

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO)	CASE NO. CR-391411(A)
Plaintiff,)	
vs)	JUDGE MARY JANE BOYLE
)	<u>MOTION FOR LEAVE TO FILE</u>
)	<u>MOTION FOR NEW TRIAL</u>
THOMAS SILLER)	
Defendant.)	

NOW COMES the Defendant, Thomas Siller, by and through counsel, and respectfully moves this Honorable Court pursuant to Ohio Criminal Rule 33 and the Sixth, Eighth and Fourteenth Amendment to the United States Constitution and Article I §10 of the Ohio Constitution to permit him to file the attached a Motion for New Trial Based On Newly Discovered Evidence outside of the 120 day limitation period. This newly discovered evidence undeniably establishes that Mr. Siller’s conviction was based on the perjured testimony of the State’s two key witnesses – Joseph Serowik and Jason Smith. The evidence clearly supports Mr. Siller’s long standing claim of innocence. Mr. Siller was unavoidably prevented from the discovery of the evidence within the 120-day period following the jury verdict in this matter.

MEMORANDUM IN SUPPORT

A. Statement of Facts

A detailed and thorough examination of the facts and circumstances surrounding the crimes for which Mr. Siller stands convicted, his two trials, and post-conviction developments in the case is provided in the attached Motion For A New Trial Based On Newly Discovered Evidence. For the purposes of this Motion for Leave, a brief summary of these facts is appropriate.

At 3:49 a.m. on June 4, 1997, an anonymous 911 call was made from a pay phone on Fleet Avenue in Cleveland reporting that a female had been assaulted at 6211 Hosmer Avenue. Police responded to the scene and found 74 year-old Lucy “Alice” Zolkowski severely beaten and tied to a chair. Zolkowski entered a coma that night and died due to her injuries almost two years later, on April 26, 1999.

Although a repeat felon named Jason Smith was initially indicted for the crime, he later entered a plea deal wherein he received a three-year sentence for aggravated burglary in exchange for his testimony against Thomas Siller and Walter Zimmer. Siller and Zimmer admittedly both knew the victim, frequently performed repairs and other work on her house, and had borrowed large sums of money from her. The prosecution’s theory was the Smith, Siller, and Zimmer bore responsibility for the crime. The defense theory has always been that Smith committed the crime without Siller or Zimmer.

Siller and Zimmer were first tried by jury for the attempted murder of Zolkowski in June of 1998 before Judge Timothy J. McGinty. At the first trial, Joseph Serowik testified that none of the victim’s blood was on Smith’s pants, and this testimony was used by the prosecutor in opening and closing to support his theory that Smith was not involved in the beating of the

victim. The jury returned guilty verdicts on all counts for both Siller and Zimmer on July 2. Siller received a consecutive sentence for a total of twenty years. Siller's appeals from these convictions were all denied. *See State v. Siller*, 1999 WL 980405 (Ohio Ct. App. Oct. 28, 1999) ("*Siller I*"), *discretionary appeal not allowed* 88 Ohio St. 3d 1443, 725 N.E. 2d 284 (Ohio 2000) (Douglas, Resnick, and F.E. Sweeney, JJ *dissenting*) and *app. for reopening denied* 2000 WL 1901275 (Ohio Ct. App. Oct. 25, 2000).

After the victim's death, Siller proceeded to trial by jury before the Honorable Mary Jane Boyle on July 18, 2001. Serowik once again testified that none of the victim's blood was found on Smith's pants. However, after questions were raised about his presumptive blood tests, Serowik re-tested the pants and claimed to find only a single drop of the victim's blood on the pants. In closing, the prosecutor argued that the single drop was consistent with Smith not being involved with the beating, and opined that whoever had conducted the assault would have had more blood on the front of his pants. Evidence closed on July 30, and Siller was convicted of aggravated murder. A mitigation phase began on August 7, 2001. On August 9, the jury rejected death and Siller was sentenced to thirty years without parole, running concurrent with his previous convictions. Direct appeal was denied. *See State v. Siller*, 2003 WL 1894573 (Ohio Ct. App. April 17, 2003) ("*Siller II*").

After Mr. Siller's second convictions, serious questions surfaced about the integrity of Serowik as a serologist and scientist. On October 18, 2001, Anthony Michael Green was exonerated and released from prison as a result of post conviction DNA testing, which definitively proved that Serowik's testimony in Green's trial had been false. Mr. Green subsequently brought a federal civil rights suit against the City of Cleveland and Joseph Serowik. In his complaint, Mr. Green alleged that the false and misleading testimony of Joseph Serowik

contributed to Mr. Green's eleven years of unjust incarceration. The lawsuit settled in June 2004, and per the settlement, the City of Cleveland agreed to undertake an "audit of files from the City's forensic laboratory involving serology and/or hair analysis." (See Anthony Michael Green Forensic Laboratory Audit, case No. 1:03CV0906, dated June 8, 2004, attached as Exhibit A). Thomas Siller's case was ultimately analyzed as part of this audit.

In October, 2004, Siller filed two *pro se* motions pursuant to R.C. § 2953.71 *et seq*, Ohio's Post-Conviction DNA testing law (aka "SB11") seeking DNA testing to prove his innocence. Siller's SB11 motion in CR-361726(B) was filed October 25, 2004, and his motion in CR-391411(A) was filed October 27, 2004. This Court denied Defendant's motion in CR-391411(A) on November 12, 2004.

On August 12, 2005, Robert P. Spalding issued his report concerning Serowik's testimony in Siller's cases to Special Master James R. Wooley. Mr. Spalding found Serowik's analysis and testimony to be replete with serious errors. (See generally Report in City of Cleveland/Police Department Forensic Audit, 04062201 OH, *State of Ohio v Thomas Siller, State of Ohio v. Walter Siller* dated August 12, 2005 ("Spalding Report"), attached as Exhibit B). The Spalding Report, however, was a paper audit and did not involve any independent reexamination of the physical evidence and, as a result was unable to conclude whether or not Serowik's testimony was perjured.

On December 8, 2005, Judge McGinty held an initial status hearing on Siller's pending SB11 DNA application. On December 9, 2005, Siller filed a Motion to Order Forensic DNA Testing, seeking to withdraw his SB11 DNA application and instead seeking DNA testing "in the interest of justice and in anticipation of a possible motion for a new trial based upon newly discovered evidence." On December 16, 2005, Judge McGinty granted Siller's motion and

ordered DNA testing on, *inter alia*, Jason Smith's beige pants. Testing was to be paid for by the Innocence Project, and conducted at Forensic Science Associates ("FSA") of Richmond, California.

On July 25, 2006, FSA issued its first Post-Conviction Testing Report, which was followed by a second Report on December 26, 2006. (*See* Post Conviction DNA Testing Report 1, FSA File number 06-139 dated July 25, 2006, attached as Exhibit C; Post Conviction DNA Testing Report 2, FSA File number 06-139, dated December 26, 2006 ("FSA Report 2"), attached as Exhibit D). In relevant part, the reports found seven additional spatters of the victim's blood on Jason Smith's pants. (Report 2 at 49).

B. Ohio Criminal Rule 33

Ohio Criminal Rule 33 contemplates a two-step process when new evidence in support of a new trial is discovered beyond the 120-day limitation imposed by Criminal Rule 33(B). The initial step is to demonstrate, by clear and convincing evidence, that the defendant was unavoidably prevented from filing a timely motion or discovering the new evidence within the period provided pursuant to Crim.R. 33. *State v. Davis*, Franklin App. No. 03AP-1200, 2004-Ohio-6065, ¶ 11; *State v. Josso* (Apr. 27, 2000), Cuyahoga App. No. 77227. The Court in *Davis* noted that clear and convincing evidence requires more than a mere allegation that a defendant was unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial motion. *See Josso*. "[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *Davis*, 2004-Ohio-6065, at ¶ 11, *citing State v. Walden* (1984), 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859.

If the evidence establishes the unavoidable delay, an order shall issue requiring the defendant to file the motion within seven days. A new trial shall be ordered, “when new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial.” Crim. Rule 33 (A)(6). Pursuant to Rule 33, this Court does not yet have to reach the question of whether a new trial shall be ordered. The only issue is whether leave will be given to request a new trial. The question before this Court is whether Mr. Siller was unavoidably prevented from discovering the evidence.

ARGUMENT

1. Nature of New Evidence Prevented Its Discovery at Time of Trial

At his original trials, Siller was not aware that state agent Joseph Serowik had perjured himself with regard to his analysis of stains on Jason Smith’s pants. At the first trial, Siller’s defense attorney did cross examine Serowik, but uncovered no evidence that Mr. Serowik had testified falsely. At the second trial, Serowik was caught flip-flopping on whether presumptive tests for blood had even been performed. However, after Serowik was called to the stand for the second time and swore that he had re-examined the critical trousers, Siller proceeded with his defense on the reasonable belief that Serowik had followed the requirements of his sworn oath and testified truthfully.

The evidence uncovered in these reports was not accessible at the time of trial and could not have been reasonably discovered through the exercise of due diligence. They were only ordered after it was discovered through the Spalding Report that Joseph Serowik’s analysis of the evidence in this case was questionable, and therefore his testimony suspect. Without the information gathered by the Spalding Report and the subsequent FSA Reports, Mr. Siller had no

knowledge of, much less the means to challenge, the perjured testimony of Joseph Serowik. His belief that Serowik's testimony was truthful was not unreasonable given that Serowik was a qualified expert witness with significant experience both in the Forensic Laboratory of the City of Cleveland and in court. In this sense, Mr. Siller could not have learned of the existence of the grounds upon which his motion for new trial is based within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence.

2. Diligence Has Been Demonstrated

Thomas Siller has satisfied the reasonable diligence requirements in attempting to bring this new evidence to the court's attention in an expedient matter. Upon learning the findings of the Spalding Report suggesting misconduct on the part of Joseph Serowik, Siller promptly filed a request for further DNA testing in an effort to determine whether Serowik had in fact committed perjury in his testimony. The motion seeking DNA testing specifically referenced filing a Motion for New Trial should exculpatory results be obtained.

When the results of this post conviction testing became available (FSA Reports 1 and 2) on December 26, 2006, counsel promptly drafted and filed the request for leave to file, and the underlying motion for a new trial based on this evidence.

3. Constitutional Consideration

The continued incarceration of one who is actually innocent of the crimes charged violates the Due Process rights of that citizen and serves as Cruel and Unusual Punishment. The Due Process Clause of the Ohio and United States Constitutions is also violated when the State relies on perjured testimony to secure a conviction.

WHEREFORE, Mr. Siller respectfully requests this Court grant him leave to file a Motion for New Trial in CR-361726-B.

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion For Leave To File Motion For New Trial and the attached Motion For A New Trial Based On Newly Discovered Evidence and Exhibits in Support of these Motions have been hand-delivered, this _____ day of January, 2007, to Matthew Meyer, Esq., Assistant Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.

TERRY H. GILBERT
One of the Attorneys for Defendant

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THOMAS SILLER)	<u>DISCOVERED EVIDENCE</u>
Defendant.)	

Now comes the Defendant, through counsel, and offers this brief in support of his “Motion for a New Trial Based on Newly Discovered Evidence” filed pursuant to Rule 33 of the Ohio Rules of Criminal Procedure.

Newly discovered evidence reveals that Joseph Serowik, a state agent, deliberately failed to disclose exculpatory evidence that now fatally undermines the testimony of the only alleged witness to the crimes for which Mr. Siller stands convicted. In short, DNA testing shows that the blood of the victim is spattered on at least seven spots of the trousers (five spatters on the front, two spatters on the back) of the prosecution’s star witness, Jason Smith, directly tying him to the fatal beating of Lucy Zolkowski and providing powerful new evidence to the long-asserted theory of the defense that Smith alone was responsible for this horrible crime.

Hints of Joseph Serowik’s misconduct were seen at Siller’s second trial when Serowik’s false representation that a stain on the back of Smith’s trousers had tested negative for blood was exposed. In the middle of the trial, Serowik was asked to re-test the trousers and then testify again. He did so and stated that additional testing had revealed a single additional drop of blood on the back of the trousers. This blood was consistent with the victim. Serowik testified under

oath that “any particular discoloration that we found on these pants was in fact tested” and that none of these other stains on the trousers were blood. (T2¹ at 2715).

