IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, v. MARLON JOHNSON, Defendant-Appellant.	:	Case No. 22-0559 On Appeal from the Lorain County Court of Appeals Ninth Appellate District Court of Appeals Case No. 21CA011732

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MARLON JOHNSON

MARLON JOHNSON #A751271
NAME AND NUMBER
Lebanon Corr. Inst.
INSTITUTION
P.O. BOX 56
ADDRESS
Lebanon, Ohio 45036
CITY, STATE & ZIP

DEFENDANT-APPELLANT, PRO SE

J.D. Tomlinson
PROSECUTOR NAME
225 Court St., 3rd Floor
ADDRESS
Elyria, Ohio 44035
CITY, STATE & ZIP
Unknown
PHONE

COUNSEL FOR APPELLEE, STATE OF OHIO

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

In Proposition of Law One Johnson contends that he was deprived of a fair trial because trial counsel failed to enter evidence of perjury on behalf of two of the state's witnesses. Because the two witnesses offered the only evidence against Johnson (by way of testimony), and because none of the physical evidence linked Johnson to the offenses at issue - and instead implicated a different person - counsel's failure here was material to the outcome of the case.

In Proposition of Law Two and Three, Johnson evidences that the pervasive publicity required a change of venue and/or sequestering of the jury. And in Proposition of Law Four Johnson asserts that he was deprived of a fair trial when jurors took a tour of the county jail where they saw him being held in custody and in county jail issued clothing.

In Proposition of Law Five Johnson argues that trial counsel provided ineffective assistance for failing to challenge the jury venire. And in Proposition of Law Six, Johnson contends that he was deprived of his constitutional right to confront his accusers at his preliminary hearing, despite his specific request to do so.

All of the propositions of law herein were unavailable to be raised in Johnson's first postconviction petition under RC 2953.21, thus they were appropriate in Johnson's second postconviction petition. However, the lower courts erroneously barred consideration of the claims under res judicata. Much of the claims were supported by sufficient evidence attached to the petition, and the balance can be substantiated by evidence that is not available to Johnson but could easily be obtained by counsel.

STATEMENT OF THE CASE AND FACTS

Marlon Johnson (hereinafter "Johnson"), Defendant-Appellant, pro se, was indicted on March 1, 2018 on offenses related to the shooting death of Todd Dais, which occurred in the early hours of January 1, 2018. Johnson pled not guilty at his arraignment on March 8, 2018. The matter came to trial by jury on April 16, 2018, the Honorable Judge James Miraldi presiding. On April 20, 2018, the jury returned verdicts of guilty on all offenses and specifications.

On May 3, 2018, a sentencing hearing was held in which Johnson was sentenced to an aggregate term of incarceration of fifty-four years. Thereafter, counsel was appointed for Johnson's appeal. (See Lorain County Court of Common Pleas Case No. 18CR097736, Judgment Entry of Conviction and Sentence journalized May 4, 2018).

Johnson filed a timely notice of appeal on May 18, 2018. He requested that appellate counsel meet with him prior to preparing the appeal brief, however counsel refused. Johnson then sent a letter dated July 15, 2019 to counsel that contained proposed assignments of error, which was entered on the case docket on July 16, 2019. (See Ninth District Court of Appeals Case No. 18CA011329). However, appellate counsel only raised one of the proposed errors (relating to the jury instruction on flight). Frankly, appellate counsel's performance on said issue was deficient, as well as the brief as a whole. It was no surprise, therefore, that the court of appeals overruled the assignments of error. (See State v. Johnson, 2020-Ohio-4178, decided August 24, 2020).

Johnson sought a timely appeal to the Ohio Supreme Court , who declined jurisdiction over the propositions of law on November 10, 2020.

(See Ohio Supreme Court Case No. 2020-1116).

Johnson filed a timely application to reopen his appeal pursuant to App. R. 26(B) on November 10, 2020, as well as an application for reconsideration pursuant to App. R. 26(A). Johnson included an instanter motion for leave to file the 26(A) application beyond the ten day limitations period. The applications under Rules 26(A) and 26(B) are fully briefed and pending a resolution with the court of appeals (at least at the time the instant brief was being prepared).

Johnson filed a timely petition for postconviction relief with the trial court pursuant to R.C. 2953.21 and Crim. R. 35 on June 22, 2018. The trial court denied the petition on August 22, 2018. However, the trial court's decision does not contain any findings of fact and conclusion of law, contrary to Crim. R. 35(C) and State v. Mapson, 1 Ohio St.3d 217, 218, 438 N.E.2d 910 (1982).

