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 Defendant's Motion for a New Trial**

Before the Court is the Defendant's motion which asks the Court to grant a new trial pursuant to Criminal Rule 33(A)(6). The State responded and requested that the motion be denied. The Defendant replied. The Court conducted an evidentiary hearing wherein numerous witnesses and a plethora of exhibits were identified and admitted.

The State of Ohio is represented by Megan Hammond, Esq., Cheri L. Stout, Esq. and William Morrison, Esq., the 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. Additional counsel for the Defendant are Julie C. Roberts, Esq. and Theodore C. Tanski, Jr., Esq. from the U.S. Office of the Public Defender

I. CASE FACTS

The facts of this case 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 allegation supporting Defendant's motion for new trial is that newly discovered DNA evidence calls into question the accuracy of the verdict. The new evidence propounded by the Defendant was found on two instruments of the crime: the railroad spike and one of the rocks. Based on more advanced DNA analysis methods developed since the original test in 1989, the two items were found to possess male DNA material which does not match the DNA of the Defendant.

New evidence recently identified by the State includes DNA results from two cigarette butts found at the crime scene: one containing DNA from the victim and one containing DNA from an unidentified male. These results were also the result of more advanced DNA analysis methods developed since the original test in 1989.

II. THE JURISPRUDENCE FOR A NEW TRIAL

Criminal Rule 33(A)(6) provides as follows:

> (A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially the defendant's substantial rights:
>
> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

The seminal standard to apply when considering the merits of a motion for new trial was set forth in the syllabus of *State v. Petro,* 148 Ohio St. 505 (1947):

> To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence. (*State v. Lopa*, 96 Ohio St. 410, 117 N.E. 319, approved and followed.)

This jurisprudence is still followed today. Eg. *City of Dayton v. Martin,* 43 Ohio App. 3d 87 (2nd Dist. 1987); *State v. Hawkins*, 66 Ohio St.3d 339 (1993); *State v. Arnold*, 2010-Ohio-5379 (2nd Dist.); *State v. Hill*, 2019-Ohio-365 (1st Dist.); *State v. Horton*, Franklin C.P. No. 05 CR 146 (Jan. 12, 2022).

"The test is whether the newly discovered evidence would create a strong probability of a different result at trial." *State v. McConnell*, 2007-Ohio-1181, ¶ 21 (2nd Dist.) But, "[t]he mere possibility of a different outcome is insufficient." *State v. Murley*, 2009-Ohio-6393, ¶ 26 (2nd Dist.), citing *90 Ohio Jurisprudence 3d* (2009), Trial, Section 665.

It is not necessary for the Defendant to prove that he did not commit the offense but, instead, that the newly discovered evidence has a strong probability of changing the outcome of the trial, even where there is other evidence in the record that could support a conviction. *Smith v. Cain*, 565 U.S. 73 (2012); *City of Dayton, supra.*

The Court must consider the impact of the newly discovered evidence within the context of the totality of all the trial evidence -- not evaluating each item of new evidence on a piecemeal basis. *Wearry v. Cain*, 577 U.S. 385 (2016); *State v. Campbell*, 2019-Ohio-3142 (1st Dist.).

While it is not necessary for the Court to hold a hearing, it is generally viewed as an abuse of discretion to not hold a hearing, especially where the State has failed to submit any evidentiary material to contradict the Defendant's new evidentiary materials. *State v. Wright*, 67 Ohio App.3d 827 (2nd Dist. 1990); *State v. Mitchell*, 2004-Ohio-459 (2nd Dist.). Here, the Court heard testimony from numerous witnesses and accepted a plethora of exhibits over six days.

III. PROCEDURAL CONSIDERATIONS

The Defendant filed simultaneous requests for relief. One request was a motion pursuant to Criminal Rule 33(A)(6) which seeks a new trial. The other request was a petition filed pursuant to R.C. 2953.23 which seeks vacating the sentence and the verdict. They are independent claims for relief with different procedures. Yet, as agreed by counsel, both result in the same potential outcome: resetting the case back to the pre-trial stage.

At the hearing on Defendant's motion, numerous witnesses testified. By stipulation, all were considered expert witnesses in their particular fields and within the context of their testimony. Their credentials were explained and appropriately documented.

In the interest of efficiencies for the Court, its staff and facilities, witnesses and counsel, both the motion and the petition were heard simultaneously. Whether testimony was presented on a particular claim or both was not easily discernable during the hearing. The State's motion *in limine* reminded the Court that the two pending motions implicate different subject matter relevance.

At the commencement of the hearing, the Court acknowledged this distinction and asked counsel to regularly interpose objections in support of the motions. However, testimony was regularly applicable to both claims and, therefore, is considered in both contexts.

IV. TESTIMONY AND EVIDENCE

Summary of Witness Testimony: Megan Clement, M.S.

Ms. Clement earned a masters degree in forensic sciences and possesses extensive practical DNA testing and supervision experience. See Curriculum Vitae at Defendant's Exhibit 21. She has testified as an expert in approximately 400 cases with 24 being in Ohio. Her testimony was especially helpful in providing foundational knowledge about the DNA testing and analysis process. See slide show at Defendant's Exhibit 104. See related Glossary at Defendant's Exhibit 105 and State's Exhibit 30. Especially relevant was testimony that testing standards since 2015 require DNA from at least 20 loci to be analyzed. (In 1989, only 1 locus was tested; in 1999, the standard was 13 loci. It is not uncommon today for DNA

from 23 or more loci to be analyzed.) As a general rule, accuracy increases as the number of loci increases.

