

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

STATE OF OHIO,	:	APPEAL NO. C-170666
	:	TRIAL NO. B-0808031
Plaintiff-Respondent-Appellee,	:	
vs.	:	<i>OPINION.</i>
WILLIAM CAMPBELL,	:	
Defendant-Petitioner-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgments Appealed From Are: Affirmed in Part and Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: May 17, 2019

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Philip Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Respondent-Appellee,

*Carpenter Lipps & Leland LLP*, *Kort Gatterdam* and *Erik P. Henry*, for Defendant-Petitioner-Appellant.

**BERGERON, Judge.**

{¶1} Raising *Brady*, ineffective assistance, and actual-innocence claims, defendant William Campbell seeks a new trial and postconviction relief. Although we find that we lack jurisdiction over the latter (postconviction) claim, we conclude that the trial court erred in denying Mr. Campbell an evidentiary hearing to evaluate his new-trial claims in light of new evidence. Accordingly, we affirm in part, reverse in part, and remand the cause.

I.

{¶2} After a night of heavy drinking in October 2008, Mr. Campbell and his companion Tina Hayes elected to get in her car and drive to visit another bar. That decision proved tragic, as the driver eventually lost control and the car crashed into a building. Neither individual was wearing a seatbelt, and the force of the crash ejected Mr. Campbell through the windshield and killed Ms. Hayes.

{¶3} This case effectively boils down to who was driving the car at the time of the crash. Although Mr. Campbell consistently denied being the driver of the vehicle, he was convicted after a trial of operating a vehicle while under the influence of alcohol (“OVI”) in violation of R.C. 4511.19(A)(1)(a), aggravated vehicular homicide in violation of R.C. 2903.06(A)(1)(a), and aggravated vehicular homicide in violation of R.C. 2903.06(A)(2)(a). The trial court sentenced him to consecutive prison terms totaling 28 years.

{¶4} Mr. Campbell unsuccessfully challenged his convictions on direct appeal and in a timely-filed postconviction petition. *State v. Campbell*, 1st Dist. Hamilton No. C-090875 (Sept. 19, 2012) (affirming on direct appeal), *appeal not accepted*, 132 Ohio St.3d 1411, 2012-Ohio-2454, 968 N.E.2d 493; *State v. Campbell*,

1st Dist. Hamilton No. C-120016 (June 29, 2012) (affirming denial of postconviction relief), *appeal not accepted*, 133 Ohio St.3d 1414, 2012-Ohio-4650, 975 N.E.2d 1031. In 2013, on remand from our decision reopening the direct appeal, the trial court merged the aggravated vehicular homicides and imposed consecutive prison terms of five years for OVI and 15 years for OVI-based aggravated vehicular homicide. *State v. Campbell*, 2012-Ohio-4231, 978 N.E.2d 970 (1st Dist.), *appeal not accepted*, 134 Ohio St.3d 1452, 2013-Ohio-347, 982 N.E.2d 729. We affirmed those convictions on appeal. *State v. Campbell*, 1st Dist. Hamilton No. C-130251 (May 16, 2014), *appeal not accepted*, 140 Ohio St.3d 1441, 2014-Ohio-4160, 16 N.E.3d 683.

{¶5} After reaching the end of the road in state court, Mr. Campbell turned to federal court, filing a petition for a writ of habeas corpus in 2014 before the Southern District of Ohio, seeking relief on various grounds including actual innocence, ineffective assistance of counsel, and prosecutorial misconduct. Upon receiving certain new evidence during the discovery process in federal court, Mr. Campbell sought to use that evidence in that forum, only to be told to return to state court for exhaustion purposes. In December 2016, the federal magistrate accordingly granted Mr. Campbell's motion to hold the habeas proceedings in abeyance pending exhaustion of state remedies. *See Campbell v. Warden, London Corr. Inst.*, S.D. Ohio No. 1:14-CV-13, 2015 WL 7710761 (Nov. 30, 2015), *supplemented*, S.D. Ohio No. 1:14-CV-13, 2016 WL 497285 (Feb. 9, 2016).

{¶6} Consistent with the federal court's directives, Mr. Campbell thereupon returned to state court, presenting his habeas grounds for relief in a petition under R.C. 2953.21 et seq. for postconviction relief and motions under Crim.R. 33 for a new trial and for leave to file a new-trial motion out of time. The trial court dismissed Mr.

Campbell's late and successive postconviction petition based on the failure to satisfy the jurisdictional requirements of R.C. 2953.23. And the court denied leave and overruled his new-trial motion on the merits, concluding that Mr. Campbell could not meet his burden under *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947).

{¶7} In the wake of this ruling, Mr. Campbell appeals, presenting a single assignment of error that challenges the trial court's denial of postconviction relief and a new trial.

A.

