

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

JONATHAN HIRSCH,

Appellant.

06-2076

On Appeal from the Hamilton
County Court of Appeals, First
Appellate District of Ohio.

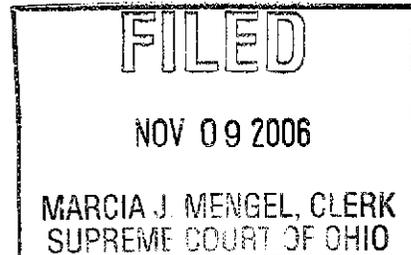
Court of Appeals Case No.
C-050529

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
JONATHAN HIRSCH

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TABLE OF CONTENTS

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION 1

STATEMENT OF THE CASE AND FACTS 3

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 4

Proposition of Law No. I:

A criminal defendant is entitled to leave to file a delayed motion for a new trial, when he demonstrates that he was unavoidably prevented from discovering the new evidence as a result of the State of Ohio intentionally suppressing the evidence in violation of the defendant’s due process rights. 4

Proposition of Law No. II:

A defendant is entitled to leave to file a delayed motion for a new trial when newly discovered evidence demonstrates that his trial counsel was clearly deficient and as a result has been denied effective assistance of counsel. 14

CONCLUSION 15

PROOF OF SERVICE 15

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL
INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION

The United States Supreme Court has clearly held that due process is violated when the prosecution suppresses evidence favorable to the accused if the evidence is material to guilt or to sentencing. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194. See also, *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375 (impeachment evidence as well as exculpatory evidence is subject to Brady disclosure; no distinction should be made with respect to constitutional disclosure requirements).

What is a defendant to do if he discovers that the prosecution suppressed evidence long after his case has been finalized? Of course the defendant should be able to file a motion for a new trial pursuant to Crim. R. 33. If more than 120 days from the date of the verdict has elapsed, the defendant must first seek leave of court to file a delayed motion for a new trial. All that the defendant should be required to demonstrate to get leave of court is that he was unavoidably prevented from discovering this evidence within 120 days of the verdict. See, Crim. R. 33(B).

In this case, the trial court and court of appeals held that Hirsch was not unavoidably prevented from discovering the new evidence within 120 days of the verdict. Hirsch was not even able to get leave of court to file a delayed motion for a new trial. How was Hirsch to know that the State of Ohio had knowingly suppressed favorable evidence? Is the burden now on a defendant to hire an investigator to investigate the case for police misconduct and suppression of favorable evidence? The decision of the lower courts basically tells citizens charged with crimes that if the police engage in misconduct

by intentionally hiding evidence, you better find it quickly, or else you lose your chance to get a fair trial. Our Constitution should have higher standards.

Hirsch clearly showed that the State of Ohio suppressed evidence that was favorable to him, but yet he was unable to even get leave to file a delayed motion for a new trial. It is a disgrace to our system of justice to claim that because he did not unearth this misconduct in a timelier manner he is simply out of luck. But that is exactly what the courts below are telling Hirsch and everybody else who may be charged with a crime. This Court needs to review this case and make it clear that if a defendant discovers egregious *Brady* violations anytime during his sentence, he should at least have the opportunity to file a motion for a new trial to have the matter heard on the merits. There should be no expectation of finality for any conviction that is tainted by misconduct of constitutional proportions, especially when the fault for that taint falls directly on the State.

One of the primary pieces of exculpatory evidence that was suppressed by the State of Ohio was a Florida police report in which Hans Cone, a primary witness for the prosecution, told a detective in Florida he would lie to get Hirsch in trouble. This report was never disclosed to the defense, but was rather uncovered years later by a private investigator. In its decision, the court of appeals blames Hirsch for “a delay of over six years,” and notes that Hirsch did not demonstrate that this delay was “an exercise of reasonable diligence.” This conclusion is astonishing. Does the court of appeals really mean that it is somehow Hirsch’s fault that the State of Ohio hid favorable impeachment evidence in a Florida police file, and somehow Hirsch should have found it sooner? Have our sacred due process rights under *Brady* been reduced to a high-stakes game of

hide-and-seek? Is a criminal defendant simply out-of-luck if the prosecution successfully conceals favorable evidence for long enough? Hopefully, this Court will not allow that to be the case.

