

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

vs. :

ANGELO HOWARD, :

Defendant-Appellant. :

Case No. 15-1269

On appeal from the Hamilton
County Court of Appeals
First District Court of Appeals

**DEFENDANT-APPELLANT ANGELO HOWARD'S
MEMORANDUM IN SUPPORT OF JURISIDCTION**

SARAH M. SCHREGARDUS #0080932
Kura, Wilford & Schregardus Co., L.P.A.
492 City Park Ave.
Columbus, Ohio 43215
(614) 628-0100
(614) 628-0103 (Fax)

JOSEPH DETERS
Hamilton County Prosecutor
230 East 9th Street, Suite 4000
Cincinnati, Ohio 45202

COUNSEL FOR DEFENDANT-APPELLANT,
ANGELO HOWARD

COUNSEL FOR PLAINTIFF-APPELLEE
STATE OF OHIO

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**EXPLANATION OF WHY THIS IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

A supported claim of actual innocence should have some weight in this court system. The fact that the wrongfully convicted person is serving a life sentence for this crime, makes it all the more serious for this Court to look at this issue. Angelo Howard submitted an affidavit from a person purporting to be the actual shooter in the murder for which Mr. Howard stands convicted. The affidavit included statements corroborating the account and explaining the circumstances of the delayed confession. Despite this, the trial court did not even grant Mr. Howard a hearing to determine the credibility of the affiant, nor hear evidence supporting his request. Too often courts are in a hurry to dismiss claims of this type, despite being of the utmost importance to the delivery of justice. Therefore, this Court should accept jurisdiction to address this important issue.

STATEMENT OF THE CASE AND FACTS

After a jury trial, Mr. Howard was found guilty of three of the four incidents for which he was charged. He was subsequently sentenced to serve 148 years to life in prison. On appeal, the court of appeals reversed one of the other incidents for insufficient evidence (the Redding case), leaving Mr. Howard convicted of two of the four incidents for which he was originally charged.

The appellate court detailed his case as follows:

Defendant-appellant Angelo Howard was indicted in the case numbered B-0703493A for offenses relating to the murders of Gino Booker and Tim Canady. Specifically, Howard was indicted for the aggravated murder and aggravated robbery of Gino Booker, the aggravated murder, aggravated robbery, and kidnapping of Tim Canady, the aggravated burglary of Krystal White's residence, the aggravated burglary of Sakinah Malik's residence, the kidnapping of Sakinah Malik, and two counts of having a weapon while under a disability. With the exception of the charges for having a weapon while under a disability, each offense carried weapons specifications.

In the case numbered B-0806325A, Howard was indicted for offenses relating to the murders of Kevin Johnson and Kevin Redding. Specifically, Howard was charged with the aggravated murder and aggravated robbery of Kevin Johnson, the aggravated murder, aggravated robbery, and kidnapping of Kevin Redding, and having a weapon while under a disability. Again, with the exception of the charge for having a weapon while under a disability, each offense carried weapons specifications.

Upon the state's motion, the indictments in the cases numbered B-0703493A and B-0806325A were joined for trial. Following a jury trial, Howard was found guilty of all offenses and accompanying specifications in the indictment in the case numbered B-0703493A. With respect to the offenses in the indictment in the case numbered B-0806325A, Howard was found guilty of the aggravated murder, aggravated robbery, and kidnapping of Kevin Redding. But he was acquitted of the accompanying specifications for these offenses. He was also acquitted of the aggravated murder and aggravated robbery of Kevin Johnson, and of having a weapon while under a disability. The trial court then sentenced Howard to an aggregate term of 148 years' to life imprisonment. [...]

Howard was found guilty of offenses stemming from his involvement in three separate criminal incidents that resulted in the murders of Gino Booker, Tim Canady, and Kevin Redding, respectively. The state's theory of these murders was that Howard and a group of accomplices, including Eugene Jackson, Carlos Jackson, Andre Thomas, Quinton Gill, Scott McCoy, and Raeshaun Hand, had

been "hustling" drug dealers. Throughout 2002, this group of men had engaged in the robbery and murder of known drug dealers and would then sell the drugs obtained in the robberies for profit.

