[Cite as *State v. Gillispie*, 2009-Ohio-3640.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22877 and 22912
v.	:	T.C. NO. 1990-CR-2667
ROGER DEAN GILLISPIE	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 24th day of July, 2009.

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FROELICH, J.

{¶ 1} In February 1991, Roger Dean Gillispie was convicted by a jury of nine counts of rape, three counts of kidnapping, three counts of gross sexual imposition, and one count of

aggravated robbery. The rape, kidnapping and aggravated robbery counts each carried a firearm specification. The trial court imposed an aggregate sentence of a minimum of 22 years to a maximum of 56 years in prison.

{¶ 2} Gillispie now appeals from two judgments of the Montgomery County Court of Common Pleas. The first judgment denied his petition for postconviction relief and overruled his motion for a new trial (CA 22877). The second judgment denied his motion to supplement the record and his motion for reconsideration of the denial of his motion for a new trial (CA 22912). These appeals have been consolidated. For the following reasons, the first judgment will be affirmed in part, reversed in part, and remanded for further proceedings. The second judgment will be affirmed.

I

{¶ 3} Gillispie's convictions stem from two separate sexual assaults in August 1988.

{¶ 4} On August 5, 1988, in the early to mid-afternoon, S.C. drove alone to a Rite-Aid drug store on North Dixie Drive in Harrison Township to purchase some hand lotion. After making the purchase, she returned to her car. As she prepared to drive away, a man jumped into the front passenger seat and pointed a chrome handgun at her head. The assailant told S.C. to do as he said or he would shoot her.

{¶ 5} The assailant directed S.C. to drive behind a vacant building and park next to a dumpster. After she stopped the car, the man took the keys and threw them under the front passenger seat. He then exposed and fondled S.C.'s breasts, instructed S.C. to unfasten her pants, unzipped his own pants, and forced her to perform oral sex on him. S.C. was instructed to spit the ejaculate into a paper bag. After this, S.C. began to ask the assailant questions to stall

him from making a further attack. During the questioning, he said his name was "Roger," that he was a security guard, and that he had been sexually molested as a child. The man stated that he wanted S.C. to drive him to Columbus. S.C. asked her assailant if she could smoke a cigarette. The man permitted it and lit one for himself, although S.C. did not recall seeing him smoke it. Afterwards, the assailant got out of S.C's car and told S.C. to exit. Instead, S.C. grabbed the keys from beneath the seat and drove away.

{¶ 6} S.C. did not immediately contact the police concerning the rape. Shortly after the incident, S.C. read an article in the newspaper concerning the rape of two other women in the Miami Township area. The article prompted S.C. to report to the Miami Township police that she too had been attacked and raped. Approximately two weeks after the assault, S.C. was interviewed by Miami Township Detective Gary Bailey and a composite picture of the suspect was developed.

{¶ 7} S.C. described the assailant as approximately six feet tall, 200 pounds, stocky build with short, light brown hair and mustache, light blue eyes, tanned skin, and strong odor of cologne. S.C. stated that he wore a button down shirt with the top buttons undone and he wore a gold chain with a medallion.

{¶ 8} On Saturday, August 20, 1988, at around 7 p.m., twin sisters C.W. and B.W. were preparing to leave from the parking lot of the Best Products store near the Dayton Mall when a man claiming to be a store security guard pushed his way into the back seat of their car and brandished a small silver handgun. The assailant thrust the gun into B.W.'s ribs and directed her to drive away from the lot. As they drove, the man asked C.W. to light him a cigarette; the women did not remember his smoking it, noting that they did not smell smoke.

The assailant also told them that he wanted a ride to Columbus.

{¶ 9} The assailant directed B.W. to a secluded area near a bridge, ordered the women from the car, and forced them at gunpoint into the woods to a fallen log. Once there, the assailant forced the twins to expose their breasts, which he fondled with his hands and the pistol. In addition, the assailant forced each woman to perform oral sex on him three times individually and once together. The women testified that, during the course of the attack, the assailant talked frequently and said, among other things, that his name was "Roger," that he had been sexually molested as a child by his grandfather, that he was from Columbus and Texas, and that his job was killing people for $1,000.

{¶ 10} The assailant then blindfolded the women and led them back to their car and placed them on the floor of the back seat. He drove them back to the Best Products parking lot where he took $83 from their purses. The assailant told the women to lie on the floor through two songs on the radio or he would kill them. The women did as they were told and the man escaped.

{¶ 11} Later that evening, the women reported the incident to their parents who contacted the Miami Township police. The police requested that the women come to the police station. Once there, the women were separately interviewed regarding the incident and each was taken to a local hospital for a throat culture. The next day, the women were again interviewed by the police and each assisted in developing a joint composite picture of the offender. The twins described the assailant as a man in his early twenties, 6'3" tall, approximately 250 pounds, with reddish-brown hair that was short on top and over the ears but longer in the back, a mustache, a wide, dark-tanned face, and a low authoritative voice. C.W. and B.W. indicated

that their assailant wore sunglasses during the incident.

{¶ 12} In June 1990, Detective Scott Moore of the Miami Township Police Department took over the investigations. In July 1990, C.W. and B.W. were contacted by Moore and asked to come to the police station to view a photo spread containing six photographs. The two women separately and independently identified Gillispie as their attacker. A few weeks later, S.C. was contacted by Moore. He showed S.C. a photo spread of the same six photographs. S.C. also identified Gillispie's photograph as her assailant.

{¶ 13} The photograph of Gillispie in the photo spread shown to S.C. and the sisters was provided to the police by security personnel from Gillispie's employer, General Motors. In 1988, a security supervisor at GM had seen the composites on the news and believed that they resembled Gillispie. He reported his belief to the chief of plant security and, a year later, to a new chief of plant security. At that time, GM security personnel reported the resemblance to the police and provided the security identification cards of Gillispie and four other individuals who resembled the composites. G.M. also provided police with information that Gillispie did not work on August 5, 1988, and August 20, 1988, the days the assaults took place.

{¶ 14} Moore used the photograph from Gillispie's security identification card in the photo spread. Gillispie's photograph depicted his face somewhat closer and larger than the five other photographs and, unlike the other five photographs in the photo lineup, had a matte finish.

{¶ 15} At trial, Gillispie claimed that he had an alibi for the times of the rapes. He asserted that, on August 5, 1988, he was with friends, and that he was camping with friends in Kentucky during the weekend of August 20, 1988.

II

{¶ 16} In the fall of 1990, Gillispie was charged with multiple counts of rape, kidnapping, gross sexual imposition, and aggravated robbery, including fifteen firearm specifications. A jury trial was held in February 1991, and he was found guilty on all counts of rape, kidnapping, and gross sexual imposition, and one count of aggravated robbery. Firearm specifications were found on the rape, kidnapping and aggravated robbery charges. Gillispie was acquitted of two additional counts of aggravated robbery.

{¶ 17} Shortly after the trial and before sentencing, one pubic hair and seven head hairs that were collected from C.W. and B.W.'s clothing were found at the Miami Valley Regional Crime Laboratory ("MVRCL"). The hairs were examined microscopically by Denise Rankin of MVRCL and Larry Dehus of Law-Science Technologies, who was retained by Gillispie. Some of the hairs were similar to standards provided by B.W. and C.W.; none of the hairs was similar to the standards provided by Gillispie.

{¶ 18} Based on the hair analyses, Gillispie moved for and was granted a new trial. In June 1991, a second jury found Gillispie guilty of all charges and firearm specifications. The trial court sentenced Gillispie accordingly.

{¶ 19} Gillispie moved for a judgment of acquittal and for a new trial, arguing that the witness identifications were not credible, that the court erred in giving the jury a modified *Allen* charge,[1] and that the State presented inadmissible evidence. In a separate motion for a new trial, Gillispie also alleged juror misconduct. The trial court overruled the motions for a new trial. In a consolidated appeal, we affirmed Gillispie's conviction and the denial of his motions for a

[1]See *Allen v. United States* (1896), 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528; *State v. Howard* (1989), 42 Ohio St.3d 18.

new trial. *State v. Gillispie* (Jan. 21, 1993), Montgomery App. Nos. 12941 and 13585 ("*Gillispie I*").

{¶ 20} In the eighteen years since his conviction, Gillispie has filed numerous motions. On March 30, 1994, Gillispie filed his first petition for post-conviction relief. He claimed that his counsel had rendered ineffective assistance by failing to subpoena a park ranger and the ranger's notes for trial, by failing to adequately prepare defense witnesses for trial, and by failing to file necessary pretrial motions. With regard to the pretrial motions, Gillispie argued that his counsel should have moved to suppress out-of-court and in-court identifications by B.W. and C.W., due to statements by Detective Moore to the victims which "so tainted" the identifications and rendered them "so deficient" that reversal was required.

{¶ 21} In response, the State moved for summary judgment, arguing that Gillispie failed to produce any evidence to support his claim that his trial counsel failed to adequately prepare his defense witnesses and that Gillispie failed to explain the significance of the park ranger's testimony, considering that the offense on August 20, 1988, occurred late Sunday evening and there was evidence at trial that Gillispie usually returned home from the park on Sunday afternoon.[2] The State further argued that Gillispie's eyewitness identification arguments were raised on direct appeal and, consequently, were barred by res judicata.

