

**IN THE SUPREME COURT OF OHIO**

|                               |   |                                 |
|-------------------------------|---|---------------------------------|
| STATE OF OHIO ex rel. DOUGLAS | ) | CASE No. 2016-0686              |
| PRADE                         | ) |                                 |
| Relator,                      | ) |                                 |
|                               | ) |                                 |
| v.                            | ) |                                 |
|                               | ) | ORIGINAL PETITION FOR THE       |
|                               | ) | ISSUANCE OF WRIT OF PROHIBITION |
|                               | ) |                                 |
| NINTH DISTRICT COURT OF       | ) |                                 |
| APPEALS, et al.               | ) |                                 |
| Respondents.                  | ) |                                 |

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**NOTICE OF FILING AGREED PRESENTATION OF EVIDENCE IN ACCORDANCE  
WITH S.Ct.Prac.R. 12.06 ON BEHALF OF RELATOR AND RESPONDENTS  
PART ONE OF TWO**

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*Counsel for Respondent  
Honorable Judge Christine Croce*

Now come the Relator Douglas Prade, Respondent the Ninth District Court of Appeals, and Respondent Hon. Judge Christine Croce, through undersigned counsel, and pursuant to the Court's briefing scheduled filed July 27, 2016, and S.Ct.Prac.R. 12.06, hereby submit the attached evidence in the form of certified copies from the Summit County Clerk of Courts (Exhibits A through M) and by stipulation (Exhibits N through P). The evidence Submitted is listed as the following exhibits.

Part One Exhibits

- A. Filed 9/24/98, Sentencing Entry, Case No.: CR 1998-02-0463
- B. Transcript of Docket and Journal Entries for the direct appeal CA-19327, *State v. Prade*, 139 Ohio App.3d 676, 745 N.E.2d 475 (9th Dist. 2000)[certified 5/31/16]
- C. Filed 7/2/12, Mr. Prade's Petition for Post Conviction Relief or in the Alternative, Motion for New Trial, Case No.: CR 1998-02-0463 (unsealed by order dated 8/2/12)
- D. Filed 7/24/12, State's Brief in Response, Case No.: CR 1998-02-0463
- E. Filed 8/1/12, Mr. Prade's Reply, Case No.: CR 1998-02-0463(unsealed by order dated 8/2/12)
- F. Filed 10/26/12, Mr. Prade, through counsel, filed Waiver of Appearance at Hearing, Case No.: CR 1998-02-0463
- G. Filed 12/3/12, the State's Post Hearing Brief, Case No.: CR 1998-02-0463
- H. Filed 12/4/12, Mr. Prade's Post Hearing Brief, Case No.: CR 1998-02-0463
- I. Filed 1/29/13 , Judge Hunter's Order, Case No.: CR 1998-02-0463

Part Two Exhibits

- J. Filed 1/29/13, Notice of Appeal filed with the Trial Clerk of Courts, Case No.: CR 1998-02-0463
- K. Filed 1/29/13, Notice of Appeal filed with the Appellate Clerk of Courts, Appellate Case No.: 26775
- L. Filed 3/11/16, Judge Croce's Order, Case No.: CR 1998-02-0463
- M. Transcript of Docket and Journal Entries for CR 1998-02-0463 (certified 5/31/16)

- N. Filed 3/19/14, Notice of Appeal of Douglas Prade, Ohio Supreme Court Case No.: 2014-0432
- O. Filed 5/5/14, Memorandum in Support of Jurisdiction, Ohio Supreme Court Case No.: 2014-0432
- P. Filed 7/23/14, Decision: Jurisdiction declined, *State v. Prade*, 139 Ohio St.3d 1483, 2014-Ohio-3195, 12 N.E.3d 1229 (2014)

Respectfully submitted,

/s/ Tiffany L. Carwile

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was sent via regular U.S. Mail  
Service to:

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Ninth District Court of Appeals*

this Tuesday, August 16, 2016.

*/s Colleen Sims*  
**COLLEEN SIMS (0069790)**  
Assistant Prosecuting Attorney  
Attorney for Respondent Judge Croce

# EXHIBIT

A

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

202 11 198  
SUMMIT COUNTY  
COURTS  
THE STATE OF OHIO

SEPTEMBER

Term 19

98

CR 98 02 0463

No. \_\_\_\_\_

vs.  
DOUGLAS E. FRADE  
PAGE ONE OF TWO

JOURNAL ENTRY

VOL. 2222 OF 0935

THIS DAY to-wit: The 24th of August, A.D., 1998, now ~~came~~ the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, DOUGLAS E. FRADE, being in Court with counsel, KERRY O'BRIEN and SUSAN VOGEL, for trial herein. Heretofore, a Jury was duly empaneled and sworn, and the trial commenced. Thereafter, the trial not being completed, adjourned from day to day, until September 22, 1998, at 2:15 P.M., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel and the charge of the Court, retired to their room for deliberation.

And thereafter, to-wit: On September 23, 1998, at 12:30 P.M., said Jury came again into the Court and returned their verdict in writing finding said Defendant GUILTY of the crime of AGGRAVATED MURDER, as contained in Count One (1) of the Indictment, WITH FIREARM SPECIFICATION, GUILTY of the crime of INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS, as contained in Counts Two (2), Three (3), Four (4), and Five (5) of the Supplement One to Indictment, and Count Seven (7) of the Supplement Two to Indictment, and Count Eight (8) of the Supplement Three to Indictment, and GUILTY of the crime of POSSESSING CRIMINAL TOOLS, as contained in Count Six (6) of the Supplement One to Indictment, which offense occurred after July 1, 1996.

The Court further finds the following pursuant to O.R.C. 2929.13(B):

(at least ONE must be found)

X aggravated murder when a death sentence is not imposed; AND

The Court further finds the Defendant is not amenable to community control and that prison is consistent with the purposes of O.R.C. 2929.11.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THIS COURT that the Defendant,

COPY

|                           |     |      |
|---------------------------|-----|------|
| Journal                   | No. | Page |
| <b>COMMON PLEAS COURT</b> |     |      |
| COUNTY OF SUMMIT          |     |      |
| <b>JOURNAL ENTRY</b>      |     |      |
| THE STATE OF OHIO         |     |      |
| Entered                   | 19  |      |
| Hon.                      |     |      |
| Judge Presiding           |     |      |

NO 2222 of 0036

DOUGLAS E. PRADE, be committed to the Ohio Department of Rehabilitation and Corrections, for the remainder of his natural LIFE, for punishment of the crime of AGGRAVATED MURDER, Ohio Revised Code Section 2903.01(A), a special felony, for a definite period of Two (2) Years for punishment of the crime of INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS, on each of two (2) counts, Ohio Revised Code Section 2933.52, felonies of the third (3rd) degree, for a definite period of One and One Half (1 1/2) years for punishment of the crime of INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS, on each of four (4) counts, Ohio Revised Code Section 2933.52, felonies of the fourth (4th) degree, and for a definite period of One (1) year for punishment of the crime of POSSESSING CRIMINAL TOOLS, Ohio Revised Code Section 2923.24, a felony of the fifth (5th) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, County-Safety Building, Akron, Ohio 44308.

IT IS FURTHER ORDERED, pursuant to the above sentence that the Defendant be conveyed to the Lorain Correctional Institution, Ohio, FORTHWITH, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the Three Year mandatory sentence imposed in this case be served CONSECUTIVELY and not concurrently with the sentence imposed in Court One (1).

IT IS FURTHER ORDERED that the sentence imposed in Counts Two (2) and Six (6) be served CONSECUTIVELY and not concurrently with each other, and CONSECUTIVE with the sentence imposed in Court One (1).

IT IS FURTHER ORDERED that the sentence imposed in Counts Three (3), Four (4), Five (5), Seven (7), and Eight (8) be served CONCURRENTLY and not

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IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

SEPTEMBER

Term 19

98

CR 98 02 0463

THE STATE OF OHIO

No. \_\_\_\_\_

vs.  
DOUGLAS E. FRADE  
PAGE TWO OF TWO

JOURNAL ENTRY

consecutively with each other, and CONCURRENT with the sentence imposed in Court One (1).

IT IS FURTHER ORDERED that credit for time served is to be calculated by the Summit County Adult Probation Department, and will be forthcoming in a subsequent journal entry.

Thereupon, the Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court.

APPROVED:  
September 23, 1998  
jam

*Mary F. Spicer*  
MARY F. SPICER, Judge  
Court of Common Pleas  
Summit County, Ohio

Vol. 2222 of 0337

- cc: Prosecutor Alison McCarty
- Prosecutor Michael Carroll
- Attorney Kerry O'Brien
- Attorney Susan Vogel
- Criminal Assignment
- Booking
- Court Convey

I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.

*[Signature]*  
\_\_\_\_\_  
Deputy Clerk

# EXHIBIT

# B

**Transcript of Docket and Journal Entries**  
**Ninth District Court of Appeals**  
-----

Case No.: **CA-19327**

ACTION FOR:

**STATE OF OHIO**  
AKRON, OH

PLTF/APPELLEE

**PRADE, DOUGLAS E.**  
AKRON, OH

DEFT/APPELLANT

1. 10/20/98 NOTICE OF APPEAL.
2. 10/20/98 DOCKETING STATEMENT.
3. 10/20/98 PRAECIPE TO COURT REPORTER.
4. 10/21/98 AMENDED DOCKETING STATEMENT.
5. 10/21/98 AFFIDAVIT OF INDIGENCY.
6. 10/27/98 THE APPELLANT IS ORDERED TO PAY THE DEPOSIT OR REQUEST A WAIVER OF THE DEPOSIT IN ACCORDANCE WITH LOC.R.2(C), ON OR BEFORE NOVEMBER 20, 1998. JL 127 PG 545. SUSAN E. WHEELER, COURT ADMINISTRATOR.
7. 11/24/98 THE TIME FOR FILING THE FILING OF THE TRANSCRIPT OF PROCEEDINGS IS EXTENDED UNTIL DECEMBER 29, 1998. JUDGE MARY SPICER.
8. 12/18/98 COURT REPORTER'S MOTION FOR EXTENSION OF TIME TO FILE THE TRANSCRIPT OF PROCEEDINGS.
9. 12/22/98 JOURNAL ENTRY. COURT REPORTER GRANTED UNTIL JANUARY 28, 1999 TO FILE THE TRANSCRIPT OF PROCEEDINGS. JL 128 PG 718. SUSAN E. WHEELER, COURT ADMINISTRATOR.
10. 01/27/99 COURT REPORTER'S MOTION FOR EXTENSION OF TIME TO FILE THE TRANSCRIPT OF PROCEEDINGS.
11. 01/27/99 APPELLANT'S MOTION TO PROCEED IN FORMA PAUPERIS AND FOR APPOINTMENT OF COUNSEL.
12. 01/29/99 JOURNAL ENTRY. COURT REPORTER GRANTED UNTIL FEBRUARY 26, 1999 TO FILE THE TRANSCRIPT OF PROCEEDINGS. JL 129 PG 321. SUSAN E. WHEELER, COURT ADMINISTRATOR.
13. 02/04/99 JOURNAL ENTRY. APPELLANT'S MOTION FOR APPOINTMENT

OF COUNSEL IS DENIED. A MOTION FOR APPOINTMENT OF COUNSEL MUST FIRST BE MADE TO THE TRIAL COURT. JL 129 PG 426. JUDGE DONNA J. CARR

14. 02/10/99 APPELLANT'S MOTION TO BE DECLARED INDIGENT FOR PURPOSES OF THIS APPEAL AND THAT COUNSEL BE APPOINTED.
15. 02/19/99 JOURNAL ENTRY. THE APPELLANT HAS MOVED THIS COURT TO FIND HIM INDIGENT FOR PURPOSES OF HIS CRIMINAL APPEAL. UPON DUE CONSIDERATION, THIS COURT FINDS THAT THE APPELLANT HAS NOT DEMONSTRATED THAT HE IS INDIGENT. THE MOTION IS THEREFORE DENIED. JL 129 PG 690. JUDGE WILLIAM R. BAIRD, JUDGE LYNN C SLABY, JUDGE BETH WHITMORE.
16. 02/26/99 (14) VOLUMES TRANSCRIPT OF PROCEEDINGS.
17. 02/26/99 EXHIBITS. (SB77) STATE'S EXHIBITS: 1 - ONE SUPERTAPE LOW NOISE; 2 - ONE SONY TAPE; 3 - ONE CASSETTE TAPE - RADIO SHACK; 4- TWO IRC LO INSTANT RECORD CASSETTES; 5 - THREE 3M CASSETTES; 6 - ONE MAXELL CASSETTE TAPE; 7 - ONE CRAIG VOX CASSETTE PLAYER; 8 - FOUR TDK AUDIOTAPES; 9 - TWO KOPPERHEAD TAPES; 10 - FOUR AUDIOCASSETTE TAPES; 11 - THREE TDK AUDIOTAPES; 12 - AUDIOTAPES; 13 - AUDIOTAPE; 14 - AUDIOTAPE; 15 - ONE CASSETTE RECORDER MANUAL; 16 - ONE INVOICE; 17 - AUDIOTAPE; 18 - POWER OF ATTORNEY; 19 - EMPTY BOX; 20 - AUDIOTAPE; 21 - AUDIOTAPE; 22 - AUDIOTAPE; 23 - AUDIOTAPE; 24 - AUDIOTAPE; 25 - AUDIOTAPE; 26 - AUDIOTAPE; 27 - AUDIOTAPE; 28 - 35 - PHOTOS; 36 - AUDIOTAPE; 37 - THREE COATS; 38 - JEWELRY BOX; 39 - JEWELRY BOX; 40 - JEWELRY BOX; 41 - JEWELRY BOX; 42 - LIFE INSURANCE POLICY; 43 - LIFE INSURANCE POLICY; 44 - SOCIAL SECURITY INS.; 45 - SOCIAL SECURITY INS.; 46 - EMPLOYMENT AGREEMENT, 1/22/96; 47 - W-2 1997, MARGO PRADE; 48 - AKRON POLICE CREDIT UNION STATEMENT; 49 - CONDENSED EARNINGS REGISTER; 50 - LETTER, 3/11/96; 51 - STATEMENT OF POLICY BENEFITS; 52 - AUDIOTAPE; 53 - LETTER, 9/8/93; 54 - LETTER, 3/15/95; 55 - LETTER, 12/9/96; 56 - LETTER, 1/9/97; 57 - LETTER, 2/3/97; 58 - SEPARATION AGREEMENT; 59 - DISSOLUTION, 2/10/97; 60 - CERTIFICATE; 61 - JUDGMENT ENTRY, 4/1/97; 62 - LETTER, 11/20/97; 63 - LETTER, 1/26/98; 64 - LETTER, 1/13/98; 65 - LETTER, 1/26/98; 66 - INVOICE, LARRY'S PLUMBING; 67 - AUDIOTAPE; 68 - 74 - PHOTOS; 75 - EMPTY BOX 1.1; 76 - EMPTY BOX 1.2; 77 - ENVELOPE CONT. TWO COPPER BULLETS; 78 - EMPTY BOX 1.3; 79 - ENVELOPE CONT. ONE COPPER BULLET; 80 - EMPTY BOX 1.4; 81 - ENVELOPE CONT. ONE COPPER BULLET; 82 - EMPTY BOX 1.5; 83 - ENVELOPE CONT. ONE COPPER BULLET; 84 - EMPTY BOX 1.7; 85 - ENVELOPE CONT. ONE COPPER BULLET; 86 - ENVELOPE 1.8; 87 - ENVELOPE CONT. ONE COPPER BULLET; 88 - APD PROPERTY ENVELOPE CONT. ONE COPPER BULLET; 89 - PATIENT LIST; 90 - AFD

EMERGENCY MEDICAL SERVICE REPORT; 91 - AERIAL PHOTO - PARKING LOT (LARGE SIZE); 92 - 93 - PHOTOS OF PURSE; 94 - CHECK FOR \$75, PAYABLE TO A. WILLIAMS; 95 - BOX CONT. FINANCIAL DOCUMENTS; 96 - 112 - PHOTOS; 113 - APD PROPERTY ENVELOPE CONT. LINE OF DIAMOND AND GOLD IN APPEARANCE PIECE FROM TENNIS BRACELET; 114 - APD PROPERTY ENVELOPE CONT. DIAMOND AND GOLD IN APPEARANCE TENNIS BRACELET; 115 - APD PROPERTY ENVELOPE CONT. FOUR BUTTONS; 116 - APD PROPERTY ENVELOPE CONT. IN APPEARANCE TWO HOOP EARRING, TWO DIAMOND EARRINGS, ONE DIAMOND/BLUE SAPPHIRE EARRING, ONE GOLD 21" CHAIN, ONE MARQUIS DIAMOND RING, ONE DIAMOND RING WITH 20 DIAMONDS; 117 - PHOTO; 119 - BOX OF CLOTHING; 120 - APD PROPERTY ENVELOPE CONT. TIME SHEET; 121 - AERIAL PHOTO - APPROXIMATE DISTANCE TRAVELED (LARGE SIZE); 122 - ENVELOPE CONT. CUTTING BACK OF LAB COAT; 123 - ENVELOPE CONT. CUTTING OF BITE MARK FROM LAB COAT; 124 - ENVELOPE CONT. DRIED BLOOD - MARGO PRADE; 125 - ENVELOPE CONT. DRIED BLOOD - DOUGLAS PRADE; 126 - ENVELOPE CONT. DRIED BLOOD - TIM HOLSTON; 127 - ENVELOPE CONT. FINGERNAIL CLIPPINGS - MARGO PRADE; 128 - VIAL CONT. SWAB OF CHEEK - MARGO PRADE; 129 - VIAL CONT. SWAB OF CHEEK - MARGO PRADE; 130 - VIAL CONT. SWAB OF BITE MARK; 131 - VIAL CONT. SWAB OF BITE MARK; 132 - APD PROPERTY ENVELOPE CONT. PHOTO ARRAY; 133 - LEADS PRINTOUT; 134 - APD PROPERTY ENVELOPE CONT. THREE PHOTOS; 135 - APD PROPERTY ENVELOPE CONT. FOUR PHOTOS; 136 - BODY DIAGRAM; 137 - 140 - AUTOPSY PHOTOS; 141 - BODY DIAGRAM; 142 - 144 - AUTOPSY PHOTOS; 145 - BODY DIAGRAM; 146 - 149 - AUTOPSY PHOTOS; 150 - BODY DIAGRAM; 151 - 152 - AUTOPSY PHOTOS; 153 - BODY DIAGRAM; 154 - BODY DIAGRAM; 155 - 159 - AUTOPSY PHOTOS; 160 - BODY DIAGRAM; 161 - AUTOPSY PROTOCOL; 162 - 167 - PHOTOS; 168 - 169 - PHOTOS - MARGO PRADE; 170 - CAST OF TEETH - MARGO PRADE; 171 - CAST OF TEETH - AL STRONG; 172 - CAST OF TEETH - TIM HOLSTON; 173 - CAST OF TEETH - DOUGLAS PRADE; 174 - CAST OF TEETH - TERRY HEARD; 175 - CAST OF TEETH - DELPHINIA GILBERT; 176 - PHOTO OF BITE MARK; 177 - BOX OF BITE IMPRESSIONS; 178 - VIDEO TAPE FROM ROLLING ACRES DODGE; 179 - VIDEO TAPE - SECRET SERVICE; 180 - VIDEO TAPE - SECRET SERVICE; 181 - VIDEO TAPE - MED ART & LEGAL GRAPHICS, ANIMATION; 182 - PHOTO - BITE MARK; 183 - PHOTO - WAX IMPRESSION; 184 - 188 - TRANSPARENCIES; 189 - 191 - PHOTOS OF TEETH (LARGE); 192 - BANK ONE RECEIPT, 10/8/97; 193 - BANK ONE RECEIPT, FRONT SIDE, 10/8/97 (POSTERBOARD SIZE); 194 - BANK ONE RECEIPT, BACK SIDE, 10/8/97 (POSTERBOARD SIZE); 195 - CHECKBOOK TAKEN FROM STATE'S EXHIBIT 95; 196 - NORTHWESTERN CHECKBOOK TAKEN FROM STATE'S EXHIBIT 95; 197 - POSTERBOARD SIZE FIGURES TAKEN FROM NORTHWESTERN CHECKBOOK TAKEN FROM STATE'S EXHIBIT 95; 198 - PHOTO, AUTOPSY; 199 - PHOTO, AUTOPSY; 200 - IRS LETTER; 201 - IRS FINAL NOTICE;

202 - KAY JEWELERS STATEMENT; 203 - MAXELL TAPE, 2/27/98 (WITHDRAWN P.2262 T.O.P.); 204 - 208 - PHOTOS OF WORKOUT ROOM. DEFENDANT'S EXHIBITS: A - CALLAGHAN REPORT; B - BANK ONE RECEIPT, 8/22/97; C - ENVELOPE CONT. BANK ONE RECEIPTS TAKEN FROM STATE'S EXHIBIT 95; D - APD PROPERTY ENVELOPE CONT. ONE AUDIO CASSETTE TAPE OF INTERVIEWS WITH HOWARD AND JUDITH BROOKS; E - F - SLIDES, DR. BAUM; G - ENVELOPE CONT. BITE IMPRESSION FROM IN-COURT DEMO; H - J - SLIDES, DR. BAUM; K - EMPTY BOX; K-1 - CAST OF DOUGLAS PRADE, LOWER WITH NO DENTURES; K-2 - CAST OF DOUGLAS PRADE, UPPER WITH NO DENTURES; K-3 - CAST OF DOUGLAS PRADE, UPPER WITH DENTURES; K-4 - CAST OF DOUGLAS PRADE, LOWER WITH DENTURES; L - POSTERBOARD, VARIOUS PHOTOS, JAW (DR. BAUM); M - EE - AUTOPSY PHOTOS (DR. COX); FF - AIR PUTTY (WITHDRAWN); GG - POSTERBOARD DIAGRAM - 360 MULL - FIRST FLOOR; HH - POSTERBOARD DIAGRAM - 360 MULL - SECOND STORY/BASEMENT; II - APD CREDIT UNION STATEMENTS - '91 - '95; JJ - COPIES OF DOUGLAS PRADE'S CHECK REGISTER BEGINNING 9/97; KK - MISC. CHECK DEPOSIT SLIPS - BANK ONE - DOUGLAS PRADE (PART OF DEFENDANT'S EXHIBIT C P.2257 T.O.P.); LL - LIST OF DEPOSITS/WITHDRAWALS, MAY - NOVEMBER 1997 (EASEL PAPER); MM - LIST OF ASSETS, NOVEMBER 1997 (EASEL PAPER); NN - POSTERBOARD - BAUM. COURT'S EXHIBITS: 1 - LETTERS TO AND FROM PROSPECTIVE JUROR HOLBURY; 2 - TRANSCRIPT OF TAPE; 3 - TRANSCRIPT OF TAPE; 4 - 9 - JURY INSTRUCTIONS. (EXHIBITS FILED IN BOXES IN SAFE WITH THE LARGE POSTERBOARDS KEPT SEPARATE) \*\*PHOTOS ON FILE W/EVIDENCE DEPT.

18. 02/26/99 RECORD - TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES FROM COMMON PLEAS COURT. ATTORNEYS NOTIFIED.
19. 03/17/99 APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF.
20. 03/22/99 JOURNAL ENTRY. APPELLANT GRANTED UNTIL APRIL 7, 1999 TO FILE THE APPELLANT'S BRIEF. JL 129 PG 944. SUSAN E. WHEELER, COURT ADMINISTRATOR.
21. 03/24/99 APPELLEE'S MOTION TO RELEASE EXHIBIT NOS. 36 AND 67.
22. 04/07/99 APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF.
23. 04/12/96 JOURNAL ENTRY. APPELLANT GRANTED UNTIL APRIL 27, 1999, TO FILE APPELLANT'S BRIEF. JL 130 PG 255. SUSAN E. WHEELER, COURT ADMINISTRATOR.
24. 04/13/99 JOURNAL ENTRY. APPELLEE'S MOTION TO RELEASE EXHIBIT NOS. 36 AND 37, TWO AUDIOTAPES IS GRANTED. EXHIBIT NOS. 36 AND 37 SHALL BE RELEASED TO APPELLEE FOR A PERIOD OF TEN DAYS FROM THE FILING OF THIS ORDER. JL 130 PG 289. JUDGE WILLIAM R.

BAIRD.

25. 04/13/99 APPELLEE'S MOTION TO CORRECT JOURNAL ENTRY DATED APRIL 12, 1999.
26. 04/22/99 JOURNAL ENTRY. APPELLEE GRANTED MOTION FOR THIS COURT TO CORRECT ITS ENTRY OF JANUARY 12, 1999, GRANTING THE RELEASE OF EXHIBITS 36 AND 37, TWO AUDIOTAPES. APPELLEE SEEKS THE RELEASE OF EXHIBIT NOS. 36 AND 67. EXHIBIT NOS. 36 AND 67 SHALL BE RELEASED TO APPELLEE FOR A PERIOD OF TEN DAYS FROM THE DATE OF FILING OF THIS ORDER. JL 130 PG 453. JUDGE WILLIAM R. BAIRD.
27. 04/23/99 APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE BRIEF.
28. 04/27/99 JOURNAL ENTRY. APPELLANT GRANTED UNTIL MAY 17, 1999, TO FILE APPELLANT'S BRIEF. JL 130 PG 510. SUSAN E. WHEELER, COURT ADMINISTRATOR.
29. 05/12/99 APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S BRIEF.
30. 05/14/99 JOURNAL ENTRY. APPELLANT GRANTED UNTIL JUNE 1, 1999, TO FILE APPELLANT'S BRIEF. JL 130 PG 794. JUDGE WILLIAM R. BAIRD.
31. 05/19/99 APPELLANT'S MOTION TO RELEASE EXHIBIT NOS. 180, 181 AND NN.
32. 05/24/99 JOURNAL ENTRY. APPELLANT GRANTED PERMISSION TO REMOVE EXHIBIT NOS. 180 AND 181, TWO VIDEOTAPES, AND NN, A POSTERBOARD. THE EXHIBITS SHALL BE REMOVED FOR A PERIOD NOT TO EXCEED FIVE DAYS. JL 130 PG 875. JUDGE WILLIAM R. BAIRD.
33. 05/28/99 APPELLANT'S MOTION TO RELEASE EXHIBIT NOS. 178, 179, TWO VIDEO TAPES.
34. 06/01/99 APPELLANT'S BRIEF.
35. 06/01/99 APPENDIX TO BRIEF OF APPELLANT.
36. 06/03/99 JOURNAL ENTRY. APPELLANT GRANTED MOTION TO REMOVE EXHIBIT NOS. 180 AND 181, TWO VIDEOTAPES, AND NN, A POSTERBOARD, FROM THE CLERK OF COURT'S OFFICE FOR THE PURPOSE OF REVIEW TO PREPARE HIS BRIEF. THE EXHIBITS SHALL BE REMOVED FOR A PERIOD NOT TO EXCEED FIVE DAYS. JL 130 PG 993. JUDGE WILLIAM R. BAIRD.
37. 06/08/99 JOURNAL ENTRY. THE JOURNAL ENTRY TIME-STAMPED ON JUNE 3, 1999, SHOULD BE CORRECTED TO STATE EXHIBIT NOS. 178 AND 179 ARE PERMITTED TO BE REMOVED FROM THE CLERK OF COURT'S OFFICE FOR THE PURPOSE OF REVIEW TO PREPARE HIS BRIEF. JL 131 PG 039. JUDGE WILLIAM R. BAIRD.

38. 06/21/99 APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE APPELLEE'S BRIEF.
39. 06/22/99 JOURNAL ENTRY. APPELLEE GRANTED UNTIL JULY 12, 1999, TO FILE APPELLEE'S BRIEF. JL 131 PG 294. JUDGE LYNN C. SLABY.
40. 07/12/99 APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE APPELLEE'S BRIEF.
41. 07/14/99 JOURNAL ENTRY. APPELLEE GRANTED UNTIL AUGUST 2, 1999, TO FILE THE APPELLEE'S BRIEF. JL 131 PG 686. SUSAN E. WHEELER, COURT ADMINISTRATOR.
42. 08/02/99 APPELLEE'S MOTION FOR EXTENSION OF TIME TO FILE APPELLEE'S BRIEF.
43. 08/04/99 JOURNAL ENTRY. APPELLEE GRANTED UNTIL AUGUST 23, 1999, TO FILE APPELLEE'S BRIEF. JL 131 PG 944. SUSAN E. WHEELER, COURT ADMINISTRATOR.
44. 08/09/99 APPELLEE'S MOTION TO RELEASE EXHIBIT NOS. 20 THRU 27 AND EXHIBIT NO. 67.
45. 08/10/99 APPELLEE'S MOTION TO RELEASE EXHIBIT NOS. 8 THRU 14.
46. 08/12/99 JOURNAL ENTRY. APPELLEE'S MOTION TO REMOVE EXHIBIT NOS. 20 THROUGH 27, AND EXHIBIT NO. 67, EIGHT AUDIOTAPES, FROM THE CLERK OF COURT'S OFFICE FOR THE PURPOSE OF REVIEW TO PREPARE THE BRIEF IS GRANTED. THE EXHIBITS SHALL BE REMOVED FOR A PERIOD NOT TO EXCEED FIVE DAYS. JL 132 PG 0008. JUDGE WILLIAM R. BAIRD.
47. 08/16/99 APPELLANT'S MOTION TO REMOVE EXHIBIT NOS. 28 THRU 35, 68 THRU 74, 92 AND 93, 96 THRU 112, 117, 162 THRU 167, 182 THRU 191, 198 AND 199, AND 204 THRU 208.
48. 08/17/99 APPELLEE'S MOTION TO RELEASE EXHIBIT NOS. 52, 179, 180 AND 181.
49. 08/19/99 JOURNAL ENTRY. APPELLANT GRANTED MOTION TO REMOVE EXHIBIT NOS. 28 THROUGH 35, 68 THROUGH 74, 92, 93, 96 THROUGH 112, 117, 162 THROUGH 167, 182 THROUGH 191, 198, 199, AND 204 THROUGH 208 FROM THE CLERK OF COURT'S OFFICE FOR THE PURPOSE OF REVIEW TO PREPARE BRIEF. APPELLEE GRANTED MOTION TO REMOVE EXHIBIT NOS. 52, 179, 180, AND 181 FROM THE CLERK OF COURT'S OFFICE FOR THE PURPOSE OF REVIEW TO PREPARE THE BRIEF. THE EXHIBITS SHALL BE REMOVED FOR A PERIOD NOT TO EXCEED FIVE DAYS. JL 132 PG 060. JUDGE WILLIAM R. BAIRD.
50. 08/23/99 APPELLEE'S BRIEF.

51. 09/01/99 APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S REPLY BRIEF.
52. 09/03/99 JOURNAL ENTRY. APPELLANT GRANTED UNTIL SEPTEMBER 13, 1999, TO FILE APPELLANT'S REPLY BRIEF. JL 132 PG 324. JUDGE WILLIAM R. BAIRD.
53. 09/13/99 APPELLANT'S REPLY BRIEF.
54. 10/29/99 APPELLEE'S MOTION TO RELEASE EXHIBITS.
55. 11/03/99 JOURNAL ENTRY. THE STATE HAS MOVED THIS COURT TO RELEASE SPECIFIED EXHIBITS TO THE STATE FROM NOVEMBER 12, 1999 TO NOVEMBER 19, 1999. NO REASON HAS BEEN PROVIDED IN SUPPORT OF THIS MOTION. UPON CONSIDERATION, THE MOTION IS DENIED. JL 133 PG 165. JUDGE LYNN C. SLABY, JUDGE WILLIAM R. BAIRD AND JUDGE WILLIAM G. BATCHELDER.
56. 11/05/99 APPELLEE'S MOTION TO RELEASE EXHIBITS.
57. 11/10/99 JOURNAL ENTRY. STATE DENIED MOTION TO RELEASE SPECIFIED EXHIBITS TO THE STATE FOR REVIEW AND REPLICATION BY THE NATIONAL MEDIA. JL 133 PG 225. JUDGE LYNN C. SLABY, JUDGE WILLIAM R. BAIRD AND JUDGE WILLIAM G. BATCHELDER.
58. 08/23/00 DECISION. JUDGMENT AFFIRMED. MANDATE TO COMMON PLEAS COURT. COSTS TAXED TO APPELLANT. JL 137 PG 880. JUDGE LYNN C. SLABY FOR THE COURT. JUDGE WILLIAM R. BAIRD AND JUDGE WILLIAM G. BATCHELDER CONCUR.
59. 10/06/00 NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO. CASE NO. 00-1782
60. 01/08/01 JOURNAL ENTRY. UPON CONSIDERATION OF THE JURISDICTIONAL MEMORANDA FILED IN THIS CASE, THE COURT DENIES LEAVE TO APPEAL AND DISMISSES THE APPEAL AS NOT INVOLVING ANY SUBSTANTIAL CONSTITUTIONAL QUESTION. JL 140 PG 637. THOMAS J. MOYER, CHIEF JUSTICE.
61. 10/25/02 MOTION FOR RETURN OF EVIDENCE AND ORDER. STATE EXHIBITS #37 THREE COATS; #38, #39, #40, #41 FOUR JEWELRY BOXES; #113 LINK OF DIAMOND AND GOLD IN APPEARANCE PIECE FROM TENNIS BRACELET; #116 TWO HOOP EARRINGS, TWO DIAMOND EARRINGS, ONE DIAMOND/BLUE SAPPHIRE EARRING; ONE GOD 21" CHAIN, ONE MARQUIS DIAMOND RING, ONE DIAMOND RING WITH 20 DIAMONDS. JUDGE MARY F. SPICER.
62. 10/25/02 EVIDENCE RETURNED TO JOHANNA NELSON, EVIDENCE PROPERTY OFFICER OF THE SUMMIT COUNTY PROSECUTOR'S OFFICE.
63. 07/02/03 LETTER FROM THE OHIO INNOCENCE PROJECT REGARDING EXHIBITS.

64. 09/19/05 APPELLEE'S MOTION TO RELEASE EXHIBITS 75 THROUGH 88 TO PROPERTY ROOM OFFICER JOHANNA NELSON.
65. 10/05/05 JOURNAL ENTRY. APPELLEE HAS MOVED TO RELEASE EXHIBITS 75 THROUGH 88 FILED IN THE RECORD OF THIS APPEAL FOR FURTHER FIREARM/BALLISTIC ANALYSIS. THE MOTION IS GRANTED AND THE EXHIBITS SHALL BE RELEASED TO THE CUSTODY OF JOHANNA NELSON, EVIDENCE PROPERTY OFFICER OF THE SUMMIT COUNTY PROSECUTOR'S OFFICE. JUDGE LYNN SLABY
66. 12/14/05 RELEASE OF EXHIBITS #75 TO #88 TO JOHANNA NELSON, EVIDENCE PROPERTY OFFICER OF SUMMIT COUNTY PROSECUTOR'S OFFICE.
67. 05/21/12 \*\*CLERK'S NOTE: TRANSCRIPTS ARE IN COURT OF APPEALS VAULT WITH FILE. 7/29 TRANSCRIPTS AND FILE OUT TO COURT OF APPEALS CLERK
68. 09/11/12 OUT TO PROSEC (178)
69. 09/13/12 OUT TO PROSEC (178,179, 180, 181)
70. 02/26/99 EXHIBIT LIST (CR J) (SB77)
71. 09/06/13 RETURNED FROM PROSECUTOR'S OFFICE (EX 178 ,179, 180, 180)
72. 08/30/1313 OUT
73. 09/06/13 OUT. EX 178, 179, 180, AND 181 TO COURT OF APPEALS
74. 04/04/14 RETURNED.
75. 02/26/99 STATE'S EXHIBIT 1: ONE SUPERTAPE LOW NOISE \*\*PHOTO ON FILE W/EVIDENCE DEPT.
76. 02/26/99 STATE'S EXHIBIT 2: ONE SONY TAPE \*\*PHOTO ON FILE W/EVIDENCE DEPT.
77. 02/26/99 STATE'S EXHIBIT 3: ONE CASSETTE TAPE - RADIO SHACK \*\*PHOTO ON FILE W/EVIDENCE DEPT.
78. 02/26/99 STATE'S EXHIBIT 4: TWO IRC LO INSTANT RECORD CASSETTES \*\*PHOTO ON FILE W/EVIDENCE DEPT.
79. 02/26/99 STATE'S EXHIBIT 5: THREE 3M CASSETTE TAPES \*\*PHOTO ON FILE W/EVIDENCE DEPT.
80. 02/26/99 STATE'S EXHIBIT 6: ONE MAXELL CASSETTE TAPE \*\*PHOTO ON FILE W/EVIDENCE DEPT.
81. 02/26/99 STATE'S EXHIBIT 7: ONE CRAIG VOX CASSETTE PLAYER \*\*PHOTO ON FILE W/EVIDENCE DEPT.
82. 02/26/99 STATE'S EXHIBIT 8: FOUR TDK AUDIOTAPES \*\*PHOTO ON FILE W/EVIDENCE DEPT.

83. 02/26/99 STATE'S EXHIBIT 9: TWO KOPPERHEAD TAPES \*\*PHOTO  
ON FILE W/EVIDENCE DEPT.

84. 02/26/99 STATE'S EXHIBIT 10: FOUR AUDIOCASSETTE TAPES  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

85. 02/26/99 STATE'S EXHIBIT 11: THREE TDK AUDIOTAPES \*\*PHOTO  
ON FILE W/EVIDENCE DEPT.

86. 02/26/99 STATE'S EXHIBIT 12: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

87. 02/26/99 STATE'S EXHIBIT 13: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

88. 02/26/99 STATE'S EXHIBIT 14: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

89. 02/26/99 STATE'S EXHIBIT 15: ONE CASSETTE RECORDER MANUAL  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

90. 02/26/99 STATE'S EXHIBIT 17: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

91. 02/26/99 STATE'S EXHIBIT 18: POWER OF ATTORNEY

92. 02/26/99 STATE'S EXHIBIT 19: EMPTY BOX \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

93. 02/26/99 STATE'S EXHIBIT 20: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

94. 02/26/99 STATE'S EXHIBIT 21: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

95. 02/26/99 STATE'S EXHIBIT 22: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

96. 02/26/99 STATE'S EXHIBIT 23: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

97. 02/26/99 STATE'S EXHIBIT 24: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

98. 02/26/99 STATE'S EXHIBIT 25: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

99. 02/26/99 STATE'S EXHIBIT 26: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

100. 02/26/99 STATE'S EXHIBIT 27: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

101. 02/26/99 STATE'S EXHIBIT 28-35: PHOTOS \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

102. 02/26/99 STATE'S EXHIBIT 36: AUDIOTAPE \*\*PHOTO ON FILE

W/EVIDENCE DEPT.

103. 02/26/99 STATE'S EXHIBIT 37: THREE COATS (RELEASED)  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

104. 02/26/99 STATE'S EXHIBIT 38: JEWELRY BOX (RELEASED)  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

105. 02/26/99 STATE'S EXHIBIT 39: JEWELRY BOX (RELEASED)  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

106. 02/26/99 STATE'S EXHIBIT 40: JEWELRY BOX (RELEASED)  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

107. 02/26/99 STATE'S EXHIBIT 41: JEWELRY BOX (RELEASED)  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

108. 02/26/99 STATE'S EXHIBIT 42: LIFE INSURANCE POLICY

109. 02/26/99 STATE'S EXHIBIT 43: LIFE INSURANCE POLICY

110. 02/26/99 STATE'S EXHIBIT 44: SOCIAL SECURITY INS.

111. 02/26/99 STATE'S EXHIBIT 45: SOCIAL SECURITY INS.

112. 02/26/99 STATE'S EXHIBIT 46: EMPLOYMENT AGREEMENT, 1/22/96

113. 02/26/99 STATE'S EXHIBIT 47: W-2 1997, MARGO PRADE

114. 02/26/99 STATE'S EXHIBIT 48: AKRON POLICE CREDIT UNION  
STATEMENT

115. 02/26/99 STATE'S EXHIBIT 49: CONDENSED EARNINGS REGISTER

116. 02/26/99 STATE'S EXHIBIT 50: LETTER, 3/11/96

117. 02/26/99 STATE'S EXHIBIT 51: STATEMENT OF POLICY BENEFITS

118. 02/26/99 STATE'S EXHIBIT 52: AUDIOTAPE

119. 02/26/99 STATE'S EXHIBIT 53: LETTER, 9/8/93

120. 02/26/99 STATE'S EXHIBIT 54: LETTER, 3/15/95

121. 02/26/99 STATE'S EXHIBIT 55: LETTER, 12/9/96

122. 02/26/99 STATE'S EXHIBIT 56: LETTER, 1/9/97

123. 02/26/99 STATE'S EXHIBIT 57: LETTER, 2/3/97

124. 02/26/99 STATE'S EXHIBIT 58: SEPARATION AGREEMENT

125. 02/26/99 STATE'S EXHIBIT 59: DISSOLUTION, 2/10/97

126. 02/26/99 STATE'S EXHIBIT 60: CERTIFICATE, 2/15/97

127. 02/26/99 STATE'S EXHIBIT 61: JUDGMENT ENTRY, 4/1/97

128. 02/26/99 STATE'S EXHIBIT 62: LETTER, 11/20/97

129. 02/26/99 STATE'S EXHIBIT 63: LETTER, 1/26/98

130. 02/26/99 STATE'S EXHIBIT 64: LETTER, 1/13/98

131. 02/26/99 STATE'S EXHIBIT 65: LETTER, 1/26/98

132. 02/26/99 STATE'S EXHIBIT 66: INVOICE, LARRY'S PLUMBING

133. 02/26/99 STATE'S EXHIBIT 67: AUDIOTAPE \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

134. 02/26/99 STATE'S EXHIBIT 68-74: PHOTOS \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

135. 02/26/99 STATE'S EXHIBIT 75: EMPTY BOX 1.1 (RELEASED)

136. 02/26/99 STATE'S EXHIBIT 76: EMPTY BOX 1.2 (RELEASED)

137. 02/26/99 STATE'S EXHIBIT 77: ENVELOPE CONT. TWO COPPER  
BULLETS (RELEASED)

138. 02/26/99 STATE'S EXHIBIT 78: EMPTY BOX 1.3 (RELEASED)

139. 02/26/99 STATE'S EXHIBIT 79: ENVELOPE CONT. ONE COPPER  
BULLET (RELEASED)

140. 02/26/99 STATE'S EXHIBIT 80: EMPTY BOX 1.4 (RELEASED)

141. 02/26/99 STATE'S EXHIBIT 81: ENVELOPE CONT. ONE COPPER  
BULLET (RELEASED)

142. 02/26/99 STATE'S EXHIBIT 82: EMPTY BOX 1.5 (RELEASED)

143. 02/26/99 STATE'S EXHIBIT 83: ENVELOPE CONT. ONE COPPER  
BULLET (RELEASED)

144. 02/26/99 SCANNING ERROR

145. 02/26/99 STATE'S EXHIBIT 84: EMPTY BOX 1.7 (RELEASED)

146. 02/26/99 STATE'S EXHIBIT 85: ENVELOPE CONT. ONE COPPER  
BULLET (RELEASED)

147. 02/26/99 STATE'S EXHIBIT 86: ENVELOPE 1.8 (RELEASED)

148. 02/26/99 STATE'S EXHIBIT 87: ENVELOPE CONT. ONE COPPER  
BULLET (RELEASED)

149. 02/26/99 STATE'S EXHIBIT 88: APD PROPERTY ENVELOPE CONT.  
ONE COPPER BULLET (RELEASED)

150. 02/26/99 STATE'S EXHIBIT 89: PATIENT LIST

151. 02/26/99 STATE'S EXHIBIT 90: AFD EMERGENCY MEDICAL SERVICE  
REPORT

152. 02/26/99 STATE'S EXHIBIT 91: AERIAL PHOTO - PARKING LOT  
(LARGE SIZE) \*\*PHOTO ON FILE W/EVIDENCE DEPT.

