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 REPLY MEMORANDUM IN SUPPORT OF PETITION FOR POSTCONVICTION RELIEF AND MOTION FOR A NEW TRIAL

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Dated: July 30, 2012

I. INTRODUCTION

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

II. ARGUMENT

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

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

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

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

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

B. The Petition And Motion Are Timely.

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

E. <u>The New DNA Exclusions Are Meaningful And Establish Actual Innocence.</u>

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

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

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

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

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

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

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

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

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

[8] Obviously, the DNA found recently could not have been Assistant Prosecutor McCarty's because it was male DNA.

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

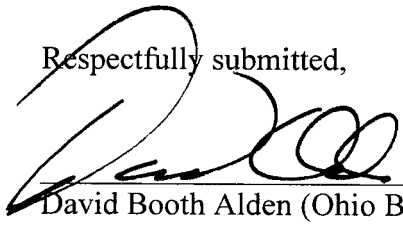
Moreover, and as noted in Mr. Prade's opening memorandum, the State's contamination theory implicitly seeks to impose a burden on Mr. Prade that he need not meet in order to prevail in these proceedings. To carry his burden on the petition for postconviction relief, Mr. Prade need not absolutely foreclose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

III. CONCLUSION

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

DATED: July 30, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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

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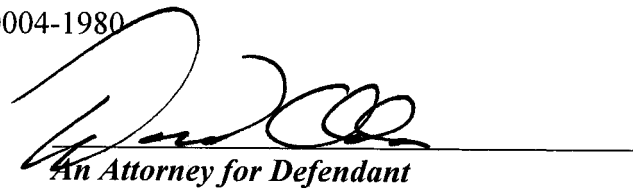

An Attorney for Defendant Douglas Prade

Exhibit T

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2012 JUL -9 PM 1:44

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO	)	**CASE NO: CR 1994 06 1409 C**
Plaintiff,	)	**JUDGE ROWLANDS**
v.	)	
	)	
DEWEY JONES, III,	)	**JUDGMENT ENTRY**
	)	
Defendant	)	

This matter comes before the Court on Dewey Jones' motion for a new trial. Upon consideration, this motion is well taken and is granted.

The Defendant argues for a new trial on two grounds – new evidence which could not reasonably have been discovered and produced at trial under Crim.R. 33(A)(6), and prosecutorial misconduct under Crim.R. 33(A)(2). In granting DNA testing on April 29, 2010, Judge Cosgrove held that such testing was unavailable at the time of trial, and that the results of such testing could be "outcome determinative." Consistent with that ruling, those DNA test results are newly discovered evidence which could not have been discovered at trial.

The absence of both Mr. Jones' and Mr. Rusu's DNA on the newly tested evidence calls into question the State's entire theory of the case. The State pursued this case believing both Mr. Jones and Mr. Rusu were among those present and were actors in the events causing Mr. Rankin's death. DNA evidence has failed to identify either man as having been present in the house.

This failure also undermines the testimony of the State's witness, Willie Caton. Mr. Caton testified Mr. Jones confessed to him that Mr. Jones and Mr. Rusu went to Mr. Rankin's house to rob him and when things "got out of hand," Mr. Jones shot Mr. Rankin. Every piece of

COPY

conclusive DNA excludes Mr. Jones and Mr. Rusu from the evidence tested. The DNA does not support, and in some instances, works directly against, the testimony of Mr. Caton.

This shortcoming exacerbates the difficulties with Mr. Caton's testimony itself. As Defendant documents with some detail, Mr. Caton developed a long history of providing informant testimony for Akron police both before and after testifying in this trial. This body of testimony seems, at least superficially, to have resulted in some leniency or advocacy on Mr. Caton's behalf from the police department. This newly discovered evidence calls into question the credibility and reliability of Mr. Caton's testimony, and combined with the absence of any DNA supporting his testimony, requires this Court to grant the motion for a new trial.

In finding Mr. Caton's history relevant to his credibility, this Court offers no opinion on the actions of the State in the original trial, or its reliance on the testimony of Mr. Caton. The Court only finds this history, coupled with the DNA evidence, raises sufficient question to justify a new trial. Because there are grounds for a new trial based on newly discovered evidence, this Court does not reach the question of prosecutorial misconduct.

