

The State separately appealed the Order granting the Petition for Post Conviction Relief (C.A. No. 26775) and the Motion for New Trial (C.A. No. 26814 and C.A. No. 27323). With respect to the Petition for Post Conviction Relief, the Ninth District Court of Appeals reversed the trial court - concluding that, based upon the enormity of evidence in support of the Defendant's guilt, and the fact that the meaningfulness of DNA exclusion was far from clear, the Defendant did not meet his burden of establishing by clear and convincing evidence his actual innocence. *State v. Prade*, 9th Dist. No. 26775, 2014-Ohio-1035, ¶145. With respect to the Motion for New Trial, the Ninth District Court ultimately found that the trial court's order granting the Motion for New Trial was not a final and appealable order, but rather, a conditional order. As such, the Ninth District Court determined that the Order on the Motion for New Trial needed to be issued on an unconditional basis. *Id.* The Ohio Supreme Court declined to hear the appeals on either the Petition for Post Conviction Relief or the Motion for New Trial. (Case No. 2014-0432 and Case No. 2014-1992).

At an oral hearing on June 12, 2015, the Defendant argued that this Court should grant a new trial based on newly discovered DNA evidence; newly discovered evidence in the area of forensic odontology, as well as eyewitness identification; and be permitted to submit testimony and argument as to each of those issues during any subsequent hearings. After hearing oral arguments, this Court ruled that in deciding the issue of a new trial, it would only take testimony as it related to newly discovered DNA evidence. Further, this Court held it would accept written briefs as to whether it should grant a new trial on newly discovered evidence in the area of forensic odontology and any other arguments for a new trial based solely on newly discovered evidence.

The parties have fully briefed the issues, as well as provided testimonial evidence at a hearing regarding the DNA Y - Chromosome Short Tandem Repeat (Y-STR) testing. This matter is now ripe for ruling.

MOTION FOR NEW TRIAL STANDARD – THE PETRO TEST

Crim.R. 33(A)(6) provides that a new trial may be granted “when new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial.”

To warrant the granting of a motion for a new trial in a criminal case, based upon the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such that could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

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

And finally, in order to properly address a motion for new trial, the trial court must look at the new evidence in the context of all the former evidence at trial. *State v. Gillispie*, 2nd Dist. No. 24456, 2012-Ohio-1656, ¶35.

In general, the stronger the evidence of guilt adduced at trial, the stronger the newly discovered evidence would have to be in order to produce a strong probability of a different result. Conversely, the weaker the evidence of guilt at trial, the less compelling the newly discovered evidence would have to be in order to produce a strong probability of a different result. In view of the beyond-a-reasonable-doubt burden of proof, newly discovered evidence need not conclusively establish a defendant's innocence in order to create a strong probability that a jury in a new trial would find reasonable doubt.

Id.

STRONG PROBABILITY

“A new trial is an extraordinary measure and should be granted only when the evidence presented weighs heavily in favor of the moving party.” *State v. Gilcreast*, 9th Dist. No. 04CA0066, 2005-Ohio-2151, ¶55. “To warrant the granting of a new trial, the new evidence must, at the very least, disclose a strong probability that it will change the result if a new trial is granted.” *State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, ¶49.¹ In other words, there must be a strong probability that the new evidence would change the verdict. *State v. Brown*, 9th Dist. No. 26309, 2012-Ohio-5049, ¶4; and *State v. Jalowiec*, 9th Dist. No. 14CA010548, 2015-Ohio-5042, ¶30. A defendant bears the burden of demonstrating this strong probability. *Cleveland*, at ¶49. See also *State v. Gilliam*, 9th Dist. No. 14CA010558, 2014-Ohio-5476, ¶12.

NEW EVIDENCE DISCOVERED SINCE TRIAL/ DUE DILIGENCE

“New evidence is that which has been discovered since trial was held and could not in the exercise of due diligence have been discovered before that.” *State v. Lather*, 6th Dist. No. OT-03-041, 2004-Ohio-6312, ¶11, citing *Petro*.

