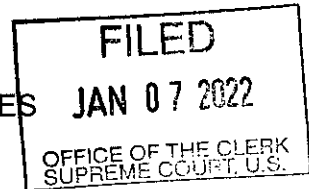


No. 21-6864

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES



DENNIS D. JACKSON — PETITIONER
(Your Name)

vs.

STATE OF OHIO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

OHIO SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DENNIS D. JACKSON
(Your Name)

5900 B.I.S. RD.
(Address)

LANCASTER, OH 43130
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

In 2013 after receiving from a non-profit organization, a copy of discovery index, and its contents. Petitioner filed a Post-Conviction Petition pursuant to ORC 2953.21, claiming the discovery index and its contents to be newly discovered evidence, evidence which he used to support both prongs of his ineffective assistance of trial and appellate counsel grounds raised therein. After a new decision in the Ohio Supreme Court in December 28, 2016, in State ex rel. Caster v. City of Columbus, 151 Ohio St. 3d 425, allowing full discovery, after completion of trial under ORC 149.43 (Public Records Availability), and use of material gained pursuant a ORC 149.43 request, to support a Post-Conviction Petition, or motion. Petitioner after receiving documents from the request found enclosed the missing subpoena, with no affidavit, allegedly obtained by Det. Pigman to search Cin. Bell Wireless. And immediately filed a Crim. R. 33 Motion on the basis of newly discovered evidence (i.e. Det. Pigman's subpoena with no affidavit, "Ex. 01", hereinafter), asserting similar grounds as had been asserted in support of his second prong of his Strickland claim in his ORC 2953.21 Petition. Showing prejudice to defendant by trial and appellate counsel's failure to obtain, review, and litigate "Ex. 01", during trial and direct review procedures.

1. Is a Petitioner who files a Post-Conviction Petition asserting Ineffective Assistance of Counsel (hereinafter, IAC), of trial, and appellate counsel who supports his grounds with arguments in show of the required prejudice prong, barred by res judicata doctrine, after discovery of new evidence, from Posing similar arguments in his Crim. R. 33 motion which are otherwise unknown outside the facts of the new evidence?

2. When a state law which prevents newly discovered evidence obtained by Ohio's Revised Code 149.43 from being used to support new trial requests in Post-Conviction Petitions, and Crim. R. 33 motions, is overruled, and Petitioner obtains newly discovered evidence by ORC 149.43, under the new law, is his right to due process, and equal protection of law pursuant the 5th, and 14th Amendment of the U.S. Constitution violated when the state Court's decision denies evidence to be new, prevents resolution of Brady violations, false testimony, and 4th Amendment violations which had a reasonable probability of changing the outcome of his trial, or to undermine confidence in the verdict?

3. Does the state of Ohio's failure to file and journalize "Ex. 01" and/or failure to disclose such to trial counsel after request by him pursuant to Crim. r. 16, regardless of good, or bad faith violate U.S. Supreme Court precedence in Brady v. Maryland, 373 U.S. 83?

4. Is "Ex. 01", (Det. Pigman's subpoena, with no affidavit) newly discovered, undisclosed, material evidence within the requirement of Brady v. Maryland, 373 U.S. 83?

5. Did the Ohio, Montgomery County, Court of Common Pleas failure to address Petitioner's actual innocence claim, and the newly discovered/presented evidence in support of such claim violate his due process right pursuant the 5th, and 14th Amendment of the U.S Constitution to a fair trial, where such affected the decision of the jury, and could have reasonably changed the outcome of the trial?

6. Does trial, and appellate counsel violate the duty owed their client when they purposely, and knowingly fail to argue a clear Brady violation, which prevents lodging of a meritorious 4th Amendment claim?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURIS DICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT.....	9
CONCLUSION.....	25

INDEX TO APPENDICES

- APPENDIX A-1: (Decision of Ohio Supreme Court, December 28, 2021).
- APPENDIX A-2: (Opinion of the Second Appellate District Court, Ohio, rendered September 10, 2021).
- APPENDIX B: (Judgment of Montgomery County Court of Common Pleas, Ohio, rendered December 11, 2020).
- APPENDIX C: ("Ex. 01" (Subpoena/affidavit, for Det. Pigman to search Cincinnati Bell Wireless -Newly discovered evidence attached to Crim. R. 33 motion)).
- APPENDIX D (Material Witness Affidavit/ Det. Pigman).
- APPENDIX E: (Brenda Harris' interview with Det. Pigman).
- APPENDIX F: (Crim. R. 33 Motion for New Trial/ and exhibits, and renewed motion to dismiss).
- APPENDIX G: (Motion for Leave to Supplement Crim. R. 33 Motion to Request Leave for Delayed Filing).
- APPENDIX H: (State v. Jackson, 2017 Ohio 1304, appeal from 2016 Post Conviction Petition).
- APPENDIX I: (Property Room Receipt from Trotwood Police Department, records downloaded by Det. Pigman from Cin. Bell Wireless).
- APPENDIX J: (Post-Conviction Petition, filed pursuant ORC 2953.21).
- APPENDIX K: (Trotwood P.C. Narrative Report of critical DNA evidence lost).
- APPENDIX L: (Alternate suspect statement about critical physical evidence).
- APPENDIX M: (Det. Troy Dexter's search warrant to search Cin. Bell Wireless).
- APPENDIX N: (State of Ohio's discover index discovered by Petitioner in 2013).
- APPENDIX O: Picture establishing colored hoodie Petitioner had on).

