AlaFile E-Notice

23-CC-1985-000164.61

Judge: CHARLES A. SHORT

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF COVINGTON COUNTY, ALABAMA

STATE OF ALABAMA V. MCCRORY CHARLES C
23-CC-1985-000164.61

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MOTION TO RECONSIDER ORDER DENYING RULE 32 RELIEF

[Filer: LOUDON-BROWN MARK AARON]

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CIRCUIT COURT OF
COVINGTON COUNTY, ALABAMA
AMY JONES, CLERK

IN THE CIRCUIT COURT OF COVINGTON COUNTY
STATE OF ALABAMA

CHARLES McCRORY,	)	
Petitioner,	)	
v.	)	No. CC-1985-164.61
STATE OF ALABAMA,	)	
Respondent.	)	

MOTION TO RECONSIDER
ORDER DENYING RULE 32 RELIEF

Keith Harward. Robert Stinson. Gerard Richardson. Willie Jackson. Roy Brown. Ray Krone. Calvin Washington. Joe Williams. James O'Donnell. Levon Brooks. Kennedy Brewer. Bennie Starks. Michael Cristini. Jeffrey Moldowan. Anthony Keko. Harold Hill. Dan Young, Jr. Greg Wilhoit. Crystal Weimer. Steven Chaney. William Richards. Alfred Swinton. Sherwood Brown. John Kunco. Gary Cifizzari. Sheila Denton. Robert Duboise. Eddie Lee Howard. Gilbert Poole. *Each was wrongfully convicted due to bite mark evidence and has since been released from wrongful incarceration,* ***notwithstanding so-called "other evidence"*** *that incriminated them.*[1]

[1] Innocence Project, *Description of Bite Mark Exonerations* (July 2021). The order signed by this Court denying relief already has garnered significant public interest. This case will be featured in an upcoming national publication scheduled for release on March 5, 2022, and also in a forthcoming documentary film. Among those who have weighed in is Gilbert Poole, who joined the expanding list of bite mark exonerees last May, and stated: "It should be shameful when a state lets a conviction stand in light of the current understanding. . . Thankfully, the Michigan Innocence Project got the Conviction Integrity Unit involved. Attorney General Dana Nessel moved to open the doors to my release. AG Nessel did the right thing. Alabama, take notes." *See* Innocence Project, *Charles McCrory Is an Innocent Man Incarcerated for Over 35 Years in Alabama* (Feb. 17, 2021), and

Fundamental fairness and due process demand that Mr. McCrory be added to that list. On April 28, 2021, on the eve of the evidentiary hearing, he turned down the chance to plead guilty and be immediately released after almost four decades in prison because he refused to admit guilt to something he did not do. And the evidence shows that. The State's own trial expert has recanted his testimony; the State's entire case turned on now-discredited bite mark evidence; the perpetrator's hair clutched in the decedent's hand did not belong to Mr. McCrory; and the only physical evidence that did exist pointed to a different man, a man who, five weeks after this crime, committed a home-invasion rape and received twenty years in prison for that crime.

And yet, via an order that constitutes an unjustifiable outlier by today's legal standards, this Court, at the behest of the Covington County District Attorney, has upheld this miscarriage of justice.

Introduction

"I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. . . . When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the courts of appeals in determining why the judge decided the case." That admonishment, cited with approval by the United States Supreme Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656 n.4 (1964), was flouted in this case.

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accompanying commentary, *available via* https://innocenceproject.org/charles-mccrory-innocent-incarcerated-35-years-in-alabama/.

This Court's near-verbatim adoption of the State's proposed order—an order riddled with clearly erroneous fact findings and unsupported by any sound legal reasoning—constitutes an abuse of discretion. Thus, this Court should take the opportunity to reverse what will otherwise be viewed among the most infamous court decisions in Alabama given its explicit embrace of junk science to justify the continued imprisonment of an innocent man.

Indeed, as evidenced in part by the names recited above, bite mark evidence is one of the most notorious forms of junk science ever introduced in American criminal courts and appropriately was renounced by the State's own trial expert in this case. Justice Scalia once acknowledged this reality, writing, "Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that '[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.'" *Melendez-Diaz v. United States*, 557 U.S. 305, 319 (2009) (citation omitted). Query what Justice Scalia would think of the words written by the prosecutors and signed by the Court in this case in an attempt to justify an erroneous conviction based on discredited forensics, which were proffered as conclusive "scientific" evidence of guilt at trial.

The Order Signed by this Court Is Legally Unsupported and Rests on Clearly Erroneous Findings

Turning first to its substance, the order signed by this Court purported to find that Mr. McCrory did not satisfy the third, fourth, and fifth requirements of

Rule 32.1(e), and thus was not entitled to relief. This order is clearly erroneous and constitutes an abuse of the Court's discretion in several ways.

First, the prosecution initially conceded that the third factor was satisfied. *See* Rule 32 H'ng 149-50 ("I would agree that I think they probably met one, two and three."). Nevertheless, the order signed by the Court found that the unanimous opinions of three forensic dentists, which included a recantation by the prosecution's own expert, that the injury to the decedent was *not* a bite mark inflicted by Mr. McCrory, was mere "impeachment" of trial testimony. This is clearly wrong. Today, the evidence simply would not be admissible. *See State of Georgia v. Sheila Denton*, No. 04-R-330, 2020 WL 7232303, at *13 (Ware Co. Super Ct. Feb. 7, 2020) (Gillis, C.J.) ("Proven unreliable scientific evidence should never serve as the basis of a conviction and should be dealt with by the [c]ourts if and when it is found. Applying such an analysis to the facts of this case, it is uncontroverted that bite mark analysis and testimony as existed at the time of [the defendant's] conviction has been proven to be unreliable and not generally accepted within the scientific community of forensic odontology.").

All three expert forensic dentists who offered evidence at the hearing agreed: the injury on the decedent *was not a bite mark*—let alone a wound that could be "compared" or "matched" to anyone or anything. *See* R. 32 H'ng 49 (Dr. Brzozowski's testimony: "This is not a human bitemark."); R. 32 H'ng 77 (Dr. Freeman's testimony: "That is not a bitemark."); R. 32 H'ng Def. Ex. 3 (Dr. Souviron's sworn statement recanting his trial testimony).

