No. 24-6566

IN THE

SUPREME COURT OF THE UNITED STATES

FELIX O. BROWN JR. – PETITIONER

~~VS.~~

STATE OF OHIO – RESPONDENT

# PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION (RESPONSE) TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

FELIX O. BROWN JR. #312-676
GRAFTON CORRECTIONAL INSTITUTION
2500 SOUTH AVON-BELDON ROAD
GRAFTON, OHIO, 44044

Petitioner, Pro se

TRUMBULL COUNTY PROSECUTOR
DENNIS WATKIN
160 HIGH STREET
ADMINSTRATIVE BUILDING,
4th FLOOR
WARREN, OHIO, 44481

Attorney for Respondent

Respondent, in clear continued violation of his Oath of Office, is now attempting to commit fraud upon this Court where his responses in Opposition lacks support by the record, law, or logic. To wit:

**Respondent's position**

"Initially, Brown failed to raise, let alone articulate, the now claimed federal constitutional violations previously...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."

Id. Brief in Opposition, page(p.) ii.

**Petitioner's reply**

Within Petitioner's "Appellant Brief and Assignment of Errors", in direct regard to the three questions presented to this Court within his Petition for Writ of Certiorari – asserting 6th and 14th Amendment infringements; i.e. Due Process and Brady violations – petitioner clearly asserted, under each and every one of his assignments of error, that the state had denied him his constitutional rights:

> "[***: 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"

Id. Appellant Brief, pages ii, iii, iv, v, vi, vii, viii, 9, 12, 14, 15, 18, 22, 23, and 24; attached hereto as Exhibit A, (for the Court's convenience).

Also in direct regard to Question 1, as contained within Petitioner's Petition for Writ of Certiorari, Petitioner argued and cited the following under his First and Fourth Assignments of Error, respectively:

"Further, commanding the jury while they remained deliberating in the jury room, that *they had to stay until they reached a decision:* clearly qualified as a supplemental jury instruction: which further implicates Appellant's rights under, both, the United States and Ohio Constitutions. Such as, his right to: (a) representation of counsel during a critical stage of the proceedings; (b) an Impartial Jury and Public Trial; and (c) be present therein. Absence of counsel during a critical stage of a trial created a presumption of error and a denial of constitutional rights without requiring a showing of prejudice. See *United States v. Cronic,* (1984), 466 U.S. 648, 659, fn. 25; State v Taylor, 2015-Ohio-2080, [*P21](11th App. Dist.).

"Presuming waiver of counsel from a silent record is impermissible." Carnley v. Cochran, (1962) 369 U.S. 506, paragraph two of the syllabus."

Id. Exhibit A, page 12.

"A criminal defendant 'may satisfy the 'unavoidably prevented' requirement contained in Crim. R. 33(B) by establishing that the prosecutor suppressed the evidence on which the defendant would rely in seeking a new trial. See, *State v. Bethel*, 2022-Ohio-783, [*P 25](citing *Banks v. Dretke*, 540 U.S. 668, 695, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); *Kyles*, 514 U.S. at 432-433, 115 S.Ct. 1555, 131 L.Ed.2d 490; and *Strickler*, 527 U.S. at 282-285, 119 S.Ct. 1936, 144 L.Ed.2d 286.)

"[P]rosecutors have 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *State v. Trimble,* 2016-Ohio-1307,[*P27](11th App. Dist.)(quoting *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). *United States v. Payne,* 63 F.3d 1200, 1208 (2d Cir.1995)).

"Judge Logan erroneous concluded that: 'Defendant offered no evidence, much less clear and convincing proof, of any effort made to obtain information from jurors in the 120-day period after the verdict.

"Here, Judge Logan, even with the presentation of clear evidence showing that an *off the record* communication had with the then deliberating jury by/or through the bailiff was knowingly performed in a clandestine fashion – so as to prevent Appellant from *ever becoming aware of* such: Judge Logan deemed it a necessary requirement for the appellant to have gained knowledge of such secretive, unlawful, communication (which deprived Appellant of his basic procedural-due-process protections during a critical stage of his criminal jury trial proceedings) through some type of bare hook *fishing expedition* so as to offer clear and convincing proof of efforts made to obtain such information from jurors so as to present such within the 120-day period after the verdict...

Id. Exhibit A, pgs. 16-17.

In direct regard to Question 2, as contained within Petitioner's Petition for Writ of Certiorari, Petitioner argued and cited the following under his Fifth Assignment of Error:

"[P]rosecutors have 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *State v. Williams,* 2023-Ohio-3526, [*P28](11th App. Dist.)(quoting Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). "Where a state provides a statutory right to appeal, that right must meet the constitutional requirements of due process; this particularly so when it has been shown by evidence that due process was not accorded in the trial court. While there is no constitutional right to an absolute accurate transcript, indigent defendants generally have a right to a reasonably accurate transcript, if one is necessary to effect an appeal. Otherwise, being deprived of a reasonably accurate transcript defendant would be unjustly deprived from assigning error to the reversible misconduct(s) that actually

occurred within his criminal trial proceedings which violated defendants right to due process.

Id. Exhibit A, page 21; see also "Crim. R. 33(B), page 4, fn.7

"'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 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.

"'[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)."

Id. Crim. R. 33(B), pgs. 6- 8

**Law**

This Court has held, in *Webb v. Webb*:

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 (1897)

"***

"There are also very practical reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness and overbreadth. The rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter.

"For all of these reasons, we, as well as litigants seeking to bring cases here from the state courts, should take care to comply with the jurisdictional statute and our rules. Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here. At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal

claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court."

Id. 451 U.S. 493, 496-97(1981)

This Court has, also, held in *Howell v. Mississippi*:

"[A] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.' Baldwin v. Reese, 541 U.S. 27, 32, 158 L. Ed. 2d 64, 124 S. Ct. 1347 (2004). In the context of § 1257, the same steps toward clarity are just as easy to take and are generally necessary to establish that a federal question was properly presented to a state court."

Id. 543 U.S. 440, 444 (2005).

**Petitioner's notice**

Further, please be aware that the Respondent is attempting to purposely mislead this Court, *as it' has successfully misled the State courts*, in direct regard to the following material evidence:

**Respondent's position**

"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."

Id. Brief in Opposition, page 3.

**Petitioner's reply**

In other words, the prosecution is continuing to fraudulently assert that the "Allen Charge" *delivered by the trial judge* on the record ***in open court***; as clearly documented within *State v. Brown*, 2000 Ohio App. LEXIS 1430, at [*10-*13], and the ***off the record*** unauthorized communication had with the jury on a separate occasion while the jury remained ***in the jury room*** during deliberations were one in ~~the same~~.

Juror Adriana Perretti's affidavit, which was obtained by a private investigator in 2022, clearly reads:

> "*I recall someone coming* ***into the jury room*** *during our deliberation and inquiring about how things were going and upon being informed that the vote was 10 to 2, then 11 to 1 this person told us to stay until we reach a decision.*"

Yet, even with petitioner's presentation of this affidavit and additional substantial evidence within the Crim. R. 33(B) proceedings and appeal of said (1) debunking the respondent's fraudulent assertion, and (2) clearly petitioning for a Brady analysis to be performed in accordance with *State v. Bethel.*[1] Id. Exhibit A, pgs. 12-17 – the trial court during its' determination of petition's Crim. R. 33(B) petition, and the appellate court's review of the denial of said Crim. R. 33(B) motion: still committed *an erred of law* by refusing to perform the requested Brady analysis. Said Courts held instead that: "Brown submitted absolutely no evidence, much less

[1] 167 Ohio St. 3d 362 (2022).

clear and convincing proof, that he made any attempt to obtain this information within 120 days after the verdict." See, Exhibit A, pgs. 12-17.

