

NAPUE NIGHTMARES:
PERJURED TESTIMONY IN TRIALS FOLLOWING
THE 1993 LUCASVILLE, OHIO, PRISON UPRISING
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I. PERJURED TESTIMONY AFTER *NAPUE*^{†1}

In 1935, the United States Supreme Court held in *Mooney v. Holohan*² that when the state wins a conviction based on perjured testimony, it turns a proceeding that may end in a defendant's life imprisonment or execution into a "pretense of a trial," and thereby violates due process.³

The Mooney case was a high-profile political controversy in the period between the world wars:⁴ the author can recall hearing the phrase "Free Tom Mooney!" while growing up in the 1930s.

Tom Mooney was a member of the international molders union.⁵ He belonged to the Socialist Party and had attended an International Socialist Congress in Europe.⁶ He had also been (briefly) a member of the Industrial Workers of the World⁷ and was a friend of anarchists like

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[†] Editors' Comment: This article concerns ongoing litigation. The Lucasville riot and following trials cause strong feelings and much controversy. With such high stakes involved, the stories of witnesses can change, but we feel this article presents a valuable contribution to the discussion.

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² 294 U.S. 103 (1935) (per curiam).

³ *Id.* at 112.

⁴ KEVIN STARR, *ENDANGERED DREAMS: THE GREAT DEPRESSION IN CALIFORNIA* 219 (1996).

⁵ RICHARD H. FROST, *THE MOONEY CASE 2* (1968).

⁶ *Id.* at 2–3.

⁷ *Id.* at 11–12.

Alexander Berkman.⁸ As a significant participant in the class-conscious radical community of northern California, Mooney had often clashed with the authorities.⁹

On July 22, 1916, there was a preparedness parade in San Francisco.¹⁰ A bomb exploded, killing ten and wounding forty.¹¹ Mooney (together with his wife) was arrested, although the arresting officer had no warrant.¹² He was immediately subjected to a nightlong interrogation by District Attorney Fickert, criminal investigator Martin Swanson (a former Pinkerton agent), and others.¹³ Mooney unsuccessfully demanded counsel forty-one times.¹⁴

Mooney together with co-defendants Warren Billings, Rena Mooney, Israel Weinberg, and Ed Nolan were indicted for murder.¹⁵ Billings was sentenced to life imprisonment, Ms. Mooney and Weinberg were acquitted, and Nolan was never brought to trial.¹⁶ Mooney was convicted and sentenced to be executed.¹⁷ In 1918, two weeks before he was to hang, the governor commuted his sentence to life imprisonment at San Quentin.¹⁸

“From the very outset, and increasingly as time went on, the defense . . . challenged the good faith of the prosecution and impeached the character and credibility of the prosecution’s major witnesses.”¹⁹ In 1926

⁸ *Id.* at 39, 79.

⁹ *Id.* at 19–79 (chapters 2–5).

¹⁰ *Id.* at 80, 85. Preparedness parades were held in many cities to show that the public supported military armament in the period leading up to the U.S. entry into World War I. *Id.*

¹¹ *Id.* at 86–87.

¹² *Id.* at 104–05.

¹³ *Id.* at 25, 106.

¹⁴ *Id.* at 105–08. The police stenographer’s record of the interrogation became available to the defense only in 1935, the year of the Supreme Court decision. *Id.* at 106.

¹⁵ *Id.* at 115.

¹⁶ *Id.* at 118.

¹⁷ *Id.* at 190.

¹⁸ *Id.* at 318–19.

¹⁹ *Id.* at 119. Alice Kidwell, a potential witness, wrote her imprisoned husband: “The authorities are going to let you out I know I am needed for a witness and they are helping by getting you out.” *Id.* at 120. A convict friendly to Billings obtained the letter and sent it to defense counsel, and Ms. Kidwell was not called. *Id.* at 124. John McDonald initially described two men who did not resemble Mooney or Billings whom he said he watched placing a suitcase at the spot where the explosion occurred. *Id.* at 122. He changed his story after the arrests, and his original story was buried in the police archives until 1930. *Id.* In 1921, John McDonald (apparently after an illness brought him close to

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the police and trial court judges in Mooney's case, and nine of the ten surviving jurors, supported Mooney's petition for clemency.²⁰

The Supreme Court's unanimous decision in *Mooney v. Holohan* declared that due process

cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the

death) executed an affidavit stating that when he first went to the authorities, District Attorney Fickert said, "Do you know Tom Mooney? He is the [expletive deleted] we want." *Id.* at 345-47. McDonald stated that Lieutenant Goff took him to Mooney's cell but he "had no recollection of ever having seen the man before." *Id.* at 347. Then Fickert said, "Now Mac, we'll take good care of you; we'll pay for your hotel expenses" and "I will see that you get the biggest slice of the reward." *Id.* McDonald said that Fickert repeatedly coached him in his testimony. *Id.*

Another witness against Mooney was Ms. Mellie Edeau. *Id.* at 207-08. She had seen two "middle-aged men" (Mooney was thirty-three in July 1916) with a heavy black suitcase at the scene of the crime. *Id.* at 207. Urged by fellow workers, she sought out the authorities. *Id.* Detective Smith took her to see Mooney and co-defendant Warren Billings, alone in their cells, and she told Smith "that she had never seen either of them before in her life." *Id.* Later she testified against both Billings and Mooney, having told other employees that "there was a lot of money in it." *Id.* at 208. When Detective Smith showed District Attorney Fickert his diary entry to the effect that Ms. Edeau could not identify Mooney and Billings, Fickert told him to keep his mouth shut. *Id.*

The key testimony against Mooney came from an out-of-town cattleman named Frank Oxman. *Id.* at 168. Oxman offered his services to the prosecution for \$2,500, "payable upon conviction of the guilty parties." *Id.* Oxman in turn recruited Ed Rigall, who would confirm Oxman's false eye witness testimony and could expect to clear at least \$100. *Id.* at 171, 178. The letters Oxman wrote to Rigall may be examined in HENRY T. HUNT, *THE CASE OF THOMAS J. MOONEY AND WARREN K. BILLINGS* 259-62 (Da Capo Press ed. 1971) (1929). Rigall had never even been in California. FROST, *supra* note 5, at 177. "Rigall and Oxman were entertained by the police and members of the District Attorney's staff during their stay in San Francisco." *Id.* at 178-79. In the end, although Rigall was not called to testify, the prosecution paid him \$150 over and above expenses. *Id.* at 183. In 1920, a police officer revealed that Oxman had never seen the vehicle in which he testified that Mooney brought the bomb to the explosion site until shown the vehicle at the police station. *Id.* at 341. The authorities gave Oxman the vehicle's license number, which he then testified he had written down after seeing the bomb go off. *Id.* Earl Hatcher, a friend of Oxman's, came forward to say that Oxman had been with him in Woodland, California, at the time of the explosion, not in San Francisco at all. *Id.* at 351. Hatcher's letter was torn to pieces, but the pieces were put in an envelope and came to light years later. *Id.* at 352.

²⁰ FROST, *supra* note 5, at 359.

pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.²¹

The decision was not quite the end of the road. The high Court remanded the case to California, instructing that Mooney seek a writ of habeas corpus in state court.²² Only after Culbert Olson was elected California governor did Mooney finally receive his freedom in 1939.²³ He died a few years later.²⁴

*Napue v. Illinois*²⁵ reaffirmed *Mooney* and settled the law about what courts should do when a petitioner demonstrates the knowing use of false evidence in a criminal trial.²⁶ The opinion, delivered by Chief Justice Earl Warren, first recited the facts. Henry Napue had been found guilty of murder and sentenced to 199 years in prison on the basis of testimony by a co-defendant, George Hamer.²⁷ Later, the prosecuting attorney filed a pleading stating that he had promised Hamer that, if he testified against Napue, “a recommendation for a reduction of his [Hamer’s] sentence would be made and, if possible, effectuated.”²⁸ The attorney sought the assistance of the court in making good on this promise.²⁹ Napue then filed a post-conviction petition “in which he alleged that Hamer had falsely

²¹ 294 U.S. 103, 112 (1935).

²² *Id.* at 113.

²³ STARR, *supra* note 4, at 219.

²⁴ *Id.* at 220.

²⁵ 360 U.S. 264 (1959).

²⁶ See Jon David Pheils, Case Note, *Criminal Procedure—Discovery—A Criminal Defendant Has a Right to a New Trial When the Prosecution Fails to Disclose Evidence Which If Revealed to the Factfinder Likely Would Have Created a Reasonable Doubt*, 53 U. Cin. L. Rev. 849, 850–51 (1984) (“The *Mooney* doctrine reached its greatest breadth in *Napue v. Illinois*. . . . [T]he *Mooney* rule as ultimately expressed in *Napue* prohibits the use by the state of evidence that is even marginally material to whether the defendant will be convicted. . . . These decisions were based primarily on the Court’s condemnation of prosecutorial misconduct that would mislead the jury as to the true facts.”).

²⁷ *Napue*, 360 U.S. at 265–66.

²⁸ *Id.* at 266.

²⁹ *Id.* at 266–67.

testified that he had been promised no consideration for his testimony.”³⁰

The Illinois Supreme Court found

that the [State’s] attorney had promised Hamer consideration if he would testify at petitioner’s trial, a finding which the State does not contest here. It further found that the Assistant State’s Attorney knew that Hamer had lied in denying that he had been promised consideration.³¹

Nonetheless the Illinois Supreme Court, over two dissents, denied Napue relief because the jury was told that an unidentified public defender had promised “to do what he could” for Hamer.³²

The Supreme Court unanimously reversed the Illinois courts. It held that “the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law.”³³ In reaching this conclusion, the high Court laid down the following principles:

1. A “conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment.”³⁴

2. “The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.”³⁵

3. “The principle that a State may not knowingly use false evidence, including false testimony, . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence”³⁶

The Annotation cited by the Supreme Court makes clear that it is the petitioner’s burden to show that:

1. The testimony in question “actually was perjured.”³⁷

³⁰ *Id.* at 267.

³¹ *Id.* at 267–68.

³² *Id.* at 268 & n.3.

³³ *Id.* at 265.

³⁴ *Id.* at 269 (citing *Mooney v. Holohan*, 294 U.S. 103 (1935) and other cases).

³⁵ *Id.* (citing cases, and adding “See generally annotation, 2 L.Ed.2d 1575”).

³⁶ *Id.*

³⁷ Annotation, *Conviction on testimony known to prosecution to be perjured as denial of due process*, 2 L. Ed. 2d 1575, 1578 & n.7 (1957).

2. The perjured testimony was “material” or, stated differently, “prejudicial” to the petitioner.³⁸

3. Prosecutors “knowingly and intentionally used” perjured testimony.³⁹

Moreover:

4. Petitioner may waive an otherwise valid objection if he had knowledge of the perjury at trial and did nothing about it.⁴⁰

On the other hand, the following procedural elements established by the cases work to the petitioner’s advantage:

1. The knowledge and conduct of a man who was “on the staff of the United States Attorney” may be attributed to the State because the prosecutor’s office “is an entity.”⁴¹ Furthermore, the knowledge and conduct of police officers who act on behalf of the State may be attributed to the prosecution.⁴² This principle is of particular importance in the Lucasville cases: the chief police investigator (Howard Hudson) was asked while on the witness stand whether he consulted with prosecutors “regarding matters of plea bargains, pleas, charging decisions, and things

³⁸ *Id.* at 1582 n.8 & 1587.

³⁹ *Id.* at 1583 & n.10.

⁴⁰ *Id.* at 1577.

⁴¹ *Giglio v. United States*, 405 U.S. 150, 152 n.1, 154 (1972). “The Court has . . . held that the prosecution violates due process by presenting perjured testimony even if the particular prosecutor does not know that the testimony is false.” Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423, 1461 (2001). To the same effect: “The prosecutor need not have actual knowledge He will be charged with ‘constructive knowledge’ of information possessed by other government officials connected with the prosecution.” Note, *A Prosecutor’s Duty To Disclose Promises Of Favorable Treatment Made To Witnesses For The Prosecution*, 94 HARV. L. REV. 887, 892 n.27 (1981).

⁴² *Curran v. Delaware*, 154 F. Supp. 27, 31 (D. Del. 1957) (“[T]he action of police officers as well as prosecuting officers on behalf of the State may constitute State action.”), *aff’d*, 259 F.2d 707, 713 (3d Cir. 1958) (discussing the record in *Pyle v. Kansas*, 317 U.S. 213 (1942), where “the prosecuting officer was in no wise a party to or cognizant of the perjured testimony given by certain witnesses of the State of Kansas or of the fact that the law enforcement officers had taken steps to procure false testimony favorable to the prosecution”).

of that nature?” and answered, “Yes”.⁴³ And after retirement in 2006, Hudson went to work for the Hamilton County Prosecutor’s Office.⁴⁴

2. In cases involving knowing use of false testimony, “if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.”⁴⁵

3. Upon a proper allegation that a prosecutor knowingly used false testimony, a petitioner is ordinarily entitled to an evidentiary hearing. A *pro se* pleading alleging counsel’s refusal to call a pertinent witness or attaching affidavits by two recanting prosecution witnesses,⁴⁶ or an admission of perjury by the prosecution’s sole witness,⁴⁷ requires a hearing.

Napue is unquestioned, rock-solid authority in all federal courts, including the United States Court of Appeals for the Sixth Circuit.⁴⁸ As a

⁴³ Transcript of Testimony of Howard Hudson at 1077, *State v. Law*, No. B-9409511 (Ohio C.P. Hamilton County Aug. 15, 1995) [hereinafter *State v. Law*].

⁴⁴ Affidavit of Staff Lieutenant (Retired) Howard Hudson, attached to Notice of Filing of Captain Brink’s Answers to Petitioner’s Questions para. 1, *Robb v. Ishee*, No. 2:02-cv-535 (S.D. Ohio July 16, 2007).

⁴⁵ *United States v. Agurs*, 427 U.S. 97, 112 (1976). In *Agurs*, the Supreme Court distinguished among different situations

each of which requires a different analysis of the prosecutor’s duty and the standard of materiality. The first situation considered by the Court is that in which the prosecution fails to disclose evidence that indicates that the state’s case rests upon perjured testimony when the prosecutor is or should be aware of such perjury. In this situation, the Court stated that *a very low standard of materiality should be applied*. The Court explained that its establishment of a very low standard of materiality in this circumstance rested upon a concern for protection of the “truth-seeking function of the trial process” and a strong disapproval of prosecutorial behavior that undermined this function. In this situation, the Court stated that a new trial should be ordered “if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.”

Pheils, *supra* note 26, at 853–54 (emphasis added).

⁴⁶ *White v. Ragen*, 324 U.S. 760, 762–64 (1945).

⁴⁷ *Alcorta v. Texas*, 355 U.S. 28, 30–31 (1957).

⁴⁸ *Stumpf v. Mitchell*, 367 F.3d 594, 619 (6th Cir. 2004) (Boggs, Chief Judge, dissenting on other grounds) (“Knowingly putting on false evidence is prosecutorial misconduct that violates the Due Process clause. *Napue v. Illinois* . . .”). See also *Wesener v. Straub*, 110 F. App’x 614, 625 (6th Cir. 2004) (citing *Napue*, *Pyle*, *Mooney*,
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practical matter, a challenge based on *Napue* is likely to receive its first serious consideration pursuant to a habeas petition in the federal courts. Habeas petitions filed after April 24, 1996, as in all the Lucasville cases, are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA).⁴⁹ The federal court may grant habeas relief pursuant to *Napue* under the AEDPA if it concludes that the factual findings of the state courts were “unreasonable,” or that facts that could not previously have been discovered through the exercise of due diligence establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.⁵⁰

Giglio and Agurs, supra; *United States v. Houston*, 107 Fed. App’x 603, 606 (6th Cir. 2004):

The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). This rule applies to both the solicitation of false testimony and the knowing acquiescence in false testimony. *Napue v. Illinois*, 360 U.S. 264, 269 (1958). To prevail on a claim that the government presented perjured testimony, [a claimant] must show: 1) that the statements were actually false; 2) the statements made were material; 3) the prosecution knew they were false. *United States v. Pierce*, 62 F.3d 818, 834 (6th Cir. 1995).

⁴⁹ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁵⁰ 28 U.S.C. §§ 2254(d)(2) and (e) read in pertinent part as follows:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . .

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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In sum, then, a habeas petitioner who alleges that perjured testimony known to the prosecution has significantly affected proceedings in the trial court is entitled to an evidentiary hearing and, if the allegations are supported by clear and convincing evidence, to a reversal of his conviction and a new trial.

II. RUSHING TO JUDGMENT

The Lucasville trials are only one instance of a problem of perjured testimony widespread in the criminal justice system. A study published by the founders of the New York City Innocence Project reported that “[f]or 63 percent of the DNA exonerations analyzed by the Innocence Project study, misconduct by police or prosecutors played an important role in the convictions,” and that since 1963, “at least 381 murder convictions across the nation have been reversed because of police or prosecutorial misconduct.”⁵¹ The study found that “Knowing Use of False Testimony” was present in 22 percent of the instances of prosecutorial misconduct.⁵²

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on–

....

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

⁵¹ JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 175 (2000). This study is cited approvingly in R. Michael Cassidy, “*Soft Words Of Hope*”: *Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1130 (2004).

⁵² DWYER ET AL., *ACTUAL INNOCENCE*, *supra* note 51, at 265. See also AMERICAN BAR ASS’N, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT* 127 (2007), available at <http://www.abanet.org/moratorium/assessmentproject/ohio/finalreport.pdf> [hereinafter ABA, OHIO DEATH PENALTY ASSESSMENT REPORT] (“Between 1970 and 2004, individual judges and appellate court panels across the nation cited prosecutorial misconduct as a
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The Los Angeles District Attorney's office used cooperative jailhouse informants to obtain convictions in at least 120 criminal cases in the 1980s.⁵³ And in 2007, a professor of sociology and criminology at Mount Holyoke College reported that

[m]y recently completed study of the 124 exonerations of death row inmates in America from 1973 to 2007 indicated that 80, or about two-thirds, of their so-called wrongful convictions resulted *not from good-faith mistakes or errors but from intentional, willful, malicious prosecutions by criminal justice personnel.*⁵⁴

What causes the use of false testimony? At Lucasville, solicitation of perjury sprang from an indignant community's passion to find persons to

factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.”)

⁵³ See DWYER ET AL., ACTUAL INNOCENCE, *supra* note 51, at 127–30 on the methodology of repeat informant Leslie Vernon White. Several informants “regularly used by the District Attorney’s office have admitted to giving false testimony about various defendants’ jailhouse confessions in order to obtain lenient treatment in their own cases.” Jana Winograde, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CAL. L. REV. 755, 756 (1990).

⁵⁴ Richard Moran, *The Presence of Malice*, N.Y. TIMES, Aug. 2, 2007, at A21 (emphasis added). By e-mailing Professor Moran at rmoran@mtholyoke.edu, one can obtain a “List of Exonerees and Supporting Information” that lists, for each of the 124 exonerees, the prisoner’s name, the year of exoneration, whether or not the exoneration was due to prosecutorial malfeasance, the nature of the malfeasance, and the state in which the process took place. Among the cases most clearly relevant to this Article were James Creamer (“Witness lied, state suppressed evidence.”), Thomas Gladish and three others (“Perjured identification under police pressure and prosecution star witness lied.”), Neil Ferber (“Perjured testimony, withheld evidence.”), Joseph Green Brown (“Prosecution allowed false testimony.”), Randall Dale Adams (“Prosecutorial misconduct, State witnesses lied.”), Clarence Brandley and Walter McMillian (“State suppressed evidence, perjured testimony.”), Verneal Jimerson (“Police forced witness to lie.”), Anthony Porter (“Witness pressured by police to lie.”), Peter Limone (“Witness fabricated testimony in conjunction with prosecutor.”), and Jeremy Sheets (“Deal made for lied confession.”). The testimony of prison informants should be considered unreliable unless special circumstances, that actually relate to the informant’s trustworthiness or provide indisputable verification of his testimony, provide a basis for crediting the testimony. Welsh S. White, *Regulating Prison Informers Under the Due Process Clause*, 1991 SUP. CT. REV. 103, 142.

punish for the heinous murder of a teacher in 1990, and a hostage correctional officer in 1993.