{¶ 22} In May 1994, the trial court granted the State's motion for summary judgment and dismissed the petition. We affirmed the trial court's denial of Gillispie's petition. *State v. Gillispie* (Feb. 1, 1995), Montgomery App. No. 14595 ("*Gillispie II*").

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[2]The State's statement that the August 20, 1988, offenses took place on Sunday was incorrect. In fact, August 20, 1988, was a Saturday.

{¶ 23} In 1996 and 1997, Gillispie requested that the trial court order the State to preserve the evidence in this case. Gillispie's motions were granted. In September 1997, Gillispie moved the court for an order allowing him to have an expert perform DNA testing on the hair samples. The trial court promptly ordered that Gillispie be allowed to have a qualified DNA expert perform testing on the hair.

{¶ 24} The State did not immediately release the hair samples, and, in February 1998, Gillispie moved for an order requiring the State to release the hair samples to Larry Dehus. The State opposed the motion, arguing that Rankin's 1991 report already indicated that the hairs recovered from the clothing of two victims were different from the known head and pubic hair standards of Gillispie. Gillispie responded that he was requesting DNA testing of the hairs in order to give him an opportunity to locate the actual perpetrator. Specifically, Gillispie desired to compare the DNA from the hairs to a DNA sample of Glen Rogers, a potential suspect.

{¶ 25} In August 1998, Gillispie filed a motion for a new trial, arguing that he would be entitled to a new trial if DNA testing demonstrated that Rogers was the source of any of the hair samples. After additional briefing, the trial court denied Gillispie's motion for a new trial. *State v. Gillispie* (Sept. 17, 1999), Montgomery C.P. No. 90 CR 2667. The court noted that Rogers was incarcerated when all of the rapes occurred and could not have committed them. Further, Gillispie had been convicted despite evidence at trial that the hairs on the victims did not belong to him. In addition, the trial court stated that DNA testing was available in 1991, and Gillispie could have requested a DNA analysis at that time; thus, Gillispie was unable to show that the new evidence could not have been discovered before trial. Although the court denied the motion for a new trial, it granted Gillispie's request to allow DNA testing at his family's

expense.

{¶ 26} In April 2000, when Rankin opened, reinventoried, and resealed State's Exhibit 7 in preparation for sending the hair evidence to a laboratory in Texas for DNA testing, the MVRCL discovered that two of the human head hairs were missing. In January 2001, Gillispie requested an evidentiary hearing to address the State's failure to turn over all of the hair samples. Gillispie informed the court that, when the hair samples were provided to the defense's expert, one or two hair samples were missing. Gillispie also sought a new trial based on the loss of evidence, arguing that the State violated his right to due process. The trial court treated the motions as a motion to hold the State in contempt for violating an order to preserve evidence. After a hearing, the trial court denied the motion, reasoning, in part:

{¶ 27} "There was no evidence presented that any of the Court's Orders had been violated by the State or anybody else because the Court ordered the transportation of specific exhibits, not specific hairs, and the Orders were diligently obeyed. Nobody expected that some hairs may be missing, and there was nothing proven to warrant the arousal of any suspicion as was alleged by Defendant/Movant. Because so many individuals have handled the exhibit, including Defendant's experts and Defendant's Counsel, the disappearance of the hairs will never be resolved."

{¶ 28} Gillispie appealed from the trial court's order, arguing that his right to due process had been violated. On appeal, we stated that, "[i]n the absence of any evidence that the State, after Gillespie's [sic] conviction and sentence had become final, being aware of the existence of exculpatory evidence, acted in bad faith in a manner causing the loss of that [hair] evidence, we conclude that there has been no due process violation." *State v. Gillespie*,

Montgomery App. No. 18852, 2002-Ohio-1774 ("*Gillispie III*").

{¶ 29} On March 5, 2003, Gillispie requested that the remaining hair samples be tested, at his expense, using Mitochondrial DNA analysis. He asserted that he could not afford this type of DNA analysis prior to that date, and that "Mitrochondrial DNA Analysis is more specific analysis than was done previously and allows the evidence to be subjected to specific DNA analysis so that information can be held hereon." In May 2003, the trial court ordered that the evidence be transported to the MVRCL, where Rankin and Dehus shall review the exhibit to ensure that all remaining hair samples are present, and then sent via Federal Express to Mitotyping Technologies for Mitochondrial DNA analysis. Gillispie's appellate counsel represented at oral argument that the DNA testing revealed that all of the tested hairs had come from the twins.

{¶ 30} In October 2004, Gillispie filed an application for post-conviction DNA testing. Gillispie sought "[Short Tandem Repeat and/or Mitrochondrial] DNA analysis of evidence recovered from the victims of the crime for which he was convicted, including the T-Shirt with a semen stain on the shoulder, a rape kit taken mere hours after the crime occurred, slides the hospital may have retained to record results of the rape kit, and items touched by the rapist, including sunglasses, a purse, and a photograph – all of which may have retained his skin cells." Gillispie acknowledged that such physical evidence "may no longer be in existence," but he asserted that the State "must conduct physical searches for the evidence at all sites that once possessed it and account for the chain of custody of the evidence through production of all contemporaneous business records and documents ***." The State opposed the application, arguing that the trial court could not accept the application for DNA testing, as a matter of law,

because neither of the two conditions set forth in R.C. 2953.74(B) applied and Gillispie could not satisfy all of the requirements set forth in R.C. 2953.74(C).[3]

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[3]R.C. 2953.74(B) provides that the trial court "may accept" the application of an "eligible inmate" for post-conviction DNA testing only if one of the following applies:

"(1) The inmate did not have a DNA test taken at the trial stage in the case ***, the inmate shows that DNA exclusion *** would have been outcome determinative at that trial stage in that case, and, at the time of the trial stage in that case, DNA testing was not generally accepted, the results of DNA testing were not generally admissible in evidence, or DNA testing was not yet available.

"(2) The inmate had a DNA test taken at the trial stage in the case ***, the test was not a prior definitive DNA test ***, and the inmate shows that DNA exclusion *** would have been outcome determinative at the trial stage in that case."

Under R.C. 2953.74(C), the court "may accept" the application only if all of the following apply:

"(1) The court determines *** that biological material was collected from the crime scene or the victim of the offense *** and that the parent sample of that biological material against which a sample from the inmate can be compared still exists at that point in time.

"(2) The testing authority determines all of the following pursuant to section 2953.76 of the Revised Code regarding the parent sample of the biological material described in division (C)(1) of this section:

"(a) The parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample.

"(b) The parent sample of the biological material so collected is not so minute or fragile as to risk destruction of the parent sample by the extraction ***.

"(c) The parent sample of the biological material so collected has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing, and the parent sample otherwise has been preserved, and remains, in a condition that is scientifically suitable for testing.

"(3) The court determines that, at the trial stage in the case ***, the identity of the person who committed the offense was an issue.

"(4) The court determines that one or more of the defense theories asserted by the inmate at the trial stage in the case *** was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be outcome determinative.

"(5) The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding that inmate.

"(6) The court determines ***, that the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated

{¶ 31} On March 16, 2005, the trial court denied Gillispie's application for post-conviction DNA testing. It concluded that, "[a]t the time of trial DNA testing was available and generally accepted. However, the only evidence used at trial which may have been subject to testing were hairs found on the clothing of the victims, all of which proved not to belong to the defendant without doing DNA testing." The trial court further reasoned:

{¶ 32} "The crimes for which the defendant was convicted occurred in 1988. When the crimes were reported the police gathered the clothing of the victims and transported the victims to Sycamore Hospital for possible DNA testing. Testimony at the trial indicates that no samples were taken from the victims at the hospital as the rape involved oral sex and the victim, prior to going to the hospital, had something to drink and had otherwise eliminated the possibility of any appropriate DNA testing. The clothing of the victims was examined for DNA and none could be found. Therefore, the clothing was returned to the victims two years prior to the trial and more than sixteen year before today's date.

{¶ 33} "The defendant claims there were other items handled by the perpetrator, including sunglasses, purses and a picture. None of these are in the possession of the State nor is there any indication that they were in possession of the State at the time of the trial."

{¶ 34} Reviewing R.C. 2953.74(C)(6), the trial court concluded that Gillispie could not establish, as a matter of law, that "the parent sample and the extracted test sample are the same sample as collected and that there is no reason to believe that they have been out of state custody or have been tampered with or contaminated since they were collected." The trial court noted that the hair samples had been turned over to Gillispie and have been tested pursuant to a prior

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since they were collected."

court order, but that none of the other items sought by Gillispie was in state custody. Thus, the court found that these items "could not be retrieved with any reasonable effort or with any reliable evidentiary integrity as required by the statute."

{¶ 35} On February 13, 2008, Gillispie filed a second petition for post-conviction relief or, in the alternative, a motion for a new trial. Gillispie argued that new evidence falling into three broad categories, had come to light, to wit: (1) evidence of police corruption, perjury, witness tampering and other official misconduct of various types by Detective Moore; (2) additional evidence that an alternative suspect, Kevin Cobb, committed the offenses; and (3) new scientific understanding in the field of eyewitness identification, demonstrating that the identification process in this case was "categorically flawed."