MATERIALITY

Evidence is “material to the issues” when there is a “reasonable probability,” that had the evidence been disclosed or available at trial, the result of the trial would have been different. *State v. Roper*, 9th Dist. No. 22494, 2005-Ohio-4796, ¶22. “Reasonable probability” of a different trial result is demonstrated by showing that the omission of new evidence would “undermine the confidence in the outcome of the trial.” *Id.*

CUMULATIVE

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

While there appears to be no Ohio case law that specifically defines “not merely cumulative to former evidence”, “cumulative – in law” has been defined as “designating additional evidence that gives support to earlier evidence. *Webster’s New World Dictionary of the American Language* (College Ed. 1966).

“Science is an ever-evolving field, and criminal defendants should not be afforded a new trial every time the scientific testing methods for forensic evidence change.” *State v. Johnson*, 8th Dist. No. 93635, 2014-Ohio-4117, ¶26.

IMPEACHMENT

With respect to impeachment, “newly discovered evidence that merely impeaches or contradicts the former evidence ‘very well could have resulted in a different verdict,’ but that is not enough to satisfy the test for granting a new trial.” *Brown*, at ¶4, quoting *State v. Pannell*, 9th Dist. No. 96CA0009, 1996 Ohio App. LEXIS 3967, 1996 WL 515540, *3 (Sept. 11, 1996). Rather, the character of that evidence is relevant as to whether a different result is a strong probability. *Jalowiec*, at ¶38.

ANALYSIS

EYEWITNESS IDENTIFICATION EVIDENCE

Dr. Goodsell, the Defendant’s expert in the area of eyewitness memory and identification, testified at the October 2012 hearing regarding the three stages of memory (encoding, storage, and retrieval), as well as several factors that can affect memory and the accuracy of eyewitness identification.

The validity of eyewitness memory and identification has been questioned for years both by Defense attorneys and experts alike. The accuracy of eyewitnesses in describing the height,

weight, eye color and physical description of a suspect/defendant, as well as cross-racial identification, have been the subject of vigorous cross examinations and many appeals.

In analyzing everything before the Court, this Court finds that the expert eyewitness identification testimony does not disclose a strong probability that a different verdict would be reached if a new trial is granted. While Dr. Goodsell's testimony and opinions did not exist in 1998, and his opinions could not have been discovered in the exercise of due diligence before trial, there is no reasonable probability that had Dr. Goodsell's 2012 opinions been disclosed or available in 1998 the result of the trial would have been different.

During the 1998 trial, counsel for the Defendant cross-examined the two eyewitnesses on the majority of the weaknesses raised by Dr. Goodsell. *Prade*, 2014-Ohio-1035, ¶128. The Ninth District Court held, "the jury, therefore, was well aware of the possible problems with the identifications of the respective eyewitnesses and chose, nonetheless, to believe them." *Id.* The Defendant's theory at trial was that the eyewitnesses' testimony was unreliable based on the timing of when they came forward, the ability to see Margo Prade's killer, as well as the accuracy of their description of the suspect. Dr. Goodsell's opinions are merely cumulative of the answers the Defendant's trial attorney elicited during cross examination of the two eyewitnesses during the 1998 trial and further, only tend impeach and/or contradict the testimony of the two eyewitnesses. Simply stated, Dr. Goodsell's testimony is similar to evidence that was presented in 1998 by a different expert and therefore this Court finds Dr. Goodsell's expert opinions are not newly discovered evidence and clearly fails the *Petro* test.

BITE MARK EVIDENCE

This Court previously limited the hearing on the Motion for New Trial to the newly discovered DNA evidence and Y-STR testing procedures but provided the parties the opportunity to address the bite mark evidence by written briefs subsequent to the November 4, 2015 hearing.

As background, the 1998 jury trial included expert testimony from Dr. Lowell Levine and Dr. Thomas Marshall (experts in forensic odontology/dentistry for the State) and Dr. Peter Baum (a maxillofacial prosthodontist for the Defendant). *Prade*, 2014-Ohio-1035, ¶63-70. The Ninth District Court of Appeals held:

As for the dental experts, the jury was essentially presented with the entire spectrum of opinions on the bite mark at trial. That is, one expert testified that Prade was the biter, one testified that the bite mark was consistent with Prade's dentition, but that there was not enough there to make any conclusive determination, and the third testified that Prade lacked the ability to bite anything. Moreover, the expert who definitively said Prade was the biter, Dr. Marshall, also said that the expert who determined a definitive inclusion could not be made (Dr. Levine) was "one of the leading bite mark experts in the country." The jury also heard testimony during cross-examination that dental experts often disagree and that bite mark testimony has led to wrongful convictions.

