IN THE SUPREME COURT OF OHIO

	Case No. 2021-1165
STATE OF OHIO, Plaintiff-Appellee	On Appeal from the Vinton County Court of Appeals, Fourth Appellate District
vs.	Court of Appeals
GREGORY B. McKNIGHT, Defendant-Appellant	Case No. 20CA721 DEATH PENALTY CASE

COMBINED MEMORANDUM IN SUPPORT OF JURISDICTION OF CROSS-APPEAL AND MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLEE/CROSS-APPELLANT GREGORY B. McKNIGHT

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INTRODUCTION

In October 2002, an all-white jury in Vinton County, Ohio, sentenced Gregory McKnight to death. As multiple jurors later confirmed, that death sentence was based not on the evidence presented in McKnight's case, but on the fact that McKnight is Black. Specifically, those jurors detailed, in sworn affidavits, the shameful racial animus that permeated their deliberations and verdicts in both the guilt and penalty phases, with specifics about the racist vitriol that tainted their discussions. Armed with this confirmation of clear juror misconduct, McKnight moved for permission to seek a new trial in Vinton County.

In his motion, McKnight explained that he had long suspected that his death sentence was predicated on racism, but was precluded from seeking out the evidence required to challenge that verdict and sentence by the law that placed statements made during jury deliberations out of bounds when challenging verdicts. When the United States Supreme Court wiped that law away in 2017 in cases where "a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant," McKnight immediately and diligently sought out—and obtained—the proof he needed to demonstrate the constitutional infirmity of his death sentence. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). But as a result of the trial court's flawed interpretation of the Ohio Rules of Evidence and Ohio Criminal Rules, his request to have his day in court was denied. On appeal, the Fourth Appellate District overturned that denial, but remanded with instructions that set forth an evidentiary standard that would likely make relief for defendants like McKnight impossible under any scenario. That cannot be the law.

This case raises "substantial constitutional question[s]" and is of "public or great general interest." S. Ct. Prac. R. 7.02(C)(2). The standard set forth by the appeals court below permits

sentences like McKnight's—sentences indisputably and indelibly tainted by racial bias—to stand by eviscerating the Ohio's new trial rule in such cases.

McKnight's case could not be a clearer example of the "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice," which the Supreme Court of the United States sought to root out through its decision in *Pena-Rodriguez*, and which every court in the country has an interest in remediating. *Pena-Rodriguez*, 137 S. Ct. at 868. Yet, because of the appellate court decision in this case, Gregory McKnight's racist death sentence will likely stand. For these reasons, as explained in greater detail below, this Court should hear this case on the merits and provide guidance on the appropriate standard for seeking leave to request a new trial.

STATEMENT OF THE CASE AND FACTS

I. Conviction and Appeal

Gregory McKnight was charged and convicted in Vinton County in October 2002 for the unrelated murders of two individuals: Gregory Julious and Emily Murray. *State v. McKnight*, 107 Ohio St. 3d 101, 837 N.E.2d 315, 328 (2005). The prosecution sought the death penalty for the charges relating to Murray, a white woman (but not for those related to Julious, a black man), and the jury voted to impose that sentence. (Pet'r. Writ of Habeas Corpus, Case No. 2:09-CV-059, ECF 9, Oct. 9, 2009, at 34). McKnight appealed, and, on November 30, 2005, this Court affirmed his convictions and sentences, including the death penalty. *State v. McKnight*, 107 Ohio St. 3d 101, 837 N.E.2d 315, 364 (2005).

McKnight filed a petition for a writ of habeas corpus in federal court in 2009, in part arguing that he was denied a fair trial and an impartial jury. He specifically sought permission to depose the jurors involved in his trial to determine whether pervasive racial bias had tainted his conviction and death sentence. (Mot. for Leave to Conduct Discovery, Case No. 2:09-CV-059,

ECF 27, Dec. 15, 2010, at 8-11). That request was denied on the ground that any information obtained from such depositions would be inadmissible under Federal Rule of Evidence 606(b). (Order on Pet'r. Mot. for Discovery, Case No. 2:09-CV-059, ECF 31, Feb. 2, 2011, at 11-13).

