In the Supreme Court of Ohio

State Of Ohio,	**:**	
Plaintiff-Appellee,	**:**	
	:	**Case No. 2016-0423**
vs.		
	:	**This Is A Capital Case.**
Jeffrey Wogenstahl,	**:**	
Defendant-Appellant.	**:**	

Appellant Jeffrey Wogenstahl's Motion to Remand Case to the Trial Court

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Jeffrey Wogenstahl moves this Court to remand this case to the trial court. Since the filing of his motion for a new trial that is the subject of this appeal, he has obtained additional information which calls into question his convictions and death sentence. The granting of this motion will permit Wogenstahl to combine all of his non-record challenges to his convictions and sentences in a single action and permit the courts to address those challenges in a single appeal as opposed to multiple appeals. Wogenstahl has attached a memorandum of law which he incorporates in this motion.

Respectfully submitted,

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Memorandum in Support

I. Introduction

The present appeal is from a decision of the court of appeals affirming the decision of the trial court order denying Wogenstahl's motion for a new trial. *State v. Wogenstahl,* 1st Dist. No. C-140683, 2015-Ohio-5346. While not granting Wogenstahl relief, the court of appeals held that Wogenstahl's motion for a new trial was timely. *Id.* at ¶ 35 ("The DOJ's correspondence showed that the newly discovered evidence contained in that correspondence could not have been discovered within the time prescribed by *Crim.R. 33(B).* We, therefore, hold that the common pleas court erred in denying Wogenstahl leave to move for a new trial based on that evidence.").

Wogenstahl's motion for a new trial is premised on the Federal Bureau of Investigation's and the United States Department of Justice's concessions that Special Agent Douglas Deedrick's testimony at Wogenstahl's trial was inaccurate. Agent Deedrick testified that a hair found in the victim's panties belonged to Wogenstahl. In their concessions, the Bureau and Department recognized that no scientific basis existed for the Special Agent's conclusion.

Since Wogenstahl's filing of the new trial motion that is the subject of this appeal, Wogenstahl has discovered additional information which further calls into question his convictions and death sentence. All of that information was in actual or constructive possession

of the prosecution at the time of trial and was not provided to trial counsel. Most of this information was not obtained by Wogenstahl until May 3, 2016 when he was able to review and copy what was asserted to be the full and complete Harrison Police Department file on this case. This information included, but was not limited to the following:

- Both the victim's mother, Peggy Garrett's, and brother, Eric Horn's, memories were improperly refreshed via hypnosis by a Patrolman with the Harrison Police Department;

- The victim kept a diary in which she wrote the following concerning her life and her mother: "I hate myself. I hate my life. I hate my classmates. . . . Sometimes I just feel like running away or killing myself. . . . *Just yesterday before I came to school my mom beat me she was punching me in the back. She just would not stop*";

- The police received reports that the victim's mother may have sold the victim to an individual to whom she owed money for drugs;

- The victim's brother had stated that he hoped the victim was dead and lied about his whereabouts on the evening in question;

- Bruce Wheeler, the State's jailhouse informant, lied when he testified that he did not receive any consideration for his testimony against Wogenstahl;

- Wogenstahl drove a brown sedan at the time of the murder. An eyewitness saw a small red vehicle at the time of the victim's disappearance in the immediate area where her body was found;

- The victim's mother frequently held parties at her residence at which illegal drugs where rampant and the mother permitted the male attendees to inappropriately touch the victim;

- In May 1991, the victim had been attacked by a male (Wogenstahl was incarcerated during that time);

- In the summer prior to her death, an adult male stalked the victim including standing outside her bedroom window;

- The victim's mother and brothers were actively involved in the sale and possession of illegal drugs;

- The victim's brother, Justin Horn lied to the police concerning his whereabouts at the time of the victim's disappearance and murder;

- The blood found in Wogenstahl's apartment was consistent with his testimony that the source of the blood was his cat;

- The prosecution proceeded on the theory that Wogenstahl abducted the victim from her bed in the early morning hours. However, the victim was wearing her "church clothes" when her body was found instead of her pajamas;

In his pending memorandum in support of jurisdiction, Wogenstahl raised only the issue of Agent Deedrick's inaccurate and prejudicial testimony concerning the hair found in the victim's panties. While Wogenstahl believes that Agent Deedrick's compromised testimony alone merits the granting of a new trial, the later discovery of the suppressed evidence, identified herein, provides additional support for the conclusion that his conviction was obtained in violation of the federal and state constitutions.

Wogenstahl has another related, but separate case (Case No. 1995-0042) that is proceeding in this Court concurrently with this one. In that case, the State's Appellate Brief, filed on September 20, 2016, alleged various scenarios for how the victim may have been killed in this case by the defendant. The evidence discussed within this pleading, and specifically within Sections VI (C), VIII (C), IX below, directly refutes many of the State's contentions in that brief. Evidence withheld by the prosecution that directly rebuts claims made by the State in closing argument as well as material from additional experts, who should have been retained at the time of trial, are just two examples of such evidence. (*See Id*.)

Wogenstahl intends to file yet another application for a new trial based on the suppressed evidence identified herein. To facilitate the courts' review of that application, the pending issue involving flawed testimony concerning the hair should be combined with the evidence identified

herein. That will permit the courts to have the entirety of Wogenstahl's challenges before them when they assess the cumulative effect of the constitutional errors. The combining of all of Wogenstahl's constitutional challenges will foster judicial economy; the courts will not have to address his claims on a piecemeal basis. For these reasons set forth herein, this Court should remand the instant appeal with instructions to the trial court that it combine the issue raised in this appeal with Wogenstahl's yet to be filed application for a new trial. In the alternative, if this Court is inclined to supplement the record before it with the following evidence in order to consider all of the evidence in the cumulative as part of the instant appeal, Wogenstahl would ask that the Court grant jurisdiction on the underlying appeal and allow briefing to occur so that all issues may be pled together.

II. 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 First District Court of Appeals affirmed his convictions and death sentence. *State v. Wogenstahl*, 1st Dist. Hamilton No. C-930222, 1994 Ohio App. LEXIS 5321 (Nov. 30,1994). This Court also affirmed Wogenstahl's conviction and death sentence. *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996). However, this Court found that the prosecution was guilty of misconduct, but that misconduct did not rise of the level of plain error:

> We agree with appellant that the prosecutor's final closing argument was riddled with improper comments regarding the nature and circumstances of the offense. Repeatedly, the prosecutor referred to the nature and circumstances of the offense as "aggravation" or "aggravating circumstances." Worse yet, the prosecutor stated that such "aggravation" was to be balanced against the evidence presented in mitigation. Such comments do not conform to Ohio's death penalty scheme for the reason stated in our discussion, *supra*.

Id. at 360.

Wogenstahl unsuccessfully sought post-conviction relief. The trial court summarily denied relief. The Court of Appeals affirmed the decision of the trial court in *State v. Wogenstahl*, 1st Dist. No. C-970238, 1998 Ohio App. LEXIS 2567 (June 12, 1998), and this Court declined to exercise its discretionary jurisdiction to hear his appeal. *State v. Wogenstahl*, 83 Ohio St. 3d 1449, 700 N.E.2d 332 (1998).

Wogenstahl pursued federal habeas relief from his convictions and death sentence. The District Court granted Wogenstahl leave to conduct limited discovery involving the victim's brother, Eric Horn. The Court permitted Wogenstahl to: (a) access the portion of the Harrison Police Department's records involving Horn's arrest for trafficking in marijuana and (b) depose the trial prosecutors and investigating officers concerning Horn's perjured trial testimony in which he had denied using and selling marijuana.

After the completion of the limited federal discovery, Wogenstahl returned to state court to exhaust the claims and evidence that he initially identified in the federal discovery. Wogenstahl filed a new trial motion based upon the victim's brother Eric Horn and his perjured testimony, which the trial court denied. The Hamilton County Court of Appeals affirmed the decision of the trial court, *State v. Wogenstahl*, 2nd Dist. No. C-030945, 2004-Ohio-5595, 970

N.E.2d 447. However, the court in its opinion determined that Horn had perjured himself and the prosecution may have suborned that perjury:

> But apparently not everything was revealed during the 1993 trial. Horn apparently perjured himself during his testimony at trial.

Id. at ¶ 13

> The allegations that the prosecutors in this case intentionally withheld information and allowed perjured testimony from Horn at trial are very serious. If proved, the prosecutors' conduct violated the law and ethical rules. And it is something that disciplinary counsel for the Ohio Supreme Court should examine. But because of the standards by which we review his appeal, Wogenstahl has failed to show reversible error.

Id. at ¶ 16

This Court declined to exercise its jurisdiction to hear Wogenstahl's appeal from the decision of the court of appeals. *State v. Wogenstahl*, 105 Ohio St. 3d 1465, 2005-Ohio-1024, 824 N.E.2d 93.

Wogenstahl subsequently returned to federal court. The District Court denied relief. *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); *cert denied, sub nom. Wogenstahl v. Robinson*,__ U.S. __, 133 S.Ct. 311, 184 L. Ed. 2d 185 (2012).

In August of 2013, almost one year after the United States Supreme Court denied Wogenstahl's petition for certiorari, the United States Department of Justice notified Wogenstahl that the Special Agent's testimony (that the hair found in the victim's panties belonged to Wogenstahl) was not supported by the applicable science. (Exhibit A to Motion). Six weeks later, on August 29, 2013, the Department sent a second letter specifically advising:

> We have determined that the microscopic hair comparison analysis testimony or laboratory report presented in this case included

> statements that exceeded the limits of science and were, therefore, invalid . . .

(Exhibit A to Motion).

On January 29, 2014, Wogenstahl, based on the information provided by the FBI and Department of Justice, filed, in the trial court, a motion for leave to file a motion for new trial with a new trial motion attached. The trial court denied the motion for leave to file the new trial motion in a terse five word entry: "not to be well taken." Entry, October 30, 2014. Wogenstahl timely appealed that decision. The First District Court of Appeals found that trial court erred in not granting Wogenstahl leave to file his motion for a new trial *State v. Wogenstahl,* 1st App. Dist. No. C-140683, 2015 Ohio 5346, ¶ 35 (the "DOJ's correspondence showed that the newly discovered evidence . . . could not have been discovered within the time prescribed by Crim.R. 33(B)"). However, the court of appeals denied Wogenstahl relief on the merits of his motion for a new trial. (*Id.* at ¶ 41).

On March 21, 2016, Wogenstahl filed his notice of appeal and memorandum in support with this Court.

Wogenstahl continued to investigate his case while this appeal has been pending. Through this investigation as well as continued litigation in this Court (*see* Case No. 2016-0410, *State of Ohio ex rel. Office of the Ohio Public Defender v. Harrison Police Department and Charles Lindsey*), Wogenstahl discovered additional *Brady* evidence that the prosecutors suppressed.

III. The Prosecution Was Obligated to Disclose Exculpatory Information.

The failure of the government to disclose favorable evidence to an accused in a criminal prosecution violates the Due Process Clause of the Fourteenth Amendment, where the evidence is material either to guilt or sentencing, regardless of the good or bad faith of the prosecutor.

Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Through *Brady* and its progeny, the Supreme Court has further held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392. 49 L. Ed. 2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Evidence is material for disclosure purposes "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Id.* at 682; *see also, Kyles v. Whitley*, 514 U.S. 419, 433-34, 15 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Moreover, the rule encompasses evidence "known only to the police investigators and not the prosecutor." *Id*. at 438.

In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437. The prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

IV. The Hamilton County Prosecutor's Office Has Been Found to Have Suppressed Material Evidence in Three Other Capital Cases.

In 1992, at the time of Wogenstahl's trial, the Hamilton County Prosecutor's Office did not have any guidelines in place to assist trial prosecutors in identifying exculpatory evidence. (Exhibit 1, pp. 259-60). The trial prosecutors did not have any training or guidance as to what constitutes exculpatory evidence. (*Id.* at 259). In addition, in 1992, the Hamilton County Prosecutor's Office did not have a policy that required the law enforcement investigating

agencies to forward to the prosecutors assigned to the case all records generated during the course of the investigation of the offense in question. According to Assistant County Prosecutor Piepmeier in Hamilton County in the 1980's and early 1990's, the Cincinnati Police Department in homicide cases transferred portions of their investigative files to the Hamilton County Prosecutor's Office in three ring binders that were referred to as "homicide books". (Exhibit 1, p. 238**).** The police did not transfer all of the relevant investigative files to the prosecutor, only the portions that the lead detective on the case determined was relevant to obtaining a conviction. (*Id.* at pp. 238-239]). Assistant Prosecutor Piepmeier testified:

> THE COURT: I've been trying to restrain myself, but tell me about this Homicide Book. You're not still using that; are you?
>
> PROSECUTOR PIEPMEIER: We still receive a Homicide Book, but – I don't know when we changed our process, but over the years we now, when we meet with the police for the first time, we ask them to bring their entire file to our office and we go through that. They prepare the Homicide Book more as a courtesy to us, which is – it's very organized and it really does contain everything I feel we need. But at the same time we've gotten in the practice to ask for everything they have just so we make sure we have everything. And I believe we've come to the point where we feel that we better know what we may need at trial than they do, and in the past we would rely solely on what they feel we need at trial.
>
> THE COURT: And the past would be any time from 1985?
>
> PROSECUTOR PIEPMEIER: Certainly in 1985 we relied on what they gave us. Again, I'm not sure, but I'd say for the last at least five years, at least personally, I asked to see everything.

(*Id.* at pp. 243-44).

Prosecutor Piepmeier provided this testimony in 1999. Pursuant to his testimony the Cincinnati Police Department did not provide the entire police file to the Prosecutor's Office until 1994. (*Id*. at p. 244.) This was obviously after Wogenstahl's trial had already concluded. Until that time, the Hamilton County Prosecutor relied upon the police to determine what

information the prosecutor should receive and review for purposes of providing discovery. The courts have awarded three death sentenced individuals new trials because members of the Hamilton County Prosecutor's Office suppressed exculpatory information. Wogenstahl's is no different from these cases.

In *Jamison v. Collins*, 291 F.3d 380, 389-91 (6th Cir. 2002), the court found that the Hamilton County Prosecutor's Office had suppressed the following: (a) an eyewitness statement that demonstrated that the eyewitness to the murder had initially chosen two photographs as the assailants neither of which were Jamison or the co-defendant Howell, (b) descriptions by Howell (who received a deal in exchange for his testimony against Jamison) that changed significantly over time, (c) a statement of another eyewitness that both contradicted Howell's trial testimony and implicated Howell as the actual murderer, (d) another eyewitness statement that provided physical descriptions of the two assailants that were much different that the physical descriptions of Howell and Jamison, (e) statements identifying other potential suspects, and (f) an initial statement from an eyewitness in which she stated that she could not identify the assailant, but later at Jamison's trial identified him as the assailant. Judge Boggs writing for the panel concluded "The evidence above, taken together, presents a significant challenge to the prosecution's theory of the case: that Howell and Jamison robbed the Central Bar on the spur of the moment, and that Jamison kicked Mitchell to death. We therefore affirm the district courts finding that the above evidence was favorable to Jamison, that it was suppressed by the prosecution, and that prejudice resulted from the suppression of the *Brady* material." *Id.* at 391-92.

In *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014), the Hamilton County Prosecutor's Office was again found to have suppressed material favorable evidence. The court described the suppressed evidence:

> It is undisputed that the State failed to turn over hundreds of pages of evidence gathered during the murder investigation. . . . The undisclosed investigative reports included a substantial collection of tips, leads, and witness statements relating to other individuals who had been investigated for the murder—two of whom had apparently confessed to the crime, and neither of whom was ever ruled out as the perpetrator. The State also withheld witness statements that undermine the State's theory of the case and information that could have been used to further impeach two of the State's witnesses.

Id. at 394-95 (footnote omitted).

