BEFORE THE
OHIO ADULT PAROLE AUTHORITY

IN RE: WILLIAM T. MONTGOMERY
Chillicothe Correctional Institution # A193-871

Clemency Hearing Date: March 8, 2018

APPLICATION FOR EXECUTIVE CLEMENCY

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I. REASONS FOR GRANTING CLEMENCY

William T. Montgomery is innocent of capital murder. He is seeking Executive Clemency in order to prevent his execution on April 11, 2018. Clemency is warranted so that the State of Ohio does not execute a man who was given an unfair trial and was convicted and sentenced on a false set of facts.

> **"I believe that in a capital case there should be no doubt about guilt. The guilt should be absolute. It should be unquestionable."**
>
> - *Lucas County Prosecutor Julia Bates, 2013*[1]

Guilt in this case is anything but absolute or unquestionable. This case comes to the Ohio Parole Board and Governor as another example of the all too familiar suspicious circumstances where there is no independent, direct evidence of guilt, two individuals are accused of murder, the evidence points to both equally, and the individual who cuts a deal first is not prosecuted for the death penalty. And beyond these troubling circumstances, this case is shrouded in a fog of gross prosecutorial misconduct and lost or destroyed evidence, resulting in confused and doubtful jurors.

> **"In October, 1986, I did not know why I voted to impose the death penalty on Montgomery. To this day, I am not sure why I voted to sentence Montgomery to death."**
>
> *- Juror Sidney Thomas 1992 affidavit*[2]

> **"At the trial and penalty phase of the proceedings as well as during the trial and penalty phase deliberations, I did not understand aggravated murder nor did I understand what**

[1] Exhibit 1 "Death penalty cases ebb in Lucas County and Ohio" (11/24/13) http://www.toledoblade.com/Courts/2013/11/24/Death-penalty-cases-ebb-in-Lucas-County-and-Ohio.html.
[2] Exhibit 2 Sidney Thomas 1992 affidavit.

was required to be proven to recommend that Montgomery should be sentenced to death."

- *Juror Roberta St. Clair 1992 affidavit*[3]

At trial, the Prosecution based its case on a very specific timeline of events. Cynthia Tincher's body was located at 7:30 a.m. in her car near the intersection of Angola and Wenz Roads on March 8, 1986 and Debra Ogle's body was located at 11:30 p.m. on March 12, 1986. The Prosecution argued W.T. Montgomery murdered both girls on March 8, 1986 with Ogle being murdered first, and Tincher murdered second in order to cover up the tracks of Ogle's murder. (Trial Transcript 1164-1168)[4]

The Prosecution's timeline came from the lips of Glover Heard. Even though the evidence pointed equally to W.T. Montgomery and co-defendant Glover Heard – in fact Ogle's wallet was found in Heard's dresser drawer and her car was found in the alley behind his residence – the Prosecution adopted Glover Heard's version of the events. And in exchange for pointing the finger at W.T. Montgomery, Glover Heard[5] cut a deal with the Prosecution to avoid the death penalty and to avoid prosecution for an unrelated charge of gross sexual imposition with a five-year-old child.

Six federal judges determined that W.T. Montgomery did not get a fair trial. Federal Judge Solomon Oliver found that W.T. Montgomery did not receive a fair trial and ordered a new trial because the Prosecution failed to turn over exculpatory evidence

[3] Exhibit 3 Roberta St. Clair 1992 affidavit
[4] Trial Transcript citations will hereinafter be referred to as (Tr. __)
[5] Heard was originally charged with two counts of aggravated murder but pled guilty to one count of complicity to murder in exchange for his testimony against W.T. Montgomery.

that "destroyed" the Prosecution's timeline. *Montgomery v. Bagley*, 482 F. Supp. 2d 919, 929 (N.D. Ohio 2007). Specifically, the Prosecution failed to turn over a police report in which high school classmates of Debra Ogle reported seeing Ms. Ogle alive shortly after 1:00 a.m. on March 12, 1986.

> **"Under the circumstances, where the State's theory was that Tincher was killed to cover up Ogle's murder, the court finds that the withheld police report revealing information suggesting that Ogle was seen alive four days after she was allegedly murdered would have severely undercut Heard's credibility and destroyed the State's timeline of the case. As such, the court finds that the prosecution's suppression of the police report created a reasonable probability that the result of trial would have been different. Therefore, the court finds that the State's failure to provide the defense with this report was material to the outcome of Montgomery's trial."**
>
> - *Judge Solomon Oliver, 2007*[6]

On appeal, the original Sixth Circuit three-judge panel affirmed the order of a new trial, (*Montgomery v. Bagley*, 581 F.3d 440 (6th Cir. 2009)), but the State sought review by the entire (*en banc*) court which reinstated W.T. Montgomery's death sentence because a majority of the *en banc* court determined the withheld evidence would not have made a difference. (Exhibit 5, *Montgomery v. Bobby*, 654 F.3d 668 (6th Cir. 2011)). While the circuit judges disagreed as to the impact of the withheld police report, all of the judges agreed that the evidence should have been turned over. As one of the judges explained, W.T. Montgomery was the victim of gross prosecutorial misconduct:

[6] Exhibit 4, *Montgomery v. Bagley*, 482 F. Supp. 2d 919 at 978.