On December 28, 2020, Johnson filed a second petition for postconviction relief, which was denied by the trial court on January 28, 2021. The trial court's decision on Johnson's second petition did contain findings of fact and conclusions of law, as mandated by Crim. R. 35(C) and State v. Mapson. The trial court's judgment on Johnson's second postconviction petition is the subject of the instant appeal.

As to the facts of the case, it is crucial to note that the State did not produce any physical evidence whatsoever linking Johnson to the shooting death of Todd Dais, and a meaningful review of the physical evidence actually implicates Tywan Perry. The only evidence that the State produced at trial to support its charges against Johnson was by way of an incredible witness named Melissa Dolin, who had everything to loose and much to gain when testifying that the gun shots ...

"all took place in the kitchen. Marlon never left the kitchen, they all took place, pop, pop, pop, pop, right there in the same spot." (Tr. pg. 310).

Detective Christopher Kovach processed the physical evidence at the scene, and he testified that it was Tywan Perry's Luger 9 mm handgun that fired all of the rounds at the scence. He testified that the gun ejected spent shell casings to the right, and since there was one spent casing on the kitchen floor in front of the cupboard, it was apparent the the first shot occurred near the back door. (Tr. pg. 418). Next the shooter chased Todd Dais down the stairs and into the basement while still shooting. This explained: (1) the spent shell casing on the floor in the kitchen; (2) the spent shell casing on the fourth step up from the basement; (3) the spent shell casing on the first step up from the basement; (4) the spent shell casing on the basement floor near the water heater (to the right of the stair); (5) the spent shell casing on the basement floor near the hot water tank (to the far right of the stair); and (6) Todd Dais' lifeless body on the basement floor at the end of the trail of spent shell casings. (Tr. pgs. 417-20; Scene Diagrams #3A-3C; and Scene Photos #1A-1W).

If Melissa Dolin testified that Johnson never left the kitchen during the shootings, and Detective Kovach testified that the shooter chased Todd Dais down the stairs and into the basement (while shooting five rounds), then Johnson cannot be the shooter. Furthermore, there was no blood in the kitchen or on the stairs. Since Tywan Perry came in the house with Johnson and was the only one near the head of the stairs with Todd Dais, and since it was Tywan Perry's handgun that was the murder weapon, it is clear that Tywan Perry is the one who chased Todd down the stairs while shooting. After all, Melissa did not testify that Tywan Perry remained in the kitchen, rather, she clearly stated that "Marlon never left the kitchen[.]" (Tr. pg. 310).

ERROR ONE: PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AS WELL AS HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL, AS A RESULT OF COUNSEL'S FAILURE TO ENTER EVIDENCE OF PERJURY ON BEHALF OF TWO OF THE STATE'S WITNESSES. THERE IS A REASONABLE PROBABILITY THAT HAD THE EVIDENCE OF WITNESS PERJURY BEEN DISCLOSED, THE RESULT OF PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT.

"[I]n light of the axiomatic importance of truthful testimony for

the integrity of judicial proceedings, evidence of a witness' perjury has a significant impact on the fairness of a trial." United States v. Cuffie, 80 F.3d 514, 518 (D.C. Cir. 1996). Additionally, "depriving a defendant of the opportunity of utilizing damaging and impeaching evidence against an essential witness should be considered in the due process analysis." Schledwitz v. United States, 169 F.3d 1003, 1016 (6th Cir. 1999). In the instant case, State's essential witnesses Melissa Dolin and William Malone committed perjury when they were asked by defense counsel if they had any cases pending against them, and both testified that they did not have cases pending against them. (Tr. 304 and 350 respectively). This is significant because Melissa Dolin and William Malone provided the only evidence to support the State's charges against Johnson, however their testimony was in direct conflict with all of the physical evidence at the scene. (See also the App. R. 26(A) application's statement of the case, facts, & exhibits).

Therefore, under the circumstances of the instant case, "the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness[es], thereby calling into question the fairness of the ultimate verdict." United States v. Cuffie, 80 F.3d at 517. Because the testimony of Melissa Dolin and William Malone was critical to Johnson's convictions, "the jury's assessment of [the witnesses] credibility was crucial to the outcome of the trial." United States v. Shaffer, 789 F.2d 682, 688-89 (9th Cir. 1986). But "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419,

115 S. Ct. 1555, 1566 (1995). This issue could be said therefore to fall into the category of a violation of the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), as the State was no doubt aware that their two star witnesses had cases pending against them - for it is well established that ...

