah 2005); VA: *Avent v. Commonwealth*, 688 S.E.2d 244, 261 (Va. 2010); VT: *State v. Schreiner*, 944 A.2d 250, 257 (Vt. 2007); WA: *State v. Mullen*, 259 P.3d 158, 171 (Wash. 2011); WV: *State v. Daniel M.*, No. 17-0714, 2018 W. Va. LEXIS 759, *17 (Nov. 19, 2018); WY: *Lindstrom v. State*, 368 P.3d 896, 899 (Wyo. 2016).

(citation omitted); *see Schad v. Arizona*, 501 U.S. 624, 640, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (a "widely shared practice" is one of the "concrete indicators of what fundamental fairness and rationality require"). This court should align Ohio law with the law in every other U.S. jurisdiction.

Moreover, this court should accept jurisdiction because the burden of proof mattered in this case. It is undisputed that there was male DNA over the killer's bite mark that was not Mr. Prade's. Both lower courts relied on the rigorous "strong probability" burden of proof in denying Mr. Prade a new trial, with the Ninth District italicizing that burden for emphasis when explaining its affirmance of the lower court's rejection of the new DNA evidence. *Prade II*, 2018-Ohio-3551, ¶ 41 ("Mr. Prade has not shown that there is a *strong probability* the new results would lead to a different outcome if introduced at a new trial.") (Ninth District's emphasis); *see also id*. at ¶ 44; 3/11/16 Order at 3, 4, 9, 16, 17, 18.

Indeed, the new DNA and bite mark identification evidence here convinced Judge Hunter not only that Mr. Prade deserves a new trial, but that he is innocent. (1/29/13 Order at 25, *rev'd*, 2014-Ohio-1035, 9 N.E.3d 1072 (9th Dist.)). Three trial jurors said on national television that they would not have convicted without the now-inadmissible bite mark identification evidence. Editorials in *The Plain Dealer* and *Akron Beacon Journal* called for Mr. Prade to have a new trial, as have the Prades' children. (*See* n.l *supra* at page 2). And a member of this court had "no doubt that this case needs to go to a new jury" and observed that Mr. Prade is "entitled to a fair trial . . . [t]hat still has not happened, and it should." *State ex rel. Prade*

v. Ninth Dist. Ct. App., 151 Ohio St.3d 252, 2017-Ohio-7651, 87 N.E.3d 1239, ¶¶ 31–33 (O'Neill, J., dissenting).

Proposition of Law No. 2: New evidence of major post-trial scientific developments demonstrating that material forensic evidence admitted at trial lacks a scientific basis or would be prohibited by current professional standards should not be disqualified as "merely" cumulative, impeaching or contradicting evidence under *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus, and may warrant a new trial.

Ohio courts confronted with new trial motions based on new scientific evidence that severely undermines or requires the exclusion of material forensic trial evidence have taken divergent approaches when considering if that evidence is "merely" cumulative, impeaching, or contradictory under *Petro*. Mr. Prade submits that the correct approach is the one set forth in *State v. Gillispie*, 2d Dist. Montgomery No. 22877, 2009-Ohio-3640, ¶¶ 148–150. *Gillispie* noted that, of course, "expert testimony may not be considered newly discovered for purposes of a new trial motion simply because recent studies may lend more credibility to expert testimony that was or could have been presented at trial." *Id.* at ¶ 148. But *Gillispie* distinguished situations where, as here, new scientific evidence is "qualitatively different" and "subsequent research and studies demonstrate that the expert testimony admitted at trial should not have been admitted or is now the subject of substantial criticism that would reasonably cause the fact-finder to reach a different conclusion." *Id.* at ¶¶ 149, 150; *see State v.*

Hill, 11th Dist. Trumbull No. 2016-T-0099, 2018-Ohio-4800, ¶ 86 (trial court assumed "the validity of [the defendant's] bite mark evidence and proceeded on the assumption that his evidence would have precluded the admission of the State's evidence at trial"). And *Gillispie* also distinguished situations where, as here, "the results of subsequent research and studies demonstrate significant jumps in our knowledge or skills (*e.g.*, the improvements in DNA analysis), such that the new research and studies cast serious doubt to a degree that was not able to be raised by the expert testimony presented at the original determination of guilt by the fact-finder." 2009-Ohio-3640, ¶ 150.

Thus, under *Gillispie*, new evidence in the form of "subsequent research and studies demonstrat[ing] that the expert testimony admitted at trial should not have been admitted or is now the subject of substantial criticism" is not merely impeaching, cumulative, or contradictory under *Petro* (*id.* at ¶¶ 48, 150) and, instead, may require a new trial. This is consistent with approaches taken elsewhere, including in cases like this one involving no-longer-admissible and no-longer-accurate bite mark opinions. *E.g.*, *Ex parte Chaney*, No. WR-84, 091-01, 2018 Tex. Crim. App. LEXIS 1243, at *32 (Dec. 19, 2018) (overturning conviction based on bite mark evidence where current ABFO guidelines would bar trial bite mark opinions); *State v. Richards*, 371 P.3d 195 (Cal. 2016) (overturning conviction based on bite mark evidence where scientific advances showed that trial bite mark opinions were unreliable).

Here, although Mr. Prade asked them to apply *Gillispie*, the lower courts concluded that scientific

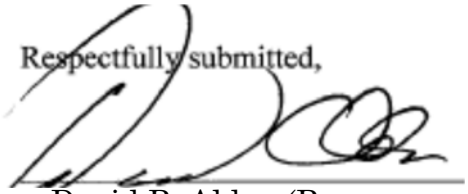
advances showing that bite mark identification has no scientific basis were the "same basic criticisms" presented at trial and, under *Petro*, were "merely cumulative of the trial testimony or merely served to impeach or contradict portions of it." *State v. Prade*, 9th Dist. Summit No. 28193, 2018-Ohio-3551, ¶ 53; 3/11/16 Order at 10. Importantly, they ignored the fact that, today, professional guidelines do not allow the opinions provided at trial that tied Mr. Prade to the killer's bite mark (Pretty Aff. at ¶ 23)—opinions the jurors said were central to the conviction. New evidence showing that important forensic evidence introduced at trial is scientifically unfounded or now would be inadmissible plainly is not merely cumulative, impeaching, or contradictory. And the issue is not limited to bite marks, as there have been similar, major advances in other forensic sciences. *E.g.*, *State v. Webb*, 12th Dist. Clermont No. CA2014-01-013, 2014-Ohio-2894, ¶¶ 45–50 (fire science); *State v. Johnson*, 8th Dist. Cuyahoga No. 93635, 2010-Ohio-4117, ¶¶ 30–31 (contamination science); *State v. Glover*, 8th Dist. Cuyahoga No. 93623, 2010-Ohio-4112, ¶ 26 (gun short residue science).