153. 02/26/99 STATE'S EXHIBIT 92-93: PHOTOS OF PURSE \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

154. 02/26/99 STATE'S EXHIBIT 94: CHECK FOR \$75, PAYABLE TO A.  
WILLIAMS

155. 02/26/99 STATE'S EXHIBIT 95: BOX CONT. FINANCIAL DOCUMENTS  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

156. 02/26/99 STATE'S EXHIBIT 96-112: PHOTOS \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

157. 02/26/99 STATE'S EXHIBIT 113: APD PROPERTY ENVELOPE CONT.  
LINK OF DIAMOND AND GOLD IN APPEARANCE PIECE FROM  
TENNIS BRACELET (RELEASED) \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

158. 02/26/99 STATE'S EXHIBIT 114: APD PROPERTY ENVELOPE CONT.  
DIAMOND AND GOLD IN APPEARANCE TENNIS BRACELET  
(RELEASED) \*\*PHOTO ON FILE W/EVIDENCE DEPT.

159. 02/26/99 STATE'S EXHIBIT 115: APD PROPERTY ENVELOPE CONT.  
FOUR BUTTONS \*\*PHOTO ON FILE W/EVIDENCE DEPT.

160. 02/26/99 STATE'S EXHIBIT 116: APD PROOPEITY ENVELOPE CONT.  
IN APPEARANCE TWO HOOP EARRINGS, TWO DIAMOND  
EARRINGS, ONE DIAMOND/BLUE SAPPHIRE EARRING, ONE  
GOLD 21" CHAIN, ONE MARQUIS DIAMOND RING, ONE  
DIAMOND RING WITH 20 DIAMONDS (RELEASED) \*\*PHOTO  
ON FILE W/EVIDENCE DEPT.

161. 02/26/99 STATE'S EXHIBIT 117: PHOTO \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

162. 02/26/99 STATE'S EXHIBIT 118: APD PROPERTY ENVELOPE  
ATTACHED TO BROWN BAG CONT. LAB COAT \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

163. 02/26/99 STATE'S EXHIBIT 119: BOX OF CLOTHING \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

164. 02/26/99 STATE'S EXHIBIT 120: APD PROPERTY ENVELOPE CONT.  
TIME SHEET \*\*PHOTO ON FILE W/EVIDENCE DEPT.

165. 02/26/99 STATE'S EXHIBIT 121: AERIAL PHOTO - APROXIMATE  
DISTANCE TRAVELED (LARGE SIZE) \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

166. 02/26/99 STATE'S EXHIBIT 122: ENVELOPE CONT. CUTTING FROM  
BACK OF LAB COAT \*\*PHOTO ON FILE W/EVIDENCE  
DEPT.

167. 02/26/99 STATE'S EXHIBIT 123: ENVELOPE CONT. CUTTING OF  
BITE MARK FROM LAB COAT \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

168. 02/26/99 STATE'S EXHIBIT 124: ENVELOPE CONT. DRIED BLOOD -  
MARGO PRADE \*\*PHOTO ON FILE W/EVIDENCE DEPT.

169. 02/26/99 STATE'S EXHIBIT 125: ENVELOPE CONT. DRIED BLOOD -  
DOUGLAS PRADE \*\*PHOTO ON FILE W/EVIDENCE DEPT.

170. 02/26/99 STATE'S EXHIBIT 126: ENVELOPE CONT. DRIED BLOOD -  
TIM HOLSTON \*\*PHOTO ON FILE W/EVIDENCE DEPT.

171. 02/26/99 STATE'S EXHIBIT 127: ENVELOPE CONT. FINGERNAIL  
CLIPPINGS - MARGO PRADE \*\*PHOTO ON FILE W/EVIDENCE  
DEPT.

172. 02/26/99 STATE'S EXHIBIT 128: VIAL CONT. SWAB OF CHEEK -  
MARGO PRADE \*\*PHOTO ON FILE W/EVIDENCE DEPT.

173. 02/26/99 STATE'S EXHIBIT 129: VIAL CONT. SWAB OF CHEEK -  
MARGO PRADE \*\*PHOTO ON FILE W/EVIDENCE DEPT.

174. 02/26/99 STATE'S EXHIBIT 130: VIAL CONT. SWAB OF BITE MARK  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

175. 02/26/99 STATE'S EXHIBIT 131: VIAL CONT. SWAB OF BITE MARK  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

176. 02/26/99 STATE'S EXHIBIT 132: APD PROPERTY ENVELOPE CONT.  
PHOTO ARRAY \*\*PHOTO ON FILE W/EVIDENCE DEPT.

177. 02/26/99 STATE'S EXHIBIT 133: LEADS PRINTOUT \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

178. 02/26/99 STATE'S EXHIBIT 134: APD PROPERTY ENVELOPE CONT.  
THREE PHOTOS \*\*PHOTO ON FILE W/EVIDENCE DEPT.

179. 02/26/99 STATE'S EXHIBIT 135: APD PROOPEPTY ENVELOPE CONT.  
FOUR PHOTOS \*\*PHOTO ON FILE W/EVIDENCE DEPT.

180. 02/26/99 STATE'S EXHIBIT 136: BODY DIAGRAM \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

181. 02/26/99 STATE'S EXHIBIT 137-140: AUTOPSY PHOTOS \*\*PHOTOS  
ON FILE W/EVIDENCE DEPT.

182. 02/26/99 STATE'S EXHIBIT 141: BODY DIAGRAM \*\*PHOTO ON FILE  
W/EVIDENCE DEPT.

183. 02/26/99 STATE'S EXHIBIT 142-144: AUTOPSY PHOTOS \*\*PHOTOS  
ON FILE W/EVIDENCE DEPT.

184. 02/26/99 STATE'S EXHIBIT 145: BODY DIAGRAM \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

185. 02/26/99 STATE'S EXHIBIT 146-149: AUTOPSY PHOTOS \*\*PHOTOS  
ON FILE W/EVIDENCE DEPT.

186. 02/26/99 STATE'S EXHIBIT 150: BODY DIAGRAM \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

187. 02/26/99 STATE'S EXHIBIT 151-152: AUTOPSY PHOTOS \*\*PHOTOS  
ON FILE W/EVIDENCE DEPT.

188. 02/26/99 STATE'S EXHIBIT 153: BODY DIAGRAM \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

189. 02/26/99 STATE'S EXHIBIT 154: BODY DIAGRAM \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

190. 02/26/99 STATE'S EXHIBIT 155-159: AUTOPSY PHOTOS \*\*PHOTOS  
ON FILE W/EVIDENCE DEPT.

191. 02/26/99 STATE'S EXHIBIT 160: BODY DIAGRAM \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

192. 02/26/99 STATE'S EXHIBIT 161: AUTOPSY PROTOCOL

193. 02/26/99 STATE'S EXHIBIT 162-167: PHOTOS \*\*PHOTOS ON FILE  
W/EVIDENCE DEPT.

194. 02/26/99 STATE'S EXHIBIT 168-169: PHOTOS - MARGO PRADE  
\*\*PHOTOS ON FILE W/EVIDENCE DEPT.

195. 02/26/99 STATE'S EXHIBIT 170: CAST OF TEETH - MARGO PRADE  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

196. 02/26/99 STATE'S EXHIBIT 171: CAST OF TEETH - AL STRONG  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

197. 02/26/99 STATE'S EXHIBIT 172: CAST OF TEETH - TIM HOLSTON  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

198. 02/26/99 STATE'S EXHIBIT 173: CAST OF TEETH - DOUGLAS  
PRADE \*\*PHOTO ON FILE W/EVIDENCE DEPT.

199. 02/26/99 STATE'S EXHIBIT 174: CAST OF TEETH - TERRY HEARD  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

200. 02/26/99 STATE'S EXHIBIT 175: CAST OF TEETH - DELPHINIA  
GILBERT \*\*PHOTO ON FILE W/EVIDENCE DEPT.

201. 02/26/99 STATE'S EXHIBIT 176: PHOTO OF BITE MARK \*\*PHOTO  
ON FILE W/EVIDENCE DEPT.

202. 02/26/99 STATE'S EXHIBIT 177: BOX OF BITE IMPRESSIONS  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

203. 02/26/99 STATE'S EXHIBIT 178: VIDEO TAPE FROM ROLLING  
ACRES DODGE

204. 02/26/99 STATE'S EXHIBIT 179: VIDEO TAPE - SECRET SERVICE

205. 02/26/99 STATE'S EXHIBIT 180: VIDEO TAPE - SECRET SERVICE

206. 02/26/99 STATE'S EXHIBIT 181: VIDEO TAPE - MED ART & LEGAL  
GRAPHICCS, ANIMATION

207. 02/26/99 STATE'S EXHIBIT 182: PHOTO - BITE MARK \*\*PHOTO ON  
FILE W/EVIDENCE DEPT.

208. 02/26/99 STATE'S EXHIBIT 183: PHOTO - WAX IMPRESSION  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

209. 02/26/99 STATE'S EXHIBIT 184-188: TRANSPARENCIES \*\*PHOTOS  
ON FILE W/EVIDENCE DEPT.

210. 02/26/99 STATE'S EXHIBIT 189-191: PHOTOS OF TEETH (LARGE)  
\*\*PHOTOS ON FILE W/EVIDENCE DEPT.

211. 02/26/99 STATE'S EXHIBIT 192: BANK ONE RECEIPT, 10/8/97  
\*\*PHOTO ON FILE W/EVIDENCE DEPT.

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(MR)

| Issued | Number | Status | Served | \$Amount | Party |
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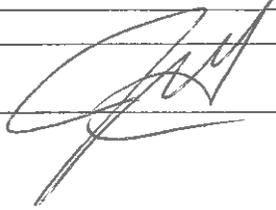
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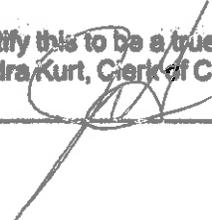
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0.00 KASAY, RICHARD S.

**The State of Ohio, Summit County**

I, the undersigned, Clerk of Court Of Common Pleas, in and for said County, do hereby certify that the foregoing is a true transcript of the Docket and Journal Entries and all the Proceedings of said Court in the above entitled case.

IN THE TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at the Court House in \_\_\_\_\_ Ohio, this \_\_\_\_\_ day of \_\_\_\_\_ A.D. \_\_\_\_\_

By  \_\_\_\_\_ Clerk  
5-31-10  
Deputy

I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.  
 \_\_\_\_\_ Deputy Clerk

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- E July 24, 1998, Federal Bureau of Investigation Report
- F January 31, 2012, DNA Diagnostics Center Report
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- J June 11, 2012, Ohio Bureau Of Criminal Identification & Investigation Report
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- L September 9, 1998, Serological Research Institute Report

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- M June 29, 2012, Affidavit of Rick W. Staub, Ph.D.
- N June 26, 2012, Affidavit of Dr. Mary Bush & Peter Bush
- O June 28, 2012, Affidavit of Charles A. Goodsell, Ph.D.
- P June 29, 2012, Affidavit of Julie Heinig, Ph.D.

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- Q January 12, 2009, *Akron Beacon Journal* "Part 7: Jury does not hear evidence found late"
- R Excerpt from 1 Paul Giannelli & Edward Imwinkelreid, *Scientific Evidence* (4th ed. 2007)
- S Excerpt from National Research Council, "Strengthening Forensic Science in the U.S.: A Path Forward" (Aug. 2009) (<http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>)

I. INTRODUCTION

Imagine a murder trial in which the State's only physical evidence linking the defendant to the crime scene was a bite mark the killer made on the victim's skin through two layers of clothing. The State called two forensic odontologists who, after comparing a picture of the bite mark to the defendant's dentition, testified either that the defendant made the bite mark or that it was consistent with the defendant's dentition. There was testimony that, in making the bite mark, the killer "probably slobbered all over" the outer layer of the victim's clothing, a lab coat, and that the lab coat over the bite mark would be "the best possible source of DNA evidence as to [the killer's] identity." And there was DNA testing of the area of the lab coat over the bite mark that, due to the limits of DNA testing at that time, detected only the victim's DNA and, thus, revealed nothing about the killer. Ultimately, the jury convicted the defendant, and he was sentenced to life imprisonment.

Now imagine the same trial where DNA test results showed male DNA on the lab coat over the killer's bite mark, and it could not have been the defendant's. DNA testing of the lab coat outside the area over the bite mark showed no male DNA. And there was evidence that odontologists, including one who testified for the State at trial, had been proven wrong by DNA results again and again. This additional evidence would have, at the very least, created very real and substantial doubt about the defendant's guilt, and prevented any reasonable jury from convicting.

Of course, the initial trial and DNA test results described above are real, not imaginary, and the defendant, Douglas Prade, has spent almost fourteen years in prison following his 1998 conviction. If the newly-discovered DNA (and other) evidence we have today had been available at Mr. Prade's trial, however, it not only would have created reasonable doubt such that

no reasonable jury would have found him guilty, but would have established that he was not the killer. Indeed, in September 2010 when considering whether new DNA testing of the lab coat over the bite mark could be "outcome determinative" as required by R.C. 2953.74(D), this "Court f[ound] that a DNA exclusion [would] compromise[] the foundation of the State's case."

(Testing Order at 13). "Without the key evidence, the State's remaining evidence – entirely circumstantial – is insufficient to support inferences necessary for a murder conviction. Thus, a strong probability exists that no reasonable juror would find the Defendant guilty of aggravated murder." (*Id.*).

We now have, among other things, the very DNA exclusion results from the lab coat over the bite mark that, in September 2010, the Court said would be "outcome determinative." They now should determine the outcome. The Court should (1) vacate Mr. Prade's aggravated murder conviction and the related firearms specification; (2) order his immediate release; and (3) if the Court deems it necessary, order a new trial.

## II. STATEMENT OF FACTS

In February 1998, Douglas Prade, a Captain in the Akron Police Department, was indicted for the murder of his ex-wife, Dr. Margo Prade. She was fatally shot in the front seat of her van on the morning of November 26, 1997, while parked outside her Akron medical offices. In September 1998, Mr. Prade was tried and convicted of aggravated murder with a firearms specification, as well as wiretapping and possession of criminal tools charges.<sup>1</sup> His conviction later was affirmed. *State v. Prade*, 139 Ohio App. 3d 676, 745 N.E.2d 475 (9th Dist. 2000),

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<sup>1</sup> The wiretapping charges were based on Mr. Prade having recorded calls to the Prades' home phone when he and Dr. Prade were married and living together, allegedly without Dr. Prade's knowledge. The possession of criminal tools charge related to the recording device used to record the phone calls to their home.

*appeal dismissed*, 90 Ohio St. 3d 1490, 739 N.E.2d 816 (2000). Mr. Prade currently is incarcerated serving a life sentence.<sup>2</sup>

**A. The Evidence At Mr. Prade's 1998 Trial.**

The Court is being asked to again evaluate how DNA exclusions would have affected a trial over which it did not preside. Where possible, the discussion below references (1) The Supreme Court of Ohio's conclusions in *State v. Prade*, 126 Ohio St. 3d 27, 2010-Ohio-1842, 930 N.E.2d 287, where it considered whether additional DNA testing could go forward in this case; and (2) this Court's September 23, 2010, Order On Defendant's Application For Post-Conviction DNA Testing (the "Testing Order"). At trial, the State relied heavily on a picture of a bite mark the killer made on Dr. Prade's arm through two layers of clothing, as well as testimony from two eyewitnesses. The bite mark, eyewitness, and other evidence from the trial are detailed below.

**1. The "crucial" physical evidence – The killer's bite mark under the lab coat.**

"Nobody witnessed the killing." (Testing Order at 10). "No weapon or fingerprints were found." (*Id.*). And, while a security camera from an adjacent building photographed the killer entering and exiting Dr. Prade's van before and after committing the crime, the picture clarity

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<sup>2</sup> Mr. Prade was sentenced to (1) life imprisonment for aggravated murder; (2) 3 years on a firearms specification related to the murder, which were to run consecutively to the aggravated murder sentence; (3) 1½ years on each of 4 counts of 4<sup>th</sup> degree felony interception of wire, oral, or electronic communications, which were to run concurrently with one another and with the aggravated murder sentence; (4) 2 years on each of 2 counts of 3<sup>rd</sup> degree felony interception of wire, oral, or electronic communications, which were to run consecutively with each other and consecutive to the sentence for aggravated murder; and (5) 1 year for possessing criminal tools. *State v. Prade*, 139 Ohio App. 3d 676, 683, 745 N.E.2d 475, 480 (9th Dist. 2000), *appeal dismissed*, 90 Ohio St. 3d 1490, 739 N.E.2d 816 (2000). This petition and motion relate only to the aggravated murder conviction and firearms specification. Mr. Prade has been imprisoned longer than the total sentences imposed for the other crimes of which he was convicted. Thus, vacating his aggravated murder conviction and the firearms specification would mean that he no longer should be incarcerated.

was insufficient to identify the killer. The only physical evidence that allegedly tied Mr. Prade to the crime scene was the State's experts' testimony about a bite mark on Dr. Prade's arm. The bite mark "was **crucial** because no other physical, non-circumstantial evidence existed to suggest Mr. Prade's guilt." (*Id.*) (emphasis added). In The Supreme Court of Ohio's words, "[t]he **key** physical evidence at trial was the bite mark that the killer made on Dr. Prade's arm through her lab coat and blouse." *Prade*, 2010-Ohio-1842, ¶ 3 (emphasis added). During the attack in her van, Dr. Prade apparently attempted to defend herself by using her arm to push the killer away: The killer bit her arm so hard that, through two layers of clothing – Dr. Prade's lab coat and blouse – the killer's teeth left a bite mark impression on her skin.

"One of the [S]tate's experts testified that the bite mark was 'consistent with' defendant's teeth but concluded that 'there's just not enough to say one way or the other' that it was defendant's," while the "[S]tate's other expert testified that the mark 'was made by Captain Prade.'" *Prade*, 2010-Ohio-1842, ¶ 3; *accord* Testing Order at 10-11.<sup>3</sup> "A defense expert opined that defendant's loose dentures meant that the act of biting for Mr. Prade, is a virtual impossibility." *Prade*, 2010-Ohio-1842, ¶ 3; *accord* Testing Order at 10-11.<sup>4</sup> Consistent with it being a focal point of the State's case, the State repeatedly emphasized the bite mark and the testimony tying it to Mr. Prade in closing argument.<sup>5</sup> And, again, this disputed bite mark evidence was the **only** physical evidence that purportedly tied Mr. Prade to the crime scene.

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<sup>3</sup> *Compare* Levine Trial Test. at 1219:5-10 (Ex. A) (the bite mark was "consistent with" Mr. Prade's dentition, which "means [he] could have done it," but there was "just not enough to say one way or other" that the bite mark was Mr. Prade's), *with* Marshall Trial Test. at 1406:12-14 (Ex. A) (the mark "was made by Captain Prade").

<sup>4</sup> Baum Trial Test. at 1641:17-20 (Ex. A) (Mr. Prade's loose dentures meant "the act of biting for Mr. Prade, [wa]s a virtual impossibility").

<sup>5</sup> Closing Arg. at 2297:25-2298:4; 2302:3-17; 2364:24-2365:13; 2369:17-20 (Ex. B).

2. Eyewitness testimony.

Mr. Prade "called an alibi witness, who testified that she saw [Mr. Prade] exercising at roughly the time of the murder." *Prade*, 2010-Ohio-1842, ¶ 4. Mary Lynch, who lived in Mr. Prade's apartment complex, testified to seeing Mr. Prade exercising in the apartment complex's work out facility "a little before 9:00 o'clock" on the morning of the murder, which occurred at 9:10 a.m., and first spoke with police investigators only two days after the murder. (Lynch Trial Test. at 1527:2-4, 18-22 (Ex. A)).

The State called Mr. Husk, an employee of the car dealership next door to the crime scene. As the Supreme Court observed, Mr. Husk "testified that he saw defendant near the murder scene before the murder, but also testified that although he learned of the murder the day it occurred, he came forward nine months later after months of press coverage that had featured defendant's photo." *Prade*, 2010-Ohio-1842, ¶ 4; *see also* Testing Order at 12.<sup>6</sup>

The State's other eyewitness, Mr. Brooks, who was not aware that a murder had just occurred, "testified that he was standing in the parking lot when he heard the possible killer's car 'peeling off,' and although he 'didn't pay it no attention' and did not identify anyone in his first two police interviews, he later identified defendant as the man inside the car during his third interview." *Prade*, 2010-Ohio-1842, ¶ 4.<sup>7</sup> Mr. Brooks, a retired coal miner, had an appointment at Dr. Prade's office on the morning of the murder to address health issues arising from his six heart attacks. (Brooks Trial Test. at 1417:25-1418:4; 1420:1-7 (Ex. A)). He told police in his third interview that he saw Mr. Prade wearing a black "Russian type" hat driving a white car out of the parking lot where the murder occurred. (*Id.* at 1435:11-15 (Ex. A)). But in his two prior interviews with police, Mr. Brooks neither mentioned a speeding car or a "Russian type" hat, nor

<sup>6</sup> Husk Trial Test. at 1263:4-1265:17; 1266:1-21 (Ex. A).

<sup>7</sup> Brooks Trial Test. at 1424:17-1425:1 (Ex. A).

indicated that he could identify anyone. (*Id.* at 1424:14-1426:1 (Ex. A); Myers Trial Test. 1058:24-1059:22 (Ex. A); Lacy Trial Test. at 1791:6-1792:11 (Ex. A)). And, while at trial Mr. Brooks claimed that he could tell that the speeding, hat-wearing driver was bald, he initially told investigators that the driver could have had hair. (*Compare* Brooks Trial Test. at 1435:6-8, 1444:16-23 (Ex. A), *with* Geiger Trial Test. at 1560:10-16 (Ex. A); *see also* Testing Order at 12 (recounting and describing Mr. Brooks's testimony)).

### 3. DNA evidence.

Although DNA testing was, by comparison to today, in its infancy in 1998, everyone recognized its "Eureka-like" ability to rule in or rule out Douglas Prade in a trial where the focal point was a bite mark the killer made on Dr. Prade's arm through two layers of clothing. At trial, the State's DNA testing expert agreed that the lab coat over the bite mark on Dr. Prade's arm was "the best possible source of DNA evidence as to [Dr. Prade's] killer's identity." (Callaghan Trial Test. at 1125:13-22 (Ex. A)). Similarly, Mr. Prade's dental expert testified that the killer "probably slobbered all over" the lab coat over the bite mark. (Baum Trial Test. at 1629:5-10 (Ex. A)). The Supreme Court confirmed that the DNA evidence – and especially the lab coat at the location of the bite – could be a "significant" source of DNA evidence as to reveal the "killer's identity." *Prade*, 2010-Ohio-1842, ¶¶ 17-19.

But the DNA testing technology that was the state of the art in 1998 was insensitive by today's standards and identified only Dr. Prade's DNA, which was "meaningless" information that did not speak to the identity of her killer. *Id.* at ¶ 19. The State's DNA expert at trial, Dr. Thomas F. Callaghan from the FBI, "testified that, due to the amount of Dr. Prade's blood on her lab coat, the DNA from Dr. Prade's blood overwhelmed or diluted the DNA from the biter's skin cells. Dr. Callaghan testified that although DNA other than Dr. Prade's would have been important in identifying the killer, the bite mark showed only Dr. Prade's DNA." *Id.* at ¶ 18

(citing Callaghan Trial Test. at 1111:6-14 (Ex. A)). The 1998 DNA "testing [of the lab coat over the bite mark] excluded defendant only in the sense that the DNA *found* was not his, because it was the victim's.... Therefore, the exclusion was meaningless, and the test cannot be deemed to have been definitive." *Id.* at ¶ 19 (emphasis in original).

Other DNA testing conducted in 1998 yielded similarly inconclusive results. The testing failed to produce results in some instances due to the small quantities of biological material available, for example, on the bracelet and the buttons. (Callaghan Trial Test. at 1086:11-1087:24; 1102:18-1105:8; 1117:5-10 (Ex. A)). And, although the testing of the DNA mixture from Dr. Prade's fingernail clippings revealed DNA that was not Dr. Prade's or Mr. Prade's, the 1998 testing did not positively identify the source of the DNA (except to the extent that some of the DNA in the mixture was consistent with the DNA of Dr. Prade's then-boyfriend, Timothy Holston). (*Id.*).

4. Other evidence.

The State introduced testimony from many witnesses who described the Prades' difficult relationship before and after their April 1997 divorce, as well as a bank deposit slip. The deposit slip was seized months after Dr. Prade's murder in February 1998 – and well after Mr. Prade had claimed, received, and begun to disburse the proceeds from a \$75,000 life insurance policy on Dr. Prade's life. The slip's front side documented a deposit to Mr. Prade's checking account on October 8, 1997, which was weeks before Dr. Prade's murder. On the back of the slip, there was a handwritten tally summing certain of defendant's debts, as well as a second tally subtracting that sum from \$75,000, the amount of the life insurance proceeds. Although the State argued that the handwritten tally was added before the murder and, thus, documented Mr. Prade's plan to kill his ex-wife for the life insurance proceeds, the handwritten tallies easily could have been made after the murder, as Mr. Prade testified, since three months elapsed between the murder

and the seizure of the deposit slip – a period during which he claimed and then received the life insurance proceeds. (Prade Trial Test. at 1931:2-1935:9; 2068:11-2069:11 (Ex. C)).

Significantly, Mr. Prade was a Captain in the Akron Police Department and, in 1997, had an annual salary of \$61,000 – slightly over \$84,000 in today's dollars – and about \$170,000 in net assets – roughly \$235,000 in today's dollars.<sup>8</sup> (*Id.* at 2081:8-17; 2078:20-2081:7 (Ex. C)). And it was undisputed that Mr. Prade (1) used more than half of the life insurance proceeds (*i.e.*, about \$39,000) to satisfy Dr. Prade's delinquent federal tax obligations; and (2) at the time of his arrest months after receiving the policy's proceeds, still had about \$18,000 – nearly a quarter of the total. (*Id.* at 1934:24-1937:10; 1938:15-1945:2; 1945:7-9 (Ex. C)).

**B. The Denial Of The DNA Testing Application, And The Ensuing Appeals.**

On February 5, 2008, Mr. Prade filed his current application for DNA testing based on the Ohio DNA testing statute, R.C. 2953.71- .84. In a June 2, 2008, order, Judge Spicer denied the application, finding that the application was barred because (1) there was a "prior definitive DNA test" under R.C. 2953.74(A); and (2) that "an exclusion result would only duplicate the result at trial and would not be outcome determinative." (6/2/08 Order at 6). Mr. Prade appealed, and the Ninth District affirmed. *State v. Prade*, 9th Dist. No. 24296, 2009-Ohio-704.

The Supreme Court of Ohio accepted a discretionary appeal and reversed, finding that, due to advances in DNA testing technology since Mr. Prade's trial, "meaningless" DNA test results obtained in 1998 with now-outmoded technology do not bar new testing that might "provide new information that was not able to be detected" in earlier tests. *State v. Prade*, 126

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<sup>8</sup> The figures for "today's dollars" are based on the information for a Midwestern urban area with a population between 50,000 and 1,500,000 in "Table 3. Consumer Price Index for All Urban Consumers (CPI-U): Selected areas, all items index" of the U.S. Department of Labor's Bureau of Labor Statistics' "New Release – Consumer Price Index – December 2011" (available at [http://www.bls.gov/news.release/archives/cpi\\_01192012.pdf](http://www.bls.gov/news.release/archives/cpi_01192012.pdf)).

Ohio St. 3d 27, 2010-Ohio-1842, 930 N.E.2d 287, ¶¶ 19, 23. Specifically, the Supreme Court found that, "due to the limitations of 1998 [DNA] testing methods," the exclusion results produced at the time of Mr. Prade's 1998 trial were "meaningless." *Id.* at ¶ 19. Then, based on the State's and Mr. Prade's experts' reports filed in connection with Mr. Prade's DNA testing application, the Supreme Court concluded that "new DNA testing methods are now able to provide new information that was not able to be detected at the time of [Mr. Prade's] trial." *Id.* at ¶ 23. Ultimately, the Supreme Court "h[e]ld that a prior DNA test is not 'definitive' within the meaning of R.C. 2953.74(A) when a new DNA testing method can detect information that could not be detected by the prior DNA test," which required reversal of the lower courts' contrary determinations. *Id.* Accordingly, the Supreme Court remanded for a determination of whether "new DNA testing would be outcome-determinative." *Id.* at ¶ 28.

**C. Post-Remand Proceedings, And This Court's Testing Order.**

On September 23, 2010, following remand and after considering the parties' briefs and hearing argument, this Court issued the Testing Order. There, the Court began by noting that resolving the remanded "outcome determinative" issue under the Ohio DNA testing statute required the Court to assess whether, if new DNA testing produced an exclusion result, there would be a "strong probability that no reasonable factfinder would have found the offender guilty of that offense." (Testing Order at 3 (quoting R.C. 2953.71(L)); *see also id.* at 9). In making that determination, rather than assuming that a result excluding Mr. Prade could be tied to a specific person other than Mr. Prade who committed the murder, the Court "assume[d] only that any new DNA test results merely foreclose the Defendant as a contributor to the biological material tested." (*Id.* at 9).

1. **The possibility of contamination.**

Before addressing the "outcome determinative" issue under R.C. 2953.74(D), however, the Court considered and rejected the State's claim that testing should not proceed because the lab coat might be contaminated. Specifically, the Court noted that "the State asserts that the lab coat may contain DNA from patients Dr. Prade had contact with on her rounds at the hospital or anyone else she had contact with while wearing the lab coat prior to her death" and recounted the State's expert's concerns about the lab coat's condition. (*Id.* at 6). The Court rejected the State's contamination claim based on (1) the 1998 opinion from the State's expert, Dr. Marshall, "that the lab coat seemed fairly clean and starched;" (2) the "Court's own recent inspection" of the lab coat, which inspection revealed that "the coat appears to be lightly starched, with minimal soiling about the cuffs and collar;" and (3) the likelihood "that casual contact of Dr. Prade's arm sleeve would be minimal for two reasons – first, that casual contact from patient or medical staff would be minimal based upon the location of the bite mark, and second, that such casual contact would not likely deposit DNA of such magnitude to interfere or compromise the testing of such area." (*Id.* at 7).

2. **The failure to detect amylase.**

The Court also considered the State's expert's concern about the inability in one test to detect amylase, an enzyme that is found in saliva and other bodily fluids, near the bite mark. (*Id.*). The State's no-proof-of-saliva claim fared no better than its contamination claim, as the Court rejected it based on (1) the fact that, "[e]ven if Dr. Benzinger [the State's expert in the DNA testing proceedings] is correct with respect to the degradation of amylase, an enzyme found in saliva, biological material may remain for ... testing;" and (2) testimony from Dr. Callaghan, the State's DNA testing expert at trial, "that he analyzed the bite mark in three

separate samples and that skin cells from the biter's lips and tongue may still exist on the fabric of the lab coat." (*Id.* at 7-8).

**3. The meaning of a potential DNA exclusion over the bite mark.**

Next, the Court "analyze[d] whether, considering the trial testimony and exhibits along with the obvious merit of updated DNA testing exclusion results," an exclusion result would create a "strong probability that no reasonable juror would find ... Douglas Prade guilty of murder." (*Id.* at 10). The Court found that "[b]ite mark evidence ... provided the basis for the guilty verdict on the count [of] aggravated murder" and that, "[t]o obtain [the] 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." (*Id.*). This "evidence was **crucial** because no other physical, non-circumstantial evidence existed to suggest [Mr.] Prade's guilt." (*Id.* (emphasis added)).

The Court also considered the conflicting expert testimony about the biter's identity from, on the one hand, Drs. Marshall and Levine, who testified that Mr. Prade made (Dr. Marshall) or could have made (Dr. Levine) the bite mark, and, on the other hand, Dr. Baum, who testified that it would have been impossible for Mr. Prade to have made the bite mark. The Court observed that "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." (*Id.* at 11). But "the equation clearly changes when jurors factor in evidence excluding Douglas Prade as a DNA donor on the lab coat swatches." (*Id.*). Specifically, "the jurors would reconsider the credibility of the respective bite mark experts' testimony," with Dr. Marshall's testimony that Mr. Prade was the biter "necessarily ... being viewed less credibly" and "Dr. Baum's assertion that Douglas Prade's biting the arm of Dr. Prade was virtually impossible becom[ing] more plausible." (*Id.*).

Further, "[w]ith DNA excluding Prade as a contributor and no compelling physical evidence connecting Prade to the crime scene, the testimony from the two eyewitnesses called by the State becomes more circumspect." (*Id.* at 12). "The first, Mr. Husk ... came forward with his statement at the eve of trial, following nine months of interim press coverage featuring [Mr.] Prade's photo. The accuracy of his memory becomes more questionable in view [o]f a DNA exclusion of Prade." (*Id.*). As to the second, Mr. Brooks, "[g]iven the variety of differing statements of Mr. Brooks, and the fact that he, too, belatedly identified the Defendant, jurors would also reasonably assign his testimony little weight, even reject it as too confusing. In sum, a reasonable juror could now conclude that these two eyewitnesses were mistaken." (*Id.*).

Concluding, the "Court f[ound] that a DNA exclusion [would] compromise[] the foundation of the State's case." (*Id.* at 13). "Without the key evidence, the State's remaining evidence – entirely circumstantial – is insufficient to support inferences necessary for a murder conviction. Thus, a strong probability exists that no reasonable juror would find the Defendant guilty of aggravated murder." (*Id.*).

**D. The New DNA Exclusions And Other DNA Testing Results.**

DNA Diagnostics Center ("DDC"), the laboratory that agreed to conduct DNA testing in this case on a *pro bono* basis, and the Ohio Bureau of Criminal Identification & Investigation ("BCI&I") have separately performed DNA testing of physical evidence from the crime scene in this case. The results of primary interest are from testing within a roughly 2.5 inch by 2.0 inch cutting from the lab coat that was directly over the killer's bite mark and that the FBI excised from the lab coat in 1998 – the "bite mark section" of the lab coat.<sup>9</sup> It appears that this cutting has been maintained separate and apart from the remainder of the lab coat since 1998.<sup>10</sup>

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<sup>9</sup> (*See* 7/23/98 FBI Report at 1 (Ex. D) (documenting receipt of the lab coat – item Q19 – on January 8, 1998); 7/24/98 FBI Report at 2 (Ex. E) (documenting cuttings taken from Q19);

DDC and BCI&I have separately issued a total of three reports – DDC's report dated January 31, 2012 (the "DDC Report" or "DDC Rep."); DDC's supplemental reported dated March 9, 2012 (the "DDC Supplemental Report" or "DDC Supp. Rep."); and BCI&I's report dated June 11, 2012 (the "BCI&I Report" or "BCI&I Rep."). Each is summarized below.

**1. The DDC Report: Mr. Prade Is Excluded From Male DNA Found In The "Bite Mark Section" Of The Lab Coat.**

On January 31, 2012, DDC provided the parties with a four-page report summarizing the results of DDC's DNA testing of "bite mark section" of the lab coat. Copies of (a) the DDC Report, (b) DDC's laboratory notes, and (c) DDC photographs are attached as, respectively, Exhibits F, G, and H. As detailed below, DDC's testing (1) identified partial male DNA profiles in two samples from the "bite mark section" of the lab coat – Samples 19.A.1 and 19.A.2, (2) compared the male DNA profiles to Mr. Prade's DNA, and (3) concluded that Mr. Prade "can be excluded as a contributor" of the DNA found in both samples taken from the bite mark. (DDC Rep. at 2 (Ex. F) (emphasis added)).

**a. The first DNA exclusion result – Sample 19.A.1.**

The first test sample – Sample 19.A.1 – was extract derived from a single, roughly circular cutting that was about three-quarters of an inch in diameter taken from the center of the "bite mark section" of the lab coat. (See DDC Notes at 50 (Ex. G) (drawing showing Sample

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(continued...)

DDC Photographs at 3 (Ex. H) (photograph showing bite mark cutting as received by DDC with handwritten (1) notation "Q19," (2) numbers "1", "2", and "3" next to three cutouts, and (3) initials "TFC," which presumably stands for Thomas F. Callahan, the FBI examiner)).

<sup>10</sup> The FBI advised the State in July 1998 that "[t]he processed DNA can be found in a package marked PROCESSED DNA SAMPLES: SHOULD BE REFRIGERATED/ FROZEN" and "recommended that these samples be stored in a refrigerator/freezer and isolated from evidence that has not been examined." (7/23/98 FBI Report at 4 (Ex. D)). Defendant does not know whether the "bite mark section" of the lab coat was refrigerated or frozen from 1998 until late 2010 when it was sent to DDC for testing.

19.A.1 cutting); DDC Photographs at 3 (Ex. H)). DDC's testing of Sample 19.A.1 identified a single male DNA profile. Specifically, DDC identified (a) three alleles at a strength at or above its reporting standard of 100 RFUs or "reflective fluorescence units;" and (b) two additional alleles that, although they were detected at a strength below reporting standards, could be used for purposes of exclusion (but not inclusion). (DDC Rep. at 4 (Ex. F); DDC Notes at 209 (Ex. G)). Comparing the male DNA found in Sample 19.A.1 to defendant's DNA from a reference sample – Sample 38.A.1 – DDC concluded that "Douglas Prade ... or any of his paternally related male relatives, can be excluded as a contributor to this partial Y-STR profile." (DDC Rep. at 2 (Ex. F) (emphasis added)).

**b. The second DNA exclusion result – Sample 19.A.2.**

The second test sample – Sample 19.A.2 – was a mixture composed of (1) extract derived from three, ¼-inch-by-¼-inch cuttings from near the outer edges of the "bite mark section" of the lab coat; and (2) the extract from Sample 19.A.1. (DDC Notes at 70 (Ex. G)). DDC found what appear to be two male DNA profiles in the mixture. (DDC Rep. at 4 (Ex. F)).

Specifically, DDC identified seven alleles in Sample 19.A.2 at a strength above the reporting standard, two of which matched above-reporting-standard markers found in Sample 19.A.1 and one of which did not. Four of these seven were alleles that were not identified at above-reporting-standard levels in Sample 19.A.1. (*Id.* (Ex. F)). Further, DDC identified nine other alleles in Sample 19.A.2 at strengths below reporting standards, one of which matched above-reporting-standard allele found in Sample 19.A.1 and another of which matched below-reporting-standard allele found in Sample 19.A.1. (*Id.* (Ex. F); DDC Notes at 207-08 (Ex. G)). Comparing the male DNA profiles in Sample 19.A.2 to defendant Mr. Prade's DNA, DDC concluded that "Douglas Prade ... or any of his paternally related male relatives, can be

excluded as a contributor to this partial mixed Y-STR DNA profile." (DDC Rep. at 2 (Ex. F) (emphasis added)).

2. The DDC Supplemental Report: Timothy Holston Is Excluded From The Male DNA Found In The "Bite Mark Section" Of The Lab Coat.

In a February 1, 2012, conference call among counsel for the parties and DDC's Dr. Julie Heinig, the State asked DDC to compare the results from the testing of Samples 19.A.1 and 19.A.2 to a reference DNA sample from Timothy Holston, Dr. Prade's male friend at the time of her murder. The stated reason for this request was that, because Mr. Holston had a "rock solid alibi" for the murder, finding his DNA there would establish that the tests were meaningless. DDC conducted the additional testing and, on March 9, 2012, issued the DDC Supplemental Report, which found that Mr. Holston "can be excluded as a contributor to" both samples. (DDC Supp. Rep. at 1 (Ex. I) (emphasis added)).

