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LORAIN COUNTY

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COURT OF COMMON PLEAS
TOM ORLANDO

**LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge**

Date Feb. 25, 2022

93CR044489
94CR045368
Case No. 94CR045372

STATE OF OHIO
Plaintiff

J. D. Tomlinson
Plaintiff's
Attorney

VS

NANCY SMITH & JOSEPH ALLEN
Defendants

M. Godsey & R. Parsons
Defendants'
Attorneys

This matter is before the Court on the [Defendants' Joint] Motion For New Trial, filed December 14, 2021, and two Memorandum Contra Defendants' Motion For New Trial, both filed January 26, 2022, by victims, A.R. and N.L.

In addition, on December 21, 2021, the victims filed a Motion To Disqualify The Lorain County Prosecutor's Office And To Appoint A Special Prosecutor.¹ And, on January 25, 2022, A.R. and N.L. filed Motions for Reconsideration of the Amendment to Sentence Agreement of the Parties to Exercise Their Right to be Present and Heard.²

An initial hearing was had on December 22, 2021, and a second, evidentiary hearing was had on January 27, 2022. All parties, including A.R. and N.L., were notified, present, and given an opportunity to be heard.

THE COURT RULES AS FOLLOWS: The Defendants' [Joint] Motion For A New Trial is well-taken and hereby **GRANTED**.


Accordingly, this matter is set for final pre-trial on **Thursday, March 17, 2022, at 1:30 p.m.** All parties, except out-of-county counsel, who may appear *via* ZOOM, are ordered to attend in-person. Jury trial set for **Monday, June 6, 2022, at 8:30 a.m.**

¹ That motion was addressed in an Order of December 29, 2021, and was denied.

² That motion was addressed in an Order of January 28, 2022, and was denied.



IT IS SO ORDERED. See Judgment Entry.



JUDGE D. Chris Cook

cc: Tomlinson, Lorain County Prosecutor
Godsey, Esq.
Parsons, Esq.
Bailey, Esq.
Yeager, Esq.



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I. INTRODUCTION

This matter is before the Court on the [Defendants' Joint] Motion For New Trial, filed December 14, 2021, and two Memorandum Contra Defendants' Motion For New Trial, both filed January 26, 2022, by victims, A.R. and N.L.

An initial hearing was had on December 22, 2021, and a second, evidentiary hearing was had on January 27, 2022.

II. TIMELINE OF PERTINENT EVENTS

This matter has been pending since 1993, for over 29 years. The relevant time-line of significant events is as follows:

NANCY SMITH

INDICTMENTS

11/10/1993 – CASE NO. 93CR044489

05/11/1994 – CASE NO. 94CR045368

07/25/1994 – CONSOLIDATED JURY TRIAL BEGINS



08/04/1994 – SMITH CONVICTED & SENTENCED TO 28-90
YEARS IN PRISON

03/07/1995 - SMITH FILES NOTICE OF APPEAL

01/25/1996 – SMITH'S CONVICTIONS AFFIRMED

09/20/1996 – 02/04/2009 - SMITH FILES NUMEROUS POST
CONVICTION PETITIONS, APPEALS,
MOTIONS TO VACATE, MOTIONS
FOR SMJ – ALL DENIED

02/04/2009 – SMITH'S CONVICTION & SENTENCE VACATED,
SMITH RELEASED FROM PRISON

06/25/2009 - COURT ENTERS JUDGMENT OF ACQUITTAL

07/23/2009 - STATE APPEALS

06/30/2010 - JUDGMENT OF ACQUITTAL UPHeld BY 9TH DIST.

04/19/2011 – OHIO SUPREME COURT REVERSES ACQUITTAL
AND ORDERS SMITH BACK TO PRISON (SMITH
NOT ACTUALLY RETURNED TO PRISON)

06/05/2013 - SENTENCING AGREEMENT REACHED WITH
STATE - SMITH GIVEN CREDIT FOR TIME
SERVED AND DISCHARGED BUT STILL
CONVICTED

12/14/2021 – SMITH FILES FOR A NEW TRIAL

JOSEPH ALLEN

INDICTMENT

05/11/1994 – CASE NO. 94CR045372

07/25/1994 – CONSOLIDATED JURY TRIAL BEGINS



08/04/1994 – ALLEN CONVICTED & SENTENCED TO 22 YEARS
CONSECUTIVE TO THREE LIFE TERMS

09/13/1994 - ALLEN FILES NOTICE OF APPEAL

02/07/1996 – ALLEN'S CONVICTIONS AFFIRMED

09/11/1996 – 04/13/2009 - ALLEN FILES NUMEROUS POST
CONVICTION PETITIONS, APPEALS,
MOTIONS TO VACATE, MOTIONS
FOR SMJ – ALL DENIED

04/13/2009 – ALLEN'S CONVICTION & SENTENCE VACATED,
ALLEN RELEASED FROM PRISON

04/22/2009 - STATE APPEALS

06/25/2009 - COURT ENTERS JUDGMENT OF ACQUITTAL

06/30/2010 - JUDGMENT OF ACQUITTAL REVERSED (AS TO
ALLEN ONLY) - ALLEN RETURNED TO PRISON

10/01/2013 - SENTENCING AGREEMENT REACHED WITH
STATE – ALLEN'S CHARGES ARE ALL ORDERED
TO RUN CONCURRENTLY AND HE IS GIVEN AN
INDEFINITE PRISON TERM OF 10 TO 25 YEARS
WITH CREDIT FOR TIME SERVED AND A
DEFINITE RELEASE DATE – ALLEN RETURNED
TO PRISON

12/14/2021 – ALLEN FILES FOR NEW TRIAL

12/22/2021 – ALLEN GRANTED PERSONAL BOND AND
RELEASED FROM PRISON

On December 29, 2021, this Court granted both Smith and Allen leave to file their [joint]³ motion for a new trial, amended their sentencing agreements with the State, and denied the victims' motion to disqualify the Lorain County Prosecutor's Office and appoint a special prosecutor.

