In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2024-0458
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
HOLLIS BOSTICK,	:	
	:	Court of Appeals
Appellant.	:	Case No. 112437

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

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INTRODUCTION

Criminal Rule 33 governs motions for new trials. It mentions in passing that a trial court holds a "hearing" when deciding whether to grant another trial based on newly discovered evidence. Crim.R. 33(A)(6). This case asks whether the trial court below erred by denying Hollis Bostick's new-trial motion without holding a live evidentiary hearing. The answer is "no." And that is so regardless of whether the Court resolves this case by looking to Rule 33's text or by looking to existing caselaw.

Text. Like many legal terms, the word "hearing" has different meanings in different contexts. *Compare, e.g.*, *Bank of Am., N.A. v. Kuchta*, 2014-Ohio-4275, ¶18 (discussing "jurisdiction"). Sometimes the term describes a live, in-court proceeding during which parties present arguments and call witnesses to testify. But not always. Sometimes a "hearing" means no more than a "nonoral" proceeding during which parties offer written submissions. *Hooten v. Safe Auto Ins. Co.*, 2003-Ohio-4829, ¶¶9 n.1, 14. Criminal Rule 33 uses the term in the latter sense. Under the rule's plain text, the point of the "hearing" is for the parties to submit "affidavits" in support of their positions. Crim.R. 33(A)(6). The rule thus anticipates that trial courts will resolve new-trial motions on the papers. A trial court, it follows, does not commit any legal error under Criminal Rule 33 simply because it denies a new-trial motion without holding a live hearing.

That makes this case straightforward. Bostick, after receiving leave to file a new-trial motion, had the chance to submit affidavits and other evidence in support of his motion.

That is the type of "hearing" that the rule promises. *See* Crim.R. 33(A)(6); *accord Hooten*, 2003-Ohio-4829 at ¶¶9 n.1, 14. So no error occurred.

Caselaw. Admittedly, a recent decision from this Court, *State v. Hatton*, 2022-Ohio-3991, suggests a more complicated analysis. That case involved a slightly different question: whether a trial court should have granted a defendant leave to file a belated new-trial motion. *Hatton*, 2022-Ohio-3991 at ¶¶26–36; *see also* Crim.R. 33(B). But at the end of *Hatton*'s analysis, the Court said that the defendant was "entitled to an evidentiary hearing on his motion" because he had "reasonably alleged" "sufficient substantive grounds for relief." 2022-Ohio-3991 at ¶36. At the same time, other cases from this Court teach that a trial court may deny a new-trial motion without a live hearing, at least when a defendant's motion fails to allege a sufficient basis for a new trial. *See State v. Hill*, 64 Ohio St. 3d 313, 333 (1992); *State v. Bethel*, 2022-Ohio-783, ¶59.

Even taking this more complicated route, the trial court did not err in this case. That is because Bostick's motion did not allege a sufficient basis for a new trial. Bostick—who was convicted of attempted murder—moved for another trial based on a newly discovered police report. The police report states that, while at the hospital immediately after the crime, the victim identified another person—"Bud"—as the "offender." According to Bostick, the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the report. But for this new-trial theory to succeed, the police report would need to create a reasonable probability of a different result. *See State v. Johnston*, 39 Ohio

St. 3d 48, 60–61 (1988). Because the State had a strong case, Bostick cannot demonstrate such a probability. Multiple eyewitnesses, who knew Bostick beforehand, identified Bostick as the culprit. And other evidence—including Bostick's attempt to dissuade one eyewitness from testifying—also implicated Bostick. Against this evidence, the victim's initial identification of "Bud" as the "offender" is easily explained. As the victim described at trial, two people he knew attacked him on the night of the crime: Bostick shot him and Bud punched him in the face.

From the allegations within Bostick's new-trial motion, the takeaway is this. Even crediting the existence and content of the police report Bostick identifies, and even assuming the State failed to disclose the report, there is still little chance that Bostick's trial would have turned out differently. Because holding a live hearing would not have changed those odds, the trial court did not err by denying Bostick's motion on the papers.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General also often serves as a special prosecutor in criminal cases. For both reasons, the Attorney General is interested in the procedural rules that govern criminal cases, including the rules that govern motions for new trials.

STATEMENT OF THE CASE AND FACTS

This case's facts and history are best understood against the backdrop of Rule 33 of Ohio's Rules of Criminal Procedure. This background begins there and then turns to the case's specific circumstances.

I. Criminal Rule 33 outlines a two-step process by which trial court resolve belated requests for new trial based on newly discovered evidence.

Criminal Rule 33 addresses when a trial court may grant a criminal defendant a new trial. The rule lists six "causes" that potentially justify a new trial. Crim.R. 33(A)(1)–(6). A court, for example, may grant a new trial if (1) an "[i]rregularitiy in the proceedings" prevented a fair trial, (2) the prosecutor committed misconduct during the initial trial, or (3) a surprise occurred at the initial trial that "ordinary prudence could not have guarded against." Crim.R. 33(A)(1)–(3). The final basis for a new trial is the most relevant here. Specifically, Rule 33(A)(6) says that another trial may sometimes be warranted if "new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial."

A convicted defendant has 120 days, from after the verdict in the initial trial, to seek a new trial based on newly discovered evidence. Crim.R. 33(B). But Criminal Rule 33 includes an exception to that deadline for defendants that were "unavoidably prevented from the discovery of the" new evidence at issue. *Id.* The rule lays out a "two-step process" by which trial courts evaluate belated requests for a new trial based on newly discovered evidence. *Hatton*, 2022-Ohio-3991 at ¶29.

Step one. Defendants seeking to file a belated new-trial motion must first seek leave from the trial court. To justify leave, defendants must establish by clear and convincing evidence that they were unavoidably prevented from discovering the relevant evidence within the normal 120-day timeframe. *Id.* at ¶28. At this first step, a trial court considers only whether to grant leave to file a belated motion based on unavoidable circumstances; the court does not consider the merits of whether a new trial is justified. *Id.* at ¶30; *Bethel*, 2022-Ohio-783 at ¶41.

