

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

JAMES T. CONWAY III,

Defendant-Appellant.

Case No. 07-64

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 05AP-550

POST-CONVICTION
DEATH PENALTY CASE

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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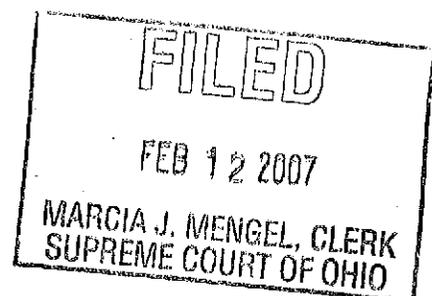


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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant presents no compelling reason for this Court to expend its scarce judicial resources to review his appeal. Defendant focuses largely on fact-laden issues of whether his trial attorneys acted ineffectively. Such issues present no question of statewide interest.

This Court has reviewed and continues to review claims of trial counsel ineffectiveness in several cases every year. Given the frequency with which this Court reviews such claims, the bench and bar do not need further instruction from this Court on the standards that govern such claims. The common pleas court and the Tenth District have both thoroughly reviewed defendant's post-conviction claims and found them to be lacking, and there is no need for this Court to grant further review.

Defendant's claims for post-conviction relief lack merit. Several of defendant's post-conviction claims are barred by *res judicata* and lack merit. The remaining claims fail because defendant did not provide evidentiary documentation and/or proof showing that his counsel acted incompetently or that there would have been a reasonable probability of a different outcome but for counsel's "errors."

The State respectfully requests that this Court decline jurisdiction in all respects.

STATEMENT OF FACTS

A. Procedural History

By indictment filed on June 7, 2002, the grand jury charged defendant with, *inter alia*, one count of aggravated murder in the killing of Andrew Dotson with prior calculation and design and/or during a kidnapping. That count included three death-penalty specifications: (1) a specification under R.C. 2929.04(A)(7) because the killing occurred during the course of a kidnapping and defendant was either the principal

offender or acted with prior calculation and design; (2) a specification under R.C. 2929.04(A)(3) because the killing was committed to escape apprehension, *etc.*, for the defendant's commission of another offense; and (3) a specification under R.C. 2929.04(A)(8) for killing a witness to prevent his testimony in any criminal proceeding.

The jury returned guilty verdicts on all counts and specifications. The court merged the (A)(3) and (A)(8) specifications for purposes of the penalty phase. The jury recommended the death penalty, and the trial court followed the recommendation. The judgment of conviction was filed on October 8, 2003. This Court affirmed the convictions and death sentence on June 21, 2006.

Meanwhile, on August 23, 2004, defendant filed a 60-page post-conviction petition raising nineteen claims. Defendant had filed an amended petition on October 29, 2004. The amended petition added a new eighth claim, and the claims formerly numbered eight through nineteen were renumbered nine through twenty. The State filed an answer and motion to dismiss regarding both the original and amended petitions.

In a status conference held on November 24, 2004, and without ruling on the State's motion to dismiss, the trial court announced that an evidentiary hearing would be held. The hearing was scheduled for March 25, 2005.

On February 3, 2005, defendant filed a "motion for funds to employ experts to present at the evidentiary hearing." Defendant requested funding in the amount of \$36,685 for the testimony of seven experts.

Also, the defense scheduled records depositions for February 23, 2005. The defense sought expansive discovery, including from this prosecutor's office, regarding "all documents" related to a wide variety of matters. The defense scheduled eight other agencies

or persons for “all documents” records depositions for that date.

The State filed a motion to quash, which the trial court granted orally. The court concluded that the wide-ranging discovery being sought was “a totally unreasonable request.” The court also denied the request for expert funding. The court said, “I know the facts involved in this case and I don’t see that any of those experts are going to help with any of the issues that have been alleged.”

The defense thereafter sought leave of court to conduct discovery, again seeking wide-ranging discovery through nineteen proposed depositions and thirty-two requests for production of documents. The State opposed the motion, and the trial court denied the motion in an entry filed on March 22, 2005. The court stated that “Defendant’s request for discovery is totally unreasonable and is obviously a continuation of the previous request to go fishing into every police agency’s file in a multi-county area.”

The evidentiary hearing was held on March 25, 2005. The defense called a single witness, Shawn Nightingale.

The trial court denied the petition in a ruling from the bench, citing, *inter alia*, lack of evidence, *res judicata*, and/or lack of merit in rejecting the various claims. The court filed its decision and judgment on May 2, 2005. The Tenth District affirmed the denial of post-conviction relief on November 28, 2006.

B. Factual Background

Andrew Dotson’s body was found in a cornfield on Galloway Road on October 10, 2001. Although several witnesses testified at trial, the State will focus here on the trial testimony of Mike Arthurs, Ronald Trent, and Dr. Patrick Fardal. The State will also summarize the post-conviction hearing testimony of Shawn Nightingale.

Mike Arthurs testified that, in September 2001, he had been a friend of defendant for approximately one year, socializing with him, Shawn Nightingale and Jamie Horton at least every weekend. Arthurs had known Andrew Dotson, who also socialized with this group. They frequently rented one or more hotel rooms in Chillicothe in order to have little parties and drink.

In September 2001, Arthurs, defendant, Jamie Horton, Ricky Heard, Rick Turner, and Andrew Dotson went to a birthday party for C.J. Stevens in Chillicothe, arriving about 8:00 or 9:00 in the evening. They stayed at the party for an hour or so. The whole group then went to their room at the Hampton Inn.

After they returned to the hotel, defendant pulled Arthurs and Shawn Nightingale into the bathroom of the hotel room, where they kept beer on ice in the bathtub. The bathroom door was closed. Defendant asked Arthurs and Nightingale if they would kill Andrew Dotson for him, and they agreed. After that discussion, the three men got their drinks and rejoined the party.

Arthurs and the others spent the night at the hotel. When Arthurs woke up, Andrew Dotson was in the room with him. They received a telephone call asking them to come downstairs. When they got outside the hotel, defendant and Jamie Horton were sitting inside defendant's champagne-colored Escalade and Shawn Nightingale was standing outside defendant's car talking to him and Horton. Defendant and Horton left, and Nightingale asked Dotson and Arthurs to go to West Virginia with him to pick up some money from someone down there. They agreed to go, and the three left in Nightingale's jeep around 11:00 or 12:00. Arthurs drove, Nightingale sat in the front passenger seat and Dotson sat in the back. There was a 9-millimeter pistol under one of

the front seats. The purpose of the trip was to kill Dotson in West Virginia.

They arrived at Nightingale's brother's house and talked to him for awhile. When they left there, they told Dotson that they were going to look for marijuana plants and drove on a back road up a hill into a wooded area. They got out of the car, and Arthurs told Nightingale that he could not kill Dotson. Nightingale shook his head, indicating that he could not do it either. They told Dotson that they were leaving, got back into the car and drove away.

Dotson asked Nightingale to get him some pills, so they stopped to pick up Nightingale's money from Richie Collins and get Dotson some pills, soma or "purple footballs," before they started back to Columbus. Dotson began taking the pills immediately and eventually passed out in the back seat of the car. Before Dotson passed out, Nightingale and Arthurs asked him if he would "tell on Jimmy for that stuff that he saw." Dotson said that he was not like that and that he would not say anything.

On the drive home, they called defendant on a cell phone and told him that they could not kill Dotson. Defendant told them to meet him in Columbus at a shopping center on the west side and to "quit being bitches." It was dark when they pulled into the shopping center. Defendant was waiting for them in his father's white Dodge pick-up truck. Jamie Horton was with him. Nightingale got out of the jeep and went over to the truck where he spoke with defendant. When he got back into the car, they followed defendant to the cornfield on Galloway Road.

They stopped their cars in the cornfield, and everyone got out of the cars except Dotson, who was still asleep in the back seat of the jeep. They discussed shooting Dotson but decided that gunshots would be too loud. Defendant was told that Dotson

was not going to tell on him. Defendant told Arthurs to get Dotson out of the car and to choke him.

