NO.: 19-7982

IN THE SUPREME COURT OF THE UNITED STATES

ALEX PENLAND

Petitioner,

v.

STATE OF OHIO

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

Alex Penland #716-815
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Lebanon, Ohio 45036

QUESTIONS PRESENTED FOR REVIEW

1. Does the trial court abuse its discretion when it failed to entertain Penland's claim that his conviction was tainted by fraud when the prosecutor knowingly solicited and failed to correct false testimony?

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Petitioner Alex Penland (hereinafter "Penland") respectfully prays that a Writ of Certiorari issue to review the judgment entry of the Ohio Supreme Court entered on October 29, 2019. (App. P.1)

OPINIONS BELOW

The opinion of the Ohio Supreme court denying discretionary review of Penland's appeal is published at *State v. Penland,* 2019-Ohio-4419, and is attached to the Petition at App. p.1. The order of the Ohio Court of Appeals for the First Appellate District, which the Ohio Supreme Court declined to review, is published at 2019 Ohio App. LEXIS 3318 entered on July 26, 2019 and is attached at App. pp. 2-4.

JURISDICTIONAL STATEMENT

The decision of the Ohio Supreme Court was issued on October 29, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the right to equal protection and a fair trial as guaranteed by the Sixth Amendment to the United States Constitution as it is applied through the Fourteenth Amendment to the United States Constitution.

I. STATEMENT OF THE CASE

A. PROCEDUREAL POSTURE

Petitioner Penland was indicted on the charges of murder, trafficking in heroin, and weapon under disability. After a lengthy jury trial, the jury returned a verdict of guilty on all counts. Petitioner was sentenced to 28 years to life.

B. STATEMENT OF FACTS

Petitioner Penland filed Defendant's Civil Rule 60(B) Motion For Relief From Judgment and Request for Evidentiary Hearing on May 15, 2018, alleging *inter alia* that the Defendant's conviction are tainted by fraud directed at the judicial machinery. The trial court *sua sponte* denied the motion on May 17, 2018, prior to the State even opposing the motion.

REASON FOR GRANTING THE WRIT

The decision of the Ohio Supreme Court Declining Penlands' Discretionary Appeal Conflicts with the Court's Clear *Brady* Violation Precedent.

This Court should accept review of Penlands' appeal because the Ohio Supreme Court has decided an important federal question surrounding the State's *Brady* duty to correct false and misleading testimony which conflicts with the Court's decision in *Mooney v. Holohan* (1935), 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed 791; *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.CT. 1194, 10 L.Ed.2d 215 and its progeny.

1. **Does the trial court abuse its discretion when it failed to entertain Penland's claim that his conviction was tainted by fraud when the prosecutor knowingly solicited and failed to correct false testimony.**

Petitioner Penland asserted a Fourteenth Amendment violation of due process, equal protection and a fair trial; where he sought relief from his criminal judgment because it's tainted by fraud. *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009). Mr. Penland submitted the entire transcript of the State's principal witness Steven J. Breunig (hereinafter "Breunig") who testified on Thursday May 21, 2015, where the prosecution knowingly solicited and failed to correct the false testimony which they were under a duty to do so.

Penland informed the trial court that his case file contained a disc of 911 calls and the second call was made by Breunig on the night of July 25, 2014, wherein operator Andrea Luck (hereinafter "Luck") received Breunig's Call. Luck attempted to acquire as much information as possible to relay to first responders, she specifically asked Breunig on three separate occasions "[d]id you see anything?" Breunig responded "[N]o. No, I just heard the guns going off!" This statement is the crux of Penland's argument. The transcripts of the 911 call presents irrefutable and uncontested *prima facie* evidence that Breunig trial testimony was tainted by fraud and the

prosecution knew it. In February 2019, Mr. Penland discovered that on March 23, 2015, two months prior to Penland's trial, the prosecution had the disc of 911 calls transcribed. Penland attempted to supplement the record with these transcripts, but the appellate court precluded such from happening. (See Appendix First Appellate District Ruling attached).

