No. 24-6704

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN JURY, *Petitioner*,

v.

STATE OF OHIO, *Respondent.*

On Petition for a Writ of Certiorari to the
Ohio's Sixth District Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Brian Jury, #654-969
BeCI
P.O. BOX 540
ST. CLAIRSVILLE, OH, 43950

Pro Se

QUESTION PRESENTED

This case poses a constitutional question of national importance. Did the Ohio Sixth District Court of Appeals impose an improper and unduly burdensome standard over Petitioner's "*Brady*" claims and his ability to present evidence of such claims; more specifically:

A. **Whether the Ohio's Sixth District Appellate Court put an intolerable / undue burden of limitations that distorted and violated the original *Brady* analysis and the purposes behind the prosecutorial obligations enunciated in *Brady* (see *Kyles v. Whitely*, 514 U.S., 419, 437-; , *Strickler v. Greene*, 527 U.S. 263, syllabus, 280-282; *Wearry v. Cain*, 577 U.S. @ fn. 8; etc.), when it erroneously required this Petitioner to show that the state had possession of TLI/CSLI in order for it to be suppressed within the meaning of a *Brady* violation; plus, provide the actual physical evidence of TLI/CSLI without a proper review analysis of materiality—a "*Trombetta*" effect where a letter from Verizon wireless warranted such?**

(This case stems from from the Sixth Appellate District Court's denial of Petitioner's Assignment of Error: "The trial court erred, abused its discretion, when it improperly applied res judicata / law of case (doctrine) without making the prerequisite findings of (Petitioner) being "unavoidably prevented" to (Petitioner's) motion for leave to file a delayed motion for a new trial pursuant to Crim. R. 33(B).")

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page; which, are represented by:

The Ohio Attorney General's Office

Solicitor General Ben Flowers
30 E. Broad St, 17th Floor
Columbus, OH 43215

RELATED CASES

Brady v. Maryland
373 U.S. 83

California v. Trombetta
467 U.S. 479

Kyles v. Whitley
514 U.S. 419

Strickler v. Greene
527 U.S. 263

Wearry v. Cain
577 U.S. 385

Youngblood V. West Virginia
547 U.S. 867

Commonwealth of Massachusetts v. Daniels
445 Mass. 392, 401-406

State of West Virginia v. Costello
245 W. Va. 19, dissent @ 39-40 (Supreme Court of Appeals of West Virginia 2021)

State of West Virginia v. Youngblood
221 W. Va. 20, 26- 650 S.E. 2d 119 (Supreme Court of Appeals of West Virginia 2007)

TABLE OF CONTENTS

page

INDEX TO APPENDICES

APPENDIX A

Decision and Judgment from the Ohio Sixth District Court on Petitioner's appeal of the trial court's denial to relief denying relief (August 30, 2024).

APPENDIX B

Judgment Entry from the Ohio Erie County Court of Common Pleas court denying relief. (November 15, 2023)

APPENDIX C

Entry from Supreme Court of Ohio denying jurisdiction of Erie County Court of Appeals Decision and Judgment (November 26, 2024).

APPENDIX D

Letter from Verizon Wireless dated January 24, 2023, exposing TLI was available to be utilized at Petitioner's trial 7 ½ months from the alleged incident.

TABLE OF AUTHORITIES

CASES ***page(s)***

STATUTES AND RULES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Brian Jury, respectfully prays that a writ of certiorari be granted to review the judgement below; or in lieu of, that a writ of certiorari be granted and that this case be remanded to the Ohio's Sixth District Court of Appeals in light of **Youngblood v. West Virginia** (2006), 547 U.S. 867; and, **California v. Trombetta**, 467 U.S. 479, 485, et al.

OPINION BELOW

The Opinion of the Ohio's Sixth District Court of Appeals denying Petitioner's appeal is reported at **State v. Jury**, 2024-Ohio-3342 (August 30, 2024), and is reproduced as **Appendix A.** The Ohio's Erie County Common Pleas Court's Judgement Entry dismissing Petitioner's motion for leave to file a delayed motion for a new trial pursuant to Crim. R. 33(B) is not reported, but is available and reproduced as **Appendix B.** The order of the Ohio Supreme Court denying discretionary review of that decision is reported at **State v. Jury,** 2024 Ohio LEXIS 2653 (November 26, 2024), and is reproduced as **Appendix C.**

STATEMENT OF JURISDICTION

The Ohio Supreme Court issued its decision denying Petitioner's petition for review on November 26, 2024, **Appendix C.** This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V (in relevant part):

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. VI (in relevant part):

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the (effective) assistance of counsel for his defense.

