In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2022-0488
	:	
Appellee,	:	On appeal from the Cuyahoga County
	:	Court of Appeals,
v.	:	Eighth Appellate District
	:	
ERIC JOHNSON,	:	Court of Appeals
	:	Case No. CA-110347
Appellant.	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

JOSEPH V. PAGANO* (0093480)
*Counsel of Record
P.O. Box 16869
Rocky River, Ohio 44116
216-685-9940
jvpemo@yahoo.com

Counsel for Appellant
Eric Johnson

MICHAEL C. O'MALLEY (0059592)
Cuyahoga County Prosecutor
GREGORY OCHOCKI* (0063383)
*Counsel of Record
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
216-443-7800; 216-443-7602 fax
gochocki@prosecutor.cuyahogacounty.us

Counsel for Appellee
State of Ohio

DAVE YOST (0056290)
Ohio Attorney General

BENJAMIN M. FLOWERS* (0095284)
Solicitor General
*Counsel of Record
SAMUEL C. PETERSON (0081432)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
benjamin.flowers@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Constitutional Provisions

Other Authorities

INTRODUCTION

"Public policy dictates that there be an end to litigation." *State v. Szefcyk*, 77 Ohio St. 3d 93, 95 (1996) (quoting *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (alteration accepted)). The need for finality is especially pressing in criminal proceedings, where the "erosion of the finality of judgments in criminal cases undermines the deterrent effect of criminal law." *State v. Steffen*, 70 Ohio St. 3d 399, 411 (1994). That is why, when the General Assembly adopted R.C. 2953.23(A), it struck a careful balance between protecting society's interest in the finality of criminal convictions, on the one hand, and providing a remedy for violations of a convicted defendant's constitutional rights, on the other. *See State v. Houk*, 127 Ohio St. 3d 317, 2010-Ohio-5805 ¶3; *see also State v. Keeling*, 2015-Ohio-1774 ¶¶12–18 (1st Dist.) (*per curiam*) (rejecting constitutional challenge to R.C. 2953.23(A)).

Eric Johnson wants the Court to upset that balance. He was convicted in 2013 of a variety of crimes, including aggravated robbery and attempted murder. *State v. Johnson*, 2014-Ohio-494 ¶¶3, 15 (8th Dist.). In subsequent years, Johnson attempted to challenge his convictions numerous times, including by filing the petition for postconviction relief (his third) at issue in this case. Because he filed that petition well after the statutory deadline, and because Johnson had already filed two earlier petitions for postconviction relief, the trial court lacked jurisdiction to rule on Johnson's petition unless Johnson could satisfy the requirements of R.C. 2953.23(A).

The Eighth District correctly held that he could not satisfy the requirements of R.C. 2953.23(A). *See State v. Johnson*, 2022-Ohio-81 ¶¶16–21 (8th Dist.) ("App.Op."). That statute requires petitioners who file a second or untimely postconviction-relief petition to show both that: (1) they were "unavoidably prevented from discovery of the facts" that form the basis for their petition; and (2) "but for constitutional error at trial, no reasonable factfinder would have found" them guilty. Petitioners must make the latter showing by clear and convincing evidence. If a petitioner cannot make *both* showings, courts "may not entertain" the petition. R.C. 2953.23(A).

Johnson made neither of the required showings. He never explained why he could not have discovered the basis for his complaint any earlier. And he did not identify any constitutional violation that occurred at his trial—let alone an error that one can say, with clear and convincing evidence, played a but-for role in Johnson's conviction. *See* App.Op.¶¶18–19.

Johnson's challenges to the Eighth District's decision all lack merit. He asks the Court to hold that he did not bear the burden of showing that he could not have discovered the factual basis for his petition sooner. *See* Apt.Br.14–15. As support, he cites the Court's recent decision in *State v. Bethel*, 167 Ohio St. 3d 362, 2022-Ohio-783. But *Bethel* gives Johnson no help. It held that a petitioner satisfies the could-not-have-discovered-earlier requirement if he shows that the government failed to turn over evidence that it was required to disclose under *Brady v. Maryland*, 373 U.S. 83 (1963). *See Bethel*, 167

Ohio St. 3d 362 at ¶¶ 24–25. This is not a *Brady* case, and the alleged error does not concern the government's failure to carry its evidence-disclosing burden. Extending *Bethel* as Johnson suggests would be inconsistent with the plain language of R.C. 2953.23(A)(1), which places on petitioners the burden of showing that they were unavoidably prevented from discovering the factual basis for their petition.

Johnson's other arguments fare no better. He cites, as support for his request for relief, *proposed* changes to Ohio rules and Ohio statutes. Apt.Br.11–13. The trouble for Johnson is that the proposed rules are proposed, not adopted, and thus irrelevant. Finally, Johnson argues that it "should not be the law" that the State's presentation of false testimony violates the Due Process Clause only if the State presents such testimony aware that it is false. Apt.Br.19. But that *is* the law, regardless of how Johnson feels about it. *See State v. Iacona*, 93 Ohio St. 3d 83, 97 (2001) (citing *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989)). And nothing in Johnson's third petition for postconviction relief suggested that the State knowingly relied on false testimony here.

