

26 - 5728

ORIGINAL

CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD SMITH – PETITIONER

Vs

STATE OF OHIO – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF OHIO

HAMILTON COUNY, OHIO

PETITION FOR WRIT OF CERTIORARI

EDWARD SMITH – PETITIONER

GRAFTON CORRECTIONAL INSTITUTION

2500 S. AVON BELDON RD.

GRAFTON, OHIO 44044

Supreme Court, U.S.
FILED

MAY 19 2026

OFFICE OF THE CLERK

QUESTION PRESENTED

Smith pose to this Honorable Court, three questions in which he ask this Court to consider if it decides to accept review of this case.

Smith asserts that these questions are of great interest to the public and the future of the criminal justice system as it calls into question the method by which prosecutors clandestinely breach the Supremacy Clause, override lower courts power, as well as violate rules of *Brady v. Maryland*, 373 U.S. 83, disclosure obligations which in the process compromise defendants due process rights under the 6th and 14th Amendments of the United States Constitution. This Court recognized that "a State may not be required to provide its citizens with a remedy for its violation of their federal rights, *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). The Court is equally unfaithful to that command when it permits state courts to disregard the Nation's treaty obligations." *Torres v. Mullin*, 540 U.S. 1035, 1037.

The First question Smith asks this Court to review: After Smith's conviction was vacated based upon prosecutorial misconduct, he was tried a second time. In the first trial the State of Ohio did not reveal it would call a federal agent to testify, however, during the second retrial the State of Ohio put on the stand a Federal FBI agent. When a ruling that insist that Smith could have discovered evidence in which the State surreptitiously failed to inform defense of its failure to follow proper Touhy regulation procedures, does it depart from every case that insist that it is not a defendant's duty to scavenge for hints of undisclosed information? See *Banks v. Dretke*, 540 U.S. 668, 697. Unlike *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988), the First District Court of appeals made no such analysis for Smith's Brady violation. Should the first District have made a Due process analysis on Smith's Brady violation claim? Petitioner's position is that it is not his duty to cross inherent procedural red tape to discovery a prosecutor's improper methods.

The Second question Smith asks this Court to review: Should a claim of a Brady violation in a Motion for leave under Ohio's Crim.R. 33(B) procedure incur a due process analysis based upon a State prosecutor's failure to disclose to defense its failure to produce a summarized statement of a Federal FBI agent's anticipated testimony before testifying in a State case? Petitioner asserts that it should.

The Third question Smith asks this Court to review: Did the First District Court error when it failed to apply a due process analysis rather than an abuse of discretion standard when considering whether Smith established the state suppressed the Touhy violation? i.e., did the suppressed evidence deny Smith due process in his right to a fair trial when it suppressed materially favorable evidence in violation of Brady, and Smith's Sixth and Fourteenth amendment rights? See *Wearry v. Cain*, (2016) 577 U.S. 385, 396; *United States ex rel. Touhy v. Ragen*, (1951) 340 U.S. 462, 468; *United States v. Andolschek*, 142 F.2d 503, 506 (2nd Cir. 1944), cited in *United States v. Reynolds*, (1952) 345 U.S. 1, at 12: footnote 27.

LIST OF PARTIES

All parties to this case are listed in the caption of the case, as Edward Smith, Petitioner versus the State of Ohio as the Respondent.

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- I. Trial court ruled during Smith's retrial that it was relevant to defense if state witness, FBI agent Rozier circumvented any rules (Tr.p. 467). Smith discovered in 2024 that the state and Rozier circumvented requirements under Touhy Regulations and thus violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963). Did Smith make a prima facie showing that the prosecutor suppressed this evidence that Rozier circumvented the Touhy Regulations and was this material?
- II. Did the trial court error in addressing the merits of Smith's motion for leave to file motion for new trial based upon newly discovered evidence unavoidably prevented and not sticking to the determination required under Crim. R. 33(B), and did the state violate its obligations under *Brady v. Maryland*?
- III. Did the first district error when it failed to apply a due process analysis rather than an abuse of discretion standard when considering whether Smith established the state suppressed the Touhy violation? i.e., did the suppressed evidence deny Smith due process in his right to a fair trial when the State suppressed materially favorable evidence in violation of Brady, and Smith's Sixth and Fourteenth Amendment rights?

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STATUTES AND RULES

OHIO Revised Code § 2903.02

5 U.S.C.S. § 301

28 C.F.R. § 16.22(a) and (c)

28 C.F.R. § 16.21(a)(2) and (b)

OTHER AUTHORITIES

OHIO CRIM.R. 16

OHIO CRIM.R. 33(B)

U.S. CONST. AMEND. VI

U.S. CONST. AMEND. XIV

U.S. CONST. art. VI, cl. 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Edward Smith, pro se, respectfully petitions the Court for a writ of certiorari to review the judgment below.