³ From this point forward, the Court will refer to the motion for a new trial as having been jointly submitted.



On January 28, 2022, the Court denied the State's motion to strike and denied the victims' motion for reconsideration of the amended sentencing agreements.

III. STANDARD OF REVIEW

A) MOTION FOR A NEW TRIAL

When considering a motion for a new trial, the Court is guided by Ohio Criminal Procedure Rule 33. The applicable rule, Crim. R. 33(A)(6), requires the Court to consider whether "new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at trial."

In addition, the Court must consider the following additional factors, to wit: 1) whether the new evidence discloses a strong probability that it will change the result if a new trial is granted; 2) the evidence was discovered since the trial; 3) it could not have been discovered with due diligence before the trial; 4) it is material to the issues; 5) it is not merely cumulative; and 6) it does not merely impeach or contradict the former evidence. See: *State v. Hawkins*, 66 Ohio St.3d 339, 350 (1993), quoting *State v. Petro*, 148 Ohio St. 505 (1947), paragraph one of the syllabus.

The Ninth District Court of Appeals has also addressed the issue,

To warrant the granting of a motion for a new trial based upon newly discovered evidence, the defendant must show that the evidence: "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Tolliver*, 9th Dist. Lorain No. 16CA010986, 2017-Ohio-4214, 2017 WL 2541224, ¶ 18, quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

State v. Prade, 9th Dist. No. 28193, 2018-Ohio-3551, 107 N.E.3d 1268, ¶ 14

B) ANALYSIS

Smith and Allen ground their motion for a new trial in the presentation of five categories of new evidence that they argue, 1) was not discoverable with reasonable diligence at the time of the original trial; and 2) if admitted in a new trial, will result in different verdicts.

This Court agrees.



THE NEW EVIDENCE

The five categories of new evidence offered by Smith and Allen are:

1) AFFIDAVITS FROM DINO GRONDIN SR. AND DINO GRONDIN JR.

A) *DINO GRONDIN, SR.*

The gravamen of the Affidavits from Dino Grondin, Sr. ("Grondin, Sr.") and Dino Grondin, Jr. ("Grondin, Jr.") support the seminal defense position at trial that the child victims in the case were coached and that their allegations are thus baseless and manufactured.

Grondin, Sr. avers that he and Margie Grondin ("Margie") have children together, that he had frequent interaction with Margie and the children, and that he witnessed Margie "coaching their daughter on what to say in order to make the allegations of sexual abuse in the Head Start⁴ case."

According to Grondin, Sr., when he asked Margie what happened to their daughter, Margie would state a narrative then ask her daughter, "Isn't that how it happened?" "Tell him that's how it happened. Isn't that right?" Margie would then try to get their daughter to repeat what Margie was saying or to agree to the story that she was telling.

Grondin, Sr. further states that Margie was "persistent in trying to get her daughter to agree with what [Margie] said happened." And that Margie wanted her [daughter] "to practice."

In addition, Grondin, Sr., avers that Margie told him that she was going to "get paid" after the case was over.⁵

Finally, Grondin, Sr. states that he recently warned his son, Grondin, Jr., to "be careful" because Margie was making new, unrelated allegations that Grondin, Jr.'s wife, Emily Grondin ("Emily") was abusing her (Emily's) daughter in order to "sue for more money."

⁴ This matter has historically been referred to as the "Head Start" case as initial allegations involved sexual abuse committed by Smith and Allen against children who rode buses to and from school as part of the Head Start Day Care Program in Lorain County. The Lorain County Head Start Program is administered by the Lorain County Community Action Agency ("LCCAA").

⁵ There is evidence in the record that LCCAA made several multi-million dollar settlement payments related to the Head Start convictions.



B) *DINO GRONDIN, JR.*

Grondin, Jr. avers that Margie (identified above) is his mother and that she recently made false allegations of sexual abuse against his wife, Emily, by accusing Emily of sexually abusing their daughter, A.G.

He swears that Margie “. . . made up all sorts of lies to try to get charges brought so she could take custody of A.G., . . .” and that “. . . she was caught in those lies.” According to Grondin, Jr., “The detective who investigated [Margie’s] claims said that Margie had coached our daughter to make the false allegations.”

He also states that “. . .when I was six my mom forced my little sister to make false allegations in the Head Start case for money.” And, “She told my sister what to say and practiced with her, telling her that if she got it right we would get enough money to go to Disney World.” Further, “My mom incorporated the allegations into games, and made my sister say it right to get little rewards.”