Prade, 2014-Ohio-1035, ¶129.

In support of his Motion for New Trial and a request for hearing, the Defendant argues that the developments in bite mark science that have occurred since 1998 completely discredit the State's reliance on the bite mark evidence at trial to link the Defendant to the crime. Defendant asserts that multiple highly credible authorities have since concluded that "the fundamental scientific basis for bite mark analysis [has never been established]" – citing:

- 1 Paul Giannelli & Edward Inwinkelreid, *Science Evidence* §13.04 (4th ed. 2007);
- National Academy of Sciences' 2009 Report titled "Strengthening Forensic Science in the United States: A Path Forward";

- 11 separate studies from 2009 to 2012 authored by Dr. Mary Bush and her testimony at the October 2012 hearing;
- Letter posted on the American Board of Forensic Odontology's website; and Dr. Wright's testimony at the October 2012 hearing;
- Professor Iain Pretty's 2015 Construct Validation Study; and
- Video recording of the February 12, 2016 meeting of the Texas Forensic Science Commission.

In October 2012, Dr. Mary Bush, an expert in forensic odontology research, testified for the Defendant, and Dr. Franklin Wright, Jr., also an expert in forensic odontology, testified on behalf of the State. Both experts were completely at odds with each other as to the reliability of bite mark evidence at trial. The Defendant maintains that Dr. Bush's expert testimony on bite mark identification is far more credible and better grounded in science than that of Dr. Wright, especially when Dr. Wright conceded at the October 2012 hearing that the numerous questions raised in the National Academy of Sciences' (NAS) 2009 Report regarding the basis for bite mark identification have not been answered in the affirmative.

Dr. Bush testified that, based upon her studies on cadavers, skin has not been "scientifically established as an accurate recording medium of the biting dentition." On the other hand, Dr. Wright testified that, based upon his review of hundreds of actual bite marks throughout his career, that human dentition is unique and capable of transferring to human skin. Both experts also admitted to certain shortcomings in their own research. Dr. Bush admitted: 1) that cadavers differ from real people in certain respects related to her testing, and 2) that she did not have a statistician determine a rate of error for the placement of the dots on the bite mark molds. Dr. Wright admitted: 1) that although bite mark evidence is generally accepted within the

scientific community, that an opinion regarding the evidence is only as good as the bite mark evidence available and the subjective interpretation of the analyst examining the evidence, and 2) that there have been instances where bite mark testimony has helped to convict individuals who were later exonerated based upon other evidence such as DNA. See also generally, *Prade*, 2014-Ohio-1035, ¶92-101.

In analyzing everything before the Court, this Court finds that the bite mark evidence does not disclose a strong probability that a different verdict would be reached if a new trial is granted, and that while the opinions of Dr. Bush and Dr. Wright did not exist in 1998 and could not have been discovered before trial, the only thing newly discovered is the Defendant's awareness of these particular experts. The new bite mark opinions are not material to the issues since there is no reasonable probability that had these differing opinions from 2012 been disclosed or available in 1998, the result of the trial would have been different. The expert opinions of Dr. Bush and Dr. Wright, while differing between each other, address many of the various differences that were testified to by Dr. Levine, Dr. Marshall and Dr. Baum during the 1998 trial. In light of those differing opinions, the 1998 jury still found the Defendant guilty.

The reliability of bite mark evidence has been a matter of contention for decades – long before the 1998 trial. Even though new possible guidelines, published articles, and other studies critical of the use of bite mark evidence have arisen since the Defendant's trial in 1998, those same basic criticisms existed at the time of trial. The Defendant's theory at trial was that the bite mark identification was unreliable. This Court finds Dr. Bush's opinion post-trial, the other published articles and studies, as well as the affidavit of Dr. Iain Alastair Pretty along with the proposed changes to the American Board of Forensic Odontology (AFBO) are nothing more than cumulative evidence to what was previously presented on the subject at trial through the

testimony of Dr. Levine, Dr. Marshall and Dr. Baum - different experts with the same opinions. See, e.g. *State v. Graff*, 8th Dist. No. 102073, 2015-Ohio-1650, ¶12; and *Johnson*, at ¶25 (“this is not a case where advancements in scientific research allow evidence to be disproved”).

