IN THE COURT OF COMMON PLEAS,
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	
Plaintiff,	:	CASE NO. B 9508578
vs.	:	JUDGE COOPER
ELWOOD JONES	:	**CAPITAL CASE**
Defendant.	:	

ELWOOD JONES'S MOTION FOR LEAVE TO FILE A DELAYED MOTION FOR NEW TRIAL

Elwood Jones moves the Court pursuant to Criminal Rule 33 for leave to file a motion for a new trial based upon new evidence of his innocence. In Jones's proposed motion for a new trial, which is attached to this pleading, he alleges that he deserves relief based upon prosecutorial misconduct for failure to disclose *Brady* material, newly discovered evidence of an alternate suspect, and actual innocence. Jones was "unavoidably prevented from discovering the evidence" upon which he relies for these claims until well after one hundred twenty days had elapsed following his verdict due to the State's failure to disclose it and Jones having no other means of knowing about it until a witness recently reached out to him. Ohio Crim. R. 33(B).

A supporting memorandum follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

This Court should permit Elwood Jones to file a delayed motion for new trial based on newly discovered exculpatory and impeaching evidence, which the State unconstitutionally withheld from him for two decades. The evidence demonstrates that Jones is actually innocent as well. Jones was unavoidably prevented from discovering the evidence upon which he relies until well after one hundred twenty days had elapsed following the verdict due to the State's failure to disclose it and the fact that he had no reason to know of its existence. Ohio Crim. R. 33(B).

Jones is presently on death row for the murder of Rhoda Nathan. On September 3, 1994, Nathan was attacked in Room 237 of the Embassy Suites Hotel in Blue Ash, Ohio. *State v. Jones*, 90 Ohio St. 3d 403, 403 (2000). Nathan was discovered lying naked, face-up on the floor and unresponsive around 8:15 am that morning. *Id.* At first, hotel guests and staff thought that Nathan had suffered a heart attack and injured herself in a fall. Nathan was transported to Bethesda North Hospital, where she was pronounced dead. After determining that Nathan had suffered multiple traumatic injuries and blunt force impacts to her head and torso, the Hamilton County Coroner's office classified the death as a homicide. *Id.*

Police initially questioned Jones, an employee at the hotel, at the station on September 12, 1994, but released him after several hours. An officer said he found the victim's pendant in a search of a toolbox in the trunk of Jones's car two days later, yet, for more than a year, police made no attempt to re-arrest Jones. In fact, still months later, Blue Ash Chief of Police Mike Allen was told the newpaper that the case "doesn't look good" and that the police were "at a point here where we're going to have to find something soon, or put it on the shelf until someone

comes forward." (Sheila McLaughlin, *DNA tests fail to link prime suspect to hotel slaying*, THE CINCINNATI ENQUIRER (MAY 25, 1995), Ex. F.) Nothing of any substance in the case changed between the time of Chief Allen's comments in May 1995 and when Jones was finally indicted in September 1995. Jones, meanwhile, has consistently maintained his innocence for nearly a quarter century.

Police finally indicted Jones in September 1995, and a Hamilton County jury convicted Jones of murdering Nathan in November 1996. (Trial Tr. 1873-1877.) After a penalty phase proceeding, Jones was sentenced to death in January 1997. (Trial Tr. 1980-1981.)

The State's theory of the case at trial was based on the fact that Jones worked at the hotel. The State argued that Jones must have surveilled Room 237 and, after Nathan's two roommates went downstairs to breakfast, entered the room using a master key with the intention of stealing money or valuables. When Jones unexpectedly encountered Nathan in the room, the State argued, he killed her in order to avoid apprehension, took a necklace and some money from the room, and then returned to his work duties as if nothing had happened. (Trial Tr. 815.)

No direct or forensic evidence at the crime scene linked Jones to the murder, however. No eyewitnesses accused him of the crime, no murder weapons were located, and no confession exists. Instead, the State's case was based on a chain of tenuous inferences, but, for every inference the State asked jurors to draw against Jones, an alternative, equally likely explanation favored Jones. This entirely circumstantial case was far from conclusive. Nonetheless, the jury convicted Jones and this Court sentenced him to death in 1997.

In 2016, Jones received a message from a woman named Tierria Suggs through the prison's email system. Tierria told Jones that her mother, Delores Suggs, had information about an alternative suspect who had confessed to killing Nathan. (Tierria Suggs email to Elwood

Jones, Ex. A-1.)[1] Delores had been in the Hamilton County Justice Center for a week and a half in November 1995, just a few months after Jones, who is African American, was indicted on aggravated murder charges in September 1995, but before his trial began. (Suggs Aff, Ex. B, ¶¶ 2-3.) While incarcerated, a fellow inmate named Linda Reed told Delores that her husband had confessed to killing Nathan and said that he had framed a black man for the crime. (*Id*. at ¶ 4.) Linda said that she did not contact the Blue Ash Police Department about her husband's confession because he was friendly with the police officers. (*Id.* at ¶ 5.) Linda further stated that she lived at an address on Pfeiffer Road, near the Embassy Suites, in Blue Ash. (*Id.* at ¶ 8.)

After Delores was released, she asked James Wilson, a man who drove a bus for her church, for advice. Wilson told Delores that she should call the police with the information Linda Reed told her. (*Id.* at ¶ 11.) Delores called the Blue Ash Police Department and spoke with an officer on duty. Delores told the officer everything that Linda had told her. The officer dismissed Delores, saying that evidence pointed to another man and that the case was closed. (*Id.* at ¶ 13.)