{¶ 36} With regard to his allegation of police misconduct, Gillispie argued that the State had failed to provide exculpatory evidence known to the police, violating his right to due process as set forth in *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Gillispie further argued that, to the extent that such exculpatory evidence was not preserved by the State, such failure to preserve evidence violated his due process rights under *Arizona v. Youngblood* (1988), 488 U.S. 51. Gillispie also claimed that he was entitled to post-conviction relief, because the State knowingly used perjured testimony of Richard Wolfe, a GM security supervisor; Detective Bailey, the original investigating detective; and Detective Moore, and because Detective Moore's conduct resulted in Gillispie's counsel's failure to call Torrie Strohman, Gillispie's former girlfriend, as a witness and to make police misconduct part of the defense case. Gillispie asserted that this new exculpatory evidence created a strong probability that the outcome of his trial would have been different and that he was entitled to a new trial.

{¶ 37} Gillispie supported his petition with numerous exhibits, including, but not limited to, the police reports from the victims; two affidavits from former Detective Steven Fritz; an affidavit from Bailey; Moore's investigation reports; a psychological evaluation of Gillispie used for purposes of sex offender classification; expert reports on eyewitness identifications in this case; photocopies of the photo line-ups; a copy of the composite drawings; an affidavit of Stephenie Walters, former girlfriend of Kevin Cobb; an affidavit of Mark Godsey regarding his conversations with Cobb and with Wade Lawson, a former detective with the Dayton police department; an affidavit of Gillispie's trial counsel, Dennis Lieberman; an affidavit of Torrie Mitchell, formerly known as Torrie Strohman; and transcripts of Moore's conversations with Strohman.

{¶ 38} The State opposed Gillispie's petition for post-conviction relief and motion for a new trial. Gillispie replied to the State's opposition memorandum, offering supplemental affidavits to support his arguments. Shortly thereafter, Gillispie moved for leave to supplement his response to include an affidavit of Wade Lawson.

{¶ 39} On July 9, 2008, the trial court granted summary judgment to the State on Gillispie's petition for post-conviction relief, denied Gillispie's motion for a new trial, overruled Gillispie's motion for a hearing, and overruled his motion to supplement his response. In response to the court's ruling, Gillispie moved to supplement the record with additional affidavits and tape recordings regarding Lawson's statements and for reconsideration of the court's denial of his motion for a new trial. On August 13, 2008, the trial court overruled the motions to supplement the record and for reconsideration.

{¶ 40} Gillispie appeals from the July 9, 2008, judgment and the August 13, 2008,

judgment, raising three assignments of error.

III

{¶ 41} We begin with the relevant standards regarding motions for a new trial and petitions for post-conviction relief.

{¶ 42} Crim.R. 33(A)(6) provides that a trial court may grant a new trial "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." "Before a new trial can be granted upon the basis of newly discovered evidence, the defendant must show that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro* (1947), 148 Ohio St. 505; *State v. Vinzant*, Montgomery App. No. 22383, 2008-Ohio-4399, at ¶7.

{¶ 43} We review the trial court's denial of a motion for a new trial for an abuse of discretion. *State v. Henderson*, Montgomery App. No. 21865, 2007-Ohio-5982. An abuse of discretion is "'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 44} The trial court employs a different standard regarding petitions for post-conviction relief. As an initial matter, if the defendant has filed a direct appeal of his conviction, a petition for post-conviction relief generally must be filed no later than 180 days

after the trial transcript is filed in the court of appeals in the direct appeal. R.C. 2953.21(A)(2). Because Gillispie filed a direct appeal of his conviction, the time limitation period for post-conviction relief began to run in 1991 when the transcripts of proceedings were filed in this Court in his direct appeal. Gillispie's most recent petition for post-conviction relief was filed nearly 17 years after the filing of those transcripts. Failure to file on time negates the jurisdiction of the trial court to consider the petition, unless the untimeliness is excused under R.C. 2953.23(A)(1)(a). *State v. Brewer* (May 14, 1999), Montgomery App. No. 17201; *State v. Ayers* (Dec. 4, 1998), Montgomery App. No. 16851.

{¶ 45} Pursuant to R.C. 2953.23(A)(1)(a), a defendant may file an untimely petition for post-conviction relief if he was unavoidably prevented from discovering the facts upon which he relies to present his claim or if the United States Supreme Court recognizes a new right that applies retroactively to his situation. If one of these conditions is met, the petitioner must then also show by clear and convincing evidence that, if not for the constitutional error from which he suffered, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b).

{¶ 46} A petitioner is not automatically entitled to a hearing on his petition for post-conviction relief. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102. "The pivotal question is whether, upon consideration of the petition, all the files and records pertaining to the underlying proceedings, and any supporting evidence, the petitioner has set forth 'sufficient operative facts to establish substantive grounds for relief.'" *Calhoun*, supra, at paragraph two of the syllabus. In reviewing the petition, the trial court "should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of

fact." *Calhoun*, supra, at paragraph one of the syllabus. If the petition, files, and records show that the petitioner is not entitled to relief, the court may dismiss the petition without an evidentiary hearing. R.C. 2953.21(C).

IV.

{¶ 47} Gillispie's first assignment of error states:

{¶ 48} "THE LOWER COURT ERRED IN FINDING NO *BRADY* VIOLATIONS"

{¶ 49} In his first assignment of error, Gillispie claims that, contrary to *Brady*, he was not provided all of the campground receipts for the weekends of the rapes and supplemental police reports, which would have demonstrated the "true origins" of the case against Gillispie, Wolfe's bias against Gillispie, and Wolfe's aggressive tactics to have charges brought against Gillispie, and that Gillispie had previously been excluded as a suspect by Detectives Bailey and Fritz.

{¶ 50} The prosecution's withholding of evidence favorable to an accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley* (1995), 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490, quoting *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. A "reasonable probability" of a different result is demonstrated when the government's suppression of evidence "undermines the confidence in the outcome of the trial." Id. at 434. "Both exculpatory and impeachment evidence may be the subject of a *Brady*

violation, so long as the evidence is material." *State v. Gibson*, Butler App. No. CA2007-08-187, 2008-Ohio-5932, at ¶25, citing *Bagley*, 473 U.S. at 676. However, no constitutional violation occurs if the evidence that was allegedly withheld is merely cumulative to evidence presented at trial. *State v. Church* (Apr. 30, 1999), Clark App. No. 98-CA-36; *State v. Aldridge* (1997), 120 Ohio App.3d 122, 145.

A. *Campground Receipts*

{¶ 51} Gillispie argues that "[a] key pre-trial objective for the defense was to obtain the campground registration cards in Kentucky for the weekend of August 20, 1988, to further corroborate Gillispie's alibi that he was camping out of state on the weekend that the twins were raped. Although witnesses could place Gillispie in Kentucky that weekend camping, the lack of a campground registration card had the effect of diluting the strength of his alibi." Gillispie asserts that it was important for the defense to view all of the registration cards for the weekend in question, because he often camped with a larger group of friends and he would be able to recognize the names of the individuals who might have been present.

{¶ 52} The question of whether the State had disclosed all campground records was initially raised prior to Gillispie's first trial. In November 1990, the defense filed a motion for the State to produce *Brady* material. The motion indicated that the defense believed that Detective Moore had contacted a State Park ranger regarding records for the campground where Gillispie was alleged to have been during the rapes. Counsel further stated: "The State Park Ranger advised counsel for defense that it sent up to Detective Moore the log books for the relevant period of time. Detective Moore has not produced such items in the discovery packet."

{¶ 53} After the court granted the motion, the State indicated that Detective Moore had

provided documents pertaining to the relevant time period, consisting solely of two records for Jerry Fyffe and one record for Homer Fyffe, none of which pertained to the weekend of August 20, 1988. The State further informed the court: "Counsel for the Defendant was to provide additional names for which these campgrounds could have been reserved and utilized during this time frame and the State is currently awaiting that information." We find no indication in the record that the defense provided additional names to the State.

{¶ 54} At Gillispie's first trial and in an affidavit in opposition to Gillispie's instant petition for post-conviction relief and motion for a new trial, Moore stated that he requested records from a campground in Kentucky in connection with Gillispie's alibi. Moore indicated that he had received three records in the mail, and he provided a copy of the records and a cover letter from the park ranger. In his affidavit, Moore denied obtaining campground records by driving to Kentucky, and he denied telling Lawson that he had done so.

{¶ 55} In his petition, Gillispie indicated that, in preparation for trial, former Detective Fritz, who was now working for the defense, went to Kentucky, organized and reviewed the campground records for 1988, and discovered that the stack for August was unusually small. Gillispie further asserted that, contrary to Moore's prior testimony, Moore told Wade Lawson in 2003 that he (Moore) had traveled to the campground in Kentucky and had taken the registration cards for the weekend of August 20, 1988. Moore allegedly told Lawson that it was "not a big deal" because Gillispie's name was not on any of the registration cards for that weekend. Gillispie supported this claim with affidavits by Attorney Mark Godsey and Michael Cappel, a fellow with the Ohio Innocence Project while a law student at the University of Cincinnati, both of whom attended an interview with Lawson regarding his conversation with Moore.

