

ORIGINAL

In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

-vs-

Case No.: 2001-0524

Mark Brown,

Defendant-Appellant.

This is a Capital Case.

Supplement to Mark Brown's Motion for Stay of Execution
Execution Date: February 4, 2010

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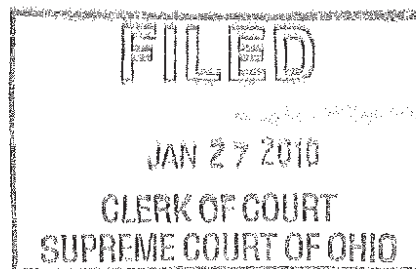
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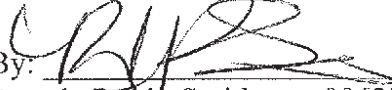
This is a Capital Case.


Supplement to Mark Brown's Motion for Stay of Execution
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On January 15th and 19th, 2010, the Mahoning County Common Pleas court held a hearing on Mark Brown's Motion for New Trial. The trial court denied Brown's motion on January 20, 2010. Brown filed his notice appealing the trial court's denial on January 22, 2010. Brown files this motion to renew the motion for a stay of execution which he filed with this Court on December 29, 2009, and to supplement the arguments in that motion with the information contained in this renewed motion.

Respectfully Submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER

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Memorandum in Support

Mark Brown requests a stay of his execution date, currently scheduled for next Thursday, February 4, 2010. Brown needs time to litigate the issues of which he has only recently become aware. It was not until December 22, 2009, that Brown learned of the letter from State's witness Myzelle Arrington to the prosecutor, in which Arrington solicited favorable treatment in exchange for testimony against Brown. And it was not until January 14, 2010, that Brown learned that State's witness Marcus Clark also perjured himself at Brown's trial, and Clark witnessed Allen "Boonie" Thomas shoot and kill Isam Salman.

Mark Brown filed a Motion for Leave to File Delayed Motion for New Trial and Motion for New Trial Based on New Evidence with the trial court on December 14, 2009. Brown supplemented his Motion for New Trial on January 15, 2010. After holding a hearing on January 15th and January 19th 2010, the trial court denied Brown's motions. Brown immediately appealed.

The trial court erred in denying Brown's motions, and it failed to even address some of the evidence raised during the hearing and in Brown's pleadings. Brown will raise these issues in his appellate brief, but he could not file his brief until the record was filed in the Court of Appeals. The record was just filed today (January 27, 2010), so Brown will file his appellate brief tomorrow (January 28, 2010).

Brown hereby renews his Motion for Stay of Execution, filed on December 29, 2009, and incorporates the arguments therein with this motion.

I. Brown can establish cause for failing to raise claims.

As this Court held in State v. Steffen, 70 Ohio St. 3d 399, 412 (1994), “The defendant wishing to stay his execution to engage in further state court proceedings must petition this court for such a stay. The petitioner must then satisfy the ‘cause and prejudice’ standard as articulated in McCleskey [v. Zant], 499 U.S. 467, 493 (1991).” Brown can satisfy that standard.

A. Cause for failing to raise claim of actual innocence

1. Factual or legal basis not reasonably available

A petitioner establishes cause if he can show “that the factual or legal basis for the claim was not reasonably available.” Steffen, 70 Ohio St. 3d at 411. The factual basis or legal basis for some of Brown’s claims were only recently available. It was not until January 14, 2010, that Brown learned from Marcus Clark that Clark actually witnessed the shootings of Hayder Al-Turk and Isam Salman. For the first time, Clark admitted that he was inside the Midway Market at the time of the shootings, and he saw Brown shoot Al-Turk and *Allen “Boonie” Thomas* shoot Isam Salman.

Counsel had repeatedly tried to locate and interview Marcus Clark, but he was reportedly on the run from the police. See Brown’s 12/29/09 Motion for Stay of Execution motion, p. 4 (“Counsel has repeatedly tried to locate and interview Marcus Clark, but he is reportedly on the run from the police”). According to the Mahoning County Sherriff’s website, Clark was arrested on January 12, 2010. On January 15th, Brown supplemented his new trial motion with the information that counsel had learned from Marcus Clark the day before. Clark was added as a witness for Brown’s hearing on his new trial motion.

