# In the Supreme Court of Ohio

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| STATE OF OHIO, | : | Case No. 2022-1182 |
| | : | |
| Appellant, | : | On Appeal from the |
| | : | Hamilton County |
| v. | : | Court of Appeals, |
| | : | First Appellate District |
| RICKEY BROWN, | : | |
| | : | Court of Appeals |
| Appellee. | : | Case No. C-210355 |

## CORRECTED MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT STATE OF OHIO

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**TABLE OF CONTENTS**

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes and Rules**

## INTRODUCTION

This case stems from an online ruse. Rickey Brown, the defendant and appellee, created an account on an application called "Letgo" using a false name. Through the application, Brown lured Holly Smothers into meeting him under the pretense of a car sale. Smothers had her friend, Sharlene Johnson-Bryant, drive her to the purported sale. Once they arrived, Smothers spoke with Brown about the car she was buying. But Brown never sold Smothers a car. Instead, he pulled out a gun, pointed it at Johnson (who was holding Smothers' money), and stole Smothers' money. Shortly after the crime, Smothers went back online. She soon connected the robber's Letgo account to Brown's Facebook account. From pictures on the Facebook account, both Smothers and Johnson immediately recognized Brown as the robber. They informed the police, and the State eventually indicted Brown for multiple counts of robbery. At his bench trial, Brown argued that he was not the culprit. But both Smothers and Johnson confidently identified Brown as the robber. The trial court found Brown guilty of robbing both Smothers and Johnson.

The First District reversed Brown's convictions. It concluded that there was a statutory problem (with Brown's conviction for robbery against Smothers) and a constitutional problem (a *Brady* violation during the trial). It erred on both fronts.

Begin with the statutory issue. In Ohio, a person commits robbery when the person, in the course of "committing a theft offense," "threaten[s] to inflict physical harm

on another." R.C. 2911.02(A)(2). No one disputes that Brown (if he was the perpetrator) robbed Johnson, as he brandished a gun and pointed it at Johnson, demanding the money in her hand. But Brown *also* robbed Smothers. By pulling out a gun while standing right next to Smothers, Brown implicitly threatened physical violence against Smothers should she choose to interfere with the theft of her money. *See State v. Evans*, 122 Ohio St. 3d 381, 2009-Ohio-2974 ¶23.

The First District, however, held that Brown committed no robbery against Smothers. It reasoned that the State, to prove robbery against Smothers, needed to prove that Smothers was the target of the theft. And, in the First District's view, because Johnson was holding the money at the time of the theft, Johnson—not Smothers—was the target of the theft. *State v. Brown*, 2022-Ohio-2752 ¶¶53–54 (1st Dist. 2022) ("App. Op."). The First District's target-of-the-theft analysis is irrelevant to the crime of robbery under R.C. 2911.02(A)(2). Nothing in that statutory provision requires that the victim of the robbery—that is, the person threatened—also be the target of the underlying theft. *Cf. State v. Thomas*, 106 Ohio St. 3d 133, 2005-Ohio-4106 ¶13. In any event, because the stolen money belonged to Smothers, she *was* a target of the theft.

Turn, then, to the alleged *Brady* violation. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the State has an obligation to disclose evidence that is favorable to the defendant and material to the case. Here, during pretrial discovery, the State identified its potential witnesses and turned over its physical evidence. But the State did not specifically

inform Brown before trial that Smothers was the person who, through online research, first uncovered his Facebook account. This detail came out the first day of trial, when Smothers testified. And Brown's attorney then used this information throughout the trial to support the defense's theory: that the victims had misidentified Brown.

These circumstances do not amount to a *Brady* violation, for at least two reasons. *First*, because the relevant information came out during trial (not after), Brown was able to use the information in support of his defense. Brown, moreover, did not seek a continuance of trial before the verdict. This sequence of events is fatal to Brown's *Brady* claim, as it shows that any delay in disclosure did *not* impair the fairness of Brown's trial. *See State v. Iacona*, 93 Ohio St. 3d 83, 100–01 (2001) (plurality op.). *Second*, the information about Smothers' investigation is not actually material to Brown's case, at least in the sense relevant to a *Brady* claim. Evidence is "material" for *Brady* purposes when, comparing what actually happened at trial to what would have happened with an earlier disclosure, "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 470 (2009). Here, no such probability exists. Brown made considerable use of the Smothers' investigation at his trial, and the trial judge (the trier of fact in Brown's case) still found him guilty based on the strength and credibility of the State's eyewitness testimony.

The First District wrongly held otherwise. Its *Brady* analysis mostly ignored the many ways Brown was able to use the new information during his trial. As a result, the

First District greatly overestimated the likelihood that an earlier disclosure of the information would have led to a different result.

All told, the First District erred by disturbing Brown's convictions. This Court should reverse.

## STATEMENT OF *AMICUS* INTEREST

The Attorney General "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. As Ohio's chief law officer, the Attorney General has an interest in ensuring the correct interpretation of Ohio statutes, including the elements of robbery under R.C. 2911.02(A)(2). The Attorney General, who often serves as special prosecutor in criminal cases, also has an interest in the correct interpretation of disclosure requirements that apply to Ohio prosecutors under *Brady* and its progeny.

## STATEMENT OF THE CASE AND FACTS

**1.** In the spring of 2020, Holly Smothers went online to shop for a car. She used an application called "Letgo" to try and locate a car within her $600 budget. Trial Tr. 61. She eventually came across a Letgo user, going by the name "Danny Buckley," offering to sell a 2001 Toyota Corolla. *Id.* at 32, 97. Smothers communicated with this supposed seller through the Letgo application: the pair agreed on a price of $600 for the car, exchanged cell phone numbers, and arranged to meet in the Avondale neighborhood of Cincinnati to complete the sale. *Id.* at 62, 64.

The agreed meeting took place on a Sunday afternoon in early May. To get to the meeting, Smothers—with her $600 in hand—hitched a ride from Sharlene Johnson-Bryant, her boyfriend's aunt. *Id.* at 63. But after Johnson drove Smothers to the prearranged location, the purported seller called Smothers and asked her to come to a different, nearby street. *It.* at 64–65, 104. When Smothers and Johnson arrived at the new location, a man approached Johnson's car and spoke with Smothers about showing her the car she was buying. *Id.* at 66–68. Smothers handed her money to Johnson and got out of Johnson's car. *Id.* at 68–69, 108. By that point, the man was on the passenger side of Johnson's car, standing "right next to" Smothers. *Id.* at 69, 71–73. He pulled out a gun, leaned down into the car, pointed the gun at Johnson, and demanded, "Give me the money." *Id.* at 73–74, 109–11. Johnson gave the man Smothers' money, and the man ran away. *Id.* at 111.

