

No. 21-5375

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS COLEY,

Petitioner,

"vs"

STATE OF OHIO,

Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO*

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW:

The post-conviction relief process under Ohio law is a collateral civil attack on a criminal judgment. It is not an appeal of the criminal conviction. The post-conviction process merely determines whether 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. In Ohio, the timeliness requirement of the statute is jurisdictional in nature. Therefore, the question presented in this case is as follows:

Whether the State of Ohio has a valid interest in the finality of judgments and in the corresponding ability to control by statute the timely filing of requirements of a death row inmate's planned petition for post-conviction relief, where the inmate has admitted that he cannot meet the statutory requirements for filing a petition out of time?

PARTIES

The Petitioner is Douglas Coley.

The Respondent is the State of Ohio.

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JURISDICTIONAL STATEMENT

Petitioner Douglas Coley seeks review of the Ohio Supreme Court's denial of his "Motion for Relief," filed on March 4, 2021. Petitioner's "Motion for Relief" sought remand of the case to the trial court, with an order requiring the trial court to permit Coley to pursue post-conviction review without applying the statutory time limitations for seeking such relief. The Supreme Court of Ohio denied the motion on May 12, 2021, and Coley filed his Petition for a Writ of Certiorari in this Court on August 10, 2021. Coley asserts jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. United States Constitution, Fourteenth Amendment, Section 1 states in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Ohio Rev. Code § 2953.21 (*See Appendix A-1*).
3. Ohio Rev. Code § 2953.23 (*See Appendix A-2*).
4. 28 U.S.C. § 12547.

STATEMENT OF THE CASE AND FACTS

The evidence adduced at trial were previously summarized by the Supreme Court

of Ohio as follows:

On December 23, 1996, around 7:30 p.m., David Moore parked his light blue, four-door Ford Taurus at his residence in Toledo. While Moore was unloading his car trunk, a man he later identified as Green asked for directions. As he gave directions, another man appeared, whom Moore later identified as Coley. Moore started to leave, but Green and Coley stood in front of him and displayed small-caliber, shiny, semiautomatic pistols. Coley then told Moore, "Give me your keys." Moore complied, and Coley told Moore, "Get in the car." Coley then climbed in behind the wheel, Green got in back behind Moore, and Coley drove the Taurus towards the art museum.

While in the car, Moore asked them to let him go, but neither Green nor Coley responded. Green did tell Moore to "cough up the cash," and Moore handed Coley \$ 112, which Coley threw on the front seat. Moore noted that Coley was calm and never appeared excited, aggravated, confused, or unsure of himself. After approximately fifteen minutes, Coley pulled into a dark, isolated field and told Moore to get out of the car.

As Moore backed out of the car, Coley shot him in the stomach. After Moore ran away, he heard a car door open and the car wheels spinning, "trying to get out of the mud." Moore heard somebody chasing him. Other shots were fired, and Moore fell down. Then Moore heard another shot and felt a bullet hit him in the head. He pretended that he was dead, but as his assailant walked away, Moore looked back and thought that Green, who was heavier and taller than Coley, was the one who had just shot him.

Eventually, Moore struggled to his feet, went to a nearby house, and summoned assistance. Police and a medical team responded and took Moore to a hospital. Moore had been shot in the head, stomach, and arms, and twice in the hand. During one operation, a surgeon removed a .25 caliber bullet from Moore's wrist.

In addition to the bullet from Moore's wrist, police found two .25 caliber shell casings on Green Street near where Moore had been shot.

Evidence established that a gun identified as Coley's gun had ejected the shell casings found on Green Street and fired the bullet removed from Moore's wrist.

On an evening shortly before Christmas 1996, Tyrone Armstrong, a cousin of both Coley and Green, saw Coley and Green driving a light blue, four-door Ford Taurus. The Taurus, which Armstrong knew did not belong to either of them, was overheating, so Armstrong helped put water in the car. Before his abduction, Moore had purchased but not installed a new replacement radiator because his Taurus tended to overheat.

That same evening, Armstrong saw Coley and Green with the same .25 caliber semiautomatic pistols that Armstrong had seen each of them previously carry. Armstrong identified State Exhibit 32, a brown-handled pistol with gray duct tape, as the weapon Coley had previously carried, and State Exhibit 33, which had a pearl handle, as Green's pistol. That evening, Green made up a rap song with the words "I shot him five times and he had dropped." At one point, Green pointed his gun at Coley and said, "You better never snitch on me." Coley mimicked the action: pointing his gun at Green, and repeating, "Better never snitch on me." Penne Graves, Coley's girlfriend, also recognized State Exhibit 32 as a gun she had seen around her house.

