[Cite as *State v. Sutton*, 2021-Ohio-854.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Nos. 108748 and 108750
v.	:	
MICHAEL SUTTON, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED, VACATED, AND REMANDED
RELEASED AND JOURNALIZED: March 18, 2021

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case Nos. CR-06-481840-D and CR-06-481840-C

Appearances:

Ohio Innocence Project and Donald R. Caster; Cullen Sweeney, Cuyahoga County Public Defender, Joanna Sanchez and Rachael Troutman, Assistant Public Defenders, *for appellants.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Gregory Ochocki, Assistant Prosecuting Attorney, *for appellee.*

ANITA LASTER MAYS, P.J.:

I. Introduction

{¶ 1} In these consolidated cases, defendants-appellants Michael Sutton ("Sutton") and Kenny Phillips ("Phillips"), appeal the trial court's denial of their motions under Crim.R. 33 for a new trial based on newly discovered exculpatory evidence. Appellants charge that the evidence was withheld by the state in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

{¶ 2} We find that the appeal has merit, reverse the trial court's judgment and remand the case for a new trial.

II. Facts and Background

{¶ 3} On May 28, 2006, Sutton, Phillips, Deante Creel ("Creel"), and Akeem Tidmore ("Tidmore"), headed out to enjoy the Memorial Day weekend. The friends were also celebrating Phillips's and Sutton's 18th birthdays upcoming the next week. Sutton was also celebrating his high school graduation and acceptance to the University of Akron.

{¶ 4} The young friends were excited to ride in Sutton's new car, a graduation gift from Sutton's parents. Sutton picked up the white 1987 Chevrolet ("Chevy") with distinctive trim from the repair shop just hours prior to going out with his friends. The repair shop performed mechanical repairs that included brake work and installed a new sound system and fancy wheels.

{¶ 5} The friends traveled to a teen night club on the west side, spoke with friends, and later proceeded to the Shell gas station located at the five-way

intersection of East 55th Street, Woodland Avenue, and Kinsman Avenue ("Intersection") in Cleveland. The Intersection is a busy hangout for teens and young adults.

{¶ 6} At approximately 2:30 a.m., appellants and friends turned west onto Woodland Avenue to return to their homes. The young men witnessed a gold car pull up to the driver's side of a black Lincoln driving in front of the Chevy, a light-skinned arm extended out of the passenger window of the gold car and fired into the Lincoln, and the gold car pulled off at great speed. Appellants described the gold car as a newer model with an "E" symbol that indicated the car was owned by Enterprise Car Rental Company.

{¶ 7} The Chevy pulled over to the curb to allow the police car that approached from behind the Chevy with lights and siren activated to pursue the gold car. Instead of pursuing the gold car, the police cruiser occupied by Cleveland Police officers Michael Keane ("Officer Keane") and Daniel Lentz ("Officer Lentz") pulled behind the Chevy. Panicked, Sutton pulled around the corner onto East 65th Street and stopped. Sutton remained with the vehicle. Phillips, Creel, and Tidmore ran due to fear that they would be accused of a crime they did not commit.[1] After a chase that culminated within approximately seven minutes, they were arrested.

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[1] At the trial, defendant Creel explained the three defendants ran, though Sutton rolled out and laid down beside the car. "But you know how it is. Like it's like I don't want to say, racial profile or whatever. I don't know how it is. But we knew they was going to try to put it on us." (Tr. 1101.)

{¶ 8} The accounts of Officers Keane and Lentz differed vastly from those of the four young men. Officers Keane and Lentz claimed that they were headed north on East 55th Street in response to a police dispatch request to assist with crowd management at the Intersection. The officers proceeded north on East 55th and, just as they approached the Intersection, they witnessed the Chevy suddenly make a wild u-turn in the bumper-to-bumper traffic a short distance in front of their police car. The officers stated they did not activate lights or siren but were able to weave in and out of the barely moving traffic to follow the Chevy to issue a citation.

{¶ 9} The officers turned right onto Woodland Avenue just in time to witness shots fired from the Chevy into a black Lincoln. The officers said they also saw the gold car referenced by appellants, Creel and Tidmore, but opined to the jury that the gold car raced from the scene in fear of the gunshots. Officers Keane and Lentz also testified that all of the suspects ran and that two of the suspects had guns and shot at Officer Lentz during the pursuit.

{¶ 10} The four men were charged with over 20 counts. Phillips was charged with:

> Counts 1 through 4 alleged attempted murder, in violation of R.C. 2923.02 and 2903.02 with respect to the victims Kenneth Tolbert ("Tolbert"), Christopher Lovelady ("Lovelady"), Kevin Tolbert ("K. Tolbert"), and Leonard Brown ("Brown");
>
> Counts 5 through 10 alleged felonious assault in violation of R.C. 2903.11 with respect to the same victims;
>
> Counts 11 and 12 alleged attempted felonious assault in violation of R.C. 2923.02 and 2903.11 with respect to those same four victims;

Counts 13 and 14 alleged attempted aggravated murder in violation of R.C. 2923.02 and 2903.01 with respect to Officer Daniel Lentz;

Count 15 alleged attempted murder in violation of R.C. 2923.02 and 2903.02 with respect to Officer Lentz;

Count 16 alleged felonious assault in violation of R.C. 2903.11 with respect to Officer Lentz;

Count 17 alleged attempted felonious assault in violation of R.C. 2923.02 and 2903.11 with respect to Officer Lentz;

Counts 18 and 19 alleged inducing panic in violation of R.C. 2917.31; and

Count 21 alleged resisting arrest in violation of R.C. 2921.33.

One-, three- and five-year firearm specifications were included with Counts 1 through 12. Counts 13 through 17 included one-, three- and seven-year firearm specifications.

Phillips pleaded not guilty to all charges.

{¶ 11} Sutton, as the driver of the Chevy, was charged with:

Count 1, attempted murder in violation of R.C. 2923.02 and 2903.02 with one-, three-, and five-year firearm specifications;

Count 2, attempted murder in violation of R.C. 2923.02 and 2903.02 with one-, three-, and five-year firearm specifications;

Count 3, attempted murder in violation of R.C. 2923.02 and 2903.02 with one-, three-, and five-year firearm specifications;

Count 4, attempted murder in violation of R.C. 2923.02 and 2903.02 with one-, three-, and five-year firearm specifications;

Count 5, felonious assault in violation of R.C. 2903.11, with one-, three-, and five-year firearm specifications;

Count 6, felonious assault in violation of R.C. 2903.11, with one-, three-, and five-year firearm specifications;

Count 7, felonious assault in violation of R.C. 2903.11, with one-, three-, and five-year firearm specifications;

Count 8, felonious assault in violation of R.C. 2903.11, with one-, three-, and five-year firearm specifications;

Count 9, felonious assault in violation of R.C. 2903.11, with one-, three-, and five-year firearm specifications;

Count 10, felonious assault in violation of R.C. 2903.11, with one-, three-, and five-year firearm specifications;

Count 11, attempted felonious assault in violation of R.C. 2923.02 and 2903.11, with one-, three-, and five-year firearm specifications;

Count 12, attempted felonious assault in violation of R.C. 2923.02 and 2903.11, with one-, three-, and five-year firearm specifications;

Count 18, inducing panic in violation of R.C. 2917.31;

Count 19, inducing panic in violation of R.C. 2917.31;

Count 20, failure to comply with the order of signal of police officer in violation of R.C. 2921.331; and

Count 21, resisting arrest in violation of R.C. 2921.33.

State v. Sutton, 8th Dist. Cuyahoga No. 90172, 2008-Ohio-3677, ¶ 7.

{¶ 12} Creel was charged with five counts of attempted murder, seven counts of felonious assault, three counts of attempted felonious assault, two counts of attempted aggravated murder, two counts of inducing panic, and one count of resisting arrest. Tidmore was charged with four counts of attempted murder, six counts of felonious assault, two counts of attempted felonious assault, two counts of inducing panic, and one count of resisting arrest.

{¶ 13} The men were jointly tried by jury in May 2007. Appellants and Creel testified in their own defense. The victims in the case, driver Tolbert, and passengers

K. Tolbert, Lovelady, and Brown testified that they were also out enjoying the weekend driving a black Lincoln.

{¶ 14} The two driver's side victims suffered gunshot wounds to the head that resulted in permanent injuries. The Lincoln's occupants confirmed that a car pulled up to the driver's side of the Lincoln, and a light-skinned arm extended from the passenger window and fired into the Lincoln. The victims could not identify the vehicle but none of them believed that the shots were fired from the Chevy.

{¶ 15} K. Tolbert testified that he slid down in his seat when the shooting started. He first "saw a car like peel off *and then*" he saw the Chevy. (Emphasis added.) (Tr. 547.) "[A] car looked like it was a white color with a hard top and then made like a hard right-hand turn." (Tr. 547.) "I remember seeing like a few police lights, the top of the police lights, because I still had the dash[board] right here, so the only thing I could see was the top of the car, I couldn't see the wheels at all." *Id*. "I remember seeing like the police lights and what not." *Id*. K. Tolbert saw a single police car and estimated that the distance from the shooting to East 65th Street where the Chevy turned right was about one streetlight.

{¶ 16} Lovelady testified that a car pulled up to the left of the Lincoln and a "brown-skinned, light-skinned hand" was extended out of the window. (Tr. 601.) Lovelady heard one gun shot before he was hit followed by several more.

{¶ 17} From his position in the rear passenger seat of the Lincoln, Brown heard shots come from the left and saw a "light-skinned black" arm extended from the rear passenger's side of a car to the left of the Lincoln. (Tr. 580.) "Kenny got

shot and he stopped the car. And that's when I seen [sic] the police right from behind us and followed the car." (Tr. 581.) Brown saw "the police go by" but could not see what type of car they were chasing or how many people were in the vehicle.

{¶ 18} Officers Keane and Lentz were the sole eyewitnesses to the shooting of the victims as well as shooting at Officer Lentz during the brief foot pursuit. Officer Lentz testified that three of the Chevy's occupants exited the passenger's side of the vehicle and that two of them had guns. Officer Lentz chased the two young men into a yard where he said muzzle flashes began to light up the yard. Officer Lentz claimed that he heard and saw the flashes of two small calibers and one large caliber weapon shooting at him. (Tr. 732.) Officer Keane claimed that he also heard, but did not see, the shots as he was chasing the third defendant who was headed in a different direction.

{¶ 19} Additional police cars responded to the scene. Though Officers Keane and Lentz testified that the shots emanated from several types of firearms, after a broad search, police were unable to locate a single gun, bullet, bullet hole, bullet casing, or other physical evidence that weapons were fired or that the Chevy's occupants had weapons.

