[Cite as *State v. Siller*, 2009-Ohio-2874.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90865

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

THOMAS SILLER

DEFENDANT-APPELLANT

JUDGMENT:
DISMISSED (CR-361726)
REVERSED AND REMANDED (CR-391411(A))

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-361726 and CR-391411(A)

BEFORE: McMonagle, J., Rocco, P.J., and Blackmon, J.

RELEASED: June 18, 2009

JOURNALIZED:

ATTORNEYS FOR APPELLANT

Terry H. Gilbert
600 Standard Building
1370 Ontario Street
Cleveland, OH 44113

Ashlie E. Case
Louis A. Chaiten
John Q. Lewis
Paula G. Shakelton
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114-1190

Alba Morales
Barry Scheck, Co-Director
Innocence Project
100 Fifth Avenue, Third Floor
New York, NY 10011

Amicus Curie Attorneys (Innocence Network)

Timothy Casey
Milton A. Kramer Law Clinic Center
11075 East Boulevard
Cleveland, OH 44106

Jesse J. Contreras
Krista M. Enns
David E. Koropp
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601-9703

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Richard J. Bombik
Matthew E. Meyer
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, J.:

{¶ 1} Defendant-appellant, Thomas Siller, appeals the trial court's judgment that denied his motion for a new trial. We dismiss the appeal in Case No. CR-361726 and reverse and remand for new trial in Case No. CR-391411(A).

FACTS

{¶ 2} On June 4, 1997, at 3:49 a.m., a phone call was made to 911 from a payphone, reporting that a female had been assaulted at 6211 Hosmer Avenue in Cleveland. The caller did not identify himself. The Cleveland police found an elderly woman, Alice Lucy Zolkowski,[1] severely beaten and tied to a chair in her living room. The back door to her home had been kicked in. Two years later, she died, never having identified her assailant.

{¶ 3} Fingerprints belonging to Jason Smith, Walter Zimmer, and Siller were found in the house. Siller and Zimmer were known in the neighborhood and had performed handyman work in Zolkowski's house. Smith had no known relationship to Zolkowski, and, hence, became the primary suspect in the investigation. When the police went to arrest Smith, he was found hiding in a closet in Jenean Harper's home; Harper was subsequently charged with a felony count of obstruction of justice.[2] Among the items confiscated from Harper's house pursuant to a warrant were Smith's bloodstained pants, which are at the heart of this appeal.

---

[1]Zolkowski was the single victim in this case; she was known to family and friends as both "Alice" and "Lucy."

[2]This charge was ultimately reduced to a misdemeanor in return for Harper's agreement to testify against Smith should he go to trial in this matter.

{¶ 4} The day following the discovery of Zolkowski, both Siller and Zimmer were contacted by the police to make statements; both were advised of their rights, waived their right to counsel, and gave statements. The statements given by the men were more or less consistent with each other.[3] Zimmer claimed that late on the night of the incident he had seen the back door of Zolkowski's home kicked in, went in to investigate, saw the victim beaten and tied up, ran from the house, and contacted Siller to tell him.[4] Siller explained that he anonymously placed the above-referenced 911 call from a public phone. Both Siller and Zimmer admitted to borrowing significant sums of money from Zolkowski over a period of time.

{¶ 5} Approximately a week later, a second statement was taken from Siller, this one memorialized on audiotape. This statement was substantially similar to the first statement; however, Siller had since remembered being in a bar called Chaulkie's earlier on the evening in question with Zimmer, and he also remembered that the amount of money he had borrowed that evening from Zolkowski was $240 rather than $200.

{¶ 6} On June 16, Ed Farrell, an inmate in jail with Smith, contacted and told detectives that Smith had confessed to him that he committed the crime to get money to buy a house for his girlfriend. According to Farrell, Smith was not worried about a

---

[3]Rose Crowder, a friend of both Siller and Zimmer, was charged with felony obstruction of justice relative to her statements corroborating the men in this matter. Her case was tried with Siller and Zimmer's case, but was dismissed pursuant to a motion under Crim.R. 29 made during trial.

[4]Zimmer claimed that an active warrant kept him from notifying the police himself.

co-defendant "snitching" because he said he had committed the crime alone. He also told Farrell that he had people in Kentucky who were going to "alibi him" for the night of the crime.

{¶ 7} On June 17, the detective took a statement from Smith, and exactly as confided by Farrell, Smith claimed the Kentucky alibi. He also claimed (and later renounced as untrue) that he had cut his leg working at the Touch of Italy restaurant. Smith continued to claim his innocence for months; that is, until Harper agreed to testify against him in her own plea deal. After that, Smith negotiated a breathtakingly favorable plea deal in exchange for testimony implicating Siller and Zimmer in the beating.

{¶ 8} As part of this plea agreement, two different pending drug cases were dismissed outright. In the case relative to this incident, where Smith had been charged in a five-count indictment with attempted aggravated murder, aggravated burglary, kidnapping, felonious assault, and aggravated robbery, all charges except the aggravated burglary were dismissed. Smith was given an agreed minimum sentence (three years) and, most improbably, immunity from prosecution for aggravated murder should Zolkowski perish from her beating.

Siller I **(Attempted Aggravated Murder)**

{¶ 9} Both Siller and Zimmer steadfastly proclaimed their innocence and went to trial. Smith testified against Siller and Zimmer, and Farrell testified as to Smith's jailhouse statements. Smith claimed that he never entered the room where Zolkowski

was being beaten. Joseph Serowick,[5] a serologist for the Cleveland Police Department, testified that he examined and tested Smith's trousers, and they contained no blood spots or spatters. Serowick's testimony was corroborative of Smith's contention that he was never physically close to the beating, and wholly inconsistent with the defense's theory of the case that Smith had committed the heinous crimes alone, and only implicated Siller and Zimmer as "currency" for a plea deal.

{¶ 10} Both Siller and Zimmer were convicted. Siller was sentenced to a total of 20 years in prison and Zimmer to a total of 40 years.

{¶ 11} Ultimately, Zolkowski perished from her wounds. Both Siller and Zimmer were indicted in the death. This time, however, they were scheduled to be tried separately; Siller was scheduled to go to trial first.

Siller II (Aggravated Murder)

{¶ 12} *Siller II* was expected to proceed more or less along the same lines as *Siller I*; however, this time the case was assigned to a different judge, and numerous new "jailhouse witnesses" were added to the mix. The first was a witness on behalf of the State, Thomas Campbell, who shared a pod in the Cuyahoga County jail with Siller after he was brought from prison to face the new charges. Campbell essentially

[5]This witness's name is spelled interchangeably throughout the proceedings as "Serowick" and "Serowik."

claimed that Siller told him that Zimmer beat up Zolkowski, and that when Zimmer could not find any money, Siller flew into a rage and hit and cut Zolkowski.[6]

{¶ 13} A second jailhouse witness was Emery Jones, who testified on behalf of Siller. He claimed that he overheard both Campbell and Siller talking many times, and that Siller repeatedly denied involvement in the crime. When Siller finally got angry at Campbell for "twisting his words," Campbell said "I don't care if you don't talk to me no more, I got enough on you already." Other jailhouse denizens likewise testified for Siller, variously trying to discredit Campbell and/or Smith.