{¶ 56} The trial court found that the alleged missing campground receipts did not warrant granting a new trial or post-conviction relief. The court reasoned:

{¶ 57} "Fritz has supplied the Court with an affidavit with respect to alleged missing campground registration cards. In paragraph 8 of his first affidavit, Steve Fritz states that one of his assignments as he investigated the case for the defense was to locate campground registration cards for the Twin Knobs Campground at Cave Run Lake, Kentucky. Fritz says that when he arrived at the campground in Kentucky, all of the cards for 1988 were in a box and in complete disarray. According to Fritz, after arranging the cards by month, he noticed that the pile of cards pertaining to August of 1988 was small in comparison to the months of June and July. Fritz believes the small number of cards for the weekend of August 20, 1988 to be 'suspicious,' especially in light of a favorable weather report for that weekend. Based on no more than hearsay and a hunch that the box should have contained more registration cards for that particular month, Fritz has concluded that Detective Moore traveled to Kentucky to the campground and removed the registration cards and engaged in a 'cover up' of evidence that would have exonerated the Defendant.

{¶ 58} "The evidence presented in the trial in this case affirms that a State Park ranger advised that he 'sent up to Detective Moore the log books for the relevant time.' There is sworn testimony from Detective Moore that he 'requested the relevant records be mailed to him.' Prior to trial, Detective Moore presented to defense counsel and the Court a cover letter that accompanied the records. Additionally, Detective Moore, by affidavit, denies going to Kentucky. Because the Defendant has supplied the Court with nothing but mere conjecture and hearsay as to the campground registration cards, and because all of these issues were known

prior to trial, the Court finds that the elements of Crim.R. 33(A) cannot be satisfied. Again, this is all evidence that could have been discovered or obtained prior to trial. It is not new evidence.

{¶ 59} "Applying *Brady* the Court finds the defense has again failed to meet its burden in that there is absolutely no admissible evidence that these records, if they exist, are material or exculpatory."

{¶ 60} On appeal, Gillispie asserts that his evidence regarding the campground registration cards demonstrates two things: (1) that the defense never got a chance to view the missing registration cards for the weekend of August 20, 1988, and (2) that Moore committed perjury at the first trial.

{¶ 61} On the record before us, Gillispie has not demonstrated that the allegedly undisclosed campground registration cards constitute *Brady* material. As stated above, the fact that evidence was not disclosed does not necessarily result in a *Brady* violation. Rather, the undisclosed evidence must be "material." For several reasons, Gillispie has failed to establish that the alleged missing campground registration cards are "material."

{¶ 62} First, Lawson's alleged statements that Moore admitted to having retrieved additional records from Kentucky in no way implies that records favorable to the defense were withheld. Lawson's account of his conversation with Moore (as detailed in Godsey's and Cappel's affidavits) – if admissible and believed – suggests only that Moore obtained the campground registration cards for the weekend of August 20, 1988, and failed to provide them to the defense. Lawson relayed that Moore had found no records with Gillispie's name. Even if the campground registration cards could have confirmed that one of Gillispie's friends had registered a campsite, the jury would still have been required to accept testimony that Gillispie

had been there. That testimony was presented to the jury.[4]

{¶ 63} At best, Gillispie has indicated that, if he had been provided all of the campground receipts for the weekend of August 20, 1988, he could have looked through them to see if any of his friends' names were there. It is understandable that the defense may have wished to review all of the campground records; however, a prosecutor is not required to have an open file policy, and the failure to provide everything in the prosecutor's file is not necessarily a constitutional violation. *Kyles*, supra; *State v. Sanders*, 92 Ohio St.3d 245, 261, 2001-Ohio-189. Consequently, Gillispie has not demonstrated that a review of all of the August 1988 campground records – if in the possession of the State (and there is no evidence that they are) and made available for his review – would have revealed a particular registration card that would have substantiated his and his friends' claims that he was camping in Kentucky when the twins were raped.

{¶ 64} Second, it is clear from the record that defense counsel was aware that the State had obtained campground registration cards. Gillispie was a participant in the camping trips with his friends, and he should have been able to provide the State with a list of individuals who went to Twin Knobs Campground with him so that the State could conduct another search, prior to trial, of the records in its possession. There is no indication that Gillispie provided the State with such a list.

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[4]At the second trial, Brian "Otis" Poulter and Jerry Fyffe each testified that Gillispie and the two men would often travel together to Cave Run Lake in Morehead, Kentucky. Homer Fyffe, Jerry's father, testified that Poulter, Gillispie and his son would go to Kentucky and "later on the other boys would come on down." Pouter, Jerry Fyffe, Homer Fyffe and Gillispie all testified that Gillispie was camping in Morehead on August 20, 1988.

{¶ 65} Gillispie asserts that his "new evidence" consists of Moore's statements that he or another officer had gone to Kentucky and retrieved the campground registration cards for the weekend of August 20, 1988. Gillispie states that he could use this information to demonstrate that Moore committed perjury.

{¶ 66} Evidence that "merely impeaches" a witness' testimony is insufficient to justify a new trial. Although Moore's 2003 alleged comments about which cards he obtained and how he obtained those cards vary from his prior testimony at the first trial, Moore's alleged comments are not material to whether Gillispie was actually in Morehead, Kentucky, during the weekend of August 20, 1988. Unlike evidence that Moore's conduct resulted in unreliable and inaccurate eyewitness identifications, Moore's alleged conduct regarding the registration cards is collateral and minimally relevant to the Gillispie's guilt, considering that there is no evidence that exculpatory campground records were suppressed by Moore. Moreover, Moore made no statements during the second trial regarding the existence or lack thereof of campground registration cards for the weekend of August 20, 1988, or how he obtained them. We fail to see how Moore's 2003 statements would "disclose a strong probability that it will change the result if a new trial is granted." See *Vinzant*, supra.

{¶ 67} Finally, Gillispie argues that the trial court erred in concluding that the conversations between Lawson and the defense team would be inadmissible as "hearsay upon hearsay" and in failing to allow him to supplement the record with tape recordings of Lawson's conversations with the defense team.

{¶ 68} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, at ¶50. "A

trial court's discretion to admit or exclude relevant evidence does not include the discretion to admit hearsay; Evid.R. 802 mandates the exclusion of hearsay unless any exceptions apply." *In re Lane*, Washington App. No. 02CA61, 2003-Ohio-3755, at ¶11. However, even if a hearsay statement were admissible, that evidence may properly be excluded for lack of relevancy, as cumulative of other evidence, or on other such grounds.

{¶ 69} Because Gillispie has not produced any evidence that there are missing records or that the allegedly missing campground records are favorable to him, and considering that Moore did not testify regarding the campground registration cards at Gillispie's trial, Lawson's alleged statements regarding how Moore obtained those records and which records he obtained would have had minimal, if any, impeachment value and little effect on the outcome of Gillispie's second trial. Even assuming, arguendo, that this additional evidence did not constitute inadmissible hearsay, any error by the trial court in its denial of Gillispie's motions to supplement the record was within the court's discretion.

B. *Supplemental Reports*

{¶ 70} Second, Gillispie argues that the trial court erred in finding no *Brady* violation with respect to the State's failure to disclose supplemental police reports, which indicated that Gillispie had once been eliminated as a suspect.

{¶ 71} At Gillispie's second trial, the State presented several witnesses who discussed the course of the police investigation and the development of Gillispie as a suspect. First, Robert Burling, a thirteen year veteran of the Miami Township Police Department, testified that he conducted an initial investigation of the rapes of the twins and collected evidence. Burling took witness statements from the sisters, drove them to Sycamore Hospital for throat cultures,

collected their clothing, and processed B.W.'s 1979 Chevy Camaro for evidence, including looking for fingerprints, and collecting a Polaroid picture and two bandanas. Burling obtained a physical description of the rapist.

{¶ 72} Gary Bailey, who in 1988 was a detective corporal with the Miami Township Police Department, testified that he was assigned to investigate the August 20, 1988, rapes the following day. Bailey's supervisor, Sergeant Steven Fritz, also assisted. Bailey interviewed C.W. and B.W. separately and obtained a physical description of the perpetrator and the perpetrator's self-reported first name. The same day, Bailey and the twins went to Best Products and to the scene of the rapes. Bailey had the twins create a composite of their assailant, which was distributed to the media, local retailers, and other police departments. Bailey testified that he worked on the case "[u]ntil all the good leads ran out." Bailey denied that he had "occasion at any time to interview or come in contact with a Roger Gillispie." On cross-examination, Bailey testified that he received more than 20 leads during his investigation, and many of those individuals came close to the description of the perpetrator. Bailey indicated that he received photographs for some of those leads and used them "to go ahead and either keep the fellow as a good suspect or go ahead and eliminate him as a suspect." Bailey did not create any photo lineups to show to B.W. and C.W. He explained on redirect examination that none of the individuals matched or closely matched the description given by the twins, and there were no "suitable suspects to go ahead and create a photo spread."