OPINIONS BELOW

Cases from Ohio State Courts:

The opinion of The Supreme Court of Ohio appear at Appendix A to the petition and is reported at *State v. Smith* 2026 Ohio Lexis 864, 2026 LX 253742, (Decided April 28, 2026 – 2026-0189); (Memorandum In Support of Jurisdiction and not accepted for review).

The opinion of the Court of Appeals First Judicial District, Hamilton County, Ohio appears at Appendix B to the petition, and is reported at *State v. Smith*, 2025 Ohio App. LEXIS 4222, 2025 LX 514613, (decided and denied: ENTERED Dec. 11, 2025, APPEAL NO. C-250290). Timely Reconsideration Motion, (decided and denied ENTERED on Jan. 9, 2026), unpublished. See Appendix C.

The opinion of the trial court for the Hamilton County Court of Common Pleas Criminal Division appears at Appendix D to the petition and is reported at *State of Ohio v. Edward Smith*, Defendant. Case No. B9609928. (Attached Judgment Journal Entry (September 1, 1999)) Judge Wende C. Cross. ENTERED May 7, 2025, Denied: Appendix E: *State v. Smith*, Defendant. Case No. B9609928 Hamilton County (Attached Judgment Journal Entry (September 1, 1999)); Appendix F: First Judicial Dist. Court of Appeals, Hamilton County, Ohio granting in part Appellant's Motion to Transmit the Record.

JURISDICTION

For cases from State Courts:

- The date on which the Ohio Supreme Court decided Petitioner's case was April 28, 2026. A copy of that decision appears at Appendix A.
- The date on which the State appellate court of Ohio, Hamilton County decided Petitioner's direct appeal, of the denial of his Motion for leave to file a motion for a new trial, was December 11, 2025. A copy of that decision appears at Appendix B.
- A timely petition for reconsideration was thereafter denied on January 9, 2026 Appendix C.
- The date on which the trial Court denied Petitioner's Motion for Leave to file a motion for new trial was on May 7, 2025 Appendix D
- The date on which Petitioner was convicted was on September 1, 1999, Appendix E
- First Judicial Dist. Court of Appeals, Hamilton County, Ohio granting in part Appellant's Motion to Transmit the Record Appendix F.

This Court has jurisdiction under U.S. Const. art. III, § 2 and 28 U.S.C. 1257(a). ¹

¹See *Wearry v. Cain*, 577 U.S. 385, 396, (2016); *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468, (1951); *United States v. Andolschek*, 142 F.2d 503, 506 (1944), cited in *United States v. Reynolds*, (1952), 345 U.S. 1, at 12: footnote 27.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to * * * be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Additionally, the Fourteenth Amendment's Due Process Clause provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend XIV.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"Pursuant to 5 U.S.C. § 301 (known as the Housekeeping statute), the Department of Justice has enacted valid Touhy Regulations to control the release of agency information."

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because of that person's official status without prior approval of the

proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part.

(c) *If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney.* Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

28 CFR §16.21

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party; and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena, order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material

Or information.

(b) For purposes of this subpart, the term employee of the Department includes all officers and employees of the United States appointed by, or subject to the

Supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. Attorneys, U.S. Marshals, U.S. Trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies.

28 CFR 16.22

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the issuing authority is located. The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

STATEMENT OF THE CASE

Prior to his inauspicious arrest in December of 1996, Edward Smith was a proud and successful business owner of Edward Smith's Construction Company, with a consistent flow of revenue. At one point in early 1996, Smith did business with one Eugene Jenkins in which Smith provided construction services for Mr. Jenkins. In the middle part of that year, Mr. Jenkins would periodically update Smith on his efforts to pay Smith for the services Smith provided to Jenkins. Eventually, the two came to an agreement on the payment, which Jenkin's wife later confirmed but was never disclosed to the jury. In the latter part of August or the early part of September

1996, Smith produced an affidavit for final payment. Smith was paid in full as stated by his wife at Smith's 1999 retrial.

On December 27, 1996, Jenkins was found with a gunshot wound in his truck in Lincoln Heights, Ohio, blocks from his residence and later died at a nearby hospital. A member of Jenkins' family, a first cousin, Special FBI agent Randall Marcellus Rozier (hereinafter, Agent Rozier), who at the time was assigned in New Rochelle, New York, Headquarters', took what appeared to be lead role in the homicide investigation (Tr. at 448, 466-68: Appx. 12a). Afterwards Smith was named a suspect in the death of Mr. Jenkins.

A grand Jury on January 9, 1997, charged Smith with the murder of Jenkins pursuant to R.C. §2903.02. A gun specification was included in the indictment. After a trial that lasted two weeks, a jury convicted Smith of Murder and a gun specification. The court sentenced Smith to 15 years to life with a three-year gun specification.

In 1998, following Smith's conviction for murder, the First District Court of Appeals reversed the trial court's judgment and ordered a new trial. See *State v. Smith*, 130 Ohio App.3d 360, 720 N.E.2d 149 (1st Dist. 1998) (reversing defendant's conviction based on prosecutorial misconduct during closing arguments).