Lucasville in the early 1990s was a community of over 1500 persons, all white, located just north of the Ohio River.⁵⁵ Many residents worked at the Southern Ohio Correctional Facility (SOCF), at the time Ohio's only maximum security prison.⁵⁶ There in 1993 they guarded an estimated 1821 prisoners, 56 per cent of whom were African-American.⁵⁷

In 1990, three years before the 1993 rebellion, a black prisoner, Eddie Vaughn, brutally murdered a white teacher, Beverly Taylor.⁵⁸ The nearby community was understandably outraged.⁵⁹ The State of Ohio appointed a new warden, Arthur Tate, who set in motion what he called Operation Shakedown, and became known to the prisoners as "King Arthur."⁶⁰ The state of repression at SOCF in April 1993 is suggested by the fact that at the time of the uprising prisoners were allowed one five-minute telephone call per year.⁶¹

The rebellion began on Easter Sunday, April 11, when prisoners returning from the recreation yard occupied L block, assaulted the guards, and after releasing certain badly injured officers retained eight guards as hostages.⁶² Before the day ended the prisoners in rebellion killed six prisoners believed to be informants.⁶³ 321 prisoners stayed on the rec yard,

⁵⁵ GARY WILLIAMS WITH LARRY DOTSON, *SIEGE IN LUCASVILLE: AN INSIDER'S ACCOUNT AND CRITICAL REVIEW OF OHIO'S WORST PRISON RIOT* 6 (rev. ed. 2006).

⁵⁶ *Id.*

⁵⁷ These numbers come from a chart entitled "SOCF Trends," following p. 23 of THE SOUTHERN OHIO CORRECTIONAL FACILITY, DISTURBANCE CAUSE COMMITTEE FINDINGS, June 10, 1993, compiled by a committee headed by Gary C. Mohr [hereinafter Mohr Report]. Sgt. Hudson testified in 1995 that the population of SOCF in April 1993 was 1950. Transcript of Testimony of Howard Hudson at 914, *State v. Were*, No. B-958499 (Ohio C.P. Hamilton County May 26, 1998) [hereinafter *State v. Were I*]. Whatever the exact population of SOCF when the disturbance broke out, it is undisputed that the prison was seriously over-crowded. SOCF was constructed to house 1540 inmates. Mohr Report at 1.

⁵⁸ STAUGHTON LYND, *LUCASVILLE: THE UNTOLD STORY OF A PRISON UPRISING* 16-17 (2004).

⁵⁹ *Id.* at 17.

⁶⁰ *Id.*

⁶¹ *See id.* at 22. The Mohr Report states that General Population prisoners at SOCF before the rebellion had access to "1 five minute call during the month of December," in contrast to (for instance) the Mansfield Correctional Institution where General Population inmates had "1 ten minute call per week." Mohr Report, *supra* note 57, at 13.

⁶² LYND, *LUCASVILLE*, *supra* note 58, at 51.

⁶³ *Id.*

or returned to it after briefly checking on the property in their cells in L block, while 407 prisoners remained in L block for the eleven days of the disturbance and surrendered on April 21.⁶⁴

After the chaos of the first hours of the occupation, a standoff ensued. The authorities deliberately dragged out negotiations. Sergeant Howard Hudson, a member of the prison negotiating team and later lead investigator for the Ohio State Highway Patrol, testified in *State v. Sanders*:

The basic principle . . . is . . . to maintain the dialogue between the authorities and the hostage taker and to buy time. . . . [T]he more time that goes on the greater the chances of a peaceful resolution to the situation.⁶⁵

Early on the first full day of the disturbance, Monday April 12, the authorities also turned off water and electricity in L block.⁶⁶ Sergeant Hudson explained that the authorities were concerned that water was running from broken sinks and coming through the floor into the tunnels where all the electrical controls were housed, but in addition:

It was also a strategic move to cut off the water and power in order to bring the riot to a conclusion as soon as possible. We did not want the inmates to have the means necessary to extend the riot for a long amount of time by having water and power.⁶⁷

⁶⁴ Transcript of Testimony of Howard Hudson at 1515, *State v. Were*, No. B-9508499 (Ohio C.P. Hamilton County, June 6, 2003) [hereinafter *State v. Were II*]. James Were (Namir) was tried a second time after the Ohio Supreme Court ruled that he had not received an adequate mental competency hearing at his first trial. *State v. Were*, 761 N.E.2d 591, 592 (Ohio 2002). Each trial ended in a guilty verdict and death sentence. *Id.*; *State v. Were*, No. C-030485, 2005 WL 267671, at *1 (Ohio Ct. App. Feb. 4, 2005); *State v. Were*, 890 N.E.2d 263, 270 (Ohio 2008).

⁶⁵ Transcript of Testimony of Howard Hudson at 2719, 2721, *State v. Sanders*, a.k.a. Siddique Abdullah Hasan, No. B-953105 (Ohio C.P. Hamilton County Mar. 5, 1996) [hereinafter *State v. Sanders*]. The Ohio State Highway Patrol (OSHP, alternatively described as Ohio State Patrol, or Highway Patrol) is responsible for investigating all crimes that occur on state property and state leased or state owned facilities. Transcript of Proceedings, Volume. 3, at 391, *State v. Robb*, No. 94CR-10-5658 (Ohio C.P. Franklin County July 24, 1995) [hereinafter *State v. Robb*].

⁶⁶ Transcript of Testimony of Howard Hudson at 953, *State v. Were I*, *supra* note 57.

⁶⁷ *Id.* at 953–54.

At a press briefing on the morning of April 14, a spokesperson for the authorities named Tessa Unwin was asked to comment on a message threatening to kill a hostage officer, written on a sheet and hung out an L block window. She said:

It's a standard threat. It's nothing new, that if we don't have something in three and a half hours, we're going to kill a hostage.

It's not a new thing. They've been threatening things like this from the beginning. It just happened to be something they hung out

We're talking to a lot of different people. Like we've said before, you know, some of them will get on and make a threat, some of them will get off and make a concession. That's just how it goes.⁶⁸

All sources agree that Ms. Unwin's words provoked a strong hostile reaction among the prisoners in L block, listening on battery-powered radios.⁶⁹ The prisoners "took this to mean that the authorities were not taking them seriously and were not considering these threats."⁷⁰ Hostage officer Larry Dotson, blindfolded as he was, heard a dramatic increase in "verbalized tensions."⁷¹ Shouts of "they don't think we're serious" and "we are going to have to give them one before they will take us seriously" became frequent.⁷² Hostage officer Robert Vallandingham was strangled the next day.⁷³

During the days of waiting, hundreds of TV and print reporters exaggerated what was believed to be happening inside L block, alleging dozens of homicides.⁷⁴ The reality was tragic enough. Before

⁶⁸ Transcript at 1045–46, *State v. Robb*, *supra* note 65 (excerpts from the videotape of Ms. Unwin's press briefing).

⁶⁹ *Id.* at 1045.

⁷⁰ Transcript of Testimony of Howard Hudson at 673, *id.*

⁷¹ WILLIAMS WITH DOTSON, *supra* note 55, at 107.

⁷² *Id.*

⁷³ LYND, LUCASVILLE, *supra* note 58, at 68–69.

⁷⁴ Bruce Porter, *The Lucasville Follies: A Prison Riot Brings Out the Worst in the Press*, COLUM. JOURNALISM REV. (May/June 1994), available at <http://archives.cjr.org/year/94/3/lucasville.asp>.

surrendering, the prisoners had killed a total of nine prisoners believed to be informants as well as Officer Vallandingham.⁷⁵

In the aftermath of the surrender, Lucasville residents circulated a petition throughout southern Ohio calling for the death penalty for those responsible for Officer Vallandingham's murder. Approximately 26,000 persons signed the petition, which was to be returned to "Death Penalty, P.O. Box 1761, Portsmouth, Ohio" for submission to the Governor and other political representatives.⁷⁶ (Portsmouth is the county seat of Scioto County where both SOCF and the town of Lucasville are located.)⁷⁷ Although most of the Lucasville trials were moved out of Scioto County,⁷⁸ there is reason to believe that four or more signers of the Death Penalty petition were members of the "venire" called to constitute the grand jury that issued indictments.⁷⁹ And in the trials of Lucasville defendants Orson Wells and Eric Scales, two members of each petit jury were almost certainly persons who had signed the petition.⁸⁰

⁷⁵ LYND, LUCASVILLE, *supra* note 58, at 1.

⁷⁶ *Id.* App. 3.

⁷⁷ Scioto County, Ohio, <http://www.sciotocountyohio.com/county.htm> (last visited Mar. 17, 2008).

⁷⁸ LYND, LUCASVILLE, *supra* note 58, at 95; *see also*, State v. Skatzes, No. 15848, 2003 WL 24196406 at *1 (Ohio Ct. App. Jan. 31, 2003) (appeal from Montgomery Court of Common Pleas); State v. Robb, No. 95APA08-1003, 1998 WL 211919 at *1 (Ohio Ct. App. April 30, 1998) (appeal from Franklin County Court of Common Pleas); State v. Sanders, No. C-960253, 1998 WL 212756 at *3 (Ohio Ct. App. May 1, 1998) (venue changed from Scioto County to Franklin County, then to Hamilton County); State v. Lamar, No. 95CA31, 1998 WL 514548 at *1 (Ohio Ct. App. April 13, 1998) (appeal from Lawrence County Court of Common Pleas); State v. Were, No. C-950908, 1998 WL 682146 at *1 (Ohio Ct. App. Sept. 30, 1998) (appeal from Hamilton County Court of Common Pleas).

⁷⁹ Venire for Grand Jury, Exhibit II, and Petitions, Exhibit LL, in Appendix, Volume II to James Were, n.k.a. Namir Abdul Mateen's Memorandum Contra to the State's Motion to Dismiss [Second Amended Post-Conviction Petition], State v. Were II, No. B-9508499 (Ohio C.P. Hamilton County June 6, 2003).

⁸⁰ Staughton Lynd, The Lucasville Uprising: New Discoveries, Exhibit PP, in Appendix, Volume II to James Were, n.k.a. Namir Abdul Mateen's Memorandum Contra to the State's Motion to Dismiss [Second Amended Post-Conviction Petition], State v. Were II, No. B-9508499 (Ohio C.P. Hamilton County June 6, 2003). Exhibit PP relates at 7-8 that Attorney Alice Lynd compared the names of trial jurors with the names of petition signers, and Professor Andrew Feight of Shawnee State University double-checked signatures and addresses against election records. *Id.*

Finally, the Lucasville prosecutions relied almost entirely on the testimony of prisoner informants and presented almost no physical evidence.⁸¹ The authorities claimed that this was because the crime scene was so contaminated that next to no reliable physical evidence was available. Sergeant Hudson, who led the investigation, testified that “there was no physical evidence . . . linking any suspect to any weapon or any suspect to any victim.”⁸² Prosecutor Krumpelbeck told the jury in *State v. Sanders*:

[T]here was very little usable evidence. . . .

[W]e’re not going to bring in fingerprints. We don’t have any. We’re not going to bring in footprints. We don’t have any.

We’re not going to bring you blood samples. There isn’t any that we were able to match.⁸³

The truth is that nobody will ever know what the physical evidence might have shown because, after cherry picking what seemed useful to the prosecution, the authorities ordered it destroyed.⁸⁴

⁸¹ There are two exceptions to this generalization. First, the prosecution made much of so-called “tunnel tapes” that recorded the conversation of prisoners during the occupation with equipment placed in tunnels under L block. The reality, however, was that these recordings were so imperfect and incomplete that prisoner informants like Lavelle and Snodgrass were called on to supplement what the jurors were able to hear on the tape. See Transcript of Testimony of Anthony Lavelle at 1238, *State v. Were I*, *supra* note 57; *State v. Were*, 890 N.E.2d 263, 284 (Ohio 2008).

Second, under Ohio law it was impossible to try defendants for homicide without autopsy evidence from medical examiners. As will be shown in parts III and VI, *infra*, this objective medical evidence often flatly contradicted the narrative presented by prosecutors.

⁸² Trial Proceedings, Volume IV, Testimony of Howard Hudson on Oct. 23, 1995 at 1913, *State v. Skatzes*, No. CP 94-CR-1890 (Ohio C.P. Montgomery County Mar. 18, 1996) [hereinafter *State v. Skatzes*]. In 2003, Hudson explained more fully to another jury:

[B]ecause of the contamination of the crime scene and because of the deterioration of the tissues and the samples, we were not able to match any victim to any suspect, any victim to any weapon or any weapon to any suspect.

Transcript, Testimony of Howard Hudson, at 1514, *State v. Were II*, *supra* note 64.

⁸³ Transcript, Opening Statement of Prosecutor Gerald Krumpelbeck at 1224, *State v. Sanders*, *supra* note 65.

Under pressure from local public opinion, and in the absence of the physical evidence that normally undergirds a criminal proceeding, prosecutors turned to a kind of evidence practitioners recognize as inherently unreliable: the testimony of prisoner informants who are complicit in the course of conduct for which the defendant has been charged. As set forth in Ohio Revised Code section 2923.03(D):

If an alleged accomplice of the defendant testifies against the defendant in a case in which the defendant is charged with complicity in the commission of or an attempt to commit an offense, an attempt to commit an offense, or an offense, the court, when it charges the jury, shall state substantially the following:

“The testimony of an accomplice does not become inadmissible because of his complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution. . . .”⁸⁵

A. Targeting Spokespersons and Negotiators

Any fair-minded conclusion as to who was responsible for killing Officer Vallandingham could have emerged only after months of painstaking investigation. The visible leaders of the eleven-day rebellion were Siddique Abdullah Hasan (formerly known as Carlos Sanders), Anthony Lavelle, Jason Robb, and George Skatzes.⁸⁶ If these men were targeted for prosecution from the very beginning, it could only have been

⁸⁴ Notice of Filing of Captain Brink’s Answers at 17, *Robb v. Ishee*, No. 2:02-cv-535 (S.D. Ohio, July 13, 2007). According to Captain Brink, “All physical evidence . . . insofar as not presented as evidence in a criminal prosecution, was destroyed per the authorization of the lead prosecutor [Mark Piepmeier] and Lieutenant Hudson.” *Id.*

⁸⁵ OHIO REV. CODE ANN. § 2903.03(D) (West 2006)

⁸⁶ *State v. Were*, 890 N.E.2d 263, 270–71 (Ohio 2008). Skatzes went out on the yard with a bullhorn to attempt negotiation on April 12, was the principal telephone negotiator for the prisoners from April 13 to April 15, and went out on the yard the evening of April 15 to release a hostage officer and make a radio broadcast. LYND, LUCASVILLE, *supra* note 58, at 54, 63–69, 70. Hasan, Lavelle, and Robb negotiated the surrender with the help of Attorney Niki Schwartz. *Id.* at 72–74. See also *State v. Skatzes*, No. 1994 CR 2890 4–5 (Ohio C.P. Montgomery County July 13, 2007) available at http://www.clerk.co.montgomery.oh.us/pro/image_onbase.cfm?docket=9847696.

because the State wanted to single out the prisoners' spokespersons and negotiators.

The State denied that it targeted these leaders. Howard Hudson, lead investigator for the Ohio State Highway Patrol, testified as follows:

Q. When you began your search for the evidence and the interviewing of the witnesses who were present, did you have a particular suspect or suspects in mind?

A. No, sir.

Q. At that time?

A. No, sir.

Q. What was the goal of the interview process? Was it to get evidence against a certain individual or a group of individuals or how did it go, Lieutenant?

A. No, sir. No, sir. The goal was to find the truth, as in any other investigation. We did not go in this with any preconceived ideas.⁸⁷

If indeed this was Hudson's approach, he apparently failed to communicate it to the patrolmen he supervised. Prisoner Johnny Fryman had almost been killed by other prisoners at the beginning of the rebellion,⁸⁸ and thus had no reason to wish to protect the leaders of the uprising. After the riot was over and he was brought back from the hospital, Fryman was taken to the SOCF infirmary.⁸⁹ He reports that, in the immediate aftermath of the surrender, two members of the Ohio State Highway Patrol questioned him as follows:

They made it clear that they wanted the leaders. They wanted to prosecute Hasan, George Skatzes, Lavelle, Jason Robb, and another Muslim whose name I don't remember. They had not yet begun their investigation but

⁸⁷ Transcript of Testimony of Howard Hudson at 1515–16, *State v. Were II*, *supra* note 64. Hudson is addressed as "Lieutenant" in this sequence of question and answer because, by the time of the second *Were* trial in 2003, he had been promoted from "a Sergeant supervisor of the investigations at our Jackson Ohio Highway Patrol District 9 headquarters" to "staff lieutenant assigned to our Office of Investigative Services in Columbus, Ohio, our general headquarters." *Id.* at 1336.

⁸⁸ Affidavit of John L. Fryman ¶ 2 (June 17, 1998) (on file with author).

⁸⁹ *Id.* ¶ 13.

they knew they wanted these leaders. I joked with them and said, “You basically don’t care what I say as long as it’s against these guys.” They said, “Yeah, that’s it.”⁹⁰

Emanuel “Buddy” Newell, whom rioting inmates also tried to kill and who likewise had been placed in the SOCF infirmary,⁹¹ implicates Hudson himself. Newell reports that shortly after the surrender, Lieutenant Root, Sergeant Howard Hudson, Trooper Randy McGough, and Trooper Sayers talked with him.⁹²

The investigative troopers (OSHP) knew already who they wanted to prosecute, even though I was one of the first inmates they spoke with. They specifically wanted me to make statements against George Skatzes, Hasan Sanders, and Lavelle. They made it clear to me that they wanted these particular individuals, and that they did not care about any others.

I asked, “You all don’t care what we say, just as long as it’s against one of the inmates you want, no matter if it’s true or not,” and was told, “that’s right.”

. . . .

These officers said, “We want Skatzes. We want Lavelle. We want Hasan.” They also said, “We know they were leaders. We want to burn their ass. We want to put them in the electric chair for murdering Officer Vallandingham.”⁹³

B. The Snitch Academy

By 1994, prosecutors had identified a number of prisoners who had been in L block during the uprising and were now prepared to become witnesses for the State. These informants, or in the language of prisoners, “snitches,” were typically threatened with capital indictments and offered consideration in the form of reduced charges and concurrent sentences.⁹⁴

⁹⁰ *Id.*

⁹¹ Affidavit of Emanuel “Buddy” Newell ¶¶ 5–8 (Dec. 30, 1998) (on file with author).

⁹² *Id.* ¶ 7.

⁹³ *Id.* ¶¶ 5–8.

⁹⁴ See LYND, LUCASVILLE, *supra* note 58, at 96–111. For example, Derek Cannon has stated under oath: “Investigator Hudson . . . said that, if I did not cooperate with the
(continued)

A second stage in the solicitation of false testimony was then set in motion. In 1995 Newell testified briefly about what happened when informants, himself among them, were brought together at Ohio's Oakwood Correctional Facility in Lima.

Sir, I was in the witness-protection program, Oakwood Correctional Facility, and there they have guys that are being witnesses for the State . . . They went to trial and made a plea bargain with the Court and told the Court that they will commit to a lesser crime, you know, to save their self from going to death row and doing a lot more time.

And during that time, you know, a lot of guys, you know, we all there. We talk to each other, and we show each other, you know, different things that we are doing, our statements, you know, different things like that. And guys, you know, spoke about things that they were going to say in trial. And they didn't care, they were going to help themselves. Whatever they had to do to get out of their crimes, they would do it to keep from doing more time in prison.⁹⁵

prosecution and testify against George Skatzes, they would find a way to charge me with murder." Affidavit of Derek Cannon ¶ 8 (Sept. 21, 2003), Petition for Post-Conviction Relief, Exhibit 33, *State v. Skatzes*, No. 1994 CR 2890 (Ohio C.P. Montgomery County July 13, 2007) *available at* http://www.clerk.co.montgomery.oh.us/pro/image_onbase.cfm?docket=9847696. Hiawatha Frezzell likewise stated in an affidavit: "I was approached by Trooper Long to act as a witness for the State of Ohio. Trooper Long informed me that if I did not testify, he would see that I was charged with a murder or murders . . . and that these charges would carry the death penalty." Affidavit of Hiawatha Frezzell III, Sept. 26, 1996, Petition To Vacate Or Set Aside Sentence ¶ 3, *State v. Cannon*, No. C-95-00710 (Ohio Ct. App. Feb. 26, 1997) [hereinafter *State v. Cannon*].