APPENDIX K: Trotwood police department Narrative Report stating critical DNA had been lost by the state of Ohio.

APPENDIX L: Alternate suspect statement about critical evidence found at the crime scene.

APPENDIX M: Troy Dexter's search warrant to search Cin. Bell Wireless.

APPENDIX N: State of Ohio's discovery index (newly discovered evidence obtained by Petitioner in 2013).

APPENDIX O: Picture establishing what type of hoodie Petitioner had on, on 3/19/10.

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Brady v. Maryland, 373 U.S. 83.....	9,11,12
Cuyler v. Sullivan, 446 U.S. 343.....	18
Evitts v. Lucey, 169 U.S. 387.....	18
Giglio v. United States, 405 U.S. 150.....	11,14
House v. Bell, 547 U.S. 518.....	22
Jackson v. Warden, Leb. Corr. Inst., 2014 U.S. list. Lexis 110700 (August 11, 2014).....	21
Morrison v. Kimmelman, 650 F.Supp 801 (3rd Cir.).....	19
Murray v. Carrier, post at 488.....	19
Napue v. Illinois, 360 U.S. 264.....	11,14
State v. Jackson, 2017 Ohio 1304.....	2
State v. Jackson, 2021 Ohio Ohio 3114.....	2
Strickland v. Washington, 466 U.S. 668.....	17
Towns v. Smith, 395 F.3d 251 (6th Cir.).....	18
United States v. Carpenter, 138 S.Ct. 2206, 201 L.Ed.2d 507..	14,20
Weary v. Cain, 577 U.S. 385 (2016).....	17
Wiggins v. Smith, 539 U.S. 510.....	17

STATUTES AND RULES

18 USCS 2703(a).....	10
28 USCS 1257(a).....	3,15
Criminal Rule 16.....	10,11,12,14,16
Criminal Rule 16(L).....	14
Criminal Rule 17.....	11

Criminal Rule 33.....	2,4,10,23
Criminal Rule 41.....	10,20
Ohio Revised Code 2953.21.....	2,10,11,16,18

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A-1 to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the 2nd District Court of Appeals, Ohio court appears at Appendix A-2 to the petition and is

- ☐ reported at 2021 - Ohio - 3114; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

PROCEEDINGS BELOW

Mr. Jackson, in April 12, 2016, filed a delayed Post-Conviction pursuant ORC 2953.21 (A)(1); and (A)(2), which he claimed discovery index and its contents disclosed in 2013, were newly discovered evidence, which he was unavoidably prevented from obtaining, after many requests. The trial Court denied relief of his IAC claims, and grounds asserting prejudice. Mr. Jackson timely appealed which the Ohio 2nd Dist. Court of Appeals denied. See State v. Jackson, (2nd Dist.), 2017-Ohio-1304. Pet. App. C.

Mr. Jackson next filed in Jan. 11, 2018, a Criminal Rule 33 motion for a new trial, asserting material evidence being Det. Pigman's subpoena without its required affidavit to search Cin. Bell Wireless, captioned "State v. John Doe", see ("Ex. 01"), acquired through a 2017 public records request, was not placed on any Court's journal/docket, or disclosed to trial counsel which was newly discovered evidence, he was unavoidably prevented from obtaining within the required time periods. With as well as newly presented evidence, evidence in support of his actual innocence claim. The trial Court denied relief, holding Jackson presented no new evidence to the Court, and res judicata barred adjudication of his asserted grounds. Mr. Jackson timely. The Ohio 2nd Dist. Court denied relief. See State v. Jackson, 2nd dist. Court, Sept. 10, 2021), 2021 Ohio 3114. Pet. App. A. Mr. Jackson, timely appealed to the Ohio Supreme Court, which affirmed.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 12/28/21.
A copy of that decision appears at Appendix A-1.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be *** deprived of life, liberty, or property without due process of law" U.S. CONST. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any state deprive any person of life, liberty, or property without due process of law ***." U.S. CONST. amend. XIV; Sect.

