

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

v.

MARTY LEVINGSTON,

Defendant-Appellant.

: Case No. 15-0073
:
: On Appeal From The First District
: Court of Appeals
:
: Court of Appeals Case No. C1400194
:
:
:

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT MARTY LEVINGSTON

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STATEMENT OF WHY LEAVE TO APPEAL SHOULD BE GRANTED

Innocent people are convicted and incarcerated in Ohio. One need look no further than the newspaper for confirmation of this reality. Most recently, a trial court in Cleveland, with the acquiescence of the Cuyahoga County Prosecutor's Office, ordered the release of three men who were convicted in the 1970's of a murder they did not commit.¹ Further, the National Academy of Sciences recently published a study estimating that 4 percent—or 1 in 25—of all Americans sentenced to death have been wrongfully convicted.² The instant case poses a pressing question for this Court: should a path to postconviction relief exist for the actually innocent whose claims may be time-barred under Ohio's postconviction relief statutes? In order to ensure that errors in our criminal justice system are corrected, no matter when they are discovered, the answer must be yes.

Our nation's federal judiciary has recently recognized that inmates may often lack the resources necessary to pursue timely postconviction relief. In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Supreme Court recognized a new gateway to federal postconviction relief. Reviewing Texas law, the Court noted that “the inherent nature of most ineffective assistance” of trial counsel “claims means that the trial court record will often fail to ‘contai[n] the information necessary to substantiate’ the claim.” *Id.* at 1919 (citing *Ex parte Torres*, 943 S. W. 2d 469, 475 (1997) (en banc)). That ruling expanded the Court's earlier holding in *Ryan v. Martinez*, 132 S. Ct. 1309 (2011). Together, *Trevino* and *Martinez* provide a means for an inmate in state custody to seek federal habeas relief, even when the state court has held that his postconviction claims have been procedurally defaulted.

¹ http://www.cleveland.com/court-justice/index.ssf/2014/11/a_free_man_ricky_jackson_to_le.html

² See Samuel R. Gross et al., “Rate of False Convictions For Inmates Who Are Sentenced to Death,” available at <http://www.pnas.org/content/111/20/7230.abstract>.

The United States Supreme Court's decisions in *Trevino* and *Martinez* do not create a requirement that state courts create an equitable path to overcome procedural default in postconviction proceedings. The decisions do, however, provide enormous incentive for state courts to recognize such a path. Under the Anti-Terrorism and Effective Death Penalty Act, federal courts must review a state court's ruling on the merits of a postconviction claim with extraordinary deference. *See, e.g.*, 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). But where a state court refuses to hear a claim on the merits but a federal court finds that the inmate has satisfied the *Trevino/Martinez* standard to overcome procedural default, the federal court is then free to go to the merits of the case with no state court findings to which to grant deference.

Even absent a claim of ineffective assistance of postconviction counsel, federal habeas review is available on otherwise procedurally defaulted claims through the co-called "gateway" claim of innocence, as articulated by the Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995). Under *Schlup*, an inmate who is able to demonstrate that he is actually innocent of the crime for which he was been convicted can overcome a procedural default. In recognizing the existence of this gateway, the Court pointed out that "the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Id.* at 324. This Court, too, should recognize that strong individual interest that is jeopardized by the punishment of the innocent.

Thus, the State of Ohio has a significant interest in recognizing a path for an otherwise time-barred postconviction claim to be litigated on its merits. In *Trevino* and *Martinez*, the

United States Supreme Court has held that in those instances in which an inmate did not receive effective assistance of postconviction counsel, federal courts should examine the merits of claims that state courts have ruled are procedurally defaulted. And in *Schlup*, the Court affirmed that a compelling claim of actual innocence will overcome procedural obstacle to review. When this happens, the federal court becomes the first to review the merits of a postconviction claim. But a collateral challenge to an Ohio conviction should be first reviewed by an Ohio court. This Court should recognize equitable exceptions to the time requirements in Ohio's postconviction relief statutes that parallel the exceptions now available under federal law. This Court should thus permit both postconviction petitions that assert "gateway claims" of innocence (as articulated in *Schlup*) and untimely petitions arising from ineffective assistance of appellate counsel (as in *Trevino* and *Martinez*) to be adjudicated on their merits, thus providing relief to potentially wrongfully-incarcerated Ohioans.

STATEMENT OF FACTS

Following a jury trial in 2009, Mr. Levingston was convicted of murder, felonious assault, and tampering with evidence. Reviewing a direct appeal of those convictions, this Court offered the following summary of the evidence presented at trial:

At trial, Carlos Mayo testified that he and his friend Michael Grace had driven to the Hawaiian Terrace apartment complex on December 28, 2007. When Grace left the car, a man approached him and pulled out a gun. As the two fought, a second gunman approached the car and began firing shots at Mayo. When Mayo attempted to return fire with a gun from the car, his gun jammed, so he fled from the scene. Grace fell in the parking lot and later died from two gunshot wounds.

