IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO	)	**CASE NO. 1999 CR 0873**
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**JUDGE REINBOLD**
	)	
	)	
	)	
DAVID G. THORNE,	)	**THIRD AMENDED**
	)	**POST-CONVICTION PETITION**
Defendant.	)	**Evidentiary Hearing Requested**

CASE HISTORY

Trial:

Charge—
Complicity to Aggravated Murder with
a for hire death penalty specification

Disposition--
Defendant was found guilty

Date Sentenced: January 27, 2000
Names of Attorneys: Jeffrey Haupt and George Keith
The conviction was the result of a Jury Trial.
The length of the trial was eight days.

Appeal to the Court of Appeals
Number or citation: 2000 CA 00067
Disposition: Conviction affirmed
Name of Attorney: Michael R. Puterbaugh

Appeal to the Ohio Supreme Court
Disposition: Jurisdiction Denied
Name of Attorney: Jeffrey W. Pederson

PETITION TO VACATE OR SET ASIDE JUDGMENT AND SENTENCE

Now comes the Petitioner, David G. Thorne, to petition this Honorable Court for post-conviction relief pursuant to Ohio Revised Code Section 2953.21. The reasons for the petition are that there were denials and/or infringements of Petitioners rights as to render the judgement and/or conviction void and/or voidable under the Ohio and/or the Constitution of the United States. Petitioner requests an oral evidentiary hearing. The affidavits attached to the original petition, first amended petition, and second amended petition are hereby incorporated by reference into this third amended petition.

JURISDICTIONAL FACTS

1. Petitioner David G. Thorne was indicted on September 15, 1999, for alleged complicity to aggravated murder with the specification that he committed complicity to aggravated murder for hire, to cause the death of Yvonne Layne, on March 31, 1999.
2. Counsel was retained and represented Petitioner throughout the proceedings.
3. A trial on the charges against Petitioner began on January 18, 2000.
4. On January 25, 2000, the jury returned a verdict of guilty of both the primary charge and the specification.
5. A sentencing hearing was held on January 27, 2000.
6. After a day and a half of deliberations, the Court found the jury deadlocked and unable to reach a unanimous decision on the appropriate sentence.

7. On February 2, 2000, a Motion to Appoint Counsel for Appeal was filed. Appellate counsel was subsequently appointed.

8. On February 3, 2000, the Court declared a mistrial on the sentencing phase and sentenced Petitioner to life imprisonment without eligibility of parole.

9. Appointed counsel timely file a notice of appeal on behalf of Petitioner in the Fifth District Court of Appeals.

10. The trial transcript was filed with the Court of Appeals on May 15, 2000.

11. A direct appeal was filed on August 3, 2000. The judgement of the Stark County Court of Common Pleas was affirmed on November 20, 2000.

12. A timely Notice of Appeal and jurisdictional Brief were filed with the Ohio Supreme Court.

13. On March 21, 2001, the Ohio Supreme Court denied Jurisdiction.

STATEMENT OF FACTS

14. Yvonne Layne was found dead in her home at 916 Devine Street in Alliance at approximately 12:30 p.m. on April 1, 1999, by her mother, Tawnia Layne. (T. Vol. III, p. 812.) The first investigator arrived within five minutes. (T. Vol. III, p. 871.) The police chief arrived later, with a civilian "observer", who was permitted to enter the crime scene. (T. Vol. III, pp. 893-894.) This individual was "Beth Newman" who was not associated with the Alliance Police Department in any manner whatsoever. (T. Vol. III, pp. 894) The coroner's investigator did not arrive until 1:22 p.m. (T. Vol. III, p. 912.) Two crime lab investigators arrived at 1:50 p.m. Several important determinations

recommended by the U. S. Department of Justice *National Guideline for Death Investigation* were not made. Most important, no attempt apparently was made to record the scene temperature or body temperature to aid in the determination of time of death, and no record was made of lividity to determine if the body had been moved after death. In addition, evidence was possibly contaminated when the victim's body was covered with a blanket before it was examined for hair, fibers, blood and other potentially important physical evidence. Among the items was a utility knife blade found resting against the back knee area of the victim. No explanation for this knife's presence in such a crucial location was ever made by investigators, or Joseph Wilkes, the admitted killer for hire.

15. An autopsy later revealed that Yvonne Layne died as a result of a gaping eight-inch laceration of the neck. The laceration was very deep and completely severed the left internal and external carotid arteries. It also severed the left jugular vein, and partially transected the trachea. (T. Vol. III, pp. 1082-1083.)

16. While at the crime scene, at 5:10 p.m., the day Layne's body was found, Detective Lloyd Sampson was approached by neighbor George Hale. Hale related that, while he was walking past Layne's residence between 9:30 and 10:00 that morning, he saw a white male, in his mid to late 20's, who was about 5'9" tall, and weighed about 180 pounds, exit the residence with a garbage bag, and walk around the west side of the house. The existence of this potentially important witness was not known to the Petitioner until Detective Sampson's report was obtained by a post-conviction investigator in late October 2000, in response to a public records request for all documents relating to the

investigation of Yvonne Layne's murder. Sampson's brief summary of Hale's statement was never made available to defense counsel before Petitioner's trial. When Hale was located and interviewed at his new address, it was learned that Sampson's brief summary, which he wrote in July 1999, did not tell the whole story of the police department's contact with Hale. According to the attached affidavit signed by Hale on December 29th, 2000, police unsuccessfully attempted to have Hale hypnotized, and had him look through a book of mug shots. Hale did not see a photo in the book of the man he saw exiting Layne's house the morning after the murder. In December 2000, Hale says in his affidavit he was shown photos of Joseph Wilkes, and David G. Thorne, and neither looked like the man he saw leaving 916 Devine Street. Hale also relates in his affidavit that his reward for coming forward with such important information, was to find himself and his girlfriend's brother treated as suspects and harassed. Finally, Hale states that police told him that they did not want him to testify at any murder trial that might result from their investigation.