Johnson and Smothers drove to a nearby store, where Smothers called 911. *Id.* at 114. A police officer soon responded to the call. *Id.* at 26. Smothers and Johnson reported the crime to the officer. In describing the robber, Smothers estimated that the man was 5'5" tall and weighed about 120 pounds. *Id.* at 30, 92. Smothers also showed the officer the communications she had with "Danny Buckley" on her phone via the Letgo application. The officer took a screenshot of these communications. *Id.* at 32; State Ex. 4. (By the time of trial, Smothers had replaced the phone she used to communicate with the robber, which had broken after the robbery. Trial Tr. 76–78.)

A day or two later, Smothers went back onto the Letgo application to look for more information about the robber. *Id.* at 82–85. She discovered that the Letgo account of "Danny Buckley" linked to the Facebook account of a "Rickey Tan." *Id.* at 82–85, 90, 94, 96–97, 138–40. Smothers thought that the photos on that individual's Facebook account "looked exactly like" the robber. *Id.* at 91. She showed the photos to Johnson, who also concluded "that was it"; the pictures were just "what he looked like." *Id.* at 121–22.

Smothers shared the "Rickey Tan" Facebook photos with the detective assigned to the investigation. *Id.* at 137–38. The detective forwarded the Facebook photos to the police department's intelligence unit, along with the screenshot the responding officer took of Smothers' phone. *Id.* at 138–40. The intelligence unit soon reported back with the name and personal information of the defendant, Rickey Brown. *Id.* at 140. The detective also obtained a search warrant for the phone number the robber had given Smothers, but the warrant produced no information helpful to identifying the robber. *Id.* at 143–45.

About a week after the robbery, the police had Smothers and Johnson look at a lineup of photographs. Both victims, independent of one another, picked Brown's photo out of the lineup. *Id.* at 46, 52–53. Johnson reported during the lineup that she was "positively, one hundred percent" sure that Brown was the robber. *Id.* at 46. Smothers became "visibly upset" during the lineup when she came across Brown's photo, she in-

dicated she was "99 percent" confident in picking Brown's picture out of the lineup. *Id.* at 52.

**2.** The State indicted Brown for multiple offenses, including having a weapon while under disability and aggravated robbery against Johnson. App. Op. ¶2. Most relevant here, the State also indicted Brown for robbery against Smothers under R.C. 2911.02(A)(2). That provision says: "No person, in attempting or committing a theft offense … shall … threaten to inflict physical harm on another."

Brown requested discovery in the leadup to trial. Among other things, the State provided Brown with (1) the names of its potential witnesses, including Smothers and Johnson, (2) the screenshot police had taken of Smothers' conversation with "Danny Buckley" via the Letgo application, and (3) the photos taken from Brown's "Rickey Tan" Facebook account. App. Op. ¶84 (Winkler, J., dissenting). But the State did not explain to Brown that Smothers was the person who first obtained the Facebook photos.

Brown opted for a bench trial, which took place over two days in April 2021. From opening statements, it appears that the prosecutor initially thought that the police found the Facebook photos of Brown. *See* Trial Tr. 15. Smothers, however, testified on the first day of trial and clarified that she had uncovered the Facebook photos using the Letgo application. *Id.* at 82–87. Brown, through his attorney, had moved to exclude the Facebook photos from evidence at the start of trial on the ground that they were unduly prejudicial. *Id.* at 8–10, 87–88. But Brown did not, on either day of trial, move for a con-

tinuance of the trial so as to locate an expert witness or conduct further investigation into the Letgo account of "Danny Buckley." *See* Crim.R.16(L)(1). Instead, Brown's attorney made clear through her cross examination of the State's witnesses that Smothers and Johnson had looked at the Facebook photos *before* they picked Brown out of a police lineup. Trial Tr. 90–91, 154–55; *see also id.* at 85–87, 116–18. Along similar lines, Brown's attorney questioned the lead detective on the case about what the police did and did not do as part of the investigation. *See id.* at 152–57.

During the State's case, both Smothers and Johnson described why they were confident in their identification of Brown. Smothers testified that, as she was getting out of Johnson's car, she had a "face-to-face conversation" with the robber from about "maybe two, three feet" away. *Id.* at 69–70, 88. As a result, Smothers got "a clear look at his face," and she was "certain" that Brown was the robber. *Id.* at 70, 82. Smothers noted that her initial description of the robber's height and weight to police was a "rough" guess, *id.* at 92, and she did not recall the robber having tattoos, *id.* at 93. (Brown is slightly larger than Smothers' estimate—he is about 5'8" tall and weighed 150 pounds at the time of the crime. *Id.* at 256–57. Brown also has tattoos on his arms. *Id.* at 257.) Smothers explained that what she had been "looking at" during her encounter with the robber was "his face." *Id.* at 93.

Johnson, who grew up in the Avondale neighborhood, testified that the robber looked familiar to her at the time of the crime. *Id.* at 106–07. When the robber bent

down into the car, Johnson was "about two feet" away from him and got "a clear look at his face." *Id.* at 109–10. Johnson was "positive" that Brown was the robber because of his "facial features." *Id.* at 120, 126. She specified that Brown's eyes, which she described as "sunk in," had "stood out" to her and "stuck with" her. *Id.* at 122–23. Like Smothers, Johnson did not remember the robber having tattoos; what she had "seen was his face." *Id.* at 123.

At the close of the State's case, Brown's attorney moved for a judgment of acquittal based on insufficient evidence. *Id.* at 161–64. She argued that the victims' identifications of Brown were unreliable because Smothers had conducted her own investigation through the Letgo application and because both victims had seen Brown's Facebook photos before picking him out of a lineup. *Id.* Brown's attorney went on to criticize the police for failing to independently investigate the connection between the Letgo account of "Danny Buckley" and Brown's Facebook account. *Id.* at 162. The trial court denied the motion, noting that the two victims of the crime had confidently identified Brown as the robber. *Id.* at 165.

Brown proceeded with an alibi defense. He argued that he could not have committed the robbery because, at the time of the robbery, he was running errands for a friend's birthday party. More specifically, Brown argued that, during the period in which the crime occurred, he was at Kroger and a restaurant, both in the Clifton neighborhood of Cincinnati. *See id.* at 244–46, 271. (Clifton is about a 10- to 15-minute drive

from the crime scene. *Id.* at 149. The crime occurred on a Sunday, when traffic would have presumably been light. *Id.*)

To support his account, Brown relied on the testimony of his girlfriend and two longtime friends. Even on the cold paper, some aspects of their collective story are far-fetched. For example, one of Brown's friends, who was not physically with him at the time of the robbery, testified that she "knew" Brown was at Kroger shortly before the robbery—and *not* any other potential store—because over a "couple second[]" phone call she discerned the "unique sound" of Kroger in the background. *Id.* at 182–84. Another longtime friend reported that, despite talking with Brown "every couple of months," and despite purporting to remember minute details about the timeline of the day in question (which occurred almost a year before trial), she had not had any conversation with Brown or other witnesses about that day's events. *Id.* at 198–99.