In conclusion, while there has been a sea of changing opinions in the science of bite mark identification, the evidence submitted by the Defendant is merely additional criticisms and/or impeachment of the testimony presented at trial in 1998. The bite mark evidence clearly fails the *Petro* test, and therefore is not newly discovered evidence.

Y-STR DNA EVIDENCE – POST TRIAL

The Defendant argues that Y-STR DNA testing completed in 2012 is newly discovered evidence and that the existence of male DNA at or near the bite mark of the lab coat conclusively excludes the Defendant as the contributor, and as such, he should be granted a new trial. The Defendant asserts that one of the more significant partial male profiles from 19.A.1 and 19.A.2 must be that of Margo Prade’s killer and that no other male DNA was found on other parts of the lab coat.

While the State concedes that Y-STR DNA testing was not available at the time of trial, it maintains that the Defendant was excluded as a possible DNA contributor in the 1998 trial, and that the new Y-STR test results did not bring about a different result. Alternatively, the State argues that even if the Court determines that Y-STR DNA testing and results are newly discovered evidence, the DDC test results relating to the bite-mark section of the lab coat are meaningless due to contamination, transfer or touch DNA, and/or analytical error. In support, the State asserts that the male DNA found on the bite mark section included extremely low levels of trace DNA, i.e. from 19.A.1 (3 – 5 cells) and 19.A.2 (approximately 10 cells), from possibly two up to five male persons, and that how or when that male DNA was deposited is unknown.

The State argues that no expert who testified at the October 2012 and November 2015 hearings could opine with any certainty as to when these new DNA profiles were deposited on the swatch of the lab coat, rather, each side merely provided expert opinions in support of their respective positions and against the opposing experts' positions.² Thus, the State argues, at best, the DNA bite-mark evidence testing results provide inconclusive results, not new evidence to support the Defendant's request for a new trial.

DNA Diagnostic Center (DDC) performed the initial Y-STR DNA testing from extracts of a large cutting from the center of the bite-mark section of the lab coat (around where the FBI previously had taken two of the three cuttings from 1998), which became DDC 19.A.1; and from three additional cuttings within the bite-mark section of the lab coat that were then combined with the remaining extract from DDC 19.A.1 to make DDC 19.A.2. It is undisputed that (1) DDC's testing of 19.A.1 identified a single, partial male DNA profile; (2) DDC's testing of 19.A.2 identified a mixture that included partial male profiles of a least two men; and (3) that both 19.A.1 and 19.A.2 conclusively excluded the Defendant (and also Timothy Holston – Margo's then current boyfriend) from having contributed male DNA in these two samples. Also, it is undisputed that these DNA exclusions of both the Defendant and Timothy Holston as contributors to the partial DNA profiles obtained from the bite-mark area of the lab coat were not expressed in terms of probabilities; but rather in certainties.

A second laboratory, Ohio Bureau of Criminal Identification & Investigation (BCI&I), performed further Y-STR testing on additional material – one new cutting from the bite-mark section of the lab coat; swabs from the sides of the lab coat; cuttings from the right and left underarm, left sleeve, and back of the lab coat; buttons from the lab coat; fingernail clippings;

² Dr. Julie Heinig, the Assistant Laboratory Director for Forensics for DNA Diagnostic Center (DDC) and Dr. Richard Staub, prior Director for the Forensic Laboratory for Orchid Cellmark, testified for the Defendant; and both Dr. Lewis Maddox and Dr. Elizabeth Benzinger from the BCI&I testified for the State,

and a piece of metal from Margo Prade's bracelet – all at the State's request. From all the items tested by BCI&I the Defendant was also excluded as a source of the male DNA.

This Court has performed an independent review of the Y-STR DNA testing and results, the testimony of Dr. Staub, Dr. Heinig, Dr. Benzinger, and Dr. Maddox and all admitted exhibits from October 2012 hearing before Judge Hunter, as well as the testimony from the same four experts and all newly admitted exhibits from this Court's two-day hearing in November 2015.³

First, this Court finds that Y-STR DNA testing was not in existence at the time of the 1998 trial, and therefore, the Defendant could not in the exercise of due diligence have discovered it before trial. *State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, ¶ 22 and 29; and *Prade*, 2014-Ohio-1035, ¶7-8.

