No. 19-8746

In the Supreme Court of the United States

SCOTT A. GROUP.,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE OHIO COURT OF APPEALS FOR THE 7TH APPELLATE DISTRICT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

SARAH KOSTICK
(Ohio Reg. No. 0086925)
Counsel of Record

33 N. STONE AVE., 21ST FLOOR
TUCSON, AZ 85701
PH: (520) 724-6923
FX: (520) 770-4168
sarah.kostick@pima.gov

DANIELA PAEZ
(Ohio Reg. No. 0091212)

ULMER & BERNE LLP
1160 W. 2ND ST., SUITE 1100
CLEVELAND, OH 44113
PH: (216) 583-7000
FX: (216) 583-7463
dpaezparedes@ulmer.com

COUNSEL FOR PETITIONER

PAUL J. GAINS
(Ohio Reg. No. 0020323)
Mahoning County Prosecutor

RALPH M. RIVERA
(Ohio Reg. No. 0082063)
Assistant Prosecutor
Counsel of Record

MAHONING COUNTY
PROSECUTOR'S OFFICE
21 W. BOARDMAN ST., 6TH FL.
YOUNGSTOWN, OH 44503
PH: (330) 740-2330
FX: (330) 740-2008
pgains@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS..ii

TABLE OF AUTHORITIES...iii

STATEMENT OF THE CASE AND FACTS..1

REASONS FOR DENYING THE WRIT..8

I. A State Court Does Not Deprive a Capital Defendant of Due Process of Law When It Denies a Defendant's Request to Present New Evidence to Challenge the Capital Conviction After a Defendant Failed to Establish that the Evidence was "Newly Discovered," *and* the Evidence Would Not Have Changed the Trial's Outcome.

CONCLUSION...25

TABLE OF AUTHORITIES

CASES:

Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954)……………………11

Group v. Robinson, 158 F.Supp3d 632 (N.D. Ohio 2016)……………………….7

Group v. Robinson, 6th Cir. No. 16-3726, 2017 U.S. App. LEXIS 26387 (Dec. 21, 2017)………………………………………………………………….7

Group v. Robinson, 86 U.S.L.W. 3641 (2018)……………………………………7

State v. Agee, 7th Dist. Mahoning No. 14 MA 94, 2016 Ohio 7183…………….19

State v. Ambartsoumov, 10th Dist. Franklin Nos. 12AP-878, 12AP-877, 12AP-889, 2013 Ohio 3011……………………………………………………….13

State v. Brown, 186 Ohio App. 3d 309, 2010 Ohio 405, 927 N.E.2d 1133 (7th Dist.)…………………………………………………………………………17

State v. Davis, 5th Dist. Licking No. 2008-CA-16, 2008 Ohio 6841……………19

State v. Dodrill, 9th Dist. Summit No. 4204, 1987 WL 19466 (Oct. 28, 1987).12

State v. Fortson, 8th Dist. Cuyahoga No. 82545, 2003 Ohio 5387………..12, 14

State v. Franklin, 7th Dist. Mahoning No. 09 MA 96, 2010 Ohio 4317……….13

State v. Gresham, 8th Dist. Cuyahoga No. 88013, 2007 Ohio 636………………9

State v. Group, 98 Ohio St.3d 248, 2002 Ohio 7247, 781 N.E.2d 980………..1-6

State v. Group, 7th Dist. Mahoning No. 10 MA 21, 2011 Ohio 6422……………6

State v. Group, 135 Ohio St. 3d 1431, 2013 Ohio 1857, 986 N.E.2d 1021……..6

State v. Group, 146 Ohio St. 3d 1413, 2016 Ohio 3390, 51 N.E.3d 658………..6

State v. Group, 7th Dist. Mahoning No. 18 MA 0098, 2019 Ohio 3958…………..
……………………………………………………………7, 14, 15, 16, 18, 19, 23

State v. Group, 2020 Ohio122, 137 N.E.3d 1196……………………………………7

State v. Hawkins, 66 Ohio St.3d 339, 350 (1993)……………………………….8

State v. Jones, 11th Dist. Ashtabula No. 2000-A-0083, 2002 Ohio 2074……...19

State v. Kiraly, 56 Ohio App.2d 37 (8th Dist. 1977)……………………………12

State v. LaMar, 95 Ohio St.3d 181 (2002)………………………………………8

State v. Lawson, 103 Ohio App.3d 307, 659 N.E.2d 362 (12th Dist.1995)……19

State v. Lordi, 149 Ohio App.3d 627 (7th Dist. 2002)………………………11, 12

State v. Mir, 7th Dist. Mahoning No. 12 MA 210, 2013 Ohio 2880…………...18

State v. Nunez, 8th Dist. Cuyahoga No. 104917, 2017 Ohio 5581……………..17

State v. Otten, 33 Ohio App.3d 339 (9th Dist. 1986)………………………………9

State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947)………………...16, 17, 18

