

No. \_\_\_\_\_

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term 2023

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**KEVIN KEITH**

Petitioner,

v.

**WARDEN, MARION CORRECTIONAL INSTITUTION,**

Respondent.

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**APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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FOR THE SIXTH CIRCUIT**

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Re: Case No. 21-3948, *Kevin Keith v. Leon Hill*  
Originating Case No. : 1:18-cv-00634

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's published opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely  
Deputy Clerk

cc: Ms. Sandy Opacich

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION  
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 23a0178p.06

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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KEVIN KEITH,

*Petitioner-Appellant,*

*v.*

LEON HILL, Warden,

*Respondent-Appellee.*

No. 21-3948

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.  
No. 1:18-cv-00634—Solomon Oliver, Jr., District Judge.

Argued: April 26, 2023

Decided and Filed: August 15, 2023

Before: SILER, KETHLEDGE, and WHITE, Circuit Judges.

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**COUNSEL**

**ARGUED:** Rachel G. Troutman, OFFICE OF THE OHIO PUBLIC DEFENDER, Columbus, Ohio, for Appellant. Michael J. Hendershot, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Rachel G. Troutman, OFFICE OF THE OHIO PUBLIC DEFENDER, Columbus, Ohio, Justin E. Herdman, Calland M. Ferraro, JONES DAY, Cleveland, Ohio, James R. Wooley, HILOW & SPELLACY, Cleveland, Ohio, Zachary M. Swisher, SYBERT, RHOAD, LACKEY SWISHER, LLC, Powell, Ohio, for Appellant. Michael J. Hendershot, Benjamin M. Flowers, Brenda S. Leikala, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

KETHLEDGE, J., delivered the opinion of the court in which SILER, J., joined in full. WHITE, J. (pg. 18), delivered a separate opinion concurring in the judgment.

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**OPINION**

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KETHLEDGE, Circuit Judge. In January 1994, the state of Ohio indicted Kevin Keith—along with his cousin and uncle—on cocaine-trafficking charges based on information provided by Rudel Chatman. Less than a month later, someone shot six of Chatman’s relatives, killing three of them. A survivor identified Kevin Keith as his attacker, and an Ohio jury convicted Keith of triple homicide and sentenced him to death.

Keith has since filed four federal habeas petitions. Three of those—including this one—argued that the prosecution failed to turn over exculpatory evidence before trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The federal habeas statute bars consideration of these claims unless Keith can show that no reasonable juror today would convict him in light of the “evidence as a whole.” We agree with the district court that Keith cannot make that showing, and affirm.

## I.

## A.

In 1993 and 1994, Rudel Chatman served as a confidential informant for a police task force investigating drug trafficking in Ohio. Chatman assisted with two important investigations. The first, initiated by the State Pharmacy Board, concerned a pharmacy burglary ring orchestrated by brothers Bruce and Rodney Melton. The second involved suspected cocaine trafficking by Kevin Keith and several of his friends and family, including Keith’s uncle Gene Keith Sr. and his cousin Gene Keith Jr.

Chatman helped the task force gather critical information, but the Keiths soon became suspicious. During one encounter in September 1993, Kevin Keith pinned Chatman against a wall so that Gene Jr. could pat him down for wires. When they found none, Keith made off with Chatman’s wallet and \$700 in cash. Two months later, another relative of Keith’s approached Chatman’s girlfriend’s mother and asked “to go for a ride with her.” She later told police what happened when she got in the car:

Gene Keith Sr. was in the car in the driver's seat and Don [Keith] got in the car and Gene drove off. Gene Sr. told her that they didn't want anything to happen to her daughter or grandkids and she asked him what he meant by that. Gene said that Rudel was a narc and was working for the cops . . . Gene said he just wanted her to know that if they got busted Rudel was history because the contract was already out on him. Don Keith then told her that he could easily slip into town just like he did this night and no one would ever know it.

Despite these threats, Chatman continued his work for the police. On January 21, 1994, task force officers arrested Keith and eight others on assorted drug charges. Keith was released on bond shortly thereafter.

At around 8:45 p.m. on the evening of February 13, 1994, someone visited Chatman's sister Marichell. Multiple family members were home that day: Marichell's daughter Marchae, her cousins Quinton and Quanita, and their aunt Linda. Marichell's boyfriend Richard Warren was also there. The visitor asked Marichell for a glass of water and spoke briefly to Linda. Then, suddenly, he pulled a handgun from a trash bag, told everyone to "get on the floor," and began firing. Marichell and Linda were killed instantly, and everyone else suffered multiple gunshot wounds. Warren managed to escape the apartment and run across a grassy area—the attacker shot him again in the buttocks as he ran—until Warren reached a nearby restaurant, where he described the attack and asked for help. First responders rushed Warren, Quanita, Quinton, and Marchae to the hospital. There, seven-year-old Marchae soon died of her injuries.

Meanwhile, at the crime-scene, Nancy Smathers—who lived down the street from the Chatmans—told investigating officers she had heard "popping noises" and seen a large, six-foot tall black man run to a car, drive into a snowbank, rock his car to release it from the snow, and drive away. Smathers said that the car had been white, cream, or light yellow in color, with broken dome and license-plate lights.

A member of the task force thereafter warned local police that Keith had a motive to harm the Chatmans and that Keith's uncle Gene had "told someone that [the Keiths] were 'going to whack families' in retribution for their arrests." In the hospital, Warren described his attacker as a "fat black guy, 6' to 6'2", weighing 250 to 275 [pounds]," and he picked Keith out of a six-photo lineup (albeit one that featured Keith's photo more prominently than the others). Warren also said that Marichell told him the shooter had recently been involved in a "large drug bust"

and was called “Kevin.” Keith’s picture then appeared on the local news, and Smathers called the station to say that Keith was the person she had seen on the night of the murders. Police then arrested Keith.

After Keith’s arrest, Damon Chatman—a surviving relative of Rudel’s—told police that “he [had] heard the Keiths were going to ‘kill every Chatman alive’” in retribution for the January arrests. The chief investigator on the case, Captain Corwin, then visited 4-year-old Quinton and 7-year-old Quanita in the hospital, where Quinton told him that “Kevin” had been the shooter. Quanita said that her “daddy’s friend” Bruce had shot her. When Corwin showed Quanita the photo-lineup, Quanita pointed at Keith’s picture and said that it looked like the man, but that it was not him. Quanita’s father, Demetrious Reeves, was friends with Keith as well as Bruce Melton; and Quanita’s mother, Joyce Reeves, told police that her daughter had mistakenly called Keith “Bruce” in the past.

A few weeks later, one of Marichell’s neighbors, Kathy Gale, came forward to the police. Gale said she had not done so earlier because she was scared and lived “right next door to the scene.” According to the police’s notes of the interview, however, Gale remembered seeing Keith on the day of the murders:

[O]n the day of the shooting approx. 3pm., she saw Kevin Keith, carrying a duffle bag, go to Marichell Chatman’s apartment. She advised [that] her son Rodney and Richard Warren had been upstairs in the apt. playing Nintendo and didn’t see him. After he left she advised Marichell came over and spoke to her and she asked her who the man was and Marichell told her it was Kevin Keith. And was saying his visit was funny as all he wanted was a glass of water, which she had given him.

Later that day, just minutes before the shooting, Gale said, she saw Linda Chatman arrive at the apartments to “pick up the Reeves kids to babysit them.” Just “as she was leaving and Linda was going [inside], she saw Kevin Keith at the east end of the walk by the parking lot.”

A short time later, Gale’s son Jessey then saw Keith repeatedly shoot Warren as he tried to escape:

She advised when Warren came out of the apt. after being shot he pounded on their door for help, then ran towards Ike’s [restaurant] as Keith was shooting at him. Her son Jessey had went to the door to see what was going on. When he

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opened the door, Keith was standing only approx. 6 feet away from him, firing at Warren, who was running. She advised Keith was concentrating on Warren and didn't see him. Jessey saw Warren get shot and fall in the snow. Keith leveled the gun at Warren and pulled the trigger but the gun didn't go off, at which time Keith turned and fled.

Less than a week after Gale's statement, Keith's case proceeded to trial.

B.

On the first day of trial, Keith moved to exclude Richard Warren's identification testimony on the ground that police officers had improperly suggested the name "Kevin" to Warren. After a brief hearing, the court denied that request, and the parties proceeded with their proofs.

Warren testified that, on the day of the murders, someone came to his girlfriend Marichell Chatman's apartment while he was staying there. Warren said the intruder wore "a turtleneck shirt pulled up over the bottom part of his face" and had asked to speak to Linda Chatman. While Linda and the intruder stepped out of the apartment to talk, Marichell told Warren that the intruder's name was Kevin:

A: Well, I was standing at the door and by that time Marichell was standing next to me and I asked her who this guy was and she told me his name was Kevin.

Q: And did she mention the last name?

A: She mentioned the last name. I didn't recall it.

Q: What else did she say?

A: She mentioned his name was Kevin and said his last name and that he was involved in a big drug bust. But she didn't say when or where.

Soon afterward, Warren said, the intruder returned, asked Marichell for a glass of water, and pulled out a gun:

A: At first when he pulled it out and pointed it at me, I just sat there because I didn't know what to do. I was pretty scared. Then he said, "I ain't bullshitting, get over here." And at that time I came over there and he made us—"Get on the floor," he goes.

...

Q: After everyone was ordered to the floor then what happened?

A: Then Marichell was saying, you know, "What are you doing? Why are you doing this? We didn't have anything...? She used his name. She said, "You know, Kevin, we didn't do anything." He told her, "Don't say my name. Don't say my name." And then she said, "Well, you don't hurt us—you ain't going to hurt us while the children are here. I don't want anything to happen to those children."

...

A: . . . Then he put the gun to her head and told her to shut up. There was just more conversation that went on and he said, "Well, you should have thought about this before your brother started ratting on people."

Warren then identified Keith as the gunman.

Smathers testified next. On the stand, she repeated the substance of her statement to the police: namely, she had seen a large black man run to the parking lot and get into a cream-colored car with a broken dome light. She also described how the man had tried to dislodge his car from the snow:

Q: Obviously, you just mentioned somebody rocking the car. Tell us in your own words what you actually observed after the car hit the snowbank.

A: The car hit the snowbank and upon hitting the snowbank, you could tell it was stuck because the wheels were turning too fast because it was on ice. And at that time they kept, like how you rock it back and forth when you are stuck. And like, upon that, they opened the door and he had his hand up on where the metal meets the frame and the hood, holding there and stepped out and with one foot, rocked back and forth, pulling at the same time.

Q: You say this person had a hand on it?

A: Yes, whatever it is that connects the roof of the car to the base of the car where the door shuts, that metal part right there.

Smathers pointed to Keith in the courtroom to identify the man she had seen.

Over the course of the next several witnesses, the prosecution established that Keith's girlfriend Melanie Davison had visited Keith in jail using a 1982 Oldsmobile Omega with the license plate MVR043. A police officer testified he had impounded that vehicle, which belonged to Davison's grandfather, because of reports that the car at the crime scene had left a partial license plate print of "043" in the snow. (In Ohio, vehicles have license plates on their front

bumper as well as in back.) Testimony from the officer established that the Oldsmobile had broken dome and plate lights, like the car Smathers saw. The prosecution further showed that someone had changed the Oldsmobile's tires shortly after the murders, even though Davison's grandfather testified he had put new tires on the vehicle not long before. Meanwhile, the defense established that 17 vehicles registered in the vicinity of the crime scene had license plates that included "043."

A series of experts then testified, explaining that, in the days following the crime, they had tested fingerprints, fibers, DNA, blood, and other evidence from the scene, from the Oldsmobile, and from Keith's residence. A fingerprint examiner said that, though she had found no usable prints on the Oldsmobile, she did find smudges consistent with Smathers's account:

A: This is a photograph of that same vehicle. This is the position between the front windshield and the driver's door. And it shows where there are some smudges here from the hands and fingers or something on one of the posts. This is the outside of the post.

Another forensic expert, Michele Yezzo, said she could confirm that the perpetrator's car had left a partial license plate imprint of the numbers "043" in the snow, which matched the placement and shape of the license plate on Davison's Oldsmobile. Yezzo also testified that the tire tracks matched the tires Davison's grandfather had recently purchased for his Oldsmobile—though they did not match the tires actually installed on it when it was found.

The defense began its case by casting doubt on Warren's testimony. Multiple witnesses confirmed that Warren had initially said the shooter was masked and unidentifiable, and Captain Stanley acknowledged that he had failed to record some of his conversations with Warren. Rodney Melton also testified, and admitted that he owned and drove a cream-colored car and had been at the scene when a crowd gathered after the murders. Melton also said he had been asleep until "about 10:30, 11:00" that night—until his friends woke him up and told him "a bunch of people got shot at Marichell's apartment." On cross-examination, Melton said it was "possible" that Marichell was his daughter.

The defense then presented Keith's alibi. Gene Keith Sr.'s wife, Gracie, testified that Keith had been at her home at the time of the shooting. And a neighbor of Keith's girlfriend Melanie Davison, namely Judith Rogers, testified that she had seen Keith and Davison leave Davison's apartment building in a blue vehicle around 8:45 p.m. that night. Quinton and Quanita's father, Demetrious Reeves, also testified that Bruce Melton was a good friend of his, and the defense played the tape of Quanita's interview for the jury. In the interview, Quanita identified "daddy's friend" Bruce as the killer.

On rebuttal, the prosecution sought to rehabilitate Richard Warren's testimony by establishing that he had given the name "Kevin" to several doctors and nurses before speaking with the police. Captain Stanley testified that he spoke to a "nurse Amy Gimmets," who told him that Warren had identified "Kevin" as his attacker. Another nurse, John Foor, testified that Warren had written "Kevin" on a notepad at 5 a.m. the morning after the shooting. Foor testified that he conveyed the name "Kevin" to the police and discarded the piece of paper. And Joyce Reeves, Quanita's mother, explained that Quanita had mistakenly called Kevin Keith "Bruce" in the past.

Bruce Melton testified last. He denied any involvement in the murders and said that he had been in Columbus, Ohio, on the night of the crime. The prosecution then confirmed Bruce's height and weight:

Q: How tall are you, sir?

A: Five nine.

Q: How much do you weigh?

A: 160.

After lengthy deliberations, the jury convicted Keith on all counts and sentenced him to death.

C.

Keith appealed his conviction and sentence, but the Ohio Court of Appeals and Ohio Supreme Court affirmed. *State v. Keith*, No. 3-94-14, 1996 WL 156716 (Ohio App. 1996); *State v. Keith*, 79 Ohio St.3d 514 (1997). In the trial court, Keith filed a motion for state

postconviction relief, asserting that his trial had been fundamentally unfair and that his counsel had been ineffective. The court denied that motion, and the Ohio Court of Appeals affirmed. *State v. Keith*, No. 3-98-05, 1998 WL 487044 (Ohio App. 1998). The Ohio Supreme Court denied leave to appeal. *State v. Keith*, 84 Ohio St.3d 1447 (1998). Keith then filed his first federal habeas petition, which the district court dismissed in 2001. This court affirmed. *Keith v. Mitchell*, 455 F.3d 662 (6th Cir. 2006).

In April 2004, Keith discovered through a public-records request that the handwritten notes from Warren's hospital stay had been faxed to Captain Corwin rather than discarded. Warren's notes were scattered across the page in difficult-to-read script, reflecting his difficulty in writing them. On the last page, the words "Capt. Stanley," "Kevin," "Damon," and "Bucyrus Police" appeared in neat handwriting that seemed clearly different from Warren's. With this evidence, Keith filed a second petition for postconviction relief in the trial court, on *Brady* grounds. That petition was "successive" under Ohio law, meaning Keith could not succeed unless he established by clear and convincing evidence that, but for the constitutional errors at trial, no reasonable juror would have convicted him. Ohio Rev. Code. § 2953.23(A)(1)(b). The trial court held Keith could not meet that burden, and the Ohio Court of Appeals affirmed. *State v. Keith*, 176 Ohio App.3d 260 (2008).

In 2007, Keith discovered that the prosecution had withheld a second set of materials: the State Pharmacy Board's file on the investigation of Bruce and Rodney Melton. The file revealed that the Meltons had "spread the word that anybody that snitches on them would be killed"; that Rodney wore a type of mask similar to the one described by Warren and Quanita; and that Rodney owned a yellow Impala and had previously had a license plate which included "043." It also showed that Rodney Melton had bragged to a coconspirator that he had been paid \$15,000 to "cripple" or "off" Rudel Chatman. At around the same time, Keith's counsel also discovered that Warren's hospital had never employed a nurse named "Amy Gimmets," suggesting that Captain Stanley had misspoken or lied when he testified about speaking with Warren's nurses.

Keith again asked the state court for a new trial, this time arguing that the Pharmacy Board materials should have been disclosed under *Brady* and that Captain Stanley had lied on the stand. The trial court denied relief, the Ohio Court of Appeals affirmed, and the Ohio Supreme Court denied leave to appeal. *State v. Keith*, 2008 WL 5053538 (Ohio App. 2008); *State v. Keith*, 123 Ohio St.3d 1508 (2009). Keith then filed a second habeas petition in federal court asserting substantially the same claims, but this court denied Keith permission to pursue a successive petition. *Keith v. Bobby*, 551 F.3d 555 (6th Cir. 2009).

Meanwhile, Keith's counsel received the police department's radio logs for the relevant time period, which showed no contact between the hospital and the police department on the morning John Foor said he had spoken with the police. Keith then filed a petition for clemency with the Governor. On September 2, 2010, then-Governor Strickland commuted Keith's death sentence to life without parole.

Keith's legal team thereafter repeatedly requested more information from the Ohio Bureau of Criminal Investigations regarding Michele Yezzo's work as an expert, but each time the Bureau refused to provide that information. In 2014, Keith filed a third federal habeas petition based on a change in law not relevant here; this court denied Keith permission to proceed with that petition as well. *In re Keith*, No. 14-3290 (6th Cir. Dec. 8, 2014).

Little changed in Keith's case over the following two years. In December 2016, however, the Ohio Supreme Court held that criminal defendants have a "clear legal right" to the public records in their own cases. *State ex. Rel. Caster v. City of Columbus*, 151 Ohio St. 3d 425, 439 (2016). Keith promptly filed another request for the police's casefiles, which he received some months later. Those files included Keith's pretrial subpoena for the police's call records. On the subpoena, someone had made the notation "Ignore for now." Keith also received Michele Yezzo's personnel file, which contained years of warnings and reprimands. Specifically, Yezzo's file showed that Yezzo's supervisors, colleagues, and even her union representatives had repeatedly expressed serious concerns about the reliability of her work. One report concluded that Yezzo would "stretch the truth to satisfy a department."

Keith again filed a motion for postconviction relief in the trial court. Along with his motion, Keith submitted a report from a forensic analyst who had reevaluated Yezzo's work and concluded that the snow impressions were not consistent with the Oldsmobile. The state courts again denied relief at every level. *State v. Keith*, No. 3-17-01, 2017 WL 2729625 (Ohio App., June 26, 2017); *State v. Keith*, 151 Ohio St.3d 1456 (2017).

Keith then filed this habeas petition in federal district court—his fourth—alleging that the prosecution's failure to disclose the Yezzo file violated *Brady*, and that the “ignore for now” subpoena showed the police had deliberately suppressed its call records. Keith attached a report from another expert who disagreed with Yezzo's conclusion; he also submitted an affidavit from Yolanda Price, an acquaintance who said she remembered seeing Kevin at his aunt Gracie's house between 8 and 9 p.m. on the day of the shooting.

This court granted Keith authorization to proceed with his successive habeas petition. *In re Keith*, 2018 WL 8807240 (6th Cir. 2018). On remand, the district court denied Keith's petition, holding that Keith could not meet the high standard applicable to successive habeas petitions. *See* 28 U.S.C. § 2244(b)(2)(B). This appeal followed.

## II.

We review the district court's denial of habeas relief de novo. *Theriot v. Vashaw*, 982 F.3d 999, 1003 (6th Cir. 2020).

### A.

The Antiterrorism and Effective Death Penalty Act bars federal courts from considering the merits of a “second or successive” habeas petition unless:

- (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B). The question here is whether Keith can satisfy these requirements.

## 1.

Everyone agrees that the impeachment information in Yezzo’s personnel file is the “factual predicate” for Keith’s latest *Brady* claim. 28 U.S.C. § 2244(b)(2)(B)(i). And we have no doubt as to Keith’s diligence in discovering that information. Keith’s counsel filed a motion for pretrial disclosure of all *Brady* material on February 28, 1994—less than two weeks after Keith’s arrest. The prosecution thereafter turned over some documents and assured Keith’s counsel that it had complied with its *Brady* obligations. After receiving that assurance, Keith was not required to “scavenge for hints of undisclosed *Brady* material.” *Banks v. Dretke*, 520 U.S. 668, 695 (2004). And Keith’s attorneys filed multiple requests for further information about Yezzo’s expert investigation after his conviction. Thus, Keith has met the diligence requirement. *See also In re Keith*, 2018 WL 8807240 at \*6.

## 2.

The statute’s second requirement requires Keith to establish by clear and convincing evidence that, but for the constitutional errors at trial, no reasonable juror would have convicted him. 28 U.S.C. § 2244(b)(2)(B)(ii). In our application of that standard, we must consider the “evidence as a whole,” meaning “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *House v. Bell*, 547 U.S. 518, 538 (2006) (cleaned up).

As an initial matter, the Warden argues that Keith must affirmatively prove his factual innocence—meaning, in other words, that he did not in fact commit the subject crime. The Supreme Court has indeed described the relevant provision as requiring a prisoner to “establish his innocence by clear and convincing evidence,” *Calderon v. Thompson*, 523 U.S. 538, 558 (1998)—or, more recently, as requiring “a credible claim of actual innocence.” *McQuiggin v. Perkins*, 569 U.S. 383, 398 (2013). But the Court has also repeatedly made clear—including in *Calderon* and *McQuiggin*—that a defendant is “actually innocent” for purposes of habeas review when, considering the evidence as a whole, “no reasonable juror would have convicted him.” *Calderon*, 523 U.S. at 540; *House*, 547 U.S. at 526; *McQuiggin*, 569 U.S. at 385, 393-94. That is also what the statute itself expressly provides. 28 U.S.C. § 2244(b)(2)(B)(ii).

Yet the district court, like the Warden, appears to have treated the “actual innocence” standard as interchangeable with “factual innocence.” They are not. To establish that no reasonable juror would have convicted him, Keith must show that “no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that . . . any reasonable juror would have reasonable doubt.” *House*, 547 U.S. at 537-38. Proof beyond a reasonable doubt requires jurors to “reach a subjective state of near certitude of the guilt of the accused,” *Jackson v. Virginia*, 443 U.S. 307, 315 (1979); it is proof “so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own [life].” *Sixth Circuit Pattern Jury Instructions*, § 1.03(5). A defendant who can dismantle the government’s case against him could therefore overcome the procedural bar of § 2244(b)(2)(B)(ii)—by clearly and convincingly removing that “certitude”—even if he cannot show that he is, in fact, innocent. *House*, 547 U.S. at 553-54 (“conclusive exoneration” not required to show “actual innocence”); *see also Rivas v. Fisher*, 687 F.2d 514, 518 (2d. Cir. 2012).

i.

To determine whether Keith can meet this standard, we begin with the “facts underlying” Keith’s claim, namely, the state’s suppression of Yezzo’s personnel file. 28 U.S.C. § 2244(b)(2)(B)(ii). Yezzo’s file shows that, over the course of decades, supervisors and coworkers concluded that Yezzo was mentally unstable and would distort the truth to please police departments. As we held in another case involving Yezzo, that information would have been “crucial impeachment evidence.” *O’Donnell v. Yezzo*, 2022 WL 130885 at \*1 (6th Cir. 2022). A reasonable jury today would very likely discount Yezzo’s testimony entirely.

Yezzo’s only role at trial, however, was to establish the presence of the Oldsmobile at the scene. And other evidence separately indicated that the attacker had used the Oldsmobile to escape. Specifically, Nancy Smathers testified that she saw a car with broken dome and license plate lights—and neither light worked on the Oldsmobile. She also said she saw someone rock the car to release it from the snow—and the Oldsmobile had smudges on the A-pillar consistent with someone rocking it. Moreover, the prosecution established that someone had changed the

tires on the Oldsmobile shortly after the murders—even though the car already had new tires. Thus, even without Yezzo, some evidence at trial connected this car to the crime.

More importantly, nothing from Yezzo’s file affects the core evidence against Keith—namely, Warren’s testimony. Warren had every reason to testify truthfully about who had shot him four times. At trial, Warren insisted that Marichell had repeatedly referred to her attacker as “Kevin,” and that she said the attacker had recently been involved in a “large drug bust” (as Keith had been). Warren also said that he had reported the name “Kevin” to his doctors and nurses. He further testified that his attacker had been a heavyset black man, and he recognized Keith in the courtroom. And other evidence supported Warren’s account: Smathers saw the shooter flee the building and confirmed Warren’s physical description of him; Nurse Foor testified that Warren had identified “Kevin” as his attacker; and Captain Stanley testified he heard the name “Kevin” from another nurse as well. Thus, with or without Yezzo, the jury had ample reason to believe Warren’s testimony.

ii.

To prevail in spite of Warren’s testimony, Keith would need to establish by clear and convincing evidence that every reasonable juror would doubt the accuracy or truthfulness of that testimony. Keith tries to make that showing by pointing to evidence that police improperly suggested the name “Kevin” to Warren. But that argument overlooks an important part of Warren’s testimony. Warren said that Marichell told him the intruder had recently been involved in a “large drug bust.” At the time of the murders, that was true only for Keith, who had been arrested just a month before. And that was not true for the Meltons, Keith’s favored suspects, who were not indicted until two months later, in April.

To be sure, the police grossly mismanaged its records in this case by failing to record several of its interactions with Warren and his nurses. The police also should have complied with Keith’s pre-trial subpoena for the relevant call records. *Brady*, 373 U.S. at 88. But police misconduct does not explain why John Foor—a nurse with no apparent connection to this case—would lie under oath about what Warren had said to him shortly after his surgery. True, Foor incorrectly testified that Warren himself had written down the name “Kevin” and that Foor had

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discarded the note; but those mistakes do not show that Foor was a liar. To the contrary, Warren's trial testimony provided a plausible explanation for the discrepancy in handwriting:

Q: Did you write any letters to anyone or any notes?

A: Yes, sir, I did.

Q: What did you do—who did you write to?

A: At first I tried to—I couldn't talk and my hands were strapped down. So I tried to do sign language and none of the nurses knew it. When my father got there he translated my sign language to the nurses then they wrote it down on paper.

Thus, Keith cannot show that Foor committed perjury at trial.

Keith faces similar problems with respect to the alleged call from nurse Amy. Again, the police made mistakes: Captain Stanley recalled Amy's last name incorrectly at trial, and a purported "transcript" of the call is incomplete. But Warren himself testified at trial that he told several of his nurses his attacker was named "Kevin." And though Keith's arguments about the suggestibility of witnesses could explain how Warren came to identify his attacker as "Kevin," they do not explain why Warren would lie about his interactions with hospital personnel. Keith has not shown, clearly and convincingly, that every reasonable juror would doubt Warren's testimony.

Keith also points to other evidence that has become available since his conviction. Specifically, the Pharmacy Board files show that Rodney Melton generally wore a mask covering only the bottom half of his face—like the mask that Warren testified the killer had worn. Those same files showed (amazingly enough) that Melton had owned a light-colored car with "043" in the license plate, and that he had been offered money to "off" Rudel Chatman. That evidence certainly favors Keith, especially when read together with Quanita's identification of the killer as "Bruce." As the jury learned at trial, however, Bruce Melton did not fit the description of the shooter. Everyone agrees the killer was a large, "fat" man, and Bruce Melton was a short man of average weight. Quanita's identification of "Bruce" therefore does not plausibly point to Bruce Melton. And Quanita's mother testified that her daughter had confused Kevin Keith with "Bruce" before.

We thus agree with our concurring colleague—considering only the evidence at trial and the new evidence relied upon by Keith post-trial—that Keith cannot show that every reasonable juror would have reasonable doubt about his guilt. Considering that evidence alone, rather, we think that only some—and perhaps most—jurors likely would find reasonable doubt.

The Supreme Court has told us, however, that we must consider the “evidence as a whole,” meaning “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *House*, 547 U.S. at 538 (cleaned up). Moreover, by relying extensively on non-*Brady* evidence—including police records—Keith has waived any objection to the use of incriminating police records in our evaluation of “all the evidence.”

And the full record here contains significant additional evidence of Keith’s guilt. Specifically, the police file shows that Quanita’s brother Quinton did identify the attacker as “Kevin.” It also shows that the Keiths had been threatening the Chatman family for months before the shooting. Indeed, an interview with a different confidential informant—submitted to the court by Keith—suggests that it had been Keith himself who offered Rodney Melton money to “off Rudel”:

Q: Or you don’t know anything [about the shootings]?

A: Bruce, Bruce said, he goes “I don’t know, the guy coulda snapped and done it,” because of cocaine. But, you know, if the guy didn’t do it himself, I know Rodney Melton, I heard, was offered \$5,000 to off Rudel.

Q: Who’d you hear that from?

A: Bruce. So, but I don’t think Rodney did it; I don’t think.

Q: Who offered him money?

A: I, I guess one of the Keiths or Kevin, himself. I don’t know.

That account would be consistent with Gene Keith Sr.’s earlier threat that a “contract was already out” on Rudel Chatman. Thus, even the records that inculpate the Meltons do not clearly exonerate Keith.

The police files also clarify Keith’s motive for committing the shooting. Keith might have faced comparatively minor charges from the drug bust, but Chatman took down a major

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drug network run by Keith's family and friends. Meanwhile, the Pharmacy Board files show that Chatman was only one of many informants against the Meltons—who, again, were not indicted until months after the shooting. The full record therefore refutes Keith's assertion that only the Meltons had a plausible motive for these murders.

Some of most damning evidence against Keith, finally, came from Marichell's neighbors. Kathy Gale saw Keith scope out Marichell's apartment on the morning of the shooting; and she saw him waiting by the parking lot just minutes before the shooting. Her son then watched from less than six feet away as Keith shot at Warren as he fled, striking him in the rear and knocking him down—which in fact occurred just as Gale described it to the police.

Taken together, the evidence described above—Warren's testimony, Gale's account, the Oldsmobile evidence, and Keith's motive to retaliate against Rudel Chatman—show that jurors faced with “the evidence as a whole” could reasonably convict Keith again today. Keith has not shown by clear and convincing evidence that “no reasonable factfinder” could find him guilty of triple homicide. 28 U.S.C. § 2244(b)(2)(B). We therefore may not consider the merits of his petition. *Id.*

\* \* \*

The district court's judgment is affirmed.

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## CONCURRENCE

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HELENE N. WHITE, Circuit Judge, concurring in part. I concur in the judgment because I agree that Petitioner Kevin Keith fails to clear the exceedingly high bar of 28 U.S.C. §§ 2244(b)(2)(B)(ii). There is no question that Keith would have had a better chance of acquittal had the *Brady* material been known to his defense team. But that is not the test. Rather, Keith must show that the withheld evidence, “if proven and viewed in light of the evidence as a whole,” would establish “by clear and convincing evidence” that, had the evidence been disclosed, “no reasonable factfinder would have found [him] guilty of the underlying offense.” 28 U.S.C. §§ 2244(b)(2)(B)(ii); *see also House v. Bell*, 547 U.S. 518, 538 (2006). I cannot say that it is more likely than not that *no* reasonable juror who completely discounted Yezzo’s expert testimony, and had the benefit of the police call logs and the information in the Ohio Pharmacy Board’s files incriminating the Melton brothers,<sup>1</sup> would have found Keith guilty beyond a reasonable doubt, considering Richard Warren’s identification of Keith as his assailant and Nancy Smathers’s testimony matching Keith’s girlfriend’s grandfather’s car to the getaway vehicle. *House*, 547 U.S. at 538.

However, I base my conclusion solely on the evidence at trial and the new evidence produced by Keith post-trial. I do not factor into my decision the additional information in the 1994 police reports because the State itself chose not to present it at trial, its reliability has never been tested, the government does not discuss the information in this appeal, and I do not agree that by relying on police records to buttress his arguments, “Keith has waived any objection to the use of incriminating police records in our evaluation of ‘all the evidence.’”<sup>2</sup>

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<sup>1</sup>I also acknowledge that although Bruce Melton does not share Keith’s physical characteristics, apparently Rodney Melton—at six feet two inches tall and 214 pounds—was closer in size and stature to the shooter, described by Warren as “approximately six to six/two, 250, 275.” R. 20-26, PID 8027; R. 21-1, PID 10047. Both Melton brothers testified before the jury at trial.

<sup>2</sup>Specifically, I would not rely on the following information, which was known to the State in 1994, yet not presented to the jury: (1) Keith’s alleged shakedown and robbery of Chatman; (2) Shannon Bostic and her mother’s encounter with Keith’s relative, during which Keith’s relative allegedly threatened Chatman; (3) Keith’s uncle’s threat that the Keith family was going to “whack” Chatman’s family in retribution; (4) Damon Chatman’s statement to the police that the Keaths were going to “Kill every Chatman alive”; (5) Kathy Gale’s statements about her and her son’s identification of Keith as the shooter on the day of the murder.

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

No. 21-3948

KEVIN KEITH,

Petitioner - Appellant,

v.

LEON HILL, Warden,

Respondent - Appellee.