U.S. Const. Amend. XIV (in relevant part): [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Criminal Rule 16. Discovery and inspection (in relevant part):

(A) Purpose, scope and reciprocity. This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants []. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery; Right to copy or photograph. Upon receipt of a written demand for discovery by the defendant [], the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:
(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;
(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;
(5) Any evidence favorable to the defendant and material to guilt or punishment;

(E) Right of inspection in cases of sexual assault.
(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

Ohio Criminal Rule 33. New trial (in relevant part)

(A) Grounds. 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.

(B) Motion for new trial; form, time. Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty-day period.

STATEMENT OF THE CASE

This case stems from the denial over Petitioner's "***Brady v. Maryland***, *373 U. S. 83*" prosecutorial violation(s) / claim(s) within his motion for leave to file a motion for new trial pursuant to Ohio Criminal Rule 33(B).

On 11/1/2013, this petitioner was arrested without a warrant in Lorain Ohio, on the accusation of the alleged victim whom stated that she was kidnapped from Lorain, Ohio, driven to Petitioner's property outside of Bellevue, Ohio, raped 5-6 times, tied-up, and left alone. The prosecution purported that this all happened within a four-hour time period. Neither petitioner's DNA nor fingerprints were found on the materials that bound her. The Ohio, Erie County Grand jury indicted Petitioner on five counts of rape, two counts of kidnapping, felonious assault, attempted murder; and specifications for firearm, sexual motivation, and a sexually violent predator. Pretrial, defense counsel submitted three separate discovery requests which asked for discovery per Criminal Rule ("Crim. R.") 16 and more specifically, "all" cell phone records of the

alleged victim and appellant (See Erie County Common Pleas Court of Ohio: **State v. Jury**, 2013-CR-0472, (2/12/14) "Motion for Disclosure of Exculpatory and Impeachment Evidence—'Specifically, the Defendant respectfully requests that this Honorable Court order the State of Ohio to **disclose any and all phone records**. . . ;'" (12/20/13) "Motion to Compel— '**Any and all cell phone records** of the victim, including any and all text messages.'" and, (12/6/13) "Demand for Discovery—'**All evidence or information known or which may become known to the State of Ohio which may be favorable to the Defendant**.., including information or evidence which could be used to obtain evidence that would diminish the credibility of any State's witness.'") (Emphasis).

At trial, **No** Cell-Site-Location-Information ("CSLI"), **Aka,** (Cell) **Tower Location Information ("TLI")** from the day of the alleged crime was submitted as evidence. The State offered evidence by several witnesses that these alleged five rapes, etc. were to have occurred over four (4) hours. **The State subpoenaed partially requested information from Petitioner's work phone cellular records from Verizon Wireless,** (the alleged victim's cellular provider's records are unknown). No material—TLI/CSLI—evidence was proffered to the defense that: 1) could impeach the alleged victim and another state witness's testimony in relation to their time-locations of themselves or provide time-location information of this Petitioner; and therefore, 2) caused this Petitioner (on advice of counsel) to testify as to his whereabouts during the day's events of 11/1/13. **The trial record is void of TLI/CSLI for either phones/persons on 11/1/13.** As a result of trial by jury, Petitioner was convicted and subsequently sentenced to two counts of rape, two counts of abduction (merged to one), one count of felonious assault, along with a gun specification (three merged to one) totaling 36 years of imprisonment. Also specific to this case, Petitioner filed a post-conviction petition and an Appellate Rule ("App. R.") 26(B) petition, asserting that there had

to be some type of "location [information]," that could tell where Petitioner was at throughout the day of 11/1/13. The prosecution denied having any "location" information within their possession. (Erie County C.P.C.: 2013-CR-472, 9/23/15). The appellate court denied relief stating, "[Petitioner] fail[ed] to enumerate any actual evidence that the state had in its possession that it did not provide." (Erie County C.O.A. Case: E-14-100).