The Court concluded as to the prosecution's conduct that "the nondisclosure of the identities of the other suspects—two of whom were reported to have confessed to the murder—*was an egregious breach* of the State's *Brady* obligations." *Id.* at 400. (emphasis added). The Court further held that as to the suppressed evidence, "it is *painfully clear* that the result of the trial would likely have been different had the suppressed evidence been disclosed to the defense." *Id.* at 403 (emphasis added).

In *Gumm v. Mitchell*, 775 F.3d 345 (6th Cir. 2013), the court again granted the defendant a new trial because members of the Hamilton County Prosecutor's Office had suppressed exculpatory evidence.[1]

> The state failed to disclose a substantial collection of tips, leads, and witness statements relating to other individuals who had been investigated for the murder of Aaron Raines. On its face, the nondisclosure of the identities of these suspects—two of whom were reported to have confessed to the murder—is an egregious breach of the state's *Brady* obligations.

[1] Gumm and Bies were co-defendants who were tried separately.

Id. at p. 364.

The court, when assessing the impact of the suppressed evidence, concluded, "[c]onsidering the quality and quantity of the evidence that the state failed to disclose, the potential for that evidence to have affected the outcome of Petitioner's trial is inescapable." *Id.* at 370. Furthermore "no reasonable jurist could find that the disclosure of the small mountain of exculpatory evidence in this case would not undermine confidence in the verdict." *Id.* at 373.

V. Trial Counsel Filed Eight Discovery Motions in an Effort to Obtain All Exculpatory Information.

Prior to the commencement of trial, Wogenstahl's counsel diligently pursued discovery. They filed motions for:

- Discovery pursuant to Crim. R. 16 (Exhibit 2)
- A bill of particulars. (Exhibit 3).
- An order to compel the investigating officers to provide the prosecution with all of their investigatory files. (Exhibit 4).
- Pretrial disclosure of witness statements (Exhibit 5).
- An order directing that a sealed copy of the prosecution's file be made part of the record for review on appeal (Exhibit 6).
- Notice of Intention to Use Evidence, pursuant to Crim. R 12(D)(2) (Exhibit 7).
- Disclosure of Favorable Evidence (Exhibit 8).
- Disclosure of Impeaching Evidence (Exhibit 9).

On October 1, 1992, the prosecution filed responses opposing Wogenstahl's motions to require pretrial disclosure of witness statements and to compel the investigating officers to provide entire copies of their files to the prosecution. (Exhibits 10 and 11). On December 14,

1992, the prosecution filed a response opposing the motion that a sealed copy of its file be made of record for appellate review. (Exhibit 12).

The trial court entertained oral argument on the discovery motions. The trial court, without the prosecution offering any argument, denied the following discovery motions: (a) to require the investigating agencies to provide the prosecution with copies of their entire files (Tr. 14); (b) for a sealed copy of the prosecution's file to be made part of the record for appellate review (Tr. 32); (c) for disclosure of the prosecution's death penalty data (Tr. 53-54); and (d) for disclosure of the prosecution's jury selection data (Tr. 53). The court granted the discovery motion to require the prosecution to provide the trial court with exculpatory evidence (Tr. 20). However, the court denied the defendant's pro se motion for disclosure of impeaching evidence noting that the motion "has no basis whatsoever." (Tr. 144). Finally, the court over objection of the prosecution ordered that it provide trial counsel with the pretrial statements of the prosecution's witness "shortly prior to trial". However it warned trial counsel that it "cannot just [interpret that discovery order] as a blanket license to start cross-examining on any statements that are not consistent." (Tr. 10-11).

VI. The Prosecution Suppressed Information that Impeached Its Witnesses.

Despite the trial court's contrary ruling, the prosecutor's duty to provide exculpatory evidence extends to information that impeaches its witnesses. *Kyles,* 514 U.S. at 433; *United States v. Bagley,* 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Here, the prosecution failed to provide in discovery information that impeached its witnesses.

A. The Prosecution suppressed information that impeached its witness, Peggy Garrett.

Peggy Garrett, Amber's mother, testified concerning Amber's background and her whereabouts in the early morning hours of November 24, 1991. The prosecution suppressed

information that (a) precluded the admissibility of her entire testimony and (b) impeached material portions of her testimony.[2]

1. *The prosecution suppressed information that Peggy Garrett's testimony was the product of improper hypnosis.*

This Court has previously held "testimony supplied by a witness whose memory has been refreshed by hypnosis prior to trial is admissible only if the trial court determines that, under the totality of the circumstances, the proposed testimony is sufficiently reliable to merit admission." *State v. Johnston*, 39 Ohio St.3d 48, 529 N.E.2d 898 (1998), paragraph 3 of the syllabus. This Court therein created a non-exhaustive list of factors that trial courts should consider in making the reliability determination:

> (a) The hypnosis session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis, to ensure the most accurate recall possible.
>
> (b) The qualified professional conducting the hypnosis session should be independent from any of the parties in the case, to avoid any biased procedures or questions.
>
> (c) Any information given to the hypnotist by any of the parties to the case prior to the hypnosis session should be recorded, at a minimum in writing, so that the trial court can determine the extent to which the subject may have received any information from the hypnotist.
>
> (d) Before the hypnosis session, the hypnotist should obtain a description of the facts from the subject, avoiding adding new elements to the subject's description, so that the trial court can compare the subject's pre- and post-hypnotic recollection.
>
> (e) The hypnosis session and all other contact between the hypnotist and the subject should be recorded, preferably on video tape, so that a permanent record is available to reveal the presence of any suggestive procedures or questions.
>
> (f) Generally, only the hypnotist and the subject should be present during the hypnosis session, in order to protect against inadvertent influence. However, other persons may be present if their attendance is necessary and steps are taken

[2] Wogenstahl limits this section concerning Peggy Garett to impeachment evidence. In a subsequent section he will address the information that the prosecution suppressed concerning Peggy Garrett as a suspect in this case.

to prevent their influencing the results of the session.

Id. at 55

On November 30, 1991, unknown to defense counsel, Patrolman Terrence M. Lowery placed Garrett under hypnosis. (Exhibit 13a). The Patrolman was neither a licensed psychiatrist nor psychologist. He also was not independent of any of the parties in the case. (Exhibit 13a and 13b). It is unclear if any of the four other *Johnston* requirements were met. Patrolman Lowery made a VHS tape recording of hypnosis session with the mother. (Exhibit 13). Wogenstahl has never been provided with that tape, and never even knew such a tape existed until counsel were granted access to the Harrison Police Department file on May 3, 2016.

Given that the prosecution has never provided counsel with a copy of the recording of the Patrolman's hypnosis session with the mother, Wogenstahl is limited to submitting the two paragraph report of the Patrolman concerning the hypnosis session. (Exhibit 13a). In the first paragraph the Patrolman states that "Peggy was able to revisicate the night of 11/24/91." (*Id.*). He continues "[s]he relived the night to the point the kids were all in bed." (*Id.*). The location of the children was both the subject of direct and cross examination of the mother. (Tr. 866, 895-96).

In the second paragraph of Patrolman Lowery's hypnosis report, he relates the mother's detailed description of what Wogenstahl was wearing on the night in question. (Exhibit 13a). The clothing Wogenstahl was wearing on the night of Amber's disappearance was also a subject of direct and cross examination. (Tr. 870, 913-17).

Peggy Garrett's testimony was wholly inadmissible. The trial court made no determination that her hypnotically refreshed testimony was reliably admissible. If it had made such a determination, it would have found that at a minimum two of the *Johnston* criteria were

not met: Patrolman Lowery was neither a licensed psychiatrist or psychologist, nor was he independent of the law enforcement department investigating the case.

2. *The prosecution suppressed a report that impeached Peggy Garrett's testimony concerning her relationship with Wogenstahl.*

Peggy Garrett testified that Wogenstahl had visited her apartment "four or five times maybe" and she could not remember the last time he had visited her apartment prior to the Saturday in question. (Tr. 896-97). She testified that a couple of the four or five times he visited the apartment "he just came in the kitchen door and asked me if I needed a way to the store." (Tr. 901). He "twice" gave her a ride to the store and "the longest he ever stayed [at the apartment] was maybe twenty minutes to a half hour." (Tr. 902).

The prosecution had in its possession three reports that impeached this portion of the Peggy Garrett's testimony concerning her relationship with Wogenstahl. Peggy's son, Justin, reported that Wogenstahl "would stop by for a few minutes every day. He would take Peggy to the grocery store or make little trips for her. . . . Most of the time JEFFREY WOGENSTAHL would come to see his mom or his brother Eric. JEFFREY was new to the area and seemed not to know very many people and was trying to catch on by knowing PEGGY and Eric." (Exhibit 14, p. 2). His mother even had a nickname for Wogenstahl, "the Canadian Jeff." (*Id.*). The prosecution possessed another report that Wogenstahl's vehicle had been "parked in the alley behind 308 Harrison Avenue, the GARRETT residence, several times in the past." (Exhibit 15). Finally, Troy Russell reported that he had seen Wogenstahl in Amber's mother's apartment more than once and in early November he had witnessed the mother and Wogenstahl smoking crack in her apartment. (Exhibit 16). Russell used to live with the Garretts. (Exhibit 16).

3. *The prosecution suppressed information that impeached Peggy Garrett's testimony about her relationship with Amber.*

Peggy Garrett provided substantial testimony over the objection of defense counsel concerning the background of the victim. The mother testified that she and Amber were very close. (Tr. 860-62). However, this was not accurate. The mother had a history of beating Amber. According to Amber's diary entry dated October 30, 1991:

> I hate myself. I hate my life. I hate my classmates. . . . Sometimes I just feel like running away or killing myself. . . . *Just yesterday before I came to school my mom beat me she was punching me in the back. She just would not stop.*

(Exhibit 17 – Diary) (emphasis added). Gil Reuhle reported "that Amber and Peggy got into an argument, and [Peggy] hit daughter 3 times in the head, it happened the night before she was missing." (Exhibit 18). A redacted report reflects that Amber told a witness that she (Amber) was not permitted to enter the apartment "which forced AMBER GARRETT to stay elsewhere on several weekends." (Exhibit 19). The police had received a report that "Amber has been talking about running away alot [sic] lately." (Exhibit 20).

4. *The prosecution suppressed information that impeached Peggy Garrett's testimony concerning Amber's eyesight.*

Peggy Garrett, in her testimony, also reported that Amber's eyesight without her glasses "was very, very bad." (Tr. 862). To illustrate her point, the mother provided the following anecdote: Amber when "she would have to go to the bathroom in the night she would not walk from the bedroom to the bathroom just from here to the real close without putting on her eyeglasses." (Tr. 862). In opening statement, the prosecution emphasized this portion of her testimony in stating, "it's important to note that she was almost blind without her glasses. You will hear evidence of that." (Tr. 834). In closing argument the prosecution twice revisited Amber's poor eyesight:

> Well, we know from the evidence that Amber Garrett was in bed early the morning of November 24th, that someone took her out of that house. They

> removed her without letting her put on her shoes, they removed her without letting her get her glasses that she needed in order to see, . . .

(Tr. 2428).

> This is the time frame when Amber Garrett is taken from her house, taken from her bed very abruptly, the evidence has shown. Glasses still there.

(Tr. 2590)

However, the prosecution possessed information that impeached the testimony and prosecution's argument concerning Amber's eyesight. One of the investigating officer's notes reflect, "Kim Garrett advises Amber can be without her glasses." (Exhibit 21). In another suppressed report, then Patrolman Mathews reported, "Kim also advised that Amber is very capable to be without her eyeglasses and has on several occasions." (*Id*.). Two individuals informed both a special agent from the FBI and a member of the Harrison police department that "Both [Redacted] advised that even though the victim wore glasses, she was able to see without them." (*Id*.).

5. *The prosecution suppressed information that impeached Peggy Garrett's testimony concerning Wogenstahl's coat.*

The jacket Wogenstahl was wearing on the night of Amber's murder played an important part in the State's case. The prosecution adduced testimony and argued that Wogenstahl's jacket was torn when he removed Amber's body from the vehicle and placed the body in the wooded area where her body was found. On direct examination Peggy Garrett testified that when she saw Wogenstahl earlier that evening he was wearing a brown jacket that "was nice . . . did not have any cuts in it or anything." (Tr. 870). In response to a question posed by the trial judge, she again stated that the jacket did not have any "cuts" or "rips" in it that evening. (Tr. 871).

The prosecution had in its possession a statement that impeached Peggy Garrett's testimony concerning the condition of the jacket. She previously told Detective Lowery that "She

remembered the jacket because 'he showed me a spot on it and asked me if it could be fixed.'" (Exhibit 13).

6. *The prosecution suppressed information that impeached Peggy Garrett's testimony concerning the whereabouts of Amber at 5:00 a.m.*

Peggy Garrett testified that she arrived home at 5:00 a.m. (Tr. 878). On her arrival at her apartment:

> The kid's bedroom door was cracked open a little bit and I peeked in and *I assume they were all there*. I saw arms and legs so –

(Tr. 880) (emphasis added).

The prosecution had possession of a report that impeached this portion of her testimony. (Exhibit 22). A summary prepared by one of the investigating officers provides, "Peg say's [sic] She got home about 505/ from Troy's (Troy and Lynn rode her home) Peg *looked in and thought she saw all three kids in there."* (*Id.*) (emphasis added).

7. *The prosecution suppressed information that impeached Peggy Garrett's testimony concerning her whereabouts on the night of the murder of Amber.*

Peggy Garrett provided detailed testimony concerning the bars she had frequented on the night of the murder. (Tr. 868-76). On direct examination she testified that she began the evening at a bar named "the Escape." (Tr. 868). Her friend Lynn Williams arrived at midnight (*Id.*). Garrett testified that Lynn and she left the Escape between "12:30 or quarter to 1" (Tr. 907) and prior to leaving the Escape she said they had two drinks each consisting of "Pepsi and a shot of rum." (Tr. 908).

The prosecution had in its possession a statement that impeached her testimony as to whom she was with and what she consumed while at the Escape. April Kennedy reported that

she "saw Peggy doing Coke Sat. Eve (Sun. Morn) 24 Nov. @1230/ w/ 2 guys: 'Bikers' @ Escape." (Exhibit 23).

Peggy Garrett testified after leaving the Escape, Lynn Williams and she went to several other bars, and then they went to the waffle house and remained there from "probably 3 or a quarter after . . . "[u]ntil 4 or a quarter after 4." (Tr. 876). The prosecution had possession of a document that impeached this portion of her testimony. Donald B. Ellis reported that "on 11-24-91 at approx. 0300 -0330 hrs. He observed Peggy Garret at the Waffle House in Harrison and was with a m/w subject short hair possibly having a mustache and approx 602." (Exhibit 24).

8. *The prosecution suppressed information that impeached Peggy Garrett's testimony concerning her prior criminal record.*

On cross examination, trial counsel questioned Garrett concerning her prior record:

Q. You were convicted of selling it [marijuana]?

A. No

Q. What were you convicted of ?

A. *It was a couple of pills*

Q. Pills?

A. Mm-mm

(Tr. 897-98) (emphasis added).

The prosecution had in its possession documents from the Indiana Highway Patrol and an Indiana court that impeached Peggy Garrett's testimony that it was just "a couple of pills." On February 25, 1982, while tending to two small children, Peggy Garrett sold five white tablets to Trooper S.E. Todd of the Indiana State Police Department. (Exhibit 25). The five pills were determined to be Methaqualone. (*Id.*). On March 5, 1982, Peggy Garrett then sold to Trooper Todd six "small light blue tablets in an approximately one inch square piece of aluminum foil."

(Exhibit 42). The tablets were later determined to be Lysergic Acid Diethylamide (LSD). (*Id.*). On June 29, 1983, Garrett pled guilty to a *couple* (two) counts of dealing in a controlled substance. (Exhibit 26). The trial court sentenced her to two to ten years on each count, the sentences to be served concurrently. (*Id.*).