{¶ 14} The second trial did, however, contain several new revelations. The first was that Smith, in three different other cases, had testified against other defendants in exchange for "deals" on his own cases. And most significantly, the testimony of Serowick (the serologist), for the first time, was called into question. In *Siller II*, Serowick again testified, as he had in the first trial, that there was no blood whatsoever on Smith's trousers. However, defense counsel pressed him on one particular stain on the back of one leg of the trousers. After some flip-flopping on the issue by Serowick, and a specific question from the jury concerning retesting the stain, the trial judge stopped the proceedings, and ordered Serowick to retest the pants.[7]

---

[6]Although a bloody knife was found at the scene, there was no evidence that Zolkowski had been cut.

[7]The trial judge in *Siller II* allowed jurors to ask questions. The question that prompted the retest was, "[n]ow that the technology for DNA testing is available, have you been asked to retest the identified bloodstains on clothing, carpet, paint, et cetera, to determine whose it is?" Serowick replied, "[o]ur office had not been–it has not been requested by our office to perform any DNA analysis of any of the material that I testified to today."

{¶ 15} When Serowick returned to the stand, he testified that the stain pointed out by the defense was blood, and, in fact, the blood matched that of the victim. On cross-examination, Serowick admitted that the stain had been tested before and was found to be positive for blood, but that there was no paperwork on that, and accordingly, his testimony in the first trial had been in error. There was a flurry of activity, and at one point, the State considered dismissing the case, and trying to vacate Smith's immunity agreement. Ultimately, the decision was made to continue with the trial and characterize the blood-evidence problem as simple error. The State retreated to an argument that, although there was a single spot of the victim's blood on Smith's pants, it could have gotten there by brushing up against something or someone.

{¶ 16} The jury apparently agreed with the State's tactic of minimization; Siller was convicted of aggravated murder with felony murder specifications and sentenced to 30 years to life on July 30, 2001. This sentence was to run concurrent with his conviction in *Siller I.*

The Anthony Green Case

{¶ 17} On October 18, 2001, Anthony M. Green, a defendant in an unrelated case, was exonerated after Serowick's testimony linking him to a rape was found to be false. Serowick was fired from the Cleveland Police Department, and in June of 2004, the city of Cleveland agreed as part of a civil settlement in a suit filed by Green to audit files from the Cleveland Police Department laboratory for the period of time Serowick was in its employ. Part of that audit uncovered deficient documentation of laboratory

results in the *Siller*/*Zimmer* case. In October of 2004, Siller, pro se, requested DNA testing; this request was opposed by the State and denied without opinion by the court.

{¶ 18} Siller's motion was later renewed by counsel, granted by the court, and this time the Innocence Project arranged for testing of Smith's trousers. On December 26, 2006, instead of finding the single "stain" or "spot" on the back of one leg that Serowick testified he erroneously declared not to be blood in the first trial, and but a single spot in the second trial, the testing discovered **20** blood **spatters** on the **front** of Smith's trousers. Of the nine spatters tested for DNA, seven came back matching the victim.[8] Thirty days later, Siller filed a motion for leave to file a motion for new trial and a motion for new trial in both *Siller I* and *Siller II*. The court did not independently rule on the motion for leave, but did in fact proceed to the merits of the motion.[9]

{¶ 19} In *Siller II*, the motion for new trial was decided by yet a third judge; this judge was the successor to the judge in *Siller II*; he did not preside over either of the *Siller* trials. He held that a new trial was not warranted because 1) "the evidence relied on in [Siller's] motion does not disclose a strong probability that it will change the result if a new trial is granted[,]" and 2) the evidence Siller relied on was "merely cumulative to former evidence." In essence, the "new" lower court found that since the

---

[8]It was unclear from the briefs, but clarified in oral argument, that only nine spatters known to be blood were tested because of financial constraints. While the 11 others spatters are in fact blood, they were not DNA tested to determine their source.

[9]In reaching the merits, the trial court impliedly granted leave. *Howell v. Durch* (Oct. 18, 1996), Trumbull App. No. 95-T-5239. See, also, *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898.

issue of Serowick's credibility was raised in the second trial when he admitted that he erred in failing to report a single stain or spot of blood of the victim's located on the back of Smith's trousers, any additional evidence that Serowick was mistaken, negligent, or untruthful in his testimony was merely "cumulative."

***Siller I* (Attempted Aggravated Murder)**

{¶ 20} The jurors in the first trial heard evidence that there was no blood whatsoever on Smith's trousers. The State argued in opening statement that this scientific finding was a crucial factor in assessing Smith's credibility. (Smith declared that he was at the crime scene, but never entered the room where the beating took place. The defense contended that Siller was not there at all and posited that Smith was the lone killer.) The State argued:

{¶ 21} "So at this point in time, the evidence will show that Detective Carlin has charged [Smith] with some very serious crimes who–where the evidence shows that his finger prints were found on a bedroom dresser.

{¶ 22} "But beyond that, **there was little more to tie him in, when you look at–when you come to the clothing, the lack of blood on his clothing**. Because Mr. Smith will say he was there, but he wasn't the one who beat this woman." (Emphasis added.) T. Trial I at 27-28.

{¶ 23} In closing arguments, the State returned repeatedly to the absence of the victim's blood–especially the absence of spatter: "[w]hoever did this vicious beating probably got some blood spattered on the clothes[,]" and "[w]e learned that *** **Alice's**

blood is not found on any clothing that was submitted, that belonged to Jason Smith." (Emphasis added.) Id. at 728-729.

{¶ 24} And finally, and most tellingly, the State argued, "**[y]ou heard previously from Joe Serowick. That was the guy at–the forensic examiner at the lab. He does the cutting of the pants and the official testing of the blood. Look at the clothes. I mean, hey, if there is evidence of blood spattering, he's going to check it. These are trained people. If they see a stain, reddish in color, they do that. They take their little swab and dab it, get a reaction to see whether it's blood or not. He did it in this case and there is no blood splatter on any of this clothing.**" (Emphasis added.) Id. at 736-737.

{¶ 25} In short, the jury in *Siller I* heard no evidence whatsoever that there was any of the victim's blood on Smith, nor were they presented with any testimony whatsoever that Serowick's conclusions were in any manner "suspect." Accordingly, the newly discovered evidence could not possibly be cumulative to the evidence presented in *Siller I.*

{¶ 26} Nonetheless, although this appeal is captioned as an appeal from a denial of a motion for new trial in both *Siller I* and *Siller II* (i.e., the motions were filed under both case numbers below and the notice of appeal was likewise filed under both case numbers), the lower court's ruling was only as to *Siller II.* The motions are still extant and unruled upon as to *Siller I*. Accordingly, insofar as this court does not have a final appealable order as to *Siller I*, we dismiss this portion of the appeal only (CR-361726).