> **"In a case of blatant prosecutorial misconduct, no one has seriously contested the fact that the prosecutor suppressed the evidence simply because it was inconsistent with his theory of the case. * * * The district court concluded that the case should be retried in state court. We should not retry it here on appeal, as my colleagues suggest. Montgomery is entitled to a jury trial free of gross prosecutorial misconduct."**
>
> - *Judge Gilbert S. Merritt*[7]

New information, unavailable to the Sixth Circuit, confirms the Prosecution's trial timeline was false and shows the materiality of the withheld evidence. After the Sixth Circuit reversed this Court's order of a new trial, W.T. Montgomery came into possession of an expert forensic report that established what had only been suggested by the withheld police report: the Prosecution's timeline was false. Thus, when the majority of the Sixth Circuit reinstated W.T. Montgomery's death sentence by finding the withheld police report would not have made a difference at trial, it did so without the benefit of a game-changing expert forensic report that establishes scientific proof that Ogle was not murdered on March 8. (Exhibit 8). The Lucas County Prosecutor's Office recently described the impact of the new forensic evidence.

> **"Establishing at trial that Ogle was not killed on March 8th would have delivered a severe blow to the State's case because it would have directly contradicted Heard's testimony, it would have contradicted the prosecution's time line of the murders and it would have eliminated defendant's motivation for killing Tincher to cover up his murder of Ogle."**
>
> - *Lucas County Prosecutor's Office, 2016 appellee brief at p. 15*[8]

[7] (Exhibit 5, *Montgomery v. Bobby*, 654 F.3d 668 at 691.

And recently, the impact of this evidence at trial was confirmed by a juror who signed an affidavit indicating, in addition to doubts at the time of trial, the juror would not have voted for guilt or the death penalty if the juror had known about the withheld evidence and forensic information.

> ***"At the time of trial, I did have some doubt that W.T. Montgomery was guilty at the trial. * * * Given the information I have today, I would not have found W.T. Montgomery guilty or voted for the death penalty."***
>
> - *Juror Sidney Thomas 2018 affidavit*[9]

The new expert report, however, did not save the day for W.T. Montgomery because his prior attorney dropped the ball in presenting it to the state courts. Commonly, when delayed motions for new trial are filed, the defendant has a hard time overcoming the procedural hurdle of whether the defendant was unavoidably prevented from discovering the new evidence earlier. Here, W.T. Montgomery was able to overcome this hurdle because the state appellate court, citing the Prosecution's withholding of evidence and inability to obtain funds for expert assistance, found that W.T. Montgomery "arguably presented clear and convincing evidence that he was unavoidably prevented" from obtaining the expert report sooner. (Exhibit 9, *State v. Montgomery,* 2016-Ohio-7527, ¶ 53, *appeal not allowed*, 2017-Ohio-8371, ¶ 53, 151 Ohio St. 3d 1425, 84 N.E.3d 1063). Tragically, however, the appellate court affirmed the dismissal of the motion for new trial because, once W.T. Montgomery's attorney came into

[8] Exhibit 6, Appellee brief, *State v. Montgomery*, C.A. No. CL-15-1282 at p. 15.

[9] Exhibit 7, *Sidney Thomas 2018 affidavit*.

possession of the expert report, his attorney's "almost nine month" delay in actually filing the motion for new trial was cause for the state court to reject the motion for new trial containing the new evidence. *Id.*

This case contains a number of troubling elements – no independent, direct evidence of guilt; the Prosecution relied exclusively on the testimony of an accused murderer and child molester who cut a deal; withheld evidence; gross prosecutorial misconduct; and confused, tainted jurors – that taken alone are cause for concern if they resulted in a death verdict. But taken together, these elements are cause for alarm as the execution approaches. Even though Judge Oliver ordered a new trial, the decision between life and death hinged on a split amongst federal judges as to whether the withheld police report would have altered the Prosecution's trial timeline for the jury. It seems obvious that the new evidence, that was not presented to the Sixth Circuit, would have changed this calculus. But we do not even have to speculate on this point because we now have the benefit of an affidavit from a juror stating affirmatively he would not have found W.T. Montgomery guilty or sentenced him to death had he known about the new evidence. In other words, the reason the thin majority of Sixth Circuit judges reversed the new trial order no longer exists.

So why are we still here on the eve of an execution? We are here because our system failed W.T. Montgomery. The Prosecution did not turn over exculpatory evidence at trial. The Prosecution presented a series of events to the jury that turned out to be false. The trial judge did not allow funding for an expert at trial. The jurors

selected for the trial were tainted and did not understand the law. The habeas procedural rules did not allow the expert report to be considered when the petition was pending in federal court. And finally, W.T. Montgomery's previous attorneys failed to file the motion for new trial in a timely fashion.

But it is not too late. Before we execute a man who did not receive a fair trial; before we execute a man based a false set of facts, before a lethal dose of chemicals is injected in to W.T. Montgomery's blood stream, this Board and Governor Kasich have the opportunity to prevent irreversible injustice and grant clemency.

> ***"History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency."***
>
> - *Justice William Rehnquist,*
>   *Herrera v. Collins, 506 U.S. 390, 417 (1993)*

II. THE W.T. MONTGOMERY CASE: A THREE-DECADE JOURNEY STARTING WITH GROSS PROSECUTORIAL MISCONDUCT AND ENDING WITH A JUROR WHO WOULD NOT HAVE VOTED FOR GUILT OR DEATH.

