ORIGINAL

No. 20-5524

IN THE

SUPREME COURT OF THE UNITED STATES

RANAU JOHNSON, — PETITIONER
(Your Name)

vs.

STATE OF OHIO — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EIGHTH DISTRICT COURT OF APPEALS OF OHIO
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

RANAU JOHNSON, #A702-557
(Your Name)
LAKE ERIE CORRECTIONAL INST.
501 Thompson Road/P.O. Box 8000
(Address)

Conneaut, Ohio 44030
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I. Can the State Court deprive the Appellant the fundamental right to effective assistance of Appellate Counsel by denying an Appellant/Defendant the opportunity to timely amend a timely filed Ohio Appellate Rule 26(B), Application For Re-Opening the appeal base on ineffective assistance of appellate counsel. Thereby, denying Appellant/Defendant his constitutional right under the Sixth Amendment of the United States Constitution to effective assistance of appellate counsel by not allowing the Appellant opportunity to present his ineffective assistance of counsel argument in its entirely?

II. Whether Appellate Counsel was ineffective for failing to Argue that Conons of Strict Construction and Due Process Require the conclusion that the Unit of prosecution for O.R.C.§2909.02(A)(1) is each fire or explosion knowingly set which results in the required harm?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

See the Table of Authorities attached hereto and incorporated by reference herein.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> **Sec. 1. [Citizens of the United States.]** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

X[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is Eighth District court of Appeals Opinion.
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Ohio Supreme Court court appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was March 17, 2020. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Order List:589 U.S. (Pursuant to COVID-19 public health concerns).

Note: Petitioner, Johnson (hereinafter referred to as Appellant and/or Johnson).

STATEMENT OF THE CASE AND FACTS

In 2017, Appellant Johnson suffered indictment and conviction (after a bench trial) for attempted felony murder, under O.R.C. 2923.02, 2903.02(B), (Count One), for setting fire to an occupied structure; aggravated arson, under O.R.C. 2909.02(A)(2), for setting fire an occupied structure, (Count Two); and two separate convictions, under O.R.C. 2909.02(A)(1), for placing the two occupants in the structure at risk of serious physical harm as a consequence of the fire to the structure, (Counts Three and Four). See Indictment; journal entry of judgment and sentence, *State of Ohio v. Ranau Johnson*, CR-17-61309-A, Cuyahoga Court of Common Pleas, Cuyahoga County, Ohio. Counsel at arraignment, the court at arraignment, the trial court, defense counsel, and the prosecutor all informed Appellant Johnson that Count One validly charged attempted felony murder, and that an eleven-year potential consecutive sentence attached to Count One alone. *Id.* at docket.

Prior to trial, Appellant Johnson informed defense counsel (Attorney Mitchell J. Yelsky) of his desire and intent to engage trial by jury. See Motion to Amend Ohio App. R. 26(B), affidavit of Appellant Ranau Johnson. On the eve of trial, defense counsel told Appellant Johnson that the charge of attempted felony murder would inflame and confuse the jury; and to obtain a fair trial, a bench trial was needed. *Id.* Prompted by defense counsel's warning, Appellant Johnson waived his constitutional right to trial by jury. *Id.* After a bench trial, Appellant Johnson was convicted on all counts. *Id.* at docket; journal entry of conviction and sentence.

For the conduct convicted, Appellant Johnson suffered an aggregate 27 year sentence: 10 years for attempted felony murder, ran concurrent with a ten year sentence for aggravated arson, under Section 2909.02(A)(2); ten years consecutive for aggravated arson, under Section 2909.02(A)(1), based on the presence of Ms. Satia Allen in the "occupied structure" unlawfully set ablaze; and ten additional years consecutive, under Section 2909.02(A)(1), based on the presence of a second occupant in the "occupied structure" unlawfully set ablaze. *Id.*

Attorney Donald Butler was appointed for appeal. Attorney Butler challenged the sufficiency and manifest weight of the evidence, the accuracy and integrity of the State's expert witness of arson, and the accuracy of the trial court's order of restitution. *Id.* On direct appeal, the Eighth District, sua sponte, held Count One to charge a non-existent offense, (namely, attempted felony murder); denied counsel challenge to the sufficiency and manifest weight of the evidence; denied counsel's challenge to the propriety of the expert; sustained counsel's argument concerning restitution, and remanded for vacatur of Count One and an evidentiary hearing with regard to restitution. *State v. Johnson*, 2018-Ohio-3670, 119 N.E. 3d 914 (8th Dist.).