In the second trial for the first time, prosecutors presented the testimony of Randall Rozier, the victim's cousin and an FBI agent based out of New Rochelle, New York (T.p. 461 lines: 24-25; 462, Lines: 1-4: Appx. 12a). Agent Rozier testified he asked the local Lincoln Heights, Ohio, Police Chief (not the City of Cincinnati, Ohio,

police chief where Smith was taken into custody at gun point on the morning of Dec. 27, 1996, by FBI agent Rozier without a warrant at Smith's garage.) if he could help with the investigation, however, he was not given permission to do so (T.p. 463, 464: Appx. 12a). Rozier went to the house of one of Smith's employees, James Spikner, whose residence was located in Lincoln Heights, Ohio, and enlisted Spikner to help him locate Smith (whose residence and garage storage facility, both, was located in the City of Cincinnati, Roselawn, Ohio, not in Lincoln Heights, Ohio, as was alleged by the State of Ohio). On December 27, 1996, after Agent Rozier told Spikner that Smith might be a suspect in Jenkins's death. Agent Rozier, drove Spikner to Smith's garage in Roselawn, Ohio, where Smith was alone. After Rozier discovered Smith in the garage, Rozier took Smith into custody at gunpoint without a warrant, no authorization, no consent, and no probable cause.

After the arrest without a warrant, though not trained in homicide by the FBI, agent Rozier offered his help to the Lincoln Heights, Ohio, Police Chief, and without permission, took up his own investigation (T.p. 468 Lines: 23-24: Appx. 12a). Moreover, the Police Chief of Lincoln Heights, Ohio, did not ask him for his help. Agent Rozier testified he did not seek prior authorization from his Boss, Mr. Calstrum, or any authorized agent of New Rochelle, New York (T.p. 462: Appx. 12a). On December 27, 1996, After agent Rozier took Smith into custody at gun point, and helped Lincoln Heights Police, Ohio, to put a photographic lineup together, which included Smith and others, whom they suspected responsible of the homicide, they showed the lineup to witness, Michelle Thomas (after telling her Smith was taken

into custody by FBI agent Rozier). Thomas identified Smith as the person she saw run past her. The State put on testimony by federal FBI agent Rozier, whose activity in the investigation drew many unanswered questions by the defense, including the Judge (Tr. at 449, Lines: 1-15: Appx. 12a). The trial court explained to the prosecutor, that evidence, that the federal agent circumvented the duty to ask the City's Police Chief of Cincinnati, Ohio, and his Supervisor, Mr. Castrum, New Rochelle, New York, with the federal bureau of investigation, was relevant to the defense (T.p. 448-449, 467 Lines: 16-21: Appx. 12a). However, prosecutors made no effort to disclose the rules they and the agent were required to follow See 5 U.S.C. § 301, 28 C.F.R. §16.21(a), (c) et seq.

Following the conclusion of the second retrial a jury once again found Smith guilty of murder and an accompanying firearm specification, and he received a 15-year-to-life sentence on the murder charge and a three-year sentence on the specification. Smith subsequently appealed his conviction, which this court affirmed. *State v. Smith*, 2000 Ohio App. LEXIS 5082 (1st Dist. Nov. 3, 2000).

Nearly 25 years later, still maintaining his innocence, and his right to a fair trial, Smith discovered *State v. Sheckles*, 176 Ohio St. 3d 665, and a report generated by an Artificial Intelligence system, which provided him information (The Gemini Report), that hand in hand demonstrated the State suppressed impeachable favorable information that showed the prosecutor and Federal Agent Rozier circumvented procedures they were required to follow pursuant to 28 C.F.R. §16.21 et seq. *Sheckles* was not decided until 2024, and the prosecutor never disclosed to

defense it did not follow the Touhy Regulations at the time of Smith's trial. Based upon the discovery of this information Smith filed a Motion for leave to file a Motion for new trial based upon a Brady violation.

The trial court denied Smith's Motion for leave (Entered May 07 2025), under Crim.R. 33(B), concluding the Touhy Regulations existed and were available for Smith's use at the time of his trial and that his motion for leave was meritless under *State v. Sheckles, Supra*. Smith Appealed to the First District Court of Appeals who later affirmed the trial court's ruling (12-11-2025).

Smith then submitted a timely reconsideration motion to the First District Court of Appeal's ruling because its ruling did not coincide with the record. The First District asserted Mr. Rozier asked his supervisor for permission but was denied (1-9-2026). This is contrary to the record. Moreover the Appellate Court did not make any mention concerning Smith's *Brady* claim.

Smith then sought review in the Supreme Court of Ohio. The Court refused to accept jurisdiction of Smith's case. *State v. Smith*, 2026 Ohio Lexis 864.

For the reasons set forth, Smith states that the reasons presented for review involves a substantial Constitutional question. Smith ask this Honorable Court to send the Court of Appeal's decision back to the trial court with orders to hold a new trial based on Due process concerns.

