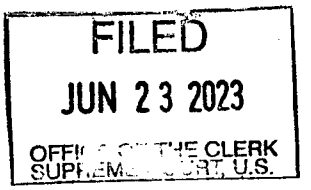
23-5013 ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES



BRIAN JURY, *Petitioner*,

v.

STATE OF OHIO, *Respondent.*

On Petition for a Writ of Certiorari to the
Ohio's Sixth District Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Brian Jury, #654-969
BeCI
P.O. BOX 540
ST. CLAIRSVILLE, OH, 43950

Pro Se

QUESTIONS PRESENTED

This case poses a pressing issue of national importance. Did the Ohio Sixth District Court of Appeals impose an improper and unduly burdensome standard over Petitioner's "*Brady*" claims and his ability to present evidence of such claims; more specifically:

A. **Whether a "*Brady*" violation requires suppression to be dependent upon possession?**

B. **Whether a trial (lower) court errs and deprives an (indigent) defendant of due process in denying without an evidentiary hearing to produce the requisite evidence that would warrant a new trial, a motion for leave and motion for new trial, a civil rule 60(B) motion, when a defendant demonstrates a new trial is warranted?**

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page; which, are represented by:

The Ohio Attorney General's Office

Solicitor General Ben Flowers
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Columbus, OH 43215

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Jury, respectfully prays that a writ of certiorari be granted to review the judgement below; or in lieu, that this case be remanded to the Ohio Supreme Court in light of **Youngblood v. West Virginia** (2006), 547 U.S. 867.

OPINION BELOW

The Opinion of the Ohio's Sixth District Court of Appeals denying Petitioner's appeal is reported at **State v. Jury**, 2022-Ohio-4419 (2022), and is reproduced at **Appendix A.** The Ohio Erie County Common Pleas Court's Judgement Entry dismissing Petitioner's motion for leave..., motion for new trial, Civil Rule 60(B), et al. as "successive petitions" on January 20, 2022 are not published, but is available and reproduced as **Appendix B.** The order of the Ohio Supreme Court denying discretionary review of that decision is published at **State v. Jury,** 2023-Ohio-1507 (2023), and is reproduced at **Appendix C**. The May 4, 2023 opinion of the Ohio Sixth District Court of Appeals denying rehearing was not published: however, is available and reproduced at **Appendix D.**

STATEMENT OF JURISDICTION

The Ohio Supreme Court issued its decision denying Petitioner's petition for review on May 9, 2023 **Appendix C.** This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V (in relevant part):

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. VI (in relevant part):

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the (effective) assistance of counsel for his defense.

U.S. Const. Amend. XIV (in relevant part): [N]or 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.

Ohio Civil Rule 60. Relief from judgment or order (in relevant part)

(B) Mistakes; Inadvertence; Excusable neglect; Newly discovered evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

Ohio Criminal Rule 16. Discovery and inspection (in relevant part):

(A) Purpose, scope and reciprocity. 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 the justice system and the rights of defendants []. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery; Right to copy or photograph. Upon receipt of a written demand for discovery by the defendant [], the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:
(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
(5) Any evidence favorable to the defendant and material to guilt or punishment;

(E) Right of inspection in cases of sexual assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

Ohio Criminal Rule 33. New trial (in relevant part)

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially the defendant's substantial rights:
(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
(3) Accident or surprise which ordinary prudence could not have guarded against;
(4) That the verdict is contrary to law;
(5) Error of law occurring at the trial;
(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.
(B) Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the 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 the one hundred twenty-day period.

Ohio Revised Code § 2953.23 Time for filing petition; appeals.

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:
(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted [].

STATEMENT OF THE CASE

This case stems from the denial over Petitioner's ***Brady v. Maryland*** violation(s) filings: motion for leave to file a delayed motion for new trial; motion for new trial pursuant to Criminal Rule 33; and, Civil Rule 60(B) motion (to include supporting motions).

On 11/1/2013, this petitioner was arrested without a warrant in Lorain Ohio, on the accusation of the alleged victim whom stated that she was kidnapped from Lorain, Ohio, taken by gun-point (implausible, she told police that her attacker held a gun to her right temple while as a passenger in the vehicle) driven to Petitioner's property outside of Bellevue, Ohio, raped 5-6 times, tied-up, and left in Petitioner's camper. Neither petitioner's DNA nor fingerprints were found on the materials that bound her. She told police that she did not know who her attacker was, then named him "Greg," then identified Petitioner in a questionable photo array—claiming that she "would never forget a face like that." The Ohio, Erie County Grand jury indicted Petitioner on five counts of rape, two counts of kidnapping, felonious assault, attempted murder; and specifications for firearm, sexual motivation, and a sexually violent predator. Pretrial, defense counsel submitted three separate discovery requests which asked for discovery per Criminal Rule ("**C.R.**") **16** and more specifically, "all" cell phone records of the alleged victim and appellant (See Ohio Erie County Common Pleas Court: **State v. Jury**, 2013-CR-0472,

(2/12/14) "Motion for Disclosure of Exculpatory and Impeachment Evidence— 'Specifically, the Defendant respectfully requests that this Honorable Court order the State of Ohio to **disclose any and all phone records**. . . ;'" (12/20/13) "Motion to Compel— '**Any and all cell phone records** of the victim, including any and all text messages.'" and, (12/6/13) "Demand for Discovery— '**All evidence or information known or which may become known to the State of Ohio which may be favorable to the Defendant**.., including information or evidence which could be used to obtain evidence that would diminish the credibility of any State's witness.'") (Emphasis).