State v. Purdue, 7th Dist. Mahoning No. 04 MA 119, 2005 Ohio 2703…………8

State v. Scudder, 131 Ohio App.3d 470, 722 N.E.2d 1054 (10th Dist.1998)….19

State v. Shakoor, 7th Dist. Mahoning No. 10 MA 64, 2010 Ohio 6386………..13

State v. Walden, 19 Ohio App.3d 141 (10th Dist. 1984)…………………………11

State v. Wilson, 7th Dist. Mahoning No. 11 MA 92, 2012 Ohio 1505…………13

State v. Wright, 67 Ohio App. 3d 827, 588 N.E.2d 930 (2nd Dist. 1990)………18

RULES:

OH. Crim.R. 33…………………………………………………………9, 10, 11

STATEMENT OF THE CASE

In January 1997, Defendant Scott Group murdered Robert Lozier and nearly killed his wife Sandra. The Supreme Court of Ohio summarized the facts that supported Defendant's convictions and death sentence:

> Robert Lozier's wife, Sandra Lozier, owned the Downtown Bar in Youngstown, Ohio. In late September 1996, the Loziers began buying wine and other merchandise from Ohio Wine Imports Company. Group, who was then employed as a deliveryman for Ohio Wine, made weekly deliveries to the Downtown Bar. Group never asked the Loziers to sign or initial a copy of the invoice when they took delivery, a practice Mrs. Lozier characterized as unusual.
>
> On December 12, 1996, Group brought his cash receipts to the Ohio Wine warehouse manager's office to be counted and compared against his invoices. Group's cash receipts were approximately $1,300 short. Although the police were notified, Group was never charged with stealing the missing money.
>
> About a week before Robert Lozier's murder, Group went to the Downtown Bar and asked Mrs. Lozier to show him the bar's copies of invoices from Ohio Wine.
>
> Less than a week before Robert Lozier's murder, two Ohio Wine employees saw Group with a revolver at work. They told him to take the gun out of the building, since possessing a firearm in the warehouse was illegal.
>
> The day before the murder, Group quit his job at Ohio Wine. That night, two witnesses saw Group at the Downtown Bar. One of them, Robert Genuske, who worked at the bar, recalled that a few weeks earlier, Group had come to the bar looking for Mr. or Mrs. Lozier because he wanted to talk to them about an invoice.
>
> The next day, January 18, the Loziers arrived at the Downtown Bar around 10:00 a.m. It was a cold day and Robert Lozier went upstairs to see whether the pipes had

frozen. Sandra Lozier went to an office, opened a safe, removed five bags containing approximately $1,200 to $1,300 in cash, and set them on her desk.

As she counted the cash, Mrs. Lozier heard a knock at the bar's front door. She went to the door, looked through the peephole, and saw Group. Mrs. Lozier recognized Group and let him in. She noted that he was wearing tennis shoes, jeans, a dark blue sweatshirt, and an undershirt. She particularly noticed that he wore both a sweatshirt and an undershirt because Group "never dressed that warmly."

Group told Mrs. Lozier that he wanted to check the invoices again. Mrs. Lozier led him to the office. As Mrs. Lozier and Group searched through the invoices, Robert Lozier came into the office, sat at the desk, and took over counting the money. As Mrs. Lozier later testified, "[Group] just kept going through [the invoices], and it was like he just kept staring at them."

Asking to use the restroom, Group left the office briefly. When he returned, he had a gun. Group ordered the Loziers to put their hands up and get into the restroom. Mrs. Lozier told Group to take the money, but Group replied, "This isn't about money." He forced the Loziers into the restroom at gunpoint and made them put their hands against the wall.

Group stated that "he was the brother of the girl that was missing." Mrs. Lozier interpreted this as a reference to Charity Agee, a murder victim who had last been seen at the Downtown Bar on New Year's Eve. The Loziers turned around, but Group ordered them to face the wall. Then he shot them both. He shot Robert Lozier once in the head. He shot Sandra Lozier twice: once in the back of the neck and once near her temple.

Mrs. Lozier lost consciousness. She woke to find her husband dead on the floor. Mrs. Lozier thought she was dying, so she tried to write "Ohio Wine" on the floor in her own blood as a clue for the police. At the time, she did not know Group's name. She then crawled to the office, where she managed to dial 911. She told the operator that "the

delivery man from Ohio Wine" had shot and robbed her and her husband. The 911 call was recorded; a voice timestamp on the tape established that the call was received at 11:05 a.m.

The first Youngstown police officer to arrive at the crime scene was Detective Sergeant Joseph Datko. Mrs. Lozier told Datko: "The Ohio Wine man shot me. The Ohio Wine man. Our delivery man shot us." The money the Loziers had been counting before the shootings was gone and so was the box of invoices that Group had been looking through.

