

CIVIL COVER SHEET

This JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the law, except as provided by the local rules of court. This form, by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Please refer to the instructions on page 2.

I. (a) PLAINTIFFS

Thorne

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Warren (EXCEPT IN U.S. PLAINTIFF CASES)

(c) ATTORNEYS (FIRM NAME, ADDRESS AND TELEPHONE NUMBER)

Melissa M. Prendergast Assistant State Public Defender Office of the Ohio Public Defender 8 East Long Street - 11th Floor Columbus, Ohio 43215

DEFENDANTS

Ernest Moore, Warden

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Warren (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

ATTORNEYS (IF KNOWN) Jim Petro Ohio Attorney General Corrections Litigation Section 150 E. Gay Street - 16th Floor Columbus, Ohio 43215

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
Foreign Nation

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories and checkboxes.

V. ORIGIN

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION:

28 U.S.C. 2254. David Thorne is incarcerated in violation of his federal constitutional rights.

VII. REQUESTED IN COMPLAINT:

Check if this is a Fed.R. Civ.P. 23 Class Action

DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY (See Instructions)

JUDGE DOCKET NUMBER

Date -12-2006

Signature of Attorney of Record

FOR OFFICE USE ONLY

RECEIPT # AMOUNT JUDGE MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

I. Civil Categories (Place and X in one category only).

- 1.  General Civil
- 2.  Administrative Review/Social Security
- 3.  Habeas Corpus Death Penalty

\*If under Title 28, §2255, name the SENTENCING JUDGE: \_\_\_\_\_  
CASE NUMBER: \_\_\_\_\_

II. **RELATED OR REFILED CASES.** See LR 3.1 which provides in pertinent part "If an action is filed or removed to this court and assigned to a District Judge after which it is discontinued, dismissed or remanded to a State court, and subsequently refiled, it shall be assigned to the same Judge who received the initial case assignment without regard for the place of holding court in which the case was refiled. Counsel or a party without counsel shall be responsible for bringing such cases to the attention to the Court by responding to the questions included on the Civil Cover Sheet."

This action is  RELATED to another PENDING civil case. This action is  REFILED pursuant to LR 3.1.

If applicable, please indicate on page 1 in section VIII, the name of the Judge and case number.

III. In accordance with Local Civil Rule 3.8, actions involving counties in the Eastern Division shall be filed at any of the divisional offices therein. Actions involving counties in the Western Division shall be filed at the Toledo office. For the purpose of determining the proper division, and for statistical reasons, the following information is requested.

ANSWER ONE PARAGRAPH ONLY. ANSWER PARAGRAPHS 1 THRU 3 IN ORDER. UPON FINDING WHICH PARAGRAPH APPLIES TO YOUR CASE, ANSWER IT AND STOP.

- (1) **Resident defendant.** If the defendant resides in a county within this district, please set forth the name of each county \_\_\_\_\_ COUNTY.  
Corporation For the purpose of answering the above, a corporation is deemed to be a resident of that county in which it has its principal place of business in that district.
- (2) **Non-Resident defendant.** If no defendant is a resident of a county in this district, please set forth the county wherein the cause of action or the event complained about occurred.  
Stark \_\_\_\_\_ COUNTY.
- (3) **Other Cases.** If no defendant is a resident of this district, or if the defendant is a corporation not having a principal place of business within the district, and the cause of action arose or the event that complained of occurred outside the district, please set forth the county of the plaintiff's residence.  
\_\_\_\_\_ COUNTY.

IV. The Counties in the Northern District of Ohio are divided into divisions as shown below. After the county is determined in Section III, please check the appropriate division.

**EASTERN DIVISION**

- AKRON (Counties: Carroll, Holmes, Portage, Stark, Summit, Tuscarawas, and Wayne)
- CLEVELAND (Counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake, Lorain, Medina and Richland)
- YOUNGSTOWN (Counties: Columbiana, Mahoning and Trumbull)

**WESTERN DIVISION**

- TOLEDO (Counties: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca, VanWert, Williams, Wood and Wyandot)



9. If you did appeal, answer the following:

- (a) Name of court Stark County Court of Appeals, Fifth Appellate District
- (b) Docket or case number (if you know) 2000CA67
- (c) Result Conviction affirmed
- (d) Date of result (if you know) November 20, 2000
- (e) Citation to the case (if you know) State v. Thorne, Stark App. No. 2000CA67 (Oh. Ct. App., Stark Co., Nov. 20, 2000).
- (f) Grounds raised See Procedural History, attached as Exhibit A
- (g) Did you seek further review by a higher state court?    Yes     No

If yes, answer the following:

- (1) Name of court Supreme Court of Ohio
- (2) Docket or case number (if you know) Case No. 01-33
- (3) Result Appeal dismissed as not involving any substantial constitutional question.
- (4) Date of result (if you know) March 21, 2001
- (5) Citation to the case (if you know) State v. Thorne (2001), 91 Ohio St.3d 1472
- (6) Grounds raised See Procedural History, attached as Exhibit A

(h) Did you file a petition for certiorari in the United States Supreme Court?    Yes     No

If yes, answer the following:

- (1) Docket or case number (if you know) \_\_\_\_\_
- (2) Result \_\_\_\_\_
- (3) Date of result (if you know) \_\_\_\_\_
- (4) Citation to the case (if you know) \_\_\_\_\_

10. Other than the direct appeals listed above, have you previously filed any petitions, applications, or motions concerning this judgment of conviction in any state court?    Yes     No

**U.S. District Court  
Northern District of Ohio (Akron)  
CIVIL DOCKET FOR CASE #: 5:06-cv-00872-JG**

Thorne v. Moore  
Assigned to: Hon. James S. Gwin  
Case in other court: Stark County Court of Common Pleas, 1999 CR  
0873  
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 04/13/2006  
Jury Demand: None  
Nature of Suit: 530 Habeas Corpus (General)  
Jurisdiction: Federal Question

**Petitioner****David G. Thorne**

represented by **Melissa M. Prendergast**  
Office of the Ohio Public Defender  
8 East Long Street  
11th Floor  
Columbus, OH 43215  
614-728-5647  
Fax: 614-752-5167  
Email: prenderm@opd.state.oh.us  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Respondent****Ernest Moore**

represented by **Ernest Moore**  
Warden  
Lebanon Correctional Institution  
P.O. Box 56  
Lebanon, OH 45036  
US  
PRO SE

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
04/13/2006	<u>1</u>	Petition under 28 USC 2254 for Writ of Habeas Corpus by a person in state custody. Filed by David G. Thorne. Filing fee paid; receipt number 54660000054. Petition not signed by petitioner David G. Thorne. (Attachments: # <u>1</u> Exhibits A and B# <u>2</u> Civil Cover Sheet)(S, He) (Entered: 04/14/2006)
04/13/2006	<u>2</u>	Random Assignment of Magistrate Judge George J. Limbert. (S, He) (Entered: 04/14/2006)
'13/2006	<u>3</u>	Administrative Track DCM Initial Order. Chief Judge James G. Carr. (S, He) (Entered: 04/14/2006)

PETITION UNDER 28 USC § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

**JUDGE GWIN**

AO 241 (Rev. 12/04)

<b>United States District Court</b>		District Northern District, Eastern Division
Name (under which you were convicted): David G. Thome		Docket or Case No. <b>5:06 CV 872</b>
Place of Confinement Lebanon Correctional Institution P.O. Box 56 Lebanon, Ohio 45036		Prisoner No. 385-897
Petitioner (include the name under which you were convicted)  David G. Thome Lebanon Correctional Institution P.O. Box 56 Lebanon, Ohio 45036		Respondent (authorized person having custody of petitioner)  v. Ernest Moore, Warden Lebanon Correctional Institution P.O. Box 56 Lebanon, Ohio 45036
The Attorney General of the State of: Ohio James Petro		
<b>PETITION</b>		
1. (a) Name and location of court that entered the judgment of conviction you are challenging <u>Stark County Court of Common Pleas, Canton, Ohio</u>		
(b) Criminal docket or case number (if you know) <u>1999 CR 0873</u>		
2. (a) Date of the judgment of conviction (if you know) <u>February 3, 2000</u>		
(b) Date of sentence <u>February 3, 2000</u>		
3. Length of sentence <u>Life w/o parole</u>		
4. In this case, were you convicted on more than one count or of more than one crime? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
5. Identify all crimes of which you were convicted and sentenced in this case <u>Complicity to Aggravated Murder, R.C. 2903.01 with death specification, R.C. 2929.04(A)(2).</u>		
6. (a) What was your plea? (Check one)		
<input checked="" type="checkbox"/> (1) Not guilty <input type="checkbox"/> (3) Nolo contendere (no contest) <input type="checkbox"/> (2) Guilty <input type="checkbox"/> (4) Insanity plea		
(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?  _____		
(c) If you went to trial, what kind of trial did you have? (Check one)		
<input checked="" type="checkbox"/> Jury <input type="checkbox"/> Judge only		
7. Did you testify at a pretrial hearing, trial, or a post-trial hearing? Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		