9. *The prosecution suppressed documents that impeached Peggy Garrett's testimony concerning the whereabouts of Justin Horn.*

Peggy Garrett testified that her son, Justin Horn, "was gone for the weekend" that Amber went missing. (Tr. 864). He left '[s]ometime in the afternoon on Friday" and did not return until "[p]robably around 3 o'clock or something like that" on Sunday. (Tr. 865).

The prosecution had a report which contradicted this portion of her testimony. In a statement, Justin Horn stated that "on Saturday, November 23, 1991, he left [the apartment] at about twelve noon and went to the apartment of Chris Marshall." (Exhibit 14, p. 1). He returned to the apartment Saturday evening at "approximately 7 to 10 p.m., more likely around 8:30 to 9:00" to get something to eat and left not long after because "there was very little to eat." (*Id.*). He returned to the apartment "at approximately 8:00 a.m." and woke her [Peggy] up and "said hi to her." (*Id.*). Justin added that his friend, Steve, was also with him at this time. (*Id.*) In yet another statement long withheld by the Harrison Police Department, it states that "Justin came home about 4:45 a.m. and Erick [sic] left about 0500." (Exhibit 27).

10. *Conclusion, the Prosecution Suppressed Material Information Concerning Peggy Garrett.*

The prosecution suppressed evidence that impeached virtually every aspect of Peggy Garrett's testimony. Her testimony was the product of unreliable hypnosis which should have resulted in her testimony being excluded in its entirety. In addition the prosecution excluded information that went to the heart of her testimony. That included but is not limited to: (a)

Garrett's relationship with both Wogenstahl and the victim, (b) Garrett's whereabouts on night and early morning hours when Amber purportedly went missing, (c) the extent of her criminal record, and (d) the condition of the Wogenstahl's coat (which the prosecution employed to link Wogenstahl to the murder).

B. The prosecution suppressed information that impeached its witness, Eric Horn.

Horn testified he was watching his brothers and sisters while his mother Peggy Garrett went out for the evening. (Tr. 947). He testified that at approximately 3:00 a.m., Wogenstahl arrived at the residence and told Horn that his mother needed him to come to Troy Beard's residence. (Tr. 953-55). He further testified that Wogenstahl gave him a ride to Beard's residence. (Tr. 965). Horn testified that when Beard answered the door, Peggy Garrett was not present and Beard stated that Peggy had not been there that evening. (Tr. 968-69). Finally, Horn testified that Wogenstahl did not wait for him as promised and as a result, Horn had to walk back to the Garrett residence. (Tr. 979). The prosecution argued that Wogenstahl tricked Horn into leaving the Garrett residence so that Wogenstahl could kidnap Amber. (Tr. 2585, 2594).

1. *The prosecution suppressed information that Horn's testimony was the product of improper hypnosis.*

On November 28, 1991, again unknown to defense counsel, Patrolman Lowry of the Harrison Police Department placed Horn under hypnosis. (Exhibit 16). This Court previously established the criteria for hypnotically refreshed testimony to be admitted at trial. The individual conducting the hypnosis session must be: (a) a licensed psychiatrist or psychologist, (b) trained in hypnosis and (c) not affiliated with an party that is involved in the litigation. *Johnston,* 39 Ohio St.3d 55. Lowry was neither a psychiatrist nor a psychologist and was actively involved in

the investigation of the death of Amber. (Exhibits 13a and 13b). It is further unclear whether any of the other *Johnston* requirements were met. *Johnston,* 39 Ohio St.3d 55.

Like Peggy Garett's, Horn's testimony was also wholly inadmissible. The trial court made no determination that his hypnotically refreshed testimony was reliable and thus admissible. If it had made such a determination, it would have found that at a minimum two of the criteria for admissibility were not met: Patrolman Lowery was not a licensed psychiatrist or a psychologist, nor was he independent of the law enforcement department investigating the case.

2. *The prosecution suppressed the report of Horn's polygraph examination.*

The Harrison Police Department arrested Wogenstahl within hours of Amber's disappearance, *albeit* for a violation of his parole. (Tr. 1776). At that point, he was the focus of the police investigation into Amber's death.

On May 26, 1992, Horn submitted to a polygraph examination administered by Timothy T. Tighe of the Cincinnati Police Department. At the conclusion of the examination, Officer Tighe issued a report which he sent to the three Hamilton Prosecutors who would eventually try Wogenstahl's case. (Exhibit 28). Officer Tighe posed four questions to Horn during the examination: (a) Did you lie about your involvement in Amber's death? (b) To the best of your knowledge, were you in the apartment when Amber was taken? (c) Did you lie to me today about knowing who took Amber? and (d) Do you know for sure who took Amber out of Peggy's apartment? (*Id.*). Office Tighe concluded "[t]here were significant emotional and physiological disturbances indicative of deception in Eric Horn's polygraph when he answered the aforementioned questions." (*Id.*). After Officer Tighe confronted Horn with his deception, the following occurred:

Horn: Am I under arrest?

Examiner: No.

Horn: Then fuck you, fuck the machine, and I'm out of here.

(*Id.*).

3. *The prosecution suppressed information that Horn was a suspect in Amber's death.*

The police arrested Wogenstahl on November 25, 1991**.** (Tr. 1776). The notes in the police file dated "12-7-91" provided "need to talk to Eric again. How would Eric get her [Amber] to Jamison Road?" where the body was found. (Exhibit 29). Two other individuals came forward with information concerning Eric, one of whom indicated that they saw Eric with a "knife". (*Id*.) Two days earlier, on December 5, 1997, Steven Kemper gave a written statement to then Patrolman Matthews that two weeks prior to Amber's death "Eric Horn had told me that he hated his sister and that he wished she was dead." (Exhibit 30).

4. *The prosecution suppressed documents that impeached Horn's testimony concerning when he was absent from the apartment.*

Horn testified that Wogenstahl tricked him into leaving the apartment by telling him that his mother wished to see him at Troy Beard's apartment. (Tr. 968-69). Horn testified that he left the apartment with Wogenstahl at 3:00 a.m. (Tr. 953-57) and returned to the apartment at approximately 3:30 a.m. (Tr. 1007). He testified that he did not leave the apartment from eleven o'clock when his mother left to go the bars until 3:00 a.m. when Wogenstahl appeared. (Tr. 953). He further testified that he remained in the apartment from 3:30 a.m. until 4:45 a.m. when he left to go to his grandfather's residence. (Tr. 1007-08).

The prosecution had in its possession two documents that called into question Horn's testimony that he remained in the apartment for the entire time period from 11:00 to 4:55 a.m. with the exception of 3:00 a.m. to 3:30 a.m. Chris T. Brickner gave a statement to the

investigating officers that he saw Horn on Harrison Avenue at 2:30 a.m. (Exhibit 31). Interestingly, Daniel Brock, who was with Brickner and reportedly saw Horn as well, stated that he did not see "the suspected vehicle." (*Id*.) The police also received a report that Horn "left @ 3/30 and left the door locked returned @ 500/ and the door was not locked Mom returned at @ 505/." (Exhibit 32).

5. *The prosecution suppressed Horn's inconsistent statements concerning Wogenstahl's clothing.*

The investigating officers seized a brown leather jacket (State's Exhibit 9) from the residence of Wogenstahl (Tr. 1682-83). On direct examination, Peggy Garrett identified State's Exhibit 9 as the jacket that Wogenstahl was wearing in the early morning hours of November 24, 1991. (Tr. 870). Eric Horn identified State's Exhibit 9 as the jacket that Wogenstahl was wearing when he gave Horn a ride to the Beard residence. (Tr. 954, 997, 999). The State, subsequent to Horn's testimony, produced expert testimony that the damage to the jacket, State's Exhibit 9, could have been caused by the vegetation found in the area where Amber's body was found. (Tr. 1360-63). The State emphasized this fact in opening statement, "the evidence will show by crime-scene investigators, will demonstrate that his now destroyed brown leather jacket contained thorns, similar thorns, similar to the type of thorns and similar to the type that was found where Amber Garrett was found . . . ." (Tr. 849-50). The prosecution twice emphasized this fact in closing argument. (Tr. 2454-55, 2584).

The prosecution had in its possession two reports that contradicted Horn's testimony and this portion of the prosecution's closing argument. (Exhibit 16). Pursuant to the prosecution's closing argument, Horn was the last person to see Wogenstahl prior to the kidnapping of Amber. Horn told Patrolman Lowery that Wogenstahl was wearing "a wine colored windbreaker type

jacket. (*Id.*). A second report indicates "What Wogenstahl wearing, Eric *Possibly* wht Sweater + jeans. . . . Hypnosis." (Exhibit 33).

6. *The prosecution suppressed information concerning Horn's drug usage.*

Horn had testified at a pretrial deposition that he had never sold marijuana and or narcotics. (Exhibit pp.). At trial on cross examination, Horn repeated this testimony:

Q: And have you ever seen any marijuana around your house?

A: No.

Q: None at all?

A. No.

Q. Did you ever sell it?

A. No.

(Trial Tr. at 986).

Horn's testimony at both his trial and his deposition was a lie. Six months prior to Wogenstahl's trial "Horn had been arrested and adjudicated as a delinquent for trafficking in marijuana", and the prosecution was well aware of this fact. *State v. Wogenstahl*, C-030945, 2004-Ohio-5994, 970 N.E.2d 447, ¶¶ 14, 45-82. Two members of the Harrison Police force—both of whom had testified at Wogenstahl's trial—testified under oath in sworn depositions in federal court that the prosecutors in the murder trial had known about Horn's drug arrest. (*Id*. at ¶¶45-82).

7. *The prosecution suppressed information concerning the reduction in Horn's charges.*

Horn was initially arrested and charged with a fourth degree felony possession of marijuana. The law enforcement officers found in his residence a "CUT tray" with approximately 63 grams of marijuana in two separate plastic baggies, and Horn's billfold containing $769.00 in

assorted denominations of United States currency. The prosecution, without any hearing or paperwork reduced Horn's felony to a misdemeanor; Horn was adjudicated delinquent, fined and placed on probation. On January 4, 1993, less than four months after being placed on probation, and just one month prior to the start of Wogenstahl's trial, Horn's probation was terminated. The record terminating his probation reflects that the entry was made anonymously, by: "Judge, Visiting." (Exhibit 34).

8. *Conclusion, the Prosecution Suppressed Material Information Concerning Eric Horn.*

The prosecution suppressed evidence that impeached virtually every aspect of Eric Horn's testimony. Like his mother, his testimony was the product of unreliable hypnosis which should have resulted in his testimony being excluded in its entirety. In addition the prosecution excluded testimony that went to the heart of his testimony. That included but is not limited to: (a) the fact that Horn apparently lied during his polygraph, (b) Horn's whereabouts on the night and early morning hours when Amber purportedly went missing, (c) Horn's previous adjudication for trafficking in drugs and the resultant deal he received, and (d) the fact that Horn was a suspect in this homicide.

C. The prosecution suppressed information that impeached its informant Bruce Wheeler.

Bruce Wheeler was incarcerated at the Hamilton County Justice Center at the time Wogenstahl was awaiting trial on the offense of involuntary manslaughter. He had back-handed the two year-old daughter of his girlfriend in the stomach, while he and his girlfriend were engaged in intercourse. He pled guilty as charged and received a sentence of five to ten years in prison.

Wheeler testified that Wogenstahl told him that Wogenstahl went to Amber's residence in the early morning hours, and tricked the victim's brother, Eric Horn, into leaving the residence (Tr. 2142). Wheeler further testified that Wogenstahl told him that Wogenstahl returned to the house, entered the bedroom where three kids were sleeping and grabbed a girl out of the bed. (Tr. 2144). Wheeler explained that Wogenstahl's intention was to have sex with the girl. (*Id*.). Wheeler testified that Wogenstahl then told him that he stuck it in her but didn't ejaculate so there would not be any evidence. (Tr. 2145). Wheeler claimed that Wogenstahl told him that when Wogenstahl tried again to have sexual relations with the little girl, she resisted and Wogenstahl responded by hitting and stabbing her. (Tr. 2146).

1. *The prosecution suppressed information that Wheeler received a benefit in exchange for his testimony.*

Wheeler, in response to the prosecutor's questions, denied that he had received or expected to receive favorable treatment because of his testimony:

> Q: Has anyone ever made any promised or offered you any rewards or inducements in exchange for your testimony?
>
> A: No.

(Tr. 2156).

> Q. Bruce if you are endangering your life by testifying against Wogenstahl and if you are not getting anything from the State for testifying, will you tell the jurors why you're doing it and why you're here today?
>
> Mr. Schmidt: You Honor, there is no showing he is in danger of his life.
>
> The Court: He may answer.
>
> Q. Go ahead.
>
> A. Because he told me he killed the girl and I have a daughter of my own, a 5 year old daughter, and I just could not go

> away not saying anything knowing he probably would get off.

(Tr. 2158).[3]

On cross-examination Wheeler continued to deny he received anything in return for his testimony:

> Q. So after your lawyer told you that you would get shock probation or early parole you would just try to enhance your position a little bit by coming up with this story about [Wogenstahl], right?
>
> A. No.
>
> Q. But it does increase your chances, does it not, and make you a little bit better shape that you are not this civic-minded person that is coming down to testify?
>
> A. I don't understand the question.
>
> Q. Well it makes you look like you're trying to get yourself organized and you are helping the prosecution, you are helping the police, you are helping society, helping the State of Ohio to convict Jeff Wogenstahl with this story you've told?
>
> A. I am telling you what Jeff told me.
>
> Q. It does help your position, doesn't it, and your chances for shock or your chances for early parole?
>
> A. *The prosecutor promised me nothing.*

(Tr. 2180-2181) (emphasis added).

In closing argument, the prosecution emphasized the credibility of Wheeler's testimony despite knowing its falsity:

[3] Assistant Prosecutor Gibson both met with Wheeler prior to Wogenstahl's trial and elicited this false testimony from Wheeler at Wogenstahl's trial. Gibson was aware that Wheeler was testifying falsely at the time of trial, yet did nothing to correct the false testimony or notify defense counsel. (Exhibit 35).

> Without holding Bruce Wheeler up as a model citizen, without defining what he did and what he is serving time for, I will tell you again you should believe him. Why? For two reasons: First, *Bruce Wheeler got nothing for his appearance in this courtroom, He got nothing.* He pled guilty before Judge Winkler as charged. *Nothing reduced, nothing dismissed.* Guilty as charged.
>
> Then on top of that he reappeared before Judge Winkler. Nobody from law enforcement spoke on his behalf and he got the maximum sentence for that charge from Judge Winkler.
>
> Now if we were going to cut him some sweetheart deal and help Bruce Wheeler out, why wouldn't we have done it before sentencing and something to keep him here so he could not get sent to Ross to prison where people could get to him? That is *because he didn't get anything.*
>
> You know, he had to leave this courtroom after testifying and he had to go back to prison, back to Ross Correctional Facility and *he got nothing for that testimony except a bad reputation* that he is going to have to carry around prison. *Why did he do that to himself if what he told you is not true and why would he put himself in jeopardy like* that? I think he told you. Because the defendant told me he did something and what he told me he did was wrong and I don't want him to get away with it. Is that so hard to believe that people actually do want to see people held accountable, that people actually do want to see that justice is done?

(Tr. 2464-2465) (emphasis added).

In fact, Wheeler did receive consideration in exchange for his testimony. In a sworn affidavit, Wheeler stated that the prosecution "implied that [he] would do less time in prison if [he] testified" against Wogenstahl. (Exhibit 35). The prosecution also promised him that if he testified they would write a letter on his behalf to the Parole Board. (*Id*.) The prosecution subsequently wrote a letter on to the Parole Board on Wheeler's behalf (Exhibit 36). In addition, in exchange for his testimony, Wheeler requested that the prosecution arrange for his transfer to Ross Correctional Institution. (Exhibit 35). He was, in fact, transferred to Ross Correctional. Wheeler believes that his subsequent transfer was part of the consideration for his testimony against Wogenstahl. (*Id*.)

