DOCKET NO. 127241
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	On Petition for Leave to Appeal from the Appellate Court of Fifth Judicial District, No. 5-20-0074
Appellant,	
v.	There on Appeal from the Circuit Court of Third Judicial Circuit,
JOHN PRANTE,	Madison County, No. 82 CF 381
Appellee.	Honorable Neil T. Schroeder Judge Presiding.

CROSS-REPLY BRIEF OF APPELLEE

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INTRODUCTION

"Bite mark" evidence has been completely discredited. As it must, the State concedes this point, yet attempts to trivialize the significance of its use of the junk science that was so central to its investigation, central to bringing the indictment, central to its choice of jurors, and central to its opening and closing arguments to John Prante's jury.

The overwhelming crux of the State's attempts to deny Prante relief on the grounds before this Court is that defense bite mark "experts" testified at trial, too. Today, however, the bite mark evidence would not be introduced, period. That Prante was compelled to call expert witnesses, who, importantly, did not question the "science" of bite mark evidence at all, does not "cure" the harm of introducing the repudiated testimony in the first instance. Rather, the "battle of the experts" at Prante's trial is a paradigmatic example of the breakdown of the adversarial process. There were no "experts" at trial, and there was no "science." Everyone in the courtroom—from the State, the defense, the jury and the judge—were operating under a false premise: bite mark evidence was valid and reliable "scientific" evidence. It was not. Instead, it was used to convict an innocent man, like it has been shown to do to dozens of other innocent individuals, many of whom also called their own defense "experts" in this same flawed arena and were nevertheless convicted. If anything, this record dramatically highlights the unique prejudice of bite mark evidence.

As it should with the due process claim already briefed, this Court should allow Prante leave to file his actual innocence claim, as his new evidence repudiating the bite mark evidence central to his arrest and prosecution demonstrates a *prima facie* case of actual innocence.

ARGUMENT

The evidence presented by John Prante that the State now acknowledges demonstrates that the bite mark evidence presented at trial was "unreliable" and has been "discredited" establishes a *prima facie* case of actual innocence.

The parties agree, that at this stage and taking John Prante's well-pled allegations as true, Prante has established, in the State's words, "that the bitemark evidence presented at defendant's trial has been discredited and deemed unreliable by the scientific community." St. Br. at 14. The State also agrees that Prante adequately established that the scientific evidence establishing these facts is both newly discovered and material. *Id*.

Since the filings in this case, this conclusion only continues to be reinforced. Indeed, on October 11, 2022, after several years of study, the National Institute of Standards and Technology (NIST), the federal government's most esteemed scientific agency, released a devastating 34-page critique of bite mark evidence. *See* "Forensic Bitemark Analysis Not Supported by Sufficient Data,[1] NIST Draft Review Finds," NIST (Oct. 11, 2022). The NIST publication did not mince words:

> [F]orensic bitemark analysis *lacks a sufficient scientific foundation* because the three key premises of the field are not supported by the data. First, human anterior dental patterns have not been shown to be unique at the individual level. Second, those patterns are not accurately transferred to human skin consistently. Third, it has not been shown that defining characteristics of those patterns can be accurately analyzed to exclude or not exclude individuals as the source of a bitemark.

NIST Report at 2 (emphasis added).

[1] https://www.nist.gov/news-events/news/2022/10/forensic-bitemark-analysis-not-supported-sufficient-data-nist-draft-review ("NIST Report").

NIST cited, as an authority for its conclusions, the 2015 Construct Validity Study co-authored by Dr. Iain Pretty, who discussed that study in his affidavit in his case. Dr. Pretty's study "casts doubt on the utility of bitemark analysis as a viable method of excluding or not excluding individuals." NIST Report at 23. Said simply, bite mark "experts" cannot reliably diagnose a bite mark, to say nothing of associating such an injury on human skin to any particular dentition, as was done by the State's "experts" at trial.

