STATE OF MICHIGAN

IN THE 46TH CIRCUIT COURT FOR THE COUNTY OF KALKASKA

People of the State of Michigan,

Plaintiff,

vs

Case No.: 97-1707-FC
Hon. Janet M. Allen

Jamie Lee Peterson,

Defendant.

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OPINION AND ORDER ON DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO MCR 6.500 AND PEOPLE'S MOTION UNDER MCL 770.16 TO DENY NEW TRIAL

INTRODUCTION

"DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Dist Attorney's Office for Third Judicial Dist v Osborne*, 557 US 52, 55;

129 S Ct 2308 (2009). Defendant uses new DNA test results to challenge his 1998 convictions for first-degree premeditated murder, first-degree felony murder, first-degree criminal sexual conduct, and larceny in a building. He has filed a motion for relief from judgment pursuant to MCR 6.500 *et seq.* and asked for a new trial in light of DNA test results excluding him as a potential contributor to all of the male DNA samples collected from the crime scene.

SUMMARY OF FACTUAL AND PROCEDURAL HISTORY

The crimes that Defendant was convicted of arose from the horrendous rape and murder of Geraldine Montgomery. Following a jury trial in December 1998, Defendant was convicted of first-degree premeditated murder, two counts of first-degree felony murder, two counts of first-degree criminal sexual conduct, and one count of larceny in a building. Later that month, Defendant was sentenced as a second habitual offender to life imprisonment without parole for each of the murder convictions, life imprisonment for each of the first-degree criminal sexual conduct convictions, and thirty-two to forty-eight months imprisonment for the larceny in a building conviction, with all sentences to be served concurrently. Defendant appealed his convictions and sentences to the Michigan Court of Appeals. Our Court of Appeals affirmed the convictions and sentences in an unpublished decision, but remanded for modification of the judgment of conviction and sentence to reflect that Defendant was convicted of one count of first-degree murder supported by two theories. *People v Peterson*, unpublished opinion per curiam of the Court of Appeals, issued October 5, 2001 (Docket No. 216575), 2001 WL 1179673, at *1. The Michigan Supreme Court denied Defendant's application for leave to appeal. *People v Peterson*, 467 Mich 859; 651 NW2d 916 (2002).

During the pendency of his appeals, Defendant petitioned the trial court for post-conviction DNA testing pursuant to Michigan's post-conviction DNA testing statute, MCL

770.16.[1] Defendant requested that a stain on the shirt worn by the victim caused by a mixture of the victim's saliva and unidentified semen be tested for DNA. At trial, an expert witness in DNA testing, Meghan Clement, stated that she was unable to develop a DNA profile from the semen present in the stain, and therefore, Defendant could not be excluded from contributing the semen present in the stain on the victim's shirt. Trial Tr., November 17, 1998, at 201, 204, 213. In a December 26, 2002, opinion and order, the trial court denied Defendant's motion for DNA testing of the shirt stain. The court reasoned that the evidence introduced at trial against Defendant, "excluding the DNA evidence, was compelling." Prosecution's Br., Ex. I at 7. Further, the court held that Defendant had not met the statutory requirements for granting the motion because Defendant had failed to show that the stain would be subject to DNA testing technology that was not available at the time of Defendant's conviction as required by MCL 770.16(4)(b)(ii). Prosecution's Br., Ex. I at 7.

In 2013,[2] Defendant, the prosecution, and the Michigan State Police all agreed to additional DNA testing of the evidence in this case using advanced scientific techniques—most importantly for the purposes of this motion, DNA testing was performed on the victim's shirt stain. The testing was done using methods of testing that were not available at the time of Defendant's trial. Defendant's Br., Ex. P. The DNA test results excluded Defendant as a source of the semen contained on the victim's shirt. Defendant's Br., Ex. O. A vaginal swab from the victim was also reanalyzed, and Defendant was once again excluded as a contributor to the nonsperm and sperm fractions of the DNA captured by the vaginal swab. *Id.* This fact was

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[1] MCL 770.16(1) states:

> Notwithstanding the limitations of [MCL 770.2], a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing.

[2] In August 2009, Defendant's lengthy habeas corpus proceeding came to an unsuccessful conclusion. *Peterson v Birkett*, 2009 WL 2766715 (ED Mich, August 26, 2009).

known to and emphasized by defense counsel at Defendant's trial. *See, e.g.*, Trial Tr., November 16, 1998, at 48. However, the identity of the contributor of the nonsperm and sperm fractions of DNA captured by the vaginal swab was not known until 2013, when a search of the Combined Police DNA Index System (CODIS) by the Michigan State Police revealed that the contributor of these DNA samples was Jason Anthony Ryan. Defendant's Br., Ex. O. Retesting the DNA evidence after obtaining an updated buccal swab from Ryan confirmed the CODIS hit. *Id.* In addition, Ryan could not be excluded as a contributor to the DNA located on the victim's shirt stain. *Id.* According to Dr. Julie Heinig, an assistant laboratory director at the Fairfield Forensic Department of DNA Diagnostic Center, the odds are astronomical that another person instead of Ryan contributed the DNA located on the victim's shirt stain. Defendant's Br., Ex. P. However, it is known that Defendant did not contribute any DNA to the victim's shirt stain. *Id.*; Defendant's Br., Ex. O.

