In the Court of Common Pleas
Portage County, Ohio

State of Ohio	:	Case No. 1995 CR 220
Plaintiff,	:	Judge Enlow
v.	:	
Tyrone Noling,	:	
Defendant.	:	

Noling's Reply to the State's Response to his
Application for Leave to file a Motion for New Trial

Tyrone Noling is an innocent man who sits on Ohio's death row. He has in his possession several newly discovered pieces of materially exculpatory evidence, which he seeks to present in a new trial motion:

a. Nathan Chesley implicated his brother in the Hartig murders. (*See* Exhibit B to Exhibit 1, attached hereto);

b. Blood-typing evidence failed to exclude Dan Wilson as the source of genetic material left on a cigarette butt found at the Hartig crime scene (*See* A to Exhibit 1);

c. The Vansteenbergs' missing .25 caliber handgun and the mystery surrounding it. (*See* Exhibits C and D to Exhibit 1).

Failure to produce evidence relating to an alternative suspect violates *Brady v. Maryland*, 373 U.S. 83 (1963). *See Sellers v. Estelle*, 651 F.2d 1074 (5th Cir. 1981); *Jamison v. Collins*, 291 F.3d 380, 391 (6th Cir. 2002). There is no question that this material was discoverable under *Brady*. Moreover, any argument that Dan Wilson is not a viable alternative suspect must fall on deaf ears; the State made no such argument in its responsive pleading. Certainly, in the seven months it took to respond, it could have produced such evidence if it in fact existed. Similarly, if the State could

resolve the suspicion and mystery surrounding the VanSteenberg's missing .25 caliber handgun, it would seem it would have done so in its responsive pleading.

The State opposed Noling's request for leave to file a new trial motion on Wednesday, February 16, 2011, on the eve of an evidentiary hearing scheduled in this Court for Friday, February 18, 2011.[1] This was some eight months after Noling initially filed his request for leave, and seven months past the responsive deadline dictated by the local rules. Noling replies herein to the State's response.[2] Where no argument is made, Noling stands on his initial request for leave to file a new trial motion.

I. Waiver of unreasonableness argument

Rule 33 places no explicit time limit on the filing of a new trial motion filed outside of the 120-day post-trial limit identified in the rule. Case law, however, supports the contention that a defendant must act reasonably in making such a request. *State v. Griffith*, Case No. 2005-T-0038,

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[1]The State asserted during the February 18th hearing that it was not served with Noling's new trial motion at the time Noling served the State with his request for leave to file said motion. The State's contention is refuted by its own response at page 3, where it references each exhibit attached to the new trial motion (which were not attached to the motion for leave). For the court's convenience a copy of the new trial motion that Noling intended to file with his application for leave to file is attached as Exhibit 1 to this reply.

[2]Despite their seven-month delay in responding to Noling's request for leave to file a new trial motion, the State of Ohio did not request Noling's acquiescence to their late filing nor seek leave of Court to file late. When contacted regarding a short extension to reply to the State's response (necessitated by the fact that undersigned counsel had to prepare for and appear before this Court less than 48 hours after the State filed its response) the State declined to agree asserting that such a request was interposed for "delay."

Noling advises this Court for the record that such a request was not interposed for delay. Indeed, Noling has pending in federal court a request to file a second habeas petition based on the facts he would present in his new trial motion to this Court. He has not sat on his rights, nor has he delayed. He certainly would not have asked the State for an additional seven months in which to contemplate his responsive pleading. He has actively pursued relief from his unconstitutional convictions.

2006 WL 1585435, 2 (Portage Ct. App. June 9, 2006) ("Crim.R. 33 does not place any time restrictions on when a motion for new trial may be filed after avoidable prevention is determined. *State v. Stansberry*, 8th Dist. No. 71004, 1997 Ohio App. LEXIS 4561, at 7, 1997 WL 626063. However, case law has adopted a reasonableness standard."). If there is undue delay in filing the motion after the new evidence was discovered, the trial court must determine if that delay was reasonable under the circumstances or that the defendant has adequately explained the reason for the delay." *Griffith*, 2006 WL 1585435, 2 (internal citations omitted). The State has not argued in its response that Noling acted unreasonably in pursuing his request for leave to file his new trial motion, therefore, any such argument is waived.

Such argument was not made because ten months was an entirely reasonable amount of time to pursue investigation and development of Noling's claims, a fact evidenced by the extensive tasks undertaken by the Noling defense team prior to presentation of his request for leave to this Court – undersigned counsel had to review the 800-plus pages of material to determine which documents they believed were new; these mateirals needed to be compared to the more than 18 boxes of material amassed by undersigned counsel in their representation of Noling; investigation was then required a) to determine if these materials were in fact new, b) to make connections between the various records (for example, who was Nathan Chesley's brother?), c) to track down witnesses and wait for them to respond, d) to determine whether there was an independent reason to exclude Dan Wilson as a suspect (e.g., determining if he incarcerated at the time of the offense necessitated review of more records); and interviews of initial witnesses led to other names for follow up. Undersigned counsel also made a second request to the Portage County Sheriff's Office for additional materials related to Chesley and Wilson on November 4, 2009, which was not responded

to until February 2, 2010.[3] Finally, materials needed to be provided to and reviewed by trial counsel in order to determine if the suspected *Brady* material was previously provided to them. Once the claims were fully investigated and developed, Noling's request for leave and his new trial motion were drafted and presented to the clerk for filing.[4]

Some two decades ago, authorities learned that Nathan Chesley claimed his brother killed the Hartigs. Simply figuring out who Chesley was and who is brother was were no small tasks. Ten months to investigate two-decades old evidence was reasonable. *See e.g.*, *State v. Burke*, Case No. 03AP-1241, 2005 WL 488394 (Franklin Ct. App. March 3, 2005) (Death penalty case where court found 17-month delay between denial of postconviction petition, which indicated evidence would more appropriately be presented in new trial motion, and the filing of a new trial motion to be reasonable.). Undersigned counsel represents that they continue to investigate these matters on Noling's behalf.

II. Unavoidably prevented from discovery

Under O.R.C. § 2945.80, a defendant may file a new trial motion outside of the 120-day window where he makes a showing "by clear and convincing proof that [he] was unavoidably prevented from the discovery of the evidence upon which he must rely." The State responds to Noling's position that he was unavoidably preventing from discovery of the evidence disputed here

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[3]Counsel was advised that no additional records were available. Had there been evidence demonstrating how or why Wilson was excluded as the Hartigs' killer, counsel expected it would be provided in this follow up request. Similarly, counsel would have expected such records would be provided to this Court in response to Noling's request for leave file a new trial motion (if such records existed) in order to avoid wasting this Court's time and resources. Counsel can only assume, based on the State's failure to provide such records, that the State does not possess materials that definitively exclude Dan Wilson as the person who killed the Hartigs.

[4]The Clerk's Office filed Noling's request for leave, but retained the original new trial motion without filing it or providing it to the Court.

with two arguments. First, the State argues that its open file discovery policy means that trial counsel had the disputed materials. Second, the State argues that counsel had enough information to essentially figure the rest out. This Court should reject both arguments.

Open file discovery

The State's brief and their presentation to this Court on February 18th relied heavily on what was referred to as their open file discovery policy. This reliance is unpersuasive. Compelling authority, including United States Supreme Court precedent, demonstrates violations of *Brady*, despite what has been described as the prosecution's open file discovery policy. The real question before this Court when such a policy is purportedly in place is — what was in that open file?[5]

In *Strickler v. Greene,* 527 U.S. 263 (1999), the prosecutor recalled that some disputed exhibits were in his open file. *Id.* at 275, n.11. Lead counsel disputed receiving these documents, while co-counsel was equivocal. *Id.* Resultantly, the Supreme Court proceeded as if Strickler went to trial without the disputed documents. *Id.* at 275. The Court noted that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady." *Id.* at 283, n.23. Even when a newspaper examined a witness' trial testimony along with a letter written by that witness, counsel was not required to go looking for *Brady* evidence because it would have been "unlikely that counsel would have suspected that additional impeaching evidence was being withheld" because of the open file discovery policy. *Banks v. Dretke*, 540 U.S. 668, 695 (2004)

[5]The prosecution also offered a variety of exhibits to suggest "proof" that the disputed items were provided to defense counsel. None of the various exhibits offered by the State identify the provision to trial counsel specifically of Exhibits A-D attached to Exhibit 1 of this Reply.