Grondin, Jr. further swears that “us kids” were abused by Margie and a male companion in ways similar to the abuse that was alleged in the Head Start case which recently resulted in him being hospitalized for a panic attack. He asserts that Margie “. . . had a male companion put on black hunter’s paint, or black or dark face paint of some sort, and pretend to be Joseph to get my sister ready for her allegations . . .” And, “She had to call him Joseph and she had to practice saying what ‘Joseph’ did to her.” According to Grondin, Jr., “The man didn’t put it on very evenly and there were spots where the hunter’s paint was bare and his skin showed through. He looked like a black man with spots.”

In addition, Grondin, Jr. avers that Margie had a picture of a black man on the wall in the basement that may have been a mug shot of Allen and that “My sister had to study it point to it and say it was Joseph.” That Margie on occasions “. . . had the other kids from the Head Start case down in the basement, and coached them the same way.” He claims Margie “played school” in the basement with the kids, that Margie was “the teacher,” and that they “. . . had to say the allegations of sexual abuse the way she wanted them to say in order to advance the game.”

Grondin, Jr. continues, claiming that victims in the Head Start case (who are now adults) admitted to him that “. . . nothing happened and the allegations were made up.” That they were told by Margie that if it was ever discovered, “. . . they will be publicly disgraced and shamed . . .and will have to give all of the money back.”

Finally, Grondin, Jr. swears that “I have no doubt that my mom [Margie] coached our daughter to say that my wife sexually abused our daughter . . .because she thought this



would allow her to sue the state or county," as the alleged abuse of A.G. by Emily occurred during a supervised visitation. And, "After this scheme fell apart because she was caught coaching my daughter, my mom lost custody of our daughter."

2) AFFIDAVIT FROM RETIRED DETECTIVE TOM CANTU

Tom Cantu ("Cantu") is a retired Detective from the Lorain Police Department. Cantu avers that he was the detective initially assigned to investigate the allegations raised in the Head Start case.

According to Cantu, he ". . . performed a full investigation into the matter and determined that no crimes took place and no charges should be brought." He continues, ". . . the most obvious reason was that the children in question told me . . . that nothing had happened . . . that nothing improper had happened . . . that they loved Nancy . . . and that they were very fond of her."

Cantu also swears that Smith ". . . passed a polygraph . . . [and] that the allegations were unfounded." Thereafter, Cantu states that he was taken off of the case, new detectives were assigned, ". . . and a prosecution was created and went forward despite my conclusions." Cantu states that the new detectives never discussed the case with him or his findings ". . . which was very unusual."

Cantu avers that he ultimately concluded that ". . . the children had been coached for financial gain," and that in the videotape of the lineup for Allen, ". . . you could see the parents coaching the kids . . . one of the parents took her child's hand and pointed it at Joseph Allen for the kid." "This was totally improper and should have sent up red flags to investigators."

Regarding allegations that Cantu had some knowledge of or familiarity with Smith, Cantu states, "Nancy Smith was not my girlfriend and I barely knew her."

3) AFFIDAVIT OF DR. VIRGINIA BRADEN

Dr. Virginia Braden ("Dr. Braden"), has submitted an Affidavit in this matter detailing her investigation into the Head Start case and in particular, the conduct of Margie Grondin. According to her sworn Affidavit, Dr. Braden is a Licensed Private Investigator and Behavioral Analyst who does freelance work for the Ohio Innocence Project⁶, private clients, and law enforcement agencies. She also has a Ph.D in criminal justice and more than 20 years of experience in her fields.

⁶ Smith's attorney, Mark Godsey, is employed by the Ohio Innocence Project, an arm of the University of Cincinnati College of Law.



According to Dr. Braden, in August, 2019, Margie told her son, Grondin, Jr., that his wife, Emily, was sexually abusing his and Emily's daughter, A.G., who was about two-years old at the time. When Grondin, Jr., questioned Margie as to why she believed this, Margie [allegedly] stated that she "knows the signs" of child abuse.

As a result of her concerns, Margie took A.G. to the hospital where the results were negative for sex abuse and negative for any concerns about A.G.'s welfare. Despite these findings, Margie [allegedly] falsely told individuals that the doctors had confirmed her suspicions about abuse.

Dr. Braden further states that in January, 2020, Margie made a formal complaint to Lorain County Children's Services ("LCCS") alleging that A.G. was being sexually abused by Emily which resulted in Margie obtaining [temporary] custody of A.G. Shortly thereafter, Margie again took A.G. to the hospital for a sex abuse evaluation and allegedly made additional false statements to medical personnel. According to Dr. Braden, the results of this second examination were also negative for any signs of abuse.

Further, Dr. Braden avers that LCCS placed A.G. in Margie's custody and that Margie [allegedly], falsely told Dino that the medical examinations confirmed her allegations of sex abuse. According to Dr. Braden, Margie thereafter instituted a "smear campaign" against Emily by publicly accusing her of sexually abusing AG. Emily has since filed a civil suit against Margie that remains pending.

Dr. Braden avers that Margie, while she had custody of A.G. from 2020 into 2021, continued to take A.G. to doctors for examinations for sex abuse and gave these medical providers false information; that Margie allegedly stated that video and explicit photos exist depicting Emily assaulting A.G.; and, that Margie has never produced these videos or photos, despite being requested to do so from law enforcement.