*   *   *

According to Group, after leaving his mother's house, he drove to the Diamond Tavern in Campbell, Ohio. Group testified that he did not know how long he was at the tavern but that he had left at noon.

There were about eight customers at the Diamond Tavern. Group bought at least two rounds of drinks for all of the customers. A fellow patron thanked Group and said, "I'll see you," but Group replied, "You aren't going to see me anymore." He had a similar exchange with the bartender, Bonnie Donatelli.

*   *   *

When Group arrived at the police station, he spoke with Captain Robert Kane, chief of detectives, and Detective Sergeant Daryl Martin. Kane and Martin noticed what looked like blood on one of Group's tennis shoes. When questioned about it, Group told Kane that he had cut his finger. He showed Kane the finger, and there was a cut on it, but it "looked like a superficial old cut" to Kane.

After brief questioning, Sergeant Martin arrested Group. Group said, "You better check out Sam Vona," a former driver for Ohio Wine. But Mrs. Lozier did not recognize Vona's picture when Martin later showed it to her.

Group's shoe was sent to Cellmark Diagnostics for DNA testing. An expert from Cellmark testified that the DNA pattern of the blood on the shoe matched the DNA pattern of a known sample of Robert Lozier's blood. She further testified that the same DNA pattern occurs in approximately 1 in 220,000 Caucasians, 1 in 81 million African-Americans, and 1 in 1.8 million Hispanics. The testing also revealed that Group was excluded as the source of the blood.

* * *

Robert Clark was an inmate at the Mahoning County Jail with Group. Clark mentioned to Group that he "was familiar with the people in the [Downtown] [B]ar." Group asked Clark whether he would "be willing to help [Group] out." Group then made up a story for Clark to tell police. Clark was to say that he had been near the Downtown Bar on the morning of the murder and had seen a man leave the bar carrying a large beer bottle box. In return, Group promised to help Clark "any way he could." Clark later received an anonymous $50 contribution to his commissary account.

Adam Perry was another Mahoning County Jail inmate at the time of Group's pretrial incarceration. Awaiting trial on pending charges, Perry was incarcerated with Group from December 1997 to May 1998. Perry was released on bond in May 1998.

In a letter postmarked March 20, 1998, before Perry's release, Group begged for Perry's help with his case:

"If you do bond out, let me know. There's something you may be able to do to help me with concerning my case. And I'm telling you, I need all the help I can get. * * * But seriously man, and this is no joke, I need your help with something if you get out. Please don't leave me hanging? We've known each other a long time and if anyone in your family needs help, you know I'll be there."

Before Perry was released, Group asked him to firebomb Mrs. Lozier's house. Group assured Perry that Mrs. Lozier no longer lived there. However, he told Perry

that "[h]e didn't want Sandy Lozier to testify against him," and he wanted Perry to "firebomb the lady's house to either scare her from testifying or to lead the police into investigating others."

Group told Perry that he had $300,000 hidden away. He offered Perry half of it in exchange for his help. Group also offered to dissuade a witness from testifying in Perry's trial.

Group explained to Perry how to make a firebomb by mixing gasoline with dish soap in a bottle, with a rag in the neck for a fuse. He instructed Perry to light the rag and throw it through the front window and then to drop a key chain with the name "Charity" on it on the front lawn. "[W]hat he wanted to do," Perry explained, "was to mislead the police into thinking that the firebomb and the murder [sic] was all involved as far as Charity's abduction and murder."

In a letter postmarked May 6, 1998, Group wrote to Perry: "So I need to know on everything if that party is still on where your sister lived. The party has to happen and happen the way we last talked. I've got to know bro, so I can figure some other things out in the next few weeks." Perry understood "the party" to refer to the planned firebombing of Mrs. Lozier's house.

Group also corresponded with Perry after Perry's release. State's Exhibit 37, a letter from Group to Perry, contains the following passage: "[Y]ou said you would take care of that flat tire for me and now that your [sic] out, I hope you do because it's a matter of life or death (mine)[.]" In the next sentence, Mrs. Lozier's address appears next to the name "Agee."

Group then wrote: "If you take care of the flat, please take care of it with that two step plan we talked about. * * * Theres [sic] $300,000.00 in a wall of a certain house * * *. Half goes to you to do what you like."

The second page of State's Exhibit 37 contains Mrs. Lozier's address and describes the house as ranch-style. It also lists the following items: "Cheap key chain or ID

> bracelet-name (Charity)" and "3 liter wine jug-mix gas & dish soap."
>
> In June 1998, Perry knocked on Mrs. Lozier's door. When she answered, he asked her whether a "Maria something lived there." Mrs. Lozier said no, and Perry left. Perry testified that he did not want to hurt Mrs. Lozier and so, after finding her at home, he took no further action. Perry later told the prosecutor about Group's plan.

