

**IN THE COURT OF APPEALS OF WARREN COUNTY, OHIO
TWELFTH DISTRICT COURT OF APPEALS**

THE STATE OF OHIO	:	
	:	Court of Appeals Case No:
Plaintiff/Appellee,	:	CA2011-03-027
v.	:	
	:	
	:	
RYAN K. WIDMER	:	Trial Court
	:	Case No. 08CR25254
Defendant/Appellant.	:	(Judge Bronson)
	:	

**BRIEF OF THE APPELLANT
RYAN K. WIDMER**

ORAL ARGUMENT REQUESTED

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I. Trial counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments by failing to timely prosecute what would have been a meritorious motion to suppress the bathtub and all evidence related to said tub discovered following its unlawful seizure. The state unconstitutionally seized the bathtub pursuant to a search warrant which neither listed the bathtub as an item to be seized nor could be construed to validly include the bathtub under the overly broad “latent fingerprint” language.....9

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Whether an item is unlawfully seized when the search warrant does not particularly describe the item as one to be seized despite that law enforcement specifically knows of: (1) the item; (2) its potential significance to the case; and (3) the type, place, date, and general time of crime in question, as well as the alleged perpetrator.

Whether the term “latent fingerprints” is overly broad to authorize the seizure of a household fixture which law enforcement specifically knows about and has deemed significant to the case.

Whether under all the circumstances of the case, the seizure of the bathtub complied with the Fourth Amendment’s reasonableness requirement.

Whether ineffective assistance of counsel attaches when trial counsel repeatedly failed to timely prosecute what would have been a successful motion to suppress one of the most significant pieces of physical evidence against the defendant, as well all evidence related to the subject evidence discovered following the constitutional violation giving rise to the motion to suppress; and also failed to raise unlawful seizure of the bathtub under the Fourth Amendment’s reasonableness requirement.

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Whether expert testimony is unreliable in violation of due process, Ohio R. Evid. 702, and *Daubert* when the expert admits that he has no training and only anecdotal, non-methodological, non-scientifically based experience on the subject.

Whether expert “body part impression” testimony assigning gender, direction, and timing to “body part impressions” is unreliable when the expert admittedly has no training and only anecdotal, non-methodological, non-scientifically based experience on the subject; and the methodology underlying the testimony has been proven unreliable.

Whether unreliable expert testimony creates a fundamentally unfair trial when it purports to give scientifically based physical evidence that corroborates the state’s theory of the case.

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Issues Presented for Review

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Whether the trial court committed plain error in violation of the Sixth Amendment by failing to instruct the jury on involuntary manslaughter predicated on a felony-level assault after making a legal determination that jurors could reasonably conclude that the evidence fell short of the “purposeful” *mens rea* necessary for murder, but instead established death as the proximate result of the defendant committing a felony-level assault while knowing that death would probably result.

Whether the trial court violated the defendant’s Sixth Amendment right to have the jury determine the facts and weigh the evidence by failing to instruct on lesser-included offenses that comported with a finding that the only witness who testified about the defendant’s *mens*

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Whether ineffective assistance of counsel attaches when the trial court decides that a certain law applies to the facts and trial counsel fails to ensure that the court properly conveys the applicable law to the jury.

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Whether the trial court violates the defendant’s due process and Sixth Amendment rights to confront all witnesses and present a *Kyles* defense challenging the integrity of the investigation by forbidding the defense to cross-examine the lead detective about his background which has been put in question by a false application for a job the prior decade and the source of the falsities are in dispute.

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STATEMENT OF THE CASE

A. Procedural Posture

Appellant Ryan K. Widmer stands convicted of murdering his wife Sarah by drowning her in a bathtub on August 11, 2008. In this direct appeal, Widmer appeals his murder conviction in violation of ORC §2903.02 on the basis that a multitude of constitutional violations occurred before and during his trial.

After a four-week trial beginning on January 18, 2011, Widmer was convicted on February 15, 2011 and sentenced that same day to imprisonment for 15 years to life.

B. Statement of the Facts

Ryan Widmer is a college graduate of Miami University, T.p. Vol. II at 854, formerly employed by the Warren County Convention and Visitors Bureau where he was a model employee. T.p. Vol. II at 707, 722. He married Sarah Steward on April 19, 2008. According to friends, co-workers, and family, the young couple deeply loved each other, were happily married, and no one could say a negative thing about either Ryan or Sarah. T.p. Vol. II at 210, 694, 711, 712-716, 729-732, 735-736, 746, 761, 762-763, 814, 834, 839, 856.

Also, according to everyone who knew her, Sarah would sleep more than a newborn baby. Sarah would fall asleep at Bengals football tailgate parties, T.p. Vol. II at 696, 858, in taverns while with friends, T.p. Vol. II at 694-696, 702, at movies, T.p. Vol. II at 811, 813, 856, and in other unusual locations frequently enough to earn her the nickname “Sleeper.” T.p. Vol. II at 813. According to a supervisor, Dr. Messmer, Sarah, who worked as a dental hygienist, would go out to her car on her lunch break to sleep instead of eating with co-workers. T.p. Vol. II at 766, 767. He would also find her sleeping in her car in the morning when he arrived at work. *Id.* Co-workers noticed Sarah’s habits of napping at work too. T.p. Vol. II at 827-829. If she

finished with a patient and had spare time before the next patient, Sarah would take a nap in her car. T.p. Vol. 828-829.

Her mother along with numerous friends and co-workers testified that Sarah frequently complained of severe headaches. T.p. Vol. I at 1301; T.p. Vol. II at 47. Often her headaches caused her dizziness, blurred vision, nausea, and the sensation of seeing spots. T.p. Vol. II at 809, 830. On a few occasions, the severity of her headaches forced her to go inside a dark room for relief. T.p. Vol. II at 815, 832. Dr. Becker, the dentist who employed Sarah, also noted that Sarah had complained of stomachaches continuously for five months leading up to her death. T.p. Vol. II at 55. The week before she died, Sarah's co-worker Patty Kroger noticed that Sarah's headaches and stomachaches had been so acute that she had at times been doubled-over in pain. T.p. Vol. II at 831. Friends urged her to see a doctor to address the issue. T.p. Vol. II at 809.

On August 11, 2008, after complaining of a headache and stomachache at work, T.p. Vol. II at 768, Sarah returned home from work with a severe headache. T.p. Vol. II at 56, 452. She terminated a long-distance call with her best friend because of the pain. T.p. Vol. II at 748-749. After watching television together, Sarah told Ryan she was going upstairs to take a bath and go to bed. T.p. Vol. I at 438-439, 1075, 1205. Ryan remained downstairs, watching a Cincinnati Bengals exhibition game for approximately another 30 or more minutes. *Id.* Ryan subsequently retired to the upstairs master bedroom where the master bathroom was located. *Id.* He stripped down to his boxer shorts, turned on the television, walked into the bathroom, and found Sarah unconscious and submerged in the bath water. T.p. Vol. I at 439, 1075, 1205, 1525; Vol. II at 114. Instinctively, Ryan pulled the drain plug, lifted her upper torso out of the water, and attempted to get a response from her. T.p. Vol. I at 439. Because of Sarah's propensity to fall asleep, Ryan's first thought was that she had once again fallen asleep. T.p. Vol. II at 114.

When his attempts to get a response from Sarah failed, Ryan grabbed his cell phone from the dresser inside the bedroom. The 911 call failed. T.p. Vol. I at 439, 1240-1241. Seeing Sarah's phone on the bathroom sink, he grabbed it and was able to reach the 911 operator. *Id.* The 911 operator advised Ryan to pull Sarah out of the tub, lay her on a flat surface, and attempt CPR. T.p. Vol. I at 470; *see also* 911 call. Ryan was also advised to run downstairs to unlock the door for rescue personnel. *See* 911 call. From the time Ryan successfully placed the 911 call until the first responder arrived by Sarah's side, 6 ½ minutes had elapsed. T.p. Vol. I at 78.

For the next 45 to 60 minutes EMS and ER personnel aggressively attempted to revive Sarah. T.p. Vol. I at 191; Vol. II at 552-553. EMS attempted and failed five intubations, T.p. Vol. II at 539, 540, 552-553, 986, which required a metal blade to be inserted into Sarah's throat to help move the vocal cords so that a hard plastic tube could be inserted into the lungs to create an airway. T.p. Vol. I at 220-222; *see also* Defense Exhibits D (laryngoscope) & E (endotracheal tube). CPR, which includes compressing the chest 1 ½ to 2 inches per compression at 100 compressions per minute, T.p. Vol. I at 108, 131, 172, 337, was performed throughout the 45-minute resuscitation period. T.p. Vol. I at 131, 198-199, 299.

EMS personnel noted that Sarah's body was dry enough to allow the defibrillator pads to stick to her skin, T.p. Vol. I at 100, 160-161, 387, 1014, 1207, with one EMS person saying that her body was not overly wet. T.p. Vol. I at 262. Sarah's hair was wet, T.p. Vol. I at 200, 263, 290, and her body was hot or warm to the touch. T.p. Vol. I at 160, 194. Three separate police officers responding to the Widmer home very briefly interviewed Ryan, who was still in his boxers, T.p. Vol. I at 480, 1073, 1091, 1162, while EMS personnel feverishly worked on Sarah in the bedroom.

The police did not observe any marks on Ryan, T.p. Vol. I at 480, 1092-1093, nor did they find any signs of violence anywhere in the house. T.p. Vol. I at 133, 423, 1118. Police did

observe blood and froth coming from Sarah's mouth and vaginal area, T.p. Vol. I at 1204; Vol. II at 15-16, 214-216; 655; *see also* Defense Exhibit GG), but all experts who testified at trial agreed that the froth and blood observed by the police was a result of the drowning process. T.p. Vol. I at 1184; Vol. II at 119.

Lt. Braley noted two significant blood spots on the carpet. T.p. Vol. II at 177, 213. One of the blood spots corresponded to the area where Sarah's pelvis/vaginal area had been resting; the other, to her head. T.p. Vol. II at 214-216; *see also* Defense Exhibit GG. A feminine hygiene wrapper was discovered in the bathroom trashcan's contents (suggesting that the blood on the carpet corresponding to her vaginal area resulted from Sarah menstruating). T.p. Vol. II at 217; Joint Exhibit 249.

The blood-soaked carpet was removed and collected as evidence. Annette Davis of the Miami Valley Regional Crime Lab testified that the carpet was so wet when it was cut and collected that it soaked through the brown paper bag in which it was stored. T.p. Vol. II at 21-22; Vol. I at 1249. As a result of the water damage, the bag had to be repaired with tape. T.p. Vol. II at 21-22. It was noted later that the bathroom floor was dry, T.p. Vol. I at 394, 1225, or "fairly dry," T.p. Vol. I at 414-415, and everything in the bathroom was relatively orderly. T.p. Vol. I at 423, 1118, 1230. A search of the premises resulted in no wet towels, rags, or clothing being found. T.p. Vol. I at 115.

The EMS responders and ER personnel noted no trauma to Sarah, T.p. Vol. I at 200, 232, and the coroner's investigator who carefully bagged Sarah's hands for later examination looked closely at her body and noted no trauma, T.p. Vol. I at 434, 444, 493. In fact, Sarah's fingernails had been French manicured, and they were perfectly intact. T.p. Vol. I at 785. Ryan's DNA was not found under her fingernails, as one might expect had there been a struggle. Ryan also had no

scratches on his body or any other physical marks that would suggest a struggle whatsoever. T.p. Vol. I at 480, 1092-1093.

All the medical experts agreed that Sarah Widmer drowned. Bruising to Sarah's lips, head, and neck were identified during her autopsies. The defense experts (all board certified), and the state's experts, (not all of whom were board certified), differed as to the cause of the injuries found during the two autopsies. All agreed that many of the injuries, including the injuries to Sarah's lips and left neck, were the result of the resuscitation efforts. The two pathologists (Dr. Werner Spitz and Dr. Balko) and one emergency room physician (Dr. Smile) who testified for the defense explained that all the injuries were consistent with the 45 minutes of resuscitation efforts. *See e.g.* T.p. Vol. II at 536, 537, 539-540 543, 552-553, 563, 564, 948, 953, 955, 958. The pathologists and emergency room physician who testified for the state agreed that most of the injuries were a result of the attempts to revive Sarah, but there were differences of opinion as to whether the bruises to the front and side of Sarah's neck resulted from the resuscitation efforts. *See e.g.* T.p. Vol. I at 681, 713, 881; T.p. Vol. II at 259-260, 280.

Although the defense never claimed that Sarah fell asleep and drowned, the state called a sleep expert to explain that otherwise healthy individuals do not fall asleep and drown; an individual would wake up if suddenly submerged in water. T.p. Vol. I at 533-534. None of the experts, state and defense alike, could rule out the possibility that Sarah may have had a seizure or a sudden cardiac event, which could have rendered her unconscious and precipitated her drowning in the tub. *See e.g.* T.p. Vol. I at 630, 982; T.p. Vol. II at 581, 642, 913.

Ryan was charged with aggravated murder on August 13, 2008, immediately after the state executed a search warrant of Ryan and Sarah's house located at 5250 Crested Owl Court. During this search, Danny Harness determined that no latent prints of value could be identified in the bathtub. T.p. Vol. II at 78, 95. Nonetheless, the tub was removed from the house and seized.