Petitioner, then filed a timely App. R. 26(A) reconsideration motion within the court of appeals arguing that, both, the appellate court and the trial court committed an error of law by failed to appropriate review his Brady claim, raised under his fourth assignment of error, and would the court now perform a Brady analysis. The court of appeals then issued the following Judgment Entry:

> "Appellant first asserts this court did not appropriately review his argument under his fourth assignment of error. See Brown, 2024-Ohio-792, [*P19-20]. Appellant specifically argues he satisfied the 'unavoidably prevented' prong of Crim.R. 33 by establishing that the prosecutor in this case, via another government 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 government actor allegedly entered the jury room, interrupted its deliberations, and urged it to reach a verdict. [Emphasis added.]
> "*** To the extent appellant failed to establish he was 'unavoidably prevented' this court was not required to discuss the constitutional dimensions of his position..."

Id. Appendix F, pgs. 4-5; attached to Petitioner's Petition for Writ of Certiorari.

**Law**

The Supreme Court of Ohio in *State v. Bethel*, clearly relied on federal law, as articulated in *Banks v. Dretke* [2], to provide the actual basis for their' decision to

[2] 540 U.S. 668, 695, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004)

hold that when a defendant seeks to assert a Brady claim in an untimely or successive petition for postconviction relief, the defendant satisfies *the unavoidably prevented requirement* contained in [Crim. R. 33(B) by establishing that the prosecution suppressed the evidence on which the defendant relies. To wit:

> "In Brady, the Supreme Court of the United States held that a state violates the Fourteenth Amendment to the United States Constitution when it 'withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.' Smith v. Cain, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012) (summarizing Brady's holding). 'There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' Strickler v. Greene, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). '[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A different result is reasonably probable 'when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' Id. at 434, quoting Bagley at 678.
>
> "***
>
> "The court of appeals used similar reasoning, holding that a 'defendant cannot claim evidence was undiscoverable simply because no one made efforts to obtain the evidence sooner.' 2020-Ohio-1343, ¶ 20. The court stated that 'Bethel was not prevented by the state from discovering Chavis' statements to Withers.' Id. at ¶ 25. It reasoned that Bethel should have

suspected that Withers had potentially relevant information because Withers's name was on the prosecution's pretrial witness list and Bethel and his counsel had communicated with Chavis before trial. Id. The court of appeals concluded, in other words, that Bethel should have conducted his own investigation to discover what Chavis had said to Withers.

"The lower courts placed a burden on Bethel that is inconsistent with Brady. In Banks v. Dretke, 540 U.S. 668, 695, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court of the United States explained that criminal defendants have no duty to 'scavenge for hints of undisclosed Brady material.' Since the decision in Banks, multiple federal circuit courts and other state supreme courts have repudiated the imposition of any due-diligence requirement on defendants in Brady cases. See, e.g., Dennis v. Secy., Pennsylvania Dept. of Corr., 834 F.3d 263, 290-293 (3d Cir.2016); Amado v. Gonzalez, 758 F.3d 1119, 1136-1137 (9th Cir.2014); United States v. Tavera, 719 F.3d 705, 711-712 (6th Cir.2013); State v. 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).

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

"***

""The 'unavoidably prevented' requirement in Crim.R. 33(B) mirrors the 'unavoidably prevented' requirement in R.C. 2953.23(A)(1)." State v. Barnes, 5th Dist. Muskingum No. CT2017-0092, 2018-Ohio-1585, ¶ 28."

Id. *State v. Bethel,* 167 Ohio St. 3d at 366- 377.

**Law**

"We must first consider whether we have jurisdiction to review the Ohio Supreme Court's decision. Respondent contends that we lack such jurisdiction because the Ohio decision rested upon the Ohio Constitution, in addition to the Federal Constitution. Under Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), when 'a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.'" *Ohio v. Robinette,* 519 U.S. 33, 36-37 (1996).

**Petitioner's reply**

Thus, clearly, petitioner's presentation of evidence entitled him *as a matter of law* to a Brady analysis. Because no court – not a trial court, not an appellate court, nor even a state supreme court – should have the authority, within its discretion, to commit an error of law.

**Respondent's position**

"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 Brown's Motion for Leave for a New Trial with their conclusion that Brown's arguments were without merit."

Id. Brief in Opposition, page 6.

**Petitioner's reply**

Petitioner presented irrefutable newly discovered material evidence – Juror's Perretti's affidavit – and argument under his First, and Fourth Assignments of Error, via Juror's Perretti's affidavit, that:

> "Commanding the deadlocked jurors, by/or through the bailiff, while they remained deliberation in the jury room, via an unauthorized communication: that *they had to say until they reach a decision:* clearly qualified as a supplemental jury instruction where petitioner's federal constitutional right(s) to representation of counsel during a critical stage of the proceeding and right to be physically present therein attached. And both violation constituted a per se violation mandated the granting of a new trial."

Id. Exhibit A, pgs. 9-12.

Petitioner, also, presented the following:

> "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; Exhibit A, Fn. 6.

Petitioner further presented irrefutable newly discovered material evidence, law, and argument under his Fifth, Sixth and Seventh Assignments of Error, establishing that the contents of Juror Brunsetter's affidavit mandated the granting of him a new trial: To wit:

- "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.*')

"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.)"

Id. Exhibit A, pgs. 19-20.

**Respondent's position**

"[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. This Court does not issue sweeping constitutional declarations to relieve a particular litigant of the adverse consequences of a single lower court ruling... "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."

Id. Brief in Opposition, page 7.

**Petitioner's reply**

The [t]hree questions presented to this Court are novel in nature, federal constitutional inquiries of substance, not theretofore determined and settled by this Court that shall not only affect the case before you, but shall effect the specifics of all related post-trial proceedings – in state court – involving newly discovered material evidence that was [willfully] suppressed by the state.

Of course the Respondent(s) wishes that this Court "dismiss or deny the Petitioner's Petition for Writ of Certiorari." Thus, enabling prosecutors throughout the State [of Ohio] to continue to *covertly* deny and/or infringe upon criminal defendants' *fundamental* federal constitutional rights[3] during post-conviction

[3] That is his right to representation of counsel during a critical stage, his right to be present during a critical stage, his right to an impartial jury, his right a reasonably accurate transcript, on direct appeal that contains the reversible misconducts that actually occurred during his criminal (jury) trial.

proceeding, in state and federal courts[4]. And if by change a petition is successful in having the merits of constitution violations addressed and the conviction reversed the prosecutors know that they shall have another opportunity to retrial said petitioner: in spite of the wanton constitution violations that the prosecution undertook in the first instance to prevent the petitioner from receiving an acquittal or a hopelessly deadlocked jury.

## 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 Petitioner's Reply Motion was sent to Trumbull County Prosecutor, at 160 Main St., Warren, Ohio, 44481, via First Class U.S. Mail, on this 17th day of March, 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 of this

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[4] Newly discovered Brady violations contained within a second or successive 28 U.S.C.S. § 2254 habeas petition are subjected to the gatekeeping restriction contained in 28 U.S.C.S. § 2244.

Motion in Reply with attached Exhibit, 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 03/17/2025.