Ohio Crim. R. 16 states in pertinent:

(A) "This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of justice system *** Once discovery is initiated by demand of the defendant, all parties have a common duty to supplement their disclosures".

Ohio Crim. R. 33 states in pertinent part:

(A) "A new trial may be granted on motion of Defendant for any of the following causes affecting materially his substantial rights:

(6) "When new evidence material to the defense is discovered, which defendant could not with reasonable diligence have discovered and produced at trial".

(B) "Motions for a new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day the verdict was rendered *** "If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the Court finding that he was unavoidably prevented from discovering the evidence within.

STATEMENT OF THE CASE

The state of Ohio alleged on the date of 3/19/10, someone entered an apartment brandishing a fire arm, committed a robbery, and shot and killed Antione West. Thomas Horn who was in the house at the time during a 911 call stated he didn't know and could not see the suspect. In his written statement he stated a man came in, and stated lay down, in which he jumped on the floor and played dead before crawling to the kitchen after hearing shots. He would later testify at a Motion To Suppress hearing (hereinafter MTS, hearing), it was dark, the man had on a hood, and that he had 2 to 3 seconds in which he focused on the gun before dropping to the floor.

During a interview with Det. Pigman, it was learned from a police report that Horn, called the detective and stated he had information on the suspect, that his cousin Shevonda Leslie's new boyfriend (Brandon Harris) had killed her son's father that night. Failing to pick the boyfriend Brandon Harris out of the photo spread. Det. Pigman next asked Horn if it was his cousin's Brenda Harris Boyfriend in which he stated, yes, but did not know his name. In a third interview Det. Pigman showed Horn a photo spread and asked him to pick out whom he knew to be Brenda Harris' boyfriend.

During trial Horn testified that he could not identify the suspect, in which the state refuted by claiming surprise, and asking direct questions, claiming Horn had attended pre-trial meetings where he identified Petitioner.

FN 1

An affidavit prepared by Det. Pigman, and notarized by prosecutor Ms. Hobson Pet. App. D, shows the false statement of the state. According to the notarized statement Thomas Horn never attended any pre-trial meetings, nor did he show up to the August, 2010 trial date. And was not available for the September, 2010, trial date. He was picked up in October, 2010, on a material witness warrant, and released again on before Oc. 2010 trial

Kimberly Carl also a witness in the apartment at that time, stated as soon as the person came in he started shooting, that she dropped to the floor, and she crawled to the kitchen with Horn.

Next door neighbor Tahira Elamin, in her written statement given that night stated that she heard shots, and in looking out the window seen a man of small build, and frame, about 5'6 running to a car. At trial Elamin testified after viewing a video from a Kroger's supermarket that maybe she was not sure about the person she had seen, after testifying she was sure of what she seen, and had written. Trial counsel who stood 6'3, or 6'4 had Elamin to step off the stand, and in standing beside him, he asked her if they were the same height in which she stated they were, in order to fit the state's theory to the jury that she had conception of height.

Dillon Sims next testified that earlier that day, petitioner who was not a friend had asked him to borrow his gun in which he gave to Petitioner. Sims told detectives he was home all night, and never left. Sims then testified that about 12 midnight he had received a call from a man who stated that Petitioner shot someone and tossed his gun. That after receiving that call he traveled along the road near the crime scene in search of his gun. Which was the reason his cell phone was pinging off the cell site tower #157, near the scene of the crime. Sims stated after waiting a couple of days he called his cousin who was an attorney who initiated the call to police, but removed herself due to the fact that they were family.

Amy Rismiller DNA Analyst, after checking Petitioner's DNA/blood standard against all evidence, and other touch evidence from the scene. It was found that he was excluded from matching any touch DNA or blood from the crime scene. She found mixed touch DNA around the rim of his pulled out pant pocket

which the state claimed was done due to a robbery.

Cincinnati Bell Wireless custodian Paula Papke whom the state did not inform trial counsel would be a witness, and part of the witness list until after being filed after trial, as objected to by counsel, testified that she provided Det. Pigman with call detail records obtained from several data bases which included cell site location, sectors of each cell tower, and sides in respect to each sector, with as well as date, time, and what type of communication occurred (CSLI). Also included were maps, manuals of how to read such info. Ms. Papke explaining the number, and address attached to each tower, at times placing the wrong address to, the wrong tower, correcting such and then again reasserting wrong tower information placed in the mind of jurors false movements of Petitioner, causing the jury to lose its way. Trial counsel declined to cross-examine Ms. Papke.

Lakesha Gray Petitioner's son mother stated in a written statement that Petitioner had satyed at her home, being in and out, all that week, and including the day of the crime, and after the fact. Which the children confirmed, except for the day of his son's burthday, as her sister died on that day, which they were at the hospital that day, of March 15, 2010. Detectives going back to Gray's home stated they obtained another, and different written statement from her in which she changed her previous statement, telling them she had lied saying Petitioner had been there the day of the crime.

