

Appeal Brief to
Court of Appeal

Satans
Friedman

No. 265821

**State of Michigan
In the Court of Appeals**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

GARY EARL LEITERMAN,

Defendant-Appellant

ON APPEAL FROM THE WASHTENAW COUNTY CIRCUIT
Trial Court No. 04-2017-FC
Hon. Donald E. Shelton

**DEFENDANT-APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENTS REQUESTED***

KIRSCH & SATAWA, PC
By: Mark A. Satawa (P47021)
Stuart G. Friedman (P46039)
Attorney for Defendant-Appellant
3000 Town Center, Suite 1700
Southfield, MI 48075
(248) 356-8320

Washtenaw County Prosecutor
Attorney for Plaintiff-Appellee
200 North Main Street
Suite 300
Ann Arbor, MI 48104
(734) 222-6620

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED	iv
TABLE OF AUTHORITIES	vi
JURISDICTION.....	x
BACKGROUND/INTRODUCTION.....	1
STATEMENT OF FACTS	2
A. <u>Pretrial and Motion Hearing (May 10, 2005)</u>	2
B. <u>Pretrial Motion and Hearing (June 21, 2005)</u>	3
C. <u>Evidentiary Hearing (June 27, 2005)</u>	4
D. <u>Motion Hearing (July 5, 2005)</u>	5
E. <u>Evidentiary Hearing Continued (July 6, 2005)</u>	6
F. <u>Trial</u>	8
ARGUMENT:	
I. THE DNA EVIDENCE SHOULD NOT HAVE BEEN ADMITTED IN THIS CASE WHERE THE STATE FAILED TO DEMONSTRATE THE ABSENCE OF CONTAMINATION IN THE 1969 EVIDENCE WHICH WAS NEVER GATHERED FOR DNA EVIDENCE TESTING, WHERE A DNA SAMPLE OF ANOTHER INDIVIDUAL WHO WAS FOUR YEARS OLD IN 1969 WAS ALSO FOUND ON THE EVIDENCE QUESTION, AND WHERE THAT FOUR YEAR OLD'S DNA SAMPLE HAPPENED TO BE IN THE STATE POLICE CRIME LAB AT THE TIME OF THAT THE COLD CASE TEAM WAS TESTING THE VICTIM'S CLOTHING.	31
II. WHERE IT IS CLEAR THAT CRITICAL EVIDENCE REGARDING THE FLAWS IN THE STATE'S DNA EXPERT WERE NOT PRESENTED TO THE JURY, THIS COURT SHOULD GRANT A NEW TRIAL UNDER MCL 770.1 ON THE THEORY THAT JUSTICE WAS NOT SERVED. ALTERNATIVELY, A NEW TRIAL SHOULD BE GRANTED BECAUSE THE DR. KESSIS'S ANALYSIS CONSTITUTES NEWLY DISCOVERED EVIDENCE.	43

A.	A New Trial Should Have Been Granted Because Justice has not Been Served in This Case.	43
B.	The testimony of Dr. Kessis also meets the standards for granting a new trial based on newly discovered evidence. Attorney Gabry consulted an expert and believed the expert fully and accurately prepared him to defend this Case.	46
III.	WHERE THE DEFENDANT'S DEFENSE WAS PREDICATED ON DNA CONTAMINATION, THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO CHALLENGE NUMEROUS ASPECTS OF THE STATE'S DNA CASE EVEN THOUGH THE DEFENSE EVIDENCE WHICH COUNSEL FAILED TO PRESENT WAS FULLY CONSISTENT WITH COUNSEL'S THEORY AND THE EVIDENCE WAS IN FACT STRONGER THAN THE EVIDENCE PRESENTED. ALTERNATIVELY, THE EXPERT'S ERRORS DENIED THE DEFENDANT DUE PROCESS OF LAW.	49
IV.	THE HANDWRITING ANALYSIS "EXPERT" TESTIMONY OFFERED IN THIS CASE DOES NOT MEET THE DAUBERT STANDARDS FOR THE ADMISSIBILITY OF EVIDENCE HANDWRITING ANALYSIS ISSUE UNDER DAUBERT AND MRE 702. EVEN THOUGH THERE WAS NO CONTEMPORANEOUS OBJECTION TO THE ADMISSION OF THIS EVIDENCE, THIS COURT SHOULD REVERSE BECAUSE IT WAS MANIFESTLY UNJUST TO ADMIT THE EVIDENCE AND BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO NOT OBJECT TO THE ADMISSION OF THIS TESTIMONY.	59
V.	THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION EVIDENCE CONCERNING THE NATURE OF THE DEFENDANT'S PRIOR ADJUDICATION FOR POSSESSION OF A FORGED PRESCRIPTION.	62
VI.	THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN BARRING THE DEFENSE COUNSEL FROM INTRODUCING EVIDENCE CONCERNING MISCONDUCT OF THE SUPERVISOR OF THE STATE POLICE DNA LAB WHERE COUNSEL HAD AN APPROPRIATE FACTUAL BASIS TO ASK THE WITNESS ABOUT WHETHER THE SUPERVISOR WAS TERMINATED FOR CHEATING ON HIS OWN PROFICIENCY EXAMINATION CONCERNING THE HANDLING OF DNA. THIS RULING WAS NOT ONLY ERRONEOUS, BUT ALSO INTERFERRED WITH THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.	67
	RELIEF.....	71

REQUEST FOR ORAL ARGUMENTS	72
PROOF OF SERVICE	73
APPENDIX:	

STATEMENT OF QUESTIONS PRESENTED

- I. WAS IT ERROR TO ADMIT DNA EVIDENCE IN THIS CASE WHERE THE STATE FAILED TO DEMONSTRATE THE ABSENCE OF CONTAMINATION IN THE 1969 EVIDENCE WHICH WAS NEVER GATHERED FOR DNA EVIDENCE TESTING, WHERE A DNA SAMPLE OF ANOTHER INDIVIDUAL WHO WAS FOUR YEARS OLD IN 1969 WAS ALSO FOUND ON THE EVIDENCE QUESTION, AND WHERE THAT FOUR YEAR OLD'S DNA SAMPLE HAPPENED TO BE IN THE STATE POLICE CRIME LAB AT THE TIME OF THAT THE COLD CASE TEAM WAS TESTING THE VICTIM'S CLOTHING?

Defendant-Appellant answers "Yes"

The Plaintiff-Appellee answers "No"

The trial court answered "No"

- II. SHOULD THIS COURT GRANT A NEW TRIAL UNDER MCL 770.1 WHERE IT IS CLEAR THAT CRITICAL EVIDENCE REGARDING THE FLAWS IN THE STATE'S DNA EXPERT WERE NOT PRESENTED TO THE JURY, ON THE THEORY THAT JUSTICE WAS NOT SERVED? ALTERNATIVELY, SHOULD A NEW TRIAL BE GRANTED BECAUSE THE DR. KESSIS'S ANALYSIS CONSTITUTES NEWLY DISCOVERED EVIDENCE?

Defendant-Appellant answers "Yes"

The Plaintiff-Appellee answers "No"

The trial court answered "No"

- III. WAS THE DEFENDANT DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO CHALLENGE NUMEROUS ASPECTS OF THE STATE'S DNA CASE EVEN THOUGH THE DEFENSE EVIDENCE, WHICH COUNSEL FAILED TO PRESENT, WAS FULLY CONSISTENT WITH COUNSEL'S THEORY AND THE EVIDENCE WAS IN FACT STRONGER THAN THE EVIDENCE PRESENTED? ALTERNATIVELY, DID THE EXPERT'S ERRORS DENY THE DEFENDANT DUE PROCESS OF LAW?

Defendant-Appellant answers "Yes"

The Plaintiff-Appellee answers "No"

The trial court answered "No"

- IV. WAS IT ERROR TO ADMIT THE HANDWRITING ANALYSIS "EXPERT" TESTIMONY OFFERED IN THIS CASE BECAUSE IT FAILED TO MEET THE STANDARDS FOR ADMISSIBILITY UNDER DAUBERT AND MRE 702? EVEN THOUGH THERE WAS NO CONTEMPORANEOUS OBJECTION TO THE ADMISSION OF THIS EVIDENCE, SHOULD THIS COURT REVERSE BECAUSE IT WAS MANIFESTLY UNJUST TO ADMIT THE EVIDENCE AND BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO NOT OBJECT TO THE ADMISSION OF THIS TESTIMONY?

Defendant-Appellant answers "Yes"

The Plaintiff-Appellee answers "No"

The trial court did not answer

- V. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION EVIDENCE CONCERNING THE NATURE OF THE DEFENDANT'S PRIOR ADJUDICATION FOR POSSESSION OF A FORGED PRESCRIPTION?

Defendant-Appellant answers "Yes"

The Plaintiff-Appellee answers "No"

The trial court did not answer

- VI. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN BARRING DEFENSE COUNSEL FROM INTRODUCING EVIDENCE CONCERNING MISCONDUCT OF THE SUPERVISOR OF THE STATE POLICE DNA LAB WHERE COUNSEL HAD AN APPROPRIATE FACTUAL BASIS TO ASK THE WITNESS ABOUT WHETHER THE SUPERVISOR WAS TERMINATED FOR CHEATING ON HIS OWN PROFICIENCY EXAMINATION CONCERNING THE HANDLING OF DNA? WAS THIS RULING ERRONEOUS? DID IT INTERFER WITH THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE?

Defendant-Appellant answers "Yes"

The Plaintiff-Appellee answers "No"

The trial court did not answer.

Table of Authorities

United States Constitution:

US Const, Ams V, VI, XI	63, 65
-------------------------------	--------

Michigan Constitution:

Const 1963, Art 1, § 17	63, 65
Const 1963, Art 1, § 17, 20	65
Const 1963, Art 1, §20	65

United States Supreme Court Cases:

Ake v Oklahoma, 470 U.S. 68, 77, 105 S Ct 1087, 84 L.Ed.2d 53 (1985)	52, 53, 54
Brown v Dodd, 484 U.S. 874, 876 (1987)	53
Chambers v Mississippi, 410 US 284; 93 SCt 1038; 35 LEd2d 297 (1973)	67
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579; 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)	33, 49, 50, 59, 60
Evitts v Lucey, 469 U.S. 387, 105 S Ct 830, 83 L Ed 2d 821 (1985)	49
Gilbert v Daimler-Chrysler Corporation, 470 Mich 749, 685 NW2d 391 (2004)	31, 34, 59, 62
Granviel v Texas, 495 U.S. 963 (1990)	53
In re Winship, 397 US 358, 363-64, 90 S Ct 1068, 25 Led 2d 368 (1970)	42
Jackson v Virginia, 443 US 307, 99 SCt 2781, 61 LEd2d 560 (1979)	42
Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167 (1999)	34
Marks v United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) ..	58
Old Chief v United States, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997) ..	63
Strickland v Washington, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984)	49, 51, 61
United States v. Park, 421 U.S. 658, 670 (1975)	69
Vickers v Arizona, 497 U.S. 1033, 1037 (1990)	53

Court of Appeals:

Blackburn v Foltz, 828 F.2d 1177, 1183 (CA 6, 1987)	56
Cave v Singletary, 971 F2d 1513 (CA 11, 1992)	55
Crisp v Ducksworth, 743 F2d 580, 583 (CA 7, 1984)	54.
Driscoll v Delo, 71 F3d 701 , 708-09 (CA 8,1995), cert denied sub nom, Bowersox v Driscoll, 519 US 910 , 117 SCt 273, 136 LEd2d 196 (1996)	56
Ford v Gaither, 953 F2d 1296, 1299 (CA 11, 1992)	52
Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923)	33
Harris v Vasquez, 949 F2d at 1534	53
Jackson v Calderon, 211 F3d 1148, 1162-63 (9th Cir. 2000)	53
Jermyn v Horn, 266 F3d 257, 307-308 (3d Cir. 2001)	53
Johnson v Baldwin, 114 F3d 835, 839-840 (CA 9, 1997)	55
Lewis v Alexander, 11 F3d 1349, 1352 (CA 6, 1993)	55
Lockett v Anderson, 230 F3d 695, 714 (5th Cir. 2000)	53

Mayfield v Woodford, 270 F3d 915 (9th Cir. 2001)	53
Moore v Ashland Chemical, Inc., 151 F3d 269, 276 (CA 5, 1998) (en banc), cert. denied, 526 U.S. 1064, 119 S.Ct. 1454, 143 L.Ed.2d 541 (1999).....	36
Oglesby v. General Motors Corp., 190 F.3d 244, 250 (4th Cir.1999).....	34
Schledwitz v United States, 169 F3d 1003 (CA 6, 1999).	47
Sheehan v Daily Racing Form, Inc., 104 F.3d 940 (CA 7, 1997).....	35
Skaggs v Parker, 235 F3d 261, 273 (6th Cir. 2000)	53
Skidmore v Precision Printing And Packaging, Inc., 188 F3d 606, 617 (CA 5, 1999)	35
Starr v Lockhart, 23 F3d 1280 (CA 8, 1994)	53
United States v. Galvin, 394 F.2d 228 (3d Cir. 1968).	60
United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006 (9th Cir. 1972)	69
United States v Morrow, 374 F Supp 2d 51, 61-62 (D.D.C., 2005).	37
United States v Perry, Crim. No. 92-474, 1994 U.S. Dist. LEXIS 20463, 4 (D.D.C. Jan. 11, 1994).....	36
United States v Streater, 70 F3d 1314 (1995)	61
Watkins v Telsmith, Inc., 121 F3d 984, 989 (CA 5, 1997).....	36
Westberry v. Gislaved Gummi AB, 178 F.3d 257, 260 (4th Cir.1999).....	34

Michigan Supreme Court Cases:

Beaubien v Cicotte, 12 Mich 459, 484 (1864)	68
Canfield v City of Jackson, 112 Mich 120, 70 NW 444 (1897).....	47
Collins v Beecher, 45 Mich 436, 438; 8 NW 97 (1881)	68
People v Barbara, 400 Mich 352, 362 (1977)	47
People v Bauman, 332 Mich 198, 63 NW2d 841 (1952).....	47
People v Bell, 74 Mich App 270, 253 NW2d 726 (1977).....	48
People v Brooks, 453 Mich 511, 517-519 (1996).....	67
People v Charles O. Williams, 386 Mich 565, 573; 194 NW2d 337(1972)	66
People v Clark, 363 Mich 643, 647, 110 NW2d 638 (1961).....	47
People v Cooper, 328 Mich 159, 43 NW2d 310 (1950)	44
People v Cummings, 42 Mich App 108, 201 NW2d 358 (1972).....	47
People v Duncan, 414 Mich 877, 322 NW2d 714 (1982) (Levin, J. dissenting) ..	48
People v Francis, 52 Mich 575, 18 N.W. 364 (1884)	44
People v Grant, 470 Mich 477, 684 NW2d 686 (2004)	55,56
People v Hampton, 407 Mich 354, 366, 285 NW2d 284 (1979),	42
People v Inman, 315 Mich 456, 24 NW2d 176 (1946)	47
People v Lemmon, 456 Mich 625, 634-635, 576 NW2d 129, 134 (1998).42, 44,45	
People v Lowenstein, 309 Mich 94, 14 NW2d 794 (1944)	44
People v. Lukity, 460 Mich. 484, 488; 596 NW2d 607 (1999).....	66
People v Moshier, 306 Mich 714, 11 NW2d 300 (1943)	44
People v Mullane, 256 Mich 54, 239 N.W. 282 (1931).....	44
People v Pickens, 446 Mich 298, 338, 521 NW2d 797 (1994).....	61
People v Prag, 261 Mich 686, 247 NW 94 (1933).....	47
People v Simon, 243 Mich 489, 220 N.W. 678 (1928)	44
People v. Swint, 225 Mich App 353, 572 N.W.2d 666 (1997)	63
People v VanderVliet, 444 Mich 52, 508 NW2d 114 (1993).....	64

People ex rel. Shimer v. Circuit Judge of Branch County, 17 Mich. 67 (1868) ...44

Michigan Court of Appeals:

People v Brown, 119 Mich App 656, 664, 666 (1982).....	62
People v Carines, 460 Mich 750 (1990).....	61
People v Carrick, 220 Mich App 17, 558 NW2d 242 (1997)	57,61
People v Chandler, 211 Mich App 604, 536 NW2d 799 (1995)	37
People v Coffman, 45 Mich App 480, 206 NW2d 795 (1973)	47
People v Dalessandro, 165 Mich App 569, 578; 419 NW2d 609 (1988).....	54,61
People v Hackney, 183 Mich App 516, 520; 455 NW2d 358 (1990).....	66
People v Havens, 2004 WL 1882883 (Mich App 2004)	58
People v Houstina, 216 Mich App 70, 73; 549 NW2d 11 (1996).....	66
People v Jackson, 91 Mich App 636, 283 N.W.2d 648 (1979).....	47
People v Lee, 212 Mich App 228, 537 NW2d 233 (1995).....	37
People v Lester, 232 Mich .App. 262, 591 N.W.2d 267 (1998).....	43
People v LoPresto, 9 Mich App 318, 327, 253 NW2d 726 (1967).....	48
People v Mack, 112 Mich App 605, 317 NW2d 190 (1981)	47
People v Matura, 205 Mich App 481, 483, 517 NW2d 797 (1994).....	47
People v McDonnel, 91 Mich App 458, 283 NW2d 773 (1979).....	52
People v McGee, 90 Mich App 115, 116; 282 NW2d 250 (1979)	65
People v McVay, 135 Mich App 617, 354 NW2d 281 (1984).....	52
People v Mechura, People v Jackson, 91 Mich App 636, 238 NW2d 648	67
People v Morse, 231 Mich App 424, 430-431 (1998).....	68
People v Snyder, 108 Mich App 754, 310 NW2d 868 (1981)	52
People v Springs, 101 Mich App 118, 123-124; 300 NW2d 315 (1980).....	65
People v Swint, 225 Mich App 353; 572 NW2d 666 (1997)	63,64
People v Tumpkin, 49 Mich App 262, 212 NW2d 38 (1973)	52
People v Wolfe, 156 Mich App 225, 401 NW2d 283 (1986).....	49

Michigan Bankruptcy Court:

in re Auto Specialties Mfg. Co., 133 BR 384 (WD Mich, 1991).....	54
--	----

Out-of-State Cases:

Ex parte Hutcherson, 677 So2d 1205, 1207 (Ala., 1996)	35
Henry v Scully, 918 F Supp 693, 715 (SDNY 1996), aff'd 78 F3d 51.....	55
In Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div., 190 W.Va. 321, 438 S.E2d 501 (W Va, 1993)	67
Jenkins v. Scully, 1992 US App LEXIS 12365 (WD NY, 1992).....	47
Ledezma v State, 626 NW2d 134, 149 (Iowa, 2001)	54
Lenoard v. Michigan, 256 F Supp 2d 723 (WD Mich 2003)	56
State v Kante, 710 NW2d 257 (Iowa App, 2005)	54
U.S. v. Rutherford, 104 F. Supp. 2d 1190, 55 Fed. R. Evid. Serv. 201 (D. Neb. 2000)	
United States v Lewis, 220 F Supp 2d 548 (SDW Va 2002).....	59
United States v. Brewer, 2002 WL 596365 (N.D.Ill.2002).....	60
United States v. Hines, 55 F.Supp.2d 62 (D.Mass.1999).	60
United States v. Saelee, 162 F.Supp.2d 1097 (D.Alaska 2001)	60

Michigan Complied Law:

MCL 600.308(1).....	x
MCL 750.316A.....	x
MCL 770.1	43
MCL 770.3	x

Michigan Court Rules:

MCR 6.431(b)	44
MCR 7.203(A).....	x
MCR 7.204(A)(2).....	x,1
MCR 7.208(B).....	x
MCR 7.214(A).....	x
MCR 7.214(E).....	x

Michigan Rules of Evidence:

MRE 401	60,67
MRE 403.....	67
MRE 404(b)	4,68
MRE 404(b)(1).....	69
MRE 609.....	4
MRE 702	7,33,35,38
MRE 703.....	33

Other Sources:

Michael J. Saks, Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science, 49 Hastings L.J. 1069 (1998)60	
S. Friedenlander, Using Prior Corporate Convictions To Impeach, 78 CALR 1313 (1990)	69

JURISDICTION

Gary Leiterman was convicted by a Washtenaw County Circuit Court jury of one count of First Degree Murder, contrary to MCL 750.316A, and was subsequently sentenced to natural life without the possibility of parole.

