COURT OF APPEALS
WARREN COUNTY
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LEBANON OHIO

IN THE COURT OF APPEALS OF WARREN COUNTY, OHIO
TWELFTH DISTRICT COURT OF APPEALS

THE STATE OF OHIO	:	
	:	**Court of Appeals Case No:**
Plaintiff/Appellee,	:	**CA2012-02-008**
v.	:	
	:	
	:	
RYAN K. WIDMER	:	**Trial Court**
	:	**Case No. 08CR25254**
Defendant/Appellant.	:	**(Judge Bronson)**
	:	

BRIEF OF THE APPELLANT RYAN K. WIDMER

ORAL ARGUMENT REQUESTED

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Issues Presented for Review

Whether a defendant's due process rights under *Napue v. Illinois* are violated when false testimony by the State's lead detective in a homicide case leads the court to quash subpoenas necessary for the defense to further investigate the detective's background and uncover a pattern of falsehoods to obtain career advancements.

Whether a defendant's confrontation rights are violated when false testimony by the State's lead detective in a homicide case leads the court to quash subpoenas necessary for the defense to: (1) further investigate the detective's background; (2) uncover a pattern of falsehoods used to obtain career advancements; and (3) confront the lead detective with his pattern of dishonesty in the workplace.

Whether a defendant's right to present a *Kyles v. Whitley* defense is violated when false testimony by the State's lead detective leads the court to quash subpoenas necessary for the defense to: (1) further investigate the detective's background; (2) uncover a pattern of falsehoods used to obtain career advancements; and (3) present to the jury an alternate theory of the case that the entire investigation was tainted due to the lead detective's incompetence and pattern of dishonesty for career advancement.

Whether the trial court violates a defendant's due process rights under *Kyles v. Whitley* when it deems the following evidence, known to the State but undisclosed to the defendant, to be a "collateral matter" that it would not have permitted the jury to consider: evidence that the lead detective in a homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field.

Whether the State can prove beyond a reasonable doubt that the defense presenting the following information to a jury would not have changed the outcome of trial: the lead detective in the homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; (3) lacked the proper training and qualifications to performs as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field; and (4) accordingly, the lead detective's incompetence and pattern of dishonesty impacted the entire investigation.

Whether knowledge of the lead detective in a homicide case is imputed to the prosecutor for purposes of a *Napue* analysis.

Whether false testimony is "material" for purposes of defining perjury when the false testimony disclaims a job application form and the purpose of the hearing is to determine the authenticity of the job application form.

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Issues Presented for Review

Whether a defendant's right to present a *Kyles v. Whitley* defense (that the lead detective's incompetence and pattern of dishonesty impacted the entire investigation) is violated when the State fails to disclose evidence that the lead detective in a homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field.

Whether a defendant's due process and confrontation rights are violated when the State fails to disclose evidence that the lead detective in a homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field.

Whether undisclosed evidence is "material" for purposes of a due process analysis when, if disclosed, the defense would have been able to present evidence to the jury that the lead detective in the homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field; and accordingly, the defense would have been able to present the jury with the context needed to fairly consider that the lead detective's incompetence and pattern of dishonesty impacted the entire investigation.

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Issues Presented for Review

Whether the trial court arbitrarily and unreasonably abuses its discretion when, with the State's agreement, it orders evidence to be preserved for purposes of future genetic DNA testing. Yet it denies the defendant access to the same evidence when the defendant: (1) files a timely post-conviction petition seeking to pursue genetic DNA testing (at his own expense); and (2) said testing: (a) could result in outcome determinative evidence as to whether an alleged homicide victim actually suffered from a disorder that causes sudden death and of which the deceased exhibited symptoms according to unrefuted expert opinion; and (b) is needed to properly evaluate a timely post-conviction claim that trial counsel rendered ineffective assistance for failing to pursue said testing prior to trial.

Whether the trial court violates a defendant's substantive and procedural due process rights when: (1) it denies the defendant access to evidence needed to pursue genetic DNA testing (at his own expense); and (2) said testing: (a) could determine whether an alleged homicide victim actually suffered from a disorder that causes sudden death and of which the deceased exhibited symptoms according to unrefuted expert opinion; and (b) is needed to properly evaluate a timely post-conviction claim that trial counsel rendered ineffective assistance for failing to pursue said testing prior to trial.

Whether ineffective assistance of counsel attaches when trial counsel fails to pursue genetic DNA testing that could determine whether an alleged homicide victim actually suffered from a disorder that causes sudden death and of which the deceased exhibited symptoms according to unrefuted expert opinion.

Whether equal protection and substantive and procedural due process violations under the state and federal constitutions attach to Ohio's post-conviction DNA testing scheme, as interpreted by the trial court, by mandating the preservation of evidence in all cases of a certain class yet denying a defendant within that class a procedure to access said evidence for testing when testing could result in outcome-determinative evidence in accordance with the standard delineated in the post-conviction DNA testing statute.

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Issues Presented for Review

Whether a defendant's procedural and substantive due process rights to access the courts and to fully present evidence of a prejudicial constitutional violation are violated when the trial court denies access to, or an in camera inspection of, grand jury testimony reasonably likely to include evidence of additional *Brady/Kyles/Napue* violations.

Whether a "particularized need" for access to, or an in camera inspection of, grand jury is demonstrated when the defendant presents specific, newly discovered evidence that the first witness whose testimony is question (the lead detective in a homicide case): (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert; and the second witness whose testimony is in question (the coroner in a homicide case), considered information from the lead detective when determining manner of death.

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Issue Presented for Review

Whether the trial court abuses its discretion in violation of a defendant's procedural and substantive due process rights when it denies a defendant's post-conviction petition without a hearing despite that the petition alone establishes constitutional violations warranting relief. Yet at a minimum, a hearing is necessary to establish further evidence of said violations to present to the court for a fair adjudication of the merits.

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STATEMENT OF THE CASE

A. Procedural Posture

Appellant Ryan K. Widmer stands convicted of murdering his wife Sarah by drowning her in a bathtub on August 11, 2008. Following his February 15, 2011 conviction, Widmer learned of a written report ("the DD&M Report") issued on June 1, 2011 to the Hamilton Township Trustees by the law firm Donnellon, Donnellon & Miller ("DD&M") summarizing an internal investigation it was hired to perform. The purpose of the investigation was to determine whether Jeff Braley falsified documents or engaged in any other improper behavior while working for the Hamilton Township Police Department.

On October 12, 2011, pursuant to the information in the DD&M Report, Widmer filed a post-conviction petition pursuant to O.R.C. §2953.21 on the basis that the State's failure to disclose the information in the DD&M Report, which was known to the State, resulted in a multitude of constitutional violations before and during his trial. Among other newly discovered evidence, the DD&M Report revealed a pattern spanning from 1996-2011 wherein Braley fabricated stories to advance his career. The DD&M Report also revealed: (1) that Braley testified falsely on the subject matter of a pre-trial hearing in Widmer's case ("the May 5th Hearing") in the same timeframe when Hamilton Township was investigating Braley's background; and (2) fabricated stories to many members of the Hamilton Township Police Department (including Chief Duvelius) about serving in the Special Forces of the United States Air Force. Chief Duvelius then relied on these fabricated stories to promote Braley to director of Hamilton Township's THOR Unit, a tactical team used for conducting police raids in the Township.

Accordingly, Widmer also requested disclosure of Braley's grand jury testimony (or alternatively an in camera inspection by the court) to determine if the testimony revealed any

inconsistencies, false testimony, or other information which Widmer could use to substantiate the due process and confrontation claims presented in his post-conviction petition. For this same purpose, Widmer also requested disclosure or an in camera inspection of Dr. Uptegrove's grand jury testimony, because Braley supplied information to Uptegrove about the Widmer case, which Uptegrove in turn considered when making his determination that Sarah drowned as the result of homicide.

Additionally, in order to ultimately determine whether trial counsel rendered constitutionally deficient assistance for failure to investigate a material and exculpatory theory of defense, Widmer also requested post-conviction genetic DNA testing to establish whether Sarah Widmer suffered from a genetic disorder that caused her to drown. Finally, Widmer requested a hearing on the post-conviction petition.

The court ultimately denied Widmer relief without a hearing and dismissed the petition pursuant to a written decision attached as Appendix A.

B. Statement of the Facts

Background of the Ryan Widmer Homicide Investigation

The following is a summary of the investigation as it was perceived in August 2008 through Widmer's February 15, 2011 murder conviction:

On August 11, 2008, Jeff Braley served as Lieutenant over the Criminal Investigations Department. He was the highest-ranking law enforcement official in Hamilton Township, Ohio, below the Chief of Police and Assistant Chief of Police. (*See* Deposition at 9 attached as Exhibit A to Post-Conviction Petition).[1] Both the trial testimony in this case and Braley's sworn deposition ("the Deposition") in an unrelated civil case (in which Braley was found liable for

[1] *See* February 5, 2009 Deposition of Lieutenant Jeff Braley in *Pritchard, et al. v. Hamilton Township Board of Trustees, et al.* U.S. District Court for the Southern District of Ohio, Case No. 1:08-cv-239.

abusing his position, fabricating and manipulating facts in a criminal investigation, and violating citizens' constitutional rights) make clear that Braley's position gave him wide control over the outcome of criminal investigations in Hamilton Township. *See* Deposition at 9-10. Braley was in charge of, among other things, whether to commence an investigation, the scope of any ensuing investigation, the collection and maintenance of evidence, whether arrests were to be made, and whether the evidence would be submitted to the Prosecutor's Office for possible indictment. *See* Deposition at 9-10 (Braley stating, "I'm basically in charge of anything that has to do with evidence…I basically oversee the criminal investigations division that's overseeing the day-today operations of any investigations that are ongoing in the township.").

Braley enjoyed this position because he had previously served in the ultra-elite rescue and investigation units of the Special Forces of the United States Air Force ("the Special Forces" or "Special Ops"). *See* Report of Donnellon, Donnellon & Miller dated June 1, 2011, at 3-4, hereinafter "DD&M Report," attached as Exhibit B to the Post-Conviction Petition. The Special Forces or Special Ops is a branch of the Air Force that works with Navy Seals and similar elite units from other branches of the military.[2] Airmen in the Special Forces are among the most highly trained military personnel in the world, and obtain training and in-the-field experience in a range of areas from military, to medical and rescue, to investigating and tracking down international terrorists.[3]

Fortunately for the citizens of Warren County, Braley brought this rare and coveted professional experience back with him to Hamilton Township, Ohio, more than a decade ago. When he arrived and began volunteering as a Chaplain for the Fire Department, many Hamilton

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[2] *See* official website: http://www.afsoc.af.mil/; Wikipedia description of Special Forces: http://en.wikipedia.org/wiki/Special_Operations

[3] http://www.af.mil/information/factsheets/factsheet.asp?id=186

Township employees heard Braley talk about his service in the Special Forces. *See* DD&M Report at 3-4. The authorities in Hamilton Township realized that Braley's talents were being under-utilized, and made sure this type of experience would not be put to waste. As a result, Braley achieved a meteoric rise from the very lowest to highest ranks in the police department in less than five years. Starting out as a human resources officer, his unique skills were put to use as soon as an appropriate position was available. In short order, Chief of Police Duvelius placed Braley in charge of the THOR Unit, a tactical SWAT-team-like unit, before he was even commissioned as an officer. *Id.* Then, in seven months time, Braley rose from human resources officer (the lowest commissioned rank) to Lieutenant Detective and became the highest-ranking law enforcement official in his jurisdiction after the Chief and Assistant Chief of Police. T.p. Vol. II at 221. With his elite Special Forces training already under his belt, Braley, of course, did not complete a promotion test or any training on crime scene investigations, death scene processing, or evidence-collection in the seven months it took him to rise from human resources officer to Lieutenant Detective. T.p. Vol. II at 221.

So, for these reasons, Braley found himself the highest-ranking law enforcement officer personally involved in the investigation of Sarah Widmer's death on August 11, 2008. On that night, every other law enforcement official who was present at the scene of Sarah Widmer's death answered to and took direction from Braley. And Braley took charge of the scene, as, with his experience, he very well should have. At one point, for example, while executing the search warrant, Braley proceeded alone to the bathroom where Sarah Widmer drowned, and began applying his expertise and talents to the most crucial piece of physical evidence in the case—the bathtub. T.p. Vol II at 190-191. Braley dusted for fingerprints and other telling "body marks," admitting later that he climbed into the tub and stood in the middle of the tub while doing so. *Id.*

As Braley began processing the tub, he concluded that latent "streaks" "made by human hands" were present on the inside wall of the tub to the right of the faucet. T.p. Vol. II at 190-191.

Braley also attended the autopsy with Deputy Coroner Russell Uptegrove. T.p. Vol. II at 188, 206-07, 212, 233. While Uptegrove was performing the autopsy, Braley supplied information about the case to Uptegrove. T.p. Vol. II at 206. Uptegrove later admitted that he considered Braley's statements when ruling the death a homicide. T.p. Vol. I at 723, 826-827. Additionally, during the autopsy, Uptegrove pointed out to Braley "medically significant" observations based on the information supplied by Braley. T.p. Vol. II at 199. Although it was not widely known at the time, it is now known that there was a weak link in that room during the autopsy. This weak link was Uptegrove. Indeed, Uptegrove has recently come under fire, after an extensive investigation by the *Cincinnati Enquirer,* for relying too heavily on the word of police officers in the autopsy room, cutting corners, and making snap (and often incorrect) rulings regarding cause and manner of death.[4]

But those who, in August of 2008, were worried about Uptegrove's weaknesses had nothing to fret about in this particular case. And that is because Uptegrove was being supplied information by Braley. Braley's insights and word naturally would have carried more weight than the average officer, and for good reason. A dead body in a middle-class home in Warren County would have been nothing compared to what Braley had handled in the far corners of the globe while serving in the Special Forces. When one has worked shoulder to shoulder with professionals who train for tasks like tracking down and assassinating Osama Bin Laden by parachute landing, unraveling a bathtub mystery in Hamilton Township, Ohio is not even resume-worthy.

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[4] *See*: http://news.cincinnati.com/article/20110910/NEWS01/109110331

And fortunately for Uptegrove, Braley was not mincing words to anyone about this case. The record shows that Braley was quite convinced that he had a homicide on his hands from a very early point in time, even before most of the facts were known. Braley's well-honed instincts from his time in the Special Forces "screamed" at him right away that this was a homicide. *See* T.p. Vol. II at 206 (Braley asserting that upon viewing the scene for the first time, he thought, "something was screaming at me something is bad wrong, something bad, really bad has happened here, more than just a tragic accident."). Braley listened to his instincts and never looked back. Braley stated that after attending the autopsy and hearing a preliminary determination of "homicide" as the manner of death,[5] he considered no other possibilities but homicide. *See* T.p. Vol. II at 212. From the autopsy, Braley immediately prepared the affidavit to support a search warrant of the Widmer house. T.p. Vol. II at 233. Less than 48 hours having passed from Sarah's death, Braley filed an arrest warrant charging Ryan Widmer with aggravated murder. T.p. Vol. II at 233.

With Braley at the helm, the case was investigated, for the most part, after Widmer was already arrested. Braley was in charge of, among other things, the collection of evidence (i.e., what was collected and what was not collected), collecting fingerprints and other marking from the bathtub, storing the tub, providing information to the Coroner, and presenting the evidence to the prosecution for possible indictment. *See* Deposition at 9-10, Exhibit A to Post-Conviction Petition (Braley stating, "I'm basically in charge of anything that has to do with evidence…I basically oversee the criminal investigations division that's overseeing the day-today operations of any investigations that are ongoing in the township.").

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[5] *See* T.p. Vol. I at 774 (Dr. Uptegrove attesting that on August 12, 2008, at the conclusion of the autopsy, he told Lt. Braley that he was *leaning toward* homicide as the manner of death).

Pre-trial Litigation Concerning Braley's Background

The following is a summary of the facts beginning in early 2010, prior to Widmer's second trial, when defense counsel sought to investigate Braley's background:

In early 2010, as the second trial in this case approached, Widmer's defense lawyers had in their possession an employment application dated June 25, 1996 ("the Application Form," attached to the DD&M Report which is Exhibit B of the Post-Conviction Petition), that purported to have been submitted to Hamilton Township by Braley.[6] This Application Form appeared to have some false information in it regarding such things as where Braley had gone to school. With this information, Widmer's attorneys began subpoenaing Braley's employment records at various places where Braley had purportedly worked in the past to confirm or verify whether Braley had ever fabricated career information, and if so, to what extent. After Braley and the State moved to quash these subpoenas, a hearing was held on May 5, 2010 ("the May 5th Hearing").

At the May 5th Hearing, Widmer's attorneys confronted Braley with the Application Form. Braley disavowed the document, stating that: (1) he never completed an employment application for Hamilton Township, 5/5/10 Hearing Tr. at 173, 178, 193, 199-201; (2) much of the information in the Application Form was inaccurate, 5/5/10 Hearing Tr. at 174-78; and (3) he was not responsible for the inaccurate information. 5/5/10 Hearing Tr. at 173-201. Then, through questioning by his counsel, Braley described his relationship and past interactions with a hostile and disgruntled former co-worker who allegedly had a vendetta against Braley. 5/5/10 Hearing Tr. at 165-69, 183-86. Braley's testimony was clearly aimed to suggest that in recent years, this disgruntled co-worker had fabricated the Application Form around the time that the

[6] As the report by DD&M makes clear, a "Resume Letter" that apparently accompanied the Application Form was also part of this litigation. All arguments made in this brief with respect to the Application Form apply with equal force, and are hereby raised, with respect to the Resume Letter.

high-profile Widmer investigation began, in order to embarrass Braley. As a result of the uncertainty regarding the authenticity of the Application Form and how it ended up in Braley's employment file, the court ultimately granted the motions to quash. 5/5/10 Hearing Tr. at 214-15.

Next, on November 15, 2010, the Ohio Bureau of Criminal Identification and Investigation ("BCI") issued a report ("the BCI Report") stating that the handwriting on the Application Form belonged to Braley. *See* DD&M Report at 3. As a result of this revelation, Widmer's attorneys moved, on January 11, 2011, for the right to confront Braley at the looming third trial with the false statements in the Application Form. *See* Motion to Allow Confrontation of Lead Investigator. The trial was scheduled to commence the following week.

In this pre-trial litigation, Widmer asserted in his motion that he not only had the right to cross-examine Braley about his false statements in the Application Form for purposes of challenging Braley's credibility, but also, he had the right to present a defense, under *Kyles v. Whitley* (1995), 514 U.S. 419, that Braley's dishonesty impacted the case in more direct ways. Indeed, Widmer argued that he had a right to insert Braley's dishonesty into the case to challenge the integrity of: (1) the processing and collecting of evidence at 5250 Crested Owl Court, including the collection of alleged "body impression markings" from the bathtub; (2) the seizure of the bathtub, *see Widmer I* (Case No. CA2011-03-027) at First Assignment of Error; (3) the Coroner's conclusion, given Braley's attendance and participation in the autopsy; and (4) the decision to charge Widmer, in which Braley participated. *See* Defendant's Motion to Allow Confrontation of Lead Investigator, dated January 11, 2011, at 12-13 (specifically requesting to raise a *Kyles* defense at trial); *see also* Reply to State of Ohio's Memorandum in Opposition to Defendant's Motion to Allow Confrontation of Lead Investigator, dated January 18, 2011, at 5 citing *Kyles v. Whitley* (arguing that defense should not only be allowed to cross-examine Braley

for purposes of impeaching his credibility, but also, to raise a *Kyles* defense at trial because Braley's dishonesty "impacts the entirety of the State's case.").