Petitioner then learned of "CSLI" from **Carpenter v. United States** (2018), 138 S. Ct. 2206. Petitioner filed a Civil Rule ("Civ. R.") 60(B)[1], asserting prosecutorial misconduct, "Fraud upon the Court." Petitioner, without success, attempted to obtain CSLI of both Petitioner and the alleged victim for 11/1/13, and all actual text messages between both the alleged victim and the Petitioner for a year leading up to 11/1/13 through several different processes: subpoenaing it through the court; filing motions to obtain this information from the court; contacting defense counsel; and, filing an emergency injunction to preserve any potential loss of this information from the cellular provider. After his attempts, Petitioner filed a "Motion to Renew," his Civ. R. 60(B)[1] and a "Motion for Leave to File a Motion to file for a New Trial," pursuant to Criminal Rule ("Crim. R.") 33(B)[1]. That case was denied by the trial court. Ohio Sixth District Court of Appeals affirmed the Erie County Common Pleas Court's Judgment on 12/9/22 on the basis of: "The state did not commit Brady violations; the trial court properly denied Jury's motion for relief from judgment; the trial court properly denied Jury's motion for leave to file for a new trial; and, Jury has not shown that the state violated his due process rights." The Ohio's Sixth District Court of Appeals affirmed the trial court's judgment denying Petitioner's Motion for Leave to file a Delayed Motion for a New Trial, (Crim. R. 33), and Civil Rule 60(B) motion (construed as a successive post-conviction petition). In that case, the court of appeals ruled that in order for the

[1] **State of Ohio v. Brian Jury**, 2013-CR-0472 (Erie County Common Pleas Court of Ohio)

state to suppress evidence under ***Brady***, it must have been in the possession of the state—not just evidence known, reasonably available to or was under the state's control, that which is favorable to the defendant. The court of appeals also ruled that as **Petitioner could no longer produce any actual evidence that CSLI or actual text messages existed or were in the possession of the State, he failed to show a *Brady* violation.** Moreover, they subjected petitioner's claims to erroneous, unfair, and unsubstantiated fact-finding. Without verification through an evidentiary hearing, the court of appeals had made unsubstantiated claims that: 1) CSLI was mere or varying degrees of speculation; and, 2) multiple cell-phone-related records were complete and received by defense counsel. **See State v. Jury**, 2022-Ohio-4419—¶ 13-15, 31, 33; ¶ 16, 21, fn. 3, respectively.

In the present case, Petitioner received a letter from Verizon Wireless dated January 24, 2023, (after the court of appeals decision) that expressed the "retention period of records." It explicitly stated: "***Tower location information is only maintained for the last 365 days.***" This clearly (implied or otherwise,) exposed that Cell **Tower Location Information** ("TLI" aka, Cell-Site-Location Information "CSLI") **was available for this Petitioner to use at and during his trial, 7 ½ months after the date of the alleged incident/arrest.** Upon this newly discovered evidence, this Petitioner filed a second/successive "Motion for Leave to File a New Trial Motion" pursuant to Crim. R. 33(B) (case sub judice). See Appendix D (Verizon Wireless Letter).

The trial court denied Petitioner's second Motion for Leave to File a Delayed Motion for New Trial, etc., citing "This Court finds that Defendant's Motions are not well-taken, and should be denied based on *Res Judicata*, as well *as the Law of the Case*." (12/15/23). **Appendix B.**

Petitioner raised three assignments of error to the Ohio's Sixth Appellate District Court (only one being forwarded to this Honorable Court): The trial court erred, abused its discretion, when it improperly applied res judicata / law of case (doctrine) without making the prerequisite

findings of (Petitioner) of being "unavoidably prevented" to (Petitioner's) motion for leave to file a delayed motion for a new trial pursuant to Crim. R. 33(B).

The Appellate Court erroneously applied a "blanket" doctrine(s) of res judicata / case of law to all of Petitioner's claims—more specifically, raising the metaphorical bar in comparison to his previously filed Crim. R. 33(B) (**State v. Jury**, 2022-Ohio-4419—see above.) In this case sub judice, **the court of appeals reiterated the fact that (based on the prosecution's statement) TLI /CSLI was not in the possession of the state nor required to have disclosed that TLI /CSLI was available for this Petitioner's defense prior to trial.** Furthermore, the state appellate court also stated: "All the letter proves is that Verizon does not have any of the CSLI data or text messages that Jury is seeking." **Appendix A, ¶ 7, 32** (respectively).

The court of appeals (and the trial court) had side-stepped the threshold requirement of whether Petitioner was unavoidably prevented from discovering evidence per **State v. Bethel** (2022), 167 Ohio St. 3d 362, when it clearly announced that Petitioner was "previously unaware of the evidence on which the petition relies and could not have discovered it by exercising reasonable diligence," per **State v. Johnson**, 173 Ohio St 3d, 592, 597 (¶ 18), circumventing the initial process of Criminal Rule 33(B). See **Appendix A, ¶ 8 ("Jury was clearly unaware of what CSLI was until June 2018")** (Emphasis); well after the 120-day time limit, by four years.)