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9. If you did appeal, answer the following:

- (a) Name of court Stark County Court of Appeals, Fifth Appellate District
- (b) Docket or case number (if you know) 2000CA67
- (c) Result Conviction affirmed
- (d) Date of result (if you know) November 20, 2000
- (e) Citation to the case (if you know) State v. Thome, Stark App. No. 2000CA67 (Oh. Ct. App., Stark Co., Nov. 20, 2000).
- (f) Grounds raised See Procedural History, attached as Exhibit A
- (g) Did you seek further review by a higher state court? Yes  No

If yes, answer the following:

- (1) Name of court Supreme Court of Ohio
- (2) Docket or case number (if you know) Case No. 01-33
- (3) Result Appeal dismissed as not involving any substantial constitutional question.
- (4) Date of result (if you know) March 21, 2001
- (5) Citation to the case (if you know) State v. Thome (2001), 91 Ohio St.3d 1472
- (6) Grounds raised See Procedural History, attached as Exhibit A

- (h) Did you file a petition for certiorari in the United States Supreme Court? Yes  No

If yes, answer the following:

- (1) Docket or case number (if you know) \_\_\_\_\_
- (2) Result \_\_\_\_\_
- (3) Date of result (if you know) \_\_\_\_\_
- (4) Citation to the case (if you know) \_\_\_\_\_

- 10. Other than the direct appeals listed above, have you previously filed any petitions, applications, or motions concerning this judgment of conviction in any state court? Yes  No

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11. If your answer to 10 was "Yes," give the following information:

- (a) (1) Name of court Stark County Court of Common Pleas
- (2) Docket or case number (if you know) 1999 CR 0873
- (3) Date of filing (if you know) November 13, 2000
- (4) Nature of the proceeding Petition for Post Conviction Relief
- (5) Grounds raised See Procedural History, attached as Exhibit A
- (6) Did you receive a hearing where evidence was given on your petition, application or motion?  
Yes  No
- (7) Result Petition denied
- (8) Date of result (if you know) October 15, 2003

(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court \_\_\_\_\_
- (2) Docket or case number (if you know) \_\_\_\_\_
- (3) Date of filing (if you know) \_\_\_\_\_
- (4) Nature of the proceeding \_\_\_\_\_
- (5) Grounds raised \_\_\_\_\_
- (6) Did you receive a hearing where evidence was given on your petition, application, or motion?  
Yes  No
- (7) Result \_\_\_\_\_
- (8) Date of result (if you know) \_\_\_\_\_



(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court \_\_\_\_\_
- (2) Docket or case number (if you know) \_\_\_\_\_
- (3) Date of filing (if you know) \_\_\_\_\_
- (4) Nature of the proceeding \_\_\_\_\_
- (5) Grounds raised \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

Yes  No

(7) Result \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(8) Date of result (if you know) \_\_\_\_\_  
\_\_\_\_\_

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition Yes  No

(2) Second petition Yes  No

(3) Third petition Yes  No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not \_\_\_\_\_  
\_\_\_\_\_

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

AO 241 (Rev. 5/85)

**GROUND ONE:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.)

See Grounds and Supporting Facts, attached as Exhibit B  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) If you did not exhaust your state remedies on Ground One, explain why: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: The existence of the witness was not discovered by the defense until after the trial.  
\_\_\_\_\_  
\_\_\_\_\_

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?  
Yes  No

(2) If your answer to Question (d)(1) is "Yes", state:

Type of motion or petition Petition for Post Conviction Relief

Name and location of the court where the motion or petition was filed: Stark County Court of Common Pleas, Canton, Ohio

Docket or case number (if you know) 1999 CR 0873

Date of the court's decision October 15, 2003

Result (attach a copy of the court's opinion or order, if available) Petition denied.

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed Stark County Court of Appeals, Fifth Appellate District

\_\_\_\_\_

Docket or case number (if you know) 2003CA00388

Date of the court's decision December 16, 2004

Result (attach a copy of the court's opinion or order, if available) Trial court's denial of post conviction relief affirmed

\_\_\_\_\_

\_\_\_\_\_

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue \_\_\_\_\_

\_\_\_\_\_

(e) Other Remedies Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**GROUND TWO:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.)

See Grounds and Supporting Facts, attached as Exhibit B

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(b) If you did not exhaust your state remedies on Ground Two, explain why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes", state:

Type of motion or petition Petition for Post Conviction Relief

Name and location of the court where the motion or petition was filed: Stark County Court of Common Pleas, Canton, Ohio

Docket or case number (if you know) 1999 CR 0873

Date of the court's decision October 15, 2003

Result (attach a copy of the court's opinion or order, if available) Petition denied.

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed Stark County Court of Appeals, Fifth Appellate District

Docket or case number (if you know) 2003CA00388

Date of the court's decision December 16, 2004

Result (attach a copy of the court's opinion or order, if available) Trial court's denial of post conviction relief affirmed.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue \_\_\_\_\_

(e) **Other Remedies** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two \_\_\_\_\_

**GROUND THREE:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.)

See Grounds and Supporting Facts, attached as Exhibit B  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) If you did not exhaust your state remedies on Ground Three, explain why: The existence of the evidence was not discovered by the defense until after the trial.  
\_\_\_\_\_

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: This claim was raised in Petitioner's postconviction petition  
\_\_\_\_\_

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes", state:

Type of motion or petition Petition for Post Conviction Relief

Name and location of the court where the motion or petition was filed: Stark County Court of Common Pleas, Canton, Ohio

Docket or case number (if you know) 1999 CR 0873

Date of the court's decision October 15, 2003

Result (attach a copy of the court's opinion or order, if available) Petition for Post Conviction Relief denied.

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed Stark County Court of Appeals, Fifth Appellate District  
\_\_\_\_\_

Docket or case number (if you know) 2003 CA 00388

Date of the court's decision December 16, 2004

Result (attach a copy of the court's opinion or order, if available) Trial court's denial of post conviction relief affirmed.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue \_\_\_\_\_

(e) **Other Remedies** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three \_\_\_\_\_

**GROUND FOUR:**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.)

See Grounds and Supporting Facts, attached as Exhibit B  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(b) If you did not exhaust your state remedies on Ground Four, explain why: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? Yes  No

(2) If you did not raise this issue in your direct appeal, explain why: This claim was raised in Petitioner's postconviction petition.

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(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

Yes  No

(2) If your answer to Question (d)(1) is "Yes", state:

Type of motion or petition Petition for Postconviction Relief

Name and location of the court where the motion or petition was filed: Stark County Court of Common Pleas, Canton, Ohio

Docket or case number (if you know) 1999 CR 0873

Date of the court's decision October 15, 2003

Result (attach a copy of the court's opinion or order, if available) Petition denied.

(3) Did you receive a hearing on your motion or petition? Yes  No

(4) Did you appeal from the denial of your motion or petition? Yes  No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? Yes  No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed Stark County Court of Appeals, Fifth District

Docket or case number (if you know) 2003 CA 00388

Date of the court's decision December 16, 2004

Result (attach a copy of the court's opinion or order, if available) Trial court's denial of postconviction relief affirmed.

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue \_\_\_\_\_

(e) **Other Remedies** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four \_\_\_\_\_

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction?

Yes  No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

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(b) Is there any grounds in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them: \_\_\_\_\_

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14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. \_\_\_\_\_

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15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? Yes  No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing Jeffrey D. Haupt, 4844 Dressler Rd., Canton, Ohio 44718 and George G. Keith, 135 Portage Trail, P.O. Box 374, Cuyahoga Falls, Ohio 44222-0008

(b) At arraignment and plea Jeffrey D. Haupt, 4844 Dressler Rd., Canton, Ohio 44718 and George G. Keith, 135 Portage Trail, P.O. Box 374, Cuyahoga Falls, Ohio 44222-0008



(c) At trial Jeffrey D. Haupt, 4844 Dressler Rd., Canton, Ohio 44718 and George G. Keith, 135 Portage Trail, P.O. Box 374, Cuyahoga Falls, Ohio 44222-0008

(d) At sentencing Jeffrey D. Haupt, 4844 Dressler Rd., Canton, Ohio 44718 and George G. Keith, 135 Portage Trail, P.O. Box 374, Cuyahoga Falls, Ohio 44222-0008

(e) On appeal Case No. 2000CA67: Michael R. Puterbaugh, 3721 Wipple Ave. NW, Canton, Ohio 44718; Case No. 2003CA00388: William T. Doyle, 2000 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113 and Jeffrey W. Pederson, 3305 Beechwood Ave., Cleveland Heights, Ohio 44701

(f) In any post-conviction proceeding William T. Doyle, 2000 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113 and Jeffrey W. Pederson, 3305 Beechwood Ave., Cleveland Heights, Ohio 44701

(g) On appeal from any adverse ruling in a post-conviction proceeding William T. Doyle, 2000 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113 and Jeffrey W. Pederson, 3305 Beechwood Ave., Cleveland Heights, Ohio 44701

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging?