{¶8} No stranger to alcohol-related incidents, Mr. Campbell had six OVI convictions between 1993 and 2002, which culminated in a lifetime driver's license suspension. Analyses of Mr. Campbell's blood at the time of the 2008 crash showed blood-alcohol-content levels well above the legal limit. The parties stipulated to those matters, leaving for trial the pivotal issue of whether Mr. Campbell or Ms. Hayes (herself under the influence of alcohol and cocaine) was driving the car at the time of the accident.

{¶9} The only eyewitness to the accident, Corporal Robert Viner of the Hamilton County Sheriff's Department, did not see who was driving. While on patrol near midnight, erratic driving prompted Corporal Viner to initiate pursuit of Ms. Hayes's car. During the course of the chase, he saw the car mount a curb, proceed through a yard, and hit a tree and then a building. "As the vehicle was striking the building," Corporal Viner, from a distance of 20 feet from the building, saw Mr. Campbell "ejected from the vehicle \* \* \* [in] one fluid motion."

{¶10} As Corporal Viner approached the car after the accident, he saw no one in the driver's seat. He then observed Mr. Campbell outside of the car, surrounded

by “a lot of debris.” On the car’s passenger side, he saw Ms. Hayes, unconscious, “seated in the passenger seat.” “[H]er legs were kind of straight ahead, but her body was kind of turned toward the passenger side,” and her head “was kind of twisted,” with “the back of her head \* \* \* wedged in between the passenger seat and what they call the vehicle B-pillar, which is basically where the door shuts and locks.” He also observed a large hole in the passenger-side windshield.

{¶11} Corporal Viner summoned his supervisor and emergency medical assistance. Mr. Campbell was bleeding from cuts on his face, arm, and leg, but emerged relatively unscathed from the accident. When asked who was driving, a somewhat dazed Mr. Campbell responded, “It wasn’t me.” Corporal Viner also observed that Ms. Hayes was wearing shoes, but Mr. Campbell was not. At some point after Ms. Hayes and Mr. Campbell were transported to the hospital, Corporal Viner noticed a pair of gym shoes on the driver’s side of the vehicle.

{¶12} The news media arrived between 12:15 and 12:30 a.m., after Ms. Hayes and Mr. Campbell had been whisked away to the hospital. A videographer shot about eight minutes of raw footage, providing (among other things) a brief look at the open driver’s side of the car. This footage did not show the shoes present on the driver’s side (a point we return to later).

{¶13} At the hospital, Mr. Campbell was found to have injuries to his face, eye, and leg, but not his chest. A chest X-ray and CT scan ruled out internal injuries. An autopsy showed that Ms. Hayes had died as a result of “a cervical spine fracture due to blunt-force trauma, due to a motor vehicle collision.” The autopsy also showed a blunt-force laceration extending from her left forehead to the parietal scalp, a four-inch laceration to the right posterior scalp, a blunt-force superficial

abrasion below her lower lip, a bruise and abrasion to the right clavicular chest, abrasions to her right wrist and forearm, and a blunt-force abrasion and contusion over her left knee. The deputy coroner who testified to the autopsy results declined to opine whether those injuries were more consistent with being on the driver's side or the passenger side of the car. But he did acknowledge, "[T]here was nothing to indicate that [Ms. Hayes] was the driver of the vehicle. There was no steering wheel imprint which you may expect in a motor vehicle collision if you were the driver and unrestrained." Nor did Mr. Campbell have any such imprint.

{¶14} Subsequent forensic analysis found that hairs gathered from the passenger window frame corresponded in microscopic characteristics with Ms. Hayes's hair, and not Mr. Campbell's hair. But hairs gathered from the middle portion of the windshield, the passenger-side windshield, and the passenger-side airbag did not correspond with either Ms. Hayes's hair or Mr. Campbell's hair. Neither the car's brake pad nor the gym shoes found in the car had left a discernable impression on the other. Asked to "look for dark fibers" because it had been "reported that the victim was wearing a dark sweater," the forensics expert collected fibers that had been "fused" into the car's passenger-side armrest, examined them microscopically, and found "several dark blue \* \* \* cotton fibers."

{¶15} No blood was found on the car's driver-side airbag. A mix of blood was found on the passenger-side airbag, and DNA analysis excluded Ms. Hayes as a contributor and identified Mr. Campbell as the major contributor. Neither Ms. Hayes nor Mr. Campbell could be excluded from the mixture of nonblood DNA collected from the gym shoes. Ms. Hayes was determined to be the source of blood on the front plate of the car's glovebox.

{¶16} Two days after the accident, Ms. Hayes’s mother, Pamela Holt, searched the car for a camera containing pictures from a recent family outing. The glovebox, according to Ms. Holt, was locked and was not dented or otherwise damaged, until a police officer assisting her “broke down the glovebox” with a crowbar to gain access to its contents. Ms. Holt also noticed that the passenger seat was pushed all the way back, with the seat back slightly reclined, whereas the driver’s seat was in its usual position for Ms. Hayes, who at five feet, three inches tall, with “short legs,” “always” positioned her seat “straight up, where she could reach the pedals.” Mr. Campbell, standing nearly six feet tall, is considerably taller.