After obtaining these DNA test results and performing additional investigation, the Michigan State Police arrested Ryan in late 2013. Ryan had previous encounters with the police during their initial investigation into these crimes. He was interviewed by the police in July 1997, and he recalled that he was staying in the area of the homicide when it occurred in October 1996. Defendant's Br., Ex. I. However, Ryan stated that he did not know the victim and that he did not know where she lived. *Id.* He also stated that he did not know Defendant. *Id.* Ryan acknowledged that he was staying with David Burgess at the time of the murder. *Id.* Burgess was investigated by police in relation to the murder after a confidential informant reported to police that Burgess told the informant that he had "killed the lady and stuffed her in the trunk, kind of jokingly," the same morning that the victim's body was discovered. Defendant's Br., Ex.

H. Burgess was eventually eliminated as a suspect in January 1997 as a result of DNA testing. Defendant's Br., Ex. J.

At his July 1997 interview, Ryan provided a DNA sample in the form of saliva to the police during the interview. Defendant's Br., Ex. I. He also subsequently underwent two polygraph examinations where he was asked about his involvement in the homicide. *Id.*; Defendant's Br., Ex. N. The results of the first polygraph test were inconclusive, but a retest the next day indicated that "Ryan was being truthful when he stated he was not involved with and did not have any knowledge of the Geraldine Montgomery homicide." Defendant's Br., Ex. I; Defendant's Br., Ex. N. Ryan's DNA sample was not compared to the samples obtained from the victim.

After obtaining the latest DNA test results, Defendant filed a motion for relief from judgment pursuant to MCR 6.500 *et seq.*[3] Defendant avers that the DNA test results constitute newly discovered evidence that require the Court to vacate his judgment of conviction and order a new trial under the century-old newly discovered evidence standard reiterated in *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003). The prosecution has opposed Defendant's motion and argued that DNA evidence played only a minor role in Defendant's trial because Defendant confessed to the crimes and knew details about the crimes that only the perpetrator could have known. The prosecution also claims that the DNA test results do not fall within the definition of newly discovered evidence and that Defendant's trial focused on the reliability of his confession, not physical evidence, so a different outcome is not probable on retrial.[4]

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[3] Defendant has not previously filed a motion for relief from judgment.

[4] The prosecution has requested that the Court delay ruling on this motion until the investigation into Ryan's involvement in these crimes is completed because, otherwise, Defendant would attempt to file successive motions for relief from judgment each time a new piece of evidence "turn[s] up" during the Ryan investigation. Prosecution's Br. at 20-21. The Court declines the prosecution's request because its arguments for delaying a ruling on Defendant's motion are unconvincing when weighed against Defendant's interest in having his motion expeditiously decided.

At oral argument on Defendant's motion, the Court questioned whether the new trial provision contained in MCL 770.16(8) applied to this case. The prosecution requested time to brief the issue and then filed a motion pursuant to MCL 770.16 requesting that the Court deny Defendant a new trial. In its motion, the prosecution insists that MCL 770.16 applies to this case and that Defendant cannot meet the clear and convincing evidence burden required by MCL 770.16(8). The prosecution attached to its motion a police report of an interview with Robert LaFrance, an inmate with the Michigan Department of Corrections who was cellmates with Defendant for approximately two months in 2013.[5] Prosecution's Motion, Ex. A. The prosecution uses Mr. LaFrance's statements to claim that Defendant confessed to the crimes as recently as 2013. Prosecution's Motion at 3. Before speaking with the police about what Defendant allegedly told him, Mr. LaFrance made certain demands, including that his visiting privileges be restored. *Id.* at Ex. A. However, Mr. LaFrance apparently agreed to be interviewed by the police before those demands were met and a transcription of that interview is attached to the prosecution's motion. *Id.* In response to the prosecution's motion, Defendant asserts that MCL 770.16(8) is solely applicable where court-ordered DNA testing is concerned. In addition, Defendant attacks Mr. LaFrance's veracity and credibility and maintains that he is merely "a jailhouse informant looking to improve his own situation with the authorities by inventing a story about Mr. Peterson." Defendant's Resp. to Prosecution's Motion at 3.

ANALYSIS

A. Whether Defendant is entitled to relief from judgment on the basis of newly discovered evidence.

[5] According to the Michigan Department of Corrections' website, Mr. LaFrance is currently serving a sentence of 18 to 50 years' imprisonment after pleading guilty to first-degree criminal sexual conduct in 2009. Prosecution's Motion, Ex. A.