At trial, Det. Dec's testimony (where he spoke to being able to retrieve deleted text messages) referenced only the contents of Petitioner's work-phone. Of the 150+ deleted texts, he only provided the placements—not the actual message—between the Petitioner's phone and the alleged victim's phone for eight months (of the one year requested) prior to 11/1/2013. No Cell-Site-Location-Information ("CSLI") from the day of the alleged crime was submitted as evidence. The alleged victim testified that all of the text messages prior to 11/1/2013 (which show were mostly initiated by her) were made by her friend Kelly Addie. Ms. Addie testified as to "never" using either phone of Petitioner or the alleged victim. The State offered evidence by several witnesses that these alleged five rapes, etc. were to have occurred over four (4) hours. Additionally, a third semen donor was present within the alleged victim's vaginal cavity, while she claimed to not having sex with anyone other than her boyfriend. A urine sample was conducted that showed that the alleged victim was self-intoxicated with a concoction of 6am (heroin), benzodiazepines, oxycodones / hydromorphones (all three in such a quantity as to be higher than the measurable limit of their respective test); and, a measurable amount of alcohol (she testified to not drinking alcohol) that with the passage of time, she would have been legally intoxicated from the alcohol alone. Toxicologist, Dr. Forney, testified that if the person (alleged

victim) were not dead, that she had to have some tolerance—again contradicting the alleged victim's testimony as an occasional drug user. **The State subpoenaed partially requested information from Petitioner's work phone cellular records from Verizon Wireless,** (the alleged victim's cellular provider's records are unknown,). No material evidence was proffered to the defense that: 1) could impeach the alleged victim and another state witness's testimony in relation to their time-locations of themselves or provide time-location information of this Petitioner; and therefore, 2) caused this Petitioner (on advice of counsel) to testify as to his whereabouts during the day's events of 11/1/13. **The trial record is void of CSLI for either phones/persons on 11/1/13, and the majority of the actual texts messages for a year leading up to 11/1/13 between the alleged victim and Petitioner. There is no evidence that they were provided to the defense.** As a result of trial by jury, Petitioner was convicted and subsequently sentenced to two counts of rape, two counts of abduction (merged to one), one count of felonious assault, along with a gun specification (three merged to one) totaling 36 years of imprisonment.

Specific to this case, Petitioner filed a post-conviction petition and Appellate Rule ("App. R.") 26(B) asserting that there had to be some type of "location" [information], that could tell where Petitioner was at throughout the day of 11/1/13. The prosecution denied having any "location" information within their possession. (Erie County C.P.C.: 2013-CR-472, 9/23/15). The appellate court denied relief stating, "[Petitioner] fail[ed] to enumerate any actual evidence that the state had in its possession that it did not provide." (Erie County C.O.A. Case: E-14-100).

Petitioner learned of CSLI from **Carpenter v. United States** (2018), 138 S. Ct. 2206. Petitioner filed a Civil Rule ("**Civ. R.**") **60(B)**, asserting prosecutorial misconduct, "Fraud upon the Court." Petitioner, without success, attempted to obtain CSLI of both Petitioner and the

alleged victim for 11/1/13, and all actual text messages between both the alleged victim and the Petitioner for a year leading up to 11/1/13 through several different processes: subpoenaing it through the court; filing motions to obtain this information from the court; contacting defense counsel; and, filing an emergency injunction to preserve any potential loss of this information from the cellular provider. After his attempts, Petitioner filed a "Motion to Renew," his **Civ. R. 60(B)** and a "Motion for Leave to File a Motion to file for a New Trial," pursuant to Criminal Rule ("**Crim. R.**") **33(B)**. It was in the State's Response to Petitioner's **Crim. R. 33(B)** request, that the **State admitted to having the alleged victim's phone within their possession the entire time.** (State's Response, Erie County C.P.C. Case No.: 2013-CR-472 -- 12/30/21—Pg. 9). The trial court dismissed both motions and relating motions as "successive petitions," without findings of facts or conclusions of law. (Judgment—1/20/22, Erie County C.P.C. 2013-CR-472). **Appendix B.**

Ohio Sixth District Court of Appeals affirmed the Erie County Common Pleas Court's Judgment on 12/9/22 on the basis of: the state did not commit Brady violations; the trial court properly denied Jury's motion for relief from judgment; the trial court properly denied Jury's motion for leave to file for a new trial; and, Jury has not shown that the state violated his due process rights. **Appendix A.** The Ohio Sixth District Court of Appeals (the last and only court to provide a finding of facts and conclusions of law) denied Petitioner's Motion for Leave to file a Delayed Motion for New Trial, Motion for New Trial (Crim. R. 33), and Civil Rule 60(B) motion (construed as a successive post-conviction petition under Ohio Criminal Rule ("O.R.C.") §2953.23). In this case, the court of appeals ruled that in order for the state to suppress evidence under ***Brady***, it must have been in the possession of the state—not just evidence known, reasonably available to or was under the state's control, that which is favorable to the defendant.

