OHIO CENTER FOR LAW-RELATED EDUCATION

Partnering with Teachers to bring Citizenship to Life

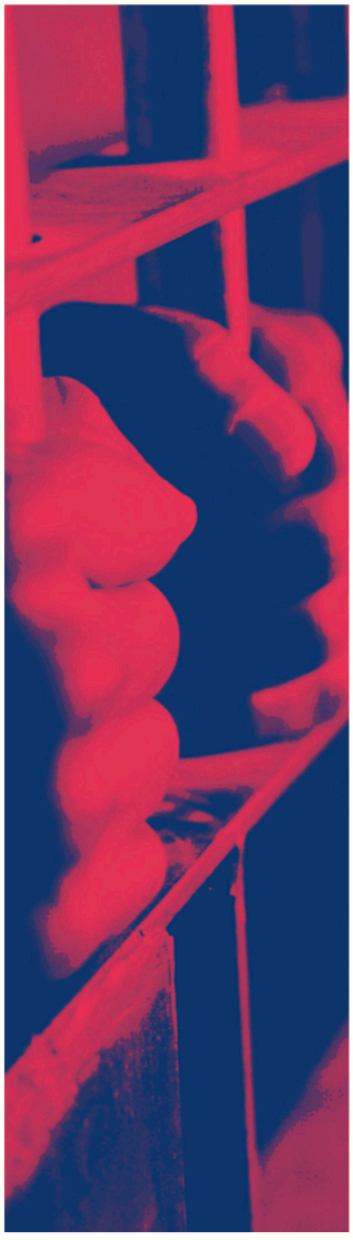
38TH ANNUAL

Ohio

20TWENTY-ONE

– HIGH SCHOOL –

MOCK TRIAL



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OCLRE is sponsored by the Supreme Court of Ohio, the Ohio Attorney General's Office, the Ohio State Bar Association, and the American Civil Liberties Union of Ohio Foundation.
The Ohio Mock Trial Competition is made possible in part by a grant from the Ohio State Bar Foundation.

Important Dates

Deadlines

- **Team Registration Deadline:** December 14, 2020 *(Teams registered after this date will incur a late fee of $40 per team)*
- **Late Registration Deadline:** December 23, 2020 *(Teams registered after this date may only compete on a space available basis)*
- **Team Roster Deadline:** December 23, 2020
- **Withdrawal Deadline:** December 23, 2020 *(No refunds will be issued after this date)*
- **Eiler Award Nomination Deadline:** July 1, 2021

Competition Dates *Tentative*

- **Virtual District Competition:** January 22, 23, 28, and 30
- **Virtual Regional Competition:** February 19, 20
- **State Competition:** March 11-13, 2021

Errata Schedule*

- **Submissions due for first errata:** Tuesday, October 13, 2020
- **First errata posting:** Tuesday, October 20, 2020
- **Submissions due for next errata:** Tuesday, October 27, 2020
- **Errata posting:** Tuesday, November 3, 2020
- **Submissions due for next errata:** Tuesday, November 10, 2020
- **Errata posting:** Tuesday, November 17, 2020
- **Submissions due for next errata:** Tuesday, November 24, 2020
- **Errata posting:** Tuesday, December 1, 2020
- **Submissions due for next errata:** Tuesday, December 8, 2020
- **Errata posting:** Tuesday, December 15, 2020
- **Submissions due for final errata:** Tuesday, December 22, 2020
- **Final errata posting:** Tuesday, January 5, 2020

**Note: All errata postings are as needed. If we do not receive any errata submissions the week prior, there will be no errata update.*

OCLRE is on Social Media!

For a glimpse behind the scenes and to stay up to date on the latest news, follow the Ohio Center for Law-Related Education on Facebook, Twitter, and Instagram. Be sure to check all three platforms so you don't miss out on important program teasers and updates!

Use #OCLRE for your Mock Trial posts!

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Mock Trial Manual

Ohio Center for Law-Related Education
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OCLRE receives support from sponsoring organizations: Supreme Court of Ohio, Office of the Ohio Attorney General, Ohio State Bar Association, and the ACLU of Ohio Foundation. The opinions expressed in this publication do not necessarily reflect the position of OCLRE Sponsors, and no endorsement should be inferred.

Ohio Mock Trial is made possible in part by a grant from the Ohio State Bar Foundation. The views expressed herein do not necessarily represent those of the Ohio State Bar Foundation.

A Note on Implicit Bias

The Ohio Center for Law-Related Education is committed to providing fair, unbiased, and equitable opportunities for students throughout the state of Ohio. As such, we recognize the importance of addressing implicit bias in our programs and offerings.

We all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called "implicit biases" or "unconscious biases."

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As participants in the Ohio Mock Trial program it is important to resist jumping to conclusions or acting upon personal likes or dislikes. Resist letting bias, prejudice, or public opinion influence your behavior inside or outside of the courtroom. Treat all individuals with respect, regardless of ability, gender, race, religion, ethnicity, sexual orientation, age, national origin, or socioeconomic status.

To reinforce the importance of confronting implicit bias, the presiding judge will read aloud a statement on implicit bias before every trial. This information is also included in all judge and volunteer training.

Civility

You may have seen trials portrayed in the movies and TV shows in which the lawyers show, or barely conceal, contempt for one another and even towards the judge. This makes for good drama, but real trials are rarely conducted in this manner, and should never be.

The general duty of an attorney is set forth in the Ohio Rules of Professional Conduct, which are adopted by the Supreme Court of Ohio and govern the conduct of all Ohio attorneys. The Preamble to the Rules reads, in part, as follows:

> As an officer of the court, a lawyer not only represents clients but has a special responsibility for the quality of justice. * * * A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. *** In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the legal system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Specific provisions of the Ohio Rules of Professional Conduct require an attorney to: be punctual in fulfilling professional commitments, avoid offensive tactics, and treat all persons involved in the legal process with courtesy and consideration [Rule 1.2(a)]; be honest in all dealings with courts and other tribunals before which the attorney appears [Rules 3.3 and 3.5]; refrain from asking questions that have no purpose other than to embarrass or harass a witness or other person [Rule 4.4(a)]; refrain from engaging in undignified or discourteous conduct that is degrading to a tribunal [Rule 3.5(a)(6)]; and avoid conduct involving dishonesty, fraud, deceit, or misrepresentation or conduct that is prejudicial to the administration of justice [Rule 8.4(c) and (d)].

Students who participate as attorneys in the Ohio High School Mock Trial Program should strive to follow these principles of civility while representing the interests of their clients and can expect the scoring judges to be favorably impressed as a result. The failure to maintain civility can be expected to have a negative impact on the scoring judges.

With the rare exception where a student is portraying a witness who might genuinely require some departure from the high standards of civility set for the legal profession, it will usually be more effective for a witness to respond courteously to the attorneys' questions, not to interrupt the attorney, and to wait while an attorney interposes an objection to the question just put to the witness. It is never a good idea, no matter how obstreperous the character being portrayed, for a witness to show disrespect to the court.

As for the attorneys, not only is civility expected, it can be surprisingly effective. Being civil does not mean being a push-over. Stridency often distracts from the inherent forcefulness of the argument being made. Cross-examination does not have to be badgering to be thorough and effective to the point where the witness's testimony is completely discredited; indeed, a badgering tone may only engender sympathy for the witness.

It is expected that advisors, coaches, and parents will, at all times, model civil behavior towards and respect for the court and members and supporters of the opposing team.

THE OHIO CENTER FOR LAW-RELATED EDUCATION
2021 OHIO MOCK TRIAL COMPETITION MANUAL

Introduction

Ohio Mock Trial provides an opportunity for high school students to participate in an academic competition. The Ohio Mock Trial Competition is designed to foster a better understanding of the American democratic legal system and to encourage development of analytical and communication skills. In moving from the classroom to the courtroom, high school students add an important dimension to their learning experience in citizenship education. Students develop an appreciation for our justice system and the role of laws in our society. Through first-hand experience, the Mock Trial Competition can teach students about their rights and responsibilities under the Constitution. The Mock Trial experience prepares students for possible future involvement as parties, witnesses and jurors in trials; familiarizes students with the rules and procedures involved in litigation and the roles and responsibilities of judges and attorneys. The Mock Trial Competition also develops students' critical thinking skills, poise and public speaking ability. By working in partnership with the legal community, teachers and students learn how our legal system works and learn important democratic principles reflected in and protected by our justice system.

COMPETITION TERMS

The following list presents important terms to know for participation in the Ohio Mock Trial Competition.

Attorney: For the purposes of mock trial judge requirements, we define an attorney as any individual who has received a Juris Doctor degree from an accredited American Law School.

Case Introduction: A narrative setting forth the facts of the case; it may not be used for purposes of impeachment during the trial.

Debriefing: A discussion by the judicial panelists of the teams' and individual performances.

District Competition: The first round of competition run by volunteer district coordinators in which each team participates in two trials, one as plaintiff, and one as the defense.

Double: When a team is asked to 'double," they are asked to simultaneously compete on opposite sides of the case, against different opponents, in a different room, at the same competition site. As a result, teams will have a free round before or after the trial in which they "doubled." Only teams with at least nine (9) team members may "double."

Judicial Panelist: An attorney, judge, magistrate, paralegal, or law student who volunteers to evaluate teams participating in the competition.

Legal Advisor: An attorney judge, magistrate, paralegal, or law student who volunteers to coach teams participating in the competition.

Presiding Judge: The judicial panelist who controls the courtroom and rules on motions and objections. This judicial panelist must be an attorney or judge.

Pretrial Conference: A brief meeting of judicial panelists, legal advisors, teachers, and student attorneys before each trial to address questions and unresolved issues.

Regional Competition: The second round of competition run by volunteer regional coordinators in which each team that advances from the district competition will participate in two trials, one as plaintiff, and one as the defense.

State Competition: Rounds of competition take place in Columbus. The teams that won BOTH regional trials compete with teams from across the state. At the state competition, teams will compete in at least one trial. Winning teams (see exception page 8, section I, letter A) keep advancing until two teams remain to compete in the Championship Round.

Simplified Rules of Evidence: Rules regarding the admission and exclusion of evidence.

Split: A school that is asked to "split" is being asked to compete at two different competition sites. Only schools with two or more teams will be asked to split. Split schools must have at least two adult chaperones, to ensure all teams are supervised at their competition sites.

Team: A group of 5-11 students from a school are called upon to present <u>both</u> the plaintiff/prosecution and defense sides of the Mock Trial case using students as attorneys, witnesses and bailiff/timekeeper.

CASE INTRODUCTION

The Ohio Center for Law-Related Education is pleased to present the 38th annual Ohio Mock Trial case: *State of Buckeye v. Micah Opessa*. In the 2021 case students will explore a scenario in which criminal defendant Micah Opessa petitions the court to withdraw their guilty plea. In 2019, Micah was charged with and pleaded guilty to voluntary manslaughter in the death of Haumea Robins. Micah maintained their innocence throughout the investigation and in the early stages of the criminal proceedings. Upon the discovery of an eyewitness placing Micah at the scene of the crime, Micah began having doubts about the outcome of the upcoming trial. When the prosecutor offered Micah a new deal of voluntary manslaughter with a 5-year sentence, Micah decided to take the deal.

Now, approximately one year into their sentence, Micah is petitioning the court to withdraw their plea because of an alleged manifest injustice based on a violation of Micah's Due Process rights. The eyewitness placing Micah at the crime scene later recanted their testimony and identified someone other than Micah at the scene of the crime, information which the prosecutor allegedly withheld during Micah's plea negotiation. The defense has filed this petition to withdraw a plea which means the defendant will bear the burden of proof. As such, the defendant will present arguments first, will put on their witnesses first, will present closing arguments first, and will be entitled to take the optional rebuttal. The prosecution (the state of Buckeye) will not be entitled to a rebuttal argument.

The defendant will seek to prove the existence of a manifest injustice based on prosecuting attorney, Justice Okafor's failure to disclose material exculpatory evidence in violation of the Brady Rule prior to Micah pleading guilty to voluntary manslaughter. The defense will seek to prove that Justice Okafor's failure to disclose evidence violated their Fourteenth Amendment right to due process thus amounting to a manifest injustice.

We hope this case presents a challenge to the students of the Ohio Mock Trial program and provides an opportunity to learn more about the intricacies of the criminal justice system. It is our goal for students to study and question the practices within the American justice system in order to gain a deeper understanding of this system and how it operates. We also wish that all who participate in the Ohio Mock Trial Program, both as competitors and volunteers, have a positive and enjoyable experience.

Please remember the judges, coordinators, committee members, and facilitators are volunteers who have taken time out of their busy schedules to benefit student participants. As such, they may display different levels of preparedness, and may make decisions at their discretion with which students and coaches may not always agree. We urge Ohio Mock Trial participants to be flexible and generous with their understanding throughout the competition process.

Best wishes and Good Luck!

The 2020-2021 High School Mock Trial Case Committee

Character Names and Pronunciation Guide

The Buckeye State is enriched by the presence of individuals from a variety of cultural, ethnic, linguistic and national backgrounds. Since 2019, OCLRE has made a commitment to including character names in the Mock Trial Case File that reflect the true diversity of our students and the State of Ohio. We encourage students to research and explore the diverse cultures from which these names originate to appreciate the legacy and contributions they make to our world.

Below is a pronunciation key for the names of characters in this year's case. The names are written in the International Phonetic Alphabet (IPA), and transliterated using English approximations. Audio recordings of IPA symbols can be accessed at https://www.internationalphoneticalphabet.org/ipa-sounds/

Corey Abrams:	IPA Transliteration	[kɔ.ˈɹi]	[ˈæ.bɹəmz]
	English approximation	*koh-REE*	*AY-brumz*
Scout Firat:	IPA Transliteration	[skaʊt]	[fĩ.ˈrat]
	English approximation	*skowt*	*f-rAht*
River Foley:	IPA Transliteration	[ɹɪ.ˈvɚ]	[ˈfoʊ.li]
	English approximation	*ri-VER*	*FOH-lee*
Charlie Nguyen:	IPA Transliteration	[tʃɑːɹ.li]	[ɲʍɪn]
	English approximation	*CHAr-lee*	*nwin (single syllable)*
Justice Okafor:	IPA Transliteration	[ˈdʒʌ.stɪs]	[ɔ.ˈkɑ.foɹ]
	English approximation	*JUH-stis*	*oh-KAH-fohr*
Micah Opessa:	IPA Transliteration	[maɪ.ˈkɑ]	[ɔ.pɛs.ˈæ]
	English approximation	*my-KAH*	*oh-peh-SAY*
Kai Robbins:	IPA Transliteration	[kaɪ]	[ˈɹɑ.bɪnz]
	English approximation	*KI (as in kite)*	*RAh-binz*
Haumea Robbins:	IPA Transliteration	[haʊ.mæ.ə]	[ˈɹɑ.bɪnz]
	English approximation	*how-MAY-uh*	*RAh-binz*

2021 RULES OF COMPETITION

I. Team Structure

a. Team Roles

i. A mock trial team may be a school or a community team and consists of a minimum of five to a maximum of eleven students (including alternates) on the official roster from the same high school (if the team is affiliated with a high school), a team advisor, and a legal advisor.

ii. A community team is a mock trial team consisting of students from a single high school or multiple high schools which do not sponsor a mock trial team. A community team may only exist with the approval of OCLRE

iii. Each team will have two attorneys (two different students), two witnesses (two different students), and a bailiff/timekeeper, playing Plaintiff and Defense sides of the case. If for any reason, including illness or other commitments, a team drops below the minimum number of students (five), the team will forfeit its right to continue in the competition. This is without exception.

iv. An individual student can be listed and serve on only one team. Members of the team must be listed on the Official Team Roster that is available online. **Only those students listed on the Official Team Roster may participate in District, Regional and State Competition.**

b. Student Roles

i. A student may play one role per side. Students may change roles when presenting the other side of the case. The roles are as follows:

Prosecution	Defense
Attorney	Attorney
Attorney	Attorney
Witness	Witness
Witness	Witness
Timekeeper/Bailiff (Official)	Timekeeper (to assist with running clock)

Each team must call and question two witnesses. Each team must have a student serve as a timekeeper during the trial, and the Plaintiff team provides a bailiff. Each team must use two attorneys for each side played. Each attorney must conduct a direct and cross-examination and an opening or closing statement. Only the attorney who conducts the direct examination of witnesses may raise objections during the cross-examination of that witness.

ii. A timekeeper will be supplied by both teams and **must** use ONLY the provided time cards in the competition manual, timekeeper's sheet and two stopwatches.

iii. The student presentations should be the work product of the students themselves, guided, by team advisor(s) (see below) and legal advisor(s), if any. It is important that presentations be the students' work rather than having students simply memorize the words prepared by an adult.

iv. OCLRE can, upon request, make revisions to materials and the competition format to accommodate students with I.E.P. and/or 504

plans.

c. Team Advisors
    i. Teams entering the Ohio Mock Trial Program will be guided by a team advisor, who must be rostered. OCLRE believes the teams should be teacher-driven to ensure that educational standards are met.
    ii. All teams must be guided by an adult team advisor and may also use a legal advisor (not required).
        1. For teams associated with a school, the adult advisor must be authorized by the school (e.g. teacher, coach, counselor, designated parent, etc.).
        2. Teams seeking a legal advisor may contact OCLRE for assistance in finding a qualified volunteer.
        3. A legal advisor may not serve as an advisor for more than one school.
    iii. A legal advisor is not required, but is strongly suggested. The legal advisor enriches the students' knowledge by providing essential in-depth understanding of the law and its role in democracy. Legal advisors must be rostered.
    iv. Any adult advisor must appear on the roster for the team.
    v. Adult advisor(s) for the team are responsible for:
        1. Completing all required forms for registration and competition.
        2. Submitting any errata or competition questions to the mock trial coordinator.
        3. Serving as the chaperone for the team (or designating a substitute) at all levels of competition.
        4. Responding to requests for information from OCLRE.
    vi. Adults advising the team should serve as guides for the students in both the academic and legal components of the program. All work product should be the exclusive work of the students on the team.

II. Required Forms

a. Registration
    i. An official Competition Registration Form and registration fee for each team must be submitted online to OCLRE by **Monday, December 14, 2020**.
    ii. A confirmation will be sent from OCLRE to the email address on the registration form. Teams registering after **Monday, December 14, 2020** will be penalized a late registration fee of $40.
    iii. If the Competition Registration Form is received by OCLRE after **Wednesday, December 23, 2020** the team will compete on a space available basis. If no space becomes available, the entire registration fee will be returned to the team.

b. Roster
    i. A team roster is required to complete the registration process. Team rosters must be submitted online via www.oclre.org by **Wednesday, December 23, 2020** in order for a team to be assigned to a competition site. Teams that submit rosters after this date will only be able to compete on a space-available basis.

ii. No roster additions/substitutions will be permitted for ANY reason after the district competition occurring on **Friday, January 22, 2021** though advisors are able to drop team members if necessary.
iii. Although the team members must remain the same for the District, Regional and State competition, the members may change the parts they play. It is strongly suggested that a school submit a complete roster of eleven team members to ensure alternates are available.

c. Withdrawing a team from competition
i. If a team drops out of the competition after submitting a registration form, a team advisor must complete the drop form found on the OCLRE Mock Trial website (http://www.oclre.org). Teams may be eligible for a partial refund if they drop from the competition before the **December 23, 2020** withdrawal deadline.

III. Eligibility

a. All students are eligible to compete on a mock trial team if they have been enrolled in their school during the academic year in which the competition occurs and have not yet graduated.
b. A student attending a career/technical, or "magnet" school that sponsors a mock trial team whose home school also sponsors a mock trial team may participate on either, but not both, teams.
c. A student at a school which does not have a mock trial team may compete on a team at another area high school or join a community program with permission from OCLRE.
d. A school may enter more than one team. Every effort will be made to accommodate second, third or more teams; however, schools fielding more than one team may be required to compete outside their home county, and/or at more than one competition site.
e. A student from a school that has a mock trial team may compete on a community team provided that no more than 50 percent of the students on the community team are from a school with a mock trial team. No student may participate on both a school and community team.

IV. Competition Structure

a. Rules for All Levels of Competition
i. Competition consists of two trials at the district level, two trials at the regional level and at least one trial at the state level.
ii. Teams registered for the Ohio Mock Trial competition will be placed at a competition site based on travel distance and capacity. Schools with a travel restriction that would prevent them from leaving their home county must indicate their restriction on their registration form. OCLRE will make every effort to honor valid travel restrictions.
1. Schools fielding more than one team may not apply for travel restrictions.
2. Schools fielding more than one team may be required to "split" between sites.
iii. OCLRE will attempt to provide teams with side playing first information no earlier than two days before the district, regional and state competitions. This information will be posted on the OCLRE website. No side playing first requests will be considered for any reason. Be aware that OCLRE may make changes to side playing first, up until the start of the

trial, without notice due to unforeseen circumstances (e.g. the addition or drop of teams, weather, etc.).

iv. *At the **district level**, teams will be matched at random with the exception that schools with a total of two teams shall not be paired against themselves. Any team from a school with a total of three or more teams (across all competition sites) could be randomly matched against another team from that school.*

v. All Teams will be matched at random at the **regional** and **state** competitions with no exceptions.

vi. No requests for assignments, pairings, or side-playing first will be accepted for any level of competition.

vii. Scrimmage arrangements are the responsibility, and at the discretion of, the team advisor. This may mean that if a team scrimmages a team in the same area, they could meet again in the competition.

viii. If possible, no more than 50 percent of teams in a district competition site will be from the same school. If the majority of the teams assigned to one competition site are from the same school, OCLRE will make an effort to select a team(s) at random to travel to an OCLRE-selected location to compete.

ix. At all levels of competition, OCLRE will attempt to place an even number of teams at each site. If there are an odd number of teams present at a site, a team with an adequate number of members will be assigned to "double" (play both Plaintiff and Defense at the same time in separate courtrooms). If a double is required at a competition site, OCLRE will randomly choose a team containing nine or more students. Teams that cannot double can apply for and explain an exemption on the roster form.

x. After each competition, score sheets will be made available to teams, with priority given to teams advancing to the next level (e.g. teams advancing from districts to regionals). All score sheets will be made available no later than 1 month after the conclusion of the state competition. Scoring errors must be brought to OCLRE's attention using the included Scoring Error Notification Form within three business days of the competition, or receipt of the score sheets (whichever is later.)

xi. If there are questions about the mock trial case or competition rules, only the team advisor and/or legal advisor – not students - may submit questions to the case and competition committees by contacting Danielle Wilmot, Mock Trial coordinator, at 614-485-3507 or dwilmot@oclre.org. The question must include the name and e-mail address of the submitting advisor. The question will be forwarded to the case or competition committee depending on the nature of the question, and if necessary, the answer will be posted on an errata sheet which can be found at http://www.oclre.org.

xii. The errata sheet will be updated every two weeks. To have your question answered in the upcoming errata, your question must be submitted one week prior to the errata release. The first errata will be posted on **Tuesday, October 20, 2020**. To have your question appear on the first errata, your question must be submitted by **Tuesday, October 13, 2020.** The final errata will be posted on **Tuesday, January 5, 2021**. The last day to submit a question is **Tuesday, December 22, 2020**.

b. District Competition
    i. In the district competition, each team will participate in two trials and will play both Plaintiff and Defense.
    ii. District site assignments will be released on **Friday, January 3, 2020** on the OCLRE website. Every effort will be made to place schools in their home county/closest competition site, but teams may be asked to travel up to 60 miles for the district competition.
        1. If a team is unable to travel, the advisor may apply for a travel restriction on the registration form. Additional documentation may be required for the committee to accept the restriction.
    iii. In the event no team at a district competition wins BOTH trials, the team with a 1-1 record that won the highest percentage of ballots (i.e. judges scoring that team as the winner) will advance to the regional competition. Ballots won will be calculated only for teams with a 1-1 record.
        1. If there is a tie in the percentage of ballots won among teams with a 1-1 record, among teams with the same percentage, the team winning the most awards (i.e. best attorney and best witness) will advance.
        2. If after considering ballots won and awards won a tie persists, all tied teams will advance to the regional competition.

c. Regional Competition
    i. In the Regional competition, each team will participate in two trials and will play both Plaintiff and Defense. Regional site assignments will be released on **Monday, January 27, 2020**.
    ii. Teams that advance to the regional competition will be placed in a location where there is space available, and OCLRE cannot prioritize keeping any teams in their home county.
    iii. OCLRE will make every effort to assign at least 4 teams to each regional site.
    iv. In the event no team at a regional competition wins BOTH trials, the team with a 1-1 record that won the highest percentage of ballots (i.e. judges scoring that team as the winner) at the regional competition will advance to the state competition. Ballots won will be calculated only for teams with a 1-1 record.
        1. If there is a tie in the percentage of ballots won among teams with a 1-1 record, among teams with the same percentage, the team winning the most awards (i.e. best attorney and best witness) at the regional competition will advance to the state competition.
        2. If after considering ballots won and awards won a tie persists, all tied teams will advance to the state competition.

d. State Competition
    i. Day One of State Competition
        1. Teams that advance to the state competition must travel to Columbus to compete at the Franklin County Courthouse.
        2. Teams will advance in a single elimination tournament. Winners will play winners and losing teams will not advance (see exception listed below). Advancing teams will be matched at random, and to the greatest extent possible, each side played in the previous trial switched.

3. OCLRE has the option of providing only one trial after determining how many teams will be present at the State Competition. At the state competition, teams can be eliminated after they lose one trial, though OCLRE retains the authority to allow each team to compete in two trials depending on the number of teams advancing to the state competition.
4. Once pairings have been determined for the second trial, they will be announced by OCLRE. After the second trial, OCLRE will announce advancing teams but NOT draw pairings until day two of the competition.
    a. In the event that the number of teams winning both trials is not exactly equal to eight, additional procedures for advancement will be required. The scenarios in which this occurs are outlined in the table below.
    b. In the event additional teams are needed, advancing teams will be selected from the teams with a 1-1 record. First, the percentage of ballots won (i.e. judges scoring that team as the winner) at the state competition will be calculated for all 1-1 teams. The number of teams needed shall be taken from that pool, in order of percentage won, the number of awards won (i.e. best attorney and best witness) at the state competition will be used to break the tie. If a tie still persists, the remaining vacancies will be drawn at random from among the tied teams.

Advancing Teams	Result
0	Refer to rule IV.d.4.b above
1	The advancing team will be named the State Champion and no further trials will occur.
2	Trial 3 will be held as the State Final trial.
3	1 team will be selected at random from the group of teams with one loss to bring the remaining number of competing teams to 4. Refer to rule IV.d.4.b above
4	Trial 3 will be held as the semi-final round with the remaining 4 teams.
5, 6, or 7	Refer to rule IV.d.4.b above
8	The Quarter-final round will begin on Day 2 with the 8 advancing teams
9-16	Teams participating in the Play-In Round will be drawn at random from the pool of advancing teams. For example, if 11 teams advance from Trial 2, then Trial 3 would have 3 matchups with 6 teams and 5 teams will automatically move on to Trial 4. From the 6 teams that compete in the Play-In Round, the 3 winning teams will join the 5 teams that automatically advanced, for a total of 8 teams in Trial 4. Play-In Round participants will be announced the morning of Day 2 at the State Competition. Teams not competing in the Play-In Round will automatically advance to the next trial. After the Play-In Round, the remaining 8 teams will then proceed with Trial 3 of the state competition.

ii. Day Two of State Competition
    1. Play-In Round (As Needed)
        a. At the end of the first day of competition, OCLRE will announce the advancing teams. If more than 8 teams qualify for advancement, OCLRE will facilitate a play-in round, which will occur before the Quarterfinal Round on Day Two of the competition.

b. In a play-in round, OCLRE will draw from the pool of eligible teams to determine which teams will compete. The number of trials will depend on how many teams need to be eliminated to get to eight. The first team drawn for each trial will play Plaintiff, the second will play Defense.
c. After the play-in round, advancing teams will be announced, and OCLRE will prepare to draw new pairings for the quarterfinal rounds.

2. Quarterfinals
   a. In the Quarterfinal rounds, a new drawing will occur in which the first team drawn will play Plaintiff/Prosecution, and the second team will play Defense.
      i. If paired teams faced each other in a previous trial, teams will play opposite sides of the case in the Quarterfinals.
   b. Non-advancing teams will be recognized before the semifinal round.
3. Semifinals
   a. Teams advancing to the semifinal round will be matched at random, and to the greatest extent possible, each side played in the previous trial switched.

iii. Day Three of State Competition
1. Championship Round
   a. The championship round will occur on the third day of competition at the Ohio Statehouse.
   b. A coin flip to determine sides played will be done in the presence of the teams the morning of the championship round. The team that comes first alphabetically will play heads, the team that comes second will play tails. The team that "wins" the coin toss will play the Plaintiff.

e. National Competition
i. The state champion earns the right to represent Ohio at the National High School Mock Trial Competition, if one is held, and will receive a stipend from OCLRE to help defray expenses for national competition.
ii. If the state champion team decides to represent Ohio in the National High School Mock Trial Competition, all state championship team members MUST be given the option of attending. If a team member is unable to attend for any reason, a written note must be provided to OCLRE by the student and the principal of the participating high school before the stipend is sent.
1. OCLRE understands that the winning team may need to add members to complete a roster for the national competition, and team members may be added as needed from the winning school. If team members are added, they must be confirmed by contacting OCLRE before the stipend is sent.
2. The winning team should contact OCLRE following the state competition to receive further information.

iii. In the event the state champion is unable to participate in the national competition, OCLRE will extend the invitation to the runner-up to participate in their stead.

V. Competition Site Logistics

a. Participants for all OCLRE programs are expected to read the behavior standards at the time that the team registers with OCLRE for the Mock Trial Competition. Team advisors are expected to complete and electronically sign the behavior standards form. It is expected that all standards will be adhered to at all times by any students, school staff, or guests of the school/team.
    i. Violation of behavior standards could lead to the disqualification of school/group and immediate dismissal from the event.
b. Teachers must report to the registration table to register the team and confirm their official roster (submitted online prior to competition).
c. Teams will receive score sheets upon check-in at the district, regional and state competition.
    i. Teams will complete the score sheets prior to the pre-trial conference. This requires the cooperation of teams, team advisors, and legal advisors.
    ii. Please complete the team's relevant information on **ONE score sheet when playing Plaintiff and TWO score sheets when playing Defense**.
    iii. Upon meeting with the other team, both will exchange score sheets and fill in the needed information before the judges meet for the pre-trial conference. DO NOT SEPARATE THE SCORESHEET COPIES. Score sheets must be completed to identify team members and their roles.
d. Courtroom assignments will be provided to teams at registration. Pairings will <u>not</u> be released in advance.
e. The District/Regional coordinator will not change pairings made by OCLRE under any circumstances. If an issue with pairings is discovered, coordinators will notify OCLRE as soon as possible to request new pairings.
f. Teams may videotape and/or livestream their own trials with permission from the opposing team *and* the presiding judge.
g. Teams may not use a laptop computer, tablet, phone or other similar device during the Mock Trial competition.
h. The competition will run as scheduled RAIN or SHINE. The only way to guarantee that a team will compete is to arrive at an open competition site. Teams travel to and from Mock Trial at their own risk, and each team's advisor must determine whether it is safe for the team to travel to the competition site.
i. OCLRE is not responsible for the safety of team members who travel to or from the Mock Trial competition. Teams MUST immediately contact the OCLRE office **and** the district/regional/state coordinator if weather or any other reason prevents their participation.
    i. In the event that a significant number of teams are not able to compete due to weather at the district or regional competitions, OCLRE will make an effort to provide a suitable make-up competition for those teams, but cannot guarantee this will occur. If a make-up competition occurs, it will be scheduled within seven days of the original competition date established by OCLRE and teams may have to travel and compete on a weekend.
j. On the day of the competition, if a situation develops whereby a team is left without an opponent, teams already competing at that site will be expected to fill

in. If a team can play both sides at the same time (double), it will be assigned to do so.

k. All students should wear a nametag so the judges can identify them. Witnesses should wear the name of the character they play; all others should wear their own names. It is the responsibility of the team to bring nametags with them. Do not list the school name on the nametag unless advised to do so by the District/Regional Coordinator.

l. Team and legal advisors are the ONLY individuals from each team who may approach a site competition coordinator or volunteer with questions or concerns. Students, parents, and guests should not address coordinators or volunteers directly.

m. In order to compete, all teams must be accompanied on site, at the district, regional and state competitions, by a teacher or school official, legal advisor or other designated adult. If a school has more than one team, each team must be subject to the supervision of a designated adult who can adequately supervise the team's behavior. While the supervisor does not need to be in the room at all times, they must be available to respond promptly if there is a need. The adult shall be listed on the team roster as the "designated adult supervisor." Failure to comply with this rule may, at the discretion of the competition coordinator, be grounds for disqualification.

n. All team members and any props or uniforms must pass through local courtroom security. As a general rule, courtroom security will not allow any weapon or object that looks like a weapon into the courthouse. Be sure to leave adequate time and be prepared to comply with courthouse security.

VI. Judging and Scoring Guidelines

a. Every effort will be made to provide each trial with a three-judge panel, all of whom will complete score sheets. In some instances, a trial may have to move forward with only two judges.
    i. On a three-judge panel, the team that wins two out of the three judges' ballots wins the trial.
    ii. On a two-judge panel, the team that wins both judges' ballots wins the trial.
    iii. If neither team wins both ballots on a two-judge panel, the judges will add each team's total points. The team with the highest total points wins the trial.
        1. If the team's total points are tied, the team that won the presiding judge's ballot will win the trial.

b. Attorney and witness awards will be based on all judges' points added together and **are not to be considered as "consolation" prizes**. If there is a tie when the scores have been added together, the Presiding Judge will decide the award winner.

c. Each judge will evaluate each team member on a scale of 1-10. The team will be scored on a 1-10 point scale for its overall performance.

d. Each judge will score individual and team performances using *whole numbers only*. The team that earns the most points on an individual judge's score sheet is the winner of that ballot.

e. A judge CANNOT have a tie between the two teams.

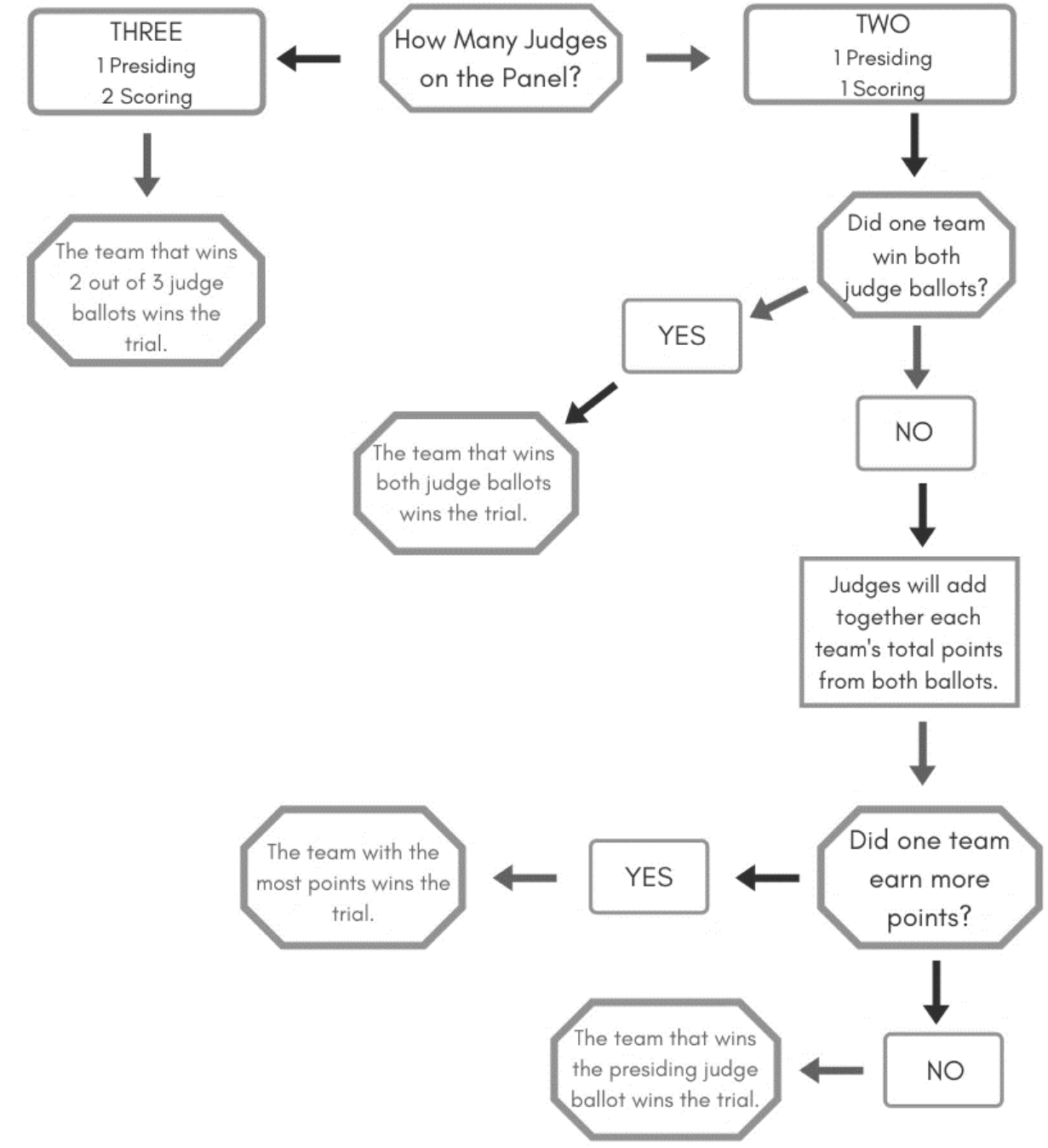
f. Teams who win both trials will advance in competition from districts to regionals and from regionals to states.

g. The judges will hear the trial as a "bench trial." This is not a jury trial, and students should address the Court. One judge will serve as the presiding judge and

will control the courtroom and rule on motions and objections. The other judge(s) will serve as scoring judges and evaluate the team and individual performances.

h. All attempts will be made not to have the same judicial panel assigned to judge the same team more than one time at the same level of competition.
i. All judges will receive a case summary, competition rules and scoring procedures.
j. If robes are available, judges may be asked to wear them for competition.
k. Only the presiding judge is to speak during a trial. The presiding judge's comments are limited to ruling on objections and do not include questioning witnesses or counsel.
    i. The trial will be judged based on individual and team performance, not the merits of the case.

Who Wins the Trial?



SCORING JUDGE RUBRIC

VII. Scoring Benchmarks

A. Scoring Judge Rubric

1. Attorney Performance Indicators:
   - ✓ *Advocacy skills:* creative, organized and convincing presentation
   - ✓ *Understanding of legal issues*: ability to apply law and facts to case
   - ✓ *Oratorical skills*: poised, able to think on feet, extemporaneous delivery
   - ✓ *Demeanor/Professionalism/Civility:* models respectful and professional behavior at all times towards the court, fellow team members, advisors, and opposing teams.
   - ✓ *Mastery of trial technique*: effective use of objections, appropriate form of questioning, ability to recognize and rehabilitate own weaknesses, mitigate opponent's good points
   - ✓ Did not ask questions that called for an unfair extrapolation from the witness
   - ✓ Did not make excessive, unnecessary objections when the invention of fact had no material impact.
   - ✓ *Opening statement:* provided case overview, identified theory of the case, discussed the burden of proof, stated the relief requested and was non-argumentative
   - ✓ *Closing argument:* continued theory of the case introduced in opening statement, summarized the evidence, applied the applicable law, discussed the burden of proof, concentrated on the important – not the trivial- and overall was persuasive
   - ✓ *Complies with Competition Rules*
2. Witness Performance Indicators:
   - ✓ Knowledge of case facts and theory of team's case
   - ✓ Observant of courtroom decorum
   - ✓ Believability of characterization and convincing in testimony
   - ✓ Avoided unnecessarily long and/or non-responsive answers on cross examination
   - ✓ Articulate and responsive
   - ✓ Did not make unfair extrapolations
   - ✓ Complies with Competition Rules

Points, Performance and Evaluation Criteria

9-10 **Excellent:** Exhibits mastery of all procedural and substantive elements. Significantly advances team effort.