A. W.T. Montgomery did not have a motive to murder the two victims.

W.T. Montgomery was out the evening of March 7 with Glover Heard, Bruce Ellis and Louren Kyser. W.T. Montgomery had steady income and bought and paid for the night out at clubs and drinks for the entire four-person party. W.T. Montgomery was known to always carry a couple hundred dollars with him. (Tr. 1503).

B. Key Facts

- 3/7/86 10:30 p.m. – W.T. Montgomery went to Streamers with Louren Kyser, Bruce Ellis, and Glover Heard. The group stayed until closing.

- 3/8/86 7:45 a.m. – Tincher's body is located in her car at the intersection of Wenz and Angola.

- 3/10/86 5:00 p.m. – Michael Clark called Crime Stoppers from the jail.

- 3/11/86 – Michael Clark is interviewed by Det. Przeslawski. (Tr. 1663).

- 3/11/86 2:30 p.m. – Detectives arrive at Heard's home. (Tr. 1663-1664).

- 3/11/86 6:45 p.m. – Heard is booked. (Exhibit 11, page 129).

- 3/12/86 – Det. Marx is called to a gas station at 803 S. Byrne where he took possession of Bersa Model 383 .380 caliber pistol that was rolled up in diaper. (Exhibit 11, page 072).

- 3/12/86 1:20 a.m. – High school classmates of Debra Ogle called police. David Ingram made a statement to police. Ingram and several friends were at Oak Hill apartments when they saw a blue ford escort with who he believes is Debra Ogle driving around the complex. The group saw her again as a passenger in the same auto. Ingram reported Ogle

waved to them since she knew them from the high school. (Exhibit 11, pages 030-031).

- 3/12/86 12:50-1:30 a.m. – Police executed a search warrant at Heard's residence and located Ogle's wallet, driver's license, and credit cards. (Exhibit 11, page 084).

- 3/12/86 – Around noon, W.T. Montgomery is arrested. (Tr. 1498, 1678-9).

- 3/12/1986 11:30 p.m. – Ogle's body is located near 4700 block of Hill Avenue. (Exhibit 11, page 107).

C. The Prosecution's case against W.T. Montgomery relied upon a specific timeline of events.

At trial, the State argued a definite timeline of events to the jury. Relying on co-defendant Glover Heard's testimony, the State argued W.T. Montgomery shot and killed Ogle and Tincher on March 8, 1986. The State's theory was that Ogle was shot first as part of a robbery and Tincher was shot second because she could place the two men with Ogle. (Tr. 1164-1168). This timeline of events came from the mouth of co-defendant Glover Heard ("Heard") who made a deal with the prosecutors.

D. Glover Heard provided multiple versions of events.

After making a deal with the prosecutors, Heard pointed his finger at W.T. Montgomery as the killer of both girls. Prior to trial, Heard told the police four different stories about the murders. (Tr. 1780-84). First, he denied any knowledge of the murders. (Tr. 1780-81). Second, after being confronted with information from a jailhouse informant, Heard admitted to bragging about seeing two girls get killed. (Tr. 1781). Third, Heard told police he saw a known drug dealer driving Ogle's car down an

alleyway. (Tr. 1782). Fourth, Heard said Bruce Ellis dropped him off after the night of partying and later, an unknown black male at a car wash told Heard that two white girls had been killed. (Tr. 1783).

At trial, Heard told the jury a fifth version. Heard testified both he and W.T. Montgomery took a cab to Ogle and Tincher's apartment. (Tr. 1769). Ogle agreed to give W.T. Montgomery and Heard a ride to W.T. Montgomery's apartment on Airport Road. (Tr. 1770). W.T. Montgomery, sitting in the front seat, gave Ogle the directions and eventually told her to stop on the side of the road on Hill Avenue. (Tr. 1770–72). Heard went on to testify that Ogle and W.T. Montgomery got out of her car and walked roughly forty yards into a field or wooded area off Hill Avenue. (Tr. 1771–72). Once in that area, Ogle was in the squat position. (Tr. at 1772). Even though there were three gunshot wounds to Debra Ogle's body, Heard testified he heard two gunshots and he then saw Ogle's body lying on the ground. (*Id.*). Heard further claimed W.T. Montgomery rushed back to Ogle's car and motioned for Heard to get in the front passenger's seat as Montgomery got into the driver's seat. (*Id.*). W.T. Montgomery drove Ogle's car back to the victims' apartment complex. (Tr. at 1774). W.T. Montgomery picked a gun up off the floor of the car, exited the vehicle, and told Heard to take the car. (*Id.*). Heard then left in the car and took Ogle's wallet as he abandoned the car roughly one block from his home. (Tr. at 1774–75).

And we know Heard's version contained lies. For example, Heard claimed W.T. Montgomery told Ms. Ogle to pull the car alongside the road, and to get out and follow

him into the nearby wooded field. (Tr. 1771). As Heard was sitting in the car, he claimed he saw the two talking, then saw Ms. Ogle in a "squat" position, and then heard two gun shots. (Tr. 1772-73). However, Heard could not have seen these events. Detective Marx, testified that the distance from where the body was found to where Heard was sitting in the car was some 80 yards into and 15 yards over into the wooded area. (Tr. 1864). Furthermore, this was occurring during the very early hours on March 8, 1986, a time when it would still be dark outside. Detective Marx told Heard that it was physically impossible to see what he said he saw sitting in the car. (Tr. 1864). Marx stated he told Heard this to get him to "share" more information with the police. (Tr. 1866). The fact remains that at this distance and during the dark morning hours, Heard's version of the events could not be true. (Tr. 1866-68).