The court of appeals also ruled that as Petitioner could no longer produce any actual evidence that CSLI or actual text messages existed or were in the possession of the State, he failed to show a ***Brady*** violation. Moreover, they denied Petitioner an evidentiary hearing on his post-conviction petitions; therefore, obviating the evidentiary hearing process, while also subjecting petitioner's claims to erroneous, unfair, and unsubstantiated fact-finding. Without verification through an evidentiary hearing, the court of appeals has made unsubstantiated claims that: 1) CSLI was mere or varying degrees of speculation; and, 2) multiple cell-phone-related records were complete and received by defense counsel. **Appendix A —¶ 13-15, 31, 33; ¶ 16, 21, fn. 3** (respectively). The trial court and the court of appeals have side-stepped the threshold requirement of whether Petitioner was unavoidably prevented from discovering evidence per **State v. Bethel** (2022), 167 Ohio St. 3d 362, circumventing the initial process of Criminal Rule 33(B) and O.R.C. §2953.23.

Petitioner filed a timely motion for reconsideration on December 16, 2022, addressing six aspects of error by the court: 1) which ignored the state's admission that it had the alleged victim's phone in its possession—which was denied until December 2021; 2) overlooked the state's failure to comply with Petitioner's pre-trial discovery requests; 3) erroneously determined that the state must possess exculpatory evidence to suppress such evidence; 4) wrongly considered Petitioner's claims about CSLI as being speculative; 5) did not recognize that the state failed to preserve materially exculpatory evidence; and, 6) that the court should have granted this Petitioner an evidentiary hearing—the reconsideration was denied on February 13, 2023. **Appendix D.** Petitioner sought a discretionary appeal to the Ohio Supreme Court, which was also denied on May 9, 2023. **Appendix C.**

Petitioner seeks a writ of certiorari from this Court on the two important questions presented in this case.

REASONS FOR GRANTING THE WRIT

This Court and several other state (supreme) courts (given Petitioner's limited ability to research other state courts) have never explicitly stated that in order for suppression to have occurred, that it had to be in the direct/unending possession of a state agent. Suppression has never been dependent upon possession; whereas, a prosecution's failure to disclose any information or knowledge of favorable evidence has been deemed to be constitutionally fundamental to the essence of a fair trial.

A. This Court should resolve the split of authority on whether a "Brady" violation requires suppression to be dependent upon possession?

1. The Ohio Sixth District Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Honorable Court, or has decided an important federal question in a way that contravenes with relevant decisions of this Honorable Court.

The Ohio Sixth District Court of Appeals has stated, "the state cannot suppress records that it does not have—and that have never been in the possession of a state agent." **Appendix A—¶ 17-18, 20, 22, 50-51.** Petitioner asserts that the prosecution was put on notice for discovery, through defense counsel, with three (3) separate discovery requests prior to trial: See Erie County Common Pleas Court of Ohio: **State v. Jury**, 2013-CR-0472, (2/12/14) "Motion for Disclosure of Exculpatory and Impeachment Evidence— 'Specifically, the Defendant respectfully requests that this Honorable Court order the State of Ohio to **disclose any and all phone records**. . . ;'" (12/20/13) "Motion to Compel— '**Any and all cell phone records** of the victim, including any and all text messages.'" and, (12/6/13) "Demand for Discovery—'**All**

evidence or information known or which may become known to the State of Ohio which may be favorable to the Defendant.., including information or evidence which could be used to obtain evidence that would diminish the credibility of any State's witness.'" (Emphasis).

Pertinent to this case is the state's failure to disclose the actual evidence of Cell-Site-Location-Information ("CSLI") for either phone of this Petitioner and the alleged victim for the day of the alleged incident (11-1-13), the actual text messages between both persons for a year leading up to the day of the alleged incident, and/or failure to disclose the existence / knowledge of CSLI and actual text messages (left the defense to believe that such evidence did not exist) so that the defense could retrieve such information to prepare / present a complete defense at Petitioner's trial which has prejudiced this Petitioner from having an effective counsel, a fair trial, and/or the ability to present a complete defense.

The prosecution had subpoenaed partial cellular records from Defendant's work phone (T. Tr. 351). The prosecutor himself was well aware of the existence of CSLI—using it to convict a previous criminal defendant (see **State v. Gipson**, Erie County C.P.C., 2008-CR-266; appeal denied, 2012-Ohio-515, ¶ **14** (***"The record shows that at trial [the prosecutor] presented extensive cell phone records that carefully tracked appellant's whereabouts throughout the night.***") (Emphasis)). Secondly, Petitioner proffered testimony from Det. Dec, whom stated that he could retrieve deleted text messages from any smartphone; of which, Petitioner's work-phone was an I-phone 4 (T. Tr. 326-27). Moreover, trial testimony stated that the inferred reason why the court could not see any records from the alleged victim's phone was because Petitioner allegedly took it (T. Tr. 578). However, on response to Petitioner's motion for new trial the prosecution admitted to having the alleged victim's phone—this went unchallenged throughout the trial court and appeal to the Sixth District Court of Appeals (See **Appendix A**—*never*

addressed). Only on reconsideration to the Sixth District Court of Appeals was this addressed as a clerical error **Appendix D.**

This Honorable Court has stated in **Kyles v. Whitley**, 514 U.S., 419, 437:

> "A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."