In closing, prosecutor Tiburzio characterized the revelation that a drop of the victim’s blood was found on Smith’s trousers as “an embarrassing situation for the Cleveland Police Department and for us” and admitted that it raised questions about Smith’s credibility. (*Id.* at 3535). However, buoyed by Serowik’s testimony that there was only one tiny spot of the victim’s blood on the back of the pants, Ms. Tiburzio told the jury:

Remember, this spot was a very small stain. Remember, Andrea Fischer told you that it was contained within a three-eighths inch by three-eighths inch cutting on the back of this pants leg, the left pants leg. Does that mean the [Jason Smith] is the one that beat Lucy Zolkowski? If he had been the one the one to beat Lucy Zolkowski, I would submit to you that there would be more blood and it would be on the front of his pants.

(*Id.*). More than a mere “embarrassing” situation, new DNA evidence is a catastrophe for both Serowik and Smith -- they’ve both been caught in false testimony. With at least eight bloodstains on the front and the back of Smith’s pants that come from the victim (the single stain from the second trial, plus the seven newly discovered stains), the answer to the prosecutor’s rhetorical question in closing is clear: Yes, the new DNA evidence means that Jason Smith is the one who beat Lucy Zolkowski, and it destroys the credibility of his accusations against Siller and Zimmer.

The new forensic evidence is equally damaging to the credibility of Joseph Serowik. Since the trials of Siller and Zimmer, Serowik’s competence as forensic analyst and his integrity as someone who accurately and fairly documents and reports scientific findings has been called into serious question. After the post-conviction DNA exoneration of Michael Green and a subsequent civil suit, the City of Cleveland fired Serowik and agreed to audit sixteen years of his

¹ “T2” cites are to Siller’s second trial transcript. “T1” cites are to Siller’s first trial transcript.

work because of evidence that he gave false testimony in the Green case, and misreported results in at least two other cases discovered in the civil litigation.

As part of this audit, supervised by former Assistant United States Attorney Jim Wooley and conducted by criminalist Robert Spalding, grave questions were raised as to whether Serowik had actually conducted tests on the stains on the pants worn by Smith. These questions were raised *before* the new DNA tests identifying blood from the victim on Smith's pants; now those tests plainly confirm the strong suspicions of auditors Wooley and Spalding that Serowik had offered false testimony.

As a result, Tom Siller's current conviction cannot stand for many reasons. First, the newly discovered DNA test results alone raise a "strong probability of a different verdict" and require Siller's conviction be vacated pursuant to Criminal Rule 33. Even more fundamentally, the new DNA test results, and newly discovered audit analysis of Serowik's work show an agent of the state, Serowik, offered false testimony material to Siller's conviction and suppressed exculpatory evidence (Serowik's failure to do tests he claimed to have performed). Such false testimony and suppression of exculpatory evidence constitute due process violations under the Ohio and United States Constitutions and also mandate that Siller's conviction be vacated.

The grounds for this motion are set forth fully below.

I. PROCEDURAL HISTORY

At 3:49 a.m. on June 4, 1997, an anonymous 911 call was made from a pay phone on Fleet Avenue in Cleveland reporting that a female had been assaulted at 6211 Hosmer Avenue. Police responded to the scene and found 74 year-old Lucy “Alice” Zolkowski severely beaten and tied to a chair. Zolkowski entered a coma that night and died due to her injuries almost two years later, on April 26, 1999.

Jason Smith and Jenean Harper were both indicted in connection with the crime in July of 1997. Smith was charged with attempted aggravated murder and other crimes on the strength of a fingerprint connecting him to the scene and information from a jailhouse informant who claimed that Smith had confessed to the assault on Zolkowski. Harper, Smith’s girlfriend, was charged with a felony count of obstruction of justice for her role in hiding Smith from the police as they tried to effect his arrest. Approximately two weeks after her indictment, Harper entered a guilty plea to misdemeanor obstruction of justice in exchange for a statement implicating Smith, and an agreement to testify against him should his case proceed to trial. On March 3, 1998, Jason Smith entered a guilty plea to aggravated burglary, which carried a three year sentence. The plea was entered in exchange for Smith’s testimony against Thomas Siller and Walter Zimmer.

In March of 1998, Siller and Zimmer were both indicted in connection with the attack on Zolkowski and charged with felonious assault, attempted aggravated murder, kidnapping, aggravated burglary and aggravated robbery. In addition, Rose Crowder, a friend of Siller and Zimmer, was charged with felony obstruction of justice for her statements corroborating Siller’s and Zimmer’s version of the events of June 3-4, 1997.

All three defendants maintained their innocence and were tried together by jury before the Honorable Timothy J. McGinty. The trial began on June 24, 1998. At the close of the State’s

case on June 29, Crowder successfully moved for a directed verdict under Rule 29 and was excused from the case. The trial concluded on June 30, and the jury returned guilty verdicts on all counts for both Siller and Zimmer on July 2. Sentencing occurred on July 29, 1998 and Siller received a consecutive sentence for a total of twenty years. Siller's appeals from these convictions were all denied. *See State v. Siller*, 1999 WL 980405 (Ohio Ct. App. Oct. 28, 1999) ("*Siller I*"), *discretionary appeal not allowed* 88 Ohio St. 3d 1443, 725 N.E. 2d 284 (Ohio 2000) (Douglas, Resnick, and F.E. Sweeney, JJ *dissenting*) and *app. for reopening denied* 2000 WL 1901275 (Ohio Ct. App. Oct. 25, 2000). *See also State ex rel. Siller v. McGinty*, 2001 WL 723237 (Ohio Ct. App. June 25, 2001) (denying writ of mandamus).

After the victim died on April 26, 1999, Siller was charged with aggravated murder. He proceeded to trial by jury before the Honorable Mary Jane Boyle on July 18, 2001. Evidence closed on July 30, and Siller was convicted of aggravated murder. A mitigation phase began on August 7, 2001. On August 9, the jury rejected death and Siller was sentenced to thirty years without parole, running concurrent with his previous convictions. Direct appeal was denied. *See State v. Siller*, 2003 WL 1894573 (Ohio Ct. App. April 17, 2003) ("*Siller II*").

After Siller's second conviction, a DNA exclusion led to the exoneration and release from prison on October 18, 2001 of Anthony Michael Green who had been wrongfully convicted of the rape of a cancer patient at the Cleveland Clinic Inn. Mr. Green subsequently brought a federal civil rights suit against the City of Cleveland and Serowik, alleging that, *inter alia*, the false and misleading testimony of Joseph Serowik contributed to Mr. Green's eleven years of unjust incarceration. The lawsuit settled in June 2004, and per the settlement, the City of Cleveland agreed to undertake an "audit of files from the City's forensic laboratory involving serology and/or hair analysis." (*See Anthony Michael Green Forensic Laboratory Audit* ("Green

Audit"), case No. 1:03CV0906, dated June 8, 2004, attached as Exhibit A). Thomas Siller's case was ultimately analyzed as part of this audit.

In October, 2004, Siller filed two *pro se* motions pursuant to R.C. § 2953.71 *et seq*, Ohio's Post-Conviction DNA testing law (aka "SB11") seeking DNA testing to prove his innocence. Mr. Siller's SB11 motion in CR-361726(B) was filed October 25, 2004, and his motion in CR-391411(A) was filed October 27, 2004. This Court denied Defendant's motion in CR-391411(A) on November 12, 2004 without analysis or opinion.

On August 12, 2005, Robert P. Spalding issued his report concerning Serowik's testimony in Siller's case to Special Master James R. Wooley. Mr. Spalding found Serowik's testing and testimony to be replete with serious errors.. (*See generally* Report in City of Cleveland/Police Department Forensic Audit, 04062201 OH, *State of Ohio v Thomas Siller*, dated August 12, 2005 ("Spalding Report"), attached as Exhibit B). The Spalding Report was a paper audit and did not involve any independent re-examination of the physical evidence.

On December 8, 2005, this Judge McGinty held an initial status hearing on Siller's pending SB11 DNA application. Since filing his *pro se* application, he had secured the services of *pro bono* counsel -- Colin Starger, Esq. of the New York Innocence Project ("IP") and Terry Gilbert, Esq. of Cleveland, Ohio. On December 9, 2005, Mr. Siller filed a Motion to Order Forensic DNA Testing, seeking to withdraw his SB11 DNA application and instead seeking DNA testing "in the interest of justice and in anticipation of a possible motion for a new trial based upon newly discovered evidence." On December 16, 2005, Judge McGinty granted Siller's motion and ordered DNA testing on Jason Smith's beige pants (Exhibit 87), his grey t-shirt (Exhibit 86), the victim's nightgown including straps (Exhibit 85), and stainless steel knife

(Exhibit 24). Testing was to be paid for by the IP, and conducted at Forensic Science Associates (“FSA”) of Richmond, California.

On July 25, 2006, FSA issued “Post Conviction DNA Testing Report 1” in the instant case. (*See* Post Conviction DNA Testing Report 1, FSA File number 06-139 dated July 25, 2006 (“FSA Report 1”), attached as Exhibit C). Report 1’s findings include the identification of female blood on areas A and C of Jason Smith’s pants (front left leg), from which Zolkowski could not be eliminated. (FSA Report 1 at 33-34). The female genetic profile obtained was “expected to be unique in the human population.” (*Id.*). In Report 1’s conclusion, scientists Ed Blake and Alan Keel indicated that they would conduct further investigation on the stainless steel knife and on “additional blood deposits from the Jason Smith khaki pants” and issue a separate report.

On September 21, 2006, Judge McGinty granted Siller’s Supplemental Motion to Produce Evidence, which sought transfer to FSA of a previously cut-out section of Smith’s beige pants that had been separately entered into evidence as Exhibit 77.

On December 26, 2006, FSA issued “Post Conviction DNA Testing Report 2”. (*See* Post Conviction DNA Testing Report 2, FSA File number 06-139, dated December 26, 2006 (“FSA Report 2”), attached as Exhibit D). Report 2’s findings include the identification of female blood genetically consistent with Zolkowski on areas K and M (front left leg), area O (front right leg), area BB (back left leg) and area DD (back right leg). (FSA Report 2 at 44).

This motion follows.

For the Court’s information, Defendant is simultaneously filing a near-identical motion for relief in case CR-361726(B). In addition, counsel for Siller have consulted with counsel for co-defendant Wally Zimmer, the Ohio Innocence Project. Zimmer is also filing largely similar motions based on the same newly discovered evidence.

II. FACTUAL BACKGROUND

A. The Crime Scene

At 3:49 a.m. on the morning of June 4, 1997, police received an anonymous 911 call from a payphone on Fleet Avenue in Cleveland that a female had been assaulted at 6211 Hosmer Avenue. *Siller I*, 1999 WL 980405 at *1. Police responding to the scene saw that the house was “lit up pretty well” but received no answer to their knocks on the front door. (T2 at 1933). Proceeding to the back door, police found wood splinters on the ground and molding of the side of the door broken, indicating “that the door had been kicked in or forced open.” (*Id.* at 1934).

Police entered the house into the kitchen with guns drawn and cleared each room. The entire house was in disarray and had been ransacked. A phone had been ripped from the wall in the dining room, but the phone in the kitchen was intact. (T1 at 466). Lucy “Alice” Zolkowski was found tied to a chair in the living room, which police entered after walking through the kitchen and dining room. The victim had been severely beaten, was swollen beyond recognition, and was non-responsive to questioning. (T2 at 1935-40). EMS arrived at the scene, removed a gag from the victim’s mouth, cut the bindings that tied her to the chair, and took the victim to Metropolitan Hospital. (*Id.* at 1845-55). The victim never regained consciousness and thus never implicated anyone in the crime.