State v. Group, 98 Ohio St.3d 248, 249-254, 2002 Ohio 7247, 781 N.E.2d 980. Defendant was convicted of Aggravated Murder (Robert Lozier), two Death Specifications, two counts of Attempted Aggravated Murder (Sandra Lozier), Intimidation, Aggravated Robbery, and the Firearm Specifications. The Supreme Court of Ohio affirmed his convictions and death sentence. *See id.*

On March 20, 2000, Defendant timely filed his Postconviction Petition. More than 9 years later, Defendant amended his petition. The Ohio Court of Appeals for the Seventh Appellate District affirmed the trial court's denial of his petition. *See State v. Group*, 7th Dist. Mahoning No. 10 MA 21, 2011 Ohio 6422. The Supreme Court of Ohio denied Defendant's discretionary appeal. *See State v. Group*, 135 Ohio St. 3d 1431, 2013 Ohio 1857, 986 N.E.2d 1021.

On June 3, 2015, Defendant filed an Untimely Application for Reopening pursuant to S.Ct.Prac.R. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992). The Supreme Court of Ohio denied his motion. *See State v. Group*, 146 Ohio St. 3d 1413, 2016 Ohio 3390, 51 N.E.3d 658.

Following Defendant's exhaustion of his remedies in state court, Defendant filed a Petition for a Writ of Habeas Corpus in the United States

District Court for the Northern District of Ohio. The District Court denied Defendant's petition, and denied Defendant a Certificate of Appealability on all claims. *See Group v. Robinson*, 158 F.Supp3d 632 (N.D. Ohio 2016).

On December 21, 2017, the Sixth Circuit Court of Appeals denied rehearing en banc the court's May 25, 2017 order denying his application for a Certificate of Appealability. *See Group v. Robinson*, 6th Cir. No. 16-3726, 2017 U.S. App. LEXIS 26387 (Dec. 21, 2017).

On March 19, 2018, Defendant filed Petition for a Writ of Certiorari in this Court. This Court denied Defendant's petition on June 25, 2018. *See Group v. Robinson*, 86 U.S.L.W. 3641 (2018).

On March 29, 2018, Defendant filed a Motion for Leave to File a Delayed Motion for New Trial in the Mahoning County Court of Common Pleas. The trial court denied Defendant's motion, because he failed to establish why he was "unavoidably prevented" from discovering the alleged "newly discovered evidence" in a timely manner.

Defendant timely appealed to the Ohio Court of Appeals for the Seventh Appellate District. The Seventh District affirmed the denial of Defendant's motion. *See State v. Group*, 7th Dist. Mahoning No. 18 MA 0098, 2019 Ohio 3958, *appeal denied by*, *State v. Group*, 2020 Ohio 122, 137 N.E.3d 1196.

The State of Ohio now responds to Defendant's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

II. A State Court Does Not Deprive a Capital Defendant of Due Process of Law When It Denies a Defendant's Request to Present New Evidence to Challenge the Capital Conviction After a Defendant Failed to Establish that the Evidence was "Newly Discovered," *and* the Evidence Would Not Have Changed the Trial's Outcome.

As for Defendant's first question presented, he contends that the trial court erred in denying his motion for leave to file a motion for new trial pursuant to Ohio Evidence Rule 33(A)(6). To the contrary, Defendant failed to establish that he was unavoidably prevented from discovering the alleged "new evidence," and further failed to establish that the alleged "newly discovered evidence" would have changed the trial's outcome. Therefore, Defendant's request for a Petition for a Writ of Certiorari must be denied.

A. UNDER OHIO LAW, THE DECISION TO GRANT A NEW TRIAL RESTS IN THE SOUND DISCRETION OF THE TRIAL COURT.

The Supreme Court of Ohio has previously held that the decision to grant a new trial based upon "grounds of newly discovered evidence falls within the sound discretion of the trial court." *State v. LaMar*, 95 Ohio St.3d 181, 202 (2002), citing *State v. Hawkins*, 66 Ohio St.3d 339, 350 (1993). The trial court's "exercise of discretion will not be overturned absent a clear and manifest abuse." *State v. Purdue*, 7th Dist. Mahoning No. 04 MA 119, 2005 Ohio 2703, ¶ 19.

And "the discretionary decision to grant a new trial is an ***extraordinary measure*** which should be used only when the evidence presented weighs heavily in favor of the moving party." (Emphasis added.) *State v. Gresham*, 8th Dist. No. 88013, 2007 Ohio 636, ¶ 11, citing *State v. Otten*, 33 Ohio App.3d 339, 340 (9th Dist. 1986).

1. OHIO COURTS ONLY ADDRESS AN UNTIMELY MOTION FOR NEW TRIAL WHERE THE DEFENDANT SHOWS HE WAS "UNAVOIDABLY PREVENTED" FROM DISCOVERING "NEW" EVIDENCE.

