COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	**CASE NO. B95-08578**
	:	
Plaintiff,	:	**Judge Wende Cross**
	:	
v.	:	**DECISION AND ENTRY GRANTING DELAYED MOTION FOR NEW TRIAL; NOTICE OF HEARING**

ELWOOD H. JONES, JR.

Defendant.

D136940352

This matter comes before the Court on the Defendant's Delayed Motion for New Trial pursuant to Ohio Rule of Criminal Procedure 33, filed on February 25, 2019. Upon consideration of the motion, responsive memoranda, evidence presented at the hearing held on August 24, 25 & 26, 2022, and arguments of the parties, the Court finds said motion well taken and a new trial is hereby **GRANTED** for reasons stated herein.

I. FACTUAL BACKGROUND

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. *State v. Jones*, 90 Ohio St. 3d 403 (2000). On the morning of September 3rd, Rhoda Nathan, Ms. Schub and Mr. Kaplan woke and prepared to eat breakfast in the hotel's first floor restaurant. Schub and Kaplan left the room at approximately 7:30 a.m. while Ms. Nathan stayed in the room 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. Initially, Nathan was thought to have suffered a heart attack and injured herself in a fall. However, after determining that she had suffered multiple traumatic injuries and blunt force impact to her head and torso, the Hamilton County Coroner's office classified the death as a homicide. *Id.* at 404.

An investigation ensued by the Blue Ash Police Department (hereinafter "BAPD"). A detective testified that he found a pendant resembling the victim's in a search of a toolbox in the trunk of Elwood Jones's car on September 14, 1994. (Trial Tr. 1219) On September 27, 1995, more than one year later, police arrested Elwood Jones for Rhoda Nathan's murder. Jones was subsequently tried, convicted, and sentenced to death in 1997 based on the investigation of the Blue Ash Police Department and evidence presented at trial by the State of Ohio.

For approximately 27 years, Jones has consistently maintained his innocence and claimed that his November 1996 trial was fundamentally flawed.

I. TRIAL PROCEEDINGS

Following a jury trial in November 1996, Jones was convicted of Aggravated Murder and Aggravated Burglary. The identity of the perpetrator of Rhoda Nathan's murder was the central issue at trial. The State's theory of the case was that (1) Elwood Jones murdered Ms. Nathan and gashed his hand during the bloody beating of her in room 237 of the Embassy Suites hotel; (2) the bacterial infection Jones had in his hand in September 1994 could *only* have been caused by a

clenched-fist injury; (3) Elwood Jones, who was an employee at the hotel at the time, had to have had a master key[1] to the Embassy Suites hotel to access Ms. Nathan's room; and (4) Ms. Nathan's pendant, which was unique and made from a family heirloom, was found in Jones's car.

II. PROCEDURAL HISTORY

Elwood Jones has unsuccessfully challenged his conviction on direct appeal, in a timely petition for postconviction relief, and other postconviction filings. He was convicted in 1996 and sentenced to death in 1997.[2] He appealed and the First Appellate District Court and Ohio Supreme Court both affirmed Jones's convictions and his death sentence on direct review.[3] The Ohio Supreme Court also affirmed the Court of Appeals' denial of Jones's motion to reopen his direct appeal.[4]

In 2000, the First Appellate District affirmed this Court's denial of Jones's petition for post-conviction relief.[5] The Ohio Supreme Court declined to exercise jurisdiction over his post-conviction appeal.[6]

Jones instituted a federal habeas corpus proceeding in 2001.[7] His petition was denied and the Sixth Circuit Court of Appeals affirmed the denial in 2010.[8]

On November 18, 2010, Jones filed a postconviction application for DNA testing with this Court. The motion was granted by entry on February 17, 2012. The results from these initial DNA tests did not implicate Jones or an alternative suspect because it was determined that the DNA

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[1] In 1994, a "master key" was a metal key that would have opened all of the guest rooms on a floor in the hotel. (Tr., Vol 2, 109:16-18, 115:1-5)
[2] *State v. Jones*, Hamilton C.P. No B 958578 (Jan. 9, 1997).
[3] *State v. Jones*, 1st Dist. Hamilton App. No. C-97-0043, 1998 WL 542713 (Aug. 28, 1998); *State v. Jones*, 90 Ohio St.3d 403 (2000).
[4] *State v. Jones*, 91 Ohio St.3d 376 (1999).
[5] *State v. Jones*, 1st District Hamilton App. No. C-990813, 2000 WL 1886307 (Dec. 29, 2000).
[6] *State v. Jones*, 91 Ohio St.3d 1510 (2001) (Table).
[7] This resulted in the disclosure of a sizeable amount of undisclosed investigatory documents and evidence outside the trial-court record.
[8] *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)

profile on the pendant belonging to Rhoda Nathan was insufficient for comparison purposes. On April 8, 2014, the Court ordered supplemental DNA testing. Results of the testing was inconclusive due to an insufficient amount of DNA.