When, as here, post-trial scientific developments show that material trial expert testimony was unfounded (and, in that sense, false) or would be inadmissible under current professional standards, those developments are not merely impeaching, cumulative, or contradicting; instead, they warrant a new trial in appropriate circumstances. The court should endorse *Gillispie*'s framework for dealing with new trial motions based on major post-trial scientific advances.

CONCLUSION

The Court should accept jurisdiction.

January 7,2019



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APPENDIX J

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SUMMIT COUNTY, OHIO

2017OCT-4 AM10:13

Douglas Prade,	**Court of Appeals Case No. 28193**
Appellant,	**Appeal From The Summit County Court of Common Pleas**
v.	**The Honorable Christine Croce**
State of Ohio,	**Common Pleas Case No. CR 98 02 0463**
Appellee.	**ORAL ARGUMENT REQUESTED**

BRIEF OF APPELLANT DOUGLAS PRADE

* * *

IV. LAW AND ARGUMENT

A. Legal Standards.

A defendant seeking a new trial based on newly discovered evidence must show that new evidence "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. Although Captain Prade has met the "strong probability" standard, "reasonable probability" is the correct standard. *See State v. Siller*, 8th Dist. No. 90865, 2009-Ohio-2874, ¶ 45.

This Court reviews a ruling on a motion for a new trial for abuse of discretion. *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus. A trial court abuses its discretion when it (1) "d[oes] not engage in a 'sound reasoning process,'" *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34 (citations omitted); (2) ignores evidence, *Dietrich v. Dietrich*, 9th Dist. Summit No. 26919, 2014-Ohio-4782, ¶ 18; or (3) commits legal error. *Menke v. Menke*, 9th Dist. Summit No. 27330, 2015-Ohio-2507, ¶ 8.

* * *

APPENDIX K

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO, Plaintiff, v. DOUGLAS PRADE, Defendant.	))))))))	**2015DEC-7** **AM 9:52** Case No. CR 98 02-0463 Judge Christine Croce

DEFENDANT DOUGLAS PRADE'S
POST-HEARING BRIEF ON DNA EVIDENCE

* * *

II. GOVERNING LAW

A. Standard For Granting A New Trial

A Court may order a new trial "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial." Crim.R. 33(A)(6). "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence: (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus; *see also State v. Johnson*, 8th Dist. Cuyahoga No. 93635, 2010-Ohio 4117, ¶ 22 (same).

With respect to the second and third *Petro* requirements—both of which address the "newness" of the evidence—"'new evidence' is that which has been discovered since trial was held and could not in the exercise of due diligence have been discovered before that." State v. Lather, 6th Dist. Ottawa No. OT-03-041, 2004-Ohio-6312, ¶ 11 (citing *Petro*, 149 Ohio St. 505). Here, the State has stipulated that: "(a) the new DNA testing results . . . are 'newly discovered evidence' for purposes of Rule 33, (b) the defendant may file a motion for new trial under Rule 33 without first obtaining a Court order finding that the defendant was unavoidably prevented from filing a motion for a new trial within the time provided under the rule, (c)

any objections as to the timeliness of the motion for a new trial under Rule 33 are waived, and (d) the State will not object to the motion for a new trial as untimely under Rule 33." (DE-66 at 2 (7/2/12 Letter from Gates to Kovach)). Accordingly, the second and third *Petro* requirements are satisfied.

The first *Petro* requirement—the "strong probability" standard[1]—is the major focus here.[2] "In view of the beyond-a-reasonable-doubt burden of

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[1] As detailed below, the new evidence presented here easily satisfies the "strong probability" standard set forth in The Supreme Court of Ohio's 68-year-old decision in *Petro*. To the extent the Court finds that Mr. Prade has not satisfied *Petro*'s "strong probability" standard, however, Mr. Prade objects to that standard and submits that, for the reasons explained in *State v. Siller*, 8th Dist. Cuyahoga No. 90865, 2009-Ohio-2874, ¶ 49, the appropriate standard for a new trial under Crim.R. ¶ 33(A)(6) based on newly discovered evidence is whether the new evidence creates a reasonable probability of a different outcome or a probability that undermines confidence in the outcome of the trial. *See State v. Osie*, 140 Ohio St. 3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶¶ 153, 215 (showing a *Brady* violation requires "a '*reasonable probability*' that the result of the trial would have been different had the evidence been disclosed," which means "a probability sufficient to undermine confidence in the outcome"; showing ineffective assistance of counsel requires "a *reasonable probability* that but for counsel's errors, the proceeding's result would have been different" (italics added) (citations and internal quotation marks deleted)), *cert. denied*, 135 S. Ct. 1562 (2015).

[2] The fourth, fifth, and sixth *Petro* requirements—materiality, non-cumulativeness, and not impeaching former evidence—all are easily satisfied. Specifically, the new DNA evidence plainly is material if the defense experts' opinions about its source are credited, it is not cumulative of evidence previously presented (as no evidence of male DNA was presented at Mr. Prade's trial), and it does not merely impeach or contradict evidence previously presented.

proof, newly discovered evidence need not conclusively establish a defendant's innocence in order to create a strong probability that a jury in a new trial would find reasonable doubt." *State v. Gillispie*, 2012-Ohio-2942, 985 N.E. 2d 145, ¶ 35 (2d Dist.). Indeed, because a criminal conviction requires the jury to both (1) find guilt beyond reasonable doubt and (2) decide unanimously, "chang[ing] the result if a new trial is granted" means only that the new evidence "may have been just enough to create a reasonable doubt as to the [defendant's] guilt in the mind of at least one juror." *State v. Irwin*, 184 Ohio App. 3d 764, 2009-Ohio-5271, 922 N.E.2d 981, ¶ 191 (7th Dist.); *accord Gillispie*, 2012-Ohio-2942, ¶ 46; *State v. Burke*, 10th Dist. Franklin No. 06AP-686, 2007-Ohio-1810, ¶ 38 (new trial required where new evidence meant that "[a] reasonable juror could conclude the state[] . . . fail[ed] to demonstrate" an element of the crime); *State v. Elliott*, 7th Dist. Columbiana No. 01 CO 24, 2003-Ohio-1426, ¶ 44 (new trial required when new evidence "would create reasonable doubt").

