No. 24-6566

IN THE SUPREME COURT OF THE UNITED STATES

FELIX O. BROWN, JR,
Petitioner

-v-s-

THE STATE OF OHIO
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, *In Forma Pauperis*

STATE OF OHIO'S RESPONSE TO FELIX O. BROWN'S QUESTIONS PRESENTED

Petitioner Felix O. Brown ("Brown') presents three questions, alleging 6th and 14th Amendment infringements, Due Process abuses, and "Brady violations" because of the trial court's decision denying his "*Motion for Leave to File a Motion for New Trial,*" filed more than 25 years after a jury found him guilty of murder. Ohio Criminal Rule 33 ("Crim.R. 33") provides the procedure, including time limits, including a delayed motion, for the filing *Motion for a New Trial.*

Initially, Brown failed to raise, let alone articulate, the now claimed federal constitutional violations previously. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) He is now asking this Court to allow him to reframe his previous arguments as federal issues, in an effort to invoke the jurisdiction of this Court to address issues which have been or should have been adjudicated previously, in both the state and federal systems.

Furthermore, a trial court's factual findings that the Defendant failed to fulfill those requirements does not invoke the jurisdiction of this court. "[T]his is primarily a factual issue which does not, by itself, justify the exercise of [the Court's] certiorari jurisdiction." *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S.Ct. 998, 999, 35 L.Ed.2d 346 (1973)

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CONSTITUTIONAL PROVISION NOT INVOLVED

Respondent, State of Ohio ("State of Ohio"), submits to this Court that Petitioner Felix O. Brown ("Brown") again presents no question meriting review by this Court. Brown alleges he has suffered 6th and 14th Amendment violations because of the trial court's decision denying his third post-conviction relief petition, this time styled as a "*Motion for Leave to File a Motion for New Trial,*" filed more than 25 years after a jury found him guilty of murder. Though not raised below, Brown, now alleging "*Brady* violations" and "Due Process violations," seeks this Court's review of his previously litigated claim of "altered transcripts" and "jury tampering." More specifically, he is asking this Court to find federal constitutional violations because the trial court's factual findings, and the appellate court's rejection of his claim that he was "unavoidably prevented from discovering evidence" to circumvent Ohio's Crim.R. 33 gate-keeper provision relating to the delayed filing of motion for new trial. These allegations fail to present a compelling reason to grant this petition as required by Supreme Court Rule 10.

STATEMENT OF THE CASE

The State of Ohio respectfully requests to combine the Procedural Posture and Statement of Facts under this single heading.

In 1995, a jury convicted Brown of murder, a violation of R.C. 2903.02, with a firearm specification under 2941.145, and of having weapons while under disability, a violation of R.C. 2923.13. Brown's conviction and sentence was affirmed in *State v. Brown*, 11th Dist. Trumbull Nos. 95–T–5349 & 98–T–0061, 2000 WL 522339 (Mar. 31, 2000) ("*Brown I*"), and the Ohio Supreme Court declined to hear his appeal. *State v. Brown*, 89 Ohio St. 3d 1455, 731 N.E.2d 1141 (2000) ("*Brown II*"). Since his conviction was affirmed, Brown has filed a plethora of state and federal post-conviction proceedings, including failed attempts seeking certiorari with this Court

and the Supreme Court of Ohio, which appeals have resulted in more than two score written decisions. Indeed, Westlaw's "Case History" of the underlying case lists twenty-seven items including the instant petition.

Factually, Brown was convicted of the brutal murder of his fiancée, Monica Brandon, thirty years ago. In Brown's direct appeal of the conviction, the Eleventh District Court of Appeals summarized the facts:

> On February 24, 1995, [Brown] placed a 911 call reporting that he and his fiancée had been robbed[,] and his fiancée had been shot in the head. Captain Charles Wilson, Patrolman Mike Wilson, and Patrolman George Kanicledis responded to the call and proceeded to apartment 278 in the Cedars of Eastwood complex in Niles, Ohio. When they arrived at the scene, [Brown] yelled from inside the apartment that he needed help and told the officers to kick in the door. Captain Wilson kicked in the door and found [Brown] attempting to give mouth-to-mouth resuscitation to Monica Brandon. The officers pulled [Brown] off Monica and paramedics rushed her to the hospital, where she died shortly thereafter. [Brown] told the officers that someone named James had robbed them[,] and that two shots had been fired. After Captain Wilson found a .380 caliber gun and a .380 caliber spent shell casing on the bed, Patrolman Wilson told [Brown] that he would have to go to the police station because he was a material witness. Patrolman Wilson read the Miranda warnings to [Brown] in the hallway of his apartment and took him to the Niles Police Department. Detective Dixon also responded to the 911 call and collected the evidence that the other officers had found.
>
> When Patrolmen Wilson and Kanicledis arrived at the police station, they re-read the Miranda warnings to [Brown], and Patrolman Wilson told him that he would have to take a paraffin test to determine if he had fired a gun. [Brown] responded that the test would be positive because he had fired his gun the day before. After Detective Dixon returned from [Brown's] apartment, he read [Brown] his Miranda rights for a third time, notified [Brown] that he was under arrest, and asked [Brown] if he wanted to make a statement. [Brown] gave a statement recorded by Detective Dixon claiming that Monica had accidentally shot herself during an argument. According to [Brown's] statement, Monica became jealous because she suspected that [Brown] was involved with another woman. As she stated, "I love you. I love you and no one else is going to have you," she picked up the gun and [Brown] grabbed her hand with the gun in it. The gun fired into the air, and when the gun fired a second time, the slide split [Brown's] right hand and the bullet hit Monica in the head. After [Brown] gave his statement, he signed a waiver of rights form.

Brown I, at *1 (Ohio Ct. App. Mar. 31, 2000).

In the most recent post-conviction proceeding, Brown, pursuant to Ohio Crim.R. 33, sought leave to file *Motion for a New Trial* on December 27, 2022, with an accompanying affidavit in support. The State filed its response on April 13, 2023, Brown responded, and the trial court denied Brown's motion. His contentions relating to the trial transcript were previously raised and resolved more than twenty (20) years ago within his direct appeal were barred by the doctrine of *res judicata*. Similarly, noting the jurors' recollections are not evidence within the scope of a Crim. R. 33 Motion, and that the juror's recollections would be prohibited under Evid. R. 606(B)(1), the Court rejected Brown's complaints relating to Brown's claimed jury issues. Additionally, Brown's allegations regarding an individual speaking with the jury were previously raised and resolved within his direct appeal when this Court ruled the "Allen" charge was properly provided to the jury. Finally, Brown did not offer "clear and convincing proof that he was 'unavoidably prevented' from, nor even attempted, to obtain this evidence within 120 days after the verdict." Brown's assertion that he was "unaware" of the evidence did not rise to the level of "unavoidably prevented." The Eleventh District Court of Appeals affirmed. *Brown I. supra.*

REASONS FOR DENYING THE WRIT

1. Petitioner's failure to previously assert the now claimed constitutional violations precludes review by the Court.

As noted, Brown failed to advance the constitutional arguments he now presents before this Court. Indeed, the opinion from which he seeks certiorari review does not reference any constitutional concerns. This is fatal to his petition.

This court has repeatedly rejected such claims when raised for the first time before this Court. "It was very early established that the Court will not decide federal constitutional issues

raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969)

> We cannot conclude on this record that petitioner raised the federal claim that she now presents to this Court at any point in the state-court proceedings. Thus, we confront in this case the same problem that arose in *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969): "Although certiorari was granted to consider this question, *** the sole federal question argued here has never been raised, preserved, or passed upon in the state courts below." Citing a long history of cases, we stated there that "[t]he Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Ibid.* We have had several occasions to repeat this rule since then, *** and we see no reason to deviate from it now." (Internal citations omitted.)

Webb v. Webb, 451 U.S. 493, 498–99, 101 S.Ct. 1889, 1893, 68 L.Ed.2d 392 (1981).

The *Webb* court continued "there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below. *Id*, at 499, 101 S.Ct. 1889, at 1893. Because "[t]his Court is one of final review, not of first review." *Ford Motor Co. v. United States*, 517 U.S. 28, 30, 134 S. Ct. 510, 187 L. Ed2d 470 (2013); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 30, 133 S. Ct. 510, 184 L.Ed.2d 417 (2012). This Court should decline his petition.