REASONS FOR GRANTING THE PETITION

Under *Brady v. Maryland*, there are three components of a true Brady violation, *Strickler v. Greene*, 527 U.S. 263, 281-282, and if those components can be overcome through a showing that the evidence is favorable, was suppressed, and was

material, according the United States Supreme Court and many subsequent rulings by this Court, then a due process analysis should be taken up by a reviewing court irrespective of the Steps provided by Ohio Criminal Rule. 33(B).

Unlike *State v. Smith*, 2026 Ohio Lexis 864 the First District Court of appeals made no such analysis for Smith's Brady violation. Should the first District court of Appeals have made a Due process analysis on Smith's Brady violation claim?

Pursuant to the Housekeeping Statute, 5 U.S.C.S § 301, the Department of Justice has enacted valid Touhy Regulations to control the release of agency information. 28 C.F.R. § 16.21 et seq. While neither 5 U.S.C.S § 301 nor the Department of Justice's Touhy Regulations create a privilege or authorize the withholding of information from the public, they do govern the procedure by which that information may be released and by whom. Such Regulations are jurisdictional.

Based upon the jurisdictional aspect of the rule, the State had a duty to understand its relevance during discovery as employed by Ohio's Criminal Rule 16 discovery requirements, and take necessary steps to assure its witness statement and testimony satisfied this jurisdictional barrier, thus mandating prosecutors to inform defense of the evidence if it is favorable. "Both the federal constitution and the Ohio Rules of Criminal Procedure already require the State to disclose any evidence it possesses that would be favorable to the defendant and material to his guilt. See *Crim.R. 16(B)(5)*; *State v. Garrett*, 2026-Ohio-49, ¶49. This as an affirmative duty. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). "It is well settled that a defendant is entitled to rely on the prosecution's duty to produce evidence that is favorable to the defense. See *Kyles*, 514 U.S. at 432-433.

Did Smith have a duty to believe the State or the Federal agent did not properly circumvent the barriers under 28 CFR 16.21(b), and 28 C.F.R. § 16.22(a) and (c)?

FIRST REASON GRANTING RELIEF:

Under Ohio's Crim.R. 33(B) excuses a defendant's failure to move for a new trial within the 14-or 120-day deadline, as applicable, if the defendant proves by clear and convincing evidence that he or she was unavoidably prevented from discovering the evidence on which the motion would be based within that time. When the defendant makes that showing, the motion for a new trial must be filed within seven days of the trial court's order finding that the defendant was unavoidably prevented from discovering the evidence within the time prescribed by Crim.R. 33(B). *State v. McNeal*, 169 Ohio St. 3d 47, ¶15. This Court explained in *State v. Bethel*, "Crim.R. 33(B) does not give a deadline by which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence." 167 Ohio St.3d 362, 19, 24, 33, 2022-Ohio-783, 192 N.E.3d 470, ¶53.

A trial court's ruling on a motion for leave to move for a new trial is reviewed for an abuse of discretion. See *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993) ("The decision to grant or deny a motion for a new trial on the basis of newly discovered evidence is within the sound discretion of the trial court and, absent an abuse of discretion, that decision will not be disturbed") *McNeal*, at ¶13.

The trial court's decision to deny Smith leave was indeed an abuse of discretion. This Court has specifically stated that "A defendant may also satisfy the

'unavoidably prevented' requirement by showing that the State suppressed the evidence on which the defendant would rely when seeking a new trial." *McNeal*, at ¶2, in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215.

At issue in this case is the applicability of the Regulations found at Title 28 of the Code of Federal Regulations, the supremacy clause, the Touhy Regulations, *Brady/United States v. Agurs*, relating to disclosure of information by employees of the Department of Justice.

28 C.F.R. § 16.22 provides in pertinent part:

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official duties or because [**9] of that person's official status without prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

Smith established by way of the record that the State did not follow the Regulations set forth under the Touhy Regulations. The record demonstrate Rozier provided no detail as to whether he was permitted to testify at Smith's trial. What he did testify to was, he did not ask for permission from his supervisor, Mr. Calstrum to participate in the case (T.p. 461 lines: 24-25, 462: Appx. 12a). Yet the State represented the case and Rozier's actions as though the Regulations at issue in this case were not of a legal matter. But these Regulations are important.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by

his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

This information, whether after seeking, or simply subpoenaing Rozier, a statement by the State was required to be supplied to a properly designated official to acquire Agent Rozier's testimony and its relevance. Whether these steps were taken were in the exclusive possession of the prosecutor's knowledge. See 28 C.F.R. § 16.22(c). The federal appeals court pointed out that evidence in the hands of the police or other investigatory arms of the state is imputed to the possession of the prosecution. *Kyles v. Whitley*, 514 U.S. 419, 437, see also *State v. Leonard*, 1994 Ohio App. LEXIS 4761, 3. All investigatory tactics as it related to Rozier's participation in the investigation and trial was dependent on what the State knew, collected for its case-in-chief and chose to disclose to defense. The State never disclosed that it contacted a supervisor to acquire Rozier's anticipated testimony. What remains of whatever attempt it was to acquire the information that Rozier possessed was never turned over in discovery.

