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ADAM WILSON
COMMON PLEAS COURT
GREENE COUNTY, OHIO

IN THE COMMON PLEAS COURT OF GREENE COUNTY, OHIO

STATE OF OHIO, : **CASE NO. 1993 CR 0066**
Plaintiff, : **Jonathan P. Hein, Judge by Assignment**
vs. :
DAVID LEE MYERS :
Defendant. : **JUDGMENT ENTRY - Granting**
: **Petition for Post Conviction Relief**

Before the Court is the Defendant's petition pursuant to R.C. 2953.21 which asks the Court to grant post-conviction relief. The State responded and requested that the petition be denied. The Defendant replied. The Court conducted an evidentiary hearing wherein numerous witnesses testified and a plethora of exhibits were admitted.

The State of Ohio is represented by Megan Hammond, Esq., Cheri L. Stout, Esq. and William Morrison, Esq., all Assistant Prosecuting Attorneys. The Defendant is represented by Elizabeth T. Smith, Esq., Christopher A. LaRocco, Esq., Maxwell H. King, Esq. and Nina I. Webb-Lawton, Esq., all of the firm Vorys, Sater, Seymour and Pease, LLP. Additional counsel are Theodore C. Tanski, Jr., Esq. and Julie C. Roberts, Esq. from the U.S. Office of the Public Defender.

I. CASE FACTS

The facts of this cases have been articulated on numerous occasions in the briefings by the parties. They need not be stated again though the Court will reference facts when appropriate within the analysis of the pending motion. Several evidentiary items are noteworthy: a railroad spike which fractured the victim's skull upon puncture through the victim's temple and three rocks located at autopsy in the victim's vaginal vault.

Procedurally, the Defendant was convicted by jury verdict on February 8, 1996 for the offense of Aggravated Murder. On March 1, 1996, the Court adopted the jury's recommendation that the death penalty be imposed as the sentence. Since then, post-conviction proceedings have occurred in both state court and federal court. During this time, the Defendant has consistently asserted that he did not commit the murder.

The factual allegations supporting Defendant's petition are that evidence essential to the conviction was not scientifically objective and was factually inaccurate. Defendant argues that this evidence resulted in a verdict that is fundamentally flawed and which resulted in an unconstitutional conviction and sentence.

II. THE JURISPRUDENCE OF POST-CONVICTION RELIEF

General Principles

A petitioner's right to post-conviction relief is based upon R.C. 2953.21(A)(1)(a), which provides as follows:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of

the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, 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. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

The provisions of R.C. 2953.21 are only available after customary remedies have been exhausted. That is, post-conviction relief can be pursued after an appeal as of right has been concluded or after such appeal rights have expired. See *State v. Juliano*, 24 Ohio St.2d 117 (1970). In this case, appellate remedies have been exhausted.

In *State v. Calhoun*, 1999-Ohio-102, the Ohio Supreme Court explained:

State collateral review itself is not a constitutional right. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67, 76, citing *Murray v. Giarratano* (1989), 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1. Further, a postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment. See *Steffen* at 410, 639 N.E.2d at 76, citing *State v. Crowder* (1991), 60 Ohio St.3d 151, 573 N.E.2d 652. Therefore, a petitioner receives no more rights than those granted by the statute.

A trial court may vacate or set aside the judgment where the Court finds that there was such a denial or infringement of the rights of the petitioner so as to render the judgment void or voidable under the Constitutions of the State of Ohio or the United States.

A Defendant seeking relief under R.C. 2953.21 is not automatically entitled to an evidentiary hearing. Instead, the trial court must first determine whether there are substantive

grounds for relief. R.C. 2953.21(C); *State v. Cole*, 2 Ohio St.3d 112 (1982). "Petitioner bears the initial burden to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and that the defense was prejudiced by counsel's ineffectiveness." *State v. Jackson*, 64 Ohio St.2d 107 (1980).

As stated in *State v. Bohanna*, 2010-Ohio-4911 at ¶21 (5th Dist.):

Evidence submitted in support of the petition "must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of [*State v. Perry* (1967), 10 Ohio St.2d 175] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery." (Citation omitted.); *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362. Thus, the evidence must not be merely cumulative of or alternative to evidence presented at trial. *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 652 N.E.2d 205.