The State did not disclose any of this information to Jones or his defense counsel at any point throughout his trial, appeals, or post-conviction litigation, even in response to two specific recent record requests from his counsel. Moreover, the State, through its agencies, has impeded Jones's investigation into this information for several years. The Hamilton County Sheriff's office has provided inaccurate information to Jones's lawyers about Delores Suggs's and Linda Reed's incarceration together, and continues to this day to falsely deny the existence of

[1] The numerical exhibits attached to the affidavits appended to the Proposed Motion for New Trial as Exhibits A-D will be designated as Ex. A-1, A-2, A-3; Ex. B-1, B-2, and so on.

corroborating records in its possession that Jones was able to obtain through the help of a third party. (*See* Barnhart Aff., Ex. A, ¶¶ 22, 29-30, 89-100.) Meanwhile, Blue Ash police records concerning Linda Reed are missing without explanation. (*See* Kevin Deye email (Mar. 5, 2018), Ex. A-11 at p. 4.)

Both Earl Reed and Linda Reed have died in the intervening years. Jones has interviewed Linda Reed's niece, Deborah Wood, who was appointed Linda's guardian and cared for her at the end of her life. Although Ms. Wood has no information about whether Earl Reed was involved in Ms. Nathan's murder, she indicated that she would not be surprised to learn if that were the case in light of his personality and behavior. (Wood Aff., Ex. C, ¶ 27.) She has also provided evidence that Earl was physically abusive to Linda, including to the point of damaging a medical device placed in her brain. (*Id*. at ¶ 19-20.) Further, Blue Ash police records also reflect three domestic violence complaints against Earl. (BAPD Earl Reed Cards, Ex. A-12, p. 2.)

In view of weak circumstantial and since-discredited "forensic" evidence against Jones, Earl Reed's suppressed confession casts significant doubt on Jones's guilt. This Court should permit Jones to proceed with his Motion for a New Trial based on this important and meritorious constitutional claim.

II. Case History

A. Trial

Jones was indicted on aggravated murder, aggravated robbery, and aggravated burglary charges and entered a not guilty plea on September 28, 1995. (Trial Tr. 2.) Jones was held without bond from the time of his arrest onward. (Trial Tr. 10.) Jones's trial began on November 15, 1996. (Trial Tr. 814.) The jury returned a guilty verdict on November 26, 1996.

(Trial Tr. 1873-1876.) The mitigation phase of Jones's trial began on December 9, 1996. (Trial Tr. 1889.) The jury returned death recommendations against Jones on December 11, 1996. (Trial Tr. 1971-1972.) The court subsequently imposed a death sentence on January 9, 1997. (Trial. Tr. 1980-1981.)

B. State Appeals

After Jones's 1996 conviction and 1997 death sentence, *State v. Jones*, Hamilton C.P. No. B 958578 (Jan. 9, 1997), the First Appellate District and Ohio Supreme Court both affirmed Jones's convictions and his death sentence on direct review, *State v. Jones*, 1st Dist. Hamilton App. No. C-970043, 1998 WL 542713 (Aug. 28, 1998); *State v. Jones*, 90 Ohio St.3d 403 (2000). The Ohio Supreme Court also affirmed the Court of Appeals' denial of Jones's motion to reopen his direct appeal. *State v. Jones*, 91 Ohio St.3d 376 (1999). The First Appellate District affirmed this Court's denial of Jones's petition for post-conviction relief. *State v. Jones*, 1st Dist. Hamilton App. No. C-990813, 2000 WL 1886307 (Dec. 29, 2000). The Ohio Supreme Court declined to exercise jurisdiction over Jones's post-conviction appeal. *State v. Jones*, 91 Ohio St.3d 1510 (2001) (Table).

Represented by counsel from the Ohio Innocence Project, Jones filed a post-conviction application for DNA testing with this Court on November 18, 2010. (Def.'s App. for DNA Testing, Nov. 18, 2010.) The State filed its R.C. 2953.75 report on January 3, 2011, but then in April 2011, moved to dismiss Jones's application on the grounds that it was filed by attorneys from the Ohio Innocence Project while Jones was then represented (in federal court on habeas proceedings) by other attorneys, Gary Crim and Michael Monta. This Court denied the State's motion. (Entry Denying Mot. to Dismiss, Aug. 5, 2011.)

On February 17, 2012, this Court entered an order for DNA testing of several items of evidence. (Order Granting in Part App. for Post-Conviction DNA Testing, Feb. 17, 2012.) This order provided that Jones reserved the right to request that the Court authorize DNA testing of additional items as permitted under Ohio law. The results from these initial DNA tests did not implicate Jones.[2] But because the results did not identify an alternative suspect, Jones requested testing of additional evidence items. (Def.'s Supp. Mem. in Support of Completion of Post-Conviction DNA Testing, Nov. 21, 2013.)

During a status conference held on December 11, 2013, the Court indicated that it would permit additional DNA testing and instructed the parties to draft an agreed order. Yet despite this Court's indication that additional DNA testing would be conducted, the State sought an execution date for Jones in a motion to the Ohio Supreme Court on December 18, 2013.

Meanwhile, the Court entered an order directing supplemental DNA testing on April 8, 2014. (Order Directing Additional Post-Conviction DNA Testing, Apr. 8, 2014.) As the order indicated, however, the State was unable to locate several items of evidence that were to be tested. (*Id*. at n.*.) In January of 2011, the State had represented that it possessed these items,

[2] In August of 2012, BCI first tested the pendant belonging to Rhoda Nathan and a piece of curtain by the front door (for which previous testing indicated the presence of blood). BCI obtained a partial DNA profile from the pendant, but determined the profile was insufficient for comparison purposes. (*See* Stipulation to Reports from B.C.I., Dec. 11, 2013, at 2.) BCI obtained no DNA from the piece of curtain. (*Id*.) BCI also tested Nathan's fingernail clippings and other fingernails samples using Y-STR methods (to determine the presence of male DNA). BCI did not obtain a male DNA profile from these samples. (*Id*. at 3.)