The testimony at trial, however, had been that the injury was a bite mark, *and* that it was inflicted by Mr. McCrory, *and* that it was inflicted by Mr. McCrory *while he was committing the murder*. The new evidence wholly undermines those material facts which previously led inexorably to the conclusion that Mr. McCrory was guilty, and thus can in no way be construed as merely impeaching. The expert testimony by Dr. Souviron at trial provided the *only* physical evidence tying Mr. McCrory to the crime (and was contradicted by the physical evidence that *did* exist; for example, the human hairs found clutched in the victim's hands did not originate from Mr. McCrory). Dr. Souviron has now "fully recant[ed]" that testimony via a sworn statement. R. 32 H'ng Def. Ex. 3. Yet the order signed by the Court entirely omits from its discussion any recognition whatsoever that Dr. Souviron fully recanted the opinion he offered at trial. *See* R. 32 H'ng Def. Ex. 3 ("My Experience and Recent Developments in the Understanding of the Limitations of Bitemark Evidence Leads Me To Recant the Individualized Bitemark Comparison Testimony I Offered at Mr. McCrory's Trial"). A full recantation of one's own testimony is not impeachment.

Black's Law Dictionary has described impeachment as "proof that a witness is unworthy of belief." *Black's Law Dictionary*, Rev. 4th Ed. at 886 (1968). No one, ever, has suggested that Dr. Souviron, either at trial or now, is unworthy of belief. Rather, Dr. Souviron believed one thing, and testified as such, at trial; today, given the advances in science, he believes something different, and opined as such. This is not a case involving impeachment; it is a case involving recantation, which means

"[t]o withdraw or repudiate formally and publicly." *Id.* at 1433. Dr. Souviron withdrew and repudiated his prior opinion testimony, and his new opinion is entirely consistent with the overwhelming consensus of the scientific community: bite mark evidence is junk science. Thus, the order this Court signed suggesting the new evidence constitutes mere impeachment is wrong.

In its discussion of this third factor, the order drafted by the prosecution and signed by the Court then cited, without any accompanying legal reasoning, a case from 1987, *Handley v. State*, 515 So. 2d 121 (Ala. Crim. App. 1987), for the proposition that jurors were free to compare Mr. McCrory's dentition to a photograph of an injury—an injury that *all experts agreed was not a bite mark*—and somehow determine in their lay opinion that Mr. McCrory's dentition inflicted that injury. There is, however, a material distinction that the order this Court signed overlooks—in *Handley*, the injury at issue *was* a bite mark; here, all experts agreed the injury is *not* a bite mark. Thus, to the extent *Handley* (outdatedly) suggests a lay juror could compare a dentition to an actual bite mark, the case in no way supports the idea that a lay juror can compare a dentition to an injury that is *not a bite mark* and magically deduce some correspondence between the two. The notion that jurors could, during the course of a criminal trial, engage in an independent examination of trace evidence collected from a victim's body and come to a diagnosis of the instrument that inflicted the injury, and determine when that injury was inflicted, and by whom, defies common sense, and distorts the proper role of a juror in the criminal legal system.

Moreover, last April, just weeks before the hearing in this case, the tortured reasoning extrapolated from the *Handley* opinion was, unsurprisingly, expressly rejected by another court in an opinion repeatedly brought to the attention of this Court. *See People v. Prante*, No. 5-20-0074, 2021 WL 1381347, at *16 (Ill. App. Ct. Apr. 12, 2021) (rejecting the analysis in *Handley*). In addition, in *Commonwealth of Pennsylvania v. Paul Aaron Ross*, No. 2038-CR-2004, at 7 (Blair Co. Ct. Common Pleas, June 2020) (opinion attached), the court, via a *reasoned* decision, expressly rejected this Court's suggestion: "An average lay-person is not capable of taking molds of another person's teeth and comparing them to the wounds on a deceased person." With its rote citation of the outdated, rejected, and inapposite *Handley* opinion, without even an attempt to justify its application, the order this Court signed failed to engage in any sound legal reasoning, and thus must be rejected.

As noted above, Drs. Freeman and Brzozowski testified at the evidentiary hearing, without impeachment, that the injury to the decedent was *not* a bite mark or "teeth marks." Thus, the order's mention of Dr. Souviron's trial testimony about the difference between "teeth" marks and "bite" marks does not save the analysis; rather, it highlights yet again how this Court overlooked unimpeached expert testimony presented at the hearing:

> Q. So is it fair to say that teeth marks would be even less reliable?
>
> A. Individual or two teeth marks *is incredibly not reliable.*

R. 32 H'ng 93 (testimony of Dr. Freeman) (emphasis added); *see also id.* at 43 (Dr. Brzozowski's testimony: "We don't have criteria for teeth marks.").

The effort to somehow distinguish "teeth marks" from "bite marks" is an exercise in sophistry. There is no meaningful distinction between these alleged injuries, apart from the fact that a tooth mark would have even *less* information—and be even more likely to confuse a juror—than an alleged "bite mark," and any finding to the contrary is clearly erroneous as it conflicts with common sense and elementary logic. The order's failure to account for this testimony is further evidence why the conclusions in the order must be rejected. *See Byrd v. State*, 78 So. 3d 445, 450-51 (Ala. Crim. App. 2009) (observing that a judge abuses his discretion where the decision is not based on the record evidence).

Second, the discussion of the fourth factor, namely, whether the trial outcome would have been different in light of the new evidence, rested on a flawed application of the law and erroneous findings.

At the outset, the order applies the wrong legal standard. Rule 32.1(e)(4) requires the Court to consider whether, if the newly discovered facts had been known at the time of trial, "the result probably would have been different." In *Kyles v. Whitley*, 514 U.S. 419, 433-36 (1995), the United States Supreme Court explained the meaning of a "reasonable probability" that "the result of the proceeding would have been different." "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but *whether in its absence he received a fair trial*, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434 (emphasis added). Thus:

> [This] is *not a sufficiency of evidence test*. A defendant need not demonstrate that after discounting the inculpatory evidence in light of

> the [new] evidence, there would not have been enough to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict.

Id. at 434-35 (emphasis added).

The order signed by this Court fails to apply the correct test. Despite the Supreme Court's clear pronouncement that this factor is "*not* a sufficiency of evidence test," the order signed by this Court three times in the two paragraphs it devotes to this question explicitly applies a "sufficiency of the evidence" test. *See* Order at 3 ("The Court has reviewed the sufficiency of the evidence which remains after taking out, as it were, the testimony of Dr. Souviron."); *id.* ("The Court finds that the evidence against the defendant was sufficient for a rational finder of fact to reasonably exclude every hypothesis except that of guilt, even absent the testimony of Dr. Souviron."); *id.* at 4 ("[A]bsent the testimony of Dr. Souviron, the jury could have reasonable found that the defendant" was guilty.). Thus, the order plainly applies the wrong legal standard and flawed legal analysis in reaching an erroneous legal conclusion.