Arthurs grabbed Dotson under the arms and pulled him out of the jeep. Arthurs put his arm around Dotson's neck and acted like he was choking him. When he put him down on the ground, Dotson was still breathing. He was lying on his back. The four men talked as they stood in a circle around Dotson. Arthurs came up with the idea of stepping on Dotson's throat, so he pulled him over behind the jeep and put one foot on his throat while keeping his other foot on the ground to make it look like he was trying to kill him. When he quit, Dotson was still breathing. Arthurs got down on his hands and knees to listen to Dotson breathe. After Arthurs stepped on Dotson's throat, he and Horton dragged Dotson fifteen or twenty yards into the cornfield. After Arthurs came out of the cornfield, Horton and Nightingale went back in and removed all of Dotson's clothing and put it into a clear plastic trash bag.

At that point, defendant took a pickax out of the back of his father's truck and went into the cornfield where Dotson was. Arthurs heard two thuds while defendant was in there. Defendant walked out of the cornfield and stuck the ax into the ground to wipe blood off it. He put the metal part of the ax into the bag of clothes in the jeep and the handle into the back of his father's truck. Jamie Horton got a full bag of lime out of the back of the jeep and poured it on Dotson.

Defendant later told Arthurs to take the bag containing Dotson's clothing and the metal part of the ax with him and dispose of it. Arthurs put the bag into a trash can in the alley behind his cousin's house.

The next morning, Arthurs received a phone call during which he was told that

the threesome of defendant, Horton, and Nightingale were on their way to get him and that he should meet them in front of his cousin's house. They picked him up in defendant's Escalade. Defendant was driving. They went first to an appliance store in the Great Southern Shopping Center to pick up something for defendant's father. While they were walking around the store, defendant picked up a spaded shovel and said it was "for the next time." After that they went to purchase new clothes for Arthurs so they could get rid of the clothing he had worn the night before. When they returned to defendant's house, defendant took Arthurs' old clothing and said he was going to burn it, just as defendant had burned the ax handle and all of his own clothing he had worn.

Defendant told Arthurs that he stabbed Dotson twice. Defendant held his hand over his belly to show where he struck Dotson the first time. Defendant held his hand over his chest to show where he struck Dotson the second time.

Dr. Patrick Fardal, the chief forensic pathologist for the Franklin County Coroner's Office, testified that he performed an autopsy on the body of Andrew Dotson on October 12, 2001. His opinion to a reasonable degree of medical certainty was that Andrew Dotson died as a result of two stab wounds to his chest, heart, liver and the great vessels surrounding the heart.

One of the stab wounds was on the right anterior chest. It was three quarters of an inch in diameter and appeared round. When the doctor examined the tissues around the heart, he found that the wound was slit-like and appeared that it had been inflicted by a sharp instrument. The sharp instrument wound created a defect in the body's pericardial sac, entered into the right ventricle and right atrium of the heart, injured the large vessel that returns blood to the lung, and injured the pulmonary veins. The wound went from

Dotson's right side to his left and from the front to the back in an upward direction. It went six inches through the body.

On the day Dotson's body was found, Dr. Fardal went to the scene and observed the body before it was removed from cornfield. He noted that parts of the torso, upper chest and lower abdomen of the body were partially covered with a powdered, whitish gray material that was similar to concrete. When Dr. Fardal first saw the two wounds on the body, he thought initially that they were gunshot wounds because they were circular. He testified that post-mortem decomposition and insect predation can alter the external appearance of wounds.

After Dotson's body was taken to the coroner's office, they rolled the body over and noticed that there were no exit wounds. In addition, blood-like fluids leaked out of the wound in the chest cavity. The amount of material in the chest indicated that Dotson was still breathing when he was stabbed.

The second wound was in the left upper quadrant of Dotson's abdomen. It was similar to the first wound, also three quarters of an inch in diameter, and went from right to left and from front to back in an upward direction. This wound also went six inches into the body and injured Dotson's liver.

Both wounds looked the same on the outside of the body, and they appeared to have been caused by the same instrument. They were both six inches in depth. Dr. Fardal saw no evidence of injuries to Dotson's head or neck to suggest that Dotson's death was caused by choking. Dotson's hyoid bone and voice box were not injured.

Detective Zachary Scott asked Dr. Fardal to compare the two wounds on Dotson's body with the pickax which was like the one used by defendant to kill Dotson that was

purchased by Mike Arthurs at Detective Scott's request. The pickax was compatible with the wounds on the inside of the body.

Ronald Trent testified that he had been in the Franklin County Jail for six to eight months awaiting trial on a gross sexual imposition charge as a third-degree felony and an attempted gross sexual imposition charge as a fourth-degree felony when defendant entered the jail and was housed in the same tank with him. Trent described the "tank" as an area with single-man cells with a common area.

Defendant complained that a gunshot wound he received before he was arrested was infected and that jail personnel were not taking care of it. Trent offered to help defendant take care of his bullet wound, and a friendship developed between the two. They eventually discovered that their grandmothers were sisters, making them cousins. This discovery made them grow closer, and they talked every day. Defendant and Trent had been jail mates together for one to two months when defendant began talking to Trent about the instant case.

Defendant said that he killed Dotson because he was afraid that Dotson was going to talk to the authorities about his witnessing defendant shoot someone in the butt at a White Castle.

Over a series of conversations during the time they were imprisoned together, defendant told Trent that Shawn Nightingale, Jamie Horton, and Mike Arthurs were also involved in the crime. Defendant said that he instructed Arthurs and Nightingale to get rid of Dotson by feeding him a bunch of pills, taking him to West Virginia, dumping him in the hills and leaving him there to die. Later on Arthurs and Nightingale brought Dotson back and told defendant that they could not do it. Defendant and Jamie Horton

met up with them. Defendant told Trent that he asked Arthurs and Nightingale where Dotson was. They told him that he was in the car. Defendant then asked them if Dotson was dead. They told him that he was not. Defendant told them to get Dotson out of the car. After that, they stood on Dotson's neck until he was dead.

In April 2002, Trent twice asked his attorney to contact the prosecutor's office because he wanted to provide information about defendant. He was interviewed by people from the prosecutor's office and the sheriff's department and gave them all the information he had about the instant case. Trent gave his first taped interview to the prosecutor's office and the sheriff's office on April 25, 2002. Trent agreed to do whatever was necessary to work with the Franklin County Sheriff's Department to further their investigation. This included wearing body wires, recording telephone conversations, meeting with individuals, and picking up guns, money and dope.

After Trent began working for the prosecutor's and sheriff's offices, he was taken out of the tank with defendant and placed in solitary confinement. Every day at 2:00 p.m., two detectives picked up Trent at the workhouse, strip-searched him, and placed a wire on him. Trent wore a wire and was under constant surveillance until he was returned to the workhouse at midnight. The purpose was to learn more about the Dotson killing, learn about defendant's involvement therein, and learn defendant's reasons for wanting Mike Arthurs killed.

Trent told defendant that he was granted work release and told defendant that he was taking care of Mike Arthurs while he was on work release. Defendant called Trent every day using three-way calling from the jail or his lawyer's phone to give him instructions to learn what progress was made in the effort to kill Mike Arthurs.

Defendant told Trent to meet up with Jamie Horton and Shawn Nightingale so they could take him to Chillicothe and show him where Arthurs lived. Horton and Nightingale showed Trent the house where Arthurs lived.

Trent learned that defendant had not told him the whole truth about how Dotson was killed. He told defendant that he learned that he had hit Dotson twice in the chest with a pickax and asked him why he did it. Defendant answered, "Just to be sure that Andrew was dead."