The new science undermining the old "science" used to convict Prante continues to be damning, and the State correctly concedes the new science's materiality. Nevertheless, the State parts ways with Prante's request for relief on the cumulative and conclusiveness prongs of his actual innocence claim. *See People v. Coleman*, 2013 IL 113307, ¶ 96. As to cumulativeness, the State insists that "defendant cannot show that his new evidence casting doubt on the reliability of bitemark evidence is noncumulative" since Prante's trial experts cast the same doubt. St. Resp. at 14. But the State's very framing of the issue is the problem: Literally one paragraph earlier, the State acknowledges that, taken at true at this stage, Prante's new evidence shows that the bite mark evidence presented at trial *was* "unreliable" and is "discredited." *Id.* There is a world's difference between the concepts of the defense "casting doubt" on the reliability of the State's evidence—which is all the defense trial experts were in a position to do—versus the State's actual concession this very same evidence *is*, in fact, unreliable and discredited.

The State—as prosecutor—plainly would not seek to admit or rely on unreliable and discredited evidence. *See* IL R. Prof. Conduct 3.8, Comment [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This

responsibility carries with it specific obligations that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."); *see also People v. Reed*, 2020 IL 124940, ¶ 32 (noting that "the prosecution has the same duty and interest in seeking the truth and justice"). Appellee highlighted this very point in his prior brief, and the State, of course, did not dispute it. Resp. Br. at 45.

So it is not just that Prante's new evidence post-conviction "cast[s] doubt" on the prior evidence, it establishes that any and all of the bite mark evidence presented by the State at trial would have never been admitted at all. That's what is at the heart of Prante's newly discovered evidence, as stated in Dr. Pretty's affidavit:

> [T]he injuries at issue here could not and cannot be scientifically or reliably determined to be human bitemarks. The conclusion levels drawn by the forensic dentists in the case, ***even at the level of identifying these injuries as human bitemarks, would not be supported [by the scientific community] today.***

C. 2935 (emphasis added). This is the proposition that the State does not dispute, at least at this stage.

With that proper framing, nothing about this new scientific evidence is cumulative. It is the polar opposite—none of the State's previously-presented bite mark evidence is admissible, including the very notion that the marks identified on the victim's shoulder are bite marks at all. Accordingly, the State's entire bite mark trial narrative would now be eliminated from a prospective new trial: A new jury would never hear a word about bite marks. This stands in stark contrast to the prosecutor telling the jury that the bite mark evidence "alone should be keyed in on." R. 754. And it certainly is noncumulative to an investigation where the bite marks were the "key factor" leading to Prante's arrest. C. 241 (reporter paraphrasing prosecutor Don Weber as saying a bite mark the victim's neck is the "key evidence" in the investigation that should lead to the arrest of their suspect); *see*

also C. 257. The undisputed, new scientific findings repudiating the bite mark evidence that permeated everything about this case certainly adds—by subtraction—to what the jury previously heard in this case. *See People v. Robinson*, 2020 IL 123849, ¶ 47.

Same, too, of the conclusiveness prong, which suffers from the same framing problems in the State's analysis. The new research does not just "cast[] doubt" on the previous testimony, St. Resp. at 16, it eliminates the State's bite mark narrative in entirety. And with that narrative eliminated, it does not just "decrease[] the inculpatory value of the testimony of Vicki and Mark White and Spencer Bond that defendant told them about the presence of bitemarks on Karla's shoulder," St. Resp. at 16, it renders it completely irrelevant. The new scientific evidence demonstrates that the State would have no scientific basis to present *any* expert testimony the marks identified on black-and-white, unscaled photographs of the victim were bite marks at all. The State is acknowledging that. So, without that narrative, the already-suspect, four-year belated, media-contaminated memories from individuals who claimed to remember Prante talking about bite marks proves nothing. If the State cannot tell the jury there are bite marks at all, there is no point of the testimony.