Brown also testified on his own behalf, describing his supposed whereabouts on the day of the crime. As already alluded to, his account of that day placed him in a different area of Cincinnati (although still nearby) around the time of the crime. During his testimony, Brown discussed a list of charges to his debit card. *Id.* at 247. The list indicated that Brown had made a purchase from a restaurant in Clifton (Mr. Sushi) on the day of the crime, but it did not indicate the time of the purchase. *Id.* at 248; App. Op. ¶37. The list, however, also included another purchase that day—at "the Avondale Drive Thru"—that placed Brown very near the scene of the crime. Trial Tr. 263–67.

Upon cross examination, Brown admitted that he "neglected" to include that purchase when testifying about the day's events. *Id.* at 267. Brown also testified that, during the timeframe in question, he was in the process of selling a 1998 Toyota Corolla through a Letgo account under his own name. *Id.* at 252. Brown ultimately sold that car. *Id.* at 255.

During closing arguments, Brown's attorney argued that the victims made a false identification based on Smothers' online investigation of the crime. The defense's theory was that Smothers linked to Brown's Facebook photos from Brown's own Letgo account, *not* from the Letgo account of "Danny Buckley." *Id.* at 294. And because the victims had already seen Brown's photos by the time of the police lineup, the results of the lineup were unreliable. *Id.* at 294–95. Smothers' flawed investigation, the defense's argument went, convinced both Smothers and Johnson that they had identified the correct perpetrator even though they had not. *Id.* at 298. Relatedly, Brown's attorney criticized the police for not doing more to investigate the crime themselves. *Id.* at 295.

The trial court delivered its verdict on April 12, 2020, about a week after hearing each side's case. (At no point between the close of trial and the verdict did Brown move for a mistrial or a continuance of trial based on the belated disclosure of information.) The trial judge, who was able to listen to and observe each witness during the bench trial, concluded that the testimony of Smothers and Johnson was credible and that the testimony of Brown and his friends was not. She found Brown guilty of having a weapon

while on disability, aggravated robbery against Johnson, and robbery against Smothers. *Id.* at 314–15.

**3.** After the trial court rendered its verdict, Brown moved for a new trial under Criminal Rule 33. Rule 33 permits a trial court to grant a defendant a new trial if prosecutorial misconduct, or newly discovered information, materially affects the defendant's rights. Crim.R.33(A). Typically, a defendant seeking a new trial based on newly discovered evidence must show "a strong probability" that the new evidence "will change the result" of the trial. *State v. Hatton*, __ Ohio St. 3d __, 2022-Ohio-3991 ¶28 (quotation marks omitted). But a defendant can also satisfy Rule 33 by showing a *Brady* violation, which—as discussed at length later on—involves a slightly different analysis as to the materiality of undisclosed information. *See State v. Johnston*, 39 Ohio St. 3d 48, 60 (1988).

In his motion for a new trial, Brown alleged that the State committed a *Brady* violation by failing to disclose before trial that Smothers had obtained Brown's Facebook photos through her own investigation. He relatedly argued that the undisclosed information was material to his case. Repeating his trial arguments, Brown submitted that Smothers misidentified him through the Letgo application, which, in turn, biased the police lineup. Mot. for New Trial at 3, 5–7 (May 25, 2021). Brown also added that, had he known of this information earlier, he might have hired an expert witness to talk about eyewitness misidentification. *Id.* at 6.

The trial court denied the motion, holding that the *Brady* violation Brown alleged did not satisfy the requirements for a new trial based on newly discovered evidence. Trial Or. (June 7, 2001) (citing *State v. Hawkins*, 66 Ohio St. 3d 339, 350 (1993)).

**4.** Brown appealed. He made two arguments that are relevant for present purposes. *See* App. Op. ¶¶1, 69. First, Brown argued that there was insufficient evidence supporting his conviction for robbery against Smothers under R.C. 2911.02(A)(2). Second, Brown argued that the trial court erred in denying his motion for a new trial based on the alleged *Brady* violation.

A divided panel of Ohio's First District Court of Appeals agreed with Brown as to both arguments. The panel first held that there was insufficient evidence that Brown robbed Smothers. App. Op. ¶¶50–54. By way of background, Ohio law recognizes several ways of committing robbery. R.C. 2911.01–.02. As relevant here, a robbery occurs when a person "in attempting or committing a theft offense or in fleeing immediately after the attempt or offense … threaten[s] to inflict physical harm on another." R.C. 2911.02(A)(2). Without analyzing this statutory text, the First District concluded that, "when no property is taken from a person, a threat of harm used against that person does not establish a robbery." App. Op. ¶53 (citing *State v. Gamble*, No. C-960071, 1996 WL 656354 at *3 (1st Dist. Nov. 13, 1996)). Said another way, the First District held that, for a robbery to occur under R.C. 2911.02(A)(2), the threatened person must also be the target of the underlying theft offense.

Applying this target-of-the-theft theory, the First District concluded that Smothers was not a victim of robbery. App. Op. ¶54. True, the money "belonged to Smothers" and Brown "brandished" the gun while "in close proximity" to Smothers. *Id.* But "the money was taken from Johnson." *Id.* That, in the First District's view, meant that Smothers was not robbed.

The First District also ruled for Brown on his *Brady* argument. App. Op. ¶¶55–69. Initially, the First District faulted the trial court for treating Brown's Rule 33 motion as a motion based on newly discovered evidence rather than an alleged *Brady* violation. App. Op. ¶60; *see also above* 12. The panel then proceeded to conduct a *Brady* analysis. Under *Brady*, prosecutors must disclose any evidence that is favorable to the defendant and material to the defendant's case. *See* 373 U.S. at 87. "Evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (brackets and quotation marks omitted).