Detective Pigman testified that he interviewed Brenda Harris-Tate at about 1:30 P.M., at which time she provided a different number for Petitioner. A number which he used to obtain a subpoena to search Cin. Bell Wireless,

for that number and others, which he testified took a while to get. Yet such were already locked away in the Trotwood Police Department property room, as established by property room receipts showing all records were downloaded on 3/23/10, and 3/31/10, at 10 a.m., and 10:30 a.m., Det. Pigman made maps from information contained in the call detail records, as he understood them, and provided them to the jury to establish Petitioner's alleged location. Attempting to place him at the scene of the crime from location of his phone.

Thomas Horn's video deposition was played for the trial against Petitioner's objections. After failing to appear for two different trial dates, and being picked up on a material witness warrant, and telling the Court that he did not have a phone number except that of his brother, and giving an address that the state, police dept., and probation dept., knew he always gave, but had never been there when they arrived, allowed Horn to be released, knowing it was probable he would not appear for the December, 2010 trial date which he did not.

The jury convicted Petitioner of 3 counts of murder; three counts of agg burglary; three counts of robbery; three counts of felonious assault; and nine firearm specifications. The Court sentenced him to 28 years to life.

REASONS FOR GRANTING THE PETITION

This is an extraordinary case. This Court has held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt, or punishment, irrespective of the good faith, or bad faith of prosecution". See *Brady v. Maryland*, 373 U.S. 83.

The state of Ohio did not disclose Ex. 01, during an initial discovery request, or during written motion to suppress (hereinafter, MTS), where trial counsel asserted, illegal search and seizure claim pursuant to Crim. R. 16, and the 4th Amend of the U.S. Const., in which the state of Ohio made a second disclosure of search warrants, and subpoenas involved with this case.

Although the state disclosed a search warrant of Detective Troy Dexter to search Cin. Bell Wireless for pics, voicemails, and text messages, in which he only received text messages. The state did not disclose at all, Det. Pigman's subpoena, and required affidavit to search Cin. Bell wireless for recovery of call detail records which contained cell site location information (CSLI), which he downloaded on 3/23/10, and again on 3/31/10. Ex. 01 does not cover the records downloaded 3/23/10. The state knowingly, and purposefully misled defense counsel to believe such records as recovered by Det. Troy Dexter, would be the records which they would use at trial, in order to survive the oral MTS hearing. Trial counsel did not argue during his oral hearing the illegal search and seizure claim as he done in the written MTS.

The state of Ohio next on the last day of trial disclosed Petitioner's phone records, and maps produced by Det. Pigman from information contained in the Cin. Bell Wireless phone records he had downloaded. Trial Counsel

objecting, and asserting a Crim. R. 16 violation, was overruled by the trial Court who misapplied the Crim. R. 16 to the facts. The trial Court declined to review the documents disclosed. Trial Counsel stated that he would allow the documents to speak for themselves, and abide with the Court. The state falsely stated to the Court that it provided all documents to counsel and only disclosed maps on the last day, contrary to what was shown by discovery.

During direct appellate review Petitioner requested through trial counsel, appellate counsel, and Ohio Public Defender's Office, a copy of discovery provided to counsel during trial in order to support his post trial motions, or ways in which he could obtain such. Because discovery and Ex. 01, was not part of the record on direct appeal. Argument as asserted in Petitioner's Crim. R. 33 motion, and his grounds of IAC, in respect to trial, and appellate counsel in his ORC 2953.21 Petition, concerning Cin. Bell Wireless issues could not be argued during direct appeal, and asserted through Cin. Bell Arguments as set forth by appellate counsel therein.

In 2013 a non-profit organization provided petitioner with a copy of discovery which showed trial counsel had knowledge that he was not provided Petitioner's phone records, or Det. Pigman's subpoena in Ex. 01. It also showed on two separate dates Det. Pigman downloaded Cin. Bell Wireless records without subpoena, or search warrant, and that they were placed in the property room of the Trotwood Police Dept.

Finally it showed a possibility of violations of federal Rule 18 USCS 2703(A); violation of his subjective expectation of privacy, through use of (CSLI), without a Crim. R. 41, search warrant; tracking of Petitioner for more than 21 days without a Crim. R. 41 search warrant; and that other 4th Amend. U.S. Const. violations may be present.

