24-6566

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FELIX O. BROWN JR. – PETITIONER

VS.

STATE OF OHIO – RESPONDENT

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOR THE ELEVENTH APPELLATE DISTRICT, TRUMBULL COUNTY, OHIO

PETITION FOR WRIT OF CERTIORARI

FELIX O. BROWN JR.
GRAFTON CORRECTIONAL INSTITUTION
2500 SOUTH AVON-BELDON ROAD
GRAFTON, OHIO, 44044

QUESTIONS PRESENTED

1. Can newly discovered material evidence which revealed an unauthorized communication had with a deliberating jury, in the jury room, by/or through a Bailiff, in violation of a Petitioner's 6th and 14th Amendment rights under the United States Constitution during a critical stage of the criminal proceedings:

   a) rise to the level of a Brady violation where said communication was suppressed by the state?

   b) or – if such intrusion does not qualify as a Brady violation – does *the state's willful suppression* of all evidence pertaining to said communication absolved a prisoner from showing that he could not have discovered the evidence by reasonable diligence?

2. Where, under a state's constitution, a convicted defendant is entitled to a direct appeal as of right: does a *Brady* violation occur where newly discovered material evidence clearly establishes that an omission of evidence in the trial transcript prevented a defendant-appellant from addressing a reversible misconduct on direct appeal with a supporting record?

3. Is Due Process, under the 14th Amendment of the United States Constitution, offended when a state applies res judicata to a claim supported by newly discovered material evidence that was either unknown, or previously made unavailable by the state, to the prisoner during direct appeal?

LIST OF PARTIES

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

RELATED CASES

State v. Brown, 2000 Ohio App. LEXIS 143 (Ohio App. Dist. 2000) Direct Appeal

State v. Brown, 89 Ohio St. 3d 1455, 731 N.E.2d 1141, 2000 Ohio LEXIS 1802 (July 19, 2000) Discretionary appeal not allowed

State v. Brown, 91 Ohio St. 3d 1482, 744 N.E.2d 1195, 2001 Ohio LEXIS 962 (Apr. 4, 2001) Dismissed by, Discretionary appeal not allowed

Brown v. Bagley, 2003 U.S. Dist. LEXIS 29724 (N.D. Ohio, June 25, 2003) Habeas corpus proceeding denied

Brown v. Bagley, 2003 U.S. Dist. LEXIS 29723 (N.D. Ohio, Aug. 5, 2003)

Brown v. Morganstern, 2004-Ohio-2930, 2004 Ohio App. LEXIS 2571 (Ohio Ct. App., Trumbull County, June 4, 2004) Related proceeding

Brown v. Hall, 2009-Ohio-1349, 2009 Ohio App. LEXIS 1161 (Ohio Ct. App., Stark County, Mar. 23, 2009) Writ of habeas corpus denied

State v. Brown, 2012-Ohio-4465, 2012 Ohio App. LEXIS 3975 (Ohio Ct. App., Trumbull County, Sept. 28, 2012) Decision reached on appeal

State v. Brown, 2017-Ohio-4241, 2017 Ohio App. LEXIS 2299, 2017 WL 2570032 (Ohio Ct. App., Trumbull County, June 12, 2017) Decision reached on appeal

Brown v. Foley, 2020 U.S. Dist. LEXIS 252312 (N.D. Ohio, Feb. 10, 2020)

Brown v. Foley, 2020 U.S. App. LEXIS 23753 (N.D. Ohio, July, 27, 2020)

Brown v. Foley, 2020 U.S. App. LEXIS 30454 (6th Cir., Sept. 23, 2020) Rehearing denied by, En banc

Brown v. Foley, 2021 U.S. LEXIS 1431 (U.S., Mar. 22, 2021) US Supreme Court certiorari dismissed

State v. Brown, 2023-T-0064, 2024-Ohio-792 (Ohio Mar. 4, 2024) Appeal Appealing the denial of Crim. R. 33(B) affirmed

State v. Brown, 2024-Ohio-2927, 2024 Ohio LEXIS 1675 (Ohio, Aug. 6, 2024) Discretion Appeal not allowed.

State v. Brown, 175 Ohio St. 3d 1474, 2024-Ohio-4761, 2024 Ohio LEXIS 2104 (Oct. 1, 2024) Motion for Leave to file Revised Motion for Reconsideration granted

State v. Brown., 2024-Ohio-5529, 2024 Ohio LEXIS 2607 (Ohio, Nov. 26, 2024) Reconsideration denied

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IN THE

THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from **state courts**:

- The opinion of the highest state court to review the merits – Court of Appeals for the Eleventh Appellate District – appears at Appendix A to the petition and is reported at State v. Brown, 2024-Ohio-792.

- The opinion of the Court of Common Pleas for Trumbull County, Ohio, appears at Appendix B to the petition and is unpublished.

- The opinion of the Supreme Court of Ohio appear at Appendix C to the petition and is reported at State v. Brown, 2024 Ohio LEXIS 1675.