{¶17} The forensic evidence presented at trial was certainly not overwhelming in either direction. Some aspects favored Mr. Campbell’s position that he was not the driver, whereas others favored the state. To secure a conviction, the state needed a viable accident-reconstruction presentation.

B.

{¶18} Corporal Brian Shepherd served as the lead investigator and the state’s accident-reconstruction expert. He arrived on the scene not long after the accident, taking pictures and measurements, and submitting evidence to the crime lab for testing. He also went to the hospital and photographed Ms. Hayes’s and Mr. Campbell’s injuries. By the time he left the hospital at 4:00 a.m. (about four hours after the accident), he felt “pretty confident” that Mr. Campbell had been the driver. Shortly after learning about Mr. Campbell’s history of OVI convictions, Corporal Shepherd initiated arrest proceedings against Mr. Campbell.

{¶19} Corporal Shepherd remarked that the first thing he noticed upon opening the driver-side door to photograph the car’s interior was “the final rest of

this gentleman's gym shoes—or male gym shoes \* \* \*, still tied.” With the shoes resting on the door sill, to the left of the driver's seat, this would help convince Corporal Shepherd of the physics of the accident because “[i]t's showing the principal direction of force. It has to go in that direction.”

{¶20} Corporal Shepherd also explored the car's speed, rotation, and tilt and the “kinematics of passengers” in the car, which entailed “matching damage to the vehicle with injury to the body.” Specifically, he focused on Ms. Hayes's head injuries and strands of hair found on the passenger-side A-post and hand-grip; blood on the backrest of the passenger seat; the injury to Ms. Hayes's knee, and absence of injury to Mr. Campbell's knees, and the “knee bolt” damage to the glovebox and undamaged driver-side dashboard; the bent steering wheel and the absence of a corresponding injury to Ms. Hayes's chest; the rearview mirror recovered from the ground next to Mr. Campbell; the gym shoes that Mr. Campbell admitted were his; and Ms. Hayes's “navy blue sweater” and the navy cotton fibers on the passenger-side armrest.

{¶21} This analysis culminated in an opinion that Mr. Campbell had been driving the car. Corporal Shepherd determined that the car began to rotate counterclockwise after hitting the tree, causing it to lean almost 22 degrees toward the passenger side as it approached the building. This tilt caused both driver and passenger, unrestrained by seatbelts, to lean that way until Mr. Campbell landed on Ms. Hayes's lap (and somehow during that lean, Mr. Campbell's shoes flew off of his feet). On impact with the building, the car's rear tires came off the ground, and the car's rotation caused Mr. Campbell to push Ms. Hayes up and into the passenger-side A-post until she could go no further. When the car disengaged from the building, it

rotated at least 90 degrees counterclockwise. Ms. Hayes’s body then “redirected” Mr. Campbell forward, and the force propelled him over the top of the airbag, through the windshield, and 11 feet beyond where the car had come to rest. Corporal Shepherd dismissed countervailing evidence, such as the fact that Mr. Campbell had a set of the car’s keys in his pocket (tending to show that Ms. Hayes was driving with her set of keys), Mr. Campbell received physical therapy for injuries to his knees, and the navy fibers could not be matched to Ms. Hayes’s “jacket.”

{¶22} To counter Corporal Shepherd’s testimony, the defense engaged accident-reconstruction expert John Pflum. But the defense did not request that he actually conduct an accident-reconstruction experiment. Instead, it seems that his charge was to simply poke holes in Corporal Shepherd’s analysis. And Mr. Pflum did not seem up to the task of that—his ultimate conclusion was that either scenario (i.e., Mr. Campbell or Ms. Hayes as driver) was “plausible.” This lukewarm testimony likely facilitated the conviction.

C.

{¶23} In his 2017 postconviction petition and motion for a new trial, Mr. Campbell sought relief on the grounds of actual innocence, ineffective assistance of counsel, and prosecutorial misconduct in failing to disclose favorable *Brady* evidence in discovery. All of these claims revolve around certain new evidence that Mr. Campbell obtained, including autopsy photos, date-and-time-stamped crash-scene photos, and original digital images of photos that had been admitted at trial (all of which came to light during federal habeas discovery), as well as the 2015 depositions of trial and appellate counsel and the 2015 report of accident-reconstruction expert Jack Holland. To support his postconviction claims, Mr. Campbell provided a litany

of examples where this “new evidence,” if available at trial, would have combatted the state’s theory that Mr. Campbell was the driver, impeached critical witnesses, discredited the state’s expert, and shone a spotlight on potential mishandling of evidence by law enforcement.

