No. 21-5375

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS COLEY,

Petitioner,

-vs-

STATE OF OHIO,

Respondent.

APPENDIX TO THE STATE OF OHIO'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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LUCAS COUNTY, OHIO

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COUNSEL FOR RESPONDENT

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Current through File 47 (except File 30 which only includes the immediately effective Revised Code sections) of the 134th (2021-2022) General Assembly; acts signed as of July 14, 2021.

Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2953: Appeals; Other Postconviction Remedies (§§ 2953.01 — 2953.84) > Postconviction Remedies (§§ 2953.21 — 2953.25)

§ 2953.21 Petition for postconviction relief.

(A)

(1)

(a) A person in any of the following categories may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief:

(i) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that 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;

(ii) Any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict;

(iii) Any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death;

(iv) Any person who has been convicted of aggravated murder and sentenced to death for the offense and who claims that the person had a serious mental illness at the time of the commission of the offense and that as a result the court should render void the sentence of death, with the filing of the petition constituting the waiver described in division (A)(3)(b) of this section.

(b) A petitioner under division (A)(1)(a) of this section may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(c) As used in division (A)(1)(a) of this section:

(i) Actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former

section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(ii) "Serious mental illness" has the same meaning as in section 2929.025 of the Revised Code.

(d) As used in divisions (A)(1)(a) and (c) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to July 6, 2010.

(e) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1) (e), (A)(1) (f), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:

(i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

(ii) For any witness with respect to whom division (A)(1) (e)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

(f) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1) (e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as

described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.

(g) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1) (e) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or undue burden or expense, including but not limited to the orders described in divisions (A)(1) (h)(i) to (viii) of this section. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

(h) If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order under division (A)(1) (g) of this section and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery as described in division (A)(1) (e) of this section. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case shall a court require a petitioner who is indigent to pay expenses under those provisions.

Before any person moves for an order under division (A)(1) (g) of this section, that person shall make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order under division (A)(1) (g) of this section shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

The orders that may be made under division (A)(1) (g) of this section include, but are not limited to, any of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the court;

(vi) That a deposition after being sealed be opened only by order of the court;

(vii) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(viii) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(i) Any postconviction discovery authorized under division (A)(1) (e) of this section shall be completed not later than eighteen months after the start of the discovery proceedings unless, for good cause shown, the court extends that period for completing the discovery.

(j) Nothing in division (A)(1) (e) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.

(k) Division (A)(1) of this section does not apply to any person who has been convicted of a criminal offense and sentenced to death and who has unsuccessfully raised the same claims in a petition for postconviction relief.

(2)

(a) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1)(a)(i), (ii), or (iii) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(b) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1)(a)(iv) of this section shall be filed not later than three hundred sixty-five days after the effective date of this amendment.

(3)

(a) In a petition filed under division (A)(1)(a)(i), (ii), or (iii) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(b) A person sentenced to death who files a petition under division (A)(1)(a)(iv) of this section may ask the court to render void the sentence of death and to order the resentencing of the person under division (A) of section 2929.06 of the Revised Code. If a person sentenced to death files such a petition and asks the court to render void the sentence of death and to order the resentencing of the person under division (A) of section 2929.06 of the Revised Code, the act of filing

the petition constitutes a waiver of any right to be sentenced under the law that existed at the time the offense was committed and constitutes consent to be sentenced to life imprisonment without parole under division (A) of section 2929.06 of the Revised Code.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A)(1)(a)(i), (ii), or (iii) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(6) Notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on the length of, a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.

(B) The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1) (e) of this section is filed shall docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1) (e) of this section is filed immediately shall forward a copy of the petition and a copy of the request if filed by the petitioner to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately shall forward a copy of the request to the petitioner or the petitioner's counsel.

(C) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1) (e) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding

division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.

(D) The court shall consider a petition that is timely filed within the period specified in division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

(E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Division (A)(6) of this section applies with respect to the prosecuting attorney's response. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

With respect to a petition filed under division (A)(1)(a)(iv) of this section, the procedures and rules regarding introduction of evidence and burden of proof at the pretrial hearing that are set forth in divisions (C), (D), and (F) of section 2929.025 of the Revised Code apply in considering the petition. With respect to such a petition, the grounds for granting relief are that the person has been diagnosed with one or more of the conditions set forth in division (A)(1)(a) of section 2929.025 of the Revised Code and that, at the time of the aggravated murder that was the basis of the sentence of death, the condition or conditions significantly impaired the person's capacity in a manner described in division (A)(1)(b) of that section.

(G) A petitioner who files a petition under division (A)(1)(a)(i), (ii), (iii), or (iv) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(2) If division (G)(1) of this section does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(3) The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) or (2) of this section.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, except as otherwise described in this division, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the court finds grounds for relief in the case of a petitioner who filed a petition under division (A)(1)(a)(iv) of this section, the court shall render void the sentence of death and order the resentencing of the offender under division (A) of section 2929.06 of the Revised Code. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(I) Upon the filing of a petition pursuant to division (A)(1)(a)(i), (ii), (iii), or (iv) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(J)

(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent

indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of *28 U.S.C. 154* with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

History

131 v 684 (Eff 7-21-65); 132 v H 742 (Eff 12-9-67); 141 v H 412 (Eff 3-17-87); *145 v H 571* (Eff 10-6-94); *146 v S 4* (Eff 9-21-95); *146 v S 2* (Eff 7-1-96); *146 v S 269* (Eff 7-1-96); *146 v S 258* (Eff 10-16-96); *149 v H 94*. Eff 9-5-2001; *150 v S 11*, § 1, eff. 10-29-03; *151 v S 262*, § 1, eff. 7-11-06; *153 v S 77*, § 1, eff. 7-6-10; *2014 hb663*, § 1, effective March 23, 2015; *2016 sb139*, § 1, effective April 6, 2017; *2020 hb136*, § 1, effective April 12, 2021.

ORC Ann. 2953.23

Current through File 47 (except File 30 which only includes the immediately effective Revised Code sections) of the 134th (2021-2022) General Assembly; acts signed as of July 14, 2021.

Page's Ohio Revised Code Annotated > Title 29: Crimes — Procedure (Chs. 2901 — 2981) > Chapter 2953: Appeals; Other Postconviction Remedies (§§ 2953.01 — 2953.84) > Postconviction Remedies (§§ 2953.21 — 2953.25)

§ 2953.23 Time for filing petition; appeals.

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1) (c) of section 2953.21 of the Revised Code, and "former section 2953.82 of the Revised Code" has the same meaning as in division (A)(1) (d) of section 2953.21 of the Revised Code.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

If a petition filed pursuant to section 2953.21 of the Revised Code by a person who has been sentenced to death is denied and the person appeals the judgment, notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a notice of appeal or briefs related to an appeal filed by the person. If any court rule specifies a limit on the number of pages in, or on the length of, a notice of appeal or briefs described in this division or on a prosecuting attorney's response or briefs with respect to such an appeal and a person who has been sentenced to death files a notice of appeal or briefs that exceed the limit specified for the petition, the prosecuting attorney may file a response or briefs that exceed the limit specified for the answer or briefs.

History

132 v H 742 (Eff 12-9-67); *146 v S 4*. Eff 9-21-95; *150 v S 11*, § 1, eff. 10-29-03; *151 v S 262*, § 1, eff. 7-11-06; *153 v S 77*, § 1, eff. 7-6-10; *2016 sb139*, § 1, effective April 6, 2017; *2020 hb136*, § 1, effective April 12, 2021.

Annotations

State v. Coley

Supreme Court of Ohio

June 20, 2001, Submitted ; October 3, 2001, Decided

No. 98-1474

Reporter

93 Ohio St. 3d 253 *; 754 N.E.2d 1129 **; 2001 Ohio LEXIS 2589 ***; 2001-Ohio-1340

THE STATE OF OHIO, APPELLEE, v. COLEY, APPELLANT.

Subsequent History: [*1]** As Corrected May 7, 2002.

Stay granted by *State v. Coley, 94 Ohio St. 3d 1403, 759 N.E.2d 781, 2001 Ohio LEXIS 3219 (Dec. 12, 2001)*

Writ of habeas corpus denied, Certificate of appealability granted *Coley v. Bagley, 2010 U.S. Dist. LEXIS 33063 (N.D. Ohio, Apr. 5, 2010)*

Motion granted by *State v. Coley, 142 Ohio St. 3d 1455, 2015-Ohio-1677, 2015 Ohio LEXIS 1176, 29 N.E.3d 1007 (May 4, 2015)*

Decision reached on appeal by *State v. Coley, 2019-Ohio-5143, 2019 Ohio App. LEXIS 5223,*

Prior History: APPEAL from the Common Pleas of Lucas County, 1449.

State v. Coley, 83 Ohio St. 3d 1449, N.E.2d 332, 1998 Ohio LEXIS 2964 1998)

Disposition: Affirmed.

Core Terms

murder, trial court, calculation, aggra kidnapping, offenses, shot, indictme grand jury, aggravating circumstanc kill, cause death, photographs, sente instructions, bullet, jurors, guilt, gun, particularized, robbery, stolen, plate, aggravated robbery, instruct a jury, c sentence, plain error, charges

Procedural Posture

After a jury trial, the Court of Common Pleas of Lucas County (Ohio) entered a judgment which convicted defendant of the kidnapping, robbery, and attempted murder of the first victim, and the kidnapping, robbery, and aggravated murder of the second victim, and which imposed a death sentence for the aggravated murder of the second victim, and various other prison sentences for the remaining offenses. Defendant filed a direct appeal.

Overview

The first victim was kidnapped, robbed, shot in the head, stomach, and arms, and was left to die in a dark, isolated field. The second victim was kidnapped, robbed, shot between the eyes, and left to die in an alley. The state supreme court cited numerous reasons for refusing to reverse defendant's convictions and death sentence, including: (1) defendant had waived his right to complain about prejudicial pretrial publicity, because he never moved for a change of venue; (2) defendant was not prejudiced by the joinder of offenses, which evidence proved that he had the second victim; (3) the cri photographs were properly admitte they were limited in number, s probative, and relevant; (4) doubl did not preclude separate punis aggravated murder and for felonies that murder; and (5) the death ser proper, because the aggravating cir of murder in the course of rol kidnapping outweighed the mitigat of defendant's youth and deprived cl

Outcome

The judgment was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Challenges to J Venire > Pretrial Publicity > Gene Overview

Criminal Law & Procedure > Trials > Defendant's

as to which evidence proved that defendant had attempted to murder the first victim, and

Venue > Pretrial Publicity

HN1[] **Challenges to Jury Venire, Pretrial Publicity**

The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. However, pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Criminal Law & Procedure > Jurisdiction & Venue > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Venue

HN2[] **Defendant's Rights, Right to Fair Trial**

Changes in venue help protect fair trial rights. A trial court may change venue when it appears that a fair and impartial trial cannot be held in that court. *Ohio R. Crim. P. 18*; *Ohio*

Criminal Law & Procedure > ... > Challenges to J Venire > Pretrial Publicity > Gene Overview

Criminal Law & Procedure > Juri Jurors > Voir Dire > General Ove

Criminal Law & Procedure > Juri Venue > Pretrial Publicity

HN3[] **Challenges to Jury Venir Publicity**

A careful and searching voir dire pr best test of whether prejudicial pretr has prevented obtaining a fair an jury from the locality.

Civil Procedure > Preliminary Considerations > Venue > Gener Overview

Criminal Law & Procedure > ... > Challenges to J Venire > Pretrial Publicity > Char Venue Requests

venue rests largely in the discretion of the trial court.

Criminal Law & Procedure > Juri
Venue > Venue

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

HN4[↓] **Preliminary Considerations, Venue**

If a defendant never moves for a change of venue, he waives his right to complain on that basis.

Civil Procedure > Preliminary Considerations > Venue > General Overview

Criminal Law & Procedure > ... > Challenges to Jury Venire > Pretrial Publicity > Prejudice

Criminal Law & Procedure > Jurisdiction & Venue > Venue

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Venue

HN5[↓] **Preliminary Considerations, Venue**

court has abused its discretion.

Criminal Law & Procedure > ... > Joinder & Severance > Duplicity Overview

HN6[↓] **Defective Joinder & S Duplicity**

The law favors joining multiple offe single trial under *Ohio R. Crim. P.* offenses charged are of the same character. Under *Ohio R. Crim.* offenses that are based on acts together or constituting parts of a scheme or plan, or are part of a criminal conduct, may also be joined

Criminal Law & Procedure > ... > Accusatory Instruments > Joinder & Severance > General Overview

Criminal Law & Procedure > ... > Accusatory Instruments > Joinder & Severance > Joinder of Defendar

A decision not to change venue will not be reversed unless it is clearly shown that the trial

Criminal Law & Procedure > ... > Severance > Defective Joinder &

Severance > Severance by Prosecutor

Criminal Law & Procedure > ... > Joinder & Severance > Defective Joinder & Severance > Severance of Codefendants

Criminal Law & Procedure > ... > Joinder & Severance > Defective Joinder & Severance > Severance of Offenses

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN7 **Accusatory Instruments, Joinder & Severance**

If it appears that a defendant is prejudiced by a joinder, a trial court may grant a severance under *Ohio R. Crim. P. 14*. However, the defendant bears the burden to prove prejudice and that the trial court abused its discretion in denying severance.

Criminal Law & Procedure > ... > Joinder & Severance > Defective Joinder & Severance > Severance of Offenses

Evidence > Admissibility > Conduct

HN8 **Defective Joinder & S Severance of Offenses**

A prosecutor can use two methods claims of prejudice by a joinder. Unc method, if one offense would h admissible under *Ohio R. Evid.* prejudice could have resulted from be admissible to prove identity certain modus operandi, other-acts must be related to and share commc with the crime in question.

Criminal Law & Procedure > ... > Severance > Defective Joinder & Severance > Severance of Offen

Evidence > Admissibility > Condu

Evidence > Prior Acts, Crimes &

Evidence > Relevance > Preserv

Relevant Evidence > Exclusion & Preservation by Prosecutors

HN9 **Defective Joinder & S Severance of Offenses**

A prosecutor can use two methods

claims of prejudice by a joinder. second method, the State can

negate prejudice by showing that evidence of each crime joined at trial is simple and direct. Thus, when simple and direct evidence exists, an accused is not prejudiced by joinder regardless of whether the evidence is admissible as other-acts evidence.

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Defendants

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

Criminal Law & Procedure > ... > Secrecy > Disclosure > General Overview

Criminal Law & Procedure > ... > Secrecy > Disclosure > Appellate Review

Criminal Law & Procedure > ... > Secrecy > Disclosure > Judicial Discretion

Criminal Law & Procedure > ... > Standards > Particularize

Procedure > Trials > Judicial Dis

Criminal Law & Procedure > ... > of Review > Abuse of Discretion Overview

HN10[] **Particularized Need Defendants**

Grand jury proceedings are secre accused is not entitled to inspect transcripts either before or during the ends of justice require it and showing by the defense that a pa need for disclosure exists which out need for secrecy. Also, w particularized need for disclosure of testimony is shown is a questio Moreover, whether to release testimony is within the discretion court. A decision to deny release reversed absent an abuse of discreti

Criminal Law & Procedure > ... > Juries > Evidence Before Grand Jury > General Overview

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > General Overview

HN11[] **Grand Juries, Evidence Before Grand Jury**

A presumption of regularity supports prosecutorial decisions, such as a decision to present additional evidence to another grand jury.

Evidence > Weight & Sufficiency

HN12[] **Evidence, Weight & Sufficiency**

In reviewing a record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.

Criminal Law &

Criminal Law & Procedure > ... > Manslaughter & Murder > Murder > General Over

Criminal Law & Procedure > ... > Murder > Defini lice

HN13[] **Definitions, Delibe Premeditation**

As to prior calculation and design, line test exists that emphatically di between the presence or absenc calculation and design. Yet prior and design is a more stringent ele the deliberate and premeditate required under prior law. Inst deliberation is not sufficient. Prior and design requires a scheme d implement the calculated decision to

Criminal Law & Procedure > ... > Manslaughter & Murder > Murder > General Over

HN14[] **Homicide, Manslau**

Procedure in Murder Definitions Do

liberation & Premeditation

Prior calculation and design can be t

when the killer quickly conceived and executed the plan to kill within a few minutes.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Criminal Law & Procedure > ... > Double Jeopardy > Double Jeopardy Protection > General Overview

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Murder > General Overview

Criminal Law & Procedure > ... > Murder > Aggravated Murder > General Overview

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Penalties

HN15[] **Procedural Due Process, Double Jeopardy**

The constitutional protection against double jeopardy does not preclude a defendant from being separately punished for an aggravated

Criminal Law & Procedure > ... > Against Persons > Robbery > Ge Overview

Criminal Law & Procedure > ... > Manslaughter & Murder > Murder > General Over

Criminal Law & Procedure > ... > Murder > Aggra Murder > General Overview

HN16[] **Crimes Against Persons**

Aggravated murder is not an allied similar import to an underlying robbery.

Criminal Law & Procedure > ... > Against Persons > Kidnapping > Overview

Criminal Law & Procedure > ... > Manslaughter & Murder > Murder > General Over

Criminal Law &

murder and for felonies involved in that murder.

HN17[⬇] **Crimes Against Persons, Kidnapping**

Aggravated murder and kidnapping are not allied offenses of similar import under *Ohio Rev. Code Ann. § 2941.25*.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > ... > Reviewability > Waiver > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

HN18[⬇] **Plain Error, Definition of Plain Error**

Criminal Law & Procedure > Trials > Judicial Dis

Evidence > Types of Evidence > Demonstrative Evidence > Photographs

HN19[⬇] **Trials, Judicial Discretio**

In capital cases, nonrepetitive ph even if gruesome, are admissible and of probative value, as lon probative value of each photograph the danger of material prejudi accused. Decisions on the admi photographs are left to the sound d the trial court.

Criminal Law & Procedure > ... > of Review > Plain Error > Definiti Error

Criminal Law & Procedure > Tria Instructions > Objections

Criminal Law & Procedure > Tria Instructions > Requests to Charg

If a defendant does not object to photographs at trial, he waives all but plain error.

Procedure > ... > Reviewability > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

HN20[] **Plain Error, Definition of Plain Error**

If a defendant fails to object at trial or request specific instructions, he waives all but plain error. *Ohio R. Crim. P. 30(A).*

Criminal Law & Procedure > Trials > Jury Instructions > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

HN21[] **Trials, Jury Instructions**

context of the overall charge.

Criminal Law & Procedure > ... > Manslaughter & Murder > Murder > General Over

Criminal Law & Procedure > ... > Mental States > Mens Rea > Spe

Criminal Law & Procedure > Tria Instructions > General Overview

HN22[] **Homicide, Manslau Murder, Murder**

See former *Ohio Rev. Code 2903.01(E)*.

Criminal Law & Procedure > Juri Jurors > Province of Court & Jury > General Overview

HN23[] **Juries & Jurors, Provinc & Jury**

The significance to be given the e exhibits is a matter for the jury.

A single instruction to a jury may not be judged in artificial isolation but must be viewed in the

Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Bifurcated Trials

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Sentencing > Proportionality

HN24[↓] **Capital Punishment, Aggravating Circumstances**

Ohio Rev. Code Ann. § 2929.05(A) requires the state supreme court to review a whether the evidence supports finding of aggravating circumstance the aggravating circumstances ou mitigating factors, and whether sentence is proportionate to tho affirmed in similar cases. *Ohio I Ann. § 2929.05(A)*.

Headnotes/Summary

Headnotes

Criminal law -- Aggravated murde penalty upheld, when.

Counsel: Julia R. Bates, Lucas Cou Prosecuting Attorney, Dean P. Manc A. Baum and Gary G. Cook, Assista Prosecuting Attorneys, for appellee.

Joseph A. Benavidez, for appellant.