* * *

APPENDIX L

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

State of Ohio	)	**2015JUN-5**
	)	
Plaintiff,	)	
	)	Case No. CR 98 02-0463
v.	)	
	)	Judge Christine Croce
Douglas Prade,	)	
	)	
Defendant.	)	

DEFENDANT DOUGLAS PRADE'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR POSTCONVICTION RELIEF AND, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL

* * *

II. ARGUMENT

MR. PRADE IS ENTITLED TO A NEW TRIAL

A. A New Trial Is Required When New Evidence May Create Reasonable Doubt In The Mind Of At Least One Juror.

A court should order a new trial based on newly discovered evidence when two conditions are satisfied. First, there must be "clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period." Crim.R. 33(B). Here, the new DNA and bite mark identification evidence could not have been discovered at the time of trial because they did not exist, and the State has stipulated that it is not contesting the timeliness of the new trial motion. (1/29/13 Order at 23; *see also* L. Gates Letter to M. Kovach & Acknowledgement (Ex. U to Defense Reply)).

Second, the new evidence must "disclose[ ] a strong probability that it will change the result if a new trial is granted."[1] *State v. Petro*, 148 Ohio St. 505, 76

[1] As detailed below, the new evidence presented here easily satisfies the "strong probability" standard set forth in The Supreme Court of Ohio's 68-year-old decision in *Petro*. To the extent that the Court finds that Mr. Prade has not satisfied *Petro*'s "strong probability" standard, however, Mr. Prade objects to that standard and submits that, for the reasons explained in *State v. Siller*, 8th Dist. Cuyahoga No. 90865, 2009-Ohio-2874, ¶ 49, the appropriate standard for a new trial under Crim.R. 33(A)(6) based on newly discovered evidence is whether the new evidence creates a reasonable probability of a different

N.E.2d 370 (1947), syllabus; *see also State v. Hawkins*, 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227 (1993) (same); *State v. Johnson*, 8th Dist. Cuyahoga No. 93635, 2010-Ohio 4117, ¶ 22 (same). Because a criminal conviction requires the jury to both (1) find guilt beyond reasonable doubt and (2) decide unanimously, "chang[ing] the result if a new trial is granted" means only that the new evidence "may have been just enough to create a reasonable doubt as to the [defendant's] guilt in the mind of at least one juror." *State v. Irwin*, 184 Ohio App. 3d 764, 2009-Ohio-5271, 922 N.E.2d 981, ¶ 191 (7th Dist.); *accord State v. Gillispie*, 2012-Ohio-2942, 985 N.E. 2d 145, ¶ 46 (2d Dist.); *State v. Burke*, 10th Dist. Franklin No. 06AP-686, 2007-Ohio-1810, ¶ 38 (new trial required where new evidence meant that "[a] reasonable juror could conclude the state[ ]. . . fail[ed] to demonstrate" an element of the crime); *State v. Elliott*, 7th Dist. Columbiana No. 01 CO 24, 2003-Ohio-1426, ¶ 44 (new trial required when new evidence "would create reasonable doubt"). "The issue . . . [i]s not whether the original jury verdict was correct. The issue [is] whether 'in light of all of the newly discovered evidence, considered cumulatively, . . . there is a

---

outcome or a probability that undermines confidence in the outcome of the trial. *See State v. Osie*, 140 Ohio St. 3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶¶ 153, 215 (showing a *Brady* violation requires "a '*reasonable probability*' that the result of the trial would have been different had the evidence been disclosed," which means "a probability sufficient to undermine confidence in the outcome;" showing of ineffective assistance of counsel requires "a *reasonable probability* that but for counsel's errors, the proceeding's result would have been different" (italics added) (citations and internal quotation marks deleted)), *cert. denied*, 135 S. Ct. 1562 (2015).

strong probability that a jury would have reasonable doubt of [the defendant's] guilt in a new trial at which the newly discovered evidence were presented.'" *Gillispie*, 2012-Ohio-2942, ¶ 46 (citations omitted).

* * *

D. <u>Should His Motion For New Trial Be Denied, Mr. Prade Objects and Reserves His Right To Assert Due Process Violations.</u>

"[H]abeas review is available to check violations of federal laws when the error qualifies as 'a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.'" *Reed v. Farley*, 512 U.S. 339, 348 (1994) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)); *see also* 28 U.S.C. § 2254 (setting forth standards). If his motion for a new trial is denied, Mr. Prade can show due process violations arising out of: (1) the new scientific evidence relating to bitemark identification that debunks the State's expert testimony at trial; and (2) the fundamental procedural defect that allowed the trial court's final verdict exonerating Mr. Prade to be appealed by the State and reversed by the Ninth District. In addition, Mr. Prade reserves his rights to assert due process violations based on the newly discovered evidence showing his actual innocence, or any other due process violations that may be identified in connection with these proceedings.

1. <u>If His Motion For New Trial Is Denied, Mr. Prade Would Be Able to Show A Due Process Violation Based On The New Scientific Evidence Relating To Bite Mark Identification That Debunks the State's Expert Testimony At Trial.</u>

The burden of showing a due process violation for federal habeas corpus purposes is met when new scientific evidence erodes the scientific pillars on which the verdict rests. *Lee v. Glunt*, 667 F.3d 397, 403 (3d Cir. 2012). The issue is whether the petitioner's "continued incarceration is unconstitutional because his convictions are predicated on what new scientific evidence has proven to be fundamentally unreliable expert testimony, in violation of due process." *Id.*

As discussed, the jury convicted because of expert testimony offered by the State that purported to match the bitemark on Dr. Prade's skin to Mr. Prade's teeth. Due to advances in the science of bitemark identification, the State's evidence has been debunked. Should the motion for new trial be denied, Mr. Prade can show a due process violation because he was convicted based on scientific evidence that is no longer valid.

2. <u>If His Motion For New Trial Is Denied, Mr. Prade Would Be Able to Show A Due Process Violation Based On The Fundamental Procedural Defect That Allowed The Final Verdict Acquitting Him To Be Appealed By The State And Reversed By The Ninth District.</u>

"Unless permitted by statute, the weight of authority in this country is against the right of the government to bring error in a criminal case." *State v. Simmons*, 49 Ohio St. 305, 307, 31 N.E. 34 (1892). The trial court's exoneration order was a non-appealable "final verdict" under R.C. 2945.67, and there is no other statute allowing the State to appeal it. Accordingly, it violated Mr. Prade's due process rights for the State to appeal (and for the Ninth District to exercise jurisdiction over and reverse) the trial court's final verdict of acquittal.

3. <u>If His Motion For New Trial Is Denied, Mr. Prade Would Be Able To Show A Due Process Violation Because He Will Be Unconstitutionally Deprived Of The Liberty Interest That Was Conferred When Judge Hunter Conditionally Granted The New Trial Motion.</u>

Judge Hunter already granted Mr. Prade's motion for a new trial in the event her exoneration order was overturned on appeal. For reasons demonstrated in connection with prior proceedings on the conditional new trial order, that order was valid under Ohio law. Further, the new trial order conferred a liberty interest to which Mr. Prade cannot be deprived without due process of law. Here, if the new trial

motion is denied, Ohio courts will have ignored their own laws and procedures to deprive Mr. Prade of his liberty interest, which would violate Mr. Prade's due process rights.

