

ORIGINAL

IN THE SUPREME COURT OF OHIO

14-1816

ARTHUR SEAL, :
 :
 APPELLANT, :
 :
 v. :
 :
 STATE OF OHIO, :
 :
 APPELLEE. :

On Appeal from the Highland
County Court of Appeals
Fourth Appellate District

Court of Appeals
Case No. 13 CA 10

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ARTHUR SEAL

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

This Court should take jurisdiction over this case because it involves the violation of important constitutional rights that can only be resolved by this Court. This case involves the trial court's refusal, as upheld by the court of appeals, to allow the Defendant to examine or obtain a copy of the 911-call that the government used as its foundation for the case against him. This unjustified refusal runs contrary to the Due Process rights of the Defendant as defined by the Fifth Amendment of the United States Constitution, it violates the principles espoused in *Brady v. Maryland*, 373 U.S. 83 (1963) and it violates the Sixth Amendment's guarantee of a fair trial.

The government contends that its involvement in this matter began with a call to 911 and that an unknown caller asked the police to respond to a residence at 5094 US 50 in Hillsboro, OH. This, the government contends, is the reason that the police entered the property 5094 US 50 in Hillsboro, OH. The government contends that the police officer investigating the 911-call smelled ether and this caused him to enter a camper on the property just to see if anyone was there -- a decision the State justified by its assertion that it was responding to the 911-call. That entry into the camper led to the police discovering the methamphetamine materials that were subsequently used as a basis for a search warrant. That search warrant then resulted in the methamphetamine manufacturing and related charges the government later brought against this Appellant. Thus, the existence, or lack thereof, of the 911-call played a pivotal role in the government's case against the Appellant. Without it, the police have no reason to respond to 5094 US 50 in Hillsboro, OH and they have no justification for entering the camper which sat on

the property. Without the 911 call to start this series of events, the government has no case against Mr. Seal.

This importance of the 911-call to the Mr. Seals' defense led him to demand the production of the 911-call. Trial counsel failed to take appropriate action to require its production prior to the trial and this ineffective representation is not presently before this Court. However, Mr. Seals renewed his demand for production of the 911-call post-trial, to be used as a basis for his post-conviction petition. To do so, he filed a Motion for Exculpatory Evidence with the trial court on April 12, 2013 asking the Court to Order the production of the 911-call. The trial court denied the request and Mr. Seals appealed to the Highland County Court of Appeals. The appellate court denied the request and Mr. Seals has filed this timely appeal.

The 911 tape should have been produced as a part of the discovery request pursuant to Crim. R. 16, but it was not. The Defendant speculates that the 911-call did not really exist and the government's reliance upon the existence of a 911-call was a fabricated effort to justify the otherwise unconstitutional intrusion onto private property without probable cause. Accordingly, the 911-call, or lack thereof, was exculpatory evidence that the government was required to produce and its failure to do so violates *Brady v. Maryland*, 373 U.S. 83 (1963). The Appellant has been denied any forum in which to address this Fourth Amendment violation. Without the call, or proof on its non-existence, the matter could not be adequately addressed through a suppression hearing.

Both the trial court and the court of appeals have interpreted this request under the Ohio Public Records Act, which Appellant raised as an alternative ground for relief. Both courts have denied this request despite a long history of this Court treating 911 calls as public records. This Court has consistently and repeatedly found that 911 recordings are subject to release pursuant to

the Ohio Public Records Act. In *State Ex. Rel. Cincinnati Enquirer v. Hamilton Cty.*, (1996), 75 Ohio St. 3d 374, 1996-Ohio-214; 662 N.E.2d 334 this Court found that 911 recordings are indeed public records. There, this Court stated:

The moment the tapes were made as a result of the calls (in these cases--and in all other 911 call cases) to the 911 number, the tapes became public records. Obviously, at the time the tapes were made, they were not "confidential law enforcement investigatory records" (no investigation was underway), they were not "trial preparation records" (no trial was contemplated or underway), and neither state nor federal law prohibited their release. Thus, any inquiry as to the release of records should have been immediately at an end, and the tapes should have been, and should now and henceforth always be, released.

Id., 75 Ohio St.3d at 378.

