No. 22-7395

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

GUDONAVON J. TAYLOR — PETITIONER

vs.

THE STATE OF OHIO — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SECOND DISTRICT COURT OF APPEALS OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the procedure rule under Crim.R. 33(B) should be deemed oppressive and arbitrary for juvenile offenders?

(2) Whether a juvenile offender's rights to fundamental fairness and due process as guaranteed by the United States Constitution are violated when a court refused to adjudicate the merits of his alleged constitutional violations that permeated his entire trial to his prejudice?

(3) Whether the *Brady* rule applies when the record demonstrates by clear and convincing evidence the State *knowingly* used perjured testimony to procure a defendant's conviction?

(4) Whether courts are constitutionally obligated to review a defendant's allegation that the State *knowingly* used perjured testimony to procure his conviction, once his conviction has become final?

(5) Whether the constitution requires a criminal defendant, whose conviction has become final, be granted a new trial when *the record* demonstrates by clear and convincing evidence the State *knowingly* used perjured testimony to procure his conviction?

(6) Whether courts are constitutionally obligated to review a defendant's allegation that the trial court violated his constitutional rights to the presumption of innocence and due process when it instructed the jury he had the burden to prove the defense of alibi beyond a reasonable doubt before he could be found not guilty?

(7) Whether a shift in the burden of proof of an essential element of the crime rises to constitutional proportions that renders a trial fundamentally unfair?

(8) Whether a defendant's right to the presumption of innocence and due process as guaranteed by the United States Constitution are violated when a trial court instructs a jury that a defendant must prove the defense of alibi beyond a reasonable doubt before he can be found not guilty?

(9) Whether clarification of existing law by the judiciary applies retroactively on collateral review?

(10) Whether a defendant's rights to due process and the equal protection of the law and due process, as guaranteed by the United States Constitution, are

violated when he is not afforded the protections provided by law as clarified by the judiciary to a class of offenders?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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STATE

UNITED STATES CONSTITUTION

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

Petitioner respectfully prays that a Writ of Certiorari be issue in this case to provide the needed guidance and directives for laymen, defense and prosecuting attorneys, and the judiciary in regards to a criminal defendant's rights once his conviction has become final.

OPINIONS BELOW

The opinion of the highest state court to review the merits of Petitioner's alleged constitutional violation, i.e., the Second District Court of Appeals of Ohio, appears at Appendix A in this petition and is reported at *State v. Taylor*, 2022-Ohio-3579, Case No. CA 29422 and CA 29423.

The opinion of the Ohio Supreme Court to decline to accept jurisdiction to review the judgment of the Second District appears at Appendix B in this petition and is reported at *State v. Taylor*, 2023-Ohio-86, Case No. 2022-1407.

The opinion of the Montgomery County Court of Common Pleas, Criminal Division overruling Petitioner's Motion for Leave to file a Motion for New Trial pursuant to Ohio Criminal Rule 33(B) appears at Appendix C in this petition and is unreported.

The opinion of the Montgomery County Court of Common Pleas, Criminal Division overruling Petitioner's Motion to Vacate Void Conviction appears at Appendix D in this petition and is unreported.

JURISIDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(A). The opinion of the Second District Court of Appeals of Ohio was rendered on October 7, 2022. The Ohio Supreme Court's decision to decline to accept jurisdiction to review the judgment of the Second District was render on January 17, 2023. The foregoing Petition for a Writ of Certiorari should be deemed timely as it is being mailed today April 13, 2023 to the Clerk of the United States Supreme Court (prior to the 90-day deadline that expires April 21, 2023).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and have the Assistance of Counsel for his defence.

U.S. CONST., AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On December 18, 2007, the State filed a complaint as to Murder against Petitioner in the Juvenile Court. On March 11, 2008 the Juvenile Court found probable cause to bindover Petitioner to the trial court on the alleged acts: Count One, Murder, in violation of R.C. 2903.02(A); and Count Two, Felony-Murder, in violation of R.C. 2903.02(B).

On April 7, 2008, Petitioner was indicted on: Count One, Murder in violation of R.C. 2903.02(A); Count Two, Murder in violation of R.C. 2903.02(B); Count Three, Felonious Assault in violation of R.C. 2903.11(A)(2); Count Four, Murder in violation of R.C. 2903.02(B); Count Five, Felonious Assault in violation of R.C. 2903.11(A)(1); and Count Six, Having Weapons While Under Disability in violation of R.C. 2923.13(A)(2). On April 18, 2008, Petitioner was charged with Discharge of a Firearm on or Near Prohibited Premises in violation of R.C.2923.162(A)(3)/(C)(4). All charges included a 3 year Firearm Specification pursuant to R.C. 2929.14 and R.C. 2941.145.

On February 20, 2009, Petitioner submitted a Notice of Alibi to the trial court. On March 22, 2010, the case proceeded to trial. Petitioner's charges were renumbered with Count Six now being Discharge of a Firearm on or Near a Prohibited Premises and Count Seven being Having Weapons While Under Disability. Petitioner was found guilty on all charges and convicted on: Count Two, Murder—15 Years to Life; Count Three, Felonious Assault—8 Years; Count Six, Discharge of a Firearm on or Near a

Prohibited Premises—10 Years; and Count Seven, Having Weapons While Under Disability—5 Years.

The trial court ordered Counts 2, 3, 6, and 7 to be served consecutively to each other and merged all the firearm specifications into one specification to be served consecutive to and prior to the definite term of imprisonment. Petitioner was given an aggregate prison term of 41 years to life.

Petitioner timely appealed. The Second District Court of Appeals of Ohio affirmed the trial court's judgment in *State v. Taylor (Taylor I),* 2013-Ohio-186. The Ohio Supreme Court declined to accept jurisdiction to review the Second District's decision. *State v. Taylor* (June 5, 2013), 135 Ohio St. 3d 1459.

On January 26, 2022, Petitioner *pro se* filed a Motion for Leave to file a motion for new trial pursuant to Crim.R. 33(B) and a Motion for New Trial pursuant to Crim.R. 33(A)(2) and Crim.R. 33(A)(5) simultaneously. Petitioner submitted documents in his Motion for Leave, *inter alia,* that established extenuating circumstances existed that stemmed from his *Juvenile Status* and lack of transcripts that supports a finding of unavoidably prevention to sustain his Motion for Leave or, at the very least, an evidentiary hearing on the issue.

The basis of Petitioner's Motion for New Trial were allegations that:

> (1) The Prosecutor committed plain error to the prejudice of the Defendant when it *knowingly* used perjured testimony to obtain his conviction; [ ] (2) The trial court committed plain error to the prejudice of the Defendant by incorrectly instructing the jury that the Defendant had the burden of proof with regard to his alibi defense.