Siller II (Aggravated Murder)

{¶ 27} In the *Siller II* trial, this time for aggravated murder occasioned by the death two years after the assault of the victim, Serowick again testified that there was no blood on Smith's trousers. However, during the trial, defense counsel noticed a spot on the back of one pant leg. Reinforced by a juror question as to DNA testing, the court stopped the trial, and ordered Serowick to test the spot over the weekend. The results were astonishing: the spot was in fact blood, and indeed the victim's blood. Smith's testimony altered accordingly; in this trial, he placed himself closer to the beating and surmised that perhaps Siller had brushed up against him, staining the back of his pant leg.

{¶ 28} The State initially appeared devastated with this mid-trial twist. There was some discussion about the possibility of revoking Smith's plea deal (that included total immunity for prosecution on the murder). The assistant prosecutor and the court had the following discussion:

{¶ 29} "The Court: Mr. Bombik, you were just on the phone in our presence with Joe the witness.

{¶ 30} "Mr. Bombik: Joe Serowick. **They said they went with another colleague over that part of pants with a, quote, the proverbial fine tooth comb, they tested all 11 spots and they came up with nothing**." (Emphasis added.) T. Trial II at 2342.

{¶ 31} Based on Serowick's representation, the prosecutors decided, after a recess, to continue with the case. This decision apparently came as a surprise to the defense:

{¶ 32} "Mr. Doyle: Your Honor, I can tell you that at this point in the case, as a result of the information we've heard this morning, we're shocked that the prosecution is still going on with this case. If they're still going with it, they have to go forward with it, this is contrary to what I had understood. It was our understanding that Mr. Jason Smith's plea agreement was going to be withdrawn and they were going to go after him. Now, all of a sudden that's all changed ***." Id. at 2344.

{¶ 33} Despite their misgivings, however, the prosecutors apparently decided that, although troublesome, this single spot of blood on the back of the pants did not "destroy" their case: "[r]emember, this spot was a very small stain. Remember, Andrea Fischer told you that it was contained within a three-eighths inch by three-eighths inch cutting on the back of this pants leg, the left pants leg. Does that mean that [Smith] is the one that beat Lucy Zolkowski? **If he had been the one to beat Lucy Zolkowski, I would submit to you that there would be more blood and it would be on the front of his pants.**" Id. at 3535.

{¶ 34} Once again, the State exhibited an uncanny prescience: when the Innocence Project testing was completed in 2006, there were in fact **20** more blood spatters located on the **front** of the pants, and of the nine that were DNA tested,

seven were found to be the blood of the victim, and two of the spatters were found to be the blood of Smith himself.[10]

{¶ 35} It is true that the evidence adduced after the verdict goes to the credibility of Serowick, and that the issue of his credibility had in some measure been raised when he admitted that he "erred" in his testimony in the second trial. However, this error was characterized by Serowick to the jury, and by the State in argument, as a simple mistake, remedied after the court ordered testing of the stain, and the results of the retesting were presented to the jury.

{¶ 36} But the new evidence, a pattern of misfeasance, malfeasance, and false testimony by Serowick in the *Green* case, voluminous number of blood **spatters**[11] on the front of Smith's pants, and DNA matching of most of those spatters to the victim (and two of them to Smith himself), are all evidence that has never before been presented to any jury for their consideration.

{¶ 37} The import of this evidence is unmistakable; in both cases, Serowick's findings were just the independent science that gave credibility to an otherwise "one-crackhead's word against another" case, supplemented only by "jailhouse snitches" on behalf of both sides.

---

[10]Evidence consistent with Siller's position that Smith was the one who kicked in the victim's back door.

[11]These were not *spots*, consistent with brushing up against someone with the blood on themselves, but rather *spatters*, consistent with close proximity to the victim during the beating.

{¶ 38} In short, only one eyewitness testified to this crime: Smith, a co-defendant with a lengthy record who was given a "deal," i.e., a three-year prison sentence for the same crime for which Siller received 20 years in prison. In that same trial, Smith was also promised complete immunity from prosecution for aggravated murder should the victim expire as a result of the beating; the same crime for which Siller was tried and could have received the death penalty, and for which he ultimately received a sentence of 30 years to life in prison.

{¶ 39} The scientific evidence that the State insisted at both trials was of great import in the jury's search for the truth, upon further testing, appears not only to undermine the State's contention concerning Smith's non-involvement in the beating and killing, but to support the argument of the defense that Smith was the one who beat the elderly woman to death, and that his statement and resulting testimony implicating Siller and Zimmer in this crime was done for the sole purpose of "making a deal."[12]

{¶ 40} In *D'Ambrosio v. Bagley* (C.A.6, 2008), 527 F.3d 489, the Sixth Circuit Court of Appeals analyzed just such a situation, where the newly discovered evidence tended both to discredit the State's case, and simultaneously bolster the contentions of the defense. The court in *D'Ambrosio* held: "Because the evidence that the prosecution suppressed would have had the effect of both weakening the prosecution's case and strengthening the defense's position that someone else

[12]A statement first made some nine months after his arrest, and only after his "alibi witness," instead of confirming his alibi, decided to testify for the State.

committed the murder, there is a reasonable probability that the outcome of D'Ambrosio's trial would have been different." Id. at 499.

{¶ 41} Siller presents with four assignments of error. We consider Assignments of Error Nos. I and II together.

{¶ 42} Assignment of Error No. I alleges that: "The lower court erred by failing to apply the due process standard when considering Siller's 33(A)(2) claim and by denying his 33(A)(2) claim when the State failed to produce exculpatory evidence and relied on false testimony to secure Siller's conviction."

{¶ 43} Assignment of Error No. II alleges that: "The trial court applied the wrong legal standard to its analysis of Siller's right to a new trial pursuant to Ohio R. Crim P. 33(A)(6) by finding that the newly discovered evidence would not have led to a different result because the evidence did not exclude Siller."

{¶ 44} We note here that the lower court cites to *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, which holds in pertinent part that "newly discovered evidence sufficient to justify a new trial ***must disclose a *strong probability* that the result will change if a new trial is granted." Id. at syllabus.

{¶ 45} *Petro* is a 1947 case. It pre-dates *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215, by some 16 years, and, more significantly, *Kyles v. Whitley* (1995), 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed. 2d 490, by 48 years. In *Kyles*, the United States Supreme Court articulated a test different from that articulated in *Petro*, that is, the touchstone of materiality is a "reasonable probability" of a different result. *Kyles* at paragraph one of the syllabus. The question is not

whether the defendant would more likely than not have received a different verdict with the evidence, but, whether, in its absence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. Id. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." Id. We note this very issue was raised in *D'Ambrosio*, supra, which utilized the "reasonable probability" standard with a nod toward Ohio's 62-year old "strong probability" standard articulated in *Petro* (and used by the lower court in this case) as perhaps being at the very least outdated, and more probably, overruled. See *D'Ambrosio* at fn. 5.