The crime scene was processed and photographs were taken. In the living room, a large amount of blood was present behind, to the sides of, and in front of the chair where the victim had been tied. (*Id.* at 1974). On the dining room table, police recovered a knife with blood on it. (*Id.* at 1938). Detective Kathleen Carlin, the primary investigator on the case, later testified that since Zolkowski had not been slashed or stabbed, the knife may have been used to cut the

victim's gown into bindings. (*Id.* at 2608). The knife handle was never tested for fingerprints. (*Id.* at 2185, 2227-29).

The Scientific Investigation Unit (SIU) was able to recover usable latent prints from a dresser drawer in rear bedroom, a glass block window on the kitchen floor, and an ashtray on a cocktail table in the front living room. (*Id.* at 2139-44). These prints were respectively linked to Jason Smith, Wally Zimmer, and Tom Siller. (*Id.* at 2206-2212). Two partial palm prints were also found in the front bedroom, but were not linked to any individual (*Id.* at 2226).

On a nightstand/end table next to the chair where the victim was found, police found a work order proposal and two sheets of monetary figures. (T1 at 469-70). The work order proposal was dated December 30, 1996 and was between Thomas Siller and Lucy Zolkowski. (T2 at 2502-04). The sheets were apparently tallies of money owed to the victim by various individuals including Zimmer and Siller as well as "Brian" and "Jim". (*Id.* at 2609-10). It was later learned that individuals named Brian Cockcran and Jim Mashott had both worked at Zolkowski's house, but police failed to interview either man in connection with their investigation. (*Id.* at 2610).

B. Investigation

Detective Carlin began her investigation by canvassing the neighborhood around the victim's house on June 4 and soon learned that Siller and Zimmer were contractors who frequently went inside the victim's home. (T2 at 2497-98). Carlin left "word on the street" that she wanted to speak with them. (*Id.* at 2499). The very next day, June 5, Siller telephoned Detective Carlin and arranged to come in to speak with her on June 6. (*Id.* at 2500).

On June 5, Detective Carlin also learned that the fingerprint recovered from the dresser drawer in the rear bedroom had been matched to Jason Smith, a convicted felon whose prints

were in the AFIS fingerprint database. (*Id.* at 2206-06, 2567). Detective Carlin immediately registered a warrant with the city prosecutor's office, but police were unable to effect an arrest of Smith until the evening of June 14. (*Id.* at 2568).

On June 6, Siller voluntarily came to Detective Carlin's office and gave statements. He did not request a lawyer. His conversation with Carlin began at 10:50 a.m. and concluded at 12:25 p.m., and the Detective condensed this conversation into a two-page statement, which Siller signed. (T1 at 500, 507). In his statement, Siller explained that he had been working on various projects for Lucy Zolkowski, whom he called Alice, since the Fall of 1996, and that he had worked with others on the projects including Bob Nichols, Brian Cochran, Wally Zimmer, Kevin (last name unknown), William Reed, Jr. and Gary Riley. (*Id.* at 500-01, 505).

Concerning the events of June 3, Siller stated that the last time he had seen Alice was after he had taken her to the National City bank around 3:00 or 3:30 p.m. and dropped her off back at her home after 4 p.m. (*Id.* at 503). In the morning of June 4, he started to receive pages from Rosie Crowder and went to her house at sometime between midnight and 3:00 a.m. (*Id.* at 501). When he arrived, Wally Zimmer was at Rosie's house said that he had discovered Alice in her home. (*Id.* at 501-02). According to his statement, Tom yelled at Wally for not calling the police, and tried to get Wally to go to Alice's with him, but Wally refused because he had warrants for his arrest. (*Id.* at 502). Siller then dropped Wally off at his home and called the police from a payphone. (*Id.* at 503). When asked about borrowing money from the victim, Siller stated that Alice had "loaned [him] about \$12,000 since I known her." (*Id.* at 505). When asked whether he knew Jason Smith, Siller responded "I think he might be the light skinned black guy who hangs around Al Gillespie. We call him Jay." (*Id.* at 506).

On June 6, Rose Crowder and Wally Zimmer also voluntarily came to Detective Carlin and gave statements. Neither requested a lawyer.

Crowder's statement was taken at 12:35 p.m., ten minutes after Detective Carlin completed her conversation with Siller. (*Id.* at 508). Rose stated that she had known Lucy Alice Zolkowski for about three or four months through Tom Siller, who was doing work for her. (*Id.* at 509). Concerning the morning of June 4, she stated that Wally came to her house at 6611 Hosmer Avenue at "around 2:00, 2:30 a.m." (*Id.*). According to Rose, Wally said that he had just been at Alice's house and someone had beaten her up. (*Id.*). Rose then paged Tom Siller and he arrived "about 10, 15 minutes later." (*Id.* at 510). Tom and Wally, whom she called Warren, left shortly after Tom arrived to go to the payphone and call 911. (*Id.* at 510). According to Rose, Tom then returned and stayed the night at Rose's house and left for work in the morning. (*Id.*). When asked if she knew Jason Smith, Crowder responded in the negative. (*Id.* at 511). However, when asked if she knew Al Gillespie, she stated that she did and that "he hangs around with a black guy named Jay." (*Id.* at 512).

Zimmer gave a statement at 1 p.m. on June 6, approximately twenty-five minutes after Detective Carlin concluded her conversation with Crowder. (*Id.* at 490). Carlin spoke with Zimmer for an hour and their conversation was reduced to a two-page statement, which Zimmer signed. (*Id.* at 491). Zimmer stated that he was going to Rosie Crowder's house on the morning of June 4 when he walked by Alice's house and noticed that the lights were on. (*Id.* at 491-92). He knocked on the door, received no answer, and so went around the back where the screen door was open. (*Id.* at 492). He peered inside and noticed cabinets open and "stuff all over the floor." (*Id.*). Zimmer stated that after knocking on the front door again, he entered through the back and discovered Alice sitting in the chair with "blood on her face and hanging from her nose and

blood all over the wall.” (*Id.*). He tried to talk to Alice but she would not answer. (*Id.* at 492-93). He considered calling 911, but changed his mind because he had a warrant. (*Id.* at 493). Zimmer then went to Rosie’s house, told her what happened, and paged Tom. (*Id.*). After Tom arrived, he dropped Zimmer off at home and then went to call 911. (*Id.*).

When asked by Detective Carlin what time he arrived at Alice’s house, Zimmer responded that he thought that the bars were closed on Fleet, so it must have been between 2:15 a.m. and 2:45 a.m. (*Id.* at 494-95). When asked about borrowing money from the victim, Zimmer stated that he had borrowed “about \$5000 over the last eight months.” When asked if he knew Jason Smith, Zimmer responded “no, but Tom told me it was Jay who hangs around with Al Gillespie.” (*Id.* at 497).

On June 13, Detective Carlin took a second statement from Siller. Again, Siller voluntarily gave the statement without the presence of counsel, and this time the statement was recorded by Carlin on audio tape. (T2 at 2568). The second statement did not substantially vary from the first. However, Siller did state the he had previously forgotten about going to a bar called Chaulkie’s with Zimmer earlier in the evening of June 3. (*Id.* at 3546). In addition, Siller remembered the amount he borrowed from Alice on June 3 as \$240 rather than \$200. (*Id.* at 2571).

From June 1997 until March 1998, Detective Carlin focused her investigation on Jason Smith. Smith was arrested on June 14, 1997, at the home of his girlfriend Jenean Harper. (*Id.* at 2572-73). Although Harper had told police that Smith was not at her house, he was found hiding in a closet. (*Id.* at 2575). Smith was charged with the attack on Zolkowski, and Harper was charged with obstruction of justice for her role in hiding Smith. (*Id.*). Harper was released on bond, and was at home on June 15 when Detective Carlin presented a warrant to confiscate

evidence. (*Id.* at 2574). Among the items confiscated from Harper's house were Jason Smith's bloodstained beige pants that are at the heart of this current motion.

On June 16, Smith gave an oral statement to Detective Carlin. (T1 at 375). At this time, Smith denied any involvement in the crime. (*Id.* at 377). While Smith denied working for Siller or Zimmer, he did state that he had seen them working on a sidewalk at the house on Hosmer Avenue, but had not met the person they were working for. (*Id.*). In this first interview, Detective Carlin asked Smith to voluntarily give a blood sample, but he refused. (*Id.* at 377-78). Detective Carlin later obtained a court order and was able to collect Smith's blood against his will. (*Id.* at 378).

A man named Ed Farrell was in the jail cell next to Smith's around June 15-16. (T2 at 3426). On June 16, Farrell gave a statement to Detective Carlin about conversations he had had with Smith. (*Id.* at 3429). Farrell told Carlin that on the first night he met Smith, Smith had admitted to breaking into a house and beating up an old lady. (*Id.* at 3427). According to Farrell, Smith had said that he was not worried about partners snitching on him because he had acted alone. (*Id.* at 3428). Smith also confided that police had told him that they had a fingerprint. (*Id.* at 3427). Smith told Farrell that he had committed the crime to get money to buy a house for his girlfriend and mentioned that she had also been arrested. (*Id.* at 3428). Farrell also told Detective Carlin that he had spoken with Smith on the following day after Smith had returned from a phone call with his girlfriend. (*Id.*). At this time, Smith told Farrell that he had people in Kentucky who were going to say that he was there on the night of the murder. (*Id.*). Smith also said that police had just left his girlfriend's house with clothes that had blood on them. (*Id.*). In exchange for this information, Detective Carlin wrote a favorable letter for Farrell to the parole board. (*Id.* at 3430).

On June 16, Smith did in fact speak with Jenean Harper via telephone and learned that police had confiscated his clothes from her house. (T1 at 378). Smith then asked to speak to Detective Carlin again. His second interview occurred on June 17, the day *after* Carlin had taken the statement from Farrell. (T2 at 3431). In his June 17 statement, Smith again denied involvement in the crime and offered an alibi -- claiming to have been in Louisville, Kentucky on the night of the crime after dropping off his cousin (exactly as Farrell had predicted). (T1 at 379-80). Smith also told Detective Carlin that he had been working at North Star Plastics and Touch of Italy restaurant and that he had cut his right leg at Touch of Italy and bled on his pants. (*Id.* at 379). Both the alibi and claim about Touch of Italy were later discredited and renounced by Smith himself.

Despite being made aware of the fingerprint and Farrell's statement, Smith maintained his total innocence for approximately nine months. (T1 at 556). However, Smith quickly changed his mind when he learned that Harper had agreed to testify against him as part of her own plea deal. (*Id.* at 301-03). Through counsel, Smith negotiated a plea deal in exchange for testimony implicating Siller and Zimmer. On March 3, 1998, Smith pled guilty to aggravated burglary and agreed to serve three years. (*Id.* at 343-44). In addition to having all of the other charges in connection with the Zolkowski assault nolle prossed, Smith also had charges dismissed in two other drug cases that were pending. (*Id.*). Finally, Smith was guaranteed immunity from prosecution on homicide charges in the event of the victim's death. (*Id.* at 344).

On the same day as he entered his guilty plea, March 3, 1998, Smith gave an audio-taped statement to Detective Carlin. (*Id.* at 345). In this statement, Smith implicated Siller and Zimmer. On the strength of Smith's statement, Siller, Zimmer and Crowder were indicted, arrested, and tried.

C. The First Trial

1. Circumstantial Evidence

The only direct evidence of Siller's or Zimmer's alleged participation in the crime offered at the first trial came from the prosecution's star witness, Jason Smith. The rest of the case hinged upon inferences suggested by the prosecution based upon Siller's and Zimmer's borrowing of money from the victim, their behavior on the morning of the crime, and alleged inconsistencies in their statements. The brief circumstantial case is quickly summarized.

Alice Zolkowski's next-door neighbor Virginia Nagy testified that Alice had many locks on her door and exercised "extreme caution" about whom she let enter her house. (T1 at 58). Nagy also stated that Siller and Zimmer were among the few people Alice let into her house, and that their visits sometimes occurred late at night. (*Id.* at 61-62). Nagy admitted that Tom Siller always seemed to be helping Alice and had never exhibited any type of attitude or violence towards her. (*Id.* at 82). Virginia Nagy's daughter April also offered testimony about Alice's cautious nature and the presence of Siller at Alice's house. (*Id.* at 84-87).

