IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

State of Ohio,	:	Case No. 2011-PA-00018
Plaintiff-Appellee		Trial Court Case No. 95 CR 220
vs.	:	
Tyrone Noling,		Regular calendar
Defendant-Appellant.	:	**This is a death penalty case.**

APPELLANT TYRONE NOLING'S CORRECTED MERIT BRIEF

ORAL ARGUMENT REQUESTED

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I. Summary of the Argument

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 that he sought to present in a new trial motion to the trial court below. This evidence included some of the most compelling evidence of Noling's innocence that he has uncovered to date:

- Nathan Chesley's claim that his brother killed the Hartigs.
- Blood-typing evidence (which previously excluded Noling and his co-defendants) did not similarly exclude Dan Wilson, a former Ohio death row inmate executed in 2009 for an unrelated aggravated murder—and also Nathan Chesley's foster brother.
- Evidence of the mysterious and deceptive efforts taken by another set of alternative suspects to conceal a missing .25 caliber handgun.

This critical exculpatory evidence supporting his claim of actual innocence was unconstitutionally withheld by the prosecution before trial. The trial court did not dispute the exculpatory nature of this evidence, but denied Noling leave to file his new trial motion. The trial court applied the "clear and convincing proof" standard in Ohio Revised Code § 2945.80, and held that Noling "failed to establish that he was unavoidably prevented from discovering the exculpatory evidence." Judgment Entry/Order T.d. 337, p.2.

This ruling, made more than fifteen years after Noling's trial, was based primarily on general testimony by a prosecutor that he followed an "open file" discovery policy. There was testimony that defense counsel did not recall seeing the exculpatory evidence concerning an alternative suspect, which was recently produced in a public records request made to the Sheriff's Office. There was a reasonable inference that this evidence may never have reached the prosecutor's files, but that inference could not overcome the "clear and convincing" hurdle required by O.R.C. § 2945.80. Neither the prosecution nor the defense produced an inventory of

evidence that was actually made available by the prosecution before trial. There is no dispute that the exculpatory evidence—which dealt with a witness directly implicating a now-executed alternative suspect in the murders in issue, blood-typing evidence that did not exclude that alternative suspect, and other investigatory leads not fully pursued by the prosecution—was not presented at trial.

As explained below, the record demonstrates that the "clear and convincing" evidence standard would be unconstitutional as applied in this specific context, and, further, that the trial court failed to allow appropriate development of Noling's evidence in the hearing. However, Noling did establish that it was disputable that the exculpatory evidence was turned over in discovery and is therefore entitled to file his new trial motion. Alternatively, if defense counsel had this powerful evidence it their possession before trial but failed to pursue it, Noling is entitled to file a new trial motion to raise an ineffective assistance of counsel claim.

Despite the trial court's recognition that the material Noling seeks to present is exculpatory, *id.*, Noling will not have his day in court unless this Court acts. More process, not less, is required in a death penalty case. U.S. Const. amends. V, XIV. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *see also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) ("When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause"). Noling respectfully requests that this Court vacate the trial court's order and remand with direction to the trial court that Noling be permitted to file his new trial motion.

II. Statement of the Case

Procedural Posture

Tyrone Noling was convicted of aggravated murder and related felonies, for the murders of Bearnhardt and Cora Hartig. He was sentenced to death on February 20, 1996.

Noling filed his first postconviction petition on July 23, 1997 (T.d. 205), which the trial court denied. *State v. Noling*, No. 95-CR-220 (Portage C.P. Apr. 9, 1998), (T.d. 242). This Court rejected Noling's appeal, *State v. Noling*, No. 98-P-049, 2003 Ohio App. LEXIS 4508 (Portage Ct. App. Sept. 19, 2003) (T.d. 257), and the Ohio Supreme Court declined jurisdiction over the case. *State v. Noling*, 101 Ohio St. 3d 1424, 802 N.E.2d 154 (2004).

On June 21, 2010, Noling filed a motion for leave to file a new trial motion. (Motion for Leave, T.d. 304). The trial court ordered an evidentiary hearing on the matter (T.d. 306, 308, 311-12), which was held on February 18, 2010. Noling subpoenaed several witnesses from whom the trial court indicated it would not entertain testimony. (*See* T.d. 326-29, 332, 334-35.) Following the hearing, the trial court denied Noling leave to file his new trial motion. (Judgment Entry/Order T.d. 337). Noling timely filed his Notice of Appeal on March 21, 2011. (Notice of Appeal T.d. 341.) This Merit Brief follows a grant of extension of time by this Court.

III. Statement of the Facts

Tyrone Noling was convicted and sentenced to death for Bearnhardt and Cora Hartig's murders. A neighbor discovered the couple shot to death in their kitchen. (T.p. 653, 659.) While the State put on 24 witnesses in its case in chief, the principal evidence against Noling was the testimony of his three alleged accomplices. Gary St. Clair, Butch Wolcott, and Joseph Dalesandro all testified that Noling developed a scheme to steal from the elderly—and he implemented that scheme twice before the Hartig murders.

Wolcott and Dalesandro testified that Noling committed the Hartig murders in exchange for complete immunity (Wolcott) and a plea deal that meant no additional time (Dalesandro). (*See, e.g.*, T.p. 842, 846-47, 850-51, 1045, 1050, 1053.) St. Clair, however, took the stand and recanted his pre-trial confession. He testified that the youths did not participate in the murders and that he was coerced into implicating Noling in these crimes. (T.p. 961, 972, 996-1000.)

On his initial round of postconviction review, Noling presented claims of actual innocence, prosecutor misconduct, and ineffective assistance of counsel. (T.d. 205.) Among the dehors the record evidence presented were Wolcott and Dalesandro's recantations—both claimed that they were coerced and manipulated into inculpating Noling in the murders. The Ohio courts denied Noling's initial postconviction petition.