In this case, the State of Ohio failed to correct the record when they were under a duty to do so. The clearly established federal law relevant to Penland's claims were firmly established by this Court's holdings as long ago as *Mooney v. Holohan* (1935), 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed 791 (the Court made that deliberate deception of court and jury by presentation of false evidence is incompatible with the "rudimentary demands of justice."). Moreover, in *Alcorta v. Texas* (1957), 355 U.S. 28, 31, 78 S.Ct. 103, 2 L.Ed.2d 9 (held that the prosecutor had a constitutional obligation to correct perjured testimony when he knew it to be perjured, even though he had not encouraged the witness to testify falsely.)

Similarly, in *Napue v. Illinois* (1959), 360 U.S. 254, 269, 79 S.CT. 1173, 3 L.Ed.2d 1217 (the Court explained, "the same results obtains when the state, although not soliciting false evidence allows it to go uncorrected when it appears.") The *Napue* Court held that even though the lie had no direct implication as to the facts of the case, it did reflect significantly on the credibility of the crucial witness and therefore should have been exposed. Such cannot be said in the case at bar. Breunig's false testimony did apply to material facts of who shot first in a self-defense case.

The State of Ohio was in possession of the disc of 911 calls and the transcripts and were aware of the contents as early as October 14, 2014, when they filed the State's Response to Defendant's Demand for Discovery. On May 21, 2015, Hamilton County Assistant Prosecuting Attorney Charles Thiemann (hereinafter Thiemann) did: (1) as an officer of the court solicit

testimony from Breunig which was directed at the judicial machinery itself; (2) which was intentionally false, or the prosecution was willfully blind to the truth as evinced by the transcripts of the 911 calls; (3) such testimony was a positive averment by Breunig; (4) and a concealment by Thiemann when he was under the duty to set the record straight; and (5) such testimony deceived the court and jury into believing that Breunig saw the shooting when in fact he did not as evinced by the 911-call transcripts. This false testimony impeached Penland's versions of events. *Carter*, 585 F.3d at 1101 (*citing Demajanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993).

The use of false testimony constitutes a denial of due process where it affects the judgment of the jury if: (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. *Strickler v. Greene* (1999). 257 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286. This Court does not have to look to far for facts establishing such denial of due process because the 911-call transcripts juxtapose to Breunig's trial testimony satisfies each element. Moreover, the false testimony would constitute a fraud directed at the judicial machinery of the court which is sufficient to compromise the courts integrity. *Demajanjuk*, 10 F. 3d at 348.

In this case, the prosecution could not claim lack of knowledge of the 911 transcripts since such information is imputed to the prosecution. *Klyes v. Whitley*, 514 U.S. 419, 437-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

The State of Ohio in their Response to Defendant's Demand For Discovery at ¶6 states:

> The State is unaware of any evidence favorable to the Defendant. If the State becomes aware of additional discoverable information, this discovery response will be supplemented accordingly.

(Appendix). Certainly, impeachment evidence is favorable to Penland, yet the State withheld such vital information from him when they were required to identify and produce the statement of

Breunig under the doctrine of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.CT. 1194, 10 L.Ed.2d 215.

The trial court avoided deciding the constitutional issues raised by Penland. The Court in *Giles v. Maryland* (1967), 386 U.S. 66, 74, 87 S.CT. 793, 17 L.Ed.2d 737 (held, that a conviction must fall under the Fourteenth Amendment when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears," even though the testimony may be relevant only to the credibility of a witness. (*Citing Napue*, 360 U.S. at 269). However, in the case at bar, the prosecutor knowingly solicited and failed to correct false and misleading testimony.

This Court now has evidence which *de hors* the trial court record at the time of trial due to the misconduct of the prosecutors, and the trial court past upon deciding the constitutional issue in Penland's Motion For Relief From Judgment which this writ has been taken. The lower courts were given the opportunity to correct and set the record straight. The prosecutor was in possession of the 911-call transcripts at all times relevant herein prior to Penland's trial.

In the court of appeals judgment entry it held at ¶ 7:

> Penland did not submit with his motion a transcript of the 911 call, leaving the common pleas court, in deciding that motion, without the evidence upon which his postconviction claims depended. And consistent with *State v. Ishmail,* 54 Ohio St.2d 402, 405-406, 377 N.E.2d 500 (1978), we overrule his motion here to "supplement the record to add evidence of fraud" in the form of the 911-call transcript. *Id.* at paragraph two of the syllabus (holding that a reviewing court may not add to the record, and then decide an appeal based on, matter that was not properly before the court below). In the absence of the 911-call transcript, Penland could not demonstrate an outcome-determinative constitutional error. Thus, he failed to satisfy the R.C. 2953.23(A)(1)(b) jurisdictional requirement for a late postconviction petition.