The state moved forward with murder charges against Ryan:

- before Dr. Uptegrove signed a final determination of the manner of death, *see* Defense Exhibit J (Dr. Uptegrove's autopsy report);
- before interviewing the emergency room physician, Dr. David Marcus (who testified that he saw no signs of trauma, but rather more blood in Sarah's lungs than he had ever seen in a drowning victim in his decades of experience, T.p. Vol. II at 120);
- before interviewing the police officers and firefighters who transported Sarah to the hospital, who also noted no trauma, T.p. Vol. II at 234;
- before reviewing Sarah's or Ryan's cell phone records and text messages, T.p. Vol. II at 234, (which revealed only loving text messages to one another and no signs of an extramarital affair by either party, T.p. Vol. I at 1279);
- before speaking with Sarah's family, friends, and co-workers about her health and the couple's relationship, T.p. Vol. II at 234, 235, 237; and
- before obtaining Sarah's prior medical records, T.p. Vol. II at 235, which reveal a cleft palate and heart murmur as a child, T.p. Vol. I at 1294-95.

In the months that followed the indictment, detectives interviewed all of Ryan's and Sarah's friends, co-workers, and family. They combed through the business and home computers, bank and financial records, personal files, phone records, employer personnel files, and they found nothing sinister. Lt. Braley indicated at trial that there was no motive and everything uncovered revealed that Ryan was well-liked and mild-mannered. T.p. Vol. II at 198, 209-210. Nor did Ryan have any history of violence or even any criminal record. Sarah's friends confirmed at trial what the police discovered: Ryan and Sarah were very much in love and had future plans for a family. T.p. Vol. I at 1321. They never exhibited any disharmony whatsoever.

However, Jennifer Crew, a drug addict from Iowa, T.p. Vol. I at 1337-1339, with a history of fraud offenses, T.p. Vol. I at 1336-1337, testified that Ryan confessed to her that he killed Sarah. T.p. Vol. I at 1386. Ryan and Crew, who managed strippers at an exotic dance

club, T.p. Vol. I at 1341, had never met in person. Instead, Crew contacted Ryan in September 2009 via his support website, freeryanwidmer.com, just minutes after watching a Dateline episode about his case.¹ T.p. Vol. I at 1342-1343. The two struck up a short-lived friendship via text message, online communication, and phone calls. According to Crew, Ryan's confession to her unfolded specifically as follows. Sarah was drawing a bath when she began confronting Ryan about a number of his ill feats—marital infidelity; a pornography addiction; and habitual and relentless smoking and drinking to excess. T.p. Vol. I at 1389-1390. Ryan's anger boiled over during the confrontation when Sarah said that their marriage was over. T.p. Vol. I at 1392. Intoxicated and in a fit of anger, Ryan responded by saying, "nobody ever leaves me, and I mean nobody." *Id.* He punched Sarah in the chest knocking her backwards to the ground. *Id.* Ryan then blacked out. T.p. Vol. I at 1393. When he regained awareness, Sarah's head was wet and she was unconscious, not breathing, apparently dead. *Id.* He panicked and did his best to clean up the scene. *Id.* Then he called 911 and reported that he found Sarah unconscious in the tub. In its closing argument, the state touted Jennifer Crew's testimony as the long-awaited answer to the mystery of how Sarah Widmer died at the hands of Ryan Widmer. T.p. Vol. II at 1193-1194.

A central issue to the case was whether Ryan had staged the scene, meaning whether Ryan had forcibly drowned Sarah much earlier, but altered the scene and faked the 911 call to convince authorities that Sarah had died alone while taking a bath. In this regard, the state called Bill Hillard, who at the request of Lt. Braley, examined the bathtub in November 2008, three

¹ Jennifer Crew first emerged as a new witness on behalf of the state prior to the trial that gives rise to the instant appeal. The instant trial began in January 2011 and marked the third trial in the case of *State of Ohio v. Ryan Widmer*. The first trial resulted in an acquittal on the aggravated murder charge and reversal of the murder conviction due to jury misconduct. The second trial resulted in a hung jury.

Crew claims Ryan made said confession to her in October 2009 some seven months prior to Widmer's **second** trial and **over a year prior** to the instant (third) trial.

months after Sarah's death. T.p. Vol. II at 225. Braley sought Hillard's expertise to examine the tub for latent fingerprints, in particular an area where Braley had dusted "streak" marks which Braley initially identified as "marks made by human hands" inside the tub to the right of the faucet. T.p. Vol. II at 190. Regarding the area of "streaks," Braley summoned Hillard to identify: (1) the presence of latent fingerprint(s); and (2) who left the fingerprint(s) in the "streak" marks. T.p. Vol. II at 135. As a result of his examination, Hillard concluded that the streak marks were "fingerprint" marks made in a "downward swiping motion," T.p. Vol. II at 136, by a person of small stature, such as a female, T.p. Vol. II at 138. Hillard also testified that he identified a male forearm impression on the front interior wall of the bathtub. T.p. Vol. II at 139-140, 141, 142, 143, 144. Finally, Hillard testified that the adult male forearm print came second in time to circular marks made by bottles that had been sitting on the edge of the tub. T.p. Vol. II at 145. In other words the "forearm marks" overlaid the circular bottle marks, thus, according to Hillard, the forearm marks were made after the circular bottle marks. *Id.*

In its closing argument the state emphasized Hillard's testimony as physical evidence in corroboration of Jennifer Crew's testimony, demonstrating that Ryan forcibly drowned Sarah and then staged the scene.

Widmer requests oral argument and presents the following written argument in support of his request for this Court to reverse his conviction.

ARGUMENT

FIRST ASSIGNMENT OF ERROR

- I. Trial counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments by failing to timely prosecute what would have been a meritorious motion to suppress the bathtub and all evidence related to said tub discovered following its unlawful seizure. The state unconstitutionally seized the bathtub pursuant to a search warrant which neither listed the bathtub as an item to be seized nor could be construed to validly include the bathtub under the overly broad “latent fingerprint” language.**

Issues Presented for Review: Whether an item is unlawfully seized when the search warrant does not particularly describe the item as one to be seized despite that law enforcement specifically knows of: (1) the item; (2) its potential significance to the case; and (3) the type, place, date, and general time of crime in question, as well as the alleged perpetrator.

Whether the term “latent fingerprints” is overly broad to authorize the seizure of a household fixture which law enforcement specifically knows about and has deemed significant to the case.

Whether under all the circumstances of the case, the seizure of the bathtub complied with the Fourth Amendment’s reasonableness requirement.

Whether ineffective assistance of counsel attaches when trial counsel repeatedly failed to timely prosecute what would have been a successful motion to suppress one of the most significant pieces of physical evidence against the defendant, as well all evidence related to the subject evidence discovered following the constitutional violation giving rise to the motion to suppress; and also failed to raise unlawful seizure of the bathtub under the Fourth Amendment’s reasonableness requirement.

The Fourth Amendment to the Constitution specifically commands that “no warrants shall issue” except those “particularly describing...the things to be seized.” U.S. Const. Amend. IV; *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 467; 91 S.Ct. 2022. This centuries-old precept, known as “the particularity requirement,” aims “to prevent the use of general warrants authorizing wide-ranging rummaging searches” that vest the executing officer with “unbridled discretion.” *United States v. Logan*, 250 F.3d 350, 364 (6th Cir. 2001); *Coolidge*, 403 U.S. at 447. The provision mandates a “particular description” of the items to be seized to “prevent the seizure of one thing under a warrant describing another,” and to ensure that “[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant.” *State v. Dillard*, 173

Ohio App.3d 373; 878 N.E.2d 694 (Ohio App. 2 Dist., 2007) quoting *Marron v. United States* (1927), 275 U.S. 192, 196; 48 S.Ct. 74.

As the D.C. Circuit explained in *United States v. Heldt*, 668 F.2d 1238 (D.C. Cir. 1981):

When investigators fail to limit themselves to the particulars in the warrant, both the particularity requirement and the probable cause requirement are drained of all significance as restraining mechanisms, and the warrant limitation becomes a practical nullity. Obedience to the particularity requirement both in drafting and executing the search warrant is therefore essential to protect against the centuries' old fear of general searches and seizures.

According to the Ohio Supreme Court, “the key inquiry is whether the warrant could reasonably describe the items more precisely than it did.” *State v. Benner* (1988), 40 Ohio St.3d 301, 307; 533 N.E.2d 701. *See also United States v. Greene*, 250 F.3d 471, 477 (6th Cir. 2001) quoting *United States v. Ables*, 167 F.3d 1021, 1033 (6th Cir. 1999) (“a description is valid if it is as specific as the circumstances and the nature of the activity permit.”). The degree of specificity required by the Fourth Amendment is measured by the information reasonably available to police in a particular case. *United States v. Ford*, 184 F.3d 566; 1999 Fed.App. 0267P (6th Cir. 1999). When the state reasonably could have more specifically described the items to be seized, the Fourth and Fourteenth Amendments require the suppression of evidence seized pursuant to the overly broad part of the warrant. *Greene*, 250 F.3d at 477.

Here, the search warrant for the Widmer house (5250 Crested Owl Court, Morrow, Ohio) listed many specific items and categories of items to be seized. But among those items, the bathtub was not included. On August 12, 2008, the day after Sarah's death, Quillan Short prepared the warrant, the affidavit supporting the warrant, and the list of items to be seized. By the time this specific warrant and supporting documents were prepared, several key events had occurred. Quillan Short, Lt. Braley, and other law enforcement officials had already conducted a cursory search of the house paying particular attention to the appearance of the bathtub, the

bathroom generally, and the bedroom. T.p. Vol. I at 1215. Sergeant Lisa Elliot, Quillan Short, Lt. Braley, and other law enforcement officials had listened to Ryan’s 911 call wherein Ryan explained that he found his wife in the bathtub unconscious and presumably dead. T.p. Vol. I at 125, 422, 1283. Also by this time, Lt. Braley had already determined that this was a murder case, and that the murder occurred by Ryan drowning Sarah in the bathtub. T.p. Vol. II at 212, 226. Indeed, the state refers to the bathtub as the precise location where Ryan allegedly drowned Sarah. *See* Affidavit for Search Warrant of Verizon cellular phone dated August 15, 2008; Affidavit for Search Warrant of HP Pavilion dated August 15, 2008; Affidavit for Search Warrant of Sentry Safe dated August 15, 2008 (“On 8/11/2008 it is believed that Ryan Widmer did purposefully drown his wife in the bathtub of his residence...”).

One item is central to each of these events—the bathtub. By the time the various warrants and related documents seeking the seizure of items from the Widmer home were prepared (beginning on August 12, 2008 and continuing until August 15, 2008), law enforcement was on prime notice that the state may seek to use items in the bathroom—namely the bathtub—as evidence in its murder case against Ryan Widmer. Even so, the bathtub is markedly absent from the list of items to be seized. Knowing the supposed crime at issue, the significance of the bathtub, and the finite list of items located in the bathroom, law enforcement undeniably could have specifically listed the bathtub. Instead, the bathtub is simply absent, and thus beyond the scope of the search warrant’s list of items to be seized. For this reason alone, the bathtub and all related evidence about said tub discovered following its unconstitutional seizure, should have (and would have) been suppressed from evidence had defense counsel timely pursued a motion to suppress raising all pertinent issues. *Greene*, 250 F.3d at 477.

The state has previously argued that the bathtub fits within the spirit of the search warrant because the list of items to be seized contains the phrase “latent fingerprints.” But this category

fails constitutional scrutiny for its over-breadth. The overly broad nature of the phrase “latent fingerprints” to seize an item as fundamental and concrete as a bathtub is self-evident—especially in a case involving an alleged murder by drowning—in a bathtub—located in a house chockfull of latent fingerprints. If using the term “latent fingerprints” were to satisfy the Fourth Amendment’s particularity requirement in a case involving a known potential crime and crime scene, then the face of Fourth Amendment jurisprudence would be dramatically altered. Law enforcement could simply use the term “latent fingerprints” to seize *literally every item* in a house from the front door to the refrigerator to the desk and all its contents. In a case, for example, where the alleged crime occurred in a trailer home, given the leeway and “unbridled discretion” offered by the term “latent fingerprints,” law enforcement could tow away the entire dwelling—because latent fingerprints are imprinted on literally everything throughout the home.

Even if this Court were to re-write Fourth Amendment jurisprudence to allow law enforcement to seize any object in a home that might contain a fingerprint of value, that new doctrine would not benefit the state here. At the time the bathtub was seized, the state knew that there were no fingerprints of value in or on the bathtub. Indeed, *prior to the tub’s seizure*, Danny Harness of the Miami Valley Crime Lab had already dusted the tub for fingerprints; performed the superglue fuming method on the tub; photographed the tub utilizing the Rufus ultraviolet imaging camera,² T.p. Vol. II at 70-77; and concluded that the tub contained “no latent prints of value” with enough characteristics to compare to known samples or warrant further analysis. T.p. Vol. II at 78. Harness performed these techniques and reached this initial conclusion while at the Widmer house *prior to the tub’s seizure*. *Id.* After the tub had been seized and sent to the Miami Valley Crime Lab, Harness processed the tub a second time, T.p. Vol. II at 99, and

² The superglue fuming method and Rufus ultraviolet imaging are techniques used to preserve, amplify, and visualize latent fingerprints. T.p. Vol. II at 70-77.

reached the same conclusion. T.p. Vol. II at 95.

