CONTENT OF APPENDICES

APPENDIX A

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	) **SS.**	
COUNTY OF TRUMBULL	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

FELIX O. BROWN, JR.,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2023-T-0064

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.

PRESIDING JUDGE EUGENE A. LUCCI

MATT LYNCH, J.,

ROBERT J. PATTON, J.,

concur.

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY

STATE OF OHIO, Plaintiff-Appellee, - vs - FELIX O. BROWN, JR., Defendant-Appellant.	**CASE NO. 2023-T-0064** Criminal Appeal from the Court of Common Pleas. Trial Court No. 1995 CR 00127

OPINION

Decided: March 4, 2024
Judgment: Affirmed

Dennis Watkins, Trumbull County Prosecutor, and *Ryan J. Sanders*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Felix O. Brown, Jr., pro se, PID# A312-676, Grafton Correctional Institution, 2500 Avon Belden Road, Grafton, OH 44044 (Defendant-Appellant).

EUGENE A. LUCCI, P.J.

{¶1} Appellant, Felix O. Brown, Jr., appeals the judgment of the Trumbull County Court of Common Pleas, denying his Motion for Leave to File a Motion for New Trial. We affirm.

{¶2} In 1995, a jury found appellant guilty of murder, in violation of R.C. 2903.02, with a firearm specification under R.C. 2941.145, and having weapons while under disability, in violation of R.C. 2923.13. Appellant was sentenced to an aggregate sentence of 18 years to life. Appellant appealed his conviction which was upheld by this court

in *State v. Brown,* 11th Dist. Trumbull Nos. 95-T-5349, 98-T-0061, 2000 WL 522339 (Mar. 31, 2000) ("*Brown I*"). The Supreme Court of Ohio later denied appellant's jurisdictional appeal. *State v. Brown*, 89 Ohio St.3d 1455, 731 N.E.2d 1141 (2000).

{¶3} Nearly 15 years after his conviction, in September 2011, appellant filed a hybrid Civ.R. 60(B)/Crim.R. 47 motion alleging a misnomer in his indictment and an error in jury instructions. The trial court overruled the motion, and this court affirmed the denial based upon the doctrine of res judicata. *State v. Brown*, 11th Dist. Trumbull No. 2011-T-0101, 2012-Ohio-4465 ("*Brown II*").

{¶4} In August 2016, appellant filed a second Crim.R. 47 motion to "vacate void judgment" in the trial court alleging the court erred by failing to instruct the jury on lesser-included offenses and on the defense of accident. The trial court denied the motion and this court affirmed. *See State v. Brown*, 11th Dist. Trumbull No. 2016-T-0105, 2017-Ohio-4241 ("*Brown III*").

{¶5} In December 2022, appellant filed the underlying Motion for Leave to File a Motion for New Trial, as well as an accompanying affidavit in support of his motion. The state filed a response seeking a dismissal of the motion. Appellant's motion was denied on August 24, 2023. This appeal follows.

{¶6} Appellant assigns seven facially, but not entirely substantively redundant errors for this court's review. Because they are interrelated, we shall address them together. They provide:

> [1.] The trial court erred as a matter of law in overruling appellant's motion for leave: to the prejudice of appellant.
>
> [2.] The trial court erred in overruling appellant's motion for leave: to the prejudice of appellant.

> [3.] The trial court erred in overruling appellant's motion for leave: to the prejudice of appellant.
>
> [4.] The trial court erred as a matter of law and abused its discretion in overruling appellant's motion for leave: to the prejudice of appellant.
>
> [5.] The trial court erred as a matter of law in overruling appellant's motion for leave: to the prejudice of appellant.
>
> [6.] The trial court erred as a matter of law in overruling appellant's motion for leave: to the prejudice of appellant.
>
> [7.] The trial court erred as a matter of law and abused its discretion in overruling appellant's motion for leave: to the prejudice of appellant."