Allen Taylor, husband of Zolkowski's niece, offered testimony about Alice's finances. (*Id.* at 161). Taylor recounted how Alice had withdrawn and deposited various sums, and written a number of checks to Siller and Zimmer. (*Id.* at 184-90). In addition, Detective Carlin spoke about the tally sheets recovered from the nightstand next to the chair where Alice was found, which showed that Tom owed \$12,155 and Wally owed \$7,640. (*Id.* at 468). In closing, the prosecutor characterized Siller and Zimmer as "bilking this woman out of money everyday." (*Id.* at 731).

Fingerprint examiner Jody Ganda described the processing of prints lifted from the crime scene. (*Id.* at 277-78). Ganda revealed that a print from a dresser drawer in the back bedroom

was linked to Jason Smith via AFIS. (*Id.* at 283-84). A print from a glass block window found on the floor of the kitchen matched to Zimmer. (*Id.* at 284-85). A print from an ashtray in the front living room came back to Siller. (*Id.* at 285). In his closing, prosecutor Bombik admitted that these fingerprints were of little consequence since Siller and Zimmer were by all accounts frequently over at Alice's house. (*Id.* at 731).

Detective Carlin read into the record the statements she took from Siller, Zimmer, and Crowder on June 6, 1997. (*Id.* at 490-512). In closing, Bombik expressed doubts about the veracity of Zimmer's and Siller's statements. For Zimmer, Bombik suggested that Zimmer's failure to call 911 inside the house was suspicious because Zimmer's warrant was only for driving under suspension, and because Alice had loaned him so much money. (*Id.* at 739). Bombik also argued that Zimmer's account of his actions in the house was intended to cover his tracks. (*Id.* at 740). For Siller, Bombik pointed out that records showed a check Siller cashed on the day of the victim's death was for \$75, not \$200. (*Id.* at 742). Bombik also noted a minor inconsistency between Siller and Zimmer about when they were together on the evening of June 3. (*Id.* at 743).

Naturally, Bombik did not mention Rose Crowder's statement in his closing because Crowder had been dismissed from the case on a directed verdict. (*Id.* at 600). Essentially, Crowder's obstruction-of-justice charge had stemmed from her providing corroboration for parts of Siller's and Zimmer's version of events, which the state maintained was a lie. (*Id.* at 579). However, no proof was offered by the state that Crowder had lied and essentially the state was asking the jury "to speculate that they think she might be a liar." (*Id.* at 600). Judge McGinty therefore granted Crowder's Rule 29 Motion. (*Id.*).

2. Smith's Account and Credibility

Jason Smith was the key to the prosecution's case against Siller and Zimmer. He maintained that he was a crack cocaine dealer to the defendants. (*Id.* at 306). Smith stated that on occasion, Siller and Zimmer would have Smith drive them to Zolkowski's house so that they could borrow money to buy crack. (*Id.* at 312-13).

Regarding the events of June 3-4, Smith testified that he met up with Tom and Wally at Rose Crowder's house around 9 p.m. on the evening of June 3. (*Id.* at 314). Smith said that he had hoped Wally or Tom would help cash a check for him. (*Id.* at 315). Instead of using Smith's money, Wally allegedly suggested going to Alice's house to borrow some money. (*Id.*). Smith then drove the two in Harper's Honda Civic to Alice's house, where they entered through the front door and returned "a little while later" with "20 or 30 dollars." (*Id.* at 316). According to Smith, the trio then purchased crack and smoked it. (*Id.* at 317).

Smith testified that after the effects of the drug wore off, the three began to fiend for more crack. (*Id.*). Siller and Zimmer allegedly suggested returning to Alice's house around 11:30 or 11:45 p.m. (*Id.* at 318). Smith stated that he drove back in Harper's car and parked by the house next door. (*Id.*). Smith testified that Siller and Zimmer then exited the car and went to the back door, "which was kind of strange, because they usually always go to the front door." (*Id.* at 319). Smith maintained that he then sat anxiously in the car for an hour or 40 minutes waiting for the duo to return. (*Id.* at 319-20). Propelled by a desire to "get high", Smith then went to the back door "to see what was taking so long." (*Id.* at 320).

Smith's story was then that he walked into the house and saw Tom "rummaging" off to the right of the kitchen. (*Id.*). Since it was his impression that Tom was looking for something to steal, Smith decided that he would "get me a little something." (*Id.* at 321). Smith testified that he noticed a box of checks in the back room where Tom was searching and decided to steal

them. (*Id.* at 322). On this account, Smith then proceeded with checks in hand into the dining room. (*Id.*). From inside the dining room, Smith was able to see Wally in the front room “standing over Alice or Lucy Zolkowski... saying, where is it at? Where is it at?” (*Id.*).

From his alleged position in the dining room, Smith stated that he could see Zolkowski by the light of the television. (*Id.* at 322-23). He stated that she was “all bloody, clothes tore off her and everything” and that Wally appeared to be “shaking her and hitting [her]”. (*Id.* at 323). Smith emphasized that he never went into the living room where Alice was tied to the chair. (*Id.* at 554). Because he was not “into that kind of thing”, Smith decided “I’m getting the fuck out of here.” (*Id.* at 323). On his way out, Smith apparently “noticed the wood on the [back] door was messed up and broken.” (*Id.* at 351). He then fled and stayed out all night looking for drugs, blaming “the way the drug had me” for his actions. (*Id.* at 324).

According to Smith, he returned to Rose’s house the next morning around 6:00 or 7:00 a.m. where Rose was with Tom. (*Id.* at 325). Tom allegedly told Smith that he was “playing off in front of Rose” because Rose did not know “exactly that us or we were the one who perpetrated the crime against Lucy Zolkowski.” (*Id.* at 326-27). Smith then asked Siller in front of Rose “they don’t know who did it, do they?” and Siller allegedly responded “no, they don’t” which was “cool” to Smith. (*Id.* at 327).

Given these allegations, Smith’s credibility was obviously a major issue at trial. Not a single witness corroborated that Smith had ever taken drugs or socialized with Siller or Zimmer on any occasion, much less the night in question. In fact, the only overlap between Smith’s rendition of events and any other narrative presented came from Tom’s June 6 statement, wherein he mentioned that “Jay stopped by Rosie’s on the morning after this happened to Alice

at about 8:30 a.m. He asked me if I wanted to make money and I blew him off and left for work.” (*Id.* at 507).

On cross, the defense attacked Smith’s credibility by pointing towards his long criminal history, including convictions for receiving stolen property, motor vehicle theft, aggravated assault, drug abuse, drug trafficking, and possession of criminal tools. (*Id.* at 336-37). Smith admitted to telling Detective Carlin two false stories, to giving a false alibi about Kentucky, to hiding in a closet to evade arrest, and to refusing to give a blood sample without a court order. (*Id.* at 377-80).

The defense called Ed Farrell who testified about the admissions Smith had made to him in city jail described previously. (*Id.* at 640-43).

In addition, the defense called Brian Roberts, who related that on the morning of June 4, 1997, he had been at the Royal Inn Motel in Independence doing drugs with prostitutes. (*Id.* at 671). On that morning, Jason Smith (whom Roberts knew as “Jay”) telephoned and said that he had “hit a lick for \$2,500”. (*Id.* at 672-73). Jay had known to call the room because of his association with Pam Brown, with whom Smith was “messaging around.” (*Id.* at 686). Roberts explained that “hit a lick” meant that Jay had admitted to stealing the money. (*Id.* at 673). Jay wanted to get high with his newfound wealth. (*Id.* at 674). Roberts refused because he had been attacked by Jay previously. (*Id.* at 686).

3. Lack of Victim’s Blood on Smith’s Pants

By the State’s own concession, the apparent lack of the victim’s blood on Smith’s pants played a crucial role in corroborating his rather unbelievable story and in the state’s decision not to prosecute him as a principal.

In his opening statement, prosecutor Bombik conceded that Smith was “incredible”, but suggested “when you listen to his testimony and you examine all the other facts and circumstances of this case” that “all of a sudden, [he does] become believable.” (*Id.* at 27-28). Again in opening, Bombik suggested that key corroboration of Smith’s story came when DNA testing of the blood on Smith’s pants all came back to Smith himself:

So at that point in time the evidence will show that Detective Carlin has charged [Jason Smith] with some very serious crimes who -- where the evidence shows that his fingerprints was found on a bedroom dresser.

But beyond that, there was little more to tie him in, when you look at -- when you come to the clothing, the lack of blood on his clothing. So eventually it led to his pleading guilty to the crime of aggravated burglary ... Because Mr. Smith will say he was there, but he wasn’t the one who beat this woman. (*Id.* at 18).

Before Smith took the stand, and even before the fingerprint testimony was taken, the prosecution called Kay Ann May, a DNA technician from the Cuyahoga County Coroner’s Office. (*Id.* at 213). May gave a technical presentation on DNA science to the jury. (*Id.* at 216-223). She then explained that she had been given blood samples from Jason Smith and Lucy Zolkowski as well as samples of clothing from Jason Smith for DNA analysis. (*Id.* at 223-24). With respect to the clothing samples she was given, May concluded that all of the blood was consistent with Smith and that there was no reason to believe that “Lucy Zolkowski’s blood was on... the pants or shirt.” (*Id.* at 226). Of course, May was not the person who chose what samples from the pants to subject to DNA testing, and she conceded that she could only test what she was given. (*Id.* at 242).

The vital responsibility for screening the pants for blood stains fell on the shoulders of Joseph Serowik. On direct, Serowik identified the “pair of khaki pants” (Exhibit 87) and explained that a portion from the right leg of the pants had been cut out and put in a coin

envelope (Exhibit 77). (*Id.* at 444). Serowik then identified some “other dark stains... some brownish stains on the left leg also”, but did not indicate that they had any significance. (*Id.*).

The question of whether these other brownish stains were blood spatter was of obvious interest to the defense given the blood spatter at the crime scene. On cross, Serowik was asked about the stains on the left leg, and whether it was “true that those stains are consistent with blood spattering”. (*Id.* at 454). To this question, Serowik first answered: “It could very well be, sir. I didn’t get a good look at it.” (*Id.* at 455). When the defense attorney followed up and suggested that it was possible that blood spatter was on Smith’s pants, Serowik answered:

A. No sir. I said that there were also some darkening stains on the other -- on the other leg of the pants there that were also discolored.

Q. You didn’t check to see if that was blood or not?

A. No, sir, I did not.

(*Id.*). As the defense attorney pressed about Serowik’s possible failure to test the stains on the pants for blood, Serowik maintained that the color of the stains indicated that they were not blood:

A. Sir, again, those stains [on the pants] were darkish grayish blackish color. Sometimes I would not necessarily test real dark stains like that, but anything that is reddish or orange brown, such as the stains on that tee shirt, as a general policy, I would test for the presence of blood.

Q. Going back again, you said that you didn’t do that on the pants?

A. I may have. I may have, sir, but I may not have looked at those stains. They are a questionable color, as far as I’m concerned. I may have tested them for the presence of blood. I may not have. I do not recall. (*Id.* at 458-59).

In closing, Bombik returned repeatedly to the apparent absence of Zolkowski’s blood on Smith’s clothing. Concerning the importance of blood spatter, Bombik recognized that “whoever did this vicious beating probably got some blood spattered on the clothes.” (*Id.* at 728).

However, “we learned from Kay May that Alice’s blood is not found on any clothing that was submitted, that belonged to Jason Smith.” (*Id.* at 729). Bombik then appealed to the jury to believe in the expertise and integrity of Serowik and accept his conclusions concerning Smith’s pants:

You heard previously from Joe Serowik. That was the guy at -- the forensic examiner at the lab. He does the cutting of the pants and the official testing of the blood. Look at the clothes I mean, hey, if there is evidence of blood spattering, he’s going to check it.

These are trained people. If they see a stain, reddish in color, they do that. They take their little swab and dab it, get a reaction to see whether it’s blood or not. He did it in this case and there is no blood splatter on any of this clothing. (*Id.* at 736-37).

