ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	Case No. 2009-0605
	)	
v.	)	On Appeal From
	)	The Summit County Court
DOUGLAS PRADE,	)	Of Appeals, Ninth Appellate
	)	District
Defendant-Appellant.	)	(9th District Case No. 24296)

REPLY BRIEF OF APPELLANT DOUGLAS PRADE

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I. INTRODUCTION

This appeal focuses on whether DNA tests conducted before Douglas Prade's 1998 murder trial using a now-outdated DNA testing method were "prior definitive DNA test[s]" that, under R.C. 2953.74(A) (App. at 31),[1] bar new testing using modern DNA testing methods. The 1998 DNA test results "d[id] not give any information about the killer,"[2] but new testing may establish Mr. Prade's innocence.

Ohio's DNA testing statute permits eligible inmates like Mr. Prade to have evidence subjected to modern DNA testing when an exclusion result might be "outcome determinative." R.C. 2953.74(B)(2) (App. at 31). The statute bars new testing when there was a "prior definitive DNA test," R.C. 2953.74(A) (App. at 31), but does not define those words. The reason for barring new testing when there was a "prior definitive DNA test," however, is readily apparent. Namely, that prohibition seeks to avoid wasting resources when new DNA testing is not likely to produce results that differ materially from those previously produced. A logical corollary is that, when further testing might yield new or different results due to, for example, later advances in DNA testing technology, the earlier tests are not "definitive" ones and do not bar new testing.

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[1] The merit brief appendix includes R.C. 2953.71-.84. It is cited as "App. at ##."

[2] Callaghan TT at 1125:23-1126:2 (Reply App. at 23-24). Cited trial transcript pages are in the Supplement to Mr. Prade's merit brief, which is cited as "Supp. at ##." Pages first cited here are attached and cited as "Reply App. at ##."

The Ninth District, however, read the statute differently. Looking only to a dictionary's definition of "definitive," it found that a "prior definitive DNA test" includes any earlier tests that produced some results that were either "final" or "conclusive" at the time, even if tests using modern DNA testing methods might produce new results that could be "outcome determinative." On that basis, the Ninth District affirmed the trial court's denial of Mr. Prade's application for DNA testing.

The State's merit brief only confirms that the Ninth District's reading of the statute is untethered to legislative intent, fairness, or logic. Other courts have, consistent with the statute's plain meaning, found that the Legislature enacted Ohio's DNA testing statute in 2003 "to take advantage of advances in technology that were not available at the time of trial."[3] Neither the Ninth District nor the State's brief suggests that the Legislature had a different intent. Given the statute's purpose, it makes no sense to, as the Ninth District did, conclude that old tests using an outdated testing method were "definitive" and, thus, bar new testing that may, due to more advanced testing methods, produce new results that would establish actual innocence.

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[3] *State v. Emerick* (2d Dist.), 170 Ohio App. 3d 647, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 18, appeal denied, 114 Ohio St. 3d 1511, 2007-Ohio-4285, 872 N.E.2d 952; accord *State v. Reynolds*, 2d Dist. No. 23163, 2009-Ohio-5532, ¶ 13; *State v. Elliott*, 1st Dist. No. C-050606, 2006-Ohio-4508, ¶ 8.

Similarly, the Ninth District's interpretation of a "prior definitive DNA test" denies DNA testing that might establish innocence to inmates who were tried when now-outmoded DNA testing techniques were used, yet allows that testing for everyone else. The State's brief offers no reason to believe the Legislature intended that arbitrary, unjust result.

Further, the Ninth District's interpretation ignores the statute's definition of an "inconclusive result," which is a result rendered when a "scientifically appropriate and definitive DNA analysis or result ... cannot be determined." R.C. 2953.71(J) (App. at 23). The State does not contest that, as to DNA from the killer's saliva on the lab coat, the 1998 DNA testing drew a complete blank. Yet current testing methods may not. Thus, the 1998 DNA tests were, by current standards, neither "scientifically appropriate" nor "definitive," and the 1998 test results here fit easily within R.C. 2953.71(J)'s definition of an "inconclusive result."

Separately, the State claims that, because a bill now pending in the House, Senate Bill 77, would define a "definitive DNA test" along the lines that Mr. Prade advances here, the existing statute must mean the opposite. Pending bills, however, generally do not aid courts in ascertaining legislative intent. And, if Senate Bill 77 is relevant here, the correct conclusion to draw from it is that the bill clarifies, not changes, the law.

Finally, the State argues that "any Y-STR result that excluded [Mr.] Prade would duplicate the prior results" of the 1998 DNA testing. (State's Br. at 5). This claim, however, conflicts with the views of both sides' DNA testing experts in the proceedings below. Similarly, the State contends that "[t]he jury knew that [Mr.] Prade had been excluded by the DNA tests and convicted him anyway." (Id. at 12). This is a half-truth. The jury knew of "test results [that] d[id] not give any information about the killer,"[4] including the fact that Mr. Prade was "excluded" from having been the source of blood identified as the victim's. But the jury heard nothing about DNA from the killer's saliva because, unlike current testing methods, 1998 DNA testing technology could not detect it.

This Court should reverse.

II. ARGUMENT

A. The Ninth District's Interpretation Of A "Prior Definitive DNA Test" Is Wrong.

The State concedes that the Ninth District "rejected the argument ... that results that might be obtained with new DNA technology must be considered in defining a prior definitive DNA test" and then attempts to defend that reading of the statute. (State's Br. at 8, id. at 8-10). Initially, the State notes that courts should "'apply a statute as it is written when [the statute's] meaning is unambiguous and

[4] Callaghan TT at 1125:23-1126:2 (Reply App. at 23-24).

definite.'" (State's Br. at 6-7 (quoting *Portage County Bd. of Comm'rs v. City of Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 52)). As the Ninth District observed, however, Ohio's DNA testing statute does not define a "prior definitive DNA test." *State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704, ¶ 8. Therefore, the statute's language is not "unambiguous and definite."

Next, the State asserts that the interpretation of the statute Mr. Prade advances here – "that the DNA testing statutes must be interpreted to take into account current DNA technology" – somehow requires "adding words to the statute(s)." (State's Br. at 7). But the State does not explain why Mr. Prade's interpretation of a "prior definitive DNA test" supposedly requires "adding words" or, if it does, why the Ninth District's contrary interpretation does not. (Id.).