{¶7} Crim.R. 33(B) provides, in relevant part, that "[m]otions 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 * * *. 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."

{¶8} This court has observed that "'Crim.R. 33 permits a convicted defendant to file a motion for a new trial within 120 days after the day of the verdict on grounds of "newly discovered evidence." However, * * * when a motion based on newly discovered evidence is filed more than 120 days after the verdict, the defendant must first file a motion to seek leave to file a delayed motion.'" *State v. ONeil*, 11th Dist. Portage No. 2022-P-0030, 2023-Ohio-1089, ¶ 21, quoting *State v. Alexander*, 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468, ¶ 14. "If [the trial court] determines that the documents in support of the motion on their face do not demonstrate that the movant was unavoidably

prevented from discovering the evidence, it may * * * overrule the motion [for leave] * * *." *State v. Trimble*, 2015-Ohio-942, 30 N.E.3d 222, ¶ 16 (11th Dist.).

{¶9} One is "unavoidably prevented" from filing a motion for new trial if he or she ""had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence."" *ONeil* at ¶ 21, quoting *Alexander* at ¶ 17, quoting *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984). There is meaningful difference between being "unaware" of information and being "unavoidably prevented" from obtaining that information. *ONiel* at ¶ 26.

{¶10} "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶11} In support of his motion for leave, appellant attached four affidavits: his personal affidavit; an affidavit from Private Investigator Tom Pavlish; an affidavit from Juror Cathy Brunstetter; and an affidavit from Juror Adriane Perretti.

{¶12} 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.

{¶13} The trial court determined that the foregoing argument lacked merit because appellant failed to demonstrate, by clear and convincing evidence, that he was unavoidably prevented from obtaining the evidence. We agree with the trial court.

{¶14} 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, 745 S.Ct. 450, 98 L.Ed. 654 (1954).

{¶15} 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.

{¶16} 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.

{¶17} 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.

{¶18} Appellant's first assignment of error lacks merit.

{¶19} We shall next address appellant's third and fourth assigned errors. Under his third and fourth assignments of error, appellant asserts the trial court erroneously concluded that he did not offer clear and convincing evidence that he was unavoidably prevented from obtaining the jurors' affidavits. Specifically, appellant claims that because, in his motion for leave, he stated he had been unavoidably prevented from obtaining the evidence, the trial court erred in drawing a contrary conclusion. We do not agree.

{¶20} 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."

{¶21} Appellant's third and fourth assignments of error are without merit.

{¶22} Under his second assignment of error, appellant argues the trial court erred in determining the "*Allen* charge" jury instruction and the communication set forth in Juror Perretti's affidavit were one in the same. Our review of the trial court's judgment does not support appellant's assertion.

{¶23} The trial court determined that the so-called "*Allen* charge," which relates to a United States Supreme Court case addressing the propriety of an instruction to a dead-

locked jury and which is disfavored in Ohio jurisprudence, *see State v. Howard*, 42 Ohio St.3d 18, 537 N.E.2d 188 (1989), was addressed and its content was approved in appellant's direct appeal. *See Brown I*, 2000 WL 522339. *4-5. The trial court's observation is accurate. Although appellant appears to argue the communication identified in Juror Perretti's affidavit was an illegitimate "*Allen* charge," his argument must fail for the same reasons discussed in his previous argument. To wit, appellant failed to establish the communication was made by a court officer, *and* he did not establish by clear and convincing evidence that he was unavoidably prevented from discovering the same within the timeframe established by rule.

{¶24} Appellant's second assignment of error lacks merit.

{¶25} 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.

{¶26} 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*. *Id.*, 2000 WL 522339,

at *10-11. Accordingly, the due process issue identified by appellant is barred by the doctrine of res judicata.