This Court has also stated in **Strickler v. Green**, 527 U.S. 263, 288:

> "'Moreover, under ***Brady*** an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.' ***Agurs***, 427 U.S. at 110."

This case is eerily similar to **Youngblood v. West Virginia** (2006), 547 U.S. 867; in that, ***Youngblood*** filed a motion for new trial on the basis of prosecutorial misconduct where a note shown to, but ignored by, a law enforcement officer had squarely contradicted the prosecution's account of the incidents and directly supported the inmate's consensual-sex defense. The inmate argued that withholding the exculpatory evidence violated the inmate's constitutional rights. The inmate's petition for a writ of certiorari was granted, the judgment affirming the denial of a new trial was vacated, and the case was remanded for further consideration. The case was remanded for the views of the full State Supreme Court on the ***Brady*** issue that ***Youngblood*** clearly presented.

In short, Petitioner asserts no criminal defendant should be denied effective counsel, a fair trial, or the ability to present a complete defense because the state selected not to obtain or disclose evidence that would have exculpated him and believes that this issue could be resolved by the similar manner/model held in **Youngblood v. West Virginia** (2006), 547 U.S. 867, where

petition for a writ of certiorari was granted, the judgment affirming the denial of a new trial was vacated, and the case was remanded for further consideration and concluded that if this Court were to reach the merits of the instant case, then it would be better to have the benefit of the views of the full [Ohio] Supreme Court on the ***Brady*** issue. Petitioner respectfully request that a writ of certiorari be granted and hold that a ***Brady*** violation had occurred.

2. The Ohio Sixth District Court of Appeals decision is divided with the decisions of other state courts and within its own precedent.

The Ohio Sixth District Court of Appeals has put an intolerable / undue burden of limitations that distort the original ***Brady*** analysis and the purposes behind the prosecutorial obligations enunciated in ***Brady***.

The West Virginia State Supreme Court vacated and remanded a similar case that first went before this Court: See **State v. Youngblood**, 221 W. Va. 20, 650 S.E.2d 119, 2007 W. Va. LEXIS 23 (W. Va., May 10, 2007). The Court later stated:

> "In ***Youngblood***, the state failed to produce a note which provided impeachment evidence in response to a Rule 16 discovery request; during the investigation, a trooper had directed a witness to throw it away. 221W. Va. At 24, 650 S.E. 2d at 120. The Court found that despite police investigators failing to advise the prosecutor of the existence of the note, the non-disclosure was imputed to the State and warranted a new trial. *Id.* At 33-34, 650 S.E. 2d at 132-33."
>
> "[T]his Court has consistently held that where a failure to make disclosure hampers the preparation and presentation of the defendant's case, such nondisclosure is fatal to the prosecution's case. *See*, syl. pt. 2, ***State v. Grimm***, 165 W.Va. 547, 270 S.E.2d 173 (1980); syllabus, ***State v. Ellis***, 176 W.Va. 316, 342 S.E.2d 285 (1986). Our holding in ***Grimm*** recognized that *adequate preparation by the defense is a prerequisite to a fair trial. We cannot allow a failure by the prosecution, albeit unintentional, to prejudice the defendant's right to a fair trial.* . . .. In this case, the appellant was not advised of the evidence until the rebuttal stage of the trial. The evidence strongly rebutted Mr. Hager's self-defense argument, his key defense. It is quite probable that had defense counsel known of this statement, it would have tried the case differently."
>
> **State v. Costello** (2021), 245 W. Va. 19, Supreme Court of Appeals of West Virginia.

The Massachusetts Supreme Court has stated:

"The Commonwealth should have [provided evidence] once it had been put on actual notice by defense counsel of the request for specific favorable evidence. See, e.g., **United States v. Brooks**, 296 U.S. App. D.C. 219, 966 F.2d 1500, 1504 (D.C. Cir. 1992) ("Where . . . there is an explicit request for an apparently very easy examination, and a non-trivial prospect that the examination might yield material exculpatory information," the prosecution has an obligation to search possible sources for such information, including files of another agency). See also **Kyles v. Whitley**, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Cf. **Commonwealth v. Donahue**, 396 Mass. 590, 596-599, 487 N.E.2d 1351 (1986) (**in some circumstances, prosecutor "should be required to seek access to material and exculpatory evidence" not in possession of prosecutor** or police). [Emphasis]. [] Because defense counsel is more likely to treat the prosecutor's failure to disclose specifically requested material as an implied representation that the evidence does not exist and make legal and strategic decisions accordingly, when the Commonwealth has not disclosed specifically requested favorable evidence, the defendant "need only demonstrate that a substantial basis exists for claiming prejudice from the nondisclosure." *Id.* at 412. [] We conclude that the judge should have granted the defendant's request for post-conviction discovery and that a hearing on his motion for a new trial may be warranted."
Commonwealth v. Daniels (2005), 445 Mass. 392, 403-405.