Ms. Clement provided background information about analyzing male only DNA by a method known as Y-STR. (Testing the Y chromosome using a short tandem repeat method to replicate the DNA quantity. Female DNA is ignored.)

As a result of the Order from the United States District Court, she became involved in this case in December, 2018. Initially, she reviewed the 1989 testing by Dr. Edward Blake of the DNA taken from a hair sample found on the victim (referred in the transcript as the "well traveled hair"). Obviously, the DNA testing method at that time (known as DQAlpha for the locus analyzed) was less discriminating and that SOPs were less exacting. Her opinions included (1) identifying a contamination problem with the control solution involved in the 1989 testing, and (2) concluding that excessive DNA amplification in 1989 likely resulted in erroneous results. Ms. Clement's conclusion was that these problems led to Blake's erroneous conclusion that the well traveled hair originated from Mr. Myers. See Defendant's Exhibit 23.

Clement recommended that a search be conducted for DNA materials from the railroad spike, three rocks from inside the victim and fingernail scrapings from the victim. This search was undertaken by Bode Technology using the Y-STR method. No male DNA was detected from the fingernail scrapings. Male DNA was detected on two rocks taken from inside the victim. However, the amount of male DNA material was determined to be below the threshold amount required by Bode Technology's standard operating procedures (SOPs). Also, Bode Technology did not have the DNA reference data for Mr. Myers provided by DNA

Diagnostic Center ("DDC"). Thus, Bode Technology could not proceed with comparison analysis about the source of the DNA.

After testing by Bode Technology, Ms. Clement reviewed the analytics and found its methodology to be scientifically reliable. She then evaluated the DNA test data. Defendant's Exhibit 24. Since she possessed the reference data from Mr. Myers, she continued her evaluation and provided the following report:

> 10. Based on the results obtained from DDC and results obtained from Bode Technology it is my opinion that:
>
> a. The major profile obtained at the six (6) loci from the rock (E04a EF) is different than the profile obtained from the reference sample from David Lee Myers. Therefore, David Lee Myers is excluded as the source of the major male DNA profile obtained from the EF (epithelial) fraction of "88-12709" rock (E04a). The major profile can be compared to any additional reference sample submitted.

The male DNA found on the rock from inside the victim did not match the Defendant.

On cross examination, Ms. Clement was questioned about the veracity of DNA results taken from minute amounts of DNA. She agreed that, where a sample is very small, the results are less reliable. This is explained by what is known as the stochastic effect: allele drop out where amplification (aka replication) of all DNA may not occur thus skewing the interpretation of results. She also acknowledged that there may be subjectivity when interpreting whether an allele at a loci is suitable for use. Her criticisms of the DQAlpha test used in 1989 did not waiver: the DNA from at least one locus did not match the Defendant's profile. Thus, the Defendant should have been excluded in 1989 as the source of the well traveled hair.

Summary of Witness Testimony: Catherine Roller, M.S.

Ms. Roller earned a masters degree in forensic sciences and possesses extensive practical DNA testing and supervision experience. See Curriculum Vitae at Defendant's Exhibit 1. She has testified as an expert in approximately 30 cases with only one on behalf of the Defendant. Her qualifications were not challenged by the State.

Ms. Roller is currently an employee of Bode Technology which is an accredited laboratory for DNA analysis. Regarding this case, she reviewed the DNA analysis (on different, staggered dates) a result of the Order from the District Court on the following items: fingernail scrapings and three rocks. The precise results of Bode Technology's testing are found in Defendant's Exhibit 3. In summary, the conclusions were that there was male DNA on one of the rocks and that there was male DNA on one of three fingernail scrapings. Since Bode Technology's SOP's required larger amounts of data, no comparison was made. Also, Bode Technology could not have made a comparison with the Defendant since his reference data was not provided.

On cross examination, the State again emphasized that the small sample size leaves open the possibility of stochastic effect and that the results could not be used by Bode Technology for comparison purposes. Also, the amplification process used by Bode Technology was at an analytical threshold below that used by most laboratories.

On redirect examination, after admitting the limitations in analysis when there is a small sample size, Ms. Roller confirmed that results which exclude a suspect are still reliable when a very small sample size is used. Inclusion results require 100% matches across all loci

(eg. 20/20 loci) whereas an exclusion result can occur when one locus does not match (eg. 1/20 loci). See Defendant's Exhibit 24.4 for example.

Summary of Witness Testimony: George Schiro, M.S.

Mr. Schiro earned a masters degree in forensic sciences and possesses extensive practical DNA testing and supervision experience. See Curriculum Vitae at Defendant's Exhibit 35. He has testified as an expert in approximately 252 cases with 90% on behalf of the prosecution. His company is known as Forensic Science Resources.

Mr. Schiro's involvement was to perform a "blind verification" of the results from Bode Technology. In other words, he was to take the DNA data without any context and (1) determine whether there was any other usable DNA material in the sample, and (2) make any conclusions whether the Defendant was implicated. The precise results from Mr Schiro are contained in Defendant's Exhibits 36 and 37.