The jury would have had a much different perception of Wheeler's testimony if they had learned that Wheeler testified falsely concerning the receipt of benefits. The jury would have heard on cross examination that Wheeler's testimony that he received no consideration was a lie. He, in fact, received three benefits from his testimony. His credibility would have been impacted two-fold: (a) he received benefits in exchange for his testimony and (b) he lied about receiving those benefits.

2. *The prosecutor misrepresented Wheeler's role in the assault on the two year old child and Wheeler's willingness to admit his involvement.*

The prosecution vouched for Wheeler's credibility in his initial closing statement in the trial phase:

> I will tell you this. There is a difference between this defendant and Bruce Wheeler. The difference is that Bruce Wheeler did something stupid, he did a thoughtless, unthinking act, he accepted responsibility for it and actually feels some remorse.

(Tr. 2466).

This argument not only constituted improper vouching, but also constituted a total misrepresentation of the facts surrounding Wheeler's beating of the two year old child. The same prosecutor provided a much different description of Wheeler to the grand jury that considered Wheeler's case:

> I don't understand how he [Wheeler] can back hand this child with this kind of force and not know how it happened. It stretches the bounds of credibility. Quite frankly, I just don't believe it.

(Exhibit 37, p. 3).

Similarly, Specialist William Davis from Cincinnati Police Department told Wheeler's grand jury that Wheeler did not initially admit to hitting the child and instead told the investigation officers that he (Wheeler) had woken up some time during the night and the child was vomiting.

Davis testified that Wheeler did not actually admit to hitting the child until Wheeler failed a polygraph examination:

> We asked him to take a polygraph exam . . . It showed that he was not being totally truthful with us. We questioned him further, and he finally admitted that he had struck the infant at approximately 4:00 p.m. on the twenty-third.

(Exhibit 37, p. 8).

The prosecutor not only improperly vouched for the credibility of Wheeler in closing, but misrepresented the facts surrounding Wheeler's felonious assault of the two year old child and Wheeler's failure to initially tell the truth concerning the assault on the minor. The suppressed evidence would have put Wheeler's testimony and the prosecution's argument in a much different light—both discrediting Wheeler and the State's theory and bolstering the defense theory of the case and testimony of the defendant, Jeff Wogenstahl.

D. The prosecution suppressed information that impeached its witness, Michelle Hunt.

Michelle Hunt testified at trial that she worked at the Waffle house and that Peggy Garret and Lynn Williams arrived at the Waffle House at approximately 2:30 to 3:00 a.m. (Tr. 1083-84). She further testified that Garrett and Williams remained at the restaurant until approximately 4:00 a.m. (Tr. 1085-86). She further testified that shortly after Williams and Garrett arrived, a vehicle pulled in the parking lot and immediately exited the lot without anyone exiting the vehicle. (Tr. 1086-87). Hunt positively identified State's Exhibit 50 as a photograph of the vehicle that she saw entering and immediately leaving the parking lot on the early morning hours of Amber's disappearance. (Tr. 1088, 1095). She testified that FBI agents showed her the photograph shortly after Amber's body was found. The vehicle in State's Exhibit 50 was subsequently identified as belonging to Wogenstahl. (Tr. 1036). Hunt testified that she believed

that there were two persons in the car, both of whom would have been in the front seat. (Tr. 1096, 1098).

However, unknown to the defense or Wogenstahl, the prosecution had in its files ***two*** statements that would have impeached Hunt's testimony at trial. Only one, Hunt's statement to Officer Wilson, was turned over. On November 25, 1991, Michelle Hunt gave a statement to Officer Wilson of the Harrison Police Department. (Exhibit 38). On November, 27, 1991, unbeknownst to Wogenstahl, Hunt gave another statement to Special Agent Woods. (Exhibit 39). Hunt made no mention in her statement to Agent Woods of having seen a car enter and leaving the parking lot. (*Id.*). Further, there is no mention of Special Agent Woods having shown her photograph(s) of vehicle. (*Id*.)

E. The prosecution suppressed a document that impeached Brian Noel.

Noel testified that he was driving on Jamison Road at approximately 3:40 a.m. on November 24, 1991, and saw Wogenstahl standing next to a car that was parked on the side of the road in the vicinity of where Amber's body was later found. (Tr. 1510-15, 1524-25). On cross examination, Noel stated that he had been at Hymie's, a tavern, from 9:00 p.m. until 2:30 a.m. and had drunk two beers. (Tr. 1529). Trial counsel on cross examination unsuccessfully attempted to develop the point that Noel had more than two beers. (Tr. 1529-30).

The prosecution had possession of a document that Noel had drunk more than two beers. (Exhibit 40). Noel reported in that statement that he had drunk "5 beers." (*Id.*).

VII. The Prosecution Suppressed Information Concerning the Existence of Other Suspects.

The prosecution's duty to provide exculpatory evidence encompasses the identity of other suspects. *D'Ambrosio v. Bagley*, 527 F.3d 489, 498 (6th Cir. 2008); *Jamison v. Collins*, 291 F.3d 380, 390-91 (6th Cir. 2002); *Castleberry*, 349 F.3d 286, 293 (6th Cir. 2003). While the State is

not constitutionally obligated to identify for trial counsel all other suspects, it is constitutionally required to identify those individuals against whom existed substantial evidence. *Jamison*, 291 F.3d at 390-91.

"[N]ew evidence suggesting an alternate perpetrator is 'classic *Brady* material.'" *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010); *see also*, *Mendez v. Artuz*, 303 F.3d 411, 412-13 (2d Cir. 2002); *DiLosa v. Cain*, 279 F.3d 259, 263, 265 (5th Cir. 2002); *Banks v. Reynolds*, 54 F.3d 1508, 1520 (10th Cir. 1995). The reason is obvious: evidence that someone else committed the crime reduces the likelihood that the defendant did so. Thus, a new trial on such grounds is necessary by the presence of alternative suspects. See *Trammell v. McKune*, 485 D.3d 546, 552 (10th Cir, 2007) (McConnell, J.).

Evidence of alternative suspects also permits defense counsel to attack "the reliability of the investigation" if it shows that investigators were less than energetic in exploring other potential suspects. *Kyles*, 514 U.S. at 446. Suppressed evidence of alternative suspects can be "used to cast doubt on police officers' decisions to focus their attention . . . on [the defendant] rather than" the other suspects. *Trammell*, 485 F.3d at 551.

A. The prosecution suppressed information that Amber was sexually assaulted in May 1991.

Amber kept a journal for her school class which she gave to her teacher, who, in turn, shortly after Amber's death gave the journal to the Federal Bureau of Investigation. Wogenstahl only recently received a copy of portions of the journal in response to a Freedom of Information request that he made of the Bureau.[4] Further portions of the journal were only recently discovered upon receipt of the Harrison Police Department file in May of this year.

[4] Current appellate counsel for Wogenstahl requested records under the Freedom of Information Act (FOIA). Records were released by the Federal Bureau of Investigation on March 5, 2015

In a diary entry dated September 27, 1991, Amber described being sexually assaulted three months earlier:

> One day me and my friends were in the parking lot and a guy came up behind me and started chasing me and he threw me on the ground twice and pulled out his you know what and told me to tattoo on it but I said no and started running and he caught me and threw me down again and he got on top of me . . . we [my mother and two older brothers] went to the police station and we have not found him yet and it was three months ago.
>
> PS. he is 17teen and his name is Doug

(Exhibit 17).

This information was exculpatory for two reasons. First, defense counsel could have pursued the information and conducted their own investigation as to this rape. Suppressed evidence claims are to be evaluated in terms of what competent counsel could have done with the evidence. *Wilson v. Beard*, 589 F.3d 651 (3rd Cir. 2009); *United States v. Gil*, 297 F.3d 93, 14 (2nd Cir. 2002). In addition, defense counsel could have used the information to impeach the quality of the law enforcement investigation given the failure of the investigating officers to pursue this lead. *Kyles*, 514 U.S. at 446 ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation.") (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)).

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and March 27, 2015. These records totaled over 500 pages. These records were highly redacted, and certain pages were not turned over. (*See* Exhibit 84, US Department of Justice cover letter from March 27, 2015). An expedited administrative appeal was filed. The Department of Justice agreed to expedite that appeal, yet a response was not received until August 16, 2016. The appeal was affirmed in part, and remanded in part back "to the FBI for further processing of certain pages of responsive records withheld pursuant to Exemption 7(E)." (*See* Exhibit 85). No further documentation has yet to be forwarded from the FBI to current counsel. This is an ongoing investigation.

This information also could have been employed to impeach Peggy Garrett's testimony. *See* § IX(A)(1), *infra*.

B. The prosecution suppressed a supplemental police report that Amber had been raped the prior summer.

On November 26, 1991, Patrolman Sogsdill interviewed Diane Fritz. (Exhibit 41). She informed the patrolman that "last summer Amber was a victim of an attempt [sic] rape by a 14 yoa m/w." (*Id.*).

C. The prosecution suppressed a Supplemental Police Report that Amber was raped one month prior to her murder.

On November 29, 1991, Patrolman Gambill of the Harrison Police Department received a telephone call from a Caucasian female who did not disclose her name. Patrolman Gambill prepared a supplemental report concerning the telephone call. (Exhibit 42). The caller provided "she had received information from [Amber's] cousin that approx., one month ago [Amber] was raped by one of the men who came to the house." (*Id.*).

D. The prosecution suppressed information concerning the man who repeatedly approached Amber's bedroom window.

During the summer prior to Amber's murder, a "creepy guy" approached Amber's bedroom window when it was open. (Exhibit 43). This happened on more than one occasion. (*Id.*) The male attempted to speak with her. (*Id.*). Eventually, Amber complained to Bobby Perkins who chased the man away from the window, but did not catch him. (*Id.*). Perkins called the Harrison Police Department and Patrolman Mathews responded. (*Id.*). Mathews was never able to identify the male. (*Id.*). Amber was so terrified of the man that she often stayed with her friend Pamela (Reamer) Petti. (*Id.*).

E. The prosecution suppressed reports concerning the Importuning of Amber.

In May 1991, Amber was the victim of an importuning. (Exhibits 13b, 44). Her complaint generated a report. (Exhibit 44). The preprinted report provided "If **ANY** of the above solvability factors have a "yes" answer, an investigative supplement must be completed and a follow-up investigation will be conducted."). Four solvability factors were marked "yes," (*Id.*). A follow up report was generated ("[i]t was located in my bin.") (Exhibit 13b). The Harrison Police Department thought that the missing report might contain possible "leads" in the investigation of the murder. (*Id.*). The supplemental report has never been provided to Wogenstahl's counsel either.

F. The prosecution suppressed information concerning a man in the woods.

In the summer prior to her murder, Pam Petti and Amber were playing in the woods behind the local community center. (Exhibit 43). They saw a man watching them who started walking towards them. (*Id.*). She and Amber fled. (*Id*).

G. The prosecution suppressed information concerning an October 3, 1991 incident.

Douglas Dalton and Robert Hess gave written statements on November 29, 1991 concerning an incident they had witnessed on or about October 3, 1991. (Exhibits 46 and 47).[5] They both reported hearing a young child screaming. (*Id.*) "A few seconds later" a young girl matching the physical description of Amber ran from an alley screaming. (*Id.*) Hess and Dalton stopped her and asked her what was wrong and she said nothing. (*Id.*) She then ran down the street and two boys matching the physical descriptions of Amber's brothers chased her. (*Id.*) Mr. Dalton telephoned the Harrison Police Department and an officer took their statement. (*Id.*)

[5] Douglas Dalton in his report states that the incident occurred on "3rd of October *1992*." (Exhibit 32) (emphasis added). The reported year was a misstatement given that he gave the written statement on November 29, 1991. (*Id.*).

Later, '[w]hen we saw the picture of Amber Garrett in the newspaper, it looked like the girl that we saw almost dead on her so we decided to come down file an official statement." (*Id.*).

H. The prosecution suppressed reports that Amber's mother, Peggy Garrett, was involved in Amber's murder.

On December 3, 1991, Special Agent Edward P. Woods interviewed Lorretta Garrett, Amber's grandmother. (Exhibit 48). She reported that Amber had informed her that her mother Peggy Garrett had drugs in her house. (*Id.*). The previous day Special Agent Knight interviewed Kim Bischoff, the homeroom teacher for Amber. (Exhibit 49). Ms. Bischoff advised the special agent:

> that she had spoke [sic] to PAM REAMER, a friend of Amber's who had stated that AMBER had told her that her [Amber's] mother, brother, and her mother's boyfriend engages in dealing drugs. Bischoff advised that her brother had wanted AMBER to get a tattoo with the word ICE on it.

Id. Other individuals reported to the investigating officers that the mother was a frequent abuser of drugs. (Exhibit 50, 51, 52, and 53).

Tammy Schuck relayed that Peggy was a known drug user, and there were always a number of people present in the mother's apartment. Frequently a lot of motorcycles were parked outside. (Exhibit 43). Schuck reported that Amber complained about some of the men who were present inside the apartment. (*Id*.). One time when picking up Amber, Schuck watched as Amber walked by the men, some of them rubbed her hair and legs. Amber told Schuck when her mother saw the men touching her, her mother would just laugh. (*Id*.) Rilda Kaiser reported many of the mother's friends were "biker-types." (Exhibit 50). One cryptic note in the police file reflects "She was raped by one of [sic] men who come in there." (Exhibit 54). The police received a report from an individual who worked at Emmarson North Hospital that "believes Amber was treated for sex abuse about 6 mo ago." (Exhibit 55).

Various individuals reported to the police that the mother was heavily in debt to the individuals who supplied her with her drugs. (Exhibits 51, 52, and 53). The police received reports that the mother had sold Amber to the individual to whom she owed money for her drugs. (Exhibit 53, 56). Ms. Burke informed one of the investigating officers that the mother was in the waffle house crying and stating that she had really "fucked up" because she had sold Amber for fifteen hundred dollars. (Exhibit 56). Russell Holton similarly advised the police that the day prior to her disappearance, the mother was at the Waffle House and had no money. (Exhibit 57). Two days later, Holton advised that the mother returned to the Waffle House claiming to have fifteen hundred dollars in her purse. (*Id.*). Similarly, Jack Brewer told Sergeant Jack Tremain of the Harrison Police Department that the mother stated after Amber's body was found that "He said that he wasn't going to beat her that bad." (Exhibit 58). April Kennedy reported that she, "saw Peggy doing Coke Sat. Eve (Sun. Morn) 24 Nov. @1230/ w/ 2 guys: "Bikers" @ Escape." (Exhibit 23).

Suspiciously, a man that lived in the apartment above Peggy Garrett, Jamie Wiemeyer, also had information that Amber's body would be found in Bright, Indiana. (Exhibit 59).

VIII. The Prosecution Suppressed Information That Impeached Its Theory Of The Case.

The prosecution's duty to provide exculpatory evidence extends to evidence that is inconsistent with the State's theory of the case. *D'Ambrosio*, 527 F.3d at 498; *Jamison*, 291 F.3d at 389-90; *Leka v. Portuondo*, 257 F.3d 89, 107-8 (2nd Cir. 2001). The prosecution violated that duty of disclosure in this case.

A. The prosecution suppressed evidence that contradicted its theory as to the circumstances involving Amber leaving the apartment.

The prosecution offered the jury the theory that Wogenstahl entered the apartment, grabbed Amber out of her bed and immediately removed her from the apartment without giving

her an opportunity to change from her bed clothes or put on her glasses without which she could barely see. In opening statement the prosecution "it's important to note that she was almost totally blind without her glasses." (Tr. 834).

