IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	**Case No. 2023-0843**
Appellee,	**Appeal from Preble County Court of Appeals, Twelfth Appellate District**
v.	
CHRISTOPHER WARD,	**Court of Appeals Case No. 22CA120021**
Appellant.	

APPELLEE STATE OF OHIO'S MEMORANDUM OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT OF GREAT GENERAL OR PUBLIC INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION, AND WHY LEAVE TO APPEAL IS NOT WARRANTED

This case does not present any issue of public or great general interest or a substantial constitutional question that would properly be addressed by this Court. Ward is asking this Court to create a new exception to the statutory deadlines for filing petitions for post-conviction relief. The Ohio General Assembly has determined what exceptions are warranted for untimely filed petitions. R.C. 2953.23. While criminal defendants certainly have an interest in filing petitions for post-conviction relief, the General Assembly has outlined the process for doing so. R.C. 2953.21. Defendants have a right to file a petition within 365 days of the filing of the transcript in their appellate case. R.C. 2953.21. Defendants may file an untimely petition if they are unavoidably prevented from discovering facts upon which they rely for relief, or if there was a constitutional error at trial. R.C. 2953.23. Unless the General Assembly decides to add additional exceptions to the timeliness requirement, the process will remain as written. It would be improper for this Court to create a new exception to a statute carefully crafted by the General Assembly. "A court's role is to interpret, not legislate." *Cablevision of the Midwest v. Gross*, 70 Ohio St.3d 541, 544, 639 N.E.2d 1154 (1994).

A. Ohio law does not require a defendant's counsel to inform him of post-conviction relief.

Ward wants there to be a requirement in the law that a defendant's appellate counsel be required to inform him of the existence and time limitations in R.C. 2953.21. But just because he wants it to be the case, does not mean that this Court is able to make it so. The Ohio Revised Code does not require a defendant's trial or appellate counsel to inform him of the timelines within which a petition for post-conviction relief must be filed. It simply is not an exception to the timeliness requirements for a petition for post-conviction relief, and one cannot be read into the statute.

R.C. 2953.23. "The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy.'" *Burrage v. United States*, 571 U.S. 204, 218, 134 S.Ct. 881 (2014). In order for Ward's proposed rule to be enforceable, it would need to be instituted through statute or court rule. *Cf.* Sixth Circuit R. 35(c).

B. There is no constitutional right for a defendant to be informed by counsel of the existence of post-conviction relief.

The Constitution likewise provides Ward with no relief. Ward believes that because he has a constitutional right to counsel on direct appeal, that counsel should be required to inform a defendant of the right to seek relief under R.C. 2953.21 by informing him of the existence of the statute and the associated timelines. But there is neither a state nor a federal constitutional right to be represented by an attorney in all postconviction proceedings. *State v. Crowder*, 60 Ohio St.3d 151, 152, 573 N.E.2d 652 (1991). There is no right to counsel beyond the first direct appeal of a criminal conviction. *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 20. Ward had counsel on direct appeal. He does not have a constitutional right to counsel in order to challenge the work of that attorney. *Id*., citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 107 S.Ct. 1990, 95 L.Ed.2d 539 ("the right to appointed counsel extends to the first appeal of right, and no further").

C. There are two exceptions to the time limitations for petitions for post-conviction relief; Ward failed to satisfy them.

Equitable tolling is likewise inapplicable in this case, contrary to Ward's assertions. Ward is unable to cite to any compelling authority that would make equitable tolling appropriate in cases where a defendant's counsel on direct appeal fails to inform his client of the existence and time limitations in R.C. 2953.21. The General Assembly has carved out two exceptions to the time limitations; Ward simply failed to satisfy either of them. R.C. 2953.23. His attorney had no legal

duty to inform him of the existence of post-conviction relief, and therefore he did not commit serious attorney misconduct sufficient to warrant equitable tolling. *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549 (2010).