Prisoners who yielded to these threats and agreed to testify were rewarded. Robert Brookover, who concededly helped to murder prisoner David Sommers, testified that his conviction would not add one day to his sentence. Transcript of Testimony of Robert Brookover at 3688, *State v. Skatzes*, *supra* note 82. As to the *quid pro quos* for Anthony Lavelle and Rodger Snodgrass, see *infra*, Parts III and IV.

Cannon refused to cooperate, and was indicted and convicted. See *infra*, Section VIB. Frezzell testified for the State and later recanted. Affidavit of Hiawatha Frezzell III ¶ 6 (Sept. 26, 1996) Petition To Vacate Or Set Aside Sentence, *State v. Cannon*.

⁹⁵ Transcript of Testimony of Emanuel Newell at 697-98, *State v. Cannon*, No. B-957633 (Ohio C.P. Hamilton County Sept. 15, 1995).

Twelve years later, in 2007, Newell set forth in greater detail proceedings at the Oakwood “Snitch Academy.”

In 1994 I was placed in a witness protection program at the Oakwood Correctional Facility located in Lima, Ohio. I was housed together with other prisoners involved in the April 1993 disturbance who had become witnesses for the State.

The following prisoners were among the informants who were with me in what became known as the “Snitch Academy” at the Oakwood Correctional Institution: Reginald Williams, John Fields, Sherman Sims, David Lomache, Robert Brookover, Steve Macko, Miles Hogan, Timothy Williams, “Frenchy” Vie[i]ra, and Tony Taylor.

Our “handlers” included prosecutors Doug Stead, Daniel Hogan, and [Lucasville Special Prosecutor] Mark Piepmeier, and Ohio State Highway Patrol Troopers Hutchinson, Sayers, and McGough.⁹⁶

Newell goes on to describe how testimony was shaped and manipulated by the prosecution team.

The aforementioned representatives of the State would speak to us individually about our latest versions of events. They would let us know when a piece of information might be unsuitable and should be modified or omitted altogether. Likewise, we were informed when information was regarded as too vague or obscure, and that it would be laudable if it were more dressed-up.

Periodically, our handlers would group us together for meetings in order to weed out inconsistencies and to tell us what we were to say against particular defendants.

Essentially, we were to correlate our statements and subsequent testimony so as to have George Skatzes, Jason Robb, Carlos Sanders and James Were sentenced to death.

⁹⁶ Affidavit of Emanuel “Buddy” Newell ¶¶ 3–5 (June 4, 2007) Exhibit MMM, in Appendix, Volume V to James Were, n.k.a. Namir Abdul Mateen’s Memorandum Contra to the State’s Motion to Dismiss [Second Amended Post-Conviction Petition], *State v. Were II*, *supra* note 64.

Our handlers often made such remarks as “You can’t say that!” and “Be sure to say this!”

For instance, when it was indicated that perpetrators wore masks, we were advised that because the prosecutors required specific visual identification of the accused defendants we should say not only that the perpetrators did NOT wear masks but, further, that the defendants were the perpetrators.⁹⁷

Prosecutors created an artificial environment of plenty for the informants at Oakwood.

Our handlers arranged a Thanksgiving dinner festival, which our handlers personally attended, exclusively for those of us in the witness protection program in the special housing block. The Thanksgiving dinner consisted of pies, popcorn, cakes, doughnuts, candy and so forth. The message was that our handlers and we were part of one single family unit and that we were to reciprocate the allegiance and loyalty that they were exhibiting towards us. We were often referred to as “the Piepmeier family.”

During my period at Oakwood, our handlers gave us parties on at least five (5) different occasions. These parties included the giving of candy, food, and a variety of gifts.

There was a hands-off policy at Oakwood that was engineered by our handlers. Whenever one of us misbehaved, there would be no consequences. This was so that there could be no written record for defendants’ lawyers to employ at trial that might incline the jurors to frown on the general conduct of the State’s witnesses.

Once each week, our handlers also made arrangements with the vendors to supply us with free treats: soda, cakes, candy, doughnuts, chips, et cetera.⁹⁸

⁹⁷ *Id.* ¶¶ 6–10.

⁹⁸ *Id.* ¶¶ 11–14. Prosecution witness Anthony Walker agrees that the doors at Oakwood were never locked so that the potential informants were free to do “pretty much . . . what we wanted.” Walker adds that prisoners at the Snitch Academy received food boxes and “it

(continued)

The *quid pro quo* for the good times at Oakwood was the potential witness' commitment to testify consistently for the State.

When I refused to testify against Greg Curry and Derek Cannon, Sergeant Hutchinson and prosecutor Hogan (now a sitting judge) threatened that I would live out the remainder of my life in prison unless I cooperated like the other inmates in the Piepmeier family and said what I was told to say. I was told that I had to be a team player and not "rock the boat," and to think of myself instead of Curry and Cannon who didn't care for me. I was repeatedly bombarded with, "Haven't we been good to you?" and "Don't you think it's time to start showing your appreciation and get with the program?"

Mr. Piepmeier, the head prosecutor, wanted me to testify against George Skatzes and Carlos Sanders. I was promised several incentives: a guaranteed parole release, a job upon my release from prison, and an out-of-state transfer until the parole was effected.

Eventually, due to my adamant refusal to fabricate testimony at the behest of prosecutors Piepmeier and Hogan, they implored inmate Robert Brookover to wheedle, cajole and coerce me to cooperate with the prosecutors by providing mendacious testimony.

The other inmates openly admitted to me that they did not care whom they cast lies upon if it would secure them guaranteed parole releases from prison. Nevertheless, I could not compel myself to cooperate in sending innocent people to Death Row. I knew of the innocence of some of

was almost like it was catered." Deposition of Anthony Walker at 32 (Feb. 3, 2006) Exhibit LLL, in Appendix, Volume V to James Were, n.k.a. Namir Abdul Mateen's Memorandum Contra to the State's Motion to Dismiss [Second Amended Post-Conviction Petition], *State v. Were II*, *supra* note 64. Prosecution witness Steven Macko testified that prisoners at the "snitch academy" were housed in individual cells and were free to come and go out of their cells and to mingle with the other witnesses. Transcript of Testimony of Steven Macko at 334–35, *State v. Robb*, *supra* note 65.

the defendants because in some instances I knew who the true perpetrators were.⁹⁹

If Newell is to be believed, the prisoner informants at Oakwood confessed their own guilt in murders for which other Lucasville defendants had been indicted.

For example, Robert Brookover personally confessed to me that he, Snodgrass, and Dewey Bocook were the ones who actually killed David Sommers and that George Skatzes had nothing whatsoever to do with the murder. Yet he was going to place the blame on George Skatzes because that is what the prosecutors wanted him to do and Brookover would garner himself a guaranteed parole in exchange for placing George Skatzes and Jason Robb on Death Row.

Brookover told prosecutors Stead and Hogan how they could convince Snodgrass to lie that George Skatzes was involved in the murder of David Sommers. Brookover acted as a “go between” and liaison for the prosecutors since, after all, they were letting him get away with the murder he had himself committed. Brookover said that as part of the deal he would have to plead guilty to involuntary manslaughter but he wouldn’t have to do any serious time.¹⁰⁰

Because of Newell’s refusal to conform to all aspects of the prosecutorial program, when he engaged in misconduct he was transferred out.

While at Oakwood I had a fight with prisoner Donald Cassell. There was no weapon involved and the fight was mutually initiated. An RIB [Rules Infraction Board] hearing was held on January 23, 1995. The RIB recommended that I be placed in Local Control and then transferred to another prison. I was transferred to North Central Correctional Institution in Marion, Ohio.

⁹⁹ Newell Affidavit, *supra* note 96, ¶¶ 15–18.

¹⁰⁰ *Id.* ¶¶ 19–20.

When I went before the Parole Board in September 1998 the Parole Board told me that Mr. Piepmeier had communicated to them that I failed to cooperate with the prosecution team in the Lucasville riot, and that I had testified on behalf of two inmates (Curry and Cannon) whom the prosecution portrayed as guilty. The Parole Board told me that I could be getting a parole right then had I only cooperated with the prosecution team but, since I had not, they were giving me ten (10) more years to think about how I didn't cooperate with the prosecutors of the Lucasville riot.¹⁰¹

According to Newell, Prosecutor Piepmeier was altogether candid as to why certain prisoners would be prosecuted and others not.

I asked prosecutor Piepmeier one time why he was allowing Snodgrass and Dewey Bocoock to get away with attempting to murder me, but charging their cohort Aaron Jefferson. Mr. Piepmeier commented that it was because Snodgrass and Bocoock were prospective witnesses whose character should not be tarnished. When I asked about Jefferson, the prosecutor stated that the team had no problem with charging him because he was not essential to the investigation and is not cooperating with the State. I was told to think of the greater good.

They did charge Jefferson and he was convicted in the Dayton Common Pleas Court. He did no more than Snodgrass and Bocoock in assaulting me.

A prisoner named Stacey Gordon prepared me for the assault by Snodgrass, Bocoock, and Jefferson by coming at me at knife-point, hand-cuffing me behind my back, and turning me over to Snodgrass. Gordon was always bragging about how he lied to get his parole, that it was his life versus the lives of those he fabricated testimony against so as to place them on Death Row. Gordon was released on parole in January 2007.¹⁰²

¹⁰¹ *Id.* ¶¶ 21–22.

¹⁰² *Id.* ¶¶ 23–26.

The informants gathered at the Snitch Academy in the Oakwood prison were used as witnesses primarily in the cases of the alleged leaders of the disturbance. Six of the informants at Oakwood (Robert Brookover, Stacey Gordon, Miles Hogan, David Lomache, Steve Macko, Timothy Williams) testified against Robb and Skatzes.¹⁰³ Five (Reginald Williams along with Gordon, Hogan, Lomache and Macko) testified against Hasan,¹⁰⁴ and five (Gordon, Macko, Sherman Sims, Tony Taylor, Reginald Williams) against James Were (also known as Namir Abdul Mateen).¹⁰⁵

The manufacture of perjured testimony in the Lucasville trials proceeded along the two tracks suggested by these affidavits. Key informants—Anthony Lavelle, Rodger Snodgrass, Kenneth Law—were not confined at Oakwood but were separately prepared to testify against others.¹⁰⁶ Meantime a supporting cast of lesser witnesses coordinated what they would say in court at the Snitch Academy.

III. MANUFACTURING PERJURY: ANTHONY LAVELLE

The most consequential informant testimony came from Anthony Lavelle, the diminutive African American leader of the smallest of the three groups or gangs involved in the disturbance, the Black Gangster Disciples. Reginald Wilkinson, Director of the Ohio Department of Rehabilitation and Correction (ODRC) at the time, has written that according to Special Prosecutor Piepmeier

the key to winning convictions was eroding the loyalty and fear inmates felt toward their gangs. To do that, his staff targeted a few gang leaders and convinced them to accept plea bargains. Thirteen months into the investigation [in

¹⁰³ Merit Brief of Appellee at 15, 69, 83, 86, 111, *State v. Skatzes*, 819 N.E.2d 215 (Ohio 2003) (No. 03-487); Merit Brief of Appellee at 10–11, 70, *State v. Robb*, 723 N.E.2d 1019 (Ohio 2000) (No. 98-1166).

¹⁰⁴ Merit Brief of Appellee at 21, 117, *State v. Sanders*, 750 N.E.2d 90 (Ohio 2001) (No. 98-1209).

¹⁰⁵ Merit Brief of Appellee at 6–7, 51, 58, *State v. Were*, 761 N.E.2d 591 (Ohio 2002) (No. 98-2197).

¹⁰⁶ See Notes of Interview of Anthony Lavelle, at Chillicothe Correctional Facility (Nov. 4, 1994); Notes of Interview by Special Prosecutors Daniel Hogan and Douglas Stead and Highway Patrol Trooper Randy McGough with Anthony Lavelle, at Chillicothe Correctional Institution (Jan. 11, 1995) (showing Lavelle was held at Chillicothe Correctional Institution rather than Oakwood); cf. Affidavit of Emanuel “Buddy” Newell ¶ 4, *State v. Were II*, *supra* note 64 (providing a partial list of prisoners held with Newell at Oakwood).

May 1994], a primary riot provocateur agreed to talk about Officer Vallandingham's death. He later received a sentence of 7 to 25 years after pleading guilty to conspiracy to commit murder. His testimony led to death sentences for riot leaders Carlos Sanders [Siddique Abdullah Hasan], Jason Robb, George Skatzes, and James Were [Namir Abdul Mateen].¹⁰⁷

The "primary riot provocateur" was Anthony Lavelle.¹⁰⁸

According to Prosecutor Hogan, Lavelle made his decision to cooperate with the State when Prosecutor Stead told Lavelle, "you are either going to be my witness, or I'm going to come back and try to kill you."¹⁰⁹ Lavelle himself testified in the trial of George Skatzes that he turned State's evidence because

I couldn't see myself spending the rest of my life in prison and I definitely did not want to die, which if I wouldn't have testified or agreed to testify, both of these possibilities was there.¹¹⁰

In fact we know in detail the steps taken by the State that caused Lavelle to become an informant.

A. *Becoming an Informant*

During the winter of 1993–94, three of the targeted leaders of the uprising—Hasan, Lavelle and Skatzes—were housed in adjacent cells in the North Hole of Chillicothe Correctional Institution. The authorities attempted to interview Skatzes on October 19, 1993, and again on March 31, 1994 and April 6, 1994.¹¹¹

¹⁰⁷ Reginald A. Wilkinson & Thomas J. Stickrath, *After the Storm: Anatomy of a Riot's Aftermath*, CORRECTIONS MGMT. Q., Winter 1997, at 16, 21, available at <http://www.drc.ohio.gov/web/Articles/article3.htm>.

¹⁰⁸ WILLIAMS WITH DOTSON, *supra* note 55, at 233.

¹⁰⁹ Transcript of Statement of Prosecutor Hogan at 4047, *State v. Skatzes*, *supra* note 82.

¹¹⁰ Transcript of Testimony of Anthony Lavelle, *id.* at 4054.

¹¹¹ Transcript of Testimony of Howard Hudson, *id.* at 2215. Hudson does not mention the March 1994 interview. According to Skatzes' counsel, on March 31, 1994, "Mr. Skatzes was taken from his cell, 'Mirandized' and interrogated by Sgt. Hudson of the Highway Patrol." Letter from Jeffrey Kelleher, Counsel to George Skatzes, to Mark Piepmeier, Esq., Lucasville Special Prosecutor (Apr. 13, 1994) (on file with author).

On the first of these occasions, Skatzes says that he was induced to leave his cell by the false statement that he had an attorney visit, but in fact the persons waiting for him were Sergeant Hudson and another Highway Patrol trooper.¹¹² Hudson states that he told Skatzes in October 1993 that “he would most likely, the next time he saw me, be facing charges for the death of Earl Elder, Officer Vallandingham and David Sommers.”¹¹³ Additionally, according to Skatzes,

Sgt. Hudson and the other trooper straight out told me if I did not help them they would see to it that I would spend the rest of my life in prison, no matter if I went to trial on riot related charges or not. . . . They went on to tell me *if* I helped them, they could help me.¹¹⁴

Skatzes told the investigators there was no way he could do anything to help them, “and with that the visit ended and I was returned to the North Hole.”¹¹⁵

On April 6, 1994, Skatzes was taken to a room where he again found Sergeant Hudson, together with Trooper Randy McGough of the Highway Patrol, and two prosecutors.¹¹⁶ Skatzes once again told the investigators that “he did not want to continue with any interviews.”¹¹⁷

According to Skatzes, what happened next was that Deputy Warden Ralph Coyle entered the room and told Skatzes that Central Office had decided he could not go back to the North Hole.¹¹⁸ Skatzes protested vehemently that this would make him look like a snitch.¹¹⁹ His attorney’s apparently un rebutted account continues:

Mr. Skatzes was moved to another cell at CCI [Chillicothe Correctional Institution] the evening of April 6. It was intimated to his former “roommates,” Sanders and Lavelle,

¹¹² Letter from George Skatzes to Jeffrey Kelleher, Counsel to George Skatzes 2 (Apr. 14, 1994) (on file with author).

¹¹³ Transcript of Testimony of Howard Hudson at 2218, *State v. Skatzes*, *supra* note 82.

¹¹⁴ Letter from George Skatzes to Jeffrey Kelleher, Counsel to George Skatzes 3 (Apr. 14, 1994) (on file with author) (emphasis in original).

¹¹⁵ *Id.*

¹¹⁶ Transcript of Testimony of Howard Hudson at 2216, *State v. Skatzes*, *supra* note 82.

¹¹⁷ *Id.* at 2216–17.

¹¹⁸ Letter from George Skatzes to Jeffrey Kelleher, Counsel to George Skatzes 8–10 (Apr. 14, 1994) (on file with author).

¹¹⁹ *Id.*

that he is now cooperating with the prosecution. This was exacerbated when Sanders went to Portsmouth on the 7th for an arraignment where, for the first time yet, he was permitted to communicate with his co-defendants [at the Portsmouth jail]. Naturally, he spread the word that Skatzes was “snitching.” Matters were made still worse on the 8th or 9th when my client was returned to “North Hole” to rejoin Sanders only to discover that Lavelle had been moved. Lavelle, it appears, is sounding the alarm that Skatzes is a snitch.¹²⁰

When Skatzes was returned to his cell in the North Hole, Lavelle was gone.¹²¹ Hasan had returned from his arraignment. Skatzes recalls going up to the bars separating their cells and saying, “I don’t know you. You don’t know me. I didn’t tell them anything.”¹²² Hasan wrote a short letter to the effect that he believed George Skatzes was telling the truth, which was distributed among Aryan and Muslim prisoners.¹²³

Lavelle, who had been removed from the area before Skatzes’ return, had no opportunity to talk with Skatzes and concluded that he had “rolled.”¹²⁴ The day after Skatzes failed to return to his cell, Lavelle wrote the following to Jason Robb.

¹²⁰ Letter from Jeffrey Kelleher, Counsel to George Skatzes, to Mark Piepmeier, Esq., Lucasville Special Prosecutor 2 (Apr. 13, 1994) (on file with author).

¹²¹ *Id.*

¹²² Personal communication from George Skatzes to Attorneys Alice and Staughton Lynd.

¹²³ Transcript of Testimony of Rodger Snodgrass at 4654, *State v. Skatzes*, *supra* note 82. Rodger Snodgrass testified about Hasan’s letter in the Skatzes trial. Snodgrass said he still had the letter in his cell. He stated:

I sent it to all of the brothers, let them read it, showed a few Muslims, which, you know, I was kind of proud to do that, to put them in their place, let them know that George is staying strong, all that rumor mill stuff, you need to cease it. I made a statement over the range that, you know, from now on, when they move someone away and try to divide and conquer and play diabolical games, that we need to wait and see something in black and white before we spread these rumors.

Id.

¹²⁴ Letter from Anthony Lavelle to Jason Robb 1 (Apr. 7, 1994), Defendant’s Exhibit 8, *State v. Robb*, *supra* note 65.

Jason:

I am forced to write you and relate a few things to you that have happen down here lately.

With much sadness I will give you the raw deal, your brother George has done a vanishing act on us

. . . .

On Wednesday April 6, 1994 G. said about 8:00 a.m. that he had a lawyer visit coming and before they were here the C.O. wanted to move him to the room, now to be short and simple, he failed to return that day and today they came and packed up his property which leads me to one conclusion that he has chose to be a cop

. . . .

Lavelle.¹²⁵

Thereafter the State moved quickly to finalize a plea agreement with Anthony Lavelle. An indictment for kidnapping Officer Darrold Clark had issued against Anthony Lavelle and Rodger Snodgrass on April 5, 1994.¹²⁶

Officer David Shepard of the Highway Patrol administered a polygraph test on May 27, 1994.¹²⁷ On June 9, 1994, Prosecutor Piepmeier filed an Information charging Lavelle with Conspiracy to Commit Aggravated Murder in violation of Ohio Revised Code section 2923.01; on June 10, Lavelle and his counsel signed a Waiver of Indictment and an Entry of Guilty Plea to Information, and Judge Mitchell signed an Entry of Sentence “to an indeterminate term of 7 to 25 years.”¹²⁸

¹²⁵ *Id.* at 1–2.

