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

STATE OF OHIO	:	
Plaintiff,	:	CASE NO. B 958578
vs.	:	JUDGE COOPER
ELWOOD JONES	:	**CAPITAL CASE**
Defendant.	:	

ELWOOD JONES'S PROPOSED MOTION FOR A NEW TRIAL

Defendant Elwood Jones respectfully requests an order granting him a new trial under Ohio Rule of Criminal Procedure 33. A memorandum in support follows.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction

Elwood Jones is innocent of the crimes for which he was sent to death row more than two decades ago. Jones has continually maintained his innocence for the aggravated murder of Rhoda Nathan, and he was never directly linked to Nathan's death. No fingerprints, no DNA, no blood or body fluids, no hair, no fibers, no eyewitnesses, and no confession implicate him. The State's case against Jones was far from conclusive, based entirely on circumstantial evidence and scientific theories since shown to be flawed.

Jones, who is African American, learned recently that the investigating police department was aware that another person confessed to the crime for which he faces execution and to framing a black man for it. Nothing indicates law enforcement ever pursued this lead, however. Jones's counsel also never received any disclosure regarding this alternate suspect and confession.

The suppression of this important information amounts to a *Brady* violation, and the undisclosed evidence, in combination with the State's already weak case, undermines confidence in the outcome of Jones's trial. As a result, Jones is entitled to, and requests, an order granting him a new trial under Criminal Procedure Rule 33 on the basis of this *Brady* violation. The newly discovered evidence creates a strong probability of a different result under a new trial and thus gives an alternative basis for a new trial under Rule 33. Finally, Jones also deserves relief from his conviction and sentence because he is actually innocent.

II. Facts

On September 3, 1994, Rhoda Nathan was attacked in Room 237 of the Embassy Suites Hotel in Blue Ash, Ohio. Nathan had been staying at the hotel with her friend, Elaine Schub, and Schub's fiancé, Joe Kaplan, while in town from New Jersey to attend a bar mitzvah. Schub and

Kaplan arrived at the hotel first and checked in to Room 237 in the early afternoon on September 2. Nathan arrived at the hotel later that afternoon. *State v. Jones*, 90 Ohio St. 3d 403, 403 (2000).

The following morning, September 3, Nathan, Schub, and Kaplan woke around 7 am. Schub and Kaplan left the room at approximately 7:30 am to eat breakfast in the hotel's first-floor restaurant while Nathan stayed in Room 237 to shower and get dressed. Schub and Kaplan returned to Room 237 approximately 30 – 40 minutes later. (Trial Tr. Vol. XXV, Joe Kaplan Video Dep., at 11.) When they opened the door, they discovered Nathan unresponsive, lying naked and face-up on the floor. *Jones*, 90 Ohio St. 3d at 403.

Schub began to scream and numerous staff and guests responded to the commotion. A hotel guest who was a doctor and two guests who were nurses rendered aid until paramedics arrived. *Id.* Nathan was transported to Bethesda North Hospital, where she was pronounced dead. At first, Nathan was thought to have suffered a heart attack and injured herself in a fall. After determining that Nathan had suffered multiple traumatic injuries and blunt force impacts to her head and torso, however, the Hamilton County Coroner's office classified the death as a homicide. *Id.* at 404.

A detective testified that he found a pendant resembling the victim's in a search of the toolbox in the trunk of Jones's car on September 14, 1994. (Trial Tr. 1219.) More than a year later, on September 27, 1995, police arrested Jones.

Jones's trial commenced in November of 1996. The State's theory was based on the fact that Jones worked at the hotel. The State argued that Jones must have surveilled Room 237 before Nathan arrived on September 2 and, after Schub and Kaplan had left for breakfast on September 3, 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.)

A Hamilton County jury convicted Jones of murdering Nathan, (Trial Tr. 1873-1877), and after a penalty phase proceeding, he was sentenced to death in January of 1997, (Trial Tr. 1980-1981).

In 2016, Jones received a message from a woman named Tierria Suggs through the JPay prison email system. (Tierria Suggs email, Ex. A-1.) Tierria told Jones that her mother, Delores Suggs, had information about a man who had confessed to killing Nathan. (*Id*.) Delores had been held in the Hamilton County Justice Center after Jones was indicted in 1995, but before his trial. (1995 Justice Center Records, Ex. A-16.) While incarcerated, Linda Reed, a fellow inmate, told Delores that her husband, Earl Reed, had confessed to killing Nathan and said that he had framed a black man for the crime. (Suggs Aff., Ex. B, at ¶ 4.) Linda said that she did not contact the Blue Ash Police Department about Earl's confession because he was friendly with the police officers, often drinking coffee with them. (*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 Suggs's church, for advice. (*Id.* at ¶¶ 10-11.) Wilson told Delores that she should call the police with the information Linda Reed told her. (*Id.* at ¶ 11.) Delores first called 911, and then the Blue Ash Police Department. (*Id.* at ¶ 12-13.) Delores told the police everything that Linda had told her. In response, however, the Blue Ash 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 or subsequently. In fact, a state agency, the Hamilton County Sheriff's office, provided inaccurate information to Jones's defense team which impeded their investigation into Delores Suggs's information for more than two years. (Barnhart Aff., Ex. A, at ¶¶ 22, 30-31, 98.) Even to this day, that agency has continued to falsely deny the existence of records in its possession that Jones was finally able to obtain through the help of a third party. (*Id.* at ¶¶ 89-100.)

Earl Reed lived within walking distance of the Embassy Suites hotel, (*see* Map, Ex. E), but both he 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. (Wood Aff., Ex. C, at ¶ 10.) 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, based on his personality and behavior. (*Id.* at ¶ 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.) Blue Ash police records also reflect three domestic violence complaints against of Earl by Linda. (BAPD Earl Reed Cards, Ex. A-12, p. 2.) Without explanation, however, Blue Ash records for Linda Reed are missing. (Kevin Deye email (Mar. 5, 2018), Ex. A-11 at p. 4.)

* * *

No direct or forensic evidence linked Jones to the crime scene, no eyewitnesses accused him of the murder, and Jones has never wavered in his profession of innocence. As detailed below, for every inference that the State asked jurors to draw against Jones based on its indirect evidence, an alternative explanation favoring Jones was equally likely, and the "forensic

evidence" the State offered was, in fact, junk science. The State's circumstantial case was far from overwhelming.

In light of the weak case against Jones, the newly discovered information regarding Earl Reed's involvement in Nathan's murder, the State's suppression of that information, and the multiple and unexplained irregularities in the records related to Linda Reed raise sufficient doubt about Elwood Jones's conviction and death sentence to undermine confidence in that outcome and justify a new trial.

III. Procedural History

A. State direct appeal

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).

B. State post-conviction

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).

C. Federal habeas

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. Nevertheless, the district court 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 for his trial counsel's failure to effectively challenge and rebut two of the State's arguments for being based on flawed scientific testimony. 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 held that Jones's application was successive and concluded that he could not meet the 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.

D. State DNA proceedings

Meanwhile, 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.) 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. (*Id*. at 5.)

The results from these initial DNA tests did not implicate Jones.[1] Because the results did not identify an alternative suspect, either, Jones requested testing of additional evidence items.

[1] 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

(Def.'s Supp. Mem. in Support of Completion of Post-Conviction DNA Testing, Nov. 21, 2013.) The Court entered an order directing supplemental DNA testing on April 8, 2014. (Order Directing Additional Post-Conviction DNA Testing, Apr. 8, 2014.)

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.

After the Court entered its order for supplemental DNA testing, the State reported that several of the items included in the order were missing from the Hamilton County Courthouse evidence storage area. (Order Directing Additional Post-Conviction DNA Testing, Apr. 8, 2014, n.*.) 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.[2]

Jones filed a petition requesting relief for the State's violation of its duty to preserve the missing evidence. (Def.'s Pet. for Post-Conviction Relief, Aug. 7, 2014.) Two months later, without acknowledging that the evidence had been missing for months, the State averred in an October 15, 2014, motion that "[t]he underlying factual basis for Jones's postconviction petition

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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*.)

