Supreme Court of Ohio Clerk of Court - Filed March 21, 2016 - Case No. 2016-0423

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No.
Plaintiff-Appellee,	:	
		Appeal taken from the Hamilton
v.	:	County Court of Appeals
		First Appellate District
JEFFREY A. WOGENSTAHL	:	C.A. Case No. C-140683
Defendant-Appellant.	:	**This is a death penalty case.**

Appellant Jeffrey A. Wogenstahl's Memorandum in Support of Jurisdiction

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TABLE OF CONTENTS

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

Jeffrey Wogenstahl was convicted of Aggravated Murder largely due to the testimony of Federal Bureau of Investigation (FBI) Special Agent Douglas Deedrick. He testified that a hair found in the victim's panties belonged to Jeffrey Wogenstahl. In July of 2013, the FBI publicly conceded for the first time that Agent Deedrick's testimony was inaccurate. There was no scientific basis for his testimony that the hair introduced at Jeffrey Wogenstahl's trial came from, or even likely came from, Jeffrey Wogenstahl. The FBI and the Department of Justice (DOJ) now concede the testimony provided in Wogenstahl's case is scientifically invalid. Exaggerated and unsupported claims made by forensic scientists are a leading cause of wrongful convictions.[1]

This unprecedented acknowledgement by the FBI that the State admitted false forensic testimony in Wogenstahl's case is only the most recent revelation of the constitutional errors that led to his conviction and death sentence.

This Court previously recognized the prosecutor's "closing argument was riddled with improper comments regarding the nature and circumstances of the offense." *State v. Wogenstahl*, 75 Ohio St. 3d 344, 360 (1996). In a concurring opinion, Judge Moore of the Sixth Circuit noted:

> The prosecution withheld *Brady* evidence, seemingly suborned perjury, improperly vouched for the credibility of state witnesses Wheeler and Deedrick, improperly denigrated defense counsel, improperly inflamed the jury with speculative commentary about the victim, improperly confronted and commented personally on petitioner, and improperly observed that the defense had failed to call witnesses.

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[1] *See* INNOCENCE PROJECT, *Unreliable or Improper Forensic Science*, http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science (last visited February29, 2016). *See also Hinton v. Alabama*, 571 U. S. 1081 (2014) ("we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that '[s]erious deficiencies have been found in the forensic evidence used in criminal trials'").

Wogenstahl v. Mitchell, 668 F.3d 307, 344 (6th Cir. 2012) (Moore, J. concurring). And, the First District Court of Appeals acknowledged that "if the accounts contained in the depositions [of the Harrison Police Department Officers] are true, they raise serious questions." *State v. Wogenstahl*, 75 Ohio St.3d 344, 360 (1996).

In addition, pending before this Court are two inter-related, but separate, actions that Wogenstahl has filed in order to vindicate his constitutional rights: Jeffrey Wogenstahl's Motion to Vacate His Execution Date and to Re-open His Direct Appeal as well as a Complaint for Writ of Mandamus. In Wogenstahl's Motion to Vacate, he has argued that the State of Ohio does not have, and never had, subject matter jurisdiction over the homicide in this case. As this Court held previously, pursuant to the prior version of R.C. 2901.11, a trial court does not have jurisdiction over a case in which the defendant is charged with murder unless the murder itself occurred in the State of Ohio. *State v. Yarbrough,* 104 Ohio St.3d 1, 10 (2004). Here, the State's case definitely proves that Amber Garrett was killed and died in Indiana, not Ohio. As the prosecutor argued in closing arguments: "as [the victim] lay on that hillside [where the body was found in Indiana] and that tiny little heart beat its last beat and those little lungs drew that last breath . . . All [the victim] had were the limbs of that juniper tree and the branches of that blackberry bush. . . ." Tr. vol. 19, 2802, March 3, 1993.

In the Complaint for Writ of Mandamus, the Relator, the Office of the Ohio Public Defender (OPD), has asked this Court to issue a writ ordering Respondent Harrison Police Department to immediately provide the police reports and summaries to Relator. The Harrison Police Department, as well as the Hamilton County Prosecutor's office (the same office that suborned perjury and utilized the false and unscientific evidence at issue here in order to convict the Appellant), unjustifiably refused to release the records in question. In a case such as this,

with a history of egregious misconduct and where Wogenstahl is under a sentence of death, public records are of the utmost importance.

This case is the epitome of a miscarriage of justice – complete with perjured testimony, false forensic evidence, and a Prosecutor's office that is still resisting turning over relevant and necessary documents to the defense. The jury's verdicts in both phases have ceased to be a reliable basis for a conviction for aggravated murder, let alone a sentence of death. This Court should grant jurisdiction to hear this case, provide guidance to the lower courts, and remand the case back to the trial court for a new trial.

STATEMENT OF THE CASE

In November of 1991, Amber Garrett went missing from her home. Within hours of her being reported missing, Jeffrey Wogenstahl was taken into custody by the Harrison Police Department. Three days later, Garrett's body was discovered in Indiana. Almost a year later, in September of 1992, Wogenstahl was indicted on charges of aggravated murder, kidnapping, and aggravated burglary in connection with death of Garrett. Five months later, Wogenstahl's trial began. Wogenstahl was ultimately convicted and sentenced to death.

Wogenstahl appealed the judgment of conviction and sentence. The First District Court of Appeals affirmed the judgment of the trial court. *State v. Wogenstahl*, 1st Dist. Hamilton No. C-930222, 1994 Ohio App. LEXIS 5321 (Nov. 30,1994). Wogenstahl, through new counsel, appealed the appellate court's decision on direct appeal affirming the judgment of conviction and sentence. This Court affirmed the judgment and upheld the sentence of death. *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996). However, this Court did agree with Wogenstahl that the state's closing arguments were "riddled with improper comments regarding

the nature and circumstances of the offense as "aggravation" or "aggravating circumstances" and many of them should not have been made to the jury. *Id.* at 360.

The United States Supreme Court denied Wogenstahl's petition for writ of certiorari. *Wogenstahl v. Ohio*, 519 U.S. 895, 117 S. Ct. 240 (1996).