We discuss the facts surrounding Howard's involvement in each criminal incident separately.

1. The Gino Booker Homicide

The evidence presented at trial established that, at approximately 4:30 in the afternoon on October 16, 2002, Howard and Carlos Jackson had been standing outside a housing complex on Walters Ave. in Walnut Hills. They were talking to a group of people when Booker approached them and inquired about buying marijuana. Booker was not satisfied with the prices he was offered, and he then produced his own bag of marijuana. Howard took the bag of marijuana to examine and smell. He then "checked" the marijuana, or refused to give it back. Booker reached for the marijuana, and Howard displayed his gun. When Booker attempted to reach for Howard's weapon, Howard fired his gun two times, hitting Booker once. Howard and Carlos Jackson then fled from the scene, and Booker died from injuries caused by the gunshot.

2. The Tim Canady Homicide

On December 14, 2002, Howard, Andre Thomas, and a third accomplice had entered the home of Krystal White, Tim Canady's girlfriend, in the middle of the night. The men were armed and wore masks. White and Canady had been asleep in White's bedroom, and various other relatives and friends of White had been sleeping throughout the home. Howard and his accomplices dragged Canady out of White's bed and then moved White and the other residents into the dining room, where they were restrained and tied up with cords. Canady was questioned by the intruders about where he kept his supply of marijuana.

Canady was handcuffed, and White and all the others were barricaded in the basement so that they could not escape. Howard and his accomplices then left with a beaten and handcuffed Canady in Canady's truck. After driving around, they eventually stopped, at Canady's direction, at Sakinah Malik's apartment in Clifton. Eugene Jackson remained in the truck with Canady, while Howard and Thomas entered Malik's apartment building. Howard and Thomas encountered Malik in the hallway as she was leaving for work. They forced her back into her apartment, placed a gun to her head, and demanded to know where "the stuff" was. Malik directed them to a duffel bag in her closet that contained Canady's marijuana. The men then restrained Malik with an extension cord and put her in bed. As she struggled to get free, she heard a gunshot outside.

After returning to Canady's truck with his bag of marijuana, Howard shot the handcuffed Canady in the back of his head two times.

On February 21, 2014, Mr. Howard filed a Motion for Leave to file a Motion for New Trial Based on Newly Discovered Evidence. Andre Thomas provided an affidavit stating that not only was Angelo Howard not present at the Tim Canady Homicide, but Andre was the person who shot and killed Mr. Canady contrary to the testimony of Eugene Jackson. On August 1, 2014, the trial court denied leave to file. Mr. Howard appealed to the First District Court of Appeals, which affirmed on June 17, 2015. This appeal timely follows.

ARGUMENT

PROPOSITION OF LAW

A defendant who demonstrates he is actually innocent is entitled to, at a minimum, a hearing on the merits of his delayed request for a motion for new trial based on newly discovered evidence.

The court of appeals affirmed the trial court's decision denying Mr. Howard's request for leave to file a delayed motion for new trial. The court of appeals found that the trial court correctly found that Mr. Howard failed to prove he was unavoidably prevented from timely filing the new evidence. A trial court's decision to deny a motion for leave to file a motion for new trial pursuant to Criminal Rule 33 is reviewed based on the "abuse of discretion" standard. *State v. Pinkerman* (1993), 88 Ohio App. 3d 158, 623 N.E.2d 643.

The term 'abuse of discretion' '* * * connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. * * *' *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 173, 404 N.E.2d 144, 149." See, also, *State v. Moreland* (1990), 50 Ohio St.3d 58, 552 N.E.2d 894, and *State v. Xie* (1992), 62 Ohio St.3d 521, 584 N.E.2d 715.

