[Cite as *State v. Carver*, 2022-Ohio-2653.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 20CA10
	:	
v.	:	
	:	
JAMES E. CARVER,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

James E. Carver, Lebanon, Ohio, Appellant Pro Se.

Anneka P. Collins, Highland County Prosecutor, Adam J. King, Assistant Highland County Prosecutor, Hillsboro, Ohio, for Appellee.

Smith, P.J.

{¶1} James E. Carver, ("Carver,") appeals the August 25, 2020 "Decision and Final Judgment Entry Denying Petition for Postconviction Relief and Other Postconviction Motions." In 2020 at jury trial, Carver was convicted of the 2019 murder and rape of Heather Camp. He was sentenced to a total of 33 years in prison. On appeal, Carver contends that the trial court erred and abused its discretion in denying his postconviction motion, which alleged prosecutorial misconduct and ineffective assistance of trial counsel, without an evidentiary hearing. Upon review, we find somewhat

differently than the trial court. We find the arguments Carver has asserted in his assignments of error are barred by application of the doctrine of res judicata, and further, we necessarily overrule this court's prior decision in *State v. Keeley*, 2013-Ohio-474, 989 N.E.2d 80 (4th Dist.). Consequently, the judgment of the trial court is affirmed.[1]

FACTS

{¶2} Carver was convicted of Murder, an unclassified felony under R.C. 2903.02(A), and Rape, pursuant to R.C. 2907.02(A)(1)(c), which generally provides that the prosecutor must prove that the victim's ability to resist or consent to sexual conduct was substantially impaired at the time of the conduct. Carver challenged those convictions in his direct appeal, *State v. Carver*, 2020-Ohio-4984, 160 N.E.3d 746 (4th Dist.), "*Carver I*." In *Carver I*, we affirmed Carver's convictions in a decision issued October 13, 2020.[2] We will not relate the facts underlying Carver's convictions as they are set forth fully in *Carver I.*

{¶3} While the direct appeal was pending, on July 20, 2020, Carver filed a motion captioned "Evidentiary Hearing Requested." On August 25,

[1]This court may affirm a judgment below if it is correct for any reason. *See In the Matter of the Estate of Workman*, 4th Dist. Lawrence No. 07CA39, 2008-Ohio-3351, at fn2, citing *Myers v. Garson*, 66 Ohio St. 3d 610, 614 N.E.2d 742 (1993).

[2]On April 27, 2021, the Supreme Court of Ohio declined to accept jurisdiction of Carver's appeal of our decision in *Carver* 1.

2020, the trial court denied this motion, which it construed as a petition for postconviction relief under R.C. 2953.21. On September 14, 2020, Carver filed notice of this appeal of the trial court's denial of his postconviction relief motion.

{¶4} Thereafter, on April 15, 2021, Carver filed a motion to reopen his direct appeal pursuant to App. R. 26(B). Carver argued his appellate counsel was ineffective for failing to raise manifest weight of the evidence arguments; failing to raise multiple issues of ineffective assistance of trial counsel; and for failing to communicate with Carver in the preparation of his direct appeal. The State of Ohio filed a "Memorandum Contra Appellant's Motion to Reopen his Appeal Pursuant to Ohio App.R. 26(B)."

{¶5} This court recently entered its decision on Carver's application to reopen his appeal. *State v. Carver*, 4th Dist. Highland No. 19CA017, (Nov. 8, 2021). We granted Carver's request to reopen his appeal, in part, and denied in part, for the following reason. At trial, Carver's entire defense to the murder count was that he did not have the specific intent to shoot and kill Heather Camp. Our review of the trial transcript revealed two instances where the incorrect mens rea for murder, "knowingly," was set forth in the jury instructions. The incorrect mens rea was also read to the jurors twice. The jurors also had a copy of the jury instructions with them during their

deliberations. The erroneous mens rea element was never addressed or corrected with an instruction to the jury to disregard it and to utilize, instead, the correct mens rea which is "purposeful."

{¶6} Based on this court's earlier decision in *State v. Baltzer*, 4th Dist. Washington No. 06CA76, 2007-Ohio-6719, at ¶ 31, wherein we found that we could not say with any sense of confidence that an erroneous and conflicting jury instruction did not affect the outcome of Baltzer's trial, we found possible merit to Carver's argument concerning the erroneous jury instruction. We found Carver raised a colorable claim of ineffective assistance of appellate counsel and provided a legitimate reason for this court to reopen his appeal. We ordered the case to proceed as on initial appeal and pursuant to the appellate rules for the limited purpose of considering argument not previously made as to the erroneous jury instructions.[3]

{¶7} Herein, we now consider Carver's timely appeal of the denial of his motion for postconviction relief.

ASSIGNMENTS OF ERROR

I. APPELLANT'S DUE PROCESS AND EQUAL PROTECTIONS OF THE LAW CONSTITUTIONAL RIGHTS WERE DENIED WHEN THE TRIAL COURT

[3]We further found the remaining claims in Carver's motion to reopen were either rendered moot or without merit.

JUDGE ABUSED HIS DISCRETION BY DENYING A POSTCONVICTION RELIEF PETITION BASED ON PROSECUTORIAL MISCONDUCT.