The date of the offense was March 20, 1969. The date of sentence was August 30, 2005. A Claim of Appeal was docketed with this Court on October 10, 2005. On or about May 5, 2006, Mr. Leiterman filed a Motion pursuant to MCR 7.208(B), seeking a directed verdict of acquittal, or in the alternative a new trial. The trial court held a hearing on Defendant's Motion on or about July 11, 2006, but did not take testimony. The trial court denied Defendant's Motion, and issued a written order, on that same date.

This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2). Mr. Leiterman is being represented by retained counsel.

BACKGROUND/INTRODUCTION

This is an appeal from a cold case prosecution for first degree murder. In 1969, Jane Mixer, a 23-year-old University of Michigan law student, was murdered. The police investigated her death extensively, but did not uncover any significant leads. Then, in 2002 the evidence from the crime scene was subjected to PCR/STR DNA testing.

Once tested, the evidence from the Mixer Case revealed two different and distinct profiles (other than Ms. Mixer). Ultimately, these profiles were uploaded to the Combined DNA Indexing System (CODIS) for comparison to profiles of previously convicted offenders. In December 2003, the CODIS system produced a "hit" or match with a convicted murderer named John David Ruelas from a drop of blood on the victim's left hand. However, Mr. Ruelas was quickly dismissed as a suspect because he would have four years old at the time of the Ms. Mixer's death.

Then in August 2004, CODIS produced a second hit, this time with the Defendant Gary Leiterman. Mr. Leiterman's DNA profile was on record with CODIS because he had previously received a deferred sentence relating to a prescription drug offense. A known DNA reference sample from the Defendant was submitted to the Michigan State Police for testing and submission to CODIS in early 2002, coincidentally the same period of time in which evidence in the Mixer case was being analyzed.

Mr. Leiterman was eventually charged with open murder in connection with Ms. Mixer's death. His trial commenced on July 12, 2005, in front of the Honorable Donald Shelton in Washtenaw Circuit Court. The trial lasted several days, and mostly consisted of endless testimony demonstrating the chain of custody related to the crime scene evidence that was maintained by the police. Mr. Leiterman was convicted by a jury of 1st degree murder, and sentenced to life without parole on August 30, 2005.

On or about May 5, 2006, Mr. Leiterman filed a Motion pursuant to MCR 7.208(B), seeking a directed verdict of acquittal, or in the alternative a new trial. The trial court held a hearing on Defendant's

Motion on or about July 11, 2006, but did not take testimony. The trial court denied Defendant's Motion and issued a written order on that same date. This Appeal follows.

FACTS

Mr. Leiterman was eventually charged with open murder in connection with Ms. Mixer's death. The main issue in the Case quickly became the evidence related to the DNA testing.

A. *Pretrial and Motion Hearing (May 10, 2005)*

On May 10, 2005, the Court held a hearing on the Prosecution's Motion to have the remaining sample of the blood from Jane Mixer's left hand tested by an independent lab. (May 10, 2005 Motion Hearing Transcript, p 5). The issue was that the additional testing would use up the rest of the blood sample. *Id* at 6. Defense counsel also requested that if the court decided to send the remaining sample of the blood from Jane Mixer's left hand, that it not be sent to the Bode Lab in order to ensure that it did not come in contact with Leiterman's DNA. *Id* at 13.

A second issue related to handwriting exemplars. *Id* at 8. The phonebook with the alleged evidentiary samples had been destroyed, but photographs of the alleged writing remained. *Id* at 8. The Prosecutor argued that the photos were of good enough quality that they could be used for comparison, while the Defense objected. *Id* at 8. There was also a problem because Defense counsel received very poor copies of the phonebook. *Id* at 9. However, the Prosecutor agreed to arrange for the Defense to receive appropriate, high quality copies of the phonebook. *Id* at 9. Defense counsel also requested a full report from the police as to their findings, and the basis of their findings in reference of the handwriting analysis. The Court granted the defense motion to compel discovery, and ordered that the evidence be produced within the week. (*Id.* at p.22).

The Prosecutor also requested a *Daubert* hearing to determine if software used by the Defense expert – Dr. Krane – was admissible at trial. *Id.* at 9. The Prosecutor's objection was that the software that

Dr. Krane uses had not been peer reviewed and it was not being used in any diagnostic laboratories. *Id.* at 10. Defense counsel contested the People's criticism about the software that Dr. Krane uses, and further argued that the Prosecutor's motion was pre-mature.

The Court agreed with Defense counsel that the motion in limine to strike the testimony of the Defense DNA expert – who had not even retained yet -- was premature. *Id* at 22. The Court also granted the motion for additional testing on the blood. *Id* at 23. However, the Court would not limit the Prosecution to a particular firm. Instead, the Court ruled that the Prosecutor could send the sample to whatever lab it wanted. *Id* at 23.

B. Pretrial and Motion Hearing (June 21, 2005)

The trial court held a hearing on June 21, 2005 which dealt with the admissibility of various forms of 404(b) evidence that the Prosecutor sought to admit against the Defendant at trial.

First, the trial court examined the Prosecutor's request to admit other acts evidence involving various newspaper articles that were found in Mr. Leiterman's closet concerning the murders that were going on Ypsilanti and Ann Arbor in 1969. (June 21, 2005 Motion Hearing Transcript, p 5). The Prosecutor also wanted to call Mr. Esper as a witness at trial to testify about Mr. Leiterman's ownership of a gun. *Id* at 6. The Prosecutor stated that Mr. Esper could further testify that there was an incident when Mr. Leiterman bragged and showed him a vial with a liquid in it that he claimed had a substance in it that could render a woman unconscious and too much of it could kill a woman. *Id* at 10.

Next, the Prosecutor wanted to introduce pictures from Van Buren County, and testimony about some controlled substances that were found in Mr. Leiterman's shaving kit. *Id* at 12. The Prosecutor claimed that Mr. Leiterman allegedly photographed a woman while she was naked and unconscious. *Id* at 12. The Prosecutor also wanted to introduce evidence regarding an alleged "sexual" incident several years previously, wherein Mr. Leiterman allegedly touched a woman on a bus. *Id* at 15. However, Mr. Leiterman was never prosecuted for the alleged incident. *Id* at 15.

Finally, the Prosecutor wanted to introduce evidence of Mr. Leiterman's plea and deferred sentence on a felony prescription drug offense out of Kalamazoo. Defense counsel argued that under MRE 609 the defendant must have a prior conviction, but that Mr. Leiterman was never convicted of a crime. *Id* at 20. Rather he entered a conditional plea so that when he completed the drug court there would be no judgment of sentence ever entered. *Id* at 20.

The trial court ruled that the Kalamazoo conviction having to do with the false prescription would be admitted only for the purpose of explaining how the defendant's DNA was originally taken. *Id* at 22. The trial court also allowed the Prosecutor to call Mr. Esper to testify about Mr. Leiterman having a gun, and to finding the various newspaper articles in Mr. Leiterman's closet. *Id* at 23. However, the trial court would not allow any testimony about Mr. Leiterman's drug use, because it was of no probative value. *Id* at 23. The court also did not allow the MRE 404(b) evidence related to the student photos, the 2004 substances, and the fact that he was a nurse who had access to drugs. *Id* at 23.

C. Evidentiary Hearing (June 27, 2005)

On June 27, 2005, the Court held a hearing on the Prosecution's *Daubert* motion regarding the Defense Expert – Dr. Krane. Dr. Krane testified that he was a Professor of Biological sciences. (June 27, 2005 Motion Hearing Transcript, p 4). He explained that old DNA samples can suffer from what is called degradation. *Id* at 15. Several things can "attack" and degrade DNA, such as UV light and chemicals (bleach, acids). *Id* at 16. Inhibition closely resembles degradation. *Id* at 17. Inhibition is when chemicals prevent the amplifying chemicals to work in the test tube. *Id* at 17.

Dr. Krane went on to explain that he received raw electronic data from the state police. *Id* at 17. He was provided the same data that was put through the Genescan software and the Genotype software. *Id* at 18. Genefiler is the automation software for the running of Genescan and Genetyper. *Id* at 19.

Dr. Krane then explained the amplification process in the DNA testing process. *Id* at 22. PCR testing allows scientists to scrutinize the information content from a handful of locations within the human

genome. *Id* at 23. During the process fluorescent tags are attached to the amplified DNA product. *Id* at 23. Genofiler attaches labels to peaks between 50 and 150 which are below the state police threshold. *Id* at 26. Dr. Krane testified that he did not think there is any significant difference between Genofiler and what the state police do, because they both label all peaks and then an analyst goes back through and edits out the peaks between 50 and 150. *Id* at 26.

Dr. Krane explained that the closest thing to any published criticism of Genofiler is a memo published by Applied Biosystems. *Id* at 29. They are the owners of Genescan and Genotyper, and they put out a statement to clarify that they have no affiliation. *Id* at 29. Dr. Krane explained that Genophiler is basically a computer macro for running the two programs used by MSP (and every other DNA lab). *Id* at 31. In Dr. Krane's opinion, Genofiler does the same thing as the state police but does by human analysts, just more objectively. *Id* at 34. He is not aware of any governmental entity that does not look for information between 50 and 150. *Id* at 35-36. That does not mean that they attach significance to it but they look and see if something of interest is there. *Id* at 37.

Dr. Krane does not test evidence in his lab, and he does not extract DNA from items in his lab. *Id* at 48. He testified that his lab takes the information from other labs and makes it accessible to people who need to understand it. *Id* at 48. The hearing was adjourned to be completed.

D. Motion Hearing (July 5, 2005)

On July 5, 2005, the Court held a hearing on the Defense's motion to suppress Leiterman's DNA and the subsequent hit in the CODIS system arguing it was an illegal search and seizure. (July 5, 2005 Motion Hearing Transcript, p 7). The Court ruled in favor of the Prosecution finding that the practice did not violate the Fourth Amendment, and that even if it did the officers acted in good faith and therefore their actions would fall under the good faith exception. *Id* at 13.

E. Evidentiary Hearing Continued (July 6, 2005)

On July 6, 2005, the Court continued the hearing on the Prosecution's *Daubert* motion regarding the Defense Expert – Dr. Krane. Jeffrey Nye testified that he is employed by the Michigan State Police Forensic Science Division. *Id* at 4. He explained the lab's extraction procedure, and how the lab develops the DNA profiles from the sample. *Id* at 6. In order to do that they use two different kits, which test for a combined thirteen different genetic markers. They use a piece of equipment called a 310 genetic analyzer, and three different software programs including Genescan and Genotyper. *Id* at 7. There are upper and lower reporting thresholds. The Michigan State Police uses a lower threshold of 150 RFUs and an upper threshold of 4500 RFUs. *Id* at 8. Mr. Nye explained that the upper and lower thresholds were determined by going through a long validation process in order to determine what works best with the software and the kits; and that they also considered what Applied Biosystems' recommends, which is 150 RFUs. *Id* at 9.

Mr. Nye then explained that if you amplify too much DNA there are certain artifacts that can occur that can have an affect on the quality of the data. *Id* at 12. He also explained that they do not look at ranges under 150 RFUs because those results are sometimes not repeatable. *Id* at 15. This essentially means that if they are not repeatable then they are inconsistent. *Id* at 16. However, he is not aware of any study that says that under 150 RFU is not reliable. *Id* at 16.

Under cross examination Mr. Nye acknowledged that the Michigan State police does analyze data at 50 RFUs. *Id* at 18.

The next witness who testified was Bruce McCord. Dr. McCord is a professor of chemistry and forensic chemistry. *Id* at 35. He has also worked with the FBI in the past. *Id* at 37. When he worked for the FBI he helped develop capillary electrophoresis. *Id* at 37. It is a technique that permits automation and rapid analysis of DNA. *Id* at 37.

Dr. McCord testified that he reviewed the State Police DNA reports and also Dr. Krane's report. *Id* at 41. He had reservations about the results from the Genofiler program because it is a reanalysis of the data, and believes that its procedure is not totally valid. *Id* at 41. It was his opinion that Dr. Krane's Genofiler is not reliable because it can provide misleading situations, and it can flag situations as particular problems even though they are not problems. *Id* at 56.

Defense counsel then attempted to convince the Court that Dr. Krane's testimony was relevant to the Case. *Id* at 88. The Court then asked the Defense to list the conclusions that Dr. Krane was going to testify to so that the judge can determine whether or not to admit the Genofiler results. *Id* at 88. In response, Defense counsel told the Court that Dr. Krane intended to testify on four points. First he expected to testify that there is no way to determine from DNA testing when the DNA got onto the various pieces of evidence. Second, he intended to testify that inadvertent transfer of DNA can occur from evidence in one case to evidence in another case. Additionally, the fact that testing was done in the same laboratory on the same day in both the Ruelas and Mixer case provided an opportunity for such contamination to take place. Third he planned to testify that various studies have demonstrated the transfer of DNA from a primary source to another article is possible. Secondary and tertiary transfers are possible as well. Finally Dr. Krane intended on testifying that retesting the samples would not directly address all the possible ways in which contamination may have occurred.

On July 7, 2005, the Court issued an Order which held that nothing in Defense counsel's offered list related to the Genophiler results or the analysis of the Michigan State Police. The Court also noted that the Genophiler program is the type of technical information that can be used by an expert under MRE 702. However, given Dr. Krane's undisputed testimony that nothing in the Genophiler results is of any particular consequence, the Court ultimately decided that the Genophiler results were not relevant and would not assist the jury to determine any fact in issue in the Case. The Court did hold that Dr. Krane would be allowed to offer testimony as outlined in the Defendant's offer of proof.

F. The Trial

Trial commenced in this Case on July 12, 2005. After jury selection, the Prosecutor (TT, 7/12/05, pp 6 – 16) and the Defense (TT, 7/12/05, pp 16 – 24) gave their opening statements. Neither side objected during opening statements, nor were there any other significant developments during openings.

The evidence presented at trial established that sometime during the evening or night of March 20, 1969, a student at University of Michigan law school was killed. She was shot in the head, and had a nylon tied around her neck. Her boyfriend, Phillip Weitzman, dropped her off at the Law Quad shortly before 6:00 pm, and was the last person to see her alive. (*Id.*, pp 37 to 39).

Ms. Mixer had apparently posted a sign on a ride board, and was offered a ride from a man named Dave Johnson. (*Id.*, p 41). However, her ride apparently never picked her up, and Ms. Mixer was not seen or heard from until the next morning when Mark Grow, a fourteen year old boy, found some of her personal belongings, and then his mother discovered Ms. Mixer's body in the Denton cemetery in Ypsilanti. (*Id.*, pp 67, 80).

Joseph Katulic then testified that he spoke to Jane Mixer in the evening of March 20, 1969. (TT, 7/12/05, p 53). Katulic was a student at the University of Michigan, and lived in a fraternity house that was kiddy corner to the Law Quad. (*Id.*, p 50). He shared a suite in the fraternity house with a man named David Johnson. (*Id.*, p 50). Mr. Katulic remembered having dinner at the fraternity house on March 20, 1969, and that his roommate attended dinner as well but left shortly after because he was performing in a play that evening. (*Id.*, p 51). After dinner Katulic returned to his suite to study. The phone rang around 10 pm, and he spoke to a woman who asked if Dave Johnson was still planning on driving to Muskegon that evening. (*Id.*, p 52-53). Mr. Katulic told the woman that he did not think so because his roommate was performing that night, and was not expected back until 11 pm. (*Id.*, p 52).

David Johnson testified that on March 20, 1969, he performed in a Gilbert Sullivan show at the True Blood Theater. After the performance he went to a bar called Binboes with some of his fraternity brothers. (TT, 7/12/05., p 61). He testified that he never knew Jane Mixer, nor did he ever offer her a ride to Muskegon. (*Id.*, p 64). After David Johnson testified the Judge stated on the record that he personally knew David Johnson -- Mr. Johnson taught the Judge's children in the Saline schools, and also sang in a men's choir with him. (*Id.*, p 65).

Mark Grow then testified that on the morning of March 21, 1969, he left his home in Denton, Michigan for the bus stop. (TT, 7/12/05, pp 69-70). He lived kiddy corner to the Denton cemetery. (*Id.*, p 67). On his way to the bus stop he noticed a brown bag on the ground in the cemetery. (*Id.*, p 70. He stopped to look inside the bag and saw a present and some note cards for school.¹ *Id.*, p 71). He returned to his home, gave his mother the items, and then left again for the bus stop. (*Id.*, p 73). Mark stated that he never saw a body in the cemetery, even though he passed the cemetery three times that morning. (*Id.*, p 74).

After Mark Grow testified, his mother's testimony from the preliminary exam was read into the record because she was unavailable to testify. (TT, 7/12/05, p 78). When she looked in the bag that her son brought home she noticed some coagulated blood on the side of the package. (*Id.*, p 80). She then left her house and looked in the cemetery and saw a body in the cemetery. (*Id.*, p 80). She walked to the body and stood very close to it. She noticed a bullet hole in Ms. Mixer's head, and a nylon around her throat. (*Id.*, p 83). Ms. Mixer's body was covered with a yellow rain coat, but her feet stuck out and she saw that Ms. Mixer did have nylons on when she found her. (*Id.*, p 83). She also thought that the Ms. Mixer's arm was over her head. (*Id.*, p 87).

Jeffrey Willet was the next witness to testify. He stated that he drove by the Grow home on the evening of March 20, 1969, and as he drove towards the Grow home he saw a lime green 1968 Chevy

¹ Mr. Grow did not have gloves on when he touched the items in the bag. *Id* at 77.

station wagon with wood graining on its side parked on the road. (TT, 7/12/05, p 94, 97). He saw a man exit the cemetery, get into the station wagon, and drive off. (*Id.*, p 95). In the process the man's car threw gravel at Mr. Willet's car. (*Id.*, p 95). Mr. Willet decided to follow the guy and planned on beating him up. However, the man drove so quickly that he could not catch up. (*Id.*, p 96). Mr. Willet stated that he never saw the man's face, but thought he had dark hair and was about the same height as the car. (*Id.*, p 97).

The police were summoned to the cemetery. The first two men to the scene were Trooper Richard Schroeder and Trooper Lalone. (TT, 7/12/05, p 107). Tpr. Schroeder testified that he arrived at the cemetery on the morning of March 21, 1969. (*Id.*, p 107). He testified that no one disturbed the body from the time he arrived and when the detectives and crime lab workers arrived. (*Id.*, p 112).

Ken Kraus was a detective with the Michigan State Police in 1969. (TT, 7/12/05., p 116). After arriving at the cemetery he was given the task of identifying the body. (*Id.*, p 121). He also went to the law school and found an open phone book in Ms. Mixer's room with a mark by the name David Johnson.² (TT, 7/12/05, p 121).