3. The BCI&I Report.

At the February 14, 2012, status conference, the State asked the Court to direct BCI&I to perform extensive additional DNA testing of the "bite mark section" of the lab coat and the lab coat more generally due to what the State claimed was the substantial likelihood that the lab coat was filled with male DNA unrelated to the murder. And, on February 29, 2012, the State filed a motion seeking that testing, arguing that "additional testing necessary to reach the best approximation of truth." (2/29/12 State's Mot. For Additional Y-STR DNA Testing at 1-2). Ultimately, the Court acceded to the State's demand and directed BCI&I to perform additional DNA testing of (1) the area over the bite mark on the lab coat, (2) a sample taken from the lab

coat within 1 inch of the bite mark; (3) samples from the upper undersides of each sleeve of the lab coat; and (4) a random sample from the lower back side of the lab coat. (3/27/12 Order).<sup>11</sup>

On June 11, 2012, BCI&I submitted the BCI&I Report summarizing the results of the additional DNA testing the State had requested, none of which showed that the lab coat was contaminated with stray male DNA and, to the contrary, which suggested just the opposite. A copy of the BCI&I Report is attached as Exhibit J, and a copy of BCI&I's lab notes is attached as Exhibit K. In terms of new information produced in BCI&I's testing, BCI&I identified no male DNA on (1) the lab coat buttons (Samples 105.1-105.3), (2) the bracelet link (Sample 102), (3) a new cutting from the "bite mark section" of the lab coat (Sample 111.1), or (4) any of the four "background cuttings" from the lab coat – a cutting an inch away from the bite mark, cuttings taken from right and left sleeve underarms, and a cutting from the back of the lab coat (Samples 114.1-114.3). (BCI&I Rep. at 2 (Ex. J)). And BCI&I's swabbing of the "bite mark section" of the lab coat (Samples 111.2-111.3) produced partial profiles that were "insufficient for comparison purposes." (*Id.* (Ex. J)).

BCI&I's testing also produced some results largely duplicating the results from 1998.<sup>12</sup> Specifically, BCI&I found one and sometimes two male DNA profiles in the fingernail clippings from Dr. Prade's hands. For the fingernail clippings from the six fingers where there was enough DNA for comparison to Mr. Prade, BCI&I found that Mr. Prade was excluded. (*Id.* (Ex. J) (Samples 106.2, 106.3 (major and minor), 106.4, 106.7 (major), 106.9 (major), 106.10 (major))). BCI&I also found additional male DNA on the fingernail clippings, but in amounts that did not

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<sup>11</sup> At the February 14, 2012, status conference, the Court had directed BCI&I to test the lab coat's buttons, a link from Dr. Prade's bracelet, and Dr. Prade's fingernail clippings. (2/29/12 Journal Entry). The Court's March 27, 2012, order also included those items. (3/27/12 Order).

<sup>12</sup> The FBI's 1998 DNA testing of the fingernail clippings – Items through Q8 through Q17 – could not exclude Timothy Holston – Source K4 – from some clippings. (7/24/98 FBI Report at 2-3 (Ex. E) (discussing the results of testing of Items Q8 and Q14 (minor))).

permit comparison to Mr. Prade. (*Id.* (Ex. J) (Samples 106.1, 106.5, 106.6, 106.7 (minor), 106.8, 106.9 (minor), 106.10 (minor))). Further, some of the male DNA was consistent with the DNA of Timothy Holston, Dr. Prade's male friend at the time of her murder. (*Id.* (Ex. J) (Samples 106.2, 106.3 (major), 106.4, 106.7 (major), 106.10 (major))).

### III. THE COURT SHOULD GRANT POSTCONVICTION RELIEF

#### A. The Standard For Granting Postconviction Relief Under R.C. 2953.21: Clear and convincing evidence that, in a trial with the new DNA evidence, there would have been reasonable doubt.

R.C. 2953.21 governs petitions for postconviction relief after statutory DNA testing. In subparagraph (A)(1)(a), R.C. 2953.21 provides that, when the testing produces "results that establish, by clear and convincing evidence, actual innocence of the felony offense" for which a person is imprisoned, the inmate "may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief." R.C. 2953.21(A)(1)(a).<sup>13</sup>

The "clear and convincing evidence" burden of proof specified in R.C. 2953.21(A)(1)(a) "is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established."<sup>14</sup> *State v. Eppinger*, 91 Ohio

<sup>13</sup> R.C. 2953.23(A) requires a showing parallel to the substantive one set forth in R.C. 2953.21(A)(1)(a) in order for a DNA-testing-based petition for postconviction relief to be timely. R.C. 2953.23(A)(2) provides that a DNA-testing-based petition for postconviction relief is timely when "the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense." For the reasons that, as described in detail below, this petition is well taken under R.C. 2953.21(A)(1)(a) (*i.e.*, there is clear and convincing evidence that would have created reasonable doubt at trial and prevented a reasonable factfinder from convicting), it also is timely filed under R.C. 2953.23(A)(2).

<sup>14</sup> Based on statements at the February 14, 2012, status conference, the State will contend that the applicable burden of proof for showing "actual innocence" under R.C. 2953.21(A)(1)(a) is beyond reasonable doubt. The State's argument presumably will be based on the absence of an express burden of proof in the definition of "actual innocence" in R.C. 2953.21(A)(1)(b). That argument, however, ignores R.C. 2953.21(A)(1)(a)'s express articulation of the burden of proof

St. 3d 158, 164, 743 N.E.2d 881, 887 (2001) (quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954)); accord *Disciplinary Counsel v. Russo*, 124 Ohio St. 3d 437, 439, 2010-Ohio-605, 923 N.E.2d 144, ¶ 6. "It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Eppinger*, 91 Ohio St. 3d at 164, 743 N.E.2d at 887 (quoting *Cross*, 161 Ohio St. at 477, 120 N.E.2d at 123).

Notwithstanding what "actual innocence" probably implies in everyday parlance, those words as used in R.C. 2953.21(A)(1)(a) have a statutorily-defined meaning that does not include requiring the defendant to prove his innocence. Specifically, the next subparagraph in the post-conviction relief statute, R.C. 2953.21(A)(1)(b), defines "actual innocence" to "mean[] 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 person's

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(continued...)

by which an "actual innocence" determination must be made – "clear and convincing evidence." Specifically, R.C. 2953.21(A)(1)(a) provides that a defendant filing a postconviction petition based on new DNA test results must show new "results that establish, by clear and convincing evidence, actual innocence of the felony offense." (Emphasis added). "Clear and convincing evidence" is a burden of proof. See *State v. Eppinger*, 91 Ohio St. 3d 158, 164, 743 N.E.2d 881, 887 (2001) ("Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.") (citation omitted). If defendants were required to prove "actual innocence" by proof beyond reasonable doubt, then either (1) R.C. 2953.21(A)(1)(a)'s "clear and convincing evidence" burden of proof is meaningless; or (2) the Court must apply two, very different burdens of proof to a single evidentiary finding. Both results violate basic rules of statutory construction. *E.g.*, R.C. 1.47 ("In enacting a statute, it is presumed that: ... (B) The entire statute is intended to be effective; ... (D) A result feasible of execution is intended"); *United Tel. Credit Union v. Roberts*, 115 Ohio St. 3d 464, 2007-Ohio-5247, 875 N.E.2d 927, ¶ 10 (courts should avoid interpretations that "render [statutory provisions] superfluous" and "must construe the applicable statute ... to avoid ... unreasonable or absurd results") (citation omitted); *State v. Lowe*, 112 Ohio St. 3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9 ("An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.") (citations omitted).

case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense." Thus, the petitioner's burden to establish "actual innocence" under R.C. 2953.21(A)(1)(a) is to provide "clear and convincing evidence" that new DNA test results would have prevented the State from meeting its traditional burden to establish guilt beyond a reasonable doubt or, stated affirmatively, that in a trial with the new DNA test results, when they were considered in the context of all admissible evidence, there would have been reasonable doubt.

R.C. 2953.21(A)(1)(b)'s standard for demonstrating that DNA exclusions establish "actual innocence" is nearly identical to R.C. 2953.71(L)'s standard that the Court applied in the September 2010 Testing Order to assess whether potential exclusions would be "outcome determinative." The text of R.C. 2953.21(A)(1)(b), which defines "actual innocence," and R.C. 2953.71(L), which defines "outcome determinative," are set forth below with the language that is (1) only in R.C. 2953.21(A)(1)(b) in brackets; and (2) only in R.C. 2953.71(L) underlined:

had the results of [the] DNA testing ... been presented at the trial ... and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the [person's] offender's case as described in division (D) of section 2953.74 of the Revised Code, there is a strong probability that no reasonable factfinder would have found the [petitioner] offender guilty of [the] that offense.

As is apparent, the sole substantive difference between the two definitions is that (a) the definition of "outcome determinative" in R.C. 2953.71(L) includes an internal, "strong probability" burden of proof, while (b) the definition of "actual innocence" in R.C. 2953.21(A)(1)(b) does not address the burden of proof, which is consistent with the fact that the prior paragraph, R.C. 2953.21(A)(1)(a), specifies that a "clear and convincing evidence" burden of proof applies.

Significantly, the distinction between R.C. 2953.71(L)'s "strong probability" burden of proof that the Court applied in September 2010 and R.C. 2953.21(A)(1)(a)'s "clear and convincing evidence" burden of proof that applies to an "actual innocence" showing here is largely semantic. Indeed, in discussing the effect of the 2006 amendment that added the "strong probability" language to R.C. 2953.71(L), the Eighth District found that "[t]he addition of the words 'strong probability' ... in essence lowers the definition of 'outcome determinative' from a showing of innocence beyond a reasonable doubt to one of clear and convincing evidence." *State v. Ayers*, 185 Ohio App. 3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 21 (8th Dist.) (emphasis added), *review denied*, 125 Ohio St. 3d 1439, 2010-Ohio-2212, 927 N.E.2d 11.<sup>15</sup>

Accordingly, the "actual innocence" issue now before the Court concerning the significance of the new DNA exclusion results is little different from the question the Court faced in September 2010 of whether then-hypothetical DNA exclusions would be "outcome determinative." And, just as the Court previously found that potential DNA exclusions on the lab coat over the bite mark would be "outcome determinative," it now should find that the new DNA exclusions from the "bite mark section" of the lab coat, when analyzed in the context of all available admissible evidence, including additional evidence about the unreliability of bite mark and eyewitness identification, establish "actual innocence."

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<sup>15</sup> In *Ayers*, the Eighth District began with the premise that, under the pre-2006 version of R.C. 2953.71(L), the burden of proof for a defendant seeking to establish that new DNA testing results would be "outcome determinative" was beyond reasonable doubt. That does not support a claim that the burden of proof for a defendant making a showing of "actual innocence" under R.C. 2953.21(A)(1)(a) is beyond reasonable doubt, however, because the Eighth District was interpreting a different statute – the pre-2006 version of R.C. 2953.71(L) – that, unlike R.C. 2953.21(A)(1)(a), lacked an express burden of proof.

**B. The New DNA Evidence Establishes Actual Innocence.**

As described above at pages 13 to 15, recent DNA test results both found male DNA in the area of the lab coat over the killer's bite mark and definitively excluded Mr. Prade from having contributed that male DNA. As explained in the attached affidavits of Drs. Rick Staub and Julie Heinig, experts in DNA testing, by far the most reasonable inference to draw from these results is that male DNA found in the "bite mark section" of the lab coat was the killer's. (6/29/12 Affidavit of Rick W. Staub, Ph.D., at ¶ 13 (Ex. M) [hereafter "Staub Aff."]; 6/29/12 Affidavit of Julie Heinig, Ph.D., at ¶ 15 (Ex. P) [hereafter "Heinig Aff."]). That, in turn, means that Mr. Prade is innocent.

Certainly, had these results been available in 1998, no reasonable factfinder would have convicted because (1) tying Mr. Prade to the bite mark on his ex-wife's arm was the "crucial" or "key" physical evidence at trial, Testing Order at 10; *Prade*, 2010-Ohio-1842, ¶ 3; and (2) the new DNA test results show that the bite mark was not Mr. Prade's. Although (1) the inquiry here is governed by an objective standard based on what a "reasonable factfinder" would have done, not a subjective standard based on what the particular jury that convicted Mr. Prade would have done; and (2) this is not admissible evidence on which the Court may rely (*see* Ohio R. Evid. 606(B), 802), defendant notes for background and information that, in a "Dateline NBC" segment that aired shortly after the trial in this case, the three jurors who were interviewed indicated that the bite mark evidence was critical to their guilty verdict.<sup>16</sup> In their words:

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

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

DATELINE NBC INTERVIEWER: The bite mark was it. You all agree?

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<sup>16</sup> Again, defendant is not asking the Court to rely on these comments because they are inadmissible and are offered only as background and for information. If the Court (or the State) would like a copy of the entire interview, defendant's counsel will provide a copy on a CD.

[All three jurors nod affirmatively.]

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

There can be no doubt that the killer's DNA was virtually certain to have been left on the lab coat when the killer made the bite mark. (See Staub Aff. at ¶¶ 11-13 (Ex. M); Heinig Aff. at ¶ 14 (Ex. P)). There was testimony that (1) in making the bite mark, the killer "probably slobbered all over" the lab coat (Baum Trial Test. at 1629:5-10 (Ex. A)); and (2) according to the State's DNA testing expert, the area of the lab coat over the bite mark is "the best possible source of DNA evidence as to [Dr. Prade's] killer's identity." (Callaghan Trial Test. at 1125:13-22 (Ex. A)). And, even though there was precious little chance that DNA testing would produce meaningful results in 1998 because this area of the lab coat was soaked with Dr. Prade's blood, two labs did that testing anyway because of the obvious significance of what might be found.

Significantly, this Court already found that a DNA exclusion in the area of the lab coat over the bite mark would have eviscerated the State's case against Mr. Prade such that, in that event, "a strong probability exists that no reasonable juror would find the Defendant guilty of aggravated murder." (Testing Order at 13). The State, however, likely will ask the Court to ignore both its prior ruling and this compelling new evidence, presumably based on claims that (1) the DNA test results over the killer's bite mark from which Mr. Prade was excluded possibly reflect DNA from another male who was not the killer (*i.e.*, contamination); (2) the male DNA found over the killer's bite mark might not be from saliva; and (3) the other evidence of Mr. Prade's guilt was sufficient to convict notwithstanding his exclusion from the male DNA found over the killer's bite mark. These arguments are not new, and neither The Supreme Court of Ohio nor this Court found them persuasive. They have not improved with either the passage of time or repetition and should be rejected now, as they were before.

1. **The possibility of contamination would not prevent the new evidence from creating reasonable doubt.**

In its September 2010 Testing Order (at 6), this Court considered and rejected the State's claim that someone other than the killer likely left the male DNA found on the lab coat over the bite mark. (Testing Order at 6). The Court reached this conclusion based on (1) Dr. Marshall's testimony that the lab coat "seemed fairly clean and starched," (2) its own inspection of the lab coat, which revealed that "the coat appears to be lightly starched, with minimal soiling about the cuffs and collar;" and (3) the far greater likelihood that, in this area, testing would find the killer's DNA from skin or saliva he deposited when biting Dr. Prade, as opposed to DNA from another male that was left by incidental contact. (*Id.* at 7). All of these grounds were valid then, and they are valid now. Nonetheless, and if past is prologue, the State will contend that, because the DNA testing here revealed what appear to be two male DNA profiles in Sample 19.A.2, the exclusions of Mr. Prade should be ignored as meaningless. This claim fails for five reasons.

a. **Sample 19.A.1 had only a single male DNA profile.**

*First*, DDC found only a single male DNA profile in Sample 19.A.1, which was a large cutting – roughly three quarters of an inch in diameter – taken from the center of the bite mark. (DDC Rep. at 2, 4 (Ex. ¶ F); DDC Photographs at 3-4 (Ex. H) (pictures of the bite mark section of the lab coat before and after DDC made the cutting that became Sample 19.A.1)). Thus, this crucial piece of evidence yielded only **one** male DNA profile from which Mr. Prade was excluded, not two.

Sample 19.A.2, which had the mixed DNA profiles that appear to have come from two males, was produced by combining the extract from Sample 19.A.1 with extract from three, smaller cuttings taken from near the outer edges of the bite mark. (DDC Notes at 70 (Ex. G) ("DNA extracts 19.A.1 and 19.B.1 were combined" and "[t]he combined extracts will now be

referred to as 19.A.2.")). The fact that a mixture prepared from four, widely-separated parts of the "bite mark section" of the lab coat – three of which were near the edges of the cutting – produced what appear to be two male DNA profiles in no way undermines the significance of the fact that, in Sample 19.A.1, there was only a single male DNA profile from which Mr. Prade was excluded.

- b. **The theory that two males, but not the killer, left DNA where the killer slobbered while biting Dr. Prade's arm with enough force to leave a lasting impression on her skin through two layers of clothing is extremely implausible.**

*Second*, Mr. Prade was excluded from **both** male DNA profiles in Sample 19.A.2. (DDC Rep. at 2 (Ex. F) ("Douglas Prade ... or any of his paternally related male relatives, can be excluded as a contributor to this partial mixed Y-STR DNA profile")). Thus, the State's argument is that, while two males likely left measurable DNA in at least some parts of the "bite mark section" of the lab coat where the killer "slobbered" while crushing Dr. Prade's arm with his teeth – one of whom did not leave DNA in the cutting that was used for Sample 19.A.1 – neither was the killer. That borders on the absurd.

Indeed, the basic question here is whether, in an area of the lab coat over where the killer bit Dr. Prade on the underside of her upper left arm, it is more likely that male DNA was left by (1) the killer during the act of biting Dr. Prade with sufficient force to leave a lasting impression on her skin through two layers of clothing; or (2) any other male whose bare skin or bodily fluids may have been deposited there. As noted previously, (1) the State's own expert testified at trial that the lab coat over the bite mark is "the best possible source of DNA evidence as to [Dr. Prade's] killer's identity" (Callaghan Trial Test. at 1125:13-22 (Ex. A); and (2) Dr. Baum testified that the killer "probably slobbered all over" the lab coat (Baum Trial Test. at 1629:5-10 (Ex. A)).

Common sense dictates that it is far more likely that the slobbering, biting killer left DNA in this out-of-the-way location on the lab coat as opposed to anyone other male.<sup>17</sup> As the Court found in the Testing Order (at 6), it is likely "that casual contact of Dr. Prade's arm sleeve would be minimal for two reasons – first, that casual contact from patient or medical staff would be minimal based upon the location of the bite mark, and second, that such casual contact would not likely deposit DNA of such magnitude to interfere or compromise the testing of such area."

Significantly, this is confirmed by Drs. Staub and Heinig. (Staub Aff. at ¶ 13 (Ex. M); Heinig Aff. at ¶ 15 (Ex. P)). As Dr. Staub explains: "There is a strong possibility that some male DNA found in the bite mark area of the lab coat would have come from the perpetrator's saliva or skin, rather than exclusively from someone unrelated to the attack who may have deposited his DNA there by incidental touching." (Staub Aff. at ¶ 13 (Ex. M)). Dr. Heinig agrees: "As between the possibility that the male DNA ... came from, on the one hand, the perpetrator in the act of forcefully biting Dr. Prade such that the bite made a lasting impression on her skin through two layers of clothing or, on the other hand, any other male who simply touched this area of the lab coat, the former is substantially more likely than the latter." (Heinig Aff. at ¶ 15 (Ex. P)).

c. **The State's efforts to develop evidence supporting its contamination theory failed.**

*Third*, the State went to great lengths to try to substantiate its contamination theory, but all of the additional DNA testing of the lab coat both within and outside of the bite mark came back empty. Specifically, after the DDC Report, the State requested, and the Court then ordered,

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<sup>17</sup> Indeed, the Chief of the Ohio Attorney General's Criminal Justice Section, James Slagle, said that any male DNA found in the bite mark most likely is the killer's. In his words, "it is much more likely to find identifiable DNA as a result of saliva" on Dr. Prade's lab coat over the bite mark "than from someone simply touching the coat because saliva contains much greater quantities of DNA than skin cells which might flake off due to touching of an article of clothing." (8/10/10 Letter from Jim Slagle to Sherri Bevan Walsh at 1-2 (Ex. 8 to State's Mot. & Subm. of Ex. 8 (filed 8/26/10)). In at least this respect, Mr. Prade agrees with Mr. Slagle.

further testing of the "bite mark section" of the lab coat, as well as of cuttings from the lab coat taken (1) an inch from the bite mark, (2) from the underarm of each sleeve, and (3) from the back of the coat. (See 2/29/12 State's Mot. For Additional Y-STR DNA Testing at 1-2; 3/27/12 Order). None of that additional testing produced anything of consequence. BCI&I found (1) "[n]o Y-chromosome DNA profile" within (a) the new cutting from the "bite mark section" and (b) the four cuttings taken from the lab coat outside the bite mark; and (2) "insufficient [DNA] for comparison purposes" in the two swabbings of the bite mark. (BCI&I Rep. at 2 (Ex. J) (discussing the results of testing Samples 111.1-111.3 and 114.1-114.4)). The facts that BCI&I found (a) no meaningful male DNA within the "bite mark section" and (b) no DNA elsewhere on the lab coat strongly suggest some of the male DNA DDC found in the "bite mark section" was the killer's DNA, rather than it all being stray DNA from incidental contact.

**d. The treatment of the "bite mark section" of the lab coat undermines the State's contamination theory.**

*Fourth*, it is unlikely that the lab coat "bite mark section" cutting from which Samples 19.A.1 and 19.A.2 were prepared contains only stray male DNA given the treatment that cutting has (or should have) received since very shortly after the murder. After the FBI received the lab coat on January 8, 1998, it apparently cut out the entire area over the bite mark, which measures roughly 2.5 inches by 2.0 inches.<sup>18</sup> Thus, whatever the treatment of the rest of the lab coat since the murder, the area of the lab coat over the bite mark has been stored separately – and presumably safely and in a manner so as to avoid contamination – since January 1998, which was only weeks after the murder.

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<sup>18</sup> (See 7/23/98 FBI Report at 1 (Ex. D) (documenting receipt of the lab coat – item Q19 – on 1/1/98); 7/24/98 FBI Report at 2 (Ex. E) (documenting cuttings taken from Q19); DDC Photographs at 3 (Ex. H) (photograph showing bite mark cutting as received by DDC with handwritten (1) notation "Q19," (2) numbers "1", "2", and "3" next to three cutouts, and (3) initials "TFC," which presumably stands for Thomas F. Callahan, the FBI examiner)).

e. The parties' respective burdens.

Finally, the State's argument ignores the parties' respective burdens. Although he likely has done so, Mr. Prade need not establish his innocence beyond a reasonable doubt. Instead, he must establish by clear and convincing evidence that (1) no reasonable factfinder would have convicted in light of the new DNA evidence; or (2) stated affirmatively, that the new DNA evidence, when considered in context, establishes reasonable doubt. Even if there were a remote, theoretical possibility that all of the male DNA found in the "bite mark section" of the lab coat and from which Mr. Prade has been excluded was left by someone other than the killer, (a) the State cannot begin to prove that the DNA was not the killer's, particularly in light of the negative results from testing other areas of the lab coat; and (b) Mr. Prade's exclusion plainly would create reasonable doubt about his guilt in light of the very substantial evidence suggesting that, in fact, the DNA came from the killer, and the State's heavy reliance on the bite mark as the physical evidence that placed Mr. Prade at the crime scene.

2. The absence of conclusive, positive test results for saliva would not prevent the new evidence from creating reasonable doubt.

Relatedly, the State can be expected to argue that (1) DNA test results cannot establish that the source of the male DNA found over the bite mark was saliva; and (2) in 1998, one test for amylase, an enzyme found in saliva, was performed in the area of the lab coat over the bite mark that was negative.<sup>19</sup> Both claims are largely irrelevant, and the Court already considered and rejected them in the Testing Order (at 6-7). Fundamentally, the specific source within the

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<sup>19</sup> Amylase testing would not be productive now due to amylase's rate of degradation. As the State's expert, Dr. Elizabeth Benzinger, stated in an earlier affidavit: "I do not believe that biochemical testing for the presence of saliva on the lab coat bite mark will conclusively determine whether saliva was on the lab coat. The available test for saliva detects activity of amylase, an enzyme found in saliva. After years of storage, I do not expect any amylase activity to remain." (7/28/10 Affidavit of Dr. Elizabeth Benzinger at ¶ 6 (Ex. 7 to State's Post-Remand Brief on DNA Testing (filed Aug. 9, 2010))).

body from which the male DNA in the "bite mark section" of the lab coat originated is of little consequence. What matters is that, whatever its origin, the DNA (a) likely came from the killer when he bit Dr. Prade's arm and (b) did not come from Mr. Prade, which the new DNA test results establish beyond any doubt.

For example, the killer's DNA in the "bite mark section" may not have come from saliva at all and, instead, may have come directly from skin from the tongue, lips, or the inside of the mouth. As this Court noted, the State's DNA testing expert testified at trial "that he analyzed the bite mark in three separate samples and that skin cells from the biter's lips and tongue may still exist on the fabric of the lab coat." (*Id.* at 7-8 (citing *Prade*, 2010-Ohio-1842, ¶ 18); *see also* Callaghan Trial Test. at 1108:24-1109:7 (Ex. A) (referenced testimony)). Along the same lines, a lab microscopically examined three small sections cut from the "bite mark section" of the lab coat in 1998 and observed a "few nucleated epithelial cells on two" of those cuttings. (9/9/98 SERI Report at 1 (Ex. L)).

Separately, the fact that one 1998 amylase test did not detect amylase in the "bite mark section" of the lab coat does not mean that amylase (or saliva) was not (or never was) there. In a preliminary "mapping" test, "[t]hree (3) areas on the cutting showed probable amylase activity." (9/9/98 SERI Report at 1 (Ex. L) (emphasis added)). As Dr. Staub explains, the amylase mapping test results suggest that amylase may have been present and could have been consumed by the "mapping" test, or that testing could have altered the amylase such that it was not detected in the follow-up, confirmatory test. (Staub Aff. at ¶ 10 (Ex. M)).

Further, we have no information about the amylase testing method that did not detect amylase here in 1998, that method's limits and sensitivity, the procedures at the laboratory that performed the testing, or the training and experience of the technician(s) who actually did the

testing. Again, as Dr. Staub explains, amylase testing can produce false negatives. (*Id.* (Ex. M)). Thus, whether due to the state of the art in 1998 or the way in which this particular amylase test was conducted, the 1998 amylase test could have failed to detect amylase from saliva that was (or had been) there.

3. **In light of the new DNA exclusions, there would have been reasonable doubt about Mr. Prade's guilt notwithstanding the State's other evidence.**

The State presented a great deal of testimony about the difficulties the Prades had leading up to and in the months after their April 1997 divorce, none of which directly implicates Mr. Prade in the murder. But the State also presented (1) bite mark identification expert testimony; (2) two eyewitnesses, Mr. Husk and Mr. Brooks, who placed Mr. Prade near the scene of the murder shortly before and after the murder; and (3) a bank deposit slip with Mr. Prade's handwriting allocating how he might disburse the proceeds of a life insurance policy on Dr. Prade. The State previously advanced these arguments as reasons why a DNA exclusion would not be "outcome determinative" and the Court rejected them then. As discussed below, they should be rejected now, as they were before.

a. **The bite mark identifications.**

The new DNA exclusions discussed at length above would, by themselves, render the State's odontologists' testimony tying Mr. Prade to the bite mark incredible. As the Court found in the Testing Order, "the equation clearly changes when jurors factor in evidence excluding Douglas Prade as a DNA donor on the lab coat swatches." (Testing Order at 11). Specifically, "the jurors would reconsider the credibility of the respective bite mark experts' testimony," with Dr. Marshall's testimony that Mr. Prade was the biter "necessarily ... being viewed less credibly" and "Dr. Baum's assertion that Douglas Prade's biting the arm of Dr. Prade was virtually impossible becom[ing] more plausible." (*Id.*).

b. The eyewitness testimony.

Adding the new DNA exclusions of Mr. Prade to the mix of evidence would have fatally undermined the testimony from the two eyewitnesses who placed Mr. Prade at the crime scene on the morning of the murder – Messrs. Husk and Brooks – particularly in light of the alibi witness, Mary Lynch, who placed Mr. Prade in a gym at roughly the time of the murder.<sup>20</sup> One eyewitness, Mr. Husk, "testified that although he learned of the murder the day it occurred, he came forward nine months later after months of press coverage that had featured [Mr. Prade's] photo." *Prade*, 2010-Ohio-1842, ¶ 4.<sup>21</sup> The other, Mr. Brooks, "testified that he was standing in the parking lot when he heard the possible killer's car 'peeling off,' and although he 'didn't pay it no attention,' and did not identify anyone in his first two police interviews, he later identified" Mr. Prade. *Id.*<sup>22</sup> As this Court found in September 2010, "[w]ith DNA excluding Prade as a contributor and no compelling physical evidence connecting Prade to the crime scene, the testimony from the two eyewitnesses called by the State becomes more circumspect," and "*a reasonable juror could now conclude that these two witnesses were mistaken.*" (Testing Order at 12 (emphasis added)).

c. The bank deposit slip.

In its brief opposing additional DNA testing after remand, the State argued that Mr. Prade's guilt was established by a deposit slip seized in February 1998, months after Dr. Prade's murder and well after Mr. Prade had claimed, received, and begun to disburse the proceeds from a \$75,000 life insurance policy on Dr. Prade's life. (State's Post-Remand Brief on DNA Testing

<sup>20</sup> Lynch Trial Test. at 1527:2-4, 18-22 (Ex. A).

<sup>21</sup> Husk Trial Test. at 1263:4-1265:17, 1266:1-21 (Ex. A).

<sup>22</sup> Brooks Trial Test. at 1424:14-1426:1 (Ex. A); Myers Trial Test. at 1058:24-1059:22 (Ex. A); Lacy Trial Test. at 1791:6-1792:11 (Ex. A).

at 4 (filed Aug. 9, 2010)). In the State's view, because the deposit slip was dated weeks before the murder and Mr. Prade made a handwritten tally on the back of the slip allocating Dr. Prade's life insurance proceeds, the slip documents Mr. Prade's plan to murder her. (*Id.*).

Yet the State cannot show that the handwriting was added in the few weeks between the bank transaction and Dr. Prade's murder and not, as Mr. Prade testified, in the months between the murder and the seizure of the deposit slip – a period during which he claimed and then received the life insurance proceeds. (Prade Trial Test. at 1931:2-1935:9; 2068:11-2069:11 (Ex. C)). It was, after all, a receipt, the very purpose of which was to be retained for future use and provide the customer with after-the-fact evidence of the transaction.

Moreover, any money problems that Mr. Prade may have had were insufficient to provide a plausible motive for him to murder his ex-wife so as to collect \$75,000. He was a Captain in the Akron Police Department and, in 1997, had an annual salary of \$61,000 – slightly over \$84,000 in today's dollars – and about \$170,000 in net assets – roughly \$235,000 in today's dollars. (*Id.* at 2081:8-17; 2078:20-2081:7 (Ex. C)). Indeed, it was Dr. Prade who needed money because she had failed to make estimated federal income tax payments. Tellingly, Mr. Prade (1) used more than half of the life insurance proceeds (*i.e.*, about \$39,000) to satisfy his ex-wife's federal tax obligations; and (2) at the time of his arrest months after receiving the policy's proceeds, still had about \$18,000 – nearly a quarter of the total amount he had received. (*Id.* at 1934:24-1937:10; 1938:15-1945:2; 1945:7-9 (Ex. C)). In sum, the State's claim that the deposit slip somehow evidenced Mr. Prade's guilt cannot withstand analysis, and the Court should reject it now, just as it did in September 2010.

**C. Other Non-DNA Evidence, Including New Evidence, Supports A Finding Of Actual Innocence.**

As explained above, the new DNA test results alone suffice to establish "actual innocence" under R.C. 2953.21(A)(1)(a). But R.C. 2953.21(A)(1)(b) provides that, when assessing a claim of "actual innocence" under R.C. 2953.21(A)(1)(a), the Court should analyze the new DNA test results "in the context of and upon consideration of **all available admissible evidence** relating to a person's case." (Emphasis added). And here there is other new evidence in addition to the DNA test results; namely, the advances in the state of the forensic sciences of bite mark and eyewitness identification that would undermine essential pillars of the State's case against Mr. Prade.

**1. Scientific advances have largely discredited bite mark identification.**

Even without the DNA test results we now have, the odontologists' conclusions at Mr. Prade's trial likely would be dismissed out of hand if proffered now for several reasons. Initially, after this trial, one of the State's bite mark experts who testified here, Dr. Levine, implicated a defendant who later was shown to be innocent based on DNA testing.<sup>23</sup> See *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005). Other bitemark "experts" have made the same mistake. E.g., *Otero v. Warnick*, 241 Mich. App. 143, 145, 614 N.W.2d 177, 178 (2000) (after odontologist testified "that [defendant] was the only person in the world who could have inflicted

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<sup>23</sup> Further, and as the Court mentioned at the June 12, 2012, status conference, the State's other odontologist, Dr. Thomas Marshall, testified in the first *Denny Ross* trial that there was a bite mark on the victim's skin when, in fact, it may have been an impression from a hair band found under the body. (See 1/12/09 *Akron Beacon Journal* "Part 7: Jury does not hear evidence found late" (Ex. Q)). This is merely background information because defense counsel has been unable to establish these facts through admissible evidence, although the article reports that Mr. LoPrinzi, who appeared for the State in this case at the February 14, 2012, status conference, also represented the State in *Denny Ross*.

the bite marks," he "was excluded as a possible source of DNA"), *appeal denied*, 463 Mich. 903, 618 N.W.2d 771 (2000).

More generally, the State's heavy reliance on bite mark evidence to provide its "crucial," "key" evidence would have been undermined by multiple, highly-credible opinions released since 1998 that "the fundamental scientific basis for bitemark analysis ha[s] never been established." 1 Paul Giannelli & Edward Imwinkelreid, *Scientific Evidence* § 13.04 at 672 (4th ed. 2007) (Ex. R) (footnote and internal quotations omitted). According to the National Research Council, the scientific basis for bite mark identification "is insufficient to conclude that bite mark comparisons can result in a conclusive match." Nat'l Research Council, "Strengthening Forensic Science in the U.S.: A Path Forward" at 175 (Aug. 2009) (Ex. S) (available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>).

As set forth in the attached affidavit from Dr. Mary Bush and Peter Bush, both of whom are experts in bite mark analysis, "research has shown that anterior human dentition is not unique, and that dental shape is not reliably transferred to human skin." (6/26/12 Affidavit of Dr. Mary Bush & Peter Bush at ¶ 11 (Ex. N)). In their view, "scientific studies raise deep concern over the use of bitemark evidence in legal proceedings." (*Id.*). This additional evidence about the unreliability of bite mark identification, particularly when coupled with the new DNA exclusion results, would have skewered the State's bite mark experts' testimony and destroyed their credibility at trial.

## 2. Scientific advances undermine eyewitness identifications.

Separately, scientific evidence about eyewitness unreliability, some of which has been developed since 1998 would lend support to the conclusion that Messrs. Husk and Brooks were mistaken. *See State v. Gillispie*, 2d Dist. No. 22877, 2009-Ohio-3640, ¶ 154 (affirming in part and reversing in part denial of motion for new trial; "the trial court, upon remand, may consider

the effect that" new expert testimony regarding the reliability of eyewitness identification "might have in conjunction with any [other] new evidence"), *review denied*, 123 Ohio St. 3d 1510, 2009-Ohio-6210, 917 N.E.2d 812. "From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real." *State v. Henderson*, 208 N.J. 208, 218, 27 A.3d 872, 878 (2011). "The empirical evidence demonstrates that eyewitness misidentification is 'the single greatest cause of wrongful convictions in this country.'" *Perry v. New Hampshire*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct 716, 738 (2012) (Sotomayor, J., dissenting) (quoting *Henderson*, 208 N.J. at 231, 27 A.3d at 885) (footnote omitted); *see also United States v. Wade*, 388 U.S. 218, 228 (1967) ("the annals of criminal law are rife with instances of mistaken identification").

"Of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification." *Henderson*, 208 N.J. at 231, 27 A.3d at 885-86 (quoting Int'l Ass'n of Chiefs of Police, Training Key No. 600, *Eyewitness Identification* 5 (2006)). Indeed, "[r]esearchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification." *Perry*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 738-39 (citing Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 9, 48, 279 (Harvard Univ. Press 2011) (hereafter "*Garrett, Convicting the Innocent*") (other citations omitted)). And significantly, "[t]hirty-six percent of the defendants convicted were misidentified by *more than one eyewitness*." Garrett, *Convicting the Innocent* at 50 (emphasis added).

There are many reasons why misidentification occurs.<sup>24</sup> "Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications." *Henderson*, 208 N.J. at 247, 27 A.3d at 895. In particular, "[s]tudy after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures." *Perry*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 739 (citations omitted).

Applying the established scientific principles to the circumstances of this case provides insights into why Messrs. Husk and Brooks's testimony should be questioned. As explained in the affidavit of Charles Goodsell, Ph.D., an expert in eyewitness memory and identification issues, there were multiple factors giving rise to questions about the accuracy and reliability of their memories, including suggestion, inattention, overstated confidence, and delay. (6/28/12 Affidavit of Charles Goodsell, Ph.D., at ¶¶ 22-26 (Ex. O)). This new scientific evidence, along with the key evidence excluding Mr. Prade as a contributor of genetic material at the site of the

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<sup>24</sup> Justice Sotomayor recently reviewed the substantial body of scientific evidence regarding eyewitness unreliability: "'The research . . . is not only extensive,' but 'it represents the gold standard in terms of the applicability of social science research to law.'" *Perry v. New Hampshire*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct 716, 738 (2012) (Sotomayor, J., dissenting) (quoting *State v. Henderson*, 208 N.J. 208, 283, 27 A.3d 872, 916 (2011)). "Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings." *Id.* (quoting *Henderson*, 208 N.J. at 283, 27 A.3d at 916). There is "nearly unanimous consensus among researchers about the [eyewitness reliability] field's core findings." *Id.* (quoting Richard S. Schmechel *et al.*, "Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence," 46 *Jurimetrics* 177, 180 (2006) (bracketed material in original)).

killer's bitemark, would have utterly discredited the eyewitness testimony placing Mr. Prade at the scene.

**IV. ALTERNATIVELY, THE COURT SHOULD GRANT THE MOTION FOR A NEW TRIAL UNDER RULE OF CRIMINAL PROCEDURE 33(A)(6)**

**A. The Standard For A New Trial Based On Newly-Discovered Evidence Under Rule Of Criminal Procedure 33(A)(6).**

Under Ohio Rule of Criminal Procedure 33(A)(6), the Court may order a new trial "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial."<sup>25</sup> "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence: (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus; *see also State v. Hawkins*, 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227 (1993) (same); *State v. Johnson*, 8th Dist. No. 93635, 2010-Ohio 4117, ¶ 22 (same).

"In view of the beyond-a-reasonable-doubt burden of proof, newly discovered evidence need not conclusively establish a defendant's innocence in order to create a strong probability that a jury in a new trial would find reasonable doubt." *State v. Gillispie*, 2d Dist. No. 24456,

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<sup>25</sup> Rule 33(B) governs when a defendant may file a motion for a new trial. That rule provides that, "[i]f it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period." Here, Mr. Prade plainly could not have obtained these new DNA testing results earlier. Consistent with that fact, the State agreed at the June 12, 2012, status conference that it would not contest the timing of this motion under Rule 33(B).

2012-Ohio-1656, ¶ 35. The decision to grant or deny a motion for a new trial is "within the sound discretion of the trial court." *State v. LaMar*, 95 Ohio St. 3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 85.

**B. The Court Should, In The Alternative, Grant The Motion For A New Trial.**

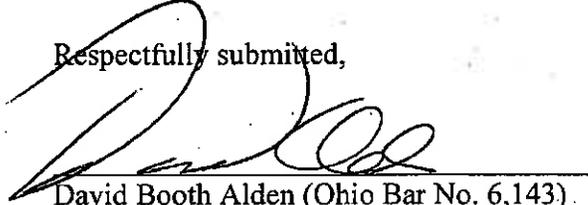
In the event that the Court finds that Mr. Prade has failed to make the showing required for postconviction relief under R.C. 2953.21(A) (and it should not make such a finding), the defense submits that, for the reasons described previously in Part III of this memorandum, the new DNA test results satisfy the requirements for granting a motion for a new trial. Specifically, the new DNA testing results are (1) recently-discovered, (2) material, (3) non-cumulative new evidence that (4) defendant could not have discovered in 1998 and (5) would have created a strong probability that, in his 1998 trial, there would have been a different result. *See State v. Hawkins*, 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227 (1993); *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus; *State v. Johnson*, 8th Dist. No. 93635, 2010-Ohio-4117, ¶ 22 (same). Further, the new evidence (in the form of expert testimony) relating to the unreliability of bite mark and eyewitness testimony developed since 1998 reinforces that conclusion. Accordingly, and in the event that it does not grant defendant's petition for postconviction relief, the Court should order a new trial under Ohio Rule of Criminal Procedure 33(A)(6) and 33(B).

V. CONCLUSION

For the foregoing reasons, the Court should (1) vacate Mr. Prade's aggravated murder conviction and the related firearms specification, (2) order his immediate release; and (3) if the Court deems it necessary, order that there be a new trial.

DATED: June 29, 2012

Respectfully submitted,



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I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.

  
Deputy Clerk

**CERTIFICATE OF SERVICE**

On this 29th day of June, 2012, copies of the foregoing, along with the exhibits, were sent  
by overnight courier to:

Mary Ann Kovach  
53 University Avenue  
Akron, OH 44308

and by regular United States mail, postage prepaid, to:

Michael DeWine  
Ohio Attorney General  
Ohio Attorney General's Office  
DNA Testing Unit  
150 East Gary Street  
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Columbus, OH 4321

  
\_\_\_\_\_  
*An Attorney for Defendant  
Douglas Prade*

# EXHIBIT

# D

COPY

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

2012 JUL 24 AM 9:57

STATE OF OHIO  
**Plaintiff**

SUMMIT COUNTY  
CLERK OF COURTS

CASE NO. CR 98 02 0463  
**JUDGE JUDY HUNTER**

v.