II. Supreme Court's Decision in *Pena-Rodriguez* and Juror Statements

But on March 6, 2017, the Supreme Court decided *Pena-Rodriguez*, which acknowledged the racial bias systemic in our criminal justice system and held that "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Pena-Rodriguez*, 137 S. Ct. at 869. *Pena-Rodriguez* thus allowed McKnight and similarly-situated defendants to seek out and use evidence of racial animus during deliberations, which had been previously precluded by Rule 606(b).

Following that decision, the Federal Public Defenders representing McKnight in the ongoing federal habeas proceeding began a diligent search to find and interview the jurors involved in McKnight's case. Counsel's investigator, Glen Almany, spent almost two years identifying the jurors, locating them, and interviewing them. He ultimately obtained sworn statements from two of them, and has executed a sworn affidavit describing the statements he obtained from three others. (*See* Motion for Leave to Seek a Motion for a New Trial, April 1, 2019 "Mot. for Leave"), Ex. A, Ex. B, Ex. C, Ex. D). The jurors who spoke to Almany confirmed that racial bias had played a key role in the jury deliberations. Those individuals explained, in detail, the discussions had during deliberations about McKnight's race, and described racist statements of the rawest and most shocking nature that were made in the jury room during deliberations in both the guilt and penalty phases of the trial. The jurors admitted that the pervasive racism by certain members of the jury materially affected the outcome of the

case and irreparably tainted McKnight's convictions and death sentence. Juror A told Almany that there were a number of holdout jurors during the deliberations who had reservations about McKnight's guilt, and that several did not want to sentence McKnight to death. (Mot. for Leave, Ex. A, ¶ 14). That same juror recalled that, as soon as jury deliberations started, one juror (referred to here as Juror C) used racial slurs to describe McKnight, proclaiming that the "'damn nigger . . . killed a white girl," and insisting that "he could tell [McKnight] was guilty" because "McKnight was a nigger." (Mot. for Leave, Ex. A, ¶¶ 7, 9). Juror C continued to use explicitly racist arguments and offensive stereotypes to persuade the holdout jurors to convict McKnight and sentence him to death. (*See* Mot. for Leave, Ex. A, ¶¶ 12-13). Juror A also recalled that Juror C warned his fellow jurors that the "nigger would come back to rape and kill [their] children if [they] didn't vote for death," repeating this threat on multiple occasions throughout the deliberations. (Mot. for Leave, Ex A, ¶¶ 12-13; Ex. C., ¶¶ 8-10). These threats were effective; after one repetition of this racist accusation, a juror who originally was not going to vote for the death penalty changed her mind and agreed to do so. (Mot. for Leave, Ex. C, ¶ 10).

Juror B gave a similar account to Almany. That individual recalled that multiple people on the jury had referred to McKnight as a "nigger" and that "[t]here were a lot of racial slurs during deliberations." (Mot. for Leave, Ex. B, ¶¶ 7-8, 12, 17). Juror B recounted how one juror—an "older man" who fits Juror C's description—"continued to say racially charged comments as the case went on," making comments like "I don't want this motherfucking nigger ever to get out," and "life without parole doesn't mean life, you know that nigger will get out." (Mot. for Leave, Ex. B, ¶¶ 10-11, 12). Like Juror A, Juror B recalled statements by Juror C that McKnight would harm the jurors' children if they did not vote for death, and concluded that "at

least half of [the] jurors voted the way they did because of the color of McKnight's skin." (Mot. for Leave, Ex. B, ¶¶ 10, 18).

Investigator Almany interviewed Juror C as well. (*See* Mot. for Leave, Ex. C, ¶¶ 5-11). Sixteen years after the deliberations had taken place, Juror C still openly and repeatedly referred to McKnight as a "nigger" throughout his conversation with the investigator. (Mot. for Leave, Ex. C, ¶¶ 5, 7, 11). Juror C further told Almany that McKnight had "mixed kids all over the place, and that none of the white women had the guts to come in the courtroom." (Mot. for Leave, Ex. C, ¶ 5). Juror C went on to say that McKnight wanted to "screw" the white victim, Emily Murray, calling McKnight's trailer in Vinton County a "pad for that nigger to bring these white women down there and spend the weekend with them." (Mot. for Leave, Ex. C, ¶¶ 6-7).