7-8 **Good:** Proficient in most procedural and substantive elements. Helps team on the whole.

5-6 **Average:** Moderately comfortable with procedural and substantive elements of the trial but contains some imprecise use of trial elements or lacks polish.

3-4 **Minimal:** Does not advance team effort. Minimal comprehension of procedural and substantive trial elements.

1-2 **Limited** No evidence of procedural and substantive trial elements.

3. Team Effort Indicators:
   - ✓ Did the team establish a credible theme for its argument?
   - ✓ Did the team select appropriate witnesses to prove the argument?
   - ✓ Was witness examination organized?
   - ✓ Did witness examination develop the argument?
   - ✓ Was the team's case carefully crafted and skillfully delivered?
   - ✓ Complies with Competition Rules

B. Penalties

1. Material Rule Violation
   A Material Rule Violation is a violation of a competition rule that affects the fairness of the trial. If at least 2 judges on the panel agree that a Material Rule Violation has occurred, a 5-point penalty shall be deducted from the offending team's score on each judge's score-sheet.
   a. One example of a Material Rule Violation affecting the fairness of a trial which ***may*** warrant a 5-point deduction would be a team going over their time-limit for closing arguments by more than 15 seconds without prior permission of the presiding judge to do so.
2. Gross Rule Violation
   If at least two judges on the panel agree that a Material Rule Violation has occurred, and agree that the 5-point penalty is insufficient given the seriousness of the violation, the panel shall consult with the Competition Committee. The committee may impose additional sanctions including, but not limited to, disqualification.
   a. One example of a Gross Rule Violation warranting a serious penalty ***may*** be communication, intended to impact the students' performance, between team members and their teacher or legal advisor, whether through signals, notes, or electronically.
3. All objections/alleged violations raised by a team must be made before the presiding judge retires for scoring (during the post-trial objections period).
4. Complaints not raised prior to the presiding judge retiring for scoring may be made only by the academic advisor after the competition in writing using the complaint form in this case file.
   a. There is a strong presumption that complaints will not alter the decisions of the judicial panel and are used only for potential rule changes or procedure variations in future years. In exceptional circumstances, the Competition Committee may find that the seriousness of a complaint warrants additional action.

PROCEDURAL RULES

I. Trial Rules and Procedures

A. Preparation

1. The case and competition sections of the Ohio Mock Trial notebook contain all materials necessary to participate in the competition. Students playing the roles of attorneys may make appropriate use of the case materials, including the legal briefs, the Judge's Order and all of the witness statements, subject to all other applicable rules of the mock trial competition. However, this does not include the case introduction, which is not considered a formal part of the case materials.
2. For purposes of the mock trial, all documentary facts are stipulated as admissible evidence, so they need not be formally introduced in court.
3. Supplemental materials are also provided to help teachers teach the case and explain the legal issues and procedures involved. These materials may not be introduced into the trial; they are for educational purposes only.
4. If a legal citation is referred to in the case, it may be utilized in development of the legal theory and cited. However, only facts and information given about that citation in the case materials may be communicated to the court.
5. It is the responsibility of the mock trial team to present and advocate the law and facts of the case to the judges. As in real life, the mock trial team should not assume judges know the facts of the case.

B. Time Limits

1. A trial is scheduled for two hours including all activities beginning with the pre-trial conference and ending with the closing of court. The presiding judge will enforce the time limit and may, at their discretion, grant a time extension in the interest of fairness.
2. Each team must supply a student timekeeper. However, the team playing the Plaintiff will supply the Official Timekeeper. Both teams may flash the cards provided in the manual in such a way that all participants can see them.
3. *Timing will begin at the Opening Statement, after the introductions are made.*
4. If a time-keeping discrepancy of more than 15 seconds is discovered between the Plaintiff and Defense teams' timekeepers, the timekeepers should notify the presiding judge as soon as the discrepancy is discovered. In this event, one of the timekeepers should stand, wait to be recognized, and say "Your honor, we have a time discrepancy of more than 15 seconds." The presiding judge will ask the nature of the discrepancy and then rule on the discrepancy before the trial continues. Once the presiding judge rules, the timekeepers shall synchronize their stop watches to match the ruling. The decisions of the presiding judge regarding timing disputes are final, and no timekeeping disputes will be entertained after the trial has concluded.
5. The time clock will stop for objections and responses.
6. The timekeeper will guide the judges' comments by showing a 1:00 minute card and a stop card 11 minutes and 12 minutes into the judge's comments.

C. Courtroom Setting

1. Plaintiff counsel on the right (facing bench).
2. Defendant's counsel on the left (facing bench).
3. Witnesses behind counsel tables.

4. Judges on the bench (or, if necessary, in the jury box).
5. Bailiff in front of the bench.

6. The Timekeepers (unless also acting as bailiff) and video camera person in the jury box, if possible, and if video is permitted by the opposing team and presiding judge

(see rule D.1).

Teachers and legal advisors behind the teams.

D. Conduct During Trial and Trial Sequence

1. The presiding judge controls the courtroom. They may ask anyone to leave, if necessary. Teams may videotape their own trials with permission from the opposing team and at the presiding judge's discretion. Videos may be shared only with the teams featured in the specific videos.
2. Until closing arguments have concluded, team attorneys may communicate only with each other. During the post-trial objection phase of the trial, attorneys may communicate with the witnesses, bailiff and timekeeper performing in the actual round. However, none of the performing team members may communicate in any way with teachers, legal advisors, team members not performing in that round or any other observers once the judges enter the courtroom and the bailiff opens the court. This restriction includes breaks during the trial.
3. If a team prepares a third witness for trial who they do not call, that third witness may not participate in the trial in any way including, but not limited to, sitting with the other witnesses and conferring during the trial.
4. Attorneys may speak from a lectern in the center of the courtroom, if one is available. **Lecterns or other furnishings may not be moved into or out of any courtroom at any time.** The Plaintiff/Prosecution side is responsible for returning the lectern and chairs to original position inside the courtroom following the trial. At the discretion of the presiding judge, attorneys may walk about the courtroom. The preference of the presiding judge should be raised and determined at the pre-trial conference.
5. No furnishing/equipment may be moved into or out of the courtroom. Not all courtrooms are equipped with the same furnishings; therefore, blackboards and other visual aids may not be used. The rule on exhibits prevails.
6. The trial, including judges' comments, should not last longer than two hours.

7. <u>Preparing Ballots for the Pre-Trial Conference</u>

   Prior to the pre-trial conference, both teams roster the scoresheets for the round. This requires the teams to disclose which witnesses they will be calling. Teams must also disclose which segment of the trial each attorney will perform. All information will be recorded in the (3) three ballots provided; (2) two for the scoring judges and (1) one for the presiding judge. These completed ballots will be given to the judges at the pre-trial conference.

8. <u>Pre-trial Conference</u> (10 minutes)

   Student attorneys will participate in a pre-trial conference with the judicial panel. Teachers, legal advisors and/or designated adult supervisors are encouraged to attend.

Permitted During Pre-Trial:

a. Discussing whether teams have permission to film
    1. Have all photo releases been signed and marked as yes?
b. Questions related to judicial preferences (e.g. should attorneys stand when making objections, waiting to respond after objections, etc.)
c. Questions related to mobility (e.g. can attorneys move about the well of the courtroom?)
d. Discussing accommodations or modifications approved by OCLRE (e.g. our second witness requires braille text, which has been provided for use)
e. Providing completed scoresheets to judges

Prohibited During Pre-Trial:

a. Giving judges copies of any trial material (including but not limited to trial binders, laminated exhibits, copies of witness statements, etc.)
    1. Judges receive materials from OCLRE. Additional items to be considered should be shown to the bench at the time it is raised during trial (e.g. when used to impeach a witness), in the same format indicated in the rules (e.g. clean, unmarked, unaltered copies).
b. Oral case summaries from either team
    1. Judges receive a case summary and errata summary from OCLRE.
    2. Any presentation of facts or evidence should occur during the trial itself through statements or witness testimony.
c. Making of motions or seeking judicial notice of any item (including but not limited to declarations of expert witness status, voir dire of witnesses, motions to separate witnesses, etc.)

9. <u>Opening the Court</u>

When the judges enter the courtroom, the bailiff opens the court by saying:

> "All rise. Hear ye, hear ye, the U.S. District Court for the Middle District of Ohio [or whatever the name of the court may be], Mock City, Ohio [or whatever town in which the court is located] is open pursuant to adjournment. All having business before this honorable court draw near, give attention, and you shall be heard. You may be seated."

10. <u>Opening Statements</u> (4 minutes' maximum per statement)

a) The presiding judge should ask counsel for Defense to make an opening statement. Defense counsel should introduce themselves and their team members and the roles they are playing and then present the opening statement. The same procedure is used with Prosecution counsel. The timekeeper will stop and then reset the stopwatch to zero after opening statements.
b) An opening statement has been defined as "a concise statement of [the party's] claim [or defense] and a brief statement of [the party's]

evidence to support it." Judge Richard M. Markus, *Trial Handbook for Ohio Lawyers* (Thomson-West, 2006 Edition), §7:1, p. 305. A party seeking relief should indicate the nature of the relief sought. It may be useful to acknowledge the applicable burden, or burdens, of proof. An opening statement is not supposed to be argumentative and should be used by attorneys to present their theories of the case. Legal authorities can be cited, to show what issue or issues are before the court for decision. It is appropriate to lay out what the attorney expects the evidence will show, but the wise attorney will be conservative in this regard.

c) The most important aspect of the opening statement is to frame the issues. The attorney wants to frame the issues so that there is a compelling narrative (the theory of the case) in their client's favor into which all the favorable facts and all favorable legal authority neatly fit. A well-crafted opening statement tells a story that will dominate the trial that follows.

11. Swearing in the Witnesses

a. The bailiff swears in with:

"Will all witnesses and parties who are to give testimony in these proceedings please step to the front?"

b. Then the bailiff holds up their right hand and says:

"Please raise your right hand. Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth and your testimony will comply with the Rules of the Ohio Mock Trial Competition?"

c. All witnesses will remain in the courtroom but will be deemed constructively separated. Therefore, it should be assumed that witnesses are unaware of prior trial testimony and no motion for separation of witnesses shall be necessary.

12. Testimony of Witnesses (Direct/Re-direct 20 minutes; Cross/Re-Cross 18 minutes)

a. Counsel for the Prosecution and Defense will each call two witnesses. Prosecution attorneys must call Prosecutions witnesses and Defense attorneys must call Defense witnesses.

b. Counsel for Defense will present their case first. The presiding judge will ask counsel for Defense to call the first witness. The witness will then testify in the following examination sequence:

- Direct
- Cross
- Re-Direct
- Re-Cross

When Defense counsel calls the second witness, the witness will be called to the stand and the procedure repeated.

c. The presiding judge will then ask counsel for the Prosecution to call their first witness. The Prosecution follows the same procedure as the Defense.

d. Witnesses are bound by their written statements.

e. Witness statements may be used by counsel to impeach a witness or refresh a witness's memory in accordance with the Simplified Rules of Evidence. Witnesses may not, however, bring witness statements or notes to use as a trial aid during testimony.

f. Fair extrapolations are permitted only during cross-examination if they are (i) consistent with the facts contained in the case materials and (ii) do not materially affect the witness's testimony. If a witness invents an answer that is likely to affect the outcome of the trial, the opposition may object. **Teams that intentionally and frequently stray outside the case materials will be penalized.**

g. If an attorney who is cross-examining a witness asks a question, the answer to which is not included in the witness's written statement or deposition, the witness is free to "create" an answer provided it is responsive to the question, does not contain unnecessary elaboration beyond the scope of the witness statement, and does not contradict the witness statement.

13. Exhibits:

All exhibits contained in the case materials are stipulated as admitted. Only exhibits that are part of the case materials may be used. If used, the exact page from the case materials may be reproduced on 8½ x 11 paper, but not bound in plastic or modified in any way. The trial proceedings are governed by the Simplified Rules of Evidence found in this casebook.

14. Closing Arguments (5 minutes maximum each, with an additional 2 minutes Defense rebuttal)

a) The presiding judge will allow attorneys two minutes (no longer) before closing arguments to incorporate results from cross or to collect their thoughts. During this time the timekeepers will stop both stopwatches and reset to zero. No one shall leave the courtroom and all rules on communication during the trial prevail. The presiding judge will ask Prosecution's and Defendant's counsel if they are ready to present closing arguments. Counsel for Defense will present their closing argument first, followed by the Prosecution's closing argument. Counsel for Defense has the option for a two-minute rebuttal after the Prosecution's closing argument. These two minutes do not have to be requested in advance. The optional rebuttal is limited to the scope of the Prosecution's closing argument.

b) Closing statements, "are permitted for the purpose of aiding the [finder of fact] in analyzing all the evidence and assisting it in determining the facts of the case." Markus, op. cit., §35:1, at p. 1013. In a bench trial (to a judge, rather than to a jury), the closing statement is also the time to argue the law to the judge.

c) The attorney should point out to the court that their side has proven everything that it promised to prove, while pointing out that the other side failed to prove what it promised it would. It can now be shown how the evidence that was presented fits into the narrative (the theory of the case) that was introduced in opening statement, which, in turn, applying the law, compels a result in that side's favor.

Remind the court what that favorable result is; i.e., the particular relief your client is seeking from the court.

d) On occasion, evidence presented won't survive an objection, or the attorney's best witness will be forced to equivocate on an important point on cross-examination. When this occurs, adjustments have to be made to the closing statement to fit the evidence actually presented in the trial.

e) The closing statements are the final opportunities to persuade the judge. In oral presentation, the statements having the most impact are the first statements, and the final statements. The attorney should try to make the first and last things said in closing argument the most vivid and persuasive, while reserving those points that have less emotional impact, but need to be said, for the middle of the statement.

15. Objections During the Trial

In addition to evidentiary objections, objections may be made during the trial by an attorney who believes that any rule set forth in the Rules of Competition has been violated. For example, if an exhibit is mounted or modified, the other team's attorney may state an objection. Similarly, if an attorney observes what appears to be communication between a team and their teacher during trial, the attorney may state an objection. In making these objections, the procedure set forth for stating evidentiary objections (Simplified Rules of Evidence and Common Objections) should be followed. As with evidentiary objections, the objection must be made at the time of the claimed violation, and the attorneys knew or should have known of the violation. No objections may be raised during opening statements or closing arguments. The presiding judge may make rulings as appear appropriate, including prohibiting use of an exhibit that has been modified, requiring compliance with the rule, admonishing individuals or teams, deducting penalty points from the team's score (such deductions to be done only by the entire panel during post-trial scoring), etc. All judges will not interpret the rules and guidelines the same way. The judge's decision, however, is final, and no appeals procedure is available. The clock stops for objections and judge's ruling.

16. Post-Trial Objections

After closing arguments are completed, and after the scoring judges have been excused to begin scoring in chambers, the presiding judge will ask, "Does either team have serious reason to believe that a material violation of any rule has occurred during this trial? I will remain on the bench for three minutes, during which time any protest or objection may be brought to my attention by a team attorney. The team attorneys may communicate with all performing team members (witnesses, bailiff and timekeeper) involved in this actual round but may not communicate in any way with legal advisors, teachers, or anyone outside their performing team members."

a. Motions for directed verdict or dismissal of the case are not permitted.

b. Objections that could have been raised during the trial, including evidentiary objections, may not be raised at this time.

If no objection is made within three minutes, the presiding judge will mark their score sheet and then retire for scoring. If there is an objection, one of the attorneys for the team will stand and state the objection and the ground for objection. The judge may conduct an inquiry in the manner they deem appropriate; the judge in their discretion may solicit a response and/or inquire further into the facts.

The presiding judge does not announce a finding but retires for scoring. The presiding judge then consults with the scoring judges and may consult with a member of the OCLRE staff.

17. Rule Violations and Penalties

For information regarding rule violations and penalties, please see Competition Rule VII.B.1-2.

18. Scoring

After the trial, the judicial panel will retire to chambers to tally their scores. Scoresheets should be completed immediately after the trial, and judges may not keep scoresheets between trials.

a. Judges may confer with one another for clarification, but ultimately each judge will make their own determination as to final scores.

b. Using the Presiding Judge Tally Sheet, determine the winners of the individual awards (i.e. Best Attorney, Best Witness).

i. Individual awards are to be determined using the scores assigned. They *should not* be treated as consolation prizes.

19. Conclusion of Trial

The bailiff calls court back in session with:

"All rise. Court is now back in session."

After the judges are seated, the bailiff says:

"You may be seated."

20. Debriefing and Announcement of Witness and Attorney Awards

The presiding judge will provide comments on the strengths and weaknesses of each team's performance. Debriefing should be precise, and last no more than 12 minutes. The timekeeper will give the judge a one-minute warning and then a "stop."

a. Any penalties assessed on a team will be announced.

b. The scoring judges will announce the outstanding witness and attorney awards, discuss the highlights of their performances, and present their certificates.

c. **The winning team and scoring information will not be announced.** Results will be announced and posted by the Competition Coordinator at the end of the district and regional competition and at the conclusion of appropriate rounds of state competition. The

official competition score sheet may be posted by the district/regional coordinator at the end of the competition. After the district competition, score sheets from the district competition will be sent to the teams advancing to the regional competition. Individual team score sheets for all teams from all levels of competition will be provided no later than **Tuesday, April 14, 2020**, one month following the state competition.

d. Decisions of the judicial panel are final. If an advisor has a complaint, they must complete an official complaint form, which will be reviewed by the competition committee. Follow-up on the status of the complaint will be communicated to team advisors as-needed.

21. Closing of Court

a. The presiding judge will recognize and thank the teachers, legal advisors, students, and families for their support and will turn the court back to the bailiff.

b. The bailiff closes the official proceeding with:

"All rise. This honorable court is hereby adjourned."

c. Both teams are responsible for leaving the courtroom in the same condition as it was found. Both teams are responsible for taking their own papers and notebooks and disposing of them properly.

II. Condensed Trial Sequence and Time Guidelines (Running Clock):

Part of Trial	Minutes
Pre-trial conference	10
Opening Statement – Defense	4
Opening Statement – Prosecution	4
Direct and Re-Direct (2 witnesses)	20
Cross and Re-Cross (2 witnesses)	18
Direct and Re-Direct (2 witnesses)	20
Cross and Re-Cross (2 witnesses)	18
Intermission to gather thoughts	2
Closing Statement – Defense	5
Closing Statement – Prosecution	5
Rebuttal – Defense only (optional)	2
Subtotal	108
Judges' Comments	12 (timed)
TOTAL	120 = 2 HOURS

SIMPLIFIED RULES OF EVIDENCE

The rules contained in this section represent the entirety of the evidentiary rules applicable to mock trial. In some instances, the simplified rules may differ in form and content from either the Federal Rules of Evidence and/or the Ohio Rules of Evidence (e.g., Mock Trial Rule 803 contains only *six* exceptions to hearsay, rather than the *twenty-three* listed in the Ohio Rules). In some instances, rule sections have been added to existing rules to cover situations unique to mock trial (e.g. clarifications have been added to Rule 602 governing the invention of fact).

Article I. GENERAL PROVISIONS

RULE 101. Scope of Rules: Applicability; Privileges; Exceptions

These rules govern proceedings in the Ohio Mock Trial Program and are the only basis for objections in the Ohio Mock Trial Program.

RULE 103. Offer of Proof

Offers of proof are not permitted.

RULE 104. Voir Dire

Voir Dire examination of a witness is not permitted.

RULE 105. Directed Verdicts

No directed verdict or dismissal motion may be entertained.

Article IV. RELEVANCY AND ITS LIMITS

RULE 401. Definition of Relevant Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

Evidence which is not relevant is not admissible.

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

RULE 404. Character

Character evidence. Evidence of a person's character, other than their character for truthfulness, may not be introduced. Evidence about the character of a party for truthfulness or untruthfulness is only admissible if the party testifies.

Article VI. WITNESSES

RULE 601. General Rule of Competency

Every person is competent to be a witness.

RULE 602. Lack of Personal Knowledge

(A) A witness may not testify to a matter or exhibit unless evidence is introduced sufficient to support a finding that they have personal knowledge of the matter. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

(B) Invention of Facts and Extrapolation The object of these rules is to prevent a team from "creating" facts not in the material to gain an unfair advantage over the opposing team.

(1) Invention of Facts - Direct Examination. On direct examination the witness is limited to the facts given in their own written statement. If the witness goes beyond the facts given (adds new facts or speculates about facts), the testimony may be objected to by the opposing counsel as speculation or as invention of facts outside the case materials. If a witness testifies *in contradiction* of a fact given in the witness statement, opposing counsel should impeach the witness's testimony during cross-examination. [S*ee also*, Procedural Rules, D.12 regarding Witness Testimony"]

(2) Invention of Facts – Cross Examination. If on cross-examination a witness is asked a question, the answer to which is not contained in the facts given in the witness statement, the witness may respond with any answer, so long as it is responsive to the question, does not contain unnecessary elaboration beyond the scope of the witness statement, and does not contradict the witness statement. An answer which is unresponsive or unnecessarily elaborate may be objected to by the cross-examining attorney. An answer which is contrary to the witness statement may be impeached by the cross-examining attorney. [*See also*, Procedural Rules, D.12 regarding Witness Testimony].

(C) When an **Invention of Fact** objection is made, the burden is on the team presenting testimony to show where in the materials the information is sourced.

RULE 603. Use of Outside Research

1. Teams may not make reference during trial to any material not included in the Ohio Mock Trial case file.
2. When an outside research objection is made, the burden is on the team presenting testimony to show where in the materials the information is sourced.

RULE 607. Who May Impeach

The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent

statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Evid.R. 801(D)(1)(A), 801(D)(2), or 803.

RULE 608. Evidence of Character and Conduct of Witness

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

RULE 611. Mode and Order of Interrogation and Presentation

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.

(B) Scope of cross-examination. The scope of cross-examination shall not be limited to the scope of the direct examination, but may inquire into any relevant facts or matters contained in the witness's statement, including all reasonable inferences that can be draw from those facts and matters, and may inquire into any omissions from the witness statement that are otherwise material and admissible.

(C) Leading questions. A leading question is one that suggests a certain answer to the witness; it "leads" the witness to that answer. Leading questions should not be used on the direct examination of a witness. Leading questions are permitted on cross-examination. When a party calls a hostile witness, direct examination of a hostile witness may be by leading questions.

(D) Scope of Re-Direct Examination After cross examination, additional questions may be asked by the direct examining attorney limited to the matters raised opposing counsel on cross-examination, or for the purposes of rehabilitating a witness's character or credibility. Leading questions are not permitted on re-direct examination.

(E) Scope of Re-Cross Examination After re-direct, additional questions may be asked by the cross-examining attorney, limited to the scope of issues raised by opposing counsel on re-direct.

(D) Hostile Witness Rule Where a witness is an unwilling one, hostile to the party calling them, or stands in such a situation as to make them necessarily adverse to such party, their examination in chief may be allowed to assume something of the form of cross-examination, at least to the extent of allowing leading questions to be put to them.

(1) The issue is whether the witness's hostile attitude toward the party calling them is likely to make the witness reluctant to volunteer facts helpful to that party. Hostility may be demonstrated by the witness's demeanor in the courtroom, by other facts and circumstances, or by a combination thereof.

(2) Whether a witness is hostile is confided to the sound discretion of the presiding judge.

RULE 612. Writing Used to Refresh Memory

If a witness uses a writing to refresh their memory while testifying, a clean and unmarked copy of the writing must be shown to opposing counsel.

RULE 616. Bias of Witness

In addition to other methods, a witness may be impeached by any of the following methods:

(A) Bias. Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

(B) Sensory or mental defect. A defect of capacity, ability, or opportunity to observe, remember, or relate may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

(C) Specific contradiction. Facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony.

Article VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, their testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of their testimony or the determination of a fact in issue.

RULE 702. Testimony by Experts

A witness may testify as an expert if: (1) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; and (2) The witness's testimony is based on reliable scientific, technical, or other specialized information.

RULE 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by them or admitted in evidence at the hearing.

RULE 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give their reasons therefore after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise.

Article VIII. HEARSAY

RULE 801. Definitions

The following definitions apply under this article:

(A) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by them as an assertion.

(B) Declarant. A "declarant" is a person who makes a statement.

(C) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with their testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with their testimony and is offered to rebut an express or implied charge against them of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving them, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent. The statement is offered against a party and is (a) their own statement, in either their individual or a representative capacity, or (b) a statement of which they have manifested their adoption or belief in its truth, or (c) a statement by a person authorized by them to make a statement concerning the subject, or (d) a statement by their agent or servant concerning a matter within the scope of their agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

RULE 802. Hearsay Rule

Testimony which is hearsay is inadmissible.

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(A) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(B) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(C) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(D) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general

character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(E) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by testimony.

RULE 804. Hearsay Exceptions; Declarant Unavailable

(A) Definition of unavailability. "Unavailability as a witness" includes any of the following situations in which the declarant:

(1) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(B) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that their death was imminent, concerning the cause or circumstances of what the declarant believed to be their impending death.

(2) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

RULE 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Article IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. Exhibits

Exhibits contained in the case materials are stipulated as admitted. Therefore, it is not necessary to demonstrate that an exhibit is authentic or an accurate representation, nor is it necessary to move the court for the admission of an exhibit. Exhibits may not be altered to give either side an unfair advantage. As an exhibit is presented through the testimony of a witness with knowledge of the exhibit, such testimony must abide by all other Simplified Rules of Evidence.

EXAMPLES: COMMON OBJECTIONS AND TRIAL PROCEDURE

Procedure for Objections

An attorney may object if they believe that the opposing attorney is attempting to introduce improper evidence or is violating the Simplified Rules of Evidence or Mock Trial Rules of Competition. The attorney wishing to object should stand and object at the time of the claimed violation. The attorney should state the reason for the objection and, if possible, cite by rule number the specific rule of evidence that has been violated. (Note: Only the attorney who questions a witness may object to the questions posed to that witness by opposing counsel.) The attorney who asked the question may then make a statement about why the question is proper. The judge will then decide whether a question or answer must be discarded because it has violated the Simplified Rules of Evidence (sustained), or whether to allow the question or answer to remain in the trial record (overruled). Objections should be made as soon as possible; however, an attorney is allowed to finish their question before an objection is made. Any objection that is not made at the time of the claimed violation is waived. When an objection has been sustained, the attorney who asked the question may attempt to rephrase that question. Judges may make rulings that seem wrong to you. Also, different judges may rule differently on the same objection. Always accept the judge's ruling graciously and courteously. Do not argue the point further after a ruling has been made.

I. Common Objections

The following are examples of common objections. This is not a complete list. Any objection properly based on the Simplified Rules of Evidence is permitted:

A. ***Irrelevant evidence***: "Objection. This testimony is irrelevant."

B. ***Irrelevant evidence that should be excluded:*** "Objection. This is unfairly prejudicial (or a waste of time) and should be excluded because..."

C. ***Leading question:*** "Objection. Counsel is leading the witness." (Remember, leading is only objectionable if done on direct or re-direct examination.)

D. ***Narrative Answer***: "Objection, this witness's answer is narrative." Commonly used during direct examination when a witness's answer has gone beyond the scope of the initial question.

E. ***Non-responsive Answer***: "The witness is nonresponsive, your honor. I ask that this answer be stricken from the record." The witness's answer does not answer the question being asked. Commonly used by the cross-examining attorney during cross examination.

a. *Example:*

i. Attorney: Isn't it true that you hit student B?

ii. Witness: Student B hit me first. They were asking for it, acting like a jerk and humiliating me in front of all my friends.

iii. Attorney: Your Honor, I move to strike the witness's answer as non-responsive and ask that they be instructed to answer the question asked.

iv. (Another option is to impeach the witness with prior testimony if they testified in their deposition that they hit student B.)

F. ***Beyond the scope of cross or re-direct:*** "Objection. Counsel is asking the witness about matters that were not raised during the cross or re-direct examination."

a. ***Improper character testimony:*** "Objection. This is testimony about character that does not relate to truthfulness or untruthfulness."
b. ***Improper opinion:*** "Objection. Counsel is asking the witness to give an expert opinion, and this witness has not been qualified as an expert." *OR* "Objection. Counsel's question calls for an opinion which would not be helpful to understanding the witness's testimony (or which is not rationally based upon what the witness perceived.)"

G. ***Lack of personal knowledge:*** "Objection. The witness has no personal knowledge that would allow them to answer this question/testify as to this exhibit."

H. ***Speculation:*** "Objection. The witness is speculating/this question calls for speculation." A hybrid between lack of personal knowledge and improper opinion.

I. ***Hearsay:*** "Objection. Counsel's question calls for hearsay."

a. If hearsay in a response could not be anticipated from the question, or if a hearsay response is given before the attorney has a chance to object, the attorney should say, "I ask that the witness's answer be stricken from the record on the basis of hearsay."
    i. *Example:*
        1. Witness X testifies that "Mrs. Smith said that the decedent's wife had a bottle of arsenic in her medicine cabinet." This testimony is inadmissible if offered to prove that the decedent's wife had a bottle of arsenic in her medicine cabinet, since it is being offered to prove the truth of the matter asserted in the out-of-court statement by Mrs. Smith. If, however, the testimony is offered to prove that Mrs. Smith can speak English, then the testimony is not hearsay because it is not offered to prove the truth of the matter asserted in the out-of-court statement. However, the testimony is only admissible if Mrs. Smith's ability to speak English is relevant to the case.

Comment:

Why should the complicated and confusing condition be added that the out-of-court statement is only hearsay when "offered for the truth of the matter asserted?" The answer is that hearsay is considered untrustworthy because the speaker of the out-of-court statement has not been placed under oath and cannot be cross-examined concerning their credibility. In the previous example, Mrs. Smith cannot be cross-examined concerning her statement that the decedent's wife had a bottle of arsenic in her medicine cabinet, since witness X, and not Mrs. Smith has been called to give this testimony. However, witness X has been placed under oath and *can* be cross-examined about whether Mrs. Smith actually made this statement, thus demonstrating that she could speak English. When offered to prove that Mrs. Smith could speak English, witness X's testimony about her out-of-court statement is not hearsay.

Remember, there are responses to many of these objections that the examining attorney can make after the objection is raised and they are recognized by the judge to respond.

II. Rules Unique to Mock Trial

The following are explanations and examples of rules/objections that are unique to mock trial.

A. **Invention of fact on Direct Examination:** If a witness gives testimony on direct that is beyond the scope of their witness statement, the cross-examining attorney could say "Move to strike the testimony concerning ...as beyond the scope of the case materials." If the attorney examining the witness asks a question that calls for a witness to go beyond their witness statement, opposing counsel could object to say "Your Honor, we object on the basis that opposing counsel's question seeks evidence that is outside the record in this case. "
    i. *Example:*
        1. If witness X does not discuss in their witness statement whether or not they saw arsenic in the medicine cabinet of the decedent's wife, they cannot be asked to testify at trial about whether they had arsenic in their medicine cabinet.

B. Use of Outside Research: "The opposing counsel is making reference to materials not included in the Ohio Mock Trial Case File. Specifically, they are referencing [e.g. guidelines created by the Federal Aviation Agency], however this was not included in the materials."

C. Use of Outside Legal Research: "Opposing counsel is citing to [a case/a part of a case] that was not included in the materials."
    a. Explanation: Students may make use of legal research that is provided in the Case Law section of the materials, with the limitation that they are only permitted to reference the portions included or cited to within the included cases.
        i. E.g. In the case materials, which may include *Kyllo v. United States*, students may see the following passage:

> "At the very core" of the *Fourth Amendment* "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States, 365 U.S. 505, 511, 5 L. Ed. 2d 734, [**2042] 81 S. Ct. 679 (1961)*. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.

If the case materials do not also include *Silverman v. United States,* the students may only reference the portion quoted.

II. Trial Procedures

The following are examples of trial procedures. This is not meant to serve as a script, rather it may be used as a guideline to follow as you progress through the trial.

A. Examining a Witness

a. Direct Examination - Form of Questions

Witnesses should be asked neutral questions and may not be asked leading questions on direct examination. Neutral questions are open-ended questions that do not suggest the answer and that usually invite the witness to give a narrative response. A leading question is one that suggests to the witness the answer desired by the examining attorney and often suggests a "yes" or "no" answer.

Examples:

1. ***Proper direct examination questions:***
    a. What did you see?

b. What happened next?

2. *Leading questions (not permitted on direct):*
   a. Isn't it true that you saw the defendant run into the alley?
   b. After you saw the defendant run into the alley, you called the police, didn't you?

b. **Cross Examination - Form of Questions**

An attorney should usually, if not always, ask leading questions when cross-examining the opponent's witness. Open-ended questions tend to evoke a narrative answer, such as "why" or "explain," and should be avoided. (Leading questions are not permitted on direct examination because it is thought to be unfair for an attorney to suggest answers to a witness whose testimony is already considered to favor that attorney's side of the case. Leading questions are encouraged on cross-examination because witnesses called by the opposing side may be reluctant to admit facts that favor the cross-examining attorney's side of the case.) However, it is not a violation of this rule to ask a non-leading question on cross-examination.

Examples:

1. *Good leading cross examination question:*
   Isn't it true that it was almost completely dark outside when you say you saw the defendant run into the alley? (This is a good question where the witness's statement says it was "almost completely dark," but a potentially dangerous question when the statement says it was "getting pretty dark out."

2. *Poor cross examination question:*
   How dark was it when you saw the defendant run into the alley? (The witness could answer, "It wasn't completely dark. I could see him.")

c. **Re-Direct Examination**

Re-direct examination is limited to the scope of cross examination. It is intended to clarify previous testimony and/or to help your witness recover from a damaging cross examination.

Examples:

1. ***Cross Examination** of physician called by Plaintiff in murder case:*

   Attorney: Doctor, you testified on direct that the defendant died of arsenic poisoning, correct?

   Witness: Yes.

   Attorney: Isn't it true that you have a deposition in which you testified that you did not know the cause of death?

   Witness: Yes, that's true.

   Re-Direct:

   Attorney: Doctor, why did you testify in your deposition that you did not know the defendant's cause of death?

   Witness: I had not yet received all of the test results which allowed me to conclude the defendant died of arsenic poisoning.

2. *Cross Examination:*

Attorney: Doctor, isn't it true the result of test X points away from a finding of arsenic poisoning?

Witness: Yes.

Re-Direct:

Attorney: Doctor, why did you conclude that the defendant died of arsenic poisoning even though test X pointed away from arsenic poisoning?

Witness: Because all of the other test results so overwhelmingly pointed toward arsenic poisoning, and because test X isn't always reliable.

Comment: As a general rule, it is not advisable to ask a question if you don't know what the answer will be.

d. Re-Cross Examination

After re-direct, additional questions may be asked by the cross-examining attorney, but such questions are limited to matters raised on re-direct examination. Re-cross is not mandatory and should not be used simply to repeat points that have already been made.

Example:

Assume the cross-examination in the example above has occurred. A good re-cross-examination would be the following:

Attorney: Doctor, isn't it true that when you gave your deposition you had received all of the test results except the result of test X?

Witness: Yes, that's true.

Comment: The cross-examining attorney would then argue in the closing argument that the doctor testified in their deposition that they did not know the cause of death at that time and the only test result received after the deposition pointed away from arsenic poisoning.

e. Refreshing Recollection (Rule 612)

If a witness is unable to recall information in their witness statement or contradicts the witness statement, the attorney calling the witness may use the witness statement to help the witness remember.

Example:

Witness cannot recall what happened after the defendant ran into the alley or contradicts witness statement on this point:

Attorney: Mr./ Ms. Witness, do you recall giving a statement in this case?

Witness: I do not recall.

Attorney: Your Honor may I approach the witness?
(Permission is granted.)

I'd like to show you a portion of the summary of your statement, and ask you to review the first two paragraphs on page three.
(Witness reads statement)

Attorney: Having had an opportunity to review your statement, do you now recall what happened after the defendant ran into the alley?

f. Impeachment (Rule 607)

On cross-examination, the cross-examining attorney may impeach the witness. Impeachment is a cross-examination technique used to demonstrate that the witness should not be believed. Impeachment is accomplished by asking questions which demonstrate either (1) that the witness has now changed their story from statements or testimony given by the witness prior to the trial, or (2) that the witness's trial testimony should not be believed because the witness is a dishonest and untruthful person.

Impeachment differs from the refreshing recollection technique. Refreshing recollection is used during direct examination to steer a favorable, but forgetful, witness back into the beaten path. Impeachment is a cross-examination technique used to discredit a witness's testimony.

Examples:

1. ***Impeachment with prior inconsistent statement:***

Attorney: Mr. Jones, you testified on direct that you saw the two cars *before* they actually collided, correct?

Witness: Yes.

Attorney: You gave a deposition in this case a few months ago, correct?

Witness: Yes.

Attorney: Before you gave that deposition, you were sworn in by the bailiff to tell the truth, weren't you?

Witness: Yes.

Attorney: Mr. Jones, in your deposition, you testified that the first thing that drew your attention to the collision was when you heard a loud crash, isn't that true?

Witness: I don't remember saying that.

Attorney: Your Honor, may I approach the witness?
(Permission is granted.) Mr. Jones, I'm handing you the summary of your deposition and I'll ask you to read along as I read the second full paragraph on page two, "I heard a loud crash and I looked over and saw that the two cars had just collided. This was the first time I actually saw the two cars." Did I read that correctly?

Witness: Yes.
Attorney: Thank you Mr. Jones.

2. *Impeachment with prior dishonest conduct:*
Attorney: Student X, isn't it true that last fall you were suspended from school for three days for cheating on a test.
Witness: Yes.

B. Witness Testimony

a. Fair Extrapolation

The limits on fair extrapolation apply only to cross examination. No extrapolation is permitted on direct examination.

An accident reconstruction expert (Mr. Smith) has testified that the accident was caused by the failure of the defendant to maintain an assured clear distance ahead. The defendant has claimed that they were undergoing a type of epileptic seizure when the driver ahead stopped abruptly. The accident reconstructionist testifies that even a person experiencing this kind of epileptic seizure would have seen the car brake abruptly. On cross examination, opposing counsel wishes to explore this testimony.

Examples:

1. *Unfair Extrapolation*
Cross-examiner: "But you're not a neurologist, are you, Mr. Smith?"
Mr. Smith: "As a matter of fact, I have a Ph.D. in Neurology from Johns Hopkins University and have written extensively on epileptic seizures."

If there is no hint in the case materials that Mr. Smith has expertise in neurology, and their expertise makes a material difference in the outcome of the case or their ability to reconstruct the accident, it would be regarded as an unfair extrapolation. If, however, their expertise is ***not*** *materially related to the outcome of the case (e.g. they testify are an expert in aneurysms but not epileptic seizures) then the extrapolation would be unnecessary but not unfair.*

2. *Extrapolation necessitated by the question*
Cross-examiner: "Have you testified before as an expert in accident reconstruction, or is this the first time that you have ever testified?"
Mr. Smith: "I have testified in 27 trials."

It may be reasonable for the expert to claim they have testified in 27 trials, if their age and background make that plausible, even if there is nothing in

the case materials to reflect an answer to that question. It is an extrapolation necessitated by the question.

b. Opinion Testimony by Non-Experts

For mock trial purposes, most witnesses are non-experts. If a witness is a non-expert, the witness's testimony in the form of opinions is limited to opinions that are rationally based on what the witness saw or heard and that are helpful in explaining the witness's testimony. Non-experts (lay witnesses) are considered qualified to reach certain types of conclusions or opinions about matters which do not require experience or knowledge beyond that of the average lay person. Note, however, that the opinion must be *rationally* based on what the witness saw or heard *and* must be helpful in understanding the witness's testimony.