Petitioner sought a discretionary appeal to the Ohio Supreme Court, which was also denied on November 26, 2024. **Appendix C.**

Petitioner now seeks a writ of certiorari from this Honorable Court on whether a ***Brady*** claim exists; moreover, whether this case be remanded to the Ohio's Sixth District Appellate Court for further consideration in light of **Youngblood v. West Virginia** 547 U.S. 867 and, a materiality analysis effect under **California v. Trombetta**, 467 U.S. 479, 485, et al.?

REASONS FOR GRANTING THE WRIT

The Ohio's Sixth District Appellate Court has put an intolerable / undue burden of limitations that distorts and violates the original ***Brady*** analysis and the purposes behind the prosecutorial obligations enunciated in ***Brady*** 373 U.S. @ 87 (see ***Kyles v. Whitely***, 514 U.S. 419, 437-; ***Strickler v. Greene***, 527 U.S. 263, syllabus, 280-282; ***Wearry v. Cain***, 577 U.S. @ fn. 8; etc.). This Court and most other state (supreme) courts have never explicitly stated that in order for "suppression" to have occurred, that it had to be in the "possession" of a state agent. "Suppression," within the meaning of a "***Brady***" violation, interpreted by this Honorable Court, has never been dependent upon "possession;" whereas, a prosecution's failure to disclose any information or knowledge of favorable, material evidence has been deemed to be constitutionally fundamental to the essence of a fair trial, hence Petitioner's case sub judice.

A. This Court should review the Ohio Sixth District Court of Appeals' authority on whether a "Brady" violation requires suppression to be dependent upon possession?

1. The Ohio Sixth District Court of Appeals has decided an important question of federal law that has not been, but should be, explicitly settled by this Honorable Court, or has decided an important federal question in a way that contravenes with the relevant decisions of this Honorable Court.

The Ohio Sixth District Court of Appeals has patently stated erroneously that, "the state cannot suppress records that it does not have—and that have never been in the possession of a state agent." **Appendix A, ¶ 7.** Petitioner asserts that the prosecution was put on notice for discovery, through defense counsel, with three (3) separate discovery requests prior to trial: See Ohio's Erie County Common Pleas Court: **State v. Jury**, 2013-CR-0472, (2/12/14) "Motion for Disclosure of Exculpatory and Impeachment Evidence— 'Specifically, the Defendant respectfully requests that this Honorable Court order the State of Ohio to **disclose any and all phone records**. . . ;'" (12/20/13) "Motion to Compel— '**Any and all cell phone records** of the victim, including any

and all text messages.'" and, (12/6/13) "Demand for Discovery—'**All evidence or information known or which may become known to the State of Ohio which may be favorable to the Defendant**.., including information or evidence which could be used to obtain evidence that would diminish the credibility of any State's witness.'" (Emphasis). Ie., Appendix D.

Pertinent to this case is the state's failure to disclose the actual evidence of Cell-Site-Location-Information ("CSLI") / (Cell) Tower Location Information ("TLI") for either phone of this Petitioner and the alleged victim for the day of the alleged incident (11-1-13), and/or failure to disclose the existence / knowledge of TLI/CSLI (which left the defense to believe that such evidence did not exist) so that the defense could retrieve such information to prepare / present a complete alibi defense at Petitioner's trial has prejudiced this Petitioner from having an effective counsel, a fair trial, and/or the ability to present a complete alibi defense. The prosecution has, erroneously, hidden behind the "possession" veil throughout Petitioner's attempts at his post-conviction claims, albeit, clearly knew of TLI/CSLI, and failed to disclose such before trial, etc.

The prosecution had subpoenaed partial cellular records from Defendant's work phone (T. Tr. 351). The prosecutor himself was fully-well aware of the existence of CSLI/TLI—using it to convict a previous criminal defendant (see **State v. Gipson**, Erie County C.P.C., 2008-CR-266; appeal denied, 2012-Ohio-515, ¶ **14** ("***The record shows that at trial [the prosecutor] presented extensive cell phone records that carefully tracked appellant's whereabouts throughout the night.***") (Emphasis)).[2]

A ***Brady*** violation would trump any res judicata bar relevant hereinto.