**FILED**  
Aug 15, 2023  
DEBORAH S. HUNT, Clerk

Before: SILER, KETHLEDGE, and WHITE, Circuit Judges.

**JUDGMENT**On Appeal from the United States District Court  
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is  
AFFIRMED.**ENTERED BY ORDER OF THE COURT**  
\_\_\_\_\_  
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

KEVIN KEITH,	)	Case No.: 1:18 CV 634
	)	
Petitioner	)	JUDGE SOLOMON OLIVER, JR.
	)	
v.	)	
	)	
LYNEAL WAINWRIGHT, Warden,	)	
	)	
Respondent	)	<u>ORDER</u>

Currently pending before the court in the above-captioned case is Petitioner Kevin Keith’s (“Petitioner” or “Keith”) Petition for Writ of Habeas Corpus (“Petition”) under 28 U.S.C. § 2254 (ECF No. 1). Also before the court are the parties’ respective Objections (ECF Nos. 42, 44) to the Magistrate Judge’s decision to partially expand the record, Keith’s Second Motion to Expand the Record (ECF No. 59), and his Motion for Oral Argument on the Habeas Petition (ECF No. 65). Under Local Rule 72.2, the court referred the Petition to the Magistrate Judge for a Report and Recommendation (“R & R”). For the following reasons, the court overrules the parties’ Objections to the ruling on Keith’s First Motion to Expand the Record, the court grants Keith’s Second Motion to Expand the Record, the court adopts the R & R as modified by this Order and dismisses the Petition, and the court denies Keith’s Motion for Oral Argument.

**I. BACKGROUND**

In May 1994, an Ohio jury convicted Keith on three counts of aggravated murder and three

counts of attempted aggravated murder.<sup>1</sup> The trial court sentenced Keith to death, per the jury's recommendation, and the Ohio Court of Appeals and Ohio Supreme Court affirmed his convictions and sentence on appeal. Since then, Keith has actively pursued post-conviction relief in state and federal court as well as Ohio's clemency proceedings. Although all of Keith's prior efforts through the courts were unsuccessful, in September 2010, then-Governor Ted Strickland commuted Keith's sentence to life in prison without the possibility of parole.

Keith's three prior federal habeas petitions were unsuccessful.<sup>2</sup> In 1999, Keith filed his first petition asserting ineffective assistance of counsel. The district court denied the petition, and the Sixth Circuit affirmed. *Keith v. Mitchell*, 455 F.3d 662, 665 (6th Cir. 2006). Keith filed a second petition in 2008, citing newly discovered evidence that the state allegedly suppressed in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). But a divided panel of the Sixth Circuit held that Keith could not pursue his claims because he failed to satisfy the threshold requirements for filing a second or successive habeas petition under 28 U.S.C. § 2244(b)(2). *See Keith v. Bobby*, 551 F.3d 555, 556 (6th Cir. 2009); *Id.* at 561 (Clay, J., dissenting). The Sixth Circuit likewise denied Keith's 2013 petition, which raised additional ineffective assistance of counsel claims, for the same reason. *See In re Keith*, No. 14-3290 (6th Cir. Dec. 8, 2014) (order).

In this fourth-in-time Petition, Keith asserts two new *Brady* violations: First, Keith argues that the state withheld impeachment information regarding Michelle Yezzo ("Yezzo"), a former forensic analyst for the Ohio Bureau of Criminal Investigation, whose testimony linked Keith to the

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<sup>1</sup> The court adopts the R & R's detailed and accurate discussion of the factual and procedural background underlying Keith's case. In light of that discussion, plus the extensive record from the trial court, direct appeal, and prior post-conviction proceedings, only a short summary of the relevant facts is needed here.

<sup>2</sup> *See* Case Nos. 1:99-CV-657; 1:08-CV-1687; 1:13-CV-1718. Early filings related to the 1999 petition predate electronic filing.

crime. Second, Keith contends that the state deliberately ignored his trial subpoena requesting police phone log records that would have contradicted the government’s theory of the case and undermined the credibility of its star witness. As with Keith’s prior requests for federal habeas relief, the court transferred this matter to the Sixth Circuit to determine whether Keith could file a successive habeas petition. (See Order, ECF No. 15.) But unlike those prior unsuccessful attempts, the Sixth Circuit granted Keith’s request after determining that he had made a *prima facie* showing to satisfy § 2244’s gateway requirements and, therefore, that his “*Brady* claims ‘warrant a fuller exploration in the district court.’” *In re Keith*, No. 18-3544, 2018 WL 8807240, at \*7 (6th Cir. Oct. 26, 2018) (quoting *In re Wogenstahl*, 902 F.3d 621, 629 (6th Cir. 2018)).

The proceedings continued in this court after the Sixth Circuit’s order authorizing Keith to pursue his successive Petition. The State filed its Return of Writ (ECF No. 26) on March 26, 2019, and Keith filed a Traverse (ECF No. 28) on May 9, 2019. With his Traverse, Keith also moved the court to include nine additional exhibits in the record. (First Mot. to Expand, ECF No. 29.) The Magistrate Judge granted that Motion as to three exhibits but denied it as to the other six. (Order, ECF No. 41.) Both parties objected to the ruling. (ECF Nos. 42, 44.) On September 3, 2020, the Magistrate Judge submitted the R & R (ECF No. 56), recommending that the court dismiss Keith’s Petition. Keith filed an Objection (ECF No. 58) and a Second Motion to Expand the Record (ECF No. 59) on September 24, 2020.<sup>3</sup> While Respondent Warden Lyneal Wainwright (“Respondent”) did not file an objection, her Response (ECF No. 60) to Keith’s Objection purports to challenge some aspects of the R & R. (See *id.* at PageID # 11738 n.2.) On March 3, 2021, Keith filed a Motion for Oral Argument (ECF No. 65).

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<sup>3</sup>

Ordinarily, Keith should have raised this Motion with the Magistrate Judge. However, because Respondent does not object to it as untimely, the court considers it in its analysis.

## II. LAW AND ANALYSIS

### A. Legal Standards

#### 1. Expanding the Record

Habeas Rule 7 allows federal habeas courts to “direct the parties to expand the record by submitting additional materials relating to the petition.” But the decision whether to expand “is left to the discretion of the trial judge.” *Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988). Expansion is not mandatory. *Id.*

#### 2. Second or Successive Habeas Petitions

Second or successive habeas petitions like Keith’s are governed by 28 U.S.C. § 2244(b)(2)(B). The relevant provisions state:

- (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
  - (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
  - (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B). The second prong is commonly referred to as the “actual innocence” standard. Before a second or successive petitioner can proceed on their claims in the district court, they must obtain authorization from the court of appeals by making a *prima facie* showing that they satisfy § 2244(b)(2)(B)’s requirements. 28 U.S.C. § 2244(b)(3)(C); *In re Wogenstahl*, 902 F.3d at 628. In this context, “*prima facie*” simply means “sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court.” *In re Wogenstahl*, 902

F.3d at 628 (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir.2004)). Once back in the district court, the petitioner “must actually show that the claim satisfies the standard” to avoid dismissal. *Tyler v. Cain*, 533 U.S. 656, 661 n.3 (2001) (cleaned up).

#### **B. Objections to First Motion to Expand the Record**

When he filed his Traverse, Keith also sought to expand the record to include the following nine exhibits:

1. Sentencing entries for defendants caught in a drug raid that also implicated Keith. (ECF No. 28-1.) Keith asserts that, although he was never tried for these drug offenses, “the sentencing outcome of the others charged demonstrates that” he likely would have faced a relatively short sentence. (First Mot. to Expand Record at PageID #10908 n.3, ECF No. 28.)
2. February 13, 1994, Mansfield police department traffic report that corroborated statements from one of Keith’s girlfriends, Melanie Davison (“Davison”). (ECF No. 28-2.) Keith claims that this report in turn corroborates his alibi.
3. A copy of a search warrant affidavit that includes “masks” in the list of items to be searched. (ECF Nos. 28-3; 33-2.) Keith argues that the affidavit shows “police apparently still believed that the shooter had been masked.” (First Mot. to Expand Record at PageID #10911 n.8, ECF No. 28.)
4. May 9, 2019, corrected affidavit of Keith’s counsel meant to demonstrate diligence under § 2244(b)(2)(B)(i). (ECF No. 29-1.)
5. May 6, 2019, affidavit of former Governor Ted Strickland stating that he commuted Keith’s sentence due to “severe doubts about his guilt.” (Strickland Aff. ¶ 5, ECF No. 28-5.)
6. State of Ohio’s January 10, 2013, brief in opposition to Keith’s petition for a writ of certiorari from the United States Supreme Court. (ECF No. 28-6.)
7. April 23, 2019, expert report from Sunita Sah (“Sah”) regarding the biases in and unreliability of Michele Yezzo’s forensic analysis. (ECF No. 28-7.)

8. May 1, 2019, affidavit of Zachary Swisher, deputy legal counsel to former Governor Strickland, stating that he has “grave concerns about the investigation and Keith’s guilt.” (Swisher Aff. ¶ 11, ECF No. 28-8.)
9. September 24, 2010, statement under oath of Davison explaining why she changed the tires on the car Keith purportedly used as his getaway vehicle. (ECF No. 28-9.)

The Magistrate Judge granted this Motion as to the affidavit from Keith’s counsel and Sah’s expert report, finding the former relevant to Keith’s diligence and the latter relevant to Keith’s claim of actual innocence. (Order at PageID #11401–03, ECF No. 41.) The Magistrate Judge also granted the Motion as to the State’s brief in opposition to Keith’s petition for certiorari because Respondent did not oppose its inclusion in the record. (*Id.* at PageID #11402.) However, the Magistrate Judge denied the Motion as to the other exhibits, finding that they were not relevant to the inquiry under 28 U.S.C. § 2244(b)(2)(B). Both parties objected to the Magistrate Judge’s ruling.

### 1. Standard of Review

When reviewing a Magistrate Judge’s ruling on a nondispositive issue, the court must “modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a). The “clearly erroneous” standard applies to the Magistrate Judge’s factual findings, while the “contrary to law” standard applies to legal conclusions. *Reid v. Moore*, No. 3:05-CV-326, 2009 WL 3857429, at \*1 (S.D. Ohio Nov. 16, 2009). Both standards afford considerable deference to the Magistrate Judge’s determinations. *Id.*

### 2. Respondent’s Objection

Respondent objects to the inclusion of the updated affidavit from Keith’s counsel (ECF No. 29-1) and Sah’s expert report (ECF No. 28-7). (See Resp.’s Obj. to Mag. J. Order at PageID #11407–08, ECF No. 42.) First, citing *Cullen v. Pinholster*, 563 U.S. 170 (2011), Respondent asserts that, “in a case in which there was a merits determination in state court . . . , the

Court cannot consider any evidence which was not before the state courts.” (Resp.’s Obj. to Mag. J. Order at PageID #11408–09, ECF No. 42.) Second, Respondent argues that even if Keith’s exhibits overcome *Pinholster*’s bar, the affidavit and expert must be excluded because they are irrelevant to the merits of Keith’s habeas claims.

These arguments are not well-taken. As to the first, the Magistrate Judge correctly distinguished *Pinholster* from this case. While *Pinholster* requires federal habeas courts to limit their § 2254(d)(1) merits analysis to the record before the state court, that limitation “is inapplicable to the threshold jurisdictional questions before the Court in § 2244(b)(1)(B).” (Order at PageID #11397, ECF No. 41.) Indeed, Respondent’s Objection acknowledges precisely this distinction. (Resp.’s Obj. to Mag. J. Order at PageID #11408, ECF No. 42 (suggesting that *Pinholster*’s bar does not apply to the affidavit from Keith’s counsel because “that document does address the § 2244 gate-keeping requirements”.) After reviewing the parties’ arguments and the Magistrate Judge’s Order—as well as decisions from other courts in this circuit that have expanded the record to include new evidence for purposes of the § 2244(b)(1)(B) inquiry, (see Order at PageID #11397, ECF No. 41)—the court finds that the Magistrate Judge’s interpretation and application of *Pinholster* is not clearly erroneous. Nor did the Magistrate err in finding the affidavit and expert report relevant to the threshold inquiry. The Magistrate Judge accurately concluded that these materials inform the analysis under § 2244(b)(1)(B), and the Order properly explained that the exhibits were admitted only for that purpose. (Order at PageID #11402–03, ECF No. 41.) Consequently, the court overrules Respondent’s Objection.

### 3. Keith’s Objection

Keith objects to the exclusion of four exhibits: the Mansfield police traffic report (ECF No. 28-2), the search warrant (ECF Nos. 28-3, 33-2), the Strickland and Swisher affidavits (ECF

Nos. 28-5, 28-8), and the Davison statement (ECF No. 28-9). (See Keith's Obj. to Mag. J. Order at PageID #11421, ECF No. 44.) The crux of Keith's Objection relative to each exhibit is that the Magistrate Judge improperly evaluated their relevance to the § 2244(b)(1)(B) inquiry.

The court also finds these arguments not well-taken. Both of the Davison exhibits, the police report and her sworn statement, potentially provide some support for Keith's defense theory and therefore potentially have some relevance to the § 2244(b)(1)(B)(ii) actual innocence prong. But Keith vastly overstates their significance, and the court cannot find that the Magistrate Judge clearly erred by excluding them. As for the affidavits, they come from third parties, who merely recount their personal views about Keith's case despite lacking direct knowledge of Keith's diligence or innocence. The court does not doubt the sincerity of the affiants' concerns, but the court ultimately agrees with the Magistrate Judge that the affidavits are not relevant to the § 2244(b)(1)(B) inquiry. Consequently, the court overrules Keith's Objection.<sup>4</sup>

### C. Second Motion to Expand the Record

Before turning to the R & R and the substance of Keith's Petition, the court first addresses his Second Motion to Expand the Record. With this Motion, which he filed along with his Objection to the R & R, Keith seeks to add the following exhibits:

1. Mansfield police department file concerning Melton's prior murder (ECF No. 59-1), which, according to Keith, "demonstrates the State's decades-long knowledge that Melton 'is highly dangerous and possibly mentally disturbed.'" (Second Mot. to Expand at PageID #11674, ECF No. 59.)
2. September 24, 2020, affidavit of Lori Rothschild Ansaldi, a television and podcast producer who obtained the Melton police file through a public records request and then forwarded them to Keith's former counsel. (Ansaldi Aff. ¶¶ 6-9, ECF No. 59-2.)

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<sup>4</sup>

In any event, for the reasons discussed below, the court still would dismiss Keith's Petition even if all of these exhibits were included in the record.

Respondent opposes this Motion, again arguing that *Pinholster* bars the court from considering materials outside the state court record and that, in any event, the materials are irrelevant. (Resp.’s Opp’n to Second Mot. to Expand at PageID #11792–95, ECF No. 62.)

The court finds Petitioner’s Motion to be well-taken. As discussed above, the court rejects Respondent’s reading of *Pinholster*. Further, the court finds that the police report has at least some relevance to the § 2244(b)(2)(B)(ii) actual innocence inquiry and that Ansaldi’s affidavit is relevant to Keith’s diligence under § 2244(b)(2)(B)(i). Accordingly, the court includes these exhibits in its analysis. However, as the court discusses below, the court finds that Keith’s Petition fails despite this evidence.

#### **D. Habeas Petition**

##### **1. Grounds for Relief**

Keith’s Petition raises two grounds for habeas relief based on alleged *Brady* violations. In the First Ground for Relief, Keith asserts that the state failed to disclose critical impeachment evidence from Yezzo’s personnel file showing that she was biased in favor of law enforcement, routinely “stretch[ed] the truth to satisfy a [police] department,” frequently used racial slurs against African Americans, and had a history of verbally and physically abusing co-workers. (Pet. at PageID #20, ECF No. 1.) Keith maintains that the state knew about these problems with Yezzo’s work “long before she testified at Keith’s trial.” (Traverse at PageID #10923, ECF No. 28.) Yet the state failed to disclose them, and Keith only learned of them in 2016, when a newspaper article highlighted issues regarding Yezzo’s reliability. The Second Ground for Relief stems from the state’s failure to comply with Keith’s trial subpoena requesting “all records, including radio dispatch logs, of all call-ins” that the Bucyrus police department received around the time of the murders. (Pet. at PageID #17, ECF No. 1.) When Keith finally obtained these records in 2016, after Ohio changed its

public records laws, he learned that the subpoena had been marked “Ignore For Now.” (*Id.*) Not only do the logs provide important evidence impeaching the credibility of the state’s star witness, Keith argues, they also bolster his claim that the police acted in bad faith throughout the investigation.

## 2. Report and Recommendation

The Magistrate Judge concluded that Keith’s Petition should be dismissed because Keith failed to satisfy the threshold inquiry under § 2244(b)(1)(B). At the first prong, the R & R found that Keith satisfied § 2244(b)(1)(B)(i)’s diligence requirement as to the evidence in Yezzo’s personnel file but not as to the police logs and the “Ignore For Now” subpoena. (R & R at PageID #11537–42, ECF No. 56.) Having concluded that Keith did not diligently pursue the phone logs, the Magistrate Judge excluded that evidence from the § 2244(b)(1)(B)(ii) inquiry. As for the Yezzo material, the R & R determined that it failed to clearly and convincingly establish Keith’s innocence when viewed against the record as a whole. (*Id.* at PageID #11542–60.) And because the Magistrate Judge determined that Keith’s new evidence did not present any credibility issues requiring further exploration, the Magistrate Judge found no need for an evidentiary hearing.

## 3. Objections

Keith filed a timely Objection to the R & R raising the following issues:

- I. The Magistrate Judge incorrectly determined that the Yezzo evidence does not satisfy the 2244(b)(2)(B)(ii) standard.
- II. The Magistrate Judge conducted the 2244(b)(2)(B)(ii) assessment incorrectly.
- III. The Magistrate Judge incorrectly found that Keith did not meet the diligence prong with regard to the subpoena with the words “Ignore for Now” written on it.
- IV. The Magistrate Judge erred in issuing his final ruling in this case before this Court ruled on Keith’s pending objections to the Magistrate Judge’s denial of portions of Keith’s Motion to Expand the Record.

V. The Magistrate Judge incorrectly denied Keith an evidentiary hearing.

(Keith's Obj. to R & R at PageID#11568, ECF No. 58.) The second objection is well-taken. The court agrees with Keith that the phrase "evidence as a whole" in § 2244(b)(2)(B)(ii) requires habeas courts to consider "all the evidence, including that alleged to have been illegally admitted and the evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." (*Id.* at PageID #11478.) The R & R's analysis, which considered only "the body of evidence presented at trial" plus the Yezzo evidence, therefore was too narrow. (R & R at PageID #11542, ECF No. 56.) However, correcting this error does not change the outcome because, as the court discusses in detail below, Keith fails to satisfy § 2244(b)(2)(B)(ii) even under the more expansive view of the "evidence as a whole." As for the other objections, the court disagrees with Keith and therefore overrules them.

Although Respondent did not file a separate objection, she makes the following argument in her Response to Keith's Objection:

As the prevailing party, the Warden need not separately object to [the Magistrate Judge's] adverse finding as to the diligence issue (*See Vanwinkle [v. United States*, 645 F.3d 365, 371 (6th Cir. 2011)]), and implores the Court to find Keith was not diligent in procuring and presenting the Yezzo documents after reviewing the issue *de novo* pursuant to Keith's objections.

(Resp.'s Opp'n to Keith's Obj. to R & R at PageID #11738 n.2, ECF No. 60.) This argument is not well-taken. The Magistrate Judge correctly concluded that Keith met the diligence prong as to the Yezzo evidence.

#### 4. Analysis

Despite sustaining one of Keith's objections, the court ultimately agrees with the R & R's recommendation to dismiss Keith's Petition. The court briefly discusses each prong of the

§ 2244(b)(2)(B) analysis in turn.

*i. Diligence*

The court agrees with the R & R's assessment that Keith was diligent with respect to the Yezzo evidence. As the Magistrate Judge explains:

[P]ortions of the personnel file to which Petitioner now points were in existence at the time of trial. But the undersigned disagrees that Petitioner can be faulted for failing to uncover it sooner. Could Petitioner have requested Yezzo's police file at the time of trial? Yes. But, when the prosecution represented to him that it would provide favorable material, and the personnel file was never mentioned or revealed . . . a reasonable individual would not have believed it necessary to do so.

(R & R at PageID #11539, ECF No. 56.) Respondent argues that the Magistrate Judge mistakenly applied a subjective standard to evaluate Keith's diligence instead of the objective standard used in the Fifth Circuit. (Resp.'s Opp'n to Keith's Obj. to R & R at PageID #11739–41, ECF No. 60.) But this criticism is unfounded. While the Magistrate Judge did consider Keith's subjective actions, the R & R explicitly states that "even under the Fifth Circuit's objective diligence standard, advanced by Respondent . . . , the undersigned would reach the same conclusion." (R & R at PageID #11540 n.2, ECF No. 56.) This court agrees. By any metric, a reasonably diligent individual in Keith's circumstances would not expect or anticipate that the state's forensic analyst would have such damning information in her personnel file, let alone that the state would allow her to testify under such circumstances. Nor would a reasonably diligent individual, after receiving assurances that the state would turn over all favorable material, suspect that the state would fail its constitutional obligation to turn over such obvious impeachment information.

However, Keith was not diligent with respect to the police call logs. The Magistrate Judge correctly found that Keith "did not do as much as could reasonably be expected from someone in his circumstances." (*Id.* at PageID #11541 (quotation omitted).) Keith issued the subpoena two days into

trial to obtain information to rebut one of the state's witnesses. Specifically, Keith demanded that the Bucyrus police department turn over "all records, including radio dispatch logs, of all call-ins from February 12, 1994 to the present time." (Subpoena, ECF No. 1-29.) But while it is undisputed that Keith never received a response, the record also shows that Keith never

- (1) brought the lack of response to the trial court's attention;
- (2) questioned any Bucyrus Police Department witness regarding whether they brought such records to trial; or
- (3) made any attempt to follow up on the lack of response at trial or during his initial appeal.

(R & R at PageID #11541, ECF No. 56.) From this, the Magistrate Judge concluded that Keith failed to satisfy the requirements under § 2244(b)(2)(B)(i) relative to the call logs because "[a] reasonably diligent individual would have, at a minimum, followed up on the lack of response at the time of trial, or at least sometime earlier than Petitioner here did." (*Id.*) That conclusion is correct.

Keith's Objection on this issue is not persuasive. He argues that the Magistrate Judge unreasonably faults him "for not predicting that the State deliberately, in bad faith, refused to comply with discovery at the time of his trial," and that

[e]ven assuming that the Bucyrus Police Department would have produced the station's phone recordings in response, Keith had no way of discovering the police's deliberate bad faith in ignoring the subpoena. This bad faith is relevant to the State's overall conduct in prosecuting Keith and could have persuaded a jury with respect to other aspects of the State's case against Keith.

(*Id.* at PageID #11614.) Tellingly, this argument does not address Keith's lack of diligence. To the contrary, by pivoting away from "the police department's non-compliance with the subpoena" and focusing instead on speculation regarding "the intentional and blatant police misconduct," Keith seems to concede that he did not act diligently with respect to his subpoena. Regardless of whether the police would have disclosed the "Ignore For Now" notation or continued to suppress it, the fact remains that a reasonably diligent individual in Keith's position would have followed up at trial to

enforce the subpoena. Consequently, Keith fails to show that this evidence “could not have been discovered previously through the exercise of due diligence.”<sup>5</sup> 28 U.S.C. § 2244(b)(2)(B)(i).

*ii. Actual Innocence*

In this circuit,<sup>6</sup> “the ‘evidence as a whole’ is exactly that: all the evidence put before the court at the time of its § 2244(b)(2)(B)(ii) or § 2255(h)(1) evaluation.” *Clark v. Warden*, 934 F.3d 483, 496 n.5 (6th Cir. 2019) (quoting *United States v. MacDonald*, 641 F.3d 596, 610 (4th Cir. 2011)). This includes “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under [evidentiary rules],” *Long v. Hooks*, 972 F.3d 442, 470 (4th Cir. 2020) (quoting *MacDonald*, 641 F.3d at 612), as well as evidence presented in support of prior habeas petitions, *In re Keith*, 2018 WL 8807240, at \*3 (considering “evidence presented in Keith’s 2008 habeas petition” for purposes of the *prima facie* § 2244(b)(2)(B) analysis).

Keith objects that the Magistrate Judge applied a narrower conception of the “evidence as a whole” when preparing the R & R. This objection is well-taken. But as the court explains below, even after correcting the Magistrate Judge’s error and accounting for the additional evidence Keith cites, the outcome remains the same: dismissal is required because Keith fails to establish his actual innocence by clear and convincing evidence.

In the R & R, the Magistrate Judge

summarize[d] the trial evidence, detail[ed] the “newly discovered

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<sup>5</sup>

Regardless, Keith’s Petition would fail even if the court found that he acted diligently with respect to the call logs and the police department’s alleged bad faith. Including this evidence as part of the “evidence as a whole,” Keith still cannot satisfy § 2244(b)(2)(B)(ii).

<sup>6</sup>

The Fourth and Tenth Circuits split on this issue. *Compare United States v. MacDonald*, 641 F.3d 596, 614 (4th Cir. 2011), with *Case v. Hatch*, 731 F.3d 1015, 1038 n. 12 (10th Cir. 2013). The Sixth Circuit subsequently aligned with the Fourth Circuit. *See Clark v. Warden*, 934 F.3d 483, 496 n.5 (6th Cir. 2019).

evidence” that satisfies § 2244(b)(2)(B)(i) as set forth above, and then analyze[d] the likely impact this new evidence would have on reasonable jurors in light of the evidence presented at trial.

(R & R at PageID #11543, ECF No. 56.) In other words, the R & R considered the evidence introduced at trial—both the prosecution and defense cases—plus the Yezzo material. As the R & R explained, the Sixth Circuit previously summarized that

[t]he core of the case . . . against Keith included:

- Eyewitness testimony of the survivor [Richard] Warren [ (“Warren”)] identifying Keith;
- A partial imprint of the license plate made from the snowbank where the getaway car crashed matched the license plate of a car he was known to have access to;
- Eyewitness identification of him as the man driving the getaway car when it crashed;
- A spent bullet cartridge casing matching the ones recovered from the scene of the murders was found where Keith later picked up his girlfriend; and
- Testimony that Keith had been indicted as a result of the drug raid precipitated by the victims’ relative[ , a police informant named Rudel Chatman (“Chatman”)].

*Keith*, 551 F.3d at 558. Because Yezzo testified regarding the license plate imprint and other factors linking Keith to the getaway car, her testimony touched the core of the state’s case. The R & R therefore correctly acknowledged that

[t]he evidence presented regarding Yezzo’s personnel file certainly weakens some of the “core” of the State’s case, and use of that information on cross-examination to impeach Yezzo might have caused a reasonable jury to discount her testimony to a degree.

(R & R at PageID #11560, ECF No. 56.) But the R & R went on to explain that impeachment evidence rarely demonstrates actual innocence. (*Id.* at PageID #11558 (citing *In re Byrd*, 269 F.3d 561, 577 (6th Cir. 2001))). And citing evidence from Warren and other eyewitnesses linking Keith

to the crime scene, the Magistrate Judge concluded that Yezzo's testimony "was not the so-called 'smoking gun' in this case, but one additional piece of evidence." (*Id.* at PageID #11557.) Accordingly, the R & R found that, applying the clear and convincing evidence standard, "reasonable, properly instructed jurors who heard the evidence presented at trial, and the newly discovered impeachment evidence from Yezzo's personnel file, would still have convicted Petitioner." (*Id.* at PageID #11560.)

In his Objection, Keith urges the court to redo the § 2244(b)(2)(B)(ii) analysis with a much broader lens, including the following factors in particular:

- Evidence impeaching the credibility of Warren, who was the state's star witness. This evidence includes (i) handwritten notes from Warren's hospital stay after the shooting, which contradict testimony at trial suggesting that Warren told his nurse that "Kevin" shot him; (ii) the police call logs, which contradict the nurse's testimony that he promptly called the police to report "Kevin" as the shooter; and (iii) notes from a hospital security guard, which suggest that the shooter remained unidentified. (Keith's Obj. to R & R at PageID #11580–86, ECF No. 58.)
- Evidence suggesting that another individual, Rodney Melton ("Melton"), committed the murders and that police conducted a shoddy investigation because they doggedly focused on Keith from the start. This evidence includes (i) statements from Melton demonstrating that he had a similar motive as Keith; (ii) eyewitness and physical evidence linking Melton to the crime scene; (iii) statements from Melton expressing that he intended to kill Chatman; and (iv) evidence that police knew this information before Keith's trial but failed to disclose it. (*Id.* at PageID #11593–95, 11605–08.)
- Post-conviction expert reports that undermine Yezzo's findings and raise serious questions regarding her biases and temperament. (*Id.* at PageID #11601–04.)
- Evidence corroborating the alibi Keith presented at trial. (*Id.* at PageID #11610–11.)
- The "Ignore For Now" subpoena, which, in combination with other evidence, demonstrates "intentional and blatant police

“misconduct” that taints the police investigation and undermines the credibility of the state’s case. (*Id.* at PageID #11615.)

With this view of “the evidence as a whole,” Keith asserts, no reasonable juror could have found him guilty beyond a reasonable doubt.

While the court agrees with Keith that this evidence is relevant to the § 2244(b)(2)(B)(ii) analysis, the court ultimately concludes that it is not enough to show by clear and convincing evidence that he is actually innocent. Throughout his trial and post-conviction proceedings, including this fourth-in-time Petition, Keith has attempted to cast doubt on the police investigation and “strongly pursued the defense that another man committed the killings, specifically Rodney Melton.”

*State v. Keith*, No. 3-17-01, 2017 WL 2729625, at \*10 n. 9 (Ohio Ct. App. June 26, 2017). But the jury saw evidence and heard extensive testimony regarding these defenses. Indeed, Melton himself testified at trial, where the jury learned, among other things, that he had a prior murder conviction—*i.e.* the murder discussed in the Mansfield police report that Keith included with his Second Motion to Expand the Record. Keith’s attorney vigorously cross-examined Melton, exposing his checkered past, his potential motive, and the physical evidence linking him to the crime scene. Defense counsel also thoroughly examined Warren, Smathers, and other key witnesses. As a result, the jury heard about Keith’s alibi and discrepancies in Warren and Smather’s testimony identifying Keith as the shooter. Yet the jury still voted to convict. As for the new expert reports, Keith’s forensic expert actually *agreed* with some of Yezzo’s key findings—most importantly that the first two digits from the license plate impression read “04” and that the tire tracks at the scene were consistent with tread from a Firestone Triumph 2000 tire. (See Bodziak Rep. at PageID #188–92, ECF No. 1-24.) Finally, while the evidence Keith marshals regarding bad faith and police misconduct certainly is troubling, it does not dictate the conclusion that Keith seeks. As with the other issues Keith emphasizes in his Petition, defense counsel challenged the police investigation

and forcefully made the case at trial that the investigators ignored other leads once they set their sights on Keith. In short, Keith’s Petition effectively reiterates the same arguments that he made at trial and that he has continued to pursue since. And while the new evidence potentially strengthens Keith’s case against Melton and potentially impeaches the credibility of the state’s eyewitnesses, it crucially does not show that Keith is innocent. As the Magistrate Judge correctly concluded, “new impeachment evidence does not of itself provide proof of actual innocence.” *In re Whittaker*, No. 17-2135, 2018 U.S. App. LEXIS 4804, at \*3 (6th Cir. Feb. 26, 2018) (citing *In re Byrd*, 269 F.3d at 577). Likewise, pointing a finger at Melton does not erode the evidence against Keith. Consequently, in light of the evidence as a whole, including all of the evidence Keith cites in his Petition and Objection, the court concludes that a reasonable, properly instructed juror could have convicted Keith.

In reaching this conclusion, the court feels compelled to emphasize that its “function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors.” *House v. Bell*, 547 U.S. 518, 538 (2006). Thus, it does not matter one whit whether the court’s independent analysis of the evidence as a whole would lead it to conclude that it had reasonable doubts about Keith’s guilt. The bar for overturning a jury verdict in federal habeas proceedings is set deliberately high. And unlike cases in which new evidence conclusively establishes the petitioner’s innocence—for example, where the state’s star witnesses recants their testimony, *see, e.g., Crosland v. Pennsylvania*, No. 21-CV-476, slip op. at 1–2 (E.D. Pa. June 22, 2021), or where new physical evidence exonerates the petitioner—Keith presents nothing to suggest that the two key eyewitnesses ever recanted their testimony, that there is new physical evidence exonerating him, or that there is conclusive evidence implicating Melton.

