IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

Case No. 22-0902

-vs-

VICTOR GUTIERREZ

Appellant

On Appeal From The Ninth Appellate District For
Wayne County, Ohio, Case No. 21-AP-0033
Trial Court Case No. 2018-CRC-1000069

MEMORANDUM IN SUPPORT OF JURISDICTION

BY VICTOR GUTIERREZ

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TABLE OF CONTENTS

	Page
STATEMENT OF GREAT PUBLIC INTEREST AND SERIOUS CONSTITUTIONAL QUESTION	2
Statement of Case and Facts:	3
PROPOSITION OF LAW NO. I:	3
WHEN AN APPELLATE COURT AFFIRMS A TRIAL COURT'S DENIAL OF A COLLATERAL PROCEEDING FOR FAILING TO ESTABLISH UNAVOIDABLE PREVENTION, ON THE BASIS OF AN ERRONEOUS FACTUAL DETERMINATION, APPELLANT IS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTIONAL, AND ARTICLE I, SEC. 10 AND 16 OF THE OHIO CONSTITUTION	
SUPPORTING ARGUMENT:	3
A. Appellate Court's Reasoning:	4
B. Law and Argument:	6
PROPOSITION OF LAW NO. II:	7
WHEN TRIAL AND APPELLATE COUNSEL FAIL TO INFORM THEIR CLIENT OF POTENTIAL COLLATERAL ISSUES AND THE MANDATORY PROCEDURES REQUIRED IN THOSE PROCEEDINGS THAT CLIENT IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION	
SUPPORTING ARGUMENT:	7
A. Appellate Court's Decision:	8
B. Law and Argument:	8
CONCLUSION	11
CERTIFICATE OF SERVICE	12

STATEMENT OF GREAT PUBLIC INTEREST

AND SERIOUS CONSTITUTIONAL QUESTION

This case presents two extraordinary issues that undermine the very basis of the constitutional freedoms upon which this Country was founded.

This case originated when a self-admitted drug addict/drug dealer, herein referred to as ("A.P"), was apprehended while on community control, for being in possession of drugs and a large amount of money. Immediately upon arrest, A.P. sought a deal with the local Drug Enforcement Agency, and went from future prisoner to paid informant.

While the actions of A.P. are all too common, the resulting trial testimony, and alleged facts presented by the State against Victor Gutierrez, herein Appellant, are not. They violated every aspect of Appellant's Jury Trial Guarantee under the Sixth Amendment, beginning with the right to effective assistance of counsel, and ending with the right to present a complete defense in a trial free from perjured testimony from law enforcement officers.

Both the trial court and appellate court were made aware of what appears to be a calculated effort/conspiracy, by law enforcement, to place perjured testimony before the trial court. Both courts disregarded the clear impact that perjured testimony had on the trial, and actually faulted Appellate for not bringing the perjured testimony to the court's attention sooner.

Adding insult to injury, the trial court and appellate court both acknowledged that Appellant informed his trial counsel about the perjury and was told "there was no way of proving that the search occurred" and "there was no benefit in bring it to the trial court's attention."

For the reasons set forth herein, Appellant asks this Court to correct the clear injustice in this case.

STATEMENT OF CASE AND FACTS:

In State v. Gutierrez, 2022-Ohio-2252, at paragraph 2, the Ninth Appellate District set for an adequate recitation of the case history and facts. However, Appellant respectfully submits that the following factual statements contained in paragraph 2 are currently the subject of dispute, and cannot be presumed correct.

Specifically, "Through recorded phone calls and texting, A.P. arranged to purchase cocaine from Mr. Gutierrez; "A.P. made a partial payment of $600.00 cash to Mr. Gutierrez's associate; and, "The Money used by A.P. to pay for the drugs was all documented and supplied by Medway."

With respect to the remaining procedural history cited in paragraphs 2 and 3, the procedural history cited therein is essentially correct.

This case turns on two basic questions. One, whether Appellant was unavoidably prevented from discovering the "newly discovered" evidence presented in this case due to lack of knowledge. Two, whether Appellant's lack of knowledge can be attributed to the trial and appellate counsel's lack of effective representation. Thus, the following is respectfully submitted.