The trial court failed to rule on whether Brown was unavoidably prevented from learning of Clark’s recantation earlier. But the trial court found that Brown was unavoidably prevented

from learning of Myzelle Arrington's recantation until Arrington sent Brown a letter alerting him to his willingness to recant.¹ (Trial Court Opinion attached as Exh. A, p. 5) ("Even if Defendant suspected Mr. Arrington's testimony to be flawed, he would have no reason to suspect Arrington would recant the same until he received his letter"). The same logic applies to Clark's recantation. There was no reason to suspect Clark would recant until he admitted to Brown's counsel (on January 14, 2010) that he lied. "[T]he factual or legal basis for the claim was not reasonably available" until Clark decided to admit it. Steffen, 70 Ohio St. 3d at 411.

B. Cause for failure to raise Brady violations

1. Interference by public officials

A petitioner also establishes cause if he can show "[i]nterference by public officials." Id. As Brown asserted in his 12/29/09 Motion for Stay, the State had just disclosed a letter from State's witness Myzelle Arrington to Mahoning County Prosecutor Philomena. (Attached to 12/29/09 motion as Exh. 4.) The letter dated May 8, 1995, from Arrington to Philomena shows that Arrington asked Philomena to assist him in getting an early release from the juvenile detention center.

At the new trial motion hearing on January 15, 2010, the State and Brown's defense attorneys stipulated that the letter was received by the Mahoning County Prosecutor's Office, and it was never disclosed to defense counsel. 1/15/10 hrng t.p. 2-3. (The parties further stipulated that had trial counsel received the letter, it may have affected the defense's strategy.) Brown's failure to raise his claim earlier concerning that letter was due to the State's failure to disclose it, and this constitutes interference by public officials.

¹ The trial court also found that there was an undue delay between the time that Brown discovered the evidence regarding Arrington and filed his motion based on Arrington's recantation.

The State further failed to disclose to the defense that both Myzelle Arrington and Marcus Clark were induced by the State to testify against Mark Brown at his trial. Clark testified at the recent hearing that he was a 15-year-old boy, serving three-and-a-half years for aggravated robbery, and “the prosecutor had said that basically by me coming in here and basically doing what I am doing now that he’s going to see if he could do away with the time that I was already doing.” 1/15/10 hrng, p. 110-11.

The State has not disputed that Marcus Clark was induced to testify at trial with a promise that the prosecutor would assist him in getting out of DYS early. The State presented no evidence to dispute this at the hearing, and it never even questioned Clark regarding this. See 1/15/10 hrng t.p. 113-21, 123.

Furthermore, at the end of the hearing on January 19, 2010, the prosecutor informed the court that, “Everything that we would argue, Your Honor, is already contained within the record, either the trial itself or what was submitted in cross exam.” 1/19/10 hrng, p. 18. “Since the trial record, including the transcript, would not reveal whether or not the prosecution knowingly and intentionally concealed exculpatory evidence, there could be, and is, nothing in the record refuting defendant's contention of prosecutorial misconduct.” State v. Walden, 19 Ohio App. 3d 141, 146 (Ohio Ct. App. 1984).

The State’s failure to deny this statement by Clark should be construed as an admission that the inducement did, in fact, occur. “If a statement is made by another person in the presence of a party to the action, containing assertions of facts which, if untrue, the party would under all the circumstances naturally be expected to deny, his failure to speak has traditionally been receivable against him as an admission.” State v. Matthews, 47 Ohio St. 2d 119, 120-121 (1976). At the January 15th hearing, Clark testified in front of the Mahoning County Prosecutors

that his trial testimony against Brown was provided in exchange for the State's promise of assistance in getting his sentence reduced. Despite the fact that the State then could have presented the testimony of both of the assistant prosecutors, as well as the detectives involved in Brown's case, the State presented no testimony to refute Clark's testimony regarding the inducement.

Clark admitted that he ultimately did not get credit for the rest of his sentence in the juvenile detention center. 1/15/10 Hrng t.p. 111-12. But it makes no difference that the State did not follow through on its promise to Clark. The point is that Clark testified at Brown's trial under the belief that he would get credit for the additional time on his sentence. Id. He further feared that since he was actually inside the Midway Market at the time of the murders, he could be charged in connection to the crime. See id. at 107 ("I was there, I didn't know no better really"). Clark's self-motivation for testifying against Brown "would be relevant to his credibility and the jury was entitled to know of it." Giglio v. United States, 405 U.S. 150, 155 (1972).