{¶ 73} Robert Miller, a security supervisor with the Harrison Division of General Motors and one of Gillispie's supervisors, testified that he saw the composites in 1988 and thought they resembled Gillispie. Miller informed the chief of plant security, but received no

feedback. When that chief left about a year later, Miller relayed his suspicion to the new chief of security, Keith Stapleton.

{¶ 74} Richard Wolfe, who supervised operation of the security department for five divisions of General Motors between 1987 and 1991, contacted the Miami Township Police Department in late 1989 or early 1990 regarding the rapes at Best Products. Wolfe acquired the composites from the police to see if the composites looked like Gillispie. After viewing the composites with Stapleton, Wolfe took the security identification cards of Gillispie and four other individuals to the police department. Wolfe stated that he talked with Fritz and Moore and told them that "some of us thought it looked like [Gillispie]."

{¶ 75} On June 15, 1990, the case was delegated to Detective Moore, who had been assigned to the detective section in 1989. Moore reviewed the file to date and felt that Gillispie's security identification card "looked very much" like the suspect. Moore ran a background check on Gillispie, "obtained his physical build," and attempted to make contact with him. On June 21, 1990, Moore sent Gillispie's security card to MVRCL to have a photograph made for use in a photo lineup. In July 1990, Moore created a photo lineup and showed it separately to C.W. and B.W. Both selected Gillispie's photograph. Moore showed another photo lineup to S.C. in August 1990; she also identified Gillsipie as her assailant. Moore interviewed Gillispie in August 1990, and executed a search warrant at his home in September 1990. Moore did not pursue any other individuals as potential suspects.

{¶ 76} In his petition for post-conviction relief and motion for a new trial, Gillispie argued that he had been considered as a suspect by Bailey and Fritz prior to Moore's involvement in the case, and that Gillispie had, in fact, been eliminated as a suspect by those

detectives. Gillispie claimed that Moore "sanitized" the case file to make it appear that he (Gillispie) did not come to the officers' attention until June 1990. In support of these arguments, Gillispie provided affidavits by Bailey, Fritz, and Lieberman. Fritz's affidavit states, in relevant part:

{¶ 77} "3. During April of 1990, Bailey and I received a tip on this case from a Rick Wolfe, a supervisor of a local GM plant. Wolfe brought over the picture of Roger Dean Gillispie, an employee that Wolfe had just terminated at GM. Wolfe said that Gillispie looked like the composite sketch of the perpetrator, and Gillispie's first name was 'Roger,' the same name used by the rapist. Bailey and I eliminated Gillispie as a suspect because of the extreme differences in Gillispie's physical appearance compared to that of the rapist, and because Gillispie, with a solid job and clean record, did not fit the profile of the brazen rapist in this case. Also, Wolfe's tip was suspicious. The WANTED poster for the case had been posted for nearly 2 years at the GM plant, but Wolfe waited until he had a nasty fight with Gillispie, and fired him, before suddenly deciding that he should turn in Gillispie as a suspect. Wolfe had no credible explanation for why Gillispie should be a suspect, other than the fact that Wolfe simply hated Gillispie for work-related reasons. As tips go, the one from Wolfe regarding Roger Dean Gillispie was a particularly unreliable one."

{¶ 78} Fritz also prepared a supplemental affidavit, which stated, in part:

{¶ 79} "3. Since writing my First Affidavit, I have reviewed my files and prior testimony to refresh my recollection about timelines and events surrounding Rick Wolfe and how Gillispie became involved in this case. When Rick Wolfe originally brought Gillispie's photo over to the department, it must have been in 1989 or early 1990. I know this for a few

reasons. First, Bailey was still in charge of the case under my supervision when this happened. I am sure of this. Bailey was still in the detectives division, and was still in charge of the case. The case was still active when this occurred. Second, a substantial period of time passed between the time that Wolfe first brought Gillspie's photo over, and the second time when Wolfe brought over a group of photos after Bailey had left the department and I was about to turn the file over to Moore. This is what I recall in addition to what I said in my First Affidavit:

{¶ 80} "a) Sometime while Bailey was still in charge of the case, in 1989 or early 1990, Wolfe brought over a single photograph to the department as a possible suspect. This photo was of Roger Dean Gillispie. When Wolfe brought this photograph over to the department, he gave it to us and presented Gillsipie as a suspect at a formal meeting attended by myself, Bailey, Wolfe, someone else from GM, and I believe Chief Thomas Angel and Captain Marvin Scothorn. As I said before, Bailey and I ultimately eliminated Gillispie as a suspect.

{¶ 81} "b) After that initial meeting, I recall Wolfe calling me on occasion and asking me about whether we were going to do anything about Gillispie. Although I don't remember my specific responses, I eventually told him that we were not going to bring charges against Gillispie and did not consider him a good suspect. I can recall discussing Wolfe's 'tip' with Bailey and both of us making sure that we crossed every 'T' and dotted every 'I,' because Wolfe had been an officer in the department before going to GM and was still friends with some of the supervisors. We wanted to make sure that we did our 'due diligence' and could explain why we were not going to pursue Wolfe's 'tip' without having to embarrass Wolfe or get in hot water with any of his friends in the department.

{¶ 82} "c) The meeting in which Wolfe brought over Gillispie's photo, and our process

of eliminating Gillispie as a suspect, were the subject of supplemental reports written by Bailey and submitted to me. I can recall discussing these reports with Bailey for the reasons set forth at paragraph (b). I can recall reviewing these reports and putting them in the file that was later inherited by Moore. It has recently been brought to my attention that these reports were never turned over by Moore to the defense, and possibly not to the prosecution. I had no knowledge of this, and assumed until recently that everything had been turned over.

{¶ 83} "d) Before I left the department, Wolfe tried again by bringing over several photos. This was after Bailey and I had already eliminated Gillispie and had filled in Wolfe that we were not moving forward with Gillispie as a suspect. *** I do not think that I even looked at the photos provided by Wolfe at this point, but just stuck them in the file. ***."

{¶ 84} Bailey's affidavit reiterated much of the information in Fritz's affidavit regarding the meeting with Wolfe and others, his investigation of Gillispie, the elimination of Gillispie as a suspect, and the creation of supplemental reports. He added that, as part of his "due diligence" he noted a discrepancy between the pants size noted by a victim when the perpetrator dropped his pants and Gillispie's build. In addition, Bailey stated, in part:

{¶ 85} "6. At Gillispie's trial, I simply came to court and answered the questions asked of me in an honest way. At the second trial, I was not asked anything about my investigation of Gillispie. At the first trial, I was asked whether I had ever followed up on any 'leads' with respect to Gillispie. I answered, 'No, sir.' I cannot recall now why I answered 'no,' but it must have been because I did not consider Gillispie to be serious enough of a tip to consider it a lead.

{¶ 86} "7. *** When I testified, it never occurred to me that there might be a discovery violation. I naturally would have assumed that the law had been complied with and that I simply

was not asked about these reports, and the facts and events contained in the reports, for reasons that did not concern me. ***"

{¶ 87} Attorney Dennis Lieberman stated in his affidavit that he did not receive Bailey's supplemental reports and did not receive the information in his reports orally or in any other form. He stated that, to the contrary, "the State made it appear as if the case against Gillispie originated when Wolfe, in April 1990, brought over photographs of 5 GM employees and gave them to Detective Moore. The history of Wolfe having tried earlier with a single photo of Gillispie, and of Bailey and Fritz eliminating Gillispie as a viable suspect, was not made available to me, or the jury." Lieberman further indicated that "[i]t would have been very important and helpful to me at trial to have had this information. My defense at trial was misidentification of Gillispie by the victims. *** Had I had the information contained in the supplemental reports regarding the early case history in this case, I would have used it to impeach Wolfe, Moore and Bailey. *** I believe that this information would have changed the outcome of the trial had it been made known to me. I consider this extremely important and powerful information that was not provided in violation of *Brady*."

{¶ 88} In its opposition memorandum, the State emphasized that Fritz was Gillispie's investigator at the time of trial, and he should have known about the alleged missing detective reports regarding Gillispie's elimination as a suspect. The State further asserted that the detectives' decision to eliminate Gillispie as a suspect was baseless, that Gillispie matched the description of the assailant, and that neither the jury nor the defense was misled about how and when Gillispie came to the attention of the police.

{¶ 89} In his reply memorandum, Gillispie disputed that he should have known of the

supplemental reports due to Fritz's involvement as an investigator for the defense. Fritz provided a second supplemental affidavit, indicating that he was instructed by Lieberman "to perform specific tasks, such as obtain particular documents or interview witnesses as he instructed. I did not go over the discovery provided by the State. I was not hired to sit through the trial to make sure that the early stages of the investigation were presented to the jury in a fair and accurate light. It never occurred to me that they would not be presented in an accurate light."

{¶ 90} Fritz further stated:

{¶ 91} "I was operating under the assumption the entire time that Mr. Lieberman *** had possession of the reports created by Bailey, and approved by me, eliminating Gillispie as a suspect. When he had questions about something, he asked me. I let him do the attorney work, and I did the footwork of an investigator when I was asked to do something. *** My job was to get things Lieberman *didn't have* already, and what he told me he needed. ***" (Emphasis in original.)