This case, more than most, demonstrates the tragic result of subjecting *Brady* claims to

§ 2244(b)'s gatekeeping requirements. *Brady* claims usually involve impeachment evidence. Yet evidence that merely impeaches is almost never sufficient to establish actual innocence. As a result, subjecting *Brady* claims to § 2244(b) often forecloses the possibility of meaningful habeas review on the merits. Other courts have expressed alarm at the predicament this poses for habeas petitioners and dismay for the perverse incentives it creates for state actors to conceal past *Brady* violations until after the petitioner files their initial petition. *See Long*, 972 F.3d at 487 (4th Cir. 2020) (Wynn, J., concurring) (“*Brady* claims, as a category, represent a good candidate for exclusion from the ‘second or successive’ requirements.”); *Scott v. United States*, 890 F.3d 1239, 1243 (11th Cir. 2018) (“[The rule subjecting *Brady* claims to § 2244(b)] eliminates the sole fair opportunity for these petitioners to obtain relief. In our view, Supreme Court precedent, the nature of the right at stake here (the right to a fundamentally fair trial), and the Suspension Clause of the U.S. Constitution, Art. I, § 9, cl. 2, do not allow this. Instead, they require the conclusion that a second-in-time collateral claim based on a newly revealed actionable *Brady* violation is not second-or-successive for purposes of AEDPA.”); *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015) (“[Petitioner’s] argument for exempting his *Brady* claim from the § 2244(b)(2) requirements has some merit. Under our precedents as they currently stand, prosecutors may have an incentive to refrain from disclosing *Brady* violations related to prisoners who have not yet sought collateral review. . . . But as a three-judge panel, we are bound to follow the teaching of prior circuit precedent.”) Like those courts, this court also must apply the law as it exists, not as the court wishes it to be. Accordingly, for the reasons discussed above, the court must dismiss Keith’s Petition because it cannot clear the hurdle erected by § 2244(b)(2)(B)(ii).

#### **E. Motion for Oral Argument**

Most recently, Keith filed a Motion for Oral Argument on his Petition. (ECF No. 65.)

Relatedly, he previously sought an evidentiary hearing before the Magistrate Judge and objected when the Magistrate Judge declined to hold one. (See Keith's Obj. to R & R at PageID #11619, ECF No. 58.) But the Magistrate Judge correctly concluded that an evidentiary hearing was not needed before issuing the R & R, and this court similarly finds that no hearing is needed before dismissing Keith's Petition. Taking Keith's evidence at face value and in the best light, his Petition still fails to satisfy the requirements of § 2244(b)(2)(B)(ii). Consequently, there are no issues that require further exploration, and a hearing would not aid the court.

### **III. CONCLUSION**

After a careful *de novo* review of the R & R, the parties' arguments, Keith's Objection to the R & R, and all relevant materials in the record, the court adopts the Magistrate Judge's R & R (ECF No. 56), as modified by this Order and hereby dismisses the Petition. The court also overrules the parties' Objections regarding the Magistrate Judge's partial expansion of the record, grants Keith's Second Motion to Expand the Record (ECF No. 59) and denies his Motion for Oral Argument (ECF No. 65).

Finally, the court certifies that, pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could be taken in good faith, and the court hereby issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b).

IT IS SO ORDERED.

/s/ SOLOMON OLIVER, JR.  
UNITED STATES DISTRICT JUDGE

September 24, 2021

No. 18-3544

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUITIn re: KEVIN KEITH,  
Movant.

) ) ) ) )

FILED  
Oct 26, 2018  
DEBORAH S. HUNT, ClerkO R D E R

Before: CLAY, GILMAN, and WHITE, Circuit Judges.

Kevin Keith, an Ohio prisoner proceeding with counsel, has filed a fourth-in-time habeas corpus petition in the district court. The district court construed the petition as a successive petition that required authorization from a court of appeals and transferred the action to this Court. *See 28 U.S.C. § 2244(b)(3)(A); In re Wogenstahl*, 902 F.3d 621, 624 (6th Cir. 2018).

Currently before this Court are (1) Keith's motion to retransfer/remand his habeas petition to the district court (R. 11), and (2) Keith's application for order authorizing the district court to consider his second or successive application for relief (R. 12). For the reasons explained below, the Court **DENIES** Keith's motion to retransfer/remand and **GRANTS** his application for authorization to file a successive habeas corpus petition.

In 1994, an Ohio jury found Keith guilty of three counts of aggravated murder and three counts of attempted aggravated murder. Keith received a death sentence. The state court of appeals and the state supreme court affirmed his convictions and sentence. *See State v. Keith*, 684 N.E.2d 47 (Ohio 1997). Keith petitioned the trial court for post-conviction relief. That court denied his petition, and the state court of appeals affirmed. *State v. Keith*, No. 3-98-05, 1998 WL 487044 (Ohio Ct. App. Aug. 19, 1998), *appeal not allowed*, 703 N.E.2d 326 (Ohio 1998). The governor of Ohio commuted Keith's death sentence to a sentence of life in prison in September 2010.

In 1999, Keith filed his first § 2254 petition. The district court denied that petition, and we affirmed. *Keith v. Mitchell*, 455 F.3d 662, 668-79 (6th Cir. 2006). He subsequently filed § 2254 petitions in the district court in 2008 and 2014, and in each instance, the district court transferred his petition to us pursuant to *In re Sims*, 111 F.3d 45 (6th Cir. 1997). We denied both applications, and we affirmed the district court's subsequent denial of his motion for reconsideration of the decision to transfer his 2008 petition. *See In re Keith*, No. 14-3290 (6th Cir. Dec. 8, 2014) (order); *Keith v. Bobby*, 618 F.3d 594, 601 (6th Cir. 2010); *Keith v. Bobby*, 551 F.3d 555, 559 (6th Cir. 2009) (Clay, dissenting).

Keith filed the current § 2254 petition in March 2018. Keith claims that he has newly discovered evidence that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Keith contends that the government withheld impeachment evidence concerning G. Michele Yezzo, a forensic analyst for the Ohio Bureau of Criminal Investigation ("BCI") whose testimony concerning license plate impressions and tire tracks linked Keith to the crime. Keith also asserts that the government deliberately ignored a subpoena request for police phone log records prior to his trial and argues that these phone logs would have contradicted the government's theory of the case and undermined the credibility of its star witness.

#### **I. The Court Will Deny Keith's Motion to Remand Because His Petition is a Successive Petition Under 28 U.S.C. § 2244(b)(3)(A)**

Keith argues that this Court should retransfer/remand his petition to the district court without evaluating it under § 2254(b) because it does not constitute a second or successive petition. (*See R. 12.*) This argument is without merit.

It is true that "not every numerically second petition is 'second or successive' for purposes of AEDPA." *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006) (citing *Slack v. McDaniel*, 529 U.S. 473, 487 (2000)). As this Court recently stated, "[a] numerically second petition is not

properly termed second or successive to the extent it asserts claims whose predicates arose after the filing of the original petition.”” *In re Wogenstahl*, 902 F.3d at 627 (quoting *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010)). This Court recently held that *Brady* claims become ripe when the alleged violations occurred, even if the petitioner was unaware of the *Brady* violations at the time he filed his previous habeas petition. *See In re Wogenstahl* at F.3d 621 at 627–28 (rejecting petitioner’s argument that his habeas petition was not successive and explaining that petitioner’s “claims were not unripe at the time he filed his initial petition because the purported *Brady* violations . . . had already occurred when he filed his petition, although [petitioner] was unaware of these facts”)).

Keith’s current petition is properly categorized as successive. *See In re Wogenstahl*, 902 F.3d at 628; 28 U.S.C. § 2244(b)(3)(A). Keith claims are based on purported conduct that occurred prior to his 1994 trial and that Keith did not raise in his previous habeas petitions.<sup>1</sup> Accordingly, Keith must satisfy § 2254(b) to obtain the merits review he seeks. *In re Wogenstahl*, 902 F.3d at 628; *In re Tibbetts*, 869 F.3d 403, 408 (6th Cir. 2017).

**II. The Court Will Grant Keith’s Application for Order Authorizing the District Court to Consider His Second or Successive Application for Relief Because Keith Has Made a *Prima Facie* Showing Under § 2254(b)(2)**

Under 28 U.S.C. § 2244(b)(2), this Court will dismiss a claim raised in a second or successive habeas petition that does not rely on a new rule of constitutional law unless:

- (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and

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<sup>1</sup> The Court notes that Keith raised *Brady* claims in one of his previous habeas petitions. *See Keith*, 551 F.3d at 556. But the *Brady* claims he raises here are different claims; here, Keith alleges that the government withheld different exculpatory material than alleged in his previous *Brady* claim. *See In re Wogenstahl*, 902 F.3d at 628 n.4 (citing *Cullen v. Pinholster*, 563 U.S. 170, 186 n.10 (2011)).

convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2). “The applicant must make a *prima facie* showing that the application satisfies the statutory requirements.” *In re Wogenstahl*, 902 F.3d at 628 (quoting 28 U.S.C. § 2244(b)(3)(C)). This Court has repeatedly explained that “[p]rima facie in this context means simply sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court.” *Id.* (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004)); *In re Siggers*, 615 F.3d 477, 479 (6th Cir. 2010) (same); *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008) (same). “This court has described this standard as ‘not a difficult standard to meet’ and ‘lenient.’” *In re Wogenstahl*, 902 F.3d at 628 (quoting *In re Lott*, 366 F.3d 432–33); *In re McDonald*, 514 F.3d at 544 (quoting *In re Lott*, 366 F.3d 432).

The Court must view the facts underlying Keith’s *Brady* claim “in light of the evidence as a whole.” 28 U.S.C. § 2244(b)(2)(B)(ii). Accordingly, the Court will summarize the evidence supporting Keith’s conviction and the evidence presented in Keith’s 2008 habeas petition. As explained below, the Court holds that Keith has made a *prima facie* showing that his habeas petition satisfies § 2244(b)(2). Therefore, the Court will authorize Keith to file a successive habeas petition.

#### **A. Evidence Supporting Keith’s Conviction and Evidence Presented in Keith’s 2008 Habeas Petition**

In its decision on Keith’s 2008 habeas petition, the Court summarized the evidence presented at trial as follows:

The prosecution’s theory of the case was that Keith murdered family members of Rudel Chatman to exact revenge for Chatman’s assistance in an investigation that led to a drug trafficking raid and indictments against Keith and members of his family. Two victims survived the shooting.

The prosecution’s star witness at trial was Richard Warren, an adult surviving victim, who selected Keith from a photo lineup and reiterated the identification at

trial. The prosecution also presented Nancy Smathers, who testified that on the night of the murders, she heard shots, looked outside her window, observed a large stocky man jump into a car, and observed the car crash into a snow bank. In her first two statements to the police Smathers was unable to identify the assailant, but in her third statement, made after seeing Keith on a television news story, she identified the assailant as Keith. There was also eyewitness testimony from Quanita Reeves, a seven-year-old surviving victim, but Reeves told police that she was shot at by her “daddy’s friend, Bruce” and excluded the picture of Keith from a photo lineup.

Keith was also connected to the crime by circumstantial physical evidence. Investigators made a cast of a tire tread and a cast of a partial license plate indentation from the snow bank identified by Smathers. The partial license plate number, “043,” matched the last three numbers of a car to which Keith was known to have access. The prosecution presented evidence that prior to the shooting, the car’s owner had purchased tires that were “similar in tread design” to the tread in the snow bank. Investigators testified that they had collected spent gun casings from the crime scene, and found a matching casing at the entrance to a General Electric plant where Keith picked up his girlfriend from work on the night of the murders.

The defense challenged the identification made by Warren, presenting evidence that Warren had been improperly influenced and that the identification was inconsistent with other statements he had made. The defense also presented an alibi for Keith and attempted to cast suspicion on the Melton brothers, who had been arrested in a string of pharmacy burglaries and who had told Rudel Chatman that his family had been shot because of Chatman’s snitching. Finally, the defense challenged the testimony of Smathers, arguing that her description of the assailant was consistent with Rodney Melton, and submitting evidence that the license plate “043” matched the first three numbers of a license plate registered to Melton. At the conclusion of the jury trial, Keith was convicted of the murders and sentenced to death.

*Keith*, 551 F.3d at 560–61 (Clay, J., dissenting).

This Court also discussed the new evidence that Keith presented in support of his 2008 habeas petition. This Court explained that “[t]his [Brady] evidence falls into two categories: new evidence that supports a contention that Rodney Melton committed the murders, and new evidence that relates to the identification made by eyewitness Richard Warren.” *Id.* at 560.

The Court summarized the first type of evidence—i.e. evidence that Rodney Melton, not Keith, committed the murders—as follows:

. . . The new evidence includes: (1) evidence from a file in another investigation in which an informant told police that, two weeks before the shooting, Rodney Melton stated that “he had been paid \$15,000 to cripple the man who was responsible for the raids in Crestline, Ohio last week”; (2) evidence that police conducted an interview in which Melton’s accomplice in the pharmacy burglary ring told the police that Melton had stated that he would kill anyone who snitched on him and that he was paid to kill Chatman; (3) evidence that two investigators in Keith’s case were part of the interview of Melton’s accomplice but that Keith was never informed of the interview; and (4) evidence that it was Melton’s habit to wear a mask like the one described by witnesses to the shooting.

... Previously-existing evidence that implicates Melton includes:

- evidence that the partial licens[e] plate number obtained from the snow bank identified by Smathers, “043,” also matches the first three numbers of a license plate registered to Melton;
- evidence that Melton owned and drove a yellow Chevy Impala, which matched Smathers’ description of a “real light” colored car that was white, cream, or light yellow;
- evidence that defense counsel had been contacted by a relative of Rodney Melton, who told him that Rodney “is in on the killings”;
- evidence that Melton appeared at the crime scene, knew the type of bullets involved in the killings, and “made sure to affirmatively tell” the police that his car, which matched the description of the car given by Smathers, was broken down that night; and
- evidence that Quanita Reeves told police that she was shot by her “daddy’s friend Bruce.”

Notably, “Bruce” is the name of the brother of Rodney Melton, and the defense argued that seven-year-old Reeves confused the brothers, both of whom were friends with her father, and that Reeves had actually attempted to identify Rodney Melton. . . .

*Id.* at 561–62.

The Court also discussed the new evidence regarding Warren’s alleged identification of Keith as the shooter:

Keith also submits new evidence that, contrary to the testimony of a police captain, the state’s primary eyewitness did not identify Keith as the shooter to a nurse.

An understanding of this evidence requires a bit of context. At Keith’s trial, Captain John Stanley testified that a nurse named “Amy Gimmets” called him and stated that Warren, a survivor of the shooting, had gained consciousness after surgery and identified Keith as the shooter. The alleged statement would have

taken place before Warren was contacted by police investigators, and undermined allegations by the defense that Warren was improperly influenced. The prosecution did not call the nurse at trial and the defense was unable to locate her.

Keith now alleges that a report prepared by Captain Stanley states that the nurse who called him regarding Warren's identification of Keith was "Amy Wishman" and not "Amy Gimmets." Based on this new information, defense counsel located the nurse, who provided an affidavit stating that: (1) she was the nurse who treated Warren after his surgery; (2) she does recall calling Captain Stanley after Warren could speak; (3) that she never told the captain that Warren had given her a name for the shooter; and (4) that Warren had never told her the shooter's name.

This new evidence is significant, most notably because the nurse's alleged statement was strong corroboration for Warren's otherwise questionable identification. At trial, Warren's identification of Keith had been challenged by Warren's previous statements that he did not know who shot him, by his statements that the shooter was wearing a mask, by another eyewitness's exclusion of Keith as the shooter, and by evidence that Warren had been given Keith's name by officers. The defense used this evidence to argue that Warren had been improperly influenced by police officers.

However, the otherwise compelling argument of improper influence was directly undermined by Captain Stanley's testimony that Warren had provided Keith's name to his nurse *before* he had spoken to any law enforcement officials. The nurse's statement, offered through Stanley, bolstered Warren's otherwise questionable identification, and could likely have convinced the jury that the identification was reliable. . . .

*Id.* at 561–63.

Ultimately, a divided panel of this Court denied Keith's motion for authorization to file his second or successive habeas petition. *See Id.* at 556–63. The majority reasoned that Keith's evidence regarding Melton and Nurse Wishman "did not contradict" the "core" of the case against Keith. *Id.* at 558. To the majority, the "core" of the case against Keith consisted of five pieces of evidence: (1) Warren's "eyewitness testimony" identifying Keith; (2) "[a] partial imprint of the license plate made from the snowbank where the getaway car crashed" that "matched the license plate of a car that [Keith] was known to have access to;" (3) eyewitness identification of Keith as the driver of the car that crashed into the snowbank; (4) a bullet cartridge recovered from where Keith picked up his girlfriend that matched those recovered from

the scene; and (5) the fact that Keith was indicted “as a result of the drug raid precipitated by the victim’s relative.” *Id.*

### **B. New Evidence Presented in the Current Habeas Petition**

In the current habeas petition, Keith presents *Brady* evidence that falls into two categories. First, evidence that impeaches the credibility of Yezzo, the forensic analyst whose testimony regarding the license plate linked Keith to the crime scene. Second, evidence that suggests that the Bucyrus Police Department acted in bad faith by deliberately ignoring Keith’s pre-trial subpoena for phone log records. The Court will discuss these categories of evidence in turn.

#### **1. New Evidence Regarding Yezzo’s Psychological Instability, Professional Integrity, and Racial Bias**

Keith has presented evidence that would have greatly impeached Yezzo’s credibility and called into question the accuracy of her findings, thus weakening the “core” of the state’s case. Keith has presented several internal BCI memoranda from 1989 to 1994 that reveal significant concerns about Yezzo’s mental state and professional integrity. For instance, a May 1989 report from BCI’s assistant superintendent states that “the consensus opinion” is that Yezzo “suffers a severe mental imbalance and needs immediate assistance.” (R. 1-16 at PageID #144.) The assistant superintendent also reported that Yezzo’s “perceived problem affects her overall performance. Her findings and conclusions regarding evidence may be suspect. She will stretch the truth to satisfy a department.” (*Id.* at PageID #145.) A report on September 1989 states that Yezzo threw a book at a co-worker and told her co-worker she was going to “deck her.” (R. 1-20 at PageID #170.) Moreover, in August 1993, Yezzo was placed on administrative leave for “threatening co-workers and failure of good behavior” after Yezzo experienced several fits of rage and threatened to kill co-workers. (R. 1-17 at PageID #148.) Notes taken during the

investigation into Yezzo's conduct in August 1993 report that Yezzo had a "reputation of giving dept. answer [it] wants if [it] stroke[s] her." (R. 1-18 at PageID #161.) The same notes indicate that an analyst assigned to one of Yezzo's cases would have reached a different result than Yezzo had reached on a footprint and blood analysis. (*Id.*) Yezzo also had a documented history of racist outbursts: she made a comment about a "ni\*\*er in a woodpile" and once referred to a co-worker as a "ni\*\*r bitch." (See R. 1-20 at PageID #173.) In fact, Yezzo was *still under investigation* when she testified against Keith. (See R. 1-21 at PageID #177.)

The state did not provide any of this evidence to Keith prior to his trial. Accordingly, Keith was unable to use any of this evidence to impeach Yezzo's credibility and contest her forensic analysis that linked Keith to the scene of the crime. Yezzo's testimony was particularly important because no physical evidence linked Keith to the murders.

## **2. New Evidence Regarding Bad Faith by the Bucyrus Police Department That Undermines the Government's Theory of the Case**

Keith also has presented evidence that suggests that the Bucyrus Police Department acted in bad faith by ignoring his pre-trial subpoena. On May 13, 1994, Keith subpoenaed the Bucyrus Police Department for "all records, including radio dispatch logs, of all call-ins from February 12, 1994 to the present time." (R. 1-29 at PageID #218.) The government did not answer the subpoena at trial. (Br. in Sup. for Successive Habeas, p. 11.) Keith has obtained the Bucyrus Police Department's copy of the subpoena. (R. 1-29 at PageID #218) The words "ignore for now" are written towards the top of the document and underlined. (*Id.*) Keith states that because of unrelated litigation, he obtained the call log records for the day in question. (Habeas Petition at PageID #13.) The logs did not show a call from one of Warren's nurses to the Bucyrus Police Department. (*Id.*)

This new evidence goes to the “core” of the government’s case. At trial, the government claimed that it first got Keith’s name from John Foor, a nurse who called the Bucyrus Police Department and reported that Warren, who had recently emerged from surgery, identified Keith as the shooter. The Bucyrus Police Department’s ignoring the subpoena—particularly coupled with the fact that the logs did not show a call from Warren’s nurses—undermines Warren’s identification of Keith. If Foor did not call the Bucyrus Police Department and provide Keith’s name, it is less likely that Warren spontaneously remembered that Keith was the shooter and more likely that Warren had been improperly influenced to identify Keith.

### C. Keith Has Made a *Prima Facie* Showing Under § 2254(b)

Keith satisfies § 2244(b)(2)(B)(i) because the factual predicates for his *Brady* claim could not have been previously discovered through the exercise of due diligence. Keith has diligently pursued exculpatory and impeachment evidence. Keith requested discovery during pre-trial proceedings—in fact, he requested the police call logs at issue here (*see* R. 1-29 at PageID #218)—and, since his conviction, Keith has filed at least three previous public records requests. (See Habeas Petition at PageID #9–10, 13.<sup>2</sup>) Faced with a similar scenario, this Court in *In re Wogenstahl* stated,

[t]hat [the petitioner] did not obtain the evidence he now presents until that final [discovery] request is hardly attributable to a lack of reasonable due diligence on his part. The prosecution has a constitutional obligation under *Brady* to provide material exculpatory and impeachment evidence, *see, e.g.*, *Montgomery v. Bobby*, 654 F.3d 668, 678 (6th Cir. 2011) (en banc), and the defendant is not required to request continuously *Brady* information in order to show due diligence.

*In re Wogenstahl*, 902 F.3d at 629. Like the petitioner in *In re Wogenstahl*, Keith has diligently attempted to obtain exculpatory and impeachment evidence before trial and in post-conviction

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<sup>2</sup> In 2004, Keith filed a public records request for the nurse’s handwritten notes memorializing Warren’s alleged statement that Keith was the shooter. (Habeas Petition, PageID #9.) In 2007, Keith filed a public records request to the Ohio Pharmacy Board that produced documents revealing that Melton had been paid to “cripple” the informant whose family members were murdered. (*Id.*) Also in 2007, Keith filed a public records request for the Bucyrus Police Department call logs. (*Id.* at PageID #13.)

proceedings. And like the petitioner in *In re Wogenstahl*, Keith cannot be faulted for the fact that his previous attempts failed to uncover the *Brady* material that he recently obtained. Accordingly, the Court finds that Keith satisfies § 2244(b)(2)(B)(i).

Keith also satisfies § 2244(b)(2)(B)(ii). Keith alleges that the government violated his due process rights by suppressing *Brady* material. “Three factors must be satisfied to establish a *Brady* violation: ‘The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.’” *In re Wogenstahl*, 902 F.3d at 629 (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). Keith has satisfied each of these three elements.

The new evidence is impeaching. The evidence concerning Yezzo’s psychological instability, professional integrity, and racial bias reduces the credibility of her testimony. The impeachment value of this evidence cannot be understated, particularly given that Yezzo’s forensic analysis of the license plate was one of the “core” elements of the government’s case against Keith. *Keith*, 551 F.3d at 558. The evidence regarding the Bucyrus Police Department’s deliberately ignoring the subpoena is also significant impeachment evidence; it undermines the government’s theory that the police learned about Keith’s identity as the shooter from a nurse who called the Bucyrus Police Department after Warren emerged from surgery.

The state suppressed the evidence. The state did not disclose the evidence in Yezzo’s personnel file at the time of trial. In fact, Keith did not receive this evidence until he successfully requested it in 2016. The state did not disclose the phone logs at the time of trial, either, even though Keith *explicitly* requested the material through a subpoena.

Finally, viewing his current claims “in light of the evidence as a whole,” 28 U.S.C. § 2244(b)(2)(B)(ii), Keith has made a *prima facie* showing that no reasonable fact finder would

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have found him guilty. *See In re Wogenstahl*, 902 F.3d at 629. That is to say, Keith's *Brady* claims ““warrant a fuller exploration in the district court.”” *Id.* (quoting *In re Lott*, 366 F.3d at 433).

### CONCLUSION

For the reasons explained above, the Court **DENIES** Keith's motion to retransfer/remand and **GRANTS** his application for authorization to file a successive habeas corpus petition.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

1 A As far as the eye coloring goes, no.

2 Q Then you talked with Officer Koepke again that  
3 night?

4 A Yes.

5 Q And again you told him it was a large black man; is  
6 that correct?

7 A Yes.

8 Q You told him he had a coat on?

9 A Yes.

10 Q And you just described him as large and round; is  
11 that correct?

12 A He was large and husky, the shape of his head was  
13 round.

14 Q And this time you told him that he had black  
15 footwear on; is that correct?

16 A Yes.

17 Q And he was dressed in dark clothing?

18 A Dark clothing.

19 Q You said that he had, not jeans on, but dark pants?

20 A Yes.

21 Q And you said he was shifting the gears in the car  
22 the second time?

23 A Yes. He was holding onto the car and rocking back  
24 and forth, shifting from neutral to reverse.

25 Q And you still, the second time you talked to Officer

1 Koepke, could not identify the person; could you?

2 A Not distinct features, no.

3 Q Well, let's talk about the difference between -- the  
4 distinct features on who the person you just pointed out to  
5 the jury as the person you saw that night?

6 A Yes.

7 Q Did you tell Officer Koepke that night that you saw  
8 this person here?

9 A I did not know who that man was at that time.

10 Q And all you knew was it was a large black person?

11 A Yes.

12 Q A large husky built man, the first and second time?

13 A Yes.

14 Q Then you talked to Captain Corwin. Do you remember  
15 that conversation you had with Captain Corwin?

16 A Yes.

17 Q This was on March 18th and you told him you saw  
18 Kevin Keith's picture in the newspaper; did you not?

19 A Not the newspaper. I seen him on T.V.

20 Q And then you told him that you were 90 percent sure  
21 that was the same person, but you couldn't be sure a hundred  
22 percent because you didn't see the color of his eyes. That  
23 is what you told Captain Corwin.

24 A I believe so.

25 Q And not only his eyes, but other distinguishing

1 traits you couldn't tell other distinguishing traits enough  
2 to make a positive identification; is that correct?

3 A Not as far as being able to a hundred percent.

4 Q As a matter of fact you told them that his face and  
5 build were the same?

6 A Yes.

7 Q Which means he had a round face and a large build;  
8 is that correct

9 A Yes.

10 Q Do you know any other people in that project that  
11 have a round face and large build?

12 A Yes.

13 Q Tell me some of the names?

14 A I have seen him a couple of times.

15 Q Who?

16 A Karrie Walker.

17 Q And he has a round face?

18 A Yes.

19 Q And a large build?

20 A Yes.

21 Q Now you also told them that you observed Karrie  
22 Walker using the phone that night; didn't you?

23 A He was over on the telephone by the office.

24 Q And you also told that you observed him walking  
25 around the project?

1 A Yes.

2 Q And that evening being around the agents and police  
3 officers as they were taking tire casts over to where the  
4 car was and Karrie was walking around standing over them; is  
5 that correct?

6 A The man that was on the telephone was out walking  
7 around where they were taking evidence.

8 Q Why do you refer to him as "the man" if you knew he  
9 was Karrie Walker?

10 A Because at the time, I did not know his name.

11 Q You didn't know Karrie Walker's name at the time.  
12 You didn't know Kevin's name at the time either. All you  
13 knew really was you saw a very large round faced black man,  
14 get into a car, leaving in a hurry, getting stuck and you  
15 weren't able to tell who it was?

16 A I can tell you it was not Karrie Walker that was  
17 driving.

18 Q You could.

19 A There is a distinct difference between the two.

20 Q Well, you also told the police that, in fact, you  
21 saw Kevin Keith there that night and this is the fourth time  
22 you talked to them. Now, the first time you didn't say you  
23 saw Kevin Keith, the second time you didn't see Kevin Keith,  
24 and the third time. But the fourth time you saw Kevin  
25 Keith, and Karrie Walker standing at the telephone, both of

1 them at the office complex.

2 MR. WISEMAN: I will object unless he makes  
3 it clear what time frame we are talking about.

4 Q (Mr. Banks) Well, let me clear it up. February 13,  
5 that evening?

6 A Yes.

7 Q You said you saw one person at the phone booth,  
8 there was one man talking on the phone and one standing out  
9 by the car. And did you tell that to the police? Is that  
10 in your statement?

11 A No, at that time, I didn't see--

12 Q So on May 3rd, five days before the trial started,  
13 you told the police you remembered something; that there  
14 were two big men standing in the project, around the police  
15 and around the phone; is that correct?

16 A Yes. I remembered seeing them the night that it  
17 happened also.

18 Q But you didn't put that in your statement.

19 A At the time they took my statement and everything, I  
20 really had no idea what was going on. At the time that I  
21 seen him even stuck in that snow, that it was to me -- it  
22 was just something how the other people behave in the  
23 project.

24 Q Other people or other black people?

25 A Other people.

1 Q I will hand you Defendant's Exhibit Number 9. Now  
2 is this the statement that you gave to the police, and it  
3 was voluntary?

4 A Yes.

5 Q And you considered that to be truthful?

6 A Yes.

7 Q And complete?

8 A At that time, yes.

9 Q Okay. Can you show where you mentioned Karrie  
10 Walker, or Kevin Keith, and/or two large people standing  
11 together in that statement?

12 A I didn't mention any names. I didn't know the names  
13 at that time.

14 Q Let's talk about the large, round, husky black  
15 males. Did you identify two large black males in your  
16 statement?

17 A No.

18 Q And when you were asked, could you identify that  
19 person if you saw him again, what did you say?

20 A I don't understand what you are talking about.

21 Q You were asked, do you think you could identify this  
22 person if you saw him again, what did you say? Do you want  
23 to take a moment and read that?

24 A I don't see where you are at on this.

25 Q Why don't you take a moment and look and see if you

1 interfere with them or will you allow anyone to approach  
2 them while they are at the scene?

3 MR. BERAN: Yes sir, I do.

4 (The jury left to visit the scene at 10:02 a.m.  
5 and returned to the courtroom at 11:07 a.m.)

6 THE COURT: You may be seated. Ladies and  
7 gentlemen of the jury I would like to remind you of the  
8 instruction of the Court that I did give you concerning  
9 communications. Again, do not let anybody approach you  
10 concerning this matter and do not discuss this case among  
11 yourselves until after the final arguments and the  
12 instructions of law. And, of course, even though this was  
13 not evidence out there at the scene, this goes with that  
14 too. Please do not discuss what each one of you has  
15 observed and if someone attempts to do so, please report  
16 that to the Court.

17 Thank you. Call your first witness.

18 MR. WISEMAN: The State calls Christine  
19 Mullins.

20 THE COURT: Before they reach the courtroom,  
21 have John ask them if they object to being photographed?

22 THE BAILIFF: Yes.

23 THE COURT: Okay, the witness has objected  
24 to being photographed. There will be no photographs taken of  
25 her.

CHRISTINE MULLINS

Being called as a witness for the State, being first duly sworn in according to law by the Bailiff, was examined and testified as follows:

DIRECT-EXAMINATION

BY - MR. WISEMAN:

Q State your name for the record please.

Q And do you live here in Bucyrus?

A Yes, I do.

Q                    Are you employed?

A. Voss, T. am

Q Where are you employed?

## A. The Restaurant

Q And is that the Ike's Restaurant in Bucyrus on Route 4 south of Bucyrus?

2 Yes

Q            Were you employed at that restaurant on the 13th of February of 1994?

A Yes, I was.

Do you recall whether or not you worked that day?

A Yes, I did.

0 What shift please?

### Three to ten shift

During that shift did something unusual happen?

1 A Yes sir, it did.  
2 Q What was that please?  
3 A A man come in that was shot.  
4 Q What did you do when--  
5 A I called 911.  
6 Q Did you actually make contact with them?  
7 A Yes, I did.  
8 Q Did you talk to somebody on the phone?  
9 A Yes, I did.  
10 Q And what did you tell them?  
11 A I told them a man come in that was shot.  
12 MR. WISEMAN: Okay. Thank you very much.  
13 No further questions.

14 THE COURT: Mr. Banks?

15 CROSS-EXAMINATION

16 BY - MR. BANKS:

17 Q Miss Mullins, did you have any conversation with the  
18 man that was shot?  
19 A Yes, I did.  
20 Q And what did he inform you?  
21 A That he had been shot.  
22 Q Did he know who had shot him?  
23 A No, he didn't.  
24 Q Did he tell you what the person was wearing?  
25 A He said he was wearing a mask.

1 Q A ski mask?

2 A He didn't say, just a mask.

3 Q Did he mention any name at all?

4 A No.

5 MR. BANKS: Nothing further. Thank you.

6 MR. WISEMAN: Just a couple redirect in  
7 light of that.

8 REDIRECT-EXAMINATION

9 BY - MR WISEMAN:

10 Q Did you ask this individual these questions about  
11 what happened?

12 A Everybody there did, yes.

13 Q You didn't though?

14 A Yes, I did.

15 Q You did?

16 A Yes.

17 Q Did you specifically ask him if he knew who shot him  
18 and his response was a masked man?

19 A He just kept saying a masked man.

20 MR. WISEMAN: Thank you.

21 THE COURT: May this witness be excused?

22 MR. WISEMAN: Yes, Your Honor.

23 THE COURT: You are excused. Thank you.

24 MR. WISEMAN: Joy McClaren.

25 THE BAILIFF: No pictures, Your Honor.

1 Q Did you fill out a report about what you did that  
2 night?

3 A Yes, I did.

4 Q And you turned it in?

5 A Yes, that night I did.

6 Q And you took some witnesses statements?

7 A Yes. That would have been the next day, I took a  
8 witnesses statement or two.

9 Q And you also took Richard Warren's, the person you  
10 identified as being shot that was at Ike's when you arrived;  
11 is that correct?