17. On April 2, 1999, detectives interviewed Tawnia Layne, Yvonne Layne's mother. In answer to their questions, Mrs. Layne told the detectives that her daughter's most recent boyfriend was Frederick "Erick" Cameron IV, the father of three of Yvonne Layne's five children. Tawnia Layne said that Cameron was in prison and that she did not know if Yvonne was still seeing him or not. "I think she was trying to get back together with David {Thorne}," the father of her two-year-old son Brandon, Tawnia Layne said. Mrs. Layne also said that the father of Yvonne's fifth, and oldest child was Jeff Stout. Mrs. Layne told the

detectives that Yvonne had complained about being physically abused by Erick Cameron in the past. She said that Yvonne had told her that Cameron had kicked her unconscious in one incident, and broken her arm in another.

18. When asked if she could think of anyone else she thought would want to hurt Yvonne, Mrs. Layne said that "several" names came to mind. "Any of Erick's family I don't trust. Any of Erick's friends I don't trust," Mrs. Layne said.

19. Mrs. Layne also mentioned a former friend of Yvonne's, Pam Knepp. She said Knepp had stolen Yvonne's purse about a year before. Police were later told that Yvonne subsequently had beaten up Knepp in retaliation.

20. Mrs. Layne also mentioned the name of a former Alliance police officer, Quentin Artis. Mrs. Layne said Yvonne had been afraid of Artis since he had come into her house on the pretext of returning her driver's license, which he had confiscated during a traffic stop. Mrs. Layne said Artis then began making sexual advances toward Yvonne, and that he stopped only when a friend of Erick Cameron's mother walked into the house.

21. When Mrs. Layne was asked her opinion of Petitioner David Thorne, she replied, "I don't think he would hurt Yvonne." She said Yvonne had never said anything about Thorne hurting her. Mrs. Layne also indicated that Yvonne and Thorne had apparently become close again since Thorne's paternity of Brandon had been determined, and he had begun picking the child up for weekend visitation. "I think she was trying to...get back together with David", Mrs. Layne said. Mrs. Layne also stated that Thorne recently had spent at least one

night with Yvonne. (At trial, Sherman Layne, Yvonne's father, testified that Petitioner had resumed a romantic relationship with Yvonne.)

22. Detectives then asked if she knew anybody who drove a cream-colored pickup with a red pinstripe, or a white van with ladders on top. She said she did not know of anyone who drove a pickup matching that description, but that the van matched the description of one driven by Frederick Cameron III, Erick's father. Mrs. Layne said the elder Cameron had been visiting Yvonne regularly since Erick's incarceration. "She didn't trust him, either," Mrs. Layne said.

23. The next significant person detectives met with was Petitioner David Thorne. Petitioner Thorne voluntarily agreed to come to the Alliance police department when he was contacted on April 2, 1999. According to an Alliance police department report, detectives received a fax from attorney Robert W. Berger, William Lentz's associate at 11:25 a.m. The fax stated that Lentz was Thorne's attorney, that Lentz would be out of town until April 5, 1999, and that police were to instruct Thorne not to make any statements to police until then.

24. Petitioner Thorne was advised of Berger's instructions when he arrived at the police station at 11:38 a.m. Petitioner Thorne was surprised by the news of Berger's instruction's, but reluctantly followed them. Police statements indicate that the fact that Thorne exercised his constitutional rights, both irritated them and aroused their suspicions of Thorne.

25. A July 20, 1999 report prepared by Detective Lloyd Sampson reflects how these attitudes were further exacerbated when attorney Lentz contacted detectives after returning to the area. "Lentz advise that if we were willing to give his client

IMMUNITY, he would be willing to arrange an interview," Sampson wrote. Petitioner Thorne contends in his affidavit, that Lentz set this condition without his knowledge or consent.

26. Sampson indicated his feelings about the condition Lentz communicated to police during an interview with Terry Claar on April 19, 1999, in which Claar told police that he was with Petitioner Thorne in Independence, Ohio, at the time of Yvonne Layne's murder. "When something of this magnitude happens, and you...refuse to talk to the police, it kind of sends up a red flag to us," a transcript of the interview quotes Sampson saying.

27. On April 5, 1999, detectives took a taped statement from Frederick Cameron III, the father of Yvonne's most recent boyfriend. In his statement, Cameron stated that Yvonne Layne usually left her front door unlocked. Cameron became the second of several people who told detectives that former police officer Quentin Artis had entered Yvonne's home, and made sexual advances towards her shortly after taking her driver's license during a traffic stop on September 25, 1998. "That policeman kept coming around...even when he was off duty," Cameron said. At another point during his statement, Cameron said he did not know for sure if Artis ever entered Yvonne's house again. He added, however, that Yvonne had told him "that she'd seen him driving up and down the street, and uh, she said that...he asked some questions, sexually type, you know." Despite the statements by two of the people closest to Yvonne Layne, there is no indication in any records turned over to Petitioner Thorne's defense attorneys, or obtained through a recent public records request, that Artis was ever questioned

or investigated for possible involvement in Yvonne Layne's murder. Cameron said that the only other person that he knew to come to Layne's home was Petitioner Thorne, to pick up his son Brandon. When he was asked if Yvonne ever mentioned if she had any trouble with Petitioner Thorne, or that she was afraid of him, Cameron said, "Uh, no. She never acted that way." Cameron admitted that his son Erick had a temper, and that Yvonne often called police when he became angry with her.