II. APPELLANT'S DUE PROCESS AND EQUAL PROTECTIONS OF THE LAW CONSTITUTIONAL RIGHTS WERE DENIED WHEN THE TRIAL COURT JUDGE ABUSED HIS DISCRETION BY DENYING A POSTCONVICTION RELIEF PETITION BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL.

III. APPELLANT'S DUE PROCESS AND EQUAL PROTECTIONS OF THE LAW CONSTITUTIONAL RIGHTS WERE DENIED AS A RESULT OF AN ABUSE OF DISCRETON WHEN THE TRIAL COURT JUDGE DENIED A POSTCONVICTION RELIEF PETITION WITHOUT ORDERING THE REQUESTED EVIDENTIARY HEARING.

A. STANDARD OF REVIEW

{¶8} R.C. 2953.21(A)(1)(a), petition for postconviction relief, provides that "Any person in any of the following categories may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief: (i) Any person who has been convicted of a criminal offense * * * 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} As the trial court noted, Carver's "irregular" motion captioned "Evidentiary Hearing Requested" stated in the first paragraph that it was a petition for postconviction relief pursuant to R.C. 2953.21. " ' "[C]ourts may recast irregular motions into whatever category necessary to identify and establish the criteria by which the motion should be judged." ' " *State v. Brown,* 4th Dist. Scioto No. 16CA3770, 2017-Ohio-4063, at ¶ 19, quoting *State v. Burkes,* 4th Dist. Scioto No. 13CA3582, 2014-Ohio-3311, ¶ 11, quoting *State v. Schlee,* 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 12.

{¶10} The Supreme Court of Ohio has held that " '[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21.' " *State v. Osborn,* 4th Dist. Adams No. 18CA1064, 2018-Ohio-3866, at ¶ 7, quoting *State v. Reynolds,* 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), syllabus. Despite the caption, a motion meets the definition of a petition for postconviction relief set forth in R.C. 2953.21(A)(1), because " it is a motion that was (1) filed subsequent to [defendant's] direct appeal, (2) claimed a denial of constitutional rights, (3) sought to render the judgment void, and (4) asked

for vacation of the judgment and sentence." *Reynolds* at 160. In this case, along with an allegation of prosecutorial misconduct, Carver alleges violation of his Sixth Amendment constitutional right to the effective assistance of trial counsel. Therefore, the motion meets the definition of a petition for postconviction relief pursuant to R.C. 2953.21. *See Osborn, supra,* at ¶ 10. *See also State v. Jayjohn,* 4th Dist. Vinton No. 20CA722, 2021-Ohio-2286, at ¶ 6.

{¶11} The postconviction relief process is a collateral civil attack on a criminal judgment rather than an appeal of the judgment. *See Jayjohn, supra,* at ¶ 10; *State v. Smith,* 4th Dist. Highland No. 19CA16, 2020-Ohio-116; *State v. Calhoun,* 86 Ohio St.3d 279, 281, 1999-Ohio-102, 714 N.E.2d 905. The postconviction relief proceeding is designed to determine whether "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." R.C. 2953.21(A)(1)(a). Postconviction relief is not a constitutional right; instead, it is a narrow remedy that gives the petitioner no more rights than those granted by statute. *See Smith, supra.* It is a means to resolve constitutional claims that cannot be addressed on direct appeal because the evidence supporting the claims is not contained in the record. *See State v. Teets,* 4th Dist. Pickaway No. 17CA21, 2018-Ohio-

5019, ¶ 14. "This means that any right to postconviction relief must arise from the statutory scheme enacted by the General Assembly." *State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 35. Thus, in this case, our review is limited to the abuse of discretion standard.

{¶12} An "abuse of discretion" is more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *See Jayjohn, supra*, at ¶ 9; *State v. Herring*, 94 Ohio St.3d 246, 255, 762 N.E.2d 940 (2002); *State v. Adams*, 60 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). In reviewing for an abuse of discretion, appellate courts must not substitute their judgment for that of the trial court. *See Bennett, supra*; citing *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 732, 654 N.E.2d 1254 (1995); *In re Jane Doe 1*, 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181 (1991).

B. LEGAL ANALYSIS

{¶13} " 'Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial, * * * or on appeal from that judgment.' " *State v. Szefcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996),

quoting *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus; *see also State v. Davis,* 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 28. However, and this is pertinent to Carver's appeal herein, " ' "[r]es judicata does not, however, apply only to direct appeals, but to all postconviction proceedings in which an issue was or could have been raised." ' " *State v. Creech,* 4th Dist. Scioto No. 19CA3877, 2020-Ohio-582, ¶ 11, quoting *State v. Heid,* 4th Dist. Scioto No. 15CA3710, 2016-Ohio-2756, ¶ 18, quoting *State v. Montgomery*, 2013-Ohio-4193, 997 N.E.2d 579, ¶ 42 (8th Dist.).

{¶14} Carver's postconviction motion set forth multiple claims based on either claimed prosecutorial misconduct or ineffective assistance of trial counsel. When rendering the decision on Carver's postconviction motion, the trial court took judicial notice that the direct appeal was pending at the time.[4] In the trial court's decision on Carver's postconviction motion, the trial court found many of Carver's claims to be barred by the doctrine of res judicata as they were being presented in the direct appeal or could have been.