Accordingly, there is no dispute that the 911 tape in question in this matter is a public record. This Court reiterated this position in *State Ex Rel. Dispatch Printing Company v. Morrow Cnty.* (2005) 105 Ohio St. 3d 172, 2005-Ohio-685, 824 N.E. 2d 64. Again, in *Morrow*, this Court ruled in favor of disclosure even going as far as to say that a transcript of 911 recording was insufficient to comply with the Public Records Act and that a copy of the tape must be provided at cost:

Respondents argue that because they permitted the Dispatch to listen to the 911 tape and offered to transcribe the tape, they satisfied their duty under R.C. 149.43. But respondents ignore R.C. 149.43(B)(2), which authorizes the person requesting the public record to choose to have the record duplicated in the same medium that the public office keeps it:

"If any person chooses to obtain a copy of a public record in accordance with division (B)(1) of this section, the public office or person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy." (Emphasis added.)

Because R.C. 149.43(B)(2) is unambiguous, we must apply it as written. See, e.g., *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004 Ohio 5718, 817 N.E.2d 76, P23. Respondents concede that they keep the requested record in audiotape format and that despite the Dispatch's requesting a copy of the tape in this format, respondents refused to release copies of the tape and did not allow the Dispatch to copy it. Under R.C. 149.43(B)(2), they had a duty to provide the Dispatch with a copy of the 911 tape in that same format.

State Ex Rel. Dispatch Printing Company v. Morrow Cnty. (2005) 105 Ohio St. 3d 172, 173-74.

Here, in stark contrast, the Defendant in a criminal case asked the court for a copy of the 911 tape as required by R.C. 149.43(B)(8). The Defendant requested the tape because, as he told the court, it was necessary for his post-conviction petition. The court of appeals reasoned that this request was unjustified because the Defendant had not yet filed his post-conviction petition, but this Court has never ruled that a post-conviction petition must be pending *before* a Defendant can be entitled to a public record. It seems unreasonable that a record that is open and obtainable by the press or a member of the general public must be concealed from the very criminal defendant against whom the accusations in the call were allegedly made.

It is common practice, and even preferred practice in many trial courts, that evidence in support of a post-conviction petition be attached to the post-conviction petition at the time of filing. By necessity then, the evidence submitted in support of the post-conviction petition must be collected prior to filing the post-conviction petition. The court of appeals ruling in this case makes that impossible. It denies criminal defendants desiring to file a post-conviction petition access to records and evidence that they must have to support their petition. O.R.C. § 2953.21 (C) requires a court to examine the supporting affidavits and documentary evidence upon the filing of a post-conviction petition. Arguably, the Defendant could have transcribed the 911 call

and attached it to his post-conviction petition, but he was unable to do so because the trial court denied him access to records that are otherwise available to the general public.

This Court should accept jurisdiction to decide upon the issue of when a court should properly deny a criminal defendant access to records that are arguably relevant and necessary to the presentation of post-conviction claims. Further, the Appellant asks this Court to find that where a Defendant makes a request for records that are indisputably public records in anticipation of using those records to file a timely post-conviction petition, a trial court abuses its discretion where it denies that request without justification.

The lower courts failed to articulate any justifiable reason why it would not permit this Defendant the same access to public records that it would afford to a random member of the public. The denial of the right to records in this instance raises important issues of Due Process, Equal Protection, and the right to a fair trial. For all of these reasons, this Court should accept jurisdiction over this issue and entertain arguments on the merits of the issue presented below.

STATEMENT OF THE CASE AND FACTS

This case arose from a grand jury indictment on October 2, 2012. The grand jury indicted the Appellant on one (1) count of Illegal Manufacture of Drugs in the vicinity of a juvenile in violation of O.R.C. § 2925.04, a felony of the first degree; one (1) count of Illegal Assembly or Possession of Chemicals for the Manufacture of Drugs in the vicinity of a juvenile in violation of O.R.C. § 2925.041, a felony of the second degree; and, one (1) count of Endangering Children in violation of O.R.C. § 2919.22(B)(6), a felony of the third degree.

The Defendant pled Not Guilty to the charges in the indictment and demanded a jury trial which began on December 3, 2012. The trial lasted less than one day and the jury returned a

verdict of guilty on all counts. The trial court sentenced the Defendant to 8 years mandatory imprisonment on count 1; 4 years mandatory imprisonment on count 2; and 2 years mandatory imprisonment on count 3 -- run consecutively -- for a total 14 years mandatory imprisonment. Appellant filed a timely appeal which was denied by the Highland County Court of Appeals on September 16, 2014. This timely appeal followed.