28. On April 6, 1999, Petitioner Thorne's sister, Gina Gatian, voluntarily called police to report her concern about statements made to her by Amy Davis, Petitioner Thorne's girlfriend, two weeks before Yvonne Layne's murder. In a subsequent taped statement, Gatian told detectives that Amy Davis had "made several comments in regard to Yvonne...as far as wishing that she were dead, and that it would be a lot easier when my...brother got custody of {Brandon} if Yvonne was, was not there." Gatian said that Amy Davis' negative comments about Yvonne began after Petitioner had learned that he was Brandon's father, and that he was going to be paying child support. On page 4 of her statement—which was missing in the copy given to defense counsel and missed being filed into the court record, Gatian went on to say that, while Petitioner and her husband, Doug Gatian, were out buying materials for a remodeling project they were working on at the Gatian home, Amy Davis asked her if she knew how much it cost to bump somebody off. Gatian said that when Davis made the statement, "It sounded as though she already had the answer." In answer to a question, Gatian said that Petitioner did not seem to be afraid of Amy Davis,"

but he spoke to family members in regards to...that if he ever broke up with her, that he would be in fear for my grandparents or their house." Asked how Petitioner got along with Yvonne, Gatian said Petitioner had "a very good relationship" with her. Gatian also said in response to a question that Amy Davis was a "very controlling" person, but that she did not have enough control over Petitioner to convince him to murder someone.

29. Despite these statements, there is little evidence that police investigated that Amy Davis could have been involved in Yvonne Layne's murder without Petitioners knowledge. Police reports indicate that Davis, who refused to consent to an interview by detectives, was viewed only from the perspective that she may have somehow assisted the Petitioner in arranging for Yvonne Layne's murder.

30. On April 9, detectives taped a statement given by Erick Cameron's mother, Linda McLaughlin, and her husband, John McLaughlin. The McLaughlin's provided information at this time that a friend, John Marsh, had been told by Doug Williams that Yvonne may have been killed by a former friend of Erick's, by the name of Shannon Morales. When the detectives investigated Shannon Morales' whereabouts the night of the murder, however, it was learned that he was in an Indiana jail.

31. Investigators did not achieve what they considered a major breakthrough until they were informed by the mother of Rose Mohr that her daughter and boyfriend, Chris Campbell, had been told the night of the murder by Joseph Wilkes, that he'd been hired to kill a women in Alliance.

32. In a July 12 statement, Rose Mohr, said that she and Campbell had a conversation with Campbell's friend, Joseph Wilkes, at the Carnation Mall in Alliance, shortly after they had gotten off work at 8:00p.m. Mohr, who did not know Wilkes, quoted the 18-year-old drifter as saying he was in Alliance because "he had a job to do, and that some guy was paying him to stay at the Comfort Inn." Mohr said Wilkes tried to change the subject, but that Campbell "kept trying to get it out of him, what he was there for." And he said, "Well. Some guy paid me to kill some girl in Alliance," Mohr said. She said Wilkes went on to say he had been paid some money in advance, and would be paid more once "the job was done."

33. On July 12, 1999, detectives also took a taped statement from Campbell. Campbell told the detectives that Wilkes told him that he had been hired to commit the murder by his girlfriend. He said Wilkes then showed them a knife he had just bought to use in the murder. Campbell said the conversation then drifted to small talk, during which Wilkes referred to his "trainer", in the martial art of shoot fighting. Campbell said he did not know the trainer's name, but at the trial identified him as Petitioner Thorne.

34. On July 14, Wilkes gave detectives a statement, in which he admitted that he had killed Yvonne Layne with a knife he had bought at K-Mart. Wilkes said he had been paid to do so by David Thorne. Wilkes' statement was internally inconsistent in several respects. On page 2, for example, Wilkes said that Thorne had talked to him "for years" about how he had wanted Yvonne "out of his life (so) that he could have his little boy," even though Thorne didn't know

that the little boy was his, until shortly before the murder. On page 4, Wilkes changed the time frame to "a month before (the murder) happened." On the same page, Wilkes referred to himself as "Joe", suggesting that he may have been reading from a prepared statement. On page 6, Wilkes made the perplexing statement, as Yvonne fell to the floor after he had slit her throat, "I walked down by her and said, 'I never did it.'"

35. On July 15, Wilkes gave a second statement that was inconsistent in several respects with his first statement. In this statement, for example, Wilkes said that, before the murder, Thorne "had me go get...gloves and a knife, and I got the baseball gloves, and waited until later on to get the knife." In his prior statement, however, Wilkes said Thorne sent him to buy "a knife and some baseball gloves" at the same time.

36. Wilkes later gave two statements to prosecutors that contradicted his two statements to police. In a summary file on November 9, Wilkes returned to his original claim that Thorne started saying he wanted Yvonne out of his life "about a year and a half ago" rather that just a month before Yvonne's murder. In an interview summary filed on January 12, 2000, Wilkes changed his story on how many times he had been to Yvonne's before the murder. In his original statement, Wilkes said he had been to the house only once. In his January 12 statement, however, Wilkes is quoted as saying he recalled being at the victims' house on three prior occasions.

37. Detectives said that Wilkes was not pressured into making the statements he gave to them. But a report filed by Detective John Leech on August 3, 1999,

that either was not turned over to the Petitioners defense attorneys or was ignored by them, paints a different picture. Leech states that Wilkes was uncooperative when he was first questioned, but that his attitude changed when "I leaned forward and told him to knock off the bullshit. I told Wilkes that it was no coincidence or magic that brought him and I together." I said, "You and David Thorne are responsible for Yvonne Layne's death." Wilkes denied the allegation. I asked him to be quiet while I told him why Thorne did not want to talk to him. I showed Wilkes Thorne's phone records and told him we knew he had called Thorne. I explained that he (Wilkes) had talked about the murder with other people and now, David Thorne was running scared. I informed Wilkes that Thorne had contacted an attorney, Bill Lentz, who told us that Thorne would talk if he was given immunity. I explained my conclusion that Thorne was willing to give up Wilkes as the murderer, if he could walk away without any charges. I asked Wilkes what he had to say about that. He sat quiet and stunned. Leech said that he then told Wilkes about all the evidence they had against him. He says he then "informed Wilkes that Layne's murder was a capital crime, and that he could receive the death penalty. I asked him if he was going to sit there, not saying anything on his own behalf, while Thorne made deals to give him up."

