No. 17-8176

# In the Supreme Court of the United States

KEVIN KEITH,

*Petitioner,*

v.

OHIO,

*Respondent.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. 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 is it?

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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## LIST OF PARTIES

The Petitioner is Kevin Keith, an inmate at the Trumbull Correctional Institution. Mr. Keith was previously a capital prisoner, but is now serving a sentence of life without the possibility of parole following a grant of executive clemency.

The Respondent is the State of Ohio.

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## INTRODUCTION

On February 13, 1994, Kevin Keith shot six people, killing three of them. He was convicted by a jury and initially sentenced to death on May 26, 1994. Keith received executive clemency in 2010 and is now serving a sentence of life without the possibility of parole. Despite numerous challenges, the state and federal courts have repeatedly upheld Keith's conviction. He now seeks review of his fifth request for a new trial. Although Keith purports to raise substantial constitutional questions, neither of his claims raise an issue worthy of review. Therefore, the petition for certiorari should be denied.

In Keith latest filing claiming the State "suppressed evidence," he alleges that he should receive a new trial. Specifically he claims a witness, Michelle Yezzo, an Ohio Bureau of Criminal Investigation (BCI) criminologist, "personnel file demonstrates that her forensic conclusions were contemporaneously questioned by her superiors and peers and that she a reputation for untruthfulness." (Keith Pet. p 3)[1] The actions taken by her superiors provide evidence that was not true. The State does not contest that Ms.Yezzo created problems with her co-workers. What her personnel file shows was there were complaints filed by her co-workers who she supervised. An unknown person took notes which were placed in Yezzo's file. Yezzo's supervisor included a summary of the complaints to his supervisor, the

[1] The Appellate Court stated in a footnote, "At oral argument, Keith's attorneys insinuated that a trial deposition was used because Yezzo was on administrative leave from BCI for the issues specific to this case, such as her work performance. This is not accurate...There is absolutely no indication that Yezzo was placed on leave for the allegations now being raised regarding substandard work or for falsifying documents to satisfy law enforcement."

Superintendent of BCI. The result was that Ms. Yezzo was placed on administrative leave until she was seen by a counselor. She was then able to return to work. Despite these unfounded claims, then Attorney General Lee Fisher, who now claims he would not have allowed her to testify, gave Yezzo a reward for her service. Further, Yezzo was approved to lecture around the United States by BCI. Most importantly, after seeking counseling, BCI allowed Yezzo to return to work and continue her employment until her retirement in 2009.

While Keith alleges her forensic conclusions were challenged and she had a reputation for untruthfulness, the evidence Keith claims shows this has been provided to the trial Court and the Appellate Court who clearly did not share that conclusion. The Appellate Court, as discussed herein, took issue with Keith's attorney label of Yezzo as a corrupt analyst.[2]

Ms. Yezzo's testimony in the Keith matter was supplied through a deposition where she corroborated evidence supplied by other witnesses. Her testimony was not the critical piece of evidence that caused the jury to convict Keith. As stated herein, much of her testimony was favorable to Keith – the shoe prints found near the car did not match Keith's shoes and no fibers found in the getaway car could

[2] Michelle Yezzo, prior to the Keith case testified, in State v. Parsons (Huron Co. Common Pleas Case No. CR 930098). As a result of Yezzo's analysis in that case, the State was able to obtain a conviction on a ten year old murder case. Yezzo testified in that case while the allegations were still under investigation. The prosecutor was aware of this and concealed that fact from the Defendant. A new trial was granted in that case. The State did not appeal as the Defendant was nearing death at the time a new trial was granted. Parson died before a trial could be held. The appellate court found Yezzo's testimony was critical to reopening a cold case. It concluded that, "Those circumstances are not remotely present here. Further, one of the findings of Yezzo was clearly favorable to Keith in this matter, indicating perhaps a strong desire by defense counsel not to challenge Yezzo's credentials."

connect it to Keith. These are the findings of the courts who have reviewed these allegations.

Through this case, Keith attempts to establish a Constitutional requirement that the State (the prosecutor) must disclose unfounded allegations that have no bearing on the work product of the witness. Keith can point to no other case that requires this, but instead says that the United States Constitution and *Brady* has always required this. Keith is attempting to create a constitutional issue where none exists.