The Ohio Supreme Court has stated:

"In ***Brady v. Maryland***, the Supreme Court of the United States recognized that the prosecution has an affirmative duty to disclose evidence that is favorable to the accused and material to the accused's guilt or punishment. 373 U.S. 83, 87, (1963); *see also* ***Kyles v. Whitley***, 514 U.S. 419, 432 (1995). That "duty encompasses impeachment evidence as well as exculpatory evidence," ***Strickler v. Greene***, 527 U.S. 263, 280 (1999), and "it encompasses evidence 'known only to police investigators and not to the prosecutor,'" *id.* at 280-281, quoting ***Kyles*** at 438. "The ***Brady*** rule applies regardless of whether evidence is suppressed by the state willfully or inadvertently. ***Strickler*** at 282." "[I]t is irrelevant whether the prosecution's suppression of evidence that is favorable to a defendant was inadvertent, because the prosecution has 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case.' ***Kyles***, 514 U.S. at 437." "But as we recognized in ***Bethel***, 'criminal defendants have no duty to "scavenge for hints of undisclosed ***Brady*** material."' ***Id.* at ¶ 24**, quoting ***Banks v. Dretke***, 540 U.S. 668, 695."
State v. McNeal, 2022-Ohio-2703, @ 19-.

"When the prosecution withholds material, exculpatory evidence in a criminal proceeding, it violates the due process right of the defendant under the Fourteenth Amendment to a fair trial. As the United States Supreme Court held in ***Brady v. Maryland***, *supra,* at 87, '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 to punishment, irrespective of the good faith or bad faith of the prosecution.'"
State v. Johnston (1988), 39 Ohio St. 3d 48.

See also, **State v. Joseph**, 73 Ohio St. 3d 450, 458 ("Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney.")

The Ohio Sixth District Court of Appeals that denied this Petitioner has stated:

> "[A]n accused has the right to be informed by the prosecutor of all potentially exculpatory evidence and to be informed before trial if the potentially exculpatory evidence existed but was not preserved." "The crux of the ***Brady*** ruling and its progeny is that ***an accused does not receive a fair trial when the accused is not given knowledge of potentially exculpatory material evidence*** or the opportunity to examine it and to present it at trial."
> **State v. Roughton** (6th App. Dist.),132 Ohio App. 3d 268, 302. (Emphasis)

Furthermore, Ohio **Crim. R. 16(B)** states:

> "the prosecuting attorney shall provide copies... for the defendant... **which are material to the preparation of a defense**, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, ***or*** **reasonably available to the state**, subject to the provisions of this rule: **(5) Any evidence favorable to the defendant** and material to guilt or punishment" (emphasis).

These cases are fundamentally rooted with the interpretation of ***Brady***. The Ohio Sixth District Court of Appeals decision of "suppression requires possession" does not comport / align with the above cases. Petitioner respectfully request that a writ of certiorari be granted and hold that a ***Brady*** violation had occurred; or in lieu, have the case remanded to the Ohio Supreme Court for further consideration, so that if this Court were to reach the merits of the instant case, then it would be better to have the benefit of the views of the full Ohio Supreme Court on the ***Brady*** issue.

B. A (lower) trial court errs and deprives an (indigent) defendant of due process in denying without an evidentiary hearing to produce the requisite evidence that would warrant a new trial, a motion for leave and motion for new trial, civil rule 60(B) motion, when a defendant demonstrates a new trial is warranted.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. ***Plyler* v. *Doe***, 457 U.S. 202, 216 (1982).

The Ohio Sixth District Court of Appeals has denied this Petitioner his Due Process Rights to equal protection of fair and impartial treatment when it: 1) essentially decided the merits of Petitioner's appeal without first determining whether he was unavoidably prevented from discovering evidence, 2) claimed that Petitioner failed to provide any actual evidence that CSLI existed, 3) denied Petitioner an evidentiary hearing, the ability to prove that actual evidence existed and, 4) required an unreasonable hurdle for an (indigent) petitioner to "first seek out" evidence. What use are discovery request(s), if the state does not honor it? Besides the three separate requests filed by trial counsel prior to trial where the defense should be entitled to assume that such evidence does not exist, then proffer, after trial, in a new trial motion, that the same prosecutor had used CSLI to convict a previous criminal defendant, this alone, should have triggered some concern as to warrant an evidentiary hearing to learn if CSLI had indeed existed for either phones. The same should hold true for all actual text messages, especially when, the state offered testimonial evidence that it could retrieve deleted text messages from phones, such as Petitioner's I-phone 4, or from the alleged victim's phone where it admitted to having it only to later redact such on Petitioner's reconsideration of the appeal.

This Honorable Court has stated:

> "A rule declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process. Ordinarily, courts presume that public officials have properly discharged their official duties. Courts underscore the special role played by the American prosecutor in the search for truth in criminal trials. Courts, litigants, and juries properly anticipate that obligations to refrain from improper methods to secure a conviction, plainly resting upon the prosecuting attorney, will be faithfully

observed. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation."
Banks v. Dretke (2004), 540 U.S. 668, 696.