DOUGLAS E. PRADE  
**Defendant**

**BRIEF OF STATE OF OHIO  
IN RESPONSE TO MOTION  
FOR NEW TRIAL/PETITION  
FOR POST-CONVICTION  
RELIEF**

**REQUEST FOR  
EVIDENTIARY HEARING**

***FILED UNDER SEAL***

The State requests an evidentiary hearing on Defendant Prade's Petition for Post-Conviction Relief or in the Alternative Motion for a New Trial (Brief). The State contends that the proper remedy requires Prade to prove actual innocence by clear and convincing evidence. The State further contends that at a hearing Prade will not meet that burden.

By Order dated June 28, 2012, this Court scheduled an evidentiary hearing for August 21, 2012, and August 22, 2012. In his Brief, Prade does not mention this hearing. Perhaps he takes for granted that the hearing will proceed as scheduled. But if he seeks a substantive ruling without a hearing the State opposes that request.

## ARGUMENT

### A. The Proper Remedy is R.C. 2953.23

Prade references two statutory remedies in his Brief: R.C. 2953.21 and in passing, Crim.R. 33. Analysis of the statutes indicates that where a defendant relies on the results of DNA testing the petition for post-conviction relief statutes (PCR) provide the sole remedy.

Both R.C. 2953.21(A)(1)(a) and R.C. 2953.23(A)(2) make specific reference to DNA testing done pursuant to R.C. 2953.71 to R.C. 2953.81. There is no reference to DNA testing in Crim.R. 33.

The reference in the PCR statutes to the DNA testing statutes is no coincidence since both PCR statutes were amended to add the reference to the DNA testing statutes in SB 11, effective October 29, 2003, the same bill that enacted the DNA testing statutes. By amending the PCR statutes the legislature created vehicles for defendants to seek relief after favorable or allegedly favorable DNA test results. By contrast, Crim.R. 33 has never been amended since its enactment effective July 1, 1973.

Prior to the amendment of the PCR statutes, a defendant's claim that improved DNA test results would show actual innocence could not be addressed under the PCR statutes because actual innocence based on newly discovered evidence was not a constitutional violation as required by the

statutes. *State v. Elliott*, 1<sup>st</sup> Dist. No. C-010598, 2002-Ohio-4454, ¶14. At that time the proper remedy was under Crim.R. 33. *Id.* ¶15.

After the enactment of the DNA testing statutes, the same defendant was successful in requiring the trial court to order DNA testing. *State v. Elliott*, 1<sup>st</sup> Dist. No. C-050606, 2006-Ohio-4508. Accordingly, the denial of the former petition for post-conviction relief was no bar to the right to DNA testing and certainly no bar to a potential remedy under the amended PCR statutes because the amended statutes did provide a remedy.

A new trial is a possible remedy for a defendant who proves actual innocence. R.C. 2953.21(G). Hence, the remedy under Crim.R. 33 is also available under the PCR statutes.

After the amendment of the PCR statutes, the bar on actual innocence claims as constitutional violations continued. However, actual innocence claims were allowable under the PCR statutes but “restricted to certain cases in which DNA testing has been duly performed.” *State v. Davis*, 5<sup>th</sup> Dist. No. 2008-CA-16, 2008-Ohio-6841, ¶138, quoting *State v. Nelson*, 5<sup>th</sup> Dist. No. CT2008-0013, 2008-Ohio-5901.

Since the PCR statutes were amended together with the enactment of the DNA testing statutes to specifically enumerate DNA test results as affording potential remedies and further by making special provision for

actual innocence claims this Court should hold that Prade is entitled to relief, if at all, only under the PCR statutes upon proof of actual innocence.

**B. The PCR Statutes Require Prade to Prove Actual Innocence by Clear and Convincing Evidence**

**B.1 Prade's Petition is Untimely**

Proof of actual innocence is required before the petition can be considered timely.

Prade's petition is filed almost twelve years after the Court of Appeals affirmed the convictions. *State v. Prade*, 139 Ohio App.3d 676, (2000). Under any version of R.C. 2953.21 the petition is untimely. *See* R.C. 2953.21(A)(2). Consequently, Prade must comply with R.C. 2953.23. *State v. Hartman*, 9<sup>th</sup> Dist. No. 25055, 2010-Ohio-5734, ¶7.

Prade claims to be actually innocent. R.C. 2953.23(2). If that is so, then he has complied with R.C. 2953.23. R.C. 2953.23(A). That is the point of the hearing scheduled for August. If Prade proves actual innocence at the hearing, then the petition is timely and the choice of remedy in Prade's case is either discharge or a new trial. R.C. 2953.21(G).

Prade correctly cites the definition of actual innocence and the burden of proof he bears: clear and convincing evidence. Brief, 17-18. He wrongly suggests to this Court that it has made a nearly identical finding in the Testing Order dated September 23, 2010.

**B.2 The Testing Order does Not State that Prade is Actually Innocent**

The Testing Order was necessitated by the decision of the Supreme Court of Ohio in *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842. The point of the decision was that Prade had not had a definitive DNA test(s) at his trial. *Id.* ¶19. Because the prior tests were not definitive it remained on remand to see if an exclusion would be outcome determinative. *Id.* ¶28, ¶30; R.C. 2953.74(B)(2); R.C. 2953.71(L).

This Court understood and complied with the Supreme Court's mandate. Testing Order, 3. The State notes that the pertinent statute did not allow the State to appeal this Court's finding that an exclusion of Prade from the bite mark would be outcome determinative. R.C. 2953.73(D)/(E) (only allows an appeal from an order rejecting an application for DNA testing to either the Supreme Court of Ohio in a death case or to the Court of Appeals in a non-death case, neither of which apply to our case.)

The Testing Order determines that an exclusion would be outcome determinative:

had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and is requesting the DNA testing, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the offender's case as described in division (D) of section 2953.74 of

**the Revised Code, there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense\*\*\*.**

R.C. 2953.71(L) (Emphasis added.)

The PCR statute requires proof by clear and convincing evidence of actual innocence:

“actual innocence” means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code 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 person's case as described in division (D) of section 2953.74 of the Revised Code, **no reasonable factfinder would have found the petitioner guilty of the offense** of which the petitioner was convicted \*\*\*.

R.C. 2953.21(A)(1)(b) (Emphasis added.); R.C. 2953.23(A)(2) (incorporating definition.)

The difference between the two definitions is distinct despite Prade's efforts to conflate them. Outcome determinative means that the probability is strong that no reasonable factfinder would convict the defendant of the offense. Actual innocence goes beyond that to require that no reasonable factfinder would convict. The first definition refers to a probability but the second mandates certainty. The Testing Order addresses outcome determinative only. Therefore the issue of actual innocence remains to be addressed.

### **C. Both Prade and this Court Must Address All of the Evidence**

The definition of actual innocence requires the Court to consider the DNA test results together with and in the context of all admissible evidence.

The State stands by the jurors' verdict. Accordingly, the following is written to reflect the verdict of the jury, that Prade, not some unknown person, did certain things or was observed doing certain things. Both the trial transcript and the opinion of the Ninth District Court of Appeals in *Prade*, 139 Ohio App.3d 676 are cited in support of Prade's guilt for the murder of Margo Prade.

Each and every alleged defect in the eyewitness testimony was the subject of cross-examination at trial and within the ken of the jury when it convicted Prade. A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir.1973). Determining the weight and credibility of witness testimony is the "part of every case [that] belongs to the jury, who [is] presumed to be fitted for it by [his or her] natural intelligence and ... practical knowledge of men and the ways of men." *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891). Any court should proceed with caution in determining that a jury verdict should be held for naught.

And it will not do to dismiss evidence as merely circumstantial. A conviction can be sustained based on circumstantial evidence alone. *State v.*

*Nicely*, 39 Ohio St.3d 147, 154-155 (1988). Circumstantial evidence can be as persuasive as direct evidence if not more so. *State v. Lott*, 51 Ohio St.3d 160, 167 (1990). There is no difference between direct and circumstantial evidence as far as determining its effect on the jury. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph one of the syllabus.

Between 8:00 – 9:00 AM on November 26, 1997, Robin Husk of Rolling Acres Dodge (which adjoined Dr. Prade's office) saw Douglas Prade and asked if he could help him, to which Prade responded negatively and moved away. T. 1262-1264; *Prade* 698.

The homicide was committed between 9:10 – 9:12 am, as documented by the Rolling Acres Dodge security videotape. T. 1044-1046; State Exhibits 179, 180, 181.

Prade waited for the victim in his car, started to leave, stopped when the victim pulled in, and parked near the victim's van. State Exhibits 179, 180, 181. Prade gained swift entry into the van by key, or by the victim unlocking the doors. Prade had keys to the van. State Exhibits 179, 180, 181; *Prade* 697. Six shots were fired into Dr Prade. T. 1141-1161.

Margo Prade was bitten during the struggle, which left a bite mark impression that a forensic odontologist ascribed to Prade. In the words of Dr. Marshall who tried to exclude Prade as the person who left the bite marks,

“Every mark lined up with every other mark.” T. 1226-1227, 1392, 1406; *Prade* 699.

As Prade drove away from the scene of the murder, patient Howard Brooks saw him as Brooks exited the medical office building. T. 1425-142; *Prade* 697-698. Prade was seen at the scene immediately before and after the killing. His bite mark impression was found on the lab coat and on her arm.

A piece of evidence strongly indicative of premeditation was that before the killing Prade was experiencing money problems. He opened Margo’s mail and knew about the insurance policy. He received \$75,238.50 after her death in insurance proceeds. More than a month before the murder, Prade’s debts had been tallied against \$75,000.00. The tally was made on the back of an October 8, 1997, bank deposit slip from Prade’s account and was found at the residence of Prade’s girlfriend, Carla Smith. T. 511-518, 1415-1453, 1463-1464; State Exhibits 51, 192-194; *Prade* 699. Prade admitted that his handwriting is on the tally. T. 2115.

In his Brief, Prade attempts to discount this evidence with the theory that Prade could have written the tally after the murder. That theory won’t hold water. The truth is that the debts listed on the slip existed prior to the time Dr. Prade was killed. After the murder Prade disbursed the insurance proceeds to other creditors.

Describing State Exhibit 194, the tally, Lieutenant Calvaruso said that the figures subtracted from \$75,000.00 were compared to notations in State Exhibit 195, Prade's checkbook. That checkbook contained notations of amounts owed to creditors comparable to the amounts listed on the tally.

T. 1454.

Examination of the relevant exhibits indicates that State Exhibit 194 is an enlargement of the back of the deposit slip dated October 8, 1997. The front of the slip is enlarged in State Exhibit 193.

On Exhibit 194 amounts corresponding to several businesses are listed. The total is 24,670.00. On the bottom, the amount of 24,600 is subtracted from 75,000. The businesses are MBMA (10,000); MH (motor home) (5400.00); Sears (3700.00); HRS (Builders Square) (350); Kay's (240); Diamond's (240); Mellion (a doctor) (900); and the figure 2,140.00.

T. 1451-1453.

State exhibit 195, Prade's checkbook, indicates that the amount due to the creditor is listed after a payment to the creditor. On October 16<sup>th</sup>, more than a month before the homicide, a payment of \$30.00 is made to HRS with a balance of \$357.21. Also on that date a payment of \$207.00 is made to MBNA with a balance of \$10,176.00 and a payment of \$80.79 is made to Diamonds with a balance of \$247.81.

On October 10<sup>th</sup> a payment of \$51.48 is made to Kay's with a balance of \$244.31. On October 3<sup>rd</sup> payments of \$41.00 and \$54.00 are made on two Sears accounts with a total balance of \$3,500.15. On October 31<sup>st</sup> a payment of \$118.00 is made to Mellion with a balance of \$1062.00.

On November 25<sup>th</sup> the checkbook shows a negative balance of \$508.54.

This exhibit shows that the debts listed in the deposit slip dated October 8, 1997, pre-dated the murder and that Prade anticipated collecting the insurance proceeds well before the murder. The exhibit screams his guilt.

State exhibit 197 is an enlargement of State Exhibit 196, Prade's check register. T. 1455-1456. The exhibit shows a beginning balance of \$75,238.50 corresponding to the amount of the insurance proceeds. From that sum are deducted payments to Rolling Acres Dodge; First Merit/Old Phoenix; IRS, Kerry O'Brien (one of Prade's attorneys); and L. Davidson, another attorney. There is a deposit of \$5,000.00. The ending balance is \$18,239.00, less \$450.00 for an unattributed payment. The point of exhibit 197 is that after the murder Prade used the insurance proceeds to pay creditors substantially different from the creditors listed on exhibit 194. This buttresses the impact of exhibits 194 and 195.

Prade never signed the divorce separation agreement documents. Had he done so, he would have forfeited his right to collect life insurance benefits. T. 2162. Prade claimed that he did not have financial problems but in August

and September of 1997, just before the homicide, he had \$300.00 in overdraft charges and as stated a \$500.00 negative balance in his checkbook. T. 2121. In November of 1997 Margo Prade had her attorney send Prade a letter concerning an increase in child support. State Exhibits 62 and 94.

Other evidence showing that Doug Prade was obsessively jealous of Dr. Margo Prade was that Prade wire tapped Dr. Margo Prade's home phone calls. There were more than five hours of taped calls played at trial from some three years of wiretapping. T. 418. There were 86 calls in October of 1994 through January of 1995 and 349 calls in December of 1996. The taped calls in December of 1996 correlate to Dr. Prade finally deciding to divorce Prade. As their relationship declined the taping increased. Prade was obsessive about her whereabouts and relationships which is typical of domestic violence cycles. The divorce complaint was filed in 1996 after Christmas. T. 558.

The Court of Appeals found that this evidence was admissible under Evid.R. 404(B). *Prade*, 685. Accordingly, it is admissible evidence under the definition of actual innocence.

Prade denied wiretapping Margo Prade's phone. He claimed that Margo Prade wanted her conversations taped to have a record of client matters. He admitted erasing some tapes so they could be used again. T. 2135. Prade's explanation is incredible because witnesses said that Margo Prade remembered her patient information; notably on a tape Margo Prade says that

she thinks Doug is taping the phone and to be careful of what is said. T. 2139. Clearly the jury in convicting Doug Prade of wiretapping did not find this explanation credible.

Despite his serious financial problems and debts, Prade admitted that he hired a private investigator for \$3,600.00 to follow her and her friend weeks before Dr. Prade was murdered. T. 2165. This is another act of compulsive, obsessive behavior for him to want to keep her.

In truth, Dr. Prade saw her death coming at Prade's hands.

Dr. Prade was very afraid of Douglas Prade. Dr. Prade's friends shared that concern and even advised her to get a gun. T. 462, 637, 766, 768, 829. Prade loitered around Dr. Prade's office late at night when he worked the midnight shift for the police department. T. 833. Prior to the murder a police cruiser was frequently seen parked near Dr. Prade's office. After the murder that car was not seen again. T. 709-712, 721.

Dr. Prade's purse and bag were left untouched in her vehicle when she was shot. T. 750. The killing was not part of a robbery.

Prade's alibi is false. Prade told police after Dr. Prade's body was discovered that he had started a workout at 9:30 am (some twenty minutes after the murder occurred) on November 26, 1997. T. 1034-1035. Prade arrived at the murder scene just after 11:00 am. T. 953. Prade claimed that he came directly from the gym, that was six minutes away and where he had been

working out, but his appearance gave no hint that he had been working out. *Prade* 698. Later, Prade attempted to foist an alibi on the jury based on his alleged workout at the time of the killing.

But he had already admitted that he was not working out when the killing occurred.

Prade testified that he assumed that he arrived at the gym on the day of the murder a little before 9:00 (am). T. 1900. He estimated that the alibi witness, Katherine Lynch, left the gym between 9:20 and 9:30. T. 1901.

Prade's alibi witness Lynch told police on January 22, 1998, that Prade arrived at the gym anywhere from 8:25 am to 9:25 am on November 26, 1997. T. 1545-1546. She testified that she arrived probably around 8:30. T. 1524. The Court of Appeals found that this alibi witness could not establish when her workout commenced (and so could not definitely say when defendant entered the gym). *Prade* 699. Prade also said that a man came into the gym when the murder occurred. But that man denied ever seeing Prade at any time in the gym. *Prade*, 699.

Prade did not have an alibi and his own statement contradicted the alibi that he attempted to establish. Prade's alibi is a fabrication.

Prade's alibi was admissible evidence at the trial and it is admissible evidence now. Evid.R. 801(D)(2)(a) excludes from the definition of hearsay

admissions by a party opponent where the statement is offered against a party and is the party's own statement.

Courts construing the analogous federal rule of evidence and prior case law hold "that a criminal defendant's prior testimony, if voluntarily given, is admissible at a subsequent trial of the same case." *United States v. Toombs*, 2010 WL 5067617 (D. Kan.), 2, citing *Harrison v. United States*, 392 U.S. 219 (1968); *United States v. Ndubuisi*, 460 Fed.Appx. 436, 2012 WL 490144 (5<sup>th</sup> Cir. 2012), 439-440.

Likewise, the testimony of the purported alibi witness is admissible. If this witness becomes unavailable her former testimony is admissible under Evid.R. 804(B)(1). *State v. Jackson*, 2<sup>nd</sup> Dist. No. 24430, 2012-Ohio-2335, ¶49-¶50; *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, ¶65.

**D. Expert Testimony Will Show that the Exclusion is Meaningless and Cannot Prove Actual Innocence**

Attached to this Brief is BCI Lab Report number 97-35366 signed by BCI DNA Technical Leader Lewis Maddox PhD and Director of Research, Development and Training Elizabeth Benzinger, PhD dated July 17, 2012. Exhibit 1. The conclusion is "that the DNA results obtained from the fingernail samples and bite mark lab coat samples are not outcome-determinative and likely represent background DNA due to casual transfer rather than a signature of the assailant in the homicide of Margo Prade."

This contrasts with the conclusions of Rick Staub, PhD and Julie A. Heinig, PhD who aver that the male DNA identified in lab coat bite mark cuttings is far more likely or very likely to have originated from the murderer. Prade Exhibits M, ¶13 and P, ¶16.

As such this Court is faced with making a credibility determination. Prade must prove his theory by clear and convincing evidence.

It must be noted here that the language in the BCI report, “outcome-determinative” is obviously not used to describe the threshold finding required by the DNA testing statutes before a DNA test is ordered. The language clearly means that the male DNA identified through the testing is not from the murderer.

The BCI report also includes two color photographs. In one the clearly soiled collar of the lab coat is shown in a 2009 photograph. In the other then Assistant Prosecutor Alison McCarty is shown holding the stained lab coat as FBI DNA expert Thomas Callaghan PhD gestures towards it. The latter photograph is reflected in the transcript at pages 1097 to 1098 where the prosecutor takes out the lab coat and questions Callaghan about it. The photographs illustrate one possibility of contamination.

Moreover, during his testimony Callaghan was shown bite mark cuttings. The transcript indicates that the “little swatches that you took out of

this cutting” were displayed and handled in court. T. 1107-1108. This illustrates another possibility of contamination.

**E. Other Background Information Concerning Prade**

Prade offers for background and information that in a news broadcast three jurors agreed that the bite mark was critical to their voting to convict (presumably for murder). Prade Brief, 21-22.

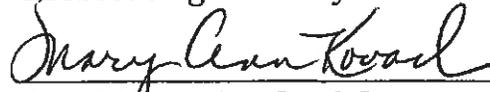
Other inadmissible background and information is that Prade took and failed a polygraph test shortly after the murder. The test was given by Bill Evans, and Prade answered deceptively on two key questions. However, Prade was told that he passed the polygraph by police investigators in order to see how he would react later thinking that he had been cleared. A transcript of an interview conducted on November 15, 2007, by Eric Mansfield then with Channel 3 News with Bill Evans and Craig Gilbride is attached to the State’s Memorandum dated August 9, 2010, along with an internet posting of the Channel 3 news story. Exhibit 5, Memorandum dated August 9, 2010. A tape recording of the interview is available.

**CONCLUSION**

For the foregoing reasons the State requests an evidentiary hearing, an opportunity to brief the issues subsequent to the hearing, and a determination that Defendant Prade is not entitled to relief.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney



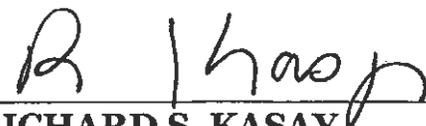
**MARYANN KOVACH**  
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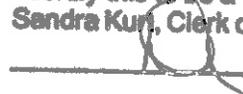
**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail and email to- David B. Alden and Lisa B. Gates, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114; and by regular U.S. Mail and email to Mark Godsey and Carrie E. Wood, Ohio Innocence Project, University of Cincinnati College of Law, P. O. Box 210040, Cincinnati, Ohio 45221-0040, on this 24th day of July, 2012.



**RICHARD S. KASAY**  
Assistant Prosecuting Attorney

I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.



Deputy Clerk



# MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

## Bureau of Criminal Identification and Investigation

## Laboratory Report

To: Mary Ann Kovach  
Summit county Prosecutor's Office  
53 University Avenue  
Akron, OH 44308

BCI&I Laboratory Number: 97-35366

Date: July 17, 2012

Offense: Homicide  
Subject(s): Douglas E. Prade  
Victim(s): Margo S. Prade

### Review of DNA Testing Results

The goal of the recent round of DNA testing was to identify DNA which could have been left by the killer of Margo Prade. DNA testing has been performed by both DNA Diagnostics Center (DDC) and the Ohio Bureau of Criminal Investigation (BCI). At BCI, Lewis Maddox and Elizabeth Benzinger reviewed the test results of both DDC and BCI as well as the reports of the FBI (July 24, 1998) and Serological Research Institute (SERI; September 9, 1998). In sum, we conclude that the DNA results obtained from the fingernail samples and bite mark lab coat samples are not outcome-determinative and likely represent background DNA due to casual transfer rather than a signature of the assailant in the homicide of Margo Prade. Our findings follow.

### Review of bite mark area of lab coat tests

The FBI identified DNA consistent with Margo Prade using the Polymarker/DQa DNA testing system.

SERI identified DNA consistent with Margo Prade using Polymarker/DQa but failed to identify amylase, a biochemical marker for saliva.

DDC obtained a partial mixed DNA profile using Y-STRs. Interpretable data was obtained for only 7 of the 16 genetic locations included in the Y-STR test.

### Review of fingernail tests

In 1998, the FBI, using Polymarker/DQa, found DNA consistent with Margo Prade and Timothy Holsten on the fingernail samples.

Please address inquiries to the office indicated, using the BCI&I case number.

BCI & I-Bowling Green Office  
1616 E. Wooster St.-18  
Bowling Green, OH 43402  
Phone:(419)353-5603

BCI & I-London Office  
P.O. Box 365  
London, OH 43140  
Phone:(740)845-2000

BCI & I-Richfield Office  
4055 Highlander Pkwy. Suite A  
Richfield, OH 44286  
Phone:(330)659-4600

**EXHIBIT 1**

2012 testing by BCI, using Y-STRs, identified DNA consistent with Timothy Holsten. Additional partial unknown profiles and profiles below the interpretation threshold were seen as well.

Peer-reviewed publications document the presence of just this level of DNA results based on testing of volunteers' fingernails. For example, Williams et al., 2012, Prevalence and persistence of foreign DNA beneath fingernails, *Forensic Science International Genetics*, 6:236-243.

**Exposure of lab coat to sources of extraneous DNA.**

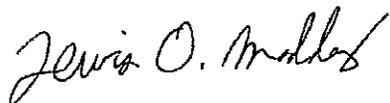
We believe that there have been multiple opportunities for extraneous DNA to be deposited on the lab coat. In the 2009 photograph taken by Benzinger, soiling of the collar suggests that the lab coat had not been recently laundered. Dr. Prade's lab coat would have been exposed to coughs and sneezes from her patients.

The lab coat was handled by evidence technicians and forensic examiners at both the FBI and SERI.

During trial, the lab coat was exposed to the DNA of court officials. The evidence was displayed during testimony. See the picture of FBI DNA examiner Tom Callaghan talking over the lab coat during trial.

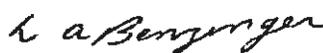
**Final Analysis of DNA testing**

We agree that Douglas Prade is excluded as a contributor to the partial DNA profiles obtained from the bite mark and the fingernails. However, DNA testing has failed to identify a full DNA profile besides that of Margo Prade from the bite mark and besides that of Timothy Holsten from the fingernails. We question the relevance of the partial mixed profiles obtained. Within one year of the crime, SERI was unable to find evidence of saliva on the bite mark area, suggesting that the amount of saliva or cells or DNA originally deposited was very low. Y-STR testing, capable of identifying male DNA even in the presence of the blood stains from Margo Prade, failed to obtain a full male DNA profile. Instead, a mixture of partial male profiles was obtained. The presence of multiple low-level sources of DNA is most easily explained by incidental transfer (patients, police, lab workers, court officials). However, no single, complete male DNA profile has been obtained by any of the testing laboratories, except for that of Timothy Holsten.



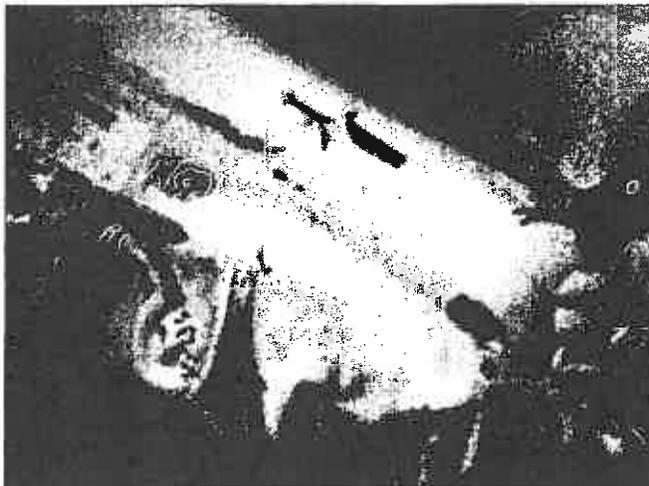
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Margo Prade lab coat soiled collar photographed by Benzinger 2009



FBI DNA examiner Tom Callaghan testifies during Prade trial. From [www.ohio.com](http://www.ohio.com)

# EXHIBIT

E

DANIEL M. HORTON  
2012 AUG -1 AM 10:07

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

STATE OF OHIO, )  
)  
Plaintiff, )  
)  
v. )  
)  
DOUGLAS PRADE, )  
)  
Defendant. )

Case No. CR 1998-02-0463  
Judge Judy L. Hunter

**FILED UNDER SEAL**

**DEFENDANT DOUGLAS PRADE'S REPLY  
MEMORANDUM IN SUPPORT OF PETITION FOR  
POSTCONVICTION RELIEF AND MOTION FOR A NEW TRIAL**

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OHIO INNOCENCE PROJECT  
Univ. of Cincinnati College of Law  
P.O. Box 210040  
Cincinnati, Ohio 45221-0040  
Telephone: (513) 556-0107

Dated: July 30, 2012

**Attorneys for Defendant Douglas Prade**

## I. INTRODUCTION

As if performing sleight of hand, the State in its Brief In Response To Motion For New Trial/Petition For Post-Conviction Relief" (hereafter, the "Opposition" or "Opp.") points here, there, and everywhere to distract from the new DNA test results that eviscerate its case against defendant Douglas Prade. But this is no magic trick, and the State's studied effort to divert attention from the DNA test results is, in the end, unavailing. It now is clear that the State simply has no good answer to why Mr. Prade should remain in prison after being definitively excluded from male DNA found on Dr. Prade's lab coat over where the biting killer slobbered and made a lasting impression of his teeth on her skin through two layers of clothing. The Court should grant Mr. Prade's petition for postconviction relief and/or his motion for a new trial.

## II. ARGUMENT

### A. The Court May Grant Defendant's Petition For Postconviction Relief And/Or His Motion For A New Trial

The State argues that, because the postconviction relief statute, R.C. 2953.21, was amended in 2003 to permit postconviction relief petitions based on new DNA test results; moving for a new trial under Ohio Rule of Criminal Procedure 33 no longer is a proper vehicle for seeking relief when new DNA test results are at issue. (Opp. at 2-3). And the State certainly is correct that there are many similarities between R.C. 2953.21 and Rule 33 in the context of proceedings relating to new DNA testing results and that, to a significant extent, they overlap.

Nonetheless, nothing in R.C. 2953.21 states that, when new DNA test results are at issue, R.C. 2953.21 either (1) is the exclusive remedy or (2) replaces, supplants or in any way limits the scope of Rule 33. Similarly, nothing in Rule 33 prohibits filing a motion for a new trial based in whole or in part upon new DNA test results. Significantly, the State offers nothing to support this argument other than its say so and, tellingly, fails to point to a single decision where, in the

nine years since R.C. 2953.21 was amended in 2003, a court found that R.C. 2953.21 somehow barred an inmate seeking relief based on new DNA test results from proceeding under Rule 33.

Indeed, in every case in which the Ohio Innocence Project has moved for relief based on DNA test results since 2003, it has moved under both the postconviction relief statute and Rule 33 and, before now, no prosecutor has even raised this issue and, obviously, no court has adopted this argument. In fact, earlier this month another inmate with new DNA test results moved on both grounds in Summit County, and Judge Rowlands granted relief under Rule 33. Order in *State v. Dewey Jones*, No. CR-1994-06-1409 C (C.P., Summit Cty., Ohio July 9, 2012) (Ex. T). The Court may, as it sees fit, grant relief under R.C. 2953.21 and/or Rule 33.

**B. The Petition And Motion Are Timely.**

The State argues that, unless Mr. Prade establishes his "actual innocence" under R.C. 2953.21(A), his petition for postconviction relief is untimely under R.C. 2953.23(A). As noted in Mr. Prade's opening memorandum (at 17 n.13), that is both correct and of little consequence. While the standard for assessing the timeliness of a DNA-testing-based petition for post-conviction relief under R.C. 2953.23(A) is identical to the substantive standard for prevailing on the petition under R.C. 2953.21(A), Mr. Prade has made the required showing. Further, Mr. Prade's motion for a new trial under Rule 33 also is timely as reflected by the stipulation to which Mr. Prade's counsel and the State agreed. (7/2/12 Gates Letter at 2 (Ex. U)).

**C. The Issue Before The Court Now Is The Same As The One That Was Before It When It Entered The September 2010 Testing Order Except That The Then-Hypothetical Exclusion Result Has Become A Reality.**

The State repeatedly concedes, as it must, that the evidentiary standard applicable to Mr. Prade's burden to show "actual innocence" in connection with his petition for postconviction relief is "clear and convincing evidence." (Opp. at 1, 4, 16; *see* R.C. 2953.21(A)(1)(a) (inmates must "establish, by *clear and convincing evidence*, actual innocence") (emphasis added)). But

then, seemingly oblivious to fact that the "clear and convincing evidence" and "strong probability" burdens of proof are the same, the State reverses course and argues that the burden of proof applicable to the petition somehow is far more daunting than the "strong probability" standard the Court applied in the September 2010 Testing Order when assessing whether then-presumed DNA exclusions would be "outcome determinative" under R.C. 2953.71(L). In the State's words, while the "strong probability" burden of proof the Court applied in September 2010 "refer[red] to a probability," the "actual innocence" determination now facing the Court "goes beyond that to require that no reasonable factfinder would convict" and somehow "mandates certainty." (Opp. at 6). This is wrong.

As detailed in Mr. Prade's opening brief (at 19), the statutory definitions of "outcome determinative" in R.C. 2953.71(L) and "actual innocence" in R.C. 2953.21(A)(1)(b) are virtually identical.<sup>1</sup> The sole difference of any substance between the two is that (1) the definition of "outcome determinative" in R.C. 2953.71(L) includes its own, internal standard of proof – "a strong probability," while (2) the definition of "actual innocence" in R.C. 2953.21(A)(1)(b) has no internal standard of proof, but is subject to the "clear and convincing" standard of proof set forth in R.C. 2953.21(A)(1)(a), which provides that, to prevail, inmates must "establish, by clear and convincing evidence, actual innocence."

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<sup>1</sup> As was done in Mr. Prade's opening brief, the text of R.C. 2953.21(A)(1)(b), which defines "actual innocence," and R.C. 2953.71(L), which defines "outcome determinative," are set forth below with the language that is (1) only in R.C. 2953.21(A)(1)(b) in brackets; and (2) only in R.C. 2953.71(L) underlined:

had the results of [the] DNA testing ... been presented at the trial ... and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the [person's] offender's case as described in division (D) of section 2953.74 of the Revised Code, there is a strong probability that no reasonable factfinder would have found the [petitioner] offender guilty of [the] that offense.

But this is a difference without any real world effect because the two burdens of proof – "a strong probability" in R.C. 2953.71(L) and "clear and convincing evidence" in R.C. 2953.21(A)(1)(a) – are synonymous. As noted in Mr. Prade's opening brief (at 20), the Eighth District said that in *State v. Ayers*, 185 Ohio App. 3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 21 (8th Dist.), *review denied*, 125 Ohio St. 3d 1439, 2010-Ohio-2212, 927 N.E.2d 11. In the Eighth District's words, "[t]he addition of the words 'strong probability'" to R.C. 2953.71(L) in 2006 "in essence lower[ed] the showing of innocence beyond a reasonable doubt to one of *clear and convincing evidence*." *Id.* (emphasis supplied).

In its Opposition, the State does not mention *Ayers*, much less explain why it is somehow not true that, as *Ayers* found, the "strong probability" and "clear and convincing evidence" burdens of proof are identical. Similarly, the State neither mentions nor attempts to distinguish The Supreme Court of Ohio's holding in *State v. Eppinger*, 91 Ohio St. 3d 158, 164, 743 N.E.2d 881, 887 (2001), that the clear and convincing evidence burden of proof "is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." (Quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954)).

Instead, the State blithely asserts – with no supporting authority, explanation, or analysis – that the showing required for "actual innocence" somehow "goes beyond [a strong probability showing] to require that no reasonable factfinder could convict" and "mandates certainty." (Opp. at 6). The State is, again, simply wrong. The standard that applies to this Court's assessment of "actual innocence" under R.C. 2953.21(A)(1)(a) now, including the burden of proof, is identical to the one it applied two years ago when it found that a DNA exclusion would be "outcome determinative" in the Testing Order. And, because we now have the very results that, after

carefully weighing all of the evidence, the Court found would be "outcome determinative" in September 2010, the Court should find that, with the new DNA exclusions, Mr. Prade has established "actual innocence" as required under R.C. 2953.21(A)(1)(a).

\* \* \*

Stated again, and to clarify, two statutory provisions have been at issue here: (1) in the Testing Order, R.C. 2953.71(L)'s "outcome determinative" standard; and (2) now, R.C. 2953.21(A)(1)'s "actual innocence" standard. Comparing only the *definitions* of "outcome determinative" and "actual innocence," as the State has done, makes it appear as if the burden of proof when making the "actual innocence" showing is more stringent than the one for making the "outcome determinative" showing. That is because, if read by itself and in a vacuum, R.C. 2953.21(A)(1)(b)'s definition of "actual innocence" requires, without qualification, that no reasonable factfinder would convict in light of the DNA test results, while R.C. 2953.71(L)'s definition of "outcome determinative" limits the otherwise identical inquiry with the words "strong probability." And, if the two definitions were the end of the inquiry, the State would be correct.

But, for R.C. 2953.21(A)(1)'s "actual innocence" inquiry, the definition is not the end of the inquiry. A *second statutory provision* – one that is not part of R.C. 2953.21(A)(1)(b)'s definition of "actual innocence" – modifies the "actual innocence" standard and lowers the applicable burden of proof from one requiring certainty to one requiring only a strong probability. That standard is R.C. 2953.21(A)(1)(a)'s "clear and convincing evidence" burden of proof that governs "actual innocence" showings. Specifically, R.C. 2953.21(A)(1)(a) provides that an inmate must "establish, *by clear and convincing evidence*, actual innocence" (emphasis added), which means that the inmate must show by "clear and convincing evidence" that no reasonable

factfinder would convict. As previously discussed, the intermediate "clear and convincing evidence" burden of proof requires less than the quantum of evidence that would create certainty. *State v. Eppinger*, 91 Ohio St. 3d 158, 164, 743 N.E.2d 881, 887 (2001) (clear and convincing standard "is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.") (citations omitted).

As such, the application of the "clear and convincing evidence" burden of proof to the defined terms "actual innocence" when they are used in R.C. 2953.21(A)(1)(a) eviscerates the State's argument that "certainty" is needed to prove "actual innocence." Under Ohio law, the "clear and convincing evidence" burden of proof is no different from the "strong probability" burden of proof. *State v. Ayers*, 185 Ohio App. 3d 168, 2009-Ohio-6096, 923 N.E.2d 654, ¶ 21 (8th Dist.), *review denied*, 125 Ohio St. 3d 1439, 2010-Ohio-2212, 927 N.E.2d 11. Thus, Mr. Prade's burden of proof now to adduce "clear and convincing evidence" that no reasonable factfinder would convict in light of actual DNA exclusions is exactly the same as was his burden to establish a "strong probability" that no reasonable factfinder would convict based on then-presumed DNA exclusions in the Testing Order.<sup>2</sup>

\* \* \*

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<sup>2</sup> The statutory language applying a "clear and convincing evidence" burden of proof to "actual innocence" determinations could not be clearer and, thus, there is no need to resort to canons of statutory construction to arrive at the correct result here. Nonetheless, defendant notes that the State's premise that a lower standard governs "outcome determinative" determinations, which permit testing to go forward, than the standard for "actual innocence" determinations, which allows courts to act on the test results, makes little sense. If the hurdle required to obtain testing were, as the State argues, lower than the one for evaluating testing results, the legislature would have, by design, allowed testing to go forward in a category of cases where it could not possibly matter, which would serve no purpose at all. See R.C. 1.47 ("In enacting a statute, it is presumed that: ... (C) A just and reasonable result is intended.").

Moreover, and even if R.C. 2953.21(A)(1)(a) had an elevated burden of proof that somehow "mandates certainty" (and it does not), it would not advance the State's case because the burden of proof applicable to Mr. Prade's motion for a new trial under Rule 33 is a strong probability. *State v. Hawkins*, 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227 (1993); *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus; *State v. Johnson*, 8th Dist. No. 93635, 2010-Ohio 4117, ¶ 22. Accordingly, however it is parsed, the burden of proof now is no different from the one the Court applied in the September 2010 Testing Order.

**D. The New DNA Exclusions Are, When Considered With All Admissible Evidence, Clear And Convincing Evidence Of Mr. Prade's Innocence.**

The State devotes the bulk of its brief to recounting the evidence that, in the State's view, somehow justifies keeping Mr. Prade imprisoned even though a central focus of the State's case – the killer's bite mark on Dr. Prade's arm – has, with the discovery of male DNA in the lab coat over the bite mark that could not have been Mr. Prade's, become compelling evidence of innocence, not guilt. (Opp. at 7-15). But the evidence the State recounts in its brief is not new and, in fact, is the very same evidence that this Court found wanting when weighed against then-potential DNA exclusions of Mr. Prade on the lab coat over where Dr. Prade's killer slobbered while violently biting her.

The only meaningful difference between the State's current recounting of the facts and its many prior ones is that, in the State's Opposition, the totals of six identified accounts listed in Mr. Prade's handwriting on the back of an October 8, 1997, bank deposit slip (State Ex. 192) are detailed at length, but with almost no explanation or analysis.<sup>3</sup> (See Opp. at 10-11). To the extent that any sense can be made of these account balances, however, they do not "scream[] ...

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<sup>3</sup> Defense counsel is not attaching copies of these exhibits to this memorandum because they presume that the Court has access to copies and, further, some of them reflect private financial information. Of course, if the Court would like copies, they will be provided.

guilt" as the State argues; instead, they are, for several reasons, fully consistent with Mr. Prade's testimony that the notations on the back of the deposit slip were added after Dr. Prade's murder and not, as the State contends, before.

Initially, the State's basic premise that the account balances somehow are precise and worthy of careful attention and consideration is flawed. All of the account totals scribbled on the back of the deposit slip are round numbers – almost literally, "back-of-the-envelope calculations" – and it is impossible to tell from the notations whether, when he made them, Mr. Prade had account statements in front of him (and, if so, which month's statement) or was merely jotting down his general recollections of the rough amounts of the account balances. In any event, the totals effectively are worthless for purposes of determining exactly when they were made. Indeed, the haste and lack of care with which the numbers were jotted down is reflected by the fact that there is a \$1,600 error in the "total" on the back of the deposit slip.<sup>4</sup>

Second, several of the rough amounts listed on the back of the deposit slip are balances on revolving accounts on which Mr. Prade continued to make purchases during the relevant periods and, thus, the amounts are impossible to place precisely in time. For example, the available account balance entries in Mr. Prade's checkbook show that the "HRS" (or Builder's Square) and "Diamond's" accounts were in the neighborhood of the amounts listed on the back of the deposit slip (respectively, \$350 and \$240) from October 1997 through January 1998. (See Defense Ex. JJ at 3-6 (Mr. Prade's checking account ledger)).<sup>5</sup>

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<sup>4</sup> The "total" of the amounts listed on the back of the deposit slip is listed on the deposit slip as being "\$24,670.00." In fact, the eight amounts listed on the back of the deposit slip add up to \$22,970 – a difference of \$1,600.

<sup>5</sup> Specifically, the HRS (Builder's Square) balances were: (1) \$357.27 according to the entry next to a check dated October 16, 1997, (2) \$353.06 according to the entry next to a check dated November 22, 1997, and (3) \$339.98 according to the entry next to the check dated January 3, 1998. (Def. Ex. JJ at 3-6). The Diamond's balances were: (a) \$247.81 according to

At trial, the State relied heavily on the account balance at "Kay's." Although it is difficult to decipher because it was scratched through in part, the amount written for "Kay's" on the back of the deposit slip appears to be \$240. (State Ex. 192 at 2). That roughly corresponds to the \$244.31 balance for that account that Mr. Prade wrote in his checkbook next to the entry for his \$51.48 check to Kay's dated October 12, 1997. (Def. Ex. JJ at 3 (Mr. Prade's checkbook)). But the \$240 amount on the back of the deposit slip also appears to roughly correspond to the amounts of Mr. Prade bills from Kay's dated as of (1) November 3, 1997, which had a balance of \$249.03; (2) December 3, 1997, which had a balance of \$253.58;<sup>6</sup> and (3) January 3, 1997, which had a balance of \$202.29. (State Ex. 202 (Kay's Ledger)). Accordingly, the amount listed for "Kay's" on the back of the deposit slip says nothing about when the notation was made.