The First District held that the State's failure to disclose Smothers' investigation before trial violated *Brady*. According to the panel, the fact that Smothers uncovered Brown's Facebook photos was material. App. Op. ¶62. Oddly, to explain why there was a reasonable probability that the result of Brown's trial would have been different with an earlier disclosure, *see Turner*, 137 S. Ct. at 1893, the panel relied primarily on arguments that Brown actually made (unsuccessfully) against the State's evidence during

his bench trial, *see* App. Op. ¶¶62–66. With little detail, the panel then suggested that, if Brown had received information earlier, he would have had a more effective opportunity to challenge "the alleged link to his Facebook page and the reliability of the identification" during trial. App. Op. ¶67. Outside of that suggestion, the panel left unclear how the timing of events—with Brown learning about the new information during trial, not after—factored into its *Brady* analysis. It noted a potential issue as to whether Brown could have raised his *Brady* argument and sought a continuance during trial. *See* App. Op. ¶68. But the panel declined to address that issue—which it apparently viewed as wholly separate from the *Brady* analysis—because the parties had not briefed it. *Id.*

The First District reversed all of Brown's convictions, discharged Brown from further prosecution for robbery against Smothers, and remanded the case for a new trial on the remaining charges. App. Op. ¶70.

Judge Winkler dissented. App. Op. ¶¶71–92 (Winkler, J., dissenting). He thought that there was sufficient evidence to convict Brown of robbing Smothers. He stressed that "Smothers was the owner of the stolen cash, Brown's intended target, and also in close proximity to Brown when he brandished the gun." App. Op. ¶75. It followed, Judge Winkler explained, that "Smothers is a victim under R.C. 2911.02(A)(2)." App. Op. ¶75.

Judge Winkler also concluded that there was no *Brady* violation. For one thing, the information in question was not favorable to the defense; upon viewing Rickey Brown's Facebook account, Smothers "immediately recognized the profile picture on the account as the robber." App. Op. ¶82. For another thing, the State had provided Brown with information in discovery—including a screenshot of Smothers' conversations with "Danny Buckley"—that put Brown on notice of the "Danny Buckley" account and its potential relevance to the case. App. Op. ¶84. Thus, Brown and his attorney could have investigated further before trial if they so desired. *Id.* Finally, Judge Winkler stressed that, even assuming this information was useful to Brown's case, it was available during trial. App. Op. ¶85. This timing—namely, disclosure "during" rather than "after" trial—meant that there was no *Brady* violation. App. Op. ¶¶86–87 (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976) and *State v. Wickline*, 50 Ohio St. 3d 114, 116 (1990)). Brown, after all, could have sought a continuance of trial if he wanted to make further use of the information. App. Op. ¶¶89–90. Instead, he chose to wait and see what the trial court's verdict would be before raising a *Brady* claim. App. Op. ¶90.

**5.** The State timely appealed, and the Court accepted this case for review.

## ARGUMENT

**_Amicus_ Attorney General's Proposition of Law No. 1:**

> *Under R.C. 2911.02(A)(2), a robbery occurs when, as part of a theft offense, the offender threatens harm against another person—there is no additional requirement that the threatened person be the target of the underlying theft.*

The trial court found Brown guilty of two robbery crimes—one against Johnson, the other against Smothers. The first question presented is whether the State presented sufficient evidence for the trial court to find Brown guilty of robbery *against Smothers* in violation of R.C. 2911.02(A)(2). Under a straightforward reading of that statutory provision, the answer is yes. The First District erred in holding otherwise; it added an element to the crime that appears nowhere in the statutory text.

### I. The State presented sufficient evidence that Brown robbed Smothers.

**A.** When a court reviews a conviction for sufficient evidence, the relevant inquiry is whether "the evidence presented, when viewed in a light most favorable to the prosecution, would allow any rational trier of fact to find the *essential elements* of the crime beyond a reasonable doubt." *State v. Groce*, 163 Ohio St. 3d 387, 2020-Ohio-6671 ¶7 (emphasis added). In discerning the "essential elements" of a crime, *id.*, one must remember that "Ohio has no common law crimes," *Maumee v. Geiger*, 45 Ohio St. 2d 238, 243 (1976) (*per curiam*). The General Assembly, instead, defines through statute what constitutes a crime in Ohio. *State v. Buttery*, 162 Ohio St. 3d 10, 2020-Ohio-2998 ¶31. Consequently, determining the elements of a crime is an act of statutory interpretation. And, as with other acts of statutory interpretation, courts should neither "delete words

used" nor "insert words not used" when interpreting criminal statutes. *State v. Tolliver*, 140 Ohio St. 3d 420, 2014-Ohio-3744 ¶10 (quotation marks omitted); *accord Thomas*, 106 Ohio St. 3d 133 ¶13.

Here, the relevant statutory provision—call it the "Robbery Provision"—defines robbery as follows:

> No person, in attempting or *committing a theft offense* or in fleeing immediately after the attempt or offense, shall do any of the following …
>
> > (2) Inflict, attempt to inflict, or *threaten to inflict physical harm on another*.

R.C. 2911.02(A)(2) (emphasis added). Breaking down the Robbery Provision's language, and in particular the italicized words, a robbery occurs whenever a person committing a theft threatens "physical harm" against "another." *Id.* The text does not place any limits on who the threatened person must be. What is more, when the General Assembly criminalizes behavior committed against "another," it "authorizes a conviction for each person" subject to the criminal behavior. *State v. Jones*, 18 Ohio St. 3d 116, 117–18 (1985). It follows that, by criminalizing threats of physical harm against "another" during a theft, the Robbery Provision authorizes a separate conviction "for each person" threatened over the course of a theft. *State v. Madaris*, 156 Ohio App. 3d 211, 218–19 (1st Dist. 2004).

This Court's cases shed further light on what it means to "threaten … another" for purposes of the Robbery Provision. The ordinary meaning of "threat," the Court has

recognized, is quite broad. *State v. Cress*, 112 Ohio St. 3d 72, 2006-Ohio-6501 ¶36. "It connotes almost any expression of intent to do an act of harm against another person." *Id.* Under the Robbery Provision, the State must prove "a threat to inflict physical harm." *Evans*, 122 Ohio St. 3d 381 ¶23. But this Court has explained that the threat "need not be explicit; rather an implied threat of physical harm is sufficient to support a conviction." *Id.* For example, when a person brandishes "a deadly weapon in the context of committing a theft offense," that amounts to an "implied threat" meant to "intimidate[] the victim." *Id.*

Finally, other parts of the Revised Code reinforce that defendants may be convicted of separate crimes for each person they victimize, even if the crimes flow from a single event. At the charging stage, statutory law permits the State to indict a defendant for "two or more different offenses connected together in their commission." R.C. 2941.04. The defendant may then be convicted of all charged offenses that are of "dissimilar import." R.C. 2941.25(B). And offenses are of "dissimilar import" if "a defendant's conduct victimizes more than one person." *State v. Ruff*, 143 Ohio St. 3d 114, 2015-Ohio-995 ¶26. For multiple-victim offenses, "the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts." *Id.*