{¶ 46} We specifically note *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, where the Ohio Supreme Court in reviewing an appellate decision granting a Crim.R. 33(B)(6) motion for new trial held as follows:

{¶ 47} "In *United States v. Bagley* [(1984), 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481], the court ruled that in determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.'" *Johnston* at 61, quoting *Bagley* at 682, and citing *Pennsylvania v. Ritchie* (1987), 489 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40.

{¶ 48} We believe the correct standard to be used is whether 1) the absence of the evidence at issue, 2) evidence of Serowick's false scientific testimony in the *Green*

trial resulting in a decades-long false imprisonment of an innocent man, and 3) the discovery that there are **20 spatters** of blood, at least seven of which belonged to the victim, and were on the **front** of Smith's trousers, undermines our confidence in the outcome of Siller's trial.

{¶ 49} We find consistent with *Petro* that there is a strong probability that if the above-omitted evidence were presented to a jury, there would be a different result. However, we also believe that the correct test is whether the evidence proffered above "undermines our confidence in the outcome of the trial." *Kyles* at paragraph one of the syllabus. It does.

{¶ 50} We also note *State v. Burke*, 10th Dist. No. 06AP-686, 2007-Ohio-1810, appeal denied, 115 Ohio St.3d 1412, 2007-Ohio-4884, 873 N.E.2d 1316. In *Burke*, the State's expert, a pathologist, opined that certain wounds on the victim were "healing wounds." In a post-conviction proceeding, the pathologist changed his opinion, and averred that his initial opinion was "in error." The court found that the jury perspective may have changed with regard to the case as a whole if given an accurate scientific picture. Id. at ¶32.

{¶ 51} In *California v. Trombetta* (1984), 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, the United States Supreme Court held this issue to be one of due process. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that

right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.' *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

{¶ 52} "The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath. *Napue v. Illinois,* 360 U.S. 264, 269-272 (1959); see also *Mooney v. Holohan*, 294 U.S. 103 (1935)." *Trombetta* at 485.

{¶ 53} In sum, the trial court utilized three tests in denying Siller a new trial. All three tests find no support in the law: (1) in weighing the newly discovered evidence, the trial court held there not to be a *substantial probability* of the different verdict; we find the correct test to be a *reasonable probability,* with *reasonable probability* defined as probability sufficient to undermine our confidence in the outcome of the trial; (2) likewise both the trial court and the dissent utilize a test that the newly discovered evidence must *exclude* the defendant as the perpetrator. Nowhere is that test articulated by either statute or case law; again the test is "*probability sufficient to undermine our confidence in the outcome of the trial,*" not whether the newly discovered evidence eliminates the defendant as the perpetrator; (3) finally, the trial court held (and the dissent cites) that "the suppressed evidence did not appear to have been a deliberate attempt to mislead the jury." Again, we find no statute or case

law that the prosecution's intent in suppressing evidence is at all relevant to the inquiry of whether Siller should be granted a new trial.

{¶ 54} The standard of review for constitutional violations where there are no disputed issues of fact is de novo. *State v. Barnes*, Cuyahoga App. No. 90847, 2008-Ohio-5472, ¶19. There are no disputed issues of fact involving Assignment of Error Nos. I and II, and upon our de novo review as articulated above, we find merit to the assignments.

{¶ 55} Assignment of Error No. III reads as follows: "The court abused its discretion in denying Siller's motion for a new trial because the newly discovered evidence of multiple spatters of the victim's blood on the front of the pants of the State's star witness was not "merely cumulative" of any evidence introduced at trial."

{¶ 56} On this issue, of course, we review for abuse of discretion because we are reviewing the court's findings of fact (that the newly discovered blood spatter evidence was "cumulative").

{¶ 57} It is difficult to discern in both the trial court's judgment and in the dissent what exactly is allegedly cumulative here; is it evidence of the blood, or the evidence of Serowick's negligence? In either event, the newly discovered evidence is not cumulative. Cumulative evidence is defined as "supporting the same point as earlier evidence."[13] Black's Law Dictionary describes "cumulative evidence" as "additional or corroborative evidence to the same point. That which goes to prove what has already

[13]The American Heritage Dictionary of the English Language, Fourth Edition.

been established by other evidence."[14] The blood evidence discovered **after** *Siller II* is not at all cumulative to the blood evidence submitted **in** *Siller II.* The blood evidence admitted at trial,[15] at best, established that Smith was at the home of the victim during or immediately subsequent to the beating. That fact is consistent with Smith's testimony. The blood evidence discovered by the Innocence Project[16] establishes that Smith was present during, and in very close proximity to the beating; a fact wholly inconsistent with Smith's testimony, and wholly consistent with the defense theory that Smith alone beat the victim to death. This is not cumulative evidence, it is contradictory evidence.

{¶ 58} The dissent appears to say that since Serowick was vigorously cross-examined at trial and his unreliability argued to the jury, further evidence of his unreliability or false testimony is merely cumulative. But the dissent confuses cross-examination and argument with evidence. "Evidence is all the testimony received from the witnesses *** (and the exhibits during trial) (and facts agreed to by counsel) (and any facts which the court requires you to accept as true)." OJI CR409.01. The evidence does not include *** (opening statements or closing arguments of counsel)." 2 Ohio Jury Instructions (2009), Section 409.03. And of course, it goes without citation, that the questions of counsel are not evidence. The fact that the defense argued to the jury that Serowick was unreliable at trial does not mean that suppressed

---

[14]Black's Law Dictionary (5 Ed.Rev.1979) 343.

[15]Either no blood, or one spot of blood on the back of Smith's trousers.

[16]20 blood spatters on the front of Smith's trousers.

evidence that comes to light at a later time that proves the unreliability or falsity of his testimony was "merely cumulative." Accordingly, we find that the trial court indeed abused its discretion in holding that the newly discovered evidence was "merely cumulative" and hence insufficient to command a new trial.

{¶ 59} Assignment of Error No. IV states that: "The lower court abused its discretion and erred in denying Siller's motion for an evidentiary hearing." In light of our ruling above, this assignment is rendered moot. See App.R. 12(A)(1)(c).

CONCLUSION

{¶ 60} As is obvious, this matter is "fact-driven," and much of the discussion in this matter by both the majority and dissent necessarily concern the facts. In conclusion, we are compelled to briefly respond to two specific factual statements in the dissent. The dissent states that "[t]he record reflects that Siller was at the victim's house on the night of the incident. Campbell testified he admitted this." We find no independent evidence (except this questionable jailhouse confession to a cellmate) that Siller was at the victim's house on the night and at the time in question.