Ken Taylor was a Detective Sergeant at the Michigan State police in 1969. (TT, 7/12/05, p 133). At trial he did not remember much of the investigation. (*Id.*, p 139). He remembered going to the Law Quad and recovering a telephone book that had "Mixer" written on it from the phone booth in the Law Quad. (*Id.*, p 142).

The main part of Dct. Taylor's testimony went to "serial killer profiler" testimony – i.e., similarities or differences between serial killer John Norman Collins' killings and the Mixer murder. Dct. Taylor remembered that there was no indication that Jane was sexually brutalized. (*Id.*, p 139). Additionally, many of the other victims were sort of hidden; whereas Ms. Mixer's body was out in public. (*Id* at 138). He also noted that another victim had been knifed either before or after she was dead, while another girl

² He did not personally seize the book. But the book was eventually seized. *Id* at 122.

had been sexually penetrated with a stick. (*Id* at 138, 140). Several other victims had been beaten with a belt buckle so badly that marks were left on their backs. (*Id* at 140). However, he did acknowledge that there was another victim who was found with a silk stocking wrapped around her neck. (*Id* at 139).

Max Little was next to testify. He stated that at the time of the trial he was retired from the Michigan State Police. (TT, 7/13/2005, V II, p 33). His responsibilities were generally to protect the crime scene. (*Id.*, p 35). He also observed the autopsy and went to the Law Quad. *Id.*, p 37). At the Law Quad he found an open phonebook in Jane's room. (*Id.*, p 37). He also found two listings for "David Johnson" and checked out both men. He cleared one of the men because the man was in the army and had some army classes that evening. (*Id.*, p 38). He worked on the investigation for seven months and investigated many men named "David Johnson," but was able to clear all of them. (*Id.*).

Don Bennett testified that in 1969 he worked in the crime lab. (TT, 7/13/2005, p 51). He arrived at the cemetery on March 21 with a five person team. (*Id.*, p 52). Several items were seized as evidence, including a yellow raincoat and a gray wool cloth covering the lower part of Jane's body, additional articles of clothing on hangers that were under the raincoat, a blood soaked towel next to her body, a silk scarf that was on Jane's legs, and a suitcase on her right side. (*Id.*, pp 62 - 63). Ms. Mixer was wearing nylons, her slip was pulled up, and her pantyhose pulled down. (*Id.*, pp 64 to 66, 112). The raincoat was still on a hanger and covered Ms. Mixer's upper body. (*Id.*, p 60). The body was situated in such a way that the arm was backward up over her head, resting on its back, and the left arm was crossed over her forehead resting on the point of the right elbow. (*Id.*, p 62). There were additional articles of clothing on hangers that were under the raincoat. (*Id.*, p 62). There was also a tire print where a car had ridden over a foot print. (*Id.*, p 69). The footprint was photographed and then set with plaster. (*Id.*, p 69).

Detective Bennett testified that Dr. Robert Hendricks performed the autopsy. (*Id.*, p 70). Dct. Bennett and his team went to the autopsy in order to take photos of the victim. (*Id.*, p 70). During the autopsy the police found and/or collected a gray jumper, a blue headband, a blue turtleneck shirt, a yellow

half-slip, yellow flowered panties, a yellow flowered bra, pantyhose removed from the victim's body, and pantyhose that were tied around the victim's neck (*Id.*, pp 117-121, 124-125). Dct. Bennett testified that during the autopsy he and Dr. Hendricks wore gloves when removing Ms. Mixer's clothing. (*Id.*, p 31). During the autopsy a detective also scraped dried blood off of the back of Ms. Mixer's left hand. (*Id.*, p 4).

At the cemetery the police also collected a cigarette butt on the ground some distance from the body. However, Detective Bennett testified that he did not remember seeing a cigarette butt near the body. (TT, 7/13/05, V II, p 26). One heel print was also taken and submitted to be compared to the plaster taken at the scene, and it was eliminated. (TT, 7/13/2005, V II p 28).

Detective Bennett recalled that in 1969 officers did not use gloves when handling evidence. (TT, 7/13/05, V II, p 21). He insisted that if an officer saw a blood spot on an item he would refrain from touching the spot of blood. (*Id.*, p 22). However, he acknowledged that there were no steps taken to sterilize, wash or clean the officers' hands in between items. (*Id.*, p 22). Detective Bennett testified that many of the items of evidence they gathered were probably bagged individually, and then placed into one big bag. (*Id.*, p 37). The items would then have been placed in the property room, and Jane's blood would have been put into the refrigerator in the lab. (TT, 7/13/05, V II, p 37). The towel and the blue scarf which were wet with blood would have been left out to dry until the following Monday. (TT, 7/13/05, V II p 37).

Dct. Bennett testified that he believed Ms. Mixer was killed away from the cemetery and then moved there. (*Id.* at 34). His opinion was based on the drag marks on her heel, and the way the blood dripped down the side of her face.

Dct. Bennett further stated that the day they found the body they also searched Ms. Mixer's boyfriend's car, and found nothing. (*Id.*, p 35). Dct. Bennett also visited her room at the Law Quad and

searched it.³ He hoped to find a stocking similar to the one she had on but was not able to find one. (*Id.*, p 36). They also looked for a towel that matched the one from the scene, but never located one. (*Id.*, p 37).

Dct. Bennett did find a phone book at the Law Quad where Ms. Mixer lived. (*Id.*, p 36). In the margin of the phonebook the words "Muskegon" and "Mixer" were written in either a pen or fine line marker. (*Id.* pp 40 - 41). Dct Bennett remembered seeing the blood on Ms. Mixer's hand at the autopsy, but not at the scene. (*Id.*, p 39).

Dct. Bennett then testified that he examined the fragments of the .22 caliber bullet. (TT, 7/13/2005, V II p 43). He saw characteristics of a Remington Gold bullet. (*Id.*, p 43). The bullet had six lands and six grooves. (*Id.*, p 44). Det. Bennett explained that at the time there would have been several manufacturers of .22 caliber firearms. (*Id.*, p 45). There is nothing that allowed him to determine if the bullets were fired from a .22 handgun or rifle. (*Id.*, p 47).

Bader Cassin was called to testify as to the autopsy performed in this Case by Dr. Hendricks. Dr. Cassin testified that he is the pathologist and medical examiner for Washtenaw and Lenawee Counties. (TT, 7/13/2005, V II p 76). He stated that he reviewed Robert Hendricks' reports from the autopsy. Dr. Hendricks originally conducted the autopsy on Jane Mixer, but had died several years before the trial. (*Id.*, p 79). After reviewing various records and reports Dr. Cassin determined that Ms. Mixer died of gunshot wounds to the head, and that the ligature marks on her body were post-mortem. (*Id.*, pp 83 – 84). The trail of blood on her face indicated that her head was upright at the time she was shot. (*Id.*, p 85). He also opined that Ms. Mixer was shot at close range because there was external scalp abrasion but no powder burn on her. (*Id.*, p 87). However, this opinion conflicted with Dr. Hendricks' original determination that she was shot from a distance. (*Id.*, p 87).

Dr. Cassin explained that the stocking around Ms. Mixer's neck was wrapped twice and knotted tightly underneath the angle of the jaw on the right side. (*Id.*, p 89). Even though the stocking was tied in a

³ He noted that the room did not look disheveled. *Id* at 37.

way that could cause death, Dr. Cassin believed that the gunshots killed her rather than strangulation. (*Id.*, p 90). This determination relied on several factors, including the fact there was no burst blood vessels in the eyelids or membranes inside the eyes, and there was no change in the color of Ms. Mixer's face. (*Id.*, pp 90 – 91). Dr. Cassin estimated that Ms. Mixer was shot sometime around 6:30 pm on March 20, although he conceded that he could not be very precise with this estimate. (*Id.*, p 104, 106).

George Hein testified that he worked in the crime lab since 1961, and that his specialty was latent prints. (TT, 7/14/05, p 6). At the scene he collected from Detective Taylor a large paper bag filled with several items, and he also seized a brown suitcase containing various articles of clothing. (*Id.*, p 8) Hein attended the autopsy in order to finger and palm print Ms. Mixer. (*Id.*, p 12). Several prints were submitted to him including those belonging to Phillip Weitzman, the Grow family, and others. (*Id.*, p 13). He found latent prints on the bag submitted to him, on the contents in the bag, and from the phonebook. (*Id.*, p 16). Seven of the fingerprints found on the book matched Phillip Weitzman. (*Id.*, p 17). Prints off of the brown paper bag matched Nancy Grow and Mark Grow. (*Id.*, p 17). Prints on a manila envelope matched Jane Mixer. (*Id.*, p 17). Shortly before trial he compared the lifted prints to the known prints belonging to Mr. Leiterman, and could not make an identification. (*Id.*, p 20).

Walter Holz then testified that he worked in the criminal laboratory at the Department of Health at the time of the killing. (TT, 7/14/05, p 43). He explained that he had the responsibility of receiving evidence and doing work on bloodstains, hairs, fibers, arson debris, paint chips, etc. (*Id.*, 44). He received several deliveries of evidence from the Mixer case. The first delivery was on March 24, 1969 from Sergeant Donald Bennett. On that day he received a gray coat, blue scarf, plastic vial containing Ms. Mixer's blood, blood from the left hand, white particles from the back of her skirt, glass jar with a used tampon, pair of brown nylon pantyhose, mini slip, panties, bra, headband, turtleneck shirt, gray jumper dress, yellow and white striped towel. (*Id.*, p 46). After receiving the items he labeled each item with a lab label, evidence

number, case number and his initials.⁴ (*Id.*, p 46). On that day he also received from Bennett a large hyalophane bag containing nylon hose tied in a knot, and cut into several pieces.⁵ He noticed several hairs caught in the knot. (*Id.*, p 53).

Holz conducted chemical and serological analysis on the blood collected from Ms. Mixer's left hand. (*Id.*, p 56). While conducting tests in 1969, Holz handled multiple pieces of evidence while not wearing gloves because it was not routine practice. (*Id.*, p 78). He determined that the blood on her left hand was human blood, type A. (*Id.*, p 56). Jane Mixer's blood was also type A. (*Id.*, pp 56-57). He also found type A blood on the gray coat, blue scarf, headband, turtleneck, the back of the jumper and on the towel. (*Id.*, pp 57, 58, 60, 62). Holz checked the used tampon that was extracted from the victim for seminal fluids but found none. (*Id.*, p 59). Nor did he find any seminal fluid on the panties, bra, or slip. (*Id.*, p 60). Several long wavy hairs and one pubic hair were removed from turtleneck. (*Id.*, p 61). The knotted nylons also had soap and hairs on them.⁶ He also observed blood stains on the nylons but did not test it. (*Id.*, p 62).

On April 9, 1969, Holz received one brown leather suitcase. He observed red markings on one corner of the suitcase. His analysis determined that the markings could be paint. (TT, 7/14/05, p 63). Two items were found in the suitcase; markings with a crayon and yellow stains that were not seminal fluid but could have been urine. (*Id.*, p 64). He was able to determine that the paint was similar to paint on a 1965 red and white Pontiac. (*Id.*, p 65). The evidence received from Bennett was placed into a locked room at the Michigan Department of Public Health. (*Id.*, p 66). Holz always personally removed the items and

⁴ The evidence is placed in a locked, climate controlled room. (TT, 7/14/05, p 75).

⁵ This contradicted earlier testimony from Bennett that Hendricks cut the nylon only once to remove it from Jane's neck. Therefore it was in one long piece.

⁶ Holz did not have any notes to indicate that some of the hair was foreign to each other. (TT, 7/14/05, p 71).

returned the items to the room. (*Id.*, p 66). He ultimately turned the evidence over to Lieutenant Earl James on November 26, 1974. (*Id.*, p 66).

Jane Mixer's murder went unsolved for several years. As a result the evidence from the murder was handled and moved on numerous occasions. During transportation at least one item of evidence was lost.

Earl James is the president of International Forensic Services and a former Dct./Lt. with the Michigan State Police. On July 22, 1974, he was given an assignment to go to the Ypsilanti Michigan State Police and make disposition on all of the property that was held there for all the cases that had been handled by the crime center. (TT, 7/14/05, p 82). During the process, property that was retained as evidence was placed into containers and subsequently placed into a vault. (*Id.* at 85). The main portion of the evidence from Ypsilanti was placed into the vault on July 29, 1974. Lt. James explained that he remembered seeing the phone book in the bomb shelter of the Ypsilanti post on July 29, 1974, *Id.* at 86. He stated that he saw the phone book in the shelter on July 23, 1974, but noticed that it was no longer there on July 30. He later learned that a janitor destroyed the book. *Id.* at 87.

Lt. James also removed evidence from the Health Department Lab on November 27, 1974. He removed everything except for the refrigerated items. *Id.* at 89. He inspected the items upon receiving them in order to ensure that what was placed in the vault was in fact what he received. *Id.* at 92. He stated that he was very careful not to contaminate any of the items. *Id.* at 107-108. Lt. James explained that the bomb shelter where the evidence was kept was not a locked and secure room, but after the phone book was destroyed the room was locked. *Id.* at 109. Lt. James conceded that it was not good police procedure to keep the evidence – as it was – in the bomb shelter. *Id.* 117.

Lt. James finally testified that the serial killer John Norman Collins' roommate was named David Johnson, and the police followed up on this lead. However, he passed a polygraph and had an excellent alibi. (*Id.*, p 115).

As previously stated the evidence from the Mixer murder was moved on several occasions. David Minzey was a Dct./Lt. with MSP who was in charge of supervising the moving of evidence from the Harrison Road location in East Lansing to another facility on Lake Lansing Road in September of 1990. (TT, 7/14/05, p 120-121). He then supervised a subsequent move to the Collins Road facility in November 1996. *Id.* at 121.

Thirty-five years after Jane Mixer was murdered scientists in the CODIS lab matched Mr. Leiterman's DNA to evidence from her murder. They also matched the DNA from a man named John David Ruelas to the Mixer murder. Julie French is a forensic scientist who worked in the CODIS (Combined DNA Index System) unit. (TT, 7/14/05, p 128). She testified that a DNA CODIS match was hit on December 9, 2003 for John David Ruelas. (*Id.*, p 136). The lab received the Ruelas DNA sample on July 19, 2002, and the sample sat in the CODIS lab for over a year and was then sent to an outsourcing lab in August of 2003.⁷ (*Id.*, p 136-137).

The lab received a DNA sample from Mr. Leiterman on February 22, 2002. (*Id.*, p 146). It was stored until July 17, 2002 and then it was pulled for testing. The first time the sample was processed on July 23, 2002 it failed to produce a DNA profile.⁸ The sample was then re-batched on January 20, 2004, and a match was reported on July 7, 2004. (*Id.*, p 146-147).

Ms. French explained that the CODIS lab has its own space, and during the initial steps of the process the CODIS lab uses its own space but later steps are sometimes completed in shared spaces. (*Id.*, p 131). Special FTA cards are used in the collection of DNA, and the DNA binds to the paper. The cards with the DNA sample are stacked next to each other when they are stored and there are no separators between the individual cards. (*Id.*, p 153). Even though the cards are stacked next to each

⁷ The sample was sent to Bode Technology Group. (TT, 7/14/2005, p 145).

⁸ There is no record of who handled Leiterman's sample even though the lab generally keeps such records. (TT, 7/14/2005, p 157).

other without protection, French refused to concede that there could be a situation in which DNA from one card sticks to another card. (*Id.*, p 153). Her refusal was based on the fact that the DNA binds to the special FTA paper and the cards are put in order so that the FTA paper only touches the back of another card and does not touch the side that has DNA on it. (*Id.*, p 153).

Sometime in 2002 John David Ruelas was charged with murder for beating his mother to death. As a result, several pieces of evidence from the murder were tested for DNA. Sarah Thivault tested several pieces of evidence from the Ruelas murder. (TT, 7/14/2005, p 163). Thivault is a forensic scientist in the biology and DNA unit of the Michigan State Police Forensic Science Division. (*Id.*, p 159). The evidence was submitted on January 29, 2002 and was removed from the refrigerator on February 20, 2002. On that day she tested several items of clothing taken from the victim's son who was the main suspect. (*Id.*, p 165). During the process Thivault spread out all of the items she tested, and looked for blood with a bright light. (*Id.*, p 166-167). If human blood is found on an item, a small piece of the item is cut and placed into a DNA extraction tube. The larger piece is placed into a coin envelope. Only the piece in the tube is submitted for DNA testing. (*Id.*, p 171). The items packaged for DNA testing go into a different refrigerator where each scientist has his/her own storage bin. (*Id.*, p 172). She completed the testing on the bulk evidence on February 20th, and put those items in the property room. The next day she completed the paperwork and turned over the cuttings for DNA testing. (*Id.*, p 177). She began to test the DNA on February 27th. (*Id.*, p 179).

Thivault explained that environmental factors may cause DNA to break down. (*Id.*, p 214).⁹ (*Id.*, p 215). She claimed that a scientist can determine from looking at the sample if degradation has occurred. (*Id.*, p 218). Therefore there is some human judgment involved in interpreting the DNA test results. (*Id.*, p

⁹ Any DNA that does not produce an interpretable result at all 13 loci is considered a partial profile. (TT, 7/15/2005, p 19). Partial profiles occur where there is limited amount of sample present or there is degradation of a sample. (TT, 7/15/2005, p 7).

219). Ms. Thivault acknowledged that she has personally made mistakes while testing DNA. (*Id.*, p 219).

Ms. Thivault stated that she never tested any evidence from the Mixer murder. (*Id.*, p 208).

After Thivault's testimony there was a conference in chambers concerning whether Defense counsel would be able to ask the witness about her supervisor, Charles Barna, at the time she tested the Ruelas evidence. The Judge refused to allow the testimony because Barna did not do any testing in either the Ruelas or the Mixer case. Additionally, by the time the Ruelas blood came into the lab Barna had retired, and allegedly had very limited involvement with the DNA testing in this Case. (TT, 7/15/2005, p 34-35). The Judge determined that the evidence was not appropriate impeachment evidence, was collateral, and therefore not admissible. (*Id.*, p 38).

Denise Powell then testified that she is a member of the "major case team," and that their team eventually became involved in the investigation. The major case team's objective is to investigate high profile crimes and unsolved murders. (TT, 7/15/2005, p 40). Powell testified that on October 24, 2001 she went to the long term storage facility on Collins Road and pulled seven items of evidence from the Mixer case, including an envelope containing hair and finger scrapings, an envelope containing a pubic hair from the pantyhose, an envelope containing blood from the left hand, pantyhose, packets of hairs from the victim's shirt, a towel and a suitcase. (*Id.*, p 42-43). The items were documented and then taken to the lab in Lansing. (*Id.*, p 43). She maintained custody of the items during transport. (*Id.*, p 44). When she arrived at the lab she checked in, and put the evidence in a secured locker. (*Id.*, p 44). When she received the items they were sealed in their own packages, except the pantyhose were removed from a sealed box and placed in an envelope. The suitcase was not in a plastic package. (*Id.*, p 45). The DNA evidence and the suitcase went into 2 different lockers, and they were locked. (*Id.*, p 45).

Under cross examination she testified that she was unable to locate the cigarette butt that was seized during the original investigation. She acknowledged that if found, it would have been submitted for DNA testing. (*Id.*, p 54). During her investigation Powell became aware that the blood on Jane Mixer's left

hand matched Ruelas. She met with John Ruelas and determined that in 1969 he was four years old. (*Id.*, p 56-57). She was never able to establish a link between Leiterman and Ruelas.¹⁰ (*Id.*, p 58). Nor could she ever establish a link between Ruelas and Mixer. (*Id.*, p 62).