STATEMENT OF THE CASE AND FACTS

In October of 1994, Caroline Jones was attacked by a knife-wielding assailant outside of her Montana Avenue apartment. The first person to arrive on the scene of the attack was Donald Blum. Jones died shortly thereafter.

There were no witnesses to the killing and no suspects were apprehended at or near the scene of the crime. While the police identified other suspects, they were not seriously pursued. Rather, the police chose to focus their attention on Jones' son-in-law, Jonathan Hirsch. Hirsch became a suspect when one of his disgruntled business associates claimed that Hirsch told him that he committed the murder.

Hirsch was charged, brought to trial, and convicted of Jones' murder. In his direct appeal, the First District Court of Appeals recognized that there were many things wrong with Hirsch's trial, most notably the misconduct by the State of Ohio. But nonetheless his conviction was affirmed. Hirsch has always maintained his innocence.

In August of 2003, Martin D. Yant, a prominent journalist and private investigator was hired by the Hirsch family to investigate the unsettling facts and circumstances that led to Hirsch's conviction. Yant specializes in the investigation of wrongful convictions and is a published author on the topic. Yant uncovered many disturbing and troubling facts that were not known at the time of Hirsch's trial. At the conclusion of Yant's investigation, Hirsch presented the disconcerting findings to the trial court. Hirsch asked

the trial court to grant him leave to file a delayed motion for a new trial pursuant to Crim. R. 33(B). The motion was denied.

Hirsch appealed, and the First District Court of Appeals affirmed the decision of the trial court. Hirsch asks this Honorable Court to accept jurisdiction of this case to correct the erroneous decisions of the courts below.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

A criminal defendant is entitled to leave to file a delayed motion for a new trial, when he demonstrates that he was unavoidably prevented from discovering the new evidence as a result of the State of Ohio intentionally suppressing the evidence in violation of the defendant's due process rights.

When new evidence is discovered more than 120 days after a verdict, a defendant must complete a two-step process before being granted a new trial. A defendant who discovers new evidence more than 120 days from the date of the verdict, must first seek leave of court to file a delayed motion for a new trial. See, Crim. 33(B).

In relevant part, Crim R. 33(B) states:

Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

A motion for leave to file a delayed motion for a new trial under Crim. R. 33(B) should be granted where the defendant was unavoidably prevented from discovering the new evidence within 120 days of the verdict. *State v. Pinkerman* (1993), 88 Ohio App.3d 158, 623 N.E.2d 643.

Through Hirsch's motion and supporting affidavits, he demonstrated to the trial court that he was unavoidably prevented from discovering the new evidence within 120 days of his verdict. Hirsch should have been granted leave to file a delayed motion for a new trial. The newly discovered evidence is set forth below.

A. Yant begins his investigation in 2003.

Investigator Yant did not even get involved in this case until late in 2003, well after the 120 days time restriction. Yant made a public records request to Cincinnati Police Department in October of 2003. However, the police department did not respond until May of 2004, and even then only under threat of litigation. Yant was also delayed in obtaining the file from Hirsch's trial counsel, the late David Otto, Esq. But, once Yant was finally able to investigate this case, the findings were deeply disturbing.

B. The first Brady violation: Cone would lie to get Hirsch in trouble.

The United States Supreme Court has clearly held that due process is violated when the prosecution suppresses evidence favorable to the accused if the evidence is material to guilt or to sentencing. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194. This duty extends to information in the possession of the law enforcement agency investigating the offense. *Kyles v. Whitley* (1995), 514 U.S. 419, 437-38, 115 S.Ct. 1555.

From the outset, it is important to point out that Hans Cone was a critical witness against Hirsch. Cone testified that Hirsch had confessed to him that he had killed Jones. Of course this confession was not tape recorded or memorialized in any manner, so Cone's credibility was critical to Hirsch's case.