{¶ 61} The dissent also states that "[t]here is also no dispute that Smith was in Siller's and Zimmer's company that night." In fact, there is no independent evidence whatsoever (except, again, the testimony of Smith), that the three were ever in each other's company at any time, let alone the night in question. The only person that says there was more than a nodding acquaintance between Siller and Smith was Smith; and of course, it is Smith's credibility that is at the heart of this case.

{¶ 62} Accordingly, we reverse and remand for new trial in Case No. CR-391411(A), and dismiss as to Case No. CR-361726.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

CHRISTINE T. McMONAGLE, JUDGE

PATRICIA A. BLACKMON, J., CONCURS

KENNETH A. ROCCO, P.J., DISSENTS WITH OPINION

KENNETH A. ROCCO, P.J., DISSENTING:

{¶ 63} I dissent.

{¶ 64} The injustice in these cases is that Siller's co-defendant Smith negotiated a plea to greatly reduced charges and, virtually, a "slap on the wrist" for his participation in crimes that eventually became the brutal murder of Lucy Zolkowski. As the majority opinion points out, although Smith had been charged along with Siller and Zimmer in CR-361726 with attempted aggravated murder, aggravated burglary, kidnapping, felonious assault, and aggravated robbery, he

pleaded guilty to only aggravated robbery, and received a minimum sentence and immunity from further prosecution; the state dismissed all other charges.

{¶ 65} It is difficult to imagine that the bargain would have been made but for the misfeasance of a police serologist who miserably missed detecting Lucy's blood on Smith's pants. This injustice, however, is not corrected by granting Siller a new trial he does not deserve in CR-391411, nor can it be. In my view, the trial court did not abuse its discretion in denying Siller's motion for a new trial, because Siller's "newly discovered" evidence does not meet the necessary Crim.R. 33(B)(6) standard for several reasons.

{¶ 66} First, it indicates only that Smith may have had a more significant role in the events of that fatal night than he claimed. This is something that the defense clearly brought out to the jury at Siller's trial.

{¶ 67} Second, the record does not demonstrate the prosecution withheld "exculpatory" evidence. Indeed, the prosecution was surprised by Serowik's breathtaking collapse as a credible witness on cross-examination.

{¶ 68} Third, in the materials Siller submitted to the trial court, one of his own experts indicated that Serowik's testimony did not appear to have been a deliberate attempt to mislead the jury. Therefore, Siller presented no evidence of "perjury." What occurred in the Green case is neither competent evidence nor relevant to this court's review of the trial court's decision on Siller's Crim.R. 33 motion.

{¶ 69} Fourth, unlike the cases upon which the majority opinion relies, the "newly discovered" evidence did not enhance Siller's credibility, since he neither testified at trial, nor provided any affidavit of his own in support of his motion. He did, however, provide statements to the police. From these, it is obvious that he had no credibility left to undermine.

{¶ 70} Finally, I dissent because the majority opinion relies mainly upon prosecution arguments presented at Siller's trial as if the jury listened only to the state's view of the case. The record reflects, however, that Siller had first-rate defense attorneys who completely destroyed Serowik as a witness, and who provided the jury with a full understanding of what Smith gained by implicating his co-defendants.

{¶ 71} It is significant to me that the facts that underlie this case have been set forth twice previously. In *State v. Siller* (October 28, 1999), Cuyahoga App. No. 75139 ("*Siller I*"),[17] Siller appealed from the consecutive sentence imposed for his original convictions in CR-361726 for felonious assault, aggravated burglary, aggravated robbery, attempted aggravated murder, and kidnapping.

{¶ 72} Siller thus presented no challenge to his convictions themselves; he made no claim of innocence. In light of the voluminous record on appeal, it

[17]The Ohio Supreme Court subsequently denied Siller's motion for a discretionary appeal in *State v. Siller* (2000), 88 Ohio St.3d 1443, and this court later denied his application to reopen his appeal in CR-361726. *State v. Siller* (October 25, 2000), Cuyahoga App. No. 75139.

remains inexplicable that, although provided opportunities since his first trial, he has never indicated that he was not involved in committing the crimes.

{¶ 73} His original convictions were based upon evidence that he and two co-defendants, Walter Zimmer and Jason Smith, were involved in beating and robbing Zolkowski inside her modest home during the early morning hours of June 3, 1997. Siller claimed in *Siller I* that his sentence for kidnapping should have been merged with the sentences imposed for his other convictions, on the basis that it was an allied offense pursuant to R.C. 2941.25(A). After a review of the evidence presented, his claim was rejected.[18]

{¶ 74} After Zolkowski died from the injuries she received in the incident, Siller and Zimmer were indicted together in CR-391411 and charged with aggravated murder; Siller's indictment in this case is the focus of the instant appeal. As the majority opinion reluctantly concedes, this court lacks jurisdiction to consider his conviction in *Siller I*.

---

[18]Siller later filed an application to reopen his appeal, claiming his appellate counsel provided ineffective assistance for failing to challenge the manifest weight of the evidence presented at trial, in particular, "Smith's credibility." In *State v. Siller* (October 25, 2000), Cuyahoga App. No. 75139, although his claim was barred by the doctrine of res judicata, this court nevertheless addressed his claim on the merits and determined, "[i]n light of the fact that this court rejected essentially the same assignment of error in the direct appeal of [Siller's] codefendant [Zimmer] after their joint trial and conviction of the same five charges, we cannot conclude either that appellate counsel was deficient or that [Siller] was prejudiced by the absence of an assignment of error challenging the credibility of Smith's testimony."

{¶ 75} Siller's case proceeded separately to a jury trial. His resulting conviction became the subject of the appeal in *State v. Siller*, Cuyahoga App. No. 80219, 2003-Ohio-1948 ("*Siller II*").[19]

{¶ 76} Obviously, the evidence in *Siller II* dealt in part with the investigation surrounding the discovery of the bloody and insensible victim tied tightly, with pieces torn from her own nightgown, to an armchair in her living room. Her blood spatters defaced the wall around the chair.

{¶ 77} As this court recounted the evidence presented at Siller's second trial, it noted that fingerprints from Siller, Zimmer, and Smith were "lifted" from various places in the victim's home. The victim kept documents that demonstrated Siller and Zimmer often borrowed money from her; the sum totaled over $19,000. Moreover, the detectives interviewed the victim's neighbors and were informed that "Siller and Zimmer had been 'hanging around' the victim's home at odd hours of the night." Id., ¶5.

{¶ 78} When the police interviewed Siller, he stated that he was called to his friend Rose Crowder's home and "saw Zimmer, who was visibly upset.***Zimmer told [Siller] he had found Zolkowski***. Zimmer did not want to call 911 because he had outstanding warrants. Siller also did not want to call 911 because of his own outstanding warrants. After driving Zimmer home, Siller decided to make

[19]The supreme court declined to accept this case for review; see *State v. Siller*, 99 Ohio St.3d 1545, 2003-Ohio-4671. Thus, quotes are taken from this court's opinion.