This Honorable Court has stated in **Kyles v. Whitley**, 514 U.S., 419, 437:

> "A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information

[2] Kevin Baxter was the same prosecutor for both Gibson and Petitioner's cases, making him clearly and knowingly aware of CSLI/TLI and its materiality.

> which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused." "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."

This Honorable Court has also stated in **Strickler v. Green**, 527 U.S. 263, 288:

> "'Moreover, under ***Brady*** an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.' ***Agurs***, 427 U.S. at 110."

This case is clearly similar to this Honorable Court's Decision in **Youngblood v. West Virginia** (2006), 547 U.S. 867; where, ***Youngblood*** filed a motion for new trial on the basis of prosecutorial misconduct where a note shown to, but ignored by, a law enforcement officer had squarely contradicted the prosecution's account of the incidents and directly supported the inmate's consensual-sex defense. The inmate argued that withholding the exculpatory evidence violated the inmate's constitutional rights. The inmate's petition for a writ of certiorari was granted, the judgment affirming the denial of a new trial was vacated, and the case was remanded for further consideration on the ***Brady*** issue that ***Youngblood*** clearly presented.

In short, the Ohio courts are fundamentally wrong. What use are discovery requests, if the state do not honor them? Besides the three separate requests filed by trial counsel prior to trial where the defense should have been entitled to assume that such evidence did not exist, then proffer, after trial, in motion for leave to file a new trial motion, A) A Verizon Wireless Letter exposing TLI/CSLI had existed for one year after the alleged date of the crime; B) TLI/CSLI would have been available at trial, 7 ½ months after Petitioner's arrest/alleged crime; and C) that the same prosecutor had used CSLI/TLI to convict a previous criminal defendant, these alone, should have triggered some concern as to warrant an evidentiary hearing to establish if TLI/CSLI had indeed existed for either phones and the (***Trombetta***) effects that TLI/CSLI would have had had TLI/CSLI

been disclosed to the defense because the actual evidence is no longer available to Petitioner. Had the evidence been disclosed to the defense, the result of the proceedings would have been different—where Petitioner surely would not have testified on his behalf, exposing him to questions beyond that of his whereabouts (TLI/CSLI would have obviated any such need), and where the evidence was material (providing timed-location information at any part of the day in question for this Petitioner and the alleged victim), impeaching the alleged victim's testimony from the beginning, while militating against Petitioner's guilt in the sense that the actual evidence of TLI by itself, would have undermined the confidence in the outcome of the trial. See **United States v. Bagley** (1985), 473 U.S. 667, 682, 678. Accordingly, this Court held, "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt" **Wearry v. Cain**, 577 U.S. 385, 393. In the instant case, this Petitioner was acquitted on three (3) of the five (5) counts of rape, attempted murder, and two (2) counts of kidnapping with various enhanced specifications—clearly showing that the jury's verdict was substantially "of questionable validity" from the original indictment. Petitioner asserts no criminal defendant should be penalized for the prosecution's blatant attempt to (continuously) deny TLI/CSLI evidence it clearly was well-aware of, or be denied effective counsel[3], a fair trial, or the ability to present a complete alibi defense because the state selected not to obtain or disclose evidence that would have exculpated him and believes that this issue could be resolved by the

[3] This Honorable Court has stated: "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed. As we observed in ***Strickler***, defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.' 527 U.S. 263 at 286-287, 144 L. Ed. 2d 286, 119 S. Ct. 1936." **Banks v. Dretke**, 540 U.S. 668.

similar manner/model held in **Youngblood v. West Virginia** 547 U.S. 867, shown above; or by granting certiorari to review this case de novo.

2. The Ohio Sixth District Court of Appeals decision is also contravening with the majority decisions of other state courts and its own precedent.

The Ohio Sixth District Court of Appeals has put an intolerable / undue burden of limitations that distort the original ***Brady*** analysis and the purposes behind the prosecutorial obligations enunciated in ***Brady*** (see ***Kyles v. Whitely***, 514 U.S. @ 438; ***Wearry v. Cain***, 577 U.S. @ fn. 8.)

The Ohio's Sixth District Appellate Court's Decision is lop-sided against the majority of other state cases that also align with this Honorable Court's ***Brady***-related precedents.