[2] 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.

[is] incorrect" because "[t]he exhibits in question have not been lost or destroyed," but rather 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.

On October 16, 2014, Jones's former counsel at the Ohio Innocence Project stipulated to the re-discovery of the missing evidence, and this Court dismissed Jones's petition. (Entry Dismissing Pet. for Post-Conviction Relief.) Jones learned of these developments only 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 present counsel entered an appearance on January 27, 2015. (Entry Withdrawing As Counsel, Jan. 27, 2015; Entry Retaining Counsel, Jan. 27, 2015.)[3]

E. Execution Date

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.)

[3] Jones requested, and this Court granted, a hearing to determine the events related to the loss and alleged re-discovery of this evidence. He has postponed commencing that hearing while he investigated Delores Suggs's information. If the Court deems appropriate a hearing on this motion, or his motion for leave to file the new trial motion, Jones can elicit testimony about the missing evidence at that time.

IV. Argument

By failing to disclose what it knew about Earl Reed's involvement in the murder of Rhoda Nathan, the State violated its constitutional obligations and suppressed material, exculpatory and impeaching evidence that undermines confidence in the outcome of Elwood Jones's murder trial. Because Jones's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), were violated, this Court should grant him a new trial. Alternatively, the newly discovered evidence about Earl Reed entitles Jones to a new trial under Criminal Rule 33. Finally, Jones also deserves relief from his conviction and sentence on the basis of his actual innocence.

A. The Blue Ash Police Department and Hamilton County Prosecuting Attorney's Office Violated *Brady* By Failing to Disclose Information about Earl Reed.

Suppression of favorable evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. A *Brady* claim has three elements: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004). The "prejudice" element is satisfied "when the suppressed evidence is material for *Brady* purposes." *Id.* at 691. Favorable evidence "is material . . . if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). There is no requirement that the withheld evidence *ensure* acquittal:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown

> when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 434 (quoting *U.S. v. Bagley*, 473 U.S. 667, 678 (1985)).

The Supreme Court has confirmed that "an individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, *including the police*." *Id.* at 437 (emphasis added). "[T]he *Brady* duty extends to impeachment evidence as well as exculpatory evidence, and *Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

Further, claims under *Brady* can be raised in a motion for a new trial under Criminal Procedure Rule 33. *State v. Johnston*, 39 Ohio St.3d 48, 60-63 (1988). *Brady* claims are cognizable under both Criminal Procedure Rule 33(A)(2) and 33(A)(6). *See id.* at 58, n.16; *see also State v. Edmonds*, 1st Dist. Hamilton App. No. C-77006, 1978 WL 216395 (May 24, 1978). When a defendant raises a claim of suppressed evidence in a motion for a new trial, the due process standards set out in *Brady* are controlling. *Johnson*, 39 Ohio St.3d at 60. "For that reason, the defense does not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal, the standard generally used to evaluate motions filed under Crim.R. 33." *Id.* (citation omitted); *see also State v. Glover*, 2016-Ohio-2833, 64 N.E.3d 442, at ¶¶ 33-35 (8th Dist.); *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, 927 N.E.2d 1133, at ¶ 35 (7th Dist.).

Even if this Court concludes that the federal Constitution does not require a new trial, this Court should nevertheless grant relief under the Ohio Constitution. The Ohio Supreme Court has repeatedly held that the Ohio Constitution must be construed to afford expansive protection to the rights of the individual, regardless of whether the same degree of protection would be

available under the federal Constitution. *See, e.g., State v. Farris*, 109 Ohio St.3d 519, ¶¶ 46-48 (2006); *State v. Brown*, 99 Ohio St.3d 323, ¶ 7 (2003); *Humphrey v. Lane*, 89 Ohio St.3d 62, 66-68 (2000); *State v. Storch*, 66 Ohio St.3d 280, 292-93 (1993).

Jones is able to make all three showings to prove a *Brady* violation occurred; the suppressed evidence regarding Earl Reed is: (1) favorable because it was either exculpatory or impeaching; (2) suppressed either willfully or inadvertently; and (3) material because the evidence undermines confidence in the outcome of his trial.

1. The Suppressed Evidence is Favorable to Jones Because it is Both Exculpatory and Impeaching.

The suppressed evidence regarding Earl Reed is both exculpatory and impeaching in Jones's case. Suggs reported to police that she had been told by Linda Reed that Linda's husband, Earl Reed, had confessed to killing Rhoda Nathan and to framing a black man for the murder. While the police were not obligated to unquestioningly accept this lead, there was no justification for the Blue Ash Police Department's apparent abject failure to investigate the lead at all. In fact, the Blue Ash Police Department did not even document that Delores had called and shared this information (or, if it did, it has wrongfully withheld this documentation from Jones). These circumstances are especially concerning considering Linda's report that Earl was friendly with Blue Ash police officers, which suggests an independent source of knowledge for the State about Earl Reed's involvement.

Jones has also discovered that the Blue Ash Police Department does not have records of Linda Reed's history despite an admittedly lengthy and memorable series of interactions between the department and Linda. (Kevin Deye email (Mar. 5, 2018), Ex. A-11 at p. 4.) In addition, Jones was repeatedly told that there is no record of Linda Reed's incarceration at the Hamilton County Justice Center, (Barnhart Aff., Ex. A, ¶¶ 30, 99), despite at least one arrest in the 1990s

with a notation on the arrest report indicating that no bail should be granted, (Linda Reed Arrest Report, Ex. A-4.) As it turns out, these repeated denials of Linda Reed's record at the jail were false. (*See* 1995 Jail Records, attached to Horne Aff., Ex. D, at 4.)[4]

If this suppressed evidence had been properly disclosed, Jones could have further investigated Suggs's report or called Suggs (or Linda or Earl Reed) to testify. Evidence that police failed to investigate or pursue a report of a confession, especially in light of the allegation that the confessor had a close relationship with several Blue Ash police officers, surely would have impeached the credibility of law enforcement officials tasked with investigating Nathan's death. This evidence also would have helped to exculpate Jones from the murder, as it inculpates another suspect and the State never argued that more than one person was involved in the crime. Under any theory of the case, this suppressed evidence regarding Earl Reed's reported confession could have only been favorable to Jones.

2. The Favorable Evidence Was Suppressed by the State Willfully or Inadvertently.

Willful or inadvertent suppression of evidence regarding Earl Reed amounts to a *Brady* violation. Even if the Court gives the benefit of the doubt to the Hamilton County Prosecuting Attorney's Office, inadvertent evidence suppression still qualifies as a constitutional violation because prosecutors have an affirmative duty to learn about and disclose any material, exculpatory evidence in the possession of police. *See Kyles*, 514 U.S. at 438. A *Brady* violation occurs even when prosecutors remain unaware of evidence in the possession of police because of the affirmative nature of the duty to disclose. *See Youngblood*, 547 U.S. at 870.

[4] As this Court is also aware, evidence it had ordered to be DNA tested also disappeared while in the State's custody. *See supra* n.1 and accompanying text.

The Blue Ash Police Department and Hamilton County prosecutors have been aware, or should have been aware, of Earl Reed's potential involvement and reported confession for decades. This evidence should have been disclosed to Jones and his defense counsel, and the failure to disclose amounts to a willful or inadvertent suppression.

3. The Willful or Inadvertent Evidence Suppression was Prejudicial Because the Suppressed Evidence is Material.

Evidence suppression is prejudicial when the suppressed evidence is material for *Brady* purposes. *Banks*, 540 U.S. at 691. Materiality is determined on the basis of the likelihood that the trial outcome would have been different if the suppressed evidence had been properly disclosed. *Kyles*, 514 U.S. at 433. In *Bagley*, the Supreme Court clarified this standard, holding that materiality is established when suppressed evidence undermines confidence in the trial's outcome. *Bagley*, 473 U.S. at 678. The Court explained, "*Bagley's* touchstone of materiality is a 'reasonable probability' of a different result," and it emphasized that "the adjective is important" because "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). The suppressed evidence regarding Earl Reed's confession significantly undermines confidence in the outcome of Jones's murder trial.