Judges: MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFE and LUNDBERG STRATTON, JJ., c

Opinion by: MOYER

Opinion

defendant's death sentence independently. The state supreme court must determine [**1134] [*253] DECISION OF TH

MOYER, C.J. On December

defendant-appellant Douglas Coley, assisted by Joseph Green, kidnapped, robbed, and attempted to murder David Moore in Toledo. Then, on January 3, 1997, Samar El-Okdi was shot between the eyes and left to die in an alley in Toledo. On January 7, 1997, Toledo police stopped a Pontiac sedan that was owned by El-Okdi and being driven by Green. Coley was a passenger. A three-judge panel convicted Green of El-Okdi's murder as well as other offenses. [1] See *State v. Green (2000), 90 Ohio St. 3d 352, 738 N.E.2d 1208*.

[*2]** In May 1998, a jury convicted Coley of the kidnapping, robbery, and attempted murder of Moore, and the kidnapping, robbery, and aggravated murder of Samar El-Okdi. Coley received a death sentence, and his case is now on direct appeal to this court.

Facts

Offenses Against David Moore

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, later identified as Green asked for As he gave directions, another man whom Moore later identified as Co started to leave, but Green and Col front of him and displayed sn **[**1135]** shiny, semiautomatic pis then told Moore, "Give me your ke complied, and Coley told Moore, " car." Coley then climbed in behind Green got in back behind Moore, drove the Taurus towards the art mu

While in the car, Moore asked them go, but neither Green nor Coley r Green did tell Moore to "cough up and Moore handed Coley $ 112, w threw on the front seat. Moore Coley was **[*254]** calm ar appeared **[***3]** excited, a confused, or unsure of hims approximately fifteen minutes, Cc into a dark, isolated field and told M out of the car.

As Moore backed out of the car, him in the stomach. After Moore ra

The three-judge panel originally sentenced Green to death. On appeal, this court affirmed the conviction but found irregularities in sentencing. On remand, the three-judge panel reconsidered its opinion and sentenced Green to life in prison without parole. Toledo Blade, April 7, 2001.

heard a car door open and the c

spinning, "trying to get out of the m

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 **[***4]** 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 which Armstrong knew did not belor of them, was overheating, so helped put water in the car. E abduction, Moore had purchase installed a new replacement radiat his Taurus tended to overheat.

That same evening, Armstrong saw Green with the same .2 semiautomatic pistols that Armstron each of them previously carry. identified State Exhibit 32, a brov pistol with gray duct tape, as th Coley had previously carried, and St 33, which had a pearl handle, a pistol. That evening, Green made song with the words "I shot him five he had dropped." At one point, Gre his gun at Coley and said, "You b snitch on me." Coley mimicked t pointing his gun at Green, and "Better never snitch on me." Penr Coley's girlfriend, also recognized St 32 as a gun **[***5]** she had seen house.

After a few days, Coley and Green

Green, saw Coley and Green driving a light blue, four-door Ford Taurus. The Taurus, Moore's Taurus. On December police recovered Moore's car in an

the residence of a girlfriend of Coley. When police found the Taurus, it bore plates that had been stolen from a Mercury Topaz.

[*255] 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. **[**1136]** 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.

Museum, to use a pay telephone. / walked outside the house at whicl staying, she heard two gunshots. had passed by the house, she saw a left in an alley. The car had "lon (similar to those on a Pontiac 60 license plate number with a zero Okdi's license number). Frusher sa stocky "man outside the car bendin had bushy hair." Another man wa the driver's seat. Then Frusher wal pay phone and talked to her frien minutes or so, but she did not retur way she had come earlier. Amerite establish that Frusher made this c p.m.

On Saturday, January 4, Christophe Okdi's boyfriend, discovered that E missing and notified police. El-Ok and relatives searched for El-Okc private detective, and distributec person flyers. These flyers describe included her photograph, describe including the bumper stickers, and last known whereabouts.

Rosie [***6] Frusher left a friend's house at West Grove Place, near the Toledo Art That same weekend in Toledo, Arm Coley driving a gray [***7] Pontiac

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 **[*256]** 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 staked out the car, using [* undercover police vehicles.

After midnight, Green, Coley, and with a baby got into the Pontiac away. Police followed in undercov and, assisted by marked police c the Pontiac to stop. Despite being s Green rammed one car and spun hi an effort to escape. Green and resisted arrest, and police forcibl each of them from the car. Polic loaded pistol in Green's coat. policeman approached the car, he r Coley, who was sitting in the back metallic object in his hand. On th rear floor, police found a loaded, [* caliber, brown-handled pistol (Exhib where Coley had been sitting.

Inside the trunk, police found a bla purse that El-Okdi had with her on when she disappeared. However, p found her red wallet and credit ca she always carried with her inside purse. Police found one of El-Ok plates underneath the stolen rear

stolen from another Pontiac 6000 some time before 6:00 p.m. on January 4, 1997. Police they found her other license plate trunk.

On the afternoon of January 7, police found El-Okdi's body in an alley behind West Grove Place, where Frusher **[***9]** 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 shell casings. After police searche residence on January 7, 1997, the empty box that had contained . Remington **[***10]** ammunition.

[*257] On January 7, 1997, Coley were arraigned on charges relating t stolen Pontiac and the stolen pi arraignment was shown on telev Moore immediately recognized C Coley from the television newscast a who had kidnapped, robbed, and sh

That same week, Coley, Green cousin Armstrong were all in jail Armstrong was being held on charges. While Armstrong and C together, Coley hugged him and told it but Joe [Green] shouldn't have s me." By this comment, Armstrong t Coley to mean that Coley had sh Coley also asked Armstrong to lie claiming that Coley had obtained h and the Pontiac from someone nam

On January 16, 1997, a grand allegations relating to El-Okdi, and r

and had fired the bullets into Moore and El-Okdi and had ejected the three crime-scene

specifications. Coley was reindicted 10, 1997, with the grand jury re

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 **[***11]** 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. [**1138] 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

and design. The trial court later n
three aggravated murder Counts (
VI). After a sentencing hearing,
recommended, and the trial judge i
death sentence for the aggravated
Samar El-Okdi. In addition to
sentence, the trial court sentence
ten years on each of Counts I, II, I
VIII, to be served consecuti
sentenced him on the firearm specifi

We have considered each of t
propositions of law. We h
independently reviewed his death se
R.C. 2929.05(A) requires, by rewe
felony-murder aggravating cir
against the mitigating factors and
the sentence in this case against
imposed in **[*258]** similar cases. W
that Coley's convictions and death
should be affirmed.

I. Pretrial Issues

A. Change of Venue

In proposition I, Coley argues tha
about his case was so pervasive tha

offender in the aggravated murder and that he committed the offense with prior calculation

must be presumed. He also argue

voir dire reinforced his claim that this

publicity prejudiced **[***13]** his right to a fair trial.

HN1[↑] "The right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd (1961), 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751, 755*. However, "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart (1976), 427 U.S. 539, 554, 96 S. Ct. 2791, 2800, 49 L. Ed. 2d 683, 695*.

HN2[↑] Changes in venue help protect fair trial rights. A trial court may change venue "when it appears that a fair and impartial trial cannot be held" in that court. *Crim.R. 18*; *R.C. 2901.12(K)*. "A change of venue rests largely in the discretion of the trial court * * *." *State v. Fairbanks (1972), 32 Ohio St. 2d 34, 37, 61 Ohio Op. 2d 241, 243, 289 N.E.2d 352, 355*. See, also, *State v. Montgomery (1991), 61 Ohio St. 3d 410, 413, 575 N.E.2d 167, 171*. However, ***HN3***[↑] " 'a careful and searching *voir dire* provides the best test of whether prejudicial pretrial publicity has prevented *107, 111, 666 N.E.2d 1099, 11* quoting *State v. Bayless (1976), 4 2d 73, 98, 2 Ohio Op. 3d 249, 262, 1035, 1051*.

Coley's claims of error based on pretrial publicity fail for several reas Coley ***HN4***[↑] never moved for a venue and thus waived his right to c this basis. *State v. Campbell (200(St. 3d 320, 336, 738 N.E.2d 1178, 1 v. Williams (1977), 51 Ohio St. 2d 1 Op. 3d 98, 364 N.E.2d 1364*, paragr the syllabus.

Second, the record contains li evidence of media interest, a commentary on the trial. A defer (which did *not* seek a change included a brief news article and Blade editorial dated January 24 would be presumed in the al evidence to the contrary that any that publicity would have dissipat time the case was tried in May 1998 record does not support **[**1139]** prejudicial pretrial publicity.

obtaining a fair and impartial jury from the evidence of such publicity c locality.' " *State v. Davis (1996), 76 Ohio St. 3d* introduced now. See *State v. Ishr*

54 Ohio St. 2d 402, 8 Ohio Op. 3d 405, 377 N.E.2d 500, paragraph one of the syllabus.

[*15]** Third, the trial court conducted individual voir dire of prospective jurors as to pretrial publicity. Seven of the seated jurors had never read or heard anything **[*259]** about the case. Two seated jurors had heard only news accounts that a jury was being selected. Three other actual jurors had heard or read about the case, but each promised to decide the case solely on the evidence at trial. Coley never challenged any of these jurors. Moreover, the court excused those prospective jurors who indicated in individual voir dire that they had been affected by pretrial publicity.

Fourth, the trial court repeatedly cautioned jurors during the trial not to read or listen to media reports. Thus, there was no evidence that publicity about the case compromised the impartiality of any juror.

Fifth, ***HN5***[↑] a decision not to change venue will not be reversed unless it is clearly shown that the trial court has abused its discretion. State v. Lundgren (1995), 73 Ohio St. 3d 474, 780. In view of the voir dire, which r prejudice, and the paucity of evider as to pretrial publicity, Coley has shown an abuse of discretion. Se White (1998), 82 Ohio St. 3d 1(N.E.2d 772, 777-778; State v. Bies Ohio St. 3d 320, 324, 658 N.E.2d Accordingly, we reject Coley's first p

B. Joinder of Offenses

In proposition XI, Coley argues th court erred by joining for trial, ov objection, unrelated offenses, n December 1996 offenses against I the January 1997 charges relati aggravated murder of Samar El-Okd

HN6[↑] "The law favors joinin offenses in a single trial under *Crin* the offenses charged 'are of the similar character.' " State v. Lott Ohio St. 3d 160, 163, 555 N.E.2d quoting State v. Torres (1981), 66 (340, 343, 20 Ohio Op. 3d 313, N.E.2d 1288, 1290. Under *Crir* offenses that are based on acts

Maurer (1984), 15 Ohio St. 3d 239, 250, 15 Ohio B. Rep. 379, 388-389, 473 N.E.2d 768, scheme or plan, or are part of a criminal conduct" may also be joinec

Nonetheless, *HN7*[↑] "if it appears that a defendant * * * is prejudiced by a joinder" **[***17]** a court may grant a severance under *Crim.R. 14*. However, the defendant bears the burden to prove prejudice and that the trial court abused its discretion in denying severance. *State v. Torres, 66 Ohio St. 2d 340, 20 Ohio Op. 3d 313, 421 N.E.2d 1288*, syllabus.

HN8[↑] "A prosecutor can use two methods to negate such claims of prejudice," as noted in *State v. Lott, 51 Ohio St. 3d at 163, 555 N.E.2d at 298*. First, if one offense would have been admissible under *Evid.R. 404(B)*, no prejudice could have resulted from joinder. "To be admissible to prove identity through a **[*260]** certain *modus operandi*, other-acts evidence must be related to and share common features with the crime in question." *State v. Lowe (1994), 69 Ohio St. 3d 527, 634 N.E.2d 616*, paragraph one of the syllabus. See, also, *State v. Smith (1990), 49 Ohio St. 3d 137, 551 N.E.2d 190*.

Here, the Moore offenses were admissible under *Evid.R. 404(B)* to prove Coley's identity

carjack victims, El-Okdi and Mc
within a block of each other, and
abducted within two weeks
other **[***18]** at roughly the same ti
between 7:30 and 8:15 p.m. Both vi
driven to a nearby secluded area,
money, shot using the same gun, ar
to die alone. Green and Coley drov
for several days after placing pla
from a similar car on the stolen car.

The court has upheld the use of sir
acts evidence in comparable cases.
State v. Green (2000), 90 Ohio S
369, 738 N.E.2d 1208, 1228 (s
Coley's accomplice Joseph Green
Bey (1999), 85 Ohio St. 3d 487,
N.E.2d 484, 491 (businessmen
chest with knife, and shoes an
removed); *State v. Woodard (1993*
St. 3d 70, 73, 623 N.E.2d
(carjacking attempt to prove identity
carjacking and murder); *State v*
(1990), 49 Ohio St. 3d 182, 18
N.E.2d 180, 182-185 (similar
robberies of stores). See, also,

as El-Okdi's killer. The similarities between the offenses were remarkable. **[**1140]** The *Ohio Op. 2d 95, 97-98, 275 N.E.2d 157* (proof of other criminal acts

prove possession of murder weapon); *State v. Martin (1985), 19 Ohio St. 3d 122, 127, 19 Ohio B. Rep. 330, 334, 483 N.E.2d 1157, 1162* **[***19]** (proof of theft of victim's weapon allowed to prove possession of murder weapon).

Further, ***HN9***[↑] the state can separately negate prejudice by showing that "evidence of each crime joined at trial is simple and direct. * * * Thus, when simple and direct evidence exists, an accused is not prejudiced by joinder regardless of" whether the evidence is admissible as other-acts evidence. *Lott, 51 Ohio St. 3d at 163, 555 N.E.2d at 298*. See, *e.g.*, *State v. Johnson (2000), 88 Ohio St. 3d 95, 109-110, 723 N.E.2d 1054, 1068* (assaults against female neighbors); *State v. Franklin (1991), 62 Ohio St. 3d 118, 123, 580 N.E.2d 1, 6* (burglaries in same neighborhood). In Coley's case, the proof of each offense was separate and distinct. The jury was not likely to be confused as to which evidence proved that Coley had attempted to murder Moore and which proved that he had murdered El-Okdi.

Here, the state satisfied both tests, either of

involved, and the evidence was ad
any event as other-acts evi
comparable circumstances the
approved **[***20]** joinder of offense
*v. Williams [*261] (1995), 73 Ohio 158, 652 N.E.2d 721, 727*, the cour
single trial of different robberies
same gun was apparently used to
driver and assault a truck driver. I
Mills (1992), 62 Ohio St. 3d 357, N.E.2d 972, 979, the court approv
for separate robberies, three mor
against different bank branches.
State v. Lott, 51 Ohio St. 3d at N.E.2d at 298.

Moreover, the trial court provided
instruction to the jury during the guil
the limited use of the Moore eviden
Coley's identity as El-Okdi's killer
court also instructed the jury in t
phase regarding the specific a
circumstances that the jury was to
imposing punishment for El-Okdi's
murder. Cf. *State v. Waddy (1992 St. 3d 424, 428, 588 N.E.2d*

which was sufficient to negate Coley's claims of prejudice. "Simple and direct" evidence was

instructions, nor did he claim that th confused about the relevance of

offenses. Accordingly, we find no merit to Coley's eleventh proposition of **[***21]** law and overrule it.

[1141]** C. Disclosure of Grand Jury Minutes

In proposition XII, Coley argues that the trial court erred in not disclosing grand jury minutes because Coley demonstrated a particularized need for records of those proceedings. We disagree.

Coley recognizes that ***HN10***[↑] "grand jury proceedings are secret, and an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." *State v. Greer (1981), 66 Ohio St. 2d 139, 20 Ohio Op. 3d 157, 420 N.E.2d 982,* paragraph two of the syllabus. Also, "whether particularized need for disclosure of grand jury testimony is shown is a question of fact * * *." *Id.*, paragraph three of the syllabus. Moreover, whether to release grand jury testimony "is within the discretion of the trial court." *Id.*,

Ohio St. 3d 305, 308, 528 N.E.2d 52

Coley argues that he demon particularized **[***22]** need because jury indicted Coley for the Moore a offenses in a noncapital indictmen January 1997. In March 1997, the resubmitted the case, and another issued a capital indictment agai Coley was then tried on those new c

However, the trial court rejecte argument that a capital indict improperly replaced the earlier indictment. At the trial court heari issue, Coley agreed that the fact t been reindicted did **[*262]** no particularized need. Further, Coley a he did not claim that pr vindictiveness was involved.

At the hearing Coley showed that s officers were unhappy that the first was for noncapital offenses and their thoughts to a newspaper Thereafter, a Toledo Blade questioned why Coley and Greer

deny release will not be reversed absent an abuse of discretion. *State v. Brown (1988), 38* investigated further and secured evidence, which was presented to

grand jury. A second indictment is not an uncommon procedure, as evidence frequently comes to light after an initial indictment.

This new evidence presented to a second **[***23]** grand jury demonstrated that El-Okdi had been kidnapped and robbed. Three witnesses who had not testified before the first grand jury testified before the second grand jury. Among the three was Frusher, who had heard shots and had seen El-Okdi's car, along with two suspects, near West Grove Place at about 8:35 p.m. on January 3. At that location, police found El-Okdi's body on January 7. Also, new evidence showed that El-Okdi's purse was missing.

Thus, Coley failed to show a particularized need for the grand jury testimony. The subsequent capital indictment was based on additional investigation and new evidence, not on improper motives such as placating a newspaper or police department.

In previous cases, this court has rejected similar generalized claims attempting to violate the sanctity of grand jury secrecy. For example, in *State v. Benge (1996), 75 Ohio St.* the grand jury because "he was bou charges of murder and theft but ir capital charges. The *Benge* cc however, that his indictment "or charges" did not show any pa need **[***24]** and thus rejected similar to those that Coley makes.

[1142]** In *State v. Brown, 38 Ohi 308, 528 N.E.2d at 530*, the court l trial court did not abuse its discreti found no particularized need defense claims that the indictment v on insufficient evidence. See, alsc *Mack (1995), 73 Ohio St. 3d 502, N.E.2d 329, 334*, (claims that "fabricated his story to conceal involvement" were not sufficient); *Davis (1988), 38 Ohio St. 3d 361 N.E.2d 925, 929-930* (claims that was based on "illegal and ir evidence" did not establish pa need). See, also, *State v. Stojetz Ohio St. 3d 452, 459-460, 705 N 337-338*; *State v. Webb (1994), 70 (325, 336-337, 638 N.E.2d 1023, 103*

3d 136, 145, 661 N.E.2d 1019, 1028, Benge argued that something improper occurred in

Finally, ***HN11***[↑] a presumption o supports prosecutorial decisions su

decision in this case to present additional evidence to another grand jury. **[*263]** See *United States v. Armstrong (1996), 517 U.S. 456, 464, 116 S. Ct. 1480, 1486, 134 L. Ed. 2d 687, 698*; *Bordenkircher v. Hayes (1978), 434 U.S. 357, 364, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604, 611*. **[***25]** In sum, Coley has not demonstrated that the trial court abused its discretion in refusing to release a record of grand jury proceedings. Accordingly, we overrule Coley's twelfth proposition.

II. Guilt-Phase Issues

A. Sufficiency of Evidence

In proposition II, Coley challenges the sufficiency of the evidence to support the jury's finding of prior calculation and design and argues that the finding of guilt as to Count IV must be set aside.

HN12[↑] In reviewing a record for sufficiency, "the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jackson v. Virginia (1979), 443 U.S. Ct. 2781, 61 L. Ed. 2d 560*. "The w given the evidence and the credib witnesses are primarily for the t facts." *State v. DeHass (1967), 10 230, 39 Ohio Op. 2d 366, 227 N* paragraph one of the syllabus.