- The decision of the Supreme Court of Ohio on petition's motion for motion for leave to revise motion for reconsideration – appear at Appendix D to the petition and is reported at State v. Brown, 2024 Ohio LEXIS 2104.

- The decision of the Supreme Court of Ohio on petitioner's revised motion for reconsideration – appear at Appendix E to the petition and is Reported at State v. Brown, 2024 Ohio LEXIS 2607.

- The judgment entry of the Court of Appeals for the Eleventh Appellate District, on petitioner's for the reconsideration of review Opinion affirming denial of petitioner's Crim. R. 33(B) motion – appears at Appendix F to the petition and is unpublished.

- The Judgment Entry Trumbull County Court of Common Pleas containing Conviction and Sentence – appears at Appendix G to the petition and is unpublished.

JURISDICTION

For cases from **state courts**:

The date on which the highest state court decided petitioner's case was August 6, 2024. A copy of that decision appears at Appendix C.

A timely petition for rehearing was thereafter denied on the following date: November 26, 2024. A copy of the order denying rehearing appears at Appendix E.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. 1, § 2 of the Ohio Constitution

Art. 1, §16 of the Ohio Constitution

Art. IV, § 1, 2, 3, of the Ohio Constitution

Fourteenth Amendment of the United States Constitution

Sixth Amendment of the United States Constitution

Ohio App. R. 9(E)

Ohio Crim. R. 24(H)(4)

Ohio Crim. R. 33(B)

Ohio Revised Code 2945.33

STATEMENT OF THE CASE

On March 16, 1995, Petitioner was indicted by the Trumbull County Grand Jury on one count of murder with a firearm specification and one count of having weapons while under disability. On September 25,1995, a jury trial was commenced whereas on September 29, 1995, the testimony of witnesses and submission of evidence to the jury was concluded. And after receiving final instruction from the trial judge, Mitchell Shaker, informed them from this time on, you will be in charge of the bailiff. You will follow her instructions in every regard. If you desire to communicate with the Court, you should do so in writing, only after the careful consideration of the language used so that the same does not necessarily disclose the status of your deliberations. The jury retired from the courtroom to deliberate upon its verdict at 1:10 p.m. Transcript page(s) (T.pg's.) 579-582.

At 6:33 p.m. the deliberating jury made several inquiries of the court. The first question, "we're noticing discrepancies in evidence of a second shell casing found in Apartment Number 238 and not Apartment 278. Are we to assume that this only an error in apartment numbers, or was this found (by Private Investigator, Ben DiGiovonne) in Felix Brown's dad's apartment?" The second question, same time, is the stipulation of the murder charge, the word purposely, "in other words, if it was not a purposely committed act, is he not guilty?" T.pg's. 584-585. At 6:50 p.m. the court refused to specifically respond to the jurors' two inquires: instead Judge Shaker informed them that they' would have to rely on their memory regarding the evidence pertaining to the recovery location of the shell casing. And in regard to

their second inquiry, Judge Shaker stated: "There is no way a Judge can answer that question except to give you the charge that I gave you (regarding) Purposely..." T.pg's. 585-587. At 8:00 p.m. the deliberating jury submitted the following question to the Court. "We all agree on the second count (having a weapon while under disability). Should we sign the Verdict on Count Two?" At 8:03 p.m. the Judge had them returned to the courtroom where he delivered a supplemental "Allen Charge" instruction. And asked the following: "I am interested in knowing whether or not there is a possibility of reaching an agreement within a reasonable time?" And after not receiving a definitive answer from the Forelady, Judge Shaker instructed them "to continue their' deliberations until 9:00 p.m. and see what happens." At 8:10 p.m. the jury retired from the courtroom to continue their deliberations. T.pg's. 587-591. And approximately 9:00 p.m. the jury announced that they had arrived at a guilty verdict on both counts. And at 9:18 p.m. Brown was escorted from the Trumbull County Jail to the Courthouse: where he was pronounced guilty on both counts. T.pg's. 591-592.

The sentencing hearing was held in October 3, 1995, where, therein, Brown informed the Court that he would like to appeal. A Notice of Appeal was filed per Brown's request on October 31, 1995.

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"After appellant's convictions, (Michael A.) Partlow was assigned as appellant's counsel. Partlow was of counsel to the firm of Morganstern, MacAdams

and DeVito, L.P.A. ('the firm'). Partlow reviewed the trial transcript and forwarded it to appellant." *Brown v. Morganstern*, 2004 Ohio 2930, [*P3](11th App. Dist).

Upon petitioner receiving the copy of his trial transcript from Atty. Partlow, petitioner immediately began to notice, therein, that there were omitted and altered sections of actual testimony of several of the defense and state witnesses. Petitioner then informed Atty. Partlow of the material inaccuracies.