This Honorable Court has also stated, "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed ***Brady*** material when the prosecution represents that all such material has been disclosed." **Banks v. Dretke** (2004), 540 U.S. @ 695.

The Ohio Supreme Court has just recently applied this principle as it has stated:

"***Banks v. Dretke***, 540 U.S. 668, 695, 124 S. Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court of the United States explained that criminal defendants have no duty to "scavenge for hints of undisclosed ***Brady*** material." Since the decision in ***Banks***, multiple federal circuit courts and other state supreme courts have repudiated the imposition of any due-diligence requirement on defendants in ***Brady*** cases. *See, e.g.*, ***Dennis v. Secy., Pennsylvania Dept. of Corr.***, *834 F.3d 263, 290-293 (3d Cir.2016)*; ***Amado v. Gonzalez***, 758 F.3d 1119, 1136-1137 (9th Cir.2014); ***United States v. Tavera***, 719 F.3d 705, 711-712 (6th Cir.2013); ***State v. Waverski***, 2019 WI 11, 385 Wis.2d 344, 922 N.W.2d 468, ¶ 51; ***People v. Bueno***, 218 CO 4,409 P.3d 320, ¶ 39; ***State v. Reinert***, 2018 MT 111, 391 Mont. 263, 419 P.3d 662, ¶ 17, fn. 1; ***People v. Chenault***, 495 Mich. 142, 152, 845 N.W.2d 731 (2014)."

"It is well settled that a defendant is entitled to rely on the prosecution's duty to produce evidence that is favorable to the defense. *See* ***Kyles***, 514 U.S. at 432-433, 115 S. Ct. 1555, 131 L.Ed.2d 490. A defendant seeking to assert a ***Brady*** claim therefore is not required to show that he could not have discovered suppressed evidence by exercising reasonable diligence. *See* ***Strickler***, 527 U.S. at 282-285, 119 S. Ct. 1936, 144 L.Ed.2d 286. We hold that when a defendant seeks to assert a ***Brady*** claim in an untimely or successive petition for postconviction relief, the defendant satisfies the "unavoidably prevented" requirement contained in O.R.C. §2953.23(A)(1)(a) by establishing that the prosecution suppressed the evidence on which the defendant relies."
State v. Bethel (2022), 167 Ohio St. 3d 362,368

This again was affirmed by the Ohio Supreme Court where it stated:

"In ***Brady v. Maryland***, the Supreme Court of the United States recognized that the prosecution has an affirmative duty to disclose evidence that is favorable to the accused and material to the accused's guilt or punishment. **373 U.S. 83, 87**, (1963); *see also* ***Kyles v. Whitley***, 514 U.S. 419, 432 (1995). That "duty encompasses impeachment evidence as well as exculpatory evidence," ***Strickler v. Greene***, 527 U.S. 263, 280 (1999), and "it encompasses evidence 'known only to police investigators and not to the prosecutor,'" ***id.*** at 280-281, quoting ***Kyles*** at 438. "The ***Brady*** rule applies regardless of whether evidence is suppressed by the state willfully or inadvertently. ***Strickler*** at 282." "[I]t is irrelevant whether the prosecution's suppression of evidence that is favorable to a defendant was inadvertent, because the prosecution has 'a duty to learn of any favorable evidence known

to the others acting on the government's behalf in the case.' ***Kyles***, 514 U.S. at 437." "But as we recognized in ***Bethel***, 'criminal defendants have no duty to "scavenge for hints of undisclosed *Brady* material."' ***Id.*** **at ¶ 24**, quoting ***Banks v. Dretke***, 540 U.S. 668, 695." **State v. McNeal**, 2022-Ohio-2703, @ 19-.

The Ohio Supreme Court has stated: "***The defendant is entitled to an evidentiary hearing when the allegations in the motion demonstrate substantive grounds for relief.*** **State v. Calhoun** (1999) 86 Ohio St.3d 279, 289." (Emphasis) **State v. Hatton** (2022), 169 Ohio St. 3d 446, 453. Petitioner's equal protection of the laws were violated, when Petitioner was denied his state-created liberty interest to an evidentiary hearing.

Petitioner has demonstrated in his motion/appeal: A) that the state had admitted to actually possessing the alleged victim's phone (at the time of trial)—while asserting that there was no way to look at the alleged victim's phone by contending the Petitioner allegedly took it (T. Tr. @ 578). Moreover, the state never corrected its admission at the trial level or until Petitioner's reconsideration motion; B) that the prosecutor knew that CSLI existed and had used it in a previous criminal trial ***Gipson***; C) Petitioner should be able to rely on the information provided after this Court's decision of ***Carpenter***; respectfully, the existence/capabilities of CSLI, such as, every phone "leave[s] behind a trail of location data," tracking "exactly the movements of its owners;" D) that the prosecution subpoenaed partial cellular records (a few days of actual text messages) from Petitioner's work-phone cellular provider (T. Tr. @ 351); E) that the defense requested "all" cellular phone records of both the alleged victim and Petitioner; and, F) that neither CSLI nor most of the actual text messages were presented at trial. These allegations demonstrate and support Petitioner's claim of a ***Brady*** violation. The trial court must hold an evidentiary hearing. **State v. Trimble**, 2016-Ohio-1307, ¶ 17.; see also **State v. Prater**, 2019-Ohio-2535, ¶ 31; **State v. McConnell**, 2007-Ohio-1181, ¶ 19; **State v. Peals**, 2010-Ohio-5893, ¶ 23."