4. If His Motion For New Trial Is Denied, Mr. Prade Reserves The Right To Assert A Due Process Violation Based On The Newly Discovered Evidence That Shows His Actual Innocence, Or Any Other Due Process Violations That May Be Identified In Connection With These Proceedings.

Although "freestanding" claims of actual innocence presently are not recognized as an independent basis for federal habeas corpus review, "[w]hether such a federal right [to be released upon proof of actual innocence] exists is an open question." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 53 (2009) (citations omitted).

As Judge Hunter determined, the newly discovered evidence is compelling proof of Mr. Prade's actual innocence. In the event his new trial motion is denied, Mr. Prade asserts an actual innocence claim. Mr. Prade also reserves the right to assert other due process violations that may be identified in connection with these proceedings.

III. CONCLUSION

For the foregoing reasons, the Court should grant Mr. Prade a new trial.

* * *

EXHIBIT A

EXCERPT FROM DATELINE JUROR INTERVIEW

Beginning at 50 minutes, 35 seconds—

INTERVIEWER: They looked at the eyewitness' testimony, the man who put Prade behind the wheel of the getaway car. But they didn't give it much weight.

JUROR 1: You almost had to dismiss it.

INTERVIEWER: Rather than be confused by it, just set it aside.

JUROR 1: Exactly. Just kind of set it aside, [unintelligible] It doesn't convict and it doesn't exonerate.

EXCERPT FROM DATELINE JUROR INTERVIEW

Beginning at 55 minutes, 47 seconds—

Interviewer: If [the killer] had not bitten Margo, do you think you would have had that verdict?

Juror 1: There's no way I could have convicted him without the bite mark.

Interviewer: The bite mark was it. You all agree?

[All three jurors nod affirmatively.]

Juror 3: Yeah, without the bite mark, I don't know if I ever would have voted guilty. I really don't.

EXCERPT FROM DATELINE JUROR INTERVIEW

Beginning at 50 minutes, 20 seconds—

Interviewer: Did you wonder if the State was making its case too strongly here? Were they arguing a divorce case rather than a murder?

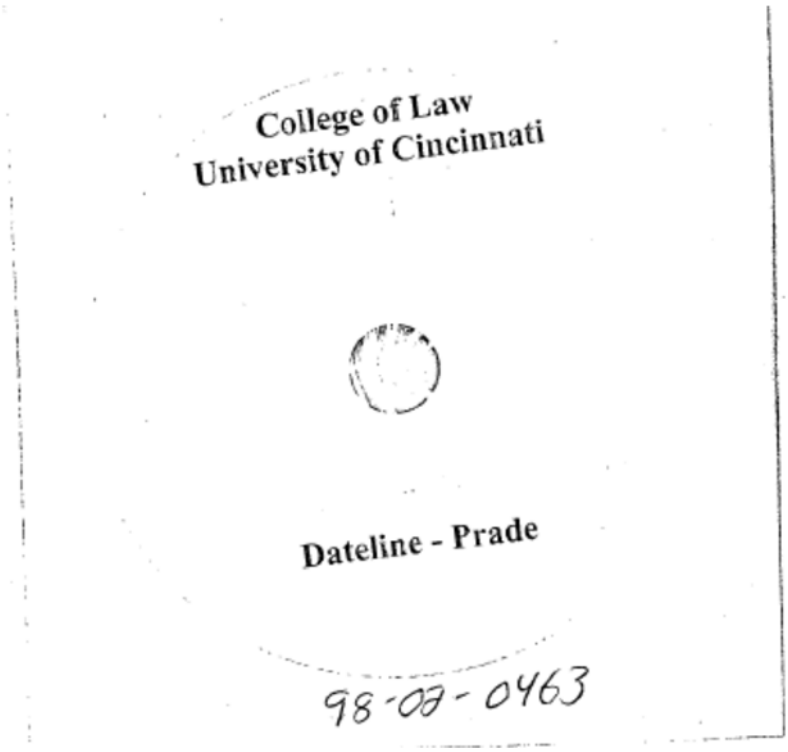
[Simultaneously:]

Juror 1: Yeah. [difficult to discern]

Juror 2: (Laughs)

Juror 3: After the very first day we got the point. She was a very nice person, she was a sweet person, she was a good doctor, and she had no clue she was being tape recorded. End of statement.

[DVD/CD]


College of Law
University of Cincinnati
Dateline - Prade
98-07-0463

APPENDIX M

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,	)	Case No. CR 98-02-0463
	)	
Plaintiff,	)	Judge Christine Croce
	)	
v.	)	
	)	
DOUGLAS E. PRADE,	)	
	)	
Defendant.	)	

AFFIDAVIT OF IAIN ALASTAIR PRETTY

1. My name is Iain Alastair Pretty. I am a qualified dental surgeon and a Professor of Public Health Dentistry at the University of Manchester in England. I make this affidavit in support of Defendant Douglas Prade's Motion to Supplement the Record with Updated Information on Forensic Bitemark Analysis.

2. I obtained my dental qualification, BDS (Hons), in 1998 from the University of Newcastle upon Tyne. I have obtained a further qualification in forensic dentistry, MSc, from the University of British Columbia, Vancouver, BC, Canada, a doctoral degree (PhD) from the University of Liverpool and a Masters of Public Health (MPH) from the University of

Manchester. I am a member of the American Society of Forensic Odontology, a fellow of the American Academy of Forensic Sciences (AAFS) and immediate past-president of the Odontology section of AAFS, a fellow of the Forensic Science Society, a member of the British Association of Forensic Odontology and the British Academy of Forensic Science. I am a Fellow of the Royal College of Surgeons of Edinburgh. I have published numerous articles and several book chapters on various aspects of forensic dentistry, in particular bitemark injuries and their analysis. I have been actively practicing forensic odontology for sixteen years. A copy of my curriculum vitae is attached as Exhibit A.

3. I have been retained on a pro bono basis by Innocence Project attorneys representing Mr. Douglas Prade. In particular, I have been asked to explain the following: (1) changes since October 2012 in the scientific understanding of the foundation, reliability and methodology of forensic bite mark analysis; (2) changes since October 2012 to the standards established by the American Board of Forensic Odontology ("ABFO") for forensic bitemark analysis; and (3) how applying the current ABFO standards would affect any bitemark evidence heard by the jury in this case.

4. I have been provided with the following materials relating to this case: (1) transcripts from the evidentiary hearing held in October 2012; (2) three close-up photographs of what appears to be a bitemark on the underside of the upper left arm of the victim, Dr. Margo Prade; and (3) the trial court's decision of January 29, 2013.