[an] anonymous 911 call. The police were suspicious of Siller's statement because he told them he was at Crowder's house sometime after midnight and before 3:00 a.m. The 911 call [, however,] was not placed until 3:49 a.m. The statement also was suspicious because, although Zimmer gave a similar statement to police, he contended he was with Siller until about midnight. Siller was brought back for further questioning about his inconsistent statements, to which he floundered, attempting to reconcile the differences." Id., ¶6. (Emphasis added.)

{¶ 79} The jury in Siller's trial, therefore, knew not only the foregoing, but also knew that "Smith***agreed to testify in exchange for a***three-year sentence." Id., ¶9.

{¶ 80} Smith testified that he supplied drugs to Siller and Zimmer, and that, as they had on previous occasions, on the evening of June 3, 1997, Siller and Zimmer obtained money from Zolkowski to buy the drugs from him. Id., ¶¶7-8. After smoking the crack cocaine, they "went back to Zolkowski's home to obtain more money."

{¶ 81} According to Smith, he "observed the men go to the back door, instead of the front door as they usually did. After waiting in the car for about forty minutes, Smith became anxious and went into the house. Upon entering the home, he observed Siller ransacking the drawers in the bedroom. Smith took a stack of blank personal checks from the dresser. He then walked to the front room, where he saw Zimmer standing over Zolkowski, who was tied to a chair.

Smith said Zimmer was slapping her and asking her where the money was***. Smith***placed the checks on the dining room table, and left ***." Id., ¶8. (Emphasis added.)

{¶ 82} In recounting the facts of *Siller II*, the majority opinion in this case acknowledges that Smith's was not the only testimony that proved Siller and Zimmer went into Zolkowski's house that night The jury additionally heard from Thomas Campbell, who shared a cell with Siller while he was at the county jail "between July and November 2000."

{¶ 83} Campbell testified that "Siller told him that it was Zimmer and Smith who first went into Zolkowski's house and that when Siller came in and saw Zolkowski tied and gagged in a chair, he told her to tell them where the money was or they would kill her. Siller and Zimmer then beat and cut Zolkowski***. According to Campbell, Siller told him that at one point, he held Zolkowski's head up while Zimmer beat her. Campbell admitted that in exchange for his testimony, the State agreed to appear on his behalf at his sentencing to inform the court of his cooperation." Id., ¶10.

{¶ 84} The majority opinion in this case attaches a great deal of significance to the fact that the state additionally presented during its case-in-chief the testimony of police department serologist Joseph Serowik. Oddly, if this testimony were so significant, the *Siller II* opinion does not mention it at all. Serowik testified he examined the pants Smith had been wearing on the night of

the incident and had found only a single spot of blood that proved to be Smith's own.

{¶ 85} As the majority opinion indicates, through this testimony, the state sought to establish that Smith must have been a mere onlooker, rather than an active participant, during the Zolkowski beating. On cross-examination, however, Serowik admitted that he actually could not recall the details of his tests. Moreover, he admitted his record-keeping seemed imprecise.

{¶ 86} Thus, while Serowik stated that "the fact that an area [on Smith's pants] was "circled suggest[ed]–highly suggest[ed] to [Serowik] that it was" tested, and since no mention of that area was made in his report, the stain must have been "negative" for blood; he was not sure. Serowik eventually acknowledged that he could not tell "exactly what stains [he] looked at and what stains [he] tested." Cross-examination of Serowik became so devastating to his credibility that, in the midst of trial, the court ordered him to conduct new tests of Smith's pants.

{¶ 87} Later, when the prosecution recalled Serowik to testify, he claimed that in re-testing Smith's pants, he again found only a single additional spot of blood; this time, the spot came from the victim. Serowik seemed positive of his facts on direct examination. However, once again, during cross-examination, Serowik admitted to having made numerous "incorrect assumptions" in his analyses and in his testimony.

{¶ 88} Siller presented his own witnesses in his defense. As this court noted in *Siller II*; "[s]everal inmates testified***that Siller had repeatedly denied having anything to do with the beating and robbing of Zolkowski. Two inmates testified that Smith had boasted that he beat a murder charge by falsely implicating others." Id., ¶12. (Emphasis added.) Siller, himself, however, elected not to testify.

{¶ 89} The record reflects that, during closing argument, the prosecutor urged the jury to convict Siller based, in part, upon Serowik's most recent analysis of the tests he performed on Smith's pants. Nevertheless, defense counsel argued strenuously, and with great persuasiveness, that Serowik's testimony was tainted beyond redemption.

{¶ 90} Defense counsel stated, in pertinent part, as follows:

{¶ 91} "MR. SHAUGHNESSY: Mr. Serowick [sic] came in here on 7-19 and told you that he assumed he tested the left pant leg and it was negative for human blood. And he told you, 'I assumed that from the first time the question was asked.' Matter of factly, he sat up here.

{¶ 92} "Mr. Bombik got up and said, 'Because it's circled, you would have tested it, right?'

{¶ 93} "Sir, I assumed that I tested it. It was negative from the first time that question was asked.

{¶ 94} "Well, he came in about six days later and what does he tell you then? The test was done back in 1997 and it was positive for human blood. You'll have his report. There's absolutely no mention of that. No basis for any independent recollection. Tells you the first time under oath, 'We tested it. It was negative.' Six days later, 'We tested it back in '97 and it was positive. But you know what it was? It was an incorrect assumption. It was an oversight.'

{¶ 95} "Mr. Serowick [sic], did you retest anything else?

{¶ 96} "No.

{¶ 97} "Did you retest the shirt?

{¶ 98} "No. I got that right the first time.

{¶ 99} "Well, we know he didn't get the pants right the first time. And we know he stood in here and looked at you and said, 'I tested it and it was negative.' With nothing different in his report, no other papers, he comes in and tells you, 'Now I remember. I tested it back in '97. It was positive.'

{¶ 100} "But this oversight. This incorrect assumption.

{¶ 101} "Well, do you think maybe you ought to go back and look at the baseball cap or the black pants, or the gray sweatshirt, or the black T-shirt? You want to make sure you don't have any incorrect assumptions for that?

{¶ 102} "And what did he tell you? 'No. I got that right the first time.'

{¶ 103} "As you apply this evidence to the most important of your own affairs, can you rely on that? Can you rely on the tests that were done? We retest one item; we get a whole different answer. We retest any other items? No.

{¶ 104} "Now [Smith] has to work his story around a little bit. Now all of a sudden we're concerned about how big the dining room table is and how can we put [Smith] over there just a little bit closer. And we know this caused [Smith] some concern, too, because he went up and was talking about it in the pod with Kenny Mullins. And what did he say? 'They were going to pull my deal but that blood doesn't matter. I beat a murder.'

