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Police Staking out one murder suspect, nab another, The Blade (Toledo), Sept. 22, 1983,
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hold an evidentiary hearing on Spirko's Rule 60(b) motion. Either way, the Court should now stay Spirko's execution.¹

BACKGROUND AND SUMMARY OF ARGUMENT

Spirko's Rule 60(b) motion starts with the undeniable facts that (1) at trial the State presented a case, introduced evidence, and argued to the jury that John Spirko and Delaney Gibson together committed the Mottinger crime; (2) the State in opposing Spirko's habeas petition repeatedly asserted before this Court and the reviewing appellate courts that the theory, evidence, and argument it presented at trial concerning Delaney Gibson's involvement were all true and that it had disclosed all exculpatory information, including all material evidence concerning Gibson's alibi and bearded appearance, to Spirko's attorneys prior to trial; and (3) the Court in denying Spirko's habeas petition accepted the State's assertions.²

Spirko has recently discovered that the State in opposing Spirko's habeas petition made misrepresentations to this Court and the reviewing appellate courts concerning Delaney Gibson's involvement and the theory, evidence, and argument it presented at trial. Specifically, we now

¹ At this stage, there now is a clear jurisdictional basis for the Court to enter a stay of execution, currently set for September 20, 2005. If the Court grants the Rule 60(b) motion, it would again have before it a pending habeas petition and would have the clear authority to enter a stay under 28 U.S.C. § 2251. If the Court instead schedules an evidentiary hearing in connection with Spirko's Rule 60(b) motion, the Court would have the power to enter a stay to preserve its jurisdiction because, at that point, the execution would be imminent. *Cooey v. Bradshaw*, 216 F.R.D. 408 (N.D. Ohio), motion to vacate denied *en banc*, 338 F.3d 615 (6th Cir. 2003).

² This Court found that "[t]he State's assertions about Gibson's involvement were not, therefore, false, much less knowingly so," and that the material regarding Gibson's presence in North Carolina and bearded appearance, even if it had been disclosed, would not have led Spirko to conduct his defense differently and would not have led to a different result. *Spirko v. Anderson*, Case No. 3:95cv7209, 2000 U.S. Dist. LEXIS 13182, at **13, 17 (N.D. Ohio July 11, 2000).

know that the State's principal witness at trial and a lead investigator, Postal Inspector Paul Hartman, had determined, based upon the totality of his own thorough investigation and the evidence he had developed prior to the trial, that Delaney Gibson had absolutely no involvement in the Mottinger crime. We now know that Hartman had shared this determination and the many substantial facts and reasons that supported it with the other members of the prosecuting team, including Van Wert County Prosecutor Stephen Keister. We know this information because we just learned that Hartman made these very admissions to three sets of people on three separate occasions beginning in April 2004. Notwithstanding this critical conclusion by the one member of the prosecution team who best understood the totality of the evidence, the State failed to disclose to the defense prior to Spirko's trial both Hartman's conclusion and virtually all of the facts and evidence Hartman had developed that led him to conclude that Gibson had absolutely no involvement in the Mottinger crimes, thereby enabling the State to proceed at Spirko's trial with a false theory of its case, evidence, and argument that Spirko and Gibson together committed the Mottinger crimes.

During Spirko's post-conviction and habeas proceedings, in both the state and federal court systems, *including before this Court*, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court, Spirko argued that his due process rights had been violated. Spirko argued first that his due process rights were violated when the State failed to disclose to him prior to trial exculpatory information demonstrating that Gibson did not participate in the Mottinger crimes, and second when the State proceeded at trial with a theory of the case, evidence, and argument it knew or should have known were false. At each and every stage, *including before this Court*, the State responded by arguing that the evidence that was not

disclosed was indeed not exculpatory and by arguing that the theory of its case and the evidence and arguments it presented at trial were indeed true and correct.

After Spirko learned about Hartman's statements for the first time in very late February 2005 and heard those statements directly from Hartman in early April 2005, Spirko promptly filed with this Court his Motion for Relief from Judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure alleging, among other things, that the State had made misrepresentations and committed fraud in defending against Spirko's habeas claims before this Court, the Sixth Circuit, and the United States Supreme Court. The State opposed Spirko's motion and in support of its opposition submitted sworn affidavits from Hartman, Keister, and postal inspector Thomas Strausbaugh. Hartman, Keister, and Strausbaugh in their sworn statements denied certain allegations raised by Spirko in his motion and simply did not address other allegations.

Based upon Spirko's motion and the allegations contained therein, this Court granted Spirko the right to conduct discovery concerning Hartman's recent statement and Spirko's allegations that the State knew prior to Spirko's trial that its theory, evidence, and argument were false and that the State had failed to disclose prior to trial facts demonstrating that the State's theory, evidence, and argument were false. (Order, May 6, 2005.)³ During the course of

³ Spirko took discovery that was narrowly tailored to the specific issues he raised in his Rule 60(b) motion. From May 18 to June 16, 2005, Spirko took nine depositions. He sought documents from the nine deponents as well as from the *Cleveland Plain Dealer* and the United States Postal Service. The Court requested that the parties submit to the Court the discovery they obtained. Spirko filed previously, as exhibits to a motion for an evidentiary hearing he anticipated filing on July 20, 2005, the following deposition transcripts and deposition exhibits:

Exhibit A – Deposition of Marlene Bennett (May 25, 2005)

(Continued on following page)

discovery, the Court granted Spirko leave to file a motion for an evidentiary hearing. (Order, June 13, 2005.) At a status conference held the day the motion for an evidentiary hearing was due, the Court concluded that the more appropriate course was to permit the State to file a motion to dismiss/for summary judgment as to Spirko's Rule 60(b) motion. (Order, July 26, 2005.) The Court has made clear that "any disputed material facts . . . will be viewed in [Spirko's] favor." (Order at 3, July 26, 2005.)

The State has now filed its Motion for Summary Judgment Denying Spirko's Motion Under Rule 60(b) ("State Mot."). The State argues that "there is no evidence whatsoever that [the State] knew or had reason to know during the course of prior habeas corpus proceedings of [the recent] statements by Hartman" and that "there is still no proof that [the State] misrepresented anything to this Court or that the prosecutor presented a false case at trial." (State Mot. at 8.)

Exhibit B – Deposition of Theo Bennett (May 25, 2005)

Exhibit C – Deposition of Ralph Eversole (June 14, 2005)

Exhibit D – Deposition of Paul Hartman (June 16, 2005)

Exhibit E – Deposition of Stephen Keister (June 15, 2005)

Exhibit F – Deposition of Charles Kennedy (June 14, 2005)

Exhibit G – Deposition of Charles Koch (May 24, 2005)

Exhibit H – Deposition of Connie Mottinger (May 18, 2005)

Exhibit I – Deposition of Thomas Strausbaugh (June 8, 2005)

Exhibit J – Deposition Exhibits one through ninety-three (cited *infra* as "Dep. Ex. ___, contained in Ex. J").

In order to avoid duplicate filings, Spirko in this Opposition will refer to and hereby incorporates Exhibits A-J, filed on July 20, 2005, as if they had been filed with this Opposition. Spirko is filing additional exhibits (Exhibits K-X) on this date with this Opposition.

The State is wrong. The State also argues that Hartman's opinion cannot be material because it "is not evidence," because the Court allegedly was aware of all of the facts supporting the conclusion, and because the facts do not "prove" that Gibson could not have been involved or that the prosecution knowingly presented a false case at trial. *Id.* The State is wrong again.

The State's arguments simply do not square with the facts. The new evidence that Spirko has developed – particularly when disputed material facts are viewed in his favor – establishes that the State procured this Court's prior judgment denying Spirko's habeas petition and the subsequent affirmances by the Sixth Circuit through fraud, misrepresentation, and/or misconduct and that those and other reasons justify granting Spirko relief from the operation of the judgment. In opposing Spirko's habeas petition before this Court and in preserving this Court's judgment before the Sixth Circuit and the U.S. Supreme Court, we now know that the State concealed the following critical information revealed for the first time in Hartman's recent statements and in the ensuing discovery:

- Substantial exculpatory evidence that was particularly significant to Hartman and was vital and integral to his determination that Gibson could not have been involved, including (1) the fact that Hartman had made an extensive effort to establish that Spirko and Gibson had communicated prior to the morning of the abduction (which consisted of, among other efforts, an exhaustive review of subpoenaed phone records from North Carolina and Ohio) but could find no such communication and (2) the fact that keys, believed to belong to the perpetrators of the Mottinger crime, had been found (including a post office box key) near the Elgin post office on the morning of the abduction, an extensive effort had been made to connect the keys to Spirko or Gibson, but no such connection could be

made. These facts were of particular significance to Hartman and served as vital components of his determination that Gibson had nothing whatsoever to do with the Mottinger crime. They had never been disclosed to defense counsel and were not before this Court when it denied Spirko's habeas petition.

- The fact that Hartman, the *de facto* lead investigator, the author of the investigators' single-spaced fifty-seven-page "Presentation Letter" to the prosecutors seeking indictments of both Spirko and Gibson, and the most important trial witness, had determined prior to the trial that Gibson had absolutely no involvement in the Mottinger crime. The importance of this determination cannot be overstated. It was based on Hartman's review of the extensive evidence (and not on a mere hunch or a feeling), most of which Hartman had developed himself and had reviewed carefully in its totality. It bears not only on the issue of whether the State presented at trial a case that it knew was false but also on the issue of whether all of the information possessed by the State and developed principally by Hartman concerning Gibson should have been disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963). Hartman's determination that Gibson could not have been involved was not before the Court when it denied Spirko's habeas petition.
- The fact that the State had decided, perhaps as early as 1983 or 1984 but we now know no later than 1995, that it would never prosecute Gibson but eventually would dismiss the pending capital indictment against him. (The State finally got around to dismissing the indictment on May 17, 2004, the same day that the Sixth Circuit affirmed by a two-one vote this Court's denial of the habeas petition and

less than a month after Connie Mottinger⁴ told the State that Hartman was talking and had told her that, based upon his review of all of the evidence, Gibson had nothing to do with the Mottinger crime.) The State's intention with respect to the open capital indictment against Gibson has been an issue of significant interest and concern throughout these habeas proceedings. The State's intention to dismiss the Gibson indictment was concealed and was not before the Court when it denied Spirko's habeas petition.

Under the well-settled standards for deciding a summary judgment motion, the Court should deny the State's motion and should either schedule an evidentiary hearing in order to resolve any factual disputes that exist regarding Spirko's Rule 60(b) motion or grant Spirko's Rule 60(b) motion based upon the existing record, and then schedule an evidentiary hearing in the context of the re-opened habeas proceeding. In order to preserve its jurisdiction to hear and decide this matter, and to prevent the possibility of executing an innocent man, unjustly convicted, the Court should stay Spirko's execution.

STATEMENT OF THE FACTS

In the underlying habeas proceeding, Spirko argued (1) that the State withheld from him significant exculpatory evidence, particularly evidence relating to Delaney Gibson's bearded appearance and presence in North Carolina on or about the time of Mrs. Mottinger's abduction, and (2) that the State knowingly presented a case at trial it knew to be false when it presented evidence and argued to the jury that Spirko and Gibson together kidnapped and murdered Betty

⁴ Connie Mottinger is the second wife of Clarence Mottinger, now deceased, the widower of Betty Jane Mottinger, the victim in this case.

Jane Mottinger. The State argued to this Court and to the federal appellate courts that it had produced all exculpatory evidence and satisfied its due process obligations and that the case it presented at trial concerning Gibson's involvement was true and correct. New evidence demonstrates that both arguments by the State to this Court and the appellate courts rested on misrepresentations.

Because Spirko in his Rule 60(b) motion contends that the State procured this Court's underlying judgment through fraud, misrepresentation, and/or misconduct, it is necessary to set forth in some detail how the State came to focus on Delaney Gibson as a suspect in the Mottinger crime and then came to realize that he had not been involved. Moreover, we need to set forth what we now know concerning the information possessed by the State at the time that it argued in this habeas proceeding (1) that it had no obligation under *Brady* to turn over to the defense the information it possessed regarding Gibson's involvement and (2) that the theory, evidence, and argument it presented at trial concerning Gibson's involvement were true and correct.

I. THE PRE-INDICTMENT INVESTIGATION OF DELANEY GIBSON

In October 1982, John Spirko, a man and a name at that time totally unknown to those investigating the kidnapping and murder of Betty Jane Mottinger and who had recently been released on parole after serving time in Kentucky for a murder conviction, was arrested for assault and found himself jailed in the Toledo area pending those charges and possible parole violations in connection with the Kentucky sentence. Aided by his new girlfriend, Spirko tried – but failed – to break out of the local jail and assaulted a guard in the process. In an effort to help himself and his girlfriend, who had been charged with aiding in the escape effort, Spirko let it be known that he had information relevant to the Mottinger crime. Postal Inspector Paul Hartman asked to assume the responsibility for interviewing Spirko because, as he testified in his recent

deposition, “nobody can do it like I can do it.” (Hartman Dep. 64:11, Ex. D.) Inspector Hartman interviewed Spirko about a dozen times. Not one of these interviews was tape-recorded, not one written statement of Spirko was taken, nor was Spirko ever asked to review and initial any notes.

Spirko attributed his knowledge about the Mottinger crime and the details about how the murder was committed and by whom to a series of ever-changing individuals, many of whom he identified only by nickname. Inspector Hartman recently stated at his deposition that he investigated each one of these stories and concluded that not one was true and not one person mentioned by Spirko had any involvement in the Mottinger crime:

Q: So then you investigated these various people and you concluded that, in fact, they had no involvement?

A: Yes, correct.

Q: And there were a whole series of these people?

A: There are a whole series of people and a whole series of stories, yes.

(Hartman Dep. 72:20-73:2, Ex. D.)

In all of these many stories, Spirko never mentioned the name “Delaney Gibson.” Inspector Hartman, however, had become aware that Spirko and Gibson had been cell mates at one time in Kentucky and that Gibson was from a tiny hamlet by the name of Bear Branch, Kentucky.

On January 11, 1983, Hartman interviewed Mr. Spirko for the twelfth time. Up to this point, Hartman had investigated each and every person Spirko had mentioned in prior interviews as having involvement in the Mottinger crime and had cleared each one. Hartman then made a suggestion to Spirko, as reflected in his investigative memorandum:

Further, in the course of general discussion, vague references were made *by me* to the community of Bear Branch, Kentucky. Spirko reacted to such references by smiling and continued to bring the community of Bear Branch, Kentucky into the conversation. Ultimately, Spirko brought forth the name of Lanney Gibson and relayed personal details concerning members of Gibson's family, including Gibson's wife and brothers.

(Mem. of Interview by Paul Hartman of John Spirko, January 11, 1983, attached hereto as Dep. Ex. 92, contained in Ex. J) (emphasis added). Hartman in his recent deposition acknowledged that it was he who introduced the subject of Bear Branch to Spirko:

Q: ...is it fair to say that you introduced that name [Bear Branch] knowing that, in fact, Mr. Spirko's former cell mate, Delaney Gibson, was from Bear Branch, Kentucky.

A: I would think that is likely, yes.

(Hartman Dep. 84:2-6, Ex. D.) Spirko, as Hartman obviously expected and hoped he would, then went on to identify Gibson, "the only friend he has ever had," as the source of his information about the Mottinger crime.

Hartman then investigated to determine whether Gibson was involved in the Mottinger crime, just as he had investigated the many other persons Spirko had identified in his previous stories. He must have been particularly wary of Spirko's latest statement that Gibson was involved, given the fact that Spirko told him a series of lies over the prior two months and that it was he, Hartman, who effectively had introduced the name of Gibson to Spirko.