As further iterated in *Calhoun, supra.* at 281 and 282:

...findings of fact and conclusions of law are mandatory under R.C. 2953.21 if the trial court dismisses the petition. "The obvious reasons for requiring findings are " * * * to apprise petitioner of the grounds for the judgment of the trial court and to enable the appellate courts to properly determine appeals in such a cause." *Jones v. State* (1966), 8 Ohio St.2d 21, 22 [37 O.O.2d 357, 358, 222 N.E.2d 313, 314]. The exercise of findings and conclusions are essential in order to prosecute an appeal. Without them, a petitioner knows no more than [that] he lost and hence is effectively precluded from making a reasoned appeal. In addition, the failure of a trial judge to make the requisite findings prevents any meaningful judicial review, for it is the findings and the conclusions which an appellate court reviews for error.' " *State ex rel. Carrion v. Harris* (1988), 40 Ohio St.3d 19, 530 N.E.2d 1330, 1330-1331, quoting *State v. Mapson* (1982), 1 Ohio St.3d 217, 219, 1 OBR 240, 242, 438 N.E.2d 910, 912.

A trial court need not discuss every issue raised by appellant or engage in an elaborate and lengthy discussion in its findings of fact and conclusions of law. The findings need only be sufficiently comprehensive and pertinent to the issue to form a basis upon which the evidence supports the conclusion. *State v. Clemmons* (1989), 58 Ohio App.3d 45, 46, 568 N.E.2d 705, 706-707, citing 5A Moore, Federal Practice (2 Ed.1990) 52-142, Section 52.06[1].

An untimely, second or successive petition for PCR can be heard only if (1) petitioner was unavoidably prevented from discovery of the facts supporting the petition, and (2) there is clear and convincing evidence that but for the constitutional error at trial, no reasonable fact finder would have found the petitioner guilty. R.C. 2953.23(A)(1); *State v. Kinley*, 2018-Ohio-2423 (2nd Dist.)

Timeliness of Petition

It is clear that the facts upon which the Defendant relies in his motion occurred after the trial in 1996. Letters to advocacy groups from 2002 through 2012 indicate persistence in seeking legal assistance. See Defendants Exhibits 87 through 94. Developments in DNA technology since the trial now make possible the analysis of DNA material that could not even be identified or analyzed before 1996. The analysis regarding new DNA evidence set forth in the Court's decision granting a new trial is incorporated herein. Therefore, the Court finds that all new DNA evidence was discovered by the Defendant and by the State after 1996 and could not have been discovered prior to trial.

Further, academic studies since the trial regarding the lack of objectivity of expert opinions have undermined the reliability of testimony (1) establishing time of injury based on gastric emptying, (2) matching hair samples to establish identity, and (3) interpreting strangulation finger marks to establish identity.

Therefore, the Court finds that the Defendant was unavoidably prevented from discovering the facts in support of the petition. Thus, the petition is deemed timely filed.

III. TESTIMONY AND EVIDENCE

Summary of Witness Testimony: Maria Cuellar, Ph.D.

Dr. Cuellar earned a two masters degrees and the a Ph.D. in statistics and public policy. She possesses extensive academic and research experience in forensic statistics. See Curriculum Vitae at Defendant's Exhibit 26. Her experience as an expert witness is limited though she has authored 10 forensic case reports for litigation purposes. Since 2018, she has been employed as an assistant professor in the criminology department at the University of Pennsylvania.

Dr. Cuellar's involvement in this case was to review the hair microscopy reports and trial testimony of three witnesses presented by the State. While not a hair analyst, she has researched and reported on the methodologies of hair examination with a focus on the validity of conclusions. Significantly, she emphasized the subjectivity of hair microscopy due to significant human interpretation. Using a statistical analysis of hair microscopy, her major consideration was that there is an insufficient data base of hair characteristics found within a population group from which to make comparisons and to then express a statistical certainty of match. Her complete report is found at Defendant's Exhibits 28 and 29.

From her testimony, Dr. Cuellar explained the lack of foundational validity in hair microscopy due to the inability to measure both (1) the consistency of the method used to gather the data, and (2) the accuracy of an opinion regarding hair matches (i.e. the margin of error). Dr. Cuellar's opinion is that microscopy is not objective. Thus, the opinions expressed at trial about the statistical certainty of the Defendant's hair sample matching the "well traveled

hair” found on the victim were inaccurate and misleading to the jury. The purpose of hair microscopy at trial was to identify (“match”) the perpetrator.