In March, 2020, Dr. Braden states that LCCS issued a report finding no evidence of physical or sexual abuse against A.G.; that in July, 2021, Margie informed LCCS that A.G. told her (Margie) that Emily sexually assaulted her (A.G.) during a supervised visit; that as a result of this allegation, the Lorain County Sheriff's Office ("LCSO") opened an investigation; that Margie repeated her allegations of sexual abuse by Emily directed at A.G. and stated that video evidence exists to support the allegations; and that Margie produced only one video to LCSO that [allegedly] shows Margie telling A.G. what to say.

Dr. Braden continues and states that as a result of Margie's statements to the LCSO, she was directed to take A.G. to the Nord center for another exam; that the results of this exam showed no trauma; that the lead detective, after completing his investigation



for the LCSO, determined that: 1) no abuse could have occurred during the supervised visit as the visit was at all times supervised; 2) that when he interviewed A.G. and left her alone, she "practiced pretend crying;" 3) that A.G. made no disclosures of abuse; 4) that he concluded that A.G. had been "coached by Margie;" 5) that there was no evidence of abuse, no disclosure of harm, and no witnesses to the abuse; 6) that the allegations were unsubstantiated and unfounded; and, 7) that during a court hearing, the detective testified that ". . . it was evident to him that Margie had coached A.G. into making a false allegation."

In conclusion, Dr. Braden avers that in August, 2021, ". . . Margie's temporary custody was revoked;" and that in September, 2021, LCCS ". . . issued their findings on the investigation . . . [and] found the allegations unsubstantiated."

Dr. Braden states that she has documents, records, transcripts, and video to support all of the factual statements made in her Affidavit.

4) THE REPORT BY PSYCHOLOGIST DR. MAGGIE BRUCK

Dr. Maggie Bruck ("Dr. Bruck") authored a report in support of the petition of Nancy Smith for Clemency. Dr. Bruck holds a doctorate in experimental psychology and is a full professor of Psychiatry and Behavioral Science at Johns Hopkins Medical Institution. She is also an adjunct professor in the Department of Psychology at McGill University. For the past 30 years, Dr. Bruck's research has focused on children's language and memory development.

According to Dr. Bruck, during the 1980's and early 1990's, there were a large number of criminal cases in which young children claimed that they were sexually abused in "fantastic and bizarre" ways, that there was very little or no scientific research into the suggestibility or memory of children, and that children making these claims were generally believed.

Since that time, there have been "enormous" changes in the views regarding the accuracy of children's reports and claims of ritualistic abuse. Many such convictions have since been overturned and there is general agreement that such acts never occurred but were the results of suggestive interview techniques.

In 1994, Dr. Bruck began studying the factors that influence children's autobiographical memory of events. She published her results and her research is highly regarded. She has lectured and trained judges, prosecutors, defense attorneys, social workers, and therapists regarding the science that has led to the development of techniques and protocols for interviewing children so as to avoid false disclosures. She has been qualified as an expert in federal and state courts throughout the country.



Dr. Bruck was tasked with evaluating the reliability of the victims' statements in the Head Start case. As part of her work, she reviewed police reports, transcripts of police interviews, news articles, trial transcripts, and an expert report authored by Dr. Kathleen Quinn.

According to Dr. Bruck, two themes emerged common to many similar cases from the same time period; first, the spread of information from one parent to the next and from one child to the next; and second, concerns regarding the pattern of disclosure. For instance, during early interviews with the children, they denied having been abused then made allegations only after repeated questioning, which were then often recanted.

In addition, Dr. Bruck opines that the children were "subjected to a number of extremely suggestive interview techniques" including obvious interview bias and suggestive interviewing techniques such as using leading questions, rewarding of the [correct] answer, telling the children what other people allegedly said, using dolls and line drawing to elicit allegations of abuse. In addition, some techniques were so "aberrant" as to allow parents to provide their own information in the presence of the child during the interview.

Dr. Bruck then states that it is her "expert opinion that the disclosures obtained in this case to support those charges are tainted and unreliable."

In support of this conclusion, Dr. Bruck goes into great detail regarding the three most significant factors that support her conclusion, to wit: A) contagion in the community contaminated the investigation; B) it is significant that the alleged victims denied having been abused in numerous early interviews; and C) the interview techniques used were suggestive and contaminated the children's memory of events.

Dr. Bruck's report on these issues is over 27 pages long, is discussed in great detail including verbatim excerpts from the transcripts, and is well-documented with reference materials. By way of example only, the individual the children first identified as their abuser (Charles Ellis) was changed to a second individual (Richard Jones) to finally Joseph Allen.

Next, Dr. Bruck points out that in the initial stages of the investigation, the children denied ever being touched or hurt by their bus driver, Nancy Smith, and that they reported that "she was nice." Four days later, one of the children (Margie's) denied abuse or ever being touched at all. Two more children, A.P. and A.W., also denied ever being touched or knowing anyone named "Joseph." Even more disturbing, Dr. Bruck reports that in one interview, A.P. states that "he was told to say this story."



Two more alleged children victims, J.S. and J.G., also initially denied being abused. Nine months later and after numerous interviews, J.G. stated he was abused.

Dr. Bruck continues that out of the five children called as witnesses at trial, two recanted on the stand, one was deemed incompetent and denied the allegations, and the remaining two denied or failed to remember or changed their allegations at various times during the investigation. The pattern of disclosure here "was contrary to that typically found among children who have been abused.