[4]In the direct appeal, Carver challenged the trial court's admission of the audio recording of his interview without a redaction of a discussion regarding alleged consensual sex with his victim. Carver also challenged the sufficiency of the evidence supporting his convictions for murder and rape.

{¶15} In the appealed-from decision, the trial court specifically stated, "Some of the claims set forth in the petition are included in the Defendant's direct appeal or could have been included since they are based on the transcript of the trial proceedings currently before the Court of Appeals." The trial court found the following claims of ineffective assistance to be barred by res judicata:

1. Failure to request appointment of a forensic expert;
2. Failure to impeach the prosecution's witnesses;
3. Failure to dismiss jurors;
4. Failure to request drug tests of witnesses;
5. Failure to object to adverse rulings of the court;
6. Failure to object to overruling of the Crim.R. 29 motion for acquittal;
7. Failure to request jury instruction on voluntary manslaughter; and,
8. Cumulative effect of ineffective assistance of counsel.

{¶16} While the trial court took judicial notice that Carver's direct appeal was pending, and that the doctrine of res judicata was applicable to many of Carver's claims, the trial court went on to consider Carver's claims and also found that his petition and supporting documents did not set forth substantive grounds for relief. The trial court provided detailed findings of fact and conclusions of law. Presumably, the trial court's "hybrid" analysis of Appellant's motion was in recognition of this court's confusing precedent as discussed in *State v. Keeley,* 2013-Ohio-474, 989 N.E.2d 80 (4th Dist.).

{¶17} In *State v. Keeley*, we held that the doctrine of res judicata did not apply to bar consideration of postconviction claims that were not raised in an appeal of right that was pending at the time the postconviction petition was filed. *Id*. at ¶¶ 7-8. We remanded Keeley's claims to the trial court for further consideration in light of the fact that res judicata did not apply at the time the trial court entered its judgment. In a later case, *State v. Seal*, 4th Dist. Highland No. 13CA15, 2014-Ohio-5415, Seal also filed his postconviction petition while his direct appeal was pending. On appeal of the denial of his postconviction petition filed while Seal's direct appeal was pending, we distinguished *Seal* from *Keeley*. In *Seal*, we applied the doctrine of res judicata. We also noted that the trial court's decision determined that Seal had not presented sufficient operative facts that would entitle him to postconviction relief and that the trial court's decision on his postconviction petition was supported by findings of fact and conclusions of law.

{¶18} Before we consider Carver's assignments of error in the current appeal, we take the opportunity to revisit and address this court's inconsistent application of the doctrine of res judicata. The dissent in *Keeley* pointed out that the Supreme Court of Ohio has stated that the doctrine of res judicata *can* be applied to a postconviction claim while the direct appeal is

pending. (Emphasis added.) *See Keeley*, dissent at ¶ 2, citing *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). In *Perry,* four defendants filed postconviction petitions that had been denied by the trial court as barred by res judicata. Perry's petition differed in that the direct appeal was still pending at the time the court rendered its decision on Perry's petition. However, regardless of the status of the appellate proceeding, the Supreme Court held that Perry's claims were barred by res judicata:

> The petition of Perry raises the same question raised in the petitions of Berardinelli and DiSanto, and also * * * Walker * * *. This case differs from the others in that the same questions are raised on an appeal from Perry's judgment of conviction and *that appeal is still pending.* (Emphasis added.) Whether the appeal is sustained or not, it will adjudicate the merits of the claims raised in these postconviction proceedings. Our statutes do not contemplate relitigation of those claims in postconviction proceedings where there are no allegations to show that they could not have been fully adjudicated by the judgment of conviction and an appeal therefrom.

Id., 10 Ohio St. 2d 175, 182.

{¶19} Thus, under *Perry,* a trial court can, and we think should, apply the doctrine of res judicata to bar claims which were or could have been raised and fully adjudicated in the trial court proceedings, or, as in the case of a claim of ineffective assistance of trial counsel based solely on the record at trial, reviewed on an appeal therefrom.

The status of the direct appeal is irrelevant.[5] Instead, the focus under the postconviction proceeding statute, R.C. 2953.21, is on whether the claim brought in the postconviction petition involves evidence *outside of the trial court record not available at the time of trial.* If the postconviction petition claim does not rely upon evidence outside the record that was not available for use at trial, but instead relies upon matters contained within the record, then the claim is barred by res judicata.

{¶20} The Supreme Court of Ohio reaffirmed this principle in *State v. Szefck*, 77 Ohio St. 3d 93,95-96, 671 N.E.2d 233, 235 (1996), wherein the Court held:

> We, therefore, reaffirm our holding in *Perry* that a convicted defendant is precluded under the doctrine of res judicata from raising and litigating in any proceeding, except an appeal from that judgment, any defense or claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in the judgment of conviction or on appeal from that judgment. We approve of and follow paragraph nine of the syllabus of *State v. Perry, supra.*[6]

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[5]*See State v. Cunningham*, 3d Dist. Allen No. 1-04-19, 2004-Ohio-5892 (where capital murder defendant filed postconviction petition while direct appeal was pending in the Ohio Supreme Court, appellate court affirmed the trial court's denial of postconviction relief where the trial court found that the claims could have been raised at trial and were barred by res judicata); *State v. Wesson*, 9th Dist. Summit No. 25874, 2012-Ohio-4495 (where citing *Perry*, trial court affirmed trial court's dismissal of postconviction petition on res judicata grounds even though direct appeal remained pending.)