JUDGE MARY MARGARET ROWLANDS

cc: Assistant Attorney General Micah R. Ault
Attorney Carrie Wood

Exhibit U

JONES DAY

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July 2, 2011

VIA EMAIL AND REGULAR MAIL

Mary Ann Kovach, Esq.
Chief Counsel
Summit County Prosecutor's Office
53 University Avenue
Akron, Ohio 44308

Re: *State of Ohio v. Douglas Prade*
Case No. 1998-02-0463
Summit County Court of Common Pleas

Dear Mary Ann:

In connection with the ongoing postconviction proceedings in the above-referenced action, we propose the following Stipulation. I believe it is consistent with our discussions and agreements at the June 12, 2012, status conference. If you have any questions or proposed changes, please let me know as soon as possible. If you agree with the Stipulation, please sign a copy of this letter and return it to me via pdf and overnight mail.

STIPULATION

Counsel for the defense and the State hereby stipulate and agree as follows:

1. The following materials are admissible evidence in any brief, or at any evidentiary hearing; any objections to the admissibility of any of these materials are waived; and neither party will object to their admissibility on any ground:

a. Forensic Report of DNA Diagnostics Center ("DDC"), Report #1, dated January 31, 2012, DDC Case No. F10-21816;

b. Documents designated DDC Discovery Files 1-9, provided by email to counsel for the parties on March 9, 2012;

c. Supplemental Forensic Report of DDC, Report #2, dated March 9, 2012, DDC Case No. F10-21816, with all accompanying material including, without limitation, lab notes and data;

d. Laboratory Report of Bureau of Criminal Identification and Investigation (BCI&I), dated June 11, 2012, Agency Case No.: 97-038814;

e. BCI&I materials underlying the June 11, 2012, Laboratory Report including, without limitation, lab notes, data and Chain of Custody Report;

f. FBI Report dated July 23, 1998, FBI File No. 62D-CV-57547;

g. FBI Report dated July 24, 1998, FBI File No. 62D-CV-57547; and

h. Analytical Report of Serological Research Institute ("SERI"), dated September 9, 1998, SERI Case No. M'4720'98.

The foregoing does not limit the right of either party to challenge or contest the weight or meaning to be afforded to statements and conclusions in these materials.

2. Should the defense file its brief for statutory postconviction relief or, in the alternative, for a new trial under Ohio Rule of Criminal Procedure 33 on or before July 3, 2012, the State stipulates that (a) the new DNA testing results, including Items 1a-e above, are "newly discovered evidence" for purposes of Rule 33, (b) the defense may file a motion for new trial under Rule 33 without first obtaining a Court order finding that the defendant was unavoidably prevented from filing a motion for a new trial within the time provided under the rule, (c) any objections as to the timeliness of the motion for a new trial under Rule 33 are waived, and (d) the State will not object to the motion for a new trial as untimely under Rule 33. The State reserves and does not waive its right to contest a motion for a new trial on the merits.

3. Any page limitations and format matters for postconviction or Rule 33 motions, memoranda, and other papers are waived, and neither party will object to the other's brief(s) on these grounds.

Very truly yours,

Lisa Gates by permission

Lisa B. Gates

Agreed to this 2 day of July, 2012.

Mary Ann Kovach

Mary Ann Kovach, Esq.
Chief Counsel
Summit County Prosecutor's Office
53 University Avenue
Akron, Ohio 44308

cc: David B. Alden, Esq.
Mark Godsey, Esq
Carrie E. Wood, Esq.

Exhibit V

Laboratory Services

FORENSIC SCIENCE COMMUNICATIONS

October 1999 - Volume 1 - Number 3

Trace Evidence Recovery Guidelines
Scientific Working Group on Materials Analysis
(SWGMAT)
Evidence Committee

January 1998 Revision

1.0. Scope

This guide describes procedures and techniques for the documentation, detection, collection, and preservation of trace evidence from crime scenes, individuals, and items submitted to the laboratory for examination.

2.0. Significance and Use

Locard's Exchange Principle states that whenever two objects come into contact, a transfer of material will occur (1). Trace evidence that is transferred can be used to associate objects, individuals, or locations.

2.1. The integrity and significance of trace material as associative evidence relies on proper detection, collection, and preservation.

2.2. An understanding of the transfer and persistence of trace evidence will assist the examiner in interpreting the significance of the analytical results.

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3.0. Documentation

3.1. When a case is initiated, a file specific for that case must be created to contain the case documentation for the length of time required by the prevailing laws and nonconflicting agency policy.

3.2. Documentation of questioned and known trace evidence collection, whether done in a laboratory or at a scene, must include permanent notes about

a. date (and time, when appropriate) of the collection,

b. name of person or persons collecting the evidence,

c. a descriptive listing of item or items collected,

d. a unique identifier for each item collected such as an item number and case number, and

e. location of each item (documented by notes, sketches, measurements, photographs, or a combination of these).