38. On September 18, which was after the arrest of Wilkes and Petitioner Thorne, Brent and Karen Enoch were interviewed. The Enochs were questioned because they had given Wilkes a home just before the murder at the request of their daughter, Summer. These statements seemed to corroborate and add to Wilkes'

statement. Summer Enoch, however, gave a statement that was not fully consistent with her parents' statements. At trial, possibly the most damaging thing Karen Enoch testified to was that Petitioner Thorne stopped by the Enoch house to see Wilkes. When she told him Wilkes was not there, Karen Enoch said Petitioner Thorne asked her to tell Wilkes not to call his home because his telephone might be tapped, and he did not want to have the Enochs or Wilkes drawn into the investigation. The implication was that Petitioner Thorne was afraid that any telephone call from Wilkes might incriminate them. (T. Vol. VI, p. 1529.) Several affidavits attached to this petition, however, indicate that Petitioner Thorne and his grandparents told many other friends and family members who were never implicated in the case the same thing after they were advised by Attorney Lentz that their phone might be tapped.

39. On July 21, 1999, Detective Sampson wrote a concluding report that showed the detectives' biased approach toward the investigation from the point that Petitioners Thorne's attorney informed them that his client would not give a statement unless he was granted immunity. The report states, in part, that: "The only person who had any motive (to have Yvonne Layne killed) was David Thorne." Sampson went on to state that, when he came to the police station: "Thorne showed no emotion. He showed no remorse."

FIRST CLAIM FOR RELIEF

40. Petitioner hereby incorporates the previous paragraph of this petition as if fully rewritten.

41. Petitioner's conviction is voidable because his counsel's performance was deficient in several respects.

42. Petitioner's original attorney greatly prejudiced police against Petitioner by stating that Petitioner would not give a statement without a grant of immunity. In addition to viewing this demand, which was given without the knowledge or consent of petitioner, as a "red flag", detectives misrepresented this condition to Joseph Wilkes as an attempt by Thorne to make a deal in return for a statement against Wilkes.

43. Despite being paid a retainer of $100,000.00, counsel later retained by Petitioner failed to conduct a thorough independent investigation of the Layne murder case. Had counsel done so, they would have learned that:

    A. Yvonne Layne had been harassed by Alliance police officer Quentin Artis, after he ticketed her for driving on a suspended license in September 1998. Layne had told family members and friends that she was afraid that Artis was going to hurt her. Artis reportedly was fired during this period for involvement in an unrelated scandal.

    B. Wilkes possibly had developed an independent relationship with Yvonne Layne, after meeting her through Petitioner Thorne. Wilkes may even have moved into her home for awhile—as he did those of many other people he met—before she threw him out. This may have given Wilkes his own motive to kill Yvonne.

    C. Summer Enoch's statement about Joseph Wilkes and David Thorne was inconsistent with those of her parents.

D. Norma Wilson, Layne's next door neighbor, says that Layne expressed fear of Officer Artis to her. She also would have told the defense, had she been interviewed, that Layne told her that she was thinking of "dumping" boyfriend Erick Cameron for David Thorne, of whom, Wilson says, Layne spoke highly.

E. Evidence existed that Thorne's girlfriend, Amy Davis, made statements about wanting to have Layne out of the picture. Counsel even declined to talk with Petitioner Thorne's sister about Amy Davis' statements to her that she wished Yvonne were dead, and about her question about how much it might cost to have someone bumped off.

F. Wilkes has a history of trying to have sexual relations with his friends' girlfriends. As pointed out to counsel by their own psychologist, Wilkes would have considered a chance to ingratiate himself with a girlfriend of the person he seemingly admired the most, Petitioner Thorne, a great achievement.

G. Petitioner had credible alibis for two of the times he supposedly visited or transported Wilkes after Layne's murder. While being held in jail without bond, Petitioner wrote in pencil detailed timelines for March 31, 1999, and April 1, 1999, that showed he could not have been with Joseph Wilkes at the times on those two days that Wilkes testified to.

H. Substantial evidence existed that Wilkes' claim that Thorne was his trainer was a figment of his fertile imagination.

44. According to affidavits and other evidence, Petitioner's lead counsel, Jeffrey Haupt, had an alcohol problem before, during and after Petitioner's trial. Counsel Haupt arrived at court each morning during Petitioner's trial with the smell of alcohol on his breath. On at least one occasion, Haupt wore the same clothes he had worn the day before, and they looked like he had slept in them. According to Melinda Elkins, whose husband, Clarence Elkins was represented by Haupt a short time before Petitioner's trial, Haupt exhibited the same evidence of a drinking problem at that time. Mrs. Elkins also states that she was later told by Larry St. Jean, Haupt's legal assistant at the time, that he had quit his job with Haupt because of Haupt's substance-abuse problems. St. Jean partially confirmed this in a conversation with Petitioner's post-conviction investigator. On February 26, less than a month after Petitioner's sentencing hearing concluded, Haupt was charged with DUI and speeding. On February 29, Haupt later pled guilty to the charges and his drivers' license was suspended until August 23, 2000.

45. Counsel for Petitioner was ineffective for failing to obtain expert witness testimony on blood spatter and other forensic evidence that may have brought into question whether Yvonne Layne's murder occurred as represented by the state.

46. Counsel for Petitioner was ineffective for failing to pursue a suggestion by the clinical and forensic psychologist retained for mitigation purposes that Joseph Wilkes' July 14 statement, during which he lapses into the third person, is what "often occurs in the context of giving false rather than true accounts of

something (and) is the kind of error that can signal that he's working from a memorized script."

47. Counsel for Petitioner failed to seek independent identification of a bloody footprint found at the murder scene to see if it matched any Nike brand of shoe, which Wilkes was said to be wearing the night of the crime. Counsel did not even attempt to determine if the bloody shoeprint was the same size as one that would have been made by Wilkes.

48. After having it pointed out by the Petitioner and others, counsel failed to ask for the record to reflect that one of the prosecutors was directing derogatory gestures and facial expressions at the Petitioner that could have been noticed by jurors. Counsel also failed to ask the Court to instruct the prosecutor to stop this prejudicial behavior and to instruct the jury to disregard the prosecutor's actions.