[6]The doctrine of res judicata has developed additional nuances as it relates to a claim of ineffective assistance of trial counsel, but those nuances do not change the analysis of res judicata as discussed here. *See State v. Cole*, 2 Ohio St. 112, 443 N.E. 2d 169 (1982) (where defendant is represented by new counsel upon direct appeal and fails to raise incompetence of trial counsel and this claim could fairly be determined without resort to evidence outside the record, res judicata bars petition for postconviction relief on that

{¶21} To overcome the barrier of res judicata, a postconviction petition must include competent, relevant, and material evidence *outside of the record established in the trial court that was not in existence or available for use at trial.* (Emphasis added.) *See e.g., State v. Jackson*, 10th Dist. No. 01AP-808, 2002-Ohio-3330, at ¶ 45. "Such evidence 'must meet some threshold standard of cogency; otherwise it would be too easy to defeat [the doctrine of res judicata] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.' " (Brackets sic) *Cunningham, supra,* at ¶ 16, quoting *State v. Lawson*, 104 Ohio App.3d 307, 315, 659 N.E.2d 362 (12th Dist. 1995); *State v. Seal, supra,* at ¶ 13.

{¶22} In *Keeley*, the defendant filed a postconviction petition while the direct appeal of his rape conviction was pending in our court. The trial court denied some of the postconviction petition claims as barred by res judicata and some claims were barred on the ground that the defendant had not made sufficient operative allegations. In the *Keeley* decision, we questioned whether the trial court could use res judicata as a bar to deny

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ground); *State v. Lentz,* 70 Ohio St. 3d 527, 1994-Ohio-532, 639 N.E.3d 527 (concerning representation at trial and appellate level by two different attorneys from the same public defender's office, res judicata applies to bar ineffective assistance of trial counsel claims unless defendant proves "an actual conflict of interest" prevented appellate counsel from raising this claim.)

postconviction petition claims that were or could have been raised during the trial proceedings when a direct appeal of the conviction was pending. We stated that the holding in *Szefcyk, supra,* concerning the use of res judicata was "phrased in past tense and, thus, suggests that res judicata may be invoked after the first appeal of right has been determined." *Keely*, at ¶ 7. However, the full syllabus of *Szefcyk* states:

> Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on appeal from that judgment. (*State v. Perry* [1967], 10 Ohio St. 2d 175, 39 O.O2d 189, 226 N.E.2d 104, paragraph nine of the syllabus, approved and followed; *State v. Westfall* [1995], 71 Ohio St. 3d 565, 645 N.E.2d 730, disapproved.) (Brackets and emphasis sic)

{¶23} Despite our prior holding in *Keeley*, and subsequent applications of *Keeley*, we must acknowledge herein that there is nothing in the language quoted above that suggests that the doctrine of res judicata cannot be invoked by a trial court to bar a claim that was raised or could have been raised by the defendant at the trial that resulted in the judgment of conviction.

{¶24} The *Keeley* majority did not explain how a pending direct appeal affects the application of res judicata. Further confusing is *Keeley's*

discussion of whether a trial court's use of res judicata "renders R.C. 2953.21(C) meaningless." *Id*. at ¶ 8. At the time *Keeley* was decided, R.C. 2953.21(C), which is now set out in substantially similar terms in RC. 2953.21, subsection (D), read:

> (C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

{¶25} As is obvious, the plain and unambiguous language of R.C. 2953.21(C) allows the trial court to consider a postconviction petition even if a direct appeal is pending. If a defendant has a direct appeal from his judgment of conviction pending - *which necessarily will be limited to only those matters contained within the trial court record,* then that defendant can also file a petition for postconviction relief-*which necessarily must include evidence outside the record that demonstrates that the petitioner could not have raised the claim at pretrial, trial, or on direct appeal.*

{¶26} In other words, the claims presented in a postconviction petition will be claims that could not be raised in the direct appeal of the judgment of conviction. Thus, the status of the direct appeal has no relevance. A trial court *should* invoke the doctrine of res judicata to bar claims that could have been raised at trial or the direct appeal and *should not* invoke it where the claims involve cogent matters outside the record that could not have been raised at trial.

{¶27} In *Keeley,* we state, "to allow the application of res judicata at that state of an appeal [while direct appeal is pending] means that a trial court could always avoid ruling on the petition's merits as long as no decision has been rendered on the appeal." *Id*. at ¶ 8. However, if a postconviction petition is barred by res judicata, it means that the claim is based on matters exclusively within the trial record and could have been raised—depending on what the issue is—in a pretrial motion (e.g., motion to suppress), at trial (e.g., evidentiary objection), or on direct appeal (e.g., ineffective of trial counsel based on matters within the record). If the matter has been raised on appeal, then it will be addressed by the appellate court and cannot be included in a postconviction petition. If the matter could have been raised on direct appeal, but was not, it is still barred by res judicata.

