No. ___

In The Supreme Court of the United States

KEVIN KEITH,
Petitioner,
v.
STATE OF OHIO,
Respondent.

On Petition For Writ of Certiorari to the
Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

G. Michele Yezzo was an agent of the State, employed by Ohio's Bureau of Criminal Investigations ("BCI"), which was identified by the prosecution as one of the three agencies involved in the investigation of Kevin Keith. BCI had documented that it was a "consensus" among BCI analysts that analyst Yezzo's "findings and conclusions regarding evidence may be suspect. She will stretch the truth to satisfy a department." It was noted in Yezzo's personnel file that she had the "reputation of giving dept. answer [it] wants if [they] stroke her."

This information, as well as evidence of Yezzo's racial bias, was documented before Yezzo testified against Keith. Keith did not learn of it until 22 years after he'd been convicted and sentenced to death, when a news article highlighted some of the details in Yezzo's personnel file.

The state courts denied Keith even the ability to file a motion on the merits about this violation of *Brady v. Maryland*, 373 U.S. 83 (1963). They faulted Keith for failing to uncover earlier the evidence that the State should have willingly provided him at the time of his trial in 1994. Accordingly, Keith raises the following question to the Court:

> **Question #1: When the State conceals evidence from the defendant, is it inconsistent with due process to condition the consideration of a *Brady* claim on the defendant's ability to first prove he looked hard enough to find what the State concealed?**

The state courts struck Keith's Motion for New Trial and resolved his case by denying his Motion for Leave to File a Delayed Motion for New Trial. Despite denying

Keith the ability to fully brief this *Brady* issue on the merits, the state court of appeals determined that the Yezzo evidence was immaterial. In making its determination, it failed to consider all of the suppressed evidence Keith had gathered and presented to the courts via *Brady* claims over the years—in 2004, 2007, 2010, and 2016—collectively. Thus, Keith raises the following question to the Court:

> **Question #2: When a defendant uncovers favorable evidence that had been suppressed by the State, should the court's materiality analysis include all pieces of suppressed evidence, despite that the pieces were uncovered at separate times and raised in separate proceedings?**

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PETITION FOR A WRIT OF CERTIORARI

Kevin Keith respectfully petitions for a writ of certiorari to review the judgment of the Ohio Court of Appeals.

OPINIONS BELOW

The opinion of the state court of appeals is reported at *State v. Keith*, 2017-Ohio-5488 (3rd Dist. 2017)) and is reproduced in the Appendix at A-1. The opinion of the trial court is reproduced in the Appendix at ___. The decision of the Supreme Court of Ohio is reported at *State v. Keith*, 2017-Ohio-8842, 2017 Ohio LEXIS 2443 (2017) and is reproduced in the Appendix at ___.

JURISDICTION

The Supreme Court of Ohio declined jurisdiction on December 6, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendments to the United States Constitution:

> Fourteenth Amendment, which provides:
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Yezzo provided the key forensic connection.

BCI analyst Michele Yezzo provided testimony in Kevin Keith's 1994 capital trial linking Keith's girlfriend's grandfather's car to the crime scene, and that was the forensic evidence used to establish his guilt. She gave her forensic opinion—after looking at a Triumph 2000 tire brochure picture sent to her by the lead detective—that "the portion of the [tire] tread design present and sufficiently registered for the examination is **the same** as the tire, Triumph 2000." Depo, p. 24. The note from the detective to Yezzo that had accompanied the Triumph 2000 brochure read that he "hope[d] this will do the trick for us." Ex. 16, p. 6, to Motion for Leave to File Delayed Motion for New Trial Based on Newly Discovered Evidence (hereinafter "MFL").

The Ohio courts relied on Yezzo's testimony to uphold Keith's conviction and death sentence: "Although the cast taken of the tire tread at the crime scene did not match tires found on the Oldsmobile Omega one month later, the cast did match the tread of the tires purchased by Alton Davison as shown on the tire's sales brochures." *State v. Keith*, 79 Ohio St. 3d 514, 517 (1997).

Yezzo's opinion also included that the license plate impression in the snow was a "043" and it had "spacing and orientation similar to the license plate 'MVR043' on the vehicle submitted as [Kevin's girlfriend's grandfather's car]." Ex. 8. When defense counsel cross-examined the police about another vehicle in the area that fit the description and belonged to a convicted murderer, the officers used Yezzo's conclusions to refute it. They'd rejected the other car as a possibility because of

Yezzo's conclusion about the "spacing and orientation" of the numbers in the plate. *See* Tr. 745, 822.