The State responded to the defense motion on January 14, 2011. In its brief, the State continued to contest the authenticity of the Application Form and whether Braley was responsible for the falsities it contained. *See* State of Ohio's Memorandum in Opposition to Defendant's Motion to Allow Confrontation of Lead Investigator, hereinafter "State's Opp. Motion" at 6-8. Specifically, the State pointed to language in the BCI Report, which indicated that alteration of the document could not be ruled out. *Id.* The State also argued that even if Braley was responsible for the false information in the Application Report, his false statements were too remote in time (1996) to be highly probative of his credibility in 2011. *Id.* at 9.

Noting that the authenticity of the Application Form was still being contested by the State, the court denied Widmer's motion to cross-examine Braley about the Application Form, as the authenticity question would cause a "mini-trial" within a trial. The court was also persuaded that even if Braley did supply the false information in the Application Form, these fabrications occurred in the too distant past, and in relation to an unpaid position (Chaplain) from which Braley did not benefit financially. *See* Order, dated January 21, 2011.

In the meantime, acting on the advisement of the Ohio Attorney General's Office (and unbeknownst to the defense), the Hamilton Township Trustees had conducted its own internal investigation of this same matter, which included statements under oath from both Braley and Chief Duvelius.[7] The results of that investigation are still unknown to the defense.

The case went forward to trial, and Ryan Widmer was not permitted to question Braley about the "disputed" Application Form. Widmer was also effectively prevented from raising a

[7] *See* http://www.hamilton-township.org/resources/minutes.html (minutes of Trustees meetings of July 7, 2010; July 21, 2010; August 18, 2010; and September 1, 2010).

compelling *Kyles v. Whitley* defense, as he had requested in his Motion to Allow Confrontation of Lead Investigator. Widmer was convicted of murder on February 15, 2011.

The New Evidence Leading to Widmer's Post-Conviction Petition

The day after Widmer was convicted, February 16, 2011, the Hamilton Township Trustees voted to hire the law firm of Donnellon, Donnellon & Miller ("DD&M") to perform an internal investigation into Lt. Jeff Braley as a result of the questions that had arisen in the Widmer case.[8] Although questions regarding Braley's Application Form had come to light nearly a year earlier, and BCI had declared the form to have Braley's handwriting on it many months early, a formal investigation into the matter—the findings of which were ultimately to be reported to the public—was inexplicably (or perhaps not so inexplicably) not launched until ***one day after*** Widmer was convicted.

On June 1, 2011, DD&M issued a written report to the Hamilton Township Trustees regarding its internal investigation of whether Jeff Braley falsified documents or engaged in any other improper behavior to obtain his post of Lieutenant Detective in Hamilton Township. This report, attached as Exhibit B to the Post-Conviction Petition, contains the following revelations:

Revelations known to the defense before or during Widmer's trial:

- Braley's Application and Resume Letter dated June 25, 1996 contained some false information and claims about Braley's educational background and work experience. DD&M Report, Exhibit B to Post-Conviction Petition, at 3.

- A handwriting analysis by BCI found that the handwriting on the Application and Resume Letter came from Jeff Braley. BCI found no evidence of alteration of either document, but could not rule out the State's argument regarding authenticity, namely, that the document may have been altered or created at a later time but before Widmer's trial. *Id.*

[8] *See* http://www.hamilton-township.org/assets/PDF_Minutes/mm_110216.pdf (minutes of Trustees meeting of February 16, 2011).

Revelations unknown to the defense before or during Widmer's trial:

- The thorough investigation by DD&M into the authenticity of the Application Form, involving DD&M "questioning various members of the Township" found no evidence that the Application Form was "anything other than what [it] appeared to be." After questioning members of the Township involved in the process of collecting and storing applications, DD&M found "no evidence" to support Braley's and the State's suggestion that the Application Form was created at the time of the Widmer trials. *Id.*

- A recent examination of the Township's records by DD&M revealed another application to the Fire Department by a third party that was submitted around the same time that Jeff Braley's application was purportedly submitted. This third-party application contains a handwritten notation in the corner stating: "background ok 05/05/97." An identical handwritten notation appears on the Jeff Braley's application in the same general location. *Id.* As DD&M recognizes, this demonstrates that Braley's application was received prior to May 5, 1997 and was "processed as any other similar application" taken at that time. *Id.* This new fact flatly refutes the State and Braley's suggestion that this document was created and submitted at a later time.

- Jeff Braley was promoted and put in charge of the Township's THOR Unit because of Braley's repeated claims that he "served in the Special Forces in the military, namely the parajumpers or pararescue jumpers while in the Air Force." *See id.* Braley was given this promotion by former Chief Duvelius "in reliance" specifically on Braley's claims of having this particularized professional training and experience. *Id.* at 4. In reality, Braley did not serve in this capacity, and had no such specialized training or experience. Braley was given this title and responsibility before he was even commissioned as a police officer. Hamilton Township, therefore, had, in essence, a civilian with no experience and no police commission in charge of their tactical police raid unit because of repeated fabrications by Braley over an extended period of time.

- Braley denied to DD&M in 2011 that he had ever made statements to anyone that he had served in the Special Forces. *Id.* at 4. DD&M concluded that Braley's denials to this effect to DD&M investigators in 2011 constituted materially false statements based on: (1) the substantial number of individuals who corroborated reports that Braley had made claims to this effect; and (2) the fact that Duvelius actually did promote Braley to Director of the THOR Unit prior to Braley even being commissioned an officer.

- Braley further denied to investigators that he had ever filled out the Application Form, as opposed to claiming that he may have filled it out but simply no longer remembers doing so *Id.* Specifically, Braley's statements in the course of the DD&M investigation "are not that he does not recall ever filling out the Application or Resume Letter" but rather "because they are patently false and because the information contained within those documents is false, he did not prepare of sign those documents." *Id.* at 4. Because the DD&M Report was prepared after the Hamilton Township Trustees conducted its own private investigation in the Summer of 2010, which included statements under oath by

Braley and Duvelius,[9] the only conclusion to draw is that Braley made these same statements to the Township under oath, patently denying preparing or signing the questioned documents (as opposed to failing to remember). DD&M would have noted any discrepancies between Braley's statements to the Township and his statements to DD&M. But the DD&M Report does not mention any such discrepancies. Instead, DD&M concludes that Braley "testified under oath that he did not fill out the Application." *Id.* at 2.

- Therefore, because: (1) BCI concluded that Braley, in fact, did complete this form; (2) DD&M found no evidence supporting Braley's claim of alteration and instead found that Braley consistently disavowed the Application Form, *id.* at 4, and "testified under oath that he did not fill out the Application," *id.* at 2; (3) DD&M found evidence that flatly refuted Braley's claim that the Application Form was created at a later date to embarrass Braley; and (4) Braley had made false statements about these matters to DD&M investigators—DD&M concluded that Braley's disavowal of the Application Form constituted a false statement and should subject him to disciplinary proceedings. *Id.* at 5.

  This finding is, by implication, the equivalent of a finding that Braley committed perjury at the May 5th Hearing.

- Braley's continued denials and false statements during the DD&M investigation regarding his background, and whether he made false claims about his background in the past, raise current and ongoing concerns about his honesty and credibility. *Id.* at 4-5.

On September 8, 2011, expert witness Dennis Waller issued a report in this case outlining the impact Braley's fabrications had on the investigation and prosecution of Ryan Widmer. Waller is one of the leading experts in the United States in the field of police training, practices, and ethics. In his career, Waller, who has an undergraduate and masters degree in police administration, served as a police officer, field-training officer, detective, sergeant, lieutenant, department training officer, and police chief. *See* Waller Affidavit, Exhibit C to Post-Conviction Petition, at 1-4. During this time, he has logged more than 3,400 hours of police training. *Id.* He also has been certified as a police-training instructor in Michigan, Florida, North Carolina, and Wisconsin, and served as the Director of a regional police-training academy in Raleigh, North Carolina. *Id.* Throughout his career, Waller has trained hundreds of officers in numerous

[9] *See* http://www.hamilton-township.org/resources/minutes.html (minutes of Trustees meetings of July 7, 2010; July 21, 2010; August 18, 2010; and September 1, 2010).

subject areas including criminal investigation techniques, crime scene investigation, and ethical police conduct. *Id.*

Since becoming an expert/consultant on police practices and ethics, Waller has evaluated more than 500 cases of police misconduct, and has testified as an expert in 34 states including Ohio. *Id.* The remainder of Waller's impressive credentials are set forth in his affidavit. *See* Waller Affidavit, Exhibit C to Post-Conviction Petition.

In his affidavit, Waller opines that, based on national law enforcement standards, Braley could be classified as "an opportunist without substance in a police department without established standards." *See id.* at 6B. Despite the "dearth of actual police experience, investigative experience, or relevant education at the time of this incident, Braley had become a Detective Lieutenant and was in charge of investigations for the Hamilton Township Police Department." *Id.* at 6B3. Waller concludes that Braley must have obtained this position through false statements and fraud, and that, based on national standards, he would not have held this position without having fabricated his background. In this respect, Waller notes:

> Inconsistent with accepted standards of law enforcement practice, Jeff Braley was placed in a position, i.e. Detective Lieutenant, where he could exert undue influence and be perceived as having credibility far exceeding his actual experience, education, and ability. Based on my experience, I believe that Braley would not have obtained this particular position without the false statements that he made about his background. It would be highly unusual if not unheard of for someone with his actual level of experience to be in a position of that nature. Any suggestion that Braley's false statements about his background did not affect his ability to land this particular job would be inconsistent with nationally accepted standards of police practice.

Id. at 6D.

Furthermore in his affidavit, Waller outlined in great detail how Braley's lack of credibility, incompetence, and willingness to manufacture facts to further his career could have contaminated the investigation and prosecution of Ryan Widmer. First, Braley was left alone with the most crucial piece of evidence in this case—the bathtub. Aside from Braley's

incompetence, which could have resulted in the negligent or reckless addition or destruction of marks, Braley may have fabricated evidence by intentionally adding marks to, or erasing marks from, the tub. *Id.* at 6G. As Widmer asserts in *Widmer I* (Case No. CA2011-03-027) Braley ordered the tub to be unlawfully seized. *See* First Assignment of Error in (Case No. CA2011-03-027) fully incorporated by reference herein. In addition, Braley fed information about the case to Deputy Coroner Dr. Uptegrove. As Waller notes, "Braley was simply not qualified to make determinations regarding this case and pass such opinions on to Uptegrove. *A coroner's opinion regarding cause of death is as reliable as the information provided to the coroner. If the information given to him is unreliable, then the opinion is unreliable in a 'garbage in, garbage out' process."* *Id.* at 6E. (emphasis added).

After detailing the myriad ways that Braley's untrustworthiness and incompetence could have impacted the case, Waller concluded:

> In order to make a proper decision in this case as to guilt, jurors would need to know about Braley's false statements, his lack of experience, and his lack of qualifications to properly understand how these factors likely tainted the entire investigation and prosecution in a "garbage in, garbage out" sequence. A person in law enforcement who made blatantly false and opportunistic statements in a manner consistent with what Braley did here, once it was known, would have serious credibility problems among personnel in law enforcement, the criminal justice system, and the Coroner's Office. To ensure fundamental fairness to the accused, it is necessary to objectively determine the credibility and source of the information provided to the Coroner and the resultant influence on the flawed process of determining how this matter was considered to be a homicide.

Id. at 6F.

In its Opposition Brief, responding to Widmer's post-conviction petition, the State failed to offer any evidence to refute or dispute Waller's opinion.

Widmer presents the following written argument in support of his request for this Court to reverse his conviction.

ARGUMENT

FIRST ASSIGNMENT OF ERROR

I. The trial court abused its discretion when it concluded: (1) that the State had no knowledge of material information that it withheld from the defense; and (2) that the withheld evidence pertained to a collateral matter about which Braley never testified falsely, thus even if disclosed, it would not have affected the outcome of Widmer's trial.

Issues Presented for Review: Whether a defendant's due process rights under *Napue v. Illinois* are violated when false testimony by the State's lead detective in a homicide case leads the court to quash subpoenas necessary for the defense to further investigate the detective's background and uncover a pattern of falsehoods to obtain career advancements.

Whether a defendant's confrontation rights are violated when false testimony by the State's lead detective in a homicide case leads the court to quash subpoenas necessary for the defense to: (1) further investigate the detective's background; (2) uncover a pattern of falsehoods used to obtain career advancements; and (3) confront the lead detective with his pattern of dishonesty in the workplace.

Whether a defendant's right to present a *Kyles v. Whitley* defense is violated when false testimony by the State's lead detective leads the court to quash subpoenas necessary for the defense to: (1) further investigate the detective's background; (2) uncover a pattern of falsehoods used to obtain career advancements; and (3) present to the jury an alternate theory of the case that the entire investigation was tainted due to the lead detective's incompetence and pattern of dishonesty for career advancement.

Whether the trial court violates a defendant's due process rights under *Kyles v. Whitley* when it deems the following evidence, known to the State but undisclosed to the defendant, to be a "collateral matter" that it would not have permitted the jury to consider: evidence that the lead detective in a homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field.

Whether the State can prove beyond a reasonable doubt that the defense presenting the following information to a jury would not have changed the outcome of trial: the lead detective in the homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; (3) lacked the proper training and qualifications to performs as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field; and (4) accordingly, the lead detective's incompetence and pattern of dishonesty impacted the entire investigation.

Whether knowledge of the lead detective in a homicide case is imputed to the prosecutor for purposes of a *Napue* analysis.

Whether false testimony is "material" for purposes of defining perjury when the false testimony disclaims a job application form and the purpose of the hearing is to determine the authenticity of the job application form.

Whether false testimony constitutes perjury under *Napue* when the false statements occur during a pre-trial hearing as opposed to a jury trial.

The *Brady* doctrine has many subcomponents under the Due Process Clause, including two distinct doctrines applicable to this case. *See Brady v. Maryland* (1963), 373 U.S. 83; 83 S.Ct. 1194. The *Kyles v. Whitley* (1995), 514 U.S. 419; 115 S.Ct. 1555, line of cases under *Brady*, discussed in the Second Assignment of Error, holds that the state must disclose evidence (such as Braley's false statements and lack of qualifications) that a defense attorney could use to impeach the quality, integrity, and motives of the investigation. The *Napue v. Illinois* (1959), 360 U.S. 264; 79 S.Ct. 1173, line of cases discussed in this First Assignment of Error creates a strict standard for reversal whenever the state knowingly benefits from perjured testimony.

In *Napue*, the Supreme Court of the United States held that a due process violation attaches when the state knowingly uses false testimony to obtain a conviction. 360 U.S. at 269-270. A *Napue* violation is the most difficult constitutional violation for the state to overcome, as it creates an almost irrebuttable presumption in favor of automatic reversal. As the Supreme Court of the United States stated in *U.S. v. Bagley* (1985), 473 U.S. 667, 680; 105 S.Ct. 3375:

> The rule that a conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue v. Illinois,* 360 U.S. at 271; 79 S.Ct., at 1178. See n. 8, *supra. See also Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972) (quoting *Napue,* 360 U.S., at 271, 79 S.Ct., at 1178). *Napue* antedated *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), where the "harmless beyond a reasonable doubt" standard was established. The Court in *Chapman* noted that there was little, if any, difference between a rule formulated, as in *Napue,* in terms of "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,' " and a rule " 'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " 386 U.S., at 24; 87 S.Ct., at 828 (quoting *Fahy v. Connecticut,* 375 U.S. 85, 86-87; 84 S.Ct. 229, 230-231, 11 L.Ed.2d 171 (1963)). It is therefore clear...that this Court's precedents indicate

that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard.

In other words, when the state benefits by knowingly using perjured testimony, the burden of proof switches to the state. In a post-conviction petition or motion for new trial, the state must prove beyond a reasonable doubt that the perjury did not in any way contribute to the state's favorable verdict.

In denying the post-conviction petition, the court found that Braley did not commit perjury because:

(1) the State had no knowledge that he was testifying falsely (due to the State's purported unawareness of the information in the DD&M Report);

(2) Braley testified to a lack of memory rather than directly disavowing the Application Form (and thus, he did not testify falsely);

(3) Braley's false testimony in the May 5th Hearing did not affect a material matter in Widmer's trial, but rather a collateral matter; (and because Braley's testimony in the May 5th Hearing did not affect a material matter in Widmer's trial, the court, in its discretion, would not have permitted the jury to hear evidence on such matters); and

(4) the *Napue* standard only applies to testimony before a jury.

Each of these conclusions is erroneous as a matter of law and unreasonable and arbitrary in its use of discretion, in violation of Widmer's due process and confrontation rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and their counterparts in the Ohio Constitution.

The following discussion unravels these four erroneous conclusions, demonstrates why the *Napue* standard applies to this situation, and explains why the State cannot meet its burden of proving beyond a reasonable doubt that Braley's perjury did not affect the outcome of Widmer's trial.

A. The trial court ruled contrary to clearly established U.S. Supreme Court precedent in concluding that the prosecutor must have actual knowledge of false testimony or undisclosed information in order to meet the *Napue* standard or result in a due process violation.

1. Knowledge of perjured testimony is imputable to the prosecution when such knowledge is possessed by anyone on the prosecution team, including both investigative and prosecutorial personnel. Because Braley acted as the lead detective in the case, his knowledge is imputed to the prosecutor.

One of the primary errors the trial court made in denying Widmer's petition was concluding that the State had no actual knowledge of the information in the DD&M Report, and thus, no knowledge that Braley was testifying falsely in the May 5th Hearing. The trial court erroneously determined that Hamilton Township, a third party, held this knowledge, not the pertinent state body here—the Warren County Prosecutor. But this determination is erroneous as a matter of law and contrary to clearly established U.S. Supreme Court precedent in *Giglio v. United States* (1972), 405 U.S. 150, 154; 92 S.Ct. 763 holding that any government agency who has participated in the investigation is considered "the state" for purposes of applying the *Napue* standard. Indeed, the state violates a defendant's due process rights when it actively or passively uses perjured testimony to obtain a conviction. *Giglio v. United States*, 405 U.S. at 154. Such violation occurs whenever the prosecutor has actual or imputed knowledge of perjury. *Id.*

The A.B.A. Standards for Criminal Justice, Discovery and Procedure Before Trials 2.1(d), cited by the U.S. Supreme Court in *Giglio* provides that:

> The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of ***any others who have participated in the investigation or evaluation of the case*** and who either regularly report or with reference to the particular case have reported to his office.

405 U.S. at 154 (emphasis added).

Certainly in many *Napue* situations, the state witness who committed the perjury in question was not a police officer working in conjunction with the prosecution, and thus, the ultimate factual question for *Napue* purposes becomes whether the prosecutor knew that the

state's lay witness was committing perjury on the witness stand. But when the witness who commits perjury is a police officer working on the case in conjunction with the prosecutors, as Braley was here, the police officer's knowledge that he was lying during his testimony is imputed to the prosecution. *See Giglio*, 405 U.S.150, 154. *See also Strickler v. Greene* (1999), 527 U.S. 263, 280; 119 S.Ct. 1936. *See also Jackson v. Brown*, 513 F.3d 1057, 1075 (9th Cir. 2008) (Supreme Court precedent is "perfectly clear that the constitutional prohibition on the 'knowing' use of perjured testimony applies when *any* of the state's representatives would know the testimony was false") citing *Napue*, 360 U.S. at 264 and *Giglio*, 405 U.S. at 154-155. *See also United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979) (knowledge of investigators imputed to prosecutors; the court explaining, "In considering the use of perjured testimony, this Court has declined to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel."). *See also United States v. Diecidue*, 448 F.Supp. 1011, 1017 (M.D. Fla., March 10, 1978) (prosecutor charged with knowledge of any investigative member of the prosecution team; state and federal investigative agencies pooled their resources for federal prosecution, thus knowledge of state agents imputed to federal prosecutors) citing *Giglio*, 405 U.S. at 154 and A.B.A. Standards for Criminal Justice, Discovery and Procedure Before Trials 2.1(d). *See also Williams v. Griswald*, 743 F.2d 1533, 1542 (11th Cir. 1984) ("it is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge will be imputed to state prosecutors") citing *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977) (a due process violation occurs when a law enforcement officer commits perjury even when the prosecutor is not personally aware of said perjury) citing *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) (knowledge of police imputed to prosecutor; "police are part of the prosecution, and the taint on the trial is no less if they, rather than the state's attorney, were

guilty of nondisclosure"); *Curran v. Delaware*, 259 F.2d 707, 713 (3d Cir. 1958) (habeas relief upheld; relief granted by district court based on false testimony given by detective but unknown to prosecutor). *See also Smith v. Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969) (knowledge imputed to the prosecutor for purposes of due process violation analysis when law enforcement suborned perjury, but said perjury was unknown to the prosecutor).

