

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,)
)
Plaintiff,)
) Case No. CR 1998-02-0463
v.)
) Judge Judy L. Hunter
DOUGLAS PRADE,)
)
Defendant.)

FILED UNDER SEAL

**DEFENDANT DOUGLAS PRADE'S
PETITION FOR POSTCONVICTION RELIEF (AND
INCORPORATED MEMORANDUM IN SUPPORT) OR,
IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL**

David B. Alden (Ohio Bar No. 6,143)
Lisa B. Gates (Ohio Bar No. 40,392)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939

Mark Godsey (Ohio Bar No. 74,484)
Carrie E. Wood (Ohio Bar No. 87,091)
OHIO INNOCENCE PROJECT
Univ. of Cincinnati College of Law
P.O. Box 210040
Cincinnati, Ohio 45221-0040
Telephone: (513) 556-0107

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Attorneys for Defendant Douglas Prade

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- 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)
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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.¹ His conviction later was affirmed. *State v. Prade*, 139 Ohio App. 3d 676, 745 N.E.2d 475 (9th Dist. 2000),

¹ 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.²

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

² 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 4th 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 3rd 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 10-11.³ "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 10-11.⁴ 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.⁵ And, again, this disputed bite mark evidence was the **only** physical evidence that purportedly tied Mr. Prade to the crime scene.

³ 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").

⁴ 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").

⁵ 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 12.⁶

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, ¶ 4.⁷ 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

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

⁷ 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.⁸ (*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

⁸ 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).

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.⁹ It appears that this cutting has been maintained separate and apart from the remainder of the lab coat since 1998.¹⁰

⁹ (*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

(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)).

¹⁰ 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).¹¹

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 1998.¹² 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

¹¹ 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).

¹² 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).¹³

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."¹⁴ *State v. Eppinger*, 91 Ohio

¹³ 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).

¹⁴ 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

(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 11.¹⁵

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."

¹⁵ 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.¹⁶ 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?

¹⁶ 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.¹⁷ 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,

¹⁷ 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.¹⁸ 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.

¹⁸ (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.¹⁹ 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

¹⁹ 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.²⁰ 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, ¶ 4.²¹ 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.*²² 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

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

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

²² 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.²³ *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

²³ 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.²⁴ "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

²⁴ 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."²⁵ "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,

²⁵ 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.

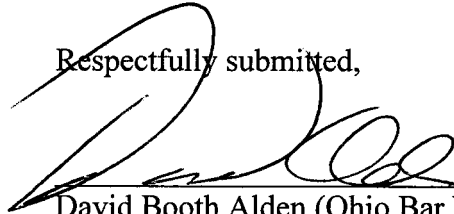
In the event that the Court finds that Mr. Prade has failed to make the showing required for postconviction relief under R.C. 2953.21(A) (and it should not make such a finding), the defense submits that, for the reasons described previously in Part III of this memorandum, the new DNA test results satisfy 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,



David Booth Alden (Ohio Bar No. 6,143)

Lisa B. Gates (Ohio Bar No. 40,392)

JONES DAY

North Point

901 Lakeside Avenue

Cleveland, Ohio 44114

Telephone: (216) 586-3939

Mark Godsey (Ohio Bar No. 74,484)

Carrie E. Wood (Ohio Bar No. 87,091)

OHIO INNOCENCE PROJECT

University of Cincinnati College of Law

P.O. Box 210040

Cincinnati, Ohio 45221-0040

Telephone: (513) 556-0107

Attorneys for Defendant

Douglas Prade

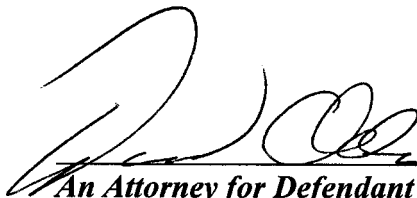
CERTIFICATE OF SERVICE

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
16th Floor
Columbus, OH 4321


An Attorney for Defendant
Douglas Prade