In addition, Clark lied during his trial testimony when the prosecutor asked him if anyone made him "any promises as far as what would happen with any of your sentences for your testimony here today." Trial t.p. 247. The State had a duty to correct Clark's false trial testimony that he was not offered anything in exchange for his testimony. Napue v. Illinois, 360 U.S. 264, 269-270 (1959). "Had the jury been apprised of the true facts, however, it might well have concluded that [Clark] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which [Clark] was testifying, for [Clark] might have believed that such a representative was in a position to implement ... any promise of consideration." Id. at 270.

II. Brown can demonstrate that he was prejudiced as result of the errors raised in his new trial motion.

Brown was prejudiced as a result of the errors raised in his new trial motion. Brown is actually innocent of the murder of Isam Salman and was wrongly convicted of the murder and sentenced to death. The evidence recently uncovered demonstrates that the State's witnesses lied at Brown's trial, and that the State failed to provide Brown's trial attorneys with evidence that would have called into question the credibility of those witnesses. Brown was sentenced to death as a result of the perjured testimony of the State's witnesses and the failure of the State to disclose exculpatory evidence. Brown will be prejudiced if this Court does not grant a stay of his execution date and permit him to litigate the issues raised in his new trial motion. He is scheduled to be executed on February 4, 2010.

III. Failure to entertain Brown's claims will result in a fundamental miscarriage of justice.

If all of the above reasons (including the failures of Brown's previous counsel²) do not constitute cause, then Brown's "failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." McCleskey, 499 U.S. at 494-495. See also Steffen, 70 Ohio St. 3d at 411.

Brown is actually innocent of the murder of Isam Salman, and failure to entertain these claims will result in a fundamental miscarriage of justice. He will be executed for a crime he did not commit. Brown's new evidence supports his innocence of the crime for which he is about to

² In its Response to Brown's 12/29/09 Motion for Stay of Execution, the State points out that Brown's current counsel is "essentially arguing" that attorneys from their office were deficient. Response, p. 9. That is precisely true – Brown was failed by attorneys who were formerly with the Office of the Ohio Public Defender, and Brown's current counsel recognizes and admits that freely. "A lawyer's supreme duty of loyalty is to his client (EC 5-1), and that is a duty that we should not assume will be ignored due to the possibility of embarrassing a co-worker." State v. Lentz, 70 Ohio St. 3d 527, 530 (1994). In a similar vein, the former Mahoning County Prosecutor had issues with corruption, and there is nothing inherently wrong with the current Mahoning County Prosecutor's recognition of that fact.

be executed. It illustrates the fact that Myzelle Arrington was not an actual eyewitness to the shootings at the Midway Market. It establishes that Boonie was not, in fact, in the car with his uncle at the time of the shootings. Most importantly, it illustrates that Boonie, not Brown, shot Mr. Salman. Brown should not be executed for a crime that he did not commit.

IV. Evidence to support claim of actual innocence and Brady violation.

The State presented testimony to Brown's jury that Brown alone committed both the murders of Hayder Al-Turk and Isam Salman. Despite Allen "Boonie" Thomas' initial arrest for these aggravated murders, Boonie ultimately received a plea deal for obstructing justice and tampering with evidence. Boonie was to serve a minimum of six months in DYS and was transferred to California to serve his time. Boonie was not required to provide any testimony in exchange for having his charges reduced from aggravated murder to obstructing justice and tampering with evidence. He was out of state for over a year by the time of Brown's trial.

As a result of the evidence the State presented at Brown's trial that Brown was in the store alone at the time of the shootings, the jury convicted Brown of two counts of aggravated murder committed with prior calculation and design and a death penalty specification. The jury recommended that Brown receive the death penalty for the aggravated murder of Salman and life imprisonment for the aggravated murder of Al-Turk.