But the three remaining accounts – "Mellion," "MBNA," and "Sears" – all point strongly toward the conclusion that the notations on the back of the deposit slip were made after, not before, Dr. Prade's murder. For the "Mellion" account, which appears to have been an account with an orthodontist, Mr. Prade made regular \$118/month payments. Although his checkbook

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(continued...)

the entry next to a check dated October 16, 1997, and (b) \$258.37 according to the entry next to a check dated January 3, 1998. (*Id.*). All of these balance amounts are within 10% of the amounts listed on the back of the deposit slip (*i.e.*, \$350 for "HRS" and \$240 for "Diamonds"). (State Ex. 192).

<sup>6</sup> The balance listed for the Kay's account in Mr. Prade's checkbook ledger reflects a slightly different chronology. Specifically, Mr. Prade wrote a check to Kay's dated November 22, 1997, that should have been received and reflected on his Kay's bill dated as of December 3, 1997. That would have reduced his balance on the December 3, 1997, Kay's bill to the \$204.06 balance listed in Mr. Prade's checkbook next to the entry for the November 22, 1997, payment. (Def. Ex. JJ at 4) (Mr. Prade's checkbook ledger)). But the check dated November 22, 1997, was not posted to Mr. Prade's account at Kay's until December 11, 1997 – nearly 20 days later – which was after Kay's sent out the next bill dated December 3, 1997. (State Ex. 202 (Kay's Ledger)). Accordingly, the bill from Kay's as of December 3, 1997, was for \$253.58, not the balance shown next to Mr. Prade's checkbook entry for the November 22, 1997, check (*i.e.*, \$204.06).

includes only a single account balance – a balance of \$1,062 after his \$118 payment on October 31, 1997 – that balance is \$162 more than the \$900 listed for the "Mellion" account on the back of the deposit slip. (*Compare* Def. Ex. JJ at 3, *with* State Ex. 192 at 2). In fact, even after Mr. Prade's next \$118 payment on that account on December 9, 1997 (Def. Ex. JJ at 5), the account balance should have been about \$944. That still is more than the \$900 listed for this account on the back of the deposit slip, and thus supports Mr. Prade's testimony that the notations on the deposit slip were made well after the murder.

Similarly, the "MBNA" account conflicts with the State's theory. Of the two post-payment balances written into Mr. Prade's checkbook for that account – \$10,176 next to a check dated October 16, 1997, and \$9,920.52 next to a check dated January 3, 1998 – the January 1998 balance is much closer to the \$10,000 amount written on the back of the deposit slip than is the October 1997 amount (*i.e.*, a difference of about \$80 in January versus about \$175 in October). (*Compare* Def. Ex. JJ at 3, 5, *with* State Ex. 192 at 2).

So, too, with the balances for Mr. Prade's two "Sears" accounts. Together, they were listed on the back of the deposit slip as having a balance of \$3,700, but, according to Mr. Prade's checkbook entries, they had combined balances of only \$3,500.15 according to the checkbook entry next to payments dated October 3, 1997, versus \$3,727.69 according to the checkbook entry next to the payments dated January 3, 1998. (*Compare* Def. Ex. JJ at 2, 5-6, *with* State Ex. 192). For these accounts, the January 3, 1998, balance of \$3,727.69 is far closer to the \$3,700 balance written on the back of the deposit slip (*i.e.*, only \$27.69 higher) than the October 3, 1997, balance of \$3,500.15, which is almost \$200 less. In sum, the amounts hastily scrawled on the back of the deposit slip, if they mean anything, support the veracity of Mr. Prade's trial testimony and, far from "scream[ing]" it, do not even whisper guilt.

Separately, the State continues to rely on the weak and potentially misleading eyewitness and bite mark identification testimony introduced in this case without so much as mentioning, much less responding to, the basic flaws in that testimony, both in Mr. Prade's trial and more generally, that were identified in the expert affidavits attached to Mr. Prade's brief or in The Innocence Network's *amicus* brief. The State's silence on these issues speaks volumes.

**E. The New DNA Exclusions Are Meaningful And Establish Actual Innocence.**

The State reaches the central issue raised in Mr. Prade's petition and motion – the exclusions of Mr. Prade from the DNA found over the killer's bite mark – only on the fifteenth page of its 17-page Opposition. But it is not worth the wait, as the State has nothing new to add. Instead, and as the State has signaled from long before there were even test results to criticize, its claim is that the new DNA exclusions reflect contamination from the stray DNA of some unknown male who was not Dr. Prade's killer and, thus, are "meaningless." (Opp. at 15). This argument is directly contrary to, among other things, the trial testimony that the killer "probably slobbered all over" the outer layer of Dr. Prade's lab coat and that the lab coat over the bite mark would be "the best possible source of DNA evidence as to [the killer's] identity" and should be rejected. And the State says not a word about this Court's rejection of essentially the same contamination argument in the Testing Order. (*See* Testing Order at 7).

Instead, the State's Opposition devotes a paragraph to explaining why the entire lab coat likely was contaminated based on photographs taken in September 1998 and 2009, and its expert's July 17, 2012, letter repeats this claim. (Opp. at 16; Opp. Ex. 1 at 2). But even if, contrary to what this Court found two years ago, the lab coat is contaminated, it matters not one whit. It is undisputed that the FBI excised the bite mark section in early 1998 before it was tested by the FBI and then SERI and, thus, the State needs to establish that the *bite mark section* – not the larger lab coat from which the bite mark section was taken – is contaminated.

Moreover, the bite mark section was taken from under Dr. Prade's left arm, so the State's experts' speculation that "Dr. Prade's lab coat would have been exposed to coughs and sneezes from her patients" is, as applied to the lab coat's bite mark section, extremely implausible. (Opp. Ex. 1 at 2).

But unseen "coughs and sneezes" on Dr. Prade's underarm are only the beginning, as the State and its experts have still more speculation to offer the Court. Next, they imply that the two laboratories that tested the bite mark section in 1998 – the FBI and SERI – may have contaminated it during their testing. (Opp. Ex. 1 at 2). But the notion that employees of either of these two highly-professional forensic laboratories who were fully aware of the importance of this evidence – and, in fact, were handling it only to perform forensic testing on it – are likely to have contaminated the cutting by touching it with their bare hands during testing is far-fetched. Further, and as reflected in the testing protocols from those laboratories at roughly this time, copies of which are attached, no such bare hands touching was to occur. (FBI Forensic Science Communications, "Trace Evidence Recovery Guidelines" at § 4 (Jan. 1998 rev.) (Ex. V); Excerpts From SERI Methods Manual at 1, Note #3 (circa 1998-99) (Ex. W)).<sup>7</sup>

Finally, the State and its experts state that the bite mark section was handled at least briefly during the trial during the direct examination of the FBI's Thomas Callaghan by Assistant Prosecutor (now Judge) McCarty. (Opp. at 16-17; Opp. Ex. 1 at 2). Although the nature,

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<sup>7</sup> For example, the FBI's "Trace Evidence Recovery Guidelines" include nine provisions designed to guard against "Contamination and Loss," including (1) wearing "[a]ppropriate protective apparel, such as laboratory coats and disposable gloves;" and (2) a directive that "[i]tems being collected for trace evidence examination must be handled as little as possible to minimize loss of the trace evidence to limit exposure of the items to contaminants." (FBI Forensic Science Communications, "Trace Evidence Recovery Guidelines" at §§ 4.3.1–4.3.9, 4.3.2, 4.3.3 (Jan. 1998 rev.) (Ex. V)). Similarly, SERI's pre-2001 methods manual states that "[i]n addition to wearing clean gloves, the examiner is required to wear a surgical mask when working on the examination, preparation, amplification steps of DNA processing." (Excerpts From SERI Methods Manual at 1, Note #3 (circa 1998-99) (Ex. W)).

duration, extent of that handling is unclear, and precautions may have been taken then to avoid direct touching, the trial transcript reflects that the bite mark section was displayed to the jury at trial. (Tr. at 1107-08). But even if the State's representatives in fact touched evidence with their bare hands during the trial, it is not at all clear why this apparently brief, incidental exposure of the dried bite mark section of the lab coat during trial should (1) have resulted in appreciable DNA being left on the cloth; or (2) be presumed to be the source of male DNA found on the bite mark section of the lab coat, rather than DNA resulting from the significant contact that undoubtedly occurred with the killer's lips, teeth, tongue, and mouth during the murder.<sup>8</sup>

Significantly, the State insisted on two rounds of DNA testing that consumed many months to try to develop evidence to support its claim that the DNA found in the bite mark section of the lab coat reflects only contamination, yet came up empty both times. First, the State had the DNA found on the bite mark section compared to the DNA of Timothy Holston, Dr. Prade's male friend, but he was excluded. Next, the State asked for and got testing in multiple locations on the lab coat, as well as additional testing in the bite mark section. Again, the testing showed nothing. Now, the State proffers still another possibility based on a snippet of trial testimony. There is nothing new about that testimony, however, and the State already was given six months to perform *carte blanche* DNA testing to develop evidence to support its contamination theory, yet failed.

The State is, in the end, relegated to the untenable argument that, where the killer aggressively bit Dr. Prade and slobbered while leaving a lasting impression of his teeth through two layers of clothing, *none* of the male DNA that was found was the killer's and, instead, *all of it* came from either (1) unknown males touching, sneezing, and coughing on or otherwise

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<sup>8</sup> Obviously, the DNA found recently could not have been Assistant Prosecutor McCarty's because it was male DNA.

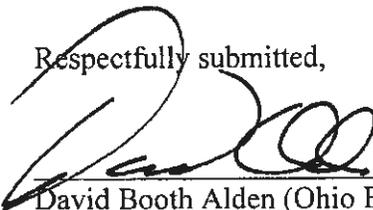
contaminating the underarm of Dr. Prade's lab coat or (2) after the excision, unprotected touching of this always-known-to-be-critical piece of evidence by forensic scientists and law enforcement officials. Neither the evidence nor common sense supports this.

Moreover, and as noted in Mr. Prade's opening memorandum, the State's contamination theory implicitly seeks to impose a burden on Mr. Prade that he need not meet in order to prevail in these proceedings. To carry his burden on the petition for postconviction relief, Mr. Prade need not absolutely foreclose every remote, theoretical possibility that another male may have deposited DNA on Dr. Prade's lab coat. Rather, Mr. Prade's burden is only to show by clear and convincing evidence – an "intermediate" standard that does not require "certainty as is required [by] beyond a reasonable doubt" and "does not mean clear and unequivocal" – that, had this evidence been available and presented at trial, there would have been reasonable doubt such that no reasonable factfinder would have convicted. And essentially the same standard applies to Mr. Prade's motion for a new trial, which also presents new evidence relating to bite mark and eyewitness identification. (*See* Mem. Supp. at 36-37). Mr. Prade has made those showings and much more.

**III. CONCLUSION**

The Court should (1) vacate Mr. Prade's aggravated murder conviction and the related firearms specification, (2) order his immediate release; and (3) if the Court deems it necessary, order that there be a new trial.

DATED: July 30, 2012

Respectfully submitted,  


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*Attorneys for Defendant  
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I certify this to be a true copy of the original  
Sandra Kurtz, Clerk of Courts.  
  
Deputy Clerk

CERTIFICATE OF SERVICE

On this 30th day of July, 2012, copies of the foregoing, along with the exhibits, were sent  
by e-mail and overnight courier to:

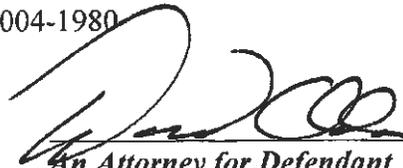
Mary Ann Kovach  
Chief Counsel  
Summit County Prosecutor's Office  
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and by regular United States mail, postage prepaid, to:

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# EXHIBIT

F



COPY

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

v.

DOUGLAS PRADE,

Defendant.

Case No. CR 1998-02-0463

Judge Jndy L. Hunter

DOUGLAS PRADE'S WAIVER OF HIS PRESENCE AT EVIDENTIARY HEARING

I, Douglas Prade, understand that, pursuant to Ohio Rev. Code § 2953.22, I have a right to be present at the scheduled evidentiary hearing related to my Motion for New Trial and Petition for Post-Conviction Relief filed by my attorneys on July 2, 2012. After having discussed the right to be present with my attorneys, I hereby waive my right under Ohio Rev. Code § 2953.22 to be present for the evidentiary hearing. I waive this right freely and voluntarily. No one has coerced or threatened me into waiving my right to be present. I waive my right to be present of my own free will.

Further affiant sayeth naught.

*Douglas Prade*  
\_\_\_\_\_  
Douglas Prade

*18 Oct 2012*  
\_\_\_\_\_  
Date

Sworn before me and subscribed in my presence this 18 day of Oct, 2012.



Melanie K. Eastwood  
Notary Public-State of Ohio  
My Commission Expires

*Melanie Eastwood*  
\_\_\_\_\_  
Notary Public

*5-4-13*

My commission expires: \_\_\_\_\_

CERTIFICATE OF SERVICE

On 19<sup>th</sup> day of October, 2012, copies of the foregoing were sent via e-mail to the Summit County Prosecutor's Office and on October 26<sup>th</sup>, 2012, copies were sent via United States Mail to:

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*An Attorney for Defendant  
Douglas Prade*

**EXHIBIT**

**G**

**IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO**

2012 DEC -3 PM 3:17

**STATE OF OHIO**      SUMMIT COUNTY CLERK OF COURTS      **CASE NO. CR 98 02 0463**

**Plaintiff**

**JUDGE JUDY HUNTER**

**v.**

**DOUGLAS E. PRADE**

**POST-HEARING  
BRIEF OF STATE OF OHIO**

**Defendant**

Defendant Prade has not demonstrated entitlement to either a new trial or a discharge. This Court must honor the jury's verdict.

Unless otherwise noted, references to the transcript are to the hearing in October of 2012.

**ARGUMENT**

**A. THE POSSIBLE REMEDIES**

Prade seeks relief under R.C. 2953.23/R.C. 2953.23 and/or Crim.R. 33.

**1. Crim.R. 33**

A new trial based on newly discovered evidence requires evidence that:

- (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3)

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

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

A probability means “more likely than not”; something greater than a 50% chance. *Miller v. Paulson*, 97 Ohio App.3d 217, 222 (1994). As demonstrated below the hearing revealed starkly contrasting testimony from the DNA experts. To grant a new trial this Court must credit Prade’s experts over the State’s experts. It will not do to say that a jury might believe either side’s testimony. If the jury must choose, there is no strong probability that a jury will choose Prade over the State.

In addition, it will not do for this Court to say that the evidence is in equipoise. If this Court finds the evidence in equipoise there is no strong probability that the jury will choose Prade.

This Court must disbelieve the State’s evidence.

Prade offered testimony attacking eyewitness evidence and bite mark evidence. As shown below both testimonies merely contradict or impeach the trial testimony. Neither testimonies support a new trial.

**R.C. 2953.21/R.C. 2953.23**

The statutes require proof by clear and convincing evidence of actual innocence:

“actual innocence” means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code 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 person's case as described in division (D) of section 2953.74 of the Revised Code, **no reasonable factfinder would have found the petitioner guilty of the offense** of which the petitioner was convicted \*\*\*.

R.C. 2953.21(A)(1)(b) (Emphasis added.); R.C. 2953.23(A)(2) (incorporating definition.)

The definition means that there is a thing: actual innocence, which requires proof by clear and convincing evidence. Clear and convincing evidence means the:

measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

*Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

The definition requires that this Court find by clear and convincing evidence that no, not any, reasonable jury would find Prade guilty of the offense at issue. Potential remedies are a discharge or a new trial. R.C. 2953.21(G).

As with the test under Crim.R. 33 Prade cannot prevail unless this Court finds his DNA evidence credible and the State's not credible.

The State adheres to the position that R.C. 2953.21/R.C. 2953.23 provides the sole basis for any relief to Prade. (Brief of State of Ohio, July 24, 2012, 2-4).

This Court previously found that a DNA test resulting in an exclusion of Prade would be outcome determinative, and so ordered DNA testing. (Testing Order, September 23, 2010). Outcome determinative means:

had the results of DNA testing of the subject offender been presented at the trial of the subject offender requesting DNA testing and been found relevant and admissible with respect to the felony offense for which the offender is an eligible offender and is requesting the DNA testing, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the offender's case as described in division (D) of section 2953.74 of the Revised Code, **there is a strong probability that no reasonable factfinder would have found the offender guilty of that offense\*\*\*.**

R.C. 2953.71(L) (Emphasis added.)

The Testing Order did not have the benefit of actual DNA tests. Now the results and interpretative testimony are before the Court. The issue is whether Prade has proved that he is actually innocent. The Testing Order provides no precedent for that conclusion. The Eighth District recently spoke to the issue. *State v. King*, 8<sup>th</sup> Dist. No. 97683, 2012-Ohio-4398.

In *King* the trial court granted the application for DNA testing, finding that an exclusion would be outcome determinative. However, after the results (excluding the defendant) were in, the trial court found that the defendant did not prove actual innocence. *Id.* ¶8, ¶14. The appellate court found that the outcome determinative test requires a strong probability that no reasonable factfinder would find the defendant guilty but actual innocence requires that no reasonable factfinder would find the defendant guilty. Moreover, crucially, “Thus, the trial court’s statements in the findings of fact and conclusions of law for the application for DNA testing are not binding on the court’s later determination regarding the petition for postconviction relief.” *Id.* ¶13, ¶22 (Gallagher, J., Concurring).

This puts to rest Prade’s argument that there is no difference between a strong probability (in the Testing Order concerning outcome determinative) and clear and convincing evidence (to show actual innocence). (Prade Reply Memorandum, August 1, 2012, 3-6, citing the

Eighth District case *State v. Ayers*, 185 Ohio App.3d 168, 2009-Ohio-6096). The *King* court rejected the argument that outcome determinative means actual innocence or that a trial court is somehow bound by its interlocutory order granting the application for DNA testing. *King*, ¶27-¶30 (Gallagher, J., Concurring).

**B. The Convictions and Admissible Evidence.**

Whether a defendant proves actual innocence requires consideration of all available admissible evidence. R.C. 2953.21(A)(1)(b). The new trial test likewise requires consideration of the evidence at trial because the alleged new evidence may merely impeach or contradict the evidence or be cumulative to it. *Petro, supra*.

The sole conviction at issue is for aggravated murder. Prade's convictions on six counts of interception of communications, and the conviction for possession of criminal tools are not affected by DNA, bite mark, or eyewitness evidence.

The decision in *State v. Prade*, 139 Ohio App.3d 676 (2000) is the law of the case. Meaning that, "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Wohleber v. Wohleber*, 9<sup>th</sup> Dist. No. 11CA010007, 2012-Ohio-4096, ¶7

(quoting *Neiswinter v. Nationwide Mut. Fire Ins. Co.*, 9<sup>th</sup> Dist. No. 23628, 2008-Ohio-37, ¶10).

The law of the case doctrine is applicable in hearings to determine whether a defendant has proved actual innocence following a DNA test. *State v. King*, 2012-Ohio-4398, ¶16-¶17.

In particular, the following holdings of the Ninth District apply here. First, evidence on the wiretapping charges is admissible. *Prade*, 685. Second, the statement that Margo Prade was smacked in the face and shoved (and thus went to stay with a friend) is admissible. *Id.* 691. Third, the statement by Annalisa Williams that Prade called Margo a slut is admissible. *Id.* 691-692.

Fourth, the statement by Donzella Anuskiewicz that she was concerned for Margo's safety is admissible. *Id.* 692. Fifth, the statement by Francis Fowler that Margo was afraid of Prade but did not file a police report because she did not want to get Prade in trouble at work is admissible. *Id.* 692.

Sixth, the statement by Al Strong that Margo said that Prade told the children that he was going to denounce the children and marry Carla (Smith, Prade's girlfriend) and that Margo resolved to take more extreme measures in the divorce, custody, and child support proceedings (acts that

the State argued were Prade's impetus for the murder) is admissible. *Id.* 693. Seven, the statement by Timothy Holston that Margo was upset just before the murder after a phone call home is admissible. *Id.* Eighth, Holston's statement that Margo learned that Prade had entered her home after she had changed the locks and installed a security system is admissible. *Id.*

Ninth, the statement of Joyce Foster that Margo was afraid of Prade is admissible. *Id.* 694. Tenth, sufficient evidence supports the conviction for aggravated murder and the conviction is not against the manifest weight of the evidence. *Id.* 699. Perforce, all of the evidence supporting those conclusions including 1) Prade attempting to establish an alibi (and failing to do so) after he admitted that he was not at a gym when the murder occurred, 2) the eyewitness testimony, and 3) the bite mark testimony is admissible.

Prade's trial testimony is admissible. "[A] criminal defendant's prior testimony, if voluntarily given, is admissible at a subsequent trial of the same case." *United States v. Toombs*, 2010 WL 5067617, 2 (D. Kan.), citing *Harrison v. United States*, 392 U.S. 219 (1968); *United States v. Ndubuisi*, 460 Fed.Appx. 436, 2012 WL 490144, 439-440 (5<sup>th</sup> Cir. 2012).

Likewise, the testimony of the purported alibi witness is admissible. If this witness becomes unavailable, her former testimony is admissible under Evid.R. 804(B)(1). *State v. Jackson*, 2<sup>nd</sup> Dist. No. 24430, 2012-Ohio-2335, ¶49-¶50; *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, ¶65.

Certainly all of the testimony and exhibits admitted at the October, 2012 hearing is admissible.

### **C. The NAS Report, The Path Forward.**

Throughout the case, Prade used the 2009 NAS Report. Case law indicates that the Report is not a source of trial court rules of decision regarding admissibility of evidence. Besides, *Coronado v. State*, 2012-WL-5506903 (Tex.App.-Dallas), discussed *infra*, these cases are the following.

In *United States v. Cerna*, 2010-WL-3448528 (N.D. Cal.) the court noted that the co-chair of the NAS committee, Judge Harry T. Edwards, said that “whether forensic evidence in a particular case is admissible is *not coterminous* with the question whether there are studies confirming the scientific validity and reliability of a forensic science discipline.” *Id.* 5. (Emphasis in original.)

In *State v. McGuire*, 419 N.J. Super 88, 16 A.3d 411(2011) the court stated that “the purpose of the NAS report is to highlight deficiencies in a

forensic field and to propose improvements to existing protocols, not to recommend against admission of evidence.” The court also quoted Judge Edwards; “nothing in the Report was intended to answer the ‘question whether forensic evidence in a particular case is admissible under applicable law’ ”. *Id.* 132, 436.

The court in *Pettus v. United States*, 37 A.3d 213 (D.C. Ct. App. 2012) noted that the report is not meant, “to imply that evidence of forensic expert identifications should be excluded from judicial proceedings until the particular methodology has been better validated.” The court made this statement in the context of pattern-matching analysis (such as bite marks). *Id.* 227.

Finally, in *Gee v. United States*, No. 10-CF-1493 (D.C. Ct. App. 2012) the trial court precluded the use and admission of the NAS report. The trial court decided that parts of the report might qualify as a learned treatise and thus usable for cross-examination (and not substantive evidence). The parties were unable to locate a case indicating that the report was or was not a learned treatise. The trial court ruled that the report could not be used to cross-examine a witness concerning “Friction Ridge Analysis” (concerning fingerprint identification testimony); hence, the report was not

a learned treatise. The appellate court held the trial court did not err. *Id.* IV.

Based on the above case law the State contends that the NAS Report is not substantive evidence. In other words, any statement in the report that either bite mark or eyewitness evidence is unreliable is not admissible for its truth.

#### **D. Bite Mark Evidence.**

In the Testing Order, this Court found that the jury struggled over the testimony of the three “bite mark” experts. This Court found that if Prade’s DNA was excluded from the bite mark, Dr. Levine’s, (one of the two State’s experts at the 2008 trial) opinion would have warranted greater force with the jurors than it likely had in the actual trial. (Testing Order, 10-12).

From this discussion in the Testing Order, Prade wants to discredit the entire field of Forensic Odontology. In essence, Prade seems to be bootstrapping issues with Forensic Odontology in a DNA hearing, into a Frye hearing questioning the admissibility of such bite mark analysis. His attack, for purposes of the hearing, comes from the testimony of Dr. Mary Bush coupled with the National Academy of Sciences 2009 report. Claiming Dr. Bush was an expert in Forensic Odontology – a field she does not practice in – Prade submitted that human dentition as neither unique,

nor the skin it impresses as being capable of retaining any value for comparison purposes.

This proposition does not stand. Nowhere in the Petition for Post-Conviction Relief, nor the Amicus brief submitted in support, or even in the affidavit of Dr. Mary Bush, the dental architect of this attack on Forensic Odontology, is there an acknowledgement that Dr. Bush has never examined a human bite mark on living human skin. (T. 148). This significant fact became known in the cross examination of Dr. Bush by the State. Dr. Bush has conducted multiple and extensive studies on marks left on cadaver skin in unknown states of decomposition by stone dental models attached to a "Home Depot" vice grip. (T. 243). But she has not conducted any testing on actual bites on living skin. As a result, no link was presented or actually suggested by Dr. Bush, in her testimony, that her studies would apply to a "real" bite on a living human. (T. 222). Dr. Bush acknowledged in response this Court's question that nothing in her studies was consistent between any of the cadavers she utilized. (T. 241). Dr. Bush also testified that none of her studies can translate to bites on African American individuals, such as Dr. Margo Prade. (T. 239).

This scheme to attack the field of Forensic Odontology ignores that, under proper examination by individuals experienced in the field of

Forensic Odontology, bite marks have been and continue to be a valuable tool for law enforcement and both prosecutors and defense counsel. Forensic Odontologists continue to offer unique assistance in directing a jury in their search for the truth. (T. 959).

While issues may exist in any investigation, trial, or battle of experts as to the evidentiary value and weight of marks on a body, nothing has been presented to this Court that would invalidate the entire profession of Forensic Odontology. The State's Expert, Dr. Franklin Wright, opined that a bite mark is a piece of evidence. (T. 967).

In addition to the testimony of Dr. Bush, the defense attempted to reduce the evidentiary value of a bite mark by citing the National Academy of Science 2009 Path Forward report claiming that Forensic Odontology lacks validity and credibility due to a lack of scientific testing. As stated above the NAS Report does not purport to offer trial rules of decision and is not substantive evidence. Prade tried to manipulate Dr. Bush's studies as studies "by proxy" to invalidate Forensic Odontology beliefs.

Dr. Wright's testimony was replete with examples of how the Bush studies are problematic as a substitute for real life bites. In response to a question on cross-examination, Dr. Wright suggested that his field shares similar concerns as those who study gunshot wounds. (T. 984 ). We do not

scientifically study the results of gunshot wounds by testing on living humans but expert witnesses before juries routinely testify to them.

Forensic Odontology is a profession that benefits the Criminal Justice System. Its findings may convict as well as exonerate. With a proper foundation, by actual experts, it is a valued tool for juries. (T. 602). Within the confines of instructions to jurors on the application of expert testimony, there is no reason why a qualified Forensic Odontologist cannot testify before a jury. To quote Dr. Mary Bush, “bite mark evidence can be compelling and of scientific evidentiary value under certain circumstances.” (T. 601).

Based upon the testimony before this Court, this valuable tool, Forensic Odontology, remains in the cache of experts who can lend assistance to jurors in their search for justice.

Recently a court upheld the admission of bite mark evidence. In *Coronado v. State*, 2012-WL-5506903 (Tex.App.-Dallas) the court found that bite mark evidence that could not exclude the defendant but excluded other persons as the biter was properly admitted against an attack claiming that forensic dentistry was not admissible scientific expert testimony. The defendant based his *Daubert* challenge in part on the NAS Report. *Id.* 1.

There was evidence that forensic odontology was accepted as valid by the American Academy of Forensic Sciences, the American Dental Association, the Texas Dental Association and “many other scientific organizations that are involved with dentistry.” *Id.* 3. The court noted that the NAS Report “does not conclude that bite mark evidence has lost general acceptance in the scientific community, nor does it call for universal exclusion of such evidence.” *Id.* 6. The court found that any deficiencies or limitations in the science of forensic odontology went to weight and not admissibility. *Id.*

As an aid to Prade Dr. Bush’s testimony at most impeaches or contradicts the evidence at trial. It really does not even do that since Dr. Bush never examined a bite mark left by a live human on a live human. As such, it provides no support for a new trial or a discharge.

#### **E. Eyewitness Evidence**

All alleged defects in the eyewitness testimony was the subject of cross-examination at trial and within the ken of the jury when it convicted Prade. A fundamental premise of our criminal trial system is that ‘the jury is the lie detector.’ *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir.1973). Determining the weight and credibility of witness testimony is the “part of every case [that] belongs to the jury, who [is] presumed to be

fitted for it by [his or her] natural intelligence and ... practical knowledge of men and the ways of men.” *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891).

Prade presented the testimony of Charles Goodsell in order to elaborate on possible deficiencies in eyewitness testimony. Goodsell had testified once as an expert witness and he could not remember where that occurred (T. 650) and it was not for the prosecution (T. 651). He admitted that there are a number of errors in his vitae (T. 664- 666).

Goodsell spent a considerable amount of time discussing the problems with eyewitness identification involving faulty encoding, storage, and retrieval, to emphasize wrongful convictions. But he did not or could not say much about the two eyewitnesses who said it was Prade they each saw the morning of the homicide in the vicinity of Margo Prade’s medical practice. Goodsell knows that some people are accurate (T. 655). He conceded that each person determines how they encode and how an event affects them and the ability to recall accurately (T. 660).

Goodsell acknowledged that he does not know how stress affects memory for an individual, (T. 661); yet his affidavit states that it does. (Exhibit 15, ¶8). Goodsell emphasized the number of wrongful convictions

based on eyewitness identification including the bugbear case of Clarence Elkins.

The State must emphasize the difference between Elkins and Prade. The only eyewitness in Elkins was the niece/victim who recanted and the DNA did not entirely clear Elkins. Earl Mann, who placed himself at the scene, cleared Elkins. He admitted having sex with Mrs. Johnson the night of the homicide. This Court did not err in any of its rulings in the Elkins case, based on the facts as they were then known.

There is no recantation in this case. In fact, the testimony of the two eyewitnesses is unrelated. One of the witnesses is African American and would have no reason to misidentify another African American. (T. 693-694).

Goodsell said he reviewed the testimony of both Husk and Brooks. He stated it would not have helped to speak with either witness before they testified to know whether they were being accurate in their identification testimony. (T. 671-672). Thus, he did not know their ability to make a good identification. Other than delay in reporting for both witnesses, he had no other real criticism of their ability to identify Prade.

Goodsell did not consider the reasons for delay in reporting. Both Husk and Brooks said they did not want to get involved. Goodsell also did

not take into account that Brooks did not come forward until discovered by the "pizza man". The pizza man also was a driver that Brooks saw the morning of the homicide driving a van for another different job. When the pizza man delivered the pizza to Brooks months later, Brooks said weren't you the man driving the van the morning Margo Prade was shot? The pizza man went to the police and told them about a witness who knows something. Goodsell was asked if he considered Brooks' ability to accurately encode, store, and retain this information accurately. (T. 672-676, 680). Goodsell basically said he did not consider it. Goodsell would only agree that people can be correct and they can identify people (T. 670, 676).

Goodsell admitted that Brooks' testimony was fairly descriptive, including a passenger in Prade's vehicle; a person with a big chest and wearing a pink garment. (T. 683-684). Husk also gave a detailed description of Prade and informed his girlfriend that day. (T. 685). Goodsell admitted that Husk said that he did not come forward immediately because he was afraid because Prade was a captain in the police department. (T. 686).

Goodsell admitted that his testimony had no effect on the reliability of the eyewitness testimony. He admitted that was the job of a jury. (T. 694-695).

Goodsell admitted that the Innocence Project does not report cases where DNA tests confirmed a defendant's guilt and where eyewitness testimony helped to convict. (T. 688-689).

Goodsell's testimony only impeaches the eyewitness testimony at trial. As with the bite mark evidence it supplies no support for a new trial or a discharge. Goodsell's testimony is also cumulative because Prade cross-examined the witnesses concerning delay in reporting and their ability to recollect accurately. (T. Trial, 1272-1280, 1437-1446).

#### **F. DNA**

The crux of the case but by no means the only important consideration as argued *infra* is the conflicting testimony from Prade's experts and the State's experts. The primary focus of the tests and testimony is the bite mark cutting, Exhibit 123. This is the "most significant" biological evidence. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, ¶17.

### **1. The Bottom Line**

Prade says that DDC found the DNA of the killer and the killer is not him. The State says DDC found male DNA (at extremely low levels) from multiple persons and that it is unknown how or when that DNA was deposited; consequently, the DDC results prove nothing.

Although Dr. Staub said that it was not possible to name a person who left male DNA on the cutting because Y-STR results are not suitable for CODIS, (T. 60), he said that the killer was the source of at least some of the male DNA; that some of the DNA should be from “the biting event.” (T. 79, 81).

Dr. Heinig said that DDC results particularly from DDC 19.A.2 indicated male DNA from a person biting the lab coat. (T. 353, 466).

Dr. Heinig’s conclusion must be contrasted with the statement of Dr. Benzinger, that as forensic scientists we make no conclusions about when or how DNA gets in a bite mark area (T. 1028) or who deposited it (T. 1029). Contra to what Prade is claiming, we cannot say the biter left his saliva smack dab in the middle of the bite. (T. 854).

Disagreeing with DDC, Dr. Maddox could not say what the source of the male DNA was; some sort of contamination, transfer, a biter, or an analytical error. (T. 707, 741-743, 750, 825-826, 828). Dr. Maddox noted

that due to the extremely low levels of male DNA DDC's tests are at the very, very lower limit of resolution. (T. 744, 818). He said that the DDC results were "more indicative" of transfer. (T. 749). He said that BCI found "some low level background stuff." (T. 759).

Dr. Maddox explained that additional BCI testing of the bite mark cutting after it was swabbed on each side did not produce results that were reliable; referring to result for 111.2 and 111.3 which produced different inconsistent results – excluding Prade (T. 777-780, 830-831), but indicating two different contributors (T. 1098). Because the same result is not occurring that means drop in or drop out. These artifacts can occur whenever low levels of DNA are tested. (T. 1098).

Dr. Benzinger noted that DDC was basing its conclusions on perhaps 3-5 cells in 19.A.1 and around ten cells in 19.A.2. (T. 859-861, 864-865). A normal sample is 1 nanogram or 150 cells. (T. 855). The lowest reference point for identifying DNA is .023 nanogram (that is 3-4 cells). (T. 849-850).

Dr. Benzinger said that there was insufficient male DNA for a reliable typing. (T. 1008-1009, 1101, 1105). She could not say DDC found DNA from the killer. (T. 1028, 1085).

Exhibit 27 is a letter dated August 10, 2010 from Jim Slagle, then Chief of the Ohio Attorney General's Criminal Justice Section. Prade made use of part of the letter. (T. 347). Mr. Slagle writes, "If someone else's DNA is found [on the bite mark], this will not exonerate Prade, as there are a number of ways DNA could have been left on the coat before or after the murder. \*\*\*it is fair to say that\*\*\*additional testing would afford some chance of finding convincing evidence of Prade's guilt, but is unlikely to find anything more than inconclusive evidence that would bear on any of his claims to exoneration." More than two years later, we know that Mr. Slagle is correct; there is only inconclusive evidence.

## **2.THE MYSTERIOUS Y**

DDC tested items Q6 and Q7, which were extracts from swabbings of the bite mark. These extracts came from the FBI and the swabbings perhaps done by the Akron Police Department. (T. 51, 320, 355-356). DDC found a Y allele, indicating a male contributor in Q7. (T. 325, 386).

It became a point of contention whether Q6 and Q7 were swabbings from the lab coat or Margo Prade's arm. Prade wanted the swabbings to be from the bite mark on the coat, indicating that perhaps DNA had been removed when the swabbings were performed (and thus leaving less to be found by DDC). (T. 51, 797, 1059). Dr. Staub said that there was no

indication that the Y allele was useful in identifying the killer. (T. 102-103). Eventually all the experts said that the swabbings were probably from Margo's arm. (T. 96-97, 372, 733-734, 1058).

This issue disappeared when Prade revealed that DDC had sent an email stating that upon further analysis there was in fact no Y-STR in Q7 but an "imbalance". (T. 126-127). Prade did not produce this email. Nevertheless, this incident proves that DDC makes mistakes and puts them in its report.

### **3. THE SLOBBERING, BITING KILLER**

Building on speculation by one of Prade's witnesses at trial Prade put on testimony that the killer probably slobbered all over the lab coat while inflicting the bite. (T. 66-67, 345-346). Further, the male DNA that DDC found should be from saliva. (T. 81, 466). A slobbering person would deposit a "male profile of strong significant signal." (T. 824, 1091). Saliva should produce many cells. (T. 64, 66, 84).

No such signal or numbers of cells are present. DDC had to go to the very limits of resolution to draw its conclusions. (T. 744, 818). Prade's witness admitted that a couple or a very low number of cells might be in DDC 19.A.1 and 19.A.2. (T. 85). There was no evidence that there were many cells from saliva. (T. 362-363).

In 1998, SERI did find the probable presence of amylase, a component of saliva, in its presumptive test. The confirmatory test detected no amylase activity. There were some epithelial cells. SERI Report, Exhibit 12; (T. 791-792). These cells might be from Margo Prade. (T. 820). There is no indication they might or might not be from Prade.

The confirmatory test is the final word on the presence of amylase. (T. 1103-1104). The amylase mapping (the presumptive test) could have minimally removed amylase but would not have altered the fabric for DNA testing. (T. 721-722.)

Dr. Wright testified that an older person on medication might not leave saliva. (T. 603). Prade could not counter this. (T. 376). The conclusion must be that there is no way to know if saliva ever existed.

#### **4. WHAT DDC FOUND**

DDC cut a section from the bite mark cutting. This cutting is 19.A.1. (T. 326). There is a partial male profile in 19.A.1. DDC excluded Prade as the contributor. (T. 328). DDC took three more cuttings from the bite mark cutting, extracted DNA, and combined it with the extract from 19.A.1 to form 19.A.2. (T. 331-332, 409). DDC found a major and a minor partial male profile in 19.A.2. DDC excluded Prade. (T. 329). DDC also found alleles that were below thresholds where comparisons were possible. DDC

stated that the below threshold might be “spurious” DNA from a third individual. (T. 333).

Curiously, in 19.A.1 at DYS 437 DDC found a 15 marker at 130 RFUs. In 19.A.2 at DYS 437 DDC found a 14 marker at 110 RFUs and a 15 marker at 54 RFUs. Exhibit 60. What happened is that the major profile in 19.A.1 is not the major profile in 19.A.2 but has become the minor profile at a much lower RFU level. (T. 412). Dr. Heinig confirmed that the 14 and 15 are from two different people. (T. 411).

Further examining the DDC results in Exhibit 60, we see that at DYS 385 there is an 11 marker at 50 RFUs in 19.A.1 and a 17 at 100 RFUs with a 14 at 53 RFUs in 19.A.2. That indicates three persons or a mistake. At DYS 391 there is a 10 at 134 RFUs in 19.A.1 and an 8 at 76 RFUs, a 9 at 72 RFUs and a 10 at 282 RFUs in 19.A.2. At DYS 448 there is a 21 at 56 RFUs in 19.A.1 and a 19 at 103 RFUs with a 21 at 54 RFUs in 19.A.2.

In sum, there are at least two male contributors to the bite mark DNA and perhaps a total of five. Dr. Heinig admitted that assuming DDC results were good some contamination or transfer had to occur. (T. 420). She could not explain, in the context of her opinion that the killer was on the tested fabric, whether it was the major or minor contributor who was the killer. (T. 421.) Then she said that the major profile was from saliva and

the minor alleles could be from contact from one or more persons. (T. 421-422).

Dr. Heinig's adherence to her conclusion faces the insurmountable problem that DDC found two persons to be major contributors. Exhibit 60, DYS 437. There is no claim or evidence that two males killed and/or bit Margo Prade.

Both 19A.1 and 19.A.2 when tested by DDC detected zero male DNA from the lab coat stain. (T. 857). Because the male DNA is below zero and a very small amount, the quantification test is an estimate and has a lot of variability. (T. 858).

Dr. Benzinger said you cannot rule out multiple men (T. 876) or there is such a low level of male DNA that mistakes are what the DDC tests shows (T. 878, 882).

Everyone agrees that the results in 19.A.1 and 19.A.2 are partial profiles, (T.90) and that drop out can occur. (T. 89).

Further, without a doubt, DDC wanted to improve the low level results obtained in 19.A.1 , so they increased the amount of DNA with 3 more small 1/4 by 1/4 inch cuttings from exhibit 123 and tested for results – a typical methodology used (T. 55, 409). Unfortunately, for Prade, DDC

surely did not expect to get multiple profiles or the major and minor profile shifting (T. 410-412).

## 5. CONTAMINATION

The explanations for the low levels of DNA are all speculation. In 1998 the FBI may have used a solution on Ex. 123 (T. 847) and may have soaked the material [DNA] out of the stain (T. 1000). Then, "it went through amylase mapping at SERI, which could possibly have removed a good portion of the killer's cellular material, and, therefore, make it difficult to get a decent Y-STR profile" (T. 80).

In Exhibit G Dr. Benzinger discussed the stain travel. She speculated that when bleeding took place over the bite mark, it could have diluted and carried away the DNA that had just been placed there (T. 884, 996).

Transfer DNA or contamination can be the same or are similar (T. 90) and secondary transfer occurs at much lower levels than primary transfer of DNA. (T. 91). It can be expected to find numbers just over the 100 RFU threshold and it cannot be determined whether it was a transfer or not (T. 92).