3.3. The chain of custody for each item must be initiated upon collection and maintained until final disposition.

3.4. Recommended procedures for documenting and labeling physical evidence are outlined in ASTM Standard E 1459-92, Standard Guide for Physical Evidence Labeling and Related Documentation (9.2), and Standard E 1492-92, Standard Practice for Receiving, Documenting, Storing, and Retrieving Evidence in a Forensic Science Laboratory (3).

3.5. The principles of record initiation, maintenance, storage, and security are fundamentally the same for evidence collections within the laboratory and collections that may begin at a site remote from the laboratory.

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4.0. Contamination and Loss

4.1. When collecting or examining items, care must be taken to prevent contamination and loss of trace materials.

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- Search

- FBI Laboratory

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4.2. If a case involves disciplines other than trace evidence, the involved examiners should confer before any work is undertaken. Unless circumstances dictate otherwise, the trace evidence should be collected and preserved prior to other examinations.

4.3. General principles and practices to avoid evidence contamination and loss, applicable to both laboratory and nonlaboratory settings, include the following:

4.3.1. Contact between items and personnel before the appropriate trace evidence has been secured should be restricted.

4.3.2. Appropriate protective apparel, such as laboratory coats and disposable gloves, must be worn to prevent contamination from the clothing of the examiner. The apparel must be changed as necessary to avoid contamination or transfer between evidentiary items, locations, and personnel.

4.3.3. Items being collected for trace evidence examination must be handled as little as possible to minimize loss of the trace evidence and to limit exposure of the items to contaminants.

4.3.4. Collect, package, and seal items individually in appropriate packaging. Keep items in a secure, sealed package until the item is processed in a controlled environment.

4.3.5. Equipment and work surfaces used during collection and examination must be cleaned in an appropriate manner before processing begins and as often as necessary during processing to prevent contamination.

4.3.6. Adhesive lift materials (used for collection, storage, or both) must be maintained in a manner to avoid contamination. Caution should be used to prevent tape edges from contacting any uncleaned surfaces.

4.3.7. Evidence examination areas should have adequate lighting, easily cleaned surfaces, and a physical environment designed to restrict excessive air currents, static electricity, and general foot traffic.

4.3.8. The examination of questioned and known items for trace evidence must be conducted separately in different locations, at different times, or both, to prevent contamination. It is recommended that questioned items with the most probative value be examined first.

4.3.9. Any contact, condition, or situation that could cause contamination or otherwise compromise the trace evidence examination must be documented and communicated between the laboratory analyst or analysts and the submitter.

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5.0. Detection, Collection, and Preservation Techniques

5.1. When selecting detection, collection, and preservation methods and the processing sequence, consider the circumstances of the case, ambient conditions, the discriminatory power of the different techniques, and the need to preserve or collect other types of evidence.

5.2. Record the techniques used for detection, collection, and preservation of the evidentiary items and the location from which they are removed.

5.3. Methods used for detecting trace evidence include but are not limited to general visual searches; visual searches assisted by different types of illumination, such as oblique lighting and alternate light sources (UV, laser, high intensity); and visual searches assisted by magnification.

5.4. Trace evidence recovery or collection techniques used should be the most direct and least intrusive technique or techniques practical. Collection techniques include picking, lifting, scraping, vacuum sweeping, combing, and clipping.

5.4.1. *Picking.* Trace evidence may be separated from an item by using clean forceps or other implements. The collected samples should be immediately protected against loss or contamination.

5.4.2. *Lifting.* An adhesive-bearing substrate such as tape is repeatedly and firmly patted or rolled over the item causing loosely adhering trace evidence to stick to the tape. Do not overload the tape. The collected lifts are typically placed on a transparent backing (e.g., clear plastic sheeting, glass slides, and clear plastic or glass petri dishes). This protects against contamination and permits samples to be easily viewed and removed for further comparison.

5.4.3. *Scraping.* A clean spatula or similar tool is used to dislodge trace evidence from an item onto a collection surface such as clean paper. The collected debris is immediately packaged in a manner to avoid sample loss. This technique is most often conducted within the laboratory in a controlled environment that reduces the risk of contamination or loss of the trace evidence.