{¶ 20} The sole physical evidence in the entire case was a small amount of a substance identified as gunshot residue ("GSR") recovered from the front passenger side of the Chevy and from the left hand of right-handed Phillips. The young men testified that Phillips was sitting in the rear driver's side seat. The officers testified that when they first pulled behind the Chevy that had initially pulled over to allow

them to pursue the gold car, a sudden great commotion occurred inside of the Chevy right before the officers' eyes. The officers offered that it appeared that the occupants were climbing around the vehicle directly in front of them to reposition themselves.

{¶ 21} Expert witnesses for both parties testified that GSR is comprised of lead, barium, and antimony and that where the three chemical constituents are found in combination, it indicates brake lining material, fireworks, or GSR. Sutton testified that he picked the Chevy up from the auto repair shop a matter of hours prior to the incident on the Memorial Day weekend and that the repairs performed included brake work. The experts also testified that GSR is easily transferred and could have been transferred to Phillips when he was transported in the police car. Of utmost importance, the experts agreed that the GSR evidence did not prove that Phillips ever possessed or fired a gun.

{¶ 22} Cleveland police detective Carl Hartman ("Detective Hartman") assigned to investigate the case reviewed the report prepared by Officer Lentz, interviewed officers who assisted in the pursuit and arrest, and personally participated in the search of the area that recovered no evidence of guns, bullets, or gun fire. Detective Hartman did not interview potential witnesses from the businesses located in the Intersection or check with a list of individuals that was provided to him. Detective Hartman said the single potential witness that he was able to contact was unwilling to talk with the police.

{¶ 23} As for the gold car, Detective Hartman testified that a request was made for the Woodland Avenue speed camera log photographs, but the information was never provided and Detective Hartman did not follow up. Detective Hartman did not check with Enterprise Car Rental about the gold car because he had no reason to do so based on the reports of the victims and officers on the scene. This is true despite the testimony of the defendants and Officers Keane and Lentz that the gold car sped from the scene after the shots were fired.

{¶ 24} Several officers responded to the request for assistance from Officers Keane and Lentz and participated in the arrest and transport of the appellants Creel and Tidmore. Officers Gregory Jones ("Officer Jones") and John Lundy ("Officer Lundy") were among the respondents. None of the officers were called as state witnesses.

{¶ 25} At the last-minute request of the prosecutor, Officer Jones briefly appeared as a rebuttal witness. Officer Jones recognized some of the defendants from John F. Kennedy High School where Officer Jones performed security work but said that he had no bias against them. Officer Jones testified that he and Officer Lundy were in the parking lot of the Marathon gas station located at the Intersection the night and early morning of the incident and heard shots.

{¶ 26} The officers reported the shots to dispatch.

State: And how far away were those shots that were fired?

Officer Jones: Well, they were fired from a car that was — I am not quite sure how far away they were. We just heard the

shots and then we saw some cars speeding down the street.

State: Some cars?

Officer Jones: We saw two cars.

State: One of them a police car?

Officer Jones: Eventually the police car joined in behind them, but initially, no.

(Tr. 1248.) Officer Jones also stated that he was detailed "[t]o assist the other officers with taking the defendants [d]owntown." (Tr. 1250.) Officer Jones did not conduct an investigation of the matter.

{¶ 27} Phillips was convicted of four counts of attempted murder, six counts of felonious assault, and two counts of attempted felonious assault of the victims in the Lincoln. Phillips was also convicted of one count of felonious assault and one count of attempted felonious assault regarding Officer Lentz, two counts of inducing panic, and gun specifications attached to seventeen counts. Phillips was found not guilty of two counts of attempted murder of Officer Lentz and one count of resisting arrest. Phillips was sentenced to 92 years of imprisonment.

{¶ 28} Sutton was found not guilty of resisting arrest as well as all firearm specifications. Sutton was found to be complicit as the driver of the Chevy in the remaining charges and was sentenced to the maximum, consecutive sentence for a total of 46½ years and five years of postrelease control. Creel and Tidmore were acquitted of all charges.

III. Appeals and Postconviction motions

A. Sutton

{¶ 29} Appellants Sutton and Phillips have filed multiple challenges to their 2007 convictions. Appellants have zealously, continuously, and unequivocally maintained their innocence.

{¶ 30} On direct appeal in *State v. Sutton*, 8th Dist. Cuyahoga No. 90172, 2008-Ohio-3677 ("*Sutton I*"), this court affirmed the trial court's judgment in part, reversed in part, and remanded for resentencing. In *Sutton III* we explained:

> [F]elonious assault and attempted murder were allied offenses of similar import and merged appellant's convictions for felonious assault and attempted murder as to each victim. This court also reversed appellant's conviction for two felony counts of inducing panic and remanded the case to the lower court to enter a judgment convicting appellant of two misdemeanor counts of inducing panic. *Further, this court found that appellant's sentence of 42½ years in prison was grossly disproportionate to the severity of his offenses.* * * *
>
> In March 2011, the Supreme Court issued a judgment entry stating, in part: "'This cause is remanded to the court of appeals for further consideration in view of our decision in *State v. Johnson*, [128 Ohio St.3d 153, 2010 Ohio 6314, 942 N.E.2d 1061].'"
>
> Thus, our task is to consider whether the Ohio Supreme Court's decision in *Johnson* affects our original holding in *Sutton I*, where we merged Sutton's convictions for felonious assault and attempted murder.

(Emphasis added.) *State v. Sutton*, 8th Dist. Cuyahoga No. 90172, 2011-Ohio-2249, ¶ 1, 3-4 ("*Sutton III*"), citing *Sutton I*.[2] We determined that the trial court "erred in

[2] The Ohio Supreme Court denied the appeal in *Sutton I*, accepted the state's cross-appeal on allied offenses and remanded the case in *State v. Sutton*, 128 Ohio St.3d 351, 2011-Ohio-736, 944 N.E.2d 233 ("*Sutton II*").

failing to merge the felonious assault and attempted murder convictions as to each of the four victims" and remanded the case to the trial court. *Sutton III* at ¶ 10.

{¶ 31} On remand, in spite of this court's statement in *Sutton I* that Sutton's 42 and one-half year sentence "was grossly disproportionate to the severity of his offenses" in violation of the Eighth Amendment's prohibition of cruel and unusual punishment, the trial court reduced Sutton's sentence by a single year. The state elected to proceed on the attempted murder counts. Sutton received

> ten years for the attempted murder of Kenneth Tolbert, ten years for the attempted murder of Christopher Lovelady, eight years for the attempted murder of Kevin Tolbert, eight years for the attempted murder of Leonard Brown, five years for failure to comply, and six concurrent months for two counts of inducing panic. The court further ordered the attempted murder and failure to comply counts run consecutive to each other but concurrent to the two counts of inducing panic *for a total of 41½ years in prison*.

(Emphasis added.) *State v. Sutton*, 8th Dist. Cuyahoga No. 97132, 2012-Ohio-1054, ¶ 5 ("*Sutton IV*"). The judgment was affirmed. *Id*. The Ohio Supreme Court declined jurisdiction. *State v. Sutton*, 132 Ohio St.3d 1534, 2012-Ohio-4381, 974 N.E.2d 1210.

{¶ 32} In *State v. Sutton*, 2016-Ohio-7612, 73 N.E.3d 981 (8th Dist.) ("*Sutton V*"), Sutton appealed the trial court's denial without a hearing of Sutton's motion for leave to file a motion for new trial based on newly discovered evidence under Crim.R. 33.

> On August 21, 2015, appellant filed an inartfully titled motion for leave to file a motion for new trial. In all, he submitted transcripts of interviews of four purported witnesses, Maelynn Colvin, Vanetta

> Redding, Dovonna Corothers, and Greg Jones; along with a written statement from Tyrell Bonner.

Id. at ¶ 3.

{¶ 33} Maelynn Colvin ("Colvin") stated she was leaving a Cleveland night club "with a convoy of cars" that was led by a "gold vehicle" "when a police car pulled out of a gas station at East 55th Street and Woodland Avenue, and attempted to stop the car in front of Colvin's." *Id.* at ¶ 4. "That car was occupied by appellant and three other people." Colvin said that the "gold vehicle that was leading their convoy was the one whose occupants were responsible for any gunshots" and "[s]he identified Willie Wayne Moore as the individual in that gold vehicle." *Id.*

{¶ 34} Vanetta Redding ("Redding"), the front passenger in Colvin's car, confirmed that Sutton's car, Colvin's car, and a third car in the caravan stopped for snacks at a gas station at the Intersection. The gold car continued to move on and did not accompany them. *Sutton*, 2016-Ohio-7612, 73 N.E.3d 981, at ¶ 5 (8th Dist.).

> The three cars left the parking lot after getting food, and the gold car rejoined the convoy in the lead again. About five minutes after getting back on the road, a police cruiser came up from behind and pulled appellant's vehicle over. Redding did not witness any gunfire coming from appellant's vehicle and stated that she heard a few gunshots while the group was stopped at the gas station.

Id.

{¶ 35} Rear passenger Dovonna Corothers ("Corothers") affirmed that the gold car was in front of the convoy, left the convoy at the Intersection, and later returned. Corothers could not remember stopping on the way home but did recall

that a police cruiser approached from behind and pulled Sutton's car over as the group was driving home. *Id*. at ¶ 6.

{¶ 36} Tyrell Bonner provided a written statement that the individual identified by Colvin as the driver of the gold car "got into a fight at the club that night and security kicked them out. The fight continued in the parking lot." "'Willie Wayne' threatened those he was fighting with." Sutton "was not involved." *Id*. at ¶ 9.

{¶ 37} The interview transcript of now former Officer Jones revealed that former Officer Jones "took issue with the version of events set forth in the police report" prepared by Officer Lentz and the testimony of Officers Lentz and Keane. *Id*. at ¶ 7. "[Former Officer] Jones indicated that Officer Lentz could not have been truthful in his testimony at trial." *Id*. [3]

{¶ 38} This court affirmed the trial court's denial of the motion without a hearing. The dissent countered that the trial court's failure to hold a hearing on the motion was an abuse of discretion.

> Sutton's support for a new trial was his allegation of a newly discovered *Brady* violation by the police. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme 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, irrespective of the good faith or bad faith of the prosecution."

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[3] In *State v. Jones*, 2015-Ohio-2151, 35 N.E.3d 934 (8th Dist.) (Stewart, J., dissenting), this court affirmed Jones's conviction for one count of rape and one count of kidnapping arising from an incident that occurred in 2012.

Sutton, 2016-Ohio-7612, 73 N.E.3d 981, ¶ 30 (8th Dist.) (Blackmon, J., dissenting). The discretionary appeal was not allowed. *State v. Sutton*, 2017-Ohio-6964, 2017 Ohio LEXIS 1478 (July 26, 2017).