Although Harness dusted the tub and performed Rufus ultraviolet imaging a second time at the lab (only to reach the same conclusion, that the tub contained no latent prints of value), the state was on notice from Harness—*prior to seizing the tub*—that the tub contained “no latent fingerprints of value.” T.p. Vol. II at 78. In the words of Harness, “I was unable to visualize any latent prints on the bathtub; I did not see anything at all really.” T.p. Vol. II at 75. For this reason as well, at the time of the seizure, the bathtub fell beyond the scope of even the overly broad term “latent fingerprints.”

To this point—the state’s claim that the bathtub falls within the spirit of the term “latent fingerprints”—it is highly significant to note that upon the initial execution of the warrant for the Widmer home (5250 Crested Owl Court), law enforcement seized Ryan’s HP Pavilion laptop computer, his Verizon cell phone, and a gray Sentry safe. *See* Affidavit for Search Warrant of HP Pavilion; Affidavit for Search Warrant of Sentry Safe; and Affidavit for Search Warrant of Verizon cellular phone.

Each of these Affidavits includes a handwritten notation explaining that each item was “seized pursuant to search warrant served on residence located at 5250 Crested Owl Court.” Yet like the bathtub, these three items were *not specifically* described in the list of items to be seized pursuant to the search warrant of the Widmer house (5250 Crested Owl Court). Even so, law enforcement seized them. Recognizing that the seizure was unlawful, beyond the scope of the search warrant for 5250 Crested Owl Court, and in violation of the Fourth Amendment, law enforcement prepared these three additional affidavits and obtained search warrants specific to each of these items. Law enforcement pursued this course to ensure that the seizure of the laptop, cell phone, and safe occurred within the strictures and the Fourth Amendment and that any evidence obtained from the items would be admissible at trial. But law enforcement did not

abide by the Fourth Amendment's particularity requirement with respect to the bathtub. The fact that law enforcement recognized that the laptop, cell phone, and safe fell beyond the scope of the search warrant for 5250 Crested Owl Court and could not be lawfully seized without **specific description** in a search warrant, demonstrates that law enforcement was well-aware that they could have tried to obtain a particularized search warrant authorizing the seizure of the bathtub.

The additional search warrants for the laptop, cell phone, and safe also demonstrate that law enforcement did not believe that the term "latent fingerprints" included items like a cell phone, laptop, or safe, which (of course) were imprinted with latent fingerprints, but which were specifically known of and easily could have been described with specificity in the search warrant. In this regard, the bathtub is indistinguishable from the laptop, cell phone, and safe.

If the bathtub ever could be lawfully seized, the constitutionally mandated procedure of having a judge issue a warrant authorizing seizure of the tub would have to be followed. In seizing the tub, law enforcement acted unreasonably under the Fourth Amendment. The bathtub and all related evidence about said tub discovered following its unconstitutional seizure were obtained in violation of Ryan's Fourth and Fourteenth Amendment rights to be free from unlawful seizures. Likewise, his rights to due process, a fair trial, meaningful confrontation of all evidence against him, and the effective assistance of counsel were violated by the admission of said evidence at trial. For a detailed discussion of the impact of Bill Hillard's testimony about his discoveries regarding the tub, which were discovered following the tub's unconstitutional seizure, *see infra* Second Assignment of Error.

A. Trial counsel provided ineffective assistance by failing to timely prosecute what would have been a successful motion to suppress the bathtub and all related evidence about said tub discovered following its unconstitutional seizure (including Bill Hillard’s “body part impression” analysis and testimony).

The Sixth Amendment to the United States Constitution provides that criminal defendants are entitled to effective assistance counsel.³ In order to prove a violation of the Sixth Amendment in Ohio, there must be a determination that counsel’s performance fell below an objective standard of reasonableness and that the defendant was prejudiced as a result. *State v. Haynes*, 2011 WL 5353070, ¶16 (Ohio App. 12 Dist., November 7, 2011) citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688; 104 S.Ct. 2052. In order to establish prejudice, an appellant must establish that but for trial counsel’s error, a reasonable probability exists that the result of his trial would have been different. *Haynes*, 2011 WL 5353070 at ¶16 citing *Strickland*, 466 U.S. at 687-688; 104 S.Ct. 2052.

Failure to file a motion to suppress that raises all the pertinent issues (here, particularity and reasonableness under the Fourth Amendment) amounts to ineffective assistance of counsel “when the record demonstrates that the motion would have been successful if made.” *Haynes*, 2011 WL 5353070 at ¶18 citing *State v. Robinson*, 108 Ohio App.3d 428, 433; 670 N.E.2d 1077 (Ohio App. 3 Dist., 1996). While courts presume trial counsel acted effectively if “counsel reasonably could have decided that filing a motion to suppress would have been a futile act,” *Haynes*, 2011 WL 5353070 at ¶18 quoting *State v. Martin*, 20 Ohio App.3d 172, 174; 485 N.E.2d 717 (Ohio App. 1 Dist., 1983), the record here strongly and unambiguously demonstrates that counsel ***did not act strategically*** and purposefully in their failure to pursue a motion to suppress the bathtub and all related evidence about said tub following its unconstitutional seizure. Rather, counsel believed that suppression was warranted as would any reasonable

³ Widmer raises ineffective assistance pursuant to the Sixth and Fourteenth Amendments to the U.S. Constitution and Section 10, Article I of the Ohio Constitution.

criminal defense attorney. After all, as discussed *supra*, the fundamental nature of the search warrant's constitutional deficiency (and the application of the exclusionary rule) is so obvious that, barring a strategic decision, failure to seek suppression of the bathtub and all evidence related to the bathtub following its unconstitutional seizure could be considered nothing but ineffective assistance.

And here, the Court need not even speculate as to whether trial counsel acted purposefully and strategically in their failure to pursue a motion to suppress the bathtub and all related evidence about said tub following its unconstitutional seizure, because the record reveals counsel's intentions and failures. Indeed, counsel prepared a motion to suppress arguing for the suppression of both categories of evidence. *See* Motion to Suppress the Bathtub (arguing for suppression of the bathtub and all evidence related to the tub following its illegal seizure). But counsel negligently missed the deadline, failed to raise the pertinent issues, and defaulted on this claim. What is more, trial counsel first failed to timely pursue the motion to suppress before the ***second trial***. Consequently, the trial court denied the motion to suppress before the ***second trial***, not because the motion lacked merit, but solely for want of timely prosecution—in other words, because defense counsel dropped the ball and attempted to file the motion after a jury had already been empaneled. *See* April 30, 2011 Order denying Motion to Suppress Bathtub for want of prosecution (“[A]n eleventh hour motion to suppress in regard to a matter well known to counsel for more than six months was not anticipated by the court and there was never any such indication given during these months and conferences by counsel. The court finds the motion has not been prosecuted in a timely fashion. Motion denied.”).

The second trial ended in a hung jury resulting in the opportunity for trial counsel to right their wrong with respect to the defaulted motion to suppress by simply rewriting a motion that raised all pertinent issues and resubmitting the motion in a timely manner prior to the third trial.

However, despite the opportunity, counsel *once again* failed to submit a motion in a timely manner prior to the *third trial*. As with their neglect prior to the second trial, counsel’s failure to pursue the motion to suppress cannot be considered strategic and purposeful. Trial counsel’s intentions are clear and consistent in the record—they hoped to suppress from evidence the bathtub and all evidence related to the tub following its illegal seizure. The following exchange in the third trial so demonstrates:

During the third trial when the state sought to admit the bathtub into evidence, counsel realized they had failed to resubmit a motion to suppress. *See* T.p. Vol. I at 1332-1333. In response, trial counsel sought to “renew” on the spot the Motion to Suppress the Bathtub, which had been untimely filed on April 22, 2010 before Widmer’s second trial and then *never* rewritten or re-filed. The trial court denied counsel’s request to “renew” the motion mid-trial, explaining that counsel had failed to timely file the motion prior to the *second* trial and was on notice of the untimely nature due to the court’s April 30, 2010 decision denying the motion for want of timely prosecution. *Id.* Even so, counsel failed to resubmit a motion raising all pertinent issues in a timely manner prior to the third trial despite several months’ notice and chance to correct the error. Accordingly, trial counsel’s effort to “renew” during the third trial what was never a viable motion to suppress to begin with, was not well-taken in the midst of the third-trial at a sidebar. *Id.*

Trial counsel simply dropped the ball time and time again on a blatantly prejudicial error in the search warrant, which if pursued, would have led to: (1) the suppression of the bathtub—one of the key pieces of evidence against Widmer; and (2) the suppression of all evidence related to the bathtub following its unconstitutional seizure pursuant to the exclusionary rule.⁴ This

⁴ Where evidence is discovered as a result of an illegal seizure, it is subject to the exclusionary rule and must be suppressed. *Mapp v. Ohio* (1961), 367 U.S. 643; 81 S.Ct. 1684 (wherein the

second category includes Bill Hillard’s “body part impression” analysis and testimony that lent the only physical, purportedly “scientific” evidence to fit the state’s theory that Ryan forcibly drowned Sarah and staged the scene to make it look like Sarah died alone while taking a bath.

Without this evidence, the state’s case would have been much weaker and lacked any physical evidence of this nature. Accordingly, Widmer suffered case-altering prejudice as the result of trial counsel’s failure to timely pursue a motion to suppress the bathtub and all evidence related to said tub following its unconstitutional seizure (which includes Bill Hillard’s analysis and testimony). *See infra* Second Assignment of Error explaining the significance of Bill Hillard’s analysis and testimony.

As explained *supra*, the unlawfulness of the bathtub’s seizure is manifest. Without question, “the record demonstrates that the motion would have been successful if made,” *Haynes*, 2011 WL 5353070 at ¶18 citing *Robinson*, 108 Ohio App.3d at 433. Likewise, a reasonable probability exists that but for counsel’s error in failing to pursue the motion, the result of Widmer’s trial would have been different. *Haynes*, 2011 WL 5353070 at ¶16 citing *Strickland*, 466 U.S. at 687-688. Accordingly, Widmer’s rights to the effective assistance of counsel, to be free of unlawful seizures, to due process, a fair trial, and the meaningful confrontation of all evidence against him have been violated. A new trial is in order.

U.S. Supreme Court held that the warrantless seizure of items from a private residence constitutes a violation of the Fourth Amendment and that this “exclusionary rule” is applicable to state courts via the Fourteenth Amendment). *See also State v. Jones*, 1999 WL 76817, *3 (Ohio App. 2 Dist., February 19, 1999) citing *State v. Timson* (1974), 38 Ohio St.2d 122; 311 N.E.2d 16 at syllabus ¶2. The exclusionary rule mandates that evidence secured incident to an invalid search or seizure should be excluded from evidence at trial. *Mapp*, 367 U.S. 643.

Trial counsel’s intention to suppress all evidence related to the tub that was discovered following the tub’s illegal seizure is also clear. In its untimely Motion to Suppress the Bathtub, trial counsel argued that because Bill Hillard’s analysis followed the illegal seizure of the tub, it must also be excluded as “fruit of the poisonous tree.” *See* Motion to Suppress the Bathtub at 2.

SECOND ASSIGNMENT OF ERROR

II. Widmer was denied a fundamentally fair trial in violation of his due process rights through the admission of impermissible expert opinion testimony that: (1) reached beyond the expert’s purported expertise; (2) lacked scientific foundation; and (3) was based on a methodology that has been proven unreliable. Accordingly, Widmer was also denied the right to adequately confront this evidence in violation of his Sixth Amendment rights.

Issues Presented for Review: Whether expert testimony is unreliable in violation of due process, Ohio R. Evid. 702, and *Daubert* when the expert admits that the methodology on which he is basing his testimony has been proven unreliable.

Whether expert testimony is unreliable in violation of due process, Ohio R. Evid. 702, and *Daubert* when the expert admits that he has no training and only anecdotal, non-methodological, non-scientifically based experience on the subject.

Whether expert “body part impression” testimony assigning gender, direction, and timing to “body part impressions” is unreliable when the expert admittedly has no training and only anecdotal, non-methodological, non-scientifically based experience on the subject; and the methodology underlying the testimony has been proven unreliable.

Whether unreliable expert testimony creates a fundamentally unfair trial when it purports to give scientifically based physical evidence that corroborates the state’s theory of the case.

Whether violations of the Due Process and Confrontation Clauses attach when an expert witness testifies about a scientific subject on which he has no training and for which the underlying methodology has been proven unreliable.

The U.S. Supreme Court has cautioned that, “expert testimony can be both powerful and quite misleading because of the difficulty in evaluating it.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1993), 509 U.S. 579, 595; 113 S.Ct. 2786, 2798. Indeed, jurors may find an expert’s testimony to “be shrouded with an aura of near infallibility.” *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975). Due to “the public’s illiteracy of science and the inability of jurors of distinguishing between good and bad science” the potentially misleading nature of expert testimony is particularly pronounced where the expert evidence is scientific in nature. *Williams v. General Motors Corp.*, 639 So.2d 275, *40 (La. App. 4 Cir. 1994).