Because Johnson cannot satisfy either of R.C. 2953.23(A)'s requirements, the statute barred the lower courts from entertaining his postconviction petition. Those courts correctly denied his petition and the Court should affirm.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law enforcement officer and "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. He is interested in protecting the balance that the General Assembly struck in R.C. 2953.23(A) between providing a remedy for constitutional violations while also protecting the finality of judgments of conviction.

STATEMENT OF THE FACTS AND CASE

1. Eric Johnson robbed James Keith. *See State v. Johnson*, 2014-Ohio-494 ¶¶5–15 (8th Dist.); *see also* Feb. 14, 2013 Tr.387 (Vol. III). He then shot him and left him to bleed out. *Id.*at 399–400. Keith, thinking that he was going to die, summoned his strength and crawled into the middle of a nearby street. *Id.* at 402. Luckily for Keith, a passing motorcyclist came upon his bloodied body and called for help. An ambulance took Keith to a hospital. *Id.* at 402–04. Keith, who had passed out at the scene of the crime, fell into a coma from which he would not wake for weeks. *Id.* at 404, 560–61. But he did survive.

Once Keith awoke, he provided authorities with information about the man who shot him. Keith told the police that "E" had shot him and that "Junior" was with "E." *Id.* at 404–05; *see also id.* at 390–91, 393–94. Keith said that he knew both men before the robbery and shooting, but only by their nicknames. *Id.* at 390–92. Further investigation revealed that Johnson's nickname was "E," and that Johnson's codefendant, John Alexander, went by "Junior." *See id.*

Keith identified both men in photo lineups. *Id.* at 409–12. The police at first had a hard time preparing a lineup involving Johnson because they could not find any photographs of him. *Id.* at 406–07. Keith, however, told them that his niece knew Johnson and that he knew Johnson had a Facebook account; he recommended that they look on Facebook for photos of Johnson. *Id.* Once the police were able to obtain photos of both suspects, Keith had no trouble identifying the men who shot and robbed him. He identified Johnson as the man who shot him, and Alexander as the other man present during the robbery. *Id.* at 409–12. Keith's identifications could not have been influenced by the police in any way; the police officer who administered the photo lineups did not know which of the pictured individuals were suspects in the crime. *Id.* at 503–14.

Keith's trial testimony comported with what he told the police who investigated the shooting. He maintained, as he had since he woke up in the hospital, that Johnson was the man who shot him. Keith expressed confidence in his identification. He testified that he had met Johnson at least five times before the night of the shooting. And Keith testified that he never forgets a face. *Id.* at 423–24; *see also id.* at 393 (testifying that he looked Johnson in the eyes during the robbery).

A jury convicted Johnson of one count of kidnapping, two counts of aggravated robbery, two counts of felonious assault, one count of attempted murder, and one count of petty theft. *State v. Johnson*, 2014-Ohio-494 ¶¶3, 15 (8th Dist.). With the exception of the theft counts, all of the counts had one and three-year firearm specifications attached.

See id. Several of the counts merged for purposes of sentencing and the trial court ultimately imposed a sentence of twenty-one years. *Id.* at ¶16.

2. Johnson challenged his convictions and sentence on appeal. He also filed multiple postconviction challenges. None succeeded. In his direct appeal, for example, Johnson raised six assignments of error. The Eighth District denied them all. *See id.* at ¶¶1–2. His postconviction efforts fared no better. He filed a petition for postconviction relief in 2013, a motion for leave to file a successive petition in 2017, and an application to reopen his direct appeal in 2018. All of them failed. *See State v. Johnson*, 2015-Ohio-1649 (8th Dist.); *State v. Johnson*, 2018-Ohio-3799 (8th Dist.); *State v. Johnson*, 2018-Ohio-952 (8th Dist.).

Johnson filed another petition for postconviction relief, his third, in 2020. R.75, Petition for Postconviction Relief. This time, he attached an affidavit from Keith to his petition. Keith asserted in the affidavit that he had doubts about whether he correctly identified Johnson as the man who shot him, and stated that he felt pressured by the police to testify against Johnson. *Id.* at Ex. A ¶6. Keith's affidavit, Johnson argued, entitled him to a new trial or, at a minimum, an evidentiary hearing. *Id.* at 6. The trial court, however, disagreed and denied Johnson's petition without a hearing. R.81, Entry.