Step two. After receiving leave, a defendant must file a motion that explains why the newly discovered evidence justifies a new trial. Typically, a defendant must show "a strong probability" that the newly discovered evidence "will change the result if a new trial is granted." *Hatton*, 2022-Ohio-3991 at ¶28; *accord State v. Petro*, 148 Ohio St. 505, 508 (1947). But the standard changes slightly when a defendant alleges that the State improperly withheld the newly discovered evidence in violation of *Brady*, 373 U.S. 83. In that familiar case, the U.S. Supreme Court held that prosecutors must disclose any evidence that is favorable to the defendant and material to the case. "Evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner v. United State*s, 582 U.S. 313, 324 (2017) (alterations accepted and quotations omitted). To remain consistent with *Brady*, this Court applies the same materiality standard for new-trial motions based on undisclosed evidence. So, when a defendant moves for a new trial

based on an alleged *Brady* violation, the defendant must show a reasonable probability—not a strong probability—that the result of the initial trial would have been different with the new evidence. *Johnston*, 39 Ohio St. 3d at 60–61.

Criminal Rule 33 provides that requests for new trials "shall be made by motion." Crim.R. 33(B). But, as proves the focus here, the rule mentions a "hearing" for deciding if another trial is justified based on newly discovered evidence. The text says this:

> 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.

Crim.R. 33(A)(6). In fewer words, the rule envisions a "hearing" that allows a defendant to submit "affidavits" in support of a request for a new trial. *Id.*

II. A jury convicts Bostick of attempted murder, based on eyewitness testimony from the victim and several other witnesses.

Over twenty years ago, Tommy Griffin was shot at close range outside a restaurant in Cleveland. *State v. Bostick*, 2023-Ohio-3631, ¶¶2, 7 (8th Dist.) ("App. Op."). The police investigated, and the evidence soon pointed to Hollis Bostick. Griffin and Bostick were affiliated with rival groups in the local area. *Id.* at ¶7; *see also* Trial Tr. 288–91. Griffin was affiliated with the "Redell Boys," while Bostick was affiliated with the "Crumb/Ansel Boys." App. Op. ¶7*; see also* Trial Tr. 284. After the shooting, the police were able to interview several eyewitnesses. Responding to photo lineups, several eyewitnesses—

including Griffin—identified Bostick as the perpetrator. Trial Tr. 306–10, 357. The photo lineups that Griffin reviewed included another possible suspect: Lonnie "Bud" McCann. Bud, like Bostick, was affiliated with the Crumb/Ansel Boys. *Id.* at 309; App. Op. ¶¶7, 12. But Griffin identified Bostick—not Bud—as his shooter. App. Op. ¶12; Trial Tr. 309.

A grand jury indicted Bostick for felonious assault, having a weapon while under disability, and attempting to murder Griffin. App. Op. ¶2. Bostick's case proceeded to a jury trial in 2003. *Id.* The State submitted to the jury that Bostick shot Griffin. Bostick argued that Bud was the shooter. *Id.* at ¶7.

The State called several witnesses to support its account of the crime. Those witnesses included the victim, Griffin, who detailed the events that led to him being shot. Griffin explained that he knew Bostick before the shooting, as the two had been involved in an earlier altercation. Trial Tr. at 250, 265. Griffin testified that, on the night of the shooting, he was walking away from a restaurant. That was when he saw Bostick and Bud together. *Id.* at 247–48. Griffin overheard Bostick identify him to Bud, using a racial slur and other profanity. *Id.* at 248. Griffin saw that Bostick was wearing a sling on his arm. *Id.* But of greater concern, Griffin saw that Bostick had a gun. *Id.* Upon seeing the gun, Griffin took off running. *Id.* Bostick pursued. *Id.* According to Griffin, he fell over during this chase and, while he was on the ground, Bostick shot him. *Id.* at 248–50. Griffin described that he was able to look at Bostick "eye to eye" during this encounter. *Id.* at 258, 273. After

the shooting, Griffin went back to the restaurant where the chase began. *Id.* at 259. Griffin testified that he then ran into Bud—who punched Griffin in the jaw. *Id.* at 259, 268.

Others who were present at the crime scene corroborated Griffin's testimony. *See* App. Op. ¶¶9, 20–21. One eyewitness, Ndeyenema Traore, had known Bostick for a few years. Trial Tr. 35. She testified that, on the night in question, she saw Bostick "standing over" somebody and "shooting them." Trial Tr. 32–33; *see also id.* at 84. Traore then heard Bostick brag that he "got" the victim. *Id.* at 56. Another witness, Paris Cole, testified that shortly before the shooting she was talking with a group of people, which included Bostick and Bud. *Id.* at 238. At some point, Bostick left the group, while Bud remained. *Id.* She then heard gunshots and she saw Bostick fleeing the scene. Trial Tr. 225–27, 238–39. Like Traore, Cole had known Bostick for years. *Id.* at 232.

Bud also testified at trial. He admitted to being present at the crime scene, but he denied punching Griffin. Trial Tr. 115, 149–50, 167–68. Bud reported that Bostick was also at the crime scene. According to Bud, he and Bostick saw Griffin, Bostick chased Griffin around a street corner, and Bud soon heard gun shots. *Id.* at 122–23. Bud also testified that he peeked around the street corner and saw "sparks flying out of a gun" that Bostick was shooting. *Id.* at 123–24. At the same time, Bud saw Griffin struggling on the ground. *Id.* at 128. Bud testified that, after leaving the crime scene, he and Bostick had a conversation in which Bostick confessed to shooting Griffin. *Id.* at 175–76, 201.