Accordingly, expert testimony that reaches beyond the outer parameters of mainstream science—

yet is nonetheless presented to juries as valid scientific evidence—is a serious problem of constitutional dimension.⁵ See *Bugh v. Mitchell*, 329 F.3d 496 (6th Cir. 2003) (when an evidentiary error is so egregious that it results in a denial of fundamental fairness, a due process violation attaches and warrants reversal); see also *Melendez-Diaz v. Massachusetts* (2009), 129 S.Ct. 2527, 2536 (a defendant’s ability at trial to confront the analyst regarding methodology is a constitutional right inherently captured within the Sixth Amendment’s Confrontation Clause). A violation of Due Process and the Confrontation Clause attaches when unreliable forensic evidence, which lacks methodology and therefore cannot be properly confronted, is nevertheless presented for the jury’s consideration

Here, the state’s expert latent print analyst, Bill Hillard gave testimony: (1) beyond his area of expertise; and (2) admittedly rooted in flawed and discredited methodology that has been abandoned by the field of latent print analysts. Specifically, Hillard testified that he identified:

⁵ In January 2009 the National Academy of Sciences (hereinafter “NAS”)* published a report on forensics exposing the faulty “scientific” evidence presented in criminal trials—often as the only evidence, or almost certainly the most persuasive evidence—against a criminal defendant. The report is titled *Strengthening Forensic Science in the United States: A Path Forward*, (2010) (hereinafter “*NAS Report*”). The U.S. Supreme Court has extensively referenced and relied on the *NAS Report* to support its conclusion that subjectivity, bias, and flawed methodology can render unreliable the common analyses often performed in a variety of forensic science disciplines. See *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2536 (2009). Quoting the *NAS Report* and making specific reference to latent fingerprint and impression marks (such as impressions allegedly made by a particular body part), the Court noted that “there is wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material.” *Id.* quoting *NAS Report* S-5 and citing *NAS Report* 5-9; 5-12; 5-17; and 5-21 (discussing problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis and pattern/impression analysis).

* The NAS is a federal body created by President Abraham Lincoln in 1863 that serves to “investigate, examine, experiment, and report upon any subject of science” and is the authority national leaders turn to for advice on scientific and technological issues underlying public policy decisions. See NAS website www.nasonline.org at About Us.

- a male forearm on the front interior wall of the bathtub, T.p. Vol. II at 139-140, 142, 143, 144. *See id.* at 144 (Hillard testifying that “based on the hair follicles, I’d say it was a male; *id.* at 141, 143, identifying the “forearm” mark as that of an adult);
- fingertip marks that were left in a “downward swiping motion,” T.p. Vol. II at 136, by a person of small stature, such as a female. T.p. Vol. II at 138; and
- that the adult male forearm print came second in time to circular marks made by bottles that had been sitting on the edge of the tub. T.p. Vol. II at 145.

Hillard’s testimony was elicited over defense objection, T.p. Vol. II at 131, 140, 144, and in violation of Ohio R. Evid. 702(C), *Daubert*, and Widmer’s constitutional rights to due process, a fair trial, and meaningful cross-examination of all witnesses and evidence against him.

Hillard’s testimony runs afoul of due process and the Confrontation Clause on two counts. First, Hillard testified beyond his areas of expertise and into a realm of “body part impressions” for which he has no training or consistent, methodologically based, non-anecdotal experience.

Second, Hillard’s testimony purporting to identify forearm prints and “fingerprint streak” marks, assign gender to these marks, and identify from which direction the marks started and ended—is not based on scientifically valid methodology. In fact, Hillard admitted that the alleged methodology for identifying body part impressions is debunked and regarded as unreliable by the scientific community. T.p. Vol. II at 154-55. Likewise, Hillard’s testimony is devoid of any scientifically valid methodology for assigning gender and movement-direction to “body part” marks.

The erroneous admission of this testimony severely prejudiced Ryan and amounted to a violation of his rights to due process, confrontation, and fair trial. Essentially the testimony physically linked Ryan to the scene of Sarah’s death and supposedly offered “scientific” proof to support the state’s theory that Ryan staged the scene. It was powerful evidence against Ryan that contradicted his claim that he found his wife unconscious, apparently dead, in the bathtub with

alleged “physical proof” that a violent, murderous struggle had occurred. And it was the only evidence against Widmer that went unchecked.

These related but distinct constitutional errors are discussed in turn following an explanation of the standard courts must apply to determine the admissibility of expert testimony.

A. The standards governing the admissibility of expert testimony: Ohio R. Evid. 702(C) and *Daubert*.

Ohio R. Evid. 702(C) governs the admissibility of expert testimony. Rule 702(C) permits a witness to testify as an expert when: (1) the witness’s testimony relates to matters beyond the knowledge or experience of a layperson; (2) the witness has specialized knowledge, skill, experience, training, or education regarding the subject matter of his or her testimony; and (3) the witness’s testimony is based on reliable scientific, technical, or specialized information.

The third prong of Rule 702 requires the court to act as a “gatekeeper” to ensure that the proffered expert testimony is sufficiently reliable and will not confuse or mislead the jury.

Kumho Tire Co., Ltd. v. Carmichael (1999), 526 U.S. 137; 119 S.Ct. 1167; *Daubert*, 509 U.S. at 590; 113 S.Ct. at 2795; *State v. Nemeth* (1998), 82 Ohio St. 3d 202, 211; 694 N.E.2d 1332, 1339.

In *Daubert*, the U.S. Supreme Court interpreted Federal Rule 702⁶ and delineated factors courts should consider when determining whether scientific testimony is sufficiently reliable in satisfaction of Rule 702(C)’s reliability requirement. These factors include: (1) whether the theory or technique has been tested; (2) whether it has been subject to peer review; (3) whether there is a known or potential error rate; and (4) and whether the methodology used has gained general acceptance. 509 U.S. at 593-594. These factors aim to ensure that scientifically valid reasoning and methodology underlies scientific testimony. *Id.* at 592-593. Additionally, the

⁶ Fed. Rule Evid. 702 and Ohio R. Evid. are identically interpreted in Ohio. In determining the admissibility of scientific evidence, the Ohio Supreme Court in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607; 687 N.E.2d 735, adopted the test set forth by the U.S. Supreme Court in *Daubert*, a case involving the interpretation of Federal Rule 702.

Daubert Court held that if the expert is testifying about scientific knowledge that will assist the trier of fact understand or determine a fact in issue, the court nonetheless must exclude the evidence if it would confuse the issues, mislead the jury, or result in unfair prejudice. *Id.* at 595.

Because even an expert otherwise qualified pursuant to Rule 702(C) is capable of rendering scientifically unreliable testimony, it is imperative for the trial court, as gatekeeper, to execute a dual examination. On one hand, the trial court must examine the subject matter of the expert's testimony, to ensure that the expert opines only on the subject matter(s) for which he is qualified as an expert witness. *See* 4 Weinstein's Fed. Evid. §702.06[1] at 702-52 (2000) (the trial court must "exclude proffered expert testimony if the subject of the testimony lies outside the witness's area of expertise"). On the other hand, the court must examine the principles and methodology that underlie an expert's opinion and determine whether they are scientifically reliable.

B. In order to qualify as reliable, the subject matter of the expert opinion must not reach beyond the expert's area of expertise.

Regarding the first inquiry, the Ohio state and federal courts, along with the U.S. Supreme Court and Circuit Courts of Appeal have all made clear that a witness, although qualified as an expert on one area of expertise, must be precluded from offering opinions beyond that area of expertise. *Breiding v. Family Dollar Stores*, 2002 WL 1584281, *4 (S.D. Ohio, June 11, 2002) quoting *Wellman v. Norfolk & Western Railway Co.*, 98 F.Supp.2d 919, 924 (S.D. Ohio 2000). *See e.g. Weisgram v. Marley Company*, 169 F.3d 514, 518 (8th Cir. 1999) (holding that a city fire captain, although qualified as an expert on fire investigation—and therefore qualified to testify as to his opinion that a fire started in the entryway and radiated to the sofa—was not qualified to testify as to his unsubstantiated theories of a malfunction that might have caused the fire); *Cummins v. Lyle Indus.*, 93 F.3d 362, 371 (7th Cir. 1996) (industrial engineer

not permitted to render an expert opinion regarding the adequacy of warnings, the adequacy of an instruction manual, and the feasibility of alternative designs for a trim press).

In other words, a showing that an expert has specialized knowledge and training on a certain issue or in a particular field, does not render the expert qualified to generally opine as an expert on related but distinct subject matters. *See e.g. Lee v. Marlowe*, 2009 WL 2591668, *2-3 (N.D. Ohio, August 20, 2009) (cardiologist’s testimony that traffic accident was caused by driver unconsciousness due to a heart condition—as opposed to inattentiveness, fatigue, or intoxication—was inadmissible because it reached beyond the cardiologist’s expertise and was merely “subjective belief,” “personal opinion,” and an assumption based on his “involve[ment] in cases throughout the years.”).

C. In order to qualify as reliable, the expert must base his opinion on scientific principles and a tested and proven methodology, beyond his personal experience in the field.

In a related but distinct gatekeeping effort, the court must examine the principles and methodology that underlie an expert’s opinion. Expert testimony cannot be based on random observations or subjective beliefs without the support of well-established principles. *Daubert*, 509 U.S. at 590. *See also Kumho Tire*, 526 U.S. at 154-55 (finding the proffered expert qualified as an expert in mechanical engineering, but that his methodology in analyzing a particular tire failure was not reliable); *State v. Hurst*, 2000 WL 249110, *9 (Ohio App. 10 Dist.) (forbidding expert testimony from a law enforcement officer, based on “random observations” about rape victims’ propensities and behavior drawn experience conducting sexual assault investigations). Instead, the expert must convince the court that his expertise is drawn from broad-based experience wherein his observations on the subject are systematic, intentional, and consistent.

Experts, of course, often base their opinions on anecdotal data from within their field of practice. Although experts certainly may draw inferences from their experiences, the trial court

as gatekeeper, must ensure that any such extrapolation accords with scientific principles and methods. See *Valentine v. Conrad* (2006), 110 Ohio St.3d 42, 44-45; 850 N.E. 2d 683 (the Ohio Supreme Court, affirming the exclusion of expert testimony because it was based solely on the expert's anecdotal experience; the Court explained that "expert testimony based on nebulous methodology is unhelpful to the trier of fact, [and] it has no place in courts of law...Although the experts are highly qualified, their experience, by itself, does not establish the legal reliability of their opinions as applied to the facts of the case." *Id.* at ¶ 23). (internal citations omitted).

In other words, if a witness's qualification for offering an "expert opinion" is his field experience, the expert still must be able to explain the scientific principles underlying his observations in the field. If the witness's collection of experiences in the field yields the same conclusion time after time, the witness still must be able to explain, in terms of scientific principles and methodology, why the same result occurs. An explanation of the scientific basis underlying the opinion ensures that the opinion is supported by a reliable process rather than subjective beliefs or biases developed throughout the expert's career. The U.S. Supreme Court's recent ruling in *Melendez-Diaz*, 129 S.Ct. at 2536, that scientific analyses are not inherently "neutral," "reliable," or "immune from the risk of manipulation," demonstrates the importance of the court acting as a gatekeeper to ensure that a proven methodology underlies an expert opinion. A carte blanche reliance on an expert witness's opinion simply because he may have stellar credentials and unquestioned competence to testify about certain subjects within a broad field does not equate "reliability" in accordance with Rule 702, *Daubert*, or a defendant's constitutional rights to due process, a fair trial, and proper confrontation of all witnesses and evidence. See *Lee v. Marlowe*, 2009 WL 2591668 (N.D. Ohio, August 20, 2009) (expert testimony excluded as "subjective belief or unsupported speculation." *Id.* at *3-4. Quoting the Sixth Circuit, the court explained that "conclusions based only on personal opinion and

experience do not suffice to establish reliability or utility of expert testimony.” *Id.* at *3 quoting *Brown v. Raymond Corp.*, 432 F.3d 640, 648 (6th Cir. 2005)). Furthermore, “if the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” *Lee*, 20009 WL 2591668 at *3 quoting Fed. R. Evid. 702 advisory committee note to the 2000 amendments.

In sum, whether an expert’s opinion is admissible depends on whether the principles and methods employed by the expert to reach that opinion are reliable. As the U.S. Supreme Court has cautioned, the word of the expert standing alone is insufficient to establish reliability. *Gen. Elec. Co. v. Joiner* (1997), 522 U.S. 136, 146; 118 S.Ct. 512.

D. Hillard testified beyond the scope of his expertise and presented scientifically unreliable (constitutionally forbidden) testimony. Testifying under the guise of an “expert witness” the jury placed undue weight on Hillard’s improper testimony.

Here, Bill Hillard, a Senior Criminalist for the City of Cincinnati with five years experience as a criminalist and over 28 years experience as a Cincinnati Police Officer, was qualified as an expert in crime scene analysis, fingerprints, and crime scene photography. T.p. Vol. II at 125. His duties as a criminalist entail processing a crime scene for evidence, including documenting, photographing, and collecting the evidence, and then processing it for fingerprints or other forensic evidence that might be involved. *Id.* Aside from his years of experience, Hillard completed training and educational programs with the FBI Academy over the course of 20 years. *Id.* Throughout his tenure as Senior Criminalist, Hillard has processed “thousands” of crime scenes, T.p. Vol. II at 132, and approximately 200 homicide scenes including half of the City of Cincinnati’s homicide cases. T.p. Vol. II at 127-128.