For context, at trial, the first hair comparison witness was Michelle Yezzo who found comparisons of the well traveled hair to sometimes be consistent and sometimes be inconsistent with other submitted pubic hair samples. Thus, her results were inconclusive. Defendant’s Exhibit 60. The second comparison witness was Larry Dehus who found the well traveled hair to have the “same identical microscopic characteristics” as the single Defendant’s pubic hair. Defendants’ Exhibit 66. The final examination was by Richard Bisbing who found the well traveled hair to be “similar in all respects” to the Defendant’s hair sample. Defendant’s Exhibit 62.

Validation studies support Dr. Cuellar’s conclusions that the testimony of Dehus and Bisbing was both inaccurate and misleading. Exhibits 52 and 108 establish that the FBI found a 90% error rate in their cases - relevant since all three microscopy witnesses were trained by the FBI. Exhibits 50 and 51 establish the lack of foundational validity. Exhibit 29 (the Cole Report) establishes a 93% error rate where faulty microscopy testimony led to wrongful convictions.

On cross-examination, Dr. Cuellar acknowledged that subjectivity is not the same as uncertainty; the “match” testimony could have been accurate. Hair microscopy is still in use today though when accompanied by DNA verification. The FBI and the Cole Report did not analyze the accuracy of the David Myers evidence. Finally, the State emphasized that the evidence merely contradicts the trial testimony and is not new evidence.

On redirect examination, the Defendant established that the same hair microscopy experts were also used to conclusively exclude another potential perpetrator, yet there is no statistical basis upon which to express this opinion either. Cuellar doubted this exclusion.

Summary of Witness Testimony: Katherine Maloney, M.D.

Dr. Maloney earned her medical degree in 2007 and finished her residency in pathology in 2011. Since then, she has served as a medical examiner in both New York City and Buffalo, New York. See Curriculum Vitae at Defendant's Exhibit 31. She has testified 95 times with only one occasion for the defense. As a forensic pathologist, she seeks to determine how a person died, with most of her cases indicating unnatural causes.

In this case, she was asked by the defense to review the reports and testimony of the Coroner and the pathologist who performed the autopsy. Her reports are found at Defendants Exhibits 32, 33, 34 and 100. There was no dispute at trial that the cause of death was from the skull puncture and ligature strangulation of the neck.

It was the testimony of the neck marks used to identify the perpetrator which Dr. Maloney determined to be unfounded. First, her experience in 20 to 50 cases involving strangulation was that most marks are made by the victim trying to release the strangulation - not made by the perpetrator. There are no studies or data that would support the opinion that the perpetrator made the marks. When using finger marks for identity purposes, conclusions are typically verified by DNA testing – which testing was not performed in this case before trial.

Dr. Maloney was also asked to review the report and testimony of Dr. Bodin regarding his opinions of time of injury based on gastric emptying. Dr. Maloney is aware of no studies which form the basis for objective opinions regarding gastric emptying. Outdated studies

which purported to establish certainty in this field were debunked since too many unknown variables affect the conclusion, such as: (1) amount of content within the stomach, (2) the nature of the contents (eg. proteins or carbohydrates or others), (3) whether the victim was taking medications, (4) whether the medication slowed or accelerated typical digestion times; (5) whether there was alcohol in the stomach and, if so, how much due to its affect on typical digestion time. Her conclusion was that any opinion regarding time of injury without knowledge of these variables would be unreliable.

Finally, Dr. Maloney also disputed the observed bruising around the victim's eyes as a basis for establishing time of injury. Again, there are no studies on deceased individuals which provide objective data. Also, pooling of migrating blood ("ecchymoses") is affected by too many variables to be used to quantify the time of injury.

In her extensive pathology experience, she has not testified about the time of injury. This is a law enforcement responsibility and outside the norm for pathology.

On cross-examination, the State established that participating in the autopsy is a better basis for analysis than reviewing reports and pictures many years later. Further, the State established that medical testimony did not identify the Defendant but only described physical characteristics of the perpetrator.

Dr. Maloney also provided testimony that providing extraneous information to any forensic investigator may result in cognitive bias in the conclusion (which she described as "allowing a fact to ruin a perfectly good theory"). This problem was extensive in the medical opinions provided at trial.

Summary of Witness Testimony: Lewis Maddox, Ph.D.