His conclusions were that the Bode Technology analysis resulted in valid data which was usable for analysis. Even with the small sample, Schiro's opinion was that the data was definitive. He concluded as follows:

> A mixed, partial Y STR DNA profile was obtained from the epithelial fraction of the rocks collected from Ms. Maher's vagina (Bode Technology Case No. CCB2–5-0158, Sample No. CCB2005-01580E04a1-EF.1). David Lee Myers is excluded as a potential contributor to this mixed, partial Y STR DNA profile. Indistinguishable Y-STR mixtures (i.e. single-donor major and/or minor contributor haplotypes cannot be discerned) may be used for exclusionary purposes.

On cross-examination, there was further emphasis on the distortions that may result from the stochastic effect and that mixed profiles (i.e. multiple contributors) are more difficult to analyze.

Summary of Witness Testimony: Lindsey Sanney. M.S.

Ms. Sanney earned a masters degree in forensic sciences and possesses extensive practical DNA testing and supervision experience. See Curriculum Vitae at Defendant's Exhibit 2. She has testified as an expert in approximately 25 cases with most being for the prosecution.

Ms. Sanney is currently employed at Bode Technology as a Senior DNA Analyst. Her experience as an analyst started in 2017. Since the U.S. District Court ordered items to be tested in piecemeal fashion to reduce costs and manpower demand, Ms. Sanney tested the jeans, shirt and railroad spike. The complete report is found at Defendant's Exhibit 10. Importantly, when testing the head of the spike, her results using Y-STR processes to find male DNA indicated the following:

5. Partial Y-STR profile obtained from sample CCB2005-0158-E07a is consistent with a mixture of at least two individuals. Due to the possibility of allelic dropout, no conclusions can be made on this mixture profile.

Testing the shaft of the spike, her results using Y-STR processes indicated the following:

6. Partial Y-STR profile obtained from sample CCB2005-0158-E07b is consistent with a mixture of at least two individuals. Due to the possibility of allelic dropout, no conclusions can be made on this mixture profile.

Due to the possibility of allele drop out (the Stochastic effect), Bode Technology SOPs prevented further analysis.

Cross examination was similar to prior witnesses: low amounts of DNA can lead to inconclusive results and inaccurate results.

Summary of Witness Testimony: Jennifer Bracamonte, M.S.

Ms. Bracamonte earned a masters degree in forensic sciences and possesses extensive practical experience in her field of expertise, including forensic DNA analyst. See Curriculum Vitae at Defendant's Exhibit 15. Currently she is employed at Cybergenetics Corporation. Ms. Bracamonte has analyzed around 2900 evidence items involving about 900 individual cases. Without objection, Ms. Bracamante was deemed qualified to testify.

The testimony of Ms. Bracamonte differs from previous DNA analysts in that she uses a computer process generally described as probabilistic genotyping software. The software developed by Cybergenetics is known as TrueAllele. In this role, she has provided expert witness testimony: 45 times for the prosecution and 9 times for the defense. A detailed understanding of TrueAllele can be found in Defendant's Exhibit 20; see also Exhibit 18.

In oversimplified layman's terms, TrueAllele applies probability modeling and statistical sampling to calculate a match statistic. TrueAllele is not limited by quantity of allele and overcomes the Stochastic effect by using all available DNA data which is located. For a more thorough explanation, see the decision by Judge Janet Burnside in *State v. Carter,* Cuyahoga C.P. No. CR-21-660657-A (May 31, 2024) filed herein on June 14, 2024. For demonstrative explanation, see Defendant's Exhibit 19 at pages 9 through 19.

As discussed below, the State's expert was aware of various probabilistic genotype software programs and recognized their theoretical reliability. Not being familiar with TrueAllele, he expressed no opinion about its accuracy or reliability. The testimony established that, like other DNA methods, TrueAllele SOPs are subject to accreditation; its results are subject to validation studies and process accreditation. TrueAllele has passed forty validation

studies applying industry standards. Presently, TrueAllele is used in ten laboratories in the United States with five more in the accreditation process. TrueAllele has produced 1,240 case reports across 46 states and has been used in 11 cases resulting in exonerations or new trials.

Therefore, based on the exhibits, pleadings and testimony, the Court finds that TrueAllele is a scientifically reliable software for use in probabilistic genotyping.

Regarding the facts of this case, Cybergenetics received the DNA data pertaining to only the railroad spike. Applying TrueAllele statistical analysis, Ms. Brachamonte's affidavit provided the following conclusions:

> ...there is no statistical support for a match between the major DNA contributor to the spike evidence (Item E07b, major contributor) and David Lee Myers (Item 01.A.1). Additionally, comparison of the minor DNA contributor to the spike evidence (Item E07b, minor contributor) and David Lee Myers (Item 01.A.1) produced an exclusionary match statistic of one in 1.26 quintillion.

Ms. Brachamonte's report (Defendant's Exhibit 17) provided the following explanation: "For an exclusionary statistic of one in 1.26 quintillion, only 1 in 44.7 sextillion people would be excluded as strongly."