Without question, Hillard is an esteemed criminalist with credentials to impress regarding his areas of expertise. However, Hillard’s testimony runs contrary to constitutional standards on two counts. First, Hillard testified beyond his areas of expertise and into a realm of “body part impressions” for which he has no training or consistent, methodologically based, non-anecdotal experience. Second, Hillard’s testimony—purporting to identify forearm prints and “fingerprint swipe” marks, assign gender to these marks, and identify from which direction the marks started and ended—is not based on scientifically valid methodology as required by *Daubert* and Widmer’s due process and confrontation rights. In fact, Hillard admitted that the alleged methodology for identifying “body part impressions” is debunked and regarded as unreliable by the scientific community. T.p. Vol. II at 154-55. Likewise, Hillard’s testimony is devoid of any scientifically valid methodology for assigning gender and movement-direction to “body part impressions.”

1. Hillard testified beyond the scope of his expertise rendering his testimony on “body part impressions” inherently unreliable.

Hillard testified that he was called to examine the bathtub on or about November 6, 2008, three months after Sarah Widmer’s death, T.p. Vol. II at 158-159, to determine if he could identify the individual who imprinted, T.p. Vol. II at 134-135, the marks inside the tub to the right of the faucet, T.p. Vol. II at 88, that had initially been dusted and identified as latent⁷ “fingerprint streaks” by Det. Braley. T.p. Vol. II at 190-191; T.p. Vol. II at 68.

By the time Hillard examined the bathtub, two other individuals already had processed said tub: Detective Braley and Danny Harness, latent print examiner with the Miami Valley Regional Crime Lab. T.p. Vol. II at 63. Three months prior to Hillard’s examination, Harness examined the marks identified by Braley as “streaks made by human hands.” T.p. Vol. II at 190-

⁷ “Latent” prints are prints that are invisible to the naked eye. T.p. Vol. II at 101.

191; T.p. Vol. II at 68. He did so by performing the superglue fuming method and utilizing the Rufus ultraviolet imaging camera—two techniques used to preserve, amplify, and visualize latent fingerprints. T.p. Vol. II at 70-77 (Harness explaining the methods used to process the tub and analyze any latent prints). Harness concluded that the tub contained “no latent prints of value.” T.p. Vol. II at 78, 95. He found no latent prints with enough characteristics to compare to known samples or warrant further analysis. T.p. Vol. II at 78. He could not identify a “direction” to the “streak” marks. T.p. Vol. II at 88. Most notably and contrary to Braley’s determination, Harness could neither identify the “streaks” as “fingerprint streaks” nor did he attempt to assign a gender, stature-size of the contributor, or direction to the marks. T.p. Vol. II at 92. In fact, Harness testified that although they *appeared* to be finger outlines, T.p. Vol. II at 88, he noted the lack of characteristics in the marks to enable him to identify them as fingerprints, as opposed to toe prints or any other part of anatomy, *id.* at 92, or to assign any direction to the marks. T.p. Vol. II at 88.

With the stage for Hillard’s testimony having been set by Harness’s testimony that “no latent prints of value” could be recovered from the tub, the state used Hillard’s testimony to educate the jury about the science underlying the latent print examination with testimony from a *true* expert in the field. While Harness was never qualified as an expert, Hillard was qualified and presented as an expert in crime scene analysis, fingerprints, and crime scene photography. T.p. Vol. II at 125.

Hillard described to the jury the properties of latent fingerprints and the methodology used to identify fingerprints, palm prints, and footprints. T.p. Vol. II at 129. When asked how a fingerprint is formed, Hillard explained that “your fingers [] have the friction skin ridges, and on these ridges you have pores and they sweat and whenever you touch something you leave a residue...that leaves a latent print,” *id.*, meaning an “invisible [print] [whereon] you use a

chemical or dusting powder to bring out that fingerprint.” *Id.* The same methodology holds true for footprints because feet contain the same skin ridges as fingertips, Hillard explained. *Id.*

Following his explanation of the scientific methodology underlying latent finger, palm, and footprint analysis, Hillard explained his findings after analyzing the tub. In agreement with Harness’s testimony, Hillard explained that, with respect to the “streak” marks on the inside of the tub to the right of the faucet, not enough ridge points were present to make comparisons with known samples, and thus, identify who left the impression. T.p. Vol. II at 136. However, contrary to Harness’ testimony (and his own testimony that not enough ridge points were present to make an identification), Hillard identified (over defense objection) the “streak” marks as “fingerprints” in a “downward position,” *id.*, made by a “person of small stature, like a child, female, or small male.” T.p. Vol. II at 138.

2. Hillard presented scientifically unreliable (constitutionally forbidden) testimony.

Hillard based his testimony that the “streak” marks were “fingerprint streaks” on the fact that he was told by someone, presumably Braley⁸, that the marks were “fingerprint streaks.” T.p. Vol. II at 135 (Hillard explaining that his involvement in the case began when Braley, T.p. Vol.

⁸ By the time Hillard examined the bathtub, two other individuals already had processed said tub: Detective Braley and Danny Harness. Accordingly, it could have only been one of these two individuals who could have told Hillard that the streak marks were from finger swipes. As Braley began processing the tub, by standing in the middle of said tub and dusting it, he concluded that latent “streaks” “made by human hands” were present in the inside wall of the tub to the right of the faucet. T.p. Vol. II at 190-191.

Harness, on the other hand, concluded that he could neither identify the “streaks” as “fingerprint” marks nor could he assign a gender, stature-size of the contributor, or direction to the marks. T.p. Vol. II at 92, 88. In fact, Harness noted the lack of characteristics in the swipe marks to enable him to identify them as fingerprints, as opposed to toe prints or prints from any other anatomy, T.p. Vol. II at 92, or to assign any direction to the marks. T.p. Vol. II at 88.

Therefore, the only reasonable deduction is that it was Braley, rather than Harness, who told Hillard that the marks were fingerprint swipes.

II at 225, requested him to “come see if those prints... could be identified... to a certain individual,” T.p. Vol. II at 135). As to his testimony that the marks occurred in a downward direction, Hillard provided no basis for his opinion. Never did he explain, in terms of scientifically valid methodology, why the “streak marks” were supposedly from fingertips stroking downward, as opposed to toes stroking downward (a common act used by someone lying in the tub to turn off the faucet), fingers stroking upward (a common act used by someone to pull hair out of the tub drain), or any other possible combination.

Similarly, Hillard testified, over defense objection, that he identified a “forearm impression” on the right front of the tub and on top of the tub and that the forearm impressions came from an adult male with discernable hair follicles on the forearm. T.p. Vol. II at 139-140, 142, 143, 144. *See id.* at 144 (Hillard testifying that “based on the hair follicles, I’d say it was a male); T.p. Vol. II at 141, 143 (identifying the “forearm” mark as that of an adult). Finally, Hillard testified that the adult male forearm print came second in time to circular marks made by bottles that had been sitting on the edge of the tub. T.p. Vol. II at 145. In other words the “forearm marks” overlaid the circular bottle marks, thus, according to Hillard, the forearm marks were made after the circular bottle marks. *Id.*

Similar to his testimony identifying the “streaks” as “fingertip swipes” made in a downward direction by a person of small-stature such as a female, Hillard offered no scientifically valid methodology for the basis of his conclusions that the alleged “forearm” impressions were indeed “forearm” impressions made by an adult male as opposed to shin, calf, or forearm impressions made, for example, by an adult female. He offered no scientifically valid methodology for his conclusion that the alleged “forearm” impressions came second in time to the circular marks as opposed to concurrently or in the reverse order.

Hillard admittedly had no training for this area of analysis and was basing his conclusions on his anecdotal and inconsistent experiences over time that had never been tested for accuracy or based on a generally accepted methodology. T.p. Vol. II at 131. Instead, his conclusions were based on his personal *ipse dixit*, which, according to the U.S. Supreme Court is insufficient to establish reliability. *Joiner*, 522 U.S. 136, 146; 118 S.Ct. 512.

But what is more, because Hillard's testimony was armed with his stellar credentials and qualification as an expert, his testimony assumed, in the eyes of the jurors, the mystical infallibility so often accorded to expert testimony on scientific subjects. Despite his impressive resume, Hillard was not qualified in the area of "body mark impressions," nor could he have been, because there is no scientifically valid methodology on which to base such analyses. Hillard himself admitted that the purported methodology underlying "body part impression" analysis is not a researched area, is not an established science, and has been "**proven unreliable.**" T.p. Vol. II at 154-55.

Yet his testimony—that adult male forearm impressions were made over top of bottle mark impressions, and that fingertip swipe marks were made in a downward direction by someone of small-stature like a female—based on his own anecdotal experience rather than any proven methodology—lent physical, supposedly "scientific" evidence to fit the state's theory that Ryan forcibly drowned Sarah and staged the scene to make it look like she died alone while taking a bath.

With respect to identifying fingerprints, palm prints, and footprints, Hillard explained the scientifically valid methodology used to identify and collect latent prints. *See* T.p. Vol. II at 154 (Hillard testifying that, "fingerprint science is based on friction ridge detail."). While even this

methodology has been prone to subjective (and thus inconsistent and unreliable) interpretation,⁹ the methodology itself is scientifically based, has been tested, peer-reviewed, and is generally accepted in satisfaction of *Daubert*, 509 U.S. at 593-594 and due process. See *NAS Report* at 143-44 (the NAS does not question the theory underlying friction ridge analysis, but rather the subjective nature of the judgments that must be made by the fingerprint examiner at every step of the process. *NAS Report* at 139, 141).

While the methodology underlying friction ridge analysis is scientifically based, tested, peer-reviewed, and is generally accepted in the scientific community, the exact opposite is true with respect to Hillard's testimony regarding: (1) the adult male forearm impression; (2) the timing of those impressions; (3) the direction of the swipe marks; and (4) the identification of

⁹ On November 22, 2005, the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 became law. 119 Stat. 2290 (2005). Through this act, Congress directed the United States Attorney General to provide funding to the National Academy of Sciences ("NAS") to convene a committee, known as the Committee on Identifying the Needs of the Forensic Science Community, to study the current state and remaining needs of the forensic sciences. *Strengthening Forensic Science in the United States: A Path Forward*, (2010) at 2 (hereinafter "*NAS Report*"). This Committee was formed under the auspices of the NAS's Committee on Science, Technology, and Law and the Committee on Applied and Theoretical Statistics, and "was composed of many talented professionals, some expert in various areas of forensic science, others in law, and still others in different fields of science and engineering. *Id.* at xx. After three years of study, including a review of all published scientific literature related to particular forensic methods, the NAS issued a report that revealed that some forensic disciplines, including friction ridge analysis, severely lack scientific validity. *Id.* at 3. The report's central finding was that other than DNA analysis, "no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." *Id.* at 5. Additionally, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence. *Id.* at 3.

Accordingly, until recently, federal and state courts have admitted friction ridge analysis almost without exception based on the assumption that the method is scientifically valid and the fact that past courts have accepted the method time and time again. However, the scientific community has called into question the acceptance of friction ridge analysis as a method of conclusively establishing that a particular fingerprint was left by a particular individual. The review of the scientific literature on friction ridge analysis by the NAS concluded that, for a variety of reasons, friction ridge analysis cannot uniquely identify a specific individual with scientific certainty. See *NAS Report* at 142.

those marks as being made by the fingertips of a small-statured person such as a female. In its analysis of “body part impression” evidence, the NAS concluded that “it is difficult to avoid biases in experience-based judgment, and there is not enough data about the natural variability of less frequent types of impressions, such as ears, lips,” or other body parts to render the analysis reliable. *NAS Report* at 145-150.

Given that “body part impression” analysis is not a researched area, is not an established science, and has been “**proven unreliable**,” Hillard admittedly based his testimony solely on his “experience” throughout the years.” T.p. Vol. II at 154-55. Even when an expert’s qualifications are based on job experience, his observations still must be based on scientifically valid methodology. For example, if Hillard had never completed the FBI Academy trainings and based his ability to analyze fingerprints on his basic police training coupled with 20 years of job experience executing those skills, his experience-based expertise would nonetheless be rooted in the scientifically valid methodology of comparing friction ridge details between a known sample and the collected sample in question. To the contrary, Hillard could not (nor could anyone) claim that any amount of job experience—be it 5 months or 50 years—identifying “body part impressions” renders him qualified to give reliable testimony about such. And this is so because analyzing “body part impressions” has been “proven unreliable” and is not an established science. Accordingly, any experience-based observations are wholly subjective, inconsistent, and lacking in scientifically valid methodology.

For these reasons, Hillard’s testimony with respect to: (1) the adult male forearm impression; (2) the timing of those impressions; (3) the direction of the swipe marks; and (4) the identification of those marks as being made by the fingertips of a small-statured person such as a female—was inadmissible. The trial court abused its discretion in overruling the defense objections and permitting Hillard’s testimony on these points.

E. Hillard’s testimony deprived Widmer of his constitutional rights to confrontation, due process, and a fair trial.

Cut loose from time-tested rules of evidence and allowed to engage in purely personal, idiosyncratic speculation, Hillard’s testimony not only violated Rule 702 and *Daubert*, but it also deprived Widmer of his constitutional rights to confrontation, due process, and a fair trial.