In failing to grant an evidentiary hearing, the court of appeals has made unsubstantiated assumptions that: CSLI was mere (or varying degrees of) speculation; and, "the state disclosed multiple cell-phone-related records to the defense" that were: a) received by the defense counsel and b) were complete (Dec., at ¶ 16; ¶ 21, fn. 3). Petitioner was unaware of these "phone" records until the court of appeals' decision. The court of appeals has admitted:

> "We note that the record...**is not the entire record—we have**...the transcript of the jury trial **without most of the exhibits, [s]o we cannot say with absolute certainty...of text messages on the record, but such...is not in the portions of the record we are able to review**." (Emphasis)
> **Appendix A.** —¶ 21, fn. 3.

Such admittances by the court of appeals should have prompted the need and warrant an evidentiary hearing to root-out whether a ***Brady*** claim existed. An evidentiary hearing would confirm or deny the lower court's claim and identify "on the record" whether counsel received these so-called records, and whether the records were complete, whether the prosecutor indeed failed to provide CSLI and the actual text messages in question (from Det. Dec's testimony), and other inquiries from cellular representatives verifying CSLI and actual text messages were available. A criminal defendant should not be held to first seek out such evidence prior to an evidentiary hearing process—such ideal is nothing more than another undue burden placed upon indigent criminal defendants in an attempt to preclude their ability to forward a ***Brady*** claim. The Ohio Sixth District Court of Appeals was well aware of the materiality of CSLI as it ruled in **State v. Gipson**, 2012-Ohio-515, **¶14** ("The record shows that at trial [the state] presented extensive cell phone records that carefully tracked appellant's whereabouts throughout the night.") Moreover, Petitioner should have been able to rely on this Court's factual findings from **Carpenter v. United States** (2018), 138 S. Ct. 2206, 2220 (see also 2218-19, syllabus, and 2211-12) (CSLI tracks "exactly the movements of its owners." **Id** @ 2218; and, all phones,

"[a]part from disconnecting the phone from the network, **there is no way to avoid leaving behind a trail of location data**." (emphasis) **Id** @ 2220.) Defendant's (I-phone 4—smart phone) CSLI would have shown indisputably, at any moment, when and where he was throughout the day, obviating any need for his testimony. Instead, Petitioner was accused of "mere speculation" and/or "varying degrees of speculation", and "unable to provide actual evidence" as the court's tactic to bar Petitioner's appeal. **Appendix A**—¶ 13-15, 33. It appears that the Ohio courts are taking advantage of indigent criminal defendants who have no means to hire investigators/ lawyers that would be required to proffer the requisite evidence needed to overcome the procedural hurdles necessary to prove a ***Brady*** violation has occurred. Historically, lower Ohio courts have attempted to place undue burdens over ***Brady*** and new trial motions. See ***Bethel***, ***McNeal*** as just some of the more recent ones that were corrected in the Ohio Supreme Court. An evidentiary hearing is/was warranted. Petitioner's due process rights were violated.

Appellant recently received a letter from Verizon Wireless dated January 24, 2023, that shows that CSLI was available for the day of the alleged crime(s) 11/1/13; but, it is no longer available unless the state preserved it. While this is only one piece of evidence, only an evidentiary hearing would flush out all the alleged prosecutorial misconduct. This indigent Petitioner cannot afford any private investigation into all aspects of his asserted ***Brady*** violations.

Petitioner respectfully request that a writ of certiorari be granted and hold that due process rights violations have occurred.

C. The Questions Presented are of Great Importance.

This case involves two (2) substantial constitutional questions. The decision by the court of appeals threatens the structure of ***Brady***, its progenies ***Kyles***, and ***Trombetta***; and, Ohio Criminal Rule (**"Crim. R."**) **16**. By its ruling, the court of appeals, undermines the United States

Supreme Court's intentions, along with Ohio's governances, to provide a fair trial to criminal defendants; it ignores the plain meaning of Ohio's **Crim. R. 16(B)** / ***Kyles***, while attempting to create its own illogical, untenable rule to permit a state prosecution to selectively ignore (non) specified defense requested material evidence that was known, reasonably available to the state, and utilized in a previous criminal defendant's conviction and/or was in full control of (defined as possession) reasonably available subpoenaed evidence from within this case (the state chose not to retrieve all cellular information—i.e., CSLI for either phones). Then, the state court further denied this petitioner the right to an evidentiary hearing to prove that such evidence existed.