Examples:

1. Witness X, a non-expert, may testify that the defendant appeared under the influence of alcohol. However, it must be shown that this opinion is *rationally* based on witness X's observations by bringing out the facts underlying the opinion, e.g., the defendant was stumbling; their breath smelled of alcohol; their speech was slurred. If witness X thinks the defendant was under the influence because they had a strange look in their eye, then the opinion should not be permitted because it is not sufficiently rational and has potential for undue prejudice.

2. Witness X, a non-expert, may not testify that in his opinion the decedent died of arsenic poisoning, since this is not a matter that is within the general knowledge of lay persons. Only an expert, such as a forensic pathologist, is qualified to render such an opinion.

c. Opinion Testimony by Experts

Only persons who are shown to be experts at trial may give opinions on questions that require special knowledge beyond that of ordinary lay persons. An expert must be qualified by the attorney for the party for whom the expert is testifying. Before a witness can testify as an expert, and give opinions in their area of expertise, a foundation must be laid for their testimony by introducing their qualifications into evidence. In a sense, every witness takes the stand as a non-expert, and the questioning attorney must then establish the witness's expertise to the court's satisfaction for the witness to be able to testify as an expert. This is usually accomplished by asking the expert directly about their background, training and experience.

Example:

Attorney: Doctor, please tell the jurors about your educational background.

Witness: I attended Harvard College and Harvard Medical School.
Attorney: Do you practice in any particular area of medicine?
Witness: I am board-certified forensic pathologist. I have been a forensic pathologist for 28 years.

It is up to the court to decide whether a witness is qualified to testify as an expert on a particular topic.

C. Evidence

a. Introduction of Physical Evidence (Rule 901)

An exhibit is presented to the court through the testimony of a witness with knowledge pf the exhibit. Exhibits may not be altered to give either side an unfair advantage.

Example:

Attorney: Your honor, we have marked this one-page document as Plaintiff Exhibit 1 (or Defendant's Exhibit A). Let the record reflect that I am showing Plaintiff Exhibit 1 (or Defendant's Exhibit A) to opposing counsel. (Exhibit is shown to opposing counsel.) Your Honor, may I approach the witness?
Judge: You may.
Attorney: Witness X, I'm showing you what has been marked as Plaintiff Exhibit 1. Do you recognize that exhibit?
Witness: Yes.
Attorney: Could you explain to the Court what that is?
Witness: It's a map of the accident scene. (At this point, the attorney may ask the witness any additional relevant questions about the exhibit, and then give it to the judge.

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Please summarize the error in 100 words or less:

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I. Teacher:_____Legal Advisor_____

School & Team Name_____County:_____

Competition Round 1 2

Opponent:_____

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Please note: Advisors shall not contact competition judges or volunteers regarding competition complaints. Any necessary communication with volunteers will come from OCLRE in consultation with the committee.

Define the problem in 100 words or less:

_____

_____

_____

_____

_____

_____

Suggest future solutions for the problem:

_____

_____

_____

Teacher:_____Legal Advisor_____

School_____ County:_____

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State of Buckeye

v.

Micah Opessa

SPECIAL INSTRUCTIONS

1. In this motion for a plea withdrawal, the defendant (Micah Opessa) bears the burden of proof. Trial will therefore proceed with Defense presenting first. As a result:
    a. Defense will present an opening statement first.
    b. Defense will present their witnesses first.
    c. Defense will present closing arguments first.
    d. Defense will have the option of presenting a rebuttal.
    e. Prosecution ***will not*** have an opportunity to present a rebuttal.

IN THE COURT OF COMMON PLEAS
CARDINAL COUNTY, BUCKEYE

STATE OF BUCKEYE, Prosecution, vs. MICAH OPESSA, Defendant.	CASE NO. 2019 CR 644 JUDGE CHARLES ABERNATHY

ORDER

This Court is in receipt of Defendant's motion to withdraw their guilty plea under Rule 32.1 seeking to correct a manifest injustice. Accordingly, this matter is set for consideration.

Hearing shall commence on January 22, 2021 and continue day to day.

SO ORDERED

_____
Judge Abernathy

IN THE COURT OF COMMON PLEAS
CARDINAL COUNTY, BUCKEYE

STATE OF BUCKEYE, Prosecution, vs. MICAH OPESSA, Defendant.	CASE NO. 2019 CR 644 JUDGE CHARLES ABERNATHY **DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA**

MOTION TO WITHDRAW GUILTY PLEA

Now comes Petitioner Micah Opessa, by and through counsel, and hereby moves this Honorable Court to allow them to withdraw their guilty plea under Rule 32.1. Because the state failed to disclose material exculpatory evidence to Micah's attorney, Micah pleaded guilty to a crime they did not commit, believing the advice of counsel that this was their best option. The state's failure to disclose this evidence created a vastly incomplete picture of the case, meaning that Micah's plea was neither voluntary nor intelligent, as required by *Boykin v. Alabama*, 395 U.S. 238 (1969). This Court should set aside Micah's conviction to correct this manifest injustice, as explained below.

I. Introduction

This case begins and ends with a bad eyewitness. When the State of Buckeye learned that its key eyewitness recanted their identification of Micah Opessa, they knew it would ruin their case. Instead of disclosing this evidence to the defense, the state swept it under the rug, and pressured Micah into pleading guilty to a crime they did not commit by offering a more generous plea deal. By failing to disclose this material exculpatory evidence, the State violated Micah's Fourteenth Amendment right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963).

Because of this, Micah did not intelligently, and voluntarily waive their constitutional rights when they pleaded guilty to shooting their best friend.

II. Facts

On August 31, 2019, someone shot and killed Haumea Robins. Corey Abrams, a food truck owner, glimpsed that someone as they fled the scene. Corey Abrams called 911 to report the crime, but it was dark, and they could not get a very good look, so they did not know who that someone was. Detective River Foley interviewed Corey Abrams on the night of the shooting and told them they would be in touch. But the Detective did not conduct a police lineup with Corey Abrams until 10 days later. On September 10, Corey Abrams misidentified Micah Opessa as the person fleeing the scene. The very next day, Detective Foley arrested Micah, and the state charged them with aggravated murder.

On September 20, Assistant County Prosecutor Justice Okafor spoke with Micah's trial attorney about a potential plea bargain. Justice Okafor told Micah's attorney that the government was confident in their case, so confident, in fact, that they only contemplated one offer: second degree murder and 30 years in prison. Micah turned it down, and this court set the trial for October 7, 2019. During initial discovery, Micah's attorney learned of the planned eyewitness testimony positively identifying Micah as the shooter, and the police lineup. Based on this information, counsel began preparing for trial.

The day before the trial, October 6, Corey Abrams recanted their statement to police. Corey Abrams saw a video of Micah's arrest, and they were "pretty sure" that they falsely identified Micah as the shooter. Corey Abrams called Detective Foley to set the record straight. They told the detective that they could no longer be confident in their identification—that the someone they saw fleeing the scene didn't look like Micah Opessa. Detective Foley saw Justice

Okafor at the courthouse on the day the original trial was scheduled and told them about the eyewitness's "reservations," but Justice Okafor never told Micah's attorney. Instead, Justice Okafor offered Micah's attorney a new plea bargain of manslaughter with 10 years in prison. The state made this offer the day after the detective informed the prosecutor that the eyewitness recanted.

Micah accepted the plea deal because they felt trapped by a mistaken eyewitness that Micah believed was willing to falsely testify that they saw Micah fleeing the scene of the crime with a gun. Without knowing that Corey Abrams recanted their identification, Micah pleaded guilty to manslaughter on October 15. If Micah had known on October 15 that Corey Abrams no longer believed they saw Micah on the night of the murder, Micah never would have entered that guilty plea.

III. Standard of Review

Generally, defendants may not withdraw their guilty plea, except "to correct manifest injustice." Bk. R. Crim. P. 32.1. When a manifest injustice has occurred, "the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." *Id.* Manifest injustice can occur when a defendant does not enter their guilty plea knowingly, voluntarily, and intelligently.

IV. Analysis

The fundamental promise of the due process clause of the Fourteenth Amendment is fairness. The Supreme Court reaffirmed this promise in *Brady v. Maryland* by requiring prosecutors to turn over all material evidence favorable to the defense within its possession. 373 U.S. 83, 87 (1963). When the state fails to meet this obligation, it violates the defendant's right

to due process under the Fourteenth Amendment. *Id.* This is true whether the prosecutor's nondisclosure is intentional or accidental. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

When the government fails to adhere to the standards outlined in *Brady* and its progeny, the Constitution renders void any conviction secured by the state. To show that the prosecution violated a defendant's Fourteenth Amendment *Brady* rights, a defendant must prove two elements: 1) the government suppressed exculpatory evidence within its possession from the defense, and 2) the evidence suppressed had a reasonable probability of leading to a not guilty verdict. *Brady*, 373 U.S. at 87.

Further, the Court places an affirmative duty on the part of the State to learn of any favorable evidence which may be in possession of others acting on the State's behalf (e.g. police officers, investigators, law clerks, etc.). *Kyles*, 514 U.S. at 437. Once they have fulfilled their obligation to seek out such evidence, the prosecutor bears the responsibility to "gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached." *Id.* Although this process undoubtedly involves some degree of subjectivity, the Court has been unambiguous in the seriousness of failure to disclose, going so far as to note that "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles*, 514 U.S. at 438.

This Court should grant Micah's motion because Corey Abrams' statements recanting their identification of Micah to Detective Foley constitutes exculpatory evidence within the State's control, which, if disclosed, has a reasonable probability of changing the outcome of the case. If a juror was told that Corey Abrams' conclusively ruled out Micah Opessa as the shooter, there is a reasonable probability they would vote to acquit. If Micah Opessa had known about these statements, there is a reasonable probability that they would have rejected the prosecutor's

plea deal; Choosing instead to proceed with a trial at which they believed they would be found not guilty.

A. The State Failed to Disclose Exculpatory Evidence Within Their Control

Prosecutor Justice Okafor had a duty under the Fourteenth Amendment to disclose Corey Abrams' statements to Micah Opessa, but they failed to do so. The State's duty to disclose favorable evidence to the defense under *Brady* goes beyond evidence prosecutors personally collect. Prosecutors also have an affirmative duty to uncover exculpatory evidence in the control of government actors. *Kyles*, 514 U.S. at 437. And "government actors" includes law enforcement. In *Kyles*, the Court specifically imposed on prosecutors "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.*

In this case, Corey Abrams made statements to Detective River Foley that exculpated Micah Opessa. They told Detective Foley that they do not believe they correctly identified Micah as the shooter. After Corey Abrams made those statements, Detective Foley had control over evidence that suggested Micah's innocence. In other words, the Trillium Police Department was in control of exculpatory evidence. That control triggered Prosecutor Okafor's duties under *Brady* as soon as Corey Abrams made those statements recanting their identification of Micah.

Nor does it matter that Corey Abrams made these statements the day before trial. The State has asked this Court to hold that a prosecutor has no duty to disclose evidence that came into the police's control too close to trial for the prosecutor to discover it. Nothing in *Kyles* gives prosecutors this kind of leeway to ignore their duty to seek out and disclose exculpatory evidence. In fact, *Kyles* suggests quite the opposite. In *Kyles*, the government requested similar "leeway to make a judgment call as to the disclosure of … evidence." *Kyles*, 514 U.S. at 438.

The Court rejected the request for leeway, noting that it opened an uncertain door "about the degree of further leeway that might satisfy the State's request." *Id.* at 439.

The same reasoning holds true for this case. The prosecution's argument asks this Court to fashion a rule that freezes a defendant's *Brady* rights for some amount of time before the trial. But how much? One day before trial? Two? A week? How much time is enough to balance the rigorous protections of the Fourteenth Amendment against the government's feeble plea for "leeway"? The State seeks a rule from this Court that would open a door to these questions that should remain shut.

But even if the moderate amount of time between the statements and the trial does matter, the State still knowingly suppressed Corey Abrams' statements to Detective Foley. River Foley explicitly warned Justice Okafor that Corey Abrams may no longer be a reliable witness. After Prosecutor Okafor learned that information, they went to speak to Micah Opessa's attorney. But instead of taking that opportunity to disclose the exculpatory statements, all they did was offer Micah a better plea deal. By failing to inform the Defendant of these exculpatory statements, the State suppressed them. Micah has met the first element of their *Brady* claim.

B. Corey Abrams' Suppressed Statements Had a Reasonable Probability of Leading to a Not Guilty Verdict

The remaining evidence suggesting Micah Opessa's guilt was inconclusive at best. Setting aside for a moment the eyewitness identification, the prosecution disclosed that their case linking Opessa to the time and location of the murder consisted only of a partial shoeprint in a size and brand that are among the most common in Buckeye. The remaining evidence, which only establishes that Opessa had physical contact with the victim at some point in the weeks or even months preceding the murder (a fact which neither side disputes) include a blue nylon fiber

that could be from any number of sources, a minimal match on a partial fingerprint, and social media and texts that are unremarkable in any dramatic teenage relationship. As there are perfectly logical explanations for all of the evidence claimed above, it seems highly likely that a jury would find sufficient reasonable doubt to acquit Opessa of the charged crimes.

Corey Abrams faulty identification of Opessa as fleeing the scene, the only reliable evidence they could offer that Opessa was involved in the murder, would have been a substantial factor in persuading a jury of Opessa's guilt. This was the sole piece of evidence for which a logical and believable explanation was unavailable. As such, the jury could reasonably be swayed by Abrams testimony to vote to convict. By extension the withholding of the fact that this evidence was no longer valid is undeniably exculpatory. Lacking this evidence, the most the State could prove beyond a reasonable doubt is that Opessa was upset with Robbins, and that, at some unknown point in time, they might have touched Robbins' glasses. It is quite reasonable to conclude that the absence of Abrams' eyewitness identification had a high probability of changing a jury's view of the case.

C. Opessa's Guilty Plea Was Not Knowing and Voluntary Under the Circumstances

Courts have long recognized that a guilty plea entered by a defendant is a serious matter. A guilty plea offered by a defendant "is more than an admission of conduct; it is a conviction." *Boykin v. Alabama*, 395 U.S. 238 (1969), at 242. A plea of guilty involves the waiver of multiple Constitutional rights, and as such "demands the utmost solicitude of which courts are capable..." *Id.* at 243. "Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval v. United States,* 274 U. S. 220, at 223. "Ignorance, incomprehension, coercion, terror, inducements… might be a perfect cover-up of unconstitutionality." *Id*. at 242-243.

In the present instance, Micah believed they were pleading guilty based on the evidence that had been requested and disclosed by the State. They were, however, making that judgment based on an incomplete record, which is solely at the fault of the State. The non-disclosure of evidence made it impossible for Opessa to accurately gauge the strength of the case against them, and therefore made it impossible that their plea could be voluntary to the level expected by the Court. The plea agreement was entered into based on the prosecutor's assertion that an eyewitness identified Opessa as the assailant. The prosecutor learned later that this was false, but did not correct their misstatement. The net effect is that Opessa entered into a plea agreement based on a false statement by the State. As has been demonstrated previously, had Abrams' revised statement (affirming that Micah was *not* the individual they saw fleeing the scene) been disclosed, Micah very probably would have rejected the plea offer and would have proceeded to trial with a plea of not guilty.

V. Conclusion

Corey Abrams made a mistake when they identified Micah Opessa as the shooter. When they realized their mistake, they contacted the police to correct it. But instead of helping Corey Abrams fix their mistake, the State doubled down on it. Instead of disclosing that Corey Abrams no longer believed that Micah was the shooter, it swept that material exculpatory evidence under the rug. "[T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles*, 514 U.S. at 438. By offering a plea deal to Micah after learning of the exculpatory evidence, the state is trying to *escape* their responsibility. The state's actions have cost Micah Opessa nearly a year of their life. Its failure to correct these mistakes have violated Micah's Constitutional right to due process under the Fourteenth Amendment.

The Petitioner respectfully requests for this Honorable Court to correct these mistakes, cure this injustice, and vacate Micah Opessa's conviction and sentence.

Respectfully submitted,

/s/ Rafael Barba
Rafael Barba (0091247)
Abbie Carmichael (00724324)
11 Justice Ave.
Harmony, Buckeye
Attorneys for Defense

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the Defendant via the Court's electronic filing system and regular U.S. Mail, postage prepaid this ____ day of September, 2020.

/s/ Rafael Barba
Rafael Barba (0091247)

IN THE COURT OF COMMON PLEAS
CARDINAL COUNTY, BUCKEYE

STATE OF BUCKEYE, Prosecution, vs. MICAH OPESSA, Defendant.	CASE NO. 2019 CR 644 JUDGE CHARLES ABERNATHY **PROSECUTION'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA**

Now comes the State of Buckeye, by and through counsel, and hereby requests this Court deny the Motion to Withdraw Guilty Plea of Defendant Micah Opessa ("Defendant"). Defendant was duly charged and pleaded guilty to voluntary manslaughter on October 15, 2019. They were sentenced to five (5) years in prison. Defendant now seeks to reverse course in an attempt to undo their voluntary and knowing guilty plea after serving one year in prison. However, as set forth below, there was no constitutional violation or other malfeasance that would permit Defendant to reverse their guilty plea. Therefore, the Prosecution respectfully requests this Court deny Defendant's Motion to Withdraw Guilty Plea.

I. STATEMENT OF FACTS

Defendant's arrival in Harmony was closely followed by various criminal acts by Defendant throughout the city. For example, Defendant was charged and convicted of forgery in 2019, when they commissioned a fake ID in order to sneak into an adult club. That was not the first criminal act of Defendant and, unfortunately for Haumea Robins, it was not their last either.

Micah Opessa, Haumea Robins, and Scout Firat were friends throughout middle school and the beginning of high school. The three friends frequently were together and often studied at Robins' home. However, Defendant began to have a romantic interest in Robins that was not mutual. Defendant had pined over Robins for most of their "friendship," with Defendant taking a greater interest in Robins than the other way around. Robins did not feel the same way about

Defendant and, instead, began a romantic relationship with Firat, betraying Defendant's feelings and leaving them alone and desperate.

Defendant channeled those feelings during a fight with Robins just a few weeks after Robins began dating Firat, resulting in a fallout between Robins and Defendant and ending their friendship. During their fight, Defendant was overheard shouting "you're gonna' pay for treating me like this!" after throwing a heavy textbook and papers across the room. Defendant went further and sent hateful and threatening messages to Robins after their fallout. When the messages did not get Defendant their satisfaction, Defendant lured Robins out to downtown Harmony where Defendant could get the final say and end things for good.

Robins agreed to meet Defendant in downtown Harmony on August 31, 2019, at approximately 7:00 PM. By all accounts, Defendant was the last person to ever see Robins alive and less than two hours after their rendezvous, Robins was found dead. Robins was murdered in cold blood and all of the evidence pointed to Defendant as the killer.

The police investigation conducted by experienced and decorated Detective River Foley[1] revealed the following inculpating evidence: (1) Defendant's fingerprints on the victim's glasses, (2) a footprint at the scene that was consistent with Defendant's shoe size and shoe type, (3) posts on Defendant's social media that talked about toughness and betrayal, implicitly referring to Robins' betrayal of Defendant; (4) threatening text messages Defendant sent to victim days before murder (5) blue nylon fibers from the scene that were consistent with a jacket that Defendant had been seen wearing; (6) a clear and distinct motive, as established by the victim's parent, Kai Robins; and (7) an eye witness (Corey Abrams) who identified Defendant as the individual they saw running away from the scene holding the murder weapon.

[1] River Foley has over 24 years of experience as a Harmony Police officer, having completed over 300 hours training and earning a Master Evidence Technician Award in 2002. Detective Foley has worked over 400 cases and has completed 4 months of advanced criminology training on forensic science with the FBI. Detective Foley is a highly respected Detective in the Harmony Police Department and is a highly skilled expert detective.

The overwhelming evidence established Defendant as the killer. Defendant was arrested on September 11, 2019 and was charged with aggravated murder. Over the next few weeks, counsel for the prosecution and defense negotiated a plea agreement, just as in all other cases the prosecution handles in the interest of just and expeditious resolution of each individual case. Defendant agreed to plead guilty to the reduced charge of manslaughter with a recommended sentence of ten (10) years in prison. This Court accepted Defendant's voluntary and knowing plea, which was entered on the record and established as a valid and enforceable plea agreement on October 15, 2019. Defendant's acceptance of the plea agreement avoided the very likely possibility that they would be found guilty of aggravated murder and sentenced to thirty (30) years in prison.

Now, after serving only one year in prison, Defendant wishes to undo their voluntary and knowing plea agreement, arguing that the State failed to disclose material evidence in violation of State and Federal law. Defendant's claims are exclusively premised on post-identification statements made by Corey Abrams less than a week before Defendant pleaded guilty, in which Abrams told Detective Foley that they were no longer sure about their identification of the Defendant because of the amount of news coverage and various pictures they saw of the Defendant. Detective Foley mentioned, in passing, that Abrams was "having reservations" to Prosecutor Justice Okafor. Their discussion was brief and only occurred as the detective and prosecutor passed each other in a court hallway. Abrams also submitted a statement to the prosecutor's office, expressing their hesitations. However, Abrams' hesitations, reservations, or confusion regarding their identification is not evidence that must be turned over to the Defendant before trial. What is more, both Defendant's own counsel and investigator failed to speak to Abrams at any point before Defendant pleaded guilty.

Accordingly, there is no basis in fact or law that can support Defendant's postconviction claims herein, warranting the denial of Defendant's instant Motion to Withdraw Guilty Plea.

II. STANDARD OF REVIEW

Motions to withdraw guilty pleas are governed by Crim.R. 32.1, which states that "[a] motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea." A defendant seeking to withdraw a plea of guilty after sentence has the burden of establishing the existence of manifest injustice. *State v. Smith,* 49 Ohio St.2d 261, 264, 361 N.E.2d 1324 (1977). A manifest injustice has been defined as a "clear or openly unjust act" and as "an extraordinary and fundamental flaw in the plea proceedings." *State ex rel. Schneider v. Kreiner,* 83 Ohio St.3d 203, 208, 699 N.E.2d 83 (1998). Under this standard, a post sentence withdrawal of a plea is permitted only in extraordinary cases. *Id.*

Defendant, in this case, is asking this Court to set aside their knowing and voluntary guilty plea because of an alleged "manifest injustice" arising of the State's unlawful failure to disclose evidence under *Brady* and *Giglio*, infringing Defendant's due process rights under the Fourteenth Amendment to the Buckeye and Federal Constitutions. Essentially, Defendant claims that a *Brady* or *Giglio* violation is sufficient to establish the necessary "manifest injustice to allow them to withdraw their guilty plea under Crim.R. 32.1.

In *Brady*, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Similarly, the *Giglio* Court held that the nondisclosure of material reliability and credibility evidence of a given witness that may be determinative of guilt or innocence violates due process where the evidence and testimony could, in any reasonable likelihood, have affected the judgment of the jury. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

In determining whether suppressed evidence was favorable to an accused, such evidence shall be deemed 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. *State v. Tran*, No. 96APA07-882, 1997 WL 65542, at *3 (Ohio Ct. App. Feb. 13, 1997). A mere possibility, however, is insufficient to give rise to an alleged *Brady* or *Giglio* violation. The evidence, instead, is material when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). This standard of materiality applies regardless of whether the evidence is specifically, generally or not at all requested by the defense. *Bagley*, 473 U.S. at 678–84.

III. LAW AND ANALYSIS

Defendant's claim of a due process violation lacks merit under Buckeye law, Federal law, and the record set forth herein for two reasons: (1) the State did not violate Defendant's due process rights by failing to disclose reservations expressed by an eyewitness, since trial had not begun; and (2) the reservations expressed by Abrams were immaterial and do not support a reasonable probability that the outcome would have been different under *Giglio*. Therefore, no "manifest injustice" is present in this case, requiring this Court to deny Defendant's Motion to Withdraw Guilty Plea.

A. Neither Exculpatory Nor Impeachment Evidence Must be Disclosed Before the Trial Phase.

There was no Due Process violation *sub judice* because neither the State nor Prosecutor Okafor was under an obligation to disclose the reservations expressed by Abrams because trial had not begun. In *Ruiz*, the Supreme Court held that a guilty plea is **not** rendered invalid by the prosecutor's failure to disclose *Giglio* evidence. *United States v. Ruiz*, 536 U.S. 622, 628–33, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002). In other words, the Supreme Court has stated that the right

to know of favorable impeachment evidence attaches at the trial phase, rather than the plea-bargaining phase of a criminal prosecution. *See generally id.*

In fact, the United States Supreme Court **has never held** that the *Brady* rule requires disclosure of evidence—either impeachment or exculpatory—prior to the entry of a plea, as opposed to prior to the start of a trial. Rather, the Supreme Court has indicated that the disclosure of evidence is necessary to secure a fair ***trial***. *See Brady*, 373 U.S. at 87–88; *see also Bagley*, 473 U.S. at 678. The *Bagley* Court explained the issue in the following way:

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, **the prosecutor is not required to deliver his entire file to defense counsel**, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

Bagley, 473 U.S. at 675 (internal citations omitted) (emphasis added).

Here, the State had no duty or obligation to disclose the Abrams' reservations because Defendant agreed to a plea **before** the trial phase. Under *Ruiz*, *Brady*, *Giglio*, and *Bagley*, the State was under no requirement to share the mere "reservations" of Adams prior to the actual trial against Defendant, disposing of Defendant's Motion to Withdraw Guilty Plea in the case at bar. Under this separate and individual basis, dismissal of Defendant's Motion is justified.

B. The Alleged *Brady* or *Giglio* Evidence Is Immaterial And Does Not Support A Reasonable Probability That The Outcome Would Have Been Different Because Of The Overwhelming Evidence Against Defendant.

In addition to demonstrating exculpatory, impeachment, or credibility evidence was suppressed, a Defendant asserting a *Brady* or *Giglio* violation must also establish that the evidence was material and favorable to the accused. Favorable evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682; *see also Kyles v. Whitley*, 514 U.S. 419, 432–36, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). Indeed, *Bagley* set forth a framework to analyze

materiality in conjunction with alleged *Brady* violations and established that (1) the allegedly suppressed evidence, taken together and collectively, must set forth a "reasonable probability" of a different result (2) by showing that the evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the result. *See Kyles*, 514 U.S. at 434–38.

As applied here, even if Prosecutor Okafor suppressed evidence related to Corey Abrams' identification of Defendant, such evidence was not material because Defendant would have been found guilty on the strength of the other evidence, resulting in the same result and inspiring, not undermining, confidence in the same.

First, Corey Abrams' subsequent reservations do not automatically nullify their initial identification. Abrams did not have such reservations until after seeing a television segment about the crime. Their confusion arose solely from media images and produced segments related to the murder of Robins. Abrams never reexamined the photo lineup again and never officially retracted their identification of Defendant as the killer.

Second, Defendant's falling out with Robins after they began dating Firat explains Defendant's motive for murdering Robins. Defendant, Robins, and Firat had been friends for years, going all the way back to elementary school. However, just prior to Robins' death, Robins and Firat began dating. This caused significant anger for Defendant. Indeed, Kai Robins (Robins' parent) observed Defendant in a heated argument with Robins and Firat before storming out of the apartment. Defendant even threatened Robins, stating, "you're gonna' pay for treating me like this!" Additionally, Defendant's own words in the form of social media posts and text messages to the victim demonstrate the anger the Defendant harbored toward the victim.

Finally, physical evidence collected at the crime scene implicates Defendant. Defendant's fingerprints were found on the victim's glasses. Further, footprints found at the scene matched shoes owned by Defendant, and fibers found at the scene matched Defendant's jacket. Indeed,

Defendant even confirmed to Detective Foley that they were wearing those items on August 31, the night of Robins' murder.

Even absent Corey Abrams' eyewitness identification of Defendant as the perpetrator, the physical evidence collected at the crime scene, combined with Defendant's recent falling out with, and anger towards, Robins would have been sufficient to warrant Defendant's acceptance of a guilty plea agreement that avoided the possibility that they be sentenced to thirty (30) years in prison. Accordingly, evidence of Corey Abrams' reservations was not "material" and failing to disclose such information did not result in a *Brady* or *Giglio* violation. Therefore, denial of Defendant's Motion to Withdraw Guilty Plea is proper in this case on this ground alone.

III. CONCLUSION

Based on the foregoing, the Prosecution respectfully requests this Court deny Defendant's Motion to Withdraw Guilty Plea, since (1) neither the State nor Prosecutor Okafor was under an obligation to disclose the evidence; and (2) the alleged *Brady* or *Giglio* evidence is immaterial and does not support a reasonable probability that the outcome would have been different.

Respectfully submitted,

/s/ Will Gardner
Will Gardner (0086753)
Alicia Florrick (0061433)
1 Justice Ave.
Harmony, Buckeye
Attorneys for State of Buckeye

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the Defendant via the Court's electronic filing system and regular U.S. Mail, postage prepaid this ____ day of September, 2020.

/s/ Will Gardner
Will Gardner (0086753)

Witness Statements

STATEMENT OF MICAH OPESSA

Defendant – Petitioner

My name is Micah Opessa. I am a 17-year-old with a lot of dreams and ambitions. Those dreams and ambitions were almost taken from me when I was wrongly accused and convicted of murdering a person who I loved and cared for dearly, Haumea Robins. That's not to say that Haumea and I didn't have problems in the past or that I have always been a perfect person. Like everyone else I struggle, and I have made mistakes, many of them in fact, but murder is absolutely not one of them. I love Haumea and I would never do anything to hurt them, not in a million years. I know we are here to talk about Haumea's murder, but let me start by telling you about myself and about my relationship with Haumea. Then, of course the night that brought me here today—the night that I replay in my head all the time, the night I lost my best friend.

My past might tell you that I can be a troublemaker and I guess that's true, but I am also a person with a great heart and love for others. I grew up in Seattle, Washington but then moved to Harmony in third grade. My dream has always been to become a physical therapist. Growing up, my family and I were involved in a car accident. I always accompanied my mom to her physical therapies and saw how much her therapist helped her. I want to help people recover from injuries or any other conditions. I also love music and was in a band for a couple years. Music always gave me an escape and was my second passion. Something about pouring my heart and soul into a new song always makes me feel better. I guess it's like an outlet for all the things I can't say. There is much more to me than my mistakes, things I am not proud of, but regardless I did them and I guess now would be a good time to talk about them.

When I was younger, I hung out with my brother's friends, I followed my brother around everywhere, even when he didn't invite me. I thought his friends were cool and as my mother would say I wanted to grow up too fast. Sure enough, that led me to some trouble. When I was 14,

my brother and his friends would smoke weed at a park almost every day after school. I didn't smoke with them, I just hung around and listened to their conversations pretending to know what they were talking about. I smoked once, maybe the first time I hung out with them, but never did after that. I never did anything like that at school, but my brother's friends would sometimes smoke at school.

One Wednesday afternoon, I was by the school lockers with my brother's friends when the school resource officer approached us. I guess someone noticed that my brother and his friends were smoking the day before and told the officer. When the officer was getting closer, my brother's friend gave me his weed and told me to hide it. I froze and didn't know what to do or say. When the officer asked me if the weed was mine, I said yes. I didn't want my brother's friends to get in trouble or to stop talking to my brother because I snitched. So, I took the fall. I don't know why I did it, it happened so fast. I didn't have that many friends, so I guess I just wanted to fit in. I ended up getting charged with possession of marijuana. Luckily, I was only required to serve 30 hours of community service because it was a very small amount of marijuana.

The next time I got in trouble was truly my fault. I can't really say it any other way; I made a mistake. Again, I was trying to fit in with the wrong crowd and got myself into trouble. When I was 16 a new 18 and over club opened in Harmony. Everyone I knew, well maybe not everyone, but it felt that way, wanted to go. Most of my friends knew they couldn't get in and left it at that, I wish I would have done the same. I had some older friends who were planning to go and told me about this lady that sold fake IDs. It seemed simple enough, provide this lady with a picture of myself and pay her $40, and I would have an ID that showed that I was 18. Sure enough, it was that simple. The ID looked real to me; I didn't think more of it. That weekend I met up with some of my friends and we headed out to the club. Well to make the story short, I got caught along with a bunch of other underage kids and we were charged with forgery for purchasing and using a fake ID.

Like I said, I've made my share of mistakes, some to fit in, others because I didn't think things through, but I am still a good person. I know plenty of good people who have made mistakes. I know that doesn't justify what I did, but I just want people to know that I am still a good person, and that I would never hurt anyone. I definitely would never kill anyone, ever, especially not a friend, not my best friend Haumea. It's hard for me to talk about Haumea, maybe that's why I have been rambling about myself, but I do want you to know about my relationship with Haumea.

I met Haumea when I was in third grade. My family and I had just moved to Harmony, so I did not know anyone when I first started school. Since the first day Haumea was nice to me. They showed me around the school and introduced me to a few new friends. Haumea and I had a lot in common, including our love for music and sports. It wasn't very long until Haumea and I started hanging out more often after of school. Haumea was my best friend through elementary and middle school. We planned on going to the same high school and taking the same classes. Luckily, we got into the same high school and, although we did not have all the same classes, we at least had half together.

On the days that I didn't hang out with my brother and his friends, I hung out at Haumea's house. I did not feel welcomed by Haumea's parent, Kai Robins, but Haumea always assured me that their parent would come around. I guess Kai had become a little overprotective since Haumea's other parent died in a freak accident. Anyway, Kai heard from other parents that I was a troublemaker and found out that I got in trouble for possession and again for buying a fake ID. Kai did not want me around Haumea because they thought I would push Haumea to get in trouble, but that was never a problem. Haumea never got in trouble and always did the right thing. Haumea was always one of those people who liked school and was really good at it, but they liked to have fun too. I'm not sure why Kai didn't want me around Haumea, even before I got in trouble. Kai never liked me and made sure I knew it. Regardless, my relationship with Haumea growing up

was great. But, Haumea changed the last years I knew them. I believe it was because of their relationship with Scout Firat.

We met Scout our last year of middle school. Scout moved to our school and didn't really know anyone. Haumea started talking to Scout and soon enough we all became friends. Haumea always made it their mission to include and welcome new students, like they once did with me. Scout and I would go over to Haumea's house at least twice a week. Right away I noticed that Kai treated Scout differently. Scout was also good at school but had gotten into trouble a couple times, just like I had. I didn't understand Kai's attitude! I asked Haumea and they assured me that Kai liked me but I had reservations. Scout signed up for all the same high school classes as Haumea, so we all had similar classes. At times Haumea and Scout would hang out alone for class projects or to study, on those days I would hang out with my brother and his friends.

I started to notice that Haumea and Scout began to hang out more, like going to the movies or bowling, without inviting me. At first, I was really upset about it. Haumea and I always hung out together and were best friends, so I was not sure why they excluded me. A couple months before, I finally confessed to Haumea that I had feelings for them. I wanted to be more than friends. Haumea told me that they didn't want to ruin our friendship and would prefer to just stay friends. Haumea also told me they didn't have feelings for me. While I was upset, I understood, and did not want to lose Haumea.

A few months later though, Haumea told me that they liked Scout and that Scout felt the same way. I didn't know what to make of it or how our friendship would change. I knew I wanted Haumea to be happy, but I always thought Scout was not the best for them. Plus, although I agreed to only be friends, I still liked Haumea. It was kind of a slap in the face when Haumea gave me a whole speech about not wanting to ruin a friendship only to turn around and date a different friend. Not too long before Scout told Haumea they liked them, Scout was in another relationship at the

time, so I was really not sure how to feel about Scout's intentions. It seemed wrong to me that Scout would be trying to start a relationship with Haumea at the same time they were seeing someone else! I expressed my concerns to Haumea and sadly we ended up distancing from each other. In the past we had fights before, not crazy fights or arguments, but just the normal teenager stuff. This time was different. Haumea changed, and I was not sure how I fit into their life anymore.

Not long after my falling out with Haumea, Scout began to spread rumors about me at school and even told lies about me to Kai. I felt betrayed by Haumea because they didn't defend me or tell Scout to stop. Instead Haumea just pushed me further away. This made me extremely upset as I had practically known Haumea my entire life and they knew those rumors were lies. Instead of defending me, Haumea continued their relationship with Scout. I honestly don't know why Scout had issues with me, but it was very clear that Scout did not like me. Haumea and I didn't talk for a month prior to the day of their murder. This is my biggest regret of life. I let all the drama and arguments get in the way of our friendship. I should have fought harder for our friendship.

I remember on one occasion I was so upset with Haumea that I sent them messages that were just mean, and I instantly regretted doing so. I called Haumea a liar and a backstabber and I was pretty harsh about their relationship with Scout. I really let my emotions get the best of me. I was hurt. I hope people understand I was hurt, I felt betrayed, but that does not mean I killed or ever hurt Haumea. I wanted to fix things with them, I loved Haumea, I just wanted my friend back.

The day Haumea was shot, August 31, 2019, I reached out to them via text. I told them I wanted to talk and fix things. I realized our friendship was bigger than any fight. At this point we hadn't talked for over a month and I just wanted my friend back. I asked Haumea to meet me in downtown Harmony at our favorite food truck to talk about our friendship and to apologize for the messages I sent them. Haumea agreed to meet me at 7:00pm. We bought our favorite sliders and

sat down to talk. Haumea and I talked for about thirty minutes, and while we both knew we had more work to do to fix our relationship, it was a good starting point. At some point, I remember Haumea dropped their glasses, as they always did. I picked them up, and we both laughed as we joked about the ridiculous number of times Haumea drops their glasses every day. I gave Haumea a hug and told them I wanted our friendship back. Haumea said they had to leave, and that maybe in the future we could talk and continue working on our friendship. I walked away happy and hopeful. At this point it was around 7:30 p.m. If I had known what was going to happen after I left, I would have never asked Haumea to meet me in the first place.

I left and headed to the park where my brother and his friends hung out. I liked going to the park when I needed to clear my head. There was a pond where you could feed the ducks and I always found that relaxing. I had some left-over bread I saved from my sliders, so I stayed at the park for a while listening to music, feeding the ducks, and thinking about my talk with Haumea. I did not hear from Haumea again that night, but I figured they were just taking some time to think things through. Eventually I left the park and went home, hopeful that Haumea and I could fix our friendship. I did not text or call them because I wanted to give them time to think about our conversation and maybe find it in their heart to forgive me and move on.

On September 3, 2019, just a few days after my conversation with Haumea, the police contacted me and asked me to go to the police station. I was really confused, but thought it maybe had something to do with my brother and his friends. I never thought, not for a second, that this conversation would be about Haumea. When I arrived and started answering questions, I realized that this had nothing to do with my brother or his friends, but instead it was about my relationship and last conversation with Haumea. I was really confused and offered to call Haumea to clear things up, that's when the detectives told me Haumea was dead. I could not believe it. I have never lost anyone close; I still can't explain this horrible feeling. I lost any possibilities of repairing my relationship with my best friend. I was and still am completely devastated. The detective asked me

about my whereabouts. I told them that I had seen Haumea that evening but left downtown a little after 8pm. and I hadn't seen Haumea since probably 7:30 that night.

For the next few days, I was devastated and confused, I did not understand why someone would do this to Haumea. I had so many thoughts running through my head. I was literally sick over Haumea's death and couldn't fully grasp what was happening. I was also scared because I was likely the last person to see Haumea. I have no idea what happened that night after I left Haumea but after my conversation with the detectives, I couldn't help but think that I was going to be blamed for killing them. It's a truly awful feeling to struggle with coming to grips with the death of your best friend while also worrying you might go to jail. I was hopeful that the detective would believe that I cared for Haumea and would never hurt them. Sadly, that did not happen. A week later I was arrested.