Felix O. Brown Jr. #312-676

A

# EXHIBIT A

Received To Appellant

**IN THE ELEVENTH DISTRICT COURT OF APPEAL**
**TRUMBULL COUNTY, OHIO**

COURT APPEAL CASE NO. 2023 TR 00064

**STATE OF OHIO,** )

Plaintiff-Appellee )

**vs.** )

**FELIX O. BROWN JR.,** )

Defendant-Appellant )



# APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR

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DEFENDANT-APPELLANT

## TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR

1. Did the Trial Court err to the prejudice of Appellant when it reached the incorrect legal conclusion by incorrectly analyzing a key fact of the case: 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?

AUTHORITIES:



FOURTH ASSIGNMENT OF ERROR

**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**
("Judgment Entry", T.d. 98, pg.'s 3-4)



1. Did the Trial Court err when it reached the incorrect legal conclusion by incorrectly analyzing a key fact of the case: 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?

AUTHORITIES:

FIFTH ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED AS A MATTER OF LAW IN OVERRULING APPELLANT'S MOTION FOR LEAVE: TO THE PREJUDICE OF APPELLANT** ("Judgment Entry", T.d. 98, p. 3)



1. Did the trial court erred 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 recollections regarding the testimony from two witnesses had at trial is not evidence that would or could have been would have been produced at the trial had they been discovered earlier, and are therefore 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?

AUTHORITIES:

SIXTH ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED IN AS A MATTER OF LAW IN OVERRULING APPELLANT'S MOTION FOR LEAVE: TO THE PREJUDICE OF APPELLANT** ("Judgment Entry", T.d. 98, p. 3)



1. Did the trial court erred as a matter of law by ruling contrary to clear and unambiguous statutory law of Ohio Evid. R. 606(B)(2)(c) when it erroneously concluded that the testimony from Juror Brunsetter, regarding her recollections of trial testimony, would be prohibited by Evid. R. 606(B)(1): 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?

AUTHORITIES:



SEVENTH ASSIGNMENT OF ERROR

**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**

AUTHORITES

## STATEMENT OF THE CASE

PROCEDURAL POSTURE – Relevant Procedural History Only[1]

On February 24, 1995, appellant and his fiancée arrived at his apartment, where an argument ensued between them over her suspected drug use which resulted in him telling her that it was over between them. Monica then accused appellant of being involved with the mother of his child. She then stated, I love you. I love you and no one else is going to have you, she then picked up the gun and appellant grabbed her hand with the gun in it. The gun then discharged up towards the ceiling, still attempting to gain control over the gun Monica and Appellant fell onto the bed where the gun discharged again. However, this time, the bullet hit Monica in the head. Appellant, in utter shock of what had just occurred somehow gathered himself and immediately placed a 911 call and informed the operator that his fiancée was shot in the head and please send help, the operator asked for and received the address.

***

On March 16, 1995, Brown 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. (T.d. 25) Whereas on September 29, 1995, the testimony of witnesses and submission of evidence to the jury was concluded. (T.d. 31). And after receiving final instruction from the trial judge, Mitchell Shaker, the jury

[1] Appellant's post-trial procedural posture, in his pursuit of *justice* is quite extensive. Thereby, herein, Appellant has limited his post-trial procedural posture relevant to the case at bar.

retired from the courtroom to deliberate upon its verdict at 1:10 p.m. Transcript page (T.p.) 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 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.p. 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 (again, according to the trial transcript) 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.p. 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.p. 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.p. 591-592.

Appellant was sentenced to Eighteen years to Life on 10/03/1995. (T.d. 32).

A notice of appeal was filed on 10/31/1995. (T.d. 33).

At some point after Brown's notice of appeal was filed, Atty. Michael Scala was appointed as Brown's direct appeal appellate counsel (whereas Brown received absolutely no notification of such from the court or Atty. Scala). On 05/02/1996 Atty. Scala filed a motion for extension of time to file Appellate brief, with the Eleventh District Court of Appeals – and, still, Brown received absolutely no contact from Atty. Scala. Then, apparently, on 06/13/1996 the court of appeals sua sponte dismissed Brown direct appeal: for want of prosecution. (T.d. 37).

Brown not receiving any word, from anyone, regarding the statue of his direct appeal since the filing of his notice of appeal by defense counsel: directed two correspondences to the Eleventh District Court of Appeals, via certified mail, on 07/26/1996 and 10/16/1996, inquiring about the status of his appeal... (Motion for Leave...T.d. 83, attached thereto Appendix A).

On 09/09/1996 Attorney Michael Atty. Partlow filed an application to reopen Brown's direct appeal. (Motion for Leave...T.d. 83, attached thereto Appendix A). And on 10/30/1996 the court of appeals granted the application and appointed Atty. Atty. Partlow as counsel to represent Brown therein. (Motion for Leave...T.d. 83, attached thereto Appendix A).

Atty. Partlow, then notified Brown, via correspondence, that he had been appointed as his new appellate counsel by the court of appeals on 10/30/1996.

THE FOLLOWING CONTAINS DIRECT QUOTES BY THIS COURT

"[P]artlow reviewed the trial transcript and forwarded it to appellant. Appellant contended that the trial transcript was materially inaccurate, and Partlow discovered that the Trumbull

County Court of Common Pleas audiotaped important criminal trials, including trials for murder. Partlow forwarded a written transcript of the audiotapes to appellant, enabling appellant to specify which part or parts of the trial transcript he claimed were materially inaccurate. Appellant provided Partlow a very detailed comparison of the trial transcript and the written transcript from trial court's audiotape of the trial, and appellant 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 was given during trial. Appellant wrote to Partlow, "[as] I informed you previously, there is no way that any audio tapes were recorded during my jury trial. The audio tapes were made after the fact (after my trial) for the purpose of supporting my intentionally altered transcripts." (Emphasis sic.)

"This court remanded appellant's criminal appeal pursuant to App.R. 9(E) to determine whether the trial transcript must be corrected. Prior to this limited remand hearing, the trial judge (*soon after learning the identity of the specific witnesses Appellant intended to have testify within the App. R. 9(E) hearing,*) decided, off the record, that the trial witnesses would not testify at the hearing to their trial testimony. Appellant 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. 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, and the court reporter. During this time, appellant contends he urged Partlow to cross-examine the court reporter to make her admit that the trial transcript was 'materially inaccurate.' Partlow did not follow these instructions.

"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.'"

Id. *Brown v. Morganstern,* 2004-Ohio-2930, [*P4-*P5](11th App. Dist.)

Appellant, thereafter, appealed his convictions. He put forth nine assignments of error; the seventh assignment of error being the only one relevant to the instant appeal. To wit:

"THE TRIAL COURT'S DECISION CONCERNING THE EVIDENTIARY HEARING REGARDING THE INACCURACIES OF THE TRIAL TRANSCRIPT OF THE PROCEEDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Whereas, in deciding this assignment of error, this Court pronounced:

"In his seventh assignment of error, appellant alleges that the trial court's decision regarding the alleged inaccuracies in the trial transcript was against the manifest weight of the evidence. Appellant contends that there are numerous discrepancies between the audio tapes of the trial and the trial transcript, and the trial court's failure to correct the discrepancies resulted in his inability to argue certain errors on appeal.

"***

"Upon our limited remand, the trial court held an evidentiary hearing to determine whether the trial transcript needed to be corrected. At the hearing, appellant called the following witnesses: himself, his father, Felix Brown, Sr., and his trial counsel, Attorney James Lewis and Attorney Walter Dragelvich. The State called court reporter, Maribeth Hoolihan. On February 27, 1999, the trial court issued its decision, which indicated that it had reviewed all relevant portions of the trial transcript and the audio tapes of the trial recorded as a backup to the official transcript. The trial court's decision included the following findings of fact and conclusions of law:

"'2. The Court finds the transcript to be true and accurate as to Dr. Cox's testimony on page 274.