Throughout Jones's trial, the State argued that Jones was the only person with a motive and an opportunity to kill Rhoda Nathan. But neither the jury nor Jones's defense counsel knew at the time about another man's possible involvement in the murder, including that this man lived just one mile from the Embassy Suites hotel, (*see* Map, Ex. E), and had confessed to murdering Nathan and framing a black man for it. Once the police became aware of Earl Reed's potential involvement and reported confession to the crime, they failed both to investigate this information

themselves, and also to disclose it to Jones, who could have investigated further and marshalled what he found in support of his innocence.

As it turns out, Earl Reed had a history of violence. Blue Ash Police records reflect three domestic violence complaints against Earl in that jurisdiction. (*See* Ex. A-12 at 2.) In addition, when Linda Reed was later admitted to the hospital with normal pressure hydrocephalus, providers told her niece that the type of trauma that would cause her condition generally came from a car accident or severe abuse. (*See* Ex. C at ¶ 14.) This assessment was consistent with reports of abuse from Linda to her family. (*See id*. at ¶ 20.) And, Linda's nursing home eventually banned Earl from visiting Linda after treatment providers discovered damage to a shunt placed in her brain to treat her condition. Linda reported that Earl had been hitting her in the nursing home as well, and when her caregiver confronted Earl about these allegations, he did not deny them. (*Id*. at ¶ 22.)

More than two decades after the fact, potential additional evidence of Earl Reed's guilt has been lost. Both he and Linda have died, meaning interviews of them—to learn more details about Earl's alleged involvement in Nathan's murder, his framing of Jones, and his relationship with the Blue Ash Police Department—are not possible. Linda's nursing home records have also been destroyed, and with them, the ability to corroborate Ms. Wood's recollection of Earl's abuse of Linda. (*See* Ex. A at ¶ 63-67.)

Earl's DNA, which could have been compared to the samples taken from the crime scene, appears to no longer be available either. (*See id*. at ¶ 70.) Jones has also not yet been able to locate witnesses who might have recognized Earl Reed from being at the hotel when Ms. Nathan died. These difficulties are a direct result of the State's suppression of this information for so long, and cannot be fairly held against Jones.

But even the information available at this late date—Earl Reed's confession to killing Nathan and framing a black man for it, combined with his history of violence and the fact that he lived nearby the scene of the murder—would likely have cast significant doubt on the State's case. The prosecution would not have been able to argue with certainty that Jones was the only possible killer had the jury known what Linda Reed said about Earl Reed. The suppressed evidence accordingly seriously undermines confidence in the jury's guilty verdict.

As the Supreme Court has explained, materiality "is not a sufficiency of evidence test." *Kyles*, 514 U.S. at 434. In other words, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id*. at 434-35. Indeed, "[o]ne does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435.

The Ohio Supreme Court has recognized the materiality of undisclosed reports regarding alternative suspects. *See State v. Brown*, 115 Ohio St.3d 55, 64 (2007). In *Brown*, notes from a police interview indicated that investigators received a report that another suspect was the actual shooter. This information was never disclosed to defense counsel. The Ohio Supreme Court found that the statements made in the police interview were material for *Brady* purposes. *See id*.

Likewise, the Sixth Circuit has also recognized the materiality of undisclosed tips regarding confessions by alternative suspects. *See Gumm v. Mitchell*, 775 F.3d 345 (6th Cir. 2014). In *Gumm*, investigators collected several reports that multiple alternative suspects confessed to an unsolved murder. *Id*. at 364. Recognizing that defense counsel would have constructed an alternative narrative of the crime based on the undisclosed reported confessions,

the Sixth Circuit held that the suppressed evidence was material for *Brady* purposes. *See id*. at 370, 375.

The fact that the Blue Ash Police Department failed to pursue a lead related to someone friendly with its officers is exactly the kind of evidence that Jones could have presented to cause a jury to question "the thoroughness and even the good faith of the investigation" in his case. *Kyles*, 514 U.S. at 445. As in *Kyles*, where the police failed to investigate a potential suspect, Jones could have "attacked the reliability of the investigation in failing even to consider" the "possible guilt" of another. *Id*. at 446. Indeed, Jones's "defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence." *Id*. at 447. See *also, e.g.*, *id*. at 446 (noting, "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation" (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)); *id*. (citing with approval the awarding of a new trial "because withheld *Brady* evidence 'carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case'") (quoting *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir.1985)).

In fact, Jones attempted this exact strategy at trial, (*see, e.g.*, Trial Tr. at 1753 (defense counsel argued in closing "the case that's been presented to you consists of an inadequate investigation, incomplete evidence, and inaccurate conclusions")), but lacked the evidence about Earl Reed which would have vividly supported his theory. As in *Kyles*, the "failure of the police to pursue" the evidence of Earl Reed's guilt "could only have magnified the effect on the jury" of the defense's arguments. *Id*. at 447.

B. The State's Case Was Entirely Circumstantial and Based on Tenuous, Inconclusive Evidence.

"In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed." *Kyles*, 514 U.S. 451. Where, however, the "evidence remaining unscathed" would "hardly have amounted to overwhelming proof" of the defendant's guilt, the withheld evidence becomes material. *See id*.

Such is the case here. The State presented no direct evidence that tied Jones to the crime. Instead, it offered weak circumstantial inferences backed by flawed evidence. In fact, even after discovering the pendant in Jones's car and months more of investigation, Chief Mike Allen of the Blue Ash Police Department was quoted in the paper as saying 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 to the case changed between the time of Chief Allen's comments in May 1995 and when Jones was indicted in September 1995.

If the jury, faced with the State's weak case, had heard that Earl Reed had confessed to the crime, it is probable that the outcome of Jones's trial would have been different.

1. The State's Theory of the Case Required the Jury to Draw Weak Circumstantial Inferences

The State presented a string of circumstantial inferences about the person who killed Rhoda Nathan. The knot that the State tied between Jones and the string of inferences becomes frayed to a breaking point when subjected to scrutiny and when viewed alongside of Earl's confession to the murder and framing another for it.

- **Claim No. 1: Jones was part of a "limited suspect pool"**

The State argued, "we know the killer of Rhoda Nathan was at that hotel in Blue Ash between 7:30 and 8 [am], a very limited time frame and very limited suspect pool." (Trial Tr. 1737.) But this inference actually does very little to narrow the range of suspects. Anyone could have been at the Embassy Suites in Blue Ash that morning. The hotel was open to the public and included a restaurant that served non-hotel patrons. What is more, Earl Reed lived less than a mile from the hotel, (*see* Map, Ex. E), potentially putting him in close proximity to the attack.

The fact that Elwood Jones was at the hotel working on the morning of the murder does not implicate him in the crime any more than it implicates the other staff, guests, and patrons who could have been present at the hotel that day. Jones is "in that suspect pool" along with hundreds of other people, including Earl Reed.

- **Claim No. 2: The murderer had a key**

At the time of the murder, the hotel used physical metal keys, not keycards. (*See* Trial Tr. 1484.) At trial, the State claimed, "we know that our murderer had a key." (Trial Tr. 1737.) The State pointed to the fact that Nathan's roommate Joe Kaplan indicated that "there was only one room key out and he had it." (Trial Tr. 1738.) It also returned to Kaplan's testimony that he "made sure the door was latched" before going to breakfast and that "when he came back [from breakfast] the door was still latched." (Trial Tr. 1737.) There is reason to question the State's certainty that the door to Room 237 was actually locked, however.

At 10:30 pm on the night before the murder, Embassy Suites security guard Virgil Rhodes found Room 237's door ajar. (BAPD Supp. Report (9/5/1994), Ex. H, at 2.) Elaine Schub, Joe Kaplan, and Rhoda Nathan had checked in to the hotel earlier that afternoon. Rhodes stated that the door's security bolt had been left between the door and the frame, propping the

door open. Rhodes "checked the room, could see it had been rented but was unoccupied, and secured it." (*Id*.) This report, like the rest of the Blue Ash Police Department records, was not disclosed until Jones initiated his federal habeas corpus petition.