Evidence that was recently uncovered by Brown's newly appointed counsel demonstrates that Boonie, not Brown shot Mr. Al-Turk. Had this evidence been available at trial, it would have the outcome of Brown's trial. Brown would not be scheduled to be executed for Mr. Al Turk's murder.

A. Recanted trial testimony of Myzelle Arrington.

In Brown's original motion with this Court, Brown pointed to evidence that one of his trial witnesses, Myzelle Arrington recanted his trial testimony. Arrington admitted that he committed perjury when he testified at Brown's trial and admitted that the reason he perjured himself was because he believed the Mahoning County Prosecutor would provide him consideration in the form of a more lenient sentence in exchange for his testimony against Brown.

During Brown's evidentiary hearing Arrington testified that he lied at Brown's trial when he testified that he could see inside the store at the time of the shooting. (1/15/10 hrg. t.p. 6-7). Arrington further admitted that he was seeking consideration in the form of a more lenient sentence when he provided detectives with information implicating Brown and identified a letter he sent to Prosecutor Philomena requesting leniency. (1/15/10 hrg. t.p. 11). The State stipulated to the fact that the State did not provide Brown's trial counsel with a copy of the letter Arrington wrote seeking consideration. (1/15/10 hrg. t.p. 2-3).

B. Recanted trial testimony of Marcus Clark.

Additional evidence not submitted in Brown's original new trial motion was also presented at the evidentiary hearing.³ Marcus Clark, a witness who testified for the State at Brown's trial, testified that his testimony at Brown's trial was not truthful. During the hearing, Clark testified that he was not standing outside the store at the time of the shooting as he testified to at trial, but was in fact in the store when the shooting occurred. (1/15/10 hrg. t.p. 106). Clark testified that he was an eyewitness to the murders of Hayder Al-Turk and Isam Salman. Clark testified that Brown shot Mr. Al-Turk, the man behind the counter, and that Allen "Boonie" Thomas shot the second man, Mr. Salman. (1/15/10 hrg. t.p. 109-10). Clark testified that he was fearful that he would be charged with a crime if he told law enforcement that he was actually in

³ This additional evidence was submitted as a supplement to the new trial motion on January 15, 2010.

the store at the time of the shooting and believed that he would receive leniency on the sentence for which he was, at the time of trial, being held. (1/15/10 hrg. t.p. 111-12).

C. Additional evidence to support Brown's claims.

Brown attempted to present evidence to the trial court to support the credibility of the testimony of the recanted witnesses and to establish the Brady violations. However, the trial court would not permit the introduction of the evidence. This evidence would have demonstrated that both Arrington's and Clark's evidentiary hearing testimony was more credible than their trial testimony.

1. Testimony from trial attorney John B. Juhasz

Brown attempted to call his trial attorney John B. Juhasz as his first witness. The trial court did not allow the admission of his testimony, but counsel for the State and Brown stipulated to the following facts:

- 1) the letter the State attached to its Response was a letter from Myzelle Arrington to then-Prosecutor James Philomena, and it was received by the prosecutor's office on the date or near the date of the letter.
- 2) neither assistant prosecutor who was assigned to Brown's case recalled ever seeing the letter
- 3) the letter was never disclosed to defense counsel
- 4) had defense counsel known about the letter, it may have affected defense counsel's strategy at Brown's trial.

1/15/10 hearing t.p. 2-3. Juhasz would have further testified that he had no strategic reason for his failure to call Jerry Granberry as a witness.

2. Testimony of Jerry Granberry

Brown also attempted to present the testimony of Jerry Granberry. Had the trial court permitted Granberry to testify, he would have provided the following testimony: Granberry was

standing outside the Midway Market with Antwane McMeans at the time of the shooting. He is positive that after hearing the shots, he saw two men run out of the store. After witnessing these events, Granberry and McMeans told McMeans' mother who immediately advised a police officer outside the store. Police detectives took Granberry to the police station to interview him. Like Arrington, Granberry initially had the impression that the police considered him a suspect in the murder. Granberry told police what he witnessed, two men run out of the store after the shots.

Granberry would further testify that he knows both Myzelle Arrington and Marcus Clark and that neither one of them were outside the store at the time of the shooting. Although he was subpoenaed by the State to testify at Brown's trial and came to the courthouse to testify, the prosecutor told him that his testimony was no longer needed after Arrington testified. 1/19/10 hearing t.p. 16-17.