The State is correct that its expert's testimony in this matter did not purport to claim an identical match to the exclusion to the rest of the world like the experts in *Howard v. State*, 300 So. 3d 1011, 1017 (Miss. 2020), and *Ex parte Chaney*, 563 S.W.3d 239, 262 (Tex. Crim. App. 2018). The same cannot be said of Prante's prosecutor, however, who told the jury, for example: "Prante's teeth are consistent with the killer, and you have to consider that in light of all the evidence. Maybe somebody in Spokane, Washington, or London, England has got teeth like John Prante. That guy wasn't sitting next door." R.

800. And just like the prosecutor in *Chaney*, who explicitly asked the jury "to convict on that dental testimony," 563 S.W. 3d at 262, Prante's prosecutor did the same, telling the jury there are "teeth marks without question. You have got human bite marks. . . . [Couple that with] the fact that one percent of the population is going to have teeth like his, . . . I think you can convict based on the teeth marks." R. 2093.

The *Chaney* and *Howard* prosecutions, moreover, did not build their entire lay witness evidence around the mere presence of bite marks, like the Prante prosecution did here. Without any evidence the mark on the victim's body is a bite at all, all of that is eliminated. So any claim that the expert testimony herein was merely *frighteningly* scientifically indefensible, and not *horrifically* scientifically indefensible like that in *Chaney* and *Howard*, must grapple with these additional circumstances unique to Prante's case—factors that, as noted by the Fifth District, "seal[ed] the petitioner's fate." *People v. Prante*, 2021 IL App (5th) 200074, ¶ 83. As far as the State's claim that the prejudice was mitigated because Prante had his own experts disputed the State's experts, St. Resp. at 17, so did *Chaney*, who, like Prante, called two experts yet obtained post-conviction relief based on the new scientific bite mark evidence at issue here. *Chaney*, 563 S.W.3d at 252. The same is true of Roy Brown, Ray Krone, William Richards, Alfred Swinton, Sherwood Brown, and Robert DuBoise—all innocent men who were convicted by bite mark evidence, C. 3040-51, despite competing expert conclusions.[2] And the reality is that

[2] https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3064 (Brown)
https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3365 (Krone)
https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4929 (Richards)

the defense experts in these cases and Prante's could not actually question the fundamental scientific validity of bite mark evidence—or its admissibility. That is what is changes everything now.

As far as the remaining evidence that the State says "paint[s] a convincing picture of defendant's guilt," St. Resp. at 16, it relies on the same evidence that the Fifth District called "far from sufficient proof of guilt." *Prante*, at ¶ 81. Specifically, the State points to pages 9-13 of their Response, St. Resp. at 16, where the State defends its previous reliance on John Scroggins, Edna Vancil, a six-year-old (Eric Moses), and the belated memories of individuals who claim to remember Prante's precise words and gestures from a four-year-old conversation that, as far as they knew at the time, was mundane and insignificant. Prante addressed these issues at length in his previous brief. Resp. Br. at 40-43.

Engaging in yet another tit for tat about this evidence clouds the real issue, which is whether this Court should take the State's invitation and pretend that the bite mark evidence touted by the State itself previously as the only reason it arrested Prante—and which, in turn, consumed every aspect of the trial proceedings from *voir dire* through closings yet the State now acknowledges is "discredited"—should simply be dismissed as harmless. This Court, of course, should not do so.

Nevertheless, the ancillary evidence on which the State hangs its hat is all significantly flawed and certainly insufficient. For example, the State claims that

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https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5287 (Swinton)
https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6039 (Brown)
https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5807 (Duboise)

Scroggins belated testimony that Prante had an unhealthy, articulated obsession with Brown is corroborated by Prante telling a detective he thought Brown was beautiful and "would have liked to have joined" the party she was having. St. Resp. at 9; R. 1506. This is hardly evidence of a motive to kill her or an "infatuation," as the State calls it, *id.*, let alone sufficient independent evidence of Prante's guilt.[3]