Everything that happened after my arrest was a whirlwind. I had a hearing where the judge decided to move forward with my case, but they wouldn't let me out on bail. To be honest, I didn't really know what that meant other than I wasn't allowed to go home. My attorney Freddie Styx asked the prosecutor about a plea deal to save me the agony of a trial. Prosecutor Okafor offered me a 30-year sentence if I would plead guilty to second degree murder. I couldn't accept the deal, no way, I was and am innocent so why would I do that? 30 years? No way. I told Attorney Styx that I declined the plea deal.

About a month passed by and I became very anxious and nervous about this whole situation. I was there with Haumea on the night they were murdered but I certainly did not shoot Haumea. Sometime in early October my anxiety only got worse when Attorney Styx advised me that someone identified me as the shooter. An eyewitness said that they saw me running from the parking lot with a gun after supposedly shooting Haumea. I could not believe what was happening! I would NEVER hurt Haumea. Based on this information and because I saw Haumea shortly before

this incident, I felt that everything incriminated me. I did not see a way out. A few days later Attorney Styx told me that the prosecutor offered a new plea deal of voluntary manslaughter and 5 years in prison. I took the deal. I did not know what to do. For someone to say they saw me and then testify that they recognize me as the shooter, that doesn't look good and I didn't really know how to get around it. Of course I was there earlier that night, so maybe someone was mistaken but Attorney Styx said the police report made note that the ID was strong. I was at a loss. I told Attorney Styx I accepted the deal.

On October 15, I entered my guilty plea and began serving time. I did not want to say or even think that I was guilty of such a crime, but I did not see another way out. Almost a year later, I received a call from Attorney Styx saying that the eyewitness was not sure they correctly identified me as the shooter. I was shocked. Why didn't they say this before? The reason I pleaded guilty was because of the eyewitness' testimony. I talked with my parents and Attorney Styx about what to do next. Attorney Styx told me he would file for post-conviction relief because the eyewitness had tried to express their doubts to the prosecutor about their testimony. I do not understand all the legal stuff, but I trust Attorney Styx, and know that justice will be served. I did not hurt Haumea, ever, and I certainly did not shoot or kill, or attempt to kill Haumea. As I said, I loved Haumea.

STATEMENT OF CHARLIE NGUYEN

Private Investigator – Defense

My name is Charlie Nguyen. I have been a licensed private investigator and sole proprietor of Nguyen Investigations, Inc. for going on ten years now. Prior to opening my own private investigation business, I was a police officer with the Buckeye Police Department – BPD for short – for 15 years. I started as a patrol officer with the BPD. As a patrol officer, it was my job to respond to citizens' calls for police assistance and to do routine traffic patrol. I knew I wanted to be a Detective, so I attended several classes and training seminars on criminal investigations, as well as collecting and analyzing different types of evidence. I completed specific training on collecting fingerprints and learned about how fingerprint evidence is analyzed. I completed a similar course on DNA collection and analysis. The criminal investigation courses taught the fundamentals of interviewing witnesses and suspects, the importance of keeping an open mind and the importance of following up on tips and other information as it comes in.

I completed enough training that I was able to become a certified evidence technician with the BPD. When a crime occurred in BPD's jurisdiction and there was evidence to be collected, the responding officer or the detective would call on one of our certified evidence technicians to collect that evidence. An evidence technician may dust for fingerprints, swab for DNA, collect hair or fibers, retrieve surveillance video, take measurements and create sketches of the crime scene – it really depended on the specifics of any particular call.

On October 2, 2019, I was contacted by attorney Freddie Styx. Freddie was representing a young kid named Micah Opessa in a murder case and wanted to hire me to investigate some things. It is very common for lawyers to hire investigators to help them out with different aspects of cases they're working on. In criminal cases, an investigator might go the scene of the crime,

review any physical evidence that has been collected or analyzed, talk to witnesses or try to find new ones. In my nearly ten years as a private investigator, I have been involved in over 100 cases. In this particular case, Freddie wanted me to take a look at the evidence that had been disclosed by the State and talk to the prosecution witnesses that had been identified. Freddie offered to pay me double my normal fee, so I agreed to take on the job and immediately got to work.

I reviewed a copy of the discovery that had been turned over by the State so I could get a big picture view of what the evidence was in the case. According to the police reports, the evidence included: (1) Micah's partial fingerprints on the victim's glasses, (2) a footprint at the scene that was consistent with Micah's shoe size and shoe type, (3) posts on Micah's social media that talked about toughness and betrayal and (4) angry text messages from Micah to Haumea (5) blue nylon fibers from the scene that were consistent with a jacket that Micah had been seen wearing. There was also a witness named Corey Abrams who identified Micah as the individual they saw running away from the scene holding a gun.

On October 4, 2019, I attempted to make contact with Corey Abrams to talk to them about what they saw and how sure they were about the identification. In my training and experience, eyewitness identifications can be problematic, especially when the eyewitness is identifying someone they saw only briefly from some distance and who is a stranger to them, not to mention the fact that ten days had passed between Corey's brief observation and the photo lineup. Corey did not answer the phone when I called, so I left a voicemail asking them to call me back. I said in the message that I was a private investigator but didn't say anything else. I didn't want to scare Corey or somehow taint their recollection of the event by offering any details on the voicemail.

I was really hoping to talk to Corey because I was especially concerned that Micah was identified from a five-pack photo lineup, which is where the police officer places a photo of a suspect and of four other individuals who are supposed to share the similar physical characteristics, such as hair color and style, eye color, age range, weight, skin color, and wearing glasses or not on the same sheet of paper. All five of the photos should have similar backgrounds, lighting and distance from the camera to the person in the photograph. The use of these types of lineups has been shown to be problematic time and again. Subconsciously, it has been shown that witnesses want to satisfy the police by picking an individual from the five-pack. Witnesses also tend to believe the perpetrator of the crime is one of the individuals included in the photo lineup that has been presented to them, so there is pressure to select a person even if the person selected only somewhat resembles the person they saw. Corey never did call me back, which is too bad. Like I said, I really wanted to talk to them.

I next focused my attention on the partial fingerprint found on the victim's glasses. Fingerprint analysis has been used to identify suspects and help solve crimes for more than 100 years; it is still a tool that is heavily utilized to this day. No two people have exactly the same fingerprints. Even identical twins, who have identical DNA, have different fingerprints. Isn't that fascinating? Fingerprints are unique patterns made by friction ridges (which are raised) and furrows (which are recessed) that appear on the pads of our fingers and thumbs. You can also get prints from palms, toes, and feet but those are not used nearly as often. A person's friction ridge patterns do not change over their lifetime.

If you press your finger into an ink pad and then press your inked finger onto a piece of paper, you'll see the friction ridges on that particular finger. Friction ridge patterns are grouped into three different types – loops, whorls and arches. Each type has a unique variation, depending on the shape and orientation of the ridges. A loop print is one that recurves back on itself to form a loop shape. A whorl print is one that forms circular or spiral patterns. Finally, an arch print

creates a waive-like pattern and includes different types of arches. Arches are the rarest type of print, making up only about five percent of all pattern types. According to the laboratory report provided to Freddie Styx, the partial fingerprint recovered from the arm of the victim's glasses was an arch print, which is consistent with Micah's friction ridge pattern. While only about five percent of people worldwide have arch patterns, about seven percent of Buckeye's population has arch prints.

In forensic science, a partial fingerprint lifted from a surface is called a latent fingerprint. A latent fingerprint is invisible to the naked eye and are often fragmentary. Because they are not clearly visible, their detection may require chemical development through powder dusting, or spraying, fuming or soaking with specific chemicals. Forensic scientists and evidence technicians use different methods for porous surfaces, such as paper, and nonporous surfaces, such as glass, metal, or plastic. A nonporous surface requires the technician to utilize the dusting process, where fine powder and a brush are used to make the print visible, followed by the application of transparent tape to lift the latent fingerprint off the surface. Given that this latent print was on the victim's glasses, the powder/tape technique was the most suitable and most likely followed by the technician.

After a crime scene is processed and evidence is collected, the investigating law enforcement agency sends the evidence to the crime laboratory where it is analyzed by the appropriate section in the lab. Firearms go to a certified firearms examiner for analysis, suspected drug substances go to chemists with the crime lab for them analyze, etc. Fingerprints go to fingerprint examiners for comparison.

Fingerprint examiners carry out a visual comparison of fingerprints collected from law enforcement at the scene of a crime, for example, and prints from a known individual. Most fingerprint examiners use a comparison methodology called "ACE-V," which is an acronym that

refers to the sequence of steps taken by a fingerprint examiner. First, an examiner **A**nalyzes the fingerprint. The purpose of this initial analysis is to assess the quantity and quality of the fingerprint. In this stage, the expert tries to assess the evidentiary value of the fingerprint – is there sufficient ridge detail for comparison? If the fingerprint passes the first step, the examiner moves onto the second step which is to **C**ompare the fingerprint to a known fingerprint. The comparison is a side by side comparison of images. For a match to be found, features found in one image should be found in the other image, in the same relative position, orientation and number of intervening ridges. The examiner requires a minimum number of points in agreement – without discrepancies – between a fingerprint collected at a crime scene and the fingerprint exemplar from a known individual. Some crime laboratories require a 12-point match to a suspect's prints, though there is no standard requirement as to how many points of identification are needed in the United States. There are as many as 150 points in the average fingerprint, so there is a lot to work with in the examination.

Having compared the images, the examiner **E**valuates what they have seen and comes to one of three general conclusions about the print: identification (often more simply stated as the prints "matching"), exclusion or inconclusive. The final stage of the examiner's process is **V**erification by one or more additional examiners. A second examiner will repeat the ACE steps above as a sort of cross-check to make sure the first examiner got it right. Because the comparison process is subjective, the verification process is a quality assurance mechanism that is critically important.

I reviewed the report of the fingerprint examiner and I was shocked to learn that the examiner came to the conclusion that they could identify Micah Opessa from the partial fingerprint that was collected. The examiner only found 7 points of similarity between Micah's known fingerprints and the fingerprint collected from the victim's glasses. I understand that a partial print doesn't give you the full 150 points of comparison but finding only 7 points of

similarity is below the standard that I always followed. When I was an evidence technician, our fingerprint examiner wouldn't accept anything less than 12 points of similarity to confirm an identification! Even more incredibly, the fingerprint examiner didn't have their conclusion verified by a second examiner. As I said earlier, that verification step is crucial to ensure that an examiner got it right because the comparison process is so subjective. I bet a second examiner would never have allowed the report to go out saying they could identify Micah based on 7 points of similarity.

Next, I turned my attention to the shoeprint that was found at the scene. From my training and experience, I know that shoeprints – also called footwear impressions – can be left on almost any surface. Shoeprints are divided into three types: visible, plastic and latent. A visible print is a transfer of material from the shoe to the surface. This type can be seen by the naked eye without additional aids. A common example of a visible shoeprint is a bloody shoeprint left on a tile floor. A plastic shoeprint is a three-dimensional impression left on a soft surface. This would include a shoeprint left in sand, mud or snow. A latent print is one that is not readily invisible to the naked eye. This type is created through static charges between the sole and the surface. Like latent fingerprints, examiners use powders, chemicals or alternative light sources to find these shoeprints. The shoeprint found at the scene is this case was a visible shoeprint; it was left as a result of someone stepping in motor oil and transferring that oil to the area of the parking lot where Haumea Robins's body was found.

Since it is not possible to cut out the section of the parking lot where the shoeprint was found, the crime scene technicians followed the traditional steps of preserving this evidence. The shoeprint was photographed and measured. It is critical that the shoeprint is properly photographed. Since there is only a slight difference between different shoe sizes, if the photographs are not taken at a 90º angle to the impression, a true shoe size cannot be produced to compare to the actual shoe. I cannot tell with certainty whether the crime scene technicians

followed this critical step, as that information is missing from the report. The photographs were high resolution to provide as much detail as possible as to the tread and wear pattern left behind in the shoeprint, which is appropriate.

Once the photographs are taken, similar to fingerprints, the next step is to lift the shoeprint so that it may be preserved for analysis. For porous surfaces, such as parking lots, the proper technique to lift the shoeprint is to use a gelatin lifter. A gelatin lifter is a sheet of rubber with a low-adhesive gelatin layer on one side that can lift prints from nearly any surface. This was most likely the technique used by the crime scene technician in this case.

The laboratory results indicated that the shoeprint left was consistent with Converse brand sneakers. Given the length of the shoeprint, the laboratory concluded that a size 9 shoe left the impression in the parking lot. In doing my own investigation, I learned that Micah does wear a size 9 shoe and owns several pairs of Converse brand shoes. In my opinion, that doesn't mean a whole lot – Converse shoes are very popular with people in Harmony. I see them all the time!

The last piece of physical evidence I looked at were blue nylon fibers found at the scene. While these fibers are consistent with a blue-nylon bomber jacket that Micah was seen wearing, they would also be consistent with countless other clothing items sold today. In fact, nylon is one of the most common fabrics and is found in a broad range of clothing and accessory items. Frankly, I am not remotely surprised the crime scene technicians found nylon fibers at the crime scene.

The important thing to remember when looking at all of this physical evidence – the fingerprint, the shoeprint and the nylon fibers – is that while all of it was at the crime scene, nobody know exactly *when* those things got there. The fingerprint on Haumea's glasses could have been deposited at any point in the past, depending upon how often and thoroughly Haumea cleaned their glasses. Who knows when someone wearing size 9 Converse sneakers stepped in

oil and walked on that particular spot in the parking lot, leaving their shoeprint behind? It could have been the day of the murder or the week before. Oil stays on pavement for a long time because it can't be easily washed away so it is not possible to tell when it happened. Likewise, when were the blue nylon fibers that were recovered left on or transferred to Haumea's clothing? Anyone who had physical contact with Haumea while they were wearing that clothing could have left those fibers behind. Even a simple hug could have been enough to transfer the nylon fibers to Haumea's clothing. No crime scene technician or expert in the world would ever be able to conclusively answer those questions.

STATEMENT OF COREY ABRAMS

Eyewitness – Defense

My name is Corey Abrams. I've lived in Harmony for the past 22 years since my family moved here when I was a kid. Harmony is a great place to grow up and a great place to live. I'm proud to be on the cutting edge of Harmony's international food scene with my pride and joy—my food truck specializing in Israeli street food, Corey's Kebabs. I've been running the truck for the past five years and I have a loyal following in downtown Harmony. I serve the familiar standards like falafel and shawarma, and obviously kebabs, but I especially love broadening Harmony's horizons with less familiar but delicious sandwiches like sabich and boureka.

All the food trucks park in the same area downtown, at the corner of First and Green. We've got The Muffin Man serving breakfast in the mornings. You can imagine what Wrap Battle specializes in. And the same person (with the same terrible sense of humor) owns two trucks that park there, Bread Pitt and Egg Sheeran. So, I'm in good company at First and Green, and we look out for each other even though I guess we're competing for customers.

I didn't start out meaning to own a food truck, actually. I majored in political science at Harmony Community College. I spent a summer studying abroad in Israel and I guess you could say my life was changed by their street food scene. When my semester ended, I couldn't find anyone back in Harmony cooking good Israeli food and I didn't want to stop eating it, so I started trying to recreate the great food I ate. One thing led to another and I bought a truck on Craigslist, perfected my menu, and here we are. I had always planned to go to law school, but I feel like I got plenty of legal education just from filling out all the paperwork it takes to open a business.

On August 31st of 2019—I remember because that was the Saturday of Labor Day weekend—I was parked in my normal spot downtown at First and Green. While I was closing down, around 8:30 p.m., I heard what sounded like gunshots, but I assumed it was just a truck backfiring. I had been scrubbing down my grill, so I wasn't looking out the window to see what

actually caused the sound. But I was startled enough that I looked out the window as soon as I heard the noise, and I saw someone running away from the parking lot that's right behind my parking spot. They ran by maybe 20 yards from me and I could see them for about 10 seconds, so I thought I got a pretty good look. But it was 8:30 at night in late August, so the light wasn't perfect or anything. They were running parallel to my truck so I mostly got a side profile. But I yelled "Hey, what's going on?" And they looked my way, so I saw their face, too. They were wearing a blue jacket with a zipper up the front. I think they call the style a bomber jacket. I did notice they were holding a gun, so I didn't try to follow them or say anything else.

Once it hit me that what I heard was actually gunshots and not a truck, I called 9-1-1 right away. They told me they were sending someone over, so I said they could find me in my truck because I still needed to finish scrubbing down my grill. You really have to do that while it's still warm. Otherwise, that grime just won't come off ever and it really shortens the grill's lifespan. An officer came up before long and asked me if I'd seen anything. They said their name was Detective River Foley. I told them what I'd seen and gave them my phone number. They said they'd be in touch so, I just finished cleaning up and didn't think about it too much more.

The next thing I heard about what I'd seen that night was on September 2nd, Labor Day. I got a call from Detective Foley asking me to come into the station to look at a photo lineup and see if I could identify the person I had seen running away. Apparently they were a suspect in a murder case! I had no idea someone had actually gotten hurt that night. I told Detective Foley I couldn't come to the station because I was at a food truck convention in Chicago all week, but I would be more than happy to help when I got back.

The convention was awesome. I went with a few other food truck owners and we had a great time. We visited a ton of vendors' booths and I got a great discount on a new under-the-counter refrigerator I've had my eye on for months. Plus, we saw a ton of great food truck concepts and I met a few other Israeli street food specialists, and that inspired me to tweak my menu some.

It's not fun to lose business when you close up for something like that, but it was an investment in the future, and I think I came out ahead. But even though I was having a blast and learning a lot, I couldn't stop thinking about the situation back in Harmony. Who was killed? And why? Would I be able to help?

The convention ended on September 9th. I got back into Harmony on the 10th, and I went down to the station to see Detective Foley right away. They gave me the photo lineup. It had five photos of people who looked roughly similar. I took my time looking at them. It was a little difficult because it had been more than a week since I had seen the person, but I also had a pretty good memory of the event because it was so unusual to hear gunshots downtown and I talked to Detective Foley about it right afterwards. I have a pretty good memory for faces, too. That's helpful for owning a food truck. People love it when you remember them after they've only been there once or twice. That's how you turn a repeat customer into a regular. So I get lots of practice remembering faces and details.

Anyway, I picked out the photo that I thought was the person I had seen running away. The photo of the person I selected seemed to be a little brighter than the others and Detective Foley seemed to watch me closely while I examined it. I took that as a good sign, but I wasn't totally sure it was the same person, and I said so. But the face definitely looked familiar, and I did my best and took my time looking at the photo lineup. Detective Foley reassured me that that was all I could do, and they were sure I had a good memory. They seemed sort of relieved that I had picked that photo as the person who I saw running away so that made me feel better, like I did a good job. Detective Foley said they would take my identification into account with the rest of their evidence as they investigated the murder. They said the person whose photo I had picked out was named Micah Opessa.

Close to a month went by and I didn't think too much more about the murder. I was rebranding my truck based on some really inspiring truck designs I had seen at the food truck

convention and designing that took up most of my time when I wasn't running the truck. On October 6th, I was kicking back to relax and watch TV when I saw a news story about a recent murder in Harmony. It turned out it was the same one—the one in the parking lot behind my truck. They said Micah Opessa—the person I identified—had been arrested for the murder and their trial was set to start the next day. The news story included a video shot of Micah walking down the sidewalk, maybe going to the courthouse or something.

My heart sank straight into my stomach. Now that I saw a video of Micah, walking around in broad daylight, I was sure I had picked the wrong photo from the lineup. Micah wasn't the person I had seen on August 31st. The person I saw running away was taller and had a bigger build than Micah. In fact, the more I thought about it, the more I was pretty sure Micah's face just looked familiar because I had seen them ordering at another food truck that evening—not because they were the person running away from the gunshots. I picked up the phone right away and called Detective Foley. I told them, "I've seen this kid on the news. That is not who I saw! They look so different from that photo." Detective Foley thanked me for calling, and that was it. I never heard from them or anyone from the police department again.

After my call to the detective, I decided to let it go for a little bit. I had already contacted Detective Foley and told them it was not Micah who I saw running away from the crime scene, so what else could I do? But two days went by and I hadn't heard anything. I knew Micah's trial was supposed to be coming up and I felt really unsettled about the whole thing, so I googled the number for the Cardinal County Prosecutor's Office and called them directly instead of going through Detective Foley. I got through to a law clerk for the office, and I asked her why no one had ever called me about my change of heart on identifying Micah. She didn't really answer my question, but she did take my statement and said she would add a note to the case file for the prosecutor to review. I asked the clerk if the prosecutor would be calling me to follow up and she said she wasn't sure.

I assumed they would just drop the case after that because I never did hear from the prosecutor. It turns out that is not at all what happened. I saw on the news a little while later that Micah Opessa pleaded guilty and was going to prison. I wasn't sure what to think about that. I hope they didn't think I would testify against them, because I definitely would not have said under oath that Micah was the person I had seen running away from the parking lot with a gun. I tried to follow up with the prosecutor's office but when I called, the clerk who I originally talked to was no longer there. The only information I could get was that the case was closed, and I didn't need to worry about it anymore.

Well, almost a year passed after that. It was a rough year. I'm not exaggerating when I say I lost a lot of sleep over the whole thing. Some nights I'd just lay awake and think about Micah sleeping in some prison and wonder if they were okay. Some days I'd catch myself staring off into space out of my truck window, looking at the place where I had seen someone—someone who wasn't Micah—running away. Eventually I had to stop parking there and find a new place, and not all of my regulars made the move with me. It sounds kind of dramatic when I say it out loud, but that kind of thing sticks with you. Honestly, I think "anguish" would be the right word for it. It really got to me when I realized that if Micah didn't commit the murder, then that's an injustice for *two* people—for Micah, who is in prison for a crime they didn't commit, and for the victim, whose murderer is still out there walking around. And it's all my fault.

I finally decided I couldn't keep living with this guilt, so I sent Micah's lawyer a letter explaining the whole thing. I offered to help in any way I could. I sent that letter on September 10, 2020, just a little bit over a year after the shooting. I guess that's why we ended up here today. I hope Micah finally gets justice. And I hope the murder victim does, too.

One last thing. I heard that apparently an investigator who worked for Micah's lawyer had called me way back in October 2019, before Micah pleaded guilty. I bet I'm not alone in getting lots of spam calls trying to sell me quadruple-glazed windows or the new big thing in gutter

cleaning or whatever. All of those have just gotten me out of the habit of answering my phone if there's a call from a number I don't know. And I guess I figure they'll leave a message or stop by the truck if they need to get in touch with me. I don't remember getting any messages from an investigator, so if they called me, I probably just didn't pick up the phone. If they left a message, I didn't notice. An unfortunate consequence of attending a big convention like I did is that your name and phone number gets placed on a lot of spam lists. It isn't unusual for me to get messages asking me to wire money to a family member in "urgent need" or to a Nigerian prince or something. I wish I would have noticed the call way back then but I'm doing the best I can now to make the situation right.

STATEMENT OF JUSTICE OKAFOR

Prosecutor

My name is Justice Okafor and I am an Assistant County Prosecutor for Cardinal County. I graduated from Buckeye State DeHaan School of Law School in 2010 and began working as a prosecutor right after I passed the bar. In fact, while I was studying for the bar exam, I worked for the Cardinal Prosecutor's Office as a law clerk. Those months as a law clerk helped prepare me to hit the ground running when I was finally assigned cases to handle. Although, law clerk work was not particularly interesting. I did a lot of filing and legal research, and sometimes helped prosecutors get witnesses and evidence prepared for trial. Ever since I can remember, I've wanted to be a prosecutor. I love being in court and trying dozens of cases a year in front of juries. Now that I'm an Assistant Prosecutor I definitely appreciate having law clerks to help with the trial prep work.

I'm currently in the General Division of the Cardinal Prosecutor's Office. My active docket is usually anywhere between 60-80 cases. All are adult felonies. I'd say my caseload is pretty average for the office, and to be honest, it is often stressful to manage. There are a lot of deadlines to juggle. For example, it can be frustrating to get witnesses to show up in court, despite having subpoena power. Then there are the witnesses that change their story or have significant rap sheets of their own. And while balancing all of this, it's crucial to stay on the judges' and bailiffs' good sides! On the other hand, there's also a lot of "hurry up and wait" in this work, too. It's definitely not as fast-paced and intense as you see on some of those crime dramas on TV. Witnesses are uncooperative, defense attorneys might have difficulty with what we call "client control," or the court's docket gets rearranged to accommodate another case. This leads to a lot of sitting around in judge's conference rooms and court hallways. During all of this sitting around, the prosecutors, cops, defense attorneys, probation officers, etc. get to know each other pretty well. I enjoy that part of the job as well, because it feels a bit like a big extended family. Although it's

true that the courthouse can be as gossipy and cliquey as high school. The only thing missing are the rows of lockers.

I definitely don't want to give the impression that I don't like being a prosecutor, though. I remember when I was a kid, having dinner at my best friend Ricky's house. His father was a Detective and his mother was a court reporter. His father told these incredible stories at the dinner table, about crime rings he'd broken up, and how he pieced cases together using clues and evidence. That guy could talk for days about his work, and you could tell he loved it. That whole scene at Ricky's house could not have been more different from my house growing up. I was stuck with parents who were professors of Philosophy at Buckeye University. *Philosophy*. Do you know how boring it is to be a ten-year old kid at dinner with parents who are inclined to discuss the meaning of life for hours on end? But I feel like my work makes a difference. Society needs law and order, to keep everyone in check.

We're here about the Opessa case, so let me take you through the background. I was assigned the case file in September of 2019. On first glance, it's a fact pattern that makes up probably 90% of adult felony cases. Typically, violence erupts over one of two things: love or money. Usually the victim knows the perp for some time before the violent act. The patterns you notice after doing this job for some time are pretty interesting. Want to know what months have the highest violent crime rates? July and August. Why? It's hot. More people are outside. Tempers flare. After you've seen enough of these case files, not much surprises you anymore. This is part of the reason why I want to be a United States Attorney eventually, to get into some really interesting high-stakes cases!

So, like I was saying, the Opessa file landed on my desk and I did a thorough review of the contents a day or two later. Usually, when I get a new file, I have a little routine I go through. I familiarize myself with the case and see if there are any red flags. A case file usually contains a lot of summaries: the case facts, witness statements, identification made during a line up, evidence,

etc. The summaries are written by the cops who handled the case, and I go through and make sure the information in the summaries lines up with the actual witness statements, for example. I don't want any surprises with details popping up at trial that weren't included in the cops' summaries.

The Opessa file contained a summary of the crime scene evidence, including Micah Opessa's partial prints found on Haumea's glasses, a shoeprint found at the scene, some fibers matching Opessa's jacket, Micah's social media posts, and angry text messages from Micah to the victim. It also contained Detective Foley's narrative about Corey Abrams' identification of Opessa in a photo lineup on September 10, 2019. There were notes in the file from Detective Foley describing Kai Robins' account of the tumultuous relationship between Opessa, Haumea Robins, and a third individual named Scout Firat. It sounded like a love triangle, which is frequently a motive for violence. When you consider the ample physical evidence along with the information pointing to a motive, it was clear that the charges against Opessa were appropriate and that this was a case I wanted to bring to trial.

When the preliminary hearing concluded on September 20, 2019 Opessa's defense attorney, Freddie Styx, stopped me in the hallway and we chatted for a while about other cases. Surprisingly, just as I thought our conversation was ending, Styx asked whether there would be a plea offer on the Opessa case. It's a little unusual to have plea negotiation before discovery, but I figured if Styx's client was interested and a plea would potentially free up space in my schedule for one of the other 70 cases to move forward, then fine by me. I told Styx that the evidence against Opessa was considerable, and I offered Murder 2 and 30 years served.

Many people don't realize this but a lot of criminal cases these days end in a plea deal rather than going to trial. In the Cardinal Prosecutor's Office, the Assistant County Prosecutors have pretty much full discretion about when and what plea deal to offer. It would have to be a pretty complicated high-profile case, such as something involving human trafficking or gang activity, before the County Prosecutor would take a look at a plea deal. I know prosecutors who

plead out almost every single one of their cases. Those are usually the ones at the very bottom of the office's end-of-the-year trial count ranking! I enjoy trials, and it's true that I probably don't offer plea deals as frequently as others in the office.

Styx discussed the plea offer with Opessa and they turned it down on September 23, 2019. My understanding is that Opessa was firmly opposed to a plea deal and adamant about their innocence. I've worked with Styx a little bit over the years. Styx generally seemed to be a reasonable defense attorney, though I had only seen them in court a handful of times. When the plea deal was turned down, I marked my calendar for the October 7, 2019 trial date and filed for initial discovery. Then I put the Opessa file on the shelf and got to work on one of the other 70 cases I had on my docket. Over the next 11 months I tried 15 cases! Thankfully the office had some great law clerks because there's no way I could have handled all of the document review, phone calls from witnesses and cops, and all of the rest of it on my own. Even with the help, it turned out to not be my strongest year though. Of the 15 trials, 5 ended with defense verdicts and one with a hung jury. There was a long article in the *Buckeye Herald* about one of the trials, some nonsense printed about trumped-up charges and criminal justice reform. I was quoted a couple of times, just my standard statements about the allegations and the pursuit of justice. Every now and then the press seems to like to stir up the public with accounts of prosecutors allegedly abusing their power. It gets frustrating to read. As a prosecutor, when I stand up in court, I am representing my county and the entire state of Buckeye. My job is to enforce the law, and the citizens are counting on me.

By the time the Opessa trial came around, I was playing catch up on lots of cases that had lingered while I'd been in trial so frequently. I also had around 15 new case files stacked on my desk, several of them needing immediate attention because they'd stagnated on some semi-retired cop's desk for a few months and we were up against some deadlines. On the day of trial, I requested a continuance, which is not something I often do. After spending some time with the

case in preparation for trial and the more I thought about it, I decided to offer Opessa another plea. Given my full case load I wanted to take some time to make sure I got all the details in order before going back to Styx with the offer which is why I requested the continuance.

I chose to offer a second plea because when I was reviewing for trial I was looking at the case with fresh eyes, and it occurred to me that the case wasn't without factors that chipped away at what was, overall, a solid case resting on the physical evidence alone. Probably the biggest factor was Opessa's relatively minor criminal history. A couple of my trials over the past year had been with Styx, and I'd been impressed by their courtroom skills. It seemed likely that Styx would effectively use testimony from their private investigator, Opessa's scant rap sheet, and details about Opessa to raise doubt and sympathy in a jury.

While I was at the courthouse requesting the continuance, I ran into Detective Foley. It was nice to see Foley - great law enforcement officer, Gulf War veteran, has a kid in the police academy right now. Foley had a heart attack at a crime scene last year, tough recovery. Foley seemed a little jumpy and paranoid since then, like the stress is too much. I think Foley's got an eye on retirement soon, deservedly. Anyway, we passed each other in the hallway, and they recalled Opessa was scheduled for trial. Foley made a comment about checking in on Abrams, the eyewitness, because Abrams was having reservations about their ID of the defendant. Later that afternoon I asked one of the law clerks at the office to follow up with Abrams and add any pertinent information to the case file so I could look it over before calling Styx with the new plea offer.

When I reviewed the notes it seemed like Opessa was nervous about testifying because they weren't totally sure Opessa was the person they saw the night of Haumea's. At the end of the day, having an eyewitness change their testimony, though certainly not helpful, is generally not detrimental to a case. Eyewitness testimony is basically the least reliable evidence to put in front of a jury. On top of that, it's not as if an eyewitness is a secret -- Abrams' name was disclosed to Styx in our initial discovery, weeks ago. Styx had plenty of time to follow up on Abrams'

testimony, multiple times, if they wanted to. After reading the clerks notes on Abrams' possible change of heart, I made a judgement call that it didn't affect the case, so I called Styx and offered the new plea: voluntary manslaughter with 10 years served. Styx called me back the next morning to let me know Opessa accepted. We went to court, they entered the plea and started serving their sentence, simple as that.

This is the first time I've been involved with a motion for a plea withdrawal in my ten years in practice. Overall, the allegations against the prosecutor's office are unfounded, and there is a lot of time and expense going into this hearing that should be spent on things like Buckeye's soaring crime rate and overloaded criminal court dockets. The plea offer Opessa accepted was absolutely fair in light of the serious charges supported by physical evidence and a spurned-lover motive which was strengthened by the defendant's own social media posts and text messages. Those elements of the case would have more than made up for a lack of photo ID. Styx is trying to make a mountain out of a molehill with this motion, and after his client got a deal of a lifetime!

STATEMENT OF KAI ROBINS

Victim's Parent – Prosecution

My name is Kai Robins and Haumea Robins was my child. My Haumea was only sixteen years old when Micah Opessa killed them. Haumea was my only child and I loved them more than anything. My partner Carey, Haumea's other parent, passed away a few weeks after Haumea's fifteenth birthday. Carey worked at the Harmony Zoo and was killed in a tragic tiger-related accident. Carey's sudden death was hard on all of us, even more so than under "normal" circumstances because the accident was so public. It was so hard being a single parent, but I still considered myself lucky. A few weeks before Carey died, we had just updated our life insurance policy, and the payout from insurance made it so I only had to work part-time. I work retail jobs mostly. Right now, I have a job with Macy's in their shoe department which is pretty nice. With my flexible schedule, it meant I could focus most of my energy on my darling Haumea.

It was nice to have all the extra time with Haumea. We were best friends. We never fought and Haumea would tell me everything about their life and I would listen. I was very involved in Haumea's life. I would volunteer frequently for class field trips and was a member of the PTA. I made sure Haumea went to school on time, ate healthy, and got good grades. Haumea was an active and well-rounded kid. They were a member of their school's basketball team and the captain of their school's debate team. I was a very proud parent. Haumea had a bright future ahead of them, and I didn't want anything to mess that up.

After Carey passed away, Haumea was all I had. I wanted to do everything I could to protect them. As Haumea was so active, I liked to keep a close eye on them and their whereabouts while still allowing them to have some freedom. I did this in a few ways. One way was through this nifty little tracker app I found out about on one of the parenting forums I like, ParentAmI.com. When I found out about it and realized it already exists on most phones, I just had to use it. I had recently gotten Haumea a new phone for their sixteenth birthday and it came

with the FindMyFamily app that allows you to sync your phone with your friends and family so you can see where they are. On my parenting forum a lot of people said their college age kids use the app with their friends when they take ride shares so they can make sure everyone gets home safely. What a great idea! When I gave Haumea the new phone we synced it with mine so we could both use the FindMyFamily app. That way whenever I was worried, I could pull up the tracker and see what Haumea was up to, and that they were safe. Looking back now, I feel stupid for ever thinking that worthless little tracker app would keep my child safe.

Another way I would try to keep track of Haumea is by always encouraging them to bring their friends over to our apartment. Haumea's basketball teammates would sometimes come over to shoot hoops in the apartment complex's recreation area. Haumea's two best friends, before all the dating drama happened, were Scout Firat and Micah Opessa. Those two were always over, either studying or watching movies. The three of them, Scout, Haumea, and Micah, have been friends for a while. Haumea and Micah became friends in elementary school. They both became friends with Scout sometime in middle school. They used to be such darling little things. It's hard to imagine that Micah would grow up to be such a monster.

Micah used to be a good kid. Used to be. After they all started high school Micah began to change. They began to dress differently, wearing all black clothes most of the time. Micah used to be very talkative with me when they were at our apartment, but suddenly they stopped. It was hard to just get a few words out of Micah, and when Micah did talk, almost every word out of their mouth would be a lie.

I remember a particularly frustrating incident with Micah. The three of them, Haumea, Micah, and Scout, came to our house one day to hang out and do homework. I knew that in a few days they had a field trip to a local art museum, and they needed permission slips signed from parents to attend. As I was going to be chaperoning, I had volunteered to make the permission

slip, and had already signed Haumea's. I reminded Micah and Scout that they needed to get theirs signed. Scout said that theirs was signed and turned in, typical responsible Scout.

Micah, on the other hand, said they had lost their permission slip and asked me if I had another one. I did have another one and gave it to Micah. I reminded Micah that they needed to keep better track of important things like this. Micah said "Whatever," rudely, and then proceeded to take the slip and sign their parent's name right in front of me! Immediately, I asked Micah what the heck they were doing. Micah rolled their eyes and said their parents always let them sign their own permission slips. I let it go right then, but I didn't believe Micah. A few months ago, when Micah started acting strange, I had asked them for their parent's phone number, you know, for safety purposes. I decided to call that number later that night to verify that what Micah was telling me was true. When I dialed the number though, it wasn't Micah's parents! Micah had given me the number to a local pizza place! I was furious. I confronted Micah about this the next time I saw them. He said his mother worked there. That was also a lie. I happened to know that both of Micah's parents are healthcare workers as I had met them before at a PTA meeting.

This was not the first time Micah had acted out. I remember an incident a few years prior, when Haumea was about 14, where Micah got into trouble with the police. That day, Haumea came in from school in a panic, worrying because Micah had gotten in trouble. Apparently, the school resource officer discovered that Micah had drugs on their person and Haumea saw the whole thing! Micah had been taken in by the police and Haumea was scared that Micah would be expelled, or even worse, be sent to jail. I tried to comfort Haumea. I told Haumea that Micah likely wouldn't go to jail, but I really didn't know. What I did know was that Micah was headed down the wrong path and it might be better for my child not to hang out with them so much.

That wasn't the last time I heard about Micah getting in trouble. Haumea confided in me not long before the two started fighting, that Micah, once again, had a run in with the police. This

time it was for forging a fake ID to go to some dance club. Given Micah's recent attitude change and new, all black attire, it seemed odd that they would want to go to a club, so I had a feeling the fake ID was for something worse than dancing. Scout more or less confirmed my suspicions when they told me Micah was the go-to source around Trillium for buying alcohol.

Of course, when I heard about these incidents, my first concern was for Haumea. I didn't want Haumea to mimic any of Micah's behaviors. I was thinking about Micah's behavior one day and it triggered me to go onto one of my parent forums to ask for advice. The parents encouraged me to get Haumea away from Micah, which I wholeheartedly agreed. I know high school is a rough time for kids and they can get caught up in all kinds of things, but it seemed, out of all of Haumea's friends, Micah was the only one struggling. Despite having more reason than most to struggle, Haumea was doing great as ever, and Scout seemed to be really blossoming in high school.

Scout had always been a great kid and still is. I don't blame them for any of this happening. In fact, it's probably mostly my fault. You see, Scout is a very sweet and kind person. They're smart as a whip too. Scout was on the debate team with Haumea, and when I went to watch the rounds, it was clear Scout was the brightest one in the room. Also, teens have a tendency to, you know, get a little awkward looking in high school, but not Scout. I swear that child has one of the most beautiful smiles and the self-confidence to go with it.

Anyway, one day I was scrolling through one of my ParentAmI forums (I like to give advice as well as get it) and saw a post about a father whose daughter had started dating this awful boy. He was asking the forum advice on how to break them up. Immediately, I thought of Haumea. What if they were to get in that situation? What if Haumea were to date someone not worthy of their affections? As a parent, I had to intervene. So, I started to, sort of, plant the idea in Haumea's head that they should start dating Scout. I'd always try to remind Haumea of how great Scout was and would mention how cute the two of them would be together.

A few months prior to Haumea's death, Haumea came to me to talk about dating Scout. I was elated. Haumea told me that they really liked Scout, but they were afraid to lose their friendship if it didn't work out. Haumea also said that they had gotten the feeling that Micah had a crush on them, and that dating Scout would only complicate that friendship. The thought that Micah had a crush on Haumea concerned me, quite frankly. It seemed that Haumea didn't reciprocate those feelings, which was good, but I did not like the idea of my child and that disrespectful little troublemaker being together. I told Haumea to follow their heart and if they were all actually good friends it would work out regardless of any jealousies. Haumea took my advice, and they and Scout started dating. I was so happy that they finally got together. As an added benefit, I could tell Micah did not like being the third wheel and I hoped they would eventually go off to find some other friends because of this.

