

APPENDIX INDEX

16-0686

ORIGINAL

Exhibit A: Order on Defendant's Petition for Post-Conviction Relief or Motion for New Trial, *State v. Prade*, Summit County Common Pleas Case No. CR 1998-02-0463 (Jan. 29, 2013)

Exhibit B: Journal Entry, *State v. Prade*, 9th Dist. Case No. 27323 (Aug. 14, 2014)

Exhibit C: Order on Defendant's Motion for New Trial, *State v. Prade*, Summit County Common Pleas Case No. CR 1998-02-0463 (Mar. 11, 2016)

Exhibit D: Notice of Appeal, *State v. Prade*, 9th Dist. Case No. 28193 (filed Apr. 7, 2016)

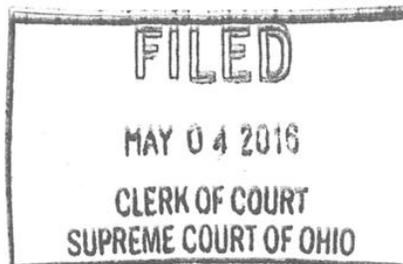


Exhibit A

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 fiancé) 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."

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.

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

"Actual innocence" under R.C. 2953.21(A)(1)(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)(1)(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)(1)(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.

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

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 P17 (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 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 (BCI&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.1

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 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,

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

(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

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

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

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.

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 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 twofold. 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

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

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. 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 P11. 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 reasonable 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

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.

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

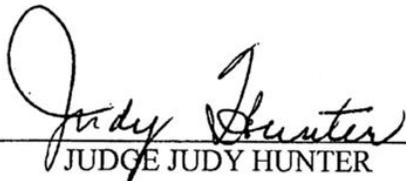
given to the evidence presented at trial. Jurors would be prompted to reconsider, as set forth above, the credibility of the key trial witnesses and the forcefulness of their testimony in the underlying trial, along with the other circumstantial evidence.

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

COPY.

cc:

Attorney David Alden

Attorney Mark Godsey

Attorney Michele Berry, amicus curiae

Attorney Michael de Leeuw, amicus curiae

Chief Counsel, Summit County Prosecutor's Office Mary Anne Kovach

Ohio Attorney General Mike Dewine

Exhibit B

COPY

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. MORGAN

STATE OF OHIO

2014 AUG 14 AM 11:21

C.A. No. 27323

Appellant

v.

SUMMIT COUNTY
CLERK OF COURTS

DOUGLAS PRADE

Appellee

JOURNAL ENTRY

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.

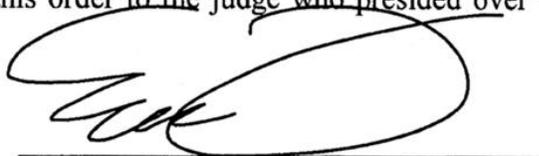
It appears that the trial court may have taken this step because it recognized in its analysis of the new trial motion that its order granting the new trial could become moot if, on appeal, this Court affirmed its grant of the petition for postconviction relief. However, the trial court could have unconditionally 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.

Exhibit C

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, the 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 matter 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.*

CUMULATIVE

¹ There appears to be no Ohio case law that specifically defines “strong probability.”

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 by 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 on 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 the Defendant's trial attorney elicited during cross examination of the two eyewitnesses during the 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 in 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 and 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 of 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 1998 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 same basic criticisms existed at the time of trial. The Defendant's theory at trial was that the bite mark identification was unreliable. This Court finds Dr. Bush's opinion post-trial, the other published 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 cumulative 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. See, 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, it 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 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.

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) 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;

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,

and a piece of metal from Margo Prade's bracelet – all at the State's request. From all the items 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

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 test 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 handled by an undetermined number of individuals. This Court therefore concludes that more likely than

³ As this Court had the benefit of reviewing the prior transcripts and exhibits from the 2012 hearing in advance of the November 2015 hearing, it was well cognizant of the complexity of the issues at hand.

not 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.

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-1035, ¶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.

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 Prade 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 not 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-1035, ¶121.

CONCLUSION

In conclusion, the Defendant has failed to demonstrate that the alleged new bite mark and eyewitness evidence establishes a strong probability that it would change the result (verdict) had it 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 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.

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.

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 on 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

Exhibit D

COPY

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COURT OF APPEALS
SANDRA HURT

2016 APR -7 AM 10:40

2016 APR -7 AM 10:03

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

SUMMIT COUNTY
CLERK OF COURTS
STATE OF OHIO,

SUMMIT COUNTY
CLERK OF COURTS

Plaintiff,

vs.

DOUGLAS PRADE,

Defendant

) Common Pleas Case No. CR 98 02-0463
)
)
) JUDGE CHRISTINE CROCE
)
)
)
) NOTICE OF APPEAL
)
)

28193

Now comes Defendant Douglas Prade, and hereby gives notice that he is appealing to the Ninth District Court of Appeals, Summit County, Ohio, from the final judgment entered in this action on March 11, 2016.

Dated: April 7, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by U.S. mail and/or electronic mail this 7th day of April, 2016, to the following:

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