The State then notes that "[t]he Ninth District correctly found that the statute did not include the availability of new technology in determining whether there had been a prior definitive DNA test." (State's Br. at 8). And it is correct that the statute does not expressly define a "prior definitive DNA test" by reference to "the availability of new technology." Yet it does not, as the Ninth District did, define those words by reference to "old technology," either.

Finally, the State attempts to defend the merits of the Ninth District's puzzling decision to define a "prior definitive DNA test" by reference to "old," rather than "new," technology. First, the State takes issue with Mr. Prade's claim that "the purpose of the [Ohio DNA testing] statutes [was] to allow inmates convicted before there was modern DNA testing to establish their innocence using current testing methods." (State's Br. at 9). Specifically, the State seeks to distinguish the facts of two cases cited in Mr. Prade's merit brief – *State v. Emerick* (2d Dist.), 170 Ohio App. 3d 647, 2007-Ohio-1334, 868 N.E.2d 742, appeal denied, 114 Ohio St. 3d 1511, 2007-Ohio-4285, 872 N.E.2d 952, and *State v. Elliott*, 1st Dist. No. C-050606, 2006-Ohio-4508. (State's Br. at 9). Yet those cases are instructive, not because they had identical facts, but because they describe the Legislature's intent,[5] which is the "paramount concern" in "statutory construction." *State v. Buehler*, 113 Ohio St. 3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 29 (citation omitted).

Both *Emerick* and *Elliott* found that the purpose underlying Ohio's DNA testing statute was "to take advantage of advances in technology that were not available at the time of [the convicted inmate's] trial." *Emerick* at ¶ 18; accord *Elliott* at ¶ 8. That reading of the Legislature's

[5] See R.C. 1.49 ("If a statute is ambiguous, the court, in determining the intention of the legislature, may consider ... (A) The object sought to be obtained; [and] (B) The circumstances under which the statute was enacted").

intent not only makes sense, but neither the Ninth District nor the State has offered any plausible different or contrary purpose. In light of this legislative purpose, it is wrong to say that 1998 tests providing meaningless results are "prior definitive DNA tests" within the meaning of a 2003 statute designed to take advantage of recent advances in DNA testing. R.C. 2953.74(A)'s prohibition on new testing when there was a "prior definitive DNA test," rather than prohibiting new testing that might be "outcome determinative," is merely a prudent limitation on new testing when, due to earlier test results, the new results will not matter.

Second, responding to Mr. Prade's claim that the Ninth District's interpretation is unreasonable because it leaves inmates who had DNA testing using now-outdated testing technologies in a worse position than those who either had no earlier testing or were tried when better methods were available (see Prade's Br. at 21-23), the State argues that this would be relevant only if constitutional claims were before this Court. (State's Br. at 10). That is not so. "If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: ... (E) The consequences of a particular construction." R.C. 1.49. This Court should not, as the State suggests, ignore the real world implications of the Ninth District's reading of the statute.

Tellingly, the State offers no reason the Legislature would have intended to deny DNA testing only to persons convicted at a time when "old technology" produced at least some "final" or "conclusive" result, yet allow that testing for everyone else for whom it might establish innocence. Nor does the State dispute the fact the Ninth District's reading of a "prior definitive DNA test" denies DNA testing to Ohio inmates where, under the federal DNA testing statute and DNA testing statutes in more than a dozen other states, it would be permitted.[6] (See State's Br. at 10; Prade's Br. at 22-23). The Ninth District's approach runs afoul of the general rule that courts "must avoid ... construing statutes" to "lead to an illogical or absurd result." *In re T.R.*, 120 Ohio St. 3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 16; see R.C. 1.47 ("[i]n enacting a statute, it is presumed that: ... (C) A just and reasonable result is intended").

Indeed, the Second District recently reversed a trial court's denial of DNA testing on similar facts. *State v. Reynolds*, 2d Dist. No. 23163, 2009-Ohio-5532. *Reynolds* involved R.C. 2953.74(B)(1), which bars testing if there was no DNA testing at trial unless "DNA testing was not

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[6] This Court has looked to similar statutes in other jurisdictions when interpreting legislative intent. *State v. Hooper* (1979), 57 Ohio St. 2d 87, 88-89, 386 N.E.2d 1348, 1349-50; see also *Ohio Ins. Guar. Ass'n v. Simpson* (10th Dist. 1981), 1 Ohio App. 3d 112, 113, 439 N.E.2d 1257, 1258. "[R]eference to legislation in other states and jurisdictions which pertains to the same subject matter ... may be a helpful source of interpretive guidance." 2B Sutherland Statutory Construction § 52:3 at 359 (Norman J. Singer & J.D. Shambie Singer eds., Thomson West 7th ed. 2008) (footnote omitted).

yet available."[7] Because there was no DNA testing at the time of the *Reynolds* defendant's 2001 trial, the trial court denied his 2008 DNA testing application based on R.C. 2953.74(B)(1). *Reynolds* at ¶ 17. The Second District reversed, finding that the development of more sensitive DNA testing technologies after 2001 meant that, despite the possibility that more primitive DNA tests could have been conducted at trial, the statute's requirement that "DNA testing [not have been] yet available" at trial was satisfied. Id. at ¶¶ 18-19. Just as the advances in DNA testing technology meant that the absence of DNA tests at trial did not bar new testing in *Reynolds*, those advances mean that meaningless DNA tests at trial using old technology should not bar new testing here.

Third, the State argues that the 1998 DNA test results here are not "inconclusive result[s]" under R.C. 2953.71(J) (App. at 23) (see Prade's Br. at 24-25) because, in the State's view, R.C. 2953.71(J) "simply does not embrace the concept that a DNA test that excludes the eligible inmate can be ignored and further testing done." (State's Br. at 10). But R.C. 2953.71(J) contemplates disregarding meaningless exclusions if they are based on obsolete technology. It defines an "inconclusive result" as one "rendered when a *scientifically appropriate* and *definitive* DNA

[7] Under R.C. 2953.74(B)(1), trial courts may accept DNA testing applications when there was no trial DNA testing only if, at the time of trial, "DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available." (App. at 31).

analysis or result ... cannot be determined." R.C. 2953.71(J) (App. at 23) (italics added). Decade-old tests that could not have detected DNA from the killer's saliva on Dr. Prade's lab coat are not "scientifically appropriate" or "definitive" when, today, the killer's DNA might be found.