"'3. The Court finds the transcript true and accurate as to trial testimony on page 258 lines 10-16.

"'4. The Court finds the transcript true and accurate as to Dr. Cox's testimony as to page 245 lines 8 through 11.

"'5. The Court finds the transcript true and accurate as to the testimony of Captain Wilson as to page 52 lines 4-21.

"'6. The Court finds the transcript true and accurate as to the cross examination of investigator Ben D. Giovonne on page 328 lines 1-23 and page 326 lines 1-15.

"'7. The Court finds the transcript to be true and accurate as to Captain Wilson's testimony on page 56 line 16-22.

"'8. The Court finds the Trial Court's instructions on page 563 lines 3-8 to include the language claimed deleted.

"'9. The Court in review of the transcript testimony and audio tapes finds the transcript reflects all the exchange on the record that was capable of being understood. The testimony of Defendant/Appellant's father as to additional jury comments is insufficient to establish that a change in official record is necessary or appropriate. The Court finds the transcript true and accurate in this regard.

"'10. The Court has directed the Court Reporter of the Trial to transcribe the "off the record" side bar that was recorded on the audio tape. * * *

"'Upon full and final review of the Defendant-Appellant's Motion, this Court finds it to be, in all respects, bordering on frivolous. The Defendant-Appellant's recollections were generally self-serving and without any basis in fact. The Defendant-Appellant's requested changes in testimony are confusing at best, and apparently created out of whole cloth. Furthermore, the Defendant-Appellant has selectively ignored certain portions of the record, that in fact took place.

"'This Court finds the official transcript of this Court to have been completed in a true, accurate and professional manner.'

"Although appellant asserts that we can reverse the trial court's decision regarding the accuracy of the trial transcript if we determine that its decision was against the manifest weight of the evidence, manifest weight is not the appropriate standard of review. (Internal citations omitted.)

"'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. Appellant's seventh assignment of error has no merit."
Id. *State v. Brown,* 2000 Ohio App. LEXIS 1430, [*28]-[*32](11th App. Dist.)

This Court affirmed the judgment of Trumbull County Court of Common Pleas on 03/31/2000. (T.d. 62)

The Supreme Court of Ohio, thereafter, did not allow the discretionary appeal. *State v. Brown*, 2000 Ohio LEXIS 1802.

On 12/27/2022, appellant filed his "[M]OTION FOR LEAVE TO FILE MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE" ("Motion for Leave...") under Crim. R. 33(B), in conjunction with the MOTION FOR A NEW TRIAL, under Crim. R. 33(A)(1), (A)(2), (A)(6); wherein, although both motions – and accompanied filings – were file stamped 12/27/2022, the "Motion for Leave..." was entered on the Docket: *but the Crim. R. 33(A) motion was not*. (T.d. 83 and T.d. 86)[2].

On 08/24/2023, the trial court overruled Appellant's Motion for Leave... (Judgment Entry T.d. 98).

Appellant then filed his notice of appeal, seeking a finding from this Honorable Court that documents and argument he submitted in support of his motion did support his claims that he was unavoidably prevented from timely discovering the new evidence. (T.d. 99).

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[2] Transcript Document 86, is Appellant motion – filed pursuant to Crim. R. 47 and Crim. R. 55 – that brought Judge Logan's Court aware that although the Clerk of Courts office had received and file stamped his Crim. R. 33(A) motion: it' had failed to enter such on the Docket.

## STATEMENT OF FACTS

The trial court, Judge Andrew D. Logan, in overruling Appellant's Motion for Leave... has violated his Oath of Office where he made clear errors of applicable law, and abused his discretion, based on its erroneous assessment of irrefutable documents submitted in support of the "Motion for Leave...".

PRESENTED UNDER APPELLANT'S FIRST ASSIGNMENT OF ERROR

Judge Logan has ruled in clear conflict with the statutory mandates of *ORC Ann. 2945.33* and *Ohio Crim. R. 24(H)(4)(6)* where he held: because Juror Adriane Perretti failed to specifically identify *exactly who it was* that entered the jury room during their' (the jurors') deliberations and instructed them "*to stay until we reached a decision*" the content of her affidavit failed to qualify as newly discovered evidence. ("Judgment Entry", T.d. 98, P. 3)

PRESENTED UNDER APPELLANT'S SECOND ASSIGNMENT OF ERROR

Judge Logan has ruled in clear conflict with the evidence presented, where he erroneously concluded that: the 'Allen Charge' jury charge instruction – which *the record clearly reveals* took place *in open Court*[3]; and the unlawful communication that informed the jury "*to stay until we reached a decision*" – which secretly took place, *off the record*, while the jurors remained in the jury room deliberating: *were one in the same*. Thus, there was no newly discovered evidence presented in this regard. ("Judgment Entry", T.d. 98, P. 3)

PRESENTED UNDER APPELLANT'S THIRD ASSIGNMENT OF ERROR

Judge Logan has ruled in clear conflict with the evidence presented: where he

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[3] *State v. Brown*, 2000 Ohio App. LEXIS 1430, [*10]-[*13] (11th App. Dist.)

erroneously concluded that Appellant had utilized the word *unaware* when discussing the specifics of the evidence contained within Juror Adriane Perretti affidavit. ("Judgment Entry", T.d. 98, p. 3.)

PRESENTED UNDER APPELLANT'S FOURTH ASSIGNMENT OF ERROR

Judge Logan disregarded clearly established law where he held: that 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. ("Judgment Entry", T.d. 98, Pg.'s 3-4.)

PRESENTED UNDER APPELLANT'S FIFTH ASSIGNMENT OF ERROR

Judge Logan violated clear and unambiguous statutory law and criminal rules: where he held: "The juror's recollections are not evidence that would or could have been would have been (sic) produced at the trial had they been discovered earlier, and are therefore outside the scope of Crim.R. 33." ("Judgment Entry", T.d. 98, p. 3) Where the material evidence contained within a juror's affidavit revealed the content of a witness's trial testimony *had in open court* that she specifically recalled (trial testimony that was unlawfully omitted from the transcript).

PRESENTED UNDER APPELLANT'S SIXTH ASSIGNMENT OF ERROR

Judge Logan violated clearly established statutory law of Ohio Evid. R. 606(B)(2)(c): where he erroneously concluded that the evidence from Juror Brunsetter regarding her recollection of *specific content* of a state witness' trial testimony – *specific content* that had been purposely omitted from the trial transcript by a court-reporter – would be prohibited by Evid. R. 606(B)(1). ("Judgment Entry", T.d. 98, P. 3)

PRESENTED UNDER APPELLANT'S SEVENTH ASSIGNMENT OF ERROR

Judge Logan: (1) violated clear and unambiguous statutory law and criminal rules where he held *in direct regard* to the content of Juror Cathy Brunsetter affidavit, that: "Finally, Defendant did not offer clear and convincing proof that he was unavoidably prevented from obtaining this evidence within 120 days after the verdict"; (2) misapplied the law involving the utilization of the word *unaware*; and (3) erred by denying Appellant the same level of basic procedural-due-process protections to satisfy the unavoidably prevented requirement of Crim. R. 33(B) where the *material evidence* relied upon when seeking a new trial had been suppressed by the court- reporter. ("Judgment Entry", T.d. 98, Pg.'s 3-4).