> "[I]mpeachment evidence ... as well as exculpatory evidence, falls within the Brady rule. Such evidence is evidence favorable to an accused ... so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. " United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 3380 (1985).

Regardless, it certainly falls into the category of ineffective assistance of trial counsel for failing to search public records for evidence of the issue at bar. This is how Johnson discovered that both Melissa Dolin and William Malone committed perjury. Johnson discovered this information upon the termination of the representation of his court appointed attorneys, and after obtaining the trial and appellate court records of his case from said attorneys pursuant to Rule 1.16(d). (See dockets attached to Johnson's second postconviction petition).

ERROR TWO: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, FOR FAILING TO MOVE THE TRIAL COURT FOR A CHANGE OF VENUE DUE TO THE PERVASIVE PRETRIAL PUBLICITY, WHICH ULTIMATELY DEPRIVED PETITIONER OF A FAIR TRIAL AND AN IMPARTIAL JURY (ADDITIONAL VIOLATIONS OF THE SIXTH AND FOURTEENTH AMENDMENTS).

Trial counsel should have moved the trial court for a change of venue due to the pervasive pretrial publicity. Because Todd Dais was the first murder victim of 2018, there was extensive press coverage prior to and during trial, which even continued through the appeal process (and post-appeal). There were many inflammatory articles, pervasive sensationalism, lurid stories, and inflammatory photographs.

Trial counsel should have requested a change of venue pursuant to Crim. R. 18(B), R.C. 2901.12, and R.C. 2931.19, which provides for a change of venue when, according to the Ohio Supreme Court, "it appears to the trial court by affidavit or evidence in open court, that a fair and impartial trial cannot be had in the county where the case is pending." State v. Maurer, 15 Ohio St. 3d 239, 250 (1984). In the instant case, trial counsel failed to enter sufficient evidence on the record of the pervasive and prejudicial publicity. As such, this issue is ripe for resolution in a postconviction petition.

Johnson did not discover that this issue had never been properly addressed until the conclusion of representation of his court appointed trial and appellate attorneys. It was at that time, following his direct appeal decision on August 24, 2020 (cited at 2020-Ohio-4178) that he obtained the trial and appellate court records from his attorneys. Fortunately, Johnson received a few newspaper articles, which he had attached to his postconviction petition - note that in many he is in county jail issued clothing. (See also Affidavit in petition appendix, pg A-2). No doubt this is only a small portion of the press coverage, as Johnson has been incarcerated since the day following Todd Dais' murder, thus he has had very limited access to this type of the press coverage (other than television news coverage). Much of the coverage witnessed by Johnson was by way of television news, which Johnson can only provide evidence of at an evidentiary hearing. As such, this is an issue requiring an evidentiary hearing to conduct further inquiry and procure further evidence as to whether or not the publicity was pervasive enough that counsel's failiure to address the issue prejudiced Johnson to the degree that demands a new trial.

In the case Sheppard v. Maxwell, 384 U.S. 333 (1966), the United States Supreme Court reversed a trial court's decision to deny change of venue because there was (1) extensive press coverage prior to and during trial; (2) inflammatory articles and pictures were published; (3) lurid stories were published; and (4) in the midst of the sensationalism, the jurors were not sequestered. "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion[.]" Irvin v. Dowd, 366 U.S. 717, 728 (1961). Johnson contends that under the particular circumstances of his case, "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." Rideau v. State of Louisiana, 373 U.S. 723, 725 (1963).

ERROR THREE: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, FOR FAILING TO MOVE THE TRIAL COURT TO SEQUESTER THE JURY.

Trial counsel should have moved the trial court to sequester the jury pursuant to Crim. R. 24(H)(2)(b) because the publicity continued throughout the trial and was ultimately prejudicially pervasive. State v. Gross, 97 Ohio St. 3d 121, 133, 2002-Ohio-5524. Sequestering of the jury in the instant case was warranted to assure that the jury was shielded from "outside influences and to ... protect the integrity of the jury's verdict." State v. Davis, 63 Ohio St. 3d 44, 48, 584 N.E.2d 1192 (1992). Johnson contends that the jury should have been sequestered for the same reasons that there should have been a change of venue, as proffered in Ground Two above. Additionally, Johnson was prevented from the discovery of this issue for the same reasons set forth in Ground Two above, and trial counsel was ineffective for failing to

address this issue under the case law and analysis set forth in Ground Two. As such, this issue is ripe for resolution in a postconviction petition because it is based on the ineffective assistance of trial counsel, relies on evidence that is outside of the record (some of which is attached hereto), and may require an evidentiary hearing for further fact development.