After hearing the above evidence and argument, the jury convicted Zimmer and Siller on all counts.

D. The Second Trial

Lucy Alice Zolkowski died on April 26, 1999. Because of his prior agreement, Jason Smith was not charged with her murder. Tom Siller and Wally Zimmer were so charged, but were not tried together as had occurred previously. Tom Siller went to trial first.

1. The State’s Case Apart from Smith

The second trial proceeded similarly to the first in many respects and the essentially consistent repeat testimony regarding Zolkowski’s finances and the June 6 statements of Siller, Zimmer, and Crowder need not be restated here. At time the state opened, the only major anticipated difference in the State’s case from the first trial was the testimony of an additional snitch -- Thomas Campbell, a cellmate of Siller who alleged that Siller had confessed to being at the crime scene. Campbell testified that he shared a pod in Cuyahoga County Jail with Siller between June of 2000 and January, 2001. (*Id.* at 2352-54). Campbell stated that on one occasion

in November of 2000, Siller confessed that “him and Wally is who beat up Alice.” (*Id.* at 2361). According to Campbell, Siller said that after taking drugs, he planned to rob Zolkowski with Smith and Zimmer. (*Id.*). Siller allegedly related that he waited outside while Smith tied Alice up, and Zimmer ransacked the house. (*Id.*). When Zimmer was unable to find any money, Siller then went in the house, flew into a rage, and hit and cut Alice. (*Id.* at 2361-62).

Of course, Siller’s supposed confession to Campbell matched neither the physical evidence (Zolkowski had not been cut) nor Smith’s version of the events. The defense further impeached Campbell’s testimony with that of Emery Jones. Jones testified that he also in the same pod as Campbell and Siller in the Cuyahoga County Jail in 2000. (*Id.* at 3361). Jones confirmed that Tom spoke with Campbell about his case “all day long” for many days. (*Id.* at 3362). Jones observed Tom arguing with Campbell on two occasions, wherein Tom accused Campbell of twisting his words. (*Id.* at 3263). Tom repeatedly denied involvement in the crime. According to Jones, Tom said: “You see there, there you go again, you talking about I did this, I told you I didn’t do it, you keep twisting my words up. I don’t want to talk to you anymore.” (*Id.*). Campbell then responded, “I don’t care if you don’t talk to me no more, I got enough on you already.” (*Id.*).

2. Siller's Alibi

While the state's circumstantial case against Siller was almost identical from the first trial to the second, the defense introduced substantially more testimony concerning Siller's alibi at the second trial. This approach also necessarily involved the introduction of significantly more testimony concerning Siller's crack cocaine addiction.²

Charles Ettenger, owner of Chaulkie's bar, testified that he had cashed three checks for Siller in the amounts of \$200, \$240, and \$75 dated June 3, the day of the crime. (*Id.* at 3133-37). This meant that Siller had over \$500 in cash on the day he supposedly planned to rob Zolkowski with Smith and Zimmer in order to buy drugs.

Rose Crowder, who had the obstruction-of-justice case against her dismissed at the first trial but had not been subsequently called by either side, testified for the defense at the second trial. She admitted to frequently using crack cocaine with Tom Siller. (*Id.* at 3170). Rose also lived on Hosmer, only nine or ten houses away from Lucy Alice Zolkowski. (*Id.* at 3169). Rose stated that on the morning of June 4, Wally Zimmer came to her house and told her that somebody had broken into Alice's house and beaten her up. (*Id.* at 3173). Rose did not want Wally to call the police from her home because she was high on crack. (*Id.* at 3174). Instead, she paged Tom several times and put "911" on the page to express the urgent nature of the situation. (*Id.*). Tom arrived at Rose's house within 15 minutes of being paged. (*Id.* at 3176). Tom yelled at Wally for not calling the authorities and Wally pleaded that he had warrants out. (*Id.* at 3177). Wally and Tom left immediately, and Tom returned alone some 20-25 minutes later. (*Id.* at 3178). Rose heard the sirens when emergency vehicles arrived at Alice's house. (*Id.* at 3179).

² Siller's lawyer had conceded his client's drug use in his opening statement in the first trial (T1 at 51), and testimony regarding Siller's and Zimmer's frequent use of crack had also come into the first trial through defense witness Brian Roberts. (*Id.* at 684-85).

Rose testified that she had met Jason Smith, whom she knew as Jay, not too long before the crime at a drug house on Hosmer. (*Id.* at 3180). She stated that she had never seen either Tom or Wally socialize together with Jay. (*Id.* at 3180-81, 3184). She did state that Jay came over to her house on the morning after the crime and appeared high. (*Id.* at 3182). Rose further stated that when Siller told Jay what had happened to Alice, Jay became nervous and ran out of her house. (*Id.*).

On cross, Rose admitted to having had a serious drug problem during the period in question. (*Id.* at 3184). She conceded that she did not remember well the precise timing of the events of June 3-4. (*Id.* at 3191). Rose admitted that she had not mentioned Jay's early morning visit in her June 6 statement to Detective Carlin. (*Id.* at 3231). Upon questioning from the jury by way of the judge, Rose stated that she had had a sexual relationship with Tom Siller, and that it had occurred a month after the crime. (*Id.* at 3245).

Aileen Marie Basek also testified for the defense for the first time at the second trial. Although Aileen had never had a sexual relationship with Tom Siller, he had lived with her for a period in 1997 and the two shared crack cocaine together. (*Id.* at 3271-72). On June 3, Aileen had paged Tom so that he would come to her house and get her high. (*Id.* at 3273-74). Tom came over dressed in nice clothes, and the two did drugs together for a few hours. (*Id.* at 3276). Aileen testified that Tom had driven to her house in Rose Crowder's car, and he left because Rose was paging him. (*Id.* at 3293-94). It was late and dark out when Tom left, and Aileen did not see Tom until the next day. (*Id.* at 3277). According to Aileen, that next day Tom was upset about a friend of his who had been beat up, and expressed his view that he could have helped her if he had not been partying with Aileen the night before. (*Id.* at 3277-78). On cross, Aileen admitted that she remained a drug addict. (*Id.* at 3305).

3. *Smith's Account and Credibility*

Jason Smith's encore performance largely tracked his debut -- asking Siller and Zimmer to cash a check, driving a first time to the victim's home and Siller and Zimmer successfully borrowing money via the front door, smoking crack, returning a second time to the crime scene, waiting in the car while Siller and Zimmer entered through the back door, growing anxious, entering the home, seeing Tom rifling through drawers, picking up some checks, seeing Wally over the victim, fleeing in horror when he realized what was happening, driving around looking for more drugs, and finally sharing knowing looks with Tom Siller the next morning at Rose Crowder's house. (*Id.* at 2767-86). However, the second time around, Smith filled his testimony with more colorful details about a range of topics including the mechanics of smoking crack, and his alleged drug history with Siller, Zimmer, and Crowder. (*Id.* at 2752-58).

These extra details included testimony that differed from the first trial. Thus, while Smith had previously denied ever being in the victim's house prior the crime, this time he stated that he had been inside Lucy Zolkowski's house on one prior occasion (with a man named Jim, who also borrowed money from the victim). (*Id.* at 2760-61, 282-26). On the second telling, Smith did not simply wait in the car while Tom and Wally went inside Zolkowski's house a second time; rather, he smoked crack to pass the time. (*Id.* at 2841-42). Smith also changed his testimony from asking Siller once to cash a check for him that night (before successfully borrowing money from the victim) to asking Siller twice to cash a check (including right before the fateful events). (*Id.* at 2846-47). Most critically, whereas at the first trial Smith testified that he had not actually seen Wally strike the victim, at the second trial he unequivocally stated that he saw Zimmer strike the face of the victim. (*Id.* at 2855-56).

Smith's new and contradictory testimony concerning his perspective on the actual beating came after the second trial had been shaken by the revelation that a single drop of Zolkowski's blood was on the back of Smith's left trouser leg. Of course, Smith was asked to explain how this single drop of blood ended up on his trousers. (*Id.* at 2810). Smith insisted that he never entered the living room and that he was not ever close enough to her to participate (*Id.* at 2858). In the end, Smith relied upon his new and clear vision of Wally striking the victim to explain the lone drop:

The only logical explanation that I can give you is that when I entered into the dining room, which is roughly two-and-a-half, three feet, maybe less that that away from the living room... As I said, Wally was striking her, so there is a possibility that the single drop of blood could have traveled and got on my leg in that fashion.

Or maybe I could have got it off of Tom. He may have brushed up against me. I can't exactly say for sure how it got on me. (*Id.* at 2810-11).

As it turns out, even the state had some qualms about accepting Smith's explanation. Police and prosecutors met to discuss the possibility of revoking Smith's plea deal. (*Id.* at 2664). In closing, prosecutor Bombik philosophized that "I can't help but wonder if three years ago, I had evidence against Jason Smith having one spot of the victim's blood on his pants, whether he would have got three years." (*Id.* at 3658). The prosecutor then admitted that "that one spot of evidence puts a date, unlike the fingerprint, concerning him in the house" and suggested that Smith would have received a larger sentence than three years. (*Id.*).

Obviously then, the question of Smith's credibility was just as central and outcome determinative in the second trial as it was in the first. And once again, the state did not offer a single independent witness who confirmed any of Smith's allegations about his history with Siller and Zimmer, in general or on the day in question. Indeed, the only "independent

corroboration" of Smith's story suggested by the prosecution in closing came from the "mouths of Thomas Siller and Wally Zimmer". (*Id.* at 3538, 3555).

The defense sought to undermine the credibility of the state's charismatic star witness. Once again, the defense called Ed Farrell and Brian Roberts, who both offered testimony consistent with their first-trial accounts of Smith boasting about beating an old lady alone and establishing a false alibi in Kentucky (Farrell) and of Smith "hitting a lick" of \$2500 in ill-gotten money in the early hours of June 4, 1997 (Roberts). (*Id.* at 3427-30, 3393-94).

In addition, the defense produced two additional jailhouse informants -- Herb Armstrong and Richard Thombs -- who both testified that Smith had confessed to committing the crime and blaming it on Siller and Zimmer. According to Armstrong, who had shared a pod with Smith in July of 2000, Smith claimed that he was willing to do anything to avoid being sent to prison, and that he had committed the crime Siller and Zimmer were convicted of. (*Id.* at 3075-76). However, Armstrong's recollection of Smith's statement included admissions that were inconsistent with known facts including the idea that Zolkowski had been stabbed with a screwdriver. (*Id.* at 3094). Richard Thombs testified that he had overheard Smith talking to other inmates saying that he had "robbed the lady and beat the hell out of her." (*Id.* at 3332). Thombs admitted to knowing Siller in prison and having read part of Siller's transcripts, but denied being recruited by Siller, pointing out that he received no benefit from testifying. (*Id.* at 3341, 3348-49). In closing, prosecutor Tiburzio attacked Thombs's credibility as well as that of Siller's "jail buddies" Emery Jones (who rebutted Thomas Campbell's testimony against Siller) and Ken

Mullins³, by suggesting that all three concocted their stories while riding a jail bus to court. (*Id.* at 3561).

The defense repeated its first-trial attack on Smith's credibility by reference to his extensive criminal history and the generous terms of his plea deal. (*Id.* at 2827-29). Smith's criminal history at the second trial included an additional guilty plea to Robbery that Smith had entered into after securing parole from prison on June 12, 2000. (*Id.* at 2813). Smith had committed this robbery on July 29, 2000, less than two months after his release from prison. (*Id.* at 2909).

The second trial also included new revelations about Smith's remarkable career as a snitch for the state. It came to light that in March of 1998 -- the same month that Smith worked out the deal in the first trial that also guaranteed his second-trial immunity -- Smith wore a wire for the Sheriff's Department and entered into sexual liaison with a male nurse in an attempt to obtain information. (*Id.* at 2868-69). Smith eventually testified before a jury against the nurse, Aaron Hrisiko, and a conviction was obtained. (*Id.* at 2910-11).