Aside from Braley knowing about the information in the DD&M Report, it is obvious that other state agents (such as other employees of the Hamilton Township Police Department) whose knowledge is imputable to the prosecution, likely were also aware of the information in the DD&M Report given that Hamilton Township was investigating Braley's background in the same timeframe when litigation regarding Braley's background was taking place in Widmer's criminal prosecution.

B. The trial court abused its discretion in concluding that Braley testified to a lack of memory in the May 5, 2010 hearing and did not make any false statements, especially in light of its own prior decision on this matter.

The trial court abused its discretion in determining that Braley only testified to a lack of memory regarding the false statements on the Application Form, as opposed to lying under oath about this point. In fact, Braley disavowed the Application Form and the trial court previously ruled to that effect in January 2011. *See* January 21, 2011 Order at 3 (finding that Braley "denies the Application.").

Braley made clear in the May 5th Hearing that he had absolutely nothing to do with the false Application Form—that he never submitted it, period. It is true that twice, when asked whether or not he "remembered" filling out the Application Form, Braley answered that he has no memory of completing such an application. But in response to all other questions **not** asking specifically about his memory, Braley made clear that he ***never*** submitted ***any*** application to

Hamilton Township, much less the one in question containing falsities.[10] *See* T.p. 5/5/11 at 164-165 (did not fill out any application for Hamilton Township); 173 (first became aware of Application Form in 2008, and reasserting that he never filled it out); 178 (was "shocked" when first shown Application Form in 2008 and reasserting "I did not fill it out."); 199 (referring to the Application Form in question, and stating, "I don't recall ever filling out an application, ***but I know I did not fill this one out.***") (emphasis added); 200 (stating the signature on the Application Form might look like his signature, but that he absolutely did not sign it); 201 (stating strenuously that he never filled out any application for Hamilton Township); 209 (stating unambiguously that he did not sign or submit the documents in question).

In sum, when asked about his memory, Braley testified that he had no memory of submitting the Application Form, because he was answering the questions exactly as they were worded to him. But when asked questions unrelated to his memory, Braley made absolutely clear that he ***did not*** fill out or sign the Application Form, period.

Because Braley made clear that he had nothing to do with the false Application Form, the trial court already ruled that Braley expressly "denied" and disavowed the Application Form in

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[10] The fact that when Braley was asked whether he "remembers" filling out an application, Braley responded, "I do not recall that at all," does not mean that Braley was suggesting that he may have filled out the Application Form but simply no longer remembers doing so. By way of example, if a witness is asked whether he has a memory of ever visiting Neptune in a spaceship, that person might plausibly answer, "No, I have no memory of ever doing that." But such an answer does not mean that this person is somehow asserting that he very well may have visited Neptune in the past. The person responded by saying, "I have no memory of that," because he was asked only about his memory in that particular question. If the same witness is then asked, "Have you ever visited Neptune in a spaceship?," he would probably answer, "Absolutely not." In such a scenario, the fact that this witness previously stated that he has no memory of visiting Neptune does not suddenly create an ambiguity about the meaning of his testimony.

That is exactly what happened here with respect to some of the questions asked of Braley. When asked about his memory, Braley said he had no memory of submitting the Application Form—he was answering the questions exactly as they were put to him. But when asked questions unrelated to his memory, Braley made absolutely clear that he DID NOT complete or fill out the Application Form, period.

the May 5th Hearing, rather than stating that he may have submitted it but simply no longer retains any memory about such matters. *See* January 21, 2011 Order at 3 (finding that Braley "denies the Application.").[11]

Now, the trial court's conclusion that Braley only testified to a lack of memory contradicts its own prior ruling from January 2011. In so holding, the trial court arbitrarily and unreasonably abused its discretion.

Reasonable minds cannot seriously dispute that Braley knowingly committed perjury at the May 5th Hearing when he expressly and unambiguously disavowed the Application Form. Since the May 5, 2010 Hearing: (1) BCI has confirmed that the handwriting on the Application Form belongs to Braley; (2) an internal investigation by DD&M has confirmed that the Application Form was received and processed in the 1990s in the regular course of business (thus undermining the State's authenticity argument that this document was an alteration submitted to the file more than a decade later); (3) Braley has consistently stated to the Hamilton Township Trustees (under oath)[12] and the DD&M Investigators "not that he does not recall ever filling out the Application or Resume Letter" but rather that "he did not prepare of sign those documents," DD&M Report at 4; and (4) Braley has been caught in an extensive pattern of lies on this very subject matter from 1996 through 2011.

C. The trial court erred as a matter of law and abused its discretion when it concluded that Braley's testimony in the May 5th Hearing pertained to a collateral matter and thus, could not amount to perjury.

When the trial court denied Widmer's post-conviction petition, one of its fundamental

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[11] The DD&M investigation reaches the same conclusion, that Braley "testified under oath that he did not fill out the Application." DD&M Report at 2.

[12] *See* http://www.hamilton-township.org/assets/PDF_Minutes/mm_100707.pdf (minutes of Trustees' July 7, 2010 meeting, explaining that "affidavits" (sic) would be taken from Braley and Duvelius).

errors occurred in failing to distinguish "materiality" in terms of the definition of perjury and "materiality" in terms of the *Napue* standard.

The court determined that Braley's false statements at the May 5th Hearing cannot legally amount to perjury because his lies pertained to "collateral matters" not material to Widmer's guilt or innocence. But this is an incorrect statement of the controlling legal standard. In terms of determining whether perjury occurred, the correct question is not whether Braley's lies were material to Widmer's guilt or innocence, but rather, whether Braley's lies were material ***to the issues in the May 5th Hearing***. The question of whether Braley's lies impacted the outcome of Widmer's trial is only addressed when applying the *Napue* standard. The court erroneously intertwined these two distinct analyses of "materiality" when the correct analysis requires: (1) a finding of whether Braley's false statements were material to the May 5th Hearing in order to determine whether perjury occurred; and (2) a separate finding of whether the false statements impacted the outcome of Widmer's trial in order to determine whether a *Napue* violation occurred.

Indeed, ORC §2921.11(A), Ohio's perjury statute, establishes that perjury can occur in "any official proceeding," whether it be a jury trial or a pretrial proceeding like the May 5th Hearing. In ORC §2911(B), the legislature then defines a material false statement, which amounts to perjury, as one that can affect that outcome of "**the** proceeding" in which the witness is placed under oath and utters the false statement. *See also United States v. Lee*, 359 F.3d 412 (6th Cir. 2004) (a statement is "material" for purposes of perjury statute if it has the natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed).

Thus, it is clear that materiality for purposes of determining whether perjury occurred is determined by asking whether Braley's false statements were material to the issues in the May

5th Hearing, and not by asking whether they were material to Widmer's guilt or innocence.[13] Such a result is obvious, as otherwise police officers could lie in pretrial suppression hearings, for example, and then claim that such lies were not perjury because the facts about which the officer lied (like whether he read *Miranda* warnings or obtained a search warrant prior to the search) were not material to the issue at trial, namely, the defendant's innocence or guilt.

At the May 5th Hearing, it was undisputed that the information in the Application Form was false. Therefore, the *only* issue—**the one material issue**—was whether or not Braley was responsible for such falsities. With respect to this material issue, the DD&M Report has made clear that Braley lied repeatedly and attempted to create a false alibi by raising the specter that a political enemy at his work submitted the false application to embarrass him. As such, his lies amount to perjury.

1. Application of the *Napue* standard.

When a law enforcement officer charged with investigating a case and bringing the suspect to justice takes the stand and lies about an issue material to that particular hearing, according to *Napue*, the burden shifts to the state to prove that the perjury did not in any way affect the outcome of the case "beyond a reasonable doubt." Certainly the State cannot meet that standard here given the significant way in which the defense theory would have changed at trial had Braley been truthful in the May 5th Hearing and had the State disclosed the information now known in the DD&M Report.

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[13] Although the court held that it would not have permitted the defense to confront Braley regarding the information in the DD&M Report regardless of Braley's testimony in the May 5th Hearing, this holding is inconsequential for this Court's determination of the "materiality" of Braley's false statements. *See United States v. DeZarn*, 157 F.3d 1042, 1998 Fed.App. 0309P (6th Cir. 1998) (for a false statement to be considered "material" for purposes of perjury, it is not necessary to demonstrate that the outcome of the proceedings in which the statement was uttered *would have been different* had the witness answered truthfully, but rather, whether such information is *merely capable of impacting* the outcome of the proceeding).

Because the court applied an incorrect "materiality/collateral matters" analysis, the court's conclusions regarding whether Braley's false statements in the May 5th Hearing impacted the outcome of Widmer's trial, according to the *Napue* standard, are equally misguided, off-kilter, and unreasonable. The court determined that because Braley's testimony in the May 5th Hearing pertained to collateral matters, it would not have permitted the jury to hear testimony about such matters regardless of whether Braley admitted to supplying the false information in the Application Form, and regardless of whether the information in the DD&M Report was known to the defense prior to trial.[14]

Additionally, the court summarized the case as one about medical evidence, where: (1) the defense focused on contentions of incompetent treatment by the EMT's and an incompetent autopsy by Dr. Uptegrove; (2) Braley's testimony comprised a very minimal portion of the testimony; and (3) every consequential fact attested to by Braley was confirmed by another State witness. *See* Decision at 12-13.

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[14] The court's decision on this point (whether the court would have permitted the defense to confront Braley regarding the information in the DD&M Report) is unreasonable, because the grounds by which Widmer previously was denied the opportunity to investigate Braley's background and confront him at trial, now have been wholly undermined in light of the DD&M Report.

It is crucial to keep in mind that the trial court ruled in favor of the State because: (1) it was not clear at that time whether Braley was responsible for the Application Form, and this dispute would cause a "mini-trial;" (2) even if Braley was responsible, his false statements were too remote in time; and (3) even if Braley was responsible, his false statements did not benefit him financially, but only for an unpaid position. *See* January 21, 2011 Order.

Now, in contrast, it is known that Braley in fact did complete the Application Form without later alteration and submit it in 1996 in the regular course of business; that Braley has a pattern of lying about his credentials from 1996 all the way until Widmer's trial; that he fabricated stories not only to be hired for paid positions but to enjoy a meteoric rise in ranks within the police department; and that he held an important position for which he was grossly unqualified according to national standards as explained by the unrefuted testimony of a police practices expert. Knowing this information during trial would have changed the defense's confrontation and presentation of evidence before the jury in the ways described *infra*.

The court's analysis of the impact (or lack thereof) that Braley's false statements in the May 5th Hearing had on the outcome of Widmer's trial, ignores its own prior decisions regarding the defense's ability to investigate and confront Braley regarding his background and present a *Kyles v. Whitley* defense. Pursuant to *Kyles*, the defense would have argued to the jury that Braley's incompetence and penchant for lying to advance his career impacted the investigation of Sarah's death from start to finish. Additionally, the defense would have been able to present the jury with context to understand why Braley's errors in the investigation warrant serious consideration in light of his lack of qualifications to hold the position of lead detective in a homicide case.

a. The trial court ignored the impact of: (1) its prior decisions regarding the defense's confrontation of Braley; and (2) the State's failure to disclose the information in the DD&M Report, on the defense's theory at trial and ability to present and confront evidence.

The relevant prior rulings are as follows: (1) the court quashed the defense subpoenas seeking to further investigate Braley's background based on the court's conclusion that Braley disavowed the Application Form; (2) the court denied the defense motion to confront Braley at trial, thereby prohibiting the defense from raising a *Kyles* defense, *see infra* Second Assignment of Error; and (3) the State failed to disclose the information in the DD&M Report, despite that the State (through its lead detective on the case whose knowledge is imputed to the prosecutor, *see supra* First Assignment of Error at Section I(A)), clearly knew all the information in the report even if the prosecutor did not.

Based on these rulings, the defense was prohibited from further investigating Braley's background, thereby eliminating any possibility that the defense independently would discover the information in the DD&M Report despite the State's failure to disclose said information. A combination of the court's prohibitions and the State's failures to disclose completely barred the defense from raising a *Kyles* defense (as the defense specifically requested in its Motion to

Allow Confrontation of Lead Investigator), wherein the defense would have presented to the jury all the ways Braley's incompetence and penchant for lying to advance his career impacted the case. Additionally, the jury would have had context to understand the significance of Braley's flaws in the investigation. After all, the proper scope of police work is beyond the understanding of the average juror. Without the ability to raise the question of Braley's credibility, the jury had no reason NOT to consider Braley, the lead detective, to be an experienced, competent homicide investigator. As such, without the context of the DD&M Report, Braley's flaws in the investigation appeared to the jury like a routine defense ploy, grasping at straws.

In denying Widmer's post-conviction petition, the trial court entirely ignored: (1) the impact of its own prior decisions and the State's material nondisclosure of the information in the DD&M Report; and (2) how consideration of these two elements affected the defense's strategy and ability to confront and present evidence, and the jury's ability to fairly consider the flaws in Braley's investigation.

The court's summary of the defense strategy at trial, as one relying on incompetence by the EMT personnel and coroner, is misguided because it fails to acknowledge that the defense focused on mistakes by the EMTs and Uptegrove only as an alternative to being able to focus on Braley and how he tainted the entire investigation. The court fatally overlooked that, of course, the defense did not focus on Braley at trial. ***The court prohibited the defense from doing so*** when it denied the defense's Motion to Allow Confrontation of Lead Detective. The court prohibited the defense from being able to further investigate Braley's background when it quashed the defense subpoenas following the May 5th Hearing. The State failed to disclose the information in the DD&M Report prior to or during Widmer's trial. A combination of the court's prohibitions and the State's failures to disclose prevented the defense from raising a *Kyles* defense (as the defense specifically requested in its Motion to Allow Confrontation of

Lead Investigator), wherein the defense would have presented to the jury all the ways Braley's incompetence and penchant for lying to advance his career impacted the case. So, of course, the defense focused its strategy elsewhere from Braley, as the court pointed out, to flaws by the EMT personnel and Uptegrove, and the inconsistencies in Jennifer Crew's testimony. The defense had no other choice.

The defense *attempted* to point out to the jury the flaws in Braley's investigation. But without being able to confront Braley about his pattern of lying and his utter lack of qualifications to hold his position as lead detective in a homicide case—in charge of the collection and processing of evidence, characterizing the evidence in consultations with the coroner and prosecutor, and essentially building the State's case for the prosecutor to present to a grand jury and trial jury—such arguments have little impact. The proper scope of police work is beyond the understanding of the average juror. Without the ability to raise the question of Braley's credibility, the jury had no reason to doubt Braley's competence to act as lead detective in a homicide case. As such, hearing flaws in the investigation sound like a routine defense tactic to distract the jurors from evidence of the defendant's guilt.

To the contrary, the flaws in Braley's investigation that the defense attempted to point out to the jury carry more weight when the jury learns that the person in charge of this investigation was an incompetent, serial liar who utterly lacked the qualifications to properly handle this investigation. Yet, the court prohibited the defense from cross-examining Braley about his full background, and the State failed to disclose the extent to which Braley had conned his way into obtaining positions with the Hamilton Township Police Department that he was never qualified to obtain. *See* DD&M Report. *See also* Waller Affidavit.

b. Because the court overlooked how the defense's strategy and ability to present and confront evidence was impacted by its own prior rulings and the State's material nondisclosures of the information in the DD&M Report, the court abused its discretion in deciding that Braley's testimony in the May 5th Hearing concerned a collateral matter that it would not have permitted the jury to consider.

As described *supra*, the trial court summarized the defense strategy as one focused on flaws by the coroner and EMT personnel. Yet, the court failed to consider, or even acknowledge, that the defense's effort to raise a *Kyles* defense regarding Braley (which would have changed the entire landscape of the trial, including the defense's confrontation and presentation of evidence and arguments to the jury) was forbidden by its prior rulings and the State's material nondisclosures. Based on its flawed summary of the defense theory, the court decided that: (1) Braley's testimony in the May 5th Hearing concerned a "collateral matter," *see* Decision at 12-13, 15; and (2) because the matters involved in the May 5th Hearing concerned a "collateral matter," he would not have permitted the jury to consider testimony about "tangential" falsities in Braley's Application Form from 14 years prior. *See* Decision at 14.

The court abused its discretion by deeming the issues regarding Braley's credibility and their impact on the entire investigation to be "collateral matters," in violation of Widmer's due process and confrontation rights under the Fifth, Sixth, and Fourteenth Amendments and their related counterparts in the Ohio Constitution.

At the time of trial, all that was known to the defense was that Braley *likely* had lied on his Application Form. *See* Exhibit B to Post-Conviction Petition. Only as a result of the uncertainty regarding the authenticity of the Application Form and how it ended up in Braley's employment file, were the motions to quash ultimately granted. 5/5/10 Hearing Tr. at 214-15. Likewise, the Motion to Allow Confrontation of Lead Investigator was denied on the same basis. Based on Braley's insistence that he neither supplied the false information nor signed the Application Form containing the false information, the State continued to contest the Application

Form's authenticity. And the court was persuaded by these arguments noting Braley's disavowal of the Application Form. *See* January 21, 2011 Order.

The case proceeded to trial, and Widmer was not permitted to question Braley about the "disputed" Application Form or the full details of his background. Widmer was also effectively prevented from raising a compelling *Kyles v. Whitley* defense, as he had **specifically requested** to do in his Motion to Allow Confrontation of Lead Investigator.

Indeed, if Braley had told the truth at the May 5th Hearing, and admitted that he made false statements in the Application Form, any of the following events easily could have occurred:

1. **Earlier investigation into Braley's background likely would have taken place**.

Braley's admissions undoubtedly would have caused the Hamilton Township Trustees, the defense team, the prosecution, (or all of the above) to launch a full-scale investigation into Braley's background at an earlier date. The facts in the DD&M Report, therefore, likely would have been discovered much sooner, and well before Widmer's third trial. Knowledge of such information would have allowed Widmer to completely alter the nature of his defense and to build a *Kyles v. Whitley* defense focusing on Braley's false statements, opportunism, lack of training, and incompetence. One cannot say that this changed defense strategy could not have impacted the verdict beyond a reasonable doubt.

2. **Defense subpoenas for Braley's employment records likely would not have been quashed**.

The defense subpoenas for Braley's employment records at various past jobs likely would not have been quashed so that the defense would have had a chance to fully understand the depths of Braley's pattern of deception and its impact on the case.

3. **Defense investigation of Braley's background would have proceeded**.