E. One of the jurors was incompetent to serve on a capital jury.

W.T. Montgomery did not have a fair and impartial jury because one of the jurors, Georgia Lukasiewicz, should have never served on this jury. The following list is a sampling of some the troubling issues regarding this juror:

A) Repeated references to the fact that she was nervous and a psychiatric patient (Tr. 39-40, 2325);

B) Expression of the opinion that death would be preferable to life in prison, and that consequently she would always choose the death penalty (Tr. 40-41);

C) Expression of the opinion that the penalty for all homicides should be death (Tr. 33);

D) Expression of opinions indicating a distinct African-American bigotry, for example, "Well, as I have said before, to each his

own. If colored want to mix with white and if the white thinks it's okay, well, it's their life, not mine" (Tr. 37);

E) Interruption of trial proceedings to ask to see a gruesome photograph (Tr. 2027); and

F) Expressed the opinion in a note to the trial judge asking his advice as to whether she should continue as a juror that the expert witness presented by Petitioner during the mitigation phase was in fact Satan based upon a revelation she had in a dream following "shock treatments" administered in 1964 (Tr. 2317).

Beyond these concerns the most troubling event regarding this juror occurred at the outset of the mitigation hearing when Ms. Lukasiewicz sent a note to the trial judge. (Tr. 2317).

> Dear Judge Abood,
>
> After I saw Dr. Briskin [Montgomery's mitigation psychiatric expert] on the stand, I decided I should ask you if I'm allowed to be a juror because I am a psychiatric patient and early in 1964 I had a dream after shock treatments. I saw Dr. Briskin in a dream. He was fat, carried a briefcase and a clock. I thought he looked like Satan. I never recall having seen this man in person.

Shockingly, this juror was allowed to continue on this jury. As a result, W.T. Montgomery was prejudiced by the trial court's failure to remove Ms. Lukasiewicz from the jury panel after it became apparent that she was biased, irrational, and incompetent to serve as a juror. The trial court became aware during voir dire of the fact that she was under psychiatric care and did not even bother to inquire as to the nature of her treatment. If the judge was concerned about unfairly intruding on her privacy as protected by the physician-patient privilege, the route was clear – she should have been

removed for cause. With the pressure imposed on jurors in death penalty cases, no one receiving psychiatric treatment should be permitted to sit. The chance for irrational decisions either way is too great.

F. Even before hearing about any withheld or new evidence, two jurors were confused on the law and one juror admitted he was not sure when he voted to convict W.T. Montgomery and sentence him to death.

In 1992, Juror Sidney Thomas expressed doubt about the verdict. His 1992 affidavit (Exhibit 2) states:

> 5) I found William T. Montgomery guilty of aggravated murder because he had to cover up the first killing by killing Cindy. In addition, the prosecutor argued that one of the victim's was Montgomery's girlfriend and this was another reason for my finding of aggravated murder.
>
> 6) A number of the jurors, including me, were very confused by the instructions given by the judge. I sent a note to the judge asking for an explanation, however the judge did not answer my question.
>
> 7) I believed in October, 1986, that William T. Montgomery could be rehabilitated due to his age.
>
> 8) In October, 1986, I did not know why I voted to impose the death penalty on Montgomery. To this day, I am not sure why I voted to sentence Montgomery to death.

Juror Roberta St. Clair admitted she did not understand the law when she sentenced W.T. Montgomery to death. Her 1992 affidavit (Exhibit 3) states:

> 7) At the trial and penalty phase of the proceedings as well as during the trial and penalty phase deliberations, I did not understand aggravated murder nor did I understand what was required to be proven to recommend that Montgomery should be sentence to death.

G. The Prosecution's actions of withholding evidence were described by a federal judge as "gross prosecutorial misconduct."

In its zeal to put W.T. Montgomery on death row, the Prosecution, in addition to cutting deals with an accused child molester, also cheated by not turning over evidence that W.T. Montgomery was constitutionally entitled to receive. Federal Judge Gilbert Merritt described the Prosecution's actions as "gross prosecutorial misconduct." (Exhibit 5, *Montgomery v. Bobby*, 654 F.3d 668 at 691).

The most prominent piece of evidence that was not turned over was the police report that, in the words of Judge Merritt, "the prosecutor suppressed * * * simply because it was inconsistent with his theory of the case." (Exhibit 5, *Montgomery v. Bobby*, 654 F.3d 668 at 691). W.T. Montgomery obtained this report only after filing a Freedom of Information Act request years later. Specifically, the Prosecution wrongfully withheld information in its possession that at approximately 1:20 a.m. on March 12, 1986, Debbie Ogle was seen alive by **SEVEN** witnesses with whom she had gone to high school, in the parking lot of her apartment complex. (Exhibit 11). At first she was seen driving a blue Ford Escort. After entering her apartment, Ogle returned a few minutes later, this time as a passenger in the Ford Escort, with an unidentified white man (Petitioner is African-American) with sideburns. Ogle seemed in no distress at the time and waved at her friends. (Exhibit 11). One of these witnesses, David Ingle, immediately reported the incident to the police that same night, since Ogle was reported missing at that time, and her picture was on both television and newspapers. (Exhibit 11). This evidence completely contradicts the State's theory at trial that Ogle was killed four days earlier, on

March 8, 1986. Because Tincher's corpse was discovered on March 8, 1986, it is impossible that the State's case, which depended upon Ogle being killed before Tincher, was valid. This evidence also disproves the capital specifications of a single continuing course of criminal conduct as well as the theory that Tincher was murdered to conceal the murder of Ogle.