Granberry's testimony would have provided the trial court with evidence to assist in the credibility determination of the testimony. Granberry's testimony demonstrates that Arrington's hearing testimony was true. Arrington was not outside the store at the time of the shooting, but was instead down the street. It would have verified that Arrington's trial testimony was false. Both Brown and Boonie were in the store at the time of the shooting, and Arrington was not standing outside the Midway Market and "able to see inside the store" at the time of the gunshots. T.p. 311.

Moreover, it would have verified Arrington's testimony that he provided the statement to the police because he was fearful that the State would charge him if he did not provide evidence to support the State's case. Granberry, like the other juvenile witnesses questioned by the police, were under the impression that the police thought he was a suspect in the murder. However,

unlike Arrington he was not facing any criminal charges or parole violations. Therefore, he was able to continue to tell the truth about what he witnessed.

Granberry's testimony would also have bolstered the credibility of Clark's hearing testimony. Granberry saw two men run out of the Midway Market after the shootings, and Clark testified at the hearing that both Brown and Boonie were inside the Market. 1/15/10 Evid. Hrng. p. 109. Granberry's testimony would also have undermined the credibility of Clark's trial testimony, as Clark testified at trial that Boonie "was in his car" at the time of the shootings. Trial t.p. 240.

3. Testimony of Gary Rini

Brown attempted to introduce the testimony of forensic scientist Gary Rini to refute the State's argument that Marcus Clark's testimony was so inconsistent with the scientific evidence that it could not be accurate. Gary Rini is a Forensic Science Consultant, and he reviewed and evaluated the forensic evidence associated with the shooting deaths of Isam Salman and Hayder Al Turk. Rini has been court-qualified as an expert in: Death Scene Investigation, Crime Scene Investigation, Crime Scene Reconstruction, Bloodstain Pattern Analysis, Shooting Scene Reconstruction, Luminol Processing, Forensic Serology, Blood Alcohol Analysis and Forensic Investigation and Examination. Mr. Rini would have been able to testify that it was not conclusively established by the testing conducted by BCI that both victims were killed with the same murder weapon.

The trial court found that Clark's hearing testimony was not credible because "the Defendant could not explain the discrepancies between [Clark's] testimony during the hearing and the testimony elicited at trial." *Id.* But it denied Brown's request to have his expert testify to explain some of those discrepancies and establish that Clark's hearing testimony was, in fact,

credible. Trial Court Opinion at p. 3. And it ignored the fact that Michael E. Roberts from Ohio Bureau of Criminal Investigation admitted that he could not say that the bullets came from the gun recovered from Mark Brown. (T.p. 534.)

The only other discrepancy asserted by the State is Clark's testimony regarding where Salman and Al-Turk were located in the store at the time of the shootings. But Clark's testimony in this regard was consistent at the hearing with what he said at Brown's trial. (See trial t.p. 235 (Clark testified that one of the store employees was in the front of the store and one was in the back of the store), and 1/15/10 hrng t.p. 118-19.) In other words, if Clark's hearing testimony is unreliable because of this point, then Clark's testimony was no more reliable when he said it at the time of trial.

V. Stay is needed for Ohio's courts to adequately consider important issues.

On January 20, 2010, the trial court denied Brown's Motion for Leave to File Motion for New Trial and denied Brown's Motion for New Trial.⁴ The trial court failed to address a number of points raised during the hearing and in Brown's pleadings. It committed a number of errors, including:

- It granted Brown's Motion for Leave, informed Brown it would only hear evidence concerning his newly discovered evidence (so Brown presented nothing regarding his Motion for Leave), then vacated its order granting leave and used Brown's failure to present any evidence regarding undue delay as a reason to deny his Motion for Leave. 1/20/10 Entry, p. 6.
- It failed to address anything other than the 2003 letter from Myzelle Arrington when determining if Brown could establish that he acted without an undue delay in filing his motion for leave, despite the fact that Brown had only learned of the letter from Arrington to Philomena on 12/22/09 and learned of Clark's recantation the day before the hearing. 1/20/10 Entry, p. 5-6.

⁴ The trial court granted Brown's Motion for Leave to File Motion for New Trial on January 14, 2010, but vacated that order in its January 20, 2010 judgment entry.