Wogenstahl filed a *pro se* application for reopening pursuant to Ohio R. App. P. 26(B) based on claims of ineffective assistance of appellate counsel in the First District. The court denied the application for reopening on the ground that it was without jurisdiction to consider the petition. *State v. Wogenstahl*, No. C-930222 (Hamilton Ct. App. May 23, 1995). Wogenstahl appealed that denial to the First District, which issued a decision affirming the judgment. *State v. Wogenstahl*, 75 Ohio St.3d 273, 662 N.E.2d 16 (1996).

In 1996, Wogenstahl filed a petition for post-conviction relief supported by affidavits and other documents in the Hamilton County Common Pleas Court. The Court of Common Pleas filed findings of fact and conclusions of law and an entry dismissing the petition.

Wogenstahl timely appealed the dismissal of his post-conviction petition. The First District affirmed the dismissal of the petition for post-conviction relief. *State v. Wogenstahl*, 1st Dist. Hamilton No. C-970238, 1998 Ohio App. LEXIS 2567 (June 12, 1998). Wogenstahl appealed that judgment to this Court, who declined jurisdiction. *State v. Wogenstahl*, 83 Ohio St. 3d 1449, 700 N.E.2d 332 (1998).

In 1999, Wogenstahl filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio, Western Division. During the course of his federal habeas corpus proceedings, Wogenstahl was granted leave to conduct discovery concerning prosecution witness Eric Horn. Wogenstahl obtained records of the Harrison Police Department reporting on the investigation and arrest of Eric Horn in August 1992, for trafficking

in marijuana. Wogenstahl obtained discovery of records of the Hamilton County Court of Common Pleas, Juvenile Division pertaining to Eric Horn's prosecution, in August 1992, for trafficking in marijuana.

Upon conclusion of discovery, the Federal District Court, by order of August 12, 2003, directed Wogenstahl to return to state court to exhaust state court remedies with respect to his newly-pled claims based on newly discovered evidence.

On September 12, 2003, in accordance with the Federal District Court's directive, Wogenstahl filed a motion for new trial (along with a motion for leave to file motion for new trial) in the Hamilton County Court of Common Pleas, which was denied. On appeal, the First District Court of Appeals noted that the depositions raised serious questions but were unwilling to say Wogenstahl's conviction should be overturned. *State v. Wogenstahl*, 970 N.E.2d 447, 455 (Ohio Ct. App. 2004). Wogenstahl's writ for habeas corpus was ultimately denied by the District Court on September 12, 2007, and by the United States Court of Appeals for the Sixth Circuit on February 2, 2012. *Wogenstahl v. Mitchell*, S.D.Ohio No. 1:99-cv-843, 2007 U.S. Dist. LEXIS 67388 (Sept. 12, 2007), *aff'd*, 668 F.3d 307 (6th Cir. 2012). The United States Supreme Court denied Certiorari on October 1, 2012. *Wogenstahl v. Ohio*, 133 S.Ct. 311, 2012 U.S. LEXIS 6487 (2012).

In August of 2013, counsel for Wogenstahl was notified by the Department of Justice that Federal Bureau of Investigation Special Agent Douglas Deedrick testified beyond the bounds of science at Wogenstahl's trial. On January 29, 2014, Wogenstahl filed a motion for leave to file a motion for new trial contemporaneously with his motion for new trial pursuant to Crim.R. 33. Wogenstahl's motion for leave to file a motion for new trial was denied by the trial court on

October 30, 2014. The trial court simply stated, "not to be well taken." Entry, October 30, 2014, attached at A-1.

Wogenstahl timely appealed the trial court's decision to the First District Court of Appeals. On December 23, 2015, the First District Court of Appeals found that the "DOJ's correspondence showed that the newly discovered evidence . . . could not have been discovered within the time prescribed by Crim.R. 33(B)" and found the trial court erred when it denied Wogenstahl leave to file his motion for new trial. *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 35, 2015 Ohio App. LEXIS 5177 (December 23, 2015), attached at A-2. However, the court failed to remand the case back to the trial court because it found Wogenstahl was not prejudiced by the denial for leave because the record did not disclose a strong probability that the new evidence would change the outcome if a new trial were granted. *Id.* at ¶ 36. Wogenstahl filed a motion for reconsideration which was subsequently denied on February 3, 2016. This entry is attached at A-20.

STATEMENT OF THE FACTS

A. Introduction.

At trial, the prosecution presented evidence in an attempt to show that in the early morning hours of November 24, 1991, Wogenstahl kidnapped Amber Garrett from the bedroom of her home, drove her to a remote location in Indiana, and murdered her. The prosecution's theory was that Wogenstahl lured Amber's half-brother, Eric Horn, who was baby-sitting Amber and two other siblings, away from the home and then returned, somehow entered the locked premises, and kidnapped Amber from the same bedroom in which the other two children were sleeping. The prosecution further theorized that after Wogenstahl kidnapped the victim, he

fatally stabbed and beat the victim in the front seat of his car, and left her body in a wooded area off a rural road just across the Ohio border.

B. The hair testimony: the lynchpin of the State's case.

The hair was found under dubious circumstances. William Dean, trace evidence examiner of the Hamilton County Coroner's Office, thoroughly examined, scraped and closely inspected the victim's panties shortly after her body was found Tr. 1177, 1197-99. The coroner's office then gave the underwear to the same small police department that later arrested Horn on drug charges. The Harrison Police Department kept the underwear together with other evidence containing Wogenstahl's hair. Tr. 1202-03, 1811, 1839, 1861. One month before trial, this evidence was sent to the FBI. One week before trial, FBI Trace Evidence Specialist, Agent Deedrick, reported, however improbably, that he found one pubic hair upon a simple visual inspection of the underwear. Tr. 1266-68, 1312, 1807.

Despite the circumstances under which this hair "appeared", the testimony and scientific conclusions of Agent Deedrick became the lynchpin that conclusively connected Wogenstahl to the victim in this case. The testimony of Agent Deedrick was the **only** piece of physical evidence that "within a reasonable degree of scientific certainty" linked Wogenstahl to the crime and supported the State's theory that the offense was sexually motivated. Tr. 1286. And the prosecution knew it, stating in closing the following:

> In fact, during the time that he testified I had to admit **I have never seen a witness with as much expertise in a particular area that is knowledgeable on his subject as Special Agent Deedrick.** Here's a person who runs the most advanced crime lab . . . in the world and teaches forensic technicians how to make comparisons of trace evidence.