On February 18, 2022, Petitioner *pro se* filed a Motion to Vacate Void Conviction pursuant to *State v. Smith*, 167 Ohio St. 3d 423 and *State v. Wilson*, 73 Ohio St. 3d 40. Petitioner alleged that the trial court lacked subject-matter jurisdiction over the acts charged and the accompanying Firearm Specification in Count Three through Count Seven of his indictment. Petitioner demonstrated that *Smith* clarified R.C. 2152.12 and R.C.2151.23(H) which limited the trial court's subject-matter jurisdiction to the acts charged in his indictment that were transferred from the Juvenile Court with a finding of probable cause.

On February 24, 2022, the trial court found Petitioner's Motion for Leave was untimely but briefly addressed the merits of his Motion for New Trial. The trial court ultimately found Petitioner's Motion for New Trial was without merit and procedural barred by the doctrine of *res judicata* as a result overruled Petitioner's Motion for Leave to file a Motion for New Trial. (Appx. C) On the same day, the trial court overruled Petitioner's Motion to Vacate Void Conviction, finding Petitioner could not avail himself to the holding in *Smith* because his conviction has become final. (Appx. D)

Petitioner timely appealed the judgments to the Second District. The Second District consolidated the appeals for review.

Petitioner raised four assigned errors for review:

(1) Petitioner's statutory and constitutional rights were violated when he was indicted and convicted on charges that were never transferred to the Montgomery County Court of Common Pleas from the Juvenile Court with a finding of probable cause;

(2) Petitioner was denied his right to a fair trial and due process as guaranteed by the Sixth and Fourteenth Amendment of the United States Constitution when the State *knowingly* used false evidence to obtain his conviction;

(3) The trial court erred to the prejudice of Petitioner by placing on him the burden of proving his defense of alibi beyond a reasonable doubt, thereby, violating the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and

(4) The trial court abused it discretion and denied Petitioner his right to fundamental fairness and due process as guaranteed by the Ohio and United States Constitutions when it denied his Motion for Leave to file a Motion for New Trial.

On October 7, 2022, the Second District upheld the trial court's decision. (Appx. A) Petitioner *pro se* timely filed a discretionary appeal to the Ohio Supreme Court. On January 17, 2023, the court declined to accept jurisdiction to review the appeal. (Appx. B) Petitioner now timely petitions this Court to issue a Writ of Certiorari.

At trial, the State failed to produce any non-testimonial evidence, i.e., murder weapon, finger prints, gunshots residue, hair fibers, DNA, blood on clothing, data whether social media or cellular that suggest or otherwise prove Petitioner is responsible for the death of the victim. The integrity of Petitioner's conviction stands on the conflicting identification testimony of Louise Tamlyn and Christopher Brown. All the other evidence presented by the State was immaterial to the identity of the assailant and merely cumulative. (Tr. *Passim*)

During opening statements, the State falsely claimed to the jury "Tamlyn will tell you ... Jb's on the ground and Don-Don is standing over him. Shooting." (Tr. 141-142) The Miami County Forensic Pathologist, Dr. Susan Allen, explained the scientific evidence in regards to the victim's exit wounds (multiple gunshots wounds to the torso) that established the victim was shot while lying on the ground. (Tr. 181) Tamlyn

testified the assailant immediately fled when *she saw* the victim fall to the ground in front of 238 Warren Street. (Tr. 229-230) Tamlyn made clear, even with the State's leading line of questioning, when the shot was firing in front of 238 Warren Street, the victim was standing in front of the assailant. (Tr. 230-231) Officer Joseph Pence, discovered the spall marks that established the victim got shot while lying on the ground in front of 238 Warren Street. (Tr. 230-381) During closing statements, the State falsely claimed to the jury that Tamlyn's account of the crime corroborates the spall marks discovered at the crime scene. (Tr. 780-781)

The State built its entire case against Petitioner solely on Tamlyn's false statement that she witnessed the crime as Brown never identified Petitioner as the assailant prior to trial. Brown identified Petitioner as the assailant when he took the stand at trial—approximately 27 months after the crime (Tr. 351) Under the totality of the circumstances Tamlyn and Brown's identification of Petitioner as the assailant is not reliable. *Neil v. Biggers*, 409 U.S. 188, 200.

Although Tamlyn and Brown pointed the finger at Petitioner, they both initially told the police they did not know who killed the victim. (Tr. 243, 340) Tamlyn testified herself she could not see the assailant during the shooting as the assailant had his back to her. (Tr. 231, 289-290) Tamlyn stated the assailant had his hood up, but that she recognized Petitioner because she saw the side of his face. (Tr. 229-230, 290) A reasonable person would not agree Tamlyn could have positively identified the Petitioner as the assailant, as a hood covers the sides of one's face.

Notably, the shooting happened right in front Adrian Uloho apartment and he could not make a positive identification of the assailant. (Tr. 570, 575) But Tamlyn expects this Court to believe she could identify Petitioner as the assailant when her house was a block away from the shooting.

Tamlyn testified she gave Petitioner's description to police the night of the shooting. (Tr. 244-245) The description Tamlyn provided was the assailant wa 5'8" to 5'9" in height. (Tr. 269) Petitioner was 6 ft tall. (Tr. 758) A reasonable person would not agree Tamlyn's initial description of the assailant is accurate with Petitioner's description.

Tamlyn was a fifty-seven-year old mental health patient who was apart of a dual diagnostic program because of her crack addiction. (Tr. 208, 262) Tamlyn has astigmatism and was disabled as she suffers from nightmares, insomnia, anxiety, post-traumatic stress disorder, and deep depression. (Tr. 233, 264, 260-261) Tamlyn takes the mental health medication, Effexor, Trazadone, Risiradone, and Topamaz. (Tr. 259)

Tamlyn stated the combination of her psychiatric medication and crack cocaine usage did not have any effect on her the night of the shooting. (Tr. 262-263) Tamlyn stated her mental function has not improved. (Tr. 263) Tamlyn was so delusional by her drug usage and mental health issues, even in the presence of the police, she was crunch down in the back of a police cruiser because her mind was telling her someone was coming to get her. (Tr. 272)

Moreover, under *Perry v. New Hampshire,* 565 U.S. 228, the Due Process Clause required a preliminary judicial inquiry into the reliability of Brown's identification of Petitioner as it was tainted by police arrangements. Ten days before Brown's identification testimony, Petitioner and Brown was placed together in holding in the county jail. (Tr. 366) The arrangement made it all but inevitable that Brown would identify Petitioner as the assailant.

Brown repeatedly testified when the victim had got shot, he got up and was on his cell phone. (Tr. 334) On the contrary, the State repeatedly claimed the victim's phone battery was dead and he had contacted his girlfriend with Petitioner's phone. (Tr. 146, 778)

This Court should take *Judicial Notice* that Tamlyn and Uloho both testified that Brown was not present during the shooting. (Tr. 227,229, 574) Tamlyn stated when Brown showed up he asked her what happened. Tamlyn stated she told Brown "JB had been shot." (Tr. 281-282, 284) The only material fact consistent with Tamlyn and Brown's identification testimony is that they both testified that they did not see Petitioner with a gun. (Tr. 231, 294, 334) A reasonable person would not agree Tamlyn and Brown cold have positively identified Petitioner as the assailant, if they were unable to see a gun and/or muzzle flash, as the victim was shot fourteen times. (Tr. 191).