On remand, instead of dismissing Count One, the trial court re-merged Counts One and Two, left Counts Three and Four intact, and reimposed its original 27-year sentence. *Id.* at docket. The appeal of the proceeding on remand remains pending. *Id.* Armed with the Eighth District's holding that trial and appellate counsel missed such a significant issue, Appellant Johnson's family hired new counsel, (i.e., counsel

undersigned), to perfect and perform the appeal from the remand proceeding; and investigate and brief any other proceedings deemed just. *Id.* at docket.

After reviewing the records and files, and interviewing Appellant Johnson, trial counsel, and appellate counsel, counsel undersigned identified constitutional error which called into question and undermined the trial court's jurisdiction to try and convict, (namely, an invalid waiver of jury trial). Counsel undersigned also identified issues relating to, and bolstering, the pro-se App. R. 26(B) issues raised by Appellant Johnson. Armed with these issues, and supporting affidavits by Appellant Johnson and trial counsel, counsel undersigned moved the Eighth District for leave to amend Appellant Johnson's (then pending) timely and initial App. R. 26(B). Motion to amend, supra. Without opinion, the Eighth District denied leave to amend. *Id.* at docket. That same date, the Eighth District denied Appellant Johnson's pro-se claims on their merits. *Id.* Counsel undersigned filed a timely motion for reconsideration. *Id.* at docket. On November 13, 2019, the motion for reconsideration was denied. *Id.*

Appellant Johnson timely filed his appeal to the Ohio Supreme Court. On March 17, 2020, the Ohio Supreme Court declined to accept jurisdiction of Appellant's Appeal pursuant to S. Ct. Prac. R. 7.08(B)(4).

Pursuant to this Honorable Court's march 19, 2020 Order extending the time to file a writ of certiorari to 150 days, Johnson now timely files his writ of certiorari to this Honorable Court.

REASONS FOR GRANTING THE PETITION

PRELIMINARY ARGUMENT:

This case deserves review for four reasons. First, this case provides the needed opportunity to establish criteria for motions to amend initial and timely motions to reopen. The Eighth District denied leave to amend without opinion. It is the position of the State that the 90-day clock of Ohio App. R. 26(B) is absolute: both initial and amended pleadings must be filed within 90 days of judgment. This is absurd. The text of App. R. 26(B) does not contain a bar or restriction relating to amendments; and the constitutional defect intended to be remedied under App. R. 26(B) support a liberal reading.

Second, this case provides an opportunity for framework for motions to amend by new appellate counsel, hired after and in connection with a remand on initial appeal, where new counsel seeks to amend an initial and timely App. R. 26(B) to reflect constitutional errors by initial appellate counsel which require relief. At the time Appellant Johnson filed his initial (and timely) App. R. 26(B), Attorney Donald Butler remained counsel appointed for direct appeal. Upon review, the Eighth District, sua sponte, vacated Count One, (which charged attempted felony murder), for failing to charge an offense. *State v. Johnson*, 2018-Ohio-3670, 119 N.E. 3d 914 (8th Dist.).

On remand, the trial court merged Counts One with Count Two, (which charged aggravated arson), and reimposed the same sentence. The appeal from this amended judgment remains pending. See *State v. Johnson*, Cuyahoga App. No. 19-108311.