HN13[↑] As to "prior calculation a design," no "bright-line test" e "emphatically distinguishes betv presence or absence" of "prior calc design." *State v. Taylor (1997), 78 15, 20, 676 N.E.2d 82, 89*. Y calculation and design' is a mor element than the 'deliberate and pr malice' * * * required under prior lav *Cotton (1978), 56 Ohio St. 2d 8, 1 3d 4, 381 N.E.2d 190*, paragraph syllabus. "Instantaneous deliberati sufficient * * *." *Id.*, paragraph t syllabus. " 'Prior calculation ar requires 'a scheme designed to imp calculated decision to kill.' " *D'Ambrosio (1993), 67 Ohio St. 3d 616 N.E.2d 909, 918*, quoting *State*

Jenks (1991), 61 Ohio St. 3d 259, 574 N.E.2d

492, paragraph two of the syllabus, following *N.E.2d at 193*.

In this case, the facts are sufficient to show that Coley "adopted a plan to kill." See *State v. Toth (1977), 52 Ohio St. 2d 206, 213, 6 Ohio Op. 3d 461, 465, 371 N.E.2d 831, 836*. Green and Coley probably kidnapped El-Okdi from the street in front of her home, one block from where Moore was also kidnapped. El-Okdi **[***27]** planned to spend the evening at home alone. She had no reason to be at the secluded location where her body was later found. From whatever location Coley and Green abducted El-Okdi, they drove her to a dead-end alley. They had no reason to drive her to this out-of-the-way spot except to kill her, a fact that shows **[*264] [**1143]** prior calculation and design. Cf. *State v. Ballew (1996), 76 Ohio St. 3d 244, 250, 667 N.E.2d 369, 377* (victim abducted and taken to remote location).

The evidence supports the jury's finding that when Coley and Green arrived at this dead-end alley, Coley personally shot El-Okdi between the eyes, execution style, and thus was the principal offender. Coley's gun was the murder weapon. No evidence suggests

Green used El-Okdi's car for sev
knowing that she could not report it
which is further evidence of a p
Finally, just twelve days earli
assisted by Green, had kidnapped a
David Moore, drove him to a simila
area, shot him several times, and
die.

Moreover, ***HN14***[↑] **[***28]** prior
and design can be found even whe
quickly conceived and executed the
within a few minutes. See, *e.g.*
Palmer (1997), 80 Ohio St. 3d 54
687 N.E.2d 685, 706 (road-ra
homicide that quickly occurred a
accident); *State v. Taylor, 78 Ohic*
20-23, 676 N.E.2d at 89-91 (chance
in bar between rivals for another's at

In any event, the death penalty in
does not hinge on a finding of prior
and design. The jury found Coley g
counts of aggravated murder based
murder, and the jury also found that
the principal offender in the mu
alternative of felony-murder v

she posed a threat to Coley or Green, who were armed. After Coley shot her, Coley and

calculation and design was not put jury in the penalty phase. Therefore

Coley's second proposition.

B. Double Jeopardy

In proposition IV, Coley argues that his rights against double jeopardy and due process were violated. Coley argues that he "was punished three times for aggravated murder," was "punished again for kidnapping and aggravated robbery," and "was thus punished various times for one **[***29]** indivisible act."

Coley misreads the record. The trial court merged the three murder charges against Coley into a single offense. The trial jury verdict referred to one death penalty, and the trial court imposed only a single death penalty.

Also, *HN15*[↑] the constitutional protection against double jeopardy does not preclude a defendant from being separately punished for an aggravated murder and for felonies involved in that murder. In order to commit murder, neither aggravated robbery nor kidnapping need be committed. This court has repeatedly rejected similar double-jeopardy claims and held that *HN16*[↑] aggravated murder is not an allied offense of similar import *N.E.2d 1358, 1371*; *State v. Smith Ohio St. 3d 89, 117, [*265] 684 N 694*. See, also, *State v. Bickerstaff Ohio St. 3d 62, 10 Ohio B. Rep. N.E.2d 892*, syllabus.

As to kidnapping, this court has also *HN17*[↑] "aggravated murder and are not allied offenses of similar im *R.C. 2941.25*." *State v. Keenan Ohio St. 3d 133, 154, 689 N. 948*. **[***30]** See, also, *State v. Re Ohio St. 3d at 682, 687 N.E.2d at 1 v. Jells (1990), 53 Ohio St. 3d 2 N.E.2d 464, 474*; *State v. Powell Ohio St. 3d 255, 261-262, 552 N 198-199*.

The aggravated robbery and the were also separate offenses under Coley and Green abducted El-Okdi with her to a secluded **[**1144]** loc prolonged restraint and substantial of the victim demonstrates a animus" sufficient to permit punishr kidnapping in addition to the robbe *Logan (1979), 60 Ohio St. 2d 126, 1*

to an underlying aggravated robbery. State v. Reynolds (1998), 80 Ohio St. 3d 670, 681, 687 3d 373, 397 N.E.2d 1345, syllabu offense was merely incidental to

offense. Cf. *State v. Reynolds, 80 Ohio St. 3d at 682, 687 N.E.2d 1358*; *State v. Jenkins (1984), 15 Ohio St. 3d 164, 198, 15 Ohio B. Rep. 311, 340, 473 N.E.2d 264, 295*. Accordingly, we reject Coley's fourth proposition.

C. Gruesome Photographs

In proposition V, Coley argues that the trial court erred in admitting gruesome photographs of the victim that had "little probative value" and were "highly prejudicial. **[***31]** " However, Coley fails to specify which photographs were objectionable or exactly why they were inadmissible. The trial court admitted, without objection, five crime-scene photos of El-Okdi's body and one autopsy photo.

Since the defense counsel ***HN18***[↑] did not object to these photographs at trial, he thereby waived all but plain error. *State v. Taylor, 78 Ohio St. 3d at 26, 676 N.E.2d at 93*; *State v. Williams, 51 Ohio St. 2d 112, 5 Ohio Op. 3d 98, 364 N.E.2d 1364*. No outcome-determinative plain error resulted from admitting these exhibits in view of the other was the murder weapon.

Moreover, no error occurred. ***H***. capital cases, nonrepetitive photogr if gruesome, are admissible if relev probative value, as long as the prob of each photograph outweighs the material prejudice to an accused. *Maurer, 15 Ohio St. 3d 239, 15 Oh 379, 473 N.E.2d 768*, paragraph se syllabus; *State v. Morales (1987), 3 3d 252, 257, 513 N.E.2d 267, 273*. on the admissibility of photogr "left **[***32]** to the sound discretion court." *State v. Slagle (1992), 65 C 597, 601, 605 N.E.2d 916, 923 Maurer, 15 Ohio St. 3d at 264, 1 Rep. at 401, 473 N.E.2d at 791*.

[*266] The five crime-scene pl portray El-Okdi's body in relatic surroundings and from different a distances. Although arguably Exhibits 50 and 65 simply show clothed body in a partly curled po she appears as though she were as from traces of blood. The photogr

compelling evidence of guilt, including the forensic evidence showing that Coley's gun Exhibits 63 and 64 from a mu distance, and one cannot even clea

that a body is shown in those photos. Exhibits 66 (crime scene) and 72 (coroner), which are gruesome, portray El-Okdi's face and clearly show the gunshot wound both before (Exhibit 66) and after (Exhibit 72) the wound was cleaned.

These photos illustrated the testimony of detectives and the deputy coroner who saw the crime scene, portrayed El-Okdi's body in relation to her surroundings, and Exhibits 66 and 72, portraying the wound, helped to prove the killer's intent and the lack of accident or mistake. See *State v. Goodwin (1999), 84 Ohio St. 3d 331, 342, 703 N.E.2d 1251, 1261*; **[***33]** *State v. Mason (1998), 82 Ohio St. 3d 144, 158-159, 694 N.E.2d 932, 949*. These photos also gave the jury an "appreciation of the nature and circumstances of the crimes." *State v. Evans (1992), 63 Ohio St. 3d 231, 251, 586 N.E.2d 1042, 1058*. The photos were limited in number, had substantial probative value and relevance, and, while some were gruesome, none were particularly inflammatory. In other cases involving even more gruesome photographs, the court has *St. 3d 426, 444, 678 N.E.2d 891, 9(* *Joseph (1995), 73 Ohio St. 3d 45(* *N.E.2d 285, 294*.

Finally, in addition to not objecting Coley never objected to the photos introduced at the penalty phase. Nc determinative plain error resulted penalty-phase carryover effect fr photos due to the insufficiency of evidence. Thus, we reject Cc proposition.

D. Guilt-phase linstructions

In propositions III, VI, VII, and argues **[***34]** that the trial court's jury instructions contained deficiencies. Coley, however, ***HN2*** to object at trial or request specific i and thus waived all but plain erro *30(A)*; *State v. Underwood (1983), 3d 12, 3 Ohio B. Rep. 360, 444 N.* syllabus; *State v. Williams, 51 Ohio 5 Ohio Op. 3d 98, 364 N.E.2d 136* No alleged deficiency caused a di result or created a manifest misc

v. Smith, 80 Ohio St. 3d at 108, 684 [**1145] N.E.2d at 687; State v. Biros (1997), 78 Ohio

justice. State v. Long (1978), 53 (
91, 7 Ohio Op. 3d 178, 372 N.E.2d

these propositions could be rejected on the basis alone that no plain error was involved.

Moreover, Coley's challenges to the court's jury instructions lack merit. In discussing proposition III, Coley argues that "the trial court defined prior **[*267]** calculation as the offender's purpose to cause death." However, the court's instructions did not equate purpose with prior calculation and design, nor did the instructions confuse these separate elements. For example, the court stated:

"Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result or engaging **[***35]** in specific conduct. To do an act purposefully is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct."

In contrast, the court explained and defined prior calculation and design differently. The court instructed:

"Prior calculation and design means that the homicide, which process of reasc have included *a mental plan involv consideration of the method and* and/or instrument with which to death of another.

"To constitute prior calculation, t have been sufficient time and opp the *planning of an act of homicid* circumstances surrounding the hom show *a scheme designed to car calculated decision* to cause the definite period of time must lapse acting on the *spur of the mome* momentary consideration of the cause the death is not sufficient." added.)

The trial court used separate [***36 explain prior calculation and design, definite process of reasoning in a "mental plan involving studied consi the method and the means," "plan act of homicide," and a "scheme d carry out the calculated decision." also noted that acting on the "s moment" was not sufficient.

purpose to cause the death was reached by a *definite process of reasoning in advance* of the

These instructions, consistent with Instructions, did not confuse thes

elements. See 4 Ohio Jury Instructions (1997 and Supp. 2000), Section 503.01. Nor did these instructions serve to direct a verdict on prior calculation and design as Coley claims. Coley's claim that **[**1146]** the trial court confused purpose or intent with prior calculation and design lacks merit. Moreover, this court has previously rejected such claims. See *State v. Jones (2001), 91 Ohio St. 3d 335, 348, 744 N.E.2d 1163, 1178*; *State v. Campbell (2000), 90 Ohio St. 3d 320, 341, 738 N.E.2d 1178, 1200-1201*. Accordingly, we reject Coley's third proposition.

In proposition VI, Coley argues that the trial court's jury instructions shifted "the burden of proof from the state by instructing the jury to deliberate on the innocence **[***37]** of the accused." Coley's claim of error rests on the following guilt-phase instruction: "You may not discuss or consider the subject of punishment. **[*268]** Your duty is confined to the *determination of the guilt or innocence* of the Defendant * * *." (Emphasis added.)

Coley's claim of plain error from the above instruction lacks merit. At most, the use of the inconsequential. ***HN21***[↑] "A single to a jury may not be judged in artifici but must be viewed in the cont overall charge." *State v. Price (197 St. 2d 136, 14 Ohio Op. 3d 379, 772*, paragraph four of the syllabus *Cupp v. Naughten (1973), 414 U.S. 147, 94 S. Ct. 396, 400, 38 L. Ed. 2d*

The trial court had already instructed the jury that the state burden of proof as to each eleme offense and that if the state failed to burden the jury must acquit. Even c this evidence standing alone, no j have believed that this incidental re "guilt or innocence" in this context state's **[***38]** burden of proof to the

Moreover, this court has previous complaints of prejudicial error arisin use of the term "guilt or innocen limited context. See *State v. Jones St. 3d 335, 348-349, 744 N.E.2d 1 State v. Campbell, 90 Ohio St. 3d a N.E.2d at 1200*. We therefore reje sixth proposition.

phrase "guilt or innocence" in this limited context relating to punishment is totally

In proposition VII, Coley suggests tl court created an "unconstitutional,

presumption of the *mens rea* element from the use of a deadly weapon." Coley argues that the court erred by not instructing that "any inference of intent to kill from the manner and commission of the offense is nonconclusive." Coley points to HN22[↑] R.C. 2903.01(E), which then stated:

"If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit [a felony-murder] may be inferred, * * * because the offense and the manner of its commission would be likely to produce death * * *, to have intended to cause the death of any person who is killed * * * during the commission of * * * the offense, the jury *shall also be instructed that* **[***39]** *the inference is nonconclusive*, that the inference may be considered in determining intent, that it is to consider all evidence * * * in determining whether the person specifically intended to cause the death of the person killed * * *, and that the prosecution must prove the specific intent of the person to have caused the death * * * by proof beyond a reasonable doubt." (Emphasis added.) 147 Ohio Laws, 6237.

[*269] "If a wound is inflicted upo with a deadly weapon in a manner to * * * destroy life or inflict great b the purpose to cause the deat *inferred* from the use of the weapon the *use of a deadly weapon is not evidence of a purpose* to cause th another. **[**1147]** *Whether or not the inference* of purpose to kill from the deadly weapon *is entirely u* (Emphasis added.)

The trial court's instruction fully s statutory requirement that the jury any "inference is *nonconclusive*." said "inferred," not "presumed," an "may" is permissive, not mandato Further, the court specifically inst jury that "use of a deadly weap *conclusive evidence* of a purpose death and "whether or not you inference of purpose to kill from the deadly weapon is entirely up to you court repeatedly advised the jury "may not be convicted of aggravat unless" the jury found "beyond a

In fact, the trial court did instruct the jury that the inference was not conclusive:

intended to cause the death of Okdi."

Finally, this court has repeatedly rejected arguments similar to those Coley makes. See, e.g., State v. Campbell, 90 Ohio St. 3d at 342, 738 N.E.2d at 1200; State v. Stallings (2000), 89 Ohio St. 3d 280, 291, 731 N.E.2d 159, 172; State v. Getsy (1998), 84 Ohio St. 3d 180, 196, 702 N.E.2d 866, 883. See, also, State v. Coleman (1988), 37 Ohio St. 3d 286, 290, 525 N.E.2d 792, 797. We therefore reject Coley's seventh proposition.

In proposition IX, Coley challenges the court's guilt-phase reasonable doubt instruction, which incorporated the statutory definition contained in R.C. 2901.05. It is our practice to **[***41]** rule summarily on well-settled points of law. Thus we summarily overrule Coley's ninth proposition of law on authority of State v. Jones (2000), 90 Ohio St. 3d 403, 417, 739 N.E.2d 300, 316; State v. Van Gundy (1992), 64 Ohio St. 3d 230, 594 N.E.2d 604; State v. Nabozny (1978), 54 Ohio St. 2d 195, 8 Ohio Op. 3d 181, 375 N.E.2d 784, paragraph two of the syllabus.

III. Penalty Instructions

regarding sentencing considerati
argues that "the jury's discre
improperly guided" because the ju
told exactly "what trial evidence w
to the weighing process." Thus, Co
that the trial court erred by instructin

"For purposes of this proceeding,
testimony and evidence which was
in this [first] phase that is relevant
aggravating circumstances * * * an
the mitigating factors * * * are to be
by you."

[*270] However, Coley did not ob
instruction or request another
Thus, Coley waived all **[***42]** but
State v. Underwood (1983), 3 Ohio
3 Ohio B. Rep. 360, 444 N.E
syllabus. Neither plain error nor any
was involved.

Contrary to Coley's complaint, the
focused the jury's attention in the
phase. First, the court admitted o
exhibits from the guilt phase into t
phase. Cf. State v. Lindsey (200

In proposition VIII, Soley argued that his constitutional rights were violated "when the legal issue of relevance is left to the jury (trial court has "duty to determine th relevant for consideration"). The

admitted photos of El-Okdi without objection, but those were arguably relevant to the penalty phase. See *State v. Gumm (1995), 73 Ohio St. 3d 413, 653 N.E.2d 253*, syllabus; *State v. DePew (1988), 38 Ohio St. 3d 275, 528 N.E.2d 542*, paragraph one of the syllabus; *State v. Woodard, 68 Ohio St. 3d at 78, 623 N.E.2d at 81*. The trial court also admitted photos of the gun that killed El-Okdi; however, if this was in error, it was certainly harmless.

[1148]** Second, in the penalty phase the trial court instructed the jury that some "evidence and testimony" considered earlier at the guilt phase was "no longer **[***43]** relevant" for purposes of sentencing. The court instructed the jury to consider only "evidence * * * presented in [the guilt] phase that is relevant to the two aggravating circumstances" proved earlier or to mitigating factors raised by Coley.

Third, the trial court carefully instructed the jury regarding the aggravating circumstances. The court also instructed that "the aggravated murder itself is not an aggravating circumstance. * * * Rather, the aggravating

Fourth, ***HN23***[↑] the significance t the evidence or exhibits was a ma jury. "The weight to be given the evi the credibility of the witnesses are p the trier of the facts." *State v. DeHa St. 2d 230, 39 Ohio Op. 2d 366, 2 212*, paragraph one of the syllabu the penalty instructions as a \ therefore find that the trial court guided the jury as to the evidence in the penalty phase.

Finally, this court has previousl similar complaints of prejudicial er to penalty-phase instructions as to evidence **[***44]** was relevant to th process." See *State v. Jones, 91 C at 349-350, 744 N.E.2d at 1179-118*

IV. Settled Constitutional Issues

In proposition X, Coley challe constitutionality of Ohio's deat statute, but that claim can be rejected. *State v. Carter (2000), 8 3d 593, 608, 734 N.E.2d 345, 35 Clemons (1998), 82 Ohio St. 3d*

circumstances " " " are all that you will consider on the aggravation side of the scale."

*[*271] 696 N.E.2d 1009, 1023*

Poindexter (1988), 36 Ohio St.

N.E.2d 568, syllabus. Coley's challenge based on international law can also be summarily rejected. State v. Bey, 85 Ohio St. 3d at 502, 709 N.E.2d at 499; State v. Phillips (1995), 74 Ohio St. 3d 72, 103-104, 656 N.E.2d 643, 671. This international law challenge was also waived, since Coley never raised international issues before the trial court. State v. Awan (1986), 22 Ohio St. 3d 120, 22 Ohio B. Rep. 199, 489 N.E.2d 277, syllabus; State v. Williams (1977), 51 Ohio St. 2d 112, 5 Ohio Op. 3d 98, 364 N.E.2d 1364, paragraph one of the syllabus.

V. Independent Sentence Evaluation

In addition [***45] to ruling on Coley's propositions of law, HN24[↑] R.C. 2929.05(A) requires us to review Coley's death sentence independently. We must determine whether the evidence supports the jury's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether the death sentence is proportionate to those we have affirmed in similar cases. *Id.*

A. Penalty Phase Evidence

defense, including Karen Armstrong of Coley's mother; Douglas Be father; and Willie Austin and Mar Bell's sisters and Coley's aunts. In a Wayne Graves, a clinical psychologi concerning Coley's mother, Victoria testimony of these witnesses extensive documentary evidence their testimony establishes tha upbringing can be described as nightmare.