Investigators first returned to Opal Seibert, the eyewitness who resided across the street from the post office, to show her a photo spread. On the day of the abduction, August 9, 1982, Ms. Seibert had provided a description of the man she saw and had described him, among other

things, as clean-shaven and wearing wire glasses.⁵ Several days later Ms. Seibert had worked with a police artist to draw two sketches of the man she had seen (these sketches are attached hereto as Dep. Exs. 12, 13). Prior to being shown the photo spread in January 1983, “the events on the morning of August 9, 1982, were discussed and the artist’s drawings from Ms. Seibert’s recollection [made in August 1982] were reviewed without comment from the interviewers.” (Mem. of Inspector Strausbaugh, February 9, 1983, attached hereto as Dep. Ex. 11, Ex. J.) Ms. Seibert selected the photograph of Delaney Gibson as depicting the man she had seen.

The photograph of Delaney Gibson that investigators had placed in the photo spread and that Ms. Seibert had selected was an old mug shot of Gibson that depicted him as clean-shaven. Both Hartman and Strausbaugh testified at their recent depositions that in showing a photo spread to a witness it would not be their preferred procedure to allow the witness to review his or her description and/or any sketches before attempting to make an identification. (Hartman Dep. 388:2-16, Ex. D; Strausbaugh Dep. 89:1-91:3, Ex. I.) Furthermore, Inspector Hartman testified at his deposition that he had no confidence in eyewitness identifications: “Personally I don’t think they [eyewitness identifications] are worth the powder to blow them to hell.” (Hartman Dep. 388:21-23, Ex. D); *see also id.* at 220:19-21 (“... I have strong reservations about resting a case solely on the reliability of one eyewitness identification.”). Given the fact that Hartman knew that each of Spirko’s prior eleven stories had been false; that he had investigated each of them and cleared each person previously identified by Spirko as his source of information about the Mottinger crime; that it was he, Hartman, who had introduced Delaney Gibson’s name

⁵ Ms. Siebert also described the man she saw as “6’2” or 6’3”, age late 40’s to early 50’s, and a muscular build with square shoulders.” (Investigative Mem. of Thomas Strausbaugh, Sept. 30, 1982, attached hereto as Exhibit K.) Gibson was only 5’8” tall and thirty-one years old.

through the ruse of “Bear Branch”; and that he did not trust eyewitness identifications, it is understandable that Hartman pressed on and continued his investigation of Gibson’s involvement.

Meanwhile, investigators launched an intensive nationwide search for Gibson, who at the time was a fugitive from justice, having escaped from the Hayden, Kentucky, jail in March 1981. Authorities eventually apprehended Gibson in Canton, North Carolina, on April 18, 1983. At the time of his arrest, *Gibson had a full beard.*

Investigators interviewed Gibson, who readily admitted that Spirko had been his best friend. (Mem. of Interview of Delaney Gibson by Thomas Stausbaugh, April 21, 1983, at 2, attached hereto as Dep. Ex. 56, contained in Ex. J; *see also* Mem. of Interview of Delaney Gibson by Thomas Strausbaugh, April 22, 1983, attached hereto as Dep. Ex. 57, contained in Ex. J.) However, Gibson denied any involvement in the Mottinger crime. He insisted that he had been in North Carolina picking tomatoes from July 1982 until his arrest in April 1983 and that, specifically, he did not go to Ohio or see Spirko during this time. (Gibson Interview, April 21, 1983, at 1-2, Dep. Ex 56, contained in Ex. J.) Gibson even offered to take a lie detector test. (Handwritten Notes, April 29, 1983, attached hereto as Dep. Ex. 16, contained in Ex. J.)

Hartman then led an extensive investigation of Gibson’s assertion that he was in North Carolina, not in Ohio, during August 1982. Hartman quickly determined that the migrant group of tomato pickers Gibson had worked with in August 1982 was at the time in Florida. Hartman and other investigators immediately traveled to Florida and interviewed a number of Gibson’s bosses and co-workers in an intense effort to ascertain where Gibson was – and what his appearance was – on or about August 9, 1982.

Each person investigators interviewed reported clear recollections that Gibson always wore a full beard during the relevant time period. “Juan Flores and Johnny Valdez both stated that Gibson’s beard always looked the same. No longer or no shorter. They both agreed that Gibson’s beard looked exactly like Postal Inspector Paul Hartman’s beard as of this date. Same in length and same in color – light and reddish brown.” (Handwritten Notes of Inspector S. J. Wolfe, April 25, 1983, attached hereto as Dep. Exs. 51-54, contained in Ex. J.) Isabell Cervantes reported that “Jimmy’s [Gibson] beard was always the same.” (Dep. Ex. 51, contained in Ex. J.) Similarly, Pablo Cervantes “[d]oes not remember him not having a beard,” and Migel Cervantes “never saw Gibson without a beard.” (Dep. Exs. 53-54, contained in Ex. J.) There is no doubt that Gibson’s bearded appearance was a subject of significant investigative interest in April 1983.

Similarly, the investigative notes from the Postal Inspectors, including Paul Hartman, reflect their review of migrant farm records. Investigators learned that during August 1982, Margie Gibson and Delaney Gibson picked tomatoes in Canton, North Carolina, and that Margie Gibson submitted “tickets” for payment for both of them so that the name of her husband, who at the time was a fugitive from Kentucky, would not appear on the records. The records further reflected that on August 10, 1982, the day after the Mottinger abduction, the Margie Gibson “time/count records for 8/10/82 ... indicated the volume reflected would seem to indicate that two persons were picking on that date... Delaney requested that all daily time recording be made in Margie’s name, a request with which Flores complied although he considered it a bit unusual.” (Interview Notes of Paul Hartman, April 22, 1983, at 3, attached hereto as Dep. Ex. 55, contained in Ex. J.) In sum, as Hartman confirmed in his recent deposition, his investigation in April 1983 indicated that Delaney Gibson was fully bearded in August 1982, picking tomatoes

in North Carolina, and work records reflected that he and his wife, Margie Gibson, were picking tomatoes on August 10, 1982:

Q: And, again, does that confirm your recollection that Mr. Gibson's beard's appearance, again, was a matter of investigative interest?

A: Oh, yes, absolutely.

Q: It was a matter you were inquiring of people about?

A: Most certainly. The reason being that witnesses did not describe a bearded person at the scene, and that when he was arrested, he had a beard and when we interviewed these people, at the time of the arrests, they asserted the fact that at a time, he wore a beard, so, yes.

(Hartman Dep. 158:8-20, Ex. D.)

Not one of these facts was disclosed to the defense prior to trial. The defense was not made aware of witnesses who would testify that Gibson was fully bearded in North Carolina both before and after August 9, 1982, nor was the defense provided any notes, or the records reflected in those notes,⁶ to indicate that the volume of tomatoes under the name Margie Gibson for August 10, 1982, reflected that two people were picking tomatoes in North Carolina on that date and that Margie Gibson routinely submitted tickets for herself and her husband.

Accordingly, as of late April 1983, the investigators, who were working diligently to gather evidence to confirm the most recent story that Spirko had told Hartman – that Gibson committed the Mottinger crime – had substantial evidence demonstrating that Spirko's latest story, just like each previous story, was false and another lie. At that point, however, they did not return to Spirko to inform him that they knew he had told them yet another false story and to

⁶ Of note, these "time/count records" to this day have not been produced by the State.

insist that he tell the truth. They did not move to indict Gibson and/or Spirko either. They in essence ceased their investigative efforts with respect to the Spirko/Gibson theory, perhaps to see if anything “better” would develop.

Then, on August 9, 1983, exactly one year after Mrs. Mottinger was found missing, Gibson, who just months earlier had been the subject of an intensive manhunt and who already had escaped once from prison, escaped again. *See Police staking out one murder suspect, nab another*, The Blade (Toledo), Sept. 22, 1983, available in LEXIS, Nexis Library (attached hereto as Exhibit L).

II. THE PRESENTATION LETTER TO THE PROSECUTING ATTORNEY AND THE CAPITAL INDICTMENTS OF SPIRKO AND GIBSON

Between the time of the photo spread identifications in January 1983 and the time the State sought indictments of Spirko and Gibson in September 1983, it does not appear that investigators developed any new evidence inculcating either Spirko or Gibson. When Keister was asked what evidence was available in September 1983 that had not been available in January 1983, he testified that he could not recall. (Keister Dep. at 83:6-12, Ex. E.) Indeed, as set forth above, the only evidence investigators developed showed that Gibson was not involved and that Spirko’s latest story – like all of his previous stories – was false.

Inspector Hartman completed a “Presentation Letter” to the prosecuting attorney on September 12, 1983, one day before indictments were returned on September 13, 1983. Hartman testified: “That is the document that I prepared... Yes, it is authored by me.” (Hartman Dep. 103:18-21, Ex. D.) That Presentation Letter laid out the cases against both Spirko and Gibson in fifty seven single-spaced pages with eighty two exhibits appended. (Presentation Letter, September 12, 1983, attached hereto as Dep. Ex. 50, contained in Ex. J.) As Hartman testified at

his deposition, the purpose of the Presentation Letter was to give the prosecutor as much information as possible about his case, including any potential problems with the case, to allow him to make an intelligent decision whether to seek indictments, and, if so, to help prepare him for trial:

Q: The presentation letter, Exhibit 50, which you have looked at previously, this is directed at a prosecutor, the prosecutor?

A: Yes. This presentation letter is intended to set out the framework of the prosecution, as seen by the officer, the agent. It is a proposed manner of prosecuting the case and setting forth the evidence and the witnesses from which the prosecutor may or may not wish to be guided.

Q: And it is also the intent to inform the prosecutor of any pitfalls or problems in the case?

A: Yes.

Q: So it is the good, the bad, and the ugly?

A: That's right. It is intended to convey the facts.

(Hartman Dep. 114:23-115:14, Ex. D.) By then Hartman had already concluded with respect to the Spirko/Gibson theory that "the weight of the evidence, in my own opinion, was not sufficient at that time to overcome the presumption of innocence." (Hartman Dep. 108:15-18, Ex. D.)

Yet nowhere in Hartman's fifty seven single-spaced pages of the Presentation Letter or among the eighty two exhibits to that letter is there any mention of that conclusion or any mention whatsoever of any of the extensive evidence that had been developed indicating that a fully bearded Delaney Gibson was working in North Carolina on or about August 9, 1982, and that had been relied upon by Hartman in arriving at his conclusion. When asked to explain why the extraordinarily detailed Presentation Letter, and its exhibits, supposedly prepared to inform completely the prosecutor, both with respect to the indictment of Spirko and the indictment of

Gibson, contained none of this information, Postal Inspector Hartman said “I have no idea. But I will tell you that it was certainly not a willful omission.” (Hartman Dep. 274:16-17, Ex. D.)

On September 13, 1983, the State secured capital indictments against both Spirko and Gibson for the abduction and murder of Mrs. Mottinger. Gibson at that time was still a fugitive.

III. THE POST-INDICTMENT INVESTIGATION

Gibson was again arrested on December 18, 1983. Now under capital indictment for the Mottinger crime, he once again maintained to investigators that he was in no way involved in – and knew nothing of – the crime, and he again refused to implicate Spirko. (Mem. of Interview of Delaney Gibson by P. D. Sullivan, December 21, 1983, attached hereto as Exhibit M.)

With Gibson in custody yet again, Hartman, assisted by other investigators, renewed his efforts to find evidence that Gibson was involved in the Mottinger crime. Investigators re-interviewed Gibson’s wife, Margie Gibson,⁷ who again told them that Gibson was in North Carolina with her all of August 1982. This time investigators obtained detailed information from Mrs. Gibson demonstrating that Gibson was in North Carolina and, in particular, that he was with her and her relatives, Michael and Brenda Bentley, the weekend of August 7-8, 1982. (Notes of Interview with Margie Gibson, Jan. 1984, attached hereto as Dep. Ex. 23, contained in Ex. J; Mem. of Interview of Margie Holland Gibson by Paul Hartman, Jan. 11, 1984, attached

⁷ Mrs. Gibson in an initial interview in April 1983 had answered general questions about her husband’s whereabouts since his escape from the jail in March 1981, but investigators in April did not tell Mrs. Gibson that her husband was a suspect in the Mottinger crime and apparently did not ask her about her husband’s specific whereabouts on August 9, 1982. (Mem. of Interview of Margie Gibson by B.C. Pfeiffer, April 25, 1983, attached hereto as Exhibit N.)

hereto as Dep. Ex. 30, contained in Ex. J.) Investigators also interviewed the Bentleys, who confirmed that Gibson was with them in North Carolina that weekend.

Most significantly, Margie Gibson provided Inspector Hartman with eighteen family photographs taken during the weekend of August 7 and 8. These photographs depicted a fully bearded Delaney Gibson in the Canton, North Carolina, area. (Margie Gibson Interview, Jan. 11, 1984, Dep. Ex. 30, contained in Ex. J.) On January 11, 1984, Inspector Hartman interviewed Michael and Brenda Bentley and received from them forty additional photographs. These photographs, similar to those obtained from Margie Gibson, also depicted a bearded Delaney Gibson in North Carolina on the weekend of August 7 and 8, 1982. (Mem. of Interview of Michael and Brenda Bentley by Paul Hartman, Jan. 11, 1984, attached hereto as Dep. Ex. 29, contained in Ex. J.) Mr. Hartman identified eleven of these photographs at his deposition as being among those he had collected from Margie Gibson and Brenda and Michael Bentley. (Hartman Dep. 173:3-175:22, Ex. D.) Paul Hartman further testified that each of these fifty eight photographs should have been placed by him and then maintained in the investigative file, before trial, during trial, through the post-trial appellate and post conviction process, and through the post-trial records litigation under the Freedom of Information Act. (Hartman Dep. 176:16-20, Ex. D.) Not one of these photographs was ever disclosed to defense counsel prior to trial, and apparently not one was maintained in the investigative file.

Hartman's investigation of Gibson did not stop once he obtained the photographs showing him in North Carolina with a beard. In January 1984, Mr. Hartman also interviewed the owner of an automotive parts store in North Carolina who recollected selling a part to Delaney Gibson on August 7, 1982, and who authenticated the receipt that reflected that the sale had occurred on that day. (Mem. of Interview of Raymond Weinhauser by Paul Hartman, Jan. 12,

1984, attached hereto as Dep. Ex. 26, contained in Ex. J.) Mr. Hartman further interviewed personnel at the stores at which the various rolls of film were processed to determine that they in fact were processed contemporaneously to the weekend of August 7 and 8. (Mem. of Interview of Michael Seever, Jan. 11, 1984; Mem. of Interview of Jean McCall by Paul Hartman, Jan. 12, 1984, attached hereto as Dep. Exs. 27, 28, contained in Ex. J.) Hartman also obtained hotel records and interviewed the hotel's night desk clerk, confirming the Bentleys' presence in North Carolina on the night of August 8, 1982. Not one of these investigative memoranda, or the substance of any of the information contained therein, was provided to defense counsel prior to trial.

We have also just learned that Inspector Hartman also made considerable efforts to establish any communication between Gibson and Spirko prior to August 9, 1982. He was unable to do so. He subpoenaed telephone records in North Carolina to see if there were any phone records that reflected any communications with Spirko. There were no such records:

Q: And the significance of that investigative effort, at least, had to do with the fact that there was – that you believed and others believed that there had to have been, whether you can find it or not, but there had to have been some contact between Mr. Spirko and whoever else he did it with, prior to the crime occurring?