When a trial court decides whether res judicata bars the postconviction claim, the procedural posture of any pending direct appeal is irrelevant.

{¶28} On the other hand, if the postconviction petition claim involves cogent matters outside the trial court record that were not in existence or available for use at trial, the trial court cannot invoke res judicata "to avoid ruling on the petition's merit" regardless of the status of the direct appeal. *Id*. at ¶ 8. Thus, there is no "rendering R.C. 2953.21(C) meaningless." This is simply because, in direct appeals appellate courts do not consider claims that rest on matters outside the record. *State v. Holsinger,* 4th Dist. Lawrence No. 18CA26, 2019-Ohio-5108, at ¶ 11. (" ' [A] reviewing court cannot add matter to the record before it that was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.' "). The very fact that the claim involves matters outside the record that were not available at trial means it could not be raised at trial, is not barred by res judicata, and will not be considered on direct appeal.

{¶29} Upon review, we find there is no rational basis for us to continue to apply *Keeley*. The review of our case law since *Keeley* shows that we have contorted facts and strained logic to "distinguish it" or otherwise avoid its application. For example, in *State v. Seal, supra*, the defendant filed a petition for postconviction relief while the direct appeal of

his drug-related conviction was pending. Seal raised (1) a prosecutorial misconduct claim for withholding exculpatory evidence; (2) a prosecutorial misconduct claim for alleged presentation of false testimony to the grand jury; (3) ineffective assistance of trial counsel for failure to file a motion to suppress evidence obtained in a search; and (4) ineffective assistance of counsel for failing to investigate the case, subpoena witnesses, and provide an adequate defense. Seal's first three claims were based on his allegations that a 911 call never occurred and the police, the prosecutor, and his own defense counsel knew the existence of the 911 call was a lie.

{¶30} The trial court denied Seal's postconviction petition without an evidentiary hearing, but it did so on the merits and it did not invoke res judicata. However, this court held that his claims were barred by res judicata because his claims of prosecutorial misconduct could have been raised during pretrial discovery or at trial and his claim of ineffective assistance of counsel involved matters in the trial court record and could have been raised in the direct appeal because he had different appellate counsel. *Id*. at ¶ 15-16. In *Seal* we discussed the *Keeley* decision and its holding that "res judicata may be invoked to bar postconviction claims only after the first appeal of right has been determined" and found that, although res judicata barred Seal's claims, his direct appeal was pending when the

trial court ruled on the postconviction claims. *Id*. at ¶ 17. We also found that the trial court had not relied on res judicata to bar Seal's claims but based its denial on insufficient operative facts entitling him to postconviction relief. However, we noted that we had just recently released the decision and judgment entry in Seal's direct appeal and thus "we are not precluded from invoking the doctrine of res judicata" in his appellate case as a basis to bar Seal's postconviction claims, even though the trial court had been. *Seal* at ¶ 18.

{¶31} In *Seal*, we contended that because we released the decision in Seal's direct appeal decision before deciding his postconviction appeal, this distinguished *Seal* from *Keeley* and allowed us as the appellate court to apply the doctrine of res judicata to Seal's postconviction claims. In retrospect, this is factually incorrect and was not a distinguishing factor. In *Keeley*, as in *Seal*, the decision in Keeley's direct appeal was released prior to our decision on the postconviction appeal. *Keely* at ¶ 6 (direct appeal decision released August 12, 2012, postconviction appeal decision released February 5, 2013); *Seal* at ¶ 18 (direct appeal decision released September 16, 2014, postconviction appeal decision released December 14, 2016). Therefore, if the *Keeley* holding barred our appellate court from using the res judicata doctrine in *Keeley*, it likewise should have been a bar in *Seal*.

Instead, we incorrectly concluded, "the scenario in the present case differs from the scenario in *Keeley*" (although in fact it did not) and decided "we are not precluded from invoking the doctrine of res judicata in the present case * * *." *Seal* at ¶ 18.

{¶32} In *State v. Clark,* 4th Dist. Highland No. 15CA12, 2016-Ohio-2705, we used the same rationale in *Seal* (which was based on an incorrect factual distinction) to allow us to consider use of the doctrine of res judicata because, again, the direct appeal in *Clark* had concluded prior to our decision in Clark's postconviction appeal. *Id*. at ¶ 16-18. And again, we avoided the bar on res judicata created by *Keeley*-at least as it applied to the appellate court. Ultimately, we found Clark's postconviction claim was not barred by res judicata because he did not have separate trial and appellate counsel during the relevant time period during his direct appeal. *Id*. at ¶ 20.

{¶33} Finally, the dissent in *State v. Adams*, 4th Dist. Lawrence No. 16CA23, 2017-Ohio-519, points out the inconsistent application of *Keeley*. In *Adams* the defendant filed a postconviction petition while his direct appeal was pending and the trial court dismissed it without an evidentiary hearing, relying on the doctrine of res judicata to bar the defendant's postconviction claims even though the direct appeal was pending, a no-no under *Keeley*. *Adams,* at ¶ 27-29. The dissenting opinion in *Adams* included

the pertinent fact that the trial court relied on res judicata to dismiss Adams' postconviction petition claims; this relevant fact was left out of the majority opinion. *Id*. at ¶ 29. However, instead of following the holding in *Keeley,* which required us to remand it to the trial court to reconsider Adams' postconviction petition, the majority in *Adams* found Adams' claims barred by res judicata and affirmed the trial court's denial because "we do not find the trial court's dismissal of [Adams'] postconviction petition constituted prejudicial error." *Id*. at ¶ 25. In other words, even though under *Keeley's* holding the trial court erred in invoking res judicata to bar Adams' postconviction claims, the appellate court could use res judicata as a basis to affirm the trial court's denial of the claims and then determine that the trial court's use of res judicata, while incorrect, was not prejudicial.