Keith did not learn of critical impeaching evidence regarding Yezzo until 2016 when his counsel saw a Cleveland Plain Dealer article about her. That article referenced a new-trial motion filed by James Parsons, and counsel for Keith obtained Yezzo's personnel files from Parsons' counsel.

Yezzo's personnel files demonstrate that her forensic conclusions were contemporaneously questioned by her superiors and peers and that she had a reputation for untruthfulness. Five years before the State used Yezzo's evidence to convict Keith, for example, a BCI memorandum documented the "consensus" that Yezzo's "findings and conclusions regarding evidence may be suspect. She will stretch the truth to satisfy a department." Ex. 1, p. 2. *See also id.* at 3 ("The feelings and attitudes [about Yezzo] are shared by all of the labs, not merely London.") And a year before Yezzo's testimony in Keith's case, during an investigation of Yezzo for "threatening co-workers and failure of good behavior," it was noted in her file that Yezzo had the "reputation of giving dept. answer[s]" and that other analysts questioned her conclusions. MFL, Ex. 2, p. 12.

Other documents indicate that Yezzo did not respond well to "peer review." Ex. 13. She was abusive to her co-workers, attempting to physically assault at least two of them. MFL, Ex. 14, p. 2, 3. She used racial slurs ("nigger bitch," "nigger in a woodpile") when addressing an African-American co-worker. *Id.* at 5, 7. By 1989, it

was the "consensus of opinion" that she "suffers a severe mental imbalance and needs immediate assistance." *Id.* at 8.

In 1993, less than a year before she testified against Keith, she was placed on Administrative Leave. MFL, Ex. 12, p. 2. A hearing to determine the extent of her suspension was set for May 26, 1994. Ex. 15. Nevertheless, on May 12, 1994—just two weeks before the hearing—Yezzo provided critical testimony against Keith without the State revealing anything to Keith about Yezzo's suspension or reputation for bias. The jury convicted him and sentenced him to death.

On September 2, 2010, Governor Ted Strickland commuted Kevin Keith's death sentence to a life sentence, citing doubts about Keith's guilt as his reasoning for the commutation. Six years later—almost 22 years after his conviction—counsel learned of and obtained the records concerning Yezzo.

Counsel for Keith then met with Lee Fisher, the Ohio Attorney General at the time of Keith's trial and who, by law, was the "chief legal officer and chief law enforcement for the state of Ohio." Ex. 3. Keith learned that Fisher had not known about Yezzo's troubling reputation, and that he "would not have permitted Ms. Yezzo to provide testimony against Kevin Keith" had he been aware of this information. *Id.* Fisher recognized the duty of the State to "disclose this information, because it severely impacts Ms. Yezzo's credibility." *Id.* Fisher also said he would have "ordered the submitted evidence to be reanalyzed by a separate analyst." *Id.*

Had a separate analyst conducted the analysis—without bias—the evidence would not have implicated Keith. William Bodziak is a retired FBI Special Agent and

an expert witness throughout the country (usually on behalf of the government) concerning footwear and tire tread impressions. He is described by prosecutors as an "internationally renowned" and a "world class" expert in impression evidence. *State v. Jones*, 681 S.E.2d 580, 583 (S.C. 2009); *see also Frankenfield v. State*, 2008 Tex. App. LEXIS 7920, at *34 (Oct. 16, 2008). He even trains BCI analysts. Ex. 20. And, after reviewing the same evidence that Yezzo reviewed, Bodziak determined Yezzo was wrong.

Bodziak concluded that the bumper of the car belonging to Keith's girlfriend's grandfather was *not consistent* with the car bumper impressions left in the snow bank at the crime scene. MFL, Ex. 4, p. 2. He also concluded that "based on the limited detail, a distinction could not be made between a license plate that reads 'MVR043' versus others that have '04' somewhere on the plate," refuting Yezzo's testimony regarding the spacing and orientation of the plate. *Id*. at 4. He also disagreed with Yezzo's conclusions about the tires. Yezzo had explained her conclusion of "similar in tread design" in a way that implied the tire track impression she examined was indeed a *match* with the tire tread from the brochure. Dep. Tr. 14, 24-25; *see also id*. at 25 ("[I]t's similarity is it would have originated from the Triumph 2000."). But Bodziak explained that "the forensic use of the word similar has no further meaning than it would for a layman in that it can only attest to a visual likeness of sorts." MFL, Ex. 4, p. 6. Contrary to Yezzo, Bodziak determined that "it is not possible to conclude whether the license tag and tire impressions represent one simultaneous event or two unrelated and independent events." *Id.* at 6.