A: I would have reasonably expected there to be some communication between these two men. And we were looking to establish that, and those efforts failed.

(Hartman Dep. at 101:18-102:4, Ex. D.) Again, the failed efforts by Hartman to establish any contact between Gibson and Spirko were never disclosed to defense counsel prior to trial.

Indeed, this information was unknown to counsel until very recently when counsel received a transcript of the typed interview between Connie Mottinger and Paul Hartman in which Hartman talks about his failed efforts to establish contact between Spirko and Gibson prior to the

abduction and explains that this was a very significant piece of evidence developed by him that led him to the conclusion that Gibson had no involvement in the Mottinger crime:

... At 6 o'clock the night of August 8th. and these guys hit this place at 7 o'clock in the morning. It just doesn't make any sense to me you know not without prior contact or prior agreement ... Other wise [sic], if you say, I am going to do this place in Elgin and I will meet you at this place at this time, but firstly, why would you pick Elgin and secondly there is no evidence of any communication.

(Tr. of Interview of Paul Hartman by Connie Mottinger ("Mottinger Tr.") at 5, attached hereto as Dep. Ex. 1, contained in Ex. J.)

Hartman has also just testified that investigators recovered from the vicinity of the Elgin post office a set of keys that he had concluded had been inadvertently left behind by those who had committed the Mottinger crime. One key was to a Ford pick-up; another was a post office lock-box key; another was a house or apartment key. Note one of the keys has ever been linked to either Spirko or Gibson. (Hartman even located Gibson's pick-up truck in Kentucky and confirmed that the key did not fit.)⁸ Hartman testified that he was "confident [the keys] were dropped by someone running from the scene of the robbery and abduction" (Hartman Dep. 182:9-11, Ex. D), and he believed that the people who had wrapped Mrs. Mottinger's body in the tarp had rolled and unrolled her body searching for those missing keys. (Mottinger Tr. at 2, Dep. Ex. 1, contained in Ex. J.) Hartman's failed effort to link either key to Gibson or Spirko also was not disclosed until Hartman's recent deposition. Indeed, there is no mention whatsoever of the recovered keys in the Presentation Letter, and curiously, the original investigative memorandum detailing the search of the Elgin area on August 10, 1982, states that seventy people conducted a detailed search of a five-mile radius "with negative results." (Investigative Mem. of Thomas

⁸ Hartman was able to determine that the keys did not belong to any of the sixty-one residents of Elgin, Ohio.

Strausbaugh, Sept. 30, 1982, Ex. K.) Certainly, Hartman's belief that these keys belonged to the perpetrator, and the fact that they did not belong to Gibson or Spirko, was highly material and exculpatory and certainly suggests that whoever owned these keys likely was responsible for Mrs. Mottinger's death.

Furthermore, the fact that one of the keys was a post office box key to another post office suggested that the perpetrators might well have some previous involvement in post office crimes. Indeed, the suspect subsequently identified by Hartman – James Clark Kelley – had a history of robbing post offices and, as it turned out, came from Madison, Indiana, one of the six communities Harman had determined by 1995 had a post office with a box matching the serial number of the dropped key. Unfortunately, the records showing to whom the post office box key belonged in 1982 had been purged by the time Hartman was seeking them in the mid 1990s. (Hartman Dep. 185:11-13, Ex. D.) A post office box key left behind by the perpetrators of an abduction and murder of a postmistress must have been considered to be an absolutely critical piece of evidence, yet its existence and, most significantly, the failure ever to link it to Spirko or Gibson were never disclosed until Hartman's recent deposition.

In sum and substance, by the end of January 1984 Inspector Hartman had produced extensive additional evidence that Delaney Gibson had been in North Carolina on the weekend of August 7 and 8, 1982, up to at least 6:30 p.m. and that he had a full beard before, on, and after August 9, 1982. Inspector Hartman had made extensive efforts to establish telephone or other contact between Delaney Gibson and John Spirko and had failed to do so. Inspector Hartman also had made extensive efforts to link keys found at the Elgin scene to Spirko or Gibson. He had been unable to link any key to Spirko or Gibson. Not one of these matters was ever

disclosed to defense counsel, and the photographs, keys and much of the record evidence apparently were not maintained in the investigative files.

IV. PRE-TRIAL DISCOVERY

As indicated previously, none of the information, photographs, or documents relating to Delaney Gibson's bearded appearance or presence in North Carolina at the time of Mrs. Mottinger's abduction was provided to defense counsel prior to trial. In addition, there had been no disclosure of the fact that keys belonging to the perpetrators had been removed from the scene and that Hartman had failed in his efforts to link the keys to either Spirko or Gibson. Nor was there any disclosure of Hartman's failed efforts to establish any communication between Spirko and Gibson prior to August 9th. Notwithstanding the fact that prosecuting attorney Keister testified that he properly viewed his *Brady* obligation as requiring disclosure of evidence "intending to exculpate as opposed to absolutely 100 percent certainty," Keister did not disclose any of this evidence to defense counsel pursuant to his *Brady* obligations. (Keister Dep. 97:10-13, Ex. E.) Keister failed to disclose these materials notwithstanding his view that the agreed-upon, Court-ordered review by a third party, John Sabol, of the investigative file (a file that, apparently, did not include the keys, the photographs, or other documentary evidence relating to Gibson's bearded appearance or North Carolina whereabouts) did not in any way minimize the State's obligations under *Brady*:

Q: Let's call it the Sabol review, did that, did that in anyway obviate or reduce your discovery obligations under the Ohio rules and under Brady?

A: No.

Q: So they remained, whatever obligations you had didn't change by virtue of having the Sabol review?

A: That would certainly be my understanding.

(Keister Dep. 103:15-24, Ex. E.)

Furthermore, the prosecution and defense had entered into a discovery stipulation with respect to discovery items that were supplied on March 13, 1984. (Discovery Stipulation, March 13, 1984, attached hereto as Dep. Ex. 89, contained in Ex. J.) Keister was the author of this Stipulation: “that appears to have been generated in my office.” (Keister Dep. 182:13-14, Ex. E.)

Pursuant to paragraph seven of that Stipulation, “copies of all photographs in possession of the State” were turned over to the defense. Yet not one of the fifty eight photographs recovered by Hartman in January 1984 showing a bearded Delaney Gibson in North Carolina on the weekend of August 7 and 8, 1982, was turned over. Keister agreed that these photographs should have been turned over pursuant to the Stipulation and that defense counsel could certainly have reasonably believed that any photographs in the possession of the State had been turned over to them:

Q: Well, certainly as the non-drafting party to that stipulation who agreed to that stipulation, wouldn't you agree that it would be the only fair reading of that that he was going to be provided all photographs?

A: My English background would say that that says all photographs in possession of the State.

(Keister Dep. 268:21-269:2, Ex. E.)

When asked to explain why these fifty eight photographs were not disclosed to the defense pursuant to Item No. Seven of the Stipulation, Keister stated “[i]f you're saying they're not there, I don't know that I necessarily have an explanation.” *Id.* at 187:23-25.

The same Stipulation continues, and in Item No. Twelve states:

Information concerning Delaney Gibson: Mr. Michael Bentley, Box 425, Ary Kentucky, 41712, has stated that Delaney Gibson was with him and his wife in North Carolina on 8/7/82 and 8/8/82 and that pictures are purported to have been taken of the weekend in question.

(Discovery Stipulation, Dep. Ex. 89, contained in Ex. J.) As of the time this Stipulation was drafted by Keister, Hartman had developed detailed and significant information with respect to Delaney Gibson's North Carolina whereabouts on August 7 and August 8, 1982, including obtaining fifty eight actual photographs, which had been personally verified by Hartman as having been taken in the Canton, North Carolina, area and having been processed contemporaneous to August 7 and 8, 1982; had obtained receipts from independent third persons reflecting Gibson's presence in Canton, North Carolina on August 7, 1982; had confirmed through interviews and hotel records the Bentley's presence in North Carolina on the evening of August 8, 1982; had obtained work records reflecting that Margie Gibson had submitted tickets for tomatoes picked on August 10, 1982, in a volume that reflected that two persons had picked tomatoes on that date; had developed evidence that Margie Gibson during that time period submitted tickets on behalf of Delaney Gibson in her name to avoid detection of her fugitive husband; and had verified Delaney Gibson's bearded appearance both before and after August 9, 1982, from a wide variety of third-party witnesses as well as from photographs.

Notwithstanding having developed this very substantial body of evidence, Keister drafted the Stipulation and omitted reference to any of this evidence. He stated only that pictures were "purported to have been taken." Keister's misleading use of the word "purported" is all the more troubling in combination with Item Seven of the Stipulation, which would lead any reasonable defense lawyer to conclude not only that no photographs were in the possession of the State, but that photographs simply did not exist. As Keister testified:

- Q. I'm not trying, Mr. Keister, to suggest any malevolence here by anyone; but given the volume and the totality of the information which I've catalogued before reflected in all of the exhibits that you have now looked at, including things we haven't talked about, you know, in the last couple minutes, including sort of employment records and records of how many tomatoes were picked and that sort of thing, but given the volume of all of that, do you have any way of, any explanation today that can help us in figuring out how it is that this narrow sort of description was what was provided with respect to these issues?
- A. I testified that I have no specific recollection of any of these documents, only the general things that I've chatted about. So assuming that those items exist, those are items that should have been in the file. I would acknowledge that, but I have no idea. I can't remember exactly what was done. I have no – to me it gets down to the issue of what's the evidence against your client and was it properly presented and does the record reflect.

(Keister Dep. 186:19-187:15, Ex. E.)⁹

There can be very little doubt that the State, through the Discovery Stipulation, which Keister drafted himself, actively misled defense counsel into believing that the State possessed

⁹ Whether Hartman shared any of this detailed exculpatory evidence with Keister is an open question. As an experienced investigator, Hartman certainly understood what *Brady* required:

Q: And again, if this were a prosecution of Delaney Gibson, you would have viewed this evidence that you had developed in North Carolina to be discoverable by the defense; is that right?

A: Yes, I would.

(Hartman Dep. 132:9-14, Ex. D.) Perhaps Hartman concealed this information from Keister too, knowing that Keister would have felt obligated under *Brady* to share these materials and this information with the defense. In either event, the State failed to disclose any of this material to Spirko.

no photographs and that the State had developed no evidence suggesting that a bearded Delaney Gibson was, in fact, in North Carolina on or about August 9, 1982.

Hartman consistently testified at his recent deposition that all of the investigative memoranda, photographs, other documentary evidence, and physical evidence (including the keys) should have been maintained in the investigative files that, prior to and during Spirko's trial, were maintained at the Van Wert Sheriff's office. Hartman at his deposition was able to offer no explanation as to why the photographs and certain other items of evidence were not kept in the file, nor did he have any understanding of where else they might have been: "I have no independent recollection. The only thing I am confident is, like all of these other documents, they would have gone to the file. It was the central repository for the documents." (Hartman Dep. 175:18-22, Ex. D.)

With respect to the photographs, Hartman testified as follows:

- Q. And these photographs, after you received them, what would you have done with them, or what did you do with them?
- A. Well, what I would have done, and I have no independent recollection of my actions after receiving them, but what I would have done it would have been to mark them for evidence, I would have prepared the memorandum of interview, and ultimately I would have conveyed them back to the case file.

Id. at 175:2-11.

Subsequent to the Spirko trial, the case files remained, pursuant to Court order, under lock and key and, as the Court is well aware, were the subject of extensive records litigation under the Freedom of Information Act and other theories. Ultimately in 1995, the court entered a stipulation agreed to by the parties giving undersigned counsel access to those files, which were

transported to Washington for review by the U.S. Postal Service and habeas counsel in early 1996. During that review, counsel for the first time saw memoranda of interviews that reflected that photographs had been turned over to Inspector Hartman by Margie Gibson and the Bentleys, and that other documents had been received by Hartman relating to a bearded Delaney Gibson's presence in North Carolina on August 9, 1982. Those photographs and documents were not in the files made available for review, and undersigned counsel was forced to go back to this Court seeking access to those materials. The photographs were then subsequently presented to undersigned counsel for the first time and have become, of course, the subject in large part of Spirko's due process claims.

When asked where these photographs had been at the time of undersigned counsel's initial review of the Postal Service records in 1996, Mr. Hartman professed not to know:

Q. Now, do you happen to have any recollection, as we sit here today, since you were the one who boxed them up, as to whether or not the photographs were in the files?

A. I don't know; I don't know.

Q. Do you recall finding the photographs subsequently?

A. No, I don't; I don't.

Q. You have no memory of that at all?

A. None.

(Hartman Dep. 136:24-137:20, Ex. D.)

To this day there has been no explanation of any kind offered by anyone as to why these photographs and other documents were not maintained in the investigative files; why they were not among the materials that the Court ordered be made available for review by undersigned counsel; from where and from whom they were ultimately located at the time undersigned

counsel came back to the Court seeking the Court's assistance in obtaining them; and why the very documents and photographs that are so critical to Spirko's due process claims were hidden for so long.

V. THE DECISION NOT TO PROSECUTE DELANEY GIBSON

Delaney Gibson was indicted for capital murder in September 1983. At the time, Gibson was a fugitive. As set forth above, on December 18, 1983, Delaney Gibson was captured, and soon thereafter Hartman and other inspectors re-interviewed Gibson and his wife, interviewed Gibson's relatives and others, and developed the extensive and corroborated evidence that Gibson was in North Carolina; that he had a full beard continuously at the time of the Mottinger crime; that despite considerable efforts, investigators could not establish contact between Spirko and Gibson prior to the abduction; and that none of the recovered keys could be linked to Spirko or Gibson.

Gibson, under indictment for capital murder for the Mottinger crime, was also wanted in Kentucky, where he had been serving a life sentence until he escaped from prison, and the State faced the issue of whether to try him for the Mottinger crime (for which the State was seeking the death penalty) or send him back to Kentucky to face non-capital charges. Rather surprising then, but not surprising in light of the evidence possessed by the State (but not revealed to Spirko), the State sent Gibson back to Kentucky: "In concert with the wishes of Van Wert County prosecutors Stephen Keister, Gibson will again be released to Kentucky authorities to stand trial on a previous homicide charge in that state. Inspector interviews of Gibson subsequent to his December 18, 1983 apprehension have been negative." (Report of Postal Inspector Thomas Strausbaugh, May 11, 1984, Dep. Ex. 43, contained in Ex. J.) When asked at his deposition about this decision, Keister stated: "I do not specifically recall having discussions

about releasing him to anyone. I'm not saying I didn't. I just don't have a recollection."

(Keister Dep. 139:4-6, Ex. E.) Later on, Keister stated: "I'm not going to be able to help you because I don't recall. I don't recall what the nature of the decision, why the decision was made, what the nature of the charges were against him in another state. I just don't recall." *Id.* at 139:24-140:3. Notwithstanding Keister's lack of recollection, Gibson was sent back to Kentucky to face non-capital charges.

Thereafter, absolutely no effort was ever made to bring Gibson to Ohio to face pending capital charges for the Mottinger crime. No detainer was ever lodged against Gibson. Keister, when asked whether or not a detainer was lodged and if not, why not, stated only "I do not recall. I just don't remember if we did or if we didn't." *Id.* at 76:17-18. Keister remained Prosecuting Attorney for Van Wert County until December 31, 1988, when he was succeeded by Charles Kennedy, who has been Prosecuting Attorney for Van Wert County continuously thereafter. When Keister was asked whether or not he had any recollection of discussing with Kennedy what to do with respect to the open capital indictment against Gibson, Keister stated "I don't have a recollection." *Id.* at 203:7. This was the only open capital indictment in Van Wert County and the only capital case other than Spirko's in the County during Keister's eight-year tenure.