PROPOSITION OF LAW NO. I

WHEN AN APPELLATE COURT AFFIRMS A TRIAL COURT'S DENIAL OF A COLLATERAL PROCEEDING FOR FAILING TO ESTABLISH UNAVOIDABLE PREVENTION, ON THE BASIS OF AN ERRONEOUS FACTUAL DETERMINATION, APPELLANT IS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SEC. 10 AND 16 OF THE OHIO CONSTITUTION.

SUPPORTING ARGUMENTS:

This Proposition of Law questions the factual basis of the Appellate Court's decision and the interpretation of the vary case authority relied on by that Court.

A. Appellate Court's Reasoning:

The Appellate Court made a number of factual statements upon which their decision was based. In this case the trial court held a hearing on Appellant's Motion for Leave to file a New Trial Motion. The hearing was to establish whether Appellate was unavoidably prevented from discovering the factual basis of his claim. (Decision at par. 6).

The primary witness at the hearing was Appellant's sister. According to the Appellate Court, the sister testified that "she first learned" about the perjured testimony of the law enforcement agents in "the Fall of 2018". (Decision at Par. 6). The Appellate Court further established that Appellant's sister "did not produce" the newly discovered evidence until "November 3, 2020." Id. It should be noted that the "newly discovered evidence" was a video recording of Medway Drug Enforcement Agents conducting a warrantless search of the Appellant's home, while his mother and sister were home. Significantly, it was that search that the Medway Agents lied about while under oath.

After the hearing, the trial court determined, and the Appellate Court agreed, that Appellate "could have discovered the 'newly discovered' evidence if he had exercised reasonable diligence." (Decision at Par. 7).

In his Appeal Brief Appellant specifically informed the Appellate Court that he "informed trial counsel that (1), the Medway Agents lied under oath, and (2) trial counsel claimed there was no way to prove they lied." (Brief of Appellant at 7).

However, the Appellate Court, like the trial court, completely disregarded the ineffective actions of trial counsel, and faulted Appellate for not seeking what trial counsel told him "would be [of] no benefit to bring [] to the trial court's attention." (Decision at 6).

More troubling still, the Appellate Court, while maintaining that "Mr. Gutierrez had a duty to make a serious effort to discover potential favorable evidence," (Decision at Par. 14), they did so while acknowledging that; "trial counsel ~~chose not to pursue any evidence in that~~ regard, ** ." Id. at Par. 14.

With respect to the Appellate Court's citations regarding their standard of review, the Court cited the "abuse of discretion" standard as outlined in State v. Leyman, 2016-Ohio-59, and Blakemore v. Blakemore, 5 Ohio St.3d 217, 219, which describes abuse of discretion as a decision that is "unreasonable, arbitrary, or unconscionable." (Decision at Par. 10).

In the context of Great Public Interest, and unconscionable decisions, Appellate respectfully submits that, at this time in this Country's history, there is nothing more unconscionable than an Attorney/Officer of the Court, being informed that numerous Law Enforcement Agents committed perjury, and by actually conducting a warrantless search, under the guise of investigating that Attorney's client, and have that Attorney claim there was no way to prove it, without conducting any investigation on the matter, especially when the perjury was in response to trial counsel's cross examination.

There can be no greater detriment to the public's confidence in Law Enforcement and the Justice System in general.

Not only did both lower courts side-step the fact that law enforcement agents conducted an illegal search that could never produce evidence that could be used in a court of law, they traumatizing two innocent bystanders in the process, and remain free to do it again because Appellant's attorney not only failed to investigate the search, counsel also failed to inform his client of the necessary procedures should proof of that warrantless search become available. In fact, trial counsel did not testify at the hearing on Appellant's Motion for Leave to a File New Trial Motion.

B. <u>Law and Argument</u>:

The facts of this case are straight forward. The first fact is, a video recording was not necessary to establish the newly discovered evidence at issue here. An affidavit and/or testimony from the two victims who were violated by Law Enforcement Agents would have been more than sufficient to establish the factual basis of the new trial motion.

The second fact is that had the information been provided in a timely manner there is a reasonable probability of a different outcome. The third fact is that Appellant was fully aware that there was a search of his home, though he did not know it was an illegal search until the Law Enforcement Agents lied about it under oath.

