

**IN THE SUPREME COURT OF OHIO
CASE No. 2022-0488**

STATE OF OHIO,	:	
	:	
Plaintiff- Appellee,	:	
	:	
v.	:	Appeal from the Cuyahoga
	:	County Court of Appeals,
ERIC JOHNSON,	:	Eighth Appellate District
	:	Case No. CA 110347
Defendant-Appellant.	:	

**MERIT BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER
IN SUPPORT OF APPEAL OF APPELLANT ERIC JOHNSON**

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SUMMARY OF ARGUMENT

The alleged victim and principal witness against Eric Johnson came forward after trial and recanted his testimony that identified Eric Johnson as an assailant. In so doing, the alleged victim, in his sworn affidavit, said something that implicates the federal and State Constitutional rights to due process: The detective on the case pressured the witness into identifying Eric Johnson.

The question before this Court is whether such an allegation deserves a day in court. After all, if the detective did pressure the witness and the witness consequently testified falsely, then responsibility for the false testimony is, at the least, shared by a government actor.

No one is asking this Court, nor did anyone ask the Eighth District Court of Appeals, to give Eric Johnson a new trial. The request at this stage of the proceedings is far more modest -- give Eric Johnson a chance to present evidence regarding this allegation. Make the trial court examine (a) whether the witness got it wrong at trial and (b) whether the detective on the case contributed to the giving of false testimony.

The Eighth District characterizes this petition for post-conviction as one that does not involve any unclean hands on the part of the prosecution team. But how can that be known when the allegation that the detective pressured the witness has never seen the light of a courtroom? In this regard, it is important to remember that the detective's pressure many not have been maliciously applied. The law has long recognized that police "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948), will sometimes find that their "'caution and sagacity'" gives way "'under the excitement that attends the capture of persons accused of crime.'" *Id.*, at n.3, quoting *United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S.Ct. 420, 423, 76 L.Ed. 877 (1932).

Moreover, the Eighth District, without any evidentiary foundation (because there has been no evidentiary hearing), concludes that the defense could have contacted the witness earlier. Shouldn't such a conclusion follow the taking of evidence on this question? Isn't the real question not one of whether the defense knew the testimony was false (after all, the defense knew the testimony was false while the witness was still on the witness stand identifying an innocent man)?

Rather, the question is when was the defense in a position to know (a) that the witness would acknowledge the testimony was false and (b) that the detective was (at least) partially responsible for the false testimony. The latter of these two questions is particularly important because it distinguishes this case from merely one where the defense learns of a recantation of a witness' voluntary testimony. Here, the defense has learned of a recantation of testimony whose voluntariness may have been undermined by government intervention.

This case begs for these allegations to come to light. And R.C. 2953.21, et seq., as presently codified, is adequate to provide that relief. Which is why the Eighth District's decision should be reversed.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Cuyahoga County Public Defender was created in 1977 to provide legal services to indigent adults and children charged with violations of the Ohio Revised Code, and is currently responsible for representing approximately one-third of all indigent felony defendants in Cuyahoga County (the remaining are represented by appointed counsel). The Office's responsibilities now also include the representation of almost all indigent defendants in the Cleveland Municipal Court charged with misdemeanor offenses punishable by incarceration.

The Office's Appellate and Post Conviction Division represents defendants in State and federal courts, particularly in the Eighth District Court of Appeals and this Court.

ARGUMENT

In support of Proposition of Law I:

A defendant's rights to due process of law and a fair trial pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution are violated when the trial court denies a defendant's petition for postconviction relief based on newly discovered evidence and is in contravention to the precedent recently established by this Court's recent decision in *State v. Bethel*, [167 Ohio St.3d 362], Slip Op. No. 2022-Ohio-783.

The trial court erred when it refused to conduct a hearing. And the Eighth District erred when it affirmed that decision. The Eighth District based its decision on two points:

1. There was no reason that the information contained in the petition could not have been uncovered earlier.
2. There was no evidence of government misconduct and thus no constitutional violation.

These are addressed below.

1. There Was Not Such Compelling Evidence of Untoward Delay So As To Justify Judgment Without A Hearing.

The Eighth District majority held that the trial court did not abuse its discretion in denying the petition without a hearing because it was unreasonable that the defense could not obtain an affidavit of recantation until 2020. *State v. Johnson*, 8th Dist. Cuyahoga No. 110347, 2022-Ohio-81 ¶¶ 17-18, 2022 WL 121128 (Opinion Below).

Without the benefit of an evidentiary hearing, it is not possible to determine if an affidavit could have been obtained earlier or to what extent other efforts were unsuccessful. That the witness worried for seven years that he testified incorrectly does not mean he would have

come forward earlier. This is especially so because the witness had attributed his incorrect testimony at trial to be a product, at least in part, of pressure he perceived was coming from the investigating detective. The particulars of why the witness was willing to aver his recantation in 2020 is something that is known best by the witness -- and something that could easily have been examined in the course of a hearing at which the witness would have testified.

In the end, the Eighth District's analysis is tautological. The Eighth District noted that "nothing in the record indicates why it was impossible for [Mr. Johnson] to have contacted [witness] Keith prior to August 2020, nor does the record contain any indication that Keith would have refused or been otherwise unable to prepare an affidavit prior to August 2020." Opinion Below at ¶ 18.

The logical response should be the holding of this Court: "How can the record indicate other than 'nothing' in the absence of an evidentiary hearing?"

2. There Was Evidence of a Constitutional Violation

The Eighth District incorrectly ignored the fact that Keith's affidavit attributed his false testimony to pressure he perceived was being applied by the detective. Thus, contrary to the Eighth District's opinion, this was a case where the government was connected to the false testimony given at trial. *Cf. Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (suggestive pretrial identification procedures that influenced in-court testimony violated due process). While *Neil v. Biggers* addressed a particular form of pre-trial suggestiveness, i.e. suggestive pretrial identification procedures, the due process principles are more encompassing. Significantly, the Supreme Court in *Neil v. Biggers* did not tether the due process violation to whether law enforcement acted maliciously. This makes sense -- the fundamental fairness of a

trial can be altered by police conduct that affects a witness' testimony, regardless of whether the police intended to place a thumb on the scales of justice.

Moreover, the Eighth Districts reliance upon the trial judge's ability to discern whether the recantation was truthful was misplaced. Without a hearing, it is impossible to tell whether the witness was truthful. This was a "whodunnit" case: that the witness was victimized was beyond peradventure. Thus, the detail that the witness provided during his trial testimony was not going to change -- the critical fact was always whether, in addition to addressing how he was attacked, the witness would be able to say who the attacker is. And nothing about his trial testimony regarding the facts of what happened would necessarily shed light on whether the defendant was correctly identified as the perpetrator. What was -- and still is -- needed was an evidentiary hearing at which the witness could explain how he came to make the in-court identification and his confidence, or lack thereof, in the identification.

CONCLUSION

For these reasons, your amicus urges this Court to reverse the decision of the Eighth District Court of Appeals and remand the case to the Cuyahoga County Court of Common Pleas for an evidentiary hearing.

Respectfully submitted,

/s/ John T. Martin

JOHN T. MARTIN
Assistant Public Defender

/s/ Erika B. Cunliffe

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2022, the foregoing Brief of *Amicus Curiae* the Office of the Cuyahoga County Public Defender in Support Of Appellant Eric Johnson was served by email to Gregory Ochocki, Office of Michael C. O'Malley Cuyahoga County Prosecutor, at gochockii@prosecutor.cuyahogacounty.us; and to Joseph Pagaon, counsel for Defendant-Appellant, at Law@GetLevy.com .

/s/ John T. Martin

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