(citing *Strickler*, 527 U.S. at 284).[6]

The Supreme Court relied on *Strickler* in *Banks v. Dretke*. The Supreme Court confirmed the defendant's right to rely on the prosecutor's representation that all *Brady* material had been provided. 540 U.S. at 693. While not an open file jurisdiction, the prosecution in *Banks* "asserted, on the eve of trial, that it would disclose all Brady material." *Id.* The Court found no fault in Banks's reliance on this representation. *Id.* (citing *Strickler*, 527 U.S. at 283-84). Moreover, the denial of Banks's assertion of prosecutorial non-disclosure "confirmed" his reliance of the prosecutor's claim that he had disclosed all evidence. *Id.*

The Fourth Circuit also rejected the prosecutor's assertion that open file discovery precluded a *Brady* violation. In *United States v. Alexander*, 748 F.2d 185 (4th Cir. 1984), the prosecution responded to defense counsel's discovery request by allowing open file discovery. *Id.* at 191. Whether the particular item sought by defense counsel was in the open file "is a critical factual question that...is only now revealed to be fairly disputable, and possibly dispositve[.]" *Id.* At a minimum, "whether the survey materials were actually produced by the open file inspection is a disputable question of fact[.]" *Id.* at 193. The case was remanded to the district court for reconsideration. *Id.*

"[O]pen file discovery does not relieve the government of its *Brady* obligations." *United*

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[6] *See also Strickler,* 527 U.S. at 276 n.14 ("In its pleadings on state habeas, the Commonwealth explained: "From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and reviewed all the evidence the Commonwealth intended to present.... Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal [*Brady*] motion."), which demonstrates the extent of the open file policy arguments made before the United States Supreme Court.

States v. Hsia, 24 F.Supp. 2d 14 (D.C. 1998). If a list of what materials were actually provided to the trial counsel through open file discovery existed, certainly the State would have provided this with the voluminous exhibits attached to its tardy Response. They fail to answer the most important question – were these materials in the State's file? The State cannot prove trial counsel received these materials by merely stating that there was open file discovery.

Almost twenty years later, attorneys Keith and Cahoon could not say definitely that they did not receive these materials. Attorney Keith was quite clear – these are the types of materials he would have expect to remember had he received him.[7] *Strickler* is directly on point when comparing the testimonies of attorneys Keith, Cahoon, and Muldowney. This Court should proceed as did the United States Supreme Court – as if Noling went to trial without the disputed evidence. *Strickler*, 527 U.S. at 275 and n.11.

Noling was unavoidably prevented from discovering said evidence. *Cf. State v. Larkins*, Case No. 82325, 2003 WL 22510579, 4 (Cuyahoga Ct. App. Nov. 6, 2003) ("As stated in *United States v. Stifel* (N.D.Ohio 1984), 594 F.Supp. 1525, "Finally, the most persuasive indication that the defense did not possess this evidence is the fact that the defense never used this evidence at trial."). The restrictions placed on examination deprived Noling of his ability to fully present his arguments, and to fully and fairly develop the record before this Court in favor of granting him leave to file his new trial motion.

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[7]Additional evidence supporting attorney Keith's position might have been developped but for this Court's curtailment of inquiry into the substantive merits of the disputed *Brady* material during the testimony of both trial counsel, which rendered Noling's burden far more difficult to demonstrate. The fact that this was *Brady* material and how counsel would have used it were directly relevant to the inquiry before this Court. Indeed, if counsel would have been permitted to describe the import of the evidence and what actions its existence would have led them to, by its nature, it would have demonstrated that trial counsel did not receive these documents in discovery.

The defense presentation at trial bolsters Noling's position as the presentation of the disputed evidence would have been entirely consistent with the defense team's trial phase theory of the case as presented through their opening statement:

> What we're here to argue about is who committed these crimes. (Tr. 642-43)
>
> Now the reasons we're here in this case is because we're submitting to you that many of the State's witnesses don't have any credibility at all. (Tr. 643-44)
>
> ...we're here to dispute that Tyrone Noling had anything to do with the homicides of these folks. (Tr. 645)

Given that the now disputed *Brady* material was entirely consistent with the defense's theory at trial, "the most persuasive indication that the defense did not possess this evidence is the fact that the defense never used this evidence at trial." *See Larkins*, 2003 WL 22510579, 4 (citing *Stifel* 594 F.Supp. 1525).

The historical record before this Court also suggests that the State's open file discovery was less than complete in this case. In a new trial motion filed on November 3, 2006, Noling offered affidavits from trial counsel identifying numerous documents that they did not receive in pre-trial discovery, including for example, grand jury transcripts. (*See* Exhibits A and B to Motion for New Trial filed November 3, 2006.) In addition, the *Plain Dealer* recounted its access of public records in this case, which resulted in several articles chronicling problems with alternative suspects and inconsistent witnesses in this case – noticeably absent from those articles is any mention of Daniel Wilson, Nathan Chesley, the blood-typing test, or the VanSteenberg gun mystery. (Exhibit 2) Subsequently, the *Plain Dealer* released the records it obtained to the general public (Exhibit 3); undersigned counsel has reviewed those records – again, noticeably absent are the disputed documents relating to Daniel Wilson, Nathan Chesley, the blood-typing test, or the VanSteenberg gun mystery.

Failure to find *Brady* violation does not necessarily resolve the new trial issue

If this Court rejects Noling's arguments regarding *Brady*, instead finding that the disputed *Brady* materials were provided in discovery, that does not resolve the issue before this Court of whether Noling should be permitted to file his new trial motion. This Court should still grant Noling leave to file his new trial motion in order to raise allegations that his counsel rendered ineffective assistance of counsel in failing to investigate and pursue the evidence related to Wilson and to VanSteenberg. *See State v. Lordi*, 140 Ohio App. 3d 561, 748 N.E.2d 566 (Mahoning Ct. App. 2000) (noting the propriety of raising allegations of ineffective assistance of counsel in a new trial motion). If this Court finds Noling cannot properly pursue a *Brady* violation, counsel's possession of, but failure to investigate and present, such evidence would be ineffective assistance of counsel warranting a new trial.

Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). In addition to investigation, counsel has a duty to present evidence "that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict." *Reynoso v. Giurbino*, 462 F.3d 1099, 1112, 2006 U.S. App. LEXIS 22648, *33 (9th Cir. 2006); *see also Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999); *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002); *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999). Failure to present exculpatory evidence "is ordinarily deficient, 'unless some cogent tactical or other consideration justified it.'" *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355, 1358 (4th Cir. 1992) (internal citations omitted). Attorney Keith's testimony stressed the importance of this newly discovered evidence thereby demonstrating there could be no strategic reason for failing to present it. Moreover, this type of evidence is entirely consistent with counsel's opening argument

stressing that identity was the key issue in this case. (*See e.g.*, "What we're here to argue about is who committed these crimes." (Tr. 642-43); "Now the reasons we're here in this case is because we're submitting to you that many of the State's witnesses don't have any credibility at all." (Tr. 643-44); "...we're here to dispute that Tyrone Noling had anything to do with the homicides of these folks." (Tr. 645)).

House v. Bell, 547 U.S. 518, 126 S. Ct. 2064 (2006), is relevant to this Court's consideration. In *House*, the petitioner presented evidence of an alternative suspect. Despite the fact that the evidence was "by no means conclusive," the Supreme Court found that, coupled with other evidence the alternative suspect evidence "would reinforce other doubts as to House's guilt." *Id.* at 2085. The evidence related to Wilson and VanSteenberg would reinforce those same doubts about Noling's guilt.

If this evidence is not *Brady*, it demonstrates that counsel's deficient performance prejudiced Noling. Resultantly, Noling would similarly be entitled to file a new trial motion raising ineffective assistance of counsel.