B. Phillips

{¶ 39} On direct appeal in *Phillips*, this court affirmed the trial court's judgment in part, reversed in part, and remanded the case for resentencing. *State v. Phillips*, 8th Dist. Cuyahoga No. 96329, 2012-Ohio-473. Phillips was resentenced to 65 years of incarceration plus a mandatory five years of postrelease control. We affirmed the judgment in *State v. Phillips*, 8th Dist. Cuyahoga No. 98487, 2013-Ohio-1443. The Ohio Supreme Court declined jurisdiction in *State v. Phillips*, 136 Ohio St.3d 1492, 2013-Ohio-4140, 994 N.E.2d 463.

{¶ 40} In 2015, appellants obtained definitive information that Officer Lundy and former Officer Jones possessed information that directly challenges the description of events provided by Officers Keane and Lentz and bolsters the account offered by appellants. The potentially exculpatory and impeaching information was not provided to the defense during the original trial.

{¶ 41} On December 29, 2015, through counsel at the Wrongful Conviction Project of the Ohio Public Defender's Office ("WCP"), Phillips moved for leave to file a motion for a new trial based on newly discovered evidence that was uncovered after the 120-day limit of Crim.R. 33. Phillips also attached statements from former Officer Jones and Officer Lundy secured by the WCP investigator that challenged the veracity of the testimony of Officers Lentz and Keane.

{¶ 42} Phillips also submitted an explanation for the delay in bringing the evidence before the court in the form of:

> an affidavit of Ohio defender wrongful conviction project investigator Larry VanCant II. In his affidavit, VanCant averred that he first interviewed Jones in February 2014. At that time, Jones provided him the information that he would eventually swear to in his November 24, 2015 affidavit. According to VanCant, Jones refused to sign the affidavit or testify on the issue in February 2014 because of a pending criminal case against him at that time. VanCant stated further that he attempted to contact Officer Lundy several times between February 4, 2014 and December 17, 2015, by visiting his last known address, leaving business cards there and speaking with his mother and son to pass his contact information to Officer Lundy. According to the affidavit, Officer Lundy did not contact VanCant until December 17, 2015, at which point VanCant spoke with Officer Lundy about Phillips's case.

State v. Phillips, 2017-Ohio-7164, 95 N.E.3d 1017, ¶ 10 (8th Dist.).

{¶ 43} Phillips argued that "the state's nondisclosure amounted to a suppression of favorable evidence to the accused that resulted in a violation of his due process rights as outlined in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)." *State v. Phillips*, 2017-Ohio-7164, 95 N.E.3d 1017, ¶ 12 (8th Dist.).

{¶ 44} The trial court denied the motion and Phillips appealed. This court determined that the trial court erred:

> Phillips presented evidence in the form of two affidavits from a current and a former Cleveland police officer that, if believed, would seriously call into question the accuracy and truthfulness of Officers Keane's and Lentz's trial testimony. The affidavits further serve as a red flag for a potential *Brady* violation by the prosecution, as on their face they show that the state was aware of potentially material and exculpatory evidence and failed to disclose that evidence to the defense.

Phillips at ¶ 22.

C. Instant appeal

{¶ 45} Sutton contacted the Ohio Innocence Project ("OIP") in the fall of 2017 to request assistance based on the WCP's evidence in Phillips's case. OIP moved for a new trial on December 7, 2017. Phillips's remanded new trial motion was consolidated with Sutton's case. The trial court held a hearing on the motions and, on May 23, 2018, granted leave to file the new trial motions.

{¶ 46} Sutton and Phillips filed the new trial motions on May 31, 2018. After a hearing, the trial court denied the motions on June 3, 2019.

> [U]pon close scrutiny as to the believability of the alleged new evidence, as has been required by the court of appeals in its remand, this Court cannot conclude that Jones's assertions are credible. In fact, closely examining all the testimony at trial and in the motion hearing, the potentially exculpatory information from Jones is not credible, not sufficiently corroborated by Lundy, and at best is mistaken to a point that would not be inconsistent with evidence jurors have previously considered. If this new evidence is not to be believed, then it [sic] evidence jurors have previously considered. If this new evidence is not to be believed, then it follows that the state did not have it and could not have disclosed it prior to trial as required by *Brady*.

Journal entry and Opinion No. 108982954, p. 11 (June 3, 2019).

{¶ 47} This appeal ensued.

IV. Assignments of Error

{¶ 48} Phillips assigns as error the following:

> I. The trial court erred in denying Phillips's motion for new trial. Crim. R. 33(A)(2) and (6); Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988); *State v. Glover, et. al.* 8th Dist. Cuyahoga Nos. 102828,102829,102831, 2016-Ohio-2833.

> II. The trial court erred in holding that Phillips failed to demonstrate a Brady violation. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); State v. Johnston, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988); *State v. Glover, et al.*, 8th Dist. Cuyahoga Nos. 102828, 102829, and 102831, 2016-Ohio-2833.

{¶ 49} Sutton echoes Phillips's assigned errors via the single assignment of error that the trial court erred in denying Sutton's motion for a new trial. Sutton also cites similar underlying issues and arguments for review:

> A trial court errs when it makes factual findings that are not supported by competent, credible evidence.
>
> The state violates *Brady v. Maryland*, 373 U.S. 83 (1963), when it suppresses the accounts of police officers who directly contradict the state's trial evidence.
>
> A trial court errs in failing to consider the weakness of the state's case at trial in determining whether suppressed evidence is material under *Brady*.
>
> A trial court errs when it discounts exculpatory evidence by making adverse credibility determinations, thereby invading the province of a jury.
>
> A trial court errs when it fails to consider the cumulative weight of newly discovered evidence in adjudicating a new-trial motion.

{¶ 50} Based on the congruence of the facts, arguments, evidence, and complicity claims underlying the convictions of the appellants, we combine the assigned errors for analysis.

V. Standard of Review

{¶ 51} Appellants argue that the parties are entitled to a new trial under (1) Crim.R. 33(A)(2) and (6); (2) that appellants' right to due process of law has been

infringed as provided by the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution; and (3) that the new evidence is exculpatory and impeaching in violation of *Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988); *State v. Glover*, 2016-Ohio-2833, 64 N.E.3d 442 (8th Dist.).

{¶ 52} Crim.R. 33(A) provides that a defendant may be granted a new trial upon motion where one of the listed factors exist and that factor materially affects the defendant's substantial rights. Appellants cite Crim.R. 33(A)(2), misconduct of the prosecuting attorney or the witness for the state and Crim.R. 33(A)(6), that the newly discovered evidence is material and could not have been discovered with reasonable diligence per Crim.R. 33(A)(6).

{¶ 53} Crim.R. 33(E)(5) adds that a new trial may not be granted, verdict set aside, or judgment of conviction reversed for any cause "unless it affirmatively appears from the record that the defendant was prejudiced thereby or was prevented from having a fair trial." *Id*.

{¶ 54} As we stated in *State v. Magwood*, 8th Dist. Cuyahoga No. 108155, 2019-Ohio-5238, ¶ 19,

> *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), governs situations when the state withholds evidence that tends to exculpate a criminal defendant. "When the prosecution withholds material, exculpatory evidence in a criminal proceeding, it violates the due process right of the defendant under the Fourteenth Amendment to a fair trial." *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988). *Brady* violations may be found regardless of whether the defense requested the evidence and "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, at 87.

Id.

{¶ 55} In addition,

> [f]or *Brady* purposes, the United States Supreme Court "disavowed any difference between exculpatory and impeachment evidence * * *." *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "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." *Giglio*, 405 U.S. 150, 154, 92 S.Ct. 736, 31 L.Ed.2d 104, quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Id. at ¶ 21.

{¶ 56} There are three elements of a *Brady* violation: "(1) evidence at issue must be favorable to the accused because it is exculpatory or impeaching; (2) evidence must have been willfully or inadvertently suppressed by the State; and (3) prejudice ensued." *State v. McGuire*, 8th Dist. Cuyahoga No. 105732, 2018-Ohio-1390, ¶ 18.

{¶ 57} "'[E]vidence 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.'" *Magwood* at ¶ 22, quoting *Giglio* at 154, quoting *United States v. Bagley*, 473 U.S. at 682, 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." *State v. Johnston*, 39 Ohio St.3d 48, 48, 529 N.E.2d 898 (1988), citing *Bagley* at 667.

{¶ 58} In addition, we may also consider any adverse effect from nondisclosure of the evidence

> 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.

Bagley at 683.

{¶ 59} Also to be considered is the "the cumulative effect of all nondisclosures in determining whether reversal is required." *State v. Glover*, 2016-Ohio-2833, 64 N.E.3d 442, ¶ 34 (8th Dist.), citing *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "Whereas each bit of omitted evidence standing alone may not be sufficiently material to justify a new trial, the net effect, however, may warrant a new trial." *Id.*, citing *State v. Larkins*, 8th Dist. Cuyahoga No. 82325, 2003-Ohio-5928, ¶ 33, citing *Kyles* at 434.

{¶ 60} While generally this court's review of the grant or denial of a Crim.R. 33 new trial motion is for an abuse of discretion, where a *Brady* materiality question is concerned, we employ "'a due process analysis rather than an abuse of discretion test because the issue on review concern[s] [the defendant's] due process right to a fair trial, namely the suppression by the prosecution of evidence favorable to [the defendant].'" *State v. Smith*, 2d Dist. Montgomery No. 27853, 2018-Ohio-4691, ¶ 24, quoting *State v. Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898 (1988). *See also State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405, 927 N.E.2d 1133,

¶ 35 (7th Dist.) (A new trial motion under *Brady* "utilizes a due process analysis rather than an abuse of discretion analysis used for motions for a new trial.").

{¶ 61} Our "'standard of review for the materiality of a purported *Brady* violation is de novo because it presents a mixed question of law and fact.'" *Glover*, 2016-Ohio-2833, 64 N.E.3d 442, ¶ 35 (8th Dist.), quoting *United States v. Phillip*, 948 F.2d 241, 250 (6th Cir.1991). "Under a de novo standard of review, we give no deference to a trial court's decision." *Brownlee v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212, ¶ 9, citing *Akron v. Frazier*, 142 Ohio App.3d 718, 721, 756 N.E.2d 1258 (9th Dist.2001). Generally, this court defers to a trial court's factual findings on issues of credibility that are supported by the record. *Glover* at ¶ 38.

VI. Discussion

{¶ 62} Appellants charge that the trial court's findings are unsupported by the record and that the trial court's findings as to credibility are based on speculation and misstatements of the record. We find that the arguments have merit.