Kennedy assumed office on January 1, 1989. Kennedy likewise testified that he has no recollection of any discussion with anyone with respect to the issue of what to do with the open capital indictment against Gibson:

Q: Do you recall any discussion back around that time with anyone about we've got this guy under that's indictment, what are we going to do about him?

A: No, Sir, I don't recall any conversations like that.

(Kennedy Dep. 38:11-15, Ex. F.) Kennedy further testified that he had no understanding of any kind with respect to the question of whether or not a detainer had been lodged against Gibson at the time that he assumed office. *Id.* at 52:8-18. Kennedy testified that he was completely surprised to learn that Gibson, in fact, had been released from prison in Kentucky and was living in the community at large today. *Id.* at 54:13-55:1.

According to his sworn testimony, Kennedy decided five or six years ago, before this Court denied Spirko's habeas claims, that it was time to nolle Gibson's case:

I knew that I had an open file, an open docket, so to speak; and I like to keep things neat and tidy if I can, and the thought had occurred to me in the last five or six years a number of times maybe it's time to nulle that case.

Id. at 40:1-5. But the Gibson capital indictment remained open. Indeed, Hartman testified that he had contacted Kennedy at least ten years ago to discuss with him the possibility of prosecuting James Clark Kelley for the Mottinger crime. By this time, Hartman had concluded that James Clark Kelley, a known "postal thief" and a female friend of his, Effie Rader, along with Spirko had alone committed the Mottinger crime, "just the three" (Mottinger Tr. at 7, Dep. Ex. 1, contained in Ex. J):¹⁰

A. The essence of the conversation is that I related to Mr. Kennedy that I had strong suspicions that James Clark Kelly and another individual by the name of Effie Rader were also involved in this homicide, in this series of crimes, including robbery, abduction and murder.

And the essence of my inquiry was to determine whether, if I were able to establish enough evidence to overcome the

¹⁰ Kelley was the man from Madison, Indiana (which had one of the six post offices with post office boxes that investigators determined might have fit the key dropped at the crime scene).

presumption of innocence, whether he would entertain a prosecution of Mr. Kelly and Ms. Rader.

Q: And what do you recall Mr. Kennedy saying to you?

A: My recollection is that Mr. Kennedy stated to me that he would not.

Q: Was it – did he offer some explanations?

A: He did.

Q: Please --

A: What he stated to me was that he was personally acquainted with Clarence Mottinger, the victim's husband, and that the family wanted no more part of any this activity related to these crimes.

Q: During that conversation, was there any discussion about the then open indictment against Delaney Gibson?

A: Not at all that I recollect.

Q: Do you recall his name coming up?

A: Not at all that I recollect.

(Hartman Dep. 15:16-16:19, Ex. D.)

It is virtually impossible to conceive that the lead investigator and prosecutor could have a discussion about the potential prosecution of other potential suspects without discussing the open capital indictment against Delaney Gibson, especially when the investigator had determined that Gibson had absolutely nothing to do with the Mottinger crime and his request to the prosecutor necessarily would have made that clear then, if it had not been made abundantly clear earlier. Kennedy made no effort to inform Clarence or Connie Mottinger of Hartman's inquiry or Hartman's conclusion that James Clark Kelley and Effie Rader were involved in the Mottinger murder, nor did Kennedy inform Spirko's counsel. Indeed, it defies common sense and common

understanding to believe that neither of two Prosecuting Attorneys over a twenty-one-year period even discussed the one open capital indictment pending in Van Wert County with anyone.

In April 2004, the day after she met with Hartman, Connie Mottinger went to Kennedy and reported to him that Hartman had just told her that he had determined based upon all the facts he had developed prior to Spirko's trial that Delaney Gibson had had no involvement whatsoever in the Mottinger crime. (Mottinger Depo. at 34:14-35:4, Ex. H). Kennedy testified that he has no recollection of that meeting, which occurred a little over a year before his deposition and while the Sixth Circuit was still reviewing Spirko's appeal. Instead, on May 17, 2004, at 8:30 in the morning, Kennedy caused the open capital indictment against Delaney Gibson, which had been pending for almost twenty one years, to be dismissed. He did that without first consulting or informing Connie Mottinger or any other member of the Mottinger family:

Q: Did you consult with Mrs. Mottinger before doing this?

A: No, sir.

Q: Did you consult with the Mottinger children?

A: No, sir.

Q: Did you make any effort to consult with either of them?

A: No, sir.

Q: After you entered the nulle, did you make any effort to inform them of what you had done?

A: No, sir.

Q: You didn't have any – well, can I infer from that that you didn't think their that their views with respect to this action were relevant?

A: Their views were important, but they would not have changed my position.

Q: Do you know how they found out about this?

A: No, sir, I don't.

(Kennedy Dep. 66:12-67:6, Ex. F.)

When asked to explain what it was that caused him to dismiss these charges after twenty one years, on this particular day, Kennedy testified as follows:

Q: Now, what prompted you on, particularly on May 17, 2004 to take this action?

A: Nothing in particular. That just happened to be a relatively quiet morning; and as I indicated in previous testimony, it's something I had been thinking about for a long time and; and, coincidentally, that's the day I did it.

Id. at 67:9-13. On May 17, 2004, the Sixth Circuit Court of Appeals, in a two-to-one decision, affirmed the denial of Spirko's habeas petition.

VI. HARTMAN'S RECENT STATEMENTS

Throughout the underlying habeas proceedings before this Court, the State contended that the theory, evidence, and argument it presented at trial was not false or untrue, much less knowingly so, because the evidence it possessed concerning Gibson's whereabouts and bearded appearance, while it might have raised some doubts about Gibson's involvement, did not exclude the possibility that he was involved. Indeed the State had argued that Gibson could have driven the six hundred and fifty miles through the night from North Carolina to Elgin, shaved his beard as he drove, somehow met up with Spirko and committed this "crime of opportunity." (Resp't Anderson's Return of Writ to Spirko's Second Am. Habeas Corpus Pet. at 37-38.) The State made this argument knowing full well that it had located witnesses who had told investigators that Gibson had a full beard continuously in August of 1982, both before, on, and after August 9, and that this information had not been disclosed to defense counsel. Hartman acknowledged it

would take about four weeks to grow back a similar beard after shaving. (Hartman Dep. 379:16-22, Ex. D.) The State also contended that “at trial, Spirko was provided with all material evidence relating to the whereabouts and physical appearance of Delaney Gibson.” (Resp’t Anderson’s Return of Writ to Spirko’s Second Am. Habeas Corpus Pet. at 36.)

We now know that lead inspector Paul Hartman has recently stated – to at least three separate groups of individuals – that he determined prior to the trial that based upon the evidence he had developed Delaney Gibson had nothing to do with the Mottinger crime and that he shared this determination and the facts supporting it with the prosecuting attorney.

First, in April 2004, Hartman participated in a tape-recorded interview with Connie Mottinger, Theo Bennett, and Marlene Bennett as part of a research effort undertaken by Mrs. Mottinger and the Bennetts about the Mottinger crimes. Second, in January 2005, Hartman was interviewed by Bob Paynter, a reporter for the *Cleveland Plain Dealer*, and that interview again was tape-recorded. Third, in April 2005, Mr. Hartman was interviewed twice on the telephone by undersigned counsel, who by then had learned of the prior interviews. In each of these interviews, Hartman stated that he had concluded prior to the Spirko trial, based upon the totality of the evidence developed in his thorough investigation, that Delaney Gibson had nothing to do with the Mottinger crimes. In each of these interviews, Hartman also stated that he had shared his conclusion and the factual bases that supported it with other members of the prosecuting team, including lead prosecutor Stephen Keister.

A. Interview of Paul Hartman by Connie Mottinger and Theo and Marlene Bennett

In April 2004, Hartman voluntarily participated in a taped interview with Connie Mottinger and the Bennetts. The relevant portion of the tape of that interview was transcribed

painstakingly and thoroughly by Connie Mottinger in the week following the interview.¹¹ In most relevant part, that transcript reads as follows:

Connie: Then why was he [Gibson] indicted? Then why

Paul: It was the prosecutors decision, not mine, because I said
“He didn’t do it!” and here is the proof.

Connie: Kennedy did this!

Paul: No it was Keister who did that.

Connie: Keister.

Paul: Yes,

Connie: Keister, I know him, he is kind of – you know.

Paul: So anyway, *I said “Look, he didn’t do it, well we are going with it anyways, well you do it as you want, but I am telling you the guy didn’t do it. But that was his decision, not mine. I argued against it. So we pretty much have a divided camp now. Strausbaugh and others are saying they got the guy and I am saying no you don’t got the guy. He is not the guy! So we go ahead and do the indictment, prepare for trial, go to trial and convict the*

¹¹ Regarding how she prepared the transcript, Mrs. Mottinger testified as follows:

I sat with that laptop on my lap, and I played like one sentence or two on it, from the tape, and then I typed it down. Then I would take the tape back, and I want to make sure because I know that when you write a book and when you are repeating anything that someone says, it better be absolutely like they say or they can sue the pants off of you.

So anyways, I went back then on the recording and I would listen again and then check on what I had wrote to make sure it was correct.

It took me a good week, I would say, to get this tape done....

(Mottinger Dep. 39:2-13, Ex. H.)

son of a bitch in trial and in part – I don't know – have you read the trial transcripts?

(Mottinger Tr. at 5, Dep. Ex. 1, contained in Ex. J (emphasis added).)

Marlene Bennett, without the aid of having seen the transcript prepared by Connie Mottinger, had exactly the same recollection of Hartman's statements:

Q: So let me understand you. So your recollection is that Mr. Hartman was telling you that Delaney Gibson could not have been involved in the crimes; is that what you're telling me?

A: That's right.

Q: And you recall Mr. Hartman saying that?

A: Yes, I do.

Q: And I know this is very hard, but do you recall anything that *Mr. Hartman told you about the basis for that conclusion?*

A: Oh, *it was a detailed one.*

Q: *He gave you a lot of details?*

A: *Um-hum.*

Q: Do you remember any of the details?

A: Well, let me think a minute. I think there was something to do with pictures that was taken and there was a date on the pictures was like that day. I think he checked phone records. There were no phone calls made to any place in this area.

Q: Okay.

A: He did say he was not the man.

Q: Delaney Gibson was not the man?

A: That's right.

Q: So he told you that. It sounds like you remember that pretty clearly.

A: Yes.

Q: Did he say in your recollection whether he shared this conclusion with the prosecutors who brought the case?

A: Well, I'm sure he did.

Q: What do you remember about that part of the conversation that you had with Mr. Hartman?

A: I don't remember any part of it; but if you went through all this trouble working, why wouldn't you tell them what you found out?

Q: Understood.

A: No. I'm sure he did. I don't remember that part. I'm just always amazed at all the stuff they go through to try and find these people, because this is all new stuff to me what I read. *That was a lot of work he did, and he said he couldn't have been there, and I believed him.*

Q: And there's no doubt in your mind that Mr. Hartman told you that Delaney Gibson couldn't have been involved?

A: That's right. *He is not the guy.*

Q: That was very clear to you?

A: That's right.

(Marlene Bennett Dep. 30:11-32:8, Ex. A (emphasis added).)

The day after her interview with Hartman, Connie Mottinger drove to Van Wert, Ohio, and met with Charles Kennedy, the current Van Wert County Prosecuting Attorney who also at one time had been the Mottingers' personal lawyer. Mrs. Mottinger told Kennedy that Hartman had just told her that Delaney Gibson was not involved in the Mottinger crimes:

A: I told him Paul Hartman said absolutely positive Gibson wasn't involved at all.

Q: How did he react then, Mr. Kennedy?

A: You got to know Mr. Kennedy. Mr. Kennedy does not have emotions. I cannot read Mr. Kennedy. I know he is a drill sergeant or whatever he is in the service. I had no reaction. Or I felt like there was no reaction. The only reaction I got was I felt he was like upset with me to think that it could all be brought forward again and to think that we could think that we could go after someone else. He left me with a feeling that he was upset with me.

Q: Did he tell you anything with respect to his intentions concerning Mr. Delaney Gibson?

A: No, he did not. But the thing of it is it was about a week after I was there. All at once – I believe Mr. Wille or it was out in the paper that Delaney Gibson was taken off.

Q: Taken off. What do you mean by “taken off”?

A: Taken away from this case. It was about a week after that. I didn’t know whether he had followed up on something I had said. I didn’t know if he had gotten a hold of Hartman. Didn’t know what happened. I had no idea what caused this, but I was delighted that the guy was not going to be held for something he didn’t do.

(Mottinger Dep. 35:3-36:1, Ex. H.)

Kennedy, when asked about this meeting, stated that he had no recollection of meeting Mrs. Mottinger and had no recollection of Mrs. Mottinger having informed him that Hartman had told her that Delaney Gibson had nothing to do with the Mottinger crimes.

Q: Similarly, if Mrs. Mottinger had come to you – well, do you recall Mrs. Mottinger ever talking to you about a meeting that she had had with Mr. Hartman?

A: No, sir, I don’t.

...

A: I would think I would remember that, yes, sir.

Q: If she had told you that she had a meeting with Mr. Hartman and during that meeting Mr. Hartman had informed her that in his view Delaney Gibson had absolutely nothing whatsoever to do with the Mottinger

case and that that had been his view from before the trial through the current, through the present day, is that something you would remember?

A: I think so. Yes, sir.

Q: And did that happen?

A: Not to the best of my knowledge.

(Kennedy Dep. 70:15-19, 71:3-15, Ex. F.)

On that same day, the day after Mrs. Mottinger's interview with Paul Hartman and while the Spirko case was under review by the Sixth Circuit, Mrs. Mottinger also called Charles Wille of the Ohio Attorney General's Office and informed him that Hartman had said that Delaney Gibson had had absolutely no involvement in the Mottinger crimes:

Q: Did you ever tell Mr. Wille that in your view it has been proven beyond a doubt that Delaney Gibson was not involved?

A: I told Mr. Wille that – well, the day I had talked with Paul Hartman, I had called him and I said, “My gosh, you know what he told me?” He said. And, yes, I did tell him that Delaney Gibson, *Paul Hartman claimed that Delaney Gibson had nothing to do with it.* Paul Hartman said it's Effie Rader and James Clark Kelly.

Q: Did he respond to that statement that you just related?

A: He said he would look into it as soon as possible, that they had their own investigators and he thanked me very much for calling him.

Q: Other than that, has he ever responded to that statement that you just made?

A: No.

(Mottinger Dep. 88:4-18, Ex. H (emphasis added).)

Hartman testified that he never received any phone call or other communication from Wille or anyone else in the Ohio Attorney General's Office asking him about a meeting he had with Connie Mottinger. (Hartman Dep. 37:2-15, Ex. D.) Nor were Spirko's counsel or any courts informed of Mrs. Mottinger's conversation with either Mr. Wille or Mr. Kennedy.

B. Interview of Paul Hartman by Bob Paynter of the *Cleveland Plain Dealer*

In January 2005 Bob Paynter of the *Cleveland Plain Dealer* interviewed Paul Hartman in connection with an in-depth investigative report he was preparing about the Spirko case. That interview was tape-recorded, and Hartman was aware that it was being recorded. The tape recording of that interview now has been transcribed by a certified court reporter. In its most relevant portion, the transcript indicates that Hartman stated to Paynter as follows:

Mr. Paynter: That's fine. My question for you – and I wouldn't expect you to be – my question for you is: Did you make those photographs [the 58 photographs obtained by Mr. Hartman from Delaney Gibson's wife and in-laws] available to Keister and show them to Keister?