Yezzo's substantial impact on Keith's case – forensic testimony to bolster a weak case.

The police initially suspected Keith because the victims' family member, Rudel Chatman, was the informant for a cocaine drug raid that had occurred a couple weeks before, and Keith had been one of the eight people arrested.[1] Also, five witnesses told the police they had seen a "large black man"—described as about 6'1", 350 lbs.—in the area around the time of the crime. Keith was 6', 300 lbs, and one of the few black men in the small city of Bucyrus.

Weeks after Keith's arrest, however, the police had discovered that the "large black man" described by those five witnesses was *not* Keith. *See* Tr. 752-53. Captain Corwin acknowledged at trial that the police ultimately "determined it was Karie Walker," not Keith, who the witnesses had seen. *Id.* The area residents had simply reported this "large black male" sighting because they'd never seen him around before. Walker was new to the complex.

It was too late, though, because the police had acted quickly in arresting Keith less than 48 hours after the shootings.

The police chief conducted a press conference after the arrest, and he referenced carpet fibers, shoe prints, and shoes that had been collected as evidence and submitted to BCI. The chief explained: "What we have is some evidence that we have collected that we *hope* we will be able to link him to the crimes." MFL, Ex. 6, Clip 2.

[1] Keith was charged with selling what equaled to less than 3 grams of crack cocaine.

None of that evidence implicated Keith. Tr. 481, 489-90; Yezzo deposition, p. 19-21, 26. Linking Keith by the getaway car was crucial.

Keith had an alibi that was supported by several people, including at least one uninterested party. Judith Rogers, the neighbor of Keith's girlfriend Melanie Davison, happened to notice Keith and Davison leaving Davison's apartment in Mansfield at about 8:45 p.m. that evening. Tr. 691. Rogers was clear about the timing, because she recalled the television show she was watching and knew it came on at 8:30 p.m. *Id.*

Around 9:00 p.m., Keith and Davison arrived in Crestline at the home of Keith's aunt, Grace Keith. Grace testified to seeing Keith at her house around 9:00. Tr. 685. Another person at Grace's house at that time, Yolanda Price, confirms Keith was there. MFL, Ex. 7; *see* Tr. 684. Price also saw Davison waiting outside in the car. *Id.* That meant that Keith was accounted for before, during, and after the shootings, which occurred at 8:45 p.m.

Two days after Keith's arrest, the seven-year-old surviving victim, Quanita Reeves, told her nurse that the person who shot them was "Bruce," who was "Daddy's friend." Tr. 735. Quanita then reiterated to detectives that "Daddy's friend Bruce" shot them. Tr. 715. The detectives showed her the photo lineup containing Keith's picture, and she was clear that "none" of the pictures were of the man who shot them. She was also clear that Keith was not the man she knew was named Bruce. *Id.* at 721. Still, Quanita's mother Joyce testified at trial that Quanita called Keith and "other people" by the name Bruce. Tr. 805-6.

Nancy Smathers told police the night of the shooting that she saw the person who was probably the shooter get into "a white, cream, light yellow" car. Tr. 389. Keith's girlfriend's grandfather's car was described by BCI as gray (Tr. 509) or green (Tr. 448, 449); *see also* MFL, Ex. 4 (color photo of Davison's car).) The police never showed Smathers a photograph of the car to see if it was the same car she saw that night. *See* Tr. 379-402.

Smathers could not identify the driver the first two times the police interviewed her. Tr. 385, 390-91. The third time, though—over a month later and after seeing Keith's picture on the news as the man arrested for the murders—she told the police that she was 90% sure that was the man she saw driving the car. *Id.* at 391-92. Smathers then identified Keith in court as the driver.

Surviving victim Richard Warren escaped from the crime scene to a nearby restaurant where he told no less than four different witnesses—including a police officer—that he did not know who shot him. *See* Tr. 240, 305, 620, 623. Very shortly after Warren came out of surgery, the police gave him four or five "Kevin" names from which to choose. Tr. 353. Despite having initially told four witnesses that he did not know who shot him, Warren ultimately recalled that his shooter's name was "Kevin." It is unclear when or how he recalled the name—and it is unclear whether the police prompted him that the shooter's name could be "Kevin." *See* Tr. 372 (Defense Counsel: So you don't recall whether you mentioned the name to them or they mentioned it to you; do you?" Warren: "No, sir, I do not."). Warren identified Keith in court.