Viewed against this background, there is nothing unusual about a victim-based reading of the Robbery Provision, under which offenders commit a separate offense for each person they threaten while committing a theft. The Eighth District's decision in

*State v. Miller* is illustrative. 2018-Ohio-2127 (8th Dist. 2018). That case involved a bank robbery during which the offender (Miller) passed a note to two bank employees that said, "Follow the directions and no one will get hurt." *Id.* at ¶13. Miller argued on appeal that he could be convicted only for a single robbery. *Id.* at ¶1. The Eighth District disagreed. It recognized that "robbery is an offense against persons, not property." *Id.* at ¶12. Thus, while the bank "was the victim of the theft offense," it was "not the victim of the robbery counts." *Id.* at ¶13. Because Miller threatened two separate people while committing the theft offense against the bank, two robbery convictions were justified. *Id.*

In sum, under the Robbery Provision, an offender commits a separate offense of robbery for each person threatened—whether expressly or impliedly—over the course of a theft. Any threatened person counts; the statutory text does not require that the victim have any special relationship to the underlying theft offense.

**B.** Turning to this case, there is more than enough evidence to show that Smothers (in addition to Johnson) was robbed. Begin with some undisputed points. First off, there is no dispute that a theft occurred, Brown simply disputes whether *he* committed the offense. It is also undisputed that, during the course of the theft, the offender pulled out a gun, pointed it at Johnson, and demanded money.

The sole issue thus becomes whether Smothers was "another" person who was threatened with physical harm as part of these events. R.C. 2911.02(A)(2). Of course

she was. The encounter kicked off with a direct conversation between Smothers and the robber concerning the supposed car sale—so the robber knew Smothers was the person who was trying to purchase a car. Trial Tr. 66. And one can readily glean from the record that the robber saw Smothers hand Johnson money when she stepped out of Johnson's car. *See id.* at 68–69. Smothers, moreover, was standing "right next" to the robber when he produced a firearm. *Id.* at 71–72. From all this, a rational juror could easily conclude that, by brandishing his weapon, the robber issued an express threat to Johnson (so that she would hand over the money) and an implied threat to Smothers (so that she would not interfere with the crime). Indeed, it would be irrational from these facts to conclude otherwise. *See Evans*, 122 Ohio St. 3d 381 ¶23.

**II. The First District erred by adding an atextual element to the crime of robbery.**

The First District saw things differently. Its analysis did not focus on whether Brown threatened Smothers with physical harm over the course of the theft. *See* App. Op. ¶¶50–54. That was because, according to the First District, "when no property is taken from a person, a threat of harm used against that person does not establish a robbery." App. Op. ¶53. In other words, the court held that, for the State to prove a robbery, it must prove that the threatened person is also the target of the underlying theft.

That is wrong. Recall, in particular, that the elements of a crime derive from the statutory text. Courts may not "insert words not used." *Tolliver*, 140 Ohio St. 3d 420 ¶10 (quotation marks omitted). This Court's decision in *Thomas*, 106 Ohio St. 3d 133,

shows this principle in action. That case focused on robbery under R.C. 2911.02(A)(3), which occurs when a person, in the course of committing a theft, "use[s] or threaten[s] the immediate use of force against another." The Court in *Thomas* faced a question strikingly similar to the one at issue in this case. The question there was whether, to commit a robbery by force, a person needed to use force "in furtherance of a purpose to deprive another of property." *Thomas*, 106 Ohio St. 3d 133 ¶13. Because the statutory text "plainly" contained no such element, the Court made quick work of the question, answering it "in the negative" in just a few sentences. *Id.*

Here, the analysis is just as easy. The statutory text of the Robbery Provision offers no support for the First District's target-of-the-theft element; and the First District did not even attempt to say otherwise. Rather, as already discussed, the text leads to the conclusion that a robbery occurs *any* time a thief threatens another person with physical harm over the course of a theft, no matter who that threatened person may be. Surrounding text within the Robbery Provision reinforces the point. A robbery may also occur when a thief, "fleeing immediately after" a theft, threatens another person. R.C. 2911.02(A)(2). By the time a thief is "fleeing" the scene, the theft has already occurred. It stands to reason that the person threatened during a thief's escape will typically be a *different* person than the victim of the theft.

Rather than relying on the text, the First District relied on an imprecise reading of caselaw. For example, the First District invoked this Court's decision in *Evans* to sup-

port its analysis. But *Evans* offers no support. The First District quoted *Evans* for the idea that a "robbery is committed when the threat of harm 'intimidates the victim into complying with the command to relinquish property without consent.'" App. Op. ¶52 (quoting *Evans*, 122 Ohio St. 3d 381 ¶23). It is true that the quoted passage from *Evans* assumes that the robbery victim and the theft victim are one and the same. But *Evans* does not *require* the victim of robbery to be the same person as the victim of the theft. Putting the quoted passage in context proves the point: the question presented in *Evans* was whether aggravated robbery through use of a deadly weapon, *see* R.C. 2911.01(A)(1), "can ever be committed without also committing robbery as defined in R.C. 2911.02(A)(2)." 122 Ohio St. 3d 381 ¶14. Thus, the Court's focus in *Evans* was comparing the two types of robbery offenses to one another, and, more specifically, deciding whether brandishing a deadly weapon always amounts to "a threat to inflict physical harm" against another. *Id.* at ¶22. The Court, it follows, was not attempting to sort out the entire universe of potential victims under the Robbery Provision. Read with this context, *Evans* is quite helpful to the State's case against Brown. Consistent with common sense, *Evans* makes clear that an "implied threat" flows naturally from the brandishing of a gun. *Id.* at ¶23.

The First District also relied on *State v. Rojas*, 2003-Ohio-5118 (3d Dist. 2003), but that reliance was similarly misplaced. The Third District's decision in *Rojas* dealt with whether a bystander who witnesses a robbery is also a victim of robbery. 2003-Ohio-

5118 ¶7. The Third District held, under the facts presented there, that the bystander in *Rojas* was not a victim of robbery. *Id.* at ¶9. But *Rojas* addressed a different form of robbery—aggravated robbery—governed by different statutory text. *See* R.C. 2911.01(A)(1). That text does not include the same "threaten … another" language as the Robbery Provision. Indeed, the court noted in *Rojas* that the Robbery Provision's language "might well" have changed the analysis. 2003-Ohio-5118 ¶9 & n.1. Thus, whether or not the Third District reached the correct answer in *Rojas* sheds no light on how a different statute with different language (that *Rojas* never definitively considered) applies to this case.