I was wrong. All this did was agitate Micah. A few weeks after Scout and Haumea started dating, the three were at our apartment. I was sitting at the kitchen table, looking through my forums, and Micah, Scout, and Haumea were in the living room. I couldn't see them, but I could hear them as the conversation got louder. Sometime during the evening I heard Haumea raise their voice a little bit, not yelling, but I could tell they were frustrated, and say "I don't see what you're so upset about?". Then I heard a thump, like something heavy being thrown on the floor. Then I heard Micah yell "You're gonna' pay for treating me like this!" I got up to see what the heck was going on. I saw Micah storm out of the front door, slamming it on their way out. I walked into the living room and there was a textbook, as well as some papers thrown on the floor. I figured Micah threw them there before they stormed out. I asked Haumea and Scout what this was all about. Haumea told me that Micah thought they were being excluded after Haumea and Scout started dating and got overly upset about it. Which was music to my ears honestly. When Micah stormed out, I thought 'good riddance'. I wrote to the other parents on the forum about how happy I was. Unfortunately, that wasn't the end of it.

I noticed that, despite seeming happy with Scout, Haumea was clearly stressed out and I assumed Micah's little outburst had something to do with it. A tell-tale sign that Haumea was upset was how often they cleaned their glasses. I know it sounds silly, but Haumea was never one to bite their nails or anything like that. Instead, when Haumea was stressed out, they would obsessively clean their glasses. They even carried one of those little cleaning cloths around all the time. In the days after Micah stormed out of our apartment Haumea's stress escalated. I don't think their glasses had ever been cleaner! I truly felt bad for Haumea because I could tell the Micah situation was really bothering them, but I was happy that Micah wasn't coming around anymore. I figured with some time and space, the situation would work itself out. I could not have been more wrong.

August 31, 2019 was the worst night of my life. It started out normal. Scout and Haumea were studying inside because it had been raining for most of the day. I was cleaning up the kitchen. Just before 7:00 p.m. Haumea walked in the kitchen and said they were craving some shawarma and wanted to walk to an Israeli food truck that was typically parked not too far from our house. This was a little weird as we had already eaten dinner. Haumea also seemed a little nervous asking me about it. I asked Haumea if they'd like me to make them a snack and told them I didn't like the idea of them walking alone after dark. I wasn't even sure if the food truck would be open still. Haumea said they would be fine and that they really wanted this specific food and some fresh air since it had finally stopped raining. I said fine, it wasn't that far, and I still had my tracker app on my phone to keep an eye on things. Scout was still in the living room making flash cards while Haumea ran out to get the food.

Haumea never came back. The truck was usually parked about a ten-minute walk away. I figured the whole trip would take Haumea about a half hour. Around 8:30, I got worried and checked the tracker app. Haumea was still near the food truck, I assumed the food truck was just busy, or the service was slow. Around 8:40 I walked into the living room to ask Scout if they'd

heard from Haumea. Scout started crying, which I didn't expect. Scout said that they had just been trying to call Haumea but they wouldn't pick up. Scout said they were scared something had happened to Haumea, something bad. I am in full on panic mode by now. I asked Scout why on earth they would think that. Scout explained that Haumea had received a few very mean text messages from Micah previously, and Haumea was actually planning to meet Micah at the food truck tonight. Haumea took screenshots of the mean texts and sent them to Scout, to ask for advice on the situation. Scout showed them to me, and they were not just mean but threatening! I was upset that Haumea didn't share them with me before.

I tried calling Haumea's phone. When I called it, someone else picked up. They said they were with the police department and asked for my address. Later, an officer showed up and my greatest fear was confirmed. Haumea was dead. The detective didn't say who killed Haumea, but I knew. There was no doubt in my mind that it was Micah Opessa.

Scout had sent me the text message screen shots, so I showed them to the police. I also told them about my forum posts and the tracker app. Eventually, they put together that Micah did this. The detective and the prosecutor assured me that the evidence clearly pointed to Micah. Now, Micah is saying they did not do this, that the food truck vendor is lying. It is Micah who is the real liar. Micah admitted they did it by pleading guilty! Why would someone lie about that? I thought I could try to cope with this all after Micah was brought to justice. But here I am again, reliving it. I just want this all to be over.

STATEMENT OF RIVER FOLEY

Harmony Detective – Prosecution

My name is River Foley. I am a detective with the Harmony Police Department and have been a police officer for the past 24 years. After returning from my time in the Gulf War, I wasn't sure what to do with myself. I didn't feel like the traditional college path was right for me. Being in the service gave me a whole new perspective on life and I knew I wanted to do something that would help people. After a few years of working odd jobs and talking to some friends on the force, I decided being a police officer was exactly what I was looking for. I completed my initial training and I was hired as a police officer in November of 1996. Once I graduated from the Buckeye Peace Officers Training Academy, I began my career as a patrolman. Then in late 2000 I was selected for a promotion and was able to attend state investigator training for three months. As an officer, I have completed over 300 hours training. As a result, I was able to earn the Master Evidence Technician Award in 2002. In May of 2003 I began working as a detective for the department. I was assigned to the homicide unit. I have worked on over 400 cases and have served as a lead detective on over a dozen cases. In May 2005 I was able to complete four months of advanced criminology training on forensic science with the FBI. The material covered in this training included bloodstain evidence, crime scene photography, death investigation, basic fingerprint classification, fingerprint comparison techniques, among various other topics. During these courses, I learned the proper techniques for collecting and preserving trace evidence e.g. fingerprints, blood samples, shoeprints, fabric and material fibers, etc.

I first learned of Haumea Robins' death on August 31, 2019 when the incident was reported. I was one of the detectives who responded to the scene. I remember getting the call about the homicide sometime after 8:30 pm because I was in the middle of watching The Great

Harmony Bake-Off which started at 8:30 pm. As soon as I got the call I headed straight to the scene of the crime. The incident occurred in a parking lot at the corner of First and Green. This area was familiar to me because it's where all of Harmony's best food trucks were located. I am guilty of being a regular at Bacon Me Crazy, despite my doctor's recommendation about eating a healthier diet. When I approached the scene, I noticed Corey Adams, the owner of Corey's Kebabs, was still closing down for the night. I recognized Corey because I had eaten at their truck a couple of times, but only when Bacon Me Crazy was closed or parked in a different location. Given where their truck was parked, I thought they might be a potential witness to the murder, so I walked over to talk with them.

I began interviewing Corey Abrams asking them to tell me about what had happened. Abrams described how they were closing shop when they heard what sounded like gunshots. At first, they thought the sound was a truck backfiring but then Abrams noticed an individual running away from the parking lot carrying a gun. They told me because it was getting dark and everything had happened so fast they were not able to get a great look at the individual running away. They did manage to briefly see the person's face and they got a profile view as well. I was able to obtain a general description of the individual seen running away with a gun. They mentioned that the individual was wearing what appeared to be a blue shirt or jacket of some sort, black skinny jeans, and a pair of black and white high-top shoes.

After talking with Abrams, I walked back towards where the homicide had occurred. By this time, the coroner had removed the body but Makoto Hayami, one of the crime scene investigators (CSI) was still collecting potential evidence. She explained how she had collected several partial prints from some of the deceased's belongings, including a partial print from their glasses. Additionally, she handed me a log of other evidence already collected, which included several shoeprints, clothing fibers, and blood samples.

It can sometimes be difficult to create a timeline with evidence, but we caught a break with this case. Harmony had experienced heavy rain and thunderstorms most of the week leading up to Haumea's murder, including heavy rainfall into the early evening on August 31. Rain can be detrimental to a crime scene, but it actually worked in our favor this time around. Because the rain was so heavy for most of the day, we had a high degree of confidence that much of the physical evidence collected from the crime scene was placed there shortly before or during Haumea's murder. Anything that was at the scene before the murder would have been washed away in the rainstorm so this led us to conclude that the print and other evidence was recent and linked to the scene.

Due to the holiday weekend and a backlog at the lab, the evidence collected was not processed until September 3, 2019. All the blood samples came back as the victim's blood, but we did get other, usable evidence. The lab reports showed that of numerous sets of prints collected a few came back with matches in our system. One of the partial prints we pulled from Haumea's glasses was an arch print which is the rarest type of fingerprint representing only a small percentage of people. This rare pattern type helped the analyst narrow down possible matches. From there, the analyst identified several points of match between the partial print found on Haumea's glasses and a print in our database. The matching print belonged to Micah Opessa. This was not the first time I have seen Micah involved in a criminal investigation.

A few years ago, when a new 18+ club opened I remember helping with several reported incidents of fake IDs being used at the club. One of the individuals who was arrested was Micah Opessa. I remember interviewing them and several other youths to see if we could catch the individual who was providing them with the fake IDs. Not long after the fake ID incident, Micah was brought into the station after a school resource officer caught them with marijuana. They were booked for possession which is why Micah's fingerprints were already in our system.

I made note of the partial print match and continued to review the remaining evidence. It's important not to get caught in the trap of latching on to a suspect too soon so I make it a point to review each piece of evidence with fresh eyes before I start to put together a narrative. In this case, the other evidence collected throughout this investigation also connected Micah to the crime. One of the footprints collected at the scene came from a size 9 Converse high top sneaker. Fibers from a Taylor Stich blue nylon bomber-jacket were found on Haumea's clothing. These items both matched the description of the clothing worn by the individual Corey Abrams saw running away from scene that evening. Throughout the investigation we continued to question the owners from some of the other food trucks to see if they remembered seeing an individual matching Micah's description near the area of the murder. I later came to learn from the owner of Mini Morsels, a food truck specializing in bite size street food, that an individual wearing a pair of Converse high tops and a blue Taylor Stich bomber jacket bought some sliders from their truck on the evening of August 31st. At some point later in the investigation I was able to confirm that Micah was wearing a blue bomber jacket and a pair of high top sneakers on August 31st.

Once Micah became a person of interest, I began looking into them more to see if there were any other indications that they could have killed Haumea. I did some digging online and found Micah's posts on several social media sites such as Twitter and Instagram. The posts contained your typical teenage content such as selfies, pictures of food and cats, silly memes, and a few posts referencing the 10-year challenge. However, there were a few specific posts that caught my eye. I was expecting your typical teen angst, which was definitely present in Micah's social media, but there were also some dark messages about betrayal and revenge. The posts came across as more insidious than normal teenage drama with Micah trying very hard to make it clear that they were tough and not to be messed with.

Based on the evidence collected at the scene I decided to bring Micah Opessa in for questioning. Micah and their parents came to the police station on September 3, 2019. I began the interview around 10 am. I started by gathering some basic information to try to determine if they were involved in the murder of Haumea Robins, or had any other information which could help us determine who the killer was. Micah told me how they had gone to meet Haumea around 7:00 p.m. When asked about the clothes they were wearing that evening, Micah responded that they could not remember exactly, but that they were probably wearing jeans, and a t-shirt. They also mentioned that they were wearing a blue bomber jacket and their favorite pair of Converse high top sneakers. Micah seemed more certain about this detail and even said "I wear both of those things everywhere!" I later checked these details with Micah's parents, and they confirmed that Micah owns and often wears a blue bomber jacket and high top sneakers.

Since it appeared Micah matched the description of the individual seen fleeing the night of August 31st, I began to ask them some questions to learn more about their relationship with Haumea. I learned Micah and Haumea had been friends since they were kids and hung around each other quite often. Micah also told me how the two had a falling out of sorts when Haumea started paying more attention to Scout Firat and less attention to them. When Micah told me about this, I could tell the subject upset them. The volume of their voice raised, and their face had a cross look on it. Micah mentioned something about how Haumea knew Micah had a crush on them but started dating Scout anyway. When I asked Micah if this bothered them, they said it did at first, but they had gotten over it. Micah said it was just a dumb teenage crush and I was making a bigger deal out of it than it was. While most people might have brushed this off as teenage drama, as a detective we are trained to analyze every statement and see if it somehow could be connected to the investigation. Working on the homicide unit, I have been involved in several homicides that were the result love-triangles and jealous lovers. As a result, I thought this

"dumb teenage crush" could have been Micah's motive for killing Haumea, especially when you consider Micah's social media posts in conjunction with their testimony during the interview.

I did not want to rush the interview, so I began asking Micah to tell me about the events of August 31st, 2019. Micah mentioned on the day of Haumea's death, the two met up that evening at the corner of First and Green to try and repair their relationship. Micah told me how the two had gotten food from one of the local food trucks and sat down to talk. After mentioning this, Micah became visibly uneasy. They crossed their arms and began to fidget in their chair. I wasn't sure where Micah was going with their story, but I decided to turn up the heat to see if Micah would confess to killing Haumea.

As I continued the interview I asked if they wanted to get back at Haumea for dating Scout even though Haumea knew Micah liked them. When asked this question Micah became extremely emotional. Their voice got even louder and they pounded the table with their fist. They said "I cannot believe you think I would want to hurt Haumea. I wanted to fix our friendship not kill them!" Once Micah finally calmed down, I informed them how we had an eyewitness who saw someone matching their description fleeing the scene of the crime with a gun. They told me that wasn't possible because once Haumea said they would think about being friends with Micah again, Micah gave Haumea a hug and left them alive and well. At this point, Micah turned away from me and asked if they could go home. Seeing as I had gained quite a bit of useful information but needed to follow up on some other leads, I told them they were free to go. After the interview, Micah left with their parents.

That same day I interviewed Kai Robins, the parent of Haumea, to see if anyone would have a reason for hurting their child. During the interview I learned how Micah and Haumea had been friends for a long time but recently had a falling out. Kai was understandably upset during our interview which only seemed to get worse as they talked about Micah. Kai knew Micah from

all the time Haumea and Micah spent together at the Robins' apartment. It was clear to me that Kai did not like or trust Micah, so much so that Kai was convinced Micah was the murderer before ever hearing about the evidence we had. Kai said they had text messages to prove it. They proceeded to show me screenshots of threatening text messages that Micah had sent to Haumea. We took the text messages as evidence and continued with the investigation.

After interviewing Kai, I wanted to get Corey Abrams down to the station to see if they could identify Micah as the person they saw fleeing that night. I tried to have Abrams come down to the police station a few days later for a photo lineup and a formal statement. However, because Abrams was attending a food truck convention in Chicago, they were not able to come to the station until September 10. Abrams returned from the convention late on September 9 and came to the station the next day at 10:00 am. I collected a formal statement from Abrams and showed them a photo lineup to see if they could identify the person, they saw that night. The lineup consisted of five photographs of individuals who fit the description, one of whom was Micah Opessa. After looking at the lineup Abrams identified Micah as the individual they saw at the scene holding a gun the night of the shooting. I checked again with Abrams to make sure they were certain that the individual in the photo was the same person they saw on August 31 at fleeing the parking lot where Haumea was murdered. After pausing for a moment, Abrams assured me the photo of Micah was the same individual they saw that night.

I did my best to make sure Abrams was certain, but eyewitness testimony tends to be unreliable. However, in the investigative part of the process it can help link physical evidence with an individual and enable the police to narrow down their list of suspects. In this case, Abrams' identification was able to reinforce what the other evidence already indicated, that Micah was the main person of interest in this case. When you're investigating, you do the best with the evidence you have and follow the information to the logical conclusion. In this case, all the information pointed to Micah Opessa even before Abrams' identification.

Once Abrams made the identification, I obtained an arrest warrant for Micah Opessa and proceeded to take Micah into custody. Micah was arrested at 3:00 pm that same day and charged with aggravated murder. Over the next couple of weeks I learned that Micah's case was given a trial date and the prosecutor assigned to the case was Justice Okafor, an assistant prosecutor. I spoke with Okafor and they advised me the case was going to trial and asked me to turn over the case file so they could prepare for trail. I gave Okafor all of the documents and notes I had regarding the case and told them to let me know if I could do anything else to help.

After Micah was in custody I had not heard much about the case until about a month later. On October 6, 2019 Corey Abrams called me. They told me that they were unsure about their initial identification of Micah as the perpetrator. Abrams explained when they saw a news story about the upcoming trial and they were able to see Micah in the daylight, they were having doubts that Micah was the person they saw fleeing the crime scene with a gun. I thought perhaps Abrams was just getting cold feet about what they saw that night and did not want to feel responsible for sending a kid to jail. However, in the interest of justice and making sure we got the right person, I took note of Abrams concern.

The next day I was at the courthouse providing testimony for another homicide I had been working on when I bumped into Justice Okafor. They appeared to be in a rush, but I stopped them to tell them about Abrams. I mentioned to them how Abrams was having reservations about their identification and that they should follow up with them to clear things up. I knew Abrams was one of the witnesses Okafor would likely be calling to testify and wanted to ensure they were prepared for trial. Okafor nodded at me, and then continued their way. I just wanted to be sure they got justice for Haumea and that their killer did not go unpunished.

Exhibits

Exhibit A
Micah Opessa Text Message to Haumea Robins

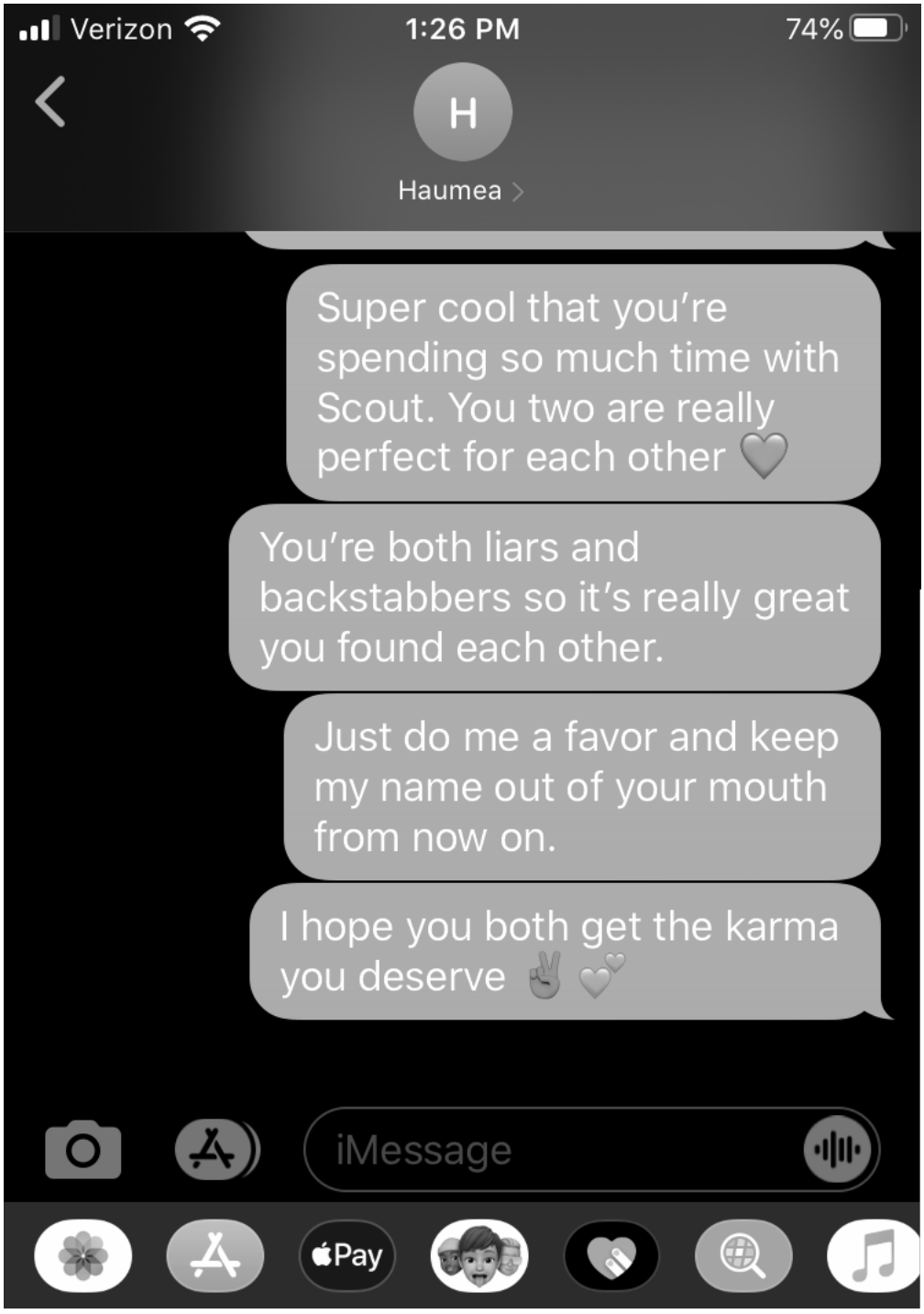


Exhibit B
Micah Opessa Tweets

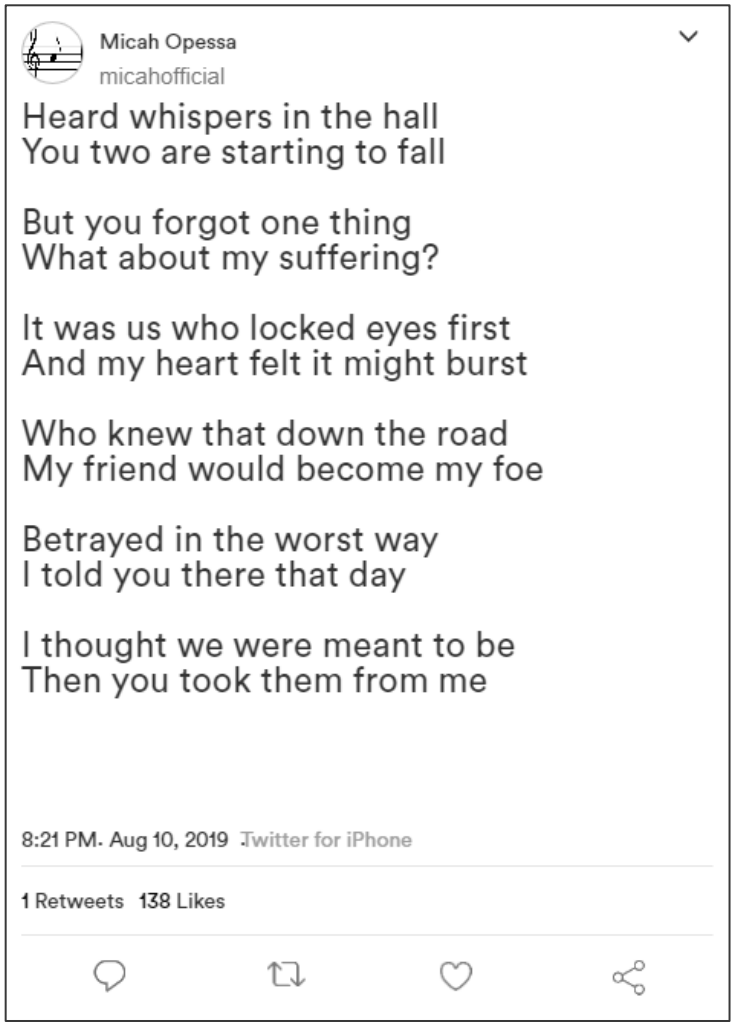


Exhibit C
Micah Opessa Instagram Post

late
at night
when you can't stay asleep
I hope
I'm the Siren
whose voice
haunts your dreams

& when you finally can't take
any more of me
& all your efforts
to drown out the sound
make you weak

I hope
that the shallowed breath of your
screams
reminds you how it must have
felt
for me

Exhibit D
Partial Fingerprint Analysis

LATENT PRINT
LIFTED FROM VICTIM'S GLASSES

COMPARISON PRINT
MICAH OPESSA RIGHT INDEX

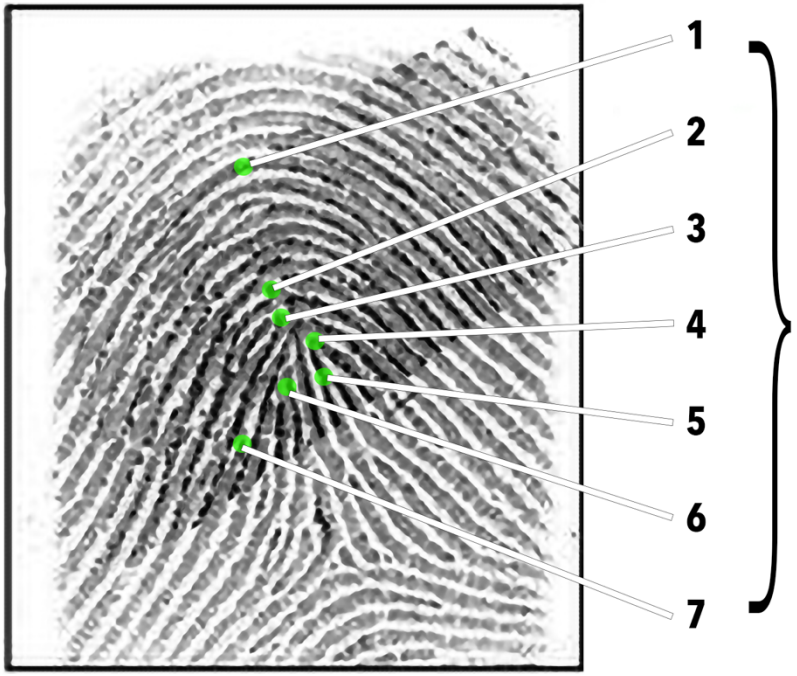
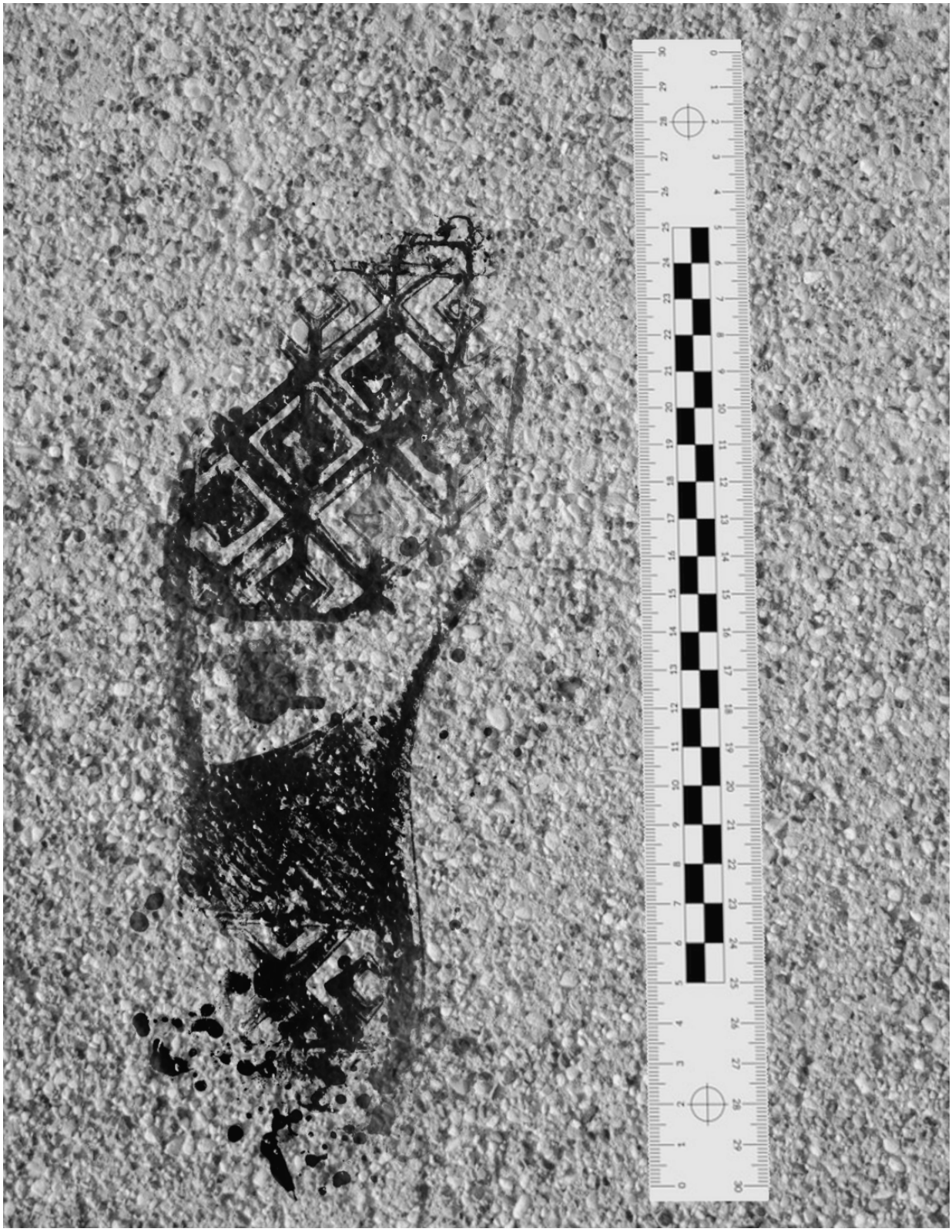


Exhibit E
Shoeprint from Crime Scene



Legal Statute

Rule 32.1 Withdrawal of a Guilty Plea

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.

Amendment V of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV of the United States Constitution

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

…

Section 5.
The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Case Law

Brady v. Maryland

Supreme Court of the United States

March 18-19, 1963, Argued ; May 13, 1963, Decided

No. 490

Reporter

373 U.S. 83 *; 83 S. Ct. 1194 **; 10 L. Ed. 2d 215 ***; 1963 U.S. LEXIS 1615 ***

Case Summary

Procedural Posture

Certiorari was granted to a decision of the Court of Appeals of Maryland to consider whether petitioner was denied a federal right when the appeals court restricted its grant of a new murder trial to the question of punishment, leaving the determination of guilt undisturbed. The appeals court granted a retrial after holding that suppression of evidence by the state violated petitioner's rights under the *Due Process Clause, U.S. Const. amend. XIV*.

Overview

A judgment granting petitioner a new murder trial that was restricted to the issue of punishment was affirmed. After petitioner was convicted of murder and sentenced to death, he learned that the State withheld a statement in which another individual admitted the actual homicide. The Court held that suppression of evidence favorable to an accused upon request violated the *Due Process Clause, U.S. Const. amend. XIV*, where the evidence was material to guilt or punishment, regardless of the State's good or bad faith. The suppression of evidence violated petitioner's due process rights and required a retrial on the sentence. The Court held, however, that it could not assume that if the suppressed evidence had been used at the first trial, the ruling that the statement was inadmissible as to guilt might have been disregarded by the jury. In Maryland, it was the trial court, not the jury, which ruled on the admissibility of evidence relating to guilt. The appeals court's statement that nothing in the suppressed confession could have reduced petitioner's offense below a first degree murder was a ruling on the admissibility of the confession as to the issue of innocence or guilt.

Outcome

The judgment granting petitioner a new trial restricted to the issue of punishment was affirmed where the suppression of evidence by the state violated petitioner's right to due process of law and required a retrial on the sentence. The Court held, however, that the appeals court had ruled the suppressed confession was inadmissible as to the issue of petitioner's guilt.

Syllabus

In separate trials in a Maryland Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, petitioner and a companion were convicted of first-degree murder and sentenced to death. At his trial, petitioner admitted participating in the crime but claimed that his companion did the actual killing. In his summation to the jury, petitioner's counsel conceded that petitioner was guilty of murder in the first degree and asked only that the jury return that

verdict "without capital punishment." Prior to the trial, petitioner's counsel had requested the prosecution to allow him to examine the companion's extrajudicial statements. Several of these were shown to him; but one in which the companion admitted the actual killing was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted and sentenced and after his conviction had **[****2]** been affirmed by the Maryland Court of Appeals. In a post-conviction proceeding, the Maryland Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law, and it remanded the case for a new trial of the question of punishment, but not the question of guilt, since it was of the opinion that nothing in the suppressed confession "could have reduced [petitioner's] offense below murder in the first degree." *Held*: Petitioner was not denied a federal constitutional right when his new trial was restricted to the question of punishment; and the judgment is affirmed. Pp. 84-91.

(a) Suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86-88.

(b) When the Court of Appeals restricted petitioner's new trial to the question of punishment, it did not deny him due process or equal protection of the laws under the *Fourteenth Amendment*, since the suppressed evidence was admissible only on the issue of punishment. Pp. 88-91.

Counsel: E. Clinton Bamberger, **[****3]** Jr. argued the cause for petitioner. With him on the brief was John Martin Jones, Jr.

Thomas W. Jamison III, Special Assistant Attorney General of Maryland, argued the cause for respondent. With him on the brief were Thomas B. Finan, Attorney General, and Robert C. Murphy, Deputy Attorney General.

Judges: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

Opinion by: DOUGLAS

Opinion

[*84] [*217] [**1195]** Opinion of the Court by MR. JUSTICE **DOUGLAS**, announced by MR. JUSTICE **BRENNAN**.

Petitioner and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. *220 Md. 454, 154 A. 2d 434*. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict "without capital punishment." Prior to the trial petitioner's counsel had requested the prosecution to allow **[****4]** him to examine Boblit's extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution. Petitioner's appeal from a denial of that motion was dismissed by the Court of Appeals without prejudice to relief under the *Maryland **[*85]** Post Conviction Procedure Act. 222 Md. 442, 160 A. 2d 912*. The petition for post-conviction relief was dismissed by the trial court; and on

appeal the Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. 226 Md. 422, 174 A. 2d 167. The case is here on certiorari, *371 U.S. 812*. [1]

[**5]** The **[**1196]** crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words "without capital punishment." 3 Md. Ann. Code, 1957, Art. 27, § 413. In Maryland, by reason of the state constitution, the jury in a criminal case are "the Judges of Law, as well as of fact." Art. XV, § 5. The question presented is whether petitioner was denied a **[***218]** federal right when the Court of Appeals restricted the new trial to the question of punishment.

[*86] ***LEdHN[2]***[] [2]We agree with the Court of Appeals that suppression of this confession was a violation of the *Due Process Clause of the Fourteenth Amendment*. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals -- *United States ex rel. Almeida v. Baldi, 195 F.2d 815*, and *United States ex rel. Thompson v. Dye, 221 F.2d 763* -- which, we agree, state the correct constitutional rule.

This ruling is an extension **[****6]** of *Mooney v. Holohan, 294 U.S. 103, 112*, where the Court ruled on what nondisclosure by a prosecutor violates due process:

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

In *Pyle v. Kansas, 317 U.S. 213, 215-216*, we phrased the rule in broader terms:

"Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if **[****7]** proven, would entitle petitioner to release from his present custody. *Mooney v. Holohan, 294 U.S. 103*. "

[*87] The Third Circuit in the *Baldi* case construed that statement in *Pyle* v. *Kansas* to mean that ***HN1***[] the "suppression of evidence favorable" to the accused was itself sufficient to amount to a denial of due process. *195 F.2d, at 820*. In *Napue v. Illinois, 360 U.S. 264, 269*, we extended the test formulated in *Mooney* v. *Holohan* when we said: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." And see *Alcorta v. Texas, 355 U.S. 28*; *Wilde v. Wyoming, 362 U.S. 607*. Cf. *Durley v. Mayo, 351 U.S. 277, 285* (dissenting opinion).

LEdHN[3][] [3]We now hold that ***HN2***[] the suppression by the prosecution of evidence favorable to **[****8]** an accused upon request violates **[**1197]** due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

The principle of *Mooney* v. *Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the

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federal domain: "The United States wins **[***219]** its point whenever justice is done its citizens in the courts." [2] A prosecution that withholds evidence on demand of an accused which, if made available, **[*88]** would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. *226 Md., at 427, 174 A. 2d, at 169*. **[****9]**

The question remains whether petitioner was denied a constitutional right when the Court of Appeals restricted his new trial to the question of punishment. In justification of that ruling the Court of Appeals stated:

"There is considerable doubt as to how much good Boblit's undisclosed confession would have done Brady if it had been before the jury. It clearly implicated Brady as being the one who wanted to strangle the victim, **[****10]** Brooks. Boblit, according to this statement, also favored killing him, but he wanted to do it by shooting. We cannot put ourselves in the place of the jury and assume what their views would have been as to whether it did or did not matter whether it was Brady's hands or Boblit's hands that twisted the shirt about the victim's neck. . . . It would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence *in considering the punishment of the defendant Brady*.

"Not without some doubt, we conclude that the withholding of this particular confession of Boblit's was prejudicial to the defendant Brady. . . .

"The appellant's sole claim of prejudice goes to the punishment imposed. *If Boblit's withheld confession had been before the jury, nothing in it could have reduced the appellant Brady's offense below murder in the first degree*. We, therefore, see no occasion to retry that issue." *226 Md., at 429-430, 174 A. 2d, at 171*. (Italics added.)

[2] Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954:

"The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts."

Giglio v. United States

Supreme Court of the United States

October 12, 1971, Argued ; February 24, 1972, Decided

No. 70-29

Reporter

405 U.S. 150 *; 92 S. Ct. 763 **; 31 L. Ed. 2d 104 ***; 1972 U.S. LEXIS 83 ****
GIGLIO v. UNITED STATES

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Disposition: Reversed and remanded.

Case Summary

Procedural Posture

Defendant appealed a judgment from the United States Court of Appeals for the Second Circuit affirming the district court's denial of defendant's motion for a new trial following a conviction for passing forged money orders.

Overview

Defense counsel asked a witness on cross-examination if any promises of leniency had been made, and the witness falsely answered no. The prosecution represented that no such promises had been made. Upon learning that a promise not to prosecute the witness had in fact been made, defendant moved for a new trial based upon the newly discovered evidence. The appellate court affirmed the trial court's denial of the motion. On certiorari, the Court reversed and remanded because the prosecution's failure to disclose the promise of leniency to the witness was an issue affecting credibility, which was therefore material. The suppression of material evidence violated due process and warranted a new trial whether it resulted from the prosecution's negligence or deliberate deception.

Outcome

The Court reversed the appellate court's judgment and the trial court's conviction of defendant and remanded the case for a new trial.

Syllabus

Petitioner filed a motion for a new trial on the basis of newly discovered evidence contending that the Government failed to disclose an alleged promise of leniency made to its key witness in return for his testimony. At a hearing on this motion, the Assistant United States Attorney who presented the case to the grand jury admitted that he promised the witness that he would not be prosecuted if he testified before the grand jury and at trial. The Assistant who tried the case was unaware of the promise. *Held*: Neither the Assistant's lack of authority nor his failure to inform his superiors and associates is controlling, and the prosecution's duty to present all material evidence to the jury was not fulfilled and constitutes a violation of due process requiring a new trial. Pp. 153-155.

Counsel: James M. La Rossa argued the cause and filed a brief for petitioner.

Harry R. Sachse argued the cause for the United States. On the brief were Solicitor General Griswold, Assistant Attorney General **[****2]** Wilson, Jerome M. Feit, and Beatrice Rosenberg.

Judges: Burger, C. J., delivered the opinion of the Court, in which all Members joined except Powell and Rehnquist, JJ., who took no part in the consideration or decision of the case.

Opinion by: BURGER

Opinion

[*150] **[***106]** **[**764]** MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government **[*151]** had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue v. Illinois, 360 U.S. 264 (1959)*, and *Brady v. Maryland, 373 U.S. 83 (1963)*.

[*107]** The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged coconspirator in the offense and the only witness linking petitioner with the crime. The Government's **[****3]** evidence at trial showed that in June 1966 officials at the Manufacturers Hanover Trust Co. discovered that Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge $ 2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and petitioner was indicted; thereafter, he was named as a coconspirator with petitioner but was not indicted.

Trial commenced two years after indictment. Taliento testified, identifying petitioner as the instigator of the **[**765]** scheme. Defense counsel vigorously cross-examined, seeking to discredit his testimony by revealing possible agreements or arrangements for prosecutorial leniency:

"[Counsel.] Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted?