Dr. Maddox testified on behalf of the State. He earned a Ph.D in medical genetics and possesses extensive practical experience in DNA testing and lab supervision. See Curriculum Vitae at State's Exhibit 24. Early in his career, he worked in DNA analysis and lab supervision for about six years. He has testified as an expert 50 - 60 times. Presently, he is employed by the State of Ohio at the Bureau of Criminal Investigation in Richfield, Ohio, as the DNA Technical Leader.

His testimony was primarily on the DNA subject of this hearing and is summarized in the decision on the motion for new trial. However, relevant to this motion was his acknowledgment that hair microscopy comparisons are of limited forensic value today and that validation studies have supported his conclusion. On cross-examination, he agreed with the following text from the NAS Study:

Scientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed. Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting. Because forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.

Summary of Witness Testimony: New DNA Evidence

The Court incorporates herein as if rewritten its summary of witness testimony and related exhibits described in the Judgment Entry which granted Defendant's motion for a new trial. The conclusions are similarly incorporated.

Stipulated Evidence

The parties stipulated the admissibility of an extensive number of exhibits which were admitted at the 1996 trial. This material includes the trial transcript. The Court has reviewed and considered such exhibits.

IV. DEFENDANT'S CLAIMS

Defendant's counsel articulated in his petition that fundamental rights were violated during the trial and concluded that the violations rise to the level of constitutional violations. The following analysis discusses the primary claims.

The Claim of Unreliable Hair Microscopy Evidence at Trial

The admission of scientifically unreliable evidence should have been recognized and mitigated by counsel. These failures caused material prejudice to the defense theory that another person was the perpetrator.

For example, the report of Larry Dehus that the hair "could have originated from the Defendant" carries no evidentiary value; there is no reasonable scientific probability when something "could" exist. Defendant's Exhibit 66. This same speculation occurred during trial. As explained at trial, his comparison methods were not a blind test. Trial Tr at 1884-1885. Instead, he was provided extraneous details that prevented his analysis from being objective: only one hair identified as the Defendant's hair was provided to compare against a single hair off the victim. Trial Tr at 1859 - 1860. His testimony that the well traveled hair was "identical" to the Defendant's hair was not expressed to any degree of scientific certainty. Trial Tr at 1889 - 1890.

Also, the two reports from the subsequent analyst, Richard Bisbing, were without factual findings and merely conclusory. Similarly, his opinion that the hair “could have originated from David L. Myers” carries no evidentiary value; again, there is no reasonable scientific certainty as the basis for his opinion. Defendants Exhibits 61 and 62. His testimony that the well traveled hair is “indistinguishable” from the Defendant’s hair and “could” have come from the Defendant was not expressed to any degree of scientific certainty. Trial Tr at 2098. While portrayed as reliable scientific evidence, there was no statistical data defining the percentage of the population which possessed hair that would also be “identical” to the well traveled hair. Further, Bisbing’s analysis also was not a blind test since he was given identities of the three donors, and their races. Importantly, he was given the report from the first analyst, Ms. Yezzo.

Based on the testimony of Dr. Cuellar, the testimony and the reports of Mr. Dehus and Mr. Bisbing were not scientifically reliable. Their testimony and reports were not supported by any objective data against which validation could have been performed. This may explain why neither testified that their conclusions were to a reasonable degree of scientific certainty: there were no scientific statistics upon which to base their conclusions and no validation studies against which to test their conclusions.

Further, Dehus and Bisbing were trained by the FBI which later reported that hair microscopy analysis possessed a 90% error rate for comparisons by the FBI’s microscopy technicians. This report undermines the reliability of both witnesses’ reports and testimony. Necessarily, the accuracy of the trial testimony is diminished, which calls into question the accuracy of the verdict.

Similarly, the Cole Report makes it clear that there is no objective standard against which to measure the test results; instead, the “expert” opinions are based simply on the experiential subjectivity of the examiner. See Defendant’s Exhibits 29 and 108.

The testimony of Dehus and Bisbing demonstrates the problem expressed by Dr. Cuellar: each expressed “a subjective opinion masquerading as an expert, scientifically valid conclusion.” This unfounded evidence calls into question the fundamental fairness of the trial and also the validity of the verdict.

The facts and analysis here are analogous to the circumstances in *State v. Gillespie*, 2012-Ohio-1656, ¶ 24 (2nd Dist) involving errors with witness identification. Clearly, it is reasonable to expect that a future jury will give less weight to the evidence of hair similarities and matches in view of research after the 1996 trial that undermines the witnesses testimony. *Supra.* at ¶ 58.