On cross examination, the State emphasized that there was no third-party blind test to validate True Allele's conclusion regarding the Defendant's testing which statistically excluded the Defendant as the DNA contributor to the spike. Also, like any analysis, the data used by TrueAllele would be subject to any contamination that might occur during the DNA processing.

Summary of Witness Testimony: Marc Taylor

Mr. Taylor earned a bachelors degree in zoology with two additional years of post-graduate research in cellular biology. See Curriculum Vitae at Defendant's Exhibit 39.

Currently, he is the President and Laboratory Director for his company, Technical Associates Incorporated, which conducts independent DNA testing and analysis of reports from other laboratories. His experience in DNA labs started in 1990. As an expert witness, he has testified about 400 times with most on behalf of the accused.

Mr. Taylor's involvement was to review the report of Edward Blake who performed DNA analysis on the "well traveled hair" found on the victim. Since Mr. Taylor's education and experience were contemporaneous with Edward Blake, the evaluation was especially relevant. The precise results from Mr. Taylor are contained in Defendant's Exhibits 39, 40 and 41.

In summary, Mr. Taylor noted numerous weaknesses in the Blake testing. First, the DQAlpha testing method in 1989 only analyzed DNA at one locus thus increasing the risk of an inaccurate comparison. (See explanation in Trial Tr at 1931-1934.) Second, when received by Blake, the analyzed hair had passed through numerous other laboratories for microscopic analysis (discussed in the decision regarding post-conviction relief) involving the sample hair along with other hairs taken from the Defendant and other suspects. These lax controls called into question whether the proper hair was actually compared. Next, when preparing the hair for DNA extraction, no masks or gloves were used, thus increasing the risk of contaminating the DNA from the well traveled hair with other DNA from within the lab, including a reference sample of the Defendant's DNA. This process violated industry recognized SOPs. Third, the hair was tested alongside other DNA reference samples from the Defendant in a process where cross-contamination was already a problem. Fourth, the DNA preparation and amplification occurred simultaneously with a total of 50 samples, in violation of SOPs suggesting a maximum

of approximately 15 samples, thus also increasing the risk of contamination. Fifth, when the first analysis detected no measurable DNA, Blake re-amplified the samples in order to find a measurable amount. However, this amplification occurred after his own lab recognized that control samples were contaminated. Trial Tr at 1968 - 1969, 1971. While Blake attributed this contamination to the manufacturer of the DNA kits, this was not verified. (Contaminated test kits were noted to be extremely rare.) Blake should have conducted verification tests to confirm whether the kit was contaminated when received or whether his processes had contaminated the test sample with the Defendant's reference sample. In Taylor's opinion, the assumption about the source of the contamination necessarily tainted the subsequent analysis and conclusions.

Mr. Taylor's also reviewed Dr. Blake's DNA results and performed an independent review. At trial, Blake concluded that the frequency of the DQAlpha DNA type was in 2% of the population (also described as 1 in 50 individuals). Trial Tr at 1973-1974. Clearly, this implicated the Defendant. Taylor's conclusions are as follows:

> Based on the results of this testing, between 2/3 and 3/4 of the population are possible contributors to the DNA detected in this sample.
>
> Finally, the failed controls on the amplification reagents, the lack of extraction blanks, and the possible contamination from processing the hair samples with other samples containing high quantities of DNA, specifically, the reference sample from the defendant as described above, and using 40 cycles, which negates any possibility of determining the genotypes of possible contributors, the entire testing of the hair samples should be deemed inconclusive. (Defendants Exhibit 41.13)

On cross-examination, Mr. Taylor acknowledged that the weaknesses of Blake's processes with possible contamination, over-amplification and result analysis were raised during the trial. Also, since DQAlpha testing was relatively new in 1989, there was less awareness of possible weaknesses, fewer industry warnings and fewer SOP mitigation steps.

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

Dr. Maddox was called 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. His testimony as an expert occurred 50 - 60 times.

Since 2011, Dr. Maddox has been employed by the State of Ohio as DNA Technical Leader. He has four prior years as the Laboratory Director at the Richfield Laboratory. For this case, he was contacted in February, 2024 to review the reports from the Defendant's experts, especially the findings involving the rock and railroad spike. His complete report is found at State's Exhibit 25.

Generally stated, he agreed with Bode Technology that the "low level data referred to was not sufficient to make conclusions." He agreed with the conclusion of Megan Clement that the rock "appears to have DNA from more than one male." Regarding the railroad spike, he stated that "[s]ince this was Y-STR testing, this indicates at least two male contributors to this sample. In review of the data, there is evidence of greater than two male contributors to this sample. Would this have impacted the conclusions made by Cypbergenetics?" Dr. Maddox's summary was as follows:

> The presence of multiple low-level sources of make DNA could be explained by incidental transfer by police, lab workers, and/or at trial depending on how the evidence was handled and talked over. A significant amount of the DNA profile of male contributors is missing from the partial profiles and the resulting minor alleles could represent combinations from more than one individual. Interpreting low level mixtures from multiple individuals is hampered by incomplete results, so my overall conclusion remains that the low level data is not sufficient to make conclusions.