Johnson appealed, and the Eighth District affirmed. App.Op.¶1. It held that the trial court was not required to hold a hearing on Johnson's petition, *id.* at ¶14, and that

Johnson had failed to satisfy any of the requirements that apply to successive or untimely petitions for postconviction relief, *id.* at ¶¶18–19. Under R.C. 2953.23(A), a court may entertain a successive or untimely petition for postconviction relief only if the petitioner can make two showings. *First*, the petitioner must show that he was unavoidably prevented from discovering the facts that form the basis for his claim for relief. *Second*, the petitioner must show by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found him guilty. Johnson, the Eighth District held, could make neither showing. He failed to show that he was unavoidably prevented from discovering the information contained in Keith's affidavit, *id.* at ¶18, and he failed to identify any constitutional error that occurred at trial, *id.* at ¶¶19–21. Judge Groves dissented, writing that she would have held a hearing on Johnson's petition. *Id.* at ¶¶24–30.

3. Johnson appealed to this Court, raising a single proposition of law. The Court accepted his appeal for review. *See 08/17/2022 Case Announcements*, 2022-Ohio-2788.

ARGUMENT

Amicus Curiae Ohio Attorney General's Proposition of Law:

> *A defendant seeking untimely postconviction relief bears the burden of demonstrating that he was unavoidably prevented from discovering the basis for his claim for relief and that, but for a constitutional error at trial, no reasonable factfinder would have found him guilty.*

Convicted defendants may seek postconviction relief on the ground "that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." R.C. 2953.21(A)(1)(a)(i). They are given only one opportunity to do so. *See* R.C. 2953.23. If they seek to file more than one petition, or if they do not file their first petition on time, courts may not entertain that second or untimely petition. *See id.*; *see also State v. Apanovitch*, 155 Ohio St. 3d 358, 2018-Ohio-4744 ¶36.

There are a few narrow exceptions to the bar on second or untimely petitions. Relevant here, a court may consider such petitions if the petitioner makes both of the following two showings. *First*, the petitioner must "show[] that [he] was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief." R.C. 2953.23(A)(1)(a). *Second*, he must "show[] by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted." R.C. 2953.23(A)(1)(b). The petition at issue in this case is untimely. It is also Johnson's third petition. So R.C. 2953.23(A)(1) governs this case. Because Johnson can make neither

showing required by R.C. 2953.23(A)(1), the courts below correctly refused to entertain his petition.

A. Johnson failed to show that he was unavoidably prevented from discovering the facts that were the basis for his petition.

1. Petitioners who file a second or untimely petition for postconviction relief bear the burden of showing that they were unavoidably prevented from discovering the factual basis of their claim for relief. That much is clear from the plain language of the relevant statute. It states that the exception to the bar on second or untimely petitions applies only if the "*petitioner shows* that the petitioner was unavoidably prevented from discovery of the facts." R.C. 2953.23(A)(1)(a) (emphasis added). As used in R.C. 2953.23(A)(1)(a), the phrase "unavoidably prevented" "means that a defendant was unaware of the relied upon facts and was unable to learn of them through reasonable diligence." *State v. Ruark*, 2015-Ohio-3206 ¶11 (10th Dist.) (citing *State v. Turner*, 2007-Ohio-1468 ¶11 (10th Dist.)); *see also State v. Holnapy*, 2013-Ohio-4307 ¶32 (11th Dist.). The "unavoidably prevented" requirement mirrors the requirement that applies to motions for a new trial under Criminal Rule 33(B). *State v. Bethel*, 167 Ohio St. 3d 362, 2022-Ohio-783 ¶59.

Under the "unavoidable prevented" standard, petitioners must do more than assert that they did not know, and could not have known, the relevant facts earlier. "Mere conclusory allegations do not prove that the defendant was unavoidably prevented from discovering the evidence he seeks to introduce." *State v. Cashin*, 2017-

Ohio-9289 ¶17 (10th Dist.). Petitioners must *explain* why that is so. *See State v. Payne*, 2020-Ohio-4804 ¶9 (9th Dist.). And the mere fact of incarceration is not enough. *State v. Peterson*, 2020-Ohio-4579 ¶20 (10th Dist.). Petitioners must provide some other "justifiable reason" to explain their delay in filing a petition for postconviction relief. *Holdnapy*, 2013-Ohio-4307 at ¶32; *see also State v. Chavis*, 2015-Ohio-5549 ¶16 (10th Dist.). Petitioners who do not "allege any facts or produce any evidence in the trial court to support [an] unsworn assertion" that they were unavoidably prevented from discovering the factual basis for their claim fail to carry their burden under R.C. 2953.23(A)(1)(a). *See State v. Winson*, 2021-Ohio-836 ¶22 (10th Dist.).