In addition to eyewitness testimony, circumstantial evidence also supported the conclusion that Bostick was the shooter. For example, one of the State's witnesses (Traore) reported that Bostick had attempted to dissuade her from testifying at trial. *Id.* at 107–08; *see also id.* at 88, 328–30. The police also apprehended Bud very soon after the crime because his car—a white Cadillac—fit the description of a car reported to the police as fleeing the scene. *See* App. Op. ¶¶10–11; Trial Tr. 151–52, 388–89. But the police found no weapons on Bud or in his vehicle. App. Op. ¶11. Recall also that Bostick was wearing an arm sling on the day of the shooting. *Id.* at ¶¶8–9; *see also* Trial Tr. 379. The arm sling covered Bostick's dominant arm. Trial Tr. 379, 396. One of the investigating detectives further testified that the shooter hit Griffin with only two of the four or five shots he fired. Trial Tr. 380, 397. That was consistent with the shooter having a "bad hand." *Id.* at 396. If the shooter "had a good hand," the detective explained, Griffin would have presumably been dead after the encounter. *Id.*

Bostick did not testify at his trial. But again, his defense rested on the theory that Bud was the shooter. App. Op. ¶7. Consistent with that theory, defense counsel used cross examination of the State's witnesses to raise the possibility that Bud was the actual shooter. *See id.* at ¶11. And defense counsel was able to establish to the jury that Bud was an initial suspect during the first hours of the police's investigation. Trial Tr. 388.

The jury found the State's evidence more convincing than Bostick's theory. It convicted Bostick on all charges. App. Op. ¶2. The trial court sentenced Bostick to almost 20 years in prison. *Id.* Bostick appealed his convictions, but his appeal failed. *Id.*

III. Bostick moves for a new trial based on a select passage from a police report.

That brings things to the present dispute. In 2021, about eighteen years after his initial trial, Bostick moved for leave to file a new-trial motion based on newly discovered evidence under Criminal Rule 33(A)(6). Mot. Leave (Sept. 29, 2021), Tr.R.33. According to Bostick, he had recently discovered a police report that recounted statements that Griffin made about the identity of the perpetrator. *Id.* at 1. Bostick further argued that, because the State had not produced the police report, he was unavoidably prevented from discovering the report within 120 days of the jury's verdict in his case. *Id.* at 8–10. The trial court soon granted Bostick leave to file a belated motion under Rule 33(A)(6). Journal Entry (Oct. 13, 2021), Tr.R.34.

The matter thus proceeded to Rule 33's second step, *see above* 4–6, with Bostick filing a motion for a new trial based on the police report. He attached two pages of the report (pages 3 and 4) to his motion. Ex. A to Mot. New Trial (Oct. 14, 2021), Tr.R.35. The key portion of the report recounts statements Griffin made to the police at the hospital shortly after being shot. It says this:

> Victim stated he tried to run and slipped and the offender fired several shots at him. Victim stated he saw the offender run into a white Cadillac w/a burgundy top …. Victim stated he then went into the Golden House Bar to have someone

> call CPD. Victim further stated to us that he knows the offender goes by a nickname as "Bud" and he does not know his real name ….

Id. (capitalization removed). Within his new-trial motion, Bostick alleged that the prosecution failed to properly disclose the report. He further argued that the failure to disclose the report amounted to a *Brady* violation. Bostick relatedly argued, under *Napue v. Illinois*, 360 U.S. 264 (1959), that a detective submitted false testimony at his trial. The detective specifically testified that, after the investigation was "wrapped up," "there was not" evidence that "Bud was the shooter." Trial Tr. 359–60. In support of his new-trial arguments, Bostick submitted an affidavit from his trial counsel. Ex. B to Mot. New Trial (Oct. 14, 2021), Tr.R.35. Counsel explained how he would have used the police report at trial had he been made aware of it. *Id.*

The State opposed Bostick's motion on multiple fronts. As a threshold matter, the State asked the trial court to reconsider its decision to grant Bostick leave to file a motion in the first place. But the State also argued that, even if the trial court reached the merits, Bostick's motion did not justify a new trial under Criminal Rule 33. *See, e.g.*, Mot. to File Instanter Br. in Opp'n 16 (Nov. 4, 2021), Tr.R.38. The State further supplied Griffin's own witness statement, which Griffin signed shortly after the crime. *Id.* at Ex. 5. In the witness statement, Griffin expressly identified "Hollis" as the person who "shot" him. *Id.* In the same statement, Griffin separately identified "Bud" as the owner of the Cadillac he saw fleeing the scene and the person who "punched [him] in the jaw." *Id.*

IV. The trial court denies Bostick's motion, the Eighth District affirms, and this Court grants review.

Through a summary ruling, the trial court "denied" Bostick's motion for a new trial "pursuant to Rule 33." Journal Entry (Feb. 14, 2023), Tr.R.41 (capitalization removed). (Because the trial court denied Bostick's new-trial motion, it did not reach the State's alternative request for reconsideration.) Bostick appealed to the Eighth District. His sole assignment of error was that the trial court should have held a live hearing before denying his motion. App. Op. ¶6.

The Eighth District disagreed with that argument and affirmed the trial court's ruling. Criminal Rule 33, the Eighth District explained, does not require a live hearing in all scenarios. *Id.* at ¶18. The Eighth District further stressed that Bostick's newly discovered evidence did not create a strong probability of a different result (under the *Petro* standard). *Id.* at ¶22. Nor did it create a reasonable probability of a different result (under *Brady*). *Id.* at ¶¶24–25. Rather, the "overwhelming evidence" refuted Bostick's argument that he was not the shooter. *Id.* at ¶20. In particular, the testimony of several eyewitnesses "corroborated" the victim's testimony at trial that "it was Bostick who shot him." *Id.* at ¶22; *see also id.* at ¶¶20–21.

The Eighth District also noted aspects of the newly discovered evidence that decreased its persuasive value. The police report recorded communications under hectic circumstances: this initial conversation happened while the victim "was at the hospital, shortly after the shooting, receiving treatment." *Id.* at ¶25. By contrast, "other police

reports" more clearly recorded that, within days of the crime, the victim identified Bostick as the actual shooter. *Id.* at ¶26. What is more, the police report that Bostick attached to his Rule 33 motion was incomplete. *Id.* at ¶25. The State represented on appeal that another page in the same report mentioned that the victim identified Bostick as the shooter. *Id.* Bostick did not dispute that representation. *Id.*

Finally, the Eighth District rejected Bostick's argument that the State submitted false testimony at his trial. App. Op. ¶¶27–28. The court stressed that "[a]fter the investigation, the evidence did not support a theory that Bud was the shooter." App. Op. ¶28 (emphasis removed). So, the detective in Bostick's case did not testify falsely when he described a lack of evidence (implicating Bud as the shooter) after the investigation had "wrapped" up. *See* App. Op. ¶¶27–28.