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress*, *supra* at 692 (citing *People v Johnson*, 451 Mich 115, 118 n.6; 545 NW2d 637 (1996)) (markings omitted). The defendant carries the burden on all four parts of this test. MCR 6.508(D); *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Motions for a new trial based on newly-discovered evidence are generally looked upon with disfavor in order to encourage parties' best efforts in securing and presenting evidence at *the* trial and out of respect for the finality of judgments. *Rao*, *supra* at 280. "*Cress* set forth the showing that a defendant must make in order to satisfy the exception to this rule and struck a balance between upholding the finality of judgments and unsettling judgments in the unusual case in which justice under the law requires a new trial." *Id.*

1. Whether the evidence itself, not merely its materiality, was newly discovered.

Defendant insists that the DNA test evidence was newly discovered because the test results were obtained solely as a result of technological advances in DNA testing that were not in existence at the time of Defendant's trial. Defendant points out that at the time of trial it was only known that Defendant was excluded from the DNA obtained from the victim's vaginal swab—no one knew that DNA testing could exclude Defendant from the shirt sample and that both DNA samples (the vaginal swab sample and the shirt stain sample) would inculpate Ryan. The prosecution responds that the evidence is not newly discovered because the DNA test results are "old evidence that is newly material." Prosecution's Br. at 6. The prosecution maintains that the DNA evidence was "present, available, and widely known at the time of trial." *Id.* Citing

Rao, the prosecution avers that Defendant was aware of the evidence at the time of trial, and thus, the evidence is not newly discovered.

There are a number of problems with the prosecution's narrow definition of newly discovered evidence. First, the prosecution's approach conflicts with the Michigan legislature's determination that technological advances in DNA testing should be available to not only the wrongly accused, but also the wrongly convicted. *See* MCL 770.16 (permitting post-conviction motions for DNA testing and new trials based on potentially exonerating results).[6] MCL 770.16 reflects the legislature's view that new DNA testing techniques previously unavailable to certain convicted defendants may reveal important evidence previously unknown to those defendants.

Second, *Rao*, which the prosecution relies on to support its view, is factually distinguishable. In that case, the defendant was convicted of abusing her daughter. *Rao*, *supra* at 274. The prosecution supported its case at trial with x-rays of the victim's ribs that showed the victim had suffered multiple rib fractures. *Id.* at 275. An expert witness for the prosecution opined that these fractures along with other injuries suffered by the victim could only be caused by child abuse. *Id.* The defendant's expert witnesses disagreed and opined that the victim's faulty bone structure was the cause of her injuries, not abuse from the defendant. *Id.* at 277. X-rays performed on the victim after the trial revealed that the victim's rib fractures resulted from metabolic bone disease and not abuse. *Id.* at 277-78. The defendant moved for a new trial on the basis of this purportedly newly discovered evidence, but the trial court denied the defendant's motion. *Id.* at 278.

The Michigan Court of Appeals reversed the trial court's decision and remanded for an evidentiary hearing. *Id.* The Michigan Supreme Court reversed the Court of Appeals and held that the additional x-rays were not newly discovered evidence under *Cress* because the defendant

[6] This statute is discussed in more detail below.

was aware at the time of trial of the allegedly newly discovered evidence and did not use reasonable diligence to produce the evidence at trial. *Id.* at 292. The Court pointed out that the defendant was aware of the existence of x-ray technology and the period in which the x-rays of the victim needed to be performed to support her defense, but chose not to move in the trial court for an order compelling x-rays of the victim after the date of the victim's last x-ray. *Id.* at 287.[7]

In this case, the technology used to obtain the DNA test results that Defendant claims are newly discovered did not exist at the time of Defendant's trial. *Cf. id.* at 287. The mere existence at the time of trial of the later tested physical evidence does not prevent DNA test results using technology developed post-trial from falling within the definition newly discovered evidence. As pointed out in *Rao*, according to *Webster's Third New Int'l Dictionary* (2002), discover means "to make known (something secret, hidden, unknown, or previously unnoticed)." *Rao, supra* at 282 (citing *People v Terrell*, 289 Mich App 553, 563; 797 NW2d 684 (2010)). Here, the DNA test results obtained in 2013 made known what was previously unknown due to a lack of technological capability: Defendant did not contribute to the stain on the victim's shirt and Ryan's DNA matched both the stain on the victim's shirt and the semen found in the victim's vagina.[8] Defendant was never aware of these two facts until after he was convicted and the DNA test results making these two facts known did not exist before trial because the technology did not exist to discover these results. *Cf. Terrell, supra* at 564 ("This Court . . . has a long history of rejecting defendants' claims that evidence that the defendant knew existed before trial constituted newly discovered evidence.").

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[7] In *Rao*, our Supreme Court left open the question of whether newly discovered evidence "must actually have been in existence at the time of trial." *Rao, supra* at 285 n.2.

[8] Although, it appears that the capability of matching Ryan's DNA to the DNA found on the vaginal swab did exist at the time of Defendant's trial. The comparison was just not performed, which is discussed below in the reasonable diligence section.

