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EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED AND THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST IN A FELONY CONVICTION

This case involves a variety of constitutional question, specifically the FIFTH, SIXTH; AND FOURTEENTH Amendment of the United States Constitution, pursuant to O.R.C. §2953.23(A)(1)(a), a petitioner may file for relief when he/she was unavoidably prevented from Discovery of the facts. It's undisputable that Appellee was unavoidably prevented from obtaining the evidence of MEDICAL RECORDS, which are a critical piece of evidence, evidence that falls under the DUE PROCESS CLAUSE. The FOURTEENTH Amendment States in pertinent part: [N]or shall any State deprive any person life, liberty or property, WITHOUT DUE PROCESS OF LAW, however, the Trial Courts refusal to review the MEDICAL RECORDS in its entirety, being relevant evidence, clearly deprives the Appellee DUE PROCESS OF THE LAW. To allow an an opposite Driver, in a separate motor vehicle (BEING AN EIGHTEEN YEAR-OLD FEMALE DRIVER: MS. ANGELA CRALLIE) to operate a vehicle under the influence of illegal drugs: COCAINE; CANNABINOID; AND BENZODIAZEPHINE, and be involved in a two-party accident, plus not be cited for any fault, is clearly prejudice and in violation of his Due Process Rights, protected by the FIFTH/ FOURTEENTH Amendment of the United States Constitution. As a result of this refusal and failure, the Appellee received no proper assistance from Trial Counsel, in fact he lacked assistance of counsel. The Ohio Supreme Court, following **Strickland v. Washington**, 466 U.S. 668(1984), slightly revised the controlling case in **State v. Lytle**(1976), 48 Ohio St.2d. 391 in determining the effectiveness of counsel, and whether the Appellee/or Appellant's SIXTH Amendment Rights were violated, in further upheld in **U.S. v. Cronin**(1984), 466 U.S. 648, counsel's investigation duties were determined ineffective under same. Attorney CHRISTOPHER NEWLON's performance was incompetent. The Fifth Amendment provides that, "[N]o person shall\*\*\*be subject for the same offense to be twice put in jeopardy of life, liberty or limb. Driving Under the Influence is necessarily a lesser included offense of AGGRAVATED VEHICULAR ASSAULT, O.R.C. §2903.06(A)(1). Further testing in reference to "same offense" is determined in **Blockburger v. U.S.**(1932), 509 U.S. 668.(**State v. Zima** (Ohio 2004), cited 806 N.E.2d. 542). In further, O.R.C. §2929.14(B) **MANDATES** the trial Court to impose the shortest term authorized. A Court could not impose more than the minimum for a first time offender. Each and all violates his Due Process Clause rights.

## STATEMENT OF THE CASE

On May 16, 2006, Appellee, Alex Clark was indicted for Aggravated Vehicular Assault, 1 CT., pursuant to O.R.C. §2903.08(A)(1)(F3); and Operating a Vehicle under the Influence of Alcohol, 1 CT., pursuant to O.R.C. §4511.19(A)(1)(a)(M1), by the STARK COUNTY GRAND JURY. Appellee retained Attorney Christopher Newlon. The case was assigned to Judge Reinbold. Appellee was arraigned and entered a NOT GUILTY PLEA. On September 5, 2006, change of Plea hearing was held. On September 6, 2006, Judge Reinbold ordered a Pre-Sentencing Investigation. On September 11, 2006 Appellee has changed his Plea from NOT GUILTY TO GUILTY to CT.1 AGGRAVATED VEHICULAR ASSAULT, pursuant to O.R.C. §2903.08(A)(1); and Count 2; OPERATING A VEHICLE UNDER THE INFLUENCE OF ALCOHOL, pursuant to O.R.C. §4511.19(A)(1)(a), On October 20, 2006, Appellant was sentenced to (2) years in a State Correctional Institution on Count 1, and to count 2 Six months. Each to run concurrent. (Count 2 with Count 1).

On June 20, 2007, Appellee filed a Petition for Post-Conviction pursuant to O.R.C. §2953.23(A). Upon newly discovered evidence, specifically MEDICAL RECORDS, and other constitutional claims. On June 26, 2007, the Stark County Common Pleas Court (Judge: Reinbold) denied the Petition, with a Facts-Finding Conclusion of Law. Thereafter on July 16, 2007 Appellee filed an appeal to the Fifth Appellate Judicial District Court of Appeals. The appeal was originally placed on the regular calendar, thus Appellee then filed a Motion to have the Appeal placed on the accelerated calendar; additionally Appellee filed a Motion to instruct the Appellate Clerk to abide by the order. In turn Appellee had to file a plethora of Petitions/Motions. On January 22, 2008 Appellee's Appeal was therefore AFFIRMED.

## STATEMENT OF THE FACTS

The Appellee on the 18th day of February, 2006, had been under the influence of alcohol.

On same date it was alleged that he caused ~~serious~~ physical harm to the opposite driver, Angela R. Crallie, in a two car accident, in Stark County, Ohio. (BEING A FRACTURED ankle in this case; OHIO LAW REQUIRES A BROKEN BONE TO BE INVOLVED IN A DUI ACCIDENT, TO BECOME A FELONY OFFENSE).