Crim.R. 33(B) provides in pertinent part:

"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.*" (Emphasis added.)

Id. at 160.

The courts' findings were unreasonable and arbitrary. The trial court notes without further analysis that "conclusory statements that he was unavoidably delayed are not sufficient." However Appellant did not submit conclusory statements, rather he submitted an affidavit

swearing that the witness/actual perpetrator originally lied about what happened and did not disclose the truth – that he, Andre Thomas, shot Timothy Canady not Angelo Howard – until July 18, 2013, more than 120 days after the jury verdict. The court of appeals expanded on this and noted that “Thomas’s trial testimony put Howard on notice that Thomas had more information about Canady’s murder than he had revealed in his statement to police or at trial.” This finding is unreasonable because at the time of trial, Mr. Thomas was represented by counsel and could not be questioned under the protections of the Fifth and Sixth Amendments.

Finding that the grant of a new trial was permissible, even though the defendant’s request was filed well beyond the one hundred twenty day limit imposed by Crim.R. 33(B), the Ninth District Court of Appeals has stated that “nothing occurred during trial to put the defense on notice of the existence of the new evidence.” *State v. Georgekopoulos*, 9th Dist. Case No. 22491, 2005-Ohio-5106. The new evidence in *Georgekopoulos* was a photograph depicting gunpowder stippling on the defendant’s right hand. The court stated that the defendant did not have notice that stippling may have been present, even though police reports contained references to stippling on a right hand. Additionally, this Court in *State v. Love*, 1st Dist. Case No. C-050131, C-050132, 2006-Ohio-6158, held that the new evidence could not have been discovered within the time limit imposed by 33(B), in part due to the difficulty of obtaining that evidence while incarcerated and indigent.

Because Appellant was not present at the offense, he would have no reason to know or question Mr. Thomas about his involvement, further, Mr. Thomas was unable to be questioned previously as he was represented by counsel and protected by the Fifth Amendment. Mr. Howard has been incarcerated since 2007. The trial court completely disregarded this

information and unreasonably determined Mr. Howard had not established he was unavoidably prevented from discovering the new evidence within 120 days of the jury verdict.

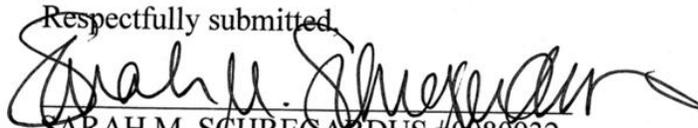
The trial court further improperly found that the new evidence would not have created a strong probability that the result would change. The new evidence discovered by Appellant is so significant and the evidence presented against him so weak that a new trial is warranted. By comparison, in *State v. Wogenstahl*, 1st Dist. No C-030945, 2004-Ohio-5994, this Court found that because the evidence of Wogenstahl's guilt was so overwhelming, the new evidence relating to the events of the night of the crime would not lead to a different result in a new trial. By contrast, at Mr. Howard's trial, the evidence presented that he committed the crimes against Mr. Canady was limited to the testimony of Eugene Jackson and the hearsay testimony of Carlos Jackson. As the State argued at trial, this was not a question of *if* a crime was committed, but rather *who* committed it. The unbiased witnesses who testified, Krystal White, LaShawndon Williams and Sakinah Malik, all testified that the men who broke in were wearing masks and therefore they could not identify them. There is a strongly probability that this newly discovered evidence from Andre Thomas would change the jury's verdict.

Furthermore, the jury heard evidence that Mr. Howard committed four separate murders. The jury acquitted him of one, this Court vacated another charge based on insufficient evidence, therefore with the remaining evidence, there can be no question that this confession from Andre Thomas is material and warrants a new trial. To deny Mr. Howard otherwise violates his constitutional rights under the Fifth, Sixth and Fourteenth Amendments.