Third, the Court's conclusion is supported by a slew of persuasive authority. In *People v Mardlin*, our Court of Appeals held that an expert's post-trial opinion testimony constituted newly discovered evidence because the expert could not complete the testing forming the basis for his opinion until after the conclusion of the trial. Unpublished opinion per curiam of the Court of Appeals, issued January 24, 2012 (Docket No. 279699), 2012 WL 205794, at *5. This case is similar to *Mardlin* in that accurate testing of the shirt stain could not be completed until after the conclusion of the trial because the technology for determining the contributor to the stain did not yet exist at the time of trial.[9] In addition, other courts have recognized that "evidence discovered before or during trial may have latent attributes that are not discovered until after trial." *United States v Cimera*, 459 F3d 452, 460 n.11 (CA 3, 2006). "For example, if a blood sample were admitted at trial and subsequent technological advances made it possible to identify precise DNA characteristics of that sample, the test results and/or relevant expert testimony may be 'newly discovered' evidence." *Id.*; *see also State v Campbell*, 2003 WL 21415147, at *1 (Ohio App, 2003) (recognizing that DNA test results produced by new technology were newly discovered evidence). A number of other states through legislation have recognized that these "latent attributes" of previously known evidence create the possibility for newly discovered evidence. *See, e.g.*, 725 Ill Comp Stat 5/116-3 (permitting post-conviction DNA testing where "testing has the scientific potential to produce new, noncumulative evidence"); NJ Stat Ann 2A:84A-32a (permitting motion for new trial based on newly discovered evidence where post-conviction DNA test results are favorable to defendant).

[9] In *People v Jackson*, 91 Mich App 636, 639; 283 NW2d 648 (1979), the Court, without any discussion, held that an expert's post-trial opinion constituted newly discovered evidence. In that case, the defendant provided blood and saliva samples to the expert after trial and the expert used these samples to rule out the defendant as contributing to a secretion found on the victim's underwear. *Id.* at 638-39.

Fourth, to the extent that the prosecution argues that it was known at trial that there was no evidence linking the DNA on the victim's shirt to Defendant, the prosecution overlooks the significance of the recent DNA test results. The new test results demonstrate that Defendant is scientifically *excluded* from contributing the semen on the victim's shirt. The results foreclose any argument previously made by the prosecution that the semen on the shirt could be attributed to Defendant. *See, e.g.*, Trial Tr., December 11, 1998, at 212 (prosecution arguing in rebuttal that semen on shirt could belong to Defendant).

Finally, the prosecution's definition of newly discovered evidence knocks the scale over in favor of upholding the finality of criminal judgments rather than balancing that interest with "unsettling such judgments in the unusual case in which justice under the law requires a new trial." *Rao*, *supra* at 274. Taken to its logical conclusion, the prosecution's view would preclude a defendant from ever seeking post-conviction relief on the basis of DNA test results because the physical evidence later tested would have existed at the time of trial, even if untestable at the time of trial. The Court refuses to adopt such a limited view that is offensive to "justice under the law." *Rao*, *supra* at 274. Therefore, the Court holds that the DNA test results and the facts that follow from the discovery of those results constitute newly discovered evidence under the *Cress* test.

2. *Whether the newly discovered evidence is cumulative.*

Defendant insists that the newly discovered evidence is not cumulative because he could not show at trial that he was excluded as the source of the semen on the shirt and that all of the DNA evidence collected points to Ryan as the perpetrator of the crimes. The prosecution responds that it was already known at the time of trial that "there was no DNA evidence linking Defendant to the crime scene." Prosecution's Br. at 7. The prosecution maintains that

Defendant would make the same argument at a new trial that he did at his first trial—none of the DNA evidence found at the scene of the crimes matched Defendant.

Again, the prosecution fails to recognize the significant difference between the argument that it made at Defendant's trial that he *could be* the contributor of the semen on the victim's shirt and the now known fact that Defendant is *scientifically excluded* from having contributed to the semen stain. Evidence is not cumulative if the defendant was "unable to present 'evidence of the same kind to the same point' at trial." *People v Grissom*, 492 Mich 296, 320 n.41; 821 NW2d 50 (2012) (quoting *Murray v Weber*, 92 Iowa 757, 758; 60 NW 492 (1894)). Defendant was unable to present evidence that he was scientifically excluded from having contributed to the semen stain on the victim's shirt at trial. Defendant was only permitted to argue at trial that the semen could have been contributed by anyone because that is all the evidence at the time of trial allowed as the semen stain on the shirt could not be tested for DNA. Defendant was also unable to present evidence that all of the DNA tested links Ryan to the crimes. Accordingly, the Court holds that the DNA test evidence is not cumulative.

3. *Whether Defendant could not, using reasonable diligence, have discovered and produced the evidence at trial.*

Defendant claims that he could not have discovered with reasonable diligence any of the DNA test results because the technology necessary to uncover the evidence was not yet in use at the time of his trial. Defendant relies on the uncontroverted affidavit of Dr. Heinig to support his argument. Defendant's Br., Ex. P. Defendant also asserts that linking Ryan's DNA to the DNA on the vaginal swab was not possible until Ryan was convicted for another crime in 2004, at which point his DNA was uploaded into CODIS. Defendant's Br., Ex. V.[10] The prosecution

[10] Exhibit V attached to Defendant's brief is a criminal history report for Ryan produced by the State of Michigan's website. The report shows, as relevant here, that Ryan was arrested in 1998 as well as in 2004. Defendant

retorts that Defendant knew of the prosecution's theory at the time of trial that an accomplice was involved in the crimes and he failed to request "independent" DNA testing of the DNA sample given to the police by Ryan at the time of Ryan's interview in July 1997. The prosecution contends that because Defendant committed the crime, he knew that Ryan was his accomplice, and thus, Defendant should have requested that DNA testing be done comparing Ryan's sample to the DNA found at the scene of the crimes.