In 2006, the *Plain Dealer* investigated Noling's case, which included accessing public records related to Noling's case. A series of articles followed, as well as release of the records obtained by the *Plain Dealer* to the general public. These materials supported Noling's second new trial motion (Second Motion for New Trial T.d. 258), which the state courts denied.

In May 2009, counsel for Noling sent yet another public records request 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 made a follow up request regarding the records he received. In his follow-up

response, Noling sought additional information related to Daniel Wilson and Nathan Chesley. Noling was informed that no records were located.

Upon review of the records Noling received, and after comparing those records to files obtained from trial counsel, undersigned counsel determined there was new, material evidence included in the public records. Trial counsel confirmed they had not seen these records previously in affidavits. (Reply to State's Response to Noling's Application for Leave to file a Motion for new Trial (hereinafter "Reply"), T.d. 336, Ex. 1.) The new, material evidence included:

Blood-type evidence and affidavits suggest Dan Wilson as an alternate suspect

The prosecution failed to disclose evidence that Noling's counsel could have used to support an alternative-suspect defense. The prosecution withheld results from a blood-typing test of a cigarette butt found at the scene. (Reply T.d. 336, Ex. A to Ex. 1.) While this genetic material did not match samples taken from Tyrone Noling and his co-conspirators, it also did not exclude Daniel Wilson (T.p. 721; Reply, T.d. 336, Ex. A to Ex. 1.)

The prosecution did not provide defense counsel with a statements made by Nathan Chesley that inculpated his foster brother, Daniel Wilson, as a possible suspect in the Hartig murders. (Reply T.d. 336, Ex. B to Ex. 1.) Police notes taken shortly after the Hartigs' murders indicate that Chesley described not only how he thought the Hartig murders were cool, but also that his brother committed them. (Reply T.d. 336, Ex. B to Ex. 1.)

Chesley lived as a foster child in the home of Shirley Spinney. (Reply T.d. 336, Ex. E p. 1 to Ex. 1.) Spinney also fostered Wilson who continued to visit the Spinney home while Chesley was living there. (Reply T.d. 336, Ex. E, p. 1 to Ex. 1.) Wilson was convicted of a 1991 murder, sentenced to death, and died by lethal injection on June 3, 2009.

Over a year after the murders of Cora and Bearnhardt Hartig, 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 blood-typing analysis on cigarette butts found outside of the Hartigs' home—the only physical evidence found at the scene. (Reply T.d. 336, Ex. A to Ex. 1.) The cigarette butts were tested against a saliva sample taken from Daniel Wilson, and the test did not exclude Wilson as a possible match. (Reply T.d. 336, Ex. A to Ex. 1.) Authorities conducted similar analyses using saliva samples from Noling and his co-conspirators. (T.p. 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. (Reply T.d. 336, Exs. F-G to Ex. 1.)

After locating the police notes reflecting Chesley's statement that his brother killed the Hartigs, 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." (Reply T.d. 336, Ex. E to Ex. 1.)

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* Reply T.d. 336, Ex. E pp. 1-2 to Ex. 1.) 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. (Reply T.d. 336, Ex. E p. 1 to Ex. 1.) 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. (Reply T.d. 336, Ex. E p. 2 to Ex. 1.)

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. (Reply T.d. 336, Ex. H to Ex. 1.) 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. (Reply T.d. 336, Ex. I to Ex. 1.) 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.)

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 Clemetson; Raymond VanSteenberg; and Dennis VanSteenberg, Raymond's son. (Reply T.d. 336, Ex. J to Ex. 1.) 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. (Reply T.d. 336, Ex. J pp. 1, 3, 5 to Ex. 1.) The prosecution disclosed these interview reports to defense counsel, but the prosecution did not disclose a statement provided by Marlene VanSteenberg, 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. (Reply T.d. 336, Exs. C p. 1 and D to Ex. 1.) Without Ms. VanSteenberg's statement, Noling's counsel were left with conflicting stories and incomplete details provided by Clemetson and Dennis and Raymond VanSteenberg. (*See* Reply T.d. 336, Ex. J to Ex. 1.)

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. (Reply T.d. 336, Exs. C-D to Ex.1.) 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. (Reply T.d. 336, Exs. C-D to Ex.1.) 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. (Reply T.d. 336, Exs. C-D to Ex.1.) This statement was not disclosed to Noling's trial counsel. (Reply T.d. 336, Exs.F-G to Ex. 1.)

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. (Reply T.d. 336, Exs. C p.1 and D to Ex. 1.) Ms. VanSteenberg also stated that on that same evening, she received a call from Raymond. (Reply T.d. 336, Exs. C p.1 and D to Ex. 1.) 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. (Reply T.d. 336, Exs. C p.1 and D to Ex. 1.) 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. (Reply T.d. 336, Exs. C p.1 and D to Ex. 1.) 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. (Reply T.d. 336, Exs. C p.1 and D to Ex. 1.)

Furthermore, Ms. VanSteenberg 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. (Reply T.d. 336, Exs. C p.1 and D to Ex. 1.) 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. (Reply T.d. 336, Exs. C p. 2 and D to Ex. 1.) Ms. VanSteenberg 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. (Reply T.d. 336, Exs. C p. 2 and D to Ex. 1.) Neither the handwritten notes nor the typed copy of Ms. VanSteenberg's statement were provided to trial counsel. (Reply T.d. 336, Exs. F-G to Ex. 1.)[1]

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[1] Marlene VanSteenberg's statement read in conjunction with police reports regarding Larry Clemetson, Raymond VanSteenberg, and Dennis VanSteenberg would have provided trial counsel with a compelling alternative suspect defense. Detectives investigated Clemetson and the VanSteenbergs. (T.d. 336, Reply Ex. J to Ex. 1.) Clemetson told police that at around 10:00 p.m. on April 6, 1990, he and Dennis VanSteenberg drove to a skating rink in a truck belonging to Dennis's father, Raymond VanSteenberg. (T.d. 336, Reply Ex. J pp. 1, 4 to Ex. 1.) On the way to the rink, Dennis showed Clemetson a .25 automatic gun that was kept in the truck. (T.d. 336, Reply Ex. J pp. 1, 4 to Ex. 1.) When Detectives Kaley and Doak asked Dennis for the gun during his interview, the gun was missing. (T.d. 336, Reply Ex. J pp. 3, 5 to Ex. 1.)