Atty. Partlow then discovered that the Trumbull County Court of Common Pleas audiotaped important criminal trials, including trials for murder. Atty. Partlow, then forwarded a written transcript of the audiotapes to Petitioner, enabling Petitioner to then specify which part or parts of the trial transcript he claimed were materially inaccurate.

Petitioner provided Atty. Partlow with a very detailed comparison of the trial transcript and the written transcript from trial court's audiotape of the trial, via certified mail, wherein Petitioner outlined differences he claimed existed between the trial transcript and the transcript of the audiotapes and between the trial transcript and the testimony he recalled given during trial. Id. *Brown v. Morganstern,* 2004 Ohio 2930,[*P3].

Petitioner then instructed Atty. Partlow to pursue the prescribed court procedure to address the intentionally altered sections of the record. Id. *Brown v. Morganstern,* 2004 Ohio 2930,[*P4].

Atty. Partlow then petitioned the Eleventh District Court of Appeals for a limited remand hearing so as to properly address said omissions and inaccuracies,

whereas the appellate court, after requesting and receiving from him an exhaustive list of the omissions and inaccuracies and explanation of how the correction of those errors would be material to the specific assignments of error, remanded appellant's criminal appeal pursuant to App. R. 9(E) to determine whether the trial transcript must be corrected.

However, prior to said limited remand, Common Pleas Court Judge Andrew Logan (who was not the judge whom presided over petitioner's criminal trial) ruled, *off the record* and in the absence of petitioner – prior to having petitioner returned from prison for the limited remand hearing – "that the trial witnesses would not testify at the hearing to their trial testimony".

Once Atty. Partlow informed petitioner of this, over the phone, days prior to petitioner being transferred from the prison back to Trumbull County for the App. R. 9(E) hearing, petitioner voiced his dislike for this decision in writing to Partlow and requested that Partlow object on the record, by any legal means possible, to this 'ruling' so to make the trial judge's decision part of the record so that the off the record ruling could be addressed during direct appeal. Partlow did not follow these instructions.

At the limited remand hearing, the trial court heard testimony from appellant, appellant's father, appellant's trial counsel[1], and the court reporter. During this time, appellant contends he urged Partlow, during his cross-examine of the court reporter, to confront her with the material inaccuracies in the trial transcript. Atty. Partlow failed to do so. *Brown v. Morganstern*, 2004-Ohio-2930, at [*P4]

"In its February 27, 1999 judgment entry, the trial court stated that 'upon full and final review of [appellant's] motion, this Court finds it to be, in all respects, bordering on frivolous. [Appellant's] recollections were generally self-serving and without any basis in fact. *** This Court finds the official transcript of this Court to have been completed in a true, accurate and professional manner.'" [Emphasis added.] **Id.** *Brown v. Morganstern*, 2004-Ohio-2930, at [*P5].

The Court of Appeals in affirming petitioner's conviction and sentence on direct appeal in *State v. Brown,* 2000 Ohio App. LEXIS 1430 did so without the documented evidence of Judge Logan's *off the record* App. R. 9(E) ruling – which only surfaced in 2004; within the Eleventh District Court's Opinion affirming the

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[1] "App. R. 9(E) states in part, 'If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by the court and the record made to conform to the truth.' Thus, 'it is within the province of the trial court to resolve disputes about the record on appeal.' State v. Schiebel (1990), 55 Ohio St. 3d 71, 81, 564 N.E.2d 54, 66. Here, the trial court did resolve the dispute; it found the year-old recollection of the former counsel for an interested party insufficiently persuasive to impeach the stenographic record. State v. Keene, 81 Ohio St. 3d 646, 665 (1998)" **Id**, Appellant Brief, Fn. 7

Trumbull County Court of Common Pleas' dismissal of petitioner's legal malpractice suit lodged against Atty. Michael A. Partlow.

To wit:

> "In the instant case, the trial court reviewed the audio tapes of the trial and listened to the witnesses at the evidentiary hearing. We have no reason to doubt the trial court's assessment of the audio tapes, and the record of the evidentiary hearing supports the trial court's conclusion that appellant's testimony was self-serving. Because the trial court's decision concerning the record was supported by competent, reliable evidence, we will not reverse its decision."

Id, *State v. Brown,* 2000 Ohio App. LEXIS 1430, [*31]

The State Supreme Court declined to accepted jurisdiction. Id, *State v. Brown,* 2000 Ohio LEXIS 1802

In October of 2021, years after numerous state and federally collateral attacks, several members of petitioner's family agreed to hire a private investigator in hope of uncovering newly discovered evidence. And as a result, the following newly discovered material evidence was obtained:

- "A member of the jury, Adriane Perritti, first being sworn according to law, deposed and stated the following within an affidavit that she specifically recalls that during their' (the jurors) deliberations: an individual came into the jury room during deliberations and asked them how it was going? And upon being informed that they were deadlocked 10-2 on Count One (the

murder charge), that individual then: '*told them to stay until they reached a decision.*'[2] And soon thereafter, they arrived at a guilty verdict on all charges."