A final point for completeness's sake. Even if the Robbery Provision did require that the robbery victim be a victim of the underlying theft, the First District reached the wrong conclusion below. As Judge Winkler explained in dissent, there is sufficient evidence on this record to rationally conclude that Smothers was a target of the underlying theft offense Brown committed. App. Op. ¶¶72–79. Regardless, because the Robbery Provision does not require that a victim of robbery also be the target of the underlying theft, the Court should never even get to that issue.

***Amicus* Attorney General's Proposition of Law No. 2:**

> *When defendants learn of information within the State's possession during trial, do not seek a continuance of trial, and then use the information as part of their defense strategy, no* Brady *violation occurs.*

The second proposition in this case concerns the State's disclosure obligations under *Brady*, 373 U.S. 83. A brief review of the facts sets the stage. Remember that the State identified Brown as the robber based on online research Smothers conducted shortly after the crime. The State did not disclose the details of Smothers' investigation during pretrial discovery, though it did disclose the product of Smothers' online research: Facebook photos of Brown. On the first day of trial, Smothers testified and clarified that she was the one who first uncovered Brown's Facebook photos.

Against this backdrop, the second question presented is whether the State's failure to disclose the details of Smothers' online research before trial amounts to a *Brady* violation. The answer is no, and the First District erred in reaching a contrary result.

## I. The State did not violate Brown's rights under *Brady*.

In *Brady*, the United States Supreme Court held that a State violates the Due Process Clause of the Fourteen Amendment when it suppresses evidence that is favorable to the defendant and material to guilt. 373 U.S. at 87. The defendant has the burden of proving a *Brady* violation. *State v. Pickens*, 141 Ohio St. 3d 462, 2014-Ohio-5445 ¶102, *overruled in unrelated part by State v. Bates*, 159 Ohio St. 3d 156, 2020-Ohio-634 ¶35. A *Brady* violation has "three components": (1) "The evidence at issue must be favorable to

the accused, either because it is exculpatory, or because it is impeaching;" (2) the "evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) "prejudice must have ensued," meaning that the suppressed evidence must be material to the case. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). For the final element, evidence will be "material" for purposes of *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner*, 137 S. Ct. at 1893 (quotation marks omitted).

In this case, even assuming the information about Smothers' online investigation was in some ways favorable to Brown's defense, Brown's *Brady* claim fails on the final two elements. *First*, no suppression occurred: Brown learned of Smothers' investigation *during* trial, he did not seek a continuance of the trial, and he was able to effectively use the information throughout his trial. *Second*, the information in question was not material to Brown's case. Accounting for the arguments Brown made during his trial, Brown has not established a reasonable probability that an earlier disclosure of the information would have led to a different trial result.

### A. After learning of undisclosed information during trial, Brown used that information to aid his defense rather than seeking a continuance of trial.

**1.** Whether a *Brady* violation occurs depends in part on the timing of any disclosure. Borrowing the United States Supreme Court's words, *Brady* applies in situations involving "the discovery, *after trial*, of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103 (emphasis added). Thus,

"[s]trictly speaking, *Brady* is not violated when disclosure occurs during trial, even when disclosure surprises the defendant with previously undisclosed evidence." *Iacona*, 93 Ohio St. 3d at 100 (plurality op.); *see also State v. Myers*, 154 Ohio St. 3d 405, 2018-Ohio-1903 ¶88; *State v. Hanna*, 95 Ohio St. 3d 285, 2002-Ohio-2221 ¶82; *State v. LaMar*, 95 Ohio St. 3d 181, 2002-Ohio-2128 ¶28 n.2; *State v. Green*, 90 Ohio St. 3d 352, 372 (2000); *Wickline*, 50 Ohio St. 3d at 116–17. Some courts have stuck with that limit, holding that "[w]here the prosecution delays disclosure of evidence, but the evidence is nonetheless disclosed during trial, *Brady* is not violated." *United States v. Gonzales*, 90 F.3d 1363, 1368 (8th Cir. 1996); *see also United States v. Soto-Alvarez*, 958 F.2d 473, 477 (1st Cir. 1992).

But other courts, including this Court at times, have assumed that *Brady* more broadly covers situations in which the State discloses material information *during* trial if "the late timing of the disclosure significantly impairs the fairness of the trial." *Iacona*, 93 Ohio St. 3d at 100 (plurality op.); *see also Pickens*, 141 Ohio St. 3d 462 ¶101 (adopting the test of the *Iacona* plurality). For courts that adopt the broader approach, the key inquiry is whether a late-breaking disclosure of information deprives the defendant of the ability to effectively use the information at trial. *Pickens*, 141 Ohio St. 3d 462 ¶101; *accord United States v. Perry*, 35 F.4th 293, 348 (5th Cir. 2022). Said another way, when disclosure occurs during trial, rather than after trial, a defendant "faces a higher hurdle" to establish a *Brady* violation. *United States v. Todd*, 825 F. App'x 313, 319 (6th Cir. 2020). The defendant, "in addition to showing that the evidence was … material to his inno-

cence," must also show that the State's delay in disclosure "itself caused prejudice" to the defense. *Id.* at 320 (quotation marks and brackets omitted); *accord State v. Osie*, 140 Ohio St. 3d 131, 2014-Ohio-2966 ¶155. And, deciding whether the State's delay caused prejudice requires consideration of how a defendant "was able to use" belatedly disclosed information "at trial." *Todd*, 825 F. App'x at 320.

Whether a defendant can effectively use late-breaking information is in many ways a procedural question. Generally speaking, the failure to press a constitutional error in a timely fashion "amounts to the forfeiture of any objection." *State v. Henderson*, 161 Ohio St. 3d 285, 2020-Ohio-4784 ¶17. And, under Ohio law, Criminal Rule 16 gives trial courts broad discretion to "grant a continuance" of trial, or grant other "just" relief, if "at any time during the course of the proceedings it is brought to the attention of the court that a" discovery violation has occurred. Crim.R.16(L)(1); *see also* Crim.R.16(B)(5) (obligating the State to turn over "evidence favorable to the defendant and material to guilt"). It follows that, if a defendant truly believes that new information disclosed during trial is game changing, and that more time is needed to make use of that information, there is a procedural rule that the defendant may employ *before* any verdict is rendered. Thus, in cases where the relevant information is disclosed during trial, the availability of Criminal Rule 16 makes any *Brady* claim first raised *after* trial immediately suspect.