Another conviction was obtained in the Melvin Washington case, in which Smith again testified to hearing a defendant confess to the crime. (*Id.* at 2910). According to Smith, Washington admitted to killing someone while Smith was in jail for a traffic violation on July 17, 2000. (*Id.* at 2871). Of course, Smith failed to tell the police about this conversation until after he was arrested for the July 29 robbery. (*Id.* at 2871-72). Nonetheless, Smith successfully negotiated another deal, which reduced his exposure on the robbery from eighteen years to one year (with credit for time served). (*Id.* at 2873-74).

³ Ken Mullins, a prisoner at the time, also testified on Siller's behalf. However, his testimony was only that Smith had boasted that he "beat a murder case", and did not involve Smith making an explicit confession to having committed the crime or trying to set up Siller or Zimmer (*Id.* at 3040).

Smith had also attempted to be a state cooperator in yet another case, which involved a man named Frank Furjan. (*Id.* at 2876). Furjan's son was charged at the time with the aggravated murder by arson of his mother (and Furjan Sr's wife). (*Id.* at 2877). Smith told police in October of 2000 (before he had worked out the Washington deal) that he had heard Furjan Sr. confess that he had directed his son to commit the crime. (*Id.* at 2876-78). The defense suggested that the failure of prosecutors to indict Furjan Sr. was due to their lack of faith in Smith's testimony. (*Id.* at 2879). The state then went the distance for its star witness. Assistant prosecuting attorney Mark Mahoney, the lead prosecutor against Furjan Jr. was actually called to the stand to affirm his faith in Smith's credibility. (*Id.* at 2971). In closing, prosecutor Tiburzio explained that calling Mahoney "was important because a misimpression had been given to you that perhaps he wasn't used as witness in another case, or another case hadn't been indicted because he was not a credible witness, and that wasn't fair because it's not true."⁴ (*Id.* at 3537).

4. *Lack of Victim's Blood on Smith's Pants*

Since the state had anticipated presenting essentially the same case in the second trial as in the first, it comes as no surprise that prosecutor Bombik in his opening once again emphasized the absence of Lucy's blood on Smith's clothing, and its effect of removing Smith from proximity to the beating:

Remember we talked about the clothing that was found. The blood on Jason's pants. I really do think, ladies and gentlemen, anybody who beat that old lady and there's blood all over the place would have gotten, the evidence will show and a fair inference you can make, blood on their clothing. But that blood did not come back to Lucy's. The evidence will show it was tested by the Coroner's Office, DNA and all that stuff. It came back listed to Jason. (T2 at 1797-98).

⁴ A defense objection to this argument was sustained. (*Id.* at 3537). However, the prosecution later repeatedly touted Smith's credibility without objection. (*Id.* at 3537-38, 3658-59).

However, the conclusion that no victim's blood could be found on Smith's pants was soon challenged after a dogged cross-examination of serologist Joseph Serowik combined with the clear interest of the jury forced the state to re-submit the pants for testing.

On direct, Serowik asserted that in 1997 he had "look[ed] for the presence of blood" on Smith's clothing, observed "characteristic red-brown stains", and found blood only on the cutting from the right leg of Smith's pants as well as on a spot on the back of Smith's T-shirt near the tag. (*Id.* at 2081). Serowik stated that the Cuyahoga County Coroner's Office performed DNA testing in 1997. (*Id.* at 2083). Of course, it was later established that DNA testing revealed that this particular blood from the right leg and from the T-shirt came from Smith himself. (*Id.* at 2735).

On cross, Serowik indicated that the phenylethylene (PIT) test for the presence of blood required a "very minimal" sample, not "more than the tip of a Paper Mate medium point pen." (*Id.* at 2090-92). Serowik's attention was then directed to a circled stain on the back of the left pants leg. (*Id.* at 2096). When asked to describe the stain's color, Serowik responded "grayish". (*Id.*). Then began the first in a series of exchanges concerning whether or not Serowik has performed a test for blood on the left leg in general, and on the particular circled stain:

Q Did you perform the test with the pink liquid [the PIT test] on the left leg at all?

A The analysis of these pants were four years ago, so I don't recall precisely. However, the fact that it is circled suggests -- highly suggests to me that it was tested.

Q Did you make a report, sir?

A Yes, we did make a report on the analysis of those pants.

...

Q You don't mark anywhere on your Forensic Laboratory report that any tests were done on any other part of those pants, whether it be up on the rear end area or the left leg; is that correct?

A That is correct.

Q Does that mean that you didn't perform them?

A No, sir. That just means that those tests were negative and we did not report them.

(*Id.* at 2096-98). With Serowik asserting that negative tests for blood could be performed but not documented, defense counsel later asked the following question and received the following answer:

Q But, sir, you'd agree with me since we don't know how many stains you tested on the tan pants, if there were one, 30, 50, we don't know if you tested the only one or if you tested half of the 50 or 49 of the 50, do we?

A Sir, every stain that in our experience appears to be blood is tested with the PIT test. If that test is positive, we continue our analysis and we remove the stain. If it is negative, we move on.

(*Id.* at 2103). Counsel then asked directly whether Serowik knew that the circled stain was negative, to which the serologist replied, "Sir, again, it was negative for blood." (*Id.* at 2104). Upon further questioning, Serowik admitted that his assertion that a negative test was performed was actually an "assumption". (*Id.* at 2105).

After this flip-flopping, Serowik was given an opportunity to explain himself on re-direct. When asked whether it was "the policy of the forensic lab of the Cleveland Police Department that every stain that appears to be blood is tested", Serowik answered, "That is correct. It would be... and in our experience we have a pretty good eye for what could be blood or what could not be blood." (*Id.* at 2107). Serowik continued in this vein a few questions later: "If there was any stain that even remotely looks like it could have a body fluid, have a body fluid within it, we will test that particular stain for a body fluid." (*Id.* at 2108). On re-cross, defense counsel confronted

Serowik with his testimony from the first trial in which the serologist had plainly denied that he had conducted a blood test -- flatly contradicting his current position. (*Id.* at 2116).

With nothing further from counsel, Judge Boyle then asked the jurors whether they had any questions for Serowik. Making their interest in the identity of the blood clear, one juror question asked: "Now that the technology for DNA testing is available, have you been asked to retest the identified bloodstains on clothing, carpet, paint, et cetera, to determine whose it is?" (*Id.* at 2117). Serowik answered: "Our office had not been -- it has not been requested by our office to perform any DNA analysis of any of the material that I testified to today." (*Id.* at 2117-18). After this question and answer, Jason Smith's pants were re-submitted for testing.

Six days after his initial testimony, Serowik returned to the stand. In a terse re-direct, Serowik testified that he re-tested the particular stain on the left leg that had been the subject of "a number of questions on cross-examination." (*Id.* at 2712). The stain was determined -- despite all the testimony to the contrary -- to be blood. (*Id.* at 2713). This blood was then identified through DNA testing to match the victim, Lucy Alice Zolkowski. (*Id.* at 2735). On cross, Serowik asserted that the PIT test had actually been positive for blood in 1997 (the time of the original test). (*Id.* at 2718). He also admitted that no underlying paperwork documented this conclusion, and blamed the error on "oversight." (*Id.* at 2721-23).

Given the central importance of the issue, prosecutor Tirbuzio specifically asked whether Serowik checked all the stains on the pants:

Q All right. Did you -- now, were there any other stains or anything on that pant -- on those pants that appeared to you to be blood?

A No, there were not.

Q Did you nonetheless test other stains or marks or anything on those pants to see if there was blood?

A Yes, we did.

Q All right. Could you hold up the pants and point to every stain that you tested within this last week for the presence of blood?

A Our laboratory tested every discoloration on the back of these pants. All through the back buttocks area, on the bottom of the pants, the bottom of the pant leg, every darkening stain. On the inside of the pants as well. Any particular discoloration that we found on these pants was in fact tested.

Q For blood?

A For the presence, using our preliminary tests for the presence of blood.

Q Did you find any other stains on those pants that was blood?

A No, we did not.

(Id. at 2714-15) (emphasis supplied).

In closing, prosecutor Tiburzio characterized the revelation about the single drop of Zolkowski's blood on Smith's pants as "obviously, obviously... an embarrassing situation for the Cleveland Police Department and for us." (*Id. at 3535*). However, buoyed by Serowik's testimony that there was only one tiny spot of the victim's blood on the back of the pants, Ms. Tiburzio told the jury:

Once one gets over the shock of the fact that all of a sudden we learned that there is a spot of the victim's blood on the back of Jason Smith's pants leg, what does it tell you? Does it mean he's lying? He's been lying all along about what happened being with these two guys?

Remember, this spot was a very small stain. Remember, Andrea Fischer told you that it was contained within a three-eighths inch by three-eighths inch cutting on the back of this pants leg, the left pants leg. Does that mean the [Jason Smith] is the one that beat Lucy Zolkowski? If he had been the one the one to beat Lucy Zolkowski, I would submit to you that there would be more blood and it would be on the front of his pants.

(Id.).

After the close of evidence and argument, the jury convicted Tom Siller of murder.

E. Michael Green Exoneration and Subsequent Civil Suit

In October of 1988, Anthony Michael Green was found guilty of the rape and robbery of a cancer patient at the Cleveland Clinic Hospital and sentenced to two consecutive ten to twenty-five year prison terms. *See* Case Profile of Michael Green, *available at* http://www.innocenceproject.org/case/display_profile.php?id=93 (“*Green IP Profile*”). Green became a suspect because he generally matched the description that the victim had provided to police, and because he had previously worked at the clinic hospital. *Id.* The victim identified Green after seeing two consecutive photo-arrays containing his photo. *Id.*

At trial, Joseph Serowik gave vital and seemingly objective scientific corroboration of the victim's identification. Serowik had examined a washcloth recovered from the scene that the perpetrator had wiped his penis with after the sexual assault as well as a hair recovered from the washcloth. *Id.* Based on his May 31, 1998 Forensic Lab Report, Serowik testified that the washcloth tested positive for the presence of semen, that the rapist was a "B" secretor, and that only 16% of the population including Michael Green could have been the rapist. (Plaintiffs' Brief in Opposition to Motions for Summary Judgment (“*Green SJ Br.*”), attached as Exhibit F at 19-21 *citing* Forensic Lab Report (Exhibit 47); Serowik Dep. at 253:11-19; and TT at 220). Serowik also testified that the hair found on the washcloth was similar in all major and minor characteristics to Green's head hair standard, and that a "pretty good estimate" of the possibility of two people having the same hair characteristics was one in 40,000. (*Green SJ Br.* at 11-12 *citing* TT at 235-37).

In 2001, pursuant to an order of Judge Anthony O. Calabrese Jr., Forensic Science Associates conducted post-conviction DNA testing on the washcloth that had been used to link Green to the crime. *Green IP Profile*. DNA analysis of spermatozoa recovered from the

washcloth definitively excluded Green, proving that he was not the rapist. *Id.* After thirteen years of wrongful incarceration, Green was released from prison on October 9, 2001, and was officially exonerated nine days later. *Id.* (See also Entry Declaring Anthony Michael Green a “Wrongfully Imprisoned Person” Under ORC § 2743.48, attached as Exhibit E). The DNA profile recovered subsequently matched Rodney Rhines, the real perpetrator, who has since confessed and been convicted. See Editorial, *Justice Denied: Though Cleveland Has Settled Michael Green’s Lawsuit, Huge Questions Remain About the System That Convicted Him*, Cleveland Plain Dealer, June 16, 2004 available at 2004 WLNR 346034.

Joseph Serowik's ignoble role in this travesty of justice became evident during Green's federal civil rights lawsuit. Serowik's trial testimony about serology and hair comparisons was patently false -- and the evidence obtained showed that Serowik knew it. With respect to the rapist being a "B" secretor, Serowik had also found that the victim was too a "B" secretor, meaning that her blood antigens could "mask" those of her assailant -- making any conclusion about the rapist's blood type entirely inappropriate. (Green SJ Br. at 19-20 *citing* Exhibit 47, and Blake at ¶ 73). Serowik knew in 1988 that he was required to assume masking in this situation, but lied to the prosecutor and jury about legitimate scientific inferences that could be drawn. (*Id.* at 22 *citing* Serowik Dep.: 174:1-7, 74:22-75:19, 89:4-17, 152:18-153; Kovacic Dep.: 79:10-21, 78:10-79:19.).