In May of 2013, BCI again tested the pendant, and tested a tooth belonging to Nathan. (*Id*. at 8.) The DNA on the tooth showed female DNA. (*Id*.) BCI tested both the tooth and the pendant using Y-STR methods, but discovered no male DNA. (*Id*.)

Later, in August of 2013, BCI tested the teeth again and, for a reference point, a blood card from Nathan. (*Id*. at 6.) It found the DNA on the tooth consistent with Nathan. BCI also undertook testing on both recovered teeth, using Y-STR methods, but found no foreign DNA on the teeth. (*Id*.)

when it filed its report pursuant to R.C. 2953.75. (State's Report, Jan. 3, 2011.) Testing commenced on the remaining items in the testing order and once again did not implicate Jones but also did not point to another suspect.[3]

Jones filed a petition requesting relief for the State's violation of its duty to preserve this evidence on August 7, 2014. (Def.'s Pet. for Post-Conviction Relief, Aug. 7, 2014.) After further investigation, the State averred in an October 15, 2014, motion that the missing evidence items were in the possession of Tom Boeing, the Hamilton County Exhibits Clerk. (State's Mot. to Dismiss Pet. for Post-Conviction Relief and Accompanying Affidavit, Oct. 15, 2014.) The State did not, however, explain where the evidence had been, why the State was not able to locate it before Jones sued, how or where it were found, or otherwise account for its whereabouts and chain of custody during the time while it was missing.

Nevertheless, on October 16, 2014, Jones's former counsel at the Ohio Innocence Project stipulated to the re-discovery of the missing evidence, and as a result, this Court dismissed Jones's missing-evidence petition. (Entry Dismissing Pet. for Post-Conviction Relief.) Jones only learned of these developments several months later and immediately filed a *pro se* motion indicating that he had not consented to the stipulation or dismissal and requested that the Court assign new counsel. (Def.'s *Pro Se* Mot., Dec. 18, 2014.) The Court allowed the Ohio Innocence Project to withdraw and the undersigned entered an appearance on January 27, 2015.

[3] In 2014, DNA Diagnostics Center (DDC) obtained partial profiles from some of the crime-scene stains it tested, but deemed them inconclusive due to an insufficient amount of DNA. DDC found partial DNA profiles obtained from stains on a white flat sheet and beige blanket were consistent with originating from a female donor.

(Entry Withdrawing As Counsel, Jan. 27, 2015; Entry Retaining Counsel, Jan. 27, 2015.) It granted Jones's request for a hearing to establish what had happened to the missing evidence.[4]

On June 8, 2015, the Ohio Supreme Court granted the State's motion to set an execution date and ordered that Jones's sentence be carried out on January 9, 2019. On September 5, 2017, Governor Kasich issued a warrant of reprieve resetting Jones's execution date to April 21, 2021. (Warrant of Reprieve, Sept. 13, 2017.)

C. Federal Litigation

Jones instituted his federal habeas corpus proceedings in 2001. Discovery and an evidentiary hearing ensued, resulting in the disclosure of a great deal of previously undisclosed investigatory documents. The district court ultimately denied Jones's habeas petition and the Sixth Circuit affirmed the denial in 2010. *Jones v. Bagley*, No. C-1:01-CV-564, 2010 WL 654287 (S.D. Ohio Feb. 19, 2010); *Jones v. Bagley*, 696 F.3d 475 (6th Cir. 2010).

Jones attempted to institute second-in-time federal habeas corpus proceedings in 2015 on the ground of ineffective assistance of trial counsel based on counsel's failure to effectively challenge and rebut two types of flawed scientific testimony introduced against him at trial. Addressing only procedure, not the merits, the district court held that Jones's petition was a second-or-successive application and transferred the petition to the Sixth Circuit. *Jones v. Warden, Chillicothe Correctional Inst.*, No. 1:14-CV-440, 2015 WL 1197542 (S.D. Ohio Mar. 16, 2015). The Sixth Circuit subsequently denied Jones's motion to remand his petition to the district court, held that his application was successive, and concluded that he could not meet the

[4] Jones has waited to commence that hearing while he investigated Delores Suggs's information. If the Court deems appropriate a hearing on this motion for leave to file the new trial motion, or the underlying proposed motion, Jones can elicit testimony about the missing evidence at that time.

procedural requirements for a successive filing. Order, In Re: *Elwood Jones*, No. 15-3316 (6th Cir. Sept. 17, 2015). It therefore dismissed the two claims without evaluating their substance. *Id*. at 7.

III. The New Evidence Should Afford Jones a New Trial.

The newly discovered evidence warrants a new trial for Jones. Jones was unavoidably prevented from discovering this evidence, and it is material to his case.

Jones has a right to file his proposed motion for new trial if he can show newly discovered evidence that he was unavoidably prevented from discovering within 120 days of the verdict. Proving the "unavoidably prevented" element requires "clear and convincing proof" that he did not know about the evidence and could not have found out about it through "reasonable diligence." As demonstrated below, Jones meets these standards.

A. Legal Standards

"Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered," unless the defendant can show "by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely . . . ." Ohio Crim. R. 33(B). When, as here, the evidence is discovered more than 120 days after trial, a defendant must seek the court's leave to file a motion for a new trial. *Id. See also* R.C. 2945.80; *State v. Pinkerman*, 88 Ohio App. 3d 158, 623 N.E.2d 643 (1993). "[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Walden*, 19 Ohio App. 3d 141, 145-46, 483 N.E.2d 859, 865 (Ohio Ct. App., Franklin County July 19, 1984).