{¶ 92} Lieberman also denied in a supplemental affidavit that he should have had knowledge of the supplemental reports:

{¶ 93} "2. The idea that I, as Mr. Gillispie's defense attorney, knew or should have know[n] of the *Brady* violation (relating to the undisclosed reports by Detective Bailey eliminating Gillispie as a suspect) because Mr. Steven Fritz worked in a limited capacity as an investigator for the defense is without merit. Like any investigator who is hired by a defense lawyer who has limited funds, Mr. Fritz *** was hired to perform specific tasks on an ad hoc basis. *** Mr. Fritz was not involved in 'big picture' analysis or strategy or anything of that

nature. As would be the case with any defense investigator, Fritz was not hired to go through discovery to see if any reports were missing ***. I depended on the good faith of the police department, as I am entitled to do by law, to ensure that proper discovery was made and that the State's witnesses would not perjure themselves at trial."

{¶ 94} Lieberman indicated that the he would have used the supplemental reports at trial to impeach Wolfe and Moore about the origins of the case against Gillispie, to have Bailey testify as to investigative techniques and practices, and to attack the motives and competence of Moore's investigation.

{¶ 95} The trial court rejected Gillispie's assertion that the alleged removal of supplemental police reports from the case file constituted a *Brady* violation. The court explained:

{¶ 96} "The Court finds that the reports were allegedly created by Bailey, reviewed by Detective Steven Fritz and placed in the file by Fritz prior to trial. Of particular importance to the Court is that Fritz, who was lead detective on this case, left the Miami Township Police Department in June of 1990 and went to work for the defense to prepare for the trial. If those documents existed, Fritz would have known it prior to trial. Any attempt by the police to 'sanitize' the record of the investigation would have been futile because Fritz had first hand knowledge. Because the records, or the lack thereof was known at the time of trial, this is not new evidence.

{¶ 97} "Pursuant to *Brady*, the defense bears the burden of proving that the State suppressed or did not disclose material, exculpatory evidence. If this evidence existed, the defense knew of its existence because its investigator, Fritz, put it into the file. It is hard to

imagine the need for further disclosure. Certainly due diligence at the time would have required the Police to produce these records or declare that they did not exist. Further, there is absolutely no admissible evidence that these records, if they exist, are material or exculpatory. The defense has not met its burden."

{¶ 98} Gillispie asserts that the trial court's ruling ignores the unrefuted affidavits of Fritz and Lieberman. In his appellate brief and at oral argument, Gillispie relied upon *D'Ambrosio v. Bagley* (N.D. Ohio Mar. 24, 2006), Case No. 1:00 CV 2521, affirmed, (C.A.6 2008), 527 F.3d 489, to support his claim that the opinions of the original investigating officers constitute *Brady* evidence.

{¶ 99} As an initial matter, we agree with Gillispie that the trial court did not reasonably conclude, as a matter of law, that the State did not need to disclose the supplemental reports, because Gillispie had access to that information from Fritz. Although Fritz performed work as an investigator for the defense prior to Gillispie's trial, the affidavits of Fritz and Lieberman, if believed, indicate that Fritz's duties as an investigator for the defense would not have reasonably led defense counsel to have discussions with Fritz regarding the supplemental reports. Fritz's role was limited to discrete assignments, and he did not review the complete discovery packet from the State as part of his duties. Unlike information that Gillispie should have known based on personal knowledge, such as the individuals who were present with him when he was camping, the defense had no basis for believing that they lacked any police reports regarding Gillispie that were prepared prior to June 1990, when Moore took over the case. Moore was questioned at a December 1990 suppression hearing as to whether Gillispie was a suspect prior to June 1990, when Rick Wolfe brought some security identification cards to him,

and Moore responded negatively. Thus, the defense had no reason to ask Fritz about whether Gillispie's name had been raised as a potential suspect prior to Moore's investigation when neither Moore nor the discovery packet gave any hint that Gillispie had previously been considered. The State offered no evidence to refute Gillispie's assertion that the defense had no knowledge, at the time of trial, that Gillispie had been considered and eliminated as a suspect.

{¶ 100} Nevertheless, the trial court properly concluded that Gillispie failed to establish that the supplemental reports, if they exist, are potentially exculpatory or material. The evidence allegedly contained within the reports concerned how Gillispie first came to the attention of the police through Gillispie's former supervisors at GM and that the initial investigating detectives concluded that Gillispie was not a viable suspect. As stated above, Wolff and Miller testified that they brought Gillispie to the attention of the police based on their comparison of Gillispie's appearance with the composites. Although defense counsel may have preferred to know that the GM supervisors had an alleged vendetta against Gillispie, that fact has little significance as to Gillispie's guilt or innocence. The allegation that the GM employees may have been motivated by a "vendetta" against Gillispie when they spoke with the detectives had no bearing on the strength of the State's case against Gillispie or whether Gillispie had committed the offenses.

{¶ 101} In addition, the police detectives' opinion that Gillispie was not a viable suspect has little, if any, relevance to Gillispie's guilt or innocence. The affidavits do not assert that the detective's opinion was based on the discovery of evidence that would have exonerated Gillispie, such as evidence to support an alibi.

{¶ 102} In this respect, Fritz and Bailey's opinions are distinguishable from the

police officers' opinions in *D'Ambriosio*. In a petition for a writ of habeas corpus, D'Ambrosio claimed, among other things, that the prosecution violated *Brady* when it failed to disclose reports from the two initial investigating officers, who had surmised the victim had been killed elsewhere and dumped in Doan's Creek; these reports were contrary to the State's theory of the case at trial that D'Ambrosio and two other men, Edward Espinoza and Thomas Keenan, had taken the victim to Doan's Creek and killed him there.[5] Agreeing with D'Ambrosio, the federal district court found that "the defense undoubtedly could have used this evidence to impeach Espinoza's testimony during trial. *** [A]ny information that would tend to undercut Espinoza's account of the murder could have been used to impeach him."

{¶ 103} The court rejected the Respondent's assertion that *Brady* did not apply, because the "mere" opinion of the initial investigating officers was inadmissible under the Ohio Rules of Evidence. The court recognized that the United States Supreme Court "has held that there is no *Brady* violation where the prosecution withheld evidence that would have been inadmissible." Id., citing *Wood v. Bartholomew* (1995), 516 U.S. 1, 6, 116 S.Ct. 7, 113 L.Ed.2d 1. The court noted, however, that several Ohio appellate districts have construed Evid.R. 701 to permit a police officer to testify about his or her own crime scene conclusions based on that officer's personal observations. The court thus concluded that the initial investigating officers

[5]D'Ambrosio was convicted of aggravated burglary and the kidnapping and murder of Anthony Klann. According to the evidence at trial, D'Ambrosio and Espinoza had gone with Keenan to look for Paul Lewis, who Keenan believed had stolen drugs from him. The three encountered Klann, a friend of Lewis. They forced him into Keenan's truck and questioned him repeatedly about Lewis's whereabouts. Eventually, Keenan drove the group to Doan's Creek, where Keenan cut Klann's throat with a knife and pushed him into the creek. After Klann got up and began to run, D'Ambrosio grabbed the knife from Keenan, caught up with Klann, and killed him.

would have been permitted to testify regarding their impressions of how the victim was killed.

{¶ 104} Unlike the reports in *D'Ambrosio*, Bailey and Fritz's affidavits do not indicate that their supplemental reports contained undisclosed information that contradicted the State's theory of how the rapes occurred or that tended to show that Gillispie was not the perpetrator. Simply stated, Bailey and Fritz's affidavits contain no *facts* that undermine the State's case against Gillispie, which was based substantially on the eyewitness identifications. Rather, their affidavits merely established that the detectives believed that they had no credible evidence, while they were conducting the investigation, that Gillispie was the perpetrator. The detectives' opinions that Gillispie does not resemble the composites and that he does not fit the profile of the person who they believed would commit this type of rape offense do not tend to establish Gillispie's innocence or to undermine the State's case against him, and the bases for those opinions – a comparison of Gillispie to the composites and information regarding Gillispie's background – was known to the defense.

{¶ 105} Based on the record before it, the trial court did not err in finding, as a matter of law and without a hearing, that no *Brady* violation occurred with respect to the supplemental reports.

{¶ 106} Gillispie's assignment of error is overruled as to the campground receipts and as to the supplemental reports.

V.

{¶ 107} Gillispie's second assignment of error states:

{¶ 108} "THE TRIAL COURT ERRED IN IGNORING THE UNREFUTED EVIDENCE OF WITNESS TAMPERING BY DETECTIVE MOORE."

{¶ 109} In his second assignment of error, Gillispie claims that trial court erred in rejecting his claim that Moore had tampered with Torrie Strohman, a potential defense witness.

{¶ 110} Prior to Gillispie's trial, Strohman, whose last name is now Mitchell, had several taped conversations with Moore, which were transcribed and provided to the defense. During these conversations, Strohman relayed an argument where Gillispie allegedly hit her in the face, that they would often "make out and stuff" in wooded areas, that Gillispie liked oral sex, and that she was scared of him. Strohman also indicated that she had lived near the location where the rapes had occurred, had seen Gillispie with mace (S.C. had stated that her assailant took her mace), and that he wore strong cologne. At the end of one of the conversations, Strohman stated: "If he did it, he belongs in jail. He belongs in prison, you know, if he did it and from everything that you have showed me I can see that he did do it."