Judge Kilbane dissented. She acknowledged that a trial court is not always required to conduct a live hearing when deciding a motion for a new trial. *Id.* at ¶37. But she thought that the police report created a strong enough possibility of a different result to justify a live hearing. *Id.* at ¶¶36–37. Judge Kilbane, however, did not detail what would have happened at such a hearing. Nor did she describe how such a hearing would have changed the legal analysis of Bostick's new-trial motion.

Bostick appealed the Eighth District's decision to this Court. In his sole proposition, Bostick contends that the trial court should have granted him an evidentiary hearing

before ruling on his new-trial motion. This Court accepted that proposition for review. *6/11/2024 Case Announcements*, 2024-Ohio-2160.

ARGUMENT

<u>*Amicus Curiae* Ohio Attorney General's Proposition of Law:</u>

> *Criminal Rule 33(A)(6) does not require a trial court to conduct a live evidentiary hearing before denying a motion for a new trial so long as the defendant receives an opportunity to submit affidavits in support of the motion.*

The question presented is whether the trial court should have held a hearing before denying Bostick's motion for a new trial based on new evidence. The answer is "no." To be more precise, nothing in Criminal Rule 33 requires that a trial court hold the type of "evidentiary hearing" that Bostick desires. *See* Bostick Am. Br. 10 (emphasis omitted).

Before explaining why that is so, it is worth emphasizing the stage of the analysis in this case. As detailed above (at 4–6), the Criminal Rule 33 lays out a "two-step process" that trial courts employ when facing belated requests for new trials. *Hatton*, 2022-Ohio-3991 at ¶29. Several of this Court's recent cases have focused on the first step of the process, during which a trial court decides whether to grant a defendant leave to file a motion. *Id.* at ¶¶30–34; *Bethel*, 2022-Ohio-783 at ¶¶58–59; *State v. McNeal*, 2022-Ohio-2703, ¶1. At that first step, the sole consideration is whether the defendant was "unavoidably prevented" from discovering the new evidence within Rule 33's normal time limits. *See* Crim.R. 33(B). Here, however, the trial court granted Bostick leave to file a motion. Journal Entry (Oct. 13, 2021), Tr.R.34. The trial court then denied Bostick's motion.

Journal Entry (Feb. 14, 2023), Tr.R.41. This case thus asks whether, at the *second step* of Rule 33's process, a trial court must hold a live hearing before denying a Rule 33 motion on its merits. Again, the answer is "no."

I. The trial court did not need to hold a live hearing before denying Bostick's motion for a new trial.

Under Ohio law, a "hearing" may take different forms. Often the word refers to an oral evidentiary hearing, involving the live presentation of testimony and evidence. But other times the word refers to a "nonoral" proceeding that "include[s] 'as little as the submission of memoranda and evidentiary materials for the court's consideration.'" *Hooten*, 2003-Ohio-4829 at ¶9 n.1 (quoting *Brown v. Akron Beacon Journal Publishing Co.*, 81 Ohio App. 3d 135, 139 (9th Dist. 1991)); *see also Gates Mills Inv. Co. v. Pepper Pike*, 59 Ohio App. 2d 155, 164 (8th Dist. 1978). This conception of a "hearing" is nothing unique to Ohio. Long before this Court wrote Ohio's procedural rules, many jurisdictions recognized that courts frequently "hear[]" matters—including new-trial motions—through written submissions, including affidavits. *See, e.g.*, *Commonwealth v. Coggins*, 324 Mass. 552, 555–57 (1949); *Hillman v. United States*, 192 F. 264, 272 (9th Cir. 1911); *Brown v. Fitzpatrick*, 49 Neb. 575, 576 (1896); *cf. also United States v. Hoffa*, 382 F.2d 856, 864 (6th Cir. 1967); *United States v. Troche*, 213 F.2d 401, 403 (2nd Cir. 1954); *Ewing v. United States*, 135 F.2d 633, 638 (D.C. Cir. 1942).

Criminal Rule 33 uses the word "hearing" to describe a nonoral proceeding. *See* Crim.R. 33(A)(6). This Court's cases, however, suggest that a trial court must sometimes

hold a live hearing before ruling on a new-trial motion. *Compare Hatton*, 2022-Ohio-3991 at ¶28; *with Hill*, 64 Ohio St. 3d at 333. But regardless of whether the Court applies Rule 33's text or conducts the inquiry its cases currently suggest, the trial court here did *not* err by denying Bostick's motion without a live hearing.

A. Criminal Rule 33's text does not require trial courts to conduct a live evidentiary hearing before ruling on a motion for a new trial.

This Court interprets procedural rules like it does statutes. *Erwin v. Bryan*, 2010-Ohio-2202, ¶22. If the meaning of a procedural rule is plain, the Court will "apply it as written." *Id.* And, to discern the plain meaning of a procedural rule, the Court "must read undefined words or phrases in [the] context" that they are used. *Id.* (quotations omitted).

With those principles in mind, return to Criminal Rule 33's text. The rule contains only two passing references to a "hearing" for resolving motions based on newly discovered evidence. The critical portion says this:

> 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*.