Dennis VanSteenberg and Clemetson provided authorities with conflicting details about the missing gun. Clemetson claimed that sometime after he and Dennis visited the skating rink, Dennis called asking about the gun's whereabouts. (T.d. 336, Reply Ex. J p. 1 to Ex. 1.) Clemetson further stated that he then went back to the skating rink, could not find the gun and reported it. (T.d. 336, Reply Ex. J pp. 1, 4 to Ex. 1.) In contrast, Dennis stated that Raymond VanSteenberg removed the gun from the truck on April 6th, at 5:30 p.m. (T.d. 336, Reply Ex. J p. 1 to Ex. 1.) On April 8th, Dennis told police that he would come up with the gun, and the next day a detective picked up a .25 automatic. (T.d. 336, Reply Ex. J pp. 3, 5 to Ex. 1.) The detectives then received a phone call advising that they had the wrong gun. (T.d. 336, Reply Ex. J p. 3 to Ex. 1.) Marlene VanSteenberg later told detectives that Raymond picked up the gun

Had Noling been permitted to file his new trial motion, he intended to use this evidence to support claims of actual innocence, and violations of *Brady v. Maryland* and/or ineffective assistance of counsel. (Reply T.d. 336, Ex. 1.)

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from her house on April 8th and that Raymond called her to ask that she tell the police he had the gun for three to four months. (Reply T.d. 336, Exs. C p. 1 and D to Ex. 1.) 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 detectives wanted had been used to kill three other people. (Reply T.d. 336, Ex. J p. 2 to Ex. 1.)

IV. ARGUMENT

Assignment of Error No. I

The trial court erred in applying Ohio Revised Code § 2945.80's requirement that a defendant demonstrate by "clear and convincing proof" that he was unavoidably prevented from discovering the evidence upon which his motion for new trial is based to Noling's request for leave to file a new trial motion. (T.d. 337).

Issues presented for review and argument

i. Application of the "unavoidable delay" requirement in Ohio Revised Code § 2945.80 to a *Brady* violation deprives a defendant of his due process rights as guaranteed by U.S. Const. Amend. XIV.

ii. Application of the "clear and convincing proof" requirement in the Ohio Revised Code § 2945.80 under the facts in this record would deprive this defendant of this due process rights as guaranteed by U.S. Const. Amend. XIV.

In *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, the United States Supreme Court established that due process is violated when prosecutors withhold material evidence from the defense. *Id.* at 87. Evidence is considered material where there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

As applied here, Ohio Revised Code § 2945.80 imposes an impermissibly high barrier to asserting this constitutionally protected right. According to the code, a motion for new trial must be filed within 120 days of the verdict unless a defendant can show by "clear and convincing proof" that he was "unavoidably prevented from the discovery of the [new evidence] upon which he must rely." O.R.C. § 2945.80. In doing so, O.R.C. § 2945.80 completely fails to distinguish between evidence from a neutral source and evidence that was unavailable to the defendant because it was withheld by the prosecution. The statute requires the same burden of proof regardless of the reasons why the defendant did not discover the evidence within the 120 day

period allowed by the statute. This impermissibly restricts the ability of defendants to assert a *Brady* violation.

***Brady* material is inherently undiscoverable by a defendant.**

When there is a *Brady* violation, "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) (*citing United States v. Kelly*, 790 F.2d 130, 135 (C.A.D.C. 1986); *United States v. Agurs*, 427 U.S. 97, 111 (1976)) (internal quotations omitted). As a result of the nature of the evidence, "the defense does not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Id.* Instead, the burden placed upon a defendant who proffers newly discovered withheld evidence is reduced to showing "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (internal quotations omitted). In other words, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434. Ohio Revised Code § 2945.80 unconstitutionally raises the burden of proof established by the Supreme Court and adds additional legal burden upon an appellant who seeks a new trial on the basis of newly discovered *Brady* evidence.

By its nature *Brady* evidence is inherently undiscoverable—it is evidence that the defendant was unavoidably prevented from the discovering due to the action or inaction, whether intentional or inadvertent, of the prosecution. The additional burden imposed by O.R.C. § 2945.80 requires the defendant to demonstrate by clear and convincing proof an element that is solely in the knowledge of the prosecution, namely how or why the exculpatory evidence was not turned over to the defendant. Because the proof needed is solely within the possession of the prosecution, the defendant cannot reasonably be held to a legal standard that requires him to prove an element that the state has an interest in continuing to keep from him in order to preserve the conviction.

Ohio Revised Code § 2945.80 impedes Noling's ability to assert a *Brady* violation.

The "clear and convincing proof" standard impermissibly restricts the ability of defendants to assert their constitutional rights under *Brady* when the exculpatory evidence comes to light at a later date, such as through the public records request here, particularly if the withholding of evidence is concealed for an extended period of time. The rules developed from *Brady* should not be interpreted to encourage prosecutors to withhold exculpatory evidence in hopes that the passage of time will make it difficult or impossible for defendants to show by "clear and convincing proof" that the evidence was improperly withheld, as is currently required by the statute.