Tr. 2456-58 (emphasis added). The State went on to emphasize Agent Deedrick's erroneous conclusions:

> **He has examined four thousand hairs and he has told you that he has never found two known head hairs or two known pubic hairs that you could not distinguish and you could not say this goes to that person and that goes to that person. And he said that is Wogenstahl's hair.**

Tr. 2456-58 (emphasis added).

C. Eric Horn's testimony: a lie.

The State's case also featured the theory that Wogenstahl lured Eric Horn away from the house under the false pretense that his mother needed him for an unexplained reason at a friend's house. The State attacked Wogenstahl's explanation that he went to the residence to purchase marijuana, and that, while there, Horn asked him to give him a ride so he could deliver marijuana to his mother. In closing argument, the State ridiculed Wogenstahl's explanation, claiming there was absolutely no other evidence that even tended to corroborate Wogenstahl's testimony that Horn used, much less dealt, marijuana. Tr. 2290.

In truth, before Wogenstahl went to trial, the same police officers investigating Amber's death arrested Horn for trafficking in marijuana, and the same prosecutor's office prosecuted Horn for drug offenses. *State v. Wogenstahl*, 970 N.E.2d 447, 451 (Ohio Ct. App. 2004). But the State never disclosed this favorable evidence to Wogenstahl, evidence that would have attacked Horn's credibility and corroborated Wogenstahl's testimony.

D. Trace evidence search of Wogenstahl's car and possessions: a forensic case that does not make sense.

The State additionally claimed its agents thoroughly searched Wogenstahl's car and possessions taken from his residence shortly after Amber's body was discovered. The State's search came up with extremely minimal results.

Although the State contended that Wogenstahl had transported the victim in his vehicle and stabbed her in the front, passenger seat (Tr. 2597), no blood or trace evidence was found in

that area of the car. Technicians said they found a minute speck of blood on the inside of the door handle on the left rear door. That speck was subjected to blood type testing (Tr. 2045-64, 2597), which, according to testimony from technician Brian Wraxall, yielded a finding that it was consistent with Amber's blood, as well as the blood found in 5.3 per cent of the Caucasian population. Tr. 2073-74.

The State presented no other evidence of blood, taken from either Wogenstahl's vehicle, his clothing, or any of his possessions seized from his apartment, that could be shown to be consistent with the blood of Amber Garrett.

The State's evidence technician testified that a semen stain detected on a comforter taken off Amber's bed was subjected to blood protein tests that indicated Wogenstahl could not be excluded as a contributor; and that a DNA test had been conducted on that stain. Defense counsel moved to admit the DNA lab report (without calling a witness from the lab) during mitigation, but the court refused to admit the report. Tr. 2087, 2104, 2398-99.

The State's trace evidence specialist found no fingerprints, hairs or fibers linking the victim to Wogenstahl's car, his clothing, his boots, or his bed sheets. Tr. 1194-95, 1210-25, 1799. The only evidence presented from these items regarded speculation about some plant material found in the jacket, gym shoes, and a bed sheet, which the State argued circumstantially linked Wogenstahl to the scene where Amber's body was found. Similarly, items taken from the victim's bedroom, including a comforter, bed sheet, and pillow cases, were examined for hair or other trace evidence of the Wogenstahl. Tr. 1213-16. Again, no trace evidence linking Wogenstahl to Amber Garrett was found for presentation to the jury. Tr. 1216.

The State theorized that the victim's blunt force injuries had been administered by a jack handle claimed to be missing from Wogenstahl's car. Tr. 1780; 1408. However, "consistent

with" simply means that the object could have caused the injuries along with likely hundreds or thousands of other everyday items. Further, despite a K-9 search no jack handle was ever found. Tr. 2013.

E. Identification Testimony: wildly inaccurate and highly suspect.

The State presented witnesses to place someone apparently matching Wogenstahl's description at sites relevant to the crime. Vicki Mozena, an employee of a United Dairy Farm convenience store thought she fleetingly saw – in the dark, from a distance, and with obstructions in her line of sight – a moving car – a car similar to Wogenstahl's – driving by the store with silhouettes of what looked to be a man and a young girl. Tr. 1444, 1465, 1467-68, 1479-81. Mozena said the man from the same car came into the store later that night, and that later still she saw a car similar to Wogenstahl's at the car wash across the street. Tr. 1446-50, 1454.

The prosecution called four other witnesses trying to place Wogenstahl on the side of Jamison Road on the night of the disappearance, near the woods where the victim's body was later found. One said he saw a car from the rear that looked like the back of Wogenstahl's car. Tr. 1549. Another said he saw, from a distance of 1,000 feet, a car pull away from a spot close to where the body was found. Tr. 1660. Two other witnesses testified they saw Wogenstahl on the roadside near where the body was found. However, one of the witnesses, who had been drinking, gave a description (glasses, height, weight and facial hair) that did not match Wogenstahl's description. Tr. 1529-33. The other thought she saw Wogenstahl driving away from the scene, but her identification did not come until more than a year after she had been unable to identify Wogenstahl in a photo array, and only after she saw Wogenstahl's face on television. Tr. 1566-69, 1588, 1592.

F. Bruce Wheeler Testimony: a snitch's story that does not add up.

Finally, Bruce Wheeler, an inmate at the Hamilton County jail testified that Wogenstahl confessed to him. Tr. 2141-46. Wheeler's already dubious testimony has been further discredited by the FBI's admission that the hair comparison testimony was invalid.

G. The case against Wogenstahl: circumstantial facts that no longer hold water.

The evidence used to convict Wogenstahl was weak at trial and continues to grow weaker as additional facts have come to light. *See* Proposition of Law II and III, *infra.*

ARGUMENT

PROPOSITION OF LAW I

When a defendant moves the court for a new trial pursuant to Crim.R. 33 based upon newly discovered, exculpatory evidence that was previously suppressed by the State, the court must apply the *Brady*, not the *Petro*, standard when assessing the significance of the evidence.