The trial court's decision to deny Smith leave to file a motion for new trial completely shifts away from rulings by numerous courts which held that, "[A]lthough a defendant ordinarily may not claim evidence was undiscoverable when no one made efforts to obtain the evidence sooner, the Court held that *Brady* violations are *different* because a defendant is entitled to rely on the prosecutor's duty to produce exculpatory evidence to the defense. As a result, a defendant asserting a *Brady*

violation is not required to show that he could not have discovered the suppressed evidence by exercising reasonable diligence.” *State v. McFarland*, 2025-Ohio-5850, ¶41. See also *Banks v. Dretke*, 540 U.S. 668, 695.

Based upon these decisions, Smith was entitled to rely on the Supreme Court of Ohio decision in *State v. Sheckles*, 176 Ohio St. 3d 665 for clarity on the procedures the State did not follow under Touhy Regulations. The trial court misrepresented Smith’s argument in his Motion for leave. After reviewing the merits, the trial court used Sheckles under the impression Smith argued for the exclusion of federal Agent Rozier’s testimony. However, Smith made an inverse argument to *Sheckles*. Rather than show that Rozier’s testimony should have been excluded, Smith welcomed such testimony, however, Smith argued instead that were it not for the prosecutor’s suppression defense could have effectively used the fact the State did not follow the requisite Regulations under Touhy to allow defense to effectively cross-examine Rozier. In *Sheckles*, the Ohio Supreme Court noted that a federal employee may be willing to testify in State proceedings, like Rozier, however, he is still under order of Touhy Regulations to receive authorization to testify. *Id.* at ¶16. This is the point in contention; if the State knew it needed to produce a summarized statement to Rozier’s superiors, and failed to do so, and failed to disclose to defense it did not do so, in failing to do so unavoidably prevented defense from discovering the value of the suppression.

For this reason, Smith ask this Court to grant certiorari review in this matter and grant relief or alternatively order the trial court to hold an evidentiary hearing on the matter.

SECOND REASON FOR GRANTING RELIEF

The current language of Ohio's Criminal Rule 33(B) code, holds that when such motion is based upon newly discovered evidence and outside the deadline for filing a timely motion for new trial it requires a Defendant to establish the following:

A motion for a new trial based on newly discovered evidence must be filed within 120 days of the verdict. Crim.R. 33(B). But an untimely motion for a new trial may be filed if the defendant shows "by clear and convincing proof" that he was "unavoidably prevented from the discovery of the evidence upon which he must rely."

However, Crim.R. 33(B)'s specified time requirement "excuses the defendant's failure to file a timely motion for a new trial if the defendant proves by clear and convincing evidence that he or she was unavoidably prevented from filing the motion within the specified time. One way that a defendant may satisfy the "unavoidably prevented" requirement contained in Crim.R. 33(B) is by establishing that the prosecution suppressed the evidence on which the defendant would rely when seeking a new trial."

The rulings by Ohio lower courts however, are contradictory at best, particularly when the discovery of evidence comprise a Brady suppression claim. For instance, when seeking leave to file a motion for new trial based upon new evidence found to have been suppressed by the State defendants must make a prima facie showing the State suppressed the newly discovered evidence. *State v. McNeal*, 169

Ohio St. 3d 47, ¶26. Less than often hearings follow, when hearings are held trial courts are unyielding to prima facie facts demonstrating the State's suppression. Furthermore, when hearings are held, they are often held to determine if the evidence is Material to the outcome of the under Brady. *State v. Parsons*, 2025-Ohio-4626, ¶5. Such decisions should deem seeking leave futile, especially when the claim involves suppressed evidence.

In Smith's case the State suppressed information that the State did not take the requisite steps to take the testimony of a Federal agent and evidence that the agent collected. When seeking information from an employee employed by the Department of justice, formal procedures are accessible to determine their disclosure, including with regard to testimonial evidence.

"Pursuant to the Housekeeping Statute, 5 U.S.C.S § 301, the Department of Justice has enacted valid Touhy Regulations to control the release of agency information. 28 C.F.R. § 16.21(a)(2) and (c) et seq, 28 C.F.R. §16.22(a) and (c). While neither 5 U.S.C.S § 301 nor the Department of Justice's Touhy Regulations² create a privilege or authorize the withholding of information from the public, they do govern the procedure by which that information may be released and by whom. Such Regulations are jurisdictional."