¹²⁶ Indictment, No. 94 CR 151 (Ohio C.P. Scioto County Apr. 5, 1994) (Counts 1 and 2 charged Anthony Lavelle with kidnapping and Counts 3 and 4 charged Rodger Snodgrass with kidnapping).

¹²⁷ Transcript, Video Tape of Anthony Lavelle Polygraph Test of 5-27-94 (on file with author).

¹²⁸ Information, *State v. Lavelle*, No. 94 CR 307 (Ohio C.P. Scioto County June 9, 1994); Waiver of Indictment, *State v. Lavelle*, No. 94 CR 307 (Ohio C.P. Scioto County June 10, 1994); Entry of Guilty Plea to Information, *State v. Lavelle*, No. 94 CR 307 (Ohio C.P. Scioto County June 10, 1994); Entry of Sentence, *State v. Lavelle*, No. 94 CR 307 (Ohio C.P. Scioto County June 10, 1994).

Prisoner Antoine Odom testified about Lavelle's state of mind in June 1994 when the two men celled near each other, and Lavelle was deciding to turn State's evidence.

Q. Tell us what he said.

A. He said the prosecutor was sweating him and he had to do what he had to do—he was gonna cop out cause the prosecutor was sweating him, trying to hit him with a murder charge.

Q. Did he say . . . what he meant by he was going to do what he had to do?

A. He just said he was . . . gonna get a deal for his self. . . .

. . . .

Q. Uh-huh. Did he say anything about the story he was going to tell the prosecutor?

A. . . . He said he was gonna tell them what they wanted to hear.¹²⁹

The court documents do not describe any aspect of Lavelle's plea agreement except the seven to twenty-five year sentence. According to Lavelle, prosecutors also agreed

to drop the kidnapping charge that I was originally charged with, transfer me out of the State of Ohio prison system into another state prison system, and notify the Adult Parole Authority that I cooperated in the prosecution of cases that extended from the Lucasville riot.¹³⁰

Lavelle would be eligible for parole in 1999.¹³¹

B. A Napue Violation?

The fact that prosecutors cleverly induced Lavelle to turn State's evidence does not establish a violation of *Napue*. Lavelle's plea bargain

¹²⁹ Transcript of Testimony of Antoine Odom at 4854, *State v. Robb*, *supra* note 65.

¹³⁰ Testimony of Anthony Lavelle, *id.* at 3265.

¹³¹ Transcript of Testimony of Anthony Lavelle at 4160–61, *State v. Skatzes*, *supra* note 82.

was, he testified, for “truthful testimony whenever called upon.”¹³² Did Lavelle testify truthfully? And if not, did prosecutors know this?

The answers to these questions are No and Yes. The evidence for this is: (1) The polygraph or coercive interrogation conducted by Officer Shepard on May 27, 1994; (2) Lavelle’s trial testimony as to what he did after the prisoners’ meeting on the morning of April 15; (3) The testimony of more than a dozen other prisoners as to what Lavelle did after the meeting.

1. *The May 1994 Polygraph*

On May 27, 1994—between the date in April when George Skatzes failed to return to his cell at Chillicothe, and the date in June when Anthony Lavelle entered into a plea agreement—Trooper Dave Shepard of the Ohio Highway Patrol conducted a polygraph examination of Lavelle.¹³³

It was a long interrogation, the transcript of which runs to 144 pages. Both men took for granted what Lavelle had already told the authorities: that he was present at a meeting of leaders of the rebellion early on the morning of April 15 when killing a guard was discussed.¹³⁴ The question on which Shepard focused was: Were you physically present when the hands-on murder happened in pod L-6, and what did you see and do?¹³⁵

Shepard said that he hoped Lavelle could arrange a deal with the State.¹³⁶ But, he went on, if Lavelle were to testify that he voted for the officer’s death but was not present during the killing, the prosecution might produce

a parade of people that come up and said, he was there. That casts enough doubt on your case that . . . what the prosecutor’s gonna do [is] . . . take the deal and squash it. Because you’re lying about it. What I’m saying is, don’t let that happen.¹³⁷

Shepard continued:

I’ve got a feeling that you were just there. In the sense that you saw it happen or saw part of it happen. Well, the

¹³² Transcript of Testimony of Anthony Lavelle at 3265, *State v. Robb*, *supra* note 65.

¹³³ Transcript of Video Tape of Anthony Lavelle Polygraph Test of 5-27-94 at 82.

¹³⁴ *See id.* at 95.

¹³⁵ *See id.* at 70–104.

¹³⁶ *Id.* at 72.

¹³⁷ *Id.* at 67.

whole point of this is that I don't want them to turn around and burn you, like saying, well if he's lying about that, he's lying about doing it.¹³⁸

The Trooper explained that Lavelle's presence in L-6 when Officer Vallandingham was killed did not make Lavelle a murderer. "On the outside, you can be in a car and watch it happen, that doesn't mean that you pulled the trigger."¹³⁹

Shepard's unmistakable message was that the prosecution, on the basis of interviews with other prisoners, knew that Lavelle had been in L-6 at the time of the murder. That being so, Lavelle had two choices: either to name those he witnessed actually do the killing, or to run the risk that he himself would be found guilty. As Trooper Shepard put it to Lavelle:

I want to know who the people were that were involved in it. I want to know from you that all you did was cast a vote, you were there and you saw it happen. That's all we want to know. That's enough to clear this whole thing up¹⁴⁰

Shepard made the case as to why Lavelle would be believed were he to say that, because he was afraid, he was only now coming forward with some things that he hadn't told the prosecutors, or the other investigators, or even his attorney.¹⁴¹

As Trooper Shepard went on and on, Lavelle began to confess. He said he knew who had ordered the officer's murder.¹⁴² He knew that the killing took place in L-6.¹⁴³ He had been there.¹⁴⁴ He knew that the victim was Officer Vallandingham because the murdered officer's shoulder was bandaged.¹⁴⁵

Lavelle told Trooper Shepard that Were (Namir) was one of several Muslims who did the actual killing: Lavelle was two or three cells away and heard them say, "we'll take care of this and it would be done

¹³⁸ *Id.* at 68.

¹³⁹ *Id.* at 69.

¹⁴⁰ *Id.* at 70.

¹⁴¹ *Id.* at 72–73.

¹⁴² *Id.* at 82.

¹⁴³ *Id.* at 92.

¹⁴⁴ *Id.* at 94.

¹⁴⁵ *Id.* at 95–96.

right”¹⁴⁶ He heard Were (Namir) giving orders such as, “grab his arm or grab his leg.”¹⁴⁷ There was a scuffle between the officer and his captors that went on for two or three minutes.¹⁴⁸ Leroy Elmore and Cecil Allen, two other Muslims, were there as well.¹⁴⁹ The murder took place in the shower on the lower range.¹⁵⁰ Officer Vallandingham kicked up his legs, and kept twisting and turning before he died.¹⁵¹ He was choked with some kind of cord.¹⁵² Were (Namir) and another Muslim also used a weight bar, which they put across Officer Vallandingham’s throat and “must have crushed his larynx,” one of them standing on one end of the bar and the other on the other end.¹⁵³ Robb, Skatzes and Bocook, all members of the Aryan Brotherhood, were also there, but there were no Gangster Disciples.¹⁵⁴

Officer Shepard then called “the lead investigator on the case [presumably Sgt. Hudson] who’s got everything in front of him.”¹⁵⁵ On the basis of “all the people that we’ve talked to,” Shepard reported, Lavelle appeared to be describing the homicide correctly, except that he was not accurately identifying the prisoners who were there and did the deed: “[Y]ou got all the players wrong.”¹⁵⁶ Lavelle then produced the name of one of his own group, a developmentally-challenged young man named

¹⁴⁶ *Id.* at 97.

¹⁴⁷ *Id.* at 98.

¹⁴⁸ *Id.* at 98–99.

¹⁴⁹ *Id.* at 100.

¹⁵⁰ *Id.* at 102.

¹⁵¹ *Id.* at 104.

¹⁵² *Id.* at 108.

¹⁵³ *Id.* at 115–17. Several witnesses had seen Lavelle himself carrying a weight bar into L-6. The following exchange took place:

SHEPARD: Who brought the weight bar in?

LAVELLE: We brought it in the block.

. . . .

SHEPARD: Did you carry the weight bar in?

LAVELLE: Ha ah.

Id. at 121.

¹⁵⁴ *Id.* at 118.

¹⁵⁵ *Id.* at 126.

¹⁵⁶ *Id.*

Aaron Jefferson, as “one of the stranglers.”¹⁵⁷ The long session ended on that note.

2. *Lavelle’s Trial Testimony as to What He Did after the Prisoners’ Meeting on the Morning of April 15*

Lavelle met with the prosecutors for two intensive sessions prior to his testimony against Robb, Were, Skatzes and Sanders.¹⁵⁸ During the first of these meetings Lavelle stated that he had *not* told the truth to Trooper Shepard, that he had not witnessed the murder of Officer Vallandingham but had learned of the killing only after the event.¹⁵⁹ At the subsequent trials, Lavelle described what allegedly happened at the meeting of riot leaders on the morning of April 15 and what he supposedly did when the meeting ended. Lavelle’s trial testimony about the meeting presented major problems for the prosecution.¹⁶⁰ His testimony about what he did after the meeting was demonstrably false, and the prosecution knew it.

¹⁵⁷ *Id.* at 141.

¹⁵⁸ Notes of Interview of Anthony Lavelle, at Chillicothe Correctional Facility (Nov. 4, 1994); Notes of Interview by Special Prosecutors Daniel Hogan and Douglas Stead and Highway Patrol Trooper Randy McGough with Anthony Lavelle, at Chillicothe Correctional Institution (Jan. 11, 1995). According to the latter document, the notes on the November 1994 interview were prepared by chief Lucasville prosecutor Mark Piepmeier. At the January 1995 interview, Lavelle reviewed, in minor ways corrected, and added to Piepmeier’s notes.

¹⁵⁹ Notes of Interview, Nov. 4, 1994, at unnumbered page 19.

¹⁶⁰ The prosecution’s theory was that the morning meeting had decided to kill a guard and that every prisoner present was guilty of murder. However, Lavelle said over and over, under oath, that the morning meeting discussed killing a guard but did not come to a final decision, and that another meeting during the afternoon was to happen before a guard would be killed. In *State v. Were I*, the following exchange occurred:

Q. When you left the meeting, was that the understanding, that a guard was going to be killed?

A. No. When I left the meeting, the understanding was we was going to meet up later on that afternoon and give them our final ultimatum. I had told them, you know, just pick a time later on this afternoon, we can all come back and take the final vote.

Transcript of Testimony of Anthony Lavelle at 1238, *State v. Were I*, *supra* note 57. Similarly at the Skatzes trial, Lavelle testified that there was no need for him to voice at the morning meeting what he claimed was his own opposition to killing a guard because “we was going to meet back up later on that afternoon” to evaluate the results of negotiations.

(continued)

Lavelle testified as follows about what he did after the meeting ended at about 9 A.M.

Q. And where did you go after that meeting, Tony?

A. Back into L-1.

Q. When you left that meeting, in your mind, there had not been a final decision made to kill a guard?

A. That's correct.

Transcript of Testimony of Anthony Lavelle at 4067, *State v. Skatzes*, *supra* note 82.

Finally, in Hasan's trial, Lavelle for a third time affirmed that at the end of the morning meeting:

We hadn't made a clear decision. I had told them, you know, that we should decide on what we're going to do but we need to come back after the deadline and make sure that this is what we want to do.

So I said, you know, after we give them a deadline, if they don't meet it we should come back together and decide, you know, whether we want to do this or not.

Transcript of Testimony of Anthony Lavelle at 3649, *State v. Sanders*, *supra* note 65. At another point in *State v. Sanders*, Lavelle stated that at the morning meeting he "suggested after the deadline has been established and it's passed that we meet back up later and decide on whether this is what we want to do, be sure that this is what we want to do." *Id.* at 3786. The following exchange ensued:

Q. Okay. Did anybody say: No, we're not going to do that?

A. No.

Q. So then the agreement was that he would not be killed without another meeting?

A. That's correct.

....

... I state, let's meet back up here later at another time, after we give them this[,] 2:30, 3:30, whatever, and we decide, okay, they haven't met our demands, they had until such and such a time, they haven't met it, are we going to do it. Yes or no.

Everybody said that's a good idea.

Id. at 3786-87.

Q. And how long did you stay there, do you know?

A. No, not exactly, I don't. I stayed in there a couple of hours. I don't know exactly the time frame.

Q. And when you eventually left L-1, where did you go?

A. Back over into L-2 cellblock.

....

Q. And did you overhear any conversation between the inmate negotiator on the phones and the outside?

A. Yes, yes, sir.

Q. And what did you hear said, if anything?

A. I don't know exactly what they were saying, but it was basically, you know, they were talking about, you know, that's what it is or what you see is what you get or something like that.

And I started asking him: What are you talking about?

And they said: Well, we got them one out there.

And I said: Like one what?

And they said: A body, you know.

And at the time I assumed they were talking about an inmate because as far as I knew, you know, the guard wasn't going to be killed until we made the demand, gave it to them and came back and met up later on.

And then someone else had told me, said: No, it's a guard out there.

Q. Is this the first that you've heard that a corrections officer has been killed and put out on the yard?

A. Yes.¹⁶¹

¹⁶¹ Transcript of Testimony of Anthony Lavelle at 3649–51, *State v. Sanders*, *supra* note 65. See also Transcript of Testimony of Anthony Lavelle at 3304, *State v. Robb*, *supra* note 65 (“I went to my cell.”); Transcript of Testimony of Anthony Lavelle at 1241, (continued)

Indeed, in the Robb trial, Lavelle testified that when he returned to L-1 for a couple of hours he “laid down” and may have gone to sleep.¹⁶² No other prisoner, in any statement to the authorities or at any trial, corroborated Lavelle’s testimony that he had returned to L-1 for a couple of hours after the meeting and laid down or gone to sleep.

3. *The Testimony of a Dozen Other Prisoners as to What Lavelle Did after the Meeting*

As prisoners were indicted, sworn testimony accumulated, and the trials proceeded, it became overwhelmingly obvious that not only had Lavelle gone to L-6 at the time of Officer Vallandingham’s death, *Lavelle himself had organized and supervised the officer’s murder.*

Three members of the Black Gangster Disciples stated under oath that Lavelle had recruited a death squad from members of the group. According to Brian Eskridge, after Ms. Unwin made her statement on the morning of April 14, Lavelle came to him and said

this is what we got to do. We got to kill this C.O. We got to show them that we serious¹⁶³

The next day, Eskridge continued, he was beaten for refusing to take part.¹⁶⁴ His eye was seriously injured.¹⁶⁵ Aaron Jefferson, another member of the Black Gangster Disciples and Lavelle’s personal bodyguard, testified that Lavelle wanted him and Brian Eskridge to participate in killing a guard, and ordered Eskridge to be beaten because he refused to take part.¹⁶⁶ Finally, a third member of the BGD, Wayne “Prince” Flannigan, states under oath:

State v. Were I, *supra* note 57 (“I left out of L2 and went back to the L1 cell block.”); Transcript of Testimony of Anthony Lavelle at 3864, *State v. Skatzes*, *supra* note 82 (“I went back to the cell block, L-1.”).

¹⁶² Transcript of Testimony of Anthony Lavelle at 2971, 3304, *State v. Robb*, *supra* note 65.

¹⁶³ Transcript of Testimony of Brian Eskridge at 2044–45, *State v. Were II*, *supra* note 64.

¹⁶⁴ *Id.* at 2046–48; Affidavit of Brian Eskridge ¶¶ 9–10, Second Petition for Post-Conviction Review, Exhibit 9, *State v. Sanders*, No. B-953105 (Ohio C.P. Hamilton County Jan. 15, 2002).

¹⁶⁵ Affidavit of Brian Eskridge ¶ 10, Second Petition for Post-Conviction Review, Exhibit 9, *State v. Sanders*, *supra* note 164.

¹⁶⁶ Transcript of Testimony of Aaron Jefferson at 2070–72, *State v. Were II*, *supra* note 64; Affidavit of Aaron Jefferson ¶ 7, Second Petition for Post-Conviction Review, Exhibit

(continued)

Anthony Lavelle was the first person I heard suggest killing a guard. After the DRC rep made her statement about not taking the inmates' threats seriously, Lavelle said that if we didn't send them a CO, the authorities wouldn't think we were serious. . . .

Inmate Brian Eskridge ("Sauce") wanted to leave the Black Gangster Disciples during the riot. . . . Lavelle gave him a "violation" and I participated in the assault on Sauce. . . . I believe that Lavelle wanted Sauce to kill a guard and Sauce didn't want to do it. . . .

. . . .

I heard Lavelle tell Aaron Jefferson (AJ), "I've got some business for you to take care of." From my experience in prison and with Lavelle and the BGD, I knew what Lavelle meant—he told AJ to kill a guard.¹⁶⁷

The next morning, April 15, a prisoner named Sean Davis who slept in L-1 heard Lavelle talking with Stacey Gordon, who was "chief of security of the Muslims"¹⁶⁸ Davis heard Lavelle tell Gordon that "he was going to take care of that business."¹⁶⁹ It seemed to Davis that Lavelle "had to come get permission from Stacey Gordon."¹⁷⁰ Gordon responded, "[Y]ou go ahead, take care of it . . . I will come clean it up afterward."¹⁷¹

According to senior Muslim James Bell a.k.a. Abdul-Muhaymin Nuruddin, at the meeting of group representatives between 8 and 9 A.M. that morning there was conflict.

It was clearly understood at the end of the April 15 meeting that there was to be another meeting, later that day, before a guard would be killed. No final decision

11, *State v. Sanders*, *supra* note 164 ("I was one of the BGD who beat up Brian Eskridge. Lavelle ordered that Eskridge be beaten because he refused to participate in killing a guard.").

¹⁶⁷ Affidavit of Wayne P. Flannigan ¶¶ 7–8, 10, Second Petition for Post-Conviction Review, Exhibit 10, *State v. Sanders*, *supra* note 164.

¹⁶⁸ Transcript of Testimony of Sean Davis at 1644–45, *State v. Were I*, *supra* note 57.

¹⁶⁹ *Id.* at 1644.

¹⁷⁰ *Id.* at 1645.

¹⁷¹ *Id.* at 1644.

about killing a guard had been made when the meeting ended. It depended on whether our demands were met.

Lavelle was mad. He said the Muslims and the Aryan Brothers were cowards because they did not want to kill a guard. Lavelle said: “Come on, do it now.” He and other BGD members left the meeting angry. They were the “hardliners.”¹⁷²

Prisoner Willie Johnson testified that around 9 A.M. on April 15 he was in L-1 and heard Lavelle say,

I told George [Skatzes] to tell them to turn on the water and electricity by 10:00, or I’m going to send one of these honkies up out of here. And he said, the Muslims, they playing peacekeepers and they think that we ain’t serious.¹⁷³

Lavelle then told BGD member Johnny Long to “put on your mask” and Lavelle, Long, and a second man who already had his mask on, left the pod. Lavelle was carrying a weight bar.¹⁷⁴

Witnesses who were in the L block hallway that morning described under oath how at about the time that Officer Vallandingham was strangled, Lavelle entered L-6 with two masked companions. Prisoner Eddie Moss testified that on the morning of April 15 he saw Anthony Lavelle, carrying a pipe and accompanied by two masked men, knock on the L-6 door and go into the pod.¹⁷⁵ Prisoner Tyree Parker testified that at 10:00 or 10:05 A.M. he met Lavelle and two other prisoners “masked up from head to toe” coming out of L-6.¹⁷⁶ A third prisoner, Sterling “Death Row” Barnes, similarly testified that on the morning of April 15 he saw

¹⁷² Affidavit of James Bell, n.k.a. Abdul Muhaymin Nuruddin ¶¶ 9, 11–12 (Aug. 8, 2007) Exhibit HHHHH, attached to Notice of Filing of Supplemental Exhibit, in James Were, n.k.a. Namir Abdul Mateen’s Memorandum Contra to the State’s Motion to Dismiss [Second Amended Post-Conviction Petition], *State v. Were II*, No. B-958499 (Ohio C.P. Hamilton County Aug. 13, 2007).