There can be no question that the “body part impression” evidence physically linking Ryan to the scene of Sarah’s death and supposedly offering “scientific” proof to support the state’s theory that Ryan staged the scene, was powerful evidence against Ryan. It contradicted Ryan’s claim that he found his wife unconscious, apparently dead, in the bathtub with alleged “physical proof” that a violent, murderous struggle had occurred. And it was the only evidence against Widmer that went unchecked.¹⁰

¹⁰ There are five categories of evidence against Widmer: (1) the bruising to Sarah Widmer’s neck; (2) the supposed lack of water at the scene; (3) Ryan’s alleged confession to Jennifer Crew; (4) inconsistent accounts of how Ryan found Sarah; and (5) Hillard’s testimony identifying an adult male forearm, evidence of a clean-up, and fingertip swipe marks made in a downward direction by a small-statured person such as a female. As the following discussion of the other evidence against Widmer reveals, Hillard’s improper testimony is the only evidence left unchecked:

The bruising to Sarah’s neck.

The pathologists and emergency room physician who testified for the state agreed that most of the injuries were a result of the attempts to revive Sarah, but there were differences of opinion as to whether the bruises to the front and side of Sarah’s neck resulted from the resuscitation efforts. *See e.g.* T.p. Vol. I at 681, 713, 881; T.p. Vol. II at 259-260, 280. The two pathologists (Dr. Werner Spitz and Dr. Balko) and one emergency room physician (Dr. Smile) who testified for the defense explained that all of the injuries, including the bruising to Sarah’s front and side neck, were consistent intubation efforts and quite possibly could have been the cause given the lengthy span of the resuscitation effort. *See e.g.* T.p. Vol. II at 536, 537, 539-540 543, 552-553, 563, 564, 948, 953, 955, 958.

The supposed lack of water at the scene.

Braley and first responders testified that the bathroom appeared dry or “fairly dry,” T.p. Vol. I at 394, 414-415, 1225, and that only Sarah’s hair was wet. T.p. Vol. I at 200, 263, 290. Braley, who had cut carpet samples from the stained areas of carpet, T.p. Vol. I at 1292, corresponding to the areas where Sarah’s head and vaginal areas had rested, T.p. Vol. I at 1204; T.p. Vol. II at 15-16, 214-216, 655; Defense Exhibit GG, testified that the carpet was also dry. Braley even

Hillard's testimony is the only unchallenged testimony against Widmer. It paints a picture of a violent struggle—supposedly backed with scientifically based, physical evidence—leaving the jurors bound to view Ryan's statements, the bruising on Sarah's neck, and the amount of water present at the scene, in a sinister light. But in actuality, Hillard's testimony lacked foundation, reached beyond the scope of his expertise, and was admittedly rooted in

testified that he removed his gloves and touched the areas of carpet where Sarah's body had lain, and his feel-test revealed dry carpet. T.p. Vol. II at 179.

On the other hand, Annette Davis testified that the carpet was so wet when it was cut and collected that it soaked through the brown paper bag in which it was stored. T.p. Vol. II at 21-22; Vol. I at 1249. As a result of the water damage, the bag had to be repaired with tape. T.p. Vol. II at 21-22. With respect to the supposed lack of water, Quillan Short, who aided Braley in processing the crime scene, noted the presence of water droplets in the drain, T.p. Vol. I at 1213; T.p. Vol. II at 181, despite that nearly two hours had passed from the time Sarah was removed from the tub to the time the bathroom was processed for evidence. *See* Consent to Search Form (signed by Ryan Widmer at 12:35 a.m. on August 12, 2008. The 911 call was placed at 10:49 p.m. on August 11, 2008. T.p. Vol. I at 1240-1241). First responders had noted in their reports that the Sarah's body hot or warm to the touch, T.p. Vol. I at 160, 194, and was "not overly wet" as opposed to dry. T.p. Vol. I at 262. Furthermore, neither Braley (nor anyone else) collected data on the factors that would impact how quickly water dries, including the air temperature, humidity, or airflow. T.p. Vol. II at 202. And perhaps most significantly, Braley and other first responders admitted that their suspicions were piqued about the lack of water because they believed that Ryan lifted Sarah from a tub full of water, T.p. Vol. I at 1112, 1202, when in fact, Ryan drained the tub prior to removing Sarah. *See* 911 call.

Ryan's alleged confession to Jennifer Crew.

Jennifer Crew testified that Ryan, in a highly intoxicated and emotional state, confessed to her that he killed Sarah. T.p. Vol. I at 1389-1393. Yet on behalf of the defense, Christopher Kist testified that he assisted Ryan in moving furniture immediately prior to Ryan's telephone call with Crew, and that Ryan had not been drinking. T.p. Vol. II at 859-861. Similarly, Melissa Waller testified that she spoke with Ryan immediately after his call with Crew, and he did not sound emotional or intoxicated. T.p. Vol. II at 1008, 1015.

Inconsistent accounts of how Ryan found Sarah.

Because Ryan did not testify, his accounts of how he found Sarah were attested to secondhand by people who encountered Ryan only minutes after either finding his 24-year-old wife of four months unconscious or learning of her death—undoubtedly the most tragic and shocking moment of his life. Despite his emotional state, Ryan consistently reported that he found Sarah facedown in the tub. T.p. Vol. I at 439, 1075, 1205; T.p. Vol. II at 114; *see also* 911 call. Only one person reported that Ryan claimed to find Sarah facing up. T.p. Vol. I at 1525.

techniques that have been “proven unreliable.” T.p. Vol. II at 154-55. This, in turn, deprived Widmer of any viable ability to confront this evidence. In its closing argument, the state then emphasized Hillard’s testimony as physical evidence in corroboration of Jennifer Crew’s testimony, demonstrating that Ryan forcibly drowned Sarah and then staged the scene.

Without Hillard’s testimony, the nature of the state’s proof would have been altogether different. A weaker case necessarily would have resulted with no unchallenged physical evidence demonstrating that a struggle (and a cover-up of that struggle) had occurred in the bathroom. His testimony was admittedly unreliable, grossly misleading, and “plainly material.” *Brown v. O’Dea*, 227 F.3d 642, 645 (6th Cir. 2000). Indeed, Hillard’s testimony was so extremely unfair that its admission violates the fundamental concepts of justice and due process.¹¹ This court must reverse.

¹¹ See *Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (holding that the state expert’s testimony was based on debunked and unreliable science and the trial court’s failure to exclude it substantially prejudiced the outcome of defendant’s trial and deprived her of her due process rights to a fair trial).

THIRD ASSIGNMENT OF ERROR

III. The trial court erred in violation of Widmer’s Fifth, Sixth, and Fourteenth Amendment rights by failing to properly instruct the jury on all lesser-included offenses of murder reasonably adduced by the evidence. Alternatively, defense counsel provided ineffective assistance in violation of the Sixth and Fourteenth Amendments by failing to ensure that the jury instruction properly conveyed the applicable law.

Issue Presented for Review: Whether the trial court committed plain error in violation of the Sixth Amendment by failing to instruct the jury on all lesser-included offenses of murder adduced by the evidence when the only witness who testified as to the defendant’s *mens rea* conveyed a scenario about which jurors could reasonably conclude established involuntary manslaughter predicated on a felony-level assault or reckless homicide.

Whether the trial court committed plain error in violation of the Sixth Amendment by failing to instruct the jury on involuntary manslaughter predicated on a felony-level assault after making a legal determination that jurors could reasonably conclude that the evidence fell short of the “purposeful” *mens rea* necessary for murder, but instead established death as the proximate result of the defendant committing a felony-level assault while knowing that death would probably result.

Whether the trial court violated the defendant’s Sixth Amendment right to have the jury determine the facts and weigh the evidence by failing to instruct on lesser-included offenses that comported with a finding that the only witness who testified about the defendant’s *mens rea* offered truthful and credible testimony as to how the victim died at the hands of the defendant.

Whether ineffective assistance of counsel attaches when the trial court decides that a certain law applies to the facts and trial counsel fails to ensure that the court properly conveys the applicable law to the jury.

Trial courts have the responsibility to give all jury instructions that are relevant and necessary in order for the jury to properly weigh the evidence and perform its duty as the fact-finder. *State v. Comen* (1990), 50 Ohio St.3d 206, syllabus at ¶ 2; 553 N.E.2d 640. As the U.S. Supreme Court has recognized, the Sixth Amendment and the Due Process Clause protect the criminal defendant’s right to trial by an impartial jury, which includes “as its most important element, the right to have a jury, rather than the judge, reach the requisite finding of ‘guilty.’” *Sullivan v. Louisiana* (1993), 508 U.S. 275, 277; 113 S.Ct. 2078, 2080. This Sixth Amendment right is further interpreted to prohibit judges from weighing evidence and making credibility

determinations, instead leaving those functions for the jury. *See e.g. United States v. U.S. Gypsum Co.* (1978), 438 U.S. 422, 446; 98 S.Ct. 2864, 2878 (holding that a jury instruction which effectively took from the jury the issue of intent properly invaded the jury's fact-finding function); *Herrington v. Edwards*, 1999 WL 98587, *3 (6th Cir. 1999) ("The court must not dictate the outcome [of the proceedings]. If it does so, it has invaded the province of the jury protected by the Sixth Amendment and the Due Process Clause."); *State v. Miller*, 2011 WL 743226 (Ohio App. 10 Dist., March 3, 2011) (a criminal defendant has a right under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution to be afforded a meaningful opportunity to present a complete defense to a properly instructed jury).

A trial court including instructions on lesser-included offenses reasonably adduced by the evidence is part and parcel to a defendant's constitutional right to a properly instructed jury. Pursuant to O.R.C. §2945.74, a jury may elect to convict a defendant of a "lesser included offense" of the charge specified in the indictment rather than the specified charge itself. In *State v. Kidder* (1987), 32 Ohio St.3d 279; 513 N.E.2d 311, the Supreme Court of Ohio established a three-prong test for determining when a separate offense constitutes a "lesser-included offense." According to *Kidder*, a given charge is a lesser included offense when: "(i) the offense is a crime of lesser degree; (ii), the offense of the greater degree cannot...ever be committed without the offense of the lesser degree also being committed; and (iii) some element of the greater offense is not required to prove the lesser offense." *Id.* at 282-283; 315-16.

Furthermore, pursuant to the Sixth Amendment and the Due Process Clause, a criminal defendant is entitled to a jury instruction on the lesser-included offense when two factors are present. First, the trial court must determine that "the offense on which the instruction is requested is necessarily lesser than and included within the charged offense," meaning that the

greater offense cannot be committed without also committing the lesser offense on which the instruction is requested. *State v. Johnson* (1990), 36 Ohio St.3d 224, 225; 522 N.E.2d 1082-83. Second, the trial court must also find that “the jury could reasonably conclude that the evidence supports a conviction for the lesser offense and not the greater,” meaning that the jury could reasonably decide that the state did not meet its burden of proof for the element that distinguishes the charged offense from the lesser-included offense. *Id.*

Here, the trial court instructed the jury on the lesser-included offense of involuntary manslaughter predicated on the commission of a misdemeanor.¹² In the event of an acquittal on the murder charge, the version of involuntary manslaughter included in the instructions would have required a finding by the jury that the death of Sarah was the proximate result of Ryan committing or attempting to commit a misdemeanor, namely misdemeanor assault. T.p. Vol. II at 1286-1287. Misdemeanor assault does not contemplate the infliction of serious physical harm, but rather more minor, non-life threatening physical harm. *See State v. Nesbitt*, 2009 WL 565510 (Ohio App. 1 Dist., March 6, 2009) (“as felonious assault involves the causing of serious physical harm to another, the distinguishing factor between felonious assault and assault is the causation of *serious* physical harm). (emphasis included in original).

Trial counsel objected to the court instructing the jury on lesser-included offenses of murder, arguing that the evidence did not support instruction on any lesser-included offenses. T.p. Vol. II at 1171-1172. Even so, over counsel’s objection, the court included an instruction on

¹² The Ohio Revised Code includes two versions of involuntary manslaughter. O.R.C. §2903.04(A) defines involuntary manslaughter as a death proximately resulting from the commission of (or the attempt to commit) a felony, whereas O.R.C. §2903.04(B) defines involuntary manslaughter as a death proximately resulting from the commission of (or the attempt to commit) a misdemeanor.

the lesser-included offense of involuntary manslaughter predicated on the commission of misdemeanor assault. *Id.*

The problem here is *not* the court's inclusion of the instruction on involuntary manslaughter predicated on the commission of misdemeanor assault, but rather: (1) the trial court's failure to include an instructions on (a) involuntary manslaughter predicated on the commission of a felony, namely felonious assault¹³ and (b) reckless homicide;¹⁴ and (2) trial counsel's failure to ensure that the instructions properly conveyed the law. In other words, the court overruling counsel's objection to not include instructions on lesser-included offenses did *not* then absolve counsel of the duty to ensure that the instructions properly defined the law in accordance with the court's decision.

In its decision to include instructions on lesser-included offenses, the court reasoned that Jennifer Crew's testimony introduced evidence that Ryan went into "some assaultive (sic) rage

¹³ According to O.R.C. §2903.11(A)(1), Felonious Assault is defined as knowingly causing serious physical harm to another.