Yes  No

(a) If so, give name and location of court that imposed the other sentence you will service in the future \_\_\_\_\_

(b) Give the date the other sentence was imposed \_\_\_\_\_

(c) Give the length of the other sentence \_\_\_\_\_

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future?

Yes  No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.\*

\* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
  - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
  - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
  - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, petitioner asks that the Court grant the following relief:

Issuance of a conditional writ of habeas corpus, ordering the State of Ohio to release Mr. Thorne unless he is retried within a reasonable period of days,

or any other relief to which petitioner may be entitled.



Signature of Attorney (Party)

Melissa M. Prendergast (0075482)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (fax)

Counsel for Petitioner

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on \_\_\_\_\_ (month, date, year).

Execute (signed) on \_\_\_\_\_ (date).

\_\_\_\_\_  
Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

**PROCEDURAL HISTORY**  
(in response to AO 241, Nos. 9 and 11).

9(f) **Grounds Raised in Direct Appeal to Fifth District Court of Appeals (Stark County)**

**Assignment of Error No. 1**

The jury's verdict of guilty was not supported by the evidence, or in the alternative was against the manifest weight of the evidence.

**Assignment of Error No. 2**

Appellant was denied his constitutional right to effective assistance of counsel.

9(g)(6) **Grounds Raised in Direct Appeal to Supreme Court of Ohio**

**Proposition of Law No. 1**

The jury's verdict was not supported by the evidence, or in the alternative was against the manifest weight of the evidence.

**Proposition of Law No. 2**

Appellant was denied his constitutional right to effective assistance of counsel.

11(a)(5) **Grounds Raised in Postconviction Petition to Stark County Court of Common Pleas**

**Note:** Petitioner timely filed a Petition for Post Conviction Relief on November 13, 2000. On January 4, 2001, Petitioner filed an amended petition. On January 10, 2001, Petitioner filed a second amended petition, and on December 27, 2001, Petitioner filed a third amended petition. Petitioner's Third Amended Postconviction Petition includes all grounds for relief asserted. The State of Ohio filed its Response on May 9, 2003.

**Claim for Relief No. 1**

Petitioner was deprived of his right to the effective assistance of trial counsel in violation of the rights secured to him under the First, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution when his trial counsel: (a) stated to police that Thorne would only make a statement after a grant of immunity; (b) failed to conduct a thorough independent investigation of the case; (c) exhibited signs of improper alcohol use during trial; (d) failed to obtain expert testimony on forensic evidence; (e) failed to request that the record reflect prosecutor's derogatory facial expressions and gestures directed toward Petitioner during trial; (f) made ill advised and belated requests for forensic testing; (g) failed to make reasonable objections at trial; and (h) failed to investigate and call witnesses for trial.

Claim for Relief No. 2.

Petitioner's constitutional rights as secured to him under the First, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution were violated when the State knowingly allowed false and misleading testimony to be presented at trial.

Claim for Relief No. 3

Petitioner's constitutional rights as secured to him under the First, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution were violated when the State of Ohio concealed, suppressed, and failed to disclose relevant exculpatory evidence.

Claim for Relief No. 4

Prosecutorial misconduct deprived Petitioner of his right to a fair trial as guaranteed to him under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Claim for Relief No. 5

Petitioner's Sixth Amendment right to a trial by jury was violated when a key prosecution witness was flirting with a member of the jury.

Claim for Relief No. 6

The trial court erred in permitting expert testimony when the State failed to lay a proper foundation and thus deprived Petitioner of his right to a fair trial as guaranteed to him under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Claim for Relief No. 7

Petitioner was denied his constitutional right to confront his accusers when the State permitted an out-of-court statement by an adverse witness.

Claim for Relief No. 8

Petitioner was denied due process of law and his conviction is voidable because the State's key witness recanted his testimony.

Claim for Relief No. 9

The cumulative errors presented at trial denied Petitioner a fair trial.

**GROUNDS AND SUPPORTING FACTS**

12(a)

**Ground One:**

Petitioner was denied his right to a fair trial and due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution when the State withheld evidence favorable to the defense.

**Supporting Facts:** Yvonne Layne's body was discovered on April 1, 1999, at approximately 12:30 p.m. Ms. Layne was found in her home, face-down on the floor, surrounded by a pool of blood. The cause of Ms. Layne's death was an incised wound to her neck, measuring 8 inches across and 4 inches deep. Alliance Police Department officers and Stark County detectives noted three partial bloody shoe prints in the crime scene and large amounts of blood pooling and blood spatter, but recovered very little physical evidence from the scene. The assistant Stark County coroner estimated that Ms. Layne died sometime after 7:00 p.m. on March 31, 1999.

Alliance police had no promising leads following Ms. Layne's murder. However, on April 1, 1999, a neighbor of Ms. Layne's by the name of George Hale spoke to Detective Sampson and told him of suspicious activity he had witnessed earlier that morning. Mr. Hale told Sampson that as he was walking by Ms. Layne's home around 9:30 a.m. on April 1, 1999, his attention was drawn by the sound of crying puppies coming from the Layne home. When he looked, Mr. Hale observed a white male wearing blue jeans and a short-sleeve shirt exit Ms. Layne's house carrying a large trash bag. The man carried the trash bag around the west side of Ms. Layne's home. Mr. Hale described the man as having medium-length hair, approximately 5'09" tall, 180 pounds, and in his mid-to-late 20s. Mr. Hale was later shown two photo arrays, containing pictures of Mr. Thorne and Joseph Wilkes, the confessed murderer allegedly hired by Mr. Thorne. Mr. Hale did not identify the man he saw exit Ms. Layne's home carrying a trash bag in either photo array.

The State failed to disclose Mr. Hale's identity or his statement to the defense, despite proper requests made by the defense. Thus, Mr. Thorne did not learn of Mr. Hale's statement until well after Mr. Thorne's trial was concluded. The State's failure to disclose this exculpatory evidence greatly prejudiced Mr. Thorne. Had this evidence been presented at trial, there is a reasonable probability that the outcome of the trial would have been different.

**Ground Two:**

Petitioner was denied the effective assistance of trial counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

**Supporting Facts:** The individual and cumulative effect of trial counsel's egregious errors served to deny Mr. Thorne a fair trial. Counsel's errors included:

(1) Mr. Thorne was denied the right to effective assistance of counsel as guaranteed to him through the Sixth and Fourteenth Amendments to the United States Constitution. Trial counsel's performance was objectively unreasonable in that counsel failed to conduct any investigation into the case in order to prepare an adequate defense for Mr. Thorne. Mr. Thorne supplied his counsel with the identities and contact information for witnesses to contradict the State's case, yet counsel ignored his repeated requests. Counsel did not even interview the State's main expert witnesses, such as the coroner and the forensic scientists, and was not adequately prepared to cross examine these witnesses. Furthermore, trial counsel made no requests for forensic testing of key evidentiary items introduced in Mr. Thorne's trial. As a result of counsel's failure to adequately prepare for Mr. Thorne's trial, at which he was facing a possible death sentence, the State introduced severely prejudicial evidence, absent objection thereby prejudicing Mr. Thorne.

(2) Trial counsel was ineffective for failing to obtain a forensic expert to explain to the jury the significance of the blood spatter evidence. The State's case against Mr. Thorne depended exclusively on the testimony and credibility of Joseph Wilkes, who claimed he carried out the murder at Mr. Thorne's request and gave a detailed account of how he murdered Ms. Layne. Given that the most significant evidence at the crime scene was the blood spatter evidence, and there was little other evidence to corroborate Wilkes's story, it was patently unreasonable for trial counsel to not engage an expert in forensic science. As was demonstrated during Mr. Thorne's postconviction evidentiary hearing, a forensic expert would have helped the jury to understand the blood spatter evidence, and would have significantly undermined Wilkes's testimony. Thus, had the jury had the opportunity to consider the report of a forensic scientist— or *any* evidence contradicting Wilkes's incredible story— there is a reasonable probability that the result of Mr. Thorne's trial would have been different. Consequently, trial counsel's failure to engage experts and to locate witnesses to contradict Wilkes's story greatly prejudiced Mr. Thorne.