{¶27} Moreover, appellant claims that the trial court erred in concluding appellant did not establish he was unavoidably prevented from obtaining the evidence contained in Juror Brunstetter's affidavit. Appellant underscores that he had "absolutely no idea and no reason to believe" and was therefore "unaware" of the facts averred in the affidavit. Nevertheless, for the reasons set forth under our analysis of appellant's first, third, and fourth assignments of error above, this argument lacks merit.

{¶28} Appellant's fifth, sixth, and seventh assignments of error are without merit.

{¶29} For the reasons discussed in this opinion, the judgment of the Trumbull County Court of Common Pleas is affirmed.

MATT LYNCH, J.,

ROBERT J. PATTON, J.,

concur.

APPENDIX B

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. 1995 CR 00127
	)	
Plaintiff,	)	JUDGE ANDREW D LOGAN
	)	
vs.	)	JUDGMENT ENTRY
	)	
FELIX BROWN,	)	
	)	
Defendant.	)	

This matter is before the Court on Defendant's Motion for Leave to File Motion for New Trial and several other procedural motions.

Defendant was convicted in 1995 on charges of Murder with a firearm specification and Having Weapons Under Disability. On December 27, 2022, Defendant filed his Motion for Leave to File Motion for New Trial on account of newly discovered evidence, together with an Affidavit of Indigency and an Affidavit in support of the Motion. On January 11, 2023, Defendant filed a Motion asking the Court to direct the Clerk to docket a Motion for New Trial and an Affidavit in support of that motion, both of which he sent to the Clerk at the same time as the Motion for Leave to File Motion for New Trial. Given that the Court had not ruled on the Motion granting Defendant leave to file the new trial motion, Defendant's January 11, 2023 request to docket the new trial motion and affidavit was premature and plainly without merit. The same is therefore OVERRULED.

Defendant then filed an Affidavit of Disqualification with the Ohio Supreme Court seeking to disqualify the undersigned. The Supreme Court denied the Affidavit of Disqualification on March 21, 2023.

On March 22, 2023, the State filed a motion requesting leave to file a response to Defendant's Motion for Leave to File Motion for New Trial. On March 30, 2023, the Court granted the State leave to file a response on or before May 8, 2023. The State filed its response on April 13, 2023.[1]

[1] The State's response should have been entitled as a memorandum in response to Defendant's motion, rather than as a motion to dismiss Defendant's motion. The error in terminology, however, is non-substantive.

On April 17, 2023, Defendant filed a motion opposing the State's request for leave to file its response. This motion was plainly moot, as the Court had already granted the State's request, and the State had already filed its response. Defendant's April 17, 2023 motion is therefore OVERRULED.

On April 27, 2023, Defendant filed his reply to the State's response.[2]

On July 31, 2023, Defendant filed a motion requesting the Court to proceed to judgment on his Motion for Leave to File Motion for New Trial. Given that this Judgment Entry resolves that motion, Defendant's July 31, 2023 motion is moot and is therefore OVERRULED.

On August 16, 2023, Defendant filed a Motion to Amend Affidavit in Support of Motion for New Trial. Given that the Court had not yet ruled on Defendant's motion for leave to file the new trial motion, this motion was premature. Defendant's August 16, 2023 motion is therefore OVERRULED.

Having disposed of the various procedural motions, the Court now turns to Defendant's original December 27, 2023 Motion for Leave to File Motion for New Trial. Specifically, Defendant is seeking leave to file a motion for new trial on account of alleged newly discovered evidence.

Ohio Crim.R. 33(A)(6) provides that a new trial may be granted "on motion of the defendant" when "new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." Additionally, Ohio Crim. R. 33(B) requires that motions for new trial on account of newly discovered evidence must be filed within one hundred twenty days of a guilty verdict or finding unless it can be shown by clear and convincing proof that the defendant was unavoidably prevented from discovery that evidence during that period.