49. After having it pointed out by the Petitioner and others, counsel failed to ask for the record to reflect that one of the key prosecution witnesses was making flirtatious glances at a juror and receiving them in return. Counsel also failed to ask the Court to instruct to witness and juror to stop this prejudicial behavior, nor did counsel ask the Court to query the other jurors if they had noticed these flirtatious glances or whether the juror to whom they were directed had made any positive remarks about the witness that might be deemed prejudicial.

50. Counsel made ill-advised and belated requests for forensic testing of the blood found at the crime scene. First, on December 20, 1999, lead attorney Jeffrey Haupt took the highly unusual step of asking the Canton-Stark County Crime Lab to, among other things, have "the knife found in the storm sewer...analized

(sic) and determined all necessary and serilogical (sic) data." Counsel Haupt made this request knowing full well that time was running out for having any such test done for the defense before trial. Although independent testing of physical evidence is a crucial element of an effective defense, Haupt asked the county crime lab to conduct the test, even while acknowledging that "most of your work is for the prosecutor." When Haupt's request was declined, he then filed an eleventh-hour request for a continuance of the trial only ten days before it was scheduled to begin, so that the defense could have evidence re-tested. The court overruled the motion, because, it noted, the evidence had been in the possession of the defense for a "significant period of time."

51. Counsel was ineffective for its failure to make reasonable objections at trial. This failure to make appropriate objections resulted in the jury being provided with improper evidence as well as diminishing the Petitioner's rights on appeal. For instance, counsel for the Petitioner failed to lodge the following objections:

A. During its case in chief, the Prosecutor introduced photos of the victim with three of her children. (T. Vol. III, pp. 789). Counsel for the Petitioner failed to lodge an objection. The admission of these photos demonstrated, improperly, that these three children were now without a mother. The prejudical value of this evidence clearly outweighed the probative effect. In any event, an objection should have been lodged for the Court to consider.

B. Counsel failed to review reports prior to the witnesses testimony. (T. Vol. IV, pp. 980).

C. Failed to obtain independent experts to assist in challenging the time of death. In this case, the State never effectively established the time of death of the victim. Counsel for the Defendant failed to obtain an expert to at least review the State's findings, challenge them, and demonstrate to the jury if they were incorrect. The State never alleged that David Thorne was inside this home when the victim was killed. Rather, their case consisted of the testimony of Joe Wilkes who testified he was hired to kill the victim. He testified as to the time and manner in which he purportedly performed this act. Counsel for the Defendant should have attempted to challenge this testimony, including but not limited to, the time of death. The State also utilized a number of witnesses to support and buttress the testimony of Joe Wilkes. Challenging the time of death would have lessened the degree of this buttressed testimony.

IRRELEVANT. CHARGED W/COMPLICITY

D. Counsel for the Defendant never objected to the State's improper introduction of character evidence, specifically but not limited to reference to "shoot fighting." This evidence was clearly introduced to establish that the Defendant was a violent person who liked hand to hand combat and to convince the jury that the Petitioner was a bad person. This was improper, and counsel's failure to object compounded the effect of this improper evidence.

E. Failed to object to speculative testimony. (T. Vol. V, pp. 1375). As stated above, timing was critical to the State's case. During its case in

chief the State introduced evidence from the Petitioner's co-workers as to when he had left his place of employment. The witness testified that: "[w]e figured it was about an hour to an hour and a half that he was gone." Counsel's failure to object left this assertion before the jury and supported the State's case that the Petitioner had the time and opportunity to perform what the witness Joe Wilkes testified that he had done. This is yet another example of the State's attempt to buttress the testimony of Joseph Wilkes.

F. Compounded the error of the Store Clerk at Dick's Sporting Goods hearsay statement being considered as expert testimony. (T. Vol. V, pp. 1450). During the State's case, the investigating officers testified that they took a photo to a clerk at Dick's Sporting Goods and that this Clerk identified the print as coming from a Nike shoe. This once again was utilized to buttress the testimony of Joe Wilkes who testified that he had worn Nike sneakers.

G. Failed to object to inadmissible hearsay. During the State's case the Court interjected, absent an objection from counsel for the Defendant to prevent a witness from introducing hearsay evidence. (T. Vol. VI, pp. 1491). Counsel should have made an objection ,but did not.

H. Failed to object to the numerous instances of Prosecutorial Misconduct. During the trial the Prosecutors handling this case engaged in a number of instances of prosecutorial misconduct. The vast majority of these were without objection. For instance, the prosecution made numerous

references to the Petitioner's right to remain silent. For example, during closing arguments counsel for the State argued that: "On April the 2nd, 1999, the evidence has shown that the Defendant came into the police department, but he refused to answer questions or to provide a statement". (T. Vol VIII, pp. 1702). This was a comment on his right to remain silent, prohibited by both the State and Federal Constitutions. This should have been objected to, but wasn't.

I. The State further stated during closing argument: "May 11, 1999, the Defendant comes for printing again. * * * * When he comes in, he says nothing * * * *." (T. Vol VIII, pp. 1704). Had the prior objection been made this may not have been said. Nonetheless and objection should have been made.

J. In addition, counsel for the Defendant failed to object to the State's vouching for the veracity of its own witnesses. See e.g. (T. Vol. VIII, pp. 1722): "There are other things that support Joe's testimony." "I have gone through all of the ways that Joe Wilke's testimony has been corroborated." (T. Vol. VIII, pp. 1728).

K. Failed to further inquire into juror misconduct. During the testimony of Detective Sampson, a female juror was observed flirting with the Detective during a break in the testimony. The Detective was observed flirting with the juror. This was not brought to the attention of the Court, nor did the Court make further inquiry. (see claim on juror misconduct, infra.)

52. While the state presented eighteen witnesses, the defense only called three , two of which were originally called by the state. Counsel presented this limited defense of the Petitioner, even though several other defense witnesses with important rebuttal information had been subpoenaed and many more could have been subpoenaed and were eager to testify on behalf of the defendant. Many other potential witnesses whose testimony would have benefited Petitioner's defense were brought to the attention of counsel, but they were never even interviewed. The Petitioner also repeatedly told counsel that he wanted to testify in his own defense. Counsel talked Petitioner out of exercising this right at the last moment, when they told him that they had not had time to properly prepare for his examination.