"[U]nder *Cress*, when a defendant is aware of evidence before trial, he or she is charged with the burden of using reasonable diligence to make that evidence available and produce it at trial." *Rao*, *supra* at 283. "[W]hat constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case." *Id.* at 283-84. "[T]he law affords a defendant procedural avenues to secure and produce evidence and, under *Cress*, a defendant must employ these avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial." *Id.* at 284.

As the quoted passages from *Rao* make clear, the reasonable diligence standard only applies to evidence that the defendant is aware of before trial. *Id.* at 283-84. If the defendant is not aware of the evidence, then failure to produce the evidence cannot constitute a failure to exercise reasonable diligence. Here, Defendant could not have been aware of the DNA test results concerning the semen stain on the shirt because the technology for performing a DNA test on the semen did not exist at the time of Defendant's trial. In other words, no amount of reasonable diligence would have allowed Defendant to discover that he was excluded as a contributor to the DNA on the victim's shirt. Defendant's Br., Ex. P. The prosecution fails to

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concludes that the 2004 arrest must have led to Ryan's DNA being uploaded into CODIS because Michigan did not begin uploading DNA profiles into CODIS until 2001. *See* Office of the Inspector General, Report No. 02-20, < http://www.justice.gov/oig/reports/OJP/a0220/findings.htm#11> (accessed July 4, 2014) ("Michigan was able to process its first upload of 2,916 complete offender profiles to CODIS in September 2001.").

address this point in its brief. Accordingly, in relation to the DNA test results produced by testing the semen stain on the victim's shirt, the Court holds that Defendant could not, using reasonable diligence, have discovered and produced this evidence at trial.

The prosecution makes a potentially viable argument in asserting that Defendant should have known of the initial police investigation into Ryan, among fifty other potential suspects, and that Ryan provided a DNA sample that Defendant could have requested be compared with the DNA contained on the vaginal swab. Therefore, according to the prosecution, Defendant failed to exercise reasonable diligence when he did not have Ryan's DNA tested against the DNA found at the crime scene. However, the prosecution's argument is flawed. First, as the prosecution points out in its brief, DNA samples were collected from over fifty suspects in this case. Prosecution's Br. at 8. Any request by Defendant to the trial court to have all of these samples tested and compared to the DNA found at the crime scene would likely have been futile. This is not a case where a single test directed at a single person was the clear course of action for Defendant. *Cf. Rao*, *supra* at 290. Second, at the time of Defendant's trial, the police had already ruled out Ryan as a suspect in the crimes. *See* Defendant's Br., Ex. N (Ryan's polygraph test results demonstrating that Ryan was being truthful "when he stated he was not involved with and did not have any knowledge of the Geraldine Montgomery homicide."). Thus, Defendant had no reason to believe that DNA testing specific to Ryan's sample would prove fruitful to his defense at trial. Further, any testing of Ryan's DNA at the time of trial still would not have revealed that Ryan was the contributor to the stain on the victim's shirt because, as discussed above, the technology did not yet exist to connect Ryan's DNA with that on the victim's shirt. Finally, to the extent that the prosecution contends that because Defendant committed the crime, he knew that Ryan was his accomplice, and thus, he should have requested that DNA testing be

done with the sample collected from Ryan, that type of circular logic is unconvincing. Thus, the Court holds that Defendant could not, using reasonable diligence, have discovered and produced at trial DNA evidence linking Ryan to the crimes.

4. Whether the new evidence makes a different result probable on retrial.

Defendant contends that the newly discovered DNA evidence makes a different result probable on retrial because the evidence "entirely upends the prosecution's theory of the case" that Defendant committed this crime with an accomplice and demonstrates that Ryan was the sole perpetrator. Defendant's Br. at 29. Defendant also claims that a different result is probable on retrial because knowledge of the prevalence of false confessions, and more particularly the susceptibility of the cognitively impaired to make such false confessions, has spread since the time of Defendant's trial. *Id.* at 32-36 (citing various scholarly resources discussing the problem of false confessions). Defendant presented evidence at trial that he suffers from mental illness and cognitive limitations. *See id.* at 20. He continues to maintain the same. *Id.* at 33. Moreover, Defendant questions the reliability of his confession given that his confession contained so many incorrect details and argues, as he did at trial, that any accurate information in his confession was a product of information relayed to him during police interrogations. *See id.* at Ex. S (listing the ways that Defendant's confession changed over time as to key facts in the investigation). Finally, Defendant cites a number of other recent cases where newly discovered DNA evidence has resulted in the granting of a new trial or acknowledgment that a defendant was wrongly convicted. Defendant's Br. at 37-39.