If the court determines that the evidence submitted clearly and convincingly demonstrates that the movant was unavoidably prevented from discovering the new evidence, the court must grant the motion for leave and allow the defendant to file a motion for new trial. *See* Crim. R. 33(B). Clear and convincing evidence is that which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. It is that measure of degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases. *Cross v. Ledford*, 161 Ohio St. 469 (1954), syllabus ¶3.

If the defendant submits documents that on their face support his claim that he was unavoidably prevented from timely discovering the new evidence, the trial court must hold a hearing to determine whether there is clear and convincing evidence of unavoidably delay. *State v. Wright*, 67 Ohio App.3d 827, 828 (1990); *State v. York*, 2000 Ohio App. LEXIS 550, (Ohio Ct. App., 2nd Dist. Feb. 18, 2000).

Under no circumstances *must* a trial court deny a motion for leave to file a motion for new trial. If the court determines that the documents do not demonstrate that the defendant was unavoidably presented from discovering the evidence, it is within the trial court's discretion to either overrule the motion or to hold an evidentiary hearing. *See State v. McConnell*, 170 Ohio App.3d 800, ¶19 (Ohio Ct. App. 2d Dist. 2007) (emphasis added).

B. Jones was Unavoidably Prevented from Discovering Newly Discovered Evidence.

While incarcerated at the Hamilton County Justice Center, Linda Reed told Delores Suggs that her husband had killed a woman at the Embassy Suites in Blue Ash and framed a black man for the murder. This conversation occurred in December 1995, after Jones was indicted for the murder of Rhoda Nathan but before his trial began. Linda said that she could not

go to the police with this information because her husband was friendly with Blue Ash police officers. After she was released from jail, Delores called 911 and then the Blue Ash Police Department. Delores relayed to the police what Linda had said in jail, including the fact that Linda' husband had confessed to killing Nathan.

No record of Delores Suggs's contact with the Blue Ash Police Department was ever turned over to Jones or his trial, appellate, post-conviction, federal habeas, or DNA counsel at any time. Jones's counsel even recently requested BAPD records in 2014 and again in 2017. (*See* Oct. 29, 2014 and May 8, 2017 letters, Ex. A-2.) No report of Earl Reed's confession was disclosed in response. (Barnhart Aff., Ex. A, at ¶ 11.) On top of all of that, Linda Reed's records are missing from the Blue Ash's files without explanation. (*See* Kevin Deye email (Mar. 5, 2018), Ex. A-11 at p. 4.)

Thus, as Jones argues in his proposed motion for new trial, the State violated Jones's rights under *Brady v. Maryland*, 373 U.S. 83 (1967), when it suppressed material evidence that was exculpatory and impeaching. Jones additionally asserts an alternative basis for relief on the grounds of newly discovered evidence, which, as he explains in more detail in the attached proposed motion, requires a showing similar to that of a *Brady* claim, but without the need to prove the State's suppression of the new evidence. (*See* Proposed Motion for New Trial at § IV.D.) Finally, Jones also request relief because he is actually innocent.

Jones had no reason to suspect that Linda Reed or Earl Reed were connected to his case until he was contacted by Tierria Suggs in February 2016. Jones never met or had any contact with Delores Suggs, Linda Reed or Earl Reed. As a result, Jones could not have obtained the State's suppressed evidence of Delores Suggs's phone call to the Blue Ash Police Department

regarding Earl Reed's confession. He had no reason to know that the phone call ever occurred and therefore had no reason to specifically request its disclosure from police.

Not only did the State fail to provide Jones with this exculpatory and impeaching information, state agencies, including the Hamilton County Sheriff's office, provided inaccurate information to Jones's defense team which impeded their investigation for more than two years. (*See* Barnhart Aff., Ex. A, ¶¶ 22, 29-30, 98.) Even to this day, that agency has continued to falsely deny the existence of records in its possession that Jones was able to obtain through the help of a third party. (*See id.* at ¶¶ 89-100.)

C. Jones Diligently Attempted to Investigate.

Jones has doggedly attempted to prove his innocence for more than two decades. (Jones Aff, Ex. 1, at 1-2.) In addition to instructing all of his attorneys to pursue his innocence claims, (*id*. at 3), Jones personally wrote to many dozens of individuals and organizations seeking their assistance in proving his innocence, (*id*. at 1-2). He has consistently welcomed thorough investigation of all aspect of his case. (*See, e.g., id*. at 2.)

As soon as Jones received Tierria Suggs's email, he shared it with his counsel. (Barnhart Aff., Ex A, ¶¶ 3-4.) His defense team then conducted a thorough and lengthy investigation to attempt to uncover and confirm the information regarding Delores Suggs, Linda Reed, and Earl Reed. (*Id*. at ¶¶ 5-112.)

After receiving Tierria Suggs's message on February 12, 2016, Jones immediately called the office of his federal habeas attorney, Erin Barnhart. (*Id*. at ¶ 3.) Jones mailed a print-out of Tierria's message and Barnhart received it on February 19. (*Id*. at ¶ 4.) That same day, Barnhart instructed Jones to respond to Tierria's message by asking her to contact his legal team. (*Id*. at ¶ 5.) Tierria called Barnhart on February 25 and indicated that her mother, Delores Suggs,

would be willing to meet with Jones's legal team. (*Id*. at ¶ 6.) Mackenzie Breeding, an investigator on Jones's legal team, scheduled a meeting for March 4. (*Id*. at ¶ 7.)