ERROR FOUR: PETITIONER'S RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN JURORS TOOK A TOUR OF THE COUNTY JAIL WHERE THEY SAW THE PETITIONER BEING HELD IN CUSTODY AND IN COUNTY JAIL ISSUED CLOTHING.

Trial counsel should have moved for a mistrial because all jurors in his trial had taken a tour of his county jail prior to his trial, where they had seen Johnson incarcerated and in county jail issued clothing. Specifically, there were 24 perspective jurors from which the 12 actual jurors were ultimately selected for Johnson's trial. All 24 had toured the county jail (in two groups of 12 per group). This unusual predicament most certainly must be deemed to have been presumptively prejudicial. Even requiring a defendant to stand trial in county jail issued clothing (which Johnson was also required to do - see Tr. 330 & press photos attached hereto) is grounds for reversal. In Estelle v. Williams, the United States Supreme Court held that "an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption [of innocence] so basic to the adversary system." Id., 425 U.S. at 504-06.

Here Johnson was not only seen by jurors in county jail clothing at the jail and throughout trial, but was actually seen in the county jail environment. Clearly this is exponentially more prejudicial than the factors being contemplated by the Supreme Court in Estelle v. Will-

iams, supra. This is especially so when considering the additional factors of the pervasive publicity discussed in Grounds Two and Three above. Johnson repeatedly asked trial and appellate counsel to obtain the relevant county jail records that would list the names of those who toured the county jail in order to evidence this claim. However, when Johnson received the trial and appellate court records from his respective attorneys at the conclusion of representation pursuant to Rule 1.16(d), he discovered that neither attorney had made any efforts whatsoever to obtain the relevant records or bring the matter to any court's attention.

Johnson of course would not be permitted to obtain the relevant records through a public records request because the information contained therein would be deemed "counsel only" materials. Certainly the Court would be able to compare the relevant public records from the county jail along with the trial court records in Johnson's case to evidence this claim. Johnson is certain that he recognized several people who toured the county jail seated as jurors in his case. (See Affidavit in petition appendix, pg. A-2). This issue is ripe for resolution in a second or successive postconviction petition because (1) Johnson was unaware that his attorneys failed him on this issue until their recent termination of representation (which constitutes ineffective assistance); (2) the issue relies on evidence that is outside of the trial court record; and (3) a full and fair resolution of the issue will require an evidentiary hearing for the court's review of the yet to be obtained relevant county jail records.

ERROR FIVE: TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, FOR FAILING TO CHALLENGE THE ARRAY OF THE JURY VENIRE.

Trial counsel should have challenged the array of the jury venire because the entire jury venire was caucasion, which is not an adequate or acceptable cross-section of the community. The issue being that Mr. Johnson is an African-American male. The circumstances present here violates the fair cross-section requirement of Crim. R. 24, and the violation materially affected Johnson's consitutional rights. State v. Puente, 69 Ohio St. 2d 136, 431 N.E.2d 987 (1982). Jury selection procedures not only implicate the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, but also implicates equal protection principles as well. First, in limited situations, a defendant may challenge the jury selection process on the ground that it violates fundamental fairness under the Due Process Clause. Second, the Sixth Amendment forbids racial discrimination in the selection of jurors and requires that the jury venire from which the petit jury is selected represents a fair cross-section of the community. See Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357, 364-65 (both cases finding that the exclusion of women violated representative cross-section requirements because women comprised over fifty percent of the citizens eligible for jury service in the applicable judicial district). But see United States v. McAnderson, 914 F.2d 934, 941 (7th Cir. 1990) (jury selection consisting of less than ten percent African-Americans not enough to demonstrate racial discrimination by unfair or unreasonable representation of African-Americans in the jury venire).

The petit jury itself need not represent a fair cross-section of the community, as such a requirement would cripple the peremptory challenge process. Holland v. Illinois, 493 U.S. 474, 480-84 (1990). A criminal defendant need not be a member of the underrepresented group

to have standing to raise the claim. Powers v. Ohio, 499 U.S. 400, 413-416 (1991).

ERROR SIX: PETITIONER WAS DEPRIVED OF HIS RIGHT TO CONFRONT HIS ACCUSERS AT HIS PRELIMINARY HEARING HELD JANUARY 9, 2018, DESPITE HIS SPECIFIC REQUEST TO DO SO.