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.[9] On December 29, 2020, Governor Dewine issued a warrant of reprieve resetting Jones's execution date to December 6, 2023.[10]

On February 25, 2019, Elwood Jones filed a Motion for Leave to File a Delayed Motion For New Trial. After considering the motion, memoranda and oral arguments by the parties, this Court granted a hearing on the motion for a new trial. [11] An evidentiary hearing was conducted by this Court on August 24, 25 & 26, 2022.

The merits of Jones's new-trial claim are now before this Court.

III. LEGAL STANDARD

Elwood Jones has moved for a new trial based on newly discovered evidence and prosecutorial misconduct, pursuant to Crim. R. 33 and *Brady v. Maryland*, 373 U.S. 83 (1963).

A. OHIO CRIMINAL RULE 33

Rule 33(A) of the Ohio Rules of Criminal Procedure provides several grounds under which a trial court may grant a defendant a new trial. Relevant here, Crim. R. 33 (A)(6) permits a trial court to grant a new trial when "new evidence material to the defense is discovered, which the

[9] Warrant of Reprieve, Sept. 13, 2017.
[10] Warrant of Reprieve, Dec. 29, 2020.
[11] An Entry granting an evidentiary hearing was issued on November 19, 2019. On October 19, 2021, Defendant filed a Motion to Set Hearing. An evidentiary hearing was scheduled on March 2, 2022. The State's unopposed Motion for a Continuance was granted, and the matter rescheduled for hearing on August 3, 2022. The Defendant filed a Motion to Vacate Hearing Date and Select a New Date due to counsel's scheduling conflict. By Entry dated March 11, 2022, the evidentiary hearing was rescheduled to August 24-26, 2022.

defendant could not with reasonable diligence have discovered and produced at the trial." However, where the newly discovered evidence was suppressed by the State, such evidence is properly analyzed under *Brady;*[12] otherwise, it is governed solely by Crim. R. 33(A)(6).[13] *See State v. Webb*, 2014-Ohio-2894, at ¶ 43 (12th Dist. 2014). Where, as here, the motion for new trial raises both of these grounds, the *Brady* analysis is controlling. *State v. Jalowiec*, 2015-Ohio-5042, at ¶ 32 (9th Dist. 2015) ("Because the standard for materiality under *Brady* and its progeny is lower than that required by Crim.R. 33(A)(6) and *Petro*, that analysis is dispositive."). Thus, this Court's analysis must begin with the *Brady* analysis.

B. THE *BRADY* PRINCIPLE

The *Brady* principle is a rule of fairness. In 1963, the United State Supreme Court ruled that suppression of evidence favorable to the accused by the prosecution violates constitutional 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 v. Maryland*, 373 U.S. 83 (1963). The motivating force behind the Supreme Court's decision in *Brady* was the belief that "society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87. *Brady's* progeny has broadened the duty of the prosecutor by establishing that a prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419 (1995). The *Brady* rule applies equally to impeachment evidence, which, if disclosed by the State and used properly by the defense, may make the difference between

[12] supra.

[13] To determine whether newly-presented evidence warrants a new trial, Ohio courts analyze the evidence using a six-factor approach. See *State v. Petro*, 148 Ohio St. 505, 706 N.Ed.2d 370 (1947); see also *State v. Prade*, 2018-Ohio-3551.

conviction and acquittal. *State v. Henderson*, 2000 WL 731472 (1st Dist); *United States v. Bagley*, 473 U.S. 667, 676 (1985).

A *Brady* claim requires the defendant to show three elements: "(1) that the prosecution withheld evidence, (2) that the defense was not aware of the evidence, and (3) that the evidence withheld was material." *State v. Holloman*, 2006-Ohio-6789, at ¶ 12 (10th Dist. 2006) (citing *State v. Johnston*, 39 Ohio St.3d 48, at paragraph four of the syllabus (1988)). The first two elements essentially establish suppression by the state, which "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. The final element, materiality, does not require that the suppressed evidence would have resulted in acquittal; rather, the "touchstone of materiality" is a "reasonable probability" of a different result. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). A "reasonable probability" of a different result is shown "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

1. **The Prosecution Withheld Evidence**[14]

During the evidentiary hearing, it was established that nearly 4,000 pages of evidence – including police investigative notes, witness statements and 400 pages of hotel guests' questionnaire responses – was withheld from Jones's defense team prior to trial. While the State did produce some discovery (over 260 pages) and access to physical items, the undisclosed documents were replete with impeaching and exculpatory evidence.