28 C.F.R. §16.22

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the U.S. Attorney for the district where the

² Regulations named after United States ex rel. Touhy v. Ragen, 340 U.S. 462;

issuing authority is located. The responsible United States Attorney shall follow procedures set forth in § 16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, *a statement by the party seeking the testimony or by his attorney*, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney. Any authorization for testimony by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

The Touhy Regulations recognize steps State prosecutors, or others, shall follow when seeking information from federal employees, these Regulations are not vague. *Landry v. FBI*, 1997 U.S. Dist. LEXIS 9850 (E.D. La. July 3, 1997) (Court did not have subject matter jurisdiction to enforce administrative subpoena *duces tecum* because FBI did not waive its sovereign immunity under APA and bank officer seeking to enforce subpoena did not comply with Touhy Regulations). Although the rules does not mention which order to follow these rules, it is clear that when seeking papers or testimony, the appearance, or the testimony of a federal employee, in addition to a subpoena *duces tecum* requires an affidavit or statement from department officials. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462. The mere fact the matter was not discussed should concern this Court. In Touhy, this Court held that subordinate federal officials could not be held in contempt for failing to comply with a court order *that was converse to a valid federal regulation*. *Id.* at 468. Additionally, "If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the

testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney.” 28 CFR §16.22(c). This affidavit and statement was materially relevant to allow Smith to prepare for cross-examination.

The State’s Misconduct intertwined violations of The Supremacy Clause,
the Fourteenth Amendment and Ohio Criminal Rule 16 Discovery
procedure.

“[A] court may not convict a criminal defendant of violating a state law that federal law prohibits. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, citing See, e.g., *Pennsylvania v. Nelson*, 350 U.S. 497, 499, 509, 76 S. Ct. 477, 100 L. Ed. 640 (1956).

“It is apparent that U.S. Const. art. VI, cl. 2, creates a rule of decision: Courts shall regard the United States Constitution, and all laws made in pursuance thereof, as the supreme law of the land. They must not give effect to state laws that conflict with federal laws. It is equally apparent that the supremacy clause is not the source of any federal rights and certainly does not create a cause of action. *It instructs courts what to do when state and federal law clash*, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.” (Scalia, J., joined by Roberts, Ch. J., and Thomas, Breyer, and Alito, JJ.) *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324.

In Smith’s case, federal regulations and Smith’s due process rights clash with Ohio Criminal Rules of Discovery, Ohio rules of evidence and Ohio Const. Art. I, § 10.

For instance, Ohio case law does not support any instance in which Touhy Regulations and Ohio rules of evidence are applicable in both federal and state courts

as substantive federal law. *Markle v. Cement Transit Co.*, 1997 Ohio App. LEXIS 4252, 31. Rather, the "Department of Justice's Touhy regulations make clear that a criminal defendant objecting to the admission of evidence has no right to rely on Touhy; instead, a federal employee holds the right to refuse to testify or produce records until he or she has been given permission to do so." *State v. Sheckles*, 176 Ohio St. 3d 665, ¶14. Where this Court recognized that "a State may not be required to provide its citizens with a remedy for its violation of their federal rights." *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). However, this Court may do so. *Torres v. Mullin*, 540 U.S. 1035, 1037.

Smith never took the position of whether or not Agent Rozier's testimony should have been omitted (contrary to the trial Court's claim in its judgment), however, Ohio criminal rules of discovery under Crim.R. 16(B)(1)(f) prior to Smith's 1999 re-trial provided that "...a prosecutor has the duty to disclose all known evidence that is clearly exculpatory and material." And Crim.R. 16(B)(1)(g) governed a defendant's discovery of witness statements. *State v. Keenan*, 81 Ohio St. 3d 133, 147. Rather Smith argued that had he discovered the Touhy regulations at the time of his trial, it would have been difficult for him and any State court to untangle the unlawful legal informalities created by prosecutors' use of evidence testified to and collected by Rozier when taken into account the lack of adherence to the federal regulation procedures by prosecutors. For instance, 28 CFR §16.22(c), holds that: "If oral testimony is sought by a demand in any case or matter in which the United States is not a party, *an affidavit, or, if that is not feasible, a statement by the party seeking*

the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney." Prosecutors' not following this procedure conflicts with Ohio Evid. R. 613(B) (Prior to 2000). Because assuming the State did acquire a statement, and furnished it upon the U.S. Attorney, this would have then made any prior statements made by Rozier discoverable, but also allowed defense to impeach prosecutor's witness on his prior inconsistent statement, and conduct. But the State did not disclose it sought such statements, yet allowed Rozier to testify. Had defense been aware of any information sought by the State from any attorney general, Defense could have asked to see any prior statements (Crim.R. 16(B)(1)(g)). Thus the conflict.

Therefore, Smith can establish that prosecutors not only violated Brady and Ohio discovery rules, but it violated the Supremacy Clause to deny Smith the right to a fair trial.

THIRD REASON FOR GRANTING RELIEF

The Brady standard does not require Smith to show that the Prosecutor's failure to disclose that it did not follow the Touhy Regulations to acquire Rozier's participation in the trial would have resulted in his acquittal. *State v. Bethel*, 167 Ohio St. 3d 362, ¶32. See also *Kyles* at 434. Nor does it require him to show that, "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been [sufficient evidence] left to convict," *Id.* At 434-435. Rather, Smith must prove that "in the context of the entire record," suppression of the

information “undermines confidence in the outcome of the trial,” *Bethel* Supra, citing *Kyles* at 434.