Yant uncovered a police report from the Sheriff's Office of Orange County Florida. The report did not appear in any discovery that had been provided by the

prosecution, and it was not present in Mr. Otto's trial file. The report dealt with Cone and a polygraph examination that was given to him by a detective in Florida.

The prosecution may argue that since the report related to a polygraph examination, the prosecution was under no duty to disclose it. That is not true in this case. For the report not only shows that Cone failed the polygraph examination, but he also made **statements after the examination**. Specifically, Det. Denny Connors of the Orange County Sheriff's Office asked Cone:

- 5) Would you lie about Jonathan Hirsch just to get him in trouble?
Answer: No. (Subject later admitted he was untruthful to this question)

The fact that Cone admitted to a Florida detective, after his polygraph examination, that he would in fact lie to get Hirsch in trouble, is certainly something that should have been disclosed to Hirsch. More pertinent to the issue before this Court, because this evidence was withheld by the State of Ohio, and not discovered by Hirsch's investigator until well after the 120 day time limitation, Hirsch's motion for leave to file a delayed motion for a new trial should have been granted.

Any attempt by the State of Ohio to claim it knew nothing of this report would be disingenuous. Det. Connors' report clearly indicates that Det. Charles Beaver, the lead Cincinnati Police detective on the case, requested the polygraph examination. The polygraph report is even referenced in notes found by Yant in the Cincinnati Police Department homicide file. But there is no evidence that these statements were disclosed to Hirsch's trial counsel.

When considering whether the state has deprived a person of due process, there is no suggestion that different "arms" of the government are severable entities, particularly

when they are closely connected. *United States v. Deutsch* (C.A. 5, 1973), 475 F.2d 55, 57. Therefore, the city's police department represents the state no less than the prosecutor's office, and the taint on the trial is not less if the police department, rather than the state's attorney, is guilty of misrepresentation. *Barbee v. Warden* (C.A. 4, 1964), 331 F.2d 842. Nor, for the purposes of due process, may any distinction be drawn as to whether the prosecutor acted in good faith. *United States v. Ash* (1973), 413 U.S. 300, 93 S.Ct. 2568.

Det. Beavers was so concerned about Cone's credibility that he asked a Florida detective to conduct a polygraph examination on Cone. The polygraph not only determined that Cone lied about Hirsch's supposed confession, but after the polygraph Cone admitted he would in fact lie to get Hirsch in trouble. It is extremely disconcerting that Det. Beavers, knowing what he knew, made a conscious decision to suppress the test and Cone's statements. Det. Beavers even stood-by, allowed Cone to testify, knowing full well that Hirsch and his defense counsel knew nothing of his admission to a law enforcement officer that he was going to lie to get Hirsch in trouble. Such conduct is a blatant and inexcusable violation of *Brady*. Had it not been for the recent investigation conducted by Yant, Det. Beavers' dark secret would have remained hidden.

Det. Beavers' suppression of this evidence is even more disturbing in light of the fact that he knew not only of the damning post-test statement, but knew the following polygraph results:

- 1) Did you provide any false or misleading information to the detectives in the statement you gave today? Answer: No. (Untruthful)
- 2) Other than checking with the library and Ohio, have you done any research on this case that you have not told me about? Answer: No. (Untruthful)

- 3) Did you lie about Jonathan Hirsch telling you he had slashed his mother-in-law's throat? Answer: No. (Inconclusive)

There can be no question that Det. Beavers acted in the utmost of bad-faith. He was concerned that Cone was lying. The test confirmed his suspicion. But he suppressed the results (along with admissible post-test statements) and allowed Cone to be presented as a credible witness. Hirsch is entitled to a new trial. At the very least, he is certainly entitled to leave to file a delayed motion for a new trial.