(3) Trial counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's repeated references, throughout trial, to Mr. Thorne's election to be represented by an attorney when questioned and to remain silent. The prosecutor's references to Mr. Thorne's invocation of his right to remain silent violated Mr. Thorne's constitutional rights to a fair trial and to due process of law, and further prejudiced the jury against him.

(4) Mr. Thorne was also denied the effective assistance of trial counsel when counsel failed to object to the State's improper vouching of its primary witness during Mr. Thorne's trial. The prosecutor's statement encroached on the province of the jury thus prejudicing Mr. Thorne.

### **Ground Three:**

Petitioner was not afforded the due process of law and was denied a fair trial, as guaranteed to him through the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

**Supporting Facts:** The State's theory of motive against David Thorne was that he wanted sole custody of his young son and did not want to pay child support to Ms. Layne. To

remedy the situation. the State argued that Mr. Thorne hired his 18-year old friend, Joseph Wilkes, to carry out a brutal murder for \$300. The physical evidence of the crime scene belies the detailed account of the murder offered by Wilkes during Mr. Thorne's trial. (see Second Ground for Relief). Further, Joe Wilkes recanted his earlier testimony under oath, first in a deposition and then during an evidentiary hearing, despite receiving a thorough warning by the trial court, his counsel, and the prosecutors, that he could face the death penalty should he violate his plea agreement. Wilkes's recantation was supported by the testimony of Victoria Rhodes, Wilkes's youth minister. Rhodes testified at the postconviction evidentiary hearing and confirmed that the night before Wilkes testified at Mr. Thorne's trial, he said: "if I tell the truth they told me I would die, and I'm too young to die." There is ample evidence that Wilkes's recantation is credible. Moreover, in recanting, Wilkes' admitted that he lied under oath at Mr. Thorne's trial. Thus, David Thorne's conviction was based almost entirely on perjured testimony, and as such cannot stand.

#### **Ground Four:**

Mr. Thorne was denied his rights to a fair trial and to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, when the prosecutor engaged in improper argument and other misconduct.

**Supporting Facts:** The individual and cumulative effect of the prosecutor's improper argument and other misconduct served to deny Mr. Thorne a fair trial. Examples of the misconduct engaged in by the prosecutor include:

- (1) The prosecutor made repeated references to Mr. Thorne's reluctance to talk to police during the criminal investigation, a direct violation of his Fifth Amendment right to remain silent.
- (2) The prosecutor engaged in improper vouching of Joe Wilkes veracity during the trial. The prosecutor's statements encroached on the province of the jury, prejudicing Mr. Thorne.
- (3) The prosecutor improperly elicited testimony in an attempt to show prior bad acts of Mr. Thorne. Throughout direct examination, the prosecutor repeatedly asked Wilkes about where he had obtained the drugs he claimed he was on the night of the murder in an attempt to represent Mr. Thorne as a drug dealer. Admission of this testimony was irrelevant and served to irrevocably prejudice Mr. Thorne in the eyes of the jury.
- (4) The prosecutor elicited testimony from Wilkes regarding Mr. Thorne's violent character. Specifically, the prosecutor questioned Wilkes about Mr. Thorne allegedly training him in "shoot fighting." The prosecutor consistently referred to the sport as a life-threatening and aggressive. During the State's direct examination, Wilkes testified that Mr. Thorne did not fear anyone and "shoot fighting" could be used to cause extreme pain. Defense counsel did not present evidence of Mr. Thorne's good character to rebut the State's theory, and the meager evidence presented on Mr. Thorne's behalf was irrelevant and incapable of undermining the State's case. (see Ground Two). Consequently, the testimony of Thorne's prior bad acts and instances of his violent character was highly improper and inadmissible.

**Ground Five:**

The cumulative effect of trial error violated Mr. Thorne's rights to due process and a fair trial.

**Supporting Facts:** Even if none of the foregoing errors, standing alone, is sufficient to warrant reversal for a new trial, the accumulation of those errors deprived Mr. Thorne of a fair trial and of the due process of law as guaranteed to him under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The evidence against Mr. Thorne was far from overwhelming, and the cumulative effect of trial error denied Mr. Thorne his rights to due process and a fair trial and warrants a retrial.



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PHIL G GLAVASIS  
CLERK OF COURTS  
STARK COUNTY OHIO  
IN THE COURT OF  
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Post-Net Fax Note	7871	Date	11/15	No. of Pages	8
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County		Co.	REPOSITORY		
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Fax #	935	Fax #			

STATE OF OHIO )  
 )  
 PLAINTIFF )  
 )  
 VS. )  
 )  
 DAVID G. THORNE )  
 )  
 DEFENDANT )

CASE NO. 1998CR0873  
JUDGE REINBOLD  
JUDGMENT ENTRY

The Petition for Post Conviction Relief can be divided into three categories. One, ineffective assistance of counsel; two, legal errors, *La. Brady v. Maryland* (1963), 373 U.S. 83 and *Jenkins v. Anderson*; 447 U.S. 250; and three, recantation. Certain of the arguments support more than one category.

Strategy

Present counsel for the Petitioner face the same strategic puzzle faced by trial and appellate counsel, which is, do we (the attorneys) defend David Thorne by arguing the innocence of Joseph Wilkes or do we concentrate solely on the facts as they relate to David Thorne and leave the murder alone? Do we become Joseph Wilkes' trial counsel and claim he is not the killer of Yvonne Layne and ergo David Thorne is not guilty either, or do we claim that Joseph Wilkes is such a ruthless killer and so inconsistent in his various statements to police that no jury could believe him, especially in conjunction with our strong alibi evidence?

It is my opinion that trial counsel chose to argue the credibility of Joseph Wilkes and the weakness of the evidence linking him to David Thome rather than attack the strength of the State's case against Joseph Wilkes. It is also my opinion that present counsel has chosen the other path, or at least has emphasized it far more than trial counsel chose to do. This decision to emphasize Joseph Wilkes' innocence negatively affects the credibility of certain arguments proffered in this Petition.

First, because of this perspective, present counsel strongly criticizes the trial attorneys' failure to retain independent forensic experts to contest the State's forensic case against Joseph Wilkes. Indeed, the greater part of the oral hearing was dedicated to this argument. But if I am correct in my characterization of trial counsel's strategy, it would have been counterproductive to bring in such expert testimony. In other words, if trial counsel chose the other path, who cares about the blood splatter, who cares about blood stains on couch pillow cases, and who cares about bloody footprints. Who cares whether or not Joseph Wilkes was wearing Nike shoes, Reebok, or moccasins.

During the hearing in May, I wondered at times just who present counsel was representing. I would bet a jury in David Thome's case hearing same or similar evidence with the emphasis on the innocence of Joseph Wilkes would have wondered the same thing. Such a presentation, I believe, would certainly have suggested to the jury an alliance between David Thome and Joseph Wilkes, a common strategy, if you will, between the two to disprove the murder of Yvonne Layne.

Second, I find the events and the evidence overwhelmingly support the conclusion that Joseph Wilkes murdered Yvonne Layne. The Defendant confessed to the police; the Defendant, being represented by two experienced attorneys, plead guilty

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to the indictment in a one to one and a half hour plea session; and the Defendant testified at trial. At none of these events did Joseph Wilkes ever deny involvement in the murder of Yvonne Layne. The evidence submitted in discovery in *State v. Joseph Wilkes* and the evidence produced at trial in the case of *State v. David Thome* strongly corroborates the details of Joseph Wilkes' statements.

Last, and here is the unavoidable contradiction, present counsel not only proffers Joseph Wilkes' innocence in the face of incredible evidence to the contrary, but they argue his confession and trial testimony cannot be believed. While this may in a perverse sense be a consistent argument, it is inconsistent with the argument that I should now find Joseph Wilkes' recantation to be credible. Counsel would now have me believe that Joseph Wilkes lied in his confession, lied in his plea, and lied at trial; but now, some four years later, after being in the State Penitentiary system and with nothing to lose, his credibility is enhanced and I should accept his recantation.

There is clearly more credible evidence that Joseph Wilkes was telling the truth as to murdering Yvonne Layne than his most recent confabulation.

(See paragraphs 43(a), (b), (c), (d), (e), (?); 45; 46; 47; 50; 51(c), (e), (f), (j); 58; entire third claim; entire sixth claim; 89; entire eighth claim.)

Speculation

In regards to the following arguments, I find insufficient credible evidence to substantiate the various claims. I find the following arguments to be either speculative, covered in the prior pages of this opinion, or not having (even if believed true) an impact on the outcome of this particular trial.