Providing "an affidavit signed outside the time limit for a timely motion that fails to offer any reason why it could not have been obtained sooner is not adequate to show by clear and convincing proof that the evidence could not have been obtained within the prescribed time period." *State v. Franklin*, 2010-Ohio-4317 ¶20 (7th Dist.). Whether relief is sought under Criminal Rule 33(B) or R.C. 2953.23, "the phrases 'unavoidably prevented' and 'clear and convincing proof' do not allow one to claim that evidence was undiscoverable simply because affidavits were not obtained sooner." *State v. Williams*, 2003-Ohio-5873 ¶21 (12th Dist.) (interpreting Crim.R.33(B)); *State v. Thorton*, 2017-Ohio-637 ¶48 (5th Dist.) (interpreting both Crim.R. 33(B) and R.C. 2953.23).

The mere assertation that a petitioner was unavoidably prevented from learning of a recanting witness is "not sufficient on its face to carry [the petitioner's] burden of

proving unavoidable delay by clear and convincing evidence." *State v. Bush*, 2009-Ohio-441 ¶11 (10th Dist.) (Rule 33 motion). The petitioner must instead provide a "factual basis" for the conclusion that the affidavit could not have been obtained sooner and, at the very least, must describe "any efforts that [have] been made to obtain the information" contained in the affidavit. *Id.* at ¶10. *See also State v. Clyde*, 2019-Ohio-302 ¶18 (6th Dist.) (Rule 33 motion); *State v. Miller*, 2022-Ohio-378 ¶¶14, 24 (8th Dist.) (Rule 33 motion and post-conviction petition).

2. The Eighth District applied these principles, and settled precedent, when it held that Johnson failed to carry his burden of demonstrating that he was unavoidably prevented from discovering the information that formed the basis for his third petition for postconviction relief. Nowhere in his petition did Johnson explain what steps he took to obtain Keith's affidavit recanting his testimony. Nor did Johnson explain why he was unavoidably prevented from obtaining that affidavit sooner. He asserted only that he was serving a lengthy prison sentence and the information was "not discoverable by him until Keith voluntarily presented it." R.75, Petition for Postconviction Relief at 4. That conclusory allegation was simply not enough to carry his burden under R.C. 2953.23.

That is not to say that it would have been impossible for Johnson to carry his burden. Johnson could have described the efforts he had made to contact Keith, and he could have explained why those efforts produced no fruit. Yet there is no evidence that

Johnson previously tried to secure this information. His failure to do so is especially noteworthy in light of the fact that Keith stated in his affidavit that he had spent "the past seven years thinking about this case and [his] testimony." R.75, Petition for Postconviction Relief, Ex. A, Aff. at ¶7. Keith's statement raises the question of why Johnson could not have discovered Keith's misgivings sooner. R.C. 2953.23 makes Johnson responsible for providing an answer. He did not do so.

3. Citing this Court's recent decision in *Bethel*, Johnson argues that the State should have borne the burden of showing that he could have obtained Keith's affidavit sooner. *See* Apt.Br.14–15. But *Bethel* did not change the fact that R.C. 2953.23 places on *petitioners* the burden of showing that they were unavoidably prevented from discovering the basis for their postconviction-relief claims. All that *Bethel* held is that petitioners can carry their "unavoidably prevented" burden by showing that the State failed to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See Bethel*, 167 Ohio St. 3d 362 at ¶25; *see also State v. McNeal*, ___ Ohio St. 3d ___, 2022-Ohio-2703 ¶23.

Johnson asks the Court to extend *Bethel*; he wants the Court to hold that the State bears some burden to show that a petitioner seeking postconviction relief could have discovered exculpatory evidence sooner, even when that evidence, unlike *Brady* evidence, was not under the State's control. *See* Apt.Br.14, 19. Johnson's argument contradicts the plain language of R.C. 2953.23(A)(1)(a), which says that a petitioner seeking

postconviction relief bears the burden of showing that the evidence could not have been discovered.

Even if Johnson's argument were not precluded by statute, it still would be without merit. While Johnson relies on *Bethel*, that case was specifically limited to *Brady* evidence. Under *Brady*, the State is required to disclose any evidence under its control that is favorable to the defense. *See Bethel*, 167 Ohio St. 3d 362 at ¶25. Criminal defendants "have no duty to 'scavenge for hints of undisclosed *Brady* material.'" *Id.* at ¶24 (quoting *Banks v. Dretke*, 540 U.S. 668, 695 (2004)). That, the Court held, remains true in postconviction proceedings. Because *Brady* places no burden on a defendant, petitioners seeking postconviction relief are "not required to show that [they] could not have discovered suppressed evidence by exercising reasonable diligence." *Id.* at ¶25. They can carry the burden imposed by R.C. 2953.23(A)(1)(a) "by establishing that the prosecution suppressed the evidence on which the defendant relies." *Id.* To hold otherwise, the Court determined, would impermissibly shift *Brady*'s burden of disclosure from the State to the defendant. *See id.* at ¶¶24–25.