The implications of the decision by the court of appeals also affect criminal defendants who realize ***Brady*** violations by penalizing them simply because the evidence they seek no longer exists without due process of the law. Other implications remove trial fairness to be required of the prosecution by eradicating its accountability to investigate and by not requiring the prosecution to seek justice. Such a rule would sabotage the fundamental fairness that the Sixth and Fourteenth Amendments of the United States Constitution guarantee—the due process right to a fair trial, effective counsel, and the right to present a complete defense.

The court of appeals decision sets a precedent that challenges ***Brady***, its progenies, and Ohio **Crim. R. 16**. This precedent would be preposterous. Due process requires criminal defendants be afforded a meaningful opportunity to present a complete defense; it would be an empty one, if the state were permitted to exclude requested, competent, 'reasonably available,' 'known to the prosecution,' reliable, indisputable, material evidence when such evidence is critical to the defendant's criminal processes—location and time were material to Petitioner's defense.

No court should force a criminal defendant to first find the evidence before holding an evidentiary hearing—metaphorically, putting the cart before the horse. An evidentiary hearing should be the vehicle to allow the search for such evidence to be "conducted so that evidence may be presented." **Merriam-Webster's Collegiate Dictionary** 11th Ed. (define "evidentiary.")

The conclusion of the court of appeals ruling is contrary both to Ohio **Crim. R. 16** and to all legal authority. The court of appeals has decided an important federal constitutional question that has not been, but should be, settled by this Court. There has been no case before this Court where a ***Brady*** suppression violation required constant/unending possession or control of evidence by the state. The ***Kyles*** Court only requires material evidence to be "known" to the prosecution. Ohio's **Crim. R. 16** in relevant part, states: the prosecutor is to disclose any evidence within the possession of **or** reasonably available to the state, favorable to the defendant. While this case is similar to that of **Youngblood v. West Virginia** (2006), 547 U.S. 867, where petition for a writ of certiorari was granted, the judgment affirming the denial of a new trial was vacated, and the case was remanded for further consideration and concluded that if the United States Supreme Court were to reach the merits of the instant case, then it would be better to have the benefit of the views of the full (Ohio) Supreme Court on the ***Brady*** issue; this Honorable Court did not squarely address the possession rule—there is clearly a divide among courts. Petitioner respectfully requests a writ of certiorari and that this Court hold ***Brady*** does not require possession for suppression to occur; and, that Petitioner's substantive and procedural due process rights were violated when Petitioner was denied an evidentiary hearing to present material evidence.

D. This Case is an Excellent Vehicle for Considering the Questions Presented.

Four aspects of this case render it an excellent vehicle for resolving the split among lower courts' authorities concerning whether ***Brady*** requires possession of a state agent. First, this appeal is the result of wrongfully withheld evidence—where petitioner was erroneously thwarted an initial review by the trial court where his claims were initiated. **Appendix B**. Secondly, he, in the first instance, raised such argument on a reconsideration motion to the Ohio Sixth District Court of Appeals who has continually denied Petitioner's ***Brady*** claims (without even a hearing). **Appendix D** and **A.** Thirdly, there is every reason to believe that a ***Brady*** violation has occurred—where petitioner received a letter from Verizon Wireless dated January 24, 2023, (after the court of appeals decision) that expresses the "retention period of records." It explicitly states: "***Tower location information is only maintained for the last 365 days.***" Finally, this Petitioner, was consequentially sentenced to prison for thirty-six (36) years due to an unrelenting, over-zealous prosecutor that was well aware of the undeniable, indisputable material evidence of Cell-Site-Location-Information ("CSLI") which would have exonerated this Petitioner, but failed to give any knowledge of its existence or acquire it for the benefit of justice. Had the evidence been disclosed to the defense, the result of the proceedings would have been different—where he surely would not have needed to testify on his behalf (CSLI would have obviated any such need), and where the evidence was material (providing timed-location information between this Petitioner and alleged victim—impeaching the alleged victim's testimony from the beginning, while obviating Petitioner's testimonial guilt) in the sense that its suppression would have undermined the confidence in the outcome of the trial. **United States v. Bagley** (1985), 473 U.S. 667, 682, 678. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt" **Wearry v. Cain**, 577 U.S. 385, 393. In the instant case, this Petitioner was acquitted on

three (3) of the five (5) counts of rape, attempted murder, and two (2) counts of kidnapping with various enhanced specifications—showing the jury's verdict was of questionable validity from the original indictment.

This Court should grant certiorari to resolve the conflict of authority whether a ***Brady*** violation requires suppression to be dependent upon possession; and, whether this Petitioner was denied his due process right(s) to an evidentiary hearing to produce the requisite evidence that would warrant a new trial.

CONCLUSION

For all of the foregoing reasons, this Petitioner's case is extraordinary and is of great importance. This Court's review is warranted not only to resolve the split amongst lower courts views of ***Brady***—suppression requiring possession, and to resolve the conflicts of undue burdens that bar convicted criminal defendant's an evidentiary hearing process to provide evidence that warrants a new trial—regardless of the statutory provisions (vehicle) involved; but also, to maintain the public's confidence that lower courts will provide the constitutional guarantees of a fair trial, effective assistance of counsel, and the ability for the criminal defendant to provide a complete defense—not compelled to be a witness against themselves. This Court should grant this petition for writ of certiorari.

Respectfully submitted,

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