After a few days, Coley and Green abandoned Moore's Taurus. On December 27, 1996, police recovered Moore's car in an area near the residence of a girlfriend of Coley. When police found the Taurus, it bore plates that had been stolen from a Mercury Topaz.

Murder of Samar El-Okdi

Samar El-Okdi was found dead in an alley on January 7, 1997. She had last been seen on January 3, 1997. The police traced El-Okdi's movements on Friday, January 3, 1997, from around 5:00 p.m. until 8:00 p.m., but no evidence firmly established exactly where or when she had been abducted. Sometime after 5:00 p.m. that day, El-Okdi left work and told coworkers that she planned to spend the evening at home. She drove her Pontiac 6000 to her apartment, a block from Moore's residence. Raymond Sunderman, her landlord, saw El-Okdi arrive home sometime between 5:00 and 5:30 p.m. El-Okdi's brother, Samir El-Okdi, recalls that El-Okdi stopped by late that afternoon at the family-owned convenience store for thirty to forty-five minutes. Around 8:00 p.m., El-Okdi dropped film off at the Blue Ribbon Photo

store at Westgate Shopping Center.

That same Friday, around 8:45 p.m., Rosie Frusher left a friend's house at West Grove Place, near the Toledo Art Museum, to use a pay telephone. As Frusher walked outside the house at which she was staying, she heard two gunshots. After she had passed by the house, she saw a car to her left in an alley. The car had "long taillights" (similar to those on a Pontiac 6000) and a license plate number with a zero (unlike El-Okdi's license number). Frusher saw a black, stocky "man outside the car bending over that had bushy hair." Another man was sitting in the driver's seat. Then Frusher walked to the pay phone and talked to her friend for thirty minutes or so, but she did not return the same way she had come earlier. Ameritech records establish that Frusher made this call at 8:41 p.m.

On Saturday, January 4, Christopher Neal, El-Okdi's boyfriend, discovered that El-Okdi was missing and notified police. El-Okdi's friends and relatives searched for El-Okdi, hired a private detective, and distributed missing-person flyers. These flyers described El-Okdi, included her photograph, described her car, including the bumper stickers, and listed her last known whereabouts.

That same weekend in Toledo, Armstrong saw Coley driving a gray Pontiac 6000 that he later identified as El-Okdi's car. On the night his cousins were arrested, Armstrong bought some cigars and two bottles of Alize (an alcoholic beverage) for Green and Coley, which police later found in that Pontiac. Armstrong admitted that Green and Coley had keys and used those keys to drive both the Taurus and the Pontiac.

Later that night, Monday, January 6, Megan Mattimoe, El-Okdi's friend and coworker, was parked on Scottwood waiting for another friend to distribute the missing-person flyers about El-Okdi. Around 11:15 p.m., Mattimoe saw El-Okdi's car drive by, which she identified by its dented rear fender and a distinctive bumper sticker, although the license plate was different. While following the Pontiac, Mattimoe used a cellphone to call a friend, who in turn called the police. Mattimoe followed the Pontiac until the driver parked at an apartment complex and two men got out.

After talking with police, Mattimoe and a Toledo detective returned to where the stolen Pontiac was parked. It bore an Ohio license plate, number YRT 022, which had been stolen from another Pontiac 6000 some time before 6:00 p.m. on January 4, 1997. Police staked out the

car, using five undercover police vehicles.

After midnight, Green, Coley, and a woman with a baby got into the Pontiac and drove away. Police followed in undercover vehicles and, assisted by marked police cars, forced the Pontiac to stop. Despite being surrounded, Green rammed one car and spun his wheels in an effort to escape. Green and Coley also resisted arrest, and police forcibly removed each of them from the car. Police found a loaded pistol in Green's coat. When one policeman approached the car, he noticed that Coley, who was sitting in the back seat, had a metallic object in his hand. On the Pontiac's rear floor, police found a loaded, .25 caliber, brown-handled pistol (Exhibit 32) near where Coley had been sitting.

Inside the trunk, police found a black crochet purse that El-Okdi had with her on January 3 when she disappeared. However, police never found her red wallet and credit cards, which she always carried with her inside the black purse. Police found one of El-Okdi's license plates underneath the stolen rear plate, and they found her other license plate in the car trunk.

