IN THE SUPREME COURT OF OHIO

STATE OF OHIO Plaintiff-Appellant, v. ANTHONY APANOVITCH Defendant-Appellee.	Case No. 2016-0696 On Appeal from the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County Court of Appeals Case Nos. 102618 and 102698

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LAW AND ARGUMENT

This case is before this Court on the State's appeal of the trial court's decision to grant death row inmate Anthony Apanovitch's fourth petition for postconviction relief, filed nearly 30 years after his conviction. On April 25, 2018, this Court sua sponte ordered the parties to brief three additional questions regarding whether the trial court had jurisdiction to consider Apanovitch's petition in the first place, and if not, what this Court should write in this case.

The State respectfully submits that Apanovitch's fourth petition did not fall under any of the statutory exceptions for untimely and successive petitions found in R.C. 2953.23(A). As such, the trial court had no jurisdiction to consider it. And because R.C. 2953.23(A) prescribes the jurisdiction of a trial court, the trial court's order granting Apanovitch relief outside the confines of that statute was null and void. The trial court should have denied that petition without a hearing. The proper remedy at this point is for this Court to hold that Apanovitch's fourth, successive petition did not satisfy any of the statutory exceptions found in R.C. 2953.23(A), and thereby vacate the trial court's order granting relief.

Question 1: Does Anthony Apanovitch's petition for postconviction relief satisfy any of the statutory exceptions for untimely and successive postconviction petitions provided in R.C. 2953.23(A)?

1. Apanovitch's untimely and successive petition was subject to the heightened requirements of R.C. 2953.23.

At the time Apanovitch filed his fourth petition for postconviction relief in 2012, Ohio's postconviction statute, R.C. 2953.21(A)(2), required a convicted offender to file a petition "no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal[.]" Apanovitch filed his fourth petition in 2012, nearly 28 years after the jury returned its verdict in 1984. As such, his petition was

untimely. Moreover, this was Apanovitch's fourth such petition, rendering that petition both untimely and successive.

Whereas R.C. 2953.21 governs a trial court's adjudication of a timely petition for postconviction relief, R.C. 2953.23 governs a trial court's jurisdiction to consider untimely or successive petitions. R.C. 2953.23(A) provides that a trial court "may not entertain a petition filed after the expiration of the period described in [R.C. 2953.21(A)] 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[.]"

R.C. 2953.23 is divided into two bases for granting postconviction relief: subsections (A)(1) and (A)(2). Subsection (A)(1) requires the petitioner to show both of the following:

> (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.

Subsection (A)(2), by contrast, applies only to inmates who have received postconviction DNA testing under R.C. 2953.71 through R.C. 2953.81. Neither subsection (A)(1) nor (A)(2) applied to Apanovitch's fourth petition.

2. Apanovitch did not bring his petition under R.C. 2953.23(A)(1).

Apanovitch has never – at any point in these proceedings – argued that his petition fell under R.C. 2953.23(A)(1). He has never argued that he was "unavoidably prevented"

from the discovery of any evidence. Indeed, the words "unavoidably prevented" do not appear in Apanovitch's petition, his reply brief in support of that petition, the transcript of the 2014 postconviction hearing (*see* PCR Tr. 1-357), his post-hearing brief, his brief in the court of appeals, or in his brief to this Court. Nor has he ever argued that the United States Supreme Court has since recognized a new right that applies retroactively to his case. As a result, there is not – and never has been – a claim that Apanovitch's petition satisfied the requirements of R.C. 2953.23(A)(1).

Significantly, the trial court disclaimed any reliance upon R.C. 2953.23(A)(1) in its order. The trial court relied upon R.C. 2953.23(A)(2), finding that Apanovitch "could only pursue this remedy[.]" *See* Trial Court's Order, p. 5. The trial court never cited or discussed R.C. 2953.23(A)(1) in its order. The trial court did not conduct any analysis of the jurisdictional requirements of R.C. 2953.23 at all, instead skipping directly to the merits of Apanovitch's underlying actual innocence claim.