5.4.4. *Vacuum Sweeping.* A vacuum cleaner equipped with a filter trap is used to recover trace evidence from an item or area. The filter and its contents should be immediately packaged to avoid sample loss. The appropriate vacuum parts, filter, and trap must be changed and rigorously cleaned between each vacuuming to avoid contamination. Consider using this method subsequent to other collection techniques as it is indiscriminate and may result in the collection of a large amount of extraneous material.

5.4.5. *Combing.* A clean comb or brush is used to recover trace evidence from the hair of an individual. The combing device and collected debris from the hair should be packaged together.

5.4.6. *Clipping.* Trace evidence can be recovered from fingernails by nail clipping, scraping, or both. Fingernails may be clipped with clean scissors or clippers and packaged in clean paper. Fingernails may be scraped with a clean implement to collect debris from under the fingernails. Package the collected debris and the scraping device as one unit, typically in clean paper. Commonly, fingernails from the right and left hands are packaged separately. This does not preclude the collection of each or any nail separately from all others, such as a nail with obvious damage.

5.5. Appropriate preservation and packaging of trace evidence and items to be examined for trace evidence will vary. Appropriate packaging must prevent loss or contamination of the trace evidence.

5.5.1. All evidence packages must be properly sealed in a manner to prevent tampering and eliminate loss or contamination of the trace evidence through open edges.

5.5.2. Small or loose trace evidence must be secured in clean, unused primary containers such as paper packets or petri dishes. The primary container should then be appropriately secured in an envelope or paper bag.

5.5.3. Large items, such as whole garments, should preferably be sealed individually in clean, unused packaging.

5.5.4. Clothing and other items that are wet must be air dried as soon as possible, without exposure to heat or sunlight, in a secured area in a manner that will prevent loss or contamination of trace evidence. An arrangement to collect any trace evidence that may fall from the item during drying should be used.

5.5.5. Small or manageable items at a crime scene that bear visible, firmly attached trace evidence should be documented, packaged intact, and transported to the laboratory for examination.

5.5.6. Items at a crime scene that bear visible but easily lost trace evidence or items that are impractical to transport should be documented and the trace evidence collected by an appropriate technique.

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6.0. Site and Special Collection Considerations

6.1. Personnel responsible for the detection and collection of trace evidence should be aware of the applicable laws governing search warrants, searches, and seizures within their jurisdiction.

6.2. Personnel should be aware that various types of evidence will be present during the processing of a crime scene or the examination of items submitted to the laboratory. Some types of evidence other than trace evidence may be more significant to a particular case and therefore should be given higher priority.

6.3. Representative known samples of an item, sufficient to represent all variations that may be present within that item, should be collected for comparison with the questioned trace evidence. The areas from which these samples are collected must be documented.

6.4. Patterned marks or impressions may be encountered and may require additional documentation and collection procedures such as 1:1 scale photography. Enhancement techniques such as oblique lighting or powder dusting and preservation techniques such as adhesive lifting or casting should be considered.

6.5. The possibility of physically matching a fractured, broken, torn, or cut portion of an object to its source should always be considered. The entire questioned item and possible source item should be collected, protecting the edges from further deformation. When the possibility of a physical match exists, one should not overlook the necessity of maintaining all items separately to prevent contamination.

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7.0. Evidence Security

7.1. Trace evidence shall remain in secure, controlled-access areas, protected from loss, damage, or contamination. It must have a documented and continuous chain of custody from the time of evidence collection until the time the evidence is admitted into court or the case has been disposed and the evidence is no longer needed.

7.2. The security and integrity of evidence is the responsibility of all persons who may identify, collect, package, store, transport, or examine evidentiary items.

7.3. Procedures and techniques for the identification, storage, and retrieval of evidence in a forensic science laboratory are outlined in ASTM Standard Practice E 1492-92, Standard Practice for Receiving, Documenting, Storing, and Retrieving Evidence in a Forensic Science Laboratory.

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8.0. Training Requirements for Trace Evidence Collection Personnel

8.1. The responsibility of trace evidence collection may be assigned to personnel of varying occupations and levels of expertise such as crime scene technicians, law enforcement personnel, and medical personnel. These personnel must be trained in trace evidence detection, collection, and preservation techniques.

8.2. Training should include but not be limited to the record-keeping protocol of the agency; crime scene search techniques; rules of evidence handling; safety concerns of evidence handling and detection techniques; legal aspects of search warrants, seizures, and evidence recovery; chain-of-custody requirements; storage of physical evidence; the detection, collection, and preservation methods used for trace evidence; contamination prevention; and the significance of trace evidence analysis results.