{¶ 111} In an affidavit in support of Gillispie's petition for post-conviction relief and motion for a new trial, Strohman asserted that Moore turned the tape recorder on and off during their conversations, "spent a lot of time trying to convince me that [Gillispie] was guilty of these crimes," and told me "things about [Gillispie], which I didn't know before and didn't know were true, that he said matched the rapist." According to Strohman, the transcript is not an accurate reflection of their conversation. Strohman further claimed that she later went to places that she had been to with Gillispie and discovered that these were not the places where the rapes had occurred. She stated that Moore harassed her and pressured her to testify against Gillispie "the way he wanted me to" after she told him that he was wrong regarding some details about Gillispie, and that Moore told her she was not allowed to talk to defense counsel. Strohman asserted that "Moore lied, cheated and harassed and manipulated me." She indicated

that she wanted to testify for the defense, but defense counsel did not want her to testify because she had recently had sex with Gillispie and due to her conversations with Moore during which she "said a bunch of things bad for Dean's case."

{¶ 112} The trial court rejected Gillispie's assertion that there was evidence of witness tampering and misconduct by Moore concerning Strohman. It reasoned that Moore had provided an affidavit attesting to the accuracy of the transcripts of his conversations with Strohman, and the transcripts belie the accusation of intimidation. The trial court further noted that defense counsel chose not to call Strohman, even though she was prepared to testify. The court stated: "Any intimidation was easily discoverable prior to trial or did not exist as it did not deter Ms. Strohman from a willingness to testify for the defense. Again, there is no new evidence here, as all of this was known or could have been ascertained prior to trial."

{¶ 113} Although the transcripts of the conversations between Moore and Strohman do not reflect any witness intimation by Moore, the trial court's conclusion that Strohman's claim of intimidation was not credible was based on the assumption that the transcripts were accurate. Strohman has expressly challenged the accuracy of the transcripts and has asserted that Moore made off-the-record statements that manipulated her responses so that they were unhelpful, if not detrimental, to Gillispie's defense. Based on Strohman's affidavit, we believe the trial court should not have concluded, as a matter of law and without a hearing, that her claims of intimidation were without merit.

{¶ 114} Nevertheless, we agree with the trial court that Strohman's claim of intimidation was not "new evidence" for purposes of Gillispie's motion for a new trial. Strohman's affidavit establishes that Strohman had contact with defense counsel, was willing to

testify at his trials, and discussed her conversations with Moore with defense counsel. Lieberman's affidavit acknowledged that Strohman had denied making the alleged statements to Moore and claimed that Moore "embellished and twisted them." However, Lieberman elected not to have Strohman testify, because "I did not wish to have a credibility match between the investigating detective and Dean Gillispie's girlfriend [and] her testimony in the balance was not worth the risk." Accordingly, the allegations of witness tampering and intimidation of Strohman were known prior to trial.

{¶ 115} Moreover, nothing in the record suggests that Strohman's testimony, had it been offered at trial, would have affected the outcome of the case. Strohman stated in her affidavit that she could have been a witness to prove that Gillispie does not tan, that his hair was always gray, and that he "was gentle and kind to me." At his second trial, Gillispie offered several witnesses who testified regarding Gillispie's ability to tan, his hair color, and his character. Strohman's testimony regarding Gillispie would have been cumulative of these other witnesses. Even if Strohman had never talked to Moore and, thus, could not have been cross-examined based on her conversations with him (e.g., her statement that Gillispie had once hit her in the face), her testimony in Gillispie's favor would have added little, if anything, to his case.

{¶ 116} The second assignment of error is overruled.

VI.

{¶ 117} Gillispie's third assignment of error states:

{¶ 118} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING GILLISPIE'S MOTION FOR NEW TRIAL WHICH PRESENTED COMPELLING NEW

EVIDENCE OF INNOCENCE."

{¶ 119} In his third assignment of error, Gillispie claims that the trial court should have granted him a new trial due to the emergence of a new alternative suspect, Kevin Cobb, and advancements in the field of eyewitness identification.

A. *Evidence Involving Alternative Suspect*

{¶ 120} "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky* (1987), 476 U.S. 683, 689-690, 106 S.Ct. 2142, 90 L.Ed.2d 636, quoting *California v. Trombetta,* (1984), 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413. "A complete defense" may include evidence of third-party guilt. See *Holmes v. South Carolina* (2006), 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503.

{¶ 121} Gillispie claims that he has discovered evidence regarding Kevin Cobb, which strongly suggests that he is the actual perpetrator of the offenses for which Gillispie has been convicted. In his affidavit, Fritz states that, after Gillispie was convicted, he spent much of the next decade investigating Cobb. Fritz indicated that he had received an anonymous call from a man claiming to be an employee at Lebanon Correctional Institute who stated that a man he had worked with, Cobb, "did those rapes." Fritz confirmed that Cobb had worked at LCI during the time of the rapes and periodically ran Cobb's criminal record. At one point, Fritz discovered a Fairfield police report, which indicated that Cobb had posed as a police officer and abducted a victim in a public parking lot in front of other people. Fritz obtained Cobb's physical description, which matched the description given by the rape victims in Gillispie's case

– light brown or dirty blond hair with a reddish tint, acne along the jaw line, and that he had a chain and medallion. A small handgun had been found in Cobb's apartment when he had been arrested. The Fairfield detective described Cobb to Fritz as "white with a real good tan." Years later, Fritz also learned that Cobb had been arrested for driving under the influence not far from the Dayton Mall.

{¶ 122} Fritz contacted several of Cobb's family members. He learned that Cobb had family in Columbus, Ohio, and a brother who committed suicide. Two former girlfriends of Cobb told Fritz that the brother's name was Roger. (It was actually Lavaughn.) Cobb's former father-in-law had heard rumors that Cobb had been molested and indicated that Cobb had stolen some items from him.

{¶ 123} In the late 1990s, Fritz met Stephanie Walters, who provided additional information about Cobb. According to Walters' affidavit, Cobb told her that he had a lot of family in Columbus and had a brother named Roger, and that he had been molested as a child, possibly by his grandfather. Walters stated that Cobb tanned quickly and kept a dark tan in the summer; was an alcoholic; had a distinctively deep, strong, and commanding voice; had a fetish for oral sex and had "normal intercourse" only when she insisted on it. Walter stated that Cobb "would sometimes brag and claim that he worked for the CIA, and that he killed people for the CIA as a contract killer."

{¶ 124} During the summer of 2003, Gillispie's attorney, Mark Godsey, located Cobb at a halfway house in Newport, Kentucky. According to Godsey's affidavit, he noticed that Cobb's voice was naturally loud and authoritative and that he was approximately 6' 3" and at least 250 pounds. Godsey described his skin as white with a tan. Godsey asked if Cobb was

familiar with Gillispie's rape case. Cobb responded, "No." When Godsey indicated that he thought that Cobb was the perpetrator, Cobb replied, "How did the *ladies* describe the guy?" (Emphasis added.) Cobb "seemed fascinated by and intensely interested in the case," asking numerous questions, mixed with denials regarding responsibility for the rapes. Cobb kept saying, "It's not up to me, it's up to [Gillispie] and the strength of his belief in God." During the conversation, Cobb denied having been arrested in Fairfield for abducting a woman while posing as a law enforcement officer.

{¶ 125} In response to Gillispie's evidence, the State asserted that Cobb was not "new evidence." It distinguished Cobb's offense in Fairfield from the rapes, noting that the only similar feature was that the perpetrators used their status as or impersonation of law enforcement officers to make the abduction of the women easier. In addition, the State noted that defense counsel referenced Cobb during the first trial and he "featured prominently" at the hearing on the motion for a new trial after the first verdict.

{¶ 126} At Gillispie's first trial, defense counsel questioned Moore about his pursuit of additional leads, including the following exchange:

{¶ 127} "Q: Sir, are you even aware of a security guard at the correctional institute in Lebanon, Ohio, by the name of Kevin Cobb whose [sic] 28 years old, six feet one, 172 pounds, light brownish hair with a red tint, blue eyes; he's a correctional officer at Lebanon arrested by the Fairfield Police for identifying himself as a police officer in order to get a girl to go to his apartment where he handcuffed her. The police arrived before anything else happened. He smoked cigarettes. He has a chain with a medallion around his neck. He has acne on his jaw line. He owned a handgun and was born in Columbus, Ohio. Are you familiar with him?

{¶ 128} "A. No.

{¶ 129} "Q. And these are leads you didn't check out?

{¶ 130} "A. That's a lead I'm not familiar with.

{¶ 131} "Q. So it would be fair to say since you weren't familiar, you didn't check it out.

{¶ 132} "A. Right.

{¶ 133} "Q. The only lead you pursued was Dean.

{¶ 134} "A. Was the one that I had."