¹⁷³ Transcript of Testimony of Willie Johnson at 4651, *State v. Robb*, *supra* note 65.

¹⁷⁴ *Id.* at 4651–52; Transcript at 1763–64, *State v. Were I*, *supra* note 57.

¹⁷⁵ Transcript of Testimony of Eddie Moss at 4503–05, *State v. Robb*, *supra* note 65; Transcript at 1808–09, *State v. Were I*, *supra* note 57.

¹⁷⁶ Transcript of Testimony of Tyree Parker at 1686–88, *State v. Were I*, *supra* note 57.

Lavelle and two masked men come from the direction of L-1, go into L-6, and return in the direction of L-1.¹⁷⁷

As to what happened inside L-6, prisoner Tony Taylor, who had been locked in a cell in L-6 for his own safety, told the authorities in July 1993 that he had seen Lavelle along with Stacey Gordon go to the upper range of L-6 and escort Officer Vallandingham to his death in the shower on the bottom range.¹⁷⁸

When the three members of the BGD returned to L-1, according to Willie Johnson, Lavelle “was like in a frenzy and he was slamming the pipe down, saying, ‘see how they like me now, see if they think we bullshitting now. The Muslims just playing games, they ain’t serious.’”¹⁷⁹

The Muslims for their part were dismayed by Lavelle’s action. James Bell (Nuruddin) recalls:

I thought that the BGDs would not follow through on their talk about killing a hostage. But I was sufficiently worried that I [tried] to find other senior Muslims like Hasan and Cummings.

At that time Namir [Were] was security on the door of L-6, where most of the hostages were being held.

I . . . eventually found Hasan and Cummings in the gym. We went to L-6. Namir was standing outside the door. He seemed dazed, shell-shocked.

Namir asked Hasan and Cummings: “Did you authorize Lavelle to kill a guard?” Hasan said: “No.”¹⁸⁰

Thereupon, eyewitnesses testified, Were went to L-1 and knocked Lavelle to the floor because of what he had done. According to Willie Johnson, Were exclaimed: “Lavelle you going to be held responsibility [*sic*] for what you caused and you’re not strong enough to make a decision like

¹⁷⁷ Transcript of Testimony of Sterling Barnes, *id.* at 1865–68.

¹⁷⁸ Ohio State Highway Patrol Interview 871, Tape A-128 (A,B,C), July 20, 1993, at 27–29.

¹⁷⁹ Transcript of Testimony of Willie Johnson at 1764, *State v. Were I*, *supra* note 57; Transcript at 4653, *State v. Robb*, *supra* note 65.

¹⁸⁰ Affidavit of James Bell n.k.a. Abdul-Muhaymin Nuruddin ¶¶ 15–18, *State v. Were II*, *supra* note 172.

that.”¹⁸¹ Eddie Moss remembered Were’s words as: “[Y]ou gonna be responsible for that call you just made, man. You didn’t have no business making that call, man.”¹⁸²

Lastly, two older prisoners report that Lavelle confessed the murder to them. Leroy Elmore, a senior Muslim also known as “Taymullah,” states that on the morning of April 15 he awoke late and began to perform his normal job during the occupation, pushing a cart with food and water to each pod.¹⁸³ When Elmore reached L-1, Lavelle approached him and said he needed to talk.¹⁸⁴ Willie Johnson, Eddie Moss and Johnny Long were nearby.¹⁸⁵ Lavelle seemed frightened. He said that Were had knocked him down.¹⁸⁶

I said, “What did you do?” Mr. Lavelle answered, “I had the guard killed.”

I said, “Why?” Mr. Lavelle stated that when the female on the radio took the inmates’ threats lightly, he felt compelled to teach her a lesson.¹⁸⁷

The late Roy “Buster” Donald, an unaffiliated African American, had seen Lavelle and two others enter and leave L-6.¹⁸⁸ Later that day, Lavelle came to the pod where Donald slept looking for clothes. “I asked him what was going on. Lavelle told me that Gordon had given him the okay to kill a guard and that he took care of his business.”¹⁸⁹

Lavelle’s trial testimony was contrary to what Trooper Shepard called the “parade” of witnesses who had seen Lavelle recruit a death squad, enter L-6 at the time of Officer Vallandingham’s death, and admit the killing afterwards. When a recanting informant named Kenneth Law informed prosecutors that he had seen Anthony Lavelle in L-6 on the morning of April 15, and that Lavelle had killed Officer Vallandingham, prosecutors

¹⁸¹ Transcript of Testimony of Willie Johnson at 1783, *State v. Were I*, *supra* note 57; Transcript at 4661–62, *State v. Robb*, *supra* note 65.

¹⁸² Transcript of Testimony of Eddie Moss at 4525–27, *State v. Robb*, *supra* note 65 .

¹⁸³ Declaration of Leroy Elmore ¶¶ 1, 13–15 (Aug. 26, 2002) (on file with author).

¹⁸⁴ *Id.* ¶ 16.

¹⁸⁵ *Id.* ¶ 18.

¹⁸⁶ *Id.* ¶ 19.

¹⁸⁷ *Id.* ¶¶ 20–21.

¹⁸⁸ Affidavit of Roy Donald ¶ 10, Second Petition for Post-Conviction Review, Exhibit 16, *State v. Sanders*, *supra* note 164.

¹⁸⁹ *Id.* ¶ 14.

told him that his “story would have to change, because Lavelle was a State witness.”¹⁹⁰

4. Conclusion

It strains credulity to suppose that the prosecution believed Anthony Lavelle’s trial testimony to the effect that, when the April 15 meeting of gang leaders ended about 9 A.M., he returned to pod L-1 and “laid down” for the next couple of hours. That story, unsupported by any other testimony, contradicted Lavelle’s previous confession to Officer Shepard, and the statements, under oath, of more than a dozen fellow prisoners. By knowingly acquiescing in Lavelle’s false testimony that he had not been in L-6 when Officer Vallandingham was murdered, the Lucasville prosecutors egregiously violated *Napue v. Illinois*.

IV. MANUFACTURING PERJURY: RODGER SNODGRASS

Next to Anthony Lavelle, the most important prosecution witness in the Lucasville cases was Samuel Rodger [*sic*] Snodgrass. Snodgrass testified for the State in six major cases: against Robb, Were (twice), Skatzes, Hasan, and Jefferson.

At the time of the April 1993 disturbance, Rodger Snodgrass was 23 years old. He was a member of the Aryan Brotherhood. A swastika was tattooed on his left bicep.¹⁹¹

Snodgrass admitted that he took part in the murder of prisoners Earl Elder and David Sommers, as well as attempting to kill prisoner Emanuel “Buddy” Newell.¹⁹² After deciding to become an informant in the summer of 1994, Snodgrass plea bargained a sentence of 5 to 25 years for the involuntary manslaughter of Elder, to run concurrently with the 5 to 25 years he was already serving for aggravated robbery.¹⁹³ He was never

¹⁹⁰ Affidavit of Kenneth Law ¶ 11 (Sept. 19, 2003), Petition for Post-Conviction Review, Exhibit 27, *State v. Skatzes*, *supra* note 94. *See infra*, Part V.

¹⁹¹ LYND, LUCASVILLE, *supra* note 58, at 99 (photograph taken when prisoners in L block surrendered on April 21, 1993).

¹⁹² Transcript of Testimony of Rodger Snodgrass at 4391–96 (stabbed Elder), 4488–90 (tried to kill Newell), 4595 (involved in Sommers killing), *State v. Skatzes*, *supra* note 82; Affidavit of Emanuel “Buddy” Newell ¶ 10 (Nov. 8, 2006), Defendant-Petitioner’s Notice of New Evidence and Supplemental Authority Supporting Post-Conviction Petition, Exhibit 2, *State v. Skatzes*, *supra* note 94.

¹⁹³ Transcript of Testimony of Rodger Snodgrass at 4595, *State v. Skatzes*, *supra* note 82 (charged in connection with murder of Elder); *Inmate’s Lies Sent 4 Others to Death Row, Convict Now Swears*, COLUMBUS DISPATCH, Dec. 30, 2006, at B4 (pled guilty to
(continued)

charged in connection with Sommers' death or for the attempted murder of Newell.¹⁹⁴

Snodgrass was paroled in September 2006.¹⁹⁵ During the weeks before his release, in a series of conversations at the Toledo Correctional Institution with a man he had tried to kill, Snodgrass (according to Emanuel Newell) confessed that "I lied on George [Skatzes]. It was his life or mine."¹⁹⁶ Skatzes had nothing to do with killing Elder, Snodgrass told Newell, and "it was he [Snodgrass] who smashed David Sommers on the head with a baseball bat."¹⁹⁷

If this affidavit is to be believed, Snodgrass also reported a series of glaring violations of *Napue*.

He said that when he was denied Parole a few years ago, he warned Prosecutor Piepmeier and Judge [formerly Lucasville prosecutor] Hogan both that unless he got a Parole, he would take back his statements and open up a can of worms: that he would tell the lies that the Prosecutors told him to tell on George Skatzes. When the Parole Board gave him more time, Snodgrass told the

involuntary manslaughter for murder of another inmate); LYND, LUCASVILLE, *supra* note 58, App. 5.

¹⁹⁴ Transcript of Testimony of Rodger Snodgrass at 4488–90 (tried to kill Newell), 4595 (never charged in connection with murder of Sommers), *State v. Skatzes*, *supra* note 82; *see also* Affidavit of Emanuel "Buddy" Newell ¶¶ 12, 16 (Nov. 8, 2006), Defendant-Petitioner's Notice of New Evidence and Supplemental Authority Supporting Post-Conviction Petition, Exhibit 2, *State v. Skatzes*, *supra* note 94.

¹⁹⁵ Affidavit of Emanuel "Buddy" Newell ¶ 8 (Nov. 8, 2006), Defendant-Petitioner's Notice of New Evidence and Supplemental Authority Supporting Post-Conviction Petition, Exhibit 2, *State v. Skatzes*, *supra* note 94; John Caniglia, *Riot Testimony Called a Lie*, CLEVELAND PLAIN DEALER, Dec. 29, 2006, at B1.

¹⁹⁶ Affidavit of Emanuel "Buddy" Newell ¶ 10 (Nov. 8, 2006), Defendant-Petitioner's Notice of New Evidence and Supplemental Authority Supporting Post-Conviction Petition, Exhibit 2, *State v. Skatzes*, *supra* note 94.

¹⁹⁷ *Id.* ¶¶ 10, 15. Newell's affidavit was accompanied by three exhibits: a calendar indicating seventeen (17) days in August 2006 on which Newell and Snodgrass had talked, and a letter and photograph Snodgrass sent to Newell. Snodgrass's apparent recantation was first reported by John Caniglia in the CLEVELAND PLAIN DEALER and then by the Associated Press in a story reprinted, *inter alia*, in the COLUMBUS DISPATCH, MARION STAR, AND YOUNGSTOWN VINDICATOR. Caniglia, *supra* note 195; *Inmate's Lies Sent 4 Others to Death Row, Convict Now Swears*, *supra* note 193; *Statement Casts Doubt on Inmate's Testimony on Riot*, YOUNGSTOWN VINDICATOR, Dec. 30, 2006, at B4.

Prosecutors, “If you don’t make the Parole Board let me go, I’ll bring out the truth.”

. . . Snodgrass said that he lied when he testified that George [Skatzes] told him in the gym, “Come with me to L-6.” Snodgrass said the Prosecutors and State Policeman Howard Hudson told him that he had to say that or they would put him on Death Row.

. . . .

According to Snodgrass, Prosecutor Piepmeier told Snodgrass they had to indict him for Elder to make it look like he took responsibility for what he did in the riot and that would make him look like a better witness.¹⁹⁸

Independently of Rodger Snodgrass’ 2006 recantation, his trial testimony in 1995–1996 flagrantly violated *Napue*.

For example, in trying Hasan (Sanders) prosecutors sought to show that Hasan was not only the principal organizer of the rebellion as a whole, but the prisoner most responsible for Officer Vallandingham’s murder on April 15. Through Snodgrass the State tried to demonstrate that Hasan led the meeting on the morning of April 15 that supposedly *decided to kill* an officer. (As will be discussed below, through another informant named Kenneth Law prosecutors presented Hasan to his jury as the person who *actually ordered the killing*.)

When Snodgrass testified against Hasan at the latter’s trial early in 1996, he was asked about Hasan’s role in the meetings of gang representatives (Muslims, Aryan Brothers, Black Gangster Disciples) that took place during the disturbance.

Q. Was Hasan present at every meeting?

A. Yes, he was.

Q. Was he the lead chair or the second chair in these meetings?

A. He was the lead.¹⁹⁹

¹⁹⁸ *Id.* ¶¶ 9–10, 16.

¹⁹⁹ Transcript of Testimony of Rodger Snodgrass at 2513, *State v. Sanders*, *supra* note 65.

On cross-examination, Snodgrass reinforced his testimony about Hasan's leading role in the meeting that supposedly decided to kill a guard.

Q. Who was at the meeting when the

A. Jason Robb, Hasan, George Skatzes and Lavelle, and Lavelle's second in command, and James Were.

Q. Who said: Okay. Let's vote. Or was that said?

A. Hasan said that.

Q. Hasan said: Let's vote?

A. Yes, he did.

Q. All in favor?

A. He said, you know: What do you think? We'll just pass it around, or something to that effect. And it was voted on.²⁰⁰

But the prosecution knew that on April 15, Hasan neither chaired a morning meeting nor called for a vote. At Were's first trial in September and October 1995, lead investigator Hudson was asked if he had heard Hasan's voice on Tunnel Tape 61, the tape of the so-called vote meeting that purportedly decided to kill a guard.

Q. [Did you hear] any voice that you have identified as belonging to that of Hasan, the Muslim faction leader, the imam?

A. No, sir, I don't believe he appears.²⁰¹

Further, Hasan did not chair the April 15 meeting: the prosecution's own transcript showed that Stanley Cummings was the chair.²⁰² And years later, at Were's second trial, Hudson was again asked to identify the prisoners whose voices could be heard on Tunnel Tape 61. He named: Were, Anthony Lavelle, Jason Robb, Stanley Cummings, Rodger

²⁰⁰ *Id.* at 2651.

²⁰¹ Transcript of Testimony of Howard Hudson at 1037, *State v. Were I*, *supra* note 57. On cross-examination Hudson again affirmed that "Carlos Sanders' voice does not appear on tunnel tape 61." *Id.* at 1046.

²⁰² See the transcript in LYND, LUCASVILLE, *supra* note 58, App. 1.

Snodgrass, George Skatzes, Cecil Allen, and Johnny Roper. “I believe that’s everybody that is on Tunnel Tape Number 61,” Hudson said.²⁰³

The State of Ohio was thus well aware, both at the time Hasan was tried and many years afterwards, that Hasan’s role (if any) at the meeting which allegedly decided to kill Officer Vallandingham was so minimal that his voice could not be heard on the tape. Yet the prosecution did nothing to correct the testimony of Rodger Snodgrass that Hasan chaired the meeting and called for the vote to kill a guard. This was a significant violation of *Napue v. Illinois*.

V. MANUFACTURING PERJURY: KENNETH LAW

In addition to what juries were told about a meeting that supposedly decided to kill an officer, in the trials of Were and Hasan the prosecution sought to show that these two Muslim leaders were responsible for Officer Vallandingham’s hands-on murder. This supposed scenario was based primarily on the testimony of a single prisoner informant, Kenneth Law, *who has since recanted his testimony in two extremely detailed and persuasive affidavits*.

A. Kenneth Law Makes Up a Story

After the surrender, Law and two other prisoners decided to invent a story about Vallandingham’s death and tell it to the prosecutors.

Before my first interview with the Ohio State Patrol myself, Sherman Sims and another inmate [Stacey Gordon], talked regularly about regaining our freedom. We knew that information in the Vallandingham murder was the key to the door²⁰⁴

The story that Law, Sims, and Gordon concocted pinned the murder on two men that they knew the State wished to convict, Hasan and Were, and two other prisoners who (as Law explained it to the author) were isolates who

²⁰³ Transcript of Testimony of Howard Hudson at 1370–73, *State v. Were II*, *supra* note 64. Hudson said he had listened to the tape several dozen times. *Id.* at 1370. He went on to explain how he had come to know the voice of each of the speakers he identified. *Id.* at 1371–73.

²⁰⁴ Affidavit of Kenneth Law para. 3 (Mar. 9, 2000), Brief in Support of Petitioner Siddique Abdullah Hasan’s Objections to Magistrate’s Recommendations by Amicus American Civil Liberties Union of Ohio Foundation, Inc., Exhibit 13, *Hasan v. Ishee*, No. 1:03-cv-288, 2006 WL 3253081 (S.D. Ohio Aug. 14, 2006) [hereinafter *Hasan v. Ishee*].

had no backing from other prisoners, Alvin Jones a.k.a. Mosi Paki and Darnell Alexander.²⁰⁵

Law, Sims, and Gordon alleged that Officer Robert Vallandingham was murdered a little after 10 A.M. on the morning of Thursday, April 15.²⁰⁶ According to their story, prisoners Alvin Jones and Darnell Alexander brought hostage Officer Vallandingham, bound and blindfolded, to a downstairs shower in L-6.²⁰⁷ Hasan then told co-defendant James Were that if he didn't receive a phone call "by a few minutes after ten," Were was to "take care of his business." Hasan then left L-6.²⁰⁸ "About two, three minutes" later, Were instructed Jones and Alexander to proceed.²⁰⁹ Jones and Alexander strangled Vallandingham, and then rocked back and forth on a weight bar placed on Officer Vallandingham's throat.²¹⁰

²⁰⁵ *See id.* (Law, Sims, and an unnamed inmate made up a story, knowing information about Officer Vallandingham's murder was "the key to the door").

²⁰⁶ Interview 1245 Tape A-189 by Troopers R. T. McGough and J. W. Fleming with Kenneth Law, in Mansfield Highway Patrol Post, Mansfield, Ohio (Apr. 27, 1994). Trooper McGough was the lead investigator of the Vallandingham homicide. Transcript of Testimony of Randy McGough at 7, *State v. Law*, *supra* note 43.

²⁰⁷ Interview 1245 Tape A-189 by Troopers R. T. McGough and J. W. Fleming with Kenneth Law, in Mansfield Highway Patrol Post, Mansfield, Ohio (Apr. 27, 1994). *See also* Transcript of Testimony of Kenneth Law at 2349–50, *State v. Sanders*, *supra* note 65; Transcript of Testimony of Kenneth Law at 1487, *State v. Were I*, *supra* note 57.

²⁰⁸ Interview 1245 Tape A-189 by Troopers R. T. McGough and J. W. Fleming with Kenneth Law, in Mansfield Highway Patrol Post, Mansfield, Ohio (Apr. 27, 1994).

²⁰⁹ *Id.*

²¹⁰ Transcript of Opening Statement of Prosecutor Breyer at 951, *State v. Law*, *supra* note 43; Transcript of Testimony of Kenneth Law at 2354, 2425, *State v. Sanders*, *supra* note 65. The version of this story Law recounted from the witness stand followed the 1994 statement closely except with respect to time. Law told the officers that "Inmate Sanders stated to inmate Were that if he didn't receive a phone call *by a few minutes after ten*" Were was to "take care of his business." Interview 1245 at 2 (emphasis added). In the Were trial, Law said that Hasan told Were

that if he didn't hear from him by 10:30—at this time it was about five minutes after 10:00, something like that, he said, if you don't hear from me *by 10:30—this is his exact words*—he said, if I don't get a call by 10:30, and you don't hear something by then, to take care of your business.

Transcript of Testimony of Kenneth Law at 1490, *State v. Were I*, *supra* note 57 (emphasis added). In the later trial, Law testified, "I hear Hasan tell Were that if he didn't get back

(continued)

After jointly creating their false account of Officer Vallandingham's death, Sims and Law experienced what Law describes in his 2000 affidavit as a "falling out."²¹¹ When Sims was indicted for assault on April 11, 1994, he immediately kited the authorities that he wanted to talk with members of the Ohio State Patrol investigating team.²¹² An interview was arranged for April 14.²¹³ Therein Sims changed his telling of the story in one important detail: he said that it was not Jones and Alexander who murdered the officer, but Jones *and* Law.²¹⁴ After the interview, instead of returning Sims to Mansfield where most of the other participants in the SOCF disturbance were housed, ODRC, at the request of the Ohio State Patrol, took Sims directly to the Oakwood Correctional Institution.²¹⁵ There Sims joined other informants at the "Snitch Academy" previously described.