At a preliminary hearing, a criminal defendant has "full right of cross-examination" of the prosecutor's witnesses, as well as the right to examine all exhibits. See Crim. R. 5(B)(2). Following the presentation of the evidence by the state at a preliminary hearing, a defendant may move for discharge for failure of proof, i.e., failure of the state to demonstrate probable cause that (1) a crime was committed; and (2) the defendant committed the crime. See Crim. R. 5(B)(3). In fact, the preliminary hearing is a formal, adversarial hearing at which the defendant is entitled (1) to be represented by an attorney; (2) to cross-examine witnesses; and (3) to introduce evidence. Coleman v. Alabama, 399 U.S. 1, 7-10 (1970). A record of the proceeding must be made available after the preliminary hearing. See Roberts v. LaVallee, 389 U.S. 40, 42 (1967) (striking down a state stautute denying indigents a free transcript of a preliminary hearing because the statute violated the constitution). Any party may request a transcript of a preliminary hearing. Britt v. North Carolina, 404 U.S. 226, 230 (1971).

Upon the termination of representation of his trial and appellate attorneys, and upon receipt of the trial and appeal records pursuant to Rule 1.16(d), Johnson discovered that a transcript of the preliminary hearing had never been requested by trial counsel, nor had trial counsel developed the trial court record on this issue at all. After this discovery, Johnson filed Defendant's Motion For A Transcript Of

The Preliminary Hearing Held January 9, 2018 At State's Expense. (See State v. Johnson, Lorain County Municipal Court Case No. 2018CRA00001, Judge Thomas Elwel presiding). (See also Affidavit of Petitioner that was attached to the petition. A motion for a transcript was filed with the Lorain County Municipal Court. The issue is ripe for resolution in a second or successive postconviction petition because (1) Johnson was unaware that his attorneys failed him on this issue until their recent termination of representation (which constitutes ineffective assistance); (2) the issue relies on evidence that is outside of the trial and appellate court records; and (3) a proper resolution of the issue may require an evidentiary hearing for further fact development.

IV. CONCLUSION

Resting therefore on the foregoing, Mr. Johnson respectfully requests that the Court grant the appeal of his second petition for postconviction relief pursuant to R.C. 2953.21. In the alternative, Mr. Johnson respectfully requests that a hearing be held on the claims that require further fact development.

Respectfully submitted,

Marlon Johnson #A751271
Toledo Correctional Institution
2001 East Central Ave.
Toledo, Ohio 43608
DEFENDANT-APPELLANT, PRO SE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by first-class United States mail to the Lorain County Prosecutor's office at 225 Court St., 3rd Floor, Elyria, Ohio 44035, on the _____ day of _____ , 2021.

Marlon Johnson #A751271
DEFENDANT-APPELLANT, PRO SE

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No.
Plaintiff-Appellee,	:	
	:	On Appeal from the Lorain
vs.	:	County Court of Appeals
	:	Ninth Appellate District
MARLON JOHNSON,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 21 CA 011732

APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT MARLON JOHNSON

JUDGMENT AND OPINION OF THE LORAIN COUNTY COURT OF APPEALS, NINTH APPELLATE DISTRICT CASE NO. 21CA011732.

STATE OF OHIO)
) ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

MARLON JOHNSON

Appellant

C.A. No. 21CA011732

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 18CR097736

DECISION AND JOURNAL ENTRY

Dated: March 31, 2022

SUTTON, Judge.

{¶1} Defendant-Appellant, Marlon Johnson, appeals the judgment of the Lorain County Court of Common Pleas denying his second petition for postconviction relief. For the reasons that follow, this Court affirms.

I.

Relevant Background Information

{¶2} In *State v. Johnson*, 9th Dist. Lorain No. 18CA011329, 2020-Ohio-4178, ¶ 2-3, this Court stated as follows:

> On March 1, 2018, the Lorain County Grand Jury issued a thirteen-count indictment against Mr. Johnson related to the shooting death of T.D. The indictment charged Mr. Johnson with: (I) aggravated murder in violation of R.C. 2903.01(A), a special felony; (II) aggravated murder in violation of R.C. 2903.01(B); (III) aggravated murder in violation of R.C. 2903.01(B); (IV) murder in violation of R.C. 2901.02(A), a special felony; (V) murder in violation of R.C. 2901.02(B), a special felony; (VI) murder in violation of R.C. 2901.02(B); (VII) aggravated burglary in violation of R.C. 2911.11(A)(1), a felony of the first degree; (VIII) aggravated burglary in violation of R.C. 2911.11(A)(2), a felony of the second degree; (IX) unlawful use of a weapon by a violent career criminal in

violation of R.C. 2923.132, a felony of the first degree; (X) felonious assault in violation of R.C. 2903.11(A)(1), a felony of the second degree; (XI) felonious assault in violation of R.C. 2903.11(A)(2), a felony of the second degree; (XII) having weapons while under disability in violation of R.C. 2923.13(A)(2), a felony of the third degree; (XIII) having weapons while under disability in violation of R.C. 2923.12(A)(3), a felony of the third degree. Counts (I)-(XI) all carried attendant career criminal, firearm, and repeat violent offender specifications.