Bethel's logic does not extend to evidence that was not subject to disclosure under *Brady*. The State cannot be faulted for failing to disclose evidence that it never possessed. And there is nothing wrong with requiring postconviction petitioners to explain why they were unavoidably prevented from discovering such evidence. Holding peti-

tioners to their burden under R.C. 2953.23(A)(1)(a), therefore, does not violate their rights under *Brady*.

Johnson additionally argues that a postconviction petitioner should be entitled to a hearing "whenever a victim comes forward with allegations that they made a misidentification." Apt.Br.16. Without a hearing, he argues, there is no way of knowing what Keith told the State about his testimony, or what the police might have done to encourage that testimony. Apt.Br.20.

Johnson cites the Second District's decision in *State v. Mackey*, 2015-Ohio-899 (2d Dist.), as supporting his request for an evidentiary hearing. *See* Apt.Br.20. It does not. When the Second District in *Mackey* held that the petitioner had carried his burden under R.C. 2953.23(A)(1)(a), it did not rely primarily on the fact that the recanting witnesses had only recently come forward. It instead focused on the many other reasons the petitioner offered for why he had been unavoidably prevented from obtaining statements from the recanting witnesses. *Mackey*, 2015-Ohio-899 at ¶16. The petitioner in that case had submitted his own affidavit, in which he alleged that both recanting witnesses had previously been "heavily abusing drugs," that one of the witnesses had been serving a sentence in federal prison, and that neither witness would talk to the petitioner "out of fear of the police." *Id.* at ¶16; *see also id.* at ¶7. The petitioner elaborated on that fear, explaining that one of the witnesses "would not recant her incriminating tes-

timony because she had been threatened by authorities that her children would be taken away from her." *Id.* at ¶16.

Johnson's petition for postconviction relief did not contain any similar allegations. To begin with, unlike the petitioner in *Mackey*, Johnson never submitted his own affidavit at all; the only explanation Johnson offered for his years-long delay in submitting his petition came in the form of unsworn assertions in the petition for postconviction relief itself. *See* R.75, Petition for Postconviction Relief. And, even then, those assertions were cursory at best. All Johnson said was that he could not have obtained Keith's affidavit any earlier because he was in prison and because Keith only recently came forward with his statement. *Id.* at 16. Neither allegation satisfied Johnson's burden under R.C. 2953.23(A)(1)(a). *See Peterson*, 2020-Ohio-4579 at ¶20; *Bush*, 2009-Ohio-441 at ¶¶10–11.

This case is also distinguishable from *State v. McConnell*, 2007-Ohio-1181 (2d Dist.), another Second District case involving a recanting witness. In that case, a defendant had been convicted of raping his eight-year-old daughter. *Id.* at ¶3. After the defendant's conviction had been upheld on appeal, he submitted an untimely motion for a new trial. *Id.* at ¶3. In support of his motion, he attached an affidavit from his wife, who was the mother of the victim, in which the victim's mother stated that the victim had recanted her testimony. *Id.* at ¶¶3–6. The Second District held that, under the circumstances, the affidavit from the victim's mother was enough to allow the defend-

ant to file an untimely motion for a new trial. A key factor in the Second District's decision was the relationship between the defendant and the victim. The Second District wrote that, "as a policy matter, we are reluctant to embrace a rule that would require a father convicted of raping his eight-year-old child to pursue the victim to obtain a recantation of her trial testimony." *Id.* at ¶15. Even accepting for argument's sake the validity of that logic, this case presents no similar public-policy concerns.

Johnson also relies heavily on changes to the Rules of Criminal Procedure recently proposed by a state taskforce on conviction integrity and postconviction review. *See* Apt.Br.11–13. Those rules hurt, rather than help, Johnson's case. The proposed rules are, by definition, *not* the current law. And if the existing rules already supported Johnson's petition for postconviction relief, then he would not need to rely on rules that have not been adopted. Beyond that, the report on which Johnson relies is a policy document designed to aid the General Assembly or other policymaking bodies. That makes the report irrelevant here. It "is not the role of the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly." *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 2010-Ohio-1027 ¶61; *cf. also* Ohio Const. Art. IV, §5(B) (giving the General Assembly oversight of the Court's rulemaking function). To the extent that changes should be made to the postconviction process, those changes should come through rulemaking and legislation, not *ad hoc* decisionmaking. *See State v. Parker*, 157 Ohio St. 3d 460, 2019-Ohio-3848 ¶37 (General As-

sembly responsible for weighing the public policy concerns implicated by R.C. 2953.23) (lead op.); *cf. also State v. Hatton*, ___ Ohio St. 3d ___, 2022-Ohio-3991 ¶¶52–54 (Donnelly, J. concurring) (calling for changes to the applicable statutes and rules).

B. Johnson did not show that *any* constitutional error occurred at trial, let alone an error so egregious that no factfinder would have found him guilty.

Even if Johnson had been able to show that he was unavoidably prevented from discovering Keith's affidavit, the outcome of this case would not change. Johnson would still need to demonstrate that there was a constitutional error at his trial. And he would need to show, by clear and convincing evidence, that but for that error, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b). He cannot make either of the statutorily required showings.