## LAW AND ARGUMENT

FIRST ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED AS A MATTER OF LAW IN OVERRULING APPELLANT'S MOTION FOR LEAVE: TO THE PREJUDICE OF APPELLANT** ("Judgment Entry", T.d. 98, p. 3)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

1. Did the trial court erred as a matter of law by ruling contrary to clear and unambiguous statutory law of ORC Ann. 2945.33 and Ohio Crim. R. 24(H)(4)(B) during its' assessment of the content of Juror Adriane 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?

**Standard of Review**

"[A]s we recently explained in *Johnson v. Abdullah,* 'courts lack the discretion to make errors of law, particularly when the trial court's decision goes against the plain language of a statute or rule.' 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 39. Instead, we review questions of law de novo. Id. at ¶ 38." *State v. McNeal,* 169 Ohio St. 3d 47,50 (2022.)

**Law**

"'This court reviews a trial court's interpretation and application of a statute under a de novo standard of appellate review.' 'Statutory interpretation involves a question of law; therefore, we do not give deference to the trial court's determination.' The cornerstone of statutory interpretation is legislative intention. In order to determine legislative intent, it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself. 'If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.'" *State v. Mancini*, 2020-Ohio-990, [*P11](11th App. Dist.)[Internal citations omitted.]

ORC Ann. 2945.33, reads, in relevant part:

"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. ***_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." [Italic print added.]

Id.

"In interpreting the criminal rules, we apply general principles of statutory construction. See *State v. Bethel,* 167 Ohio St.3d 362, 2022-Ohio-783, 192 N.E.3d 470, ¶ 54 Thus, we must "apply the language in [the rule] as written 'without adding criteria not supported by the text.'" *State ex rel. Garcia v. Baldwin*, 2023-Ohio-1636,[*P15] (2023).

Ohio Crim. R. 24(H)(4)(b), reads: "[T]he officer may inquire whether the jury has reached a verdict, *but shall not: Communicate with the jurors or permit communications with jurors,* except as allowed by court order." Id. [Italic print added.]

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

"Affidavits or testimony of jurors may be received, upon motion for new trial, *to prove unlawful communications made to members of the jury by court officers or others,* ***during the period of the jury's deliberation." *Emmert v. State,* (1933) 127 Ohio St. 235. [Italic print added.]

"The oath of office of each judge of a court of record shall be to support the constitution of the United States and the constitution of this state, to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on the person as such judge, according to the best of the person's ability and understanding." ORC Ann. 3.23.

"A judge shall comply with the *law.*" OHIO JUD. Canon R. 1.1"

**Argument**

The statutory mandates of *ORC Ann. 2945.33* and *Ohio Crim. R. 24(H)(4)(6)* are clear and unambiguous. Yet, Judge Logan appears to declare that because the juror, Ms. Adriane Perretti, could not recall the identity, sex, or role of this person: *who actually entered the jury room* and ordered them (the jurors) *"to stay until we reached a decision"* somehow diminishes the fact that the bailiff violated said statutory mandates by: (a) entering the jury room *himself,* or (b) *permitted someone else to unlawfully enter the jury room and instruct them of such.*

To wit:

"The second juror, Adriane Perretti, attest 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 (sic) Peretti (sic) expressly attests in the affidavit that 'I do not recall the identity, sex, or role of this person.'" (Judgment Entry T.d. 98, 3.)

Further, commanding the jury while they remained deliberating in the jury room, that *they had to stay until they reached a decision:* clearly qualified as a supplemental jury instruction: which further implicates Appellant's rights under, both, the United States and Ohio Constitution. Such as, his right to: (a) representation of counsel during a critical stage of the proceedings[4]; (b) an Impartial Jury and Public trial; and (c) be present therein.

SECOND ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR LEAVE: TO THE PREJUDICE OF APPELLANT** ("Judgment Entry", T.d. 98, p. 3)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

1. Did the Trial Court err when it reached the incorrect legal conclusion by incorrectly analyzing a key fact of the case: 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?

**Standard of Review**

"The term 'abuse of discretion' is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record.'" *In re D.P.*, 2023-Ohio-3120, [*P34](11th App. Dist.)

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[4] Absence of counsel during a critical stage of a trial created a presumption of error and a denial of constitutional rights without requiring a showing of prejudice. See *United States v. Cronic* (1984), 466 U.S. 648, 659, fn. 25; *State v. Taylor*, 2015-Ohio-2080, [*P21](11th App. Dist.) "Presuming waiver of counsel from a silent record is impermissible." *Carnley v. Cochran*, (1962) 369 U.S. 506, paragraph two of the syllabus.

**Argument**

Judge Logan has ruled in clear conflict with the evidence presented, where he erroneously concluded that: the "Allen Charge" jury charge instruction, and the communication revealed within Juror Adriane Perretti's affidavit, were one in the same. To wit:

"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." ("Judgment Entry", T.d. 98, p. 3.)

However, the record clearly reveals that this is an egregious assessment of the evidence. The jury were instructed on the 'Allen Charge' jury charge instruction: *in open court* by the trial judge *on the record.* To wit:

"In his third assignment of error, appellant alleges that the trial court erred by making inappropriate comments regarding the time and expense of the trial in order to persuade the deadlocked jurors to come to a unanimous verdict. When the jury indicated that it could not agree on the murder charge, the trial court gave the jury the following supplemental charge: "'Ladies and gentlemen, the completion of this trial is of great importance to the parties and to the Court. Not only has there been considerable expense to bring this matter to trial, but also expenditure of valuable time[] of the parties, the Court, the attorneys and, of course, your valuable time. I urge you to exert every possible effort to reach an agreement, if you can conscientiously do so. This is a new and difficult assignment for you. The process of discussion and deliberation in the jury room is necessarily slow and requires careful consideration and patience. I request that you return to your jury room and review the opinions of each juror to determine whether you have overlooked any areas of agreement which could lead to a verdict. "'In a large portion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere consent to the conclusion of other jurors, each question submitted to you should be examined with proper regard and deference to the opinions of other jurors. You should consider desirable that the case be decided.
"***."
See, *State v. Brown*, 2000 Ohio App. LEXIS 1430, [*10]-[*13] (11th App. Dist.).

Whereas, the *clandestine* communication exposed by Juror Adriane Perretti, within her affidavit, clearly revealed that:

"I recall someone coming into the jury room during our deliberations and inquiring about how things were going, and upon being informed that the vote was 10 to 2, then 11 to 1: this person told us *to stay until we reached a decision*."

(Motion for Leave, T.d. 83, pg.'s 3 and 13; see also attached thereto, Appendix D.)

THIRD ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR LEAVE: TO THE PREJUDICE OF APPELLANT** ("Judgment Entry", T.d. 98, p. 3)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

1. Did the Trial Court err when it reached the incorrect legal conclusion by incorrectly analyzing a key fact of the case: 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?

**Standard of Review**

"A trial court abuses its discretion where its decision is clearly erroneous, that is, the trial court misapplies the law to undisputed facts." *V.T. Larney Ltd. v. Ohio Civ. Rights Comm'n, 2023-Ohio-3123*, [*P24](11th App. Dist.)

**Argument**

Judge Logan erroneous concluded that Appellant "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."("Judgment Entry", T.d. 98, p. 3)

Whereas, what Appellant actually asserted *in direct regard to the content of Juror Adriane Perretti's affidavit* was:

- "Brown had been unavoidably prevented from the discovery of the new evidence, upon which he must now rely, within one hundred twenty days after the day upon which the verdict was rendered." (Motion for Leave... , T.d. 83, Pg.'s 1 and 16.)

- "Further, Brown only became *aware* of the unlawful communication with members of the then deliberating jury by a court official on or about October 10, 2022: via a juror's affidavit." See, again, Appendix D." ("Motion for Leave...", T.d. 83, p 5.)