D. This Court cannot create the rule that Ward seeks.

In July 2022, this Court's Task Force on Conviction Integrity and Postconviction Review analyzed the postconviction-review process in Ohio and issued a report containing recommendations for changes to the Ohio Revised Code, the Rules of Criminal Procedure, and other tools that could reduce the likelihood of wrongful convictions. Report and Recommendations, The Task Force on Conviction Integrity and Postconviction Review, July 2022, available at https://www.supremecourt.ohio.gov/docs/Boards/CIPR/Report.pdf (last visited July 21, 2023). As this Court recognized, if a change to the rights associated with petitions for post-conviction relief is to occur, it properly would be through a change of law by the General Assembly. While the task force recommended changes to rules and statutes, it stressed that only the General Assembly has authority to implement statutory change. *Id.* at 1. This Court cannot sua sponte add requirements to the post-conviction statutes that are not currently present, and there is no constitutional right to the advisements that Ward desires.

E. Deciding Ward's propositions of law will not matter because his underlying claims would fail.

Even if they had been presented in a timely filed petition for post-conviction relief, Ward's claims were barred by res judicata. All of the evidence cited in his petition was referenced at trial or was available at the time of trial. Moreover, Ward's trial counsel's decisions—that are the basis of his post-conviction relief motion—were reasonable trial strategies, which do not establish ineffective assistance of counsel. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 101.

Ward does not present a substantial constitutional question or a matter of great general or public interest that could be remedied by this Court. This case is not worthy of review.

STATEMENT OF THE CASE AND FACTS

Appellant, Christopher Ward, used his position of authority as both a Trooper with the Ohio State Highway Patrol ("OSHP") and as a parent to sexually assault numerous women and one minor. The offenses occurred from 2011 to 2018, and occurred in various counties throughout Ohio. None of the victims knew each other; they had no connection other than crossing paths with Ward. The minor was a 15 year old girl who was having a sleepover at Ward's house with his daughter; Ward sexually assaulted her while he thought she was sleeping. Another victim was a passenger in a car Ward pulled over for speeding, and when ordered out of the car Ward sexually touched her during a pat down. A third victim was pulled over by Ward and he then entered the vehicle, threatened her and physically and sexually assaulted her. In a different incident involving the fourth victim, Ward forcibly rubbed the woman's vaginal area against her will after a date. For this conduct, Ward was convicted following a bench trial of one count of sexual battery and three counts of gross sexual imposition; he was acquitted by the trial court of additional charges related to different victims. Following the bench trial, Ward filed a motion for a new trial, which was denied. Ward was sentenced to three years in prison, and was designated as a Tier III sex offender.

Ward appealed his convictions to the Twelfth District Court of Appeals; the transcripts were filed on January 15, 2021. On November 22, 2021, the Twelfth District affirmed the judgment of the trial court, finding there to be no *Brady* violation in the State not providing Ward with GPS records that were available through a public records request, and that Ward's convictions were not against the manifest weight of the evidence. *State v. Ward,* 12th Dist. Preble No. CA2020-06-009, 2021-Ohio-4116, ¶¶ 15, 35.

Ward's counsel filed a second motion for a new trial one week after the Twelfth District issued its decision on direct appeal. Ward, pro se, filed a petition for post-conviction relief six months later. In his petition, Ward claimed that his counsel was ineffective for failing to file a motion to suppress one of the victim's identification of him given that it was based on her viewing only a single photograph, and for failing to call as a witness a relative of a different victim who would have testified about the victim's mental health and previous accusations of sexual assault against others. Following a hearing, where Ward was permitted to argue but no evidence was presented, the petition was dismissed as untimely. Ward's motion for a new trial was likewise deemed to be without merit. Ward appealed from the denial of his motion for a new trial, which was overruled by the Twelfth District.

In Ward's appeal from the dismissal of his petition for post-conviction relief, Ward claimed that the trial court abused its discretion in denying the petition because while his petition was untimely, the untimeliness should have been excused because his trial counsel failed to advise him of the possibility of postconviction relief. The Twelfth District found this argument to be without merit, because this is not one of the exceptions listed in R.C. 2953.23(A); Ohio law does not require trial counsel to tell a defendant about the timelines for filing a petition for postconviction relief. *State v. Ward*, 12th Dist. Preble No. CA2022-12-021, 2023-Ohio-1606, ¶ 13. The Twelfth District found that the trial court properly dismissed Ward's petition for lack of jurisdiction. *Id.* at ¶ 17. The Twelfth District did not reach the merits of Ward's claims—all of which he knew of at the time of trial—or address whether they were barred by res judicata.