Second, this Court finds that the Y-STR DNA test results conclusively exclude the Defendant as a contributor of the DNA on the "bite mark" - the same exclusion as in the 1998 criminal trial. During the 1998 trial and post trial hearings no expert ever testified or indicated that the Defendant's DNA was ever found anywhere on the lab coat including at or near the bite mark.

Third, with respect to the meaning of the Y-STR DNA results as it relates to whether the two other partial males DNA profiles are that of Margo Prade's killer, this Court finds that the test results remain inconclusive. None of the four experts could opine with any degree of certainty as to when these two partial male profiles were deposited on the fabric swatch. This well worn lab coat and swatches traveled at various times to at least five different laboratories and were handled by an undetermined number of individuals. This Court therefore concludes that more likely than

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

not the existence of the two partial male DNA profiles occurred due to incidental transfer and/or contamination rather than containing the true DNA from Margo Prade's killer.

Although the Ninth District Court of Appeals addressed the Y-STR testing results along with the testimony from the Defendant and State's experts under the "clear and convincing/actual innocence" standard found in R.C. 2953.21(A)(1)(b) and the other "available admissible evidence" standard found in R.C. 2953.21(A)(1)(b) and R.C. 2953.23(A)(2), their observations, as well as their methodology and analysis of the evidence with respect to the Y-STR testing results, remain instructive and pertinent herein.

In the Ninth District Court's analysis and conclusion section of that decision, it determined that "while the results of the post-1998 DNA testing appear at first glance to prove Prade's innocence, the results, when viewed critically and taken to their logical end, only serve to generate more questions than answers." *Prade*, 2014-Ohio-1035, ¶112. The Court went on to state:

Without a doubt, Prade was excluded as a contributor of the DNA that was found in the bite mark section of Margo's lab coat. The DNA testing, however, produced exceedingly odd results. Of the testing performed on the bite mark section, one sample (19.A.1) produced a single partial male profile, another sample (19.A.2) produced at least two partial male profiles, and a third sample (111.1) failed to produce any male profile. All of the foregoing samples were taken from within the bite mark, some directly next to each other, but each sample produced completely different results. Meanwhile, the testing performed on four other areas of the lab coat also failed to produce any male profiles.

There was a great deal of testimony at the PCR hearing that epithelial cells from the mouth are generally plentiful. Indeed, Dr. Maddox testified that buccal swabs from the mouth are the preferred method for obtaining DNA standards from people due to the high content of cells in the mouth and that, because a buccal swab typically contains millions of cells, it is usually necessary for BCI to either take a smaller cutting or to dilute a sample so that its testing equipment can handle the amount of DNA that is being inputted for testing. Dr. Benzinger testified that the ideal amount of cells for DNA testing is about 150 cells and that the threshold amount for testing is about four cells. There is no dispute that the testing that occurred here was at or near the threshold amount. Specifically, Dr.

Benzinger testified that 19.A.1 only contained about three to five cells and 19.A.2 only contained about ten cells. Thus, despite the fact that there are usually millions of cells present when the source of DNA is a person's mouth, the largest amount of DNA located here was ten cells. Moreover, those ten cells were not from the same contributor.

When DDC tested 19.A.2, it discovered at least two partial male profiles. More importantly, the major profile that had emerged when DDC tested 19.A.1, was different than the major profile that emerged when DDC tested 19.A.2. While the results from 19.A.1 showed a 15 allele at the DYS437 locus, the results from 19.A.2 showed a 14 allele at the DYS437 locus, with the 15 shifting to a minor allele position that fell below DDC's reporting threshold. Thus, in addition to the fact that two different partial profiles emerged in DDC's tests, the major profile that emerged was not consistent. It cannot be said, therefore, that even though multiple profiles were uncovered, there was one consistent, stronger profile that emerged as the profile of the biter.