Keith first claims that this Court should provide guidance as to how courts assess "due diligence" requirements for new trial and violations under *Brady v. Maryland*, 373 U.S. 83 (1963). Keith has not shown in its application, nor have lower Court determined that the State violated *Brady*. Keith's real objection is that the Ohio courts misapplied *Brady* in denying him relief. They did not, but even if they had, Keith cannot show materiality or prejudice. Thus, regardless of any alleged error, the outcome for Keith would not change.

Keith's second claim, calling for the creation of a requirement that Courts consider all previous failed *Brady* attempts when reviewing new requests, fares no better. Keith has continuously placed his failed rationale before Courts for their consideration through his many, many appeals including those before this Court. His real argument is that the lower Courts applied his allegation to the law and decided the cases in favor of the State.

"Initially, we reiterate this court's prior finding that "a jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals." Keith, 2008-Ohio-6187, at ¶35 restated in State v. Keith, 192 Ohio App.3d 231 (2010).

This is yet another attempt by Keith to invalidate the overwhelming evidence of guilt against him. As a result of the proven facts of this case, his review of *Kyles* lacks merit, and review is unnecessary.

For these and other reasons below, the petition should be denied.

## COUNTERSTATEMENT #1

**A consensus exists on excusing the due diligence requirement when the State acts in bad faith.**

In 2013 Keith argued that the lower court's denial of new trial motion should be denied because he could not show bad faith on behalf of the state. Keith has repackaged this claim in his arguments to dispense of the "due diligence" requirements as violation of due process. The State does not seek to protect prosecutors who hide the ball from Defendants and violate the basic tenants of due process. The State did not hide the ball with Yezzo's personnel file. In this case the issue is that the ball is not what Keith contends it is.

Keith never alleges bad faith by the Prosecutor, only that he should have known his witness was not liked by her co-workers and had difficulty in the

workplace. The Defendant points to no proven correlation to the quality of her work in this case or discipline due to problems with her work product.[3]

In *Arizona v. Youngblood,* this Court answered the question of what a criminal defendant must prove to establish a constitutional violation based on the police's failure to preserve "potentially useful" evidence. 488 U.S. at 51. *Youngblood* embodies a constitutional duty "over and above that imposed by cases such as *Brady* and *Agurs*." *Id.* at 56. And in identifying the contours of this duty, courts "face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed." *Id.* at 57-58 (internal quotation marks).

Given its "unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance," the Court adopted a standard that requires the defendant to prove "bad faith" on the part of the police. *Id.* (internal quotation marks omitted). A required showing of improper motives by the police, the Court explained, "both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it." *Id.*

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[3] Despite the claims of the Keith, Bodziak did not review the evidence (the tire casting and plaster casting of license plate in the snow) reviewed by Yezzo. He only reviewed photographs, documents, and Yezzo's reports (per Exhibit 4) submitted by Keith with his motion for a new trial. Keith could have hired an expert at the state's expense at the time of trial and failed to do so. No previous court has found the Bodziak Report persuasive.

"Bad Faith" already has a well-understood meaning in the law. Bad faith requires "dishonesty of belief or purpose." Black's Law Dictionary 159 (9th Ed. 2009). This requirement of improper motive is exactly what the courts look to in discerning whether the police acted in bad faith. *See, e.g,, Ex parte Napper*, 322 S.W.3d 202, 232-35 & 238 (Tex. Ct. Crim. App. 2010) (surveying post-*Youngblood* case law and observing, "bad faith entails some sort of improper motive, such as personal animus against the defendant or a desire to prevent the defendant from obtaining evidence that might be useful"). This Court's use of a legal term of art to define a clear standard provides all the guidance that is needed. And Keith presents no good reason for this Court to elaborate further.

## COUNTERSTATEMENT #2

**Potential impeachment evidence which results in no prejudicial effect does not qualify as Brady material requiring a new trial.**

Even if the evidence contained in Yezzo's personnel file was suppressed by the State, the state's suppression of evidence favorable to an accused violates due process rights only where the evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87. To be considered a violation of due process, however, the suppressed evidence must both be (1) favorable to the defendant and (2) material to guilt or innocence. *Brady, Id.*

The State of Ohio has adopted the materiality standard as enunciated in *United States v. Bagley* (1985), 473 U.S. 667, 682. It states that,. " '[E]vidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; a

'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" State v. Jackson, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶129, quoting United States v. Bagley (1985), 473 U.S. 667, 682.

Finally, the United States Supreme Court has held that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense." Agurs, 427 U.S. at 109-110.