It is from this determination that Ward now seeks review.

ARGUMENT

Appellee's First Proposition of Law

There is no constitutional requirement for a defendant's appellate counsel to provide their client with advice regarding the possibility of filing a petition for post-conviction relief and the timelines associated with this separate civil proceeding; counsel is not ineffective for failing to provide their client with information that they have no constitutional or statutory duty to provide.

In his first proposition of law, Ward proposes that he had a right to "the guiding hand" of counsel when his petition for post-conviction relief became due, and that therefore he had a right to have his appellate counsel inform him of the existence, scope and time limitations for filing a post-conviction petition. (Memorandum in Support, p. 9). This is supported neither by statute or the constitution.

1. There is no constitutional right to counsel in post-conviction proceedings

The Supreme Court of the United States only "established the right of state criminal defendants to the guiding hand of counsel at every step in the proceedings against them." *Georgia v. McCollum*, 506 U.S. 42, 65-66, 112 S.Ct. 2348 (1992), citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). Those proceedings do not include civil collateral attacks on the judgment once direct appeal is complete.

There is no constitutional right to counsel in post-conviction proceedings, or to be informed of the existence of post-conviction relief. Ward acknowledges that "once the direct appeal has been decided, the right to counsel no longer applies." (Memorandum in Support, p. 10). Ward nonetheless believes that because petitions for post-conviction relief are due "well before the decision of [a defendant's] direct appeal," that there should be a right to advice from counsel regarding the existence of and time limitations which apply to petitions for post-conviction relief. (Memorandum in Support, p. 11).

But petitions for post-conviction relief are not due "well before" a defendant receives a decision on direct appeal. While this may be true in some cases where the appellate court requires an extended period of time to issue a decision, Ward need look no further than his own case to find his hypothetical disproven. Ward had 365 days from the filing of his transcript in the court of appeals to file a timely petition for post-conviction relief; he had until January 15, 2022 to file a timely petition. R.C. 2953.21(A)(2)(a). Ward's convictions were affirmed on direct appeal on November 22, 2021. *Ward*, 2021-Ohio-4116. Ward's right to counsel terminated nearly two full months before his petition for post-conviction relief was due.

Ward's attempt to distinguish *Finley v. Pennsylvania*, 481 U.S. 551, 557, 107 S.Ct. 1990 (1987) from his case fails. A motion for post-conviction relief is a "collateral attack that *normally* occurs *only after* the defendant has failed to secure relief through direct review of his conviction." (Memorandum in Support, pp. 13-14), citing *Finley* at 557. Petitions for post-conviction relief do not "become due prior to the conclusion of direct appeal," as Ward claims. (Memorandum in Support, p. 14). While this could be true in some cases, normally—like in Ward's case—they are due after the conclusion of direct appeal. "[T]he Due Process Clause does not require that the State require a lawyer" for a post-conviction proceeding. *Id.* at 557.

2. There is no statutory right to be informed of the existence of post-conviction proceedings.

A trial or appellate counsel's failure to advise of the right to seek postconviction relief is not an exception to the timely filing requirements of R.C. 2953.21. As the statute is currently written, failure to be advised of the possibility of postconviction relief is not one of the exceptions listed in R.C. 2953.23(A). The "failure of counsel (appointed for trial or direct appeal) to advise a defendant of postconviction procedures does not equate to being 'unavoidably prevented from discovering the facts upon which he must rely to present the claim for relief.'" *State v. Clay*, 7th

Dist. Mahoning No. 17 MA 0113, 2018-Ohio-985, ¶ 12, citing R.C. 2953.23(a)(1)(a). If Ward's trial counsel failed to tell him about postconviction relief, that means only that he was unaware of the law, but he was not unavoidably prevented from discovering anything. "The statute speaks of being unavoidably prevented from discovery facts, not the law." *Id.*; *see also State v. Theisler*, 11th Dist. Trumbull No. 2009-T-0003, 2009-Ohio-6862, ¶¶ 19-20. "Simply being unaware of the law * * * does not equate with being unavoidably prevented from discovering the facts upon which the petition is based." *State v. Sturbois*, 4th Dist. No. 99CA16, 1999 WL 786318, *2, (Sept. 27, 1999). "Ignorance of the law as to the time for filing is no excuse." *State v. Halliwell*, 134 Ohio App.3d 730, 735 (8th Dist.1999) ("Merely because counsel failed to advise him of the deadline for filing a petition does not show he was 'unavoidably prevented' from discovering the deadline on his own or from other sources").