Here, the first type of evidence Defendant claims to have newly discovered relates to his claim that there were alterations and omissions in the trial transcript. The only "new" evidence Defendant has submitted in this regard is correspondence with a federal court from November 2022 in which Defendant alleges that a copy of his trial transcript filed with that Court at some point by the Ohio Attorney General is missing 15 pages. This is not evidence that would or could have been produced at trial had it been

[2] The reply should have been entitled as a reply memorandum to the State's response, rather than as a motion in reply to the State. The error in terminology, however, is non-substantive.

discovered earlier, and it is therefore outside the scope of Crim. R. 33. Further, Defendant does not, and cannot, explain how this evidence would warrant granting a new trial. Finally, Defendant's claims regarding the trial transcript were raised, addressed, and resolved more than 20 years ago in the course of Defendant's direct appeal. *State v. Brown*, No. 95-T-5349, 2000 WL 522339, at *11 (Ohio Ct. App. Mar. 31, 2000). The doctrine of *res judicata* bars Defendant from reasserting those claims via a motion for new trial. *State v. Russell*, 2005-Ohio-4063, ¶¶ 7-8.

The second type of newly discovered evidence comprises affidavits from two jurors from Defendant's trial.

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 would have been produced at 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)."

The second juror, Adriane Perretti, attests that a person came into the jury room during their deliberations, asked how things were going (the vote was 10-2 and then 11-1 at the time) and told them to stay until they reached a decision. Defendant suggests that the person was a court official, but the Peretti expressly attests in the affidavit that "I do not recall the identity, sex, or role of this person." Further, it was determined in Defendant's direct appeal that the "Allen" charge given to the jury after it informed the Court it was deadlocked was proper. *State v. Brown*, *supra*, at *4-5. Finally, Defendant did not offer clear and convincing proof that he was unavoidably prevented from obtaining this evidence within 120 days after the verdict. Defendant simply asserts that he was unaware of this evidence until the juror's affidavit was obtained by a private investigator in late 2022. The Eleventh District Court of Appeals, however, has recently held that "[t]here is a material difference between being unaware of certain information and being unavoidably prevented from discovering that information, even in the exercise of due diligence." *State v. Oneil*, 2023-Ohio-1089, ¶ 26, appeal not allowed sub nom. State v. O'Neil, 2023-Ohio-2407, ¶ 26, 170 Ohio St. 3d 1494, 212 N.E.3d 950. Defendant 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.

For the reasons thus stated, the Court therefore finds that Defendant's December 27, 2023 Motion for Leave to File Motion for New Trial is not well taken and the same is therefore OVERRULED.

It is therefore ORDERED, ADJUDGED and DECREED that the Motions of Defendant addressed herein are each found not well taken and the same are hereby OVERRULED.

IT IS SO ORDERED.

August 24, 2023
DATE

ANDREW D LOGAN, Judge
Court of Common Pleas
Trumbull County, Ohio

TO THE CLERK OF COURTS: YOU ARE ORDERED TO SERVE COPIES OF THIS JUDGMENT ENTRY ON ALL COUNSEL OF RECORD OR UPON THE PARTIES WHO ARE UNREPRESENTED FORTHWITH BY ORDINARY MAIL.

ANDREW D. LOGAN, Judge

FILED
COURT OF COMMON PLEAS
AUG 24 2023
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

APPENDIX C

The Supreme Court of Ohio

State of Ohio

v.

Felix O. Brown, Jr.

Case No. 2024-0773

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Trumbull County Court of Appeals; No. 2023-T-0064)

Sharon L. Kennedy
Chief Justice

APPENDIX D

The Supreme Court of Ohio

State of Ohio

v.

Felix O. Brown, Jr.

Case No. 2024-0773

ENTRY

This cause came on for further consideration upon the filing of appellant's motion for leave to file revised motion for reconsideration. It is ordered by the court that the motion is granted and appellant's revised motion for reconsideration is deemed filed as of the date of this entry.

(Trumbull County Court of Appeals; No. 2023-T-0064)

Sharon L. Kennedy
Chief Justice

APPENDIX E

The Supreme Court of Ohio

State of Ohio

v.