The interviewed jurors also discussed racism in deliberations more broadly. (*See* Mot. for Leave, Ex. C, ¶¶ 4, 13). In addition to his conversation with Juror C, Almany detailed in his affidavit his conversations with Jurors D and E. Both recalled that one of the jurors had asked the rest of the jury if they were "sentencing Mr. McKnight to death because he was black." (Mot. for Leave, Ex. C, ¶ 13; Ex. A ¶ 6). Similarly, Juror D confirmed McKnight's view that racism made the prospect of McKnight testifying in his own defense in Vinton County a terrible idea, telling Almany, "I can't imagine in Vinton County a black man that gets on the stand would have been well received." (Mot. for Leave, Ex. C, ¶ 4).[1]

III. Efforts to Obtain a New Trial

After diligently pursuing evidence to support his new trial motion for a year, McKnight sought to amend his federal habeas petition within the one-year filing deadline in order to

[1] Juror B offered a similar opinion, stating that "[t]here were also things going on in the community that would have made it impossible for Mr. McKnight to get a fair trial. Vinton County is not a friendly place for black people, or anyone who is not white." (Mot. for Leave, Ex. B, ¶ 17).

include claims based on the troubling facts Almany had gathered. That motion was denied on May 22, 2018. (Decision and Order on Mot. to Amend, Case No. 2:09-CV-059, ECF 282, May 22, 2018). In his order, the Magistrate Judge conceded that "[i]t is plainly unconstitutional to convict someone and sentence him to death because of his race or on the basis of racial stereotyping," but found that the principles governing the retroactive effect of Supreme Court decisions on *collateral* attacks on convictions, such as that habeas proceeding, precluded the claim. (Case No. 2:09-CV-059, ECF 282, at 3). The court specifically observed that its rulings did not preclude McKnight from seeking relief in state court in Ohio. *Id*. at 13. Indeed, in another order, the federal court again noted that a new trial motion in state court would be procedurally more appropriate than raising the issue in a collateral challenge. (Order Denying Pet'r. Mot. for Auth. To Appear in State Court, Case No. 2:09-CV-059, ECF 305, Aug. 28, 2018 at 3-4).

In light of that decision and the federal court's observations, McKnight's attorneys from the Federal Public Defender requested permission to appear in state court on McKnight's behalf to present his motion for a new trial. (Pet'r Mot. for Auth. To Appear in State Court, Case No. 2:09-CV-059, ECF 287, Jul. 6, 2018). That request was denied by the district court on November 28, 2018. (District Judge Order Denying Auth. To Appear in State Court, Case No. 2:09-CV-059, ECF 322, Nov. 28, 2018). Within three months of that denial, (1) McKnight retained the undersigned counsel to represent him, (2) undersigned counsel sought admission *pro hac vice* in Ohio, and (3) undersigned counsel filed notices of appearance in the trial court.

McKnight filed his Motion for Leave to Seek a Motion for New Trial on April 1, 2019. (Mot. for Leave). On July 1, the Court held a telephonic status conference, during which McKnight requested oral argument. *State v. McKnight*, Case No. 01-CR-7230 (Vinton Common

Pleas, Jul. 3, 2019). On July 3, the Court denied that request, and instead "set [the] matter for a non-oral hearing" on August 9, 2019. *State v. McKnight*, Case No. 01-CR-7230 (Vinton Common Pleas, Jul. 3, 2019). McKnight filed a "non-oral hearing" brief, requesting that the Court reconsider the request for oral argument. (Def. Mot. For Reconsideration, Aug. 9, 2019).

After six months, the trial court denied the Motion for Leave in a cursory, two-page order on February 27, 2020. (*See* State's Memorandum in Support of Jurisdiction ("State Memo"), Ex. 2). McKnight appealed, and although the Fourth District Court of Appeals ruled in his favor, the appellate decision articulated an incorrect rule of decision to be applied in the trial court, one that would effectively preclude relief by *any* defendant seeking leave to request a new trial on the grounds McKnight has advanced here. (*See* State Memo, Ex. 1). The state appealed the decision (*see* State Memo), and McKnight now cross-appeals.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW OF APPELLEE/CROSS-APPELLANT GREGORY MCKNIGHT