From the Court’s perspective, analytical improvements in social science research – as applied through the justice system – should be expected and embraced. Improvements do not suggest that prior methods were conceived in ignorance; improvements do not suggest that prior methods were intended for ill-gotten purposes. Mr. Dehus and Mr. Bisbing did nothing malicious; they applied their knowledge as understood over 30 years ago. However, just as it is commonly known today that the earth is not flat, it is also commonly known today that microscopic hair comparison is not scientifically reliable. See similar commentary in *State v. Ayers*, 2009- Ohio-6096, ¶ 24.

The Claim of Unreliable DNA Evidence at Trial

As stated above, the findings and conclusions set forth in the decision regarding the motion for a new trial are incorporated herein as if fully rewritten. The reliability of the original DQAlpha test results is significantly diminished in evidentiary value when confronted with new DNA results presented by both the Defendant and the State. *Gillespie, supra*.

The Claim of Unreliable Strangulation Evidence at Trial

Trial testimony regarding strangulation was provided by the Coroner. This testimony would be expected when solicited to establish the cause of death. Indeed, the death in this case was stated to be both strangulation and skull puncture. Trial Tr at 1372. The Defendant does not quarrel with this conclusion.

However, what was unexpected was the use of the Coroner's testimony to identify the perpetrator, notably the medical testimony that the finger marks were caused by the perpetrator and that the apparent lack of pressure from a particular finger mark matched the injured (and arguably weaker) finger of the Defendant. Trial Tr at 1414, *et. seq.*

The testimony of Dr. Maloney about the lack of scientific support for this opinion is deemed persuasive by the Court. First, the professional experience and training of the Coroner to conclusively describe the mechanism of strangulation was without experiential or scientific foundation. Next, an alternative explanation for the nail marks exists (eg. that the victim made the marks while trying to loosen the strangulation device) which was apparently not considered by the Coroner. Third, to validate his conclusion, the Coroner should have ordered DNA analysis of fingernail scrapings – analysis which was never performed. Fourth, Dr. Maloney established that there exist no scientific studies upon which to express certainty about

whether the perpetrator's or victim's fingers caused the lacerations when considering the finger marks alone. Finally, any opinion about the Defendant's injured finger having decreased strength and, therefore, "matching" the injury site was without factual reliability since there was no examination of the Defendant's finger at or near the time of the death.

The medical testimony again demonstrates the inherent dangers of scientifically unreliable opinions. As stated in the research study published by the National Academies of Sciences (officially titled "Strengthening Forensic Science in the United States: A Path Forward"):

... in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

Defendant's Exhibit 50.26. See also Defendant's Exhibit 51: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods," published by the Presidents Council of Advisors on Science and Technology (the PCST Report).

While the NAS Study and the PCAST Report were not available at the time of trial, both unequivocally articulate the inherent problems when the jury is permitted to hear unreliable testimony masquerading as science when presented by persons educated in other fields of study. Such unreliable testimony went to the jury during the trial in this case and caused material prejudice to the Defendant.

The Claim of Unreliable Time of Injury Evidence at Trial

Next, the Court considers the trial testimony regarding the time of injury sustained by the victim. This importance of this testimony is due to the circumstantial evidence of the perpetrator's identity and the defense theory that an alibi existed.

The State introduced the testimony of Dr. Badin to establish the time of injury. To do so, he expressed opinions based upon review of the autopsy and, especially, the stomach contents at time of autopsy. His opinion was that the injury occurred at approximately 1:45 a.m. Trial Tr. at 2187 - 2190

The Court finds that Dr. Badin's conclusions at trial regarding time of injury based on gastric emptying (eg. 1:30 am to 2:00 am) to be without scientific reliability. While Dr. Badin possessed educational knowledge in human physiology, his opinions about time of injury were not based on essential facts, including consideration of the type of food in the stomachs, the extent of alcohol consumption, whether the victim used medications and the extent and nature of bleeding from the head injury in evaluating ecchymoses. At trial, Dr. Badin admitted the numerous assumptions which were built into the opinion which were consistent with the variables that Dr. Maloney considered essential before expressing any opinion. Even if there were no variables, an opinion would be considered scientifically reliable only if based upon an objective, statistical foundation. Again, the lack of statistical basis may explain why Dr. Bodin's opinion was not expressed to a reasonable degree of medical certainty. Trial Tr at 2189. Without necessary facts about stomach contents and without objective statistical research, the opinion regarding time of death was unreliable and without mathematical certainty.