After filing a Post-Conviction Petition pursuant ORC 2953.21, and using the discovery index, and its contents as newly discovered evidence. The same trial judge who declined to review, assess, and address on record documents provided by the state to trial counsel on the last day, supporting his Crim. R. 16 objection (T. Tr. 972), held "The Cin. Bell records, were an issue at trial as reflected by the appellate decision resulting from Mr. Jackson's appeal of various convictions" *** "Mr. Jackson, as such, cannot credibly assert he was unaware of the facts relating to the Cin. Bell records or was unavoidably prevented from discovering the facts supporting his post-conviction claims which rely in one way or the other, upon the Cin. Bell records.", the Post-Conviction Court also left moot Petitioner's request of the state pursuant Crim. R. 17 to produce to him a copy of Ex. 01.

After gaining access to Det. Pigman's subpoena, which was without affidavit Ex. 01, disclosed through a public records request after change in Ohio law in December 28, 2016. Petitioner filed a Crim. R. 33 motion for a new trial asserting Det. Pigman's subpoena to search cin. Bell Wireless was material, and constituted a Brady violation. The Montgomery County Court of Common Pleas, decide, and the 2nd Dist. Appellate Court, Ohio, affirmed, the issue of newly discovered evidence, contrary to federal law, and clearly established U.S. Supreme Court precedence as set forth by this Court in Brady v. Maryland, 373 U.S. 83; Giglio v. United States, 405 U.S. 150; and Napue v. Illinois, 360 U.S. 264-71.

I. Crim. R. 16 Violation Exists In This Case Causing A Brady Violation

A. Ohio Crim. R. 16, is directly in line with the requirements of Brady v. Maryland, supra..

Trial counsel being provided his initial discovery request was provided no subpoenas, or search warrants dealing with this case at all. After a written MTS request asserting illegal search, and seizure. The state disclosed search warrants and subpoenas. One included a search warrant obtained by Det. Troy Dexter for search of Cin. Bell Wireless for particularly pics, voice mails, and text messages. Det. Pigman's subpoena to search Cin. Bell Wireless was not part of the June 29, 2010, disclosure.

On the last day of trial, during testimony of Det. Pigman he stated when asked:

Prosecutor: And, at some point and time you indicated you received records for Mr. Jackson's cell phone.

Det. Pigman: Yes.

Mr. Monta: I'm going to object. Can we approach the bench?

The Court: You may. You may.

(T. Tr. 937)

(at side bar)

Mr. Monta: You know, this is--this is all hearsay, saying he checked the records when we don't know what the records are.

(T. Tr. Id.)

The Court: -- on the 19th, and 20th. Is there going to be testimony about the cell towers?

(T. Tr. 956)

Mr. Monta: Well I have another question about that judge. And I was just provided with this information about cell phone towers during trial. And I refer back to that rule 16 where we didn't get that and there wasn't anything provided to the Court that that was going to be used.

(T. Tr. 956)

The record is clear from trial counsel's hearsay statement that he did not have any of petitioner's phone records, or the documents provided to him on the last day of trial in respect of how to read cell tower information. Even after introduction to the jury of Exhibits 206 - 209 (Petitioner's call detail records, and records key) (T.Tr. 968); and Exhibit 248 (Maps made from call detail records). Id. Mr. Monta again objected. (T. Tr. 972). The Court held "You had -- you were told that the -- you were informed that a Cincinnati Bell Representative was going to be called and you could have, I suppose, tried to secure to secure information regarding that which was going to be produced, but I don't see that as a discovery violation". Even after trial counsel before testimony of Cin. Bell Wireless custodian of record Paula Papke who testified before Det. Pigman, alerted the Court that the state of Ohio had not given him notice that Ms. Papke would testify, and that she was not a part of the witness list (T. Tr. 861), which was not filed in this case until after the trial.

B. Material Evidence

This Court has held newly discovered evidence is only material if it undermines confidence of a fair trial, and could have reasonably affected the outcome of the trial *** not that it would have changed the verdict.

Here Det. Pigman's subpoena was material as it showed that his request within his subpoena was against 18USCS 2703(a) which required a warrant pursuant Crim. R. 41, that he tracked through long term monitoring Petitioner in and out of public places 24 hrs. a day continuously for more than 21 days without a warrant by using cell site location information (CSLI). That he obtained such subpoena without an affidavit. See United States v. Carpenter, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018).

Det. Pigman also testified that he had no intel on an alternate suspect, and he didn't know if he had been around the crime scene. When trial counsel questioned him if the phone records of the alternate suspect showed he was at the crime scene that night. See (T. Tr. 979, 980). Yet his subpoena request shows he searched for the alternate suspects phone records. A copy of discovery index, and its contents gained by Petitioner in 2013 showed through a property room receipt that such records were download, and placed in the property room. See Ex. Q3; and Ex. Q4, of Pet. App. F. See also Giglio v. United States, 405 U.S. 150.