53. Petitioner was prejudiced by these violations of his state and federal constitutional rights and that counsel's actions fell below a minimal standard of competency, and there is a reasonable probability that, but for the deficient performance of counsel, there would have been a coherent investigation and presentation resulting in acquittal.

54. As a result of these actions, Petitioner's rights, as secured by the following provisions of the United States Constitution were violated: (1) The prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment; (2) Substantive due process and other unenumerated rights guaranteed by the Ninth Amendment; (3) The due process and equal protection clause of the Fourteenth Amendment; (4) The right to trial by an impartial jury, and the right to effective assistance guaranteed by the Sixth Amendment; (5) The guarantee of

procedural and substantive due process protected by the Fifth Amendment; (6) The freedom to petition the government for redress of wrongs as provided for in the First Amendment.

55. Petitioners same rights were violated as guaranteed by Sections 1, 2, 3, 5, 7, 10, 16, and 20 of Article I of the Ohio Constitution.

56. Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it is related to this claim would amount to denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

SECOND CLAIM FOR RELIEF

57. Petitioner hereby incorporates the previous paragraphs of this petition as if fully rewritten.

58. Petitioner's conviction is voidable because the State of Ohio and the Stark County Prosecutor's Office knowingly allowed false or misleading testimony in the Petitioner's case. The false and misleading testimony includes, but is not limited to, the testimony of Detective Sampson that states that only Petitioner Thorne's and Erick Camerson's names were originally mentioned as possible suspects by those who knew Yvonne Layne. Testimony about which knife was used to make bloody swipe marks on a couch pillow case in Yvonne Layne's home was also false or misleading. On April 1, 1999, Dennis M. Florea, a criminalist at the Canton-Stark County Laboratory determined that the

impressions are "consistent with and could have been made by" a kitchen knife found in the roadway near Yvonne Layne's home, that was likewise found to be consistent with a set of knives that she owned. On October 5, 1999, however, Florea determined that the swipe marks also could have been made by a much smaller knife Wilkes said he used to commit the crime. During Thorne's trial, Florea went even further, and said that the impression found on that pillowcase was more consistent with Wilkes' knife than with the kitchen knife. Florea's testimony contradicted that of criminalist Jennifer Bloink, that the bloody swipes "appear to be somewhat narrow with the end tapering to a point." The kitchen knife blade tapered to just such a point, but the knife allegedly used by Wilkes did not. A significant amount of the testimony offered at trial was different than the testimony introduced at other proceedings, including the preliminary hearing.

59. As a result of these actions, Petitioner's rights, as secured by the following provisions of the United States Constitution, were violated; (1) The prohibition against cruel and unusual punishment guaranteed by the Eight Amendment; (2) Substantive due process and other unenumerated rights guaranteed by the Ninth Amendment; (3) The due process and equal protection clause of the Fourteenth Amendment; (4) The right to trial by an impartial jury and the right to effective assistance guaranteed by the Sixth Amendment; (5) The guarantee of procedural and substantive due process protected by the Fifth Amendment; (6) The freedom to petition the government for a redress of wrongs as provided for in the First Amendment;

60. Petitioner's same rights were violated as guaranteed by Sections 1, 2, 3, 5, 7, 10, 16, and 20 of Article I of the Ohio Constitution.

61. Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial of the request for discovery as it is related to this claim would amount to denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

THIRD CLAIM FOR RELIEF

62. Petitioner hereby incorporates the previous paragraphs of this petition as if fully rewritten.

63. Petitioners conviction is voidable because the State of Ohio. through the Stark County Prosecutors Office and the Alliance Police Department, concealed, suppressed and failed to disclose relevant exculpatory evidence. This includes, but is not limited to, the State of Ohio's failure to disclose the statement of a material exculpatory witness, George Hale.

64. Petitioner was prejudiced by this violation of his state and federal due process rights in that there is a reasonable probability that if the information described above had been disclosed to defense counsel or the petitioner, the result of the proceedings would have been different.

65. As a result of these actions, Petitioners rights, as secured by the following provisions of the United States Constitution, were violated; (1) The prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment; (2) Substantive due process and other unenumerated rights guaranteed by the Ninth

Amendment; (3) The due process and equal protection clause of the Fourteenth Amendment; (4) The right to trial by an impartial jury and the right to effective assistance guaranteed by the Sixth Amendment; (5) The guarantee of procedural and substantive due process protected by the Fifth Amendment; (6) The freedom to petition the government for a redress of wrongs as provide for in the First Amendment;

66. Petitioners same rights were violated as guaranteed by Sections 1, 2, 3, 5, 7, 10, 16, and 20 of Article I of the Ohio Constitution.

67. Petitioner requires discovery as provided by the Ohio Rules of Civil Procedure in order to fully develop and pursue this claim. Denial for the request for discovery as it is related to this claim would amount to denial of substantive and procedural due process as guaranteed by the aforementioned state and federal constitutional provisions.

68. In Brady v. Maryland , 373 U.S. 83 (1963), U.S. Supreme Court held that the States suppression of exculpatory evidence at trial, violated the due process clause of the Fourteenth Amendment. To prevail on a Brady claim, a petitioner must plead and prove: (a) the prosecution suppressed evidence. (b) the evidence was favorable to the defendant, either as to guilt or punishment. (c) the evidence was material to the issue of guilt or punishment. Evidence is material if there is a reasonable probability (sufficient to undermine confidence in the outcome) that had the evidence been disclosed, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985); Giglio v. U.S., 405

U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963); Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979). United States v. Augers, 427 U.S. 97 (1976).