Moreover, the Supreme Court has consistently held that a state cannot erect impediments to the exercise of a federal right. *See Harman v. Forssenius*, 380 U.S. 528 (1965) (finding a poll tax unconstitutional because it created a "plainly cumbersome procedure" and a "real obstacle" to the exercise of citizens constitutionally protected right to vote under the 15th Amendment); *Frost v. R.R. Comm'n of California*, 271 U.S. 583, 593-94 (1926) (holding that a state "may not

impose conditions which require the relinquishment of constitutional rights"); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (overturning Texas voting law requirements as a violation of the 15th amendment because "constitutional rights would be of little value if they could be indirectly denied"). Ohio Revised Code § 2945.80 erects just such a barrier here by creating an impediment to the exercise of Noling's constitutionally protected right to due process.

A death sentenced prisoner is entitled to the benefit of the doubt when he alleges a *Brady* violation.

Noling faces execution. There is evidence that casts doubt on his conviction, but which no court has reviewed. Because death is different, when a capital defendant brings forth an actual innocence claim on appeal, supported by exculpatory *Brady* evidence, the defendant is entitled to the benefit of the doubt. The case at hand "is a capital case...and one moreover in which our reading of the evidence shows there is a real possibility that the wrong man is to be executed. In such a case,...[the defendant] should receive the benefit of the doubt." *State v. Johnston*, 39 Ohio St. 3d at 62 529 N.E.2d at 913 (*quoting Lindsey v. King*, 769 F.2d 1034, 1043 (5th Cir. 1985) (alterations in original)). "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring). Much has come to light since Tyrone Noling was wrongfully convicted, and constitutional safeguards, as well as the interest of justice, require he be permitted to mount the full defense the suppressed exculpatory evidence did not allow him to present.

The United State Supreme Court has distinguished *Brady* violations as a special circumstance entitling a defendant to a lower burden of proof. Ohio Revised Code § 2945.80 as applied in this instance works to unconstitutionally raise that burden. Ohio's failure to bifurcate

the standard of proof for both new evidence discovered after trial from a neutral source and evidence wrongfully withheld from the defense is a clear violation of Noling's constitutionally protected right to due process. This Court should vacate the trial court's holding and remand Noling's case to the trial court with instructions that it grant leave to allow Noling to present his new trial motion.

The facts in this record demonstrate that evidence with great potential impact was inexplicably absent from the trial record. No inventory was produced by either side to demonstrate that the evidence was produced in discovery, and the "clear and convincing proof" standard would make it virtually impossible for any defendant to overcome the generalized claim that prosecutors followed an open file discovery policy. Moreover, an inadvertent failure to produce exculpatory evidence is still a *Brady* violation." *Strickler v. Greene*, 527 U.S. 263, 288 (1999). Under the facts in this record, the "clear and convincing proof" requirement cannot be applied to Noling without violating his due process rights under the Fourteenth Amendment to the United States Constitution.

Assignment of Error No. II

The trial court abused its discretion when it denied Noling leave to file his new trial motion. (T.d. 337).

Issues presented for review and argument

i. Denial of leave to file a new trial motion is inappropriate where the court bases such a ruling on the existence of open file discovery.

ii. Denial of leave to file a new trial motion is inappropriate where petitioner demonstrates he has been unavoidably prevented from discovering new evidence.

iii. Denial of leave to file a new trial motion is inappropriate where trial court has placed unconstitutional limits on the development of evidence during state court evidentiary proceedings.

iv. Denial of leave to file a new trial motion is inappropriate where the trial court fails to consider whether Appellant has been unavoidably prevented from raising claims of actual innocence and ineffective assistance of counsel.

A. Introduction

There is no question that the evidence Tyrone Noling seeks to present is compelling, exculpatory evidence. The trial court's ruling recognizes the evidence Noling seeks to present is "exculpatory evidence." *See* Judgment entry/order, T.d. 337, p. 2, *State v. Noling*, No. 95-CR-220 (Portage C.P. Mar. 2, 2011). Despite the compelling nature of this exculpatory evidence, the trial court denied Noling leave to present his claims finding that Noling had not demonstrated that he was unavoidably prevented from discovering this evidence. *See id.* The trial court's finding was unreasonable and arbitrary. This Court must vacate the trial court's order and remand with instructions that Noling be given leave to file his new trial motion.

B. Standard of review

This Court reviews the trial court's denial of leave to file a new trial motion under the abuse of discretion standard. *See State v. Shakoor*, No. 10 MA 64, 2010 Ohio App. LEXIS 5407 at **9 (Mahoning Ct. App. Dec. 22, 2010); *State v. Townsend*, No. 08AP-371, 2008 Ohio App. LEXIS 5396 *at* **5 (Franklin Ct. App. Dec. 11, 2008); *State v. Coon*, No. 04CA5, 2005 Ohio App. LEXIS 1865 at **9 (Jackson Ct. App. Apr. 25, 2005). The trial court abuses its discretion when the "court's attitude is unreasonable, arbitrary or unconscionable." *See Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 217, 450 N.E.2d 1140, 1142 (1983).

C. Argument

1. The trial court abused its discretion when it found Noling was not unavoidably prevented from discovering the exculpatory evidence he wishes to present in his new trial motion.

An open file discovery policy does not resolve the issue presented.

The trial court found that Noling failed to establish that he was unavoidably prevented from discovering the exculpatory evidence, and it noted that the prosecution had conducted open file discovery in this case. Judgment Entry/Order, T.d. 337, p. 2. Any reliance on the fact that the prosecution had an open file discovery policy is misplaced. The important question is what was in the prosecution's file.