Likewise, the defense would have been permitted to further investigate Braley's background and potentially discover the information in the DD&M Report. The direction this

avenue of investigation could have led is unknown. Thus, it is impossible to fairly conclude that Braley admitting in the May 5th Hearing to supplying the false statements in the Application Form could not have impacted the verdict beyond a reasonable doubt.

4. <u>Concerns about a "mini-trial" with respect to the Application Form and its origin would have been negated</u>.

Braley's admissions would have negated any concern about a "mini-trial" with respect to the Application Form and its origin.[15] This would have greatly increased the chances that the defense would have been able to cross-examine Braley about the Application Form at trial (and have the jury hear him admit his false statements).[16]

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[15] Noting that the authenticity of the Application Form was still being contested by the State, the trial court denied Widmer's motion to cross-examine Braley about the Application Form, as the authenticity question would cause a "mini-trial" within a trial. The Court was also persuaded that even if Braley did supply the false information in the Application Form, these fabrications occurred in the too distant past, and in relation to an unpaid position (Chaplain) from which Braley did not benefit financially. *See* January 21, 2011 Order.

[16] If all of the facts in the DD&M Report had been known in January 2011 (or Braley had told the truth at the May 5th Hearing), and even in light of this information, the trial court still would not have permitted the defense to raise a *Kyles v. Whitley* defense, confront Braley, and subpoena Braley's remaining employment records, Widmer would have been able to appeal the court's ruling based on a complete record. Indeed, the information in the DD&M Report undermines the bases of the trial court's prior rulings on this issue. The trial court ruled in favor of the State because: (1) it was not clear at that time whether Braley was responsible for the Application Form, and this dispute would cause a "mini-trial;" (2) even if Braley was responsible, his false statements were too remote in time; and (3) even if Braley was responsible, his false statements did not benefit him financially, but only for an unpaid position. Accordingly, without the information in the DD&M Report, Widmer was prevented from effectively appealing on direct appeal the court's decision denying the defense the opportunity to confront Braley regarding his background (as the trial court suggested, *see* Decision at 10). The appeal could not encompass the claim that the defense was prohibited from raising a *Kyles v. Whitely* defense at trial. After all, the record on appeal in *Widmer I* (Case No. CA2011-03-027) does not include the DD&M Report and thus, Widmer could raise only a limited assignment of error in *Widmer I* regarding Braley. *See* Fourth Assignment of Error in *Widmer I* (Case No. CA2011-03-027). Without the DD&M Report, the record in *Widmer I* could not demonstrate Braley's pattern of lying to advance his career, the full extent of Braley's incompetence, or why the State's failure to disclose the information in the DD&M Report violated Widmer's due process and confrontation rights, and prohibited the defense from meaningfully demonstrating to the jury how Braley's

5. <u>The impact on the jury</u>.

After hearing about Braley's negligence and lack of qualifications, and having context with which to fairly consider flaws in the investigation, the jury might have determined that Braley was not credible,[17] and therefore, that the investigation against Widmer could be fatally flawed or at least not fully trustworthy. This consideration alone could have created reasonable doubt in at least one of the jurors' minds.

6. <u>Defense would have been permitted (and able) to raise a solid *Kyles v. Whitley* defense at trial</u>.

Likewise, the defense would have been permitted, and able, to raise a solid *Kyles v. Whitley* defense at trial; namely, that Braley's lack of credibility affected the integrity of:

a. The collection of evidence, including:

- **the bathtub**, which was seized in violation of the Fourth Amendment at Braley's instruction despite that: (1) no court authority for seizing the tub had been granted (or even sought); and (2) prior to the tub's seizure, Danny Harness of the Miami Valley Crime Lab had already dusted the tub for fingerprints; performed the superglue fuming method on the tub; photographed the tub utilizing the Rufus ultraviolet imaging camera,[18] T.p. Vol. II at 70-77; and concluded that the tub contained "no latent prints of value" with enough characteristics to compare to known samples or warrant further analysis. T.p. Vol. II at 78. *See* Case No. CA2011-03-027 at First Assignment of Error; Reply Brief at Section I; and Appellant's Post-Argument Response to Panel's Question, all fully incorporated by reference herein, to demonstrate how Braley directly caused the tub to be unlawfully seized;

- **the initial processing of the bathtub**, which occurred by Braley standing inside the tub, T.p. Vol. II at 190-191, dusting for fingerprints, and identifying what he deemed to be

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incompetence and pattern of lying to advance his career impacted the entire investigation of Sarah Widmer's death. *See Kyles v. Whitley* (1995), 514 U.S. 419.

[17] The *Napue* standard, requiring the state to prove beyond a reasonable doubt that the perjury did not in any way contribute to the state's favorable verdict, applies equally when the false testimony relates only to the credibility of the witness. This is true even when the jury is apprised of other reasons to doubt the credibility of the witness. *Napue*, 360 U.S. at 269-271.

[18] The superglue fuming method and Rufus ultraviolet imaging are techniques used to preserve, amplify, and visualize latent fingerprints. T.p. Vol. II at 70-77.

"streak marks made by human hands" inside the tub to the right of the faucet. *Id.* Regarding the area of "streaks," Braley summoned fingerprint expert Bill Hillard to identify: (1) the presence of latent fingerprint(s); and (2) who left the fingerprint(s) in the "streak" marks. T.p. Vol. II at 135.[19]

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[19] Hillard became involved in the case at the request of Braley three months after Sarah's death. T.p. Vol. II at 224-225. Danny Harness had processed the tub twice prior to Hillard's involvement with the tub and concluded that the tub contained "no latent prints of value" with enough characteristics to compare to known samples or warrant further analysis, T.p. Vol. II at 70-78. Despite Harness's two processings, Hillard saw no sign that the tub had been processed when he analyzed it in the basement of the Hamilton Township Police Department three months later. T.p. Vol. II at 152, 136. And the condition Harness left the tub at the end of his two tub-processings was not the condition in which Hillard found the tub when he analyzed it in the basement of the Hamilton Twp. Police Department. T.p. Vol. II at 152; Defense Exhibit CC.

Noting that Danny Harness had processed the tub twice before Hillard's analysis, and that Harness's processings involved adding black fingerprint powder on top of the substances used in the superglue fuming method, T.p. Vol. II at 77, Hillard admitted that he should have been able to see white impressions (the remnants of the superglue fuming method) that become visible when black fingerprint powder is added on top of the substances used in the superglue fuming method. After all, the superglue fuming method "preserves" the condition of the prints and surface on which it is utilized, so that when black powder is added on top, white impressions become visible where the fumes adhered to the surface. T.p. Vol. II at 79.

Yet Hillard saw no signs of the superglue fuming method having been performed. T.p. Vol. II at 153. The lack of any sign that Harness had processed the tub when undisputed evidence demonstrates that Harness processed the tub twice before Hillard's analysis, suggests that a chain-of-custody issue or contamination of the tub occurred in the three months that elapsed between the Harness and Hillard processings. Accordingly, if Widmer had the information in the DD&M Report, he would have had the information in the record needed to add a section to the bathtub-suppression and improper-expert-testimony issues presented in *Widmer I* (Case No. CA2011-03-027 challenging the bathtub's admission into evidence and Hillard's expert testimony), on the additional ground that contamination occurred prior to Hillard's analysis. *See* First and Second Assignments of Error in *Widmer I* (Case No. CA2011-03-027) fully incorporated by reference herein.

Hillard testified that he identified:

1. a male forearm on the front interior wall of the bathtub, T.p. Vol. II at 139-140, 142, 143, 144. *See id.* at 144 (Hillard testifying that "based on the hair follicles, I'd say it was a male; *id.* at 141, 143, identifying the "forearm" mark as that of an adult);

2. fingertip marks that were left in a "downward swiping motion," T.p. Vol. II at 136, by a person of small stature, such as a female. T.p. Vol. II at 138; and

3. that the adult male forearm print came second in time to circular marks made by bottles that had been sitting on the edge of the tub. T.p. Vol. II at 145.

This testimony from Hillard was elicited over defense objection, T.p. Vol. II at 131, 140, 144, and in violation of Ohio R. Evid. 702(C), *Daubert*, and Widmer's constitutional rights to due process, a fair trial, and meaningful cross-examination of all witnesses and evidence against him. Essentially the testimony physically linked Ryan to the scene of Sarah's death and supposedly offered "scientific" proof to support the state's theory that Ryan staged the scene. It was powerful evidence against Ryan that contradicted his claim that he found his wife unconscious, apparently dead, in the bathtub with alleged "physical proof" that a violent, murderous struggle had occurred. And it was the only evidence against Widmer that went unchecked. In its closing argument, the State emphasized Hillard's testimony as physical evidence in corroboration of Jennifer Crew's testimony, demonstrating that Ryan forcibly drowned Sarah and then staged the scene. Without Hillard's testimony, the nature of the State's proof would have been altogether different. A weaker case necessarily would have resulted with no unchallenged physical evidence demonstrating that a struggle (and a cover-up of that struggle) had occurred in the bathroom. *See* Case No. CA2011-03-027 Second Assignment of Error, fully incorporated by reference herein to demonstrate how Braley—determined to find evidentiary value in the tub which he unlawfully seized and possibly contaminated—identified a purported expert in "body part impressions" who claimed to identify "body part" impressions in the tub, which the State relied on as "physical proof" that a violent, murderous struggle had occurred in corroboration with Jennifer Crew's testimony.

Hillard based his testimony that the "streak" marks were "fingerprint streaks" on the fact that he was told by someone, presumably Braley, that the marks were "fingerprint streaks." T.p. Vol. II at 135 (Hillard explaining that his involvement in the case began when Braley, T.p. Vol. II at 225, requested him to "come see if those prints...could be identified...to a certain individual."). T.p. Vol. II at 135. The only reasonable deduction is that it was Braley, rather than Harness, who told Hillard that the marks were fingerprint swipes. After all, by the time Hillard examined the bathtub, the two other individuals who already had processed said tub were Braley and Harness. Accordingly, it only could have been one of these two individuals who told Hillard that the streak marks were from finger swipes. As Braley began dusting the tub he concluded that latent "streaks" "made by human hands" were present on the inside wall of the tub to the right of the faucet. T.p. Vol. II at 190-191.

Harness, on the other hand, concluded that he could neither identify the "streaks" as "fingerprint" marks nor could he assign a gender, stature-size of the contributor, or direction to the marks. T.p. Vol. II at 92, 88. In fact, Harness noted the lack of characteristics in the swipe marks to enable him to identify them as fingerprints, as opposed to toe prints or prints from any other anatomy, T.p. Vol. II at 92, or to assign any direction to the marks. T.p. Vol. II at 88.

Therefore, the only reasonable deduction is that it was Braley, rather than Harness, who told Hillard that the marks were fingerprint swipes.

b. What evidence not to collect.

Braley freely admitted that after attending the autopsy and hearing Uptegrove "preliminarily" determine homicide as the manner of death,[20] he considered no other possibilities but homicide. *See* T.p. Vol. II at 212. From the autopsy, Braley immediately prepared the affidavit to support a search warrant of the Widmer house. *See* T.p. Vol. II at 233. Less than 48 hours having passed from Sarah's death, Braley filed an arrest warrant charging Ryan Widmer with aggravated murder. T.p. Vol. II at 233. The next morning (August 13, 2008) with the word "homicide" etched in his mind, Braley executed the search warrant of the Widmer house and collected only the items he thought supported a charge of murder against Ryan Widmer.

For example, on the night of Sarah Widmer's death (August 11, 2008), Braley noted concern about two blood spots on the carpet. T.p. Vol. II at 177, 213. Two days later—having decided to the exclusion of all other possibilities that a homicide had occurred—while executing the search warrant, Braley decided that the feminine hygiene wrapper in the bathroom trashcan held no evidentiary value or significance of any kind. Accordingly, he did not collect it into evidence. T.p. Vol. II at 217. The Widmer defense discovered the feminine hygiene wrapper in a picture of the bathroom trashcan's contents, none of which was collected as evidence. T.p. Vol. II at 217; Joint Exhibit 249. Defense investigation of the first-responders' written statements revealed that one of the blood spots corresponded to the area where Sarah Widmer's pelvis had been resting; the other, to her head. T.p. Vol. II at 214-216; *see also* Defense Exhibit GG.

Having established that Sarah was expelling bloody froth from her mouth and nose, the State later used the location of the two blood spots to argue that **both** blood spots resulted from

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[20] *See* T.p. Vol. I at 774, Dr. Uptegrove attesting that on August 12, 2008, at the conclusion of the autopsy, he told Lt. Braley that he was leaning toward homicide as the manner of death.

the fluids exiting Sarah's mouth and nose. Thus, the State argued, Ryan had staged the scene of Sarah's body, apparently repositioning her from one place to another before the first-responders arrived. T.p. Vol. II at 1183.

This example demonstrates how Braley's tunnel vision for homicide obscured the collection of evidence. The feminine hygiene wrapper was not collected or otherwise noted in the investigation. Consequently, a blood spot potentially resulting from an innocent, natural process catapulted Braley's suspicions and was characterized by the State as a sinister piece of evidence in the State's case against Ryan Widmer, allegedly demonstrating that he repositioned her body. Fortunately, this example was uncovered by the defense by chance. But because Braley *admittedly* conducted his investigation—including his search of the Widmer house and all interviews—with the belief that a homicide had occurred, it remains unknown what other items were not collected due to their seemingly benign value in "proving" a homicide. *See also* Waller Affidavit, Exhibit C to Post-Conviction Petition at 6G (opining that Braley was incompetent to hold the position he held in this case, and that his incompetence and lack of credibility affected the collection of evidence; the State never offered any evidence to refute this finding).

c. The decision to charge Widmer.

Braley moved forward with charges against Widmer less than 48 hours from Sarah's death, T.p. Vol. II at 233, before Dr. Uptegrove signed a final determination of the manner of death; before interviewing the emergency room physician, Dr. David Marcus (who testified that he saw no signs of trauma, but rather more blood in Sarah's lungs than he had ever seen in a drowning victim in his decades of experience, T.p. Vol. II at 120); before interviewing the police officers and firefighters who transported Sarah to the hospital, T.p. Vol. II at 234; before reviewing Sarah's or Ryan's cell phone records and text messages, *id.*, (which revealed only loving text messages to one another and no signs of an extramarital affair by either party, T.p.

Vol. I at 1279); before speaking with Sarah's family, friends, and co-workers about her health, T.p. Vol. II at 234; and before obtaining Sarah's prior medical records which reveal a cleft palate and heart murmur as a child, T.p. Vol. I at 1294-95. *See* T.p. Vol. I at 774 (Dr. Uptegrove attesting that on August 12, 2008, at the conclusion of the autopsy, he told Braley that he was ***leaning toward*** homicide as the manner of death, yet after the autopsy Braley considered no possibility other than a homicide. T.p. Vol. II at 212). It was only after Ryan was arrested and indicted that Braely conducted an investigation. But that investigation was one molded to fit the notion that a homicide occurred. With the proper context, the jury would have the opportunity to fairly and properly consider Braley's errors in the investigation and his rush to judgment that a homicide had occurred.

d. The coroner's conclusion that a homicide occurred.

Braley testified that upon viewing the scene for the first time, he thought, "something was screaming at me something is bad wrong, something bad, really bad has happened here, more than just a tragic accident." T.p. Vol. II at 206. It was with this mentality that he consulted with Dr. Uptegtove during the autopsy on August 12, 2008. T.p. Vol. II at 206. Dr. Uptegrove admitted that he considered what Braley told him in ultimately concluding that a homicide had occurred. T.p. Vol. I at 723, 826-827. Additionally, during the autopsy, Dr. Uptegrove pointed out to Braley findings that Uptegrove found to be "medically significant" in light of the information Braley had told Uptegove about the case. T.p. Vol. II at 199. *See also* Waller Affidavit, Exhibit C to Post-Conviction Petition at 6E (opining that "Braley was simply not qualified to make determinations regarding this case and pass such opinions on to Uptegrove. *A coroner's opinion regarding cause of death is as reliable as the information provided to the coroner. If the information given to him is unreliable, then the opinion is unreliable in a 'garbage in, garbage out' process.*") (emphasis added).

In sum, it is unreasonable to conclude that Widmer's ability to raise a *Kyles v. Whitley* defense could not have impacted the verdict beyond a reasonable doubt, according to the *Napue* standard. Pursuant to a *Kyles v. Whitley* defense, the defense would have: (1) emphasized to the jury Braley's involvement in these key areas of the case; and (2) argued that Braley's incompetence to act as lead detective in an alleged homicide and tendency to lie and fabricate facts to advance his career, impacted his decisions as to which evidence to collect and how to characterize the evidence when consulting with other state agents about the case. The defense would have substantiated these claims with the evidence in the DD&M Report. Most importantly, the jury would have had the context to understand and fairly consider the flaws Braley made in the investigation of Sarah's death in terms of their impact on Ryan Widmer's criminal prosecution. Flaws in the investigation carry more significance when the jury is able to consider that the person in charge of this investigation has routinely lied to advance his career and was never trained to perform as lead detective in homicide cases.

It is for these reasons that the court erroneously and unreasonably concluded that Braley's testimony in the May 5th Hearing concerned a collateral matter about which the court had discretion to exclude from the jury's consideration.

D. The court erred as a matter of law when it held that only false testimony before a jury can constitute material perjury under the *Napue* standard.

Likewise, the court erred as a matter of law when it decided that: (1) only false testimony before a **jury** can constitute "perjury" under *Napue*, *see* Decision at 15; and (2) because the matters involved in the May 5th Hearing concerned what the court unreasonably and erroneously deemed to be a "collateral matter," (3) the court would not have permitted the jury to consider testimony about falsities in Braley's Application Form from 14 years prior, irrespective of whether Braley admitted during the May 5th Hearing responsibility for the Application Form's falsities. *See* Decision at 14-15. For the reasons discussed *supra* in the First Assignment of

Error at Section I(C)(1)(b), the court abused its discretion in violation of Widmer's due process and confrontation right by deeming the issues regarding Braley to be "collateral matters" when the defense can readily point to material ways that Braley's perjury and knowledge of the information in the DD&M Report would have changed the defense strategy pursuant to *Kyles v. Whitley* (1995), 514 U.S. 419.

Additionally, without the information in the DD&M Report, Widmer was prevented from effectively appealing the court's decision denying the defense the opportunity to confront Braley regarding his background on direct appeal (as the trial court suggests, *see* Decision at 10). After all, the record on appeal in *Widmer I* (Case No. CA2011-03-027) does not include the DD&M Report and thus, Widmer could only raise a limited assignment of error in *Widmer I* regarding Braley's impact on the case. *See* Fourth Assignment of Error in *Widmer I* (Case No. CA2011-03-027). Without the DD&M Report, the record in *Widmer I* could not fully demonstrate: (1) Braley's pattern of lying to advance his career; (2) the full extent of Braley's incompetence; or (3) why the State's failure to disclose the information in the DD&M Report violated Widmer's due process rights and prohibited the defense from meaningfully demonstrating to the jury how Braley's incompetence and pattern of lying to advance his career impacted the entire investigation of Sarah Widmer's death. *See Kyles v. Whitley* (1995), 514 U.S. 419.