Mr. Hartman: I know that I explained to Steve Keister that I had developed an alibi for Delaney Gibson, I know that. Now, I don't know what I showed, uh – I don't know what I presented, but I have a recollection, that I explained to him that I developed an alibi for Gibson. And *it was my belief that Gibson didn't have anything to do with it.*

Mr. Paynter: Because of his alibi? So if Keister decided –

Mr. Hartman: *No, no for a whole host of reasons, not just the alibi.*

Mr. Paynter: Okay.

Mr. Hartman: *The alibi is part of it but not totally and completely.*

(Tr. of Paynter Interview of Paul Hartman at 102, attached hereto as Dep. Ex. 93, contained in Ex. J (emphasis added).)

Later on in the interview, Hartman explicitly stated “and I did not believe, *based upon the facts*, that Gibson did it.” *Id.* at 105 (emphasis added). Still later on in the interview, the following exchange occurred:

Mr. Paynter: Then why wasn't he indicted and tried in January of '83 when you had the case against him? Delaney Gibson was what gave you entree to Elgin, it put uh an eyewitness there, it put him there, Spirko's best friend, that was woven intricately into that prosecution and without Delaney Gibson you had everything you were going to get in January 1983?

Mr. Hartman: I'm not the prosecutor. I didn't make prosecutor's decision.

Id. at 113-14. Later on in the interview with Paynter, Hartman stated “[w]ell again, my belief is that, was and is, that *Gibson didn't have anything to do with it.*” *Id.* at 115 (emphasis added).

C. Interviews of Paul Hartman by Thomas Hill and Alvin Dunn

On April 5, 2005, undersigned counsel, Thomas Hill, had a telephone conversation with Hartman, having earlier learned from Connie Mottinger about the interview she had with Hartman in April 2004. During the interview, Hartman stated “I concluded that Gibson had absolutely nothing to do with it [the Mottinger crime].” (Aff. of Thomas Hill, April 19, 2005, at 2, attached hereto as Exhibit O). Hartman further said that prior to Spirko's trial he had informed Postal Inspector Thomas Strausbaugh and Prosecuting Attorney Stephen Keister that “Gibson had no involvement in the Mottinger crimes.” *Id.* Hartman went on to say that it “defied common sense” to conclude that Delaney Gibson had any involvement whatsoever in the Mottinger crimes. *Id.* Hartman proudly explained the factual bases upon which he drew this conclusion, including the very detailed and thorough investigative work that he had done confirming Gibson's presence in North Carolina as late as 6:00 p.m. on the night before the August 9, 1982, abduction and Gibson's bearded appearance throughout the relevant time period

and his failure, in spite of an extensive effort, to establish any evidence whatsoever of contact between Spirko and Gibson at any time prior to the Mottinger abduction. *Id.* at 2-3. Two days later, Hartman repeated the substance of these remarks in another telephone interview between Hartman and Thomas Hill and his co-counsel, Alvin Dunn. *Id.* at 4.

D. Paul Hartman's Sworn Statements

On May 1, 2005, Postal Inspector Hartman executed a sworn affidavit for submission to this Court. By that time, Theo Bennett had already told Hartman that he had destroyed the tape that had been made of Hartman's interview with Mrs. Mottinger and the Bennetts: "Well, by virtue of the fact that this was executed on May 1 and believing that Mr. Bennett's surgery had occurred well prior to that time, I would believe that I would have known that he had destroyed those tapes." (Hartman Dep. 262:24-63:3, Ex. D.)¹² However, Hartman was unaware that a

¹² After Connie Mottinger completed her transcription of the relevant tape, she transmitted that transcript along with the tape cassette itself to Theo Bennett, who was to write the book about Betty Jane Mottinger. Mr. Bennett retained possession of the only copies of the transcript and the tape. Apparently, the Attorney General's Office, after having been notified by Connie Mottinger in April 2004 of her interview with Hartman and the rather remarkable statements made by Hartman in that interview, chose not to do any follow-up and did not secure the tape. The Attorney General's office did not contact Mr. Bennett until after Spirko's counsel brought these issues to its attention.

Spirko's counsel learned about the tape of the Hartman interview from Connie Mottinger, who contacted Spirko's counsel as part of her effort to investigate the case and who traveled to Washington to meet with Spirko's counsel on February 25, 2005. (Mottinger Dep. 57:12-58:4, Ex. H.) Both Mrs. Mottinger and Spirko's counsel made immediate efforts to obtain the tape and the transcript from Mr. Bennett. Neither was ever provided to counsel by Mr. Bennett. However, Mr. Bennett did notify Paul Hartman that Mrs. Mottinger had met with undersigned counsel. (Hartman Dep. 34:24-35:2, Ex. D.)

On Good Friday (March 25, 2005) Mr. Bennett, after having receiving repeated requests by telephone and email from Spirko's counsel to provide the tape, destroyed the tape. (Theo Bennett Dep. 32:18:24, Ex. B.) Mr. Bennett never told undersigned counsel, which had made repeated requests for the tape, that he had destroyed the tape. However, Mr. Bennett did notify Mr. Hartman that he had destroyed the tape. *Id.* at 53:23-54:16.

(Continued on following page)

transcript had been prepared prior to the tape's destruction: "I had no knowledge of them [transcripts] or of any notes or purported transcript." *Id.* at 263:9-10. With respect to the interview with Paynter, Hartman believed that the tape still existed at the time he executed his affidavit, *id.* at 267:1-8, and Hartman also believed that undersigned counsel had taped their conversations with him. *Id.* at 267:9-12. Such was the state of Hartman's belief on May 1, 2005.

In his sworn affidavit filed with this Court, Hartman asserts generally that at no time prior to the trial did he state an opinion to anyone that Gibson had absolutely nothing to do with Mrs. Mottinger's murder and further asserts that he believed that Gibson could have been involved. (Aff. of Paul Hartman ¶ 5, May 1, 2005, attached hereto as Dep. Ex. 3, contained in Ex. J.) Of course Hartman was submitting his affidavit to respond to specific assertions in Spirko's Rule 60(b) motion that he had made the alleged statements to (1) Connie Mottinger and the Bennetts, (2) the *Cleveland Plain Dealer*, and (3) Spirko's attorneys.

Hartman in his affidavit addresses only the specific assertions concerning his statements to Connie Mottinger and the Bennetts. He acknowledges that he had spoken to Connie Mottinger about his investigation of the Mottinger crime and states that he had reviewed an affidavit submitted by Connie Mottinger in which she set forth the critical statements Hartman had made to her concerning his conclusion that Gibson had nothing to do with the Mottinger crime and the fact that he shared that conclusion with the prosecuting attorney, Stephen Keister.

Hartman's recollection is similar. (Hartman Dep. 39:21-40:2, Ex. D.) Hartman further acknowledged that at the time he executed his affidavit in this case, on May 1, 2005, he had already been informed by Mr. Bennett that the tapes had been destroyed. *Id.* at 40-41.

In his affidavit to this Court, Hartman denies making those critical statements: “I made no such statement to Stephen Keister, nor did I state to Connie Mottinger that I had made such a statement to Stephen Keister.” *Id.* at ¶ 8.

At the same time, Hartman is completely silent in his affidavit with respect to the issue of whether he made the same statements specifically to the *Cleveland Plain Dealer* and then again to undersigned counsel, even though those additional statements by Hartman were squarely raised in Spirko’s Rule 60(b) motion. Hartman obviously felt quite comfortable swearing that he had not made statements to Mrs. Mottinger when he believed that the tape of that interview had been destroyed and no transcript existed and was uncomfortable making the same denials when he believed tapes existed of his interviews with Paynter and with counsel.

At his deposition, Hartman made an effort to continue to deny he made certain statements to Mrs. Mottinger and the Bennetts. When confronted at his deposition with the transcript of his interview with Connie Mottinger, Hartman claimed “it is either in error or I misspoke.” (Hartman Dep. 259:21, Ex. D.)

Connie Mottinger was unequivocal that Hartman’s statement in his sworn affidavit was not true:

Q: In your view, is that a true statement by Mr. Hartman?

A: No, it is not.

Q: And please describe why it is not true.

A: Because I heard him with my own ears and those tapes will prove it ...

(Mottinger Dep. 77:19-23, Ex. H.)

Even though Hartman denied that he told Mrs. Mottinger and the Bennetts that he concluded prior to trial Gibson had nothing to do with the Mottinger crime and that he had shared this conclusion with Keister, Hartman in his deposition acknowledged that he made *the exact same statements* to Bob Paynter of the *Cleveland Plain Dealer* and undersigned counsel. However, quite remarkably, Hartman now claimed that he made these statements *in a calculated effort to mislead and deceive Paynter and Spirko's counsel*:

Q: Were you purposely untruthful?

A: There was a time when I misled him [Paynter], yeah.

...

Q: So your testimony today is that you purposely misled him?

A: Absolutely.

Q: So that – with respect to what you felt about Delaney Gibson?

A: That's right.

Q: So that – did you also purposely mislead Mr. Dunn and myself [Thomas Hill]?

A: Yes, I withheld facts that would lead you to an opposite conclusion, perhaps.

...

Q: I mean, if I understand what you said before, you made a conscious effort when you were talking to Mr. Paynter to mislead him?

A: With regard to that issue, yes.

Q: Then you followed that on by trying to mislead Mr. Dunn and myself as well?

A: That's correct, with regard to that issue.

Q: That issue being your state of mind with respect to Mr. Gibson's involvement?

A: That's correct, that's right.

(Hartman Dep. 228:3-229:21, Ex. D.) In the very next breath, Hartman asserted that while he had deceived Paynter and undersigned counsel about his conclusion that Gibson was not involved and about the fact that he shared that conclusion with the prosecutor, he had been truthful when he had made the exact same statements to Mrs. Mottinger and the Bennetts:

Q: All right. Now, when you were talking to Ms. Mottinger and Mr. Bennett, were you trying to mislead them as well?

A: No, no.

Id. at 229:22-25.

Hartman then testified that he had told Mr. Prichard and others from the Attorney General's office that he had misled Paynter and counsel:

Q: In talking to these gentlemen [from the Attorney General's office], you acknowledged that you, in fact, said the things that we claimed you said, but even though you said them, they were not correct and true?

A: What I said to these gentlemen [from the Attorney General's Office] was that I misled Paynter and that I misled you, simply that, nothing more.

Id. at 268:21-269:2.

The Attorney General's Office had never advised counsel that Hartman had tried to mislead us, as would have been their obligation. In questioning Hartman, the Attorney General's Office suggested strongly that Hartman had never told the office of his deception. Hartman, however, stuck to his guns:

Q: And isn't it true that you never said the words to us [The Attorney General's Office] that you misled Bob Paynter, when we met with you at Bob Evans. You never said the words that "I misled Bob Paynter"?

A: No, that is not true. I remember stating specifically that I did mislead the reporter and the defense attorneys. You may not have heard it, but I said it.

Id. at 289:19-90:1.

Just as remarkable as Hartman's statement that he was lying to the *Cleveland Plain Dealer* and Spirko's counsel – but not to Mrs. Mottinger and the Bennetts – is Hartman's asserted rationale for attempting to mislead the *Cleveland Plain Dealer* and Spirko's counsel:

Q. And the reason, again, why you were trying to mislead Mr. Paynter?

A. Because he was your agent and you two have mounted your defense that has had this Defendant on my back all these years, and have maligned me and my integrity. So this was a little pay back, a little pay back.

Q. If you could again, just briefly, explain to me, to us, as to how it was that this effort on your part to mislead or deceive was going to accomplish whatever end it was that you were seeking to accomplish.

A. It is real simple. It was clear to me, based on past performance, that ultimately you would get the information from Paynter, who was acting as your agent, and that given that little bit of ray of sunshine, you would puff it and spin it and bring it to where it is today. And the ultimate objective on my part was to be able to set the record straight with regard to many of these issues that have been fired by you over the years but have never been the subject of any testimony.

Q. So you --

A. I wanted to set the record straight. And by golly, here I am.

Q. So you wanted these issues to be aired?

A. Yes, yes, I did.

Q. And you want them to be aired in a public forum?

A. I wanted to set the record straight, the record for this case.

Q. And you felt that if you sort of deceived or misled us, it would cause us to do certain things which would lead to where we are today?

A. I anticipated that you would head down the garden path into this flight of fancy, and it would lead us ultimately to where we are today, yes.

Q. So you are presumably pleased with the outcome today?

A. I am pleased that I have the opportunity to testify. Now, I am sure that Mr. Paynter will have a copy of the transcript before the ink is dry, and that will be another series of articles. But the realities are, yes, I have the opportunity to set the record straight with regard to this entire case, and the aftermath, actually.

Id. at 230:1-7, 271:17-273:8.

VII. THE NOTIFICATION TO THE OHIO ATTORNEY GENERAL'S OFFICE IN APRIL 2004 OF HARTMAN'S STATEMENTS TO MRS. MOTTINGER AND THE BENNETTS

Within a day of her meeting with Paul Hartman in April 2004, Connie Mottinger contacted Charles Wille to tell him the startling news she had learned during her meeting with Inspector Hartman: "... I did tell him that Delaney Gibson, Paul Hartman claimed Delaney Gibson had nothing to do with it. Paul Hartman said it's Effie Rader and James Clark Kelly." (Mottinger Dep. 88:8-11, Ex. H.) Wille told Mrs. Mottinger that he had investigators who could look into this; he thanked her for the information; he told her he would get back to her; and that is the last Mrs. Mottinger heard from Wille on the subject. In April 2004, Spirko's appeal from the denial of his habeas petition was pending in the United States Court of Appeals for the Sixth Circuit. The Attorney General's office had argued to the Sixth Circuit in its briefs and at oral argument that the alibi and bearded appearance evidence with respect to Gibson was not

exculpatory and that the State's theory of its case, evidence, and argument that Gibson and Spirko together committed the Mottinger crime was true and correct.

Wille did not inform the Sixth Circuit that he had information that Hartman had concluded prior to Spirko's trial based upon the facts he had developed that Gibson had absolutely nothing to do with the Mottinger crimes; nor did he inform defense counsel. Apparently Wille did not even contact Hartman to find out why he had told Mrs. Mottinger that Gibson had not been involved in the abduction and murder. (Hartman Dep. 281:15-82:15, Ex. D.) These failures are all the more remarkable given the fact that the Sixth Circuit had specifically asked during oral argument about the State's intention with regard to the open Gibson capital indictment. In fact, in the words of the majority opinion from the Sixth Circuit, "the state viewed [Gibson] as probably having been the chief perpetrator." 368 F.3d at 611. After the Sixth Circuit affirmed the denial of Spirko's Habeas Petition on May 17, 2004, neither Wille nor anyone in the Attorney General's Office notified the Sixth Circuit or the United States Supreme Court of these developments. Rather, the Attorney General's Office continued to make the same arguments that it always made in defense of Spirko's claims, first in defending against Spirko's efforts for *en banc* review by the Sixth Circuit and then in responding to Spirko's arguments to the United States Supreme Court in his Petition for Writ of Certiorari. And, of course, at no time was defense counsel notified of the statements that Hartman made to Mrs. Mottinger.