Armed with the Eighth District's conclusion that appellate counsel missed a significant and obvious issue, family members of Appellant Johnson retained new counsel. After reviewing the record and files, new counsel moved to amend Appellant Johnson's initial and timely App. R. 26(B) to reflect a second jurisdictional defect missed by Attorney Butler, and to expand upon the issues initially raised pro-se. The Eighth District denied leave to amend without opinion. Guidance in this important area is needed.

Third, this case provides an opportunity to meaningfully determine the unit of prosecution under O.R.C. 2909.02(A)(1). By conditioning liability, under Section 2909.02(A)(1), upon occurrence of a fire or explosion, the General Assembly manifested a clear intent to criminalize each fire or explosion knowingly started which results in a risk of harm to others other than the offender. By its additional use of the phrase "any person" to qualify the victim, the General Assembly fortified intent to criminalize each knowingly set fire or explosion that harms a person or a group. O.R.C. 1.43(A). Buttressing the point is R.C. 1.47(C).

Under Section 1.47(C), just and reasonable constructions of criminal statutes are mandatory and intended. In enacting Section 2909.02(A)(1), the General Assembly included police officials, firefighters, and emergency medical personnel as qualifying victims. See R.C. 2909.01(A), (B). Setting the unit of prosecution for Section 2909.02(A)(1) as each knowingly set fire or explosion would produce a fair and just result. Setting the unit of prosecution on each person who suffers the required risk

would not.

It is not just or reasonable to assume that the General Assembly intended to depend the number of counts on the number of firefighters, police officials, emergency medical personnel, or Red Cross officials who happen to show up and deal with a fire. Demonstrating the point, liability under Section 2909.02(A)(1) does not depend on the presence of a person when causing the required fire or explosion; establishing that Section 2909.02(A)(1) is not a crime against the person. The Eighth District below, and *State v. Poelking*, 2002-Ohio-1655 (8th Dist), both held that the unit of prosecution under Section 2909.02(A)(1) is each person subjected to risk by an unlawfully set fire. *State v. Keough*, 2009-Ohio-6269 (6th Dist); *State v. Linkous*, 2013-Ohio-5853 (4th Dist); and *State v. Tucker*, 2015-Ohio-3810 (9th Dist), each hold that the unit of prosecution for Section 2909.02(A)(1) is each fire or explosion knowingly set. This case provides a medium to resolve this important split.

Finally, this case presents the opportunity to determine whether O.R.C. 2909.02(A)(1) and (A)(2) are allied offenses of similar import where the "occupied structure" set ablaze for Section 2909.02(A)(1) purposes is the same structure that subjected the occupant present to the risk of harm required under Section 2909.02(A)(2); and a single act, engaged under a single state of mind, established both violations. *State v. Frazier*, 2014-Ohio-3025 (4th Dist), holds that merger is required in the above circumstance. The panel below held that merger is not required. This split further renders this case worthy of review.

LAW AND ARGUMENT

GROUNDS SUPPORTING REASONING FOR GRANTING THE PETITION:

PROPOSITION OF LAW NO. 1: THE COURT OF APPEALS AND ABUSED ITS DISCRETION BY DENYING RETAINED COUNSEL LEAVE TO AMEND APPELLANT JOHNSON'S TIMELY PRO-SE APP. R. 26(B).

I. Motions to amend timely filed motions to reopen are constitutionally and statutorily permitted.

The text of Ohio App. R. 26(B) does not indicate or suggest that amendments of timely filed applications are barred. Motions to amend timely applications to reopen are therefore constitutionally and statutorily permissible.

II. Where a timely motion to reopen is filed pro-se, leave to amend by counsel should be granted where each claim amended is constitutional and possesses substantial merit, and the chief claim establishes that the trial court tried Appellant Johnson in absence of jurisdiction.

A. Constitutional and jurisdictional error occurred.

Criminal defendants possess a fundamental constitutional right to trial by jury. See Ohio Constitution, Article I, Section 5. See also, United States Constitution, Amendments V, VI, and XIV. Like other fundamental constitutional rights, however, the right to trial by jury may be waived. Ohio Crim. R. 23(A) provides that criminal defendants may waive their constitutional right to trial by jury, under condition that the waiver is knowing, intelligent, and voluntary. For a defendant's waiver of the fundamental right to trial by jury to be knowing, the defendant must understand the

nature of each charge, and the consequences. *State v. Adams*, 43 Ohio St. 3d 67, 69 (1989).