{¶24} Wielding this new evidence to support each of his claims, Mr. Campbell emphasized that the evidence established Ms. Hayes as the driver. He contended that the undisclosed autopsy photos showed bruising to Ms. Hayes’s left side, and thus if available at trial, would have bolstered the defense’s theory that Ms. Hayes bent the steering wheel, directly undermining the state’s accident expert’s conclusion to the contrary and discrediting the coroner’s testimony that her injuries were confined to her right-side chest and collarbone. In a similar vein, Mr. Campbell suggested that the enhanced original digital images clarified Ms. Hayes’s injuries, contradicting Corporal Shepherd’s reenactment photo placing Ms. Hayes in the passenger seat and supporting the defense theory that injuries to her right-side might have resulted from contact with the center console. Further, when considering the original digital images with the new date-and-time-stamped photos, Mr. Campbell believed that they illustrated potential mishandling of evidence concerning the rearview mirror, ignition key, airbags, and the glovebox faceplate. Based on this new evidence (combined with the evidence presented at trial), Mr. Holland, an accident-reconstruction expert, presented a compelling report that ruled out Mr. Campbell as the driver, noting the many inconsistencies (and some impossibilities) in the state’s expert’s conclusion at trial.

{¶25} Filtering this evidence through the three substantive claims illustrates its significance. In his *Brady* claim, Mr. Campbell asserted that he had been denied

a fair trial based on the state's failure to provide in discovery the autopsy photos and the date-and-time-stamped crash-scene photos. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). To satisfy *Brady's* materiality requirement, Mr. Campbell suggested the autopsy photos depict injuries that contradict Corporal Shepherd's, Mr. Pflum's, and the coroner's testimony regarding who was driving, the enhanced original digital images produce conflicting evidence about the car's elevation on impact and the point of impact, and the date-and-time-stamped photos (coupled with the video footage) highlight that the gym shoes may not have originally been on the car's driver's side. All of this undisclosed evidence, Mr. Campbell posits, supports the heart of his case—he was not the driver.

{¶26} With respect to actual innocence, Mr. Campbell relies heavily on Mr. Holland's accident-reconstruction report (in addition to the other new evidence discussed above). Mr. Holland's report crystalized a number of discrepancies in the state's expert's analysis, including the accuracy of the car's principal direction of force, the calculations used to support the theory that Mr. Campbell was propelled from the car, and the rotation of the car during the crash, all supporting Mr. Holland's conclusion that Mr. Campbell was not the driver. Moreover, the original crash-scene images and the date-and-time-stamped photos, Mr. Campbell claimed, raised numerous concerns about potential mishandling of the evidence, which followed in line with the defense theory that sought to cast doubt upon Corporal Shepherd's investigation.

{¶27} Finally, regarding his ineffective-assistance-of-counsel claims, Mr. Campbell argued that his trial and appellate counsel fell below the *Strickland* threshold in failing to assert a violation of his right to remain silent, and his trial

counsel in particular had been ineffective in failing to investigate and to use at trial available exculpatory and impeachment evidence referenced above. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Such assertions are strengthened, according to Mr. Campbell, by trial counsel's own admission of deficiencies in failing to investigate and demand the autopsy photos.

II.

A.

{¶28} We first consider Mr. Campbell's postconviction petition before turning to the new-trial request. This was Mr. Campbell's second petition, and filed well after the expiration of the time prescribed by R.C. 2953.21(A)(2). Under such circumstances, R.C. 2953.23 closely circumscribes a trial court's jurisdiction to entertain a late or successive postconviction claim. The petitioner must show either that he was unavoidably prevented from discovering the facts upon which his postconviction claim depends, or that his claim is predicated upon a new or retrospectively applicable right recognized by the United States Supreme Court since the expiration of the time for filing his claim. R.C. 2953.23(A)(1)(a). Upon making that showing, the petitioner must demonstrate "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found [him] guilty of the offense of which [he] was convicted \* \* \*." R.C. 2953.23(A)(1)(b). We hold that Mr. Campbell's late and successive postconviction petition was properly dismissed for lack of jurisdiction, because he failed to satisfy the R.C. 2953.23(A)(1)(b) requirement of demonstrating an outcome-determinative constitutional violation.

{¶29} We address briefly Mr. Campbell's assertion that the R.C. 2953.23 criteria are not jurisdictional, and that if jurisdictional, it calls into question the

statute's constitutionality. The Ohio Supreme Court recently rejected the former argument: "[A] petitioner's failure to satisfy R.C. 2953.23(A) deprives a trial court of jurisdiction to adjudicate the merits of an untimely or successive postconviction petition." *State v. Apanovitch*, Slip Opinion No. 2018-Ohio-4744, ¶ 36. And we have rejected the latter. See *State v. Cook*, 1st Dist. Hamilton No. C-140118, 2014-Ohio-4900, ¶ 6 (upholding the constitutionality of R.C. 2953.23(A)(1)(b)'s jurisdictional standard). Therefore, R.C. 2953.23 is jurisdictional and withstands Mr. Campbell's constitutional challenge.