Brown testified he was homeless—living on the streets. (Tr. 322) Brown stated he was in and out of Tamlyn's house (116 Lincoln St.) six months prior to the crime as drugs were being sold there. (Tr. 358) To the contrary, Tamlyn testified she was

renting a room at 116 Lincoln Street only for a week prior to the crime as her mail was still going to the homeless shelter. (Tr. 208, 212, 216)

Brown testified he smoked crack cocaine ten to fifteen times on the night of the shooting. (Tr. 359) Brown was so deep in his drug addiction that he stated the drug just motivated him and it really didn't have an effect. (Tr. 370, 372) Brown stated he got a deal for testifying against Petitioner. (Tr. 342)

The State illegally obtained Petitioner's mother coat (State's Exhibit 46) off her back and had Tamlyn identify it as the coat the assailant wore during the shooting. (Tr. 594-596, 251) Tamlyn testified the coat came down to the middle of the assailant's thigh. (Tr. 285, 288-289) Tamlyn identified the coat as being Petitioner's. (Tr. 251)

Petitioner presented an alibi defense. Latoya Stewart, Shabrandia Walder, and Gujuan Payton testified Petitioner was in another city at the time of the crime. (Tr. 684-686, 694, 706) The trial court erroneously instructed the jury that Petitioner had the burden of proving his alibi defense beyond a reasonable doubt before he could be found not guilty. (Tr. 823)

Petitioner testified he did not shoot the victim and that his size had not changed since the time of the crime. (Tr. 732) Petitioner stated that the coat was not his—then his Attorney Richard Skelton asked the trial court if he could try on the coat in front of the jury. (Tr. 733) The State objected at a sidebar, arguing it was not relevant how the coat fit Petitioner because he testified it was not his coat. The State ultimately argued to allow the demonstration would be confusing and misleading to the jury due to the passage of time, Petitioner's age, and opportunity for growth.

Petitioner's defense argued the relevance is the State's entire case against Petitioner is based on the appearance of the coat on Petitioner. Mr. Skelton pointed out that there was already evidence presented that Petitioner's size had not changed. Mr. Skelton attempted but failed to get the trial court to avoid the error that violated Petitioner's fundamental rights to rebut the State's theory and evidence. (Tr. 733-734, 737, 738-741)

The trial judge instructed the jury:

> "due to the age of the Defendant at the time of the shooting and the potential that the Defendant size can change in two years. Mine has, for example, although not in the same direction we're concerned about. We're not going to allow the Defendant's last request."

(Tr. 738)

In this instance, Judge Gregory F. Singer introduced the evidence that established Petitioner's guilt. The relevance of the "fit of the coat" on Petitioner need not be established herein, as the State conceded on appeal, "if the parka did not fit there was a very real risk that the jury would automatically assume that [Petitioner] was not the shooter." (Pg. 13 of Appellee's brief in *Taylor I*) Judge Singer's remarks gave the jury the indelible impression, using his own size for example, that Petitioner had outgrown the coat, the coat was Petitioner's, and it was the coat allegedly worn by the assailant during the crime—although the State failed to produce any evidence to support his position.

Dr. Allen testified the victim had small abrasions known as "stippling" around his forehead and chin. Dr. Allen stated that stippling is caused by gun powder hitting

the skin and scraping off the skin. Dr. Allen stated that this happens when the shooting happens less than two feet from the victim. (Tr. 186)

Surely, the victim's DNA and blood would have been on the coat if it was the assailant's coat and/or Petitioner's DNA or hair fibers would have been on the coat if it was Petitioner's coat. Why else would the State run a DNA, blood, and hair fiber analysis on the coat? The DNA, blood, and hair fiber analysis did not connect Petitioner or the victim to the coat. (Tr. 497-506)

Mr. Skelton asked the trial court if Petitioner could try on the coat outside the presence of the jury. (Tr. 738) The coat proved the State's theory was wrong and Petitioner was actually innocent as the coat came down to Petitioner's navel and not down to the middle of his thigh. (Tr. 764, 769, 842-843) This Court should take *Judicial Notice* that the State did not ask Brown to identify the coat as Petitioner's after Tamlyn's identification testimony—which implicitly proves the State was aware that their theory about the coat was faulty and contradicted their narrative about the coat being Petitioner's and/or the coat being the assailant's.

During cross-examination, the State reopened the issue about the coat by asking Petitioner whether his size has changed. At a sidebar, Mr. Skelton argued again Petitioner should be allowed to try on the coat in front of the jury in an attempt to get the trial court to correct its error. The trial court was not convinced and upheld its previous decision not to allow Petitioner to try on the coat in front of the jury. (Tr. 759)

Long after the Defense and State rested its case the trial court vindictively reconsidered its two previous decisions not to allow Petitioner to try on the coat in front of the jury and offered him the opportunity in a limited fashion. This Court should take *Judicial Notice* that at this point in the proceeding the State had foreknowledge of how the coat fit Petitioner and still objected to him trying on the coat in front of the jury—which implicitly proves the coat did not fit Petitioner. Mr. Skelton objected to the trial court's offer asserting the court had already informed the jury the evidence (State's Exhibit 46) was not credible or reliable. Mr. Skelton argued the offer was untimely and unreasonable as it failed to include the benefit of calling rebuttal witnesses. (Tr. 767-769)

The Second District found in *Taylor I*:

> "[P52] We agree with Taylor that the trial court's editorial comments that it 'determined that due to the age of the Defendant at the time of the shooting and the potential that the size of the Defendant can change in two years. Mine has, for example, although not in the same direction as we're concerned about,' were improper. The trial court, however, reconsidered its ruling prior to closing statements, and Taylor was given and refused the opportunity to try on the jacket in the presence of the jury. Taylor accordingly, waived his argument that the trial court abused its discretion when it denied his request to try on the coat. Finally, we have viewed the video of Taylor trying on Exhibit 46, and the fit of the jacket is as Tamlyn described and as the State represents."

The rule to preserve an error for appellate review is the complaining party must give the trial court the opportunity to avoid the error and/or correct the error. (Ohio Contemporaneous Objection Rule) See e.g., *State v. Quarterman*, 140 Ohio St. 3d 464, ¶15. The Second District's finding that Petitioner waived[1] the issue surrounding the

[1] "Waiver is the intentional relinquishment or abandonment of known right." See e.g., *United States v. Olano*, 507 U.S. 725, 733.

coat is an obvious error as the record verify Mr. Skelton preserved the error for appellate review by using Ohio Contemporaneous Objection Rule precisely. (Tr. 733-734, 737—Mr. Skelton attempts but fails to get Judge Singer to avoid the error) (Tr. 759—Mr. Skelton attempts but fails to get Judge Singer to correct the error) Judge Singer's offer should only been deemed as the trial court's admission of error and a new trial should have been granted.