{¶ 105} "'They were going to pull my deal.' You saw his lawyer come in here and sit in the back of the courtroom, protect his deal. 'They found that spot of blood in the middle of the trial and they were going to pull my deal. But I got out of it.'

{¶ 106} "We don't know how much of Lucy's blood is on those shirts. We don't know if those are T-shirts he wore. We don't know how much blood would be on them. Officer Mendat said 'I've seen it both ways. You might expect to see a lot of blood. You might not see any blood.'

{¶ 107} "The State's asking you to rely on those tests, done by the Cleveland Police Department Scientific Investigation Unit, and you watched it all here in the courtroom. You watched him say, 'I did it. It was negative.' And you watched him come back and say, 'It was an oversight. But we didn't bother to

recheck or retest anything else. We're pretty sure that's the only oversight we got in this case.'"

{¶ 108} In challenging his ultimate convictions in *Siller II*, Siller presented eleven assignments of error; among them was the argument "that his conviction as a principal offender was against the manifest weight of the evidence because Campbell was not a credible witness." Id., ¶53. (Emphasis added.) Thus, Siller did not think it necessary to challenge either Serowik's or Smith's credibility, both of which had been tested and undermined at trial.

{¶ 109} In considering his argument, this court noted that the jury heard Campbell's testimony that "Siller told him that initially Smith and Zimmer were sent in to tie up Zolkowski and rob her. Siller went into the house after***[a] length of time***. When Siller entered the house, he saw Zolkowski bound to the chair***." Id., ¶56. (Emphasis added.) The jury also heard witnesses who testified "Siller denied participating in the criminal acts." Under the circumstances, the jury acted within its prerogative to determine the witnesses' credibility. Id., ¶57. Siller's conviction for aggravated murder was affirmed.

{¶ 110} On January 26, 2007, Siller filed a motion in both *Siller I* and *Siller II*, seeking leave to file, pursuant to Crim.R. 33, a motion for a new trial. Siller claimed he had "newly discovered evidence" that established his "conviction was based on the perjured testimony of the State's two key witnesses-[Cleveland

Police Department serologist] Joseph Serowik and Jason Smith." (Emphasis added.)

{¶ 111} Siller attached to his motion several exhibits, including copies of reports issued by "Forensic Science Associates ('FSA') of Richmond, California," which had performed DNA tests on several areas of the pants Smith wore on the night of the incident. Siller claimed that a new trial was warranted because, while at his first trial "Joseph Serowik testified that none of the victim's blood was on Smith's pants," and at the second trial had been forced in the middle of the proceedings to reevaluate his testimony and then "claimed to find only a single drop of the victim's blood on the front," FSA's retesting indicated "seven additional spatters of the victim's blood [were found] on Jason Smith's pants." (Emphasis added.)

{¶ 112} Siller argued he was prevented from discovering this new evidence in a timely manner since he "was not aware that state agent Joseph Serowik had perjured himself with regard to his analysis of the stains on Jason Smith's pants.***Siller proceeded on the reasonable belief that Serowik had***testified truthfully." Siller pointed out that constitutional rights are violated "when the State relies on perjured testimony to secure a conviction." (Emphasis added.) Siller subsequently supplemented his motion with an additional affidavit to support it "pursuant to Crim.R. 33[A](3) and (6) and the Due Process Clause[s] of the Ohio and United States Constitution[s]." (Emphasis

added.) Siller did not present his own affidavit, claiming innocence. Rather, Edward Blake, FSA forensic serologist, stated therein that he found a "significant number of blood spatter stains on the front and back of Jason Smith's pants," and that "a conscientious and experienced forensic scientist" could not have failed to observe and test the stains. Siller argued that his conclusion casts doubt on Smith's testimony that indicated "his presence [at the scene of the crime] was fleeting and not that of an active participant."

{¶ 113} The state filed a brief in response, conceding that a "claim based on new DNA evidence meets the standard to file a delayed" new trial motion. However, the state contended that the "facts behind [Siller's] perjury claim have existed, without change, since the conclusion of [his] second trial in [the year] 2000***"; thus, the trial court should deny Siller's request for leave.

{¶ 114} Siller filed a lengthy reply brief, to which he attached another affidavit. Therein, Timothy Palmbach, a forensic scientist, averred that, after reviewing the available materials, including photographs of Jason Smith's pants, he could state to a reasonable degree of scientific certainty that the size and distribution of the blood droplets on Smith's pants were consistent with him "having stood near a source of impacted blood" and "having been in the same room with the victim at the time of the beating" rather than in another room.

{¶ 115} Siller argued that, without Serowik's "false testimony" to support it, the jury would not have believed Smith's version of the incident. Siller

further accused the prosecution of having "withheld evidence" that was "vital to the defense," in that Serowik failed to disclose that he had not performed the thorough analysis of Smith's pants that he claimed. Nevertheless, Siller continued to base his motion on Crim.R. 33(A)(6).

{¶ 116} On December 6, 2007, the trial court issued an opinion and order in *Siller II* denying Siller's motion for a new trial. The trial court held that Siller failed to meet the requirements necessary under Crim.R. 33(A)(6). The court stated, in relevant part, that Siller's new evidence did not exclude him as a perpetrator, and that one of Siller's own experts concluded that Serowik's testimony did not appear to have been a deliberate attempt to mislead the jury.[20]

{¶ 117} Since the trial court never ruled upon his motion in *Siller I*, this court lacks jurisdiction to entertain his appeal in that case. In my view, it is thus improper for this court to render any opinion on the merits of that case.

{¶ 118} Siller argues in this appeal that he met all the requirements for a successful motion for a new trial pursuant to Crim.R. 33(A), therefore, the trial court abused its discretion in denying his motion. I find no merit to his argument.

{¶ 119} It is clear from the record that in the lower court Siller relied only upon subsection (A)(6) in seeking a new trial. In this appeal, however, he raises a claim based specifically upon Crim.R. 33(A)(2) for the first time. It is

[20]This conclusion was contained on page 17 of "Exhibit B" attached to Siller's January 26, 2007 motion for leave to file a motion for a new trial.

axiomatic that arguments which are not raised in the trial court are waived for purposes of appeal. *State v. Williams* (1977), 55 Ohio St.2d 112.

{¶ 120} Moreover, although he did not cite Crim.R. 33(A)(2), Siller argued numerous times in his briefs in support of his motion that Serowik and Smith perjured themselves. His assertion in his first assignment of error, viz., that the trial court incorrectly used an analysis based upon a claim of perjury, thus constitutes "invited error," which should not be credited. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶86.