5. By way of background, the ABFO is the only board certifying body for forensic odontologists. The individuals that the ABFO trains, certifies and, after a certain period, recertifies, are called Diplomates. Guidelines for forensic odontology practice and testimony are promulgated by the ABFO in the ABFO Reference Manual, the most recent edition of which is dated March 2015 and is attached as Exhibit B (the "Manual").

6. As additional background, in 2009, the National Academy of Sciences undertook a review of the scientific basis for many forensic disciplines, including bitemarks. This review culminated in the publication of the report *Strengthening Forensic Science in the United States: A Path Forward* ("*NAS Report*"). The NAS Report was the subject of testimony by experts for both the defense and the State at the October 2012 evidentiary hearing in this case. In short, the NAS concluded that forensic odontologists lack "the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." NAS Report at 7; *see also id.* at 175 ("[T]he scientific basis is insufficient to conclude that bitemark comparisons can result in a conclusive match."). The NAS Report challenges the two fundamental premises underlying bitemark analysis, specifically, whether human dentition is unique and, if so, whether human skin is a reliable medium for recording its unique features.

7. The NAS Report prompted further research regarding forensic bitemark analysis. For example, research has been undertaken to investigate the legitimacy of the two primary premises for analysis noted above, including research by Dr. Mary Bush,

about which she testified at the October 2012 evidentiary hearing.

Changes In Scientific Understanding Of Bitemark Analysis Since October 2012

8. As a result of the NAS Report, I was involved in a research study with the objective of showing that the ABFO's basic "decision tree" for forensic bitemark analysis provided a scientifically legitimate framework for the opinions given by ABFO Diplomates. Dr. Adam Freeman (Vice President of the ABFO's Executive Committee) and I undertook the study. In designing the research, we sought views from ABFO members including David Senn, another ABFO member and a proponent of bitemark analysis. At each stage of the study design, the approach and methodology was approved by the ABFO. Our study, entitled *Construct Validity Bitemark Assessments Using the ABFO Bitemark Decision Tree* ("Construct Validity Study"), was presented at a meeting of the American Academy of Forensic Science held in Orlando, Florida in February 2015.

9. The Construct Validity Study was designed to evaluate the reliability of opinions by Diplomates using the ABFO decision tree, and not to assess whether their conclusions were actually correct. The first stage in assessing the validity of a method is to determine if, given the same evidence, do examiners of similar training and experience (in this case those who have passed the ABFO exam), reach the same conclusions.

10. As part of the Construct Validity Study, photographs of 100 patterned injuries (sourced from case files of ABFO members and approved by the

ABFO as suitably representative) were shown to ABFO board-certified Diplomates. In total 38 Diplomates completed the entire study.

11. Among other questions, the Diplomates were asked whether, if the injury was a human bitemark, the injury had distinct, identifiable arches and individual tooth marks. This question essentially sought information about whether the mark contained enough distinguishing features to be of value for comparison purposes.

12. Again, we did not examine the results for correctness but, rather, for agreement between and among the Diplomates. We wanted to know whether there was consensus because bitemark matching relies on subjective analysis and not quantifiable data. The level of consensus would show whether the results produced by the decision tree framework have the necessary predictability and repeatability to be considered scientifically valid.

13. Significantly, our results showed that the Diplomates' opinions on the 100 case studies were not consistent. There were only three images out of 100 with 100% agreement.

14. The Construct Validity Study raises new and fundamental doubts regarding the expert bitemark identification testimony presented by the State at trial. The level of doubt exposed by the Construct Validity Study is highly significant and substantially beyond the doubt already revealed by Dr. Bush's and Dr. Wright's respective testimony at the evidentiary hearing in October 2012.

Changes To ABFO Guidelines Since October 2012

15. After the results of the Construct Validity Study were presented, newly-elected ABFO president Gary Berman, in his 2015 "mid-year message" to members, expressed concern and recognized the need to further revise the Manual's guidelines and decision tree, providing:

> In order to improve the study of bitemarks the ABFO developed a decision tree to assist practitioners in the proper selection and pathways of analysis in bitemark analysis. Drs. Pretty and Freeman designed a study with the assistance of some ABFO members providing the case materials to evaluate the reliability of Step 1 of a proposed revision to the bitemark analysis and comparison decision tree. This was presented at the AAFS meeting in Orlando in 2015.
>
> Statistical analysis of the results of that study showed poor overall agreement, utilizing Step 1, among the individuals who participated in the survey. *** The ABFO in reaffirming its commitment to ensure accuracy in bitemark analysis is currently revising and updating the terminology used in the decision tree to ensure reliable results by forensic dentists. Drs. Freeman and Pretty will be continuing their preliminary research after new terminology is approved the Diplomates of the ABFO.

16. Thus, the ABFO currently is reviewing and revising its guidelines for issuance by early 2016, and the new standards are expected to weaken even

further an ABFO Diplomate's ability to give an opinion purporting to match an injury to an individual's dentition. But even the current ABFO guidelines reflect fundamental changes since October 2012, when the Court heard about the then-current ABFO standards from the State's expert, Dr. Franklin Wright.

17. The Manual defines for ABFO Diplomates five terms they may use "to relate a suspected biter to a bitemark." (*Id.* at 102.) A conclusion of "the Biter" means that the Diplomate has identified the biter to the exclusion of all other potential biters (*i.e.*, individualization). A Diplomate may also reach four other conclusions: "The Probable Biter", "Not Excluded as the Biter", "Excluded as the Biter", and "Inconclusive." (*Id.*)

18. The ABFO's Guidelines up until 2013 allowed Diplomates to reach a conclusion of "The Biter" in any case. Responding to the criticisms in the NAS Report that there was no scientific basis to support individualization, the ABFO significantly changed their Guidelines in August 2013. The Guidelines now provide that "*The ABFO does not support a conclusion of "The Biter" in an open population case(s)*". *Id.* (emphasis original). Open population cases are those in which the universe of potential suspects is unknown.

19. Also new since October 2012 is the ABFO decision tree, which is set forth in the Manual and discussed above in the context of the Construct Validity Study. The current decision tree, which was not in effect in October 2012 and so not a subject of Dr. Wright's testimony, imposes strict limits on the

circumstances in which a Diplomate should even attempt to compare an injury to an individual's dentition. It also cautions against attempting to differentiate between biters when the discernible features of the bitemark are indistinct.

How Application Of The Current ABFO Guidelines Would Affect Any Bitemark Evidence Heard By The Jury In This Case

20. My opinions about how application of the current ABFO Guidelines would affect any bitemark evidence heard by the jury in this case are as follows.