Here, Defendant contends that he is entitled to a new trial based upon "newly discovered evidence." Ohio Criminal Rule 33 provides that a trial court may grant a defendant a new trial where his substantial rights were materially affected by any of the following:

> (1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

> (5) Error of law occurring at the trial;
>
> (6) When ***new evidence material to the defense is discovered***, ***which the defendant could not with reasonable diligence have discovered and produced at the trial***. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

(Emphasis added.) OH. Crim.R. 33(A). Ohio Criminal Rule 33(B), however, sets forth the time requirements for filing a motion for new trial:

> Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, shall be filed within fourteen days after the verdict was rendered, or the decision of the court where a trial by jury has been waived, unless it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.
>
> ***Motions for new trial on account of newly discovered evidence*** shall be filed ***within one hundred twenty days*** after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear ***by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence*** upon which he must rely, such motion ***shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence*** within the one hundred twenty day period.

(Emphasis added.) OH. Crim.R. 33(B). Thus, Ohio trial courts can only address the merits of a motion for new trial where the motion is timely, or leave is granted by the trial court. When a defendant fails to file a motion for new trial within the time limit set forth in Ohio Criminal Rule 33, it must seek and obtain leave from the trial court. Thus, "[l]eave *must* be granted before the merits are reached." (Emphasis added.) *State v. Lordi*, 149 Ohio App.3d 627, 634 (7th Dist. 2002).

To obtain leave, the unavoidable delay must be proved by clear and convincing evidence. *See id.*, citing OH. Crim.R. 33. "Clear and convincing evidence is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus (1954).

"[A] party is unavoidably prevented from filing a motion for new trial if the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the time prescribed for filing the motion for new trial in the exercise of reasonable diligence." *Lordi*, 149 Ohio App.3d at 634, quoting *State v. Walden*, 19 Ohio App.3d 141, 146 (10th Dist. 1984).

"Thus, in order for a trial court to properly reach the merits of an untimely motion for a new trial, clear and convincing proof requires more than a mere allegation that a defendant has been unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial." *Lordi*, 149 Ohio App.3d at 634, citing *State v. Kiraly*, 56 Ohio App.2d 37, 55 (8th Dist. 1977), and *State v. Dodrill*, 9th Dist. Summit No. 4204, 1987 WL 19466 (Oct. 28, 1987).

"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. Fortson*, 8th Dist. Cuyahoga No. 82545, 2003 Ohio 5387, ¶ 11. "Furthermore, the clear and convincing requirement places the burden on the defendant to show he was unavoidably prevented from timely discovery of evidence." *Id.* at ¶ 12.

a.) Defendant Failed to Establish He was Unavoidably Prevented From Discovering the Alleged New Evidence.

To begin, Defendant failed to establish that he was unavoidably prevented from discovering the alleged "new" evidence—i.e., Dr. Baird's affidavit, Dr. Dan Krane's statement, and Christine Funk's Report.

"Ohio courts have held that affidavits filed outside of the 120-day time limit of Crim.R. 33 that ***fail to offer a sufficient explanation as to why evidence could not have been obtained sooner are inadequate*** to show that the movant was unavoidably prevented from obtaining the evidence

within the prescribed time." (Emphasis added.) *State v. Ambartsoumov*, 10th Dist. Franklin Nos. 12AP-878, 12AP-877, 12AP-889, 2013 Ohio 3011, ¶ 25; *accord State v. Wilson*, 7th Dist. Mahoning No. 11 MA 92, 2012 Ohio 1505, ¶ 57 (concluding "the affidavits and the motion for leave do not contain enough information to conclude that Wilson was unavoidably prevented from discovering the evidence within the prescribed period."); *State v. Shakoor*, 7th Dist. Mahoning No. 10 MA 64, 2010 Ohio 6386, ¶ 21 (stating the court has "favorably cited these decisions and have concluded that the use of an affidavit signed outside Crim.R. 33(B)'s time limit 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 movant was unavoidably prevented from obtaining the evidence within the prescribed time period.").

In *State v. Franklin*, the Seventh District Court of Appeals previously concluded that the mere use of an affidavit or statement obtained beyond the one-hundred and twenty day time limit does not satisfy the defendant's burden under Ohio Criminal Rule 33:

> The burden is on the petitioner to show how he was unavoidably prevented from timely discovering the evidence; the court is "not required to make suppositions about the reasons for the delay." *Fortson,* 8th Dist. No. 82545, 2003-Ohio-5387, at ¶ 12. Thus, the use of 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. *Id.*

State v. Franklin, 7th Dist. Mahoning No. 09 MA 96, 2010 Ohio 4317, ¶ 20.