The prosecution responds that the new evidence does not make a different result probable on retrial because this case hinges on Defendant's confession to the crimes, not any physical evidence linking Defendant to the crime scene. The prosecution asserts that DNA evidence

played a limited role at trial and only served the purpose of supporting the prosecution's theory that multiple perpetrators committed these crimes. Additionally, the prosecution claims that Defendant could have committed a sexual assault and not left any DNA behind. Finally, the prosecution maintains that any increased awareness as to the possibility of false confessions should not play a role in the Court's determination because such information does not amount to newly discovered evidence.

In determining whether newly discovered evidence makes a different result probable on retrial, a court must look forward to how the newly discovered evidence would impact a jury's determination at a retrial, not backward to how the newly discovered evidence would have impacted the jury's verdict at the initial trial. *People v Vinson*, unpublished opinion per curiam of the Court of Appeals, issued July 26, 2012 (Docket No. 303593), 2012 WL 3046236, at *6. Although, it may be helpful for a court to analyze what evidence was emphasized at the initial trial in order for the court to assess the importance of the newly discovered evidence against that backdrop.

Here, both the prosecution and Defendant focused much of their attention at trial on Defendant's confession to the crimes. *See Peterson, supra*, 2011 WL 1179673 at *2 ("Although there was no scientific evidence directly connecting defendant to the crime, defendant gave several confessions admitting every element of the crimes charged. The validity and accuracy of these confessions was hotly debated below."). However, after reviewing a number of trial transcripts, the Court recognizes that DNA evidence was also an important and oft argued topic that pervaded the trial. *See, e.g.*, Trial Tr., November 17, 1998, at 161-64, 173-74, 176-77, 179 (Dr. Stephen Cohle discussing DNA evidence); Trial Tr., November 17, 1998, at 186-216 (Meghan Clement discussing DNA evidence); Trial Tr., November 19, 1998, at 176-79 (Connie

Swander discussing DNA evidence); Trial Tr., November 24, 1998, at 95-97, 170 (Detective Greg Somers mentioning DNA evidence); Trial Tr., November 25, 1998, at 29, 117-18 (same); Trial Tr., November 26, 1998, at 161 (same); Trial Tr., December 11, 1998, at 166, 168, 185, 212, 215 (mentions of DNA evidence during closing arguments).[11] The prosecution used the DNA evidence available at the time of trial to argue the possibility that the semen on the victim's shirt was contributed by Defendant and to assert a multiple perpetrator theory.[12]

With the possibility that Defendant contributed the DNA on the victim's shirt rendered null and the likelihood of a multiple perpetrator theory diminishing, looking forward to a possible retrial, the new DNA evidence makes a different result probable at such a retrial. The prosecution can no longer solidly rely on a theory that untestable physical evidence *might* have been left by Defendant at the scene of the crimes.[13] Thus, the prosecution would be left to argue the reliability of Defendant's statements admitting to the crimes and that Defendant committed these crimes without leaving behind any physical trace of his presence. However, as Defendant points out, false confessions, especially by those who are cognitively impaired, are very real. Defendant's Br. at 32-36; *see also J.D.B. v North Carolina*, ___ US ___; 131 S Ct 2394, 2401

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[11] At oral argument on Defendant's motion, the prosecution maintained that only two of these witnesses provided original testimony as to DNA test results. In other words, Dr. Cohle and Detective Somers only reiterated to the jury what was already told to them by Ms. Clement and Ms. Swander. The prosecution used this distinction to strengthen its argument that DNA evidence did not play a significant role at trial. However, the prosecution's distinction is without a difference—the DNA evidence testimony, whether original or rehashed, was heard by the jury on those occasions.

[12] While the prosecution is right to point out that opening statements and closing arguments are not evidence, arguments made by counsel at trial are meant to help the jury understand the evidence. CJI 2.3. At Defendant's trial, the prosecution used a portion of its closing argument to ask the jury to infer that the DNA on the victim's shirt belonged to Defendant. The Court may take into consideration how newly discovered evidence would affect the arguments made by the parties at trial. *See Grissom*, *supra* at 334 (Kelly, J., concurring) (discussing how newly discovered evidence would have altered prosecution's closing argument).

[13] The prosecution has asserted that it would once again go forward at a new trial with a multiple perpetrator theory. At oral argument, the prosecution stated that at a new trial it could make the claim that untestable DNA evidence found on the victim's necklace belonged to Defendant. *See* Defendant's Br., Ex. O (Michigan State Police forensic report noting that "the limited DNA results" obtained from the victim's necklace "are insufficient for conclusive association purposes."). Of course, the prosecution may be free to pursue such a theory at a new trial, but the prosecution's position overlooks the significant difference between untestable DNA found on a necklace, which cannot be said to originate from a male or female, and DNA contained in a semen stain on the victim's shirt that can be said to originate from the male perpetrator of the crimes.