Apanovitch incorrectly claims in his merit brief to this Court that his "Petition was brought under Ohio Revised Code § 2953.21(A)(1)[.]" *See Merit Brief of Appellee*, at p. 15. R.C. 2953.21 applies only to timely petitions. Because Apanovitch's petition was both untimely and successive, Apanovitch was required to demonstrate that his petition satisfied one of the statutory exceptions found in R.C. 2953.23. Apanovitch made little attempt to do so, and to the extent that he did, his petition expressly relied solely on R.C. 2953.23(A)(2):

> "Ohio Revised Code section 2953.23 requires that a second or successive petition for postconviction relief may not be filed unless one of two enumerated exceptions apply. For purposes of this petition, the second exception – regarding actual innocence as laid out in section 2953.23(A)(2) – applies, and the petition may be considered by this Court."

Post-Conviction Petition, p. 4. Apanovitch never cited to R.C. 2953.23(A)(1) in his petition or in any of his subsequent filings.

3. Apanovitch could not have brought his petition under R.C. 2953.23(A)(1) because he was not "unavoidably prevented" from discovery of any evidence.

The record also shows that Apanovitch was not "unavoidably prevented" from the discovery of the DNA evidence referenced in his 2012 petition. Barbara Campbell testified at trial that she took swabs from the victim's body and preserved them using slides. Tr. 826-827. On July 1, 1992, Linda Luke of the Cuyahoga County Coroner's Office met with Apanovitch's defense counsel and informed them that the Coroner's Office was still in possession of the "trace evidence slides." *See State's Brief in Opposition to Defendant's Petition for Postconviction Relief*, filed July 30, 2012, at Ex. 4 (handwritten notes of Linda Luke). And the State provided the results of the Coroner's testing on those slides to Apanovitch's defense in 2008. *See Petition for Postconviction Relief*, at Ex. 8. (discovery letter from Assistant Prosecutor Matthew Meyer).

"There is a material difference between being unaware of certain information and being unavoidably prevented from discovering that information, even in the exercise of due diligence." *State v. Warwick*, 2d Dist. Champaign No. 01CA33, 2002-Ohio-3649, ¶ 19. The record here shows that Apanovitch was aware of the slides' existence continually since his trial in 1984. He was also aware of the wording of his indictment, which was the basis for the trial court's *Valentine* ruling. Apanovitch never claimed otherwise, and therefore did not attempt to bring his petition under the "unavoidably prevented" prong of R.C. 2953.23(A)(1).

4. A claim of "actual innocence" is not cognizable under R.C. 2953.23(A)(1).

Even if Apanovitch had attempted to rely on R.C. 2953.23(A)(1), that subsection does not permit a convicted offender to bring a freestanding claim of actual innocence. In *Herrera*

v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L.E.2d 203 (1993), the Supreme Court of the United States held that "a claim of 'actual innocence' is not itself a constitutional claim[.]" Instead, a claim of actual innocence is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.*

In Ohio, postconviction relief is limited to claims that allege "a violation of rights that were constitutional in dimension, which occurred at the time that the petitioner was tried and convicted." *State v. Zich*, 6th Dist. Lucas No. L-15-1263, 2017-Ohio-414, ¶ 22. *See also* R.C. 2953.23(A)(1)(b) (requiring the petitioner to demonstrate "constitutional error at trial"). "A claim of actual innocence based on newly discovered evidence will, therefore, not provide substantive grounds for postconviction relief, because 'it does not, standing alone, demonstrate a constitutional violation in the proceedings that actually resulted in the conviction.'" *State v. Campbell*, 1st Dist. Hamilton No. C-950746, 1997 Ohio App. LEXIS 11, *13 (Jan. 8, 1997), quoting *State v. Powell*, 90 Ohio App.3d 260, 265, 629 N.E.2d 13 (1st Dist.1993).

Ohio appellate courts, relying on *Herrera*, have uniformly held that Ohio's postconviction statutes do not provide relief based on a freestanding claim of "actual innocence." *See State v. Byrd*, 145 Ohio App.3d 318, 330, 762 N.E.2d 1043 (1st Dist. 2001) ("Ohio appellate courts, applying *Herrera*, have held that a defendant's claim of 'actual innocence' based on newly discovered evidence does not demonstrate a constitutional violation in the proceedings that actually resulted in the defendant's conviction"); *State v. Keith*, 176 Ohio App.3d 260, 2008-Ohio-741, 891 N.E.2d 1191, ¶ 47 (3rd Dist.) (a claim of actual innocence "fails to demonstrate a substantive ground for post-conviction relief"); *State v. Harrington*, 172 Ohio App.3d 595, 2007-Ohio-3796, 876 N.E.2d 626, ¶ 18 (4th Dist.)