In addition to this police report, the Prosecution also failed to turn over a number of other items:

A) The State wrongfully withheld information in its possession that on March 12, 1986, during a search of the residence of co-defendant Glover Heard, the police found a pair of Nike "hi-top" shoes which had blood stains upon them. (Exhibit 11, page 84). This disproves the State's theory advanced at trial that co-defendant Heard was not at the scene of either of the murders, and supports instead the defense theory that co-defendant Heard was the sole murderer of Tincher and Ogle, and/or that he was the principal offender in those murders.

B) The State wrongfully withheld information in its possession that stains found in the seat of Tincher's car were not blood stains. This contradicts the representations advanced by the State at trial that the stains found in Tincher's car were blood stains.

C) The State wrongfully withheld information in its possession that stains found on Petitioner's jacket were in fact saliva stains. (Exhibit 11). This contradicts the State's representations made at trial that the stains were blood stains. Moreover, it disproves the State's theory that Petitioner had the jacket cleaned in order to conceal evidence of the crime.

D) The State wrongfully withheld information in its possession that the police had received numerous reports that Tincher and Ogle were killed by a third suspect (neither Petitioner nor codefendant Heard). This third person was alleged to be a "hitman" for a drug cartel. (Exhibit 11). The police also had in

their possession information never revealed to the defense which corroborated that Ogle and Tincher were for some time involved in the illegal sale of drugs, and that their murders were connected to this illegal activity. (Exhibit 11, Exhibit 12). This contradicts virtually every representation advanced at trial by the State, and provides not only different suspects for the crime, but indeed an entirely different theory of the case. Disclosure of the evidence would have also undercut the prosecution's effort to portray the victims as All-American girls, one of whom was supposedly praying when she was killed.

E) The State wrongfully withheld information in its possession that on March 8, 1986, seven witnesses saw the car on the corner of Wentz and Angola in which Tincher's corpse was discovered. The State revealed only three of these witnesses, each of whom testified at trial. The four unrevealed witnesses (Kathy Copeland, Thomas Caldwell, Barb Martino, and Mary Jane Evener) described an individual very different in appearance from Petitioner running away from the car. (Exhibit 11). Since even the three witnesses who testified for the State described the person running from the car as *possibly* male and *possibly* black, these unrevealed witnesses would have effectively destroyed the credibility of the inference the State advanced at trial that the man seen running away from Tincher's corpse was in fact Petitioner.

F) The State wrongfully withheld information in its possession that on March 8,1986, at approximately 7:30 a.m., Tom Hager saw a second car parked at the intersection of Wentz and Angola, and saw Tincher's car stop as if to meet with the first car. (Exhibit 11). This evidence rebuts the State's representations at trial that Tincher was abducted from her apartment by her murderer and drove against her will to the corner of Wentz and Angola.

G) The State wrongfully withheld information in its possession that on March 8, 1986, the night when Tincher and Ogle were allegedly murdered, neighbors heard unidentified male voices arguing "all night long" in their apartment. (Exhibit 11). This contradicts the State's assertions made at trial that Petitioner and co-defendant Heard arrived at Tincher and Ogle's apartment at approximately 5:00 a.m., and that Ogle willingly left with them

shortly thereafter to give them a ride. Indeed, like much of the other evidence withheld by the State, this evidence tends to indicate alternative suspects as well as entirely different theories of the case.

H) The State wrongfully withheld information in its possession that Tincher was terrified of her step-father, a Toledo police officer, who according to witnesses like Tracey Bailey, had once sexually molested Tincher and was stalking her around the time of the murders. (Exhibit 11). Moreover, Tincher's diary, which might have corroborated the witness statements and/or provided even more inculpatory evidence regarding Tincher's step-father, was given by the police to Tincher's step-father, thus effectively destroying it. (Exhibit 11, page 141).

I) The State wrongfully withheld information in its possession that prior to their deaths witnesses observed both Tincher and Ogle as being "nervous and upset," thus completely rebutting the State's representations at trial that this was a "spur of the moment crime" Indeed, in conjunction with other evidence wrongfully withheld by the State, this evidence supports the alternate theory which, if revealed, could have been advanced by the defense that Tincher and Ogle were in fear for their lives for some time from one of the many alternate unrevealed suspects to this murder.

J) The State wrongfully withheld information in its possession that Ogle and Tincher were killed by someone other than Petitioner. (Exhibit 11). In April and October of 1985, Ogle had had two abortions. The father of these children was Bruce Smith. (Exhibit 11, page 071). Ogle's boyfriend at the time of her death, Fenton Williamson, was very jealous of Smith, and both of these men (particularly Williamson) were primary suspects in these murders. (Exhibit 11). Yet this information was not disclosed to Petitioner which precluded efforts to develop that information on his behalf.

K) The State wrongfully withheld information in its possession that contrary to testimony at trial and during suppression hearings, all police reports on the instant matter were written by Det. Marx, not Det. Prezlawski. (Exhibit 11). Had this evidence been

revealed to the defense, the investigating detectives would have been shown to have committed perjury, thus destroying their credibility in regard to both the trial and the defense motion to suppress evidence.