Victoria Coley, Coley's mother, w nine sisters. Victoria Coley was hos state mental hospitals some fift between 1977 (when Coley was two to 1991. Victoria also had extensive treatment when she was [*** institutionalized. Victoria, who had a 65-68 range, was a chronic schizophrenic. She also [**1149] from mixed substance abuse and personality disorders. When out of i Victoria used street drugs, drank h engaged in prostitution to obtain drugs. In 1989, Victoria was found n

Several of Coley's relatives testified for the her home that endangered her childı

Her sister-in-law, Martha Jean Davis, described Victoria as an "oversexed mental patient * * * [who] wouldn't keep her clothes on." She "would strip and run down * * * the street with no clothes on. * * * She would have sex with anyone, anybody, anywhere * * *." Victoria had sex with Davis's ten-year-old son, and reportedly had sex with her own children. When Victoria was institutionalized, her children stayed with relatives. However, Coley and his older brother, Victor, were neglected and malnourished, whether they were with Victoria or relatives. In referring to both Victoria's family and Bell's family, Davis characterized them as "all alcoholics and drug addicts." Children's Service **[*272]** Bureau and other social service records concerning Victoria and **[***47]** her family date from 1975 and document the family's horrific problems and neglect of the children, including Coley.

Douglas Bell, Coley's father, was not a positive father figure. Bell went to prison for five years when Coley was just a few months old. Bell lived with Victoria at various times, but Bell agreed that he has served about six or seven

born, Bell was usually in prison c with drugs.

Karen Armstrong, Coley's aunt, te Victoria's life went downhill after sh involved with Bell and his family be used drugs more frequently and e prostitution.

Willie Louise Austin, Bell's sister, her entire family of six brothers and was not stable. Austin testified tha been a prostitute and drug addic everyone in the family had been dr or alcoholics at some point. Th (Coley and Victor) were forced t themselves, which is "where the p and stealing and selling dope comes

Marquita Armstrong, Victoria's siste for **[***48]** the state and identifie Coley had written to her acknowledg had been taught the difference bet and wrong. Coley stayed with M times in his childhood and attend when he did. Marquita admitted boyfriend sold drugs when Coley her. She also agreed that she ha

burglary, robbery, felonious assault, drug trafficking, and other offenses. After Coley was boyfriend but "not for selling drugs."

Douglas Coley did not testify or make an unsworn statement to the jury. Although the defense presented evidence about Coley's parents and relatives, the defense presented little or no direct evidence as to Coley's character, schooling, or employment history. Coley was born on August 24, 1975, and was twenty-one years old at the time of these offenses.

Although Coley did not speak to the jury, he made an unsworn statement at the sentencing hearing. Coley told the trial court that because of his upbringing and life, "sometimes there's no way to control how you get caught up in things * * *." Coley also sent his "condolences to the El-Okdi family for what happened to their daughter * * * your sister, your friend--but I'm not that monster that was in that alley that night. * * * I ain't that monster * * *."

B. **[***49]** Sentence Evaluation

After independent assessment, we find that the evidence is sufficient to prove the aggravating circumstances, *i.e.*, that Coley **[**1150]** committed aggravated murder, as the principal offender in the course of

[*273] The nature and circumstan offense reveal nothing of mitigat Coley, assisted by Green, kidna robbed El-Okdi, an innocent your and then drove with her in her ow deserted area, where Coley shot h the eyes. Then Coley and Green left alone and uncared for, on a January

Upon a review of the evidence pr mitigation, we find that Coley's bac entitled to some weight in mitig. defense presented strong, credible that Coley's history and background chaotic, nightmarish upbringing by with very serious mental problems a who was in prison most of the time. the extended family of Victoria anc cared for Coley and his brother mother and father were institu offered no better care. Coley's h background are worthy of mitiga because **[***50]** he faced ove obstacles throughout his childhood No evidence was presented as character.

committing kidnapping and aggravated robbery.

Coley's age of twenty-one at the t offenses is a mitigating factor u

2929.04(B)(4). No evidence in the record supports other statutory mitigating factors.

Once again, as we have been in a number of death penalty cases, we are presented with a record that contains evidence of unrelenting, shocking abuse of a child by adults, including a parent. However, after weighing the aggravating circumstances against the mitigating evidence, we find that the aggravating circumstances of murder in the course of robbery and kidnapping outweigh the mitigation evidence of Coley's young age and deprived childhood.

The death penalty imposed against Coley is also appropriate and proportionate when compared with other aggravated murders involving either kidnapping or aggravated robbery. See, e.g., State v. Moore (1998), 81 Ohio St. 3d 22, 44, 689 N.E.2d 1, 20; State v. Henness (1997), 79 Ohio St. 3d 53, 69, 679 N.E.2d 686, 700; State v. Cook (1992), 65 Ohio St. 3d 516, 531, 605 N.E.2d 70, 85; **[***51]** and State v. Roe (1989), 41 Ohio St. 3d 18, 28-29, 535 N.E.2d 1351, 1363.

convictions. Finding the death appropriate and proportionate, we sentence of death. The judgment o of common pleas is hereby affirmed.

Judgment affirmed.

DOUGLAS, RESNICK, F.E. S PFEIFER, COOK and LI STRATTON, JJ., concur.

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For the foregoing reasons, we affirm the

APPENDIX B-2

State v. Jackson

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

December 5, 2019, Rendered

No. 18AP-758

Reporter
2019-Ohio-4995 *; 2019 Ohio App. LEXIS 5070 **; 2019 WL 6615076

State of Ohio, Plaintiff-Appellee, v. Kareem M. Jackson, Defendant-Appellant.

Subsequent History: Discretionary appeal not allowed by *State v. Jackson, 2020-Ohio-1393, 2020 Ohio LEXIS 886 (Ohio, Apr. 14, 2020)*

Motion denied by *State v. Jackson, 2020-Ohio-2955, 2020 Ohio LEXIS 1211 (Ohio, May 15, 2020)*

Prior History: **[**1]** APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 97CR-1902).

State v. Jackson, 2018-Ohio-2318, 2018 Ohio App. LEXIS 2505 (Ohio Ct. App., Franklin County, June 14, 2018)

Disposition: Judgment affirmed.

Core Terms

trial court, post conviction relief, apartment, assigned error, grounds for relief, asserts, robbery, evidentiary hearing, handgun, lack jurisdiction, death sentence, abused, unavoidably, canceling, discovery, corpus, killed, reasonable factfinder, meaningful access, motion for leave, specifications, conducting, retrieved, sentences, overrule, untimely

Case Summary

Overview

HOLDINGS: [1]-Trial court did not abuse its discretion by reconsidering the jurisdictional issue and canceling the evidentiary hearing based on its conclusion that it lacked jurisdiction over the second post-conviction relief petition because the trial court lacked jurisdiction over the second petition since it failed to satisfy the requirements of *R.C. 2953.23(A)* and, thus, likewise lacked jurisdiction to conduct an evidentiary hearing on that petition; [2]-Assuming without deciding that appellant was unavoidably prevented from discovering the facts upon which he relied, the second post-conviction relief petition failed to demonstrate by clear and convincing evidence that, but for the alleged errors, no reasonable factfinder would have found him guilty at trial as the evidence that he was the shooter and evidence tying him to the handgun was sufficient to convict.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Capital Punishment

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Findings

HN1[⬇] Sentencing, Capital Punishment

The United States Supreme Court held in Hurst that Florida's capital sentencing scheme violated the Sixth Amendment because although it allowed the jury to make a recommendation that the death penalty be imposed, it ultimately required the trial judge to independently find and weigh the aggravating and mitigating circumstances before issuing a sentence of death.

Criminal Law & Procedure > Counsel > Right to Counsel > Postconviction

Criminal Law & Procedure > Postconviction Proceedings

HN2[⬇] Right to Counsel, Postconviction

Postconviction relief proceedings are considered civil in nature, and there is no constitutional right to counsel in state postconviction relief proceedings. Ohio law provides a limited statutory right to counsel for an initial timely postconviction relief petition by an indigent criminal defendant sentenced to death. Pursuant to R.C. 2953.21(J), when an indigent defendant sentenced to death intends to file a postconviction relief petition, the trial court is required to appoint counsel to represent the defendant. However, this statutory provision does not extend to successive or untimely postconviction relief petitions under R.C. 2953.23.

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Criminal Law & Procedure > Habeas Corpus > Procedural Defenses > Successive Petitions

HN3[⬇] Postconviction Proceedings, Findings of Fact & Conclusions of Law

R.C. 2953.21(D) provides that before granting a hearing on a petition filed under R.C. 2953.21(A), the court shall determine whether there are substantive grounds for relief. Indeed, the trial court has a statutorily imposed duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing. The Second PCR Petition was filed beyond the time provided in R.C. 2953.21, and it was Jackson's second request for postconviction review; therefore, it was also subject to the requirements of R.C. 2953.23. That statute provides that a court may not entertain an untimely or successive postconviction relief petition unless the requirements of R.C. 2953.23(A)(1) or (2) are met. The Supreme Court of Ohio has held that unless the requirements of R.C. 2953.23(A)(1) or (2) are satisfied, a court lacks jurisdiction over a successive postconviction relief petition. A trial court lacks subject-matter jurisdiction over an untimely or successive petition for postconviction relief unless the petition satisfies the criteria set forth under R.C. 2953.23(A).

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

HN4[⬇] Postconviction Proceedings, Findings of Fact & Conclusions of Law

If the trial court lacked jurisdiction over the Second post conviction relief (PCR) petition because it failed to satisfy the requirements of R.C. 2953.23(A) the court likewise lacked jurisdiction to conduct an evidentiary hearing on that petition. The purpose of a hearing on a postconviction claim is to aid the court in determining the claim on its merits. It follows

that the court need not conduct a hearing on a postconviction claim that the court has no jurisdiction to entertain. Assuming for purposes of analysis that the trial court initially concluded it had jurisdiction over the Second PCR Petition at the time it scheduled the hearing, the trial court could later reconsider the issue of jurisdiction. The law of the case doctrine does not foreclose reconsideration of subject-matter jurisdiction.

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Criminal Law & Procedure > Habeas Corpus > Procedural Defenses > Successive Petitions

HN5[] Postconviction Proceedings, Findings of Fact & Conclusions of Law

R.C. 2953.23(A)(1) provides that a trial court may not entertain an untimely or successive petition for postconviction relief unless both of the following conditions apply: (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A) (2) of R.C. 2953.21 or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right. (b) The petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Criminal Law & Procedure > Habeas Corpus > Procedural Defenses > Successive Petitions

HN6[] De Novo Review, Conclusions of Law

Because R.C. 2953.23 is jurisdictional, the issue of whether a successive postconviction relief petition satisfies the requirements of R.C. 2953.23(A) is a question of law, which the court reviews de novo.

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN7[] Postconviction Proceedings, Findings of Fact & Conclusions of Law

With respect to the first prong of the R.C. 2953.23(A)(1) test, the phrase unavoidably prevented in R.C. 2953.23(A)(1)(a) means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Criminal Law & Procedure > Postconviction Proceedings > Findings of Fact & Conclusions of Law

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of

Legislation

HN8[↓] Case or Controversy, Constitutionality of Legislation

To the extent a petitioner seeks to assert an as-applied challenge to R.C. 2953.23(A)(1)(b), the appellate court has held that the Ohio General Assembly imposes a clear and convincing standard in order to balance the State's need for final judgment against a petitioner's right to challenge his conviction on the basis of constitutional violations. Thus, the statute is not unconstitutional.

Counsel: On brief: Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellee.

Argued: Steven L. Taylor.

On brief: Carpenter Lipps & Leland LLP, and Kort Gatterdam, for appellant. Argued: Kort Gatterdam.

Judges: DORRIAN, J. KLATT, P.J., and SADLER, J., concur.

Opinion by: DORRIAN

Opinion

(REGULAR CALENDAR)

DECISION

DORRIAN, J.

[*P1] Defendant-appellant, Kareem M. Jackson, appeals from a judgment of the Franklin County Court of Common Pleas denying his second petition for postconviction relief. For the following reasons, we affirm.

I. Facts and Procedural History

[*P2] Jackson was indicted in 1997 on six counts of aggravated murder with death penalty specifications and firearm specifications, related to the killings of Antorio Hunter and Terrance Walker. Jackson was also indicted on four counts of kidnapping with firearm specifications and four counts of aggravated robbery with firearm specifications, related to Hunter, Walker, and two other victims, Nikki Long and Becky Lewis, and one count of felonious assault with a firearm specification related to Lewis. The trial court dismissed the aggravated robbery charge related to Lewis and **[**2]** the case proceeded to a jury trial on all remaining charges. The facts of the case were fully detailed by the Supreme Court of Ohio in *State v. Jackson, 92 Ohio St.3d 436, 438, 2001- Ohio 1266, 751 N.E.2d 946 (2001)* ("*Jackson I*") and will only be briefly summarized below as is necessary for our review.

[*P3] The evidence at trial indicated that Jackson, Michael Patterson, Derrick Boone, and a man identified as "Little Bee" planned to rob an apartment where drugs were being sold. Jackson and Little Bee planned to enter the apartment first and buy drugs. Patterson and Boone would then enter the apartment, and the four men would commit the robbery. Malaika Williamson drove the four men to the apartment. *Id.* When Jackson and the others arrived at the apartment, Hunter, Walker, Long, and Lewis were present. Boone testified at trial that, as planned, after Jackson and Little Bee purchased marijuana, Boone and Patterson burst into the apartment with shotguns. After the men searched the apartment for drugs and money, Patterson and Little Bee left the apartment. At that point, Long and Lewis were located in the kitchen of the apartment, while Jackson and Boone were in the living room with Hunter and Walker, who had been told to lie on the floor. Boone testified Jackson stated **[**3]** he had to kill Hunter and Walker because they recognized him and knew his name. Boone stated that

Jackson shot Hunter and Walker in the head with a handgun, first placing a pillow over each man's head before firing. Boone and Jackson then joined Patterson and Little Bee in the car and Williamson drove the men back to her apartment. Long and Lewis then fled the apartment and called the police.

[*P4] Long gave a description of Boone to police and a composite portrait was created and distributed to the sheriff's department and the media. Shortly after the sketch was released, Boone turned himself in to the sheriff's department. Boone made a statement implicating appellant in the shooting. Lewis subsequently identified a photo of appellant as the man who had a handgun during the robbery. Lewis also testified at trial that Jackson was the only individual she saw with a handgun.

[*P5] Williamson testified she drove Jackson, Boone, Patterson, and Little Bee to the apartment where the robbery occurred and drove them away afterward. Williamson testified that when she picked up Jackson and Boone prior to the robbery they placed two long guns in the trunk of her car. When the men were at Williamson's home **[**4]** prior to the robbery, she also saw both Jackson and Little Bee with handguns. Williamson testified that after the robbery, Jackson placed a handgun in a closet at her home. She also stated she had previously seen Jackson with that same handgun. Police later retrieved the handgun when a sheriff's deputy, posing as Jackson's uncle, went to Williamson's apartment with Boone and told Williamson the gun belonged to the "uncle." The handgun recovered from Williamson's apartment was tested and found to have fired the bullets retrieved from Hunter. Although the gun could not be conclusively matched to the bullet retrieved from Walker, the bullet was of the same caliber and possessed some characteristics matching the gun. Police also searched the apartment Jackson shared with his girlfriend, Ivana King, and retrieved a shotgun and two rifles. When police interviewed King, she stated Jackson told her he had "done two people," meaning that he had killed two people. At trial, King testified she did not remember having that conversation with Jackson, but that to the best of her knowledge she told police the truth when she was interviewed.

[*P6] The jury found Jackson guilty on all charges and recommended **[**5]** the death sentence. *Jackson I at 438*. The trial court accepted this recommendation and sentenced Jackson to death. *Id.*

A. Direct Appeal

[*P7] Jackson filed a direct appeal of his convictions and sentences to the Supreme Court, setting forth 17 propositions of law, which the court reviewed and overruled. *Id. at 438-51*. The court also independently reviewed the death sentences for appropriateness and proportionality. The court concluded the aggravating circumstances outweighed the mitigating factors and the sentences were appropriate and proportionate when compared with similar capital cases. *Id. at 451-53*.

B. First Postconviction Relief Petition

[*P8] Jackson filed a petition for postconviction relief pursuant to *R.C. 2953.21* in April 1999, presenting 26 grounds for relief. *State v. Jackson, 10th Dist. No. 01AP-808, 2002-Ohio-3330*. The trial court denied Jackson's petition for postconviction relief without conducting an evidentiary hearing. *Id. at ¶ 33*. On appeal, this court affirmed the trial court's denial of Jackson's first petition for postconviction relief, concluding the trial court did not abuse its discretion by denying the petition without a hearing because the grounds for relief stated in the petition were barred by res judicata or were otherwise insufficient to warrant a hearing. *Id. at ¶ 40-97*. **[**6]**

C. Federal Habeas Corpus Petition

[*P9] Jackson then filed a petition for a writ of habeas corpus in federal court, which was denied. *Jackson v. Bradshaw, 681 F.3d 753, 756 (6th Cir.2012)*. Jackson appealed, raising multiple claims. The federal Sixth Circuit Court of Appeals ultimately affirmed the denial of Jackson's petition for a writ of habeas corpus. *Id. at 780*.

D. Second Postconviction Relief Petition and Other Motions

[*P10] On November 14, 2016, Jackson, represented by the Office of the Ohio Public Defender, filed a second petition for postconviction relief ("Second PCR Petition"). In the Second PCR Petition, Jackson asserted six alleged constitutional errors that constituted grounds for relief. Plaintiff-appellee, State of Ohio, filed an answer indicating it did not oppose an evidentiary hearing on the Second PCR Petition, thus effectively conceding to a hearing, but asserting Jackson would be unable to meet the statutory standard for such a petition.

[*P11] On January 11, 2017, Jackson's attorneys also moved for leave to file a motion for a new mitigation trial pursuant to *Crim.R. 33* and *Hurst v. Florida, U.S. , 136 S.Ct. 616, 193 L. Ed. 2d 504 (2016)* ("motion for leave to file a *Hurst* motion").[1] The state filed a memorandum in opposition to the motion for leave to file a *Hurst* motion.

[*P12] On April 27, 2017, the trial **[**7]** court conducted a status conference and subsequently issued an amended case schedule setting discovery deadlines and scheduling a hearing on the Second PCR Petition for December 14, 2017.

[*P13] In June 2017, Jackson's attorneys moved the court for leave to conduct discovery for the evidentiary hearing on the Second PCR Petition, which the state opposed. Four months passed without a ruling on that motion; in October 2017, Jackson's attorneys moved to expedite the court's ruling on the motion for discovery.

[*P14] In an entry issued November 7, 2017, a visiting judge sitting by assignment denied the motion for leave to file a *Hurst* motion.

[*P15] On December 1, 2017, that same visiting judge denied Jackson's motion for leave to conduct discovery prior to the December 14, 2017 hearing on the Second PCR Petition.

[*P16] On December 6, 2017, Jackson filed an appeal of the trial court's denial of his motion for leave to file a *Hurst* motion. Two days later, Jackson moved to vacate the December 14, 2017 hearing date for the Second PCR Petition, asserting the trial court lacked jurisdiction over the matter while the appeal was pending. Then, on December 12, 2017, the state moved to dismiss the Second PCR Petition, effectively **[**8]** withdrawing its concession to conducting a hearing and arguing the trial court should dismiss the petition without a hearing. The same day, the trial court issued an entry continuing the hearing date, noting the pending appeal and four pending motions.

[*P17] On June 14, 2018, this court issued a decision affirming the trial court's denial of Jackson's motion for leave to file a *Hurst* motion. *State v. Jackson, 10th Dist. No. 17AP-863, 2018-Ohio-2318*.

[*P18] On September 20, 2018, the trial court

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HN1[↑] The United States Supreme Court held in *Hurst* that Florida's capital sentencing scheme violated the *Sixth Amendment* because although it allowed the jury to make a recommendation that the death penalty be imposed, it ultimately required the trial judge to independently find and weigh the aggravating and mitigating circumstances before issuing a sentence of death. *Hurst at 620-22*. In his memorandum for leave to file a *Hurst* motion, Jackson suggested that he would argue that under *Hurst* his death sentence violated the *Sixth* and *Fourteenth Amendments to the United States Constitution* and that a new mitigation trial was warranted under ***Crim.R. 33(A)***.

conducted a status conference on the case. The following day, without conducting a hearing on the Second PCR Petition, the trial court issued a decision granting the state's motion to dismiss the Second PCR Petition.