Felix O. Brown, Jr.

Case No. 2024-0773

RECONSIDERATION ENTRY

Trumbull County

It is ordered by the court that the revised motion for reconsideration in this case is denied.

(Trumbull County Court of Appeals; No. 2023-T-0064)

Sharon L. Kennedy
Chief Justice

APPENDIX F

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	) **SS.**	
COUNTY OF TRUMBULL	)	**ELEVENTH DISTRICT**

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

FELIX O. BROWN, JR.,

Defendant-Appellant.

JUDGMENT ENTRY

CASE NO. 2023-T-0064

On March 11, 2024, appellant, Felix O. Brown, Jr., filed a Motion to Certify a Conflict; on March 14, 2024, appellant filed a "Motion for Reconsideration." The filings relate to this court's opinion and judgment in *State v. Brown*, 11th Dist. Trumbull No. 2023-T-0064, 2024-Ohio-792. The state duly replied and opposed each filing. Each filing will be addressed in turn in the instant judgment entry.

Motion to Certify

The Supreme Court of Ohio has observed:

> at least three conditions must be met before and during the certification of a case to this court pursuant to Section 3(B)(4), Article IV of the Ohio Constitution. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be on "upon the same question." Second, the alleged conflict must be on a rule of law—not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

(Emphasis sic.) *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Appellant contends this court's definition of the phrase "unavoidably prevented," in the context of newly discovered evidence, conflicts with other appellate courts' definition. In particular, appellant contends that the phrase "unavoidably prevented" is equivalent to the term "unaware." He maintains, however, that this court distinguished the terms and the matter must be certified to the Supreme Court owing to this alleged conflict.

In the underlying opinion, this court pointed out:

> One is "unavoidably prevented" from filing a motion for new trial if he or she ""had no knowledge of the existence of the ground supporting the motion and could not have learned of that existence within the time prescribed for filing the motion in the exercise of reasonable diligence."" [*State v. ONeil*, 11th Dist. Portage No. 2022-P-0030, 2023-Ohio-1089,] ¶ 21, quoting [*State v. Alexander*, 11th Dist. Trumbull No. 2011-T-0120, 2012-Ohio-4468,] ¶ 17, quoting *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984). There is meaningful difference between being "unaware" of information and being "unavoidably prevented" from obtaining that information. *ONiel* at ¶ 26.

Brown, 2024-Ohio-792, at ¶ 9.

Appellant maintains the foregoing conflicts with the *State v. Gordon*, 10th Dist. Franklin No. 23AP-437, 2024-Ohio-530; *State v. Wilson*, 5th Dist. Holmes No. 23CA001, 2023-Ohio-3314; *State v. Piatt*, 9th Dist. Wayne No. 22AP0048, 2023-Ohio-2714; *State v. Jewett*, 4th Dist. Scioto No. 22CA4004, 2023-Ohio-969; and *State v. Snowden*, 2d Dist. Montgomery No. 29355, 2022-Ohio-4119.

In each of these cases, the various appellate districts observed a defendant is "unavoidably prevented" from obtaining newly discovered evidence when "a defendant was unaware of those facts and was unable to learn of them through reasonable diligence." *Gordon* at ¶ 18; *Wilson* at ¶ 27; *Piatt* at ¶ 7; *Jewett* at ¶ 14; and *Snowden* at ¶ 28.

This court cited a modified, but equivalent definition in the underlying opinion. *See Brown*, 2024-Ohio-792. This court, however, added that there is an important difference from being "unaware" and being "unavoidably prevented" from obtaining the evidence. *Id.* It is this point with which appellant takes issue. We, however, discern no conflict of law between this court's statement of the law in the underlying case and those statements of the other districts cited by appellant.