Whether a particular item was in the open file "is a critical factual question." *United States v. Alexander*, 748 F.2d 185, 191 (4th Cir. 1984). In *Alexander*, the court determined that it was disputable that the materials in question were in the open file and therefore remanded to the district court for reconsideration. *Id.* at 193. Accordingly, the fact that a prosecutor's office utilizes open file discovery does not foreclose the possibility of a violation of *Brady v. Maryland,*

373 U.S. 83 (1963). A court must inquire further to determine whether the evidence in question was contained in the file that was made available to defense counsel.

Noling has established that it is disputable whether the evidence in question was in the open file provided to his trial counsel. Noling's trial counsel both testified that they did not recall having seen the new alternative suspect documents at the time of trial. (Hrg. T.p. 46, 51, 53, 80, 81, 82.) It has been nearly twenty years since they conducted discovery in this case, and as a result, neither attorney was able to say with certainty that they did not see these documents during that process. However, the nature of the documents makes clear that if trial counsel had seen them, they would certainly have followed up on the information contained in them. (See, Hrg. T.p. 47, 56, 66-67.) "The most persuasive indication that the defense did not possess this evidence is the fact that the defense never used this evidence at trial." *State v. Larkins*, No. 82325, 2003 Ohio App. LEXIS 5276 at **11-12 (Cuyahoga Ct. App. Nov. 6, 2003) (citing *United States v. Stifel*, 594 F. Supp. 1525 (N.D. Ohio 1984)). The defense theory at trial was that someone other than Noling murdered the Hartigs. (*See* T.p. 642-45; Hrg. T.p. 42) ("The real issue in our minds in terms of this case was was there anybody else who was willing or available or suspected of doing this because identity was the sole issue.") Had Noling's attorneys received information that indicated that someone else may have had perpetrated the crime they would have followed up on that information.

Trial counsel disputed that he reviewed records at Sheriff's Office.

Moreover, the trial court found that these documents were provided to defense counsel based on the fact that there was open file discovery paired with the testimony of Assistant Prosecutor Eugene Muldowney. The trial court found that Muldowney "testified he gave full discovery of everything in his possession and further that he met with defense counsel at the

Sheriff's Office to allow them to examine the file," and that "the Sheriff's Office only had one file for all of the co-defendants." Judgment entry/order, T.d. 337, p. 2. However, a review of the hearing transcript reveals that it is not quite so clear. First, it should be noted that Noling's current counsel obtained these documents through a public records request to the Portage County Sheriff's Office for Noling's co-defendants' files. Muldowney testified that while the prosecutor's office had separate files for each co-defendant, the Sheriff's Office had only one file for the entire case. (Hrg. T.p. 114.) Muldowney indicated that he and one or both of Noling's trial counsel went to the Sheriff's office and reviewed the files there. (Hrg. T.p. 105.) But Attorney Cahoon testified that he remembered going to either the prosecutor's office or the Sheriff's Office to review the ***physical evidence***. (Hrg. T.p. 87.) Cahoon did not recall reviewing any documents at that time. (Hrg. T.p. 88.) Cahoon further indicated that he believed the documents that had been provided to him by the prosecutor's office prior to the review of the physical evidence constituted all discovery, (*id.*), the implication being that there would have been no reason to review any documents at the Sheriff's Office. Based on the evidence in the record, it is disputable that Noling's trial counsel received the exculpatory documents at issue here.

It should also be noted that Assistant Prosecutor Muldowney executed an affidavit prior to the hearing in which he stated that "complete copies of the Portage County Prosecutor's file were provided to defense counsel," and that trial counsel "visited the Portage County Prosecutor's Office, on more than one occasion, to meet with prosecutors and investigators to review the Prosecutor's file." (T.d. 333, State's Response to Noling's Application for Leave to File Motion for New Trial (hereinafter "State's Response"), T.d. 333, Ex. 1, p. 2. Nowhere in

that affidavit does Muldowney state that Noling's trial counsel reviewed the Sheriff's files—the files from which Noling's current counsel obtained the documents.

Defense counsel may rely on the State's assertion that all *Brady* material is in the open file.

Both in their response to Noling's motion for leave to file a new trial motion and at the hearing, the State implied that Noling's counsel should have known that Daniel Wilson was a suspect in the Hartig murders regardless of what was turned over in discovery. The State argued in its response that the media reported that Wilson was a suspect and therefore that Noling's counsel could have come to learn of the BCI report testing Wilson against the cigarette butt found at the scene. (State's Response, T.d. 333, pp. 8-14.) At the hearing, the State questioned both trial counsel about whether they had read about Wilson and his possible connections to this crime in the newspapers. (Hrg. T.p. 67, 93.) Both trial counsel testified that they do not conduct discovery through the newspaper (*id.*), but even if they did, they had no reason to believe that there was exculpatory evidence that had not been provided to them. Moreover, both counsel testified they were not aware that Wilson was a suspect in the Hartig murders. (*See* Hrg. T.p. 66-67 ("I was not aware of that name [Dan Wilson]. If I had been aware of his name and his record at that time, it would have been hugely significant of what we were doing."); Hrg. T.p. 94 ("I don't remember anything in the *Beacon* about Dan Wilson."); Hrg. T.p. 95 (In response to whether he was aware that Mr. Wilson's name was a matter of public record, counsel responded "no.").

When 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*." *Strickler v. Greene*, 527 U.S. 263, 283 n.23 (1999). Even in a case in which the 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) (citing *Strickler*, 527 U.S. at 284). "[O]pen file discovery does not relieve the government of its *Brady* obligations." *United States v. Hsia*, 24 F. Supp. 2d 14 (D.C. 1998).

To date, the State has not provided a list of what materials were actually turned over to Noling's trial counsel during the open file discovery process. Instead, the State presented a receipt for certain items and certain categories of items provided in discovery. (State's Response, T.d. 333, Ex. 4.) The State asserted that the exculpatory documents at issue were contained in numbers 31 ("Miscellaneous Hartig papers"), 33 ("Miscellaneous: reports – calendar – personal papers"), and 34 ("Blood analysis reports"). Items 31 and 33 are broad categories that could arguably contain many different kinds of documents. And, item 34 could easily have been the blood analysis reports from the testing of the cigarette butt against Noling and his co-defendants.