(2011) ("[T]he pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed.") (citation and markings omitted). Defendant's confession will undoubtedly be viewed in a different light at retrial given the spreading awareness of false confessions by the cognitively impaired and the new DNA test results excluding Defendant as a contributor to any DNA evidence found at the crime scene.[14]

In addition, the new DNA test results tend to support a view that Ryan was the sole perpetrator of these crimes. The prosecution has provided scant evidence that suggests Ryan and Defendant associated with each other at the time of the crimes.[15] *Compare* Prosecution's Br., Ex. J (Michigan State Police report of interview with Nathan Wells who stated that Defendant and Ryan were part of same group that would smoke outside of school on breaks and Defendant would visit his girlfriend during lunch breaks at the school Ryan attended) *with* Defendant's Br., Ex. U (Michigan State Police report of interview with Douglas Steinka who stated that he did not think that Defendant and Ryan associated together) *and* Defendant's Reply Br., Ex. B (Michigan State Police report of interview with Angela Stonebrink who was part of smoking group at school and listed names of others that were part of group including Ryan and not Defendant).[16]

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[14] Defendant is likely to again argue that his confession was the product of information provided to him during police interrogation and that he suffers from mental illness and cognitive impairment. *See* Defendant's Br. at 33; Defendant's Br., Ex. S. Any allegation that Defendant recently confessed to the crimes is dubious given the source of the allegation, the source's motivation for coming forward, and the inconsistencies contained in the source's statement to police. For example, Mr. LaFrance told police that Defendant said he did not feel "one bit guilty" about committing the crimes yet moments later Defendant had tears in his eyes and confessed to Mr. LaFrance so that he could clear his conscience and because he felt guilty and remorseful that he was going to be released. Prosecution's Motion, Ex. A. Another example: Mr. LaFrance claims that Defendant confided in him that Defendant and a person named Mike committed the crimes and that Mike strangled the victim into unconsciousness. *Id.* However, there was no medical evidence introduced at trial showing that the victim was strangled.

[15] Defendant named multiple accomplices throughout his series of confessions. All of the named accomplices were cleared as suspects by the police. Ryan was not named by Defendant as one of those accomplices.

[16] At oral argument, defense counsel expressed doubt as to the accuracy of Nathan Wells' statement to the police. Mr. Wells told the police that Defendant used to visit Defendant's girlfriend, Carol Adams, at the school that Mr. Wells attended. According to Mr. Wells, it was when Defendant visited his girlfriend that Defendant and Ryan were in the same smoking group because Ryan attended the same school as Mr. Wells. Prosecution's Br., Ex. J.

Given the savage nature of the crimes committed against the victim, it seems that if there were two perpetrators, they would have been known to previously associate with each other on a more intimate basis. It does not appear likely that mere acquaintances would link up for this criminal episode. These facts strengthen the conclusion that the new DNA evidence makes a different result probable at such a retrial.

Case law also supports the Court's decision. While not involving DNA testing, in *People v Jackson*, 91 Mich App 636, 639-40; 283 NW2d 648 (1979), our Court of Appeals reversed the defendant's conviction for statutory rape and remanded for a new trial after scientific testing of the defendant's secretor status revealed that the defendant likely did not leave the semen stain found on the victim's underwear. The Court held that this newly discovered evidence "could well make a different result possible on retrial, since the only evidence against defendant at the original trial was his identification by the victim." *Id.* Other courts faced with circumstances more similar to this case (a confession and newly discovered DNA test evidence) have split on the issue of granting retrial. *Compare In re Bradford*, 140 Wash App 124, 131-32; 165 P3d 31 (2007) (affirming lower court's reversal of convictions based on newly discovered DNA evidence and order for new trial where DNA evidence called into question reliability of defendant's confession) *with State v Combs*, 162 Ohio App 3d 706, 711-12; 834 NE2d 869 (2005) (affirming trial court's denial of defendant's motion for DNA testing as DNA testing would not be outcome determinative because, in part, Defendant had confessed to crimes). However, the Court finds the circumstances of this particular case warrant a retrial because the factual disputes regarding Defendant's confession should be resolved in the context of the new

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However, Ms. Adams testified at Defendant's trial that she and Defendant dated in 1996, Trial Tr., November 17, 1998, at 219, and the only record evidence of Ryan's attendance at Wells' school shows that Ryan was enrolled at the school in 1995. Defendant's Reply Br., Ex. A. These facts call into question any association that Wells claims existed between Ryan and Defendant.

DNA evidence. *In re Bradford*, *supra* at 132; *see also Osborne*, *supra* at 55 (recognizing power of DNA evidence). The Court finds further support for granting Defendant's motion in *Jackson*, which involved a method of testing less certain than DNA testing.[17] "At the least, should [D]efendant again be convicted, it would be done with due regard for the newly discovered evidence that has been uncovered." *Cress*, *supra* at 697 (Kelly, J., dissenting).

B. Whether the new trial provision of Michigan's post-conviction DNA testing statute, MCL 770.16, is applicable and whether Defendant meets that standard.

Prior to oral argument on Defendant's motion, both parties seemed content with arguing Defendant's motion under the *Cress* standard and MCR 6.500 *et seq.* without clashing over the proper interpretation of MCL 770.16. Neither party discussed in their initial briefs the new trial provision contained in Michigan's post-conviction DNA testing statute, MCL 770.16. However, as discussed above, after oral argument, the prosecution submitted a motion "under MCL 770.16 to deny new trial."