{¶34} The dissent in *Adams* points out the problem and states that, "based on *Keeley*, we should sustain Adams' first assignment of error and remand the cause to the trial court to consider the petition." *Id*. at ¶ 28. The questionable workability and logic of *Keeley* is highlighted in the dissent's next sentence which states, "On remand, because his direct appeal is no longer pending, the trial court is free to consider whether his claims are not barred by res judicata." *Id*.

{¶35} The rationale of *Keeley* is even more tenuous in this case. Here, Carver was convicted of murder and rape and filed a direct appeal, which we decided on October 13, 2020. While Carver's appeal was pending, he filed a postconviction petition in July 2020 asserting multiple claims of ineffective assistance of trial counsel and prosecutorial misconduct. On August 25, 2020, while the direct appeal was still pending, the trial court denied Carver's postconviction petition without a hearing and invoked res judicata as a bar to many of Carver's ineffective assistance of trial counsel claims. However, the court also analyzed the merits of Carver's claims and set this forth in the appealed-from decision.

{¶36} In this case, yet another wrinkle has developed because as we previously indicated above, Carver applied for, and was granted, a reopening of his direct appeal on November 8, 2021, which is now currently pending again. This means that under the rationale of *Keeley* as further clarified in *Seal*, neither the appellate court nor the trial court can currently deny any of Carver's postconviction claims by invoking the doctrine of res judicata. If we remanded this matter back to the trial court, it could not invoke res judicata to bar any of Carver's claims because that "res judicata window" was only open from October 13, 2020 until November 8, 2021. Under *Keeley,* here are the relevant dates and time frames for when res judicata was

available to bar Carver's claims and which court could or could not invoke it:

1. Carver's direct appeal filed September, 2019.
2. Carver's postconviction petition filed July 20, 2020.
3. Trial court's postconviction petition denial of August, 25, 2020.
4. Carver's appeal of postconviction petition filed September 14, 2020.
5. Carver's direct appeal decided October 13, 2020.
6. Carver's direct appeal reopened November 8, 2021 and currently pending.

{¶37} The trial court could not invoke res judicata as a bar to Carver's postconviction petition claims unless it held the petition in abeyance until after October 13, 2020 and then decided it after October 13, 2020 but before November 8, 2021, when the direct appeal reopened. If the trial court failed to rule on the postconviction petition until after November 8, 2021, it would once again be unable to invoke res judicata to dispose of any of Carver's postconviction petition claims. If we remanded this cause, the trial court would not be able to invoke res judicata until after the reopened appeal is decided.

{¶38} The appellate court could not use res judicata as a ground to affirm the denial of Carver's postconviction petition claims from September 14, 2020 (when he filed his appeal of it) until October 13, 2020. After October 13, 2020 until November 8, 2021, the appellate court could have

invoked res judicata in deciding Carver's postconviction petition appeal. However, because the appellate court did not rule on Carver's postconviction appeal by November 8, 2021, the appellate court is once again barred from invoking res judicata while the reopened direct appeal is pending.

{¶39} This on-again off-again application of res judicata is nonsensical. No rational basis exists to prevent a court from invoking the doctrine of res judicata to bar postconviction petition claims while the direct appeal is pending. By perpetuating the *Keele*y holding, we are inviting inconsistent rulings on the same issue in two different courts. A trial court that cannot invoke res judicata to bar a postconviction petition claim that was already raised at trial and is pending on appeal is forced to render a decision on the merits of that claim. That trial court's postconviction petition decision could be inconsistent with the appellate decision on that same claim.

{¶40} We are cognizant of the importance of respecting stare decisis. However, the holding in *Keeley* is incorrect and unsupportable.

> The doctrine of stare decisis generally compels a court to recognize and follow an established legal decision in subsequent cases in which the same question of law is at issue. It is a doctrine of policy that recognizes the value of continuity and predictability in our legal system. It

> allows those individuals affect by the law to rely on its consistency. (Internal citations omitted.)

State v. Henderson, 161 Ohio St. 3d 285, 2020-Ohio-4784, 162 N.E.3d 776, at ¶ 28.

> In [*Westfield Ins. Co. v.] Galatis*, 11 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, we laid out a test to help us consider the prudence of overruling our prior decisions. We said that we must be willing to overrule our prior decisions when (1) the decisions were wrongly decided or circumstances no longer justify continued adherence to them, (2) the decisions defy practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Henderson, supra.