II. Assignments of Error

[*P19] Jackson appeals and assigns the following five assignments of error for our review:

> [I.] THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT MEANINGFUL ACCESS TO THE COURT.
> [II.] THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLANT DUE PROCESS BY CANCELING THE EVIDENTIARY HEARING AND RULING ON THE PETITION WITHOUT TAKING NECESSARY EVIDENCE.
> [III.] THE TRIAL COURT ERRED IN DENYING APPELLANT'S FIRST, SECOND AND FOURTH GROUNDS FOR RELIEF.
>
> [IV.] BECAUSE IVANA KING SWORE UNDER OATH THAT APPELLANT DID NOT CONFESS AND SHE **[**9]** WAS INTIMIDATED BY POLICE INTO SAYING APPELLANT "CONFESSED" IN AN UNSWORN STATEMENT, THE TRIAL COURT ERRED IN FINDING APPELLANT'S GROUND FOR RELIEF "SPECULATIVE."
>
> [V.] *O.R.C. § 2953.23(A)(1)(b)* IS UNCONSTITUTIONAL AS APPLIED TO APPELLANT'S SUCCESSOR POSTCONVICTION PETITION.

III. Analysis

A. First Assignment of Error — Denial of Meaningful Access to Court

[*P20] Jackson asserts in his first assignment of error the trial court abused its discretion and violated his right to due process by denying meaningful access to the court. Jackson argues his attorneys failed to act in his best interests and the trial court failed to respond to Jackson's complaints regarding his attorneys' actions.[2] Jackson claims the trial court abused its discretion by not conducting a hearing to address his complaints, but ultimately it appears Jackson wanted the trial court to appoint new counsel to represent him. Jackson sent two letters to the trial court in December 2017 advising the court he was unhappy with his attorneys' management of the case and lack of responsiveness to his inquiries. In those letters, Jackson complained his attorneys were not adequately prepared for the hearing on the Second PCR Petition and improperly sought to delay **[**10]** the hearing. Jackson also claimed he only consented to the attempt to file a *Hurst* motion on the belief it would not interfere with the Second PCR Petition. Jackson requested the court appoint different counsel to represent him.

[*P21] *HN2*[↑] Postconviction relief proceedings are considered civil in nature, and there is no constitutional right to counsel in state postconviction relief proceedings. *State v. Waddy, 10th Dist. No. 15AP-397, 2016-Ohio-4911, ¶ 42-43, 68 N.E.3d 381*. Ohio law provides a limited statutory right to counsel for an initial timely postconviction relief petition by an indigent criminal defendant sentenced to death. Pursuant to *R.C. 2953.21(J)*, when an indigent defendant sentenced to death intends to file a postconviction relief petition, the trial court is required to appoint counsel to represent the defendant. However, this statutory provision does not extend to successive or untimely postconviction relief petitions under *R.C. 2953.23*. *Waddy at ¶ 51*; *State v. Conway, 10th Dist. No. 12AP-412, 2013-Ohio-3741, ¶ 72*. Thus, Jackson did not have a constitutional or statutory right to counsel for the Second PCR Petition.

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[2] Subsequent to the filing of the present appeal, Jackson obtained new counsel and is not represented by the same attorney on appeal as he was in the proceedings below.

[*P22] Jackson argues his attorneys ceased acting as his agents, thereby denying his right to due process and meaningful access to the court, citing *Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010)*. In *Holland*, the defendant, Albert Holland, had been convicted of first-degree murder **[**11]** and sentenced to death. *Holland at 634*. Following an unsuccessful direct appeal of his conviction and sentence, Holland's court-appointed counsel filed a motion for postconviction relief in the state trial court. During the three years that Holland's state postconviction relief petition was pending, Holland wrote multiple letters urging his counsel to ensure that his claims would be preserved for federal habeas corpus review. *Id. at 636*. Despite repeated written requests from Holland, his counsel failed to timely file a federal habeas corpus petition after his state postconviction relief petition was denied. *Id. at 638*. Holland ultimately filed an untimely pro se federal habeas corpus petition upon learning that the Florida Supreme Court had issued a final determination in his postconviction relief petition. *Id. at 639*. The United States Supreme Court held that the relevant statutory limitations period was subject to equitable tolling in extraordinary circumstances and remanded to the Court of Appeals to determine whether the circumstances of the case warranted equitable tolling. *Id. at 652-54*. Justice Alito wrote a separate concurrence in *Holland* noting that Holland argued his attorney essentially abandoned him by almost completely failing **[**12]** to communicate with him or respond to his inquiries for several years. *Id. at 659*.

[*P23] Jackson argues his case is analogous to *Holland*, asserting his attorneys effectively abandoned him by disregarding his requests to proceed with the evidentiary hearing on the Second PCR Petition without delay. However, unlike Holland's attorney, who failed to respond to inquiries over a series of years and failed to adequately protect his client's interests, it is clear that in this case Jackson's attorneys were actively pursuing a dual-track strategy involving both a successive petition for postconviction relief and a request for a new mitigation trial. Within the context of the Second PCR Petition, Jackson's attorneys actively sought discovery of matters they argued were relevant to the petition. Although Jackson may not have agreed with his attorneys' dual-track approach, their actions in this case do not constitute the type of abandonment contemplated in *Holland*.

[*P24] Under these circumstances, we cannot find the trial court abused its discretion or that Jackson was denied meaningful access to the court. Accordingly, we overrule Jackson's first assignment of error.

B. Second Assignment of Error — Failure to Conduct [**13] Hearing on Petition

[*P25] Jackson argues in his second assignment of error the trial court abused its discretion by canceling the December 14, 2017 evidentiary hearing and ruling on the Second PCR petition without conducting an evidentiary hearing. Jackson asserts the trial court had a statutory duty to ensure the postconviction relief petition contained sufficient evidence to warrant a hearing before granting one; therefore, the court must have implicitly concluded there was sufficient evidence when it scheduled a hearing on the Second PCR Petition. Jackson claims the trial court acted arbitrarily by canceling the hearing because the only change that occurred during the intervening period was the delay created by his attorneys' additional filings.

[*P26] *HN3*[↑] *R.C. 2953.21(D)* provides that "[b]efore granting a hearing on a petition filed under [*R.C. 2953.21(A)*], the court shall determine whether there are substantive grounds for relief." *See also State v. Cole, 2 Ohio St.3d 112, 113, 2 Ohio B. 661, 443 N.E.2d 169 (1982)* ("Indeed, the trial court has a statutorily imposed duty to ensure that the

petitioner adduces sufficient evidence to warrant a hearing."). The Second PCR Petition was filed beyond the time provided in R.C. 2953.21, and it was Jackson's second request for postconviction review; therefore, it was also **[**14]** subject to the requirements of R.C. 2953.23. That statute provides that a court "may not entertain" an untimely or successive postconviction relief petition unless the requirements of R.C. 2953.23(A)(1) or (2) are met. The Supreme Court of Ohio has held that unless the requirements of R.C. 2953.23(A)(1) or (2) are satisfied, a court lacks jurisdiction over a successive postconviction relief petition. State v. Apanovitch, 155 Ohio St.3d 358, 2018-Ohio-4744, ¶ 38, 121 N.E.3d 351. See also State v. Conway, 10th Dist. No. 17AP-90, 2019-Ohio-382, ¶ 8 ("A trial court lacks subject-matter jurisdiction over an untimely or successive petition for postconviction relief unless the petition satisfies the criteria set forth under R.C. 2953.23(A).").

[*P27] Although the circumstances in this case are unusual because the trial court initially scheduled a hearing before later canceling it and denying the Second PCR Petition without a hearing, ***HN4***[↑] if the trial court lacked jurisdiction over the Second PCR Petition because it failed to satisfy the requirements of R.C. 2953.23(A) the court likewise lacked jurisdiction to conduct an evidentiary hearing on that petition. See State v. Peoples, 1st Dist. No. C-050620, 2006-Ohio-2614, ¶ 10 ("[T]he purpose of a hearing on a postconviction claim is to aid the court in determining the claim on its merits. It follows that the court need not conduct a hearing on a postconviction claim that the court has no jurisdiction to entertain."). Assuming for **[**15]** purposes of analysis that the trial court initially concluded it had jurisdiction over the Second PCR Petition at the time it scheduled the hearing, the trial court could later reconsider the issue of jurisdiction. See Amen v. Dearborn, 718 F.2d 789, 794 (6th Cir.1983) ("[T]he law of the case doctrine does not foreclose reconsideration of subject-matter jurisdiction."). Therefore, we cannot conclude the trial court abused its discretion by reconsidering the jurisdictional issue and canceling the evidentiary hearing based on its conclusion that it lacked jurisdiction over the Second PCR Petition.

[*P28] Accordingly, we overrule Jackson's second assignment of error.

C. Third and Fourth Assignments of Error — Error to Deny Petition

[*P29] Having concluded the trial court did not abuse its discretion by canceling the previously scheduled hearing once it determined it lacked jurisdiction over the Second PCR Petition, we turn to the question of whether the trial court erred by concluding it lacked jurisdiction over the petition. The trial court generally held that Jackson failed to establish he was unavoidably prevented from discovering the facts he relied on to obtain relief and that, but for the alleged constitutional errors at trial, no reasonable **[**16]** factfinder would have found him guilty. The court also briefly addressed each of the specific grounds for relief presented in the Second PCR Petition, finding that none of the alleged grounds was sufficient to meet the standard of R.C. 2953.23(A)(1). In his third assignment of error, Jackson asserts the trial court erred by denying the first, second, and fourth grounds for relief presented in his Second PCR Petition. In his fourth assignment of error, Jackson asserts the trial court erred by denying the fifth ground for relief presented in the Second PCR Petition.[3] Because both of these assignments of error involve the trial court's conclusion that Jackson failed to satisfy the requirements of R.C. 2953.23(A)(1), we will address them together.

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[3] Jackson does not address the trial court's denial of his third or sixth grounds for relief in the Second PCR Petition in his brief on appeal, and appears to have abandoned any appeal of those issues.

[*P30] HN5[↑] As relevant to the present appeal, R.C. 2953.23(A)(1) provides that a trial court may not entertain an untimely or successive petition for postconviction relief unless both of the following conditions apply:

> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States **[**17]** Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
>
> (b) The petitioner shows by clear and convincing evidence that, but for the constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

[*P31] HN6[↑] Because R.C. 2953.23 is jurisdictional, the issue of whether a successive postconviction relief petition satisfies the requirements of R.C. 2953.23(A) is a question of law, which we review de novo. Apanovitch at ¶ 24; Conway at ¶ 11; State v. Teitelbaum, 10th Dist. No. 19AP-137, 2019-Ohio-3175, ¶ 12.

[*P32] Jackson asserted in his first ground for relief that the prosecution withheld police reports indicating that Long and Lewis described the probable shooter as being approximately 5'4" tall and heavyset, with a medium complexion. Jackson argued this physical description was inconsistent with his height of 5'8" or 5'9" and dark complexion. Similarly, in his second ground for relief, Jackson **[**18]** asserted that recently discovered materials indicated there were three assailants during the robbery and shooting, rather than four, and that Jackson did not match the physical description of any of the assailants. In his fourth ground for relief, Jackson claimed that evidence not disclosed to the defense indicated Little Bee had a motive for the killings—i.e., to send a message to a rival drug dealer. Finally, in his fifth ground for relief, Jackson asserted King had recanted a portion of her testimony, stating that Jackson never told her he "done two people," and she only told police this because she felt intimidated and feared she would be jailed or prevented from going home to her children.

[*P33] HN7[↑] With respect to the first prong of the R.C. 2953.23(A)(1) test, "[t]he phrase 'unavoidably prevented' in R.C. 2953.23(A)(1)(a) means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence." State v. Turner, 10th Dist. No. 06AP-876, 2007-Ohio-1468, ¶ 11. The trial court generally found Jackson failed to show he was unavoidably prevented from discovering the facts relied on in his claims for relief in the Second PCR Petition. The court stated the record indicated Jackson's trial counsel was aware of the witness descriptions cited in support of **[**19]** the first ground for relief. The court further noted with respect to the second ground for relief that the disputed number of robbers was raised at trial. The court rejected Jackson's claims about Little Bee's purported motive by noting there were testimony and interviews in the record indicating that witnesses referred to Little Bee as a participant in the robbery. Finally, with respect to the fifth ground for relief, the trial court noted the defense team interviewed King before trial, suggesting that presumably she could have disclosed any untruth in her statement to police at that time.

[*P34] We need not decide the question of whether Jackson was unavoidably prevented from discovering the facts upon which he relied in the Second PCR Petition because we conclude the Second PCR Petition fails to satisfy the second prong of the R.C. 2953.23(A)(1) standard. Assuming without deciding that Jackson was unavoidably prevented from discovering the facts upon which he relies, the Second PCR Petition fails to demonstrate by clear and convincing evidence that, but for the alleged errors, no reasonable factfinder would have found him guilty at trial. R.C. 2953.23(A)(1)(b). The alleged errors claimed in the Second PCR Petition related to **[**20]** the testimony of Long, Lewis, and King, and the theory that Little Bee was the actual shooter. However, the alleged errors cited in the Second PCR Petition, even if proved, would not implicate the *other* evidence identifying Jackson as the shooter—specifically, Boone's direct testimony that Jackson fired the shots that killed Hunter and Walker, and the evidence tying Jackson to the handgun retrieved from Williamson's apartment, which was found to have fired the shots that killed Hunter. That evidence, if found credible by a jury, would have been sufficient to convict Jackson. Therefore, the Second PCR Petition failed to establish that *no reasonable factfinder* could have found him guilty if the alleged errors had not occurred. The trial court did not err by denying the merits of the Second PCR Petition.

[*P35] Accordingly, we overrule Jackson's third and fourth assignments of error.

D. Fifth Assignment of Error — Error to Deny Constitutional Challenge

[*P36] In his fifth assignment of error, Jackson asserts that R.C. 2953.23(A)(1)(b) is unconstitutional as applied to the facts of his case. Although Jackson purports to set forth an "as-applied" challenge to R.C. 2953.23(A)(1)(b) in his fifth assignment of error, several of the arguments contained **[**21]** in his brief assert facial challenges to the statute's constitutionality. Jackson asserts the statute violates the Supremacy Clause of the United States Constitution, the doctrine of separation of powers under the Ohio Constitution, and the "Due Course of Law" and "Open Courts" provisions of *Article I, Section 16 of the Ohio Constitution.* To the extent Jackson asserts a facial challenge to the statute under these provisions, this court has previously rejected those arguments in other decisions and we are bound by those precedents. *See* State v. Conway, 10th Dist. No. 12AP-412, 2013-Ohio-3741, ¶ 61-62. Similarly, HN8[↑] to the extent Jackson seeks to assert an as-applied challenge to the statute, this court has held that "the General Assembly imposed a 'clear and convincing' standard in order to balance the State's need for final judgment against a petitioner's right to challenge his conviction on the basis of constitutional violations." *Id.* at ¶ 63. Thus, the statute is not unconstitutional as applied to Jackson.

[*P37] Accordingly, we overrule Jackson's fifth assignment of error.

IV. Conclusion

[*P38] For the foregoing reasons, we overrule Jackson's five assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT, P.J., and SADLER, J., concur.

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APPENDIX B-3

State v. Guy

Court of Appeals of Ohio, Sixth Appellate District, Sandusky County

February 19, 2016, Decided

Court of Appeals No. S-15-019

Reporter
2016-Ohio-619 *; 2016 Ohio App. LEXIS 538 **; 2016 WL 698039

State of Ohio, Appellee v. James D. Guy,

Appellant

Prior History: [**1] Trial Court No. 11 CR 215.

State v. Guy, 2013 Ohio 7, 2013 Ohio App. LEXIS 6 (Ohio Ct. App., Sandusky County, Jan. 4, 2013)

Disposition: Judgment affirmed.

Core Terms

trial court, postconviction, assigned error, untimely, post conviction relief, sentence, direct appeal, merits

Counsel: James D. Guy, Pro se.

Judges: YARBROUGH, J. Mark L. Pietrykowski, J., Stephen A. Yarbrough, J., James D. Jensen, P.J., CONCUR.

Opinion by: Stephen A. Yarbrough

Opinion

DECISION AND JUDGMENT

YARBROUGH, J.

I. Introduction

[*P1] Appellant, James Guy, appeals the judgment of the Sandusky County Court of Common Pleas, dismissing his petition for postconviction relief. We affirm.

A. Facts and Procedural Background

[*P2] The underlying facts of this case were briefly summarized in our decision in State v. Guy, 6th Dist. Sandusky No. S-11-034, 2013-Ohio-7, as follows:

> On March 18, 2011, appellant was indicted on four counts of felonious assault and two counts of attempted murder in connection with an incident that occurred on February 18, 2011, in which two men were stabbed outside a Clyde, Ohio, bar. On May 18, 2011, appellant entered a plea of guilty to two counts of felonious assault, second degree felonies, and the remaining counts were dismissed. Appellant was sentenced to eight years on each count to be served consecutively.

[*P3] On August 10, 2011, appellant timely appealed his convictions to this court, asserting four assignments of error relating to the trial court's imposition of consecutive sentences. [**2] On January 4, 2013, we affirmed appellant's convictions. Id. at ¶ 12. Appellant was represented on appeal by the same counsel that represented him during the trial court proceedings.

[*P4] On February 15, 2013, appellant, acting pro se, filed a notice of appeal with the Supreme Court of Ohio. In his memorandum in support of jurisdiction, appellant raised the same issues concerning the trial court's imposition of sentence that were asserted in his appeal to this court. Two months later, the Supreme Court declined to accept jurisdiction over the appeal.

[*P5] Almost one year after the Supreme Court dismissed appellant's appeal, appellant filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio, Eastern Division. Once again, the issues raised in the petition were exclusively related to the trial court's imposition of consecutive sentences. Ultimately, the federal court dismissed appellant's petition on March 9, 2015. *Guy v. Kelly, N.D.Ohio No. 3:14 CV 00792, 2015 U.S. Dist. LEXIS 28515, 2015 WL 1036487 (Mar. 9, 2015)*.

[*P6] While appellant's habeas petition was pending before the federal court, he filed a pro se "Petition to Vacate or Set Aside Judgment of Conviction or Sentence." In his petition, appellant **[**3]** argued that he was entitled to postconviction relief based upon his trial counsel's ineffective assistance. More specifically, appellant asserted that his guilty plea was involuntary in that it was predicated upon his counsel's false advice that he could receive a sentence of life in prison if he was convicted of the charges contained in the indictment.[1]

[*P7] As a follow-up to his postconviction petition, appellant, on February 20, 2015, filed a motion to supplement the petition with an additional basis for postconviction relief, namely that the trial court violated his constitutional rights in accepting his guilty plea without complying with the mandates of *Crim.R. 11*. Three days later, the trial court ordered the state to file a response to appellant's petition and supplemental motion within 30 days. Thereafter, the state filed three separate requests to extend the deadline for its response. The court granted each of these motions, ultimately extending the deadline to April 29, 2015. Despite the extensions, the state did **[**4]** not file its response until April 30, 2015, at which time the state moved to dismiss appellant's postconviction petition as untimely filed.

[*P8] Because the state filed its response after the deadline set by the trial court, appellant moved the court to strike the state's response. Without ruling on appellant's motion to strike, the trial court, on May 29, 2015, issued its decision granting the state's motion to dismiss. In its decision, the trial court found that appellant's petition was filed outside the 365-day window under *R.C. 2953.21(A)(2)*. Further, the court determined that appellant's petition failed on the merits. Appellant's timely appeal followed.