Powell also testified that the pubic hair found at the Mixer murder did not match Gary Leiterman, nor did any of the fingerprints from the crime scene. (*Id.*, p 62). On the day the first search warrant was executed on the Leiterman home she met with Leiterman and spoke with him for five hours.¹¹ She learned that he lawfully purchased a gun in 1967, but she was never been able to locate the gun.¹² (*Id.*, p 66). She was also never able to determine if Leiterman ever owned a station wagon in 1969. (*Id.*, p 68).

As part of the ongoing investigation into the Mixer murder the police gathered several DNA samples for elimination purposes. Eric Schroeder testified that he helped collect DNA samples from various police officers who investigated the case in 1969.¹³ (TT, 7/15/2005, p 73). He also took a DNA sample from Leiterman on November 23, 2004 pursuant to a search warrant. (*Id.*, p 75). Finally, he took fingerprints from Leiterman and believes he turned them over to Powell. (*Id.*, p 76).

Wendy Thompson testified that she is the laboratory evidence technician responsible for the intake and securing of evidence. (TT, 7/15/2005, p 90). She stated that she was working on April 4, 2002, when Sergeant Schroeder brought her a sealed manila envelope. (*Id.*, p 91). She noticed it was *not* sealed when she received it, so she put red tape around it. (*Id.*, p 92). She was then responsible for taking

¹⁰ Nor could she determine a link between Leiterman and any of John Ruelas' family members. (TT, 7/15/2005, p 58).

¹¹ Powell went to the Leiterman home on December 14, 2004 to execute a search warrant.¹¹ (TT, 7/15/2005, p 48). During the search she found a hand written story. (TT, 7/15/2005, p 49).

¹² In 1987 Leiterman reported a 22 caliber Ruger stolen.

¹³ Schroder was a trooper in Ypsilanti during the years 1996-1997. (TT, 7/15/2005, p 73).

it to the biology refrigerator; however, she cannot remember if she or someone else took the sample to the refrigerator on that occasion. (*Id.*, p 92).

David Eddy then testified that he also worked in the violent crimes unit. (TT, 7/15/2005, p 93). Schroeder gave him a DNA swab belonging to Leiterman on November 23, and he gave the sample over to Wendy Thompson the next day. (*Id.*, p 95).

Steven Milligan testified that he works in the Michigan State Police Crime Lab. He stated that he received a sealed buccal swab from Leiterman and a presumed known blood sample from Mixer. (TT, 7/15/2005, p102). He also took a presumed known sample from the towel.¹⁴ Milligan tested several pieces of the pantyhose for DNA. (*Id.*, p 111). He tested a piece from the right rear ankle and determined that Leiterman could not be excluded as a donor.¹⁵ *Id.* at 116. There were also pieces taken from the upper right leg, the lower right leg, and the middle left leg. All three DNA profiles matched Leiterman. *Id.* at 120. He also took cuttings from the towel. The cuttings from the towel showed evidence of two donors, and neither Leiterman nor Mixer could be excluded as donors. *Id.* at 132. There was also some unexplained activity which suggested that there may also be an unknown donor. *Id.* at 133.

Milligan also tested the blood from Ms. Mixer's left hand. The DNA was consistent with a single source, but there was additional activity that might indicate a mixture. (*Id.* at 135). The DNA for the major donor matched the reference sample of John Ruelas. *Id.* Leiterman was excluded as a possible donor to the sample. *Id.* The entire sample from Jane Mixer's left hand had been used up in testing. There was none left for additional testing. (*Id.* at 140).

¹⁴ He explained that a 36 year old liquid sample from Mixer would putrefy and the DNA would degrade. (TT, 7/15/2005, p 104). Therefore he had to rely on the sample from the towel.

¹⁵ For that particular piece he determined that the probability of finding an individual who could have contributed to the mixture was one in eight for Caucasians, one in six for blacks and one in six for Hispanics. (TT, 7/15/2005, p 117).

Sarah Thivault worked on the Ruelas murder around the same time as Milligan worked on the Mixer case, but Milligan testified that when he processed the evidence he was alone in the lab and there was no other evidence laying out on the table. (*Id.*, p 141). Milligan saw nothing in the lab results indicating the possibility of contamination, (*Id.* at 141). Milligan also testified that scrapings from under her nails were taken, but that they were never tested for DNA, (*Id.* at 148).

Ann Gordon did some additional testing after Milligan. (TT, 7/15/2005, p 173). She received a jumper, turtleneck, and towel from Schroeder. *Id.* Gordon was only able to generate a partial or incomplete result, but Leiterman could not be excluded from the incomplete result found on various areas of the turtleneck and towel. *Id.* While Mr. Leiterman could not be excluded from the three loci partial profile found on the turtleneck sample, he was excluded from other areas. Some of the samples matched Jane Mixer. Phillip Weitzman could also not be eliminated as a donor.

Jeffrey Nye then testified that he is the supervisor of the forensic science division. He explained that because there was some confusion and concern in the lab as to how John Ruelas' DNA was found on the evidence from the Mixer murder, he reviewed all of the case jacket materials. The case jackets contain a complete history of what is done with every sample. (TT, 7/19/2005, p13). He determined that the testing for the respective cases did overlap but "barely". (*Id.*, p 15). Additionally there was no indication in the reports that there was any contamination. *Id.* Thivault began to process her samples in the DNA lab on February 27, 2002, and Milligan did not begin until March 26, 2002. (*Id.* at 37). They were never in the lab on their respective cases at the same time. (*Id.* p 42). Additionally there were two or three benches between them in the lab and they worked ten to fifteen feet from each other. *Id.*

Crystal Harrison was the next witness called by the Prosecutor. She testified that she works in the Washtenaw County Sheriff Department. (TT, 7/19/05, p 45). She stated that she checks all incoming mail for contraband. (*Id.* at 47). Detective Hilobuk asked her to turn over all of Mr. Leiterman's mail. (*Id.* at 49). Patrick Bell received mail and copied non-attorney mail belonging to Mr. Leiterman. *Id.* at 51. Most of

these letters were between Mr. and Mrs. Leiterman. (*Id.* p 54-6). These letters were provided to Lieutenant Riley to be used as handwriting samples. *Id.* at 56.

The Prosecutor next called Robert Kaplan as a witness. Mr. Kaplan testified that he is the owner of True Value Hardware. (TT, 7/19/2005, p 101). He explained that in the late 1960's the store had to record the purchase of ammunition. (*Id.* p 102). He testified that he still has those records, and that there is an entry for a Gary Leiterman having bought two boxes of .22 long rifle bullets. There was also a record for a sale of a sixteen gauge shotgun to Mr. Leiterman in 1967. (*Id.*, p 106). He also purchased a twelve gauge shotgun. *Id* at 107. Mr. Kaplan did not know Mr. Leiterman back in 1967, so he could not testify that it is in fact the same Mr. Leiterman that was on trial. *Id.* at 108.¹⁶

Next, Megan Shaffer testified that she worked at Reliagene Technologies in New Orleans. (TT, 7/19/2005, p 113). Because there was concern about the DNA results on the blood from Ms. Mixer's hand, the Prosecution sent a DNA extract to Reliagene for an independent analysis. (*Id.*, p 115). The lab was able to develop a profile that determined there were 2 donors, one of which was male. (*Id.*, p 117). She compared her lab's results with Milligan's results and determined that they were consistent. (*Id.*, p 117). She also received additional evidence from Detective Moore. The evidence was logged in on a Saturday, and was then lost for over two months and eventually located in his office one Friday afternoon. (*Id.*, p 119). She received from Sergeant Moore an envelope containing a coin envelope with a folded paper packet in it. (*Id.*, p 119). The lab could not detect any DNA on the card. (*Id.*, p 120).

Sylvia Gillis testified that she worked at Bode Technology Group, and that the DNA extract was also sent to Bode. (TT, 7/19/2005, p 131). Bode used YSTR testing which is a male specific form of DNA testing. (*Id.*, p 135). It is ideal for samples which contain a lot more female than male DNA. (*Id.*, p 138).

¹⁶ Police Officer Tameka Singleton testified that a search of Mr. Leiterman's home on November 23, 2004 did not yield any firearms, but they did find a cylinder from that could fit a .22 gun and some ammunition. (TT, 7/19/2005, p 95-100). See also Robert Rayer: TT, 7/20/2005, p 51.

Ms. Gillis testified that she conducted the DNA testing on the items received. She received an extract from the stocking, and was able to develop a partial profile. (*Id.*, p 139). She also received a buccal swab from Leiterman, from which she developed a full profile. (*Id.*, p 139). She concluded that the two profiles were a match. (*Id.*, p 142). Once a profile is developed she can check the profile in a data base to determine the frequency of that profile.¹⁷ (*Id.*, p 143). The database allows her to determine the rarity of the YSTR profile in the general population. (*Id.*, p 144). She searched the database for both profiles and did not find a single observation for either the stocking sample or the Leiterman profile across all ethnic groups. (*Id.*, p 145).

Orville Hamilton then testified that he is a trooper with Michigan State Police. On November 23, 2004, he searched a 1999 Mercury Mainer that was registered to Gary Leiterman. (TT, 7/19/2005, p 153). During the search they found bullets in the door pocket of the driver's side door, and that he believes they were .22 caliber long rifle bullets. (*Id.*, pp 153 – 154).

Kenneth Rochell testified that he is a police officer who attended the search of Gary Leiterman's home on November 23, 2004. During the search he found a composition notebook in the garage in a milk crate. (TT, 7/20/2005, p 7). He also found a notebook in the master bedroom closet. (*Id.*, p 7). Defense counsel objected to the admission of the notebook because the police lost it and could not turn it over to the Defense. The Judge did not immediately rule on the objection, and decided to wait to hear the expert testimony on handwriting before ruling. (*Id.*, p 11). During a search of the Leiterman home on December 14, 2004, he also found a 1967 newspaper article with Mr. Leiterman's photo indicating that he lived at an address in Saline. (TT, 7/20/2005, p 12). Additionally Officer Rochell testified that he obtained a buccal swab from Mr. Leiterman on May 12, 2005, and turned it over to Detective Sergeant Moore. (*Id.*, p 12). He also obtained a blood sample from John Ruelas on June 20, 2005. (*Id.*, p 14). The blood sample was

¹⁷ She testified that she believed that the database has been statistically validated. (TT, 7/19/2005, p 143).

transported back to the Michigan State Police post in Ypsilanti where it was logged into evidence and was placed in a locked refrigerator. (*Id.*, p 14). It was eventually transported to St. Joseph Mercy for ABO blood testing. (*Id.*, p 14).

Finally, Officer Rochell had to find a phonebook that resembled the phonebook taken from the Law Quad but subsequently lost by the police. (*Id.*, p 16). He found a phonebook that matched the proportions of the original phonebook, made several Xerox copies of it, and turned them over to Detective Moore. (TT, 7/20/2005, pp 16-17). See also Moore TT 7/20/2005, p. 42-43.

Sergeant Patrick Moore testified that he obtained a writing sample from Mr. Leiterman using the sample phonebooks. (TT, 7/20/05, p 44). Mr. Leiterman was only instructed to write on the cover, and then the covers were ripped off and taken to the lab. (*Id.*, p 45). Mr. Leiterman wrote the samples with a Bic, round stick, non retractable, black ink ball point pen. (*Id.*, p 47). However, Sgt. Moore does not know what was used on the original phonebook. (*Id.*, p 47). He acknowledged that he failed to recreate the original conditions of the writing because he instructed Mr. Leiterman to write on regular copy paper rather than the heavier paper that is used for the cover of a phonebook. (*Id.*, p 47). He used the Xeroxed copy of the phonebook even though he knew that Detective Rochell had found a phonebook that would have more accurately recreated the original phonebook. (*Id.*, p 48).

Reinhard Pope was called next as a witness. He testified that he is a detective sergeant with the Michigan State Police, in the firearms identification unit of the forensic lab. He stated that he was given jars with various bullet parts that were taken from Ms. Mixer during her autopsy. (TT, 7/20/2005, p 62). While the bullet fragments were possibly from a .22 caliber gun, he was not able to determine what caliber or type of bullets they were because they were just small fragments and were not sufficient to classify or identify with a particular firearm. (*Id.*, p 65). He acknowledged that there were over three dozen firearms that have the same class rifling characteristics as the fired bullets he was asked to examine. (*Id.*, p 67).

Gregoire Michaud then testified that he is a detective lieutenant with the Michigan State Police, latent fingerprint unit. (TT, 7/20/2005, p 83). He stated that he was given the suitcase to analyze for prints, but was unable to develop any latent prints from it. (*Id.*, p 92). While he was archiving cases he came across the Mixer Case, and found several sets of latent prints that were good enough to be run through the AFIS system. *Id.* at 94. He was able to identify the prints off of the phonebook belonged to a man named Gary Kaberle.¹⁸ (*Id.*, p 95). However, he did not know from which phonebook the prints came from. (*Id.*, p 97). He made a comparison between the known impressions of Mr. Leiterman and all of the identifiable fingerprints taken off of every piece of evidence seized in the Case, and found no matches. (*Id.*, p 97).

Paul Esper testified that he lived with Mr. Leiterman in the spring of 1969. (TT, 7/20/2005, p 118). He recalled a pistol being in the home, and that Mr. Leiterman had a firing range in the basement. (*Id.*, p 122). While living with Mr. Leiterman on one occasion he went into Gary's closet to borrow a jacket and found a collection of newspapers that discussed John Norman Collins. (*Id.*, p 123). However the papers in the closet were not clippings, they were whole papers. (*Id.*, p 131). He did not remember Mr. Leiterman ever driving a station wagon. (*Id.*, p 131).

The Prosecutor then called Thomas Riley as a witness. Mr. Riley testified that he is employed as a detective lieutenant in the Question Document Unit of the Michigan State Police. (TT, 7/20/2005, p 139). He stated that he examined a photograph of a front cover of an Ann Arbor/Ypsilanti phonebook. (*Id.*, p 151).¹⁹ While he did not have the original phonebook (with the "original questioned handwriting"), he

¹⁸ Kaberle dated a girl who went to Michigan Law School and who lived in the Law Quad. *Id* at 105. He thinks his girlfriend lived either above or below Jane Mixer. *Id* at 107. He remembers that the night Jane died he was up all night studying and heard the phone ring all night. *Id* at 109. He spoke with the police back in 1996 and provided them with handwriting samples at the time. *Id* at 113.

¹⁹ The spiral notebook that defense counsel objected to earlier was now admitted into evidence. *Id* at 150.

explained that he had two photos.²⁰ One was an enlargement of the entries, "Muskegon" and "Mixer." *Id.* at 151. He also received numerous handwriting samples from Mr. Leiterman – however, during his comparison he later determined that several of the samples actually belonged to Mr. Leiterman's wife Solly. (*Id.*, p 156).

Lt. Riley testified that a person's handwriting can change over time, and therefore an old sample may not be useful. (*Id.* p 160). He concluded that after reviewing the materials presented to him that it is highly probable that Mr. Leiterman wrote the words "Muskegon" and "Mixer" on the phonebook.²¹ (*Id.* p 182).

Under cross examination Lt. Riley qualified his opinion, stating his analysis was as good as could be done from a photograph. Furthermore, the fact that he never saw an original handcuffed him in conducting his comparison, because it prevented him from microscopically examining the writing and conducting tests that he would have conducted on the original. (*Id.*, p 187). However, he insisted that he could actually see pen pressure variations in the photos. (*Id.*, p 190). Additionally, Lt. Riley claimed that the pen pressure the writer uses will vary based on the position that the writer is sitting in, and he could not know what position the writer was sitting in back in 1969. (*Id.*, p 190).

Lt. Riley stated that when he received Mr. Leiterman's writing samples, they were known to him. (*Id.*, p 196). In other words, he knew before examining the samples that they belonged to Mr. Leiterman. (*Id.*, p 196). Two nights before testifying at trial, Lt. Riley received handwriting samples from Solly Leiterman, and determined that the first 35 pages or so of the spiral notebook attributed to Mr. Leiterman were in fact written by his wife. (*Id.*, p 198). However, he expressly acknowledged that until he found out

²⁰ Riley insisted that the photos were of good enough quality that he could form an opinion. *Id* at 161.

²¹ Highly probable is defined as, "it's a strong probability, highly probable or very probable. The evidence is very persuasive yet some critical feature or quality is missing so that identification is not in order. *Id* at 183.

that the writing was in fact Mrs. Leiterman's, he used those writings in his comparisons for Mr. Leiterman. (*Id.*, p 199).

Furthermore, Lt. Riley also acknowledged that when he conducted his examination he "altered" some of Mr. Leiterman's "known" writing samples before he compared them by removing part of the letters. (*Id.*, p 199). For example, he determined that by removing the initial stroke found in Mr. Leiterman's capital, cursive "M," the remainder of the letter exhibits proportional information – i.e., that it is similar to the "Mixer" and "Muskegon" evidentiary sample. (*Id.*, p. 199). Finally, Lt. Riley was also forced to admit another difference in writings he compared – that in the spiral notebook Mr. Leiterman used numerous approach strokes, but that on the phonebook cover there were no approach strokes. (*Id.*, p 205).

After Lt. Riley's testimony was completed, the Prosecutor offered several exhibits into the record, which were admitted without objection by the Defense. (*Id.*, p 217). The Prosecutor then rested. (*Id.*, p 217). The Defense made a motion for a directed verdict, arguing that no rational trial of fact could find that the Prosecutor proved beyond a reasonable doubt that Mr. Leiterman was the perpetrator of this crime. (TT, 7/21/2005, pp 3 – 5). The Court denied Defense counsel's motion, stating that the question of Mr. Leiterman's guilt was one for the jury to decide. (*Id.*, p 7).

The Defense then put on its case. The first Defense witness called was Robert Kullman. Mr. Kullman testified that he is a forensic document analyst employed by Spekean Labs in Lansing, MI. (TT, 7/21/2005, p 9). Prior to that, he was a forensic document examiner for the Michigan State Police for 22 years. (*Id.*, p 9).

Mr. Kullman stated that like Lt. Riley, he had never seen the original phonebook. (*Id.*, p 14). He was critical of Lt. Riley's opinion, explaining that there are several limitations when working from a photo

instead of the original writing sample. (*Id.*, p 14). For example, you cannot determine the direction of the strokes from a photo, and the scale of the photograph is unknown. (*Id.*, pp 14-15).

Mr. Kullman testified that he received numerous writing samples from the State, but he never received the original spiral notebook. He only received copies of the notebook, and a CD with a copy of the notebook but his computer could not open the files. (*Id.*, p 21). Mr. Kullman explained that when comparing writing samples he looks at the fluency of the writing, whether there is tapering at the beginning or ending of the strokes, whether there is pressure variation, and the speed of the writing. (*Id.*, p 25). He stated that he did not believe that all of the samples belonged to Mr. Leiterman. (*Id.*, p 40).

Additionally, Mr. Kullman believed that there were numerous differences between Leiterman's known writing and the words "Muskegon" and "Mixer." (*Id.*, p 43). He went on to list several examples of differences in many of the letters. He explained that Mr. Leiterman's known samples were different from the evidentiary sample in formation and proportion. (*Id.*, p 46). He opined that there is a high probability that Mr. Leiterman did not write the words "Muskegon" and "Mixer" on the cover of the phonebook. (*Id.*, p 57).

Importantly, Mr. Kullman was very critical of Lt. Riley's technique of "altering" letters in the writing samples and then using them in the comparison. Mr. Kullman testified that "you can't go ahead and start removing strokes and saying, well now it fits." (*Id.*, p 45). However, given that Lt. Riley testified that he did this, Mr. Kullman did so and then compared the "altered samples" with the evidentiary samples. Even after he did this, Mr. Kullman found that Mr. Leiterman's "altered" writing samples still did not match the "Mixer, Muskegon" evidentiary sample. (*Id.*, pp 45 – 46).