By all appearances, it seems that police ignored Rhodes's report, because Kaplan indicated that he, Schub, and Nathan returned to Room 237 at 10 pm on September 2 and did not leave again for the rest of the night. Police records indicate that they viewed Kaplan's statement as "refut[ing] Embassy's security statement that the room (237) was found adjar [*sic*] and vacant at 10:30 pm on Friday night." (BAPD Supp. Report (9/10/1994 – 12:30p.m.), Ex. I.) There was no further investigation into this issue and Kaplan was never questioned about the discrepancy.

This was a serious investigatory mistake because the State's argument that the killer must have used a key to open the door to Room 237 was entirely premised on the idea that Kaplan closed, latched, and locked the room door on the morning of September 3. In closing arguments, the State asked the jury to infer that the killer entered Room 237 with a key because Kaplan was "very clear that when he went to breakfast on Saturday morning he made sure the door was latched." (Trial Tr. 1737.) In Kaplan's videotaped deposition that was presented to the jury, he was asked if the room door was locked. Kaplan unequivocally stated, "I know it was locked." (Trial Tr. Vol. XXV, Kaplan Dep. 10.)

Kaplan's insistence that he had been very conscious of latching the door is not in line with Rhodes's observation of an unlocked and open door less than twelve hours before the murder occurred. Jones was not able to raise this discrepancy at trial because Rhodes's report

was suppressed. Further, there is some indication in police records that door locks had failed at the Embassy Suites in the past.[5] The person who killed Nathan may not have needed a key at all.

- **Claim No. 3: "Master keys" were rare, one was used to get to Nathan, and Jones alone had one**

Barring the fact that the killer may not have needed a key to enter Room 237 at all, the State insisted that the killer must have used a master key to enter Room 237 and that "not everyone" had access to master keys. (Trial Tr. 1738.) This inference is presumably based on Kaplan's statement that he was the only person with a room key checked out. However, there were "three keys to each room of the hotel, [and] usually the extra keys are signed out by the hotel staff members." (BAPD report (June 28, 1992), Ex. K.)[6] This would leave two keys for Room 237 unaccounted for and possibly in the possession of hotel staff members. Police never investigated this angle, so it is unknown whether other employees may have had keys to Room 237 on September 3, 1994.

What is clear, however, is that most hotel employees had access to master keys that opened guest rooms. Attorneys representing the hotel's operating company (in a civil suit filed by the Nathan family) interviewed many of the employees who worked at the Embassy Suites in September 1994. In a memorandum prepared following these interviews, the hotel's attorneys note that "*most employees reported that at the time of the incident they were fully aware that the keys they had in their possession, for whatever position they held, were master keys and were accessible to any and all public areas and private rooms*." (Ex. L at 1 (emphasis added).)

[5] A hotel Loss and Incident Report dated June 28, 1993, notes that the "door in Suite 315 [was] left open" and that the guest "felt locks where [sic] loose." (Ex. J.) The report reflects that the incident "does not look like a break in" and that the locks were in fact loose. (*Id.*)

[6] There is no indication that this key management system changed between 1992 and the time of the murder in 1994.

While a hotel key was recovered from a briefcase in Jones's car, neither of these events are unexpected or unusual. Banquet employees like Jones regularly used master keys and it was not uncommon for employees to return keys without signing them back in or to take them home after a shift was concluded. Randy Hughes, the hotel's executive chef, explained why Jones would have had a master key. Hughes said that "the banquet rooms were converted guests rooms and in order to cut costs, the locks/keys were never changed. It was more economical to simply provide the banquet workers with the same type of key given to housekeeping." (*Id*. at 7.) And Diana Morgan, another hotel banquet department employee, reported that "there were many times that she, as well as other employees, would inadvertently take the keys home." (Ex. M at 1.)

In truth, master keys were *not* rare, and many people had access to them. Therefore, even if Jones had a master key (which the State never proved),[7] and even if a master key was used to get into Nathan's room, nothing proves that Jones was the one to use such a key to access the room.

- **Claim No. 5: The killer had to be a hotel employee on the second floor**

The State also argued, "we know our murderer was on the second floor that morning." (Trial Tr. 1738.) In elaborating on this argument, the prosecution inexplicably focused on only hotel employees and ignored the fact that there were dozens of hotel guests on the second floor as well that morning. The State went on to argue that Jones was the only person assigned to work on the second floor that morning and that Angela Early, a housekeeper, was "the only other person that indicated they were up there that morning before the homicide." (Trial Tr. 1739.)

[7] Instead, the State presented only 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.

This argument ignores the possibility that even if the killer was an employee, he or she may not have been seen by anyone else while on the second floor, and certainly would not have admitted to being there. And of course, the killer might not have been an employee at all; he or she could have been a hotel guest or member of the public who had access to the hotel.

- **Claim No. 6: Jones, alone, could not be alibied**

The State also claimed that the killer "cannot be alibied between 7:30 and 8 [am]." (Trial Tr. 1740.) The prosecution stated that there were many employees "working together in the breakfast area" and "some maintenance people together," but that Elwood Jones was "on [his] own" and "can't be alibied that morning." (Trial Tr. 1741.) This was both a gross misstatement of the facts and an inaccurate representation of the locations of other employees.

Jones told police that he was in the first floor breakfast area cleaning tables from 6:30 am until the victim was discovered. (*See* Elwood Jones Employee Location by Statement Chart, Ex. N.) Prosecutors argued that Jones must have been lying about his whereabouts because he "can't be alibied that morning." (Trial Tr. 1741.) This was a misstatement of the facts. Various employees saw Jones in the breakfast area on the morning of September 3, but struggled to pinpoint the exact time. For example, Marvin Ferguson, a kitchen employee, stated that he saw Jones coming in and out of the kitchen throughout the morning but could not provide specific times. (BAPD Supp. Report (9/25/1994), Ex. S.) Demetrius Williams, a breakfast employee, reported seeing Jones in the breakfast area for "about five minutes" around 7 am. (Williams Employee Location by Statement Chart (9/3/1994), Ex. O.) Sharon Mobley, another complimentary breakfast employee, stated that she could not say with certainty that Jones had not been in and out of the breakfast area that morning. (Mobley Interview (9/29/1995), Ex. P.) And Earlene Metcalfe, a complimentary breakfast supervisor, stated that she was taking a break

with Jones around 7:30 am and was with him when an emergency call came over the hotel radios following the discovery of Rhoda Nathan's body. (Metcalfe Interview (9/15/1994), Ex. Q, at 10.) Police seem to have disbelieved Metcalfe's alibi of Jones because of her romantic relationship with him and the fact that a polygraph test indicated that she was being "deceptive."[8] (Metcalfe Polygraph (10/27/1995), Ex. R, at 3.) But her account was consistent with the accounts of these other employees.

Because police never thoroughly investigated other hotel employees as suspects, it is unclear whether similar alibi issues would have arisen given the hectic environment of the breakfast area during a holiday weekend. For example, maintenance employee Greg Henry's whereabouts are not accounted for during the timeframe when Nathan was killed. Henry told police that he was on the hotel's first floor with all of the other maintenance employees (Art Armacost, Charles O'Banion, and Michael Hajjalie) when he heard Elaine Schub's screams. (BAPD Supp. Report (9/13/1994), Ex. T.) But this does not match with the statements made by any of these other maintenance employees. Armacost told police that he was alone with O'Banion when he heard Schub's screams, (BAPD Supp. Report (9/23/1994, Ex. U), and O'Banion confirmed that he was alone with Armacost at the time of the screams, (BAPD Supp. Report (9/25/1994), Ex. S). Likewise, Hajjalie reported that he was in a presidential suite at the time of Schub's screams and did not mention being with any other maintenance employees. (*Id.*)

When Henry responded to Schub's screams, his first reaction was to look around Room 237 for clues as to what had happened. Henry reported that he even went so far as to check the mulch below the room's balcony to determine if the killer had jumped to escape the room. (Greg

[8] *See U.S. v. Scarborough*, 43 F.3d 1021, 1026 (6th Cir. 1994) ("Results of a polygraph . . . are inherently unreliable.").