If the record reveals that the defendant was misinformed regarding the nature of an offense charged, or the consequences, or a feature of the proceeding which qualifies its lawfulness, a subsequent waiver of the fundamental right to trial by jury may be constitutionally invalid. *State v. Ruppert*, 54 Ohio St. 2d 263, 262 (1994); *State v. Haight*, 98 Ohio App. 3d 639, 664-67 (1994). This is such a case. Appellate Johnson was informed by the court at arraignment, arraignment counsel, the trial court, and defense counsel that Count One validly charged, and that he faced conviction and an additional eleven-year sentence for, attempted felony murder, in violation of R.C. 2923.02, 2903.02(B).

Under direction of counsel, fear of conviction for attempted felony murder, and apprehension of the additional eleven-year sentence warned to attach to that count alone, Appellant Johnson waived his constitutional right to trial by jury. After a bench trial, Johnson suffered conviction and was sentenced to nearly maximum sentences on all counts, including attempted felony murder. On direct review, the Eighth District, sua sponte, held Count One to charge a non-existent offense. Namely, attempted felony murder.

Informed that Count One charged a non-existent offense, and that the eleven-year penalty warned of could not and did not legally attach, Appellant Johnson would have exercised his fundamental right to trial by jury. A presumption that Appellant

Johnson would have waived his right to trial by jury notwithstanding the misinformation caused by Count One is also impermissible. See *Ruppert*, supra, 54 Ohio St. 2d at 272, ("Ruppert was misinformed that only a unanimous verdict of a three-judge panel could convict him of the offenses if he were to waive his right to jury trial. Clearly, the defendant was not informed of an important consequence of his decision to waive jury trial. Ruppert was not only foregoing the right to be tried before a panel of 12 jurors, but he was also waiving the right to a unanimous verdict. Irrespective of whether other tactical decisions entered into his decision to waive jury trial, Ruppert could not have knowingly, intelligently, and voluntarily waived this right where he was misinformed as to the consequences of his decision of being tried by the court.").

As in *Ruppert*, irrespective of whether other tactical considerations entered into Appellant Johnson's decision to waive trial by jury, he could not have knowingly, voluntarily, and intelligently waived this right where he was misinformed regarding the nature, legality, and consequences of a major offense. Because this misinformation contributed to Appellant Johnson's decision to waive trial by jury, constitutional error occurred. Ruppert, supra. See also, the due process, equal protection, and effective assistance of counsel clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article I, Section 10 to the Ohio Constitution.

In criminal cases, a trial court lacks jurisdiction to try a case absent obtaining a valid jury trial waiver. *State v. Pless*, 74 Ohio St. 3d 333, 339 (1996); *Ruppert*, supra.

Because Appellant Johnson's invalid waivers of trial by jury deprived the trial court of jurisdiction to try and convict, appellate counsel's failure to raise the claim was unreasonable and prejudicial. See also, the due process, equal protection, and effective assistance of counsel clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and Article I, Section 10 to the Ohio Constitution.

B. A miscarriage of justice results absent correction.

Judgments imposed without jurisdiction are void. The failure to correct a void judgment would result in a miscarriage of justice. Review is therefore warranted.

PROPOSITION OF LAW NO. 2: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT CANONS OF STRICT CONSTRUCTION AND DUE PROCESS REQUIRE THE CONCLUSION THAT THE UNIT OF PROSECUTION FOR O.R.C. 2909.02(A)(1) IS EACH FIRE OR EXPLOSION KNOWINGLY SET WHICH RESULTS IN THE REQUIRED HARM.