Bruce Finkbeiner was the next witness called by the Defense. He testified that he lived with Mr. Leiterman and Mr. Harvey in an apartment in Westland, MI during the fall of 1969. (TT, 7/21/2005, p 96). He stated that he did not remember Mr. Leiterman having a shooting range in the basement. (*Id.*, p 99).

George Messingham then testified that in 1969 he worked with Mr. Leiterman at 3M. (TT, 7/21/2005, p 105). They were friends who hung out together, and did a lot of hunting together. (*Id.*, p 106). He remembered Mr. Leiterman buying a .22 magnum. (*Id.*, p 107). He also did not remember Mr. Leiterman having a shooting range in his basement, but admitted that he was in a coma for some time and had lost a lot of his memory. (*Id.*, p 109).

Dan Krane was the last witness to testify for the Defense. He testified that he is a DNA expert that does not conduct forensic testing on DNA samples. (TT, 7/21/2005, p 131). Instead he looks at reports that are generated and figures out alternative explanations. (*Id.*, p 132). He testified that DNA is easily transferable to other surfaces once it has been left behind. (*Id.*, p 147). He criticized the police calculation in this Case under the Combined Probability of Exclusion because they ignored the fact that there is an allele that neither Leiterman or Jane Mixer had, and that should have adjusted their number from one in forty to one in ten. (*Id.*, p 149). He also stated that it is very odd that there was no DNA from Ms. Mixer on the pantyhose. (*Id.*, p 151).

Furthermore, Dr. Krane testified that the DNA results cannot tell you how Mr. Leiterman's DNA got on the evidentiary items, or whether Ms. Mixer was wearing the pantyhose when his DNA got on them. (*Id.*, p 151). Finally, Dr. Krane testified that while there is no solid proof that contamination occurred in Mr. Leiterman's Case, he believed there is a good chance that there was contamination because of the unlikely situation of finding Mr. Ruelas' blood on Ms. Mixer. (*Id.*, p 158).

After Dr. Krane's testimony, the Defense rested. (TT, 7/21/2005, p 183). The People did not present any rebuttal evidence or testimony. (TT, 7/21/2005, p 183).

The Prosecution then gave its closing arguments, (TT, 7/22/05, pp 3 – 22), followed by the Defense closing argument (TT, 7/22/05, pp 22 - 48), and the Prosecutor's rebuttal (TT, 7/22/05, pp 48 -

60). Neither side objected during closing arguments, nor were there any other significant developments during closings. The court then gave the jury the instructions on the law.

On July 22, 2005, the jury convicted Mr. Leiterman of 1st degree murder. On August 30, 2005, the court sentenced Mr. Leiterman to life without parole.

On or about May 5, 2006, Mr. Leiterman filed a Motion pursuant to MCR 7.208(B), seeking a directed verdict of acquittal, or in the alternative a new trial. The trial court held a hearing on Defendant's Motion on or about July 11, 2006, but did not take testimony. The trial court denied Defendant's Motion, and issued a written order on that same date. This Appeal follows.

ARGUMENT

- I. IT WAS ERROR TO ADMIT THE DNA EVIDENCE THIS CASE WHERE THE STATE FAILED TO DEMONSTRATE THE ABSENCE OF CONTAMINATION IN THE 1969 EVIDENCE WHICH WAS NEVER GATHERED FOR DNA EVIDENCE TESTING, WHERE A DNA SAMPLE OF ANOTHER INDIVIDUAL WHO WAS FOUR YEARS OLD IN 1969 WAS ALSO FOUND ON THE EVIDENCE QUESTION, AND WHERE THAT FOUR YEAR OLD'S DNA SAMPLE HAPPENED TO BE IN THE STATE POLICE CRIME LAB AT THE TIME OF THAT THE COLD CASE TEAM WAS TESTING THE VICTIM'S CLOTHING.

Standards of Review. According to *Daubert*, the decision whether to admit expert testimony is committed to the trial court in the first instance. The decision is reviewed for an abuse of discretion. *Gilbert v Daimler-Chrysler Corporation*, 470 Mich 749, 685 NW2d 391 (2004). While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither "abandon" this obligation nor "perform the function inadequately." *Id.* 779-780.

The perplexing mystery in this Case has been the presence of the DNA match with the blood of John Ruelas. The Defendant has consistently and repeatedly suggested that this DNA match points to contamination of the Mixer DNA evidentiary samples. The State has emphatically denied even the

possibility of contamination, apparently suggesting that the four year old or someone with his DNA was present at the crime scene.

This crime took place during the reign of terror inflicted on Ann Arbor by serial killer John Norman Collins. Mr. Collins committed a series of murders of female students at the University of Michigan and Eastern Michigan University. Ms. Mixer's killing was thought by many to be one of Mr. Collins's atrocities. To rebut these allegations, the Prosecutor called a serial killer profiler who testified to the alleged differences between these two crimes. In addition, the Prosecutor was allowed to present unreliable and misleading testimony from a handwriting "expert" to opine on the alleged similarities between a disputed evidentiary handwriting sample and Mr. Leiterman's handwriting.

Defendant submits that it was a manifest injustice to admit this testimony. The opinion testimony of a self-proclaimed profiler and unreliable handwriting evidence do not meet the standard of reliability required under *Daubert*.

In this Case, the disputed evidence is not subject to expert verification. The expert was free to opine on the differences between the proven *Collins* killing and this Case. Any two killings are going to have differences whether they are committed by the same individual or not. The expert testimony in this Case, however, permitted the jury to find potentially irrelevant details relevant. Correlations were drawn in this Case which had no scientific basis, but which could easily appear to have such an appearance.

The statistics that were testified to in the DNA case were never intended to be applied to a situation such as the Present. The handwriting examiner had no correlation statistics with which to testify. His testimony was bald opinion testimony with no correlation to support it. The serial killer profiler similarly had no statistical pool in which he testified.

In sum, the testimony of two of Prosecutor's three experts had no correlation statistics. Furthermore, the one Prosecution Expert that did have correlation statistics – the DNA expert -- testified

to correlation statistics which were never intended to or adjusted to deal with the degradation and contamination which took place in this Case.

a. ***Overview of the Daubert Standard.²²***

With the adoption of the current form of MRE 702 and 703,²³ Michigan moved from a "Frye" jurisdiction to a *Daubert* jurisdiction.²⁴

In *Daubert*, the Supreme Court charged trial judges with a gatekeeper function to exclude unreliable expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 593-94, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). First, the trial court must ensure that the evidence is reliable. *Id.* at 592. Second, the court must ensure that the evidence will assist the trier of fact and is thus relevant. *Id.* The Court articulated five factors that could be used in making a reliability determination, while emphasizing that the analysis should be flexible: (1) whether the theory can be and has been tested; (2)

²² This discussion of *Daubert* is being adopted by reference in the Defendant's challenge to the handwriting analysis and the serial murderer profile evidence.

²³ Revised MRE 702 reads as follows:

"If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Revised MRE 703 states:

"The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter."

²⁴The *Daubert* standard replaced the test from *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir.1923). *Daubert*, 509 U.S. at 584-89, 113 S.Ct. 2786, 125 L.Ed.2d 469. The *Frye* test had required that the theory be generally accepted by the relevant community before a court could admit it. 293 F. 1013, 1014.

whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has achieved general acceptance in the relevant community. *Id.* at 593-94.

In *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999), the Supreme Court held that the principles enunciated in *Daubert* applied to all expert testimony, not merely scientific evidence. 526 U.S. 137, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999). In *Kumho Tire* the Court further stated that the gate-keeping function demanded that an expert employ “in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Examining the facts closely, the Supreme Court upheld the federal district court’s rejection of a tire expert’s testimony after the district court had found unreliable “the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis.”

Accordingly, the Fourth Circuit has stated:

A reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods

Oglesby v. General Motors Corp., 190 F.3d 244, 250 (4th Cir.1999) (citing *Daubert*, 509 U.S. at 590, 592-93, 113 S.Ct. 2786, 125 L.Ed.2d 469). That same court has further noted that the reliability inquiry “necessitates an examination of . . . the reasoning or methodology underlying the expert's proffered opinion.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 260 (4th Cir.1999).

Michigan has expressly adopted this viewpoint. Under the Michigan Supreme Court’s ruling in *Gilbert v Daimler-Chrysler Corporation*, 470 Mich 749, 685 NW2d 391 (2004), a Michigan Court is required to exclude evidence if the evidence is scientifically unreliable. ***The burden of reliability rests with the proponent of the evidence.*** *Gilbert* at 781. In this Case the State was the proponent.

Unreliability is established under these tests if the evidence or its conclusions are based on a statistically or scientifically flawed model. As an example, failure to properly maintain correlation statistics requires exclusion of the evidence. *Sheehan v Daily Racing Form, Inc.*, 104 F.3d 940 (CA 7, 1997).

Under *Daubert*, the trial court is to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid [reliability] and of whether that reasoning or methodology can be applied to the facts at issue [relevance]." *Skidmore v Precision Printing And Packaging, Inc.*, 188 F3d 606, 617 (CA 5, 1999) (citing *Daubert*, 509 U.S. at 592-93). Reliability and validity do not require certainty, but must be demonstrated by evidence that the knowledge is more than speculation. *Daubert*, 509 U.S. at 590. Further, as the *Gilbert* Court noted:

This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology.

Gilbert, 470 Mich at 782, 685 NW2d at 409.²⁵

b. As Applied to this Case, the State Failed to Demonstrate Reliability in the Methodology Where the State Failed to Demonstrate the Absence of Taint and Could Not Account for the Impact of Such Taint on the Reliability of Its Testing.

In this Case, the *Daubert* standard was not met when the State failed to explain or address the contamination issues in this Case. No one can explain how the Ruelas DNA was found on the Mixer

²⁵ The Advisory Committee Notes to Rule 702 also specifically caution that a trial court is required under *Daubert* to do more than "take[e] the expert's word for it." See FRE 702, Advisory Committee Notes to 2000 Amendments. In the instant case, the trial court did not do more than take the expert's word for the reliability of his experiment.

evidence, but the Defense suggests that this demonstrates the unreliability of the alleged Leiterman DNA which was extracted from the same clothing.

Daubert requires a court to determine not only that the specific type of scientific evidence is reliable in theory, but that reliable scientific methodology was followed in the case at bar. As applied to DNA, one federal district court recently noted:

To demonstrate reliability, the proponent of the expert testimony must present "some objective, independent validation of the expert's methodology. *The expert's assurances that he has utilized generally accepted scientific methodology is insufficient.*" Moore v Ashland Chemical, Inc., 151 F3d 269, 276 (CA 5, 1998) (en banc), cert. denied, 526 U.S. 1064, 119 S.Ct. 1454, 143 L.Ed.2d 541 (1999). The Court must consider (1) the validity of the scientific principles used; (2) the accuracy of the data relied upon by the expert; and (3) the correctness of the application of the scientific principles to the relevant data. Watkins v Telsmith, Inc., 121 F3d 984, 989 (CA 5, 1997).

Irrespective of the general admissibility of PCR STR DNA testing, the Prosecution had the burden of demonstrating the accuracy and reliability of the specific testing in this Case. As the D.C. Circuit recognized in another PCR case:

A number of courts have required that the trial court further inquire into whether the expert properly performed the techniques involved in creating the DNA profile. *Id.* at 1197; cf. United States v Perry, Crim. No. 92-474, 1994 U.S. Dist. LEXIS 20463, at *4 (D.D.C. Jan. 11, 1994) ("Having carefully reviewed the relevant case law, the Court continues to hold that it is proper to take judicial notice of the FBI's DNA profiling techniques."). As such, there must be "a preliminary showing that the expert properly performed reliable methodology in arriving at his opinion." *Id.* at 1197-98. As the *Martinez* court explained:

the court should make an initial inquiry into the particular expert's application of the scientific principle or methodology in question. The court should require the testifying expert to provide affidavits attesting that he properly performed the protocols involved in DNA profiling. If the opponent of the evidence challenges the application of the protocols in a particular case, the district court must determine whether the expert erred in applying the protocols, and if so, whether such error so infected the procedure as to make the results unreliable.

Id. at 1198 (emphasizing that this inquiry "is of necessity a flexible one").

United States v Morrow, 374 F Supp 2d 51, 61-62 (D.D.C., 2005). In this Case, the Defense is not merely challenging the general error rate of the laboratory – the Defense is challenging the fact that contaminants were found in a particular test related to this specific Case.

Even if Prosecution satisfies the general scientific foundation requirements, it must demonstrate that the tests were properly conducted (i.e., that generally accepted laboratory procedures were followed).

People v Chandler, 211 Mich App 604, 536 NW2d 799 (1995); *People v Lee*, 212 Mich App 228, 537 NW2d 233 (1995). As the Alabama Supreme Court recognized part of a *Frye* analysis requires a Court to ask: “did the testing laboratory perform generally accepted scientific techniques without error in the performance or interpretation of the tests?” *Ex parte Hutcherson*, 677 So2d 1205, 1207 (Ala., 1996).

Dr. Kessis’ report did not simply find minor flaws in the testing of this evidence; the report identified numerous significant flaws that would directly undercut the reliability of the test and which strongly suggest contamination. However, the most significant problem with the reliability of the testing, and the one which Dr. Kessis highlights throughout his Report, is one that is identified through simple common sense: the presence of the DNA from a third contributor who would have been four years old at the time. Frequently, when faced with extraordinarily complex and difficult scientific and technical issues (like DNA), lawyers and the legal system all too often “lose the forest through the trees.” They focus so strongly on the complex things that make up the science (alleles, loci, cross contamination), that they forget whether the particular evidence as a whole “makes sense” (or is reliable). In this Case, that phenomenon is demonstrated by the handling of the presence of John Ruales’ DNA.

The presence of Mr. Ruales blood lacks scientific explanation, and defies common sense. As Dr. Kessis noted, “this fact alone is especially troubling since neither the laboratory nor the State was able to proffer a reasonable explanation for presence of DNA from a four-year-old male on an evidentiary item.” In fact, the Prosecution was so stymied by the presence of his DNA, that they did not even attempt to offer

an explanation. In effect they said – both pre-trial and during trial – that “we cannot tell you how this DNA got there.” A closer look reveals the bill of goods the Prosecution sold by making the following argument: “We have the presence of 2 person’s DNA on the victim – Mr. Leiterman and Mr. Ruales. Because he was only four years old at the time, we cannot tell you how Ruales’ blood got there. However, because he was old enough to kill Jane Mixer, we can tell you that Leiterman’s DNA got there because he killed her.” This is such a leap of logic as to be absurd.

As Dr. Kessis explained in his Report, there are only three possibilities for how Ruales’ DNA was found on Jane Mixer:

Only three possibilities can account for the finding of Mr. Ruelas’ profile on the victim’s hand: i) at the age of four, Mr. Ruelas was at the scene of the crime, ii) an individual with the same DNA profile as Mr. Ruelas was at the scene of the crime, iii) a cross contaminated event involving samples from two separate cases occurred.

Given that no connection between Mr. Ruales and either Mr. Leiterman or Ms. Mixer was ever found (despite the exhaustive attempt by the police), that Mr. Ruales was only 4 years old at the time, and that the probability of another individual sharing the same DNA profile as Mr. Ruelas’ vastly exceed 1 in 6 billion, a contamination event clearly seems to be the only reasonable explanation for the unexplained finding of Mr. Ruelas’ DNA on evidence in the Mixer case. See Kessis Report, p 2. This is particularly true in light of the concurrent processing of evidence in the Ruelas and Mixer cases within the lab.

With such obvious evidence of contamination present in this Case, none of the testing results regarding any of the samples tested can be deemed reliable. This is true whether the issues is evaluated under *Daubert*, MRE 702, the DAB advisory board, scientifically established standard operating procedures, or simple common sense. The evidence is not reliable enough to have been presented to a jury, or to serve as the basis for a conviction of 1st degree murder.

However, even if this Court believes that the contamination issue goes to "weight" or "admissibility" (which in this Case it does not), the evidence was not properly challenged by trial counsel. Dr. Kessis found numerous other problems associated with the DNA in this Case. He has identified testing problems involving the taking of Mr. Leiterman's CODS sample,²⁶ evidence which shows contamination of the degraded samples,²⁷ the lack of any centralized quality control at the State Police lab,²⁸ and numerous other problems regarding the reliability at the lab.²⁹ Dr. Kessis also makes it quite clear why the subsequent tests performed to validate the results do not alter this equation – explaining that once a contamination event occurs, any re-testing of the contaminated sample would still produce the contaminated result.³⁰ Dr. Kessis also points to evidence which shows that what limited quality control procedures were in place were not followed by this lab.³¹

Dr. Kessis also reviewed the testimony of Dr. Krane and the arguments of Attorney Gabry to identify where his report and analysis differed from those individuals. Starting on page 13 of the report, Dr. Kessis notes that Attorney Gabry focused on a theory of secondary transfer of the Defendant's DNA in the distant past. Attorney Gabry did not discuss laboratory error and contamination of one of the negative controls samples in this matter. As part of the testing procedure, a sterile specimen such as distilled water is tested by the State Police. Contamination was found in this specimen during one of the tests. Counsel failed to establish the lack of adequate quality controls in the lab. Once contamination occurred, the

²⁶ Report, p. 10.

²⁷ Id at 10-11.

²⁸ Report at 11-12.

²⁹ Id. at 12.

³⁰ Id. at 12.

³¹ Id. at 13.

retesting of the contaminated materials by an outside lab was of little significance. On page 15 (paragraphs 8 and 9), Dr. Kessis identified specific scientifically erroneous testimony coming from both side's experts which could have misled the jury. Lastly, Attorney Gabry did not re-examine Dr. Krane after the State made it appear as if Dr. Krane agreed with the State that there was a match. This was not what Dr. Krane was attempting to say.³²

The harm that Mr. Leiterman suffered cannot be underscored enough. In preparation for this Appeal, the Defense did extensive research regarding what several courtroom observers felt was "the most powerful piece of evidence that the Prosecution presented." The overwhelming response was the chart that the Prosecution presented showing the various blood spots and how they were tied to Mr. Leiterman's DNA. This argument seemed to be the guiding light in convincing the neutral observers of the Defendant's potential guilt. If appropriate expert testimony had been presented by the Defense, the jury would have learned that given the manner of testing that took place, the alleged presence of the Defendant's DNA in these spots did not increase the probability of guilt.

Further, the alleged quantities of the Defendant's DNA do not change the calculation. In fact, if anything they cut in favor of a theory of contamination. If all of the DNA was left together in 1969, then it can be assumed that it would have degraded at the same rate. One would also expect more DNA to be present from the primary contributor (Jane Mixer, the one wearing the panty house), than the secondary contributor (Gary Leiterman or John Ruales).³³ However, that is not the case here – in the Present Case, the samples of the Defendant's DNA were considerably less degraded than the Mixer DNA.³⁴ The

³² Report at 16.

³³ Report at 11.

³⁴ According to Dr. Kessis' report:

differing levels of degradation seriously call into question the Prosecution's assertions that the DNA was contributed at the same time, but more importantly explain why a minor amount of a contaminant could appear disproportionately "large" when judged against the Mixer DNA.³⁵ Quite simply, when the DNA from

In the case of the panty hose, one would expect the deposit of considerable numbers of the victim's cells (and DNA), given the fact that: *i*) the victim was wearing the panty hose for some period of time prior to the crime and *ii*) additional cells and DNA, deposited as a result of sweat and friction, were more than likely to have been left on this item in the course of her abduction and murder. Similarly, skin cells belonging to the victim would have been transferred during the collection of the drop of blood from her left hand.