Based on Jones's post-conviction efforts, the Defense now has from the investigative files of the BAPD, evidence the defendant was not aware of before trial, including: (1) statements from

[14] The defense team showed, in a concise and easy to understand manner, what evidence was withheld and why that piece of evidence was crucial to Jones's case a trial.

several hotel guests who witnessed several security breaches at the hotel on the day of or near the time of the murder, one including Rhoda Nathan; (2) a statement from Robyn Williams (Budd), a hotel guest, who witnessed on the morning of the murder a white male "late 20's, thin build, medium length brown hair, 6-feet tall, wearing dark clothing, walking rapidly" out the hotel door,[15] propped open by a yellow cup, "and running through the parking lot, and sprinting into the woods";[16] (3) a number of documents pertaining to another potential suspect who worked at the Blue Ash Embassy Suites and was present on the morning of the murder; (4) investigative statements from two hotel employees[17] – Demetrius Williams and Ryan Norman – who separately informed the Blue Ash Police Department that they saw a white and black man leaving Ms. Nathan's room the morning of the murder; with the white guy running out of the room and the two men separating in different directions when they came out;[18] (5) witness statements by several hotel employees[19] concerning a number of "master keys" to the hotel that were in circulation and unaccounted for that the Blue Ash Police Department did not investigate; (6) inconsistent information by the Blue Ash Police Department regarding which specific officer recovered the pendant - a crucial piece of evidence in the State's case - found in Jones's car;[20] and (7) evidence that the BAPD traveled to New York to meet with Ms. Nathan's family about Ms. Nathan's pendant and learned that it was *not* unique or made from a family heirloom.[21]

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[15] Hearing Tr., Vol. 1, 174:19-25-175:1-2.

[16] Hearing Tr., Vol. 1, 161:6-18, 162:2-8.

[17] Both employees knew Elwood Jones and did not identify him as either individual seen leaving Ms. Nathan's hotel room.

[18] Hearing Tr., Vol 2, 121:1-24.

[19] At the hearing on August 25, 2022, defense expert, retired police officer Beth Ann Mohr, testified that she identified a number of witness statements given to BAPD that were ignored by them and withheld from Mr. Jones prior to trial, including statements by Art Armacost (in charge of hotel keys), Terri Lutz (kitchen employee who told BAPD that a number of kitchen staff had master keys), and Virgil Rhodes (security officer of the hotel).

[20] BAPD Officer Michael Bray testified at trial that he found the pendant alone. (Trial Tr., Vol XV, pp. 1217-1219). However, there was no record or documentation of such recovery in the BAPD files. There was a report indicating that Sargent Jim Schaffer had recovered the item from Jones's car. (Hearing Tr., Vol. 2, 170:1-9; Def. Hearing Ex. 43)

[21] The State represented to the jury at trial that the Nathan pendent was unique and made from a family heirloom, despite investigative information to the contrary. (Trial Tr. Vol XII at 820: 18-25, 828:10-13; Vol. XIX, 1747:6, 1748:17-24). This information was not disclosed to Jones or his defense team prior to trial.

Additionally, evidence at the hearing established that there were several documents pertaining to Hepatitis B tests that the State conducted which revealed that Ms. Nathan tested positive for Hepatitis B, but Elwood Jones's blood did *not and never has*. In fact, evidence of Ms. Nathan's Hepatitis B status was known to the State but not disclosed to Jones or his defense team prior to trial. Even more significant was the fact that the State tested Jones's blood for Hepatitis B on September 15, 1994, and the results were negative. The State's decision to test Jones's blood and the results were also not disclosed to the defense prior to trial.

2. The Defense Was Not Aware of Material Evidence

It is undisputed from the evidence presented at the hearing on the instant motion that the State did not disclose and the defense was unaware prior to trial of nearly 4,000 pages of investigative materials. It is also undisputed that the defense was not aware of the Hepatitis B test results. In fact, the State does not contest that it possessed all of this evidence prior to trial.