1. Johnson has not identified any constitutional error that occurred at trial. All that Johnson alleged in his petition was that he "was misidentified as the assailant and but for that misidentification he would not have been convicted." R.75, Petition for Postconviction Relief at 5. Johnson claimed that this was a violation of his rights to due process and a fair trial because Keith misidentified Johnson "due to feeling pressured by law enforcement." *Id.* at 6. Keith, for his part, stated in his affidavit that he "felt pressured by Detective Brooks to testify against Mr. Johnson even though I wasn't sure he was the person who committed these crimes against me." R.75, Petition for Postconviction Relief, Ex. A, Aff. at ¶6.

These allegations and assertions do not rise to the level of a constitutional violation. Construed most charitably, Johnson may have been attempting to allege that Keith perjured himself at trial. But, if that is the case, Johnson's claim fails on the merits for two distinct reasons. *First*, even now Keith has not claimed that his trial testimony was false. His affidavit says only that he "wasn't sure" whether Johnson was the person who robbed and shot him, and that he now "believe[s]" that he identified the wrong person as committing the crimes against him. *Id.*at ¶¶6–7. *Second*, even if Keith *had* alleged that his trial testimony was false, that would not necessarily show that Johnson's constitutional rights were violated.

The "knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *State v. Iacona*, 93 Ohio St. 3d 83, 97 (2001) (quoting *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989)). The same is true if the State allows evidence that it knows to be false to go uncorrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *see also State v. Sanders*, 92 Ohio St. 3d 245, 271 (2001). But, in both instances, a constitutional violation occurs only if the State knows that the evidence is false. *Iacona*, 93 Ohio St. 3d at 97. Even the most compelling evidence of perjury, "without proof of knowledge on the part of the prosecution of that perjury, does not implicate constitutional rights and therefore, does not support a petition for post-conviction relief." *State v. Parker*, 2013-Ohio-3177 ¶¶5, 19 (2d Dist.).

The burden is on the defendant to show that the government knowingly relied on perjured testimony. *Lochmondy*, 890 F.2d. at 822. A witness's recantation of his testimony is not enough, standing alone, to carry that burden. *State v. Lavette*, 2020-Ohio-5338 ¶12 (8th Dist.). Nor is it enough to show that the government pressured a witness to testify. Merely pressuring a witness is different from encouraging a witness to testify falsely. "Coerced testimony is not necessarily fabricated," and a "reluctant witness or co-conspirator whose testimony an officer must pry out through aggressive interrogation techniques may be telling the truth despite the measures used." *Coleman v. City of Peoria*, 925 F.3d 336, 346 (7th Cir. 2019).

Johnson failed to carry his burden of showing that his constitutional rights were violated. Neither Keith in his affidavit, nor Johnson in his petition, ever alleged that the State was aware of Keith's misgivings—let alone that the State knew that Keith's testimony might possibly be false. *See, generally*, R.75, Petition for Postconviction Relief. And Johnson has certainly not proven that was the case. He has therefore failed to show that a constitutional error occurred at his trial. Under R.C. 2953.23(A)(1)(b), that alone is fatal to his claim for postconviction relief.

2. Even if Johnson had alleged that the State knowingly relied on false testimony at trial, he would still need to show by clear and convincing evidence that, but for that constitutional violation, no reasonable factfinder would have found him guilty. R.C. 2953.23(A)(1)(b). He failed to make that showing.

The only evidence that Johnson provided in support of his petition for postconviction relief was Keith's affidavit, in which Keith asserted that he was unsure whether Johnson was the man who robbed and shot him and that he now believes that he may have identified the wrong man at trial. *See* R.75, Petition for Postconviction Relief, Ex. A, Aff., at ¶¶6–7. The trial court correctly determined that Keith's recanting affidavit was not credible, and the Eighth District correctly affirmed.

While "a trial court should give due deference to affidavits sworn to under oath and filed in support of" a petition for postconviction relief, *State v. Calhoun*, 86 Ohio St. 3d 279, 284 (1999), recanting testimony "ordinarily is unreliable and should be subjected to the closest scrutiny," *Taylor v. Ross*, 150 Ohio St. 448, syl.3 (1948); *see also State v. Hines*, 2008-Ohio-1927 ¶16 (8th Dist.) ("Recantations of prior testimony are to be examined with utmost suspicion.") (Stewart, J.) (quoting *State v. Gray*, 2003-Ohio-6643 ¶10 (8th Dist.)). That is because, "where a witness makes subsequent statements directly contradicting earlier testimony the witness either is lying now, was lying then, or lied both times." *State v. Jones*, 2006-Ohio-5953 ¶25 (10th Dist.) (ultimately quoting *United States v. Provost*, 969 F.2d 617, 620 (8th Cir. 1992)). The more time that passes between a witness's testimony and his recantation, the less credible that recantation becomes; "the delayed disclosure of a witness's recantation weighs against the believability and truthfulness of the witness." *State v. Robinson*, 2013-Ohio-5672 ¶19 (12th Dist.) (quotation omitted).