{¶ 63} As we have stated, our review of a trial court's ruling on a new trial motion based on a *Brady* violation is de novo. The relevant inquiry is whether due process was violated. We consider here whether the newly discovered information constitutes materially exculpatory or impeachment evidence so that the outcome of the proceedings would reasonably have been different.

A. New Trial Hearing

{¶ 64} Phillips's new trial motion highlighted the state's emphasis to the jury during trial on the inability of the defendants to disprove the testimony of the highly creditable officers. The state argued at trial:

> So you in this case, you judge credibility. And on one hand you have two highly decorated veteran Cleveland police officers who testified about what they saw and they are very clear. And it's very opposite as to what the defendants' version is. It's completely different. And the defendants say the police are lying and that they are in this conspiracy to frame them because basically they are too lazy to go over the real people in the gold car.
>
> * * *
>
> I guess I will leave you with this. When you consider each and every one of these offenses in the indictment, and you apply the facts that we provided you, and you look at them separately and distinctly, and you really judge the credibility of the defense witnesses, versus Officer Michael Keane, Officer Daniel Lentz, and how they testified, and the manner they testified, that is really a big part of this case.
>
> * * *
>
> Ladies and gentlemen of the jury, you look at motivation. Defense obviously have a clear bias to protect themselves. But they can't explain why the Cleveland police officers would try to frame them and lie about them. Now, the attorneys make much of that. Yet they testified to that and they can't explain it and they took no action, provided no witnesses. It is just an allegation out there that boomeranged right back on them and they are hoping you ignore it.

(Tr. 1342-1347; 1350-1351; 1417-1418.) Appellants stress that the entire case was grounded on the testimony of the two officers. The state had no other evidence.

{¶ 65} The new trial hearing was held on January 30, 2018, 12 years after the incident. Distilled, former Officer Jones and Officer Lundy testified that Officers

Keane and Lentz could not have witnessed appellants shoot the Lincoln victims and that there were no shots fired during the subsequent foot pursuit.

{¶ 66} Officer Lundy appeared under subpoena. A 29-year police officer who was still employed by the force, Officer Lundy testified that he and former Officer Jones, Officer Lundy's partner for 18 years, were based in the usual weekend spot at the Marathon station located in the Intersection on the night of the incident. Contrary to the trial testimony of Officers Keane and Lentz that they appeared at the Intersection in response to a request for crowd assistance, Officer Lundy testified that no request for assistance was placed "until the actual incident happened." (New tr. 131.)

{¶ 67} Officer Lundy explained that Officers Keane and Lentz dropped by the Marathon station on the night of the incident. The four officers were sitting in their cars by the gas pumps in the Marathon station when Officers Keane and Lentz told former Officer Jones and Officer Lundy about a shooting that occurred earlier that evening. Thereafter, Officer Lundy saw Officers Keane and Lentz drive to the other side of the large Marathon station parking lot. Officer Lundy and former Officer Jones were sitting in the Marathon lot by the middle pumps, facing westbound toward the minimart. "Our back was actually to East 55th Street. We could see Woodland to our left and East 55th northbound to our right." (New tr. 155.)

{¶ 68} About one-half hour after former Officer Jones and Officer Lundy talked with Officers Keane and Lentz, Officer Lundy and former Officer Jones heard

shots. (New tr. 152.) Officer Lundy said, "Everybody was scattering, cars flying all over the place. It was chaos. * * * I radioed in for backup. And then we observed two cars leaving at a high rate of speed out of the parking lot." (New tr. 133.) Officer Lundy said the shots sounded like they were fired in the gas station parking lot, and that two cars were leaving the area quickly. Officer Lundy and former Officer Jones pursued a gold car that exited onto Woodland Avenue while Officers Keane and Lentz exited the station and pursued the other car[4] down Kinsman.

{¶ 69} Officer Lundy and former Officer Jones were unable to catch the gold car but "[w]e definitely thought that the gold car was 'involved' in the shooting." (New tr. 134.) They abandoned the pursuit to assist Officers Keane and Lentz. Former Officer Jones and Officer Lundy arrived at East 65th Street just in time to see the occupants exit the vehicle but did not observe any weapons. Former Officer Jones and Officer Lundy pursued and secured one of the defendants. Sutton, the driver, remained with the vehicle. Officer Lundy and former Officer Jones talked with the defendants during transport to the precinct because former Officer Jones "knew the guys" from former Officer Jones's "off duty [work] at John F. Kennedy High School." (Tr. 136.) The defendants told the officers that they were not involved in anything.

{¶ 70} Officer Lundy did not hear shots fired during the foot pursuit and Officer Lundy did not recall that former Officer Jones testified at the original trial.

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[4] Officer Lundy could not see the type of vehicle because it was dark and he only saw the taillights.

(New tr. 150.) Officers Keane and Lentz never mentioned that they were shot at by the defendants and Officer Lundy and former Officer Jones did not hear about it from any other officers. Extra security is exercised during the arrest of suspects who fire at officers and additional paperwork is required. There was no extra security involved in the arrests in the case. Officer Lundy was not approached by anyone from the police department about what he witnessed that night though the department knew that former Officer Jones and Officer Lundy were present.

{¶ 71} Officer Lundy stated his belief that the shots were fired in the area of the Marathon station and that Officer Lentz and Officer Keane, "exited out of the parking [lot] onto Woodland up Kinsman." (New tr. 157.) "We pulled out first and went after the first car and went down Woodland. But we saw Lentz and them flying out, seeing them out the right side of my eye." *Id*.

{¶ 72} Former Officer Jones testified that he left the police force in 2014 when he was convicted of rape and received a nine-year sentence. Former Officer Jones confirmed that Officers Keane and Lentz pulled up next to former Officer Jones and Officer Lundy who were sitting in their car at the Marathon station. They told former Officer Jones and Officer Lundy about a shooting on the westside where someone was shot in the head. "[T]hen I saw them pull on the other side of the gas station and park. And then a little while later is when we heard the shots and saw the cars." (New tr. 158.) "I heard the shots, I looked up, I saw two cars' taillights gone (indicating)." (New tr. 159.) Former Officer Jones stated that he was standing outside of the police car when the shots were fired, and that Officer Lundy radioed

dispatch. One of the cars drove away so fast that former Officer Jones and Officer Lundy could not catch it and the other car turned right off of Woodland Avenue onto East 65th Street. Former Officer Jones did not recall that one car went down Kinsman and the other on Woodland as Officer Lundy had testified but confirmed that Officers Keane and Lentz were not behind the cars when the shots were fired.

{¶ 73} Former Officer Jones confirmed that he and Officer Lundy arrived to see the suspects "bail" out of the Chevy but Sutton remained. "From what I remember, yeah. Because he said he didn't have no reason to run and he just sat in the car." (New tr. 160.) The suspects did not appear to have weapons or anything else in their hands as they exited the vehicle. Former Officer Jones and Officer Lundy pursued a suspect across the street to the King Kennedy housing complex. Former Officer Jones added that the "foot pursuits were short less than about 10 minutes before" everyone was in custody. (New tr. 138.) Sutton was still sitting by the Chevy when they returned from the foot pursuit. (New tr. 160.) Former Officer Jones did not hear shots or see flashes indicating that guns were fired during the pursuit. Former Officer Jones did not pull his gun.

{¶ 74} Former Officer Jones also confirmed that he and Officer Lundy were acquainted with the Chevy's occupants due to former Officer Jones's work as a security guard at John F. Kennedy High School. The officers testified the young men maintained their innocence as they were being transported to the precinct and insisted that the occupants of another car committed the shooting.

{¶ 75} Officers Keane and Lentz handled the police report and former Officer Jones did not see it. "I just assumed that they wrote what happened that night." (New tr. 142.) Former Officer Jones also said that he and Officer Lundy were on the witness list for the case but when they arrived and informed Detective Hartman that the defendants did not shoot at officers that night, they were told that they could leave.

{¶ 76} During his rebuttal testimony at the original trial, former Officer Jones did not discuss Officer Lentz and Officer Keane's location before the shooting occurred or whether the defendants shot at the police during the foot pursuit during his rebuttal testimony because he was not asked those questions. (New tr. 145.)

{¶ 77} Former Officer Jones explained that he first met with WCP investigator Larry VanCant ("Investigator VanCant") in 2014 while his rape case was pending. That was the first time that former Officer Jones reviewed the police report and the statements of Officers Keane and Lentz. Former Officer Jones was surprised about several items.

> First of all, about car doing a turn, doing a 360 in the street, and shots being fired, sort of like by the gas station. And what else? Yeah. And everybody having guns when they jumped out of the car, you know. So those things.

(New tr. 148.) Former Officer Jones also talked with Sutton's investigator Pavlish and was visited by members of internal affairs and the prosecutor's office. Former Officer Jones did not speak with Phillips or any of his family members prior to former Officer Jones's incarceration.

{¶ 78} Former Officer Jones first heard from Phillips's family during his incarceration in Toledo between November 2014 and August 2016. Former Officer Jones did not know the name of the young lady who asked former Officer Jones if he would tell the truth about what happened that night. Former Officer Jones was not contacted by the young lady or Phillips's family prior to his arrival at the Toledo Correctional Institution.

{¶ 79} Former Officer Jones was not willing to testify until after his trial "[b]ecause I felt like I had a lot on my plate and I didn't want to be — anything else on my plate at that time because that was a lot for me. So that's why." (New tr. 173.) "I wanted to focus solely on my trial." *Id*. Former Officer Jones would have appeared if subpoenaed because he would have been legally required to do so. (New tr. 173, 178.)

{¶ 80} Former Officer Jones also responded to questions by the trial court. Former Officer Jones and Officer Lundy were "probably parked right in the middle" of the rows of pumps. (New tr. 191.) Former Officer Jones did not remember which way their car was facing but believed that Officers Keane and Lentz pulled up on the passenger's side of the car that former Officer Jones and Officer Lundy were driving whose car was "probably facing the minimart." (New tr. 192.) Officers Keane and Lentz "pulled out around the crowd, like along East 55th, and parked like in the little grassy area on the other side of the gas station * * * north of where we were at." *Id*.

{¶ 81} When the shots were fired, "I think I was standing right in front of the minimart." (New tr. 193.) "I was facing the crowd. Because I think I was talking to

some people and then heard the shots. I remember looking up and seeing the cars jet down the street." *Id*. The cars were headed east on Woodland by Rally's restaurant on the northeast corner of East 55th across the street from the Marathon.

{¶ 82} Former Officer Jones did not see where the two cars were before he heard shots. "We heard the shots and when I looked up that's about where they were at. They were going so fast." (New tr. 194.) Former Officer Jones did not know where Officers Keane and Lentz were located at that moment, "I just remember seeing their car pull out, too. And you know, it was so long ago, but I want to say we were kind of getting down there, getting down Woodland around the same time." (New tr. 195.)