B. Assignments of Error

[*P9] On appeal, appellant raises the following assignments of error:

> First Assignment of Error: The trial court failed to make a ruling on Mr. Guy's motion to strike the [state's] motion to dismiss. The trial court abused their [discretion] when it made a ruling dismissing Guy's petition without [considering] his motion to strike, in violation of his due process rights to redress his claims in a court of law.
>
> Second Assignment of Error: The trial court failed to issue a final-appealable order when they did not support their ([May] 29, **[**5]** 2015) judgment entry with both findings of fact and conclusions of law.
>
> Third Assignment of Error: The trial court abused their [discretion] when they dismissed Mr. Guy's constitutional claim [number one].
>
> [Fourth Assignment of Error:] The trial court abused their [discretion] when they dismissed Mr. Guy's constitutional claim [number two.]
>
> Fifth Assignment of Error: The trial court abused their [discretion] when they dismissed Mr. Guy's constitutional claim

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1 Notably, the indictment included two counts of attempted murder in violation of *R.C. 2903.02* and *2923.02*, felonies of the first degree, which were punishable by prison sentences of 15 years to life.

[number three.]

II. Analysis

[*P10] In appellant's assignments of error, he asserts that the trial court erred in dismissing his petition for postconviction relief. He raises several arguments in support of his assignments of error. However, as a threshold matter, we must consider the timeliness of appellant's petition.

[*P11] Under R.C. 2953.21(A)(2), absent certain exceptions that are inapplicable in this case, a petition for postconviction relief must be filed "no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication * * *." The filing time limit requirement is jurisdictional. R.C. 2953.23(A). "Therefore, if the petition has been untimely filed, **[**6]** the trial court cannot consider the substantive merits of the petition and must summarily dismiss it without addressing the merits of the petition." State v. Unsworth, 6th Dist. Lucas No. L-14-1238, 2015-Ohio-3197, ¶ 16.

[*P12] Here, appellant acknowledges that the trial transcript in his direct appeal was filed with this court on September 19, 2011. Therefore, his postconviction petition was untimely as it was not filed with the trial court until November 6, 2014, well beyond the 365-day period set forth in R.C. 2953.21(A)(2).

[*P13] Appellant attempts to avoid the dismissal of his postconviction petition on timeliness grounds by referencing the decision of the Sixth Circuit in Gunner v. Welch, 749 F.3d 511 (6th Cir.2014). There, the Sixth Circuit determined that the federal district court erred in dismissing Gunner's habeas petition on procedural grounds. The district court's dismissal was predicated upon a finding that habeas relief was procedurally forfeited since Gunner failed to file a petition for postconviction relief in state court. Id. at 515. However, the Sixth Circuit excused Gunner's failure to file a postconviction petition because it found that Gunner's appellate counsel on direct appeal failed to inform him of the timetable for filing the petition under R.C. 2953.21, or notify him **[**7]** when the trial transcript was filed with the appellate court. Id. at 520. Consequently, the district court's dismissal of Gunner's habeas petition was reversed and the matter was remanded to the trial court for consideration of the petition on the merits. *Id.*

[*P14] Having examined appellant's timeliness argument in light of the Sixth Circuit's decision in *Gunner*, we remain unpersuaded that his postconviction petition was timely filed. We read the Sixth Circuit's holding in *Gunner* as allowing federal habeas petitions to go forward despite a defendant's failure to file a postconviction petition under the unique circumstances that were applicable in that case. We do not find Gunner relevant to our determination of whether an untimely postconviction petition should be accepted by Ohio courts where appellate counsel fails to inform the defendant of the 365-day time period under R.C. 2953.21(A)(2). In so finding, we are in agreement with the Eighth District's decision in State v. Taylor, 8th Dist. Cuyahoga No. 102020, 2015-Ohio-1314, wherein the court considered the Sixth Circuit's decision in *Gunner*, but found that its holding was limited to federal habeas claims. Id. at ¶ 14. The court went on to find that *Gunner* was in conflict with Ohio law to the extent that it could be read to **[**8]** create an exception to the time limit for filing postconviction petitions under R.C. 2953.21(A)(2). Id. at ¶ 15.

[*P15] Even if we were to extend the applicability of the exception set forth in *Gunner* to postconviction petitions, our finding that appellant's petition was untimely would remain. As noted above, we issued our decision in appellant's direct appeal on January 4, 2013. Appellant did not file his

postconviction petition until November 6, 2014. Given the fact that appellant waited approximately 22 months after we affirmed his convictions to file his postconviction petition, we reject his argument that his untimely petition should be accepted based upon appellate counsel's failure to notify him when the trial transcript was filed with this court in his direct appeal. Appellant knew or should have known that the record was filed no later than the date we released our decision. Therefore, appellant's assertion that his appellate counsel's alleged shortcomings caused him to file his petition in an untimely fashion lacks credibility.

[*P16] Having concluded that appellant's petition for postconviction relief was untimely filed, we find that the trial court did not abuse its discretion in dismissing it. Further, **[**9]** because the petition was untimely filed, we are unable to reach the merits of the petition. *Unsworth, 6th Dist. Lucas No. L-14-1238, 2015-Ohio-3197, at ¶ 16.*

[*P17] Accordingly, appellant's assignments of error are not well-taken.

III. Conclusion

[*P18] In light of the foregoing, we affirm the judgment of the Sandusky County Court of Common Pleas. Costs are hereby assessed to appellant in accordance with *App.R. 24.*

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to *App.R. 27. See also6th Dist.Loc.App.R. 4.*

Mark L. Pietrykowski, J.

Stephen A. Yarbrough, J.

James D. Jensen, P.J.

CONCUR.

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State v. Apanovitch

Supreme Court of Ohio

June 26, 2018, Submitted; November 29, 2018, Decided

No. 2016-0696

Reporter
155 Ohio St. 3d 358 *; 2018-Ohio-4744 **; 121 N.E.3d 351 ***; 2018 Ohio LEXIS 2816 ****

THE STATE OF OHIO, APPELLANT, v. APANOVITCH, APPELLEE.

Subsequent History: Reconsideration denied by *State v. Apanovitch, 154 Ohio St. 3d 1467, 2018-Ohio-5210, 2018 Ohio LEXIS 3028, 114 N.E.3d 217 (Dec. 26, 2018)*

Prior History: APPEAL from the Court of Appeals for Cuyahoga County, Nos. 102618 and 102698, *2016-Ohio-2831, 64 N.E.3d 429*. **[****1]**

State v. Apanovitch, 2016-Ohio-2831, 2016 Ohio App. LEXIS 1717, 64 N.E.3d 429 (Ohio Ct. App., Cuyahoga County, May 5, 2016)

Disposition: Judgment vacated and cause remanded.

Core Terms

trial court, postconviction, testing, vacate, post conviction relief, new trial, slide, vaginal, subject-matter, offender, untimely, unavoidably, death sentence, murder, sperm, convincing, entertain, motion for a new trial, adjudicate, aggravated, petitions, appeals, argues, mouth, rape, trial court's judgment, discovery of evidence, constitutional error, lack jurisdiction, rape count

Case Summary

Overview

HOLDINGS: [1]-The trial court lacked subject-matter jurisdiction to grant the untimely, successive petition for postconviction relief under *R.C. 2953.21* because the inmate clearly did not satisfy *R.C. 2953.23(A)(1)(b)* since he did not raise any argument that there was a "constitutional error at trial" under the Ohio Constitution; [2]-The petition did not satisfy the plain language of *R.C. 2953.23(A)(2)* because the DNA testing at issue was not performed as a result of a request by the inmate under *R.C. 2953.71* to *R.C. 2953.81* or under former *R.C. 2953.82*; [3]-Because the inmate did not satisfy either of the exceptions provided in *R.C. 2953.23(A)*, the trial court fundamentally lacked jurisdiction to consider his petition or to provide relief under *R.C. 2953.21*. *Crim.R. 33* did not empower the trial court to consider and decide a postconviction relief petition.

Outcome

Judgment vacated and cause remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN1[↓] **Postconviction Proceedings, Motions to Vacate Judgment**

R.C. 2953.23(A) allows a prisoner to file only

one postconviction petition in most situations. However, R.C. 2953.23(A) permits a prisoner to file an untimely, successive petition for postconviction relief only under specific, limited circumstances.

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN2[↓] Postconviction Proceedings, Motions to Vacate Judgment

R.C. 2953.23(A) is the limited gateway through which only those otherwise-defaulted postconviction claims that meet its specific terms may proceed.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Conclusions of Law

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

HN3[↓] De Novo Review, Conclusions of Law

The question of whether a court of common pleas possesses subject-matter jurisdiction to entertain an untimely petition for postconviction relief is a question of law, which appellate courts review de novo.

Criminal Law & Procedure > Postconviction Proceedings > Motions to Set Aside Sentence

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN4[↓] Postconviction Proceedings, Motions to Set Aside Sentence

An exception to an untimely petition for postconviction relief under R.C. 2953.23(A)(1) allows the trial court to consider an untimely and successive petition if: (1) the petitioner was "unavoidably prevented from discovery of the facts" upon which his claim relies or he is asserting a claim based on a new, retroactively applicable federal or state right recognized by the U.S. Supreme Court after his petition became untimely and after he had filed earlier petitions, R.C. 2953.23(A)(1)(a); and (2) he shows by clear and convincing evidence that no reasonable factfinder would have found him guilty or eligible for the death sentence but for "constitutional error at trial." R.C. 2953.23(A)(1)(b).

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN5[↓] Postconviction Proceedings, Motions to Vacate Judgment

For the purpose of postconviction relief, the United States Supreme Court has ruled that under the United States Constitution, an actual-innocence claim is not itself a constitutional claim.

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

HN6[↓] Postconviction Proceedings, DNA Testing

R.C. 2953.23(A)(2) allows a trial court to entertain an untimely and successive petition filed by an offender for whom DNA testing was performed under R.C. 2953.71 to R.C. 2953.81 or under former R.C. 2953.82 and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in R.C. 2953.74(D).

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

HN7[↓] Postconviction Proceedings, DNA Testing

The statutory language of R.C. 2953.23(A)(2) is circumscribed. It confers jurisdiction over a select class of DNA-based actual-innocence claims—only those arising from an eligible offender's application for DNA testing under R.C. 2953.71 to R.C. 2953.81 or under former R.C. 2953.82.

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

HN8[↓] Postconviction Proceedings, DNA Testing

R.C. 2953.84 does not address the means for supporting an untimely and successive postconviction petition based on DNA testing. Only R.C. 2953.23(A)(2) does that.

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN9[↓] Postconviction Proceedings, Motions to Vacate Judgment

A postconviction proceeding is a collateral civil attack on the judgment and the right to file a postconviction petition is a statutory right, not a constitutional right. A postconviction petitioner therefore receives no more rights than those granted by the statute. This means that any right to postconviction relief must arise from the statutory scheme enacted by the Ohio General Assembly. That includes the right to have one's claim heard at all: R.C. 2953.23(A) provides that a court may not entertain a petition filed after the expiration of the period prescribed in R.C. 2953.21(A) or a second petition or successive petitions for similar relief on behalf of a petitioner unless one of the exceptions in R.C. 2953.23(A) applies. Therefore, a petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition. Ohio's intermediate appellate courts have all reached the same conclusion.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN10[↓] Jurisdiction & Venue, Jurisdiction

Subject-matter jurisdiction connotes the power to hear and decide a case upon its merits. By providing that a court "may not entertain" an untimely or successive postconviction petition except in limited circumstances, R.C. 2953.23(A) plainly prohibits a court from hearing and deciding on the merits a petition that does not meet one of the exceptions.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

HN11[↓] Postconviction Proceedings, Motions for New Trial

The authority to proceed under *Crim.R. 33* empowers a court to provide relief only under that rule. *Crim.R. 33* does not empower the trial court to consider and decide a postconviction relief petition. R.C. 2953.23 provides the only basis upon which the trial court could proceed to decide the postconviction petition.

Criminal Law & Procedure > Postconviction Proceedings > DNA Testing

HN12[↓] Postconviction Proceedings, DNA Testing

The legislature in R.C. 2953.23(A) has created a narrow path for an offender to bring an

untimely and/or successive postconviction claim based on DNA evidence.

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

Criminal Law & Procedure > Appeals > Standards of Review

HN13[⬇] **Jurisdiction & Venue, Jurisdiction**

A judgment rendered by a court lacking subject matter jurisdiction is void ab initio.

Headnotes/Summary

Headnotes

Criminal Law—Postconviction DNA testing—R.C. 2953.21 and 2953.23(A)—Trial court lacked subject-matter jurisdiction to entertain untimely and successive petition for postconviction relief when requirements of R.C. 2953.23(A) were not satisfied—Judgment vacated and cause remanded.

Counsel: Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Christopher D. Schroeder and Katherine E. Mullin, Assistant Prosecuting Attorneys, for appellant.

Berkman, Gordon, Murray & DeVan, Mark R. DeVan, and William C. Livingston; and Crowell & Moring, L.L.P., Harry P. Cohen, and Michael K. Robles, for appellee.

Michael DeWine, Attorney General, Eric E. Murphy, State Solicitor, Samuel C. Peterson, Deputy Solicitor, and Thomas E. Madden, Assistant Attorney General, urging reversal for amicus curiae, Ohio Attorney General.

Judges: FISCHER, J. FRENCH, DEWINE, and DEGENARO, JJ., concur. O'DONNELL, J., concurs in part and dissents in part, with an opinion joined by O'CONNOR, C.J., O'DONNELL, J., concurring in part and dissenting in part.

Opinion by: FISCHER

Opinion

[*353] [*358] FISCHER, J.**

[P1]** Appellee, Anthony Apanovitch, was convicted of aggravated murder, aggravated burglary, and two counts of rape, and in January **[****2]** 1985, he was sentenced to death. The body of the victim, Mary Anne Flynn, was found in a bedroom in her home. She had been strangled and severely beaten, and sperm was found in her mouth and vagina.

[P2]** On direct appeal, the Eighth District Court of Appeals and this court affirmed Apanovitch's convictions and death sentence. *State v. Apanovitch, 8th Dist. Cuyahoga No. 49772, 1986 Ohio App. LEXIS 8046 (Aug. 28, 1986)*; *State v. Apanovitch, 33 Ohio St.3d 19, 514 N.E.2d 394 (1987)*. Apanovitch unsuccessfully pursued a number of avenues for relief, including filing three state postconviction petitions, *State v. Apanovitch, 70 Ohio App.3d 758, 591 N.E.2d 1374 (8th Dist.1991)*; *State v. Apanovitch, 107 Ohio App.3d 82, 667 N.E.2d 1041 (8th Dist.1995)*; *State v. Apanovitch, 113 Ohio App.3d 591,*

681 N.E.2d 961 (8th Dist.1996), and a federal habeas corpus action, *see Apanovitch v. Houk, N.D.Ohio No. 1:91CV2221, 2009 U.S. Dist. LEXIS 103985 (Aug. 14, 2009), aff'd sub nom. Apanovitch v. Bobby, 648 F.3d 434 (6th Cir.2011)*.

[P3]** This appeal involves Apanovitch's fourth postconviction petition, in which he asserted claims in the Cuyahoga County Court of Common Pleas based on DNA testing done on specimens taken from Flynn's vagina. After an evidentiary hearing, the court acquitted Apanovitch of vaginal rape. It then dismissed the other, identically worded rape charge and granted Apanovitch a new trial on the remaining aggravated-murder and aggravated-burglary counts. The Eighth District Court of Appeals affirmed. *2016-Ohio-2831, 64 N.E.3d 429*.

[P4]** We accepted review of three of the state's propositions of law. We do not reach those propositions, however, because the General Assembly has not authorized **[*359]** a court of common pleas to exercise **[****3]** jurisdiction over a petition for postconviction relief in the circumstances presented in this case. As a result, because **[***354]** the trial court lacked subject-matter jurisdiction to grant the petition for postconviction relief, the trial court's judgment (and, in turn, the court of appeals' judgment) must be vacated. We remand this matter for proceedings consistent with this opinion.

I. BACKGROUND

A. Investigation, trial, and direct appeals

[P5]** Mary Anne Flynn arrived home on August 23, 1984, at about 10:00 p.m. She owned the house—a duplex—and rented out the other unit. The people in the other unit that night heard Flynn's front door slam soon after she arrived, and they heard more noises (a loud thud and a high-pitched sound) from Flynn's unit between 11:30 p.m. and midnight. No witnesses saw or heard anything after that.

[P6]** When Flynn, a nurse, failed to report for her shift at a nearby hospital the next afternoon, a concerned coworker called Flynn's brother. They accessed Flynn's unit that evening and discovered Flynn's body in her bedroom. She was lying face down, naked on the bed with her hands tied behind her back. A bedsheet had been rolled up and was tied around her neck and to the headboard. **[****4]** She had been severely beaten, apparently with a piece of wood broken from a basement windowsill. An autopsy revealed sperm in her mouth and vagina. She had died from asphyxia by cervical compression, i.e., strangulation.

[P7]** Soon after the murder, investigators focused on Apanovitch, whom Flynn had hired earlier that summer to paint part of the exterior of her house. Circumstantial evidence suggested that he could be the murderer: There was evidence that Flynn had argued with a man she had hired to paint her house and that Flynn had ended the painting arrangement before the work was finished. Several witnesses testified that Flynn was fearful of a man who had done some painting at her house, and one of those witnesses identified Apanovitch as the person Flynn feared. There was evidence that Apanovitch had approached Flynn outside of her home the afternoon before the murder asking to paint her windowsills. Following that interaction, Apanovitch apparently made sexually suggestive comments about Flynn to a coworker. Also, Apanovitch could not satisfactorily account for his whereabouts or for a scratch that he had received on his face the night of the murder. Finally, based on his blood type, **[****5]** Apanovitch could not be excluded as the source of sperm recovered from Flynn's body.

[P8]** Apanovitch was charged with aggravated murder, aggravated burglary, and two counts of rape. The rape counts were

identical, both alleging that Apanovitch "unlawfully and purposely engaged in sexual conduct with Mary Anne **[*360]** Flynn not his spouse by purposely compeling [sic] her to submit by the use of force or threat of force."

[P9]** After a jury found Apanovitch guilty on all counts, it recommended a death sentence, which the trial court imposed. The court of appeals and this court affirmed the convictions and death sentence.

B. DNA evidence and testing

[P10]** When conducting Flynn's autopsy, a forensic pathologist with the Cuyahoga County Coroner's office[1] created **[***355]** slides that contained specimens obtained from Flynn's mouth and vagina. DNA testing of the specimens was not available at the time of trial in 1984.

[P11]** In 1988, one of Apanovitch's attorneys asked the coroner's office for records related to Flynn's death. At that time, the slides could not be located and it was assumed that they had been lost or destroyed. But in 1991, three slides related to Flynn's case (one vaginal slide and two oral slides) were located. **[****6]** [2]

[P12]** In 1991, the coroner's office sent the slides to Forensic Science Associates ("FSA") in California for DNA testing. Due to the condition of the samples, FSA determined that it could not analyze two of the slides (the vaginal slide and one oral slide), but it was able to determine a partial DNA type of the other oral slide (referred to by FSA as "Item 2"). A sample of Apanovitch's DNA was not available to FSA at that time for comparison.

[P13]** In 2000, an assistant Cuyahoga County prosecuting attorney asked the Cuyahoga County Coroner to conduct DNA testing on "any trace evidence or samples" related to Flynn's murder. The assistant prosecutor's letter said, "It is the intention of this request that the identity of the donor of sperm found in the victim, Mary Ann [sic] Flynn, be established to the degree of scientific certainty available." By that time, FSA had returned the vaginal and oral slides to the coroner's office. The coroner's office tested the slides in late 2000 but concluded that there was not sufficient material left on them to obtain a clear DNA profile.