CONCLUSION

This Court should accept jurisdiction to provide guidance to lower courts on the interpretation of Crim.R 33, and reverse this case to protect the rights of Angelo Howard.

Respectfully submitted,



SARAH M. SCHREGARDUS #0080932
Kura, Wilford & Schregardus Co., L.P.A.
492 City Park Ave.
Columbus, Ohio 43215
(614) 628-0100

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent via U.S. Mail to the Hamilton County Prosecutor, 230 East 9th Street, Suite 4000, Cincinnati, Ohio 45202, this 3rd day of August, 2015.



SARAH M. SCHREGARDUS #0080932

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STATE OF OHIO,

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**APPENDIX TO DEFENDANT-APPELLANT ANGELO HOWARD'S
MEMORANDUM IN SUPPORT OF JURISIDCTION**

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

STATE OF OHIO,	:	APPEAL NO. C-140516
Plaintiff-Appellee,	:	TRIAL NO. B-0703493-A
vs.	:	<i>JUDGMENT ENTRY.</i>
ANGELO HOWARD,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Angelo Howard appeals from the Hamilton County Common Pleas Court's judgment overruling his Crim.R. 33(B) motion for leave to file a motion for a new trial. We affirm the court's judgment.

Howard was convicted in 2010 on multiple counts of aggravated murder, aggravated burglary, aggravated robbery, kidnapping, and having weapons while under a disability. He unsuccessfully challenged his convictions in direct appeals to this court and the Ohio Supreme Court. *State v. Howard*, 1st Dist. Hamilton No. C-100240, 2011-Ohio-2862, *appeal not accepted*, 130 Ohio St.3d 1418, 2011-Ohio-5605, 956 N.E.2d 310. In this appeal, he presents a single assignment of error challenging the overruling of his 2014 motion seeking leave to move for a new trial on the ground of newly discovered evidence.

A Crim.R. 33(A)(6) motion for a new trial on the ground of newly discovered evidence must be filed either within 120 days of the return of the verdict or within seven days after leave to file a new-trial motion has been granted. A court may grant leave to file a Crim.R. 33(A)(6) motion out of time only upon clear and convincing evidence that the movant had been unavoidably prevented from timely discovering, and from timely

presenting in a new-trial motion, the evidence upon which the new-trial motion depends. Crim.R. 33(B); *State v. Schiebel*, 55 Ohio St.3d 71, 74, 564 N.E.2d 54 (1990); *State v. Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034, ¶ 32. The court's decision concerning leave may not be overturned on appeal if it is supported by some competent and credible evidence. *Schiebel* at 74; *State v. Mathis*, 134 Ohio App.3d 77, 79, 730 N.E.2d 410 (1st Dist.1999), *rev'd in part on other grounds*, *State v. Condon*, 157 Ohio App.3d 26, 2004-Ohio-2031, 808 N.E.2d 912, ¶ 20 (1st Dist.).

Howard's new-trial motion depended on the 2013 affidavit of his co-indictee Andre Thomas. In a statement to the police, Thomas had implicated Howard in the shooting death of Tim Canady. At Howard's 2010 trial, Thomas recanted his statement and testified that Howard had not been involved in Canady's death. Three years later, Thomas confessed to Howard's counsel, and executed an affidavit averring, that he had shot Canady.

Thomas's trial testimony put Howard on notice that Thomas had more information about Canady's murder than he had revealed in his statement to police or at the trial. But Howard, in seeking leave to move for a new trial based on Thomas's affidavit, offered nothing that might fairly be said to demonstrate that he had diligently sought to discover that information.

The common pleas court denied leave upon its conclusion that Howard failed to demonstrate unavoidable prevention. Because the record supports the court's conclusion, the court did not err in denying leave. Accordingly, we overrule the assignment of error and affirm the court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., FISCHER and STAUTBERG, JJ.

To the clerk:

Enter upon the journal of the court on June 17, 2015,
per order of the court _____.

Presiding Judge