Lab employees or others do not wear masks today and that can account for transfer or DNA contamination (T. 431). Finally, Dr. Heinig said that what is giving rise to minor alleles below threshold in 19.A.2 often

would be the result of touching something thus passing cells from place to place. Then it is possible or likely that you will get some contamination or transfer. (T. 478).

Dr. Benzinger said if DNA is degraded or broken up there are fewer copies of larger loci, which occurred in both 19.A.1 and 19.A.2 (T. 867). Degradation could also account for the lab coat 114.1, 114.2, 114.3, and 114.4 having no DNA (T. 992). In addition, the bite mark could have lost or have less DNA now than in 1997 (T.1056). Prade spent considerable time exploring the potential loss of DNA on the bite mark (T. 1059-1064), acknowledging the low-level results.

One explanation for the results is contamination or transfer whether primary or secondary. Prade referred to this issue as “stray” male DNA (T. 61). Dr. Staub gave an explanation that is more thorough indicating that touch DNA is highly variable depending on casual touching verses grabbing the garment. (T. 62).

State’s Exhibits C and D are excerpts from the 1998 trial that WKYC taped. The State subpoenaed, copied, and played portions from these tapes to ascertain what may have occurred during the course of the trial that would account for contamination.

Exhibit C shows Dr. Levine without gloves opening the envelope, State's Exhibit 123, which contained the blood stained fabric bite mark cut out. Dr. Levine touched the inside flap of the envelope where the piece of cloth comes across when it is removed. Dr. Heinig took a long time and had to see Exhibit D, the testimony of Dr. Callahan and how the piece of unprotected cloth is removed from Exhibit 123, before she states her concern that transfer DNA could happen. "We don't do that". (T. 442-446). Dr. Benzinger stated, "Speaking over evidence is something that we do not do at BCI because of its potential for contamination." (T. 1089).

Dr. Heinig said it is "possible" there could have been contamination (T. 466); however, she thought, "that the DNA is coming from saliva rather than touch DNA from back then in 1998" (T. 466). She noticed the prosecutor in the video was holding it [Exhibit 123] on the edge and did not recall her running her fingers across the entire piece (T. 474) in spite of viewing repeated replays of the tape (State's Ex. D.) and knowing a male prosecutor had earlier marked the outside envelope of Exhibit 123 from the trial testimony. Dr. Maddox when asked about 19.A.1 could not say that piece was not held on the back of the swatch in the video (T. 795) which could account for the differences in 111.2 and 111.3.

This Court asked Dr. Heinig about double transfer being a cause of a sufficient number of cells to reveal something. (T. 474). Dr. Heinig finally said it could have happened. (T. 476). Dr. Benzinger said Exhibit 123 could have picked up Dr. Levine's cells (T. 887). Dr. Heinig said that different people shed different amounts of DNA (T. 475).

Dr. Maddox testified about his concerns from viewing Exhibit D. He stated, "she's touched other items and she's coming back and touching that item, the cutting, as well. And if anything she touched had a few cells on it, the testing in the immediate case, it appears that they are results from very minimal number of cells, so if she's touching that, if she's had any transfer from the item to her gloves, could they have been transferred over to the cutting that she's holding. So that's the possibilities that I see." (T. 728-729). Further, with regard to Dr. Callaghan in the video Exhibit D, Dr. Maddox stated, "you can tell he was speaking over that item." Benzinger agreed, "He's talking right over it" (T. 889).

It is a fact that some contamination or transfer occurred on Exhibit 123 after the 1998 trial, producing the results in 19.A.1 and 19.A.2. (T. 420). Otherwise, there would not be more than one profile and a shifting of the major/minor profile. (T. 420). Dr. Maddox explained that people shed a certain amount of DNA daily and talking over an item can deposit DNA

from saliva. (T. 726). We also know there is a degree of subjectivity in interpretations for the results (T. 388, 406, 407) whether baseline noise, stutter, drop-in or drop-out, or artifacts are considered.

Ultimately, Dr. Heinig opined that three or more profiles are in 19.A.1 and 19.A.2. (T. 422).

If total contamination or transfer occurred, then excluding Doug Prade or anyone else is meaningless. (T.125, 751). However, Dr. Heinig refused to consider that as an option (T. 420, 454) until she admitted that if, hypothetically in a sample there is contamination or transfer whoever you're comparing it to is meaningless. (T. 479).

This Court demonstrated its concern about the evidence handling in 1998. (T. 845-846). This Court asked Dr. Benzinger, "what do we need to do right now for handling evidence?" (T. 1074-1076).

It simply cannot be said with any degree of confidence that the male DNA found on Exhibit 123 in preparation for the October hearing was deposited during the murder of Margo Prade.

#### **G. WHAT ARE WE LEFT WITH**

We know that the DDC DNA tests have not resulted in reliable information. We know that contamination occurred and quite possibly errors in interpretation due to the extremely low numbers of cells present.

We know that DDC identifies at least two and maybe three or more males in the bite mark cutting. To be sure, none of them is Prade but to state categorically that one is the killer is wildly speculative. In addition, it is speculation defeated by the facts.

Although the jury had information allowing speculation that something was under Margo Prade's blood in the area of the bite mark, today we cannot say with any certainty what is there. Like the lab coat that had no DNA after testing additional areas, the bite mark may also have no DNA from the biter.

We do know what is there: several men, likely a group. From the Rolling Acres Dodge video, we know there was only one killer: DDC, in the role of Prade's advocate, tells us saliva (that slobbering killer again) is the source of the major profile. (T. 421-422). There are two major contributors in 19.A.1 and 19.A.2, both above 100 RFUs. DDC cannot be correct. (T. 789).

The best DNA test results would have resulted from testing something that was taken, preserved, and sealed before trial (T. 846), because we would know the item had not been contaminated (T. 456). However, nothing was sealed or preserved that can furnish results different from what the jury already heard. The jury knew there was multiple male DNA

under Margo's fingernails that excluded Prade. This "new evidence" from the bite mark cutting does not give us anything more or anything new.

At most, there is conflicting, credible expert opinion. That is a draw. Consequently, the status quo must stand.

We know when the murder occurred: on November 26, 1997 and between 9:10 and 9:12 am. (T. Trial, 1044-1046; State Exhibits 179, 180, 181). Two persons identified Prade as present in the immediate vicinity of the murder. One person saw Prade before the murder. (T. Trial, 1262-1264). One saw him afterwards, speeding away in a van with a passenger with large breasts wearing pink. (T. Trial, 1424-1426, 1434-1436, 1442).

Prade attempts to discredit these persons' ability to remember accurately through Charles Goodsell. He adds nothing that the jury did not know, except his admission that some persons can accurately recollect and report (T. 655) and that his testimony did not encroach on the jury's job to determine reliability. (T. 694-695).

We know that Prade claimed that he was at a gym when the murder occurred. We know from his own mouth that he was not and that he was unaccounted for when the murder occurred. (T. Trial, 1034-1035). We know that his alleged alibi, constructed after his admission that he did not get to the gym until some twenty minutes after the murder, went nowhere

because one of his alibi witnesses could not remember when she arrived at the gym and the other said he never saw Prade at the gym. *State v. Prade supra* 699. Prade lied.

We know that Prade and his wife were going through a contentious divorce. Prade was jealous of his wife and prior to the filing of the divorce complaint in late December of 1996 (T. Trial, 558) tapped her phone less than 100 times but in December of 1996 tapped her phone over 300 times. A total of five hours of calls were played for the jury. (T. Trial, 418). This obsessive behavior is admissible, *Prade, supra* 685, and highly relevant.

We know that Prade physically assaulted Margo and called her a slut. *Prade, supra* 691-692. We know that Margo feared Prade. *Prade, supra* 692-694. We know that Prade broke into Margo's home. *Prade, supra* 693. We know that after the filing of the divorce complaint Prade announced he would marry girlfriend Carla Smith and abandon his children. Margo then determined to respond strongly in the divorce proceedings. *Prade, supra* 693.

Prade never signed the divorce decree. Had he done so he would have forfeited entitlement to life insurance proceeds on Margo's life. (T. Trial, 2162).

The State has gone to some length to show that the jury could credit that Prade anticipated distribution of the proceeds before Margo's death, based on a document found in Carla Smith's residence. (Brief of State of Ohio, July 24, 2012, 9-11). Prade in turn has gone at length to refute that theory. (Prade Reply Memorandum, August 1, 2012, 7-10). The State is not going to reargue the point, but stands by its argument. However, there is a question. Why would Prade, after the death of Margo, make a rough calculation of what he owed several creditors, then subtract it from the life insurance amount, and do it on a slip dated in October of 1997? In Prade's words make, "back of the envelope calculations." (Prade Reply Memorandum, August 1, 2012, 8). Taken together with all the other admissible evidence the State's argument is valid.

We know that three bite mark experts testified at trial with three different conclusions. Two of the experts could not exclude Prade as the biter. Prade's spearhead in his attack on bite mark evidence; curiously, an attack against the backdrop of trial testimony that was equally favorable to him, is Dr. Bush. She has no experience dealing with the issue at hand. (T. 148, 222, 239, 241). The credible testimony is that bite mark evidence plays a role in criminal trials. (T. 959, 967). The bite mark evidence heard by the jury at the trial is unaffected by the evidence at the October hearing.

**H. PRADE IS WHERE THE JURY FELT HE BELONGS**

To contend after fair consideration of all admissible evidence that Prade has demonstrated either a strong probability that he would be acquitted of aggravated murder at a new trial or, by clear and convincing evidence, actual innocence so that not one reasonable factfinder would find him guilty of aggravated murder is truly to enter the realm of the absurd.

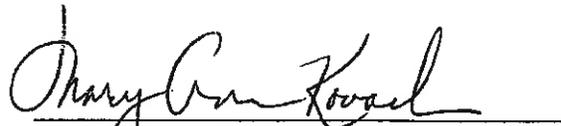
This matter has been pending in one form or another for years. Prade had his opportunity to begin anew in court or to walk out of prison. He failed. That is the only just conclusion.

**CONCLUSION**

For the foregoing reasons the State respectfully requests findings of fact and conclusions of law and that no new trial or discharge be granted.

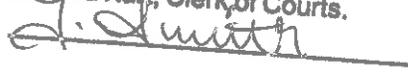
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Sandra Kurt, Clerk of Courts.

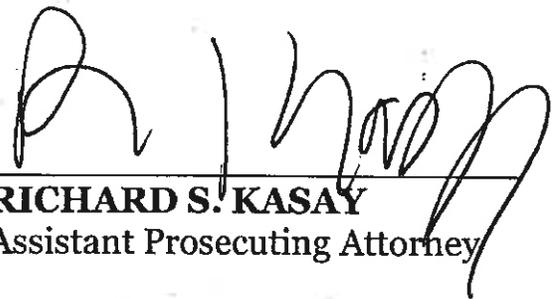
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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing has been sent by regular U.S. Mail and email to- David B. Alden and Lisa B. Gates, Jones Day, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114; and by regular U.S. Mail and email to Mark Godsey and Carrie E. Wood, Ohio Innocence Project, University of Cincinnati College of Law, P. O. Box 210040, Cincinnati, Ohio 45221-0040, on this 3rd day of December, 2012.



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# EXHIBIT

# H

DANIEL M. MORRIGAN

2012 DEC -4 PM IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

SUMMIT COUNTY  
CLERK OF COURT  
STATE OF OHIO, )  
)  
Plaintiff, )  
)  
v. )  
)  
DOUGLAS PRADE, )  
)  
Defendant. )

Case No. CR 1998-02-0463  
Judge Judy L. Hunter

**DEFENDANT DOUGLAS PRADE'S  
POST-HEARING BRIEF IN SUPPORT OF HIS  
PETITION FOR POSTCONVICTION RELIEF OR,  
IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL**

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| EXHIBIT NO. | SPONSORING PARTY | DESCRIPTION   | ADMISSION STATUS |
|-------------|------------------|---|------------------|
| DE-1        | Defense          | Excerpts From Trial Testimony Exclusive of Douglas Prade*   | Admitted         |
| DE-2        | Defense          | Excerpts From Trial Closing Arguments*  | Admitted         |
| DE-3        | Defense          | Excerpts From Trial Testimony of Douglas Prade*   | Admitted         |
| JE-4        | Joint            | July 23, 1998, Federal Bureau of Investigation Report   | Admitted         |
| JE-5        | Joint            | July 24, 1998, Federal Bureau of Investigation Report   | Admitted         |
| JE-6        | Joint            | January 31, 2012, DNA Diagnostics Center Report   | Admitted         |
| JE-7        | Joint            | DNA Diagnostics Center Laboratory Notes   | Admitted         |
| JE-8        | Joint            | DNA Diagnostics Center Photographs Of Evidence Envelope and Bite Mark Section Of Lab Coat   | Admitted         |
| JE-9        | Joint            | March 9, 2012, DNA Diagnostics Center Supplemental Report   | Admitted         |
| JE-10       | Joint            | June 11, 2012, Ohio Bureau Of Criminal Identification & Investigation Report  | Admitted         |
| JE-11       | Joint            | Ohio Bureau Of Criminal Identification & Investigation Laboratory Notes   | Admitted         |
| JE-12       | Joint            | September 9, 1998, Serological Research Institute Report  | Admitted         |
| DE-13       | Defense          | June 29, 2012, Affidavit of Rick W. Staub, Ph.D.  | Admitted         |
| DE-14       | Defense          | June 26, 2012, Affidavit of Dr. Mary Bush & Peter Bush  | Admitted         |
| DE-15       | Defense          | June 28, 2012, Affidavit of Charles A. Goodsell, Ph.D.  | Admitted         |
| DE-16       | Defense          | June 29, 2012, Affidavit of Julie Heinig, Ph.D.   | Admitted         |
| DE-17       | Defense          | January 12, 2009, <i>Akron Beacon Journal</i> "Part 7: Jury does not hear evidence found late"  | Admitted         |
| DE-18       | Defense          | Excerpt from 1 Paul Giannelli & Edward Imwinkelreid, <i>Scientific Evidence</i> (4th ed. 2007)†   | Admitted         |
| DE-19       | Defense          | Excerpt from National Research Council, "Strengthening Forensic Science in the U.S.: A Path Forward" (Aug. 2009) ( <a href="http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf">http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf</a> )‡ | Admitted         |
| DE-20       | Defense          | FBI Forensic Science Communications, "Trace Evidence Recovery Guidelines" (Jan. 1998 rev.)  | Admitted         |
| DE-21       | Defense          | Excerpts from SERI Methods Manual (circa 1998-99)   | Admitted         |
| DE-22       | Defense          | Curriculum vitae of Rick W. Staub, Ph.D.  | Admitted         |
| DE-23       | Defense          | Curriculum vitae of Dr. Mary Bush   | Admitted         |
| DE-24       | Defense          | Curriculum vitae of Charles A. Goodsell, Ph.D.  | Admitted         |

| EXHIBIT NO. | SPONSORING PARTY | DESCRIPTION   | ADMISSION STATUS |
|-------------|------------------|---|------------------|
| DE-25       | Defense          | Curriculum vitae of Julie Heinig, Ph.D.   | Admitted         |
| DE-26       | Defense          | Video footage from trial (Callaghan Excerpt)  | Admitted         |
| JE-27       | Joint            | Letter dated August 10, 2010, from Slagle to Walsh, with attached Analysis  | Admitted         |
| JE-28       | Joint            | Letter dated March 14, 2008, from Benzinger to Kovach   | Admitted         |
| JE-29       | Joint            | Letter dated October 22, 2009, from Benzinger to Kovach   | Admitted         |
| JE-30       | Joint            | July 28, 2010, Affidavit of Elizabeth A. Benzinger, Ph.D.   | Admitted         |
| DE-31       | None             | September 7, 2007, Affidavit of Cassie Johnson  | Withdrawn        |
| DE-32       | None             | July 7, 2010, Affidavit of Cassie Johnson   | Withdrawn        |
| DE-33       | Defense          | Brief of State of Ohio In Response to Motion for New Trial/Petition for Post-Conviction Relief, filed July 24, 2012   | Admitted         |
| JE-34       | Joint            | Letter dated July 17, 2012, from Maddox and Benzinger to Kovach   | Admitted         |
| DE-35       | Defense          | Bush M.A., Bush P.J., Sheets H.D., "A Study of Multiple Bitemarks Inflicted in Human Skin by a Single Dentition Using Geometric Morphometric Analysis," <i>For. Sci. Int'l</i> 211:1-8 (2011)   | Admitted         |
| DE-36       | Defense          | Bush M.A., Miller R.G., Bush P.J., Dorion R.B., "Biomechanical Factors in Human Dermal Bitemarks in a Cadaver Model," <i>J. Forensic Sci.</i> 54(1):167-176 (2009)  | Admitted         |
| DE-37       | Defense          | Sheets H.D., Bush P.J., Brzozowski C., Nawrocki L.A., Ho P., and Bush M.A., "Dental Shape Match Rates in Selected and Orthodontically Treated Populations in New York State: A Two Dimensional Study," <i>J. Forensic Sci.</i> 56(3):621-626 (2011) | Admitted         |
| DE-38       | Defense          | Bush M.A., Bush P.J., Sheets H.D., "Similarity and Match Rates of the Human Dentition In 3 Dimensions: Relevance to Bitemark Analysis," <i>Int'l J. Leg. Med.</i> 125(6):779-784 (2011)   | Admitted         |
| DE-39       | Defense          | Bush M.A., Bush P.J., Sheets, H.D., "Statistical Evidence for the Similarity of the Human Dentition," <i>J. Forensic Sci.</i> 56(1):118-123 (2011)  | Admitted         |
| DE-40       | Defense          | Bush M.A., Thorsrud K., Miller R.G., Dorion R.B.J., Bush P.J., "The Response of Skin to Applied Stress: Investigation of Bitemark Distortion in a Cadaver Model," <i>J. Forensic Sci.</i> 55(1):71-76 (2010)  | Admitted         |

| EXHIBIT NO. | SPONSORING PARTY | DESCRIPTION   | ADMISSION STATUS |
|-------------|------------------|---|------------------|
| DE-41       | Defense          | Miller R.G., Bush P.J., Dorion R.B., Bush M.A., "Uniqueness of the Dentition as Impressed in Human Skin: A Cadaver Model," <i>J. Forensic Sci.</i> 54(4):909-914 (2009)   | Admitted         |
| DE-42       | Defense          | Bush M.A., Cooper H.I., Dorion R.B., "Inquiry into the Scientific Basis For Bitemark Profiling and Arbitrary Distortion Compensation," <i>J. Forensic Sci.</i> 55(4):976-983 (2010)   | Admitted         |
| DE-43       | Defense          | Sheets H.D., Bush M.A., "Mathematical Matching of a Dentition to Bitemarks: Use and Evaluation of Affine Methods," <i>Forensic Sci. Int'l</i> 207(1-3):111-118 (2011)   | Admitted         |
| DE-44       | Defense          | Sheets H.D., Bush P.J., Bush M.A., "Patterns of Variation and Match Rates of the Anterior Biting Dentition: Characteristics of a Database of 3D Scanned Dentitions," <i>J. Forensic Sci.</i> (in Press)   | Admitted         |
| DE-45       | Defense          | Sheets H.D., Bush P.J., Bush M.A., "Bitemarks: Distortion and Covariation of the Maxillary and Mandibular Dentition as Impressed in Human Skin," <i>Forensic Sci. Int'l</i><br><a href="http://dx.doi.org/10.1016/j.forsciint.2012.08.044">http://dx.doi.org/10.1016/j.forsciint.2012.08.044</a><br>(2012) (in Press) | Admitted         |
| DE-46       | Defense          | Curriculum Vitae of Dr. Franklin Wright   | Admitted         |
| DE-47       | Defense          | Franklin Wright Message from ABFO President   | Admitted         |
| DE-48       | Defense          | <i>Otero v. Warnick</i> , 241 Mich. App. 143, 614 N.W.2d 177 (2000)   | Admitted         |
| DE-49       | Defense          | Excerpts from ABFO Diplomates Information   | Admitted         |
| DE-50       | Defense          | Excerpts from <i>Prade</i> Trial Transcript (Levine & Marshall)*  | Admitted         |
| DE-51       | Defense          | Excerpts from ABFO Diplomates Reference Manual  | Admitted         |
| DE-52       | Defense          | <i>Burke v. Town of Walpole</i> , 405 F.3d 66 (1st Cir. 2005)   | Admitted         |
| DE-53       | Defense          | Excerpts from 1 Paul Giannelli, Edward Imwinkelreid, <i>Scientific Evidence</i> (4th ed. 2007)†   | Admitted         |
| DE-54       | Defense          | Excerpts from National Academy of Sciences, <i>Strengthening Forensic Science In The United States: A Path Forward</i> (2009)‡  | Admitted         |
| DE-55       | Defense          | Historical Listing of ABFO Officers (from ABFO website)   | Admitted         |
| DE-56       | Defense          | David Senn presentation to National Academies "Committee on Identifying the Needs of the Scientific Community" (April 23, 2007)   | Admitted         |

| EXHIBIT NO. | SPONSORING PARTY | DESCRIPTION   | ADMISSION STATUS |
|-------------|------------------|---|------------------|
| DE-57       | Defense          | Excerpts from Franklin Wright presentation (January 12, 2011)   | Admitted         |
| DE-58       | Defense          | <i>Arizona v. Krone</i> , 182 Ariz. 319, 897 P.2d 621 (1995)  | Admitted         |
| DE-59       | Defense          | Mark Hansen, "The Uncertain Science of Evidence," <i>ABAJ</i> (July 28, 2005)   | Admitted         |
| DE-60       | Defense          | Demonstrative Chart With All Ohio BCI & DDC Lab Coat Bite Mark Section Results  | Admitted         |
| SE-A        | State            | Bush 2d Slide   | Admitted         |
| SE-B        | State            | Bush 3d Slide   | Admitted         |
| SE-C        | State            | Trial Video Excerpt – Callaghan   | Admitted         |
| SE-D        | State            | Trial Video Excerpt – Levine  | Admitted         |
| SE-E        | State            | Email Trail – Mary Bush To Wright   | Admitted         |
| SE-F        | State            | Wright Opinion  | Admitted         |
| SE-G        | State            | Dr. Benzinger PowerPoint  | Admitted         |
| SE-H        | State            | Dr. Benzinger Summary Chart of Ohio BCI Testing Results   | Admitted         |
| SE-I        | State            | Dr. Wright – ABFO Letter  | Admitted         |
| SE-J        | State            | Budowle B., Eisenberg A.J., van Daal A., "Validity of Low Copy Number Typing and Applications to Forensic Science," <i>Croatian Med. J.</i> 50:207-217 (2009) | Admitted         |
| SE-K        | State            | Dr. Benzinger - 3-Page PowerPoint   | Admitted         |
| SE-L        | State            | Photo – Callaghan/Prosecutor  | Admitted         |

\* Respecting Exhibits 1-3 and 50, which are trial transcripts excerpts designated by the defense, the State has stipulated that the entire trial transcript is admissible.

† Exhibits 18 and 53 are non-identical excerpts from the same document.

‡ Exhibits 19 and 54 are non-identical excerpts from the same document.

## I. INTRODUCTION

After four days of hearings and testimony from multiple expert witnesses, the record clearly and convincingly establishes Douglas Prade's innocence. It is undisputed that (1) Dr. Prade's killer bit her on the left underarm hard enough that, through two layers of clothing, he left a permanent impression on her skin; (2) her killer is highly likely to have left substantial quantities of DNA on the her lab coat over the bite mark – the "Lab Coat Bite Mark Section" – when he bit Dr. Prade; (3) recent testing identified male DNA on the Lab Coat Bite Mark Section; and (4) none of the male DNA found is Douglas Prade's DNA. As between, on the one hand, the possibility that all of the male DNA found on the Lab Coat Bite Mark Section is stray male DNA unrelated to the crime or "contamination" and, on the other hand, the possibility that some of the DNA found there is Dr. Prade's killer's, the latter is far more likely than the former. Indeed, although the State demanded testing elsewhere on the lab coat to substantiate its contamination theory, its search-for-contamination testing came back empty, with not a single locus having been identified, and the State's DNA experts – far from explaining those results – ignored them. The new DNA evidence excluding Douglas Prade from all male DNA found on the lab coat over the killer's bitemark not only is sufficient for a jury to find reasonable doubt, but establishes Douglas Prade's innocence.

Separately, Douglas Prade's conviction was premised in substantial part on two bitemark experts' testimony that, to a greater or lesser extent, tied the impression on Dr. Prade's skin from the killer's bite to Douglas Prade's dentition. Yet the bitemark identification evidence at the hearing showed that (1) the scientific foundations for the reliability of bitemark identification not only have not been established, but likely cannot be; and (2) the State's bitemark experts' testimony at the 1998 trial either is worthless (Dr. Marshall) or, when read fairly, supports the

defense (Dr. Levine). Tellingly, even *the State's* new bitemark expert's testimony at the hearing helped gut the State's trial bitemark experts' opinions. Likewise, the eyewitness identification evidence at the hearing cast serious doubt on the testimony of the two supposed eyewitnesses who placed Douglas Prade at or near the crime scene shortly before and shortly after the murder.

In sum, defendant Douglas Prade has provided "clear and convincing evidence" of his innocence, as well as that, had the new DNA and other evidence been introduced at trial, there would have been reasonable doubt such that no reasonable jury would have convicted. The Court should grant his postconviction petition and exonerate him. And, in the alternative, Douglas Prade has provided the evidence required for a new trial either based on his petition or the motion for a new trial because there is new, material, non-cumulative evidence disclosing a strong probability of a different result in a new trial. *See State v. Hawkins*, 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227 (1993); *State v. Johnson*, 8th Dist. No. 93635, 2010-Ohio 4117, ¶ 22.

This post-hearing brief consists of three parts – governing law (Part II), relevant facts (Part III), and relief requested (Part IV). The Court must, of course, prepare findings of fact and conclusions of law. *See* R.C. 2953.21(G); Ohio R. Crim. P. 35(C). Given the size of the record, the defense is, for the Court's convenience, submitting proposed conclusions of law and findings of fact or "PFOF" as Attachment A hereto.

## II. GOVERNING LAW

### DOUGLAS PRADE HAS MADE THE SHOWINGS REQUIRED TO GRANT THE PETITION AND NEW TRIAL MOTION (PFOF ¶¶ 2-14)

#### A. Douglas Prade Has Made The Showing Required To Grant His Postconviction Relief Petition (PFOF ¶¶ 2-5).

R.C. 2953.21 permits petitions for postconviction relief after postconviction DNA testing and, in subparagraph (A)(1)(a), provides that, when the new DNA testing produces "results that establish, by clear and convincing evidence, actual innocence of that felony offense" for which a

person is imprisoned, the inmate “may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.” R.C. 2953.21(A)(1)(a). The “clear and convincing evidence” burden of proof specified in R.C. 2953.21(A)(1)(a) “is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.” *State v. Eppinger*, 91 Ohio St. 3d 158, 164, 743 N.E.2d 881, 887 (2001) (quoting *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954)).

Under R.C. 2953.21(A)(1)(b), “actual innocence” as used in R.C. 2953.21(A)(1)(a) “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 person’s case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense.” Thus, the petitioner’s burden is to provide “clear and convincing evidence” that, “had the results of the DNA testing ... been presented at trial ... and upon consideration of all admissible evidence,” “no reasonable factfinder” would have found that the State met its traditional burden to establish guilt beyond a reasonable doubt.<sup>1</sup> Stated affirmatively, a petitioner seeking postconviction relief

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<sup>1</sup> In his opening brief (at 19-20) and reply brief (at 2-7), defendant argued that there is little difference between the legal standard that applies to this petition for postconviction relief under R.C. 2953.21(A)(1)(a) and the legal standard the Court applied in September 2010 when determining whether then-hypothetical new DNA test results would be “outcome determinative” as those words are defined R.C. 2953.71(L). That argument was – and remains – sound.

In *State v. King*, 8th Dist. 97683, 2012-Ohio-4398, however, the majority found that the two standards differ. The *King* trial court ordered new DNA testing based on its determination that hypothetical exclusion results could be “outcome determinative” under R.C. 2953.71(L), but later denied the petition for postconviction relief after the new DNA test results excluded the defendant because the trial court concluded that the new DNA test results failed to establish

under R.C. 2953.21 must provide clear and convincing evidence that, if the new DNA test results had been considered in the context of all admissible evidence at trial, there would have been reasonable doubt such that a reasonable jury would have acquitted.

Here, as described at length in Part III below, Douglas Prade has made the showing that R.C. 2953.21(A)(1)(a) requires – “clear and convincing evidence” of his “actual innocence.”

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(continued...)

“actual innocence” under R.C. 2953.21(A)(1)(b). Rejecting the defendant’s claim that the trial court had erred, the *King* majority, while acknowledging that the two standards “resemble each other,” concluded that the inclusion of the words “strong probability” in R.C. 2953.71(L), when coupled with their absence in R.C. 2953.21(A)(1)(b), means that the evidentiary standard governing R.C. 2953.71(L)’s “outcome determinative” determination is lower than the one governing R.C. 2953.21(A)(1)(b)’s “actual innocence” determination. *Id.* at ¶ 13. The majority’s exclusive focus on the definition of “actual innocence” in R.C. 2953.21(A)(1)(b), however, ignores the fact that “actual innocence” is applied in R.C. 2953.21(A)(1)(a) and, there, is made subject to R.C. 2953.21(A)(1)(a)’s “clear and convincing evidence” standard that is analogous to R.C. 2953.71(L)’s “strong probability” standard. (*See Reply Br.* at 3-6).

The *King* concurring opinion, unlike the majority, concluded that the trial court did not err because it was permitted to reconsider its initial, interlocutory order that found that an exclusion result would be “outcome determinative,” while the dissent made essentially the argument that Douglas Prade has advanced here (*i.e.*, that the evidentiary standards governing “outcome determinative” and “actual innocence” determinations are indistinguishable). *Id.* at ¶ 24 (concurring opinion); *id.* at ¶ 38 (dissenting opinion). Both the concurrence and dissent were, as to the evidentiary issue, correct in that (1) as the concurrence found, an order finding that an exclusion result would be “outcome determinative” is interlocutory and, on appropriate facts, can be revisited; and (2) as the dissent found, the “clear and convincing evidence” standard by which “actual innocence” determinations are governed under R.C. 2953.21(A)(1)(a) is much like the “strong probability” standard that governs “outcome determinative” determinations under R.C. 2953.71(L). The issue here in connection with the petition under R.C. 2953.21 – *i.e.*, whether the defense has provided “clear and convincing evidence” of “actual innocence” – is, as the *King* dissent found and as Douglas Prade argued in his opening and reply briefs, little different from the one the Court faced in September 2010 when assessing whether a then-hypothetical exclusion result would be “outcome determinative.” But, as the *King* concurrence found, this Court is not bound by its earlier determination that a then-hypothetical exclusion result would be “outcome determinative” because the Court’s earlier ruling was an interlocutory one that could be changed (although it should not be here). In any event, and regardless of the standard applied, the defense has met its burden of establishing Douglas Prade’s “actual innocence.”

**B. The Postconviction Relief Petition Is Timely (PFOF ¶ 6).**

R.C. 2953.23(A)(2) governs the timeliness of postconviction petitions and provides that a DNA-testing-based petition for postconviction relief is timely when “the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense.” Accordingly, the timeliness provision in the petition for postconviction relief statute, R.C. 2953.23(A)(2), requires a showing parallel to the substantive one set forth in R.C. 2953.21(A)(1)(a) in order for a DNA-testing-based petition for postconviction relief to be timely. For the same reasons that the Court should grant Douglas Prade’s petition for postconviction relief, it is timely under R.C. 2953.23(A)(2).

**C. Douglas Prade Has Made The Showing Required For Granting A New Trial Under Ohio Rule Of Criminal Procedure 33 (PFOF ¶¶ 7-10).**

Under Ohio Rule of Criminal Procedure 33(A)(6), the Court may order a new trial. “[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial.” The decision to grant or deny a motion for a new trial is “within the sound discretion of the trial court.” *State v. LaMar*, 95 Ohio St. 3d 181, 202, 2002-Ohio-2128, ¶ 85, 767 N.E.2d 166, 196.

“To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence: (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.” *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus; *see also State v. Hawkins*, 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227 (1993) (same); *State v. Johnson*, 8th Dist. No. 93635, 2010-Ohio 4117, ¶ 22 (same). “In

view of the beyond-a-reasonable-doubt burden of proof, newly discovered evidence need not conclusively establish a defendant's innocence in order to create a strong probability that a jury in a new trial would find reasonable doubt." *State v. Gillispie*, 2d Dist. No. 24456, 2012-Ohio-1656, ¶ 35.

Here, as described at length in Part III below, Douglas Prade has made the showings that Ohio Rule of Criminal Procedure 33 requires for a new trial.

**D. The Ohio R. Crim. P. 33 Motion For A New Trial Is Timely (PFOF ¶ 11).**

Ohio Rule of Criminal Procedure 33(B) governs when a defendant may file a motion for a new trial and provides that, "[i]f it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period." Here, the new DNA and bitemark identification evidence could not have been discovered at the time of trial, and the State has stipulated that it is not contesting the timeliness of the new trial motion. (7/2/[12] Gates Letter to Kovach & Acknowledgement (Ex. U to Defense Reply)).

**E. The Petition For Postconviction Relief And The New Trial Motion May Proceed Simultaneously (PFOF ¶¶ 12-14).**

In its opposition, the State claimed that the postconviction relief remedy in R.C. 2953.21 based on the results of new DNA testing is exclusive and somehow bars a motion for a new trial. (Opp. at 2-4). In further response to that argument, defendant notes that several courts have expressly or implicitly rejected that argument. For example, the Tenth District observed in *State v. Burke*, 10th Dist. No. 06AP-656, 2006-Ohio-4597, ¶ 10, that "the procedure for new trial

motions made pursuant to Crim. R. 33(B) exists independently from the procedure for post-conviction petitions pursuant to R.C. 2953.21.” (Citations omitted).<sup>2</sup>

Indeed, The Supreme Court of Ohio rejected a claim that R.C. 2953.21 provides an exclusive remedy in the analogous context of a motion to withdraw a guilty plea under Ohio R. Crim. P. 32.1. *State v. Bush*, 96 Ohio St. 3d 235, 329, 2002-Ohio-3993, ¶ 14, 773 N.E.2d 522, 526. There, the court stated that petitions for postconviction relief under “R.C. 2953.21 and 2953.23 do not govern a Crim.R. 32.1 postsentence motion to withdraw a guilty plea. Postsentence motions to withdraw guilty or no contest pleas and postconviction relief petitions exist independently. A criminal defendant can seek under Crim.R. 32.1 to withdraw a plea after the imposition of sentence.” *Id.* (citations omitted). Moreover, and even if the State’s argument might have force in a case where the sole basis upon which defendant was seeking a new trial were the new DNA testing results that are the focus of R.C. 2953.21(A)(1)(a) (and it does not), the argument would not apply here, where Douglas Prade’s new trial motion is premised not only on new DNA test results, but also on substantial new evidence relating to bitemark identification.

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<sup>2</sup> *Accord State v. Lee*, 10th Dist. No. 05AP229, 2005-Ohio-6374, ¶ 13 (“this court and others have at least implicitly found that the Crim.R. 33(B) procedure for new trial motions exists independently from the R.C. 2953.21 procedure for post-conviction petitions) (citations omitted); *see also State v. Tucker*, 8th Dist. No. 95556, 2011-Ohio-4092 (considering petition for R.C. 2953.21 petition for postconviction relief and Ohio R. Crim. P. 33(B) motion for new trial based on newly-discovered evidence). R.C. 2953.21(J) provides that “the remedy set forth in [R.C. 2953.21] is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction.” As multiple courts have found, however, an Ohio Rule of Criminal Procedure 33(B) motion for a new trial is a direct – not a collateral – challenge and, thus, as the *Burke* court observed, “exists independently from the procedure for post-conviction petitions pursuant to R.C. 2953.21.” *Burke*, 2006-Ohio-4597, ¶ 10 (citations omitted).

### III. RELEVANT FACTS

#### THE EVIDENCE SUPPORTS GRANTING THE PETITION AND MOTION (PFOF ¶¶ 15-199)

#### A. The New DNA Evidence Clearly And Convincingly Establishes Douglas Prade's Innocence And "Actual Innocence" (PFOF ¶¶ 15-129).

##### 1. It is undisputed that Dr. Prade's killer bit her on the arm in the course of the crime in the area of the Lab Coat Bite Mark Section (PFOF ¶¶ 46-51).

The primary focus of the new Y-STR DNA testing in this case was, from the beginning, the Lab Coat Bite Mark Section. (See 9/23/10 Order On Defendant's Application For Post-Conviction DNA Testing (the "Testing Order") ("the equation clearly changes when jurors factor in evidence excluding Douglas Prade as a DNA donor on the lab coat swatches")). That is because it is undisputed that -

(1) Dr. Prade's killer bit her on the left underarm with such force that, through two layers of clothing, he left a lasting impression on her skin (PFOF ¶¶ 46-48; Trial Tr. at 1164:3-1165:8 (Platt); Trial Tr. at 1358:8-22 (Marshall); Trial Tr. at 1211:10-17 (Levine); *see also* State's Post-Remand Br. on DNA Testing at 3 (filed Aug. 9, 2010) ("Margo Prade was bit[ten] during the struggle, which left a bite mark impression on her arm"); Testing Order at 10 (the bite mark was a central focus of the 1998 trial));

(2) the Lab Coat Bite Mark Section was taken from an area of the lab coat over the bite mark where Drs. Marshall and Levine testified that, on the lab coat, they had seen traces of a bite (PFOF ¶ 49; Trial Tr. at 1359:9-18 (Marshall); Trial Tr. at 1208:16-1210:9 (Levine)); and

(3) Dr. Prade's killer likely "slobbered all over" the Lab Coat Bite Mark Section such that it likely would be the "best possible source of DNA evidence as to her killer's identity" because he would have left saliva or skin cells there when biting her (PFOF

¶¶ 52-61; Trial Tr. at 1125:13-25 (Callaghan); Trial Tr. at 1628:18-1629:10 (Baum);  
Hearing Tr. at 63:20-64:15, 67:13-16 (Staub); Hearing Tr. at 342:3-10 (Heinig)).

Not surprisingly given the prominence that the killer's bite mark in the State's case against Douglas Prade during the 1998 trial, the State's current DNA experts did not contest the fact that Dr. Prade's killer bit her during the murder. (PFOF ¶ 50; Hearing Tr. at 833:2-6 (Maddox); Hearing Tr. at 1086:23-1087:1 (Benzinger)). Thus, it is undisputed that Dr. Prade's killer bit her during the murder and that he did so in the area of the lab coat that now is the Lab Coat Bite Mark Section.

**2. It is undisputed that DDC identified male DNA on the Lab Coat Bite Mark Section that was not Douglas Prade's DNA (PFOF ¶¶ 20-31, 52-61, 92).**

Four DNA experts testified at the hearing, including two for the defense and two for the State. The defense DNA experts were Dr. Rick Staub, who was the Forensic Laboratory Director at Orchid Cellmark's DNA testing laboratory until very recently, and Dr. Julie Heinig, who is the Assistant Laboratory Director – Forensics at DDC's DNA testing laboratory. (See DE-22 (Staub CV); DE-25 (Heinig CV)). The DNA experts for the State were Dr. Lewis Maddox, who is employed at the Ohio Bureau of Criminal Identification & Investigation ("Ohio BCI"), and Dr. Elizabeth Benzinger, another Ohio BCI employee. At least with respect to the basics of the recent DNA testing, there was substantial agreement amongst these experts.

Specifically, it is undisputed that DNA Diagnostic Center's (or "DDC's") Y-STR DNA testing of extracts from (1) a large cutting from the center of the Lab Coat Bite Mark Section around where the FBI previously had taken two cuttings in 1998 became DDC Item 19.A.1; and (2) three additional cuttings within the Lab Coat Bite Mark Section were then combined with remaining extract from DDC Item 19.A.1 to make DDC Item 19.A.2. (PFOF ¶¶ 20-24; JE-8 at C-E (DDC Pictures) (showing the Lab Coat Bite Mark Section as received by DDC, after the

cuttings for DDC Item 19.A.1 and after the additional cuttings that went into DDC Item 19.A.2)). Also undisputed are the facts that (1) in DDC Item 19.A.1, DDC's Y-STR DNA testing identified a single, partial male DNA profile, and that testing conclusively excluded both Douglas Prade and Timothy Holston from having contributed that DNA; and (2) in DDC Item 19.A.2, DDC's Y-STR DNA testing identified a mixture that included partial male DNA profiles of at least two men, and that testing conclusively excluded both Douglas Prade and Timothy Holston from having contributed any of that DNA. (PFOF ¶¶ 25-30). And there is no disagreement about the fact that DNA exclusions are not expressed in terms of probabilities because they are certainties. (PFOF ¶ 92; Hearing Tr. at 37:19-21 (Staub); Hearing Tr. at 458:18-459:9, 478:20-479:3 (Heinig); Hearing Tr. at 766:22-767:21, 774:23-775:5 (Maddox)).

In short, not only the defense DNA experts, but the State's DNA experts "agree[d] that Douglas Prade is excluded as a contributor to the partial DNA profiles obtained from the bite mark ..." (JE-34 at 2 (7/17/12 Maddox/Benzinger Letter; *see also* Hearing Tr. at 749:23-750:18 (Maddox) ("I agree with – concur with the exclusion of Doug Prade."); Hearing Tr. at 1036:22-1037:9 (Benzinger) ("Q. And Doug Prade was definitively excluded from that partial DNA profile [in DDC Item 19.A.1], correct? A. Given what the interpretation was, yes.")). Accordingly, it is undisputed that (1) DDC identified male DNA on the Lab Coat Bite Mark Section and (2) the male DNA that DDC identified was not Douglas Prade's.