The Defendant does not meet his burden of showing prejudice changing the outcome of the trial.

## COUNTERSTATEMENT #3

**The Trial Court and the State Appellate Court properly applied the standard as stated in *Kyles vs Whitley.***

The Defendant continually contends in its many, many filings that courts have failed to consider the cumulative effect of suppressed evidence in this matter. In describing *United States v. Bagley*, 473 U.S. 667, this Court's interpretation found that the state's disclosure turns on a cumulative effect of all suppress evidence favorable to the defendant not on an item by item basis. *Kyles v. Whitley (1995) 514 U.S. 419.*

Despite Keith's repeated filings of additional suppressed items, every Courts hearing this case has denied his claims. Each reviewing Court has found that evidence in question was either: (1) not material; (2) not prejudicial; or (3) that Keith has not proven a reasonable probability that disclosure of said evidence would

have produced a different result at trial. The theory that Defendant asks the Court to adopt would result and encourage more unfounded appeals which would further create a serious lack of confidence in the judicial system. The State does not seek to establish a system where the prosecutor may hide, a defendant must seek, as stated by the Defendant in his petition. (Keith Petition p17) The State is attempting to protect the sanctity and finality of our judicial system.

Despite the Defendant's erroneous contention that the claimed suppressed evidence has never been refuted (Keith Petition, p19), every Court has found that the suppressed evidence did not meet the standard for a new trial. Said another way after being shut out in every court decision, the Defendant seeks to claim that all those shut outs should result in a new trial. Zero plus zero plus zero does not equal one.

## REASONS FOR DENYING THE WRIT

### A. Reviewing Courts have found overwhelming evidence of Keith's guilt

Kevin Keith decided to seek revenge after learning that Rudel Chatman had reported his involvement in a drug ring to the police. On February 13, 1994, he entered the home of Chatman's sister—Marichell Chatman—and shot the six occupants, killing her, her four-year-old daughter, and her aunt, and wounding three others.

Upon arriving at Marichell's apartment, Keith was greeted by Richard Warren. Warren did not know Keith, but Marichell identified him as "Kevin." After

some small talk with Warren, Keith brandished a nine-millimeter handgun and ordered everyone in the apartment down on the floor. Tr. 340, 341.[4] Again calling him "Kevin," Marichell pleaded with Keith not to shoot. Tr. 342. He told her to "shut up" and to stop using his name and that she "should have thought of this before [her] brother started ratting on people." Tr. 342-43. Keith then shot each of the six and fled. Tr. 343-44. Despite having been shot three times, Warren was able to stand up and run for help, but Keith noticed him and shot him again. Tr. 344.

An eyewitness heard the gunshots and saw a man she later identified as Keith leaving the apartment. Tr. 380-81, 385. She watched Keith enter a light-colored, mid-sized vehicle and slam into a snow bank, before speeding away. Tr. 381-83. The police later discovered tire prints and a partial license plate imprint, which they matched to a 1982 Oldsmobile Omega, commonly used by Melanie Davidson, one of Keith's girlfriends. Tr. 443-44, 474-75. By the time officers located the vehicle, its relatively new tires had been changed without the owner's knowledge. Tr. 446. After Keith had been identified and arrested by witnesses, the casting of the imprint in the snowbank, tire tracks left in the snow and other evidence was submitted to the Ohio Bureau of Criminal Investigation. Michelle Yezzo, the witness at issue, reviewed it. Her deposition would later be read into the record at trial.

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[4] The citations below are to the transcripts from Keith's criminal trial. A complete rendition of the evidence adduced at trial can also be found in the Ohio Supreme Court's opinion on direct review. *State v. Keith*, 684 N.E.2d 47, 47-53 (Ohio 1997).

In addition to the eyewitnesses who saw Keith leave the apartment, Warren identified Keith as the shooter. While recovering from surgery, Warren provided hospital staff with the name of his assailant, "Kevin," by using sign language with his father. Nurse John Foor testified that he contacted the police to relay Warren's identification. Tr. 778-80. Prior to identifying "Kevin" as the shooter, Warren had no contact with police. *Id.* When interviewed by police, Warren identified Keith from a name array with 75% certainty and a photo array with 95% certainty. Tr. 362. Warren also made an in-court identification of Keith. Tr. 336.