- It never ruled on the Brady violation concerning the sentencing consideration offered to Clark (that was not disputed), and never engaged in a Brady analysis regarding any of the suppressed evidence.
- It refused to allow Brown to present testimony to explain the discrepancies in the hearing testimony from the trial testimony, but then made a finding that Brown failed explain the discrepancies.
- It refused to hear testimony to corroborate the hearing witnesses unless the defendant could establish that he was unavoidably prevented from discovering the corroborative evidence at the time of trial (basically, Brown had to corroborate at the time of trial the evidence that he would discover in the future)

The trial court erred, and Brown deserves the opportunity to have the Court of Appeals (and ultimately, this Court, if necessary) hear his claims. He cannot likely accomplish this within the next 8 days.

Careful consideration of the denial of Brown's new trial motion is essential given that the newly discovered evidence calls into question Brown's guilt of the murder of Isam Salman, the murder for which the State is executing Brown. Brown requests a stay of his execution date to allow the Seventh District Court of Appeals time to carefully and thoroughly consider the important evidence uncovered since counsels' appointment in November of 2009 and to consider the important issues raised on appeal. Currently, there is insufficient time for the court to review the appeal.

In addition, this will allow, if necessary, this Court to accept jurisdiction, set a briefing schedule, receive and review the entire record from the court below, hold oral argument, and issue an opinion on the merits of this appeal after a careful review of the record. If this Court does not stay Brown's February 4, 2010 execution date, neither the court of appeals nor this Court will have sufficient time to review Brown's appeal.

VI. Conclusion.


A painstaking review of Brown's case is justified because of the severity of the sentence imposed upon Brown and the need for heightened reliability in this capital case. See Burger v. Kemp, 453 U.S. 776, 785 (1985). Mark Brown, therefore, requests a stay of execution so this Court will have adequate time to review this instant appeal on the merits.

Respectfully Submitted,

OFFICE OF THE
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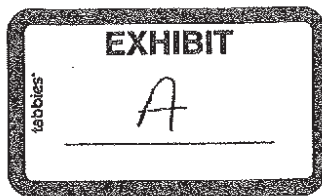
Counsel For Appellant

Certificate of Service

I hereby certify that a true copy of the foregoing Supplement to Motion for Stay of Execution was sent via facsimile to Ralph Rivera, Assistant Prosecutor, Appellate Division, and Paul Gaines, Mahoning County Prosecutor, Office of the Mahoning County Prosecutor, and Adam Van Ho, Office of the Ohio Attorney General on this 27th day of January, 2010.



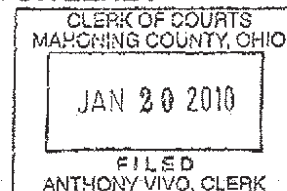
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COPY

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO)	CASE NO. 1994 CR 120
)	
Plaintiff)	JUDGE MAUREEN A. SWEENEY
)	
-vs-)	JUDGMENT ENTRY
)	
MARK A. BROWN)	
)	
Defendant)	



This matter came before the Court on a Motion for New Trial filed by Defendant, Mark Brown. The State filed a Response to the Motion and Defense filed a Response to the State's Motion. Defense also filed a Motion for funds to present expert testimony which the State opposed. Prior to the hearing this Court overruled Defendant's Motion for Funds. The hearing commenced on January 15, 2010 over the objection of the Prosecutor. The Prosecutor asserted the Court was required to determine if the Motion was properly filed based upon the requirements that the defendant was unavoidable prevented from discovering the evidence and that the motion was filed within a reasonable time after discovering the evidence. The Court noted the Prosecutor's objection; however, given the circumstances of the current case and the time constraints thereon, the Court proceeded with the hearing.