At trial, the parties stipulated that if Shawn Nightingale were to be called by the State, he would exercise his right against self-incrimination and not testify despite his having a prior agreement with the State to testify in its case. However, Nightingale did testify in the post-conviction evidentiary hearing. Nightingale confirmed that he, defendant, Jamie Horton, and Mike Arthurs were close friends. He recalled the time when he, defendant, and Arthurs ended up in the hotel bathroom, after which Nightingale understood that he was supposed to take Dotson to West Virginia to kill him. Defendant told Nightingale and Arthurs to kill Dotson, and they both agreed. Defendant said it was because Dotson had witnessed defendant shoot Jesse James. It might have been Nightingale's idea to do it in West Virginia.

Nightingale detailed how he, Horton, and defendant went to Lowe's the next morning to buy a shovel, some mulch, and "some concrete or lye or lime." Defendant's purpose was to use these items to help dispose of the body after the killing of Dotson.

Nightingale, Arthurs, and Dotson thereafter left for West Virginia. Even on the way to West Virginia, Nightingale and Arthurs knew they could not go through with the killing. Dotson assured them that he would not ever say anything about the shooting.

Nightingale and Arthurs could not bring themselves to kill Dotson in West Virginia.

After making some stops in West Virginia, the threesome began their return to Columbus. At some point, there was a phone call to defendant. They told defendant that the killing was unnecessary. But defendant told them to meet him at a shopping center. At that meeting, defendant "had words" with Nightingale and Arthurs for not following through. Defendant called Nightingale a "bitch."

At defendant's direction, they all drove to the Galloway Road area. Nightingale feared defendant at this point. Arthurs grabbed the sleeping Dotson out of the car and started choking Dotson in a chokehold. After that choking, Arthurs still thought Dotson was alive, so, according to Nightingale, Arthurs put his foot on Dotson's neck and starting moving up and down on the neck. Nightingale testified that Dotson's neck was "flat" and bore the imprint of the bottom of Arthurs' shoe. According to Nightingale, Arthurs then took Dotson's head and "twisted it probably two or three times all the way around * * * like on that movie The Exorcist." Nightingale claimed to have heard "snapping and cracking" of the neck. Nightingale asserted that Dotson was dead by then.

They removed Dotson's clothes, and Arthurs dragged the body back into the cornfield. Defendant went back to the body with an axe, and then Horton poured concrete or lime on the body. Dotson's clothes were later burned.

Nightingale admitted that he had taken the Fifth at defendant's trial, and he admitted that he at one point had said that he was scared of defendant.

ARGUMENT

RESPONSE TO FOURTH PROPOSITION OF LAW

POST-CONVICTION RELIEF IS UNWARRANTED WHEN THE DEFENSE FAILS TO PROVIDE SUFFICIENT EVIDENTIARY DOCUMENTATION TO WARRANT AN EVIDENTIARY HEARING AND WHEN, DESPITE THE ABSENCE OF SUFFICIENT DOCUMENTATION, THE COURT NEVERTHELESS GRANTS A HEARING AND THE DEFENSE THEREUPON FAILS TO PROVE THE CLAIMS AT THE HEARING.

For ease of discussion, the State will address the propositions of law out of order by first addressing why the fourth proposition of law lacks merit and why none of defendant's post-conviction claims warranted an evidentiary hearing. Such discussion will provide a helpful background to a discussion for the remainder of defendant's propositions of law regarding lack of funding of experts, lack of discovery, and *res judicata*.

Even though no evidentiary hearing was warranted, the trial court nevertheless proceeded to conduct a hearing, at which the defense introduced only the testimony of Nightingale. A number of claims were therefore forfeited by a failure to provide proof at the evidentiary hearing.

To be sure, some claims were dependent on funding, in which case the failure to present evidence is excusable if the trial court's failure to provide funding was reversible error. But many of the claims would have simply involved fact witnesses like Nightingale, including Dr. Stinson, who could have been called as a fact witness rather than an expert regarding his examination of defendant as part of the initial trial proceedings. Other fact witnesses would have included defendant's prior attorneys, including Cicero. The failure to present such fact witnesses is not justified by a lack of discovery, since the defense still had the subpoena power at the hearing and could have employed that power.

“[O]nce the trial court granted th[e] hearing, it became necessary for appellant to produce admissible evidence under the rules of evidence.” *State v. Morgan* (1995), 10th Dist. No. 95AP-382. Accordingly, to the extent the defense failed to call fact witnesses at the evidentiary hearing, the claims were unsupported at the evidentiary hearing and therefore lacked merit.

A.

When a defendant files a post-conviction petition, “the trial court has a statutorily imposed duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing.” *State v. Cole* (1982), 2 Ohio St.3d 112, 113. Before a defendant can obtain a hearing, the defendant must provide evidentiary documentation setting forth specific operative facts to support his claims. See *State v. Kapper* (1983), 5 Ohio St.3d 36; *State v. Pankey* (1981), 68 Ohio St.2d 58; *State v. Jackson* (1980), 64 Ohio St.2d 107.

The evidentiary materials must support each element of the asserted constitutional claim. See *id.* at 111. “It bears emphasis here that claims in postconviction proceedings must be supported by some competent evidence of a constitutional violation. A mere hypothesis of a constitutional claim upon further discovery is not sufficient to warrant an evidentiary hearing.” *State v. Coleman* (1993), 1st Dist. No. C-900811. “[T]he purpose of post-conviction proceedings is not to afford one convicted of a crime a chance to retry his case.” *Id.*

Post-conviction relief is allowed only for *constitutional* violations. R.C. 2953.21(A). Moreover, only errors occurring before the judgment of conviction can be grounds for post-conviction relief. *State v. Murnahan* (1992), 63 Ohio St.3d 60. As stated in *State v. Powell* (1993), 90 Ohio App.3d 260, the defendant must “demonstrate a constitutional

violation in the proceedings that actually resulted in the conviction.” *Id.* at 265.

The standard for whether a hearing is warranted is *not* the standard set forth under Civ.R. 12(B)(6). “[A] dismissal of a petition for postconviction relief pursuant to R.C. 2953.21 is distinguishable from a dismissal under Civ.R. 12(B).” *State v. Zerla* (1997), 10th Dist. No. 96AP-1583; *State v. Lawson* (1995), 103 Ohio App.3d 307, 313.

B.

“Postconviction review is a narrow remedy, since *res judicata* bars any claim that was or could have been raised at trial or on direct appeal.” *State v. Steffen* (1994), 70 Ohio St.3d 399, 410; *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. “*Res judicata* is applicable in all postconviction proceedings.” *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 95. *Res judicata* “underscores the importance of finality of judgments of conviction.” *Id.* *Res judicata* will apply “if the petition for postconviction relief does not include any materials out[side] of the original record to support the claim for relief.” *State v. Combs* (1994), 100 Ohio App.3d 90, 97.

Some outside evidence will not avoid the *res judicata* bar because that evidence merely repackages factual matters that were part of trial record. *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶27; *Lawson*, 103 Ohio App.3d at 315.

Even for supposed new factual matters, *res judicata* will still bar most claims because such facts *could have been raised* before conviction. To avoid the *res judicata* bar, evidence from outside the original trial record “must be more than that which was in existence at the time of trial and which should have and could have been submitted at trial if the defendant had desired to make use of it.” *State v. Weaver* (1997), 9th Dist. No. 97CA006686; *Coleman supra*; see, also, *State v. Hawkins* (1996), 1st Dist. No. C-950130.

To avoid the *res judicata* bar, “the evidence relied upon must not be evidence that was in existence or available for use at the time of trial and should have been submitted at trial if the petitioner wished to make use of it.” *State v. Braden*, 10th Dist. No. 02AP-954, 2003-Ohio-2949, ¶ 27.

Accordingly, most constitutional claims will be barred by *res judicata*, since they could have been raised before or during trial or thereafter on appeal. Although claims of ineffective trial counsel are not barred by *res judicata* when supported by evidence outside the original trial record, such claims *will* be barred when the alleged ineffectiveness could have been fairly raised on appeal, so long as the defendant is represented by different counsel on appeal. *Cole, supra*.