Crim.R. 33(A)(6) (emphasis added). Breaking down this language, the rule requires that defendants support their new-trial positions through "affidavits." *Id.* The rule presupposes that defendants will "produce" those affidavits "at the hearing on the motion." *Id.* The trial court has discretion to "postpone the hearing" if more "time is

required by the defendant to procure such affidavits." *Id.* Prosecutors may also "produce affidavits or other evidence to impeach the affidavits" that defendants produce. *Id.*

Nothing in the above language promises defendants that trial courts will conduct live evidentiary hearings before deciding motions for new trials. Rather, the type of hearing Criminal Rule 33 describes is consistent with a nonoral hearing. Again, a nonoral hearing refers to "the submission of memoranda and evidentiary materials for the court's consideration.'" *Hooten*, 2003-Ohio-4829 at ¶9 n.1. The rule's language matches that notion: in referring to a "hearing," the rule contemplates that defendants will have a means of supporting their motions with evidentiary materials—namely, "affidavits." Crim.R. 33(A)(6). Said differently, the rule anticipates that trial courts, at least in the ordinary course, will decide motions for new trials on the papers. It follows that what Criminal Rule 33(A)(6) really promises is that parties will receive a fair chance to offer supporting affidavits to the trial court.

Reading Criminal Rule 33 in this manner squares with the phrasing of other Ohio laws. For example, many procedural rules and statutes expressly reference "*oral* hearing[s]." *E.g.*, Crim.R. 47 (emphasis added); *see also* Civ.R. 7(B)(2); Civ.R. 75(N)(2); App.R. 3(G)(1); Juv.R. 19; R.C. 2308.02(C), 2323.42(B), 2323.45(B)(2), 2712.49–.50, 2743.65(A), 2744.07(D), 3109.043. The prevalence of that qualifier would be strange unless courts may sometimes satisfy hearing requirements through nonoral proceedings. *See Hooten*, 2003-Ohio-4829 at ¶9 n.1.

Consider, also, how this Court has read Civil Rule 56. That frequently applied rule governs how courts decide motions for summary judgment. And for many years, Civil Rule 56(C) said that there would be a "time fixed for hearing" on motions for summary judgment. *Hooten*, 2003-Ohio-4829 at ¶12 (quoting former version of the rule); *see also* 2015 Staff Note, Civ.R. 56. That reference to a "hearing" did not mean that trial courts were required to conduct a "formal, oral hearing" for every summary-judgment motion. *Hooten*, 2003-Ohio-4829 at ¶14 (collecting authority). Instead, trial courts had the discretion to decide motions for summary judgment based on informal, nonoral hearings. *Id.* What Civil Rule 56 demanded, this Court explained, was that a trial court provide parties with a fair chance to make their summary judgment arguments and evidentiary submissions. *See id.* at ¶¶32–35. Criminal Rule 33(A)(6)'s use of the word "hearing" is analogous.

Importantly, the mention of a "hearing" within Criminal Rule 33 should not be conflated with the use of that term within Ohio's postconviction statutes. *See* R.C. 2953.21–.23. In the postconviction context, the surrounding statutory language strongly implies that trial courts must sometimes hold live hearings that the petitioner will be "permitted to attend." R.C. 2953.22. The statutory language further signals that postconviction hearings will sometimes involve the "introduction of evidence." *See id.*; R.C. 2953.21(F). Rule 33 does not use the same surrounding language, so its use of the

term "hearing" should not automatically be read in the same way. *See Obetz v. McClain*, 2021-Ohio-1706, ¶21.

B. This Court's cases suggest that a trial court may rule without a live hearing when a new-trial motion fails to allege sufficient grounds for relief.

Notwithstanding Criminal Rule 33's text, some passages in this Court's caselaw suggest a different approach. This Court has indicated that defendants will sometimes be "entitled to an evidentiary hearing" on their Rule 33 motions. *Hatton*, 2022-Ohio-3991 at ¶28. Under this logic, a trial court must hold a live hearing if the "allegations in the motion demonstrate substantive grounds for" a new trial. *Id.* Other cases, however, indicate that a trial court may deny a new-trial motion without holding a live hearing if the motion, on its face, fails to allege a viable basis for a new trial. *See Hill*, 64 Ohio St. 3d at 333; *cf. also Bethel*, 2022-Ohio-783 at ¶59.

A deeper dive into this Court's caselaw supplies further context as to why a live hearing is not usually required. Start with *Hatton*. That case involved a defendant (Hatton) who—long after his conviction—discovered a memo written by the State's DNA expert. 2022-Ohio-3991 at ¶2. Based on the newly discovered memo, Hatton moved for leave to file a belated motion for a new trial. *Id.* at ¶3. The trial court denied leave. *Id.* This Court held, however, that the trial court erred because it wrongly "jumped to the merits" of the defendant's "claim for a new trial," instead of considering whether *leave* to file a motion was justified. *Id.* at ¶32. Given that initial error—at step one of the Rule 33 process, *see above* 4–6—this Court cautioned that it was "express[ing] no opinion" on the

merits of Hatton's request for a new trial. *Hatton*, 2022-Ohio-3991, ¶35. But despite that caution, the Court went on to say that that Hatton was "entitled to an evidentiary hearing on his motion." *Id.* at ¶36. In the Court's view, that was because his motion "reasonably alleged" the possibility of a different trial outcome, given that it highlighted new evidence that "illuminated a substantial hole in the state's theory." *Id.* This implies that a particularly strong claim triggers a live-hearing requirement, but other claims may not.

Other cases give a similar impression. That is, other cases from this Court reflect that trial courts may often deny new-trial motions without live hearings. Take, for instance, the Court's decision in *Hill*, 64 Ohio St. 3d 313. There, a convicted defendant moved for another trial based on newly discovered evidence. *Id.* at 333. The defendant specifically submitted an affidavit from a witness, who recanted his earlier trial testimony. *Id.* The trial court denied the defendant's motion on the papers. On appeal, the defendant argued that the trial court erred by failing to hold a formal hearing. *Id.* This Court rejected that argument. It explained that "even with the recantation affidavit, the result of the defendant's trial would not have been different." *Id.* In other words, a hearing was unnecessary because, even crediting the defendant's newly discovered evidence, the defendant's motion did not satisfy the standard for justifying a new trial under Criminal Rule 33. *Id.*; *see also Bethel*, 2022-Ohio-783 at ¶59 (refusing to remand for a futile hearing on a new-trial motion).