Furthermore the state of Ohio disclosed only Det. Troy Dexter's search Cin. Bell Wireless in response to trial counsel's written MTS, purposely, and knowingly misleading trial counsel to believe records it would use at trial was from his search. Preventing investigation, and preparation of a defense to meet the state's case in respect to the search conducted by Det. Pigman. As the state used Petitioner's call detail records on the last day of trial, which had not been disclosed to trial counsel, or had disclosure of the source from which they were obtained (Ex. 01). See Napue v. Illinois, 360 U.S. 269.

Finally, the continued deliberate deception of the Court, and jurors, by the state included its false testimony after trial counsel's objection,

and assertion of Crim. R. 16 violation. The state placed on record that all exhibits used in testimony of Paula Papke were disclosed through discovery SEE *NAPUE V. Illinois*, supra.. This Court taking judicial notice of the discovery index, and Cin. Bell Wireless custodian Paula Papke's testimony will in respect to the exhibits used find the state's deliberate deception incompatible with rudimentary demands of justice. As the state provided 1 page phone records (subscriber sheet) in its April, 2010 disclosure. See Pet. App. N.

Here the disclosure of "Ex. 01", would have put the whole case in a different light, as there was more evidence WA, Email from alternate suspect, critical physical evidence (broken watch), and phone records which pointed at and showed more than likely the alternate suspect committed the crime, over the circumstantial, evidence that the state set forth against Petitioner. It remains that had Ex. 01, been disclosed to defense counsel there is a very strong reasonable probability that the outcome of the proceeding would have been different, through the cumulative effect of all evidence known, and unknown had it been presented to the jury, been evaluated under the correct standard. Such would have been enough to cause more research into Petitioner's actual innocence.

II. Exercise Of Jurisdiction Is Appropriate To Resolve A Const. Question

Petitioner has presented a Constitutional question of a Brady violation to the Montgomery County Court of Common Pleas which has the duty and discretion to determine if Petitioner was unavoidably prevented from discovering the new evidence timely before answering the Constitutional question. An issue the Post-Conviction judge who was also the trial judge, failed to correctly address through misapplication of Ohio's Crim. R. 16 during trial (T. Tr. 956), failing to comply with his duty pursuant to Ohio's Crim. R. 16(L) to review the material, make a record of such, and properly preserve the record for appellate review purposes.

Because a trial Court has discretion to deny newly discovered evidence in wake of an awaiting Const. question, such question is never resolved. Appealing the decision of the trial Court, and such decision being affirmed by the Court of appeals, the opinion of the Court yet again leaves the Const. question unresolved. See Pet. App. A.

Here because trial counsel denied Petitioner's request for a copy of discovery during timely period to file the Crim. R. 33, motion, and/or Petition pursuant 2953.21, in respect to evidence dehors the record. He was unable to know what grounds could be argued in respect to any claims being asserted, and unable to know the contents of the missing document (Ex. 01), in order to show the material factor of the Brady violation. Thus it is clearly shown the effect of the non-disclosure of Ex. 01 by the state of Ohio, on investigation, and preparation of a defense for trial. Critical interview of one of the state's most important witnesses Paula Papke (Cin. Bell Wireless custodian), and the effect of the jury receiving a one-sided theory of the state in respect to Petitioner's location, per se information

(CSLI) contained in the call detail records versus a defense which could not be set forth due to missing subpoena, and records received by Det. Pigman as a result of the search still being withheld by the state of Ohio.

Petitioner respectfully invokes this Honorable Court's jurisdiction pursuant 28 USCS 1257(a) in which this Court has jurisdiction over final judgments of state post-conviction Courts. Petitioner asserts this is an appropriate case to exercise such jurisdiction, as such was compound to other evidence which showed Petitioner's actual innocence. *Weary v. Cain*, 577 U.S. 335

Thus this Court is asked to resolve, and answer the questions as set forth herein.

III. Ineffective Assistance Of Counsel

Here trial counsel objected to not being provided phone records (T. Tr. 937), and the states late disclosure on the last day of trial (T. Tr. 956-957). Yet Counsel having discovery which showed what he had, and had not been provided by the state, and knowing that the trial Court denied review of the records disclosed on the last day by the state (T. Tr. 972), he did not request a continuance to investigate what the documents were, the source in which they were obtained, and make a record in support of his findings and objections, or why such continuance was unnecessary, see *Wiggins v. Smith*, 539 U.S. 510, as such decision not to request a decision was not strategic, and rested on a rotten foundation. Thus it is probable trial counsel refused to reply to Petitioner's request for a copy of discovery during a period of which he was able to file a timely ORC 2953.21 Petition, or Crim. R. 33.