The police found additional evidence linking Keith to the shootings. Farnella Graham lived across the street from the local General Electric plant where Keith had picked up another girlfriend, Zina Scott, from work on the night of the murders. Tr. 410, 426-37. Graham located a bullet casing in her front yard along with litter. Tr. 427-28. Not knowing the significance of the bullet casing, Graham tossed it into her kitchen trashcan. Tr. 428. Thereafter, she told her daughter about her discovery, and her daughter called the police. Tr. 428-29. An officer responded and recovered the casing, which matched the bullet casings from the crime scene. Further testing revealed that all of the casings were fired from the same weapon. Tr. 438, 572.

The trial court cited the following information as overwhelming evidence upon Keith's second request for post conviction relief in 2004:

1. Approximately 8 hours after the shootings, Richard Warren, while recovering from surgery, wrote the name "Kevin" on a piece of paper as the name of his assailant.

2. Later in the day, Warren selected Kevin Keith from a photo array of six individuals.
3. Investigators recovered a total of twenty-four cartridge casings from the crime scene area, which had all been fired from the same gun.
4. On the night of the murders, [Keith] picked up his girlfriend, from work at the entrance to the General Electric plant where another matched casing was found.
5. Nancy Smathers, a resident of the Bucyrus Estates, heard popping noises, looked outside her window on the night of the murders, and observed a ***267** large stocky man making his escape, whom she was able to identify six weeks later as Kevin Keith, from a television news story depicting [Keith].
6. The man Smathers identified jumped into a light-colored, medium-sized car, a description consistent with the automobile Kevin Keith was known to have had access.
7. Smathers witnessed a number of events: the car slid into a snow bank; the perpetrator got out to rock the car, but the dome light did not operate when the driver's door opened; the light for the license plate was out; the perpetrator was able to free the vehicle from the snow bank.
8. At the snow bank where Smathers witnessed the getaway car slide, investigators made a cast of the tire tread and of the indentation in the snow bank made by the car's front license plate number—"043."
9. The indentation from the license plate matched the last three numbers of a 1982 Oldsmobile Omega seized from Melanie Davison shortly after she visited [Keith] in jail, under the pseudonym "Sherry Brown" a few weeks after the murders.
10. The Oldsmobile was registered to Alton Davison, Melanie's grandfather, and was also regularly used by Melanie. Alton Davison had put four new tires on the Omega six months prior to the murders. He estimated that by February 1994, the new tires had been driven less than 3,000 miles without any problems or need for replacement.
11. The cast taken of the tire tread at the crime scene did not match tires found on the Oldsmobile Omega one month later, but the cast did match the tread of the tires purchased by Alton Davison—this, based upon the tire brochures.
12. The tires found on the Oldsmobile Omega after the murders had been manufactured but a month before the murders.

13. It will be recalled that the perpetrator put a gun to Marichell's head, complaining bitterly about Marichell's brother "ratting on people." Rudel Chatman, the victim's brother was a police informant in a drug investigation involving Kevin Keith. And the month prior to the murders, Keith was charged with several counts of aggravated drug trafficking.
14. The description of the vehicle by Nancy Smathers—a light colored, medium-sized car—generally fit the description of the Oldsmobile Omega owned by Alton Davison and frequently driven by his granddaughter Melanie, one of the girlfriends of Kevin Keith.
15. The description of the perpetrator by Nancy Smathers—a large, stocky black man—generally fits and continues to fit (from this court's observation of [Keith] at the hearing) [Keith].
16. It will be recalled that after drinking a glass of water through a pulled-up portion of a turtleneck sweater, the perpetrator pulled a nine-millimeter handgun from a plastic bag that he was carrying. Kevin Keith was seen earlier in the day in the neighborhood by a neighbor while he (Keith) was carrying a bag.

*State v. Keith,* 176 Ohio App.3d 260

While the Court mentioned above the license plate imprint in the snow and the tire tracks, those facts were readily apparent at the scene on the night of the crime and were only corroborated through the use of Yezzo's forensic evaluation. State v. Keith, 2017-Ohio-5488 at 22.

At trial, Keith's defense was that another individual was actually responsible for the shootings. He also maintained that the evidence linking him to the crime—such as the bullet casing found by Graham—was planted by the police and that the police's fixation on him as a suspect ultimately influenced the eyewitness identifications. Tr. 841-52.

The jury found Keith guilty of three counts of aggravated murder and three counts of attempted aggravated murder. Keith was then sentenced to death. *Keith*, 684 N.E.2d at 53.