In *Fortson*, the Eighth District Court of Appeals previously concluded that "[t]he 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." *Fortson*, supra at ¶ 11. For instance, in *Fortson*, the Eighth District found that the defendant failed to establish that he was "unavoidably prevented" from discovering two witnesses who later recanted their testimony. *See id.*

The Eighth District Court of Appeals concluded that the trial court did not abuse its discretion in concluding that the defendant failed to establish that the new evidence could not have been timely discovered. *See id.* at ¶ 11.The Eighth District reasoned that the witnesses' affidavits did not explain why they failed to recant their testimony some two years later. *See id.*

To explain the delay in filing his motion, Defendant submitted an affidavit from his federal public defender, Alan Rossman. This "new evidence" consisted of affidavits from Attorney Christine Funk, Dr. Michael Baird, and Dr. Daniel Krane. While Defendant contends that the trial court ignored Alan Rossman's affidavit, the Seventh District Court of Appeals concluded that the trial court did in fact consider Rossman's affidavit. *See State v. Group*, 7th Dist. Mahoning No. 18 MA 98, 2019 Ohio 3958, ¶ 25.

In the Ohio appellate court, Defendant argued that he was unavoidably prevented from discovering this "new" evidence only on his contention that the federal court would not give Rossman permission to file

the evidence in state court. As the Seventh District Court of Appeals properly found, while Defendant could not retain counsel to file the motion, "[a]t no time does he explain why he was prevented from filing his motion for new trial *pro se*." (Emphasis sic.) *Group*, 2019 Ohio 3958, ¶ 26.

Thus, the Seventh District Court of Appeals properly concluded that Defendant failed to offer any legitimate explanation for his untimely motion:

> Even so, there is nothing in this record to suggest that Appellant even attempted to secure counsel to represent him in state court. Rossman's affidavit avers solely that Rossman and his office could not represent Appellant in state court, not that Rossman or Appellant attempted to secure other representation. There is nothing within the record to support the self-serving statement at oral argument that several attorneys declined to accept his case before he finally found his current counsel. Again, the only evidence contained in Rossman's affidavit is an explanation as to why Rossman, himself, could not file a state court motion for new trial. This record does not reveal that Appellant was unavoidably prevented from discovering the evidence he would like to use to request a new trial. For this reason alone Appellant's argument is not well taken.

Group, 2019 Ohio 3958, ¶ 26.

Further, neither Dr. Baird's affidavit, Dr. Dan Krane's statement, nor Christine Funk's report offered an adequate explanation as to why the information could not and was not obtained at an earlier date. In fact, there are no explanations contained in any of the proffered documents regarding why the information could not and was not provided and obtained at an earlier date.

Thus, Defendant clearly failed to establish that he was unavoidably prevented from discovering the alleged "new" evidence—i.e., Dr. Baird's affidavit, Dr. Dan Krane's statement, and Christine Funk's Report—in a timely manner.

Here, Defendant's only contends that the federal public defenders could not file a motion for leave in state court, but his motion for leave failed to offer any explanation as to why his *current* defense counsel could not file the motion for leave within a reasonable time upon discovering the alleged new evidence. *See Group*, 2019 Ohio 3958, ¶¶ 24-27.

Thus, Defendant's motion was not filed in a timely manner, and Defendant did not establish that he was unavoidably prevented from discovering the alleged "new evidence" pursuant to Ohio Criminal Rule 33.

2. EVEN IF DEFENDANT SHOWED HE WAS "UNAVOIDABLY PREVENTED" FROM DISCOVERING THE NEW EVIDENCE, GROUP DID NOT ESTABLISH THAT THE EVIDENCE WOULD HAVE CHANGED THE TRIAL'S OUTCOME.

Even assuming Defendant was unavoidably prevented from discovering the evidence (i.e., Dr. Baird's affidavit, Dr. Dan Krane's statement, and Christine Funk's Report), the evidence is not "newly discovered evidence" that would entitle Defendant to relief pursuant to Ohio Criminal Rule 33.

In *State v. Petro*, the Supreme Court of Ohio defined "newly discovered evidence" that would entitle a defendant to relief:

> To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370, syllabus (1947).

Here, Defendant contends that the evidence (i.e., Dr. Baird's affidavit, Dr. Dan Krane's statement, and Christine Funk's Report) entitles him to relief under Ohio Criminal Rule 33 due to trial counsel's ineffectiveness. The evidence that Defendant proffered in support of his motion pertains to the blood found on Defendant's shoe, and how the State characterized that evidence at trial. Simply stated, the evidence is not "newly discovered evidence," and even if it was, it merely seeks to contradict and impeach testimony that was offered at Defendant's trial.

First, none of the evidence proffered in support of Defendant's motion for leave and his motion for new trial is "newly discovered." The various emails, letters, billing statements, and activity logs have been ***in existence for nearly 20 years***, and were ***known*** to Defendant's numerous defense counsels over the years. *See State v. Nunez*, 8th Dist. Cuyahoga No. 104917, 2017 Ohio 5581; *see also State v. Brown*, 186 Ohio App. 3d 309**,** 2010 Ohio 405, 927 N.E.2d 1133 (7th Dist.). The more recent documents, such as Dr. Baird's affidavit, Dr. Dan Krane's statement, and Christine Funk's report,

are not "newly discovered," because they do not contain any "new" information unknown to Defendant, and are documents Defendant solicited with the intended purpose to support his motion for new trial. These documents (including the information contained within) were not *discovered*, but were in fact *created*.