- "A member of the jury, Cathy Brunstetter, first being sworn according to law, deposed and stated the following within her affidavit, that she specifically recalls that during Dr. (William) Cox's testimony, he informed them that 'the defendant placed the weapon against the victim's head and *intentionally pulled the trigger; he pushed that gun into her head.*" (Yet, *nowhere* contained within the entirety of the *alleged* official trial transcript is it documented that Dr. Cox testify that 'the defendant ... *intentionally pulled the trigger* and/or *he pushed that gun into her head.*')

On 12/27/2022, Petitioner filed a Motion for Leave to File a Motion for a New Trial, under Ohio Crim. R. 33(B) – in conjunction with his Ohio Crim. R. 33(A) New Trial Motion – based upon such newly discovered material evidence. And, therein, he presented irrefutable documented evidence to satisfy and/or overcome the reasonable

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[2] "Bailiff misconduct in communicating to a deliberating jury will be presumed prejudicial where after such communication a verdict is returned. See *State v. King* (1983), 10 Ohio App. 3d 93, 460 N.E.2d 1143, citing *State v. Adams* (1943), 141 Ohio St. 423, 48 N.E.2d 861, where a bailiff standing inside the doorway of the jury room after being informed the jury could not reach a decision replied, 'You can't do that. You must reach a decision if you have to stay here for three months.' *State v. Foster*, 1995 Ohio App. LEXIS 4812, [*5](8th App. Dist.)" **Id**, Defendant's Crim. R. 33(B) motion, fn. 16; Appellant Brief, Fn. 6.

diligence prerequisite of Crim. R. 33(B); via, proof that: (1) the trial transcript had not being provided to him, as an indigent defendant in prison[3] until well after the 120-day timeline prescribed in Crim. R.33(B); (2) that the evidence documenting Judge Logan's *off the record* App. R. 9(E) ruling had been previously unavailable to the prisoner until 2004 – when a panel of the Eleventh District Court of Appeals had itself somehow uncovered, and then revealed, such within its' 06/04/ 2004 Opinion in *Brown v. Morganstern*[4]; and (3) the improper communication had with the jury, during deliberations, was untranscribed and only known by the state. Petitioner further, presented, therein, the following case law in support:

> "'*Griffin v. Illinois* and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a

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[3] "[T]he Supreme Court of Ohio again held that the clerk of courts is under no duty to provide an indigent defendant with a copy of a trial transcript in addition to the copy filed with the court of appeals. State ex rel. Greene v. Enright (1992), 63 Ohio St.3d 729, 732, 590 N.E.2d 1257, ***Clearly, the duty to provide a transcript at the state's expense extends only to providing one free transcript for the entire judicial system, not to sending an additional transcript to an indigent defendant in prison. *State v Maddox,* 2002 Ohio App. LEXIS 1202, [*P17-*P18] (11th App. Dist.)." **Id**, Appellant Brief, Fn. 9.

[4] Id. 2004-Ohio-2930, at [*P4]

transcript of prior proceedings when that transcript is needed for an effective defense or appeal.' *Britt v. North Carolina*, (1971) 404 U.S. 226, 227.[5]

"'[T]he state must afford defendants with a fair and adequate procedure[s] for settling transcripts.' *Maxwell v. Conway*, 2009 U.S. Dist. LEXIS 129999, at *7 (S.D.N.Y. May 19, 2009). To demonstrate a due process violation arising out of transcript inaccuracies, a Petitioner must show; that either the available settlement procedures were unfair or the existence of intentional tampering; and (2) that the errors prejudiced his right to appeal. See, *Burrell v. Swartz,* 558 F. Supp. 91, 92 (S.D.N.Y. May 19, 2009).[6]

"Brown has, thereby been adversely affected by the denial of his rights under, both, the United States, and the Ohio Constitution where he was deprived of: (1) a full and fair criminal jury trial proceeding; (2) an impartial jury; (3) an adequate App. R. 9(E) corrective process in which to fully address the intentional omissions and altered sections contained in the trial transcript; and (4) a full and fair direct appeal.

"In *Holmes v. United States* (C.A. 4, 1960), 284 F. 2d 716, Judge Haynsworth stated that there are two types of newly discovered evidence: (1) evidence bearing upon the substantive issue of guilt; and (2) evidence bearing upon the integrity of the trial."