The state courts affirmed Keith's conviction and sentence on direct and post-conviction review, and the federal courts denied habeas relief. *See id.* at 54; *see also Keith v. Mitchell*, 455 F.3d 662 (6th Cir. 2006), *cert denied by Keith v. Houk*, 549 U.S. 1308 (2007); *State v. Keith*, 891 N.E.2d 1191, 1193-94 (Ohio Ct. App. 2008), *discretionary review denied*, 917 N.E.2d 811 (Ohio 2009). In 2010, the Governor of Ohio commuted Keith's death sentence to life without the possibility of parole.

In 2016, Keith filed his fifth delayed request for a new trial. The basis of this request was the documents regarding G. Michelle Yezzo's treatment of her fellow employees within the Bureau of Criminal Investigation (BCI). The trial court denied the motion on the grounds that Defendant made no efforts to inquire into the qualifications of Yezzo during her deposition on cross examination; nor were requests made for employee file through public records requests. Keith, through his attorneys or relatives, made several public records requests of police agencies and BCI.

Keith appealed the trial court's decision to the Ohio Third District Court of Appeals who affirmed the lower decisions but did so on broader grounds than the trial court. The trial court summarily dismissed the *Brady* claim finding that the failure to provide a personnel file which was not requested did not become a *Brady* violation because the witness testified at trial through her deposition. The Appellate Court discussed at length the testimony elicited from Yezzo and Keith's attorney cross

examination. In addition to the license plate and tire track evidence which corroborated other testimony, she testified that shoe prints and other evidence found in the car did not tie Keith to the crime. In its 2017 decision, the State Appellate Court found:

> "Over the years in his numerous appeals and post-conviction petitions Keith has challenged many aspects of his case and the evidence against him, but one fact remains clear, the evidence against Keith was simply overwhelming. Based on the record we cannot find that, even assuming Yezzo's personnel file was suppressed, and that it contained information favorable to Keith, there is no reasonable possibility that the information contained in Yezzo's file would have made any difference in the outcome of this case." *State v. Keith,* 2017-Ohio-5488 at § 41 (2017 3rd Dist.).

**B. The Court reviewing this motion have found no prejudice resulted from the absence of the Yezzo personnel file**

The principles governing claims under *Brady v. Maryland* are well-known. Under *Brady*, the government has an obligation to disclose evidence that is favorable to the accused and material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material when there is a reasonable probability—a probability "sufficient to undermine[] confidence in the outcome"—that the result of the proceeding would have been different had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (internal quotation marks omitted); *see also Cone v. Bell*, 556 U.S. 449, 469-70 (2009). In evaluating *Brady* evidence, courts must assess "the tendency and force of the undisclosed evidence item by item" and then determine "its cumulative effect for purposes of materiality." *Kyles*, 514 U.S. at 436 & n.10.

Keith's *Brady* claim turns on the question of materiality. The courts below applied these well-settled principles and correctly concluded that Keith failed to demonstrate the necessary "reasonable probability" of a different outcome. And even if he could establish that the Ohio courts' materiality analysis was flawed, he makes no credible showing (nor could he) that the evidence he identifies in his petition "could reasonably be taken to put [his] whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

The Third District also stated, "We absolutely could not find in the circumstances of this case that prejudiced resulted here." *State v. Keith,* 2017-Ohio-5488 at P 22 (3rd District Appeal, 2017). It also concluded that "Based upon the record we cannot find that, even assuming Yezzo's personnel file was suppressed, and that it contained information that was favorable to Keith, *there is no reasonable possibility* that the information contained in Yezzo's file would have made any difference in the outcome of this case." *Id.*, Page 24.

In 2007, Keith sought leave to file a delayed motion for a new trial under Ohio Crim. R. 33(B). Keith said that he had discovered new evidence withheld by the prosecution, again claiming that he had uncovered evidence that Melton had committed the crime. The trial court denied the motion, and the Ohio Court of Appeals affirmed, observing that "[m]uch of the [new] evidence was already presented at trial. . . . [A] jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals. This case was before this Court

as recently as February 25, 2008 . . . . We were not persuaded then, nor are we now, that Keith has suffered prejudice sufficient to merit a reversal of the trial court's judgment." *State v. Keith*, 2008-Ohio-6187, ¶¶ 33-34 (Ohio Ct. App.). The Ohio Supreme Court declined discretionary review. *State v. Keith*, 902 N.E.2d 502 (Ohio 2009).