The trial court can assess the credibility of the defendant’s evidentiary documentation, determine that such documentation lacks credibility, and thereby dismiss the petition without an evidentiary hearing. *State v. Calhoun* (1999), 86 Ohio St.3d 279.

C.

To succeed on a claim of ineffective assistance, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668. In assessing such claims of incompetence, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101.

“There are countless ways to provide effective assistance in any given case. Even

the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690. In assessing competence, every effort must be made to avoid the distorting effects of hindsight. *Id.* at 689.

The test for ineffectiveness is an objective one, *i.e.*, whether the trial counsel acted within the wide range of *reasonable* professional assistance. *Strickland*, 466 U.S. at 688-90. The defendant “must establish that no competent counsel would have taken the action that his counsel did take.” *Chandler v. United States* (C.A. 11, 2000), 218 F.3d 1305, 1314.

Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694.

When counsel’s alleged ineffectiveness involves the failure to pursue a motion, objection, or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion, objection, or defense “is meritorious,” and, second, the defendant must show that there is a reasonable probability that the verdict would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, citing *State v. Lott* (1990), 51 Ohio St.3d 160, 175. The right to effective counsel does not entitle a defendant to the luck of a lawless decisionmaker. *Strickland*, 466 U.S. at 695.

D.

Claims 1 & 18

International-law challenges to the death penalty (Claim 1), and challenges to the alleged cruel and unusual nature of lethal injection (Claim 19), were or could have been raised before conviction and therefore were barred by *res judicata*. Such claims also lacked merit as a matter of law. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571, ¶¶ 126, 127; *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, ¶ 102 (international-law claim rejected); *State v. Carter* (2000), 89 Ohio St.3d 593, 608 (lethal-injection challenge rejected).

Defendant has erred in contending that “structural error” somehow trumps the doctrine of *res judicata* vis-a-vis these international-law claims. Even if a violation of international law somehow constituted “structural error,” a “structural error” analysis would merely supply an automatic finding of prejudice for preserved errors, thereby avoiding harmless-error analysis. It does not supply an automatic finding of plain error for unpreserved errors, see *State v. Rector*, 7th Dist. No. 01AP-758, 2003-Ohio-5438, ¶¶ 12-18, nor does it affect the applicability of other procedural-default mechanisms, including *res judicata*. See, e.g., *Breard v. Greene* (1998), 523 U.S. 371 (treaty-based claim deemed procedurally defaulted in habeas review); *State v. Issa* (2001), 93 Ohio St.3d 49, 56 (treaty-based claim “can be procedurally defaulted”).

Claim 2

The alleged inadequacy of post-conviction procedures (Claim 2) is a post-judgment matter that would not affect the validity of the judgment of conviction. The remedy for inadequate post-conviction procedures would be adequate post-conviction

procedures, not vacating the convictions.

Post-conviction procedures are adequate. “This Court and other Ohio appellate courts have rejected defendant’s claim that Ohio’s postconviction statute does not afford an adequate corrective process.” *Hessler*, 2002-Ohio-3321, ¶ 73 (collecting cases).

Ohio need not provide for post-conviction proceedings: *Pennsylvania v. Finley* (1987), 481 U.S. 551, 557; *Steffen*, 70 Ohio St.3d at 410. “State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.” *Murray v. Giarrantano* (1989), 492 U.S. 1, 10 (plurality).

Finally, defendant’s claim of inadequate corrective process is self-defeating. Defendant is arguing that the statute is unconstitutional, but defendant is proceeding under that very statute, and a finding of unconstitutionality would mean that he could no longer proceed under the statute, leaving him without a remedy. Defendant’s argument “has no place in a direct appeal from the dismissal of a petition.” *State v. Wiles* (1998), 126 Ohio App.3d 71, 83-84.

Insofar as defendant complains about the lack of discovery, there is no entitlement to post-conviction discovery. See Response to Second Proposition of Law, *infra*.

Claim 3

The complaint about the trial court’s post-judgment failure to appoint post-conviction counsel (Claim 3) was abandoned in the Tenth District. Also, there was no constitutional right to post-conviction counsel. *Finley, supra*.

Claim 4

The complaint about an incomplete transcript on appeal (Claim 4) was another

post-judgment matter that is not a cognizable ground for vacating the judgment of conviction. *Res judicata* also barred this claim, since complaints about an incomplete record can be raised in the direct appeal. To the extent defendant was complaining about the inaction of his appellate counsel on direct appeal, such claims of appellate counsel ineffectiveness were not cognizable in post-conviction review. *Murnahan, supra*.

Claims 5 & 6

Defendant also complained about local law enforcement officials (Claim 5) and federal law enforcement officials (Claim 6) failing to respond or inadequately responding to the inquiries of post-conviction counsel in June 2004 requesting documents and records. Such post-judgment failures to cooperate with defense efforts could not be grounds for vacating the judgment of conviction. *Res judicata* also barred these claims, since the defense could have tried these same tactics before conviction. These officials had no duty to cooperate anyway.

Claim 7

Defendant's complaint that his statements to Trent were suppressible (Claim 7) was barred by *res judicata*. Defendant cited portions of the transcript of the pre-trial suppression hearing, which confirmed that the issue was raised before trial.

In addition, defendant's *Miranda* argument fails on the merits. Defendant gets the timeline wrong as to when Trent became an undercover agent for law enforcement. There was evidence that he did not become an agent until much later than claimed by the defense. Moreover, engaging in mere talks with law enforcement is not enough to show an agency relationship. See *United States v. Birbal* (C.A. 2, 1997), 113 F.3d 342, 346 (jailmate acting in "entrepreneurial way to seek information" does not thereby become

“deputized by the government to question that defendant.”). “An inmate who acts upon the expectation of an unpromised reward does not thereby become an agent for the State.”

Burgan v. State (1988), 258 Ga. 512, 515, 371 S.E.2d 854, 857 (quoting another case).

Even if Trent had become an agent under the purported defense time frame, the *Miranda* argument still failed. “Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*.” *Illinois v. Perkins* (1990), 496 U.S. 292, 296. Even if the suspect has invoked *Miranda* rights, the use of an undercover agent is allowed. *State v. Hall* (2003), 204 Ariz. 442, 65 P.3d 90, ¶ 40. Also, defendant’s arguments seeking suppression assume the credibility of certain facts put forth by the defense, and the trial court was not required to believe those facts when it denied the motion to suppress.

Claim 8

Defendant complained that his former attorney Christopher Cicero violated the attorney-client privilege by talking to law enforcement officials and had a conflict of interest because he was “actively involved in the investigation.” However, the evidentiary documentation did not show what privileged matters Cicero allegedly disclosed to the police and/or prosecutors. For example, Cicero’s reporting of a purported death threat against him would not have been privileged. In addition, it did not appear that Cicero’s purported discussions with Trent, Nightingale, or Arthurs reached any privileged matters.

As for whether a conflict of interest existed, Cicero was removed from the case long before the case went to trial. Cicero was replaced by one pair of attorneys, who were eventually replaced by another pair who tried the case. Whatever “conflict” that existed was remedied before trial, and defendant did not show in the post-conviction petition how

Cicero's earlier "conflict" would have tainted the representation by his subsequent attorneys.

Finally, there was no indication that the defense was unaware of Cicero's supposed ethical or conflict problems. As a result, the defense could have raised these issues before trial, and the issues now were *res judicata*.

Claim 9

Defendant's complaint that the prosecutor's office should have recused itself (Claim 9) was also barred by *res judicata*, since that issue could have been raised before trial. Moreover, the claim was flawed, since defendant was never charged with plotting against the prosecutors. In addition, a criminal defendant should not be rewarded with a prosecutor's recusal because the defendant plotted against the prosecutor. "[W]ere it possible for a defendant charged with serious crimes to disqualify the prosecutors trying the case from proceeding with the prosecution by threatening them, willful defendants would be handed a powerful weapon to disrupt the course of justice." *Millsap v. Superior Court* (1999), 70 Cal.App.4th 196, 204, 82 Cal.Rptr. 733, 738; *Resnover v. Pearson* (N.D.In. 1991), 754 F.Supp. 1374, 1388-89.

