

No. ~~23~~-5013

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 REHEARING

Brian Jury, #654-969
BeCI
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OCTober 4, 2023

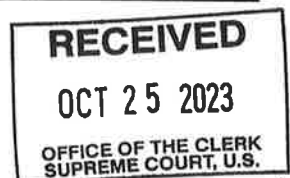


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PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner suggests that there are “intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented,” that militate in favor of granting rehearing (and certiorari) with respect to this petitioner, vacating the previous decision (**Jury v. Ohio**, 2023 U.S. LEXIS 3859—Decided 10/2/23—Case No.: 23-5013) denying the “Petition for writ of certiorari to the Court of Appeals of Ohio, Erie County in favor of this Petitioner’s case for review, or remanding the matter back to the state court.

On March 27, 2023, this Petitioner filed a second “Motion for Leave to File a ‘Delayed Motion for a New Trial’ under Criminal Rule 33(B)” enumerating an analogous prosecutorial misconduct “*Brady*” claim for its failure to disclose Cell-Site-Location-Information “CSLI.” Within that new motion, Petitioner submitted an “Affidavit of Truth and Verity” and a “Verizon Wireless Letter” that was dated January 24, 2023—providing the retention period of records—which show that “Tower location information [was] only maintained for the last 365 days” from the day in question (11-1-13). CSLI / Tower Location Information was available at the time of Petitioner’s trial which commenced on 6-17-14. Despite multiple discovery requests, no disclosure of CSLI or its existence was made to Petitioner which prohibited him from: material / impeaching evidence, presenting a complete defense, and receiving effective counsel. In addition, this Petitioner was compelled to be a witness against himself due to the nondisclosure.

A. Failure to grant a rehearing and certiorari would allow the state courts to dismiss Petitioner’s “*Brady*” claim on the same premise(s) as before.

Petitioner cannot overcome the untenable burden of proving that CSLI was in the “actual” possession of the state or its agents; whereas, he has shown that the state knew about CSLI—using in on a previous criminal defendant’s trial (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)). Petitioner has also shown that the state/prosecution was in control, thus possession, of Petitioner’s cell phone records, through its testimony of subpoenaing partial cellular records from his work phone cellular records (T. Tr. 351). *The State failed to subpoena all cellular records, albeit, defense counsel made three separate discovery requests.*

B. Without the ability to properly impeach the state’s star witness, Petitioner’s current conviction is not worthy of confidence.

Under **Kyles**, this Honorable court stated, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received . . . a trial resulting in a verdict worthy of confidence." **Kyles v Whitley**, 514 U.S. at 434. Without CSLI— which would have shown where each person was at any time throughout the day of the alleged sexual assault (providing indisputable evidence, as to the location and time placements of each), and/or the actual text messages would have spoken volumes as to the previous and numerous sexual relationships between this Petitioner and the alleged victim, which she emphatically denied during trial—this Petitioner cannot be said to have received a fair trial. Petitioner was unable to properly impeach the state’s star witness(es) (i.e., the alleged victim and/or Mr. Pegas) because of the missing CSLI of both the alleged victim and this Petitioner and/or actual text messages between both the alleged victim and this Petitioner. CSLI (along with the actual text messages) would have obviated any need for this Petitioner’s trial counsel to advise this Petitioner to take the stand, thus being compelled to take the stand.

C. The Ohio Sixth District Court of Appeals insinuation that defense counsel, thus Petitioner, was responsible to ascertain CSLI is contrary to Brady.

Petitioner asserts that the Ohio Sixth District Court of Appeals insinuation that defense counsel, thus Petitioner, was somehow responsible to ascertain CSLI because counsel

subpoenaed “Jury’s wireless carrier for ‘any and all text messages sent and received by * * *’ Jury’s [work] phone number for one-year...” (**Appendix A (of original petition)—State v. Jury**, 2022-Ohio-4419, ¶ 21) should have no bearing on CSLI / Tower Location Information not being retrieved. Beyond the multiple discovery requests (noted above)—where the prosecution failed to comply, this Petitioner was not aware of the essential facts of CSLI until 4 years after his trial. Petitioner was led to believe that such information did not exist. This Petitioner believes that if the prosecution would have disclosed that CSLI was available, defense counsel would have or at least should have subpoenaed it—but like the court admitted: “...*but such a discussion is not in the portions of the record we are able to review.*” **Appendix A** (of the original petition)—**State v. Jury**, 2022-Ohio-4419, fn. 3. Prohibiting an evidentiary hearing has made it impossible for this Petitioner to determine any additional discovery or evidence and who was responsible for not providing CSLI / Tower Location Information and actual text messages for/between both phones of Petitioner and the alleged victim. What is certain, is that this Petitioner was compelled to be a witness against himself; denied the right to exculpatory/material evidence; negated an effective counsel; and, thwarted the ability to present a complete defense, thus—all of which were/are prohibited by the United States Constitution.