Actual innocence

Regardless of whether the new trial motion proceeds on *Brady* or ineffective assistance of counsel grounds, Noling's new trial motion would also include a claim raising Noling's actual innocence. The newly discovered evidence provides strong support for the position Noling has maintained for nearly twenty years—he did not kill Bearnhardt and Cora Hartig. Noling's co-defendants recanted their testimony and confessed their lies years ago. This new evidence only serves to strengthen Noling's claims of innocence. His convictions and death sentence violate the Eighth Amendment. *See Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., joined by Kennedy, J., concurring) ("executing the innocent is inconsistent with the Constitution"); *Id.*

(O'Connor, J., joined by Kennedy, J., concurring) ("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 ... than to execute a person who is actually innocent."); *Schlup v. Delo*, 513 U.S. 298, 316 (1995); *see House v. Bell*, 311 F.3d 767, 768 (6th Cir. 2002); *Wilson v. Greene*, 155 F.3d 396, 404 (4th Cir. 1998); *Milone v. Camp*, 22 F.3d 693, 699-700 (7th Cir. 1994) (internal citations omitted); *Cornell v. Nix*, 119 F.3d 1329, 1333 (8th Cir. 1997); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (internal citations omitted); *Lopez v. Mondragon*, No. 93-2148, 28 F.3d 113 (10th Cir. June 20, 1994); *Jackson v. Calderon*, 211 F.3d 1148, 1165 (9th Cir. 2000); *Felker v. Turpin*, 83 F.3d 1303, 1312 (11thCir. 1996).

Print media failed to include *Brady* facts

The State argues that Exhibits 24-29 absolved it of its obligation to turn over the disputed *Brady* material related to Dan Wilson. Because a handful of newspaper articles indicated that Wilson was a suspect in the Hartig murders at a point in time, the State seems to assert that it did not need to produce Chesley's assertion that it was his brother who killed the Hartigs or blood-type testing that failed to exclude Wilson as the potential donor of genetic material left at the Hartig crime scene. As trial counsel made clear at the February 18th hearing, they do not conduct discovery via the media and they relied on the State's representations that they were being provided open discovery in this case. Discovery in the public record is insufficient to meet the State's duty under *Brady*. *See e.g., Mathis v. Dretke*, 124 Fed. Appx. 865, 877 (5th Cir. 2005) (finding unpersuasive state's

argument that it had no duty to disclose exculpatory evidence available in the public record); *Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) ("If the state failed under a duty to disclose the evidence, then its location in the public record, in another defendant's trial, is immaterial.").

Even if a newspaper article could suffice for the State to fulfill its *Brady* duties, exhibits 24-29 do not reveal the *Brady* material that Noling alleges was not disclosed to trial counsel. Careful review of these articles demonstrates that there is no mention of either the Chesely statement or of the blood-type testing that fails to exclude Wilson. So, the matter at issue in this case was not a matter of public record available to trial counsel via the newspapers. Moreover, *Strickler* demonstrates that such a situation actually serves to bolster Noling's claims – even after a newspaper examined a witness' trial testimony along with a letter written by that witness the Court found counsel's reliance on open discovery reasonable, noting that it would have been "unlikely that counsel would have suspected that additional impeaching evidence was being withheld" because of the open file discovery policy. *Banks*, 540 U.S. at 695 (citing *Strickler*, 527 U.S. at 284); *see also Strickler*, 527 U.S. at n.23 ("We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."). So, even if trial counsel knew Wilson was a suspect (but testimony at the evidentiary hearing directly contradicted this point) such knowledge would actually have obviated any suspicion on counsel's part that additional exculpatory evidence existed because they were relying on the prosecution's representations (representations they continue to make to this day) that they were receiving open file discovery. *See id.*

Media coverage cannot dispose of a prosecutor's duty under *Brady*. Moreover, in this

instance, the media coverage **did not include** the very *Brady* material at the heart of the dispute before this Court.

Blood-typing evidence

The State seems to argue that because it turned over a lab report excluding Noling and his co-defendants as the source of the genetic material found on the cigarette butts left at the crime scene, counsel should have been able to figure out that Dan Wilson had similarly been tested and that such testing had failed to exclude him. This argument borders on the absurd. It is not counsel's obligation to contact any forensic scientist who conducts any forensic testing to inquire whether that scientist has tested genetic material against all (or even any) other person in the world. It is the State's duty to disclose such evidence. *See Dretke,* 540 U.S. at 695 ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."). The State's counterintuitive argument that counsel should have figured out that it did not turn over ever blood-typing test is tantamount to the scavenger hunt foreclosed by *Banks*. *See id.*

This is yet another instance where the State's open file discovery would work against the position it takes before this Court. Having turned over blood-type testing with respect to Noling and his co-defendants, and with an understanding of the State's open file discovery, defense counsel would have no reason to suspect that other, exculpatory testing evidence existed. *See Banks*, 540 U.S. at 695 (citing *Strickler*, 527 U.S. at 284); *see also Strickler*, 527 U.S. at n.23 ("We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.").

Indeed, attorney Cahoon testified that he would not have contacted the BCI lab worker in this instance. And why would he? The BCI worker's testing actually aided their defense of Noling.[8]

Conclusion

The fact that the documents in question are *Brady* material answers the question of whether Noling was unavoidably prevented from discovering the evidence. The documents were exclusively in the State's control. Trial counsel were entitled to rely on the prosecution's constitutional duty to turn over all *Brady* material. *See State v. Russell*, 2011-Ohio-592, 2011 Ohio App. LEXIS 580 (Feb. 10, 2011) (motion for leave to file new trial motion should have been granted where the evidence in question was *Brady* material). "[O]btaining the evidence from the state is not a game of asking the right questions of the prosecution. If the prosecution is aware that material exculpatory evidence exists it must provide it to defense counsel." *Id.* at ¶ 34. Because the evidence was not turned over to Noling and because it is *Brady* material, Noling cannot be faulted for not finding and coming forward with this evidence within the 120-day period contemplated by O.R.C. § 2945.80.

For the reasons contained in his request for leave and in this Reply, this Court should permit Noling to file his new trial motion. Noling could not have discovered, through due diligence, material the State withheld from his counsel. Noling "was unavoidably prevented from the discovery of the evidence upon which he must rely." See O.R.C. §2945.80. Therefore, Noling respectfully requests this Court grant his application for leave to file a motion for new trial.

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[8]Interestingly, the State did not present Mr. Laux, who conducted the testing, as a witness at Noling's trial.

Respectfully submitted,
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Certificate Of Service

I hereby certify that a true copy of the foregoing Noling's Reply to the State's Response to his Application for Leave to file a Motion for New Trial was forwarded via regular mail to Prosecutor Victor Vigluicci, 241 South Chestnut St. Ravenna, Ohio 44266 on this _ day of February, 2011.

____

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In The Court Of Common Pleas
Portage County, Ohio

State Of Ohio,

Plaintiff-Respondent,

Case No. 95-CR-220

- vs -

Tyrone Noling,

Defendant-Petitioner.

This is a capital case

Instanter Motion For New Trial

Tyrone Noling moves this Court for a new trial under O.R.C. §§ 2945.79(B), (F), and Ohio R. Crim. P. 33(A)(2), (A)(6). The reasons for this motion are stated in the attached memorandum in support.

Respectfully submitted,

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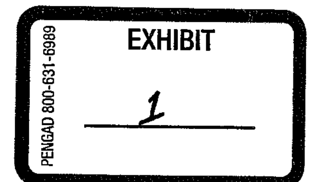

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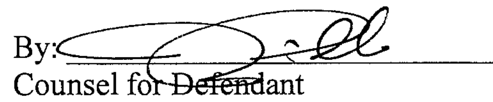
By: 
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PRELIMINARY STATEMENT

Tyrone Noling should be granted a new trial based on newly discovered evidence and prosecutorial misconduct. Noling was convicted and sentenced to death for the brutal murders of Bernhardt and Cora Hartig; murders that Noling did not commit.