12 A Yes.

13 Q And as a matter of fact, you stated in your report  
14 that he was coherent?

15 A Um hum.

16 Q And that he was conscious?

17 A Yes.

18 Q And also that you asked him often who had shot him?

19 A Yes.

20 Q And he told you he did not know who had shot him?

21 A That's correct.

22 Q He did not report any first name?

23 A No he did not.

24 Q And did he repeat a last name?

25 A No.

1 Q Did you talk to any of the nurses?

2 A Yes.

3 Q And what did they ask you?

4 A Same question, if I knew the guy, if I know who it  
5 was or his name.

6 Q And what did you tell them?

7 A I told them I knew his first name.

8 Q And what name did you use?

9 A Kevin.

10 Q And did you tell what he was wearing?

11 A Yes.

12 Q And what did you tell them?

13 A He was big and black and had a turtleneck shirt --  
14 to the best of my knowledge a turtleneck shirt pulled up  
15 over half his face.

16 Q Do you remember telling the police that the only way  
17 you could identify this man was by his build and size?

18 A I told them that I thought that would be the only  
19 way I would be able to identify him.

20 Q If you saw his face from the nose up and you saw his  
21 head because he didn't have a hat on, why would you say you  
22 could only identify him based on his build?

23 A Because I wasn't sure at that time if I would be  
24 able to recognize his face.

25 Q As a matter of fact, you didn't know what the last

1 A Jeffrey Augsburger.

2 Q Mr. Augsburger, where do you live?

3 A Bucyrus.

4 Q And where are you employed?

5 A Ike's Restaurant.

6 Q And I would like to direct your attention to  
7 February 13, 1994. Do you recall anything in particular  
8 happening that evening?

9 A I had come into the restaurant for a carry-out order  
10 and my cook came out of the back and said that there was a  
11 man bleeding at the back door. I went back there and nobody  
12 was there. And when I came out of the kitchen he was seated  
13 in the first booth.

14 Q Okay. Were you able to gather anything that he was  
15 saying as to who shot him?

16 A He just said he was masked and basically that's it.

17 Q Did he say he knew him or didn't know him?

18 MR. WISEMAN: Objection, leading.

19 MR. BANKS: I will take that back.

20 A At the time he said he didn't know.

21 Q He didn't know and wore a mask?

22 A Right.

23 Q Were you working that night or just at the  
24 restaurant?

25 A I was just at the restaurant.

1 one of the cooks was in the back and came running out,  
2 ranting and raving, "Call 911, someone's at the door.  
3 They're hurt."

4 I was standing close to the door, like at the cash  
5 register and a fellow stumbled in. He had been shot. He  
6 was bleeding. I was just totally in shock. I just stood  
7 there. Heavy and my manager helped sit him down in the  
8 first booth and I had my note book out and we were asking,  
9 "Where are you from? What happened?" And he said the  
10 apartment number and I couldn't understand anything he was  
11 hardly saying. He was asked, "Do you know who did this?"  
12 And he said, "No I do not. The guy had a mask." He said he  
13 did not know who did it to him.

14 He was in shock. I asked his name and I could not  
15 understand what he was saying. I guess I was in shock too.

16 Q I imagine it was a very traumatic experience. How  
17 much longer did you work there?

18 A I just quit as of the 31st of May.

19 MR. BANKS: Thank you. I have nothing  
20 further.

21 THE COURT: Any questions?

22 MR. WISEMAN: No questions, thank you.

23 THE COURT: You are excused.

24 MR. BANKS: We would call A [REDACTED] S [REDACTED] to  
25 the stand.

1 name was; did you?

2 A No, I didn't.

3 Q And the police called you that evening after you  
4 came out of surgery?

5 A Yes.

6 Q And what did they tell you?

7 A They asked me if I knew the name and I told them  
8 yes.

9 Q If you knew what name?

10 A The name of the guy who--

11 Q And what did you tell them?

12 A I did know the first name but I couldn't remember  
13 his last name.

14 Q And what did he say?

15 A They said, would you know it if you heard it? And I  
16 said I probably would.

17 Q And so what did they do?

18 A He asked me approximately four to five names,  
19 different last names.

20 Q Can you remember the names?

21 A I can only remember one was like Smith and one was  
22 Keith and a couple of other ones I don't remember.

23 Q Okay, so it was Smith and Keith and what did you  
24 tell him?

25 A I told him that it was Keith was the last name.

1 Q Did you write any letters to anyone or any notes?

2 A Yes, sir I did.

3 Q What did you do -- who did you write to?

4 A At first I tried to -- I couldn't talk and my hands  
5 were strapped down. So I tried to do sign language and none  
6 of the nurses knew it. When my father got there he  
7 translated my sign language to the nurses then they wrote it  
8 down on paper.

9 Q Okay, wait a minute, let's get this correct. You  
10 were using sign language because of your pain and coming out  
11 of surgery?

12 A Yes.

13 Q And Nurse Foor came up and the others and they  
14 didn't understand sign language?

15 A No one understood the sign language so it was  
16 translated by my father.

17 Q Your father translated the sign language?

18 A Yes.

19 Q And what did he translate?

20 A He translated the letters that I was signing.

21 Q The letters?

22 A That I was signing.

23 Q So you didn't write the word Kevin on a piece of  
24 paper for Nurse Foor?

25 A No, sir.

1 Q So you don't recall whether you mentioned the name  
2 to them or they mentioned it to you; do you?

3 A No, sir, I do not.

4 Q Now--

5 A Not on the phone. If I said that in a phone  
6 conversation, I don't remember.

7 Q Now, I think your earlier testimony was that the  
8 person that came in your apartment asked for a drink of  
9 water?

10 A Yes.

11 Q And he drank the water through his mask or--

12 A That's what it looked like to me.

13 Q Okay, was there a mouth piece opening to the mask?

14 A That's not what I seen -- not that I seen.

15 Q And you are sure it was a turtleneck pulled up over  
16 his nose?

17 A I'm not sure it was a turtleneck, that's what it  
18 appeared to be to me.

19 Q I would like you to look back at Defendant's Exhibit  
20 Number 8, which was one of your statements. Turn to page  
21 number 9. Your response to that question by Captain Corwin  
22 was, "And he drank through the mask, or through the shirt."  
23 Now, were you unsure at that time whether it was a mask or a  
24 shirt?

25 A Could you repeat the question.

1 A Well, specifically about his personal history: Did  
2 he have any family so we might try to get in contact with  
3 some family that might be related to him so we can inform  
4 them of his situation. And also I just asked if he had any  
5 idea who might have caused his injuries?

6 Q And what were his responses?

7 A Well, at the time Mr. Warren was not able to speak  
8 because he was on the ventilator, post operatively. And he  
9 initially tried to communicate by sign language and wasn't  
10 successful. So I was able to get a clipboard and a piece of  
11 paper and he wrote out the information.

12 Q What did he write, specifically in relation to the  
13 incident?

14 A He said that he felt the first name of the person  
15 was Kevin, that's all he knew. He did not know the last  
16 name or anything like that.

17 Q What time of day was it when this happened?

18 A Specifically, it was in the early morning hours, a  
19 couple of hours after the operations and so forth. Sometime  
20 around 5:00 a.m. I believe that I charted -- that I started  
21 writing notes around 5:00 in the morning -- medical records.

22 Q Did he have contact with anybody other than you or  
23 medical personal from the hospital from the time he left  
24 surgery until -- while you were with him?

25 A No, not in the communicative sense.

MR. WISEMAN: Mr. Foor thank you very much for your testimony. No further questions.

CROSS-REBUTTAL EXAMINATION

BY - MR. BANKS:

Q           Mr. Foor, what would you say if I told you  
Mr. Warren said he never wrote anything down?

A Well, he did write something down.

Q            And how long have you been a nurse?

A Since 1984.

Q And did you consider his condition to be life threatening that evening?

A At any time anybody is in the critical care unit, their situation is such that it could be life threatening.

Q So it was critical the information that he was writing down, enough for you to communicate back to someone else?

A Yes, sir.

Q And, in fact, what did you do with the note?

A It was with the patient's chart there and was just on a piece of scratch paper.

Q Did you write it down in the notes, specifically what the patient said?

A No.

Q We have a death and life situation and a person has identified a first name of the person, wrote it on a piece

1 of paper and gave it to you and you did not keep that piece  
2 of paper; did you?

3 A No, I did not.

4 Q Nor did you write any of this conversation down  
5 anywhere in the medical records or the notes; did you?

6 A What I wrote down was "patient is writing a note."

7 Q Would you like to find that for me?

8 MR. BANKS: May I approach, Your Honor.

9 These are the medical records that were delivered from the  
10 hospital.

11 THE COURT: Are those marked?

12 MR. BANKS: No, but we can mark them.

13 THE COURT: Well, let him go through the  
14 records and what he testifies from, we will mark that  
15 specifically.

16 MR. BANKS: Yes, Your Honor.

17 A Here it is on the nursing notes. Note 0500 on  
18 February 14th under the narrative observations which is part  
19 of the record, "Alert and oriented, cooperative, Kistrea's,  
20 writing notes. And the doctor, he mentions wrote down the  
21 name Kevin.

22 Q But that is not recorded here.

23 Would you mark this please.

24

25

1 (Defendant's Exhibit 22 was marked for  
2 identification by the court reporter.)

3 Q You are saying he was coherent, alert, and writing  
4 notes?

5 A That's correct.

6 Q And that was important to you to state his  
7 condition?

8 A Yes.

9 Q And it was important also, enough for you to call  
10 and say that he had written down the name Kevin?

11 A Yes, I called.

12 Q And informed the Bucyrus Police Department of that  
13 information?

14 A Right.

15 Q And you didn't keep the note or the piece of paper  
16 he wrote it on?

17 A No, I didn't.

18 Q And you didn't say what was in the note in your  
19 narrative; did you?

20 A Not what it said specifically, no.

21 0 you didn't think it was important enough to--

22 MR. WISEMAN: Objection, Your Honor.

23 THE COURT: Objection is sustained.  
24 Q (Mr. Banks) Your training from the other hospitals  
25 and prior to your being employed at Grant, isn't it true



4



1

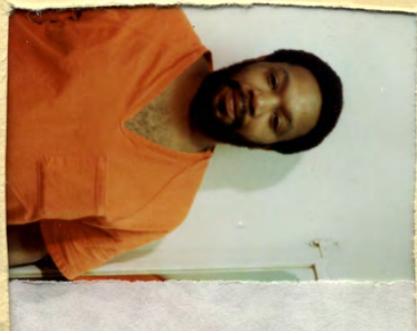


5



2

7  
DEFENDANT'S  
EXHIBIT



6



3

OHIO  
NEWS BUREAU INC.  
CLEVELAND, OHIO 44115  
216/241-0675

BUCYRUS TELEGRAPH FORUM  
BUCYRUS, OH.  
PM CIRC. 7,970

APR-18-94

249

## Triple murder suspect's drug trial delayed

By RHONDA RARICK

T-F Staff Writer

Murder suspect Kevin Keith was granted a continuance today in a drug case alleged as the motive in a Feb. 13 shooting spree which left three people dead and three wounded.

Keith, 30, 1010 Seltzer St., Crestline, was scheduled for a jury trial Tuesday on four counts of aggravated trafficking in drugs.

Common Pleas Judge Nelfred Kimerline today granted a defense motion for a continuance. Keith is still scheduled to stand trial May 10 on three counts of aggravated murder and three counts of attempted murder.

Columbus attorney James H. Banks represents Keith on both cases. Banks requested a continuance on the drug case, saying he was not ready for trial.

Kimerline granted the continuance this morning during a pre-arranged conference telephone call with Banks. County Prosecutor Russ Wiseman was in the judge's chambers when Banks made the request. Wiseman said he was prepared for tomorrow's trial.

Keith was indicted in January on four third-degree felonies alleging he sold cocaine. The drug case is alleged as the motive behind the murders in February.

The theory is that Keith shot relatives of the police informant in the drug case to send a message to the informant.

The shootings occurred at the Bucyrus Estates apartment of 24-year-old Marichell D. Chatman, 1712 Marion Road. She was the sister of alleged informant Rudel Chatman.

Killed were Marichell, her 4-year-old daughter, Marchae D. Chatman, same address, and Marichell's aunt, Linda J. Chatman, 39, 826 Wilbur St.

Seriously wounded were Marichell's live-in boyfriend, Richard Warren, 23, and two other children, Quentin Reeves, 4, and his sister, Quanita, 7, 116 N. Pearl St., Crestline.

Marichell was babysitting the Reeves children and Linda Chatman had stopped by to pick them up prior to the shootings.

The children's mother, Joyce Reeves, was the sister of Linda Chatman and an aunt to Marichell and Marchae. Keith has said that the children's father, Demetrius Reeves, was a good friend.

Demetrius Reeves was among five area men included in a 99-count indictment filed April 6 in Franklin County Common Pleas Court in connection with a series of statewide pharmacy break-ins.

Reeves was charged with engaging in a pattern of corrupt activity, theft, breaking and entering and vandalism.

Keith was among nine people arrested Jan. 21 on indictments for selling cocaine and marijuana. He was out on a \$10,000 bond when the shootings occurred.

He is charged with selling 350 grams of cocaine Aug. 27, 276 grams Aug. 31, 1,609 grams Sept. 2 and .342 grams Sept. 3.

Keith's uncle, Gene Keith Sr., 56, 716 Scott St., and cousin, Gene Keith Jr., 27, 1077 County Line Road, Crestline, were indicted by the same grand jury.

Gene Keith Sr. was indicted on three counts of aggravated trafficking in drugs for allegedly selling cocaine.

His son is charged with five counts of aggravated trafficking in drugs for allegedly selling cocaine in August and September.

Kevin Keith has been held in the county jail under a \$1 million bond since his Feb. 15 arrest. He was indicted by a special session of the grand jury Feb. 22 on six counts of murder and attempted murder.

Keith could face the death penalty if convicted of the murder charges. He has said he was at his aunt and uncle's house, the home of Gene Keith Sr., at the time of the shootings.



Page: 42  
Case # 94-1043  
Date: April, 1994

**CHARGES REQUESTED:**

**RODNEY MELTON**

**08/16/93 - Knisley's Pharmacy, Ross County,**

Count # 1      Breaking and Entering  
Count # 2      Vandalism  
                    Dollar Value in Damages =  
Count # 3      Theft of Drugs  
                    Dollar Value of theft = \$2,865.82

Evidence      Testimony of Jim Parker  
                    Initial Police Report from Ross Co. S/O  
                    DEA Theft Report from Pharmacy

**08/20/93 - Blake Pharmacy, Adams County**

Count # 4      Breaking and Entering  
Count # 5      Vandalism  
                    Dollar Value in Damages =  
Count # 6      Theft of Drugs  
                    Dollar Value of theft = \$200.00

Evidence      Testimony of Jim Parker  
                    Initial Police Report from Adams Co. S/O  
                    DEA Theft Report from Pharmacy

**08/22/93 - Winchester Pharmacy, Adams County**

Count # 7      Breaking and Entering  
Count # 8      Vandalism  
                    Dollar Value in Damages = \$1,215.82  
Count # 9      Theft of Drugs  
                    Dollar Value of theft = \$1,100.00

Evidence      Testimony of Jim Parker  
                    Initial Police Report from Adams Co. S/O  
                    DEA Theft Report from Pharmacy

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Page: 43  
Case # 94-1043  
Date: April, 1994

10/29/93 Blackers Pharmacy, Perry County

Count # 10      Breaking and Entering  
Count # 11      Vandalism  
                    Dollar Value in Damages = \$1,705.60  
Count # 12      Theft of Drugs  
                    Dollar Value of theft = \$3,738.43  
  
Evidence              Confession of Bruce Melton  
                    Testimony and Confession of Jim Parker  
                    Initial Police Report from the Crooksville Police Department  
                    DEA Theft Report from Pharmacy

12/15/93 - David's Pharmacy, Fairfield Co.

Count # 13      Breaking and Entering  
Count # 14      Vandalism  
                    Dollar Value in Damages = \$500.00  
Count # 15      Theft of Drugs  
                    Dollar Value of theft = \$600.00  
  
Evidence              Testimony and confession of Jim Parker  
                    Initial Police Report from Lancaster P.D.  
                    Theft Report from Lancaster PD  
                    Tape Recording and transcript between CI # 1 and Bruce Melton

01/26/94 - Drug Buy CI # 1, Vicodin ES

Count # 16      Aggravated Drug Trafficking ( schedule III Controlled Substance )  
  
Evidence              54 white tablets scored Vicodin ES  
                    Lab Report from Metrich Crime Lab  
                    Testimony of CI # 1  
                    Testimony of Detective Julie Finkle Franklin Co. S/O

01/26/94 - Drug Buy CI # 1, Methylphenidate

Count # 17      Aggravated Drug Trafficking ( schedule II Controlled Substance )  
  
Evidence              170 white tablets scored MD562  
                    Lab Report from Metrich Crime Lab  
                    Testimony of CI # 1  
                    Testimony of Detective Julie Finkle Franklin Co. S/O

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GET Q. HICKMAN MIGHT HAVE A COUPLE QUESTIONS FOR YOU ABOUT THIS, I'M SURE YOU'VE SEEN THE NEWSPAPER ARTICLES AND THE TV REPORTS AND THOSE TYPES OF THINGS ABOUT WHAT HAPPENED UP IN BUCYRUS. YOU KNOW ANYTHING ABOUT ANY OF THAT? BE TOTALLY HONES

PARKER A. TO BE TOTALLY HONEST WITH YOU, I THINK THE GUY, IF HE DIDN'T DO IT HIMSELF, HE KNOWS WHO DONE IT, BECAUSE I KNOW, FOR SURE, RUDELL TOOK MIKE HOOVER TO SEE TERRY'S HOUSE TO BUY HEROIN. HOOVY'S REAL STUPID. FUCKIN' RUDELL IS INTO COCAINE. WE KNOW ABOUT RUDELL, YOU KNOW? YOU MIGHT AS WELL KEEP HIM UNDER WRAPS OR WHATEVER YOU'RE GONNA DO WITH HIM, JERRY, YOU KNOW? 'CAUSE HE'S DONE AROUND HERE. NOW, I JUST, I TOLD HOOVY, HOOVY TOLD ME HE TOOK HIM OUT THERE AND I GO "HOOVY, MAN..."

PADGET Q. YOU'RE GONNA HAVE TO PROBABLY DIRECT THIS, THIS TO THESE GUYS, 'CAUSE I'M NOT.

HICKMAN Q. WELL, QUESTION WAS IF YOU KNEW ANYTHING ABOUT...

PARKER A. THE KILLINGS.

HICKMAN Q. AND WHO WAS RESPONSIBLE FOR IT.

PARKER A. MAN, IF I DID, I'D TELL YOU GUYS. IF THERE'S ANYTHING I CAN DO, MAN, 'CAUSE, YOU KNOW, YOU KNOW HOW I AM. I'M NO THIEF, I'M NO MURDERER; I JUST GOT A DRUG PROBLEM.

HICKMAN Q. YOU HAVEN'T HEARD ANYTHING?

PARKER A. I HEARD, WELL, BRUCE...

HICKMAN Q. OR YOU DON'T KNOW ANYTHING?

PARKER A. BRUCE, BRUCE SAID, HE GOES "I DON'T KNOW, THE GUY COULDA SNAPPED AND DONE IT," BECAUSE OF COCAINE. BUT, YOU KNOW, IF THE GUY DIDN'T DO IT HIMSELF, I KNOW RODNEY MELTON, I HEARD, WAS OFFERED \$5,000.00 TO OFF RUDELL.

HICKMAN Q. WHO'D YOU HEAR THAT FROM?

PARKER A. BRUCE. SO, BUT I DON'T THINK RODNEY DID IT; I DON'T THINK.

HICKMAN Q. WHO OFFERED HIM MONEY?

PARKER A. I, I GUESS ONE OF THE KEITHS OR KEVIN, HIMSELF. I DON'T KNOW. BUT, IF THERE'S ANYTHING I CAN DO THERE, THAT'S, THAT'S WRONG, MAN.

PADGET Q. OKAY, WELL, I DON'T THINK I HAVE ANY QUESTIONS, ANY MORE QUESTIONS, RIGHT NOW; THAT'S NOT TO SAY THAT SOON, IN THE FUTURE, I MAY NOT, SOMETHING MAY COME UP I MAY NEED TO ASK YOU ABOUT, AND I'D LIKE TO KEEP THE DOOR OPEN TO BE ABLE TO DO THAT; IS THAT OKAY WITH YOU?

PARKER A. THAT'S FINE.

PADGET Q. YOU HAVE ANYTHING ELSE YOU'D LIKE TO ADD?

PARKER A. NO.

PADGET Q. LT., ANYTHING? JERRY? OKAY, WITH THAT, WE'LL CONCLUDE THE INTERVIEW OF JIM PARKER. IT'S 4:25PM, FEBRUARY 4, 1994. I'M SORRY, CORRECTION ON THAT, MARCH 4, 1994.

1 A And Kevin Keith.  
2 Q What time-- Kevin didn't live with you did he?  
3 A No.  
4 Q What time did you see Kevin that evening?  
5 A I seen Kevin at 9:00 O'clock by my watch.  
6 Q And how do you know that?  
7 A I looked at my watch.  
8 Q Why did you look at your watch?  
9 A I usually do most of the time when somebody's in the  
10 house. You hear somebody talking, I looked at my watch.  
11 Q Do you know what time Kevin came to your house that  
12 night?  
13 A No, I don't.  
14 Q Did he speak to you that evening?  
15 A Yes, he did.  
16 Q What did he say?  
17 A Hi, Gracie May.  
18 Q Gracie what?  
19 A Gracie May.  
20 Q And where were you at the time in your house?  
21 A I was in the bedroom.  
22 Q And how is that located in your house in relation to  
23 your front door or your back door?  
24 A The front.  
25 Q Did you physically see him that evening?

1 A Yes, I did.

2 Q And it is your testimony that he was present at your  
3 house at 9:00 O'clock that evening?

4 A Yes, sir.

5 Q And you don't know what time he arrived?

6 A No, I don't.

7 Q Do you know when he left?

8 A No, I don't.

9 Q Okay, and when he hollered, "Hi Gracie May," you say  
10 you looked at your watch?

11 A Yes.

12 Q Did you have any other conversations with him that  
13 evening?

14 A No, I didn't.

15 Q Do you go to church Mrs. Keith?

16 A Yes, I do.

17 MR. WISEMAN: Objection.

18 THE COURT: Sustained.

19 Q (Mr. Banks) Do you have any reason or would you lie  
20 for Kevin Keith?

21 MR. WISEMAN: Objection.

22 THE COURT: Sustained.

23 A No, sir.

24 MR. WISEMAN: Objection. May we approach  
25 the Bench, Your Honor.

4 MR. WISEMAN: You ruled on the first one and  
5 your ruling was based on the law presumes a witness is  
6 telling the truth, number one.

7 MR. BANKS: Sure.

8 MR. WISEMAN: And it does not have to be  
9 bolstered by their religious beliefs.

10 And her having a reason to lie, that is for the jury  
11 to determine.

12 MR. BANKS: But I should be able to ask,  
13 would you lie if she is the type of person that would come  
14 in and tell a lie for him.

15 MR. WISEMAN: I disagree you are bolstering  
16 a witness and it is very highly prejudicial.

17 THE COURT: I am not going to allow it. You  
18 can ask if she is telling the truth and always tells the  
19 truth.

20 (The following proceedings was done in the  
21 presence of the jury:)

22 Q (Mr. Banks) Mrs. Keith you know you took an oath  
23 here today and you are under oath?

24 A Yes.

25 O Are you telling the truth as you sit there on the

1 stand?

2 A Yes, I am.

3 Q And have you always told the truth?

4 A I don't know about that now. I try to.

5 MR. BANKS: Thank you very much.

6 CROSS-EXAMINATION

7 BY - MR. WISEMAN:

8 Q Mrs. Keith do you remember giving an interview to  
9 the T.V. people shortly after the murder?

10 A Do I what?

11 Q Remember giving an interview to the T.V. people  
12 shortly after the--

13 A Yes.

14 Q Do you remember what you said? Do you remember  
15 being asked or requested to give the exact time he was with  
16 you?

17 A Yes, I do.

18 Q And do you remember saying, "Well I didn't pay no  
19 attention to that part of it." And now under oath you are  
20 saying he was at your house around 9:00 O'clock. And you  
21 said, "My son said he came and borrowed \$5.00 from him"?

22 A Yes.

23 Q Excuse me?

24 A I said yes.

25 Q And do you remember in response to the question,

1 "You are saying he was with you during the time of the  
2 killing?" and your answer being, "I can't say that cause I  
3 don't know what time it was, not more than what I seen in  
4 the news and paper, that's all I know."

5 Do you remember--

6 A I didn't say all that.

7 Q You didn't say that?

8 A No.

9 MR. WISEMAN: Thank you.

10 REDIRECT-EXAMINATION

11 BY - MR. BANKS:

12 Q You didn't have any knowledge that evening what time  
13 the killings were; did you?

14 A No.

15 MR. BANKS: Thank you, I have nothing  
16 further.

17 THE COURT: You are excused.

18 MR. BANKS: You can get down Mrs. Keith.

19 Your Honor we call Judith Rogers to the Stand.

20 THE BAILIFF: She does object.

21 THE COURT: She does object to photographs  
22 being taken of her.

23 JUDITH ROGERS

24 Called as a witness by the Defendant, being first  
25 duly sworn in according to law by the Bailiff, was examined

1 and testified as follows:

2 DIRECT-EXAMINATION

3 BY - MR. BANKS:

4 Q Please state your name for the record.

5 A Judith Rogers.

6 Q And Ms. Rogers where do you reside?

7 A [REDACTED]

8 Q And where is that located?

9 A In Mansfield.

10 Q And how long have you lived there?

11 A Since October of last year.

12 Q Do you have any children?

13 A I have two.

14 Q And what are their ages?

15 A Thirteen and 14 months.

16 Q Do you know a Melanie Davison?

17 A Yes, sir, I do.

18 Q And how do you know her?

19 A She lives up over me.

20 Q I would like to bring your attention to the 13th of  
21 February 1994. Do you recall that date?

22 A Yes, sir, I do.

23 Q How do you recall that date?

24 A Well, that day was a Sunday.

25 MR. WISEMAN: Could you speak up please.

1 A Excuse me. It was on Sunday and I was -- well I  
2 was-- I wanted to use the phone upstairs. So I went  
3 upstairs to use the phone and Kevin opened the door and let  
4 me in. I went to call my mother about my older son being  
5 out and I wanted to know why he wasn't in preparing for  
6 school.

7 Q What time was this on Sunday?

8 A Approximately 8:30.

9 Q In the evening?

10 A Yes, sir.

11 Q And then what did you do the rest of that evening?

12 A Well, I went back downstairs after I talked to my  
13 mother. And about 8:45 I seen Melanie and Kevin leaving  
14 cause I was watching in the living color.

15 Q You were watching a living color?

16 A It was Living Single.

17 Q Do you know what time that comes on?

18 A Yes, sir.

19 Q What time did it come on?

20 A At 8:30.

21 Q Now you said that you watched Melanie Davison and  
22 Kevin Keith leave?

23 A Yes, sir.

24 Q Leave the apartment?

25 A Yes, sir, I did.

1 A Yes, I was.  
2 Q How long have you lived at that Crestline address?  
3 A About 21 or 22 years, something like that.  
4 Q Have you been in trouble with the law?  
5 A Once.  
6 Q And what was that, a felony?  
7 A What?  
8 Q Was it a felony?  
9 A No.  
10 Q Okay. I would like to bring your attention to  
11 February 13, 1994 the night of the murders. Are you related  
12 to Kevin Keith?  
13 A I'm his aunt by marriage.  
14 Q And who is his uncle?  
15 A Gene.  
16 Q How long have you been married to him?  
17 A About seven, eight years -- about seven years.  
18 Q Going back to February 13th the night of the  
19 murders, could you tell us where you were?  
20 A I was home.  
21 Q And could you tell us who -- well who was home with  
22 you?  
23 A Well Jolanda Price, Dwayne Price and some girl,  
24 Zena -- I don't know what her last name is.  
25 Q Anyone else?

**In re: State of Ohio v. Kevin Keith**

AFFIDAVIT OF YOLANDA PRICE

IN THE STATE OF OHIO )  
COUNTY OF RICHLAND ) ss )

I, Yolanda Price, after being duly sworn according to the law state as follows:

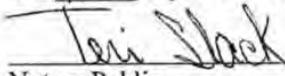
- 1) I used to live in Crestline, Ohio, and I know Kevin Keith and Rodney Melton. I lived in Crestline for around 8-10 years, and then I moved to Mansfield. I lived in Mansfield at the time the murders occurred at the Bucyrus Estates.
- 2) On February 13, 1994, the night that the murders occurred, I was visiting Gracie Keith at her house in Crestline. I was there with my kids. I remember that other people were there, too; I specifically remember that Roy Price, Grace Keith, and Gene Keith were there.
- 3) I specifically recall that Kevin came to Gracie's house that night. Because so many years have passed, I can't recall the exact time that I saw Kevin at Gracie's house. I do know, however, that it was after 8 p.m. and before 9 p.m. on the night the murders occurred.
- 4) I remember that Kevin came in borrowed \$5 from Roy. Kevin's girlfriend, Melanie Davison, was outside in the car, and my kids were outside talking to Melanie.
- 5) I remember that was the first time I had seen Melanie. I knew Zina Scott, Kevin's fiancé, because Zina and I had worked together at one point. I noticed that Kevin and Melanie had driven there in Zina Scott's car. Zina's car was a blue, small car.
- 6) I didn't stay at Grace's house much longer after Kevin and Melanie left. I drove back to Mansfield, and I remember that I found out about the murders right when I walked in the door to my house. I remember that it was around 9:30 p.m.
- 7) After I found out about the murders, I remembered something that Rodney Melton had said in front of me two weeks earlier. About two weeks before the murders, I heard Rodney say, "if Rudel ever snitched on me, I'd kill him." I said to Rodney, "that's your nephew," and he looked at me very seriously and said "I'd kill him."
- 8) I also remember seeing Rodney and Bruce Melton dressed alike, wearing dark camouflage-type clothing. I believe that this was the night of the murders, but I cannot be completely sure.



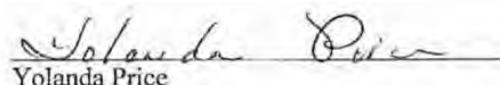
- 9) Rodney was always with his brother Bruce. Whenever you'd see one, you'd see the other. They were different with each other than with their other brother and sisters. It was just Rodney and Bruce who were always together.
- 10) I have never seen Rodney Melton and Kevin Keith together. From my years living in and then visiting Crestline, I recall that Kevin generally hung around his family or Zina Scott.
- 11) Over all these years, none of Kevin's attorneys had ever contacted me. I was asked by the father of the 5-year-old victim, Marchae Chatman, to look into this case. I have been in contact a lot with Kevin's brother Charles Keith over the years, because Charles was the one that I knew was working on getting Kevin out of prison. Kevin's attorneys never bothered to call me, and I don't feel that they investigated anything or interviewed anyone.
- 12) I have no relation whatsoever to Kevin Keith or Rodney Melton. My children are related to the Chatman family, through their father's side. I certainly have no reason to lie for Kevin Keith.
- 13) I believe that Kevin Keith is innocent.

Further affiant sayeth naught.

Sworn to and subscribed in my presence  
this 11<sup>th</sup> day of March, 2010.

  
Teri Slack

Notary Public

  
Yolanda Price

3-11-10  
Date



DATE 03-05-94 TIME 11:00PM. PLT: BUCYRUS POLICE DEPARTMENT Bucyrus, Ohio

MELANIE JUANA DAVISON as 26 years old. My Date of Birth is [REDACTED]

Address: [REDACTED] MANSFIELD, Ohio 44902

Phone #: [REDACTED] My SSN #: [REDACTED]

am giving this statement to Capt. M. L. Corwin I.D. 407

I do hereby knowingly, intelligently and voluntarily make the following statement at my own free will and without any promises or offers of leniency or favors and without compulsion or persuasion by any person or persons whomsoever:

Q: How long have you known Kevin Keith?

A: Since January of 1993.

Q: What kind of relationship do you have with Kevin?

A: Serious relationship.

Q: How often do you see Kevin?

A: Usually saw him everyday until he was arrested.

Q: How long have you been using your Grandfather's Oldsmobile, license number MVR 0437

A: Off and on since the Fall school Quarter of 1993.

Q: Has Kevin ever used the car?

A: No.

Q: Has he ever been in it?

A: I'm not sure, we took one of my Grandfather's car to Canton in late January or early February to check on my broken down car, a white 1984 Oldsmobile Cutlass Cierra 4dr., brougham, that Kevin had taken to Canton to try to sell for me. I can't remember which one of Grudpa's cars we took.

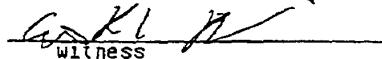
Q: Did you see Kevin on Sunday, February 13, 1994?

A: Yes.

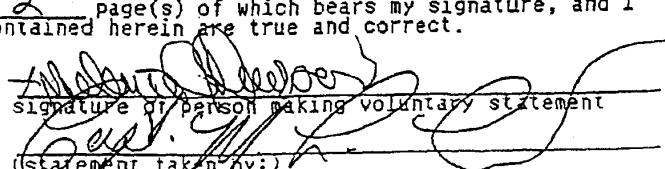
Q: Tell me what happened that day?