A. Introduction.

The First District Court of Appeals applied the wrong standard in assessing the significance of the newly discovered evidence. Instead of applying the new trial motion standard found in Crim.R. 33 and as explained by this Court in *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), both this Court as well as the United States Supreme Court have found that a lower standard – the materiality standard found in *Brady v. Maryland*, 373 U.S. 83 (1963) – must be utilized in cases where the State suppressed the newly discovered evidence. That is the case here. Thus, Wogenstahl merely needed to show that the evidence is material. *See State v. Johnston*, 39 Ohio St. 3d 48, 60, 529 N.E.2d 898, 911 (1988). The lower court erred in applying a higher standard.

B. The *Brady* standard applies when the State suppresses evidence favorable to the defendant.

This Court has delineated the standard for granting a new trial based on newly discovered evidence in *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947). This Court reiterated that standard in *State v. Hawkins*, 66 Ohio St. 3d 339, 612 N.E.2d 1227 (1993):

> To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

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

However, in cases where the State suppresses evidence favorable to the defense, this Court has held that a different standard applies: "the usual standards for new trial are not controlling because the fact that such evidence was available to the prosecution and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." *Johnston*, 39 Ohio St. 3d at 60, 529 N.E.2d at 911. As such, Wogenstahl "[did] not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal, the standard generally used to evaluate motions filed under Crim.R. 33." *Id. See also United States v. Agurs*, 427 U.S. 97, 111 (1976) ("If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.") Instead, Wogenstahl merely needed to show that the evidence is material. *Id.* ("[T]he key issue in a case where exculpatory evidence is alleged to have been withheld is whether the evidence is material.")

The evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Johnston*, 39 Ohio St. 3d at 61, 529 N.E.2d at 911 (*citing United States v. Bagley*, 473 U.S. 667, 682 (1984)). A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

C. The *Brady* standard applies to Wogenstahl's case.

The suppression of the fact that Agent Deedrick's testimony was scientifically invalid was a *Brady* violation. Thus, the *Brady* materiality standard should be applied to determine the weight and effect of this now known fact.

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *See Brady*, 373 U.S. at 87. "[T]he *Brady* duty extends to impeachment evidence as well as exculpatory evidence, and *Brady* suppression occurs when the government fails to turn over even evidence that is known only to police investigators and not to the prosecutor." *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (internal citations omitted). While *Brady* most often applies in cases where the prosecutor has suppressed exculpatory material, it remains equally applicable to cases where the State has relied upon perjured testimony. *See United States v. Agurs*, 427 U.S. 97, 103 (1976).

Brady is further applicable to state actors other than prosecutors, such as police officers and State forensic scientists. *See, e.g. Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir. 2001) (it was clearly established as of 1979 that police could not withhold from prosecutors exculpatory information such as the fact that defendant's fingerprints did not match those found at crime scene); *Charles v. City of Boston*, 365 F. Supp. 2d 82, 89 (D. Mass. 2005) ("Bogdan, an experienced crime lab technician, must have known of his legal obligation to disclose

exculpatory evidence to the prosecutors, their obligation to pass it along to the defense, and his obligation not to cover up a *Brady* violation by perjuring himself."). Collectively, these cases reflect a judicial knowledge that false testimony offered by the State has the potential to cause great prejudice to the accused and corrupts "truth seeking function of the trial process." *Agurs*, 427 U.S. at 104.

In relation to Wogenstahl's case specifically, it is clear that the *Brady* standard should have been applied by the lower court in assessing this evidence. First, the fact that the hair comparison testimony admitted at trial against Wogenstahl was patently false and scientifically invalid is clearly favorable to Wogenstahl. Agent Deedrick's testimony and report were unreliable and false, per the government's own admission. And, the State either was, or reasonably should have been, aware that this testimony was false, even at the time of trial. Indeed, Agent Deedrick stretched his claimed "scientific testimony" so far – as now revealed by the Department of Justice – that there can be little if any doubt he knowingly offered this scientifically invalid testimony to help convict Wogenstahl versus to provide neutral scientific testimony. *Giglio*, 405 U.S. at 154 (finding due process violation where prosecutor did not know state witness was lying and perjury undermined the witness' credibility).

Second, it is also clear that the evidence in question was not made available to Wogenstahl at trial. There is no dispute that Wogenstahl did not receive the information regarding Agent Deedrick's false testimony prior to during, or after trial. Wogenstahl also could not have uncovered this evidence on his own through diligence because it was in the sole possession of the government. In fact, the lower court found this to be true. *See State v. Wogenstahl*, 2015 Ohio 5346, ¶ 35, 2015 Ohio App. LEXIS 5177 (December 23, 2015).

Thus, the only real consideration in this case was whether this new evidence was material to Wogenstahl's case. The answer to this question is a resounding "yes." *See* Proposition of Law II.

D. The Court below applied the wrong standard.

The First District Court of Appeals incorrectly applied the *Petro* standard in determining the significance of the invalid hair evidence admitted at Wogenstahl's trial. That court specifically found:

> A Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence may be granted only if that 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. Wogenstahl, 2015 Ohio 5346, ¶ 37, 2015 Ohio App. LEXIS 5177 (December 23, 2015), *citing State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), (syllabus).

Based on the lower court's application of the wrong standard, it then found that "the record [did] not disclose a strong probability that the newly discovered evidence would change the outcome if a new trial were granted." *State v. Wogenstahl*, 2015 Ohio 5346 ¶ 36 (Ct. App.). This was error. Application of this higher standard is contradictory to precedent established by the United States Supreme Court in *Brady* and *Kyles*. Application of this higher standard also denied Wogenstahl a fair trial and due process of law. *See* U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

E. Conclusion.

This Court should accept jurisdiction and remand this case to the Court of Appeals to permit it, in the first instance, to apply the correct standard – the *Brady* materiality standard – in

assessing the significance of this scientifically invalid evidence in the context of Wogenstahl's case.

PROPOSITION OF LAW II

A capital appellant must be granted a new trial when it has been conclusively determined that the State admitted false forensic testimony at his trial, and this testimony materially infected the conviction.