The fourth, and perhaps most important fact, Appellant informed his attorney as soon as he was made aware of the perjured testimony in question.

In <u>State v. Covender</u>, 2012-Ohio-6105, this Court made it clear that: "Unavoidable delay results when the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence." Id. at Par. 14.

To be clear, the above cited facts are not in dispute. The only question is whether Appellate can be held accountable for his trial counsel's complete disregard of his clients rights. While it is clear Appellant was aware of the perjury, it is equally clear that Appellant was unaware that the perjury was a significant issue that could form the "ground supporting [a] motion for a new trial," as set forth in <u>Covender</u>, supra.

In fact, Appellant was not aware that collateral proceedings were even available in his case, nor was he aware of any procedural requirements related to such proceeding, and that must be attributed to trial counsel error.

The lack of knowledge regarding the ground for relief at issue here is the direct result of trial counsel's failures as set forth by Appellant in his initial Motion for Leave under Crim.R. 33(B).

Specifically, under Strickland v. Washington, 466 U.S. 668, the United States Supreme Court stated: "Among the more particular duties that derive from counsel's function as assistant to the defendant are the duties to consult with the defendant in important decisions and to keep the defendant informed of important developments in the course of the prosecution." Id. at 688.

Not only did trial counsel fail to advise Appellant of specific filing requirements for collateral proceeding, counsel actually told Appellant "there would be no benefit to bring it to the court's attention." (Decision at Par. 14).

Thus, it is clear that Appellant had no knowledge of the actual ground for relief as set forth in Covender, supra. Moreover, the Appellate Court's assertion that Appellant was aware of the factual predicate/ground for relief, constitutes an unreasonable determination of the facts presented to that court and cannot be afforded the presumption of correctness. See 28 U.S.C. 2254(e).

PROPOSITION OF LAW NO. II

WHEN TRIAL AND APPELLATE COUNSEL FAIL TO INFORM THEIR CLIENT OF POTENTIAL COLLATERAL ISSUES AND THE MANDATORY PROCEDURES REQUIRED IN THOSE PROCEEDINGS THAT CLIENT IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

SUPPORTING ARGUMENTS:

The right to effective assistance of counsel was well established at the time of Appellant's trial. Strickland v. Washington, 466 U.S. 668.

The right to effective assistance of appellate counsel was also well established at the time of Appellant's appeal. Evitts v. Lucey, 469 U.S. 387.

A. Appellate Court's Decision:

When addressing the issue of appellate counsel's error, the Appellate Court stated: "As this Court has stated, filing an application for reopening under Appellate Rule 26(B) is the appropriate remedy for asserting a claim for ineffective assistance of appellate counsel." (Internal citations omitted). After making that statement and citing case authority supporting that concept of law, the Appellate Court declared that: "His claim for ineffective assistance of appellate counsel, ***, is not properly before this Court." (Decision at Par. 16).

The Appellate Court continued, stating: "Moreover, Mr. Gutierrez's reliance on Gunner v. Welch, 749 F.3d 511 (6th Cir. 2014) is misplaced. Id. at Par. 17. The Appellate Court's reasoning appears to be that because Gunner concerns a procedural default "in filing for federal habeas relief" it has no applicability in overcoming a state procedural default. Significantly, the Appellate Court did acknowledge that Appellant's ineffective counsel claim incl̶ded trial court.

B. Law and Argument:

First and foremost, on direct appeal, Ohio law limits the reviewing court "to the record of the proceeding at trial." McGuier v. Warden, 738 F.3d 741, 751. Thus, Ohio courts have refused to adjudicate ineffective-assistance claims on direct appeal because of the need for additional evidence. See e.g. State v. Smith, 17 Ohio St.3d 98.

Because the claims of ineffective trial and appellate counsel cannot be addressed without considering evidence that is not in the trial court record, the Appellate Court's conclusion that the claim was "not properly before [that] court is simply wrong. As for the Appellate Court's assertion hat Appellant's reliance on Gunner is "misplaces" the following is submited.