{¶ 83} Phillips's original trial counsel, the late Richard Agopian ("Agopian"), provided an affidavit executed shortly before his death that averred the state failed to disclose the potentially exculpatory information possessed by former Officer Jones and Officer Lundy.

> Officers Keane and Lentz were the prosecution's primary witnesses, and the only witnesses to testify that Mr. Phillips and his codefendants shot at either the victims' car or the police during the May 29, 2006, incident. Thus, the information provided in [the former Officer Jones and Officer Lundy affidavits] would have been critical to challenging Officer Keane's and Officer Lentz's accounts of what occurred.
>
> Two of Mr. Phillips's codefendants were acquitted after trial. It is my belief that had the exculpatory evidence contained in Mr. Jones's and Officer Lundy's affidavits been disclosed by the prosecution prior to Mr. Phillips's trial, the result of Mr. Phillips's trial may have been different.

Agopian affidavit, p. 2 (Jan. 22, 2018).

{¶ 84} Agopian's sentiments were echoed by the multiple defense trial and appellate counsel who testified at the hearing. Each of the attorneys testified that they did not have the exculpatory information and the appellate counsel stated they focused on the record on appeal. All counsel opined that the evidence was improperly withheld and exculpatory under *Brady*.

{¶ 85} Tidmore's trial counsel Mark Mariotti ("Mariotti") said that the defense counsel would have shared the former Officer Jones and Officer Lundy information if known. The police officers were on the witness list, but "it's just not general practice to interview police officers prior to trial." (New tr. 209.) Mariotti would have used the exculpatory information from former Officer Jones and Officer Lundy at trial. (New tr. 209.)

{¶ 86} Criminal defense attorney Jay Schlachet ("Schlachet"), admitted to practice in 1979, represented Creel at trial.

> I would be lying to you if I said I have any independent recollection of the discovery. I mean, it was a pretty extensive file. We had — I think the judge knows better, but I think we had probably a 16 week jury trial. So there was a lot of information. There was a lot of material that probably would have been in my file.

(New tr. 216.)

{¶ 87} On the issue of the affidavits' content, Schlachet did not recall hearing the information before trial. Schlachet was also surprised to learn that former Officer Jones and Officer Lundy did not hear shots since the testimony at trial was that Officer Lentz "was the purported victim" of shooting during the chase. (New

tr. 219.) Schlachet was positive that the defense counsel did not have the information from former Officer Jones and Officer Lundy.

> I'm quite certain. I've done many cases with Mr. Agopian and have the utmost respect for him. He's probably one of the finest defense lawyers I've ever met with and worked with. He would have been all over this, as they say. It would have been something he would have focused on.

(New tr. 220-221.)

{¶ 88} Finally, as to former Officer Jones's rebuttal appearance

> Counsel: Would you have any reason to believe that [Former Officer Jones] had a different account from what officers Lentz and Keane had testified to based on what you had been given in the record?
>
> Schlachet: No reason to believe at all.

(New tr. 227.)

{¶ 89} Criminal defense attorney William G. Guarnieri ("Guarnieri"), who represented Sutton in the case, testified that he has been a criminal defense attorney for 50 years. (New tr. 236.) Guarnieri agreed that evidence that Officers Keane and Lentz were not where they said they were when the shots were fired into the Lincoln would have cast doubt on the officers' testimony. Attorney Agopian was unable to appear due to illness. The parties agreed to admit his affidavit into evidence.

{¶ 90} On June 3, 2019, in a 12-page opinion, the trial court denied the motions.

> [U]pon close scrutiny as to the believability of the alleged new evidence, as has been required by the court of appeals in its remand, this Court cannot conclude that Jones's assertions are credible. In fact, closely examining all the testimony at trial and in the motion hearing, the potentially exculpatory information from Jones is not credible, not sufficiently corroborated by Lundy, and at best is mistaken to a point

> that would not be inconsistent with evidence jurors have previously considered. If this new evidence is not to be believed, then it [sic] evidence jurors have previously considered. If this new evidence is not to be believed, then it follows that the state did not have it and could not have disclosed it prior to trial as required by *Brady*.

Journal entry and Opinion No. 108982954, p. 11 (June 3, 2019).

{¶ 91} Sutton and Phillips appeal.

B. Discussion

{¶ 92} Appellants argue that the trial court's findings are: (1) unsupported by competent credible evidence, (2) based on speculation and misstatements of the record, and (3) erroneously dismissive of exculpatory and/or impeaching material evidence as "merely inconsistent." We find that the arguments have merit.

{¶ 93} We reiterate that our review of a trial court's ruling on a new trial motion based on a *Brady* violation is a due process analysis and the issue of materiality under *Brady* is *de novo*. The relevant inquiry is whether "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Magwood*, 8th Dist. Cuyahoga No. 108155, 2019-Ohio-5238, at ¶ 19, quoting *Giglio*, 405 U.S. 150, 154, 92 S.Ct. 736, 31 L.Ed.2d 104, quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.*

{¶ 94} The trial court focused on perceived conflicts between the affidavits and new trial testimony of former Officer Jones and Officer Lundy. The trial court concluded that "[d]efendants set forth a list of assertions of fact in their motion most

of which are merely inconsistent, but not in fact exculpatory with the testimony adduced in this matter." Journal entry and Opinion No. 108982954, p. 4 (June 3, 2020).

{¶ 95} Next, the trial court lists several "facts asserted by defendants which were never asked at trial and not necessarily inconsistent with [the] trial testimony." *Id*. at p. 4. The cited facts include that: (1) Officers Lundy, Keane, and Lentz and former Officer Jones were at the Marathon station before the shots were fired; (2) former Officer Jones and Officer Lundy believed the gold car that sped away was involved in the shooting; (3) former Officer Jones and Officer Lundy saw the defendants exit the car but did not see guns in their hands; (4) former Officer Jones and Officer Lundy did not hear shots or see strobing during the foot pursuit; and (5) former Officer Jones and Officer Lundy did not hear that Officer Lentz and Officer Keane alleged the defendants shot at them.

{¶ 96} The trial court concluded that "[w]hile some of these facts may be inconsistent with some trial testimony, none of these facts are in fact substantially material to the outcome reached by the jurors." *Id*. The determinant of materiality is whether there is a reasonable probability that the result of the proceeding would have been different if the information had been disclosed to the defense. *Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*.

{¶ 97} The trial court's focus on credibility, corroboration, and believability discounts the key issue of nondisclosure. Every counsel who testified at the new trial

hearing orally or by affidavit stated that the disclosure of the former Officer Jones and Officer Lundy information would have impacted the defense's trial preparation and strategy. "Keane and Lentz were the * * * only witnesses to testify" that the defendants "shot at either the victims' car or the police." Agopian affidavit. "The information * * * would have been critical to challenging Officer Keane's and Officer Lundy's accounts of what occurred." *Id.*

{¶ 98} We find that the facts are indeed substantially material. The entire account of events underlying the convictions in these cases is directly impacted by the former Officer Jones and Officer Lundy evidence. We also cannot say that immaterial discrepancies in testimony ten years after the incident impinges credibility. Both officers commented during their testimony that it was difficult to recall some of the details due to the considerable passage of time.

{¶ 99} It is significant that, to bolster the lack of physical evidence, the state emphasized to the jury the credibility of the "highly decorated veteran Cleveland police officers" versus the criminal defendants who claimed that they were being framed. (Tr. 1346-1347.) Also underscored by the state was that the defendants "provided no witnesses" to explain why Officer Lentz and Officer Keane would be untruthful. (Tr. 1417-1418.) We find that the evidence offered by former Officer Jones and Officer Lundy provides that opportunity.

{¶ 100} The newly discovered evidence offered by former Officer Jones and Officer Lundy, experienced, reputable officers who were in good standing at the time of the trial, may have been of equal or greater influence to the jury thus directly

impacting the outcome of the cases. *See Magwood*, 8th Dist. Cuyahoga No. 108155, 2019-Ohio-5238, ¶ 20; *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 736, 31 L.Ed.2d 104 (1972); *Napue*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217. Officer Lundy's testimony, a reliable police officer who testified "over a hundred times" during his career and twice on behalf of a defendant, conflicts with the testimony of Officers Keane and Lentz on most, if not all, of the material elements underlying these convictions. (New tr. 127.)

{¶ 101} The information provided by former Officer Jones and Officer Lundy directly refutes the testimony of Officers Keane and Lentz beginning with the timing of and reason for their arrival at the Intersection.[5] The officers also deny the claim by Officers Keane and Lentz that the Chevy engaged in a reckless u-turn directly in front of them in the middle of the essentially gridlocked traffic.

{¶ 102} Officers Keane and Lentz advised the jury that the gold car drove away at a high speed due to fear of the gunfire and maintained the shots could not have emanated from the gold car. There is no dispute that Officer Lundy and former Officer Jones agreed the shots were fired prior to the pursuit of the alleged suspects and that the gold car was directly involved in the shooting. This testimony supports that of appellants'.

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[5] According to the Journal entry and Opinion No. 108982954 (June 3, 2020), "Lentz never testified that Lundy called for assistance, merely that he heard a broadcast of a massive crowd and by the inflection of his voice, Lentz believed they could be of assistance with the crowd." Journal entry and opinion No. 108982954, p. 11 (June 3, 2019), p. 5, citing tr. 716.

{¶ 103} One refrain remains constant throughout the testimony of Officer Lundy and former Officer Jones. Officers Keane and Lentz were not behind the Chevy so they could not have witnessed the shootings and no shots were fired by the defendants during the foot pursuit.

{¶ 104} The total lack of physical evidence is extremely disturbing. Not a single gun, bullet hole, bullet casing, or evidence that any guns were present or fired by the defendants though officers combed the area. Officers Keane and Lentz stated the Chevy's occupants exited the vehicle with guns. Former Officer Jones and Officer Lundy also witnessed the defendants' exit but observed no guns or other objects. Officer Lentz claimed that two of the occupants shot at him and that he saw gun flashes from at least two small caliber and one large caliber weapon. Former Officer Jones and Officer Lundy did not hear any shots. Former Officer Jones and Officer Lundy also confirmed that Sutton remained with the Chevy. Officers Keane and Lentz said that he did not.

{¶ 105} Then there is the very limited GSR evidence. The alleged GSR, that could have been from the brake work that had just been performed or even from fireworks someone handled during the Memorial Day weekend, was miniscule. There was a spot in the Chevy and one on Phillips' hand. This is true though Officers Keane and Lentz imputed multiple weapons to the suspects that were fired during the pursuit and the shooting of the Lincoln's occupants had just occurred. Experts for both parties said the GSR did not prove that Phillips fired a weapon and could have been acquired during transport in the police vehicle. *See Glover*, 2016-Ohio-

2833, 64 N.E.3d 442, ¶ 49. Again, former Officer Jones and Officer Lundy observed no weapons and heard no gunshots.