Smith’s due process claim overcomes the burden of showing the three components of a Brady violation, that “[T]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Bethel*, 167 Ohio St. 3d ¶19.

a. The Touhy violation is favorable information for impeachment purposes

Had this information been made available to Smith at the time of his trial defense could have further inquired into the State’s anticipated false claims by Rozier, specifically when he was expected to testify that State’s witness Spikner told him Smith possessed a weapon (T.p. 448-449).

This anticipated testimony occurred during a side-bar was discovered to have been a lie. Defense could have inquired into whether or not this claim was placed in a federal file (Ohio Evid.R. 613(B) self-contradiction impeachment), or presented in a statement. Armed with this knowledge and used effectively to impeach Rozier, may have made the difference between a conviction and acquittal. “Brady requires the government “to turn over evidence that is both favorable to the defendant and material to guilt or punishment.” *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 154. See also *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 36. See also *Brady*, 373 U.S. at 91. Smith could not make effective

use of the evidence because the State withheld that it did not follow the necessary Touhy Regulations.

b. The evidence was Suppressed

The State in its opposition to Smith's Motion for leave, did not express that it did not suppress whether it followed the necessary Touhy Regulations while subpoenaing a federal agent and obtaining any information collected by him. Smith overcomes this burden in his first proposition of law but further elaborates herein to satisfy the second component under Brady.

Had the State complied with the Touhy Regulations steps like that taken by the Fourth Circuit case in *Smith v. Cromer*, 159 F.3d 875, where that Court held that "We are convinced, both by statute and precedent, that 28 C.F.R. § 16.22(a) is valid insofar as it directs Appellees not to testify without prior approval of the proper Department official." *Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998); *Gomez v. Gates* (In re Boeh), 25 F.3d 761(9th Cir. 1994). Additionally, further cases has laid further foundations for prosecutors to follow in an effort to put all parties on notice of Federal agent's participation in State proceedings. According to the rules under Touhy, "[P]roperly promulgated agency Regulations implementing federal statutes have the force and effect of federal law which state courts are bound to follow." *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir.1989) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-296, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979)). A state court cannot allow a federal official to testify *absent compliance with the Regulations requiring agency*

approval. See *id.* "Such action plainly violates both the spirit and the letter of the Supremacy Clause." *State v. Sheckles*, 2023-Ohio-133, ¶32.

Based upon this ruling nowhere in the record can the State show that it followed these valid procedures, nor can it show that it did not inhibit the trial court and defense from recognizing these steps were not followed. *Bethel* at ¶ 24. Such prosecutorial misconduct would be seen as an intentional act to conceal relevant information. *United States v. Andolschek*, 142 F.2d 503, 506, para. [** 8-9] (2nd Cir. 1944), cited in *United States v. Reynolds*, (1952), 345 U.S. 1, at 12 footnote 27.

c. The evidence was material to Smith's guilt

28 C.F.R. § 16.22(c) provides in pertinent part:

If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, *setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney*. Any authorization for testimony by a present or former employee of the Department *shall be limited to the scope of the demand as summarized* in such statement.

The trial court determined that Smith was not prejudiced by his lack of access to this information because he was not afforded any rights provided under the Touhy Regulations. *State v. Sheckles*, 176 Ohio St. 3d 665. However, Smith never expressed any rights afforded him under Touhy Regulations. Based upon the mischaracterization of its assessment on the merits the trial court concluded that the revelation would not have changed anything. Yet the trial court did not determine if Smith was prejudiced by the suppression, or that the information was immaterial for Brady purposes. *State v. Bethel*, 167 Ohio St. 3d 362, ¶33. Suppressed evidence must

be "considered collectively, not item by item." Citing *Kyles*, 514 U.S. 419, 433-434, 436, 115 S.Ct. 1555, 131 L.Ed.2d 490. And the materiality of suppressed evidence must be viewed "in the context of the entire record." *United States v. Agurs* (1976), 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342.

Therefore, in examining the materiality of the issue involving the prosecutor's failure to disclose that it did not provide Rozier's superiors a summarized statement of Rozier's anticipated testimony (T.p. 448-449: Appx. 12a). This Court must 1.) Consider if the State's failure to do so denied Smith due process in a criminal trial when the government failed to choose; whether or not to leave the particular transaction between it and Rozier in obscurity from which a trial was to draw them, or to expose them fully. The Second Circuit Court held nor does it seem to us "...possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant."

This Court with approval in *United States v. Andolschek*, id at 506, cited in *United States v. Reynolds*, (1952), 345 U.S. 1, at 12: footnote 27, in which the Second Cir. Court also held that although it can "accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons," it "cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." *Andolschek*, id at 506, at 8, 9; and 2.) Whether when taken into consideration the suppressed evidence, did it deprive defense from further inquiring into what

Prosecutors intended to present to the jury. *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988). i.e., during a side-bar conference, the anticipated claims made by Rozier became a point of contention:

Direct - Examination: (Tr. At 448-449):

(Tr. At 448, Lines: 10-25).

(The following proceedings were had at Sidebar conference.)

Prosecutor: "What?"