Serowik's hair analysis was doubly dishonest. First, Serowik had actually excluded Green on the basis of a public hair comparison, but nonetheless proceeded to compare the crime-scene pubic-hair with one of Green's head hairs and declared that a match. (*Id.* at 8-9 *citing* Serowik Dep.: 222:4-13, 194:11-195, 246:15-19, 193: 4-18, 231:2-13, 456-58.). Comparing hairs of different somatic origin (head, pubic, chest) violates one of the most basic tenets of hair

analysis, and Serowik knew this. (*Id.* at 6-7 *citing* Houck ¶ 5.0; Serowik Dep. 241:18-242:1, 204:5-11, 248:20-23, 249:14-18, 242:2-12). Second, due to the absence of published studies documenting the frequencies by which specific microscopic characteristics occur in human hair, it was clear in 1988 that a forensic examiner must never express a conclusion in terms of probabilities like one in 40,000. (*Id.* at 6 *citing* Houck ¶ 4.14). Serowik knew this too. (*Id.* at 7 *citing* Serowik Dep.: 212:10-16). Serowik failed to tell the prosecutor during any of their meetings that the questioned hair was a pubic hair, that Green was actually excluded as the perpetrator based on hair comparison, or that it was inappropriate to testify to a statistical match in hair comparisons. (*Id.* at 10 *citing* Serowik Dep. 252-253. 238: 19-239:2, 202, 203, 218-19, 238:19-239).

In addition to exposing his profound misconduct in the Green case, the federal suit uncovered evidence that Serowik had fabricated inculpatory hair evidence in at least two other cases, and that he had improperly claimed to have isolated genetic traits of semen in three other cases. (*Id.* at 14-15, 24).

In June of 2004, at the eve of trial, the City of Cleveland settled with Mr. Green. As part of the settlement, and arising directly from the largely uncontested allegations against Serowik, the City of Cleveland agreed to "conduct an audit of files from the City's forensic laboratory involving serology and/or hair analysis." (Green Audit at 1). The City specifically agreed to retain James Wooley as the audit's Special Master, and Wooley was charged with overseeing the entire audit process, including the hiring of expert consultants. (*Id.* at 2). Ultimately, Thomas Siller's case was selected to be part of the audit, and Robert P. Spalding of Spalding Forensics, LLC was retained as the expert consultant to conduct the review.

F. Robert Spalding Audit

On August 12, 2005, Spalding issued his report in the City of Cleveland/Police Department Forensic Audit for *State of Ohio v Thomas Siller*. This report was based upon a review of documents relating to Siller's prosecution, including: (1) cases reported on Westlaw; (2) Cuyahoga County Clerk of Court Information Sheets involving Siller and Zimmer's cases; (3) Cleveland Police Department Laboratory Cards from the 1997 and 2001 tests; (4) trial testimony excerpts from both trials; and (5) various letters and news articles. (Spalding Report at 1-3).

The Spalding Report begins with a summary of the basic facts of Siller's prosecution, proceeds with a review of the available laboratory documentation, continues with an analysis of Serowik's trial testimony, and then concludes by answering the five questions asked of the Special Master under the Green settlement agreement. The dominant theme of the report is the repeated failure of the laboratory to document its work with notes or original data. (*Id.* at 5-8, 16-17).

With regard to the central issue of the blood spatter on Smith's trousers, Spalding first noted that the original laboratory notes had identified "small stains on front legs - spatter patterns." (*Id.* at 6). Based on these notes, Spalding criticized Serowik's first-trial testimony because: (1) he interchangeably used the terms "stain" and "stains"; (2) if there truly was a spatter pattern, the term "stain" was inappropriate; (3) Serowik focused only on the left leg while the notes indicated spatter on both legs; and (4) Serowik could have visually inspected the trousers to answer the spatter question. (*Id.* at 9-10). Spalding criticized Serowik's initial second-trial testimony regarding the pants for his attempt to create a hypothesis to explain why the left-leg stain was not cut out, instead of simply admitting that he did not recall whether testing had

been done. (*Id.* at 14). After recounting that Serowik was given the pants to re-test and that Serowik then found blood, Spalding presciently observed:

It is significant that the blood now being referred to on the pant leg is on the back of the leg and not the front where the original stain(s) thought to be spatter were noted on the observation sheet (Lab Card 356740, A-F#1. The lack of clarity in the observations is a potential source of confusion, although it was not brought up.

(*Id.* at 15). Concerning the significance of the spatter, Spalding observed that “[s]patter in and of itself may not be of great importance, but in this case, the presence and nature of any spatter on Smith’s clothing may relate to the role of Jason Smith in the crime.” (*Id.* at 11).

In his final conclusions, Spalding found that: (1) the lack of recorded data made it impossible to determine whether appropriate protocols were followed; (2) in some instances, laboratory notes did not agree with reported results and testimony offered; (3) the lack of underlying data was not consistent with accepted standards of the time; and (4) Serowik’s testimony was not in keeping with the normal standards of expert testimony. (*Id.* at 16-17). Spalding also found, based on the information available to him in the paper-only audit, that “it does not appear [that] the judge and trial jury were misled by the testimony of Mr. Serowik.” (*Id.* at 17). However, Spalding also plainly recognized the possibility that Serowik could have perjured himself:

This case illustrates the crucial need for thorough documentation of observations during the analytical process dealing with the evidence. To state the extremes: at best, this is very poor record keeping; at the very worst, the lack of data could mean that the tests discussed were never done.

(*Id.*) (emphasis supplied).

G. Forensic Science Associates DNA Testing

After post-conviction DNA testing was ordered, items of evidence were sent to Forensic Science Associates (FSA) of Richmond, California including the critical “pair of khaki pants”

from Jason Smith, with two previously removed areas missing (*FSA Report 2*, at 16-26) and a large cutting from the right pant leg of Jason Smith's pants (*Id.* at 27-32). A genetic reference sample for Zolkowski was developed from a blood deposit on her gown. (*FSA Report 1* at 29). A genetic reference sample for Jason Smith was developed from spermatozoa recovered from a semen deposit on the fly area of his pants⁵. (*Id.* at 30). Ultimately, FSA found:

Small spatter-type blood deposits are present on the Jason Smith pants [Item 3] in areas A and C that originate from Alice Zolkowski... [S]mall blood deposits on the Jason Smith pants [Item 3] in areas K, M, O, BB, and DD were determined to originate from Alice Zolkowski.⁶

(*Id.* at 49).

⁵ A third genetic reference sample was developed from female epithelial cells commingled with the spermatozoa from the Jason Smith pants fly, identified as "Unknown Female #1". (*Id.* at 32).

⁶ "The deposits in areas M and O and to a lesser extent in areas BB and DD also contain background cellular debris from Unknown Female #1." (*Id.*).

III. ARGUMENT

A. **Serowik's Perjured Testimony Constitutes Fundamental Misconduct Attributable to the Prosecution And State That Violated Siller's Due Process Rights And Denied Him A Fair Trial**

Criminal Rule 33 (A)(2) allows a court to order a new trial if misconduct of the prosecuting attorney or witnesses for the state materially affects the fundamental rights of the accused. Criminal Rule 33 and O.R.C. §2945.79 (B). It is a bedrock constitutional principle that when the state knowingly uses false evidence at trial to obtain a conviction, it acts unconstitutionally. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Pyle v. Kansas*, 317 U.S. 213, 216, (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

For due process purposes, there is no meaningful distinction to be drawn between prosecutors and agents of the state, such as the police or forensic serologists. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (police failure to disclose *Brady* material attributable to state); *Pierce v. Gilchrist*, 359 F.3d 1279, 1285-86 (10th Cir.2004) (recognizing “Fourteenth Amendment right not to be deprived of liberty without due process of law, or more specifically, as the result of the fabrication of evidence by a government officer acting in an investigative capacity”); *Zahrey v. Coffee*, 221 F.3d 342, 355 (2d Cir. 2000) (“It is firmly established that a constitutional right exists not to be deprived of liberty on the basis of false evidence fabricated by a government officer.”). *See also State v. Wiles*, 59 Ohio St. 3d 71, 78 (1991) (“[I]n as much as ‘the police are a part of the state and its prosecutorial machinery,’ such knowledge on the part of a law enforcement officer must be imputed to the state.”). In short, if a police agent commits perjury, it does not matter whether the prosecutors knows that this misconduct has occurred. *See*

State v. DeFronzo, 59 Ohio Misc. 113, 120, 394 N.E.2d 1027, 1033 (1978) (citing *United States v. Deutsch*, 474 F.2d 55, 57 (5th Cir. 1973); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964)).

When the state uses perjured testimony to secure a conviction, the tainted conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. See *U.S. v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v United States*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264, 271 (1959). See also *DeFronzo*, 59 Ohio Misc. at 121.

Turning to the facts of this case, the new DNA evidence demonstrates that state actor Joseph Serowik perjured himself when he testified at the second trial that he had examined every single stain on the front and back of the pants and tested them for blood, but found only the one spot of blood on the back of the left leg. (T2 at 2714-15). It is simply impossible for Serowik to have conducted these presumptive tests in 2001 without identifying any of the seven stains identified by Forensic Science Associates.

The context of Serowik's second examination of these trousers must not be forgotten. He had been repeatedly cross-examined about his presumptive testing for blood on the pants, and had been caught changing his story from not having tested them, to most likely having tested them, to definitely having tested them. The jury then specifically asked about the possibility of re-testing, and prosecutors then gave Serowik the trousers. The importance of a thorough examination was thus dramatically highlighted, and Serowik's testimony that he tested for blood "any particular discoloration that we found on the pants" was unequivocal. (T2 at 2715). At least seven additional discolorations were in fact blood, and all unquestionably came from the victim.

Moreover, the inference that Serowik perjured himself at the first trial is also strongly supported. As revealed in the Spalding Report, Serowik had previously identified spatter patterns

the front of the pants legs before the first trial. (Spalding Report at 6). Perhaps this explains why Serowik actually testified (after the second-trial revelation) that the presumptive test had been positive for blood in 1997 but that it had not been reported due to an oversight. (T2 at 2718). In other words, Serowik himself asserted that he knew that the single contested spot was blood before the first trial. It thus seems entirely plausible that Serowik knew that the other spots were blood too -- as he had recorded them as “spatter” in his notes. And while “oversight” might possibly describe failing to record a single positive test for blood, it can in no way explain the failure to identify seven additional spots on both the front and back of both pants legs.

In the end, Serowik’s failure to identify the blood spatter on the front and back of Smiths pants means that either (a) he never performed the presumptive tests, or (b) he did perform them and failed to disclose the positive results to the court and to the defense. Under either scenario, Serowik’s representations to the court -- that he had conducted presumptive tests in 1997, and that he had conducted a further thorough re-examination inspection of the trousers in 2001 and found no blood beyond the single spot -- were patently false and dangerously misleading.

Serowik’s exact and unequivocal second-trial testimony means there is no possibility of mistake. Revelations from the Green civil litigation confirm that Serowik had a practice misreporting data. When Serowik testified at the Green trial that he could state a statistic of 1 in 40,000 for the likelihood that hairs from the rape kit came from anyone other than Michael Green, it reflected a conscious disregard for the scientific truth and a willingness to make up data when he thought it would advance the prosecution’s case. His serological testimony was similarly flawed and demonstrative of a deliberate disregard for the truth. Indeed, the danger of Serowik’s approach was recognized by City of Cleveland in consenting to an audit as part of the

civil suit -- and it was this audit that directly led to the DNA testing in this case, which has in turn confirmed Serowik's perjury.

Finally, it is beyond cavil that Serowik's false testimony affected the judgment of the jury. The jury itself asked whether re-testing could be done at the second trial, and the jury's obvious interest led to the re-examination of the trousers. The presence or absence of blood on Smith's trousers played a major role in both trials by giving legitimacy to the state's star witness via seemingly objective scientific corroboration of his story that he was not involved in the assault. In the first trial, prosecutor Bombik specifically referred to Serowik's expertise and assured the jury that he would have found spatter if it existed. (T1 at 736-77). At the second trial, prosecutor Tiburzio was equally vehement in assuring that the "embarrassing situation" was not too significant because Serowik had found only a single drop of blood. (*Id.* at 3535).