Applying the correct legal standard, the new evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435; *see also Smith v. Cain*, 565 U.S. 73, 76 (2012) ("the State's argument offers a reason that the jury *could* have" come to a given conclusion, "but gives us no confidence that it *would* have done so") (emphasis in original). The materiality analysis in this case was clearly wrong on the law and relief is warranted.

The materiality analysis in this case was clearly wrong on the facts as well. The order signed by the Court opined that expert testimony that Mr. McCrory bit the decedent while he was murdering her was not material to his conviction and that testimony at the Rule 32 hearing demonstrating that this was in fact *not true* would somehow not have changed the outcome. Such reasoning, once again, defies logic.

It is now well-established that evidence cloaked as "scientific" and presented by an "expert," as was done at trial with respect to the alleged bite mark, is particularly prejudicial and material to a conviction, especially when such evidence is the only physical evidence tying the defendant to the crime. As the Court of Appeals for the Eleventh Circuit has observed: "expert testimony may be assigned talismanic significance in the eyes of lay jurors." *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004).

Bite mark evidence is uniquely prejudicial "expert" evidence because it also is direct evidence of violence. As demonstrated by the ever-growing number of wrongful convictions it has caused, bite mark evidence is among the most prejudicial forms of forensic evidence ever introduced in this country's legal system. Even standing alone, biting someone can rise to felony assault. Unlike DNA, fingerprints, or firearms matching, there is virtually never an innocent explanation for a suspect to bite someone, particularly at or near the time of death, as was alleged at Mr. McCrory's trial. To suggest, as the order does, that expert testimony opining that Mr. McCrory bit the decedent during the murder did not dictate the

outcome of this trial is to be willfully blind to reality. This is particularly so given that the perpetrator's hair was found clutched in the hands of the decedent, and Mr. McCrory was definitively excluded as being the source of that hair. In other words, the "expert" bite mark testimony was *so* powerful in the eyes of the jury that it overcame other substantial evidence of innocence.

Faced with the undeniable reality that without Dr. Souviron's testimony the outcome of the proceedings would have been different, this Court, in the order the prosecution wrote for it to sign, instead again reverted to the absurd notion that the jury was free to determine that Mr. McCrory's dentition inflicted a bite mark that the expert dentists agreed was *not a bite mark*. As discussed above, this view runs counter to common sense and, also unsurprisingly, has been rejected by courts. *See, e.g.*, *Prante*, No. 5-20-0074, at *16; *Ross*, No. 2038-CR-2004, at 7.

In an attempt to salvage an unsupportable conviction, the order signed by the Court purported to find that other facts also supported the conviction. In so doing, however, the order ignored record evidence to the contrary, and thus its contents are due no deference. *See Byrd*, 78 So. 3d at 450-51.

The below constitute the entirety of the purported "other evidence" relied upon by this Court to sustain Mr. McCrory's conviction.

- The order cites evidence that there was no forced entry to conclude that the intruder must have had a key. ***False.*** State's Exhibit 16 from trial (reproduced below) shows that there was an open window found at the home. Trial evidence also revealed that there was a fresh footprint below the window that was so significant to the investigation that police had it cast. R-136-42, 150.

- The order cites testimony that two neighbors saw Mr. McCrory's car parked at the home of the decedent around the time of the murder. ***False.*** Although they testified to seeing a car that looked *like* one that Mr. McCrory drove on what *might have been* the night of the murder, R-203, 242, those witnesses's alleged observations were impeached by other witnesses, and unrebutted evidence at the Rule 32 hearing demonstrated the neighbors could not have seen what they claimed. *See* Def. Trial Ex. 6; R. 32 H'ng Def. Exs. 7, 8. In addition, neighbor Wayne Meeks's testimony was so incredible at the Rule 32 hearing that the Court had to stop him while he was testifying and strike his testimony. R. 32 H'ng 162-63.

- The order opines that Mr. McCrory's question at the scene about whether the injuries to the back of the decedent's head were what killed her suggest guilt because he would not have known that the decedent had suffered an injury to the back of her head just by looking at her body. ***False.*** Evidence admitted at trial showed that any person who responded to the scene would have immediately seen that the decedent had injuries to the back of her head. *See, e.g.*, State's Trial Exhibit 48.

The point here bears repeating. This Court's abject failure to engage with any of these facts in a meaningful analysis constitutes an abuse of judicial discretion that resulted in findings of fact that were clearly erroneous.

Just as glaring is the Court's blanket failure to account for the unimpeached evidence in the record demonstrating that Mr. McCrory was innocent:

- The hair of the perpetrator that was found clutched in the decedent's hand following the violent struggle that led to her death did *not* belong to the decedent or to Mr. McCrory. R-269, 290-91.

- None of the physical evidence collected from the scene, and no forensic evidence, implicated Mr. McCrory in any way. R-108-110.

- Immediately after Mr. McCrory supposedly committed a violent murder, he consented to searches of his home, his car, and his person, all revealing no incriminating evidence. R-186-88, 193.

This Court's utter refusal to admit or attempt to address these unimpeached facts of innocence in the order it signed is further evidence as to why the order is clearly erroneous and the product of a tainted process and a judge who abused his discretion.

Lastly, the prosecution wrote, in the order this Court signed, that "The Court has reviewed the transcript of the trial in its entirety." Given the above-mentioned errors and omissions, it is fair for the objective reader to question whether this is true. In addition, the opening and closing statements have never been made available to defense counsel, as was noted at the Rule 32 hearing, and thus have not been reviewed by the Court. When defense counsel interviewed the attorney who gave the closing argument at trial and informed the Court that the attorney's recollection of his closing argument was that the bite mark was material to the conviction, this Court refused to consider that supplement to the record. *See* Doc. 81. Yet at the hearing the Court *did* allow the prosecution to re-read self-selected portions of the testimony of its own trial witnesses despite such testimony already being in the record, R. 32 H'ng 96-158, 170-75, in an apparent attempt to

masquerade as a response to Mr. McCrory's new evidence and arguments, when the prosecution in fact had no substantive response.

Third, as counsel anticipatorily explained in their post-hearing brief, the two sentences devoted to the fifth factor in the order signed by this Court constitute an incorrect legal analysis and the order cites no legal authority in support of its position. The question asked by the fifth factor, found in Rule 32.1(e)(5), is *not* whether innocence has been established (even though it has), but rather, whether the type of evidence presented speaks to the issues of guilt and innocence.