L) The State wrongfully withheld information in its possession that its representation of how it obtained an alleged confession from co-defendant Glover Heard was a complete fabrication. The State presented evidence at trial that it first came to suspect Petitioner in these murders when it received a call to "Crimestoppers" by an inmate in the Lucas County Jail named Michael Clark, who said co-defendant Glover Heard had told him that that he had seen two white girls murdered. According to testimony presented by the State at trial, the police then questioned Heard, who confessed to the crimes. In fact, Heard was not in jail with Clark on March 10, 1986, as the State's perjured trial testimony indicated. (Exhibit 11). Instead, Clark told the Sheriff that he had called Heard on the prison phone and confessed to the murders. (Exhibit 11). Toledo Detective Sifuentes, who interviewed Clark, reported that Clark was making up this story since the prisoners' phone in the Lucas County Jail was not turned on at the time he claimed to have received the phone call from Heard. Had this evidence been revealed to the defense, it would have destroyed the credibility of Clark and Heard.

H. Six Federal Judges determined that W.T. Montgomery was denied his constitutional right to a fair trial.

During the federal habeas litigation, Judge Solomon Oliver of the U.S. District Court for the Northern District of Ohio, determined the withheld police report was exculpatory, and, as a result, W.T. Montgomery was entitled to a new trial because the State of Ohio withheld the report. (Exhibit 4, *Montgomery v. Bagley*, 482 F. Supp. 2d 919, 939 (N.D. Ohio 2007)). Judge Oliver stated:

> The court finds that the State's case was not airtight and that it could have been undermined by sufficient contradictory evidence. Although some evidence points to Montgomery (for example, that he owned the gun that was used in the murders), other evidence points

equally to both Montgomery and his co-defendant, Heard (for example, that Montgomery's uncle testified that both defendants passed the refrigerator *977 and that either could have taken the gun, and that no fingerprints were found on the gun). Substantial portions of the State's theory relied on the testimony of Heard, who had a motivation to lie to exculpate himself due to the circumstantial evidence pointing to both defendants.

Heard admitted on cross-examination that he had given four different versions of the facts to the police. Heard testified that the four stories were as follows: First, he denied knowing anything about the murders. (TT 1780–81.) Second, once the detectives confronted Heard about the phone call that Clark had reported, in which Clark said that Heard had bragged about seeing two girls killed, Heard admitted that story. (*Id.* at 1781.) Third, Heard said that he saw a known dope dealer driving Ogle's brown car down an alleyway. (*Id.* at 1782.) Fourth, Heard said that Bruce Ellis, one of the men whom Montgomery and Heard had been drinking with the night before the murders, had dropped Heard off and that Heard had gone to a carwash, where an unknown black male told him that two white girls had been killed. (*Id.* at 1783.)

On the stand, Heard proceeded to give a fifth version of the facts, a version that was consistent with the State's theory of the case. Heard admitted being at the scene of Ogle's murder, and stated that he had seen Montgomery and Ogle get out of Ogle's car and walk about 40 yards into a field. Heard stated that he saw Ogle sitting in a squatting position, and that when he looked away he heard two gunshots. When he looked back, Ogle was lying on the ground. (*Id.* at 1770–73.) However, Officer Marx testified that he told Heard that the distance from the street to the place where the body was found was actually more than 80 yards and that it was "physically impossible" for Heard to have seen what he says he saw. (*Id.* at 1864–1868.) Marx said that he told Heard this information in the hope that it "would be an enticement for him to give us more information." (*Id.* at 1866.)

The court finds that sufficient weaknesses exist in Heard's testimony, and therefore in the State's case, that could have been undermined by the withheld police report. For example, the State posited that Montgomery first killed Ogle for her car, and then killed Tincher afterward to eliminate the witness who had last seen Ogle alive. Heard testified that he saw Ogle lying dead on the ground on the morning of March 8, 1986. Yet the withheld police report indicates that David Ingram reported that he and several witnesses saw Ogle alive and that she waved to them in the early morning hours of March 12, 1986. The fact that the

> alleged first victim was seen alive four days after the alleged second victim was found dead directly contradicts Heard's testimony, the State's timeline of the murders, and the State's theory of Montgomery's motivation for killing Tincher. Furthermore, if the defense had received this report, it could have led to testimony by multiple people who could have corroborated Ingram's account. According to Ingram, he and the other witnesses were high school friends of Ogle, and therefore were in good positions to identify Ogle. Consequently, if a jury found this testimony credible, it would have severely undermined the State's theory of the case.
>
> In addition, the State posited that robbery was the motivation for Ogle's murder, yet Ogle's car and wallet—the fruits of the robbery—were found in Heard's possession, not Montgomery's. In fact, Heard admits that he took these items, and says that he was planning to take Ogle's car even if Montgomery had not told him to do so (according to Heard's version of the facts).

(Exhibit 4, *Montgomery v. Bagley*, 482 F. Supp. 2d 919, 976–77 (N.D. Ohio 2007)).