The inconsistency in the major profile in DDC's tests calls into question several of the conclusions that Prade's DNA experts made. For instance, Dr. Heinig stated:

[B]ased on everything that I've testified [to], I believe that the major DNA that we obtained from [19.A.2] is very likely from the saliva, and that if there is contamination the minor alleles, for instance, could be from contact from another individual or more than one individual * * *.

Because the minor allele in 19.A.2 was the major allele in 19.A.1, however, it is difficult to understand how Dr. Heinig could distinguish between the two and rely on one as "the major DNA" while attributing the other to contamination. Similarly, Dr. Staub testified that he felt "that the biting activity should leave a lot more cellular material than touch would; and, therefore, if they're getting any result, now certainly some of that should be from the biting event." Yet, DDC did not find "a lot more cellular material" from one profile. Instead, it uncovered *inconsistent major profiles within an extremely low amount of DNA cells*.

Another significant reality about the bite mark section of Margo's lab coat is that amylase testing resulted in a negative test result. Even back in 1998, therefore, it was determined that *no amylase (saliva) was present on the bite mark section*. That fact rebuts any assertion that there was a "slobbering killer." It also undercuts the assumption made by both the defense witnesses and the trial court that there had to be DNA from the biter on the lab coat due to the large amount of DNA in saliva. Quite simply, there was never a shred of evidence in this case that the killer actually deposited saliva on the lab coat. Even back in 1998, Dr. Callaghan testified that "if someone bites someone else or that fabric, they *may*

have left DNA there. It can be of such a low level that it's not detected. Or they may have left no DNA there." (Emphasis added.) The only enzyme test conducted to determine whether saliva was present, the amylase test, was negative. And while the preliminary test showed probable amylase activity, Dr. Benzinger specified: "[i]f the confirmatory test is negative, then your results are negative."

Although the trial court rejected the State's contamination theories as "highly speculative and implausible," the results of the DNA testing speak for themselves. The fact of the matter is that, while it is indisputable that there was only one killer, at least two partial male profiles were uncovered within the bite mark. Even Dr. Heinig admitted that, for that to have occurred, there had to have been either contamination or transfer. And, while the lab coat itself was not contaminated, as evidenced by the negative results obtained on the four other locations cut from the coat, the inescapable fact, once again, is that the bite mark section itself produced more than one partial male profile. Whatever the explanation for how more than one profile came to be there, the fact of the matter is that the profiles are there.

Both the defense experts and the trial court concluded that the only logical explanation for the low amount of DNA found in the bite mark section was that a substantial amount of the biter's DNA was lost due to the various testing that occurred over the years and/or the DNA simply degraded with time. Dr. Straub, in particular, deemed it "somewhat far-fetched and illogical" to suggest that all of the partial profiles DDC discovered came from people other than the biter. To conclude that one of the partial profiles DDC discovered belonged to the biter, however, one also must employ tenuous logic. That is because the three to five cells from 19.A.1 uncovered one major profile, and the ten cells from 19.A.2 uncovered a different major profile and at least one minor profile. The total amount of cells for each major profile, therefore, had to be very close in number. For one of those major profiles to have been the biter, that DNA would have had to either degrade at exactly the right pace or have been removed in exactly the right amount to make it mirror the transfer/contamination DNA attributable to the other partial profile(s) DDC found. It is no more illogical to conclude that all the partial profiles DDC discovered were from transfer/contamination DNA, than it is to conclude that degradation or cellular loss occurred to such a perfect degree. The former conclusion also comports with both Drs. Maddox and Benzinger's opinion that "[t]he presence of multiple low-level sources of DNA is most easily explained by incidental transfer."

As previously noted, there is no dispute that Prade was definitively excluded as the source of the partial male profiles that DNA testing uncovered. The problem is, if none of the partial male profiles came from the biter, that exclusion is meaningless. Having conducted a thorough review of the DNA results and the testimony interpreting those results, this Court cannot say with any degree of confidence that some of the DNA from the bite mark section belongs to Margo's killer. Likewise, we cannot say with absolute certainty that it does not.

For almost 15 years, the bite mark section of Margo's lab coat has been preserved and has endured exhaustive sampling and testing in the hopes of discovering the true identity of Margo's killer. The only absolute conclusion that can be drawn from the DNA results, however, is that their true meaning will never be known. A definitive exclusion result has been obtained, but its worth is wholly questionable. Moreover, that exclusion result must be taken in context with all of the other "available admissible evidence" related to this case. R.C. 2953.21(A)(1)(b); R.C. 2953.23(A)(2).