Ward concedes that counsel in a defendant's direct appeal "does not have a duty to inform a defendant of the existence and time limits for filing" petitions for post-conviction relief. (Memorandum in Support, pp. 4-5). It is up to the Ohio General Assembly to determine whether such a duty should be inserted into R.C. 2945.21. This Court cannot read a duty into a statute where one does not otherwise exist. *State v. Taylor*, 161 Ohio St.3d 319, 2020-Ohio-3514, 163 N.E.3d 486, ¶ 9 ("we are mindful that the proper role of a court is to construe a statute as written without adding criteria not supported by the text"). Without any textual basis in either R.C. 2953.21 or R.C. 2953.23, this Court cannot add into the statute a requirement that appellate counsel inform a defendant of the process for filing a petition for post-conviction relief.

Ward believes that requiring appellate counsel on direct appeal to provide advisements regarding post-conviction proceedings would benefit countless criminal defendants. Even if true, and even if this Court were to agree that this suggestion is worthwhile, this policy discussion is

beside the point. "A court's role is to interpret, not legislate." *Cablevision of the Midwest v. Gross*, 70 Ohio St.3d 541, 544, 639 N.E.2d 1154 (1994). Courts should not take it upon themselves "to judicially rewrite [a] statute." *State v. Christian*, 2d Dist. Montgomery No. 25256, 2014-Ohio-2672, ¶ 128, citing *State v. Pietrangelo*, 11th Dist. Lake No. 2003-L-125, 2005-Ohio-1686, ¶ 17.

There is not an absolute right to counsel during post-conviction proceedings. Ohio law provides post-conviction counsel to a petitioner if two criteria are met: (1) the trial court determines that the petitioner's allegations warrant an evidentiary hearing; and (2) counsel determines that the petitioner's allegations have arguable merit. R.C. 120.16. As Ward concedes, the public defender's office is only required to prosecute a postconviction remedy for an indigent defendant if it is satisfied there is arguable merit to the proceeding. R.C. 120.16(D). This does not lead to a conclusion that all defendants have a right to be informed of postconviction proceedings. The right to counsel only attaches after the petition is filed, and only if substantive claims are made.

Ward's petition was not timely filed, and neither of the exceptions in R.C. 2953.23 were met, therefore the trial court was not required to provide him with an evidentiary hearing or counsel to evaluate the arguable merits of the proceeding.

3. Post-conviction review is being carefully considered by this Court.

Ward passionately asserts that it "would not be unduly burdensome to require counsel to give simple advice which would benefit all Ohio defendants and the system which is intended to be fair." (Memorandum in Support, p. 13). Even if this Court were to agree, it cannot sua sponte require counsel to give such advice, given that this duty cannot be read into either the constitution or statute. "The role of this Court is to apply the statute as it is written—even if we think some other approach might accord with good policy.'" *Burrage v. United States*, 571 U.S. 204, 218, 134 S.Ct. 881 (2014) (internal quotation marks and brackets omitted).

This Court has carefully studied ways in which the post-conviction relief process in Ohio can be improved, and has issued a report and recommendation on its findings. Report and Recommendations, The Task Force on Conviction Integrity and Postconviction Review, July 2022, available at https://www.supremecourt.ohio.gov/docs/Boards/CIPR/Report.pdf (last visited July 21, 2023). The task force acknowledged that only the General Assembly has the authority to implement changes to the post-conviction relief statute. *Id.* at 1. The task force recommended that this Court adopt Crim.R. 33.1, which, among other changes, would allow a defendant to file a motion for a new trial based on new evidence at any time. The task force recommended amending R.C. 2953.21 and 2953.23 to expand access to discovery in noncapital postconviction proceedings, expand the time period in which a defendant may seek postconviction relief, and provide a mechanism for appointing counsel for certain noncapital defendants. *Id.* at 2, 21. The task force did not, however, recommend that a petitioner should be required to be informed by his appellate counsel on direct appeal of the existence of post-conviction relief as a potential remedy. The General Assembly could nonetheless choose to adopt a code section that would require such notifications be made, but doing so is outside the scope of this request for review.