The West Virginia State Supreme Court vacated and remanded a similar case that first went before this Honorable Court: See **State v. Youngblood**, 221 W. Va. 20, 650 S.E.2d 119, 2007 W. Va. LEXIS 23 (W. Va., May 10, 2007). The West Virginia Supreme Court later stated:

> "In ***Youngblood***, the state failed to produce a note which provided impeachment evidence in response to a Rule 16 discovery request; during the investigation, a trooper had directed a witness to throw it away. 221W. Va. At 24, 650 S.E. 2d at 120. The Court found that despite police investigators failing to advise the prosecutor of the existence of the note, **the non-disclosure was imputed to the State and warranted a new trial.** *Id.* At 33-34, 650 S.E. 2d at 132-33." (Emphasis.)
>
> "[T]his Court has consistently held that where a failure to make disclosure hampers the preparation and presentation of the defendant's case, such nondisclosure is fatal to the prosecution's case. *See*, syl. pt. 2, ***State v. Grimm***, 165 W.Va. 547, 270 S.E.2d 173 (1980); syllabus, ***State v. Ellis***, 176 W.Va. 316, 342 S.E.2d 285 (1986). Our holding in ***Grimm*** recognized that *adequate preparation by the defense is a prerequisite to a fair trial. We cannot allow a failure by the prosecution, albeit unintentional, to prejudice the defendant's right to a fair trial. . .* .. In this case, the appellant was not advised of the evidence [well after the 120-day due diligence period after] trial. The evidence [would have] strongly rebutted [the state's time-line] argument, his key defense. It is quite probable that had defense counsel known of this statement, it would have tried the case differently."
> **State v. Costello** (2021), 245 W. Va. 19, S. Ct. of Appeals of West Virginia.

The Massachusetts Supreme Court has stated:

"The Commonwealth should have [provided evidence] once it had been put on actual notice by defense counsel of the request for specific favorable evidence. See, e.g., **United States v. Brooks**, 296 U.S. App. D.C. 219, 966 F.2d 1500, 1504 (D.C. Cir. 1992) ("Where . . . there is an explicit request for an apparently very easy examination, and a non-trivial prospect that the examination might yield material exculpatory information," **the prosecution has an obligation to search possible sources for such information**, including files of another agency). See also **Kyles v. Whitley**, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). Cf. **Commonwealth v. Donahue**, 396 Mass. 590, 596-599, 487 N.E.2d 1351 (1986) (**in some circumstances, prosecutor "should be required to seek access to material and exculpatory evidence" not in possession of prosecutor** or police). [Emphasis]. [] Because defense counsel is more likely to treat the prosecutor's failure to disclose specifically requested material as an implied representation that the evidence does not exist and make legal and strategic decisions accordingly, when the Commonwealth has not disclosed specifically requested favorable evidence, the defendant "need only demonstrate that a substantial basis exists for claiming prejudice from the nondisclosure." *Id.* at 412. [] We conclude that the judge should have granted the defendant's request for post-conviction discovery and that a hearing on his motion for a new trial may be warranted." (Emphasis.)
Commonwealth v. Daniels (2005), 445 Mass. 392, 403-405.

The Ohio Supreme Court has stated:

"In ***Brady v. Maryland***, the Supreme Court of the United States recognized that the prosecution has an affirmative duty to disclose evidence that is favorable to the accused and material to the accused's guilt or punishment. 373 U.S. 83, 87, (1963); *see also* ***Kyles v. Whitley***, 514 U.S. 419, 432 (1995). That "duty encompasses impeachment evidence as well as exculpatory evidence," ***Strickler v. Greene***, 527 U.S. 263, 280 (1999), and "it encompasses evidence 'known only to police investigators and not to the prosecutor,'" *id.* at 280-281, quoting ***Kyles*** at 438. "The ***Brady*** rule applies regardless of whether evidence is suppressed by the state willfully or inadvertently. ***Strickler*** at 282." "[I]t is irrelevant whether the prosecution's suppression of evidence that is favorable to a defendant was inadvertent, because the prosecution has 'a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case.' ***Kyles***, 514 U.S. at 437." "But as we recognized in ***Bethel***, 'criminal defendants have no duty to "scavenge for hints of undisclosed ***Brady*** material."' ***Id.*** **at ¶ 24**, quoting ***Banks v. Dretke***, 540 U.S. 668, 695." **State v. McNeal**, 2022-Ohio-2703, @ 19-.

"When the prosecution withholds material, exculpatory evidence in a criminal proceeding, it violates the due process right of the defendant under the Fourteenth Amendment to a fair trial. As the United States Supreme Court held in ***Brady v.***

> ***Maryland**, supra,* at 87, 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'"
>
> **State v. Johnston** (1988), 39 Ohio St. 3d 48.