The next day, April 15, Law, correctly inferring that Sims had turned informant and told a story threatening to Law, asked to see the Highway Patrol.²¹⁶ What happened next is recounted by Law's attorneys:

On April 27, 1994, the Highway Patrol, without prior notice to Mr. Law, had him surreptitiously removed from the Mansfield prison and brought to the Mansfield Highway Patrol station. When Mr. Law left the prison, he was told he was being taken to a doctor's appointment. Trooper McGough and Trooper Fleming met Kenneth Law at the Mansfield Highway Patrol station. . . . [Mr. Law] was told he was to be interrogated by the Highway Patrol

with him *in a half hour* to take care of his business." Transcript of Testimony of Kenneth Law at 2351, *State v. Sanders*, *supra* note 65 (emphasis added).

²¹¹ Affidavit of Kenneth Law para. 4, *Hasan v. Ishee*, *supra* note 204. According to Trooper McGough, who repeatedly interviewed both Sims and Law, Law believed that "Sims is accusing Law because after the killing [of Officer Vallandingham] Were made Sims carry the body out when Law refused." Transcript of Testimony of Randy McGough at 1349, *State v. Law*, *supra* note 43.

²¹² Transcript of Testimony of Randy McGough at 1313–14, *State v. Law*, *supra* note 43.

²¹³ *Id.* at 1316–18.

²¹⁴ Transcript of Opening Statement of Defense Counsel Knight, *id.* at 984 ("Sims names Jones and Law. Law named Jones and Alexander.").

²¹⁵ Transcript of Testimony of Randy McGough, *id.* at 1318–19.

²¹⁶ Transcript of Testimony of Randy McGough, *id.* at 1320–21. *See also id.* at 39–40 (the State Highway Patrol's first conversation with Law took place after Sims told the Patrol that Law took part in Officer Vallandingham's murder).

regarding the events of the riot and C.O. Vallandingham's death.²¹⁷

The interrogation began between 9 and 10 A.M.²¹⁸ There is conflicting testimony as to whether Law was given Miranda warnings.²¹⁹ At 1:22 P.M., approximately four hours later, the officers turned on the tape recorder.²²⁰

On the tape, Law recounted the original story he, Sims and Gordon had fabricated. Thereafter the authorities continued to meet and talk with both Law and Sims.²²¹ As Law tells it:

After the riot, prosecutors, including Brower [Breyer], and troopers, including McGough, placed tremendous pressure on me, saying that they would convict and execute me for killing Vallandingham, which I had nothing to do with, unless I said that Hasan had commanded the killing. At one point, I revealed to them that Anthony Lavelle had killed Vallandingham. The

²¹⁷ Memorandum in Support of Motion to Suppress at 4, *State v. Law*, *supra* note 43.

²¹⁸ *Id.* See also Transcript of Testimony of Randy McGough at 31, *State v. Law*, *supra* note 43.

²¹⁹ Trooper McGough testified that after the tape recorder was turned on he stated that he had given Law his rights and Law "acknowledged that I did." Transcript of Testimony of Randy McGough at 15, *State v. Law*, *supra* note 43. However, on cross examination McGough conceded that Law was probably not Mirandized at the beginning of the April 27 conversation and that the tape recorder was not playing when McGough gave Law his Miranda warnings, so there was no written record of it. *Id.* at 32, 36.

²²⁰ Interview 1245 Tape A-189 by Troopers R. T. McGough and J. W. Fleming with Kenneth Law, in Mansfield Highway Patrol Post, Mansfield, Ohio (Apr. 27, 1994) at 1; Memorandum in Support of Motion to Suppress at 3-7, *State v. Law*, *supra* note 43. The ABA emphatically recommends that interrogations be videotaped or, if necessary, audiotaped, *in their entirety*. See ABA, OHIO DEATH PENALTY ASSESSMENT REPORT, *supra* note 52 at vi (Recommendation 2), 78 ("Complete recording is on the increase in this country and around the world."), 94 ("[N]ineteen law enforcement agencies in Ohio regularly record the entirety of all custodial interrogations.").

²²¹ Transcript of Opening Statement of Prosecutor Breyer at 947-53, *State v. Law*, *supra* note 43. Law was also polygraphed by Trooper Shepard on May 3, 1994. Transcript of Testimony of Randy McGough, *id.* at 17-20. Sgt. Hudson testified that before Sims took the witness stand against Law he had talked with Sims "approximately a dozen" times. Transcript of Testimony of Howard Hudson, *id.* at 1077. In addition, Sims testified that he talked with Trooper McGough "on several occasions," twice "at great length." Transcript of Testimony of Sherman Sims, *id.* at 1221-22.

prosecutor told me that my story would have to change, because Lavelle was a State witness.

. . . .

. . . I refused to cooperate any further.²²²

Accepting as true the false scenario that both Law and Sims presented, but choosing to believe Sims rather than Law as to who the hands-on killers were, prosecutors indicted Law for the kidnapping and aggravated murder of Officer Vallandingham.

In opening and closing statements at Law's trial, prosecutors told the jury that Law was a hands-on murderer of Officer Vallandingham.

[S]hortly after 10:00 in the morning Hasan, Carlos Sanders, the leader of the Muslims and the leader of this riot, told a group of Muslims in L6, and it was a group which included this gentleman, Kenneth Law, if you do not have a phone call from me, or if we do not get a phone call in the next ten minutes, then you, Kenneth Law, you, James Were, you, Alvin Jones, take care of business.

Within minutes Carlos Sanders, Hasan, left the block, and within minutes after that *James Were turned to Kenneth Law and Alvin Jones and told them to proceed. And Kenneth Law and Alvin Jones took that cord and wrapped it around the neck with one man on one end, and one on the other, and they yanked on that cord, and they put a bar bell over his neck until he was dead.*²²³

The prosecutor reiterated the idea in the closing argument, stating, "Kenneth Law is here before you today because the State of Ohio believed it had sufficient evidence to prove to you beyond a reasonable doubt that he was the hands-on killer of Robert Vallandingham on April 15, 1993."²²⁴

²²² Affidavit of Kenneth Law ¶¶ 11, 13, Petition for Post-Conviction Review, Exhibit 27, *State v. Skatzes*, *supra* note 94.

²²³ Transcript of Prosecutor's Opening Statement at 937, *State v. Law*, *supra* note 43 (emphasis added).

²²⁴ Transcript of Prosecutor's Closing Statement, *id.* at 1521.

In August 1995, the jury convicted Law of kidnapping but hung on the more serious murder charge.²²⁵

B. Prosecutors Compel Law to Repeat His Fabricated Story

In his second affidavit in 2003, Law recounted what happened after the jury hung on the murder charge.

I went to trial for the Vallandingham murder and the jury hung. The prosecutors increased the pressure on me, and even my own lawyer pressed me to cooperate and avoid a second trial. They made it clear that I would die for something I had not done unless I said what they wanted me to say. I eventually broke, and gave false testimony.

To this day, I regret having lied in my statement and on the stand. I do not want to go to the grave with this on my conscience. I am willing and able to testify to the foregoing, if called.²²⁶

The testimony the authorities forced Law to give against Were and Hasan in 1995–1996 was exactly the same story that the authorities had determined to be false a year and a half earlier, when they put Law on trial for his life. The prosecutor told Hasan’s jury that they should not doubt Law’s testimony because Law was simply repeating the statement he had made to the authorities in April 1994.

Q. [I]n return for you pleading guilty to conspiracy to commit murder and receiving a sentence of 7 to 25 concurrent, what were you supposed to do for the State of Ohio?

A. Testify [against] three of the . . . alleged co-defendants in my case.

Q. Okay. Which co-defendants were they?

A. Siddique Hasan, James Were . . . and Alvin Jones.

Q. And you testified in the case of State of Ohio versus James Were?

²²⁵ State v. Law, No. C-950651, 1996 WL 539792, at *1 (Ohio Ct. App. Sept. 25, 1996).

²²⁶ Affidavit of Kenneth Law ¶¶ 13–14 (Sept. 19, 2003), Petition for Post-Conviction Review, Exhibit 27, *State v. Skatzes*, *supra* note 94.

A. That's correct.

Q. And you're here today to testify in the case of State of Ohio versus Hasan, is that correct?

A. Yes.

Q. Now was there an agreement in regards to what you were supposed to testify to?

A. The truth of the statement that I originally made.

Q. Okay. You made a statement to the State Patrol at some time prior, is that correct?

A. That is correct.

Q. And you're supposed to tell us basically what you told us in that statement, is that correct?

A. That's the truth.

Q. And what's to happen if you don't testify consistently to the statements that you've already made to the State Patrol?

A. The original charge can be reinstated with the death specifications.²²⁷

What the prosecutor failed to tell the jury is that the State considered this statement to be false in one critical respect: prosecutors had tried Law rather than Alexander as the second hands-on murderer, along with Jones.

C. Kenneth Law Recants

Law recanted his testimony in affidavits of March 9, 2000 and September 19, 2003. He stated in part:

I, Kenneth Law, am making this confession voluntarily to clear my conscience of the injustice I was forced to play a part in because of fear for my life being sacrificed for a crime I did not do nor had knowledge of.

²²⁷ Transcript of Testimony of Kenneth Law at 2301-02, *State v. Sanders*, *supra* note 65 (emphasis added).

This Affidavit is to expose the scandal executed by the Ohio State Patrol and the prosecutors involved in the S.O.C.F. riot investigation.²²⁸

Law is one of the many who states that hostage Officer Vallandingham was murdered by Anthony Lavelle. According to Law:

During the Lucasville riot of 1993, I slept in the cell belonging to James Were in block L-1. Although I was a mid-level Muslim, L-1 was the block that Anthony Lavelle and his Black Gangster Disciples controlled during the riot, and I overheard many of their conversations.

On the morning of April 15, 1993, I was in L-1 and heard Anthony Lavelle, Aaron Jefferson, and Tim Williams talking about killing a guard. Lavelle left L-1, along with two others whom I recognized to be Gangster Disciples, despite their masks.

A few minutes later, I also left L-1 and went toward L-6. As I approached the door of L-6, the two masked Disciples came out. I entered L-6 and saw Lavelle inside. I looked into the shower and saw Officer Vallandingham dead. It was very clear to me what had just happened: Lavelle and his associates had killed the guard.²²⁹

D. Further Evidence that Law's Testimony Was False

Law's testimony at the Were and Hasan trials must be rejected not only because he himself has recanted it, but also because, first, it is contradicted by the medical examiner's testimony, and second, the State's chief investigator stated shortly before Hasan's trial that it continued to be the State's position that Law was one of the two men who strangled the hostage officer.

1. Was There a Weight Bar?

Law testified in *State v. Sanders* that he saw prisoners Alvin Jones and Darnell Alexander place

²²⁸ Affidavit of Kenneth Law para. 1–2, *Hasan v. Ishee*, *supra* note 204.

²²⁹ Affidavit of Kenneth Law ¶¶ 2–4 (Sept. 19, 2003), Petition for Post-Conviction Review, Exhibit 27, *State v. Skatzes*, *supra* note 94.

a bar, a weight bar over [Officer Vallandingham's] neck and both of them stood on both ends of it. Jones held onto the bars to balance himself on the bar, and Alexander was in the doorway and was holding onto the doorway standing on it, pressing down on the officer's neck.²³⁰

Law elaborated on cross examination.

Q. [Now] you said that they stood on that bar to sort of press it down on the front of his throat?

A. Yes, something like a seesaw manner, both of them pressing down and standing on him.²³¹

The autopsy on Officer Vallandingham was performed by Dr. Patrick Fardal, chief forensic pathologist and deputy coroner for Franklin County, Ohio.²³² Dr. Fardal testified that the cause of death was ligature strangulation, that the larynx had not been crushed, that *there was no evidence that a bar had been used, and that he could say with a reasonable degree of scientific certainty that there had been no rocking back and forth on Officer Vallandingham's neck by two men standing on a weight bar.*²³³ The medical examiner's evidence contradicted Law's testimony about the use of a weight bar. But Law's lurid testimony no doubt strongly influenced the jury.

²³⁰ Transcript of Testimony of Kenneth Law at 2354, *State v. Sanders*, *supra* note 65.

²³¹ *Id.* at 2425.

²³² *State v. Were*, 890 N.E.2d 263, 273 (Ohio 2008); *see also State v. Murphy*, 605 N.E.2d 884, 893 (Ohio 1992).

²³³ Transcript of Testimony of Dr. Patrick Fardal at 4166–67, 4174–76, *State v. Sanders*, *supra* note 65. The prosecution knew that Law's testimony about a weight bar would be contradicted by Dr. Fardal. Dr. Fardal had previously testified, on direct examination in other cases, that Officer Vallandingham's injuries were not consistent with a belief that an object such as a weight bar had been placed on the officer's neck by men on either side pushing or standing on the bar. Transcript at 4433 (“[T]here was no injury to the voice box or the trachea.”), 4438 (“[T]here was nothing on the outside of the body that would tell me another type of object was used across the neck other than what we saw as far as the ligature goes.”), 4442 (“Mr. Vallandingham died solely and exclusively as a result of ligature strangulation.”), *State v. Robb*, *supra* note 65; Transcript at 4870–71, *State v. Skatzes*, *supra* note 82.

2. *The State Still Believes that Law Helped to Kill Officer Vallandingham*

Furthermore, Sergeant Howard Hudson, the State's chief investigator, testified in another proceeding just a few weeks before Hasan's trial that Law's story was not true. Alvin Jones, one of the two men named by Law as hands-on murderers of Officer Vallandingham, was not criminally indicted but was administratively tried by a Rules Infraction Board in January 1996.²³⁴ Sergeant Hudson testified.²³⁵ Hudson stated in part:

Law failed polygraph. *Law took himself out of the act [of murdering Officer Vallandingham] & replaced himself with inmate Darnell Alexander.*²³⁶

Hudson chose the identical words to characterize Law's testimony that Prosecutor Breyer had chosen only a few months before in telling a jury that Law was a murderer. Like Hudson, Breyer said: "he substituted another inmate for himself."²³⁷ The facts as seen by prosecutors had not changed. But those facts, which in summer 1995 called for Law to be sentenced to death, in winter 1995–1996 justified calling Law as the key witness against Were and Sanders. In both those trials, Law was presented to the jury as a crucial, truthful witness for the prosecution.

The prosecution presented Law as a witness in the subsequent *State v. Sanders* trial to testify, as he had testified against Jones at Jones' Rules Infraction Board hearing, that Jones and Alexander had killed Officer Vallandingham and that the killers rocked back and forth on a weight bar placed on Vallandingham's neck.²³⁸ In doing so, the prosecution presented evidence that it knew to be false: Law said that a weight bar was used to crush Officer Vallandingham's neck, but Dr. Fardal said there was no evidence of this. Further, the prosecution also presented evidence that it believed to be false: Law said that the murder was by Jones and Alexander

²³⁴ Testimony of Sergeant Howard Hudson at Rules Infraction Board hearing for Alvin Jones (Jan. 18, 1996), Brief in Support of Petitioner Siddique Abdullah Hasan's Objections to Magistrate's Recommendations by Amicus American Civil Liberties Union of Ohio Foundation, Inc., Exhibit 16, *Hasan v. Ishee*, *supra* note 204.

²³⁵ *Id.* (A summary of his testimony was reported by Andrea Carroll, Secretary of the Rules Infraction Board, and certified as true and accurate by Sergeant Hudson.)

²³⁶ *Id.* (emphasis added).

²³⁷ Transcript of Prosecutor's Opening Statement at 952, *State v. Law*, *supra* note 43.

²³⁸ Transcript of Testimony of Kenneth Law at 2354, 2425, *State v. Sanders*, *supra* note 65.

but the State believed the murder was by Jones and Law. The prosecutors were silent about their own disbelief in the story that they forced Law to tell the Were and Hasan decisionmakers.

Indeed, in February 2004, almost ten years after calling Law to state under oath in the trials of Were and Hasan that Officer Vallandingham was murdered by inmates Jones and Alexander, the lead Lucasville prosecutor signed a pleading asserting that it was “[i]nmates *Law and Allen*” who killed the hostage guard.²³⁹ Not only did Prosecutor Piepmeier assert—after permitting Law to testify otherwise against Were and Hasan—that his star witness was actually one of Officer Vallandingham’s killers. Prosecutor Piepmeier also now claimed that Officer Vallandingham’s murderers were Law and yet another candidate for the April 15 death squad, Cecil Allen. It would seem that after convicting four men for Officer Vallandingham’s murder, the State still did not know who actually killed him.

At the very least, complete presentation of all that the State knew or believed to be true to the Were and Hasan juries—who recommended death sentences—would have significantly damaged the credibility of the prosecution’s principal witness to the supposed involvement of the two Muslims in Officer Vallandingham’s death. This was a dramatic violation of *Napue v. Illinois*.

VI. MANUFACTURING PERJURY: ERIC GIRDY, DWAYNE BLAKELY, AND THE SINGLE FATAL BLOW STRUCK BY TWO DIFFERENT MEN

The southern Ohio public, and therefore, the Lucasville prosecutors, were primarily concerned to “bring to justice” the prisoners responsible for murdering Officer Vallandingham. Although nine prisoners and one hostage officer were murdered, only one prisoner, Keith Lamar, was sentenced to death solely for allegedly murdering other inmates.²⁴⁰ Accordingly, this presentation has focused on the key informants against Lucasville defendants charged with the officer’s murder: Lavelle, Snodgrass, and Law.

However, the five prisoners sentenced to death in Lucasville judicial proceedings represent only 10 percent of the prisoners who were found guilty or who entered into guilty pleas.²⁴¹ In addition to the five prisoners

²³⁹ Motion to Dismiss Defendant’s [Post-Conviction] Petition to Vacate at 26, *State v. Skatzes*, No. 94 CR 2890 (Ohio C.P. Montgomery County July 13, 2007) (emphasis added).

²⁴⁰ LYND, LUCASVILLE, *supra* note 58, App. 6.

²⁴¹ Wilkinson and Stickrath, *supra* note 107, at 21.

sentenced to death for aggravated murder in Lucasville judicial proceedings, forty-two more were found to be guilty or entered guilty pleas for lesser crimes such as kidnapping or assault.²⁴²

These non-capital defendants must be considered in discerning an appropriate remedy for *Napue* violations in the Lucasville cases. It is one kind of problem if a small number of high-profile defendants were convicted on the basis of perjured testimony. It is a different sort of problem if the solicitation of, and acquiescence in, perjured testimony pervaded all the Lucasville prosecutions.

A. *Eric Girdy*

Like other prisoners at Lucasville who were in L block during all or part of the April 1993 disturbance, Eric Girdy, a young African American, was questioned by troopers from the Ohio State Highway Patrol. A portion of one of these interviews is reproduced in the author's book about the uprising. These excerpts "show how the state persuaded him to talk in return for vague promises of a letter to the Parole Board, lesser charges, a lesser sentence, and protection from other prisoners."²⁴³

Eric Girdy has recanted, under oath, his statements against George Skatzes, Timothy Grinnell, Derek Cannon, and James Were. In 1998 he wrote an affidavit about Skatzes, who had been sentenced to death for the aggravated murder of two inmates, one of them named Earl Elder.

When the riot jumped off, I was celling in L-6-52.
George Skatzes celled in L-6-58. I knew him well.

I stayed in L-6 and I worked as door man, inside the
door.

. . . .

George Skatzes was nowhere around when Earl Elder
was killed.

²⁴² *Id.* See Ohio State Penitentiary, <http://www.drc.ohio.gov/Public/osp.htm> (last visited June 26, 2008). Non-death sentenced Lucasville defendants at the Ohio State Penitentiary include Thomas Blackmon, Gregory Curry, Timothy Grinnell, Aaron Jefferson, Alvin Jones, Rasheem Matthews, and Orson Wells. Ohio Department of Rehabilitation and Correction, Offender Search, <http://www.drc.ohio.gov/OffenderSearch/Search.aspx> (last visited June 26, 2008). All these men are African-American. *Id.*

²⁴³ LYND, LUCASVILLE, *supra* note 58, at 99–102.