Mr. Johnson entered a plea of not guilty at arraignment. Mr. Johnson did not waive his right to a speedy trial, and a jury trial was scheduled for April 11, 2018. Following trial, a jury found Mr. Johnson guilty on all counts and specifications in the indictment. The trial court accepted the jury's verdicts, found Mr. Johnson guilty, and, after a sentencing hearing, sentenced Mr. Johnson to an aggregate term of life in prison with parole eligibility after fifty-four years.

Mr. Johnson filed a direct appeal of his sentence and convictions. In so doing, Mr. Johnson raised five assignments of error for this Court's review: (1) the verdict is against the sufficiency of the evidence; (2) the convictions are against the manifest weight of the evidence; (3) the trial court erred in denying Mr. Johnson's request for a transcript of the grand jury proceedings; (4) Mr. Johnson did not receive effective assistance of counsel; and (5) Mr. Johnson was deprived the right to a fair trial due to erroneous jury instructions. Finding no error, however, this Court affirmed. *Johnson* at ¶ 69.

{¶3} While his direct appeal was still pending, Mr. Johnson filed a "Petition to Vacate or Set Aside Judgment of Conviction or Sentence." The trial Court denied Mr. Johnson's petition. Mr. Johnson then moved this Court to reopen his direct appeal based upon ineffective assistance of counsel, which we also denied. Further, Mr. Johnson filed, *pro se*, a second petition for postconviction relief, which is the subject of the present appeal.

Mr. Johnson's Second Petition for Postconviction Relief

{¶4} In his second petition for postconviction relief, Mr. Johnson argued he was "unavoidably prevented from the discovery of the facts upon which his claims rely due to the

ineffective assistance of trial counsel and/or the ineffective assistance of appellate counsel[.]" Specifically, Mr. Johnson claimed his counsel failed to: (1) enter evidence of perjury regarding the State's witnesses; (2) change the venue of the trial due to publicity; (3) move to sequester the jury; (4) move for a mistrial because the jurors toured the county jail and saw Mr. Johnson incarcerated and in jail issued clothing; (5) challenge the array of the jury venire; and (6) cross-examine the State's witnesses at a preliminary hearing on January 9, 2018. In support of his claims for relief, Mr. Johnson attached several exhibits including court dockets and news articles about his case, as well as an affidavit.

{¶5} The State opposed Mr. Johnson's petition arguing, pursuant to R.C. 2953.21, Mr. Johnson's claims are untimely and successive, as well as being barred by the doctrine of *res judicata*. The State asserted:

> all of the claims in [Mr.] Johnson's petition are based on facts and circumstances that occurred prior to or during trial, were known to him during or before trial, or could have been discovered in the exercise of reasonable diligence. Therefore, [Mr.] Johnson failed to demonstrate why he was unavoidably prevented from the discovery of the facts necessary to file a timely [postconviction] petition as all the *factual* matters asserted are matters of which he was personally familiar of those which he could have reasonably discovered.

As such, the State sought dismissal of Mr. Johnson's petition.

{¶6} In dismissing Mr. Johnson's petition, the trial court stated:

> Here, [Mr.] Johnson's petition is both untimely and successive. [Mr.] Johnson's trial transcript was filed in his direct appeal on November 26, 2018. The [p]etition before the court was filed over two years later, on December 28, 2020, and [Mr.] Johnson previously filed a petition for [postconviction] relief which was denied.
>
> [Mr.] Johnson does not contend that the United States Supreme Court recognized a new right that applied retroactively to him; rather he maintains that he was unavoidably prevented from the discovery of the facts upon which he relied to present his ineffective-assistance-of-counsel claims. In support of his argument, [Mr.] Johnson maintains that he was unable to discover several "issues" that should have been addressed at trial and raised on appeal until he received his

"client papers and property" from this trial and appellate counsel following the conclusion of his direct appeal.

* * *

[A]ll of the claims in [Mr.] Johnson's petition are based on facts and circumstances that occurred prior to or during trial, were known to him during or before trial, or could have been discovered in the exercise of reasonable diligence. Therefore, [Mr.] Johnson has failed to demonstrate why he was unavoidably prevented from the discovery of the facts necessary to file a timely [postconviction] petition as all the *factual* matters asserted are matters of which he was personally familiar or those which he could have reasonably discovered.