O.R.C. 2909.02(A)(1) provides that: No person, by means of fire or explosion, shall knowingly create a substantial risk of serious physical harm to any other person other than the offender. R.C. 2909.09(A)(1). Section 2909.01(A) provides that "to 'create a substantial risk of serious physical harm to any person' includes the creation of harm to emergency personnel." R.C. 2909.01(A); Section 2909.02(B) defines the phrase "emergency personnel" to include: (1) a peace officer; (2) a member of a fire department or another firefighting agency; (3) a member of a private fire company; (4) a member of a joint ambulance district or joint emergency medical services district; (5) an emergency medical personnel technician, paramedic, ambulance operator, or other member of an emergency medical team; (6) state fire marshal, chief deputy state fire

marshal, or an assistant fire marshal; (7) fire investigators, fire prevention officers, or similar investigators; and Section 2909.02(A)(1) encompasses bystanders, neighbors, and occupants present in an occupied structure. R.C. 2909.01(A), (B); R.C. 2909.02(A)(1).

Under Counts 2 and 3, Johnson stands separately convicted and sentenced, under Section 2909.02(A)(1), based on his act of setting a single fire, to a single home, exposing two occupants present to the required risk of harm. Canons of strict construction, and constitutional precepts of fair warning and due process, require a conclusion that Johnson engaged a single violation of Section 2909.02(A)(1). The allowable unit of prosecution for crimes in Ohio is set by the General Assembly. If the General Assembly fails to set the unit of prosecution with clarity, doubts regarding the intent of the General Assembly must be resolved in favor of the accused. R.C. 2909.04(A).

By conditioning liability, under Section 2909.02(A)(1), upon occurrence of a fire or explosion, the General Assembly manifested intent to criminalize each fire or explosion knowingly started which results in the required harm. By the use of the phrase "any person" to qualify the victim, the General Assembly manifested intent to criminalize each fire or explosion knowingly set which subjects any person or group of persons to the required risk. See R.C. 1.43(A). R.C. 1.47(C) supports this conclusion.

Under Section 1.47(C), just and reasonable constructions of criminal statutes are

intended. In enacting Section 2909.02(A)(1), the General Assembly included police officials, firefighters, ambulance drivers, emergency medics, and all other emergency personnel as qualifying victims. R.C. 2909.01(A), (B). Holding the unit of prosecution for section 2909.02(A)(1) to be each fire or explosion knowingly started would produce a just and reasonable result.

It is important to note that liability under Section 2909.02(A)(1) does not depend on the presence of a person when causing the required fire or explosion. This fact demonstrates that Section 2909.02(A)(1) is not a crime against the person. Under this fact, it would be unjust and unreasonable to assume that the General Assembly intended the number of counts, under Section 2909.02(A)(1), to depend on the number of firefighters, police officials, emergency medical assistants, medics, ambulance operators, assistant fire marshals, fire investigators, neighbors, or passers-by who show up to watch or otherwise respond to a fire and suffer the required risk.

Every arson of an occupied structure will invariably subject multiple people to the required risk. Every firetruck carries 8 to 12 people. Counting Red Cross workers, police officials, fire investigators, assistant fire marshals, and emergency medical personnel who constantly show up, every fire or explosion exposes at least 15 people to the required risk. Under Section 2909.01(A), as stretched by the State, the 15 or so people described are victims, per-se. Because the General Assembly has not manifested intent to authorize 15 or more counts, for each of the 15 or more people invariably responding,15 counts would not be authorized.

Bell v. United States, 349 U.S. 81 (1995), is instructive. In *Bell*, the United States Supreme Court confronted the issue of whether the simultaneous interstate transportation of two women in violation of the Mann Act (making unlawful the interstate transport of "any woman or girl" for immoral purposes) amounted to multiple crimes or a single offense. Finding the legislative intent ambiguous, the Court held: "About only one aspect of the problem can one be dogmatic. When Congress has the will [to define the unit of prosecution] it has no difficulty expressing it. When Congress leaves the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." 349 U.S. at 83.