{¶ 135} Addressing Gillispie's request for a new trial based on Cobb as a new suspect, the trial court found that Gillispie had not satisfied Crim.R. 33(A). It reasoned:

{¶ 136} "Kevin Cobb is the Defense's nominee for the 'true culprit in the rapes that Defendant was convicted of committing.' The existence of Kevin Cobb is not new evidence. Cobb's official presence in this case goes back to the first motion for a new trial. The Defendant has not raised any new issues or presented new evidence as to his 'alternate suspect' theory that would sustain any of the Crim.R. 33(A) elements."

{¶ 137} The record supports the trial court's conclusion that Cobb was known to the defense prior to his second trial. Indeed, based on the defense counsel's questioning during the first trial, the defense team was aware not only of his Fairfield offense, but of several similarities between Cobb and the description of the assailant in Gillispie's case.

{¶ 138} However, Gillispie has presented new evidence regarding Cobb, consisting of statements that Cobb has used the name "Roger" to refer to his brother, even though that was not his brother's name; that Cobb's voice was distinctively authoritative; that

Cobb had bragged that he was a contract killer; and that he had asked how the "ladies" had described their assailant even though he was not told that there were multiple rape victims. Gillipsie also included several purported photographs of Cobb, including a December 1990 police photograph, which are similar to the composites and descriptions by the victims. Together, all of these new facts add to Gillispie's theory that Cobb was the true perpetrator. In particular, the fact that Cobb liked to brag that he was a contract killer is similar to the twins' assailant. C.W. and B.W. both wrote in their statements to the police that the assailant had said that he kills people for a living for $1000. In our view, the additional evidence regarding Cobb constituted "new evidence" and was sufficient to require a hearing to flesh out the evidence and to determine whether a new trial under Crim.R. 33 is warranted based on that evidence.

B. *Eyewitness identification*

{¶ 139} Finally, Gillispie claims that there have been "new advancements" in the field of eyewitness identification, particularly in the area of memory retention and eyewitness identification accuracy.

{¶ 140} Throughout this case, Gillispie has challenged the accuracy of the victims' eyewitness identifications, arguing that the lineup was unduly suggestive. Prior to the first trial, Gillispie moved to suppress the eyewitness identifications. A hearing on the motion was held in December 1990, and the motion was subsequently denied. Gillispie raised the issue again prior to the second trial, and it was again denied. On direct appeal, Gillispie raised the constitutionality of the identification procedure. We overruled that assignment of error. See *Gillispie I*, supra.

{¶ 141} At his second trial, Gillispie offered the testimony of Kipling Williams,

Associate Professor of Psychology at the University of Toledo. Williams identified three stages of memory – encoding, storage, and retrieval – and he discussed several factors that affect memory, including the duration of exposure, proximity to the event, lighting at the time of the event, the length of time between witnessing an event and retrieval of the memory, stress, the presence of a weapon, and exposure to additional information from other sources. Williams stated that the ability to recall drops rapidly and then stabilizes and that a person's stated level of confidence in their identification has little relationship to accuracy. As to photo lineups, Williams discussed the need for a fair lineup, i.e., a lineup that contains individuals such that non-witnesses should not be able to pick out the suspect and no photos that stand out. He indicated that people tend to select the photo that is closest to the perpetrator and that suggestions by police officers may affect the selection.

{¶ 142} In support of his motion for a new trial, Gillispie offered the affidavits of two experts, Dr. Margaret Bull Kovera and Dr. Steven E. Clark. In her affidavit, Kovera identified seven factors relevant to the accuracy of eyewitness identification: (1) extreme stress at the time of the witnessed event; (2) presence of a weapon; (3) a long interval between witnessing the event and the identification; (4) lineup composition; (5) lineup instruction; (6) lineup administrator knowledge of the suspect's identity; and (7) the relationship between witness confidence and accuracy. Like Williams, Kovera stated that eyewitness identifications are less accurate under high stress conditions, that witnesses tend to focus on a weapon when it is present, and that memory initially drops precipitously and then eventually stabilizes.

{¶ 143} Discussing photo lineups specifically, Kovera indicated that matching the lineup photos to the suspect as opposed to the victim's description increases mistaken

identifications. She emphasized that the administrator's instructions "have a powerful influence on the accuracy of the witness's decisions" and the importance of unbiased instructions. She stated that new studies have demonstrated that the lineup administrator's knowledge of a suspect's identity reduces the accuracy of eyewitness identifications. As did Williams, Kovera stated that witness confidence is only weakly correlated with accuracy.

{¶ 144} Clark also discussed the scientific literature on eyewitness identification and its application to Gillispie's case. He discussed how the physical conditions of observation – duration, lighting, occlusion, and distance – define the witness's opportunity to observe. The opportunity to observe is also affected by psychological factors, such as attention distraction and focus, emotional stress, a cross-racial relationship, and the presence of a weapon. Clark stated that initial witness descriptions tend to be brief but accurate; as time passes memory becomes less accurate. Studies show, however, that the passage of time does not appear to make witnesses less willing to choose someone from a lineup.

{¶ 145} Clark stated that composites quite often do not clearly depict the person for whom they are created and that the creation of composites leads to lower levels of accuracy in later identifications. If composites are created, each witness should construct the composite separately. Clark discussed the construction of photo lineups and the effects of telling the witness that a suspect is in the lineup and that there might be changes in the suspect's appearance. Clark also indicated that the lineup administrator can influence the decisions of the witnesses in subtle ways. Clark noted that quick rather than deliberative identifications are more likely to be accurate. Postidentification feedback can distort a witness's confidence and "retroactively re-write the witness's assessment of what actually happened and how good his or

her conditions of observation actually were."

{¶ 146} Reviewing Gillispie's proposed new evidence, the trial court found that "it appears that the Defendant is actually promoting the exact same analysis and conclusions that were drawn by a previous expert called by the Defendant at trial. The Court can only conclude, as the State has, that the Defendant has simply found another expert to 'put a fresh coat of paint on issues that have been fully litigated.' At best, this evidence is cumulative, but no matter how it is looked upon this evidence does not create a strong probability that it will change the result if a new trial is granted."

{¶ 147} We agree with the trial court's assessment.

{¶ 148} A case cannot be retried based on every "advancement" in scientific research. See *Commonwealth v. LeFave* (1991), 430 Mass. 169, 181, 714 N.E.2d 805. "[E]xpert testimony may not be considered newly discovered for purposes of a new trial motion simply because recent studies may lend more credibility to expert testimony that was or could have been presented at trial. To hold otherwise would provide convicted defendants with a new trial whenever they could find a credible expert with new research results supporting claims that the defendant made or could have made at trial." Id.

{¶ 149} Kovera's and Clark's affidavits relate additional research concerning how police departments should prepare and administer photo lineups in order to best ensure an accurate response from witnesses. However, through Williams' testimony, the jury was presented with significant expert testimony from which they could have concluded that the victims' memories were initially affected by the stressfulness of the situation, the presence of a weapon, and the statements made to them by Moore. Moreover, the jury heard testimony that

the victims' memories were likely to deteriorate rapidly, casting doubt on their ability to remember accurately at the time that they made their identifications. Despite this testimony, the jury chose to believe the identifications by the victims. While Kovera's and Clark's potential testimony may bolster and enhance Williams' expert testimony, it is not so qualitatively different so as to create a strong probability that the jury would have reached a different result had the evidence been admitted at trial.

{¶ 150} This is not a situation where subsequent research and studies demonstrate that the expert testimony admitted at trial should not have been admitted or is now the subject of substantial criticism that would reasonably cause the fact-finder to reach a different conclusion. Nor is it a situation, contrary to Gillispie's assertion, where the results of subsequent research and studies demonstrate significant jumps in our knowledge or skills (e.g, the improvements in DNA analysis), such that the new research and studies cast serious doubt to a degree that was not able to be raised by the expert testimony presented at the original determination of guilt by the fact-finder. Rather, the "new advancements" presented by Gillispie are just that – an advancement, a refinement, an enhancement of our pre-existing knowledge – not a quantum leap in our understanding of eyewitness identification.

{¶ 151} The trial court did not abuse its discretion when it concluded that there was no strong probability that the jury would choose to reject the victims' identifications with Gillispie's new expert testimony on eyewitness identification

{¶ 152} The third assignment of error is overruled in part and sustained in part.

{¶ 153} In light of our disposition of Gillispie's third assignment of error, Gillispie's argument that the trial court erred in denying his motion for reconsideration of its

denial of his motion a new trial is overruled as moot.

VII.

{¶ 154} The portion of the trial court's July 9, 2008, judgment denying the petition for post-conviction relief will be affirmed. The portion of the July 9, 2008, judgment denying the motion for a new trial will be affirmed in part and reversed in part, and the matter will be remanded to the trial court for a hearing to determine whether Gillispie's evidence regarding Cobb merits a new trial. Although we concluded that the trial court did not abuse its discretion when it found that the new expert testimony regarding eyewitness identification did not, by itself, warrant a new trial, the trial court, upon remand, may consider the effect that such testimony might have in conjunction with any new evidence regarding Cobb.

{¶ 155} The trial court's August 13, 2008, judgment denying the motion to supplement the record and for reconsideration of the court's denial of the motion for a new trial will be affirmed.

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BROGAN, J. and FAIN, J., concur.

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