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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

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STATE OF OHIO	**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*, 8th 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*, 9th Dist. No. 11CA010007, 2012-Ohio-4096, ¶7

(quoting *Neiswinter v. Nationwide Mut. Fire Ins. Co.*, 9th 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 (5th 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*, 2nd 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 ¼ by ¼ 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.

Respectfully submitted,

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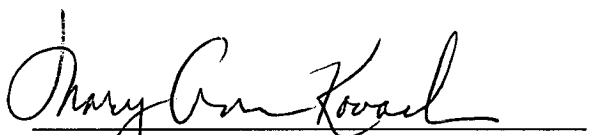

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PROOF OF SERVICE

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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