Evidence was recently discovered that requires a new trial for Noling. This new evidence, discovered since trial, strongly indicates that there are viable, alternative suspects responsible for the Hartig murders. Through a diligent and protracted investigation, Noling's attorneys have secured new evidence indicating that Dan Wilson, a convicted and executed murderer, was a viable suspect in the Hartigs' murders. The new evidence shows that DNA tests from a cigarette butt, the only piece of physical evidence discovered at the crime scene, did not exclude Dan Wilson as a possible DNA match. Although known to the prosecution and withheld from Noling, this evidence was not available to Noling, and could not have been procured by Noling's counsel, at trial. This same type of testing did, however, exclude Noling and his three co-defendants. Moreover, Noling's attorneys, only after filing a public records request, discovered notes from a police interview with Wilson's foster brother, Nathan Chesley before Noling's trial. Noling's counsel contacted Chesley who swears that it is likely Wilson, not Noling, who committed the Hartig murders. This new evidence goes to the very heart of Noling's case and requires that a new trial be granted. It would undoubtedly have aided Noling in proving his innocence at trial—or at a minimum, in establishing reasonable doubt.

In addition to this new evidence connecting Wilson to the Hartig murders, other newly discovered evidence further supports granting a new trial. In a material statement withheld by the State, one witness details the extremely suspicious activity of another possible suspect in the Hartig murders, Raymond VanSteenberg. In her statement, VanSteenberg's sister-in-law

recounts activities surrounding the disappearance of VanSteenberg's .25 caliber automatic gun. This was the same type of weapon used in the Hartig murders and was the same gun police requested that he produce for testing and comparison against the bullets used in the Hartigs' murder. This new evidence, withheld by the State, was undoubtedly material to Noling's defense at trial and only further supports Noling's request for a new trial.

For the reasons stated above, the Court must grant Noling's request for a new trial.

FACTUAL BACKGROUND

In May 2009, counsel for Noling sent public records requests to the Portage County Sheriff's Department. Noling's counsel requested records related to the investigation and prosecution of Noling's co-defendants, Gary St. Clair in case number 1992 CR 00210 and Joseph Dalesandro in case number 1992 CR 00208. Counsel received a phone call from Portage County authorities indicating a response to the request was forthcoming. On July 28, 2009, Noling's counsel sent a second request for these records as no records were ultimately produced in response to the May 2009 request. Noling then received a response to his request and records were produced by the Portage County Sheriff's Department in August 2009. On December 15, 2009, Noling a follow up request regarding the records he received requesting additional information related to Daniel Wilson and Nathan Chesley. Noling was informed that no records were located.

ARGUMENT

Under O.R.C. § 2945.79 a defendant may obtain a new trial "[w]hen new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial." O.R.C. § 2945.79(F); see also Ohio R. Crim. P. 33(A)(6). The Ohio Supreme Court delineated the standard for granting a new trial based on newly

discovered evidence in State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947). The Court reiterated that standard in State v. Hawkins, 66 Ohio St. 3d 339, 612 N.E.2d 1227 (1993):

> To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown 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.

Id. at 350, 612 N.E.2d at 1235 (citation omitted).

Noling easily meets this standard, though he is not required to, since a defendant is also entitled to a new trial where misconduct by the prosecution materially affects his substantial rights. O.R.C. § 2945.79(B); see also Ohio R. Crim. P. 33(A)(2). In cases where the State suppresses evidence favorable to the defense, the Ohio Supreme Court held that "the usual standards for new trial are not controlling because the fact that such evidence was available to the prosecution and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." State v. Johnston, 39 Ohio St. 3d 48, 60, 529 N.E.2d 898, 911 (1988) (internal citations omitted.) And though Noling maintains his innocence, he "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.; see also United States v. Agurs, 427 U.S. 97, 111 (1976) ("If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice."). Noling merely needs to show that the evidence is material. Id. ("[T]he key issue in a

case where exculpatory evidence is alleged to have been withheld is whether the evidence is material.").

This 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." Johnston, 39 Ohio St. 3d at 61, 529 N.E.2d at 911 (citing United States v. Bagley, 473 U.S. 667, 682 (1984)). And a "reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

I. NEWLY DISCOVERED EVIDENCE REQUIRES GRANTING A NEW TRIAL

The newly discovered evidence requires that this Court grant Noling a new trial, so that he may defend himself in a court of law with a complete record of all of the evidence available in this case; an opportunity he was not given during his first trial. This new evidence, discovered since trial, will result in a not-guilty verdict for Noling, finally showing that he is actually innocent of the Hartig murders. Even after due diligence, this evidence could not have been discovered before the trial. The State had this evidence and did not produce it. Noling and his attorneys relied on the State's representations that all relevant evidence in the State's possession was produced. There can be little doubt that evidence relating to viable alternative suspects was material to the issues of this trial—Noling's guilt or innocence. The record shows that this evidence is not cumulative of former evidence produced at trial and does not merely impeach or contradict former evidence. It is new evidence that lends further support to Noling's original, and on-going defense, that he is innocent of the Hartig murders.

A. The New Evidence Will Change the Result in a New Trial

The new evidence will change the result in a new trial because it provides new support for Noling's innocence defense. Specifically, new DNA evidence and an affidavit shows that

another man could be responsible for the Hartig murders (1); and new details provided in an affidavit detail questionable activity by another suspect with regard to a .25 caliber automatic gun (2).

1. ***Brady violation***

Where evidence is material to either guilt or sentencing, the prosecution's failure to disclose favorable evidence to an accused in a criminal proceeding violates the Due Process Clause, regardless of the prosecutor's good or bad faith. Brady v. Maryland, 373 U.S. 83, 87 (1963). The Court has expanded the duty to disclose to include impeachment evidence as well as exculpatory evidence. Bagley, 473 U.S. at 676.

In order to comply with Brady, "the 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." Kyles v. Whitley, 514 U.S. 419, 437 (1995). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Id. at 433-34.

"[W]hen the defendant asserts that the new evidence at issue is exculpatory evidence which the government failed to turn over in violation of Brady he should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. Rather, the defendant must show only that the favorable evidence at issue was 'material,' with 'materiality' defined according to opinions interpreting the Brady doctrine." United States v. Frost, 125 F.3d 346, 382 (6th Cir. 1997) (internal citations and quotations omitted).

New evidence, discovered since trial and conviction, supports Tyrone Noling's claims of innocence. While the prosecution's actions lessen the burden imposed on Noling, he easily

meets the more stringent requirements of Petro and Hawkins. The evidence Noling presents will change the result if this Court grants him a new trial. The suppressed evidence includes:

DNA evidence and affidavits suggest Dan Wilson as an alternate suspect

The prosecution failed to disclose evidence that Tyrone Noling's counsel could have used to support an alternative-suspect defense. The prosecution withheld results from a DNA test of cigarette butts found at the scene. (Ex. A). While this DNA evidence did not match samples taken from Tyrone Noling and his co-conspirators, it also did not exclude Daniel Wilson (Tr. 721; Ex. A). Wilson was convicted of a 1991 murder, sentenced to death, and died by lethal injection on June 3, 2009.

The prosecution did not provide defense counsel with a statement taken from Nathan Chesley which inculpated his foster brother, Daniel Wilson, as a possible suspect in the Hartig murders. (Ex. B). Nathan Chesley lived as a foster child in the home of Shirley Spinney. (Ex. E). Spinney also fostered Daniel Wilson, who visited the Spinney home while Chesley was a resident. (Id.). Not long after the Hartig murders, Portage county authorities interviewed Chesley. (Ex. B). In his statement to the police, Chesley described not only how he thought the Hartig murders were cool, but also that his brother committed them. (Id.).

Over a year later, Portage County authorities were still looking at Wilson as a potential suspect. On June 19, 1991, the Ohio Bureau of Criminal Identification and Investigation conducted a DNA analysis on cigarette butts found outside of the Hartigs' home—the only physical evidence found at the scene. (Ex. A). The cigarette butts were tested against a saliva sample taken from Daniel Wilson, and the test did not exclude Wilson as a possible DNA match. Id. Authorities conducted similar analyses using saliva samples from Noling and his co-conspirators. (Tr. 721). Neither Noling nor his co-conspirators matched the DNA found on the

cigarettes. Id. While the prosecution disclosed Noling's results to counsel, the prosecution withheld both the fact that they tested Wilson and the results of Wilson's test.[1] (Exs. F, G).