Id.

Further, the circumstances involving the *alleged* newly discovered evidence discussed and decided within *State v. Oneil*,[5] where the word *unaware* was actually utilized, is a far cry from the newly discovered evidence involving the *secretive* communication had with the then deliberating jury that was *knowingly suppressed by the Bailiff.*

Moreover, in a case factually similar to the one at bar, the Supreme Court of Ohio, in *State v. Adams*, also utilized the word *aware* to describe *suppressed* newly discovered evidence contained within a juror's affidavit. To wit:

> "A motion for new trial was filed by the defendant and overruled, whereupon an application for rehearing on motion for new trial was filed, stating that at the previous hearing on defendant's motion for a new trial, he was not *aware* of facts which had since come to his attention to the effect that communications had been made to the jurors by a court officer during the jury's deliberations, contrary to law. To this application were attached and filed the affidavits of three members of the jury."

Id. 141 Ohio St. 423, 424(1943) [ Italic print added.]

FOURTH ASSIGNMENT OF ERROR

**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**
("Judgment Entry", T.d. 98, pg.'s 3-4)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

1. Did the Trial Court err when it reached the incorrect legal conclusion by incorrectly analyzing a key fact of the case: 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?

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[5] 2023-Ohio-1089

**Standard of Review**

"A trial court abuses its discretion where its decision is clearly erroneous, that is, the trial court misapplies the law to undisputed facts." *V.T. Larney Ltd. v. Ohio Civ. Rights Comm'n, 2023-Ohio-3123*, [*P24](11th App. Dist.)

**Law**

A criminal defendant 'may satisfy the 'unavoidably prevented' requirement contained in Crim.R. 33(B) by establishing that the prosecution suppressed the evidence on which the defendant would rely in seeking a new trial. See, *State v. Bethel,* 2022-Ohio-783,[*P 25]

"[P]rosecutors have 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *State v. Trimble*, 2016-Ohio-1307, [*P27](11th App. Dist.)

**Argument**

Judge Logan erroneous concluded that: "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." ("Judgment Entry", T.d. 98, p. 4.)

Here, Judge Logan, even with the presentation of clear evidence showing that an *off the record* communication had with then deliberating jury by/or through the bailiff was knowingly performed in a *clandestine fashion* – so as to *prevent* Appellant from *ever becoming aware* of such: Judge Logan deemed it a necessary requirement for the appellant to have gained knowledge of such *secretive*, unlawful, communication (which deprived Appellant of his basic procedural-due-process protections *during a critical stage* of his criminal jury trial proceedings)

through some type of *bare hook fishing expedition* so as to offer clear and convincing proof of efforts made to obtain such information from jurors so as to present such within the 120-day period after the verdict. ("Judgment Entry" T.d. 98, Pg.'s 3-4.)

Again, Juror Adriane Perretti clearly revealed that:

> "I recall someone coming into the jury room during our deliberations and inquiring about how things were going, and upon being informed that the vote was 10 to 2, then 11 to 1: this person told us *to stay until we reached a decision*."

(Motion for Leave, T.d. 83, pg.'s 3 and 13; see also attached thereto, Appendix D.)

Judge Logan's reasoning, herein, is a clear failure to exercise sound, reasonable, and legal decision-making of the most basic sort: in light of the undisputed facts presented as newly discovered evidence that revealed unlawful communication[6], *that by design, no one besides the bailiff and the jurors knew had taken place*; which then resulted in a unanimous guilty verdict.

FIFTH ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED AS A MATTER OF LAW IN OVERRULING APPELLANT'S MOTION FOR LEAVE: TO THE PREJUDICE OF APPELLANT** ("Judgment Entry", T.d. 98, p. 3)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

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[6] "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.). ("Motion for Leave...", T.d. 83, fn. 16)

1. Did the trial court erred 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 recollections regarding the testimony from two witnesses had at trial is not evidence that would or could have been would have been produced at the trial had they been discovered earlier, and are therefore 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?

**Standard of Review**

"No court—not a trial court, not an appellate court, nor even a supreme court—has the authority, within its discretion, to commit an error of law." *State v. Williams*, 2021-Ohio-241, [*P 156] (11th App. Dist.)

"That is why courts apply a de novo standard when reviewing issues of law." *Johnson v. Abdullah*, 166 Ohio St. 3d 427, 437(2019)

**Law**

"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;

"***" Id. Ohio Crim. R. 33 [Italic print added.]

"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." *State v. Walden,* 19 Ohio App. 3d. 141, 145 (10th App. Dist. 1984). ("Motion for Leave...", T.d. 83, p. 5.)

Under the Ohio Constitution, a criminal defendant is entitled to appeal as a matter of right. See, Article IV, Sections 1, 2, and 3.

"A fundamental tenet of judicial review in Ohio is that cases should be decided on their merits. App. R. 9(E) is to be construed liberally to give effect to this principle." *State v. Schiebel*, (1990) 55 Ohio St. 3d 71, 82-83. ("Motion for Leave...", T.d. 83, p. 5.)

"When an appellant raises a claim of error, the reviewing court can look to that part of the record where it shows, or fails to show, prejudice. Implicit in this rule is the idea that the record will accurately reflect what actually occurred at the trial. An accurate transcript is the lynch pin of appellate review." *State v. Cunningham,* 1993 Ohio App. LEXIS 1914, [*P11](4th App. Dist.)

**Argument**

In the case at bar, Appellant presented newly discovered exculpatory evidence, via Juror Brunsetter affidavit, that revealed material events; i.e, *specific content of actual trial testimony* that she specifically recalled occurring *in open court* during Appellant's criminal trial. To wit:

> "I recall Dr. William Cox testifying that Mr. Brown put the weapon against Monica's head and *intentionally pulled the trigger.* I recall Dr. Cox testifying that Mr. Brown *pushed the gun into her head*".

("Motion for Leave...", T.d. 83, p. 2; see also, attached thereto, Appendix C)

Yet, these *specific* material segments of Dr. Cox's actual trial testimony were completely omitted within the trial transcript: thus, preventing Appellant from assigning error to said on

direct appeal *with a supporting record.*[7]

This Court remanded appellant's criminal appeal to the trial court pursuant to App. R. 9(E) to determine whether the trial transcript must be corrected.

Yet prior to this limited remand hearing, the trial judge – Judge Logan – decided, *off the record*, that the trial witnesses would not testify at the hearing to their trial testimony. Thus, unbeknown to this Court during direct appeal, Judge Logan deprived Appellant access to the only trial court witnesses whom could unequivocally exposed the omitted and inaccurate sections of the trial transcript. (Motion for Leave..., T.d. 83, p. 11) See, also, *Brown v. Morganstern*, 2004 Ohio 2930,[*P4](11th App. Dist.)

During the App. R. 9(E) hearing the Prosecution called a single witness to verify the accuracy of the trial transcript: the court-reporter responsible for written transcript. See, *State v. Brown*, 2000 Ohio App. LEXIS 1430, [*P28](11th App. Dist.)

"[P]rosecutors have 'a duty to learn of any favorable evidence known to *the others acting on the government's behalf in the case*, including the police.'" *State v. Williams*, 2023-Ohio-3526 [*P28](11th App. Dist.)

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[7] "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.).

Where a state provides a statutory right to appeal, that right must meet the constitutional requirements of due process; this particularly so when it has been shown *by evidence* that due process was not accorded in the trial court. While there is no constitutional right to an absolute accurate transcript, indigent defendants generally have a right to a reasonably accurate transcript, if one is necessary to effect an appeal. Otherwise, being *deprived of a reasonably accurate transcript* defendant would be *unjustly prevented* from assigning error to the reversible misconduct(s) that actually occurred within his criminal trial proceedings which violated defendants right to due process. ("Motion for Leave...", T.d. 83, p. 4; fn.7).