As the Seventh District Court of Appeals found, "the Baird, Funk, and Krane affidavits are not newly discovered nor do they technically contain evidence." *Group*, 2019 Ohio 3958, ¶ 28. "Clearly, then, this 'evidence' was well known to Appellant at trial and it is not newly discovered. These affidavits merely supplement facts and evidence known at the time of trial with different interpretations of these facts." *Id.* at ¶ 31.

Second, the information contained within the supporting documents submitted by Defendant is not "newly discovered evidence" that would entitle him to relief. *See Petro*, syllabus.

Here, the affidavit and reports merely seek to contradict *parts* of the State's evidence regarding the DNA profile found on Defendant's shoe, rather than to exonerate Defendant. "[N]ew evidence that merely contradicts prior evidence does not provide a basis for granting a new trial." *State v. Mir*, 7th Dist. Mahoning No. 12 MA 210, 2013 Ohio 2880, ¶ 12, citing *Petro*, at syllabus; *accord State v. Wright*, 67 Ohio App. 3d 827, 831, 588 N.E.2d 930 (2nd Dist. 1990).

In specific regards to Christine Funk's report, Ohio appellate districts have consistently concluded that an affidavit or report by a legal expert does not constitute cogent evidence to establish that trial counsel was constitutionally ineffective under *Strickland*. *See State v. Agee*, 7th Dist. Mahoning No. 14 MA 94, 2016 Ohio 7183, ¶¶ 28-30, citing *State v. Davis*, 5th Dist. Licking No. 2008-CA-16, 2008 Ohio 6841, *State v. Jones*, 11th Dist. Ashtabula No. 2000-A-0083, 2002 Ohio 2074, *State v. Scudder*, 131 Ohio App.3d 470, 722 N.E.2d 1054 (10th Dist.1998), and *State v. Lawson*, 103 Ohio App.3d 307, 659 N.E.2d 362 (12th Dist.1995).

Furthermore, "none of this 'evidence' is particularly helpful to Appellant. Even if Appellant were successful and permitted to file a motion for new trial, none of this is likely to change the outcome of his trial." *Group*, 2019 Ohio 3958, ¶ 28.

At trial, Sandra Lozier testified that Defendant-Appellant Scott Group was the "regular delivery man from the Ohio Wine Company." (Trial Tr., at 2581.) From October 1996 through January 1997, Sandra Lozier had around ten interactions with Defendant delivering to the bar. (Trial Tr., at 2581.)

On Saturday, January 18, 1997, Sandra and Robert Lozier went to the bar around 10:00 a.m. (Trial Tr., at 2589.) While Sandra was counting money from the previous night, Defendant knocked on the door. (Trial Tr., at 2592.) Defendant coincidentally quit his job at Ohio Wine the previous day—Friday, January 17, 1997. (Trial Tr., at 3171.)

Sandra opened the door for Defendant, and he was talking about needing to see some invoices. (Trial Tr., at 2592.) Sandra told him, "No problem. I'll get them out. You can check them." (Trial Tr., at 2592.) Defendant asked if Robert was there, and she answered yes. (Trial Tr., at 2592.) Sandra and Defendant then started looking through the invoices. (Trial Tr., at 2593.) The money she was counting remained out on her desk. (Trial Tr., at 2593.)

Defendant asked Sandra if she remembered a time that he delivered one case of something, but she did not remember; Robert walked in, and Defendant asked him the same, but he too did not remember. (Trial Tr., at 2594.) Sandra then gave Defendant the 1996 invoices; Defendant looked through them but did not find what he was looking for. (Trial Tr., at 2594.) Robert sat down at the other desk and continued counting the money. (Trial Tr., at 2594.)

Defendant then asked if he could use the restroom, which he was allowed to do. (Trial Tr., at 2595.) Defendant left the office, and when he returned "within a minute or two [he was] holding a gun in his hand." (Trial Tr., at 2595.) Defendant was holding the gun with both hands. (Trial Tr., at 2595.)

Defendant told them to put their "hands up and get into the restroom." (Trial Tr., at 2595.) Defendant led them into the men's restroom; Sandra told him, "Take the money. It doesn't mean anything to us." (Trial Tr., at 2596.)

Defendant responded, "This isn't about the money." (Trial Tr., at 2596.) Defendant then stated "that he was the brother of the girl that was missing." (Trial Tr., at 2596.)