Indeed, it was not until undersigned counsel raised these very same issues to Wille by letter of April 7, 2005, that the Ohio Attorney General's Office appeared to respond in any way to the issues raised therein. (Letter of Thomas Hill to Charles Wille, April 7, 2005, attached hereto as Dep. Ex. 45, contained in Ex. J.) Of course, the original source of the information

contained in that letter came also from Mrs. Mottinger, after she took it upon herself to contact undersigned counsel in late February 2005. It must have come as quite a surprise to the Attorney General to learn that Mrs. Mottinger, the wife of the victim's widower, had finally in frustration contacted Spirko's lawyers. Only then, when the Attorney General knew that counsel had been made aware of the fact that Hartman was stating that he had determined, based upon his thorough investigation of the facts prior to the Spirko trial, that Delaney Gibson had nothing to do with the Mottinger crime, did the Attorney General's office make any efforts to investigate. But, unfortunately, by then it was too late, since not only had Theo Bennett destroyed the tape of the Hartman interview on March 25, 2005, but, most importantly, this Court, the Sixth Circuit, and the United States Supreme Court had been denied the opportunity to consider this important additional evidence and these new developments.

ARGUMENT

I. THE FACTS DEMONSTRATE THAT THE STATE PROCURED THIS COURT'S DENIAL OF SPIRKO'S HABEAS PETITION BY FRAUD, MISREPRESENTATION, AND/OR MISCONDUCT AND THAT THE STATE'S SUMMARY JUDGMENT MOTION SHOULD BE DENIED

In a habeas case, "the purpose of a Rule 60(b) motion is to allow a district court to reconsider its judgment when that judgment rests on a defective foundation." *In re Abdur'Rahman*, 392 F.3d 174, 179 (6th Cir. 2004); *see also Gonzalez v. Crosby*, 125 S. Ct. 2641, 2648 (2005) (Rule 60(b) motion proper to correct "some defect in the integrity of the federal habeas proceedings," recognizing that "[f]raud on the federal habeas court is one example of such a defect").

In order to establish fraud, Spirko must show conduct

1. On the part of an officer of the court; 2. That is directed to the "judicial machinery" itself; 3. That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4. That is

a positive averment or is concealment when one is under a duty to disclose; 5. That deceives the court.

Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993). “Although there are cases holding that a ‘plan or scheme’ must exist in order to find fraud on the court . . . a scheme, based on a subjective intent to commit fraud, is not required Reckless disregard for the truth is sufficient.” *Id.* at 352-353. “As an officer of the court, every attorney has a duty to be completely honest in conducting litigation . . . ‘when he departs from that standard . . . he perpetrates fraud upon a court.’” *Id.* at 352 (quoting Moore’s Federal Practice and Procedure ¶ 60.33). It is not necessary to show bad faith: “It is not sufficient to say . . . that no prosecutorial misconduct occurred under the *Brady* principle because no particular individual . . . has been proved to act in bad faith with the express intent of suppressing exculpatory evidence. In *Brady* itself the Court stated that the failure to disclose material is a due process violation ‘irrespective of the good faith or bad faith of the prosecution.’” *Id.* at 353.

Before the Court is the State’s summary judgment motion. Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding the motion for summary judgment, the evidence of the non-moving party will be accepted as true, all doubts will be resolved against the moving party, all evidence will be construed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn in the non-moving party's favor. *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451, 456 (1992); accord *Torrez v. DaimlerChrysler Corp.*, 306 F. Supp. 2d 722 (N.D. Ohio 2004) (opinion of Carr, J.) (denying summary judgment to moving party).

Viewing the extensive evidence that has been developed under this standard, there can be no question that the State's motion should be denied. For the purpose of this motion, the following facts, though perhaps disputed by the State, must be taken as true:

- Hartman concluded prior to trial that Gibson had absolutely nothing to do with the Mottinger crime. This conclusion was unknown to Spirko and was not before the Court when it denied Spirko's habeas petition.
- Hartman's conclusion was based in significant part on the fact that he had made extensive investigative efforts, but failed to establish any communication between Spirko and Gibson just prior to the Mottinger crime, a failure that Hartman believed was extremely important. This fact was unknown to Spirko and not before the Court when it denied Spirko's habeas petition.
- Hartman's conclusion also was based largely on the fact that he could never link any of the keys found at the crime scene, including the postal lock box key—keys that investigators had concluded belonged to the perpetrators—to either Gibson or Spirko. This fact, including even the existence of the unidentified keys, was unknown to Spirko and was not before the Court when it denied Spirko's habeas petition.
- The State decided as early as 1983 or 1984 – and in any event no later than 1995 – not to prosecute Delaney Gibson. This fact was unknown to Spirko and was not before the Court when it denied Spirko's habeas petition. Indeed, the State allowed this Court and the reviewing courts to believe the contrary – that Delaney Gibson still would be prosecuted under his open indictment. In resisting

disclosure of the investigative files, Hartman has filed affidavits in which he asserted that the basis for the State's unwillingness to disclose the investigative file was the pending open indictment of Delaney Gibson, including one in 1996 in which he stated: "Mrs. Mottinger's homicide has not been completely solved. Although Spirko has been convicted, Gibson, who is presently serving three life sentences in the Kentucky State Penitentiary for at least three separate murders, has yet to be tried for the Mottinger murder." (Aff. of Paul Hartman, June 10, 1996, at 4, attached hereto as Exhibit P.)

- Hartman's conclusion and the evidence supporting it were known to the Van Wert County Prosecuting Attorney prior to the trial, were made known again to the Van Wert County Prosecuting Attorney no later than 1995, and were known to the Attorney General's office no later than later April 2004, prior to the date the Sixth Circuit affirmed the Court's denial of Spirko's habeas petition by a two-one vote.

These facts, which must be taken as established for the purpose of deciding the State's summary judgment motion, support Rule 60(b) relief and require denial of the State's summary judgment motion. They without question demonstrate that this Court's judgment was procured by fraud, misrepresentation, and/or misconduct of the State, and, therefore, for those reasons as well as for other reasons, relief from the operation of the judgment is justified.

At trial, the State presented a case, introduced evidence, and argued to the jury that John Spirko and Delaney Gibson together committed the Mottinger crime. Before this Court (as well as before the reviewing appellate courts), Spirko argued that his due process rights had been violated in two distinct ways: (1) when the State failed to disclose to him prior to trial

exculpatory information demonstrating that Gibson did not participate in the Mottinger crimes and (2) when the State proceeded at trial with a theory of the case, evidence, and argument it knew or should have known were false. At each and every stage, *including before this Court*, the State responded by arguing (1) that the evidence that was not disclosed was indeed not exculpatory and that Spirko, by obtaining access to the investigation files in 1996-97, possessed all of the evidence the State had concerning Delaney Gibson; and (2) that the theory of its case and the evidence and arguments it presented at trial were indeed true and correct. This Court accepted those representations and arguments in denying Spirko's habeas petition.

The evidence that Spirko has recently discovered demonstrates that with respect to each of these two arguments, the State procured this Court's judgment through fraud, misrepresentation, or other misconduct.

A. The State Procured This Court's Denial of Spirko's Brady Claim Through Misrepresentations

In opposing Spirko's *Brady* claim, the State argued that Spirko had all of the information possessed by the State concerning Delaney Gibson. The State argued that "at trial, Spirko was provided with all material evidence relating to the whereabouts and physical appearance of Delaney Gibson." (Resp't Anderson's Return of Writ to Spirko's Second Am. Habeas Corpus Pet. at 36.) The State also relied on the fact that an independent third-party attorney reviewed what the State represented was all of its records: "At trial the prosecutor turned over his entire investigatory file, including all records from the United States Postal Services investigation, to an independent third party attorney, John Sabol." *Id.* at 28. The State continues steadfastly to maintain its position. In a recent letter to Spirko's counsel, the State represented that "you have already been provided any and all evidence concerning Delaney Gibson's involvement or lack of involvement in Ms. Mottinger's abduction and murder. I specifically refer to the investigation

files maintained by the United States Postal Service, copies of which you have already been provided.” (Letter from Charles Wille to Thomas Hill at 2, April 11, 2005, attached hereto as Exhibit Q.)

We now know that these representations were false. As set forth above, Spirko did not obtain – and this Court was not aware of when it denied Spirko’s habeas petition – significant evidence concerning Delaney Gibson’s and/or John Spirko’s alleged involvement in the Mottinger crime. This evidence includes (1) the fact that investigators subpoenaed phone records and made other substantial efforts to establish communication between Gibson and Spirko around the time of the Mottinger crime but failed to establish any communication between the two; (2) the fact that investigators discovered a set of keys at the crime scene that they were convinced were dropped by the perpetrators but that they were unable to link to Gibson or Spirko; and (3) substantial documentary evidence showing that Gibson was in North Carolina at the time of the crime, such as work records showing he was picking tomatoes in North Carolina at the time and store receipts showing he was making purchases in North Carolina at the time.

In addition, the State concealed from Spirko – and from this Court – the fact that Paul Hartman had concluded that Gibson could not have been involved in the Mottinger crime. The State seeks to minimize this conclusion and argues that it is merely an inadmissible “opinion” that is of no consequence and that need not be disclosed or considered here. This is far too narrow a reading of the State’s due process obligations under *Brady v Maryland*, 373 U.S. 83, 87 (1963), and its progeny, particularly most recently *Banks v. Dretke*, 124 S. Ct. 1256 (2004), especially in a death penalty context. Furthermore, the State cannot have it both ways. At trial, the State asked Hartman whether he “had determined” whether the many individuals Spirko had

asserted in his first eleven stories were involved in the Mottinger crime were, in fact, involved. Each time Hartman answered that he had “determined” that the particular suspect was not involved. (Trial Tr. 2457:10-2461:22, attached hereto as Exhibit R.) If the State deemed these conclusory determinations to be important enough to present to the jury, certainly Hartman’s conclusion or determination concerning Gibson’s involvement should now be considered by this Court.

When the State’s principal investigator – the investigator who best understands the totality of the evidence, the investigator who himself wrote the incredibly detailed “Presentation Letter” to the prosecutor, the investigator who has conducted (more often than not, alone) nearly all of the many interviews of the defendant, the investigator who has led the investigative effort seeking to corroborate Spirko’s statements – concludes that the theory and supporting evidence under which the prosecution intends to proceed is untrue, then the prosecution must disclose that fact to the defense, whether or not the “conclusion” or “determination” later would be admissible. *Mazzan v. Warden*, 993 P.2d 25, 37 (Nev. 2000) (due process requires disclosure of evidence that would not be admissible at trial); *Carriger v. Stewart*, 132 F.3d 463, 481 (9th Cir. 1997) (evidence “need not have been independently admissible to have been material” under *Brady*).

Moreover, even if the “conclusion” itself were held not to be a required *Brady* pre-trial disclosure, in the post-trial habeas evaluation of the propriety of the State’s failure to disclose the underlying exculpatory facts that had given rise to the “conclusion,” the “conclusion” by the one investigator with the greatest understanding of the totality of the evidence and its significance is absolutely critical in assessing whether or not there was an obligation on the part of the State to disclose to the defense the facts that had led to the “conclusion” or “determination.”

Paul Hartman interviewed John Spirko many times; he led the investigative effort to determine if Spirko's stories were true; he interviewed the witnesses and collected the evidence in Florida, Kentucky, and North Carolina to determine if Spirko's story that Gibson had abducted and murdered Mrs. Mottinger was true; he subpoenaed phone records and confirmed that there had been no contact between Spirko and Gibson prior to August 9, 1982; he tried – and failed – to link any of the keys left at the scene by the perpetrators to Gibson or Spirko. And based on the totality of all this evidence, Paul Hartman concluded that Delaney Gibson had no involvement whatsoever in the Mottinger crimes.

When the State chose to ignore that “conclusion” it did so at its peril. Hartman expressed to Keister his “conclusion” that Delaney Gibson was not involved; that “you don't got the guy”; that “the guy didn't do it.” (Mottinger Tr. at 5, Dep. Ex. 1, contained in Ex. J.) The investigator's conclusion and determination that the facts he had uncovered contradicted the state's theory of the case is itself relevant to the prosecutor's determination of what his obligations were under *Brady*. Knowing that even the investigator who uncovered the evidence found it to be exculpatory, the prosecution team could not, under *Brady*, have withheld the Gibson alibi, bearded appearance, and lack of phone contact evidence, claiming that it was not “favorable to the accused.”

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the U.S. Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good

faith or bad faith of the prosecution.”¹³ It is well established that potential *Brady* evidence must be reviewed not piecemeal but by evaluating the undisclosed evidence in its totality. *Kyles v. Whitley*, 514 U.S. 419 (1995) (holding that the state's obligation under *Brady* turns on the “cumulative effect of all such evidence suppressed by the government” and explaining that assessment of materiality under *Brady* requires that evidence be “considered collectively, not item by item”). When on habeas review serious *Brady* violations have been alleged, particularly in a death penalty context, and the State knows as fact that its principal witness and chief investigator had determined prior to trial that the State’s theory, argument, and evidence were untrue, that fact is required to be disclosed to the habeas court(s). When the State knows that this conclusion was based upon a review of the totality of all the evidence and that evidence includes very significant items that had never been disclosed even to habeas counsel, the State is required to disclose that information to the habeas court and certainly cannot represent and argue that all exculpatory material has been disclosed and revealed.

¹³ Furthermore, “favorable evidence is material, and constitutional error results from its suppression by the government, ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *Kyles v. Whitley*, 514 U.S. 419, 433 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985). “A ‘reasonable probability’ of a different result is accordingly shown when the government's evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Kyles*, 514 U.S. at 434. The materiality inquiry under *Brady* is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions; rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Strickler v. Greene*, 527 U.S. 263 (1999). In this context, materiality is to be determined by considering the suppressed evidence collectively, and “once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review.” 514 U.S. at 435. Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule, and may constitute “evidence favorable to an accused” so that, “if disclosed and used effectively, it may make the difference between conviction and acquittal.” *Bagley*, 473 U.S. at 676.

When the State fails to meet these obligations, the judgment of the habeas court and any reviewing court is procured by fraud, misrepresentation, and misconduct, and the habeas proceeding must be re-opened.

B. The State Procured This Court's Denial of Spirko's Presentation of a False Case Claim Through Misrepresentations

In opposing Spirko's presentation of a false case claim, the State argued before this Court that "[t]he prosecution did not use false testimony to convict John Spirko." (Resp't Anderson's Return of Writ to Spirko's Second Am. Habeas Corpus Pet. at 44.) In its summary judgment motion, the State reiterates the arguments it has made throughout this proceeding that the State had not developed any information that "directly contradicted" Ms. Seibert's eyewitness testimony and that the extensive evidence possessed by the State concerning Gibson's alibi and bearded appearance "did not conclusively preclude Gibson's presence in Ohio on August 9, 1982." (State Motion at 15.)

We now know that these assertions were false. The evidence that Spirko has recently discovered, particularly when disputed issues of fact are resolved in Spirko's favor and all reasonable inferences are drawn in Spirko's favor, demonstrates that the State's assertions regarding its theory, evidence, and argument that Gibson was involved in the Mottinger crime were – and still are – false.

As we have discussed at length, Hartman had determined prior to Spirko's trial that Gibson could not have been involved in the Mottinger crime and had shared that conclusion with the prosecuting attorney. Hartman's determination is not the mere "opinion" of a single observer based on simple subjective observations of particular matters. Rather, Hartman's determination is the firmly held conviction of the man who developed most of the critical evidence in this case

and who was the State's most important witness at trial. Hartman's determination is based on extensive evidence, much of which he developed personally, as well as on substantial efforts – efforts that ultimately failed – to link Spirko and Gibson to each other and to evidence found at the crime scene.