### C. Reviewing Courts have properly denied Keith's *Brady* claim because the *Brady* evidence he identifies, when taken collectively, is not material.

Keith first argues that review is necessary because the "Ohio courts have decided an important question of constitutional proportions that has not been, but should be, settled by this Court." Pet. 7. He says that this Court should clarify that standard stated in *Kyles*. Courts must assess the materiality of *Brady* evidence collectively, not item-by-item, and that this materiality review must include evidence identified as part of an earlier proceeding. Pet. 7-13.

But such clarification is wholly unnecessary. As citations in his own petition confirm, there is a clear consensus among state and federal courts that materiality review requires a collective assessment of all *Brady* material, including that identified in previous proceedings. Pet. 8-13; *see also, e.g.*, *Basden v. Lee*, 290 F.3d 602, 610 (4th Cir. 2002); *Boyette v. Lefevre*, 246 F.3d 76, 92 (2d Cir. 2001); *Schledwitz v. United States*, 169 F.3d 1003, 1012 (6th Cir. 1999); *Gillispie v. Timmerman-Cooper*, 835 F. Supp. 2d 482, 507 (S.D. Ohio 2011); *Newman v. State*, 354 S.W.3d 61, 69 (Ark. 2009); *Rubalcada v. State*, 731 N.E.2d 1015, 1019 (Ind.

2000). That approach is consistent with the approach advocated by Keith, and he therefore fails to offer any basis for review.

According to Keith's Petition, "None of the 2004, 2007, 2010 suppressed evidence **has ever been refuted** (emphasis added by Keith). (Keith Pet. P.19) That is completely untrue. A brief review (below) of the Trial Court and Appellate Court decisions makes Keith's attempt to mislead patently obvious.

**2004 Post-Conviction Relief Evidence**

In 2004, Keith alleged that State did not provide certain police reports to him through discovery. Further he alleged the state failed to provide the note written by Richard Warren in the hospital and that their alternative suspect was under indictment. Lastly he contended that the police had new information that two people were involved with the shooting and that the investigator for the police department had tried to provide assistance to their alternative suspect.

The Trial Court found that, "In fact none of the exhibits, in the judgment of this court, even meets a lesser burden of proof – that of preponderance of the evidence." The Court went as far to conclude that the evidence was "corroborative of guilt." (Judgment Entry 94-CR-0042, Feb. 13, 2007, p19)[5] The Court held that, "None of the evidence is likely to alter the jury's finding of guilt. *Id. at 24*

In reviewing this evidence, the Ohio Third District Court of Appeal stated:

> The essence of Kevin Keith's successor Petition for Post Conviction Relief is that the newly discovered evidence

[5] The Petition for Post Conviction Relief was filed in 2004, but not denied until 2007 as other actions were pending in other Court on the case.

> demonstrated in the proffered exhibits supports a collection of *Brady* violations, and that these exhibits, as a whole, support a theory of innocence. On this issue, this court finds that reasonable minds can come to only one conclusion—that being unfavorable to [Keith] and favorable to the State. This court finds that, on the face of the record the evidence offered by [Keith] fails to demonstrate substantive grounds for relief. This court notes that, according to the United States Court of Appeals for the Sixth Circuit, [Keith] does not contend that he is actually innocent.

**2007 Motion for a New Trial**

In 2007, Keith filed for a new trial alleging in summary the following:

1. Bruce Melton told a Confidential Informant on 1/31/94 that he had been paid $15,000 to cripple "the man" responsible for the raids in Crestline, Ohio
2. Richard Warren never told Amy Gimmets that the assailant's name was Kevin because no one by that name worked at the hospital.
3. Nancy Smather's testimony indicated the getaway vehicle was white, cream, light in color which matched Melton's car, not Keith.
4. Melton's car tires were never analyzed.

The trial Court found that these items were barred by res judicata. *State v. Keith*, Case 3-08-15 (Third District Court of Appeals, 2008). The Appeals Court further found that Ms. Smather's testified at trial to the color of the vehicle as did Melton. The Appeals Court determined that discussion at trial made this assertion inappropriate a motion for new trial because of res judicata due to the issue being placed before the jury. The Court also determined that issue regarding Nurse Gimmets could have been raised at trial.