The court of appeals seems to discount the *Brady* violation by noting that Hirsch "was well aware at trial that Hans Cone was a hostile witness." When you are a defendant, most witnesses for the prosecution are *hostile* witnesses. That does not give the state the right to suppress impeachment evidence about that witness. See, *United States v. Cuffie* (D.C. Dist. 1996), 80 F.3d 514, 518-19 (due process violated by government's failure to disclose evidence of witness' prior perjury even though witness had already been impeached on basis of cocaine addiction, cooperation with prosecution, incentives to lie, and violation of oath as police officer; "undisclosed impeachment evidence can be immaterial because of cumulative nature only if the witness was already impeached at trial by the same kind of evidence.") Hirsch had every right to present to his jury Cone's statement to the police that he would lie to get Hirsch in trouble.

The second Brady violation: Somebody else wanted to kill Jones.

Upon examination of Attorney Otto's case file, it became apparent that the State of Ohio had also failed to disclose to the defense the existence of other suspects. The existence of other suspects was critical in this case because the prosecution presented evidence and argued, albeit improperly, that Hirsch was guilty because Jones had no

enemies or foes, and nobody else had a reason to kill her. Yant discovered this was simply not true.

In the police homicide file, Yant discovered that a temporary worker at the Bureau of Workers Compensation (where Jones worked) had become so upset with Jones that he had to be escorted from the building as he shouted, "I'm going to kill that Bitch!" "She got me fired and I'll never be able to get another job now." The existence of another suspect who had threatened to kill Jones was highly exculpatory. But again, Det. Beavers chose to suppress this evidence.

Similarly, in *Jamison v. Collins* (C.A. 6, 2002), 291 F.2d 380, the Cincinnati Police Department suppressed evidence relating to the existence of other possible suspects. The Sixth Circuit found this to be a violation of *Brady* and ordered a new trial.

As it relates to the issue before this Court, Hirsch did not become aware of this suppressed evidence until Yant discovered it, well after the 120 day time limitation. Hirsch should have been granted leave to file a delayed motion for a new trial.

C. The third Brady violation: The truth about Densford.

Gregory Densford had been a possible suspect that Hirsch was aware of at the time of trial. However, Det. Beavers testified that he eliminated him as a suspect because Densford had an alibi as he had been at work at the time of the killing. This testimony was misleading. Yant discovered a note in the police file indicating that Densford normally clocked in at work between 7:45 AM and 8:00 AM. This was more than an hour **after** the murder was committed. Densford could have easily killed Jones and made it to work on time.

Interestingly, Denford was also the suspect in a burglary in Jones' neighborhood a few weeks before Jones was killed. Det. Beavers failed to mention at trial that Densford was also charged with voyeurism. Also, Densford had filed 12 workers compensation claims between 1979 and 1998. Densford committed suicide in 1998.

Had Hirsch known that Det. Beavers was untruthful when he testified that Densford had a credible alibi, he would have obtained further evidence about Densford that would have cast serious doubt on Hirsch's guilt. The State of Ohio cannot in good faith argue that Hirsch could have timely obtained this information, when its agent (Det. Beavers), intentionally misled Hirsch away from the truth.

D. The fourth Brady violation: Blum the trained killer.

Yant also discovered that Det. Beavers failed to testify that Donald Blum, the man who found Jones' body, was also considered to be a suspect. Det. Beavers eliminated Blum as a suspect even though he was told that Blum had a temper, was fascinated with knives, once owned a large collection of knives, and was the first person to find Jones' body.

At Hirsch's trial, the prosecution claimed that Hirsch was a "trained killer." The prosecution argued that the killer of Jones felt "very comfortable with a knife" and was "very comfortable with hand-to-hand combat." The prosecutor argued at Hirsch's trial:

I couldn't do that. I don't think any of you are equipped to do that. It's Rambo over here, the trained military man, the **trained killer**.

But as the state well knew, Blum was more of a "trained killer" than was Hirsch. Yant discovered that Det. Beavers knew that Blum had been in the Marine Corps for four years during World War II, was trained in the use of a knife, and participated in jungle warfare in Guam for a year.