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These paragraphs are as follows:

- 42 Immunity;
- 43(a) Yvonne Layne and Alliance police officer;
- 43(b) Yvonne Layne and Joseph Wilkes' relationship;
- 43(c) Enoch's statement;
- 43(d) Norma Wilson's statement;
- 43(e) Amy Davis' statement;
- 43(f) Joseph Wilkes' sexual history;
- 46 Mitigation statement of Joseph Wilkes;
- 48 facial expression;
- 49 flirtatious glances of jurors;
- 51(a) photos of victims;
- 51(b) failure to review forensic reports;
- 51(d) speculative testimony;
- 51(e) Nike shoes;
- 51(g) hearsay;
- 51(j) support of Wilkes' testimony;
- 51(k) flirtatious conduct;
- 58 knife swipes on pillowcase;
- 73(a) repetitious;
- 73(b) character evidence;
- 73(e) repetitious;
- 73(f) prior illegal activities;

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- 77           repetitious;
- 78           repetitious;
- 80           shoe print;
- 81           shoe print;
- 84           shoe print;
- 85           repetitious;
- 89           Joseph Wilkes' statement;
- 90           same as above.

Appellate Issues

The following arguments raised in this Petition were raised or could have been raised by appellate counsel.

Under *State v. Perry* (1987), 10 Ohio St.2d 175 and all the cases that follow, it is my opinion that the Doctrine of Res Judicata applies to any defense or claim of lack of due process that was raised or could have been raised during the appeal.

The following, then, were raised on appeal and/or could have been raised on appeal. (I will refer to the appellate page number, but I will not attach the brief to this opinion. A.B. = Appellant's Brief.)

- 43(e)       evidence against Thome's girlfriend - A.B. page 18;
- 43(g)       credible alibi witnesses - A.B. page 18;
- 43(h)       Thome as trainer of Wilkes - A.B. page 18;
- 44           Defense attorney's appearance - A.B. page 17;
- 45           expert forensic evidence - A.B. page 18;

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- 47 bloody footprint - A.B. page 18;
- 50 see paragraph - A.B. page 18;
- 51(c) see paragraph - A.B. page 18;
- 52 number of witnesses available - A.B. page 18;
- 52 failure to have Defendant take the witness stand - A.B. page 18

Affidavits

There are a number of affidavits filed in support of the Petitioner's request for relief. There are five factors to consider in reviewing the credibility of affidavits. *State v. Moore* (1994), 89 Ohio App.3d 748. These factors are: one, whether I was the trial judge, to which the answer is yes; two, identical language with an apparent common author, to which the evidence strongly suggests that there was a common author of the affidavits and certainly the language within all affidavits is strikingly similar; three, hearsay, to which the answer is somewhat; four, relationship of affiants to the Petitioner (all are either related by blood, marriage or friendship); and five, whether the affidavit contradicts proffered evidence, and the answer to that issue is that some of it does and some of it does not.

When I view the affidavits against this criteria, I find they are of little evidentiary value.

Discovery

The Petitioner raises the issue of discovery (paragraphs six and seven), which has been answered in footnote number nine, page six of the State's Brief.

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Self Incrimination

The Petitioner raises three separate instances in which he alleges that the State commented on the Petitioner's right against self-incrimination. One, refusal to answer questions - Volume VIII, page 1702; saying nothing when he comes in for fingerprinting - Volume VIII, page 1704; and lack of cooperation - Volume V, page 1412 - 1413.

Two initial points: One, these were claims that could have been raised on appeal; and second, regarding the third issue at page 1412, there was an objection and an admonishment by the Court.

In regards to the larger question, it should be noted that the claimed violations pertain to pre-arrest silence, which is dealt with a bit differently by the courts than post-arrest silence. I have turned to a well-written Fifth District Court of Appeals opinion entitled *State v. Graber*, 2002 CA 00014 (Stark Fifth Dist.) wherein Judge Hoffman discusses pre and post-arrest silence, whether or not a failure to object is "plain error", and the standard to use in such an analysis.

First, under Judge Hoffman's opinion, I find that the state of the law in Ohio is not so clear cut as to render this particular grounds sufficient to grant relief. Second, I find when read in the context of the entire trial or in the context of the entire exchange or argument surrounding the cited portions of the transcript that even if the statements were inappropriate, they do not rise to the level of plain error requiring relief.

Miscellaneous

There are a number of issues raised by Petitioner concerning my involvement in certain exchanges between counsel, most particularly concerning the attempt of the

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State to introduce expert testimony and what the appropriate form of questioning should be. I have reviewed that section of the transcript and find no error sufficient to justify reversal. Further, I have taken all the issues of prosecutorial misconduct and cited them by paragraph and the various arguments, but in general I would again say that those issues could have been brought on appeal.

Therefore, for the reasons set out above, David G. Thome's Petition for Post Conviction Relief is Denied.

  
RICHARD O. REINBOLD, JR., JUDGE

cc: Prosecutor  
Jeffrey W. Pederson, Esq.



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COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO  
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STATE OF OHIO  
Plaintiff-Appellee

JUDGES:  
William B. Hoffman, P.J.  
Julie A. Edwards, J.  
John F. Boggins, J.

-vs-

Case No. 2003CA00388

DAVID G. THORNE


Defendant-Appellant

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal From Stark County Court  
of Common Pleas Case 1999CR0873

JUDGMENT:

Affirmed 

DATE OF JUDGMENT ENTRY:

APPEARANCES:


For Plaintiff-Appellee

For Defendant-Appellant

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WILLIAM T. DOYLE  
2000 Standard Building  
Cleveland, OH 44113

BY   
Date 12/16/04

7

Stark County App. Case No. 2003CA00388

2

*Edwards, J.*

{¶1} Defendant-appellant David G. Thorne appeals from the October 15, 2003, Judgment Entry of the Stark County Court of Common Pleas, which denied appellant's petition for post-conviction relief. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On September 15, 1999, the Stark County Grand Jury indicted appellant on one count of aggravated murder, in violation of R.C. 2903.01. The grand jury added a complicity for hire specification, pursuant to R.C. 2929.04(A)(2). The indictment arose from the allegation that appellant hired Joseph Wilkes to kill appellant's ex-girlfriend, Yvonne Layne. Ms. Layne was the mother of five children. Appellant was the father of one of Ms. Layne's children, Brandon. After a police investigation which led to Mr. Wilkes, Mr. Wilkes agreed to testify truthfully about the crime and appellant's involvement in the planning of the murder in exchange for a life sentence with possibility of parole after 30 years.

{¶3} A jury trial commenced on January 18, 2000, at which time the following evidence was adduced. On April 1, 1999, Tawnia Layne, the victim's mother, went to Yvonne Layne's home to take one of her grandchildren to school. When she arrived, Tawnia found her daughter's body. Yvonne's throat had been cut, and her body was lying in a pool of blood. Yvonne's five young children were awake in the house but were locked in their rooms. Tawnia Layne called the police.

{¶4} While there were two partial bloody footprints at the scene, there was little other physical evidence. The police were unable to recover any usable fingerprints.

{¶5} As part of the investigation, the police discovered that Ms. Layne had recently implemented paternity proceedings for her son, Brandon. As a result, appellant had been ordered to pay child support in the amount of \$358 per month, with weekly payroll deductions beginning in March, 1999. By the time of his first payment, appellant owed more than \$700 in back support.

{¶6} The Alliance police learned of Joseph Wilkes through Rose Mohr. Ms. Mohr contacted the police to tell them that she and her boyfriend, Chris Campbell, had spoken with Mr. Wilkes at the Carnation Mall in Alliance on the night of March 31, 1999, the night of the murder. According to Ms. Mohr, Mr. Wilkes told her and Mr. Campbell that he was in Alliance because he had been hired to kill a woman. Mr. Wilkes made statements that he had purchased a knife at K Mart and showed the knife to Ms. Mohr and Mr. Campbell. Ms. Mohr remembered Mr. Wilkes saying that he was hired for money to commit the murder "for a guy." In contrast, Mr. Campbell recalled Mr. Wilkes stating that his "girlfriend" had paid for a room for him at the adjoining Comfort Inn and that the girlfriend had asked Mr. Wilkes to commit the murder. Ms. Mohr claimed that at this meeting, Mr. Wilkes wrote his name and phone number on a business card and gave it to her.

{¶7} In July, 1999, Mr. Wilkes confessed to the murder and implicated appellant, claiming that appellant paid him to kill Ms. Layne. Mr. Wilkes claimed that appellant wanted custody of his son, Brandon, and did not want to pay child support to Ms. Layne. Mr. Wilkes gave details on how appellant 1) planned the murder, 2) provided an alibi for himself, 3) provided Mr. Wilkes with a place to stay before and after

Stark County App. Case No. 2003CA00388

4

the murder, 4) provided transportation to and from that location, and 5) provided money to purchase batting gloves and the knife used in the murder.