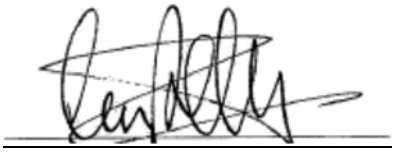
21. As a threshold matter, the forensic significance of the evidence of the bitemark injury is *extremely low*. The photographs show only one arch and indistinct tooth characteristics without individualization. In essence the injury is similar in appearance to those injuries within the Construct Validity Study that resulted in the highest levels of disagreement between and among the Diplomates.

22. Given the low forensic value of the evidence, an ABFO Diplomate following the current guidelines would conclude that no comparison should be attempted and/or that any comparison would not allow any differentiation between individuals.

23. If this case were tried today, there could be no opinion presented, consistent with ABFO guidelines, that purports to link the victim's injury to Mr. Prade's (or anyone else's) dentition. In contrast, the State's expert evidence at trial included a definitive opinion that Mr. Prade was "the biter" and another opinion that Mr. Prade's teeth were "consistent with" the dentition of the biter.

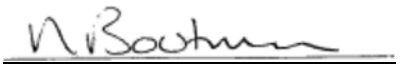
24. If called to testify at a hearing in this matter, I would testify to the opinions described above and provide further explanation and detail for my opinions. If the ABFO establishes new standards prior to my testifying, it could have an impact on my opinions.

This concludes my affidavit.



Iain Alastair Pretty

Sworn to before me and subscribed in my presence on this 15 day of October, 2015.



Witness

APPENDIX N

STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES
A PATH FORWARD

Committee on Identifying the Needs of the Forensic Science Community

Committee on Science, Technology, and Law Policy and Global Affairs

Committee on Applied and Theoretical Statistics
Division on Engineering and Physical Sciences

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This study was supported by Contract No. 2006-DN-BX-0001 between the National Academy of Sciences and the National Institute of Justice. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the organizations or agencies that provided support for the project.

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* * *

By contrast, much more research is needed on the natural variability of burn patterns and damage characteristics and how they are affected by the presence of various accelerants. Despite the paucity of

research, some arson investigators continue to make determinations about whether or not a particular fire was set. However, according to testimony presented to the committee,[118] many of the rules of thumb that are typically assumed to indicate that an accelerant was used (e.g., "alligatoring" of wood, specific char patterns) have been shown not to be true.[119] Experiments should be designed to put arson investigations on a more solid scientific footing.

FORENSIC ODONTOLOGY

Forensic odontology, the application of the science of dentistry to the field of law, includes several distinct areas of focus: the identification of unknown remains, bite mark comparison, the interpretation of oral injury, and dental malpractice. Bite mark comparison is often used in criminal prosecutions and is the most controversial of the four areas just mentioned. Although the identification of human remains by their dental characteristics is well established in the forensic science disciplines, there is continuing dispute over the value and scientific validity of comparing and identifying bite marks.[120]

Many forensic odontologists providing criminal testimony concerning bite marks belong to the

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[118] J. Lentini. Scientific Fire Analysis, LLC. Presentation to the committee. April 23, 2007. Available at www7.nationalacadem
ies.org/stl/April%20Forensic%20Lentini.pdf.

[119] NFPA 921 Guide for Explosion and Fire Investigations, 2008 Edition. Quincy, MA: National Fire Protection Association.

[120] E.g., J.A. Kieser. 2005. Weighing bitemark evidence: A postmodern perspective. *Journal of Forensic Science, Medicine, and Pathology* 1(2):75-80.

American Board of Forensic Odontology (ABFO), which was organized in 1976 and is recognized by the American Academy of Forensic Sciences as a forensic specialty. The ABFO offers board certification to its members.[121]

Sample Data and Collection

Bite marks are seen most often in cases of homicide, sexual assault, and child abuse. The ABFO has approved guidelines for the collection of evidence from bite mark victims and suspected biters.[122] The techniques for obtaining bite mark evidence from human skin—for example, various forms of photography, dental casts, clear overlays, computer enhancement, electron microscopy, and swabbing for serology or DNA—generally are

well established and relatively noncontroversial. Unfortunately, bite marks on the skin will change over time and can be distorted by the elasticity of the skin, the unevenness of the surface bite, and swelling and healing. These features may severely limit the validity of forensic odontology. Also, some practical difficulties, such as distortions in photographs and changes over time in the dentition of suspects, may limit the accuracy of the results.[123]

Analyses

The guidelines of the ABFO for the analysis of bite marks list a large number of methods for analysis,

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[121] American Board of Forensic Odontology at www.abfo.org.

[122] Ibid.

[123] Rothwell, op. cit.

including transillumination of tissue, computer enhancement and/or digitalization of the bite mark or teeth, stereomicroscopy, scanning electron microscopy, video superimposition, and histology.[124] The guidelines, however, do not indicate the criteria necessary for using each method to determine whether the bite mark can be related to a person's dentition and with what degree of probability. There is no science on the reproducibility of the different methods of analysis that lead to conclusions about the probability of a match. This includes reproducibility between experts and with the same expert over time. Even when using the guidelines, different experts provide widely differing results and a high percentage of false positive matches of bite marks using controlled comparison studies.[125]

No thorough study has been conducted of large populations to establish the uniqueness of bite marks; theoretical studies promoting the uniqueness theory include more teeth than are seen in most bite marks submitted for comparison. There is no central repository of bite marks and patterns. Most comparisons are made between the bite mark and dental casts of an individual or individuals of interest. Rarely are comparisons made between the bite mark and a number of models from other individuals in addition to those of the individual in question. If a bite mark is compared to a dental cast using the guidelines of the ABFO, and the suspect providing the dental cast cannot be eliminated as a person who could have made

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[124] American Board of Forensic Odontology, op. cit.

[125] Bowers, op. cit.

the bite, there is no established science indicating what percentage of the population or subgroup of the population could also have produced the bite. This follows from the basic problems inherent in bite mark analysis and interpretation.

As with other "experience-based" forensic methods, forensic odontology suffers from the potential for large bias among bite mark experts in evaluating a specific bite mark in cases in which police agencies provide the suspects for comparison and a limited number of models from which

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to choose from in comparing the evidence. Bite marks often are associated with highly sensationalized and prejudicial cases, and there can be a great deal of pressure on the examining expert to match a bite mark to a suspect. Blind comparisons and the use of a second expert are not widely used.