In closing argument in the trial phase, the prosecution told the jury to convict Wogenstahl because:

> Well, we know from the evidence that Amber Garrett was in bed early the morning of November 24th, that someone took her out of that house. They removed her without letting her put on her shoes, they removed her without letting her get her glasses that she needed in order to see, they removed her without letting her get dressed or put on a coat. And we know from the evidence a few days later Amber's body was found out in Bright, Indiana *still wearing these panties and these clothes that she had worn in the bed on the evening* of Saturday, November 23rd.

(Tr. 2428) (emphasis added).

In the rebuttal closing argument in the trial phase, the prosecution returned to this purported factual argument:

> How about a person who would return to the Garrett household, pick up a half naked Amber Garrett and get her out into his car?

(Tr. 2594).

The prosecution told the jury in the sentencing closing argument to return a death recommendation because:

> He returns and now knows nobody is there. This is aggravation. This is balancing on the end of this scale the mitigation and it is a simple balancing test. He returns and he takes a 10-year-old girl, takes a sleeping 10-year-old girl from her warm bed which she is sharing with her little sister and her little brother. Incredible in terms of an aggravating circumstance in this crime. He takes her sound asleep from her home or half-asleep so quickly on this freezing cold night and he removes her. *There is not time to have shoes put on her, a coat put on her and she is half blind without her glasses, and what kind of aggravation is it? What kind of a person would commit that kind of a crime?*

(Tr. 2837-38) (emphasis added).

The prosecution suppressed several documents that contradicted its theory that in the middle of the night Amber was grabbed from her bed without an opportunity to change from her clothes in which she was sleeping or her put on her glasses without which she could barely see.

First, Amber could see without her glasses and had in the past not worn her glasses all of the time. *See* Section VI(A)(4), *supra.*

Second, when she left the apartment, she was fully clothed and not wearing the clothing she wore to bed. According to the notes from an interview of the mother, "Amber had the Loretta Lynn shirt on" when she went to bed. (Exhibit 60, p. 2). According to the report of Patrolman Lindsey, the mother told him that "that even the nightshirt she slept in was still there [in the house]." (Exhibit 61, p. 2).

Amber was wearing a red dress when she was murdered. (State's Exhibit 52). The investigating officers diligently pursued the origin of the red dress. Cheryl Hadley's daughter, Michelle Bickel originally owned the dress. (Exhibit 62). Hadley gave the dress with other clothes to Brenda Philpot to give to a needy family. (*Id.*). Ms. Philpot "in turn took them to Peggy Garrett's home and gave them to her for her daughter Amber." (Exhibit 63). Then Patrolman Steve Mathews took the photograph of the dress and showed it to Michelle Bickel who wrote out a statement which in part provided "[p]hotographs of the dress that Steve Mattews [sic] showed me was the dress that I gave to Philpote (sic)." (Exhibit 64). Annette Knox (f.k.a. Ida Philpot) confirmed that this was her dress and that she had lent it to Amber for church. (Exhibit 43).

B. The prosecution suppressed documents that contradicted its theory as to when Amber was murdered.

The prosecution adduced evidence and argued that Amber was killed at approximately 3:30 a.m. on November 24, 1991. Vicki Mozena testified that she saw a vehicle being drive by

Wogenstahl at approximately 3:15 a.m. heading in the direction of Jamison Road (where the body was found three days later) and saw the same car approximately a half hour later returning from the area. (Tr. 1446-47). Three witnesses testified that they saw Wogenstahl at approximately 3:40 a.m. standing next to a vehicle parked on the side of the road near the area where Amber's body was found. (Tr. 1524-25, 156-63). The prosecution relied on this testimony in both its opening statement and closing argument. (Tr. 845-47, 2437-50).

The prosecution possessed several documents that impeached its theory as to the time of Amber's death. These documents call into question what time Amber may have been murdered, particularly in light of other evidence regarding Garrett's and Horn's whereabouts that evening.

Charlene Macaluso reported that she "saw a white car by guard rail on Sunday morning around 8:30 a.m. green army jacket on m/w 5'10 – 5'10½ at Jamison Creek near or at scene." (Exhibit 65). The trunk of the vehicle was open. (Exhibit 55, 65).

Matt Barnes reported that his spouse "Saw a car pulled off the road Sunday nite about 12:30 a.m." (Exhibit 66).

Susan Crowder telephoned Sergeant Bettinger and reported that "she had some info regarding Amber. She seen [sic] 2 trucks on Jamison Road, one was a brown truck with Ky plates. She said they were . . ." (Exhibit 67).

Amanda Beard, a classmate of Amber's reported seeing her at 10:00 a.m. the following day in a "blue p/u with white cap" which was "going toward Indiana." (Exhibit 68, 69). Amber was "leaning against the window of truck crying wearing jean overalls."(*Id.*). The reporting person, Amanda Beard, was a classmate of Amber (*Id.*). Amanda reported that it was "definitely Amber." (*Id.*). Amber's mother reported to the media that "Amber may be wearing blue jean overalls. The overalls are gone." (Exhibit 78).

Mary Jo Puckett reported that on her way to work on Monday, November 25, 1991, at approximately 4:10 a.m. to 4:15 a.m., she saw an "old, dark, small car off to the side of the road." (Exhibit 70). She added that this car was "reddish in color, two door. Reddish as in rusty-red, not bright red." (*Id*.).

And Jo Ann Black reported to Harrison Police Department Patrolman Steve Mathews that she also saw a car parked on Jamison Road "at the top of the hill." (Exhibit 71, 72). She saw this car while travelling to work on either Saturday or Sunday morning at 6:00 a.m. (*Id*.).

Two other individuals reported seeing either a person and/or a car on Jamison Road that seemed suspicious during the timeframe when Amber was missing. (Exhibit 72).

C. The prosecution suppressed evidence that impeached its theory that Wogenstahl lied concerning the blood found in his apartment.

Authorities went to great lengths to secure evidence from Wogenstahl's apartment that would link him to the murder of Amber Garrett. The Harrison Police Department executed multiple search warrants and the Hamilton County Coroner's Crime Laboratory combed through a multitude of the evidence seized from Wogenstahl's apartment and vehicles.

Jeffrey Schaefer from the Hamilton County Coroner's Office performed serological testing. He testified there was blood present on the following items: one gym shoe (Tr. 1881), Levis blue jeans (Tr. 1884), four areas swabbed from the bathtub and one area swabbed from a cup holder inside the bathroom (Tr. 1884-87), one white t-shirt (Tr. 1931), and work boots (Tr. 1926). Schaefer testified that once he identified something as blood he did no further testing in an effort to preserve the evidence for more sophisticated testing. (Tr. 1880, 1881, 1921). He testified that he did not test any items to distinguish whether the blood was human or animal because further testing would have consumed the entire available sample. (Tr. 1880, 1887).

Some of the items tested by Schaefer were sent for further testing. Brian Wraxall, of the Serological Research Institute, did additional presumptive testing on some of the items reviewed by Schaefer. (Tr. 2048). Wraxall's testing failed to obtain more conclusive results. (Exhibit 75). With respect to items taken from Wogenstahl's apartment, Wraxall performed blood testing on two pairs of blue jeans, two towels, a work boot, and the stains from Wogenstahl's bathroom. (*Id*.). His testing on both pairs of blue jeans and the work boot could not confirm whether the blood was of animal or human origin, and he obtained no typing results. (*Id*.). Wraxall obtained no results from the stains in the bathroom beyond presumptive testing. (*Id*.). The only piece of evidence from Wogenstahl's bathroom on which Wraxall testified he obtained additional results was one of the towels. (*Id*.). Wraxall testified the blood on the towel was ***not*** consistent with the blood of Wogenstahl or Amber Garrett. (Tr. 2098, emphasis added). Therefore, the only confirmed human blood found in Wogenstahl's apartment did not match the victim.

At trial, Wogenstahl testified during the week prior to Amber going missing, his cat jumped from the seat of the toilet in his bathroom and towards the top of the shower curtain. (Tr. 2297). The cat hit his mouth on the side of the tub, causing it to bleed from its mouth. *Id*. He testified that he wiped blood off the side of the tub and the toilet. *Id*.

In closing argument, the State ridiculed Wogenstahl's testimony concerning the cat and injury to his mouth:

> How did that blood that was found on the outside of his bathtub, on the side of his bathtub, how did that get there? We didn't find enough to type but we found enough to tell us it was blood. How did it get there? No, it didn't have anything to do with cleaning up that night. My cat fell. Now this is terrible. This is tragic. Have you ever heard of a cat that falls with such force that it knocks itself unconscious and knocks out a tooth? *That story is absolutely ridiculous.* I have heard people who have cats fall off windows and land on their feet, but his cat falls in the bathroom where there is blood in it and knocks out a tooth. That is tragic.

(Tr. 2460-2462) (emphasis added). In rebuttal closing, the state again attacked Wogenstahl's testimony concerning his cat:

> And you heard yesterday about the psychopathic cat that fell off of the curtain rod and was knocked out cold and was bleeding all over the bathroom.

(Tr. 2592).

However, the prosecution suppressed a report that supported Wogenstahl's testimony concerning his cat and rebutted the prosecution's argument concerning the "psychopathic cat."

Prior to trial, and unbeknownst to Wogenstahl, the investigating officers seized Wogenstahl's cat and took it to Doctor William Kuhlman, a veterinarian, who confirmed that the cat had a chipped tooth. (Exhibit 73). In addition, the Doctor found that the cat had a scabbed tail. (*Id.*). Doctor Kuhlman drew a blood sample from the cat and gave the sample to Jeffrey Schaefer of the Hamilton County Coroner's Office for testing. (*Id.*). On March 23, 1992, Schaefer issued a report concerning the serological testing that he had conducted on a multitude of items that the officers seized during their homicide investigation. (Exhibit 74). Conspicuously absent was any reference to the blood sample that Doctor Kuhlman drew from the cat. (*Id.* at pp. 1-6). On August 25, 1992, Brian Wraxall, Chief Forensic Serologist for the Serological Research Institute issued a report concerning the testing that he had conducted. (Exhibit 75). His report also did not make reference to the blood sample taken from the cat. (*Id.*).

If the prosecution had provided trial counsel with the report concerning the examination of the cat by Doctor Kuhlman, it would have had a double effect on Wogenstahl's case. The suppressed report would have bolstered Wogenstahl's testimony, as well as his credibility, in general. It would have also rebutted the prosecution's closing arguments, assuming that the prosecution would have even made this argument after full disclosure.

IX. The Suppressed Evidence Was Material.

Constitutional error results when the favorable evidence suppressed by the government causes the reviewing court to conclude that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 682). "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. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434; *See also Strickler*, 527 U.S. at 264. To assess the materiality of the suppressed evidence, this Court must examine the totality of the evidence. In the prior two sections of this pleading, Wogenstahl identified the individual pieces of information that the prosecution suppressed. In this section, Wogenstahl will combine the individual pieces.

Because Wogenstahl is only requesting that this case be remanded for assessment of the claim(s) identified herein, he need only make a prima facie case. If Wogenstahl was required to prove the existence of constitutional violations and he met this burden, no reason would exist to remand his case.

A. Suppressed evidence related to Peggy Garrett was material.

1. *Suppressed evidence demonstrates that Amber was physically and emotionally abused and exposed to drugs and sexual violence at a young age; this was material.*

Contrary to her mother's testimony, Amber and her mother were not close. In fact just the opposite was true. Amber was physically and emotionally abused by her mother. Amber wrote in her diary, "just yesterday before I came to school my mom beat me she was punching me in

the back. She just would not stop." (Exhibit 17). The night before Amber went missing, her mother hit Amber in the head three times. (Exhibit 18). Her mother would often lock her out of the house for entire weekends. (Exhibit 19). As stated in another report, it is not surprising that "Amber has been talking about running away alot [sic] lately." (Exhibit 20). Teresa Smith reported that "Peggy Garrett wasn't much of a mother. She didn't care if Amber was out after dark, never came over to get her, and never sent for her to come home." (Exhibit 76).

Peggy Garrett was also heavily into drugs. (Exhibits 50, 51, 52, 53). Annette Knox (f.ka. Ida Philpot) also relayed that her mother, Brenda, never let her go inside the Garrett house because her mother did not like that there were so many people in and out of there and there was a lot of alcohol and drug use. Knox said her mother also thought they were selling drugs out of the apartment. (Exhibit 43). Once again, evidence of Peggy and Eric's drug use was rampant throughout this investigation.

There were always numerous strangers present in Garrett's house and motorcycles parked outside. (Exhibit 43). Some of these strangers had inappropriate contact with Amber. She complained about some of the men who were present inside the apartment. (*Id.*). One time when picking up Amber, Tammy Schuck (f.k.a. Tammy Reamer, a friend of Amber's) watched as Amber walked by the men, some of them rubbed her hair and legs. (*Id.*). Amber reported that when her mother saw the men touching her, her mother would just laugh. (*Id.*). Rilda Kaiser reported many of the mother's friends were "biker-types." (Exhibit 50). A cryptic note in the police file reflects "She [Amber] was raped by one of [sic] men who come in there." (Exhibit 54). The police received a report from an individual who worked at Emmarson North Hospital that "Amber was treated for sex abuse about 6 mo ago." (Exhibit 55).

Patrolman Sogsdill interviewed Diane Fritz. (Exhibit 41). She informed the patrolman that "last summer Amber was a victim of an attempt [sic] rape by a 14 yoa m/w." (*Id.*). During the summer prior to Amber's murder, a "creepy guy" approached Amber's bedroom window a few times when it was open. (Exhibit 43). Amber was so terrified of the man that she often stayed with her friend Pamela (Reamer) Petti. (*Id.*).

Pam Petti (f.k.a. Pam Reamer) provided further information during this recent investigation. (Exhibit 43). Pam said that Amber was one of her closest friends, and explained that Amber was at her house almost every day. Pam said she would occasionally spend the night at Amber's house, but Amber's mother, Peggy Garrett, was often away, so Amber usually stayed with her instead. (*Id.*). Pam recalled an incident in 1991, she thought around July 4th, when she and Amber were playing in the woods behind the Community Center. They saw a man watching them. He started to walk towards them, and she and Amber ran. Pam said Amber tore her shirt on a thorn bush. Pam didn't recognize the man. (*Id*.). Pam also recalled that during the summer of 1991, there was some creepy guy who frequently stood outside of Amber's bedroom window. Pam said that one time Amber's window was open, and the man tried to talk to her. As far as Pam knew, the man was never caught. Pam said that Amber was afraid to stay in her bedroom, and that was another reason why she stayed at Pam's house so often. (*Id*.)

All of this matters. Peggy Garrett was cast as a good mother at Wogenstahl's trial. And the fact of the matter is—this was a lie. Garrett was anything but a good mother. Amber described how she hated her life and her mother. Garrett not only beat her daughter, but she also abused drugs, she allowed her daughter to be raped and/or sexually abused on multiple occasions, and she was, in fact, a suspect in the case. (*See e.g*. Exhibits 17, 18, 19, 20, 41, 43, 50, 51, 52, 53, 54, 55, 76).

One of the former jurors from Wogenstahl's trial recently signed an affidavit. Carmen Pittman stated "I remember that I, and other jurors, were mad at Amber's mother. We didn't think she supervised her children and that Amber had to grow up too fast." (Exhibit 77). Evidence of the above information would have made a difference to jurors like Pittman. Even with the little she had to go on at trial, she was angry with Garrett. Had she known the full extent of what Peggy Garrett put Amber through, as well as what is laid-out in the following two sections regarding Garrett as an actual suspect in the homicide itself, it very well could have changed at least Pittman's verdict. As Pittman stated, "I did not think the evidence in the first phase was overwhelming." (*Id*.).