In determining materiality, materiality is defined in terms of "suppressed evidence considered collectively, not item by item." *See State v. Henderson*, 2000 WL 731472 (1st Dist.) quoting *Kyles v. Whitley*, 514 U.S. 419, 434-437.

a. The Hepatitis B Evidence Was Material and Withheld

The full import of the undisclosed evidence of the State's decision to test Jones's blood for Hepatitis B and the negative results that followed was fully explained by the testimony of Dr. Steven Burdette. Dr. Burdette, a professor of medicine and chief of infectious diseases at the Wright State University Boonshoft School of Medicine, testified as the defense expert in infectious diseases.[22] Dr. Burdette testified that Hepatitis B is a "highly contagious virus."[23] In fact, he explained that "Hepatitis B is more contagious than Hepatitis C," and "significantly more

[22] Hearing Tr. Vol. 2, 4:20-22: Vol. 3, 6:1-8.
[23] Hearing Tr., Vol. 2, 22:21-24.

contagious than HIV," and that even though when "it comes to blood-borne pathogens, people worry about HIV because of the stigma that comes along with it ... Hepatitis B is dramatically more contagious if somebody gets exposed to the blood."[24]

Dr. Burdette noted that studies done on a "needle-stick" blood exposure—exposures based on tiny pricks with needles that have only microscopic, trace amounts of blood—establish that there is a 33% chance of infection of Hepatitis B in those instances.[25] He went on to explain, though, that "[t]he more blood that you're exposed to, the more virus your body can be exposed to, therefore, the more likely your risk for infection would increase."[26] In addition, Dr. Burdette explained that if a person has an open wound, they lack the protection that skin generally provides from infection and the risk of infection with an open wound is higher.[27] In sum, "the risk of contracting Hepatitis B is ***at least*** 33 percent, but ... it goes up as the volume of blood in the area of exposure, and the vulnerability in [an] area increases." (Hearing Tr., Vol. 2, 27:14-19 (emphasis added)). And unlike some viruses, Hepatitis B does ***not*** require an extensive amount of blood exposure to cause infection.[28]

Dr. Burdette further explained that he had reviewed the records about the crime scene and about Elwood Jones's hand injury, and testified that it was a "bloody scene with a laceration on [Mr. Jones's] hand."[29] Based on that, Dr. Burdette testified that it was his expert opinion that Jones would have Hepatitis B if what the State says took place in fact occurred. (Hearing Tr., Vol. 2, 32:1-7 ("With my review of the case in terms of the photographs and the description of the crime

[24] Hearing Tr., Vol. 2, 23:6-14.
[25] Hearing Tr., Vol. 2, 24:1-13.
[26] Hearing Tr., Vol. 2, 25.
[27] Hearing Tr., Vol. 2, 26.
[28] Hearing Tr., Vol. 2, 33-35.
[29] Hearing Tr., Vol. 2, 27:23-25-28:1-5.

scene with the amount of blood, and seeing the size of the lacerations over the knuckle, I would have expected Mr. Jones to acquire Hepatitis B… if he was involved with that crime.")).

Of course, as Dr. Burdette went on to explain, Elwood Jones does not have Hepatitis B. In addition to the September 15, 1994 negative Hepatitis B test[30] that the State conducted and withheld from Jones, Dr. Burdette reviewed a more comprehensive May 26, 2022 test confirming that Mr. Jones does not have active Hepatitis B, was never immunized for Hepatitis B, and never had a prior Hepatitis B infection.[31] In other words, the Hepatitis B tests that the State withheld were important medical information that directly undermined the State's theory. Moreover, Dr. Burdette testified that the disparity in Ms. Nathan's blood test results and Jones's blood test results is so significant that the State's theory is scientifically implausible.

b. The Alternate Suspect Evidence Was Material and Withheld.

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 team knew at the time about another man's possible involvement in the murder. At the hearing on the instant motion, the Defense persuasively argued that it was unaware of and the State failed to disclose evidence pertaining to a witness's communication with the BAPD before trial regarding a reported confession to the commission of the murder by someone other than Elwood Jones. The State argued that it was also unaware of this evidence prior to trial because there is no *record* of this communication in the BAPD's files.

Specifically, Ms. Delores Suggs testified that she was incarcerated in the Hamilton County Justice Center on November 6, 1995.[32] While there, another inmate, Linda Reed, told Ms. Suggs

[30] Def. Hearing Ex. 6

[31] Hearing Tr., Vol. 2, 29-31; Def. Hearing Ex. 71. It is worth noting that the State did not cross-examine Dr. Burdette on these opinions or rebut them in any way at the hearing. (*See, e.g.,* Hearing Tr., Vol. 2, 33-35).