On March 4, 2016, Mackenzie Breeding and the undersigned met with Delores Suggs. (*Id*. at ¶ 8.) Delores told them about her conversation with Linda Reed in the Hamilton County Justice Center. (*Id*. at ¶ 9.) Delores stated that the conversation occurred when she was in the Justice Center at some time in the mid-1990s. (*Id*.) A woman named Linda Reed approached Delores and spoke about a murder at the Embassy Suites in Blue Ash. (*Id*.) Linda said that her husband was the real killer and that a black man had been framed. (*Id*.) Linda told Delores that she was in jail on a menacing charge and that her husband was trying to take the deed to their home. (*Id*.) Delores described Linda as white, heavy set, short, and stubby, and in her 50's or 60's. (*Id*.) Linda told Delores that she lived on Pfeiffer Road in Blue Ash. (*Id*.)

With this information, Jones's legal team began to investigate Linda Reed. On March 4, 2016, the undersigned obtained a divorce decree dated February 7, 1997, in the matter of *Earl Reed v. Linda Reed*, which listed property at 5110 Pfeiffer Road in Blue Ash. (*Id*. at ¶ 12.) A few days later, on March 9, the undersigned obtained two Blue Ash arrest reports involved Linda and Earl Reed. (*Id*. at ¶ 13.) One report, dated October 28, 1995, involved Linda's arrest on a charge of aggravated menacing. (Linda Reed Arrest, Ex. A-4.) The other report, dated May 12, 1996, listed a charge of domestic violence against Earl Reed involving Linda as the victim. (Earl Reed Arrest, Ex. A-5.) In both reports, Linda's and Earl's addresses were listed as 5110 Pfeiffer Road in Blue Ash, and their social security numbers matched the divorce decree. The undersigned requested photos of Linda and Earl from the Blue Ash Police Department but never received a response to this request. (Ex. A at ¶ 15.)

On May 31, 2016, attorney Erin Barnhart contacted several officials to try to learn more about Linda Reed's 1995 menacing arrest. (*Id*. at ¶ 20.) She was told that Reed was never housed in the Hamilton County Jail in relation to that arrest or any other, and that she may have instead been held in Blue Ash jail. (*Id*. at ¶ 22.) On June 14, 2016, Barnhart sent an official request for Hamilton County jail records to the Hamilton County Sheriff's Office. (*Id*. at ¶ 24.) After an e-mail conversation with a Sheriff's Office employee, Barnhart received records from four occasions when Delores Suggs was housed in the Justice Center beginning in 1999 but was told that there was no record of any Linda Reed having been housed in the jail at any time. (*Id*. at ¶¶ 29-30.) As a result of these statements from law enforcement officials, the investigation's focus turned toward other possible individuals Delores might have spoken to in the jail. (*Id*. at ¶ 32.)

After some initial attempts to individually identify people with names similar to 'Linda' or 'Reed' who had been housed in the jail at the same time as Delores Suggs, (*see id*. ¶¶ 33-42), at Jones's legal team eventually received the entire jail roster from each night Suggs spent in the jail between 1999 and 2011, (*id*. at ¶ 44). Throughout late 2016 and 2017, Jones's legal team sifted through the 23,000 individuals who were housed in the jail on the same nights as Delores. (*Id*. at ¶ 45.) Even after narrowing the field down significantly, they were unable to identify any of these people as the woman who had spoken to Delores Suggs about the Embassy Suites murder.

Jones's team also attempted to find corroborating proof of Ms. Suggs's calls to 911 and then the Blue Ash Police Department. The 911 call center, however, does not maintain records back far enough to show Ms. Suggs's call. (*Id*. at ¶ 103.) Jones's team also searched for James Wilson, the man who advised Ms. Suggs to call the police from his home. (*Id*. at ¶¶ 101-112.)

This involved combing online and print resources for leads and sending letters and making visits to the area where he used to live in an attempt to locate him. (*Id*. at ¶ 106.) They eventually located the church where he may have worked, but on advice of counsel, the church would not give out the last address they had for Mr. Wilson. (*Id*. at ¶ 110.) The pastor did agree, however, to forward a letter from Jones's team to that address, but Jones has not received any response from that effort. (*Id*. at ¶ 111.)

After these dead-ends, in early 2018, investigator Tané Dorsey began to re-focus on Linda and Earl Reed. Dorsey obtained photos of Linda Reed from an online ancestry message board and showed them to Delores Suggs on February 8, 2018. (*Id*. at ¶ 54.) Delores immediately knew that the woman in the photos was the same person she had spoken with in the jail. (*Id*. at ¶ 55.) Dorsey also located Reed's brother and sister-in-law (James and Jeanette Shemwell) in Kentucky. An investigator met with the Shemwells on February 28, 2018 and they shared that Linda's niece, Debbie Wood, had been Linda's caretaker in her final years. (*Id*. at ¶ 57.)

Jones's team reached out to Ms. Wood and spoke with her on March 2, 2018. (*Id*. at ¶ 59.) She informed them that Linda had spent several years in nursing homes before her death in the early 2000s. (*Id*.) Over the following month, Jones's legal team requested records related to Linda Reed from the now-defunct nursing home and various hospitals. (*Id*. at ¶ 71.) None of these leads provided any substantive information relevant to Jones's claim.