{¶ 121} In addition, Crim.R. 33 motions for a new trial are not to be granted lightly. *Toledo v. Stuart* (1983), 11 Ohio App.3d 292. Thus, it is well settled that the denial of a motion for a new trial on the grounds of newly discovered evidence is within the sound discretion of the trial court and may be reversed only where there has been a "gross abuse" of that discretion. *State v. Williams* (1975), 43 Ohio St.2d 88, paragraph two of the syllabus; *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶85; *Toledo v. Stuart*, supra; see also, *State v. Blalock*, Cuyahoga App. Nos. 82080 and 82081, 2003-Ohio-3026. "The decision of whether a hearing is warranted upon such a motion also lies soundly within the discretion of the trial court." *State v. Brewer*, Montgomery App. No. 20051, 2004-Ohio-6873, ¶6; *Blalock*, supra.

{¶ 122} There are, in essence, three prerequisites for a successful Crim.R. 33(A)(6) motion for a new trial. See *State v. Shepard* (1983), 13 Ohio

App.3d 117. First, a new trial may be granted on the grounds of newly discovered evidence only if the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial. Id. Second, the evidence must be truly new, not cumulative, and cannot be used merely to impeach or contradict prior evidence. *State v. Petro* (1947), 148 Ohio St. 505. Finally, the evidence must disclose a "reasonable probability" that it will change the result if a new trial is granted. *State v. Johnston* (1988), 39 Ohio St.3d 48.

{¶ 123} A trial court abuses its discretion in granting a new trial if any of these prerequisites is not satisfied. *State v. Hawkins* (1993), 66 Ohio St.3d 339, 350. Although the majority opinion finds, without specifically stating, that Siller met each prerequisite, I do not agree.

{¶ 124} As to the first prerequisite, the state conceded in the opposition brief it submitted to the lower court that the "new DNA evidence" Siller produced was undiscoverable before trial. A finding that evidence was undiscoverable before trial, however, does not compel a new trial, if the movant has failed to satisfy the remaining requirements. *State v. Elliott*, Hamilton App. No. C-020736, 2003-Ohio-4962, ¶14.

{¶ 125} The record reflects that Siller was at the victim's house on the night of the incident. Campbell testified he admitted this. There is also no dispute that Smith was in Siller's and Zimmer's company that night; thus, the jury was well aware of Smith's presence at the scene, and of the close confines of

Zolkowski's house. This scenario thus differs completely from the one presented in *State v. Johnston*, supra, in which the newly-discovered evidence supported the defendant's claim that he was not involved in the crimes; the new evidence suggested someone else entirely committed the crimes.

{¶ 126} Moreover, in this case, during closing argument, defense counsel forcefully reminded the jury of Serowik's unreliability as a witness, and, too, urged the jury to consider Smith's motives to place the blame for the crimes on Siller. The jury, unfortunately, could do no more. The state already had decided to provide Smith "total immunity for prosecution on the murder" of Zolkowski. This is the injustice that occurred in this case, but it does not constitute grounds to grant Siller's motion pursuant to Crim.R. 33(A)(6).

{¶ 127} In my view, the trial court correctly concluded that evidence that several of the victim's blood spatters appear on the front and back of Smith's pants, rather than only one on the front, is cumulative in nature. *State v. Campbell*, Hamilton App. No. C-030377, 2003-Ohio-3201; cf., *State v. Hairston*, Franklin App. No. 94APA02-205. The fact that more blood spatters existed only contradicts an assertion made by Serowik, whose credibility as a witness was undermined at trial. This fact is not, in itself, significant in light of the other circumstances of this case.

{¶ 128} Serowik was only one of many witnesses presented in *Siller II*. The record reflects his testimony was not a linchpin of the state's case, but only a

piece of the entire picture. Moreover, the defense's cross-examination of him was so devastating that it led to a dramatic revelation in the midst of trial, a "Perry Mason moment," which destroyed his credibility and caused the judge to order him to retest the pants.

{¶ 129} Even when the prosecution subsequently recalled Serowik to testify, he remained a witness whose testimony was impaired to the point of being a liability. The jury was aware that Serowik could not be considered "a conscientious *** forensic scientist."

{¶ 130} The jury heard testimony from many witnesses, not only Smith and Serowik, that proved Siller and Zimmer borrowed large amounts of money from Zolkowski, some of which went to Smith for drugs, came and went from her house at will, and that Siller, at the very least, admitted he knew from Zimmer that Zolkowski had been beaten that night. Like Zimmer, Siller had simply left her there.

{¶ 131} In *State v. Burke*, Franklin App. No. 06AP-686, 2007-Ohio-1810, the new forensic evidence entitled the defendant to a new trial because "a reasonable juror could conclude" from it "that defendant testified truthfully in stating [the victim] went over a fence. Such a conclusion, in turn, could lead to further believing not only that [the co-defendant] may have been the only person who inflicted knife wounds to [the victim], but that all the wounds may have been inflicted outside [the victim's] home, in accordance with defendant's testimony."

(Emphasis added.) Burke, who had testified, without corroborating forensic evidence, that only the co-defendant committed the stabbing, thus had substantiated a possibility that at least one juror might "resolve other inconsistencies and credibility issues in favor of defendant."

{¶ 132} This case, on the other hand, differs. Siller never testified to proclaim his innocence. Instead, he exercised his right against self-incrimination. The jury in Siller's case thus was not required to consider Siller's credibility directly. Rather, the jury was presented with additional evidence, i.e., testimony other than Smith's or Serowik's, that established Siller admitted participating in the beating, and Siller could describe the incident. *State v. Elliott*, supra.

{¶ 133} Consequently, even if the jury were presented with evidence that DNA analysis located many more spatters of the victim's blood on Smith's pants, this evidence would not show a "reasonable probability" that Siller's trial on a charge of aggravated murder would have had a different result.

{¶ 134} Siller has never asserted in an affidavit presented to the trial court, as stated in the majority opinion, "consistent with his defense theory [at trial] that Smith alone beat the victim to death." It is one thing to invoke a Fifth Amendment right against self-incrimination at trial. It is quite another completely to fail to provide a personal affidavit in support of one's own motion for a new trial based upon "newly-discovered evidence."

{¶ 135} At best, the record reflects Siller himself has only argued that he was not one of the "principal offenders." Police officers acknowledged during Siller's trial that, even in bloody crimes, sometimes the actual perpetrator's clothing do not have blood spatters, the jury was aware of Smith's motivation to testify for the state, and Serowik's unreliability as a witness had been made obvious. *State v. Campbell*, supra; *State v. Clark* (Nov. 22, 2000), Clark App. No. 17839; cf., *State v. Johnston*, supra; *State v. Burke*, supra. Nothing in the record, in my view, supports a "reasonable probability" of a different result from the verdict rendered in *Siller II*.

{¶ 136} For the foregoing reasons, I do not agree that the trial court abused its discretion in denying Siller's Crim.R. 33(A)(6) motion for a new trial without conducting an oral hearing. *State v. Clark*, supra. I would, accordingly, overrule Siller's assignments of error and affirm the trial court's decision in CR-391411.