The Second District's subsequent finding that the "fit of the jacket is as Tamlyn described and as the State represents" is unconstitutional.[2] It is well established that the Sixth Amendment right to trial by jury includes, as its most important element, right to have jury, rather than judge, reach requisite finding of guilty." *Sullivan v. Louisiana*, 508 U.S. 275, 277. The "fit of the coat" related directly to the guilt or innocence of Petitioner which he had the right to have the jury decide, as the State conceded, "if the parka did not fit there was a very real risk that jury would automatically assume [Petitioner] was not the shooter." (Pg. 13 of Appellee's brief in *Taylor I*)

The jury never saw Petitioner in the coat, regardless if it was due to Judge Singer denying Petitioner of the opportunity upon Mr. Skelton's repeated request or due to Mr. Skelton being ineffective for declining Judge Singer's unreasonable offer—it was the duty of the jury not the court to determine how the coat fit Petitioner as it related to his guilt or innocence. The Second District then erroneously based it

[2] "It is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial." See, e.g., *Cavazos v. Smith*, 132 S. Ct. 2, 4.

affirmation of Petitioner's conviction on an evidentiary issue (the fit of the coat on Petitioner) that was never before the jury.

The cumulative prejudicial errors resulted in Petitioner's conviction.

REASONS FOR GRANTING THE PETITION

I. The Second District's decision not to reach the merits of Petitioner's alleged constitutional violations on the basis that his *Juvenile Status* and lack of transcripts cannot form the basis for an excuse to meet the unavoidably prevention standard for untimely review warrants this Court's attention.

In Ohio a Motion for New Trial pursuant to Crim.R 33(A) is a remedy for criminal defendants can use to gain relief for various alleged constitutional violations. Some of which can only be developed by review of the record like an appeal[3], as here, where there is a mixed question of law and facts. However, if a defendant fails to raise his alleged constitutional violations within 14 days after the verdict, Crim.R 33(B) only permits leave for untimely review if "it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from discovering the evidence" upon which the motion relies on. In the case herein, the Second District refused to adjudicate the merits of Petitioner's alleged constitutional violations raised in his Motion for New Trial pursuant to Crim.R. 33(A). The court determined that his *Juvenile Status* and/or lack of transcripts cannot form the basis for an excuse to meet the unavoidable prevention standard for untimely review pursuant to Crim.R. 33(B). (Appx. A, Pg. 11-16)

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[3] A criminal defendant especially one acting *pro se* has a right to a meaningful appeal based upon a complete transcript." *United States v. Higgins*, 191 F.3d 532, 536.

To the contrary, this Court held that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense." *Graham v. Florida*, 560 U.S. 48, 78, citing, *Miller v. Alabama*, 567 U.S. 460, 478. Notably, under Ohio law the features that distinguish juvenile offenders from adult offenders liken them to criminal defendants found incompetent to stand trial. R.C 2945. 37(G) requires court(s) to find a defendant incompetent to stand trial if "the defendant is incapable of understanding the nature and objective of the proceeding against [him] or assisting in [his] defense."

Significantly, this Court held, to be adjudge competent, a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402. This Court went even further and determined that "[a defendant's] due process rights are violated by a court's failure to hold a proper competency hearing when there is substantial evidence that a defendant is incompetent." *Pate v. Robinson*, 383 U.S. 375, paragraph one of syllabus.

Clearly the protections provided to Petitioner in the Juvenile Court mirror those given to those who suffer from incompetence or insanity, a recognized mental disability or deficiency as "the juvenile justice system is grounded in the legal doctrine

of *parens patriae*, meaning that the state has the power to act as a provider of protection to those unable to care for themselves." *State v. Hanning*, 89 Ohio St. 3d 86, 88 citing, ARTICLE: The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track, 33 U.S.F. L. Rev. 401. R.C. 2131.02 placed Petitioner in the same category as "persons of unsound mind" as he was under the age of eighteen and under guardianship during the adjudication of this case in criminal court.

The Ohio Supreme Court made clear that "[if a person] is under guardian, the presumption of sanity is not only removed, but the presumption arises to the contrary." *Kennedy v. Walcutt*, 188 Ohio St. 442, paragraph four of syllabus. It cannot be disputed this case originated in the juvenile justice system whereas Petitioner has been reliant on the State and/or the State's representatives to preserve and promote his rights and interest. It would be absurd to assume a juvenile has no further need for a guardian simply because of the offense he is alleged to have committed.

The old adage "ignorance of the law is no excuse" should not apply rigidly in this case because of Petitioner's *Juvenile* Status. The old adage derives from the faulty position that "that all *pro se* litigants have knowledge of the law and legal procedures." *Wills v. Turner*, 150 Ohio St. Less than half of the inmates in prison have a high school diploma or GED—many have learning disabilities. The position of the court that all inmates should be held to the standard of attorneys—who often make mistakes while holding a degree in jurisprudence—is not complete as it fails to give an account to children transferred to criminal court.

Taken altogether, this Court should find it is unconscionable to expect a juvenile offender to comprehend the effects of the findings in a victim's autopsy report and the spall marks discovered at the crime scene when compared to the State's principle witness testimony as demonstrated below and to expect him to have knowledge of the law and legal procedures to gain relief in a court of law. Especially, when the State in their respective position, as here, bolstered in opening and closing statements, falsely claiming the scientific evidence corroborates their witness testimony. The same idea holds true in regards to the erroneous jury instructions as demonstrated below.

As such, Crim.R. 33(B) should be deemed an oppressive and arbitrary procedural rule for juvenile offenders because Ohio Judges would never find a defendant unavoidably prevented from discovering evidence that is on the record. Judges in Ohio are bound to presume "that all *pro se* litigants have knowledge of the law and legal procedures." *Wills v. Turner*, 150 Ohio St. 3d 379, ¶8. "They are held to the same standard as litigants who are represented by counsel." *Id.* However, in reality the competency level of an adult is arbitrarily attached to a juvenile offender solely upon his transfer to criminal court.

This Court should grant a writ of certiorari to determine: (1) whether the procedure rule under Crim.R. 33(B) should be deemed oppressive and arbitrary for juvenile offenders; (2) whether a juvenile offender's rights to fundamental fairness and due process as guaranteed by the United States Constitution are violated when a

court refused to adjudicate the merits of his alleged constitutional violations that permeated his entire trial to his prejudice.

II. The decision of the Second District is in conflict with constitutional law as determined by the United States Supreme Court and other Federal Circuit Courts.

To look away from the injustice in this case because Petitioner's trial and appellate counsel were ineffective for failing to raise the State's misconduct and/or error of law in the proceeding is neither fundamentally fair nor practical. The courts below, thus far, have determined to put procedure over substantial rights, which should never occur. The law must serve justice, not procedure. "To ignore this practical reality is to elevate form over substance, procedure over justice." *Ray v. Clements* (7th Cir. 2012), 700 F.3d 993, 1018. This Court made clear that "rules of procedure should promote, not defeat the ends of justice." *Thomas v. Arn*, 474 U.S. 140, 145, citing *United States v. Walters*, 638 F.3d 947, 949-950.