69. A Brady violation occurs regardless of whether the prosecutor knew of the evidence. Kyles v. Whitney, 514 U.S. 419, 432-443 (1995) prosecution has "affirmative duty to disclose evidence favorable to the defendant;" state has the "burden" and is "assigned the responsibility" to discover and disclose; "the government simply cannot avoid responsibility;" responsibility is on state because "disclosure will serve to justify trust in the prosecutor". The record as a whole must be examined to determine whether a constitutional violation occurred. See id. At 436, "suppressed evidence [must be] considered collectively, not item-by-item, "to determine whether the trail "result[ed] in a verdict worthy of confidence"; Gilday v. Callahan, 59 F.3d257, 272 (1st Cir. 1991); Banks v. Reynolds, 54F.3d 1508,1515 (10th Cir. 1995); Felker v. Thomas, 52 F.3d 907,911, (11th Cir. 1995).

70. When the State fails to disclose the statement of a material exculpatory witness, even when the name of the witness is mentioned in a police report, "the Defense cannot be said to have received anything approaching meaningful discovery." State v. Aldridge, 120 Ohio App.3d 122, 697 N.E.2d 228 (2nd Dist. 1997).

FOURTH CLAIM FOR RELIEF

71. Petitioner hereby incorporates the previous paragraphs of this petition as if fully rewritten herein.

72. Prosecutorial misconduct deprived the Petitioner of his right to a fair trial

73. During the course of Petitioner's trial, the prosecution engaged in numerous instances of misconduct which deprived him of a fair trial.

A. During its case in chief, the Prosecutor introduced photos of the victim with three of her children. (T. Vol. III, pp. 789). The prejudical value of this evidence clearly outweighed the probative effect.

B. Counsel for the State improperly introduced character evidence of the Defendant. This evidence was clearly introduced to establish that the Defendant was a violent person who liked hand to hand combat and to convince the jury that the Petitioner was a bad person. This was improper, and counsel's failure to object compounded the effect of this improper evidence. The State made numerous references to the fact that the Petitioner was involved in shoot fighting. This was introduced to demonstrate that the Petitioner was a dangerous violent person. To this point, the Petitioner had not testified, nor had he placed his character at issue. At this juncture, it was improper for the State to introduce this evidence of the Petitioner's character. The State utilized Joe Wilkes to testify about shoot fighting. (T. Vol. V, pp. 1187, 1188, 1190-1195). The State also used Wilkes to introduce testimony that Petitioner did not fear anybody, and that shoot fighting could be used to cause others extreme pain. (T. Vol V, pp. 1190-1191). In addition, and more damaging, the State asked Wilkes what he now thought about shoot fighting. Wilkes responded that if he hadn't learned shoot fighting from Petitioner, he wouldn't be in the trouble that he was in,

meaning that if he hadn't learned shoot fighting from David Thorne, he would not have killed Yvonne Layne. (T. Vol. V, pp. 1192). The State also had Wilkes testify that he had hurt others before on behalf of Petitioner. This was improper character evidence. (T. Vol V, pp. 1194-1195).

C. During closing arguments counsel for the State argued that: "On April the 2nd, 1999, the evidence has shown that the Defendant came into the police department, but he refused to answer questions or to provide a statement". (T. Vol VIII, pp. 1702). This was a comment on his right to remain silent, prohibited by both the State and Federal Constitutions. It is well established that an accused has a Constitutional right to remain silent and that the State is absolutely prohibited from commenting on exercising this right.

D. The State further stated during closing argument: "May 11, 1999, the Defendant comes for printing again. * * * * When he comes in, he says nothing * * * *." (T. Vol VIII, pp. 1704).

E. The State vouched for the veracity of its own witnesses. See e.g. (T. Vol. VIII, pp. 1722): "There are other things that support Joe's testimony." "I have gone through all of the ways that Joe Wilke's testimony has been corroborated." (T. Vol. VIII, pp. 1728).

F. The State had Joe Wilkes testify that David Thorne had engaged in illegal activity prior to this case. Specifically Wilkes testified that

Petitioner had provided him with cocaine and acid. (T. Vol V. pp. 1220).

G. During the testimony of Detective Sampson, he testified that: "Due to Dave's lack of cooperation, we contacted" (T. Vol V, pp 1412). The Detective made a direct comment on the Petitioner's right to remain silent, to the Petitioner's prejudice.

74. A capital defendant is entitled to a determination of his guilt and sentence free from prosecutorial misconduct which renders the proceeding fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The prosecutor has a special duty and functions as the government's representative, "whose obligation to govern impartially is as compelling as its obligation to govern at all." Berger v. United States, 295 U.S. 78, 88 (1935). *See also*, United States v. Bess, 593 F. 3d 749 (6th Cir. 1979). The prosecutor has a dual obligation in a criminal case, to prosecute crimes, but also to insure that justice is done. *Id.* When the two conflict, the latter controls. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger, *supra*.

75. In this case, the prosecution crossed the line and denied the Petitioner his right to a fair trial. These violations violated the Petitioner's right to a fair trial

81. During Petitioner's capital trial there was evidence introduced relating to a shoe print which was found at the murder scene. (T. Vol V. pp. 1417-1418). Detective Sampson testified that a store clerk at a Dick's Sporting Goods provided a shoe which purportedly matched the pattern. (T. Vol. V. pp 1418). There was no foundation as to the qualification of this clerk to match shoe prints. Despite the lack of foundation, the court permitted this testimony.

82. In Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), the Supreme Court clarified the admissibility requirements for expert scientific testimony by holding that Rule 702 supersedes Frye v. United States, 293 F. 1013, 1014, (D.C. Cir. 1923) which required that expert scientific testimony had to be "generally accepted" to be admissible. According to the Court, "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to 'opinion' testimony.' " Daubert, *supra* at 588. (citations omitted). Even with the relaxed standard in Rule 702 governing expert scientific testimony, however, the Court stated that the trial judge would still serve an important gatekeeping role: "[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, **but reliable.**" Daubert, *supra* at 589. (Emphasis added). The Court then suggested a "flexible" list of factors for a district court to consider when presented with scientific testimony to determine whether the reliability component

has been met: (1) "whether a theory or technique ... can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) "general acceptance." Daubert, *supra* at 593-594. While the Court stated that its discussion was "limited to the scientific context," as opposed to "technical, or other specialized knowledge," the dissent suggested that the Court left open this question. Daubert, *supra* at 600. (Rehnquist, C.J., concurring in part and dissenting in part).