The hearing commenced with the testimony of Myzelle Arrington. On direct examination, Mr. Arrington testified that parts of his testimony during the Defendant's trial were untrue. (Transcript p.6, lines 14-16.) He testified that when he was first approached by the police investigating this matter, he believed

he could be charged in the murder. (Transcript pp.7-8, lines 23-24.) He further testified that during his second interview with the police, he only identified the Defendant from the photographs shown to him because there was a mark on one of them. (Transcript p. 10, lines 1-10.) Mr. Arrington then testified that he sent a letter to then Prosecutor, James Philomena, but did not receive any response. (Transcript p. 11, lines 1-11.) Arrington went on to state that prior to his testimony at trial in this case, he was told by someone in the prosecutor's office what his answers to certain questions should be. (Transcript p. 11, lines 15-22.) Arrington testified that his testimony at trial that he could see in the store was not truthful. (Transcript p. 14, lines 12-16.) Arrington stated he was outside the store some ways down and could not see the store from where he was. Arrington testified that on November 16, 2003 he sent a letter to the Defendant, Mark Brown, recanting his testimony. (Transcript pp. 15-16, lines 2-4.)

On cross-examination Arrington was shown the statement he gave to the police on February 2, 1994. Arrington did not refute the truthfulness of most of his statement, however, he testified that he lied about seeing the Defendant run back into the store because he thought that was what the police wanted to hear. (Transcript 27-28, lines 23-4.) The Prosecutor then reviewed Mr. Arrington's juvenile and adult criminal record with him. Mr. Arrington admitted to being on probation most of his juvenile life and being familiar with police talking to witnesses of a crime (Transcript p. 37, line 4-5.) Mr. Arrington was then shown a picture of the Defendant. He admitted that his signature was on the back of the photograph and that the Defendant's name, Mark Brown, was not on the

photograph contrary to what was stated in his letter to the Defendant, transcript p. 57-58, lines 16-20.) and that there were no marks on it other than the signatures of those persons who identified it. (Transcript p. 76-7, lines 20-1.) Mr. Arrington also admitted that he would play dumb if it would help him or a friend of his (Transcript p. 50, lines 1-10) and he would stay out of things if it meant risking his life or a friend's life. (Transcript pp.65-66, lines 18-4.) He admitted to writing the letter to Prosecutor Phifomena to see if it would help him get out of DYS sooner,(Transcript p. 65 line 11.) and that he lied several times in that letter because it sounded good. (Transcript p. 86, lines 10-11.)

The Court then received testimony from Marcus Clark. Prior to testifying, the Court appointed counsel to Mr. Clark to advise him of his Fifth Amendment rights and the possibility of being charged with perjury. After consulting with his attorney, Mr. Clark testified. On direct examination, Mr. Clark testified that when he gave his statement to the police he did so without a parent present and was scared. (Transcript p. 108, lines 14-20.) He testified that at the time of the shooting the Defendant appeared to be very high and that he saw another individual, "Boonie" shoot the second man behind the counter. (Transcript p. 112, lines 6-11.)

On cross-examination, Mr. Clark testified at the time of the shooting he was in the store together with the Defendant, Mark Brown and Boonie. (Transcript p. 114, lines 2-5.) Prior to testifying, with counsel present, Mr. Clark had drawn a diagram of the location of all the people in the store, which was marked as State's Exhibit 13. He identified the drawing during the hearing and

believed it to be an accurate and correct depiction of how the store was the night of the homicide. (Transcript p. 115, lines 16-19.) Mr. Clark placed the second victim in an aisle, labeled in the depiction as "aisle no. 1". (Transcript p, 116, lines 13-19.) He testified that after the first victim was shot, he saw Boonie point his own gun at the second victim and shoot him. (Transcript pp. 117-118-19, lines 15-5.)

Based upon the testimony of these two witnesses, the Defendant then called Jerry Granberry to testify. The State of Ohio objected to this witness's testimony. Defense Counsel also renewed their motion to call the expert testimony of Gary Rini, a Forensic Science Consultant. The Court recessed and advised both parties to prepare briefs in support of their respective positions and be prepared to argue the same when Court resumed.

After oral arguments on the above two witnesses, the Court recessed and took the matter under consideration. The Court issued a Judgment Entry in which it overruled Defense Counsel Motions to call the other two witnesses. Defense counsel voiced an objection to the Court's ruling and was permitted to read into the transcript what each of the two witnesses would have testified to.

All exhibits used during the hearing were admitted into evidence without objection.

Based on the evidence presented in this matter, the Court hereby issues the following Findings of Fact and Conclusions of Law.