2. *Suppressed evidence concerning Garrett's whereabouts was material.*

Peggy Garrett testified in detail concerning her whereabouts on the night/morning of Amber's disappearance. She stated that she went to several bars with her friend Lynn Williams and later the Waffle House. (Tr. 868-76, 907-08). However, she was seen "doing Coke Sat. Eve (Sun. Morn) 24 Nov. @1230/ w/ 2 guys: "Bikers" @ Escape." (Exhibit 23). Later that morning she was "at approx. 0300 -0330 hrs. . . . observed . . . . at the Waffle House in Harrison and was with a m/w subject short hair possibly having a mustache and approx 602." (Exhibit 24).

As stated above, Peggy Garrett was portrayed at trial as a loving mother who did not presently deal or do drugs. This was false. Had trial counsel had the police reports that appellate counsel now have in their possession, trial counsel could have crossed-examined Peggy Garrett as to the drug-ridden life-style that multiple sources detailed her as having (*See e.g*. Exhibits 43, 50, 51, 52, 53). They could have also cross-examined her as well as both Lynn Williams and Michelle Hunt as to who the white male subject was that Peggy was seen with at the Waffle House on the evening of Amber's disappearance. Who was this mysterious man that was seen

that evening, and how could he be connected to Amber's disappearance and murder? And who were these two bikers that Peggy Garrett was seen doing Coke with at The Escape bar—could they also be connected to Amber's murder?

3. *Suppressed information concerning Garrett's involvement in Amber's death was material.*

The police received reports that Peggy Garrett may have sold Amber to the individual to whom she owed money for drugs. (Exhibit 53). Various individuals reported that the mother was heavily in debt to the individuals who supplied her with her drugs. (Exhibits 51, 52, 53). Ms. Burke reported that Amber's mother was in the waffle house crying and stating that she had really "fucked up" because she had sold Amber for fifteen hundred dollars. (Exhibit 56). Russell Holton similarly advised the police that the day prior to her disappearance, Amber's mother was at the Waffle House and had no money. (Exhibit 57). Two days later, Holton advised that the mother returned to the Waffle House claiming to have fifteen hundred dollars in her purse. (*Id.*) Similarly, Jack Brewer told Sergeant Jack Tremain of the Harrison Police Department that the mother stated after Amber's body was found that "He said that he wasn't going to beat her that bad." (Exhibit 57).

Evidence of this magnitude—that a key State's witness and the mother of the victim—may have sold the victim for drug money is clearly important information that the jury should have been aware of at the time of Wogenstahl's trial. One juror, Delores Reed, reported that "she thought the victim's mother was definitely involved and that she'd probably sold Amber for drugs or money in the past." (Exhibit 43). She further recalled that "other jurors felt the same way and wanted the mother charged." (*Id.*). Reed added that "it was her belief that the mother and brother had probably gotten their story together to cover up that the mother was drunk." (*Id.*).

As demonstrated by one of Wogenstahl's actual jurors, who heard and saw the evidence against him, not only would this evidence have impeached Peggy Garrett's testimony, but it also would have cast suspicion on the State's case in general. It would have additionally called into question Garrett, herself, as a prime suspect in this homicide.

4. *Suppressed evidence concerning Garrett's relationship with Wogenstahl was material.*

Peggy Garrett testified that Wogenstahl had visited her apartment "four or five times maybe" and she could not remember the last time he had visited her apartment prior to the Saturday in question. (Tr. 896-97). She testified that a couple of the four or five times he visited the apartment "he just came in the kitchen door and asked me if I needed a way to the store." (Tr. 901). He "twice" gave her a ride to the store and "the longest he ever stayed [at the apartment] was maybe twenty minutes to a half hour." (Tr. 902).

The prosecution had in its possession three reports that impeached this portion of the Peggy Garrett's testimony concerning her relationship with Wogenstahl. Peggy's son, Justin, reported that Wogenstahl "would stop by for a few minutes every day. He would take Peggy to the grocery store or make little trips for her. . . . Most of the time JEFFREY WOGENSTAHL would come to see his mom or his brother Eric. JEFFREY was new to the area and seemed not to know very many people and was trying to catch on by knowing PEGGY and Eric." (Exhibit 14, p. 2). His mother even had a nickname for Wogenstahl, "the Canadian Jeff." (*Id.*). The prosecution possessed another report that Wogenstahl's vehicle had been "parked in the alley behind 308 Harrison Avenue, the GARRETT residence, several times in the past." (Exhibit 15). Finally, Troy Russell reported that he had seen Wogenstahl in Amber's mother's apartment more than once and in early November he has witnessed the mother and Wogenstahl smoking crack in her apartment. (Exhibit 16). Russell used to live with the Garretts. (Exhibit 16).

Peggy Garrett's relationship with Wogenstahl was extremely important to both the State and the defense case at trial. First of all, if there is an innocent explanation for Amber's blood to be found in Wogenstahl's car—which there would be if Wogenstahl frequently drove Amber and/or her mother places around town—that would have been something for the defense to bring out on cross-examination. Moreover, this is additional impeachment evidence—another lie—that Peggy Garrett was caught uttering. If Garrett lied about her relationship with Wogenstahl, what else did she lie about?

B. Suppressed information concerning Eric Horn was material.

Eric Horn testified that he was at the Garrett residence all evening except from approximately 3:00 to 3:30 a.m. (Tr. 953, 1007-08). However, Chris T. Brickner saw Horn on Harrison Avenue at 2:30 a.m. (Exhibit 31). And interestingly, Daniel Brock, who was with Brickner and reportedly also saw Horn, reported to the police that he did not see "the suspected vehicle." (*Id*.) The police also received a report that Horn "left @ 3/30 and left the door locked returned @ 500/ and the door was not locked Mom returned at @ 505/." (Exhibit 32). Horn would later fail a polygraph concerning the events in question. (Exhibit 28).

The investigating officers also considered Horn a suspect in the murder. (Exhibits 28 and 29). Two weeks prior to Amber's death Eric Horn stated that "he hated his sister and that he wished she was dead." (Exhibit 30). The notes in the police file provided "need to talk to Eric again. How would Eric get her [Amber] to Jamison Road?" where the body was found. (Exhibit 29). Two other individuals came forward with information concerning Eric, one of whom indicated that they saw Eric with a "knife". (*Id*.) And Douglas Dalton and Robert Hess gave written statements on November 29, 1991 concerning an incident they had witnessed on or about

October 3, 1991. (Exhibits 46 and 47).[6] They both reported hearing a young child screaming. (*Id.*). "A few seconds later" a young girl matching the physical description of Amber ran from an alley screaming. (*Id.*). Hess and Dalton stopped her and asked her what was wrong and she said nothing. (*Id.*). She then ran down the street and two boys matching the physical descriptions of Amber's brothers chased her. (*Id.*)

Undermining Horn's testimony was key for the defense theory at trial—in turn, either establishing that Horn was a reliable stand-alone suspect and/or impeaching his testimony to the point that is was completely unbelievable were vital for the defense. It was clearly material that Horn, a suspect, and one of the prosecution's key witnesses, had previously stated that he wished that the victim was dead. The jury should have known that Horn had previously made this statement. The jury should have also known about the contradicting evidence as to Horn's whereabouts that evening. Horn's whereabouts are important for multiple reasons. First, Horn is a suspect, himself. Second, if Horn was out of the house from 3:30 a.m. until almost 5:00 a.m., that is an hour and a half of time that is unaccounted for when the Garrett residence unattended. Any number of people could have abducted Amber during that time period. As explained by multiple sources, there were people in and out of the Garrett residence at all hours. (Exhibit 43). Trial counsel also should have had the opportunity to talk to Dalton and Hess about what they saw on October 3, 1991. Was it Eric and Justin Horn, who were chasing Amber on the street that day, and why?

Teresa Smith was recently interviewed by an investigator with the Office of the Ohio Public Defender and supplied an affidavit in this case. She reported that "Amber didn't want to go into her apartment because her brother, Eric Horn, was there and her mother wasn't home. It

[6] Douglas Dalton in his report states that the incident occurred on "3rd of October *1992*." (Exhibit 32) (emphasis added). The reported year was a misstatement given that he gave the written statement on November 29, 1991. (*Id.*).

became a common occurrence that Amber wouldn't go home if Eric was there and her mother wasn't." (Exhibit 76). Smith went on: "Amber told me that her brother would cuss at her and grab her by the throat. She also confided in me that Eric had 'touched her.' I didn't ask for specifics, but I knew that she was saying that Eric sexually molested her. She then begged me not to tell her mom, saying 'don't tell mom, my mom will kill me.' Because she begged me and seemed petrified about her mom knowing, I didn't say anything. Eric was always Peggy's favorite. I tried to have Amber over to my house as much as possible in an attempt to protect her." (*Id*.). Her husband, who went by the nickname Big Kenny, also disliked Eric and "saw Eric using drugs around town." (*Id*.). Smith also reported that she ran into Eric at the store following Wogenstahl's trial. Eric remarked to her "Sometimes you get away with stuff, sometimes you don't." (*Id*.). It was clear to Teresa that Eric was telling her that he had gotten away with Amber's murder. (*Id*.).

Following Wogenstahl's trial, Eric Horn was convicted of sexual battery of a 13 year-old girl. (Exhibit 34). The victim of that offense had claimed that Eric raped her. (*Id*.) The date of the report was September 29, 1993. (*Id*.) Although not traditional *Brady* evidence, because the offense and conviction occurred (mere) months after Wogenstahl's trial had concluded, this information should be considered as additional evidence of Horn's intention to commit acts of violence against young girls.

What also exacerbates the newly discovered evidence regarding Horn is other previously disclosed (but not disclosed until Habeas discovery) *Brady* evidence concerning Horn. Horn testified at a pretrial deposition that he had never sold marijuana and/or narcotics. (Eric Horn pre-trial videotaped deposition). At trial on cross examination, Horn again denied selling marijuana. (Tr. 986). Unbeknownst to defense counsel and Wogenstahl at trial, six months prior to Wogenstahl's trial "Horn had been arrested and adjudicated as a delinquent for trafficking in

marijuana.**"** *State v. Wogenstahl*, C-030945, 2004-Ohio-5994, 970 N.E.2d 447, ¶ 14. Horn was initially arrested and charged with a fourth degree felony possession of marijuana. The prosecution, without any hearing or paperwork, reduced Horn's felony to a misdemeanor and placed Horn on probation. Just one month prior to the start of Wogenstahl's trial, Horn's probation was terminated. (Exhibit 34).

The fact that Horn had been adjudicated delinquent for trafficking drugs was undisclosed at trial. Because of that, the State was able to capitalize on their nondisclosure, stating in closing:

> [Wogenstahl's] next story is that he had to go by and get Eric so Eric could take some marijuana to his mother over at Troy Beard's house. *** Is that second story supported by any testimony other than him and other than his own statement other than what happened? *** The only evidence you have heard of marijuana in this case is marijuana he [Wogenstahl] had in his car or in his possession that he smoked with Peggy and Lynn and paraphernalia that he had in his house when they came in and executed the search warrant. There is no evidence in this case that anybody else ever had any marijuana.

(Tr. 2433-36).

> How did he get Eric out of the house? That is critical. This is very critical. His first story was he told -- and he told this to Eric, he told this to Peggy and Troy and then later on he told the exact same story to Patrolman Lindsey. You will have that back with you. He said it was just a joke. I was messing with his mind. I do that to him all the time. Within seventy-two hours he had drastically changed his story. Now he says he was afraid he was going to have his parole violated. We are talking over a marijuana cigarette.

(Tr. 2587-88).

What proved critical for the prosecutors was their successful effort to hide the truth about Horn. Horn lied. State agents knew he lied. Had defense counsel had evidence of Horn's drug use/abuse, it would have doubly benefitted Wogenstahl. First, the prosecution could ***not*** have successfully made the arguments to the jury that it did; second, Wogenstahl's credibility, and in

turn, his version of the facts – that he went over to the Garrett residence to buy drugs from Eric Horn – is considerably bolstered by Horn's drug usage and resultant lies concerning it. Further, it can be implied that Horn received consideration for his testimony against Wogenstahl. Without any hearing, the prosecution reduced Horn's felony to a misdemeanor; Horn was adjudicated delinquent, fined, and placed on probation. On January 4, 1993, less than four months after being placed on probation, and just one month prior to the start of Wogenstahl's trial, Horn's probation was terminated. The record terminating his probation reflects that the entry was made anonymously, by: "Judge, Visiting." (Exhibit 34). This has to be more than just coincidence.

Coupled with this revelation that Horn used and dealt drugs, evidence that Horn was a suspect, that Horn had previously stated that he wanted his sister dead, and that Horn was seen outside of the Garrett residence on the night Amber disappeared would have destroyed Horn's credibility as to what he saw that evening regarding Wogenstahl. Moreover, with so much stacked against Horn, the prosecution may have decided against using Horn as a witness against Wogenstahl.

Two former jurors who recently signed affidavits in this case both stated that additional information regarding Eric Horn would have made a difference. Roberta Venturini, stated, "I suspected the older brother, Eric, was involved. He seemed weird. . . . If the defense attorneys had emphasized the problems with the mom and brother's stories more, it may have affected my sentencing decision. It would have given me and the other hold out juror more to stand up to the other jurors and possibly could have persuaded them." (Exhibit 79). Another juror, Carmen Pittman, also stated, "[e]vidence of Eric's dealing drugs could have explained why Jeff went over to the house in the middle of the night and why Eric would leave his sister in the middle of the night." (Exhibit 77). She went on to explain: "[i]nformation about Eric Horn's drug dealing

would have had effect on my decision to convict because Amber's murder could have been about him owing someone money or a drug deal gone bad." (*Id*.).

Another juror also spoke with an investigator from the Office of the Ohio Public Defender. (Exhibit 43). Delores Reed would not sign an affidavit, but she stated to Ms. Phillips that "had she known the brother was lying about selling drugs her verdict may have been different. She said that Eric Horn's story about how Mr. Wogenstahl tricked him to get him out of the house was one of the most important pieces of evidence. She said at the time she thought Mr. Wogenstahl was despicable for playing that trick." (*Id*.). Reed further believed that "the mother and brother had probably gotten their story together to cover up that the mother was drunk." (*Id*.).

Three separate jurors have all indicated how important this suppressed information concerning Eric Horn would have been to them—this is unmistakably material to Wogenstahl's case.

C. Suppressed evidence concerning Amber's exit from the residence was material.

The prosecution told the jury that Amber was snatched from her bed without even being given the opportunity to change into her street clothes and put on her glasses which she was blind without. (Tr. 2428, 2590). Her mother would testify that Amber's eyesight was so bad that she could not even walk from her bed to the bathroom without her glasses. (Tr. 834, 862).

However, this was not true; Amber often was seen without her glasses (Exhibit 21, 43). When Amber left the apartment, she was fully clothed and not wearing the clothing she wore to bed. "Amber had the Loretta Lynn shirt on" when she went to bed. (Exhibit 60, 78). According to the report of Patrolman Lindsey, the mother told him that "that even the nightshirt she slept in

was still there [in the house]." (Exhibit 60, p. 2). Amber was clothed in a red dress when she was murdered. (State's Exhibit 52).

This was again crucial evidence that was not disclosed to the defense. The State made much hay out of the fact that Amber was practically blind without her glasses and in a "nightshirt" when she was found. Yet, both of these "facts," as the State would have had the jury believe, were actually falsities. Loretta Garrett, Amber's grandmother confirmed in a recent interview that Amber did not rely as heavily on her glasses as the State would have had the jury believe. Loretta Garrett assured the investigator that Amber "only wore her glasses about half of the time." (Exhibit 43).

An interview with Brenda Gatliff (f.k.a. Philpot) also confirmed that the dress that Amber was found in was a church dress that belonged to Gatliff's daughter. (Exhibit 43). In a follow-up interview with Annette Knox (f.k.a. Ida Philpot, Brenda Philpot's daughter), Knox further confirmed that the dress that Amber was found in was a dress that Knox had loaned Amber to wear to church because Amber did not have any dresses. (Exhibit 43).