[32] Hearing Tr., Vol. 1, 73:6-19; *see also* Def. Hearing Ex. 69.

that her husband (Earl Reed)[33] had confessed to committing the murder at the Embassy Suites in Blue Ash, Ohio and to framing a black man for his crime.[34] Ms. Suggs testified that Ms. Reed explained that she did not tell the BAPD about her husband because he was friends with BAPD officers and they drank coffee together.[35]

Ms. Suggs was released from the Hamilton County Justice Center on November 17, 1995. (Def. Hearing Ex. 69). She testified that around two weeks after she was released, she called 911 and was directed to the Blue Ash Police Department.[36] Ms. Suggs testified she then "called the [BAPD] and … let them know what [Linda Reed] had told [her] about her husband." (Hearing Tr., Vol. 1, 77:20-24). The BAPD, however, was not interested in what Ms. Suggs had to say. The person Ms. Suggs spoke with at the BAPD told her that "it was a closed case" because they had "found something … in [a man's] possession."[37]

Ms. Suggs's daughter, Tierra Suggs, also testified at the hearing. According to her, in 2016, her mom "frantic[ally]" woke her up in the middle of the night and said "I was watching TV, and I remember being in jail with this lady telling me about this case, this murder that happened and they framed this black man."[38] Tierra Suggs testified that she Googled the murder at the Blue Ash hotel and Elwood Jones's name popped up.[39] Thus, despite the early hour, Tierra Suggs sent Mr. Jones a message through JPay on February 12, 2016, at 1:58:10 AM EST informing him of Earl Reed's apparent confession, which the BAPD ignored and the State suppressed.

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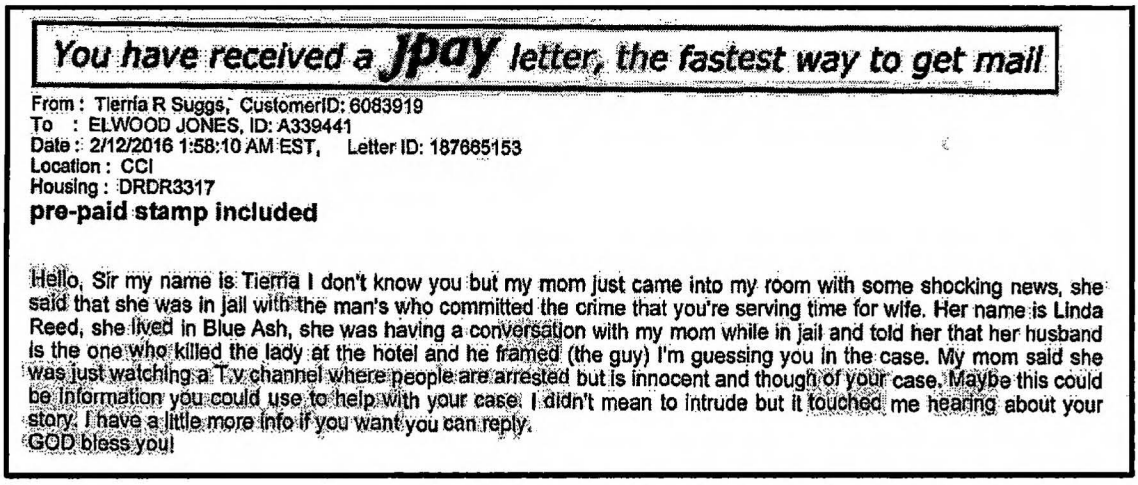
[33] Delores Suggs is African American. Linda and Earl Reed are Caucasian.
[34] Hearing Tr., Vol. 1, 75:14-18, 79:7-16; *see also* January 25, 2019 Affidavit of Dolores Suggs ("Suggs Aff."), ¶ 4).
[35] Hearing Tr., Vol. 1, 88:13-16; Suggs Aff. ¶ 5.
[36] *See* Hearing Tr., Vol. 1, 80:10; Suggs Aff. ¶¶ 12-13.
[37] Hearing Tr., Vol. 1, 80:12-22; Suggs Aff. ¶ 13 ("The [BAPD] was not interested in what I had to say. [The BAPD] told me that they had found stuff in a man's possession and that it was a closed case.").
[38] Hearing Tr., Vol. 1, 149:2-14.
[39] Hearing Tr., Vol. 1, 151:15-23.