Contrary to what the prosecution argued and wrote for this Court to sign, Rule 32.1(e)(5) does *not require* Mr. McCrory to establish his innocence to receive a new trial (even though he has). Rather, the Supreme Court of Alabama has squarely rejected the prosecution's argument, which was adopted verbatim by this Court, because such "reasoning would place an almost impossible burden on a criminal defendant." *Ex parte Ward*, 89 So. 3d 720, 727 (Ala. 2011). Rather, a "common-sense reading of Rule 32.1(e) is one that requires a showing that the newly discovered facts *go to the issue of* the defendant's actual innocence (as opposed to a procedural violation not directly bearing on guilt or innocence)." *Id.* (emphasis added). There has been no suggestion that the new evidence Mr. McCrory has presented *goes to the issue* of his innocence as opposed to a procedural violation. Thus, the legal conclusion in the order signed by this Court is clearly erroneous.

Finally, again without engaging in any legal analysis and again simply signing off on two sentences written by the State, the order signed by the Court rejected Mr. McCrory's argument that the Constitutions of the United State and Alabama require a new trial. Mr. McCrory re-asserts and re-adopts the state and federal constitutional arguments and authorities already presented, including those in his post-hearing brief.

In addition, and as discussed further below, the order written by the prosecution and signed by this Court constitutes a state and federal due process violation in itself. This Court's failure to recognize and apply clear law or engage with the facts and evidence, and instead its willingness to cut and paste the State's brief into a four-page court order after sitting on this case for ten months undermines any reasonable onlooker's belief that due process has been satisfied in this case. The fact findings and legal analysis in the order signed by this Court are "plainly incorrect." *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017) (granting relief to person on Alabama's death row because the Alabama court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law").

Pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, pursuant to the Alabama Constitution, and pursuant to Alabama law, the order signed by this Court denying Mr. McCrory relief—for both the procedural and substantive reasons detailed—must be set aside.

The Process that Led to this Court's Signing an Almost-Verbatim Version of an Order Written by the State Reveals that the Order in this Case Constitutes an Abuse of Discretion

On April 28, 2021, Mr. McCrory declined the State's invitation to plead guilty to a crime he did not commit, despite the promise of being released from prison that same day, nearly four decades after his wrongful conviction. This Court then went forward with an evidentiary hearing at which all three expert forensic dentists who offered evidence agreed: the injury on the decedent that was claimed, at trial, to have been a bite mark inflicted by Mr. McCrory during the murder, *was not a bite mark*. After the hearing, the Court requested post-hearing briefing.[2] Briefs were submitted within thirty days.

Almost *ten months later*, the Court added one sentence to the four-page order that the State had written, affixed its signature, and denied relief, without addressing any of the arguments put forth in Mr. McCrory's extensive post-hearing briefing or engaging with any of the new facts Mr. McCrory presented during the hearing. Such a *process* undermines faith in the legal system and merits no respect from any audience. *See Jefferson v. Upton*, 560 U.S. 284, 292-94 (2010) (criticizing the verbatim adoption of a party's proposed findings when the circumstances cast doubt on the judge's engagement with the underlying facts); *Anderson v. City of Bessemer City*, 470 U.S. 564, 571-72 (1985) (discussing circumstances under which the adoption of party-authored findings do not merit deference on review).

[2] When the defense suggested a deadline for the briefing of six weeks, the Court indicated that six weeks would be too long: "I appreciate the compliment to my memory when I say that I can wait that long and remember stuff." R. 32 H'ng 187.

The Supreme Court of Alabama has recognized that orders prepared similar to the one this Court signed are due no respect. "It is axiomatic that an order granting or denying relief under Rule 32, Ala. R. Crim. P., must be an order *of the trial court*. It must be a manifestation of the findings and conclusions *of the court*." *Ex parte Ingram*, 51 So. 3d 1119, 1122 (Ala. 2010) (emphasis in original). Review of the order signed by this Court makes plain that it is "not a product of its independent judgment." *Ex parte Scott*, 262 So. 3d 1266, 1273 (Ala. 2011). Perhaps the most striking evidence is that the order relies—twice—on an inherently inconsistent finding in support of its decision. After accepting as true the evidence presented by the forensic dentists at the Rule 32 hearing that the injury was not a bite mark and could not be compared to any dentition by any forensic expert, the order states that the jury "had the ability to compare the physical evidence of the photographs of the injury to the victim's arm and the mold of the defendant's teeth for themselves and thus conclude that the defendant's teeth matched the marks of the injury." Order at 2-3. In other words:

- The Court accepted that board-certified experts, each of whom had decades of experience, agree the injury is *not* a bite mark.
- And the Court accepted that, given the lack of scientific validity of the entire field of bite mark analysis, no expert could compare the injury to a dentition.
- *But, nevertheless, the Court found that a lay jury could do what the experts admit they cannot do: compare a dentition to a photograph of an injury of unknown origin, conclude that the injury is a human bite mark, and determine that Mr. McCrory inflicted the bite and did so at the time of the murder.*

The evident fallaciousness of this reasoning demonstrates that this Court did not independently adjudge this case and, instead, merely signed the order the State put before it.

Another example of this Court's failure to independently decide this case, and instead simply sign an order that was "infected with the same adversarial zeal of the State's counsel," *Scott*, 262 So. 3d at 1274, is that the Court, in its purported analysis of the materiality of the new evidence, failed to *even mention* the single-most important piece of unimpeached evidence adduced at the Rule 32 hearing. The State's *own* forensic dentist from trial, in a sworn affidavit, fully recanted his trial testimony, the same testimony the State used to wrongfully convict Mr. McCrory. Completely ignoring what was arguably the most significant piece of evidence presented at the Rule 32 hearing is stark proof that this Court did not independently consider the facts of this case and thus that the order is due no deference. *Compare Woods v. State*, 221 So. 3d 1125, 1152 (Ala. Crim. App. 2016) ("[T]he circuit court's order was 80 pages long . . . [and] contains none of the obvious inaccurate findings . . . ."), *with* Order at 1-5 (spanning just four pages despite a robust evidentiary hearing and adopting verbatim the obviously inaccurate statements contained in the State's order).

Not long ago, in a panel decision that included then-Chief Judge Carnes and Judge Tjoflat, the Eleventh Circuit affirmed habeas relief because "other than altering the concluding sentence and including the date and his signature, [the state habeas judge] made no changes to the proposed order, notwithstanding the

many glaring errors it contained." *Jefferson v. GDCP Warden*, 941 F.3d 452, 475 (11th Cir. 2019). Accordingly, this Court's factual findings are likewise not "entitled to a presumption of correctness." *Id.* at 474.