Pursuant to the trial court's legal determination regarding the implications of Jennifer Crew's testimony, T.p. Vol. II at 1172, the precipitating felony could also be aggravated assault. According to O.R.C. §2903.12, Aggravated Assault is defined as knowingly causing serious harm to another while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim, that is reasonably sufficient to incite the person into using deadly force.

Although involuntary manslaughter predicated on aggravated assault requires an element of proof (rage induced within the assailant by the victim), which is not always necessary to sustain a conviction of the greater offense of murder, the facts presented at trial necessitate consideration of this offense as a viable lesser offense to murder. The trial court made an in-chambers determination to this effect.

Jennifer Crew's testimony, the court explained, introduced evidence that a jury could reasonably conclude proves that Ryan recklessly or knowingly caused Sarah's death by assaulting her while in a fit of sudden rage she provoked, aware that doing so would probably lead to her death. T.p. Vol. II at 1172.

¹⁴ O.R.C. §2903.041 defines Reckless Homicide as recklessly causing the death of another.

that went beyond the scope of what his intent may have been and [that he] just submerged her, not intending to kill her, but knowing under the definition of knowingly kept her submerged too long...that led eventually to her death.” T.p. Vol. II at 1172.

Based on the court’s finding that Jennifer Crew’s testimony supported the inclusion of a lesser-included offense, the trial court committed plain error in violation of the Sixth Amendment and the Due Process Clause by failing to instruct the jury on (a) involuntary manslaughter predicated on a **felony** (O.R.C. §2903.04(A)) and (b) reckless homicide (O.R.C. §2903.041). Instead, the court only instructed the jury on the lesser-included offense of involuntary manslaughter predicated on a **misdemeanor** (O.R.C. §2903.04(B)).

The court unambiguously decided that that the jury could conclude, based on Jennifer Crew’s testimony, that Ryan went into an “assaultive rage,” submerging Sarah not intending the kill her but knowing that submerging her would probably lead to her death. T.p. Vol. II at 1172. An instruction on involuntary manslaughter based on the commission of a felony captures this possible fact-determination by the jury—that Ryan acted beyond just knowingly causing physical harm and into the realm of knowingly causing *serious physical harm*¹⁵ **that would probably lead to Sarah’s death.**¹⁶

¹⁵ According to O.R.C. §2903.11(A)(1), Felonious Assault is defined as knowingly causing serious physical harm to another.

Accordingly to O.R.C. §2903.12, Aggravated Assault is defined as knowingly causing serious harm to another while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim, that is reasonably sufficient to incite the person into using deadly force.

¹⁶ Additionally, in accordance with the Sixth Amendment, Due Process, and *State v. Comen*, the court should have instructed the jury on Reckless Homicide (O.R.C. §2903.041) to ensure that the jury was instructed on all lesser-included offenses reasonably adduced by the evidence as necessary for it to properly weigh the evidence and perform its duty as the fact-finder. As the court determined, Jennifer Crew’s testimony introduced evidence that a jury could reasonably

Instead, however, the court proceeded to instruct the jury *only* on involuntary manslaughter based on the commission (or attempt to commit) a misdemeanor assault, which does not contemplate **serious physical harm**, but rather only physical harm of a non-life threatening nature. Accordingly, the court failed to give the jury the option to find that Ryan had caused Sarah’s death while knowingly causing her **serious, life-threatening, physical harm** and/or while in a fit of sudden rage as Jennifer Crew had testified. *See State v. Nesbitt*, 2009 WL 565510 (Ohio App. 1 Dist., March 6, 2009) (“as felonious assault involves the causing of serious physical harm to another, the distinguishing factor between felonious assault and assault is the causation of *serious* physical harm). (emphasis included in original).

In other words, the trial court clearly envisioned the possibility that Ryan may have caused Sarah’s death by knowingly assaulting her in a fit of rage, imposing serious harm that would probably lead to her death, and that he caused her death accidentally or recklessly (but not purposefully). This was a reasonable option for the trial court to envision, because such an option was supported by the testimony of Jennifer Crew—the only state witness who spoke to Ryan’s alleged state of mind that night. But then the trial court made a mistake and accidentally charged the jury with lesser-included offense of misdemeanor assault, a charge **that did not fit the facts of the case**. The trial court’s statements and the evidence adduced at trial demonstrate that this was an inadvertent error by the trial court—a plain error that made no sense in light of the evidence and the trial court’s own reasoning and comments. But this error had a major impact on Ryan’s case. And once their objections were overruled, defense counsel had an obligation to ensure that the lesser-included offense instructed to the jury was correct. In other

conclude proves that Ryan recklessly or knowingly caused Sarah’s death by assaulting her while in a fit of sudden rage, aware that doing so could lead to her death. T.p. Vol. II at 1172.

words, defense counsel had an obligation to object to the trial court's error and ensure that the instruction properly fit the facts of the case.

In so instructing, the court stripped the jury of its fact-finding duty and made a credibility determination about Jennifer Crew's veracity as a witness—duties that should have been left within the sole province of the jury according to the constitutional guarantees of the Sixth Amendment and Due Process. The constitutionally deficient instructions constitute plain error because the court obviously intended to instruct the jury on its ability to determine that Ryan caused Sarah's death recklessly as a the proximate result of committing felonious or aggravated assault (based on the court's reasoning that Crew's testimony presented evidence that Ryan acted in a assaultive rage. T.p. Vol. II at 1172). But despite its clear intentions, the court instructed the jury only on involuntary manslaughter predicated on a misdemeanor (which does not contemplate **serious, life-threatening**, physical harm) and left the jury with no option to convict Ryan on the scenario attested to by Jennifer Crew and touted by the State during closing argument as its theory of how Sarah died at the hands of Ryan. T.p. Vol. II at 1193-1194.

Pursuant to Crim. R. 52(B), plain error exists when there is an obvious deviation from a legal rule that affected the defendant's substantial rights or influenced the outcome of the proceedings. *State v. Dodson*, 2011 WL 6017950, ¶ 39 (Ohio App. 12 Dist., December 5, 2011). *See Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999) (holding that the Michigan Supreme Court invaded the province of the jury by finding that the erroneous jury instruction was harmless and that no reasonable juror would have believe the defendant's claim of self-defense. The Michigan Supreme Court asserted that because the victim received ten blows to the head and was stabbed thirty-two times, no reasonable juror would have believed that such force was necessary to resist a sexual assault by an "enfeebled" victim. However, the Sixth Circuit concluded that there was sufficient evidence in the record to support rational conclusions to the contrary. Accordingly, the

Sixth Circuit determined that the Michigan Supreme Court must have wholly discredited this testimony in arriving at its conclusion that the amount of force used was unjustified to include a self-defense instruction. Similarly, the state court's conclusion that the victim was "enfeebled" rejects testimony to the contrary, that although the victim walked with a cane, he was "a strong man." In reaching these factual conclusions and denying a self-defense instruction, the Sixth Circuit held that the state court invaded the province of the jury in violation of the Sixth Amendment and Due Process Clause).

Here, without instructions on reckless homicide and involuntary manslaughter predicated on the commission of felonious or aggravated assault, the jury had no option to determine that Jennifer Crew's testimony was credible. Thus, the jury had no option to conclude that: (1) Ryan knowingly caused Sarah serious, life-threatening, physical harm by punching her and submerging her head under water knowing that doing so would probably kill her; and/or (2) that Ryan was induced into a fit of rage by Sarah confronting him with his infidelities leading him to punch her and submerge her head under water.

This error is one of constitutional dimension because the jury could have rationally determined that the state's evidence fell short murder but demonstrated conduct more egregious than a death predicated upon misdemeanor assault. Believing that a conviction of murder more accurately captured the seriousness of the alleged crime, the jury quite likely resorted to a murder conviction for lack of an option that properly reflected the state's evidence. It is for this reason that it is incumbent on the trial court to properly instruct the jury on all lesser-included offenses reasonably adduced by the evidence. Otherwise, the fact-finding, evidence-weighting functions of the jury are undermined, and the jury is at risk of being extorted into convicting a defendant of a greater offense than the state actually proved.

Widmer's constitutional rights under the Sixth Amendment and the Due Process Clause demand trial by an impartial and properly instructed jury. See *Sullivan v. Louisiana*, 508 U.S. at 277 (the Sixth Amendment and the Due Process Clause protect the criminal defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have a jury, rather than the judge, reach the requisite finding of 'guilty.'"); *U.S. Gypsum Co.*, 438 U.S. at 446 (The Sixth Amendment right is further interpreted to prohibit judges from weighing evidence and making credibility determinations, instead leaving those functions for the jury; holding that a jury instruction which effectively took from the jury the issue of intent properly invaded the jury's fact-finding function); *Herrington*, 1999 WL 98587 at *3 ("The court must not dictate the outcome [of the proceedings]. If it does so, it has invaded the province of the jury protected by the Sixth Amendment and the Due Process Clause.")

A. Trial counsel had the constitutional duty to ensure that the court properly instructed the jury according to the applicable law as determined by the court.

Alternatively, by trial counsel's failure to object to the faulty instructions, Widmer was deprived of his constitutional right to the effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution and Section 10, Article I of the Ohio Constitution. A criminal defendant is denied the right to effective assistance of counsel when counsel's performance is "so deficient that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington* (1984), 466 U.S. 668, 687; 104 S.Ct. 2052. A criminal defendant must further establish that he suffered prejudice as a result of his attorney's deficient performance. *Id.* Prejudice, in this context, has been defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008).

Although trial counsel disagreed with (and objected to) the instructions on lesser-included offenses, once overruled, counsel had a constitutional duty to ensure that the court properly instructed the jury according to the applicable law as determined by the court in chambers. *See* T.p. Vol. II at 1171-1172 (the court reasoned that Jennifer Crew’s testimony introduced evidence that Ryan went into “some assaultive (sic) rage that went beyond the scope of what his intent may have been and [that he] just submerged her, not intending to kill her, but knowing under the definition of knowingly kept her submerged too long...that led eventually to her death.”).

For the reasons explained *supra* discussing the court’s commission of plain error, a reasonably probability exists that the constitutionally deficient jury instructions influenced the outcome of Ryan’s trial. The instructions enabled the court to usurp the jury’s fact-finding function with respect to Jennifer Crew’s credibility. Consequently, the jury was deprived of its ability to convict Ryan in accordance with her testimony. For these reasons, counsel’s failure to object deprived Ryan of the effective assistance of counsel. Relief is warranted.

FOURTH ASSIGNMENT OF ERROR

IV. Due Process and Sixth Amendment violations occurred when the trial court: (1) quashed the defense subpoenas seeking to further investigate Lt. Braley’s background following the May 5, 2010 hearing; and (2) denied the January 2011 defense motion requesting permission to confront Lt. Braley during trial about his background.

Issues Presented for Review: Whether the trial court violates the defendant’s right to present a *Kyles* defense (that the entire investigation was tainted due to the lead detective’s potential propensity for dishonesty, as demonstrated by a false job application form from the prior decade) when the court quashes subpoenas needed to further delve into the detective’s background.

Whether the trial court violates the defendant’s due process and Sixth Amendment rights to confront all witnesses and present a *Kyles* defense challenging the integrity of the investigation by forbidding the defense to cross-examine the lead detective about his background which has been put in question by a false application for a job the prior decade and the source of the falsities are in dispute.

As the Court is aware pursuant to Widmer's Motion to Stay previously filed in this Court, a petition for post-conviction relief is pending in the trial court which involves a much more extensive record on this topic and additional claims for relief based on a multitude of constitutional violations. If Widmer's post-conviction petition is unsuccessful, Widmer will appeal to this court based on the full record.

In the meantime, Widmer now presents the constitutional violations on this topic, which are found in the record currently before this Court.¹⁷

In *Kyles v. Whitley* (1995), 514 U.S. 419, 445-446; 115 S.Ct. 1555, the U.S. Supreme Court held that that a *Brady v. Maryland* (1963), 373 U.S. 83; 83 S.Ct. 1194, violation occurs when the prosecution fails to disclose information or materials that impeach the quality of the police investigation, show that the police investigation was shoddy or negligent, or cause the jury to question the "thoroughness and good faith" of the police investigation. *See Kyles*, 514 U.S. at 445-46 (discussing this principle of law and citing with approval *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (awarding new trial because withheld *Brady* evidence "carried within it the potential ... for the ... discrediting ... of the police methods employed in assembling the case").

¹⁷ Widmer filed his Motion to Stay in this Court because, after Widmer's conviction, new evidence was discovered on this issue, which fundamentally changes the record and the facts underlying this matter. The Motion to Stay was filed because Widmer does not believe it makes sense to resolve this issue at this time because the new evidence makes resolution on the "old" incomplete evidence obsolete. Because the Motion to Stay was denied, Widmer feels compelled to raise this issue at this time in order to avoid arguments at a future time that he somehow waived the issue by not raising it now in incomplete form. If the trial court resolves Widmer's post-conviction motion in his favor, then this appeal will become moot. If the trial court resolves this issue against him, Widmer will appeal that decision and then move to consolidate that appeal with the instant appeal, so that this Court can consider all legal issues based on their full and complete records.

Here, *Brady* and *Kyles* violations occurred, along with violations of Ryan's constitutional rights under the Sixth Amendment to meaningfully confront all witnesses and present a complete defense, when the trial court: (1) quashed defense subpoenas seeking to obtain further information about Lt. Braley's background; and (2) denied the defense motion seeking to confront Braley during trial about his background.