Remarkably, the record shows the victim, at best, to be a minor contributor of DNA to these items. Testing data shows her profile as barely detectable to absent. While this might seem problematic, degradation of the DNA deposited on these samples is not unexpected over the course of nearly 35 years. Not surprisingly, review of the testing data reveals such degradation of the DNA associated with the minor DNA profile detected here, presumably the profile of the victim.

What is surprising however, is the finding of DNA from major contributors on these items in vast excess to that likely to have been contributed by the victim. In the case of the panty hose, a profile consistent with that of Mr. Leiterman's was detected, while a profile matching Mr. Ruelas was demonstrated on the drop of blood. Interestingly, the State's theory of events requires the DNA from these two individuals to have been deposited on these evidentiary items at the time the crime was committed, more than 35 years ago.

Ignoring Mr. Ruelas for the time being, one would at the very least expect Mr. Leiterman and Miss Mixer to have deposited their DNA to these items in somewhat equal quantities. Any argument that the victim could only have contributed a small amount of DNA to the panty hose has not been shown. If Mr. Leiterman and the victim contributed DNA to this item in 1969, then one would expect their DNA to degrade at similar rates. This however is not what the testing data shows. A profile consistent with that of Mr. Leiterman's is clearly present on some portions of the panty hose.

Even if Mr. Leiterman had contributed more DNA to this item than Miss Mixer, the results of the testing show his contribution vastly outweighs that of the victim. Judging from the testing records, at least a 100-fold excess of Mr. Leiterman DNA was detected in comparison to the minor contributor, again most likely the victim's DNA.

³⁵ Think of the DNA in this process as a template in a manufacturing process. If the template is all chewed up, you cannot make very good copies of it, and in some instances you cannot make any copies. This amplification process is exponential in nature. So if you start with two copies of DNA and run it through 30 cycles of copying, one should get 2 to the 30th copies or 1,073,741,824 (billion) copies of new DNA at the end of the day. Now, if during each round of

Mixer, Ruelas, and Leiterman went through the amplification process of PCR testing, any "older" more degraded DNA would not amplify at the same rate (i.e. as well) as "newer" less degraded DNA. The non/less degraded DNA simply would amplify at a faster rate.

The Alabama Supreme Court has recognized the massive prejudice that a criminal defendant suffers when a DNA test is erroneously admitted. *Hutcherson*, at 909. Juries look at DNA as the holy grail of evidence – a positive match viewed as infallible evidence of guilt. In this Case, the DNA evidence is effectively the only evidence against this Defendant.

Quite simply, without the DNA evidence, the State could not have obtained a conviction. There was no evidence tying Mr. Leiterman to Ms. Mixer outside of an unreliable piece of handwriting evidence which the State submits was written by the Defendant, and which was directly refuted by the Defense experts. There was no evidence demonstrating Gary Leiterman knew Ms. Mixer, there was no evidence that he was ever with Ms. Mixer, and there was no evidence that Mr. Leiterman ever drove a Chevrolet station wagon. If this Case had been presented without the DNA evidence it would have never been bound over to circuit court, let alone proceed to trial.

A directed verdict should have been granted.³⁶ Without the DNA evidence, there was insufficient evidence to convict this Defendant. This Court should find that the Defendant is entitled to a directed

coping only 1.5 copies of the DNA on average is available for copying (because of degradation), then the final numbers are dramatically different (1.5 to the 30th power = 19,1751). Therefore, the upshot is degraded DNA is amplified a less efficient rate, and the power of geometric growth can cause big difference in the amount of DNA made in the amplification and hence what's in the test tube to be detected.

³⁶A request for a directed verdict was made by Appellate Counsel. A directed verdict of acquittal should have been granted to enforce the due process guarantee that the Government must prove the Defendant guilty beyond a reasonable doubt. *In re Winship*, 397 US 358, 363-64, 90 S Ct 1068, 25 Led 2d 368 (1970). Due process commands a directed verdict of acquittal when "sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt," *People v Hampton*, 407 Mich 354, 366, 285 NW2d 284 (1979), citing *Jackson v Virginia*, 443 US 307, 99 S Ct 2781,

verdict of acquittal or a judgment notwithstanding the verdict. At minimum, this matter should be remanded for further proceedings where Dr. Kessis can testify.

II. WHERE IT IS CLEAR THAT CRITICAL EVIDENCE REGARDING THE FLAWS IN THE STATE'S DNA EXPERT WERE NOT PRESENTED TO THE JURY, THIS COURT SHOULD GRANT A NEW TRIAL UNDER MCL 770.1 ON THE THEORY THAT JUSTICE WAS NOT SERVED. ALTERNATIVELY, A NEW TRIAL SHOULD BE GRANTED BECAUSE THE DR. KESSIS'S ANALYSIS CONSTITUTES NEWLY DISCOVERED EVIDENCE.

Standards of Review. This Court reviews the decision to grant or deny a motion for new trial for an abuse of discretion. *People v. Lester*, 232 Mich .App. 262, 591 N.W.2d 267 (1998).

A. A New Trial Should Have Been Granted Because Justice has not Been Served in This Case.

The Defendant urged the trial court to grant a new trial because the interest of justice had not been served under MCL 770.1. The Defendant argued that while Attorney Gabry had presented an attack on the DNA evidence, counsel failed to present the most problematic aspects of the test. Appellate Counsel supported the motion with a report by noted DNA specialist – Dr. Theodore Kessis.

Critical evidence which undercut the reliability of the most important aspect of the People's case was not presented. Without this evidence, there was insufficient evidence to convict the Defendant. At this point in the proceeding it is unnecessary for this Court to find party fault. It can simply grant a new trial in the interest of justice. If ever there was a case demanding such result, this is it.

MCLA 770.1 provides, "[t]he judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, *or* when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." The

61 LEd2d 560 (1979) is lacking. *See also People v Lemmon*, 456 Mich 625, 634, 576 NW2d 129 (1998).

operative principles regarding new trial motions are that the court "may," grant the defendant's motion for a new trial, "when it appears to the court *that justice has not been done,*" or when the Defendant demonstrates that there is "cause" which by the operation of "law" requires the Defendant to be granted a new trial. The statute is written in the disjunctive and sets forth two alternative theories for granting the motion.³⁷

Case law does not specifically address when "justice has not been done." Instead, Michigan courts have preferred to leave this question to the broad discretion of the trial judge.³⁸ While a court does not have the authority to second guess the jury or act as a thirteenth juror, this concern is not implicated here. The Defendant is not asking this Court to grant a new trial based on the fact that the jury "got it wrong" with the information they heard.³⁹ Simply put, this Motion is *not* challenging the jury's credibility determination. The Defendant is requesting this Court to grant a new trial because there was critical information which did not get to the jury, as well as information that was presented to the jury which legally should have been excluded.⁴⁰

³⁷ Similarly, MCR 6.431 (b) provides:

(B) Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

³⁸ People v Cooper, 328 Mich 159, 43 NW2d 310 (1950); People v Lowenstein, 309 Mich 94, 14 NW2d 794 (1944); People v Moshier, 306 Mich 714, 11 NW2d 300 (1943); People v Mullane, 256 Mich 54, 239 N.W. 282 (1931); People v Simon, 243 Mich 489, 220 N.W. 678 (1928); People v Francis, 52 Mich 575, 18 N.W. 364 (1884).

³⁹ People v. Lemmon, 456 Mich. 625, 576 NW2d 129 (1998).

⁴⁰ Cf People ex rel. Shimer v. Circuit Judge of Branch County, 17 Mich. 67 (1868) (recognizing the broad discretion of a circuit judge to grant a new trial on an Affidavit demonstrating critical evidence did not get to the jury).

The interests of justice were not served because critical evidence was never presented to the jury, and evidence was presented to the jury which legally should have been excluded. As Dr. Kessis' report makes clear, the DNA evidence presented to this jury was derived through a highly suspect procedure that did not meet basic standards of reliability. One of the State's own negative control samples showed contamination. Both secondary contributors' DNA samples were present in the lab at the time that Jane Mixer's evidence was tested. Their samples do not show degradation of the DNA nearly to the point that Jane Mixer's (the primary contributor) does. The State also failed to maintain minimal standards.

Later in this Brief, the Defendant presents an ineffective assistance of counsel challenge, but this Court does not have to reach the question of party fault. This Court has the inherent authority to grant a new trial without finding any finding of fault. An interesting facet to this statute is that it does not require fault by the Prosecution. It requires the Court on its face to look at the ends of justice *or* whether there has been a miscarriage of justice. As the Michigan Supreme Court recognized in *People v Lemmon*, 456 Mich 625, 634-635, 576 NW2d 129, 134 (1998):

Under the statute, as well as the court rule, the operative principles regarding new trial motions are that the court "may," in the "interest of justice" or to prevent a "miscarriage of justice," grant the defendant's motion for a new trial.

In this Case, the interests of justice were not served. The key evidence against this Defendant was not effectively challenged. With this evidence a different result was exceptionally probable.

The trial court found that Dr. Kessis' testimony was not significantly different than the testimony of Dr. Krane, the Defense expert called in the trial court. This is simply incorrect. While both experts were concerned about the accuracy of the testimony, particular in lieu of evidence strongly indicating contamination of the evidence, the original expert failed to report on the most critical flaws of the test, to wit:

Only three possibilities can account for the finding of Mr. Ruelas' profile on the victim's hand: *i*) at the age of four, Mr. Ruelas was at the scene of the crime, *ii*) an individual with the same DNA profile as Mr. Ruelas was at the scene of the crime, *iii*) a cross contaminated event involving samples from two separate cases occurred.

Given that no connection between Mr. Ruales and either Mr. Leiterman or Ms. Mixer was ever found (despite the exhaustive attempt by the police), that Mr. Ruales was only 4 years old at the time, and that the probability of another individual sharing the same DNA profile as Mr. Ruelas' vastly exceed 1 in 6 billion, a contamination event clearly seems to be the only reasonable explanation for the unexplained finding of Mr. Ruelas' DNA on evidence in the Mixer case. See Kessis Report, p 2. This is particularly true in light of the concurrent processing of evidence in the Ruelas and Mixer cases within the lab.

While there might be some superficial appeal to stating that a partial attack on the evidence was adequate, e.g. that the jury knew that an expert had problems with the test, this partial attack in fact had the opposite effect. Compare this test to an inadequate safety inspection which point to minor problems with an aircraft safety system. People might believe that the minor problems that were identified did not impact on overall safety, but if the full extent of the problems were identified a different opinion might easily be reached. In 1969, the evidence technicians could not have anticipated modern DNA testing. The methods of evidence gathering and evidence preservation were not designed to deal with these issues. The presence of the Ruelas DNA strongly suggests that there was contamination. The trial court's ruling constituted an abuse of discretion. The evidence presented by Dr. Kessis was simply not repetitive or redundant.

- B. The testimony of Dr. Kessis also meets the standards for granting a new trial based on newly discovered evidence. Attorney Gabry consulted an expert and believed the expert fully and accurately prepared him to defend this Case.**

These facts were unavailable at the original trial and constitute newly discovered evidence. Defendant is entitled to a new trial on the grounds of newly discovered evidence where the evidence is

newly discovered, could not have been discovered and produced at trial by reasonable diligence, is not cumulative, and is such as to render a different result probable on retrial.⁴¹

The decision whether to grant a new trial on the basis of newly discovered evidence is discretionary with the trial court, but such discretion should be exercised wisely for the purpose of promoting justice and protecting the innocent. *People v Prag*, 261 Mich 686, 247 NW 94 (1933); *People v Inman*, 315 Mich 456, 24 NW2d 176 (1946).

Newly discovered evidence which goes directly to the question of guilt or innocence and corroborates a defendant's claim of innocence is not cumulative. *People v Cummings, supra*. Indeed, the United States Court of Appeals for the Sixth Circuit has held that it is a "due process violation" under the Fifth Amendment of the United States Constitution to deny the Defendant the ability to receive a new trial where evidence directly callings into question the testimony of the state's main witnesses is unearthed. *Schledwitz v United States*, 169 F3d 1003 (CA 6, 1999).

In *People v Mechura, supra*, newly discovered evidence which corroborated the defense theory was held to be enough to prevent the conclusion that the new evidence probably would not have led to a different result. In *People v Jackson*, 91 Mich App 636, 238 NW2d 648 (1979), the defendant, convicted of statutory rape, moved for a new trial based on newly discovered evidence from the chemist, who had testified at trial that there was nothing in his tests of the seminal stains in the victim's underwear to connect them with the defendant, but he was never given any blood or sperm samples of the defendant and so

⁴¹ *People v Matura*, 205 Mich App 481, 483, 517 NW2d 797 (1994); *People v Mack*, 112 Mich App 605, 317 NW2d 190 (1981); *People v Barbara*, 400 Mich 352, 362 (1977); *People v Clark*, 363 Mich 643, 647, 110 NW2d 638 (1961); *Canfield v City of Jackson*, 112 Mich 120, 70 NW 444 (1897); *People v Bauman*, 332 Mich 198, 63 NW2d 841 (1952); *People v Cummings*, 42 Mich App 108, 201 NW2d 358 (1972); *People v Coffman*, 45 Mich App 480, 206 NW2d 795 (1973).

New scientific procedures can constitute newly discovered evidence. See, e.g. *Jenkins v. Scully*, 1992 US App LEXIS 12365 (WD NY, 1992) (the "newly-discovered evidence consists not of the hair samples themselves but of the results of the application of DNA fingerprint testing to the samples, assuming such results are favorable to the petitioner").

was unable to eliminate him. The victim identified the defendant at trial as her assailant. Following Jackson's conviction, samples were taken from the defendant and he was determined to be a type O secretor. The chemist then reviewed his notes and found that the victim's assailant was a non-secretor. The trial court denied the motion for new trial on the grounds that newly discovered evidence was of such speculative nature that it would not likely render a different result probable on retrial. The chemist was not positive of the test as to whether the semen was from a secretor or a non-secretor. The trial court found that the evidence could have been introduced by the defendant at trial. The Court of Appeals cited the standards for reviewing newly discovered evidence and concluded that the lower court reversibly erred in denying the motion for new trial:

The lower court's finding that the evidence was too speculative to make a different result probable on retrial is, in our opinion, erroneous. The chemist was confident that the tests were accurate and that in his expert opinion the tests done on stains from the victim's panties seriously question whether defendant was in fact her assailant. The fact that he could not assign a degree of certainty to his opinion is a matter which can be weighed by the jury. This 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.

The lower court's finding that this evidence could have been produced by the defendant at trial is also of doubtful validity. The chemist's report and notes were apparently not introduced at trial, and defendant had no reason to rebut his testimony that the underwear contained seminal stains. Moreover there is no evidence that defendant and his counsel possessed the required scientific knowledge to interpret the notes.

Because there was a showing of all four requirements necessary for the granting of a new trial based on newly discovered evidence...the lower court reversibly erred when it denied defendant's motion for a new trial." 91 Mich App at 639-640.

See also *People v LoPresto*, 9 Mich App 318, 327, 253 NW2d 726 (1967); *People v Bell*, 74 Mich App 270, 253 NW2d 726 (1977); *People v Duncan*, 414 Mich 877, 322 NW2d 714 (1982) (Levin, J. dissenting).

In this Case, this new evidence is direct evidence undercutting the key evidence the State offered against this Defendant. The fact that Defense counsel did not discover this is due to non-culpable

negligence, given that he relied on the incorrect advice of an expert. As Issue I of this Brief demonstrates, this Court has broad discretion to grant a new trial in the interest of justice. This is such a Case. Defendant urges this Court to grant a new trial.

III. THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO CHALLENGE NUMEROUS ASPECTS OF THE STATE'S DNA CASE EVEN THOUGH THE DEFENSE EVIDENCE WHICH COUNSEL FAILED TO PRESENT WAS FULLY CONSISTENT WITH COUNSEL'S THEORY AND THE EVIDENCE WAS IN FACT STRONGER THAN THE EVIDENCE PRESENTED. ALTERNATIVELY, THE EXPERT'S ERRORS DENIED THE DEFENDANT DUE PROCESS OF LAW.

Alternatively, Defendant submits that trial counsel was ineffective in failing to present the true picture related to the DNA evidence in this Case. The failure to present this evidence constitutes ineffective assistance of counsel.⁴² Further, as is demonstrated later in this issue, counsel submits that the errors committed by Dr. Krane constituted a deprivation of due process of law.

Defendant brought before the trial court a Motion for New Trial (and for an evidentiary hearing) seeking a new trial based on the ineffective assistance of counsel. Most importantly, the Defendant claimed that counsel was ineffective based on his inexplicable failure to subject the DNA testing in this Case to a *Daubert* hearing to challenge the general acceptability of the results in light of the fact that at least one unexplainable profile was detected in the evidentiary materials, or to challenge the general acceptability of results involving partial profile. Appellate Counsel throughout this Brief has cited to Dr. Kessis' Report and cataloged the many reasons to question the reliability of the DNA testing evidence in this Case. Trial counsel's failure to even attempt to challenge the reliability of the DNA evidence on these

⁴² *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 LEd2d 674 (1984); *Evitts v Lucey*, 469 US 387, 105 S Ct 830, 83 L Ed 2d 821 (1985); *People v Wolfe*, 156 Mich App 225, 401 NW2d 283 (1986).

grounds given these extreme concerns regarding its reliability was a complete failure of trial counsel, and cannot be deemed trial strategy of any sort.

In addition to the failure to file a motion requesting a *Daubert* hearing, the Defense submits that trial counsel was also constitutionally ineffective for all of the following reasons:

1. Trial counsel failed to effectively argue that that majority of retesting, which State claimed as probative, was done with extracts of material and not original evidence.
2. Trial counsel failed to identify and present the relevant and important arguments and/or challenges to the DNA evidence in this Case. The focus of the trial counsel's energy on the DNA issue was spent on obtaining electronic data, and proving an extremely speculative secondary transfer theory. The Defense's pretrial and trial arguments centered on the theory that Mr. Leiterman's DNA came to be on the evidence via secondary transfer in 1969. In doing so, trial counsel failed to argue or establish that Ruelas' DNA on Mixer's hand was a contamination event that most likely happened early in the testing, and why that could signify a problem with the presence of Mr. Leiterman's DNA being there.
3. Trial counsel failed to effectively argue and establish that all test samples are inherently controls, and that unexplained contamination events such as the Ruales blood impacts the reliability of all items tested performed in this Case.
4. Trial counsel failed to effectively argue and establish laboratory error as a relevant issue. The Defense failed to argue that lack of centralized corrective action files and error logs violates the goals and spirit of the DAB standards and good laboratory practice. The Defense further failed to establish Charles Barna's role in the case, the reason for departure from the lab, and the individual who assisted him in faking proficiency test results. The Defense also failed to interview or subpoena Barna and his accomplice. The Defense's arguments for discussion of these issues during trial were weak and demonstrated a lack of preparation. Finally, the Defense never argued or established that the Barna's lack of a centralized corrective action plan and error logs was potentially in place to hide mistakes from scrutiny.
5. Trial counsel (with the assistance of his DNA expert) failed to seek and obtain relevant discovery. The discovery sought by the defense fell far short of that required for a due diligent review. The failure to seek and obtain the correct discovery severely limited the Defense's ability to establish the true reliability of the testing. The list of the items that the Defense failed to obtain includes, but is not limited to, the following: the case file materials associated with independent retesting; the lab technician's profiles; the profiles associated with other case work run in the same time and space; a map/diagram of the lab (or visit the lab); the maintenance records; the proficiency test results of the personal who performed the testing; documents associated with audit and accreditation; and documents associated with manufactures acceptable use of reagents used in testing.