A. Introduction.

The First District Court of Appeals undermined the importance of the false hair testimony to the prosecution's case when it found that "Deedrick's testimony and report concerning the hair evidence [cannot] be said to have been the lynchpin to the state's case." *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 38, 2015 Ohio App. LEXIS 5177 (December 23, 2015) (internal quotations omitted). Yet, this hair comparison testimony was indeed that lynch-pin, since it was the sole direct evidence that connected Wogenstahl to the victim in this case. Challenging Agent Deedrick's testimony at trial was also practically impossible at trial, particularly since the State relied so heavily on this evidence, as well as Agent Deedrick's qualifications, in its closing argument. Standing alone, and within the context of his case, Wogenstahl deserves a new trial based upon this piece of newly discovered *Brady* evidence. This Court should accept jurisdiction and remand this case for a new trial.

B. The appellate court erred in finding that the DOJ did not conclude that the scientific analysis as testified to by Agent Deedrick was invalid and not based on scientific principles.

The appellate court stated that the DOJ's letter "expressly disclaimed any intention to review the science underlying microscopic hair comparison analysis." *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 33, 2015 Ohio App. LEXIS 5177 (December 23, 2015). In relying on this so-called "limitations language", the lower court seemingly brushed aside the grievous errors in this case.

But, contrary to that finding by the lower court, the DOJ's letter expressly declared that Agent Deedrick's testimony was invalid and not based on scientific principles. This is a finding that should not be similarly ignored by this Court.

The DOJ's report, dated June 19, 2013, entitled *Microscopic Hair Comparison Analysis Result Of Review* [hereinafter MHCARR] concluded that there were three types of errors committed at Wogenstahl's trial:

> **Error Type 1:** The examiner stated or implied that the evidentiary hair could be associated with a specific individual to the exclusion of all others. **This type of testimony exceeds the limits of the science.**
>
> **Error Type 2**: The examiner assigned to the positive association a statistical weight or probability or provided a likelihood that the questioned hair originated from a particular source, or an opinion as to the likelihood or rareness of the positive association that could lead the jury to believe that valid statistical weight can be assigned to a microscopic hair association. **This type of testimony exceeds the limits of the science.**
>
> **Error Type 3**: The examiner cites the number of cases or hair analyses worked in the lab and the number of samples from different individuals that could not be distinguished from one another as a predictive value to bolster the conclusion that a hair belongs to a specific individual. **This type of testimony exceeds the limits of the science.**

Exhibit to Motion A, p. 1 of MHCARR (emphasis added).

In its letter, the FBI essentially explained the significant limitations of the field of hair microscopy – limitations that severely weaken the probative value of the evidence, but more importantly found that the testimony of Agent Deedrick was not supported by the applicable science. As explained in the MHCARR, an examiner can conclude that an individual contributor is included as the possible source of a hair in a pool of people of unknown size. The examiner can also exclude an individual as a contributor. However, an examiner cannot declare that a certain hair belongs to a certain individual. Yet, this is exactly what the agent testified to in Wogenstahl's case. This was scientific error. Therefore, the FBI did, as Wogenstahl asserts and

contrary to the finding of the lower court, conclude that the scientific analysis as testified to by Agent Deedrick was inaccurate and unreliable because it was not based on scientific principles.

C. The admission of false forensic testimony is uniquely prejudicial, and prejudiced Wogenstahl in this case.

The testimony provided in Wogenstahl's case was not only scientifically invalid but highly prejudicial. False testimony by scientific experts is uniquely prejudicial because, as stated in *Daubert v. Merrell Dow Pharmaceutical*, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." 209 U.S. 579, 595 (1993). Jurors may assign talismanic significance to expert testimony. Courts must take care to weigh the value of such evidence against its potential to mislead or confuse the jury. Expert opinions that claim a scientific basis are apt to carry undue weight with the trier of fact. *United States v. Frazier*, 387 F.3d 1244, 1263 (11th Cir. 2004); *United States v. Baller*, 519 F.2d 463, 466 (4th Cir. 1975). This is especially true in Wogenstahl's case where the state's expert was a Special Agent with Federal Bureau of Investigation. Relief is warranted when the undisclosed favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). There can be no confidence in the integrity of the verdict against Wogenstahl.

1. Agent Deedrick's testimony was faulty and prejudiced Wogenstahl.

The testimony of Agent Deedrick encompassed all three error types the FBI has now identified and admitted constitute exaggerated conclusions based on invalid science. Agent Deedrick's testimony, coupled with the closing argument of the prosecutor, provides a devastating example of the impact of invalid forensic evidence can have, particularly when the other evidence supporting the conviction is extremely weak and circumstantial.

Much of Agent Deedrick's "expert" testimony indicated that a pubic hair found on the victim's panties could be associated with Wogenstahl to the exclusion of all others:

Q: Tell the jurors, in your opinion, sir, to a reasonable degree of scientific certainty, where did that hair on the panties come from?
A: It's reasonable for me to believe the hair did come from Jeffrey Wogenstahl. I cannot say positively.
Q; You can't eliminate the possibility that it came from some other individual on the face of the earth?
A: Without comparing them all, no, I can't.

Tr. 1286. This testimony was highly prejudicial in that the hair was the single most damning piece of physical evidence presented by the State at trial. Agent Deedrick went on to inaccurately testify that he could assign a positive association, a statistical weight, or probability that that hair originated from a particular source and provided an opinion as to the likelihood or rareness of the positive association that led the jury to believe a valid statistical weight could be assigned to the hair association:

Q: Mr. Deedrick, the prosecutor asked you some degree of medical certainty that you had an opinion or whatever that that was his hair. What was that?
A: Reasonable degree of scientific certainty.
Q: What does that mean, and tell these ladies and gentleman of the jury and tell me because we're no engineers or whatever, what that means?
A: Well, scientific certainty is based upon experience of an individual, abilities of a person to discriminate one sample to the next. It's not absolute. Most of these are not absolute associations. It falls back to reasonableness. Is it reasonable based upon the experience what has been seen and what is visible that the two items are alike or they are different.

Tr. 1290-91. Finally, Agent Deedrick bolstered his "expertise" by citing the number of cases he had worked in the lab and the number of samples from different individuals, not the defendant, that could not be distinguished from one another as a predictive value to bolster his conclusion that the hair belonged to Wogenstahl:

Q: What if you have two in there, I mean you're playing the odds; isn't that right?

A: In case work you examine sample versus sample and many of the cases don't involve more than two or three known samples. It's not possible to take a hair from the very first case number one that I have worked and then save it and compare it with case number four thousand and you see if it is like it or not.