"[Taliento.] Nobody told me I wouldn't be prosecuted.

"Q. They told you you might not be prosecuted?

"A. I believe I still could be prosecuted.

. . . .

[*152] "Q. Were **[****4]** you ever arrested in this case or charged with anything in connection with these money orders that you testified to?

"A. Not at that particular time.

"Q. To this date, have you been charged with any crime?

"A. Not that I know of, unless they are still going to prosecute."

In summation, the Government attorney stated, "[Taliento] received no promises that he would not be indicted."

The issue now before the Court arose on petitioner's motion for new trial based on newly discovered evidence. An affidavit filed by the Government as part of its opposition to a new trial confirms petitioner's claim that a promise was made to Taliento by one assistant, DiPaola, [1] that if he testified before the grand jury and at trial he would not be prosecuted. [2] DiPaola presented the Government's case to the grand jury but did not try the case in the District Court, and Golden, the assistant who took over the case for trial, filed an affidavit stating that DiPaola assured him before the trial that no promises of immunity had been **[***108]** made to Taliento. [3] **[****6]** The United **[*153]** States Attorney, Hoey, filed an affidavit stating that he had personally consulted with Taliento and his **[****5]** attorney shortly before trial to emphasize that Taliento would definitely be prosecuted if he did not testify and that if he did testify he would be obliged to rely on the "good judgment and conscience of the Government" as to whether he would be prosecuted. [4]

The District Court did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys, DiPaola and Golden, but proceeded on the theory that even if a promise had been made by DiPaola it was not authorized and its disclosure to the jury would not have affected its verdict. We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits. The heart of the matter is that one Assistant United States Attorney -- the first one who dealt with Taliento -- now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

[766]** LEdHN[1][↑] [1]LEdHN[2][↑] [2]LEdHN[3][↑] [3] **[****7]** LEdHN[4][↑] [4]LEdHN[5][↑] [5]LEdHN[6][↑] [6]As long ago as *Mooney v. Holohan, 294 U.S. 103, 112 (1935)*, this Court made clear that ***HN1***[↑] deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas, 317 U.S. 213 (1942)*.In *Napue v. Illinois, 360 U.S. 264 (1959)*, we said, "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id., at 269*. Thereafter *Brady v. Maryland, 373 U.S., at 87*, held that ***HN2***[↑] suppression of material evidence justifies a new

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[1] During oral argument in this Court it was stated that DiPaola was on the staff of the United States Attorney when he made the affidavit in 1969 and remained on that staff until recently.

[2] DiPaola's affidavit reads, in part, as follows:

"It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, . . . he would not be . . . indicted. . . . It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted."

[3] Golden's affidavit reads, in part, as follows:

"Mr. DiPaola . . . advised that Mr. Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant Giglio."

[4] The Hoey affidavit, standing alone, contains at least an implication that the Government would reward the cooperation of the witness, and hence tends to confirm rather than refute the existence of some understanding for leniency.

trial "irrespective of the good faith or bad faith of the prosecution." When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. *Napue, supra, at 269*. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." *United States v. Keogh, 391 F.2d 138, 148 (CA2 1968)*. A finding of materiality of the evidence is required under *Brady, supra, at 87*. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Napue, supra, at 271*.

[*109]** *LEdHN[7]*[] [7] *LEdHN[8]*[] [8]In the circumstances shown by this record, neither DiPaola's authority nor his failure to inform his superiors or his associates **[****9]** is controlling. Moreover, *HN3*[] whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

LEdHN[9][] [9]Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore **[*155]** an important issue in the case, and evidence of any understanding **[****10]** or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it.

LEdHN[10][] [10]For these reasons, the due process requirements enunciated in *Napue* and the other cases cited earlier require a new trial, and the judgment of conviction is therefore reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

United States v. Bagley

Supreme Court of the United States

March 20, 1985, Argued ; July 2, 1985, Decided

No. 84-48

Reporter

473 U.S. 667 *; 105 S. Ct. 3375 **; 87 L. Ed. 2d 481 ***; 1985 U.S. LEXIS 130 ****; 53 U.S.L.W. 5084
UNITED STATES v. BAGLEY

Prior History: **[****1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *719 F.2d 1462*, reversed and remanded.

Case Summary

Procedural Posture

The government sought review of an order of the United States Court of Appeals for the Ninth Circuit, which held that the government violated defendant's constitutional right to effective cross-examination on a finding that the government withheld information from discovery that trial witnesses were paid for testimony.

Overview

Defendant was indicted for violating federal narcotics and firearms statutes. Defendant filed a discovery motion regarding whether witnesses were paid to give testimony. The prosecutor failed to disclose that witnesses would be paid after testimony. Defendant was found guilty. Subsequently, defendant discovered that the witnesses had been paid, and he sought to vacate his sentences on the grounds that failure to disclose violated his right to due process and to impeach witnesses. The trial court denied defendant's motion to vacate, holding that impeachment evidence would not have affected the outcome of the trial. The appellate court reversed, holding that the denial of evidence was a violation of due process and defendant's right to confrontation. The Court reversed and remanded for a determination of whether the failure to disclose the evidence would have affected the trial outcome, thus comprising a constitutional error where such evidence was material.

Outcome

The Court reversed the order and remanded for a determination of whether the prosecutor's withholding of evidence was material in that it would have affected the outcome of the trial.

Syllabus

Respondent was indicted on charges of violating federal narcotics and firearms statutes. Before trial, he filed a discovery motion requesting, *inter alia*, "any deals, promises or inducements made to [Government] witnesses in exchange for their testimony." The Government's response did not disclose that any "deals,

promises or inducements" had been made to its two principal witnesses, who had assisted the Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent. But the Government did produce signed affidavits by these witnesses recounting their undercover dealing with respondent and concluding with the statement that the affidavits were made without any threats or rewards or promises of reward. Respondent waived his right to a jury trial and was tried before the District Court. The two principal Government witnesses testified about both the firearms and narcotics charges, and the court found respondent guilty on the narcotics charges but not guilty on the firearms charges. Subsequently, in response to **[****2]** requests made pursuant to the Freedom of Information Act and the Privacy Act, respondent received copies of ATF contracts signed by the principal Government witnesses during the undercover investigation and stating that the Government would pay money to the witnesses commensurate with the information furnished. Respondent then moved to vacate his sentence, alleging that the Government's failure in response to the discovery motion to disclose these contracts, which he could have used to impeach the witnesses, violated his right to due process under *Brady v. Maryland, 373 U.S. 83*, which held that the prosecution's suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. The District Court denied the motion, finding beyond a reasonable doubt that had the existence of the ATF contracts been disclosed to it during trial, the disclosure would not have affected the outcome, because the principal Government witnesses' testimony was primarily devoted to the firearms charges on which respondent was acquitted, and was exculpatory on the narcotics charges. The Court of Appeals reversed, **[****3]** holding that the Government's failure to disclose the requested impeachment evidence that respondent could have used to conduct an effective cross-examination of the Government's principal witnesses required automatic reversal. The Court of Appeals also stated that it "[disagreed]" with the District Court's conclusion that the nondisclosure was harmless beyond a reasonable doubt, noting that the witnesses' testimony was in fact inculpatory on the narcotics charges.

Held: The judgment is reversed, and the case is remanded.

Opinion

[*669] **[***486]** **[**3377]** JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion of the Court except as to Part III.

LEdHN[1A][1A] In *Brady v. Maryland, 373 U.S. 83, 87 (1963)*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." The issue in the present case concerns the standard of materiality to be applied in determining whether a conviction should be reversed because the prosecutor failed to disclose requested evidence that could have been used to impeach Government witnesses.

I

In October 1977, respondent Hughes Anderson Bagley was indicted in the Western District of Washington on 15 charges of violating federal narcotics and firearms statutes. On November 18, 24 days before trial, respondent filed a discovery motion. The sixth paragraph of that motion requested:

"The names and addresses of witnesses that the government intends to call at trial. Also the prior criminal records of witnesses, **[****7]** and any deals, promises or inducements **[*670]** made to witnesses in

exchange for their testimony." App. 18. [1]

The Government's two principal witnesses at the trial were James F. O'Connor and Donald E. Mitchell. O'Connor and Mitchell were state law enforcement officers employed by the Milwaukee Railroad as private security guards. Between April and June 1977, they assisted the federal Bureau of Alcohol, Tobacco and Firearms (ATF) in conducting an undercover investigation of respondent.

The Government's response to the discovery motion did not disclose that any "deals, promises **[****8]** or inducements" had been made to O'Connor or Mitchell. In apparent reply to a request in the motion's ninth paragraph for "[copies] of all Jencks Act material," [2] the Government produced a series of affidavits that O'Connor and Mitchell had signed between April 12 and May 4, 1977, while the undercover investigation was in progress. These affidavits recounted in detail the undercover dealings that O'Connor and Mitchell were having at the time with respondent. Each affidavit concluded with the statement, "I made this statement freely and voluntarily without any threats or rewards, or promises of reward having been made to me in return for it." [3]

[**9]** Respondent waived his right to a **[***487]** jury trial and was tried before the court in December 1977. At the trial, O'Connor **[*671]** and Mitchell testified about both the firearms and the narcotics charges. On December 23, the court found respondent guilty on the narcotics charges, but not guilty on the firearms charges.

In mid-1980, respondent filed requests for information pursuant to the Freedom of Information Act and to the Privacy Act of 1974, *5 U. S. C. §§ 552* and *552a*. He received in response copies of ATF form contracts that O'Connor and Mitchell had signed on May 3, 1977. Each form was entitled "Contract for Purchase of Information and Payment of Lump Sum Therefor." The printed portion of the form stated that the vendor "will provide" information **[**3378]** to ATF and that "upon receipt of such information by the Regional Director, Bureau of Alcohol, Tobacco and Firearms, or his representative, and upon the accomplishment of the objective sought to be obtained by the use of such information to the satisfaction of said Regional Director, the United States will pay to said vendor a sum commensurate with services and information rendered." App. 22 and 23. Each form **[****10]** contained the following typewritten description of services:

"That he will provide information regarding T-I and other violations committed by Hughes A. Bagley, Jr.; that he will purchase evidence for ATF; that he will cut *[sic]* in an undercover capacity for ATF; that he will assist ATF in gathering of evidence and testify against the violator in federal court." *Ibid*.

The figure "$ 300.00" was handwritten in each form on a line entitled "Sum to Be Paid to Vendor."

Because these contracts had not been disclosed to respondent in response to his pretrial discovery motion, [4] respondent moved under *28 U. S. C. § 2255* to vacate his sentence. He **[*672]** alleged that

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[1] In addition, para. 10(b) of the motion requested "[promises] or representations made to any persons the government intends to call as witnesses at trial, including but not limited to promises of no prosecution, immunity, lesser sentence, etc.," and para. 11 requested "[all] information which would establish the reliability of the Milwaukee Railroad Employees in this case, whose testimony formed the basis for the search warrant." App. 18-19.

[2] The Jencks Act, *18 U. S. C. § 3500*, requires the prosecutor to disclose, after direct examination of a Government witness and on the defendant's motion, any statement of the witness in the Government's possession that relates to the subject matter of the witness' testimony.

[3] Brief for United States 3, quoting Memorandum of Points and Authorities in Support of Pet. for Habeas Corpus, CV80-3592-RJK(M) (CD Cal.) Exhibits 1-9.

[4] The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not

the Government's failure to disclose the contracts, which he could have used to impeach O'Connor and Mitchell, violated his right to due process under *Brady v. Maryland, supra.*

[**11]** The motion came before the same District Judge who had presided at respondent's bench trial. An evidentiary hearing was held before a Magistrate. The Magistrate found that the printed form contracts were blank when O'Connor and Mitchell signed them and were not signed by an ATF representative until after the trial. He also found that on January 4, 1978, following the trial and decision in respondent's case, ATF made payments of $ 300 to both O'Connor and Mitchell pursuant to the contracts. [5] Although the ATF case agent who dealt with O'Connor and Mitchell testified that these payments were compensation for expenses, the Magistrate found that this **[***488]** characterization was not borne out by the record. There was no documentation for expenses in these amounts; Mitchell testified that his payment was not for expenses, and the ATF forms authorizing the payments treated them as rewards.

[**12]** The District Court adopted each of the Magistrate's findings except for the last one to the effect that "[neither] O'Connor nor Mitchell expected to receive the payment of $ 300 or any payment from the United States for their testimony." App. to Pet. for Cert. 7a, 12a, 14a. Instead, the court found that it was "probable" that O'Connor and Mitchell expected to receive compensation, in addition to their expenses, for their assistance, "though perhaps not for their testimony." *Id.*, at 7a. The District Court also expressly rejected, *ibid.*, the Magistrate's conclusion, *id.*, at 14a, that:

[*673] "Because neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any 'deals, promises or inducements' to these witnesses. Nor did the United States suppress evidence favorable to the defendant, in violation of *Brady v. Maryland, 373 U.S. 83 (1963)*."

The District Court found beyond a reasonable doubt, however, that had the existence of the agreements been disclosed to it during trial, the disclosure would have had no effect upon its finding that the Government **[**3379]** **[****13]** had proved beyond a reasonable doubt that respondent was guilty of the offenses for which he had been convicted. *Id.*, at 8a. The District Court reasoned: Almost all of the testimony of both witnesses was devoted to the firearms charges in the indictment. Respondent, however, was acquitted on those charges. The testimony of O'Connor and Mitchell concerning the narcotics charges was relatively very brief. On cross-examination, respondent's counsel did not seek to discredit their testimony as to the facts of distribution but rather sought to show that the controlled substances in question came from supplies that had been prescribed for respondent's personal use. The answers of O'Connor and Mitchell to this line of cross-examination tended to be favorable to respondent. Thus, the claimed impeachment evidence would not have been helpful to respondent and would not have affected the outcome of the trial. Accordingly, the District Court denied respondent's motion to vacate his sentence.

The United States Court of Appeals for the Ninth Circuit reversed. *Bagley v. Lumpkin, 719 F.2d 1462 (1983)*. The Court of Appeals began by noting that, according to precedent **[****14]** in the Circuit, prosecutorial failure to respond to a specific *Brady* request is properly analyzed as error, and a resulting conviction must be reversed unless the error is harmless beyond a reasonable doubt. The court noted that the District Judge who had presided over the bench trial **[*674]** concluded beyond a reasonable doubt that disclosure of the ATF agreement would not have affected the outcome. The Court of Appeals,

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known that the contracts existed and that he would have furnished them to respondent had he known of them. See App. to Pet. for Cert. 13a.

[5] The Magistrate found, too, that ATF paid O'Connor and Mitchell, respectively, $ 90 and $ 80 in April and May 1977 before trial, but concluded that these payments were intended to reimburse O'Connor and Mitchell for expenses, and would not have provided a basis for impeaching O'Connor's and Mitchell's trial testimony. The District Court adopted this finding and conclusion. *Id.*, at 7a, 13a.

however, stated that it "[disagreed]" with this conclusion. *Id., at 1464*. In particular, it disagreed with the Government's -- and the District Court's -- premise that the testimony of O'Connor and Mitchell was exculpatory on the narcotics charges, and **[***489]** that respondent therefore would not have sought to impeach "his own witness." *Id., at 1464, n. 1*.

The Court of Appeals apparently based its reversal, however, on the theory that the Government's failure to disclose the requested *Brady* information that respondent could have used to conduct an effective cross-examination impaired respondent's right to confront adverse witnesses. The court noted: "In *Davis* v. *Alaska,* . . . the Supreme Court held **[****15]** that the denial of the 'right of *effective* cross-examination' was '"constitutional error of the first magnitude"' requiring automatic reversal." *719 F.2d, at 1464* (quoting *Davis v. Alaska, 415 U.S. 308, 318 (1974))* (emphasis added by Court of Appeals). In the last sentence of its opinion, the Court of Appeals concluded: "we hold that the government's failure to provide requested *Brady* information to Bagley so that he could effectively cross-examine two important government witnesses requires an automatic reversal." *719 F.2d, at 1464*.

We granted certiorari, *469 U.S. 1016 (1984)*, and we now reverse.

II

HN1[⬆] The holding in *Brady* v. *Maryland* requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." *373 U.S., at 87*. See also *Moore v. Illinois, 408 U.S. 786, 794-795 (1972)*. The Court explained in *United States v. Agurs, 427 U.S. 97, 104 (1976)*: "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed **[****16]** evidence might have affected the outcome of **[*675]** the trial." The evidence suppressed in *Brady* would have been admissible only on the issue of punishment and not on the issue of guilt, and therefore could have affected only Brady's sentence and not his conviction. Accordingly, the Court affirmed the lower court's restriction of Brady's new trial to the issue of punishment.

The *Brady* rule is based on the requirement of due process. Its purpose is **[**3380]** not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. [6] Thus, ***HN2***[⬆] the prosecutor is not required to deliver his entire file to defense counsel, [7] but only to disclose evidence favorable to the **[***490]** accused that, if suppressed, would deprive the defendant of a fair trial:

"For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose. . . .

". . . But to reiterate a critical point, ***HN3***[⬆] the prosecutor will not have violated his constitutional **[****17]** duty of disclosure **[*676]** unless his omission is of sufficient significance to result

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[6] By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States, 295 U.S. 78, 88 (1935)*. See *Brady v. Maryland, 373 U.S., at 87-88*.

[7] See *United States v. Agurs, 427 U.S. 97, 106, 111 (1976)*; *Moore v. Illinois, 408 U.S. 786, 795 (1972)*. See also *California v. Trombetta, 467 U.S. 479, 488, n. 8 (1984)*. An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice." *Giles v. Maryland, 386 U.S. 66, 117 (1967)* (dissenting opinion). Furthermore, a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.

in the denial of the defendant's right to a fair trial." *427 U.S., at 108*.

[**18]** *LEdHN[2]*[] [2]In *Brady* and *Agurs*, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. *HN4*[] Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule. See *Giglio v. United States, 405 U.S. 150, 154 (1972)*. Such evidence is "evidence favorable to an accused," *Brady, 373 U.S., at 87*, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois, 360 U.S. 264, 269 (1959)* ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

The Court of Appeals treated impeachment evidence as constitutionally different from exculpatory evidence. According to that court, failure to disclose impeachment evidence is "even more egregious" than failure to disclose **[****19]** exculpatory evidence "because it threatens the defendant's right to confront adverse witnesses." *719 F.2d, at 1464*. Relying on *Davis v. Alaska, 415 U.S. 308 (1974)*, the Court of Appeals held that the Government's failure to disclose requested impeachment evidence that the defense could use to conduct an effective cross-examination of important prosecution witnesses constitutues "'constitutional error of the first magnitude'" requiring automatic reversal. *719 F.2d, at 1464* (quoting *Davis v. Alaska, supra, at 318*).

This Court has rejected any such distinction between impeachment evidence and exculpatory evidence. In *Giglio v. United States, supra*, the Government failed to disclose impeachment evidence similar to the evidence at issue in the present case, that is, a promise made to the key Government **[*677]** **[**3381]** witness that he would not be prosecuted if he testified for the Government. This Court said:

HN5[] "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the] general rule [of *Brady* **[****20]**]. We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed **[***491]** evidence possibly useful to the defense but not likely to have changed the verdict . . . .' A finding of materiality of the evidence is required under *Brady*. . . . A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .'" *405 U.S., at 154* (citations omitted).

Thus, the Court of Appeals' holding is inconsistent with our precedents.

[Redacted]

The constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such **[****22]** suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. *HN6*[] Consistent with "our overriding concern with the justice of the finding of guilt," *United States v. Agurs, 427 U.S., at 112*, a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

III

A

It remains to determine the standard of materiality applicable to the nondisclosed evidence at issue in this case. Our starting point is the framework for evaluating the materiality of *Brady* evidence established in *United States* v. *Agurs*. [Redacted]The Court in *Agurs* distinguished three situations involving the

discovery, after trial, of information favorable to the accused that had been known to the prosecution but unknown to the defense. The first situation was the **[***492]** prosecutor's knowing use of perjured testimony or, equivalently, the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false. The Court noted the well-established rule that "a conviction obtained by the knowing **[****23]** use of perjured testimony is fundamentally unfair, and must be set aside if there is any **[**3382]** reasonable likelihood that the false testimony could have affected the judgment of the jury." **[*679]** *427 U.S., at 103* (footnote omitted). [8] **[****24]** Although this rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, [9] it may as **[*680]** easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt. The Court in *Agurs* justified this standard of materiality on the ground that the knowing use of **[***493]** perjured testimony involves prosecutorial misconduct and, more importantly, involves "a corruption of the truth-seeking function of the trial process." *Id., at 104*.

[**25]** At the other extreme is the situation in *Agurs* itself, where the defendant does not make a *Brady* request and the prosecutor fails to disclose certain evidence favorable to the accused. The Court rejected a harmless-error rule in that situation, because under that rule every nondisclosure is treated as error, thus imposing on the prosecutor a constitutional duty to deliver his entire file to defense counsel. [10] *427 U.S., at 111-112*. At the same time, the Court rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably **[**3383]** would have resulted in acquittal. *Id., at 111*. The Court reasoned: "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice." *Ibid*. The **[*681]** standard of materiality applicable in the absence of a specific *Brady* request is therefore stricter than the harmless-error standard but more lenient to the defense than **[****26]** the newly-discovered-evidence standard.

The third situation identified by the Court in *Agurs* is where the defense makes a specific request and the prosecutor fails to disclose responsive evidence. [11] **[****27]** The Court did not define the standard of materiality applicable in this situation, [12] but suggested that the standard might be more lenient to the defense than in the situation in which the defense makes no request or only a general request. *427 U.S., at 106*. The Court also noted: "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Ibid*.

The Court has relied on and reformulated the *Agurs* standard for the materiality of undisclosed evidence in two subsequent cases arising outside the *Brady* context. In neither case did the Court's discussion of the *Agurs* standard distinguish among the three situations described in *Agurs*. In **[***494]** *United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982)*, **[****28]** the Court held that due process is violated when testimony is made unavailable to the defense by Government deportation of witnesses "only if there is a reasonable likelihood that the testimony could have affected the judgment of the **[*682]** trier of fact." And in *Strickland v. Washington, 466 U.S. 668 (1984)*, the Court held that a new trial must be granted when evidence is not introduced because of the incompetence of counsel only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 694*. [13] The *Strickland* Court defined a "reasonable probability" as "a probability sufficient

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[13] In particular, the Court explained in *Strickland*: ***HN7***[↑] "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt

to undermine confidence in the outcome." *Ibid*.

[**29]** *LEdHN[1B]*[↑] [1B]We find *HN8*[↑] the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence 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.

The Government suggests that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases. See Brief for United **[**3384]** States 31. The Government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued. *Ibid*.

We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary **[****30]** process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the **[*683]** nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. This possibility of impairment does not necessitate a different standard of materiality, however, for under the *Strickland* formulation the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

[*495]** B

In the present case, we think that there is a significant likelihood that the prosecutor's response to respondent's discovery motion misleadingly induced defense counsel to believe that **[****31]** O'Connor and Mitchell could not be impeached on the basis of bias or interest arising from inducements offered by the Government. Defense counsel asked the prosecutor to disclose any inducements that had been made to witnesses, and the prosecutor failed to disclose that the possibility of a reward had been held out to O'Connor and Mitchell if the information they supplied led to "the accomplishment of the objective sought to be obtained . . . to the satisfaction of [the Government]." App. 22 and 23. This possibility of a reward gave O'Connor and Mitchell a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, but was expressly contingent on the Government's satisfaction with the end result, served only to strengthen any incentive to testify falsely in order to secure a conviction. Moreover, the prosecutor disclosed affidavits that stated that O'Connor and Mitchell received no promises of reward in return for providing information in the affidavits implicating respondent in **[*684]** criminal activity. In fact, O'Connor and Mitchell signed the last of these affidavits the very day after they signed **[****32]** the ATF contracts. While the Government is technically correct that the blank contracts did not constitute a "promise of reward," the natural effect of these affidavits would be misleadingly to induce defense counsel to believe that O'Connor and Mitchell provided the information in the affidavits, and ultimately their testimony at trial recounting the same information, without any "inducements."

The District Court, nonetheless, found beyond a reasonable doubt that, had the information that the Government held out the possibility of reward to its witnesses been disclosed, the result of the criminal

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respecting guilt." *466 U.S., at 695*.

prosecution would not have been different. If this finding were sustained by the Court of Appeals, the information would be immaterial even under the standard of materiality applicable to the prosecutor's knowing use of perjured testimony. Although the express holding of the Court of Appeals was that the nondisclosure in this case required automatic reversal, the Court of Appeals also stated that it "disagreed" with the District Court's finding of harmless error. In particular, the Court of Appeals appears to have disagreed with the factual premise on which this finding expressly was **[****33]** based. The District Court reasoned **[**3385]** that O'Connor's and Mitchell's testimony was exculpatory on the narcotics charges. The Court of Appeals, however, concluded, after reviewing the record, that O'Connor's and Mitchell's testimony was in fact inculpatory on those charges. *719 F.2d, at 1464, n. 1*. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to that court for a determination whether there is a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

[Concurrence and Dissent Redacted]

Campbell v. Marshall

United States Court of Appeals for the Sixth Circuit

July 23, 1985, Decided

No. 84-3404

Reporter

769 F.2d 314 *; 1985 U.S. App. LEXIS 21017 **
WILLIAM L. CAMPBELL, III, Petitioner-Appellant, v. R. C. MARSHALL; THE ATTORNEY GENERAL OF OHIO, Respondents-Appellees

Prior History: **[**1]** ON APPEAL from the United States District Court for the Northern District of Ohio.

Disposition: Affirmed.

Case Summary

Procedural Posture

Petitioner inmate sought review of a decision of the United States District Court for the Northern District of Ohio that denied his writ of habeas corpus, which alleged that his guilty plea was invalid and unconstitutional because the state failed to disclose Brady information prior to his plea.

Overview

Petitioner inmate filed a writ of habeas corpus in the district court citing that his guilty plea was invalid because the state failed to disclose Brady information prior to the guilty plea. The district court denied his writ. On appeal, the principal issue was whether the failure of the state to disclose potentially exculpatory evidence in its possession rendered involuntary an otherwise voluntary, counseled plea of guilty. The court affirmed the district court's denial of petitioner's writ of habeas corpus. The court opined that the withholding of Brady information did not taint the plea-taking as to render petitioner's guilty plea involuntary or unintelligent, and as such petitioner's plea was valid and his *U.S. Const. amend. XIV* right to due process was not violated. The court noted that a plea decision was not made with any perfect knowledge of the results were a trial to be held. The court noted that the state's conduct in suppressing information favorable to petitioner would have violated his *U.S. Const. amend. XIV* due process rights if he had been convicted after a trial without the benefit of that information.

Outcome

The court affirmed the denial of habeas corpus. The court opined that the withholding of Brady information did not taint the plea-taking as to render petitioner's guilty plea involuntary or unintelligent, and as such petitioner's plea was valid and his *U.S. Const. amend. XIV* right to due process was not violated. The court noted that a plea decision was not made with any perfect knowledge of the results were a trial to be held.

Opinion

[*315] ENGEL, Circuit Judge.

The principal issue in this habeas corpus appeal is whether the failure of the state to disclose potentially

exculpatory evidence in its possession renders involuntary an otherwise voluntary, counseled plea of guilty. We assume without deciding that under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, the state's conduct here in suppressing information favorable to the petitioner would have violated his *Fourteenth Amendment* due process rights if he had been convicted after a trial without the benefit of that information. Nonetheless, we conclude that under *Tollett v. Henderson, 411 U.S. 258, 36 L. Ed. 2d 235, 93 S. Ct. 1602 (1973)*, **[**2]** and related Supreme Court decisions, the question presented in the instant case is not so much whether the particular conduct complained of violated *Brady*, but instead, whether under such circumstances petitioner's guilty plea was intelligently and voluntarily made with the advice of competent counsel. Put another way, did the prior withholding of the *Brady* information so taint the plea-taking as to render the guilty plea involuntary or unintelligent? We hold that petitioner's guilty plea here was valid and that his *Fourteenth Amendment* right to due process was not violated.

The relevant facts in this case are largely undisputed. While there was no trial, the evidence is fully laid out upon the record of the state and federal proceedings in which petitioner first pleaded guilty and then attempted to extricate himself from that plea.

On June 3, 1978, appellant William L. Campbell, III, used his key to enter the apartment of his former wife, Sheila Campbell. Campbell had been living in the apartment with Sheila and their children until about two weeks earlier. In his statement to the police, Campbell said that he went to the apartment to remove some of his personal property, **[**3]** including a.22 caliber automatic pistol and approximately 300 rounds of ammunition. He alleges that he was drunk and fell asleep at the kitchen table after placing the gun and ammunition on a divider between the table and the apartment's front door. Sometime after midnight Sheila Campbell, their children, and a male companion entered the apartment. Campbell told the police that he asked the man who he was, and the man replied, "Franket." Campbell further stated that several months earlier a friend had warned him that Ronald Franket had a gun and was "looking for him." Campbell **[*316]** claimed that although he saw no gun, he saw Franket reach into his pocket, and Campbell, therefore, shot Ronald Franket five times. He also shot Sheila Campbell three times. Both died.

Campbell turned himself in the following day and was subsequently indicted by a Columbiana County, Ohio grand jury on two counts of aggravated murder with specifications and one count of aggravated burglary. The specifications alleged that Campbell committed each murder as a part of the killing of two or more persons and that each was committed during the course of an aggravated burglary. Under Ohio law, Campbell **[**4]** could have received the death penalty if convicted of aggravated murder and at least one of the specifications. *Ohio Rev. Code §§ 2929.03(B)*, *2929.04(A)(5)*, *(7)*. If convicted of aggravated murder but neither of the specifications, Campbell's maximum possible sentence was life imprisonment for each count. *Ohio Rev. Code §§ 2929.02-.03*. The aggravated burglary count carried a possible sentence of 4 to 25 years. *Ohio Rev. Code §§ 2911.11*, *2929.11*.

As part of Campbell's plea bargain, the prosecutor moved both to strike the specifications from the aggravated murder portion of the indictment and to enter a nolle prosequi as to the aggravated burglary charge. In return, Campbell entered a plea of guilty to the two aggravated murder counts.

Before his plea hearing, Campbell was given a document entitled "Judicial Advice to Defendant." That document contained a discussion of each of the constitutional rights Campbell would waive by pleading guilty, the elements of the crime to which he intended to plead, and the maximum penalties he could receive. Campbell completed a written "Defendant's Response to Court" indicating that he had read and understood the information in the "Judicial Advice **[**5]** to Defendant." In his "Response" he also answered specific questions to establish that his guilty plea was knowing, intelligent, and voluntary. At the plea hearing the state court judge determined that Campbell had read and understood these documents. He also questioned Campbell as to his knowledge of the consequences of his guilty plea and discussed some of the rights Campbell was waiving. The court did not specifically inform Campbell in court that the plea would waive his right to be free from self-incrimination, his right of confrontation, and his right to

compulsory process, although a discussion of the waiver of each of these rights was included in the "Judicial Advice to Defendant." When asked by the court why he shot Ronald Franket and Sheila Campbell, Campbell replied, "Because he was with my wife," and "Because she was with him." The court accepted Campbell's guilty plea and sentenced him to two consecutive life sentences.

Before Campbell decided to plead guilty, his counsel made a specific written request for discovery from the prosecution. He requested any evidence material to Campbell's guilt or punishment as well as a list of the tangible objects which the prosecution **[**6]** intended to use at trial. Campbell subsequently learned that the police had found a.25 caliber semi-automatic pistol on Franket's body and had taken that gun into their possession. The palm-sized weapon was found in the left, rear, hip pocket of Franket's pants. Although they were aware of the gun's existence and had the gun in their possession, the prosecution did not disclose the gun to Campbell or his counsel.

Campbell subsequently challenged his conviction in the Ohio courts and lost those challenges. He then brought a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. The district judge referred Campbell's habeas petition to a magistrate who recommended a denial of the writ. In a written opinion, the district judge adopted the magistrate's report and recommendation and denied Campbell's petition.

In his habeas petition and on appeal, Campbell argues that his plea bargain was invalid on two grounds. First, Campbell argues that the prosecution's failure to disclose **[*317]** the existence of Franket's handgun violated his *Fourteenth Amendment* due process rights as set forth in *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. **[**7]** The lower court held that the suppression of the evidence concerning the gun did not amount to a constitutional violation. Campbell contended that he pleaded guilty only because he had no believable self-defense claim and that he would have gone to a jury with that defense had he known of the gun. the district court rejected this argument, finding that

> ***HN1***[⬆] To establish the defense of self-defense, an accused must demonstrate that at the time of the killing he reasonably believed that he was in danger of loss of life or serious bodily harm. . . . That petitioner later learned that the male victim was carrying a gun would not have any effect on the reasonableness of his belief that his life was in danger at the time of the shooting. Consequently, the suppression of this evidence did not materially prejudice petitioner's ability to assert self-defense. . . . The prosecution's failure to disclose the existence of the handgun did not amount to a violation of petitioner's constitutional rights.

Campbell v. Marshall, No. C 83-3004 Y, slip op. at 3-4 (N.D. Ohio March 26, 1984).

Second, Campbell states that because he was not specifically informed by the trial judge in **[**8]** open court that his guilty plea would waive his right to be free from self-incrimination, his right of confrontation, and his right to compulsory process, his *Fourteenth Amendment* due process rights were violated under the principles expressed by the Supreme Court in *Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)*. The district court found that Campbell's constitutional rights as enunciated in *Boykin v. Alabama* were not violated, relying on the Sixth Circuit's decisions in *Roddy v. Black, 516 F.2d 1380* (6th Cir.), *cert. denied*, *423 U.S. 917, 96 S. Ct. 226, 46 L. Ed. 2d 147 (1975)*, and *Fontaine v. United States, 526 F.2d 514 (6th Cir. 1975)*, *cert. denied*, *424 U.S. 973, 47 L. Ed. 2d 743, 96 S. Ct. 1476 (1976)*.

I.

Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), stands for the proposition that ***HN2***[⬆] "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. **[**9]** " *Brady v. Maryland* concerned the state's suppression of exculpatory evidence until after trial, thereby making that information unavailable to the defense for use at trial. Justice Douglas, the author of *Brady v. Maryland*, wrote that the *Brady* ruling was an extension of

the Court's previous decision in *Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791, 55 S. Ct. 340 (1935)*. In *Mooney*, the Court had held that the state violated due process when it deliberately deceived the trial court and deprived a defendant of his liberty by presenting testimony it knew was perjured. *294 U.S. at 112*. As Justice Douglas stated in *Brady*:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty **[**10]** helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the [Maryland] Court of Appeals. 226 Md., at 427, 174 A.2d at 169.

Brady v. Maryland, 373 U.S. at 87-88 (footnote omitted).

[*318] We assume for the purposes of this opinion that under *Brady v. Maryland* if Campbell had gone to trial and been convicted without the suppressed evidence having come to light, a violation of his *Fourteenth Amendment* due process rights would have been established. Campbell's attorney requested disclosure of both tangible evidence which the prosecution intended to use at trial and any evidence material to the accused. The government may be able to excuse its failure to disclose the presence of the gun in response to the tangible evidence request on the basis that it did not intend to introduce the pistol at trial. However, in our judgment, it cannot validly justify its failure to disclose that evidence on the basis that it was not material **[**11]** to the accused. The government had to be well aware from Campbell's statements that he claimed to have heard that Franket was carrying a gun and was out to get him, and that he saw Franket reach for his pocket. To the extent that Campbell might have presented a self-defense case to a jury, the presence of the gun in Franket's pocket certainly would have been relevant, at least to Campbell's credibility. That evidence could have corroborated his expressed concern that Franket was armed.

In *Jones v. Jago, 575 F.2d 1164* (6th Cir.), *cert. denied*, *439 U.S. 883, 99 S. Ct. 223, 58 L. Ed. 2d 196 (1978)*, (a case which also originated in the Northern District of Ohio) we held that a state prosecutor may not avoid his disclosure obligation under *Brady v. Maryland and United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*, merely by claiming that in his view the suppressed evidence was neutral and not exculpatory. Instead, we decided that where information has been specifically requested by the defense, the subjective evaluation of that information's evidentiary value is not for the prosecutor to make. This is especially **[**12]** true where "the request is timely and specific [and] the prosecutor had to be aware of all of the attendant circumstances and of the [potential] importance of the testimony." *Jones v. Jago, 575 F.2d at 1168*. In those circumstances the prosecutor should at least submit the disclosure problem to the trial judge for resolution. *Id.*

Here the prosecutor's decision not to disclose can be described, at best, as "cute"; at worst, it is reprehensible. In any case, we need go no further in evaluating the likelihood of success of the defense to conclude that this evidence was very probably material and might have tended to exculpate Campbell. This evidence was also important to Campbell's attorney, both because it was requested and because it certainly could have borne upon the defense counsel's negotiating power in arriving at a plea.

The question then becomes whether this non-disclosure renders involuntary Campbell's otherwise voluntary plea, given without knowledge of this evidence.

We believe it is fully established by *Tollett v. Henderson, 411 U.S. 258, 36 L. Ed. 2d 235, 93 S. Ct. 1602*

(1973), and the Court's earlier decision in *Brady v.* **[**13]** *United States*, [1] 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) that HN3[] "a guilty plea represents a break in the chain of events which has preceded it in the criminal process," Tollett, 411 U.S. at 267:

> When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann* [*v.* Richardson, 397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970)].
>
> A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant [may be able to] show that if counsel had pursued a certain factual inquiry such a pursuit would **[*319]** have uncovered a possible constitutional infirmity in the procedures for dealing with the claim.

Id.

[14]** In the so-called *Brady* Trilogy, Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); McMann v. Richardson, 397 U.S. 759, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970); and Parker v. North Carolina, 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458 (1970), the Supreme Court held that HN4[] where a guilty plea is otherwise voluntarily and intelligently made with the advice of competent counsel and where the factual basis for the plea fully establishes guilt, the plea is not rendered involuntary merely because the defendant may have been motivated by a statute or state conduct later found to be unconstitutional. These three decisions, all authored by Justice White, presented variations on a single theme: each concerned a post-conviction attack by a petitioner upon his earlier counseled plea of guilty, a plea he claimed was involuntary because it was induced in part by some impermissible cause amounting to a constitutional violation.

In Brady v. United States, 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970), for example, the Supreme Court found the petitioner's guilty plea voluntary even though **[**15]** he claimed the plea had been induced by his fear of receiving the death penalty if he stood trial on kidnapping charges. The Court held the plea was voluntary even though the advice of Brady's counsel that he might be risking the death penalty by going to trial was later shown to have been overly pessimistic. Indeed, in United States v. Jackson, 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968), the Supreme Court overturned the death penalty statute in question. Yet, Justice White concluded that the unconstitutionality of the death penalty provision did not invalidate Brady's plea:

> The fact that Brady did not anticipate United States v. Jackson, supra, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions.

Brady v. United States, 397 U.S. at 757. **[**16]**

[Redacted]

[23]** We believe that in *Tollett* and the *Brady* Trilogy the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was

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[1] *Brady v. United States* should not be confused with *Brady v. Maryland*, discussed earlier.

followed by a plea which otherwise passes constitutional muster as knowing and intelligent. However, we believe those authorities provide a fully adequate basis for affirming the district court's denial of habeas relief here.

First, as in those cases, the plea-taking here included the establishment of a factual basis for Campbell's plea and complied with *Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)* (as discussed *post*). The record of the plea-taking in this case is as fully convincing in showing the plea's voluntary and intelligent nature as the accounts of the pleas reported in the cited Supreme Court decisions. We believe that the belated discovery of the information concerning Franket's gun does not in any way detract from the credible factual basis for Campbell's plea admitted in his own statements at the plea proceeding. Those statements fully established his factual guilt: according to Campbell, he shot and killed Franket **[**24]** "Because he was with [his] wife," and he shot and killed his former wife "Because she was with him." As in *Tollett* and *Brady v. United States*, **[*322]** these admissions of factual guilt in open court are entitled to great weight.