3. **The defense DNA experts' opinion that the new DNA evidence excludes Douglas Prade from having been Dr. Prade's killer is consistent with and supported by the evidence, while the State's DNA experts' opinion is contrary to a great deal of evidence and should be rejected (PFOF ¶¶ 62-128).**

At this point, agreement ends, and the DNA experts for the defense and those for the State part ways. The defense DNA experts, as they had in their affidavits submitted previously, both opined that, while some male DNA that DDC identified in DDC Item 19.A.1 or DDC Item

19.A.2 was stray male DNA from sources unrelated to Dr. Prade's killer, there is a high likelihood that at least some of the male DNA found there – none of which was Douglas Prade's – came from Dr. Prade's killer. (PFOF ¶ 40). As Dr. Staub explained, "if they're getting any result, now certainly some of that should be from the biting event." (Hearing Tr. at 79:11-81:9 (Staub); PFOF ¶ 40). Dr. Heinig agreed: "I just think that there's a high likelihood that the DNA [found in the Lab Coat Bite Mark Section by DDC] is coming from saliva rather than touch DNA left there in 1998." (Hearing Tr. at 466:3-21 (Heinig); PFOF ¶ 40; *see also* DE-13 at ¶¶ 12-13 (6/29/12 Staub Aff.); DE-16 at ¶¶ 14-16 (6/29/12 Heinig Aff.)). If the Court accepts Drs. Staub and Heinig's opinion about the source of the male DNA in DDC Items 19.A.1 or 19.A.2, then even the State's DNA experts concede that Douglas Prade is innocent of the crime of killing Dr. Prade. (*See* PFOF ¶ 41; *see also* Hearing Tr. at 816:7-22 (Maddox); Hearing Tr. at 1092:24-1093:5 (Benzinger)).

The State's DNA experts have a different view. Dr. Maddox testified that the male DNA identified in DDC Items 19.A.1 and 19.A.2 is "better explained" as stray male DNA unrelated to Dr. Prade's killer (Hearing Tr. at 832:16-23 (Maddox); *see* PFOF ¶ 42), but could not rule out the possibility that some of that male DNA was the killer's. (Hearing Tr. at 749:23-750:21, 790:3-15, 816:23-817:13, 834:9-16 (Maddox); *see* PFOF ¶ 43). And Dr. Benzinger's ultimate conclusion was that she had "no way of knowing that" the DNA there was the killer's. (Hearing Tr. at 1026:19-1027:1 (Benzinger); *see also* Hearing Tr. at 1028:24-1029:3 (Benzinger); PFOF ¶ 42). If the Court were to endorse Drs. Maddox and Benzinger's opinion, then the new Y-STR DNA test results are, for purposes of determining the identity of Dr. Prade's killer, of more limited value.

As detailed below, however, this battle of the DNA experts is a rout. Fundamentally, the defense DNA experts' opinion comports with common sense, while the State's DNA experts' opinion defies it. And, unlike the State's DNA experts' opinion, the defense DNA experts' opinion fits with and is well supported by the record. Specifically, the defense DNA experts' opinion is credible – and the State's DNA experts' opinion is not – because:

(1) Saliva is a rich DNA source, while touch DNA is a weak DNA source, so it is far more likely that male DNA found now was contributed by the biting killer than by inadvertent contact (*see* discussion below at pages 13 to 16);

(2) Y-STR DNA testing of areas of the lab coat other than the Lab Coat Bite Mark Section that was expressly designed to test for contamination failed to find any male DNA, which suggests a low level of contamination (*see* discussion below at pages 16 to 18);

(3) The ways in which the State suggested that the Lab Coat Bite Mark Section could have been contaminated are highly speculative and implausible (*see* discussion below at pages 18 to 22);

(4) The small quantity of male DNA found in DDC Items 19.A.1 and 19.A.2 does not mean that the Y-STR profiles obtained from those samples are invalid or unreliable (*see* discussion below at pages 22 to 27); and

(5) Earlier testing and treatment of the Lab Coat Bite Mark Section explains the small quantity of male DNA remaining from the crime (*see* discussion below at pages 27 to 30).

Very simply, the new DNA evidence clearly and convincingly establishes Douglas Prade's innocence, and the Court should grant his petition and motion.

- a. Saliva is a rich DNA source, while touch DNA is a weak DNA source, so it is far more likely that male DNA found now was contributed by the biting killer than by inadvertent contact (PFOF ¶¶ 62-74).

Common sense dictates that the source and quantity of the male DNA found on the Lab Coat Bite Mark Section now would depend on the source and quantity of the male DNA left there in 1997 or 1998.<sup>3</sup> (PFOF ¶ 62; *see* Hearing Tr. at 790:17-22 (Maddox); Hearing Tr. at 1087:10-16 (Benzinger)). The two primary sources from which that male DNA could have originated are either (1) Dr. Prade's slobbering killer having bitten her on the Lab Coat Bite Mark Section in the course of the murder or (2) some other male leaving his DNA there, presumably through casual touching.<sup>4</sup> As between these two possible sources of the male DNA that DDC found, it is no contest.

On the one hand, there is a great deal of evidence that both Dr. Prade's killer violently bit her on the Lab Coat Bite Mark Section, and that the killer's bite likely would have left behind a significant amount of the killer's DNA (*see* discussion above at pages 8 to 9). On the other hand, there is zero evidence of how the Lab Coat Bite Mark Section might have come to be contaminated. Moreover, all four DNA experts agreed that saliva is a rich source of DNA, while touch DNA is a very weak one. (PFOF ¶¶ 63-65; Hearing Tr. at 35:17-23, 64:2-15 (Staub), Hearing Tr. at 342:11-25 (Heinig); Hearing Tr. at 730:7-18, 791:1-5 (Maddox); Hearing Tr. at 1086:9-14 (Benzinger)). In fact, saliva and the inside of the mouth are such potent sources of DNA that swabbing the inside of the mouth with a cotton swab is a common way that DNA

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<sup>3</sup> The Lab Coat Bite Mark Section was stored in an envelope after the 1998 trial, and there is no allegation that current laboratory anti-contamination protocols are inadequate or that any of the male DNA identified recently originated from DDC or Ohio BCI personnel.

<sup>4</sup> The State has suggested a range of possible sources of contamination and, as noted above, nearly all of them rely on touch DNA. Each of the State's contamination theories is addressed individually below at pages 18 to 22.

laboratories collect reference DNA samples. (PFOF ¶ 63; Hearing Tr. at 1086:9-14 (Benzinger) (“Q. Saliva’s a rich source of DNA, right? A. Yes. Q. Buccal swabs from rubbing the inside of the cheek are a common way to get reference samples? A. That’s correct.”)).

Significantly, the fact that the amylase testing in 1998 failed to confirm the presence of saliva does not mean that saliva was not there. (PFOF ¶ 59, JE-12 at 1 (9/9/98 SERI Report); DE-13 at ¶ 10 (6/29/12 Staub Aff.); Hearing Tr. at 49:6-15 (Staub)). For one thing, the results of the initial amylase testing were positive, indicating that amylase may have been present. (PFOF ¶ 59; JE-12 at 1 (9/9/98 SERI Report); Hearing Tr. at 49:2-15 (Staub)). For another, the confirmatory amylase test that came back negative could have turned out that way because either (1) the initial mapping test either consumed some or all of the amylase that was there or (2) the confirmatory test produced a false negative. (PFOF ¶ 59; DE-13 at ¶ 10 (6/29/12 Staub Aff.); Hearing Tr. at 49:6-15 (Staub)). For still another, the portions of the Lab Coat Bite Mark Section that were excised based on that initial amylase testing showed “nucleated epithelial cells” (*i.e.*, skin cells) when examined microscopically, which means that skin was present in the bitemark. (PFOF ¶ 60; JE-12 at 1 (9/9/98 SERI Report); Hearing Tr. at 81:21-82:13 (Staub); Hearing Tr. at 803:9-24 (Maddox)).

Tellingly, over three years ago when speaking privately about this case with James Slagle, the Chief of the Ohio Attorney General’s Criminal Justice Section, Dr. Benzinger agreed with the common sense notion that saliva is, by far, the most likely source of any DNA found on the Lab Coat Bite Mark Section. (PFOF ¶ 66; JE-34 at 1-2 (8/10/10 Slagle Letter)). As Mr. Slagle explained in his August 10, 2010, letter to Prosecutor Walsh:

I want to make sure we are clear on what Dr. Benzinger believes could be determined by additional testing so that there is no misunderstanding on this issue. While you are correct that due to the passage of time it is no longer possible to determine whether

saliva is on the lab coat, this does not eliminate the ability to find DNA from the saliva. If the murderer left saliva on the coat as a result of biting the victim, there is still a good possibility of finding DNA, even though we will no longer be able to find other evidence of the saliva. It is also possible that DNA could be found on the lab coat which is unrelated to the murder. However, ***it is much more likely to find identifiable DNA as a result of saliva than from someone simply touching the coat because saliva contains much greater quantities of DNA than skin cells which might flake off due to touching an article of clothing.***

(JE-34 at 1-2 (8/10/10 Slagle Letter) (emphasis added)). And Mr. Slagle did not misconstrue or somehow fail to comprehend what Dr. Benzinger was saying because, at the hearing, she confirmed that Mr. Slagle's letter accurately reported her comments. (PFOF ¶ 67; Hearing Tr. at 1067:14-16 (Benzinger) ("Q. That's what you told Mr. Slagle, isn't it? A. Yes.")).

When asked at the hearing to explain how their opinion that none of the DNA found on the Lab Coat Bite Mark Section is likely to have come from Dr. Prade's killer can coexist with the fact that multiple witnesses testified about the killer having bitten Dr. Prade during the murder, the State's DNA experts' response was, well, nothing. (PFOF ¶ 72; Hearing Tr. at 834:18-22 (Maddox); Hearing Tr. at 1091:13-19 (Benzinger)). Seriously – nothing. Dr. Maddox had no explanation:

Q. [Y]ou don't have an explanation if there was a biting, slobbering killer [as to why] it is – that we're not seeing the killer's DNA, do you?

A. No, I do not.

(Hearing Tr. at 834:18-22 (Maddox)). Dr. Benzinger could do no better:

Q. [I]f the biting killer left saliva on the lab coat over the bitemark you have no explanation for how the killer's saliva isn't there to find in 2011 or 2012, correct?

A. Correct.

(Hearing Tr. at 1091:13-19 (Benzinger)). That the State's experts drew a blank on this issue is not surprising because it is stupefying that, as between a strong DNA source and a very weak one, the State's DNA experts steadfastly cling to the notion that it somehow is likely that all of the DNA that DDC found on the Lab Coat Bite Mark Section was from the very weak DNA source, while none was from the strong DNA source.

Simply focusing on the possible sources of the male DNA on the Lab Coat Bite Mark Section – *i.e.*, either the biting killer's saliva and skin left from the bite or touch DNA – is, by itself, sufficient reason for adopting the defense experts' opinion that at least some of the male DNA found on the Lab Coat Bite Mark Section came from Dr. Prade's killer and, thus, to conclude that Douglas Prade is innocent. In at least this respect, the defense agrees with Dr. Benzinger that, while "it ... is possible that DNA could be found on the lab coat which is unrelated to the murder," "it is *much more likely* to find identifiable DNA as a result of saliva than from someone simply touching the coat because saliva contains much greater quantities of DNA than skin cells which might flake off due to touching an article of clothing." (JE-34 at 1-2 (8/10/10 Slagle Letter) (emphasis added)).

- b. Y-STR DNA testing of areas of the lab coat other than the Lab Coat Bite Mark Section that was expressly designed to test for contamination failed to find any male DNA, which suggests a low level of contamination (PFOF ¶¶ 75-83).

As the Court will recall, the State's contamination claims are not new (or limited to this case) and, at the State's request, the Court ordered testing in areas of the lab coat outside the Lab Coat Bite Mark Section so as to test the State's hypothesis that DDC's results reflect nothing more than contamination. (PFOF ¶ 78; 3/27/12 Testing Order; Hearing Tr. at 1052:10-12 (Benzinger) ("Q. [W]hat we were doing [in selecting the four locations outside the Lab Coat Bite Mark Section for testing was] looking for contamination, weren't we? A. That's correct.")).

Specifically, Ohio BCI conducted DNA testing of samples taken from four areas of the lab coat chosen to test the contamination theory, including samples taken (1) an inch away from the Lab Coat Bite Mark Section (Ohio BCI Item 114.2), (2) further down the same sleeve of the lab coat (Ohio BCI Item 114.3), (3) on the opposite arm of the lab coat in the area corresponding to where the Lab Coat Bite Mark Section was taken (Ohio BCI Item 114.1), and (4) from the back of the lab coat (Ohio BCI Item 114.4). (PFOF ¶ 75; JE-10 at 1 (6/11/12 Ohio BCI Report); JE-11 at 14 (Ohio BCI Lab Notes)).

But, as it turned out, all four samples that Ohio BCI selected to test for contamination on the lab coat outside the Lab Coat Bite Mark Section came back empty. (PFOF ¶ 79; JE-10 at 2 (6/12/12 Ohio BCI Report)). Indeed, very empty. Ohio BCI not only failed to find enough male DNA to meet its DNA quantification threshold, but, when it went ahead and attempted to run DNA profiles using its comparatively low reporting threshold of 65 relative fluorescence units or “RFUs,” they came back without identifying even a single above-reporting-threshold locus in any of the four samples. (PFOF ¶ 80; JE-11 at 54-61 (Ohio BCI Lab Notes) (electropherograms for Ohio BCI Items 114.1 through 114.4)).

Both defense DNA experts relied on the negative results of this search-for-contamination testing in their affidavits as a basis for concluding that contamination is not a likely source of all of the DNA found in the Lab Coat Bite Mark Section. (PFOF ¶ 81; *see* DE-13 at ¶ 8(f) (6/29/12 Staub Aff.); DE-16 at ¶ 10(g) (6/29/12 Heinig Aff.); *see also* Hearing Tr. at 70:9-13, 79:17-24 (Staub); Hearing Tr. at 347:22-349:3 (Heinig)). For that reason, as well as because their own laboratory did this testing and the negative results speak so directly to their opinion that all of the male DNA found on the Lab Coat Bite Mark Section could be from contamination, one would think that the State’s DNA experts would go to some lengths to explain away these results.

That would be wrong. Drs. Maddox and Benzinger said not a word about these results in their July 11, 2012, letter that summarized their opinions. (*See* JE-34 (7/17/12 Maddox/Benzinger Letter); *see also* Hearing Tr. at 788:2-24 (Maddox); Hearing Tr. at 1055:15-1056:5 (Benzinger)). And neither of the State's DNA experts had anything to say about these negative results by way of explanation when testifying at the hearing other than to say that the results were surprising and contrary to what had been expected. (PFOF ¶ 80; Hearing Tr. at 885:1-18, 991:14-992:16, 1052:19-21 (Benzinger)).

In short, the State asked for and got exactly the testing it wanted to test its theory that Dr. Prade's lab coat was contaminated with stray males' DNA, from its own laboratory no less. Yet the State's DNA experts studiously ignored and avoided the negative results of the State's search-for-contamination testing – results that directly conflict with their opinion – and have no good basis for explaining how their opinion accounts for it. But ignoring this evidence does not make it go away. The simple truth is that the results of State's laboratory's own testing of areas of the lab coat outside the Lab Coat Bite Mark Section – results that showed not the slightest trace of contaminating male DNA – are another compelling reason to conclude that some of the male DNA found over the killer's bite mark on the Lab Coat Bite Mark Section is from Dr. Prade's killer and, thus, to find that Douglas Prade is innocent.

- c. **The ways in which the State suggested that the Lab Coat Bite Mark Section could have been contaminated are speculative and implausible (PFOF ¶¶ 117-28).**

The State came up with multiple ways in which one might conceive of the Lab Coat Bite Mark Section having been contaminated with stray male DNA. Specifically, the State (or its experts) suggested that the Lab Coat Bite Mark Section could have been contaminated in eight ways:

**Possibility #1** - Before the murder, by one of Dr. Prade's male patients touching, coughing on, or sneezing on it.

**Possibility #2** - After the murder but before the lab coat was forwarded to the FBI, by touching, coughing, or sneezing from the police, coroner, or medical personnel.

**Possibility #3** - After the Lab Coat Bite Mark Section was excised by the FBI in early 1998, by either FBI or SERI technicians touching, coughing on, or sneezing on it.

**Possibility #4** - At trial, by (1) a male prosecutor touching the outside of the envelope containing the Lab Coat Bite Mark Section and (2) the female prosecutor, who was wearing gloves, then picking up the male prosecutor's DNA on the gloves when she picked up the envelope and (3) subsequently transferring it to the Lab Coat Bite Mark Section while displaying it to Dr. Callaghan.

**Possibility #5** - At trial, by Dr. Callaghan spraying DNA from his mouth onto the Lab Coat Bite Mark Section as it was being displayed during his testimony.

**Possibility #6** - At trial, by (1) Dr. Levine depositing DNA on the back of the flap of the envelope containing the Lab Coat Bite Mark Section and then (2) Dr. Levine's DNA being transferred to the Lab Coat Bite Mark Section as it was being pulled out of the envelope.

**Possibility #7** - At trial, by Dr. Levine spraying DNA from his mouth onto the Lab Coat Bite Mark Section as he looked into the envelope containing it.

**Possibility #8** - At trial, by a male juror handling or spraying DNA from his mouth on the Lab Coat Bite Mark Section during the jury's deliberations.

(See PFOF ¶¶ 118, 120, 122).

While the State (and its experts) deserve credit for being creative in concocting ways in which this critical piece of evidence could have been mishandled and contaminated with stray male DNA, not one of these possibilities is remotely convincing, particularly when weighed against the virtual certainty that Dr. Prade's killer bit her and, in so doing, left behind saliva or skin. For one thing, there is no direct evidence that the Lab Coat Bite Mark Section was contaminated in any of these ways. (See PFOF ¶¶ 118, 120, 123-25). Not a shred. While almost anything is, of course, conceivable, every one of these possibilities is, at bottom, founded on rank speculation.

For another thing, the evidence we have contradicts every one of these speculative possibilities. The first two – *i.e.*, that the lab coat was contaminated by either one of Dr. Prade’s male patients before the murder (Possibility #1) or police, coroner, or medical personnel before it was sent to the FBI in January 1998 (Possibility #2) – fly in the face of the negative results of the recent search-for-contamination DNA testing that, as described above at pages 16 to 18, Ohio BCI did in four other areas of the lab coat selected for the very reason that they would serve as proxies to determine whether the lab coat was contaminated with stray male DNA.<sup>5</sup> (PFOF ¶¶ 79-80; JE-10 at 2 (6/12/12 Ohio BCI Report); JE-11 at 54-61 (Ohio BCI Lab Notes) (electropherograms for Ohio BCI Items 114.1 through 114.4)). Likewise, the third possibility – *i.e.*, that the Lab Coat Bite Mark Section was contaminated by forensic scientists at the FBI or SERI who were fully aware of its significance – is not only implausible on its face, but conflicts with the experts’ testimony that, even in 1998, forensic laboratories took basic precautions to guard against contaminating the evidence they were testing. (PFOF ¶ 121; Hearing Tr. at 74:1-75:1 (Staub); Hearing Tr. at 349:18-350:2, 430:4-431:18 (Heinig); Hearing Tr. at 1072:13-22 (Benzinger); *see also* DE-20 (excerpt from Jan. 1998 FBI Forensic Laboratory Protocol); DE-21 (excerpt from late 1990s SERI Methods Manual); *see also* Hearing Tr. at 431:1-18 (Dr. Heinig visited the FBI’s forensic laboratory in 2000 and observed them wearing masks)).

As to the no less than five ways the State suggested the Lab Coat Bite Mark Section could have become contaminated at trial – Possibilities #4 through #8 – none holds water.

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<sup>5</sup> Possibility #1 – *i.e.*, one of Dr. Prade’s patients touching, coughing on, or sneezing on the Lab Coat Bite Mark Section before the murder – also ignores the fact that the bitemark’s location – on the left underarm – is an unlikely location for a male patient to have touched, coughed on, or sneezed on Dr. Prade. (PFOF ¶ 119; Hearing Tr. at 63:8-18 (Staub); Hearing Tr. at 341:12-342:2 (Heinig); *see also* Testing Order at 7 (“casual contact from patient or medical staff would be minimal based upon the location of the bite mark”)).

Possibilities #4 and #6 – *i.e.*, (1) a male prosecutor touching the envelope and depositing his DNA, (2) the glove-wearing female prosecutor picking up his DNA on the gloves when she picked up the envelope and then (3) transferring it to the Lab Coat Bite Mark Section when she displayed it during Dr. Callaghan’s testimony (Possibility #4) and (1) Dr. Levine touching the back of the envelope flap and depositing his DNA and then (2) his DNA being transferred to the Lab Coat Bite Mark Section as it was pulled across the envelope flap (Possibility #6) – are multi-step scenarios that, on their face, are highly implausible. Each starts with a weak male DNA source – *i.e.*, touch DNA – and then assumes that whatever touch DNA was deposited then was transferred either once (Possibility #6) or twice (Possibility #4). Yet “every time you have an indirect transfer ... the expectation is there’s going to be less of a transfer of DNA from an item to an item to an item.” (Hearing Tr. at 476:5-22 (Heinig); *see* PFOF ¶ 126).

For Possibility #5 and Possibility #7 – *i.e.*, Dr. Callaghan spraying DNA from his mouth onto the Lab Coat Bite Mark Section as it was being displayed during his testimony (Possibility #5) or Dr. Levine doing so while peering into the envelope (Possibility #7) – the State’s DNA experts admitted that there was nothing in the videos of these events showing that this spraying occurred. (PFOF ¶ 125; Hearing Tr. at 793:8-25 (Maddox); Hearing Tr. at 1088:16-18 (Benzinger); *see also* DE-26 (video of Dr. Callaghan’s testimony); SE-D (video of Dr. Levine’s testimony)). Indeed, the Court had a hard time with this contamination theory, commenting that the notion that people “spew when they talk” was “getting a little far out.” (Hearing Tr. at 477:20-478:4 (Heinig); *see* PFOF ¶ 125). Further, short of Dr. Callaghan or Dr. Levine licking the Lab Coat Bite Mark Section as they would a stamp, which plainly did not occur, it is hard to see how even a stray bit of their saliva that might have escaped from one of

their mouths would be likely to have found its way into the cuttings from which DDC Items 19.A.1 or 19.A.2 were extracted.

Finally, Possibility #8 – *i.e.*, that a male juror may have touched or sprayed DNA on the Lab Coat Bite Mark Section – is sheer guesswork. Significantly, two-thirds of the deliberating jurors – eight out of twelve – reportedly were women, who could not have contributed male DNA. And the State has offered no reason – and there is none – why any juror would want to examine the Lab Coat Bite Mark Section that, in the 1998 trial, had nothing like its current significance.

On balance, every one of the ways in which the State has suggested the Lab Coat Bite Mark Section might have been contaminated with stray male DNA is devoid of supporting evidence and, to the extent there is any evidence that speaks to the issue, conflicts with that evidence. This guesswork and speculation, however, lies at the core of the State’s experts’ opinion that the male DNA found on the Lab Coat Bite Mark Section could be stray male DNA unrelated to the crime. And it is that guesswork and speculation that the State and its DNA experts invite the Court to adopt in the face of – indeed, to the exclusion of – the compelling, undisputed evidence that Dr. Prade’s killer violently bit her on the Lab Coat Bite Mark Section and, in so doing, likely left saliva or skin behind. The Court should decline this invitation.

**d. The small quantity of male DNA found in DDC Items 19.A.1 and 19.A.2 does not mean that the Y-STR profiles obtained from those samples are invalid or unreliable (PFOF ¶¶ 84-102).**

The State’s DNA experts testified that, because the quantity of male DNA in DDC Items 19.A.1 and 19.A.2 was small, the partial male DNA profiles that DDC observed should be interpreted with caution due to, for example, “drop out” (*i.e.*, the test failing to identify loci) or “drop in” (*i.e.*, the test identifying loci that should not be there). (*See* Hearing Tr. at 1013:19-1014:3 (Benzinger)). Significantly, however, both of the State’s DNA experts agreed that,

putting aside “drop out” that plainly occurred because the male profiles DDC observed were partial ones, these testing artifacts merely are possibilities and neither testified that there was, in fact, “drop in” (or that there were, in fact, other testing artifacts) that would call the results into question. (PFOF ¶ 94; *see* Hearing Tr. at 1008:12-25 (Benzinger)).

To be sure, the State’s DNA experts are correct that the amount of male DNA in DDC Items 19.A.1 and 19.A.2 was small in that it was below DDC’s ability to quantify it (*i.e.*, about 0.023 nanograms of DNA) and, as noted above, the male DNA profiles DDC identified were partial ones. (PFOF ¶ 87; JE-7 at 123, 125-26 (DDC Lab Notes) (reporting results of quantification testing); DE-60 (Chart of Lab Coat Bite Mark DNA Testing Results) (showing partial profiles)). But the State’s DNA experts’ implicit larger point – that, due to the small quantity, the results at issue here could be less than fully reliable – is a smokescreen that should be rejected for several reasons.

First, when attempts to quantify DNA fail, as they did here, it is standard procedure for DNA testing laboratories to continue testing to attempt to obtain Y-STR DNA profiles. (PFOF ¶ 89; Hearing Tr. 858:11-859:25, 1040:6-12 (Benzinger)). Indeed, the State’s experts’ own laboratory – Ohio BCI – attempted to obtain Y-STR DNA profiles from multiple samples here after failing to quantify the male DNA present. (PFOF ¶ 89; Hearing Tr. at 1040:19-1041:4 (Benzinger)). The reason laboratories go ahead to seek a Y-STR DNA profile even when the attempt to quantify the male DNA yields an undetermined result is that the quantification test is merely an “estimate,” “[so] a zero might be a zero, but a zero might also mean there’s a few copies of DNA there.” (Hearing Tr. at 1040:19-1041:4 (Benzinger); *see* PFOF ¶ 89). And if, as occurred here, the subsequent attempt to obtain a Y-STR DNA profile succeeds, “since [we’ve] seen the Y-STR data [we] know that there is some male DNA there” and, in that event, “the Y-

STR results are definitive. If [we] get Y-STR results from a sample then [we] know it has to be male DNA.” (Hearing Tr. at 863:24-864:8 (Benzinger); *see* PFOF ¶ 90).

Second, the notion that, because the male DNA profiles produced for DDC Items 19.A.1 and 19.A.2 were partial ones (*i.e.*, not all of the loci were identified), the results somehow are in doubt is utter nonsense. While DNA *inclusions* are stated to a specific degree of probability because they are premised on matches between the test and reference samples and multiple men may share somewhat similar genetic patterns (*e.g.*, as several witnesses commented, Douglas Prade and Timothy Holston’s genes were remarkably similar), the issue here is the meaning of DNA *exclusions*. *Exclusions* have no stated degree of probability because they are a certainty – *i.e.*, if one or more alleles do not match up, the subject is excluded – period, end of story. (PFOF ¶ 92; Hearing Tr. at 37:19-21 (Staub); Hearing Tr. at 458:18-459:9, 478:20-479:3 (Heinig); Hearing Tr. at 766:22-767:21 (Maddox)). “[W]ith an exclusion, when that occurs, then that is definitive, you know, it’s a hundred percent a fact, that there’s no need for understanding or a significance attached to it.” (PFOF ¶ 92; Hearing Tr. at 458:18-459:9 (Heinig)). The fact that the profiles upon which the exclusions were based were partial profiles is of little consequence because, as Dr. Benzinger testified, it is common to base DNA exclusions on partial profiles. (Hearing Tr. at 1037:7-9 (Benzinger) (“Q. It is not uncommon to do an exclusion based upon a partial profile, is it? A. No.”)). Indeed, partial DNA profiles produced after unsuccessful DNA quantification tests regularly are relied upon in criminal proceedings, and partial DNA profile inclusions, which are far more uncertain than the exclusions at issue here, often are used to obtain criminal convictions. (PFOF ¶ 91; Hearing Tr. at 471:4-473:7 (Heinig)).

Here, notwithstanding the low quantity of male DNA found, there is no question whatsoever about whether Douglas Prade was excluded from the single male profile in DDC

Item 19.A.1 or the mixed male profiles in DDC Item 19.A.2 – he was. (PFOF ¶¶ 27, 30; Hearing Tr. at 54:8-15, 56:3-11 (Staub); Hearing Tr. at 328:12-330:4, 332:9-334:2 (Heinig); Hearing Tr. at 749:23-750:18, 767:6-10, 774:3-8, 808:24-809:6 (Maddox); Hearing Tr. at 1036:22-1037:9, 1037:16-22 (Benzinger)). Very simply, the male DNA that DDC found on the Lab Coat Bite Mark Section over where the killer bit Dr. Prade was not Douglas Prade's or, as the State's experts wrote in their joint letter reporting their conclusions, "[w]e agree that Douglas Prade is excluded as a contributor to the partial DNA profiles obtained from the bite mark..." (JE-34 at 2 (7/17/12 Maddox/Benzinger Letter); see PFOF ¶ 27).

Finally, the low-quantity examples Dr. Benzinger used to illustrate "drop in" and "drop out" do nothing to call into question the results for DDC Items 19.A.1 and 19.A.2 and, to the contrary, eviscerate her claim that these results somehow are unreliable. (PFOF ¶¶ 95-100; SE-K at 2 (Benzinger Demonstrative)). In Dr. Benzinger's initial example on page 2 of the demonstrative, she compared a partial electropherogram from a sample of a lab technician's hair with 0.06 nanograms of DNA, which is at the top of the page, to another partial electropherogram from the same hair sample with 0.001 nanograms of DNA, which is at the bottom of the page. (SE-K at 2 (Benzinger Demonstrative)). In the higher-quantity sample at the top of the page, the electropherogram shows that eight loci were observed at 1,000 RFUs or higher (plus three more at about 100 RFUs). (*Id.*). In the low-quantity sample at the bottom of the page, five of the same eight loci were observed (but at dramatically lower RFU levels), including only locus identified at an above-reporting-threshold level of RFUs. (*Id.*). In addition, there was one locus that was not observed in the higher-quantity sample (*i.e.*, the erroneous result that "dropped in"), although it was observed at a level below the reporting threshold. (*Id.*).

Read fairly, this example shows two things. First, even in this extremely low-quantity sample with 0.001 nanograms of DNA or  $1/23^{\text{rd}}$  the DNA quantification threshold,<sup>6</sup> five of six results in the partial male DNA profile observed corresponded to a “true result,” as did the only result that was observed at an above-reporting-threshold level of RFUs. Thus, Dr. Benzinger’s example suggests that even very, very low quantity samples generally produce accurate results, particularly if one focuses on only the above-reporting-threshold results.

Second, Dr. Benzinger’s larger “teaching point” in this example – the locus that erroneously “dropped in” and, in Dr. Benzinger’s view, should give the Court pause before relying on DDC’s results – was observed at about **20 RFUs**. (*Id.* (result denoted “11” in handwriting at the bottom of page that does not correspond to results at the top of the page, which has a peak that is roughly  $\frac{1}{2}$  of the 38 RFU tick mark on the Y-axis)). But a “dropped in” locus observed at 20 RFUs is of no concern here because it would wind up on DDC’s proverbial “cutting room floor.” (PFOF ¶ 96; Hearing Tr. at 1079:6-1080:6 (Benzinger)). That is because 20 RFUs is 20% of DDC’s 100-RFU threshold for reporting results and, indeed, only 40% of DDC’s 50-RFU cut-off for even identifying a locus on an electropherogram. (*See* Hearing Tr. at 1079:6-1080:6 (Benzinger); *see* PFOF ¶ 96). Thus, the locus that erroneously “dropped in” in Dr. Benzinger’s example not only would not have been considered a reportable result by DDC, it would not even have been identified in DDC’s electropherograms. (Hearing Tr. at 1079:6-

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<sup>6</sup> During her direct examination, Dr. Benzinger testified that the lower limit of the quantification testing was 0.023 nanograms of DNA, which corresponds to about 4 cells. (PFOF ¶ 85; Hearing Tr. at 848:6-850:1 (Benzinger)). Using that estimate, the initial example Dr. Benzinger used in her demonstrative – the example using 0.001 nanograms of DNA – was roughly one-fifth of a cell, and her second example (discussed below on page 27) – the example with 0.003 nanograms of DNA – was roughly half a cell. For comparison, Dr. Benzinger testified that there were 2-5 cells of male DNA in DDC Item 19.A.1 and roughly 10 cells in DDC Item 19.A.2. (PFOF ¶ 86; Hearing Tr. at 864:13-865:12 (Benzinger)).

1080:6 (Benzinger) (“Q. But the [locus that dropped in was identified as a RFU level that was] so low that [it] would never have made it to the DDC report, right? A. I agree.”)). Thus, the single instance of “drop in” observed in this example does nothing to suggest that “drop in” should be of concern when interpreting the results observed in DDC Items 19.A.1 or 19.A.2, all of which were observed at dramatically higher RFU levels.

Moreover, Dr. Benzinger’s second example undercuts her first one. In that second example, which is on the third page of her demonstrative and used 0.003 nanograms of DNA or about 1/7<sup>th</sup> the quantification threshold, there was no “drop in.” (PFOF ¶ 98; SE-K at 3 (Benzinger Demonstrative) (comparing partial electropherograms from 0.06 and 0.003 nanogram samples of the same hair taken from a lab technician)). Thus, a 0.002 nanogram increase in the amount of DNA in the sample (*i.e.*, from 0.001 in the prior example – 1/23<sup>rd</sup> the quantification threshold – to 0.003 in this one – 1/7<sup>th</sup> the quantification threshold), eliminated the “drop in” entirely. And Dr. Benzinger agreed that even this higher-DNA second example was a “really, really, really” low-level sample. (Hearing Tr. at 1081:11-17 (Benzinger); *see* PFOF ¶ 99). This is still further evidence that “drop in” is not a meaningful concern here. The State’s DNA experts’ reservations about “drop in” and other testing artifacts amount to nothing more than conjecture and unsupported speculation and, thus, should be rejected.

e. **Earlier testing and treatment of the Lab Coat Bite Mark Section explains the small quantity of male DNA remaining from the crime (PFOF ¶¶ 103-16).**

Another basis for the State’s DNA experts’ opinion that all of the DNA DDC found could be stray male DNA unrelated to the crime is that the low quantity of DNA found is somehow inconsistent with the DNA having come from a rich source of DNA such as saliva or skin. Even then, Dr. Maddox could not say that the amount of DNA identified by DDC was inconsistent with the DNA having come from the biting killer -

THE COURT: So – so are you saying that if, in this situation, it is inconsistent with DNA that could be left from a bitemark?

THE WITNESS: *I can't say that.*

THE COURT: You can't say that, either.

THE WITNESS: It's just so low level that I can't – to me, it's more indicative of a background level, you may have DNA in there from the person that committed a bitemark, but I can't say that conclusively.

THE COURT: Could it be either?

THE WITNESS: *It could be. I can't rule that out.*

(Hearing Tr. at 741:23-742:13 (Maddox) (emphasis added); see PFOF ¶ 103).

In any event, and although this attempt to transform a fundamental weakness of their opinion (*i.e.*, their inability to explain why none of the male DNA found was likely to have been the killer's given that saliva is a rich source of DNA, while touch DNA is a weak one) into a strength is clever, it is unavailing. That is because the State's experts' premise – that finding a low amount of male DNA in 2011 and 2012 somehow is inconsistent with the male DNA having originated from a rich source of DNA like saliva – simply ignores the many reasons, including multiple tests and insults to the Lab Coat Bite Mark Section between the murder and the recent testing, that account for the recent testing finding only trace amounts of the killer's DNA that he left behind in November 1997. (PFOF ¶ 104; Hearing Tr. at 45:2-15 (Staub); Hearing Tr. at 335:17-337:15, 351:24-353:24, 452:1-23 (Heinig); Hearing Tr. at 1056:10-17 (Benzinger) (“Q. If you assume that there was male DNA on the bitemark section of the lab coat in late 1997 and the section was after late 1997 treated in ways that might have caused it to lose DNA, there could be less DNA now of what was there in '97, correct? A. That's a possibility.”)).

Initially, it is undisputed that multiple tests were conducted on the Lab Coat Bite Mark Section in 1997 and/or 1998, each of which likely caused some DNA loss and the combination

of which likely caused very substantial DNA loss. If the swabbings that became FBI Items Q6 and Q7 were swabbings of the Lab Coat Bite Mark Section (although they might not be), those swabbings would have significantly reduced the amount of the killer's DNA that could be found in 2011 and 2012. (PFOF ¶ 106; Hearing Tr. at 50:24-51:15 (Staub) (if the swabbing were of the Lab Coat Bite Mark Section, they "certainly could reduce the amount of cellular material on it"); Hearing Tr. at 336:8-22 (Heinig); Hearing Tr. at 797:5-18 (Maddox); Hearing Tr. at 1059:22-1060:3 (Benzinger)). Along those lines, Dr. Benzinger speculated that Dr. Prade's blood could have "washed away" some of the DNA (PFOF ¶ 107; Hearing Tr. at 995:19-996:15 (Benzinger)), and she displayed a photograph of the lab coat in the area of the Lab Coat Bite Mark Section before that section was excised, which possibly reflects the entire area having been swabbed by the FBI. (PFOF ¶ 108; *compare* SE-G at 25 (Benzinger Slide Presentation) (top picture), *with* JE-8 at C (picture of Lab Coat Bite Mark Section as received by DDC)). Further, the FBI and then SERI took a total of six cuttings from the Lab Coat Bite Mark Section, none of which was available for cutting or swabbing in 2011 or 2012.<sup>7</sup> (PFOF ¶¶ 109, 112; JE-5 at 2 (7/24/98 FBI Report); JE-12 at 1 (9/9/98 SERI Report); *see also* JE-8 at C (picture of Lab Coat Bite Mark Section as received by DDC)).

In addition, SERI conducted both a presumptive blood test and an amylase mapping test on the Lab Coat Bite Mark Section, both of which likely caused some DNA to have been removed. (PFOF ¶¶ 110-11; JE-12 at (9/9/98 SERI Report)). In particular, the amylase mapping test almost certainly caused substantial DNA loss because it involved pressing damp filter paper directly against the Lab Coat Bite Mark Section. (PFOF ¶ 111; Hearing Tr. at 47:16-48:12,

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<sup>7</sup> And, of course, the DNA in DDC's cuttings was not available to be found by Ohio BCI. (PFOF ¶ 113).

49:16-50:3 (Staub); Hearing Tr. at 335:17-336:13 (Heinig); Hearing Tr. at 801:17-802:1 (Maddox); Hearing Tr. at 1062:9-23 (Benzinger)). As Dr. Staub observed, the amylase mapping “testing removed possibly a lot more of the biter’s DNA that may have been on that swatch.” (Hearing Tr. at 49:16-18 (Staub)).

Finally, all four DNA experts agreed that the simple passage of time causes DNA to degrade. (PFOF ¶ 114; Hearing Tr. at 44:15-45:1 (Staub) (DNA “definitely can degrade over time; particularly, if it’s already at low levels to start with”); Hearing Tr. at 336:23-337:15 (Heinig); Hearing Tr. at 792:11-24 (Maddox); Hearing Tr. at 1064:15-25 (Benzinger)). Moreover, DNA degrades at roughly the same rate, whatever its original source, so the passage of time would degrade touch DNA to the point of no longer being detectable long before it would degrade saliva- or skin-based DNA to that point. (PFOF ¶ 69; Hearing Tr. at 792:15-24 (Maddox); Hearing Tr. at 1064:15-25 (Benzinger) (“Q. Now, passage of time degrades DNA, too, doesn’t it? A. Yes. Q. And that doesn’t just apply to saliva DNA, it applies to any DNA, doesn’t it? A. Any DNA. Q. So if we’re going back to 1998 or 1997, saliva that was there could degrade over time; touch that was there could degrade over time, correct? A. Correct.”)).

In short, the fact that only a small amount of male DNA was found in the Lab Coat Bite Mark Section is neither a mystery nor a reason to conclude that its original source was not the biting killer’s saliva or skin.

4. **If the Court were to credit the State’s DNA experts’ opinion about the source of the male DNA on the Lab Coat Bite Mark Section (and it should not), the new DNA evidence still establishes reasonable doubt (PFOF ¶ 129).**

Even if the Court were to find that the evidence weighs in favor of the State’s DNA experts’ opinion regarding the significance of the new DNA evidence – and, as discussed at length above, the Court should not – the Court nonetheless should grant Douglas Prade’s petition and motion. That is because the new DNA evidence, when coupled with (1) the defense DNA

experts' opinion that at least some of this male DNA was Dr. Prade's killer's; (2) the State's DNA experts' inability to rule out that possibility; and (3) the additional bitemark and eyewitness identification evidence described in the following sections at pages 32 to 45, would be more than sufficient to establish reasonable doubt as to Douglas Prade's guilt.

Both the petition for postconviction relief and the motion for a new trial pose essentially the same question; namely, "If the new DNA evidence were admitted at trial and considered in light of all other admissible evidence, would a reasonable jury find the defendant not guilty because the State would not have met its burden to establish guilt beyond a reasonable doubt?" See R.C. 2953.21 (A)(1)(a); *State v. Gillispie*, 2d Dist. No. 24456, 2012-Ohio-1656, ¶ 35. As the *Gillispie* court observed in the context of a motion for a new trial, "[i]n 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." *Gillispie*, 2012-Ohio-1656, ¶ 35.