Fernelle Graham testified at trial that a spent bullet casing was found outside her home. Because Graham lived in the house across from the General Electric plant, where Keith picked up his girlfriend Zina Scott on the night of the murders, the State used this casing to link Keith to the crime. Graham testified that it was "a quarter to ten" when she looked out of her window and saw the fast food trash on her sidewalk. Tr. 430. The next morning, she picked up the trash and found the bullet casing. *Id.* at 428. Scott testified that Keith picked her up at the GE plant 11 p.m. that night. *Id.* at 410. There was no explanation as to how the casing was linked to Keith if the trash and casing were outside Graham's house at 9:45, yet Keith was not in the area until 11 p.m.

As Robert Stetzer, a BCI Senior Special Agent, testified, there were no fingerprints, fibers, or blood evidence that linked Keith to this case. Tr. 490. The State used Yezzo's testimony to bolster its shaky eyewitness testimony, asserting in closing that neither Warren nor Smathers had "the motive or opportunity to fabricate. Their statements are corroborated by each other and by other witnesses. *There is no way they can be lying because their statements are backed by the facts as we have seen from other sources*." *Id.* at 841 (emphasis added).

The tire and license plate imprints in the snow were the key forensic evidence that allegedly linked Keith to this crime—and Yezzo is the witness who provided that for the State.

This is <u>the fourth time</u> that Keith has discovered favorable evidence that the State suppressed.

Keith uncovered suppressed favorable evidence in 2004, then in 2007, then in 2010, and then most recently in 2016, when he learned about Yezzo. Had Keith discovered the suppressed evidence all at the same time, he would have presented it in one filing. But although Keith cannot control the timing with which he uncovers what the State has hidden from him, he acted with due diligence upon discovering each item and filed his *Brady* claims immediately upon discovering them.

Destroyed and suppressed evidence discovered in 2010:

Keith has always questioned how surviving victim Warren went from not knowing who the shooter was, describing his shooter as an unknown man wearing a mask, to the next day recalling the shooter's name was "Kevin" and picking Keith's photo out of a lineup. After Warren came out of surgery, the police called him and gave him four or five "Kevins" from which to choose, and Keith has maintained this was extremely suggestive. Tr. 353. The State countered by presenting the testimony of Warren's nurse, John Foor, who testified that Warren wrote the name "Kevin" down immediately upon coming out of surgery. Foor testified that this occurred at five a.m. the day after Warren was shot, and Foor stated that he called the police immediately to tell them. But, Foor testified, those handwritten notes were thrown away.

Warren denied that he wrote the name down; his hands were strapped down when he came out of surgery. And Warren admitted on cross-examination that he did not know whether he or the police first mentioned the name "Kevin" as the

person who was the shooter. See Tr. 372 (Defense Counsel: "So you don't recall whether you mentioned the name to them or they mentioned it to you; do you?" Warren: "No, sir, I do not."). Moreover, the hospital security guard report reflected Warren's description of the shooter as, "The perpetrator *whos* [sic] *name is still unknown* is still at large. The *only description* of the perpetrator is that it is a black male approximately 6'3" in hiegth [sic] and about 260 lbs." Ex. 5 (emphasis added). This was created at 1:00 p.m., eight hours after Foor's purported interaction with Warren. Therefore, Keith wanted the police station's phone records to determine whether nurse John Foor was telling the truth about his call to the station at 5 a.m.

Keith submitted public records requests in 2007 to obtain evidence of phone calls between the police and Foor, but the Bucyrus Police Department told him that the call logs did not exist and that any recordings were destroyed. An unrelated lawsuit produced radio dispatch logs that included all entries from the day of the Bucyrus Estates shootings. In 2010, Keith received these logs and discovered that they showed no call from Warren's nurses to the police. He attempted to challenge his conviction based in part on *Arizona v. Youngblood*, 488 U.S. 51 (1988), as the calls were destroyed. His attempts failed, because he was unable to establish that the police acted in bad faith.

The logs showed no call from Nurse John Foor—not at 5 a.m. or any other time. The logs also indicated that a bullet casing, purportedly found near where Keith was known to have been, was actually found elsewhere. The log reads: "1221 S. Walnut.