{¶30} Fundamentally, we lack jurisdiction over Mr. Campbell's postconviction claims because he has not shown "clear and convincing evidence" that no reasonable factfinder would convict him (obviating our need to evaluate the other criteria). As we shall see in the new-trial analysis, the new evidence that he has marshalled certainly would permit a jury to side with him (and might well render that result likely). But we cannot say that this satisfies the statutory showing. A new trial might well devolve into a battle of the experts, given the more equivocal nature of the forensic evidence. The jury would then have to assess their credibility and methodologies. Because the case is not so one-sided in Mr. Campbell's favor, we agree that the trial court lacked jurisdiction to entertain the second postconviction petition.

B.

{¶31} Mr. Campbell's new-trial motion, however, stands on surer footing. An untimely Crim.R. 33 motion for a new trial (like this one) necessitates leave to file, which may be granted upon "clear and convincing proof that the defendant [had been] unavoidably prevented" from timely discovering the evidence or filing the

motion. Once leave is granted, the court should then assess the merits of the new-trial motion. *See State v. Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034. The trial court here appeared to both deny leave as well as deny the motion on the merits. We hold that the court erred in denying leave and abused its discretion in overruling the new-trial motion without an evidentiary hearing.

1.

{¶32} The state does not appear to dispute that it did not provide the evidence that Mr. Campbell now claims was wrongfully withheld during the initial trial proceedings. And our review of the record convinces us of Mr. Campbell's diligence in pursuing this evidence. The state only relinquished this evidence during the course of discovery in federal court, after the federal court ordered discovery. Armed with that new evidence, Mr. Campbell then retained Mr. Holland to submit an expert report that accounts for both the prior and newly-discovered evidence. He then submitted Mr. Holland's 2015 report and his counsel's 2015 depositions in support of his habeas petition, only to be told that he needed to return to state court for exhaustion purposes. Mr. Campbell filed his present state proceedings with appropriate diligence after being prompted by the federal court.

{¶33} The record demonstrates that the state's violation of its duty to disclose material evidence effectively precluded Mr. Campbell from gaining access to that evidence, and thus learning of the proposed grounds for a new trial, until the evidence surfaced in habeas discovery and expert analysis revealed its significance. Thus, his motion for leave demonstrates that the evidence upon which his new-trial motion depends could not have been discovered within the time prescribed by

Crim.R. 33. We, therefore, hold that the trial court erred in denying him leave to move for a new trial based on that evidence.

2.

{¶34} We also hold that the trial court abused its discretion in overruling Mr. Campbell’s new-trial motion without affording him an evidentiary hearing. *See State v. Williams*, 43 Ohio St.2d 88, 330 N.E.2d 891 (1975), paragraph two of the syllabus (abuse-of-discretion standard). While Crim.R. 33(A) does not mandate an evidentiary hearing on a motion for a new trial (it would be a futile gesture, after all, if the motion were obvious in either direction), the rule certainly contemplates a hearing, and the nature of that hearing is discretionary and depends on the circumstances. *State v. Gaines*, 1st Dist. Hamilton No. C-090097, 2010-Ohio-895, ¶ 4 (“The rule plainly contemplates a hearing on the motion. But it does not mandate an evidentiary hearing.”).

{¶35} While sometimes the court may decide a new-trial motion on a “paper hearing,” if the affidavit testimony submitted in support of the motion facially lacks credibility, this case is ill-suited for such treatment. The Supreme Court teaches us to consider various factors in evaluating such evidence, none of which is present in this case, including:

- (1) whether the judge reviewing the postconviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or

otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witness, or to be internally inconsistent, thereby weakening the credibility of that testimony.

*State v. Calhoun*, 86 Ohio St.3d 279, 284-285, 714 N.E.2d 905 (1999); see *Gaines* at ¶ 25-26 (holding that *Calhoun* factors should be used to determine the need for an evidentiary hearing on a new-trial motion). Overriding all of this, however, is the need to apply our “common sense.” *Calhoun* at 284.

{¶36} We conclude that Mr. Campbell was entitled to an evidentiary hearing on his claims because he has presented substantive grounds for relief. As we consider the evidence at hand, we bear in mind that “the pieces of evidence must be evaluated ‘cumulative[ly],’ not each piece in isolation.” *Hill*, 1st Dist. Hamilton No. C-180114, 2019-Ohio-365, at ¶ 72, quoting *Wearry v. Cain*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1002, 1007, 194 L.Ed.2d 78 (2016). Taken together, and mindful of our “common sense,” the newly discovered pieces of undisclosed evidence intertwined with the evidence and testimony at trial presents a compelling alternative to the jury’s judgment—that Mr. Campbell was not the driver.

{¶37} While Mr. Campbell proposes a seemingly endless list of possibilities of how this new evidence could have influenced the trial, we need not mine every nuance of this evidence to satisfy ourselves that an evidentiary hearing is warranted. With reference to the undisclosed autopsy photos, the coroner testified that Ms.