In July 2018, Barnhart contacted the Hamilton County Sheriff's Office again to inquire about the date range of the digital jail records and whether they would include records from before 1996. (*Id*. at ¶¶ 72-75.) Despite multiple inquiries, Barnhart never received an answer to this question. (*Id*. at ¶¶ 75-79.) Meanwhile, Delores Suggs remained sure that her conversation

with Linda Reed occurred in the mid 1990s, despite the fact that the jail had not provided records of either of them being incarcerated then. In September, Suggs recalled for the first time that when she spoke with Linda Reed, she had been serving time in the jail as part of a program to reduce court fees and other government debts. (*Id*. at ¶ 83.) This prompted Barnhart to contact the Hamilton County Public Defender's office on October 3 to verify if and when this practice existed in Hamilton County. (*Id*. at ¶¶ 85-86.) Ann Ohmer, a paralegal in that office, consulted several attorneys who practiced during that time and confirmed on October 4 that the practice had existed then. (*Id*. at ¶ 87.)

Ann Ohmer also offered to assist with obtaining any necessary records. Barnhart explained the difficulties in obtaining records of Delores Suggs's and Linda Reed's time in the Justice Center in the mid-1990s. (*Id*. at ¶ 88.) On October 5, a breakthrough occurred: Ohmer sent Barnhart jail records that revealed Delores Suggs had been in the jail between November 6 and November 17, 1995, while Linda Reed had been in the jail between October 28 and November 28, 1995. (*Id*. at ¶ 89.) Cheryl Horne, a public defender staff member, had obtained the records by contacting the jail records supervisor at the Justice Center. (Horne Aff., Ex. D, ¶¶ 3-5.) After years of searching, Jones finally had definitive proof to back up what Suggs told him.

Barnhart called the telephone number provided by Cheryl Horne in order to replicate her retrieval of these jail records. (Barnhart Aff., Ex. A, at ¶ 92.) As instructed, Barnhart then faxed another formal request for all jail records related to both Linda Reed and Delores Suggs. (*Id*. at ¶ 97.) Astoundingly, Barnhart once again received a response that no records existed for Linda Reed and was provided with only four jail records for Delores Suggs dating from 1999 and after. (*Id*. at ¶ 100.) It is unclear why Hamilton County officials have consistently failed to provide

accurate records to Jones's legal team for more than two years. This obfuscation has significantly impaired and delayed Jones's ability to investigate his claims.

Because the State had this evidence and did not disclose it to defense counsel, by definition, Jones was unavoidably prevented from discovering it. In *Banks v. Dretke*, 540 U.S. 668 (2004), the Supreme Court rejected "a rule thus declaring prosecutor may hide, defendant must seek," as it is "not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696 (internal citations omitted). Defense counsel cannot be required to "scavenge for hints of undisclosed *Brady* material . . . ." *Id*. at 695. In other words, the State cannot mislead and then fault Jones for not discovering the truth earlier.

D. The State was Required to Disclose the New Evidence.

The newly discovered evidence, which the State suppressed, was required to be disclosed under *Brady*. Had the information about an alternate suspect, who confessed to the murder but was not investigated by the State, been presented at trial, it would have "undermined confidence in the verdict." Accordingly, Jones deserves a new trial.

1. The Suppressed Evidence is Exculpatory and Impeaching.

By definition, a confession by someone other than the defendant is exculpatory. *See, e.g.*, *White v. Commonwealth*, 402 S.E.2d 692, 694 (Va. Ct. App. 1991) ("A confederate's admission that he or she actually killed the victim favors an accused in a murder trial . . . on the question of guilt or innocence because it tends to show that someone else, not the accused, committed the crime.") (citing *Brady*, 373 U.S. at 87). Linda Reed revealed that her husband was responsible for Nathan's murder, framed Jones for the crime, and that his relationship with the Blue Ash police was so close that she could not go to them with information about the murder. This

favorable information "contradicted the prosecution's theory of the case," *id*., and exculpated Jones of guilt.

It also would have allowed Jones to impeach the credibility of law enforcement witnesses and cast doubt on the integrity of their investigation. Jones would have been able to argue that police failed to pursue the report of a confession while at the same time highlighting the allegation that the confessor had a close relationship with several Blue Ash police officers. This illegitimate motivation for their sloppy work could have caused the jury to question "the thoroughness and even the good faith of the investigation" in Jones's case. *Kyles*, 514 U.S. at 445.

2. The Suppressed Evidence is Material.

Further, the suppressed evidence was material because it would have cast serious doubt on the State's theory of the case. In evaluating whether suppressed evidence is material for purposes of a *Brady* claim, a party need only show that it is *reasonably probable* that, had the undisclosed information been available to the defendant, the result would have been different. *Kyle v. Whitley*, 514 U.S. 419, 459 (1995) (emphasis added)). This standard has been further clarified in recent years to: "[*Brady*] evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016). Thus, to prevail on his *Brady* claim, Jones does not need to prove that he "more likely than not would have been acquitted" had the evidence been turned over. *Id.* Rather, he needs to show only that the evidence is sufficient to "undermine confidence in the verdict." *Id.*[5]

[5] As noted in his proposed motion, this element of a newly-discovered-evidence claim is more demanding; to prevail there, Jones must show that the evidence "discloses a strong probability that it will change the result if a new trial is granted." *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus. Jones meets this standard as well. (*See* Proposed Motion for New Trial at § IV.D.)

Because the circumstantial case against Jones was weak, the suppressed information of another's confession certainly "undermines confidence in the verdict." There was no confession, legitimate forensic evidence, or eyewitness account linking Jones the killing. Instead of direct evidence, the State relied upon an assortment of circumstantial evidence to infer Jones's guilt, while failing to investigate a number of other leads and potential suspects.

As explained in more detail in the Proposed Motion for New Trial, (*see* § IV.B.1 of that proposed motion), each of the State's arguments against Jones at trial were tenuous and, even when viewed together, do not actually link Jones to the murder of Nathan.