By noting that a meaningful difference exists between mere unawareness and being unavoidably prevented from discovering evidence, this court underscored that one cannot simply allege he or she did not know or was unaware that the evidence existed within the timeframe prescribed by Crim.R. 33. The simple fact that appellant did not know about or was unaware of the evidence submitted in support of his motion for leave *does not* demonstrate that he was unavoidably prevented, had he exercised due diligence and some effort, from discovering the same. This legal point is completely consistent with the definitions set forth in the other districts' opinions. We therefore decline to certify a conflict on the issue identified by appellant. His motion to certify is therefore overruled.

"Motion for Reconsideration"

The test this court applies when considering an application for reconsideration is whether the application "calls the attention to the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E. 2d 278 (10th Dist.1981).

Moreover,

> "[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court. App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law."

State v. Owens, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (11th Dist.1996). Appellant has failed to meet the requirements for reconsideration.

Appellant first asserts this court did not appropriately review his argument under his fourth assignment of error. *See Brown*, 2024-Ohio-792, ¶ 19-20. Appellant specifically argues he satisfied the "unavoidably prevented" prong of Crim.R. 33 by establishing that the prosecution in his case, via another governmental actor, "suppressed" evidence on which appellant relied to seek a new trial. Appellant maintains this court failed to address the constitutional issue of whether he was deprived of due process when, as the affidavits attached to his motion for leave demonstrate, a governmental actor allegedly entered the jury room, interrupted its deliberations, and urged it to reach a verdict.

In *Brown*, this court observed:

> Under his third and fourth assignments of error, appellant asserts the trial court erroneously concluded that he did not offer clear and convincing evidence that he was unavoidably prevented from obtaining the jurors' affidavits. Specifically, appellant claims that because, in his motion for leave, he stated he had been unavoidably prevented from obtaining the evidence, the trial court erred in drawing a contrary conclusion. We do not agree.
>
> 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., 2024-Ohio-792, at ¶ 19-20.

To the extent appellant failed to establish he was "unavoidably prevented," this court was not required to discuss the constitutional dimensions of his position. Indeed, in finding appellant's first assignment of error without merit, this court observed and concluded:

> 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, 745 S.Ct. 450, 98 L.Ed. 654 (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.

(Emphasis sic.) *Brown*, 2024-Ohio-792, ¶ 14-17.

Given the foregoing, this court fully addressed appellant's arguments in the underlying opinion and deemed them insufficient for relief on appeal. Appellant has failed to direct this court to an obvious error or an alleged error that was either not fully considered or not considered at all. In effect, appellant simply disagrees with this court's rationale and conclusions which support the disposition in the underlying case. His application for reconsideration is therefore overruled.

Conclusion

Appellant has failed to identify a conflict to certify to the Supreme Court of Ohio pursuant to App.R. 25. Furthermore, he has failed to set forth argumentation sufficient to grant relief in reconsideration under App.R. 26(A). His filings are without merit and are overruled.

It is so ordered.

PRESIDING JUDGE EUGENE A. LUCCI

MATT LYNCH, J.,

ROBERT J. PATTON, J.,

concur.

APPENDIX G

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO,

Plaintiff

-vs-

FELIX O. BROWN, JR.,

Defendant

CASE NO. 95-CR-127

JUDGE MITCHELL F. SHAKER

JUDGMENT ON THE VERDICT

The Jury, on this 29th day of September, 1995, having returned a verdict of Guilty on Count 1 of Murder, and having returned a verdict of Guilty on the Specification attached thereto, and also having returned a verdict of Guilty on Count 2 of Having Weapons While Under Disability, the Court having examined the same, and finding the same regular as to form, it is hereby ORDERED, ADJUDGED and DECREED that judgment is hereby rendered on said Verdicts.

DATE: October 2, 1995

JUDGE MITCHELL F. SHAKER

cc: Cynthia W. Rice, Asst. Pros.
Rodger L. Dixon, Asst. Pros.
Atty. James F. Lewis
Atty. J. Walter Dragelevich
Felix O. Brown, Jr.