As this Court is aware, the due process clause permits a state a wide berth in developing rules of procedure and evidence. *Spencer v. State of Texas* (1967), 385 U.S. 554. A constitutional violation cannot rest upon this Court's independent judgment or personal appraisal of what seems the fairer or the better procedure. *Leland v. State of Oregon* (1952), 343 U.S. 790, 799. The fundamental bases of "due process" relate to adequate notice and reasonable opportunity to be heard. *Hovey v. Elliott* (1897), 167 U.S. 409, 413-418. Beyond these minimal standards only oppressive and arbitrary state procedural rules command federal review. Federal intervention is justified only when the state law "offends some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental," *Snyder v. Commonwealth of Massachusetts* (1934), 291 U.S. 97, 105., or frustrates a right "implicit in the concept of ordered liberty." *Palko v. State of Connecticut* (1937), 302 U.S. 319, 325.

The conviction in this case has been established only by the State's misconduct and/or the ineffective assistance of Petitioner's trial and appellate counsel. The alleged constitutional violations below trigger constitutional protections that were established to ensure public confidence in the judicial proceeding and to ensure a conviction does not come by a mistake. Query: How will the rising practice of the judiciary refusing to adjudicate a defendant's allegation that the State *knowingly* used false evidence to procure his conviction and/or allegation that the trial court gave an incorrect law to the jury to determine a defendant's innocence affect the public confidence in the judicial proceeding?

Failure to intervene in this case will result in a fundamental miscarriage of justice.

III. The Second District's decision to bar Petitioner's allegation that the State *knowingly* used false evidence to procure his conviction warrants attention from this Court.

In the case herein, the Second District barred Petitioner's allegation that the State *knowingly* used perjured testimony to procure his conviction in violation of the the Sixth and Fourteenth Amendment to the United States Constitution by the doctrine of *res judicata*. The Second District found:

> "Upon review, we agree with the trial court and conclude that issues raised by Taylor regarding Tamlyn's testimony in his motion for leave to file a delayed motion for new trial were barred by the doctrine of res judicata, as he could

have raised those issues in his direct appeal and raised similar issues in other post-convictions motions."

(Appx. A, Pg. 10-11)

As this Court is aware, the *Brady* rule applies in three quite different situations. United *States v. Agurs* (1976), 427 U.S. 97, 103. Applicable here, as exemplified by *Giglio*, is where the prosecution relied on false testimony and it either knew it was false or should have known that the testimony was false. This case is distinguishable from *Giglio* because the evidence that prove the prosecution *knowingly* used perjured testimony to procure Petitioner's conviction was disclosed at his trial. However, it was never brought to the attention of the trial court by either the State or Petitioner's Defense Attorney nor was it brought up on direct appeal by Petitioner's appellate attorney.

For such reasons, this Court should issue a writ of certiorari to settle: (1) whether the *Brady* rule applies when the record demonstrates by clear and convincing evidence the State *knowingly* used perjured testimony to procure a defendant's conviction; (2) whether courts are constitutionally obligated to review a defendant's allegation that the State *knowingly* used perjured testimony to procure his conviction, once his conviction has become final; and (3) whether the constitution requires a criminal defendant, whose conviction has become final, be granted a new trial when the record demonstrates by clear and convincing evidence the State *knowingly* used perjured testimony to procure his conviction.

As this Court is aware, to establish a *Napue* claim, Petitioner must show that: (1) the statement was actually false; (2) the statement was material; and (3) the

prosecution knew it was false. *Napue v. Illinois,* 360 U.S. 264. It is well established the standard of review for the materiality of a purported *Napue* claim, as here, is *de novo* because it presents a mixed question of law and facts. *United States v. Phillip* (6th Cir. 1991), 948 F.2d 241, 250.

In the case herein, the State's principle witness, Louise Tamlyn testified explicitly the victim was shot while standing in front of 238 Warren Street. Tamlyn made clear that when *she saw* the victim fall to the ground the assailant immedially fled. To the contrary, the findings in the victim's autopsy report and the spall marks discovered at the crime scene conclusively proves the victim was shot while lying on the ground in front of 238 Warren Street. The State falsely claim to the jury during opening and closing arguments that Tamlyn's testimony corroborates the scientific evidence.

Tamlyn's account of the crime is as follows:

"**State of Ohio:** When you heard the gunshots, what did you do?

Tamlyn: Nothing at first. I looked outside the window.

[]

State of Ohio: So you heard the gunshots. Did you wait before looking out?

Tamlyn: Yes.

State of Ohio: And what do you see when you look out?

Tamlyn: I see JB dancing from foot to foot out in the middle of the street.

State of Ohio: And show the jury on [sic] State's Exhibit 45 where you see him.

Tamlyn: Right here.

State of Ohio: Are you pointing to the intersection of Warren and Lincoln?

Tamlyn: Yes.

State of Ohio: Do you see any other people out there when you see JB dancing foot to foot?

Tamlyn: No I do not.

State of Ohio: Okay. Do you continue to look out that particular vantage point?

Tamlyn: No I don't.

State of Ohio: What do you do?

Tamlyn: I go to my front door.

State of Ohio: Okay. And?

Tamlyn: And open the door.

[]

State of Ohio: Alright. And what do you see when you look out?

Tamlyn: I see a man in black slacks or jeans and a black parka coat with a fur hood running across the field.

[]

State of Ohio: And who did you see running that way?

Tamlyn: At first I couldn't tell who it was.

State of Ohio: At that point though, could you tell what the person was wearing?

Tamlyn: Yes. He had on black jeans and a black parka jacket, well, ski jacket whatever you want to call it, with fur around the hood. *He had a hood over his head.*

State of Ohio: Now that you're seeing this person run across the field, can you see anybody else?

Tamlyn: Yes. I see JB.

State of Ohio: And where is JB?

Tamlyn: *JB's standing right here.*

State of Ohio: Okay. Had you seen him move from the intersection of Lincoln and Warren to where you just point at *238 [Warren St.*]?

Tamlyn: No, because at the time I was moving from the window to the door.

State of Ohio: Did you see any other individuals other than JB and DonDon?

Tamlyn: No, I did not.

State of Ohio: *What did you see happen*?

Tamlyn: *I see JB fall to ground.*

State of Ohio: *And where does he fall to the ground?*

Tamlyn: *Right here.*

State of Ohio: *At 238 Warren*?

Tamlyn: *Yes.*

State of Ohio: What?

Tamlyn: On the side of the building.

State of Ohio: *And what happens next?*

Tamlyn: *I see the man run back through here.* And there happens to be a streetlight there and I had my porch light on. *I see the side of the face* and I see the orange lining and *I see DonDon* come back through the field.

State of Ohio: Okay. Let's back up. Louise, when you said that you saw JB over here, by *238 Warren*, how close did the man running across the field get to JB?

Tamlyn: He was – *he had his back to me but he was right in front of him.*

State of Ohio: *And what did you see happen here*?