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9.0. Referenced Documents

1. Locard, E. The analysis of dust traces. Part I. *American Journal of Police Science* (1930) 1:276-298.

2. *ASTM E 1459-92: Standard Guide for Physical Evidence Labeling and Related Documentation.* American Society for Testing and Materials, West Conshohocken, Pennsylvania.

3. *ASTM E 1492-92: Standard Practice for Receiving, Documenting, Storing, and Retrieving Evidence in a Forensic Science Laboratory.* American Society for Testing and Materials, West Conshohocken, Pennsylvania.

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You are invited to submit constructive feedback on the Document Comments Form.

Exhibit W

DNA PROCEDURE CHANGE ORDER

The changes/additions below to the DNA written protocols have been put in to effect.

DNA Preparation (Page 1)

IA and IB:

Note #1 - All DNA reference samples (or other high quantity DNA samples) must be processed and prepared in the designated preparation area.

(Page 4) Corrected section heading from "E HAIRS" to "F HAIRS".

DNA Isolation

IC, D, E and F:

Note #1 - The area used for evidence examination should be thoroughly cleaned with 1/10 bleach, dried, and fresh paper placed down for each examination.

Note #2 - An extraction blank tube (extraction tube with all chemicals/reagents except no DNA) should be placed as the last sample of each case processed for DNA.

Note #3 - In addition to wearing clean gloves, the examiner is required to wear a surgical mask when working on the examination, preparation, and amplification steps of DNA processing. In addition, a surgical cap should be worn when examining hair samples.

IV. **Chelex Extraction (Page 6)**

Note #1 - The preferred method of DNA isolation is "organic." Chelex extraction may be used when processing reference samples on a rush basis or when the examiner decides chelex extraction would be necessary due to the size, nature or condition of the evidence.

V. **DNA Yield Gel Electrophoresis (Page 10)**

4. Dilute DNA extracts if necessary (blood samples or samples expected to yield > 1 ug DNA, dilute 1/10). Add 5 ul of extract to each well.

Note #1 - DNA Slotblot method of quantitation is preferable. The yield gel should be used only when the DNA is to be used for RFLP or when the quality of the DNA is in question.

DNA 001-1

VII. HLADQα Typing (Page 16)

Amplification

Note #1 - With extreme care, aliquot 50 uls (using repeater pipet) of PCR cocktail to each blue tube. Cap and store in a covered container in the refrigerator. Label container with expiration date and lot numbers from the kit and cocktail.

Note #2 - Add 10 ul of a 3% BSA solution (dilute 30% BSA 1/10 in sterile water; store in refrigerator) to each tube of $MgCl_2$ solution in kit.

X. Amplification (Page X-1)

3. Add 40 ul of Primer Set solution to all tubes.

Note #1 - With extreme care, aliquot 40 uls (using repeater pipet) of PCR cocktail to each blue tube. Cap and store in a covered container in refrigerator. Label container with expiration dates and lot numbers from the kit and cocktail.

Note #2 - Add 10 ul of a 3% BSA solution (dilute 30% BSA 1/10 in sterile water; store in refrigerator) to each tube of Primer Set in kit.

XI D1S80 Protocol

Page XI-2 Amplification

4. Add 10 ul of 5mM $MgCl_2$ solution (recipe: 5 ul 1M $MgCl_2$ + 985 ul sterile H_20 + 10 ul 3% BSA) to each tube.

Page XI-3

For the discontinuous buffer system, the gel consists of:

Change: APS - 40 mg
TEMED - 30 ul

Page XI-4

To Assemble Gel Plates Horizontal Method

1-4 As for vertical method.
5. Place spacers on top of large plate, then place top glass plate on spacers.
6. Clamp plates together using spring clips.
7. Place assembly on a horizontal level surface.
8. Pour gel at top, let flow to bottom. Remove air bubbles.
9. Insert comb 1 cm. Allow to polymarize.
10. Remove clamps and comb. Rinse well with 1x gel buffer.

DNA CO# 1-2

Page XI-5

Loading and Running the Acrylamide Gel

1. Place aluminum/glass assembly in gel running tank and clamp with large glass plate facing you.
2. In a microtiter plate add gel loading buffer (1 ul/3 ul PCR product) to each of 16 wells.

Silver Stain Protocol for D1S80

Note #1 - Increase all volumes to a total of 500 mls. Adjust recipes accordingly.

Note #2 - The deionized water must be of high quality or the band separation and/or gel background may be of poor quality. If gel lanes are smeared, then repeat using distilled water.

Brian Wraxall — Brian Wraxall

1-1-96 — Date