{¶ 106} Even further to the issue of inconsistencies, a review of the trial transcript reveals conflicts between the testimony of Officers Keane and Lentz only a year after the incident versus the more than ten-year period that preceded the statements of Officer Lundy and former Officer Jones. Despite those discrepancies, the jury determined that the testimony from the officers was sufficient to convict Phillips and Sutton.

{¶ 107} It is widely accepted that testimony by police officers are perceived to carry great weight. For example, a police officer may not give an opinion on the truthfulness of an accused. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 122. It is also true that "[a] jury tends to trust a police officer's perceptions, similar to that of an expert witness." *State v. Brown*, 2016-Ohio-1358, 62 N.E.3d 943, ¶ 33 (11th Dist.), citing *State v. Root*, 11th Dist. Ashtabula No. 2003-A-0043, 2004-Ohio-2439, ¶ 31. "As a result, such testimony infringes upon the fact-finding function of the jury and affects the fundamental fairness of the trial." *Id.*

{¶ 108} In this case, Officers Keane and Lentz allegedly provided admissible eyewitness testimony regarding the shooting of the victims and attempted shooting of Officer Lentz.[6] The jury was denied the opportunity to hear the eyewitness

[6] The admissible testimony excludes the elements of opinion laced throughout the testimony of Lentz and Keane that imputed intention or motive to the gold car occupants and the defendants, such as that the gold car raced from the scene due to fear and could not have been involved in the shooting, or that the Chevy was weaving through traffic as if trying to catch up to someone.

testimony of former Officer Jones and Officer Lundy whose evidence directly challenges those statements. It logically follows that conflicting eyewitness evidence from other equally reliable officers at the scene may very well, in the eyes of a jury, provide a counterbalance to the weight of the officers' testimony at trial.

{¶ 109} We find that there is a reasonable probability that had the defense possessed the newly discovered material, exculpatory and impeaching evidence, the outcome of the proceeding would have been different. *Magwood*, 8th Dist. Cuyahoga No. 108155, 2019-Ohio-5238, ¶ 22, citing *Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481.

{¶ 110} "The purpose of our jury system is to impress upon the community as a whole that a verdict is given in accordance with the law by persons who are fair and impartial." *Cordova v. Emergency Professional Servs.*, 2017-Ohio-7245, 96 N.E.3d 906, ¶ 2 (8th Dist.), citing *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Stated another way, "the quest is for jurors who will conscientiously apply the law and find the facts." *Id.*, citing *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

{¶ 111} The trial court next determined that the "only material evidence which may have affected the outcome of the trial was the location of Lentz and Keane when the shots occurred." Journal entry and Opinion No. 108982954, p. 6 (June 3, 2019). "Officer[s] Lundy and Jones observed" the car of Keane and Lentz "exit the gas station after shots were fired." Journal entry and Opinion No. 108982954, p. 7

(June 3, 2019), citing the affidavits and the testimony of Jones and Lundy. Jones also stated that he "could still see Officers Keane and Lentz at the Marathon." *Id*.

{¶ 112} The trial court distilled the issue to "whether Jones and Lundy had this information" and, in that case, "the state violated *Brady* by failing to disclose it, which would be misconduct pursuant to Crim.R. 33 and the basis for a new trial." *Id.* "Whether or not Jones and Lundy had this information would also depend on whether or not it's reliably accurate and true." *Id*. In other words, if the trial court determined that the new evidence was reliably accurate and true, former Officer Jones and Officer Lundy effectively had the information and a *Brady* violation was established.

{¶ 113} The trial court cited this court's decision in *State v. Luckett*, 144 Ohio App.3d 648, 655, 761 N.E.2d 105 (8th Dist.2001), for the premise that an appellate court must afford great deference to the trial court's judgment in new trial appeals.

> Notably, a motion for new trial must be filed with the trial judge who presumably heard the witnesses testify and had an opportunity to assess their demeanor. "The discretionary decision to grant a motion for a new trial is an extraordinary measure which should be used only when the evidence presented weighs heavily in favor of the moving party." *State v. Luckett*, 144 Ohio App.3d 648, 655, 761 N.E.2d 105 (8th Dist.2001). "The deference shown to the trial court in such matters is premised in large part upon the familiarity of the trial court with the details of the case as a result of having presided over the actual trial." *Id*. and in reviewing the trial court's decision on such matters, '"[a] more searching inquiry is required' if the new trial is granted than if denied * * * because of 'the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function.'" *Id*., quoting *Tri Cty. Industries, Inc. v. Dist. Of Columbia*, 200 F.3d 836, 840 (D.C.Cir.2000).

Journal entry and Opinion No. 108982954, p. 7 (June 3, 2019).

{¶ 114} The trial court presided over the 2007 trial and, under a different standard of analysis, its findings would receive great deference. However, the reliance on *Luckett* is misplaced. *Luckett* did not involve a *Brady* challenge. We reiterate that this court's task where a *Brady* violation is also involved is to determine whether appellants have been denied due process and our review of the materiality of the new evidence involved is de novo. *Johnston*, 39 Ohio St.3d 48, 60, 529 N.E.2d 898; *Glover*, 8th Dist. Cuyahoga Nos. 102828, 102829, and 102831, 2016-Ohio-2833.

{¶ 115} The trial court questioned former Officer Jones in depth during the new trial hearing and dissected former Officer Jones's credibility in the judgment entry and opinion.

> This case poses a unique set of facts with respect to the posture of a motion for new trial. Defendants have requested a new trial based on the allegedly new evidence provided by a former police officer, Gregory Jones, now incarcerated after being convicted of rape. In most cases, the credibility of an officer as to exculpatory information is rarely challenged, logic would require that the police would not invent information that hurts a change of conviction. However, should our inquiry merely accept apparently exculpatory information regardless of its actual veracity simply because it comes from a police officer. If new information is accepted without scrutinizing its credibility, any police officers or former officer could throw doubt on any conviction after the fact.

Journal entry and Opinion No. 108982954, p. 7 (June 3, 2019).

{¶ 116} Appellants offer that the trial court's credibility findings are based on speculation and misstatements. We have already alluded to the degree of credibility frequently afforded police testimony. Here it is clear that the credibility that former

Officer Jones enjoyed as a police officer who served honorably and was presumed reliable to testify during his tenure as an officer expired upon his conviction. This is ironic where, for example, the testimony of motivated jailhouse informants are routinely offered by the state.

{¶ 117} More importantly, had this information been properly disclosed as appellants complain in this case, former Officer Jones's credibility would not have been tainted by a subsequent unrelated issue. Thus, appellants have been prejudiced by the failure to disclose. *McGuire*, 8th Dist. Cuyahoga No. 105732, 2018-Ohio-1390, at ¶ 18.

{¶ 118} Former Officer Jones responded to the trial court's questions about his motives for coming forward. Former Officer Jones did not know that Officers Keane and Lentz testified that they were eyewitnesses to the incident or that the defendants allegedly shot at the officers until former Officer Jones was presented with a copy of the police report by the investigator in 2014. Former Officer Jones also testified that he did not hold a grudge against the Cleveland Police Department or Cuyahoga County prosecutor's office due to his prosecution, nor did he have any issues with Keane and Lentz. (New tr. 154.) Former Officer Jones also explained that he did not have a personal relationship with Phillips and Sutton other than through his security work at the high school. "Most of the kids knew me. So I think they knew me more than I knew them, but I knew their face[s]." (New tr. 154.)

{¶ 119} As Phillips maintains, "Neither the trial court nor the State identified any nexus between [Jones's] conviction and Jones's affidavit or hearing testimony.

The conviction itself does not render Former Officer Jones unworthy of belief." Phillips's reply brief, p. 2. We agree.

{¶ 120} The trial court additionally found it suspect that: (1) the affidavit was produced after Jones was incarcerated and had corresponded with Phillips; (2) Jones was "visited" by Phillips's female family member; and (3) that Jones said he talked to Lundy who indicated a willingness to help. "When cross-examined on his conversations with Lundy in prison, Jones first said he spoke with Lundy, then said it was email and Lundy did not respond." Journal entry and Opinion No. 108982954, p. 8 (June 3, 2019). The trial court determined that these factors indicate "Former Officer Jones' credibility is suspect as a convicted felon imprisoned as a former police officer." Journal entry and Opinion No. 108982954, p. 8 (June 3, 2019).

{¶ 121} Former Officer Jones met with the WCP investigator in February 2014 during which former Officer Jones first viewed the police report and shared his account of events. However, former Officer Jones did not want to provide a statement until former Officer Jones's pending criminal case was resolved. The investigator took notes at the meeting that were computerized for recordkeeping purposes.

{¶ 122} The investigator met with former Officer Jones again in October 2015 while former Officer Jones was incarcerated in Toledo. The investigator learned that Phillips had corresponded with former Officer Jones to ask whether former Officer Jones would sign an affidavit. Former Officer Jones responded to

Phillips that he would. Copies of the October and April correspondence, the year was not listed therein, were introduced into evidence. The investigator testified that the description of events provided by former Officer Jones in 2014, prior to contact with Phillips, matched the description shared during the October 2015 meeting. The information was provided to WCP and WCP prepared former Officer Jones affidavit for execution.

{¶ 123} The trial court was also concerned that "Jones was visited by a young lady family member of [Phillips] in the prison in Toledo during November 2014." Journal entry and Opinion No. 108982954, p. 8 (June 3, 2019). Former Officer Jones testified that he was "contacted" by a young female related to Phillips at some point during his Toledo incarceration between November 2014 and 2016 who "just asked me would I tell the truth about what happened that night." (New tr. 170.) Former Officer Jones did not testify that the contact was via visit.

{¶ 124} As to the contact with Officer Lundy, former Officer Jones testified that he "probably" contacted Officer Lundy by telephone and email. "I asked him about the case, basically. Asked him had he heard anything about this case." (New tr. 174.) "I didn't hear back from John. Yeah." *Id*. "Well, I sent him an email and he didn't respond back. So I contacted, yeah. I didn't speak with him. I tried to contact him. I did contact him or I thought, you know." *Id*. The confusion may have been due to the passage of time or the fact that former Officer Jones's freedom was on the line at the time the contact attempts took place. We do not agree that the information is material.

{¶ 125} Former Officer Jones also responded to the trial court's inquiry regarding his motive for waiting until after his trial to testify on behalf of Phillips. Former Officer Jones responded, "Because I felt like I had a lot on my plate and I didn't want to be — anything else on my plate at that time because that was a lot for me. So, that's why." (New tr. 173.)