Tamlyn: *I heard about five to seven shots.*

State of Ohio: So this is a separate set of gunshots from what you described hearing originally?

Tamlyn: Yes.

State of Ohio: And when you heard the gunshots, where was JB?

Tamlyn: JB was right there.

State of Ohio: And was he laying on the ground?

Tamlyn: Yes.

State of Ohio: And where did you see the person who had run across the field?

Tamlyn: Come back the way that he went.

State of Ohio: *But when the gunshots were firing, where did you see the person who had ran across the field?*

Tamlyn: *I seen him standing in front of JB.*

State of Ohio: Now did you see a gun?

Tamlyn: No.

[]

State of Ohio: *Could you see JB on the ground*?

Tamlyn: No, not--not when *he was standing in front* of him."

(Tr. 226-231) (Emphasis added.)

Tamlyn testified explicitly that she *saw "JB standing"* in front of 238 Warren St. (Tr. 229, Line 17-19) Tamlyn testified explicitly that she *saw "JB fall to the ground"*

in front of 238 Warren St. (where the victim's body and spall marks in the ground where discovered). (Tr. 229, Line 25) The State asked Tamlyn explicitly "*what happened next (*after she saw the victim fall to the ground)?" (Tr. 230, Line 7) Tamlyn testified that she *saw "the man run back through here*" and "*DonDon come back through the field.*" (Tr. 230, Line 8-10) The State expected Tamlyn to testify that the assailant *shot* the victim *after she saw* the victim fall to the ground.

Instead of correcting Tamlyn's perjured testimony that the assailant fled *after she saw* the victim fall to the ground, the State had Tamlyn retell her account of the crime in a failed attempt to solicit and/or coerce Tamlyn to testify that *she saw* the assailant *shoot* the victim after *she saw* the victim fall to the ground. The State stated "Okay. Let's back up Louise. When you said that you saw JB over here, by 238 Warren St. (this is where she just testified she saw "*JB Standing*" (Tr.229, Line 17-19)), how close did the man get to JB?" (Tr. 230, Line 16-18) Tamlyn testified "he had his back to me but he *was right in front of him.*" (Tr. 230, Line 19) The State asked "what did you see happen here?" (Tr. 230, Line 21) Tamlyn testified that she "heard about five to seven shots." (Tr. 230, Line 22)

As this Court is aware, *standing in front* of someone shooting is completely different from *standing over* someone shooting. The latter would be consistent with the scientific evidence in this case, as the State itself is aware, as the State falsely claimed to the jury during opening statements that "Tamlyn will tell you ... JB's on the ground and Don-Don is *standing over* him. Shooting." (Tr. 141, Line 22, Tr. 142, Line 5-6)

Again, the State failed to correct Tamlyn's false statement and just muddied the waters with leading questions (*e.g.* And was he lying on the ground? (Tr. 231, Line 3)) in a failed attempt to solicit and/or coerce Tamlyn to testify the victim *was shot* after *she saw* him fall to the ground. The State went on to ask Tamlyn explicitly "But *when the gunshots were firing* where did you see the person who had run across the field?" (Tr. 231, Line 8-9) Tamlyn testified she "seen him *standing in front* of JB." (Tr. 231, Line 10)

Again, for Tamlyn's account of the crime to be true she would have had to testify that the assailant was *standing over* the victim shooting as the State falsely claimed she would. The State went on to ask Tamlyn explicitly could she see "JB on the ground?" (Tr. 231, Line 16) Tamlyn testified explicitly "no not when he was *standing in front* of him?" (Tr. 231, Line 17)

In no context could it be perceived that Tamlyn testified that *she saw* the victim get *shot* while lying on the ground. Tamlyn made clear *she saw* "JB standing" and *she saw* "JB fall to the ground." Tamlyn made clear that the assailant fled after *she saw* JB fall to the ground. The mere fact that Tamlyn testified that *she did not see the victim on the ground* when the assailant was *standing in front* of JB only substantiates the fact that her account of the crime is indisputably false as she stated that *the shots were firing* when the assailant was *standing in front* of JB and that the assailant fled after *she saw* the victim fall to the ground.

On the other hand, Dr. Allen explained the scientific evidence regarding the victim's exits wounds (multiple gunshots wounds to the torso) that established the victim was shot while lying on the ground. Dr. Allen testified as follows:

> "**Dr. Allen:** The exit wound is a little bit unusual in that there is scraping of the skin around the exit wound which you normally would see with an entrance wound. And it's referred to as a shored, s-h-o-r-e-d, shored exit. This can happen when the body is against a firm surface right as the bullet is exiting, so the skin is pressed up against the firm surface and that firm surface scrapes the skin off."
>
> **State of Ohio:** And this – shored entrance – or exit wound – excuse me – that you're describing, Doctor, would that be consistent with someone who's laying down on the ground when they're shot?
>
> **Dr. Allen:** Yes."
>
> (Tr. 181)

Furthermore, Officer Pence, explained the scientific evidence regarding the spall marks discovered that established the victim was shot while lying on the ground in front of 238 Warren Street. Mr. Pence testified as follows:

> "**State of Ohio:** Once the body was removed, were you able to see the area of the snow underneath where the body had been?
>
> **Mr. Pence:** I was.
>
> **State of Ohio:** And did you notice anything about it that caught your attention?
>
> **Mr. Pence:** There was blood there and there was also spall marks.
>
> **State of Ohio:** Okay. Can you tell us what you mean when you say "spall marks"?
>
> **Mr. Pence:** A spall mark is created when something [] if you shoot a hard object at somewhere close to a 90-degree angle, the bullet penetrates, and when the bullet stops, flattens out, begins to bounce back, it creates a void that is like an upside down cone. It's very – the same effect would be shooting a plate glass

window with [a] BB. The conical area that it knocks out of the glass would be a spall."

(Tr. 380-381)

Accordingly, it will be proper for this Court to find Tamlyn's statement that she witnessed the crime is indisputably false as the findings in the victim's autopsy report and the spall marks discovered at the crime scene conclusively prove the crime did not occur as Tamlyn reported.

Furthermore, the integrity of Petitioner's conviction stands on the conflicting identification testimony of Louise Tamlyn and Christopher Brown as demonstrated in the *Statement of The Case* above. All the other evidence presented by the State was immaterial to the identity of the assailant and merely cumulative. (Tr. *Passim*) It was Tamlyn's false statement that she witnessed the crime that established probable cause for Petitioner's arrest, bindover, and indictment which resulted in Petitioner's subsequent conviction. Tamlyn is the only witness who identified Petitioner as the assailant in a photo array, identified the coat allegedly worn by the assailant as Petitioner's, and created the narrative/motive of the crime. This Court should take *Judicial Notice* that Tamlyn testified explicitly that Brown was not present during the shooting and that she was the one who informed Brown "JB had been shot." (Tr. 281-282, 284)

As such, it will be proper for this Court to find that the State built its entire case against Petitioner solely on Tamlyn's false statement that she witnessed the crime as Brown never identified Petitioner as the assailant until he took the stand—approximately 27 months after the crime (after police arranged him to be placed in a

holding cell with Petitioner and after he received a deal for testifying against Petitioner). (Tr. 351, 366)

Accordingly, it will be proper for this Court to find Tamlyn's false statement that she witnessed the crime was material as it was the cornerstone to the State's case against Petitioner. Without Tamlyn's false statement that she witnessed the crime Petitioner's case would never have been prosecuted. As such, it will be proper for this Court to find there is a reasonable likelihood Tamlyn's false statement that she witnessed the crime affected the judgment of the jury as it was the basis of the State's case against Petitioner.