Hayes only had injuries to the right side of her chest/collarbone area, which provided the foundation for Corporal Shepherd to opine that Ms. Hayes was not the driver, as well as prompting the defense's expert to throw up his hands at this question. Yet Mr. Campbell contends that the undisclosed autopsy photos show bruising to Ms. Hayes's left side chest, shoulder, and neck—evidence that might deflate the state's case. Further, Mr. Campbell questions why the undisclosed autopsy photos show no picture of Ms. Hayes's entire front (a routine photo for such a case), a fact that the defense could have used to impeach the completeness of the coroner's investigation.

{¶38} The date-and-time-stamped photos afford Mr. Campbell similar opportunities. Notably, at trial, the state utilized the location of a pair of shoes (on the driver's side) to prove that Mr. Campbell was the driver (since he was shoeless) and as part of the basis for the force calculations. The defense tried to combat this evidence at trial with news footage of the crash, taken between 12:15 and 12:30 a.m., showing no shoes on the driver's side. But the missing link was when the state's picture of the shoes was taken—which we now know to be 12:34 a.m. Since that occurred after the news footage, it raises serious questions as to how those shoes materialized on the driver's side *after* the accident.

{¶39} Turning to the original digital images, the enhanced pictures cumulatively illuminate numerous discrepancies in the state's theory. At trial, the state provided these pictures of Ms. Hayes's injuries, suggesting that her knee wounds were caused by the passenger side glovebox faceplate handle. However, the enhanced images depict evidence supporting defense's theory that the imprint to both knees was caused by the straps attached to the medical board, and that the large gash on her knee (made evident in the original digital images) would presumptively

had to leave a smear of blood on the glovebox faceplate. Moreover, Mr. Campbell asserts the images show bruising on the right side of her body—evidence the defense could have used to place Ms. Hayes in the driver’s seat (the injuries to her right side might have been caused by the center console). Another potential use for the original digital images included debunking the state’s evidence that Ms. Hayes was wearing a navy blue sweater that matched the navy blue cotton fibers found on the passenger-side armrest, since the enhanced images showed her wearing a black jacket. Coupled with countless other discrepancies arising from the original digital images, this new evidence deprived Mr. Campbell at trial of adequate opportunities to appropriately challenge the state’s evidence and to mount his defense.

{¶40} With the benefit of this new evidence, Mr. Campbell provides a compelling accident-reconstruction report from Mr. Holland, countering Corporal Shepherd’s reasoning and ultimate conclusion. Mr. Holland’s impressive credentials include accident-reconstruction education, training, and experience over a 28-year career with the Ohio State Highway Patrol, testifying in myriad cases for both the state and defense. In arriving at the conclusion that Mr. Campbell was not the driver, Mr. Holland noted discrepancies, “scientifically unsound” calculations concerning Mr. Campbell’s and Ms. Hayes’s movements during the crash, and impossibilities in Corporal Shepherd’s analysis. Further, Mr. Holland, using his own calculations, provided an explanation for how Ms. Hayes (as the presumed driver) ended up on the passenger-side seat after the crash.

{¶41} With reference to the undisclosed autopsy photos, time-and-date-stamped crash-scene photos, and original digital images, Mr. Holland found that Ms. Hayes’s chest injuries comported with impact to the steering wheel, and that her

head, neck, and chest injuries, along with the blood on the passenger-side seat cushion and the absence of damage to the car’s center console, were inconsistent with the “occupant motion” theory described by Corporal Shepherd and depicted in his reenactment photos. Thus, on the pivotal question of who was driving the car when it hit the building, the newly-discovered evidence served to undermine the credibility of the state’s witnesses and provided the foundation for an exculpatory expert opinion, similar to the situation we faced in *Carusone*. See *Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034, at ¶ 37 (“The undisclosed evidence contained in those reports, along with other newly discovered evidence, served to undermine the credibility of the State’s key witnesses and provided the fundament for the [new] expert’s [exculpatory] opinion \* \* \*.”).

{¶42} We certainly do not mean to suggest that Mr. Campbell is correct in his assessment of the strength or impact of any of this evidence—only that he has presented enough to justify an evidentiary hearing. We now take a closer look at the three substantive grounds for relief (*Brady*, actual innocence, and ineffective assistance), although they all dovetail with one another to a certain extent.

{¶43} First, a new trial may be granted under Crim.R. 33(A)(2) on the ground of prosecutorial misconduct in failing to disclose, upon request, evidence “material either to guilt or to punishment,” including evidence undermining a witness’s credibility. See *Brady*, 373 U.S. at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215; *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). To satisfy the materiality requirement, the defendant need only show that the evidence presents a “reasonable likelihood it could have affected the judgment of the jury.” (Internal

quotation marks omitted.) *Wearry*, \_\_\_ U.S. \_\_\_, 136 S.Ct. at 1006, 194 L.Ed.2d 78, quoting *Giglio* at 154.