But I have had a number of cases over the years where I have had more than a hundred samples and was able to eliminate all but one many times. I have never found yet in case work where you could not distinguish between two known samples. That is the basis of the whole thing. If you look at one person's hair and look at another person's hair, if they look the same what is the sense of doing a hair exam. What I find is they are different and that's why I think you could do that.

Tr. 1297. All of this testimony is, by the government's own admission, improper and exceeded the limits of the relevant science.

There is simply no currently accepted scientific basis to make the claims Agent Deedrick made in Wogenstahl's trial. Agent Deedrick's testimony demonstrates the exact testimonial errors that have now been discredited and renounced by the FBI.

2. The State's misuse of Agent Deedrick's testimony in closing argument compounded the prejudice in this case.

The State compounded the impact of Deedrick's invalid testimony by vouching for him in closing argument:

> In fact, during the time that he testified I had to admit **I have never seen a witness with as much expertise in a particular area that is knowledgeable on his subject as Special Agent Deedrick.** Here's a person who runs the most advanced crime lab . . . in the world and teaches forensic technicians how to make comparisons of trace evidence.

Tr. 2456-58 (emphasis added). The State went on to emphasize Agent Deedrick's erroneous conclusions:

> **He has examined four thousand hairs and he has told you that he has never found two known head hairs or two known pubic hairs that you could not distinguish and you could not say this goes to that person and that goes to that person. And he said that is Wogenstahl's hair.**

Tr. 2456-58 (emphasis added). The State's vouching and restatement of Agent Deedrick's invalid testimony surely compounded the harm to Wogenstahl. The message to the jury was clear – Agent Deedrick's testimony that Wogenstahl's pubic hair was found in the victim's panties was incontrovertible proof beyond a reasonable doubt of his guilt.

Further, the hair evidence cannot be parsed as suggested by the Court of Appeals. The testimony concerning the hair evidence was particularly misleading and damning in Wogenstahl's case and its implications infected the rest of the trial.

The Agent's testimony featured prominently into the prosecution's attack on Wogenstahl's credibility on cross examination at trial:

Q: Do you want to tell the jury how your pubic hair got in her underwear?
A: It is not my pubic hair. That is all I can say.
Q: Were you here when Special Agent Deedrick testified to that hair?
A: Yes, sir, I was.
Q: Another terrible coincidence or is this FBI agent lying also?
A: I believe that the FBI agent stated that it was similar to mine but he could not positively say it was mine.
Q: To the exclusion of everyone in the world.

***

Q: The FBI agent said to the exclusion of everyone in the world but exhibited every one of the characteristics of your pubic hair and you are telling the jury that was not your pubic hair?

Tr. Trans. 2373-2374. (emphasis added). This impeachment of Wogenstahl looms large in light of the prosecution's concealment of Eric Horn's involvement in drugs and its use of the concealment in closing arguments to further impeach Wogenstahl. Tr. 2433-36; 2587-88.

Finally, the State's theory that this crime was sexually motivated was supported only by Agent Deedrick's testimony and that of jail-house informant Bruce Wheeler. Despite the fact that the coroner testified there was no evidence of sexual abuse, and Wogenstahl was not, in fact,

indicted with any sexually-motivated crime, Wheeler testified Wogenstahl admitted to raping the victim. The only corroborating evidence was the pubic hair found and "matched" by Agent Deedrick. Wheeler's testimony, already highly suspect in context and substance, would have been an unsubstantiated accusation without the hair evidence to corroborate it.

But for the recently revealed new evidence that totally undermines Agent Deedrick's trial testimony, Wogenstahl could have effectively confronted and eviscerated the claimed "hair comparison" false testimony. *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000). And, had Wogenstahl been able to eviscerate this critical piece of evidence in the State's case against him, it would have crumbled the foundation of the State's case against him.

On point is the Sixth Circuit case of *Schledwitz v. United States*, 169 F.3d 1003 (6th Cir. 1999). *Schledwitz* involved an alleged *Brady* violation based on the government's failure to disclose exculpatory information that could have been used to impeach the government's expert witness in a federal prosecution for mail fraud. The Sixth Circuit found reversible error due in large part to the government's failure to disclose information revealing that the expert witness, a retired IRS agent – contrary to his portrayal at trial as being a neutral, detached expert who had only reviewed financial records of the defendant – had been significantly more involved in the criminal investigation of the defendant. *Id.*, at 1015. Here, Agent Deedrick's testimony is even more dubious in the manner in which it came about. Subsequent to the microscopic examination of another expert who found ***no*** hair on the victim's panties, and a week after meeting with the prosecutors (the same prosecutors that undeniably suborned the Horn's perjured testimony), Agent Deedrick miraculously discovered this hair upon a simple, unaided visual inspection of those same panties.

D. The State's case against Wogenstahl is not "overwhelming"; Wogenstahl deserves a new trial.

The First District Court of Appeals ultimately denied relief in this case, not because the Agent's testimony was not scientifically invalid and misleading, but because at in looking at the totality of the evidence against Wogenstahl, it found "other evidence" to be "overwhelming". *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 39-40, 2015 Ohio App. LEXIS 5177 (December 23, 2015). In its denial of relief, the appellate court included a litany of various pieces of evidence that the State presented against Wogenstahl at trial. However, as will be laid out below, each piece of evidence, if it could not be challenged at trial, can now be both contested and disputed. In light of this most recent development (that the lynchpin of the State's case, the forensic hair comparison testimony, was, in fact, both false and misleading) and in combination with other revelations that occurred post-trial, the State's case is but a shell of what it once was. In all, the prosecution's case has been exposed for what it is: false.

Initially, the Court of Appeals pointed to the fact that Wogenstahl was aware that Eric Horn, Peggy Garrett's 16-year-old son who was later caught trafficking drugs, was the only person home with Amber and her younger siblings. *Id.* However, Wogenstahl was not the only person who likely knew this fact. According to Peggy's own testimony, she was out with other people besides Wogenstahl that evening. Tr. 868, 869. Additionally, leaving her son alone with the younger kids was not out of the ordinary for Peggy. Tr. 880, 907.