("Ohio courts have been consistent in holding that a claim of actual innocence is not itself a constitutional claim, nor does it establish a substantive ground for post-conviction relief"); *see also State v. Bound*, 5th Dist. Guernsey No. 04 CA 8, 2004-Ohio-7097, ¶ 22; *State v. Willis*, 6th Dist. Lucas Nos. L-15-1098, L-15-1101, 2016-Ohio-335, ¶ 19; *State v. Williams*, 8th Dist. Cuyahoga No. 85180, 2005-Ohio-3023, ¶ 31; *State v. Weaver*, 9th Dist. Lorain No. 97CA006686, 1997 Ohio App. LEXIS 5973, *11-12 (Dec. 31, 1997); *State v. Burke*, 10th Dist. Franklin App. No. 99AP-174, 2000 Ohio App. LEXIS 539, *9 (Feb. 17, 2000); *State v. Noling*, 11th Dist. Portage No. 98-P-0049, 2003-Ohio-5008, ¶ 46; *State v. Watson*, 126 Ohio App. 3d 316, 323, 710 N.E.2d 340 (12th Dist.1998).

R.C. 2953.23(A)(1) is limited to claims of newly-discovered evidence that "the petitioner was unavoidably prevented from discover[ing][.]" In practical terms, this unavoidable prevention requirement generally refers to *Brady* or *Giglio* violations. Such violations, if proven, would constitute a "constitutional error at trial" that could justify the granting of postconviction relief. R.C. 2953.23(A)(1)(b). But there are no *Brady* claims before this Court. The Sixth Circuit resolved all of Apanovitch's *Brady* claims in the State's favor in federal habeas. Apanovitch's 2012 petition was based solely on a claim of actual innocence based on DNA evidence. R.C. 2953.23(A)(1) does not recognize such a claim.

The only circumstance in which R.C. 2953.23 allows a convicted offender to bring a claim of actual innocence is through Ohio's postconviction DNA testing statutes, as incorporated in R.C. 2953.23(A)(2), which Apanovitch did not do.

5. Apanovitch's petition did not satisfy R.C. 2953.23(A)(2) because he was not an offender for whom DNA testing was performed under R.C. 2953.71-2953.81.

In 2003, Ohio's General Assembly enacted Senate Bill 11, creating R.C. 2953.71 through 2953.83 "to establish a mechanism and procedures for the DNA testing of certain

inmates serving a prison term for a felony or under a sentence of death." *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 29, quoting Sub.S.B. No. 11, 150 Ohio Laws, Part IV, 6498. Apanovitch never sought any DNA testing under these statutes.

At the same time, Senate Bill 11 also created R.C. 2953.23(A)(2), which allowed a convicted inmate "for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code" to file an untimely or successive postconviction petition arguing that "the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense * * *." This is the second basis for granting relief in the case of an untimely or successive postconviction petition under R.C. 2953.23(A).

The trial court in this case incorrectly relied upon R.C. 2953.23(A)(2) to grant Apanovitch relief. *See* Trial Court's Order, p. 5 ("R.C. 2953.23(A)(2) specifically provides that a petition for post-conviction relief is timely when it involves the testing of DNA. *Petitioner could only pursue this remedy* * * *") (emphasis added). R.C. 2953.23(A)(2), however, applies only to "an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code[.]" It does not, as the trial court incorrectly believed, apply to any petition that "involves the testing of DNA."

It is undisputed that Apanovitch never sought or received any DNA testing under R.C. sections 2953.71 to 2953.81. Instead, Apanovitch relied upon non-court-ordered re-testing done by the Cuyahoga County Coroner's Office in 2000-2001, and in fact, upon subsequent reinterpretations of that testing by his own independent experts years later. R.C. 2953.23(A)(2), however, is not a catchall provision that allows any convicted offender to bring a freestanding actual innocence claim in postconviction years after-the-fact where that claim "involves the testing of DNA." *Id.* Rather, the plain language of R.C. 2953.23(A)(2)

limits its application to offenders "for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code[.]" Apanovitch was not such an offender.