{¶44} In *State v. Hill*, 1st Dist. Hamilton No. C-180114, 2019-Ohio-365, ¶ 74, the defendant’s new-trial motion rested on *Brady* material (an undisclosed police report) that supported the defense’s theory that Ms. Dudley (the victim’s mother) rather than Mr. Hill (the defendant), killed their six-month-old daughter. We found that the undisclosed report there supported Mr. Hill’s *Brady* claim, because not only could the defense have used the report to undermine the credibility of the state’s key witness, but the “defense could have used the report in cross-examining the officer and [the mother] to advance its theory of innocence, by showing that [the mother] had, to an objective observer been as likely a suspect in [the victim’s] disappearance and death as Hill.” *Hill* at ¶ 74. While involving different facts, the underlying theme of *Hill* and this case relies on similar defense theories, that if the defense had the *Brady* material at trial, the defense could have poked enough holes in the state’s case that the evidence might have impacted the result. The evidence uncovered by Mr. Campbell “would have constituted, and could have led to, favorable impeaching or exculpatory evidence that might reasonably be said to have affected the jury’s judgment, had it been disclosed to the defense at trial.” *See id.* at ¶ 75. We, therefore, conclude that Mr. Campbell’s *Brady* claim, on its face, demonstrated substantive grounds for relief. Accordingly, we hold that he was entitled to an evidentiary hearing on that claim.

{¶45} Second, Mr. Campbell also sought a new trial on the ground that the evidence chronicled above establishes actual innocence. As in *Hill*, we conclude that Mr. Campbell has presented sufficient evidence to warrant an evidentiary hearing on

his actual-innocence claim. *See id.* at ¶ 87-90. To the extent that the actual-innocence claim hinges on a *Brady* violation, the analysis as to the propriety of the evidentiary hearing collapses with the *Brady* analysis already covered above. *Id.* at ¶ 84-86. To the extent that it encompasses non-*Brady* newly-discovered evidence, the evidence must ultimately “disclose[] a strong probability that it will change the result if a new trial is granted.” *Petro*, 148 Ohio St. 505, 76 N.E.2d 370, at syllabus.

{¶46} The evidence supporting Mr. Campbell’s actual-innocence claim, for purposes of the *Petro* analysis, qualifies as “newly discovered” for the reasons discussed above. That evidence is also “material to the issues” of Mr. Campbell’s guilt or innocence and to the credibility of the witnesses against him—Corporal Shepherd, the corner, and even his own trial expert witness. The evidence is not “merely cumulative to,” nor does it “merely impeach or contradict” the evidence adduced at trial. *See Petro* at syllabus. And the impeachment and exculpatory value of that evidence was such that it might fairly be said to not only present “a reasonable likelihood it could have affected the judgment of the jury,” *Wearry*, \_\_\_ U.S. \_\_\_, 136 S.Ct. at 1007, 194 L.Ed.2d 78, quoting *Giglio* at 154, but also to “disclose[] a strong probability that it will change the result if a new trial is granted.” *Petro* at syllabus.

{¶47} Yet again similar to *Hill*, when we consider Mr. Holland’s affidavit with the undisclosed and newly-discovered evidence, it not only undermines the credibility of key state witnesses, but strongly suggests an alternative that another “might instead have been responsible for [the victim’s] death.” *Hill* at ¶ 82.

{¶48} Moreover, as noted above, the case at hand is analogous to *Carusone*, where we granted an evidentiary hearing based on five missing pages of a hospital record (that the defendant’s mother found after trial) and a pathology expert’s

opinion of this new evidence. *Carusone*, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034 at ¶ 37-38. These missing pages conflicted with the coroner’s testimony (and the state’s theory) that the victim’s death was caused by the defendant’s stab wound, and instead supported the defense theory that the victim’s recent ingestion of alcohol and drugs caused his death. *Id.* at ¶ 15, 20. Based on both the missing hospital records and other newly-discovered evidence, a pathology expert concluded that the coroner had been mistaken in the cause of death, which Mr. Carusone used to support his motion for leave. *Id.* at 20. We found that this newly-discovered evidence entitled Mr. Carusone to an evidentiary hearing, not only because the undisclosed evidence, along with other newly-discovered evidence, served to undermine the credibility of the state’s key witnesses, but because the newly-discovered evidence provided the foundation for the expert’s exculpatory opinion. *Id.* at ¶ 37.

{¶49} In a similar vein as *Carusone*, the newly-discovered evidence in Mr. Campbell’s case (autopsy photos, date-and-time stamped photos, and original digital images) serves not only to undermine the credibility of the state’s key witnesses discussed above, but Mr. Holland’s “expert analysis revealed its significance,” demonstrating that the evidence is material to his actual-innocence claim. *See id.* at ¶ 38. Therefore, for purposes of evaluating the necessity of an evidentiary hearing, the credibility of the affidavits submitted in support of Mr. Campbell’s actual-innocence claim could not have been discounted, and those averments must be “accepted \* \* \* as true statements of fact.” *See Gaines*, 1st Dist. Hamilton No. C-090097, 2010-Ohio-895, at ¶ 35.