The facts underlying the indictment arose on June 4, 2012. The Highland County Sheriff's Office claimed it was dispatched to a residence at 5094 US 50 in Hillsboro, OH, although the State was unable to produce any recording of the 911 call nor could it produce a record of such a call. The reason for the alleged call was unclear; however, the police demanded that everyone get out the house. While they were doing so, Deputy Seaman walked around to the rear of the house where he saw three individuals in the yard, including Appellant. One of the other individuals, Mark Ervin, fled upon seeing Deputy Seaman. Deputy Seaman engaged Ervin in a foot pursuit onto neighboring property where he eventually caught and arrested Ervin. Seaman also discovered methamphetamine on Ervin when he patted him down.

Seaman eventually returned to the property at 5094 US 50 where he claimed to detect an odor of ether coming from a camper on the property. Seaman entered the trailer without a warrant, then after first conducting an illegal search of the trailer, Seaman sought to obtain a warrant to make his search a "lawful" one. Inside this trailer the police alleged that they found chemicals used in the manufacture of methamphetamine and they concluded that the trailer must belong to the Appellant since they allegedly found an old piece of mail with the Appellant's name on it inside the trailer. Curiously, the State never bothered to check the trailer's registration to see who owned the trailer or to whom it was registered.

The State noted that the Appellant's eight-year-old daughter was inside the home when the police arrived. They presented no evidence that she had ever entered the trailer nor that she was in close vicinity to the trailer. Ervin, after his arrest, turned State's evidence and told the State that Appellant was the source of the methamphetamine found in his pocket and the State's case against the Appellant rested almost entirely upon Ervin's accusations. Ervin told the government that he had known Appellant and that Seal was dating his daughter-in-law, Lindsay Findley. He claimed to have witnessed the Appellant making methamphetamine and claimed that Appellant admitted to him that he made methamphetamine. Ervin also admitted to a misdemeanor shoplifting conviction, a case in which he was represented by Appellant's trial counsel, George Armintrout, unbeknownst to the Appellant. In exchange for his favorable testimony, the government dismissed all felony charges and allowed Ervin to plea out to misdemeanor possession of drugs.

B.C.I. lab analysts testified that jars found inside the camper contained methamphetamine, but fingerprints taken failed to provide any link to the Appellant. The police also claimed that on two separate occasions they had encountered the Appellant at or near the same, or similar looking trailer, parked at different locations. The government did not allege that the camper was used for any illicit purpose on those occasions. While it appears undisputed that the camper contained meth-making materials, there is little to no evidence tying the Appellant to that trailer other than a single piece of mail and the self-serving testimony of a government informant.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The trial court abused its discretion and violated the Defendant's rights to Due Process and Equal Protection when it denied his request pursuant to the Ohio

Public Records Act for the 911 call that the State alleged was the basis for the investigation and charges against him.

The Ohio Court of Appeals unreasonably found that the trial court was within its discretion when it justified the government's refusal to produce a 911 recording that played a material role in the Defendant's prosecution and conviction. In doing so, the lower court failed to apply the prior precedents of this Court as it pertains to the Ohio Public Records Act and it violated the Defendant's right to Due Process and Equal Protection. The fact that the 911 call that he requested was allegedly the basis for the police investigation against him meant it was relevant to the criminal charges against him and subject to discovery pursuant to Crim. R. 16. Trial counsel's failure to demand production of the 911-tape is arguably subject to challenge in a post-conviction petition as his efforts, or lack thereof, and demanding discovery may not be determinative solely from the trial court record. Accordingly, the Appellant was justified in seeking the 911-tape and/or transcript of the 911-call in preparation for the filing of a post-conviction petition and the trial court's refusal to order production of the tape was unreasonable and arbitrary.

The request of Mr. Seal, pursuant to the Ohio Public Records Act, for this 911-call was consistent with the requirements of R.C. 149.43(B)(8) as determined by the court of appeals. Furthermore, his request was relevant to claims that he was anticipating filing as part of a petition for post-conviction relief and the fact that 911-tapes are public records is well established by this Court. *State Ex Rel. Dispatch Printing Company v. Morrow Cnty.* (2005) 105 Ohio St. 3d 172; *State Ex. Rel. Cincinnati Enquirer v. Hamilton Cty.*, (1996), 75 Ohio St. 3d 374. As the court of appeals conceded, the trial court was required, as a matter of law, to make a finding pursuant to R.C. 149.43(B)(8) and the trial court failed to make any such finding. The

court of appeals excused the trial court's failure to make a finding and it instead engaged speculation as to what the findings might have been if the trial court had done what it was supposed to do. However, R.C. 149.43(B)(8) expressly and ambiguously requires the trial court to make the requisite findings under the Ohio Public Records Act. It contains no exception to the rule nor does it permit such findings to be made by the appellate court when the trial court fails to follow the statute. For this reason, the trial court abused its discretion when it denied the Appellant's request for the 911-tape and the court of appeals abused its discretion in not remanding the case back to the trial court for failure to follow R.C. 149.43(B)(8).