{¶ 126} "As has been discussed above, Jones's credibility is suspect as a convicted felon imprisoned as a former police officer." Journal entry and Opinion No. 108982954, p. 8 (June 3, 2019). Therefore, the trial court speculated, "Lundy's willingness now to help his partner [of 18 years] is considerable motivation for his attempt to corroborate Jones's story."[7] Journal entry and Opinion No. 108982954, p. 8 (June 3, 2019). It is unclear how Officer Lundy's testimony would possibly serve to benefit former Officer Jones. According to the record, former Officer Jones told Investigator VanCant to contact Officer Lundy who would be willing to help Phillips, not to assist former Officer Jones. (New tr. 178.)

{¶ 127} This position is somewhat ironic since Investigator VanCant testified that Officer Lundy was actually reluctant to speak with him. Officer Lundy also made it clear during the hearing that his testimony was under subpoena.

Counsel: Would it be a stretch to say that you're not exactly happy to be here?

Officer Lundy: I answered my subpoena.

(New tr. 127.)

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[7] Arguably, a similar rationale could apply to the willingness of Officer Keane and Officer Lentz to help each other at the trial.

{¶ 128} There is no stated consideration of whether Officer Lundy's willingness or reluctance to testify may have been impacted by his status as a 29-year officer still employed with the Cleveland Police Department and soon approaching retirement. Also not addressed is that more than 12 years had passed since the incident as evidenced by occasional responses by both Officer Lundy and former Officer Jones that they were not sure or could not recall. *See* for example, Officer Lundy's response that "it's been so long ago I don't remember." (New tr. 133.) The adage the trial court employed to support denial of a new trial also supports its grant. "[L]ogic would require that the police would not invent information that hurts a change of conviction." Journal entry and Opinion No. 108982954, p. 8 (June 3, 2019).

{¶ 129} The trial court rejected former Officer Jones's testimony that Officer Lundy and former Officer Jones advised Detective Hartman at the pretrial that nobody shot at the police officers.[8] Detective Hartman reportedly talked with the prosecutor who advised former Officer Jones and Officer Lundy that they may leave. The trial court stated former Officer Jones's testimony "is misleading * * * as further questioning revealed that the conversation with Officer Lundy, former Officer Jones,

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[8] Officer Lundy testified that he did not remember attending the pretrial. (New tr. 147-148.) Officer Lundy was not aware that former Officer Jones testified at the trial as a rebuttal witness. *Id.* However, of material importance, Officer Lundy testified and stated in his affidavit that "[a]t no point did I hear additional shots once the foot pursuit began." Officer Lundy Affidavit at p. 1. Also significant, Officer Lundy never heard anyone talking about the defendants shooting at Officer Keane or Officer Lentz and the arrest protocol normally employed where suspects shoot at police was not implemented.

and Detective Hartman at the pretrial conference was about no one shooting at the police, former Officer Jones was referring to the fact that no one shot at former Officer Jones or Officer Lundy." Journal entry and Opinion No. 108982954, p. 11 (June 3, 2019), citing new tr. 144. Also, "Lundy testified that he did not talk to a prosecutor, only internal affairs years after." *Id.*, citing new tr. 146.[9]

{¶ 130} Former Officer Jones testified that he talked with Detective Hartman who talked with the prosecutor. He assumed the prosecutor did not call them to testify because the prosecutor knew that the testimony of former Officer Jones and Officer Lundy did not support that of Officer Lentz and Officer Keane. "*Because we told him we didn't hear any shots* and he didn't put us on the stand. So[,] I would have to assume he didn't put us on the stand because we had a different testimony than Keane and Lentz." (Emphasis added.) (New tr. 172.) On this point, the trial court ruled "[b]ecause the evidence in its totality does not support Jones's credibility, Jones's assertion, even if construed that he provided information to the prosecutor that no shots were fired at Lentz, likewise is not a violation of *Brady*." Journal entry and Opinion No. 108982954, p. 11 (June 3, 2019). As to these points, the law provides that the knowledge of the police department is imputed to the state. *Glover*, 2016-Ohio-2833, 64 N.E.3d 442, at ¶ 47. Officer Keane, Officer Lentz, Detective Hartman, former Officer Jones, and Officer Lundy were police officers.

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[9] The motion hearing transcript in the record is entitled "Partial Transcript of Proceedings, Volume II of II." The page numbering begins at page 102. At some points in the trial court's journal entry, references to the transcript cites the page number indicated by the .pdf software utilized to view the transcript instead of the number that appears on the transcript.

{¶ 131} Regardless of speculatively imputed motives, Officer Lundy's testimony parallels that of former Officer Jones on a number of key points that directly contradicts the testimony of Officers Keane and Lentz and corroborates the account of events provided by the trial defendants. These points include: (1) Officer Keane and Officer Lentz had not just arrived at the Intersection shortly before the shots were fired; (2) there was no wild u-turn by the Chevy in the middle of the bumper-to-bumper traffic in front of the arriving Officer Keane and Officer Lentz; (2) Officer Keane and Officer Lentz emerged from the Marathon station and began their pursuit after the shots were fired so they were not behind the Chevy to witness the shots; (3) the gold car was present, accelerated rapidly after the shots were fired, and appeared to be directly involved in the shooting; (4) the defendants did not emerge from the Chevy with weapons; (5) no shots were fired during the foot pursuit; and (6) Sutton did not run but remained with the vehicle.[10]

{¶ 132} Pertinent here, during the limited rebuttal testimony at the original trial, former Officer Jones testified that "we heard the shots and then we saw some cars speeding down the street." Neither car was a police car but "[e]ventually the police car joined in behind them, but initially, no." (Tr. 1248.) Former Officer Jones also stated during the rebuttal testimony that he and Officer Lundy were assigned

[10] Thus, Sutton did not fail to comply with a police order or resist arrest under R.C. 2921.331 and 2921.33 underlying two of convictions.

"[t]o assist the other officers with taking the defendants [d]owntown." (New tr. 1250.)[11]

{¶ 133} Officer Lundy additionally testified that it is rare for suspects to shoot at a police officer and, if that had occurred, additional security precautions would have been in place during the arrests and a police department report form submitted. The security was not utilized during the arrests in this case. (New tr. 150-151.) The referenced police department report form was not produced during discovery.

{¶ 134} Phillips also points to discrepancies in the testimony by Officer Lentz and Officer Keane that shots were fired at the time of the foot pursuit:

> Officer Lentz conceded that he never radioed about gunfire during the foot pursuits. (Tr. 739.) Officer Keane claimed he radioed about shots fired at Officer Lentz. (Tr. 632.) But that cannot be true: Officer Keane's call about "shots fired" was made before the foot pursuit began. New Trial Motion, Ex. I at 3:28-4:26.6. Further, Officer Lentz testified that as Phillips and his codefendants exited the car, Officer Lentz immediately radioed that he believed them to have weapons. (Tr. 730-731.) That call was made after Officer Keane's call that shots were fired. The dispatcher later confirmed that "24" (Officer Keane and Lentz's patrol car) called in "shots fired" one minute before the foot pursuit began. *Id.* at 43:51; (Tr. 644.)

Phillips brief, p. 32. A review of the record reflects discrepancies between the officers' testimony during the trial in multiple areas.

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[11] "Rebuttal witnesses, as well as witnesses used in the prosecution's case-in-chief, fall within the scope of discovery." *State v. Finnerty*, 45 Ohio St.3d 104, 106-107, 543 N.E.2d 1233 (1989), citing *State v. Howard*, 56 Ohio St.2d 328, 383 N.E.2d 912 (1978); *State v. Parson*, 6 Ohio St.3d 442, 453 N.E.2d 689 (1983). "Thus, if the prosecution does not provide the name of a rebuttal witness upon a defendant's request for such information, the trial court may impose sanctions on the prosecution." *Id.*

{¶ 135} The trial court then moved to discrepancies between the new evidence and testimony offered during the original trial. The trial court concluded:

> Clearly Lundy's testimony reflects his perception and memory of Keane and Lentz so near the suspect car in the intersection of East 55th and Woodland at the terminus of Kinsman, that therefore, Keane and Lentz must have been in the Marathon lot where Lundy had last seen them 30 minutes earlier when the shots were fired. Lundy's testimony is not supportive of Jones's assertion of the location of Keane and Lentz when the shots were fired, and therefore, does not support these facts are true now or in 2007 when discovery was provided to defendants. If Jones's assertion is not true, then his subsequent claim after the trial cannot be imputed to the state, nor considered a *Brady* violation.

Journal entry and Opinion No. 108982954, p. 10 (June 3, 2019). Without belaboring the point, former Officer Jones and Officer Lundy agreed on the key issues underlying these convictions. Officer Keane and Officer Lentz were not behind the vehicles in question when the shots were fired and both observed Officer Keane and Officer Lentz pull out from the opposite side of the Marathon station.

{¶ 136} The record clearly reflects that discovery was served on the state by the appellants. Counsel Agopian requested on Phillips's behalf: (1) all favorable evidence known or that may become known; (2) information that demonstrated the involvement of others in the crime to the exclusion of the accused; (3) witness or other statements that cast doubt on the identity of the accused or on the charge elements; and (4) requested that the "prosecution interview all agents of the government involved in the investigation to determine whether any of the materials requested within the Demand for Discovery existed." Agopian affidavit, p. 1-2.

{¶ 137} The trial court also declared that "Lundy's testimony was directly contradicted by Jones, defendants, and the victims." Journal entry and Opinion No. 108982954, p. 9 (June 3, 2019). Examples include that Officer Lundy thought that former Officer Jones was also in the car when the shots were fired but former Officer Jones said he was standing in front of the car talking. Journal entry and Opinion No. 108982954, p. 9 (June 3, 2019). Officer Lundy also testified to his belief that the victims were shot in the Marathon station and that Keane and Lentz pursued one of the vehicles up Kinsman, though Lundy believed that Keane and Lentz pursued the other car near Woodland. Journal entry and Opinion No. 108982954, p. 10 (June 3, 2019).

> Lundy's testimony is not supportive of Jones's assertion of the location of Keane and Lentz when the shots were fired, and therefore, does not support these facts are true now or in 2007 when discovery was provided to defendants. If Jones's assertion is not true then his subsequent claim after the trial cannot be imputed to the state, nor considered a *Brady* violation.

Id. Once again, former Officer Jones and Officer Lundy did not waver in their statements that the police car operated by Officers Keane and Lentz was not behind any of the vehicles involved in the incident until after the shots were fired.

{¶ 138} *Brady* holds 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 to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215.