MCL 770.16(1) permits a defendant convicted of a felony at trial before January 8, 2001, to petition the trial court for "DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing." MCL 770.16(8) provides the steps for a court to follow if potentially exonerating DNA test results are discovered after court-ordered testing is performed in accord with MCL 770.16(4). Subsection 8 states:

> If the results of the DNA testing show that the defendant is not the source of the identified biological material, the court shall appoint counsel pursuant to MCR 6.505(a) and hold a hearing to determine by clear and convincing evidence all of the following:

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[17] *Jackson* also involved an eyewitness identification; such identifications are often called into question, similar to confessions in a custodial interrogation setting. *See, e.g.*, *Ferensic v Birkett*, 501 F3d 469, 471-72 (CA 6, 2007) (citing expert testimony as to unreliability of eyewitness identifications).

> (a) That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material.
>
> (b) That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation described in subsection (1).
>
> (c) That the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial.

Defendant's motion for court-ordered DNA testing pursuant to MCL 770.16 was denied by the trial court in December 2002. The statute does not appear to limit the number of petitions for DNA testing that may be filed. *See People v Hernandez-Orta*, 480 Mich 1101, 1101; 745 NW2d 112 (2008) (reversing Court of Appeals' decision denying DNA testing and remanding case to trial court for further proceedings where defendant filed successive motion for DNA testing after first motion for DNA testing was denied). *But see id.* at 1102 (Young, J., dissenting) ("[N]othing in [MCL 770.16] permits the filing of serial petitions for DNA testing as a remedy for the denial of a previously filed petition."). Nor does a defendant appear to be limited to choosing between filing a motion for a new trial under MCL 770.16 and a motion for relief from judgment pursuant to MCR 6.500 *et seq.* *People v Faulkner*, 495 Mich 912; 840 NW2d 365 (2013) ("We note that in 2006 the defendant filed a petition for DNA testing under MCL 770.16, but the filing of that petition did not preclude him from filing a motion for relief from judgment under MCR Subchapter 6.500.").[18]

Yet, Defendant has decided not to file a motion for a new trial under MCL 770.16, a statute that may apply here. Defendant maintains that MCL 770.16 is inapplicable to this case

[18] An order of the Michigan Supreme Court is precedentially binding only when it contains a concise statement of the facts and the rationale for the decision can be understood. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 484; 633 NW2d 440 (2001) (citing *People v Crall*, 444 Mich 463, 464 n.8; 510 NW2d 182 (1993)).

because testing was done by stipulation and without a court order. Further, defense counsel seemed to indicate at oral argument that another challenge to Defendant's convictions under MCL 770.16 would be procedurally barred. *But see Hernandez-Orta, supra* at 1101.

It appears that the standard for a new trial in the face of new DNA test results should be the same whether the test results are the product of court order or stipulation. It seems odd to assume that the Michigan legislature would have set forth a standard for trial courts to use in one instance (court-ordered testing) and not the other (testing by stipulation). *See People v Agnew*, unpublished opinion per curiam of the Court of Appeals, issued July 19, 2011 (Docket No. 289692), 2011 WL 2848272, at *1-*2 (applying MCL 770.16 where prosecution stipulated to DNA testing). *But see People v Clemmons*, unpublished opinion per curiam of the Court of Appeals, issued May 8, 2007 (Docket No. 266331), 2007 WL 1345867, at *4 (applying standard set forth in *Cress* to DNA evidence).

In any event, assuming that the new trial provision contained in MCL 770.16 applies here, the Court finds that Defendant meets the standard for a new trial under MCL 770.16(8). First, it is without question that only the perpetrator of the crimes for which Defendant was convicted could be the source of DNA left on the victim's shirt. MCL 770.16(8)(a). Second, there is no doubt that the tested biological material has been properly preserved so that the recent DNA profile would be identical to the DNA profile of the sample initially collected during the investigation.[19] MCL 770.16(8)(b); *see* Defendant's Br., Ex. O. The prosecution agrees that these two provisions are met. Prosecution's Motion at 2. Finally, for the reasons stated in section A(4) above, "Defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new

[19] No DNA profile was created for the semen on the victim's shirt when the sample was originally collected. Defendant's Br., Ex. P.

trial." MCL 770.16(8)(c). The Court finds all of these conclusions are supported by clear and convincing evidence and an evidentiary hearing is not necessary to reach these conclusions.

CONCLUSION

For the aforementioned reasons, Defendant has met his burden under the *Cress* test and his motion for relief from judgment pursuant to MCR 6.500 *et seq.* is **GRANTED**.

To the extent that MCL 770.16 applies to this case, the Court holds that Defendant is entitled to a new trial pursuant to the provisions of that statute.

Accordingly, the judgment of conviction in this case is **VACATED** and a new trial is **ORDERED**.[20]

IT IS SO ORDERED.

Date: 8/14/2014

HONORABLE JANET M. ALLEN
46th Circuit Court

PROOF OF SERVICE

I certify that copies of this Opinion and Order were mailed to the parties and/or their attorneys by first class mail this date.

Date mailed: 8/14/14

Clerk

[20] Given the Court's conclusions, it is unnecessary to address Defendant's alternate arguments for relief pursuant to MCL 770.1 and *Herrera v Collins*, 506 US 390; 113 S Ct 853 (1993).