The Order Written by the Prosecution and Signed by this Court Is the Latest Example of this Court Abusing its Discretion by Issuing Unreasoned Orders at the Behest of the District Attorney

This Court's practice of signing unreasoned orders and failing to give due consideration to matters before it does not appear to be unique to this case. Rather, while counsel's research into this Court's practices is in the early stages and remains ongoing, a pattern already has emerged that has constitutional implications, *see, e.g.*, *Jefferson*, 560 U.S. at 292-94; *Anderson*, 470 U.S. at 571-72, and will increase the growing public interest in this case.

For example, in *Ex parte Steinberg*, 294 So. 3d 835, 837-38 (Ala. Crim. App. 2019), Judge Short was presented with six different petitions for expungement based on facts and circumstances *unique* to each. Judge Short "entered separate but *identical* orders denying all the petitions for expungement." *Id.* at 838 (emphasis added). On appeal, the Attorney General did *not* defend the orders and instead conceded error. *Id.* at 842. The appellate court reversed because this Court based its orders "on an erroneous conclusion of law and, thus, abused its discretion." *Id.*

In *Henderson v. State*, 60 So. 3d 948, 950 (Ala. Crim. App. 2008), the appellant filed a motion for new trial and attached affidavits, record excerpts, medical reports, and medical findings, culminating in a filed document that

spanned approximately 177 pages. Judge Short "merely stamped 'denied' on the first page of [the] motion."[3] *Id.* The appellate court reversed. *Id.* at 951; *see also King v. State*, No. CR-19-0249, 2021 WL 940954, at *1 n.1 (Ala. Crim. App. Mar. 12, 2021) (noting that the appellate court had to remand the case because Judge Short "did not include it its restitution order the facts and circumstances supporting the order").

Judge Short repeatedly has engaged in the practice of issuing "stamped decisions" to deny relief to defendants, particularly in cases involving requests for relief from a conviction or sentence pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Below is a sampling:

- *State of Alabama v. Jeffery Andrews*, No. CC-1998-131.62 (Covington Co. Cir. Ct. Sept. 10, 2014) (Doc. 10);
- *State of Alabama v. Gregory Bernard Feagin*, No. CC-1991-256.62 (Covington Co. Cir. Ct. Oct. 24, 2011) (Doc. 3);
- *State of Alabama v. Hal Morgan Tucker, II*, No. CC-2005-182.60 (Covington Co. Cir. Ct. Apr. 9, 2014) (Doc. 17);
- *State of Alabama v. Joel Clayton Kelley*, No. CC-20050481.61 (Covington Co. Cir. Ct. Oct. 17, 2017) (Doc. 4);
- *State of Alabama v. Raymond Turner*, No. CC-2007-331.60 (Covington Co. Cir. Ct. Sept. 28, 2015) (Doc. 12);
- *State of Alabama v. Chad Bell*, No. CC-2008-187.62 (Covington Co. Cir. Ct. Mar. 14, 2016) (Doc. 10);
- *State of Alabama v. William George Maxie*, No. CC-2008-462.62 (Covington Co. Cir. Ct. Dec. 21, 2017) (Doc. 6);

[3] Judge Short repeated this practice of stamping "denied" on a substantive defense pleading in this case. *See* Doc. 81.

- *State of Alabama v. Kelvis Jermaine Coleman*, No. CC-2010-45.60 (Covington Co. Cir. Ct. June 17, 2015) (Doc. 11);

- *State of Alabama v. Jerwaske Mack*, No. CC-2012-380.60 (Covington Co. Cir. Ct. Dec. 8, 2015) (Doc. 7);

- *State of Alabama v. Jimenez Pete #187743 C1-20A*, No. CC-2014-140.60 (Covington Co. Cir. Ct. Aug. 27, 2021) (Doc. 12);

- *State of Alabama v. Hal Morgan Tucker, II*, No. CC-2013-28.60 (Covington Co. Cir. Ct. June 10, 2014) (Doc. 17);

- *State of Alabama v. Spenard Kirk Donovan*, No. CC-2016-369.60 (Covington Co. Cir. Ct. Aug. 27, 2021) (Doc. 17);

- *State of Alabama v. James Richard Downes*, No. CC-2008-106.60 (Covington Co. Cir. Ct. Nov. 18, 2014) (Doc. 7);

- *State of Alabama v. Michael Eugene Feagin*, No. CC-2005-109.60 (Covington Co. Cir. Ct. July 5, 2012) (Doc.3);

- *State of Alabama v. Jody Potts*, No. CC-1981-86.60 (Covington Co. Cir. Ct. June 15, 2017) (Doc. 56);

- *State of Alabama v. Scotty Edwards*, No. CC-2008-17.60 (Covington Co. Cir. Ct. Mar. 17, 2017) (Doc. 16);

- *State of Alabama v. Samuel A. McCormick*, No. CC-2007-122.61 (Covington Co. Cir. Ct. Jan. 12, 2021) (Doc. 18);

- *State of Alabama v. Willis T. Marshall*, No. CC-2016-108.60 (Covington Co. Cir. Ct. Nov. 9, 2020) (Doc. 13);

- *State of Alabama v. Eugene Wallace Black*, No. CC-2015-7.60 (Covington Co. Cir. Ct. May 29, 2018) (Doc. 15);

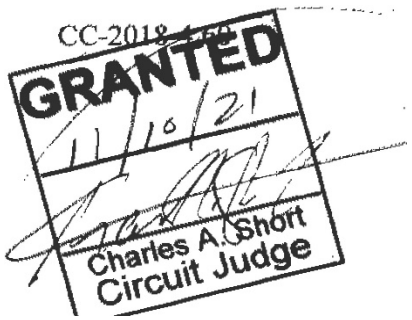
- *State of Alabama v. Huey Edward Coon*, No. CC-1978-238.60 (Covington Co. Cir. Ct. Dec. 15, 2020) (Doc. 32);

- *State of Alabama v. Charles E. Hobdy*, No. CC-2003-423.62 (Covington Co. Cir. Ct. Aug. 3, 2017) (Doc. 7);

- *State of Alabama v. Michael Tyson Lee*, No. CC-2005-40.62 (Covington Co. Cir. Ct. Mar. 21, 2017) (Doc. 4);

- *State of Alabama v. Justin James Long*, No. CC-2018-4.60 (Covington Co. Cir. Ct. Nov. 10, 2021) (Doc. 18).