Indeed, as to potentially critical evidence here – DNA from the killer's saliva on the lab coat over the bite mark – the 1998 tests produced *no* results. As to that evidence, there was no "prior definitive DNA test ... regarding the *same biological evidence*." R.C. 2953.74(A) (App. at 31) (italics added). Thus, either (1) the results of the 1998 testing were "inconclusive" under R.C. 2953.71(J) (App. at 23) and, for that reason, are not "definitive" under R.C. 2953.74(A) and R.C. 2953.74(B)(2); or (2) alternatively, Mr. Prade now seeks testing of different "biological evidence" – the killer's saliva left on the lab coat over the bite mark – as to which the 1998 tests produced no results at all.

B. The Pending Bill That Would Amend Ohio's DNA Testing Statute, If Relevant At All, Supports Reversal.

Senate Bill 77, which is pending in the House, would add a new paragraph (U) to R.C. 2953.71 stating that a "[d]efinitive DNA test" does not include one where, "because of advances in DNA technology[,] there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may have failed to discover." (App. to State's Br. at A-21). The State argues that Senate Bill 77 creates a presumption

that the Legislature is "chang[ing] rather than clarify[ing] the prior law" and, thus, the reading of the current statute that Mr. Prade advances here is wrong. (State's Br. at 12 (citing 1A Sutherland Statutory Construction § 22:30 (Norman J. Singer ed., West 6th ed. 2002 rev.)). This argument fails for four reasons.

First, Senate Bill 77 is a bill, not a law.[8] It is not yet (and may not end up being) the Legislature's intent.[9] The State cites no authority for the proposition that pending bills create presumptions that assist courts when interpreting enacted statutes.

Second, if this presumption applied, it would be rebutted here, and the proper inference would be that the Legislature is clarifying, not changing, the law. The treatise the State cites says that, "[i]f an amendment was enacted soon after controversies arose about interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act – a formal change – rebutting the presumption of substantial change." 1A Sutherland

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[8] If proposed R.C. 2953.71(U) becomes law during the pendency of this appeal, it would not moot the appeal unless it applies retroactively.

[9] If the definition of a "[d]efinitive DNA test" in proposed R.C. 2953.71(U) does not become law, that fact alone would say very little about the existing statute's meaning. "'[N]o one knows why the legislature did not pass [a] proposed measure[] ... Legislative inaction is a weak reed upon which to lean in determining legislative intent.'" *Oliver v. Kaiser Cmty. Health Found.* (1983), 5 Ohio St. 3d 111, 115, 449 N.E.2d 438, 441 (quoting *Berry v. Branner* (1966), 245 Ore. 307, 311, 421 P.2d 996, 998).

Statutory Construction § 22:31 at 375 (Norman J. Singer & J.D. Shambie Singer eds., Thomson West 7th ed. 2009) (footnote omitted).[10] Proposed R.C. 2953.71(U) and its definition of a "[d]efinitive DNA test" were added to Senate Bill 77 immediately after the Ninth District's ruling below.[11] Given the timing of proposed R.C. 2953.71(U), it was "a legislative interpretation of the original act."[12]

Third, the State's reliance on *County Board of Education of Putnam County v. Board of Education of Hartsburg Rural Special School District* (1925), 112 Ohio St. 108, 114, 146 N.E. 812, 814, is misplaced. (State's Br. at 12-13). There, this Court observed that, "'[w]hen an existing statute is repealed and a new and different statute upon the same

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[10] Accord 1A Sutherland Statutory Construction § 22:30 at 369 (Norman J. Singer & J.D. Shambie Singer eds., Thomson West 7th ed. 2009) ("the time and circumstances surrounding the enactment of the amendment may indicate that the change wrought by the amendment was formal only – that the legislature intended merely to interpret the original act").

[11] As introduced last March, Senate Bill 77 did not define a "[d]efinitive DNA test." Ohio Legis. Serv. Comm'n: Bill Analysis S.B. 77 at 12-13 (copy at http://lsc.state.oh.us/analyses/analysis128.nsf/C68A7E88E02F43A985256DAD004E48AA/DC2575BC9801B80B85257585004E39A0?OpenDocument) (last visited Oct. 28, 2009) (S.B. 77 as introduced on March 11, 2009). Proposed R.C. 2953.71(U), which defines a "[d]efinitive DNA test," was added after the Ninth District's ruling during a committee's consideration of the bill. See App. to State's Br. at A-21 (version of bill as passed by the Senate).

[12] The Ohio Innocence Project and Mark Godsey, one of Mr. Prade's counsel here, proposed language for what became Senate Bill 77 to members of the Legislature. See 6/24/09 Univ. Cinti. Press Release (copy at http://www.uc.edu/News/NR.aspx?id=10371) (last visited Oct. 29, 2009). After the Ninth District's ruling below, Mr. Godsey and another of Mr. Prade's counsel, Mr. Alden, suggested proposed language for R.C. 2953.71(U).

subject is enacted, it is presumed that the Legislature intended to change the effect and operation of the law to the extent of the change in the language thereof.'" Id. (citation omitted). But here, there is no existing definition of a "[d]efinitive DNA test" in the statute to repeal.[13] Therefore, *County Board of Education of Putnam County*'s presumption that applies "[w]hen an existing statute is repealed and a new and different statute upon the same subject is enacted" does not apply.

Finally, the State ignores the rule that, while "[a]n amendment of an unambiguous statute indicates a purpose to change the law, ... no such purpose is indicated by the mere fact of an amendment of an ambiguous provision." 1A Sutherland Statutory Construction § 22:30 at 368 (Norman J. Singer & J.D. Shambie Singer eds., Thomson West 7th ed. 2009) (footnote omitted). As this Court observed: "'Where the original statute was ambiguous, is it not just as reasonable to assume that the legislature pointed out the construction they had intended from the outset?'" *Oliver v. Kaiser Cmty. Health Found.* (1983), 5 Ohio St. 3d 111, 116, 449 N.E.2d 438, 442 (quoting *Berry v. Branner* (1966), 245 Ore. 307, 310-11, 421 P.2d 996, 998). Proposed R.C. 2953.71(U), to the

[13] R.C. 2953.71 (App. at 22-24) defines terms for purposes of the DNA testing statute. While Senate Bill 77 would repeal the existing version of R.C. 2953.71, it would then reenact the existing statute with (1) wording changes to several of paragraphs (A) through (R) (e.g., changing the defined term "[e]ligible inmate" to "[e]ligible offender"); and (2) new paragraphs (S), (T), and (U). (App. to State's Br. at A-20 – A-21).

extent relevant here, shows that the Legislature is clarifying the existing statute and, thus, supports reversal.