Had competent defense counsel had this information, at the very least, defense counsel could have lain to rest the prosecution's notion that Amber was snatched from her bed so quickly that she did not even have a second to change. She, in fact, was fully dressed. And she could also see—at least to some extent—without her glasses. And, in addition, defense counsel could have utilized much of this information to poke further holes in the testimony of Eric Horn's and Peggy Garrett's testimony.

D. Suppressed evidence concerning the time of death was material.

The prosecution adduced testimony, presented evidence, and argued to the jury that Amber was killed at approximately 3:30 a.m. on November 24, 1991. (Tr. 1446-47) (Tr. 1524-

25, 156-63). The prosecution relied on this testimony in both its opening statement and closing argument. (Tr. 845-47, 2437-50). However, several suppressed reports indicate that Amber could have been killed at a time other than around 3:30 a.m., on November 24, 1991. Matt Barnes's spouse "[s]aw a car pulled off the road Sunday nite about 12:30 a.m." (Exhibit 66). Susan Crowder saw "2 trucks on Jamison road", while Mary Jo Puckett reported that on her way to work on Monday, November 25, 1991, at approximately 4:10 a.m. to 4:15 a.m., she saw a small "reddish in color, two door" car. (Exhibit 70). Jo Ann Black also saw a car parked on Jamison Road "at the top of the hill" on either Saturday or Sunday morning at 6:00 a.m. (Exhibit 71, 72). Charlene Macaluso "saw a white car by guard rail on Sunday morning around 8:30 a.m. green army jacket on m/w 5'10 – 5'10½ at Jamison Creek near or at scene." (Exhibit 65, 55). The trunk of the vehicle was open. (Exhibit 55). Two other individuals saw a suspicious person and/or car on Jamison Road and reported it to the police as well. (Exhibit 72).

Amanda Beard, a classmate of Amber's reported that she saw Amber at 10:00 a.m. the following day [November 25, 1991] in a "blue p/u with white cap" which was "going toward Indiana." (Exhibit 69). Amber was "leaning against the window of truck crying wearing jean overalls."(*Id.*). Amanda reported that it was "definitely Amber." (*Id.*). Amber's mother reported to the media that "Amber may be wearing blue jean overalls. The overalls are gone." (Exhibit 78).

In addition, Annette Knox also told an investigator from the Office of the Ohio Public Defender other information that contradicted the State's theory of when Amber exited or was taken from the residence. Knox explained that she and Amber would frequently attend church together on Sunday and usually rode the church bus. (*Id.*). A note in the file confirms that Amber would go to Brenda Philpot's to go to church with Brenda's kids. (Exhibit 29).

Knox explained that she remembered November 24, 1991, like it was yesterday. She recalled that the church bus driver was late picking her up that day. According to Knox, the bus would usually arrive at her house between 8:45 and 9:00 a.m., but that day he didn't arrive until 9:30 a.m. Knox said that he was also driving his personal vehicle instead of the bus. (*Id.*). Why was the bus driver late that day and driving his personal vehicle instead of the church bus? This is yet another question that should have been investigated or at least should have been the subject of cross-examination as to the police detectives and whether or not they looked into this lead.

Knox then described that she got home from church that day around 12:00 p.m., changed clothes, and went to see if Amber was home. Peggy came to the door and told her Amber wasn't home and that she'd gone to church. Knox told Peggy that Amber hadn't gone to church. Knox then said that Peggy told her Amber must be playing with a friend. (*Id.*). At that point, Knox said she walked back to her house to see if Amber had gone to her house. Amber wasn't there, so she walked back to Peggy's house and knocked on the door again. This time Eric Horn answered the door. There was also a third person Knox didn't know in the apartment this time. Knox said Eric told her they assumed Amber was out with her friends. (*Id.*).

Evidence that Amber may have left her house and/or have been taken at a time other than between 3:00 a.m. and 3:15 a.m. on November 24, 1991, was exculpatory and should have been turned over to Wogenstahl's defense counsel. Had competent defense counsel had this information, they could have exploited this information in front of the jury raising reasonable doubt as to the time Amber disappeared from her home. For instance, had they been aware of Amanda Beard's statement to police or Knox's statements regarding the church bus, they could have, at the very least, planted reasonable doubt in the minds of the jurors. Especially in light of other suppressed evidence as to Garrett's and Horn's whereabouts on the night in question, these

statements call into question the State's claims as to when Amber was murdered. This evidence undermines the State's case as well as draws inferences that someone other than Wogenstahl could have committed this crime.

E. Suppressed evidence undercuts the eyewitness testimony in this case and is material.

1. *Suppressed evidence undermines Michelle Hunt's testimony.*

Michelle Hunt testified that she worked at the Waffle house on the night/morning of Amber's disappearance. (Tr. 1083-84). She testified that after Peggy Garrett arrived at the restaurant, a vehicle with two persons in the front seat pulled in and immediately exited the parking lot. (Tr. 1086-87, 1096, 98). Hunt identified State's Exhibit 50, as a photograph of the vehicle that she saw enter and immediately leaving the parking lot. (Tr. 1088, 1095).[7] She testified that FBI agents showed her the photograph shortly after Amber's body was found. Unbeknownst to Wogenstahl, on November, 27, 1991, Hunt gave a statement to Special Agent Woods. (Exhibit 39).

Remarkably, she made absolutely no mention in this statement of her having seen a car enter and leaving the parking lot. (Exhibit 39). Further, there is no mention of Special Agent Woods having shown her photograph(s) of vehicle. This is incredible, and defense counsel at Wogenstahl's trial should have had this report in order to cross-examine Hunt as to her memory of this so-called vehicle that she saw pull into the Waffle House on the evening in question.

Further, Wogenstahl's current counsel has obtained a sworn affidavit from a qualified expert in eyewitness identification – Harvey G. Shulman. Ph.D. (Exhibit 80). Although Dr. Shulman does not speak specifically to Hunt's identification of Wogenstahl's vehicle, he speaks

[7] That vehicle in State's Exhibit 50 was subsequently identified as belonging to Wogenstahl. (Tr. 1036).

in general to factors that operate to produce a false identification, including "poor lighting, viewing angle, distance, divided attention and limited time", all of which would have been present in Hunt's viewing of Wogenstahl's vehicle for a brief moment through the front windows of the Waffle House, at night, while tending to customers, etc. (*Id*.).

2. *Suppressed evidence undermines Brian Noel's testimony.*

Prosecution witness Brian Noel also testified that at approximately 3:40 a.m. on November 24, 1991, he saw Wogenstahl standing next to a car parked on the side of the road in the vicinity where Amber's body was later found. (Tr. 1510-15, 1524-25). On cross examination, Noel stated that he had been at Hymie's, a tavern, from 9:00 p.m. until 2:30 a.m. and had drunk two beers. (Tr. 1529-30). A suppressed report demonstrates that Noel previously told the investigating officers that he had drunk "5 beers." (Exhibit 40).

In addition, Dr. Shulman writes specifically on Noel's lacking identification testimony, finding that "memory of a face of a stranger seen once for a few seconds is difficult under optimal conditions. When visibility is limited by poor lighting, viewing angle, and limited time it is extremely challenging to form durable, detailed memory." (Exhibit 80). Dr. Shulman then commented on the line-up that Noel viewed that contained Wogenstahl:

> In the video recording of the lineup in which Brian Noel identified Wogenstahl his comments indicate a relative choice strategy. For example at 5:02 on the video timeline Noel stated "closest one out of that bunch, he's the only one that fits that description all that much." ***As noted above this 'best match' strategy is prone to false identification errors***. (*Id*.) (emphasis added).

3. *Other eyewitness identifications at Wogenstahl's trial are likewise called into question.*

In addition, Dr. Shulman commented upon the other eyewitness identifications made at Wogenstahl's trial. Similar to Noel's identification, both Kathy Roth and Fred Harms's

identifications "viewed a person later claimed to be Jeffrey Wogenstahl at night from moving vehicles for a very limited amount of time." (*Id*.). Dr. Shulman noted that as to these identifications, "[m]emory for a face of a stranger seen once for a few seconds is difficult under optimal conditions. When visibility is limited by poor lighting, viewing angle, and limited time it is extremely challenging to form a durable, detailed memory." (*Id*.).

Dr. Shulman also commented on the fact that chance encounters and or exposure to media accounts of a suspect may alter a witness's memory: "Both Vicki Mozena and Kathy Roth testified that they had encountered Wogenstahl in contexts other than the one on which they based their identification. Mozena had seen him in the UDF before the crime date and Roth saw him on TV just after the crime." (*Id*.). Dr. Shulman stated that "[t]hese encounters may have provided or enhanced the memory that identification was based upon. It is not uncommon to recognize a face but forget the circumstances of an encounter. When this happens in a photo identification procedure the result can be a false identification." (*Id*.).

Dr. Shulman pointed out that identifications in a photo lineup can be mistaken when the administrator provides encouragement or incentives, as was done with Vicki Mozena. The instruction given to her: "Circle the one that [she] thought was the gentleman that came in that night' was suggestive" and improper without further instructions that do not seem to have been given. (*Id*.).

State's witness Kathy Roth could not initially make an identification when presented with a photo array shortly after the crime occurred. It was not until eleven months later when she was shown a second array, and an obvious mugshot of Wogenstahl, that she was able to make an identification. Dr. Shulman again concluded that this identification was procedurally flawed. (*Id*.). Kathy Roth recently confirmed in an interview on September 8, 2016, with an investigator

from the Office of the Ohio Public Defender that she "wasn't sure about her identification of Wogenstahl" until she saw him in court, and added that "they [the police] knew" that she was not sure. (Exhibit 43).

All five eyewitnesses utilized at trial who either saw Wogenstahl or his car on the evening in question could have been, and should have been, challenged on cross-examination and through an eyewitness identification witness expert. Had the prosecution turned over all Brady evidence that was apparent at the time of the trial, that evidence could have further been explored and exploited by an expert at trial, as Dr. Shulman demonstrates in his attached affidavit. (Exhibit 80).

F. Suppressed evidence concerning Wogenstahl's jacket was material.

The investigating officers seized a brown leather jacket (State's Exhibit 9) from the residence of Wogenstahl. (Tr. 1682-83). The prosecution adduced lay and expert testimony and argued that Wogenstahl's jacket was torn while he was removing Amber's body from the vehicle and placing it in the wooded area where her body was eventually found. On direct examination, Peggy Garrett testified that when she saw Wogenstahl earlier that evening he was wearing a brown jacket that "was nice," and "did not have any cuts in it or anything." (Tr. 870). However, she previously told Detective Lowery that "She remembered the jacket because 'he showed me a spot on it and asked me if it could be fixed.'" (Exhibit 13). Eric Horn identified State's Exhibit 9 as the jacket that Wogenstahl was wearing when he gave Horn a ride to the Beard residence. (Tr. 954, 997, 999). However, Horn initially told Patrolman Lowery that Wogenstahl was wearing "a wine colored windbreaker type jacket. (*Id.*). A second report indicates "What Wogenstahl wearing, Eric *Possibly* wht (sic) Sweater + jeans . . . Hypnosis." (Exhibit 33).

What Wogenstahl was wearing that evening was obviously a crucial fact for the prosecution to prove. First, the prosecution needed to get Wogenstahl into his leather jacket – through eyewitness testimony as well as the testimony of Peggy Garrett and Eric Horn. Anything that would undercut these witnesses' testimony would, in turn, hurt the prosecution's chances that the jury would believe that Wogenstahl was indeed wearing this jacket on that evening.

Second, the prosecution needed to show that the damage to the jacket was due to the circumstances of the homicide, in particular, carrying Amber's body into the ravine where her body was ultimately found. So, the appearance and condition of the leather jacket was of particular importance. If the damage to the jacket preexisted that evening, then the prosecution's theory of the case could be challenged and their witness regarding biological evidence, specifically Dr. Robert Webster's testimony concerning the field of botany and the identification of plant products found around the body and crime scene, would have been all but completely refuted.

Had trial counsel had these reports, they could have painted a different picture. First, Wogenstahl may not have even worn his brown leather jacket that evening, as Eric Horn reported to Patrolman Lowery. Additionally, even if he was wearing his leather jacket that evening, evidence that it was damaged prior to this incident would have provided essential rebuttal evidence to counter Dr. Webster's testimony.

G. Suppressed evidence concerning prosecution witness Bruce Wheeler was material.

Bruce Wheeler was the jail house informant who testified that Wogenstahl had confessed to killing Amber. (Tr. 2142-46). Wheeler, in response to the prosecutors' and defense counsels' questions, denied that he had received or expected to receive favorable treatment because of his testimony. (Tr. 2156, 2158, 2180-81). In closing argument, the prosecution emphasized that Wheeler had received nothing in exchange for his testimony. (Tr. 2450, 2464-65).

Wheeler in fact received consideration in exchange for his testimony. In a sworn affidavit, Wheeler stated that the prosecution "implied that [he] would do less time in prison if [he] testified" against Wogenstahl. (Exhibit 35). The prosecution also promised him that if he testified they would write a letter on his behalf to the Parole Board. (*Id*.). The prosecution subsequently wrote a letter to the Parole Board on Wheeler's behalf. (Exhibit 36). In addition, in exchange for his testimony, Wheeler requested that the prosecution arranged for his transfer to Ross Correctional Institution. (Exhibit 35). Wheeler was incarcerated at Ross Correctional Institution. (Tr. 2133).

Wheeler's testimony, and the credibility thereof, was highly important, if not critical, to the prosecution's case. Without Wheeler, the State lacked a confession and a motive. In the context of the case, this evidence was highly important to the State because all of the other evidence against Wogenstahl was entirely circumstantial. Additionally, the State would have had to better explain the lack of forensic evidence and other exculpatory forensic evidence, such as the semen stains on Amber's bed that excluded Wogenstahl. The evidence of Wheeler's bias and compensation from the State would have been of significant use for the defense to cast doubt on the likelihood of the State's version of the events on the night in question.

The importance to the prosecution of maintaining the credibility of Wheeler's testimony in particular is shown by the prosecutor's discussion of Wheeler in his closing argument, where he stressed to the jury that:

> Without holding Bruce Wheeler up as a model citizen, without defining what he did and what he is serving time for, I will tell you again you should believe him. Why? For two reasons: First, **Bruce Wheeler got nothing for his appearance in this courtroom, He got nothing.**

(Tr. at 2464) (emphasis added), and later by the prosecutor's personally vouching for the credibility of the prosecution's witnesses in general and attacking Wogenstahl's credibility in the same phrase:

> **They didn't lie and they are not mistaken. These are honest people.** . . . **They are honest people** . . .
> You could believe them or you could believe this burglar, this thief who is in here before you today.

(Tr. 2450) (emphasis added). And to contrast that with Wogenstahl's lack of credibility:

> How did that blood that was found on the outside of his bathtub, on the side of his bathtub, how did that get there? We didn't find enough to type but we found enough to tell us it was blood. How did it get there? No, it didn't have anything to do with cleaning up that night. My cat fell. Now this is terrible. This is tragic. Have you ever heard of a cat that falls with such force that it knocks itself unconscious and knocks out a tooth? **That story is absolutely ridiculous.**

(Tr. 2460-62) (emphasis added).

Evidence that Wheeler in fact received consideration in exchange for his testimony would have been extremely useful to the defense to demonstrate a possible ulterior motive for testifying. Such evidence would have provided the jury with a basis to believe that Wheeler possibly testified against Wogenstahl not because he was a stand-up person, but as a means of avoiding going to a less desirable prison, or obtaining parole, or receiving some other favorable treatment by the Hamilton County Prosecutor's Office. Admitting Wheeler's grand jury transcript, or asking him questions on cross-examination to the same effect, would have backed-up this conclusion—Wheeler was actually not the stand-up guy he claimed to be. (Exhibit 37). Instead, he lied and tried to avoid prosecution for killing a child and only came clean upon being called out when he failed a lie detector. This is a far cry from the person Wheeler claimed to be, and as was vouched for by the prosecution, during Wogenstahl's trial.