On the afternoon of January 7, police found El-Okdi's body in an alley behind West Grove Place, where Frusher had heard shots and had seen two men in a car four days earlier. El-Okdi was wearing the same white shirt, black shoes, and black trousers that she wore to work on January 3. At the scene, police found a live .25 caliber bullet and a .25 caliber shell casing near El-Okdi's body.

The deputy coroner found that El-Okdi had died from a .25 caliber bullet, which the deputy coroner removed from the back of her cerebellum. The bullet had struck her between the eyes and had been fired from a muzzle distance of approximately twelve to eighteen inches. The deputy coroner concluded that El-Okdi did not die immediately.

David Cogan, a firearms expert, examined the .25 caliber bullet removed from El-Okdi's brain, the .25 caliber bullet removed from Moore's wrist, three .25 caliber shell casings from the two crime scenes, and Coley's .25 caliber semiautomatic pistol recovered from the rear floor of El-Okdi's Pontiac. Cogan concluded that Coley's pistol was in operating condition and had fired the bullets into Moore and El-Okdi and had ejected the three crime-scene shell casings. After police searched Green's residence on January 7, 1997, they found an empty box that had contained .25 caliber Remington ammunition.

On January 7, 1997, Coley and Green were arraigned on charges relating to El-Okdi's stolen Pontiac and the stolen plates. That arraignment was shown on television, and Moore immediately recognized Green and Coley from the television newscast as the men who had kidnapped, robbed, and shot him.

That same week, Coley, Green and their cousin Armstrong were all in jail, although Armstrong was being held on unrelated charges. While Armstrong and Coley were together, Coley hugged him and told him, "I did it but Joe [Green] shouldn't have snitched on me." By this comment, Armstrong understood Coley to mean that Coley had shot El-Okdi. Coley also asked Armstrong to lie for him by claiming that Coley had obtained his weapon and the Pontiac from someone named Denny.

On January 16, 1997, a grand jury heard allegations relating to El-Okdi, and returned an indictment of murder, without death-penalty specifications. Coley was reindicted on March 10, 1997, with the grand jury returning an eight-count indictment for the following offenses: Count I, the kidnapping of David Moore, in violation of R.C. 2905.01(A)(2); Count II, the aggravated robbery of David Moore, in violation of R.C. 2911.01(A)(1); Count III, the attempted murder of David Moore, in violation of R.C. 2923.02; Count IV, the aggravated murder of Samar El-Okdi, in violation of R.C. 2903.01(A); Count V, the aggravated murder of Samar El-Okdi, in violation of R.C. 2903.01(B); Count VI, the aggravated murder of Samar El-Okdi, in violation of R.C. 2903.01(B); Count VII, the kidnapping of Samar El-Okdi, in violation of R.C. 2905.01(A)(2); and Count VIII, the aggravated robbery of Samar El-Okdi, in violation of R.C. 2911.01(A)(1). Each count included a firearm specification in violation of R.C. 2941.145. Count III also had a firearm specification under R.C. 2941.146. Each murder count included a specification under R.C. 2929.04(A)(7) that the murder was committed during a kidnapping or robbery.

Coley pleaded not guilty to the charges, and was convicted as charged, and the jury found both that Coley was the principal offender in the aggravated murder and that he committed the offense with prior calculation and design. The trial court later merged the three aggravated murder Counts (IV, V, and VI). After a sentencing hearing, the jury recommended, and the trial judge imposed, a death sentence for the aggravated murder of Samar El-Okdi. In addition to the death sentence, the trial court sentenced Coley to ten years on each of Counts

I, II, III, VII, and VIII, to be served consecutively, and sentenced him on the firearm specifications.

State v. Coley, 93 Ohio St.3d 253, 253-257, 2001-Ohio-1340, 754 N.E.2d 1129 (Appendix B-1).

After his conviction, the trial court appointed attorney Joseph Benevidez to file an appeal on Coley's behalf. *See* relevant portion of trial court's docket sheet, Appendix C-1. (The State was unable to locate in the record, the actual trial court journal entry appointing counsel). Coley's conviction and sentence were affirmed on direct appeal. *State v. Coley*, 93 Ohio St.3d 253, 253-257, 2001-Ohio-1340, 754 N.E.2d 1129 (Appendix B-1).