See also, **State v. Joseph**, 73 Ohio St. 3d 450, 458 ("Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney.")

The Ohio Sixth District Court of Appeals that denied this Petitioner has stated:

> "[A]n accused has the right to be informed by the prosecutor of all potentially exculpatory evidence and to be informed before trial if the potentially exculpatory evidence existed but was not preserved." "The crux of the ***Brady*** ruling and its progeny is that ***an accused does not receive a fair trial when the accused is not given knowledge of potentially exculpatory material evidence*** or the opportunity to examine it and to present it at trial."
>
> **State v. Roughton** (6th App. Dist.),132 Ohio App. 3d 268, 302. (Emphasis)

Furthermore, Ohio **Crim. R. 16(B)** states:

> "the prosecuting attorney shall provide copies... for the defendant... **which are material to the preparation of a defense,** or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, ***or*** **reasonably available to the state,** subject to the provisions of this rule: **(5) Any evidence favorable to the defendant** and material to guilt or punishment" (emphasis).

The Ohio's Sixth District Court of Appeals has denied this Petitioner his Due Process Rights to equal protection of fair and impartial treatment when it: 1) essentially decided the merits of Petitioner's appeal (without first determining whether he was unavoidably prevented from discovering evidence—although claiming that Petitioner was clearly unaware of TLI/CSLI until 2018), 2) claimed that Petitioner failed to provide any actual evidence that TLI/CSLI existed, 3) denied Petitioner any relief after proving that evidence had actually existed, and, 4) required an unreasonable hurdle for an (indigent) petitioner to "first seek out" actual evidence. Discovery request(s) are useless, if the state does not honor them? Three separate requests were filed by trial

counsel prior to trial. This Petitioner (defense counsel) should be entitled to assume that such evidence did not exist. Then, after trial—Petitioner learned of CSLI through this Honorable Court's Decision in **Carpenter v. United States**, 585 U.S. 296, proffered in motion for leave to file a new trial motion: A) A Verizon Wireless Letter implicitly stating that TLI/CSLI existed for one year after the alleged date of the crime; B) TLI/CSLI would have been available at trial 7 ½ months after his arrest/alleged crime; and C) that the same prosecutor had used CSLI/TLI to convict a previous criminal defendant. These alone, should have triggered some concern as to warrant an evidentiary hearing to learn if TLI/CSLI had indeed existed for either phones and the (***Trombetta***) effects that TLI/CSLI would have had had it been disclosed to the defense.

Had the evidence been disclosed to the defense, the result of the proceedings would have been different—where the evidence was material. Petitioner surely would not have testified on his behalf (TLI/CSLI would have obviated any such need, providing timed-location information of this Petitioner and the alleged victim) impeaching the alleged victim's testimony from the beginning, while militating against Petitioner's criminal charges, because TLI/CSLI would have single-handedly undermined the confidence in the outcome of the trial. **United States v. Bagley** (1985), 473 U.S. 667, 682, 678. See Appendix D (Verizon wireless Letter).

The above cases are fundamentally rooted with the interpretation of ***Brady*** and its progeny. The Ohio Sixth District Court of Appeals decision of "suppression requires possession" does not comport / align with the above cases. Petitioner respectfully request that a writ of certiorari be granted and hold that a ***Brady*** violation had occurred; or in lieu, have the case remanded to the Ohio appellate court for further consideration on the ***Brady*** issue.

B. The Question Presented is of Great Constitutional Importance.

This case involves one (1) substantial constitutional question: Whether the Ohio's Sixth District Appellate Court put an intolerable / undue burden of limitations that distorted and violated the original ***Brady*** analysis and the purposes behind the prosecutorial obligations enunciated in ***Brady*** (see ***Kyles v. Whitely***, 514 U.S., 419, 437-; , ***Strickler v. Greene***, 527 U.S. 263, syllabus, 280-282; ***Wearry v. Cain***, 577 U.S. @ fn. 8; etc.), when it erroneously required this Petitioner to show that the state had possession of TLI/CSLI in order for it to be suppressed within the meaning of a ***Brady*** violation; plus, provide the actual physical evidence of TLI/CSLI without a proper review analysis of materiality—a "***Trombetta***" effect where a letter from Verizon wireless warranted such? *See Appendix D.*