Blum also failed a polygraph examination, and was determined to be deceptive when asked if he stabbed Jones with a knife. Also, Blum was a bartender, and a Coors baseball hat was found at the scene.

E. Failure to pursue other leads.

Yant's review of the homicide file found nothing to indicate that the police followed-up on a report that one of Jones' neighbor, Karen Essel (a police officer), reported seeing a man wearing a baseball cap while walking down the street with the aid of a cane and wearing some type of body brace, about an hour before the murder.

F. Other newly discovered evidence.

1. Missing evidence.

In June of 2004, Yant attempted to locate the exhibits from Hirsch's trial. Because of advancements in the field of DNA testing, Yant wanted to conduct DNA tests on the baseball cap that was found at the scene. After getting "the run around," it was determined that the exhibits from Hirsch's trial have gone missing. Other evidence that once existed, including cigarette butts, hairs, and blood evidence, is all unexplainably gone. Hirsch cannot now take advantage of new DNA testing to prove his innocence.

2. Other new evidence regarding Hans Cone.

Attorney William Sheaffer, represented Hirsch on the aggravated battery charge in Florida in 1995, in which Cone was a victim. Sheaffer indicated that during pre-trial negotiations with the Florida prosecutor, an amount of restitution was agreed upon. But Cone attempted to extort an additional \$5,000.00 from Hirsch. More importantly, Cone never came forward to suggest that Hirsch had told him he had killed Jones.

Further, when Diana Rankin, a private investigator, recently interviewed Cone about this matter he made statements inconsistent with his trial testimony.

At trial, Cone testified that he made a telephone call to David Brown from Hirsch's home. The State's theory was that Hirsch orchestrated this telephone call in order to establish a false alibi. Hirsch's trial counsel did speak with Brown about a telephone call from Hirsch. However, he concluded that Brown would be of no value as a witness because he could not remember if Hirsch called him on a specific night because they spoke frequently. However, Hirsch's counsel never pursued the fact that Brown was certain that he **never** received a telephone call from Hans Cone.

3. The disparaging nicknames.

On Hirsch's direct appeal, the court of appeals was rightfully critical of the prosecution's use of name calling when it referred to Hirsch as "Rambo," "Jonny Psycho," and "Psycho Jonny." The court of appeals concluded that the name-calling had "little relevance other than to portray Hirsch as a violent individual." That court also found that this evidence was admitted "solely for the purpose of painting Hirsch as a violent individual, and it was clearly inadmissible under Evid. R. 404(B)."

Not only was the prosecutor's action distasteful and in violation of the rules of evidence, it has been discovered to be misleading and false. Lewis M. Alexander is a retired Lieutenant Commander from the United States Navy where he served for 31 years. Alexander worked closely with Hirsch on a daily basis and no derogatory names were used as nicknames for Hirsch. To the contrary, Alexander states that Hirsch was the cream-of-the-crop of the thousands of men he served with in the Navy. Alexander states that nobody who knew Hirsch would refer to him as "Rambo" or "Psycho." Alexander

had offered to testify on behalf of Hirsch, but for some unexplainable reason, Hirsch's trial counsel indicated he would not be needed.

4. Hair evidence: Lethal nonsense.

Yant correctly points out in his affidavit filed in support of Hirsch's new trial motion that the only physical evidence that allegedly connected Hirsch to the scene of the crime was two strands of hair. At trial, Mike Trimpe, a Hamilton County Criminalist, testified that a hair on the ball cap was consistent with Hirsch's hair, except for the color. While this may appear to be damning evidence, in reality it is nothing other than misleading.

In 1999, the new mitochondrial DNA test showed an error rate of 100 percent on 17 hairs "matched" by experts to one or the other of two co-defendants in a murder case. "After a century of expert testimony about microscopic hair comparisons, DNA tests have exposed the field as **lethal nonsense**," Barry Scheck, Peter Neufeld and Jim Dwyer write in their 2000 book *Actual Innocence*. They add that 29 percent of the wrongful convictions studied by the Innocence Project, which Scheck and Neufeld founded, included evidence from hair analysis.