A: I called Kevin around 6PM. at his home in Crestline and told him to come to dinner. He got to my house around 7PM. and we stood at the window in the Kitch and watched a drunk driver being stooped on the hill on Franklin St. by my house. Saw the police put the man in car #10, there were bottles ontop of the car the man was driving. We got tired of watching this and put supper on the table and we ate. After we got done eating, around 7:40PM. Kevin went in the bedroom and unzipped his pants and laid down and then my kids ate. I laid down on the bed beside him and we took a nap and I got up around 8:25PM. that's the time that was on the HBO box. I got up and told Kevin I'd be right back and took his car keys off the dresser and drove his Dynasty to my mom's house and talked to her very briefly and borrowed money and went through the Drive Through on Diamond St. and got some Michelob beer, a quart. Went home and put the beer on the kitchen table and Kevin set straight up in bed and said "lets ride". My two children were asleep and 10 year old Terrance was wacthing TV and I told him not to answer the door and I'd sand if anyone called to tell them mommy would get back with them. We then left with Kevin driving and went to Crestline and got to his aunt Gracie's house around 9:00PM., we had left Mansfield about 8:45PM. At his aunt's house I stayed in the car and Kevin went in for about 10 minutes and then came back out and we went back to my house and went back inside to my bedroom and the clock on the HBO box said 9:25PM. I got a call on my cordless phone from a close male friend and I told him I didn't have time to talk because my Honey was there and hung up and then we laid down on the bed and I asked Kevin to hold me and we fell asleep. I was awakened by him saying he had to go get his girl and I was laying on his arm.

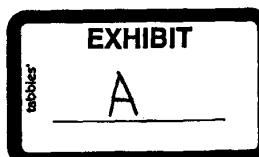
I have read this statement consisting of 2 page(s) of which bears my signature, and I do affirm that all facts and statements contained herein are true and correct.

  
witness

Witness

  
Signature of person making voluntary statement

(Statement taken by:)



as 26 years old. My Date of Birth is [REDACTED]  
[REDACTED] MANSFIELD, Ohio 44902

Phone #: [REDACTED] My SSN#: [REDACTED]

ing this statement to Capt. M. L. CORWIN I.D. 407  
I do hereby knowingly, intelligently and voluntarily make the following statement at my own free will and without any  
offers of leniency or favors and without compulsion or persuasion by any person or persons whatsoever:

CONTINUED:

followed him to the door and made him tie his shoes, and he left about 10:20  
M. TO get Zina Scott at work. He then came back to my house at Midnight and  
issed me good night, which was not unusual. He made a phone call to someone  
nd asked "are my people still there" By his expression on the phone he was  
leased with the answer and then said "GOT A GO, GOT A GO" and then he left.  
Did you see him on Monday, February 14, 1994?

saw him between noon and 1PM. when I was going to get my foodstamps and he  
dropped me off and said he had to go see his attorney at "POET's" lounge  
ad that he'd be by after he was done. He came over at 3PM. and said he was  
going to Akron to get some statues or fabris for his business and wanted to  
know if I wanted to ride along and I couldn't because my kids were coming  
ome. He came back at 9:30PM. with a rose and card in hand and then he had  
to leave at 10:15PM. to get Zina and we made arrangements to go somewhere on  
uesday because we were supposed to be together the whole day monday for  
valentine's day and we couldn't so I was upset. I never saw him on Tuesday.  
here was your Grandfather's Oldsmobile on Sunday the 13th of February?  
at his house.

hat was Kevin wearing on Sunday the 13th?

light colored pair of jeans and a gold shirt, like acid washed jeans, real  
ight. Gold and black underwear, he calls them his "bitch drawers". His  
black boots, the ones he took the strings out of in January, pair of white  
ocks.

o you know anything about the murders here in Bucyrus, Ohio on 02/13/94?  
o sir, not other than what I've read in the newspapers.

ad you ever hear Kevin mention them?

ly that Zina told him that somebody "done shot up the Chatman's".

there anything else you want to say?

sir.

Are you advised of your rights and did you completely understand them before  
king this statement?

ls.

ead this statement consisting of 2 page(s) of which bears my signature, and I  
m that all facts and statements contained herein are true and correct.

KEVIN KEITH  
ess

KEVIN KEITH  
Signature of person making voluntary statement

Capt. M. L. CORWIN  
(Statement taken by:)

1 A It was a light cream color but I couldn't, you know,  
2 with the lights and stuff, see the exact color. I know it  
3 was a white, cream, light yellow.

4 Q Okay, and it was a large black male?

5 A Yes.

6 Q And he had on a hat?

7 A Yes.

8 Q Had no gloves on?

9 A Right.

10 Q You said his face was not covered?

11 A Right.

12 Q But you told them you could not identify that man;  
13 didn't you?

14 A That night at that time, no I couldn't.

15 Q As a matter of fact you said that you saw his face,  
16 but it was so dark that you only could recognize a mustache  
17 or facial hair?

18 A I couldn't see distinct features like the color of  
19 his eyes.

20 Q You saw the form of a big man?

21 A I seen, it's not exactly features but I seen the  
22 shape -- the head shape of the man.

23 Q But you told them that you weren't close enough to  
24 see the color of his eyes. You couldn't make out distinct  
25 details about who the person was; could you?

1 A At that point, after we spoke to Deputy Robertson  
2 and he spoke to Captain Corwin, Captain Corwin asked for the  
3 car to be impounded.

4 Q And was that done?

5 A Yes, that was.

6 Q And where was the vehicle taken to?

7 A The holding place over across the street from the  
8 Police Department and we call it the fire barn and secured  
9 it over there.

10 Q And when you say secured it, do you mean locked it  
11 up?

12 A Right.

13 Q Do you know what kind of vehicle it was that was  
14 impounded?

15 A It's an Omega.

16 Q What year, please.

17 A An '82.

18 Q Do you know who the registered owner was?

19 A I really can't remember right now.

20 MR. WISEMAN: Thank you officer, I have no  
21 further questions, Your Honor.

22 MR. BANKS: No questions, Your Honor.

23 THE COURT: You are excused.

24 MR. WISEMAN: Farnella Graham.

25 THE BAILIFF: No objection.

1 anything about the final analysis of anything that was  
2 submitted with your initials on and that you are here merely  
3 to testify about what you did at the scene and what you  
4 carried to BCI?

5 A That's not correct. I told you here, and I  
6 testified I have had numerous conversations with Captain  
7 Corwin and Captain Blankenship--

8 Q I am talking about BCI Mr. Hardin, the people that  
9 work with you over there? I didn't mention Captain Corwin  
10 or Captain Blankenship at all. I want to know at BCI,  
11 people in your building at your facility that did the  
12 analyses?

13 A I told you about that.

14 Q You don't have any information from any of them?

15 A No.

16 Q Good. Now, you were called out again or appeared  
17 again, you appeared on March 10, 1994?

18 A No, that is not correct.

19 Q When did you appear?

20 A I was requested on March 7th.

21 Q When did you finally get here?

22 A March 7th that's when I got there.

23 Q And for what purpose again?

24 A To process a 1982 Oldsmobile Omega, four door,  
25 bearing Ohio registration Mary Victor Robert 043.

1 A Yes.

2 Q And it was an Oldsmobile?

3 A Yes.

4 Q And in fact, the same tires you purchased would have  
5 fit her car?

6 A Yes.

7 Q Now, did your granddaughter work?

8 A She goes to college.

9 Q Okay, how did she live to support herself?

10 A She's on some sort of program that helps her go to  
11 college is all I know.

12 Q Does she have any children?

13 A Three.

14 Q Was she on public assistance or Welfare?

15 A I would imagine. I'm sure she didn't have a job.

16 Q Do you help her financially?

17 A I try. I was trying to help her keep her car going  
18 so she could use it to go to school with.

19 Q Do you know whether her car needed any tires?

20 A No, sir, I don't.

21 Q Did you notice, in fact, your car-- I'm sorry.

22 Strike that.

23 What color is that car?

24 A Green.

25 Q Pardon me?

1 A It's green.

2 Q Have you noticed the tires from the time you bought  
3 them, and I believe you purchased the car in June of '93; is  
4 that correct?

5 A Yes.

6 Q And you purchased the tires in August?

7 A Right.

8 Q Two months later?

9 A Right.

10 Q Have you watched the car and the tires since that  
11 time to see if they have been changed or when they were?

12 A No, I have not.

13 Q Do you know for a fact yourself, whether or not the  
14 tires have been changed?

15 A I do not.

16 Q Did your granddaughter ever tell you that she used  
17 the tires or changed the tires or tell you she put the tires  
18 on her car?

19 A No.

20 Q Have you since been contacted by the police checking  
21 your car for the mileage?

22 A I don't have the car, sir.

23 Q You haven't had the car since when?

24 A Somewhere near the middle of February.

25 Q So about three months?



1 A To do a comparison, yes, sir.

2 Q So you can't say and my question is, the license  
3 plates you are looking at in Defendant's Exhibit Number 5  
4 could be excluded as being the license plate or car with the  
5 license plate that made that impression; could you?

6 A I can't make any statement related to those at all,  
7 including or excluding them.

8 Q Now, you did more than just a tire and license  
9 analysis, didn't you, in your report and examination?

10 A That's right.

11 Q As a matter of fact, you were asked as to your  
12 report, C7: received a sealed evidence envelope containing  
13 glass samples from storm door window frame. Is that  
14 correct?

15 A That's correct.

16 Q And what did you find from the examination of that  
17 evidence?

18 A That was submitted as standards for comparison for  
19 any glass that might be found on certain other items.

20 Q Did you find any of that glass in the car with the  
21 license number 043 that you have identified in the Exhibit  
22 for the State?

23 A No, sir, I did not.

24 Q Then you were also asked as to number C8: sealed  
25 evidence bag containing carpet sample. Can you tell us what

1 you did with that?

2 A Again, that was submitted as a standard for  
3 comparison.

4 Q And where did it come from do you know?

5 A I can't tell you off hand other than it was  
6 submitted as a standard from I believe the residence.

7 Q What did you compare it to or analyze it for?

8 A I used it as a standard for comparison with any  
9 samples from sweepings to see if, in fact, any fibers would  
10 coincide with the samples in that standard.

11 Q What was your understanding as to where the  
12 sweepings came from?

13 A They were submitted as having been taken from the  
14 vehicle that we had as submission E1.

15 Q Okay, and what vehicle was that?

16 A The vehicle that is in the photograph, State's  
17 Exhibit Number 8.

18 Q Number 8? The Oldsmobile we have been talking  
19 about?

20 A That's correct.

21 Q With regards to the carpet sample, did you find any  
22 carpet samples in that car that would match?

23 A I found no fibers that were consistent with it, no,  
24 sir.

25 Q With regard to C11, you analyzed sealed evidence bag

1 containing clothes and shoes removed from the residence of  
2 Kevin Keith; is that correct?

3 A That's is correct.

4 Q What type of tests did you perform on that?

5 A I performed an analysis to determine if there was  
6 any blood present on those items.

7 Q Did you check for carpet fibers also?

8 A Yes, sir.

9 Q Did you check for glass samples?

10 A Yes, sir.

11 Q And what did you find?

12 A I found neither.

13 Q No glass samples or carpet fibers and no blood  
14 samples?

15 A That's correct.

16 Q Then C12 on your report you have: One sealed bag  
17 containing clothes and shoes of Kevin Keith at the time of  
18 arrest. Was it your understanding in C11, the articles of  
19 clothing and shoes came from his residence as reported?

20 A I believe that was stated on the submission, yes,  
21 sir.

22 Q And C12, these items came from off of his body at  
23 the time of his arrest. Is that your understanding?

24 A Again, as I understand it.

25 Q What type of tests did you perform with regard to

1 C12?

2 A I examined the debris as well as analyzing them for  
3 any potential blood stains.

4 Q And did you find anything that connected Kevin Keith  
5 to those fibers or other things you were looking for like  
6 blood stains, carpet fibers, from the broken glass from the  
7 window frames?

8 A I found no glass or fibers that were consistent with  
9 the carpet standards submitted and I found no blood stains  
10 on the items.

11 Q You were submitted as a matter of fact, by Captain  
12 Blankenship, what is referred to as D2, a bag containing  
13 shoes and socks of Quanita Reeves. Did you find anything  
14 through your analysis with regard to those articles that  
15 would be associated or implicate any contact with Kevin  
16 Keith?

17 A Sir, I don't believe any analysis was done of those  
18 items.

19 Q You didn't do an analysis on those items?

20 A That's correct.

21 Q Could you explain for me on your last page under  
22 Item 2 of your report the second paragraph: "Further  
23 examination of these tires revealed, DOT..." What does that  
24 stand for?

25 A Department of Transportation.

1 Q       Would you please. If you look at page three of your  
2 report under number 4. Would that be your response to that?

3 A       Yes, the footwear impression is different in tread  
4 design from the footwear items submitted in items 11 and --  
5 I beg your pardon, C11 and C12.

6 Q       Go now to page two of your report, F3 you talk about  
7 sweeper filter and vacuum sweepings from the gray 1982  
8 Oldsmobile and we already established that you weren't able  
9 to find anything?

10 A       That's correct.

11 Q       And F4, again vacuum sweepings from the same car,  
12 you found nothing?

13 A       That's right.

14 Q       Okay, F5, the sweeper filter, you found nothing,  
15 same car?

16 A       Yes, sir.

17 Q       Also all of these F3, 4, 5, and 6 all came from the  
18 Oldsmobile you identified in the Exhibit. And again as you  
19 read on, the submission portion of the report on page two,  
20 they were all submitted as originating from that vehicle?

21 A       That's what it means to me.

22 Q       Well, you don't have any reason to doubt they were?

23 A       No, sir, but for the purposes of identification, I  
24 can't state that either.

25 Q       I understand that.

1 It was Bruce.  
2 It was Bruce, who is Bruce?  
3 Daddy's friend.  
4 Daddy's friend, okay. Where was Bruce at?  
5 At the house.  
6 Was he there the whole time?  
7 No.  
8 He just came there?  
9 Um hum.  
10 Why did he come there?  
11 I don't know.  
12 You don't know. Who did he talk to?  
13 Just Linda.  
14 Just Linda. Did he talk to her inside or outside?  
15 In.  
16 Inside, okay. Where was Bruce at?  
17 In the house by the door.  
18 He stayed by the door?  
19 Yes.  
20 Did he go anyplace else?  
21 No.  
22 Did he ask Marichell for anything?  
23 Yeah.  
24 What did he ask?  
25 A glass of water.

1 Did he drink it?

2 Yes.

3 Did he do anything else with the glass?

4 No.

5 How many glasses of water did he drink?

6 Two.

7 Two, well he was thirsty wasn't he.

8 What's Bruce look like?

9 He had a black mask on his nose and mouth.

10 Just over his nose and mouth so you could see his  
11 eyes and the top of his head?

12 No.

13 What did he have on top of his head?

14 Just not nothing.

15 Just nothing, so it was bare huh? Did he have a lot  
16 of hair?

17 No.

18 Or very little hair?

19 Little.

20 Okay, so he came in and drank two glasses of water?

21 Is that a yes?

22 Yes.

23 Okay. What did he do then?

24 He had a gun.

25 Where did he have the gun at?

1 In the bag.

2 A bag. What kind of bag?

3 A black bag.

4 Was it like plastic or like a gym bag?

5 Plastic.

6 It was plastic. What do you usually use that kind  
7 of a bag for?

8 Trash.

9 Okay. Let me think of some more questions.

10 So the gun-- You didn't see the gun?

11 Yes, when he took it out.

12 When he took it out. What did he do when he took it  
13 out?

14 He shot us.

15 He shot you right away.

16 And took off.

17 Did he make you do anything first?

18 Yeah, get down.

19 He made you get down where?

20 On the floor and shot us.

21 He made everybody get down?

22 Yup.

23 And were you scared, I bet I would be. Have you  
24 ever seen this Bruce before?

25 Yeah.

1 Where have you seen him at?

2 Everywhere. He been talking to me.

3 He's been talking to you.

4 Up to the apartment.

5 Out at the apartment.

6 Me and my brother, and my mommy.

7 He talked to mommy?

8 Yeah.

9 When you were out there visiting.

10 To my grandma's.

11 When you were at your grandma's house, is that where  
12 you saw him? You are shaking your head again.

13 Yeah.

14 Yeah. Where's grandma's at?

15 Out to the apartment.

16 Out to the apartments.

17 At A apartment?

18 In Crestline? I see. So you saw him over at  
19 Crestline. You never saw him before out where you were at,  
20 at Marichell's house?

21 No, he talked to us out to the apartments.

22 Okay. I understand. Did he shoot everybody?

23 Himself?

24 Yes.

25 Okay. Did you see anybody else except him?

1 No. Except that one white boy.

2 Okay.

3 Marichell's boyfriend.

4 Marichell's boyfriend? Okay. Was anybody with him?

5 No.

6 Was he by himself?

7 Yeah.

8 Okay. Did you see anybody else except him?

9 No.

10 Do you remember what kind of clothes he was wearing?

11 No.

12 No. Shoes?

13 Yeah.

14 What kind of shoes did he have on?

15 Black and brown.

16 Black and brown shoes?

17 Just like my dog.

18 Just like your dog. You got a dog that wears shoes?

19 No.

20 I don't see it around here. It must be at home.

21 You left the dog at home?

22 Uh hun.

23 Okay. Let me think -- see if I got any more  
24 questions. Did he say anything?

25 Yeah.

1                   What did he say?

2                   Just get down.

3                   Just get down? He didn't tell you why? Okay. If I  
4 show you some pictures, if his picture's in it do you think  
5 you'll recognize it?

6                   Yeah.

7                   Okay. See I got six pictures right here. Okay.

8                   And I just want you to look at them and if you can't see him  
9 that's okay. But if you see him, you just point at him and  
10 tell me which one he is.

11                  None.

12                  None of those are him?

13                  He don't got a head like this.

14                  What do you mean he don't have a-- You just pointed  
15 at number five, right?

16                  Yeah, he don't got a lump.

17                  He don't have no lump.

18                  Over his head.

19                  Oh, was he maybe wearing a hat?

20                  No.

21                  But that does look like him but that's not him  
22 though.

23                  It looks like him but that's not him.

24                  No.

25                  The guy you saw doesn't have a lump on his head.

1 Okay.

2 But that's the guy-- Well, let me ask you this is  
3 that the guy that you know-- That's not the guy you know  
4 that's named Bruce?

5 No.

6 Do you know who that is?

7 No.

8 You've never seen him before? Okay.

9 Do you recognize any of those other pictures?

10 No.

11 Okay. Have you seen any news or anything? You  
12 haven't. So you've never seen this picture before I showed  
13 it to you?

14 No.

15 Okay. Are you scared? Yeah I would be too.

16 You caught him?

17 We've got somebody in jail. We want to make sure we  
18 got the right somebody in jail. We want to make sure. Okay.  
19 Do you have anything else you want to tell me?

20 No.

21 That's pretty much it huh? Okay. Well, I can't  
22 think of anything else-- Well let me ask you one more time.  
23 You say that looks like him except for the head?

24 Yeah.

25 Number five this guy right here?

1 impression that I received at the laboratory, were different  
2 tread designs from the tires that were on the vehicle again  
3 in the photograph marked as State's Exhibit 8 and the tire  
4 being in photograph, State's Exhibit number 10, they were  
5 different in tread design.

6 Q In other words, the tires that were on the vehicle  
7 submitted to you for examination were inconsistent with the  
8 cast and photographs submitted to you as being from the  
9 crime scene?

10 A That's correct.

11 Q Okay. What else did you determine about the  
12 submissions given to you and these tires?

13 A Well, I received again, from the "G" submission, some  
14 items, I believe those were introduced as State's Exhibit 5.  
15 Among them, one which I blew up which is called State's  
16 Exhibit Number 9, an enlargement from that on the copy  
17 machine, the Triumph 2000 tire, again shown here on my item  
18 State's Exhibit 9, I found to be similar in tread design to  
19 the plaster cast and also to the photographs of the crime  
20 scene area.

21 Q Were you able to find out anything about the tires  
22 that were on the car submitted to you for comparison?

23 A Yes, sir, I was.

24 Q And is that contained in your report?

25 A Yes, sir.

1 MR. WISEMAN: I think I have no further  
2 questions. Mr. Banks, your witness.

## CROSS-EXAMINATION

4 BY - MR. BANKS:

5 Q Can you say with absolute scientific certainty that  
6 the license plate impression from the snow is absolutely the  
7 license plate that was on the Oldsmobile that you  
8 identified?

9 A No, sir, I didn't state that.

10 Q As a matter of fact, you can just say there's a  
11 similarity; isn't that correct?

12 A Well, as I stated, the numbers 043 were present and  
13 that the license plate was placed consistently on that  
14 vehicle versus the impression in the snow.

15 Q Would there have been any other types of tests,  
16 based on your education and experience, that you could have  
17 used to more specifically identify that car, say, for  
18 example a paint chip? Would you be able to run a test on a  
19 paint chip?

20 A Well, sir, I don't understand your question.

21 0 Let me rephrase it.

22 Let's say you had the Oldsmobile, let's use the  
23 State's Exhibit which is--

24 A Number 8.

25 O --State's Exhibit Number 9 (sic). And let's say you

1 had a piece of the paint that came from State's Exhibit 9 --  
2 that Oldsmobile -- would you be able to analyze that at the  
3 lab?

4 A Yes, sir.

5 Q And tell whether or not that came from that  
6 Oldsmobile?

7 A You would still not prevail in saying it came from  
8 that particular vehicle in most circumstances.

9 Q But my question is, did you have any other type of  
10 evidence whatsoever: a chip of paint, fingerprints from  
11 anyone coming from around the rim of the tires? Were there  
12 any fingerprints at all?

13 A I don't do fingerprint work. I don't know what was  
14 submitted for that work.

15 Q You don't know, if in fact, the tires were changed  
16 on that car and if they were by whom?

17 A No, sir, I do not. I do know they were manufactured  
18 in January of 1994.

19 Q My question to you is you don't know when or who  
20 changed the tires?

21 A No, sir.

22 MR. BANKS: I need just a minute.

23 MR. WISEMAN: Take your time.

24 Q (Mr. Banks) Ms. Yezzo, were you provided any other  
25 type of documentation with regard to the numbers 043 by any

1 police department?

2 A No, sir, I was not.

3 (Defendant's Exhibit 5 was marked for  
4 identification.)

5 Q Would you take a look at that. Would you agree that  
6 is three pages of license numbers from Richland County and  
7 Crawford County with cars having license plates ending in  
8 the numbers 043?

9 A That's what it appears to be, sir.

10 Q And you were never provided that?

11 A No, sir.

12 Q So therefore you couldn't really tell us whether or  
13 not any of those cars or license plates demonstrated in that  
14 list, were in fact the car that made the impression?

15 A Sir, I don't know that I would be able to do that  
16 had I had all the cars in my possession.

17 Q And you hadn't been able to do that here today with  
18 the license plate. All you can tell is that the license  
19 plate you saw is similarly placed in height and the number  
20 043; is that correct?

21 A And the orientation towards one side on the front of  
22 the vehicle.

23 Q And in order to compare or make a fair analysis with  
24 regards to the other 043 license plates, you would need an  
25 impression also; wouldn't you?

1 A To do a comparison, yes, sir.

2 Q So you can't say and my question is, the license  
3 plates you are looking at in Defendant's Exhibit Number 5  
4 could be excluded as being the license plate or car with the  
5 license plate that made that impression; could you?

6 A I can't make any statement related to those at all,  
7 including or excluding them.

8 Q Now, you did more than just a tire and license  
9 analysis, didn't you, in your report and examination?

10 A That's right.

11 Q As a matter of fact, you were asked as to your  
12 report, C7: received a sealed evidence envelope containing  
13 glass samples from storm door window frame. Is that  
14 correct?

15 A That's correct.

16 Q And what did you find from the examination of that  
17 evidence?

18 A That was submitted as standards for comparison for  
19 any glass that might be found on certain other items.

20 Q Did you find any of that glass in the car with the  
21 license number 043 that you have identified in the Exhibit  
22 for the State?

23 A No, sir, I did not.

24 Q Then you were also asked as to number C8: sealed  
25 evidence bag containing carpet sample. Can you tell us what

1 you did with that?

2 A Again, that was submitted as a standard for  
3 comparison.

4 Q And where did it come from do you know?

5 A I can't tell you off hand other than it was  
6 submitted as a standard from I believe the residence.

7 Q What did you compare it to or analyze it for?

8 A I used it as a standard for comparison with any  
9 samples from sweepings to see if, in fact, any fibers would  
10 coincide with the samples in that standard.

11 Q What was your understanding as to where the  
12 sweepings came from?

13 A They were submitted as having been taken from the  
14 vehicle that we had as submission E1.

15 Q Okay, and what vehicle was that?

16 A The vehicle that is in the photograph, State's  
17 Exhibit Number 8.

18 Q Number 8? The Oldsmobile we have been talking  
19 about?

20 A That's correct.

21 Q With regards to the carpet sample, did you find any  
22 carpet samples in that car that would match?

23 A I found no fibers that were consistent with it, no,  
24 sir.

25 Q With regard to C11, you analyzed sealed evidence bag

1 containing clothes and shoes removed from the residence of  
2 Kevin Keith; is that correct?

3 A That's is correct.

4 Q What type of tests did you perform on that?

5 A I performed an analysis to determine if there was  
6 any blood present on those items.

7 Q Did you check for carpet fibers also?

8 A Yes, sir.

9 Q Did you check for glass samples?

10 A Yes, sir.

11 Q And what did you find?

12 A I found neither.

13 Q No glass samples or carpet fibers and no blood  
14 samples?

15 A That's correct.

16 Q Then C12 on your report you have: One sealed bag  
17 containing clothes and shoes of Kevin Keith at the time of  
18 arrest. Was it your understanding in C11, the articles of  
19 clothing and shoes came from his residence as reported?

20 A I believe that was stated on the submission, yes,  
21 sir.

22 Q And C12, these items came from off of his body at  
23 the time of his arrest. Is that your understanding?

24 A Again, as I understand it.

25 Q What type of tests did you perform with regard to

1 C12?

2 A I examined the debris as well as analyzing them for  
3 any potential blood stains.

4 Q And did you find anything that connected Kevin Keith  
5 to those fibers or other things you were looking for like  
6 blood stains, carpet fibers, from the broken glass from the  
7 window frames?

8 A I found no glass or fibers that were consistent with  
9 the carpet standards submitted and I found no blood stains  
10 on the items.

11 Q You were submitted as a matter of fact, by Captain  
12 Blankenship, what is referred to as D2, a bag containing  
13 shoes and socks of Quanita Reeves. Did you find anything  
14 through your analysis with regard to those articles that  
15 would be associated or implicate any contact with Kevin  
16 Keith?

17 A Sir, I don't believe any analysis was done of those  
18 items.

19 Q You didn't do an analysis on those items?

20 A That's correct.

21 Q Could you explain for me on your last page under  
22 Item 2 of your report the second paragraph: "Further  
23 examination of these tires revealed, DOT..." What does that  
24 stand for?

25 A Department of Transportation.

1 Q And there is a number sign and some letters and 034?

2 A That's correct.

3 Q Do you know what the 034 stands for?

4 A That refers to the manufacture and it refers to the  
5 fact it was manufactured in the third week of 1994.

6 Q Okay, now with regard to your tire impressions,  
7 regarding the Triumph 2000, that is the brochure that was in  
8 the car that you identified--

9 A No, sir.

10 Q --the new tires?

11 A No, the brochure was submitted to me directly via  
12 the Bucyrus Police Department.

13 Q What does TR2000 mean to you?

14 A It had 2000 S-A-T-R-A for the Triumph 2000; which is  
15 a brand and style of tire made by Bridgestone, Firestone.

16 Q And you referred to that in number G1 and G2; is  
17 that correct?

18 A Yes, sir.

19 Q And were those the items in the booklet that you  
20 documented or that was found in the car or that you  
21 associated with being purchased by those documents?

22 A Those are the items that were submitted to the  
23 laboratory which I have opened here, that were in State's  
24 Exhibit Number 5. They are copies of brochures received  
25 directly from the Bucyrus Police Department. As to whether

1 or not they came from the vehicle, I have no knowledge of  
2 that, sir.

3 Q And with regard to Exhibit Number 5 and that  
4 documentation, you are saying the tire impression is similar  
5 in tread and design; is that correct?

6 A That's correct.

7 Q Now, I am not trying to challenge you at all. I am  
8 trying to learn about the difference between similarly and  
9 absolutely. Is there any test that you can do where you  
10 could say that you were absolutely sure that is the tire?

11 A Sir, what you have is a partial tread design  
12 deposited in the snow, and as a result of that, the portions  
13 that are sufficiently registered to examine are the same as  
14 the tire that I have. However, not all of the tire is  
15 registered and within our agency the results are what we  
16 call similar.

17 Q So based on the amount of information available to  
18 you, that is the only result that you could come up with?

19 A Based on the material that was available that is the  
20 conclusion that I can draw, yes, sir.

21 Q Now, if you would have had a complete tire  
22 impression or maybe the tire itself, you could compare it to  
23 the picture and probably give a more complete--

24 A Well, again, the first thing we are talking about is  
25 a partial design and you would need a complete design.

1 Q But my question is, if you had a complete design,  
2 would you be able to give a complete answer?

3 A It depends on if there were individual markings  
4 sufficiently registered for identification.

5 Q So you're really not sure completely about that tire  
6 at all but are merely giving an impression based on what you  
7 were provided with and to the extent to say there are some  
8 similar traits with the partial cast which you compared to  
9 the literature and brochure you were provided by the police  
10 department; is that correct?

11 A No, sir.

12 Q Okay, tell us what you are saying?

13 A What I am saying is basically as stated in the  
14 report and that is that the partial design that was present  
15 in the snow bank and also on the plaster cast is similar in  
16 design to the Triumph 2000, and incidentally, different than  
17 the tires that were present on the vehicle that was  
18 submitted as our number E1 in State's Exhibit 8, depicting  
19 that vehicle. So it can be limited having been different  
20 than the tires that were present on the vehicle which I  
21 received and that they were -- the portion of the tread  
22 design present and sufficiently registered for the  
23 examination is the same as the tire, Triumph 2000. The  
24 reason it is stated as being similar and as I stated  
25 previously is that when one has not an entire design, one

1 can only speak of what is present and what was deposited in  
2 the snow that I have are the same, however for the sake of,  
3 again, conservatism, I will state are similar with the tread  
4 design because it is not completely registered.

5 Q So what you are really saying after all that is that  
6 it is not conclusive?

7 A No, sir, it conclusively eliminates the tires that  
8 were on the vehicle and it's similarity is it would have  
9 originated from the Triumph 2000.

10 Q But did not conclusively originate from the Triumph  
11 2000, just similarly not conclusively?

12 A Conclusive in what respect, sir?

13 Q Conclusively, that you absolutely know that the  
14 tires that were on that car, I guess you could say, were  
15 there at that time? You can't say that?

16 A I can absolutely say that it is not the tire that  
17 was on the vehicle as I received it.

18 Q Well, that is absolute. But you can't say the tires  
19 that are in the pictures you identified were, in fact, the  
20 tires that were purchased can you?

21 A The tires that were purchased? I don't know  
22 anything about the tires that were purchased.

23 Q They didn't inform you to make an analysis or  
24 comparison on the tires from the pictures and the tires in  
25 the impressions to see if they were different?

94-10495, 94-10495-A  
94-10495-C, 94-10495-D  
94-10495-E, 94-10495-F  
94-10495-G  
- page 2 -

CONTINUED:

Submitted on 030794 by Captain R.L. Blankenship (94-10495-E)

#E1. 1982 Oldsmobile Omega, 4S, Ohio Registration MVR043,  
VIN#1G3AB69R3CW331319.

Submitted on 030894 by Larry D. Harden, BCI Agent (94-10495-F)

#F3. One (1) sealed evidence envelope containing paper,  
sweeper filter, and vacuum sweepings from grey 1982  
Oldsmobile, Ohio Registration MVR043.  
#F4. One (1) sealed evidence envelope containing paper,  
sweeper filter, and vacuum sweepings from grey 1982  
Oldsmobile, Ohio Registration MVR043.  
#F5. One (1) sealed evidence envelope containing paper,  
sweeper filter and vacuum sweepings from grey 1982  
Oldsmobile, Ohio Registration MVR043.  
#F6. One (1) sealed evidence envelope containing paper,  
sweeper filter, and vacuum sweepings from grey 1982  
Oldsmobile, Ohio Registration MVR043.

Submitted on 031494 by Captain M.L. Corwin via mail (94-10495-G)

#G1. Copy of store sales receipt for tires sold and placed  
on item #E1 on 08/12/93 by owner.  
#G2. Copy of maintenance and warranty manual for same tires.  
#G3. Company photo of triumph 2000 tire put on car as  
mentioned above and believed to have been on vehicle at  
time of crime.

FINDINGS:

Examination of photographs from the film submitted as item #2,  
revealed the presence of a partial license plate impression  
(plaster cast submitted as item #42), a tire impression (plaster  
cast submitted as item #43) and a footwear impression registered  
in snow, comparison of these impressions with submitted standards  
revealed that:

- 1). The license plate region on item #2 bears the numbers  
"043" and is set toward the driver's side of the car  
with spacing and orientation similar to the license  
plate "MVR043" on the vehicle submitted as item #E1.



Page: 11  
Case # 94-1043  
Date: April, 1994

with SWAT to advise them of all the information that they needed to know safely conduct their surveillance.

The surveillance was conducted all night of 01/29/94 until 6:30 A.M. and no remarkable activity took place. The reason for this was later noted to be because Rodney was unable to locate a driver for this burglary.