D. Failure to Grant a rehearing subjects this Petitioner to the United States Sixth Circuit’s illogical rule to successive or second federal habeas petitions pursuant to 28 U.S.C. § 2244(b)

“In *Wogenstahl* we held that *Brady* claims are subject to § 2244(b)’s gatekeeping requirements because the factual predicate of the claim—the unlawful withholding of evidence—occurs before the petitioner files his first habeas petition. *Id.* at 627.” “Upon further consideration, we respectfully believe that *Wogenstahl* was incorrectly decided.” “Unfortunately, as ill-guided as *Wogenstahl* may be, it remains the law of our circuit, *Salmi v. Sec’y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985), so we must hold that [Petitioner’s] petition alleging a *Brady* violation is “second or successive.” **Baugh v. Nagy**, 2022 U.S. App. LEXIS 27469 (6th Cir.), *Id.* @ 16-19.

Moreover, this Honorable Court’s Justice Sotomayor has stated:

“As I have previously explained, the Fifth Circuit’s “illogical rule” defining “second or successive” in this fashion “rewards prosecutors who successfully conceal their *Brady* and *Napue* violations until after an inmate has sought relief from his convictions on other grounds.” *Bernard v. United States*, 592 U. S. ___, ___, 141 S. Ct. 504, 208 L. Ed. 2d 484, 486 (2020) (dissenting opinion). “Under this rule, prosecutors can run out the clock and escape any responsibility for all but the most extreme violations.” *Id.*, at ___, 141 S. Ct. 504, 208 L. Ed. 2d 484, at 487.”

“The Fifth Circuit’s rule contravenes this Court’s precedent. *Panetti v. Quarterman*, 551 U. S. 930, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007), holds that a petition bringing a claim that was not ripe when the petitioner filed his first-in-time petition is not “second or successive.” That reasoning “applies with full force to *Brady* claims” like *Storey*’s where the issue is that the State unlawfully failed to disclose evidence favorable to the defense, and the petitioner is not aware of that evidence until after the first-in-time petition. *Bernard*, 592 U. S., at ___ - ___, 141 S. Ct. 504, 208 L. Ed. 2d 484, at 486 (SOTOMAYOR, J., dissenting). By ignoring *Panetti*’s logic, the Fifth Circuit’s rule improperly “produce[s] troublesome results, create[s] procedural anomalies, and close[s] our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress’ intent.” *Panetti*, 551 U. S., at 946, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (internal quotation marks omitted).”¹

¹ At least three other Courts of Appeals have adopted the same erroneous interpretation as the Fifth Circuit. See *In re Wogenstahl*, 902 F. 3d 621, 626-628 (CA6 2018) (*per curiam*); *Brown v. Muniz*, 889 F. 3d 661, 668-671 (CA9 2018); *Tompkins v. Secretary, Dept. of Corrections*, 557 F. 3d 1257, 1259-1260 (CA11 2009) (*per curiam*). But see *Scott v. United States*, 890 F. 3d 1239, 1254-1258 (CA11 2018) (disagreeing with *Tompkins* at length but following it as binding); *In re Jackson*, 12 F. 4th 604, 611-616 (CA6 2021) (Moore, J., concurring) (opining that *Wogenstahl* was wrongly decided). (Emphasis).

Storey v. Lumpkin (2022), 142 S. Ct. 2576, 2578.

In essence, this Petitioner will not get the “first in time” equitable judicial review on his *Brady* violation, simply because the state of Ohio and its prosecution were able to conceal evidence regardless whether evidence is suppressed by the state willfully or inadvertently.

Conclusion

Because of the Ohio Sixth District Court of Appeal’s prejudicial decision of injurious effect on two important questions of federal law that have not been, but should be, settled by this Honorable Court, and/or because they have decided these important federal questions in a way

that conflicts/contravenes with relevant decisions of this Honorable Court, or where the lower court's decision is divided with the decisions of other state courts and even within its own precedent, this Court should allow Petitioner Jury to pursue any entitlement to relief on his *Brady* violation(s) and due process right to an evidentiary hearing through a motion for a new trial—and should therefore grant the petition for rehearing, vacate its previous decision, grant the petition for a writ of certiorari in favor of Petitioner Jury, review his two constitutional questions, or remand this case back to the lower state court for further proceedings in light of *Youngblood v. West Virginia*, (2006) 547 U.S. 867; or, of/on this Honorable Court's own accord.

This petition for rehearing is presented in good faith and not for delay.

Respectfully Submitted,



Brian Jury, #654-969

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Petitioner—Pro Se

October 4, 2023

Date

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v.

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CERTIFICATE OF SERVICE


I, Brian Jury, do swear or declare that on this date, OCT. 4, 20 23, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR REHEARING, on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Erie County Prosecutor's Office:
Ms. Kristin Palmer
247 Columbus Ave., Suite 319
Sandusky, Ohio, 44870

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/4/23, 20 23


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