The Court of Appeals also noted that Wogenstahl "lured Eric from the apartment and stranded him several blocks away". *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 40, 2015 Ohio App. LEXIS 5177 (December 23, 2015). It is true that Wogenstahl first stated to officers that he was playing a joke on Eric. However, when Wogenstahl realized the serious nature of Amber's disappearance, he admitted that he had stopped by the Garrett house to buy marijuana. He

admitted this despite realizing that his parole would be violated and he would go back to prison. Avoiding the truth here would have been natural as his status as a parolee; it is not necessarily indicative of a murderer.

Further, Eric Horn lied under oath at trial about whether he used or dealt drugs. Tr. 92-93. This lie not only bolstered his own testimony, but it greatly diminished Wogenstahl's credibility, because it contradicted Wogenstahl's version of events. Moreover, at its worst, Horn's perjured testimony indicates that Horn (a step-sibling) had something to do with Amber's murder and that he was only too happy to point the police in Wogenstahl's direction. At best, it indicates that Horn believed that Wogenstahl killed his sister, and he wanted to make sure Wogenstahl was convicted. Either way, any disputes between what Horn testified to versus what Wogenstahl claimed should be resolved in Wogenstahl's favor following the revelation of Horn's prior criminal record for trafficking in drugs, and resultant perjured testimony. In addition, Horn's perjured testimony concerning his drug use begs the question: what else did he lie about? At the very least, Wogenstahl should get a new trial so that a jury can properly evaluate Horn's testimony, free from perjury.

In addition, Wogenstahl did not leave Horn stranded several blocks away. Troy Beard just a few minute walk from the Garrett residence. And, in light of Horn's now proven drug usage and trafficking, Wogenstahl's explanation that Horn wanted to go to Beard's place to take marijuana to his mother, Peggy, makes significantly more sense than it would have to Wogenstahl's jury during his capital trial. Tr. 2290.

The Court of Appeals next pointed to the various eyewitnesses who claimed to have seen Wogenstahl or his car in the early morning hours on the evening Amber disappeared. *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 40, 2015 Ohio App. LEXIS 5177 (December 23, 2015).

However, these eyewitnesses' identifications are unconvincing and should give this Court pause in light of recent developments in, and scholarship concerning, criticisms surrounding the use of eyewitness identification evidence. *See e.g.*, *Identifying the Culprit, Assessing Eyewitness Identification*, The National Academy of Sciences (2014); Adam Benforado, *What the Justice System Gets Wrong About Eyewitness Testimony*, available at http://nymag.com/scienceofus/2015/06/legal-system-doesnt-get-eyewitness-accounts.html# (accessed December 31, 2015).

Vicki Mozena, an employee of a United Dairy Farm ("UDF") convenience store, thought she fleetingly saw – in the dark, from a distance, and with obstructions in her line of sight – a moving car – a car similar to Wogenstahl's – driving by the store with silhouettes of what looked to be a man and a young girl. Tr. 1444, 1465, 1467-68, 1479-81. Mozena said the same man came into her store later that night, and later still she saw a car similar to Wogenstahl's at the car wash across the street. Tr. 1446-50, 1454. Given the circumstances of her observations (fleeting, at night), the Court should not accept Mozena's identification of Wogenstahl as the man she claimed to be in the car. Moreover, Mozena did not come forward with this information until after Eric Horn and his friends had come into the UDF while Mozena was working and a week after Garrett disappeared. Tr. 1455; 1491.

Four other prosecution witnesses tried to place a car or a man who resembled Wogenstahl on the side of a road, near the woods where Amber's body was found. One said he saw a car from the rear that looked like the back of Wogenstahl's car. Tr. 1549. Another said he saw, from a distance of 1,000 feet, a car pull away from a spot close to where the body was found. Tr. 1660. The testimony of these two witnesses is legally insufficient to conclude anything about whether or not Wogenstahl was present.

Two other witnesses said they saw Wogenstahl on the roadside near where the body was found. One, who had been out drinking, gave a description (glasses, height, weight and facial hair) that did not match Wogenstahl. Tr. 1529-33. At the line-up he gave an unconvincing identification saying the Wogenstahl looked "most" like the man he saw. State's Trial Exhibit 37. The other thought she saw Wogenstahl driving away from the scene. But, more than a year earlier, right after the crime, she could not identify Wogenstahl in a photo array. Her tentative ID came only after she saw Wogenstahl on television. Tr. 1566-69, 1588, 1592.

The lower court next relied on the fact that Wogenstahl's leather jacket was recently washed and that plant material, similar to material found around Amber's body, was found on the jacket to support its conclusion that the evidence against Wogenstahl was "overwhelming." *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 40, 2015 Ohio App. LEXIS 5177 (December 23, 2015). At trial, Wogenstahl explained to police that his jacket had been recently washed because his cat had urinated on it. Tr. 1683, 1764. The prosecution mocked this explanation in closing argument, ridiculing Wogenstahl for this explanation as well as his claims as to Horn's drug use. Yet, in light of the State's use of Horn's perjured testimony as well as the unscientific testimony of Agent Deedrick that is the subject of this current litigation, any credibility determinations should be once again construed in Wogenstahl's favor. At the very least, Wogenstahl is entitled to have a jury – armed with all of the facts about Horn's perjured testimony – make those credibility determinations. Further, as explained at trial, the plant material that was found on Wogenstahl's jacket was commonly found throughout the Midwest, and both Wogenstahl as well as Lynn Courtney testified that they had very recently been hiking in the woods. Tr. 1975-76.

The appellate court also pointed to a speck of blood found in Wogenstahl's car. As the lower Court noted, at trial, this speck of blood could be tied to 5% of the population and did not

definitively tie Amber to Wogenstahl's vehicle. *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 40, 2015 Ohio App. LEXIS 5177 (December 23, 2015). Moreover, that court's review of evidence ignores the undisputed testimony regarding evidence *not* found in Wogenstahl's car – evidence that one would expect to be there if Wogenstahl committed the crime. The prosecution painted a bloody scene at trial where Amber was stabbed and bludgeoned in the front passenger seat of Wogenstahl's vehicle. Yet, even though the State claimed its agents thoroughly searched Wogenstahl's car and possessions, the State came up with virtually nothing. No blood or trace evidence was found in the front area of the car. The State's trace evidence specialist also found no fingerprints, hairs or fibers linking the victim to Wogenstahl's car, clothing, boots, or bed sheets. Tr. 1194-95, 1210-25, 1799. Finally, items from Amber's bedroom, including a comforter, bed sheet, and pillowcases, were examined for biological evidence to place Wogenstahl in the room. Tr. 1213-16. Again, no trace evidence was found linking Wogenstahl to the scene. Tr. 1216. In fact, DNA test results, **not admitted at trial**, excluded Wogenstahl as a contributor to the semen found on the comforter. Tr. 2087, 2104, 2398-99.