Moreover, we perceive in the state's misconduct here no likelihood of greater prejudice to the defendant's ability to plead knowingly and voluntarily than any prejudice brought about by the misconduct that was the subject of the *Brady* Trilogy. While the prosecution's non-disclosure of the pistol was certainly objectionable, it was no more reprehensible than the beatings alleged in *McMann*, for example.

In addition, as in *Tollett* and the *Brady* Trilogy, Campbell's plea was made with the advice of competent counsel. Indeed, the record shows that the conduct and advice of Campbell's defense counsel was even less blameworthy than that of counsel in *Parker* and *McMann*. There the attorneys' advice that the coercive confessions might be used against their clients and that this use would guarantee certain convictions was very possibly incorrect. The record does not show that Campbell's counsel was guilty of any such probable misadvice.

[25]** Finally, the certainty of a constitutional violation is much less clearly established here than in the *Brady* Trilogy. We first note that there is no authority within our knowledge holding that suppression of *Brady* material *prior to trial* amounts to a deprivation of due process. Here error is claimed in non-disclosure of the evidence concerning the pistol before trial. Moreover, it is unclear what prejudicial effect this non-disclosure would have had at a trial; that is, even if this evidence had been disclosed and introduced at a trial, the weight a jury would have given it is subject to some question. Construed in the light most favorable to Campbell, disclosure of the fact of the gun's presence in Franket's pocket when he was killed could have added some credibility to Campbell's statement that he had heard and believed that Franket was armed and out to get him. Yet, we must remember that Campbell had armed himself and that he remained in his former wife's apartment long after any need to do so had passed. It has also been established that Campbell did not in fact see Franket's weapon and that he put three bullets into his former wife, against whom, he concedes, no **[**26]** self-defense claim could be asserted. His conduct, therefore, strongly negated any self-defense theory and strongly supported the inference that he remained on the premises specifically to carry out a preconceived design to kill. Thus, while we have assumed the existence of a *Brady* violation for the purposes of this opinion, it is uncertain whether Campbell could have shown the prejudice necessary to prove such a violation.

Our decision is also supported by the only reported federal court of appeals case which is directly on point and discusses the relevant issues. [3] In *Fambo v. Smith, 433 F. Supp. 590* (W.D.N.Y.), *aff'd*, *565 F.2d 233*

[3] A district court case, *United States v. Wolczik, 480 F. Supp. 1205 (W.D. Pa. 1979)*, is not directly on point because it is not a habeas corpus case. However, the issues there are closely related and the opinion is well-reasoned. A third case is clearly on point but does not discuss the relevant issues. In *Clements v. Coiner, 299 F. Supp. 752 (S.D. W.Va. 1969)*, a district court granted a habeas corpus petition filed by a state prisoner who had pleaded guilty to murder. The court found that the defendant's constitutional rights had been violated under the doctrine of *Brady v. Maryland*

(2d Cir. 1977), Fambo petitioned for a writ of habeas corpus, claiming that his state court conviction was unconstitutional because the prosecution had not disclosed exculpatory facts before the court accepted his guilty plea. The indictment had charged Fambo with two violations of *N.Y. Penal Law § 265.04*, a class B felony prohibiting possession of an explosive substance with the intent to use it against another person or that person's property. The indictment alleged that Fambo had possessed a tube of dynamite **[**27]** on or about November 29, 1970 and December 1, 1970. Fambo pleaded guilty to one count of a violation of *N.Y. Penal Law § 265.02(2)*, a **[*323]** class D felony concerning possession of an explosive or incendiary device. *433 F. Supp. at 591*.

[28]** At a subsequent, unrelated trial, Fambo learned that a deputy sheriff had made the tube of dynamite in question harmless on November 29, 1970, by removing the tube's explosive contents and repacking it with sawdust. The tube was then returned to where it had been hidden. Therefore, on December 1, 1970, when Fambo apparently retrieved the tube from its hiding place, he was not in possession of an explosive substance even though he believed he was. The prosecution did not inform Fambo or his counsel that the tube contained only sawdust on December 1. Fambo argued that without knowledge of this exculpatory evidence, his guilty plea was not voluntary, intelligent, and knowing. *Id. at 592*.

It is interesting to note that in *Fambo*, the Defendant may not have been technically guilty of the particular charge to which he pleaded as a part of his plea bargain. The district court observed that Fambo could not have been convicted of possession of dynamite on December 1 because the police had previously removed the explosive from the tube in question. Nevertheless, the court observed that under all accounts, Fambo was guilty of possession on November 29 before the dynamite was removed. **[**29]** *Id. at 599*. Further, according to the district court, he could still have been convicted of *attempting* to possess an explosive on December 1; under New York law proof of that offense would constitute a class C felony. *Id.*

After a lengthy discussion of plea bargaining practices, the trial judge in *Fambo* finally concluded that

> The record before me indicates that there was thus sufficient mutuality of advantage to support this bargain as being reasonable and fair, after the fact, even though the Assistant District Attorney's failure to disclose potentially exculpatory evidence was an omission of constitutional proportions and is subject to censure as a bargaining tactic. In retrospect, petitioner's decision to plead guilty to a D felony, with assurances that a maximum term of five years' imprisonment would be imposed, was still a voluntary and intelligent, if not properly informed, choice among the alternative courses of action open to him at the time the plea was entered. *See North Carolina v. Alford, supra*, 400 U.S. at 31, 91 S. Ct. 160.

433 F. Supp. at 600.

The Second Circuit affirmed in a brief per curiam opinion. **[**30]** *Fambo v. Smith, 565 F.2d 233 (2d Cir. 1977)*. Noting that the indictment and dates therein were couched in "on or about" language, the court concluded that the difference in the two dates in the two counts alleged in the indictment would not have been a fatal imperfection in the proof at the trial; the court found that the imperfection "could not possibly have made any difference in the treatment of the defendant." *Id. at 235*. As to the misconduct of the government in failing to apprise Fambo or his attorney of the substitution of the sawdust, the Second Circuit concluded:

> While we agree with Judge Curtin's conclusion that it was reprehensible for the district attorney not

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because two documents suggesting defendant's impaired mental capacity were not disclosed to defendant's counsel before he pleaded. The *Clements* opinion pre-dates the Supreme Court cases dealing with guilty pleas and waiver and contains no discussion of the propriety of applying *Brady v. Maryland* in a guilty plea context.

> to disclose the substitution of sawdust for dynamite, we cannot see, in view of Fambo's undisputed possession [of] dynamite a mere two days prior to the "on or about" date specified in the indictment, how any dereliction of duty on the part of the local law enforcement officers could possibly have so prejudiced the petitioner as to render his conviction unconstitutional.

Id.

We find ourselves examining the government's misconduct here in the manner of **[**31]** the Supreme Court in the *Brady* Trilogy and *Tollett* and the Second Circuit in *Fambo*. While each of those cases certainly contained instances of state conduct which was at least reprehensible, if not clearly unconstitutional, each court still evaluated the validity of the challenged plea in light of all the attendant circumstances. Here, as in those cases, the record shows the **[*324]** assistance of counsel, a plea-taking procedure compliant with *Boykin v. Alabama*, and a factual basis for the plea. These circumstances must go a long way toward protecting the plea-taking event from later collateral attack.

Finally, it is clear that the undisclosed information's greatest value to Campbell and his counsel was as an aid in their evaluation of the possibilities of success on trial and that the suppressed information was unavailable for that purpose. Yet, a plea decision is not made with any perfect knowledge of the results were a trial to be held. Both Campbell and his attorney had to know that if they had proceeded to trial, any number of events might have intervened to affect the final outcome. Favorable or unfavorable rulings on the evidence might have been rendered; **[**32]** witnesses favorable to the defense or to the prosecution may have died awaiting trial or have become otherwise unavailable. New witnesses might have come forward; known witnesses might have recanted. The evidence of the prosecution may have taken entirely unpredicted turns to the favor or prejudice of the government's case. These are trial's unknown risks and dangers which the plea bargaining process may eliminate. Campbell was foregoing the possibility that any such events would have resulted in a not guilty verdict. Certainly the knowledge of the gun's presence was important to Campbell and his attorney, but we cannot say it would have been controlling in the decision whether to plead. Especially given Campbell's own statements at the time of the plea, the constitutional wrong, if such it was, did not compromise either the truth or the voluntary and knowing nature of the plea.

We hold that Campbell's *Fourteenth Amendment* due process rights were not violated.

II.

Campbell's claim that *Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)*, was violated by the plea-taking procedure involved here is without merit.

Contrary to the assertion **[**33]** of appellant, the plea-taking procedures employed fully complied with the requirements of *Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)*, as interpreted by our decisions in *Roddy v. Black, 516 F.2d 1380* (6th Cir.), *cert. denied*, *423 U.S. 917, 96 S. Ct. 226, 46 L. Ed. 2d 147 (1975)*, and *Fontaine v. United States, 526 F.2d 514* (6th Cir.), *cert. denied*, *424 U.S. 973, 47 L. Ed. 2d 743, 96 S. Ct. 1476 (1976)*. We decline the petitioner's invitation to reexamine those decisions, and in words of *Armstrong v. Egeler, 563 F.2d 796*, we "are unwilling to hold, as a constitutional requirement applicable in habeas cases to state prosecutions, that a guilty plea requires any precise litany for its accomplishment." *Id. at 799* (footnote omitted).

AFFIRMED.

Kyles v. Whitley

Supreme Court of the United States

November 7, 1994, Argued ; April 19, 1995, Decided

No. 93-7927

Reporter

514 U.S. 419 *; 115 S. Ct. 1555 **; 131 L. Ed. 2d 490 ***; 1995 U.S. LEXIS 2845 ****; 63 U.S.L.W. 4303; 95 Cal. Daily Op. Service 2841; 95 Daily Journal DAR 4952; 8 Fla. L. Weekly Fed. S 686
CURTIS LEE KYLES, PETITIONER v. JOHN P. WHITLEY, WARDEN

Subsequent History: [**1]** As Amended May 1, 1995.

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: *5 F.3d 806*, reversed and remanded.

Case Summary

Procedural Posture

Petitioner challenged a first-degree murder conviction claiming that the State failed to disclose evidence favorable to him. The Fifth Circuit Court of Appeals affirmed the denial of petitioner's habeas corpus petition, and petitioner was granted certiorari.

Overview

Petitioner was convicted of first-degree murder. He appealed, claiming that the State knew of evidence favorable to him before and during trial that it failed to disclose. The State supreme court remanded the case for an evidentiary hearing on defendant's claims of newly discovered evidence. The trial court, after review, denied relief. The state supreme court denied petitioner's application for discretionary review. A petition for habeas corpus was then filed in district court, which denied the petition. The court of appeals affirmed by a divided vote. The Supreme Court granted certiorari and reversed and ordered a new trial, holding that the net effect of the evidence withheld by the State in this case raised a reasonable probability that its disclosure would have produced a different result.

Outcome

Petitioner's conviction was reversed and remanded for a new trial ordered because the omitted evidence favoring petitioner could have potentially resulted in a different verdict.

Opinion

[*421] **[**1559]** **[***498]** JUSTICE SOUTER delivered the opinion of the Court.

LEdHN[1A][↑] [1A]After his first trial in 1984 ended in a hung jury, petitioner Curtis Lee Kyles was tried **[**1560]** again, convicted of first-degree murder, and sentenced to death. On habeas review, we follow the established rule that the state's obligation under *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. Because the **[****8]** net effect of the evidence withheld by the State in this case raises **[*422]** a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial.

I

Following the mistrial when the jury was unable to reach a verdict, Kyles's subsequent conviction and sentence of death were affirmed on direct appeal. *State v. Kyles, 513 So. 2d 265 (La. 1987)*, cert. denied, *486 U.S. 1027, 100 L. Ed. 2d 236, 108 S. Ct. 2005 (1988)*. On state collateral review, the trial court denied relief, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence. During this state-court proceeding, the defense was first able to present certain evidence, favorable to Kyles, that the State had failed to disclose before or during trial. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. *State ex rel. Kyles v. Butler, 566 So. 2d 386 (La. 1990)*.

LEdHN[2A][↑] [2A]Kyles then filed a petition for habeas corpus in the United States District **[****9]** Court for the Eastern District of Louisiana, which denied the petition. The Court of Appeals for the Fifth Circuit affirmed by a divided vote. *5 F.3d 806 (1993)*. As we explain, *infra*, at 440-441, there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard. Because "our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," *Burger v. Kemp, 483 U.S. 776, 785, 97 **[***499]** L. Ed. 2d 638, 107 S. Ct. 3114 (1987)*, [1] we granted certiorari, *511 U.S. 1051 (1994)*, and now reverse.

[**10]** **[*423]** II

A

[Redacted – Summary of Crime]

Kyles was indicted for first-degree murder. Before trial, his counsel filed a lengthy motion for disclosure by the State of any exculpatory or impeachment evidence. The prosecution responded that there was "no exculpatory evidence of any nature," despite the government's knowledge of the following evidentiary

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[1] LEdHN[2B][↑] [2B]

The dissent suggests that *Burger* is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. *Post*, at 457. We explain, *infra*, at 440-441, that this is not a case of simple error correction. As for the significance of prior review, *Burger* cautions that this Court should not "substitute speculation" for the "considered opinions" of two lower courts. *483 U.S. at 785*. No one could disagree that "speculative" claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles's *Brady* claim.

items: (1) the six contemporaneous eyewitness statements taken by police following the murder; (2) records of Beanie's initial call to the police; (3) the tape recording of the Saturday conversation between Beanie and officers Eaton and Miller; (4) the typed and signed statement **[*429]** given by Beanie on Sunday morning; (5) the computer printout of license numbers of cars parked at Schwegmann's on the night of the murder, which did not list the number of Kyles's car; (6) the **[****21]** internal police memorandum calling for the seizure of the rubbish after Beanie had suggested that the purse might be found there; and (7) evidence linking Beanie to other crimes at Schwegmann's and to the unrelated murder of one Patricia Leidenheimer, committed in January before the Dye murder.

At the first trial, in November, the **[***503]** heart of the State's case was eyewitness testimony from four people who were at the scene of the crime (three of whom had previously picked Kyles from the photo lineup). Kyles maintained his innocence, offered supporting witnesses, and supplied an alibi that he had been picking up his children from school at the time of the murder. The theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money. Beanie did not testify as a witness for either the defense or the prosecution.

Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested. Even so, after four hours of deliberation, **[****22]** the jury became deadlocked on the issue of guilt, and a mistrial was declared.

After the mistrial, the chief trial prosecutor, Cliff Strider, interviewed Beanie. See App. 258-262 (notes of interview). Strider's notes show that Beanie again changed important elements of his story. He said that he went with Kyles to retrieve Kyles's car from the Schwegmann's lot on Thursday, the day of the murder, at some time between 5 and 7:30 p.m., not on Friday, at 9 p.m., as he had said in his second and third statements. (Indeed, in his second statement, Beanie said that he had not seen Kyles at all on Thursday. *Id.*, at **[*430]** 249-250.) He also said, for the first time, that when they had picked up the car they were accompanied not only by Johnny Burns but also by Kevin Black, who had testified for the defense at the first trial. Beanie now claimed that after getting Kyles's **[**1564]** car they went to Black's house, retrieved a number of bags of groceries, a child's potty, and a brown purse, all of which they took to Kyles's apartment. Beanie also stated that on the Sunday after the murder he had been at Kyles's apartment two separate times. Notwithstanding the many inconsistencies **[****23]** and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.

In December 1984, Kyles was tried a second time. Again, the heart of the State's case was the testimony of four eyewitnesses who positively identified Kyles in front of the jury. The prosecution also offered a blown-up photograph taken at the crime scene soon after the murder, on the basis of which the prosecutors argued that a seemingly two-toned car in the background of the photograph was Kyles's. They repeatedly suggested during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann's on the day of the murder and had retrieved it later, a theory for which they offered no evidence beyond the blown-up photograph. Once again, Beanie did not testify.

As in the first trial, the defense contended that the eyewitnesses were mistaken. Kyles's counsel called several individuals, including Kevin Black, who testified to seeing Beanie, with his hair in plaits, driving a red car similar to the victim's about an hour after the killing. Tr. 209 (Dec. 7, 1984). Another witness testified that Beanie, with his hair in braids, had tried **[****24]** to sell him the car on Thursday evening, shortly after the murder. *Id., at 234-235*. Another **[***504]** witness testified that Beanie, with his hair in a "Jheri curl," had attempted to sell him the car on Friday. *Id.*, at 249-251. One witness, Beanie's "partner," Burns, testified that he had seen Beanie on Sunday at Kyles's apartment, stooping down near **[*431]** the stove where the gun was eventually found, and the defense presented testimony that Beanie was romantically interested in Pinky Burns. To explain the pet food found in Kyles's apartment, there was testimony that Kyles's family kept a dog and cat and often fed stray animals in the neighborhood.

Finally, Kyles again took the stand. Denying any involvement in the shooting, he explained his fingerprints

on the cash register receipt found in Dye's car by saying that Beanie had picked him up in a red car on Friday, September 21, and had taken him to Schwegmann's, where he purchased transmission fluid and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the cigarettes.

On rebuttal, the prosecutor had Beanie brought into the courtroom. All of the testifying eyewitnesses, **[****25]** after viewing Beanie standing next to Kyles, reaffirmed their previous identifications of Kyles as the murderer. Kyles was convicted of first-degree murder and sentenced to death. Beanie received a total of $ 1,600 in reward money. See Tr. of Hearing on Post-Conviction Relief 19-20 (Feb. 24, 1989); *id., at 114 (Feb. 20, 1989)*.

LEdHN[3A][↑] [3A]Following direct appeal, it was revealed in the course of state collateral review that the State had failed to disclose evidence favorable to the defense. After exhausting state remedies, Kyles sought relief on federal habeas, claiming, among other things, that the evidence withheld was material to his defense and that his conviction was thus obtained in violation of *Brady*. Although the United States District Court denied relief and the Fifth Circuit affirmed,[6] Judge **[*432]** King dissented, **[**1565]** writing that "for the first time in my fourteen years on this court . . . I have serious reservations about whether the **[***505]** State has sentenced to death the right man." *5 F.3d at 820*.

[**26]** III

LEdHN[3C][↑] [3C] ***LEdHN[4A]***[↑] [4A] ***LEdHN[5A]***[↑] [5A] ***LEdHN[6A]***[↑] [6A] ***LEdHN[7A]***[↑] [7A] ***LEdHN[8A]***[↑] [8A]***HN1***[↑] The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*. See *id., at 86* (relying on *Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935)*, and *Pyle v. Kansas, 317 U.S. 213, 215-216, 87 L. Ed. 214, 63 S. Ct. 177 (1942)*). *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *373 U.S. at 87*; see *Moore v. Illinois, 408 U.S. 786, 794-795, 33 L. Ed. 2d 706, 92 S. Ct. 2562 **[*433]** (1972)*. **[****27]** In *United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*, however, it became clear that a defendant's failure to request

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[6] ***LEdHN[3B]***[↑] [3B]

Pending appeal, Kyles filed a motion under *Federal Rules of Civil Procedure 60(b)(2)* and *(6)* to reopen the District Court judgment. In that motion, he charged that one of the eyewitnesses who testified against him at trial committed perjury. In the witness's accompanying affidavit, Darlene Kersh (formerly Cahill), the only such witness who had not given a contemporaneous statement, swears that she told the prosecutors and detectives she did not have an opportunity to view the assailant's face and could not identify him. Nevertheless, Kersh identified Kyles untruthfully, she says, after being "told by some people . . . [who] I think . . . were district attorneys and police, that the murderer would be the guy seated at the table with the attorney and that that was the one I should identify as the murderer. One of the people there was at the D. A.'s table at the trial. To the best of my knowledge there was only one black man sitting at the counsel table and I pointed him out as the one I had seen shoot the lady." Kersh claims to have agreed to the State's wishes only after the police and district attorneys assured her that "all the other evidence pointed to [Kyles] as the killer." Affidavit of Darlene Kersh 5, 7.

The District Court denied the motion as an abuse of the writ, although its order was vacated by the Court of Appeals for the Fifth Circuit with instructions to deny the motion on the ground that a petitioner may not use a *Rule 60(b)* motion to raise constitutional claims not included in the original habeas petition. That ruling is not before us. After denial of his *Rule 60(b)* motion, Kyles again sought state collateral review on the basis of Kersh's affidavit. The Supreme Court of Louisiana granted discretionary review and ordered the trial court to conduct an evidentiary hearing; all state proceedings are currently stayed pending our review of Kyles's federal habeas petition.

favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, *427 U.S. at 103-104*; [7] second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id., at 104-107*; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id., at 108*.

[**28]** In the third prominent case on the way to current *Brady* law, *United States v. Bagley, 473 U.S. 667, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)*, the Court disavowed ***HN2***[⬆] any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i. e.*, the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." **[*434]** *473 U.S. at 682* (opinion of Blackmun, J.); *id., at 685* (White, J., concurring in part and concurring in judgment).

[*506]** ***LEdHN[4B]***[⬆] [4B]Four aspects of materiality under *Bagley* bear emphasis. ***HN3***[⬆] Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance **[****29]** that disclosure of the suppressed evidence would have resulted ultimately **[**1566]** in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id., at 682* (opinion of Blackmun, J.) [Redacted] *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley, 473 U.S. at 678*.

LEdHN[5B][⬆] [5B]The second aspect of *Bagley* materiality bearing emphasis here is that ***HN4***[⬆] it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory **[*435]** evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing **[****31]** that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. [8]

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[7] ***LEdHN[3D]***[⬆] [3D]

The Court noted that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs, 427 U.S. at 103* (footnote omitted). As the ruling pertaining to Kersh's affidavit is not before us, we do not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category. See n. 6, *supra*.

[8] This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed. See *post*, at 463 (possibility that Beanie planted evidence "is perfectly consistent" with Kyles's guilt), *ibid.* ("The jury could well have believed [portions of the defense theory] and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses

[**32]** LEdHN[6B][↑] [6B] Third, we note that, contrary to the assumption made by the Court **[***507]** of Appeals, 5 F.3d at 818, HN5[↑] once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U.S. at 682 (opinion of Blackmun, J.); id., at 685 (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict,'" Brecht v. Abrahamson, 507 U.S. 619, 623, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), quoting Kotteakos v. United States, 328 U.S. 750, 776, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946). [Redacted]

LEdHN[7B][↑] [7B]The fourth and final aspect of *Bagley* HN7[↑] materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item. [10] As Justice Blackmun emphasized in the portion of his opinion written for the Court, HN8[↑] the Constitution is not violated every time the **[*437]** government fails or chooses not to disclose evidence that might prove helpful to the defense. 473 U.S. at 675, and n. 7. We have never held that the Constitution demands an open file **[***508]** policy (however **[****35]** such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) HN9[↑] ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) HN10[↑] ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

[**36]** LEdHN[8B][↑] [8B]HN11[↑] While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith **[*438]** or bad faith, see Brady, 373 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable **[**1568]** evidence rising to a material **[****37]** level of importance is inescapable.

The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25,

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were similarly mistaken"), *post*, at 468 (the *Brady* evidence would have left two prosecution witnesses "totally untouched"), 469 (*Brady* evidence "can be logically separated from the incriminating evidence that would have remained unaffected").

[10] LEdHN[7C][↑] [7C]

The dissent accuses us of overlooking this point and of assuming that the favorable significance of a given item of undisclosed evidence is enough to demonstrate a *Brady* violation. We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion, at Part IV-D, *infra*.

27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor. [11] To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)*. Since, then, the prosecutor has the means to discharge **[***509]** the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing **[****38]** what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Short of doing that, we were asked at oral argument to raise the threshold of materiality because the *Bagley* standard "makes it difficult . . . to know" from the "perspective [of the prosecutor at] trial . . . exactly what might become important later on." Tr. of Oral Arg. 33. The State asks for "a certain amount of leeway in making a judgment call" as to the disclosure of any given piece of evidence. *Ibid.*

[*439] Uncertainty about the degree of further "leeway" that might satisfy the State's request for a "certain amount" of it is the least of the reasons to deny the request. At **[****39]** bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the **[****40]** government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs, 427 U.S. at 108* ("The prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)*. **[*440]** And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. **[**1569]** [Redacted] The prudence of the careful prosecutor should not therefore be discouraged.

LEdHN[1B][] [1B]There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the

[11] The State's counsel retreated from this suggestion at oral argument, conceding that the State is "held to a disclosure standard based on what all State officers at the time knew." Tr. of Oral Arg. 40.

undisclosed materials," 5 F.3d at 817, the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone. [Redacted] **[*441]** The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, as the ensuing discussion will show.

IV

LEdHN[1C][↑] [1C]In this case, disclosure of the **[****43]** suppressed evidence to competent counsel would have made a different result reasonably probable.

A

As the District Court put it, "the essence of the State's case" was the testimony of eyewitnesses, who identified Kyles as Dye's killer. 5 F.3d at 853 (Appendix A). Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed.

[REDACTED]

[**47]** **[*444]** **[**1571]** Since the evolution over time of a given eyewitness's description can be fatal to its reliability, [Redacted] the Smallwood and Williams identifications would have been severely undermined by use of their suppressed statements. The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses. [Redacted] And even aside from such important details, the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before. See Agurs, 427 U.S. at 112-113, n. 21.

B

Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State's own admission, Beanie was essential to its investigation and, indeed, "made the case" against Kyles. Tr. of Closing Arg. 13 (Dec. 7, 1984). Contrary to what one might hope for from such a source, however, Beanie's statements **[****49]** to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police.

If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies.

[REDACTED]

LEdHN[9A][↑] [9A]Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense **[**1572]** could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. See, *e. g.,* Bowen v. Maynard, 799 F.2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); Lindsey v. King, 769 F.2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential . . . for the . . . discrediting . . . of

the police methods employed in assembling the case"). [15] **[****51]**

[*447] **[***514]** By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence. In his initial meeting with police, Beanie admitted twice that he changed the license plates on the LTD. This admission enhanced the suspiciousness of his possession of the car; the defense could **[****52]** have argued persuasively that he was no bona fide purchaser. And when combined with his police record, evidence of prior criminal activity near Schwegmann's, and his status as a suspect in another murder, his devious behavior gave reason to believe that he had done more than buy a stolen car. There was further self-incrimination in Beanie's statement that Kyles's car was parked in the same part of the Schwegmann's lot where Dye was killed. Beanie's apparent awareness of the specific location of the murder could have been based, as the State contends, on television or newspaper reports, but perhaps it was not. Cf. App. 215 (Beanie saying that he knew about the murder because his brother-in-law had seen it "on T. V. and in the paper" and had told Beanie). Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified that Beanie was never a suspect, Tr. 103-105, 107 (Dec. 6, 1984), and that he had "no knowledge" that Beanie had changed the license plate, *id., at 95*.

The admitted failure of the police to pursue these **[****53]** pointers toward Beanie's possible guilt could only have magnified the effect on the jury of explaining how the purse and the gun happened to be recovered. In Beanie's original recorded statement, he told the police that "[Kyles's] garbage goes out tomorrow," and that "if he's smart he'll put [the purse] in [the] garbage." App. 257. These statements, along with the internal memorandum stating that the police had "reason to believe" Dye's personal effects and Schwegmann's bags **[*448]** would be in the garbage, would have supported the defense's theory that Beanie was no mere observer, but was determining the investigation's direction and success. The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed by the prosecutor's admission at one of Kyles's postconviction hearings, that he did not recall a single instance before this case when police had searched and seized garbage on the street in front of a residence, Tr. of Hearing on Post-Conviction Relief 113 (Feb. 20, 1989), and by Detective John Miller's admission at the same hearing that he thought at the time that it "was a possibility" that Beanie had **[****54]** planted the incriminating evidence in the garbage, Tr. of Hearing on Post-Conviction Relief 51 (Feb. 24, 1989). If a police officer thought so, a **[***515]** juror would have, too. [16]

[1573]** To the same effect would have been an enquiry based on Beanie's apparently revealing remark to police that "if you can set [Kyles] up good, you can get that same gun." [17] **[****56]** App. 228-229. While the jury might have understood that Beanie meant simply that if the police investigated Kyles, **[****55]** they would probably find the murder weapon, the jury could also have taken Beanie to have been making the more sinister **[*449]** suggestion that the police "set up" Kyles, and the defense could have argued that the police accepted the invitation. The prosecutor's notes of his interview with Beanie would have shown that police officers were asking Beanie the whereabouts of the gun all day Sunday, the very day when he was twice at Kyles's apartment and was allegedly seen by Johnny Burns lurking near the stove, where the gun was later found. [18][Redacted] Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman, who testified on cross-examination that he did not know if Beanie had been at Kyles's apartment

on Sunday. Tr. 93, 101 (Dec. 6, 1984). [19]

[**57]** **[*450]** **[***516]** C

LEdHN[10][↑] [10]Next to be considered is the prosecution's list of the cars in the Schwegmann's parking lot at mid-evening after the murder. While its suppression does not rank with the failure to disclose the other evidence discussed here, it would have had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s standard of materiality is satisfied. On the police's assumption, argued to the jury, that the killer drove to the lot and left his car there during the heat of the investigation, the list without Kyles's registration would **[**1574]** obviously have helped Kyles and would have had some value in countering an argument by the prosecution that a grainy enlargement of a photograph of the crime scene showed Kyles's car in the background. The list would also have shown that the police either knew that it was inconsistent with their informant's second and third statements (in which Beanie described retrieving Kyles's car after the time the list was compiled) or never even bothered to check the informant's story against known fact. Either way, the defense would have **[****58]** had further support for arguing that the police were irresponsible in relying on Beanie to tip them off to the location of evidence damaging to Kyles.

The State argues that the list was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does **[*451]** not purport to be a comprehensive listing of all the cars in the Schwegmann's lot. Such argument, however, confuses the weight of the evidence with its favorable tendency, and even if accepted would work against the State, not for it. If the police had testified that the list was incomplete, they would simply have underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat Beanie as a suspect and his statements with a presumption of fallibility. But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to Kyles.

D

LEdHN[1D][↑] [1D]In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the **[****59]** *Brady* evidence had been disclosed. It is significant, however, that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. See Tr. of Oral Arg. 56 ("The heart of the State's case was eye-witness identification"); see also

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[19] In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibers, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." Tr. 260, 262-263, 279, 280 (Dec. 7, 1984). On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

JUSTICE SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 471-472. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

Tr. of Hearing on Post-Conviction Relief 117 (Feb. 20, 1989) (testimony of chief prosecutor Strider) ("The crux of the case was the four eye-witnesses"). Ammunition and a holster were found in Kyles's apartment, but if the jury had suspected the gun had been planted the significance of these items might have been left in doubt. The fact that pet food was found in Kyles's apartment was **[***517]** consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id., at 188*. Although Kyles was wrong in describing the cat food as being on sale the day he said he **[****60]** bought it, he **[*452]** was right in describing the way it was priced at Schwegmann's market, where he commonly shopped. [20]

[**61]** Similarly undispositive is the small Schwegmann's receipt on the front passenger floorboard of the LTD, the only physical evidence that bore a fingerprint identified as Kyles's. Kyles explained that Beanie had driven him to Schwegmann's on Friday to **[**1575]** buy cigarettes and transmission fluid, and he theorized that the slip must have fallen out of the bag when he removed the cigarettes. This explanation is consistent with the location of the slip when found and with its small size. The State cannot very well argue that the fingerprint ties Kyles to the killing without also explaining how the 2-inch-long register slip could have been the receipt for a week's worth of groceries, which Dye had gone to Schwegmann's to purchase. *Id., at 181-182*. [21]

[**62]** **[*453]** ***LEdHN[1E]***[] [1E] ***LEdHN[11]***[] [11]The inconclusiveness of the physical evidence does not, to be sure, prove Kyles's innocence, and the jury might have found the eyewitness testimony of Territo and Kersh sufficient to convict, even though less damning to Kyles than that of Smallwood and Williams. [22] But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict **[***518]** would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution. The jury would have been entitled to find

> (a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including

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[20] Kyles testified that he believed the pet food to have been on sale because "they had a little sign there that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar." Tr. 341 (Dec. 7, 1984). When asked about the sign, Kyles said it "wasn't big . . . it was a little bitty piece of slip . . . on the shelf." *Id., at 342*. Subsequently, the prices were revealed as in fact being "three for 89 [cents]" and "two for 77 [cents]," *id., at 343*, which comported exactly with Kyles's earlier description. The director of advertising at Schwegmann's testified that the items purchased by Kyles had not been on sale, but also explained that the multiple pricing was thought to make the products "more attractive" to the customer. *Id., at 396*. The advertising director stated that store policy was to not have signs on the shelves, but he also admitted that salespeople sometimes disregarded the policy and put signs up anyway, and that he could not say for sure whether there were signs up on the day Kyles said he bought the pet food. *Id., at 398-399*. The dissent suggests, *post*, at 473, that Kyles must have been so "very poor" as to be unable to purchase the pet food. The total cost of the 15 cans of pet food found in Kyles's apartment would have been $ 5.67. See Tr. 188, 395 (Dec. 7, 1984). Rather than being "damning," *post*, at 472, the pet food evidence was thus equivocal and, in any event, was not the crux of the prosecution's case, as the State has conceded. See *supra, at 451* and this page.

[21] The State's counsel admitted at oral argument that its case depended on the facially implausible notion that Dye had not made her typical weekly grocery purchases on the day of the murder (if she had, the receipt would have been longer), but that she had indeed made her typical weekly purchases of pet food (hence the presence of the pet food in Kyles's apartment, which the State claimed were Dye's). Tr. of Oral Arg. 53-54.

[22] See *supra, at 445*. On remand, of course, the State's case will be weaker still, since the prosecution is unlikely to rely on Kersh, who now swears that she committed perjury at the two trials when she identified Kyles as the murderer. See n. 6, *supra*.

four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt;

(b) that the lead police detective who testified was either less than wholly candid **[****63]** or less than fully informed;

(c) that the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found;

(d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;

(e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he **[*454]** claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case;

(f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

[**64]** *LEdHN[1F]*[1F] [1F]Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, "fairness" cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the "massive" case envisioned by the dissent, *post*, at 475; it is a significantly weaker **[****65]** case than the one heard by the first jury, which could not even reach a verdict.

[1576]** The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: STEVENS

Concur

[Redacted]

Dissent

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

[Redacted]

I

Before proceeding to detailed consideration of the evidence, a few general observations about the Court's methodology are appropriate. It is fundamental to the discovery rule of *Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)*, that the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States v. [***523] Agurs, 427 U.S. 97, 112, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)*. **[****76]** It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to "destroy," *ante*, at 441, the *particular* prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates. It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt. See *United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 [**1579] (1985)*; *Agurs, [*461] supra, at 112-113*. The Court's opinion fails almost entirely to take this principle into account. Having spent many pages assessing the effect of the *Brady* material on two prosecution witnesses and a few items of prosecution evidence, *ante*, at 441-451, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante*, at 451-453. This partiality is confirmed in the Court's attempt to "recap . . . *the suppressed evidence* and its significance for the prosecution," *ante*, at 453 (emphasis added), which omits the **[****77]** required comparison between that evidence and the evidence that was disclosed. My discussion of the record will present the half of the analysis that the Court omits, emphasizing the evidence concededly unaffected by the *Brady* violation which demonstrates the immateriality of the violation.

[Redacted]

[Redacted]

* * *

The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that petitioner was guilty of murder, and that he lied about his guilt. The effect that the *Brady* materials would have had in chipping away at the edges of the State's case can only be called **[****101]** immaterial. For the same reasons I reject petitioner's claim that the *Brady* materials would have created a "residual doubt" sufficient to cause the sentencing jury to withhold capital punishment.

I respectfully dissent.

United States v. Ruiz

Supreme Court of the United States

April 24, 2002, Argued ; June 24, 2002, Decided

No. 01-595

Reporter

536 U.S. 622 *; 122 S. Ct. 2450 **; 153 L. Ed. 2d 586 ***; 2002 U.S. LEXIS 4650 ****; 70 U.S.L.W. 4677; 2002 Cal. Daily Op. Service 5602; 2002 Daily Journal DAR 7067; 15 Fla. L. Weekly Fed. S 454
UNITED STATES, PETITIONER v. ANGELA RUIZ

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: Reversed.

Case Summary

Procedural Posture

Respondent refused a plea bargain that required she waive her right to evidence that could potentially impeach witnesses. The Government withdrew the offer. Respondent later pleaded guilty to a drug offense without a plea agreement. Upon the grant of a writ of certiorari, petitioner Government appealed the United States Court of Appeals for the Ninth Circuit's decision, vacating respondent's sentence and finding the waiver unconstitutional.

Overview

Respondent contended that without disclosure of potential impeachment evidence her guilty plea under the proposed plea agreement would not be knowing and intelligent. The Government argued that providing such information to respondent would result in the premature disclosure of its case, which was not constitutionally required. The United States Supreme Court held that the United States Constitution did not require the Government to disclose material impeachment evidence prior to entering a plea agreement with respondent. The Government was not required to disclose its potential case, and thus the value of the evidence impeaching the Government's case was unknown. Further, respondent's guilty plea under the plea agreement, with its accompanying waiver of constitutional rights, could have been accepted as knowing and voluntary despite any misapprehension by respondent concerning the specific extent or nature of the impeachment evidence. Finally, requiring disclosure of the evidence would improperly force the Government to disclose witness information and engage in substantial trial preparation prior to plea bargaining.

Outcome

The decision vacating respondent's sentence was reversed.

Syllabus

After immigration agents found marijuana in respondent Ruiz's luggage, federal prosecutors offered her a "fast track" plea bargain, whereby she would waive indictment, trial, and an appeal in exchange for a reduced sentence recommendation. Among other things, the prosecutors' standard "fast track" plea agreement acknowledges the Government's continuing duty to turn over information establishing the defendant's factual innocence, but requires that she waive the right to receive impeachment information relating to any informants or other witnesses, as well as information supporting any affirmative defense she raises if the case goes to **[****2]** trial. Because Ruiz would not agree to the latter waiver, the prosecutors withdrew their bargaining offer, and she was indicted for unlawful drug possession. Despite the absence of a plea agreement, Ruiz ultimately pleaded guilty. At sentencing, she asked the judge to grant her the same reduced sentence that the Government would have recommended had she accepted the plea bargain. The Government opposed her request, and the District Court denied it. In vacating the sentence, the Ninth Circuit took jurisdiction under *18 U.S.C. § 3742*; noted that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial; decided that this obligation entitles defendants to the information before they enter into a plea agreement; ruled that the Constitution prohibits defendants from waiving their right to the information; and held that the "fast track" agreement was unlawful because it insisted upon such a waiver.