Reproduced below is the stamp Judge Short routinely used to dispose of the above-mentioned cases by granting the District Attorney's motions to dismiss without rendering any reasoning whatsoever in support of his decision.[4]



Meanwhile, counsel's ongoing research has yet to uncover *any* reasoned decision issued by Judge Short addressing the merits of a Rule 32 Petition. *See also, e.g.*, *State of Alabama v. John W. Kearns, Jr.*, No. CC-2012-92.60 (Covington Co. Cir. Ct. Aug. 19, 2021) (Doc. 28) (denying motion, not via a stamp, but via an unreasoned summary order).[5] Notably, however, research *has* uncovered reasoned

[4] Many of the above-cited cases involved "stamped decisions" on pleadings written by Assistant District Attorney Grace McLemore Jeter during the tenure of District Attorney Walt Merrell. This creates, at the least, an appearance of impropriety due to differential treatment of prosecutors and defendants. *See, e.g.*, Commentary to ABA Rule of Professional Conduct 3.8, *Special Responsibilities of a Prosecutor* ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[5] The entirety of the order reads as follows. "This cause is before the Court on the Defendant's Rule 32 Petition and the State's answer to and Motion to Dismiss the same. After a review of the pleadings in this case the Court finds and orders as follows. The State's Motion to Dismiss the Defendant's Rule 32 petition is due to be and the same is hereby Granted." Doc. 28.

decisions addressing such petitions authored by *other* judges of this same Circuit. What is becoming clear is that Rule 32 petitions pending before Judge Short do not get the consideration or due process that is legally and constitutionally required.

Perhaps most troubling (apart from the instant matter) is a case that directly implicates the current District Attorney Walt Merrell, and Assistant District Attorney Grace McLemore Jeter, who took primary responsibility at the evidentiary hearing in Mr. McCrory's case. In *State of Alabama v. Samuel Allan McCormick*, No. CC-2007-522.61 (Covington Co. Cir. Ct., Judge Short), Ms. Jeter filed an Answer and Motion to Dismiss Defendant's Rule 32 Petition on June 9, 2021, at 4:54 p.m. *See* Doc. 39. Review of the case reveals approximately sixty scanned images in the Rule 32 docket alone. Early the next afternoon, on June 10, 2021, at 1:13 p.m., Judge Short granted the State's motion to dismiss, writing that he had "reviewed all of the pleadings." *See* Doc. 41.

This Court's practice of signing unreasoned orders and issuing "stamped decisions," apparently with the expectation and condonation of the current prosecuting attorneys, informs the review of this case. *See also State of Alabama v. Kevin Lamar Huff*, No. CC-2013-142.60 (Covington Co. Cir. Ct., Judge Short) (summarily denying Rule 32 petition on motion of Ms. Jeter after Mr. Huff was sentenced to fifteen years in prison for possession of marijuana). While it is not yet public "the extent to which [a convicted person's] rights and mechanisms of review have become an empty formality, [because] courts have outsourced their

responsibility to the prosecution,"[6] through this case, evidence of the "empty formality" in this Court is emerging. Mr. McCrory's continued wrongful imprisonment is the purest manifestation of the harm caused by this routine trampling of Alabama citizens' constitutional rights.

With Its Decision, this Court, at the Urging of the Covington County District Attorney's Office, Enjoys the Unique and Notorious Distinction of Allowing a Conviction to Stand Notwithstanding the Admission of Now-Defunct Bite Mark Evidence

In *Commonwealth v. Cifizzari*, 492 N.E.2d 357 (Mass. 1986), the Supreme Judicial Court of Massachusetts affirmed Gary Cifizzari's murder conviction that was based on a bite mark, among other evidence. In *State v. Stinson*, 397 N.W.2d 136 (Wis. 1986), the Court of Appeals did the same in Robert Lee Stinson's case. And in *Brooks v. State*, 748 So. 2d 736 (Miss. 1999), the Supreme Court of Mississippi affirmed Levon Brooks's capital murder conviction based on bite mark and other evidence. While those cases are decades old, they set the legal precedent for the admission of bite mark evidence in the respective states.

Gary Cifizzari has been exonerated and is free. Robert Lee Stinson has been exonerated and is free. Levon Brooks was exonerated and was free before he died of cancer. Charles McCrory will be next, because as has often been said, though the arc of the moral universe may be long, it bends towards justice. Until then, this Court, and the District Attorney who defended this conviction, bear the same stains and share the same infamy of those before them who failed to recognize and lacked

[6] Jordan M. Steiker, James W. Marcus, Thea J. Posel, *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 Hous. L. Rev. 889, 931-32 (2018).

the courage to overturn a wrongful conviction secured thanks to bite mark evidence. Reconsideration is this Court's last chance to right that wrong.

The decision must be reversed.

/s/ *Mark Loudon-Brown*
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Counsel to Charles McCrory

CERTIFICATE OF SERVICE

I certify that the foregoing document has been served upon the following:

District Attorney Walt Merrell
Chief Assistant District Attorney Grace McLemore Jeter
Office of the Covington County District Attorney
1 North Court Square, Suite G
Andalusia, Alabama 36420

On this 1st day of March, 2022.

/s/ *Mark Loudon-Brown*
Mark Loudon-Brown

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
V.	:	2038 CR 2004
	:	
PAUL AARON ROSS,	:	
DEFENDANT.	:	

ELIZABETH A. DOYLE	PRESIDING JUDGE
RICHARD A. CONSIGLIO, ESQ.	DISTRICT ATTORNEY
THOMAS M. DICKEY, ESQ. THOMAS K. HOOPER, ESQ. DANA M. DELGER, ESQ. CHRIS FABRICANT, ESQ.	DEFENSE COUNSEL

OPINION AND ORDER

Before the court, on remand from the Pennsylvania Superior Court, is the Defendant', Paul Aaron Ross' ("Ross") Notice of Expert Testimony and Response to Commonwealth's Proffer filed on April 13, 2020 and the Commonwealth's Response thereto, filed on May 7, 2020. Before we discuss the outstanding legal issues in this matter, we shall briefly detail the most recent procedural history in this matter.