You have received a jpay letter, the fastest way to get mail

From : Tierria R Suggs, CustomerID: 6083919
To : ELWOOD JONES, ID: A339441
Date : 2/12/2016 1:58:10 AM EST, Letter ID: 187665153
Location : CCI
Housing : DRDR3317
pre-paid stamp included

Hello, Sir my name is Tierria I don't know you but my mom just came into my room with some shocking news, she said that she was in jail with the man's who committed the crime that you're serving time for wife. Her name is Linda Reed, she lived in Blue Ash, she was having a conversation with my mom while in jail and told her that her husband is the one who killed the lady at the hotel and he framed (the guy) I'm guessing you in the case. My mom said she was just watching a T.v channel where people are arrested but is innocent and though of your case. Maybe this could be information you could use to help with your case. I didn't mean to intrude but it touched me hearing about your story. I have a little more info if you want you can reply.
GOD bless you!

(Def. Hearing Ex. 60).

Although the State contends that it has no record of Ms. Suggs's 1995 telephone call, Ms. Beth Ann Mohr[40] testified that in light of the BAPD's failure to generate a call log for this case, the lack of a report memorializing the call is in no way indicative of the call not being made.[41] Ms. Mohr noted references in the BAPD file to a radio broadcast and a press release offering a $10,000 reward for helpful information in the case.[42] Based on Ms. Mohr's years of experience, a reward of that size made known to the public would have garnered "a lot of attention and a lot of calls."[43] The BAPD should have had a "log where each call was documented, the date and time it came in, who took the call, and who spoke with the person, what they said just generally", yet Ms. Mohr did not find any evidence of any such call log.[44]

Likewise, the lack of documentation regarding a call about Earl Reed does not mean a call was not placed; after all, the evidence established that there was a myriad of leads and suspects that the BAPD failed to document or follow up on. Thus, based on the credibility of the witnesses

[40] Ms. Mohr, called by the Defense at the evidentiary hearing, is a nationally known expert in police investigations, with extensive training and experience as a police officer and investigator. She is a certified law enforcement instructor and trains police officers and investigators. Hearing Tr., Vol. 2, 74-80.
[41] Hearing Tr., Vol. 2, 93:10-23.
[42] Hearing Tr., Vol. 2, 91; *see also* Def. Hearing Ex. 10 (BAPD September 9, 1994 Press Release of $10,000 Reward).
[43] Hearing Tr., Vol. 2, 91:8-13.
[44] Hearing Tr., Vol. 2, 91:15-25-92:1-4.

and evidence presented, this Court concludes that information of Delores Suggs's 1995 call to BAPD was known to BAPD, even if not known to the prosecutors. Nevertheless, the result is the same. See *Youngblood v. West Virginia*, 547 U.S. 867 (2006) quoting *Kyles*, 514 U.S. at 438 ("*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'")

Moreover, additional evidence of an alternate suspect supporting the evidence of Earl Reed's confession include: (1) evidence of security breaches at the hotel; (2) evidence of a potential white male suspect seen fleeing from the hotel by Robyn Williams (Budd); and (3) evidence of potential white and black male suspects seen running out of Ms. Nathan's hotel room on the morning of the murder. Recognizing that Jones's defense counsel could have constructed an alternative narrative of the crime based on this undisclosed reported confession, this evidence is clearly material. *Kyles*, 514 U.S. at 434 ("[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.") Accordingly, the suppression of this impeaching and/or exculpatory evidence significantly undermines confidence in the outcome of Jones's murder trial.

c. The Evidence of the Pendant Not Being Unique was Material & Withheld.

A crucial piece of evidence to the State's case at trial was a pendant allegedly belonging to Ms. Nathan that the BAPD found in Jones's car. At trial, the State represented to the jury that the pendant was unique and that her husband had it "custom made for her".[45] In fact, the State told the jury that "[i]t's as if Rhoda Nathan left her print with the defendant." *Id.* at 1748:17-24.

[45] Trial Tr., Vol Xiii at 820:18-25, 828:10-13 (State's Opening Statement); Trial T., Vol. XIX, 1747: (State's Closing Argument)

However, the State failed to disclose that prior to trial members of the BAPD flew to New York to meet with Ms. Nathan's family about the pendant. Notes in the investigative files of the BAPD, that was not disclosed to the Defense, establish that officers spoke with Ms. Nathan's family members who informed the police that the pendant was *not* a custom-made piece, and that the engagement ring that the family originally thought the pendant was made from was in the possession of Ira Nathan.[46] Ira Nathan told police that he thought the pendant had simply been bought from a jewelry store in the Bronx. *Id.*

Ms. Mohr did not see any evidence in the investigative file that the BAPD gave any credence to the family's claim that the pendant was not custom made. Nevertheless, the Court finds this evidence is material, and suppression of it undermines the confidence in the outcome of Jones's trial.