It is not clear, moreover, how a description of "curled up on the floor" is a "minor difference in wording" from the victim being actually found upright and "bent over a lard can," as the State contends St. Br. at 10. Nor is it correct that Prante ignored statements the Whites, Bonds, or Lutz claimed Prante said. St. Br. at 10. Prante addressed them directly in his testimony, explaining that he did not say those things, *see e.g.*, R. 1962, and ultimately his testimony is consistent with his entire theory that the four-year-late recaps of Prante's supposed inculpatory statements were tainted memories contaminated by the prosecutor's media campaign and 24-hour surveillance of Prante after the supposed bite mark identifications. And any further back and forth about the significance of Edna Vancil and Eric Moses—which Prante deconstructed in his prior brief, Resp. Br. at 41-43, to determine Prante's "opportunity" is frankly silly. St. Resp. at 11-12. In four decades of statements Prante has never disputed he was at Paul Main's house next door for some parts of that day. He just adamantly and consistently disputes that he had anything to do with crimes against her—whether in sworn statements or surreptitiously recorded ones.

[3] To illustrate this point, even prosecutor Weber called the victim "beautiful" to the media, C. 236, and Weber's interest in the case—described by a journalist as an "obsession"—may have been due to her resemblance to a 15-year-old cheerleader he liked in high school, C. 263, yet no one would claim that is sufficient evidence of the prosecutor's own guilt.

Opportunity is not the issue with Vancil and Moses' testimony—the contradictory narrative told by the prosecution witnesses is the issue.

Finally, as far as the State's claim that Prante offers "no support" for his theory that his varied accounts were tainted by the bite mark evidence, St. Resp. at 2, Prante will be very clear: He became a suspect only because of the supposed "discovery" of bite marks on the victim's neck. Then, there was a purposeful media saturation coordinated by the local prosecutor to tell the public that an arrest was near, and it was an open secret that Prante was the focus of the State's interest. Then, the second time Prante ran into his old acquaintance Spencer Bond in a matter of two days after not speaking to him for years and Bond relentlessly questioned and accused him of the murder, Prante figured out that Bond was working for the police. In response, Prante cooperated with investigators, including calling the prosecutor himself, and attempted to piece together his whereabouts down essentially to the minute from a day four years earlier in the hopes of clearing himself of a crime he knew he did not commit. That attempt, of course, was doomed to fail precisely because that's not how memory works, C. 2899-2908, but Prante did not know that. Without the flawed and admittedly "discredited" process for identifying the existence of a bite mark at all, none of that happens. That is how Prante's inconsistent statements are tainted by the bite marks themselves.

CONCLUSION

It is impossible to extricate the bite mark evidence from the investigation that led to the arrest of Prante, let alone from the trial evidence used to convict him. It permeates every aspect of this case. New scientific evidence demonstrates that the mere conclusion there was a bite mark at all is a totally unsupported conclusion, which the State

acknowledges. In light of these facts, Petitioner easily makes a *prima facie* case of both actual innocence as well as a due process violation. This Court, therefore, should remand to the Circuit Court for further proceedings on both of those claims.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

Dated: October 19, 2022 */s/*Joshua Tepfer

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	)	
Appellee.	)	Honorable Neil T. Schroeder
	)	Judge Presiding.

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PLEASE TAKE NOTICE that on October 19, 2022, Appellee John Prante filed his **CROSS-REPLY BRIEF OF APPELLEE** via the Court's Odyssey electronic-filing system with the Clerk of the Supreme Court of Illinois, a copy of which is hereby served upon you.

DATED: October 19, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2022, I caused a copy of the foregoing Proof of Service and **CROSS-REPLY BRIEF OF APPELLEE** accompanying to be served on the following via the Court's Odyssey e-filing system:

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DATED: October 19, 2022 */s/ Joshua A. Tepfer*

VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters I certify as aforesaid that I verily believe the same to be true.

DATED: October 19, 2022

/s/ Joshua A. Tepfer

Joshua A. Tepfer