Knowing now that Hartman had determined prior to the trial that Gibson could not have been involved in the Mottinger crime places in a wholly different light the case the State presented at trial, as well as the arguments it made to this Court in opposition to Spirko's habeas petition. Knowing now that Hartman had concluded that Delaney Gibson had nothing to do with the Mottinger crime – and knowing now the additional extensive evidence that supported that conclusion – demonstrates ever more plainly that the State knowingly presented a false case at trial and made misrepresentations to this Court when it asserted otherwise.

The State's presentation of a false case only started with the testimony of Opal Seibert, who testified she was one-hundred percent certain that she saw Delaney Gibson outside the post office on August 9, 1982. Ms. Seibert based her testimony on her identification of an old photograph of Delaney Gibson that showed him clean-shaven. The State never showed Ms. Seibert – and never revealed to the defense – photographs of Gibson taken right around August 9, 1982, that showed him in North Carolina with a full beard. The State thereby denied the defense the opportunity to show Ms. Seibert photographs of Delaney Gibson taken less than twenty four hours prior to the abduction. The State presented Ms. Seibert's testimony even though Hartman had concluded that Gibson had absolutely nothing to do with the Mottinger crime.

The State's presentation of a false case continued with the extensive testimony of Paul Hartman at trial. After Prosecuting Attorney Stephen Keister asked Hartman to testify at length

and in great detail with respect to the many stories Hartman asserts John Spirko told him about the Mottinger crime, Keister asked Hartman specific questions about the various persons Spirko allegedly mentioned in his stories. Keister asked Hartman about Clyde Cravens, Eugene Sizemore, “Dino” (Dean) Harder, “Rooster,” “Dirty Dan,” and “Napolean.” For each person, Keister asked Hartman whether he had investigated the person, whether the person is real, and whether his investigation produced any evidence to associate the person with the Mottinger crime. For each person, Hartman testified that he had investigated the person, had identified the person, and had determined that the person had no involvement in the Mottinger crime and that Spirko’s statements with respect to each person had been lies.¹⁴ (Trial Tr. 2457:10-2461:22, attached hereto as Exhibit R.)

Prosecutor Keister asked Hartman about each and every individual Spirko allegedly named in his many stories, whether he had investigated the individual, and the results of his investigation. Except for one: Delaney Gibson. Keister never asked Hartman whether he had investigated Gibson and whether his investigation had produced any evidence to link Gibson to the Mottinger crime.

We now know that Keister’s failure to ask Hartman whether he had investigated Delaney Gibson was no oversight or omission. Instead, it must have been part of a concerted effort by the prosecution to mislead the jury and the trial court, one that has continued for over twenty years after Spirko was convicted and sentenced to death. We now know that Hartman had conducted a detailed and thorough investigation and determined that Delaney Gibson had nothing to do with

¹⁴ Keister also asked Hartman about an individual named Swartz, who Spirko allegedly named in his stories to Hartman. Hartman testified that he was unable to identify any person names Swartz.

the Mottinger crime and that he had shared that conclusion with Keister. Had Keister asked Hartman whether he had investigated Delaney Gibson – just as he asked Hartman whether he had investigated every other person Spirko allegedly implicated in his stories – Hartman (had he told the truth) would have testified that he had determined that Delaney Gibson – just like every other person Spirko allegedly implicated in his stories – could not have been involved in the Mottinger crime.¹⁵ Had this Court known that Hartman had concluded that the Gibson theory and testimony were untrue, it would have been in a position to evaluate Spirko’s due process claims properly and would have concluded that Hartman’s testimony was untrue and misleading.

The State needed to sustain the theory that Gibson and Spirko together committed the Mottinger crimes to serve two absolutely critical ends. First, Ms. Seibert’s “I never forget a face,” one-hundred percent positive eyewitness identification, coupled with the demonstrated friendship between Spirko and Gibson, provided the missing positive eyewitness testimony the

¹⁵ There was one isolated (and likely unintended) point where Keister asked Hartman a question relating to his investigation of Gibson. The answer Hartman gave – we now know – was not truthful:

Q (by Keister): And July of 1982 was the whereabouts of Delaney Gibson able to be determined?

A (by Hartman): No, sir, certainly not by enforcement agencies.

Q: Why not?

A: Because he was a fugitive from justice.

(Trial Tr. 2552:18-22, attached hereto as Exhibit S.) We now know that Hartman had determined prior to trial that Gibson was in North Carolina in July 1982 working for a migrant tomato picker.

State was lacking as to Spirko.¹⁶ This testimony was particularly important given the complete and utter lack of any physical or forensic evidence linking Spirko to the crime and the detailed and independently corroborated alibi John Spirko would be able to present, showing that he was on his way from Swanton to Toledo with his sister, Cathy Carpenter, for his initial meeting with his parole officer, Steve Lohmeyer, when Betty Jane Mottinger was being abducted in Elgin, more than 100 miles away.¹⁷ Prosecuting Attorney Keister's closing argument made it

¹⁶ Mark Lewis, a truck driver for the Elgin Grain Company, when shown a photo spread five and a half months after the crime, stated that he was only seventy percent sure that a photograph of Spirko depicted the man that he saw outside of the post office. In an interview conducted just after the crime, Lewis viewed a photo array and selected the photograph of Sonny Baumgardner as most closely resembling the man he saw but stated that the photo likely did not depict the person he saw.

¹⁷ On August 9, 1982, Spirko, having recently been released from prison in Kentucky, was living with his sister, Cathy Carpenter, in Swanton, Ohio, thirty miles west of Toledo and one-hundred miles from Elgin, Ohio. Both Spirko and his sister testified that on Monday morning, August 9, Carpenter took Spirko to meet his parole officer, Steven Lohmeyer, in Toledo. (Trial Tr. 2996-2997, 3481-3483, attached hereto as Exhibit T.) They then returned home to Swanton, and when Carpenter developed a migraine, Spirko drove her back to her doctor in Toledo to receive an injection to relieve her pain. (Trial Tr. 2998-3001) Both testified that upon his return, Spirko found a notice from the post office that a package was waiting for him; he went to the post office and picked it up; it contained his belongings from the Kentucky prison, but his television was missing; Spirko spoke with Linda Duncan on the phone; and Spirko then called the prison to complain. (Trial Tr. 3001-3004)

Spirko's alibi was independently corroborated and in many respects not challenged by the State. Parole Officer Lohmeyer confirmed that Spirko met with him that day for about forty five minutes to an hour-and-a-half, but he could not recall the time of day (remarkably, he no longer had records indicating who he saw that day and when); Lohmeyer also testified that he met Carpenter, who had accompanied Spirko and who appeared completely lucid and unimpaired (Trial Tr. 3025-35); a Swanton postal clerk testified that the package was retrieved (Trial Tr. 3051-52); Duncan testified that she spoke with Spirko for twenty or twenty five minutes on the phone at 1:30 or 1:45 p.m. (Trial Tr. 3039-40); phone records established that Spirko's call to the prison from his sister's home in Swanton occurred at 2:14 p.m. (Trial Tr. 3236); and Carpenter's doctor testified that he saw Carpenter on August 9 between noon and 5 p.m., that he gave her an injection that he would not give unless the patient were accompanied by another person because the drug inhibits a person's ability to drive and to speak clearly. (Trial Tr. 3226-

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abundantly clear how important Opal Seibert's positive eyewitness identification was to the State's case:

Now, the defense is going to say that Mark Lewis was seventy percent sure; and as a representative of the State of Ohio, I am not going to come up here and say that seventy percent is beyond a reasonable doubt. You know that's silly; I know that's silly. If that were the only thing that we were looking at, but you have to take that identification in conjunction with all of the statements the Defendant has made, the pretrial confessions, the total picture, *and with the identification that Opal Siebert made.*

Opal Siebert said this was the man that was there that I saw. She put that in a drawing, and there is the side view of the man that she saw with the hair combed down with the dark eyebrows, with the dark hair, with the thin face. This is a picture of Delaney Gibson. There is a profile of Delaney Gibson.

I submit to you it is almost as if the person who made this drawing back on August 11, 1982, had this picture from which to make the drawing. You make the comparison. That identification is there. *Delaney Gibson was there that morning*, and he had a blue shirt on, and he had the dark eyebrows and the dark hair

Now, take Mark's identification, take the fact that these two were the most important persons to each other, the best friends in the whole world, and put that all together as a package

(Trial Tr. 3755:22-57:5, attached hereto as Exhibit U (emphasis added).)

Second, once it was established that Delaney Gibson had had no involvement whatsoever in the Mottinger crime, then Spirko's last and twelfth statement to Hartman would have been shown to be just as false as his prior eleven statements – just another story from a guy who had come forward and was lying and making things up to try and help his girlfriend and himself. But

31). For its part, the State did not dispute that on August 9, 1982, Spirko met with his parole officer in Toledo; took his sister to the doctor in Toledo; picked up a package in the early-to-mid afternoon from the Swanton post office; and called the prison from Swanton at 2:14 p.m.

most importantly, the State would have been back to square one, without a theory of how the Mottinger crimes were committed. Certainly the State could not have stood before a jury without some theory – some story – of what had happened to Mrs. Mottinger. Spirko's story about Delaney Gibson gave them that theory and story. However, the story was not true, and the State had so concluded well before Spirko's trial.

Of course the State now minimizes the importance of Gibson's alleged involvement. As soon as Spirko discovered the extensive evidence possessed by the State demonstrating that Gibson could not have been involved, the State began asserting that the conviction did not depend at all on Gibson's alleged involvement but rested entirely on Spirko's stories and the facts the State alleges Spirko knew that only the killer could have known. We now know that these assertions by the State have been misrepresentations. The investigator who had the most knowledge of the crime and who was the key witness at trial had determined that Gibson was absolutely not involved and had shared that conclusion with his fellow investigators and with the prosecuting attorney. If Gibson were not critical to the case, no evidence would have been introduced concerning him or evidence showing that Gibson was not involved might have been used to challenge Spirko during interviews or even impeach him at trial. Sadly, the State obviously concluded that Gibson's involvement and Ms. Seibert's testimony, whether true or not, were needed to convict Spirko.

We also now know that all of Hartman's testimony must be viewed very differently in light of what we now know of his credibility. The State's assertion that Spirko revealed to investigators information that only the killer could know rests entirely on Hartman's testimony because the information the State alleges Spirko revealed was allegedly revealed in interviews at which only Hartman was present. Even before reviewing Hartman's sworn affidavit dated May

1, 2005, and taking his deposition on June 16, 2005, Spirko noted that Hartman's notes of his interviews with Spirko raised serious questions as to whether the information came from Spirko or whether it came from public press reports or even from Hartman himself. (*See* Spirko Mot. for Relief from J. at 12-17 (noting that much of the information Spirko allegedly provided was in public press reports and other information appeared to be added by Hartman to his interview notes)).

Hartman was unquestionably the State's most important witness, and his credibility was absolutely critical to the Spirko jury. Now that it has been demonstrated that Hartman has lied in his sworn testimony to this Court and that Hartman's testimony misled the jury at Spirko's trial as to Delaney Gibson's involvement, it is fair to ask whether any of his trial testimony can be relied upon to permit Spirko's death sentence to stand. Furthermore, Hartman's recent sworn testimony that he purposely lied to deceive and mislead Spirko's counsel, knowing that counsel would bring these matters to the Court, standing by itself should give this Court great pause to allow an execution to go forward where Hartman's testimony was so obviously critical to Spirko's conviction. At an absolute bare minimum, this Court must hear directly from Hartman and make its own assessment as to whether this conviction can be allowed to stand based on Hartman's credibility alone.¹⁸

¹⁸ Beyond the serious questions now raised concerning Hartman's credibility, Spirko's statements themselves are inherently unreliable and are not on their own enough to uphold a conviction or, in particular, impose a death sentence. Professor Steven Drizin, Clinical Professor of Law at Northwestern University School of Law in Chicago and the Legal Director at Northwestern University School of Law's Center on Wrongful Convictions, has determined that Spirko's statements are unreliable and bear many similarities to false and coerced "confessions" that have been used to wrongfully convict hundreds of defendants. Professor Drizin's detailed and compelling analysis, submitted

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II. THE STATE'S ARGUMENTS MISSTATE THE FACTS AND MISSTATE SPIRKO'S CLAIMS

The State's motion is filled with arguments that misstate the facts and misstate Spirko's claims. The State's misrepresentations must cease.

1. The State asserts that Spirko's Rule 60(b) motion is based on "reports that Paul Hartman, one of the case investigators, stated publicly his opinion that another one of Spirko's criminal associates, instead of Delaney Gibson, helped Spirko kill Betty Jane Mottinger." State motion at 3. This assertion is false. As the State knows, Spirko's Rule 60(b) motion is based in large part on Hartman's statements that he determined prior to Spirko's trial that Gibson had absolutely nothing to do with the Mottinger crime but that the State nevertheless decided not to disclose pursuant to its *Brady* obligation that determination and the evidentiary basis for it, allowing the State to argue at trial that Spirko and Gibson committed the crime together. The State has continued to argue to this Court that the theory, evidence, and argument it presented at trial were true and correct. Spirko's Rule 60(b) motion is not based on Hartman's discovery of

to the Ohio Parole Board on behalf of Spirko's clemency petition, is attached hereto as Exhibit V.

Bill Latham, the Wyandot County investigator with twenty seven years of law enforcement experience who became involved in this case by pure happenstance when he happened to be interviewing John Willier on an unrelated charge, has reached the same conclusion. Investigator Latham's Statement to the Ohio Parole Board is attached hereto as Exhibit W.

As Professor Drizin and Mr. Latham note, the information Spirko allegedly provided was all information *the State already possessed*. Not even the State alleges that Spirko provided any new information not already known to investigators. Indeed, when Spirko claimed he could provide to investigators new information – such as by identifying the location where the murder occurred – investigators concluded the information he attempted to provide was false. (Mem. of Interview of John Spirko by Paul Hartman, December 13, 1982, at 3, attached hereto as Dep. Ex. 69, Ex. J.)

James Clark Kelley as a suspect – which occurred years after Hartman concluded that Gibson had nothing to do with the Mottinger crime – although Hartman’s extensive efforts to continue to investigate the Mottinger case well after the trial provide additional confirmation that the State knew the case it presented at trial was false.

2. The State asserts that the Attorney General’s office “learned of Hartman’s recently stated opinions on the case the same time as did everyone else, when they were reported in a newspaper story written almost five years after this Court issued its decision.” (State Mot. at 3-4.) The State further asserts that “[t]here is no evidence whatsoever that [the State] knew or had reason to know during the course of prior habeas corpus proceedings of any such opinions or statements by Hartman.” (State Mot. at 8; *see also* State Mot. at 10 (“There is no evidence that [the State] knew or had reason to know during the course of prior habeas corpus proceedings of any such conclusions or statements by Hartman.”)).

These assertions are false. The *uncontroverted* evidence is that Connie Mottinger informed the Attorney General’s office of Hartman’s opinions immediately after she interviewed Hartman in April 2004. (Mottinger Dep. 88:4-11, Ex. H.) Charles Wille, who was at Mrs. Mottinger’s deposition and cross examined her, did not challenge her assertion that she called him immediately after her interview of Hartman in April 2004. Moreover, Charles Wille has not submitted an affidavit denying that Mrs. Mottinger called him and told him about Hartman’s statements.

The State also asserts that “[i]t is undisputed that . . . Connie Mottinger informed [the State] of statements made by Hartman to the effect that he had concluded based on his investigations subsequent to Spirko’s conviction that Spirko’s accomplice was James Clark Kelly.” (State Mot. 11.) This assertion is misleading at best. What is undisputed is that Mrs.