APPELLEE/CROSS-APPELLANT GREGORY McKNIGHT'S PROPOSITION OF LAW NO.1*: Gregory McKnight was unavoidably prevented from obtaining and presenting evidence of juror misconduct by the combination of two Ohio procedural rules: Rule 606(B) of the Ohio Rules of Evidence—which barred McKnight from obtaining and presenting testimonial evidence from jurors about statements during jury deliberations—and Ohio Criminal Rule 33(C)—which required such affidavits in order to seek a new trial.*

The decision of the appellate court, if allowed to stand, creates a nearly impossible standard for defendants seeking a new trial based on this type of juror misconduct. Far from "reliev[ing] the defendant of the burden of proof imposed under the terms of Crim. R. 33," as the state claims, the decision below imposes an impossible standard that finds no support in the spirit or letter of the Ohio Rules. (State Memo at 9). Specifically, though the appellate court correctly stated the standard for McKnight's motion (*see* Judgment Entry and Opinion, Fourth Appellate District, Aug. 3, 2021 ("App. Op."), at 5-6), it went on to require a particular way of meeting that

standard that will all but preclude a successful motion in cases involving overt racial animus in jury deliberations.

The appellate court's decision categorically requires defendants to interview jurors within 14 days of a verdict even if they were convicted prior to *Pena-Rodriguez*, when the defendant was flatly prohibited by the Ohio rules from using any information a defendant could obtain through those discussions. (*See* App. Op. at 11).

Pursuant to Rule 33 of the Ohio Rules of Criminal Procedure, a defendant may file a motion for permission to seek a new trial without leave of court within 14 days of a verdict. Ohio Crim. R. 33(B). Even after the 14-day period, however, "[i]f it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial," the defendant may file a motion within seven days from an order of the court finding that "he was unavoidably prevented from filing such motion" within the time limitations. Ohio Crim. R. 33(B). Additionally, when filing a motion for leave to seek a new trial based on juror misconduct, as McKnight does, Ohio Criminal Rule 33(C) further requires that the allegations must be "sustained by [supporting] affidavit[s] showing the[] truth" of those allegations. Ohio Crim. R. 33(C).

But that very requirement was precluded by Ohio Rule of Evidence 606(B), which prohibited jurors from testifying about what took place during jury deliberations. Ohio Evid. R. 606(B) ("[A] juror may not testify as to any matter or statement occurring during as to any matter or statement occurring during the course of the jury's deliberations…"). As McKnight has pointed out continuously in his briefing to lower courts, this regime itself therefore created a *de facto* bar to relief based on juror misconduct, a bar that remained in place until the Supreme Court announced in *Pena-Rodriguez* that the protections of Rule 606(b) had to give way when it

came to colorable allegations of racial animus in deliberations, because of how pervasive and problematic racism has become in our criminal justice system. *Pena-Rodriguez*, 137 S. Ct. at 868.

Thus, even if McKnight had learned of the racism that pervaded his conviction and sentence right after the verdict came down, he would have been unable to introduce that as evidence in court, because the affidavit required by Ohio Criminal Rule 33(C) was prohibited by Rule 606(B) of the Ohio Rules of Evidence. Indeed, as noted above, McKnight sought permission to avoid that bar from the courts, and that permission was denied on the basis of Rule 606(b). And if McKnight had engaged in those conversations with jurors back in 2002, sat on that information until *Pena-Rodriguez* allowed him to use it, and then come back into court, under the appellate court's opinion he would still likely lose today because it would no longer be considered newly discovered evidence.

In its opinion, the appellate court initially presented the new trial motion standard correctly:

> An application for a new trial based on jury misconduct must be filed within 14 days after the verdict is rendered, "unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for new trial ***." The definition of "unavoidably prevented" is: "[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *State v. Walden*, 19 Ohio App.3d 141, 145-146, 483 N.E.2d 859 (10th Dist.1984).