5. New witness: Bonita Nicholls.

Bonita Nicholls talked to Hirsch on the telephone during the evening of October 26, 1994, which was the time that the State of Ohio claims Hirsch was driving to Cincinnati to kill Jones.

Further, Nicholls saw Hirsch the morning of October 29, 1994. Hirsch was wearing a short-sleeve shirt, and he did not have any bandages or injuries to his arms as claimed by Cone.

6. New witness: Herberta Lawrence.

Herberta Lawrence was present at Hirsch's Florida residence, the night before the killing, when Hirsch was supposedly on his way to Ohio.

7. New witness: Lisa Peterson.

Lisa Peterson had also been at Hirsch's home, where Hirsch and Mark Lawrence were working on a Bobcat; at the time Hirsch was supposedly on his way to Cincinnati to kill Jones.

8. New witness: Kimberly Baxter Sherman.

Kimberly Sherman lived two doors down from Jones. On the morning of the killing, Sherman heard her dogs barking. Sherman then heard a man and woman arguing in Jones' parking lot. The state's theory of the case is that Hirsch surprised Jones as she was getting into her car in the garage and immediately killed her. Jones then crawled to the parking lot where Donald Blum found her.

Sherman's testimony would have contradicted the State's theory of the case. Hirsch concedes his trial counsel was aware of Sherman and claimed he was going to have Sherman testify by way of a videotape deposition as she was in the hospital at the time of the trial. But for some unknown reason, she was never called to testify.

Proposition of Law No. II:

A defendant is entitled to leave to file a delayed motion for a new trial when newly discovered evidence demonstrates that his trial counsel was clearly deficient and as a result has been denied effective assistance of counsel.

While Hirsch did raise specific instances of ineffective assistance of counsel on his direct appeal, evidence of new instances of deficient performance by his trial counsel have been discovered. New instances of ineffective assistance of counsel include:

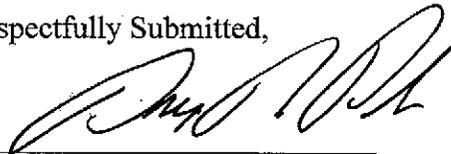
1. Failure to follow-up on the investigation of suspect Gregory Densford.
2. Trial counsel inexplicably only called one witness to testify that Hirsch was at home the evening he was supposedly on the way to Ohio to kill Jones. Lisa Peterson and Herberta Lawrence could have corroborated the testimony of Mark Lawrence.
3. Trial counsel failed to call Kimberly Baxter who overheard the loud argument at the time of the killing, and would have discredited the state's theory of the case.
4. Trial counsel never called Attorney Sheaffer who would have contradicted and discredited Cone.
5. Trial counsel never called Alexander to contradict the disparaging name calling by the prosecution.

Hirsch was deprived of his constitutional right to effective assistance of counsel as a result of the numerous deficiencies of his trial counsel.

CONCLUSION

For all the foregoing reasons, Defendant-Appellant, Jonathan Hirsch, requests this Honorable Court to grant jurisdiction and hear this case on the merits.

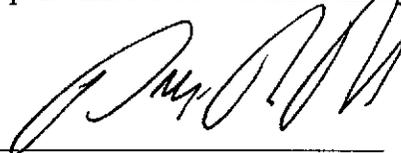
Respectfully Submitted,



Bryan R. Perkins (0061871)
COUNSEL FOR APPELLANT,
JONATHAN HIRSCH

PROOF OF SERVICE

I certify that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction served upon Joseph T. Deters, Hamilton County Prosecutor, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202, by personal service on this 9th day of November, 2006.



Bryan R. Perkins

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-050529
Plaintiff-Appellee,	:	TRIAL NO. B-9603557
vs.	:	<i>JUDGMENT ENTRY.</i>
JONATHAN HIRSCH,	:	
Defendant-Appellant.	:	

This appeal is considered on the accelerated calendar under App.R. 11.1(E) and Loc.R. 12, and this Judgment Entry shall not be considered an Opinion of the Court pursuant to S.Ct.R.Rep.Op. 3(A).