The refusal of the trial court to permit the Appellant to obtain a copy of the alleged 911-call was nothing more than an arbitrary denial that lacks any basis in the law. In addition to violating the Ohio Public Records Act, the government's refusal to produce the tape violated the Appellant's right to a fair trial. The prosecution was required to turn over the material as required by *Brady v. Maryland*, 373 U.S. 83 (1962) In *Brady*, 373 U.S. at 87, the Supreme Court held that the prosecution is required by the Fourteenth Amendment's Due Process Clause to disclose evidence in its possession that is both favorable to the accused and material to guilt or punishment. *See also, United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). *Brady* is premised on "the avoidance of an unfair trial to the accused." *Brady*, 373 U.S. at 87; *see also Bagley*, 473 U.S. at 675 & n.6-7. Therefore, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675.

To establish a Brady violation, it must be shown that (1) the prosecution suppressed evidence; (2) the suppressed evidence was favorable to the accused; and (3) the suppressed evidence was material to guilt or punishment, "irrespective of the good faith or bad faith of the

prosecution." *Moore v. Illinois*, 408 U.S. 786, 794-95, 92 S. Ct. 2562, 33 L. Ed. 2d 706 (1972); *see also Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Brady*, 373 U.S. at 87; *Bowling v. Parker*, 138 F.Supp.2d 821, 880 (E.D. Ky. 2001), *aff'd*, 344 F.3d 487 (6th Cir. 2003). Evidence "favorable to the accused" includes both exculpatory and impeachment evidence. *Bagley*, 473 U.S. at 676. Evidence is "material" within the meaning of *Brady* "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also, Cone v. Bell*, 556 U.S. 449, 469-70, 129 S. Ct. 1769, 173 L. Ed. 2d 701 (2009). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the trial. *Bagley*, 473 U.S. at 682; *see also Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). In determining whether withheld evidence is "material" within the meaning of *Brady*, courts must evaluate the omission "in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

Appellant has met this criterion because 1) the 911-call clearly falls within the purview of Crim. R. 16. and the State failed to provide it to counsel in response to the discovery request; 2) The non-existence of the 911-call undermines the State's purported reason for making a warrantless entry onto the property and it undermines the credibility of the Deputy Seaman who claims he was responding to call a 911-call; 3) the 911-call was material to guilt or punishment because of the critical role it played in State's case -- it was the foundation upon which the remainder of the case against the Appellant was built. If, as claimed, the 911-call did not exist, there was no probable cause for the warrantless entry and there was no probable cause to obtain the search warrant. Without either of those, there is no indictment and no conviction.

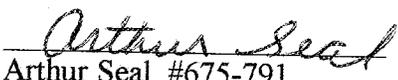
Accordingly, because the government suppressed material evidence that played a critical role in the case against the Appellant, it violated *Brady v. Maryland*.

The Court of Appeals decision in this case failed to properly apply the principles and arguments established in *Brady v. Maryland*. Further, its decision that the Appellant was not permitted to obtain the 911-call pursuant to the Ohio Public Records Act to support his post-conviction petition is contrary to this court's well-established precedent in favor of disclosure of public-records. The fact that Appellant is presently incarcerated is not, in and of itself, a reason to deny him access to exculpatory and material evidence that was used by the government to obtain a conviction. For these reasons this Court should reverse the court of appeals and remand this matter back to the trial court with instructions to grant the Appellant's request for a copy of the 911-call which allegedly formed the basis of the charges against him.

CONCLUSION

For the reasons discussed above, this case is a case of public or great general interest, it raises a substantial constitutional question, and it is an appeal of a felony conviction. The appellant requests that this Court accept jurisdiction in this case so that these important issue will be reviewed on the merits.