{¶50} Third, a new trial may also be granted under Crim.R. 33(A)(1) or 33(E)(5) on the ground of ineffective assistance of counsel. We conclude that, for purposes of triggering an evidentiary hearing, Mr. Campbell sustained his burden of demonstrating prejudicial deficiencies in his counsel's performance that may fairly be said to have "so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result." *See State v. Powell*, 90 Ohio App.3d 260, 266, 629 N.E.2d 13 (1st Dist.1993), citing *Lockhart v. Fretwell*, 506 U.S. 364, 379, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), and *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶51} Beyond the new evidence that we have discussed above, Mr. Holland concluded that trial counsel had been prejudicially deficient in failing to recognize and competently cross-examine Corporal Shepherd concerning the flaws in his calculations and analyses and in failing to investigate and present other evidence to support the defense's theory. The failure to present a competing accident-reconstruction theory strikes us as a fairly egregious example. Although the failure to hire a reconstruction expert may not, standing alone, establish ineffective assistance, *see State v. McHenry*, 1st Dist. Hamilton No. C-170671, 2018-Ohio-3383, ¶ 25, here Mr. Campbell provides evidence (from Mr. Holland's affidavit) that not only was trial counsel prejudicially deficient in failing to cross-examine the state's expert reconstructionist, but that trial counsel in his deposition also admitted deficiencies in investigating and presenting Mr. Campbell's defense. Further, Mr. Holland's affidavit offers more than "purely speculative" testimony. Thus, with the ineffective-counsel claims, the motion, on its face, demonstrated substantive grounds

for relief. Accordingly, we hold that Mr. Campbell was entitled to an evidentiary hearing on those claims.

III.

{¶52} The trial court had no jurisdiction to entertain Mr. Campbell’s late and successive postconviction petition. Accordingly, we overrule the assignment of error in part and affirm the court’s judgment dismissing the petition.

{¶53} But the court erred in denying him leave to file a new-trial motion and abused its discretion in overruling his new-trial motion without an evidentiary hearing. We therefore sustain the assignment of error in part, reverse the court’s judgment denying leave and overruling the new-trial motion, and remand this matter for an evidentiary hearing to evaluate the new-trial motion consistent with this opinion.

Judgments affirmed in part and reversed in part, and cause remanded.

**ZAYAS, J.**, concurs.

**MOCK, P.J.**, concurs separately.

**MOCK, P.J.**, concurring separately.

{¶54} I concur separately. I agree with the majority’s conclusion that Campbell was entitled to an evidentiary hearing on his *Brady* claims with reference to the undisclosed autopsy photographs, and the time-and-date-stamped crash-scene photos. Campbell’s new accident-reconstruction expert, Holland, had found that Hayes’s chest injuries were consistent with impact to the steering wheel, and that her head, neck, and chest injuries were inconsistent with Corporal Shepherd’s “occupant motion” theory. Based on the time-and-date-stamped photos he also rejected Corporal Shepherd’s assertion that the location of the gym shoes on the driver’s side of the vehicle was a “good indicator” that Campbell was the driver.

{¶55} Thus on the pivotal issue of who was driving the car, the newly-discovered autopsy photographs and time-and-date-stamped photos served to undermine the credibility of the state’s witnesses and were central to Holland’s expert opinion that Campbell had not been the driver.

{¶56} A new trial may be granted under Crim.R. 33(A)(2) on grounds that the state had failed to disclose, upon request, evidence “material either to guilt or to punishment,” including evidence undermining a witness’s credibility. *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194, 10 L.Ed.2d 215. To demonstrate the materiality of the withheld evidence, a defendant need not demonstrate that he more likely than not would have been acquitted had the wrongfully withheld evidence been admitted at trial. *See Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012); *Compare* majority opinion at ¶ 30 (“the new evidence \* \* \* would permit a jury to side with [Campbell] (and might well render that result likely).”). The evidentiary-hearing requirement is satisfied simply if the evidence, considered collectively, presents “any reasonable likelihood it could have affected the judgment of the jury.” *Wearry*, \_\_\_ U.S. \_\_\_, 136 S.Ct. at 1006, 194 L.Ed.2d 78.

{¶57} Here, the undisclosed evidence probative of Campbell’s guilt was not wholly negated by the trial record. And, consistent with our constrained inquiry in this area, I would conclude only that the withheld evidence, comprising the autopsy and the time-and-date-stamped crash-scene photographs, would have constituted, and could have led to, favorable impeaching or exculpatory evidence that might reasonably be said to have affected the jury’s judgment, had it been disclosed in discovery. I would therefore hold simply that Campbell’s *Brady* claim, on its face, demonstrated substantive grounds for relief, and that he was entitled to an evidentiary hearing on those two matters alone.

Please note:

The court has recorded its own entry on the date of the release of this opinion.