But aside from the trial court overlooking the point that the false Application Form only seems "collateral" when no consideration is given to how the course of litigation and defense strategy would have been altered had the defense known the information in the DD&M Report, the court also erred as a matter of law in deciding that only false testimony before a jury can constitute material perjury under *Napue*. This holding runs contrary to *Napue* and Widmer's state and federal due process and confrontation rights. *See State v. DeFronzo*, 59 Ohio Misc. 113, 121; 394 N.E.2d 1027, 1032 (Ohio Com. Pl, Lucas Co., Sept. 29, 1978) ("materiality of

perjured testimony is not germane solely to the defense employed at trial, but also to how the defendant may have prepared his case differently, had the falsehood been known"); *see also United States v. Polisi*, 416 F.2d 573, 577 (2d Cir. 1969) ("the concept out of which the constitutional dimension arises, is prejudice to the defendant measured by the effect of the suppression upon defendant's preparation for trial, rather than its effect upon the jury's verdict."). *See also Martel v. Lamarque*, 2010 WL 2305884 (C.D. Cal., March 9, 2010) (*Napue* due process rule applies to the government's presentation of false evidence at a suppression hearing as well as at trial); *see also Kozol v. Payne*, 2007 WL 2688179, *4 (W.D. Wash., Sept. 10, 2007) (considering *Napue* claim regarding detective's false testimony at pre-trial suppression hearing); *Carr v. Runnels*, 2007 WL 133971, *6-7 (N.D. Cal., Jan. 16, 2007) (analyzing due process claim based on arresting officer's alleged perjury in connection with motion to suppress).

In sum, when the correct legal doctrines are applied, it is clear that Braley gave false testimony in the May 5th Hearing with the State's knowledge. He did not testify to a lack of memory, but rather, he directly disclaimed the Application Form.[21] The false testimony affected the material issue of the May 5th Hearing (the authenticity of the Application Form) and thus, his false testimony amounted to perjury. Braley's perjury relates to a material rather than a collateral matter, because if Braley had admitted to supplying the false Application Form, the defense would have been able to further investigate Braley's background and discover the information in the DD&M Report (although the State had a duty to disclose this information per *Brady* and *Kyles*). *See infra* Second Assignment of Error. Consequently, the defense would have been able to pursue a *Kyles v. Whitley* defense confronting Braley with his incompetence

[21] Citing the transcript of the May 5th Hearing, DD&M reached this same conclusion. *See* DD&M Report at 2 ([Braley] testified under oath that he did not fill out the Application Form. *See also id.* at 4 ("Braley's statements are not that he does not recall ever filling the Application....but that he did not prepare or sign those documents.").

and pattern of lying to advance his career, and presenting to the jury with context for understanding how Braley's errors in the investigation significantly impacted the entire investigation of Sarah Widmer's death to the prejudice of Ryan Widmer.

When a member of the prosecution team knowingly commits perjury in a criminal case, only in rare occasions will the resulting conviction **not** be overturned. With all the various ways that Braley's perjury materially impacted defense strategy and thus could have impacted the verdict, it is inconceivable that the State can demonstrate "beyond a reasonable doubt" that it had no effect on the case. Accordingly, Widmer is entitled to a new trial on this ground.

SECOND ASSIGNMENT OF ERROR

II. The trial court abused its discretion and ruled contrary to clearly established U.S. Supreme Court precedent by: (1) concluding that Widmer's post-conviction petition failed to point out material information known to the State that was withheld from the defense prior to or during trial; and (2) ignoring Widmer's due process and confrontation claims wherein he contends that, due to the State's failure to disclose the information about Braley contained in the DD&M Report, he was denied the ability to raise a *Kyles v. Whitley* defense at trial challenging the integrity of the State's investigation and confronting Braley about the information contained in the DD&M Report.

Issues Presented for Review: Whether a defendant's right to present a *Kyles v. Whitley* defense (that the lead detective's incompetence and pattern of dishonesty impacted the entire investigation) is violated when the State fails to disclose evidence that the lead detective in a homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field.

Whether a defendant's due process and confrontation rights are violated when the State fails to disclose evidence that the lead detective in a homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field.

Whether undisclosed evidence is "material" for purposes of a due process analysis when, if disclosed, the defense would have been able to present evidence to the jury that the lead detective in the homicide case: (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; and (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert attesting to national standards in the field; and accordingly, the defense would

have been able to present the jury with the context needed to fairly consider that the lead detective's incompetence and pattern of dishonesty impacted the entire investigation.

A. *Brady* and *Kyles v. Whitley* violations occurred when the State failed to disclose the various problems surrounding Braley's credibility, entitling Widmer to relief.

Related to but legally distinct from Widmer's *Napue* claim is the *Brady/Kyles* violation that occurred when the State failed to disclose to the defense that Braley: (1) fabricated his background on the Application Form; (2) fabricated stories about serving in the Special Forces, which led Duvelius to appoint Braley director of the THOR tactical-raid unit; (3) was grossly unqualified to be in charge of this investigation (in light of 1 and 2 above); and (4) lied under oath on May 5, 2010 about the Application Form. *See Kyles v. Whitley* (1995), 514 U.S. 419; *see also Brady v. Maryland* (1963), 373 U.S. 83; 83 S.Ct. 1194.

Of course Braley, a state agent, had knowledge of all four points above, but the defense did not.[22]

It is only through the lens of *Kyles* that this withheld information can be understood to have had a material impact on Widmer's trial. After all, pursuant to *Kyles*, a *Brady*/due process violation occurs when the state fails to disclose information or materials that impeach the quality of the police investigation, show that the police investigation was shoddy or negligent, or cause the jury to question the "thoroughness and good faith" of the police investigation. *See Kyles*, 514 U.S. at 445-46 (discussing this principle of law and citing with approval *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such

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[22] Braley's knowledge of the four points above is imputed to the prosecution. *See Strickler v. Greene* (1999), 527 U.S. 263, 280; 119 S.Ct. 1936 ("[T]he rule encompasses evidence known only to police investigators and not to the prosecutor. In order to comply with *Brady*, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."). *See also* First Assignment of Error at Section I(A), fully incorporated by reference herein.

use in assessing a possible *Brady* violation"); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding new trial because withheld *Brady* evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case.").

Such is the case here. Had the defense been aware of these facts, this evidence would have been used not only to impeach Braley, but also and more importantly, to mount a *Kyles v. Whitley* defense, which would have changed the nature of the entire trial. As expert Dennis Waller has opined (with no evidence to the contrary presented by the State), Braley's incompetence, untrustworthiness, and penchant for manufacturing facts to further his career, are all relevant to the alleged "body impression markings" on the bathtub, the collection of evidence in general (or lack thereof), the decision to charge Widmer, and Uptegrove's homicide determination. *See* the discussion in First Assignment of Error at Section I(C) fully incorporated by reference herein. *See also* Waller Affidavit. Given the change in defense theory that would have occurred had the defense known this information, there is a reasonable probability a different verdict would have resulted. Consequently, without this information, Widmer did not receive a fair trial.

Regardless of whether Braley committed perjury at the May 5th Hearing as discussed in the First Assignment of Error, it is undeniable that the State failed to disclose these matters. It is undeniable that the disclosure severely prejudiced the defense by barring its ability to attack the integrity of the evidence and the State's investigation of Sarah Widmer's death; confront Braley about his background and pattern of lying to advance his career; and present an alternate theory of the case—that Braley's penchant for lying and incompetence affected the entire investigation. It is undeniable that, when presented with the information in the DD&M Report, the jury would have had the context needed to understand the significance of Braley's errors in the

investigation, as the acts of an incompetent, serial deceiver rather than a routine defense ploy aimed at distracting the jurors from evidence of guilt.

The trial court's decision entirely ignores these claims.[23] The court fails to consider the overall impact of the State's failure to disclose the information in the DD&M Report on the defense strategy, ability to confront the State's evidence, and present an alternate theory of the case. The State's failure to disclose these matters to the defense constitutes a clear *Brady* and *Kyles v. Whitley* violation, entitling Widmer to relief.

B. A *Brady/Kyles* violation occurred when the State delayed its official DD&M Investigation of Braley until one day after Widmer was convicted.

After the undersigned counsel learned of the DD&M Report, counsel investigated to determine when the DD&M investigation of Braley commenced. By examining the minutes of the Hamilton Township Trustees, counsel learned that the decision to hire an outside firm to conduct an investigation was discussed and then voted on at the February 16, 2011 Trustees' Meeting.[24] This was one day after Widmer was convicted. Furthermore, counsel learned that the Trustees conducted its own internal investigation of Braley beginning in July 2010, the results of which still remain unknown to Widmer.[25]

The record is clear that suspicions about Braley first arose in the Widmer litigation nearly one year prior to the launch of the DD&M investigation. These suspicions were aired in open court by the defense team and reported in the media. Then, in November 2010, BCI found that

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[23] Because the trial court failed to address these claims, this Court should apply *de novo* review. *State v. Harrington*, 172 Ohio App.3d 595, 599; 876 N.E.2d 626, 630 (Ohio App. 4 Dist., 2007) citing *State v. Gondor* (2006), 112 Ohio St.3d 377; 860 N.E.2d 77.

[24] *See* http://www.hamilton-township.org/assets/PDF_Minutes/mm_110216.pdf (minutes of Trustees meeting of February 16, 2011).

[25] *See* http://www.hamilton-township.org/assets/PDF_Minutes/mm_100707.pdf (minutes of Trustees meeting of July 7, 2010).

the handwriting on the Application Form belonged to Braley. Yet Hamilton Township—the government entity that hired Braley and was in charge of investigating the Widmer case—decided to wait until one day after Widmer was convicted to launch its DD&M investigation. It is self-evident that this delay smacks of an intentional delay and cover-up. Pursuant to *Brady* case law, the state has a duty to not stick its head in the sand or intentionally delay investigations in order to avoid learning facts that might undermine its pending case. *See Strickler v. Greene* (1999), 527 U.S. 263, 280; 119 S.Ct. 1936 ("In order to comply with *Brady*, therefore, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.").

Widmer requested a hearing to subpoena records and witnesses to verify what appears to be obvious—that a decision was made intentionally to delay the discovery of additional *Brady/Kyles* information concerning Braley until after Widmer's trial. But the trial court denied Widmer's request for a hearing, violating his right to access the courts and discover additional evidence of a substantive due process violation. *See infra* Fifth Assignment of Error. If what appears to be self-evident were confirmed at a hearing (that a decision was made intentionally to delay the discovery of *Brady/Kyles* information concerning Braley until after Widmer's conviction), then Widmer would be entitled a new trial on this ground as well.

C. A *Brady/Kyles* violation occurred (and is still occurring) when the State failed to disclose the results of the Hamilton Township Trustees' 2010 internal investigation of Braley.

After counsel obtained the DD&M Report, she examined the minutes of the Hamilton Township Trustees meetings, as described *supra*. A review of the minutes reveals that the Board of Trustees conducted its own investigation of Braley in July 2010.[26] The minutes do not indicate

[26] *See* http://www.hamilton-township.org/resources/minutes.html (minutes of Trustees meetings of July 7, 2010; July 21, 2010; August 18, 2010; and September 1, 2010).

the findings or results of that investigation, but the minutes do indicate that the Trustees took statements under oath from both Braley and Duvelius during this investigation.[27] Duvelius was a particularly damaging witness to Braley's credibility in the DD&M Report, as he indicated that he appointed Braley director of the THOR Unit based on Braley's Special Forces fabrications. None of this information was known to the Widmer defense team until after Widmer was convicted, and it is highly likely that Braley and Duvelius's statements to the Trustees in the Summer of 2010 are identical to their statements to DD&M in the weeks following Widmer's February 2011 conviction. If either Braley or Duvelius told the Trustees statements that differed from their statements to DD&M, such discrepancies certainly would have been noted in the DD&M Report. But because: (1) the DD&M Report notes no such discrepancies; and (2) it is now known that (following Widmer's conviction) Braley told DD&M that "he did not prepare or sign those documents" and "not that he does not recall ever filling out the Application," *see* DD&M Report at 2, 4—it is inconceivable that he told a different story (under oath) to the Trustees in the Summer of 2010.

The *Brady* doctrine required the disclosure of this information to the defense prior to the third trial, along with any and all other information damaging to Braley's credibility that was uncovered during this investigation.

What is even more disturbing about this revelation of an undisclosed internal investigation wherein Braley made additional false statements under oath, is that in January of 2011, litigation commenced regarding Widmer's ability to cross-examine Braley at the looming third trial. Information about Braley's recent false statements concerning service in the Special Forces, and Braley's blatantly false statements to the Trustees in the Summer of 2010, if

[27] *See id.* at July 7, 2010 minutes explaining that "affidavits" (sic) would be taken from Braley and Duvelius.

disclosed, would have substantially altered the face of that litigation. Yet none of the information discovered in the Summer of 2010 was disclosed despite that the State clearly was on notice that Braley's credibility was an ongoing issue, not only for the Township, but also for the Widmer prosecution. In fact, the Trustees voice concerns about Braley's personnel issues in the specific context of the "forthcoming Widmer trial."[28]

Widmer requested a hearing so that he could use subpoena power to obtain records and testimony regarding exactly what transpired during the Trustees' investigation in the Summer of 2010. But the trial court denied Widmer's request for a hearing violating his right to access the courts and discover additional evidence of a substantive due process violation. *See infra* Fifth Assignment of Error. If a hearing revealed what appears to be obvious—that a state entity had knowledge of most of the crucial facts in the DD&M Report all the way back in the Summer of 2010—then yet another blatant *Brady* violation occurred, and Widmer is entitled to a new trial on this ground as well.

To be sure, a blatant *Brady* violation **already** occurred due to the fact that Braley, a State agent in charge of the Widmer investigation, knew that he was lying and failed to disclose these facts. But Widmer is entitled to know if other state actors in addition to Braley knew of this information, and if so, to assert that additional and compounding *Brady* violations occurred.

D. Alternatively, trial counsel rendered ineffective assistance for failing to raise the new evidence about Braley if in fact such evidence was disclosed to counsel prior to or during trial.

It is abundantly clear from the record, including the November 8, 2011 Affidavit of Ravert J. Clark, that none of the new evidence discussed *supra* in the Second Assignment of Error at Sections II(A)-(C) was known to defense counsel prior to or during Widmer's trials. *See*

[28] *See* http://www.hamilton-township.org/resources/minutes.html (minutes of Trustees meetings of September 1, 2010 where Trustees also elect to seek advice from the Ohio Attorney General's Office); *see also id.* at minutes of meetings of July 7, 2010; July 21, 2010; and August 18, 2010).

Defendant's Supplement to his Motion for Post-Conviction Relief, a New Trial, Genetic DNA Testing, and an Evidentiary Hearing (November 8, 2011 Affidavit of Ravert J. Clark attached). Indeed, the issues involving Braley were strenuously litigated from May 2010 until the eve of the third trial, and it is clear from these filings and transcripts that none of this information was known to defense counsel. However, in the unlikely event that the State is able to demonstrate that this information was in fact disclosed to trial counsel in a timely manner, and that counsel somehow failed to act on it, then Widmer alleges ineffective assistance of counsel for failing to follow through on such crucial new evidence. All case law and standards relating to a post-conviction claim for ineffective assistance of counsel are set forth *infra* in the Third Assignment of Error and are incorporated by reference herein.

THIRD ASSIGNMENT OF ERROR

III. The trial court abused its discretion in failing to grant Widmer's post-conviction request for genetic DNA testing of Sarah Widmer's biological remains to determine if she suffered from a genetic disorder. Such genetic testing is necessary to properly review the post-conviction claim of ineffective assistance of trial counsel, because if testing demonstrated that Sarah suffered from a genetic disorder, then trial counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments for failing to pursue what would have led to crucial, exculpatory evidence for the jury's review. But because the trial court denied Widmer's request for testing, it unreasonably foreclosed any possibility of evaluating whether trial counsel provided constitutionally deficient assistance in this regard.

Issues Presented for Review: Whether the trial court arbitrarily and unreasonably abuses its discretion when, with the State's agreement, it orders evidence to be preserved for purposes of future genetic DNA testing. Yet it denies the defendant access to the same evidence when the defendant: (1) files a timely post-conviction petition seeking to pursue genetic DNA testing (at his own expense); and (2) said testing: (a) could result in outcome determinative evidence as to whether an alleged homicide victim actually suffered from a disorder that causes sudden death and of which the deceased exhibited symptoms according to unrefuted expert opinion; and (b) is needed to properly evaluate a timely post-conviction claim that trial counsel rendered ineffective assistance for failing to pursue said testing prior to trial.

Whether the trial court violates a defendant's substantive and procedural due process rights when: (1) it denies the defendant access to evidence needed to pursue genetic DNA testing (at his own expense); and (2) said testing: (a) could determine whether an alleged homicide victim actually suffered from a disorder that causes sudden death and of which the deceased exhibited symptoms according to unrefuted expert opinion; and (b) is needed to properly evaluate a timely

post-conviction claim that trial counsel rendered ineffective assistance for failing to pursue said testing prior to trial.

Whether ineffective assistance of counsel attaches when trial counsel fails to pursue genetic DNA testing that could determine whether an alleged homicide victim actually suffered from a disorder that causes sudden death and of which the deceased exhibited symptoms according to unrefuted expert opinion.

Whether equal protection and substantive and procedural due process violations under the state and federal constitutions attach to Ohio's post-conviction DNA testing scheme, as interpreted by the trial court, by mandating the preservation of evidence in all cases of a certain class yet denying a defendant within that class a procedure to access said evidence for testing when testing could result in outcome-determinative evidence in accordance with the standard delineated in the post-conviction DNA testing statute.

In his post-conviction petition, Widmer requested that the trial court order genetic DNA testing to determine if Sarah Widmer suffered from Long QT Syndrome or other similar genetic disorder. Long QT Syndrome is a genetic defect that, for reasons not fully understood at the present time, is often triggered when the patient is in a body of water such as a swimming pool or bathtub. T.p. Vol. II at 891 (Dr. Balko testifying that drowning is shown to be associated with underlying, rather obscure disease processes that are not readily clinically apparent). When triggered, the patient will enter an unconscious state and drown. There is strong cause to believe that Sarah Widmer suffered from Long QT Syndrome or other similar genetic defect. She had many of the indicators, including a cleft palate and heart murmur as a child, narcolepsy-like symptoms during life, short stature, and death from drowning. T.p. Vol. II at 930-935. As Dr. Michael Gregory Balko opines in his unrefuted affidavit, "[S]ufficient clinical indications are present that Sarah Widmer may have suffered from Long QT Syndrome, and that this syndrome may have resulted in accidental drowning . . . . Sufficient clinical indicators are present in this case such that genetic testing should be performed, in my professional opinion." (Affidavit of Dr. Michael Gregory Balko, Exhibit D to Post-Conviction Petition, at 4-5).

Widmer's request for genetic DNA testing came as no surprise to the State or to the court as Widmer had already won an order from the trial court preserving all physical and biological evidence pursuant to SB 77 for purposes of future testing.[29]

A. The trial court abused its discretion by unreasonably and arbitrarily deciding that the biological evidence should be preserved pursuant to ORC §2933.82 ("SB 77") but then denying testing of said evidence to pursue the very claim for which Widmer sought an order of preservation.

The entire purpose of seeking the Preservation Order with respect to the biological and physical evidence was to preserve the opportunity for future genetic DNA testing. *See* Motion to Preserve Evidence. Indeed, the fact that the legislature recently passed a law requiring the State to preserve DNA in a case like this one, for the express purpose of future DNA testing, reflects the notion that post-conviction DNA testing is appropriate here. Fittingly, ***the State and the trial court already have agreed that SB77 applies to the biological and physical materials in this case and that Widmer's preservation request with respect to these items should be granted*** as the following explanation of the previous litigation outlines:

Upon inheriting the case from trial counsel, undersigned appellate counsel filed a Motion to Preserve Evidence on April 15, 2011. In this motion, Widmer requested an order to secure and preserve:

1. All bodily fluids and bodily materials of Sarah Widmer ever collected in this case including but not limited to all slides and swabs taken from such evidence;

2. All physical evidence ever collected from the alleged crime scene including but not limited to the carpet cuttings.

See Motion to Preserve at 1.