On 01/31/94 this Agent talked with Detective Hickman. The CI had talked with Detective Hickman and reported that Rodney had contacted her on this date and told her that he and Maurice were going to assist him with the pharmacy burglary in Columbus and that he wanted her to drive for him. Rodney still was insisting that the CI use his car(which is a 1979 Chevrolet. Impala with a new yellow paint job. Ohio Reg. JKZ218. He also stated that he had been paid \$15,000 to cripple "the man" who was responsible for the raids in Crestline, Ohio last week. After he finishes that and the pharmacy burglary he stated that he is going to Atlanta to take care of some other business. The CI agreed to drive for this burglary and notified Rodney that he had to give her some notice as to when he would need her. Arrangements were still continuing to do a controlled buy on 02/01/94 at the home of Bruce Melton in Canal Winchester. This buy was limited to pharmaceutical drugs in preferably in stock drug containers.

On 02/01/94 this agent met with Detectives Finkel and Powell from the Franklin Co. Sheriff's Dept. and Detectives Hickman and Dayne of the Galion Police Dept., also present at this meeting was a confidential informant. The reason for this meeting was to debrief the informant and to begin preparation for a controlled drug buy later this date from Bruce Melton. The informant talked with Bruce Melton over the telephone and was told that Belinda Carswell had left and that it was OK to come over.

When the informant went to the residence she got no response from inside the apartment. After several attempts to get a response the informant left the area. The informant also attempted to contact Bruce Melton by phone but got no response. after the last attempt to reach Melton was unsuccessful the attempt to purchase drugs from Bruce Melton was abandoned for the time being. The informant was told to continue to attempt to contact Melton over the weekend to determine why he would not answer the door.

It is also important to note that as I was leaving the area that I received a alpha message on my pager informing me that there had been a pharmacy burglary this A.M. at the Johnstown Pharmacy. Entrance had been gained to the pharmacy by prying open a door, after the alarm wires had been cut.

During the dates of 02/07/94 through 02/10/94 the informant made several contacts with individuals connected to the Melton's. Many of these telephone conversations were taped recorded by the informant. The tapes were then turned over to Detective Hickman as evidence and for transcribing.

*5*  
This report may not be distributed without the express permission of the Board of Pharmacy's Compliance Administrator.

1 Q Can you point him out?

2 A Yes, the gentleman seated at the Defendant's table.

3 MR. WISEMAN: May the record indicate the  
4 witness has identified the Defendant?

5 THE COURT: It shall.

6 Q (Mr. Wiseman) What was the result of the activities  
7 of Rudell Chatman that was performed under your supervision?

8 A It resulted in a series of indictments that were  
9 returned and we made a series of arrests on January 21,  
10 1994. Mr. Keith specifically had been indicted on four  
11 counts of trafficking in drugs.

12 Q And do you know the status of the Defendant's case  
13 as of February 13, 1994?

14 A At that point my belief is that his case was pending  
15 and he was out on bond.

16 MR. WISEMAN: Thank you. No further  
17 questions.

18 THE COURT: You may inquire.

19 CROSS-EXAMINATION

20 BY - MR. BANKS:

21 Q Lt. Dayne, how many approximately, persons were  
22 arrested as a result of Mr. Chatman's-- You call him an  
23 informant or confidential informant?

24 A Yes, sir, confidential informant.

25 Q How many people in Galion were arrested as a result

1 A Yes, sir.

2 Q She was a daughter of--

3 A Supposedly, yes sir.

4 Q Did you kill her?

5 A No, sir.

6 MR. WISEMAN: I would like to ask the  
7 witness to stand?

8 THE COURT: Certainly.

9 MR. WISEMAN: Mr. Bailiff, would you bring  
10 the witness down here next to the Defendant.

11 (The witness stood beside the Defendant)

12 All right fine. Thank you. Please return to your  
13 seat Mr. Melton.

14 Q (Mr. Wiseman) How tall are you, sir?

15 A Five nine.

16 Q How much do you weigh?

17 A 160.

18 Q Where were you the night of February 13, 1994?

19 A Columbus, Ohio.

20 MR. WISEMAN: I have no further questions,  
21 thank you.

22 CROSS-REFUTTAL EXAMINATION

23 BY - MR. BANKS:

24 Q Now, Mr. Melton, Rodney Melton is your brother; is  
25 that correct?

1 name was; did you?

2 A No, I didn't.

3 Q And the police called you that evening after you  
4 came out of surgery?

5 A Yes.

6 Q And what did they tell you?

7 A They asked me if I knew the name and I told them  
8 yes.

9 Q If you knew what name?

10 A The name of the guy who--

11 Q And what did you tell them?

12 A I did know the first name but I couldn't remember  
13 his last name.

14 Q And what did he say?

15 A They said, would you know it if you heard it? And I  
16 said I probably would.

17 Q And so what did they do?

18 A He asked me approximately four to five names,  
19 different last names.

20 Q Can you remember the names?

21 A I can only remember one was like Smith and one was  
22 Keith and a couple of other ones I don't remember.

23 Q Okay, so it was Smith and Keith and what did you  
24 tell him?

25 A I told him that it was Keith was the last name.

1 A Well, specifically about his personal history: Did  
2 he have any family so we might try to get in contact with  
3 some family that might be related to him so we can inform  
4 them of his situation. And also I just asked if he had any  
5 idea who might have caused his injuries?

6 Q And what were his responses?

7 A Well, at the time Mr. Warren was not able to speak  
8 because he was on the ventilator, post operatively. And he  
9 initially tried to communicate by sign language and wasn't  
10 successful. So I was able to get a clipboard and a piece of  
11 paper and he wrote out the information.

12 Q What did he write, specifically in relation to the  
13 incident?

14 A He said that he felt the first name of the person  
15 was Kevin, that's all he knew. He did not know the last  
16 name or anything like that.

17 Q What time of day was it when this happened?

18 A Specifically, it was in the early morning hours, a  
19 couple of hours after the operations and so forth. Sometime  
20 around 5:00 a.m. I believe that I charted -- that I started  
21 writing notes around 5:00 in the morning -- medical records.

22 Q Did he have contact with anybody other than you or  
23 medical personal from the hospital from the time he left  
24 surgery until -- while you were with him?

25 A No, not in the communicative sense.

MR. WISEMAN: Mr. Foor thank you very much for your testimony. No further questions.

CROSS-REBUTTAL EXAMINATION

BY - MR. BANKS:

Q           Mr. Foor, what would you say if I told you  
Mr. Warren said he never wrote anything down?

A Well, he did write something down.

Q And how long have you been a nurse?

A Since 1984.

Q        And did you consider his condition to be life threatening that evening?

A At any time anybody is in the critical care unit, their situation is such that it could be life threatening.

Q So it was critical the information that he was writing down, enough for you to communicate back to someone else?

A Yes, sir.

Q And, in fact, what did you do with the note?

A It was with the patient's chart there and was just  
on a piece of scratch paper.

Q Did you write it down in the notes, specifically what the patient said?

A No.

Q We have a death and life situation and a person has identified a first name of the person, wrote it on a piece

1 of paper and gave it to you and you did not keep that piece  
2 of paper; did you?

3 A No, I did not.

4 Q Nor did you write any of this conversation down  
5 anywhere in the medical records or the notes; did you?

6 A What I wrote down was "patient is writing a note."

7 Q Would you like to find that for me?

8 MR. BANKS: May I approach, Your Honor.

9 These are the medical records that were delivered from the  
10 hospital.

11 THE COURT: Are those marked?

12 MR. BANKS: No, but we can mark them.

13 THE COURT: Well, let him go through the  
14 records and what he testifies from, we will mark that  
15 specifically.

16 MR. BANKS: Yes, Your Honor.

17 A Here it is on the nursing notes. Note 0500 on  
18 February 14th under the narrative observations which is part  
19 of the record, "Alert and oriented, cooperative, Kistrea's,  
20 writing notes. And the doctor, he mentions wrote down the  
21 name Kevin.

22 Q But that is not recorded here.

23 Would you mark this please.

24

25

1 (Defendant's Exhibit 22 was marked for  
2 identification by the court reporter.)

3 Q You are saying he was coherent, alert, and writing  
4 notes?

5 A That's correct.

6 Q And that was important to you to state his  
7 condition?

8 A Yes.

9 Q And it was important also, enough for you to call  
10 and say that he had written down the name Kevin?

11 A Yes, I called.

12 Q And informed the Bucyrus Police Department of that  
13 information?

14 A Right.

15 Q And you didn't keep the note or the piece of paper  
16 he wrote it on?

17 A No, I didn't.

18 Q And you didn't say what was in the note in your  
19 narrative; did you?

20 A Not what it said specifically, no.

21 O you didn't think it was important enough to--

22 MR. WISEMAN: Objection, Your Honor.

23 THE COURT: Objection is sustained.  
24 Q (Mr. Banks) Your training from the other hospitals  
25 and prior to your being employed at Grant, isn't it true

1 as he was coming out of the surgery at 5:00 O'clock in the  
2 morning, he can't even speak, yet he is giving John Foor,  
3 his nurse, the name Kevin. John Foor called the Bucyrus  
4 Police Department. That is how the name Kevin found its way  
5 into this case.

6 He then, of course as you heard, later on was able  
7 to give a description of what went on. You will see from  
8 the exhibits that you will have with you, that his  
9 descriptions of the scene and the placement of the bodies  
10 and you should pay particular attention to things like that.

11 The description of Linda Chatman and her position  
12 which gave the attitude that she knew who this was and maybe  
13 wasn't taking it as seriously as it turned out. You will  
14 see from the photographs of the scene, Exhibit 92, that the  
15 comments and testimony which placed Linda by the door and  
16 the car keys and the lit cigarette, that she continued to  
17 smoke despite the threats by the Defendant. And that is  
18 present in the photographs.

19 You will see that the glass that Richard described  
20 the Defendant drinking out of is present. You will see this  
21 in the photographs.

22 You will see that the fatal wound borne out by the  
23 doctor's report. Richard said she was shot first in the  
24 head.

25 The trash bag in which the gun was concealed will

No. 21-3948

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**KEVIN KEITH,**

*Petitioner-Appellant,*

v.

**LEON HILL, Warden,**

*Respondent-Appellee.*

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**SUPPLEMENTAL BRIEF OF PETITIONER-APPELLANT KEVIN KEITH**

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## I. Introduction

Richard Warren, the state’s key eyewitness at Kevin Keith’s trial, testified that he remembered that the perpetrator’s name was “Kevin.” Thus, a central question at trial became whether Warren’s memory was tainted by his interactions with police who, on the night of the crime, had already set their sights on Keith as the suspect. The existence of an early morning phone call from Warren’s hospital nurse to the police station—during which the nurse reported that Warren recalled the name “Kevin”—was vitally important to bolstering Warren’s identification, and to refuting the defense’s assertion that Warren was improperly influenced at a time when he was particularly vulnerable to suggestion.

The evidence (wrongly suppressed and otherwise) now strongly suggests that there was no call from Warren’s nurse to the police. If the police communicated the name “Kevin” *to* Warren through hospital staff or otherwise—perhaps by providing that name to a nurse who then relayed it to Warren as he was heavily sedated and recovering from surgery—that destroys the credibility of Warren’s independent memory of the name. And the name was vital. Aside from the visual identification—which is itself highly suspect for the host of reasons already explained, *see* Doc. 22, Appellant Br. at 8–10, 33–37—Warren’s memory of the name “Kevin” was necessary to inculpate Keith and exculpate the alternative suspect, Rodney Melton. When paired with all the other evidence presented at trial

and that has been unearthed since, any reasonable factfinder would have a reasonable doubt about Keith's guilt.

## **II. The State used the Foor call to rehabilitate Warren's identification.**

On the night of the shooting, after Warren had escaped from the scene and at a time when the police described him as "conscious" and "coherent," Warren told no less than four witnesses—including a police officer—that he did not know who shot him and did not report a first or last name. R.21-1, PageID#9993. Warren testified at trial, however, that he recalled that the perpetrator was named "Kevin." R.21-1, PageID#10026. On cross examination, he admitted that he could not "recall whether [he] mentioned the name to [police] or they mentioned it to [him]." *Id.* at PageID#10060. And the police acknowledged that, at some point after Warren came out of surgery, they provided him with a list of "Kevin" names from which to choose. *Id.* at PageID#10041.

Likely recognizing the weaknesses of Warren's identification, the State sought to show that Warren was the one who first brought up the name Kevin. During pre-trial proceedings, after defense counsel challenged Warren's identification as having been influenced by the police, Bucyrus Police Captain John Stanley testified that he first learned of the name "Kevin" through Warren's nurse "Amy Gimmets." *Id.* at PageID#9914. Captain Stanley then testified to this "Amy Gimmets" call again

during trial, and he stated that it occurred “shortly after noon.” *Id.* at PageID#10466.<sup>1</sup>

A nurse named Amy never testified and was not mentioned again. Instead, in rebuttal, the prosecution called nurse John Foor, who testified that Warren recalled the name “Kevin” shortly after emerging from surgery, and that he telephoned the police with that information at 5:00 a.m.—seven hours *earlier* than the “Gimmets” call. *Id.* at PageID#10470. No police officer testified about this 5:00 a.m. call, however, even though the officer who wrote a report mentioning the call testified about other matters. And the police never provided a recording of the phone call to either the prosecution or the defense. R.1-27, PageID#205 (police statement that “the recorded phone call from Nurse Foor was not copied for the prosecution or the defense at that time”). Nevertheless, the prosecution in closing argument

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<sup>1</sup> Pursuant to a transcript of the “Gimmets” call admitted at trial, Gimmets says that Warren “has identified the assailant, I guess, his first name is Kevin.” R.20-32, PageID#9616. The phone is then given to Warren, who describes the moments leading up the shooting. *Id.* During this narrative, Warren never states the name Kevin. Rather, it is Captain Stanley who mentions the name Kevin *after* Warren’s narrative—he asks “You’re saying Linda recognized Kevin?” R.20-32, PageID#9617. Importantly, Warren’s narrative leaves out a key part of his testimony at trial, where he stated that Marichell Chatman repeatedly said the name “Kevin,” and the perpetrator remarked “Don’t say my name. Don’t say my name.” R.21-1, PageID#10031. Thus, far from bolstering the identification, the transcript of the call further supports the idea that the police were eager to mention the name Kevin, and that Warren’s memory shifted after interactions with the police.

emphasized the 5:00 a.m. call: “John Foor called the Bucyrus Police Department. That is how the name Kevin found its way into this case.” R.21-1, PageID#10529.

### **III. The current evidence undermines the existence of the Foor call.**

The evidence now strongly suggests that there was no 5:00 a.m. phone call. Keith’s trial counsel served a subpoena on the Bucyrus Police Department for “all records, including radio dispatch logs, of all call-ins” during the relevant time. R.1-29, PageID#218. Unbeknownst to Keith, the police deliberately refused to comply with that subpoena—they wrote “Ignore for now” on their copy. *Id.* Then, in 2007 when Keith again requested the call records while he was sitting on death row, the Bucyrus Police Department told him “[n]o such daily phone log existed.” R.20-24 PageID#7045. Keith would later learn through sworn testimony in another case, however, that the Bucyrus Police Department *does* prepare a “contemporaneous radio log” of all the police station’s incoming phone calls, R.20-24, PageID#7065–68, and he was able to obtain the “radio log” for the relevant time period, R.20-24, PageID#7107–11. That radio log reveals no call from Warren’s nurse. *Id.* The absence of the call thus demonstrates one of two things: (1) there was no 5:00 a.m. call; or (2) there was an *outgoing* call from the police station *to* the hospital. Either scenario deeply undercuts the state’s theory that Warren was the first to mention “Kevin.” The fact that the police *deliberately* suppressed this evidence also speaks volumes.