I believe George Skatzes was a peacemaker during the riot. He didn't want anybody killed. He was trying to prevent a war between blacks and whites.²⁴⁴

Two years later, in August 2000, Girdy spontaneously confessed to the author and his wife Attorney Alice Lynd that he himself had been one of the three men who actually killed Mr. Elder.²⁴⁵ His description of the murder weapon, a glass “shank” made from the broken mirror in an officers’ rest room, tallied with the coroner’s description of the lethal wounds.²⁴⁶ When Girdy’s statement came to the attention of the authorities, they accepted it as genuine, indicted Girdy for Aggravated Murder, and entered into a plea agreement according to which Girdy was found guilty of “Count I, Murder . . . section 2903.02(A).”²⁴⁷ If true, Girdy’s statement meant that anything Skatzes was alleged to have done earlier could at most have amounted to attempted murder.²⁴⁸

²⁴⁴ Affidavit of Eric Girdy ¶¶ 1–2, 10–11 (June 17, 1998) (on file with author). Girdy executed essentially the same affidavit five years later. Affidavit of Eric Girdy (Sept. 19, 2003) Petition for Post-Conviction Relief, Exhibit 21, *State v. Skatzes*, *supra* note 94.

²⁴⁵ Affidavit of Alice Lynd ¶ 6 (Aug. 16, 2000) Petition for Post-Conviction Relief, Exhibit 19, *State v. Skatzes*, *supra* note 94.

²⁴⁶ Larry R. Tate, M.D., testified that the fatal wounds were five stab wounds to the chest. Transcript at 4832–33, *State v. Skatzes*, *supra* note 82. A shard of glass was found in one of those wounds. *Id.* at 4838. *See also* Dr. Tate’s autopsy report C93-1060 at 5 (dissection in the depths of Wound #33 revealed “a chard [*sic*] of glass . . . retained for police authorities”) (Apr. 13, 1993) (on file with author).

²⁴⁷ Judgment Entry, *State v. Girdy*, No. 05-CR-001416 (Ohio C.P. Scioto County Aug. 24, 2006).

²⁴⁸ Skatzes was alleged at his trial to have directed Rodger Snodgrass in attacking Earl Elder. Even supposing that Snodgrass’ highly questionable testimony was true, it is clear that Elder did not die as a result of the wounds Snodgrass said that he inflicted. Snodgrass testified that he stabbed Elder with a very thin, long, icepick-like shank. Transcript of Testimony of Rodger Snodgrass at 4395, *State v. Skatzes*, *supra* note 82; Transcript at 3757 (“[M]ore or less an ice pick with a handle on it.”), *State v. Robb*, *supra* note 65, and Transcript at 2623 (“I had an ice pick.”), *State v. Sanders*, *supra* note 65. Tim Williams, another prosecution witness, also testified that Snodgrass had a weapon like an icepick. Transcript at 3072 (“[H]e had an ice pick type weapon that he was able to slide his four fingers through and make a fist out of his hand with the end of his weapon protruding like this to a point.”), *State v. Skatzes*, *supra* note 82. Dr. Tate in his testimony made clear that the lethal wounds in Elder’s body were elongated and appeared to have been made by something with a sharp edge, as opposed to many small superficial non-lethal wounds made by something like an augur or icepick. Transcript of Testimony of Larry R. Tate, M.D. at 4842–45, *State v. Skatzes*, *supra* note 82.

(continued)

Extraordinarily, however, the Lucasville prosecutors have done nothing to cause Skatzes' sentence for the murder of Elder to be modified on the basis of these new facts. Their failure to do so would appear to violate *Napue v. Illinois*.

In 2001, on his own initiative, Girdy began to create a series of affidavits on behalf of other Lucasville defendants. Therein he alleged continuous pressure from the authorities to fabricate testimony. For example, Girdy stated under oath that when he initially declined to make statements against supposed riot leaders Carlos Sanders, James Were and Keith Lamar,

D.R.C. transferred me from one institution to another, interrogating me along the way about riot related events, making numerous promises like "out-of-state transfer or protective custody" for so-called information related to the S.O.C.F. uprising.²⁴⁹

Finally, Girdy said, after he declined to take a polygraph test on three separate occasions, lead investigator Sgt. Howard Hudson and lead Lucasville prosecutor Mark Piepmeier "[d]ecided to have me placed at the O.S.P. [where many Lucasville defendants were confined] knowing that I was now labeled as a state witness."²⁵⁰ More particularly, Girdy alleges that on or about August 15, 1993, the State Highway Patrol came to Lucasville prison to interview him about the alleged role of inmate Timothy Grinnell in assisting the so-called death squad of prisoners who entered L-6 on the afternoon of April 11 and killed five prisoners who had been locked in cells there.

I informed the Highway Patrol that Timothy Grinnell did not participate in the riot.

Thus Elder was murdered by three men with whom (according to Girdy) Skatzes had no connection, who later entered Elder's cell and stabbed him to death. Therefore, Skatzes' supposed conduct should fall under Ohio Jury Instruction 409.56: "3. INDEPENDENT INTERVENING CAUSE OF DEATH. If the defendant inflicted an injury not likely to produce death, and if the sole and only cause of death was . . . (fatal injury inflicted by another person), the defendant who inflicted the original injury is not responsible for the death." Other causes, intervening causes, 4 Ohio Jury Instructions (Ohio Jud. Conf.) 409.56 (Jan. 2003).

²⁴⁹ Affidavit of Eric Girdy ¶ 4 (Dec. 27, 2001) (on file with author).

²⁵⁰ *Id.* ¶ 5.

On or about August 22, 1993 Sgt. Howard Hudson & Special Prosecutor Mark E. Piepmeier stated to me that . . . if I did not cooperate with them fully they would indict me on six counts of aggravated murder and put me on Death Row.

During the interview [they] stated to me “that Timothy Grinnell operated the console and open up cell doors so the group of inmates that was doing the killing could kill the inmates that was locked in the cells.” Sgt. Howard Hudson & Special Prosecutor Mark E. Piepmeier repeated the above mention statement to me over & over. So I finally agreed with them²⁵¹

Girdy goes on to say that, in fact, it was not Grinnell who opened cell doors for the “death squad” but

when the group of inmates enter[ed] L-6 cell block to kill the inmates, I, Eric Girdy and another inmate by the name of Michael Ellis operated the console opening up cell doors

. . . [W]hen homicides were taken place I observed Timothy Grinnell standing by the water fountain watching the homicides taking place on the bottom range.²⁵²

In 2003, Girdy similarly came forward to support Derek Cannon who had been indicted for taking part in the April 11 death squad. His declaration stated:

I was in L-6 when the so-called “death squad” came into L-6 and went from cell to cell, killing a number of inmates. I was sitting in a chair by the ice machine near the front door of L-6. The members of the “death squad” passed by me when they came into L-6, and passed by me again when they left.

When the “death squad” came into L-6 the electricity was still on. I was wearing my glasses. I could see clearly.

²⁵¹ Affidavit of Eric Girdy ¶¶ 6–9 (Apr. 16, 2002) (on file with author).

²⁵² *Id.* ¶¶ 11–12.

Derek Cannon was not part of the “death squad.”²⁵³

Girdy went on to assert, under oath, that prosecutor Piepmeier had lied to him to prevent him testifying for Cannon.

When Derek Cannon was tried, I expected to testify on his behalf. I was confined at the Warren Correctional Institution near Cincinnati at that time. I was taken to Cincinnati in order to testify.

. . . .

I was taken out of the holding cell to a small room near the courtroom. Special Prosecutor Mark Piepmeier, Sergeant Hudson of the Ohio State Highway Patrol, Trooper Shepard, and one other man were in the small room.

Piepmeier and the others told me that “Cannon decided not to call you.” I was taken back to the holding cell without testifying, and was returned to Warren.

About a year ago Derek Cannon and I were placed in the same living area at the Ohio State Penitentiary in Youngstown, Ohio. I learned that for all this time he believed I had refused to testify for him. Nothing could be further from the truth.²⁵⁴

In 2004 Girdy summed up his interaction with Hudson and Piepmeier and added his voice to the chorus of witnesses who identified Anthony Lavelle as the murderer of hostage Officer Vallandingham.

On the day the correctional officer was murdered, I, inmate Eric Girdy, was in fact working security on the front door of L-6 when there was a knock on the door. I pulled the towel back from the window and saw Anthony Lavelle and two other masked men standing by his side. I was told to unlock and open the door. Anthony Lavelle then ordered everybody out of the L-6 Block.

²⁵³ Declaration of Eric Girdy ¶¶ 7–9 (June 9, 2003) (on file with author).

²⁵⁴ *Id.* ¶¶ 10, 13–15.

I was allowed to return to my post as L-6 door security 40 minutes later. A body was brought out of L-6 right before I entered.²⁵⁵

As to his many conversations with the authorities, Girdy asserts that in 1994

Trooper Hudson and Special Prosecutor Piepmeier tried to force me to take a polygraph test in Columbus, Ohio, about and against James Were's involvement in the correctional officer's murder. They tried to coach, doing several interviews. That's when I called Mr. Randall Porter at the office of the Ohio Public Defender . . . Mr. Porter came down to the O.S.H.P. [Ohio State Highway Patrol] building at Main and Parson Streets in Columbus, and told me not to take the polygraph test.²⁵⁶

Early in 2004, Girdy was visited at OSP.

I was forced out of my cell to go down to the Medical Transport section of O.S.P. to meet secretly with Trooper Hudson and Special Prosecutor Piepmeier, and three other gentlemen I never saw before. They wanted to talk with me about some of the affidavits I had done for some of the guys who were convicted in the S.O.C.F. riot. I refused to talk with any of them. That's when Special Prosecutor Mark Piepmeier made this statement to me: "We don't want you to help any of those S.O.C.F. riot guys. If you do we'll be back to see you and it won't be a nice visit."²⁵⁷

B. Duane Buckley

Lucasville prisoner Derek Cannon was convicted of the murder of fellow inmate Darrell Depina on the first day of the disturbance, and sentenced to life.²⁵⁸ Attorney Colin Starger of the New York Innocence

²⁵⁵ Affidavit of Eric Girdy ¶¶ 6–7 (June 4, 2004) (on file with author).

²⁵⁶ *Id.* ¶ 12.

²⁵⁷ *Id.* ¶ 13.

²⁵⁸ Memorandum from Attorney Colin Starger, N.Y. Innocence Project, Derek Cannon: A Compelling Non-DNA-Based Innocence Claim 1 (Dec. 22, 2005) (on file with author). Because Mr. Cannon's claim is "non-DNA-based," the rules of the Innocence Project did not allow Attorney Starger to pursue Mr. Cannon's case in court. *Id.*

Project has analyzed documents concerning Cannon's case and concluded that "the justice system has utterly failed Mr. Cannon, and . . . he is in all probability an innocent man."²⁵⁹

Cannon's defense was that when the uprising began he was on the recreation yard, that he briefly returned to L block to check on his personal property in L-1 where he celled, and that he left L block without ever entering L-6, where Depina was murdered.²⁶⁰ As Attorney Starger states, Cannon's counsel called "no fewer than twelve inmate witnesses who all corroborated Cannon's testimony that he was simply not involved. . . . All confirmed that Cannon did not enter the L-6 block where Depina was murdered during the uprising."²⁶¹

After the defense rested, the prosecution called a witness named Dwayne Buckley who was a porter in the Hamilton County jail where Cannon was confined awaiting trial,²⁶² which began on August 28, 1995.²⁶³

Buckley testified that Cannon had confessed to him not only that he murdered prisoner Depina, but also that he tortured and murdered hostage Officer Robert Vallandingham.²⁶⁴ According to Buckley, Cannon told Buckley "that him and some of his friends had took a guard, so to speak, made them [*sic*] suffer before they killed them. . . . He said they tortured them and they killed them."²⁶⁵ According to Cannon's lawyer Joseph Hale, the judge told him after trial that "it was the State's last witness—the jail porter—that impressed a lot of the jury as to what kind of person" Cannon was.²⁶⁶

As Attorney Starger rightly stresses, "it was literally impossible for Cannon to have been involved in Officer Vallandingham's murder since he

²⁵⁹ *Id.*

²⁶⁰ Transcript of Testimony of Derek Cannon at 761, 778–82 *State v. Cannon, supra* note 94.

²⁶¹ Starger, *supra* note 258, at 4.

²⁶² *Id.* at 5.

²⁶³ See Cannon Affidavit ¶ 3 (June 29, 2007) (on file with author) (trial began August 28, 1995 in Hamilton County); *cf.* Transcript of Testimony of Dwayne Buckley at 862 ("[A]fter knowing him a couple of days, he basically told me some things, what happened at the Lucasville riot."), 870–71 ("This was the same morning that I left."), *State v. Cannon, supra* note 94.

²⁶⁴ Starger, *supra* note 258, at 5.

²⁶⁵ Transcript of Testimony of Dwayne Buckley at 862, 871, *State v. Cannon, supra* note 94.

²⁶⁶ Letter from Attorney Joseph Hale to Derek Cannon (Oct. 11, 1995) Exhibit B, Starger, *supra* note 258.

had already been removed from Block L to Block K when that murder occurred.”²⁶⁷ Cannon testified without rebuttal that after he went back to the rec yard on the afternoon of April 11, 1993, he was one of the prisoners who in the early hours of April 12 was placed in K block. His placement in K block is confirmed by an official list.²⁶⁸ No prisoners entered L block after that date. And on April 16, 1993, four days later, another official document records Cannon’s transfer from SOCF to Lebanon Correctional Institution.²⁶⁹

Buckley was lying and the prosecution knew it. As Cannon himself states under oath:

I was not charged with the guard murder, the State prosecutor knew I wasn’t on L-side when the guard was murdered.

The prosecutor knew prior to, during, and after inmate D. Buckley testimony that it was false, and [did not] said or did anything to correct it.²⁷⁰

Cannon adds that he tried in vain to persuade his trial and appellate lawyers to challenge Buckley’s transparently false and prejudicial testimony.

I asked my trial attorney (Joseph Hale) to object to inmate D. Buckley false testimony, and he told me, we’ll save it for appeal.

My trial attorney (Joseph Hale) decli[n]e to represent me on appeal, and against my wishes my court appointed appellate attorney (Roxann Dieffenbach) refused to address inmate Buckley false testimony and the prosecutor misconduct on my direct appeal.²⁷¹

²⁶⁷ Starger, *supra* note 258, at 5.

²⁶⁸ “Listing of Inmate[s] Recovered from the Yard,” at 2 (Feb. 8, 1994) (the forty-second name listed is Derek Cannon, #A221663, recovered from the Yard on April 12, 1993).

²⁶⁹ State of Ohio Department of Rehabilitation and Correction, Certification of Record, Exhibit C, Starger, *supra* note 258 (showing Cannon’s inmate number, A221663, and stating that Cannon “moved from SOCF to LECI [Lebanon Correctional Institution]” on April 16, 1993).

²⁷⁰ Cannon Affidavit ¶¶ 9–10 (June 29, 2007) (on file with author).

²⁷¹ *Id.* ¶¶ 11–12.

The ineffective assistance of his counsel was the more frustrating to Cannon because, as he correctly observes, “Judge Cox told my trial attorney, and the prosecutor several times during the course of my trial, that he felt that I was innocent.”²⁷²

C. The Single Fatal Blow Struck by Two Different Men

In 1995, Justice Stevens commented that “serious questions are raised ‘when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens’.”²⁷³ These questions are presented by separate proceedings against two Lucasville defendants for murdering a prisoner named David Sommers who was killed by a single blow.²⁷⁴

In the trials of George Skatzes and Aaron Jefferson, each prosecutor asserted that the defendant in that particular trial struck the fatal blow. During the Skatzes trial, Assistant Special Prosecutor Hogan asserted:

[T]hink about David Sommers, . . . the one where [Skatzes] wielded a bat and literally beat the brains out of this man’s head.²⁷⁵

During the subsequent trial of Aaron Jefferson, Assistant Special Prosecutor Crowe first told the jury in opening argument:

I think . . . you will believe, yes, *he [Jefferson] in fact did kill David Sommers; he in fact did beat his brains out.* I

²⁷² *Id.* ¶ 14. Cannon’s statement about the opinion of the trial judge is based on the letter from Cannon’s attorney, Joseph Hale, previously cited as Exhibit C to Starger, and also attached as an exhibit to Cannon’s 2007 affidavit. Attorney Hale states: “During the trial [Judge Cox] even made a couple of comments to Mr. Tieger and me that indicated he thought you were innocent.” Hale, *supra* note 266, at 3.

²⁷³ *Jacobs v. Scott*, 513 U.S. 1067, 1070 (1995) (Stevens, J., dissenting); accord Kelly Kszywienski, Comment, *Roadblock In The Search For Truth: What Are A Criminal Prosecutor’s Constitutional And Ethical Obligations When The Evidence Supports Multiple, Inconsistent Theories Of A Crime?*, 37 U. TOL. L. REV. 1111, 1111 (2006) (quoting *Jacobs*, 513 U.S. at 1070 (Stevens, J., dissenting)).

²⁷⁴ This issue was again before the Supreme Court in *Stumpf v. Mitchell*, 367 F.3d 594, 596 (6th Cir. 2004), *reversed in part, vacated in part, and remanded by Bradshaw v. Stumpf*, 545 U.S. 175, 186–88 (2005).

²⁷⁵ Transcript of Prosecutor’s Closing Statement at 6108, *State v. Skatzes*, *supra* note 82.

don't think there's going to be a doubt at all in your mind, let alone a reasonable doubt.²⁷⁶

In closing Prosecutor Crowe added:

If there was only one blow to the head of David Sommers, the strongest evidence you have [is that] this is the individual—I won't call him a human—this is the individual that administered that blow. . . . *If there was only one blow, he's the one that gave it.* He's the one that hit him like a steer going through the stockyard, the executioner with the pick axe, trying to put the pick through the brain.²⁷⁷

The prosecutors in both cases were constrained to refer to a single fatal blow because of the testimony of Leopold Buerger, M.D., the forensic pathologist who did the autopsy on Sommers' body. Dr. Buerger testified that the cause of death was one single massive blow to the head, with a blunt instrument, which split the skull, separating the sutures and extending into the face and base of the skull, and causing lacerations of the brain with loss of part of the brain tissue.²⁷⁸ Additionally, in *State v. Jefferson*, Dr. Buerger was asked whether the injuries to David Sommers could have been the result of multiple blows. No, Dr. Buerger responded. Pointing to a picture of the head, Dr. Buerger indicated to the *Jefferson* jury that one single blow hit the brain, fractured the base of the skull, and also damaged part of the face. There was evidence of multiple body trauma, but the cause of death was one blow.²⁷⁹ "All of the underlying skull fractures I could correlate to just that one blow," including the front of the face.²⁸⁰

How then did Prosecutor Crowe try to persuade the jury that Jefferson had struck the single fatal blow that killed Sommers? Answer: by impeaching the evidence of his own expert witness, medical examiner Leopold Buerger. Crowe stated in closing argument:

²⁷⁶ Transcript of Prosecutor's Opening Statement at 146, *State v. Jefferson*, No. 95-CR-3922 (Ohio C.P. Montgomery County Mar. 21, 1996) [hereinafter *State v. Jefferson*] (emphasis added).

²⁷⁷ Transcript of Prosecutor's Closing Statement, *id.* at 656–57 (emphasis added).

²⁷⁸ Transcript of testimony of Dr. Leopold Buerger at 3293–95, *State v. Skatzes*, *supra* note 82; Transcript at 267–68, *State v. Jefferson*, *supra* note 276.

²⁷⁹ Transcript at 275, *State v. Jefferson*, *supra* note 276.

²⁸⁰ *Id.* at 283.

I know we heard Dr. Buerger, kind gentleman, come in here and tell you that there was one blow to the head. I'm going to ask you to look at State's Exhibit Number 13. . . . Look at that picture and make up your own minds.

He's an expert, that's true. The law requires no one can be convicted of a homicide under Ohio law without what's called expert testimony. Somebody must testify to a reasonable medical certainty as to what the cause of the death was.²⁸¹

The prosecutor then invited the jury to play doctor and to disbelieve the State's medical examiner:

And I like Dr. Buerger and I'm not trying to in any way impugn his ability, but when you look at these pictures, and compare that with the actual findings . . . then use your common sense and the testimony you heard. Everybody said, everybody who was there, all the testimony [was that] this man was beaten many, many, many times.