This is not the first time that *Brady* material has appeared years after trial in this case.

The historical record before this Court also suggests that the State's open file discovery was deficient. The *Plain Dealer* accessed public records in this case and ran several articles chronicling problems with alternative suspects and inconsistent witnesses. Noticeably absent from those articles is any mention of Daniel Wilson, Nathan Chesley, the blood-typing test, or the VanSteenberg gun mystery. (Reply, T.d. 336, Ex. 2. The *Plain Dealer* then released the records it had obtained by posting them on their website. (Reply, T.d. 336, Ex. 3.) Undersigned counsel has reviewed those records. The disputed Wilson and VanSteenberg documents were not among the records obtained by the *Plain Dealer*. There were, however, other documents

obtained by the *Plain Dealer* that had not been turned over to Noling's trial counsel and which became the basis for Noling's first motion for new trial filed November 3, 2006. Noling offered affidavits from trial counsel identifying numerous documents that were not disclosed in pre-trial discovery, including grand jury transcripts. (*See* Motion for New Trial filed November 3, 2006 T.d. 258, Exs. A and B.) It seems that each time someone asks for records in this case, something new appears.

It is disputable that the documents in question were provided in discovery, therefore Noling is entitled to file his new trial motion.

Noling was unavoidably prevented from discovering the evidence currently in question. The restrictions placed on examination deprived Noling of his ability to fully present his arguments and to fully and fairly develop the record in the trial court in favor of granting him leave to file his new trial motion. *See* subsection C.2. *infra.* But, at the very least, Noling has established that whether the documents in question were in the open file discovery is disputable. *See Alexander*, 748 F.2d at 193.

The instant case is very similar to *Strickler*. In *Strickler*, the prosecutor recalled that the alleged *Brady* materials were in his open file. *Strickler*, 527 U.S. at 275, n.11. Lead defense counsel disputed receiving these documents, while co-counsel was equivocal. *Id.* The Supreme Court proceeded as if Strickler went to trial without the disputed documents. *Id.* at 275. Almost twenty years after discovery was conducted, Attorneys Keith and Cahoon could not say definitively that they did not receive these materials. Attorney Keith was quite clear, however, that these are the types of materials he would have remembered if he had received them. (Hrg. T.p. 51, 56.) *Strickler* is directly on point when comparing the testimonies of attorneys Keith, Cahoon, and Muldowney.

Based on the foregoing, the trial court's decision was demonstrably unreasonable. 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. Accordingly, this Court should order the trial court to grant Noling leave to file his new trial motion.

2. Any deficiency in Noling's efforts to demonstrate that he was unavoidably prevented from discovering this new evidence is the result of the trial court's curtailment of his presentation during the evidentiary hearing.

Noling subpoenaed five witnesses to testify before the trial court on February 18, 2011—trial counsel Pete Cahoon and George Keith as well as Nathan Chesley, Kenneth Amick, and Marlene Dobosh (formerly VanSteenberg).[2] Rather than hearing from all of these witnesses, the trial court conducted a truncated proceeding in which it allowed Noling to present only testimony from trial counsel. Even in allowing the testimony the trial court limited the questions counsel were able to pose, severely limiting Noling's ability to develop the facts in support of his claim.

Attorney Keith made clear during his testimony that "[t]he real issue in our minds in terms of this case was was there anybody else who was willing or available or suspected or doing this because identify was the sole issue." (Hrg. T.p. 42.) Keith went on to say that he had no recollection, for example of seeing Hearing Exhibit 2 (wherein notes reflect Nathan Chesley claimed his brother killed the Hartigs). In trying to shore up this recollection, counsel sought to delve into attorney Keith's trial strategy to show that this was the type of document attorney

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[2]Most significant among these witnesses was the testimony that would have been offered by Nathan Chesley. As reported in the *Plain Dealer* "Nathan Chesley wants the world to know that an innocent man is sitting on Ohio's death row." Regina Brett, *Nathan Chesley needs to be heard in Tyrone Noling's death row case*, The Plain Dealer (Mar. 6, 2011). The article continues, "[i]t didn't bother Nathan that his foster brother had been executed in that June of 2009. He believed that Dan deserved to die for killing Bearnhardt and Cora Hartig. Nathan never forgot the day Dan told him that he had shot the elderly couple." *Id.* The *Plain Dealer* column goes on to provide a detailed account of Chesley's knowledge about the Hartig murders, and Dan Wilson's responsibility therefore. *See id.*

Keith would recall had he received it. However, the trial court sustained the State's objection. (Hrg. T.p. 48.) This transpired again with respect to Hearing Exhibit 4 (one of Marlene VanSteenberg's statements). Attorney Keith indicated he had no recollection of receiving this document. (Hrg. T.p. 53.) Counsel followed up, "[i]s there anything in that document that is significant to you to the point where you would recall it had you received it?" (*Id.*) The trial court sustained the State's objection. (*Id.*)

During the testimony of attorney Cahoon, the court sustained the State's objection, when counsel asked, "[i]s this the type of document, sir, that you would remember based on what is written in it?" (Hrg. T.p. 81.)

While both counsel testified they did not recall receiving the disputed items, it had been some fifteen years since trial. It was appropriate to inquire whether these were the types of documents they would *expect* to recall, what they would have done had they seen them—in order to demonstrate by inference that they were not turned over to trial counsel—but the trial court did not allow this development. *Cf. Larkins*, No. 82325, 2003 Ohio App. LEXIS 5276 at **11-12 ("As stated in *United States v. Stifel*, 594 F. Supp. 1525 (N.D. Ohio 1984), "'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.'").