Here, even if the Court were to adopt the State's DNA experts' opinion that all of the male DNA found on the Lab Coat Bite Mark Section is "better explained" as contamination – a finding that, again, the Court should not make because it flies in the face of both common sense and the record – there nonetheless would be reasonable doubt in the hypothetical trial in which the new DNA evidence was admitted and considered in the context of all other evidence. Even putting aside the evidence discussed below concerning the unreliability of bitemark and eyewitness identification evidence, imagine a trial in this case where the evidence shows, among other things, that:

(1) Dr. Prade's killer bit her with such force that, through two layers of clothing, his teeth made a lasting impression on her skin;

(2) witnesses testified that the lab coat over the killer's bite mark would be the "best possible source of DNA evidence as to [the killer's] identity" and that the biting killer "probably slobbered all over" the outer layer of the victim's clothing;

(3) male DNA was found on the lab coat over where the killer made the bite mark;

(4) all DNA experts agreed that the defendant was definitively excluded from the male DNA found on the lab coat over where the killer made the bite mark;

(5) two scientists with Ph.D.s and decades of experience in DNA testing testified on behalf of the defense that, on balance, it is far more likely that the male DNA found over the bite mark originated from the biting killer than from stray male DNA that is mere contamination; and

(6) the State's DNA experts, although testifying that the male DNA over the killer's bitemark was "better explained" as contamination, (a) could not rule out the possibility that some of the DNA found on the Lab Coat Bite Mark Section was the killer's and (b) had no explanation for how their conclusion that none of the DNA likely came from the killer and a murder where there was a biting killer could coexist.

That record screams "reasonable doubt" and would do so even if, in contrast to what the defense submits the Court should find here, the jury found the State's DNA experts' opinion about the source of the male DNA more credible than the defense DNA experts' opinion. Accordingly, even the State were to win the evidentiary "battle" about what the new DNA test results mean (and it should not), the State's victory would be a Pyrrhic one because the defense nonetheless wins the larger "war" in that, even in that event, the petition and motion should be granted.

**B. The Bitemark Identification Evidence Is Still Further Support For Granting The Petition And Motion (PFOF ¶¶ 130-64).**

At the evidentiary hearing, the defense called Dr. Mary Bush, an expert in the field of forensic odontology research, and the State responded with Dr. Franklin Wright as its own bitemark expert. By way of background and to put this new evidence in context, "[b]ite mark evidence ... provided the basis for the guilty verdict on the count for aggravated murder."

(Testing Order at 10 (citing *State v. Prade*, 126 Ohio St. 3d 27, 27, 30, 2010-Ohio-1842, ¶¶ 3, 17,

930 N.E.2d 287, 288, 289)). More specifically, as the Court previously found, “[t]o 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.” (Testing Order at 10). This evidence was “crucial because no other physical, non-circumstantial evidence existed to suggest Prade’s guilt.” (*Id.*)

At trial, there were three bite mark experts – two called by the State and one by the defense – and, as the Court noted, “[t]he respective opinions of these three experts covered the spectrum.” (*Id.*). “Dr. Marshall [testifying for the State] believed the bite mark was made by Prade; Dr. Levine [for the State] testified there was not enough to say one way or another; and Dr. Baum [for the defense] opined that such an act was a virtual impossibility for Prade due to his loose denture.” (*Id.* at 10-11). Troubled by these three disparate opinions, the Court analyzed what could have led to the divergence. (*Id.* at 11). The Court found: “[T]he 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.” (*Id.* at 11). Further, the autopsy photographs of the bite mark were of poor quality, “without clear edge definition,” not to mention the potential for “expert bias.” (*Id.* at 11). Based on this review of the trial evidence, the Court surmised: “Surely the jury struggled assigning greater weight to the testimony of these witnesses \* \* \* [and] the equation clearly changes when jurors factor in evidence excluding Douglas Prade as a DNA donor on the lab coat swatches.” (*Id.*)

Even without the new DNA test results, the new bitemark evidence offered at the hearing would have caused a reasonable factfinder to reject the expert bitemark evidence the State offered at trial. That is because the expert evidence at trial “is now the subject of substantial criticism that would reasonably cause the fact-finder to reach a different conclusion,” in that “the

new research and studies cast serious doubt to a degree that was not able to be raised by the expert testimony presented at the original determination of guilt by the fact-finder.” *State v. Gillispie*, 2d Dist. No. 22877, 2009-Ohio-3640, ¶ 150. Not only has bitemark identification evidence been discredited as not scientifically established for reasons that the defense bitemark identification expert at the hearing, Dr. Bush, described at some length,<sup>8</sup> but the new opinions of Dr. Wright – *the State’s* new bitemark expert – would lead any reasonable juror to unqualifiedly reject Dr. Marshall’s opinion and disregard Dr. Levine’s. This new evidence – even without the DNA test results but especially in conjunction with them – demonstrates that there is no physical evidence connecting Douglas Prade to the crime and would lead any reasonable juror to find reasonable doubt and acquit Douglas Prade.

1. **The scientific basis for bitemark identification has not been established (PFOF ¶¶ 138-45).**

The State's heavy reliance on bite mark evidence to link Douglas Prade to the crime is undermined by the conclusion reached since 1998 by multiple, highly credible authorities that "the fundamental scientific basis for bitemark analysis ha[s] never been established." (PFOF ¶ 138; 1 Paul Giannelli & Edward Imwinkelreid, *Scientific Evidence* § 13.04 at 672 (4th ed. 2007) (DE-18) (footnote and internal quotations omitted)). For example, the National Academy of Sciences (“NAS”) in its 2009 report entitled *Strengthening Forensic Science in the United States: A Path Forward* (the “2009 NAS Report”) concluded that: “(1) The uniqueness of the human dentition has not been scientifically established. (2) The ability of the dentition, if unique, to

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<sup>8</sup> While expert bitemark testimony may be deemed inadmissible under Ohio Evidence Rule 702(C) because it is not “based on reliable scientific, technical, or other specialized information,” the Court need not reach that issue here. At this juncture, the defense contends only that the new evidence goes to the credibility and the weight of the State’s experts’ trial testimony. The defense reserves the right to challenge the admissibility of bitemark identification evidence if there is a new trial.

transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established.” The NAS observed: “Some research is warranted in order to identify the circumstances within which the methods of forensic odontology can provide probative value.” (PFOF ¶ 138; DE-54 at 175-76 (2009 NAS Report)).

The defense bitemark expert, Dr. Mary Bush, who is a dentist, assistant professor of dentistry and researcher at the State University of New York at Buffalo School of Dental Medicine, described her research that explored the questions the NAS had identified as needing further research. (PFOF ¶ 140; Hearing Tr. at 164:17-218:13 (Bush)). Having now conducted eleven such studies, all of which were published in peer-reviewed scientific journals, Dr. Bush concluded that human dentition (1) is not unique, at least as reflected in bitemarks; and (2) does not reliably transfer unique impressions to human skin. (PFOF ¶¶ 140, 141; Hearing Tr. at 186:3-187:5, 220:8-25 (Bush); DE-35 – DE-45 (Bush published articles)).<sup>9</sup> In Dr. Bush’s opinion, “scientific studies raise deep concern over the use of bitemark evidence in legal proceedings.” (DE-14 at ¶ 11 (Bush Affidavit); *see* PFOF ¶ 141).

The State’s bitemark identification expert, Dr. Franklin Wright, is a dentist and Diplomate of the American Board of Forensic Odontology (“ABFO”). (PFOF ¶ 134; DE-46 (Wright CV)). Dr. Wright testified that, in his view, bitemark inclusions or exclusions (1) are appropriately based on observation and experience, which necessarily entails subjectivity and a lack of reproducibility under controlled, scientific conditions (PFOF ¶ 143; Hearing Tr. at 569:17-570:19, 585:10-587:9; 592:15-593:6, 614:13-615:8 (Wright); PFOF ¶ 147; DE-57 at 5,

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<sup>9</sup> Additional research on bitemark identification is set forth at pages 10 to 22 of the *Amicus Curiae* Brief Of The Innocence Network In Support of Defendant Douglas Prade (filed July 16, 2012), as well as in paragraph 10 of the June 26, 2012, Affidavit of Dr. Mary Bush & Peter Bush (DE-10).

11, 12, 28, 29, 30 (1/12/11 Wright Presentation);<sup>10</sup> and (2) can used in a very limited set of circumstances (*i.e.*, a closed population of biters with significantly different dentitions). (PFOF ¶ 155; DE-57 at 30, 31, 67, 68, 81 (1/12/11 Wright Presentation)).

Yet Dr. Wright's defense of the scientific basis for bitemark identification in light of the concerns raised in the 2009 NAS Report was, well, not much. He could not simply dismiss the NAS's concerns, not only because it was, after all, the National Academy of Sciences, but also because the NAS lifted – almost word for word – the unresolved scientific issues underlying bitemark identification from Dr. Wright's predecessor as ABFO president, Dr. David Senn's, April 2007 presentation to the NAS. (PFOF ¶ 142; *compare* DE-54 at 175 (2009 NAS Report) (outlining issues in bitemark identification that had not been scientifically established), *with* DE-56 at 31, 32, 35, 36 (4/23/07 Senn Presentation to NAS); *see also* Hearing Tr. at 934:5-943:13 (Wright)). And he could not point to research that has resolved the questions the 2009 NAS Report identified as requiring more research before the basis for bitemark identification could be scientifically established because there is no research answering those questions in a way that supports bitemark identification. (*See* PFOF ¶ 143; *see also* Hearing Tr. at 897:17-898:7 (Wright)). In the end, the best Dr. Wright could do was to point to what are, in his view, limitations on the relevance of Dr. Bush's research and, more generally, opine that the 2009 NAS Report's questions cannot be researched in a scientifically rigorous fashion because, in essence, violent bitemarks inflicted during crimes are not reproducible in controlled conditions. (PFOF

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<sup>10</sup> *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.”) (emphasis added).

¶ 143; Hearing Tr. at 569:17-570:19, 585:10-587:9, 592:15-593:6, 614:4-615:8, 985:18-23 (Wright)).

So, on the one hand, the defense bitemark identification expert testified that, after years of research and eleven peer-review scientific articles exploring the questions the NAS Report identified as requiring further research before the scientific foundation for bitemark identification could be established, her conclusion is that there is no reliable scientific basis for bitemark identification. And, on the other hand, the State's bitemark identification expert testified that questions identified in the NAS Report not only have not been answered, but cannot be explored scientifically. While the defense submits that the defense bitemark identification expert's testimony is far more credible and better grounded in science, it almost does not matter whose view is superior because even the State's bitemark identification expert's testimony supports a finding that the multiple questions raised in the 2009 NAS Report about the scientific basis for bitemark identification neither have been nor can be answered in the affirmative.

Further, Dr. Wright acknowledged that "bitemark analysis [can] go[] terribly wrong" when, as occurred here, bitemark inclusions are offered as proof of guilt. (DE-47 at 1 (Wright Letter); *see* PFOF ¶ 147). For example, he lamented to the ABFO Diplomates when writing to them in his capacity as the ABFO's president in 2010 that: "Those fateful cases have ruined lives, stolen precious days of freedom from those who have been imprisoned and led to wrongful convictions and incarcerations. No words or apologies can begin to make amends nor is there any excuse for what has happened in ruining the lives of those affected." (DE-47 at 1 (Wright Letter); *see* PFOF ¶ 146; Hearing Tr. at 904:5-23 (Wright)). More specifically, Dr. Wright agreed that several bitemark identifications upon which imprisonments or convictions were based have been proven wrong by later DNA testing, including the wrongful imprisonments or

convictions of Ray Krone, Anthony Otero, and Edmund Burke, each of whom was imprisoned or convicted based at least in part on bitemark identification testimony from a current or future ABFO Diplomat. (PFOF ¶¶ 150-51; Hearing Tr. at 907:3-914:20, 925:14-929:6 (Wright)).

Surely a reasonable juror, presented with the abundant new research and scientific authority debunking bitemark identification evidence, would give little or no weight to the States' trial experts' bitemark opinions – opinions that were a foundation of the State's case at trial in 1998.

2. **Dr. Wright gutted the State's trial bitemark identification experts' opinions (PFOF ¶¶ 146-64).**

The defense did not ask Dr. Bush to opine as to the reliability of the specific opinions that Drs. Marshall and Levine offered at Douglas Prade's trial because, among other things, the entire field is, in her view, suspect (or worse). (See PFOF ¶ 141; DE-14 at ¶ 11 (6/26/12 Bush Aff.)). But, even though the defense had to take a pass, there was a wealth of testimony at the hearing to the effect that the opinions Drs. Marshall and Levine's offered at trial are highly suspect and unreliable, all from *the State's* bitemark identification expert, Dr. Wright. Thus, even if the Court were to find that, as a general matter, there is an established scientific basis for bitemark identification – and there is not – Dr. Wright's testimony raises serious questions about the reliability of the specific bitemark opinions that Drs. Marshall and Levine offered in Douglas Prade's 1998 trial.

In Dr. Wright's opinion, "the reality isn't that bitemark analysis doesn't work. The problem is some who are doing the bitemark analysis; their failure to recognize the errors of their ways, the biases they unknowingly introduce, their failure to follow the prescribed bitemark analysis guidelines, a lack of peer review, a failure to understand the limitations of bitemark analysis, the failure to understand the biting dynamics involved in the biting and on and on."

(DE-47 at 2 (Wright Letter); *see* PFOF ¶ 148). And, indeed, judging Drs. Marshall and Levine's trial opinions against the standards Dr. Wright articulated at the hearing leaves Drs. Marshall and Levine's opinions, and with them the State's bitemark case against Douglas Prade, in tatters.

a. **Dr. Wright's analysis requires rejecting Dr. Marshall's opinion matching the bitemark to Douglas Prade's teeth (PFOF ¶¶ 153-59).**

Dr. Marshall's opinion definitively matching the bitemark to Mr. Prade's dentition suffers from many of the fatal flaws in bitemark analysis identified by Dr. Wright. First, Dr. Marshall's definitive, unqualified opinion is utterly at odds with the ABFO Bitemark Methodology Guidelines sponsored by Dr. Wright. While Dr. Marshall, who was not an ABFO Diplomate, opined conclusively that Mr. Prade was the biter, the ABFO Guidelines state: "Terms assuring unconditional identification of a perpetrator, with or without doubt, are not sanctioned as a final conclusion." (PFOF ¶ 153; DE-51 at 116 (ABFO Diplomates Reference Manual); Hearing Tr. at 916:10-13 (Wright)). Indeed, in Dr. Wright's extensive experience, he has never – not even once – conclusively opined that a particular suspect was "the biter." (PFOF ¶ 153; Hearing Tr. at 901:24-903:8 (Wright)).

Second, Dr. Marshall's opinion conclusively matching the bitemark on Dr. Prade's skin to Mr. Prade's dentition was improper for the additional reason that the population of potential biters here was "open," not "closed,"<sup>11</sup> which, according to Dr. Wright, means that bitemark

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<sup>11</sup> In this case, there was an open population of potential biters because unlike in, for example, certain child abuse cases, there was not a defined and limited set of individuals who had access to Dr. Prade. *See Coronado v. State*, No. 05-11-00605-CR, 2012 WL 5506903, \*5 (Tex. App. Nov. 14, 2012) (noting the "closed population of suspects exposed to the child at the time the injuries were inflicted," which consisted of "the three individuals who had access to the victim during the time the injuries were inflicted," specifically the child's father, mother, and grandfather); *State v. Williams*, 865 S.W.2d 794, 799 (Mo. Ct. App. 1993) (noting the "closed population" consisting of the individuals "who had exposure" to the three-year-old child abuse victim); *see also* PFOF ¶ 156; DE-57 at 31 (1/12/11 Wright Presentation) (discussing a "closed population of suspected biters (n=2 or 3)").

identification should not be used at all. According to Dr. Wright: “In an open population of suspected biters, bitemark analysis opinions should not be rendered.” (PFOF ¶ 154; DE-57 at 71(1/12/11 Wright Presentation)).<sup>12</sup> Rather, Dr. Wright believes that “the biter” can be identified, if at all, only within small, closed populations and, even then, only when each of the suspected biters “present with significantly different dentitions.” (PFOF ¶ 155; DE-57 at 31 (1/12/11 Wright Presentation)).<sup>13</sup>

Third, Dr. Wright counsels that “[b]itemarks in skin lacking *individual* characteristics of the biter’s teeth should not be used in bitemark analysis” (PFOF ¶ 158; DE-57 at 30 (1/12/11 Wright Presentation) (emphasis in original)), yet Dr. Marshall rendered his opinion based on just such undifferentiated characteristics. As Dr. Levine testified: “There are general matching characteristics. The problem that I find with this case is that the injury was caused through two fabrics; the doctor coat and the blouse, and so while you have arrangements and teeth, the individualization of some of the characteristics I personally am not able to interpret them if

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<sup>12</sup> See also PFOF ¶¶ 154-55; DE-57 at 68 (1/12/11 Wright Presentation) (“Identification of the biter should be restricted to only those cases that meet the criteria as previously noted – bitemarks with distinct individual and class characteristics, small/closed population of suspected biters, each of whom has distinctly different dentitions”); DE-57 at 29 (1/12/11 Wright Presentation) (“In an open population of suspected biters, little scientific evidence exists to say with any degree of certainty that the skin will record details of the biter’s teeth in such a way that a single suspected biter could reliably be identified.”); DE-57 at 80 (1/12/11 Wright Presentation) (“Working with an open population and less than ideal bitemark evidence will lead to an undeterminable error rate”).

<sup>13</sup> See also PFOF ¶ 155; DE-57 at 30 (1/12/11 Wright Presentation) (“A closed population of suspected biters with similar dentitions could not be discriminately separated in analysis with a bitemark in skin, even with a bitemark deemed to be of high forensic evidentiary value”); DE-57 at 67 (1/12/11 Wright Presentation) (“If the bitemark in skin possesses both distinct individual and class characteristics (high quality bitemark) AND if the population of suspected biters is small (say n=2 or 3) AND if each suspected biter has a dentition that is visibly and notably different for [*sic*] each other, it would be possible to establish biter identity.”); DE-57 at 81 (1/12/11 Wright Presentation) (“False positive or false negative errors should be near zero with high quality bitemarks and closed population of biters who have different dentitions”).

they're there.” (PFOF ¶ 158; Trial Tr. at 1227:12-25 (Levine)). Thus, according to Dr. Wright, bitemark analysis should not have been conducted at all here given the lack of individual characteristics of the biter’s teeth in the poor quality bitemark image. The Court, too, recognized a problem with the poor quality and lack of clarity in the autopsy photos. (Testing Order at 11).

In light of these fatal flaws – flaws identified by *the State’s* new bitemark identification expert – a reasonable juror now would reject Dr. Marshall’s opinion matching the bitemark to Douglas Prade’s teeth.

**b. Dr. Wright’s testimony transforms Dr. Levine into a defense witness and casts doubt on Dr. Levine’s credibility (PFOF ¶¶ 160-63).**

Dr. Levine gave a weak and equivocal opinion, refusing to state that Mr. Prade was “the biter” – agreeing only that the bitemark was “consistent with” Dr. Prade’s dentition while also stating that he was “hesitant to say reasonable scientific certainty.” (PFOF ¶ 160; Trial Tr. at 1228:10-17 (Levine)). According to Dr. Wright, under current standards: “If the best I could do is consistent with, I would say it’s inconclusive. . . .” (PFOF ¶ 161; Hearing Tr. at 922:17-19 (Wright)). Other than an opinion that a suspect is excluded as “the biter,” an “inconclusive” opinion provides the weakest possible connection between the suspect and the bitemark based on the five opinion options set forth in the current ABFO standards. (*See* PFOF ¶ 161; DE-51 at 116 (ABFO Diplomates Reference Manual)).

Dr. Wright’s interpretation of Dr. Levine’s opinion confirms what this Court already implicitly observed: Dr. Levine’s testimony did not buttress Dr. Marshall’s “definitive biter” opinion and, to the contrary, it contradicted and undermined it. (*See* Testing Order at 10-12). Indeed, Dr. Wright’s testimony effectively transforms Dr. Levine into a defense witness and, since Dr. Levine was proffered by the State, would give a reasonable juror a compelling basis for rejecting Dr. Marshall’s opinion.

To the extent a juror might find Dr. Levine's opinion relevant to guilt or innocence (and, as clarified by Dr. Wright, it does nothing to suggest guilt), there would be another, perhaps even more compelling, reason to disregard it – the case of *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005) (copy at DE-52). *Burke* arose from Dr. Levine's erroneous identification of a defendant as the biting perpetrator in a criminal case, which resulted in the defendant's wrongful imprisonment, subsequent DNA exoneration, and then a civil damages action against Dr. Levine. Dr. Wright admitted that Dr. Levine's flatly wrong bitemark identification opinion in *Burke* is an illustration of "the horrors that have occurred involving bitemark analysis gone terribly wrong." (Hearing Tr. at 929:3-6 (Wright); see PFOF ¶¶ 146, 150-52). With this dark shadow cast on Dr. Levine's credibility, a reasonable juror would view his opinions with skepticism.

For all of these reasons, a reasonable juror weighing all of the admissible evidence would reject any suggestion from Dr. Marshall or Dr. Levine that Mr. Prade made the bitemark.

**C. The Evidence Concerning The Reliability Of Eyewitness Testimony Is Additional Support For Granting The Petition And Motion (PFOF ¶¶ 165-83).**

No third party witness saw the murder. The State called two witnesses – Robin Husk and Howard Brooks – who purported to place Mr. Prade near the scene at around the time of the crime. (PFOF ¶ 171; Testing Order at 12). Even before the evidentiary hearing, this Court found that, in the presence of DNA evidence excluding Douglas Prade, "a reasonable juror could now conclude [that Mr. Husk and Mr. Brooks] were mistaken." (PFOF ¶ 183; Testing Order at 12). The expert opinion evidence offered by the defense at the evidentiary hearing provides compelling additional support for the Court's earlier finding.<sup>14</sup>

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<sup>14</sup> Although there have been recent advances in scientific research in this field, the defense does not contend that this evidence qualifies as "new" evidence that would, by itself, warrant a new trial under Rule 33. Rather, the defense offered Dr. Goodsell's testimony for the Court to consider "in conjunction with [the] new evidence," *State v. Gillispie*, 2d Dist. No. 22877,

By way of background, long before the era of exculpatory DNA evidence, the United States Supreme Court described “the annals of criminal law” as “rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967). More recently, in *State v. Henderson*, 208 N.J. 208, 218, 27 A.3d 872, 878 (2011), the New Jersey Supreme Court reviewed the vast body of scientific literature concerning eyewitness memory and identification and concluded: “From social science research to the review of actual police lineups, from laboratory experiments to DNA exonerations, the record proves that the possibility of mistaken identification is real.” *Id.*; see also *Williams v. Illinois*, 567 U.S. \_\_\_, \_\_\_, 132 S. Ct. 2221, 2228 (2012) (noting that eyewitness identification is “less reliable” than DNA evidence) (citing *Perry v. New Hampshire*, 565 U.S. \_\_\_, \_\_\_, 132 S. Ct. 716, 738 (2012)). “Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification.” *Perry*, 565 U.S. at \_\_\_, 132 S. Ct. at 738-39 (citing Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* at 9, 48, 279 (Harvard Univ. Press 2011) (hereafter “Garrett, *Convicting the Innocent*”) (other citations omitted)). And significantly, “[t]hirty-six percent of the defendants convicted were misidentified by more than one eyewitness.” Garrett, *Convicting the Innocent* at 50 (emphasis added).<sup>15</sup>

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(continued...)

2009-Ohio-3640, ¶ 154, because “the newly discovered evidence, considered cumulatively, may be of even greater significance to a jury when considered in light of studies regarding eyewitness identification testimony. . . .” *State v. Gillispie*, 2d Dist. No. 24456, 2012-Ohio-1656, at ¶ 58.

<sup>15</sup> Additional case authority and supporting eyewitness research is set forth at pages 33 to 35 of Defendant’s Petition for Postconviction Relief (And Incorporated Memorandum In Support) Or, In The Alternative, Motion For A New Trial (filed June 29, 2012), as well as at pages 22 to 37 of the *Amicus Curiae* Brief Of The Innocence Network In Support of Defendant Douglas Prade (filed July 16, 2012).

The defense called Dr. Charles Goodsell, an expert in the area of eyewitness memory and identification, who described how memory works, why mistaken identifications occur, and the factors that could have adversely affected the accuracy of the two eyewitness identifications of Mr. Prade in this case. (See PFOF ¶ 165; Hearing Tr. at 617:12-648:13 (Goodsell)). Based on his review of trial testimony in this case, Dr. Goodsell determined that there were a number of factors that could have had an adverse impact on the accuracy of the eyewitness identifications of Mr. Prade by Mr. Husk and Mr. Brooks. (See PFOF ¶ 180; Hearing Tr. at 630:18-631:17, 640:22-647:18 (Goodsell); DE-15 at ¶¶ 14-26 (6/28/12 Goodsell Aff.)). As for Mr. Husk, there is nothing to suggest that he was paying close attention during his casual encounter with the man at the dealership. (See PFOF ¶ 180; Hearing Tr. at 644:24-645:5 (Goodsell); DE-15 at ¶ 23 (6/28/12 Goodsell Aff.)). In the interim nine-month period between the crime and Mr. Husk identifying Mr. Prade, because of the high-profile nature of this case, Mr. Prade's image was frequently seen on television and in newspapers. (See PFOF ¶ 180; Hearing Tr. at 645:17-25 (Goodsell); DE-15 at ¶¶ 5-20 (6/28/12 Goodsell Aff.)). In Dr. Goodsell's assessment, these circumstances could have altered Mr. Husk's memory of the man he saw. (See PFOF ¶ 180; Hearing Tr. at 645:17-25 (Goodsell)).

As for Mr. Brooks, Dr. Goodsell noted that he had very little time to observe the man because, as Mr. Brooks indicated, the car was "peeling off." (See PFOF ¶ 181; Hearing Tr. at 641:5-13 (Goodsell); DE-15 at ¶ 24 (6/28/12 Goodsell Aff.); Trial Tr. at 1424:14-25, 1425:24-25, 1426:4-6 (Brooks)). Mr. Brooks even admitted that he "didn't pay it no attention." (Trial Tr. at 1424:23-24 (Brooks); see PFOF ¶ 181). Dr. Goodsell explained that, having observed the man's mustache and Russian-type hat and the big chest of the passenger, Mr. Brooks would not have had much time to attend to other details. (See PFOF ¶ 181; Hearing Tr. at 641:21-642:6

(Goodsell); DE-15 at ¶ 24 (6/28/12 Goodsell Aff.); Trial Tr. at 1434:20-24, 1435:11-15, 1436:2-16, 1442:3-5 (Brooks)). Moreover, there likely was a pane of glass between Mr. Brooks and the driver of the car that would have impeded Mr. Brooks' observation. (See PFOF ¶ 181; Hearing Tr. at 642:7-20 (Goodsell); Trial Tr. at 1424:21-23, 1424:21-23, 1425:15-18, 1440:20-25 (Brooks)). Finally, Mr. Brooks was unable to provide an identification of Mr. Prade during his first couple of interviews with the police, and he did not identify Mr. Prade until his third interview – almost three months after the murder. (See PFOF ¶ 181; Hearing Tr. at 642:21-643:14 (Goodsell); DE-15 at ¶ 26 (6/28/12 Goodsell Aff.)). Thus, in Dr. Goodsell's opinion, there were a number of factors that could have adversely affected the accuracy of Mr. Brooks' memory of the driver. (See *id.*)

Finally, both Mr. Husk and Mr. Brooks testified that they were confident that Mr. Prade was the person they saw on the morning of the murder. (See PFOF ¶ 182; Trial Tr. at 1271:15-20 (Husk); Trial Tr. at 1433:9-12 (Brooks)). Dr. Goodsell explained that the level of confidence bears little relationship to accuracy. (See PFOF ¶ 182; Hearing Tr. at 643:15-644:5, 647:6-18 (Goodsell); DE-15 at ¶ 19 (6/28/12 Goodsell Aff.)). A person's confidence level can be unduly influenced by factors such as comments from the police or repeated viewings of pictures of the suspect in the media. (See *id.*) Yet, research has shown that a witness's confidence level can influence a juror. (See PFOF ¶ 182; Hearing Tr. at 647:19-24 (Goodsell); DE-15 at ¶ 19 (6/28/12 Goodsell Aff.)).

Dr. Goodsell's testimony casts substantial doubt on the accuracy of the witness identifications of Mr. Prade near the crime scene. Considering Dr. Goodsell's testimony in conjunction with the new DNA test results and discredited bitemark evidence, a reasonable juror would be highly likely to could conclude that Mr. Husk and Mr. Brooks were mistaken.

**D. Other Evidence Relating To The Petition And Motion (PFOF ¶¶ 184-96).**

“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.” (PFOF ¶ 184; Testing Order at 10). Further, “[n]o weapon or fingerprints were found.” (*Id.* (citing *State v. Prade*, 126 Ohio St. 3d 27, 27, 30, 2010-Ohio-1842, ¶¶ 3, 17, 930 N.E.2d 287, 288, 289)).

One of the defense witnesses, Mary Lynch, testified that she saw Doug Prade exercising in the complex’s work out facility “a little before 9:00 o’clock” on the morning of the murder, which occurred at 9:10 a.m. (PFOF ¶ 185; Trial Tr. at 1527:2-4, 18-22 (Lynch)). Notably, and unlike the State’s eyewitnesses, Ms. Lynch first spoke with police investigators two days later. (*Id.*).

The handwritten debt tally offered by the State as “strongly indicative of premeditation” in fact shows no such thing. It is undisputed that, on the reverse side of a bank deposit slip dated October 8, 1997, Douglas Prade scribbled a tally summing certain of his debts, as well as a second tally subtracting that sum from \$75,000, the approximate amount of life insurance proceeds that Mr. Prade received upon Dr. Prade’s death. (PFOF ¶ 186; Trial Tr. at 1449:20-1453:4 (Calvaruso); Trial Tr. at 2069:9-11, 2117:1-5 (Prade); State Trial Ex. 192 (deposit slip), State Trial Ex. 193 (copy of front of deposit slip), State Trial Ex. 194 (copy of back of deposit slip with handwriting). Although the State contends that the tally was made before the murder and, thus, documented Douglas Prade’s plan to kill his ex-wife for the life insurance proceeds, Douglas Prade testified at trial that he made the tally after Dr. Prade’s death and after receiving notice from the insurance company. (PFOF ¶ 186; Trial Tr. at 2069:9-11, 2117:1-5 (Prade)).

The State’s position is based on (1) the October 1997 date printed on the front side deposited slip itself; (2) the listed debt amounts, which the State says match the amounts Mr.

Prade owed in October 1997; and (3) the fact that Mr. Prade ultimately used the insurance proceeds to pay other obligations. None of these is convincing.

First, while it is true that the deposit slip is dated before the murder, it was, after all, a receipt, which by design is for recordkeeping purposes, and there is no support for the notion that the debt tally itself was made before the murder. The scribbled debt amounts do not allow a determination of precisely when the list was made – both because the amounts are rough and rounded estimates and also because at least several of the balances applied to revolving accounts on which Mr. Prade continued to make purchases and payments. (PFOF ¶¶ 187-88; Trial Tr. at 1451:20-1453:4, 1460:20-25 (Calvaruso); Trial Tr. at 2069:9-11, 2118:8-19 (Prade); State Trial Ex. 194 (handwritten tally); State Trial Ex. 195 (Douglas Prade's checkbook ledger)). If anything, moreover, the list in its totality leads to the conclusion that it was made after – and not before – Dr. Prade's murder. Specifically, after accounting for all known balances, purchases, and payments, the amounts roughed out on Mr. Prade's tally more closely approximate the debt balances that would be expected in the post-murder period rather than the October 1997 time frame. (PFOF ¶ 190-194; State Trial Ex. 194 (handwritten tally); State Trial Ex. 195 (Douglas Prade's checkbook ledger); State Trial Ex. 202 (Kay's ledger)).

Second, there is nothing odd about Douglas Prade considering paying off certain debts with the life insurance proceeds, but then actually using those proceeds differently. It simply means he changed his mind, which obviously had to have occurred no matter when the handwritten tally was made. Thus, the fact that he used the life insurance proceeds (to the extent he used them) differently than the way he contemplated he might when he made the rough, handwritten tally is of no consequence. (PFOF ¶ 195; Trial Tr. at 2111:6-21, 2117:22-2118:7

(Prade); State Trial Ex. 97 (figures taken from Northwestern checkbook); State Trial Ex. 196 (Northwestern checkbook)).

Other evidence casts further doubt on any notion that Douglas Prade had money problems so severe that he murdered his ex-wife for the insurance money. Douglas Prade was a Captain on the Akron Police Department and, in 1997, had an annual salary of \$61,000 – slightly over \$84,000 in today’s dollars – and about \$170,000 in net assets – roughly \$235,000 in today’s dollars.<sup>16</sup> (PFOF ¶ 196; Trial Tr. at 2081:8-17; 2078:20-2081:7 (Prade)). Douglas Prade used more than half of the life insurance proceeds (*i.e.*, about \$39,000) to satisfy Dr. Prade’s delinquent federal tax obligations (for which Dr. Prade apparently would been responsible had she lived) and not his personal debts. (Trial Tr. at 1934:24-1937:10; 1938:15-1945:2 (Prade)). At the time of his arrest months after receiving the policy’s proceeds, Douglas Prade still had about \$18,000 – nearly a quarter of the total. (PFOF ¶ 196; Trial Tr. at 1456:8-11 (Calvaruso); 1945:7-9 (Prade)).

In short, and as this Court previously found, the State’s remaining evidence is “entirely circumstantial” and “insufficient to support inferences necessary for a murder conviction.” (Testing Order at 13).

#### **IV. RELIEF REQUESTED (PFOF ¶¶ 200-02)**

A court granting a postconviction relief petition “shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines

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<sup>16</sup> The figures for “today’s dollars” are based on the information for a Midwestern urban area with a population between 50,000 and 1,500,000 in “Table 3. Consumer Price Index for All Urban Consumers (CPI-U): Selected areas, all items index” of the U.S. Department of Labor’s Bureau of Labor Statistics’ “New Release – Consumer Price Index – December 2011” (available at [http://www.bls.gov/news.release/archives/cpi\\_01192012.pdf](http://www.bls.gov/news.release/archives/cpi_01192012.pdf)). (PFOF ¶ 196).

appropriate.” R.C. 2953.21(G). Accordingly, the postconviction relief statute permits the Court to either release/exonerate the petitioner or order that there be a new trial.

Here, for the reasons described at length above, there is new evidence that (1) clearly and convincingly establishes Douglas Prade’s innocence; and (2) had it been considered in the context of all admissible evidence at trial, clearly and convincingly would have prevented a reasonable jury from convicting Douglas Prade of both Dr. Prade’s aggravated murder and the related firearms specification. For those reasons, the petition for postconviction relief is timely, and the Court should grant the postconviction relief petition and vacate and set aside the aggravated murder conviction and related firearms specification.

In terms of the ultimate relief that should be granted, the defense submits that the appropriate relief is exoneration and that there is no need for another trial given –

(1) The defense DNA experts’ testimony that there is a high likelihood that some of the male DNA found on the Lab Coat Bite Mark Section – none of which was Douglas Prade’s – was from Dr. Prade’s killer, which means the Douglas Prade is innocent;

(2) The mountain of evidence that favors accepting the defense DNA experts’ opinion as to the likely source of the DNA rather than the State’s DNA experts’ opinion, including the complete absence of any direct evidence supporting the State’s speculative contamination theories, which run the gamut from the merely implausible to the virtually impossible;

(3) The State’s DNA experts’ inability to rule out the possibility that the male DNA found there was the killer’s, as well as their failure to explain how both (a) their opinion that contamination is most likely source of the male DNA on the Lab Coat Bite Mark Section and (b) there having been a biting killer could coexist;

(4) The fact that, because the State's DNA experts' opinion was so limited, hedged, and qualified, there would be reasonable doubt even if the jury were to credit the State's DNA experts' opinion as to the most likely source of the male DNA;

(5) The fact that, whether the Court accepts Dr. Bush's or Dr. Wright's approach, there is no reliable scientific basis such as that called for in the 2009 NAS Report for the entire field of bitemark matching identification, which was the foundation of the State's case in the 1998 trial;

(6) The flaws and infirmities in the State's trial bitemark experts' opinions that Dr. Wright – *the State's* bitemark identification expert at the hearing – identified, which mean that (a) in this case, no responsible bitemark identification expert (and certainly no ABFO Diplomate) could, as Dr. Marshall did in 1998, opine that Douglas Prade bit Dr. Prade during the murder; and (b) the State's other bitemark expert at trial, Dr. Levine, gave an opinion that, under today's ABFO guidelines, effectively would convert him into a defense expert; and

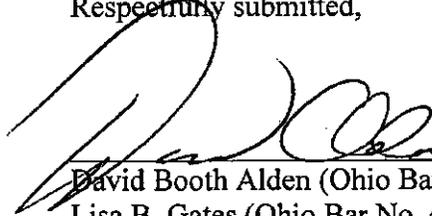
(7) The concerns about the reliability of eyewitness testimony that Dr. Goodsell identified at the hearing, coupled with the facts that (a) one of the two supposed eyewitnesses, Herbert Brooks, reportedly has passed away and, thus, the jury would not be able to assess his credibility in person and, instead, would have to rely on a written transcript or the video; and (b) there was an alibi witness.

Separately, the defense submits that, in addition to finding that Douglas Prade should be exonerated in connection with the petition for postconviction relief, the Court should, as an alternative form of relief in the event that the exoneration is somehow modified in the event of an appeal, (1) order a new trial as an alternative form of relief on the petition for postconviction

relief and (2) grant the Ohio Rule of Criminal Procedure 33 motion for a new trial. As to the latter, and again for the reasons described at length above, the Court should find that the new trial motion is timely and that defendant has made the showing required to grant the new trial motion. Specifically, defendant has (1) provided new, material, and non-cumulative evidence (2) that, with reasonable diligence, could not have been discovered at the time of trial and (3) discloses a strong probability of a different result if offered in a new trial.

DATED: December 3, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

On this 3d day of December, 2012, copies of the foregoing, along with the attachment,  
were sent via e-mail to:

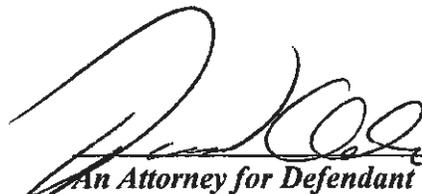
Mary Ann Kovach  
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A copy of the foregoing, along with the attachment, also was sent via United States mail,  
postage prepaid, to:

Michael DeWine  
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An Attorney for Defendant  
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I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.

 Deputy Clerk

# EXHIBIT

I

DANIEL M. HARRIGAN

2013 JAN 29 AM 7:56

SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

|               |   |                             |
|---------------|---|-----------------------------|
| STATE OF OHIO | ) | CASE NO.: CR 1998-02-0463   |
|               | ) |                             |
| Plaintiff,    | ) | JUDGE JUDY HUNTER           |
|               | ) |                             |
| v.            | ) | <u>ORDER ON DEFENDANT'S</u> |
|               | ) | <u>PETITION FOR POST-</u>   |
| DOUGLAS PRADE | ) | <u>CONVICTION RELIEF</u>    |
|               | ) | <u>OR MOTION FOR NEW</u>    |
| Defendant     | ) | <u>TRIAL</u>                |
|               | ) |                             |

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

FACTS AND PROCEDURAL HISTORY

On November 26, 1997, Dr. Margo Prade was fatally shot in the front seat of her van parked outside of her medical office in Akron, Ohio. She died from multiple gunshot wounds to her chest. In February of 1998, her ex-husband, Akron Police Captain Douglas Prade, was indicted for aggravated murder, a firearms specification, wiretapping, and possession of criminal tools. Prade raised an alibi defense at trial. On September 24, 1998, then sitting Judge Mary

Spicer sentenced Prade to life in prison after he was found guilty by jury of aggravated murder, among the other counts. Prade is currently incarcerated and has consistently maintained his innocence. On August 23, 2000, Defendant's conviction was affirmed on appeal. *State v. Prade* (2000), 139 Ohio App.3d 676. Later that year, the Ohio Supreme Court declined a discretionary review of his conviction. *State v. Prade* (2000), 90 Ohio St.3d 1490.

In 2004, Defendant filed his first Application for Post-conviction DNA Testing pursuant to a newly enacted Ohio DNA testing statute, R.C. 2953.71. On May 2, 2005, Judge Spicer denied his Motion, in part, finding that DNA testing had been done before trial that had excluded him as the source of the DNA samples taken from the victim. As such, the Court determined that Prade did not qualify for DNA testing because a prior definitive DNA test had previously been conducted. The Ninth District Court of Appeals dismissed his appeal of this denial as untimely. *State v. Prade* (June 15, 2005), 9<sup>th</sup> 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*, 9<sup>th</sup> Dist. C.A. No. 24296, 2009 Ohio 704. (*Prade*, 9<sup>th</sup> 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.<sup>1</sup> 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."

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<sup>1</sup> 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*, 8<sup>th</sup> 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.<sup>2</sup> *King*, at P16-17.

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<sup>2</sup> 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.<sup>3</sup>

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,

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<sup>3</sup> 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 Diplomat 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* (4<sup>th</sup> 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.<sup>4</sup>

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

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<sup>4</sup> 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*, 9<sup>th</sup> 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*, 9<sup>th</sup> 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 10<sup>th</sup> 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.<sup>5</sup>

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<sup>5</sup> “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*, 10<sup>th</sup> Dist. No. 05AP-229, 2005 Ohio 6374, P13; *State v. Georgakopoulos*, 9<sup>th</sup> 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

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to create a strong probability that a jury in a new trial would find reasonable doubt.” *State v. Gillispie*, 2<sup>nd</sup> 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

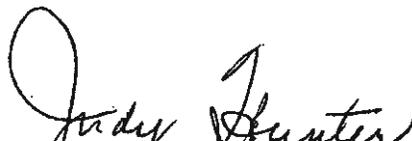
given to the evidence presented at trial. Jurors would be prompted to reconsider, as set forth above, the credibility of the key trial witnesses and the forcefulness of their testimony in the underlying trial, along with the other circumstantial evidence.

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.

  
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JUDGE JUDY HUNTER

I certify this to be a true copy of the original  
Sandra Kurt, Clerk of Courts.

  
\_\_\_\_\_  
Deputy Clerk

COPY.

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