Moreover, the record demonstrates the State was complicit to the admission of Tamlyn's perjured testimony at trial. The State relied on and misrepresented Tamlyn's false statement in opening and closing arguments to draw favorable inferences from the jury. During opening statements, the State falsely claimed to the jury, "Tamlyn will tell you ... Jb's on the ground and Don-Don is *standing over him. Shooting.*" (Tr. 141-142) The State's opening statements demonstrates that the State had foreknowledge of Tamlyn perjured testimony and failed to correct it.

Additionally, Dr. Allen's explained the scientific evidence that conclusively proves the victim was shot while lying on the ground—prior to Tamlyn's testimony. (Tr. 181) This Court should take *Judicial Notice* that instead of correcting Tamlyn's perjured testimony that the assailant immediately fled when *she saw* the victim fall to the ground, the State rephrased their questions multiple times in a failed attempt

to solicit and/or coerce Tamlyn to testify that the victim was shot after *she saw* the victim fall to the ground. (Tr. 226-231)

The State then falsely claimed to the jury during closing statements "the physical evidence in this case corroborates our witnesses. The mere fact that there was ... spalling, that white hole that was there in the snow in the concrete where Jb's body had been, that comes from 90-degree angle bullets hitting the hard surface. So in order for you to get where the Defense wants you to go you going to have to disbelieve Louise Tamlyn ... and disregard that the physical evidence corroborates what [she say]." (Tr. 780-781)

As such, it will be proper for this Court to find that not only was the State aware of Tamlyn's statement that she witnessed the crime was actually false but the State relied on and misrepresented Tamlyn's false testimony in opening and closing arguments to draw favorable inferences from the jury. Accordingly, it will be proper for this Court to find the record demonstrates by clear and convincing evidence that the State *knowingly* used perjured testimony to procure Petitioner conviction.

Failure to intervene in this case will result in a fundamental miscarriage of justice.

IV. The decision of the Second District is in conflict with constitutional law as determined by the United States Supreme Court and other Federal Circuit Courts.

Regardless, if the evidence a defendant relies on to prove the State *knowingly* used perjured testimony to procure his conviction was disclosed or suppressed at his trial—the State's misconduct still deprived him of a fair trial and due process as

guaranteed by the 6th and 14th Amendment to the United States Constitution. This Court made clear that, "a criminal conviction procured by the state prosecuting authorities solely by the use of perjured testimony known by them to be perjured and knowingly used by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment." *Mooney v. Holohan* (1935), 294 U.S. 103, paragraph two of syllabus. Moreover, the Second District's decision to bar Petitioner's allegation by the doctrine of res judicata undermines this Court precedent that mandates "every State to provide corrective judicial process for the relief of persons convicted and imprisoned for crime without due process of law." *Id. Holohan*, at paragraph three of syllabus.

This Court should agree Petitioner's tainted conviction and the Second District's decision to bar his allegation that the State *knowingly* used perjured testimony to procure his conviction offends all notions of justice rooted in our republic. This Court held,

> "if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."
>
> *Id. Holohan,* at 112.

"The Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate* (1967), 386 U.S. 1, 7. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." *Mesarosh v. United States* (1956), 352 U.S. 1, 9. "Indeed, if it is established

that the government knowingly permitted the introduction of false testimony reversal is 'virtually automatic.'" *United States v. Wallach* (2d Cir. 1991), 935 F.2d 445, 456.

The Second District's decision essentially established that criminal defendants whose conviction has become final has no recourse of law to gain relief from alleged constitutional violations on record, as here, that permeated his entire trial to his prejudice as demonstrated above. Query: Is it easier for a court to dispose of a *Napue* claim on the merits or make the determination that the defendant could have raised the issue on direct appeal? How will the judiciary practice of not adjudicating a defendant's *Napue* claim affect public confidence in the judiciary? This Court should agree given the highly prejudicial nature of a *Napue* claim due process demands that such allegation be adjudicated on the merits.

V. The Second District's decision to bar Petitioner's allegation that the trial court erred to his prejudice by instructing the jury he had the burden to prove the defense of alibi beyond a reasonable doubt before he could be found not guilty warrants this Court's attention.

In the case herein, the Second District barred Petitioner's allegation that his right to the presumption of innocence and due process as guaranteed by the United States Constitution was violated when the trial court instructed the jury he had the burden to prove the defense of alibi beyond a reasonable doubt in order to be found not guilty. The Second District found:

> "the record establishes that he and his trial counsel were provided a copy of the jury instructions prior to their being read to the jury, and the version of the alibi instruction given by the trial court was requested by Taylor and given without objection. See 2 Ohio Jury Instructions CR 421.03.2 We also note that any issues regarding the jury instructions could have been argued by Taylor in

his direct appeal from his convictions, but were not, and are therefore barred by res judicata."

(Appx. A, Pg. 15)

In the case herein, the trial court erroneously instructed the jury:

"If after the consideration of the evidence of alibi along with all the evidence you are not convinced beyond a reasonable doubt that the Defendant was present at the time in question, you must return a verdict of not guilty."

(Tr. 823)

The erroneous jury instruction could have done nothing other than mislead the jury and caused a miscarriage of justice as it placed a burden on Petitioner which he did not have. If Petitioner did not offer an alibi defense, the burden of proof never shifts to him and he could have relied upon the State's failure to establish his identify and presence at the crime scene beyond a reasonable doubt. The vital prejudice here is that the instruction compels the jury to believe the State's evidence relating to Petitioner's presence at the crime scene unless he was able to overcome its effect by proof beyond a reasonable doubt.

It is well established in a criminal trial, the burden of proof rest solely on the State, and the standard of proof required is beyond a reasonable doubt. The defendant need not produce anything to establish his innocence. He is presumed innocent until the State overcomes the presumption with proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364. This Court made clear, "erroneous reasonable doubt instructions constitutes structural error," *Sullivan v. Louisiana*, 508 U.S. 275, section (a) and (b) of syllabus, and that "shifting to the defendant the burden of proving an alibi defense violates the Due Process Clause of the Fourteenth Amendment." *Johnson*

v. Bennett, 393 U.S. 253, 255, citing, *Stump v. Bennett* (1968), 398 F.2d 111. The court in *Smith v. Smith* (1971), 454 F.2d 572, 579, found "there is yet no doubt that a shift in the burden of proof of an essential element of the crime, [as here], does rise to constitutional proportions and renders the trial fundamentally unfair." Notably, the Fifth Circuit Court of Appeals held:

> "It is fundamental to our jurisprudence that instructions to the jury must be consistent with each other, and not misleading to the jurors. The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. Most important, in no condition of proof is it permissible to leave the jury with the idea that it had become the duty of the defendant to establish his innocence to obtain an acquittal."
>
> *Perez v. United States* (5th Cir. 1961), 297 F.2d. 12, 16.