Woman found casing. Thinks she may have picked it up in the McDonald's area." Exh. 8, p. 3. The McDonald's area was over a mile away from Keith's location.

Suppressed evidence discovered in 2007:

Thirteen years after Kevin Keith was convicted and sentenced to death, he discovered that a convicted murderer, Rodney Melton, had told an informant of his own plans to carry out the shootings in this case. In 2007, Keith uncovered documents from an investigation spearheaded by the Ohio Pharmacy Board. In these documents, Keith learned that Rodney Melton not only had motive to injure the victims of the Bucyrus Estates shootings, but Melton also told a confidential informant two weeks before the Bucyrus Estates shootings that he had been paid to "cripple" Rudel Chatman, whose actions as a police informant were the motive behind the shootings. *See* tr. 830. The Melton brothers also had "spread the word that anybody that snitches on them would be killed."

There were several other documents in the Pharmacy Board files that implicated Rodney Melton. It was Rodney's habit to wear a mask that covers his mouth because he has a gap between his front teeth. Exh. 2, pp. 7, 8. Significantly, Quanita Reeves and Richard Warren both recalled that the man who shot them wore a mask that covered his mouth. T.p. at 348, 716. Also, after Keith was arrested for the Bucyrus Estates murders, Melton's accomplice in the pharmacy burglary ring told the police that Melton was paid to kill Chatman.

Suppressed evidence discovered in 2004:

In April 2004, a public records request led Keith to the handwritten notes that, according to the sworn testimony of Nurse John Foor, had supposedly been destroyed years ago. The notes were from Warren's hospital stay, and the name "Kevin" was written down on the paper in a handwriting different than the other handwritten notes that are clearly attributable to Warren. Although Warren's handwriting was nearly illegible, included misspelled words, and the words he wrote were haphazardly strewn across the pages, "Kevin" was written clearly – and was written in what appears to be the same handwriting as the words "Captain Stanley" and "Bucyrus Police."

In other words, Warren admitted on cross-examination that he did not know whether he or the police first mentioned the name "Kevin" as the person who was the shooter. See Tr. 372 (Defense Counsel: "So you don't recall whether you mentioned the name to them or they mentioned it to you; do you?" Warren: "No, sir, I do not."). The name "Kevin" was on a written piece of paper in front of Warren, in the handwriting of someone other than Warren, before Warren was even extubated from surgery. This is more evidence of extreme suggestion by police.

The state courts refused to permit Keith to file a Motion for New Trial, finding that he did not demonstrate diligence in obtaining the information about the State's witness.

On October 28, 2016, Keith filed the Motion for Leave to File a Delayed Motion for New Trial, Motion for New Trial, and Successor Post-Conviction Petition at issue here. The trial court held that the Motion for New Trial was filed in error. 10/31/16

Entry. It then denied Keith's Motion for Leave to File Delayed Motion for New Trial on January 13, 2017, because "the defendant failed to meet [the] standard" that "the information contained in Yezzo's personnel file was unavailable to the defendant with the exercise of reasonable diligence."

The state court of appeals agreed, finding that Keith filed to use public records law to obtain the information. It found no error in the trial court's refusal to permit Keith to file his motion on the merits, and then it then determined that the evidence would not have mattered anyway.

Keith appealed to the Supreme Court of Ohio, requesting it grant jurisdiction and hear his case. Two former Ohio Attorneys General filed a Memorandum of Amicus Curiae in support of Keith's request. Seventeen memory and eyewitness identification experts also filed as amici curiae in support of Kevin Keith. But the Supreme Court declined jurisdiction without comment.

REASONS FOR GRANTING THE WRIT

I. There is no consensus among the state and federal courts regarding whether there is a "due diligence" requirement in the *Brady* context, and if so, what that is.

The Ohio courts denied Keith's Motion for Leave to File a New Trial Motion, because they determined he did not act with reasonable diligence in learning of and obtaining the impeaching information about BCI analyst Yezzo at the time of his trial. But is such a diligence requirement, when the evidence was suppressed by the State, consistent with due process? And if so, how much diligence is required?