{¶ 139} As previously stated, the knowledge of the police department is imputed to the state. *Glover*, 2016-Ohio-2833, 64 N.E.3d 442, at ¶ 37. *See Kyles v. Whitley*, 514 U.S. 419, 437-438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and *State v. Wiles*, 59 Ohio St.3d 71, 78, 571 N.E.2d 97 (1990) ("Inasmuch as the police are a part of the state and its prosecutional [sic] machinery, * * * such knowledge on the part of a law enforcement officer must be imputed to the state.").

{¶ 140} The United States Supreme Court "observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict." *Smith v. Cain*, 565 U.S. 73, 76, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012), citing *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). As the court stated in *Cain*, "That is not the case here." *Id.*

{¶ 141} As the Tenth Circuit Court of Appeals has explained:

> The purpose of *Brady* "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." *Bagley*, 473 U.S. at 675, 105 S.Ct. 3375, 87 L.Ed.2d 481. *Brady* and its progeny are thus grounded in notions of fundamental fairness and they embody a practical recognition of the imbalances inherent in our adversarial system of criminal justice. *See, e.g., Bagley*, 473 U.S. at 692-695, 105 S.Ct. 3375, 87 L.Ed.2d 481 (Marshall, J., dissenting).

{¶ 142} Thus,

> To compensate for these imbalances, *Brady* represents a "limited departure from a pure adversary model" in the interest of promoting and enhancing the search for truth. *Bagley*, 473 U.S. at 675, [105 S.Ct. 3375, 87 L.Ed.2d 481]; *see also United States v. Abello-Silva*, 948 F.2d 1168, 1180 (10th Cir. 1991) ("The government's hand is stacked with cards the defense lacks."), *cert. denied*, 113 S. Ct. 107 (1992). Equally

> important, *Brady* acknowledges "that the prosecutor's role transcends that of an adversary" because the prosecutor, acting as the representative of the sovereign, has an obligation to ensure "'not that it shall win a case, but that justice shall be done.'" *Bagley*, 473 U.S. at 675 n.6 (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935)); *see also* Brady, 373 U.S. at 87-88, [83 St.Ct. 1194, 10 L.Ed.2d 215].

Smith v. Secy. of New Mexico Dept. of Corr., 50 F.3d 801, 823 (10th Cir.1995).

{¶ 143} As counsel for appellants highlight, the state emphasized at the original trial that the defendants could not prove a motive by police to be less than truthful about the incident or why the defendants would run instead of surrender. The media is replete with news of police violence against blacks, especially young black males. The statistical data is appalling.

{¶ 144} Numerous studies confirm that African-Americans are disproportionately and often wrongfully convicted. A 2017 study co-edited by a Michigan University Law professor is illustrative. *See* National Registry of Exonerations, *Race and Wrongful Convictions in the United States*, Mar. 7, 2017. ("Exonerations Report"). According to the report, 47 percent of 1,900 exonerated individuals listed with the National Registration of Exonerations were African-American. *Id.* at p. 1. "About 1,900 additional innocent defendants who had been *framed and convicted* of crimes in 15 large-scale police scandals were cleared in 'group exonerations;' the great majority of those defendants were also black." (Emphasis added.) *Id.*

{¶ 145} The majority of exonerations were for drug crimes, sexual assault, and murder but covered a broader range overall. African-Americans served as 50

percent of the total exonerations for murder. A leading cause of false convictions of blacks for sexual assault, primarily against white women, was "mistaken eyewitness identifications — a notoriously error-prone process when white Americans are asked to identify black strangers." *Id*. at p. 2.

{¶ 146} As for drug transactions, African-Americans are more likely than whites to be convicted in routine drug possession cases because they are "more likely to be stopped, searched, and arrested." *Id*. at p. 2. "African Americans are also the main targets in a shocking series of scandals in which police officers systematically framed innocent defendants for drug crimes that never occurred." *Id*.

{¶ 147} "African-American prisoners who were convicted of murder are about 50% more likely to be innocent than other convicted murderers." *Id*. at p. 4. "[I]nnocent [black] defendants who are charged with killing white victims are more likely to be sentenced to death, and sometimes no doubt executed, than those charged with killing black victims." *Id*.

{¶ 148} Turning to appellants' inability to prove that Officers Lentz and Keane had a motive to provide inaccurate testimony, the report acknowledges that "[it] takes a lot to overcome the practical presumption that police tell the truth in court, especially when the competing story comes from the accused." *Id*. at p. 24. "The cases that come to light are those in which the evidence of corruption becomes overwhelming, which is most likely in scandals with many innocent victims." *Id*. "When that point is reached, the dam breaks and a flood of dozens or hundreds of convictions are recognized as unreliable or baseless." *Id*.

{¶ 149} Finally, the Exoneration Report concludes that "[t]here is no single explanation" for why African-Americans constitute approximately half of the discovered individual exonerations. *Id*. at p. 27. The report lists contributing factors. However, the listed factors indicate discrimination is foundational such as racial profiling officer misconduct. *Id*. at p. 27-28.

{¶ 150} Also informative here is the recently expressed concern of the dissenting opinion in *State v. Bonnell*, 2020-Ohio-3276, 2020 Ohio LEXIS 1399 (June 17, 2020) (Donnelly, J., dissenting). Bonnell was sentenced to death in 1988 for felonies including the aggravated murder of Robert Brunner. *State v. Bonnell*, 8th Dist. Cuyahoga No. 108209, 2019-Ohio-5342, ¶ 1. Bonnell filed multiple challenges to his conviction and sentence.

> The record shows (and has been conceded by the state through the years) that some evidence from the crime scene was either not collected or preserved, including blood droppings from the back porch and its railing; vomit located near Bunner's body; certain fingerprints; substances on Bonnell's hands; the contents of Bonnell's car; and some of the clothes Bonnell was wearing on the night of the murder. The failure to collect and preserve the evidence has been a central challenge made by Bonnell throughout the years.

Id. at ¶ 2.

{¶ 151} Bonnell filed a motion for leave to file a motion for a new trial based on newly discovered evidence in 2019. The trial court denied the motion without a hearing and this court affirmed. *Id*. at ¶ 3.

{¶ 152} The Ohio Supreme Court declined jurisdiction. *Bonnell*, 2020-Ohio-3276, 147 N.E.3d 647 (June 17, 2020). The concerns expressed in the

dissenting opinion deserve due consideration here. Though the instant case does not involve a death penalty, the sentences are effectively a death knell because the appellants were teens at the time of trial who will be over 60 years of age when released. The dissenting opinion in *Bonnell* noted:

> Of all the shortcomings or deficiencies that one might identify in the postconviction-review process of death-penalty cases, there are two that have been identified as "particularly problematic: the reluctance of state trial courts to conduct evidentiary hearings to resolve contested factual issues, and the wholesale adoption of proposed state fact-finding instead of independent state court decision-making." Steiker, Marcus & Posel, *The Problem of "Rubber-Stamping"* in State Capital Habeas Proceedings: *A Harris County Case Study*, 55 Hous.L.Rev. 889, 893 (2018). Those are precisely the two problems involved in this case and presented to this court in this appeal.
>
> Despite appellant William Bonnell's repeated, ardent claims of his actual innocence, his colorable claims of the state's mishandling of the evidence in his case, and evidence showing a conflicting description of the assailant through a recent sworn statement by one of the witnesses to the 1987 offense who testified at trial, the Cuyahoga County Court of Common Pleas denied Bonnell's motion for leave to file a delayed motion for new trial without holding a hearing. Moreover, the trial court's decision on the motion was a verbatim repetition of the findings of fact and conclusions of law that were proposed by the state. The trial court similarly adopted, verbatim, the state's proposed findings of fact and conclusions of law in overruling Bonnell's postconviction motions in 2005 and 2017.
>
> An important job that we must perform as a state court of last resort is to exercise our discretion to review "cases of public or great general interest." Ohio Constitution, Article IV, Section 2(B)(2)(e). The problem of giving short shrift to defendants' postconviction litigation efforts and rejecting them through judgment entries authored by a prosecuting attorney exists in many jurisdictions, including Ohio. *See* Steiker, Marcus & Posel at 893-894; Ulate, The Ghost in the Courtroom: *When Opinions Are Adopted Verbatim from Prosecutors*, 68 Duke L.J. 807, 810, 813-814 (2019). One of the worst forms of injustice that our justice system can perpetrate is the dashing of a person's cherished right to freedom through the person's wrongful imprisonment, and worse yet, wrongful execution. The United States

> Supreme Court has recognized that in the context of capital-punishment cases, death is different. *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986); *see also State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 81 (Lanzinger, J., dissenting). In light of the repeated claims of actual innocence by capital-defendant Bonnell, the evidentiary problems that his case presents, the severity of the penalty ordered to be imposed, and the nationwide problem that Bonnell's arguments on appeal exemplify, how could we not consider this case to be one of public or great general interest?

Id. at ¶ 1-3.

VII. Conclusion

{¶ 153} Due process has been denied and a new trial required "if there is any reasonable likelihood that the [allegedly] false testimony could have affected the judgment of the jury." *Hastings v. Berghuis*, 6th Cir. No. 16-2666, 2017 U.S. App. LEXIS 28061, at *6 (May 9, 2017), citing *Foley v. Parker*, 488 F.3d 377, 391-92 (6th Cir. 2007) (citing *Napue*, 360 U.S. 264, 272, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)).

{¶ 154} To deny appellants' right to have all material evidence considered by the jury is a travesty of justice, particularly where there is minimal, questionable, physical evidence. The evidence provided by former Officer Jones and Officer Lundy is exculpatory and useful for impeachment purposes under *Brady* and the knowledge of the officers is imputed to the state. *Glover*, 2016-Ohio-2833, 64 N.E.3d 442, at ¶ 37.

{¶ 155} The three elements of a *Brady* violation have been met in this case. The material evidence in issue is favorable to the accused because it is exculpatory or impeaching. The evidence was willfully or inadvertently suppressed by the state.

Appellants were prejudiced by the suppression. *McGuire*, 8th Dist. Cuyahoga No. 105732, 2018-Ohio-1390, at ¶ 18.

{¶ 156} We further find that pursuant to Crim.R. 33, appellants were denied a fair trial where the state failed to provide exculpatory evidence that materially affected Phillips's and Sutton's substantial rights and that the newly discovered material evidence could not have been discovered with reasonable diligence. Additionally, we find that the record affirmatively supports that Phillips and Sutton were prejudiced and therefore were not afforded a fair trial.

{¶ 157} The decision of the trial court is hereby reversed, appellants' convictions are vacated, and this case is remanded for a new trial according to law and consistent with this court's opinion.

It is ordered that appellants recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANITA LASTER MAYS, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
MICHELLE J. SHEEHAN, J., CONCUR