Claim 10

Defendant's complaints about the prosecutor's office making alleged extrajudicial statements (Claim 10) were barred by *res judicata* as well, since that issue could have been raised before trial. Publicity issues also were waived because the defense did not exhaust its peremptory challenges. *State v. Getsy* (1998), 84 Ohio St.3d 180, 189. Defendant actually raised the issue of pretrial publicity on direct appeal, and this Court rejected it for several reasons. *Conway*, 109 Ohio St.3d 412, at ¶¶ 37-40.

Even if the prosecutorial comments were extrajudicial, and even if they were

improper, defendant cannot show any prejudice, since the trial court questioned the jury about pretrial publicity and found no difficulty seating a jury. Only a small number of potential jurors had heard about the case. Those who had heard of the prior conviction and/or death sentence were excused for that reason or other reasons. Only four prospective jurors who had heard anything about the case remained on the venire by the time peremptory challenges were exercised. These four indicated that they could be fair and put aside whatever minimal information they had seen or heard. None of these jurors ended up serving on the jury anyway.

Claim 11

Defendant complained that the aggravated murder count was duplicitous (Claim 11) because it charged two kinds of aggravated murder in one count. But that claim was barred by *res judicata* because it could have been raised before trial. Duplicity objections are waived by lack of objection. *State v. Keene* (1998), 81 Ohio St.3d 646, 664.

While the different ways of committing aggravated murder could have been stated in separate counts, see R.C. 2941.04, stating them in the same count was not duplicitous. It is proper to state alternative ways of committing a crime in the same count, so long as the alternatives are not repugnant. See *State v. Daniels* (1959), 169 Ohio St. 87, paragraph thirteen of the syllabus. Moreover, duplicity only results in a splitting-out of the duplicitous count into different counts, see R.C. 2941.28, and so the defense suffered no prejudice from the issue. While defendant claims that the alleged duplicity prevents reviewing courts from determining whether defendant was convicted on the basis of prior calculation and design or on the basis of committing the murder during a kidnapping, in fact the verdicts confirm that the jury found both of these things. Defendant was found

guilty of both the kidnapping death specification and of the kidnapping count. Moreover, the guilty verdicts on the (A)(3) specification and the (A)(8) witness-murder specification both served to confirm that the murder was committed with prior calculation and design, as both strongly confirm the plan to escape detection by murdering a witness. Finally, to the extent defendant complained that he may have been prejudiced in the penalty phase, the jury was instructed that the aggravated murder itself was not an aggravating circumstance, and so the supposed duplicity in the count could not have affected the jury's death recommendation.

Claim 12

Defendant's complaints about the prosecutor's supposed use of "non-judicial subpoenas" (Claim 12) was barred by *res judicata* because such an objection could have been raised before trial. This claimed violation of a criminal rule also does not rise to the level of a constitutional violation. Finally, no prejudice can be shown, since, even assuming a timely objection, and even assuming the defense did not consent, the prosecution could have obtained the same records or witness through another subpoena.

Claims 13 & 14

Defendant speculated that the prosecution withheld exculpatory evidence (Claim 13) and that the prosecution presented perjured testimony (Claim 14). However, the defense provided no evidentiary documentation to support those claims. Like other constitutional claims raised in post-conviction review, claims of withheld exculpatory evidence and perjured testimony must be supported by sufficient evidentiary documentation to warrant a hearing. *Zerla, supra*.

Defendant's claims of "systemic" prosecutorial suppression of exculpatory

evidence were hyperbole. Defendant cited four cases as somehow showing a “systemic” problem, but four cases out of thousands of cases every year hardly showed a pattern.

Defendant claimed that there was perjury based on supposed inconsistencies between Lora Eberhard’s pretrial interview and her trial testimony. Even assuming Eberhard made inconsistent statements, “[m]ere inconsistencies in testimony by government witnesses do not establish the government’s knowing use of false testimony.” *United States v. Griley* (C.A. 4, 1987), 814 F.2d 967, 971. “[D]ue process is not implicated by the prosecution’s introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements.” *United States v. Brown* (C.A. 5, 1981), 634 F.2d 819, 827. The defense did not claim that it was unaware of the Eberhard pretrial interview, which raises the issue of *res judicata*.

Claims 15 & 18

Claims 15 and 18 presented a laundry list of ineffective trial counsel claims. Most lacked evidentiary documentation, and none satisfied both the first and second prong of *Strickland*.

The claim of inadequate pretrial investigation was conclusory. The cross-examination of prosecution witnesses, including Trent, showed that substantial investigation had occurred. One or both counsel also attended the previous trials of Horton and Nightingale.

The claim of failing to call a forensic entomologist and to call psychologist Stinson were not supported by evidentiary documentation, there being no affidavit or documentation from an entomologist or from Stinson showing how an entomologist or

Stinson would have testified. Absent such a showing, there was no way of knowing whether counsel acted incompetently or whether counsel's action caused actual prejudice under the *Strickland* standard.

Defendant did provide some evidentiary documentation regarding the claim that the defense should have hired a forensic pathologist. Werner Spitz contended that Dotson was probably dead when he was pickaxed. But counsel acted reasonably by thoroughly cross-examining Dr. Fardal. Counsel's choice to rely on cross-examination instead of calling an expert did not constitute ineffectiveness. *State v. Hartman*, (2001), 93 Ohio St.3d 274, 299.

In addition, the Spitz claim would not have created a reasonable probability of a different outcome. Even if defendant did not kill Dotson, he nevertheless solicited the killing and was liable as a complicitor and was still subject to the death penalty.

The claimed need for a "cultural expert" was only supported by general information contained in articles and in documents pertaining to other capital defendants. There was no affidavit from a cultural expert who had specifically examined defendant and his family. As a result, defendant did "not explain what such a witness could have said on his behalf." *State v. Murphy* (2001), 91 Ohio St.3d 516, 542 (rejecting claim that expert on "cultural diversity" should have been called). Courts have rejected claims regarding "cultural experts," holding that deciding whether to use experts is a question of trial strategy. See, e.g., *State v. Hooks* (1998), 2nd Dist. Nos. CA 16978, 17007; *State v. Loza* (1997), 12th Dist. No. CA96-10-214.

Given the retention of a psychologist who was not called to testify, counsel reasonably could have thought that retention of a "cultural expert" was unnecessary or

would be unhelpful. If the psychologist was unable to provide information helpful to defendant, counsel could have reasonably decided that a “cultural expert” was likely to be unhelpful. The trial court in its discretion could have denied funding for a “cultural expert” on the ground that it was unnecessary given the presence of a psychologist.

The strong presumption of effectiveness applies in assessing mitigation strategies in capital sentencing proceedings. “A post-conviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial.” *Combs*, 100 Ohio App.3d at 103; see, also, *Hessler, supra*, ¶ 32. “[W]hen * * * counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance.” *Combs*, 100 Ohio App.3d at 105. “[W]hat [the defendant] is seeking to do now is present an alternative approach to mitigation because the one he chose at trial failed him. An unsuccessful mitigation strategy, however, does not render the imposition of the death penalty constitutionally infirm.” *Coleman, supra*; see, also, *Harris v. Vasquez* (C.A. 9, 1990), 913 F.2d 606, 620 n. 14.

Evidence of defendant’s dysfunctional earlier family life, including his father’s behavior, was presented at the penalty phase. Counsel could choose not to present more of the same.

Focusing on “positive” information regarding defendant was a reasonable trial strategy. Too much testimony about defendant’s current character and/or defendant supposedly following his father’s example would have opened the door to evidence of defendant’s other crimes, including the capital aggravated murder near Dockside Dolls.