On appeal to the U.S. Court of Appeals for the Sixth Circuit, the initial three-judge panel agreed with Judge Oliver and ordered a new trial for W.T. Montgomery. *Montgomery v. Bagley*, 581 F.3d 440 (6th Cir. 2009). The State of Ohio, however, sought *en banc* review of the Sixth Circuit's panel decision. After *en banc* review, the Sixth Circuit reversed Judge Oliver's decision to award W.T. Montgomery a new trial. (Exhibit 5, *Montgomery v. Bobby*, 654 F.3d 668 (6th Cir. 2011)). Significantly, five federal circuit judges (Judges Merritt, Martin, Clay, Moore, and Cole) dissented from the *en banc* decision because they believed W.T. Montgomery was denied a fair trial because exculpatory evidence was withheld from W.T. Montgomery's trial lawyers. Thus, even though W.T. Montgomery's conviction and sentence have been affirmed on appeal to this point, the State of Ohio cannot deny that, at a minimum, there is disagreement

among federal judges as to whether W.T. Montgomery should receive a new trial based solely on the police report questioning the time of death of one of the victims.

In addition to evidence that was not turned over, the Prosecution also lost or destroyed a number of pieces of evidence including: Glover Heard's Nike tennis shoes (police described as having blood on them); Tincher's diary; Ogle's fingernail scrapings; and the fingerprints on either Ogle or Tincher's bodies. (Exhibit 13).

I. Evidence was not heard by the jury when it convicted W.T. Montgomery and sentenced him to death nor was the evidence considered by the Sixth Circuit when it reinstated W.T. Montgomery's conviction.

A death verdict built on a) a deal with a co-defendant/accused child molester; b) no incriminating evidence pointing to W.T. Montgomery alone; c) withheld evidence; and d) confused jurors carries enough inherent reservations that it is not worthy of being carried out. But that is not the end of the story. We now have the benefit of new evidence that was not presented to the jury, or available to the Sixth Circuit when it reinstated W.T. Montgomery's conviction and death sentence.

After the Sixth Circuit reinstated the conviction and death sentence, W.T. Montgomery sought and obtained an expert forensic pathology report from Independent Forensic Services, LLC (S. Eikelenboom-Schieveid, M.D., Forensic Medical Examiner, and Jon J. Nordby, Ph.D., D-ABMDI, Final Analysis Forensics) regarding the time of death for Ogle. (*See* Report Attached to the Motion for New Trial); (Exhibit 8). This expert report opined that Ogle could not have been murdered on March 8 and left in the woods for four days as the State argued at trial. The report opined:

1. Warming of her body should have led to decomposition, but none was noted.

2. The lividity found in her body shifted as she was moved. This could not have happened if she had lain dead in the woods for four days.

3. There was no damage to her body from animal activity or insects and this would also have occurred had she been dead in the woods for four days.

The expert report noted the testimony of the pathologist who performed the autopsy on Ms. Ogle made absolutely no mention of any decay or degradation of her body. *Id*. At that time, the weather reports indicated the temperatures in Northwest Ohio ranged from a little below freezing to well above it. *Id*. The median temperature for those days was always above freezing. *Id*. But there is no indication Ogle's body had been exposed to the elements for any length of time. The report went on to opine that the State's theory was contrary to science because, within three days there would have been substantial changes in a corpse, much less a corpse left in a field. *Id*. There would have been changes in the color of the skin, and attacks by wildlife would have marked the corpse. *Id*. None of these observations were reported by the pathologist which contradicts the conclusion that her body lay in the woods for four days. *Id*.

The expert report also focused on the concept of lividity. Lividity is the reddish purple discoloration of the skin after death. *Id*. Influenced by gravity, blood seeks the lowest levels within the vascular system. *Id*. For example, when a dead body lies on its back, the blood sinks into the back, buttocks, thighs, calves, and back of the neck. If the

body is turned over in the early postmortem interval, some or all of the lividity will move to the altered most lower areas. *Id*. When movement does not occur after the passage of time, lividity becomes "fixed." In general, lividity is fixed around 12 hours after death. *Id*.

As noted by the expert report, even though Ogle was found lying face down, the coroner described lividity on the front left side of her body and on the back. Thus, since it is clear the body was found face down, lividity could not have fixed on the back of Ogle's body. *Id*. The only explanation is that lividity was not **fixed** when she was found, and it became fixed after she was moved by officers at the scene and then taken to the coroner's office. This had to occur within as little as six but no more than 12 hours of her death. If she had laid face down more than 12 hours, lividity would have fixed in that manner and could not have been changed when her body was turned. State's Trial Exhibit 46 clearly shows that there was no lividity on the front of Ogle's body. Therefore, the expert report explained it is scientifically impossible for Ogle to have been killed on March 8, 1986 as the prosecution claimed. As noted in the report, this means the victim did not die on March 8, 1986 and, in fact, likely died around March 12, 1986. *Id*. Thus, this expert report corroborated the withheld police report and further undercut the State's timeline.

J. W.T. Montgomery's prior attorney dropped the ball and prevented the state court from considering the new expert report.

This new expert should have triggered a new trial, but it did not because W.T. Montgomery's attorney dropped the ball. When a criminal defendant comes into

possession of new evidence they face the high procedural hurdle of proving they were "unavoidably prevented" from discovering the evidence sooner. Here, W.T. Montgomery was able to overcome this hurdle because the state appellate court, citing the Prosecution's withholding of evidence and inability to obtain funds for expert assistance, found that W.T. Montgomery "arguably presented clear and convincing evidence that he was unavoidably prevented" from obtaining the expert report sooner. (Exhibit 9, *State v. Montgomery,* 2016-Ohio-7527, ¶ 53, *appeal not allowed*, 2017-Ohio-8371, ¶ 53, 151 Ohio St. 3d 1425, 84 N.E.3d 1063). Tragically, however, the appellate court affirmed the dismissal of the motion for new trial because, once W.T. Montgomery's attorney came into possession of the expert report, his attorney's "almost nine month" delay in actually filing the motion for new trial was cause for the state court to reject the motion for new trial containing the new evidence. *Id.*

K. At least one juror stated that had he known about the new evidence and the withheld police report, he would not have voted to convict or sentence W.T. Montgomery to death.