Sandra stated that this upset her, because they had "felt so bad of the situation that happened with this girl. (Trial Tr., at 2597.) Both Sandra and Robert turned around and said to Defendant, "God, * * *, you know, we are really sorry, but we don't know, you know, we don't know anything that happened with this girl."[1] (Trial Tr., at 2597.) Defendant then stated that he was leaving town." (Trial Tr., at 2597.)

Defendant again told them to turn around and put their hands on the wall. (Trial Tr., at 2599.) Robert then told Defendant that they were "working with the police." (Trial Tr., at 2599.) At this point, Defendant shot Robert twice in the head and then shot Sandra. (Trial Tr., at 2599.)

Sandra woke up to Robert laying on the floor next to her; Sandra was "wobbly" and could not sit up. (Trial Tr., at 2600.) Sandra then "tried to write 'Ohio Wine' in [her] own blood." (Trial Tr., at 2600.) Sandra did this because did not know his actual name, but she knew he worked for Ohio Wine, and thought she was dying. (Trial Tr., at 2600.) She was unable to write it because of the floor's ceramic tile. (Trial Tr., at 2601.) Sandra then crawled to the office, pulled the phone off the desk, and dialed 911. (Trial Tr., at 2602.)

---

[1] The girl that went missing was Charity Agee; she was seen at the Lozier's Downtown bar on New Year's Eve. Charity Agee had been murdered, but it had not been solved as of January 18, 1997. (Trial Tr., at 2598-2599.)

The money on the Loziers' desks and the invoices that Defendant looked through were gone. (Trial Tr., at 2607, 2614-2615.)

Sandra Lozier was shot twice; once in her back and another below her temple. (Trial Tr., at 2608.) She also suffered a gunshot wound to her hand (may have been a defensive wound). (Trial Tr., at 2608.)

Youngstown Detective-Sergeant Daryl Martin showed Sandra a photographic array of several individuals, and she identified Defendant Scott Group as the driver from Ohio Wine that shot her and her husband. (Trial Tr., at 2611-2612.)

In June 1998, a stranger came to Sandra's door and asked if "Maria" had lived there; she told him no and he left. (Trial Tr., at 2616.) Sandra stated that she felt strange about her encounter; the stranger was outside looking around at the other neighbors. (Trial Tr., at 2616.)

Sandra told Det. Martin about the encounter a few days later when he called Sandra to warn her about a plot to kill her. (Trial Tr., at 2618.) Sandra left her house and never returned. (Trial Tr., at 2618.)

Sandra Lozier identified the stranger as Adam Perry, the person Defendant hired to kill Sandra Lozier. (Trial Tr., at 2619-2620, 3186.)

Sandra Lozier stated that she had no doubt that Defendant-Appellant Scott Group shot her and her husband that morning. (Trial Tr., at 2621.)

The Seventh District Court of Appeals properly found that Defendant's alleged "new evidence" would not have changed the trial's outcome:

> Regardless, none of this "evidence" is particularly helpful to Appellant. Even if Appellant were successful and permitted to file a motion for new trial, none of this is likely to change the outcome of his trial. As discussed by the state, the DNA evidence was only a small portion of the evidence against him at trial and played a relatively minor role. Sandra testified about the events leading to the shooting, including the receipts and invoice discrepancies and her earlier interactions with Appellant. She identified Appellant as the shooter in court. Additionally, several inmates testified that Appellant offered them money in exchange for intimidating witnesses and murdering Sandra. At least two of Appellant's friends provided testimony regarding Appellant's fear of the results of his gunshot residue test and that he asked at least one of them to lie and tell investigators that he was at the shooting range with Appellant the day before the shooting. Based on this evidence, there is little possibility of change in the outcome of the trial even if the DNA evidence would be ruled improper.

Group, 2019 Ohio 3958, ¶ 32.

Thus, the evidence (i.e., Dr. Baird's affidavit, Dr. Dan Krane's statement, and Christine Funk's Report) would not entitle Defendant to relief pursuant to Ohio Criminal Rule 33, because it is not "newly discovered evidence," and there is "little possibility of change in the outcome of the trial." *Group*, 2019 Ohio 3958, ¶ 32.

Therefore, Defendant's request for a Petition for a Writ of Certiorari must be denied, because a state court does not deprive a capital defendant of due process of law when it denies a defendant's request to present new evidence to challenge the capital conviction after a defendant failed to establish that the evidence was "newly discovered," *and* the evidence would not have changed the trial's outcome.

Conclusion

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

/s/ Paul J. Gains
PAUL J. GAINS
(Ohio Reg. No. 0020323)
Mahoning County Prosecutor

/s/ Ralph M. Rivera
RALPH M. RIVERA
(Ohio Reg. No. 0082063)
Assistant Prosecutor
Counsel of Record

Mahoning County Prosecutor's Office
21 W. Boardman Street, 6th Floor
Youngstown, OH 44503
(330) 740-2330
pgain@mahoningcountyoh.gov
rrivera@mahoningcountyoh.gov

COUNSEL FOR RESPONDENT