Defendant claimed that counsel should have argued that defendant had a lesser

degree of involvement in the killing because he did not kill Dotson and that Dotson had induced or facilitated the offense by instigating the shooting of Jesse James. But, regardless of whether defendant killed Dotson, he was deeply involved since he ordered the killing. Moreover, whether or not Dotson instigated the felonious assault against James, he did not induce his own murder. It would take defendant's twisted calculus to conclude that Dotson bears responsibility for defendant's decision to kill Dotson to silence Dotson. Counsel acted reasonably, and defendant did not provide evidentiary documentation showing a reasonable probability of a different outcome.

As for the defense failure to call Shawn Nightingale as a defense witness, Nightingale had taken the Fifth Amendment at trial, and therefore there was no basis for defense counsel to call him as a witness. Moreover, Nightingale's account was hardly exculpatory. Even though Nightingale insisted that defendant had not personally killed Dotson, Nightingale nevertheless confirmed that defendant solicited the killing. Even under the Arthurs-killed-Dotson theory, defendant remained guilty as a complicitor in the aggravated murder and in the capital specifications. Reasonable counsel therefore could decide not to employ Nightingale's account of events, and defendant cannot show a reasonable probability of a different outcome if that account had been used.

Claim 16

Defendant's complaints about the sufficiency of the evidence as to the aggravating-circumstance specifications and as to the aggravated murder count (Claim 16) could have been raised during trial and thereafter on appeal, and therefore such claims were barred by *res judicata*. To the extent defendant relied on evidence not admitted at trial to try to show he was not the principal offender, such evidence can play

no role in the sufficiency-of-evidence analysis, which is limited to evidence admitted at trial. *State v. Jenks* (1991), 61 Ohio St.3d 259.

There was sufficient evidence of principal offender status through the testimony of Mike Arthurs. There was also sufficient evidence that defendant was guilty of the (A)(8) witness-murder specification. Moreover, even regardless of principal offender status, evidence showed that defendant was guilty as a complicitor in this planned killing.

This Court affirmed the convictions and upheld the sufficiency of the evidence in all respects. *Conway*, 109 Ohio St.3d 412, at ¶¶ 41-47, 53-56.

Claim 17

Res judicata also barred defendant's claim (Claim 17) that he was deprived of funds and/or testimony of a forensic entomologist, a forensic pathologist, a cultural expert, and a forensic psychologist. The amount of funds granted by the trial court, and any alleged deficiency therein, could have been litigated before or during trial or thereafter on appeal. Defendant conceded in the petition that the defense did not seek to retain these experts, and therefore his claim to funding for those experts is further barred by waiver.

As for forensic psychologist Dr. Robert Stinson, the defense obtained a court order allowing Stinson to visit defendant in jail. The trial court appropriated \$1500 for Stinson's services on June 3, 2003 and an additional \$750 on September 5, 2003. No error in lack of funding can be claimed here. While the defense could have called Stinson in the penalty phase, the defense was not required to do so, and the trial court committed no error in failing *sua sponte* to force the defense to call him.

Defendant's fourth proposition of law does not warrant review.¹

RESPONSE TO FIRST PROPOSITION OF LAW

A TRIAL COURT IS NOT REQUIRED TO PROVIDE FOR THE FUNDING OF EXPERTS FOR A POST-CONVICTION PROCEEDING.

"Post-conviction review is not a constitutional right but, rather, is a narrow remedy which affords a petitioner no rights beyond those granted by statute." *State v. Campbell*, 10th Dist. No. 03AP-147, 2003-Ohio-6305, ¶ 13. "A post-conviction relief petition does not provide a petitioner a second opportunity to litigate his or her conviction." *Id.*

There is no statutory provision that provides for a right to assistance of experts while pursuing a petition for post-conviction relief. *Hooks, supra*. Although a petitioner facing the death penalty has a statutory right to counsel to pursue post-conviction relief, there is no corresponding statutory right to expert assistance. See *State v. Smith* (2000), 9th Dist. No. 98CA007169; *State v. Nelson* (2000), 8th Dist. No. 77094.

"[N]either the post-conviction statute nor the constitution warrants funding for such expert assistance in a post-conviction petition." *State v. Tolliver*, 10th Dist. No. 04AP-591, 2005-Ohio-989, ¶ 25 (citing *Hooks* and *Smith*). "A postconviction petitioner has only those rights granted by statute, and the statute does not grant a right to the appointment of an expert." *State v. Madsen*, 8th Dist. 85439, 2005-Ohio-3850, ¶ 29.

R.C. 2929.024 does not provide independent grounds for funding expert and

¹ Defendant's Claim 20 was a claim of cumulative error, which lacked merit because the other nineteen claims lacked merit.

investigative assistance. R.C. 2929.024 provides for assistance “at trial or at the sentencing hearing.”

Similarly, Superintendence Rule 20 does not authorize expert funding in post-conviction litigation. It is tied to the appointment of counsel under the rule, and the rule is limited to appointing counsel at trial or on direct appeal. See *Hooks, supra*.

Reliance on *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, ¶ 18, would be misplaced. *Lott* states that trial courts addressing *Atkins* mental retardation claims should “consider expert testimony, appointing experts if necessary, in deciding this matter.” But that statement is limited to such claims and does not purport to set forth a broader principle applicable in all post-conviction proceedings. Defendant is not making an *Atkins* claim.

Even if the trial court had possessed the discretion to fund the requested experts “if necessary,” the request for expert funding here was excessive and unwarranted. For example, it would have been excessive to spend \$4,000 on the testimony of Professor Quiqley about international law, when Ohio courts have regularly rejected international-law challenges to Ohio’s death penalty and when that issue is barred by *res judicata*.

Moreover, even if this case were still in the pretrial phase, the trial court would not have been required to fund the requested experts at these levels. The funding of expert assistance for an indigent defendant is required only if such assistance would be reasonably necessary for the proper representation of defendant, as shown by a particularized showing that: (1) there exists a reasonable probability that the requested expert would aid the defense; and (2) denial of the requested expert assistance would result in an unfair trial. *State v. Mason* (1998), 82 Ohio St.3d 144, syllabus. The defense must show more than the mere possibility of assistance, and due process does not require

that an indigent defendant be given all of the assistance that a wealthier counterpart might buy. *Id.* at 149. An indigent defendant is only entitled to the basic and integral tools necessary to ensure a fair trial. *Id.* at 149. A court must consider whether the availability of alternative devices would fulfill the same function as that requested in the motion for expert assistance. *State v. Campbell* (2000), 90 Ohio St.3d 320, 328.

The defense had received the assistance of at least one psychological expert, and this should have been sufficient expert assistance in that area. Defendant was not entitled to have a “cultural expert” provide more psychological background for defendant. See *State v. Niels* (2001), 93 Ohio St.3d 6, 12-13 (psychiatrist already retained provided alternative means for fulfilling same functions as expert assistance sought).

The provision of funding for two attorney-experts also would have been excessive. Even if the testimony of an attorney-expert would be necessary, the testimony of one such attorney would have been sufficient.

In the final analysis, the trial court did not abuse its discretion in declining these exorbitant funding requests. Defendant’s first proposition of law does not warrant review.

RESPONSE TO SECOND PROPOSITION OF LAW

THERE IS NO ENTITLEMENT TO CIVIL DISCOVERY IN POST-CONVICTION LITIGATION.

The defense sought intrusive discovery of the prosecution’s files, police files, and other items in the trial court. However, the defense was not entitled to any discovery.

“Postconviction petitions are special civil actions governed exclusively by statute.” *State v. Spirko* (1998), 127 Ohio App.3d 421, 429. “[A] petitioner receives no more rights than those granted by the statute.” *Calhoun*, 86 Ohio St.3d at 281. As a

result, “there is no requirement of civil discovery in postconviction proceedings.” *State ex rel. Love v. Cuyahoga Cty. Prosecutor’s Office* (1999), 87 Ohio St.3d 158, 159 (citing *Spirko*).