The testimony of Dr. Maloney clearly establishes both (1) the lack of scientific basis for expressing mathematical probabilities in general, and (2) the lack of factual foundation to use gastric emptying and ecchymoses as reliable factors to establish time of injury in this case. See also Def. Exhibits 31, 32, 33.

Indeed, without Badin's unfounded opinion about time of injury, the medical evidence about time of injury as determined by the Coroner (eg. 1:30 am to 3:00 am) would have consistent with the Defendant's alibi. Trial Tr at 1409.

No Allegation of Prosecutorial Misconduct

In reading Ohio case decisions, it is not uncommon for post-conviction petitions to be based upon misconduct by the investigative agency or by the State's counsel. In this case, there is no allegation of misconduct by either law enforcement or the prosecution.

Also, regardless of the Defendant's belief, the Court considers it mere speculation whether the State would have pursued its case against the Defendant if it was aware of the new DNA evidence and the unfounded medical opinions. What a prosecutor might have done with the evidence as viewed today is both unknown and immaterial to the pending petition.

V. THE JURISPRUDENCE OF DUE PROCESS RIGHTS

A thorough yet succinct explanation of due process rights was set forth in *Dayton v. Siff*, 2023-Ohio-4685 (2nd Dist.). In the context of substantive due process, the following excerpt provides guidance:

{¶ 70} “Substantive due process is “[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed.” ’ ’ *Granato v. Davis*, 2d Dist. Montgomery No. 26171, 2014-

Ohio-5572, 2014 WL 7224556, ¶ 75, quoting *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). “It protects a narrow class of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that “shock the conscience.” ” Id., quoting *Bell v. Ohio State Univ.*, 351 F.3d 240, 249-250 (6th Cir. 2003). “It also protects the right to be free from “arbitrary and capricious” governmental actions, which is another formulation of the right to be free from conscience-shocking actions.” Id., quoting *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003).

Equally insightful is the explanation set forth in *State v. Eaton*, 2022-Ohio-1340

(2nd Dist.):

{¶ 30} “Substantive due process claims are those that allege a violation of a constitutional right which is implicit in the concept of ordered liberty, deprivation of which is inherently offensive to notions of fundamental fairness.” *I-Star Communications Corp. v. City of E. Cleveland*, 885 F.Supp. 1035, 1040 (N.D. Ohio 1995). See also *Rochin v. California*, 342 U.S. 165, 169, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (due process is the “constitutional guarantee of respect for those personal immunities which * * * are “so rooted in the traditions and conscience of our people as to be ranked as fundamental” or are “implicit in the concept of ordered liberty” ”). Deprivations of substantive due process can be divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that shock the conscience. *Mansfield Apt. Owners Assn. v. Mansfield*, 988 F.2d 1469, 1474 (6th Cir. 1993).

{¶ 34} Having found no procedural due process violations, we turn now to substantive due process. The concept of substantive due process is much more imprecise than its procedural counterpart. Substantive due process protects against (1) deprivations of a particular constitutional guarantee; and (2) actions that shock the conscience. *Mansfield Apt. Owners Assn.* 988 F.2d at 1474. Because both the trial court (although its main argument is couched under cruel and unusual punishment terms) and Eaton focus on the second prong, “actions that shock the conscience,” so too will our analysis.

¶ 35} One of the things that makes this body of law so tricky is that there is no bright line rule on what exactly “shocks the conscience.” The United States Supreme Court has held conduct that shocks the conscience is so brutal and offensive that it does not comport with traditional ideas of fair play and decency. *Breithaupt v. Abram*, 352 U.S. 432, 435, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957). It has further stated that the type of government methods that rise to the level of a due process violation must “do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically.” *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952). The Sixth Circuit Court of Appeals has asserted that “[c]onduct shocks the conscience if it violates the decencies of civilized conduct.” *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014). What shocks the conscience, then, is subjective; but the courts

have been clear that the “ ‘shocks the conscience’ standard is not a font of tort law, but is instead a way to conceptualize the sort of egregious behavior that rises to the level of a substantive due process violation.” *Granato v. Davis*, 2d Dist. Montgomery No. 26171, 2014-Ohio-5572, 2014 WL 7224556, ¶ 79.