H. Suppressed evidence bolstered Wogenstahl's testimony and rebutted the prosecution's closing argument.

Wogenstahl testified that during the week prior to Amber going missing, his cat jumped from the seat of the toilet towards the top of the shower curtain. (Tr. 2297). The cat hit his mouth on the side of the tub, causing it to bleed. (*Id.*). In closing argument, the State ridiculed Wogenstahl's testimony concerning the cat and injury to its mouth. (Tr. 2460-2462) (emphasis added). In rebuttal closing, the State again attacked Wogenstahl's testimony concerning his cat. (Tr. 2592). However, the prosecution suppressed a report that supported Wogenstahl's testimony concerning his cat and rebutted the prosecution's argument. The investigating officers had seized Wogenstahl's cat and took it to Doctor William Kuhlman, a veterinarian, who confirmed that the cat had a chipped tooth and a scabbed tail. (Exhibit 73).

This hidden report was clearly favorable to Wogenstahl. Had trial counsel had this report in hand, it would have had a double effect on Wogenstahl's case. Not only would it have bolstered Wogenstahl's testimony and credibility in front of the jury, but the arguments that the State made in closing either would have been rebutted or would not have occurred. Wogenstahl was made out to be a liar when, in fact, it was the State that was lying to the jury in this case. The State clearly took advantage of not disclosing this information which supported Wogenstahl's statement.

I. Suppressed evidence concerning Justin Horn's whereabouts was material.

Peggy Garrett testified that her son, Justin Horn, "was gone for the weekend" that Amber went missing. (Tr. 864). He left "[s]ometime in the afternoon on Friday" and did not return until "[p]robably around 3 o'clock or something like that" on Sunday. (Tr. 865).

The prosecution had a report which contradicted this portion of her testimony. In a statement given by Justin Horn, he stated that "on Saturday, November 23, 1991, he left [the apartment] at about twelve noon and went to the apartment of Chris Marshall." (Exhibit 14, p. 1).

He returned to the apartment Saturday evening at "approximately 7 to 10 p.m., more likely around 8:30 to 9:00" to get something to eat and left not long after because "there was very little to eat." (*Id.*). He returned to the apartment "at approximately 8:00 a.m." and woke her [Peggy] up and "said hi to her." (*Id.*). Justin also added that his friend, Steve, was also with him at this time. Chris Marshall was also recently interviewed. He confirmed that it was unlikely that Justin Horn spent the night at his house on the evening that Amber disappeared. (Exhibit 81). In addition, Eric Horn made a statement to Patrolman Lawry that Justin came home at about 4:45 a.m., before Eric left at about 5:00 a.m. that morning. (Exhibit 27).

Had trial counsel been aware that Justin Horn was not, in fact, "gone for the weekend", they could have investigated both Justin Horn as well as his friend Steve. They also could have cross-examined the detectives on whether or not they followed-up with Justin as to his whereabouts that evening/early morning.

Trial counsel also should have had the opportunity to question Justin Horn as to the incident on October 3, 1991, when Dalton and Hess saw a young girl matching the physical description of Amber running from an alley screaming. (Exhibits 46 and 47). Hess and Dalton stopped her and asked her what was wrong and she said nothing. (*Id.*). She then ran down the street and two boys matching the physical descriptions of Amber's brothers chased her. (*Id.*). Was one of these two boys Justin Horn, and why was he chasing a terrified Amber?

J. Suppressed evidence regarding alternate suspects was material.

Evidence existed that Amber was stalked by a "creepy guy" who would show-up at her bedroom window, that she was followed in the woods by another man, and that she was raped on at least two separate occasions. (Exhibits 13b, 41, 42, 43, 44, and 54). In addition, a man (who lived above Peggy Garrett) suspiciously had information that Amber's body would be found in

Bright, Indiana. (Exhibit 59). Amber also had an "older boyfriend" named Jeff Ertzel that no one ever investigated. (Exhibit 45).

All of this information, particularly in the cumulative, was material for several reasons. First, defense counsel could have pursued the information and conducted their own investigation as to these suspicious circumstances. Was this one person or different people that were stalking and terrorizing Amber? In addition, defense counsel could have, at the very least, used the information to impeach the quality of the law enforcement's investigation given the failure of the investigating officers to pursue these various leads. *Kyles*, 514 U.S. at 446 ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation.") (quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)).

K. A coroner expert and crime scene investigation expert could have also refuted the State's case and must be considered in assessing the materiality of this new *Brady* evidence.

Counsel for Wogenstahl recently contacted Carl J. Schmidt, M.D., M.P.H., a licensed physician in the States of Ohio and Michigan. Dr. Schmidt signed an affidavit with his opinions and conclusions concerning this case. (Exhibit 82). Those conclusions include, but are not limited to the following:

- ***To a reasonable degree of medical certainty, my opinion is that the injuries could not have been inflicted in the vehicle shown in the pictures.*** It is practically impossible that the victim was in the car when these injuries were sustained, as the physical space needed by the assailant to inflict those injuries is much greater than that (this means the space needed to swing an arm wielding a weapon). Further, in order to cause the injuries sustained by the victim here, an assailant would need a significant amount of energy, and repeated blows, to injure the soft tissues of the head and cause the comminuted, depressed skull fractures described in the autopsy report. The fractures span much of the left side of the skull and brain tissue was exposed. The fracture lines extended to the floor of the skull and included the left orbital plate. There was also injury to the brain. The blows needed to cause them would have generated at least some spread or splatter

of soft tissue and blood at the place where the injuries were inflicted**.** ***The injuries to the head were caused when the head was supported against a firm surface, such as the ground, with the right side of the head in contact with it. This is also supported by the bruising seen on the right ear and the right temple, which could have been caused when victim's head was against a hard, irregular surface such as the ground outside.*** These injuries could not have occurred while the victim was sitting up, such as she would have been in the front passenger seat of the car. Had she been in a sitting position the head would have swung like a pendulum moving back forth, a process which dissipates energy and would have resulted in a different pattern of injury, instead of that seen here, where there is much more severe injury to the left side of the head in comparison to the right side. Injuries are remarkably absent from the right side of the brain.

- I don't believe you could move the body without some of this blood being left behind if it contacted any surface while being moved. Even if the body had been wrapped in some manner the body would have been leaking a large amount of fluid (including blood, saliva, brain matter, water, etc.) from the injuries incurred, and it is unreasonable to believe that a significant portion of this fluid would not have leaked in the transportation of the body. It would be extremely hard to thoroughly clean up this blood and fluid, particularly in a small space, such as a car that includes absorbent materials like carpeting.

- ***In conclusion, my opinion to a reasonable degree of medical certainty is that the victim in this case was killed outside of the car seen in the pictures that I reviewed. The injuries were likely inflicted while the body, and the head, were lying on an irregular surface, such as the ground outside, with the right side of the head in contact with it. Due to the amount of bleeding and blood loss, my opinion to a reasonable degree of medical certainty, is that the injuries to the head were sustained first, rendering the victim unconscious within seconds to minutes, while the stab wounds were inflicted.*** If the victim had not been alive when the head injuries occurred, I don't think you would have seen bleeding as extensive as was documented within and outside of the head. Death would have occurred quickly, perhaps within minutes of the injury to the blood vessels of the chest wall because of the large caliber of those blood vessels and their direct connection to the aorta.

(Exhibit 82) (emphasis added).

Counsel also contacted Gary A. Rini, M.F.S., who reported the following informed conclusions concerning the crime scene and investigation in this case (Exhibit 83):

- ***The procedures used by crime scene investigators did not meet the standards reflected in contemporary crime scene-related texts*** (see Fisher) regarding the planning, searching, documentation, protection and evidence collection of homicide-related scenes.

- Bleach will not prevent the scientists from locating blood. ***The luminol-bleach reaction is very specific, and to an experienced analyst, blood is easily recognizable.*** The luminol-bleach-blood reaction will appear "wiped-up" but the luminol chemical r**e**action will have a unique "flash" characteristic to its appearance. Subsequent presumptive tests such as the use of phenolphthalein will still test positive in the presence of blood, after applying bleach to the blood in an attempt to "wipe the blood away.

- ***The application of bleach to blood as a masking agent will not necessarily preclude subsequent detection of blood through the use of luminol detection techniques***, nor will it absolutely preclude the detection of DNA from a collected blood sample.

- Cat urine will not cause a reaction to the application of luminol, as the luminol reacts to a specific component contained in blood (hemoglobin) which is not present in cat urine.

- Due to the lack of the volume of blood one would expect inside a closed space (such as a vehicle) that would have been generated from the victim's injuries, and due to the lack of any transfer evidence of the murder weapon onto the interior of the vehicle, ***it is highly unlikely that the victim was killed or transported in the suspect's vehicle.*** The lack of detection of blood, or indications of blood clean-up, within Wogenstahl's apartment make it highly unlikely that the victim was murdered inside Wogenstahl's apartment. It appears that crime scene investigators removed the plumbing from Wogenstahl's bathroom to examine the contents of the drain pipes for evidence of blood. If blood had been present, it would have been found in the drain pipes. The lack of blood in the drain pipes indicates that no blood was present, nor was there any evidence of the use of any cleansing agents that would have removed any traces of blood.

- ***The State's contention that the victim was murdered elsewhere, or in Wogenstahl's car, which was then used to transport the victim to the scene, is not supported by the physical evidence in the car, at the scene or on the victim.*** As was previously mentioned, there was no evidence of bloodstains and weapon transfer evidence detected in the vehicle that would support the determination of a violent confrontation inside the vehicle; there was no documentation of bloodstain transfers along the path from the roadway to the body dump site that would support the determination that the body was transferred (dead) from another location and "dumped" at the site at which the victim was found. Other than the lack of the amount of blood that one would expect to be present after a violent confrontation, there were no fingerprints, hairs, fibers or any other physical evidence recovered which would connect the victim to Wogenstahl's apartment or car (in which they specifically vacuumed for trace evidence that resulted in their failure to discover any trace evidence linking the victim to the car). In addition, to this lack of evidence, there was semen found on the comforter upon the bed on which the victim slept that was never identified (linked) as to its source.

- ***My informed opinion is that the victim was killed very close to the dump site, then dragged (as indicated by Dr. Schmidt's description of the drag marks present on the victim), and placed where she was discovered.*** However, due to the lack of a thorough crime scene investigation, the exact location where the victim was murdered is impossible to determine after the passage of twenty years.

  (Exhibit 83) (emphasis added).

The combination of Rini's report and Dr. Schmidt's affidavit demonstrate the utter unreliability of the State's case against Wogenstahl. These reports pick apart any remaining evidence that the *Brady* evidence, as well as the newly discovered revelations concerning the hair testimony, had not already eviscerated. As these expert's conclude, Amber could not have been killed in Wogenstahl's apartment[8] or in his car. The State relied heavily on bleach as a masking agent at trial, alleging that the only reason that Wogenstahl's jacket and apartment could not be linked to the victim was because he had basically soaked them in bleach. (*See e.g*. 2461). However, as Rini points out, "[b]leach will not prevent the scientists from locating blood. ***The luminol-bleach reaction is very specific, and to an experienced analyst, blood is easily recognizable.*** The luminol-bleach-blood reaction will appear 'wiped-up' but the luminol chemical r**e**action will have a unique 'flash' characteristic to its appearance. Subsequent presumptive tests such as the use of phenolphthalein will still test positive in the presence of blood, after applying bleach to the blood in an attempt to 'wipe the blood away.'" (Exhibit 83). Thus, contrary to arguments raised by the State at trial, the negative tests for blood on Wogenstahl's jacket are just that – negative. (Exhibit 86). Further, as Rini explained, "Cat urine will not cause a reaction to the application of luminol." (Exhibit 83). This is key, considering the newly disclosed *Brady* evidence concerning Wogenstahl's cat discussed above in Section VIII(C) and IX(H). Wogenstahl's explanation concerning his cat—who indeed had a chipped tooth and scabbed tail—must be re-examined in this context. The same is true about

[8] The State has alleged in their recently filed Appellee's Brief in Case No. 1995-0045 that Amber was killed in Wogenstahl's apartment. Besides the fact that this scenario is virtually impossible due to the timelines established by the State and as pled in that case, these experts' conclusions also refute those contentions.

Wogenstahl's apartment: Amber's blood was never linked to Wogenstahl's apartment, and had blood been in the apartment, particularly in the plumbing removed from the bathroom, presumptive tests would have still tested positive for blood. Bleach is not the barrier to finding blood that the prosecution made it out to be. (*Id*.)

Moreover, due to the lack of blood and/or other biological evidence found in the car, Amber could not have been transported in Wogenstahl's car, at least not after the injuries were inflicted. Again, based upon these two expert's conclusions, and not contradictory to anything that was stated at trial, what is reasonable to conclude is that Amber was killed "outside of the car" . . . "The injuries were likely inflicted while the body, and the head, were lying on an irregular surface, such as the ground outside, with the right side of the head in contact with it." (Exhibit 82). The exact location cannot be determined some twenty years later; however, it is Rini's "informed opinion is that the victim was killed very close to the dump site, then dragged (as indicated by Dr. Schmidt's description of the drag marks present on the victim), and placed where she was discovered." (Exhibit 83).

What is also reasonable to conclude, and again not contradictory to anything presented at trial, is due to the amount of bleeding and blood loss, Dr. Schmidt's "opinion to a reasonable degree of medical certainty, is that the injuries to the head were sustained first, rendering the victim unconscious within seconds to minutes, while the stab wounds were inflicted. If the victim had not been alive when the head injuries occurred, I don't think you would have seen bleeding as extensive as was documented within and outside of the head. Death would have occurred quickly, perhaps within minutes of the injury to the blood vessels of the chest wall because of the large caliber of those blood vessels and their direct connection to the aorta." (Exhibit 82). This again refutes the State's contentions that Wogenstahl killed the victim either in his apartment or in his car. As Dr. Schmidt concluded, death would

have occurred within minutes of the injuries taking place. And the large amount of blood loss makes it unfathomable that Amber was stabbed and/or bludgeoned anywhere but outside, on the ground, somewhere near the site where her body was then discovered. (*Id*.)

The State's theory—that Amber was killed inside of Wogenstahl's car—cannot stand-up to scrutiny. The State's theory—that Wogenstahl used bleach to cover his tracks and mask blood on his jacket and in his apartment—cannot stand-up to scrutiny. The State's theory—that Amber may have been killed inside of Wogenstahl's apartment—cannot stand-up to scrutiny. Nothing more remains of the State's case, a case that was always built on a rocky foundation.

L. Conclusion, concerning materiality.

Rini's final conclusion in his report was the following:

> In my nearly forty years of experience in law enforcement and forensic investigation, it is my opinion that the investigation of this case was so deficient in its thoroughness and adherence to established procedures of professional competence that it rates in the top 10% of the most troublesome cases that I have reviewed, or personally have been involved with, since I began my law enforcement career in 1975.

(Exhibit 83).

This case cannot stand. This case is the epitome of a miscarriage of justice—complete with perjured testimony, false forensic evidence, and a Prosecutor's office that hid numerous relevant and necessary documents from the defense. Wogenstahl has made at least a prima facie showing concerning the materiality element to warrant this Court to order the case remanded. The State suppressed information that went to all aspects of its case against him.

Conclusion

For the reasons set forth herein, this Court should order this case remanded to permit the lower courts to assess the totality of the evidence that the prosecution suppressed. In the alternative, if this Court is inclined to supplement the record before it with the following

evidence in order to consider all of the evidence in the cumulative as part of the instant appeal, Wogenstahl would ask that the Court grant jurisdiction on the underlying appeal and allow briefing to occur so that all issues may be pled together.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing **Appellant Jeffrey Wogenstahl's Motion to Remand Case to the Trial Court** was served by U.S. mail addressed to Phillips Cummings, Hamilton County Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on this 7th day of October, 2016.

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