Significantly, in cases in which courts have been found unit of prosecution ambiguity, the object of the offense has been prefaced by the word "any," which is defined to encompass (and not exclude) the object of an offense in the plural. Compare e.g., *Ladner v. United States,* 358 U.S. 169 (1958)(single discharge of a firearm wounding two federal officers; held, single crime); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952)(wage and hour violations against numerous employees, over several week period; held, single crime). Section 2909.02(A)(1) is such a statute.

Because the General Assembly has not set the unit of prosecution for Section 2909.02(A)(1) with clarity, fundamental precepts of fair warning and due process compel the conclusion that Appellant Johnson engaged a single violation of Section 2909.02(A)(1); and appellate counsel was ineffective for failing to argue the issue. See

generally, the due process, equal protection, and effective assistance of counsel clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and Article I, Section 10 to the Ohio Constitution.

PROPOSITION OF LAW NO. 3: APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT O.R.C. 2909.02(A)(1) AND O.R.C. 2909.02(A)(2) ARE ALLIED OFFENSES OF SIMILAR IMPORT SUBJECT TO MERGER.

O.R.C. 2909.02(A) provides, in part, that: No person, by means of fire or explosion, shall knowingly do any of the following: (1) Create a substantial risk of serious physical harm to any person other than the offender; or (2) Cause physical harm to an occupied structure.

The phrase "occupied structure" defined in Section 2909.01(C) to include any house, building, watercraft, aircraft, railroad car, truck, trailer, tent or other portion thereof, to which any of the following apply: (1) it is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present; (2) at the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present; (3) at the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present; (4) at the time, any person is present or likely to be present. R.C. 2909.02(A)(2); R.C. 2909.01(C).

Appellant Johnson remains convicted and sentenced, under Sections 2909.02(A)(1) and (2), for his act of causing physical harm to an "occupied structure"

by means of fire or explosion; and as a result, exposing two occupants present to the risk of harm required under Section 2909.02(A)(1).

In determining whether statutory subsections are allied offenses of similar import, under Section 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one offense without committing the other. If companion subsections can be violated by the same conduct, courts must determine whether the separate subsections were violated by the same conduct, (i.e., a single act, committed with single state of mind). If the answer to both questions if yes, the statutory subsections establish allied offenses of a similar import and are subject to merger.

Section 2909.02(A) establishes such a scheme. *State v. Frazier*, 2014-Ohio-3025 (4th Dist). According to *Frazier*, supra, it is possible to violate Section 2909.02(A)(1) and (2), (i.e., cause physical harm or risk of harm to a person and the structure they are in), with the same conduct, engaged under a single state of mind. If, by fire or explosion, an offender knowingly causes physical harm to an "occupied structure," (i.e., any house, building, watercraft, aircraft, railroad car, truck, trailer, tent in which any person is present), he has violated the terms of Section 2909.02(A)(2). This is exactly what happened here.

Because Appellant Johnson's act of setting fire to an "occupied structure" simultaneously subjected all persons present and responding to the fire to the required risk of harm, Appellant Johnson, under a single state of mind, and through a single act,

violated Sections 2909.02(A)(1) and (2). Under these facts, merger was required; and appellate counsel performed unreasonably by failing to raise the issue. Because this issue was a winner, appellate counsel's unreasonable performance was constitutionally prejudicial. See generally, the due process, equal protection, and effective assistance of counsel clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; and Article I, Section 10 to the Ohio Constitution.

CONCLUSION

Petitioner-Appellant, Johnson is convicted and sentence for some very serious crimes herein in which the Petitioner was sentenced to a twenty-seven (27) year term of imprisonment for crimes that he did not commit. Considering the foregoing arguments, Petitioner has made a substantial showing of the denial of his constitutional and due process rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Therefore, this instant petition for a writ of certiorari should be granted in the interest of law, justice, equity and good conscience and to prevent a manifest miscarriage of justice.

Respectfully submitted,

Ranau Johnson

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Executed on August 13, 2020.