Henry #1 (9/13/1994), Ex. V.) By the accounts of every other staff member and guest, the understanding at that time was that Nathan had had a medical emergency, not that there was any criminal activity behind her condition. Henry had no reason to be looking for clues or investigating the mulch below the balcony unless he had knowledge that Nathan's death was a homicide. Blue Ash Police also noted that Henry was "supposed to have talked to a guest who heard screams and a scuffle from Rm. 237 on the murder date," but apparently never followed up on this information with Henry. (BAPD Supp. Report (9/12/1994) pp. 2/2, Ex. W.)

At Jones's trial, Henry testified in great detail about the locations of small blood spatters in Room 237. (Trial Tr. 1667-1677.) Henry was only in Room 237 for a short amount of time with many other people, so it is unclear how he could have possibly described these blood spatters in such great detail unless he had been in the room before Nathan's body was discovered. As a maintenance employee, Henry had keys with unlimited access to guest rooms, so this is a very real possibility. (*See* BAPD Supp. Report (9/12/1994) pp. 1/2, Ex. X.)

In spite of these inconsistencies and major concerns, police never seriously considered Henry as a suspect. Police never even took his fingerprints. (Trial Tr. 1673.) In fact, no physical evidence was collected from Henry and no effort was made to corroborate or further investigate his statements.

- **Claim No. 7: Nathan's presence in the room was a surprise to the killer**

The State argued that it was "reasonable to conclude that the murderer never suspected or expected to find anyone in [Room 237]," while admitting, "we don't know this for a fact." (Trial Tr. 1741.) The prosecution based its argument on the fact that while Joe Kaplan and Elaine Schub had arrived at the hotel and checked in while Jones was working on September 2, Rhoda Nathan arrived after Jones had left work for the day. Based on this, the prosecution argued,

Jones would not have known that Nathan was still in the room when Kaplan and Schub left for breakfast on the morning of September 3. (Tr. Tr. 1742.)

Even if this theory, which was pure conjecture by the prosecution's own admission, is correct, it is just as applicable to any other person who was not at the hotel when Nathan arrived on September 2, which would include hundreds of employees and guests. It does almost nothing to link Jones to the crime. Further, *anyone* who would have observed a couple leaving a hotel room and assumed that no one else was still behind in the room could also have been surprised by Nathan's presence in the room, regardless of whether that person had observed Kaplan and Schub checking in the day before.

- **Claim No. 8: marks on Nathan's body "fit" items Jones possessed**

The State also argued that various items that Jones possessed or had access to were "consistent with" or "fit" marks and bruises on Nathan's body. The prosecution mentioned that "one of the marks in the center of the chest is consistent with a shoe or a heel mark. And we know that one of the defendant's shoes . . . fits that particular heel mark." (Trial Tr. 1743.) But no evidence in the record supported that assertion. In fact, an FBI laboratory report that was sent to the Blue Ash Police Department stated that the marks on Nathan's body *could **not** be associated with Jones's shoes*. (FBI Lab Shoe Analysis (2/9/1995), Ex. Y.) The FBI report went on to state that the marks "could not be determined to be a footwear impression." (*Id*.) Thus, there was no evidence that Jones's shoe caused the impression, let alone that the mark was even caused by a shoe at all.

The State further argued, "there's some marks across the face that were consistent, both in their shape and in their size, to some chain marks." (Trial Tr. 1743.) A photo showing two metal door chains that were found in the trunk of Jones's car were offered as a State's exhibit at

the trial. (Photo – Door chains, Ex. Z.) The prosecution argued that these chains tied Jones to the crime. In reality, no one ever established that the chains found in Jones's car, or any chains, actually caused the marks on Nathan's face. In a videotaped deposition, State's witness Dr. William Oliver admitted, "the marks are simply ellipses. They are not necessarily a chain." (Trial Tr. Vol. XXV, Oliver Dep. at 37.) When asked if he knew the source of the marks on Nathan's face, Oliver responded, "No, I do not," and that he "can't tell . . . the source of the marks." (*Id.*)

The State also argued that a mark on Nathan's right shoulder was consistent with a radio or walkie talkie that Jones occasionally carried at work. In its closing argument, the State said that "the outline of [the radio], the size of [the radio], the shape of [the radio], and those rivet marks are consistent." (Trial Tr. 1744.) To reach this conclusion, the prosecution relied on an autopsy slide photo of the injury that went through a "rectification" process at an FBI laboratory in Washington, D.C. The reliability of that rectified photo is called into serious question, however, based on the fact that the photo was re-scaled with the express purpose of matching the radio to the mark on Nathan's shoulder.

F.B.I. Special Agent Stokes testified in a videotaped deposition that "you use the radio to calculate the size along with the scale that's in the photo." (Trial Tr. Vol. XXV, Stokes Dep. at 27-28.) Naturally, a rectified photo will be consistent with the item that was used to scale the adjustment – in this case, the radio. This was confirmed by Dr. Joan Lurie, an expert in the field of photogrammetry, in an affidavit filed during Jones's attempted second-in-time federal habeas proceedings.[9] (Dr. Joan Lurie Aff. (10/1/2013), Ex. AA.) As Dr. Lurie stated, Stokes "used

[9] As noted above, the federal courts dismissed Jones's attempts to bring this claim on procedural grounds, without reaching the merits.

circular logic to determine that the radio 'matched' the wound." (*Id.* at ¶ 16.) Dr. Lurie went on to explain:

> Agent Stokes assumed the wound in the image had been caused by a certain radio. Agent Stokes then used that same radio to rescale the image. ***Therefore he was not able to size the wound without assuming first that the radio caused the wound. In other words, he assumed the conclusion.*** This made his technique invalid to determine whether the wound matched the radio. Instead, he manipulated the photograph to force the wound to match the radio. Therefore the wound would certainly "match" that radio—his premise begged that conclusion. Had he used a different radio, or any other object, in the same manner to resize the wound image, the wound size would have matched that object.

(*Id.* at ¶ 17) (emphasis original). Dr. Lurie concluded that "Agent Stokes's determination that the radio 'matched' the marks on the victim's body is not scientifically valid." (*Id.* at ¶ 23.)

State's expert Dr. Oliver also examined the wound photo and testified at trial that he was not able to establish that the radio caused Nathan's injuries. (Trial Tr. Vol. XXV, Oliver Dep., at 38.) He acknowledged that any object of a shape similar to the radio could have caused the injury because "only the shape correspondences [*sic*]." (*Id*. at 39.) Oliver admitted that the cause of the impression "could be anything that includes rectangular bases or any housing with circular holes or fasteners, fittings, and et cetera," leaving a large "universe of discourse for possible objects." (*Id*. at 40.)

Beyond the fact that the radio was never conclusively matched to Nathan's injuries, the State also never established that Jones was carrying any radio on the day of the murder, much less the radio that was supposedly "matched" to the bruise in the rectification process. (*See, e.g.*, Trial Tr. 1074-76; 1172-73.)

The State's own witnesses called into question the reliability of the photo rectification process and made clear that there was no way to be certain that any object, including those

offered by the prosecution, caused Nathan's injuries. At best, this evidence was inconclusive; at worst, it was misleading junk science.

2. The State Also Offered "Scientific Testimony" That Was Neither Scientifically Accurate Nor Independently Verifiable.

In an attempt to more directly tie Jones to the murder of Nathan, the State argued that an injury to Jones's hand occurred when he struck Nathan in the face with his fist. To support this conclusion, the State presented testimony from Dr. John McDonough.

Dr. McDonough, a hand surgeon, had treated Jones for a badly infected hand wound several days after Nathan's death. Jones consistently stated that the hand injury had occurred when he tripped on metal stairs leading to the hotel's dumpster while taking out trash. (Ex. BB.) Jones also consistently stated that the injury had been exacerbated when he crushed his hand while dismantling a dance floor and putting the pieces onto a rolling cart. (*Id*.)