Some courts have considered the issue of the defense's diligence already answered by *Banks v. Dretke*, 540 U.S. 668, 695-96 (2004) ("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;" and "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). If that is, in fact, the case, then this Court should summarily reverse the state court judgment. This Court "has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing, *e.g., Mullenix* v. *Luna*, 136 S. Ct. 305 (2015) (*per curiam*); *Stanton* v. *Sims*, 571 U.S. ___, 134 S. Ct. 3 (2013) (*per curiam*); *Parker* v. *Matthews*, 567 U.S. 37 (2012) (*per curiam*); *Coleman* v. *Johnson*, 566 U.S. 650 (2012) (*per curiam*); *Wetzel* v. *Lambert*, 565 U.S. 520 (2012) (*per curiam*); *Ryburn* v. *Huff*, 565 U.S. 469 (2012) (*per curiam*); *Sears* v. *Upton*, 561 U.S. 945 (2010) (*per curiam*); *Porter* v. *McCollum*, 558 U.S. 30 (2009) (*per curiam*)).

Because it is unclear whether *Banks* controls, it is not just the Ohio courts that treat the diligence question in the *Brady* context as unresolved. *See, e.g., Biles v. United States*, 101 A.3d 1012, 1023 n.10 (D.C. 2014) ("[T]he question whether the 'due diligence' doctrine is consistent with *Brady* and its progeny is an unresolved and complicated one."). This Court's guidance is necessary, and Keith's case is the perfect vehicle for determining whether there is a diligence requirement for the defense with *Brady* claims, and if so, just how much diligence is "due."

A. Varying positions of courts

The United States Courts of Appeals for the Tenth Circuit and for the D.C. Circuit reject the burden-shifting that occurs with a due diligence requirement. As the Tenth Circuit stated in *Banks v. Reynolds,* 54 F.3d 1508 (10th Cir. 1995), "the fact that defense counsel 'knew or should have known' about the Dean/Hicks information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was 'exculpatory.'" *Id.* at 1517. Similarly, in *In re Sealed Case*, 185 F.3d 887 (1999) the D.C. Circuit rejected the government's argument that there was no *Brady* violation because that information was otherwise available through "reasonable pre-trial preparation by the defense." *Id.* at 896.

Other Circuits, such as the Fifth and Sixth Circuit Courts of Appeal, have looked to whether the evidence at issue was equally accessible to the defendant as it was to the State. *See, e.g., United States v. Infante,* 404 F.3d 376, 387 (5th Cir. 2005); *Bell v. Bell*, 512 F.3d 223, 235 (6th Cir. 2008). Essentially, if the defendant had been given an idea that there was more to be discovered, then it was the defendant's fault for failing to further inquire.

The Connecticut Superior court has excused lack of diligence on the part of defense counsel when it is a *Brady* violation. *See Provost v. Comm'r of Corr.*, No. CV000802785S, 2003 Conn. Super. LEXIS 3402, at *76 (Super. Ct. Dec. 8, 2003) ("This Court is well aware that Attorney Thompson failed in his duty of due diligence. However, the *Brady* violations should supersede the lack of due diligence on this

issue."). The Supreme Court of Florida has stated that "[t]he defendant's duty to exercise due diligence in reviewing *Brady* material applies only after the State discloses it." *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003).

And then there are courts like Washington: "[e]vidence that could have been discovered but for lack of due diligence is not a *Brady* violation." *State v. Mullen*, 171 Wash. 2d 881, 896, 259 P.3d 158, 166 (2011). And Florida: "Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the ***Brady*** test, it continues to follow that a ***Brady****Error! Bookmark not defined.* claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant." *Occhicone v. State*, 768 So. 2d 1037, 1042 (Fla. 2000).

It is Keith's position that, when it is the State's suppression of evidence that prevents a defendant from timely filing his constitutional challenge, the State should lose the ability to object regarding the timeliness of the defendant's discovery. It is nonsensical to punish a defendant for taking too long to find what it is that the State hid. As described in *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 158, "Through its burden-shifting framework, the due diligence rule incentivizes prosecutors to delay disclosure of, or even purposely withhold, exculpatory evidence."

That is inconsistent with due process.

B. Under any standard, Keith has met his obligations.

The Ohio courts determined that Keith did not act with reasonable diligence, because he could have obtained Yezzo's personnel file through a request for public records pertaining to Yezzo. In essence, they employed the "equally accessible to the defendant" rule that is used in the Fifth and Sixth Circuit Courts of Appeals. But even under this line of cases, the suppressed evidence was never equally accessible to Keith.