{¶8} Specifically, Mr. Wilkes testified at trial that he rented a room at the Comfort Inn at Carnation Mall in Alliance on March 31, 1999. He then purchased batting gloves and, later, a knife at the K Mart in the mall, walked to Ms. Layne's residence, and committed the murder. He told the police he threw the knife in a storm sewer near the house, and disposed of his gloves in a McDonald's dumpster. Mr. Wilkes claimed that the next morning appellant picked him up at the motel and took him to a friend's house. Mr. Wilkes hid his nylon pants, which he claimed he had worn at the time of the murder, in the woods near his friend's house.

{¶9} Mr. Wilkes' took the police to a storm sewer where they recovered a knife and to where a pair of pants were found under some brush. The knife was consistent with the knife sold at K Mart, the knife shown to Mohr and Campbell and the murder weapon. The pants matched a description of the pants Mr. Wilkes was wearing at Carnation Mall the night of the murder.

{¶10} The knife and pants were tested for human blood. A preliminary test on the knife showed the possibility that there was human blood on the knife. However, further testing failed to return a positive result of human blood. No blood was found on the pants.

{¶11} However, the condition of the knife and pants was consistent with them having been subject to the elements for several months. According to testimony, this could have accounted for the failure to find blood on either item.

{¶12} In addition, there was testimony concerning the shoes worn by Mr. Wilkes on the night of the murder. Mr. Wilkes testified that he was wearing Nike shoes. A Detective from the Alliance Police Department testified at trial that as a result of the investigation, the Detective had a clerk at Dick's Sporting Goods identify the tread pattern of the shoe prints found in the blood. According to the Detective, the clerk provided the Detective with a shoe that "pretty much" matched the tread pattern. That shoe was a Nike. Tr. 1417-1418.

{¶13} After five days of testimony and deliberation, the jury found appellant guilty of aggravated murder as well as the complicity for hire specification. On January 27, 2000, a sentencing hearing was held. After hearing the testimony, the jury was unable to reach a verdict as to whether appellant should receive the death penalty. Accordingly, the trial court declared a mistrial as to the penalty phase of the trial and proceeded to sentence appellant to a term of life in prison without parole eligibility, pursuant to *State v. Springer* (1992), 63 Ohio St.3d 167, 586 N.E.2d 96.

{¶14} Appellant appealed his conviction and sentence to this Court. Appellant's conviction and sentence was affirmed.<sup>1</sup> Appellant appealed this Decision to the Ohio Supreme Court. The Ohio Supreme Court declined to accept the case for further review.

{¶15} On November 13, 2000, appellant filed a Petition for Post-Conviction Relief, pursuant to R.C. 2953.21. In addition, appellant filed two amendments to this petition and supplemented the petition with evidentiary materials, including an affidavit

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<sup>1</sup> *State v. Thorne*, Stark App. No. 2000-CA-00067, 2000 WL 1732540, appeal dismissed (2001), 91 Ohio St.3d 1472, 744 N.E.2d 193.

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of Joseph Wilkes. In the affidavit, Mr. Wilkes denied killing Ms. Layne or being hired by appellant. The trial court conducted an evidentiary hearing on May 12, 2003.

{¶16} At the evidentiary hearing, Mr. Wilkes testified that he had not been hired by appellant and had not killed Ms. Layne. In addition, appellant presented the testimony of a crime scene expert who claimed that the murder of Ms. Layne could not have happened the way Mr. Wilkes described. Appellant also presented the testimony of a questioned documents examiner who stated that when he compared the writing on the business card provided by Ms. Mohr to an alleged sample of Mr. Wilkes' handwriting, he concluded that they had not been written by the same person. In addition, a woman testified that Mr. Wilkes told her, before appellant's trial, that he was going to lie at trial and take the plea to save himself.

{¶17} One additional witness was presented by appellant. That witness was George Hale. Appellant claimed that Mr. Hale was a newly discovered witness. Because, Mr. Hale's existence was never released to appellant at the time of appellant's trial, appellant alleged that he had been the victim of a *Brady* violation.<sup>2</sup> At the evidentiary hearing, Mr. Hale testified that on the morning of April 1, 1999, he walked by Ms. Layne's home and observed a person exit the house carrying a trash bag and walk around toward the back of the house.<sup>3</sup> Mr. Hale also testified that later in the day, he gave a statement to the police, which was documented in a supplemental report written

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<sup>2</sup> *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 739 N.E.2d 749.

<sup>3</sup> Specifically, Mr. Hale stated the following "I seen someone came out with a trash bag." Tr. of PCR Hearing, Pg. 23. Further questioning by appellant's counsel elicited that the "someone" was male and Mr. Hale had seen this person coming out of the house. *Id.* at 23-24.

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by a detective of the Alliance Police Department.<sup>4</sup> On cross examination, Mr. Hale also agreed with the prosecuting attorney when the prosecuting attorney asked "you don't know for sure that he was in that house, do you?" Tr. of PCR hearing, pg. 37. Mr. Hale verified that neither Mr. Wilkes nor appellant was the man he saw exiting the residence.

{¶18} On October 15, 2003, the trial court issued a Judgment Entry which denied appellant's Petition for Post-Conviction Relief. The trial court found that many of appellant's arguments were barred as res judicata. In addition, the trial court questioned Mr. Wilkes' motives and reliability. In essence, the trial court found Mr. Wilkes was not credible. The trial court also concluded that the evidence submitted and produced at trial strongly corroborated the details of Mr. Wilkes' initial confession.

{¶19} Thus, it is from the October 15, 2003, Judgment Entry that appellant appeals, raising the following assignments of error:

{¶20} "I. THE TRIAL COURT ERRED IN FAILING TO GRANT POST-CONVICTION RELIEF TO APPELLANT BASED UPON THE STATE'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE.

{¶21} "II. THE TRIAL COURT ERRED IN FAILING TO GRANT POST-CONVICTION RELIEF [SIC] TO THE RECANTATION OF THE FORMER TESTIMONY OF THE STATE'S PRIMARY WITNESS.

{¶22} "III. THE TRIAL COURT ERRED IN FAILING TO GRANT POST-CONVICTION RELIEF BASED ON INADEQUATE REPRESENTATION OF COUNSEL.

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<sup>4</sup> In the narrative supplement, the officer wrote that Hale stated "he saw a w/m about 5'9", about 180 pounds, in his mid to late 20's, wearing blue jeans and a short sleeve shirt, with medium length hair, exit the residence carrying a garbage bag." Narrative Supplement, dated 7-19-99.

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{¶23} "IV. THE TRIAL COURT ERRED IN FAILING TO GRANTED [SIC] POST-CONVICTION RELIEF TO APPELLANT BASED UPON PROSECUTORIAL MISCONDUCT."

{¶24} In the first assignment of error, appellant contends that the trial court erred when it failed to grant appellant a new trial based upon the State's failure to disclose George Hale as a witness, in violation of *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. We disagree.

{¶25} In *Brady v. Maryland*, supra, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; See *State v. Treesh* (2001), 90 Ohio St.3d 460, 475, 739 N.E.2d 749, 767. "In determining whether the prosecution improperly suppressed evidence favorable to an accused, such evidence shall be deemed material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Johnston* (1988), 39 Ohio St.3d 48, 529 N.E.2d 898, paragraph five of the syllabus (following *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375, 87L.Ed.2d 481).

{¶26} We find no showing of a *Brady* violation. We cannot conclude that there is a reasonable probability that, had Mr. Hale been disclosed to the defense, the result of the trial would have been different. In this case, the jury was presented with a *complete*



confession by Mr. Wilkes, which implicated appellant as the man who paid Wilkes to commit the murder. In addition, Mr. Wilkes not only told the police and subsequently the jury, the details of his offense but Mr. Wilkes took police to where they could recover a knife which was consistent with the knife used to kill the victim. The knife was identical to a knife purchased at the K Mart at Carnation Mall on March 31, 1999, at 8:10 P.M. Around that same time, Mr. Wilkes was seen at the Carnation Mall by Ms. Mohr and Mr. Campbell. Mr. Wilkes proceeded to show these two people a knife, which was consistent with the knife sold at K Mart and consistent with the knife recovered through Mr. Wilkes. The knife had a substance on it that gave a preliminary positive test result for blood although the substance could not be further identified as human blood. According to Mr. Campbell, Mr. Wilkes stated that he was in Alliance to handle some business. When asked what business, Mr. Wilkes showed them the knife. Tr. of Trial, Vol. VI, pg. 1487. According to Rose Mohr, Mr. Wilkes showed them the knife and said "that he was there to kill some girl in Alliance, that some guy had paid him." Tr. of Trial, Vol. IV, pg. 1113.