In White v. Warden, 2019 U.S. App. LEXIS 30161, the United States Court of Appeals for the Sixth Circuit, gave a thorough analysis for situations where, as in this case, claims of ineffective counsel requires consideration of facts not contained in the trial court record.

While the White decision concerns overcomming a procedural default in a federal habeas action, that Court's reasoning significantly states "Ohio's procedural framework effectively 'channel[ed] initial review of [White's] constitutional claim' to collateral proceedings." Id. at 423.

In overcomming his habeas procedural default, the White Court reasoned: "he raised a substantial ineffective-assistance claim; he was without counsel during his post-conviction preceedings; the post-conviction proceeding was the initial opportunity for a merit assessment of the claim; and the design and operation of Ohio procedural law rendered it 'highely unlikely' his claim would be reviewed on direct appeal. Id." at [*16] through [*18].

Thus, the decisions in Gunner and White establish two aspects of law applicable to Ohio reviewing courts. One, that in Ohio collateral proceedings are the initial opportuinty to raise certain claims of trial and/or appelalte counsel ineffectiveness. Two, that under Strickland, trial and appellate counsel has a duty to inform their clients of triggering events that are related to collateral proceedings and the mandatory filing requirements associated with such collateral proceedings.

In addition, it should be noted by this Court that the decision in Gunner was based primarely on the ABA Model Rules of Professional Conduct upon which Ohio Rules of Professional Conduct, are based and the well established reviewing standard for ineffective counsel review set forth in Strickland, supra. See 749 F.3d at 518.

This case is not a typical procedural default case. This case places blame on Appellant for not discovering proof of the criminal actions of law enforcement agents - criminal actions that Appellant did not know were in fact criminal in nature due to counsel's disregard of the perjury.

The undisputed fact is that Appellant informed his trial counsel that the law enforcement agents were giving false testimony, not one, or two, but each officer that testified. The most shocking aspect of that fact is that (1) trial counsel did not bring that fact to the trial court's attention; (2) the trial court held a hearing in which trial counsel did not participate; and (3) the entire case was dismissed on procedural grounds that appears to place the protection of the integrity of law enforcement over the constitutional rights of the citizens those officer were sworn to protect.

To be sure, the actions of Wayne County Medway Agents were not some type of mistake, oversight, or excusable neglect. Those agents assembled together, dressed in their official Medway Agent Uniforms, traveled from the city of Wooster, Ohio, to the outskirts of Orrville, Ohio, and without any authority to do so, entered the home of Appellant, his Mother and Sister, and searched that residence. These fact are not in dispute.

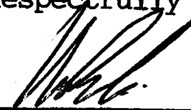
Moreover, if any other citizen had committed that same act, they would face an extensive prison sentence. These officers, however, appear to be free from such scrutiny. The questions that arise from the actions of these law enforcement agents are numerous, but must begin with; what were their intentions?; how many times have they conducted such unauthorized searches?; and why have they not been held accountable in this case?

Thus, this case presents the hallmark example of Great Public Interest and Serious Constitutional Question required by this Court to accept jurisdiction and resolve the clear injustice at issue.

<u>CONCLUSION</u>

For all of the reasons set forth herein, Appellant respectfully asks this Court to take jurisdiction of this matter and resolve the injustice that has been committed in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction, was sent, via ReGular U.S. Mail, to Counsel for Appellee, Michael Cooper, Assistant prosecutor, at 115 West Liberty Street, Wooster, Ohio 44691, on this 14th day of July, 2022.

By:

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e-filed on 06/30/2022 08:05 AM in Wayne County, Ohio

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C.A. No. 21AP0033
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
VICTOR GUTIERREZ	COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO
Appellant	CASE No. 2018 CRC-I 000069

DECISION AND JOURNAL ENTRY

Dated: June 30, 2022

HENSAL, Presiding Judge.

{¶1} Victor Gutierrez appeals from the judgment of the Wayne County Court of Common Pleas that denied his motion for leave to file a delayed motion for a new trial. This Court affirms.

I.