Dr. Bruck further bases her conclusions on the fact that changes and inconsistencies in the children's responses were ignored by the interviewers. And, A.P.'s story changed so much "that his father interjected when he thought A.P. was straying from 'the story.'"

Other issues identified by Dr. Bruck include that the children described their molester variously as white, black, Hispanic, and sometimes covered in paint; that they identified at least seven different homes as the location of their alleged abuse and provided intricate details of a basement that did not exist in Joseph Allen's basement. In addition, some of the allegations were so bizarre that they were unbelievable such as Nancy asked the children to stick a needle into her vagina; Joseph had peed on their feet and made them drink urine; children had been tied to a tree outside Joseph's house on a major thoroughfare through Lorain; that Nancy and Joseph took the children to the mall and a restaurant; and that Joseph shot a child in the face with a gun.

In addition, Dr. Bruck points out that one child, A.P., identified a different bus driver (Angel) as the person who took them to Joseph's house instead of Nancy. And, at some point during the investigation and trial, every single child said someone other than Nancy had taken them to Joseph's house.

Dr. Bruck identifies early on in the interviews that the detectives said things like "I understand Joseph made some real bad threats to you;" and one of the parents in front of his child said "Joseph's not gonna get you . . . Joseph has been doing this for a while." There are many such examples of the questioning including a question to a child, N.Z., "what does Nancy do to you?" and other, similar leading questions.

As further evidence that the entire investigation was flawed, Dr. Bruck emphasizes that the interviewers used rewards and punishment to affect the children's statements such as stating "good for you" when a child disclosed abuse and letting J.G. play with handcuffs when he said the right things.

Next, Dr. Bruck discusses the problems attendant with the children's parents being present during police interviews, their own interviews with their children, and their communication about the alleged abuse. The presence of the parents "compounded



the pressure on the children to answer the way they believed their parents wanted them to; information that the children learned during interviews was then reinforced during subsequent interviews and, one parent continued to press his son (J.G.) to answer a certain way despite the fact that J.G. denied any abuse at any time by anyone. Another child, J.S., also continuously denied any abuse or ever being taken to a house by Nancy at which point a Children's Social Services worker said, "I would just find out from mom what's going on."

In concluding her evaluation and review of the Head Start case, Dr. Bruck reiterates that she has spent 30 years of her career researching the subject of interviewing children, that she has evaluated hundreds of interviews of suspected child abuse cases, and that the interview techniques here were "suggestive and biased," used "the full array of suggestive techniques to elicit allegations of abuse," that the children were "scolded," "threatened," and "bribed."

Dr. Bruck's final conclusion states;

"In my expert opinion, the key facts in this case are incontrovertible: the children denied abuse in early interviews; when they did make allegations, these were proceeded by extremely suggestive interview techniques that rendered all subsequent statements unreliable."

5) THE POSITION OF THE LORAIN COUNTY PROSECUTOR'S OFFICE
THAT SMITH AND ALLEN ARE INNOCENT

Finally, though not really "evidence" in the traditional sense, the Court's decision is further corroborated by the conclusions reached by Prosecutor Tomlinson.

**WAS THE NEW EVIDENCE DISCOVERABLE WITH DUE
DILIGENCE AT THE TIME OF THE ORIGINAL TRIAL**

The Affidavit of Dino Grondin, Sr., was signed on November 20, 2021.
The Affidavit of Dino Grondin, Jr., was signed on November 19, 2021.
The Affidavit of Former Detective Tom Cantu was signed on November 19, 2021.
The Affidavit of Dr. Virginia Braden was signed on December 7, 2021.
The expert report authored by Dr. Maggie Bruck was signed on January 25, 2013.
The position of the Lorain County Prosecutor's Office was made public on December 15, 2021, when Prosecutor Tomlinson filed the State's response to the motion for a new trial.



In determining whether or not the evidence presented qualifies as "new evidence," the Court must consider the following factors: 1) the defendants could not, with reasonable diligence, have discovered and produced the evidence at trial; and 2) the evidence was discovered since or after the trial.

Recall that the trial in this case began on July 25, 1994, and concluded on August 4, 1994, almost 28 years ago. The Affidavits of both Grondins, Cantu, and Dr. Braden were executed within the last 90 days, decades after the trial. Dr. Bruck's expert report was authored in 2013, almost a decade ago, and about 20 years after the trial.

Grondin, Sr.'s, Affidavit discusses the role that Margie had in coaching their daughter to fabricate her allegations of abuse in the Head Start case and were triggered by similar (alleged) conduct by Margie relative to manufacturing a recent claim of sexual abuse of her granddaughter by Emily Grondin.

Grondin, Jr.'s, Affidavit discusses in great detail the role that Margie allegedly played in coaching his sister (Margie's daughter) in the Head Start case and her (allegedly) false allegations of sexual abuse by Grondin, Jr.'s wife, Emily, directed at their daughter in order to secure the same financial gain she (Margie) obtained from the LCCAA settlement.

Cantu's Affidavit states that he was the lead investigator who determined that no abuse occurred; that Smith passed a polygraph test; that he was taken off of the case; and that the new detectives never discussed the case with him.