The Court's decision in *Iacona* brings many of these points together. There, a defendant argued that a belated disclosure of evidence during trial required the trial court to declare a mistrial under *Brady*. *Iacona*, 93 Ohio St. 3d at 100 (plurality op.). The Court assumed, for the purpose of its analysis, that the evidence at issue was first disclosed at a "late stage" in trial, during the questioning of a defense witness. *Id.* at 101. Even so, all of the defendant's "contentions could have been presented to the trial court in support of a motion for continuance." *Id.* But, instead of seeking a continuance, the defendant and her attorney made the "strategic decision" to continue with an unaltered defense strategy. *Id.* That course of conduct led the Court to "reject" the defendant's contention "that she could not have made full and effective use" of the newly disclosed evidence. *Id.*; *see also Pickens*, 141 Ohio St. 3d 462 ¶103.

**2.** Applying the above principles to the facts here, there is no *Brady* violation. As an initial matter, even before trial, the State disclosed the Facebook photos of Brown and a screenshot of Smothers' phone, which included communications between Smothers and "Danny Buckley." The State, in other words, disclosed most of the information relevant to Brown's defense before trial. *See* App. Op. ¶84 (Winkler, J., dissenting). Perhaps most importantly, Brown was already on notice before trial of the potential relevance of "Danny Buckley" to the case. *See* State Supp. Disc. (Feb. 2, 2021); State Ex. 4.

In any event, Brown and his attorney learned the details of Smothers' online research midway through the first day of trial. Trial Tr. 84. So, if Brown wanted to con-

duct further investigation or obtain an additional witness based on that information, he had ample opportunity to seek a continuance. He could have moved for a continuance during the first day of trial. Or he could have slept on it and moved for a continuance the next day of trial. Or he could have filed a written motion for a continuance sometime between the close of evidence (on April 6, 2020) and the trial court's verdict (on April 12, 2020). Brown did none of these things. He instead pressed on with trial and utilized the new information as part of his defense.

That strategy call was entirely reasonable. The record shows that Brown's attorney was able to effectively fold this new information into Brown's alibi defense. Questioning—from both Brown's attorney and the State—clearly established that Smothers and Johnson reviewed Facebook photos of Brown before they picked his photo out of a police lineup. Trial Tr. 85–87, 90–91, 116–18, 154–55. Armed with that fact, Brown's attorney argued that the results of the police lineups were unreliable. *Id.* at 161–64, 294–95. And she further argued that Smothers had misidentified Brown during her online research, and that Smothers and Johnson had then mistakenly convinced themselves that they had the right man. *Id.* at 294, 298. Along related lines, Brown's attorney repeatedly criticized the police's reliance on Smothers' research and their failure to conduct an independent investigation. *See id.* at 152–57, 162, 295. True, these arguments were unsuccessful in the end, as the trial court concluded that Smothers and Johnson were more credible than Brown and his friends. But the record shows that Brown's at-

torney was able to make considerable use out of the information she discovered on the first day of trial.

In short, the record here reflects that Brown, through his attorney, made a strategic call to proceed with trial and make use of newly learned information rather than seeking a continuance. The Court should therefore reject Brown's "contention that [he] could not have made full and effective use of" the information disclosed during trial. *See Iacona*, 93 Ohio St. 3d at 101 (plurality op.). Brown's "use of the [information] at trial, coupled with the fact that defense counsel failed to ask for a continuance," dooms his *Brady* claim. *See Todd*, 825 F. App'x at 321.

Before moving on, a few quick points about the relationship between this case and others. In *Iacona*, the plurality stopped short of crafting any bright-line rule for when a defendant forfeits this type of *Brady* claim. *See id.* at 101. But the Court should take that step here, so as to avoid any further confusion and put defendants on notice going forward. *Cf. State v. Harper*, 160 Ohio St. 3d 480, 2020-Ohio-2913 ¶43. In particular, the Court should require that defendants press this type of *Brady* claim—that is, a claim based on information disclosed during trial rather than after—*before* any verdict is rendered. The premise underlying *Brady* is that a fair trial cannot occur when the State leaves defendants unaware of information favorable to the defense and material to the case. *See* 373 U.S. at 87. But when defendants learn of information during trial and then voluntarily proceed with the trial anyway, there is no comparable fairness concern. *See*

*Todd*, 825 F. App'x at 320 ("[W]e must infer from [the defendant's] decision to proceed to trial without objection that he believed he had enough time to make use of the evidence."). A contrary rule would encourage defendants to hedge their bets: if no forfeiture occurs, savvy defendants—seeking to maximize their options—will wait and see how the trial turns out and then belatedly raise *Brady* claims "depending on how the trial goes." *Id.* at 321.

Even assuming the Court declines to adopt a bright-line rule, cases like *Iacona* and *Pickens* already set a strong presumption against *Brady* claims arising from during-trial disclosures when a defendant fails to seek a continuance of trial. *See also State v. Ketterer*, 126 Ohio St. 3d 448, 2010-Ohio-3831 ¶46. If a defendant at the time of disclosure does not think new information justifies a continuance, it is hard to see why a court should lack confidence in the result of the trial.

### B. The information disclosed during Brown's trial was not material within the meaning of *Brady*.

**1.** "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Thus, "there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Agurs*, 427 U.S. at 109 (quotation marks omitted). Along similar lines, prosecutors are not required "to share all useful information with the defendant." *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

All of this is to say that a *Brady* violation occurs only when the undisclosed information is *material* to the case. The burden is on the defendant to show materiality. *Agurs*, 427 U.S. at 112. As already mentioned, information is "material" within the meaning of *Brady* "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner*, 137 S. Ct. at 1893 (quotation marks omitted). This standard does not require the defendant to show that "a different verdict" is "more likely than not." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). But it does require the defendant to show more than relevance: the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial," is not enough. *Agurs*, 427 U.S. at 110; *accord Kyles*, 514 U.S. at 436–37. In short, materiality asks whether suppressed evidence, when viewed in the context of "the whole case," undermines "confidence in the verdict." *Kyles*, 514 U.S. at 435.

Materiality, it follows, requires a comparison. Analysis of materiality first considers what *actually happened* during trial, through an examination of the entire trial record. *Turner*, 137 S. Ct. at 1893. The analysis then contemplates what *might have happened* "had the [suppressed] evidence been disclosed" earlier. *Id.* (quotation marks omitted). If comparing what actually happened to what might have happened yields a reasonable probability of a different result, then the suppressed evidence is material. *But*, when a *Brady* claim involves the disclosure of evidence during trial, as opposed to after trial, the

comparison becomes more complex. In that scenario, the materiality analysis does more than just assess the value of the belatedly disclosed evidence. Instead, the analysis—in comparing what happened at trial to what might have happened—must account for how the defendant "was able to use" belatedly disclosed information during the actual trial. *Todd*, 825 F. App'x at 319–20. And that makes sense: if a defendant was able to make use of the belatedly disclosed information at trial, that automatically reduces the odds that "the result of the proceeding would have been different." *See Turner*, 137 S. Ct. at 1893 (quotation marks omitted).

