

**IN THE
INDIANA COURT OF APPEALS**

CAUSE NO. 22-CR-01241

JASON D. BROWN	)	Appeal from the
	)	Marion County Superior Court,
Appellant (Defendant below)	)	Criminal Division 32
)	
vs.	)	Cause No. 49G32-1708-MR-028177
)	
)	
STATE OF INDIANA	)	The Honorable
Appellee	)	Mark Stoner, Judge

PETITION FOR REHEARING

Marion County Public Defender Agency,
Appellate Division
Ann M Sutton
Att. No. 16198-49
3115 Southeastern Avenue, Suite 300
Indianapolis, IN 46203
317-327-3982
Ann.sutton@indy.gov

Attorney for the Appellant

TABLE OF CONTENTS

Statement of the Issue.....3
Argument.....3
Conclusion.....6
Certificate of Service.....6

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U.S. 83 (1963).....5
Cafeteria Workers v. McElroy 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230
(1961).....4
Davis v. State, 898 N.E.2d 281 (Ind. 2008).....4
Everroad v. State, 570 N.E.2d 38 (Ind. Ct. App. 1991).....3
Glasscock v. State, 576 N.E. 2d 600 (1991).....3,4,5
Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)..5
Lassiter v. Dep’t of Soc. Servs, 452 U.S.18, 101 S.Ct. 2153, 68 L.Ed.2d 640
(1981).....4

Constitution

Fourteenth Amendment, United States Constitution..... 4

Code

IC 35-31.5-2-144.....5

**IN THE
INDIANA COURT OF APPEALS
NO. 22A-CR-01241**

JASON BROWN	)	Appeal from the
	)	Marion County Superior Court,
Appellant (Defendant below))	
)	
vs.	)	Cause No. 49G32-1708-MR-028177
)	
STATE OF INDIANA	)	The Honorable
Appellee	)	Mark Stoner, Judge

PETITION FOR REHEARING

**STATEMENT OF THE ISSUE
NECESSITATING REHEARING**

Jason Brown asserts due process required the State to preserve the urine evidence that was expected to play a significant role in the defense, and the opinion in **Glasscock**, which was the basis for rejecting this issue, does not adequately consider concerns of allowing the State to circumvent due process by failing to collect routine, relevant evidence.

ARGUMENT

This Court relied on **Glasscock v. State**, 576 N.E. 2d 600 (1991), which relied on **Everroad v. State**, 570 N.E.2d 38 (Ind. Ct. App. 1991) , to hold that if the police or prosecution does not

Jason Brown Petition for Rehearing

possess evidence, then the rule on negligently destroying evidence does not apply. In **Glasscock**, the State was allowed to admit blood evidence obtained from the hospital, but was not required, according to the opinion, to be responsible for the failure to save any of the sample for defense testing.

The Fourteenth Amendment to the United States Constitution guarantees that every person shall not be deprived of life, liberty, or property without due process of law. While ‘due process’ eludes specific definition, it is not a technical term “with a fixed content unrelated to time, place and circumstances.” **Davis v. State**, 898 N.E.2d 281, 287 (Ind. 2008) citing **Lassiter v. Dep’t of Soc. Servs.**, 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), quoting **Cafeteria Workers v. McElroy**, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). “Instead, ‘the phrase expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty.’ **Lassiter**, 452 U.S. at 24. Accordingly, ‘[a]pplying the Due Process Clause is thus an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.’ **Id.** at 24-25.” **Davis** at 287.

In Mr. Brown’s case, the State indicated in a report it was collecting the blood evidence, then failed to do so. There should have been no question at the time that impairment was going to be central to figure out what happened. The body camera video, which is Exhibit 148, in Volume I, page 165 of the Exhibit Volume, shows the chaos of the scene. This video, in addition to all of the medical personnel at the scene who described Mr. Brown’s condition, indicate that he was not okay.

In **Kyles v. Whitley**, 514 U.S. 419, 437–38, 115 S. Ct. 1555, 1567–68, 131 L. Ed. 2d 490 (1995), the United Supreme Court stated (Emphasis added):

On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of “reasonable probability” is reached. **This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.** But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, **see Brady v. Maryland**, 373 U.S., at 87, 83 S.Ct., at 1196–1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles indicated “including police” but did not exclude others acting on the government’s behalf.

Glasscock did not discuss the fact that the blood samples were collected for the purpose of prosecution, and used by the prosecution. It focused on the hospital’s role of collecting the BAC and then destroying the samples, as if the hospital was acting independently of the State.¹ The duty was on the police or prosecution to diligently secure this evidence.

The State failed in its duty to collect the blood evidence from the hospital in a timely manner. It was not evidence that was easily obtained by Mr. Brown or his attorneys. There was plenty of evidence indicating that his sobriety would be at issue. The violence of the car accident itself, the video of the shooting of Lt. Allan, and the marijuana found in the vehicle all pointed to a need to know whether Mr. Brown was intoxicated. Even the property owner’s statement, alleging that Hassan London said they were on drugs, would indicate that intoxication was at

¹ Indiana Code 35-31.5-2-144(a)(2) does include “hospital” in the definition of “Governmental entity.”

Jason Brown Petition for Rehearing

issue. As a matter of policy, the prosecutor and the police should not benefit from failing to collect critical yet routine evidence.

CONCLUSION

For the foregoing reasons and the reasons asserted in the original Brief of Appellant and Reply Brief of Appellant, Mr. Brown respectfully requests this Court reverse the Murder conviction below in accordance with Mr. Brown's constitutional and due process rights, thereby vacating the entry of conviction and for all just relief.

Respectfully submitted,

/s/Ann M. Sutton

Ann M. Sutton, Att. No. 16198-49
Marion County Public Defender Agency
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served by electronic filing via Public Defender Information Efling System to the Attorney General of Indiana, 219 State House, Indianapolis, IN 46204, on or before this 27th day of November, 2023.

/s/Ann M. Sutton

Marion County Public Defender
Ann M. Sutton
3115 Southeastern Avenue, Suite 300
Indianapolis, IN 46203
317/327-3982
Ann.sutton@indy.gov