{¶27} Mr. Wilkes was wearing a nylon workout suit at the Mall. After confessing, Mr. Wilkes told the police where to find the pants he wore that night. Nylon pants like the ones he claimed he wore and as seen by Ms. Rohr and Mr. Campbell were found where Mr. Wilkes said, specifically, under some brush in Ravenna. Although no blood was found on the pants, Jennifer Bloink, a criminalist at the Canton-Stark County Crime Laboratory, testified that the pants were covered in mud, debris and mold which would hamper the ability to detect blood. She also testified that the pants showed the effects of being in the elements for quite a while which would also hamper the ability to identify

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small blood stains and may have washed away any blood. Tr. of Trial, Vol. IV, pg. 951-952.

{¶28} This strong evidence must be considered against what George Hale could have disclosed. Mr. Hale originally claimed that between 9:30 and 10:00 A.M. on April 1, 1999, he saw a man, not appellant or Mr. Wilkes, exit the victim's residence with a trash bag. There is a significant gap between the time Mr. Hale saw this unknown man and the estimated time of the victim's death. The Stark County Chief Deputy Coroner, Dr. P.S.S. Murthy, stated that the time of death was around or after 7:00 or 8:00 P.M. on March 31, 1999. Further, upon cross examination at the evidentiary hearing, Mr. Hale stated that he could not know for sure that the man he saw was in the victim's house nor did he know what was in the garbage bag. On cross-examination, Mr. Hale agreed that all he could recall was that "there was a guy around that house carrying some sort of garbage bag...." Tr. of PCR hearing, pg. 40.

{¶29} Upon review, we find that Mr. Hale's testimony would not have been material, as defined in *Johnson*, supra., and *Bagley*, supra. We find no reasonable probability that, had this evidence been disclosed to the defense, the result of the trial would have been different.

{¶30} Accordingly, while this court believes the best course of action would have been for the police to reveal the existence of Mr. Hale to the defense, we find that there was no *Brady* violation. Appellant's first assignment of error is overruled.

II

{¶31} In the second assignment of error, appellant argues that the trial court should have granted appellant a new trial based upon the recantation of the State's

primary witness, Joseph Wilkes. Essentially, appellant argues that if one cannot trust Mr. Wilkes' confession concerning the murder itself, one cannot trust Mr. Wilkes' accusations against appellant.

{¶32} At the evidentiary hearing, Mr. Wilkes stated that his prior statements against appellant were false and that neither he nor appellant had anything to do with the victim's death. Mr. Wilkes claimed that any information he possessed regarding the murder was given to him by the Alliance Police. Mr. Wilkes asserted that he implicated appellant because he was afraid and felt that he had no choice.

{¶33} Appellant argues that Mr. Wilkes' recantation is supported by the testimony of Brent Turvey, a private crime scene investigator, and Michael Robertson, a questioned documents examiner. Mr. Turvey testified that upon his review of the forensic documentation available, including photographs of the crime scene, the crime could not have occurred as described by Mr. Wilkes. Mr. Wilkes claimed that the victim was first attacked while on the couch and then moved to a sliding glass door, before she collapsed. Mr. Turvey claimed that the photographs showed that the victim was attacked while she stood at the sliding glass doors and then was partially dragged to where she was found. Mr. Turvey claimed that any blood found on the couch was transferred to the couch by the attacker.

{¶34} Michael Robertson testified as a questioned documents examiner. Mr. Robertson compared the writing on the business card on which Mr. Wilkes allegedly wrote his name and phone number when he spoke with Rose Mohr and Chris Campbell at the Carnation Mall. Ms. Mohr claimed that appellant wrote on the card at the same general time he told her and Mr. Campbell that he had been hired by someone to kill a

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girl. Mr. Robertson compared the card to a sample given to him which was claimed to be a sample of Mr. Wilkes' handwriting. Mr. Robertson concluded that the handwriting on the card was not written by the same person that wrote the sample. From that conclusion, appellant argues that Ms. Mohr provided perjured testimony in regard to the business card and thus the rest of her testimony is tainted.

{¶35} Recantations of prior testimony are to be examined with utmost suspicion. *State v. Germany* (Sept. 30, 1993), Cuyahoga App. No. 63568 citing *United States v. Lewis* (C.A.6, 1964), 338 F.2d 137, 139). "Recantation by a significant witness does not, as a matter of law, entitle the defendant to a new trial. This determination is left to the sound discretion of the trial court." *State v. Walker* (1995), 101 Ohio App.3d 433, 435, 655 N.E.2d 823.

{¶36} We find that the trial court did not abuse its discretion in denying appellant a new trial. First, the trial court found Mr. Wilkes' recantation incredible. It appears that the trial court also found Mr. Turvey's testimony either incredible or unpersuasive in light of the evidence that supports a finding that Mr. Wilkes committed the murder. Such matters of credibility are primarily entrusted to the trial court. *State v. Rieke* (Aug. 14, 1997), Cuyahoga App. No. 71237, 1997 WL 473095 ("Considerable latitude is entrusted to the trial judge because of his opportunity to judge the impact of the evidence, newly discovered or recanted, and place it in proper perspective. The issue is essentially one of credibility and that is entrusted to the trial judge.")

{¶37} Further, we agree with the trial court that there is also significant evidence to support a conclusion that Mr. Wilkes committed the crime. Mr. Wilkes not only told to the police, and subsequently to the jury, the details of his offense but took police to

where they could recover a knife which was consistent with the knife used to kill the victim. The knife was identical to a knife purchased at the K Mart at Carnation Mall on March 31, 1999, at 8:10 P.M. Around that same time, Mr. Wilkes was seen at the Carnation Mall by Ms. Mohr and Mr. Campbell. Mr. Wilkes proceeded to show these two people a knife, which was consistent with the knife sold at K Mart and consistent with the knife recovered through Mr. Wilkes. The knife had a substance on it that gave a preliminary positive test result for blood although the substance could not be further identified as human blood. According to Mr. Campbell, Mr. Wilkes told these people that he was in Alliance to handle some business. When asked what business, Mr. Wilkes showed them the knife. Tr. of Trial, Vol. VI, pg. 1487. According to Rose Mohr, Mr. Wilkes showed them the knife and said "that he was there to kill some girl in Alliance, that some guy had paid him." Tr. of Trial, Vol. IV, pg. 1113.

{¶38} Mr. Wilkes was wearing a nylon workout suit at the Mall. After confessing, Mr. Wilkes told the police where to find the pants he wore that night. Nylon pants like the ones he claimed he wore and as seen by Ms. Rohr and Mr. Campbell were found where Mr. Wilkes said the pants would be found.

{¶39} As to the issues concerning the business card, Mr. Robertson testified that the handwriting on the business card was not written by the same person that wrote the sample. However, there are questions as to who actually wrote the sample. Mr. Robertson did not witness the writing of the sample but merely received the sample from a woman named Sue Gless. Sue Gless did not testify at the hearing.

{¶40} Thus upon review and consideration, we find that the trial court did not abuse its discretion.

{¶41} Appellant's second assignment of error is overruled.

III

{¶42} In the third assignment of error, appellant asserts that the trial court should have granted appellant post-conviction relief due to trial counsel's alleged failure to provide adequate representation. We disagree.

{¶43} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶44} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142, 538 N.E.2d 373. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable, professional assistance. *Id.*

{¶45} In order to warrant a reversal, appellant must additionally show he was prejudiced by counsel's ineffectiveness. "Prejudice from defective representation sufficient to justify reversal of a conviction exists only where the result of the trial was unreliable or the proceeding fundamentally unfair because of the performance of trial counsel." *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965, (citing *Lockhart v. Fretwell* (1993), 506 U.S. 364, 370, 113 S.Ct. 838, 122 L.Ed.2d 180).

{¶46} Further, both the United States Supreme Court and the Ohio Supreme Court have held that a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373 (quoting *Strickland* at 697).

{¶47} Here, however, we find that we do not reach the merits of several of appellant's arguments. When a defendant, represented by new counsel on direct appeal, fails to raise therein the issue of competent trial counsel, and that issue could fairly have been determined without resort to evidence outside the record, *res judicata* is a proper basis for rejecting a post-conviction claim. *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, at syllabus. Stated in other words, "Under the doctrine of *res judicata*, a final judgment of conviction bars the convicted from raising or litigating in any proceedings, except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised, ... on an appeal from that judgment." *State v. Perry* (May 3, 1967), 10 Ohio St.2d 175, 180, 226 N.E.2d 104.

{¶48} A review of the issues raised by appellant demonstrates that the following issues could have been raised on direct appeal and, therefore cannot be raised now:

{¶49} (d) During its case in chief, the Prosecutor introduced photos of the victim with three of her children. (citing the trial transcript at page 789) Appellant asserts that counsel for appellant should have lodged an objection.