Any assumption that due process requires discovery procedures would be wrong. There is no general due process right to discovery in a criminal case. *Weatherford v. Bursey* (1977), 429 U.S. 545, 559; *Midland Steel Prods. v. U.A.W. Local 486* (1991), 61 Ohio St.3d 121, 131. It is difficult to see why a convicted criminal defendant would acquire such a right for the more limited purpose of post-conviction litigation.

Some post-conviction defendants have contended that a denial of discovery would deny them equal protection in comparison to civil litigants. But a post-conviction petitioner is not similarly situated to civil litigants, since a petitioner has already had access to the subpoena power via a trial and has already been found guilty beyond a reasonable doubt. Civil litigants using civil discovery procedures have not yet had a trial, and they are not trying to upset a judgment of conviction. In addition, special concerns for the need for finality of convictions are involved in post-conviction litigation and are not present in civil litigation. *Steffen*, 70 Ohio St.3d at 411 (“the erosion of the finality of judgments in criminal cases undermines the deterrent effect of criminal law.”).

Although there is language in some cases indicating that discovery may be a matter of discretion for the trial court, see *State v. Samatar*, 10th Dist. No. 03AP-1057, 2004-Ohio-2641, ¶ 21, other language in that case follows *Love* and holds that there is no requirement of discovery. *Id.* at ¶ 23. As stated in *State v. Twyford*, 7th Dist. No. 98-JE-56:

Under his second assignment, appellant challenges the trial court’s decision to deny his motion for discovery.

Appellant asserts that he was entitled to conduct discovery because a postconviction proceeding under R.C. 2953.21 is considered civil in nature. He further asserts that, since a party in a civil action is entitled to complete discovery before summary judgment can be granted, he was not given a legitimate opportunity to develop his claims before judgment was entered against him.

Like appellant's first assignment, the resolution of his second assignment is also dictated by express precedent of the Supreme Court of Ohio. In *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St. 3d 158, 159, 718 N.E.2d 426, the court stated that "there is no requirement of civil discovery in postconviction proceedings."

In support of the foregoing statement, the *Love* court cited with favor the decision of the Third Appellate District in *State v. Spirko* (1998), 127 Ohio App. 3d 421, 713 N.E.2d 60. In the latter case, the *Spirko* court began its analysis by noting that postconviction proceedings in Ohio are governed solely by statutory law. The court then noted that R.C. 2953.21 et seq., did not contain any provision allowing for discovery. Based on this, the *Spirko* court concluded that the trial court had not erred in refusing the defendant's request for discovery.

Although not cited in either *Love* or *Spirko*, this court would note that the holding in both cases is consistent with the Supreme Court's interpretation of Crim.R. 16(B) and R.C. 149.43, the public records statute. In *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, the court indicated that, prior to his trial in a criminal proceeding, a defendant cannot employ R.C. 149.43 to obtain documents from the prosecutor which would not be subject to discovery under Crim.R. 16(B). The *Steckman* court also stated that once a defendant has exhausted his direct appeal from his conviction, he cannot use R.C. 149.43 to obtain documents from the prosecutor to support a postconviction relief petition. *Id.* at paragraph six of the syllabus. Furthermore, as to post-trial requests for documents from the prosecutor, the Supreme Court has held that such a request cannot be made under Crim.R. 16 because the duty to disclose exculpatory evidence under that rule only applies before or during trial. *State ex rel. Flagner v. Arko* (1998), 83 Ohio St. 3d 176, 177, 699 N.E.2d 62.

In light of the foregoing precedent, it is evident that the Ohio Supreme Court has determined that discovery between the state and a defendant can take place only when a criminal case is pending for trial. This basic holding is based on the proposition that a defendant's post-judgment motion cannot be predicated upon additional information from the prosecutor which had not been disclosed prior to the end of the trial. *Steckman* at 432. Thus, by concluding that discovery cannot be had as part of a postconviction proceeding, the *Love* court was acting consistent with its general precedent on the issue of criminal discovery.

Prior to the issuance of the *Love* decision, there existed some authority for the basic proposition that the allowance of discovery in a postconviction proceeding was a matter within the sound discretion of the trial court. See *Wiles, supra*, 126 Ohio App. 3d at 77, citing *State v. Smith* (1986), 30 Ohio App. 3d 138, 140, 506 N.E.2d 1205. However, that authority has no further value as precedent. That is, pursuant to *Love* and *Spirko*, there are no circumstances under which a defendant in postconviction proceedings can be entitled to discovery.

(Footnote omitted).

Beyond the problem of conducting discovery at all, the defense went too far in its discovery requests. The defense basically sought every piece of paper on a multi-county basis that might mention defendant, co-defendants, or witnesses. It was for all intents and purposes a fishing expedition, unreasonable in scope and intrusive into prosecutorial and police files, even regarding still-pending cases. The defense even asked for documents pertaining to the Dockside Dolls killing, a crime which did not come into evidence in this case. Usually it takes a rigorous and significant showing to allow this kind of invasive and time-consuming discovery into the processes of prosecutorial and police agencies. See, e.g., *United States v. Armstrong* (1996), 517 U.S. 456. Here, however, defendant proffered little evidentiary documentation, none of which suggested that the fishing expedition was warranted. "It bears emphasis here that claims in postconviction

proceedings must be supported by some competent evidence of a constitutional violation. A mere hypothesis of a constitutional claim upon further discovery is not sufficient to warrant an evidentiary hearing.” *State v. Coleman, supra*. “[T]he purpose of post-conviction proceedings is not to afford one convicted of a crime a chance to retry his case.” *Id.*

Even if discovery otherwise were allowed in post-conviction proceedings, the trial court acted properly in barring the unreasonable and oppressive expedition that defendant wished to undertake with prosecutorial and police agencies. The trial court correctly recognized that these were extremely unreasonable discovery demands.

Such discovery also would have invaded prosecutorial and police work product which is protected from discovery in criminal cases by Crim.R. 16(B)(2). The State properly contended below that the defense had received its discovery pursuant to Crim.R. 16 and that the defense should not be entitled to anything more based on unsupported post-conviction allegations. See *Twyford, supra*.

Defendant’s second proposition of law should be overruled.

RESPONSE TO THIRD PROPOSITION OF LAW

***RES JUDICATA* APPLIES TO CLAIMS THAT WERE OR COULD HAVE BEEN RAISED BEFORE TRIAL OR ON DIRECT APPEAL.**

As discussed in the Response to the Fourth Proposition of Law above, several claims were barred by *res judicata*.

Defendant erred below in claiming that the mere attachment of evidentiary documentation to the petition vitiates the application of *res judicata*. The inclusion of

materials outside the original trial record does not necessarily avoid the application of the *res judicata* bar. Some outside evidence will not avoid the *res judicata* bar because that evidence merely repackages factual matters that were part of trial record. *Hessler, supra*.

Even for supposed new factual matters, *res judicata* will still bar most claims because such facts *could have been raised* before conviction. To avoid the *res judicata* bar, evidence from outside the original trial record “must be more than that which was in existence at the time of trial and which should have and could have been submitted at trial if the defendant had desired to make use of it.” *Weaver, supra; Hawkins, supra; Braden, supra*. Accordingly, most constitutional claims will be barred by *res judicata*, since they *could* have been raised before or during trial or thereafter on appeal, regardless of whether they were actually raised at that time.

Under defendant’s mistaken view of *res judicata*, few if any constitutional claims would be barred by *res judicata*. According to the defense, the *res judicata* bar would be avoided through the simple expedient of attaching evidentiary documentation setting forth information not contained in the original trial record. But the very reason the information was not developed fully before or during trial is because the defense failed to raise the issue. The issue is whether the issue *could* have been raised, not just whether it actually was raised. Defendant’s argument would turn the “could have been raised” prong into a nullity by making *res judicata* apply only to issues that were fully developed before trial.