PROCEDURAL HISTORY

In the most recent decision of the Pennsylvania Superior Court, filed on November 21, 2019, the court described the most recent background in this case:

> On October 12, 2012, an *en banc* panel of this Court vacated [Ross's] judgment of sentence and remanded for a new trial. On November 17, 2015, the Pennsylvania Supreme Court denied the Commonwealth's petition for allowance of appeal.
>
> On March 1, 2016, [Ross] filed pre-trial motions in which he sought, *inter alia*, the exclusion of any expert evidence relating to bite mark identification

> and a *Frye* hearing. At trial, the Commonwealth intends to introduce the testimony of Dr. Dennis Asen (Dr. Asen) and Dr. Lawrence Dobrin (Dr. Dobrin). Dr. Asen and Dr. Dobrin are both dentists and practice in the field of forensic odontology (the study of the structure of teeth). Dr. Asen and Dr. Dobrin intend to testify that the mark on Ms. Miller's left breast was caused by a human bite, and when they compared five sets of teeth molds, including one from [Ross], Dr. Asen and Dr. Dobrin could exclude four of the molds from having made the bite mark, but not [Ross'].
>
> On December 2, 2016, following the filing of several supplemental motions by [Ross] and objections by the Commonwealth, the trial court heard oral argument on [Ross'] request for a *Frye* hearing. On March 8, 2017, after the parties submitted additional briefs on [Ross'] request for a *Frye* hearing, the trial court entered an order concluding that bite mark identification evidence is not novel and therefore a *Frye* hearing was not warranted. The court further provided that the Commonwealth's experts were to adhere to the guidelines set forth by the American Board of Forensic Odontologists (ABFO).
>
> On April 5, 2017, [Ross] filed a motion to amend the March 8, 2017 order to include language relating to Pennsylvania Rule of Evidence 702(c), so that the trial court could address whether the expert methodology is generally accepted in the relevant field. [Ross] also requested that the court certify for immediate appeal its decision not to hold a *Frye* hearing on the bite mark identification evidence. On November 6, 2017, the trial court entered an amended order once again denying Appellant's request for a *Frye* hearing. The trial court also included in the order language addressing Rule 702(c) and granting [Ross'] request for certification of immediate appeal.
>
> On December 5, 2017, [Ross] filed a petition for permission to file an interlocutory appeal with this Court, which we denied by *per curiam* order on May 7, 2018. On June 1, 2018, [Ross] filed a petition for allowance of appeal to the Pennsylvania Supreme Court. On November 20, 2018, our Supreme Court granted [Ross'] petition for allowance of appeal, vacated this Court's order denying [Ross'] petition for permission to file an interlocutory appeal, and remanded the case to this Court for disposition.

Commonwealth v. Ross, No. 1738 WDA 2018, unpublished memorandum at 2-4 (Pa. Super. filed November 21, 2019). The Superior Court vacated the trial court's order and remanded the matter, indicating: "[t]herefore, we vacate the order denying

Appellant's request for a *Frye* hearing and remand this matter to the trial court for a hearing in accordance with *Frye*."

This matter was previously presided over by the Honorable Jolene Grubb Kopriva and it is Judge Kopriva's previous order that was vacated. On February 11, 2020, this jurist convened the parties for a status conference to discuss the parameters of the *Frye* hearing mandated by the Superior Court. At this proceeding, and to this jurist's knowledge, for the first time in the long history of this case, the Commonwealth indicated it no longer was calling any odontologists as experts but rather as fact witnesses. More specifically, they intend to use Dr. Asen to present overlays taken from molds of various individuals' teeth including Ross and show them as "circumstantial evidence" to the jury without any comment from Dr. Asen. Accordingly, we offered the Commonwealth to produce a specific offer of proof relative to its intended witnesses and permitted Ross to respond. We shall now proceed to a summary of the parties' respective arguments.

SUMMARY OF ROSS' ARGUMENT

Ross argues that the Commonwealth, by now arguing that its former experts may testify as lay persons, would force the jury "to do what no expert can." Inviting the empaneled jurors to determine whether bite marks match the overlays of the molds of Ross' teeth, according to Ross, " would subvert not only *Frye*" but also his right to a fair trial. Ross then goes on to cite a Presidential report and a relatively recent federal case as support for his contention that the science underlying bite-mark identification is not sound.

Further, Ross argues that basic principles of Pennsylvania evidentiary law preclude the entry of evidence from these experts from testifying as lay people because

their knowledge "beyond that possessed by the average layperson." Additionally, Ross' argument continues, the evidence does not meet the basic requirements of relevancy where its only probative value is to show that Ross' teeth produced the injuries on the victim. This is precisely the conclusion that Ross contends the Commonwealth is saying its witnesses are not going to make, thus vitiating the need for the *Frye* hearing. Otherwise, Ross contends, the experts have no other "facts" to offer that are material to this case. Finally, Ross points to the mandate handed down by the Pennsylvania Superior Court that a *Frye* hearing must be conducted.

SUMMARY OF THE COMMONWEALTH'S ARGUMENT

The Commonwealth asserts in its reply to the defense response that the Superior Court held that the only issue to be addressed on remand is the explicit issue of whether the Commonwealth could introduce testimony of its witnesses (Dr. Asen and Dr. Juriga) allowing them to identify a certain pattern injury on the victim's breast as a human bite mark and whether or not the Commonwealth witnesses could arrive at conclusions that the defendant could not be excluded as the individual causing the bite mark, while other specific individuals could be excluded. They assert that the Superior Court stated that they made no judgment as to the admissibility of the bite mark identification evidence at issue and as to whether the Commonwealth expert witnesses' bite mark identification analysis may not have applied generally accepted scientific methodology in reaching their conclusions.

The Commonwealth then asserted that due to the delay in this matter, they decided not to proceed with the above expert testimony as to the analysis of the bite mark evidence; but, to simply present the dentists as fact witnesses, to testify as to what was done

regarding the pattern injury found on the victim. They asserted that their witnesses would not offer expert opinions and would not opine that the mark on the victim's breast is a bite mark. The Commonwealth asserts that there is no basis to object to actions taken by the Commonwealth witnesses during the police investigation. They stated: *There has never been any objection or indication that the witnesses do not have the experience to create dental impressions, molds, and/or take photographs, and/or make overlays. These witnesses are clearly experienced to perform such actions.* (Commonwealth's reply, p. 3, emphasis added).

The Commonwealth then asserted that the defense objection that the witnesses will be giving a scientific opinion is totally unfounded. The witnesses would not be permitted to describe the pattern injury as a bite mark. The defense could cross-examine in this area. The Commonwealth noted the defense argument that once Dr. Asen's expert qualifications are extensively established, the same would communicate to the jury that he is, in reality proceeding as an expert. Commonwealth asserted that their inclusion of his qualifications and history is solely for the purpose of establishing that they have the ability, training, and experience to take photographs of the pattern injury, and make impression molds and overlays.