Further, the motion explained that:

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[29] In 2010, Ohio enacted Senate Bill 77 ("SB 77"), which requires the State to preserve physical evidence and biological remains in all murder cases for purposes of future post-conviction DNA testing. *See* ORC §2933.82

> Widmer requests that the material listed in paragraphs 1 and 2 be preserved for future testing.... Regarding the items detailed in paragraphs 1 and 2, tests exist that may be able to conclusively determine if Sarah Widmer suffered from a medical condition that caused her to drown.* Furthermore, even if current testing fails to provide this determination, it is unknown what medical advances will occur in the future that may lead to such diagnosis. Accordingly, this memorandum serves as notice that the items in paragraphs 1 and 2 may be tested today or at some point in the future with the results exculpating Ryan Widmer. All such materials clearly fall within the new biological evidence retention standards set forth in Senate Bill 77 and codified in ORC §2933.82. Therefore, preservation not only is necessary to the ends of justice but also is required by Ohio statute and Widmer's constitutional rights to due process, to present a full and complete defense, and to confront all adverse witnesses."
>
> *In Footnote 1, the motion explained that, "As soon as the exact test necessary is determined, Widmer will supplement this motion with a request to have the evidence released to the appropriate agency for said testing to be conducted."

Id. at 2-3 and *Id.* at Footnote 1.

In its response, the Motion to Dismiss Defendant's Motion to Preserve Evidence, the State agreed with Widmer's request to preserve the biological and physical evidence and, likewise agreed that preservation is required pursuant to SB 77:

> As for the Defendant's request to preserve the biological and physical evidence in this case, the State would not object since the preservation of such evidence is required by ORC §2933.82. So, **the State would agree that the part of the Defendant's motion concerning the biological and physical evidence should be granted**, and that such duty was imposed by SB 77.

Motion to Dismiss Defendant's Motion to Preserve at 5.

Ultimately, the trial court ordered the preservation of all physical and biological evidence pursuant to SB 77.

But then, the court arbitrarily and unreasonably refused to permit Widmer access to the ***same evidence*** for the ***same purpose*** the court already granted the Preservation Order. As explained in his post-conviction petition, genetic DNA testing could result in powerful, new,

evidence of a plausible alternative manner of death, which would be outcome-determinative.[30] Furthermore, genetic DNA testing is necessary for a fair adjudication of Widmer's timely post-conviction claim that, if testing were to reveal that Sarah Widmer suffered from a genetic disorder, then trial counsel provided ineffective assistance for failing to pursue testing prior to trial.

For these reasons, the court abused its discretion by arbitrarily and unreasonably refusing Widmer access to the biological materials to pursue genetic DNA testing at his own expense (not the State's). This error occurred in violation of Widmer's procedural and substantive due process rights to access the courts and present: (1) outcome-determinative evidence of a plausible alternative manner of death; and (2) evidence of constitutionally deficient performance by trial counsel.

B. Although Widmer's case does not fit within Ohio's statute for state-funded DNA testing, Widmer's request for privately-funded DNA testing could lead to outcome-determinative evidence.

The Ohio legislature, like most legislatures across the country, has indicated a strong preference for allowing convicted inmates access to DNA testing to challenge their convictions. Reflecting this preference, Ohio, like 48 other states, passed a post-conviction DNA testing law, commonly known as Senate Bill 262 ("SB 262"). SB 262 was first passed in 2003 as Senate Bill 11 ("SB 11"), and then expanded numerous times in the intervening years, most recently on July 6, 2010.

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[30] "Outcome determinative" means that had the results of DNA testing of the subject inmate been presented at the trial * * * and been found relevant and admissible with respect to the felony offense for which the inmate * * * is requesting the DNA testing * * *, *and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case * * *, there is a strong probability* that no reasonable factfinder would have found the inmate guilty of that offense." *See* ORC §2953.71(L)

Widmer concedes that he does not qualify for state-funded testing pursuant to SB 262 because that statute permits state-funded testing when DNA testing excludes the inmate from the crime scene evidence and/or when DNA testing identifies an alternate suspect. *See* ORC §2953.74(C)(5). In other words, the statute includes cases where: (1) the inmate seeks state-funded testing; and (2) the perpetrator's DNA was left at the crime scene, such as, the perpetrator's semen in a rape case. When DNA testing shows that the inmate is not the source of the semen from the rape, the inmate presents the outcome-determinative result for adjudication. Here, of course, genetic testing does not fall within this structure because Widmer has requested genetic DNA testing as a source of a potential diagnosis, cause of Sarah's death, and theory that no crime occurred. In other words, the evidence of which Widmer is seeking genetic DNA testing is not evidence from which Ryan can be "excluded" or an alternate suspect identified, but rather, to show that no crime occurred to begin with.

Even so, genetic testing in this case would meet SB 262's "outcome determinative" standard in the same manner as DNA testing contemplated under SB 262.

Under Ohio law, "outcome determinative" is defined as follows:

> 'outcome determinative' means that had the results of DNA testing of the subject inmate been presented at the trial * * * and been found relevant and admissible with respect to the felony offense for which the inmate * * * is requesting the DNA testing * * *, *and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case * * *, there is a strong probability* that no reasonable fact finder would have found the inmate guilty of that offense."

See ORC §2953.71(L) (emphasis added.). Thus, this standard simply requires a helpful DNA test result that would raise reasonable doubt—here, that Sarah Widmer in fact suffered from Long QT Syndrome or other such genetic disorder. And the test does not require *actual* reasonable doubt, but only a strong probability of reasonable doubt. *See State v. Emerick*, 2011 WL 5137200; 2011-Ohio-5543 (Ohio App. 2 Dist., Oct. 28, 2011) (discussing this low standard

for DNA testing in Ohio). It is self-evident that reasonable doubt can exist even when substantial circumstantial evidence of guilt exists. Thus, the DNA results need not "explain away" all of the evidence as the State suggested in the lower court. *See id.* (noting that post-conviction DNA testing should be granted by the court even when "significant evidence" of guilt still would exist, as the DNA results need not explain away all of the evidence but need only raise a strong probability of reasonable doubt).

Given how strenuously contested this case has been, without question a genetic test result demonstrating that Sarah Widmer actually suffered from Long QT Syndrome—a syndrome that causes its sufferers to go unconscious and potentially drown when in water—would raise reasonable doubt even if it does not explain away every piece of evidence against Widmer.

C. When an inmate timely files a motion for post-conviction relief, and an order of DNA testing would help the court resolve the issue, the court should order testing. Here, the court acted arbitrarily and unreasonably in deciding that genetic DNA testing would not help resolve whether trial counsel rendered ineffective assistance.

Merely because Widmer does not qualify for state-funded post-conviction testing pursuant to SB 262 does not mean that he must be denied the right to DNA testing altogether. Not only does Widmer's claim fall within the spirit of SB 262 and proffer a scenario that would meet the "outcome determinative" standard, but also, it comports with the Ohio Attorney General's only official interpretation of the law. Indeed, after the passage of SB 11 (the first iteration of Ohio's post-conviction DNA testing law), then-Ohio Attorney General Jim Petro issued the State's official interpretation of the law in Attorney General Opinion 2005-009 dated March 1, 2005 (hereinafter "AG Opinion," attached as Exhibit F to the Post-Conviction Petition).

The AG Opinion makes clear that SB 11 and SB 262 are merely vehicles by which an inmate can force the State to pay for post-conviction DNA testing in certain circumstances. This law does not preempt the field, however, and it does not divest a court of authority to order post-

conviction DNA testing for inmates who do not qualify under the statute. As the AG Opinion makes clear, ***when an inmate timely files a motion for post-conviction relief, and an order of DNA testing would help the Court resolve the issue, the Court should order testing.*** *See* AG Opinion, Exhibit F of Post-Conviction Petition at 11-14 (citing cases). Additionally, the legislature's recent passage of SB 77, which requires the State to preserve DNA in a case like this one ***for the express purpose of future DNA testing***, further reflects the notion that post-conviction DNA testing is appropriate here. Holding otherwise would undermine the official interpretation of law by the Ohio Attorney General and subvert legislative intent.

Without genetic DNA testing, as requested in Widmer's post-conviction petition, the trial court could not properly evaluate Wimder's claim of ineffective assistance of trial counsel. Despite that the idea of Sarah *potentially* suffering from a genetic disorder that leads to death was raised at trial, a genetic test result demonstrating that Sarah *actually* suffered from Long QT Syndrome—a syndrome that causes its sufferers to go unconscious and potentially drown in water—changes the entire landscape of the evidence. Such a test result certainly would raise reasonable doubt if not explain away every piece of evidence against Widmer. Likewise, such a test result would demonstrate that trial counsel rendered constitutionally deficient assistance, because in such scenario, but for trial counsel's failure to pursue testing, the jury could have considered evidence that Sarah suffered from a syndrome that causes its sufferers to go unconscious and potentially drown in water.[31]

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[31] Widmer does not concede that trial counsel could have obtained genetic testing prior to trial, or that trial counsel was aware that such testing could have provided helpful results based on the available technology. From the time trial counsel commenced control of the case following Widmer's reversed conviction in 2009, the only biological material of Sarah Widmer in the possession of the defense had been fixed in formalin and embedded in paraffin. At that time (and at the present time), materials that are preserved in this manner cannot be tested for Long QT Syndrome or other similar genetic disorders. *See* Affidavit of Michele L. Berry at 3 attached as Exhibit E to Post-Conviction Petition.

Indeed, the Sixth Amendment to the United States Constitution provides that criminal defendants are entitled to effective assistance of counsel. In order to demonstrate ineffective assistance, there must be a showing that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced as a result. *State v. Haynes*, 2011 WL 5353070, ¶16; 2011-Ohio-5743 (Ohio App. 12 Dist., November 7, 2011) citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688; 104 S.Ct. 2052. In order to establish prejudice, an appellant must establish that but for trial counsel's error, a reasonable probability exists that the result of his trial would have been different. *Haynes*, 2011 WL 5353070 at ¶16 citing *Strickland*, 466 U.S. at 687-688; 104 S.Ct. 2052.

The failure to properly investigate potentially exculpatory evidence may be the basis for an ineffective assistance of counsel claim. *See e.g. State v. Strutton*, 62 Ohio App.3d 248, 251; 575 N.E.2d 466 (Ohio App. 2 Dist. 1988) (appellate court overturned a trial court's denial of a motion to withdraw a guilty plea and remanded the case for a hearing, holding that ineffective assistance of counsel encompasses the failure to pursue evidence that might vindicate defendant; trial counsel failed to pursue an exonerative evidentiary lead). *See also Wiggins v. Smith* (2003), 539 U.S. 510; 123 S.Ct. 2527, 2356 (failure to properly investigate constitutes basis for an

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Thus, in order to proceed with testing for Long QT Syndrome or other similar genetic disorder, Widmer would have needed (and still would need) the State to release Sarah Widmer's biological materials in its possession, such as the carpet samples (which contain blood and biological materials of Sarah Widmer, untainted by preservatives). *See* Affidavit of Michele L. Berry. However, the technology needed to extract DNA from the carpet sample is a newly developed technology. *See id.* (explaining extraction methods of Orchid-Cellmark). Accordingly, it may have been impossible for trial counsel to pursue this avenue of investigation based on the technology available at the time.

However, in the event that this Court determines that testing could have been attempted prior to Widmer's third trial, Widmer is asserting ineffective assistance of counsel as an alternative argument pursuant to the legislative intent of SB 262 and the official interpretation of law by the Ohio Attorney General.

ineffective assistance of counsel claim). *See also Wisconsin v. Hicks*, 536 N.W.2d 487 (Wis. Ct. App. 1995) (overturning rape conviction due to defense counsel's failure to subject hair samplings found at the rape scene to DNA testing). *See also State v. Thomas*, 768 S.W.2d 335, 336-337 (Tex. App. 1989) (defense counsel has a responsibility to seek out and interview potential witnesses; the failure to interview a witness will be considered ineffective rather than strategic when inaction precludes the accused from advancing a viable defense).

Failure to follow an evidentiary lead can only be considered strategic if trial counsel could have decided that pursuing the lead would have been futile. *Haynes*, 2011 WL 5353070 at ¶18 quoting *State v. Martin,* 20 Ohio App.3d 172, 174; 485 N.E.2d 717 (Ohio App. 1 Dist., 1983). Given that testing could result in outcome-determinative evidence of a plausible alternative manner of Sarah Widmer's death, trial counsel could not have possibly considered testing to be a futile pursuit.

Moreover, Ohio's official interpretation of SB 77 makes clear that a court can order DNA testing for cases that fall outside the statute when: (1) the inmate has timely filed a post-conviction motion; and (2) the court would need the results of the DNA tests to fairly assess the merits of the post-conviction claim.

Here, in order to prevail on his ineffective assistance of counsel claim, Widmer must show that he was prejudiced by his trial counsel's failure to obtain genetic DNA testing prior to trial. This Court cannot fairly evaluate whether he was prejudiced without knowing the results of the DNA testing—in other words, whether Sarah Widmer actually suffered from Long QT Syndrome or other similar genetic disorder. Thus, because a court must order genetic DNA testing in order to assess the merits of Widmer's timely filed motion for post-conviction relief, this case falls squarely within the scenario outlined by the AG's Opinion, and the Ohio law collected therein, in which a Court should order post-conviction DNA testing "outside" of SB 77.

The court abused its discretion by unreasonably and arbitrarily ruling that genetic testing is not necessary and is not an aide to properly evaluating the ineffective of assistance claim, especially in light of its previous decision ordering the preservation of all biological and physical evidence pursuant to SB 77.

D. Ohio's post-conviction DNA testing scheme, as interpreted by the trial court, runs contrary to Widmer's equal protection and substantive and procedural due process rights under the state and federal constitutions by mandating the preservation of evidence in all murder cases involving a not guilty plea, yet denying him access to said evidence for testing when testing could result in outcome-determinative evidence of a plausible alternative manner of death.

Ohio's post-conviction DNA testing scheme mandates the preservation of all biological materials for defendants who are convicted of, but did not plead guilty to, certain types of felony convictions. *See* ORC §2933.82(B). Ryan Widmer, a defendant convicted at trial of murder in violation of ORC §2903.02, falls within this class of defendants. And for the reasons explained *supra* in the Third Assignment of Error at Section III(B), genetic testing could result in "outcome-determinative" evidence as contemplated under the post-conviction DNA testing statute. Even so, Ohio's DNA testing scheme, as interpreted by the trial court, arbitrarily excludes defendants such as Widmer: (1) who are convicted of but did not plead guilty to murder; (2) and for whom testing could lead to outcome-determinative evidence; but (3) for whom testing would not exclude his DNA from crime scene materials or inculpate an alternate suspect.

When testing would lead to an outcome-determinative result and the defendant has steadfastly maintained his innocence, no rational basis exists to exclude defendants such as Widmer from the post-conviction DNA testing scheme. Simply because an outcome-determinative result would mean that no crime occurred at all (as opposed to a suspect other than the defendant committing the crime), is an arbitrary, unreasonable, and irrational basis for excluding an individual from the DNA testing scheme, especially when Ohio's compensation

law for "wrongfully imprisoned individuals" encompasses scenarios in which the crime "was not committed by any person." ORC §2743.48(A)(5).

According to the Supreme Court of the United States in *District Attorney's Office v. Osborne* (2009), 557 U.S. 52; 129 S.Ct 2308, a defendant must have an adequate process to access DNA evidence for testing. *See id.* at 2320 (courts may upset a state's post-conviction relief procedures if they are "fundamentally inadequate" to vindicate the substantive rights provided; the ability of a defendant to perform post-conviction DNA testing rests on state statutes and procedures). *See also Grier v. Klem*, 2011 WL 4971925 (W.D. Pa., Sept., 19, 2011) (in a §1983 case litigating an inmate's request to access evidence for post-conviction DNA testing, the court held that the inmate's procedural due process rights were violated by the state's lack of process to afford him access to post-conviction DNA testing that could lead to an outcome-determinative result); *see also Hartman v. Walsh*, 2011 WL 5362123 (N.D. Ohio, Nov. 2, 2011) (rejecting defendant's federal due process claim based on denial of request for post-conviction DNA testing because defendant "never attempted to have DNA tests ordered pursuant to Ohio statutes" and "did not comply with the statutory requirements concerning DNA testing," citing ORC §2953.71-2983.84); *Castanon v. Johnson*, 2012 WL 874683 (M.D. Tenn., March 14, 2012) (in order for a procedural due process violation to attach, defendant must show that the governing state law denies him a viable avenue for the requested relief).

Here, Ohio's DNA testing scheme, as interpreted by the trial court, lacks a process for defendants such as Widmer, for whom post-conviction DNA testing could lead to an outcome-determinative result, but for whom the result would tend towards the fact that no crime occurred to begin with, rather than the crime having been committed by an alternate suspect. The scheme is fundamentally inadequate and lacks a viable procedure for a defendant in Widmer's position. To be sure, the State potentially can lawfully exclude defendants from *state-funded* DNA testing

on a basis such as this. But to altogether exclude defendants from a process to access DNA evidence, and to create such a procedural exclusion on an arbitrary and irrational basis such as this is constitutionally impermissible.

For these reasons, Ohio's post-conviction DNA testing scheme, as interpreted by the trial court, runs contrary to Widmer's equal protection and substantive and procedural due process rights under the state and federal constitutions.

FOURTH ASSIGNMENT OF ERROR

IV. The trial court abused its discretion by denying Widmer access to the grand jury testimony of Braley and Uptegrove, or at a minimum conducting an in camera inspection of said testimony, when Widmer demonstrated a particularized need for access to the testimony for a review of: (1) whether Braley made any false statements to the grand jury which would support his *Brady, Kyles,* and *Napue* claims; and (2) whether the testimony of either witness reveals what information, or the extent to which, Braley supplied information about the case to Uptegrove that he considered in his determination that Sarah Widmer drowned as a result of homicide. This error occurred in violation of Widmer's procedural and substantive due process rights under the U.S. Constitution and their related counterparts in the Ohio constitution, including meaningful access to the courts.

Issues Presented for Review: Whether a defendant's procedural and substantive due process rights to access the courts and to fully present evidence of a prejudicial constitutional violation are violated when the trial court denies access to, or an in camera inspection of, grand jury testimony reasonably likely to include evidence of additional *Brady/Kyles/Napue* violations.

Whether a "particularized need" for access to, or an in camera inspection of, grand jury is demonstrated when the defendant presents specific, newly discovered evidence that the first witness whose testimony is question (the lead detective in a homicide case): (1) fabricated his credentials; (2) engaged in a pattern of falsehoods to obtain career advancements; (3) lacked the proper training and qualifications to perform as lead detective in a homicide case according to the unrefuted opinion of a police practices expert; and the second witness whose testimony is in question (the coroner in a homicide case), considered information from the lead detective when determining manner of death.

Along with the October 12, 2011 post-conviction petition, Widmer filed a Motion to Compel Disclosure of Grand Jury Testimony of Braley & Uptegrove; or alternatively an in camera inspection by the court. Widmer sought to discover whether the grand jury testimony of either witness contains *Brady, Kyles,* or *Napue* material helpful or relevant to his post-conviction

petition. Widmer requested access to, or an in camera inspection by the court, of the grand jury testimony of Braley and Uptegrove to determine: (1) whether Braley made any false statements to the grand jury (which would support Widmer's *Brady*, *Kyles* and *Napue* claims); or (2) whether Braley or Uptegrove testified about the specific information, or the extent to which, Braley supplied information to Uptegrove that Uptegrove then considered in his determination that Sarah Widmer drowned as a result of homicide.