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[5] Id. Crim. R. 33(B), p. 8

[6] Id. Crim. R. 33(B), p. 6

State v. Walden, 19 Ohio App. 3d 141,145 (10th App. Dist. 1984)."[7]

In refusing to grant petitioner's Crim. R. 33(B) motion for leave to proceed the trial court – *Judge Logan* – pronounced: in direct regard to the contents of Juror Cathy Brunsetter's affidavit recounting the actual material content of testimony of several trial witnesses:

- "The first juror, Cathy Brunstetter, attests to her recollections regarding testimony from two witnesses at the trial. The juror's recollections are not evidence that would or could have been produced at the trial had they been discovered earlier, and are therefore outside the scope of Crim. R. 33. Further, testimony from Brunstetter regarding her recollections would be prohibited by Evid. R. 606(B)(1)"[8]

Therein, Judge Logan, also, held: in direct regard to the content of Juror Adriane Perritti's affidavit – involving the unauthorized communication, had in the jury room, with the then deliberating jury:

- That there was 'no evidence this was a court official, and rejected the evidence, further claiming that Appellant had not shown 'by clear and convincing evidence' that he was 'unavoidably prevented' from discovering this evidence within 120 days of the verdict.[9]

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[7] Id. Crim. R. 33(B), p. 5

[8] Id. Appendix B, p. 3

[9] Id. Appendix B, p. 3

Within petitioner appeal, appealing the denial of his Crim. R. 33(B) motion, petitioner raised the following: "ISSUES PRESENTED FOR REVIEW AND ARGUMENT":

- "Did the trial court err as a matter of law by ruling contrary to clear and unambiguous law of ORC Ann. 2945.33 and Ohio Crim. R. 24(H)(4) during its' assessment of the content of Juror Adriana Perretti affidavit: in violation of Appellant's right to Equal Protection of Law and Due Process under Art. 1, § 2 and Art. 1, §16 of the Ohio Constitution; and under the Fourteenth Amendment of the United States Constitution?"[10]
- "Judge Logan disregarded clearly established law where he held: that the petitioner was not entitled to the same level of basic procedural-due-process protections to satisfy the unavoidably prevented requirement of Crim. R. 33(B) that the law afforded a petitioner that had evidence suppressed by the prosecutor: because it was the bailiff, not the prosecutor, whom suppressed the evidence petitioner relied upon."[11]
- "Did the trial court err as a matter of law by ruling contrary to clear and unambiguous statutory, and constitutional, law when it held: the affidavit of Juror Cathy Brunsetter attesting her recollection regarding the testimony from two witnesses had at trial is not evidence that would or could have been produced at the trial had they been discovered earlier, and are therefore

[10] Id, Appellant Brief, pgs. ii and 9-12; Appellant Reply Brief, pgs. 3-4

[11] Id, Appellant Brief, Pgs. 8 and 15-17; Appellant Reply Brief, pgs. 6-7

outside the scope of Crim. R. 33: in violation of Appellant's right to Equal Protection of Law and Due Process under Art 1, § 2 and Art. 1, §16 of the Ohio Constitution; and under the Fourteenth Amendment of the United States Constitution?"[12]

The court of appeals in affirming the trial court's denial of Petitioner's Crim. R. 33(B) Motion for Leave to File a Motion for New Trial, issued the follow pronouncement:

"Under his first assignment of error, appellant argues that the trial court misapplied the law regarding the affidavit submitted by Juror Perretti who sat on his trial. The juror averred that a person entered the jury room during deliberations to see how deliberations were going; the person allegedly indicated that the jury needed to continue deliberating until they reached a decision. Appellant asserted, without substantiation, the individual described in the affidavit was a court official. Appellant claims the trial court failed to give proper weight to the juror's affidavit. In appellant's view, this interruption in deliberation occurred in violation of R.C. 2945.33, which requires the jury to be under the charge of an officer and that officer shall not allow communications to the jury nor shall he or she make communications to the jury except to ask if the jury has agreed on a verdict.

"The trial court determined that the foregoing argument lacked merit because appellant failed to demonstrate, by clear and convincing evidence, that he

[12] Id, Appellant Brief, Pgs. V and 17-22; Appellant Reply Brief, pgs. 1-2

was unavoidably prevented from obtaining the evidence. We agree with the trial court.

"Misconduct of a court officer in communicating to the jury, in violation of R.C. 2945.33, during its deliberations 'will be presumed to be prejudicial to a defendant against whom, after such communication, a verdict is returned by such jury.' State v. Adams, 141 Ohio St. 423, 430-431, 48 N.E.2d 861 (1943), paragraph three of the syllabus. Hence, as a general rule, a court officer's communication with the jury in the defendant's absence may be grounds for a new trial. State v. Abrams, 39 Ohio St.2d 53, 55-56, 313 N.E.2d 823 (1974); Bostic v. Connor, 37 Ohio St.3d 144, 149, 524 N.E.2d 881 (1988) (superseded by statute on other grounds). The presumption of prejudice, however, is not conclusive. Rather, the burden shifts and 'rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.' State v. Murphy, 65 Ohio St.3d 554, 575, 605 N.E.2d 884 (1992), quoting Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954).

"Initially, Juror Perretti did not aver that the alleged individual entering the jury-deliberation room was a court officer. In fact, she averred she did not recall "the identity, sex, or role of this person." Appellant accordingly assumes, without supportive evidence, that the individual was a court officer. This is problematic because without an averment that the individual was a

member of court personnel, it is unclear what, if any impact the statements made by the individual would have had on the jury's deliberations.