1. A motion for a new trial filed after 120 days requires leave from the Court and in order to obtain leave, the defendant must demonstrate by clear and

convincing evidence the he was unavoidable prevented from discovering the evidence being relied upon within the 120 day period. "Unavoidably prevented" exists if the party had no knowledge of the existence of the grounds supporting the motion for new trial and could not have learned of the information within the time prescribed by the Criminal Rule through the exercise of reasonable diligence. State v. Berry, 2007 Ohio App. LEXIS 2083, (10th App. Dist.) P. 19.

In the current matter, Defendant's evidence is the letter from Myzelle Arrington. The letter, which is dated November 16, 2003, was obviously not discoverable within 120 day period. Even if Defendant suspected Mr. Arrington's testimony to be flawed, he would have no reason to suspect Arrington would recant the same until he received his letter. Thus, the Court finds the Defendant was unavoidably prevented in discovering this new evidence.

2. Once a Defendant has shown that he was unavoidable prevented from discovering the new evidence, he must then show that his motion for leave was filed within a reasonable time after discovering the evidence. Berry at P.37. In State v. Woodward, 2009 Ohio App. LEXIS 3556, (10th App. Dist.) the Court determined that when a significant delay occurs between the time the Defendant receives the new evidence and files his motion for new trial, the Defendant must explain the reason for the delay. In Woodward, the Court found a delay of two years not justified. id. at P17.

In the current matter, the Defendant waited over six years to obtain and affidavit from Mr. Arrington. Defendant's explanation for this delay is that his former counsel failed him by neglecting to present the letter to the Court. The

court does not find this to be an adequate explanation. First, the Court notes that this explanation was only forthcoming once the State raised the issue in its response to Defendant's Motion for New Trial. Secondly, the Court notes that Defendant's explanation is void of any affidavit from Defendant Brown's former defense counsel

The Court had initially granted Defendant's Motion for Leave in order to expedite the hearing on the Motion because of time constraints. The Court now orders the **Judgment Entry dated January 14, 2010 vacated**. The Court finds the Defendant's Motion for Leave to file Motion for New Trial is not timely and therefore is overruled.

The Court notes that even though it has determined the Motion for Leave was not timely filed, the Court held an evidentiary hearing on this matter because of time constraints. Since this Court did hear testimony of the Motion, the Court will address the merits of Defendant's Motion for New Trial.

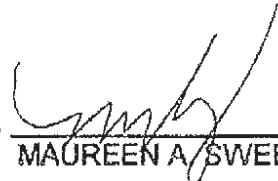
3. In order for a Court to find a witness's recanted testimony newly discovered evidence, the Court must find the new testimony credible. Furthermore, the Court must find that the new testimony would materially affect the outcome of the trial. State v. Burke 2007 Ohio App. LEXIS 1640 (10th App. Dist.) P.18. In determining the credibility of a witness's recanted testimony, the Court must view it with the upmost suspicion. State v. Jones 2006 Ohio App. LEXIS 5845 (10th App. Dist.) P. 25. Recanted Testimony or testimony contradicting earlier testimony means the witness is either lying now, was lying before, or has lied both times. United State v. Earles (n>D. Iowa, 1997) 983 F.

Supp 1236, 1248. Additionally if the Court finds the recanted testimony not credible, then it would most likely not affect the credibility of the original testimony and probably not materially affect the outcome of the original trial. Earles at 1250.

In the current matter, Defendant presented Arrington's recanted testimony as his newly discovered evidence. Additionally, Defendant presented the testimony of Marcus Clark. The Court finds the testimony of both witnesses not to be credible. The Court finds that Arrington admitted he would play dumb if he had to or lie if he felt it would benefit him. Further, the Court finds there were many discrepancies between his testimony on direct examination and that on cross-examination. The Court finds that although Arrington did not appear to have an underlying motive for this testimony, his statements on the witness stand lead this Court to believe he has little regard for truthfulness or the sanctity of an oath. Regarding Marcus Clark's testimony, the Court finds the Defendant could not explain the discrepancies between his testimony during the hearing and the testimony elicited during the trial.

Based upon the foregoing, the Court overrules Defendant's Motion for Leave to file Motion for New Trial, and Defendant's Motion for New Trial.

1/20/10
DATE

HON. 
MAUREEN A. SWEENEY