Any deficiencies in Noling's proof were due to the trial court's limitations upon the witnesses who could testify, and the question that counsel could pose to trial counsel. The trial court's limitations were demonstrably unreasonable and precluded Noling from fully and fairly developing a record in the court below.

This Court should order the trial court below to grant Noling leave to file his new trial motion. At a minimum, however, this Court should vacate the trial court's order and direct a

new hearing be granted on Noling's request for leave to file a new hearing, with directions to the court that counsel be permitted to delve into the aforementioned areas.

3. The trial court abused its discretion when it failed to consider the impact of Noling's innocence and ineffective assistance of counsel claims on his request for leave to file a new trial motion

The trial court failed to address Noling's alternative argument that if the evidence in question was not withheld by the prosecution, he is still entitled to file a new trial motion to raise allegations that his trial counsel rendered ineffective assistance of counsel and his companion claim of actual innocence. Noling maintains that the evidence used to support his motion for new trial was *Brady* material. However, if trial counsel had the evidence in their possession at the time of trial, they were ineffective for failing to investigate and pursue the evidence related to Wilson and VanSteenberg. This was a claim that could be raised in a new trial motion. *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).

Failure to present exculpatory evidence constitutes deficient performance.

If there was no *Brady* violation by the State, Noling's trial counsel must have had the documents in question and failed to utilize them. Trial counsel have "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 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). Here, the very testimony of Noling's trial counsel at the evidentiary hearing makes clear that this was not the case. (Hrg. T.p. 42.)

The trial court should have determined when Noling, not his trial counsel, knew of this evidence.

The inquiry in the context of ineffective assistance of counsel with respect to whether Noling was unavoidably prevented from discovering the evidence upon which he would rely in his new trial motion is significantly different—rather than asking when trial counsel knew of these materials, the court must inquire into when Noling knew of these materials, and whether they could have been discovered sooner. *Cf.* Judgment Entry T.d. 295, p. 23, *State v. Noling*, No. 2007-P-0034 (Portage Ct. App. May 19, 2008) (in the context of analyzing a successor postconviction petition, noting that "appellant argues he was unavoidably prevented from utilizing the evidence until he uncovered it, i.e., until filing his successive petition. With this argument in mind, we shall assume appellant was unavoidably prevented from discovering the evidence...").

Noling outlined in his new trial motion, attached as exhibit 1 to his reply to the state's opposition to his request for leave to file his new trial motion (T.d. 304) that in May 2009, undersigned counsel 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 sent 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.

As this Court has noted, "[a] party is 'unavoidably prevented' from filing a motion for a new trial where the party had no knowledge of the existence of the evidence or grounds supporting the motion for a new trial and, in the exercise of reasonable diligence, could not have learned of the matters within the time provided by Crim.R. 33(B)." *State v. Olcese*, No. 2010-P-0045, 2011 Ohio App. LEXIS 2086 at **22 (Portage Ct. App. May 20, 2011); *see also* Judgment Entry T.d. 295, p. 10.

Undersigned counsel stated at the hearing (Hrg. T.p. 31) and described for the trial court again in Noling's reply, that they then undertook review of the 800-plus pages of material to determine which documents they believed were new; these materials 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 to a) determine if these materials were in fact new, b) make connections between the various records (for example, who was Nathan Chesley's brother?), c) track down witnesses and wait for them to respond, d) 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). Interviews of initial witnesses then 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, to which there was no response until February 2, 2010. 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.

Some two decades ago, authorities learned that Nathan Chesley claimed his "brother" killed the Hartigs. Simply figuring out who Chesley was and who his brother (really his foster brother) was were no small tasks. Ten months to investigate two-decades old evidence was reasonable. *See e.g., State v. Burke*, 106 Ohio St. 3d 1484, 832 N.E.2d 737 (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.).[3]

Noling did not possess these materials previous to the 2009 public records request. Despite having amassed some 18 boxes of materials related to his case. Despite an earlier public records request by the *Plain Dealer*. Despite repeated requests for discovery and evidentiary development, Noling did not have knowledge of these materials until some 15 years after his conviction and death sentence. Moreover, as described above, he moved as diligently and efficiently as the circumstances allowed to present these facts to the trial court.

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.

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[3]In addition, as Noling described in his reply to the State's opposition to his request for leave to file a new trial motion, the historical record before the trial court was rife with information about the files and information available to Noling via undersigned counsel. For example, Noling cited the *Plain Dealer* recounting of 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. Subsequently, the *Plain Dealer* released the records it obtained to the general public; 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.

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*, 462 F.3d at 1112; *see also Avila*, 297 F.3d at 919; *Hart*, 174 F.3d at 1070; *Lord*, 184 F.3d at 1093.

Noling disputes the trial court's finding with respect to open files. Assuming arguendo that this finding is correct that finding does not resolve when Noling received these materials for purposes of alleging ineffective assistance of trial counsel and a companion innocence claim.[4] The trial court's wholesale failure to address this component of Noling's request was unreasonable and an abuse of discretion that warrants relief.

4. Conclusion

The trial court abused its discretion when it denied Noling leave to file his new trial motion. The net result, the merits of compelling claims of actual innocence, and violations of *Brady v. Maryland* and/or ineffective assistance of counsel will never be heard. This Court must correct this fundamental miscarriage of justice. This Court should vacate the trial court's holding and remand Noling's case to the trial court with directions that it grant leave to allow Noling to present his new trial motion.

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[4]Noling argued that the materials supporting his new trial request were either suppressed by the prosecution or that his trial counsel rendered ineffective assistance of counsel for failing to investigate and present such evidence. Noling would raise a companion, substantive innocence claim to accompany either error by the prosecution or by defense counsel.