Disbelief of recantations makes sense "not just because the formality of a court, the presence of the litigants, and the gaze of a judge induce witnesses to hew more closely to the truth than they do when speaking in private and attempting to appease the losing side's advocate. Disbelief is reasonable because it protects witnesses after trial, and thus promotes truthful testimony during trial." *Mendiola v. Schomig*, 224 F.3d 589, 593 (7th Cir. 2000) (Easterbrook, J.) (citing *Hysler v. Florida*, 315 U.S. 411, 422 (1942)). Skepticism towards recantations also makes clear that "recantation will not affect the outcome of the trial" and "makes it less likely that defendants and their friends will hound witnesses after trial." *Id.*

In light of the skepticism with which affidavits of recanting witnesses are viewed, a trial court should grant relief "based upon recanted testimony only where the court is reasonably well satisfied that the testimony given by a material witness is false." *State v. Hatton*, 2014-Ohio-3601 ¶12 (4th Dist.) (internal quotation and citation omitted). Particular deference must be given to credibility determinations made by judges who also presided over a defendant's original trial. *See Calhoun*, 86 Ohio St. 3d at 285. Those judges had the "benefit of observing the witnesses at the time of the trial, [are] able to appraise the variable weight to be given to their subsequent affidavits, and can often discern and assay the incidents, the influences, and the motives that prompted the recantation." *Taylor*, 150 Ohio St. at 452 (quoting *State v. Wynn*, 178 Wash 287, 289 (1934)).

The trial judge that considered Johnson's petition for postconviction relief in this case was the same judge that presided over his trial, and his decision to credit Keith's original trial testimony over his recanting affidavit was a reasonable one. At trial, Keith testified that his brother was friends with Johnson, Feb. 14, 2013 Tr.390 (Vol. III), that he had known Johnson for about a year, that he had met Johnson at least five times before Johnson robbed and shot him, *id.* at 390–91, 423–24, and that he had known Johnson's accomplice for even longer, *id.* at 392. Keith's testimony was also buttressed by testimony from the detectives who investigated the shooting. Detective Brooks testified that it was Keith who originally provided the police with the names of his assailants. *Id.* at 561–63. And when the police were unable to locate a photo of Johnson, Keith told them that his niece knew Johnson and that they should look for a photo of him on Facebook. Feb. 14, 2013 Tr.406–07. Keith also easily identified Johnson when presented with a photo lineup of suspects. *Id.* at 409–12. The detective who administered that photo array did not know which of the photos, if any, depicted Johnson and his accomplice. *Id.* at 503–14, 563–67; *see also* Feb. 12, 2013 Tr.44–46, 57–58. And Detective Brooks, the detective that Johnson now says pressured Keith to testify against Johnson, was not present during that lineup. *See* Feb. 14, 2013 Tr. 503–14, 563–67. Keith confirmed that the police played no role in his identification of Johnson; he testified that no one pressured him to select Johnson out of the photo array. *Id.* at 411.

Compare Keith's detailed trial testimony to the threadbare assertions that he made in his affidavit. All that Keith alleged in his affidavit was that he was unsure whether Johnson was the man who robbed and shot him, that he felt pressured to testify by Detective Brooks, and that he now believes that he identified the wrong man. R.75, Petition for Postconviction Relief, Ex. A, Aff. at ¶7. Keith did not address his prior testimony or explain why, if he knew Johnson prior to the shooting, he is now unsure whether Johnson was the man who shot him. Nor does he explain the many other inconsistencies in his testimony—including his explicit testimony at trial that he *was not* pressured to identify Johnson in the photo lineup.

Because Keith's affidavit directly contradicted his trial testimony in numerous ways, and because he offered no explanation for those contradictions, it was reasonable for the trial court to determine that the affidavit was insufficient to support Johnson's request for postconviction relief. A trial court "may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony." *Calhoun*, 86 Ohio St. 3d at 285. The Eighth District reasonably affirmed the trial court's decision on that basis. *See* App.Op.¶¶20–22.

There is one final reason to credit Keith's original testimony over his recanting affidavit: Johnson had previously threatened Keith in an effort to prevent him from testifying. At a bond hearing before trial, the State presented testimony that suggested

that Keith was in hiding because Johnson had told Keith he intended to "finish the job" by shooting him in the head. Dec. 6, 2012 Tr.16–20. It was at least reasonable, in light of Johnson's prior threats, for the trial court to question the reliability and veracity of Keith's affidavit recanting his trial testimony.