**2.** In this case, Brown has not met his burden of showing materiality. That is largely because of what actually happened during his trial. Recall, once again, that Brown and his attorney learned of Smothers' online research during the first day of trial. And Brown's attorney was able to effectively incorporate this information into Brown's defense during his trial. *See, e.g.*, Trial Tr. 161–64, 294–99. For instance, during closing statements Brown's attorney argued to the trial judge—the trier of fact in Brown's bench trial—that Smothers' flawed online investigation led Smothers and Johnson to be overconfident in their identifications of Brown. Trial Tr. at 298. Despite the defense's emphasizing Smothers' investigation, the trial judge concluded that Brown was guilty of several crimes. The takeaway is this: because Brown's attorney made heavy use of Smothers' investigation during trial, there is little reason to suspect that earlier disclosure of this information would have led to a different result.

Two further points reinforce that conclusion. *First*, two eyewitnesses confidently identified Brown as the robber. Johnson, in particular, offered compelling—and quite specific—testimony as to why the robber's facial features (including the robber's sunken eyes) stuck with her and made her "certain" that Brown was the culprit. Trial Tr. 120–23. Smothers, of course, was also an eyewitness to the crime. With the crime fresh in her mind, Smothers performed some basic online research from which she was able to quickly identify Brown. Even if the circumstances of Smothers' investigation are favorable to the defense in some marginal ways—for example, by devaluing the police lineup as separate evidence—Smothers' investigation, by and large, *incriminates* Brown. *See* App. Op. ¶¶82–83 (Winkler, J., dissenting).

*Second*, this case at its core comes down to the credibility of witnesses. Two victims are confident that Brown is the robber; Brown and his friends say he was somewhere else at the time of the crime. In matters of credibility, appellate courts owe considerable deference to the triers of fact, who are able to "see the witnesses and observe their demeanor." *State v. Petro*, 148 Ohio St. 473, 501 (1947). Here, the result of trial makes it obvious that the trial judge—even accounting for Smothers' online research—found the State's witnesses far more credible than the defense's witnesses. Another trial is not going to change that.

## II. The First District's *Brady* analysis is unpersuasive.

The First District misapplied *Brady*. It largely ignored that Brown received the relevant information during trial, not after. That led to several mistakes.

Consider, for example, the First District's materiality analysis. To describe why it thought the evidence of Smothers' investigation was material, the court relied primarily on arguments that Brown had actually made during trial. *See* App. Op. ¶¶62–66. For example, the panel expressed concern that Smothers' online research, rather than the victims' memory of events, was what "prompted" the victims' "identifications of Brown as the perpetrator." App. Op. ¶64. In other words, the First District considered the value of the belatedly disclosed information, in and of itself, without accounting for how Brown used that information during trial. *Contra Todd*, 825 F. App'x at 319–20. As a result, the First District never explained, in any convincing fashion, how arguments the trial court *already rejected* during the first trial made it reasonably probable that another trial would lead to a different result.

Once one removes arguments the trial court already considered, all that remains is undeveloped speculation. Though somewhat unclear, the First District seemed to suggest that, if Brown knew of the Smothers' investigation sooner and had more time to investigate, he would have been able to obtain additional evidence or witnesses "to challenge both the alleged link to his Facebook page and the reliability of the identification." *See* App. Op. ¶67. But "vague" conjecture that earlier disclosure "would have

enhanced the ability of the defense" to challenge the State's case is not enough to show materiality. *See Osie*, 140 Ohio St. 3d 131 ¶¶156, 158. Along the same lines, a *Brady* claim requires more than "mere speculation" that disclosed information will lead "to some additional evidence" that the defense "could have … utilized." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (*per curiam*); *see also United States v. Wells*, 873 F.3d 1241, 1264 (10th Cir. 2017); *Maynard v. Gov't of the V.I.*, 392 F. App'x 105, 116 (3d Cir. 2010); *States v. Aleman*, 548 F.3d 1158, 1164 (8th Cir. 2008); *United States v. Garza*, 264 F. App'x 369, 376 n.7 (5th Cir. 2008); *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999); *cf. also Illinois v. Fisher*, 540 U.S. 544, 547–48 (2004) (distinguishing *Brady* violations from the failure to preserve "potentially useful evidence" that "could have been subjected to tests, the results of which might have exonerated the defendant") (quotation marks omitted). A defendant must instead come forward with developed, specific arguments as to how further "investigation would have borne fruit." *Maynard*, 392 F. App'x at 116.

A final error is worth unpacking. At the end of its analysis, the First District refused to consider whether Brown could have pressed his *Brady* argument sooner by seeking a continuance of the trial. *See* App. Op. ¶68. In the court's view, it did not need to reach the issue because the parties' briefing had not specifically addressed it. *Id.* There are a few problems with this dodge. Because this case involves a disclosure that occurred during trial, whether Brown was able to effectively use the newly learned information is an essential part of the *Brady* inquiry. *Pickens*, 141 Ohio St. 3d 462 ¶101;

*Iacona*, 93 Ohio St. 3d at 100 (plurality op.). And whether Brown could have sought a continuance is crucial to discerning whether Brown could have made effective use of the information. *Pickens*, 141 Ohio St. 3d 462 ¶103; *Iacona*, 93 Ohio St. 3d at 101 (plurality op.); *Todd*, 825 F. App'x at 320. Importantly, Brown bore the burden on these issues. *Pickens*, 141 Ohio St. 3d 462 ¶102. So any failure in failure in party presentation cuts against *Brown*, not the State. *Contra* App. Op. ¶68. What is more, although the State did not raise the issue of a continuance explicitly, it did make arguments relating to the timing of disclosure. The State consistently argued below that Brown's *Brady* claim should fail because Brown had a fair opportunity to challenge the State's case by cross examining the victims during trial. The First District never grappled with that argument, despite its importance to the *Brady* analysis.

In sum, the First District analyzed Brown's *Brady* claim as if Brown never received the relevant information during trial. That was a crucial mistake—a *Brady* claim based on evidence disclosed during trial is much different than a *Brady* claim based on evidence disclosed only after trial.

## CONCLUSION

The Court should reverse the judgment of the First District.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Corrected Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant State of Ohio was served this 6th day of February, 2023, by e-mail on the following:

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