"One obvious, if not the primary, bane R.C. 2945.33 is designed to avoid is contaminating the jury's deliberations. If an individual, who appears to be operating under the cloak of the court's authority, interrupts deliberations and provides improper direction to the jury outside of the court's, the defendant's, as well as defense counsel's presence, a defendant's due process right to a fair trial is presumed to be compromised. Because, however, appellant did not establish the individual at issue was a court officer or employee, it is not clear that the presumption of prejudice would necessarily attach.

"Even assuming this point is insufficient to fully undermine appellant's argument, appellant failed to aver or set forth any material facts that he was unavoidably prevented from obtaining the information elicited from Juror Perretti's affidavit. To establish eligibility to obtain leave to file, a party must establish a firm belief or conviction in the facts sought to be established. Appellant concedes he retained Private Investigator Tom Pavlish on October 23, 2021, some 16 years after his conviction. The information could have reasonably been obtained by appellant prior to the expiration of the 120 days set forth in Crim.R. 33 with the exercise of reasonable diligence. Appellant's argument therefore lacks merit."

Appendix A, *at* [*P12- *P17]

The court of appeal, also, held: in direct regard to the contents of Juror Cathy Brunsetter's affidavit – involving her recollections of the actual material content of testimony of several trial witnesses:

> "Under his fifth, sixth, and seventh assignments of error, appellant claims the trial court erred in denying him leave to file his motion for new trial based upon Juror Cathy Brunstetter's affidavit. In her affidavit, Juror Brunstetter averred she 'recall[ed] Dr. William Cox testifying that Mr. Brown put the weapon against [the victim's] head and intentionally pulled the trigger. I recall Dr. Cox testifying that Mr. Brown pushed the gun into her head.' Appellant maintains, however, this aspect of the trial testimony was omitted from the trial transcript. He therefore maintains he was denied due process because, on appeal, the trial transcript was incomplete. We disagree.
>
> "Appellant mistakenly claims that that Juror Brunstetter's averments indicate the trial transcript was altered. The content of the affidavit, however, merely indicates the juror's recollection of some of the substantive content of one expert witness. While irregularities in the transcript were at issue in this case, these points were raised on appellant's direct appeal and resolved by this court in Brown I. 2000 Ohio App. LEXIS 1430, 2000 WL 522339, at *10-11. Accordingly, the due process issue identified by appellant is barred by the doctrine of res judicata."

Appendix A, at [*P25-*P27].

REASON FOR GRANTING THE PETITION

A STATE COURT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. **Question 1:** Can newly discovered material evidence which revealed an unauthorized communication had with a deliberating jury, in the jury room, by/or through a Bailiff, in violation of a Petitioner's 6th and 14th Amendment rights under the United States Constitution during a critical stage of the criminal proceedings:

   a) rise to the level of a Brady violation where said communication was suppressed by the state?

   b) or – if such intrusion does not qualify as a Brady violation – does *the state's willful suppression* of all evidence pertaining to said communication absolved a prisoner from showing that he could not have discovered the evidence by reasonable diligence?

The Court of Appeals for the Eleventh Appellate District of Ohio has, and thereby has sanctioned the Trumbull County Court of Common Pleas to, answer[ed] this *Brady* designation, and suppression of evidence, question in the negative. To wit:

"Appellant neither avers nor offers a compelling basis regarding why the evidence could not have been discovered with reasonable diligence. There is nothing to indicate that appellant undertook any efforts to discover the

evidence prior to October 2021, when the private investigator who interviewed the jurors was hired. *Although appellant may have been unaware of the information resulting from the investigator's interviews, it does not follow he was unavoidably prevented from discovering the evidence within 120 days of the verdict.* Accordingly, the trial court properly concluded appellant had offered "no evidence, much less clear and convincing proof, of any efforts made to obtain information from jurors in the 120-day period after the verdict."

Id. Appendix A, at [*P20][Italic print added.]

Here, the Ohio Courts, even in light of the presentation of clear material evidence establishing that an *untranscribed* communication had with the then deliberating jury in the jury room by/or through the bailiff was performed in a clandestine fashion so as to prevent petitioner from becoming aware of such – which also deprived petitioner of his basis fundamental rights to representation of counsel during a critical stage of his criminal trial proceedings[13], and due process right to be personally present therein – deemed it a requirement for the petitioner to have gained knowledge of such evidence through some type of bare hook fishing expedition within the 120-day period after the verdict. In other words, Ohio courts rewards prosecutors

[13] Commanding the jury, during deliberation, after learning that two of the jurors remained undecided, that they *"had to stay until they reached a (*unanimous*) decision"* surely qualified as a supplemental jury instruction.

who successfully conceal their Brady, and other *fundamental* Sixth and Fourteenth Amendment, violations until after a particular post-trial timeliness deadline has expired: with a win – that is, the continued incarceration of a person whose trial was fundamentally unfair (and unconstitutional).