The evidence described above is Brady material that, if provided to Noling's defense counsel, would have strongly contributed to an alternative suspect defense. Nathan Chesley implicated Wilson in the Hartig murders. Moreover, a DNA test does not exclude Wilson as a suspect. (Exs. A, B). If provided with Nathan Chesley's statement and the DNA test results, counsel would have pursued Wilson and sought corroborating evidence. After locating Chesley's statement, Noling's current counsel obtained an affidavit from Chesley confirming that he made the statement on April 24, 1990 in reference to his foster brother Daniel Wilson and that he "believe[s] the Hartig murders were crimes that Wilson was capable of and likely committed." (Ex. E).

Chesley's affidavit not only implicated Wilson in the Hartig murders, it also lends further credence to Wilson being an alternative suspect by providing particular and intimate insight into Wilson's character. See id. In his affidavit, Chesley stated that Wilson was a heavy drinker and a violent person who frequently made threats and once tried to stab his foster mother. Id. Furthermore, Chesley stated that Wilson was committing thefts and breaking into homes at the time of the Hartig murders, that he may have had guns, and that he drove a blue Dodge Omni. Id. Another foster brother, Kenneth Amick, also recently located by current counsel provided Noling's counsel with an affidavit regarding Wilson, attesting to the fact that he drove a blue car.

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[1] In a separate motion to the state trial court, Noling requested DNA testing of the cigarette butt, but was denied. State v. Noling, Portage C.P. No. 1995 CR 220, March 11, 2009 Entry. Noling appealed that decision, which is currently before the Ohio Supreme Court. State v. Noling, Case No. 2009-0773. Based on that court's recent decision in State v. Prade, 2010 Ohio LEXIS 1038, unreported, 2010-Ohio-1142 (Ohio May 4, 2010), counsel fully expects a reversal of the trial court's decision. Noling also intends to file a second DNA test request, seeking testing of the DNA against Wilson's DNA, on file with CODIS.

(Ex. H). In notes from an interview with Jim Geib—also withheld by the prosecution and addressed in Noling's previous motion for new trial—Geib told authorities that on the day of the Hartig murders, he saw a dark blue, midsize car leaving "that general location [of the Hartig home]" at around 4:30 p.m. (Ex. I). In addition, Wilson had a history of home invasion and victimizing the elderly:

> When he was fourteen years old, Wilson broke into an elderly neighbor's home. When the neighbor surprised him, Wilson struck the elderly man, causing him to fall and break his hip. Wilson then ripped the phone cord out of the wall and left. The neighbor was not found for two days and died as a result of his injuries and the lack of medical attention.

Wilson v. Mitchell, 498 F.3d 491, 496 (6th Cir. 2007).

If provided the opportunity to review the evidence against Wilson, Noling's trial counsel would have followed-up with Nathan Chesley and other foster brothers, including Kenneth Amick. Counsel would have discovered that Daniel Wilson was a violent person whom others believed was capable of committing murders and who was breaking into homes at the time of the murders. Counsel could have obtained the details about Wilson's blue car, material evidence when combined with Jim Geib's undisclosed statement that he saw a blue car near the Hartig home. All of this evidence would have been utilized by counsel, in conjunction with the DNA test result, as further support for an alternative suspect defense. However, Noling did not get an opportunity to build such a defense because the prosecution withheld the Brady material that would have supported such a theory.

Additional new evidence details another suspect's suspicious activity

Not only did the State withhold material evidence related to an alternative suspect, but prosecutors also failed to disclose a material statement about suspicious gun activity. The .25 caliber automatic weapon used to kill the Hartigs was never recovered. Just days after the Hartig

murders, Detectives Doak and Kaley interviewed Larry Clementson; Raymond VanSteenberg; and Dennis VanSteenberg, Raymond's son. (Ex. J). Each of the interview reports includes details about a missing .25 caliber automatic gun, the same type of gun that was used to shoot and kill the Hartigs. (Id.) The prosecution disclosed these interview reports to defense counsel, but the prosecution did not disclose a statement provided by Marlene Van Steenberg, Raymond VanSteenberg's sister-in-law. In her statement, Ms. VanSteenberg provides significant details regarding both the disappearance of a .25 caliber automatic gun owned by Raymond VanSteenberg and attempts by Raymond VanSteenberg to hide the details surrounding the gun's disappearance from Portage County authorities. (See Exs. C, D). Without Ms. VanSteenberg's statement, Noling's counsel was left with conflicting stories and incomplete details provided by Clemetson and Dennis and Raymond VanSteenberg. (See Ex. J). This Brady material could have been used by trial counsel to solidify an alternative-suspect defense.

On April 1, 1991, Marlene VanSteenberg visited the Portage County Sheriff's Office to retrieve a .25 caliber gun that belonged to her and her husband, Richard VanSteenberg. (Exs. C, D). Their gun was at the Sheriff's Office because Raymond VanSteenberg, Richard's brother, had turned the gun into the police the day after the Hartigs' bodies were discovered. Portage County conducted ballistic tests on the gun, and eventually determined that it was not the murder weapon. (Id.) However, while at the Sheriff's Office, Marlene VanSteenberg provided a statement regarding events that took place in the days following the Hartig murders, before the gun was turned over for testing. (Id.) This statement was not disclosed to Noling's trial counsel. (Exs. F-G)

In her statement, Ms. VanSteenberg described that when she returned home from work on April 8, 1990, her husband informed her that his brother had stopped by that day and taken

their gun. (Id.) Ms. Van Steenberg also stated that on that same evening, she received a call from Raymond. (Id.) He was at the Portage County Sheriff's Department, and he told her that he had turned in the gun belonging to her and her husband. (Id.) He asked Ms. VanSteenberg to tell the detectives that he had their gun in his possession for at least three to four months prior, but Marlene declined to do so. (Id.) Ms. VanSteenberg stated that when she asked Raymond about his own gun, he told her that he threw it away because he "just had to do it," and he was upset that she would not lie for him. (Id.)

Furthermore, Ms. Van Steenberg stated that the very next day, April 9, 1990, after hearing about the double murder on the radio, she contacted Detective Don Doak and told him about her phone call with Raymond and about the gun he turned in. (Id.) In her statement, she also mentioned a conversation that she had with Shelton Morris, her husband's boss, about a month after Raymond's mysterious April 8, 1990 phone call. (Id.) Ms. Van Steenberg described what Morris relayed: that someone he knew was riding in Raymond VanSteenberg's truck near a skating rink when Raymond's son, Dennis VanSteenberg, picked up a gun that was kept in the truck and threw it out the window. (Id.) Neither the handwritten notes nor the typed copy of Ms. Van Steenberg's statement were provided to trial counsel. (Exs. F-G)

Taken alone, Marlene VanSteenberg's statement is material. However, this statement when combined with statements taken from Larry Clemetson, Raymond VanSteenberg, and Dennis VanSteenberg, would have provided counsel with details necessary to turn conflicting and incomplete evidence into an alternative suspect defense. The day after the Hartig murders, detectives began investigating Clemetson and the VanSteenbergs. (Ex. J). Notes from Clemetson's interview state that at around 10:00 p.m. on Friday, April 6, 1990, Clemetson and Dennis VanSteenberg drove to a skating rink in a truck belonging to Dennis's father, Raymond

VanSteenberg. (Exs. J). On the way to the rink, Dennis showed Clemetson a .25 automatic gun that was kept in the truck. (Id.) When Detectives Kaley and Doak asked Dennis for the gun during his interview on Sunday April 8, 1990, the gun was missing. (Ex. J). Neither Dennis nor Raymond VanSteenberg could produce the gun. (Id.)

Dennis VanSteenberg and Larry Clemetson provided authorities with conflicting details about the missing gun, but neither one ever produced the gun that police sought. Clemetson claimed that sometime after he and Dennis visited the skating rink that Friday, Dennis called asking about the gun's whereabouts. (Ex. J). Clemetson further stated that he then went to the skating rink, could not find the gun and reported it. Id. In contrast, Dennis stated that Raymond VanSteenberg removed the gun from the truck that Friday, at 5:30 p.m. (Id.) Notes from Dennis's interview on April 8 report that Dennis told police that he would come up with the gun and that the next day Kaley picked up a .25 automatic. (Ex. J). The notes also report that Doak received a phone call advising that the police had the wrong gun, but there is no mention of Marlene or Raymond VanSteenberg in that report. Id. A separate page of handwritten notes mentions only that Raymond picked up the gun from Marlene's house on Sunday and that he called Marlene to ask that she tell the police he had the gun for three to four months. (Ex. J). In an interview conducted about one month after the murders, Clemetson stated that he knew that police had the wrong gun and that Dennis told him that the gun the Sheriff's Office wanted had been used to kill three other people. (Ex. J).