Despite Jones's consistent and reasonable explanation for his injury, Dr. McDonough reached his own conclusion that the wound was the result of contact with a human mouth. Dr. McDonough mentioned that Jones told him that he had injured his hand on the dumpster and that Jones had told a resident that he had injured his hand on the stairs. (Trial Tr. 981-983.) The State painted this as evidence of Jones lying about the cause of injuries, but Jones's explanation is consistent because the metal stairs he referenced were next to dumpster and were used to access it. Jones's trial counsel never pointed out this factual omission.

Dr. McDonough testified that he had discovered that the infection was caused by eikenella, a bacteria that, according to him, only lives in the human mouth and is a typical cause of "fight bite" infections to hands. (Trial Tr. 990-991.) But Dr. McDonough had never studied eikenella and is not an expert on bacteriology or pathology. Jones presented testimony from Dr. Solomkin, a bacteriologist, who stated that eikenella can live for several days outside of the

mouth. (Trial Tr. Vol. XXV, Solomkin Dep., at 11.) Based on this, Jones could have contracted the eikenella bacteria from many potential locations other than a human mouth.

Further, Nathan's mouth was never tested for the presence of eikenella. There is no way to establish that Nathan could have transmitted the bacteria without knowing if the bacteria was in her mouth in the first place. It *was* established, however, that Nathan was infected with Hepatitis B at the time she was killed. (Ex. CC at 12.) Hepatitis B is much more infectious than eikenella and, had Jones injured his hand by punching Nathan in the mouth as the State claimed, then the probability that she would have infected Jones with hepitatis B is "rather remarkably high." (*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.) Jones, however, tested negative for Hepatitis B in the aftermath of the Nathan murder, (*see* Excerpt from Testimony of Julius Sanks and associated exhibit, Transcript of Evidentiary Hearing, *Jones v. Bagley*, No. 1:01-cv-564 (Sept. 25, 2007), Ex. DD, at Hr'g Tr. 138-39, Bates Numbered page 000112), and to this day has never contracted the disease.[10]

3. The Pendant Discovered in Jones's Car Was Not Present in the Days after Nathan's Murder and Was Only Recovered After Police Left the Car Accessible in the Station for Several Days.

The State's alleged "smoking gun" was a pendant found in Jones's toolbox, which was located in the trunk of his car. The State told the jury that the pendant was "one-of-a-kind" and had belonged to Rhoda Nathan, thus linking Jones to the crime. (Trial Tr. 1747.) Photo evidence was presented of Nathan wearing a pendant necklace of similar appearance and a family member identified the pendant as having belonged to Nathan. (Trial Tr. 1036-1037.)

[10] As noted in § III.C, *infra*, Jones attempted to raise a claim related to his trial counsel's failure to rebut the State's theory with this hepatitis evidence, but was unable to obtain a review of that argument on the merits from the federal court because of procedural barriers.

There was some disagreement about where the pendant came from and how unique it actually was,[11] but regardless of any discrepancy about the origin and uniqueness of the pendant, the State argued that because the pendant was found in Jones's toolbox, he must have killed Nathan and stolen it from her. The prosecution likened the pendant to a fingerprint because of its allegedly unique nature, claiming that "it's as if Rhoda Nathan left her print with the defendant." (Trial Tr. 1748.)

The significance of the pendant is questionable, however. Detective Bray of the Blue Ash Police Department testified that he discovered the pendant in Jones's toolbox on September 14, 1994, ten days after Nathan was killed. (Trial Tr. 1209, 1219.) Bray's search of Jones's car took place more than thirty-six hours after police had seized the car. At the Blue Ash Police station, Jones's car was parked with the keys unsecured nearby between the time it was seized and the time it was searched. (Trial Tr. 1205-07.) This leaves open the possibility that the pendant was placed in the toolbox during this time period when Jones's car was left unattended.

Testimony from Jimmy Johnson, an acquaintance of Jones, lends credence to this theory. Johnson had tuned Jones's car on September 4 and used Jones's tools from the car's trunk for the work. (Trial Tr. 1582-1583.) Johnson testified that he "opened the tool box up and took all of the tools out of it." (Trial Tr. 1584.) When questioned about whether he carefully looked through the tray where the pendant was found, Johnson demonstrated to the jury how he extensively looked through the toolbox, inventorying its contents and moving every item around

[11] The State presented testimony that the pendant had been made from a diamond wedding ring that belonged to Nathan's mother-in-law. (Trial Tr. 1036.) On the other hand, Nathan's brother-in-law told investigators that it was not possible that the ring had been made from the diamond wedding ring because he retained possession of that ring. (Ex. EE at 2.) There was some indication that the pendant may have been mass-produced and purchased at a jewelry store in New York City. (*Id.* at 2-3)

within the tray. (Trial Tr. 1584-1586.) Defense counsel showed Johnson the pendant found in Jones's toolbox and he testified that he had not seen it when he looked through the tools. (Trial Tr. 1586.) Johnson further testified that he believed he would have seen the pendant if it had been in the toolbox. (Trial Tr. 1587.) After Johnson used the toolbox on September 4, Jones then spent much of the next week (September 6-10) in the hospital due to his hand injury, limiting the opportunities for him to have placed the pendant in his car before the police took him in for questioning and seized his car on September 12.

Another fact that calls into question the power of the pendant is that the Hamilton County Prosecutor's Office did not indict Jones for the murder for more than a year after police claimed to have found the pendant in his car. This is certainly a puzzling way for prosecutors to treat a brutal murderer if they trusted the reliability of the proverbial "smoking gun" in their possession. Doubt about the provenance of the pendant is consistent with the Blue Ash Police Chief's assessment months after the pendant was allegedly found that the case against Jones "doesn't look good," and his statement that "We're 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.)

When viewed alongside the facts that the car was left unattended and unsecured in the station for almost two days after it was seized, and that law enforcement did not act to arrest Jones for more than a year after its discovery, the pendant evidence appears far less damning. Moreover, Jones has always maintained that the pendant had to have been planted in his toolbox. Now, the information from Delores Suggs gives credence to that theory; Earl Reed confessed to killing Nathan and framing a black man for that murder.

C. The Blue Ash Police Department's Mishandling of the Nathan Murder Investigation Further Undermines Confidence in the Outcome of Jones's Trial.

The Blue Ash Police Department prematurely and incorrectly concluded that Elwood Jones killed Rhoda Nathan following a flawed and incomplete investigation. The police inexplicably focused on Jones without eliminating alternative suspects or following up on other viable leads. As a result, there are many unanswered questions about the events that occurred at the Embassy Suites Hotel in Blue Ash during the weekend when Nathan was killed. Viewed together, these loose ends undermine confidence in the outcome of Jones's trial and militate in favor of a new trial, especially when considered against the suppressed information about Earl Reed and his confession. *See, e.g.*, *Kyles*, 514 U.S. at 446-47.

First, several hotel guests reported that unknown and uninvited people attempted to enter their rooms during the weekend when Nathan was murdered. (*See* Ex. FF.) The information about these five incidents was sent to the Blue Ash Police Department in response to questionnaires mailed one month after Nathan's murder to all guests who were registered at the Embassy Suites on the morning of September 3, 1994. There is no indication in police records that any of these guests were contacted for further information about these incidents. These guest questionnaire responses were also not disclosed to Jones's trial counsel and only came to light when discovered during his habeas proceedings.[12] *Jones*, 2010 WL 654287, at *45.

[12] Jones raised this *Brady* claim in federal court, but it was rejected by the Sixth Circuit. *Jones v. Bagley*, 696 F.3d 475, 488 (6th Cir. 2012).

The description in four of these five incidents excludes Jones, either because he was not working at the time,[13] was accounted for elsewhere,[14] or did not match the description.[15] The fifth description does not provide enough detail to be probative.[16] These guest reports indicate that there was a pattern of what may have been attempted robberies at the hotel on the same day that Nathan was killed and that, for nearly all of these incidents, Jones could not have been involved. This undermines confidence in Jones's guilt and suggest that Nathan's death may have been connected to these uninvestigated incidents.