3. Johnson takes issue with the fact that only *knowing* reliance on false testimony violates the Due Process Clause. That, he argues, "should not be the law." Apt.Br.19. But it *is* the law, no matter how much he might disagree with it. This Court has consistently held that the "knowing use of false or perjured testimony" violates the Due Process Clause. *Iacona*, 93 Ohio St. 3d at 97; *State ex rel. Sands v. Coulson*, 163 Ohio St. 3d 275, 2021-Ohio-671 ¶8 (*per curiam*). And the decisions that Johnson cites from the Second and Ninth Circuits holding otherwise are outliers that have attracted significant criticism—and that have been rejected by every other court that has addressed them. *See* Apt.Br.19 (citing *Ortega v. Duncan*, 33 F.3d 102 (2d Cir. 2003) and *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002)); *see Mooney v. Trombley*, No. 05-CV-71329-DT, 2007 WL 2331881 *14 (E.D. Mich. Aug. 13, 2007) (collecting cases); *Penick v. Filion*, 144 F. Supp. 2d 145, 151 (E.D.N.Y. 2000) (same); *Cash v. Maxwell*, 565 U.S. 1138, 1145 (2012) (Scalia, J. dissenting from the denial of *certiorari*) (noting that the U.S. Supreme Court has never held, and is "unlikely ever to" hold, that the government violates the Due Process Clause by unknowingly relying on false testimony).

Searching for another possible constitutional violation upon which to rest his request for postconviction relief, Johnson asserts that the State violated his rights under the Fourteenth Amendment's Due Process Clause because the police coerced Keith into testifying. *See* Apt.Br.17–18. The main problem for Johnson is that neither the facts of Keith's affidavit, nor the cases that Johnson cites, support his claim.

It is true that some courts have held that the introduction of coerced witness statements can violate the Fourteenth Amendment's Due Process Clause. *See Bradford v. Johnson*, 354 F. Supp. 1331, 1336-38 (E.D.Mich. 1972), *aff'd per curiam*, 476 F.2d 66 (6th Cir. 1973); *see also La France v. Bohlinger*, 499 F.2d 29, 34–36 (1st Cir. 1974). Others disagree. *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2019); *cf. Papadakos v. Norton*, 663 Fed App'x 651, 657 (10th Cir. 2016). The Court need not decide who is right. Johnson's claim fails for a much simpler reason: Keith's affidavit does not state that his testimony was coerced.

There is a significant difference between statements that were coerced and those that were obtained as the result of lawful pressure. *See State v. Perez*, 124 Ohio St. 3d 122, 2009-Ohio-6179 ¶¶71–76; *United States v. Tavares*, 705 F.3d 4, 23 (1st Cir. 2013); *see also Sate v. Shurelds*, 2021-Ohio-1560 ¶¶45–47 (3d Dist.). Coercion requires that an individual's will be "overborne." *Reck v. Pate*, 367 U.S. 433, 440 (1961). And while coercion does not always require physical mistreatment, *see Reck*, 367 U.S. at 440, it, at a minimum, requires governmental misconduct sufficient to render a statement involuntary,

Colorado v. Connelly, 479 U.S. 157, 170 (1986); *see also State v. Clark*, 38 Ohio St. 3d 252, 261 (1988).

Keith's affidavit alleges nothing of the sort. It says only that Keith "felt pressured" to testify against Johnson. But pressure is not coercion, and the cases that Johnson cites do not hold otherwise. One case held that the admission of a witness's statements violated the Due Process Clause because the State's coercion of the witness had been "extreme." *See State v. Asher*, 112 Ohio App. 3d 646, 654 (1st Dist. 1996); Apt.Br.17 (citing *Asher*). (Whether *Asher* correctly categorized the coercion as extreme is irrelevant for purposes of this case; what matters is that the First District demanded evidence of extreme coercion before finding a due-process violation.) Another found unconstitutional coercion when a witness's statements were the product of "torture[]". *Bradford*, 354 F. Supp. at 1333; Apt.Br.17–18 (citing *Bradford*). And the third did not find a violation at all; it held that a defendant's statements *were not* coerced. *See Lisenba v. California*, 314 U.S. 219, 240–41 (1941); Apt.Br.17 (citing *Lisenba*).

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

DAVE YOST (0056290)
Ohio Attorney General
/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS* (0095284)
Solicitor General
**Counsel of Record*
SAMUEL C. PETERSON (0081432)
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980; 614-466-5087 fax
benjamin.flowers@ohioago.gov

Counsel for *Amicus Curiae*
Ohio Attorney General Dave Yost

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee was served by email this 13th day of December, 2022, upon the following counsel:

Joseph V. Pagano
P.O. Box 16869
Rocky River, Ohio 44116
jvpemo@yahoo.com

Gregory Ochocki
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113
gochocki@prosecutor.cuyahogacounty.us

/s/ Benjamin M. Flowers
Benjamin M. Flowers
Solicitor General