The standard of "any reasonable likelihood that the false testimony could have affected the judgment of the jury" as set out in *Agurs*, *Giglio*, and *Napue* is a deliberately an easy one to meet -- if false evidence by a state actor can be proven. This is because our system of justice and our Constitution cannot stand quiet when the government's procedures pass beyond the line of tolerable imperfection and fall into the field of fundamental unfairness. *Curran v. Delaware*, 259 F.2d 707, 713 (3d Cir. 1958). As noted in *Defronzo*, "[o]ur system of administration of justice suffers when any accused is treated unfairly." *Defronzo*, 394 N.E. 2d at 1033, citing *Hilliard v. Williams*, 516 F.2d 1344, 1350 (6th Cir. 1975).

For this reason alone, Thomas Siller's conviction should be vacated.

B. Had The New DNA Evidence Been Disclosed At Trial, There Is A Strong Probability That The Jury Would Have Reached A Different Verdict.

Criminal Rule 33 (A)(6) requires a two-step analysis before a new trial may be ordered. A defendant must demonstrate that the new evidence is material to the defense and that the defendant could not, despite reasonable diligence, have discovered and presented the evidence at trial. Criminal Rule 33 (A)(6) and ORC § 2945.79(F). Case law interpreting this rule has divided this analysis into a six part test. The Ohio Supreme Court in *State v. Petro* wrote that to warrant a new trial based on newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before trial even with the exercise of due diligence; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence. *State v. Petro*, 148 Ohio St. 505, 507-08, 76 N.E.2d 370, 372 (Ohio 1947). *See also State v. Hawkins*, 66 Ohio St. 3d 339, 350, 612 N.E.2d 1227, 1235 (Ohio 1993).

The new evidence which forms the basis of Siller's motion clearly satisfies these requirements.

1. *The FSA DNA testing results constitute new evidence discovered since trial that could not have been discovered with reasonable diligence.*

Turning to the second and third elements of *Petro*, as discussed in defendant's Motion for Leave to File a Motion for a New Trial, the evidence upon which Siller bases his motion was only discovered after trial as a result of post-conviction DNA testing. Such testing was ordered in the face of information from the Spalding Audit, which called the veracity of Serowik's testimony into question. As discussed in the Motion for Leave, this evidence could not have been discovered and produced at trial despite defense counsel's reasonable diligence. The entry of this

Court ordering the Motion for New Trial to be filed is a finding that due diligence was demonstrated and the defendant was unavoidably prevented from discovering this evidence. This leaves only the questions of the materiality and the significance of the evidence.

2. *New evidence creates a strong probability of a different verdict by destroying the credibility of the Jason Smith, the only direct witness to Siller's presence at the crime scene.*

Since Jason Smith provided the only direct evidence of Siller's alleged participation in the crime, both trials hinged on the jury's assessment of Smith's credibility and the veracity of his version of events. New evidence reveals that seven additional spatters of the victim's blood are present on the pants of state's star witness -- directly implicating Smith in the fatal beating of the victim and flatly contradicting Smith's critical testimony proffered at both trials.

At the first trial, the apparent lack of the victim's blood anywhere on Smith's clothing was emphasized in the prosecutor's opening and closing. This strategy was attempted at the second trial as well -- until a jury question about re-testing the pants led to the "discovery" of a single drop of the victim's blood on the back of Smith's trousers. Figure 1 illustrates the location of the blood drop found in the course of the *second trial*.

Blood Spatter from Victim on Jason Smith's Pants: Trial 2



Image created by the Innocence Project from FSA photographs and reports for illustrative purposes.

Blue dot represents location of blood spatter matched to victim at Trial 2- not its actual size or shape.

FIGURE 1

In closing at the second trial, prosecutor Tiburzio argued that the single drop of blood was actually consistent with Smith “coming in, getting close enough at an angle to see Wally Zimmer making motions to strike this woman and turning around to leave.” (T2 at 3536). The new evidence shows with scientific certainty that Smith’s presence before the victim as she was tied and beaten was not nearly as fleeting as argued by Tiburzio. Figure 2 illustrates the location of the additional blood drops from the victim on Smith’s pants, as uncovered by post-conviction investigation.

Blood Spatter from Victim on Jason Smith's Pants: New Evidence



Image created by the Innocence Project from FSA photographs and reports for illustrative purposes

Red dots represent locations of blood spatter matched to victim in postconviction testing by FSA - not actual size or shape

Blue dot represents location of blood spatter matched to victim at Trial 2 - not actual size or shape.

FIGURE 2

Without question, Smith did not flee as soon as he realized what was happening to the victim. At a minimum, the blood spatter on the front and back of both legs of the trousers demonstrates that Smith stood in front of the victim for an extended period of time and at multiple angles. More critically, the DNA evidence strongly supports the inference that Smith himself struck the victim and caused the injuries that led to her death.

Comparison of the figures above demonstrates that the new evidence is not merely cumulative. It literally changes the entire picture of what happened, and destroys the plausibility of the prosecutor's speculation that Smith could have been hit with a single drop while fleeing

from the scene. Indeed, since there is “more blood” and it is, in fact, “on the front of the pants”, it seems clear that the prosecutor herself would concede this point.

This new DNA would have profoundly affected both of Siller’s juries. Initially, the new evidence confirms Smith’s culpability and reveals the extent of his motivation to lie and pin responsibility on other parties. Given Smith’s direct participation, he becomes eligible to receive the death penalty -- an outcome to be avoided at all costs. In short, the jury would approach the testimony of a potential capital defendant with far more skepticism than that of accused burglar and check thief.

By demonstrating that Smith’s allegation that he fled the crime as soon as he observed Wally striking the victim was a lie, the new evidence creates doubt about the entire chain of events described by Smith. As an initial example, consider Smith’s testimony that as he fled, he noticed for the first time that the rear door had been kicked in. (T1 at 324; T2 at 2783). Since the circumstances of his exit wherein he viewed the door have been proven false, a jury could more easily believe that Smith actually kicked the door in himself. Of course, this would explain the presence of Smith’s own blood on the inside his right pants leg -- blood that Smith had first told police came from an accident at work, and then told police came from kicking in Jenean Harper’s door on the night of the crime. (T1 at 329, 379; T2 at 2837).

Similarly, DNA evidence now puts the recovery of Smith’s fingerprint in the rear bedroom in a different light. At both trials, Smith had stated that he picked some checks up while rummaging and then abandoned the checks once he saw what Wally was doing. (T1 322-23; T2 at 2782). At the second trial, Smith specifically said that Wally’s actions caused him fear and so he dropped the checks. (T2 at 2782). This tale of fear now rings hollow, and it seems more likely that Smith left his fingerprint after he tied up the victim and began to tear through the house

looking to “hit a lick” (lending credibility in turn to the testimony of Brian Roberts who stated that Smith boasted of hitting a lick on the morning of June 4).

The jury’s evaluation of the rest of Smith’s story would continue in this vein. Through the lens of the new DNA evidence, all of the previously apparent problems with Smith’s testimony -- its lack of direct corroboration, its contradictions from the first trial to the second, etc. -- are magnified and create more and more reasonable doubt about his story. Where the jury may have had reservations about the informants *against* Smith, the DNA evidence lends credence and physical corroboration to the statements of Herbert Armstrong, Richard Thombs, and Edward Farrell who all testified that Smith had confessed to committing the crime alone. Indeed, given the weight of the evidence against Smith, it seems likely that prosecutors would be interested in revoking Smith’s deal entirely, a possibility admittedly weighed after the single-drop fiasco.

On the flip side, the remaining evidence against Siller (and Zimmer) now appears woefully thin. Without Smith’s tale, a jury would find absurd the notion that either defendant broke into the back door of a house where they had regular front-door access in order to beat and rob a woman who had kindly and repeatedly lent large sums of money to them. Without Smith, the jury would believe the essential truth of the statements of Siller, Zimmer, and Crowder concerning the events of the evening, rather than find the minor inconsistencies sinister. Indeed, the jury would see the small variations for what they really were -- the inexact recollections of individuals often under the influence of crack cocaine, and who were generally scared of the law because of their drug use.

The impact on the jury of the testimony about crack in both trials should not be underestimated. Siller’s and Zimmer’s use clearly explained their unfortunate and ill-advised

borrowing of thousands of dollars from the victim. However, there is a profound difference between illegal drug activity or “scamming” and “bilking” an elderly lady, and the horrific violence of the attack on Zolkowski. It was Smith’s damning testimony that explained and gave proof to the apparent transformation of Siller and Zimmer from petty users to hardened criminals. Without Smith, the jury would have no reason to believe that Siller and Zimmer were even capable of such violence.⁷

It is thus clear that there exists more than a strong probability of a different outcome -- a not guilty verdict would virtually be assured.

C. The New DNA Evidence Further Reveals That Exculpatory *Brady* Material Was Suppressed.

As explained above, Serowik’s failure to identify the blood spatter on the front and back of Smiths pants means that either (a) he never performed the presumptive tests in 1997 or 2001, or (b) he did perform them and failed to disclose the positive results. Either way, this clearly exculpatory information should have been disclosed to the defense.

As is well known, in order to prevail on a due process claim resulting from withholding evidence from the defense, the substantive standard is that a reasonable probability exists that, had the material evidence been disclosed, a different outcome would have resulted. *See United*

⁷ Without Smith and the circumstantial evidence bolstered by Smith, the *only* other evidence against Siller is the jailhouse snitch testimony of Thomas Campbell who stated that Siller later confessed. However, this testimony was directly contradicted and rebutted by that of Emory Jones, and to a lesser extent by Ken Mullins. Certainly, there is no reason to give Campbell’s testimony any more weight than that of Jones, Mullins, Armstrong, Thombs, or Farrell. In short, when looking at informant testimony, the defense had more witnesses and they were more reliable (none received a benefit for testing).

States v. Bagley, 473 U.S. 667, 682 (1985). A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Id.*

As demonstrated above, Siller easily meets the more stringent “strong probability” standard of *Petro* and Rule 33. Therefore, he necessarily meets the *Brady/Bagley* standard and deserves relief on this basis as well.

CONCLUSION

Thomas Siller moves this court for new trial under distinct, but intertwined principles stemming from the fact that his convictions were based on the perjured testimony of the states’ witnesses. A new trial is warranted under Criminal Rule 33 due to the newly discovered evidence, which destroys Jason Smith’s story and supports Siller’s long-held claim of innocence. In addition, a new trial is warranted as Serowik’s and Smith’s perjured testimony violated Thomas Siller’s constitutional right to Due Process and a fair trial. In short, Siller seeks relief from this court because the State, through Serowik and Smith has infringed on the very integrity of the criminal justice system. As the court noted in *DeFonzo*:

The court can conceive of no infringement which is more serious than the lying of a police officer which substantially contributes to the conviction and loss of freedom of a defendant. *Defonzo*, 394 N.E. 2d at 1033.

Serowik blatantly lied about his analysis of the critical piece of physical evidence offered at the defendant’s trial, and in so doing, he supported the perjury of the State’s star witness and undermined Siller’s defense. It was Serowik’s sworn obligation to testify truthfully and he utterly and completely failed to do so. His failure was not as a result of mere mistake or accident, but was his pattern and practice, as revealed in the Green civil litigation. Given the clear evidence of perjury, one would hope that the State would no longer stand behind this conviction. Indeed, one

would further hope that the State would understand the wisdom of the *DeFronzo* court when it noted

The State seems to fail to realize that its highest duty to the people of the State of Ohio is the participation in the system's quest for justice. The word justice is not synonymous with the word convictions. *Id.*

For the reasons stated, Thomas Siller prays that his motion be granted.

WHEREFORE, Mr. Siller respectfully requests this Court grant him leave to file a Motion for New Trial in CR-361726-B.

Respectfully Submitted,

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