First, [Mr.] Johnson cites to online court dockets that he obtained for trial witnesses [M.D.] and [W.M.], which he claims demonstrate that [M.D.] and [W.M.] each committed perjury by failing to disclose the existence of criminal cases which he maintains were pending at the time of trial. [As reflected by the dockets attached to Mr. Johnson's petition, both of these cases were resolved prior to Mr. Johnson's trial.] In doing so, [Mr.] Johnson has failed to establish why these public dockets, which are from 2017, could not have previously been discovered in the exercise of reasonable diligence or how the receipt of his client papers allowed for their recent discovery.

Moreover, [Mr.] Johnson was aware of the facts and circumstances that form the basis of his remaining grounds for relief during or before trial. First, [Mr.] Johnson certainly knew of any pretrial publicity surrounding his case that he now claims should have required a change in venue and the sequestering of the jury well before the filing of his second petition. In fact, [Mr.] Johnson acknowledges in his [a]ffidavit that since the day of the murder, he had access to any television media coverage leading up to and surrounding the trial and during the sentencing hearing. In addition, Mr. Johnson saved newspaper articles from the trial which he in turn attached to his petition.

[Mr.] Johnson was also aware of the facts which he claims support a mistrial as he himself claims to have observed certain jurors taking a tour of the county jail. [Mr.] Johnson was further aware of the composition of the jury which he claims did not represent a fair cross-section of the community as he was present and sat through the jury selection process. Finally, [Mr.] Johnson attended the preliminary hearing held in the Lorain Municipal Court on January 9, 2018[,] and heard the testimony presented by the State which established probable cause to bind the matter over to the Lorain County Court of Common Pleas Grand Jury. [Mr.] Johnson could have requested a transcript if he so chose. Moreover, [Mr.] Johnson was present at trial and would have immediately been aware if the trial testimony differed from that offered at a preliminary hearing.

Ultimately, [Mr.] Johnson merely advances *new legal theories* which could have been raised at trial or on appeal as a result of facts upon which he was already

> aware. However, R.C. 2953.23(A) contemplates the unavoidable discovery of *new historical facts* of the case, not new legal theories. Thus, [Mr.] Johnson's untimely filing may not be excused because he was not unavoidably prevented from discovering facts upon which has relied in presenting his second petition for [postconviction] relief. R.C. 2953.23(A)(1).
>
> Further, [Mr.] Johnson does not even attempt to satisfy the second prong of R.C. 2953.23(A)(1). Specifically[,] [Mr.] Johnson does not allege, much less demonstrate by clear and convincing evidence that, but for the asserted constitutional claims at trial, no reasonable fact finder would have found him guilty of the offenses for which he was convicted. R.C. 2953.23(A)(1)(b).
>
> Because [Mr.] Johnson failed to demonstrate the applicability of an exception which would allow this court to consider his untimely petition, this court lacks jurisdiction to consider [Mr.] Johnson's petition.

(Emphasis in original.)

{¶7} Mr. Johnson now appeals raising six assignments of error for our review.[1] Because our analysis of Mr. Johnson's assignments of error is identical, we consolidate our discussion below.

II.

ASSIGNMENT OF ERROR I

> [MR. JOHNSON] WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AS WELL AS HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL, AS A RESULT OF COUNSEL'S FAILURE TO ENTER EVIDENCE OF PERJURY ON BEHALF OF TWO OF THE STATE'S WITNESSES. THERE IS A REASONABLE PROBABILITY THAT HAD THE EVIDENCE OF WITNESS PERJURY BEEN DISCLOSED, THE RESULT OF [MR. JOHNSON'S] TRIAL WOULD HAVE BEEN DIFFERENT.

ASSIGNMENT OF ERROR II

> TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, FOR FAILING TO MOVE THE TRIAL COURT FOR A CHANGE OF

[1] Mr. Johnson's assignments of error mirror his claims for relief as stated in his second petition for postconviction relief.

VENUE DUE TO THE PERVASIVE PRETRIAL PUBLICITY, WHICH ULTIMATELY DEPRIVED [MR. JOHNSON] OF A FAIR TRIAL AND AN IMPARTIAL JURY (ADDITIONAL VIOLATIONS OF THE SIXTH AND FOURTEENTH AMENDMENTS).

ASSIGNMENT OF ERROR III

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, FOR FAILING TO MOVE THE TRIAL COURT TO SEQUESTER THE JURY.