(App. Op. at 5-6). But then the appeals court went on to restrict the ways in which a defendant can meet that standard, effectively barring relief in every case predicated on jury misconduct like that upon which McKnight relies:

> McKnight's argument that he was prevented by Evid.R. 606(B) from investigating jury misconduct misconstrues the rule and "puts the cart before the horse." He must first interview the jury and ask questions about potential juror misconduct, (i.e., outside influences, tampering, attempted threats or bribes, or any other improper conduct) before he can determine whether there was any juror misconduct and the nature of it. Only after interviewing the jury could he learn the type of jury misconduct that occurred. A defendant who is not unavoidably prevented from discovering the misconduct would not be entitled to leave to file a motion for new trial based on jury misconduct regardless of the type of jury misconduct involved. Evid.R. 606(B) would be irrelevant because a defendant would not be entitled to file a motion for a new trial under Crim.R. 33(A)(2) for any type of jury misconduct. The lack of reasonable diligence – not Evid.R. 606(B) –would bar any motion for a new trial under Crim.R. 33(A)(2). *See State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990).

(App. Op. at 11). In other words, it is likely that McKnight could no longer avail himself of the out-of-time rule for seeking a new trial, since he didn't seek to obtain evidence within 14 days that he knew he could not introduce in court, despite the fact that he diligently sought out, obtained, and presented that evidence as soon as that bar was lifted. Not only does that standard encourage frivolous filings that would result in an enormous waste of judicial resources, but it also completely subsumes an important procedural mechanism that was put in place to ensure that, where appropriate, defendants could present to the courts significant deficiencies in their trial and conviction that were discovered outside of the 14-day period.

Nothing in the Ohio Rules required McKnight to talk to jurors in 2002 in order to be entitled to seek a new trial. Instead, as the standard clearly states, he needed to exercise reasonable diligence as soon as he was able to obtain the evidence of juror misconduct. As he has demonstrated at all stages of this case, McKnight did precisely that. *See State v. Landrum*, No. 17 CA 3607, 2018 WL 1611764, at *4 (4th Dist. Mar. 29, 2018) (quoting *State v. Walden*, 19 Ohio App. 3d 141, 438 N.E.2d 859, 865 (10th Dist. 1984)) ("[a] party is unavoidably prevented from filing a motion for a new trial if the party had no knowledge of the existence of

the ground supporting the motion . . . and could not have learned of the existence of that ground within the time prescribed . . . *in the exercise of reasonable diligence*") (emphasis added). As soon as *Pena-Rodriguez* was decided, Investigator Almany immediately began finding the jurors who served in McKnight's 2002 trial and was able to identify all twelve jurors after multiple trips to Vinton County. He then obtained the evidence the Ohio Rules require, and McKnight promptly pursued his new claims, first in his pending federal proceedings, and then shortly thereafter in State Court. As such, the standard on remand articulated by the appellate court was erroneous, and McKnight requests that this court clarify the standard so that this matter can be properly judged by the trial court.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW OF APPELLANT

I. McKnight has presented clear and convincing proof that he was unavoidably prevented from filing a motion for new trial.

The state argues that McKnight is not entitled to relief because he "fail[ed] to produce clear and convincing proof that he was unavoidably prevented from" filing a timely motion for a new trial. (*See* State Memo at 13). But for all the reasons set out in detail in his prior briefing, that is simply not true. As explained above and in the briefing before the trial and appellate courts, the paradox created by Rule 33(C) and Rule 606(B) precluded McKnight from introducing the evidence of juror misconduct that the Ohio Rules require until the Supreme Court's decision in *Pena-Rodriguez* circumscribed the reach of Rule 606(B).

That point is underscored by the fact that McKnight suspected that juror misconduct and pervasive racial bias had affected the outcome of his case long before *Pena-Rodriguez*, and sought permission from the courts to seek out evidence to that effect. That permission was denied because Rule 606(B) prohibited the introduction of juror testimony about deliberations unless a defendant had an independent basis to suspect misconduct based on extrinsic evidence.

Ohio Evid. R. 606(B). McKnight's requests to depose the jurors in his case about issues involving racial bias were similarly denied by the federal courts on the ground that any information obtained from such depositions would be inadmissible under Federal Rule of Evidence 606(b). (Case No. 2:09-CV-059, ECF 27, at 8-11); (Case No. 2:09-CV-059, ECF 31, at 12-13). To suggest that McKnight should be penalized now either for seeking permission from the court in the face of a procedural bar to obtaining the evidence he needed or for subsequently abiding by the decisions rendered by those courts would be both illogical and unfair. McKnight was unavoidably prevented from vindicating his due process rights until the change in law brought about by the Supreme Court's decision.