Second, guests at the Embassy Suites reported that a variety of other suspicious activity occurred at the hotel during the weekend when Rhoda Nathan was murdered. (*See, e.g.*, Questionnaire of Gerald Cantor, Ex. II.) These activities include giving out guest room numbers, unlocking the exterior doors, (Questionnaire of Stacey Shub, Ex. JJ), lack of security or verification of guest status, (Questionnaire of Linda Motashami, Ex. KK), doors propped open with makeshift items, and strange visitors seen fleeing the hotel, (BAPD Supplementary Report (9/26/94), Ex. LL).[17] The record does not indicate any further investigation into these reports.

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[13] *Compare* Jones Embassy Suites Timesheet (8/29/1994 – 9/11/1994), Ex. GG *with* Questionnaires (Gittelman; Cratin; Wellman; Huffaker; Paris), Ex. FF, at 1-3 (Jones clocked out of work prior to two men attempting to open Gittelman's door on Sept. 2; Jones had not yet started work when someone opened Cratin's door early in the morning of Sept. 3).

[14] *Compare* Mobley Interview (9/29/1995), Ex. P *with* Questionnaires (Gittelman; Cratin; Wellman; Huffaker; Paris), Ex. FF, at 5-6 (Jones was with two other employees when someone attempted to open Wellman's hotel room door).

[15] *See* Questionnaires (Gittelman; Cratin; Wellman; Huffaker; Paris), Ex. FF, at 7 (a white person stuck his hand inside Huffaker's room; Jones is African American).

[16] Police never asked Paris to provide more of a description of the person or specify the time when someone attempted to enter her hotel room, (*see* Questionnaires (Gittelman; Cratin; Wellman; Huffaker; Paris), Ex. FF, at 9), so it is not possible to know whether Jones was even at the hotel when that happened.

[17] It is noteworthy that guest Robyn William reported to police that the man she observed exiting the hotel rapidly via a propped-open door, during the window of time in which the victim was attacked, proceed south on foot across Lake Forrest Drive. (Ex. LL.) Earl Reed's house was south and east of the hotel, meaning this individual walked away from the hotel and in the

Moreover, the reports were never disclosed to Jones's trial counsel. *See Jones*, 2010 WL 654287, at *45. By ignoring these leads, police likely missed information that may have been favorable to Jones and which could have further undermined confidence in his guilt.

Third, two hotel workers observed strange men, unknown to them and decidedly *not* Jones, exiting Room 237 after the murder. There is no indication that police ever investigated this lead, or learned the identity of these men.

Demetrius Williams and Ryan Norman, complimentary breakfast employees at the Embassy Suites, reported that they saw a white man and a black man exiting Room 237. Williams wrote that he "seen [*sic*] a black guy and white guy come out of the room." (Williams Voluntary Statement (9/3/1994), Ex. MM.) Likewise, Norman reported that he "seen [*sic*] a dark skinned male wearing a brown shirt and some other man, but he was Caucasian." (Norman Voluntary Statement (9/3/1994), Ex. NN.) Handwritten notes from a police interview with Norman indicate that a "suspicious dark skinned guy with brown shirt and a white guy were coming of the room" and "separated when they came out." (Norman Interview Notes (9/3/1994), Ex. OO.) Norman further reported that the black male walked away to the right and was carrying a walkie talkie while the white man walked away to the left. (*Id.*) Norman believed that the black man worked at the hotel and provided a detailed description of both men. (*Id.*) Both Williams and Norman knew Elwood Jones as a co-worker at the hotel and neither man identified Jones as one of the men seen exiting Room 237. These records were, like the rest of the Blue Ash Police Department investigatory documents, not disclosed to Jones's trial counsel and only came to light when the case reached the federal courts.

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direction of the Reed home. (*See* Map showing distance from Reed home to Embassy Suites, Ex. E.)

Williams and Norman may have seen the real killer or killers. Dozens of people were in and out of Room 237 while life-saving efforts were underway and before police arrived to secure the scene. (*See* Elaine Shub Interview (9/3/1994), Ex. PP, at 11-12 (Nathan's friend observed, "somebody could have been in the room that . . . was the criminal . . . and he could have easily walked out and nobody knew who he was.").) No witness ever claimed that Jones was one of the people who entered Room 237. One of these dozens of people could have been the person who killed Nathan, stole money from Schub's purse, or both. Moreover, to the extent that the State believed that a walkie-talkie was a murder weapon, the failure to investigate the report of these men when one was observed carrying a walkie-talkie is devastating. Both of these uninvestigated leads undermine confidence in the outcome of Jones's trial.

Fourth, despite receiving reports and tips about potentially related incidents in the surrounding area, the police did not conduct any meaningful investigation and never ruled out any connection between suspicious events in the community and Nathan's murder.[18] Further, records of these incidents were never provided to Jones's trial counsel. This failure to investigate and eliminate possibly connected events also undermines confidence in the outcome of Jones's trial.

Finally, police were aware of at least three additional alternative suspects beyond Earl Reed. These alternative suspects were investigated to a limited extent, but police quickly began

[18] These included a lack of investigation in a similar crime that occurred in Covington, Kentucky, in 1982, with an accomplice still at large, (BAPD Supp. Report (9/12/1994 – 11:15 a.m.), Ex. QQ), no indication that police ever interviewed members of a drywall crew who were in the hotel and unaccounted for on the morning of the murder, (BAPD Supp. Report (9/9/1994) pp. 1/3, Ex. RR), failure to follow up on notice of a "strange hitchhiker" who was arrested in a nearby town and found with a woman's drivers license in his possession, (BAPD Supp. Report (9/8/1994), Ex. SS), and ignoring a tip from a nearby Holiday Inn about two men who were attempting to scam area hotels and businesses less than a week before the Nathan murder, (Holiday Inn Letter & 8/30/94 Security Report, Ex. TT).

to focus attention on Jones without completely investigating the other suspects. Due to these investigatory failures, it remains unknown what involvement, if any, these men might have had with Nathan's murder, but it is clear that there was reason for police to suspect their involvement.

Police knew Mike McDowell, a contract plumber, was present in the Embassy Suites hotel on the day Nathan was murdered, but failed to verify his alibi in spite of reports from hotel staff that McDowell remained in the hotel for hours after finishing his contracted work and that he was acting suspiciously. Art Armacost, the hotel's chief engineer, stated that McDowell left the hotel at 4:30 am after working with McDowell on a plumbing repair from 1-4:30 a.m. on the morning of September 3. (BAPD Supp. Report (9/8/1994 – 4:10 p.m.), Ex. UU.) An overnight housekeeping employee reported, however, that she was startled by the contract plumber she had seen with Armacost earlier that morning suspiciously "sneaking around the hall by the pool area of the hotel" between 6:00 and 6:30 am on the morning of September 3. (*Id.*) Armacost indicated that he "would be extremely surprised to find out the plumber was still at [the hotel] at [6 am]." (*Id.*) Moreover, police records note that McDowell had a criminal history of domestic violence and assault, among other charges. (*Id*.) Police eventually contacted McDowell, who stated that he had left the hotel at 4:30 a.m on September 3 and that his wife was at home when he arrived back at 4:55 a.m. that morning, (McDowell Interview Notes (9-8-1994), Ex. VV), but investigators never interviewed McDowell's wife to confirm his version of events or otherwise conducted any further investigation into McDowell.