[P14]** In 2006, for reasons that are not clear from the record, FSA further analyzed DNA from its Item 2, the specimen from Flynn's **[****7]** mouth, which it had retained and stored frozen in its DNA archive. This time, FSA developed a more complete male DNA profile that occurs in about 1 in 285 million Caucasian males. **[*361]** In 2007, the federal district court in Apanovitch's habeas case ordered Apanovitch, a Caucasian male, to provide a sample of his DNA for comparison. After analyzing that sample, FSA concluded that Apanovitch could not be eliminated as the source of the sperm taken from Flynn's mouth. Apanovitch contests that finding, arguing that FSA's report is unreliable.

C. Apanovitch's fourth postconviction petition

[P15]** In 2012, Apanovitch filed his fourth postconviction petition, focusing on the coroner's office's 2000 test of a specimen taken from Flynn's vagina. At the postconviction hearing, Dr. Rick Staub, Apanovitch's expert, testified about his review of the results of the testing of that specimen. Unlike the coroner's office, Dr. Staub concluded that a sample from the vaginal slide

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1 The county official formerly known as the Cuyahoga County Coroner is now known as the Cuyahoga County Medical Examiner. *See* Cuyahoga County Charter, Section 5.03, effective January 1, 2010.

2 During habeas review, the federal district court found that the chain of custody of those slides had not been broken. *Apanovitch v. Houk, 2009 U.S. Dist. LEXIS 103985 at *24*.

had provided useful results. In his opinion, the testing showed that Apanovitch's sperm was not on that slide, but the DNA of at least two other unknown males was on the slide; Apanovitch, therefore, was excluded as a contributor of the **[****8]** sperm. The state's expert at the postconviction hearing, Dr. Elizabeth Benzinger, testified that the vaginal sample contained a low level of DNA and could have been contaminated, but she did not testify as to whether Apanovitch was excluded as a contributor of the sperm.

[P16]** Because Dr. Benzinger did not contradict Dr. Staub's opinion that Apanovitch was excluded as a contributor to the vaginal sample, the trial court acquitted Apanovitch on the vaginal-rape charge. **[***356]** The trial court also dismissed the other rape charge with prejudice "for its lack of specificity or differentiation from the other count in violation of [Apanovitch's] due process rights." Based on the changes regarding the evidence and to the charges, the trial court granted Apanovitch a new trial on the remaining aggravated-murder and aggravated-burglary counts.

[P17]** In reaching its decision, the trial court found that "there was insufficient material to reach any conclusion whether [Apanovitch's] DNA was contained in the materials recovered from the victim's mouth." Because evidence of the 2007 report from FSA was not presented at the postconviction hearing, the trial court did not consider FSA's finding in that report that only **[****9]** 1 in 285 million Caucasians has the same DNA profile as Apanovitch and the sperm found in Flynn's mouth. The trial court noted that the state had stipulated prior to the postconviction hearing that it would not rely on any evidence generated by Dr. Edward Blake, the author of that report, who did not testify at the hearing.

[P18]** On the state's appeal, the court of appeals held that the trial court did not abuse its discretion in finding Apanovitch actually innocent of vaginal rape. *2016-Ohio-2831, 64 N.E.3d 429, at ¶ 46*. It also affirmed the trial court's dismissal of the second rape charge. *Id. at ¶ 55, 61*. The state did not assert an assignment of error concerning the trial court's decision granting a new trial.

[P19]** **[*362]** The state appealed to this court, and we accepted review of three of the state's propositions of law.[3] *150 Ohio St.3d 1407, 2017-Ohio-6964, 78 N.E.3d 908.*

II. ANALYSIS

[P20]** Upon our review of the record, we ordered supplemental briefing on three issues that centered on whether the trial court had lacked jurisdiction to consider Apanovitch's petition for postconviction relief. *152 Ohio St.3d 1439, 2018-Ohio-1600, 96 N.E.3d 296.* The jurisdictional questions we raised in that order relate to the statutory scheme by which the General Assembly has authorized offenders to pursue postconviction relief in Ohio courts.

[P21]** When **[****10]** Apanovitch filed his petition in 2012, the statutory deadline for filing a timely postconviction petition had long since passed. *See* former *R.C. 2953.21(A)(2)*, 2010 Sub.S.B. No. 77. Moreover, *HN1*[↑] *R.C. 2953.23(A)* allows a prisoner to file only one postconviction petition in most situations. The current petition is Apanovitch's fourth postconviction petition. Apanovitch's petition, therefore, was both untimely and successive.

[P22]** However, *R.C. 2953.23(A)* permits a prisoner to file an untimely, successive petition for postconviction relief only under specific, limited circumstances. *R.C. 2953.23* provides:

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Apanovitch moves to strike a portion of the state's brief, arguing that it is beyond the scope of this discretionary appeal. Because we are capable of deciding the issues properly before us without striking arguments, *see State ex rel. Tam O'Shanter Co. v. Stark Cty. Bd. of Elections, 151 Ohio St.3d 134, 2017-Ohio-8167, 86 N.E.3d 332, ¶ 11*, we deny the motion.

(A) Whether a hearing is or is not held on a petition filed pursuant to *section 2953.21 of the Revised Code*, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless **[***357]** division (A)(1) or (2) of this section applies:
(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in *division (A)(2) of section 2953.21 of the Revised Code* or to the filing of an earlier petition, the United States **[****11]** Supreme Court recognized a new **[*363]** federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under *sections 2953.71 to 2953.81 of the Revised Code* or under former *section 2953.82 of the Revised Code* and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in *division (D) of section 2953.74 of the Revised Code*, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and **[****12]** that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in *division (A)(1)(b) of section 2953.21 of the Revised Code*, and "former *section 2953.82 of the Revised Code*" has the same meaning as in *division (A)(1)(c) of section 2953.21 of the Revised Code*.

Thus, ***HN2***[↑] *R.C. 2953.23(A)* is the limited gateway through which only those otherwise-defaulted postconviction claims that meet its specific terms may proceed.

[P23]** We must decide three questions: First, does the postconviction petition satisfy an exception provided in *R.C. 2953.23(A)*? Second, if no exception applies, did the trial court lack jurisdiction to adjudicate the petition? And third, if the trial court lacked jurisdiction to adjudicate the petition, how should we resolve this appeal?

A. The petition does not satisfy *R.C. 2953.23(A)*

[P24]** The trial court found that Apanovitch's postconviction petition satisfies *R.C. 2953.23(A)(2)*. Apanovitch argues that we must defer to that determination absent an abuse of discretion. But ***HN3***[↑] "the question whether a court of common pleas possesses subject-matter jurisdiction to entertain an untimely petition for postconviction relief is a question of law, which appellate courts review de novo." *State v. Kane, 10th Dist. Franklin No. 16AP-781, 2017-Ohio-7838, ¶ 9*.

[P25]** **[*364]** We begin by examining *R.C.*

2953.23(A)(1). HN4[↑] That exception would [***358] allow the trial court to consider [****13] Apanovitch's untimely and successive petition if (1) Apanovitch was "unavoidably prevented from discovery of the facts" upon which his claim relies *or* he is asserting a claim based on a new, retroactively applicable federal or state right recognized by the United States Supreme Court after his petition became untimely and after he had filed earlier petitions, R.C. 2953.23(A)(1)(a), *and* (2) he shows by clear and convincing evidence that no reasonable factfinder would have found him guilty or eligible for the death sentence but for "constitutional error at trial," R.C. 2953.23(A)(1)(b).

[**P26] We need not address whether Apanovitch satisfies R.C. 2953.23(A)(1)(a), because he clearly has not satisfied R.C. 2953.23(A)(1)(b), which requires him to show that his conviction resulted from "constitutional error at trial." In arguing that he satisfied R.C. 2953.23(A)(1)(b), Apanovitch asserts only that he is actually innocent of a rape charge. HN5[↑] The United States Supreme Court has ruled that under the United States Constitution, an actual-innocence claim "is not itself a constitutional claim," Herrera v. Collins, 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), and this case, therefore, does not involve a "constitutional error at trial" under R.C. 2953.23(A)(1)(b). See State v. Willis, 2016-Ohio-335, 58 N.E.3d 515, ¶ 15-19 (6th Dist.). Additionally, Apanovitch does not raise any argument that there was a "constitutional error at trial" under the Ohio Constitution. Apanovitch's [****14] petition, therefore, does not qualify under R.C. 2953.23(A)(1).

[**P27] That leaves HN6[↑] R.C. 2953.23(A)(2), which allows a trial court to entertain an untimely and successive petition filed by

> an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code.

[**P28] The trial court construed this language broadly, stating that a postconviction petition "is timely when it *involves the testing of DNA*." (Emphasis added.) The trial court appears to have assumed that Apanovitch satisfied R.C. 2953.23(A)(2) simply because he was making a claim based on DNA evidence.

[**P29] HN7[↑] The statutory language of R.C. 2953.23(A)(2), however, is more circumscribed. It confers jurisdiction over a select class of DNA-based actual-innocence claims—only those arising from an eligible offender's application for DNA testing under R.C. 2953.71 to 2953.81 or under former R.C. 2953.82. The state asserts—and Apanovitch does not dispute—that the DNA testing at issue here was not performed as a result of a request by Apanovitch under R.C. 2953.71 to 2953.81 [*365] or under former R.C. 2953.82. The parties agree that *the state* asked the Cuyahoga County Coroner to test the vaginal slide and that at *the state's request* the federal district [****15] court ordered Apanovitch to provide his DNA for comparison. Thus, Apanovitch's petition does not satisfy the plain language of R.C. 2953.23(A)(2).

[**P30] Apanovitch nevertheless argues that his petition qualifies under R.C. 2953.23(A)(2), first by claiming that he requested DNA testing in 1989. This argument does not help Apanovitch. Even if he sought DNA testing in 1989, he clearly did [***359] not do so under R.C. 2953.71 to 2953.81 or under former R.C. 2953.82, because those statutes were not enacted until 2003. Sub.S.B. No. 11, 150 Ohio Laws, Part IV, 6498, 6507-6524, 6525.

[**P31] He also argues that notwithstanding

R.C. 2953.23(A)(2)'s clear reference to DNA testing performed under R.C. 2953.71 to 2953.81 or under former R.C. 2953.82, the circumstances under which the DNA was tested are "immaterial." This argument relies principally on R.C. 2953.84, which provides:

> The provisions of sections 2953.71 to 2953.81 of the Revised Code by which an offender may obtain postconviction DNA testing are not the exclusive means by which an offender may obtain postconviction DNA testing, and the provisions of those sections do not limit or affect any other means by which an offender may obtain postconviction DNA testing.

[P32]** According to Apanovitch, "DNA testing under R.C. 2953.71 to 2953.81 is not the exclusive means for supporting a petition for postconviction relief," because "requiring petitions to be based solely on **[****16]** DNA testing under those sections would render R.C. 2953.84 superfluous in violation of basic tenets of legislative interpretation." But Apanovitch disregards the clear language of R.C. 2953.84, which speaks only of the "means by which an offender may *obtain postconviction DNA testing*." (Emphasis added.) HN8[↑] That statute does not address the means for supporting an untimely and successive postconviction petition based on DNA testing. Only R.C. 2953.23(A)(2) does that. If Apanovitch is correct that R.C. 2953.84 opens the door for untimely and successive postconviction petitions based on *any* DNA testing, then R.C. 2953.23(A)'s reference to DNA testing "performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code" would have no meaning.

[P33]** Apanovitch also contends that R.C. 2953.23(A)(2) cannot be strictly limited to DNA testing performed under R.C. 2953.71 to 2953.81 or former R.C. 2953.82, because that would lead to harsh and absurd results. This argument presumes that the procedures established by the General Assembly in R.C. 2953.71 to 2953.81 and former R.C. 2953.82 serve no legitimate purpose—something **[*366]** Apanovitch has not shown. At most, he makes an equitable argument based on what has transpired over the last 30 years. But even assuming arguendo that the equities are in his favor, as Apanovitch maintains, his argument cannot overcome the clear requirements established **[****17]** by the General Assembly that give a trial court jurisdiction to entertain petitions for postconviction relief only in certain, limited situations.

[P34]** Finally, Apanovitch contends that strictly applying R.C. 2953.23(A)(2) would encourage the state to prevent offenders from initiating DNA testing under R.C. 2953.71 to 2953.81. This argument rings hollow because, despite his claims, Apanovitch has not shown that he ever tried to pursue—or that the state prevented him from seeking—DNA testing under the statutory scheme. Indeed, Apanovitch now asserts that he can pursue testing under R.C. 2953.71 to 2953.81, further undermining his argument.

B. The trial court lacked jurisdiction to adjudicate the petition

[P35]** We next must decide whether Apanovitch's failure to qualify for an exception under R.C. 2953.23(A) deprived the trial court of jurisdiction over his petition. We start by recognizing that HN9[↑] a postconviction **[***360]** proceeding is a collateral civil attack on the judgment, State v. Calhoun, 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905 (1999), and that the "right to file a postconviction petition is a statutory right, not a constitutional right," State v. Broom, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d 620, ¶ 28. A postconviction petitioner therefore "receives no more rights than those granted by the statute." Calhoun at 281. This means that any right to

postconviction relief must arise from the statutory scheme enacted by the **[****18]** General Assembly.

[P36]** That includes the right to have one's claim heard at all: R.C. 2953.23(A) provides that "a court *may not entertain* a petition filed after the expiration of the period prescribed in [R.C. 2953.21(A)] or a second petition or successive petitions for similar relief on behalf of a petitioner *unless*" one of the exceptions in R.C. 2953.23(A) applies. (Emphasis added.) Therefore, a petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition. Ohio's intermediate appellate courts have all reached the same conclusion. *See, e.g.*State v. Beuke, 130 Ohio App.3d 633, 636, 720 N.E.2d 962 (1st Dist.1998); State v. Greathouse, 2d Dist. Montgomery No. 24084, 2011-Ohio-4012, ¶ 12; State v. Cunningham, 2016-Ohio-3106, 65 N.E.3d 307, ¶ 13 (3d Dist.); State v. Damron, 4th Dist. Ross No. 10CA3158, 2010-Ohio-6459, ¶ 19; State v. Brown, 5th Dist. Delaware No. 06-CA-A-10-0076, 2008-Ohio-524, ¶ 20; State v. Eubank, 6th Dist. Lucas No. L-07-1302, 2008-Ohio-1296, ¶ 6; State v. Flower, 7th Dist. Mahoning No. 14 MA 148, 2015-Ohio-2335, ¶ 14; State v. Davis, 8th Dist. Cuyahoga No. 106012, 2018-Ohio-751, ¶ 9; State v. Harris, 9th Dist. Lorain No. 03CA008305, 2003-Ohio-7180, ¶ 8; State **[*367]** v. Martin, 10th Dist. Franklin No. 05AP-495, 2006-Ohio-4229, ¶ 22; State v. Noling, 11th Dist. Portage No. 2007-P-0034, 2008-Ohio-2394, ¶ 37; State v. Gipson, 12th Dist. Warren No. CA2001-11-103, 2002-Ohio-4128, ¶ 18.

[P37]** Apanovitch's arguments for a different result are unpersuasive. He first argues that his failure to meet a statutory exception did not deprive the trial court of subject-matter jurisdiction, because trial courts clearly have subject-matter jurisdiction over postconviction petitions. Relatedly, because he maintains that the trial court was not deprived of subject-matter jurisdiction, **[****19]** he contends that his failure to satisfy R.C. 2953.23(A) is a waivable issue and that the state did, in fact, waive the issue by not raising it on appeal.

[P38]** Apanovitch has not shown that the trial court had subject-matter jurisdiction over his petition. ***HN10***[↑] Subject-matter jurisdiction "connotes the power to hear and decide a case upon its merits." Morrison v. Steiner, 32 Ohio St.2d 86, 290 N.E.2d 841 (1972), paragraph one of the syllabus. By providing that a court "may not entertain" an untimely or successive postconviction petition except in limited circumstances, R.C. 2953.23(A) plainly prohibits a court from hearing and deciding on the merits a petition that does not meet one of the exceptions. Thus, R.C. 2953.23(A) did not permit the trial court to exercise jurisdiction over Apanovitch's petition, and the state could not waive the issue. *See*State v. Davis, 131 Ohio St.3d 1, 2011-Ohio-5028, 959 N.E.2d 516, ¶ 11 ("Subject-matter jurisdiction cannot be waived and is properly raised by this court sua sponte").

[P39]** **[***361]** Apanovitch next argues that the trial court had an independent basis for exercising jurisdiction—under *Crim.R. 33*—because the parties stipulated that the trial court would consider the relief requested under that rule in addition to R.C. 2953.21 and 2953.23. ***HN11***[↑] The authority to proceed under *Crim.R. 33* empowers a court to provide relief only under that rule. Contrary to Apanovitch's argument, *Crim.R. 33* **[****20]** did not empower the trial court to "consider and decide the Petition." R.C. 2953.23 provides the only basis upon which the trial court could proceed to decide the postconviction petition.

[P40]** Finally, Apanovitch argues that the court should just ignore the jurisdictional problem. In support, he points to Broom, 146 Ohio St.3d 60, 2016-Ohio-1028, 51 N.E.3d

620, and *State v. Gondor, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77*, cases in which we examined the merits of postconviction petitions without addressing whether the petitioners had satisfied R.C. 2953.23(A). But now that the jurisdictional question has been briefed and is squarely before us, *Broom* and *Gondor* do not support the notion that we can or should simply disregard it.

[P41]** **[*368]** We recognize that it may seem unduly formalistic or unfair to foreclose the trial court from considering a postconviction claim that is based on DNA testing that the state itself procured. But it is the prerogative of the General Assembly, not this court, to set the terms by which an offender may pursue postconviction relief. See*Calhoun, 86 Ohio St.3d, at 281, 714 N.E.2d 905* (postconviction rights are granted by statute); *State v. Smorgala, 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (1990)* (the legislature's valid laws control policy preferences). ***HN12***[↑] The legislature in R.C. 2953.23(A) has created a narrow path for an offender to bring an untimely and/or successive postconviction claim based on DNA evidence. Because Apanovitch did **[****21]** not satisfy either of the exceptions provided in R.C. 2953.23(A), the trial court fundamentally lacked jurisdiction to consider his petition or to provide relief under R.C. 2953.21.

C. We vacate the judgment and remand the cause

[P42]** Because we conclude that the trial court lacked subject-matter jurisdiction to adjudicate Apanovitch's postconviction petition brought under R.C. 2953.23, we must vacate the trial court's judgment acquitting Apanovitch of vaginal rape. *Patton v. Diemer, 35 Ohio St.3d 68, 518 N.E.2d 941 (1988)*, paragraph three of the syllabus (***HN13***[↑] "A judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*"); *Van DeRyt v. Van DeRyt, 6 Ohio St.2d 31, 36, 215 N.E.2d 698 (1966)* ("A court has inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity"). We must also vacate the dismissal of the other rape count and the granting of a new trial, because those aspects of the trial court's judgment were based on the improper adjudication. And because we vacate the trial court's judgment, it necessarily follows that the court of appeals' judgment must also be vacated.

[P43]** The final issue for consideration is whether to remand the cause for further proceedings. The state joined Apanovitch in stipulating prior to the trial court's hearing in this case that "*Rule 33 of the Ohio Rules of Criminal Procedure* appl[ies] **[****22]** to this post-conviction proceeding" and that the trial court "shall refer to and rely on said rule * * * during its deliberations and judgment." In its posthearing brief filed in the trial court, the state at several different places discussed the standards for granting a motion for a new trial under **[***362]** *Crim.R. 33* and also specifically urged that Apanovitch's "motion for new trial should be denied." However, the state now maintains that because Apanovitch did not file a motion for a new trial pursuant to *Crim.R. 33*, we do not need to remand this cause if we determine that the trial court lacked subject-matter jurisdiction to grant relief under the postconviction statutes. Moreover, the state argues that even if this court were to consider the *Crim.R. 33* issue, Apanovitch did not **[*369]** demonstrate that he was "unavoidably prevented" from the discovery of the evidence upon which his claim is based under *Crim.R. 33(B)*.