C. NEW EVIDENCE WARRANTING NEW TRIAL UNDER *STATE v. PETRO*

As noted above, to warrant granting a motion for new trial based upon newly discovered evidence, a defendant must satisfy the requirements set forth by the Supreme Court of Ohio in *State v. Petro*, 145 Ohio St. 505, 706 N.Ed.2d 370 (1947), by demonstrating that the new 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.

See also *State v. Prade*, 2018-Ohio-3551.

Jones's aggravated murder conviction by jury hinged on the science involving Eikenella infections. Dr. John McDonough, one of the State's witnesses at Jones's trial, was the treating

[46] Hearing Tr., Vol. 2, 174.

physician who took care of Elwood Jones's hand infection in September 1994.[47] Dr. McDonough's opinion at trial was that Jones's hand infection "was caused by a clenched-fist injury because of the presence of Eikenella corrodens."[48] During his testimony, Dr. McDonough testified that Eikenella corrodens is an extremely rare mouth organism, that he had only seen three other Eikenella infections in his career, that it is very rarely in saliva, and that it is almost always found in dental plaque. [49] Dr. McDonough also testified that this kind of infection "requires an inoculum or certain amount of bacteria to be inoculated underneath the skin or into the joint to get the infection. A simple cut won't cause it."[50]

The testimony at trial also established that Jones's own mouth tested negative for the presence of Eikenella, but only *after* he completed two heavy antibiotic regimens to treat the infection in his hand. [51] Dr. McDonough testified that he did not know if the antibiotics would eliminate the presence of Eikenella."[52]

At the hearing on Jones's instant motion, however, Dr. Burdette specifically rejected Dr. McDonough's trial testimony by stating: (1) there is no evidence in the record establishing that Ms. Nathan had Eikenella in her mouth such that she could have been the source of an Eikenella infection;[53] (2) Dr. McDonough confused a strep infection with a staph infection and incorrectly identified Mr. Jones's infection as primarily an Eikenella infection;[54] (3) Dr. McDonough's

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[47] Hearing Tr., Vol. 2, 48:8-17
[48] Trial Tr., Vol. XIV, 1105:15-18.
[49] Trial Tr., Vol. XIV, 990, 1000-1001.
[50] Trial Tr., Vol. XIV, 1000:14-17.
[51] Trial Tr., Vol. XIV, 1024-1025.
[52] Trial Tr., Vol. XIV, 1024.
[53] Hearing Tr., Vol. 2, 50:11-14. Dr. Burdette further explained that Dr. McDonough's opinions were based on his supposition that Ms. Nathan had a neglected mouth such that one might expect Eikenella to be present, but then pointed out that the autopsy report established that Ms. Nathan in fact did ***not*** have a neglected mouth and that Dr. McDonough's opinions were therefore unfounded in—and, indeed, contradicted by—the record evidence. Hearing Tr., Vol. 2, 38-39.
[54] Hearing Tr., Vol. 2, 37. Based on his review of Mr. Jones's medical records, Dr. Burdette testified that Jones's hand infection was primarily a Strep A infection and that Eikenella was merely present in the wound. (Hearing Tr., Vol. 2, 37).

identification of Eikenella as a "rare" bacteria was objectively wrong;[55] (4) Elwood Jones "absolutely could have [had] Eikenella," and "[t]he negative culture was because of the prior antibiotics. So the negative culture after antibiotics does not mean he did not have it in his mouth at the time that he was – putting that wound up to his mouth to suck the blood off";[56] and (5) Dr. McDonough's opinion that the only way Elwood Jones could have gotten Eikenella in his hand was by punching someone in the mouth was objectively and scientifically wrong.[57] Based on the testimony of Dr. Burdette, Jones was convicted based on flawed medical hypothesis.

Based on the *Petro* factors, the Court finds that Jones has demonstrated his newly-presented evidence could not have been produced before his original trial, is material, and likely to change the result, thereby warranting granting the remedy of a new trial. In this Court's view, the jury convicting Jones did not have the benefit of the advances in medical knowledge that have occurred over the past 25 years.[58] Whether a jury would reach the same result today creates doubt sufficient to warrant granting a new trial.