Further, this is the very reason App. R. 9, particularly App. R. 9(E). exist: to address the inaccuracies in the trial court record: thus ensuring a meaningful appeal as of right. See, *State v. Brown,* 2000 Ohio App. LEXIS 1430, [*P27](11th App. Dist.)

Appellant was convicted by a jury, which 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. Accordingly, a constitutional due process violation occurred where it is shown that inaccuracies in the transcript adversely affected meaningful appellate review of reversible misconducts that actually occurred within Appellant's criminal jury trial proceedings.

"[I]t is the duty of the court reporter to correctly prepare the transcript." *State v. Tiedjen*, 2019-Ohio-2430, [*P20](8th App. Dist.)

Appellant "should not suffer an injustice because of the nonfeasance of court personnel." *In re Holmes*, 104 Ohio St. 3d 664, 667 (2004)

SIXTH ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED IN AS A MATTER OF LAW IN OVERRULING APPELLANT'S MOTION FOR LEAVE: TO THE PREJUDICE OF APPELLANT** ("Judgment Entry", T.d. 98, p. 3)

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

1. Did the trial court erred as a matter of law by ruling contrary to clear and unambiguous statutory law of Ohio Evid. R. 606(B)(2)(c) when it erroneously concluded that the testimony from Juror Brunsetter, regarding her recollections of trial testimony, would be prohibited by Ohio Evid. R. 606(B)(1): 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?

**Standard of Review**

"'[C]ourts lack the discretion to make errors of law, particularly when the trial court's decision goes against the plain language of a statute or rule.' Instead, we review questions of law de novo." *State v. McNeal,* 169 Ohio St. 3d 47, 50 (2022) (Internal citation omitted.)

**Law**

"When an appellate court is reviewing a pure issue of law, the mere fact that the reviewing court would decide the issue differently is enough to find error." *Sood v. Rivers,* 2023 Ohio 3417, [*P36](11th App. Dist.)

Ohio Evid. R. 606(B)(2)(c) clearly reads: "**Exceptions**. A juror may testify about whether: any threat, any bribe, any attempted threat or bribe, or *any* improprieties of any officer of the court occurred." Id. [Italic print added.]

"A judge shall comply with the *law*." OHIO JUD. Canon R. 1.1

**Argument**

In the case at bar, Appellant presented newly discovered exculpatory evidence, via Juror Brunsetter affidavit, that revealed material events; i.e, specific content of actual testimony that

she specifically recalled occurring *in open court* during Appellant's criminal trial. To wit:

"I recall Dr. William Cox testifying that Mr. Brown put the weapon against Monica's head and *intentionally pulled the trigger*. I recall Dr. Cox testifying that Mr. Brown *pushed the gun into her head*".

("Motion for Leave...", T.d. 83, page 2; see also Appendix C, attached thereto.)

Yet, these material segments of actual trial testimony of Dr. Cox were completely omitted or inaccurately transcribed within the trial transcript *by the courtreporter.*

Dr. Cox testified to this *in open court*: thereby, Juror Brunstetter's affidavit does not violate Evid. R. 606(B), but instead falls well within Evid. R. 606(B)(2)(c): where she *only* revealed what she witnessed Dr. Cox testify to *in open court*: she did not reveal if and/or how that testimony affected her or her fellow jurors' deliberations.

Now, surely, this actual trial testimony of Dr. Cox: which was omitted from the certified trial transcript: surely qualifies as *"... any improprieties of any officer of the court occurred."*

SEVENTH ASSIGNMENT OF ERROR

**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**

ISSUES PRESENTED FOR REVIEW AND ARGUMENT

1. Did the Trial Court err when it erroneously concluded, *in direct regard* to the content of Juror Cathy Brunsetter affidavit, that: "Finally, Defendant did not offer clear and convincing proof that he was unavoidably prevented from obtaining this evidence within 120 days after the verdict": in the face of a presentation of substantial documented evidence to the contrary: 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? ("Judgment Entry", T.d. 98, p. 3)

2. Did the Trial Court err when it erroneously concluded, *in direct regard* to the content of Juror Cathy Brunsetter affidavit, that: simply because Appellant utilized the word *unaware* such utilization negated the substantial presentation of documented evidence proving that he was unavoidably prevented from obtaining this evidence within 120 days after the verdict: 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? ("Judgment Entry", T.d. 98, p. 3)

3. Did the Trial Court err when it erroneously held: that 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): with a presentation of irrefutable evidence establishing that the court-reporter, instead of the prosecutor, caused the *suppression of evidence* that Appellant would relied when seeking a new trial: 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? ("Judgment Entry", T.d. 98, pg.'s 3-4)

**Argument**

Within Appellants' eighteen-page long Motion for Leave... he presented *verbatim* the following clear and convincing proof that he was unavoidably prevented from obtaining this evidence within 120 days after the verdict:

- "Brown had absolutely no idea, *and no reason to believe*, that the actual events of his jury trial proceedings would not be accurately contained within the trial transcript; so as to be addressed during his direct appeal.[8] And having been declared indigent by the state trial and appellate courts, Brown remained *completely* unaware of such until he was supplied with a copy of his trial transcript; which, as the evidence below shall clearly reveal, was *well after* the one hundred twenty days upon which Brown's verdict was rendered.[9]" ("Motion for Leave...", T.d. 83, p. 4.)

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[8] "Where a state provides a statutory right to appeal, that right must meet the constitutional requirements of due process. While there is no constitutional right to an absolute accurate transcript, indigent defendants generally have a right to a reasonably accurate transcript, if one is necessary to effect an appeal." (Numerous citations omitted.)

[9] "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

- "At some point after Brown's notice of appeal was filed, Atty. Michael Scala was appointed as Brown's direct appeal appellate counsel (whereas Brown received absolutely no notification of such from the court or Atty. Scala). On 05/02/1996 Atty. Scala filed a motion for extension of time to file Appellate brief, with the Eleventh District Court of Appeals (and, still, Brown received absolutely no contact from Atty. Scala). Id. Appendix A.[10]
  "Then, apparently, on 06/10/1996 the court of appeals sua sponte dismissed Brown direct appeal: for want of prosecution. Id. Appendix A.
  "On 07/11/1996 the original papers were returned to the common pleas court. Id. Appendix A.
- "Brown not receiving any word, from anyone, regarding the statue of his direct appeal since the filing of his notice of appeal by defense counsel: directed two correspondences to the Eleventh District Court of Appeals, via certified mail, on 07/26/1996 and 10/21/1996, inquiring about the status of his appeal... Id. Appendix A.
- "On 09/09/1996 Attorney Michael Partlow filed an application to reopen Brown's direct appeal. And on 10/30/1996 the court of appeals granted the application and appointed Atty. Partlow as counsel to represent Brown therein. Id. Appendix A.
- "Atty. Partlow, then notified Brown, via correspondence, that he had been appointed as his new appellate counsel by the court of appeals on 10/30/1996.
- "Brown's verdict was rendered on 09/29/1995, and sentence was pronounced on 10/03/1995. Id. Appendix A.
- "**Newly Discovered Evidence**
- "Thus, Brown remained totally unaware that his trial transcript contained material omissions and inaccuracies until he received a copy of his trial transcript from his newly appointed Direct Appeal Appellate Counsel, Atty. Michael Partlow, on or after 10/30/1996: which well past the one hundred twenty days after the day upon which Brown's verdict was rendered. Id. Appendix A; see, also, *Brown v. Morganstern*, 2004 Ohio 2930, [*P3] ("After appellant's convictions, 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. Appellant contended that the trial transcript was materially inaccurate, and Partlow discovered that the Trumbull County Court of Common Pleas audiotaped important criminal trials, including trials for murder. Partlow forwarded a written

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indigent defendant in prison." *State v Maddox,* 2002 Ohio App. LEXIS 1202, [*P17-*P18](11TH App. Dist.)."