{¶2} This Court set forth the factual background of this case in *State v. Gutierrez*, 9th Dist. Wayne No. 18AP0043, 2019-Ohio-4626, as follows:

> A convicted drug trafficker ("A.P.") was caught by his probation officer with 5 grams of cocaine and $4,000.00 in cash while on community control. He soon struck a deal to be paid $550.00 and avoid prosecution by cooperating with the Medway Drug Enforcement Agency ("Medway") in an investigation into the alleged source of his cocaine: Mr. Gutierrez. Through recorded phone calls and texting, A.P. arranged to purchase cocaine from Mr. Gutierrez, which soon led to a controlled buy where A.P. made a partial payment of $600.00 cash to Mr. Gutierrez's associate ("K.O.") and received a "brick" of cocaine weighing 140.45 grams. On two separate occasions, and while under surveillance, A.P. met Mr. Gutierrez and paid him another $3,900.00 cash and $1,500.00 cash, respectively. The money used by A.P. to pay for the drugs was all documented and supplied by Medway.

> Mr. Gutierrez was charged with two first-degree felonies–trafficking in cocaine and possession of cocaine–both of which were accompanied by major drug offender ("MDO") specifications.

Id. at ¶ 2-3. The matter proceeded to a bench trial on August 13, 2018. After the trial, "the trial court granted Mr. Gutierrez's Crim.R. 29 motion for acquittal as to the possession charge, but then found him complicit in, and therefore guilty of, the trafficking charge and its attendant MDO specification." *Id.* at ¶ 3. "The court sentenced him to a mandatory prison term of 11 years and imposed a mandatory fine of $10,000.00." *Id.* Mr. Gutierrez filed a direct appeal, and this Court affirmed his convictions on November 12, 2019. *Id.* at ¶ 19.

{¶3} On January 22, 2021, almost two and one-half years after the trial, Mr. Gutierrez filed a pro se motion for leave to file a delayed motion for a new trial. In it, he acknowledged that the deadline for filing a motion for a new trial under Criminal Rule 33(B) had passed. He argued, however, that he should be granted leave to file a delayed motion for a new trial because his motion was based upon newly discovered evidence, and he was unavoidably prevented from filing a motion for a new trial sooner.

{¶4} More specifically, Mr. Gutierrez argued that on November 6, 2020, he received an affidavit from his sister indicating that she had recorded a video of a police search of his home that occurred in November 2017 (i.e., prior to his trial). Mr. Gutierrez argued that this video would serve to impeach some of the trial testimony of the police who testified that they did not recall conducting a search of his home, which would undermine their credibility and, accordingly, would undermine the State's entire case against him. Mr. Gutierrez admitted that he knew at the time of trial that the police had searched his home, and that he brought this to the attention of his trial counsel when the police testified that they had not searched his home. According to Mr. Gutierrez, his trial counsel told him there was no way of proving that the

search occurred, and that – since no evidence was obtained and used at trial as a result of that search – there was no benefit in bringing it to the trial court's attention. His trial counsel, therefore, did not pursue the issue.

{¶5} Mr. Gutierrez asserted that he spoke with his sister on the phone after his conviction. In his affidavit attached to his motion for leave, Mr. Gutierrez averred that this conversation occurred sometime between September and November of 2020. During that call, his sister told him that she had recorded a video on her cell phone of the police search. Mr. Gutierrez asserted that, prior to that call, he was unaware that a video existed, and that he never pursued the issue since his trial counsel told him it would be of no benefit.

{¶6} The State opposed Mr. Gutierrez's motion for leave and the trial court held a hearing on the issue of whether Mr. Gutierrez was unavoidably prevented from filing his motion for a new trial sooner. Mr. Gutierrez's sister testified at the hearing. According to her, she and her mother were home at the time of the police search in 2017, but she was not at Mr. Gutierrez's trial and was unaware that the police testified that they did not search Mr. Gutierrez's home. She testified that she first learned of this when she spoke to Mr. Gutierrez in the Fall of 2018, about three months after his trial. In her affidavit, however, which she executed on November 3, 2020, Mr. Gutierrez's sister averred that she "recently learned" that one of the officers who searched their home testified that he did not search Mr. Gutierrez's home. Mr. Gutierrez's sister testified that it "took [her] a while" to get the videos, which she did not produce until November 2020.