While the court of appeals may be correct in its determination that a reviewing court may not add to the record, and then decide an appeal based on, matter that was not properly before the

court below. However, it's an oxymoron to determine that Penland's claims are depended upon the 911-call transcripts, and then to deny Penland the ability to supplement the record to include said 911-call transcripts. Furthermore, to determine that in absence of the 911-call transcripts Penland could not demonstrate an outcome-determinative constitutional error. The lower court had the authority to remand the case in the face of Penland uncovering the 911-call transcripts that the court recognized he needed to demonstrate his constitutional claims. The Court held in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* (1965), 382 U.S. 172, 178, 86 S.Ct. 347, 15 L.Ed.2d 247 (Fairness requires that on remand *Walker* have the opportunity to make it § 2 claims more specific, to prove the alleged fraud, and to establish the necessary elements of the asserted § 2 violation).

Moreover, it is noteworthy that the State of Ohio did not provide Penland nor his counsel with the 911-call transcripts, as Penland uncovered and obtained them through the dint of his own post-trial investigation, although his pretrial discovery request included a request for all prior inconsistent statements made by any witness the State intended to call as a witness. In this case, Breunig was a crucial witness to the prosecution's case. His original statement made to law-enforcement was properly discoverable, but intentionally withheld upon request.

Courts have however, stated that Rule 16 violations are "reversible only when there is a showing that: (1) the prosecution's failure to disclose was a willful violation of the rule; (2) foreknowledge of the information would have benefited the accused in the preparation of his defense; and (3) the accused suffered some prejudicial effect." *State v. Joseph,* 73 Ohio St.3d 450, 458, 1995-Ohio-228, 653 N.E.2d 285 (1995)(*citing State v. Parson*, 6 Ohio St.3d 442, 445, 453 N.E.2d 689 (1983)). Penland's claims meet these criteria.

The prosecution decided to transcribe the 911 disc on March 27, 2015, a month and a half prior to Penland's trial and failed to supplement the record; knowledge of Breunig's statement would have permitted Penland to impeach Breunig; and as a direct result of the failure to disclose, Penland was precluded from impeaching Breunig with his prior statement.

No Supreme Court decision lend support to the notion that defendant's must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such materials has been disclosed. *Banks v. Dretke* (2004), 540 U.S. 668, 695, 124 S.Ct. 1256, 157 L.Ed.2d 1166; *see also Strickler v. Greene* (1999), 527 U.S. 263, 282-289, 119 S.Ct. 1936, 144 L.Ed.2d 286. *Brady* does not require the state simply to turn over some evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs. *See Barton v. Warden S. Ohio Corr. Facility*, 786 F.3d 450, 468 (6th Cir. 2015).

In this case, there is compelling "*new reliable*" evidence of Mr. Penland's actual innocence since he acted in self-defense. (See 911-call Transcripts). *Schlup v. Delo* (1995), 513 U.S. 298, 115 S.Ct. 85, 130 L.Ed.2d 808. This evidence *de hors* the trial court record which Penland did point out to the appellate court who repudiated such by affirming the denial of relief from judgment.

This Court may also grant relief on the merits if the failure to do so resulted in a fundamental miscarriage of justice. *Coleman v. Thompson* (1991), 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640; *Wainwright v. Sykes* (1997), 433 U.S. 72, 91, 97 S.Ct. 2497, 53 L.Ed.2d 594. Penland's claimed self-defense at the outset, and the failure to consider the "*new reliable*" evidence would result in an innocent man remaining convicted do to a judgment tainted by fraud.

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CERTIFICATE OF SERVICE

I, hereby certify that a copy of the enclosed Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of certiorari were served via first-class U.S. Mail, postage prepaid on this 19 day of November 2019 upon:

Joseph T. Deters
Hamilton County Prosecuting Attorney
230 E. Ninth Street, Ste. 4000
Cincinnati, Ohio 45202

All persons required to be served have been served.

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