C. New DNA Testing May Be Outcome Determinative.

1. The non-DNA evidence is inconclusive.

The State begins its brief by recounting the non-DNA evidence at trial. (State's Br. at 1-3). The sole issue not addressed in Mr. Prade's merit brief is the claim that he killed his wife because of "money problems" and, in particular, to get $75,000 in life insurance proceeds. (State's Br. at 2). This is nonsense.

If the Prades had "money problems," they were Dr. Margo Prade's pre-divorce failures to pay her federal income taxes, and satisfying her back tax obligations consumed half of the life insurance proceeds. (Calvaruso TT at 1455:2-22 (Reply App. at 4); Prade TT at 1938:15-1945:9 (Reply App. at 7-14)). Far from desperately needing this money for his own purposes, Mr. Prade, who was an Akron Police captain, had meaningful assets and income, and he did not spend much of the life insurance money. (Prade TT at 2078:20-2081:17 (Reply App. at 19-22); Anderson TT at 518:22-519:18 (Reply App. at 1-2); Calvaruso TT at 1456:8-11 (Reply App. at 5)).

Along the same lines, the State argues that, on the back of a bank receipt, Mr. Prade "tall[ied] his debts against" the life insurance proceeds

"more than a month before the murder." (State's Br. at 2). More nonsense. Although the bank receipt was dated before the murder, it was, after all, a *receipt*, the very purpose of which was to be kept as a record long after the underlying transaction. There was no proof that Mr. Prade's handwritten notations on the back of the receipt pre-dated the murder. (Calvaruso TT at 1460:20-25 (Reply App. at 6); see also Prade TT at 2066:22-2069:11 (Reply App. at 15-18)). And the police seized the receipt in February 1998 – three months after the murder and two months after Mr. Prade received the life insurance proceeds. (Calvaruso TT at 1448:14-20 (Reply App. at 3)).

More fundamentally, this is not an insufficient-evidence challenge to Mr. Prade's conviction. For these purposes, even the State's cramped, one-sided reading of the record establishes why modern DNA testing should go forward. That is because it is undisputed that: (1) Mr. Prade has always maintained his innocence; (2) there was no eye witness to the murder; (3) the killer's gun was not found; (4) the witnesses who testified that they saw Mr. Prade shortly before or after the murder either (a) failed to implicate Mr. Prade in initial interviews over the course of three months, or (b) first came forward on the eve of trial, nine months after this highly-publicized murder; and (5) the only physical evidence

was the bite mark, about which (a) the State's experts disagreed, and (b) a defense expert said Mr. Prade could not have made.[14]

Indeed, and as explained in The Innocence Network's *amicus curiae* brief, the central role bite mark analysis played in Mr. Prade's trial highlights the need for new, more reliable DNA testing. Bite mark analysis is inherently speculative and has a high error rate. (*Amicus* Br. at 6-11). More than a dozen persons convicted based on bite mark analysis later were acquitted based on DNA evidence. (Id. at 13-19). Significantly, one of those wrongful bite mark analysis convictions was based on expert testimony by Dr. Lowell Levine, who was one of the State's bite mark analysis experts at Mr. Prade's trial. (Id. at 15-16).

2. New DNA evidence could be "outcome determinative."

The State recounts the various DNA tests that were done at the time of Mr. Prade's trial in 1998, none of which used the STR or Y-STR testing methods that currently are used. (State's Br. at 3-5). As the State notes, some of those tests identified Dr. Margo Prade's DNA, some could not identify the DNA that was found, some excluded Mr. Prade's DNA, and none identified Mr. Prade's DNA. (Id.). Yet the conclusion the State asks this Court to draw from this evidence for present purposes –

[14] Levine TT at 1219:5-10 (Supp. at 28); Marshall TT at 1406:12-14 (Supp. at 41); Baum TT at 1641:17-20 (Supp. at 65).

that "any Y-STR result" from new testing "that excluded [Mr.] Prade would duplicate the prior results" (id. at 5) – is flatly wrong.

The State built its case at trial around its experts' testimony about the bite mark on Dr. Margo Prade's arm, and the State's trial DNA expert testified that Dr. Prade's coat over that bite mark was "the best possible source of DNA evidence as to [Dr. Prade's] killer's identity." (Callaghan Trial Test. ["TT"] at 1125:13-22 (Supp. at 23); see also Baum TT at 1629:5-10 (Supp. at 64) (the killer "probably slobbered all over" the lab coat over the bite mark)). But there was *no* evidence at trial about DNA from the killer's saliva on the lab coat over the bite mark. *None.*

This evidentiary void existed because, given the limits of 1998 PCR DNA testing technology, none of the DNA from the killer's saliva could be detected given the large volume of Dr. Prade's blood present.[15] As explained in Mr. Prade's merit brief (at 7-9), however, there have been major advances in DNA testing science since 1998. Indeed, the State concedes, as it must, that its own DNA testing expert in these proceedings said "that Y-STR testing can identify minor male contributions in an otherwise overwhelmingly female DNA environment,"

[15] In the State's trial DNA expert's words, "the fact that there [was] blood there [on the lab coat] and [that] blood's got a lot of DNA in it" prevented him from detecting any other DNA that may have been present. (Callaghan TT at 1111:6-14 (Supp. at 20)). Thus, the 1998 DNA "test results d[id] not give any information about the killer." (Id. at 1125:23-1126:2 (Reply App. at 23-24)).

a view with which Mr. Prade's DNA testing expert concurs. (State's Br. at 5 (citing Benzinger Letter at 2 (Supp. at 98); Johnson Aff. at ¶ 6 (Supp. at 94)).

Here, these advances mean that, unlike the 1998 DNA testing that "d[id] not give any information about the killer," modern testing of Dr. Prade's lab coat over the killer's bite mark might, for the first time, detect and identify DNA from the killer's saliva. Thus, the State is wrong in asserting that "any Y-STR result that excluded [Mr.] Prade would duplicate the prior results" of the 1998 DNA testing. (State's Br. at 5).