First, the State argued that a hotel "master key" was recovered from a briefcase in the trunk of Jones's car and that Jones must have used the key to open the door to Room 237. (Trial Tr. 1738.) The prosecution presented this argument as if master keys were difficult for hotel employees to obtain and as if Jones was not supposed to have this key. Both of these suggestions are inaccurate. By the admissions of several hotel employees, it was easy to obtain master keys, and not uncommon for employees to take the keys home at the end of the day. (Employee Interview Memo., Ex. L, at 1; Diane Morgan Interview Memo., Ex. M, at 1.) Hotel staff did not know how many master or room keys were in circulation, (Boyatt Supp. Report (Sept. 12, 1994), Ex. W, at 1), but all indications point to the fact that a great many employees had master keys. Viewed in light of these facts, it is not particularly surprising or damning that a hotel master key was found in Jones's car.[6]

[6] Beyond the fact that it was not unusual for Jones to take a hotel master key home with him, it is also important to note that the State never actually proved that the key was, in fact, a master key. Instead, the State only presented testimony that the key found in Jones's trunk opened the door to Room 237. (Trial Tr. 1319-20.) Any number of hotel key types could have opened Room 237.

The State also argued that marks on Nathan's body "corresponded" to or were "consistent" with items that Jones had access to in the course of his work at the hotel. (Trial Tr. 1743-44.) This argument fails to link Jones to the crime for three reasons. First, FBI laboratory reports and the State's own expert testimony demonstrate that the marks the State suggested were made by shoes and chains were in fact never definitively linked to these items. (FBI Report (Feb. 10, 1995), Ex. Y; Trial Tr. Vol. XXV, Oliver Dep., at 37-40.) Second, the process used to "match" a bruise mark on the victim to a walkie talkie was unscientific, making the conclusion essentially worthless. (*See* Dr. Joan Lurie Aff. (10/1/2013), Ex. AA.) And finally, many hotel employees had access to the items in question, and the State never proved that Jones was actually in possession of any of these items on the date of the murder.

Testimony was also presented about a hand wound that Jones suffered on the morning of the murder. While Jones consistently stated that he cut his hand while climbing up a set of metal stairs next to the hotel's dumpster, (*see* BWC document, Ex. BB, at 2), his treating physician, Dr. John McDonough, reached an independent conclusion that Jones had cut his hand after striking someone in the mouth, (Trial Tr. 1005). The reported basis for Dr. McDonough's conclusion was the fact that Jones's wound became infected with a bacteria, *eikenella corrodens*, which is found in human mouths. (*Id*.) Based on this conclusion, the State argued that Jones cut his hand and contracted the *eikenella* infection after punching Nathan in the mouth. (Trial Tr. 1746-47.)

The State's argument based on Dr. McDonough's testimony was misleading for several reasons. Dr. McDonough is not a bacteriologist and admitted that he had never studied the *eikenella* bacteria. (Trial Tr. 1020-21; 1028-29.) Dr. Solomkin, an expert on infectious disease, has since stated that *eikenella* bacteria can live outside the mouth and that Jones could have contracted the bacteria from food waste in the garbage he was throwing into the dumpster when

he cut his hand. (Dr. Solomkin Testimony, Ex. HH, at 34, 39.) Further, Nathan's mouth was never tested for the *eikenella* bacteria, so the State never proved whether she could have been the source of the bacteria in Jones's infection in the first place. And finally, Nathan's blood work did come back positive for the highly infectious Hepatitis B, (Postmortem Examination, Ex. CC, at 12), but Jones tested negative for Hepatitis B in the aftermath of the Nathan murder, and has never contracted the disease in the 24 years since Nathan was killed. Yet Hepatitis B is much more infectious than eikenella and, had Jones injured his hand by punching Nathan in the mouth as the State claimed, a "rather remarkably high" probability exists that she would have infected Jones with hepitatis B as well. (*See* Testimony of Dr. Solomkin, Transcript of Evidentiary Hearing, *Jones v. Bagley*, No. 1:01-cv-564 (Sept. 25, 2007), Ex HH at Hr'g Tr. 24-25.)

Finally, the State presented a pendant that was reportedly recovered by a police officer from a toolbox in the trunk of Jones's car. The pendant was identified as having belonged to Nathan and was reported missing soon after she was killed. Testimony was presented to the effect that Nathan never took the pendant off, (Trial Tr. 1036), suggesting that it must have been stolen during or after the time of her murder. A Nathan family member identified the pendant recovered from Jones's toolbox as the pendant that had belonged to Nathan. (Trial Tr. 1036-37.)

The reliability of this evidence, however, is questionable. To begin, such "smoking gun" proof of a connection between Jones and the murder, if believed by law enforcement, would have meant that Jones had committed a violent assault against a random stranger and was capable of doing so again. Yet if Jones was truly a cold-blooded killer, would the authorities have released him and permitted him to live and work freely in their jurisdiction and others for more than a year with zero restrictions?

Such inaction to protect the public from another attack suggests that law enforcement did not have faith in the pendant as proof of Jones's involvement. And good reason exists for skepticism. After police impounded Jones's car on the night of September 12, 1994, the keys to it were left accessible nearby on an officer's desk. (Trial Tr. 1207.) More than 48 hours later, on September 14, a single officer searched the car and found the pendant when he was alone, after an employee from the coroner's office had left. (Trial Tr. 1211-19.)

Other evidence also suggests that Jones did not place the pendant in the toolbox. On September 4, the day after the murder, a mechanic acquaintance of Jones's, Jimmy Johnson, worked on Jones's car. (Trial Tr. 1582.) Johnson testified that he used Jones's tools for this job and inspected everything in the toolbox in the course of his mechanical work. (Trial Tr. 1583-84.) Johnson said that there was no pendant in the toolbox on September 4. (Trial Tr. 1585-87.) Jones subsequently spent much of the time between September 4 and September 12 in the hospital (September 6-10), leaving him little opportunity to place the pendant in his toolbox after Johnson had accessed it.