Finally, the lower court relied on the testimony of "a fellow justice center inmate" (Wheeler) in concluding its recitation of the "overwhelming" evidence in this case. *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 40, 2015 Ohio App. LEXIS 5177 (December 23, 2015). But Wheeler discredits himself. Despite the fact that the coroner testified there was no evidence of sexual abuse, Wheeler testified that Wogenstahl claimed to have raped Amber before killing her. The only corroborating evidence of a potential sexual assault was the pubic hair, which is again the subject of this litigation, and should be considered highly suspect as evidence of anything in light of the Department of Justice's recent revelations. Wheeler's testimony was highly

suspicious and unreliable in context and substance at trial. In light of the newly discovered evidence, it's merely an unsubstantiated accusation with nothing to corroborate it.

There is not overwhelming evidence in this case. Instead of a mountain of evidence, there is a molehill of circumstantial facts that have been diminished further by the combination of Horn's perjured testimony and the false and unscientific testimony of Agent Deedrick. The hair evidence was a critical piece of evidence, as evidenced through the State's heavy reliance on it in closing argument to Wogenstahl's jury. This testimony can no longer be relied upon to support this conviction. Because Wogenstahl has met the requirements of *Brady*, this Court should accept jurisdiction and reverse and remand this case for a new, fair trial.

D. Conclusion.

By emphasizing this invalid and highly prejudicial testimony, the prosecutors precluded Wogenstahl from having the opportunity to present a complete and meaningful defense, thereby denying him a fair trial, due process of law, and a reliable sentencing determination. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. The case against Wogenstahl has been decimated over the years and is no longer overwhelming, and as such, the motion for new trial should have been granted. In order to correct this constitutional error and to prevent the execution of a man whose conviction was obtained through illegal means, this Court should accept jurisdiction and remand this case to the trial court for a new trial.

PROPOSITION OF LAW III

When highly prejudicial, newly discovered evidence comes to light, pursuant to Crim.R. 33 and *State v. Petro*, relief must be granted when the new evidence discloses a strong probability that it will change the result if a new trial is granted.

Assuming arguendo that this Court does not accept Wogenstahl's Proposition of Law I, and instead finds that the First District Court of Appeals applied the correct standard in assessing

the significance of the hair evidence in the context of Wogenstahl's case, Wogenstahl still succeeds in his claim. Wogenstahl has proven 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." *Hawkins*, 66 Ohio St. 3d at 350, 612 N.E.2d 1235 (internal citation omitted). *See* Proposition of Law II.

First, the pubic hair was the only forensic evidence to conclusively place the Wogenstahl with the victim. In light of the pivotal nature of Agent Deedrick's report and testimony to the theory of the prosecution and the lack of the defense's ability to rebut it, the testimony of Deedrick cannot be held to have not had an effect on the jury's verdict. Likewise, it cannot be said not to have had ***any*** reasonable likelihood that it ***could have*** affected the judgment of the jury.

Second, the new evidence was discovered well after trial; indeed, the new evidence was not discovered until the government disclosed it in August of 2013.

Third, Wogenstahl exercised due diligence. As the court below found, the evidence was simply not available to Wogenstahl until the government disclosed it. *State v. Wogenstahl*, 2015 Ohio 5346, ¶ 35, 2015 Ohio App. LEXIS 5177 (December 23, 2015) (The "DOJ's correspondence showed that the newly discovered evidence . . . could not have been discovered within the time prescribed by Crim.R. 33(B)").

Fourth, Douglas Deedrick's testimony, which admittedly exceeded the bounds of science, was absolutely crucial to the credibility of the prosecution's theory of the case and the underlying facts of the murder, as Wogenstahl has noted previously.

Fifth, Douglas Deedrick's erroneous testimony and report at trial are not cumulative of any other evidence, but, instead, was the only pivotal evidence linking Wogenstahl to the victim and corroborating that a sexual assault had occurred.

Sixth, and finally, this new evidence does not merely impeach or contradict former evidence. This evidence undermines the prosecution's entire case by thoroughly discrediting the testimony of the only expert witness capable of placing Wogenstahl with the victim thus tainting the jury's verdict.

Thus, even assuming the *Petro* standard applies to this case, Wogenstahl has proven that he is entitled to relief. This Court should accept jurisdiction to correct this grievous wrong.

Regardless of which standard applies, Wogenstahl's motion for new trial should have been granted. During Wogenstahl's trial, the State supplied false scientific testimony that materially prejudiced him. As a result, Wogenstahl's capital murder trial was fundamentally unfair. *See* U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. The Court should accept jurisdiction and reverse and remand this case for a new, fair trial.

CONCLUSION

As Justice Moore stated in a concurring opinion in this case:

> The prosecution withheld *Brady* evidence, seemingly suborned perjury, improperly vouched for the credibility of state witnesses Wheeler and Deedrick, improperly denigrated defense counsel, improperly inflamed the jury with speculative commentary about the victim, improperly confronted and commented personally on petitioner, and improperly observed that the defense had failed to call witnesses.

Wogenstahl v. Mitchell, 668 F.3d 307, 344 (6th Cir. 2012) (Moore, J. concurring). With the addition of this unprecedented acknowledgement by the FBI that false forensic testimony was also admitted in Wogenstahl's case, Jeffrey Wogenstahl now moves this Court to accept

jurisdiction to correct the injustices in his case, and to provide guidance to the lower courts. Wogenstahl requests that, after permitting him to pursue discovery and funding for expert witnesses, the trial court be ordered to conduct a new trial pursuant to Ohio Criminal Rule 33; and that this Court grant any further relief to which Wogenstahl might be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Appellant Jeffrey A. Wogenstahl's Memorandum in Support of Jurisdiciton** has been sent by regular U.S. mail to Philip R. Cummings, Assistant Hamilton County Prosecuting Attorney, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 21st day of March, 2016.

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