6. Trial counsel never requested or obtained the Ruelas case file materials (the Defense only obtained the report) for the purposes of establishing the Defense's version of the timeline of events. The Defense instead essentially stipulated to the State's version of events and claims of multiple contributors in all Ruelas evidentiary samples. Furthermore, trial counsel never investigated or established the significance of other items in Ruelas case (such as swabs for example).
7. The Defense failed to argue and establish that the lab committed other errors in the course of testing as revealed by the limited discovery received, including: the running of samples of known and unknown origins in the same time and space, date alterations, and control contaminations. This suggests the strong possibility of an incomplete review of the discovery by the Defense.
8. The Defense never argued or established that the lab's SOP at the time of testing did not follow generally acceptable principles with respect to the handling of reference and evidentiary samples, in comparison to the recommendations of the NRC, and the SOPs of the FBI, Reliagene, Cellmark, Bode, LabCorp and dozens of other labs across the Country.
9. Never argued or established that the majority of retesting was unnecessary and essentially a red herring created by the lab to distract from their mistakes. Quite simply, once a contamination event occurs, any re-testing of the contaminated sample would still produce the contaminated result. The Defense never requested to witness retesting of any evidence, and never argued, established, or requested additional testing of other probative items (such as Ms. Mixer's fingernails, or the pubic hairs found on Ms. Mixer).

Under *Strickland*, to establish ineffective assistance of counsel the Defendant must show: (1) counsel's performance was deficient (this requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment); and (2) the deficient performance prejudiced their defense. A defendant is required to demonstrate a violation of both prongs in order to prevail. 466 US at 687.

No specific standards were given under the first prong of the *Strickland* test, and each analysis depends on a case-by-case analysis. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." 466 US at 688. These professional norms do, however, encompass a duty on the part of counsel to investigate potentially meritorious defenses. While counsel is normally presumed competent, this presumption does not apply to counsel who does not adequately investigate the facts surrounding his client's case:

Id.

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, apply a heavy measure of defense to counsel's judgment.

Under *Strickland* counsel has an ethical duty to investigate and present potentially meritorious defenses when they exist.⁴³ In evaluating the Constitutional effectiveness of defense counsel, it is impossible to divorce what Mr. Gabry did from what the expert did. Mr. Gabry hired an expert to assist him. That expert was amalgamated in the defense team. At the *Ginther* hearing, the Defense intends to show that Mr. Gabry consulted with and relied on the expert. His consultation was fully integrated into the Defense.

The actions of lay members of the defense team are imputed to counsel. Mr. Gabry was not a DNA expert. There can be no dispute that DNA is a highly complex issue. Therefore, Mr. Gabry was dependent on his expert to properly understand this critical issue and rise to the occasion. The fact that the fault in failing to present this evidence is can be attributed to the defense expert rather than defense counsel does not absolve the defense team of the fault in this Case.

In *Ake v Oklahoma*, 470 U.S. 68, 77, 105 S Ct 1087, 84 L.Ed.2d 53 (1985) the Court ruled that the defendant was entitled not merely to the assistance of a psychiatrist, but to the assistance of a "competent psychiatrist." 470 U.S. at 77 (emphasis added). Consequently, a defendant's right to the effective assistance of experts is violated when a defendant is provided access to an expert who is incompetent or who conducts an evaluation inadequate for the defendant's purposes. See *Ford v Gaither*, 953 F2d 1296,

⁴³. *People v Tumpkin*, 49 Mich App 262, 212 NW2d 38 (1973); *People v McDonnel*, 91 Mich App 458, 283 NW2d 773 (1979); *People v Snyder*, 108 Mich App 754, 310 NW2d 868 (1981); *People v McVay*, 135 Mich App 617, 354 NW2d 281 (1984).

1299 (CA 11, 1992) (finding a violation of defendant's right to expert assistance because the two psychiatrists who evaluated the defendant did not evaluate his competency at the time of the crime, and did not offer adequate assistance in preparing his defense); *Starr v Lockhart*, 23 F3d 1280 (CA 8, 1994) (finding a violation of defendant's right to expert assistance because the psychiatrist who examined and testified regarding the defendant conducted an examination that did not adequately refer to the mitigating factors, and his testimony was not helpful to the jury). As Judge Noonan of the Ninth Circuit has written, “[a]fter *Ake*, no one could suppose that due process was satisfied because psychiatrists testified or because licensed psychiatrists were made available by the state. In light of *Ake*, bedrock fairness requires effective assistance if the defendant's mental state in a capital case is at issue.” *Harris v Vasquez*, 949 F2d at 1534 (Noonan, J., concurring in part and dissenting in part).

It is evident that to satisfy *Ake*, an expert must be “a competent professional who will perform an appropriate examination.”⁴⁴ Rather, experts are critical in cases where the evidence being presented is beyond the capability of the average juror. Indeed, courts increasingly recognize the importance of the proper utilization of experts.⁴⁵ This approach is consistent with the United States Supreme Court’s

⁴⁴ *Brown v Dodd*, 484 U.S. 874, 876 (1987) (Marshall, J. and Brennan, J. dissenting); see also *Vickers v Arizona*, 497 U.S. 1033, 1037 (1990) (Marshall, J. and Brennan, J. dissenting) (explaining that “depriv[ing] a defendant of diagnostic testing necessary for the psychiatrist to perform his *Ake* function adequately renders the right meaningless”); *Granviel v Texas*, 495 U.S. 963 (1990) (Marshall, J. and Brennan, J. dissenting) (stating that the provision of a “disinterested” expert does not satisfy the *Ake* requirement that the psychiatrist be part of the defense team).

⁴⁵ See, e.g., *Mayfield v Woodford*, 270 F3d 915 (9th Cir. 2001) (counsel’s failure to call appropriate expert witnesses at penalty phase, including an endocrinologist who could have explained effects of defendant’s diabetes on his physical and mental condition, and toxicologist who could have explained effects of defendant’s chronic abuse of PCP on his mental condition, contributed to finding that counsel was ineffective); *Jermyn v Horn*, 266 F3d 257, 307-308 (3d Cir. 2001) (counsel’s failure to call any mental health expert to explain defendant’s childhood abuse and its impact on his adult functioning and culpability, contributed to finding that counsel was ineffective); *Skaggs v Parker*, 235 F3d 261, 273 (6th Cir. 2000) (counsel’s failure to “present an even marginally

recognition in *Ake* that what "fundamental fairness" requires shifts over time, and is responsive to "evolving practice" in the criminal law. *Ake*, 470 U.S. at 87, 82.

All the strategy which flowed from the defective DNA expert consultation contaminated the Defense strategy throughout this Case. Bad science cannot be sound strategy. Trial strategy must be "sound trial strategy" to qualify.⁴⁶ The question is not whether Mr. Gabry is a good lawyer or a bad lawyer. The question is not whether Mr. Gabry's heart was in the right place. The question that this Court must answer is whether Gary Leiterman was denied his right to effective assistance of counsel and/or due process. A captain is only as good as his crew. In this case, Mr. Gabry's first mate steered the "ship" directly for an iceberg.

The question of whether this Defendant was denied his right to ineffective assistance of counsel cannot be answered by simply asking: "Did Mr. Gabry investigate the case"? A mechanistic answer would effectively insulate improper convictions anytime the error was committed by lay staff. An attorney could claim he was not ineffective because it was his investigator who did not interview a witness, or that it was his runner who failed to deliver the Notice of Affirmative Defenses to the Court.⁴⁷ As the practice of law

competent expert on crucial evidence" including defendant's "borderline mental retardation and other clinical psychological conditions" constituted ineffective assistance); *Lockett v Anderson*, 230 F3d 695, 714 (5th Cir. 2000) (counsel's failure to adduce expert testimony regarding defendant's mental and psychological abnormalities contributed to finding of ineffective assistance); *Jackson v Calderon*, 211 F3d 1148, 1162-63 (9th Cir. 2000) (counsel's failure to call medical expert who could have explained defendant's chronic use of drugs and their effects on his mental condition and his impaired mental condition at the time of the crime, and failure to compile a social history of defendant, contributed to finding of ineffective assistance).

⁴⁶ *People v Delessandro*, 165 Mich App 569, 419 NW2d 609 (1988). See also *Crisp v Ducksworth*, 743 F2d 580, 583 (CA 7, 1984).

⁴⁷ Cf *In re Auto Specialties Mfg. Co.*, 133 BR 384 (WD Mich, 1991) (lead counsel is responsible for the errors of his staff, associates, clerks, and counsel); *State v Kante*, 710 NW2d 257 (Iowa App, 2005) (defense counsel ineffective because of faults of interpreter); *Ledezma v State*, 626 NW2d 134, 149 (Iowa, 2001) (same).

becomes increasingly complex, the simple reality is that lawyers must depend on specialists, lay support staff, and experts to prepare for trial.

The Michigan Supreme Court recently recognized that inadequate investigation claims must be judged on a case by case basis. *People v Grant*, 470 Mich 477, 684 NW2d 686 (2004). Because of the importance of that ruling to this case, a more detailed discussion than average is required of that case.

In *Grant*, the Defendant was convicted of criminal sexual conduct. The state claimed that the Defendant sexually assaulted two sisters. The testimony of the older sister was critical in obtaining the Defendant's conviction. That girl testified that a vaginal injury that she received was the result of the defendant's criminal assault. Earlier, the girl had told a doctor, hospital staff, and others that the injury was from a bicycle accident.

What is notable in *Grant* is the fact that counsel did in fact conduct significant investigation of the defense case, and mounted a real defense. Defense counsel, however, failed to interview crucial witnesses and missed several key points in the defense. A four justice majority of the Court held that this constituted ineffective assistance of counsel.

In reversing, the *Grant* Court first recognized that a trial attorney's strategy must constitute "sound trial strategy" to qualify. "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable judgment." The Court further stated that: "Counsel must make 'an independent examination of the facts, circumstances pleadings and law involved.'"⁴⁸ "[M]erely labeling [counsel's] errors 'strategy' does not shield his performance from Sixth Amendment scrutiny." *Henry v*

⁴⁸ *Grant*, (Kelly, J.) at 487 (quoting *Von Moltke v Gillies*, 332 U.S. 708, 721, 68 S Ct 316, 92 Led 309 (1948)). See also *Grant* at 498-499 (Taylor, J. concurring) ("to fail to [conduct reasonable investigation] is not a reasonable professional judgment").

Scully, 918 F Supp 693, 715 (SDNY 1996), aff'd 78 F3d 51.⁴⁹ The *Grant* Court also stressed that in evaluating claims of trial strategy, a court should look first and foremost at trial counsel's actions and words at the time of the trial. The principle that a court should not evaluate the strategy with the benefit of hindsight is a two way street. The fact that strategy failed does not make it unsound. Conversely, counsel should not be allowed to utilize post hoc hypothesis to create a strategy where none existed:

We evaluate defense counsel's performance from counsel's perspective at the time of the alleged error and in light of the circumstances. Thus, counsel's word and actions before and at trial are the most accurate evidence of what his strategies and theories were at trial.

Grant at 487 (Kelly, J.). In *Grant*, defense counsel stated that his strategy was to show to the jury that the older girl was a habitual liar and could not be trusted. He stated that based on this theory, he "welcomed" her testimony that she had originally lied when she stated that the bicycle accident was an accident. *Id.*

The lead opinion however rejected this purported strategy, because counsel took actions inconsistent with this "strategy" at trial. He did not prepare discounted additional witnesses that would have supported his approach, he failed to contact witnesses listed by the defense, and he failed to act on statements made by these witnesses.

What is important to recognize about the *Grant* case is that trial counsel actually exerted some effort to prepare a defense. Counsel interviewed some of the witnesses, and contacted doctors who could not offer a conclusive opinion about what transpired. However, these efforts did not save him from an ineffectiveness claim. *Id.* at n. 7. Counsel's big fault in *Grant* (as in the Current Case), ***is that he failed to have a full understanding of his client's predicament, and what prosecution evidence simply had***

⁴⁹ See also *Cave v Singletary*, 971 F2d 1513 (CA 11, 1992). Counsel has a duty to pursue "all leads relevant to the merits of the case." *Grant* at 487 (Kelly, J.) (quoting *Blackburn v Foltz*, 828 F.2d 1177, 1183 (CA 6, 1987)). See also *Johnson v Baldwin*, 114 F3d 835, 839-840 (CA 9, 1997) (reversed for failure to investigate alibi witnesses); *Lewis v Alexander*, 11 F3d 1349, 1352 (CA 6, 1993).

to be attacked in order to create doubt.⁵⁰ Counsel in *Grant* dispatched investigators, but failed to focus them around what was the crucial evidence at trial. *Id.* at 491-92. Where counsel fails to make an investigation, the societal confidence in a verdict is by definition undermined. *Id.* at 493. As noted by Justice Kelly:

The failure to make an adequate investigation is ineffective assistance of counsel if it undermines the confidence in the trial's outcome. Counsel's failure to investigate his primary defense prejudiced defendant. It adversely affected the outcome depriving defendant of a fair trial. In light of the evidence presented at trial, there is a reasonable probability that the outcome would have been different.

Id. Defendant is not unmindful that Justice Corrigan mounted a dissent to the four Justice holding. It is important, however, to stress that Justice Corrigan's opinion focused on the investigation that counsel did mount in that case. Counsel interviewed numerous witnesses and told the client at the time that his reasoning for not mounting a defense was his personal belief that the jury would not believe the same. These facts (in Justice Corrigan's opinion) brought counsel's actions within the realm of trial strategy.⁵¹

⁵⁰ *Id.* at 491 (Kelly, J.). See also *Driscoll v Delo*, 71 F3d 701 , 708-09 (CA 8,1995), cert denied sub nom, *Bowersox v Driscoll*, 519 US 910 , 117 SCt 273, 136 LED2d 196 (1996) (deficient performance where counsel merely read a three-page laboratory report, but failed to understand the serological tests performed and to rebut the prosecution's theory that conflicted with the report); *Leonard v Michigan*, 256 F Supp 2d 723 (WD Mich 2003) (counsel's inadequate knowledge of DNA evidence and preparation for its introduction constituted ineffective assistance).

⁵¹ Justice Corrigan's dissent in *Grant* needs to be juxtaposed with her opinion in *People v Carrick*, 220 Mich App 17, 558 NW2d 242 (1997). There, a unanimous panel of the Michigan Court of Appeals (applying federal law) found that trial counsel was ineffective in failing to raise a jurisdictional challenge in the trial court. There, the defendant was charged and convicted of resisting and obstructing a peace officer. The officer in question was an off-duty motor vehicle carrier-enforcement officer. The Court of Appeals found that because of the limited powers of arrest given to such officers under the statute, they did not constitute peace officers under the resisting and obstructing statute. The Court further found that there was no conceivable reason consistent with trial strategy for counsel to refuse to raise such an issue. Writing for the Court, then Judge Corrigan wrote:

Defense counsel's failure to raise the limited scope of [Officer] Rainey's authority under the statute denied defendant a fair trial. As discussed earlier, the off-duty motor carrier officer had no duty under the statute to detain the defendant. But for counsel's omission, defendant would not have been convicted. Counsel had no

Reading Justice Corrigan's dissent in *Grant* with her opinion in *Carrick*, it is clear that her disagreement with the *Grant* majority is a question of degree. She believed that based on his performing some preparation and lawyering, that the *Grant* attorney's partial investigation represented reasonable lawyering. The level of investigation performed by that attorney, however, is considerably more than Counsel's handling of the DNA evidenced in this Case.

Finally, it is important to stress that Justice Corrigan's dissenting opinion in *Grant* is obviously not its holding. Contrary to Justice Corrigan's claims to the contrary, the points on which four Justices of the Court all agreed *is the holding* in *Grant*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

Harmonizing the opinions in *Grant*, it is clear that four Justices agreed on the following points:

- Strickland's presumption of deference is not applicable where counsel fails to conduct requisite investigation, *Grant*, at 487 (Kelly, J.); *Grant* at 498-499 (Taylor, J. concurring) ("to fail to [conduct reasonable investigation] is not a reasonable professional judgment");
- Counsel has a duty to investigate potential defenses, *Id.*
- Counsel has a duty to pursue exculpatory physical evidence;
- Counsel has a duty to apprise himself with the state's case and prepare to meet the same; and
- Merely mechanically investigating a case without the foregoing does not protect counsel from an ineffective assistance of counsel challenge.

It seems clear that the *Grant* Court did find that the asserted behavior fell below the Sixth Amendment floor in that case. It is also important to stress that in *People v Havens*, 2004 WL 1882883

legitimate strategy for failing to interpose the issue of Officer Rainey's authority to detain defendant.

558 NW2d at 244.

(Mich App 2004), one Court of Appeals cited to the *Kelly* opinion in *Grant* for the proposition that counsel is not entitled to deference for not calling witnesses that he never learned of do to his/her failure to investigate the case.

In this Case, the Defendant was denied the right to valuable evidence because of the collective effect of the defense team. This Court can declare this a violation of due process or ineffective assistance of counsel. Either way, the Defendant is entitled to a new trial.

IV. THE HANDWRITING ANALYSIS “EXPERT” TESTIMONY OFFERED IN THIS CASE DOES NOT MEET THE STANDARDS FOR THE ADMISSIBILITY OF EVIDENCE UNDER DAUBERT AND MRE 702. EVEN THOUGH THERE WAS NO CONTEMPORANEOUS OBJECTION TO THE ADMISSION OF THIS EVIDENCE, THIS COURT SHOULD REVERSE BECAUSE IT WAS MANIFESTLY UNJUST TO ADMIT THE EVIDENCE AND BECAUSE IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO NOT OBJECT TO THE ADMISSION OF THIS TESTIMONY.

Standards of Review. According to *Daubert*, the decision whether to admit expert testimony is committed to the trial court in the first instance. The decision is reviewed for an abuse of discretion. Gilbert v Daimler-Chrysler Corporation, 470 Mich 749, 685 NW2d 391 (2004).

At trial, the Prosecution called Lt. Thomas Riley as a witness. He was a detective lieutenant in the Question Document Unit of the Michigan State Police, and opined that after reviewing the materials presented to him that it is highly probable that Mr. Leiterman wrote the words “Muskegon” and “Mixer” on the phonebook found in the law quad.

Defendant asks this Court to reverse his conviction and/or remand this matter to the new trial because of the problems associated with handwriting analysis in general and in this case in particular. A general discussion of the *Daubert* standard for admissibility appears earlier in this Brief and will not be restated here.

Under *Daubert* many courts throughout the country have raised grave doubts about the accuracy of handwriting analysis in general.⁵² Defendant recognizes that handwriting evidence does not need to be conclusive to be admissible.⁵³ At the same, the evidence does needs to be capable of objective verification and replication. This is the heart of the scientific methodology and *Daubert*, and is not present in this Case.

The universal unreliability of handwriting comparison evidence in general was further compounded in the Present Case by the fact that the specific evidence admitted against Mr. Leiterman was misleading and compromised. The first issue related to the specific handwriting analysis presented in against Mr. Leiterman is the fact that the original phonebook (with the "original questioned handwriting") was not available for testing. While the Prosecutor's expert attempted to testify that the photos were of good enough quality that he could form an opinion, the "real story" is that the photograph handcuffed the experts' attempts at making a comparison. Even Lt. Riley qualified his opinion on cross examination, stating his comparison was as much as can be done from a photograph. (TT, 7/20/05, pp 186 – 187).