Consistent with the finding that Jones was unavoidably prevented from discovering the new evidence within 120 days of the verdict, the Court finds that Jones's newly-presented evidence has been discovered since his trial, and is such as could not in the exercise of due diligence have been discovered before the trial.

The Court finds that the new evidence is not cumulative to former evidence. Additionally, it is clear from the new evidence and testimony of Dr. Burdette that a jury today would hear

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[55] Hearing Tr., Vol. 2, 57. Dr. Burdette explained, there is literature that around "30 percent of people at some point will have Eikenella in their mouth and it can ebb and flow." (Hearing Tr., Vol. 2, 57:10-13; *see also* Hearing Tr., Vol. 2. 50:2-3 ("I would not consider [Eikenella] a rare bacteria.")).

[56] Hearing Tr., Vol 2, 51:22-25-52:1-7.

[57] Hearing Tr., Vol. 2, 57:16-23.

[58] Indeed, evolving science involved in arson investigations, analysis of DNA and medical science advances are all recognized by courts today.

substantially different expert testimony and conclusions casting doubt upon the validity of the State's expert's opinions, and thus creating a strong probability of a different result upon retrial.

Finally, the above-described evidence is not merely impeaching. According to the evidence presented, Dr. McDonough's testimony cannot now withstand scrutiny under accepted scientific knowledge given the medical community's understanding of the evolved science of Eikenella infections.

IV. CONCLUSION

The police investigation of the murder of Ms. Rhoda Nathan was mishandled by the Blue Ash Police Department in 1994. By the evidence, there are many unanswered questions about the events that occurred at the Embassy Suites Hotel in Blue Ash, Ohio during the weekend when Ms. Nathan was killed. Unfortunately, this mishandling resulted in the jury considering evidence based on an incomplete police investigation and flawed circumstantial evidence. Additionally, the jury did not have the benefit of considering material evidence which was known to the BAPD and the State prior to trial but not disclosed to the Defense.

When prosecutors withhold evidence that they are duty-bound to turn over, they undermine the Constitution, the Supreme Court's case law, and the premise of justice. *Brady* violations not only send potentially innocent people to prison, but they reinforce a win-at-all costs mentality that undermines the pursuit of justice. As noted by the U.S. Supreme Court, a prosecutor should not be the "architect of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 87-88. Such failures violate a defendant's rights to due process of law under the Fifth and Fourteenth Amendments and thwart the various protections that together constitute the fundamental right to a fair trial under the Sixth Amendment.

For reasons stated herein, the Court finds that the State failed to disclose prior to trial information received about Earl Reed's reported confession to the murder of Rhoda Nathan, the Hepatitis B test results, and almost 4,000 pages of investigative notes, witness statements, and questionnaire responses. The undisclosed evidence contained in those investigative materials, along with other newly discovered evidence, served to undermine the credibility of the State's key witnesses and provide the fundament for the medical expert's opinion that Jones's hand infection was caused by a clenched-fist injury because of the presence of Eikenella corrodens. Therefore, the evidence presented at the hearing on Defendant's motion for a new trial demonstrated that the undisclosed evidence was *material* in the sense that it undermines the confidence in the jury's 1996 verdict that Elwood Jones caused the death of Rhoda Nathan as charged.

Additionally, the undisclosed evidence demonstrated that the State's violation of its duty to disclose material evidence had effectively precluded Jones from learning of the existence of that evidence and of the proposed grounds for a new trial until his defense team's post-conviction diligence and the communication from Tierra Suggs uncovered the evidence.

Whether the State acted in bad faith or out of negligence when failing to disclose material evidence to the defense, which could have arguably changed the outcome of the trial, it is clear that the failure to disclose the existence of relevant exculpatory and impeaching evidence prior to trial deprived Elwood Jones of a fair trial. The Sixth Amendment requires a new trial as the only appropriate remedy. Accordingly, Elwood Jones's Motion for a New Trial is hereby **GRANTED.**

IT IS SO ORDERED.

DATE: 12/20/2022

Wende C. Cross

JUDGE WENDE C. CROSS

V. NOTICE OF HEARING

In light of the foregoing, it is FURTHER ORDERED that this matter shall come before the Court for hearing in **Courtroom 380** on **January 12, 2023 at 10:30 a.m.**

JUDGE WENDE C. CROSS

To the Clerk:

Serve a copy of this Entry on Defendant

Elwood Jones, A339441
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North Chillicothe, Ohio 45601