R.C. 2953.72(A) requires that an eligible offender who wishes to request DNA testing under those statutes "shall submit an application for the testing * * * on a form prescribed by the attorney general for this purpose[.]" Apanovitch never signed or submitted that form. He never submitted to the screening process for eligible offenders set forth in R.C. 2953.74. He never agreed that if the trial court rejected his application, it could not then consider any subsequent applications. *See* R.C. 2953.72(A)(7). He never agreed that no determination the trial court made in the exercise of its discretion regarding any postconviction DNA testing was reviewable by or appealable to any court. *See* R.C. 2953.72(A)(8).

To be sure, R.C. 2953.84 provides that Ohio's postconviction DNA testing statutes found in R.C. 2953.71 through R.C. 2953.81 "are not the exclusive means by which an offender may obtain postconviction DNA testing[.]" But the question of whether Apanovitch could "obtain" testing is not at issue here. Apanovitch is not seeking any DNA testing; nor did he ask for any additional testing in the trial court (in fact, a significant portion of this appeal concerns Apanovitch's attempt to exclude DNA test results from the lower courts' review). Rather, Apanovitch had already obtained the testing he sought years before he filed his fourth postconviction petition. Having declined, however, to submit to the requirements of Ohio's postconviction DNA testing scheme found in R.C. 2953.71 through R.C. 2953.81, Apanovitch cannot now claim the benefit of those statutes.

This is significant because the requirements of Ohio's postconviction DNA testing scheme would very likely have precluded the trial court from granting Apanovitch's petition. First, the trial court would have been statutorily required to reject Apanovitch's application

"if a prior definitive DNA test had been conducted regarding the same biological evidence[.]" R.C. 2953.74(A). The 2007 FSA report showing that Apanovitch's semen was found in the victim's mouth would have been a prior definitive DNA test that would have precluded the trial court from considering Apanovitch's 2012 petition. By avoiding the use of Ohio's postconviction DNA statute, Apanovitch sidestepped that question.

Second, as the Sixth Circuit noted in its 2006 opinion, Apanovitch had at that time tactically withdrawn his actual innocence claim in an attempt to prevent the federal court from considering the DNA evidence found in the victim's mouth. *Apanovitch v. Houk*, 466 F.3d 460, 489-490, n. 10 (6th Cir.2006).

Third, Apanovitch would have had to agree that the testing authority designated by the trial court could independently determine whether "[t]he parent sample of the biological material so collected contains scientifically sufficient material to extract a test sample." R.C. 2953.74(C)(2)(a). Given that both FSA and the Coroner's Office found that Coroner's Item 2.1 had insufficient DNA for testing, it is highly doubtful that Apanovitch would have been able to satisfy that statutory requirement.

By declining to utilize R.C. 2953.71 through 2953.81, Apanovitch avoided a series of statutory requirements he likely would not have been able to satisfy. That is, at this point, water under the bridge. But because he did so, he cannot now obtain relief under R.C. 2953.23(A)(2). That statute is limited, by its express terms, to "an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code[.]" Because Apanovitch was not such an offender, his petition did not fall under R.C. 2953.23(A)(2).

<u>Question 2</u>: If no statutory exception applies, did the trial court lack jurisdiction to consider the petition?

Apanovitch's fourth, successive petition did not satisfy either R.C. 2953.23(A)(1) or (A)(2), and as a result, the trial court had no jurisdiction to consider or grant that petition. *See* R.C. 2953.23(A) (a trial court "may not entertain a petition filed after the expiration of the period described in [R.C. 2953.21(A)] 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").

There is no constitutional right to postconviction review. *See State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994) ("postconviction state collateral review itself is not a constitutional right, even in capital cases"). Because a convicted inmate has no constitutional right to postconviction review, "[t]he 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, *citing State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). A petitioner "receives no more rights than those granted by statute." *Calhoun* at 281.

The General Assembly chose, in its discretion, to limit the types of claims that a convicted offender may bring in a second or successive postconviction petition. R.C. 2953.23(A) is a "proper procedural bar[]" that Ohio "is free to impose * * * to restrict repeated returns to state court for postconviction proceedings." *Slack v. McDaniel*, 529 U.S. 473, 489, 120 S. Ct. 1595, 146 L.Ed.2d 542 (2000). R.C. 2953.23(A)(1) allows claims based on evidence the offender was "unavoidably prevented" from discovering, as well as claims based on retroactive decisions by the Supreme Court of the United States. R.C. 2953.23(A)(2) allows claims of actual innocence brought by offenders who submit to the postconviction DNA testing statutes found in R.C. 2953.71 through R.C. 2953.81. If the offender does not satisfy either of those exceptions, the trial court has no jurisdiction to consider the petition.