It was not one just one single bat or blow to the head.²⁸²

The prosecution's conduct in the *Skatzes* and *Jefferson* trials exemplifies the cavalier attitude toward facts, prohibited by *Napue*, that pervades the Lucasville trials. Prosecutors do not know who killed Officer Vallandingham and offer different teams of perpetrators in different cases. Rodger Snodgrass tells a fellow prisoner that *neither* Skatzes or Jefferson—the two men found guilty of the crime—were involved in the murder of David Sommers. Kenneth Law is presented to juries as a reliable relator of a narrative about Officer Vallandingham's murder that prosecutors previously found so unbelievable that they charged Law himself with the crime. Eric Girdy declared under oath that he, not Skatzes, took part in the murder of Earl Elder, and he, not Grinnell, opened the cell doors in L-6 so that five prisoners could be murdered on April 11. Still, Skatzes and Grinnell remain convicted. Duane Buckley is put on the stand to testify to a crime by Derek Cannon (torturing and murdering Officer Vallandingham) that was physically impossible because the State's own documents prove that Cannon was not in L block on April 15. And

²⁸¹ Transcript of Prosecutor's Closing Statement, *id.* at 655.

²⁸² *Id.* at 655–56.

then, in the *Skatzes* and *Jefferson* trials, two men, in two different trials, prosecuted by two different Assistant Prosecutors, are found guilty of administering a single lethal blow that could only be struck by one person and that in all likelihood neither of them delivered. This pattern of prosecutorial misconduct not only violates *Napue*—it also violates the Ohio Code of Professional Responsibility in effect at all relevant times: “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”²⁸³

VII. WHAT REMEDY?

A. Prosecutorial Misconduct and Not So Harmless Error

The State of Ohio has done a poor job in policing prosecutorial misconduct. According to Howard Tolley, Jr., Professor of Political Science at the University of Cincinnati and Amnesty International representative in Ohio, in fourteen death penalty cases over a twelve-year period the Ohio Supreme Court found statements to the jury by Hamilton County prosecutors to be improper, but in each case a majority concluded that those remarks constituted “harmless error” and did not merit a new trial.²⁸⁴ For example, according to Professor Tolley:

In Angelo Fears’ case,²⁸⁵ Justice Francis Sweeney for the majority faulted two prosecutors for referring to an expert psychologist as the defense counsel’s “mouthpiece” paid for with tax dollars. . . . “We express our deep concern over some of the remarks and misstatements made by the prosecutors involved in this case.”

²⁸³ OHIO CODE OF PROF’L RESPONSIBILITY Canon 7, EC 7-13 (1974) (repealed 2007), available at <http://www.sconet.state.oh.us/Rules/professional/professional.pdf>. Note that the new rules, effective February 1, 2007, provide: “The Ohio Code of Professional Responsibility shall continue to apply to govern conduct occurring prior to February 1, 2007” OHIO RULES OF PROF’L CONDUCT, Form of Citation, Effective Date, Application (b) at 191 (2007), available at <http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/rules/profConductRules.pdf>. See also Kszywienski, *supra* note 273, at 1133–34.

²⁸⁴ Press Brief, Howard Tolley, Jr., ACLU and Amnesty International, Hamilton County Death Sentences: Overzealous Prosecutors and Jailhouse Informants 1 (Apr. 11, 2003) (on file with author) (listing the 12 cases).

²⁸⁵ *State v. Fears*, 715 N.E.2d 136 (Ohio 1999).

Ohio Chief Justice Moyer[']s dissent joined by Justice Paul Pfeifer noted the prosecutors “unabashedly cross the line of vigorous but proper advocacy” [and found] “fundamental unfairness of a trial riddled with prosecutorial misconduct.” In Elwood Jones[']s case a year later,²⁸⁶ a Hamilton County prosecutor’s misstatement [led] Moyer to ask: “How do we stop prosecutors from engaging in conduct that we tell them time and time again is improper?”²⁸⁷

Professor Tolley also lists “at least 10” cases, including the trials of Were and Hasan, in which the testimony of so-called “jailhouse snitches” contributed to death sentences in Hamilton County.²⁸⁸ As shown above, *State v. Cannon* should be added to his list.

Hamilton County, in which the city of Cincinnati is located, is the focus of Professor Tolley’s condemnation and is particularly important for the present Article. As Professor Tolley noted, in 2003 (when his study was released) Hamilton County contained 7.3 percent of Ohio’s population, but accounted for 23 percent of the prisoners on Death Row and one-third of the executions.²⁸⁹ Moreover, the trials of several Lucasville defendants—including the trials of Hasan, Were, and Cannon, previously discussed—took place in Hamilton County,²⁹⁰ and Cincinnati attorney Mark Piepmeier remains Lucasville Special Prosecutor.²⁹¹

²⁸⁶ *State v. Jones*, 739 N.E.2d 300 (Ohio 2000)

²⁸⁷ Tolley, *supra* note 284, at 1–2. See also ABA, OHIO DEATH PENALTY ASSESSMENT REPORT, *supra* note 52, at 148–49 (reviewing prosecutorial misconduct in argument and findings of “harmless error” by Ohio courts). The ABA committee also reported that between 1984 and 2004, there were 150 capital cases in Ohio in which the defendant alleged prosecutorial misconduct; that the Ohio Supreme Court found prosecutorial misconduct in 116 of these cases; but that the Supreme Court reversed a conviction or sentence in only four of these cases. *Id.* at 160. The Report lists essentially the same Supreme Court cases cited by Professor Tolley in which the Court “rebuked Hamilton County prosecuting attorneys for misconduct during the guilt and sentencing phases of capital trials.” See *id.* at 161 & n.254.

²⁸⁸ See Tolley, *supra* note 287, at 2 (listing cases).

²⁸⁹ *Id.* at 1.

²⁹⁰ See *State v. Sanders*, 750 N.E.2d 90, 103 (Ohio 2001), *State v. Were*, 761 N.E.2d 591, 591 (Ohio 2002), *State v. Cannon*, No. C-950710, 1997 WL 78596 at *1 (Ohio Ct. App. 1997).

²⁹¹ *State v. Were*, 890 N.E.2d 263, 270 (Ohio 2008); Michael Grossberg, *Staging an Appeal*, COLUMBUS DISPATCH, Apr. 11, 2007, at E6.

Professor James S. Liebman of Columbia University, a nationally-recognized authority on death penalty appeals, offers an assessment consistent with Tolley's analysis. Liebman testified before the Ohio Criminal Justice Committee of the Ohio House of Representatives in June 2002. He told the Ohio legislative committee that

Hamilton County (Cincinnati) has the seventh highest death-sentencing rate in the nation among relatively populous counties [and] twice the death-sentencing rate of Cuyahoga County (Cleveland) and the state as a whole, and nearly three times the death-sentencing rate of Franklin County (Columbus).²⁹²

Like Professor Tolley, Professor Liebman also expressed concern that

although the Ohio Supreme Court frequently *finds* error in capital cases, it also very frequently goes on to *approve* the capital verdict on the ground that the error—and even patterns of error in particular counties—are not serious enough to warrant reversal. As the experiences of Georgia, California and Pennsylvania suggest, the Ohio Supreme Court's forgiving approach to identified error is a recipe for high rates of reversal years later, once Ohio cases reach the federal courts.²⁹³

²⁹² *The Risk of Serious Error in Ohio Capital Cases, and the Need for Additional Study: Hearing on H.B. 502 Before the Ohio Criminal Justice Committee of the Ohio House of Representatives*, 124th Gen. Assembly 6 (June 4, 2002) (testimony of James S. Liebman in support of bill). The "death-sentencing rate" is the number of death sentences for every 1000 homicides. *Id.* at 5. See also the even more dramatic figures reported in ABA, OHIO DEATH PENALTY ASSESSMENT REPORT, *supra* note 52, at 140–42. Between 1982 and 2005 in Ohio, the percentage of capital indictments resulting in death sentences was 10.5 percent. *Id.* In Hamilton County the rate was 38 percent as compared to 6 percent in Cuyahoga County and 4 percent in Franklin County. *Id.*

²⁹³ Liebman, *supra* note 292, at 6–7 (emphasis in original). See also *id.* at 7:

the tendency of the Ohio Supreme Court to affirm capital verdicts notwithstanding its finding of error, and even ongoing patterns of error, threatens to push back the necessary process of curing error to the later appeal stages, which increases the likelihood of delay and expense and the chance that serious errors—including errors that put innocent people on death row—will slip through the net.

Passing on flawed but uncorrected cases from the Ohio court system to the federal courts can have a huge potential impact on the Lucasville Five as well as on all other death-sentenced prisoners in Ohio. As of June 2008, the Department of Rehabilitation and Correction reported 182 Ohio prison inmates sentenced to death for Aggravated Murder.²⁹⁴ Within the preceding two years, there have been six new death sentences,²⁹⁵ five executions,²⁹⁶ twelve death sentences vacated by courts,²⁹⁷ and one inmate who died of natural causes.²⁹⁸ The number of death-sentenced Ohio prisoners presently in federal court has been estimated at 131.²⁹⁹ Between July 2006 and June 2008, the Sixth Circuit Court of Appeals denied habeas relief to thirteen men.³⁰⁰ Attorney Jeffrey M. Gamso, Legal Director,

²⁹⁴ Ohio Department of Rehabilitation and Correction, Death Row Inmates, <http://www.drc.ohio.gov/Public/deathrow.htm> (last visited June 27, 2008).

²⁹⁵ The six people sentenced to death during this period are Lamont Hunger, Phillip Jones, Edward Lang, Charles Maxwell, Wayne Powell, and Donna Roberts. *Id.*

²⁹⁶ The prisoners executed during this period were: Rocky Barton, Darrell Ferguson, Jeffrey Lundgren, James Filiaggi, and Christopher Newton. Ohio Department of Rehabilitation and Correction, Ohio Executions 1999 to Present, <http://www.drc.ohio.gov/web/Executed/executed25.htm> (last visited June 27, 2008).

²⁹⁷ The prisoners whose death sentences were vacated during this period are: David Mapes, Derrick Evans, Jamie Madrigal, Timothy Hancock, George Franklin, Kevin Yarbrough, Richard Joseph, Darryl Gumm, James Mills, Kenneth Richey, John Spirko, Raymond Smith, and Clifton White. Ohio Public Defender, Former Death Row Residents Under 1981 Law (June 4, 2008) http://opd.ohio.gov/dp_ResidentInfo/dp_FormerResidents.pdf; *State v. White*, 885 N.E.2d 905, 912–13 (Ohio 2008) (as to Clifton White only).

²⁹⁸ *Id.* (James Taylor died on Jan. 30, 2008).

²⁹⁹ E-mail from Kathy Soltis, Cleveland Coalition Against the Death Penalty, to author among others, citing Attorney Jeffrey M. Gamso, Legal Director, American Civil Liberties Union of Ohio Foundation, Inc. (Aug. 29, 2007, 13:29:02 EDT) (on file with author).

³⁰⁰ The thirteen men denied habeas relief during this period are Kevin Keith and Billy Slagle, *see* OPD Death Penalty Report, Third Quarter 2006, http://www.opd.ohio.gov/AArchive/dp_Reports/dp_Report_3Q_06.pdf; Melvin Bonnell and Michael Benge, *see* OPD Death Penalty Report, First Quarter 2007, http://www.opd.ohio.gov/dp_reports/dp_Report_1Q_07.pdf; Richard Niels, Darryl Durr, and Robert Van Hook, *see* OPD Death Penalty Report, Second Quarter 2007, http://www.opd.ohio.gov/dp_reports/dp_Report_2Q_07.pdf; Gregory Bey, Jason Getsy, Brett Hartman, Lawrence Reynolds, and Daniel Wilson, *see* OPD Death Penalty Report, Third Quarter 2007, http://www.opd.ohio.gov/dp_reports/dp_Report_3Q_07.pdf; and Reginald Brooks and John Fauntenberry, *see* OPD Death Penalty Report, First Quarter 2008, http://www.opd.ohio.gov/dp_reports/dp_Report_1Q_08.pdf.

American Civil Liberties Union of Ohio Foundation, Inc., estimates that within the near future Ohio will be likely to see “executions numbering in the low teens” per year.³⁰¹

B. The Attica Analogy: A Path that May Still Be Taken

The author’s intention is not to call for censure or disbarment of Ohio prosecutors, to have prosecutors jailed for contempt, or to seek damages on behalf of prisoners convicted on the basis of perjured testimony.³⁰² The question presented by this Article is: How can justice, long denied, be finally brought about in the Lucasville cases?

It is settled law that “[m]anufacturing fabricated evidence to use in a criminal proceeding is a ‘gravely serious wrong’.”³⁰³ This Article has presented a *pattern* of such prosecutorial misconduct, in violation of *Napue v. Illinois*, during the judicial aftermath of the 1993 Lucasville uprising. A case-by-case remedy is insufficient to respond to a course of misconduct extending over half a hundred separate proceedings. Attica offers an instructive alternative.

At Attica, armed forces of the State assaulted the occupied recreation yard on the last day of the riot, killing twenty-nine prisoners and ten hostage guards.³⁰⁴ But if one sets to one side the dreadful events of that last day, there is more similarity than commonly supposed between what happened at Attica in 1971 and what happened, twenty-two years later, at SOCF. The violence initiated by prisoners at Attica and Lucasville may be compared as follows:

³⁰¹ Gamso, *supra* note 299. This forecast is the more plausible because Ohio, although it is a Northern state, is a leader in executions. In 2004, Ohio’s seven executions were second only to Texas. Press Release, Office of the Ohio Public Defender, Andremy Dennis executed; Ohio edges past Oklahoma for number two spot in national ranking (Oct. 13, 2004), http://www.opd.ohio.gov/press/pr_10_13_04.htm.

³⁰² Compare Shaila Dewan, *Duke Prosecutor Is Jailed; Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007, at A8.

³⁰³ Mitchell P. Schwartz, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1120 (2003) (quoting *Devereaux v. Abbey*, 263 F.3d 1070, 1083 (9th Cir. 2001) (Kleinfeld, J., dissenting)).

³⁰⁴ See LYND, LUCASVILLE, *supra* note 58, at 165–68, and sources cited therein.

Figure: Comparison of violence initiated by prisoners at Attica and Lucasville.

	ATTICA	LUCASVILLE
Officers killed	1 (Officer Quinn)	1 (Officer Vallandingham)
Alleged prisoner “snitches” killed	3 in 4 days	9 in 11 days

Moreover, there were seven additional prisoners at Attica who kept to themselves in a tent near the handball court.³⁰⁵ One of them put a white cloth on a stick on top of the tent.³⁰⁶ The seven were thereupon accused of being “traitors” and the committee that sought to coordinate the uprising repeatedly debated their fate, some prisoners favoring their execution.³⁰⁷ In view of the similarity between the charges against these seven prisoners and the accusations directed at the three who were killed, at least some of the seven might well have been killed had the disturbance lasted longer. Indeed, on the final morning, the young man who hoisted the white flag and one other were blindfolded, bound, and left in an exposed position to await the assault.³⁰⁸

Thus the apparent misdeeds of prisoners at Attica and Lucasville were similar, and so were the initial judicial proceedings. What was critically different in the two situations was what happened next. At Lucasville, prosecutions were pursued. Judicial proceedings after Attica had an altogether different conclusion. According to two authorities on prison disturbances:

Scandal broke out in 1975, when a chief assistant to the special Attica prosecutor went public with charges that his investigation of reprisals and reckless use of firearms by guards and police was being stifled from above. In the clamor over his disclosures, *a general amnesty was*

³⁰⁵ ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 283 (1972).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 283–84.

³⁰⁸ *Id.* at 284.

declared. All outstanding indictments of inmates were dropped. Seven inmates who had pleaded guilty to reduced charges were pardoned by Governor Hugh Carey. The sentence of John Hill (Dacajaweah), convicted of killing Quinn, was commuted, and he was paroled in March of 1979.³⁰⁹

In the words of the New York State Special Commission on Attica:

With the exception of Indian massacres in the late 19th century, the State Police assault which ended the four-day prison uprising was the bloodiest one-day encounter between Americans since the Civil War.³¹⁰

Governor Carey's declaration of amnesty five years later was an action that, if taken during the Attica disturbance, would have limited deaths to four and saved almost forty lives.

Tragically belated as it was, the Governor's statement of December 31, 1976, represents a dramatic and instructive template for what might yet be possible in Ohio. Explaining that "we now confront the real possibility that the law itself may well fall into disrespect" and that "equal justice by way of further prosecutions is no longer possible," Governor Carey vacated the plea agreements of seven former Attica prisoners, commuted the sentence of the prisoner convicted of killing Officer Quinn, and barred disciplinary action against twenty state troopers and correctional officers.³¹¹ His statement also said:

I am moved to recognize that Attica has been a tragedy of immeasurable proportions, unalterably affecting countless lives. Too many families have grieved, too many have suffered deprivations, too many have lived their lives in uncertainty waiting for the long nightmare to end. For over five years and with hundreds of thousands of dollars and countless man-hours we have followed the path of investigation and accusation. We have succeeded in dividing and polarizing the people of this state without

³⁰⁹ BERT USEEM & PETER KIMBALL, *STATES OF SIEGE: U.S. PRISON RIOTS, 1971-1986* 56 (1991) (emphasis added).

³¹⁰ ATTICA, *supra* note 305, at xi.

³¹¹ *Text of the Statement by Carey On Inquiries Into Attica Uprising*, N.Y. TIMES, Dec. 31, 1976, at A10.

satisfying the quest for justice in this tragedy. To continue in this course, I believe, would be merely to prolong the agony with no better hope of a just and abiding conclusion.³¹²

The Governor concluded by saying that his actions should not be understood to imply “a lack of culpability for the conduct at issue.” Rather, “these actions are in recognition that there does exist a larger wrong which transcends the wrongful acts of individuals”³¹³

Should Ohio wish to explore a similar course of action, the New York State Special Commission on Attica offers a useful model. Appointment of the Commission was prompted by medical testimony which established two days after the rebellion ended that hostage officers had been killed by gunfire (therefore by the assault force), not because prisoners cut their throats.³¹⁴ The nine members of the Commission were designated by the Chief Judge of New York’s highest court and the “four presiding judges of the state’s Appellate Division.”³¹⁵ A General counsel and thirty-six full-time staff, including eighteen lawyers, were appointed.³¹⁶ Robert McKay, chair of the Commission, was dean of the New York University School of Law.³¹⁷ The other members were not all legal professionals: they included a Roman Catholic bishop, the founder and president of the Society of Friends of Puerto Rico, and a former inmate.³¹⁸ After some controversy, the Commission was authorized to act in complete independence from any ongoing criminal proceedings.³¹⁹ Additionally, the Governor’s executive order empowered the Commission to subpoena and enforce the attendance of witnesses, and to require the production of books and papers.³²⁰

If Governor Strickland were to order a similar inquiry into the Lucasville proceedings, the first step would be to appoint a commission with composition and powers similar to the McKay Commission. The Governor should then make clear that the criteria for assessment of the Lucasville cases should be those set forth by the Supreme Court of the

³¹² *Id.*

³¹³ *Id.*

³¹⁴ ATTICA, *supra* note 305, at xxiii.

³¹⁵ *Id.* at xxiii–xxiv.

³¹⁶ *Id.* at xxvi–xxvii.

³¹⁷ *Id.* at xxiv.

³¹⁸ *Id.* at xxiv.

³¹⁹ *Id.* at xxv–xxvi.

³²⁰ *Id.* at xxvi.

United States in *Napue v. Illinois* and its progeny and in related codes of ethical conduct for lawyers, prosecutors, and judges. And of course, until the commission made its final report, the execution of any of the five Lucasville defendants sentenced to death should be stayed.³²¹

³²¹ See ABA, OHIO DEATH PENALTY ASSESSMENT REPORT, *supra* note 52, at vii: “It is . . . the conclusion of the members of the Ohio Death Penalty Assessment Team that the State of Ohio should impose a temporary suspension of executions until such time as the State is able to appropriately address the issues and recommendations throughout this Report.”