VI. MISCELLANEOUS ARGUMENTS

Defendant’s counsel frequently reminded the Court of the conclusion from the federal district court that this case is a weak circumstantial case. Since there was no direct evidence of the identity of the perpetrator, this court concurs with the federal court’s conclusion that this case - like many - was built on circumstantial evidence. However, circumstantial evidence alone is a sufficient basis for a verdict of guilty. See 4 OJI-CR 409.01. The record is filled with circumstantial evidence and related inferences which were used to close the ring of guilt around the Defendant. Certainly, this is the role of the State. However, whether this is a weak case is a matter of speculation - for which the Court expresses no opinion.

The Court is also mindful of the repeated assertions from the State that the remaining evidence of guilt is still sufficient to sustain the conviction. See State’s “Summary of Non-Forensic Evidence of Defendant’s Guilt.” Contrary to the State’s assertion, the test is not whether the remaining evidence – if believed – would still support the conviction in an abstract analysis; instead, the test is whether the new evidence – and without the formerly admitted but now unreliable evidence – has a strong probability of changing the outcome. Again, the Court expresses no opinion about the strength of the State’s future case. The State will get the chance to vindicate its conclusion at further proceedings.

VII. CASE ANALYSIS / CONCLUSIONS OF LAW

Regarding the testimony establishing identity from hair microscopy, the Court finds that the evaluation processes involved at the time of trial were fundamentally flawed. Further, based on several post-trial studies, there was no reliable scientific data upon which to state conclusions of certainty to a statistical certainty. Indeed, the use of microscopy alone as forensic evidence of identity is virtually extinct today. The exclusion of other suspects based on faulty hair microscopy was equally flawed. Hair microscopy evidence wrongly deprived the Defendant of his trial defense and alibi.

Regarding DNA evidence, the Court finds that the DQAlpha DNA analysis was technically flawed and objectively unreliable. The recent DNA analyses using more accurate processes and stringent SOPs support this conclusion. Presenting this faulty evidence at trial deprived the Defendant of substantive due process in that the verdict was not supported by the DNA evidence.

Regarding the strangulation testimony, there was no scientific basis for the use of fingerprint analysis to identify a perpetrator. The failure to corroborate fingerprint analysis was a crucial shortcoming. Presenting this evidence at trial deprived the Defendant of substantive due process rights.

Regarding time of injury testimony, the use of gastric digestion as a means of establishing time of injury is too subjective to be reliable. Too many unknown variables and too few case studies clearly indicate the lack of objectivity. Presenting this evidence at trial deprived the Defendant of an effective trial defense and an alibi.

Any use of any one category of unreliable evidence causes serious question about the accuracy of the verdict. As more unreliable evidence is added, the accuracy of the verdict increasingly become questionable.

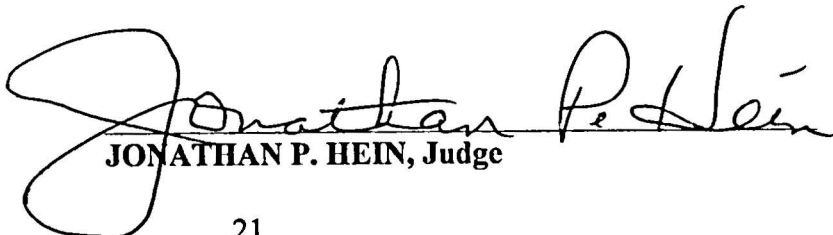
Based on these conclusion, the Court finds a fundamental deprivation of the Defendant's due process rights based upon the unreliable evidence presented to the jury as scientifically objective. Such deprivation is determined to be an unconstitutional due process violation.

VII. CONCLUSION

The Court finds the petition for post-conviction relief was timely filed. Further, the Court finds there is clear and convincing evidence that due to the constitutional errors described above, there is a reasonable probability that a different verdict would occur had the errors not permeated the trial. The Court concludes that there are substantive grounds for relief and that Defendant's petition for post conviction relief must be granted.

Further, the other propositions of law presented by the Defendant are dismissed without analysis as moot.

IT IS, THEREFORE, ORDERED AND DECREED that the Defendant's petition for post conviction relief is granted. The Defendant's conviction and sentence are vacated. This matter will be scheduled for further pre-trial proceedings pursuant to notice. Final Appealable Order.


JONATHAN P. HEIN, Judge

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