{¶7} After the hearing, the trial court concluded that Mr. Gutierrez failed to meet his burden of demonstrating by clear and convincing evidence that he was unavoidably prevented from filing a timely motion for a new trial. In reaching this conclusion, the trial court found that Mr. Gutierrez could have discovered the "newly discovered" evidence if he had exercised

reasonable diligence. Mr. Gutierrez now appeals that decision, raising two assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ABUSED ITS DISCRETION IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS WHEN IT DETERMINED APPELLANT FAILED TO EXERCISE REASONABLE DILIGENCE[.]

{¶8} In his first assignment of error, Mr. Gutierrez argues that the trial court abused its discretion by determining that he failed to exercise reasonable diligence related to the discovery of the video of the police search. For the reasons that follow, this Court disagrees.

{¶9} We begin our analysis by noting that Mr. Gutierrez filed a delayed motion for a new trial along with his motion for leave. "Although a defendant may file his motion for a new trial along with his request for leave to file such motion, 'the trial court may not consider the merits of the motion for a new trial until it makes a finding of unavoidable delay[.]'" *State v. Covender*, 9th Dist. Lorain No. 11CA010093, 2012-Ohio-6105, ¶ 13, quoting *State v. Brown*, 8th Dist. Cuyahoga No. 95253, 2011-Ohio-1080, ¶ 14. This Court's review on appeal is limited to whether the trial court erred by denying Mr. Gutierrez's motion for leave. Accordingly, this Court will not address the merits of Mr. Gutierrez's delayed motion for a new trial.

{¶10} "A trial court's decision to grant or deny a motion for leave to file a delayed motion for a new trial will not be reversed on appeal absent an abuse of discretion." *State v. Leyman*, 9th Dist. Medina No. 14CA0037-M, 2016-Ohio-59, ¶ 7. "An abuse of discretion implies that the court's decision is unreasonable, arbitrary, or unconscionable." *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶11} When a motion for a new trial is based upon newly discovered evidence, it must be filed within 120 days "after the day upon which the verdict was rendered[.]" Crim.R. 33(B). If the motion is not filed within 120 days, the defendant must provide "clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely[.]" *Id.* "While Crim.R. 33(B) does not provide a specific time limit in which defendants must file a motion for leave to file a delayed motion for new trial, many courts have required defendants to file such a motion within a reasonable time after discovering the evidence." *State v. Hill*, 5th Dist. Stark No. 2020CA00019, 2020-Ohio-4050, ¶ 24, quoting *State v. Griffith*, 11th Dist. Trumbull No.2005-T-0038, 2006-Ohio-2935, ¶ 15; *Leyman* at ¶ 9 (same).

{¶12} This Court has stated that "[u]navoidable delay results when the party had no knowledge of the existence of the ground supporting the motion for a new trial and could not have learned of the existence of that ground within the required time in the exercise of reasonable diligence." *Leyman* at ¶ 8, quoting *Covender* at ¶ 14. "[C]riminal defendants and their trial counsel have a duty to make a 'serious effort' of their own to discover potential favorable evidence." *Covender* at ¶ 14, quoting *State v. Anderson*, 10th Dist. Franklin No. 12AP133, 2012-Ohio-4733, ¶ 14.

{¶13} As previously noted, Mr. Gutierrez was convicted on August 13, 2018. He filed his motion for leave to file a delayed motion for a new trial almost two and one-half years later on January 22, 2021. According to him, he always knew that the police searched his home, but he did not know his sister had a video of the search until he spoke with her after his conviction. According to his sister's testimony at the hearing on Mr. Gutierrez's motion, she spoke with Mr. Gutierrez in the Fall of 2018, which is when she learned that the police testified that they did not search Mr. Gutierrez's home. She did not produce the video or her affidavit until two years later

in November 2020. According to Mr. Gutierrez, he did not pursue any evidence related to the search of his home because his trial counsel told him there would be no way to prove that the search occurred and, since no evidence from that search was introduced at trial, there would be no benefit to bringing it to the trial court's attention.