Sidney Thomas expressed doubt about his vote of guilty and vote to sentence W.T. Montgomery to death back in 1992. Recently, Mr. Thomas was presented with the evidence that was not available to him at the time of the trial (Exhibit 7):

> 3. If I had been provided that information, I would have voted differently in this case.
>
> 4. I am now aware that an expert forensic examiner examined the autopsy and coroner's report. I am aware the new forensic report found that Ms. Ogle was likely killed around March 12, 1986 and not on March 8, 1986 as the jury was told at trial.

5. If I had been provided that information, I would have voted differently in this case.

6. At the time of trial, I did have some doubt that W.T. Montgomery was guilty at the trial. In 1992 I made an affidavit where I said that I believed in 1986 that W.T. Montgomery could have been rehabilitated due to his age.

7. Given the information I have today, I would not have found W.T. Montgomery guilty or voted for the death penalty.

L. What kind of prisoner is W.T. Montgomery?

W.T. Montgomery has been incarcerated for over 31 years on death row. Despite maintaining his innocence, he has been a cooperative inmate. He has held numerous positions as a clerk and has contributed positively to recreation activities and programs for inmates on death row. For example, W.T. Montgomery assisted DRC staff and administrators by designing an outdoor recreation yard. W.T. Montgomery has also worked as a tutor for at least two fellow inmates and as a Unit Clerk where he has received numerous recommendations and thanks for positions from ODRC staff and administrators.

Evaluator and reviewer comments (Exhibit 14) reflect his positive experience in the Ohio Department of Rehabilitation and Corrections. Corrections Officer S. Lane and Unit Manager O.E. McGraw noted:

- Montgomery fulfills his duties well, also has a good attitude towards the officers.

Sgt. G. Pullman noted:

- He gets along with the block officers and his supervisor. He is inspiring in his attitude.

Unit Manager Joe Scurlock note:

- Inmate assists in every Unit Clerical function. Took on added duty of L.C. Blocks. Assists in recreation activities. Job requires skill and knowledge. With responsibility and skill required, pay should reflect 007 category.

Oscar E. McGraw noted:

- I would like to extend my thanks and appreciation for your exemplary performance while working as my assistant Clerk in the Unit Seven Death Row unit since August 2, 1989.

Unit Seven Manager, W.J. Scurlock, noted:

- Inmate Montgomery #193-871 has worked as the Unit Clerk since August 1, 1989. He has worked under my supervision for the past two years. I found that Inmate Montgomery is an excellent clerk. He is very creative and knowledgeable. He not only does the work of a unit secretary, he has also been very instrumental in keeping programs going for Level A inmates. He serves as a liaison between the Recreation Department and Unit Seven. He gets along very well with all Unit Staff.Inmate Montgomery requires minimal supervision and is always quick to offer new ideas to make the Unit function better. So, it is with great pleasure that I recommend him for any job that requires a high degree of skill.

Mr. Montgomery also played a leading role in the organization of a 5-on-5-basketball tournament for inmates on death row from March-April of 1992. He has also participated in the follow activities or programs:

- Stamp Club (2000)
- Tutor (Inmates Broom and Davis in 2001)
- Mothers Against Drunk Driving Red Ribbon Campaign (2006)
- School Box Top Program (2006)
- Combined Charity Walk (2006)
- OSP Poetry Workshop (2008)

III. CONCLUSION – THE GOVERNOR SHOULD GRANT CLEMENCY

This case contained no independent, direct evidence of guilt, a deal to an admitted murderer and accused child molested, confused and tainted jurors, as well as withheld and lost evidence that amounted to "gross prosecutorial misconduct." Based on the withheld evidence, six federal judges ordered a new trial. Even though a majority of the Sixth Circuit voted to reinstate the verdict and sentence because the withheld evidence did not sufficiently undercut the Prosecution's trial timeline, those Sixth Circuit judges were not aware of the new game-changing forensic evidence. This new expert report was so significant, even the prosecution admitted the new report would have dealt a severe blow to the prosecution theory. And there is no need to even speculate at the significance of this report because the same juror who expressed doubt about the verdict six years after trial, unequivocally stated now he would not have voted guilty or voted for the death penalty had he known about the new and withheld evidence. This Board, the Governor, and the People of the State of Ohio should not be comfortable with W.T. Montgomery being executed under these circumstances. Clemency is warranted.

Respectfully submitted,

s/ John Q. Lewis
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Application for Executive Clemency and Appendix of Exhibits was electronically delivered to Jamie O'Toole-Billingsley of the Ohio Parole Board: jamie.otoole@odrc.state.oh.us; Evy Jarrett of the Lucas County Prosecutor's Office: ejarrett@co.lucas.oh.us; and Brenda Leikala of the Ohio Attorney General's Office: Brenda.Leikala@ohioattorneygeneral.gov on this 1st day of March, 2018.

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