If provided Marlene VanSteenberg's statement, trial counsel could have pieced together the disjointed evidence linking the VanSteenbergs, the missing gun, and the murder. Ms. VanSteenberg's statement provides possible explanations for the suspicious disappearance of Raymond VanSteenberg's gun. (Exs. C, D). Detectives investigating this murder without a

murder weapon immediately sought out Raymond VanSteenberg's gun, and Marlene's statement describes how Raymond kept them from getting it. (Id.) Raymond admits to throwing his gun away because "he just had to do it." (Id.) Furthermore, the statement describes how upset Raymond became when Marlene refused to participate in his deception. (Id.) In fact, according to Marlene, to this day, Raymond, formerly a regular visitor, had not visited or spoken with his sister-in-law since their conversation on April 8, 1990. (Id.) These details point directly to Raymond VanSteenberg as an alternative suspect, one that counsel surely would have pursued.

The statement also provides an alternative scenario in which Dennis may have disposed of the gun used in the murder, which matches details in Clemetson's statement. According to Marlene, Dennis threw the gun out the truck window on the way to the skating rink, and another man witnessed him doing it. (Id.) Counsel would have at least pursued Morris and this potential witness.

Both scenarios are ones that trial counsel would have further explored had the prosecution merely disclosed Marlene VanSteenberg's statement. The gun that was used to kill the Hartigs was never found, and the only witness at trial to place the murder weapon in Noling's possession was Joseph Dalesandro, an incredible witness who made conflicting testimony at trial. (See Tr. 1234). Ms. VanSteenberg's statement, as well as Nathan Chesley's statement, would have been used to combat the prosecution's weak case. Noling was undoubtedly entitled to that evidence, as required by Brady.

The new evidence illustrates the weakness of the original case

Even without this new evidence, the original case against Noling was weak. There was no physical evidence linking Noling to the crime, and only the inconsistent and unreliable testimony of Noling's alleged co-conspirators. This Brady material provides alternative suspects

that Noling's counsel would have pursued at trial, given the opportunity: Daniel Wilson, who was linked to the only physical evidence at the crime scene; and Raymond and Dennis VanSteenberg, both of whom were involved in suspicious gun activity just days after the Hartig murders, with the same type of gun used to commit the crime.

Brady requires a cumulative review of the evidence suppressed. Kyles, 514 U.S. at 436. The jury would not have believed, or at least had reasonable doubt about, the prosecution's case had defense counsel been provided with the suppressed evidence. Perhaps more importantly, this Court cannot have faith in the reliability of Noling's convictions with the suppression of material evidence.

This evidence becomes more compelling when coupled with other evidence of Noling's innocence offered in prior litigation, including:

- Evidence of insurance agents as alternative suspects (T.d. 258, 261-64, Ex. L), including that one agent owned a .25 Titan handgun (Id. at Ex. AA), one of only 4 models that could have been the murder weapon. (T.p. 1243); and that agent refused to take a polygraph examination. (Id. at Ex. Y).

- A witness, Jim Geib placed a dark haired man in his thirties, in a dark blue vehicle leaving the area of the Hartigs' home at a high rate of speed around the time of the murders. (Id. at Ex. K) Exhibit K notes that LeFever matches this description.

- Evidence of coercion and lies from the State's witnesses (Id. at Exs. D-F, N-P, JJ, KK, U, V), including, for example, the failure to mention the murder by witnesses as well as claims that Ron Craig threatened to frame witnesses.

- Inconsistencies among and between the State's witnesses, including psychological evidence casting doubt on Wolcott's testimony (Id. at Ex. HH) (Id. at Ex. GG, p. 2) II.

- The lack of a murder weapon, even after a search of Dalesandro's car. (Id. at Ex. SS).

- Evidence that the perpetrator knew the Hartigs (Id. at Exs. CC & DD). The Hartigs were shot sitting at their kitchen table (Id. at Exs. CC, DD). Tne subject was sitting at the table facing the door. (Id. at Exs. CC, DD). There was no sign of struggle and or alarm. (Id). Mr. Hartig's wallet was undisturbed. (Id. at Ex. CC). And a desk was ransacked with papers on the floor. (Id). This evidence suggested the Hartigs knew the perpetrator.

The evidence described above is even more important when evaluated in light of the material presented at trial and the evidence presented in Noling's first postconviction petition (T.d. 205-06, 212, 219), which included recantations by co-defendants Dalesandro and Wolcott, both of whom independently claimed to have been coerced and manipulated into falsely inculpating Noling in the Hartigs' murders. (T.d. 205, Exs. F, Y); and the evidence of Noling's innocence apparent from the trial record, including:

Noling's prior crimes were nonviolent and inept

Noling was a bumbling and inept criminal. In early April 1990, he robbed two elderly couples—the Hugheses and Murphys. Noling admitted to the robberies. He also admitted to having stolen a .25 caliber handgun during the Hughes robbery. (Tr. 1043.) Noling took that same gun with him to the Murphy robbery, where he accidentally fired it into the floor. (Tr. 839, 1376.) He immediately checked on Mrs. Murphy's well-being. (Tr. 1370.) When questioned about the event, Mrs. Murphy described Noling as being as scared as she was. (Id.) The prosecution then went on to argue that Noling, that same scared teen, went on to commit two calculated, execution-style murders a mere four hours later. The facts simply do not fit. Other than the coincidence that the Hartigs were elderly like the victims in Noling's two robberies, there are significant differences between the prior robberies and the Hartig murders that clearly distinguish them.

First, there was no violence associated with the Hughes and Murphy robberies. Noling admits to firing his weapon during the Murphy robbery; however, it was accidental and he immediately checked on Mrs. Murphy's well being. (Tr. 1370.) Mr. Murphy's testimony supports this version of events. He testified that Noling "evidently tripped or something. Anyhow the gun went off[.]" (Tr. 1376.) So even though Noling carried a weapon during both

robberies, he showed no inclination to harm anyone.

Second, Noling committed both the Hughes and Murphy robberies in close proximity to the Trandifer home. The four youths did not drive to the crime scenes. They robbed in their own neighborhood and ran through the woods to return home. (Tr. 835, 954.) Meanwhile, the Hartig murders would have required the youths to drive some distance to Atwater, Ohio. Noling never demonstrated any proclivity to venture out of his own neighborhood to commit crimes.

Third, nothing of value was stolen from the Hartigs' home. Mr. Hartig's wallet remained in his pocket. Mrs. Hartig still wore her rings. (Id. at 425.) Easily accessible cash was found in the house. (Id. at 429.) No small electronics were listed missing from the home. These were exactly the types of items Noling stole from both the Hughes and Murphy homes, yet they were left inexplicably undisturbed at the Hartig home. (See e.g., Tr. 831, 837, 953, 958, 1375-76.)

Numerous other details signal that Noling did not commit these murders. The Hartigs were found in their kitchen while the other robbery victims were placed in closets, bathrooms, or bedrooms. (Tr. 1044, 1375.) The phone wires were cut during the robberies (Tr. 1044), but no testimony indicated that the Hartigs' phone line was cut.

The only similarity between the Hartig murders and the Hughes and Murphy robberies is that all of the victims were elderly. That fact alone proves nothing. Cf. State v. Lowe, 69 Ohio St. 3d 527, 634 N.E.2d 616, 620 (1994) (other acts evidence offered for identity must tend to show by substantial proof that the crime charged and the other act are impressed with the defendant's 'behavioral fingerprint.'). If Noling's attorneys had the newly discovered evidence at the time of the trial, these inconsistencies, which the State used to convict Noling, could have been rebutted and explained. Instead, the defense was left only with Noling's adamant stance that he was innocent.