Similarly, the State's contention that "[t]he jury knew that [Mr.] Prade had been excluded by the DNA tests and convicted him anyway" (id. at 12), while literally true, is misleading because some exclusion results mean more than others. As to Dr. Prade's lab coat over the bite mark on her arm, the jury knew only that (1) the PCR DNA testing conducted before trial had identified the blood there as Dr. Prade's; and (2) because the testing method could not detect it, none of the DNA from the killer's saliva had been found. A meaningless DNA "exclusion" showing that Mr. Prade did not contribute DNA from the murder victim's blood is a far cry from excluding Mr. Prade from male DNA on lab coat over the bite mark – a result that current DNA testing technology can produce, but that 1998 DNA testing technology could not.

Significantly, the State's only substantive response to the fact that current DNA test methods may, for the first time, identify DNA from Dr. Prade's killer's saliva is to note that any such results "would have to be interpreted in light of possible contamination from persons who may have come into contact with the exhibit." (State's Br. at 5; see also id. at 7-8, 12). But that is no reason testing should not go forward. Test results here, as in any other case, would "have to be interpreted in light of possible contamination." The mere possibility of contamination, however, is not a reason to bar new testing.

In any event, the statute provides for a DNA testing authority to review the "quantity and quality" of the material available for testing and determine whether, in fact, the "sample has degraded or been contaminated to the extent that it has become scientifically unsuitable for testing." R.C. 2953.76(B) (App. at 35); see also R.C. 2953.74(C)(6) (App. at 32-33). Generic concerns about "possible contamination" alone cannot defeat an application for statutory DNA testing and, if that were enough, the statute would be meaningless.

In short, new DNA test results that, for example, exclude Mr. Prade from having contributed male DNA on the lab coat over the bite mark on Dr. Prade's arm would not "duplicate the prior results" or anything the "jury knew" at trial. Any such result would create "a strong probability

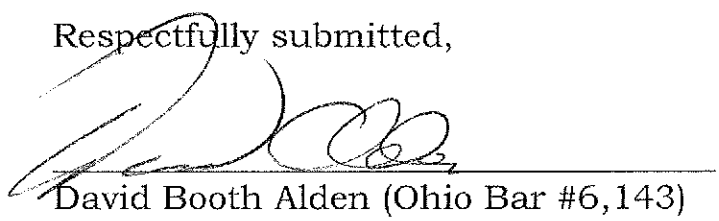
that no reasonable factfinder would have found [Mr. Prade] guilty" and, therefore, would be "outcome determinative" as Ohio's DNA testing statute requires. R.C. 2953.71(L) (App. 23), R.C. 2953.74(B)(2) (App. 31); see *Reynolds*, 2d Dist. No. 23163, 2009-Ohio-5532, ¶ 10 (reversing denial of DNA testing application where testing might "demonstrate presence of third unknown person who actually committed the crimes").

III. CONCLUSION

This Court should reverse, remand, and direct that the procedures for DNA testing under R.C. 2953.71 et seq. should go forward.

November 9, 2009

Respectfully submitted,



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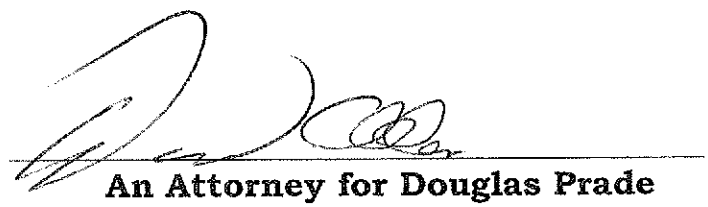
CERTIFICATE OF SERVICE

Copies of the foregoing document and the appendix that follows were served this 9th day of November, 2009, by U.S. Mail, postage prepaid, on (1) Sherri Bevan Walsh, Prosecuting Attorney, and Richard S. Kasay, Assistant Prosecuting Attorney, Appellate Division, Summit County Safety Building, 53 University Avenue, Akron, Ohio 44308; and (2) Richard Cordray, Ohio Attorney General, Ohio Attorney General's Office, DNA Testing Unit, 150 East Gay Street, 16th Floor, Columbus, Ohio 43215.



An Attorney for Douglas Prade

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	
	)	
Plaintiff-Appellee,	)	Case No. 2009-0605
	)	
v.	)	On Appeal From
	)	The Summit County Court
DOUGLAS PRADE,	)	Of Appeals, Ninth Appellate
	)	District
Defendant-Appellant.	)	(9th District Case No. 24296)

APPENDIX TO REPLY BRIEF OF APPELLANT DOUGLAS PRADE

1 A. Right.
2 Q. All right. How did you contact the person
3 involved here on this account?
4 A. Mr. Prade?
5 Q. Right.
6 A. I sent a letter to him at the office, what
7 we thought was his office at the police
8 department.
9 Q. You initiated the contact; is that correct?
10 A. That is correct.
11 Q. All right. Who is the beneficiary on the
12 $75,000 policy?
13 A. Mr. Prade.
14 Q. Okay. And you contacted Mr. Prade sometime
15 then in mid to late December; is that
16 correct?
17 A. It would have been early December by the
18 date of the letter.
19 Q. All right. And Mr. Prade responded?
20 A. He responded probably, just siphoning
21 through the mail, maybe a week later.
22 Q. Did Mr. Prade ever draw down the full
23 amount of the $75,000?
24 A. No, sir, I don't believe he did.
25 Q. He left money in that account; did he not?

1 A. Yes.
2 Q. How much money is left in that account?
3 A. I don't know. I have a feel for it, but it
4 would be -- I'm estimating, it is in the
5 range of $50,000. I don't know for sure,
6 though.
7 Q. Okay. For sure we know there is money left
8 in that account?
9 A. Yes. There is a court order to freeze that
10 account.
11 Q. Mr. Prade could have taken a lump sum check
12 of $75,238 if he wanted to in December; is
13 that correct?
14 A. Yes.
15 Q. He chose then to leave the money basically
16 in the Northwestern Mutual checking account
17 --
18 A. That is correct.
19 Q. -- is that correct? All right.
20 MR. O'BRIEN: If I could have a
21 moment, Your Honor.
22 THE COURT: Sure.
23 (Discussion off the record.)
24 MR. O'BRIEN: Your Honor, thank you
25 very much.

police department you've worked for during your career.