Scientific Interpretation and Reporting of Results

The ABFO has issued guidelines for reporting bite mark comparisons, including the use of terminology for conclusion levels, but there is no incentive or requirement that these guidelines be used in the criminal justice system. Testimony of experts generally is based on their experience and their particular method of analysis of the bite mark. Some convictions based mainly on testimony by experts indicating the identification of an individual based on a bite mark have been overturned as a result of the

provision of compelling evidence to the contrary (usually DNA evidence).[126]

More research is needed to confirm the fundamental basis for the science of bite mark comparison. Although forensic odontologists understand the anatomy of teeth and the mechanics of biting and can retrieve sufficient information from bite marks on skin to assist in criminal investigations and provide testimony at criminal trials, the scientific basis is insufficient to conclude that bite mark comparisons can result in a conclusive match. In fact, one of the standards of the ABFO for bite mark terminology is that, "Terms assuring unconditional identification of a perpetrator, or without doubt, are not sanctioned as a final conclusion."[127]

Some of the basic problems inherent in bite mark analysis and interpretation are as follows:

(1) The uniqueness of the human dentition has not been scientifically established.[128]

(2) The ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established.[129]

i. The ability to analyze and interpret the scope or extent of distortion of bite mark

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[126] Bowers, op. cit.

[127] American Board of Forensic Odontology, op. cit.

[128] Senn, op. cit.

[129] Ibid.

patterns on human skin has not been demonstrated.

ii. The effect of distortion on different comparison techniques is not fully understood and therefore has not been quantified.

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(3) A standard for the type, quality, and number of individual characteristics required to indicate that a bite mark has reached a threshold of evidentiary value has not been established.

Summary Assessment

Despite the inherent weaknesses involved in bite mark comparison, it is reasonable to assume that the process can sometimes reliably exclude suspects. Although the methods of collection of bite mark evidence are relatively noncontroversial, there is considerable dispute about the value and reliability of the collected data for interpretation. Some of the key areas of dispute include the accuracy of human skin as a reliable registration material for bite marks, the uniqueness of human dentition, the techniques used for analysis, and the role of examiner bias.[130] The ABFO has developed guidelines for the analysis of bite marks in an effort to standardize analysis,[131] but there is still no general agreement among practicing forensic odontologists about national or international standards for comparison.

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[130] Ibid.

[131] American Board of Forensic Odontology, op. cit.

Although the majority of forensic odontologists are satisfied that bite marks can demonstrate sufficient detail for positive identification,[132] no scientific studies support this assessment, and no large population studies have been conducted. In numerous instances, experts diverge widely in their evaluations of the same bite mark evidence,[133] which has led to questioning of the value and scientific objectivity of such evidence.

Bite mark testimony has been criticized basically on the same grounds as testimony by questioned document examiners and microscopic hair examiners. The committee received no evidence of an existing scientific basis for identifying an individual to the exclusion of all others. That same finding was reported in a 2001 review, which "revealed a lack of valid evidence to support many of the assumptions made by forensic dentists during bite mark comparisons."[134] Some research is warranted in order to identify the circumstances within which the methods of forensic odontology can provide probative value.

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[132] I.A. Pretty. 2003. A Web-based survey of odontologists' opinions concerning bite mark analyses. *Journal of Forensic Sciences* 48(5):1-4.

[133] C.M. Bowers. 2006. Problem-based analysis of bite mark misidentifications: The role of DNA. *Forensic Science International* 159 Supplement 1:s104-s109.

[134] I.A. Pretty and D. Sweet. 2001. The scientific basis for human bitemark analyses—A critical review. *Science and Justice* 41(2):85-92. Quotation taken from the abstract.

APPENDIX O

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,	)	Case No. 98-02-0463
	)	
Plaintiff,	)	C.A. No.
	)	Excerpt of Transcript
v.	)	of Proceedings
	)	
DOUGLAS E. PRADE,	)	Volume I of I
	)	
Defendant.	)	

* * *

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the HONORABLE MARY F. SPICER, Judge Presiding, and commencing on Monday, August 24, 1998, the following proceedings were had: (Closing Statements).

* * *

MARGARET G. WELLEMEYER, RMR, CRR
Official Court Reporter
Summit County Courthouse
Akron, Ohio 44308

* * *

STATE'S CLOSING STATEMENT

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Prade — and this is the issue — Douglas Prade is sitting in that parking lot for five minutes, from 9:02 on, waiting for Margo Prade to arrive. And for some reason he becomes impatient, begins to leave, and as he is leaving Dr. Prade drives in. He drives around, back to the parking place. Dr. Prade parks. He pulls into the middle hiding from her behind a vehicle that's parked there, gets out of the car and walks to the passenger side of the van.

The only person that's interested in doing anything that is threatened, that she's afraid of, is Douglas Prade. When he gets to the passenger side of the van, he is able to get in. It's not a stranger. She doesn't flee from the van. She either unlocks the doors or allows him to get in.

And what happens in the van? We don't know exactly what happened in the van except for sure we know this from Dr. Platt, a gun, this .38 caliber revolver is produced, is pointed at Dr. Prade and there's a fight over the gun.

This is in dispute, but — and in the

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fight over the gun, the driver is able to grab the gun, Dr. Prade, and in this struggle she is bitten. And after she is bitten she is able to jerk away and she is shot.

And we know how it happened. First one she actually tries to block the shot. It's futile. It can't be done. But it is a reaction that she tried. And she is shot a total of six times.

And during the course of the shooting — and I submit to you this is after the first three, which are three on the right side, to the head, the graze here and into the shoulder, and then the fatal shot to the breast — she is pulled back from that driver's door where she is leaning lifeless, actually, lab coat fully ripped open, and shot three more times, one of them entering here and exiting here, one of them entering here, and one entering the breast and exiting the top of the breast.

Now, it's going to be in dispute somewhat from the medical testimony but that is what happened, six shots. And Douglas Prade, after shooting her the six times,

* * *

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spend this windfall $75,000 that he should have never received in the first place.

Dr. Thomas Marshall tells you without controversy — no one has suggested otherwise — that the bottom teeth of Douglas Prade inflicted the bite mark on the left arm of Margo Prade. Absolutely he did that.

The defense, not being able to bring in someone to dispute that fact, brings you Dr. Baum. And Dr. Baum says he couldn't have done that because of his biting ability, is the way I'll phrase it. But what he shows you is that what Douglas Prade can do is bite and when he does the only mark is made with his lower teeth. Why is there only a lower bite in this case? Because Douglas Prade did the biting, Douglas Prade did the killing.

And, finally, let me tell you about alibi here. You're going to hear about alibi a lot. What Douglas Prade says is, "I wasn't there," and that's what alibi means,

I was somewhere else. But he wasn't somewhere else as Tim Holston was in Columbus where he could not have done this. He was six minutes away, and he produces for you an alibi witness,

* * *

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waits five minutes.

And the first time we played the tape, we let you sit through those five minutes and it was uncomfortable. Dr. Kraus, you know, was trying to think of things to say while he was standing up there. Five minutes is a very long time when you're sitting in a car waiting for your ex-wife in order to kill her. It's a very long time.

He knew what her plan was, when she would be arriving. He saw her come in, and he drove around, parked again and hid the car. She let that person in her car, in her van. She could have run out the front door if she wanted to and run inside the parking lot or scream. She chose not to. She knew that person.