II. McKnight diligently pursued evidence about juror misconduct in the jury room and brought that evidence to the court once he was no longer prevented from doing so.

The state argues that both McKnight's delay in discovering evidence of juror misconduct and the delay in filing his motion warrant denial of the relief he seeks—namely an opportunity to present his request for a new trial and the evidence supporting that request to the courts. Again, McKnight has demonstrated at every stage of this proceeding that he both diligently worked to discover the evidence and diligently moved to present that evidence to the trial court once he had it. Ohio courts have held that "[a] party is unavoidably prevented from filing a motion for a new trial if the party had no knowledge of the existence of the ground supporting the motion… and could not have learned of the existence of that ground within the time prescribed… *in the exercise of reasonable diligence*." *State v. Landrum*, No. 17 CA 3607, 2018 WL 1611764, at *4 (4th Dist. Mar. 29, 2018) (emphasis added) (quoting *State v. Walden*, 19 Ohio App. 3d 141, 438 N.E.2d 859, 865 (10th Dist. 1984)). Additionally, courts have held that mere delay is not a sufficient justification for denying a defendant leave to file a motion for a new trial, *State v. Pinkerman*, 88 Ohio App. 3d 158, 160, 623 N.E.2d 643, 644 (4th Dist. 1993), where, as here, the

defendant was unavoidably prevented from discovering the new evidence within 14 days. Ohio Crim. R. 33(B).

As required by the rules and court rulings, McKnight waited until he had a proper avenue for introducing evidence of juror misconduct in court, and then exercised reasonable diligence to obtaining that evidence as quickly as possible. As soon as *Pena-Rodriguez* was decided, Investigator Almany immediately began seeking out all of the jurors who served in McKnight's 2002 trial, and was ultimately able to identify and locate all twelve jurors after multiple trips to Vinton County despite the fact that more than 15 years had passed since they rendered their decision in McKnight's case. Two jurors were deceased, one was incarcerated, and one refused to speak with him. (Mot. for Leave, Ex. D, ¶ 7, 13-14). He also obtained sworn affidavits confirming the racist misconduct that McKnight had long suspected from two of the jurors. (Mot. for Leave, Ex. A; Ex. B).

McKnight first sought to pursue his new claims through counsel he already had in proceedings that were already underway. He filed a motion to amend his pending federal habeas petition to add claims of racial bias during deliberations. (Pet'r. Mot. for Leave to File Amend. Pet., Case 2:09-CV-059, ECF 271a, Mar. 6, 2018). That motion was denied on May 22, 2018, based on the Magistrate Judge's determination that federal habeas proceedings were not the appropriate avenue for pursuing these claims. (Case No. 2:09-CV-059, ECF 282). The federal defenders moved for permission to represent McKnight in state court proceedings to preserve these critical arguments about the injustice of his death sentence, but that motion was denied. (Case No. 2:09-CV-059, ECF 287, 322). Within three months from the date of that decision, McKnight had found and retained undersigned counsel to represent him *pro bono*, and counsel had sought admission *pro hac vice* and filed notices of appearances with the trial court. That

sequence of events cannot plausibly be characterized as an "unreasonable" delay. (*See State v. McKnight*, Case No. 01-CR-7230 (Vinton Common Pleas, Feb. 27, 2020) ("Order") at 2). As such, McKnight has demonstrated reasonable diligence in pursuing his claims.

CONCLUSION

This Court should accept jurisdiction and clarify how *Pena-Rodriguez* affects the interplay of Rule 33(C) and Rule 606(B) in the context of a new trial motion based on juror misconduct involving racism in the jury room. Such a clarification is critical to allow defendants like McKnight, whose life is literally on the line, to vindicate the constitutional protections at the core of our criminal justice system. McKnight—like so many others—deserves the opportunity to present this compelling and deeply troubling evidence about the deficiency in his conviction and sentencing, which demonstrate beyond any doubt that he is sitting on death row because of the color of his skin.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Cross-Appellant's Notice of Cross-Appeal was sent via email and served on all counsel listed below.

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