On cross-examination, Dr. Maddox admitted not reviewing Dr. Blake's report but was aware of the control and contamination problems. Also, DQAlpha testing is no longer used today since other methods are significantly improved. Where DQAlpha only tested DNA from one locus, today's tests are performed at 24 to 27 loci. He agreed that one rock and the spike both contained male DNA. Using the State's SOP regarding quantity, it would not test the rock. However, using Bode's SOP, the quantity is usable. Maddox also agreed that the difference in threshold amounts between laboratories is not a new phenomena; the differences are accounted for in validation processes to ensure reliability. Finally, he agreed the rock does not contain the Defendant's DNA with the assumption there is only one male contributor to the sample.

Further on cross-examination, he acknowledged that the State's laboratories do not use probabilistic genotype software such as TrueAllele but uses a less powerful random match probabilities software. He provided no criticism of the TrueAllele software.

Importantly, on cross-examination, he acknowledged that recent testing by the BCI lab found (1) DNA on a cigarette butt at the scene which was matched to the victim, and (2) DNA on a cigarette butt at the scene attributed to an unknown male. Neither item was tested for DNA in 1989 given the inability to find minute amounts of DNA material.

Finally, 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.

Defendants Exhibit 50.45-46.

Stipulated Evidence

The parties agreed to stipulated evidence which provided the DNA profile from the Defendant. See Defendant's Exhibits 43, 44, 45 and 46. Also, an extensive number of exhibits were admitted by both parties without objection since the exhibits were admitted as a part of the original trial. This material includes the trial transcript. The Court has reviewed and considered such exhibits.

V. OVERVIEW OF FORENSIC DNA TESTING

In the experience of the law, DNA testing seems to be quintessential scientific evidence: wholly objective and reliable for the offered purposes, whether medical, legal or otherwise. It is portrayed as the "gold standard" of evidence. In some respects these impressions are accurate.

Generally, the expert witnesses in this case agreed that there are typically the five same steps in the DNA process: (1) extraction of DNA from cellular material; (2) quantifying the amount recovered; (3) amplifying (replicating) the DNA material; (4) separating the DNA for computer analysis; and (5) interpretation and comparison of the analysis. As explained later, these processes should lead to objective analysis; by implication, these processes should lead to uniform results.

However, the testimony indicated there is a lack of uniformity in the interpretation and analysis steps. For instance, the computer hardware and software used in the analysis step may differ from laboratory to laboratory. The kits of reagent chemicals used to

DNA material from other cellular materials are manufactured by different companies with different contents. Individual labs develop their own standard operating procedures (SOPs) which define numerous variables, such as what amount of DNA (a threshold) is necessary to be considered an allele (suitable for analysis); what number of amplifications is appropriate to produce a measurable sample size and what number may cause distortion; what number of alleles should be found for comparison purposes; whether the number of alleles is the same or different for exclusion results and inclusion (match) results; etc.

Federal and state governments set minimum standards for many of these specifications in order to make a DNA result eligible for submission to federal and state databases (eg. CODIS). These databases are a valuable tool in solving crimes.

To ensure integrity of the testing processes and, thereby, the integrity of the results, individual DNA testing laboratories develop SOPs to achieve uniformity and accuracy (among many other purposes). However, as indicated in the NAS Study, there is no universal standard for DNA testing and reporting. (Defendant's Exhibit 50.45.) Individual labs are permitted to set their own thresholds and processes provided they are objectively verifiable. What one lab considers a minimum amount of DNA material necessary for a valid analysis is not necessarily the same amount deemed necessary by another lab. This is not inherently wrong since objectivity is routinely validated by regulatory oversight.

Reliability during the first four phases of DNA processing is rarely disputed. Where disputes arise is in the final phase of interpreting DNA data. Thus, DNA conclusions are, in fact, the result of a subjective process.

This subjectivity was evident in this hearing. For example, witness testimony from both sides indicated that their own standards would not permit analysis of data obtained by another laboratory which followed different SOPs; thus, one lab considers another lab's conclusions to be unreliable. Another example of subjectivity was demonstrated when experienced analysts would look at the same data and make different conclusions about the meaning of the data (notably interpreting the DQAlpha results), based upon their foundational knowledge, experiences and SOPs.

Herein lies the crux of this case: is one DNA method reliable enough to undermine another? More specifically, is the Defendant's newly discovered DNA evidence -- which purportedly excludes the Defendant's presence at the crime scene – sufficiently reliable to undermine the integrity of the trial verdict?

The short answer is "yes." Advances in DNA technology over more than 25 years are unrefuted. Every DNA expert agrees that current methodologies and technologies are significant improvements over the DQAlpha method from 1989. These advances have also exposed weaknesses in the DQAlpha method.

VI. ANALYSIS OF THE SIX *"PETRO"* FACTORS

As explained above, the six factors set forth in *Petro* must be analyzed by the Court when considering whether to grant a new trial. The analysis is a follows.

Petro Factor 2: Was the DNA Evidence Discovered after Trial?

From the testimony, it is uncontroverted that the DNA evidence on the rock placed in the victim's vaginal vault existed at the time of the murder. The rock was removed at autopsy and placed into an evidence storage bag thereafter. No party has contested that the NDA existed in 1989 and thereafter.