The State willful act of unauthorized communication was material where it interfered with the jurors' duty to adjudge petitioner's innocence or guilt based *exclusively* from the evidence introduced in open court...Thus, the suppression of the unlawful communication was/is a clear violation of Brady, wherein, had this favorable (exculpatory) evidence been revealed to the defense as soon as it occurred then the result of the proceeding would have been different – a new trial mandated. See, *Parker v. Gladden*, (1966) 385 U.S.363; *Rushen v. Spain*, (1983) 464 U.S. 114; *United States v. Cronic*, (1984), 466 U.S.648, 659; *Fillippon v. Albion Vein Slate Co.*, (1919), 250 U.S. 76; *Lewis v. United States*, (1892) 146 U.S. 370, 372.

In *Banks v. Dretke*, 540 U.S. 668, 695 (2004), this Court 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., United States v. Tavera, 719 F.3d 705, 711-712 (6th Cir.2013); Bracey v. Superintendent Rockview SCI, 986 F.3d 274, 280 (3d Cir.2021); Amado v. Gonzalez, 758 F.3d 1119, 1136-1137 (9th Cir.2014); State v. Bethel, 167 Ohio St. 3d 362, 369 (2022); State v. Wayerski, 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).

An individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police. *Kyles v. Whitley,* 514 U.S. 419, 437 (1995).

Ohio Revised Code Ann. 2945.33 – Keeping and conduct of jury after case submitted – is clear and unambiguous. To wit:

> "When a cause is finally submitted the jurors must be kept together in a convenient place under the charge of an officer until they agree upon a verdict, or are discharged by the court. The court, except in cases where the offense charged may be punishable by death, may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. *Such officer shall not permit a communication to be made to them, nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court...*"

Id. [Italic print added.]

Moreover, here, as a result of the suppression of said unauthorized communication (supplemental jury instruction by/or through the bailiff), petitioner was also *unknowingly* deprived of his fundamental constitutional rights, under the Sixth and/or Fourteenth Amendment: (a) to representation of counsel during a

critical stage of his criminal trial; and (b) to be personally present during a critical stage of his criminal proceedings.

Id. Defendant's Crim. R. 33(A), pgs. 29-34; and Appellant Brief, pg. 12.

"Is jury re-instruction a 'critical stage' under Cronic? While the Supreme Court has not expressly considered whether jury reinstruction, as it is understood in this matter, is a critical stage, this court recently determined - in a decision squarely on-point and founded on the U.S. Supreme Court's decision in Cronic - that it is. On remand from the Supreme Court, which had vacated the original appellate opinion in French and remanded for reconsideration in light of the Supreme Court's decision in Bell v. Cone, 535 U.S. 685, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (2002), this court reiterated its previous decision holding that jury re-instruction was indeed a 'critical stage' as described in Cronic and that prejudice could be presumed." *Caver v. Straub,* 349 F.3d 340, 349-50(6th Cir. 2003)

But see, *Payton v. Crow,* 2022 U.S. Dist. LEXIS 119698, (N.D. Okla,)("The Supreme Court has not specifically recognized mid-deliberation communication with a jury as a critical stage of criminal proceedings... And the Supreme Court has cautioned the lower courts about framing its cases at 'a high level of generality.'") **Id.**

A STATE COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Question 2: Where, under a state's constitution, a convicted defendant is entitled to a direct appeal as of right: does a *Brady* violation occur where newly discovered material evidence clearly establishes that an omission of evidence in the trial transcript prevented a defendant-appellant from addressing a reversible misconduct on direct appeal with a supporting record?

> "Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. McKane v. Durston, 153 U.S. 684 (1894). Nonetheless, if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' Griffin v. Illinois, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. In Griffin itself, a transcript of the trial court proceedings was a prerequisite to a decision on the merits of an appeal."

Evitts v. Lucey, 469 U.S. 387, 393 (1985).

A petitioner's constitutional rights, under the Sixth and Fourteenth Amendment of the United States Constitution, are violated where inaccuracies in the transcript adversely affected the outcome of the criminal proceeding. And, since the jury which convicted petitioner acted on the basis of the evidence they saw and heard, rather than on the basis of the written transcript of the trial--which was, of

course, non-existent until after the trial was completed--this means that a constitutional violation occurred if the inaccuracies in the transcript adversely affected appellate review in the state courts.

"If there is no record supporting an appellant's arguments on appeal, the appellate court presumes the regularity of the trial court's decision and affirms." *State ex rel. Ames v. Portage Cty. Bd. of Comm'rs,* 2020-Ohio-3932 (11th App. Dist.)

"An accurate transcript is the lynch pin of appellate review" State v. Ricard, 2008-Ohio-3742, [*P6](11th App. Dist.)