Nothing was stolen. Her purse was not disturbed. And she was shot and killed. She wasn't just threatened. Her van wasn't stolen. She was — she's only five foot tall, just kicked out of the van so she could be carjacked. She was brutally murdered.

And in the struggle he bit her. And this bite mark is on her body, on her body,

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conclusively shown to be his. There's no dispute there. As much as Attorney O'Brien would like to characterize Lowell Levine's testifying — testimony as saying that's not Doug Prade, that's not what he said. He said that bite mark is consistent with Douglas

Prade's. Every one else is excluded; his is consistent. The difference is degree. It's clear, I believe, from hearing testimony that Dr. Marshall, who was the odontologist on this case, who spent hours analyzing those teeth, and Dr. Levine was a corroborative second opinion.

Howard Brooks identifies him, identifies him. That's direct evidence, ladies and gentlemen. I saw him. It was him. Bottom line. Bottom line. It was him.

Now, Attorney O'Brien may talk about how these witnesses wait before they come forward, and perhaps you might understand in this case why that would happen. You have an Akron police detective coming and asking questions about an Akron police captain, his ex-wife is murdered. Now, gee, mightn't somebody be a little nervous about saying,

* * *

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police department. He knew how to commit a crime. He planned it. He knew how he was going to get rid of this gun, how he was going to get rid of this car that couldn't traced to him, he knew how he could get rid of his clothes. He planned it for weeks.

What didn't he plan? What didn't he plan on happening? He didn't plan on Margo be Prade's desire to live. He didn't plan that the woman for years who he was able to verbally abuse and put down, that put up with it, who never officially complained, never in all those years, he didn't count on the fact that she was going to fight it, that the second she saw that gun she fought and she fought for her life.

He did not plan on that, and he had to bite her. It was a primitive instinct, something he would never have chosen to do in his cold and calculating way. But he didn't count on the new Margo, the Margo who was — the Margo who had a reason to live, the Margo who wanted to fight so she could see her daughters grow up and become successful that they are destined to be, the Margo who wanted

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APPENDIX P

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,	)	Case No. 98-02-0463
	)	
Plaintiff,	)	C.A. No.
	)	Transcript of
v.	)	Proceedings
	)	
DOUGLAS E. PRADE,	)	Volume VII of XIV
	)	
Defendant.	)	

* * *

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the HONORABLE MARY F. SPICER, Judge Presiding, and commencing on Monday, August 24, 1998, the following proceedings were had:

* * *

MARGARET G. WELLEMEYER, RMR, CRR
Official Court Reporter
Summit County Courthouse
Akron, Ohio 44308

* * *

of people possibly to wash their hands quite often?

A. Yes.

Q. I have nothing further, Doctor. Thank you very much.

- - -

REDIRECT EXAMINATION

BY MS. McCARTY:

Q. Okay. I'm — just so we're clear on this then, Dr. Callaghan, you're saying, based on your analogy of a lot of people in the courtroom, there are many people that possibly could have contributed or could not have been excluded from contributing the DNA underneath Margo Prade's fingernails?

A. Correct. And —

Q. And these might even be people that have never met Margo Prade and never be anywhere around her but yet they could not be excluded from contributing the DNA just because of the system you work with?

A. It's kind of like saying green eyes. Lots of people with green eyes.

Q. And if someone had casual contact with Dr. Prade, either that Monday, Tuesday,

Wednesday, or even the weekend before, it is possible that she could have had their DNA underneath her fingernails?

A. It's possible.

Q. And by saying that Douglas Prade's DNA was not found and he was excluded, you're not saying that that doesn't mean he wasn't at the scene, are you?

A. No, I'm not.

Q. And you're not saying that Douglas Prade didn't bite or kill Margo Prade?

A. I can't say that, no.

Q. And as a forensic scientist, if you are looking to find the best source of evidence, if you're going to assume that Margo did not bite herself and that the bite occurred at the time of the homicide, what area of her body, what source of DNA would you be looking to as being the best possible source of DNA evidence as to her killer's identity?

A. Given those assumptions, the bite mark is very important.

Q. And your test results do not give you any information about the killer; the bite mark shows you Margo Prade's DNA only?

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A. The type that is consistent with Margo Prade is the only type of blood stain, bite mark.

(Pause.)

MS. McCARTY: That's it.

THE COURT: Anything further?

MR. O'BRIEN: No recross.

THE COURT: Dr. Callaghan, thank you very much. You're excused.

(Witness excused.)

THE COURT: Doctor, just raise your right hand. I'm going to go ahead and swear you in. You can go ahead and sit down.

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* * *

APPENDIX Q

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,	)	Case No. 98-02-0463
	)	
Plaintiff,	)	C.A. No.
	)	Transcript of
v.	)	Proceedings
	)	
DOUGLAS E. PRADE,	)	Volume IX of XIV
	)	
Defendant.	)	

* * *

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas, Summit County, Ohio, before the HONORABLE MARY F. SPICER, Judge Presiding, and commencing on Monday, August 24, 1998, the following proceedings were had:

* * *

MARGARET G. WELLEMEYER, RMR, CRR
Official Court Reporter
Summit County Courthouse
Akron, Ohio 44308

* * *

Q. Doctor, could we see the next slide?

A. That is — that is a picture of the original bite. That's —

Q. That was an example of the demonstration that you just performed; is that correct?

A. Yes.

Q. All right. Are there any more slides, Doctor?

A. No.

Q. Please have a seat.

Doctor, as a result of your second visit with Mr. Prade, besides taking photo slides and the wax impression and performing your own demonstration then, did you take any other type of samples?

A. Yes.

Q. What did you take?

A. Well, we have discussed the scenario that this case revolves around and if there was a bite on a laboratory coat sleeve. Something that, again, I run into on a daily, if not hourly basis, with which I and my assistant constantly struggle against is that people slobber, especially when you have any type of fabric in the mouth, and we place those

gauzes in people's mouth, the saliva comes pouring out. Saliva is chock-full of antibodies, white blood cells, and other DNA containing materials.

So it was my supposition that if there was a bite made on a piece of fabric, whoever did it probably slobbered all over it, and that if we could obtain a DNA sample from that fabric, we would be able to possibly identify or exclude someone.

I mentioned that, and what we did is we agreed, we immediately took a sample. Mr. Prade consented. I placed some gauze in his mouth. We took a washing of saliva and tissue and we placed it on one of those sterile bags, and you marked it off and sent it for analysis.

Q. Doctor, did you take any plaster cast of Mr. Prade's mouth?

A. Yes, I did.

Q. And how many casts did you take?

A. Four.

Q. And describe that for me.

A. We made a plaster cast of his upper denture.

Shut that off, I'm sorry. Thank you.

* * *