ASSIGNMENT OF ERROR IV

[MR. JOHNSON'S] RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN JURORS TOOK A TOUR OF THE COUNTY JAIL, WHERE THEY SAW [MR. JOHNSON] BEING HELD IN CUSTODY AND IN COUNTY JAIL ISSUED CLOTHING.

ASSIGNMENT OF ERROR V

TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS, FOR FAILING TO CHALLENGE THE ARRAY OF THE JURY VENIRE.

ASSIGNMENT OF ERROR VI

[MR. JOHNSON] WAS DEPRIVED OF HIS RIGHT TO CONFRONT HIS ACCUSERS AT HIS PRELIMINARY HEARING HELD JANUARY 9, 2018, DESPITE HIS SPECIFIC REQUEST TO DO SO.

{¶8} R.C. 2953.21(A)(1)(a)(i) provides:

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:

Any person who has been convicted of a criminal offense * * * 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[.]

{¶9} Further, R.C. 2953.21(A)(2)(a) states, in relevant part, that a petition for postconviction relief "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[.]" Further, in accordance with R.C. 2953.23(A)(1), a trial court may not entertain an untimely or successive petition for postconviction relief unless both of the following apply.

> (a) [e]ither 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) [t]he 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[.]

Indeed, as this Court has previously stated, "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." *State v. Little*, 9th Dist. Lorain No. 20CA011662, 2021-Ohio-1446, ¶ 9, quoting *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, ¶ 36.

{¶10} Here, the transcripts in Mr. Johnson's direct appeal were filed with this Court on November 26, 2018. As such, Mr. Johnson had until November 26, 2019, to timely file his petition for postconviction relief. Mr. Johnson, however, filed his second petition on December 28, 2020, which is beyond three hundred sixty-five days after the date the transcripts were filed in his direct appeal. Thus, Mr. Johnson's second petition for postconviction relief is both untimely and successive.

{¶11} Although Mr. Johnson argues, pursuant to R.C. 2953.23(A)(1)(a), he was unavoidably prevented from discovering the facts upon which he must rely to present his claims for relief, the record simply does not support this faulty contention. With reasonable diligence, Mr. Johnson could have discovered the court dockets relating to the State's witnesses, prior to filing his first petition for postconviction relief, as they are public records. Further, the dockets attached to Mr. Johnson's second petition for postconviction relief indicate both cases were resolved in February 2018, and Mr. Johnson's trial began on April 16, 2018.

{¶12} Additionally, in his affidavit, Mr. Johnson admits to having access to a television, where he "witnessed pervasive and prejudicial press coverage on the television news nearly every day leading up to the trial, and literally every day surrounding the trial and the sentencing hearing." Therefore, Mr. Johnson was privy to the media's coverage of his case prior to the beginning of trial.

{¶13} Finally, Mr. Johnson had direct knowledge about the jurors' tour of the county jail, the jury venire, and the preliminary hearing because he was, in fact, present at those times. Indeed, as indicated by our sister courts, a petitioner is "unavoidably prevented from the discovery of facts if he had no knowledge of the existence of those facts and could not have, in the exercise of reasonable diligence, learned of their existence within the time specified for filing his petition for postconviction relief." *State v. Cunningham*, 3d Dist. Allen No. 1-15-61, 2016-Ohio-3106, ¶ 19, citing *State v. Holnapy*, 11th Dist. Lake No. 2013-L-002, 2013-Ohio-4307, ¶ 32, citing *State v. Sansom*, 2d Dist. Champaign No. 2009 CA 38, 2010-Ohio-1918, ¶ 9.

{¶14} Thus, because Mr. Johnson had direct knowledge of the issues set forth in his second petition for postconviction relief, or with reasonable diligence, could have discovered the same within the requisite time-frame, he has failed to demonstrate the statutory factors, set forth

in R.C. 2953.23(A)(1)(a), permitting an untimely, successive filing. As such, the trial court lacked jurisdiction to consider Mr. Johnson's second petition for postconviction relief and did not err in dismissing the petition.

{¶15} Accordingly, Mr. Johnson's six assignments of error are overruled.

III.

{¶16} Mr. Johnson's assignments of error are overruled and the judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Betty Sutton

BETTY SUTTON
FOR THE COURT

TEODOSIO, P. J.
CARR, J.
CONCUR.

APPEARANCES:

MARLON JOHNSON, pro se, Appellant.

J. D. TOMLINSON, Prosecuting Attorney, and LINDSEY C. POPROCKI, Assistant Prosecuting Attorney, for Appellee.