Held:

[REDACTED]

2. The Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. Although the *Fifth* and *Sixth Amendments* provide, as part of the Constitution's "fair trial" guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, see, *e.g.,* *Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194*, a defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees, *Boykin v. Alabama, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709.* **[****4]** As a result, the Constitution insists that the defendant enter a guilty plea that is "voluntary" and make related waivers "knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences." See, *e.g.,* *id., at 242*. The Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive his right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that they would have had to make had the defendant insisted upon a trial. Several considerations, taken together, demonstrate that holding's error. First, impeachment information is special in relation to *a trial's fairness,* not in respect to whether a plea is *voluntary.* It is particularly difficult to characterize such information as critical, given the random way in which it may, or may not, help a particular defendant. The degree of help will depend upon the defendant's own independent knowledge of the prosecution's potential case -- a matter that the Constitution does not require prosecutors to disclose. Second, there is no legal authority that provides **[****5]** significant support for the Ninth Circuit's decision. To the contrary, this Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See, *e.g.,* *Brady v. United States, 397 U.S. 742, 757, 25 L. Ed. 2d 747, 90 S. Ct. 1463*. Third, the very due process considerations that have led the Court to find trial-related rights to exculpatory and impeachment information -- *e.g.,* the nature of the private interest at stake, the value of the additional safeguard, and the requirement's adverse impact on the Government's interests, *Ake v. Oklahoma, 470 U.S. 68, 77, 84 L. Ed. 2d 53, 105 S. Ct. 1087* -- argue against the existence of the "right" the Ninth Circuit found. Here, that right's added value to the defendant is often limited, given that the Government will provide information establishing factual innocence under the proposed plea agreement, and that the defendant has other guilty-plea safeguards, see *Fed. Rule Crim. Proc. 11*. Moreover, the Ninth

Circuit's **[****6]** rule could seriously interfere with the Government's interest in securing guilty pleas by disrupting ongoing investigations and exposing prospective witnesses to serious intimidation and harm, thereby forcing the Government to modify its current practice, devote substantially more resources to preplea trial preparation, or abandon its heavy reliance on plea bargaining. Due process cannot demand so radical a change in order to achieve so comparatively small a constitutional benefit. Pp. 4-9.

3. Although the "fast track" plea agreement requires a defendant to waive her right to affirmative defense information, the Court does not believe, for most of the foregoing reasons, that the Constitution requires provision of this information to the defendant prior to plea bargaining. Pp. 9-10.

241 F.3d 1157, reversed.

Judges: BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment.

Opinion

[2453]** **[***592]** **[*625]** JUSTICE BREYER delivered the opinion of the Court.

LEdHN[1A][1A] [1A]In this case we primarily consider whether the *Fifth* and *Sixth Amendments* require **[****7]** federal prosecutors, before entering into a binding plea agreement with a criminal defendant, to disclose "impeachment information relating to any informants or other witnesses." App. to Pet. for Cert. 46a. We hold that the Constitution does not require that disclosure.

I

After immigration agents found 30 kilograms of marijuana in Angela Ruiz's luggage, federal prosecutors offered her what is known in the Southern District of California as a "fast track" plea bargain. That bargain -- standard in that district -- asks a defendant to waive indictment, trial, and an appeal. In return, the Government agrees to recommend to the sentencing judge a two-level departure downward from the otherwise applicable United States Sentencing Guidelines sentence. In Ruiz's case, a two- level departure downward would have shortened the ordinary Guidelines-specified 18-to-24-month sentencing range by 6 months, to 12-to-18 months. *241 F.3d 1157, 1161 (2001)*.

The prosecutors' proposed plea agreement contains a set of detailed terms. Among other things, it specifies that "any [known] information establishing the factual innocence of **[***593]** the defendant" "has been turned over to the defendant," **[****8]** and it acknowledges the Government's "continuing duty to provide such information." App. to Pet. for Cert. 45a-46a. At the same time it requires that the defendant "waive the right" to receive "impeachment information relating to any informants or other witnesses" as well as the right to receive information supporting any affirmative defense the defendant raises if the case goes to trial. *Id.,* at 46a. Because Ruiz would not agree to this last-mentioned waiver, the prosecutors withdrew their bargaining offer. The Government then indicted Ruiz for unlawful drug possession. And despite **[*626]** the absence of any agreement, Ruiz ultimately pleaded guilty.

At sentencing, Ruiz asked the judge to grant her the same two-level downward departure that the Government would have recommended had she accepted the "fast track" agreement. The Government opposed her request, and the District Court denied it, imposing a standard Guideline sentence instead. .

Relying on *18 U.S.C. § 3742*, see *infra,* at 4-6, Ruiz appealed her sentence to the United States Court of

Appeals for the Ninth Circuit. The Ninth Circuit vacated the District Court's sentencing **[****9]** determination. The Ninth Circuit pointed out that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial. . It decided that this obligation entitles defendants to receive that same information before they enter into a plea agreement. *Id., at 1164*. The Ninth Circuit also decided that the Constitution prohibits defendants from waiving their right to that information. *Id., at 1165-1166*. And it held that the prosecutors' standard "fast track" plea agreement was unlawful because it insisted upon that waiver. *Id., at 1167*. The Ninth Circuit remanded the case so that the District Court could decide any related factual disputes **[**2454]** and determine an appropriate remedy. *Id., at 1169*.

The Government sought certiorari. It stressed what it considered serious adverse practical implications of the Ninth Circuit's constitutional holding. And it added that the holding is unique among courts of appeals. Pet. for Cert. 8. We granted the Government's petition. *151 L. Ed. 2d 689, 122 S. Ct. 803 (1992)*.

II

[REDACTED JURISDICTIONAL ANALYSIS]

III

LEdHN[4][↑] [4]The constitutional question concerns a federal criminal defendant's waiver of the right to receive from prosecutors exculpatory impeachment material -- a right that the Constitution provides as part of its basic "fair trial" guarantee. See U.S. Const., Amdts. 5, 6. See also *Brady v. **[**2455]** Maryland, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)**HN5***[↑] (Due process requires prosecutors to "avoid . . . an unfair trial" by making available "upon request" evidence "favorable **[****13]** to an accused . . . where the evidence is material either to guilt or to punishment"); *United States v. Agurs, 427 U.S. 97, 112-113, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)* (defense request unnecessary); *Kyles v. Whitley, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)* (exculpatory evidence is evidence the suppression of which would "undermine confidence in the verdict"); *Giglio v. United States, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972)* (exculpatory evidence includes **[***595]** "evidence affecting" witness "credibility," where the witness'"reliability" is likely "determinative of guilt or innocence").

LEdHN[5][↑] [5]***LEdHN[6]***[↑] [6]***HN6***[↑] When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional **[*629]** guarantees. *Boykin v. Alabama, 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969)* (pleading guilty implicates the *Fifth Amendment* privilege against self-incrimination, the *Sixth Amendment* right to confront one's accusers, and the *Sixth Amendment* right to trial by jury). Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is "voluntary" and that the defendant must make related waivers "knowingly, intelligently, **[****14]** [and] with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970)*; see also *Boykin, supra, at 242*.

LEdHN[1B][↑] [1B]In this case, the Ninth Circuit in effect held that a guilty plea is not "voluntary" (and that the defendant could not, by pleading guilty, waive his right to a fair trial) unless the prosecutors first made the same disclosure of material impeachment information that the prosecutors would have had to make had the defendant insisted upon a trial. We must decide whether the Constitution requires that preguilty plea disclosure of impeachment information. We conclude that it does not.

LEdHN[1C][↑] [1C]LEdHN[7A][↑] [7A]LEdHN[8][↑] [8]First, impeachment information is special in relation to the *fairness of a trial,* not in respect to whether a plea is *voluntary* ("knowing," "intelligent," and "sufficient[ly] aware"). Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But HN7[↑] the Constitution does not require the prosecutor to share all useful information with the defendant. *Weatherford v. Bursey, 429 U.S. 545, 559, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977)* **[****15]** ("There is no general constitutional right to discovery in a criminal case"). And HN8[↑] the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances -- even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his **[*630]** right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide. Cf. *Colorado v. Spring, 479 U.S. 564, 573-575, 93 L. Ed. 2d 954, 107 S. Ct. 851 at 851 (1987)* (*Fifth Amendment* privilege against self-incrimination waived when defendant received standard *Miranda* warnings regarding the nature of the right but not told the specific interrogation questions to be asked).

LEdHN[1D][↑] [1D]LEdHN[7B][↑] [7B]It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, **[****16]** help a particular defendant. The degree of help that impeachment information can **[***596]** provide will depend upon the defendant's own independent **[**2456]** knowledge of the prosecution's potential case -- a matter that the Constitution does not require prosecutors to disclose.

LEdHN[1E][↑] [1E]Second, we have found no legal authority embodied either in this Court's past cases or in cases from other circuits that provide significant support for the Ninth Circuit's decision. To the contrary, this Court has found that HN9[↑] the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See *Brady v. United States, 397 U.S. at 757* (defendant "misapprehended the quality of the State's case"); *ibid.* (defendant misapprehended "the likely penalties"); *ibid.* (defendant failed to "anticipate a change in the law regarding" relevant "punishments"); *McMann v. Richardson, 397 U.S. 759, 770, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (1970)* (counsel "misjudged **[****17]** the admissibility" of a "confession"); *United States v. Broce, 488 U.S. 563, 573, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989)* (counsel failed to point out a potential defense); *Tollett v. Henderson, 411 U.S. 258, 267, 36 L. Ed. 2d 235, 93 S. Ct. 1602 [*631] (1973)* (counsel failed to find a potential constitutional infirmity in grand jury proceedings). It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.

Third, due process considerations, the very considerations that led this Court to find trial-related rights to exculpatory and impeachment information in *Brady* and *Giglio*, argue against the existence of the "right" that the Ninth Circuit found here. This Court has said that HN10[↑] due process considerations include not only (1) the nature of the private interest at stake, but also (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests. *Ake v. Oklahoma, 470 U.S. 68, 77, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985)*. Here, as we have just pointed out, the added value of the Ninth Circuit's "right" to a **[****18]** defendant is often limited, for it depends upon the defendant's independent awareness of the details of the Government's case. And in any case, as the proposed plea agreement at issue here specifies, the Government will provide "any information establishing the factual

innocence of the defendant" regardless. That fact, along with other guilty-plea safeguards, see *Fed. Rule Crim. Proc. 11*, diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty. Cf. *McCarthy v. United States, 394 U.S. 459, 465-467, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969)* (discussing *Rule 11*'s role in protecting a defendant's constitutional rights).

At the same time, a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration **[***597]** of justice. The Ninth Circuit's rule risks premature disclosure of Government witness information, which, the Government tells us, could "disrupt ongoing **[*632]** investigations" and **[****19]** expose prospective witnesses to serious harm. Brief for United States 25. Cf. Amendments to Federal Rules of Criminal Procedure: Hearings before the Subcommittee on Criminal Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 92 (1975) (statement of John C. Keney, Acting Assistant Attorney General, Criminal Div., Dept. of Justice) (opposing mandated witness disclosure three days before trial because of documented instances of witness intimidation). And the careful tailoring that characterizes most legal Government witness disclosure requirements suggests recognition by both **[**2457]** Congress and the Federal Rules Committees that such concerns are valid. See, *e.g.*, *18 U.S.C. § 3432* (witness list disclosure required in capital cases three days before trial with exceptions); *§ 3500* (Government witness statements ordinarily subject to discovery only after testimony given); *Fed. Rule Crim. Proc. 16(a)(2)* (embodies limitations of *18 U.S.C. § 3500*). Compare 156 F.R.D. 327, 461-462 (1994) (congressional proposal to significantly broaden *§ 3500*) with 167 F.R.D. 221, 223, n. (judicial conference opposing **[****20]** congressional proposal).

Consequently, the Ninth Circuit's requirement could force the Government to abandon its "general practice" of not "disclosing to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses." Brief for United States 25. It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number -- 90% or more -- of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.

[*633] These considerations, taken together, lead us to conclude that ***HN11***[⬆] the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.

LEdHN[9][⬆] [9]In addition, we note that the "fast track" plea agreement requires a defendant to waive her **[****21]** right to receive information the Government has regarding any "affirmative defense" she raises at trial. Pet. for Cert. 46a. We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining -- for most (though not all) of the reasons previously stated. That is to say, in the context of this agreement, the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea; the value in terms of the defendant's added awareness of relevant circumstances is ordinarily limited; yet the added burden imposed upon the Government by requiring its provision well in advance of trial (often before trial preparation begins) can be serious, thereby significantly interfering **[***598]** with the administration of the plea bargaining process.

For these reasons the decision of the Court of Appeals for the Ninth Circuit is

Reversed.

[CONCURRENCE REDACTED]

State v. Leon

Court of Appeals of Ohio, Sixth Appellate District, Huron County

March 29, 2019, Decided

Court of Appeals No. H-18-018

Reporter

2019-Ohio-1178 *; 2019 Ohio App. LEXIS 1269 **; 2019 WL 1422876
State of Ohio, Appellee v. Josefino Alvaro Leon, Appellant

Prior History: **[**1]** Trial Court No. CRI 93 0620.

Case Summary

HOLDINGS: [1]-The trial court properly denied an inmate's motion pursuant to R.C. 2943.031(D) to withdraw his guilty pleas to trafficking in marijuana under R.C. 2925.03(A)(1), as under the totality of the circumstances the inmate subjectively understood the rights he relinquished and the effects of entering the guilty pleas pursuant to *Crim.R. 11(C)*, he understood the immigration-related consequences, and he did not explain the 15-year and 24-year delays prior to seeking relief; [2]-There was no abuse of discretion in denying the motion under R.C. 2943.031(D), as the inmate did not establish all four of the statutory factors; [3]-The inmate did not establish a manifest injustice under *Crim.R. 32.1*, as his self-serving allegations of trial counsel's deficient performance unsupported by evidence in the record did not entitle him to relief.

Outcome

Judgment affirmed.

Judges: OSOWIK, J. Arlene Singer, J., Thomas J. Osowik, J., Christine E. Mayle, P.J., CONCUR.

Opinion

OSOWIK, J.

[*P1] This is an accelerated appeal from a judgment of the Huron County Court of Common Pleas which denied appellant's motion to vacate his 1994 guilty pleas. For the reasons set forth below, this court affirms the judgment of the trial court.

[*P2] Appellant set forth three assignments of error:

> [REDACTED]
>
> II. The trial court erred in denying the Defendant/Appellant's Motion to Withdraw His Guilty Plea pursuant to O.R.C. 2943.031 and not considering the holding set forth in the United States Supreme Court's decision in *Padilla v. Kentucky* which should be applied retroactively.

I. Statement of Facts

[*P3] This appeal was triggered by a trial court judgment in 2018, but stems from events in 1993. On

August 30, 1993, the Norwalk Police Department filed three criminal complaints against appellant Josefino Alvaro Leon, a.k.a. Josefino Leon Herrera, in Norwalk Municipal Court that were bound over to a Huron County Grand Jury. The grand jury indicted appellant on three counts of trafficking in marijuana, each a violation of *R.C. 2925.03(A)(1)* and each a felony in the fourth degree. Since September 1, 1993, the municipal court and then the common pleas court, at appellant's request, appointed counsel from the Huron County Public Defender's office and a Spanish interpreter due to his indigency and his assertion he "knows very little or no English."

[*P4] At the November 1, 1993 arraignment, appellant entered not guilty pleas to all three counts. Discovery ensued, and on January 5, 1994, the trial court held a hearing on appellant's change of pleas from not guilty to guilty to two counts with the third count dismissed. After 24 years the record no longer contained a transcript of the plea hearing. However, the record contained the trial court's **[**3]** January 7, 1994 journalized entry of the plea hearing, in which the trial court identified appellant was present with his counsel, but did not specifically identify, for example, the exact dialogue of the proceedings nor the presence of the Spanish interpreter. The trial court's entry stated appellant was advised that each of the offenses to which he proposed to plead guilty were punishable by definite prison terms from a minimum of six months to a maximum of 18 months. The entry continued as follows:

> The defendant stated that he understood and then did enter a plea of guilty to Counts I and II, of the Indictment. The Court then personally addressed the defendant, and: (1) Determined that he is making the plea voluntarily, understanding the nature of the charge and the maximum penalty involved, and that he is eligible for probation; (2) Informed him of and determined that he understood the effect of his plea of **guilty**, and that the Court upon acceptance of the plea may proceed with judgment and sentence; (3) Informed him and determined that he understood that by his plea of **guilty**, he is waiving his rights to jury a [sic] trial, to confront witnesses against him, to have compulsory **[**4]** process for obtaining witnesses in his favor, and to require the State to prove his guilt beyond a reasonable doubt at trial at which he cannot be compelled to testify against himself. The Court being satisfied from the total circumstances, found that the defendant had **KNOWINGLY, INTELLIGENTLY**, **VOLUNTARILY** and **UNDERSTANDINGLY** made and entered his plea of guilty to Counts I and II, of the Indictment. It is therefore **ORDERED, ADJUDGED**, and **DECREED** that the defendant's guilty plea to the charge shall be and hereby is accepted; that the defendant shall be and hereby is adjudicated **GUILTY**, and that the defendant shall be and hereby is **CONVICTED** thereof accordingly, of Trafficking in Marijuana, a violation of *Ohio Revised Code Section 2925.03(A)(1)*. (Emphasis sic.)

[*P5] Thereafter, on February 11, 1994, the trial court, in a subsequently journalized nunc pro tunc entry, sentenced appellant to two concurrent prison sentences for a total of one year. Appellant did not appeal his conviction and sentence. On March 31, 1994, the trial court granted appellant's request for "shock probation" under former *R.C. 2947.061*, released him from prison, and placed him on probation. Appellant was released from probation on February 13, 1996.

[*P6] The trial court record **[**5]** was then silent for over 22 years until appellant filed an August 13, 2018 motion. Appellant argued he was entitled to vacate his 1994 guilty pleas for two reasons: (1) the trial court took the guilty pleas in violation of *R.C. 2943.031*, and (2) the guilty pleas where not knowingly, voluntarily or intelligently made pursuant to *Crim.R. 32.1* and *Padilla v. Kentucky, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010)*. For the first time in the trial court record, appellant alleged a number of facts in his motion and accompanying affidavit relevant to this appeal.

[REDACTED]

III. *Crim.R. 32.1* Remedy

[*P48] In support of his third assignment of error, appellant argued the trial court abused its discretion when it failed to find a manifest injustice under *Crim.R. 32.1* to grant his motion to vacate plea. Appellant argued there was a manifest injustice because 24 years ago he received ineffective assistance of counsel pursuant to *Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)* and ***HN18***[] *Padilla*, which held erroneous deportation advice may violate the *Sixth Amendment* if prejudice is proven.

[*P49] In response, appellee argued the trial court did not abuse its discretion when it denied appellant's motion to vacate his plea after 24 **[**30]** years. Appellee argued appellant failed to meet the high burden of a manifest injustice pursuant to *Crim.R. 32.1* because appellant's claim of ineffective assistance of counsel was not supported by the law or the facts. In the absence of appellant producing the plea hearing transcript, "[T]here is nothing compelling in the Appellant's affidavit to suggest his trial counsel fell below his duty."

[*P50] ***HN19***[] We review the trial court's denial of a motion to withdraw plea pursuant to *Crim.R. 32.1* for an abuse of discretion. *Francis, 104 Ohio St.3d 490, 2004-Ohio-6894, 820 N.E.2d 355, at ¶ 32*. "A defendant has no absolute right to withdraw his guilty plea." *State v. McNew, 6th Dist. Lucas No. L-98-1120, 1998 Ohio App. LEXIS 3924, *5 (Aug. 28, 1998)*. *Crim.R. 32.1* in its entirety states, "A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea."

[*P51] ***HN20***[] *Crim.R. 32.1* is a separate remedy from *R.C. 2943.031(D)*. *R.C. 2943.031(F)*; *State v. Romero, 5th Dist. Stark No. 2016CA00201, 2017-Ohio-2950, ¶ 10-11*. "A manifest injustice has been defined as a 'clear or openly unjust act' and as 'an extraordinary and fundamental flaw in the plea proceedings.'" (Citations omitted.) *State v. Sheehy, 6th Dist. Lucas No. L-12-1273, 2013-Ohio-1596, ¶ 17*. Post-sentence withdrawal of a plea is permitted only in extraordinary circumstances. *Id.* This high burden is necessary **[**31]** because we "recognize * * * that if a plea of guilty could be retracted with ease after sentence had been imposed, 'the accused might be encouraged to plead guilty to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. * * *'" (Citation omitted.) *State v. Blatnik, 17 Ohio App.3d 201, 203, 17 Ohio B. 391, 478 N.E.2d 1016 (6th Dist.1984)*, quoting *State v. Peterseim, 68 Ohio App.2d 211, 213, 428 N.E.2d 863 (8th Dist.1980)*.

[*P52] ***HN21***[] Appellant had the burden of establishing the existence of manifest injustice. *State v. Smith, 49 Ohio St.2d 261, 361 N.E.2d 1324 (1977)*, paragraph one of the syllabus. "An undue delay between the occurrence of the alleged cause for withdrawal of a guilty plea and the filing of a motion under *Crim. R. 32.1* is a factor adversely affecting the credibility of the movant and militating against the granting of the motion." *Id.* at paragraph three of the syllabus. The trial court had the discretion to determine the credibility of an affidavit attached to the motion and whether to accept the factual statements as true. "A motion made pursuant to *Crim.R. 32.1* is addressed to the sound discretion of the trial court, and the good faith, credibility and weight of the movant's assertions in support of the motion are matters to be resolved by that court." *Id.* at paragraph two of the syllabus.

[*P53] ***HN22***[] Ineffective assistance of counsel can be the basis for a *Crim.R. 32.1* claim of manifest injustice, **[**32]** where the standard set out in *Strickland* will apply. *State v. Andreias, 6th Dist. Erie No. E-10-070, 2011-Ohio-5030, ¶ 14*; *State v. Patterson, 6th Dist. Erie No. E-08-052, 2009-Ohio-1817, ¶ 14*. The *Strickland* test can be applied to guilty pleas. *Id.* Evidentiary hearings are not required by *Crim.R. 32.1*. *McNew, 6th Dist. Lucas No. L-98-1120, 1998 Ohio App. LEXIS 3924, at *5*. Evidentiary hearings are held only in cases where the facts, if taken as true, require the trial court to permit appellant to withdraw his plea. *Id.*, citing *State v. Kapper, 5 Ohio St.3d 36, 38, 5 Ohio B. 94, 448 N.E.2d 823 (1983)*; *State v. Legree, 61 Ohio App.3d 568, 573, 573 N.E.2d 687 (6th Dist.1988)*.

[*P54] An ineffective assistance of counsel claim must overcome the strong presumption that a properly

licensed Ohio lawyer is competent. *State v. Gondor, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62*, citing *Calhoun, 86 Ohio St.3d at 289, 714 N.E.2d 905*. The record did not show appellant questioned the licensure of his trial counsel, so her competence was presumed.

[*P55] ***HN23***[⬆] To overcome this presumption of competence, appellant had the burden to show: (1) deficient performance by his trial counsel below an objective standard of reasonable representation, and (2) a reasonable probability of prejudice that but for his trial counsel's errors the outcome would have been different, i.e., he would have gone to trial on three felony counts and not have entered guilty pleas on January 5, 1994, to two felonies. *Strickland, 466 U.S. at 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." **[**33]** *Strickland at 694*. In making a determination of ineffective assistance of counsel, a reviewing court considers the totality of the evidence before the judge or jury. *Id. at 695*. Appellant must submit evidentiary documents containing sufficient operative facts to demonstrate his entitlement to relief pursuant to ineffective assistance of counsel. *Gondor at ¶ 62*. Until he has done so, no evidentiary hearing is required. *State v. Pankey, 68 Ohio St.2d 58, 58-59, 428 N.E.2d 413 (1981)*, citing *State v. Jackson, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980)*, syllabus.

[*P56] Appellant argued the trial court failed to weigh the first prong of *Strickland* that counsel's performance was deficient and fell below an objective standard of reasonableness. Appellant argued trial counsel's performance fell below "the prevailing professional norms at the time" because, although he maintained he was not guilty, he felt he had no option other than to plead guilty, and his attorney failed to ensure he understood the potential immigration consequences of his pleas. Appellant argued his trial counsel's duty to provide competent representation to him required "much more specific advice than the generalized immigration warning set forth in *R.C. 2943.031*" pursuant to *State v. Yapp, 2015-Ohio-1654, 32 N.E.3d 996, ¶ 14-17 (8th Dist.)*. We disagree and find ***HN24***[⬆] the Eighth District in *Yapp* held that, depending on the circumstances, a trial court could **[**34]** find prejudice under *Padilla* even where the *R.C. 2943.031(A)* advisement was given.

[*P57] Appellant's affidavit accompanying his motion made only one reference to his trial attorney's deficient performance: "I had a public defender represent me. To the best of my recollection, I was not told that there would be immigration consequences from my conviction by the public defender * **. If I had known I could be deported as a result of the conviction, I would not have pled guilty." These self-serving allegations of trial counsel's deficient performance unsupported by evidence in the record do not entitle appellant to the relief sought. *See Kapper, 5 Ohio St.3d at 38, 448 N.E.2d 823*; *see also Jackson, 64 Ohio St.2d at 112, 413 N.E.2d 819*. A faded memory from 24-years earlier did not meet his burden for the first prong of *Strickland*. Even if we accepted appellant's unilateral recollections, the record shows appellant admitted to receiving the *R.C. 2943.031(A)* advisement from the judge on January 5, 1994, immediately after entering his plea. Appellant had the opportunity at that time to express to his attorney his insistence that he wished "to fight the case" and withdraw his guilty pleas. Instead, it appears that appellant "harbored some subjective misconception of the import of the charge" when he averred he did **[**35]** not think his first-time felony convictions "would lead to immigration issues." *Smith, 49 Ohio St.2d at 265, 361 N.E.2d 1324*. ***HN25***[⬆] "[M]istaken belief on the part of defendant * * * was not sufficient to support a claim of manifest injustice." *Legree, 61 Ohio App.3d at 573, 573 N.E.2d 687*.

[*P58] Appellant further argued the trial court failed to weigh the second prong of *Strickland* that he was prejudiced by his counsel's deficient performance. Appellant argued he maintained his innocence, and the actions of his attorney led him to believe he had no option but to enter guilty pleas, which resulted in "certain deportation." His deportation separated him from his family, who were all United States citizens. Appellant's affidavit did not mention or insist on his innocence despite his guilty pleas. Rather, he averred his subjective belief his first offense would not lead to "immigration issues." He also averred he would have avoided deportation by insisting on going to trial "to fight the case" by hiring immigration and criminal attorneys.

[*P59] *HN26*[] "An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." *Stinson v. England, 69 Ohio St.3d 451, 1994- Ohio 35, 633 N.E.2d 532 (1994)*, paragraph one of the syllabus. Appellant's affidavit was the sole evidence submitted to support his motion to withdraw his 24-year **[**36]** old guilty pleas. Self-serving affidavits are generally insufficient to demonstrate manifest injustice. *State v. Passafiume, 2018-Ohio-1083, 109 N.E.3d 642, ¶ 26 (8th Dist.)*. Further, a record reflecting compliance with *CrimR. 11* has more probative value than appellant's self-serving affidavit intending to show manifest injustice because of the presumption that appellant knowingly, intentionally, and voluntarily entered his guilty pleas. *Id.*

[*P60] We reviewed appellant's affidavit in light of the entire record and find it failed to show a probability that due to the prejudice from his trial counsel's alleged errors, he would not have changed his three not guilty pleas to two guilty pleas after nearly two months of discovery. *Padilla, 559 U.S. at 372, 130 S.Ct. 1473, 176 L.Ed.2d 284* (appellant has burden to show a decision to reject the plea bargain would have been rational under the circumstances). Further, we find his affidavit failed to show a probability due to the prejudice from his trial counsel's alleged errors that the hiring of immigration and criminal attorneys, despite his indigency, would have yielded different outcomes for his two felony convictions. He admitted the immigration attorneys he consulted in 2003 and 2006/2007 failed to give him satisfactory advice. His self-serving claim of his innocence as the **[**37]** sole basis to "fight the case" fails to produce the requisite probability. Moreover, we find his affidavit failed to show a probability due to the prejudice from his trial counsel's alleged errors he would have avoided "certain deportation."

[*P61] Appellant did not meet his burden under *Strickland*. Having previously found the trial court substantially complied with *Crim.R. 11(C)* and *R.C. 2943.031*, and having determined appellant failed to meet his burden for a claim of ineffective assistance of counsel, we find appellant's evidence failed to meet his burden to show a manifest injustice pursuant to *Crim.R. 32.1*. Although appellee conceded a remand to the trial court to conduct a hearing on appellant's prejudice claims could be a remedy, we do not find it is necessary in this matter because of the contradictions between the *Crim.R. 32.1* allegations and the record. *State v. Johnson, 6th Dist. Lucas No. L-16-1280, 2018-Ohio-1656, ¶ 12*.

[*P62] We conclude that no manifest injustice is presented under these facts by the trial court's denial of appellant's motion to vacate his guilty pleas based upon claimed ineffective assistance of counsel. We conclude that the trial court did not abuse its discretion in overruling the motion to withdraw appellant's guilty pleas based **[**38]** upon claimed ineffective assistance of counsel.

[*P63] Appellant's third assignment of error is not well-taken.

[REDACTED]

V. Conclusion

[*P70] On consideration whereof, we find that substantial justice has been done in this matter and the judgment of the trial court to be lawful. The judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant to *App.R. 24*.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27*. *See also 6th Dist.Loc.App.R. 4*.

Arlene Singer, J.
Thomas J. Osowik, J.
Christine E. Mayle, P.J.
CONCUR.

Time Keeper Materials

OHIO HIGH SCHOOL MOCK TRIAL TIMEKEEPER MANUAL

Timekeepers' Responsibilities

I. BEFORE THE TRIAL

A. Be sure to have in your Timekeeper's Packet:

a) 1 Timekeeping Sheet;

b) 1 Time Card Use Sheet;

c) 2 stop watches;

d) 1 set of time cards (teams MUST use the cards provided in the Competition Manual)

B. Enter the courtroom; take your position (at the end of the jury box closest to the audience, if possible). Rise when the judge and jury enter the courtroom. Be seated when the judge grants permission for all to be seated.

II. DURING THE TRIAL

A. Enter the Trial Number and Team Names in the spaces provided at the top of the Timekeeping Sheet. Arrange your stopwatches, time cards and Time Card Use Table.

B. Keep time during the trial, remembering the following.

1. Use one stopwatch for each side – PROSECUTION on your left and DEFENSE on your right.

2. RESET stopwatch to zero *only* at the following times:

a) at the beginning of each side's opening statement;

b) at the beginning of each side's direct examination;

c) at the beginning of each side's cross-examination; and

d) at the beginning of each side's closing argument.

3. DO NOT reset stopwatch to zero at any other time.

a) DO NOT reset stopwatch to zero at the end of direct and cross-examinations, since you will need to resume direct-examination timing for redirect questioning, and cross-examination time for re-cross questioning;

b) DO NOT reset stopwatch to zero at the end of the Defendant's closing argument, since you will need to resume the Defendant's closing argument timing for the Defendant's rebuttal.

4. START timing only when the actual opening statement/closing argument or questioning begins (e.g., *do not start* when an attorney asks to reserve time for rebuttal or when a witness is sworn).

5. STOP timing during objections, responses to objections, and questioning by the judge.

6. During the trial, if there is more than a 15 second discrepancy between the Prosecution and Defense teams' timekeepers, the procedure outlined below in Section V will be followed.

C. Display time cards to the attorneys and witnesses at the intervals set out in the Time Card Use Table. Display the STOP card to the presiding, scoring judges, and teams.

D. At the conclusion of the trial, if either side informs the court that it wishes to file a dispute and a dispute hearing is granted, please time the additional three-minute argument per side.

III. DURING THE RECESS

A. Add the time used for each side and sign the timekeeping sheet.

B. Give your timesheet to the presiding judge.

C. Remind the judges that they have 12 minutes for debriefing and that you will signal when time for debriefing has expired.

D. Help teams straighten up the courtroom for the next round.

IV. AFTER THE RECESS

A. Reset your stopwatch to zero and start time for the debriefing.

B. Signal the presiding judge when the 12 minutes allowed for debriefing have expired.

V. DISCREPANCIES IN TIME BETWEEN TEAM TIMEKEEPERS

A. If a time-keeping discrepancy of more than 15 seconds is discovered between the prosecution and defense teams' timekeepers, the timekeepers should notify the presiding judge as soon as the discrepancy is discovered. In this event, one of the timekeepers should stand, wait to be recognized, and say "Your honor, we have a time discrepancy of more than 15 seconds."

B. The presiding judge will rule on any time discrepancy before the trial continues. Timekeepers will synchronize stop watches to match the presiding judge's ruling (for example if the Prosecution's stop watch indicates 2 minutes left on a direct examination and the Defense's stop watch indicates time is expired, the presiding judge may decide to split the difference in the timing variation and give the Prosecution 1 minute to conclude the direct examination. Defense would adjust timing to allow for the 1 minute timing decision.)

C. Any discrepancies between timekeepers less than 15 seconds will not be considered a violation.

D. Timekeepers may raise time discrepancies of 15 seconds or more as soon as they are discovered. No time disputes will be entertained after the trial concludes. The decisions of the presiding judge regarding the resolution of timing disputes are final.

OHIO HIGH SCHOOL MOCK TRIAL COMPETITION

Timekeeper Instructions

1. **ALL TEAMS** are to bring two (2) **STOPWATCHES** and a ***trained*** TIMEKEEPER. No stopwatches and no timecards will be available at the competition site. Your timekeeper is to be *one of the official team members* listed on your roster. Timekeepers are to be so noted on your team roster in each round.

2. **TWO STOPWATCHES** are needed by each team (one stop watch for keeping time for the Prosecution and one stop watch for keeping time for the Defense, regardless of which side your team is presenting), the Timekeeper's Responsibilities Sheet AND your own "**TIME-REMAINING**" CARDS. **Teams MUST use the timekeeper cards provided in the Competition Manual.** (The timekeeper must be familiar with the trial sequence chart and have practiced completing the tally sheet before the tournament begins.) In each trial, the timekeeper will sit in the jury box, if one is available, and keep time **for both teams**. In all trials, the **official timekeeper** will turn in the timing sheet in to the presiding judge.

3. The official timekeeper will (a) keep accurate time for both teams; (b) show "time-remaining" cards to both teams; and (c) notify the presiding judge that "TIME" has expired at the end of the trial by showing the "STOP" card.

If a time-keeping discrepancy of **more than 15 seconds** is discovered between the prosecution and defense teams' timekeepers, the timekeepers should notify the presiding judge as soon as the discrepancy is discovered. In this event, one of the timekeepers should stand, wait to be recognized, and say "Your honor, we have a time discrepancy of more than 15 seconds. The procedure below will then be followed:

- The presiding judge will rule on any time discrepancy before the trial continues. Timekeepers will synchronize stop watches to match the presiding judge's ruling (for example if Proseuction's stop watch indicates 2 minutes left on a direct examination and the Defense's stop watch indicates time is expired, the presiding judge might decide to split the difference in the timing variation and give the Prosecution 1 minute to conclude the direct examination. Defense would adjust timing to allow for the 1 minute timing decision.)

- Any discrepancies between timekeepers less than 15 seconds WILL NOT be considered a violation.

- Timekeepers may raise time discrepancies of 15 seconds or more as soon as they are discovered. No time disputes will be entertained after the trial concludes. The decisions of the presiding judge regarding the resolution of timing disputes are final.

Timekeepers' cards, **provided in the competition manual**, are to show time remaining as indicated on the Time Card Use sheet. Rounding seconds used up or down to whole minute integers will make timekeeping easier. Both timekeepers are responsible for keeping accurate time.

REMEMBER:

Signed Timing Sheet is to be returned with the judges' packet at the conclusion of each round.

Ohio High School Mock Trial Competition Time Card Use Table

For **Opening** Statements

When your stopwatch says	Hold up the timecard that says
1:00	3:00
2:00	2:00
3:00	1:00
3:30	:30
4:00	STOP

For **Direct** Examination

When your stopwatch says	Hold up the timecard that says
5:00	15:00
10:00	10:00
15:00	5:00
16:00	4:00
17:00	3:00
18:00	2:00
19:00	1:00
19:30	:30
20:00	STOP

For **Cross** Examination

When your stopwatch says	Hold up the timecard that says
3:00	15:00
8:00	10:00
13:00	5:00
14:00	4:00
15:00	3:00
16:00	2:00
17:00	1:00
17:30	0:30
18:00	STOP

For **Closing** Statements

When your stopwatch says	Hold up the timecard that says
1:00	4:00
2:00	3:00
3:00	2:00
4:00	1:00
4:30	0:30
5:00	STOP

For **Rebuttal** – Defense ONLY (Optional)

When your stopwatch says	Hold up the timecard that says
1:00	1:00
2:00	STOP

For **Judges' Comments** – Reset Stopwatch for Each Judge

When your stopwatch says	Hold up the timecard that says
3:00	1:00
4:00	STOP

Ohio High School Mock Trial Competition

Timekeeping Sheet

Defense Team _____ Prosecution Team _____ Trial #_____

Opening Statements (4 minutes each)

Defense _____
Prosecution _____

Direct/Redirect Examination of Two Defense Witnesses (20 total minutes)

FIRST WITNESS (ending time) _____

SECOND WITNESS (cumulative ending time) >20 = time violation) _____

Cross/Recross Examination of Two Defense Witnesses (18 total minutes)

FIRST WITNESS (ending time) _____

SECOND WITNESS (cumulative ending time) >18 = time violation) _____

Direct/Redirect Examination of Two Prosecution Witnesses (20 total minutes)

FIRST WITNESS (ending time) _____

SECOND WITNESS (cumulative ending time) >20 = time violation) _____

Cross/Recross Examination of Two Prosecution Witnesses (18 total minutes)

FIRST WITNESS (ending time) _____

SECOND WITNESS (cumulative ending time) >18 = time violation) _____

Closing Arguments (5 minutes each)

Defense _____
Prosecution _____

Rebuttal (optional) (2 minutes)

Defense _____

_

REMEMBER: CLOCK STOPS FOR OBJECTIONS!

TIMEKEEPER'S SIGNATURE

_____

15:00

10:00

5:00

4:00

3:00

2:00

1:00

:30

STOP

Sample Score Sheet

OHIO HIGH SCHOOL MOCK TRIAL SCORE SHEET

ALL Judges MUST complete and return score sheet to competition coordinator upon completion!

DO NOT SEPARATE COPIES – PLEASE PRESS FIRMLY

Circle One: District Regional State **County:**_____

Circle One: Trial 1 Trial 2

Judge's Name: _____ **Circle One:** Presiding Scoring

Using a scale of 1 to 10, rate the Plaintiff/Prosecution and Defense in the categories below

LIMITED: 1-2 points MINIMAL: 3-4 points AVERAGE: 5-6 points GOOD: 7-8 points EXCELLENT: 9-10 points

Trial Segment	School AND Team Name	School AND Team Name
Opening Statement	**Defense**	**Prosecution**
Defense Attorney (Name):	(1-10)	
Prosecution Attorney (Name):		(1-10)
Defense 1st Witness (Character):		
Direct Attorney (Name):	(1-10)	
Cross Attorney (Name):		(1-10)
Witness Direct (Name of **Student**):	(1-10)	
Witness Cross:	(1-10)	
Defense 2nd Witness (Character):		
Direct Attorney (Name):	(1-10)	
Cross Attorney (Name):		(1-10)
Witness Direct (Name of **Student**):	(1-10)	
Witness Cross:	(1-10)	
Prosecution 1st Witness (Character):		
Direct Attorney (Name):		(1-10)
Cross Attorney (Name):	(1-10)	
Witness Direct (Name of **Student**):		(1-10)
Witness Cross:		(1-10)
Prosecution 2nd Witness (Character):		
Direct Attorney (Name):		(1-10)
Cross Attorney (Name):	(1-10)	
Witness Direct (Name of **Student**):		(1-10)
Witness Cross:		(1-10)
Closing Statement (and Rebuttal if applicable)		
Defense Attorney (Name):	(1-10)	
Prosecution Attorney (Name):		(1-10)
Overall Team Performance Score	(1-10)	(1-10)
Team Totals: Add Scores Down in Each Column	**Defense Total (11-110)**	**Prosecution Total (11-110)**
5 Point Deduction for Material Rule Violation Affecting Fairness of Trial? Do not issue without first discussing with the competition coordinator.		

DO NOT use fractional points or award zero points. NO TIES ALLOWED in TOTAL POINTS

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