Dr. Braden's Affidavit alleges in great detail the chicanery that Margie went to in order to obtain custody of Grondin, Jr. and Emily's daughter and how Margie attempted to facilitate an elaborate scheme of manufactured allegations of sexual abuse against Emily for financial gain.

The expert report of Dr. Bruck is nothing short of a primer on the history of bizarre, falsified allegations of the sexual abuse of children from the late 1980's through the 1990's; how so many of those cases were ultimately debunked; and why the Head Start case perfectly fits the paradigm of these manufactured cases.

The next inquiry then, is whether the content and substance of what is alleged in the Affidavits and reports was available to Smith and Allen with due diligence at the time of the trial.

The Court finds that it was not.



The Affidavits of the Grondins were executed very recently and the information they contain was ostensibly recalled when Margie's alleged misconduct came to light. The Affidavit of Cantu was also very recently executed and discusses information that Smith and Allen would not have been privy to at the time of trial. While this Court has not reviewed the discovery provided by the state at the trial, it is inconceivable that had Smith and Allen known of Cantu's findings and conclusions that he would not have been called by them as a witness for the defense.

As for Dr. Braden's Affidavit outlining Margie's recent actions, clearly, Smith and Allen would not have been able to anticipate such conduct would occur by Margie, an important figure in the Head Start case, 28 years later.

And regarding Dr. Bruck's expert report, that information is new, scientific evidence gleaned from years of research into childhood memory and the review of many similar cases of bizarre, ritualistic sex abuse allegations. Obviously, that evidence was not available at the time of trial.⁷

Finally, the position of the Lorain County Prosecutor's Office, that it would not oppose Smith's and Allen's motion for a new trial and the conclusions by Prosecutor Tomlinson that Smith and Allen are actually innocent, could not have been known by them in 1994.

As such, this Court finds, as a matter of law, that all of the evidence submitted in support of the motion for a new trial is "new evidence" and that none of it could have been discovered with reasonable diligence prior to or at the time of trial.

IF ADMITTED AT A NEW TRIAL, WILL THE NEW EVIDENCE RESULT IN A DIFFERENT VERDICT

Finding the evidence submitted in support of the motion for a new trial to be "new evidence," the Court must further determine if the new evidence: 1) discloses a strong probability that it will change the result if a new trial is granted; 2) is material to the issues; 3) is not merely cumulative; and 4) does not merely impeach or contradict the former evidence.

- 1) THE NEW EVIDENCE DISCLOSES A STRONG PROBABILITY THAT IT WILL CHANGE THE RESULT IF A NEW TRIAL IS GRANTED; IS MATERIAL TO THE ISSUES; IS NOT MERELY CUMULATIVE; AND DOES NOT MERELY IMPEACH OR CONTRADICT THE FORMER EVIDENCE

⁷ The Court is cognizant that Dr. Bruck's expert report was authored in 2013 and is not temporally "new" relative to the motion for a new trial but it is temporally new considering the date of the trial.



The new evidence submitted in support of the motion for a new trial is compelling. The Grondin Affidavits present a pattern of sinister manipulations orchestrated by Margie to manufacture allegations of sexual abuse of multiple children by Smith and Allen for Margie's own financial gain. If believed, the Grondins' testimony would, in and of itself, torpedo any effort to successfully convict Smith and/or Allen at a new trial.

Moreover, the Affidavit of former Det. Cantu is important in that a member of law enforcement, in fact, the initial detective who investigated the case and interviewed the children, concluded that no crime occurred. Cantu's testimony that the children he interviewed told him that "nothing happened" and that they were "very fond" of Nancy [Smith] would similarly, standing alone, compromise any chance of conviction.

More disturbing yet regarding Cantu's Affidavit are his assertions that A) he was taken off of the case; B) his conclusions were not sought by the new detective team; and C) he was not (presumably) called as a witness by Smith and/or Allen⁸ because his highly exculpatory information was (presumably) not provided to them.⁹

In addition to the above, perhaps the most damning new evidence that not only supports a new trial but may go further yet, is the Affidavit from Dr. Braden. Dr. Braden is a highly educated, experienced investigator and behavioral analyst who engaged in a comprehensive review of facts, evidence, convictions, and new evidence in this case.

Dr. Braden avers in great detail the alleged corrupt activities of Margie and her efforts to gain custody of her granddaughter for the purpose of indoctrinating her (like she allegedly did to the Head Start victims – including her own daughter) in order to make new claims of abuse for financial gain.

According to Dr. Braden, she has detailed evidence that clearly demonstrates the duplicity of Margie's scheme, that no abuse was ever identified to have occurred to her granddaughter despite multiple, repetitive medical examinations, and that the Lorain County Sheriff's Deputy in charge of investigating Margie's allegations concluded 1) no abuse occurred to A.G.; 2) the child "practiced crying;" 3) the child made no disclosures of abuse; 4) that the child had been coached; 5) there was no evidence of abuse or witnesses to abuse; 6) Margie's allegations were unsubstantiated and unfounded; and

⁸ I reach this conclusion solely by inferring that no competent defense attorney would fail to call Cantu as a defense witness if this information was known to him or her at the time of the original trial.