The following is an explanation of the relevant factual and procedural background underlying these violations as they are reflected in the *current* record:

In early 2010, in the pre-trial stage of the case, Widmer's trial lawyers had in their possession an employment application dated June 25, 1996, that purported to have been submitted to Hamilton Township by Lead Detective Braley. This Application Form appeared to contain some false information regarding such things as where Braley had gone to school. With this information, Widmer's attorneys began subpoenaing Braley's employment records at various places where Braley had purportedly worked in the past to confirm or verify whether Braley had ever fabricated career information, and if so, to what extent. After Braley and the State moved to quash these subpoenas, a hearing was held on May 5, 2010 ("the May 5th Hearing").

At the May 5th Hearing, Widmer's attorneys confronted Braley with the Application Form. Braley disavowed the document, stating that: (1) he never completed an employment application for Hamilton Township (5/5/10 Hearing Tr. at 173, 178, 193, 199-201); (2) much of the information in the Application Form was inaccurate (5/5/10 Hearing Tr. at 174-78); and (3) he was not responsible for the inaccurate information. (5/5/10 Hearing Tr. at 173-201). Then, through questioning by his counsel, Braley described his relationship and past interactions with a hostile and disgruntled former co-worker who allegedly had a vendetta against Braley. (5/5/10 Hearing Tr. at 165-69, 183-86). Braley's testimony was clearly aimed to suggest that in recent

years this disgruntled co-worker had fabricated the Application Form around the time that the high-profile Widmer investigation began in order to embarrass Braley. As a result of the uncertainty regarding the authenticity of the Application Form and how it ended up in Braley's employment file, the motions to quash were ultimately granted by the trial court. (5/5/10 Hearing Tr. at 214-15).

Next, on November 15, 2010, the Ohio Bureau of Criminal Identification and Investigation ("BCI") issued a report ("BCI Report") stating that the handwriting on the Application Form belonged to Braley. *See* BCI Report. As a result of this revelation, Widmer's attorneys moved on January 11, 2011, for the right to confront Braley with the false statements in the Application Form at the looming third trial, which was scheduled to commence the next week. *See* Defendant's Motion to Allow Confrontation of Lead Investigator dated January 11, 2011.

In this pre-trial litigation, Widmer asserted in his motion that he not only had the right to cross-examine Braley about his false statements in the Application Form for purposes of challenging Braley's credibility, but also, he had the right to present a defense, under *Kyles v. Whitley*, that Braley's dishonesty impacted the case in more direct ways. Indeed, Widmer argued that he had a right to insert Braley's dishonesty into the case to challenge the integrity of: (1) the processing and collecting of evidence at 5250 Crested Owl Court, including the collection of fingerprints and markings from the bathtub; (2) the Coroner's conclusion, given Braley's attendance and participation in the autopsy; and (3) the decision to charge Widmer, in which Braley participated. (*See* Defendant's Motion to Allow Confrontation of Lead Investigator, dated January 11, 2011, at 12-13 (specifically requesting to raise a *Kyles* defense at trial; and Reply to State of Ohio's Memorandum in Opposition to Defendant's Motion to Allow Confrontation of Lead Investigator, dated January 18, 2011, at 5 citing *Kyles v. Whitley* and

arguing that defense should not only be allowed to cross-examine Braley for purposes of impeaching his credibility, but also, to raise a *Kyles* defense at trial because Braley's dishonesty "impacts the entirety of the State's case").

The state responded to the defense motion on January 14, 2011. In its brief, the state continued to contest the authenticity of the Application Form and whether Braley was responsible for the falsities it contained. *See* State of Ohio's Memorandum in Opposition to Defendant's Motion to Allow Confrontation of Lead Investigator, (hereinafter "State's Opp. Motion") at 6-8. Specifically, the state pointed to language in the BCI Report, which indicated that alteration of the document could not be ruled out. *Id.* The state also argued that even if Braley was responsible for the false information in the Application Report, his false statements were too remote in time (1996) to be highly probative to his credibility in 2011. *Id.* at 9.

Noting that the authenticity of the Application Form was still being contested by the State, the trial court, in an order dated January 21, 2011, denied Widmer's motion to cross-examine Braley about the Application Form, as the authenticity question would cause a "mini-trial" within a trial. The trial court also ruled that even if Braley did in fact supply the false information in the Application Form, these fabrications occurred in the too distant past, and in relation to an unpaid position (Chaplain) from which Braley did not benefit financially. *See* Order, dated January 21, 2011.

The case went forward to trial, and Ryan Widmer was not permitted to question Braley about the "disputed" Application Form. Widmer was also effectively prevented from raising a compelling *Kyles v. Whitley* defense, as he had requested in his Motion to Allow Confrontation of Lead Investigator.

All of this occurred in violation of Ryan’s constitutional rights per *Brady v. Maryland*, *Kyles v. Whitley*, and the Sixth and Fourteenth Amendment rights to meaningfully confront all witnesses/evidence and present a complete defense.¹⁸

FIFTH ASSIGNMENT OF ERROR

V. Widmer’s conviction is based on insufficient evidence in violation of his constitutional rights to due process and a fair trial. At most, the state presented sufficient evidence to sustain a conviction of involuntary manslaughter or reckless homicide.

Issue Presented for Review: Whether sufficient evidence exists to convince the average person that the defendant is guilty of murder beyond a reasonable doubt when the sole witness testifying to the issue of *mens rea*—and touted by the state as attesting to its theory of how the death occurred—presents a scenario that, at most, establishes death: (a) by a reckless act; or (b) as the result of the knowing infliction of serious physical harm that would probably lead to death.

In a sufficiency of evidence inquiry, this Court does not determine whether the state’s evidence is believable, but rather, whether the state’s evidence, *if believed*, establishes the state’s case for murder. *State v. Yarbrough* (2002), 95 Ohio St.3d 227, ¶¶79-80; 767 N.E. 216. After viewing the evidence in a light most favorable to the state and assuming all the state’s witnesses to have testified truthfully, no rational trier of fact could have found the essential elements of murder to be proven beyond a reasonable doubt.¹⁹ *State v. Jenks* (1991), 61 Ohio St.3d 259; 574 N.E.2d 492 (syllabus at ¶2); *see also State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-87; 678

¹⁸ As stated *supra*, after Widmer’s conviction, evidence was discovered that Braley: (1) had fabricated his entire background in order to obtain his position; and (2) was grossly unqualified to hold the position that he held in this case. In addition, evidence was discovered that the State was aware of this information, but suppressed it from the public and Widmer, until one day after Widmer’s conviction. This new evidence significantly changes the claim here, and thus, if Widmer is unsuccessful in the trial court in his post-conviction claim, he will appeal that decision and move to consolidate the appeals so that this Court can review this issue based on the full and complete record.

¹⁹ According to O.R.C. §2903.02(A), in order to sustain a conviction for murder, the state must prove beyond a reasonable doubt that Ryan purposefully caused Sarah’s death.

N.E.2d 541. At most, the state proved a lesser-included offense of murder²⁰ namely either: (1) reckless homicide; (2) involuntary manslaughter predicated on the commission of an underlying felony (felonious assault or aggravated assault); or (3) involuntary manslaughter predicated on the commission of an underlying misdemeanor (assault).

The viable lesser-included offenses require proof beyond a reasonable doubt as follows:

- **For reckless homicide:** that Ryan recklessly caused Sarah’s death. O.R.C. §2903.041.
- **For involuntary manslaughter based on the commission of an underlying felony (felonious assault or aggravated assault):** that Ryan proximately caused Sarah’s death while knowingly committing or attempting to commit serious physical harm to Sarah (for felonious assault, O.R.C. §2903.11); or while in a fit of sudden rage (for aggravated assault, O.R.C. §2903.12). O.R.C. §2903.04(A) (defining involuntary manslaughter)²¹
- **For involuntary manslaughter based on the commission of an underlying misdemeanor:** that Ryan proximately caused Sarah’s death while knowingly committing or attempting to commit non-life threatening physical harm to Sarah (assault, O.R.C. §2903.13(A)).²² O.R.C. §2903.04(B) (defining involuntary manslaughter).

The state’s case proves no more than one of these lesser offenses.

²⁰ “A criminal offense is a lesser-included offense of another if: (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense.” *State v. Barnes* (2002), 94 Ohio St.3d 21, 25-26; 759 N.E.2d 1240.

²¹ Although involuntary manslaughter predicated on aggravated assault requires an element of proof (rage induced within the assailant by the victim), which is not always necessary to sustain a conviction of the greater offense of murder, the facts presented at trial necessitate consideration of this offense as a viable lesser offense to murder. The trial court made an in-chambers determination to this effect.

Jennifer Crew’s testimony, the court explained, introduced evidence that a jury could reasonably conclude proves that Ryan recklessly or knowingly caused Sarah’s death by assaulting her while in a fit of sudden rage she provoked, aware that doing so would probably lead to her death. T.p. Vol. II at 1172. See Third Assignment of Error for a full discussion of the constitutional errors that resulted from the trial court’s deficient jury instructions and trial counsel’s failure to object to the deficiencies.

²² See also *State v. Nesbitt*, 2009 WL 565510 (Ohio App. 1 Dist., March 6, 2009) (“as felonious assault involves the causing of serious physical harm to another, the distinguishing factor between felonious assault and assault is the causation of *serious* physical harm).

The state's evidence falls into three categories: (1) bruising on Sarah's neck and head; (2) evidence used to suggest that Ryan staged the scene to make it appear that he found Sarah unconscious or dead in the bathtub, which includes: (a) the amount of water at the scene; (b) male forearm markings and petite fingerprint smears in the tub; and (c) Ryan's statements on the 911 call, to first-responders, and law enforcement personnel; and (3) Ryan's alleged confession to Jennifer Crew.

Construing the evidence in the light most favorable to the state requires this Court to assume that each of the state's witnesses, including Jennifer Crew, testified truthfully. *State v. Bankston*, 2009 WL 418770, ¶4 (Ohio App. 10 Dist., February 19, 2009). And In light of Jennifer Crew's testimony, a rational trier of fact must conclude that the state's evidence establishes *only* involuntary manslaughter or reckless homicide.

Even when considering the bruising to be the result of Ryan inflicting blunt force trauma rather than resuscitation efforts, in light of Jennifer Crew's testimony, the state only presented evidence that Ryan caused Sarah's death accidentally, recklessly, as the result of knowingly causing her serious physical harm, or in a fit of sudden rage. *See* T.p. Vol. I at 1389-1390, 1392, 1393 (testimony of Jennifer Crew claiming that, Ryan confessed to boiling over with anger as Sarah confronted him about his extramarital affairs. As a result, Crew claims, Ryan punched Sarah, causing her to fall backwards and hit her head at which point Ryan then blacked out and apparently killed Sarah during a period of unconsciousness. When he regained awareness, Sarah was dead).

Aside from testimony about bruising to Sarah's body, the remainder of the state's evidence is focused on attempting to prove that Ryan staged the 911 call and the scene to make it appear that he found Sarah dead or unconscious in the bathtub. But even if believed, this evidence does not aide in directly or circumstantially establishing any essential elements of

murder versus involuntary manslaughter or reckless homicide. However, Jennifer Crew's testimony, if believed, establishes the elements of involuntary manslaughter or reckless homicide.

Simply put, after viewing all evidence in the light most favorable to the state, the record is absent the slightest modicum of evidence that Ryan "purposefully" caused Sarah's death. At best, sufficient evidence exists to sustain a conviction for involuntary manslaughter or reckless homicide, which does not require a "purposeful" intention but rather a reckless intent, or a knowing intent to cause serious physical harm. The state's evidence fails in violation of Ryan Widmer's rights to a fair trial, due process, and to have the state prove all elements of the offense beyond a reasonable doubt, as guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Sections 10 and 16 to the Ohio Constitution.

SIXTH ASSIGNMENT OF ERROR

VI. Widmer's conviction is against the manifest weight of evidence.

Issue Presented for Review: Whether the jury lost its way in resolving conflicting testimony and weighing reasonable inferences to be drawn from the record thereby creating a manifest miscarriage of justice.

When an appellate court reverses a judgment on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387; 678 N.E.2d 541, 546-547 quoting *Tibbs v. Florida* (1982), 457 U.S. 31, 45; 102 S.Ct. 2211, 2220. Here, the jury clearly lost its way in resolving conflicts of evidence and weighing reasonable inferences to be drawn from the record such that a manifest miscarriage of justice has occurred and a new trial is in order. *State v. Martin* (1983), 20 Ohio App.3d 172, 175; 485 N.E.2d 717, 720-21. For these reasons and the reasons explained *supra* in the Fifth Assignment of Error, Ryan Widmer's murder conviction is against the manifest weight of the evidence in

violation of his rights to due process, a fair trial, to have the state prove all elements of the offense beyond a reasonable doubt, and to meaningfully confront all evidence against him.

CONCLUSION

For all the reasons stated herein, Defendant Ryan K. Widmer respectfully requests this Court to vacate his conviction and grant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Appellant Ryan K. Widmer was delivered this 12th day of December, 2011 to the Warren County Prosecutor's Office by hand delivery.

Michele L. Berry

**Appendix A: Judgment Entries of Conviction and Sentence by the
Warren County Court of Common Pleas (February 15 & 16, 2011)**