The Commonwealth cited a case from Connecticut about comparison of footwear. They stated that the Connecticut Superior Court found that footwear comparison evidence need not be considered scientific in nature for the purpose of evidentiary admissibility. The Connecticut court favorably referenced a precedent stating that where a witness testifies about subjects that simply require jurors to use their own powers of observation and physical comparison, the jurors are free to make their own

determination as to the weight they would accord the witnesses' testimony in light of their own powers of observation and physical comparison. State v. Patel, 216 Conn. Super. LEXIS 3440, *30 (Conn. Super. Ct. Dec. 28, 2016. The Commonwealth cited this case as precedent, although clearly a case from Connecticut is not direct precedent which this Court must follow.

The Commonwealth asserted that its proffer does not attempt to establish the injury pattern as a bite mark and does not try to analyze the injury pattern. It stated that it does not attempt to include or preclude any contributor to the injury. The Commonwealth asserts that there is no basis in law to prohibit the witnesses from testifying as to what they factually did regarding the exhibits in this matter, nor any basis to prohibit any publication of the exhibits to the jury.

LEGAL STANDARD

a. Expert Testimony: Pa. R. E. 701 & 702

"Expert testimony is admissible only where the formation of an opinion on a subject requires knowledge, information, or skill beyond that possessed by the average juror." ***Commonwealth v. Patterson***, 91 A.3d 55, 70 (Pa. 2014). The Pennsylvania Superior Court has given guidance on how to distinguish expert testimony from that of a lay person:

> The exercise of scientific expertise requires inclusion of scientific authority and application of the authority to the specific facts at hand. Thus, the minimal threshold that expert testimony must meet to qualify as an expert opinion rather than merely an opinion expressed by an expert, is this: the proffered expert testimony must point to, rely on or cite some scientific authority—whether facts, empirical studies, or the expert's own research—that the expert has applied to the facts at hand and which supports the expert's ultimate conclusion. When an expert opinion fails to include such

> authority, the trial court has no choice but to conclude that the expert opinion reflects nothing more than mere personal belief.

Commonwealth v. Yocolano, 169 A.3d 47, 60–61 (Pa. Super. 2017) (citation omitted). Pennsylvania Rule of Evidence 701 provides as follows:

> "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) **not based on scientific, technical, or other specialized knowledge** within the scope of Rule 702."

Pa. R. E. 701 (emphasis supplied).

b. Relevance: Pa. R. E. 401 & 402

Pennsylvania Rule of Evidence 401 delineates relevant evidence as "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa. R. E. 401. Rule of Evidence 402 mandates that "[e]vidence that is not relevant is not admissible." Pa. R. E. 402. Otherwise relevant evidence "may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Pa. R. E. 403.

The court agrees with Ross that the proffered testimony of the experts is only relevant in so far as the alleged bite marks on the victim tends to implicate him in this homicide. For what other purpose would this evidence be shown to the jury? Clearly, the value of the alleged bite mark evidence hinges on whether or not the molds taken of Ross' teeth match the alleged bite marks on the victim.

An average lay-person is not capable of taking molds of another person's teeth and comparing them to the wounds on a deceased person. This is precisely the reason why the Commonwealth's experts' qualifications are a vital portion of their testimony. If

the witnesses were not dentists and/or forensic odontologists, then the cross-examination of them by Ross would center on their lack of expertise. However, the Commonwealth's witnesses do possess expertise and what the Commonwealth seeks is to allow the jury to infer that Ross made the alleged bite marks on the victim without the accompanying ability for Ross to cross-examine the experts or undermine their conclusions. If the experts make no conclusions, then how can the ultimate conclusion that the Commonwealth wants the jury to reach be subject to any scrutiny by the defense? It is clear that the absence of any conclusions coupled with the lack of a finding that the witnesses are experts would turn the jurors into twelve individual experts. The conclusion the Commonwealth seeks is that the image of Ross's bite mark matches the image of the marks on the body. It moves to enter the witnesses as "fact witnesses" when their only connection to this case involves their implementation and examination of Ross and the victim through specialized, technical, and *expert* methods. The Commonwealth's own words, as emphasized by the Court above, reveal that they want to use the witnesses' *experience to create dental impressions, molds, and/or take photographs, and/or make overlays* to argue to the jury that the shape of Ross's bite mark matches the image of the mark on the victim.

The Commonwealth's intended production of witnesses who are people who possess skill and knowledge beyond that of lay persons without qualifying them as experts is an attempt to thwart the strictures of the *Frye* test. The Commonwealth attempts to not have to meet any test imposed by the rules of evidence by simply never calling their experts as experts. These witnesses are clearly experts and not fact witnesses. Therefore, if the Commonwealth seeks to call them as witnesses they must

produce evidence at a *Frye* hearing as previously ordered by the Pennsylvania Superior Court.

We cannot countenance the Commonwealth's attempt to avoid a *Frye* hearing by merely referring to their witnesses as lay persons or fact witnesses. It is clear that should the court permit the Commonwealth's experts to testify, at minimum, we must permit Ross the opportunity to refute their methods and the science underlying their conclusions. Without conclusions, the Commonwealth's experts are immunized against this cross-examination.

For all the foregoing reasons we enter the following:

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

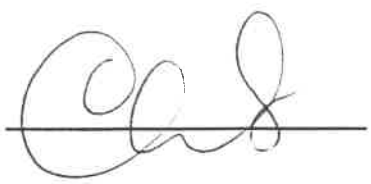
COMMONWEALTH OF PENNSYLVANIA,	:	
V.	:	2038 CR 2004
PAUL AARON ROSS, DEFENDANT.	:	

ELIZABETH A. DOYLE	PRESIDING JUDGE
RICHARD A. CONSIGLIO, ESQ.	DISTRICT ATTORNEY
THOMAS M. DICKEY, ESQ. THOMAS K. HOOPER, ESQ. DANA M. DELGER, ESQ. CHRIS FABRICANT, ESQ.	DEFENSE COUNSEL

ORDER

AND NOW, this 31st day of June, 2020, it is hereby **ORDERED**, **DIRECTED** and **DECREED** that the Commonwealth is precluded from calling any of its dentistry/forensic odontology witnesses to testify about bite-mark evidence and/or the molds taken of Ross' teeth or the teeth of any other individuals without the court conducting a *Frye* hearing. The court shall not permit testimony of this type in the form of a lay opinion and/or fact witness.

BY THE COURT:



P.J.