[P44]** We additionally note that our ability to squarely address any *Crim.R. 33* issues is greatly complicated by the fact that the state did not appeal either the trial court's conclusion of law that *Crim.R 33* "is applicable to this proceeding" or the trial court's reliance on *Crim.R. 33* as part of its rationale for granting a

new trial. Thus, given our vacation **[****23]** of the judgment and the unusual procedural history of this case, the trial court should have the first opportunity to determine whether it has the authority to take any action beyond dismissing Apanovitch's postconviction petition. We therefore remand the matter to the trial court for the limited purpose of determining if any further proceedings are necessary and, if so, resolving any remaining issues in a manner consistent with this opinion.

Judgment vacated and cause remanded.

FRENCH, DEWINE, and DEGENARO, JJ., concur.

O'DONNELL, J., concurs in part and dissents in part, with an opinion joined by O'CONNOR, C.J.

KENNEDY, J., concurs in the judgment to vacate the trial court's judgment acquitting Apanovitch of vaginal rape because the trial court lacked subject-matter jurisdiction to adjudicate the postconviction petition, to vacate the trial court's dismissal of the other rape count and the granting of a new trial, and to vacate the judgment of the court of appeals, and dissents from the order to remand.

Concur by: KENNEDY; O'DONNELL (In Part)

Concur

KENNEDY, J., concurs in the judgment to vacate the trial court's judgment acquitting Apanovitch of vaginal rape because the trial court lacked subject-matter jurisdiction to adjudicate the postconviction petition, to vacate the trial court's dismissal of the other rape count and the granting of a new trial, and to vacate the judgment of the court of appeals, and dissents from the order to remand.

Dissent by: O'DONNELL (In Part)

Dissent

O'DONNELL, J., concurring in part and dissenting in part.

[P45]** I concur with the majority's conclusion that the trial court lacked jurisdiction **[****24]** over Anthony Apanovitch's fourth petition for postconviction relief, but I dissent from its decision to "remand the matter to the trial court for the limited purpose of determining whether any further proceedings are necessary and, if so, resolving any remaining issues in a manner consistent with this opinion," majority opinion at ¶ 44. The majority concludes that its "ability to squarely address any *Crim.R. 33* issues is greatly complicated" by the facts of this case and that "given our vacation of the judgment and the unusual procedural history of this case, the trial court should have the first opportunity to determine whether it has the authority to take any action beyond dismissing Apanovitch's postconviction petition." *Id.* Based on what? If the trial court had no jurisdiction to consider the fourth postconviction petition as the majority has concluded, then there is nothing pending before the trial court with respect to this appeal.

[P46]** **[*370]** If the trial court had no such jurisdiction, how can it determine "whether it has the authority to take any action"? At best, the majority opinion is confusing. This matter should be concluded.

[P47]** *Crim.R. 33(A)* states, "A new trial may be granted on motion of the defendant" **[****25]** for any of the reasons enumerated in the rule, and *Crim.R. 33(B)* states:

> **[***363]** Application for a new trial shall be made by motion which, except for the cause of newly discovered evidence, *shall be filed within fourteen days after the verdict was rendered*, * * * unless it is

made to appear by clear and convincing proof that the defendant was unavoidably prevented from filing his motion for a new trial, in which case the motion *shall be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such motion within the time provided herein.*

Motions for new trial on account of newly discovered evidence shall be filed *within one hundred twenty days* after the day upon which the verdict was rendered * * *. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed *within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.*

(Emphasis added.)

[P48]** In addition, the court in *State v. Stansberry, 8th Dist. Cuyahoga No. 71004, 1997 Ohio App. LEXIS 4561, 1997 WL 626063, *3 (Oct. 9, 1997)*, explained:

A trial court must first determine if a defendant has **[****26]** met his burden of establishing by clear and convincing proof that he was unavoidably prevented from filing his motion for a new trial within the statutory time limits. If that burden has been met but there has been an undue delay in filing the motion after the evidence was discovered, the trial court must determine if that delay was reasonable under the circumstances or that the defendant has adequately explained the reason for the delay.

[P49]** The deadlines set forth in *Crim.R. 33(B)* have long since passed, and therefore Apanovitch must seek leave to file a delayed motion for new trial, demonstrate by clear and convincing proof that he satisfies the unavoidable **[*371]** prevention requirement, and obtain an order from the trial court to that effect. But he has not filed any such motion. To the extent he seeks a new trial on account of newly discovered evidence, such as the results of the DNA testing by the coroner's office which he has admittedly known about since December 2008, he also carries the burden to demonstrate that the undue delay in moving for leave to file a motion for new trial is reasonable. Notably, when Apanovitch filed his fourth petition for postconviction relief in March 2012, he did not request **[****27]** a determination regarding unavoidable prevention or reasonableness of delay for purposes of *Crim.R. 33* nor did he request a new trial pursuant to that rule.

[P50]** Prior to the hearing on the fourth postconviction relief petition, the parties stipulated, "*Rule 33 of the Ohio Rules of Criminal Procedure* appl[ies] to this post-conviction proceeding and * * * the Court shall refer to and rely on said rule, in addition to all other applicable Ohio law, during its deliberations and judgment." However, Apanovitch failed to follow the requisite procedure to seek relief pursuant to that rule.

[P51]** **[***364]** Based on the trial court's consideration of postconviction relief, which we have concluded was error, the court acquitted Apanovitch of vaginal rape and then erroneously predicated its decisions to dismiss the remaining rape charge and grant a new trial as to the aggravated murder and aggravated burglary charges on its erroneous acquittal.

[P52]** The majority somehow conflates what it recognizes as an error by the trial court in granting postconviction relief as an opportunity for the trial court to determine whether it has authority to take any action beyond dismissing the postconviction petition. This is not a method of availing Apanovitch of relief, because *Crim.R. 33* requires **[****28]** adherence to the prerequisites of the rule that

Apanovitch and all other litigants are required to satisfy. And the trial court is required to assure compliance with the rule.

[P53]** Notably, a motion for new trial must be filed with the trial judge who presumably heard the witnesses testify and had an opportunity to assess their demeanor. "The discretionary decision to grant a motion for a new trial is an extraordinary measure which should be used only when the evidence presented weighs heavily in favor of the moving party." *State v. Luckett, 144 Ohio App.3d 648, 655, 761 N.E.2d 105 (8th Dist.2001)*. "The deference shown to the trial court in such matters is premised in large part upon the familiarity of the trial court with the details of the case as a result of having presided over the actual trial." *Id.* And in reviewing the trial court's decision on such matters, "'[a] more searching inquiry is required' if the new trial is granted than if denied * * * because of 'the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function.'" *Id.*, quoting *Tri Cty. Industries, Inc. v. Dist. of Columbia, 200 F.3d 836, 840, 339 U.S. App. D.C. 378 (D.C.Cir.2000)*.

[P54]** **[*372]** This case, however, involves the rape and murder of a 33-year-old female that occurred more than 34 years ago. The judge who presided at that trial, former Justice **[****29]** Francis E. Sweeney, was familiar with the details of the case and in the best position to assess witness credibility and make the serious decision whether to nullify the jury's verdict, and he is now deceased. *See* https://www.supremecourt.ohio.gov/SCO/formerjustices/sweeney (accessed Nov. 8, 2018). Remanding this case for a different trial judge to consider taking action beyond dismissing Apanovitch's fourth postconviction petition makes a mockery of the jury trial that former Justice Sweeney conducted in this brutal killing that resulted in convictions that have been affirmed on appeal and upheld by this court and the federal courts in multiple postconviction proceedings. This is especially true given that no motion for a new trial was ever actually filed in this instance and that the time for filing such a motion has long since passed.

[P55]** It is time to finalize this case.

[P56]** I therefore concur in the judgment to vacate the ill-considered decision of the trial court to entertain a petition for postconviction relief that it should not have considered. But I would not cavalierly remand this case to the trial court to determine whether it has authority to take action beyond dismissing the postconviction **[****30]** petition. Take action on what?

[P57]** No motions are pending in this matter and the majority rules today that the trial court had no jurisdiction to consider the postconviction petition. Hence, there is nothing before the trial court for it to consider. This court should bring this matter to a conclusion!

[P58]** **[***365]** To ensure the finality of this nearly 34-year-old judgment that has been affirmed on appeal and upheld by this court and the federal courts in several postconviction proceedings, I would reverse the judgment of the appellate court and vacate the trial court's decision to entertain the fourth petition for postconviction relief. There is no reason whatsoever for a remand of this matter.

O'CONNOR, C.J., concurs in the foregoing opinion.

End of Document

Public Documents

LUCAS COUNTY COURT OF COMMON PLEAS
J. BERNIE QUILTER, CLERK
700 ADAMS STREET
TOLEDO, OHIO

TIME: 10:17:04 AM
DATE: 9/21/2021

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CASE: G-4801 -CR -199701449-000

TITLE: S/O VS DOUGLAS LAMONT COLEY
JUDGE: LINDSAY D NAVARRE

APPENDIX C-1

FILING DATE: 7/2/1997

CASE TYPE: CAP CAPITAL MURDER

MONETARY AMOUNT:
ORIGINAL COURT:
PREVIOUS CASE NUMBER:

DOCKET/PAGE:
TAX TYPE:
STATE OF OHIO NUMBER:

	Party	Counsel	Prosecutor
DEFENDANT 1:	COLEY DOUGLAS LAMONT 209 INDIANA TOLEDO, OH 43602	BRENDA J. MAJDALANI 4192132001 LUCAS COUNTY PROSECUTORS OFFICE CIVIL DIVISION 711 ADAMS - 2ND FLOOR TOLEDO, OH 43604	DEAN P MANDROS (ASST PROS)
DEFENDANT 1:		ADRIAN P. CIMERMAN 4192428214 241 N. SUPERIOR STE 200 TOLEDO, OH 436041304	DEAN P MANDROS (ASST PROS)
DEFENDANT 1:		WILHELM JOSEPH E 2165224856 CAPITAL HABEAS UNIT 1660 W SECOND ST STE 750 CLEVELAND, OH 44113	DEAN P MANDROS (ASST PROS)
DEFENDANT 1:		HICKS SHARON A 2165224856 CAPITAL HABEAS UNIT 1660 W SECOND ST STE 750 CLEVELAND, OH 44113	DEAN P MANDROS (ASST PROS)
DEFENDANT 1:		MERLE R. DECH 4192415506 610 ADAMS STREET SECOND FLOOR TOLEDO, OH 436041423	DEAN P MANDROS (ASST PROS)

COUNT	PARTY	DESCRIPTION	ABBREV.
1	(D -1)COLEY DOUGLAS LAMONT	KIDNAPPING & 2941.141-FIREARM SPEC	F1
2	(D -1)COLEY DOUGLAS LAMONT	AGGRAVATED ROBBERY & 2941.145-FIREARM SPEC	F1

3	(D -1)COLEY DOUGLAS LAMONT	ATTEMPT TO COMMIT MURDER&2941.146&2941.145 SPECS	FSP
4	(D -1)COLEY DOUGLAS LAMONT	AGGRAVATED MURDER&DEATH SPEC&FIREARM SPEC	FSP
5	(D -1)COLEY DOUGLAS LAMONT	AGG MURDER/DTH SPEC-AGG ROB&2941.145-FIREARM SPEC	FSP
6	(D -1)COLEY DOUGLAS LAMONT	AGG MURDER/DTH SPEC-AGG ROB&2941.145-FIREARM SPEC	FSP
7	(D -1)COLEY DOUGLAS LAMONT	KIDNAPPING & 2941.145-FIREARM SPEC	F1
8	(D -1)COLEY DOUGLAS LAMONT	AGGRAVATED ROBBERY & 2941.145-FIREARM SPEC	F1

DATE	SEQ	EVENT
7/1/1997	1	Title : PLD:REPLY MEMORANDUM IN SUPPORT OF MOTION FOR DISCLOSURE OF GRAND JURY TESTIMONY FILED BY ATTORNEY **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	1	Title : ---------- **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	2	Title : CASE CONT'D FROM MANUAL DOCKET **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	3	Title : CAL:PRETRIAL- for Thursday, July 3, 1997, at 9:00a.m. **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	4	Title : ---------- **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	5	Title : ---------- **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	6	Title : ORD:MOTION GRANTED Defendant's Motion for Release of Records in Support of Mitigation Investigation, filed June 17, 1997, granted. See ORDER and JE. **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	7	Title : ---------- **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/2/1997	8	Title : EVT:ORDER FILE & JOURN EXP5/13 MOTION FOR RELEASE OF RECORDS C-124-60 **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/3/1997	1	Title : ---------- 771-00191 issued by RRE **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/3/1997	2	Title : MIS:CR, S/O, ATTY, DEF PRESEN Court Reporter: D. Sniderhan. **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/3/1997	3	Title : HRG:PRETRIAL HEARING HELD **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/3/1997	4	Title : HRG:PRETRIAL SET for Tuesday, July 8, 1997, at 10:30a.m. **PARTY :** D1 - COLEY DOUGLAS LAMONT
7/3/1997	5	Title : HRG:MOTION HEARING SET

PARTY : D1 - COLEY DOUGLAS LAMONT

7/9/1998 5 Title : ORD:VOUCHER ORDERED ISSUED
Central Behavioral Healthcare, Inc, in the amount of
$2,798.42, for professional services
VOUCHER #78045 DATED 7-9-98
PARTY : D1 - COLEY DOUGLAS LAMONT

7/9/1998 6 Title : ----------
PARTY : D1 - COLEY DOUGLAS LAMONT

7/9/1998 7 Title : EVT:ORDER FILE & JOURN EXP5/13
VOUCHER C-139-12
PARTY : D1 - COLEY DOUGLAS LAMONT

7/9/1998 8 Title : EVT:ORDER FILE & JOURN EXP5/13
VOUCHER C-139-13
PARTY : D1 - COLEY DOUGLAS LAMONT

7/13/1998 1 Title : SUPREME CT RETURN OF FILING
SUPREME COURT RECEIVED RE-NOTICE JUNE 26, 1998
PARTY : D1 - COLEY DOUGLAS LAMONT

7/21/1998 1 Title : MIS:MANDATE DISMISSING APPEAL
PARTY : D1 - COLEY DOUGLAS LAMONT

8/18/1998 1 Title : MTN:FOR APPOINTMENT OF COUNSEL
FILED BY JOSEPH A. BENAVIDEZ, ATTORNEY
PARTY : D1 - COLEY DOUGLAS LAMONT

8/31/1998 1 Title : EVT:FILE STAMPED COPY RETURNED
MOTION TO APPOINT COUNSEL
JOSEPH A. BENAVIDEZ
ATTORNEY AT LAW
138 W. HIGH STREET
LIMA, OHIO 45801
PARTY : D1 - COLEY DOUGLAS LAMONT

9/25/1998 1 Title : PLD: TRANSCRIPT OF PROCEEDINGS
PARTY : D1 - COLEY DOUGLAS LAMONT

9/28/1998 1 Title : EVT:J.E. FILED & JOURNALIZED
MOTION TO APPOINT COUNSEL GRANTED C-143-89
PARTY : D1 - COLEY DOUGLAS LAMONT

9/29/1998 1 Title : EVT:CERTIFIED COPY SENT
JUDGMENT ENTRY:MOTION TO APPOINT COUNSEL GRANTED.
DEAN MANDROSS
LUCAS COUNTY PROSECUTORS OFFICE
JOSEPH ANTHONY BENAVIDEZ, ATTORNEY
138 WEST HIGH STREET
LIMA, OHIO 45801
DOUGLAS COLEY, INMATE # 36144
MANSFIELD CORRECTIONAL IINSTITUTION
P.O. BOX 788
MANSFIELD, OHIO 44901
PARTY : D1 - COLEY DOUGLAS LAMONT

10/7/1998 1 Title : ----------
PARTY : D1 - COLEY DOUGLAS LAMONT

10/7/1998 2 Title : ORD:MOTION GRANTED
Motion to Stay Execution granted. See JE
PARTY : D1 - COLEY DOUGLAS LAMONT

APPENDIX C-2

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

STATE OF OHIO,	:	
Respondent,	:	Trial Court No. 97-1449
vs.	:	
DOUGLAS COLEY,	:	**DECISION AND JUDGMENT ENTRY**
Petitioner,.	:	Decided:

* * * * * * * *

This matter is before the court on Petitioner Coley's motion for appointment of counsel to assist in the preparation and filing of Petitioner Coley's petition for post-conviction relief.

Upon due consideration, Petitioner Coley's motion is found well-taken. Counsel will be appointed by this Court, through a separate Entry.

JUDGE RUTH ANN FRANKS

County of Richland :

STATE of OHIO : ss.

I am Douglas L Coley. I have personal knowledge of the information contained in this AFFidavit.

(1) Approximately, 2 months after I arrived at Death Row I received a letter from Attorney Joseph Bermudez. The letter told me that Mr. Bermudez and Attorney VanDeilen had been appointed to represent me on appeal. The letter also contained an affidavit of indigency. I signed the affidavit, got it notarized and mailed it back to Mr Bermudez. This letter was the only time I ever got

ANYTHING IN THE MAIL FROM MR. BENAVIDEZ.

(2) THE NEXT TIME I HEARD FROM MR. BENAVIDEZ IS WHEN I CALLED HIM AROUND JANUARY 2000. I ASKED HIM ABOUT POST CONVICTION RELIEF. MR. BENAVIDEZ TOLD ME THAT HE HAD FILED FOR POST CONVICTION RELIEF. I ASKED MR. BENAVIDEZ ABOUT MR. VAN DEILEN. MR. BENAVIDEZ TOLD ME THAT HE HAD NOT TALKED TO MR. VAN DEILEN BUT WAS GOING TO SCHEDULE A MEETING. HE ALSO TOLD ME THAT HE TAKING CARE OF MY APPEAL.

③ IN MAY OF 2000, I FOUND OUT THAT MR. BENAVIDEZ DID NOT FILE FOR POST CONVICTION RELIEF. AT THAT TIME I CONTACTED THE OHIO Public Defenders OFFICE MR. BODIKER VISITED ME AND TOLD ME THAT his OFFICE could NOT REPRESENT ME SINCE THEY ALREADY REPRESENTED JOSEPH GREEN.

④ I HAVE NEVER MET, TALKED TO OR RECEIVED MAIL FROM ATTORNEY VAN DEILEN.

⑤ I HAVE NEVER BEEN VISITED BY ATTORNEY BENAVIDEZ.

⑥ I WAS NEVER ASKED BY MR. BENAVIDEZ ABOUT ANY ISSUES THE COULD BE OR WERE RAISED IN POST CONVICTION OR ON APPEAL.

(7) Mr. Benavidez never mailed me any copies of the Transcript, Brief or other papers related to my case.

(8) Mr. Benavidez never sent me a copy of the decision from the Ohio Supreme Court denying my appeal.

(9) I wanted to try to obtain Post Conviction Relief. I filed a motion for appointment of counsel to represent me in Post Conviction. The Court sent me an order saying that Judge Franks had already appointed Mr. Benavidez.

(10) I have no money to hire Lawyers or investigators to represent me on

appeal or in post conviction. I have no legal education. I relied on Mr. Benavidez to handle my case. Mr. Benavidez did not take care of my case. I feel he let me down, big time and didn't do his job.

(11) Dictated by me and written down by Mr. Yeazel.

Douglas L. Coley

Sworn to and subscribed in my presence this 14th day of December 2001.

KEITH A. YEAZEL
ATTORNEY AT LAW
[illegible]
P.C. 1407