> But we have not applied the *Galatis* test in all cases in which we have overruled a prior decision. We have said that it applies when we consider overruling precedent on substantive law, and that it is most helpful in cases involving contract, property, and tort principles. In cases in which we overrule a prior decision regarding procedural rules, evidentiary rules or constitutional questions though, we have declared the *Galatis* analysis unnecessary. And in some cases, we have simply overruled one of our prior decisions without mentioning the *Galatis* test at all. (Citations omitted.)

Henderson, supra, at ¶ 29.

> {¶41} Based on the foregoing, we find that *Keeley* was wrongly

decided, defies practical workability, and abandoning it would not create undue hardship for those who relied upon it.[7] We hereby overrule our prior decision in *State v. Keeley*, 2013-Ohio-474, 989 N.E. 2d 80 (4th Dist.), where we held that the doctrine of res judicata did not apply to bar consideration of postconviction claims that were not raised in an appeal of right that was pending at the time the postconviction petition was filed. We now hold that a defendant's pending direct appeal does not bar application of the doctrine of res judicata to a defendant's postconviction petition. Overturning *Keeley* will provide clarification for trial courts and restore res judicata as an important and useful legal doctrine to the judiciary in our district, which should be invoked when applicable, regardless of the status of any pending direct appeal.

{¶42} Carver's appeal of the denial of his postconviction motion challenges only three of the ineffective assistance of counsel claims he originally asserted, the denial of his claim of prosecutorial misconduct, and the dismissal of his postconviction petition without an evidentiary hearing. Therefore, we proceed to discussion of only those claims.

1. Appellant's claim of ineffective assistance of counsel.

[7]We also observe that we appear to be the only appellate district in Ohio with this temporal "carve out" for invoking the doctrine of res judicata to postconviction petition claims.

{¶43} For ease of analysis, we begin with Carver's ineffective assistance of counsel claim, set forth in the second assignment of error. To demonstrate ineffective assistance of counsel, an appellant " 'must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different.' " *State v. Kelly,* 4th Dist. Hocking No. 20CA5, 2021-Ohio-2007, at ¶ 51; *State v. Short,* 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113, citing *Strickland v. Washington,* 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052 (1984); *State v. Bradley,* 42 Ohio St.3d 136, 538 N.E.2d 373 (1988), paragraph two of the syllabus. Failure to demonstrate either prong of this test "is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14, citing *Strickland,* 466 U.S. 668, 104 S.Ct. 2052.

a. Failure to dismiss jurors.

{¶44} Generally, jury selection falls within the realm of trial strategy and tactics. *See State v. Jenkins,* at ¶ 19; *State v. Mundt,* 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 63; *State v. Keith,* 79 Ohio St.3d 514, 521, 684 N.E.2d 47 (1997). Thus, reviewing courts should not second guess trial counsel's voir dire strategy or "impose 'hindsight views about how

current counsel might have voir dired the jury differently.' " *Mundt* at ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998); *accord State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 153. Trial counsel, who observed the jurors firsthand, is in a much better position than a reviewing court to determine whether a prospective juror should be peremptorily challenged. *See State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 99.

{¶45} In Carver's postconviction petition, he argues his trial counsel was deficient for neglecting to dismiss Juror Smith "because he was a family member to the victim's advocate and friends with the Detective of this case." He attached copies of the transcript of the voir dire. The trial court found this claim was barred by res judicata and rightly so.

{¶46} The trial court noted that "[t]he record on direct appeal contains the transcript of the voir dire examination and rulings on challenges made by the parties. This claim could have been raised in the direct appeal." We agree with the trial court. Therefore, Appellant's claim herein is barred by res judicata.

b. Failure to investigate and present an alibi witness.

{¶47} Carver's "witness" claim has varied in his filings. In his

appellate brief herein, Carver claims his counsel was deficient for "neglecting to present an alibi witness."[8] In the underlying postconviction motion, Carver argued that, "These witnesses had pertinent information about victim's (Heather Camp) refusal to go to the hospital for the gunshot wound because she had criminal warrants, and she did not want to get into trouble, nor did she want to get Petitioner into trouble. * * * These witnesses were all prepared to testify that the victim refused to go to the hospital and/or call 911, and that Petitioner did, in fact, try to talk her into it, and incorporate others' help to talk her into it." In the currently appealed-from decision, the trial court addressed Carver's "witness" claim as follows:

> Defendant argues in his fifth claim that his trial counsel should have subpoenaed witnesses who would have testified that he told them that the shooting was accidental. He did not provide copies of any statements or affidavits or any names of such witnesses. However, even if he had, this testimony would not have been admissible at trial because it was inadmissible hearsay. The only statements of a defendant that can be admitted at trial are statements against interest. These statements would not have qualified to be admitted and were therefore excluded by the hearsay rule.

{¶48} Again, in his brief, Carver does not identify any witness or witnesses which he claims should have been investigated. Nevertheless, we

[8]The above argument differs slightly from Carver's claim in his 26(B) motion to reopen. There Carver argued there was additional evidence from potential witnesses, including a person named Felisha Grimm, that prior to trial Carver provided his counsel with a list of people he contacted in search of medical assistance for Heather.

need not consider Carver's vague and changing argument herein because these witnesses and their purported favorable testimony, along with any deficiency of his trial counsel in finding and investigating these witnesses, would have been known to Carver at the time of his direct appeal. Carver did not raise this argument in his direct appeal and he is now barred from doing so by application of res judicata.

c. Neglecting to request a jury instruction on voluntary manslaughter.