It would stand logic on its head to award an exemption from *res judicata* for those defendants who have failed to make their objections when they should have done so. Accordingly, even when the information presented is “new” in the sense that it did not appear in the original trial record, the issue still remains whether the defense *could* have

raised the issue in the trial court.

An example is the Cicero matter, which is Claim 8. Cicero was succeeded by two different sets of attorneys. Either set of attorneys could have raised issues regarding a supposed breach of privilege by Cicero.

Defendant's third proposition of law does not warrant review.

RESPONSE TO FIFTH PROPOSITION OF LAW

SUPERINTENDENCE RULE 20 DOES NOT CREATE A RIGHT TO TWO COUNSEL IN AN APPEAL FROM THE DENIAL OF POST-CONVICTION RELIEF.

In the fifth assignment of error below, the defense challenged only the actions of the Court of Appeals in appointing a single appellate counsel. No claim was made that the trial court had erred, and, in fact, a post-conviction claim regarding lack of appointment in the trial court was *withdrawn* in the Court of Appeals.

Insofar as appointment of appellate counsel is concerned, no possible prejudice has ensued, since two counsel were listed on defendant's appellate brief anyway, and there is no indication that the briefing would have been any different if second counsel had been officially appointed.

In any event, for the following reasons, the State continues to oppose the appointment of a second counsel and, in particular, continues to oppose defense reliance on the flawed 11th District decision in *State v. Lorraine*, 11th Dist. No. 2003-T-159, 2005-Ohio-2529.

The constitutional right to appointed counsel only extends to the first appeal of right, "and no further." *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555; *State v. Buell*

(1994), 70 Ohio St.3d 1211, 1212. It makes no difference that there is a statute or rule that allows appointment of counsel. In *Finley*, there was a statutory right to counsel, but that did not control the constitutional issue. *Finley*, 481 U.S. at 553. “[T]he fact that the defendant has been afforded counsel in some form does not end the inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer’s assistance, combined with the nature of the proceedings, that controls the constitutional question.” *Id.* at 556.

Nor does it make any difference that counsel would be purporting to seek enforcement of a constitutional right in the post-conviction proceeding. In *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, the Court rejected the claim that there is a constitutional right to counsel to file an application for reopening to raise a claim of appellate counsel ineffectiveness. The Court relied on *Finley* and other cases:

{¶20} The Supreme Court of the United States has “declined to extend the right to counsel beyond the first appeal of a criminal conviction.” *Coleman v. Thompson* (1991), 501 U.S. 722, 756, 111 S.Ct. 2546, 115 L.Ed.2d 640. And nothing in the United States Constitution requires that the state provide counsel to every indigent criminal defendant who wants to challenge the work of his or her original appellate attorney. See *Pennsylvania v. Finley* (1987), 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (“the right to appointed counsel extends to the first appeal of right, and no further”).

{¶21} Similarly, we have never recognized in our decisions that an indigent accused has a constitutional right to a second appellate lawyer to challenge the effectiveness of his original appellate counsel. Nor does App.R. 26(B) require this. If we were to so hold, then logically an accused would have a constitutional right to yet a third appellate lawyer to challenge the adequacy of representation of his second appellate lawyer, and so on ad infinitum. We reject such an approach precisely because the App.R. 26(B) process is not a part of the direct appeal.

“[N]either the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment’s equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right.” *Coleman v. Thompson*, 501 U.S. at 756, 111 S.Ct. 2546, 115 L.Ed.2d 640. See, also, *Jackson v. Johnson* (C.A.5, 2000), 217 F.3d 360, 363-364 (rejecting a state prisoner’s argument that “his opportunity to file a motion for rehearing should be considered the last step in his first appeal of right,” and noting that “a holding to that effect would surely create a new rule of constitutional law”); *Kitchen v. United States* (C.A.7, 2000), 227 F.3d 1014, 1018 (“once the direct appeal has been decided, the right to counsel no longer applies”).

{¶22} The fact that Ohio has created this special postappeal opportunity to challenge an appellate judgment does not change Ohio’s obligations under the Sixth Amendment. The procedure to appoint counsel under App.R. 26(B)(6)(a) is one that Ohio has chosen to provide to criminal defendants whose appeal of right has ended. Ohio had no constitutional obligation to create App.R. 26(B) at all, and it has no constitutional obligation now to provide counsel to those defendants who file applications under that rule.

Accordingly, as *Eads* recognizes, no constitutional right to counsel accrues merely because the State has provided for appointment of counsel in the post-conviction proceeding in some circumstances, nor does it arise because the State has created a post-appeal mechanism for raising a constitutional claim. If the raising of a constitutional claim created a constitutional guarantee of a right to counsel, then the constitutional right to counsel would continue on *ad infinitum*, and neither the Sixth Amendment nor Equal Protection require such a result. *Finley, supra; Eads, supra*. It does not violate Equal Protection that the right to counsel applies at trial and on direct appeal but not thereafter. *Finley*, 481 U.S. at 556.

Even if a constitutional right existed, no case would hold that such a right extends

to require the appointment of *two* counsel. Superintendence Rule 20, which sets forth a two-attorney principle for trial and direct appeal in death penalty cases, does not require two attorneys for post-conviction proceedings. R.C. 2953.21(I) creates a statutory right to the appointment of post-conviction counsel for an indigent defendant facing the death penalty, but that provision does not require the appointment of two counsel. See R.C. 2953.21(I)(2) (twice referring to “an attorney”).

The Eleventh District in *Lorraine* did not challenge this analysis generally. The *Lorraine* court conceded that “the state’s authority provides an accurate statement of the law in general postconviction proceedings * * *.” *Lorraine*, ¶ 49. Nevertheless, for purposes of post-conviction petitions raising *Atkins* mental retardation claims, the *Lorraine* court viewed the issue differently. In particular, the *Lorraine* court believed that Superintendence Rule 20 required the appointment of two counsel for *Atkins* claims. *Lorraine* does not control here, since defendant Conway is not pursuing an *Atkins* claim.

In any event, *Lorraine* is subject to criticism even in the *Atkins* context. The court cited no provision in Superintendence Rule 20 creating an entitlement to the appointment of two post-conviction counsel. While the rule provides for appointment of counsel for trial and for direct appeal, see Rule 20(II)(A) & (B), post-conviction review is not a trial, nor is it an appeal of a conviction. Rather, post-conviction review is a collateral challenge against a conviction.

The *Lorraine* court also cited part of the rule as saying “If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to this rule.” The *Lorraine* court observed that this language “demonstrates an intent to provide two attorneys,” when in fact the provision does not demonstrate an

overarching intent to provide two attorneys to all indigent capital defendants at every stage of proceedings. If the rule had been intended to provide such an overarching right to two counsel, it would not have been necessary for the provision that say “[i]f the defendant is entitled to the appointment of counsel * * *.” In effect, the rule recognizes its own limits, since the rule only provides for the appointment of two attorneys in the trial court before conviction and on direct appeal after conviction. If the rule had been intended to provide for two counsel at every stage of collateral or post-appeal review, there would be no “if” clause, and the rule would have provided for a broader application, but it did not do so.

Another significant flaw with the *Lorraine* court’s analysis is its failure to recognize that “[r]ules of Superintendence are not designed to alter basic substantive rights of criminal defendants.” *State v. Singer* (1977), 50 Ohio St.2d 103, 110. “They are purely internal housekeeping rules which are of concern to the judges of the several courts but create no rights in individual defendants.” *State v. Gettys* (1976), 49 Ohio App.2d 241, 243. Yet, the Eleventh District treated the issue as warranting reversal.

Defendant’s fifth proposition of law does not warrant review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this 12th day of Feb., 2007, to Randall L. Porter, Ohio Public Defender's Office, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, counsel for defendant-appellant.



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