The State's reluctance to arrest Jones for more than a year after obtaining what should have been conclusive evidence of his guilt suggests it had doubts about the legitimacy of the pendant evidence. Such doubts would be consistent with the Blue Ash Police Chief's assessment that the case against Jones "doesn't look good" even months after the pendant was discovered. (Sheila McLaughlin, *DNA Tests Fail to Link Prime Suspect to Hotel Slaying*, THE CINCINNATI ENQUIRER, (May 25, 1995), Ex. F.) They would also be consistent with Earl Reed's confession to framing a black man for the murder, which could suggest the pendant was planted in Jones's toolbox.

Even where one piece of suppressed evidence "standing alone may not be sufficiently material to justify a new trial, the net effect, however, may warrant a new trial." *State v. Larkins*, 8th Dist. Cuyahoga No. 82325, 2003-Ohio-5928, 2003 WL 22510579, ¶ 33, citing *Kyles*, 514 U.S. at 434 (reviewing courts should consider the cumulative effect of all nondisclosures in determining whether reversal is required). In light of the State's weak circumstantial case, it is likely that evidence of an alternative suspect's confession could have impacted the outcome of Jones's trial by creating an increased sense of reasonable doubt. The jury was not aware that Earl Reed confessed to killing Rhoda Nathan and said he framed a black man for the murder. The fact that the Blue Ash Police Department ignored this information and did not conduct any investigation would have further undermined confidence in the propriety of the Nathan murder investigation, potentially raising more doubt about the pendant recovery. And Linda Reed's report of her husband being friendly with some Blue Ash police officers would have been powerful impeaching evidence to offer in combination with the evidence of a poor and incomplete investigation that focused on Jones while ignoring and abandoning other leads. (*See* Proposed Motion for New Trial § IV.A.3.)

IV. Failing to Grant Jones's Motion for Leave Would Violate his Federal and State Constitutional Rights.

Jones deserves the opportunity to file his Proposed Motion for New Trial. Failure to provide him that opportunity would further deprive him of his right to due process and freedom from cruel and unusual punishment.

The failure of the State to disclose evidence favorable to the defense violates the due process clause of the Fourteenth Amendment. *Brady*, 373 U.S. at 86. In addition, the Due Process Clauses of the Fifth and Fourteenth Amendments guarantee the right to a fair trial, *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984), and motions for new trial on the basis of

newly discovered evidence are "designed to afford relief where, despite the fair conduct of the trial, it later clearly appears to the trial judge that, because of facts unknown at the time of trial, substantial justice was not done." *United States v. Johnson*, 327 U.S. 106, 112 (1946).

A conviction based on fundamentally unreliable expert testimony also violates due process. *See, e.g.*, *Han Tak Lee v. Glunt*, 667 F.3d 397, 408-09 (3rd Cir. 2012). Additionally, failure to consider Jones's new evidence would lead to the execution of a factually innocent defendant. Claims of actual innocence involve the most basic and fundamental rights to "life and liberty" under the due process clause of the Fourteenth Amendment and the Eighth Amendment of the United States Constitution. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993); *see also id*. at 419 (O'Connor, J., joined by Kennedy, J., concurring); *id*. at 429 (White, J., concurring); *id*. at 430 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting); *Schlup v. Delo*, 513 U.S. 298, 316 (1995) (describing a "substantive *Herrera* claim").[7]

In summary, the delayed filing of Jones's Proposed Motion for New Trial is a product of prosecutorial failure to disclose. This cannot be fairly attributed to Jones. Nor can the delay between Jones's first notice of the Earl Reed information in February 2016 and the present filing. His investigation into the lead from the moment he learned of it was diligent and impeded by inaccurate responses from the State. Therefore, it would amount to a substantial denial of his rights and fundamental fairness to refuse to consider his claims.

[7] Although this Court is constrained by Ohio precedent not recognizing actual innocence as a substantive ground for relief, Jones maintains those cases are wrongly decided and he thus preserves the issue for further appeal—both under the United States and Ohio constitutions. *See e.g.*, *State v. Willis*, 58 N.E. 3d 515, 519 (2016).

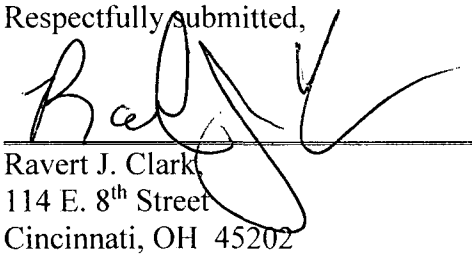
V. Conclusion and Relief Requested

Elwood Jones's conviction was based on incomplete information, prosecutorial misconduct, shoddy "science," and ineffective assistance of counsel. The result of his trial cannot stand.

Jones has demonstrated that he was unavoidably prevented from discovering the grounds upon which he now seeks a new trial within the time prescribed by Criminal Rule 33. He has also demonstrated the diligence with which he acted to pursue this newly discovered evidence once he was made aware of it, despite false and inaccurate responses from state agencies which mislead him in his investigation.

In its discretion, this Court should grant Jones leave to file his proposed motion for a new trial or, alternatively grant a hearing. It should also grant Jones other appropriate relief, including leave to conduct discovery and authority to obtain subpoenas for further investigation supporting his claims.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ELWOOD JONES'S MOTION FOR LEAVE TO FILE A MOTION FOR A NEW TRIAL served upon Hamilton County Assistant Prosecutor Phil Cummings, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 15 day of February, 2019.

Ravert J. Clark