A lack of physical evidence linking Noling to the crime scene

Noling's fingerprints were not found at the scene, even though the perpetrator clearly touched many items in the Hartigs' home. Cigarette butts found at the crime scene were not linked to Noling, or any of his alleged accomplices. **On the contrary, as noted above, the recently discovered DNA analysis of Daniel Wilson does not exclude him as a suspect.** (Ex. B). Further, the bullets used to kill the Hartigs did not match the only .25 caliber handgun tied to Noling.

There was no murder weapon introduced at trial. Testimony established that Noling and St. Clair committed the Hughes robbery with a sawed off shotgun and a BB gun. (Tr. 842.) During that robbery, Noling stole a .25 caliber automatic handgun. (Tr. 953.) Noling then carried, and accidentally fired, that .25 during the Murphy robbery. (Tr. 1376.) Investigators recovered the .25 stolen from the Hugheses' home and fired during the Murphy robbery; which was the same type of weapon used to kill the Hartigs. (Tr. 1242, 1366.) However, this was not the weapon used to kill the Hartigs. (Tr. 1243.) Portage County Authorities actively pursued a missing .25 caliber automatic handgun owned by Raymond VanSteenberg, but this weapon was never located. (Exs. C, D).

Instead, Noling's alleged accomplices' testimony consistently referenced their possession of only three guns: a BB gun, a shotgun, and the .25 stolen during the Hughes robbery. (Tr. 832, 842, 949, 953, 1033-34, 1040, 1048.) When Wolcott described the guns Noling and St. Clair carried into the Hartig home, he indicated that Noling carried the small gun that he stole at the previous robbery. (Tr. 909.) Similarly, Dalesandro's inventory of the weapons carried on April 5, 1990 only accounted for three weapons. (Tr. 1048.)

Subsequently, Dalesandro's testimony diverged from Wolcott's and St. Clair's.

Dalesandro asserted that the boys possessed two small automatic guns. (Tr. 1066.) Dalesandro claimed that he sold one of the small guns to Chico after the Hartig murders. (Tr. 1059.) However, Dalesandro testified that Noling had placed the gun he used inside the Hartigs' home in the glove box, (Tr. 1064) and that Noling asked him to sell that gun after the police released Dalesandro from jail. (Tr. 1064.) Dalesandro implied that it was this second gun that Noling used in the Hartig murders.

However, there was substantial evidence that demonstrated that there was only one .25. Wolcott does not mention a second .25. St. Clair does not mention a second .25. Moreover, prior to the prosecution eliciting a statement from Dalesandro that there was a fourth gun, Dalesandro had consistently maintained that they only had possession of three guns—a .25 automatic, a BB gun, and a sawed off shotgun. (Tr. 1040, 1048.) And, Dalesandro did not mention that second .25 automatic until February 24, 1993, years after the crime and his earlier inculpatory statements. (Tr. 1115.) Dalesandro's belated claims demonstrate that there was only one .25, the one the police recovered—and that weapon was not used to kill the Hartigs.

If defense counsel had the evidence related to the alternate suspects, and especially the evidence showing that Wilson, already a convicted murderer at the time of trial, was not excluded by the DNA test, there would at least have been reasonable doubt that Noling committed the murders, let alone a possible finding of not-guilty. Moreover, the suspicious activities surrounding the disappearance of the VanSteenberg gun was undoubtedly material to the subsequent search effort, and a failure to find, the .25 caliber gun used in the Hartig murder. In fact, all of the new evidence goes to the very heart of the issues in this case.

<u>Co-defendants receiving favorable plea-bargains in exchange for their testimony</u>

At trial, Wolcott and Dalesandro maintained that they went to Atwater, that Noling and

St. Clair entered the Hartigs' home, and that Noling killed Mr. and Mrs. Hartig. Both youths gave detailed testimony about a plan, Noling's actions, incriminating statements, and even testimony about the smell and appearance of Noling's gun. (See e.g., Tr. 827, 847-48, 850-51, 1035-36, 1041-42, 1050, 1053, 1054-55, 1057.) In exchange for this testimony, neither Wolcott nor Dalesandro spent a single day in prison for the Hartig murders..

Wolcott received complete immunity in exchange for his testimony. (Tr. 886-87.) He will never be prosecuted for his alleged participation in the crimes for which Noling now sits on death row. (Tr. 886-87.) Even though Dalesandro was supposed to receve a prison term for his alleged involvement in the Hartig murders, the proseucotr agreed to recommend that Dalesandro's plea bargain be reinstituted if he cooperated at Noling's trial. (Tr. 1138.) Reinstitution of Dalesandro's plea bargain meant that his participation in the Hartigs' deaths cost him no prison time, as that sentence ran concurrently with his aggravated trafficking sentence.

These youths had nothing to lose and everything to gain by implicating Noling in these murders, which makes their credibility highly questionable.

Co-defendants giving inconsistent testimony

During Wolcott and Dalesandro's initial questioning in 1990, immediately following the Hartig murders, both claimed to know nothing about the Hartig murders. (Tr. 875, 1100.) They continued to assert that lack of knowledge for years. Of course, both later gave statements inculpating Noling in the Hartig murders.

However, even as they changed their stories, the stories they did tell repeatedly demonstrated that they knew nothing about the Hartig murders.

- Wolcott could not take investigators to the Hartigs' home on Moff Road. (Tr. 895.)
- Wolcott asked prosecutor Durst, during his statement, if he was "finally on his side." (Tr. 905.)

- Wolcott told investigators that he had been drinking on the day of the murders. Wolcott described himself as "toasted," in the back of the car "dozing off," as "pretty drunk," and as "wobbling and weaving." (Tr. 910.)

- Wolcott admitted that he did not know what he was telling investigators:

> For some reason I'm not sure. Like I said, I can remember a garage but I can't explain it to you. Just seems like for some reason it's another house and another dream. I don't know if what I'm telling you is in my mind, I mean, I'm not sure if it's mixed with other things or not about details of the house and road and so on and so forth. I mean, it could be some other house, some other road I have seen. Do you know what I mean. Just what you told me. (Tr. 917.)

- The prosecutor determined that Dalesandro's statement contained major omissions, was not truthful in part, and minimized his participation in the Hartig murders. (Tr. 1008.)

- Dalesandro could not identify the Hartigs' home. (Tr. 1098.)

- Dalesandro could not pronounce Atwater. (Tr. 1104.)

- Dalesandro could not name the road where the Hartigs lived. (Tr. 1109.)

Even as they confessed to their crimes, Wolcott and Dalesandro made it clear that they did not know what they were talking about.

Six days after the prosecutor revoked Dalesandro's plea bargain, and the trial court sentenced him to the maximum consecutive sentences for his participation in the Hartig murders, Dalesandro's memory became fresher and clearer than ever before. Prior to the revocation of Dalesandro's plea deal, Dalesandro never mentioned seeing an old man outside of the Hartigs' home, he never mentioned seeing blood on Noling's clothes, he never mentioned seeing smoke come from Noling's gun, and he never mentioned the gun-dealer, Chico. (Tr. 1111-15, 1123.) Dalesandro asserted that he kept this information from the prosecution because he did not want to get Noling into too much trouble. (Tr. 1113, 1119.) Dalesandro's claim was unbelievable—having inculpated Noling in a capital murder, Dalesandro's statements already placed Noling in

serious trouble. The more likely scenario: Dalesandro made up even more phony information in an effort to get the prosecutor to modify his sentence. (Tr. 1010 .)

The prosecutor called Dalesandro a liar. (Tr. 1008-09.) Resultantly, the prosecutor revoked his plea bargain and Dalesandro received the maximum sentence available consecutive to his current sentence for aggravated trafficking. (Tr. 1009.) Rather than looking at five to fifteen years running concurrently with his three to fifteen years for drug trafficking, Dalesandro faced eight to thirty years. It was only after the State sentenced Dalesandro that his memory was suddenly fine-tuned. He made up more incriminating facts to ensure that he would regain his original deal with the prosecutor.

All of this mounting evidence only underscores the unreliability and weakness of the State's case.

2. Ineffective assistance of counsel

It is Noling's position that this information was not provided to the defense at the time of trial. (Exs. F-G) If the State is able to demonstrate this material was provided to defense counsel, then counsel rendered ineffective assistance of counsel in failing to investigate and pursue the evidence related to Wilson and to VanSteenberg. The information, if it were in trial counsel's possession, similarly would change the result if this Court remands for a new trial.

Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984)). In addition to investigation, counsel has a duty to present evidence "that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict . . . ." Reynoso v. Giurbino, 462 F.3d 1099, 1112 (9th Cir. 2006); see also Avila v. Galaza, 297 F.3d 911, 919 (9th Cir. 2002); Hart v. Gomez, 174 F.3d

1067, 1070 (9th Cir. 1999); Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999). Failure to present exculpatory evidence "is ordinarily deficient, 'unless some cogent tactical or other consideration justified it.'" Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355, 1358 (4th Cir. 1992) (internal citations omitted).

House v. Bell, 547 U.S. 518 (2006), is relevant to this Court's consideration. In House, the petitioner presented evidence of an alternative suspect. Despite the fact that the evidence was "by no means conclusive," the Supreme Court found that, coupled with other evidence the alternative suspect evidence "would reinforce other doubts as to House's guilt." Id. at 2085. The evidence related to both Wilson and VanSteenberg would likewise reinforce doubts about Noling's guilt. Resultantly, if counsel is proved to have possessed this information, then their deficient performance prejudiced Noling.

3. Actual innocence

The information presented in this motion provides strong support for the position Noling has maintained for twenty years—he did not kill Bearnhardt and Cora Hartig. Each of Noling's co-defendants recanted their testimony and confessed their lies years ago. Review of the above information further strengthens Noling's claims.

Noling is actually innocent of these crimes. His convictions and death sentence violate the Eighth Amendment. See Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., joined by Kennedy, J., concurring) ("executing the innocent is inconsistent with the Constitution"); id. (O'Connor, J., joined by Kennedy, J., concurring) ("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 ... than to execute a person who is actually innocent."); Schlup v. Delo, 513 U.S. 298, 316 (1995); see also House v. Bell, 311 F.3d 767, 768 (6th Cir. 2002); Wilson v. Greene, 155 F.3d 396, 404 (4th Cir. 1998); Milone v. Camp, 22 F.3d 693, 699-700 (7th Cir. 1994) (internal citations omitted); Cornell v. Nix, 119 F.3d 1329, 1333 (8th Cir. 1997); Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (internal citations omitted); Lopez v. Mondragon, No. 93-2148, 28 F.3d 113 (10th Cir. June 20, 1994); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000); Felker v. Turpin, 83 F.3d 1303, 1312 (11thCir. 1996).

Noling incorporates section 1 herein as if fully rewritten. The materials suppressed by the prosecution would have proved his actual innocence of the Hartig murders. At a minimum, the jury would have had real and serious doubts about Noling's guilt that would have resulted in an acquittal. This Court cannot have confidence in the trial jury's verdict, and it must be overturned and a new trial ordered.

B. This evidence has been discovered since trial

Prior to trial, Noling filed six motions to access all of the information to which he was entitled under the Fourteenth Amendment and Ohio R. Crim. P. 16. (See Motions filed 11/15/92, 11/16/92, 11/22/95 (3 motions), and 12/5/95.) Those motions included requests for information regarding: others who may have perpetrated the crime, names and addresses of other suspects and what led them to be considered suspects, and any statements that suggest doubt as to Noling's identity as the perpetrator of these offenses, among numerous others. The prosecution

opposed some of these requests. (See, e.g., Motion filed 11/30/95.) By doing so, the State suppressed material evidence that went to the very heart of Noling's case.

The Supreme Court has confirmed the defendant's right to rely on the prosecution's representation that all Brady material was provided. Banks v. Dretke, 540 U.S. 668, 693 (2004) (finding that defendant rightfully relied on prosecution's representations that all Brady material was provided). The prosecution in Banks "asserted, on the eve of trial, that it would disclose all Brady material." Id. The Court found no fault in Banks's reliance on this representation. Id. (citing Strickler v. Greene, 527 U.S. 263, 283-84 (1999)); see also Dobbs v. Zant, 506 U.S. 357, 359 (1993) (per curiam) (affirming defendant's right to rely on prosecution's representations with respect to the record).

In state post-conviction, Noling again requested development of the facts upon which he now relies to support his misconduct and innocence claims. (See Postconviction petition and amendments filed 7/23/97, 7/31/97, 8/26/97, 9/5/97.) In his First Claim for Relief, Noling alleged he was actually innocent of the Hartigs' murders. (PCP filed 7/23/97.) In his Second Claim for Relief, Noling asserted that the prosecution knowingly used false evidence to obtain his conviction. (Id.) In his Third Claim for Relief, Noling argued that the prosecution suppressed material exculpatory evidence. (Id.) Noling requested an evidentiary hearing to establish the existence of the facts to support these claims. (PCP and amendments filed 7/23/97, 731/97, 8/26/97.) This Court dismissed Noling's post-conviction petition after a truncated hearing that denied his requests for full fact development. (State v. Noling, Case No. 03-1950, MISJ filed 11/6/03.)

In his appeal to the Portage County Court of Appeals from the dismissal of his post-conviction petition, Noling raised the failure of the trial court to award him a complete

evidentiary hearing. The Court of Appeals overruled the claim. In the Ohio Supreme Court Noling again raised the issue of the trial court's failure to grant him a full evidentiary hearing. The Ohio Supreme Court refused to exercise its discretional jurisdiction to hear his appeal. After having done all of the above, and being summarily denied each time, Noling made a public records request in his co-defendant's cases and obtained the Wilson and VanSteenberg material.

D. <u>The new evidence could not have been discovered before trial with due diligence</u>

This evidence could not have been discovered through due diligence because the prosecution, the only source for this evidence, never disclosed it. In fact, the prosecution failed to disclose this evidence even after repeated requests from Noling to provide this very type of evidence.

E. <u>The new evidence is material to the events at issue in this case</u>

Noling was convicted of killing the Hartigs, even though he claimed (and to this day continues to claim) that he was innocent. His earlier crimes, which Noling readily admitted to, were nonviolent and rather inept. There was no physical evidence linking Noling to the crime. Instead, his conviction rested upon the word of two co-defendants who received extremely favorable plea bargains in exchange for their testimony. Further, the prosecution's witnesses' testimony was plagued with inconsistencies and misstatements.

The prosecution's trial case was weak at best. Compelling evidence such as this, directly on point to the central issue at trial—who committed the Hartig murders—would have been material to the issue.

F. <u>The new evidence is not merely cumulative of former evidence</u>

No evidence was introduced at trial identical to that outlined above. Review of the trial record reveals this motion is not cumulative of trial efforts.

G. The new evidence does not merely impeach or contradict former evidence

The evidence presented in this motion does not merely impeach or contradict. It presents to viable alternative suspects that defense counsel could have investigated and pursued in their defense of Noling.

II. A NEW TRIAL MUST BE GRANTED BECAUSE THE PROSECUTION'S MISCONDUCT MATERIALLY AFFECTED NOLING'S RIGHTS.

The Court is empowered with the authority to grant Noling a new trial under these particular circumstances, where it is shown that the prosecution withheld material evidence in violation of a defendant's substantive rights. O.R.C. § 2945.70(B). Such is the case here. The evidence delineated above is material under Brady. Moreover, Noling has also shown that the State knew about his evidence and failed to provide it. Given that this material evidence was withheld by the State, in violation of the prosecutor's legal and ethical duties, the Court must grant Noling a new trial.

III. CONCLUSION

Noling has discovered "new evidence" material to his defense, "which he could not with reasonable diligence have discovered and produced at the trial." See O.R.C. § 2945.79(F). See also O.R.C. § 2945.79(B). The prosecution withheld material exculpatory evidence. Under O.R.C. §§ 2945.79(B) and (F) and Ohio R. Crim. P. 33(A)(2) and (6), Noling requests that this Court grant his Motion for a New Trial.

Respectfully submitted,

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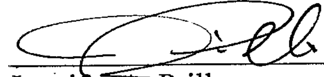
Certificate Of Service

I hereby certify that a true copy of the foregoing **Instanter Motion For New Trial** was forwarded via regular mail to Prosecutor Victor Vigluicci, 241 South Chestnut St. Ravenna, Ohio 44266 on this 17 day of June, 2010.



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