The requirements of R.C. 2953.23(A) are "jurisdictional, and a trial court has no authority to consider an untimely filed petition for postconviction relief absent certain exceptions." *State v. Dilley*, 8th Dist. Cuyahoga No. 99680, 2013-Ohio-4480, ¶ 9 (citations omitted). *See also State v. Hall*, 4th Dist. Hocking No. 06CA17, 2007-Ohio-947, ¶ 10 ("A court has no jurisdiction to entertain an untimely petition for postconviction relief unless the petitioner makes the showings required by R.C. 2953.23(A)"); *State v. Lawson*, 1st Dist. Hamilton Nos. C-120077 and C-120067, 2012-Ohio-5281, ¶ 7 ("Because Lawson satisfied neither the time strictures of R.C. 2953.21(A)(2) nor the jurisdictional requirements of R.C. 2953.23(A), the postconviction statutes did not confer upon the common pleas court jurisdiction to entertain Lawson's postconviction claims on their merits"); *State v. Halliwell*, 134 Ohio App.3d 730, 734, 732 N.E.2d 405 (8th Dist.1999) ("Unless the above exceptions [of R.C. 2953.23(A)] apply, the trial court has no jurisdiction to consider an untimely filed petition for postconviction relief"). Without an express grant of statutory authority, the trial court had no jurisdiction to consider Apanovitch's fourth petition.

<u>Question 3</u>: If the trial court lacked jurisdiction to consider the petition, what is the proper disposition of this appeal?

This Court's final question is essentially one of remedy. The State submits that if this Court finds that the trial court was without jurisdiction to consider Apanovitch's fourth, successive petition, the remedy would be to vacate the trial court's order in its entirety. In that circumstance, the trial court's order granting Apanovitch relief would be void.

1. Without statutory authority to grant Apanovitch postconviction relief, the trial court's order purporting to do so was null and void.

R.C. 2953.23 is a jurisdictional statute. It delineates the jurisdiction that Ohio trial courts have to hear and consider untimely or successive petitions for postconviction relief.

"When a general jurisdiction of the subject matter exists, but the statute has prescribed the mode and particular limits in which it may be exercised, it must be confined to the limits thus prescribed, and cannot be exercised in any other manner, or upon any other terms." *McCleary v. McLain*, 2 Ohio St. 368 (1853). "[O]therwise, although the proceedings are within the general subject-matter jurisdiction of the court, any judgment rendered is void because the statutory conditions for the exercise of jurisdiction have not been met." Ohio Jurisprudence 3d (2003), Courts and Judges, Section 243.

"[A] judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*." *Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988). A void judgment "is a nullity and open to collateral attack at any time." *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, ¶ 46. This Court possesses the "inherent power to vacate a void judgment because such an order simply recognizes the fact that the judgment was always a nullity." *Van DeRyt v. Van DeRyt*, 6 Ohio St.2d 31, 36, 215 N.E.2d 698 (1966).

Ohio courts have consistently held that where a postconviction petition does not satisfy any of the jurisdictional requirements of R.C. 2953.23(A), any order by the trial court granting relief based on that petition is void. *See State v. Taqi*, 9th Dist. Lorain No. 14CA010672, 2015-Ohio-5319, ¶ 9 ("the trial court's judgment partially granting Taqi's petition for post-conviction relief * * * was void ab initio"); *State v. Williams*, 4th Dist. Lawrence No. 11CA25, 2012-Ohio-3401, ¶ 15-16 (vacating as void the trial court's order to grant the defendant's postconviction petition because it "was untimely and did not meet the requirements of either R.C. 2953.23(A)(1) or 2953.23(A)(2)"); *State v. Kolvek*, 9th Dist. Summit Nos. 22966 and 22967, 2006-Ohio-3113, ¶ 7 (where "appellant failed to meet his burden under R.C. 2953.23(A)(1) to file a timely petition for post-conviction relief and the

trial court therefore lacked jurisdiction to entertain the petition * * * the trial court's journal entries * ** are void ab initio"). This Court should vacate the trial court's decision.

2. If the trial court had no jurisdiction to grant Apanovitch postconviction relief on the rape count, this would vitiate the trial court's subsequent reliance upon Crim.R. 33 to grant Apanovitch a new trial on the remaining counts.