Savana Sorrells witnessed the melee from an apartment that overlooked the parking lot. At trial, she was called as a court's witness and identified David Johnson as the first gunman. Sorrells also testified that although she had named Levingston as the second gunman before trial, she doubted her identification. The state challenged her uncertainty by asking whether she

had identified Levingston as the second gunman to police on January 7, 2008, and to the grand jury. Sorrells conceded that she had done so, and that before the shooting she had known both men from the apartment complex.

The state also called Detective Matt Thompson, who testified that Sorrells had named "David and Marty" as the shooters during her police interview. Detective Thompson confirmed that she was referring to Levingston and Johnson by showing her photographs of both men. The jury heard an audio recording of this interview.

In addition, Robert Taylor, an inmate in the Hamilton County Justice Center, claimed that Levingston had admitted that he had killed Grace. According to Taylor, Levingston and Grace had been members of rival gangs who had been fighting over stolen guns before the shooting.

State v. Levingston, 1st Dist. No. C-090235, 2011-Ohio-1665, ¶¶ 2-6. Mr. Levingston's appointed appellate counsel did not file a petition for postconviction relief.

On June 12, 2013, Mr. Levingston filed a petition for postconviction relief, asserting that his trial was infected by fourteen errors of constitutional magnitude. The trial court denied the petition via an entry that simply stated:

This matter comes before the Court on defendant's Motion for Post-conviction Relief. The Court having considered the Motion, and any pertinent materials, together with applicable law, denies the request.

The First District Court of Appeals affirmed the judgment of the trial court.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law One: When an inmate claiming actual innocence does not timely seek postconviction relief as the result of ineffective assistance of appellate or postconviction counsel, an Ohio trial court should adjudicate the merits of a postconviction petition, regardless of when it is filed.

Under Ohio Revised Code 2953.23, a petition for postconviction relief must be filed within 180 days of the date on which the trial court record is filed in the court of appeals. In the instant case, the trial court apparently denied the petition as untimely. While the trial court did not state its reason for denial, a merits-based denial must be accompanied by findings of fact and

conclusions of law. R.C. 2953.21(G). A denial that does not include such findings is not a final, appealable order. *See, e.g., State v. Fuller*, 171 Ohio App.3d 260, 2007-Ohio-2018, 870 N.E.2d 255 (1st Dist.). However, a “trial court need not issue findings of fact and conclusions of law when it dismisses an untimely [postconviction-relief] petition.” *State ex rel. James v. Coyne*, 114 Ohio St. 3d 45, 2007-Ohio-2716 867 N.E.2d 837, ¶ 5. Based on the trial court’s disposition, one must assume its decision was predicated on the timeliness of the petition.

The trial court should have reached the merits of Mr. Levingston’s petition for two reasons. First, Mr. Levingston has asserted and established his actual innocence of the crime of which he was convicted. Regardless of the statute’s time frame, tolling should be appropriate in instances where, as here, a petitioner can demonstrate his actual innocence. While the Ohio Supreme Court has not recognized an actual innocence gateway for postconviction claims, the principle is well-established in federal law. *See, e.g., Schlup v. Delo*, 513 U.S. 298 (1995). Given the structure of federal habeas review—which requires a federal court to accord great deference to the adjudication of a postconviction claim by a state court, but which also permits de novo review where no state court adjudication has occurred—permitting an actually innocent petitioner to bring an otherwise untimely postconviction relief petition is logical. Such claims ultimately will be heard in federal court, and Ohio has a strong interest in being the first to pass judgment on such claims.

Mr. Levingston’s actual innocence claim is a strong one. Not a shred of physical evidence links him to the crimes for which he has been convicted. At trial, the State had just one piece of substantive evidence against him: the testimony of an incentivized “jailhouse snitch” who claimed to hear incriminating statements through a jail air duct. Both the Ohio and federal constitutions contain protections against cruel and unusual punishment and the deprivation of the

due process of law. These protections are meaningless if they do not at least forbid the state from incarcerating the innocent. Thus, based on Mr. Levingston's actual innocence, this Court should grant postconviction relief.