⁹ Again, as the Court is not aware of the discovery or witnesses that were provided to Smith and Allen for trial, I can only assume that Cantu's findings and opinions were not disclosed for if they were, the failure to call him as a witness would be nothing short of stunning legal malpractice. In addition, the Ohio Rules of Criminal Procedure in effect in 1994 may not have required disclosure though the mandates of *Brady v. Maryland* (citations omitted) surely would have.



7) it was evident to the detective that Margie had coached the child into making a false allegation.

This alleged conduct eerily parallels the pattern of manipulation that Margie allegedly engaged-in in this case and if believed, would further erode any effort to secure subsequent convictions against Smith and/or Allen.

The expert report by Dr. Maggie Bruck is also insightful as it provides historical context to the mindset of the nation in the late 1980's and early 1990's regarding bizarre, ritualistic allegations of child sex abuse.

Dr. Bruck's report focuses on the conduct of law enforcement and the "tainted and unreliable" disclosures that were obtained due to biased, suggestive interview techniques that included "leading questions," the "rewarding of correct answers," telling the children "what other people said," using dolls and inappropriate interview techniques, and situations where the parents of some of the children were allowed in the interview room and "provided their own information in the presence of the child."

Her conclusion that, ". . . the key facts in this case are incontrovertible: the children denied abuse in early interviews; when they did make allegations, these were proceeded by extremely suggestive interview techniques that rendered all subsequent statements unreliable," is powerful, new evidence that bolsters this Court's conclusion that this evidence would most certainly result in a different verdict.

Finally, the position of Lorain County Prosecutor Tomlinson, his review of the Head Start case, and his conclusion that not only should a new trial be granted but that Smith and Allen are innocent, while not actual evidence, nevertheless supports this Court's determination that a new trial should be granted and is the death knell for any effort to successfully prosecute Smith and Allen anew.¹⁰

2) TODAY'S DETERMINATIONS DO NOT RENDER YESTERDAY'S DECISIONS UNETHICAL

On this point the Court makes one additional observation. This Court does not find, and has been presented no evidence, that indicates that former Prosecutors Gregory White, Jonathon Rosenbaum, Dennis Will, or Tony Cillo, or any members of law enforcement

¹⁰ Again, this Court reiterates that it takes no position on the issue of guilt or innocence of either Smith or Allen.



that were involved in the initial investigation and prosecution of this case acted with malice or vendetta. In fact, Prosecutors Will and Cillo entered into sentencing agreements with Smith and Allen that substantially reduced their sentences.

To be fair to Prosecutor Tomlinson and those who agree with him on this issue, the Court did not investigate the matter in anywhere near the detail that he did nor did this court review discovery, trial transcripts, or motion rulings. While this Court has great respect for all of the prosecutors that have been involved in this case from the beginning to the present, I believe that it is difficult, and perhaps unfair, to judge the actions of individuals that occurred 29 years ago through a present-day lens. In 1993, the law was different, child interview techniques were in their infancy, and the nation was gripped by a virtual hysteria regarding lurid, rampant allegations of child sex abuse.

What Prosecutor Tomlinson has done in reviewing the Head Start case is appropriate in his role as Lorain County Prosecutor and he should be commended for fulfilling his commitment to the public to do so. But his findings, valid though they may be, do not compel the conclusion that those who came before him were unscrupulous.

**THE GRANTING OF A NEW TRIAL, EVEN IF THE CHARGES
ARE ULTIMATELY DISMISSED, IS NOT TANTAMOUNT TO AN
EXONERATION**

As noted above, the Court would be remiss to not reiterate that the Court is aware of comments made at the hearings of December 22, 2021, and January 27, 2022, by Prosecutor Tomlinson and his position expressed in the State's December 15, 2021, filings, that if this Court grants Smith and Allen a new trial, it is his intention to dismiss this case.¹¹ It follows then, that if the charges are dismissed, such a result may open the door for a possible civil action against the State of Ohio by Smith and/or Allen.

Regardless of any subsequent result of Prosecutor Tomlinson's actions, such circumstances are wholly irrelevant to the decision to grant a new trial and were not considered for any purpose in reaching the conclusion that Smith and Allen should be granted a new trial.

In addition, at the December 22, 2021, hearing, an argument was advanced by the victims that they were not so much opposed to Smith and Allen getting a new trial as they were to them being exonerated.

¹¹ Should that occur, it is clearly his prerogative to do so.



The problem with this view is that while this Court has the authority to grant Smith and Allen a new trial, it does not have the authority or even jurisdiction to take the further step of exonerating them or declaring them “innocent.”

In the State of Ohio, the General Assembly has created a special statutory right for citizens to sue the state for monetary damages where they believe they were wrongfully imprisoned. R.C. 2743.48, “Wrongfully Imprisoned Civil Action Against State,” provides the mechanism for a wrongfully imprisoned person to bring a claim. The civil action must be filed in a court of common pleas and if a judge determines that the person is a wrongfully imprisoned individual, then the person may file a civil action against the state in the court of claims for money damages. *McClain v. State of Ohio*, 2021-Ohio-1423, at ¶ 8.

As such, the concerns of the victims that the granting of a new trial, even if the charges are ultimately dismissed, will result in the exoneration of Smith and Allen are not only unfounded, they are well outside the scope and purview of the issue at bar. It is certainly conceivable that Smith or Allen, or both, could file such an action, but if so, that will result in an entirely new case, with a different standard of review, and a burden-shift to Smith and/or Allen to demonstrate their innocence.