In doing so, this Court would not need to consider the applicability of Crim.R. 33 (governing motions for a new trial). Apanovitch did not file a motion for a new trial, nor did he cite Crim.R. 33 in his postconviction petition. Rather, the parties stipulated that the trial court could consider both R.C. 2953.23 and Crim.R. 33 in adjudicating Apanovitch's petition. PCR Tr. 52, 314. After acquitting Apanovitch of one count of rape, the trial court thus relied upon Crim.R. 33 to grant Apanovitch a new trial on the remaining counts of aggravated murder and aggravated burglary. Tr. 327-329.

Crim.R. 33 allows a trial court to grant a "new trial." It does not allow a trial court to acquit a defendant on a particular count. Crim.R. 33(D) provides: "When a new trial is granted by the trial court * * * the accused shall stand trial upon the charge or charges of which he was convicted." Under this rule, the trial court could not have retroactively acquitted Apanovitch of the single count of rape. The court could only grant Apanovitch a new trial, or modify his conviction to reflect a lesser offense. *See* Crim.R. 33(A)(4).

The trial court's decision to grant a new trial depended on its decision to acquit Apanovitch on the count of vaginal rape. After acquitting Apanovitch of the rape, the trial court relied upon *Valentine v. Konteh*, 395 F.3d 626 (6th Cir.2005) to "dismiss[] the other [rape] count for lack of specificity or lack of differentiation from the other count in violation of Petitioner's due process rights." PCR Tr. 327. It was only at that point – once the trial court dismissed the second count of rape without prejudice – that the court granted

Apanovitch a new trial. *See* PCR Tr. 328 (stating that "[w]ith rape no longer being a part of the case it could make a difference" in "how a jury might view the aggravating circumstances when considering the death penalty"), citing Crim.R. 33(A)(4).

In sum, the trial court had no jurisdiction to consider Apanovitch's postconviction petition and no jurisdiction to acquit him of the rape count. Without that acquittal, the trial court's stated basis for dismissing the second rape count under *Valentine* would not exist. Double jeopardy only bars retrial where "there is a dismissal or acquittal based upon a factual finding of innocence." *Ohio v. Malinovsky*, 60 Ohio St.3d 20, 23, 573 N.E.2d 22 (1991), citing *United States v. Scott*, 437 U.S. 82, 96-97, 98 S. Ct. 2187, 57 L.Ed.2d 65 (1978). Without the dismissal of the second rape count, there was no basis on which to grant a new trial. The only circumstance in which this Court would ever consider Crim.R. 33 would be if this Court were to (1) find that Apanovitch's petition did satisfy one of the statutory exceptions of R.C. 2953.23, (2) affirm the trial court's decision to acquit Apanovitch of the count of rape, and (3) affirm the trial court's dismissal of the second rape count under *Valentine*.

Even if this Court were to reach the new trial issue, Crim.R. 33(B) likewise required Apanovitch to prove that he "was unavoidably prevented" from discovery of the evidence upon which his claim was based. Once again, Apanovitch never claimed that he was "unavoidably prevented" from discovery of anything, the trial court never made such a finding, and the record shows that Apanovitch has been continually aware of the existence of the trace evidence slides since his trial in 1984. Moreover, he could not have been "unavoidably prevented" from the discovery of the language of his own indictment, which was the basis for the trial court's new trial order under *Valentine*.

CONCLUSION

Based on the foregoing, the State respectfully asks this Court to hold: (1) Apanovitch's petition for postconviction relief did not satisfy any of the statutory exceptions for untimely and successive postconviction petitions provided in R.C. 2953.23(A), (2) the trial court lacked jurisdiction to consider the petition, and (3) the trial court's order granting Apanovitch postconviction relief was therefore a nullity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing *Supplemental Brief of Appellant the State of Ohio* was served by email this 15th day of May, 2018 to Mark R. DeVan (mdevan@bgmdlaw.com), William C. Livingston (wlivingston@bgmdlaw.com), Harry P. Cohen (hcohen@crowell.com), and Michael K. Robles (mrobles@crowell.com), counsel for Defendant-Appellee Anthony Apanovitch, and to Samuel C. Peterson (samuel.peterson@ohioattorneygeneral.gov) and Thomas E. Madden (thomas.madden@ohioattorneygeneral.gov), counsel for *Amicus Curiae* Ohio Attorney General Michael DeWine.

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