> "In the instant case, one of the ultimate issues before the jury concerned appellant's state of mind at the time of the incident, i.e., [his] mens rea. Since the determination of whether a person acted *** purposely *** is typically predicated upon an interpretation of the circumstances surrounding the murder, it does not require the application of expert knowledge. Accordingly, expert opinion testimony concerning the accused's state of mind is not admissible under Evid. R. 704."

State v. Poling, 1991 Ohio App. LEXIS 2294, [*27]-[*28](11th App. Dist.)[14]; *United States v. Finley,* 301 F.3d 1000, 1014-15(9th Cir. 2001).[15]

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[14] Id. Petitioner's Crim. R. 33(A), pgs. 19-20.

[15] Id. Petitioner's Crim. R. 33(A), p. 21

THE STATE COURT HAS, ALSO, DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A RELEVANT DECISION OF THIS COURT, AND THAT OF SEVERAL UNITED STATES CIRCUIT COURTS.

Question 3: Is Due Process, under the 14th Amendment of the United States Constitution, offended when a state applies res judicata to a claim supported by newly discovered material evidence that was either unknown, or previously made unavailable by the state, to the prisoner during direct appeal?

The Court of Appeals, for the Eleventh Appellate District, application of res judicata to: (1) the newly discovered material evidence revealed in Juror Cathy Brunstetter's affidavit, and (2) the previously unavailable evidence of Judge Logan's *off the record* App. R. 9(E) ruling, conflicts with this Court's holding in *Boumediene v. Bush,* where, therein, this Court pronounced:

> "There is evidence from 19th-century American sources indicating that, even in States that accorded strong res judicata effect to prior adjudications, habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner.
>
> "***
>
> "It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on

review, even in the postconviction habeas setting. *Here that opportunity is constitutionally required."*

Id. 553 U.S. 723, 780, 786 (2008) [Internal citations omitted, and italic print added.]

The Court of Appeals, for the Eleventh Appellate District, application of res judicata to newly discovered material evidence is also in direct conflict with relevant decisions of several United States Court of Appeals, where said material evidence irrefutably revealed: (1) the state court's available settlement procedures to address the inaccuracies in the record were rendered unfair – by the Judge Logan's *off the record* ruling; and (2) the existence of intentional tampering of the transcript. To Wit:

> "If a state fails to afford a fair and adequate procedure for settling transcripts on which to base such an appeal, or if a state official intentionally alters a transcript in a way that prejudices a defendant's appeal, the due process clause of the fourteenth amendment might be violated. [Internal citations omitted.] To prove such a violation plaintiff would have to show either the unfairness of available settlement procedures or the existence of intentional tampering; then, he would have to prove the alleged errors and omissions in the trial transcript prejudice his statutory right to appeal."

Burrell v. Swartz, 558 F. Supp. 91, 92 (S.D.N.Y. 1983).[16]

[16] Id. Crim. R. 33(B), p. 6

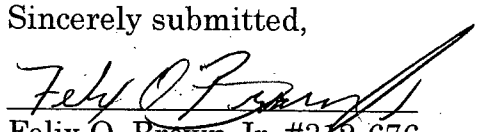
"A defendant 'does not have a constitutional right to a totally accurate transcript of his criminal trial.' Carpenter v. Vaughn, 296 F.3d 138, 155 (3rd Cir. 2002), quoting Tedford v. Hepting, 990 F.2d 745 (3rd Cir. 1993). A defendant's constitutional rights are violated only if the inaccuracies in the transcript adversely affect the outcome of the criminal proceedings, such as by preventing or inhibiting meaningful review."

Dunbar v. Curtis, 2005 U.S. Dist. LEXIS 33561,[*29](E. D. Mich.).[17]

CONCLUSION

The petition for a writ of certiorari should be granted.

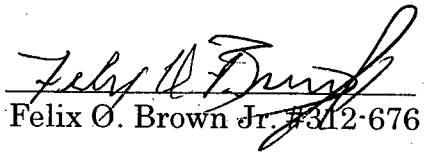
Sincerely submitted,



Felix O. Brown Jr. #312-676

CERTIFICATE OF SERVICE

I hereby certify that a true and full copy of the foregoing Petition for Writ of Certiorari was sent to Trumbull County Prosecutor, at 160 Main St., Warren, Ohio, 44481, via First Class U.S. Mail, on this 27th day of January, 2025.



Felix O. Brown Jr. #312-676

MAILING DECLARATION

I, Felix O. Brown Jr., do herein swear, affirm, and attest, under the penalty of perjury, and under the authority of *Houston v. Lack*, that the original and one

[17] Id. Crim. R. 33(A), p. 11

full copy of this Petition for Writ of Certiorari, with attached Appendix, was surrendered over to the appropriate correctional institution personnel to be mailed, via certified mail, to the United States Supreme Court at 1 1st Street, Washington, D.C., 20543-0001, by my placing such in the prison mailbox on 01/27/2025.

Felix O. Brown Jr. #312-676