{¶49} In his postconviction motion, Carver also argued his trial counsel was ineffective for failing to request an instruction on the lesser included offense of voluntary manslaughter. "The trial court must 'fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.' " *State v. Teets*, 4th Dist. Pickaway No. 16CA3, 2017-Ohio-7372, at ¶ 61, quoting *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. Additionally, a trial court may not omit a requested instruction, if it is " ' "a correct, pertinent statement of the law and [is] appropriate to the facts." ' " *State v. Clay*, 4th Dist. Lawrence No. 11CA23, 2013-Ohio-4649, at ¶ 43, quoting *State v. Lessin*, 67 Ohio St.3d 487, 493 (1993), quoting *State v. Nelson*, 36 Ohio St.2d 79 (1973), paragraph one of the syllabus.

{¶50} Ohio law codifies the crime of voluntary manslaughter in R.C. 2903.03(A), which states, in pertinent part, "[n]o person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another." *See also Teets, supra*, at ¶ 62. Thus, in deciding whether a defendant is entitled to an instruction on voluntary manslaughter, the trial court must determine whether, under any reasonable view of the evidence and construing all the evidence in a light most favorable to the defendant, a reasonable jury could find that the defendant had established sufficient provocation. *See State v. Rawlins*, 4th Dist. No. 97CA2539 (Dec. 24, 1998); *State v. Shane*, 63 Ohio St.3d 630 (1992), paragraph one of the syllabus (determining merely "some evidence" to support voluntary manslaughter is not enough to require an instruction).

{¶51} In the appealed-from decision, the trial court found Carver's argument herein to be barred by res judicata and also found the claim to be without merit. The trial court noted:

> [T]he Court finds that as a matter of law, this request was not supported by the trial record. In order to obtain an instruction on this offense, the record would have had to show that there was sufficient serious provocation by the victim to reasonably incite the Defendant into use of deadly force. The record did not show that in this case and

> that was clearly the reason that trial counsel did not request the instruction. Instead, he requested and obtained an instruction on the lesser offense of Reckless Homicide which was appropriate under the evidence.

{¶52} We agree with the trial court's conclusion that this claim is barred by res judicata. Carver failed to raise the argument concerning the requested jury instruction in his direct appeal. It is now barred by res judicata.

2. Carver's claim of prosecutorial misconduct.

{¶53} Carver argues the prosecutor misled the Highland County Grand Jury and secured a defective indictment by specifically withholding exculpatory evidence. Carver claims he is entitled to the Grand Jury transcripts. While claiming prosecutorial misconduct, Carver is actually arguing the trial court's denial of his request for the transcripts is an abuse of discretion. Crim.R. 6(E) provides, in part:

> A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

{¶54} " 'Although grand jury proceedings are secret, * * * an accused may inspect grand jury transcripts if the ends of justice require it and if he can show that he has a particularized need for them that outweighs the reasons for secrecy.' " *See State v. Pyles*, 4th Dist. Scioto No. 17CA3790, 2018-Ohio-4034, at ¶ 28, quoting *State ex rel. Collins v. O'Farrell*, 61 Ohio St.3d 142, 143, 573 N.E.2d 113 (1991), citing *State v. Patterson*, 28 Ohio St.2d 181, 277 N.E.2d 201 (1971), paragraph three of the syllabus; *State v. Greer*, 66 Ohio St.2d 139, 420 N.E.2d 982 (1981), paragraph two of the syllabus.

{¶55} In the appealed-from decision, the trial court noted that Carver did not demonstrate a particularized need, other than his personal belief that the transcripts would show evidence of the claims raised in his postconviction motion. The trial court found Carver's reasons for the request to be unsupported and based on speculation. Consequently, the trial court denied the request.

{¶56} However, we find that Carver's claim of prosecutorial misconduct and/or entitlement to grand jury proceeding transcripts is an argument he could have raised in this direct appeal. Carver did not choose to do so. Therefore, this claim is also barred by res judicata.

3. Appellant's claimed entitlement to an evidentiary hearing.

{¶57} A criminal defendant seeking to challenge a conviction through a petition for postconviction relief is not automatically entitled to an evidentiary hearing. *See Jayjohn, supra* at ¶ 11; *Calhoun, supra*, 86 Ohio St. 3d 279 at 282, citing *State v. Cole,* 2 Ohio St.3d 112, 443 N.E.2d 169 (1982). Before granting an evidentiary hearing, the trial court must determine whether substantive grounds for relief exist. R.C. 2953.21(D). As indicated above, the trial court found Carver failed to allege sufficient evidence that would show substantive grounds entitling him to postconviction relief on any of the bases asserted.

{¶58} We agree that Carver failed to allege sufficient evidence that would show substantive grounds entitling him to an evidentiary hearing. We find the trial court did not abuse its discretion by dismissing Appellant's petition without conducting an evidentiary hearing. However, our finding is made on the alternative basis that res judicata applied to bar the claims raised in Carver's postconviction petition. Accordingly, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed 60 days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J., concurs in Judgment and Opinion.
Abele, J., concurs in Judgment Only.

For the Court,

_____

Jason P. Smith
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.