During the pendency of his direct appeal, the trial court also appointed Benevidez to pursue post-conviction relief on Coley's behalf. *See* Appendix C-2. No petition was ever filed. However, the allegation that Mr. Coley's court appointed attorney "abandoned" him, by Coley's own admission, was known to him in May of 2000. *See* Affidavit of Douglas Coley, Appendix C-3. In his Motion for Relief, Coley asked the Ohio Supreme Court for an order directing the trial court to accept and file a planned untimely post-conviction petition - a petition which could not meet the timeliness requirements of Ohio Rev. Code §2953.23(A). Coley asserts that the denial of the order violated his federal constitutional rights to Equal protection and Due Process. For the reasons stated below, the State respectfully disagrees.

REASONS FOR DENYING THE WRIT

The Rational Basis test:

The Equal Protection Clause provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Fourteenth Amendment, Section 1.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Lawrence v. Texas*, 539 U.S. 558, 579, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Under the rational basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.*

Contrary to the assertion in Coley's Petition, the State has a valid, rational interest in ensuring the timely presentation of legal claims. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 444, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) (J. Powell, concurring). Claims are best presented and decided closer in time to the actual subject event, when the evidence is fresh, when recollections are fresh, and when witnesses are more readily available. With the passage of time, evidence and witnesses become difficult to find and memories fade. This makes the proper administration of justice, especially in post-conviction proceedings, inherently difficult and problematic. As a result, the State has a valid, rational state interest in ensuring the timely presentation of legal claims. *Logan*, 455 U.S. at 444.

Appellate courts have no authority to ignore and override the provisions of a valid state statute.

In his Petition, Coley asks this Court to accept jurisdiction to review the Ohio Supreme Court's denial of his Motion Relief. Coley's Motion for Relief sought to compel the trial court to accept and file a planned post-conviction petition under the provisions of Ohio Rev. Code § 2953.21 et seq., (Appendix A-1 & A-2), without requiring that the petition meet the statutory timeliness requirements of Ohio Rev. Code § 2953.23(A) (*see* Appendix A-2). Coley asserts that unless this Court accepts jurisdiction and mandates the trial court's acceptance of what he admits would be an untimely post-conviction petition under the provisions of Ohio Rev. Code §2953.23(A), his federal and state constitutional rights to Equal Protection and Due Process will be violated. Although Coley's situation is certainly unique, the State of Ohio must respectfully disagree.

The post-conviction relief process, under Ohio Rev. Code §2953.21 et seq., (Appendix A-1 & A-2) is a collateral civil attack on a criminal judgment. Under Ohio law, it is not an appeal of the criminal conviction. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 1999 - Ohio-102, 714 N.E.2d 905 (1999). The post-conviction process merely determines whether "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." Ohio Rev. Code §2953.21(A)(1)(a); *see also Calhoun*, 86 Ohio St.3d at 281.

Appellate courts in Ohio have held that the timeliness requirement of Ohio

Rev. Code §2953.23 is jurisdictional in nature. *See e.g., State v. Jackson*, 10th Dist. Franklin App. No. 18AP-758, 2019 Ohio-4995, ¶31 (see Appendix B-2); *State v. Guy*, 6th Dist. Sandusky App. No. S-15-019, 2016- Ohio-619, ¶11 (see Appendix B-3).

The "right to file a postconviction petition is a statutory right, not a constitutional right," (citation omitted). "A postconviction petitioner therefore "receives no more rights than those granted by the statute." (citation omitted). This means that any right to postconviction relief must arise from the statutory scheme enacted by the General Assembly.

State v. Apanovitch, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶35, [Appendix B-4] (emphasis added).

Appellate courts are constrained to interpret a State's post-conviction statute as written by applying the plain meaning of the language used by the General Assembly. *Holly Frontier Cheyenne Refining, LLC v. Renewable Fuels Assn.*, ___ U.S. ___, 141 S.Ct. 2172, 2176, 210 L.Ed.2d 547 (2021). Appellate courts therefore have no authority to ignore and override the timeliness provisions of a valid state statute.

A petitioner cannot sit on his constitutional rights for decades before pursuing relief. Under the rational basis test, the State has a valid interest in the timely presentation of legal claims.

As stated above, the allegation that Mr. Coley's court appointed attorney had "abandoned" him and had not filed a post-conviction petition, by Coley's own admission, was known to him back in May of 2000. *See Affidavit of Douglas Coley*, Appendix C-3. So why did it take Coley over 18 years in order to file for relief? In

2000, Coley could have pursued post-conviction relief out of time, alleging ineffective assistance of counsel under the provisions of Ohio Rev. Code §2953.23. At that time, his request to file a petition out of time would likely have been granted by the trial court, but not after the passage of 18 years. Coley did file a pro se motion on February 2, 1999, in the trial court attempting to get new counsel appointed, but that motion was denied. However, Coley failed to raise his post-conviction claims when he first discovered that no petition had been filed. Instead, he and his attorneys waited 18 years to file his Motion for Relief, choosing to exhaust all other legal claims first. Coley now attempts to present an ineffective assistance of counsel claim that was well known to him over 18 years ago.