Trial counsel here had a duty, see *Strickland v. Washington*, 466 U.S. 668, to assert, and protect Petitioner's U.S. Const. rights, with as well as his

right to a fair trial during all proceedings. See *Evitts v. Lucey*, 169 U.S. 387 where this Court held "a proceeding initiated, and conducted by the state itself is an action of the state within the meaning of the 14th Amend. of the U.S. Const., see *Cuyler v. Sullivan*, 446 U.S. 343.

Before the start of testimony from Paula Papke, trial counsel stated that he did not know and was not alerted to the fact that she would be a state's witness (T. Tr. 861), yet trial counsel did not request a continuance to investigate, interview, and recall her, and only stated he would not cross examine her. See *Towns v. Smith*, 395 F.3d 251, 258 (6th Cir., 2005) holding a lawyer's obligation fulfilling his Strickland duty "includes the obligation to investigate all witnesses who may have information concerning his or her clients guilt or innocence". Trial did not until testimony of Det. Pigman (who testified after Paula Papke), that he challenged phone records, cell tower maps, and how to read cell tower information in call detail records from Cin. Bell Wireless, and maps produced by Det. Pigman from Cin. Bell. Wireless, call detail records, with as well as the fact that records the state displayed records during testimony of Paula Papke which did not represent Petitioner's actual records. While knowing a 4th Amend. violation had occurred trial counsel stated he'd abide by the decision of the trial Court, after the trial Court misapplied Crim. R. 16, through its own interpretation of law pursuant Crim. R. 16.

Failure of trial counsel to adhere to his Strickland duties, and ignorance to a point of law (Crim. R. 16), which would have been cause for further investigation affected Petitioner's right to a fair trial, and due process of law. See *Williams v. Taylor*, 529 U.S. 362 (An attorney's ignorance to a point of law that is fundamental to his case with his failure to perform

basic research on that point is a quintessential example of unreasonable performance under Strickland).

Finally, appellate counsel also failed his duty to challenge trial counsel's ineffectiveness in respect to his Crim. R. 16 objections, and request a full and fair hearing in respect to Petitioner's 4th Amendment U.S. Const. claim not addressed or argued orally during the MTS hearing by trial counsel. See *Morrison v. Kimmelman*, 650 F. Supp. 801, (3rd Cir.), remand back by this Court. Although evidence to support these claims on direct appeal dehor the record. The appellate Court remanding this case back to the trial Court to conduct such full, and fair hearing, would have allowed some evidence dehor the record to become part of the record of from such hearing and thus become available for use as part of the record on direct appeal.

Here Petitioner's 6th Amend Const. right to effective assistance of counsel during trial proceedings, and during direct review, has been violated as both trial, and appellate counsel's actions have led to a procedural default for failure to assert a 4th Amendment claim, and request one full, and fair hearing. *Murray v. Carrier*, post at 488. Which should have been conducted in oral MTS hearing, as such issue was raised in his written MTS.

IV. Due Process, Equal Protection Of Law, And Fair Trial Rights Were Violated

The state of has violated Petitioner's due process, equal protection, and fair trial rights by appointing counsel who having knowledge of the states U.S. Const. violation of the 4th, 5th, 14th, Amend. rights did not protect those rights, *Strickland v. Washington*, supra.. Tria counsel allowing such to go unchallenged, unpreserved in lower Court proceedings prevented such from being raised during direct review. Newly discovered, and newly presented

evidence in possession of trial Court had a reasonable probability of affecting the outcome of his trial which could not in any way be deemed fair. As such was contrary to U.S. Supreme Court precedence in Brady, supra, and United States v. Carpenter, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), as the state of Ohio knowing used cell site location during trial after stating it was not (T. Tr. 955), and tracked Petitioner for more than 21 days all without a warrant pursuant to Crim. R. 41, and used maps created by Det. Pigman created from call detail records containing (CSLI).

Petitioner's 14th Amend. U.S. Const. rights were violated due to IAC of trial and appellate counsel, and state's withholding of evidence in bad faith.

V. Actual Innocence Claim Should Be Resolved In The Interest Of Justice

A. Prior Actual Innocence Claims

Petitioner asserts and with permission of this Court Re-incorporates here his actual innocence claim as presented to the state of Ohio Court, and refers this Court to pages 2 of 25 through 6 of 25 of his Crim. R. 33 motion. See Pet. App. F, which includes in full facts arguments, and exhibits in respect to misidentification by the states material witness Thomas Horn, newly presented critical physical evidence (i.e. watch and email from alternate suspect), and exculpatory DNA evidence, which was all in trial counsel's possession, but never heard by the jury.

Petitioner asserts he first presented a Schulp claim to the Southern District federal Court in his 2013 habeas corpus petition, after being provided in the earlier part of 2013 a copy of his discovery, containing police reports which he felt showed his innocence. Which was not part of the record.