{¶14} Despite Mr. Gutierrez's arguments to the contrary, this Court cannot say that the trial court abused its discretion when it denied his motion for leave to file a delayed motion for a new trial. Mr. Gutierrez admitted that he always knew the police searched his home. While we are mindful of his assertions that his trial counsel chose not to pursue any evidence in that regard, Mr. Gutierrez had the duty to make a serious effort to discover potentially favorable evidence. *See Covender* at ¶ 14. Moreover, his sister testified that she spoke with Mr. Gutierrez in the Fall of 2018, which is when she learned that the police testified at Mr. Gutierrez's trial that they did not search his home. Mr. Gutierrez did not file his motion for leave, however, until January 2021. While his sister did testify that it took some time to locate the videos, Mr. Gutierrez knew, at the latest, in the Fall of 2018, that his sister was present for the police search. We cannot say that the trial court erred by concluding that Mr. Gutierrez failed to meet his burden of demonstrating by clear and convincing evidence that he was unavoidably prevented from filing a timely motion for a new trial. Mr. Gutierrez's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLA[TE] COUNSEL ON HIS DIRECT APPEAL OF RIGHT, WHEN COUNSEL FAILED TO INFORM HIM OF POTENTIAL POST-CONVICTION ISSUES AND THE MANDATORY PROCEDURES INVOLVED WITH SUCH PROCEEDING.

{¶15} In his second assignment of error, Mr. Gutierrez argues that he received ineffective assistance of appellate counsel[1] because his appellate counsel did not inform him of potential post-conviction issues, or the procedures involved with those issues. For the reasons that follow, this Court disagrees.

{¶16} As this Court has stated, filing an application for reopening under Appellate Rule 26(B) "is the appropriate remedy for asserting a claim for ineffective assistance of appellate counsel." *State v. Hale*, 9th Dist. Summit No. 29096, 2019-Ohio-3466, ¶ 10, citing *State v. Buck*, 9th Dist. Summit No. 27597, 2017-Ohio-273, ¶ 19. His claim for ineffective assistance of appellate counsel, therefore, is not properly before this Court. *Id.*

{¶17} Moreover, Mr. Gutierrez's reliance on *Gunner v. Welch*, 749 F.3d 511 (6th Cir.2014) is misplaced. There, in the context of federal habeas relief, the Sixth Circuit held that the defendant's appellate counsel rendered ineffective assistance by not informing the defendant of the time requirements for filing a petition for post-conviction relief. *Id.* at 520. The Sixth Circuit, therefore, concluded that the defendant's appellate counsel's ineffective assistance "excuse[d] the procedural default that would otherwise subject the petition for habeas corpus to dismissal." *Id.* Like other state appellate courts that have considered *Gunner*, we conclude that its holding is inapplicable to the case before us. *See State v. Clark*, 7th Dist. Mahoning No. 08 MA 15, 2015-Ohio-2584, ¶ 32 (addressing *Gunner* and concluding that "a procedural default *in filing for habeas relief* does not provide an excuse for filing an untimely application for reopening

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[1] We note that Mr. Gutierrez's merit brief also discusses his trial counsel. As this Court has stated, however, "an appellant's assignment of error provides this Court with a roadmap to guide our review." *In re Guardianship of Bakhtiar*, 9th Dist. Lorain No. 16CA010932, 2017-Ohio-5835, ¶ 9, quoting *Taylor v. Hamlin–Scanlon*, 9th Dist. Summit No. 23873, 2008-Ohio-1912, ¶ 12.

in a state appellate court[.]"); *State v. Taylor*, 8th Dist. Cuyahoga No. 102020, 2015-Ohio-1314, ¶ 14-15 (declining to apply *Gunner*).

{¶18} In light of the foregoing, Mr. Gutierrez's second assignment of error is overruled.

III.

{¶19} Mr. Gutierrez's assignments of error are overruled. The judgment of the Wayne 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 Wayne, 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.

JENNIFER HENSAL
FOR THE COURT

I hereby certify that this is a true copy of the original on file
WITNESS my hand and seal at the Ninth District Court of Appeals. This 30th day of June 20 22
TIM NEAL
Clerk of Courts Wayne County, Ohio
By: Michael A Pittard

CARR, J.
SUTTON, J.
CONCUR.

APPEARANCES:

VICTOR GUTIERREZ, pro se, Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and MICHAEL COOPER, Assistant Prosecuting Attorney, for Appellee.