Respectfully submitted,


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APPELLANT, PRO SE

Certificate of Service

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by regular U.S. mail to counsel for Appellee State of Ohio, Aneka P. Collins Highland County Prosecuting Attorney 112 Gov Foraker Place Hillsboro, OH 45133 on this the 17th day of October, 2014.

Arthur Seal
Arthur Seal

IN THE SUPREME COURT OF OHIO

ARTHUR SEAL,

APPELLANT,

v.

STATE OF OHIO,

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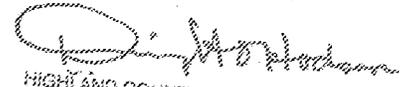
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Court of Appeals
Case No. 13 CA 10

APPENDIX APPELLANT ARTHUR SEAL

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

FILED
COURT OF APPEALS
HIGHLAND COUNTY, OHIO

SEP 16 2014


HIGHLAND COUNTY CLERK OF COURTS

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
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 v. :
 :
 ARTHUR SEAL, :
 :
 Defendant-Appellant. :

Case No. 13CA10

DECISION AND
JUDGMENT ENTRY

APPEARANCES:

Arthur Seal, Chillicothe, Ohio, *pro se* Appellant.

Anneka P. Collins, Highland County Prosecuting Attorney, Hillsboro, Ohio, for Appellee.

Hoover, J.

{¶ 1} Arthur Seal, an inmate at the Chillicothe Correctional Institution, appeals from a judgment of the Highland County Common Pleas Court that denied his “motion for exculpatory evidence” wherein Seal sought the release of a 911 recording for use in a post-conviction proceeding. We previously determined that the motion was actually filed pursuant to R.C. 149.43(B)(8); and thus the trial court’s judgment is a final appealable order. [See Magistrate’s Order filed July 3, 2013]. For the following reasons, we affirm the trial court’s judgment.

{¶ 2} On December 3, 2012, a jury found Seal guilty of: 1) the illegal manufacture of drugs, with the additional finding that the offense occurred in the vicinity of a juvenile; 2) the illegal assembly or possession of chemicals for the manufacture of drugs, with the additional finding that the offense occurred in the vicinity of a juvenile; and 3) endangering children. On December 10, 2012, the trial court sentenced Seal to an aggregate prison term of 14 years. On

January 2, 2013, Seal filed a notice of appeal, indicating his intent to directly appeal his convictions and sentence.

{¶ 3} On April 12, 2013, while his direct appeal remained pending, Seal filed the motion for exculpatory evidence that is at issue in the instant appeal. In his memorandum in support of the motion, Seal argued that the 911 recording was necessary to prove in a post-conviction proceeding that law enforcement unlawfully searched the property at which he had been staying.¹ Essentially, Seal asserts that there was never an emergency at the property; that law enforcement should have never been present at the property; and that the existence or non-existence of the 911 recording could help prove that theory. Finally, Seal indicated that his trial counsel requested discovery from the State; knew of the alleged 911 call and the State's failure to produce a record of it; and yet failed to further seek production of the call recording prior to his trial.

{¶ 4} Before the State could file a memorandum contra Seal's motion, the trial court denied the motion on April 17, 2013. In its judgment denying the motion, the trial court stated that: "This case is completed and a direct appeal of the conviction is now pending. The 911 tape if it exists is a public record which the [d]efendant can obtain from the Sheriff's Department under public records laws."

{¶ 5} Seal sets forth the following assignment of error from the trial court's decision to deny the motion:

Assignment of Error:

TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE
APPELLANT'S MOTION FOR EXCULPATORY EVIDENCE AND
REFUSING TO ORDER HIS PROSECUTION DEPT. TO EITHER RELEASE

¹ At trial, Deputy Craig Seaman of the Highland County Sheriff's Office testified that on June 4, 2012, he was dispatched to answer a 911 call indicating possible assistance needed at 5094 US Route 50, in Highland County, Ohio. Seaman testified further that an investigation of the 911 call led to the procurement of a search warrant for a house and a camper that were located at the address. Upon execution of the search warrant, authorities located an active methamphetamine lab in the camper. *See State v. Seal*, 4th Dist. Highland No. 13CA1.