Ohio public records law—at all times relevant to Keith—prohibited defendants from obtaining documents through public records for use in their cases. In 1994, the year of Keith's trial, a defendant had to first exhaust his direct appeals before he could use the Public Records Act to obtain information. *State ex re. Clark v. Toledo*, 54 Ohio St. 3d 55, 57 (1990). Ohio Criminal Rule 16 was more restrictive than it is today, and defendants were not entitled to open file discovery. *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 428 (1994). By the time Keith exhausted his direct appeals, *Steckman* prohibited a defendant from using public records to challenge his conviction even after exhausting direct appeals. *Id*. at 432. Before 2016, it was only through "an act of bureaucratic grace" or through "a bureaucratic mistake" that a defendant obtained such records. *State ex rel. Caster v. City of Columbus*, 89 N.E.3d 598, 609 (2016).

Yezzo's personnel file was undiscoverable to them through public records. Keith learned of the contents of Yezzo's personnel file not because the State disclosed

it, but by happenstance when his lawyer read about Yezzo in the newspaper 22 years after his trial. Ex. 41, p. 3. Keith acted with more than reasonable diligence in obtaining the evidence upon discovery, and filing it with the Ohio courts.

II. When a defendant uncovers the State's suppressed evidence piece-by-piece and raises it in back-to-back filings, the materiality analysis should encompass the suppressed evidence at issue in all previous proceedings.

Over the years, Keith has uncovered several items of evidence favorable to him that had been suppressed by the State. He has, with due diligence, filed *Brady* claims immediately upon discovering the suppressed favorable evidence, but those discoveries and the filings on which they are based occurred years apart. No court, however, has conducted a materiality review of Keith's *Brady* claims considering all of the suppressed evidence—from 2004, 2007, 2010, and 2016—collectively.

The trial court did not engage in an analysis of the suppressed evidence, other than to simply conclude that it "rejects the defendant's contention that failing to provide Yezzo's personnel file to the defendant constitutes a *Brady* violation." Appendix, A-11. The state court of appeals, however, denied Keith's current *Brady* claim in part by finding it was immaterial, but it never even referenced the 2004, 2007, or 2010 suppressed evidence. *See id.* at A-14 to A-40.

None of the 2004, 2007, or 2010 suppressed evidence **has ever been refuted**. In fact, it led to Governor Strickland's commutation of Keith's death sentence, due to doubts of his guilt. All of the suppressed evidence should be considered collectively, not item by item. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Only then can a

court determine if the "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

A. This Court's mandate in *Kyles v. Whitley*—to consider suppressed evidence collectively and not item-by-item—makes no distinction between newly discovered suppressed evidence and suppressed evidence previously considered by a court.

As this Court has mandated, to determine materiality, "suppressed evidence [must be] considered collectively, not item by item." *Kyles,* 514 U.S. at 436. Keith's case "involves additional *Brady* violations that were not considered by [any] court" in previous filings. *Schledwitz v. United States,* 169 F.3d 1003, 1012 (6th Cir. 1999). All of the *Brady* claims he has raised should be evaluated together, not item by item. Keith has no control over when he finds the evidence hidden by the State.

Several courts have acknowledged this logical extension of *Kyles* and have conducted their *Brady* materiality inquiry by considering the previously-filed suppressed evidence in conjunction with the newly discovered suppressed evidence. Most have interpreted *Kyles* as requiring such an analysis, but at least one court's analysis pre-dates *Kyles*.

In *Schledwitz v. United States*, the Sixth Circuit addressed whether the determination on the first *Brady* claim had a preclusive effect on a second *Brady* claim encompassing both newly uncovered evidence and the evidence submitted in support of the first petition. 169 F.3d at 1012. The Sixth Circuit concluded that *Brady* was an exception to the res judicata doctrine. *Id.* The court reached that conclusion because it was the only way to satisfy the mandate of *Kyles* to consider all the *Brady* evidence in the aggregate. *Id.*

Similarly, in *United States v. Basciano*, 2010 U.S. Dist. LEXIS 85502, 20-21 (E.D.N.Y. 2010), the district court considered the effect of the law-of-the-case doctrine and the mandate rule. The district court found that it was required to include the previously-filed *Brady* claim in its materiality analysis of the new *Brady* claim, despite the appellate court's denial of the previous claim. "[T]he mandate rule has a more limited application when a defendant asserts new *Brady* claims in addition to *Brady* claims that have already been asserted on appeal. Because the materiality of suppressed information must be 'considered collectively, not item-by-item,' a district court must consider the defendant's new claims cumulatively with the materiality of all the defendant's *Brady* claims, including those that the defendant appealed." *Id.* (citing *Kyles*, 514 U.S. at 436).