In short, this Court does not today make any declaration or judgment as to Smith’s or Allen’s guilt or innocence – but instead, confines itself to the issue at hand which concludes only that they are entitled to a new trial.

THE OHIO ATTORNEY GENERAL (AN INDEPENDENT PROSECUTOR) WILL EVALUATE AND IF APPROPRIATE, DEFEND, THE STATE OF OHIO IN ANY WRONGFUL IMPRISONMENT ACTIONS FILED BY SMITH AND/OR ALLEN

Another concern expressed by the victims at the first hearing was that an independent prosecutor should evaluate this case and represent the State of Ohio, if necessary. The Court dispensed with this argument as the duly elected Lorain County Prosecutor, Prosecutor Tomlinson, is well within his discretion to prosecute, or refuse to prosecute cases as he sees fit, including this one.

That said, it should be noted that in the event either Smith or Allen (or both) file a wrongful imprisonment action against the State of Ohio, it will be defended by “an independent prosecutor,” the Ohio Attorney General, as that office represents the state in such actions. Obviously, the state has a pecuniary interest in such cases and the Attorney General is tasked with evaluating and if necessary, defending, such cases. (See *McClain, supra*, where Dave Yost, Attorney General, and Margaret Moore, Assistant Attorney General, represented the state in those proceedings.)



IV. CONCLUSION

For more than 29 years, this case has captured the attention of the public, media, and legal community in Lorain County, Ohio. It is so engrained in the culture of Lorain County jurisprudence that one need only mention the "Head Start" case to conjure up spirited debate, speculation, and firmly held beliefs.

From the horrific allegations that were leveled against Smith and Allen, to their convictions and lengthy sentences, supposition about their questionable alliance, the bizarre nature of the allegations, and beliefs about the manner in which the case was investigated, have all led to rampant conjecture about what really occurred.

It is undeniable, as pointed-out by Attorney Rosenbaum, that a jury of Lorain County citizens convicted Smith and Allen, that this case has been reviewed multiple times by multiple courts, and that the convictions have all been upheld. Nevertheless, as this Court observed at the hearing on December 22, 2021, in the last 18-months, in Ohio alone, at least ten individuals have been identified as wrongly convicted and given either an outright release from prison or granted a new trial.¹²

Regardless, issues remain regarding the Head Start case and in 2013, then Prosecutor Dennis Will with the assistance of Chief Assistant Prosecutor, Anthony Cillo, entered into sentencing agreements with Smith and Allen that gave them both significant consideration in their respective cases. Smith was not required to return to prison and sentenced to less serious charges – Allen was returned to prison, but given a maximum sentence release date, an opportunity at parole, and was sentenced to less charges.

It is hard to imagine that questions surrounding the investigation, prosecution, and convictions of Smith and Allen coupled with the community's continued concern and apprehension about the case failed to play some role in Prosecutors Will and Cillo's decision in 2013 to revisit these cases and offer significant accommodations to both Smith and Allen.

Similarly, Prosecutor Tomlinson picked up the ball and fulfilled a campaign promise to the community to take a fresh look at the Head Start case and reviewed the matter from a new, different, and comprehensive perspective. His conclusions, based upon input from his experienced investigators and his own judgment, led him to concur with Smith's and Allen's requests for a new trial and he has taken the matter one step further by affirmatively proclaiming their innocence.

¹² Christopher Smith, Isaiah Andrews, Michael Sutton, Kenny Phillips, Anthony Lemons, Ralph Blaine Smith, Theodore Decker, Kevin Strickland, Kim Hoover-Moore, and Michael Bruehner.



Today's decision to grant Smith and Allen a new trial is consistent with the evolution of procedural and legally intriguing machinations that have followed this case from the day they were convicted, to the present, and furthers this Court's responsibility to the *vox populi* to review new evidence, arguments, and issues as they come to the fore.

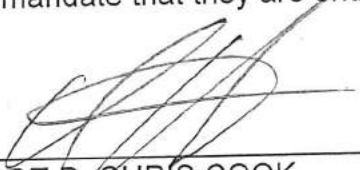
Moreover, while the granting of a new trial is justified under existing case law, there is a separate reason for a new trial. The alleged manipulation of the criminal justice system by Margie for the sole purpose of personal financial gain violates our basic concepts of fundamental fairness and Due Process of Law. Ohio Criminal Rule 33, the rule that provides for new trials, is there for a reason; that any citizen should be convicted and imprisoned for a crime that may never have occurred cannot be allowed to stand without the opportunity for a new trial. The integrity of our judicial system demands nothing less.

Notwithstanding the above, and however history judges those involved, including most importantly, Smith and Allen, this Court finds by a significant margin that the new evidence is substantial, credible, and, without a reasonable doubt, would affect the outcome of a new trial such that it would be difficult, if not impossible, to secure a conviction of either Smith or Allen at a new trial.

In closing, this Court reiterates that none of these legal rulings, factual findings, or anecdotal observations should be construed to conclude that Smith or Allen are innocent or that the crimes they were convicted of did not occur. Such a determination, should it ever arise, is for another day and a different court.

But as for today, the law, justice, and Due Process, mandate that they are entitled to a new trial.

IT IS SO ORDERED.



JUDGE D. CHRIS COOK