The more troubling issue with regard to the reliability and credibility of the handwriting comparison done in the Present Case is the fact that the Prosecutor's expert acknowledged that when he conducted his examination that *he "altered" some of Mr. Leiterman's "known" writing samples* before he compared them by removing part of the letters. (TT, 7/20/2005, p 199). For example, he removed the

⁵² See, e.g., *United States v. Lewis*, 220 F.Supp.2d 548, 554 (S.D.W.Va.2002) (finding proficiency tests and peer review meaningless where the evidence showed that handwriting experts "always passed their proficiency tests, ... [and that] peers always agreed with each others' results" (emphasis in original)); *United States v. Brewer*, 2002 WL 596365 (N.D.Ill.2002); U.S. v. Rutherford, 104 F. Supp. 2d 1190, 55 Fed. R. Evid. Serv. 201 (D. Neb. 2000); *United States v. Saelee*, 162 F.Supp.2d 1097 (D.Alaska 2001); *United States v. Hines*, 55 F.Supp.2d 62 (D.Mass.1999). See also Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 Hastings L.J. 1069 (1998) (questioning the reliability of handwriting, fingerprint, and tool mark analyses, among others).

⁵³ *United States v. Galvin*, 394 F.2d 228 (3d Cir. 1968).

initial stroke found in Mr. Leiterman's capital, cursive "M," to find that exhibited "proportional information" – i.e., that it is similar to the "Mixer" and "Muskegon" evidentiary sample. In addition, Lt. Riley also admitted that in the spiral notebook Mr. Leiterman used numerous approach strokes, but that on the phonebook cover there were no approach strokes. (TT, 7/20/2005, p 205).

The Defense expert was very critical of Lt. Riley's technique of "altering" letters in the writing samples and then using them in the comparison, stating that doing so is not acceptable handwriting analysis. The first Defense expert -- Robert Kullman -- was a forensic document examiner for the Michigan State Police for 22 years. He explained that "you can't go ahead and start removing strokes and saying, well now it fits." (TT, 7/21/2005, p 45). Even more problematic is that even given that Lt. Riley testified that he did this, Mr. Leiterman's "altered" writing samples still did not match the "Mixer, Muskegon" evidentiary sample. (TT, 7/21/2005, pp 45 – 46).

In this Case, the Prosecutor's presentation of the handwriting analysis is troubling. The Prosecutor's strategy apparently was the following: in a Case where the DNA evidence had inexplicable problems with it, the handwriting analysis may very well have been the needed reassurance that the jury needed to convict this Defendant, e.g. the jury could safely feel that the evidence in this case was not simply based on DNA, but on multiple forensic pieces of evidence.

Although Attorney Gabry did not object to the admissibility of the handwriting testimony on these specific grounds, the error was plain error which clearly affected Defendant's substantial rights. The following requirements were met: "(1) the error must have occurred; (2) the error was plain, that is, clear or obvious; (3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750 (1999). In the alternative, counsel was ineffective in failing to object to the introduction of the clearly inadmissible experiment and its results.⁵⁴ Knowledge of the law applicable to the defendant's case is essential to a

⁵⁴ *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338, 521 NW2d 797 (1994).

rendering of effective assistance.⁵⁵ Only sound trial strategy will defeat a claim of ineffective assistance.⁵⁶

Failure to move for suppression of inadmissible evidence can be ineffective assistance of counsel warranting relief.⁵⁷ In this Case, Mr. Gabry's failure to object to the admission of this wholly unreliable and outright misleading handwriting evidence, and the Prosecutor's argument based thereon, was ineffective, there was no conceivable trial strategy in failing to object to such clearly inadmissible evidence and such clearly improper argument. Accordingly, Mr. Leiterman was denied a fair trial, and his conviction should be reversed. Alternatively, the Defendant requests this Court remand this matter for a *Ginther* hearing.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING OVER DEFENSE OBJECTION EVIDENCE CONCERNING THE NATURE OF THE DEFENDANT'S PRIOR ADJUDICATION FOR POSSESSION OF A FORGED PRESCRIPTION.

Standard of Review. According to Daubert, the decision whether to admit expert testimony is committed to the trial court in the first instance. The decision is reviewed for an abuse of discretion. *Gilbert v Daimler-Chrysler Corporation*, 470 Mich 749, 685 NW2d 391 (2004)

The trial court held a hearing on June 21, 2005 which dealt with the admissibility of various forms of 404(b) evidence that the Prosecutor sought to admit against the Defendant at trial. One of these included Mr. Leiterman's plea and deferred sentence on a felony prescription drug offense out of Kalamazoo. The trial court ruled that the Kalamazoo conviction having to do with the false prescription would be admitted only for the purpose of explaining how the defendant's DNA was originally taken. The

⁵⁵ *United States v Streater*, 70 F3d 1314 (1995); *People v Carrick*, 220 Mich App 17, 22 (1996).

⁵⁶ *People v Dalessandro*, 165 Mich App 569, 578; 419 NW2d 609 (1988).

⁵⁷ *People v Brown*, 119 Mich App 656, 664, 666 (1982).

trial court also allowed the Prosecutor to call Mr. Esper to testify about Mr. Leiterman having a gun, and to finding the various newspaper articles in Mr. Leiterman's closet.

The fact that the state police recently and routinely obtained the Defendant's blood was relevant. The nature of the Defendant's conviction or that it was a conviction at all was not. Mr. Leiterman believes that he was denied his constitutional right to a fair trial by the reference to his prior deferred sentence adjudication for a prescription drug offense.⁵⁸

While the fact that the State obtained the Defendant's DNA routinely and lawfully may have been relevant, the fact that the Defendant was charged with a crime or the nature of the crime was not. In *People v Swint*, 225 Mich App 353; 572 NW2d 666 (1997), the Court found that in a felon in possession prosecution, the State could not automatically introduce the nature of the accused's prior conviction. While finding the error to be harmless on the facts of that case, this Court observed:

Finally, defendant argues that the trial court violated his right to a fair trial because the court denied his motion to exclude evidence of his prior felony conviction of assault with a dangerous weapon in exchange for a stipulation and plea that defendant had been convicted of felonious assault and was ineligible to possess a firearm. We agree and find that the trial court abused its discretion by denying the motion. *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997).

The court went on to note Rule 403, "precluded the admission of evidence regarding the name and nature of the defendant's underlying felony in light of the offered stipulation to prevent, as the defendant argued, "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged," i.e., improper propensity evidence that creates a prejudicial effect outweighing ordinary relevance." *Swint*, 225 Mich at 377-378 (footnotes omitted).

In *Old Chief v United States*, 519 US 172, 117 S Ct 644, 136 L Ed 2d 574 (1997), the United States Supreme Court recognized that the prosecution has the right to prove every element of its case by

⁵⁸ US Const, Ams V, VI, XIV; Const 1963, Art 1, § 17; *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997).

the evidence it chooses to present. However, the Court said this rule must be abandoned when the defendant is charged with felon in possession of a firearm. The Court explained that not telling the Defendant's record "leaves no gap in the story of a defendant's subsequent criminality, and its demonstration by stipulation or admission neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution, to confuse or offend or provoke reproach. *Id.* at 655. The Court went on to note that "the most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instruction." *Id.* at 655. In the Case at bar, the rule in *Old Chief* was violated when it was stipulated that Mr. Letierman had a prior conviction for a drug offense. According to the case law, the stipulation should have been general in nature providing only that the State Police lawfully had taken a sample of the Defendant's DNA.

Mr. Leiterman was affirmatively prejudiced by these actions. The prejudice was manifest here where such evidence has the tendency to generalize Defendant's unrelated act of drug abuse arising out of an accident and an addiction to lawfully prescribed pain killers into bad character, raising the odds that he committed the instant charged offense. The evidence serves as improper propensity evidence. See *Swint*, 225 Mich at 377-378.

The United States Supreme Court has stated that "the term 'unfair prejudice', as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 117 S Ct at 650. There is absolutely no legitimate reason to allow the trier of fact to be informed of the specific prior adjudication. All that was required was proof that the police lawfully obtained the DNA. *Old Chief*, 117 S Ct at 655.

A basic tenet of criminal law is that a jury may not consider prior convictions as evidence that a defendant is acting in conformity with his or her criminal propensity in the case then before the jury (the classic "bad man" evidence). See *People v VanderVliet*, 444 Mich 52, 508 NW2d 114 (1993). Introduction of "similar acts" evidence requires close scrutiny. In *Old Chief* the United States Supreme Court stated that a contrary ruling would:

That reading would leave the party offering evidence with the option to structure a trial in whatever way would produce the maximum unfair prejudice consistent with relevance. He could choose the available alternative carrying the greatest threat of improper influence, despite the availability of less prejudicial but equally probative evidence. The worst he would have to fear would be a ruling sustaining a Rule 403 objection, and if that occurred, he could simply fall back to offering substitute evidence. This would be a strange rule. It would be very odd for the law of evidence to recognize the danger of unfair prejudice only to confer such a degree of autonomy on the party subject to temptation, and the Rules of Evidence are not so odd.

Old Chief, 117 S Ct at 651-652. Therefore, if prosecutors are allowed to divulge the name of the defendant's prior conviction, while other criminal counts are pending, then they can effectively circumvent case law and the rules of evidence controlling such evidence under the rationale that "it's necessary to establish the chain of custody."

This Court has recognized repeatedly that a defendant is unfairly prejudiced by evidence concerning his prior sentences, incarceration, probation, or parole status.⁵⁹ Allowing the trier of fact to hear Mr. Leiterman's prior adjudication by name was inexcusable. Under *Old Chief*, the chain of custody should have been stipulated to. This was violative of the standards set forth by the United States Supreme Court in *Old Chief*, a violation of the Michigan Rules of Evidence, and unfairly prejudiced Mr. Leiterman.

⁵⁹ See, e.g., *People v McGee*, 90 Mich App 115, 116; 282 NW2d 250 (1979) (reversing a felony-murder conviction because the prosecutor elicited testimony about the defendant's prior incarceration); *People v Springs*, 101 Mich App 118, 123-124; 300 NW2d 315 (1980) (reversing because of several instances of prosecutorial misconduct, including the prosecutor's elicitation of testimony that the defendant was then on parole or had been in prison).

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN BARRING THE DEFENSE COUNSEL FROM INTRODUCING EVIDENCE CONCERNING MISCONDUCT OF THE SUPERVISOR OF THE STATE POLICE DNA LAB WHERE COUNSEL HAD AN APPROPRIATE FACTUAL BASIS TO ASK THE WITNESS ABOUT WHETHER THE SUPERVISOR WAS TERMINATED FOR CHEATING ON HIS OWN PROFICIENCY EXAMINATION CONCERNING THE HANDLING OF DNA. THIS RULING WAS NOT ONLY ERRONEOUS, BUT ALSO INTERFERRED WITH THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

Standard of Review. An appellate court reviews a decision to exclude evidence for abuse of discretion. *People v Charles O. Williams*, 386 Mich 565, 573; 194 NW2d 337(1972); *People v Hackney*, 183 Mich App 516, 520; 455 NW2d 358 (1990). However, review of constitutional issues is de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). Additionally, questions of law are reviewed de novo. *People v. Lukity*, 460 Mich. 484, 488; 596 NW2d 607 (1999).

During the course of the Defense examination of Ms. Thivault, the court preliminarily sustained the Prosecution's objection to the Defense questioning her about her former supervisor Charles Barna. The Court, however, asked the witness to remain after the completion of her testimony. The Court then held a transcribed in chambers hearing. The hearing concerned whether Defense counsel would be able to ask the witness about her supervisor at the time she tested the Ruelas evidence – Mr. Barna. Mr. Barna retired under a cloud of suspicion following allegations that he had paid another individual to take his external proficiency tests with respect to the handling of DNA. According to Mr. Gabry, Mr. Barna was head of the lab and held supervisory responsibility over Ms. Thivault. Mr. Barna was her first point of contact concerning any concerns she might have had, (TT, 7/15/2005, p 33). The Prosecutor disputed the allegations, but conceded that the allegations made by Defense counsel were widely circulating in the legal community.

The Judge refused to allow the testimony because Mr. Barna did not do any testing in either the Ruelas or the Mixer case. Additionally, by the time the Ruelas blood came into the lab Barna had retired, and allegedly had very limited involvement with the DNA testing in this Case. (TT, 7/15/2005, p 34-35).

The Judge determined that the evidence was not appropriate impeachment evidence, and that it was collateral and therefore not admissible. (TT, 7/15/2005, p 38).

The trial court's ruling evidenced a misunderstanding of the role of Mr. Barna as a supervisor. A supervisor is responsible for the controls in place to insure the reliability of the testing process. As the West Virginia Supreme Court recognized in dealing with cases involving intentionally false DNA: "This corruption of our legal system would not have occurred had there been adequate controls and procedures in the Serology Division." *In Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Div.*, 190 W.Va. 321, 438 S.E2d 501 (W Va, 1993). Proof that the supervisor of the State Police DNA lab was willing to cheat on an accreditation test is one brick in the wall of the Defendant's case that contamination is likely to have happened.

This ruling violated both the Sixth Amendment and Michigan's Rules of Evidence. It is well settled that if state evidentiary rules interfere with the defendant's constitutional right to present a defense, they must yield as well.⁶⁰ Under the Michigan rules of evidence, relevant evidence is admissible, unless the prejudicial aspects of the evidence "substantially outweigh" the probative value. MRE 401; MRE 403. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact is of consequence to the determination of the action more probable than it would be without evidence."

In *People v Brooks*, 453 Mich 511, 517-519 (1996), our Supreme Court set forth the following principles in determining relevancy. First, a court must determine materiality. Materiality asks whether the evidence is of consequence to the determination of the action. Second, a court must determine the probative force of the evidence and whether it makes a fact more or less likely than it would without the evidence.

⁶⁰ *Chambers v Mississippi*, 410 US 284; 93 SCt 1038; 35 LEd2d 297 (1973); *People v Morse*, 231 Mich App 424, 430-431 (1998).

Probative force is the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Further, "any" tendency is sufficient probative force. MRE 401. This definition is well established in Michigan jurisprudence. See *Beaubien v Cicotte*, 12 Mich 459, 484 (1864), and *Collins v Beecher*, 45 Mich 436, 438; 8 NW 97 (1881).

The principles found in the early cases of Beaubien and Collins are amplified in the McCormick treatise, where the reader encounters the familiar formulation that "a brick is not a wall."

The court went on to note that in the American system of litigation, a case is built brick by brick. Each item may not be conclusive and might have alternate explanations. This, however, does not destroy the relevancy of the evidence. "A single piece of evidence need not ever make that proposition appear more probable than not." The Court went on to note that "it is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence." The court then noted that often evidence proves a point circumstantially, and the "common objection that the inference for which the fact is offered "does not necessarily follow" is untenable. It poses a standard of conclusiveness that very few single items of circumstantial evidence ever could meet. A brick is not a wall." In *Brooks*, the Court went on to hold that the trial court abused its discretion in a murder case in excluding evidence that the decedent had cocaine in her bloodstream at the time of death, where the defendant testified that the decedent had a substantial amount of cocaine in her home, and the defense theory was that someone else who knew the decedent kept drugs in her home had killed the decedent.

MRE 404(b)(1) further implements this designed by stating evidence of other wrongs is admissible to prove actions such as "motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. If there was evidence that the individual examiner cheated on a proficiency examination causing him to be discharged, this would certainly be admissible. It would demonstrate that he was willing to lie and fabricate to get ahead in her chosen profession, but where the misconduct is undertaken by a direct

supervisor, there appears to be an unwillingness to ascribe the misconduct of the leaders of an office to the projects undertaken by that office.

The United States Court of Appeals for the Ninth Circuit has noted that corporate misconduct is most likely sanctioned by those who are higher ranking and who have managerial responsibility.⁶¹ The fact that the policies and day to day procedures were set by an individual who was willing to lie and cheat to maintain accreditation is one more brick in the wall of the Defendant's case that the State Police are not likely to admit the errors that they have committed.

Defendant relies on S. Friedenlander, *Using Prior Corporate Convictions To Impeach*, 78 CALR 1313 (1990), for a general discussion of how the law has fallen behind in this area. Notwithstanding the Prosecution's claims to the contrary, this evidence was logically relevant to demonstrating that the State Police may not be completely candid with respect to the manner in which they handled the disputed evidence. There is no logical reason to limit misconduct to the act of the particular examiner. Far more than an officer on the street, a laboratory functions like an office and a team. It was error to refuse to admit this evidence. Defendant requests this Court reverse his conviction.

⁶¹ See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972) (justifying conviction of corporation for antitrust violation on grounds that high management is "likely to have participated" in violation or was at least aware of violation). See also *United States v. Park*, 421 U.S. 658, 670 (1975) (individual criminal liability can be imposed "not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission").

RELIEF

WHEREFORE, Defendant asks this Court to REVERSE his conviction and remand this matter for a new trial. At minimum, the Defendant requests this Court to remand this matter for an evidentiary hearing.

Respectfully submitted,

KIRSCH AND SAWA, P.C.



By: Mark A. Satawa (P47021)
Stuart G. Friedman (P46039)
Attorneys for Defendant-Appellant
3000 Town Center; #1700
Southfield, MI 48075
(248) 356-8320

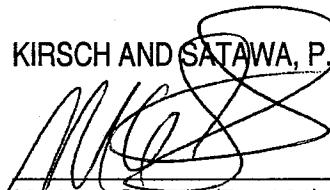
Dated: 1/9/07

REQUEST FOR ORAL ARGUMENTS

Mr. Leiterman submits that oral argument should be granted because this Brief on Appeal was timely filed thus preserving his qualified right to oral argument under MCR 7.214(A). Furthermore, the exceptions under MCR 7.214(E) are not applicable because, (a) this appeal has merit, (b) the Court's deliberations would be significantly aided by oral argument because the briefs may not adequately represent all of the legal arguments by the time that this case is reviewed by the Court, due to the substantial passage of time between the filing of a brief on appeal and review by this Court, and (c) there is no way for counsel to predict whether a decision will be released between the time of filing and the time of review which would aid the Court in reviewing this case. See MCR 7.214(E).

Respectfully submitted,

KIRSCH AND SATAWA, P.C.



By: /Mark A. Satawa (P47021)
Stuart G. Friedman (P46039)
Attorneys for Defendant-Appellant
3000 Town Center; #1700
Southfield, MI 48075
(248) 356-8320

DATED:

PROOF OF SERVICE

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

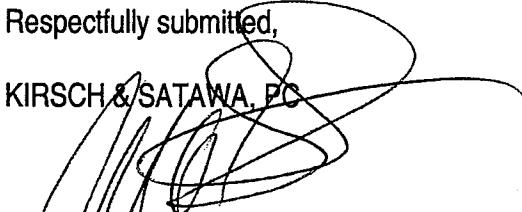
The undersigned declarant being first duly sworn, deposes and says that on January 9, 2007,
(s)he did mail a copy of the attached DEFENDANT- APPELLANT'S BRIEF ON APPEAL, to:

WASHTENAW COUNTY PROSECUTOR'S OFFICE
Post Office Box 8645
Ann Arbor, MI 48107

Declaration in Lieu of Notarization. I declare that the foregoing is true and correct to the best of
my information, knowledge, and belief.

Respectfully submitted,

KIRSCH & SATAWA, PC

By: 
Mark A. Satawa (P47021)
Attorney for Defendant-Appellant
3000 Town Ctr Ste 1700
Southfield, MI 48075
Phone: (248) 356-8320

DATED: January 9, 2007