It is also uncontroverted that the DNA evidence on the railroad spike removed from the victim's skull existed at the time of the murder. The spike was removed at autopsy and placed into an evidence storage bag thereafter. No party has contested that the DNA existed in 1989 and thereafter.

It is also uncontroverted that the DNA evidence on the two cigarette butts found at the crime scene existed at the time of the murder. The butts were recovered at the time of the investigation and placed into an evidence storage bag thereafter. No party has contested that the DNA existed in 1989 and thereafter.

It is also uncontroverted that DNA identification processes at the time of the investigation in 1989 were not sophisticated enough to identify the DNA's existence on any item. It was only after technology advanced sufficiently that such minute ("touch") amounts of DNA could be located and then processed to a sufficient amount that the DNA was recognized as possessing evidentiary value.

Clearly, the evidence propounded by the Defendant could not have been identified by the Defendant (or the State for that matter) at the time of trial. The Court again

finds that the DNA materials on the rock and the spike are newly discovered evidence that could not have been discovered prior to trial.

Also, in May of 2024, the State submitted various evidence items to the Bureau of Criminal Identification for DNA analysis. Results were obtained in June, 2024 which indicated that the victim's DNA was found on one cigarette butt and that DNA from an unknown male was found on another cigarette butt. See Defendant's Exhibit 106.

Clearly, the evidence propounded by the State could not have been identified by the State (or the Defendant for that matter) at the time of trial. The Court, therefore, finds that the DNA materials on the two cigarette butts are newly discovered evidence that could not have been discovered prior to trial.

***Petro* Factor 3: Could the Evidence Have Been Sooner Discovered with Due Diligence?**

When deciding whether to grant a Defendant permission to file a successive motion for a new trial, the Court is required to consider whether the Defendant used reasonable diligence to discover the new evidence. The Court notes that its prior decision granting leave to file the motion for new trial articulated reasons that the evidence could not have been discovered before trial by using due diligence. The findings and conclusions set forth in the prior decision are incorporated herein by reference and not further considered.

Additional evidence from the motion hearing demonstrating the Defendant's legal process diligence are found in Defendant's Exhibits 69 to 82 and 87 - 94. Additional evidence at the motion hearing established the Defendant's significant medical condition which hindered his

ability to pursue legal remedies to seek DNA testing. Defendant's Exhibits 95, 96, 97. The Court finds that his legal efforts and his medical condition again support the conclusion that the Defendant exercised diligent when attempting to find the new evidence.

Regarding the new evidence uncovered by the State in June, 2024, the Court finds that this evidence is new evidence which the Defendant could not have discovered before trial by using due diligence.

Alternatively, relatively recent jurisprudence from the Ohio Supreme Court explained that there is no need to consider whether the Defendant must file a motion for new trial in a timely manner. In *State v. Bethel*, 2022-Ohio-783, the Court explained:

> {¶ 53} Crim.R. 33(B) does not give a deadline by which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence. The rule states only that a defendant must show that he was "unavoidably prevented from the discovery of the evidence upon which he must rely." Courts nevertheless have concluded that a convicted defendant must file a motion for leave within a reasonable period of time after discovering the new evidence, to prevent defendants from deliberately delaying filing the motion "in the hope that witnesses would be unavailable or no longer remember the events clearly, if at all, or that evidence might disappear." *State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 WL 626063, *3 (Oct. 9, 1997). * * *
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> {¶ 55} Crim.R. 33(B), again, does not establish a time frame in which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence. Courts have justified imposing a reasonable-time filing requirement by relying on Crim.R. 1(B) and 57(B). See, e.g., Thomas, 2017-Ohio-4403, 93 N.E.3d 227, at ¶ 8; State v. York, 2d Dist. Greene No. 2000 CA 70, 2001 WL 332019, *3-4 (Apr. 6, 2001). But neither of those rules supports the imposition of a reasonable-time filing requirement.
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> {¶ 58} We hold that the court of appeals erred when it held that it was within the trial court's discretion to deny Bethel's motion for leave based on Bethel's failure to file the motion within a reasonable time after discovering Summary 86.

This jurisprudence leads the Court to find that there is no reasonable time requirement for the Defendant to file his motion for new trial based on newly discovered

evidence. Alternative, if a reasonable time requirement is required, the Court finds that the Defendant's motion was filed within a reasonable time after discovery.

***Petro* Factor 4: Would the new DNA Evidence have been Material at Trial?**

Materiality was succinctly explained by the United States Supreme Court in *Wearry v. Cain*, 577 U.S. 385, 392 (2016), though in the context of post-conviction relief:

> Evidence qualifies as material when there is " 'any reasonable likelihood' " it could have " 'affected the judgment of the jury.' " citing *Giglio v. United States*, 450 U.S. 150, 154 (1972) quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959).

The court finds this definition should also be applied in the context of a motion for new trial. See *Bethel, supra,* for further discussion of the materiality requirement.

The Court acknowledges that newly discovered DNA does not necessarily result in a new trial. For example, see *State v. Prade,* 2018-Ohio-3551 (9th Dist.), where the mechanics of the crime made the DNA evidence immaterial,

In this case, the identification of the perpetrator of Amanda Maher's murder was always the key issue, for both the prosecution and the defense. There was no eyewitness testimony; there was no confession. Thus, identity of the perpetrator was a matter of circumstantial evidence. The investigation identified other males who should be included in forensic testing to determine whether they were the perpetrator(s). Virtually every trial witness' testimony dirctly or indirectly involved the question of identity. For additional context, see Defendant's Summary of Alternative Suspect Testimony and Evidence.