Adding things up, the inquiry that cases like *Hatton* suggest can be summarized as follows. To decide whether a live hearing is needed before resolving a new-trial motion, a trial court must accept a defendant's allegations of newly discovered evidence—crediting both the existence of the new evidence and its alleged content. A trial court must then decide whether that new evidence, viewed against what happened at trial, creates a sufficient likelihood of a different result to justify a new trial under Criminal Rule 33's standards. *See above* 5–6 (discussing the probability standards of *Petro* and *Brady*). If the answer is yes, then a defendant is entitled to a live hearing. *See Hatton*, 2022-Ohio-3991 at ¶¶28, 36. If the answer is no, then the trial court may deny the motion for a new trial without further proceedings. *See Hill*, 64 Ohio St. 3d at 333. In other words, if a live "hearing would be an exercise in futility," then a trial court need not hold one. *See Bethel*, 2022-Ohio-783 at ¶59.

The Court's approach in this area closely resembles what this Court has said in postconviction cases. In the latter context, "a trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing where the petition [and supporting materials] do not … set forth sufficient operative facts" to justify relief. *State v. Calhoun*, 86 Ohio St.3d 279, syl. ¶2 & 291 (1999). Indeed, a key passage of *Hatton* cited to *Calhoun*—a postconviction case—for the idea that defendants are sometimes entitled to evidentiary hearings on new-trial motions. *Hatton*, 2022-Ohio-3991 at ¶28. But as discussed above (at 18–19), at least when it comes to the meaning of

"hearing," a comparison between Criminal Rule 33 and Ohio's postconviction statutes is inapt. Surrounding text indicates that the word means different things in the different settings.

The federal approach to new-trial motions yields a more helpful comparison. Federal judges have "broad discretion" to decide whether to hold evidentiary hearings before ruling on new-trial motions. *United States v. Jordan*, 958 F.3d 331, 335 (5th Cir. 2020); *accord United States v. Anderson*, 76 F.3d 685, 692 (6th Cir. 1996). That broad discretion "makes sense" since "the trial judge is in the best position to evaluate" the argued basis for a new trial. *Jordan*, 958 F.3d at 336 (quotations omitted). Armed with that discretion, federal trial courts frequently reject new-trial motions without holding live hearings; and federal appellate courts do not presume any error when they do so. *See, e.g.*, *United States v. Smith*, 749 F.3d 465, 493 (6th Cir. 2014); *United States v. Bass*, 460 F.3d 830, 838 (6th Cir. 2006); *United States v. Benanti*, 755 F. App'x 556, 561–62 (6th Cir. 2018).

C. The trial court did not need to hold a live hearing before denying Bostick's motion for a new trial.

In this case, the trial court was not required to hold a live hearing before denying Bostick's motion for a new trial. The Court should take this opportunity to realign its caselaw with Rule 33's text, which does nothing to promise movants live evidentiary hearings. *Contra Hatton*, 2022-Ohio-3991 at ¶28. But regardless of whether the Court proceeds under text or existing caselaw, Bostick's bid for a live hearing fails here.

1. Rule 33's text did not require a live hearing.

The trial court met the requirements of holding a nonoral hearing under Criminal Rule 33. With his initial motion, Bostick submitted the police report that he was highlighting as newly discovered evidence. Ex. A to Mot. New Trial (Oct. 14, 2021), Tr.R.35. Bostock also submitted an affidavit from his trial counsel, detailing how the defense would have used the police report at trial. Ex. B to Mot. New Trial (Oct. 14, 2021), Tr.R.35. Thus, the trial court ruled only after Bostock had the chance to provide his evidentiary submissions, including a supporting affidavit. In referencing a "hearing," that is all that Criminal Rule 33 contemplates. *See* Crim.R. 33(A)(6); *above* 16–18. Bostick, moreover, fails to highlight any affidavit that he was unable to submit to the trial court. *See*, *e.g.*, Bostick Am. Br.12, 18.

It perhaps helps to think of the above analysis as something akin to harmless error. Under Criminal Rule 52(A), Ohio courts are to disregard any "error, defect, irregularity, or variance" in proceedings that "does not affect substantial rights." As discussed at length already, the point of the "hearing" that Criminal Rule 33 mentions is for the parties to "procure … affidavits" supporting their positions. Crim.R. 33(A)(6). And here, Bostick was able to present the Court with the affidavit and newly discovered evidence that he thought justified a new trial. Because Bostick was able to make the evidentiary submissions that Rule 33 contemplates, the trial court's decision to forgo any live

evidentiary hearing did "not affect" any right that Rule 33 bestows. *See* Crim.R. 52(A). It follows that the trial court's failure to hold such a hearing does not warrant reversal.

2. This Court's caselaw did not require a live hearing.

The trial court's ruling also satisfies the more complicated inquiry that cases like *Hatton* suggest. Even crediting the existence and content of Bostick's newly discovered evidence, Bostick's allegations and supporting evidence fail to demonstrate a sufficient likelihood that a new trial would make any difference. It follows that the trial court could properly deny Bostick's motion on the papers, without a live hearing. That should come as no surprise: because the nature of Bostick's newly discovered evidence was largely (if not wholly) undisputed, Bostick's motion presented the type of legal question that trial courts often resolve without live hearings.

A more detailed review of Bostick's new-trial theory reinforces as much. Bostick's principal theory for a new trial was a supposed *Brady* violation. Specifically, Bostick's argument rested on newly discovered evidence—a police report—that the prosecution allegedly withheld. This theory required Bostick to show that the newly discovered evidence was material. To justify another trial, the newly discovered evidence needed to be powerful enough (when pitted against the State's evidence) to create a reasonable probability that Bostick's initial trial would have turned out differently with the evidence. *See Johnston*, 39 Ohio St. 3d at 60–61. In other words, the undisclosed information, when

viewed in the context of "the whole case," needed to undermine "confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Turn, then, to Bostick's newly discovered evidence. No one disputes the existence of the police report Bostick relies upon. And no one disputes the content of the passage that Bostick wishes to emphasize. The passage describes the victim's (Griffin's) statements to police in the hospital shortly after the crime. It says:

> Victim stated he tried to run and slipped and the offender fired several shots at him. Victim stated he saw the offender run into a white Cadillac w/a burgundy top …. Victim stated he then went into the Golden House Bar to have someone call CPD. Victim further stated to us that he knows the offender goes by a nickname as "Bud" and he does not know his real name ….