The Ohio's Sixth District Court of Appeals, where the validity of its decision in Petitioner's case draws into question on the ground of it being repugnant to the Constitution. It threatens the structure of ***Brady***, its progenies ***Kyles***, ***Wearry***, ***Strickler***, and ***Trombetta*** etc.; and, Ohio's Criminal Rule 16. By its ruling, the court of appeals, undermines this Honorable Court's intentions, along with Ohio's governances, to provide a fair trial to criminal defendants; it ignores the plain meaning of ***Kyles*** / Ohio's Crim. R. 16(B) , while attempting to create its own illogical, untenable rule to permit a state prosecution to selectively ignore (non) specified defense requested material evidence that was known, reasonably available to the state, and utilized in a previous criminal defendant's conviction and/or was in full control of (defined as possession) reasonably available subpoenaed evidence from within this case (by which the state chose not to retrieve all cellular information—i.e., TLI/CSLI for either phones).

The implications of the decision by the court of appeals also affect criminal defendants who realize ***Brady*** violations by penalizing them simply because the evidence they seek no longer exists without due process of the law; while allowing the prosecution to hide behind the

"possession" veil. Other implications remove trial fairness to be required of the prosecution by eradicating its accountability to investigate and by not requiring the prosecution to seek justice. Without intervention by this Honorable Court, lower courts will/would sabotage the fundamental fairness that the Sixth and Fourteenth Amendments of the United States Constitution guarantee—the due process right to a fair trial, effective counsel, and the right to present a complete alibi defense. Res judicata would be inapplicable if a ***Brady*** violation occurred.

The Ohio court of appeals decision sets a precedent that challenges ***Brady***, its progenies, and Criminal Rule 16. Allowing this precedent would be disastrous. Due process requires criminal defendants be afforded a meaningful opportunity to present a complete defense; it would be an empty one, if the state were permitted to exclude requested, competent, 'reasonably available,' 'known to the prosecution,' reliable, indisputable, material evidence when such evidence is critical to the defendant's criminal processes—location and time were materially specific and essential to this Petitioner's alibi / consensual sex defense.

The conclusion of the court of appeals ruling is contrary both to Ohio Crim. R. 16 and to all legal authority. The court of appeals has decided an important federal constitutional question that has not been, but should be, well-settled by this Honorable Court. There has been no case before this Court where a ***Brady*** suppression violation required constant/unending possession or control of evidence by the state. The ***Kyles*** Court only required material evidence to be "known" to the prosecution. Ohio's Crim. R. 16 in relevant part, states: the prosecutor is to disclose any evidence within the possession of **or** reasonably available to the state, favorable to the defendant. While this case is greatly similar to that of **Youngblood v. West Virginia** (2006), 547 U.S. 867, where petition for a writ of certiorari was granted, the judgment affirming the denial of a new trial was vacated, and the case was remanded for further consideration on the ***Brady*** issue; this

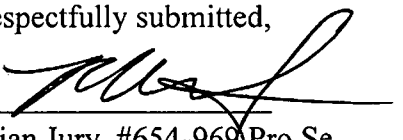
Honorable Court apparently (according the Ohio Sixth Appellate Court's Judgement) did not squarely address the "possession" rule—there is clearly a dissonance among state courts.

Petitioner respectfully requests a writ of certiorari and that this Court hold ***Brady*** does not require possession for suppression to occur.

CONCLUSION

For all of the foregoing reasons, this Petitioner's case is extraordinary and is of great importance. This Court's review is not only warranted "where the validity of a [ruling of Ohio] is drawn in question on the ground of its being repugnant to the Constitution," as herein, to resolve the dissonance amongst lower state courts' views of ***Brady***—if "suppression requires possession," and secondarily resolve the conflicts of undue burdens that bar convicted criminal defendant's to provide evidence that warrants a new trial—regardless of the statutory provisions (vehicle) involved; but also, to maintain the public's confidence that lower courts will afford the constitutional guarantees of a fair trial, effective assistance of counsel, and the ability for the criminal defendant to provide a complete defense—not compelled to be a witness against themselves. This Court should grant this petition for writ of certiorari and remand this "***Brady***" claim for further review to the Ohio Sixth District Court of Appeals in light of **Youngblood v. West Virginia** (2006), 547 U.S. 867; and, **California v. Trombetta**, 467 U.S. 479, 485, et al; or, review this case on the "possession" and any other issues.

Respectfully submitted,



Brian Jury, #654-969 Pro Se
Belmont Corr. Inst.
P.O. Box 540
St. Clairsville, OH 43950