THE ALLEGED 9-1-1 CALL/TRANSCRIPTS OR ORDER THE STATE TO CONCEDE THERE IS NO 9-1-1 CALL AND NEVER WAS IN ORDER FOR THE APPELLANT TO SUPPORT HIS RELIEF PETITION, AND THE TRIAL COURT VIOLATED THE APPELLANT'S DUE PROCESS AND EQUAL PROTECTION TO THE LAW WHICH VIOLATED THE APPELLANT'S 4TH, 5TH, 6TH & 14TH U.S. CONSTITUTIONAL AMENDMENTS AND ARTICLE I, SEC.S 10, 14 & 16 OF THE OHIO CONSTITUTION.

{¶ 6} In his single assignment of error, Seal contends that the trial court erred and abused its discretion by denying his request for the 911 recording which is purportedly in the possession of the prosecutor's office; if such a recording actually exists.

{¶ 7} Through the passage of the Ohio Public Record's Act, "[t]he General Assembly clearly evidenced a public-policy decision to restrict a convicted inmate's unlimited access to public records in order to conserve law enforcement resources." *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 14. In furtherance of that goal, "R.C. 149.43(B)(8) requires an incarcerated criminal offender who seeks records relating to an inmate's criminal prosecution to obtain a finding by the sentencing judge or the judge's successor that the requested information is necessary to support what appears to be a justiciable claim." *State ex rel. Fernbach v. Brush*, 133 Ohio St.3d 151, 2012-Ohio-4214, 976 N.E.2d 889, ¶ 2. R.C. 149.43(B)(8) specifically provides:

A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication

with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

{¶ 8} “A ‘justiciable claim’ is a claim properly brought before a court of justice for relief.” *State v. Wilson*, 2d Dist. Montgomery No. 23734, 2011-Ohio-4195, ¶ 9. “Establishing a justiciable claim ordinarily involves identifying a ‘pending proceeding with respect to which the requested documents would be material.’ ” *State v. Rodriguez*, 12th Dist. Preble No. CA2013-11-011, 2014-Ohio-2583, ¶ 14, quoting *State v. Rodriguez*, 6th Dist. Wood Nos. WD-13-026, WD-13-053 and WD-13-071, 2014-Ohio-1313, ¶ 5. “The trial court’s decision with respect to whether the inmate established a justiciable claim is reviewed under an abuse of discretion standard.” *Id.*

{¶ 9} As an initial matter, we note that the trial court arguably misinterpreted Seal’s motion. While the motion could have been worded more clearly, it does appear that Seal was seeking a finding, as required by R.C. 149.43(B)(8), that the 911 recording was necessary to support a justiciable claim. [See Magistrate’s Order filed July 3, 2013]. The trial court did not make the required finding, but instead denied the motion on the grounds that it was not the proper office to seek a public records request.

{¶ 10} Nonetheless, even if the trial court misinterpreted the nature of Seal’s request, we find no error in its denial of the request. First, we note that Seal failed to identify any pending justiciable proceeding for which the requested item would be material. While Seal argued that the 911 recording was necessary to prepare a post-conviction relief petition, no such petition was actually pending when the request was made. *See State v. Atakpu*, 2d Dist. Montgomery No. 25232, 2013-Ohio-4392, ¶ 9 (“[W]here an incarcerated defendant did not identify any pending

proceeding with respect to which the requested documents would be material, the trial court did not err in overruling a public records request.”); *see also Rodriguez*, 2014-Ohio-2583 at ¶ 16; *Wilson*, 2011-Ohio-4195 at ¶ 9.

{¶ 11} We also find that Seal does not have a justiciable claim because any claim he might present would be barred by the doctrine of res judicata. *See State v. Reid*, 2d Dist. Montgomery No. 24672, 2012-Ohio-1659, ¶ 9 (“Claims barred by res judicata are not justiciable.”).

{¶ 12} It is well established law in Ohio that:

Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.

State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

{¶ 13} Here, Seal admitted in his motion for exculpatory evidence that his trial counsel knew of the State’s failure to produce the 911 recording, despite his request for discovery, yet made no attempts to compel production prior to trial. Moreover, Seal’s brief in support of his direct appeal, which we note was filed after Seal’s motion for exculpatory evidence and by new appellate counsel, did not raise the present issue as an assignment of error or separate argument. *See State v. Seal*, 4th Dist. Highland No.13CA1. Because Seal could have raised the issue at trial, or in his direct appeal, he is now barred by the doctrine of res judicata from raising the issue in

any post-conviction proceeding. Thus, the 911 recording, if it exists, does not support a justiciable claim.

{¶ 14} Based on the foregoing, we overrule Seal's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the 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 Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court

By: 

Marie Hoover, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.