Second, the court below should have reached the merits of Mr. Levingston's postconviction petition because the Supreme Court recognized a new right that, under R.C. 2973.23, excuses the untimeliness of his petition. The record is clear that Mr. Levingston received ineffective assistance of postconviction counsel, as counsel wholly failed to seek postconviction relief. In *Trevino*, the Supreme Court recognized a new gateway to federal postconviction relief. Reviewing Texas law, the Court noted that "the inherent nature of most ineffective assistance" of trial counsel "claims" means that the trial court record will often fail to 'contai[n] the information necessary to substantiate' the claim." *Id.* at 1919 (citing *Ex parte Torres*, 943 S. W. 2d 469, 475 (1997) (en banc)). The Court held that the rule of *Martinez*, permitting the ineffective assistance of postconviction counsel to constitute grounds to overcome procedural default, must apply any time "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." Thus, "a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference." *Id.* at 1921.

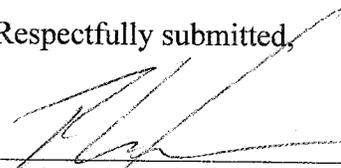
Mr. Levingston raises an ineffective assistance claim based on his trial counsel's failure to investigate, a claim that could not have been raised on direct appeal. The new "federal right" recognized in *Trevino* is thus grounds, under R.C. 2973.23(A)(1)(a), to bring an otherwise

untimely petition for postconviction relief. The trial court erred in dismissing the petition as untimely, and its decision should be reversed.

CONCLUSION

This is a case of great public importance. This Court should make the availability of postconviction relief congruent with the availability of federal habeas corpus relief. Doing so will both recognize the important individual interests at stake in such proceedings and protect the power of Ohio courts to be the first to adjudicate claims arising from Ohio convictions. This case provides an excellent vehicle for examining the scope and limits of procedural barriers to postconviction relief in Ohio.

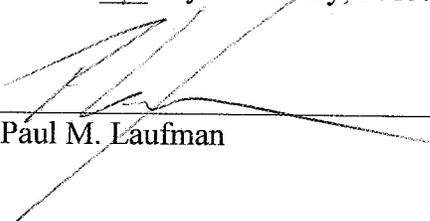
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon the Hamilton County Prosecuting Attorney, via US mail, postage prepaid, on this 14 day of January, 2015.



Paul M. Laufman

ENTERED
DEC 10 2013

HAMILTON COUNTY COURT OF COMMON PLEAS
CINCINNATI, OHIO

ENTER

DEC 10 2013

STATE OF OHIO,
Plaintiff,
vs.
MARTY LEVINGSTON,
Defendant

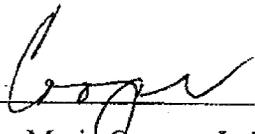
Case No.: B-0800258-B
ETHNA M. COOPER, JUDGE

(Judge Cooper)

ENTRY OVERRULING MOTION FOR
POST-CONVICTION RELIEF

This matter comes before the Court on the defendant's Motion for Post-conviction Relief. The Court having considered the Motion, and any pertinent materials, together with applicable law, denies the request.

So Ordered,


Ethna Marie Cooper, Judge



D104564195

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-140194
Respondent-Appellee,	:	TRIAL NO. B-0800258B
vs.	:	
MARTY LEVINGSTON,	:	<i>JUDGMENT ENTRY.</i>
Petitioner-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Petitioner-appellant Marty Levingston appeals the judgment of the trial court denying his petition under R.C. 2953.21 et seq. for postconviction relief.

In a single assignment of error, Levingston challenges the trial court's denial of his petition as untimely.

Levingston argues that the time for filing a petition under R.C. 2953.21 should be tolled where a petitioner can demonstrate actual innocence. However, a defendant's claim of actual innocence based on newly discovered evidence does not constitute grounds for postconviction relief. See *State v. Byrd*, 145 Ohio App.3d 318, 762 N.E.2d 1043 (1st Dist.2001). Therefore, Levingston's argument is without merit.

Levingston also argues that the United States Supreme Court established a new "federal right" to the effective assistance of counsel in a postconviction proceeding,

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which excuses the untimeliness of his petition. *See Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013); *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 1319, 182 L.Ed.2d 272 (2012). This court has held that neither the state nor the federal constitution gives an indigent defendant the right to appointed counsel in a postconviction proceeding. *See State v. Chamblin*, 1st Dist. Hamilton No. C-130828, 2014-Ohio-3895, ¶ 3-4. Furthermore, the right established in *Martinez* and applied in *Trevino* applies only to federal petitions for habeas corpus. *See State v. Glover*, 8th Dist. Cuyahoga Nos. 100330 and 100331, 2014-Ohio-3228, ¶ 28; *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir.2014). We, therefore, overrule Levingston's sole assignment of error.

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., FISCHER and DEWINE, JJ.

To the clerk:

Enter upon the journal of the court on December 5, 2014
per order of the court _____
Presiding Judge