During oral argument, the Warden referenced Officer John Beal's report—which mentions a call from nurse Foor—as proof that Foor called the station at 5:00 a.m. As an initial matter, Officer Beal's trial testimony consists of approximately five transcript pages, and never once did he testify about this 5:00 a.m. call. In any event, the report itself raises more questions than it answers. The report (excerpted below) states “The following is a list of times of my radio traffic in ref[erence] to this complaint” and then provides a list of radio call entries:

```

I WROTE SEVERAL PICTURES OF THE RUNNING SHOE PRINT.
THE FOLLOWING IS A LIST OF TIMES OF MY RADIO TRAFFIC IN REF TO THIS
COMPLAINT;
AT APP 0500HRS A SUBJ WHO IDENTIFIED HIMSELF AS NURSE JOHN FOOR OF
GRANT HOSPITAL ADVISED THAT HE HAD BEEN COMMUNICATING WITH WARREN IN
THAT WARREN WAS ABLE TO WRITE HIS ANSWERS TO QUESTIONS. FOOR ADVISED
THAT HE ASKED WARREN WHO DID THIS TO HIM AND WARREN'S RESPONSE WAS
"KEVIN". WARREN DID NOT KNOW THE LAST NAME BUT WOULD KNOW IT IF HE
HEARD THE LAST NAME.
2109; SIG 3 AT IKES 2110; CALL FOR STOFCHEK
2112; NEED MORE MEDICS AT ESTATES 2112; CALL IN 404 AND 407
2118; CALL IN 3RD SHIFT 2128; CALL FOR CORONER
2156; CONTACT WISEMAN PER 407 2215; GET VIDEO EQUIP FOR SCENE
2227; DELIVERED EQUIPMENT 2355; BCI AGENTS ARRIVAL
0211; PLASTER CASTS REMOVED 0214; SIG 3 HERITAGE CIRCLE
0217; SIG 2 FROM HERITAGE CIRCLE 0236; SIG 2 FROM ESTATES

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R.20-20, PageID#6210. Curiously, every entry corresponds to a specific time—except for the purported Foor call, which is listed as “at app[roximately] 0500HRS.” *Id.* And the other entries in the report are reflected on the radio logs—again, except for the Foor call. R.20-24, PageID#7107–11.

Counsel for the Warden also argued that, per his own (extra-record) review, the radio logs did not record all incoming calls. But again, by Officer Beal's own account, the Foor call *would* have been part of the “radio traffic” captured in the radio logs. R.20-20, PageID#6210. And sworn testimony from the Bucyrus Police

Department's records custodian during the relevant period shows that the radio logs recorded each call that came into the station. R.20-24, PageID#7065–68. Moreover, the calls that the logs *did* capture range from the important (*e.g.*, a note that a bullet casing was found at a McDonalds)<sup>2</sup> to the more mundane (*e.g.*, a note that two BCI agents arrived at the scene). It therefore defies logic that an incoming call as important as an eyewitness identification would not be so much as referenced on the radio logs.

#### **IV. Warren's hospital records further undermine the State's narrative about how Warren recalled the name "Kevin."**

Warren's hospital records show that Warren was taken into the operating room at 11:45 p.m. on February 13th. R.20-11, PageID#3723. At 5:00 a.m., when Warren was supposed to have communicated the name Kevin to Foor, he was still in the emergency department following surgery and had not even been transported to a room in the Intensive Care Unit yet. *Id.* at PageID#3724. The records show that, at the time, Warren was under the influence of both Midazolam and Morphine. *Id.* at PageID#3757. The Patient Care Plan, signed by nurse John Foor, includes orders like "implement methods to reduce excessive environmental stimuli." *Id.* at PageID#3805. And the records document that Warren was intubated until 12:24 p.m.

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<sup>2</sup> As previously argued, the logs contradict Fernelle Graham's testimony that she found the casing in front of her home, across from the General Electric plant. *See* Doc. 22, Appellant Br. at 29.

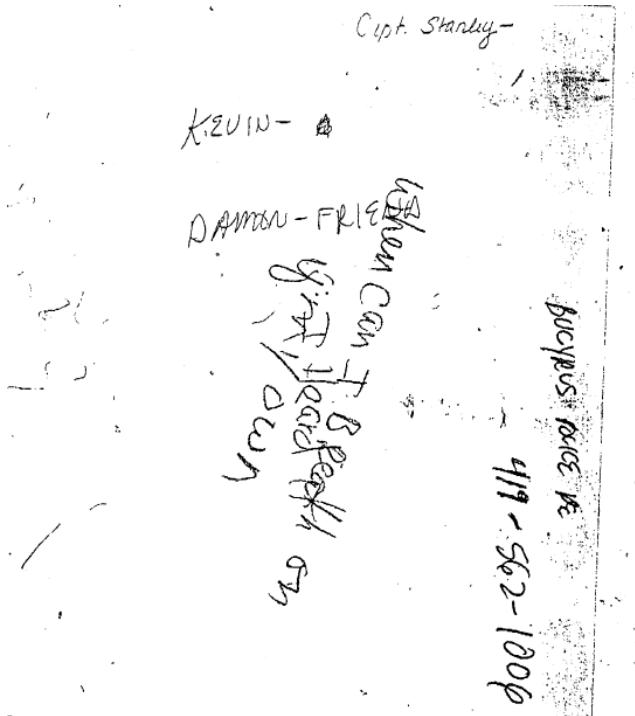
that afternoon. R.20-10, PageID#3477 (indicating that Warren was “extubated” at 12:24). Thus, Warren was intubated and heavily sedated during the time when both the Gimmets and the Foor calls allegedly occurred.

On top of all this, the hospital records (excerpted below) indicate that, at 1:00 p.m., Warren told a hospital security officer that the shooter’s “name [was] still unknown”:

Safety and Security				Report Number 94-0188
Person of Interest				Report Date 2-14-94
<input checked="" type="checkbox"/> Patient <input type="checkbox"/> Visitor <input type="checkbox"/> Employee <input type="checkbox"/> Prisoner <input type="checkbox"/> Other				
Name Last <b>WARREN</b>		First <b>RICHARD</b>	Middle Initial A K A:	
Home Address <b>1530 EAST COMER AVE INDIANAPOLIS IN</b>		City <b>46203</b>	State <b>(317) 784-5587</b>	Zip Code <b>Phone Number</b>
(If Patient) Date Admitted <b>2/13/94</b>		Date Admitted <b>2303</b>	Floor Number <b>309</b>	Phone Number
Guarding Agency		Contact Person <b>PAM + PHIL WARREN</b>	Agency Phone	
Race <b>WHITE</b>	Sex <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female	Age <b>23</b>	Height <b>6'1"</b>	Weight <b>190</b>
Eyes <b>GREEN</b>	Hair <b>BROWN</b>	Social Security Number <b>ACT # 9402800157</b>		DOB <b>7/3/78</b>
Narrative: <b>ON FEBRUARY 14, 1994 AT 1300 HRS. THIS OFFICER WAS DISPATCHED TO ROOM 309 TO FILL OUT A NRI. ON THE ABOVE LISTED SUBJECT, MR. RICHARD WARREN. MR. WARREN WAS PLACED ON A NRI. PER HIS PARENTS PAM &amp; PHIL WARREN. THE REASON MR. WARREN WAS PLACED ON A NRI. WAS BECAUSE MR. WARREN WAS SHOT EXECUTION STYLE. ALONG WITH FIVE OTHER OF MR. WARREN'S ACQUAINTANCES, THE PERPETRATOR WHO'S NAME IS STILL UNKNOWN IS STILL AT LARGE. THE ONLY DESCRIPTION OF THE PERPETRATOR IS THAT IT IS A BLACK MALE APPROXIMATELY 6' IN HEIGHT AND ABOUT 210-165. MR. WARREN'S PARENTS WILL BE STAYING AT THE HOLIDAY INN.</b>				

R.1-2, PageID#42. This was eight hours *after* the alleged Foor call (and an hour after the alleged Gimmets call). Moreover, despite Foor’s testimony that he did not

keep the note containing the name “Kevin” (R.21-1, PageID#10472), Keith later obtained hospital notes with the name “Kevin” in the same handwriting as “Capt. Stanley” and “Bucyrus Police”—in sharp contrast to the sloppy handwriting ostensibly made by Warren:



R.1-25, PageID#199. Thus, at some point before Warren could even “breathe on [his] own,” *id.*, he had in front of him a piece of paper with the name “Kevin” written on it. These hospital records therefore cast serious doubt on whether Warren independently recalled the name “Kevin.”

#### **V. Viewing the current evidence, Warren’s identification is not credible.**

Given that the photographic lineup eventually shown to Warren was extremely problematic, Doc. 22, Appellant Br. at 34–37, Warren’s memory of the name

“Kevin” is of prime importance to his identification. The current evidence seriously undermines the State’s claim that Warren recalled the name “Kevin” *before* interacting with the police. And that is critical. If, for example, the police mentioned the name to Warren’s nurse who then placed the words “Kevin” in front of a highly sedated and suggestible patient, then Warren’s identification is entirely unreliable.

As explained by seventeen eyewitness-identification experts who analyzed this case, “[m]emory is very malleable and highly reconstructive.” R.20-30, PageID#9388. Thus, it “can be modified” by “[a] suggestion by another witness, the police, or the media, or an inference made by the witness.” *Id.* In other words, “[o]nce Warren heard the name Kevin” from the police, “the name could have readily become part of his memory.” *Id.*; *see also* Third Circuit Task Force, *2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications*, 92 Temp. L. Rev. 1, 65 (2019) (“A witness may learn information from the police” and “come to believe the source of the information was the witnessed event.”); *United States v. Smithers*, 212 F.3d 306, 312 n.1 (6th Cir. 2000) (“Memory and perception may be affected by . . . a witness’s incorporation of information gained subsequent to an event into his or her memory of that event.”). Indeed, “the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor.” *United States v. Wade*, 388 U.S. 218, 228–29 (1967).

And one need not doubt the entirety of Warren's testimony to reasonably doubt Keith's guilt. One can believe that the shooter wore a turtleneck type mask that covered his mouth and nose. *Compare* R.20-21, PageID#6372-73 (Rodney Melton wore mask that covered mouth because of gap between teeth). One can believe that the shooter referenced Marichell Chatman's brother ratting on people. *Compare* R.21-1, PageID#10450 (after the shooting, Rodney told people that it happened because Rudel Chatman had been "setting people up"); R.1-8, PageID#59 (Meltons spread word that they would kill "anybody who snitches on them"); R.1-9, PageID#123 (Meltons knew Rudel was informant); R.1-11, PageID#127 (Rudel was informant against Rodney for morphine street sales). One can believe virtually every other word that Warren said about what happened that night. But if, as the evidence shows, his recall of the name "Kevin" is unreliable, then his identification holds little value in inculpating Keith. And when combined with all the other evidence in the case—Keith's numerous alibi witnesses; the lack of reliable physical evidence tying Keith to the crime; Quanita Reeves' exclusion of Keith and identification of her "Daddy's friend Bruce"; the evidence against Bruce and Rodney Melton; etc.—it is certainly not enough for any reasonable juror to "reach a subjective state of near certitude" of Keith's guilt. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

Respectfully submitted,

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*Counsel for Petitioner-Appellant*  
*Kevin Keith*

C19NC

SUBPOENA (including command to produce document or object)

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IN THE CRAWFORD COUNTY COMMON PLEAS COURT, BUCYRUS, OHIO  
(Court) 44820

STATE OF OHIO

Case No. XXX 94CR042

Plaintiff

VS

KEVIN A. KEITH

Defendant

TO:

Custodian of Records c/o Chief Baran

Bucyrus Police Dept., Bucyrus, Ohio

Name

Address

YOU ARE HEREBY COMMANDED TO appear

before Judge Kimerline

on the 13 day of May 19 94 at 9:00

o'clock A M.

You are further ordered to:

bring with you all records, including radio dispatch logs, of all call-ins from February 12, 1994 to the present time.

James H. Banks 0031958

Witness my hand and seal of said Court this 12 day of

Attorney's Name

P.O. Box 1950

Attorney's Address

Dublin, Ohio 43017

May 19 94

Attorney for: Defendant

By Sherry M. Adlow Deputy

Phone No: (614) 866-0666

PATRICIA J. CALDWELL, Clerk of Courts

## RETURN ON SERVICE

On the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_,

I served the above named individual by \_\_\_\_\_

Dated \_\_\_\_\_, 19 \_\_\_\_\_

Service fees:

By \_\_\_\_\_  
(Process Server)

1 day's fee tendered ..... \$ \_\_\_\_\_

Service and Return ..... \_\_\_\_\_

Mileage ..... \_\_\_\_\_



# BUCYRUS POLICE DEPARTMENT

Kenneth L. Teets, Chief



500 S. Sandusky Avenue • Bucyrus, Ohio 44820  
Phone: (419) 562-1006 • FAX: (419) 562-5341

Rev. Renard Torrence

[REDACTED]  
Canton, OH 44705

Dear Rev. Torrence;

Be assured that I received your most recent records request pertaining to Bucyrus Police Department report #94000315 towards the end of May, 2007. My apologies for the delay in this response. It would be helpful if you would supply me with a phone number so I can keep you abreast of my findings in a more punctual fashion in addition to our written correspondence.

You ask for four pieces of documentation/information regarding this report that I will respond to in order;

#1) Regarding the Station's daily phone log for 02/14/07: No such daily phone log existed at that time so I cannot supply you with that documentation.

#2) Regarding the recording of the incoming phone call from Nurse John Foor from 02/14/94: The recorded phone call from Nurse Foor was not copied for the prosecution or the defense at that time. The incoming/outgoing phone call recording system for the Bucyrus Police Department has undergone changes since 1994. The changes made the playback of the recording mediums obsolete so the audiotapes were not retained by this Police Department. The Bucyrus Police Department does not have the recording tapes from 02/14/94.

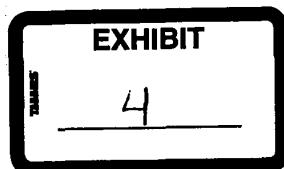
#3) Regarding the name "Kevin" that was reported by Nurse Foor; The information Nurse Foor gave me in his phone call of 02/14/94 was documented in my supplement to Bucyrus Police Department report #94000315.

#4) Regarding the handwritten statement from Nurse John Foor; A copy of this statement is included with this correspondence.

If I and the Bucyrus Police Department can be of further assistance please do not hesitate to ask. Again, a phone number where you can be reached would be helpful in expediting your records requests.

Yours Truly;

Capt. John W. Beal



## In Re: Proceedings

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<p>1 being Bates stamped at the bottom, and you have to  2 actually look at the top number. What he is talking  3 about is page 23 at the top, item 45, that's what he  4 was talking about.</p> <p>5 THE COURT: So it's on -- what -- what  6 are these numbers down here at the bottom?</p> <p>7 MR. BECK: Those are Bates stamps. Those  8 shows my office generated those and those exact  9 copies so that's just a referencing number but that's  10 the number at the top.</p> <p>11 THE COURT: I see. All right. I thought  12 this was 39 of 75 pages.</p> <p>13 MR. BECK: That's a 75-page document but  14 we didn't --</p> <p>15 THE COURT: So I should disregard the  16 numbers at the bottom.</p> <p>17 MR. BECK: Yes, sir.</p> <p>18 THE COURT: All right. Thank you. Thank  19 you for clarifying that.</p> <p>20 Q. (By Mr. Walker) Okay, Mr. Crall, I don't  21 want to belabor a point here. Would it be fair to  22 say that in the year 2000 that the Ohio Municipal  23 Records Manual listed suggested record retention  24 periods for the the reel-to-reel audiotapes which are</p>	<p>1 DAVID ROBERTSON  2 being first duly sworn, as prescribed by law, was  3 examined and testified as follows:  4 CROSS-EXAMINATION</p> <p>5 By Mr. Walker:</p> <p>6 Q. Good morning, sir.</p> <p>7 A. Good morning.</p> <p>8 Q. Would you state your name for the record,  9 please.</p> <p>10 A. David Robertson.</p> <p>11 Q. And what is your address, sir?</p> <p>12 A. [REDACTED] Bucyrus, Ohio.</p> <p>13 Q. Do you presently work anywhere?</p> <p>14 A. Yes, sir.</p> <p>15 Q. Where are you employed?</p> <p>16 A. Ziegler's Electrical Service.</p> <p>17 Q. Are you a retired member from the Bucyrus  18 Police Department?</p> <p>19 A. Yes, I am.</p> <p>20 Q. What year did you come on to Bucyrus  21 Police Department?</p> <p>22 A. 1973.</p> <p>23 Q. Would you happen to know the day and  24 year -- month, I mean?</p>
Page 42	Page 44
<p>1 somewhat the subject of this litigation? We are at  2 page 23 at the top.</p> <p>3 A. Right. I'm sorry. I lost my spot here.  4 Well, it does say radio/phone calls audio recordings.  5 I'm no expert on exactly what was at the police  6 department at that time, but it would seem what's  7 been described to me that that would cover that.</p> <p>8 Q. So the Bucyrus Police Department should  9 have recognized them as a record then at this time,  10 in 2000?</p> <p>11 A. By 2000, but I don't believe they had  12 them in 2000 any longer, that -- the particular type  13 of thing at issue here.</p> <p>14 MR. WALKER: That's all I have,  15 Mr. Crall. Thank you.</p> <p>16 Thank you, your Honor.</p> <p>17 MR. BECK: Nothing further.</p> <p>18 THE COURT: Anything else?</p> <p>19 Thank you, sir. You may step down.</p> <p>20 THE WITNESS: Thank you.</p> <p>21 THE COURT: Go ahead.</p> <p>22 MR. WALKER: I would call David Robertson  23 to the stand as on cross.</p> <p>24 ---</p>	<p>1 A. April 1, 1973.</p> <p>2 Q. April 1? And when did you retire from  3 the Bucyrus Police Department?</p> <p>4 A. 1996.</p> <p>5 Q. Who was your chief of police when you got  6 hired on?</p> <p>7 A. When I got hired?</p> <p>8 Q. Yes, sir.</p> <p>9 A. Dave McDonald.</p> <p>10 Q. Dave McDonald. Now, during your tenure  11 with the Bucyrus Police Department, were you ever --  12 let me see if I understand this right. I was told  13 that there used to be a captain who was in charge of  14 the records area at one time in the City of Bucyrus?</p> <p>15 A. That's correct.</p> <p>16 Q. And then that position more or less they  17 did away with or created a new one, and it became an  18 administrative officer; is that correct? A records  19 administrative officer? Did somebody else do that  20 job that that captain had?</p> <p>21 A. Yes. They -- I was put into that  22 position there at some time.</p> <p>23 Q. When do you think you would have been put  24 into that position?</p>

11 (Pages 41 to 44)

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In Re: Proceedings

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1 A. I'm not sure, probably 1990, maybe  
 2 somewhere around there.  
 3 Q. 1990? And how long were you in that  
 4 position?  
 5 A. Until I retired.  
 6 Q. Okay. What did you do in that position?  
 7 What -- what were your functions, your duties?  
 8 A. I kept track of the records. I kept  
 9 track of evidence. I was a court officer. I guess  
 10 now they give it a public information officer is the  
 11 title they give it now.  
 12 Q. Okay. Did you ever take care of the tape  
 13 recorder that was used to tape record the telephone  
 14 lines and --  
 15 A. Yes, I did.  
 16 Q. What was the name of that machine they  
 17 used?  
 18 A. I don't remember.  
 19 Q. And were they using that when you took  
 20 over for the captain? Were they using that machine  
 21 then?  
 22 A. I believe it was after that I got in  
 23 there when they started that.  
 24 Q. Do you have any idea when that would have

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1 been?  
 2 A. No, I do not.  
 3 Q. Now, was that Dictaphone?  
 4 A. I do not remember. I know it was a reel  
 5 to reel. That's all I remember.  
 6 Q. Big reels?  
 7 A. Yes.  
 8 Q. And how many reels are on that machine?  
 9 A. On the machine at one time when it was in  
 10 use?  
 11 Q. Yeah. If the machine was sitting there  
 12 running right now, how many reels would be on it?  
 13 A. There was two.  
 14 Q. Now, when you say two, is it like an A  
 15 set and a B set or just two reels?  
 16 A. Reel -- reel to reel.  
 17 Q. So it was like four reels spinning?  
 18 A. Two wheels.  
 19 Q. Two wheels so just --  
 20 A. As I remember.  
 21 Q. Okay.  
 22 A. You had the one, a blank reel that -- or  
 23 an empty reel that you recorded onto and then the  
 24 next day you would switch them around, put the --

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1 Q. Oh, I see. So there was two sets there,  
 2 two tape decks or something, you could -- if there  
 3 was an emergency, you could activate the other one or  
 4 something like that?  
 5 A. Not that I remember. As I remember, it  
 6 was just two -- two reels.  
 7 Q. Two reels. And what did they record?  
 8 A. Telephone calls that came in.  
 9 Q. Did you have the 911 system then?  
 10 A. Not at that time, not when we first got  
 11 them, no.  
 12 Q. No? How many lines come into the police  
 13 station?  
 14 A. There was four when I was there.  
 15 Q. Were all of them emergency lines, or was  
 16 one of them kind of like a personal line?  
 17 A. One of them was -- one of them was a  
 18 personal line because at that time when we were  
 19 holding prisoners, we could not record their  
 20 conversations.  
 21 Q. I understand.  
 22 A. So that's the line we had them use on the  
 23 phone.  
 24 Q. So and the police radio traffic, was it

Page 48

1 captured on that recording?  
 2 A. Not while I was there, no.  
 3 Q. So you couldn't capture the radio  
 4 traffic, just the telephone?  
 5 A. Telephone calls.  
 6 Q. And you say you only used one tape at a  
 7 time; did I understand that correct?  
 8 A. Yes.  
 9 Q. Okay. Would you walk me -- if you can  
 10 recall, sir, I know it's been a number of years, but  
 11 who normally changed the tapes?  
 12 A. That was my responsibility.  
 13 Q. And what time of day generally would you  
 14 try to do that?  
 15 A. Usually first thing in the morning.  
 16 Q. Now, would that be like 8 a.m.? Is it  
 17 beginning of your shift? Does that sound accurate or  
 18 not?  
 19 A. Well, my shift started at 7. But whether  
 20 I did it right then I don't believe I did because I  
 21 also had to get the news release ready for the media,  
 22 and at that time they -- the local radio station  
 23 called us so. So it was -- it was in the morning.  
 24 Q. Okay.

12 (Pages 45 to 48)

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## In Re: Proceedings

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1        A. But whether it was first thing in the 2 morning, I don't remember. 3        Q. Okay. Fair enough. Now, as the 4 procedure -- the tape change procedure goes, you 5 would stop the machine and rewind the tape? 6        A. No. 7        Q. Did you have to -- could you -- 8        A. Stop the machine, take the tape off, and 9 then put a new one on. 10      Q. Where did the other one come from? 11      A. Out of the storage unit below. 12      Q. Okay. So there was only one tape on that 13 machine at one time? 14      A. Yes, one tape we were recording on, yes. 15      Q. Okay. Was there another tape present? 16 Some of the machines I've seen they have been about 17 the size of refrigerators, the old ones I've looked 18 at, and they had, you know, a set -- an A deck and a 19 B deck so there would be reel to reel up here and 20 reel to reel down here. 21      A. No. I don't believe ours was like that. 22      Q. Okay. Thank you, thank you. That 23 cleared me up. Did you need to rewind that tape 24 before you used it again or?	1        (EXHIBIT MARKED FOR IDENTIFICATION.) 2        Q. Okay. Sir, I am handing you a document 3 that's been tentatively marked Relator's Exhibit 3 4 and it's got a date up here and some names and I am 5 going to ask you to identify it and then I want to 6 direct your attention to this entry and ask you about 7 that. Can you take a minute to review that document 8 for me. 9        A. Yeah. These are the radio logs that they 10 used to use. 11      Q. Okay. Kept for the Bucyrus Police 12 Department? 13      A. Yes. The person working the desk would 14 keep track of this. 15      Q. Now, would this be kept in a like manual 16 typewriter and somebody would -- 17      A. Yes, it was. 18      Q. So this record would -- the girl in the 19 desk and the dispatcher, I would assume, would type 20 these on? 21      A. Yeah, whoever was working the desk. 22      Q. At the top right-hand corner there is a 23 date there, could you read that into the record for 24 us so we know what year this is?
Page 50	Page 52
1        A. I do -- I do not remember. 2        Q. Now, when you left that administrative 3 position in 1996 -- is that correct? 4        A. That's correct. 5        Q. Who replaced you? 6        A. Ralph Grubel. 7        Q. When you walked out of the police 8 department on your last day, were they still using 9 that machine then? 10      A. Yes, they were. 11      Q. Okay. Was there a backup system to this 12 tape recorder? Was there any way to back it up, or 13 if the machine broke, if a tape broke, would 14 something else kick in to start capturing? 15      A. Not that I remember. 16      Q. Not that you remember. Okay. Now, sir, 17 when you changed the tapes, was there a log or entry 18 made of anything having to do with that tape change? 19 Did you record it anywhere that somebody could see 20 the tapes had been changed? 21      A. No. 22      Q. Was there an entry made on a radio log or 23 anything like that during your time? 24      A. I do not remember if we did or not.	1        A. February 13, 1994. 2        Q. February 14, 1994? 3        A. 13th -- 4        Q. Okay. 5        A. -- on the top page. The third page it's 6 February 14, 1994. 7        Q. Oh, okay. So these run from like 8 midnights through the days? Probably change. Okay. 9 Now, three quarters of the way down on page 3, do you 10 see that entry there? It talks about the tape 11 number? 12      A. Yes. Tape 36 placed on the machine. 13      Q. Can you describe to me what that is, what 14 that signifies? 15      A. I would say that tape No. 36 was the one 16 that was put on the machine at 9 o'clock in the 17 morning. 18      Q. And who would have put that on? Do you 19 recognize the initials? Above that I think that -- 20      A. I do not see any initials. 21      Q. Okay. That's fine. So at 9 a.m. within 22 that date they changed the tape on that machine; is 23 that correct? 24      A. Yes. Okay. If you're talking about

13 (Pages 49 to 52)

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<p>1    halfway down on this page where it says 7-8 of 3P  2    DDY, that would have been whoever the dispatcher was.  3    Denise Young, I believe, would be DDY.</p> <p>4    Q. Now, these tapes that we are referring to  5    here that went on this machine, you guys didn't have  6    a warehouse full of them, did you?</p> <p>7    A. No, sir.</p> <p>8    Q. So you would recycle them and reuse them  9    from time to time?</p> <p>10   A. Yes.</p> <p>11   Q. So they take a tape off -- take that  12   machine off and put it in that box and would the box  13   go on a shelf somewhere?</p> <p>14   A. There was a storage -- if I remember  15   right, there was a -- we either had a storage unit  16   under the machine or there was a cupboard right under  17   the desk there at the front window.</p> <p>18   Q. Okay. So it would be available for you  19   to reuse it probably a month later? I don't know.  20   How often did you recycle those things?</p> <p>21   A. I think they had averaged out about a  22   month.</p> <p>23   Q. Okay. And was a bulk eraser used on them  24   before they were put back on the machine?</p>	<p>1    Relator's Exhibit 3, that is a radio log.  2    A. That's correct.  3    Q. Which is -- is that made  4    contemporaneously, in other words, when the call  5    comes in, the dispatcher creates the log?  6    A. Yes.  7    Q. So in police work is the radio log  8    capturing the data through the telephone call? In  9    other words, when the call is made, that information  10   is recorded on the radio log?  11   A. Yes, that's the way it was when I was  12   there. They would -- the dispatcher would answer the  13   call and then she would put down the time of the  14   call, who called, and who she assigned the call to.  15   Q. And in police work this was a useful tool  16   to have, the radio log.  17   A. Yes, sir.  18   Q. Because it showed you the time of the  19   call and everything associated with the call.  20   A. Yes, sir.  21   Q. And did the log also record what -- what  22   the officer may have done in response to the call, in  23   other words, what the dispatch told them to do?  24   A. She would probably put some -- something</p>
Page 54	Page 56
<p>1    A. I don't remember.  2    Q. But in any event they were reused and  3    other materials recorded over them, right?  4    A. Yes, we reused the tapes.  5    Q. And so would you agree with me that  6    things that had been on that tape before being  7    written over, those older things are probably gone  8    now and can't be retrieved?  9    A. I would venture to guess, yes.  10   MR. WALKER: Okay. That's all, Mr. Beck.  11   Thank you, sir.</p> <p>12   ---</p> <p>13   DIRECT EXAMINATION</p> <p>14   By Mr. Beck:</p> <p>15   Q. Mr. Robertson, just so I understand what  16   you are telling us is that the recordings initially  17   recorded just the radio traffic between officers and  18   dispatch?</p> <p>19   A. As far as I remember, it was the  20   telephone traffic.</p> <p>21   Q. All right. So people calling into the  22   station.</p> <p>23   A. Correct.</p> <p>24   Q. And you are looking at Plaintiff's -- or</p>	<p>1    on there to let us know that the officer was finished  2    at a certain time.  3    Q. And I think from what you've told us,  4    sir, is that the City had essentially 30 tapes, and  5    they would just reuse them every month, so you would  6    record on day one and put that tape away and it would  7    come back approximately 31 days later and be written  8    over.  9    A. Yeah, something like that, yes.  10   MR. BECK: All right. That's all I have.  11   Thank you.  12   THE COURT: Anything further?  13   MR. WALKER: Just one quick thing, your  14   Honor, thank you.</p> <p>15   ---</p> <p>16   RECROSS-EXAMINATION</p> <p>17   By Mr. Walker:</p> <p>18   Q. Sir, when -- during your tenure there did  19   you ever have occasion -- I believe in 1994 in that  20   one radio log we referred to, there was several  21   homicides in town that day. It was kind of a  22   significant day. And my question to you is was there  23   an ability to harvest information off that machine by  24   maybe a cassette so you could take that to court with</p>

RADIO LOG  
STATION KUA 229  
DEPARTMENT OF POLICE

500 S. SANDUSKY AVE.  
BUCYRUS, OHIO 44820  
PHONE: (419) 562-1006

Date: FEBRUARY 13, 1994

Time	From	To	Contents
1126	229	10	BARKING DOG COMPLAINT AT 571 ROGERS ST.
1130	10	229	SIG.1
1134	10	229	DOGS QUIET AFTER SPOKE TO RESIDENT/STRAY CNT CAUSING BARKING
1158	229	10	CHECK POPLAR/RENSSELEAR ST. FOR 10-21
1202	10	229	#2 FROM SCENE; HAVING SUB #23
1203	10	229	RP#KFZ401, KIU051
1203	10	229	#24
1240	10	229	#11
1315	10	229	#2
1318	10	229	#24 REPORTS
			3P--11P---JAM
1506	6	229	#2
1516	15	229	SIG 2
1547	9	229	#2
1602	15	229	#24 PRISONERS
1615	15	229	#2
1621	229	6	LOCKOUT AT BONDED
1622	15	229	#3 EAST
1623	229	9	CHECK VEH PARKED AT 817 CLELAND RP#KFW840
1927	6	229	#3/RP#LNA945
1629	6	229	#2 OPEN/NO DAMAGE
1630	15	229	#2
1631	9	229	RP#KFZ504
1643	9	229	VEH CITED-WILL BE TOWED IF THAT DOES NOT HELP
1653	15	229	#17
1657	15	229	#2
1700	15	229	#24 PRISONERS
1718	229	6	10-29 FRONT OF NUMBER #17
1723	9	229	SUBJECTS WAVED ME OVER-ADVISED ALL IS O.K.AT THIS TIME
1724	15	229	#2
1726	15	229	#3 606 GAY STREET
1729	15	229	#2
1729	9	229	#24
1750	15	229	STOPPTNG RP#HDJ276 100 BLK S POPLAR
1752	15	229	DS#
1755	15	229	#2 #18
1759	15	229	#24
1801	6	229	#11 #17
1819	229	9	DOOR STANDING OPEN 1023 TIFFIN #7
1822	9	229	#3 HERE
1825	9	229	2 9 SECURED
1831	6	229	2
1914	15	229	#2
1919	15	229	#11 #17
1933	9	229	#24
1950	15	229	#2
2003	229	15	MINOR 10-26 DAYS INN
2012	15	229	#1 HERE
2027	9-15	229	#2 15-#2 #9 TWIN LEFT
2039	229	9	CHECK 918 UNION ST FOR RP#DJP640 AT 918 UNION ST
2049	9	229	VEHICLE IS AT THIS RESIDENCE WILL BE #3 HERE
2056	9	229	#2 NO ONE WOULD ANSWER THE DOOR
2058	6	229	#1 PERRY STREET
2101	229	9	#23 #6
2106	229	9	MALE HAS BEEN SHOT AT IKES
2107	15	229	#2
2109	9-15	229	#3 HERE
2109	6	229	#2 JUST WANTS EXTRA WATCH UPTOWN
2109	229	6	1712 BUCYRUS ESTATES-GUNSHOTS
2110	9	229	HAS STOPCHECK BEEN ADVISED-EN ROUTE
2112	9	229	CALL STOPCHECK-THEY WILL NEED MORE THAN ONE AMBULANCE-404/407
2114	9	229	5 PEOPLE DOWN WITH GUNSHOT WOUNDS AT 1712 A BUCYRUS ESTATES
2118	9	229	CALL IN NITESSHIFT
2131	15	229	CALL FOR CORONER
2136	229	9	CORONER EN ROUTE
2139	404	229	ANYONE READY TO GO SHOULD GO TO ER
2140	1712	229	TWO CHILDREN AT ER DID NOT KNOW SUSPECT
2151	9	229	TWO SUBJECTS NEEDED AT SCENE-ONE AT ER

EXHIBIT

8

RADIO LOG  
STATION KOD 229  
DEPARTMENT OF POLICE

500 S. SANDUSKY AVE.  
BUCYRUS, OHIO 44820  
PHONE: (419) 562-1006

Date: FEBRUARY 13, 1994, 19

Time	From	To	Contents
2153	15	229	RP#KFZ314
2154	406	229	UNIT 7 AND MYSELF WILL BE EN ROUTE TO BUCYRUS ESTATES- UNIT 3 WILL BE EN ROUTE TO ER
2156	9	229	PS WISEMAN ADVISED HIM OF THE SITUATION
2201	7	229	#2 EN ROUTE TO ER/A-UNIT
2204	6	229	#2
2207	7	229	#3 <sup>7</sup> ER
2208	407	229	PS OLDENDICK REF SEARCH WARRANT NEEDED AT SCENE DUE TO OWNERSHIP NOT ESTABLISHED-SUBJECTS UNCONSCIOUS-NEGATIVE
2209	229	407	HE ADVISED YOU WILL NEED ONE WHEN YOU LEAVE AND RE-ENTER
2209	229	9	WISEMAN EN ROUTE
2214	407	229	ADVISE STOPCHECK WE WILL NEED TO TRANSPORT TWO TO FRANKLIN
COUNTY			
2215	229	407	THEY REQUEST TO BE ADVISED WHEN YOU ARE READY
2215	9	229	#2
2217	407	229	CALL FOR AGENT FROM BCI-ADVISED THEM WE HAVE A SET OF TIRE TRACKS IN THE SNOW
2218	9	229	#24
2225	9	229	#2 EN ROUTE TO ESTATES
2227	9	229	#1 AT ESTATES
2234	229	407	DO YOU NEED ANYTHING BESIDES TIRE TRACKS-CRIME SCENE
2234	407	229	JUST THEIR ASSISTANCE -ETA(1HR)
2235	229	407	ATOMIC ABSORPTION?
2235	407	229	AFFIRMATIVE
2236	407	229	CORONER JUST LEFT SCENE EN ROUTE TO ER/WISEMAN JUST ARRIVED ON SCENE
2245	229	407	SGT. THOMAS FROM CRESTLINE WANTING INFO ON WHAT IS COMING HIS WAY
2245	407	229	DO NOT HAVE ANY INFO FOR HIM
2247	229	407	MEDIA AGAIN-WHAT TO ADVISE?
2247	407	229	WON'T KNOW ANYTHING UNTIL MORNING
2251	229	407	BARNES ON PS-90 MIN ETA-DO YOU WANT HIM TO COME DIRECTLY TO SCENE
2251	407	229	AFFIRMATIVE
2257	229	6	#23 TO PICK UP #19 PER 406
2258	407	229	PS OLDENDICK REF UNIT 15 STOPPING AT HIS RESIDENCE
2258	229	407	HE ADVISED THAT WOULD BE OK
2310	19	229	#2
2318	9	229	RP#KFW823 RUN AND HOLD
2320	9	229	RP#KFW84 RUN AND HOLD
2320	15	229	#24
2625	7	229	SEND TT TO MANSFIELD PD REF POSSIBLE RETALIATION HEADED THAT WAY
2333	9	229	RP#KFY727
2337	229	407	BCI ETA 15-20
2342	6	229	RP#KFY739
2344			WASTE WATER PLANT
2346	229		WATER PLANT CHECK IN
2355	9	407	BCI ON THE SCENE
0012	229	9	ADVISE WHEN BCI IS DONE-CORONER WANTS STOPCHECK NOTIFIED AT THAT TIME-THEY WILL PICK HIM UP
0019	407	229	TWO BCI AGENTS ON THE SCENE
0049	229		WATER PLANT CHECK-IN/WASTEWATER CHECK-IN
0107	19	229	RP#KFZ164 REAR OF MCDONALDS
0109	229	19	#23 #6
0150			WATER PLANT & WASTE WATER PLANT
0159	3	229	CHECKED AREA AROUND GARVINS-NEGATIVE RESULTS
0204	15	229	#2 #23
0206	7	229	IS SOMEONE AVAILABLE TO GIVE SUBJECTS RIDE HOME
0206	229	3	CLEAR DIRECT?
0208	15	229	24
0211	9	229	HAVE TAKEN A COUPLE PLASTER CASTS FROM HERE ESCORTING B.C.I. AGENT TO HERITAGE CIRCLE FOR ANOTHER ONE
0214	9	229	#3 400 BLK. HERITAGE CIRCLE
0214	7	229	#2 ONA 23
0214	3	229	#2 S.O. UNIT & I TRANSPORTED GROUP TO ELM ST.
0217	404	229	NEED STOPCHECK HERE & CRUISER
0217	9	229	#2 ENROUTE TO BUCYRUS ESTATES
0221	9	229	#3

RADIO LOG  
STATION KUA 229  
DEPARTMENT OF POLICE500 S. SANDUSKY AVE.  
BUCKEY, OHIO 44820  
PHONE: (419) 562-1006

Date: FEBRUARY 14, 1994

Time	From	To	Contents
0223	7	229	#3 BUCYRUS ESTATES WAITING FOR STOPCHEK
0236	9	229	#2
0243	7	229	#3 W/ STOPCHEK
0246	9	229	24
0246			WASTE WATER PLANT
0247			WATER PLANT
0255	229	3	SOMEONE GOING THROUGH VEH'S ER-WITNESS SAW SUBJECT STEAL SOMETHING OUT OF VEH
0256	229	3	SUBJECT JUST SEEN GOING INTO DR. LYONS OFFICE
0258	407	229	BODIES HAVE BEEN REMOVED FROM SCENE
0258	9	229	#2 ENROUTE TO HOSP
0301	3-7	229	#3
0301	19	229	#3 AREA
0304	9	229	#2
0305	7	229	RP#879P, TK VEH THAT WAS ENTERED OWNER STATED IT WAS O.K.
0306	19	229	#2
0343			WASTEPLANT
0350			WATERPLANT
0430	3	229	24
0442	3	229	#2
0447			WATER PLANT
0453			WASTE WATER PLANT
0454	7	229	W/3
0458	7	229	#2
0524	3	229	24 PRIS
0527	9	7	23
0527	406	229	#2 ON A 23
0527	407	229	SIG. 7
0544			WATER PLANT
0554			WASTE WATER PLANT
0618	407	229	#2 ENROUTE TO E.R.
0623	407	229	#3 E.R.
0626	7	229	24 REPORT
0650	407	229	2,23
-7A--3P--DDY			
0707	20	229	#2
0714	20	229	#3 AREA OF HIGH SCHOOL
0714	7	229	#3 CITY GARAGE
0723	20	229	#2
0733	20	229	#3 AREA MIDDLE SCHOOL
0733	7	229	#24
0736	7	229	#2 ENROUTE
0743	7	229	#3 BEHIND IKE'S
0803	20	229	#2
0809	229	20	#23
0812	20	229	#24
0822	20	229	#2
0825	20	229	#3 IKE'S
0842	20	229	#2
0842	229	20	1221 S. WALNUT; WOMAN FOUND CASING; THINKS SHE MAY HAVE PICKED UP IN MCDONALD'S AREA
0843	20	229	#1
0849	20	229	#2
0858	406	229	DISPATCH NEXT AVAILABLE 10-61
0900	20	229	NEED 2 REPORTS REF: 10-45 AND WEAPONS
0900	229		TAPE 36 PLACED ON MACHINE
0927	20	229	#3 S. SPRING W/HDJ169 REF: LOCKOUT
0929	20	229	#2 ENTRANCE GAINED; NO DAMAGE
0935	7	229	RP#49P7061
0940	406	229	VIN/1G3AM190DD389348
0948	406	229	#2 #23
1057	20	229	#24 #11
1129	20	229	#2
1150	229	29	CAR LOCKOUT ALLEY REAR FARMERS MARK BRANCH, W. MARY BRO TK
1202	20	229	#2 ENTRANCE GAINED; NO DAMAGE
1227	401	229	WILL BE OUT OF TOWN FOR APPROX 1/2 HR
1231	43	229	#11 #17

RADIO LOG  
STATION KUA 229  
DEPARTMENT OF POLICE

500 S. SANDUSKY AVE.  
BUCYRUS, OHIO 44820  
PHONE: (419) 562-1006

Date: FEBRUARY 14, 1994

Time	From	To	Contents
1259	43	229	#2
1318	4	229	ENROUTE TO MUNI W/ONE
1353	4	229	#2 #23
1404	20	229	#3 W/LOCKOUT 100 BLOCK W.LUCAS
1408	20	229	#2 ENTRANCE GAINED; NO DAMAGE TO LNA779
1424	229	20	POSSIBLE 10-28 ON ROGERS SOUTH OF SOUTHERN
1430	20	229	#1 ROGERS
1435	20	229	RODE UP & DOWN ROGERS; SEE NOTHING
1435	229	20	UPPER SANDUSKY HAS FUNERAL PROCESSION; COMING IN ON WEST 30; GOING TO OAKWOOD
1444	20	229	#1 CITY LIMITS
1449	20	229	#2
1453	20	229	#24
			3P--11P--JAM
1521	9	229	#2
1521	6	229	#2
1535	6	229	ANY SUCCESS REACHING JUDGE
1538	9	229	HAVE UNIT 15 CONTACT WISEMAN AND ASK HIS OPINION
1540	15	229	#2
1543	15	229	#13 CCSO/MUNI CRT
1547	229	15	ITEM READY AT CCSO
1548	6-9	229	#2
1552	229	9	#15 ADVISED JUDGE SAID TO GO AHEAD AND GO IN
1552	9	229	WE WILL WAIT HERE FOR 404 AND 407
1553	6	229	#24
1553	9	229	#24
1554	229	20	10-21 GEYERS LOT
1556	20	229	#2 EN ROUTE
1601	9	229	#2
1601	20	229	#1 HERE
1604	20	229	RP#NQ7ED RP#FTH290
1607	20	229	DS ISI
1607	6	229	#2
1610	15	229	#24
1614	20	229	#2 NEED CRASH REPORT
1629	15	229	#2
1633	229	15	10-21 IN HIGH SCHOOL; WHITE CHEVETTE
1636	6	229	#1 BOB & DON'S
1637	15	229	#1 W PERRY
1637	20	229	#2 EN ROUTE TO LANE ST
1638	20	229	#1 HERE
1641	20	229	RP#HDH321 DS
1656	20	229	#2 EN ROUTE TO ER
1657	15	229	DS
1659	20	229	#3 ER
1707	15	229	#7 #4 TRANSPORTING ONE TO RESIDENCE ON W MANSFIELD
1709	20	229	#2 404/407 EN ROUTE TO COLUMBUS
1713	6	229	#2
1714	15-20	229	#2 #23 REPORTS
1719	6	229	#24
1730	9	229	#3 W/DJN084 LOCKOUT
1742	9	229	#2
1744	9	229	#24
1745	6	229	#2
1801	6	229	#11 #17
1816	20	229	#2
1818	20	229	#13 UDF
1822	20	229	#2
1831	6	229	#2
1834	6	229	#24
1836	15	229	#14 MARION ROAD
1843	20	229	#24
1912	19-6	229	#2
1914	15	229	RP#MVP149 10-45 IN ESTATES-HEADED NB ON MARION RD
1920	15	229	#2
1924	19	229	#3/IN-RP#497061 OR 49P7061
1931	19	229	VIN#1G3AM19RODD389348

RADIO LOG  
STATION KUA 229  
DEPARTMENT OF POLICE

500 S. SANDUSKY AVE.  
BUCYRUS, OHIO 44820  
PHONE: (419) 562-1006

Date: FEBRUARY 14, 1994

Time	From	To	Contents
1936	19	229	PS DAGMAR ALBERT
1938	7	229	#2
1940	229	19	VEH BELONGED TO WARREN-WAS IN FOR REPAIRS
1941	15	229	#24
1942	7	229	#13 UDF
1947	19	229	#16 300 BLK SHORT STREET
1948	7	229	#2
1951	229	7-19	10-28 113 FRANKLIN STREET
1952	19	229	#2 EN ROUTE
1956	7	229	#3 FRANKLIN
1958	19	229	#3 IN AREA
2003	15	229	#11 #17
2005	7-19	229	#2 SUBJECTS NEED COUNSELING-ARE ON WAITING LIST-AGREED TO LEAVE EACH OTHER ALONE
2023	229	6	10-54 100 HERITAGE CR
2024	19	229	#24
2026	7	229	#14 HOPLEY
2026	15	229	#2
2026	229	15	#23
2027	15	229	#24
2031	6	229	#1 HERE
2034	9-15	229	#3 EN ROUTE TO ESTATES
2036	6	229	#2
2040	7	229	#2
2040	9-15	229	#3 IN ESTATES
2046	229	6-7	10-28 530 FAILER #3/COMP AT #4 ACC LEFT AREA
2050	19	229	#2
2052	6-7	229	#3 FAILOR
2106	7-6	229	#2
2114	6	229	#24 PRISONERS 10-55 TYPING
2124	9	229	#2 #23
2128	9-15	229	#24
2138	19	229	#13 UDF
2140	19	229	#2
2152	229	19	10-45 VEH 252 HAYES-MAROON PU/LT.CAP-ONE OCCUPANT
2200	19	229	#3 IN AREA
2204	19	229	#2 #9 COA-NOTHING PARKED IN AREA
2208	6	229	#2
2214	19	229	RP#NRA541
2245	404-407	229	#3 BACK IN CITY ON #23
2252			11PM-7AM--TLG--
2313	7	229	#2
2315	406	229	#2
2323	19	229	#2
2326	19	229	11,17
2331	229	406-7	934 E. MANSFIELD ST. REF. 10-26
2335	7	229	#3
2345			WASTE WATER PLANT
2347	7	229	WATER PLANT
2347	7	229	#2 NEG. RESULTS
2315	10	229	2
2352	406	229	24
2355	9	229	2
0006	7	229	24 PRIS
0015	7	229	#2
0020	406	229	#2
0026	229	19	STOP AT S.O.
0031	19	229	24 PRIS
0044			WASTE WATER PLANT
0051			WATER PLANT
0112	19	229	#2
0115	19	229	#3 S.O.
0123	406	229	24
0129	229	19	23 FOR A PRIS
0130	7	229	24 PRIS
0144			WASTE WATER PLANT
0148	19	229	#2
2349			WATER PLANT
0150	19	229	24

## Ohio Innocence Project seeks release of convicted wife-killer



James Parsons is seeking to be released from prison after 22 years for the slaying of his wife, Barbara. The Ohio Innocence Project says he has been convicted of a crime he didn't commit. (*The Plain Dealer*).



By **John Caniglia, The Plain Dealer**

[Email the author](#) | [Follow on Twitter](#)

on January 08, 2016 at 7:00 AM, updated January 08, 2016 at 4:22 PM

NORWALK, Ohio – A husband convicted in 1993 of killing his wife is seeking to be released from prison, claiming prosecutors withheld evidence of a forensic expert's erratic work record.

James Parsons, 77, has leukemia and congestive heart disease and has been treated at **the Ohio State University Wexner Medical Center**. He asked a judge Thursday for a hearing involving evidence that his lawyer says could overturn his conviction for the slaying of his wife, Barbara.

An attorney with **the Ohio Innocence Project** said in court records that prosecutors failed to tell Parsons' defense attorney, Cleveland lawyer Paul Mancino, that the forensic expert was forcibly removed from her laboratory two months before Parsons' trial for contentious dealings with co-workers.

In documents filed in Huron County Common Pleas Court, Parsons' attorney, Donald Caster, also attacked the expert's findings, saying they were based on "junk science."

He urged **Judge James Conway** to "correct the injustice wrought upon the Parsons' family more than two decades ago." Parsons has maintained his innocence.

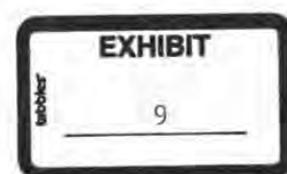