A. Primarily in the Uniform Subdivision. I did temporary assignments in the Detective Bureau and the Crimes Against Property and the Vice Unit. I work in training, teaching leadership and ethics, and currently I'm assigned in the Internal Affairs Unit, have been there the last three years.

Q. Concerning the investigation of the death of Dr. Margo Prade, were you involved in the investigation?

A. Yes.

Q. And I want to talk to you about a specific thing. We have had testimony that there were some items recovered from a closet in the bedroom of Officer Carla Smith's house, I believe, on February 23rd. Are you aware of that?

A. Yes.

Q. Were you actually present at the house when the search was conducted?

A. No.

Q. I'm going to hand you first, Lieutenant Calvaruso, State's Exhibit Number 95. You

1 BY MR. CARROLL:
2 Q. We have marked that as State's Exhibit Number
3 196. What is that, Lieutenant Calvaruso?
4 A. It's a checkbook with Northwestern Access
5 Fund on it. It lists the beginning balance
6 of $75,238.50 with six deductions from that
7 taking place.
8 Q. And what are the deductions that were taken
9 from that?
10 A. Rolling Acres Dodge. The amount of that
11 transaction was $8,000.
12 First Merit slash Old Phoenix, which
13 would be aligned with the motor home, that's
14 the financial institution in line with that,
15 that was for $6,626.57.
16 Then there's a deposit to Bank One for
17 $5,000.
18 Then there's a payment to the IRS for
19 $36,8 -- $36,872.79, a payment to Kerry
20 O'Brien for $5,000, and a payment to Attorney
21 L. Davison for $450, and all those are
22 subtracted from $75,000.
23 (State's Exhibit 197 was
24 marked for identification.)
25

1 BY MR. CARROLL:
2 Q. I'm going to show you State's Exhibit Number
3 197, Lieutenant Calvaruso. Is that a copy of
4 that -- I'm going to refer to it as a check
5 register that was contained in that
6 Northwestern life insurance account?
7 A. Yes, it is.
8 Q. And the balance that was remaining, at least
9 what had been subtracted out of there, how
10 much was left?
11 A. $18,239, not including the last 450.
12 (Pause.)
13 MR. CARROLL: That's all the
14 questions I have, Your Honor.
15 THE COURT: Attorney O'Brien.
16 - - -
17 CROSS-EXAMINATION
18 BY MR. O'BRIEN:
19 Q. Lieutenant, I believe it's Exhibit 95, is
20 that the box that had some financial
21 documents in it?
22 A. Yes.
23 Q. Okay.
24 MR. O'BRIEN: If I could have the
25 court's indulgence.

1 A. Yes.
2 Q. All right. Would those computations be --
3 well, it's not so much similar, but in the
4 same vein, there's a column of figures there?
5 A. Yeah, but there is no corresponding --
6 Q. No corresponding designations?
7 A. No.
8 Q. All right. But there's a column of five or
9 six sets of figures therein?
10 A. Yes, there is.
11 Q. Okay. Let me ask you another thing,
12 Detective. With respect to Defendant's
13 Exhibit 193, that has a date on the front of
14 it of October 8th, 1997, appears to be 1601.
15 That would be 4:00 o'clock, one minute after
16 4:00 o'clock in the afternoon?
17 A. Yes.
18 Q. That's military time?
19 A. Yes.
20 Q. Does the back of what has been designated 195
21 have a date on it?
22 A. No.
23 Q. So we're not sure when these notations were
24 made, are we?
25 A. No.

1 insurance policy; is that correct?
2 A. Yes.
3 Q. What do you spend, if anything, after the
4 Dodge Durango?
5 A. I know -- I know we spent some other dollars
6 out of that, and I think I transferred 5,000
7 of that to a Bank One checking account.
8 Q. Your checking account?
9 A. Yes.
10 Q. Did you conduct any other transactions out of
11 that checking account or, I'm sorry, mutual
12 fund account?
13 A. Out of that account I paid two attorneys:
14 yourself and Attorney Larry Davison.
15 Q. Now, we have $75,000. Does there come a
16 point in time when you make a large payment
17 out of that account?
18 A. Yes.
19 Q. And when is that, Doug?
20 A. That was, I believe, toward the end of
21 January. I paid $39,000 tax liability.
22 Q. By tax liability, you mean Internal Revenue
23 Service?
24 A. Yes.
25 Q. And how had that tax liability been incurred?

A. It was actually back taxes from a previous tax year.
Q. What tax year?
A. I believe it's '96.
Q. You and Margo still married then?
A. Yes.
Q. Did you file a joint return?
A. Yes.
Q. Are your taxes or tax money, Internal Revenue money, automatically withdrawn from your paycheck by the police department at that time?
A. Yes.
Q. How was Margo's medical office set up in 1996?
A. In terms of her tax?
Q. Yes. In other words, was she working for somebody or was she self-employed?
A. Beginning, I believe it was, April of '96, she -- she sold her practice to -- to Akron General. Prior to that she had operated as a -- as a satellite office under the umbrella of an organization affiliated with Akron General called Network -- Network Health Ventures.

1 Q. What was your understanding of Margo's tax
2 plan?
3 A. Our -- our tax accountant, a gentleman by the
4 name of Henry Brown who had been my tax
5 accountant since 1966, advised Margo to pay
6 her taxes on a quarterly basis.
7 Q. And is that, to the best of your
8 understanding, most self-employed people are
9 supposed to pay their taxes?
10 A. The way he explained it, it was much more
11 advantageous for her to do it that way.
12 Q. Did you come to find out that the quarterly
13 payments for 1996 had not been made?
14 A. Yes.
15 Q. And who notified you of that?
16 A. The -- a letter from the IRS.
17 Q. Was -- when did that letter arrive?
18 A. I don't know when that letter actually
19 arrived. I only discovered that letter after
20 Margo passed on.
21 Q. Do you remember reading that letter?
22 A. Yeah. I found it at the house as I was
23 looking at some other tax papers. And, yes,
24 I read it.
25 Q. As a result of that letter --