Prade, 2014-Ohio-1035, ¶113-120 (emphasis therein).

Thus, this Court concludes that the Y-STR DNA results are not material to the issues since there is not a strong probability that had the two partial male Y-STR DNA profiles been disclosed or available at trial the result of the trial would have been different. While the Y-STR DNA results are not cumulative as to the discovery of the two male partial DNA profiles, the results are cumulative as to the exclusion of the Defendant as a contributor to either of the partial profiles. In fact, the jury heard expert testimony at trial that DNA from an unknown third person was found on the bite mark of the lab coat and the jury still found the Defendant guilty of aggravated murder. The Defendant has failed to introduce any new evidence that the jury had not already considered during the 1998 trial.

OVERWHELMING "OTHER CIRCUMSTANTIAL EVIDENCE"

Finally, when analyzing the overwhelming other circumstantial evidence in this case, this Court is firmly convinced that when considering the Defendant's alleged motive, i.e. his financial problems, the impending divorce, his jealousy as evidenced by the taped conversations of Dr. Prade, as well as testimonial statements from Dr. Prade's acquaintances, the Defendant has failed to meet his burden of proving a strong probability exists that the eyewitness expert opinions, bite mark expert opinions and the Y-STR DNA test results would change the result if a new trial is granted. As succinctly stated by the Ninth District Court of Appeals:

“The amount of circumstantial evidence that the State presented at trial in support of Prade's guilt was overwhelming. The picture painted by that evidence was one of an abusive, domineering husband who became accustomed to a certain standard of living and who spiraled out of control after his successful wife finally divorced him, forced him out of the house, found happiness with another man, and threatened his dwindling finances. The evidence, while all circumstantial in nature, came from numerous, independent sources and provided answers for both the means and the motive for the murder.”

Prade, 2014-Ohio-1035, ¶121.

CONCLUSION

In conclusion, the Defendant has failed to demonstrate that the alleged new bite mark and eyewitness evidence establishes a strong probability that it would change the result (verdict) had it been available and/or presented at trial. From a review of the 2012 testimony “...each of the defense’s experts had critical things to say about the experts and eyewitnesses who testified at trial.” *Prade*, 2014-Ohio1035, ¶128.⁴ Therefore, this testimony is cumulative of the other testimony presented during the 1998 trial and, if introduced at a new trial, would merely impeach or contradict the evidence presented at the original trial. Furthermore, in considering all of the other evidence presented during the 1998 trial, this Court finds that the bite mark evidence was not the sole basis for the jury’s guilty verdicts. Therefore, the Defendant has failed to demonstrate a strong probability that the introduction of any “new” expert testimony regarding the bite mark and eye witness evidence would change the result (verdict) if a new trial was granted.

After analyzing the DNA evidence presented at the original criminal trial in 1998, this Court concludes the Defendant was excluded as the source of the DNA that was found on the three cuttings from the bite mark section of the lab coat.

⁴ The Court further noted that witness and expert credibility determinations and the weight to afford those determinations fall within the province of the jury as they are in the best position to weigh said issues. *Prade*, 2014-Ohio-1035, ¶112 & 128.

In analyzing the Y-STR test results post-trial, the bite mark area of the lab coat was the most focused on portion of the lab coat from the time of Margo Prade's death until 2012. The fact that the only male DNA found on the lab coat was near the bite mark and not anywhere else on the lab coat demonstrates that neither of the two partial male DNA profiles are that of the killer but more likely the product of incidental transfer and/or contamination, rendering those profiles meaningless.

In considering the significance of the above mentioned Y-STR DNA evidence, and strong probability that the existence of two partial male profiles is from incidental transfer and/or contamination in conjunction with the enormity of the remaining circumstantial evidence presented at the 1998 trial, this Court finds the Defendant has failed to demonstrate a strong probability that the introduction of the Y-STR DNA test results would change the result (verdict) if a new trial was granted.

Based on the foregoing, the Defendant's Motion for New Trial is not well taken and is denied on all grounds.

IT SO ORDERED.


JUDGE CHRISTINE CROCE

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