This Court should issue a Writ of Certiorari to determine: (1) whether courts are constitutionally obligated to review a defendant's allegation that the trial court violated his constitutional rights to the presumption of innocence and due process when it instructed the jury he had the burden to prove the defense of alibi beyond a reasonable doubt before he could be found not guilty; (2) whether a shift in the burden of proof of an essential element of the crime rises to constitutional proportions and renders a trial fundamentally unfair; and (3) whether a defendant's right to the presumption of innocence and due process as guaranteed by the United States Constitution are violated when a trial court instructs a jury that a defendant must prove the defense of alibi beyond a reasonable doubt before he can be found not guilty?

Failure to intervene in this case will result in a fundamental miscarriage of justice.

VI. The decision of the Second District is in conflict with constitutional law as determined by the United States Supreme Court and other Federal Circuit Courts.

Regardless, if the defendant' s defense counsel requested the alibi instructions and/or defendant was present when the erroneous jury instruction was given at trial—the erroneous jury instructions deprived him of his rights to due process and a fair trial as guaranteed by the 6th and 14th Amendment to the United States Constitution. The erroneous jury instruction left the jury with the idea that it had become the duty of Petitioner to establish his innocence by proof of alibi defense beyond a reasonable doubt. Thereby, relieving and shifting the prosecution of its burden to prove Petitioner was at the crime scene beyond a reasonable doubt.

This Court should agree the erroneous jury instructions given in this case offends the oldest and most fundamental rights protected by the U.S. Constitution. This Court held, "the presumption of innocence and the burden of proof placed on the State in criminal prosecutions are two of the oldest and most fundamental rights protected by our Constitution." *Coffin v. United States* (1895), 156 U.S. 432. "They purport to protect all citizens from the threat of punishment by mistake. They are therefore far too important and fundamental to be classified as less than constitutionally protected." *Deutch v. United States* (1961), 367 U.S. 456.

The Second District's decision essentially established that criminal defendants whose conviction has become final has no recourse of law to gain relief from alleged constitutional violations on record, as here, that permeated his entire trial to his prejudice as demonstrated above. Query: Is it easier for a court to dispose of a

defendant's allegation that the trial court erred to his prejudice by instructing the jury he had the burden to prove the defense of alibi beyond a reasonable doubt before he could be found not guilty or make the determination that the defendant could have raised the issue on direct appeal? How will the judiciary rising practice of refusing to adjudicate a defendant's allegation that the trial court gave an incorrect law to the jury before deliberation to determine an accuse innocence affect public confidence in the judiciary? This Court should agree given the highly prejudicial nature of such alleged constitutional violation due process demands that such allegation be adjudicated on the merits.

VII. The Second District refusal to apply Ohio clarified law, i.e., R.C. 2152.12 and R.C. 2151.23 (H) to Petitioner's case warrants this Court's attention.

In the case herein, the Second District barred Petitioner's allegation that his statutory and constitutional right were violated when he was indicted and convicted on charges that were never transferred to the Montgomery Court of Common Pleas, Criminal Division from the Juvenile Court with a finding of probable cause. The Second District found:

> "Taylor's conviction has been final for approximately seven years when he filed his motion to vacate void conviction on February 18, 2022. Nevertheless, and without providing any support for his argument, Taylor argues that the Ohio Supreme Court decision in *Smith*, issued in February 2022, should be retroactively applied to render his convictions void. However, as previously stated, new judicial rulings may only be applied to cases that are pending on the announcement date, and the new judicial ruling may not be applied retroactively to a conviction that has become final because the accused has exhausted all of his appellate remedies. Because Taylor's convictions became final in 2015, he cannot avail himself of the Ohio Supreme Court's holding in *Smith*, which was decided in 2022."

(Appx. A, Pg. 9-10)

In adjudicating *Smith*, the Supreme Court of Ohio did not change the language or definition of either R.C. 2152.12 or R.C. 2151.23(H). Rather, the court clarified that "to hold that a finding of probable cause on any bindover offense permits the juvenile to be bound over on any other offense would ignore this precedent. It would render R.C. 2152.12 meaningless by ignoring the statutorily required finding of probable cause by the juvenile court for each act charged, including specification." *State v. Smith*, 167 Ohio St. 3d 423, ¶40.

It also clarified that "R.C. 2151.23(H) thus sets forth the jurisdiction of the adult court by describing the adult's court 'jurisdiction subsequent to the transfer.' It does not authorize jurisdiction over whatever charges the adult court independently determines should arise from the underlying course of criminal conduct that was the basis for the complaint in the juvenile court." Id. at ¶34.

This Court should issue a writ of certiorari to settle: (1) whether clarification of existing law applies retroactively on collateral review; and/or (2) whether a criminal defendant is denied the right to equal protection of the law and due process as guaranteed by the United States Constitution when he is not afforded the protections provided by law as clarified by the judiciary to a class of offenders.

VIII. The decision of the Second District is in conflict with constitutional law as determined by the United States Supreme Court and other Federal Circuit Courts.

The court *in St. Thomas Hosp. v. Sebelius*, 705 F. Supp. 2d 905, 919, found that a "clarification is strong evidence of its retroactive effect because [a] clarification is a

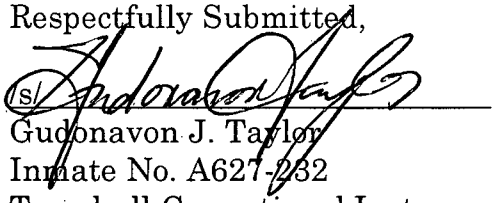
statement of what [the legislature] believed the law already was, and thus to be applicable to all cases, past, present and future." Quoting, *Cookeville II*, 2006 U.S. Dist. LEXIS 68961, 2006 WL 2787831 at *7. The court in *United States v. Ells*, 687 Fed. Appx. 485, 486, found that "clarifications of the law, [as here], have retroactive application while substantive changes do not." This Court upheld "the retroactive clarification of uncertain law." *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03.

Failure to intervene in this case will result in a fundamental miscarriage of justice.

CONCLUSION

For the reasons contained herein and that the errors contained herein undermine confidence in the fundamental fairness of the State's adjudication, a Writ of Certiorari should issue to review the judgment of the Second District Court of Appeals of Ohio. See e.g., *Teague v. Lane, 489 U.S. 288*, 311-314 quoting *Mackey v. United States*, 401 U.S. 667, 692-694.

Respectfully Submitted,



(s/ Gudonavon J. Taylor
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