1 (The fire alarms sounded.)
2 THE COURT: All right. I think
3 it's probably safe to proceed.
4 MR. O'BRIEN: I suppose I should
5 really thank somebody, Your Honor, for
6 helping me keep the jury awake through a long
7 dialogue.
8 I apologize.
9 BY MR. O'BRIEN:
10 Q. Douglas, we were talking about IRS?
11 A. Yes.
12 Q. And you made this payment to IRS in --
13 sometime in January of '98?
14 A. I think it was January, end of January, first
15 of February. I can't recall. I haven't seen
16 my checkbook in months.
17 Q. And we can agree it's a figure somewhere
18 around 37, 38, maybe even $39,000?
19 A. 38, I think.
20 Q. Now, because IRS had filed this tax notice,
21 was this tax deficiency against just you or
22 just Margo or both?
23 A. No. I -- I learned through several calls to
24 Cincinnati and the Cleveland IRS offices that
25 the fact that we had filed a joint return

1 made me liable for the -- for the tax debt.
2 Q. So as a result of that tax debt IRS commenced
3 some type of collection action; is that
4 correct?
5 A. Yes. It was during the time that I was
6 calling them trying to get information on how
7 to set up a -- set up a payment plan, and
8 then later I learned that there was a form
9 called injured spouse form.
10 Q. That would be innocent spouse form?
11 A. Yeah, that's it.
12 And I tried looking into that. In the
13 meantime, I'm -- I'm sort of trying to buy
14 time from them because the lady explained to
15 me that in the event a payment program is not
16 worked out within a satisfactory amount of
17 time, that they would take recovery action
18 against -- against my pay.
19 Q. Of the two people on that return, you were
20 the only one left; is that correct?
21 A. Yes, that's correct.
22 Q. They didn't in particular care at IRS about
23 circumstances; they just wanted their money.
24 Is that correct?
25 A. Right. I -- I explained to both of them how

1 my taxes are taken out of my pay from the job
2 and that Margo paid her own taxes and that
3 this -- this arrearage was a result of her
4 not having paid that, but it was my
5 understanding she was herself in the process
6 of trying to work out an arrangement for a
7 payment plan.
8 Q. How much money was IRS taking out of your
9 paycheck? First of all, before you answer
10 that, how were you paid in the police
11 department in early '98?
12 A. Weekly.
13 Q. I'm sorry?
14 A. Weekly.
15 Q. You've got to keep your voice up.
16 A. By the week.
17 Q. This 1908 courtroom is one of the two
18 original ones if I remember correctly and
19 your voice travels up instead of back.
20 With respect to this weekly payment,
21 was IRS garnishing your wages?
22 A. They did.
23 Q. And how much did they garnish?
24 A. I think they took five -- in excess of $500
25 from me three times, and the actual amount of

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1 the arrearage was close to 40,000. And it
2 amortized on the basis of those three
3 deductions that they -- I think it was three
4 all total. And I paid it off before the next
5 payroll went in, and they stopped it.
6 Q. How much of a paycheck were you getting the
7 three times -- I'm sorry. What was left in
8 your paycheck after IRS hit your paycheck?
9 A. Well, actually, take -- taking -- well, not
10 take home, but the paycheck left me with $70
11 actually in the figure amount, but I was
12 still getting a couple hundred dollars in
13 credit union moneys per week. There were a
14 couple investment programs. Totally about 40
15 or 50 bucks, so I think all totaled take home
16 was about $310.
17 Q. But all but $70 of that was tied up in funded
18 programs or benefits?
19 A. That's correct.
20 Q. Is that right?
21 A. That's correct.
22 Q. So when you cashed a paycheck, you got?
23 A. $70.
24 Q. Three twenties and a ten?
25 A. Essentially.

1 Q. So you paid off IRS; is that correct?
2 A. Yes.
3 Q. And that left you with -- did you spend any
4 more money out of that $75,000 that you can
5 recall?
6 A. Not that I can recall.
7 Q. To the best of your knowledge what is still
8 left in that account?
9 A. About 18,000.
10 Q. During January or February of 1998 did you
11 have an occasion to commence or seek legal
12 advice with respect to your daughters?
13 A. Yes, I did.
14 Q. And who did you consult?
15 A. Initially I consulted with Annalisa Stubbs
16 Williams. She was involved in preparing the
17 paper work for the probate process on the
18 estate, and she advised me that I needed to
19 apply for guardianship of my daughters and --
20 Q. How is a guardianship accomplished?
21 A. How is it accomplished?
22 Q. Yes.
23 A. Well, it's a legal process that I have to
24 fill out, essentially a court-issued
25 application. I believe there is an

1 appears that the loan was amortized and I
2 shifted some of the loan payments to -- all
3 of the loan payments to share -- share
4 deposits.
5 Q. Calling your attention to '94, are there
6 regular deposits in '94?
7 A. That's correct.
8 Q. Are there withdrawals in '94?
9 A. Yes, there are.
10 Q. In '95 -- are there regular payments in '95
11 or deposits?
12 A. Yes, there are.
13 Q. Are there also withdrawals in '95?
14 A. Yes, there are.
15 Q. Are the withdrawals in '95 made periodically?
16 A. Yes.
17 Q. Now, did you also have a checkbook?
18 A. Yes, I did.
19 Q. Okay. And would you make periodic deposits
20 in your checkbook?
21 A. Yes.
22 Q. Handing you what's been marked for purposes
23 of identification as Defendant's JJ, would
24 you please look at that.
25 What does that purport to represent?

1 A. This is a copy of my checkbook register from
2 September 3rd of '97 through February 18th of
3 '98.
4 Q. Now, previously the State submitted into
5 evidence a copy of this. Do you recall that?
6 A. I believe they did, but I don't recall.
7 Q. In calling your attention to certain figures
8 in around the October time period, do you see
9 that in your check register?
10 A. Yes, I do.
11 Q. And you recall, I believe it was, Lieutenant
12 Calvaruso pointing those figures out to the
13 jury?
14 A. That's correct. I recall that.
15 Q. I'm going to ask you to go further into your
16 check register, into January. Do you see
17 similar figures in January of '98?
18 A. Yes, I do.
19 Q. Handing you what has been marked for purposes
20 of identification as Defendant's KK, do
21 you -- do you recognize that exhibit?
22 A. Yes. These are the copies of customer --
23 customer receipts for my checking deposit.
24 Q. Are they from various dates over the last few
25 years?