V. Conclusion

The United State Supreme Court has distinguished *Brady* violations as a special circumstance entitling a defendant to a lower burden of proof. Ohio Revised Code § 2945.80 as applied in this instance works to unconstitutionally raise that burden. Requiring proof of unavoidable delay before allowing Noling to file his motion for new trial violated his due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution.

Even if this Court finds that the unavoidable delay requirement was appropriately applied, the trial court abused its discretion when it found that Noling did not meet that standard. The fact that there was an open file discovery policy is not the end of the inquiry. The trial court further abused its discretion when it failed to address Noling's alternative argument that if the newly discovered evidence was not *Brady* material, he was entitled to file his new trial motion on the basis of ineffective assistance of counsel.

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. 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 foregoing reasons, Noling respectfully requests that this Court vacate the judgment of the trial court and remand the matter with instructions that Noling be granted leave to file his new trial motion.

Respectfully submitted,

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By: 
Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT TYRONE NOLING'S CORRECTED MERIT BRIEF was forwarded via regular mail to Prosecutor Victor Vigluicci, 241 South Chestnut St. Ravenna, Ohio 44266 on this 13th day of July, 2011.


Jennifer A. Prillo (0073744)
Counsel for Defendant-Appellant

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

State of Ohio,	:	Case No. 2011-PA-00018
Plaintiff-Appellee,	:	Trial Court Case No. 95 CR 220
vs.	:	Regular calendar
Tyrone Noling,	:	
Defendant-Appellant.	:	**This is a death penalty case.**

APPENDIX TO APPELLANT TYRONE NOLING'S CORRECTED MERIT BRIEF

Noling
Motion hearing 2/18/11
JAE/rp

FILED
COURT OF COMMON PLEAS
MAR 02 2011
LINDA K. FANKHAUSER, CLERK
PORTAGE COUNTY, OHIO

IN THE COURT OF COMMON PLEAS

PORTAGE COUNTY, OHIO

STATE OF OHIO

Plaintiff

CASE NO. 95 CR 220

-v-

JUDGE ENLOW

TYRONE LEE NOLING

JUDGMENT ENTRY/ORDER

Defendant

This matter came on for hearing on February 18, 2011 before the Honorable John A. Enlow on the Defendant's motion for leave to file a motion for new trial.

The defense filed a request for public records on August 13, 2009; the motion for leave to file for a new trial was subsequently filed on June 21, 2010, almost a year later.

The parties stipulated that Exhibits 2, 3, 4 and 5 were discovered in a public records request for Sheriff's records as to codefendants

Exhibit 2 is a handwritten statement of Nathan Chesley indicating his brother committed the crime.

Exhibit 3 is a blood test conducted by Dale Laux of BCI.

Exhibits 4 and 5 are statements by Marlene Van Steenberg.

In the Tyrone Noling case the State of Ohio conducted open file discovery. Attorneys George Keith and Peter Cahoon testified they had no recollection of seeing

State's Exhibits 2, 3, 4 and 5. Attorney Cahoon testified he did not know whether or not he saw State's Exhibits 2, 3, 4 and 5.

Assistant Prosecuting Attorney Eugene Muldowney testified he gave full discovery of everything in his possession and further that he met with defense counsel at the Sheriff's Office to allow them to examine the file. Assistant Prosecutor Muldowney also testified that the Sheriff's Office only had one file for all of the co-defendants.

The defendant has the burden of proving by clear and convincing evidence that he was unavoidably prevented from discovering the exculpatory evidence.

Based upon the evidence presented at the hearing as to this motion and the briefs in the file, the Court finds that the defendant failed to establish that he was unavoidably prevented from discovering the exculpatory evidence, therefore, the Court finds the motion is not well taken.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion for new trial be and is hereby not well taken and is, therefore, **DENIED**.

IT IS SO ORDERED.

JOHN A. ENLOW, JUDGE

cc:

Portage County Prosecutor's Office
Attn: F. M. Ricciardi, Chief of the Criminal Division
And Pamela Holder, Staff Attorney

Ralph Miller, Esq.
1300 Eye Street NW Suite 900
Washington, DC 20005

James A. Jenkins, Esq.
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Cleveland, OH 44113

AMENDMENT V, UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, UNITED STATES CONSTITUTION

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

*** CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 18 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
NEW TRIAL

Go to the Ohio Code Archive Directory

ORC Ann. 2945.80 (2011)

§ 2945.80. Application for new trial

Application for a new trial shall be made by motion upon written grounds, and except for the cause of newly discovered evidence material for the person applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be filed within three days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial in which case it shall be filed within three days from the order of the court finding that he was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days following the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within three days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 33 (2011)

Review Court Orders which may amend this Rule.

Rule 33. New Trial

(A) Grounds.

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

(5) Error of law occurring at the trial;

(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

(B) Motion for new trial; form, time.

Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

(C) Affidavits required.

The causes enumerated in subsection (A)(2) and (3) must be sustained by affidavit showing their truth, and may be controverted by affidavit.

(D) Procedure when new trial granted.

When a new trial is granted by the trial court, or when a new trial is awarded on appeal, the accused shall stand trial upon the charge or charges of which he was convicted.

(E) Invalid grounds for new trial.

No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

(1) An inaccuracy or imperfection in the indictment, information, or complaint, provided that the charge is sufficient to fairly and reasonably inform the defendant of all the essential elements of the charge against him.

(2) A variance between the allegations and the proof thereof, unless the defendant is misled or prejudiced thereby;

(3) The admission or rejection of any evidence offered against or for the defendant, unless the defendant was or may have been prejudiced thereby;

(4) A misdirection of the jury, unless the defendant was or may have been prejudiced thereby;

(5) Any other cause, unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.

(F) Motion for new trial not a condition for appellate review.

A motion for a new trial is not a prerequisite to obtain appellate review.