The new evidence proves the existence of male DNA material on multiple evidence items integral to commission of the crime. The new evidence excludes the Defendant

as the source of the DNA. The new DNA evidence would clearly have given the defense additional factual support for their theory that another perpetrator was culpable. The new DNA evidence would have given additional factual support for the Defendant's closely related alibi defense. Therefore, it takes quick dispatch to conclude that the newly discovered DNA evidence is material to the key issue in the trial.

Petro Factor 5: Is the DNA Evidence Merely Cumulative?

Cumulative evidence can be understood from the succinct explanation provided in *State v. Teitelbaum*, 2016-Ohio-3524, ¶ 89 (10th Dist.)"

> Cumulative evidence "is additional evidence of the same kind to the same point." *Smith v. Chatwood*, 2d Dist. No. 2618, 1990 WL 119270 (Aug. 15, 1990), citing *Kroger v. Ryan*, 83 Ohio St. 299, 94 N.E. 428 (1911), paragraph one of the syllabus.
>
> The interpretation in *Kroger, supra*, is especially helpful:
>
> 'Cumulative evidence' is additional evidence of the same kind to the same point. Therefore, where evidence offered on a motion for new trial is merely additional upon the same point upon which evidence was given by the party at the trial, such evidence will be rejected as cumulative. But where the evidence thus offered is respecting a new and distinct fact, although it tends to stablish the same general result sought to be established by evidence given at the trial, such new evidence is not cumulative and, if otherwise competent, will be received.

See also Ev. Rule 404(B).

The Court finds that the newly discovered evidence is not merely cumulative of other evidence presented at trial. The new evidence is independent from, and contrary to, evidence presented at trial.

Petro Factor 6: Does the New Evidence Merely Impeachment Other Evidence?

As explained in City of *Dayton v. Martin, supra.*:

> In singling out impeaching or contradicting evidence, *Petro* recognized that the nature of such evidence requires that a trial court exercise circumspection in determining whether newly discovered evidence of that character would create a strong probability of a different result, because such evidence quite often will not be likely to change the outcome. In a case where the newly discovered evidence, though it is impeaching or contradicting in character, would be likely to change the outcome of the trial, we see no good reason not to grant a new trial.

Here, the new DNA evidence does impeach the DNA results from the DQAlpha method. The new evidence could be considered to have greater evidentiary weigh since new tests are performed at many more loci on the DNA strand instead of the single location on the DQAlpha test used as trial evidence.

Also, the new DNA evidence establishes a strong rebuttal to virtually every other facet of the state's case. For example, does the new DNA evidence impeach the statements by David Tincher (the jailhouse informant) and his testimony about incriminating statements by the Defendant about the facts of the case? Not directly, for the DNA evidence is not testamentary in nature. But it leaves unanswered the crucial questions: If Tincher is to be considered credible, how does he explain the absence of the Defendant's DNA both on the rock and the spike? Further, if Tincher is to be considered credible, how does he explain the presence of another male's DNA on a cigarette butt near the victim's body?

These same questions could be posed to every witness: microscopy witness Dehus, microscopy witness Bisbing, gastric emptying witness Badin, etc. How would they reconcile their conclusions which implicated the Defendant when confronted with new DNA evidence which excludes the Defendant and implicates another male?

Further, the new DNA evidence supports the trial testimony of lay witness Drake who testified that Terrance Rogers admitted committing the offense and threatened Drake to keep her quiet. Drake's testimony is more credible with the new DNA evidence.

In conclusion, the new DNA evidence from both parties goes much farther than impeachment. Crucially, all the new results exclude David Myers as the contributor of the male DNA. The new DNA evidence inserts another, unknown perpetrator(s) into the case. This evidence supports the alibi defense.

***Petro* Factor 1: Does the New Evidence Raise a Strong Probability of a Different Result?**

The first listed *Petro* factor is considered last since it involves consideration of the other five factors. For the following reasons, the Court finds that the newly discovered evidence possesses significant probative value such that there exists a strong probability that the jury would have reached a different verdict had the new evidence been available at trial.

First, the new evidence clearly supports the Defendant's trial defense that another male committed the offense and that the Defendant was not present. The DNA evidence makes this defense exponentially more credible.

Second, without the new DNA evidence, the Defendant's evidence was – like the State's evidence – circumstantial. The new DNA evidence would be presented as direct evidence to contradict the State's evidence. While both direct evidence and circumstantial evidence are a worthy basis upon which to base a conviction (4 OJI-CR 409.01), the tactical argument that direct evidence is more reliable (i.e. less susceptible to subjective bias and human interpretation) is hard to refute.

Third, the new evidence significantly bolsters the Defendant's numerous witnesses who attempted to convince the jury that another perpetrator(s) had motive and opportunity to commit and/or assist in the murder. Every defense witness would certainly have been perceived as more credible, especially those who established an alibi and those who indicated other possible male perpetrators were seen in the vicinity at the approximate time. Each would still be testifying from their own observations, knowledge and biases but with their credibility enhanced by the evidence that male DNA from two / three potential suspects were on the instruments of the crime and near the crime scene.