Upon reviewing the asserted evidence as *Brady* material, the Court found that Keith had failed to show that the evidence was material. It concluded by saying:

> The trial court found, and we agree, that there is no reasonable probability that the aforementioned evidence, if disclosed, would have changed the outcome. Much of the evidence was already presented at trial, if not directly at least inferentially... We were not persuaded then, nor are we now, that Keith has suffered prejudice sufficient to merit a reversal of the trial court's judgment. *Id.*

The "new evidence" Keith uncovered in 2004 and 2007, was, at most, merely cumulative of the evidence Keith presented at trial, which generally will not suffice to establish a *Brady* violation. *Brooks v. Tennessee*, 626 F.3d 878, 893 (6th Cir. 2010) ("Evidence that is 'merely cumulative' to evidence presented at trial is 'not material for purposes of *Brady* analysis.'"); *see also United States v. Sanchez*, 917 F.2d 607, 618-19 (1st Cir. 1990) (collecting cases). Keith has never explained in his petitions how this new evidence would have altered the jury's assessment of his theory that Melton was the actual perpetrator.

**2010 Motion for a New Trial**

In his 2010 Motion for a New Trial, Keith claimed that a public record lawsuit against the Bucyrus Police Department revealed that phone call from Nurse Foor never occurred and therefore Keith's identification by Richard Warren was fabricated. He also said the unrelated lawsuit also proved that the witness Farnella Graham had not found the shell casing near the General Electric Plant but at McDonalds. McDonalds would have been next door to the restaurant where Warren ran after being shot. The Plant was over a mile in distance from the shooting and where Keith was known to have been that night picking up one of his girlfriends.

Without support, Keith claims these radio logs are the equivalent of incoming call logs that maintain a record of every call received by the department. But the testimony of the Bucyrus Police Department records' custodian (on which Keith relied in his new trial motion) shows that the radio logs have a different purpose. They record radio traffic between the dispatcher and the cruisers and when "the dispatcher received a 911 call or a call coming in from outside and she needed to send someone, that would [also] be recorded on the typed log." New Trial Motion Ex. 6, *Davila v. City of Bucyrus*, Crawford Co. Case No. 09 CV 0303, Tr. of hrg. 76–77. Here, Nurse Foor called the police to relay information about Warren's status, including that he was communicating and had stated that the name of his assailant was "Kevin." Tr. 776–82. Because Nurse Foor was merely reporting information and not requesting that an officer be dispatched, the absence of an entry in the radio log is logical, and its absence does nothing to bolster Keith's claim that no call was ever made.

The Trial Court made the following findings regarding this evidence:

1. Notwithstanding repeated collateral attacks upon the capital convictions of Kevin Keith, the evidence of his guilt beyond a reasonable doubt is compelling, persuasive and overwhelming.
2. The defendant has failed to establish, by any standard of proof, that the so-called newly discovered evidence regarding Nurse John Foor would produce a strong probability for a change in the jury verdict of guilty.
3. The issue of whether Nurse John Foor did or did not telephone BPD [Bucyrus Police Department] on a date and time certain is only remotely material to the issues in this case, and unlikely to impact the credibility of the witness Richard Warren.

4. The issue of whether Nurse John Foor did or did not telephone the BPD on a date and time certain does not impeach or contradict Richard Warren's identification of the Defendant, much less does it contradict the constellation of evidence, both direct and circumstantial, connecting Kevin Keith to the events in question.
5. The issue of John Foor's testimony has been so thoroughly explored and dissected as to be foreclosed and resolved as res judicata. This most recent issue appears to have been known to Keith's attorneys for more than a year.
6. The Defendant has failed to establish, by any standard of proof, that the so-called newly discovered evidence regarding State's Exhibit 43 [the bullet casing] and the police log would produce a strong probability for a change in the jury verdict of guilty.
7. The police log, regarding the discovery of State's Exhibit 43, on its face, merely contradicts the testimony of Farnella Graham; however, the log entry is patently erroneous and unworthy of belief.
8. The combination of both direct and circumstantial evidence in this case supports the finding that even were this court to grant a motion for new trial, the result—a verdict of guilty—would remain the same.

*State v. Keith*, 192 Ohio App.3d 231 (2011, 3rd District Ct. App.)

In dismissing Keith's appeal, the Third District concluded that Keith had failed to meet the materiality requirements and denied his *Brady* claim. It went on to say that the radio log information was not "even remotely sufficient to undermine the confidence in the outcome of the trial." Id. p18.