Ex. A to Mot. New Trial (Oct. 14, 2021), Tr.R.35 (capitalization removed). Bostick focuses most specifically on the statement that Griffin identified "Bud"—another person at the crime scene—as "the offender." *Id.*; *see, e.g.*, Bostick Am. Br. 1, 12. The question under *Hatton* becomes whether, considered against the trial evidence, that statement creates a reasonably probability that Bostick's trial would have turned out differently.

It does not. To understand why, recall first that the State presented "overwhelming evidence" at trial that Bostick was indeed the shooter. App. Op. ¶20. Multiple eyewitnesses—who included but were not limited to Griffin—identified Bostick as the shooter. App. Op. ¶¶8–9, 20–21. And Bostick was not an unknown assailant to these witnesses. Rather, *all* the eyewitnesses knew Bostick before the night of the crime. *See* Trial Tr. 35, 124, 232, 250, 265, 353–54. Remember, also, that circumstantial evidence

implicated Bostick over Bud. *Above* 9. For one thing, one of the State's witnesses testified that Bostick had attempted to dissuade her from testifying at trial. Trial Tr. at 107–08; *see also id.* at 88, 328–30. For another, Bostick was wearing an arm sling when the crime occurred. App. Op. ¶¶8–9. That helped explain the details of the shooting: more precisely, it explained how Griffin could still be alive when he was shot at four or five times from close range, with at least some of the shots coming while Griffin was lying helpless on the ground. *See* Trial Tr. 396.

When set against the State's trial evidence, the police report falls short of materiality under *Brady*. Recall that the report in question memorializes the police's conversation with Griffin in the hospital immediately after the crime. *See* App. Op. ¶¶13, 25. It is hardly shocking that the police's understanding of events was less than perfect in those initial moments. Whereas, after those first moments, but still within days of the shooting, Griffin made a written statement clearly identifying Bostick—someone he knew beforehand—as his shooter. Ex. 5 to Mot. to File Instanter Br. in Opp'n (Nov. 4, 2021), Tr.R.38. Griffin's trial testimony, it follows, was in no way an abrupt about face.

In any event, it does not take much work to reconcile the police report with Griffin's trial testimony. The police report's inartful, seriatim list of what the "victim stated" reads as if there was only a single offender. Ex. A to Mot. New Trial (Oct. 14, 2021), Tr.R.35. But, within days, Griffin clarified (consistent with his ultimate trial testimony) that there were *two* individuals who attacked him on the night in question: Bostick shot him and

Bud punched him in the jaw. Ex. 5 to Mot. to File Instanter Br. in Opp'n (Nov. 4, 2021), Tr.R.38; App. Op. ¶8. With that clarification, the police report makes sense. The report, after all, does not directly say that Bud was the "shooter"; it says that Bud was the "offender." Ex. A to Mot. New Trial (Oct. 14, 2021), Tr.R.35. And, by Griffin's account, Bud was also an "offender," having punched him.

All told, given the strength of the State's case at trial, there is little possibility—and certainly no reasonable probability—that the result of Bostick's first trial would have been different with the police report that Bostick now highlights. Rather, even crediting Bostick's newly discovered evidence (the existence and content of which are not in any serious dispute), Bostick's motion fails to allege a viable basis for relief. *See Hatton*, 2022-Ohio-3991 at ¶28. Thus, because the parties' submissions revealed that Bostick's new-trial theory was "without merit," holding a live hearing was unnecessary. *See Bethel*, 2022-Ohio-783 at ¶59. The trial court, it follows, did not abuse its discretion by denying Bostick's motion without a hearing. *See Hill*, 64 Ohio St. 3d at 333.

II. Bostick's contrary arguments are unpersuasive.

Bostick see things differently, but his arguments are unconvincing. Notably, Bostick spends little time developing the actual proposition he submitted to the Court. As the Court no doubt recalls, it accepted this case to decide whether (and if so when) a trial court must conduct a live hearing before ruling on a new-trial motion. *See* Bostick Am. Br. 10 (restating proposition). Bostick, however, fails to offer a legal explanation for why

Criminal Rule 33, or any other source of law, entitles him to a live hearing. Instead, Bostick merely asserts that his "motion warranted a hearing" and the law "cannot be" otherwise. Bostick Am. Br. 10–11. But saying so does not make it so, and Bostick's failure to ground his alleged hearing right in some legal source is a sure sign that he is improvising.

Instead of focusing on the proposition he submitted, Bostick pivots to other topics. Bostick, for instance, spends much time arguing about the first step of the Rule 33 process: whether he should have received leave to file a motion in the first place. *See* Bostick Am. Br. 10–13. But Bostick's claim that the trial court "summarily den[ied] his motion seeking leave to file the new trial motion," *see* Bostick Am. Br. 10, is simply false. The trial court *granted* Bostick leave to file a new-trial motion. Journal Entry (Oct. 13, 2021), Tr.R.34. So, Bostick succeeded at the first step of Rule 33's process. To be sure, the State later asked the trial court to reconsider its initial decision. But the trial court did not reconsider its decision to grant Bostick leave. *Contra* Bostick Am. Br. 12. Rather, it "denied" the new-trial motion that Bostick had filed "pursuant to Rule 33." Journal Entry (Feb. 14, 2023), Tr.R.41 (capitalization removed). This case is thus about step two of Rule 33's process, at which a trial court decides whether a defendant's motion justifies a new trial. *Above* 5–6.