Multiple eyewitnesses also placed Anthony Lackey, an Embassy Suites overnight employee, at the hotel on the morning of September 3 despite the fact that Lackey had called in absent for that work shift. (*See* BAPD Supp. Report (9/5/1994), Ex. H, at 1-2.) Another hotel

employee saw Lackey in the hotel kitchen wearing his work uniform at 7:50 am on the morning of the murder, (Ball Interview Notes, Ex. WW), and the employee van driver had picked up Lackey at the hotel on September 3 at around 8:50 a.m. despite the fact that Lackey was not supposed to be working that day, (BAPD Supp. Report (9/6/1994 – 7:40a.m.), Ex. XX). These reports place Lackey at the hotel during the time when Nathan was murdered, even though he had officially called off of work that day. Lackey's behavior after the murder was also suspicious, (*see* BAPD Supp. Report (9/5/1994), Ex. H, at 2; BAPD Supp. Report (9/6/1994 – 7:00 a.m.), Ex. YY), and police were aware of Lackey's extensive criminal record, including felony convictions for aggravated robbery, tampering with records, theft, carrying a concealed weapon, and disorderly conduct, (Embassy Suites Employee Profile/Interview Spreadsheet, Ex. ZZ).

Police did pursue Lackey as a suspect to a limited extent, subjecting him to a voluntary polygraph examination several days after the murder in which he denied involvement. (Lackey Polygraph (9/8/1994), Ex. AAA.) The examiner indicated that Lackey's answers were truthful. (*Id.*) Lackey's girlfriend, Mary Dodds, also provided a partial alibi for the morning of September 3, reporting that she had had sex with Lackey at around 5 am on the morning of the murder. (Dodds Interview Notes, Ex. BBB at 2.) Nathan was murdered between 7:30 and 8 am, however, so this is not inconsistent with the two separate reports of him being at the hotel later that morning, both before and after Nathan's murder. Blue Ash Sergeant Robert Lilley testified at Jones's trial that Lackey's name had been cleared by the investigation, (Trial Tr. 1361-62), but nothing in the record supports this testimony. Police never definitively established where

Lackey was when Nathan was killed or answered why several hotel employees saw him at the Embassy Suites when he was, by all reports, not supposed to be there.[19]

These investigatory failures seriously undermine confidence in the outcome of Jones's trial and suggest that the real killer of Rhoda Nathan may never have been apprehended.

Accordingly, even if the suppressed report of Earl Reed's confession alone were not enough to convince this Court to grant Jones a new trial, the cumulative effect of favorable evidence here demands relief. *See State v. Larkins*, 8th Dist. Cuyahoga No. 82325, 2003-Ohio-5928, 2003 WL 22510579, ¶ 33 (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") (citing *Kyles*, 514 U.S. at 434 (reviewing courts should consider the cumulative effect of all nondisclosures in determining whether reversal is required))).[20]

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[19] A third alternative suspect, Greg Henry, is discussed *supra* in § IV.B.1, Claim No. 6.

[20] During prior proceedings, Jones raised four additional *Brady* violations: (1) police reports reflecting criminal acts and suspicious employees at the Embassy Suites; (2) inconsistent descriptions of Nathan's pendant; (3) contemporary complaints from Embassy Suites guests about intruders in the hotel; and (4) witness statements that contradicted trial testimony. *See Jones v. Bagley*, 696 F.3d 475, 486 (6th Cir. 2010). While this suppressed evidence was not enough to persuade the Sixth Circuit that habeas relief was appropriate, this Court's analysis may consider it in addition to the Earl Reed evidence, which was not before the federal court.

For example, while the Sixth Circuit disagreed with the premise that the crime reports would have helped Jones innocence case, the court did not have the benefit of Earl Reed's confession. In particular, Jones argued during prior litigation, in part, that the prior reports show several thefts occurred at the hotel after Jones was no longer employed there, including an incident in which someone tried to enter a guest's room with a key. Thus this evidence coupled with the Earl Reed confession directly provides support for the theory that someone other than Jones was responsible for Nathan's murder.

The Sixth Circuit acknowledged the evidence against Jones was strong, but "not overwhelming." *Id.* at 489. All of the facts that support Jones's conviction have equally plausible explanations. Now, with the Reed confession, when this Court considers the cumulative effect of Jones's *Brady* claims, the effect of all the evidence combined would have created a reasonable probability of a different result when considering the otherwise strong circumstantial evidence of his guilt. *See Kyles*, 514 U.S. at 436–37.

D. Jones is also Entitled to a New Trial on the Basis of Newly Discovered Evidence.

As demonstrated by the forgoing, this Court should grant Jones a new trial in light of the *Brady* violation. In addition, or as an alternative, Jones is also entitled to the same relief on the basis of newly discovered evidence under Ohio Criminal Rule 33.

The newly discovered evidence about Earl Reed entitles Jones to a new, fair trial. 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). In Ohio, Criminal Rule 33(A) provides, "A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights: . . . . When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Crim.R. 33(A)(6).

To obtain a new trial on these grounds, Jones must prove 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. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

As a preliminary matter, the Earl Reed evidence undoubtedly was discovered since Jones's trial (element 2) and, by supporting another person's guilt for the crimes for which Jones was convicted, does not merely impeach or contradict former evidence (element 6). Unlike a

Brady claim, a newly-discovered-evidence claim does not require the defendant to prove suppression by the State. There is much overlap, however, among other elements of each type of claim.

Jones's arguments above demonstrate that he could not have discovered the evidence before his trial in the exercise of due diligence, since he did not know Linda Reed, Earl Reed, or Delores Suggs, and since the State failed to disclose what Delores Suggs reported about Earl's confession (element 3), and that the evidence is material to the issues, since it exonerates Jones and implicates another suspect in the crimes (element 4). The first element, that the evidence discloses a strong probability that it will change the result if a new trial is granted, is more rigorous than the showing required under *Brady* (that the evidence undermines confidence in the jury's guilty verdict.) *See, e.g.*, *State v. Hill*, 1st Dist. Hamilton No. C-180114, 2019-Ohio-365, ¶ 79. Nevertheless, Jones meets even that standard. If this Court grants a new trial, a strong probability exists that Jones would not be sentenced to death nor convicted of these crimes. In addition to the fact that the State would not be able to offer any direct or forensic evidence tying Jones to the crimes, the persuasiveness of its case would be severely undercut by the State's complete failure to investigate Earl Reed's confession.

E. Jones is also Entitled to Relief on the Basis of Actual Innocence.

Finally, in addition to supporting Jones's request for a new trial on the basis of a *Brady* violation and newly-discovered-evidence grounds, the evidence now demonstrates that Jones is actually innocent of the crime for which he was convicted and sentence to death, and, as such, his conviction and sentence are in violation of his constitutional rights. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming for the sake of argument "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional"); *see also id*. at 419 (O'Connor, J., joined by Kennedy, J.,

concurring) (recognizing that "the execution of a legally and factually innocent person would be a constitutionally intolerable event"); *id*. at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *id*. at 430 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting) ("Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." (internal citation omitted); *Schlup v. Delo*, 513 U.S. 298, 316 (1995) (describing a "substantive *Herrera* claim").[21]

No evidence directly connects Jones with the crime in this case. All legitimate forensic analysis has failed to implicate him, and Jones has shown why the so-called scientific evidence offered at his trial was in reality unscientific and illegitimate. On top of all these gaps in the evidence, Jones has now discovered evidence that another person confessed to the murder and that the State failed to disclose that information to him. This truly persuasive showing of actual innocence renders his conviction and death sentence constitutionally intolerable, and this Court should vacate both of them.

V. Conclusion

Elwood Jones was convicted and sentenced to death based on an incomplete police investigation and flawed circumstantial evidence. This was a close case. Had the jury known that a suspect who confessed to the crime was never investigated, it is likely that the outcome of

[21] Although this Court is constrained by Ohio precedent not recognizing actual innocence as a substantive ground for postconviction 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).

Jones's trial would have been different. The scale would have tipped toward reasonable doubt. For the foregoing reasons, Defendant Elwood Jones respectfully requests an order granting him a new trial and other appropriate relief, including leave to conduct discovery, authority to obtain subpoenas for further investigation supporting his claims, and a hearing in which to prove the merits of his *Brady*, newly-discovered-evidence, and actual-innocence claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ELWOOD JONES'S PROPOSED MOTION FOR A NEW TRIAL was served upon Hamilton County Prosecutor Joseph Deters, Hamilton County Prosecutor's Office, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 25 day of February, 2019.

Ravert J. Clark