Judge: "What's the relevancy? *Is he an expert witness or something?*"

Prosecutor: "He will be testifying that when he came upon the situation that he was basically, his training and his experience as a 'police officer', he was frightened enough to pull his firearm when he saw what was happening between Spikner and the defendant. He's a trained -"

Judge: "What's the relevancy?"

Prosecutor: "There's a dispute here about whether or not the defendant has a gun. This witness will testify that Spikner told him that he had a gun. He withdrew his weapon when they came

(Tr. at 449, Lines: 1-15):

On the scene because of his fear, based on his training. That gives relevance

To his actions."

Defense: "Spikner never testified to that."

Judge: "Spikner never said he saw a gun. You don't object?"

Defense: "I do object."

Prosecutor: "He's going to testify -"

Judge: "No. Are you trying to impeach your own witness?"

Prosecutor: "No."

Judge: "Then I'm not going to allowing it."

Thank you." (T.p. p. 448-449, see Appendix 12a)

This is why the issue of Touhy must be viewed in the context of the entire record, *Agurs* at 112. Pursuant to 28 C.F.R. § 16.22(c) "a statement by the party seeking the testimony or by his attorney, *setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible U.S. Attorney.*" *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468, 95 L. Ed. 417, 71 S. Ct. 416 (1951); *United States v. Andolschek*, 142 F.2d 503, 506 (1944), cited in *United States v. Reynolds*, (1952), 345 U.S. 1, at 12: footnote 27. If Smith's position is given no weight, this court must ask itself, what if the State did furnish the responsible U.S. Attorney with a summary of the testimony it intended to present to the jury. It must then assume the State used valid Touhy regulations and implemented Rozier's actions from the start of the trial to the end of trial. Hence, this would require a review of the entire record. *Agurs*, supra.

When considering the testimony of Rozier, Rozier's presence and testimony was obviously essential to law enforcement's investigation. The State argued for Rozier's anticipated testimony, that it was relevant to a claim unsupported by other witness testimony, and physical evidence. If the State was willing to produce testimony it knew to be false and/or inaccurate, certainly then Smith can make a prima facie case that the anticipated testimony was not inspired during the side-bar, but rather during the preparation of the State's case-in-chief. Therefore, had the prosecutor disclosed that it had to follow the Touhy Regulations defense then could have determined if these Regulations were complied with and sought out the very

statement it promoted during the side-bar, from Rozier's superiors, and ultimately used the evidence to further impeach Rozier on his illegal activity and bias based on the fact that the victim was his cousin. *United States v. Andolschek*, 142 F.2d 503, 50 (1944), cited in *United States v. Reynolds*, (1952), 345 U.S. 1, at 12: footnote 27.

Given the jury found Smith guilty, the jury did not believe Smith's defense without further proof, and ultimately did accept the agent's claims over Smith's defense. Such omission of the Touhy Regulations cannot be seen as harmless when a Defendant's constitutional rights to cross-examine a witness is at stake. Federal Courts has determined that, "In a case like this that depends on whether the jury believes the word of the defendant versus the word of an FBI agent, exclusion of such impeachment evidence is not harmless error." *United States v. Mergen*, 543 Fed. Appx. 46, 49 (2nd Cir. 2013); see also, *United States v. Miller*, 793 F.2d 786, 792 (6th Cir. 1986), U.S. Lexis 26245; *United States v. Lawson*, 683 F.2d 688, 690, 693 694. (1982). If a new trial were granted today further cross-examination of Rozier on the State's position that a warrant was not needed for Smith's employee to enter Smith's garage (Tr. 465: Appx. 12a) would be relevant material evidence. The State made the position that even though Rozier used Spikner as a proxy to unlawfully enter Smith's garage a warrant was not needed. However, a review of the entire record would show that from the start to the end of trial Rozier unlawfully inserted himself into the investigation under questionable and unauthorized privileges, a jury may then find that the evidence the State used against Smith could have been planted by Rozier when taken into consideration his unlawful acts.

Based on this evidence presented Smith is able to show that the State's theory that he committed the offense of murder is faulty, and further proves he may have been framed by way of Rozier's rogue conduct.

CONCLUSION

A state court cannot allow a federal official to testify absent compliance with the Regulations requiring agency approval. See *id.* "Such action plainly violates both the spirit and the letter of the Supremacy Clause." The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.' *Gonzales v. Raich*, 545 U.S. 1, 29. If this court find this to be true the due process deprivations in violation of Smith's Sixth and fourteenth amendment rights, require this Court to interject and enforce the law.

Based on the issues presented in this petition, Petitioner, Edward Smith, pray that this Honorable Court accept jurisdiction in accordance with *Wearry v. Cain*, 577 U.S. 385, 396; *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468; *United States v. Andolschek*, 142 F.2d 503, 506 (1944), cited in *United States v. Reynolds*, (1952), 345 U.S. 1, at 12: footnote 27, and grant the writ of certiorari based upon the evidence Edward Smith as petitioner has presented.

Respectfully Submitted,

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