Barbara Parsons, 41, died in the bedroom of her Norwalk home in 1981 after someone wielding a large, heavy object beat her 15 times in the head. James Parsons claimed he was away from his home that day, working at his auto-repair business.

Twelve years later, in 1993, authorities arrested her husband and accused him of murder. The charge was filed after authorities resubmitted evidence to state crime analysts. Months later, a Huron County jury spent four hours deliberating before finding Parsons guilty. He was sentenced to 15 years to life, and he has spent 22 years in prison.

Caster said in the document that Parsons' conviction hinged on the testimony of a forensic scientist named G. Michele Yezzo from the Ohio Bureau of Criminal Identification and Investigation.

During Parsons' trial, Yezzo testified about bloodstains found on evidence and the patterns they left behind. Specifically, she used chemical enhancements to find that the stains had markings linked to a large mechanic's tool. Authorities seized a similar tool, known as a breaker bar, in a car James Parsons had sold to a friend.

[http://www.cleveland.com/court-justice/index.ssf/2016/01/ohio\\_innocence\\_project\\_seeks\\_r.html](http://www.cleveland.com/court-justice/index.ssf/2016/01/ohio_innocence_project_seeks_r.html)



1/2

95. I continued to investigate factual and legal ways to help Mr. Keith. After the Supreme Court issued *Trevino v. Thaler*, I felt that Mr. Keith had a new way to address some of the inequities in his case. I filed a habeas corpus petition on Mr. Keith's behalf July 26, 2013. The federal district court transferred Mr. Keith's habeas petition to the Sixth Circuit for authorization to consider a successor habeas petition.
96. On May 16, 2014, I filed in the Sixth Circuit Mr. Keith's motion for authorization to file a successor application.
97. The Sixth Circuit denied Mr. Keith's motion for authorization to file a successive habeas petition on December 8, 2014.
98. We continued to investigate and look for ways to assist Mr. Keith. On January 8, 2016, I received a Google alert with Michele Yezzo's name relating to a case brought by another inmate, James Parsons. On that day, I also received an email from a colleague with whom I'd discussed Mr. Keith's case. As a result of these events, I learned for the first time that Ms. Yezzo's BCI personnel file contained evidence that should have been disclosed to Mr. Keith under *Brady*.
99. I obtained Ms. Yezzo's BCI personnel file that same day through a connection to James Parsons' attorney. It took me approximately a month to go through it in its entirety.
100. On March 3, 2016, I called the Crawford County Prosecutor Matthew Crall and asked if he would be willing to have a meeting with Keith's counsel. He agreed, and the meeting was scheduled for April 12, 2016 at his office.
101. On April 12, 2016, my co-counsel and I met with Mr. Crall and Assistant Attorney General Brenda Leikala, counsel for the Warden in Mr. Keith's current federal habeas case. We discussed with them our concerns about Mr. Keith's conviction, especially in light of the new information regarding Ms. Yezzo. We told Mr. Crall that we would be filing a motion for leave to file a new trial motion if necessary, based on this new material. Mr. Crall told us that he would review the case, and we agreed to hold off on filing our motion until he got that opportunity. I asked Mr. Crall, in exchange, not to raise the argument that we failed to file the evidence within a reasonable amount of time. I witnessed Ms. Leikala explain to Mr. Crall that there was a requirement in the case law that the movant has to file the motion within a reasonable amount of time within discovery of the evidence. Mr. Crall agreed.
102. After leaving the meeting, I sent via email summaries with supporting documentation to both Mr. Crall and Ms. Leikala so that they could review the information. Ms. Leikala thanked me for the materials, and that was the last communication we received regarding our request. **Ex. X.**
103. When we did not hear from Mr. Crall, our co-counsel Jim Petro sent a follow-up email to Mr. Crall and blind-copied me on the email. **Ex. Y.** Mr. Petro did not, to my knowledge, ever receive a response.

  
**RICHARD CORDRAY**  
OHIO ATTORNEY GENERAL

HR 2000  
AF



**MEMORANDUM**

**To:** G. MICHELE YEZZO, FORENSIC SCIENTIST  
**FROM:** PETER C. TOBIN, SUPERINTENDENT  
**DATE:** JANUARY 30, 2008 *9/16/2008* *1/30/2009*  
**SUBJECT:** WRITTEN RECORD OF VERBAL REPRIMAND

This notice constitutes a written record of a verbal reprimand and will be placed in your personnel file.

It has come to my attention that on September 29, 2008 you were placed under a corrective action related to an interpretational error of a glass proficiency test. When you were presented with this information you offered no explanation for your poor performance. As this was the second glass related error, the corrective action ultimately required all glass cases and respective instrumentation to be transferred to the BCI & I Bowling Green laboratory.

On December 30, 2008 a second quality issue related to the paint analysis in a criminal case was presented to you with no explanation for your poor performance. Subsequently, you have been placed under a second corrective action requiring all paint case work completed by you since July 1, 2008 to be evaluated to determine if similar observational assessments were made in the examination process. In addition, your next 25 Trace Evidence cases requiring examination will be re-examined by another qualified forensic scientist.

These interpretational and observational errors indicate a lack of attention to detail, which cannot be tolerated in such a sensitive position. Your failures could lead to a substantial miscarriage of justice. Any further failures may result in discipline up to and including termination from employment.

Please take this notice in the positive spirit in which it is intended; our goal is to resolve this problem that limits the effectiveness of the work you do.

Yezzo Verbal Reprimand 01/30/2009 Page 1 of 2

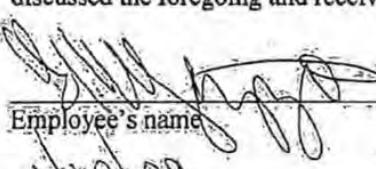
Page 1

**EXHIBIT**

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The Employee Assistance Program (EAP) provides encouragement and professional assistance to employees whose personal problems may be affecting, or likely to affect workplace performance, behavior, health, or safety. If you would like to avail yourself to the services of the EAP, they can be reached at 1-800-221-6327 or (614) 644-8545.

Your signature on this document is only meant as acknowledgement that you reviewed and discussed the foregoing and received a copy of the same.

  
Employee's name

  
Date

c: Personnel File

Yezzo Verbal Reprimand 01/30/2009 Page 2 of 2

Page 2

DEAR SUPERINTENDENT TOBIN,  
I HEARLY TENDER MY RESIGNATION, IN  
ANTICIPATION OF RETIREMENT, EFFECTIVE MARCH 1,  
2009.

2/27/09  
6/11/09  
JDF

EXHIBIT

11

cont'd, Page 2  
Michele Yezzo

- d. Employees have expressed a fear of Michele. Their opinion is based on threats of Michele making statements she will get a gun! The assumption is she will either use the gun on herself or others.
- e. Michele's personality/behavior is described as a roller coaster - ups-downs, highs-lows, excessive arguments, battles and conflicts. Constantly building an issue until it explodes and then acts as if everything is purged and nothing happened.
- f. Has been observed to break down with spells of sobbing for no apparent reason.
- g. Constantly intimidates fellow employees with abusive language such as calling them Bitches and Ass Holes and flips the bird to co-workers without provocation.
- h. In the past had intentional physical contact (short of assault) with a fellow employee (Ron Dye), has told a supervisor (Dan Cappy) Fuck You, for no apparent reason.
- i. Jamie St.Clair and Cheryl Siler have both sought professional counseling in order to cope with the fears and frustration (a request was made to review Jamie St. Clair's exit interview as it may state that management's lack of action against Michele was a noted reason for her resignation).
- j. The consensus is that Michele's perceived problem affects her overall performance. Her findings and conclusions regarding evidence may be suspect. She will stretch the truth to satisfy a department.
- k. Her outbursts have been directed to police officers regarding processing of evidence and requests.

Basically, the union has placed us on notice that they consider management ineffective and unconcerned in controlling Michele. Additionally, we will not face, accept or address the issue. If we ignore it, it may go away. What will happen to them when the time arrives that Michele finally loses what little control she has and hurts someone.

8/9/93

Per Kom Dye

Angela Hudson

Michelle Jeffre

Angela Hudson - overseeing my case  
had reassigned

footprint - same size of ID Brand



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Attorney General  
Anthony J. Celebreeze, Jr.

Interoffice Memorandum

To: FILE  
123:1- 33-04  
From: MICHAEL L. YARCHAK, LABORATORY DIVISION CHIEF *AF*  
Date: OCTOBER 24, 1986  
Subject: G. MICHELE YEZZO

G. Michele Yezzo represents a serious management problem. She is a very qualified scientist and microanalyst with excellent abilities. However, she demonstrates behavior problems, inability to cooperate with coworkers [REDACTED]

She began work with BCI in November of 1976 and has demonstrated difficulties relating with other people since February of 1977. Since that time she has alternately improved and had recurring problems. At one time or another she has had problems dealing with almost every person in the Laboratory Division. Her unpredictable behavior has made all personnel uncomfortable in her presence. As a result, most personnel try to totally avoid dealing with her. She has caused persons in the Micro section to request transfers or to leave employment.

She is prone to severe self-deprecation, crying spells, rude and insulting remarks and actions, threatening statements, suicide comments and has behaved in a manner that could be considered assaultive. At times she makes comments which make no sense to her or anyone else. At times she becomes violently upset with others over trivial matters. At times she can be extraordinarily pleasant and yet, at times, threaten to harm herself or others.

This behavior has gone on for 10 years. We have tried to address and discuss with her the problem without success for so long that I believe it must be addressed by someone other than management/employer. I feel that she has a severe self-image problem which is at the root of her problems; and one which neither she alone nor BCI management is capable of properly addressing.

Some examples of her unusual behavior are listed.

In February, 1977, after a mock trial, she indicated her low self-image stating that she wasn't good enough to work here, that she did not like the Division Chief because he did not yell at her and that she would not return the following work day.

-2-

Dale Hibner conducted her original training in the Micro section. She could not get along well with Hibner. She didn't seem to want to be told what to do because she felt she had learned something sufficiently well and would simultaneously complain about not being given sufficient direction.

She later trained other microanalysts and had personality problems with each. Patricia Brown, whom she knew from Youngstown State, asked to be transferred from the Micro section and eventually quit. Others include Sylvia Clark, Kevin Moran, Howard Millman, Denise Walters, Jami St. Clair and Jeannette Davis. In fact, she has not gotten along well with a single co-worker in the Micro section. With each person she trained or helped train, problems seemed to center around Yezzo's control of the section. She was simultaneously concerned about being responsible for every detail of section activities and not being responsible for the actions of others in the section.

With Walters she became involved in a rude and childish note writing campaign. With Clark she has had numerous confrontations, especially when they were both involved in training situations. At one time she referred to a "nigger in the woodpile" while talking with Clark.

Written complaints have been filed by Davis and St. Clair and verbal complaints registered by Walters, Matuzak and others.

It has been reported to the Superintendent's Office that she exposed her breasts in a bar in Columbus in the presence of personnel from the AG's office and BCI agents asking if they've ever seen anything like that.

Yezzo has requested transfer to the Richfield Lab and has suggested transfers to Fremont, Cambridge and the Chemistry section at London and subsequently reconsidered each.

On one occasion she made an obscene gesture at her supervisor after he informed her that a series of slides were ready to be viewed by Micro section personnel.

On another occasion she became upset with a chemist who had changed a setting on the gas chromatograph. They exchanged words and Yezzo screamed uncontrollably at him the length of the hallway using profane language.

An argument involving Yezzo and three other Micro personnel is described in separate memo. During this altercation, Yezzo became violent and assaulted another employee.

Also described in separate documentation are the events surrounding a message for Yezzo to appear for court in Vinton County. This involved threatening comments made to Jeannette Davis and Tom Nicholson that Yezzo would get a gun and shoot someone and subsequent assaultive behavior described by Ron Dye.

On several occasions she has mentioned to co-workers, to her supervisor and to the Division Chief that she would not return to work because she would be dead or that she would kill herself.

At one time or another she has been rude to, made insulting remarks to or had arguments with just about everyone in the laboratory including chemists, latent print examiners, firearms examiners, supervisors and clerical personnel.

-3-

Many of these matters have been discussed with Yezzo by those directly involved and by supervision on several occasions. She usually states that others are trying to make trouble for her, that she is not worth saving but she will try to do better. She may improve for some period of time but it has always been temporary with eventual recurrence of emotional and/or violent events.

[REDACTED] Failure to do so would be detrimental to continued employment.

MLY/ms

It has also been brought to my attention that other employees are afraid to ride in an automobile to court with Yezzo, being fearful that she might cause harm to herself or others. *MLY*



Attorney General  
LEE FISHER

BCI-73 (Rev. 8-91)

Date \_\_\_\_\_

On June 10, 1993, Russ McSevny, a latent prints technician at BCI, was interviewed between 10:15 am, and 10:28 am. McSevny provided the following information:

McSevny has been employed by the Bureau since July, 1968, and has known Michele Yezzo since she started working at the Bureau.

McSevny stated that he was never threatened by Yezzo. However, on one occasion, McSevny advised that he knows Yezzo had a serious problem with former employee Sylvia Clark. It seems Yezzo told McSevny that she was going to get that "nigger bitch". On the day after Yezzo told McSevny, there was an altercation between Clark and Yezzo. Clark allegedly threatened to attack Yezzo with a broken test tube. McSevny knows no other details.

At times Yezzo would go into the latent prints section and cry to McSevny about people yelling at her. She would often complain about Laboratory Division Chief Mike Yarchak.

June 10, 1993

London, Ohio

SI9315

On \_\_\_\_\_ at \_\_\_\_\_ File No. \_\_\_\_\_

by \_\_\_\_\_ at \_\_\_\_\_ Date dictated \_\_\_\_\_

This document contains neither recommendations nor conclusions of the BCI & I. It is the property of the BCI & I and is loaned to your agency; it and its contents are not to be distributed outside your agency.



Attorney General  
Lee Fisher

August 16, 1993

Michele Yezzo

RE: Suspension from Duties Conference

Dear Ms. Yezzo:

This will advise you that John Lenhart has recommended that you be suspended from service for ten (10) work days. The charges are threatening co-workers and failure of good behavior.

Specifically, you have made the following threatening remarks:

1. On June 2, 1993, you told Pam Long that if you did not get out of there soon, you were going to kill someone. Your tone was serious and you looked determined.
2. On May 25, 1993, you similarly told Angela Hudson that if you did not get out of there, you were going to kill some co-workers. At the time you made these statements, you were in a rage and were shaking violently.
3. Earlier in May, you told Michelle Anderson that there was going to be an incident in your work place "like the postal workers had."
4. On March 5, 1993, in Peg Saupe's presence, you commented to another employee that you had a gun at home but would not dare bring it to work because you know you would use it.
5. In September of 1992, you stated to Michelle Anderson that you wanted to knock Lynn Rider's head off. At that time you were shaking in rage.

State Office Tower / 30 East Broad Street / Columbus, Ohio 43266-0410

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Page 2

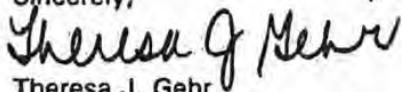
6. Later that week you told Angela Hudson that you were going to kill Lynn Rider.

In general, you have demonstrated an inability to interact cooperatively with co-workers and an inability to control your emotional behavior in dealing with your co-workers.

You will have an opportunity to respond to these charges at a pre-suspension conference on Friday, August 20, 1993 at 9:00 a.m. in the 17th floor small conference room of the State Office Tower, 30 East Broad Street, Columbus, Ohio.

This letter will be the only formal notice of the conference. If there are any changes, you will be notified. Absent any extenuating circumstances, failure to attend this meeting as scheduled will result in a waiver of your right to the conference.

Sincerely,



Theresa J. Gehr  
Director of Human Resources

SJP/fip

cc: John Lenhart  
Conference Administrator

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**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION AT CLEVELAND**

Kevin Keith, : Case No. 1:18-cv-00634  
Petitioner, : *(This case is related to 1:18-cv-00047)*  
-vs- :  
Lyneal Wainwright, Warden : Judge Solomon Oliver, Jr.  
Marion Correctional Institution, :  
Respondent. : Magistrate Judge James R. Knepp, II  
:

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**Petitioner's Memorandum in Opposition to Warden's Motion  
to Transfer to the Sixth Circuit**

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Petitioner, Kevin Keith, opposes the Warden's to transfer his habeas petition to the Sixth Circuit. The Supreme Court of the United States, as well as the Sixth Circuit, have made clear that that "not all second-in-time petitions are 'second or successive.'" *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (citing *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007)). Keith has properly filed his petition with this Court, and this Court maintains jurisdiction to proceed.

Respectfully Submitted,

/s/ James R. Wooley  
/s/ Calland M. Ferraro  
James R. Wooley (003850)  
Calland M. Ferraro (0093439)  
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And

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And

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Jimpetro73@gmail.com

Counsel for Petitioner

**Memorandum in Support**

In Keith's related lawsuit under 42 U.S.C. § 1983, Keith predicted that the Warden's counsel would, yet again, attempt to prevent his *Brady* claims from being heard on the merits by arguing for them to be subjected to a higher burden. And now the Warden's counsel has alleged that, because Kevin Keith is attacking the same judgment, his fourth habeas petition "must be transferred to the Sixth Circuit" as successive and evaluated pursuant to 28 U.S.C. § 2244. Warden's Motion to Transfer, Doc. 9, PageID 242. The Warden points to Keith's allegations in the § 1983 suit as some sort of concession that Keith believes the "proper course" is "seeking the proper approval from the Sixth Circuit." Doc. 9, PageID 243. To the contrary, Keith's prediction of the course of action the Warden would take is no concession by Keith. The Warden's "Motion to Transfer Keith's Improperly Filed Successive Habeas Petition to the Sixth Circuit Pursuant to 28 U.S.C. § 1631" does, however, provide a glimpse into what Keith has been up against.

**The Warden's Cited Legal Support is Misleading and Incomplete**

In arguing for a transfer, the Warden misrepresents the holding of *Magwood v. Patterson*, 561 U.S. 320 (2010) and cites to just one Sixth Circuit case: *In re Sims*, 111 F.3d 45, 47 (6<sup>th</sup> Cir. 1997). Conspicuously absent from her motion, though, is any citation to the multitude of cases from the Sixth Circuit and Supreme Court that succeeded that 1997 case, and that contradict her position. *See, e.g., Panetti v. Quarterman*, 551 U.S. 930, 944 (2007); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998); *Slack v. McDaniel*, 529 U.S. 473, 487 (2000); *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017); *In re Tibbetts*, 869 F.3d 403 (6th Cir. 2017); *In re Salem*, 631 F.3d 809, 813 (6th Cir. 2011); *In re Jones*, 652 F.3d 603, 605-06 (6th Cir. 2010); *In re Bowling*,

2007 U.S. App. LEXIS 30397, 9-10 (6th Cir. Sept. 12, 2007); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006); *Rosales-Garcia v. Holland*, 322 F.3d 386, 398 (6th Cir. 2003).

The Warden represents the following to this Court: “The United States Supreme Court has stated that a petition is successive if it is attacking the same judgment as a previous petition. *Magwood v. Patterson*, 130 S.Ct. 2788 (2010).” Doc. 9, PageID 242. Then she tells the Court that “[t]ransfer is required here,” because Keith’s fourth habeas petition is “attacking the same state court judgment.” *Id.* But *Magwood* does not hold that, if a petitioner is attacking the same court judgment, it is automatically considered “successive” and subject to transfer.

As the Court pointed out in *Magwood*, “it is well settled that the phrase [second or successive] does not simply ‘refe[r] to all § 2254 applications filed second or successively in time.’” *Magwood*, 561 U.S. at 332 (citing *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007) and describing *Panetti* as “creating an ‘exceptio[n]’ to § 2244(b) for a second application raising a claim that would have been unripe had the petitioner presented it in his first application”).<sup>1</sup> To make the majority, Justices Breyer, Stevens, and Sotomayor joined Justices Thomas and Scalia in their opinion in *Magwood*<sup>2</sup> but they made very clear in their concurring opinion that the *Magwood* holding did not, in fact, mean that a petition is successive if it is attacking the same judgment as a previous petition:

The Court neither purports to alter nor does alter our holding in *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007). See *ante*, at 335, n. 11, 177 L. Ed. 2d, at 604. In *Panetti*, we “declined to interpret ‘second or successive’ as referring to all § 2254 applications filed second or

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<sup>1</sup>The Court in *Magwood* also cited to *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998), and described it as “treating a second application as part of a first application where it was premised on a newly ripened claim that had been dismissed from the first application as premature,” as well as to *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) in which the Court “declin[ed] to apply § 2244(b) to a second application where the District Court dismissed the first application for lack of exhaustion.”

<sup>2</sup> They did not join the opinion as to Part IV-B.

successively in time, **even when** the later filings address a state-court judgment **already challenged in a prior § 2254 application.**” 551 U.S., at 944, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (emphasis added). In this case, by contrast, we determine how 28 U.S.C. § 2244(b) applies to a habeas petition that is the *first* petition to address a *new* “state-court judgment” that has not “already [been] challenged in a prior § 2254 application.” And, for the reasons provided by the Court, such a “first” petition is not “second or successive.” Of course, as the dissent correctly states, if *Magwood* were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply, including *Panetti*’s holding that an “application” containing a “claim” that “the petitioner had no fair opportunity to raise” in his first habeas petition is not a “second or successive” application. *Post*, at 346, 177 L. Ed. 2d, at 612 (opinion of Kennedy, J.).

*Magwood*, 561 U.S. at 343 (Breyer, J., joined by Stevens and Sotomayor, JJ., concurring in part and concurring in judgment).

Again, *Panetti*—a case not cited by the Warden—specifically rejected the interpretation of “‘second or successive’ as referring to all § 2254 applications filed second or successively in time, **even when the later filings address a state-court judgment already challenged in a prior § 2254 application.**” 551 U.S. at 944 (emphasis added). *Magwood* did not overrule *Panetti*.

Nor did *Magwood* overrule *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998) or *Slack v. McDaniel*, 529 U.S. 473, 487 (2000). Although these two cases were cited by the Supreme Court in *Magwood*, the Warden failed to cite to them or to address their impact on her argument.

In *Martinez-Villareal*, the State made—and lost on—the argument that “because [Martinez-Villareal] already had one fully-litigated habeas petition, the plain meaning of § 2244(b) … requires his new petition to be treated as successive.” 523 U.S. at 643. *Compare* Warden’s Motion to Transfer, Doc. 9, PageID 240-43. The Supreme Court rejected this interpretation because of the “far-reaching and seemingly perverse” effects it would have.

*Martinez-Villareal*, 523 U.S. at 644. Instead of treating it as a mere mathematical computation, the Court focused on the fact that Martinez-Villareal “brought his claim in a timely fashion, and it has not been ripe for resolution until now.” *Id.* at 645.

Two years later, the Court touched on the “second or successive” issue again in *Slack v. McDaniel*. *Slack* is somewhat distinguishable from the present case, because the issue concerned a petitioner who re-filed his habeas petition after it had been dismissed for lack of exhaustion. When he re-filed his habeas petition after exhausting his claims, the Court stated that a “petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as ‘any other first petition’ and is not a second or successive petition.” *Slack*, 529 U.S. at 487. Again, the Court was clear that the statutory phrase “second or successive” is a term of art in the habeas context, not a mere mathematical computation. *See id.*

Contrary to the Warden’s position, the Sixth Circuit has acknowledged that “[i]t’s true that not all second-in-time petitions are ‘second or successive.’” *In re Coley*, 871 F.3d 455, 457 (6th Cir. 2017) (citing *Panetti*, 551 U.S. at 944). And the Sixth Circuit has recognized that the question of whether a petition is “successive” does not turn on whether the petitioner already had one fully-litigated petition. In fact, it has explicitly outlined what the analysis should be when the habeas challenge addresses the same state-court judgment previously challenged:

To determine whether a second-in-time petition is “second or successive,” we look at the proposed § 2254 petition “as a whole,” *see Magwood v. Patterson*, 561 U.S. 320, 335 n.10, 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010), and ask whether it challenges the same state-court judgment of conviction and sentence that the petitioner challenged in a previous § 2254 petition. *See id.* at 331-33, 338 n.12; *see also King v. Morgan*, 807 F.3d 154, 157-58 (6th Cir. 2015). If the answer is “No,” the analysis is at an end. The proposed petition is not successive. *See Magwood*, 561 U.S. at 323-24, 331, 338-39, 341-42. But if the answer is “Yes,” as is the case here, we focus on the proposed claims themselves and apply to them abuse-of-the-writ principles, as modified by §

2244(b), to determine if the claims' presence in the petition renders it successive. *See id.* at 335 n.11; *Askew v. Bradshaw*, 636 F. App'x 342, 346-47 (6th Cir. 2016). "Under the abuse of the writ doctrine, a numerically second petition is 'second' when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect." *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006).

*In re Sutton*, No. 17-5640, 2018 U.S. App. LEXIS 7207, at \*3 (6th Cir. Mar. 21, 2018). Notably, what the Court did **not** say is that a petition is successive, and transfer is required, when the habeas petition is attacking the same state court judgment. Instead, the Sixth Circuit has stated a court must consider factors of ripeness and whether the petitioner failed to raise the claims in his first petition "either due to deliberate abandonment or inexcusable neglect." *In re Bowen*, 436 F.3d at 704; *see also In re Salem*, 631 F.3d 809, 813 (6th Cir. 2011); *Rosales-Garcia v. Holland*, 322 F.3d 386, 398 (6th Cir. 2003) ("A 'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition.")

**Keith's claims are newly ripe, and he has not abused the writ.**

As the Sixth Circuit stated in *In re Tibbetts*, "[A] petition is not second or successive when it raises a claim that was unripe for review when the first habeas petition was filed." 869 F.3d 403, 406 (6th Cir. 2017) (citing *Panetti*, 551 U.S. at 945-47 and *In re Jones*, 652 F.3d 603, 605-06 (6th Cir. 2010)). Keith's current *Brady* claim was unripe for review at the time of his first federal habeas petition in 1999, because he did not know it existed.

In *Jones*, the Sixth Circuit observed that, in *Panetti*, "the [Supreme] Court relied on pragmatic concerns, observing that '[i]nstructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources' or vindicate any other policy of federal habeas law." 652 F.3d at 605 (citing *Panetti*, 551 U.S. at 946). Based on that logic, the Sixth Circuit determined that Jones did not require authorization to file his petition, was not subjected to the limitations in § 2244(b), and he could

litigate his ex post facto claim in the district court. *Jones*, 652 F.3d at 606. It came to this conclusion because “no useful purpose would be served by requiring prisoners to file ex post facto claims in their initial petition as a matter of course, in order to leave open the chance of reviving their challenges in the event that subsequent changes to the state’s parole system create an ex post facto violation.” *Id.* at 605.

Similarly, Keith could not have filed his current *Brady* claim in his first habeas petition in 1999, because he did not discover the evidence suppressed by the State until 2016. In January 2016, counsel for Keith saw an article in the Cleveland Plain Dealer that referenced BCI analyst G. Michelle Yezzo, the BCI expert who provided testimony that forensically “linked” Keith to the crime scene. The article quoted from a memo written by a state supervisor about Yezzo: “Yezzo’s findings and conclusions regarding the truth maybe [sic] suspect. She will stretch the truth to satisfy a department.” *Id.* This triggered Keith’s counsel to obtain Yezzo’s personnel file from Yezzo’s time at BCI. Keith had no knowledge of this information in Yezzo’s personnel file until he read about it in the newspaper in 2016.

Certainly the practice should not be to file unsupported *Brady* violation allegations against the State, simply to preserve the petitioner’s ability to raise the claim if it became colorable. Keith’s discovery of the State’s suppressed evidence “render[s] his instant challenge ... newly ‘ripe,’” and for that reason it is not “second or successive.” *In re Tibbetts*, 869 F.3d at 408.

In addition, “courts defining ‘second or successive’ generally apply abuse of the writ decisions, including those decisions that predated AEDPA.” *In re Bowen*, 436 F.3d at 704 (citing *Martinez-Villareal*, 523 U.S. at 643-45. The Sixth Circuit pointed to pre-AEDPA Supreme Court case law to define “abuse of the writ:”

In *Sanders v. United States*, 373 U.S. 1 (1948), the Supreme Court explained abuse of the writ: If a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. ... Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

*Bowen*, 436 F.3d at 704.

A petition is successive under the abuse of the writ doctrine when the claim was, or could have been, raised in an earlier petition. “Under the abuse-of-the-writ doctrine a subsequent petition is ‘second or successive’ when it raises a claim that was, or could have been, raised in an earlier petition.” *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002). The abuse-of-the-writ standard has been used by the majority of the circuits in determining whether to label a petition successive. *See id.*; *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) (“[W]e find that the abuse of the writ doctrine retains viability as a means of determining when a petition should be deemed ‘second or successive’ under the statute.”); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001) (“That Crouch’s proposed petition is subject to § 2244(b)’s limitations is, however, not dispositive. Although Crouch’s proposed petition neither relies on a new rule of constitutional law nor identifies newly-discovered facts that establish his innocence of the underlying sex offenses, Crouch may nevertheless be free to file his proposed petition in the district court if it is not ‘second or successive.’”); *Hill v. Alaska*, 297 F.3d 895, 898 (9th Cir. 2002) (“That a prisoner has previously filed a federal habeas petition does not necessarily render a subsequent petition ‘second or successive.’”).

Conversely, when the petitioner’s claim could not have been raised during the prior habeas proceedings, there is no abuse of the writ. Federal courts have thus held that under the AEDPA, when a second-in-time habeas petition presents a claim that was not available during

the prior habeas proceeding, the petition is not “second or successive” and the gatekeeping mechanism of § 2244(b) does not apply. *Benchoff*, 404 F.3d at 817; *Singleton*, 319 F.3d at 1023. “Such petitions do not abuse the habeas process... because the petitioner, by definition, could not have raised the claims in his first habeas petition.” *In re Cabey*, 429 F.3d 93, 94 (4th Cir. 2005); *see also Crouch v. Norris*, 251 F.3d 720, 725 (8th Cir. 2001) (“[W]hile district courts are required to dismiss without prejudice all claims contained in such a petition, petitions refiled after a prisoner has exhausted state remedies are not deemed successive and are adjudicated under the same standard as would apply to a first petition.”).

Keith certainly did not fail to raise these claims “either due to deliberate abandonment or inexcusable neglect.” *In re Bowen*, 436 F.3d at 704. Certainly, in 1999 while under a sentence of death, Keith would have jumped at the chance to litigate the issues in his current habeas petition.

Moreover, “a rule thus declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” *Banks v. Dretke*, 540 U.S. 668, 696, (2004). Keith should not pay the price for his inability to find what the State hid in time to file it in his 1999 petition. To subject Keith’s claims to a higher burden, because the State effectively hid evidence long enough, rewards the State for its unconstitutional actions. This would be one of the “far-reaching and seemingly perverse” effects the Supreme Court warned of in *Martinez-Villareal*, 523 U.S. at 644.

**Keith’s previous litigation further demonstrates he has not “abused the writ.”**

As the Warden points out, Keith has an extensive history of litigation. The litigation history is one of the reasons Keith predicted the Warden would move to transfer his petition and subject it to the higher burden in § 2244(b). The fact that this is Keith’s fourth habeas petition demonstrates two things: 1) Keith has been proactive in raising his claims, as opposed to

“deliberately abandon[ing] or inexcusabl[y] neglect[ing]” them; and 2) the State has hidden multiple pieces of evidence, and Keith has done his best to uncover it all.

For example, in 2007, Keith uncovered suppressed documents from a 1993-94 investigation, spearheaded by the Ohio Pharmacy Board and involving Galion Police Officers.<sup>3</sup> The State had argued that Keith shot and killed Rudel Chatman’s family members as revenge for Chatman’s role as an informant in the Crestline drug raids (in which Keith was arrested for selling approximately 3 grams of crack). But what Keith uncovered in 2007, that the State never told him, was that a man named Rodney Melton had “spread the word that anybody that snitches on [him and his brother Bruce] would be killed;” Rudel Chatman was an informant on the Meltons; and Melton had told a woman two weeks before the shootings that “he had been paid \$15,000 to cripple ‘the man’ who was responsible for the [drug] raids in Crestline, Ohio last week.” Petition, Exhibit 8, Doc. 1-8, PageID 59, 62.

Keith filed his second federal habeas petition in 2008, on the bases of evidence discovered in 2007, and the District Court transferred it to the Sixth Circuit within a week. Keith filed in the Sixth Circuit pursuant to § 2244(b), and although the panel found doubt, two of the three judges determined he could not meet the heightened standard that the new evidence “demonstrate[d] by clear and convincing evidence that no reasonable juror could find Keith guilty.” *Keith v. Bobby*, 551 F.3d 555, 559 (6th Cir. 2009).

In the meantime, on September 2, 2010, Governor Strickland commuted Keith’s death sentence to life without parole based on doubts of his guilt.

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<sup>3</sup> Galion Police were one of the agencies involved in the case against Keith.

In 2013, after the Supreme Court’s decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013),<sup>4</sup> Keith filed a federal habeas petition concerning the procedurally-defaulted ineffective-assistance-of-counsel claims that his original federal habeas counsel had failed to raise. The Magistrate Judge determined that “As Keith’s Third Petition raises claims that either were or could have been raised in his First Petition, his Third Petition is successive. *Keith v. LaRose*, No. 1:13CV1718, 2014 U.S. Dist. LEXIS 42121, at \*12 (N.D. Ohio Feb. 6, 2014). The District Judge adopted her findings and transferred the petition to the Sixth Circuit. The Sixth Circuit denied Keith’s ineffective assistance of counsel claims, because he could not meet the high standards in § 2244(b).

Keith had no knowledge of this information in Yezzo’s personnel file until he read about it in the newspaper in 2016. If the Warden takes issue with the fact that Keith did not file it with his initial 1999 petition, it should be taken up with the parties who suppressed the evidence.

Moreover, to the extent the Warden is relying on the previous transfers as “proof” of what this Court must do with Keith’s current petition, Keith directs this Court to *In re Sutton*, 2018 U.S. App. LEXIS 7207, at \*3. The previous transfers have no bearing on Keith’s current petition. As Sixth Circuit directed, when a petitioner is attacking the same judgment as previously attacked, the Court should “focus on the proposed claims themselves and apply to them abuse-of-the-writ principles” to determine if the petition is successive. *Id.* A claim that is “not properly classified as ‘second or successive’ … thus does not require [Circuit] authorization to go forward in the district court.” *In re Jones*, 652 F.3d at 605.

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<sup>4</sup> *Martinez* and *Trevino* established that procedural default would not bar a federal habeas court from hearing a petitioner’s ineffective-assistance-of-counsel claim if the petitioner can establish that his post-conviction counsel was ineffective in failing to raise the claim.

### Conclusion

“[N]ot all second-in-time petitions are ‘second or successive.’” *In re Coley*, 871 F.3d at 457 (citing *Panetti*, 551 U.S. at 944). It is not simply a numerical calculation, despite what the Warden claims in her motion, and she is simply wrong when she asserts that “[t]his Court lacks jurisdiction to proceed absent [the Sixth Circuit’s] authorization.” Doc. 9, PageID 243.

To interpret the statute in a way that subjects Keith’s *Brady* claims to a higher burden—rewarding the State for effectively hiding the suppressed evidence long enough—would be a “far-reaching and seemingly perverse” effect. *Martinez-Villareal*, 523 U.S. at 644.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was electronically filed this 3<sup>rd</sup> day of April, 2018. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Respectfully submitted,

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