Mottinger informed the Attorney General's office not only of statements by Hartman that Kelley was a suspect but also of statements by Hartman that Gibson was absolutely not involved. Occasionally it may occur that some time *after* trial – perhaps even years after trial – new evidence is developed that leads to new suspects, even perhaps on a theory that is different from the original trial theory. However, it violates due process when the State proceeds with a theory it learns *before* trial is untrue. This is what Connie Mottinger told Wille in April 2004 – that Hartman had concluded based on his review of the evidence *before* the Spirko trial that Delaney Gibson was not involved in the Mottinger crime.

Beyond that, Hartman in 1995 contacted Charles Kennedy, the Van Wert County Prosecuting Attorney, to discuss with him the possibility of prosecuting James Clark Kelley for the Mottinger crime. (*See* Hartman Dep. 15:7-16:19, Ex. D.) It is virtually impossible to believe that Hartman and Kennedy could have had this conversation about Kelley and other discussions over the many years without discussing the open capital indictment against Delaney Gibson and without Hartman once again expressing his firmly-held belief and the evidentiary support that Gibson had nothing to do with the Mottinger crime. *See Eastman Kodak Co.*, 504 U.S. at 456 (all reasonable inferences should be construed in favor of the party opposing summary judgment). Connie Mottinger also told Kennedy in April 2004 that Hartman had just told her that he had concluded prior to the Spirko trial that Gibson had no involvement whatsoever.

3. The State asserts that it “is necessarily so” that “the case against Gibson was never as strong as the case against Spirko” because it is Spirko who told authorities about the crime. (State Mot. at 4.) This assertion is false. The case against Gibson is weak because, as Hartman rightly concluded, the overwhelming evidence developed by Hartman demonstrates that Gibson had nothing to do with the Mottinger crime. It is precisely that evidence – along with extensive

other evidence indicating that Spirko did not, as he was claiming, have accurate knowledge about the Mottinger crime – that should have caused investigators to return to Spirko and confront him with his lies.

4. The State asserts that “[o]pinions are all that Spirko presents.” (State Mot. at 4.) This assertion is false. At issue here is not some mere “hunch” or “feeling” of some random investigator. Rather, the critical “opinion” of Paul Hartman, the State’s principal witness and a lead investigator, is his determination based on his assessment of all of the evidence, much of which he gathered personally. Nearly all of it was not revealed to Spirko’s counsel prior to the trial, and critical evidence – such as the fact that investigators made substantial efforts to establish communications between Spirko and Gibson prior to the abduction but could not do so and the fact that keys were found at the scene but never linked to Spirko or Gibson – was not revealed to Spirko’s attorneys or to this Court until just this year, long after this Court issued its decision.

5. The State asserts that “Spirko does not allege let alone offer any proof that [the State] concealed evidence or did anything else improper.” (State Mot. at 5.) The State also asserts that “*Spirko does not claim that [the State] concealed from this Court evidence of Delaney Gibson’s whereabouts at the time of the crimes that materially conflicts with any of the previous arguments made by [the State] in these proceedings.*” (State Mot. at 10) (emphasis in the original). These assertions are false. The State concealed from Spirko’s attorneys that Hartman had determined throughout this case – prior to trial; in the 1990s when investigating James Clark Kelley and pressing for his prosecution; and in 2004 when speaking with Connie Mottinger – that Gibson had nothing to do with the Mottinger crime and had shared that conclusion and the evidence that supported it with others from the State. During this proceeding the State concealed

from Spirko's attorneys and from this Court much of the critical evidence supporting that conclusion, including the fact that investigators made substantial efforts to establish communications between Spirko and Gibson prior to the abduction but could not do so and the fact that keys, including a postal box key, were found at the scene, believed to have been dropped by the perpetrators, but never linked to Spirko or Gibson.

6. The State asserts that "there is no credible evidence" to support Spirko's allegations that Hartman had determined prior to the trial that Gibson had nothing to do with the Mottinger crime and that he expressed his conclusion to the prosecuting attorney. (State Motion at 7 n.1.) This assertion is false. There is extensive credible evidence that Hartman determined that Gibson had nothing to do with the Mottinger crime and shared that conclusion with the prosecuting attorney.

First, in the past year and a half, Hartman has told three separate sets of individuals unequivocally that he reached that very conclusion and shared it with the prosecuting attorney. It has only been since Spirko filed his Rule 60(b) motion that Hartman has attempted to change and explain away his prior unambiguous statements.

Second, any fair reading of the evidence gathered by investigators and the prosecuting attorney's examination of Hartman at trial leads to the conclusion that Hartman and the prosecuting attorney had determined that Gibson had nothing to do with the Mottinger crime but that they needed to put on the Seibert eyewitness identification of Gibson in order to obtain a conviction. The overwhelming evidence was that Gibson was in North Carolina, had a full beard, and had not been in communication with Spirko prior to the abduction. The only "evidence" linking Gibson to the crime were the lies of Spirko (who implicated Gibson after

Hartman suggested that Gibson was involved by means of the “Bear Branch” ruse) and the clearly mistaken identification of Opal Seibert. As described above, when examining Hartman, the prosecuting attorney asked him specific questions about the various persons Spirko allegedly mentioned in his stories and, for each person, asked Hartman whether he had investigated the person, whether the person was real, and whether his investigation produced any evidence to associate the person with the Mottinger crime. For each person, Hartman testified that he had determined that the person had no involvement in the Mottinger crime. However, the prosecuting attorney never asked Hartman whether he had investigated *Gibson* and whether his investigation had produced any evidence to link Gibson to the Mottinger crime. We now know why: Hartman, based on the extensive evidence the investigation had produced, had determined that Delaney Gibson had nothing to do with the Mottinger crime and had shared that conclusion with the prosecuting attorney.

7. The State asserts that “there is still no proof that [the State] misrepresented anything to this Court.” (State Mot. at 8.) This assertion is false. In the State’s Return of Writ filed with this Court in 1999, the State stated that “the ‘evidence’ with respect to Delaney Gibson is neither new, convincing nor remotely exculpatory.” (Resp’t Anderson’s Return of Writ to Spirko’s Second Am. Habeas Corpus Pet. at 36.) As we have already demonstrated, virtually all the evidence about Delaney Gibson’s bearded appearance was “new”; it certainly was “convincing” enough to convince the State’s principal witness and lead investigator that Delaney Gibson had no involvement whatsoever in the Mottinger crime; and as such was clearly “exculpatory” as it totally contradicted and impeached the State’s theory, evidence, and argument and would have demonstrated, if disclosed, that Spirko’s twelfth story to Hartman was every bit as much a lie as his first eleven.

The State further said in its Return of Writ that “[a]ssuming *arguendo* that the prosecution had known of evidence showing Delaney Gibson to be innocent and in North Carolina at the time that Spirko murdered Betty Jane Mottinger, this evidence would have been used at trial to impeach Spirko when he accused Gibson of being the ‘real’ murderer.” *Id.* at 44. Herein lies perhaps the crux of the impact of the State’s failure to disclose the exculpatory information it had developed demonstrating that Gibson, like the other many characters identified by Spirko in his prior statements to Hartman, was not involved. There was nothing “*arguendo*” about the State’s conclusion that Gibson was not involved, and had this been acknowledged, this Spirko story, like all those that preceded it, would have been impeached and the State would have been back to square one in trying to develop a theory and evidence of how this crime actually occurred. The State needed to have a theory of how the Mottinger abduction and murder happened to present to the jury. By failing to disclose the exculpatory evidence, the State was able to proceed with an untrue theory, support it with untrue evidence, and forcefully prosecute it with an untrue argument – instead of continuing its investigative efforts and returning to Spirko and others to try and develop the truth.

8. The State asserts that “[t]his Court was aware of the facts which lead [sic] Hartman to express this opinion” (State Mot. at 8) and that “Spirko obtained all of the investigatory records relevant to Delaney Gibson’s whereabouts on or before August 9, 1982,” with the exception of the so-called desk file (State Mot. at 9) and that “the opinions of Paul Hartman, upon which Spirko bases his latest arguments, were and are based on evidence that this Court reviewed prior to denying Spirko’s petition.” (State Mot. at 14-15.) These assertions are false. Certainly the Court was aware of some of the facts that led Hartman to his conclusion that Gibson was not at all involved in the Mottinger crime because Spirko’s counsel gained access to those facts upon

reviewing the investigation files and brought those facts to the attention of the Court. However, there are critical facts that Spirko's counsel did not find in the investigation files, that counsel did not learn of until the recent revelations, and that counsel accordingly was unable to bring to the attention of the Court. These include (a) the fact that Paul Hartman, the State's principal witness at trial and chief investigator, had himself determined based upon the totality of the evidence that the State's theory, evidence, and argument that Spirko and Gibson together committed this crime were untrue; (b) the fact that investigators recovered keys left by the perpetrators but could not link the keys to Spirko or Gibson but did somehow subsequently link them to another suspect; and (c) the fact that investigators were unable, in spite of an exhaustive effort, to establish that Spirko and Gibson communicated prior to the abduction.

9. The State asserts that "the evidence is undisputed that when questioned by [the State] *subsequent* to the filing of Spirko's motion for relief from judgment, Hartman *denied* stating to Paynter or to Spirko's attorneys an opinion that Gibson was not involved in the crimes. (State Mot. at 11.) This assertion is false. Hartman testified that when he met with attorneys for the State, he told them that he "may have shared with [Paynter and Spirko's attorneys his] opinion as to whether or not Gibson was involved or not." (Hartman Dep. 291:5-8.) Moreover, Hartman made clear at his deposition – even when cross examined by the State – that he told attorneys for the State that he had purposely misled Paynter and Spirko's attorneys regarding his opinion as to whether Gibson was involved in the Mottinger crime. (Hartman Dep. 289:19-291:24, Ex. D.) Hartman's statement that he misled Paynter and Spirko's attorneys itself is evidence that Hartman – when he met with attorneys for the State – did not deny stating to them an opinion that Gibson was not involved. The evidence is hardly "undisputed" concerning what Hartman told attorneys for the State.

10. The State asserts that “[a]n electronic message prepared by Hartman on September 21, 1990, refers to statements reportedly made by Kelly to an informant implicating Kelly *and* Spirko in the robbery of the post office.” (State Mot. at 12.) This assertion is false. The electronic message says only that “KELLEY BOASTED TO THE INFORMANT THAT HE HAD KILLED 18 PEOPLE, INCLUDING A POSTMASTER IN OHIO DURING AN ARMED ROBBERY.” (State Mot., Ex. B.) The electronic message does *not* state that Kelley implicated Spirko during his conversation with the informant. Indeed, the first mention of Kelley’s alleged implication of Spirko in the documents submitted by the State is in a letter dated June 28, 1999, from Hartman to Mr. Henry J. Bauman of the Office of Chief Inspector of the U.S. Postal Inspection Service. In that letter, Hartman states that in 1990 an FBI agent told him that a “confidential source” who had been in prison with Kelley in North Dakota told him that Kelley had stated that “he and ‘Jack Spirko’ held up a post office in Ohio and killed the postmaster.” (State Mot., Ex. A.) The fact that this information is not in the original electronic message dated September 21, 1990, is telling. It is extremely unlikely that the omission was inadvertent.

III. THE COURT SHOULD CONDUCT AN EVIDENTIARY HEARING

We demonstrated above that under well-settled summary judgment standards, which require that all inferences be drawn in Spirko’s favor and entitle the State to judgment only if there are no disputed issues of material fact, the State’s motion must be denied. We do not argue, however, that the State has conceded our rendition of the facts is correct. Indeed, the State does not even concede that Hartman concluded that Gibson had nothing to do with the Mottinger crime. (*See* State Mot. at 7 n.1.) As the Court no doubt has discerned, just about every fact, whether material or not, is hotly contested.

We contend that the record now contains ample support that would permit the Court to grant Spirko's Rule 60(b) motion. If the Court agrees, we would urge it to schedule an evidentiary hearing on Spirko's re-opened habeas petition. If the Court disagrees, we would urge the Court to schedule an evidentiary hearing on Spirko's pending Rule 60(b) motion. The Court itself has noted the importance of deciding this matter on a full and complete record, both for itself and for the appellate review that the Court has recognized will follow whatever decision the Court reaches.

The Court has the discretion to hold an evidentiary hearing on Spirko's pending Rule 60(b) motion, *United States v. 8136 S. Dobson St.*, 125 F.3d 1076, 1086 (7th Cir. 1997) (affording the "district court substantial discretion in determining whether to conduct an evidentiary hearing on a Rule 60(b) motion"), as well as on a re-opened habeas petition. *See Townsend v. Sain*, 372 U.S. 293, 312-13 (1963), *overruled in part on other grounds, Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-7 (1992); *see also McMillan v. Barksdale*, 823 F.2d 981, 983-84 (6th Cir. 1987). Indeed, the Sixth Circuit has held that a district court must hold an evidentiary hearing to decide a Rule 60(b) motion when it is necessary to make credibility findings or supply additional facts not yet in the record. *See Jordan v. Paccar, Inc.*, Civ. No. 95-3478, 1996 U.S. App. LEXIS 25358, at **32-33 (6th Cir. Sept. 17, 1996) (unpublished opinion) (attached hereto as Exhibit X). *See also Anderson v. Cyrovac, Inc.*, 862 F.2d 910, 930-31 (1st Cir. 1988) (ordering remand for evidentiary hearing where district court abused its discretion by not making "findings of fact on the very matters which inquiry could reasonably be expected to illuminate"); *United States v. Baus*, 834 F.2d 1114, 1124 (1st Cir. 1987) (Court of Appeals must determine "whether the allegations, if proven, would justify relief. If so, the district court should be directed to hold an evidentiary hearing in order to determine if the allegations are indeed true. . .

.”). *See also Workman v. Bell*, 227 F.3d 331, 336 (6th Cir. 2000) (granting full evidentiary hearing to determine whether fraud was committed on the district court or the panel below where prisoner showed sufficient facts to create a material dispute of fact).

IV. THE COURT SHOULD GRANT A STAY OF EXECUTION

As the Court is well aware, Spirko’s execution is scheduled for September 20, 2005. The Court suggested during a status conference that the State join Spirko in a motion before the Ohio Supreme Court to stay the execution in order to give the Court the opportunity to decide this matter on a full record, allowing sufficient time for a complete and thorough review of these important issues, as well as to give the appellate court an opportunity to review carefully whatever decision this Court reaches. The State refused to join Spirko in making such a motion. Nevertheless, on August 2, 2005, Spirko filed with the Ohio Supreme Court a motion to reschedule the execution date. The State opposed the motion. On August 25, 2005, a divided Ohio Supreme Court denied the motion, with two justices dissenting.

Certainly even the State would concede that time now is of the essence. Spirko requests a stay of execution, which is now within this Court’s power to enter, given the immediacy of the scheduled execution.

CONCLUSION

For the foregoing reasons, Spirko respectfully requests that the Court deny the State's summary judgment motion and grant his pending Rule 60(b) motion or, in the alternative, schedule an evidentiary hearing to resolve any disputed issues of fact regarding his Rule 60(b) motion. In either event, Spirko respectfully requests that the Court order a stay of execution.

DATED: August 29, 2005

Respectfully submitted,

/s/ John J. Callahan

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2005, a true and correct copy of the foregoing Petitioner John Spirko's Opposition to the State's Summary Judgment Motion was served by notice of electronic filing (or, if such notification fails, by e-mail attachment) on the following counsel of record:

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