83. In analyzing Daubert, the Court has stated that "although 'Daubert dealt with scientific experts, its language relative to the 'gatekeeper' function of federal judges is applicable to all expert testimony offered under Rule 702.' " United States v. Thomas, 74 F. 3d 676, 681 (6th Cir. 1995) *quoting:* Berry v. City of Detroit, 25 F.3d 1342, 1350 (6th Cir.1994), *cert. denied*, 513 U.S. 1111, 115 S.Ct. 902, 130 L.Ed.2d 786 (1995)). It is thus clear that a district court has the duty to decide not only whether evidence is relevant **but also whether it is reliable**. *See* Daubert, supra. (Emphasis added).

84. In this case, the testimony of Detective Sampson was not only improper, it was unreliable. There was no evidence as to the qualifications of this person to match shoeprints. For all anybody knew, this so-called expert was a high school kid working part-time at Dick's Sporting Goods. There was not sufficient foundation on the record to permit this clerk to identify this sneaker pattern. In

addition, there was not sufficient foundation on the record to permit Detective Sampson to say that the patterns were consistent.

85. In addition, other improper expert testimony was admitted during the course of Petitioner's capital trial. For example, a witness was permitted to testify, over objection that the pattern of a knife did not match the impression on a pillowcase. (T. Vol. IV, pp. 1019). There was no foundation that this witness was an expert in stain analysis, nor that this opinion was reliable. As such, this expert opinion should not have been permitted.

86. In addition, after the Prosecutor improperly attempted to have this improper expert opinion omitted, the Trial Court gave him advice on how to properly do it. (T. Vol. IV, pp. 1020). The Court went so far so as to ask the witness himself, in order to get this improper opinion into evidence. (T. Vol IV, pp. 1023).

87. The admission of these improper expert opinions deprived the Petitioner of his right guaranteed by the United States Constitution as well as Sections 1, 2, 3, 5, 7, 10, 16, and 20 of Article I of the Ohio Constitution.

SEVENTH CLAIM FOR RELIEF

88. Petitioner incorporates paragraphs one through eighty-six as if fully rewritten herein.

89. The Petitioner was denied his Constitutional right to confront his accusers when the Court permitted the State to introduce a statement purportedly made by Joe Wilkes that he was in town to do a job. (T. Vol. IV, pp. 1029-1034). The Court admitted this statement pursuant to Rule 803(3) of the Ohio Rules of Evidence.

90. The admission of this statement deprived Petitioner of his right to a fair trial. As more fully described above, the prosecution of this case consisted of the State buttressing the testimony of its suspect, yet key witness, Joseph Wilkes. This was just another example of the State attempting to improperly corroborate his story.

91. The admission of this statement deprived Petitioner the right to confront his accusers and denied him his right to a fair trial guaranteed by the United States Constitution as well as Sections 1, 2, 3, 5, 7, 10, 16, and 20 of Article I of the Ohio Constitution.

EIGHTH CLAIM FOR RELIEF

92. Petitioner hereby incorporates the previous paragraphs of this petition as if fully rewritten herein.

93. Petitioner's conviction is voidable because the state's primary witness, Joseph Wilkes, has recanted his testimony that he was hired by Petitioner to kill Yvonne Layne as more fully set forth in the affidavit of Joseph Wilkes, attached hereto and incorporated by reference.

94. Petitioner was convicted solely on the testimony of Joseph Wilkes. (T. Vol. V, pp. 1202 – 1205, 1211 – 1215, 1220 – 1221, 1229 – 1233, 1324). No other evidence was presented at trial linking petitioner to the crime except the testimony of Joseph Wilkes that he was hired by petitioner to kill Yvonne Lane. Even the state's motive that petitioner wanted Yvonne Layne murdered so that he would not have to pay child support was debunked by the testimony of attorneys Jacqueline Huntley, attorney for Child Enforcement and John Guia,

Petitioner's counsel at the child support hearing, who respectively testified that petitioner readily and voluntarily agreed to the payment of child support. (T. Vol. VI, pp. 1569-1573, 1575, 1579-1582)

95. To allow Petitioner's conviction to stand in light of this recantation violates Petitioner's rights, as secured by the following provisions of the United States Constitution: (1) The prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment; (2) Substantive due process and other unemerated rights guaranteed by the Ninth Amendment; (3) The due process and equal rights protection clause of the Forteenth Amendment; (4) The right to a fair trial as guaranteed by the Sixth Amendment; (5) The guarantee of proceduarl and substantive due process protected by the Fifth Amendment; (6) Thereedom to petition the government for redress of wrongs as provided for in the First Amendment.

96. Petitioner's same rights were violated as guaranteed by Sections 1, 2, 3, 5, 7, 10, 16, and 20 of Article I of the Ohio Constitution.

NINTH CLAIM FOR RELIEF

97. Petitioner hereby incorporates the previous paragraphs of this petition as if fully rewritten herein.

98. The cumulative errors and defects which during the pretrial stage, trial, and sentencing, deprived the petitoner his right to fair trial.

99. As a result, petitoner's rights were violated as guaranteed by Sections 1, 2, 3, 5, 7, 10, 16, and 20 of Article I of the Ohio Constitution.

DEMAND FOR RELIEF

WHEREFORE, Petitioner requests the following relief;

(A) That the Court grant petitoner the benefit of all of the rules of Civil Procedure, and give him the opportunity to conduct discovery to further develop and support his claims for relief prior to disposition of the merits of the claims;

(B) That this Court grant Petitioner an evidentiary hearing pursuant to Ohio Revised Section 2953.21;

(C) That the Court declare that the convictions and sentences are void or voidable and that the petitioner either be granted a new trial or a judgment of acquittal;

(D) For such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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