{¶50} (e) Counsel allegedly failed to review reports, which are part of the record, prior to the witnesses' testimony. (citing the trial transcript at page 980)

{¶51} (f) Counsel allegedly failed to object to the State's alleged improper introduction of character evidence, specifically, but not limited to references to "shoot fighting." Appellant contends that this evidence was clearly introduced to establish that appellant was a bad person. (citing the trial transcript at page [sic])

{¶52} (g) Counsel purportedly failed to object to speculative testimony. (citing trial transcript at page 1375). Appellant provides the following argument: "Time of death was critical to the State's case. During its case in chief the State introduced evidence from the Appellant's co-workers as to when he left his place of employment. The witness testified that: '[we] figured it was about an hour to an hour and a half that he [appellant] was gone.' Counsel's failure to object left this assertion before the jury and supported the State's case that the Appellant had the time and opportunity to perform the actions that Joe Wilkes testified that he had done."

{¶53} (h) Counsel allegedly compounded an error which allowed a hearsay statement of the store clerk at Dick's Sporting Goods to be considered as expert testimony. (citing the trial transcript at page 1450) During the State's case, the investigating officers testified that they took a photo to a store clerk at Dick's Sporting Goods and that the Clerk identified the print as coming from a Nike Shoe. According to appellant, this was utilized to buttress the testimony of Wilkes who claimed that he had worn Nike sneakers. Although not expressly stated by appellant, this court presumes that appellant contends that trial counsel should have objected to this testimony.

{¶54} (i) Counsel allegedly failed to object to inadmissible hearsay. During the State's case, the Court acted sua sponte to prevent a witness from introducing hearsay



evidence. (citing the trial transcript at page 1491) Appellant asserts that counsel should have made an objection, but did not.

{¶55} (j) Counsel allegedly failed to object to numerous instances of prosecutorial misconduct. The vast majority of these instances were without objection.

{¶56} (k) Appellant contends that counsel should have objected when, during closing arguments, the Prosecutor stated as follows: "May 11, 1999, the Defendant comes for printing....When he comes in, he says nothing..... (citing the trial transcript at page 1704)

{¶57} (l) Counsel for appellant allegedly failed to object to the State's vouching for the veracity of its own witness. (citing, e.g. trial transcript at pages 1722 and 1728).

{¶58} Appellant presents the following allegations which are not barred as res judicata:

{¶59} (a) Counsel allegedly arrived at court several mornings during appellant's trial with the strong smell of alcohol on his breath and on the day that the State's primary witness testified he allegedly arrived smelling strongly of alcohol with the same clothes that he wore the day before which looked like he had slept in them.

{¶60} (b) Counsel allegedly failed to obtain expert testimony on blood splatter and other forensic evidence that would have brought into question whether Ms. Layne's murder occurred as represented by the State. Appellant asserts that counsel had a duty to try to undermine the testimony of Mr. Wilkes. Appellant alleges that counsel failed in that obligation in not obtaining the testimony of an expert. As a result, appellant alleges that his defense was prejudiced because a great chance to impeach the testimony of Joseph Wilkes was missed.

{¶61} (c) Counsel allegedly made an ill-advised and belated request for forensic testing of the blood found at the crime scene. Counsel made a request for said testing on December 27, 1999, approximately 29 days before the trial, which the trial court denied.

{¶62} (m) While the State presented eighteen witnesses, the defense only called three witnesses, two of which were originally called by the State. Counsel presented a limited defense, even though several other defense witnesses with important rebuttal information had been subpoenaed and were eager to testify on behalf of Appellant. Appellant attached affidavits to his post-conviction petitions in support of his argument.

{¶63} In addition, appellant contends that even if any of the alleged errors or omissions when viewed individually do not rise to the level of ineffective assistance of counsel, when the errors are considered in total, there was a prejudicial, cumulative effect.

{¶64} As to appellant's allegation in paragraph a, we find no showing of prejudice. Although appellant alleges that one of appellant's two attorneys had the smell of alcohol about him and, on one day, arrived in rumpled clothes, appellant has not shown prejudice. There is no assertion that counsel's behavior was that of one under the influence of alcohol and appellant had another attorney acting as counsel as well. Accordingly, we find no showing of prejudice.

{¶65} As to the allegations in paragraph b, concerning forensic evidence, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if a better strategy had been available. See *State*

*v. Phillips* (1995), 74 Ohio St.3d 72, 85, 656 N.E.2d 643. A trial counsel's decision not to seek expert testimony "is unquestionably tactical because such an expert might uncover evidence that further inculcates the defendant." *State v. Glover*, Clermont App. No. CA2001-12-102, 2002-Ohio-6392, 2002 WL 31647905, at ¶ 95. "Further, even if the wisdom of such an approach is debatable, 'debatable trial tactics' do not constitute ineffective assistance of counsel." *Id.* (quoting *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189). Further, the failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel. *State v. Hartman* (2001), 93 Ohio St.3d 274, 299, 754 N.E.2s 1150.

{¶66} In this case, appellant's trial counsel's trial strategy centered around an attempt to identify Mr. Wilkes as the ruthless killer and show how Mr. Wilkes was inconsistent and lied to implicate appellant. Counsel attacked the weakness of the evidence linking appellant to Mr. Wilkes. A decision to obtain a blood splatter expert would have required the trial strategy to evolve into a defense of Mr. Wilkes. However, Wilkes had already entered a plea in which he confessed to the murder. Upon consideration, we find that the decision whether to obtain a blood splatter expert was a question of trial strategy. Accordingly, we must reject appellant's claim of ineffective assistance of trial counsel on this basis.

{¶67} In paragraph c, appellant alleges that trial counsel was ineffective when they failed to motion for forensic tests on blood evidence until it was too late. In the motion for such testing, appellant sought blood and serological testing of certain pieces of evidence, including knives, bedding, blood stains, and clothes. In addition, appellant sought a blood sample from Wilkes to compare to the aforementioned evidence.

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{¶68} Appellant has again failed to show prejudice from counsel's actions. The prime means to show prejudice would be to provide such test results in the post-conviction relief petition. No such test results were provided. In fact, appellant has failed to show any prejudice.

{¶69} In paragraph m, appellant essentially asserts that counsel were ineffective when they presented a limited defense, including a failure to call several witnesses who had been subpoenaed. The decision whether to call a witness is generally a matter of trial strategy. *State v. Williams* (1991), 74 Ohio App.3d 686, 694, 600 N.E.2d 298.

{¶70} In this case, appellant has provided affidavits from the subpoenaed witnesses, as well as affidavits from potential witnesses who were not subpoenaed. The affidavits of the subpoenaed witnesses fail to state to what those witnesses would have testified. Thus, even if this court would consider trial counsel's decision as something other than a trial strategy, appellant failed to show any prejudice from counsel's failure to call these witnesses.

{¶71} Further, a review of the affidavits by potential witnesses who were not subpoenaed reveals that, in general, each would have testified that appellant and his grandparents told many people, not just Wilkes, as was suggested by the evidence presented at trial, not to call appellant at his home because the phone was tapped. The contention in the affidavits was that this evidence would have countered the State's implication that appellant went out of the way to tell Wilkes not to call appellant at appellant's home because appellant was concerned that Wilkes would make damaging statements concerning the death of Ms. Layne.

{¶72} However, once again, even if this court would consider trial counsel's decision as something other than a trial strategy, we see no prejudice to appellant. In light of the other evidence presented in the case, counsel's failure to call these witnesses does not render the result of the trial unreliable or the proceedings fundamentally unfair. As such, we find no basis for reversal.

{¶73} Last, appellant argues that there was a cumulative effect by all of the alleged instances of ineffective assistance of counsel. In that we have found no basis for a claim of ineffective assistance of counsel upon review of each of appellant's assertions, there can be no cumulative effect.

{¶74} Accordingly, appellant's third assignment of error is overruled.

IV

{¶75} In the fourth assignment of error, appellant argues that the trial court should have granted appellant a new trial based upon prosecutorial misconduct. We find that appellant cannot raise this issue in a petition for post-conviction relief. Appellant's arguments are based upon the record of the proceedings in the trial court. As stated previously, an appellant cannot raise an issue in a post-conviction petition that could have been raised on direct appeal. *State v. Perry*, supra. This issue and all of the underlying arguments could have been raised on direct appeal.

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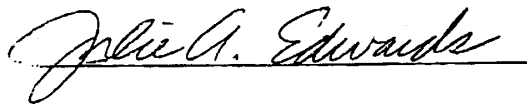
{¶74} Accordingly, appellant's fourth assignment of error is overruled.

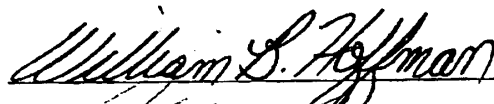
{¶75} The judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Boggins, J. concur

  
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JUDGES

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