2. <u>Petitioner's claimed error relating to factual findings precludes review by this Court</u>

Brown also takes issue with the trial court's factual findings that his evidence fails to prove by clear and convincing evidence that he was "unavoidably prevented from discovering the evidence which he claims provides the basis of his motion. "[T]his is primarily a factual issue which does not, by itself, justify the exercise of our certiorari jurisdiction." *Tacon v. Arizona*, 410

U.S. 351, 352, 93 S.Ct. 998, 999, 35 L.Ed.2d 346 (1973). Nor does the Court "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S.CT. 496, 497, 69 L.ED. 925. (1925).

> Thus Mr. Justice Holmes, speaking for a unanimous Court [in *Johnston, supra*] thirty-five years ago, summarized the practice of the Court in abstaining from exercising its certiorari jurisdiction for the purpose of reviewing facts and weighing evidence in relation to them. This practice obviously derived from the Evarts Act of 1891, by which Congress established intermediate courts of appeals to free this Court from reviewing the great mass of federal litigation in order to enable the Nation's ultimate tribunal adequately to discharge its responsibility for the wise adjudication of cases 'involving principles the settlement of which is of importance to the public, as distinguished from that of the parties."

Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 111–12, 80 S.Ct. 173, 176, 4 L.Ed.2d 142 (1959) (FRANKFURTER, J. dissenting).

3. <u>Ohio's "gate keeper" provision under Crim.R. 33 barring a delayed motion for new trial on the grounds of newly discovered evidence unless the defendant can produce by clear and convincing proof, that he was unavoidably prevented from the discovery of evidence supporting his motion, does not violate a defendant's constitutional rights.</u>

Crim. R. 33(A) states that "a new trial may be granted on motion of the defendant for any of the following causes affecting materially the defendant's substantial rights:

> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) That the verdict is contrary to law;
>
> (5) Error of law occurring at the trial;

> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses."

Crim. R. 33(A).

Additionally, Crim. R. 33(B) provides, in relevant part, that an application for new trial based upon allegedly newly discovered evidence shall be filed within one hundred twenty (120) days after the day upon which the verdict was rendered, or if it was made by ***clear and convincing proof*** that the defendant was ***unavoidably prevented from the discovery of the evidence***, such motion shall be filed within seven (7) days from an order of the court finding the defendant was unavoidably prevented from discovering the evidence within the one hundred twenty (120) day period. Crim. R. 33(B) (Emphasis added).

The trial court did not err nor abuse its discretion by holding that Brown did not demonstrate by clear and convincing evidence that he was unavoidably prevented from obtaining his alleged "evidence" within 120 days after the verdict. In fact, as noted by the trial court, Brown submitted absolutely no evidence, much less clear and convincing proof, that he made any attempt to obtain this information within the 120-day period after the verdict. Likewise, Brown's purported "evidence" failed to demonstrate by clear and convincing evidence that he was entitled to a new trial. Consequently, the Eleventh District Court of Appeals appropriately affirmed the trial court's denial of Browns's Motion for Leave for a New Trial with their conclusion that Brown's arguments were without merit.

[R]arely [does this Court] grant review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case" *Salazar-Limon v. Houston*, 581 U.S.946, ——, 137 S.Ct. 1277, 1278, 197 L.Ed.2d 751 (2017) (ALITO, J., concurring in denial of certiorari.) This Court also does not issue sweeping constitutional declarations to relieve a particular litigant of the adverse consequences of a single lower court ruling. "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897 (1955). This is exactly the approach petitioner is advocating herein as he is unhappy with the trial court's findings, the appellate court's affirmation of that decision and the Ohio Supreme Court's denial of his requested review.

CONCLUSION

This Court should dismiss or deny the petition for writ of certiorari.

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PROOF OF SERVICE

I do hereby certify that a copy of the foregoing Brief in Opposition was sent by ordinary U.S. Mail to Petitioner on this 10th day of March, to FELIX O. BROWN, JR., #A312676, Grafton Correctional Institution, 2500 S. Avon Beldon Rd., Grafton, Ohio 44044.

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