[10] Please be aware that "Appendix A", contain[ed] a *certified copy* of the Docket Summary Statement.

transcript of the audiotapes to appellant, enabling appellant to specify which part or parts of the trial transcript he claimed were materially inaccurate. Appellant provided Partlow a very detailed comparison of the trial transcript and the written transcript from trial court's audiotape of the trial, and appellant 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 was given during trial.") Id. Appendix E.

- "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 demanding and receiving from him an exhaustive list of the alleged errors 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".
- "**Newly Discovered Evidence**
- "Prior to this limited remand hearing, the trial judge decided, off the record, that the trial witnesses would not testify at the hearing to their trial testimony. Appellant 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. Partlow did not follow these instructions. ***" Id. *Brown v. Morganstern*, 2004 Ohio 2930,[*P4](11th App. Dist.) [Bold and Italic print added.] See, again, Appendix E.
- "This, the Eleventh District Court of Appeals', Opinion also constitutes newly discovered evidence, under *State v. Bethel*, in that prior to said court of appeals' 06/06/2004 pronouncement: Brown possessed absolutely no evidence that Judge Logan had made said off the record rulings.
- "**Newly Discovered Evidence**
- "With substantial financial assistance from several family members Brown was able to retain the services of a reputable private investigator, Mr. Tom Pavlish on 10/23/2021. And among his other requested tasks, Brown asked that he locate and interview the members of the jury; where, therein, he (Mr. Pavlish) was able to gather the following relevant information; as the affidavit from Investigator Pavlish and several jurors' attest:
- "Dr. Cox testified that: 'the defendant put the end of the muzzle of that gun against victim's head and intentionally pulled the trigger, the defendant pushed the gun into her head.' (Yet, according said trial transcript, Dr. Cox only stated, during his testimony that: 'that the end of the muzzle of that gun was placed against the skin and discharged')."

Id. ("Motion for Leave...", T.d. 83, Pg.'s 9-11)

ADDESSING ISSUE ONE PRESENTED FOR REVIEW AND ARGUMENT

**Law**

"The term 'abuse of discretion' is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record." *State v. Hogya*, 2023-Ohio-342, [*P14](11th App. Dist.)

**Argument**

Surely, not only did, the above presentation provided clear and convincing proof that Appellant was unavoidably prevented from obtaining this newly discovered evidence within 120 days after the verdict. But the evidence contained within Juror Brunsetter's affidavit *when now viewed with* Judge Logan's App. R. 9(E) *off the record* ruling surely create(d) an obvious hole in Judge Logan's holding where he concluded: "This Court finds the official transcript of this Court to have been completed in a true, accurate and professional manner.[11]" ("Motion for Leave...", T.d. 83, p.2; see, also attached thereto Appendix C.)

On direct appeal, unaware of Judge Logan's *off the record* ruling, and the content of Juror Brunsetter's affidavit (which did not exist at the time), a panel of this Court ruled:

> "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. Appellant's seventh assignment of error has no merit."

Id. *State v. Brown*, 2000 Ohio App. LEXIS 1430, [*31](11th App. Dist.)

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[11] *State v. Brown*, 2000 Ohio App. LEXIS 1430, [*30](11th App. Dist.)

ADDRESSING ISSUE TWO PRESENTED FOR REVIEW AND ARGUMENT

By a simple review of the above presentation of evidence it is clear that where Appellant used the word *unaware* he was declaring that "remained totally unaware that his trial transcript contained material omissions and inaccuracies until he received a copy of his trial transcript from his newly appointed Direct Appeal Appellate Counsel, Atty. Michael Partlow, on or after 10/30/1996: which well past the one hundred twenty days after the day upon which Brown's verdict was rendered." Id.

**Law**

"[I]t is the duty of the court reporter to correctly prepare the transcript." *State v. Tiedjen*, 2019-Ohio-2430, [*P20](8th App. Dist.)

**Argument**

Appellant simply had no reason to believe that the court-reporter would fail in her duty to provide an accurate transcript.

"A petitioner is unavoidably prevented from discovery of the facts upon which the petition relies when the petitioner 'was unaware of those facts and was unable to learn of them through reasonable diligence.'" *State v. Piatt*, 2023-Ohio-2714,[*P7](9th App. Dist.)

ADDRESSING ISSUE THREE PRESENTED FOR REVIEW AND ARGUMENT

**Law**

"'[P]rosecutors have 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" *State v. Williams*, 2023-Ohio-3526 [*P28](11th App. Dist.)

**Argument**

During the App. R. 9(E) hearing the Prosecution called a single witness to verify the accuracy

of the trial transcript: the court-reporter responsible for written transcript. See, *State v. Brown*, 2000 Ohio App. LEXIS 1430, [*P28](11th App. Dist.)

The prosecution knew that the court-reporter's testimony therein was false and failed to correct it: thus, the court-reporter's suppression of material evidence (via omission of said from the trial transcript) must be imputed to the State.

## CONCLUSION

In light of foregoing evidence and argument, clearly Appellant had established by clear and convincing proof within his "Motion for Leave...": that he was unavoidably prevented from the discovery of the evidence upon which he based his motion for a new trial: *even where due diligence was required*. Thus, Appellant is entitled to have the merits of his Crim. R. 33(A) determined.[12]

Appellant simply ask this Court to comply with the law.

Further, provided this case is reversed and remanded, Appellant respectfully moves this Honorable Court to order that a merit determination of his Crim. R. 33(A) be assigned to a different judge in light of the foregoing evidence that Judge Logan had a clear duty *under his Oath of Office*: "To support the constitution of the United States and the constitution of this state, to administer justice without respect to persons, and faithfully and impartially to

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[12] Again, both, Appellant's Crim. R. 33(B) and Crim. R. 33(A) was received and file stamped on 12/27/2022 by the Trumbull County Clerk of Courts Office, but *his Crim. R. 33(B) motion was not entered on the Docket.*

discharge and perform all the duties incumbent on the person as such judge, according to the best of the person's ability and understanding."[13] Yet, he has simply refused to adhere to the most basic applicable constitutional, and unambiguous statutory, laws in the performance of his duties: when it comes to *any* of Appellant's court filings; i.e. a fixed anticipatory judgment.

To this point, Judge Logan was obligated to recuse himself sua sponte from determining Appellant Crim. R. 33(B) motion *immediately upon his notice* of the content of Juror Cathy Brunsetter's affidavit: in light of his aforementioned *off the record* App. R. 9(E) ruling.

"A judge should step aside*** if a reasonable and objective observer would harbor serious doubts about the judge's impartiality."

Respectfully submitted,

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Appellant, Pro se

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was sent to the following individuals, via First Class U.S. Mail, on this 26th day of October, 2023.

- Trumbull County Prosecutor, at 160 Main St., Warren, Ohio, 44481
- Private Investigator, Tom Pavlish, at 7452 Broadview Rd. #222, Cleveland, Ohio, 44134.

Felix O. Brown Jr. #312-676

[13] ORC Ann. 3.23.