From the record, it is apparent that the State and the Courts did refute the evidence put forward by Keith. The issues appealed in this decision were appealed to the United States Supreme Court and the Ohio Supreme who both refused to hear the cases.

**2016 Motion for a New Trial**

As discussed above the motion before the Court arises out a personnel issue among forensic scientists at the Bureau of Investigation (BCI) – the state crime labs. Several of the analysist complained about treatment by Michelle Yezzo to their supervisor who documented their complaints to his supervisor – the Superintendent of BCI.

The State Appellate Court found :

> Over the years in his numerous appeals and post-conviction petitions Keith has challenged many aspects of his case and the evidence against him, but one fact remains clear, the evidence against Keith was simply overwhelming. Based on the record we cannot find that, even assuming Yezzo's personnel file was suppressed, and that it contained information favorable to Keith, there is no reasonable possibility that the information contained in Yezzo's file would have made any difference in the outcome of this case.
>
> *State v. Keith*, 2017-Ohio-5488

At oral argument, Keith attempted to claim that Yezzo was on leave because poor performance related to providing answers that law enforcement wanted. The Court noted in its decision, "There is absolutely no indication that Yezzo was placed on leave for the allegations now being raised regarding substandard work or for falsifying documents to satisfy law enforcement."

The *Brady* material Keith points to in this petition does nothing to significantly undercut that evidence of guilt.

Although Keith presses the importance of assessing materiality collectively, he strains to argue that a defendant should not be punished when the State

suppresses favorable evidence. He also makes no serious effort to explain how the *Brady* evidence he identifies in his petition, when viewed collectively, was material. Instead, Keith's petition presents nothing new. He says he has produced information that was stated at trial and considered by the jury. Then he seeks to add that information to other tangential evidence that has little or no bearing on Keith's guilt. In this appeal like other filed before, the impeachment value of this evidence would have been at most, minimal, and more likely nonexistent.

Keith also fails to offer a credible claim that there is any probability—much less a reasonable one—that the outcome of his trial would have been different had this *Brady* evidence been available. His *Brady* claim therefore fails, and further review by this Court will change nothing.

The State Appeals Court in his 2008 appeal found that "Much of the [new] evidence was already presented at trial. . . . [A] jury of twelve citizens found the evidence presented sufficient to convict Keith, and this verdict has stood the test of time and an exhaustive series of both state and federal appeals. . . . . We were not persuaded then, nor are we now, that Keith has suffered prejudice sufficient to merit a reversal of the trial court's judgment." *State v. Keith*, 2008-Ohio-6187, ¶¶ 33-34 (Ohio Ct. App.) Even adding these new claims of discovered evidence, Keith cannot sustain his burden and therefore his petition should be denied.

**D. The withheld evidence is too distant from the main evidentiary points to meet the *Brady* standards.**

The Court recently dealt with evidence which was actually known to the State that it failed to disclose in *Turner v. U.S.*, 137 S.Ct. 1885. In that case, the state did not disclose: (1) the identity of person seen running into the ally after a homicide who stopped by the garage where the body had been found; (2) the statement of a witness who heard groans coming from the garage; and (3) evidence tending to impeach three witnesses.

In *Turner*, the State contested the materiality of the evidence in question. Like most *Brady* claims, the claims in *Turner* were what the Court labeled "factually complex." *Turner* at 1893. The standard, as applied by the Court after reviewing the withheld evidence "in the context of the entire record," *Agurs*, supra, at 112, was whether "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone*, supra, at 470 (citing *Bagley*, supra, at 682). The Court concluded that there was "no such reasonable probability."

Keith's arguments are far more removed than what was presented in *Turner*. The information at question in Keith's latest request involve the credibility of a witness whose deposition was read into the record. Further, the witness in question provided favorable evidence to Keith. Despite the case law presented by Keith in his petition, Keith, through his attorneys or his family made numerous public record requests. He even made requests involving Michelle Yezzo, the witness in

question. Keith does not deny making those requests or that he received the information sought. He did not make the requests of Yezzo's personnel information.

Even if Keith had received the evidence requested the question of materiality would still exist. As stated in *Turner,* and upon considering the withheld evidence "in the context of the entire record," *Agurs*, supra, at 112, the evidence would be "too little, too weak, or too distant from the main evidentiary points to meet Brady's standards." *Turner,* supra 12

## CONCLUSION

For these reasons state above, the Court should deny Keith's petition for writ of certiorari.

Respectfully submitted,

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