Although the court never specifically addressed this motion, it appears that the court denied the motion, because the opening sentence of the decision states that the court's decision considered the State's Motion to Dismiss Post-Conviction Relief and Opposition to *Remaining Motions*. (emphasis added). Because the State's Opposition Brief addressed its opposition to Widmer's Motion to Compel Disclosure of Grand Jury Testimony and the court referenced "remaining motions," it appears that the court summarily dismissed the motion in question. Furthermore, a motion that is still pending at the time of final disposition of a case is presumed to have been denied. *State v. Luks*, 2008 WL 3126177, ¶44 (Ohio App. 8 Dist., Aug. 7, 2008).

In denying the motion, the court arbitrarily and unreasonably abused its discretion in violation of Widmer's procedural and substantive due process rights and his rights under the Confrontation Clause. Widmer was denied access to the courts or any process to discover further evidence of a *Brady/Kyles/Napue* violation, use such evidence to further support his post-conviction petition, and meaningfully confront Braley, Uptegrove, and the State's evidence against him.

The principle of grand jury secrecy in American legal jurisprudence is not absolute. *Butterworth v. Smith* (1990), 494 U.S. 624; 110 S.Ct. 1376; *see also State v. Tenbrook*, 34 Ohio Misc.2d 14; 517 N.E.2d 1046 (Ohio Com. Pl., Cuyahoga Co., 1987); *see also Craig v. Lima City Schools Bd of Educ.*, 384 F.Supp.2d 1136 (N.D. Ohio, 2005). Under Ohio law, the disclosure of

grand jury proceedings is currently governed by Criminal Rule 6. The rule clearly and absolutely prohibits the discovery of grand jury deliberations and grand jurors' votes, but does not bar the discovery of witness testimony before a grand jury. Crim. R. Rule 6(E).

In *State v. Greer* (1981), 66 Ohio St.2d 139, Ohio recognized an exception to the grand jury secrecy requirement and adopted the "particularized need" doctrine promulgated by the Supreme Court of the United States in *United States v. Procter & Gamble* (1958), 356 U.S. 677, 682; 78 S.Ct. 983. In *Proctor & Gamble*, the Supreme Court recognized the five major policy rationales for maintaining the secrecy of grand jury proceedings as follows:

> (1) to prevent the escape of those whose indictment may be contemplated;
>
> (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors;
>
> (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it;
>
> (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; and
>
> (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

The Court stated that before a judge permits the defendant to examine grand jury transcripts, the defendant must demonstrate that a "particularized need" for disclosure outweighs the countervailing policy of maintaining secrecy. *Id* at 682. Furthermore, the *Greer* Court explained that a "particularize need" is shown when, considering the circumstances, "it is probable that failure to disclose the testimony will deprive the defendant of a fair adjudication of the allegations placed in issue by the witness's trial testimony." 66 Ohio St.2d at ¶3 of syllabus. *See e.g. State v. Sellards* (1985), 17 Ohio St.3d 169, 173; 478 N.E.2d 781 (a "particularized need" shown when the state became aware prior to trial of a more precise date when an offense took place but failed to disclose such information to defense; the record suggested that the state

intentionally withheld the information; accordingly the Supreme Court ordered the trial court to conduct an in camera inspection).

Here, none of the five rationales for retaining grand jury secrecy are implicated in the slightest manner here, so the "secrecy" side of the balance carries no weight. On the other side of the scale, clearly Widmer's request was not a fishing expedition but rather a well-supported claim. As in *Sellards*, the State here was aware[32] prior to Widmer's trial of the information in the DD&M Report and the fact that Braley's background was under suspicion. Nevertheless, the State never disclosed this information despite that litigation regarding Braley's background and defense attempts to investigate same, were ongoing in Widmer's case during the exact timeframe when the Township was investigating Braley's background.[33] As in *Sellards*, the record here demonstrates that the State was aware of this information yet withheld it from the defense. In light of: (1) the information in the DD&M Report; (2) Braley's pattern of falsehoods for the sake of career advancement; and (3) Uptegrove's consideration of information supplied by Braley to determine that a homicide occurred, T.p. Vol. I at 723, 826-827, and which findings to point out to the lead detective as being "medically significant," *see* T.p. Vol. II at 199—a reasonable likelihood exists that the grand jury testimony of Braley and Uptegrove contains additional

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[32] The state was aware vis-à-vis Braley if not additional state actors, especially considering that Hamilton Township was conducting an investigation of Braley's background in the same timeframe when the defense attempted to investigate Braley's background in the May 5th Hearing and continuing until the defense's January 2011 Motion to Allow Confrontation of Lead Investigator.

[33] It is important to note that the Township's investigation involved eliciting statements from Braley, under oath, in which he apparently directly disclaimed filling out or signing the Application Form. Because the DD&M Report notes no discrepancies, it is highly unlikely that Braley's statements differed from his statements to DD&M, that "he did not prepare or sign those documents" and "not that he does not recall ever filling out the Application." *See* DD&M Report at 2, 4. *See also* http://www.hamilton-township.org/resources/minutes.html (Trustees' Minutes) at July 7, 2010 minutes explaining that "affidavits" (sic) would be taken from Braley and Duvelius.

Brady/Kyles/Napue material.

This Court has further explained, in *State v. Leach*, 2001 WL 171026, *6; 2001-Ohio-4203 (Ohio App. 12 Dist., Feb. 20, 2001) citing *State v. Mack* (1995), 73 Ohio St.3d 502, 508, that mere speculation that grand jury testimony might contain material evidence or might aid his cross-examination by revealing contradictions or inconsistencies does not constitute a particularized need. This Court instructed that "speculation" of inconsistencies that could aid cross-examination is what could exist in every case, but a "particularized need" is a probability of inconsistencies based on *actual facts or circumstances* that the defendant can demonstrate to the court. *Id. See also State v. Godfrey*, 181 Ohio App.3d 75, 81; 907 N.E.2d 1230 (Ohio App. 3 Dist. 2009) (pretrial motion for disclosure of grand jury transcript denied, but the court noting that after the witness in question testified, the court may be required to conduct an in camera inspection of the testimony if the defendant can point to specific reasons in the testimony that give rise to need for review of the grand jury testimony).

In other words, *any* defendant can speculate that a witness testified inconsistently or divulged additional information not otherwise provided to the defense. Only in rare circumstances does the defendant actually have specific information that a fair adjudication of his post-conviction claims, ability to confront the state's evidence against him, and pursue a likely successful defense theory cannot occur without disclosure (or at least an in camera inspection) of certain grand jury testimony.

But such is the case here. Widmer demonstrated a particularized need based on specific events and circumstances that give rise to a reasonable and rational belief that the grand jury testimony of Braley and Uptegrove very easily could contain information to which he is entitled under *Brady*, *Kyles*, and *Napue*, and which would have further supported the claims presented in his post-conviction petition (and now, in this appeal). *See* First and Second Assignments of

Error fully incorporated by reference herein.

As explained in the First and Second Assignments of Error, Widmer discovered new evidence which demonstrates that Braley, among other things: (1) has committed perjury in this case; (2) fabricated his background, including experience in the Air Force Special Forces, in order to enjoy a meteoric rise in the Hamilton Township Police Department (e.g. appointment as director of the THOR Unit); (3) has a pattern of making false statements to advance his career; (4) was grossly unqualified to hold the position he held in this case according to the unrefuted opinion of a police practices expert attesting to national standards in the field; and (5) supplied information about the case to Uptegrove, which Uptegrove admitted he considered in issuing his decision that a homicide occurred. *See* T.p. Vol. I at 723, 826-827.

Additionally, Braley has admitted that upon viewing the scene for the first time, he thought, "something was screaming at me something is bad wrong, something bad, really bad has happened here, more than just a tragic accident." T.p. Vol. II at 206. It was with this mentality that he consulted with Dr. Uptegtove during the autopsy on August 12, 2008 despite that he had not even begun an investigation. T.p. Vol. II at 206. During the autopsy, Uptegrove then pointed out to Braley findings that he (Uptegrove) deemed "medically significant" based on the information Braley supplied to him about the case. T.p. Vol. II at 199. *See also* Waller Affidavit, Exhibit C to Post-Conviction Petition (police practices expert opining that Braley was incompetent to hold the position he held in this case, and that his incompetence and lack of credibility affected the collection of evidence. Regarding Braley's consultation with Uptegrove, Waller notes, "Braley was simply not qualified to make determinations regarding this case and pass such opinions on to Uptegrove. *A coroner's opinion regarding cause of death is as reliable as the information provided to the coroner. If the information given to him is unreliable, then the opinion is unreliable in a 'garbage in, garbage out' process." Id.* at 6E). (emphasis added)

In its Response to Widmer's post-conviction petition, the State never offered any evidence to refute Waller's opinion.

With this specific information in mind, the full context of Braley's incompetence to perform as lead detective in a homicide investigation, and the reasons in the First and Second Assignments of Error explaining the resulting prejudice, Widmer easily meets the standard set forth in *Greer*. Without question, a reasonable probability exists that the grand jury testimony of Braley and Uptegrove contains inconsistencies or information that could have further supported the claims presented in his post-conviction petition (and now in this appeal). *Greer*, 66 Ohio St.2d at ¶3 of syllabus.

Additionally, failure to disclose the testimony (or at least have the court conduct an in camera inspection thereof) deprived Widmer of a meaningful opportunity to confront the facts attested to by Braley and Uptegrove, and present a defense demonstrating that Braley's incompetence and penchant for lying had a reasonable probability of impacting the outcome of Widmer's trial.

For these reasons, this Court should order disclosure to the defense or in camera inspection of Braley and Uptegrove's grand jury testimony.

FIFTH ASSIGNMENT OF ERROR

V. The trial court abused it discretion in denying Widmer's October 12, 2011 post-conviction petition without a hearing because the petition and material appended to it demonstrate a *prima facie* case of constitutional violations. This error occurred in violation of Widmer's procedural and substantive due process rights under U.S. Constitution and their related counterparts in the Ohio constitution, including meaningful access to the courts.

Issue Presented for Review: Whether the trial court abuses its discretion in violation of a defendant's procedural and substantive due process rights when it denies a defendant's post-conviction petition without a hearing despite that the petition alone establishes constitutional violations warranting relief. Yet at a minimum, a hearing is necessary to establish further evidence of said violations to present to the court for a fair adjudication of the merits.

When evidence suggests that "there was such an infringement on the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States," at a minimum, a hearing on the evidence is in order. *State v. Calhoun* (1999), 86 Ohio St.3d 279; 714 N.E.2d 905. *See also See also State v. Tinney*, 2012 WL 75860, *5; 2012-Ohio-72 (Ohio App. 5 Dist., Jan. 9, 2012) (after granting defendant's motion to withdraw guilty plea on the basis of the motion and its appended materials, appellate court remanded the case for a hearing to allow a full presentation of evidence in order to fairly determine if a manifest injustice occurred).

For the reasons explained in the First and Second Assignments of Error fully incorporated by reference herein, Widmer, at a minimum, presented a *prima facie* case that a due process violation occurred by the State's failure to disclose the information in the DD&M Report about which the State clearly knew through Braley, if not through other state actors as well. Widmer is entitled to a new trial on the grounds presented in the Second Assignment of Error even if this Court disagrees with Widmer's contention that Braley committed perjury in the May 5th Hearing.

Among other items, Widmer supported his petition with: (1) the DD&M Report, which was publicly disclosed in June 2011, four months after Widmer's conviction; (2) an affidavit

from trial counsel Ravert J. Clark explaining that the defense was unaware of the information in the DD&M Report; and (3) an unrefuted affidavit from police practices expert Dennis Waller who opined that Braley's incompetence, untrustworthiness, and penchant for manufacturing facts to further his career, are all relevant to the evidence collected from the bathtub, the collection of evidence in general (or lack thereof), the decision to charge Widmer, and Uptegrove's homicide determination. Even without Waller's unrefuted affidavit, the DD&M Report and Clark Affidavit alone establish that a *Brady/Kyles* violation occurred when the State failed to disclose the information in the DD&M Report—especially in light of the fact that litigation ***in this case*** regarding Braley's background and credibility took place in the same timeframe when Hamilton Township conducted an internal investigation on these same matters.

Although Braley's knowledge suffices for a due process violation to attach, it is inconceivable that state actors beyond Braley were unaware of the Township's investigation and Braley's role in the Widmer case. With this consideration in mind, along with the fact that Widmer can readily point to material ways in which the defense strategy and ability to confront and present evidence at trial were impacted by the defense's unawareness of the information in the DD&M Report, Widmer is entitled to a new trial based simply on the post-conviction petition and its attached materials.

But even if this Court disagrees, Widmer has presented a *prima facie* case of constitutional violations that, at a minimum, entitle him to a hearing to present his claims and subpoena records and witnesses to testify under oath.

Specifically, Widmer is entitled to a hearing to subpoena records and witnesses to verify what appears to be obvious—that a decision was made to delay the discovery of additional *Brady/Kyles* information concerning Braley until after Widmer's trial. If Widmer were able to confirm this at a hearing, then Widmer would be entitled a new trial on this ground as well.

Additionally, Widmer is entitled to a hearing to subpoena records and testimony regarding exactly what transpired during the Trustees' investigation in the Summer of 2010. Again, if a hearing were to reveal what appears to be obvious—that a state entity in charge of the Widmer investigation (the Hamilton Township Police Department, the Hamilton Township Fire Department, or the Warren County Prosecutor's Office) had knowledge of most of the crucial facts in the DD&M report all the way back in the Summer of 2010—then yet another blatant *Brady* violation occurred, and Widmer is entitled to a new trial on this ground as well.

By denying Widmer's petition without a hearing, the trial court abused its discretion in violation of Widmer's right to access the courts and to discover and present additional evidence of a substantive due process violation as necessary for a fair determination of the constitutional claims in his post-conviction petition.

CONCLUSION

For all the reasons stated herein, Appellant Ryan K. Widmer respectfully requests this Court to vacate his conviction and grant a new trial. Additionally, Widmer respectfully requests this Court to order the trial court to release the pertinent biological samples for genetic DNA testing, and conduct an in camera inspection of the grand jury testimony of former Lt. Braley and Dr. Uptegrove or disclose same to the defense. In the event that this Court does not vacate his conviction and grant a new trial, Widmer respectfully requests this Court to remand the case for a hearing on his post-conviction petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Appellant Ryan K. Widmer was delivered this 7th day of May, 2012 to the Warren County Prosecutor's Office by hand delivery.

Michele L. Berry

Appendix A: Judgment Entry & Decision by the Warren County Court of Common Pleas denying post-conviction petition & related motions without a hearing (January 17, 2012)

JAN 2012
COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED
2012 JAN 17 PM 4:05
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

STATE OF OHIO
Plaintiff,

vs.

RYAN WIDMER
Defendant,

CASE NO. 08CR25254

DECISION AND ENTRY

FAO

This matter is before the court on the Defendant's **Motions for Post-Conviction Relief, A New Trial and Genetic Testing** and what the court will accept as the State's **Motion to Dismiss the Post-Conviction Relief and Opposition to Remaining Motions.**

Post Conviction Relief

The Defendant has included a request for an evidentiary hearing. Before granting a hearing, the court must determine whether there are substantive grounds for relief.[1] The court must find that there are grounds to believe that "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States."[2]

Although there are multiple arguments set forth, they dovetail and the court's discussion will encompass all findings relied upon in its conclusions. There are essentially four U.S. Supreme Court cases relied upon the Defendant in his arguments. They will be examined not only for their holdings but, in order to better grasp the holdings, also for their factual content.

[1] R.C. 2953.21(C)
[2] *State v. Calhoun* (1999), 86 Ohio St. 3d 279.

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In *Napue v. Illinois*[3] the syllabus includes; "At petitioner's trial in a state court in which he was convicted of murder, the principal state witness, an accomplice then serving a 199-year sentence for the same murder, testified in response to a question by the Assistant State's Attorney that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney had in fact promised him consideration, but he did nothing to correct the witness' false testimony. The jury was apprised, however, that a public defender had promised 'to do what he could' for the witness. *Held*: The failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment. (a) The established principle that a State may not knowingly use false testimony to obtain a tainted conviction does not cease to apply merely because the false testimony goes only to the credibility of the witness."

Factually, the prosecutor elicited from the witness on both direct and re-direct that the State had made no promises to him for his testimony. These were statements that were false and **known by the prosecutor to be false**. The court noted, "Hamer's (the witness') testimony was **extremely important** because the passage of time and the dim light in the cocktail lounge made eyewitness identification very difficult and uncertain, and because some pertinent witnesses had left the state. On the basis of **the evidence presented, which consisted largely of Hamer's testimony**, the jury returned a guilty verdict." **(Emphasis added).**

The next case, chronologically, is *Brady v. Maryland*.[4] Part of the syllabus of the case is, "Suppression **by the prosecution of evidence favorable** to an accused who has requested it violates due process **where the evidence is material** either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." **(Emphasis added).**

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[3] 360 U.S. 264 (1959)
[4] 373 U.S. 83 (1963)

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Factually, in separate trials Brady and Boblit were found guilty of murder in the first degree and were sentenced to death. Their trials were separate, Brady being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment."

Prior to the trial Brady's counsel had requested the prosecution to allow him to examine Boblit's extrajudicial statements. Several of those statements were shown to him: but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to Brady's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

The Court restated the principle of *Mooney v. Holohan*, 293 U.S. 103 where it ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has **contrived a conviction** through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the **presentation of testimony known to be perjured**. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." **(Emphasis added).**

In *U.S. v. Bagley*[5] the court did not find, but remanded for a determination, as to whether or not the non-disclosure in the case was material. Factually, defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to O'Connor and Mitchell if the information they supplied led to "the accomplishment of the objective sought to be obtained . . . to the satisfaction of [the Government]." The prosecutor disclosed affidavits that stated that O'Connor and

[5] 473 U.S. 667 (1985)

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Mitchell received no promises of reward in return for providing information in the affidavits implicating Bagley in criminal activity. In fact, they signed the last of these affidavits the very day after they signed contracts with the ATF.

The court found a significant likelihood that the prosecutor's response to the discovery motion misleadingly induced defense counsel to believe that O'Connor and Mitchell could not be impeached on the basis *of bias or interest arising from inducements* offered by the Government. Further, *the possibility of a reward* gave O'Connor and Mitchell *a direct, personal stake* in Bagley's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was *expressly contingent on the Government's satisfaction* with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction. Although the blank contracts did not constitute a "promise of reward," the natural effect of these affidavits would be misleadingly to induce defense counsel to believe that O'Connor and Mitchell provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any "inducements."

The court noted that the defense was free to cross-examine the witnesses on any relevant subject.[6] "The constitutional error, if any, in this case was **the Government's failure to assist the defense by disclosing information** that might have been helpful in conducting the cross-examination. As discussed above, such suppression of evidence **amounts to a constitutional violation only if it deprives the defendant of a fair trial.**" **(Emphasis added).**

The court continued,

"It remains to determine the **standard of materiality** applicable to the nondisclosed evidence at issue in this case. Our starting point is the framework for **evaluating the materiality** of *Brady* evidence established in *United States* v. *Agurs*.[7] The Court in *Agurs* distinguished three situations involving the discovery, after trial, of information favorable to the accused that had been **known to the**

[6] This court's restriction on the scope of cross-examination at trial would seem a matter of direct appeal and not subject to this court's jurisdiction.
[7] 427 U.S. 97

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prosecution but unknown to the defense. The first situation was prosecutor's **knowing use of perjured testimony** or, equivalently, the prosecutor's knowing failure to disclose **that testimony used to convict the defendant was false.** The Court noted the well-established rule that "a conviction obtained by the knowing use of perjured testimony is **fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment** of the jury." Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which **the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.** The Court in *Agurs* justified this standard of materiality on the ground that **the knowing use of perjured testimony involves prosecutorial misconduct** and, more importantly, involves "a corruption of the truth-seeking function of the trial process." **(Emphasis added).**

In *Kyles v. Whitley*[8] the prosecution responded to a lengthy discovery request that there was "no exculpatory evidence of any nature," despite the government's knowledge of, *inter alia* the following evidentiary items: (1) contemporaneous eyewitness statements taken by the police following the murder; (2) various statements made to the police by an informant known as "Beanie," who was never called to testify; and (3) a computer print-out of license numbers of cars parked at the crime scene on the night of the murder, which did not list the number of Kyles's car.