1 A. Yes.
2 Q. All right. Are there writings on the front?
3 A. Yes.
4 Q. Are the writings on the back?
5 A. Yes.
6 Q. Are the writings on the back of all of them?
7 A. Not all of them.
8 Q. Are there dates on the back of the deposit
9 tickets that have writings on them?
10 A. No.
11 Q. Do you recall the State's exhibits -- and I
12 apologize to the court and the jury for not
13 having an exhibit number -- where they blew
14 up a deposit ticket for, I believe, October
15 of 1997?
16 A. I do.
17 Q. And there was -- there a four or $500 deposit
18 in there?
19 A. I don't recall the amounts.
20 Q. All right. And there is a time stamp on the
21 front of that ticket indicating it was
22 October of '97. Do you remember that?
23 A. Yes.
24 Q. All right. Do you remember some -- being
25 shown some writing on the back of that

1 ticket?
2 A. I do.
3 Q. All right. Was that your handwriting?
4 A. Yes, it was.
5 Q. Do you recall when you made those notations
6 on the back of that deposit ticket?
7 A. My recollection of that was made clear once I
8 was in the courtroom.
9 Q. When do you remember writing those notations
10 on the back of that deposit ticket?
11 A. In January of '98.
12 Q. All right. In -- in the summer of 1997 you
13 made some withdrawals from your police credit
14 union; is that correct?
15 A. Yes.
16 MR. O'BRIEN: With the court's
17 permission, I would like to list them on this
18 sheet of paper and then have the court
19 reporter mark it as an exhibit.
20 THE COURT: Go ahead.
21 BY MR. O'BRIEN:
22 Q. We're going to put summer '97. Do you recall
23 that time?
24 A. Yes.
25 Q. All right. Do you recall making any deposits

1 And I said, "Yeah."
2 Margo said: "Because he has to help me
3 with these girls. Mom can't do everything,"
4 talking about her mother.
5 I said, "I have no problem with that."
6 I made an observation that I would love to
7 have custody period, but that I probably had
8 a snowball chance in a lava flow of getting
9 custody of my children and that the only way
10 a guy generally got custody is if the wife
11 was declared unfit as if maybe she was a
12 whore or a slut. And I did say that, but I
13 didn't call her that.
14 MR. O'BRIEN: With the court's
15 permission, if I could use this paper.
16 I'll tear this off later, Your Honor,
17 more carefully because with my luck I'll rip
18 it right down the middle.
19 BY MR. O'BRIEN:
20 Q. Calling your attention to November of '97,
21 Douglas, what was your financial condition as
22 far as assets go in November of '97?
23 MR. O'BRIEN: Your Honor, I'd
24 also like to have permission to mark this as
25 an exhibit.

1 A. In terms of assets, I had about 2,000 in the
2 credit union. These are rounded-off figures
3 that I'm recalling. I had about 2,000 in my
4 checking account. I had --
5 BY MR. O'BRIEN:
6 Q. Just a second. I'm not like my secretary. I
7 can't go that fast.
8 Credit union, 2,000. I think you said
9 2,000?
10 A. Yes.
11 Q. Checking, 2,000?
12 A. Yes.
13 Q. Anything else?
14 A. In terms of assets I had $83,000 in deferred
15 comp.
16 Q. What's deferred comp?
17 A. Deferred comp are moneys taken out of your
18 pay after taxes to -- I'm sorry, before
19 taxes, but at the time we started doing that
20 deferred comp, reduced your tax liability and
21 deferred the payment on those taxes until
22 such time as you retire.
23 Q. Is that available to state employees?
24 A. Yes.
25 Q. City employees?

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1 A. Yes.
2 Q. County employees?
3 A. Yes.
4 Q. Like judges?
5 A. Yes.
6 Q. Probation officers?
7 A. Yes.
8 Q. Police officers?
9 A. Yes.
10 Q. Prosecutors?
11 A. Yes.
12 Q. Okay. Any other assets?
13 A. I think I had about 75,000 in accumulated
14 time.
15 Q. What's accumulated time?
16 A. At the time I retired I was entitled to five
17 weeks of vacation a week. I would never use
18 all of those weeks and you could bank
19 whatever was left over, so every year I
20 generally banked a week or two plus court
21 time plus unused sick time.
22 Q. Is that what they say in the military
23 carrying it over on the books or something
24 like that?
25 A. That's correct.

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1 Q. Any other assets? Any savings?
2 A. I had about 8,000 in a savings account at
3 Bank One.
4 Q. Any type of funds or any other type of
5 investments?
6 A. I think I had another 2,000 in Templeton
7 World Fund Investments.
8 Q. In November '97 what is your rank in the
9 police department?
10 A. Captain.
11 Q. Do captains get overtime?
12 A. Yes.
13 Q. Approximately what was your annual salary
14 then in November of 1997 as a captain on the
15 police force?
16 A. I think that year I made 61,000 with
17 overtime.
18 Q. There's been some testimony, Douglas, about
19 some furs and jewelry that have been marked
20 as State's exhibits that were found in your
21 storage locker.
22 MR. O'BRIEN: With the court's
23 permission, I'll mark that exhibit later.
24 BY MR. O'BRIEN:
25 Q. There were some furs and jewelry and some

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1 Wednesday, or even the weekend before, it is
2 possible that she could have had their DNA
3 underneath her fingernails?
4 A. It's possible.
5 Q. And by saying that Douglas Prade's DNA was
6 not found and he was excluded, you're not
7 saying that that doesn't mean he wasn't at
8 the scene, are you?
9 A. No, I'm not.
10 Q. And you're not saying that Douglas Prade
11 didn't bite or kill Margo Prade?
12 A. I can't say that, no.
13 Q. And as a forensic scientist, if you are
14 looking to find the best source of evidence,
15 if you're going to assume that Margo did not
16 bite herself and that the bite occurred at
17 the time of the homicide, what area of her
18 body, what source of DNA would you be looking
19 to as being the best possible source of DNA
20 evidence as to her killer's identity?
21 A. Given those assumptions, the bite mark is
22 very important.
23 Q. And your test results do not give you any
24 information about the killer; the bite mark
25 shows you Margo Prade's DNA only?

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1 A. The type that is consistent with Margo Prade
2 is the only type of blood stain, bite mark.
3 (Pause.)
4 MS. McCARTY: That's it.
5 THE COURT: Anything further?
6 MR. O'BRIEN: No recross.
7 THE COURT: Dr. Callaghan,
8 thank you very much. You're excused.
9 (Witness excused.)
10 THE COURT: Doctor, just raise
11 your right hand. I'm going to go ahead and
12 swear you in. You can go ahead and sit down.
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