4. Ward's counsel was not per se ineffective.

Ward claims that his counsel's "complete failure to notify [him] of the existence of, and time limitations which apply to, a petition for post-conviction relief should be held to constitute per se constitutionally ineffective representation that requires no showing of prejudice by way of a likelihood of success on appeal." (Memorandum in Support, p. 14). It stretches credulity to believe that an attorney could be per se ineffective for not doing something that neither statute, the constitution, or rule required him to do. To hold otherwise would create a dangerous precedent, that would provide attorneys with little to no guardrails for what conduct might later be deemed

"per se constitutionally ineffective." It was not Ward's appellate counsel's duty to advise Ward of the existence and time limits associated with petitions for post-conviction relief. Ward's petition, even if timely filed, would have failed on its merits, as his claims were barred by res judicata and were based on information that existed at the time of trial. Ward's petition became due after his counsel's representation had ended. Ward's counsel represented him at trial, on direct appeal, and through the filing and hearings on two motions for a new trial. He was a zealous advocate for Ward, and was not ineffective.

Ward's first proposition of law should not be well taken.

Appellee's Second Proposition of Law

Equitable tolling cannot be applied when counsel fails to inform their client of the existence or time limitations for petitions for post-conviction relief, because they have no legal duty to provide such information, and therefore the failure is not a serious instance of attorney misconduct that would warrant such tolling.

In his second proposition of law, Ward asserts that equitable tolling should be applied to untimely filed petitions for postconviction relief when a defendant was represented by counsel on direct appeal, the defendant relied on the advice or silence of counsel regarding when petitions were due, and the defendant pursued his rights upon being informed of their existence. Ward cites to *Holland v. Florida*, 570 U.S. 631, 130 S.Ct. 2549 (2010) in support of his position that a one year limitations period, like that associated with R.C. 2953.21, could be subject to equitable tolling.

But in *Holland*, the Court made clear that "a petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some *extraordinary circumstance* stood in his way and prevented timely filing." *Id.* at 649 (internal citations omitted). The *Holland* Court found that equitable tolling was appropriate for the late filing of a habeas petition only because of a serious instance of attorney misconduct. *Id.* at 651. A "garden variety claim" of attorney negligence is insufficient to warrant equitable tolling. *Id.* at 651-52. The

circumstances of a case must truly be "extraordinary" before tolling can be applied under *Holland*. *Id.* at 652 (finding that a circumstance where counsel failed to file a federal petition despite the inmate's repeated letters asking him to, and counsel's failure to communicate with his client over a period of years may well be an "extraordinary" instance).

Even if the analogous rule Ward proposes were to be applied to untimely filed petitions for post-conviction relief, here there was no serious instance of attorney misconduct. There was no rule in effect at the time of Ward's appeal that his attorney was required to inform him of but neglected to do so. The record shows that Ward's attorney was very diligent, and Ward retained him for his trial, his first motion for a new trial, his direct appeal, and his second motion for a new trial where his attorney argued on his behalf. Ward's counsel filed a motion for a new trial on November 29, 2021; a mere week after his direct appeal had been denied. Ward's counsel implemented Ward's reasonable requests, kept Ward informed of key developments in the cases in which counsel was representing him, performed competent legal work, and never abandoned him. *Id.* at 652-53. By all accounts, Ward's counsel did everything Ward asked him to do, which distinguishes his case from a case like *Holland* where equitable tolling was warranted.

Ward's second proposition is not worthy of review.

CONCLUSION

For the above reasons, the State urges the Court to deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to S.Ct.Prac.R. 3.11(C)(1), a copy of the foregoing *Appellee State of Ohio's Memorandum Opposing Jurisdiction* has been filed and was sent by email on July 28, 2023 to counsel for Appellant, William B. Norman, to WillNorman@DefendingCleveland.com.

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