Fourth, the new evidence substantially undermines the credibility of the State's expert opinion witnesses. *State v. Hill*, 2019-Ohio-365, ¶86 (1st Dist.). Dehus, Bisbing, Badin, Blake and Krause are all significantly less credible in the face of the new DNA evidence. Indeed, with the new DNA evidence, the Court opines that these witnesses would have re-examined their conclusions in light of the new evidence; indeed, these experts likely would have been unwilling to express their prior opinions. It seems reasonable to conclude these witnesses would have possessed no answer as to how the Defendant's DNA was not on the instruments of the crime while other male DNA was on the items. Diminished credibility is especially noteworthy in a case where circumstantial evidence was so heavily relied upon.

In conclusion, the impeachment and exculpatory value of the new evidence presents "a reasonable likelihood it could have affected the judgment of the jury..." *Wearry v. Cain*, *supra.* quoting *Giglio, supra.*, quoting *Napue v. Illinois*, *supra.* In making this conclusion, the Court has considered the context of the entire trial and the evidence previously presented. *Kyles v. Whitley*, 514 U.S. 419, 441 (1995).

The analysis and conclusion herein are strikingly similar to the facts in *State v. Jones*, 2013-Ohio-2986 (9th Dist). Also, although the legal issue was not the same, this case is similar to *State v. Scott,* 2022-Ohio- 4277, ¶ 14 ["the relevant question is whether there is a strong probability that no reasonable fact-finder would have found Scott guilty of the offenses * * * if a DNA test result excluding Scott had been presented at trial and analyzed in the context of and upon consideration of all available admissible evidence..."] .

In making this conclusion, the Court also considers a forward-looking view of a future trial within the context of evidence which may be excluded as scientifically unreliable: hair microscopy analysis; gastric digestion to establish time of injury; and fingermark comparison. The analysis of the evidentiary weaknesses in this testimony is outlined in the decision on the motion for post-conviction relief.

Importantly, this conclusion recognizes the unquantifiable expectation of all participants in criminal justice that objective, scientific evidence is crucial to the obtaining the correct outcome at trial. (This jury expectation was identified during hearing as the "CSI Effect" and also recognized in Defendant's Exhibits 50, 51.) Numerous expert witnesses acknowledged its reality and practical effects though its practicality was questioned.

The Court acknowledges the point frequently raised in cross examination by the State: that the conclusions by the Defendant's DNA witnesses are subject to the same possible testing errors and interpretation subjectivity that was visited upon the State's trial witnesses during this hearing. The State made a valid point. However, these considerations are deemed relevant as to the weight of the evidence but not to the admissibility of this new evidence.

VII. CONCLUSION

As stated previously, for purposes of a motion for new trial, the Defendant need not prove that he did not commit the crime. Instead, he must raise a strong probability that the verdict would have been different. A new trial should be granted "if the evidence, considered collectively, presents "any reasonable likelihood it could have affected the judgment of the jury." *Werry, supra.* David Lee Myers has met this burden.

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 any unreliable evidence – has a strong probability of changing the outcome.

Based upon the evidence presented at the hearing, and based upon the reasonable inferences drawn therefrom, the Court finds that the Defendant's new evidence is sufficiently reliable – in both theory and in reality – to undermine the integrity of the trial verdict. The Defendant's motion for a new trial must be granted.

Post-Script

The Court does not take lightly the consequences of granting a new trial. No Court should. As prior Courts have recognized, "assurance that the public is protected because the actual offender is behind bars depends on the confidence of the conviction. *Scott, supra.* at ¶ 22. Further, as succinctly summarized by the Court in *State v. Ayers,* 2009-Ohio-6096 (8th Dist.):

> {¶ 24} The United States Supreme Court has stated that the "ultimate objective" of our system of criminal law is that "the guilty be convicted and the innocent go free." Herring v. New York (1975), 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593. If DNA testing has the proven ability to "exonerate[ ] wrongly convicted people," we can perceive no

> viable argument that matters of judicial economy should supersede the law's never-ending quest to ensure that no innocent person be convicted. The refinement of DNA testing has shown that law and science are intersecting with increasing regularity. When scientific advances give the courts the tools to ensure that the innocent can go free, those advances in science will necessarily dictate changes in the law. See, e.g., Pickett v. Brown (1983), 462 U.S. 1, 17, 103 S.Ct. 2199, 76 L.Ed.2d 372, fn. 6 (noting that "recent advances" in blood testing have dramatically reduced the possibility of false paternity claims).

And, in a similar context regarding the use of newly discovered DNA evidence, the Supreme Court of Ohio stated in *State v. Scott*, 2022-Ohio-4277:

> {¶ 22} We do not reach this decision lightly. The horrible events leading to Buckley's death are not ones that her family and friends should have to relive so many years later. But the specter of a wrongful conviction in light of available but untested DNA evidence is something the legislature has sought to prevent by making postconviction testing available. See R.C. 2953.71 through 2953.84. And assurance that the public is protected because the actual offender is behind bars depends on the confidence of the conviction.

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

JONATHAN P. HEIN, Judge

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