Petitioner thereafter requested to expand the record in federal Court which the stated opposed, and the Court later granted. See Jackson v. Warden, Leb. Corr. Inst., 2014 U.S. Dist. Lexis 110700 (August 11, 2014), Case No. 3:13-cv-347.

Magistrate Mertz, held while he did not believe the evidence in which he assessed individually undermined his confidence in the outcome of the trial. He did in respect to the states only material witness Thomas Horn hold "Admittedly, the newly-tendered evidence undermines the credibility of Thomas Horn", Id at [*25].

Petitioner raised his actual innocence claim again in state Court for several reasons: (1) Magistrate Mertz in addressing each piece of evidence individually did not weighing them cumatively, and its effects as a whole on the probable effects on reasonable minded jurors, as required by this Court's precedence in *House v. Bell*, 547 U.S. 518, Id. at [*538], held "a habeas Court must consider all evidence old and new, incriminating, and exculpatory" without regard to "rules of admissibility", and "Based on this total record, the Court must make a probabilistic determination about what reasonable properly instructed jurors would do", closing with "The Court's function is not to make an independent factual determination about what likely occurred, but rather assess the likely impact of evidence on reasonable jurors As Magistrate Mertz assessed the claim contrary to clearly established U.S. Supreme Court precedence; and (2) Newly discovered evidence in "Ex. 01", not only showed that an alternate suspect's phone number was requested and downloaded by Det. Pigman, but that the state of Ohio, and Det. Pigman knowingly, and purposely, with malicious intent, through false testimony, stated when questioned by trial counsel if the alternate suspect, (Brandon Henderson), Thomas Horn's brother was in the area at the time, and if he was within any of the cell phone towers at that time (T.Tr. 980). Which Det. Pigman answered he did not have any intel on him (T. Tr. Id.).

B. Physical, critical, and exculpatory DNA evidence

Taken as a whole Brandon Henderson's email stating he was at the apartment that night for a credit bag of marijuana because he had no money, and that he sold the victim his watch earlier that day excusing the fact that it was torn from his arm during a struggle and found broken lying next to the victim. That after DNA test results it was found as provided by Amy Rismiller's

testimony. Petitioner did not have one number matching the results of the mixed DNA standard from that test. Although the jury was not made aware of the test results in respect to the watch, and the victim. DNA test results Petitioner provided as new evidence show the victim was also excluded from the mixed DNA found in the watch. This evidence taken as a whole, with "Ex. 01" herein, showing such evidence (intel), was requested, and obtained by Det. Pigman from Cin. Bell Wireless, (phone records), which are still being withheld, along with the fact that Det. Pigman, an arm of the state, knowingly and purposely testified under oath, that he did not have such (T. Tr. 980). These facts should strongly undermine this Court's confidence that Petitioner received a fair trial. As no evidence placed Petitioner at the scene of the crime.

Petitioner presenting Ex. 01 to state Court as newly discovered evidence, was prevented adjudication of his actual innocence claim, creating a manifest injustice through application of a procedural bar, by the trial Court's abuse of discretion, as Petitioner has clearly surmounted due diligence beginning as far back as 2012. See Pet. App. G (Motion for leave, to supplement Crim. R. 33 motion to request leave for a delayed filing, and attached exhibits showing diligence). As this Honorable Court has been invoked to also resolve Petitioner's actual innocence claim, *Weary v. Cain*, 577 U.S. 395

C. Misplaced and Lost Critical DNA Evidence:

During public records request in 2017, Petitioner recieved Exhibit K (Narrative Report which was not provided to trial counsel in discovery as shown by discovery index in Ex. N. Explaining that hairs found on the victim, and hairs found inside a skull cap from the scene the state of Ohio held was worn by the suspect.

Petitioner asserts trial counsel should have been given a copy of this report as it contained information in respect to his guilt, or innocence, or punishment thereafter. As such presented a Brady violation, pursuant Brady v. Maryland, supra., and violation of due process, and right to a fair trial pursuant to the 5th, and 14th amendments of the U.S. Const. Petitioner asserts had this information been provided to counsel. Such could have been provided to the jury. The jury knowing that the real suspect was still on the street, and identity of the suspect could have been proven by DNA analysis of the hair strans found inside the knit skull cap, and off the victim. There was a strong, and reasonable probability that trial proceedings would have provided a different result.

The alternate suspect inculpatated himself through his own statement, as shown by Exhibit L. Had the jury been aware of this state through testimony of Det. Pigman who provided the narrative report. They would have questioned the NA of the wearer of the watch and that found inside of the skull cap, and off the victim, as knowledge of the existence of other NA evidence which could thus provide identity to the real suspect would have been enough to cause a different outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Devin D. Jackson

Date: January 5, 2022