"As the District Court put it, 'the essence of the State's case' was the testimony of eyewitnesses, who identified Kyles as Dye's killer." The court proceeded to factually note inconsistencies in the testimony of two eyewitnesses. The designated "best" witness had described the assailant on the scene as being a half-foot shorter and bigger build than the defendant. A description, the court noted, that better fit Beanie, the informant.

A second eyewitness had given a statement at the scene "that he had not seen the actual murder and had not seen the assailant outside the vehicle. 'I heard a lound [sic] pop.' he said. 'When I looked around I saw a lady laying on the ground,

[8] 514 U.S. 419 (1985)

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and there was a red car coming toward me.' [The witness] said that he got a look at the culprit, a black teenage male with a mustache and shoulder-length braided hair, as the victim's red Thunderbird passed where he was standing. When a police investigator specifically asked him whether he had seen the assailant outside the car, [the witness] answered that he had not: the gunman "was already in the car and coming toward me.'" In his testimony, he described, in detail, the murder weapon as a small black .32 caliber pistol, which matched the type of weapon used. His description of the car had gone from a "Thunderbird" to an "LTD": he did not testify about the assailant's shoulder-length hair and moustache, details noted by no other eyewitness.

In finding a lack of confidence in the verdict, the court noted:

Confidence cannot survive a recap of the **suppressed evidence and its significance for the prosecution.** The jury would have been entitled to find:

(a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt:

(b) that the lead police detective who testified was either less than wholly candid or less than fully informed;

(c) that the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found;

(d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;

(e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case:

(f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

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The court found a lack of confidence in the verdict, but in so doing added, "**Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses** if the discoveries of gun and purse were above suspicion. **Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment.** But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid." **(Emphasis added).**

Strickler v. Greene[9] originated from Virginia, which had an open file policy giving access to all of the evidence in the prosecutor's file. At trial, a witness gave detailed eyewitness testimony about the crimes and Strickler's role as one of the perpetrators. The prosecutor failed to disclose exculpatory materials in the police files, consisting of notes taken by a detective during interviews with that witness, and letters written by her to the detective, that cast serious doubt on significant portions of her testimony. The court held that, "Although petitioner has demonstrated cause for failing to raise a *Brady* claim, Virginia did not violate *Brady* and its progeny by failing to disclose exculpatory evidence to petitioner."

In its analysis, the court reiterates the essentials of *Brady:* the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The following two paragraphs are quotes of various factual findings made by the court.

[9] 527 U.S. 263 (1999)

Factually, the witness gave detailed testimony how she had seen Strickler, another man and a woman twice on the day in question and later witnessed their abduction of the victim. When police showed her photographs she identified the two males with absolute certainty, but not much confidence as to the woman. In the mall, she took note of and feared the defendant due to his demeanor bumped into the other man and thought she felt something hard in his coat pocket. She tried to follow them from the store, but lost them. She saw the threesome a third time as they pounded on and eventually entered the vehicle of the victim. The victim was being beaten and honking her horn. The witness honked her horn until the activity stopped. She got out of the car and asked the victim if she was okay and the driver mouthed what she could only conclude to be "help." The victim drove away, continued to honk and the witness directed her daughter to write down the license plate number. She contacted the police over a week later. She identified the victim from a picture and the defendant. She responded to a question as to whether she was influenced by pretrial publicity by stating: "First of all, I have an exceptionally good memory. I had very close contact with [petitioner] and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification. The State did not produce any other witnesses to the abduction. The daughter did not testify.

Notes by the officer or letters received from the witness that were eventually disclosed revealed the following: 1) just two weeks after the crime. The note indicates that she could not identify the black female victim. The only person the witness apparently could identify at this time was the white female. 2) she was not sure whether she could identify the white males but felt sure she could identify the white female. 3) "to clarify some of my confusion for you." The letter states that she had not remembered being at the mall, but that her daughter had helped jog her memory. Her description of the abduction includes the comment: "I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. . .Then the

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guy I saw came running up to the black girl's window.? Were those 2 memories the same person?" In a postscript she noted that her daughter "doesn't remember seeing the 3 people get into the black girl's car . . . " 4) "My Impressions of 'The Car,'" which contains three paragraphs describing the size of the car and comparing it with [witness'] Volkswagen Rabbit, but not mentioning the license plate number that she vividly recalled at the trial. 5) a brief note from the witness, stating that after spending several hours with victim boyfriend, "looking at current photos," she had identified victim "beyond a shadow of a doubt." The District Court noted that by the time of trial her identification had been expanded to include a description of her clothing and her appearance as a college kid who was "singing" and "happy." 6) she thanks the officer for his "patience with my sometimes muddled memories." She states that if the student at school had not called the police, "I never would have made any of the associations that you helped me make." 7) "So where is the 3x4 card? . . . It would have been very nice if I could have remembered all this at the time and had simply gone to the police with the information. But I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load at JMU... Monday, January 15th. I was cleaning out my car and found the 3x4 card. I tore it into little pieces and put it in the bottom of a trash bag."[10]

The court found that the witness' testimony *was* prejudicial and made the defendant's *conviction more likely*, but *denied* relief concluding "That however, is not the standard that petitioner must satisfy in order to obtain relief. He must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles:* 'The adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the

[10] The card had the license number.

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evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'"

In the matters before this court, the asserted perjury violation is alleged to have occurred at a hearing conducted on May 5, 2010. This was a hearing on the record and the court's ruling, as previously footnoted, as well as its ruling denying the January 11, 2011 **Motion to Allow Confrontation of Lead Investigator**, should be a matter of direct appeal and would, in the opinion of this court, preclude jurisdiction and warrant dismissal.

Due to additional nuances introduced in argument, the court will go further. The brief states, "...this court denied Widmer's motion to cross-examine Braley about the Application Form, as the authenticity question would cause a 'mini-trial' within a trial." The necessity of the court's ruling of January 21 is borne out by what is now being presented as evidence by the defense.

The defense notes that as the result of an internal investigation there are six bullet points of information unknown to it prior to trial examining "whether Jeff Braley falsified documents or engaged in any other improper behavior **to obtain his post of Lieutenant Detective in Hamilton Township.**"[11] **(Emphasis added).**

As noted in the court's January 21 **Decision**, in response to the question, "And do you ever recall filling that out?" he answered, "No sir, I do not recall that at all." It is further noted that Braley admitted the truth or falsity of every specific referenced from the content of the Application. This is consistent with the investigation. The information in the report does nothing to prove perjury at the May 5, 2010 hearing. In direct contradiction of the **highlight** of the preceding paragraph, the report has the following findings: "...former Chief Duvelius acknowledged that he never saw the Resume Letter prior to its coming into question in the Widmer matter and because of this, would not have relied on any of the information contained in the Resume Letter in his duties while **Police Chief.**

[11] Motion pp. 10 -11

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Mr. Duvelius also acknowledged that while he was given the **Application** sometime in 1997, it was merely placed in Lt. Braley's file but **not used by him in making any decisions regarding Lt. Braley's employment.**"[12] Also, "It should be noted that **no one at the Township**, including Fire Chief Goebel Williams, **relied on any of the information contained within the Application in the hiring of Lt. Braley.**"[13]

Turning to the affidavit of Mr. Waller, the court, in summary, finds it to be a biased reiteration of points made by the defense throughout the presentation of evidence and the arguments of counsel. He presents himself as an expert in the field of police practice yet his first opinion to a reasonable degree of professional certainty is that "Dr. Uptegrove was influenced in determining the manner of death as homicide by the information provided by Lt. Jeff Braley." This is apparently a confirmation of counsel's contention on page 5 of the Motion that, "Uptegrove later admitted that he considered Braley's statements when ruling the death a homicide." This is a misstatement and an extrapolation of the testimony.[14] The bottom line is that Mr. Waller is telling the court as a police expert that Dr. Uptegrove, a licensed physician, perjured himself when rendering his medical opinion.[15] He makes what can only be classified as impermissible comments on the credibility of other witnesses[16] and stretches his conclusions to invade the province of the jurors as to what they "would need to know." His affidavit is of no value.

It is clear to this court that to follow the path sought by the Defendant would have resulted in a sideshow with "the jury bogged down in an interminable

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[12] Exhibit B, p. 2
[13] Exhibit B, p. 3
[14] Dr. Uptegrove makes no specific mention of Braley on p. 723 of the tanscript. He mentions "The scene investigation or historical information from individuals involved in the case." The reference to pages 826 and 827 again, is not a reference to Braley and involves a totally different case in a different jurisdiction
[15] Where cited, Dr. Uptegrove does state he would never rule a homicide because a police officer told him to do so.
[16] *State v. Boston* (1989), 46 Ohio St. 3d 108, 128.

parade of witnesses called to testify as to specific instances of conduct of a prior witness in an attempt to contradict the prior witness' testimony."[17]

The Defendant's motion asserts that a State agent (Braley) knowingly committed perjury and that "a *Napue* violation is the most difficult constitutional violation for the State to overcome, as it creates an almost irrebuttable presumption in favor of automatic reversal." There is no evidence of perjury. A lack of memory is not perjury and that is all that was testified to by Braley.

The motion presents no evidence that any testimony that was offered at trial was false. This court has presided over the Defendant's trial three times. Defense counsel had the benefit of reviewing and using prior trial testimony of every police officer, including Lt. Braley, medics and doctors presented by the State to challenge the witnesses' testimony. This court has reviewed nearly all the non-medical testimony of the State's witnesses. The court could find nothing of consequence presented through the testimony of Lt. Braley that was not testified to by at least one other witness. He and Coroner's Investigator Doyle Burke were essentially officers, who gathered the information from other officers and medical people on the scene.

The defense tries to re-present this case as a police case. It was, only to the extent that the Hamilton Township Police, including Lt. Braley, were inexperienced in homicide cases. Lt. Braley admitted every shortcoming in his training and his advance through the ranks presented by the defense.[18] He admitted a laundry list of matters that were not investigated prior to obtaining an arrest warrant.[19] This was a medical defense case relying on contentions of incompetent emergency treatment followed by an incompetent autopsy.

While numbers are not conclusive, this court cites them as some degree of a measuring stick. Out of approximately 2700 pages of transcript, Lt. Braley's entire

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[17] *State v. Leuin*, 11 Ohio St. 3d 172

[18] Tr. Pages 214 - 221

[19] Tr. 234 * the court notes that pagination throughout this decision may differ slightly as the court is working off individual transcripts.

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testimony was approximately 65 pages. By comparison, on the scene Officer Short's was approximately 150 pages.

In closing argument, Lt. Braley's name was not mentioned once by the State. Dr. Uptegrove was mentioned seven times. The defense mentioned Lt. Braley nine times. It mentioned Dr. Uptegrove fifty-six times.[20] The use of Braley and Uptegrove in the defense arguments is telling. The defense did not run away from, Lt. Braley's testimony, but rather embraced it. The attack was on Dr. Uptegrove.

> "Dr. Uptegrove has never seen a case like this. Hamilton Township hasn't had a homicide even close type fatality in over ten years so none of the EMS workers had, none of the police had. Lindsey asked you, and I think you understand now, don't make something that seems odd or where you go that seems kind of strange, don't make that anonymous (sic – probably anomaly) suspicious. Just because it seems strange doesn't make it wrong."[21]

Comment on EMS personnel included:

> "Look at all the mistakes on the one, two. three, four, five. six, seven, eight. nine. Nine on that page of routine paperwork these folks do every run. okay. That (they) came in here, the paramedics and firefighters were almost identical in lock step of their phrasing and how they described. Except Max Smith."[22]

Braley's input was mentioned **only** to bolster the defense.

> "Detective Braley told you we didn't do a real thorough search that night. he wanted you to think they kind of overlooked things. But remember when I cross examined I said,
> You knew there was a bathtub. you knew she drown, you were looking for evidence that he cleaned up. right? Well, yeah. So you looked in the dryer, you looked everywhere for things that would dry water. Yeah. **Didn't find anything.** Cars hadn't left the house, the dryer hadn't been running. Nothing was cleaned up."[23] **(Emphasis added)** And

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[20] These numbers were counted and supplied to the court by the court reporter's term scanner.
[21] Tr. II - 1199
[22] Id. 1208
[23] Id. 1210

"Think about what Jeff Braley told you he did. He went and got bank records, business records, took everything out of Ryan's office with a search warrant, looked at cell records, looked at personal telephone records, mortgage papers, any kind of document he got. **No motive anywhere. No pornography.**"[24] **(Emphasis added)**

"So where does that bring us? **Dr. Uptegrove, he's why we're here.** Dr. Uptegrove, again, not board certified. Although he took the test and is not board certified. I'm not exactly sure what that means. Maybe the practical portion of the test didn't go so well. We're here **largely because of the neck hemorrhage** because he's never seen those injuries in his experience as a forensic pathologist even though he's unfamiliar with the literature, the research on **injuries that could result from intubation**, he's unfamiliar with the research that establish **injuries commonly associated with resuscitation efforts mimic injuries occurring during strangulation**... Are we up to the 350 where the standards say now you're making serious judgments in errors, making serious shortcuts, not doing what needs to be done."[25] **(Emphasis added)**

CONCLUSIONS:

Constitutional Violations

Braley's testimony on May 5, 2010 did not constitute perjury. There are certainly acknowledged inaccuracies in the Application that were discussed that day. Each of them was acknowledged by Lt. Braley. He testified to a lack of memory. There is no false statement. The Defendant has failed to point to any false testimony presented at trial. The Defendant has failed to point to any information that was known by the State that was not turned over to him. Given the information presented with this motion, this court would not have, beyond doubt, permitted the inquiry into a tangential matter occurring 14 years in the past. The inquiry of a felony conviction that remote in time would not be admissible except through judicial discretion.[26]

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[24] Id. 1240
[25] Id. 1228-1229
[26] Ev.R.609(B)

Again, in *Napue* there were statements that were false and known by the prosecutor to be false. That is not the case here. In *Napue*, the witness' testimony was extremely important and the conviction stood largely on that testimony. As noted within this decision. Braley's input in the case was more beneficial than harmful to the defense. He added nothing unconfirmed by other witnesses. As in *State v. Loza*,[27] the materials submitted in support of the motion are conclusory and self-serving materials that do not set forth operative facts which demonstrate that Braley testified falsely. Although asking the court to charge the State with knowledge of an investigation done by a township on a collateral matter, the Defendant has provided absolutely no evidence that the prosecution willfully or inadvertently used false evidence to obtain his conviction.

The actual matters on the scene, e.g., positioning of the body, dryness or wetness of the body and surrounding items/areas, the timing of events on the scene, the lack of obvious wounds to the decedent and the Defendant, the channel of the televisions, the lack of wet clothes/towels throughout the house, the Defendant drinking beer were confirmed from police and/or EMS personnel.

The true focus of the defense was the faulty administration of CPR and attempts at intubation, especially while in motion, and Dr. Uptegrove's failure to recognize that any medical findings that he observed were the result of attempted medical intervention and not violence.

The case law does not specifically exclude consideration of testimony not presented at trial; however, this court has not been directed to one such case. The cases do involve false testimony given to a criminal jury; impeaching evidence as to questionable identification or conflicting statements as to the actual crime that were withheld from a criminal jury; motivation of bias, prejudice or personal or monetary gain for a witness' testimony given to a criminal jury. The admissibility of evidence in a collateral matter is within the court's discretion. The allegations of

[27] 1997 Ohio App. 4574

perjury are unsubstantiated and not material to guilt or punishment. The Defendant has failed to submit evidentiary materials setting forth sufficient operative facts to demonstrate substantive grounds for relief. The court finds no lack of confidence in the verdict.

The Defendant challenges the effective assistance of counsel. As already stated, based on the materials presented in support of this motion, there would not have been any different rulings regarding the testimony of Lt. Braley.

Further asserted in this argument is trial counsels' failure to seek DNA testing and movant is seeking it now to prove ineffective assistance. This is an argument raised in hindsight and unfounded in the evidence. Dr. Balko's affidavit includes a partial summary of his testimony to the jury. He has had a connection to the case since the time of the first trial. He asserts that although he has been aware of Long QT syndrome for many years, genetic testing is now warranted because it is only recently that *he* determined "that Sarah Widmer *may* have had *some* key traits associated with ATS...short stature, low-set ears, and narcolepsy-type symptoms, *among others*. A *curious* association exists between drowning and the Long QT Syndrome, in general, and ATS in particular." He follows that up with, "There are sufficient clinical indications that Sarah Widmer *may* have suffered from Long QT Syndrome, and that this syndrome *might* have resulted in accidental drowning." (*Emphasis added*).

The doctor's statements are unqualified. He has had access to the medical evidence, which included measurements. He has had, presumably, access to photographs. He does not state what "short" is for diagnosis or if Sarah would be classified as short. He does not state what "low-set ears" means for purposes of diagnosis or if Sarah would be classified as having "low-set ears." The question of whether Sarah Widmer suffered from narcolepsy was a matter contested in the evidence. He does not define what a "curious association" means.

During trial and without the benefit of DNA testing, Dr. Balko and all other medical experts were asked about the medical possibility of Sarah having suffered a

sudden medical event. There was medical testimony of the possibility of a seizure. There was medical testimony about the possibility of unidentified sudden cardiac arrest, including Long QT. The doctor's affidavit is replete with speculation and inferences drawn upon other inferences. Despite his speculations, whatever the test results might be, he could not opine to a reasonable degree of medical certainty that this syndrome *resulted in accidental drowning*. That remained a question the jury may, or may not, have considered within the ultimate question presented by the facts and argued by the defense, which was the interpretation of injuries.[28]

Further, the argument of the Defendant that trial counsels' failure to obtain DNA testing was ineffective assistance of counsel would charge them with more medical knowledge than Dr. Balko, who was not struck with the possibility of ATS until, perhaps, he testified.

To show ineffective assistance of counsel requires a two-part test: (1) that counsels' performance was deficient and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [29]

Trial counsel defended this case twice. Any observer of the Defendant's trial(s) would conclude that defense counsel gave every effort, raised every argument and pressed the court for every possible ruling in their favor in their effort to secure an acquittal for the Defendant.

The court finds no violation of the Defendant's due process rights for any of the arguments presented. There are no substantive grounds for relief based on ineffective assistance of counsel.

New Trial

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[28] Reference the subject of footnote 25.
[29] *Strickland v Washington* (1984), 466 U.S. 668.

"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."[30]

The jury returned its verdict on February 15, 2011. The instant motion was filed October 12. 2011. The Defendant has failed to allege, much less offer any proof, as to why the motion was not brought in compliance with the rule and is denied as untimely. Even if it were timely, the court has made its findings on the value of what is advocated as newly discovered evidence in addressing his Petition for Post-Conviction Relief. The court similarly concludes these are not materials that would merit a new trial.

The Petition is HEREBY DISMISSED.

The Motion is OVERRULED.

Neal B. Bronson, Judge
Common Pleas Court

Prosecutor
Michele Berry

[30] Cr. Rule 33(B)

WARREN COUNTY
COMMON PLEAS COURT
JUDGE NEAL B BRONSON
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