In March 1997, following a jury trial, defendant-appellant Jonathan Hirsch was convicted of the aggravated murder of his mother-in-law and was sentenced to life in prison. In his single assignment of error, Hirsch now challenges the trial court's denial of his motion for leave to file a delayed motion for a new trial, made pursuant to Crim.R. 33(A)(6), on grounds of newly discovered evidence.

In 2003, six years after his trial, Hirsch's family employed a private investigator to examine the case against Hirsch. As a result of this investigation, in 2005, Hirsch filed the motion for leave—eight years after the conclusion of the trial. He claimed (1) that numerous instances of police efforts to withhold evidence and of failures to pursue likely

OHIO FIRST DISTRICT COURT OF APPEALS

suspects had occurred; (2) that trial evidence was now missing; (3) that he was the victim of prosecutorial misconduct; (4) that scientific tests connecting him to the crime were unreliable; (5) that new witnesses had come forward; and (6) that he was denied the effective assistance of counsel.

As Hirsch failed to seek a new trial based on newly discovered evidence within 120 days of the jury's verdict, he had to obtain leave from the trial court to do so. See Crim.R. 33(B). Leave from the court is granted only when a defendant proves by clear and convincing evidence that he was unavoidably prevented from filing a timely motion or from discovering the new evidence within the prescribed time period. See *id.*; see, also, *State v. Elliott*, 1st Dist. No. C-020736, 2003-Ohio-4962, at ¶13. A party is "unavoidably prevented" from filing a motion for a new trial if he had no knowledge of the existence of the evidence or grounds supporting the motion for a new trial, and could not have learned of the matters involved within the time provided by Crim.R. 33(B), in the exercise of reasonable diligence. See *id.*

Hirsch failed to establish a firm belief or conviction that he could not have had knowledge of the most compelling evidence of witness bias at the time of trial. For example, he was well aware at trial that Hans Cone was a hostile witness. Hirsch had been convicted of assaulting Cone in 1994. Hirsch also could not adequately justify why a delay of over six years to begin assembling the new evidence was an exercise of reasonable diligence. As the trial court noted in its well-reasoned written opinion, "A long[-]term passage of time prevents the proper presentation of the issues for the Court to fairly consider them. This is precisely why Criminal Rule 33(B) was enacted." See

OHIO FIRST DISTRICT COURT OF APPEALS

Cross v. Ledford (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus.

Even if Hirsch had been granted leave of court to file his new-trial motion, the record does not support granting him a new trial. The decision whether to grant a new trial on grounds of newly discovered evidence falls within the sound discretion of the trial court. To prevail, the new evidence must disclose a strong probability that it will change the result if a new trial is granted, and it must not be merely cumulative of evidence from the first trial. See *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶85, citing *State v. Petro* (1947), 148 Ohio St. 505, 76 N.E.2d 370, syllabus. When applying the abuse-of-discretion standard, a reviewing court may not substitute its judgment for that of the trial court. See *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

In light of the cumulative nature of most of Hirsch's new evidence, his motive and opportunity at trial to cross-examine many of the "new" witnesses who were the subjects of motion, and the overwhelming evidence of guilt produced at trial, including "Hirsch's detailed confessions to Cone and Cantwell, to his attempt to silence Cantwell, [and] his attempts to establish a false alibi," *State v. Hirsch* (1998), 129 Ohio App.3d 294, 310, 717 N.E.2d 789, we find no abuse of discretion by the trial court. As the trial court's decision was well supported and was not unreasonable, arbitrary, or unconscionable, the assignment of error is overruled. See *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 97, 482 N.E.2d 1248.

Therefore, the judgment of the trial court is affirmed.

OHIO FIRST DISTRICT COURT OF APPEALS

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., GORMAN and SUNDERMANN, JJ.

To the Clerk:

Enter upon the Journal of the Court on September 27, 2006

per order of the Court _____
Presiding Judge