Even before *Kyles* was decided, a federal district court in Wyoming acted similarly. It decided the newest *Brady* claim by considering it in the aggregate with the *Brady* materials filed in a previous habeas petition. *Hopkinson v. Shillinger*, 781 F. Supp. 737, 745-46 (1991). "[T]his court has evaluated all of the material raised in both petitions, in the context of the evidence presented at both trials, to determine whether the petitioner has been deprived of due process of law by the withholding of exculpatory evidence." *Id.* at 746.

At least one state court faced with the issue has done the same as the federal courts above. The Supreme Court of Missouri, over objections from the State, analyzed old and new suppressed evidence together to determine *Brady* materiality, noting that the claims "are distinct from [the defendant's] previous claims because

they rest on a collection of new evidence…unknown and unavailable when Engel previously sought relief." *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (2010). The court found that "[j]ustice requires that this Court consider all available evidence uncovered following Engel's trial that may impact his entitlement to habeas relief." *Id.* *Kyles* was one of the cases upon which the court relied.

The aggregate material value of this suppressed evidence in this case is significant. The Ohio courts failed to collectively analyze Keith's *Brady* evidence for materiality. The 2007 suppressed evidence shows that two weeks before the murders, convicted murderer Rodney Melton had told an informant of his own plans to carry out the shootings in this case. Melton's car and the mask he was known to wear fit the description of the shooter. The sole witness to identify "Kevin" was provided with a name line-up of "Kevins," and the 2004 suppressed evidence indicates that the name lineup was given to that witness *before* he recalled the name on his own. It defies logic that courts would consider this evidence—and the additional *Brady* evidence—collectively and conclude that it is immaterial.

B. When it is the State's conduct that impedes the defendant from presenting additional evidence of *Brady* violations, the defendant should not be denied the review to which he would otherwise be entitled.

Had Keith discovered the suppressed evidence all at the same time, he would have presented it in one filing. There would have been no question that the courts reviewing his *Brady* claim should consider all of the suppressed items collectively.

But Keith cannot control the timing with which he uncovers what the State has hidden from him. He has, with due diligence, filed his *Brady* claims immediately

upon discovering suppressed favorable evidence. For that reason, however, Keith's *Brady* claims have only been considered individually. Despite arguing that the suppressed evidence should all be considered collectively, not item by item, he has been unable to have a court collectively review the suppressed evidence to determine whether it is material. *Kyles*, 514 U.S. at 436.

When it is the State's conduct that has impeded the defendant in raising his claims, it is not the *defendant* who should suffer the consequences. For example, as this Court recognized in *Strickler v. Greene*, 527 U.S. 263 (1999), "conduct attributable to the State that impeded trial counsel's access to the factual basis for making a *Brady* claim" is just such a factor that can "ordinarily establish the existence of cause for a procedural default." *Id.* at 283. The impact of *Brady* claims is on the fairness of the proceedings, and the proceedings do not magically become more fair because the defendant discovered the multiple suppressed items at separate times.

Keith cannot be faulted for failing to uncover the State's suppressed evidence earlier. "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (internal citations omitted.) This Court has expressly rejected "a rule thus declaring prosecutor may hide, defendant must seek," as it is "not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (internal citations omitted).

C. The doctrine of res judicata does not preclude consideration of prior *Brady* claims in the materiality analysis of a new *Brady* claim.

Keith did not ask the courts to revisit their findings on his previous *Brady* claims. If his current *Brady* claim was based on the same cause of action previously argued, then res judicata would preclude consideration and relief. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.") Despite being based on the same case law, Keith's *Brady* claims are not the "same cause of action." *Id.*

"Given that *Kyles* mandates that the question of whether the undisclosed evidence meets the 'materiality' standard must be considered in the aggregate," Keith's previous cases "[have] only limited res judicata effect in this case." *Schledwitz*, 169 F.3d at 1012. The point of the *Brady* materiality analysis is to determine to what extent the State's suppression affected the outcome of the trial. Each piece of suppressed evidence has a different impact on the trial, and multiple pieces of suppressed, favorable evidence could affect the trial exponentially.

CONCLUSION

Because of the failure to disclose multiple pieces of exculpatory and impeaching evidence, the State's "case was much stronger, and the defense case much weaker, than the full facts would have suggested." *Kyles*, 514 U.S at 429. No court has ever considered the suppressed evidence in its totality. Instead, Keith has been repeatedly

faulted for his failure to discover sooner what the State hid. Due process requires more than this.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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