Granting Coley the relief he is requesting would involve issuing a court order overriding the provisions of Ohio Rev. Code §2953.23. However unfortunate Coley's situation may be, if such relief is granted after almost two decades of failing to pursue the relief now requested in his Motion to the Ohio Supreme Court, would establish an extremely dangerous legal precedent. Such precedent would allow any trial or appellate court to ignore the timeliness filing requirements, and the plain meaning of any state statute for any reason which a criminal defendant might deem feasible. It would allow and in fact encourage criminal defendants to sit on their rights for decades, and to present stale legal claims which would otherwise be time barred, contrary to the terms of valid state statutes. After the passage of decades, witnesses and evidence may no longer be available in collateral post-conviction proceedings, particularly those claims raised decades after the original

trial. It is axiomatic that both trial and appellate courts are to apply statutes, not to rewrite them or to ignore them, even when the reason for doing so may seem persuasive. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, ___ U.S. ___, 140 S.Ct. 2367, 2381, 207 L.Ed.2d 819 (2020) ("It is not for us to rewrite [a] statute so that it covers only what we think is necessary to achieve what we think Congress really intended.")

Coley admits that he currently cannot meet the requirements of Ohio Rev. Code §2953.23(A). Petition for Writ of Certiorari at p. 13-14. ("Mr. Coley lost any review under *Strickland v. Washington*, 466 U.S. 668 (1984), because his claims did not satisfy the hurdles put in place for late filings.") However unfortunate his position may be, he cannot simply sit on his rights for almost two decades and then claim that he is now entitled to pursue them.

To grant Coley jurisdiction and relief now, would treat him differently and better than all other Ohio prisoners, who were validly subjected to the provisions of Ohio Rev. Code §2953.23.

Coley asserts that he must be granted relief to avoid treating him differently from other prisoners. However, the fact is that Coley has not been treated differently - he is being held to the same valid, statutory standards of Ohio post-conviction relief as all other Ohio prisoners. To grant him the relief which he requests would actually treat him differently and would treat him better than all other Ohio prisoners to whom the timeliness requirements of Ohio Rev. Code §2953.23(A) were validly applied. Granting Coley jurisdiction and the relief he is requesting, after knowingly sitting on his rights for approximately 18 years, would

require state appellate courts to ignore and override the valid timeliness requirements of state post-conviction relief statutes. Such a ruling would allow both criminal defendants and state appellate courts to ignore valid timeliness statutes whenever the reason for filing late petitions is deemed compelling enough. It would create exceptions which would swallow the statutory rules. For all these reasons, the State of Ohio respectfully requests that this Court deny Petitioner jurisdiction.

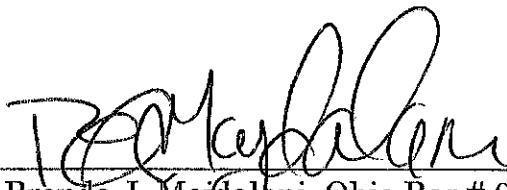
CONCLUSION

In Ohio, the timeliness requirement of Ohio Rev. Code §2953.23 is jurisdictional. Both trial and appellate courts are to apply the plain meaning of state statutes, not to rewrite them or to ignore them, even when the reason may be persuasive. To grant Coley jurisdiction and the relief he is requesting, after the passage of over 18 years, would require the issuance of a Court order mandating that the trial court ignore and override the provisions of Ohio Rev. Code §2953.23- a valid state statute. If such relief is granted, this would establish an extremely dangerous precedent which would allow any criminal defendant, and any state court to ignore the timeliness filing provisions of state post-conviction relief statutes for any reason deemed compelling. To grant Coley jurisdiction and the relief he is requesting would invalidate the timeliness requirements of all state post-conviction relief statutes, as long as the reason is deemed compelling enough. The State has a valid, rational state interest in ensuring the timely presentation of legal claims. Granting Coley the relief he is requesting would treat him differently and better

than all other Ohio prisoners, for whom the timeliness requirements of Ohio Rev. Code §2953.23 were validly applied. For these reasons, the State of Ohio respectfully requests that this Court deny Coley jurisdiction.

Respectfully submitted,

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