Bostick also spends much time arguing the underlying merits of his *Brady* claim. On that front, Bostick overvalues his new evidence and undervalues the strength of the State's case. Contrary to Bostick's characterizations, the police report at issue does not

say that Griffin "unequivocally" identified Bud as the person who "shot" him. *See* Bostick Am. Br.1. Rather, according to the report, Griffin identified Bud as the "offender." And again, by Griffin's account of events, Bud was one of the *two* people who attacked him on the night in question. *Above* 26–27.

As for the State's case, Bostick glosses over many key details. As one example, Bostick describes Bud as "a pivotal witness for the prosecution." Bostick Am. Br. 1. In actuality, the State's case featured the testimony of three other eyewitnesses. The victim (Griffin) testified that he looked at Bostick "eye to eye" during the shooting. Trial Tr. 273. Another witness (Traore) testified that she saw Bostick "standing over" somebody and "shooting them." *Id.* at 32–33. And still another witness (Cole) testified she was with a group of people at the crime scene, a group that included both Bostick and Bud. *Id.* at 238. This last witness did not see the shooting, but when she heard gunshots Bostick was no longer with the group—Bud, however, was still there. *Id.* at 238–39. At the risk of undue repetition, all these witnesses knew Bostick before the night of the crime. *Id.* at 35, 232, 250, 265. They were not identifying a stranger. Thus, with or without the police report, there is no reason to lack confidence in all these identifications. And, with or without the police report, there is no reason to think that all these witnesses coordinated their trial testimony to incriminate Bostick and exonerate Bud. Instead, the obvious explanation for the police report is that Griffin identified Bud as one of the two people who attacked him

that night and the police either misunderstood or imprecisely recorded Griffin's statement at the hospital.

In arguing otherwise, Bostick misunderstands the nature of the materiality inquiry. He criticizes the Eighth District for engaging in "guesswork and supposition" about the value of the police report in comparison to other evidence. Bostick Am. Br. 14. But the materiality inquiry, by its very nature, requires a court to suppose a counterfactual. More precisely, materiality under *Brady* requires a court to (1) consider what happened during a defendant's actual trial and then (2) contemplate what might have happened had the allegedly suppressed evidence been disclosed earlier. *See Turner*, 582 U.S. at 324–25. A court will normally be able to complete that comparison if they have the trial record and are aware of the content of the allegedly suppressed evidence. So, a live hearing will often prove unnecessary. *See Bethel*, 2022-Ohio-783 at ¶59.

Tellingly, Bostick offers few practical details as to how a live hearing would have made a difference for his new-trial motion. His most concrete suggestion is that he would have presented testimony from the police officer who authored the initial report. (This suggestion is late-breaking: within his new-trial motion, Bostick stressed the police report itself as the "fundamental basis" for a new trial—he did not mention wanting to call the officer to testify at a hearing. *See* Mot. New Trial at 7 (Oct. 14, 2021), Tr.R.35.) But how would the officer's testimony have moved the needle in any significant way? The police officer, after all, was not a witness to the crime. So even if the officer remembered

the hospital interview in question, and even if the officer's memory matched the contents of the report, the officer's second-hand account of events would not undo the first-hand accounts of eyewitnesses who knew Bostick beforehand. At best, Bostick's position seems to invite rampant speculation—as opposed to reasonable inferences—as to what the police officer might have said. But a *Brady* claim requires more than "mere speculation" that previously undisclosed information will lead "to some additional evidence." *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) *(per curiam*).

Also troubling is the fact that Bostick leaves unclear the precise boundaries of the hearing he requests. Bostick says that a hearing would have allowed the trial court to make "credibility determinations." Bostick Am. Br. 14. But if Bostick is suggesting that he gets to reexamine the State's trial witnesses, that should sound alarm bells. Nothing in Criminal Rule 33's text suggests that a trial court needs to effectively retry a defendant's case to decide whether a new trial is necessary.

One final topic warrants brief discussion. In addition to his principal claim under *Brady*, Bostick makes an ancillary claim about the police's testimony at his trial. By way of background, the State violates a defendant's due-process rights when the prosecution submits perjured testimony that it knows or should know is false. *State v. Sanders*, 92 Ohio St. 3d 245, 271 (2001) (citing *Napue*, 360 U.S. 264). But a witness's "mistaken, inaccurate or rebuttable" testimony is not enough to establish a due-process violation. *Henry v. Ryan*, 720 F.3d 1073, 1084 (9th Cir. 2013). Nor are "mere inconsistencies in

testimony by government witnesses." *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998) (quotations omitted). Further, to succeed on this type of claim, a defendant must show that the testimony at issue is material to the case. *Smith v. Phillips*, 455 U.S. 209, 220 n.10 (1982).

Here, in light of the police report, Bostick argues that a detective testified inaccurately in his case. Bostick Am. Br. 19–21. Bostick's argument centers on the following exchange between the prosecutor and the detective:

> Q. Again, defense counsel asked you why you didn't get a search warrant to get Bud's clothes to see if there was any residue. Was there any evidence after you wrapped this all up that Bud was the shooter?
>
> A. No, there was not.

Trial Tr. 359–60. This exchange does not show any due-process violation. The Eighth District correctly concluded that this testimony "was not false." App. Op. ¶28. By the time the police's investigation "wrapped" up, Griffin had clarified to the police that Bostick was the person who shot him. But even if the Court thinks the detective's statement was mistaken—based on a literal, isolated reading of the phrase "any evidence"—the statement remains miles away from perjury. And Bostick also fails to show that this one statement was material to his overall case. Through other testimony, Bostick was able to establish that Bud was an initial suspect in the police's investigation. Trial Tr. 388. That fact was outweighed by the remainder of the State's case, which—as already discussed at length—included the testimony of multiple eyewitnesses who knew

Bostick and identified him as the culprit. And returning to the actual proposition in this case, Bostick makes only cursory, undeveloped assertions as to why the trial court needed to hold a live hearing to evaluate this claim. *See* Bostick Am. Br. 20–21. Those assertions do not carry the day.

CONCLUSION

For the foregoing reasons, the Court should affirm the Eighth District.

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellants was served this 24th day of September, 2024, by e-mail on the following:

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