STATEMENT OF FACTS CONTINUED....

Alleged victim, ANGELA R. CRALLIE (Opposite driver), and her 15 year old passenger, HEATHER FRENZ, were taken to separate hospitals. Angela R. Crallie was taken to MERCY MEDICAL CENTER, where after a URINE test, she had tested **positive to: COCAINE; CANNABINOID; and BENZODIAZEPHINE**, but this was never reported to Police or the appropriate departments. Her passenger, HEATHER FRENZ, was transported to AULTMAN HOSPITAL, where she was also given a physical and URINE TEST, which she tested **positive to: ACETAMINOPHEN, and CANNABINOIDS**, **again** neither were reported of their illegal drug use, which had impaired Ms. Crallie's capability to operate a Motor vehicle.

During the Appellee's sentencing, and preceding to the Stark County Prosecution Office, to enhance the sentence that the office was seeking, they ~~misconstrued~~ his DUI convictions within a (6) year period. He had not received a DUI in a lengthy nine and half years beyond the time the Office stated to enhance any sentence. No mention of the opposite driver was mentioned as to her ability to drive the fact that she had a (15) year old passenger under the influence of illegal drugs.

Attorney CHRISTOPHER NEWLON allowed this unconstitutional procedure to carry on, without persuading a defense for his client, Appellee. Even manipulating the Appellee to plea to a charge that was not his to plea to. (See proposition of Law No.3).

QUESTION PRESENTED FOR CONSTITUTIONAL REVIEW IS WHETHER THE CONSTITUTIONAL ERRORS WERE SO SEVERE TO DEPRIVE THE APPELLEE OF HIS DUE PROCESS RIGHTS: (FIFTH, SIXTH/FOURTEENTH AMENDMENT OF THE U.S, CONSTITUTION. (IT IS OBVIOUS THEY WERE)).

PROPOSITION OF LAW

PROPOSITION OF LAW No.1: TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING APPELLEE'S POST-CONVICTION PETITION, PURSUANT TO O.R.C. §2953.23(A)(a). Denying Appellee DUE PROCESS OF THE LAW, GUARANTEED UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment reads that:

"ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATES WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS"

On June 20, 2007, The Appellee filed a petition for Post-Conviction Relief, pursuant to O.R.C. §2953.23(A)(a). Citing various errors; and presented NEW EVIDENCE, evidence not addressed prior to his Plea bargain, a Bargain accepted by the Trial Court.

O.R.C. §2953.23(A) holds:

(A) Whether a hearing is or is not held on a petition filed pursuant to section §2953.21 of the revised Code, a Court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(a) or (2) of the section applies:

(a). Either, the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief or, subsequent to the period prescribed in division (A)(2) of Section §2953.23 of the Revised Code or to the filing of an earlier petition, The United States Supreme Court recognized a new Federal or State right that applies retroactively to persons in the petitioner's situation, and petition asserts a claim based on that right.

(b). THE PETITIONER SHOWS BY CLEAR AND CONVINCING EVIDENCE THAT. BUT FOR THE CONSTITUTIONAL ERROR AT TRIAL, NO REASONABLE FACT-FINDER WOULD HAVE FOUND THE PETITIONER GUILTY OF THE OFFENSE OF WHICH THE PETITIONER WAS CONVICTED OR, IF THE CLAIM CHALLENGES A SENTENCE OF DEATH THAT, BUT FOR CONSTITUTIONAL ERROR AT THE SENTENCING HEARING, NO REASONABLE FACTFINDER WOULD HAVE FOUND THE PETITIONER ELIGIBLE FOR THE DEATH SENTENCE.

At the appropriate time, Appellee addressed the constitutional error, in reference to the new evidence, which he obtained from sources out of Court, and had no knowledge before hand, evidence that would have changed the outcome of the plea Appellee was enforced to accept by his own counsel, although preceding the plea counsel stated something totaly opposite to what Appellee received.

Appellee was unavoidably prevented from discovery of the facts upon which the Appellee must rely, to present the claim for relief. First, Appellee must show that he was unavoidably prevented from discovery of the facts. O.R.C. §2953.23(A)(1)(a). It is undisputed that Appellee was unavoidably prevented from obtaining the evidence presented to the Trial Court. Which had shown the Medical records of the alleged victim(s), in the opposite vehicle. Documents which were not introduced to the Court. If these documents were and not viewed as evidence, it would have prejudiced the Appellee, and be in violation of his 14th Amendment rights guaranteed by the United States Constitution, thus if introduced, the outcome of the Plea and Appellee's sentence would undoubtedly been a different result.

To meet the second criterion, Appellee must show "by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found him guilty as charged. O.R.C. §2953.23 (A)(2). Based on the Prosecutions' alleged failure to disclosure exculpatory evidence as required by **Brady v. Maryland**(1963), 373 U.S. 83, 83 S.Ct. 87, as its progeny. **Brady** held that, "The prosecution by suppression of evidence favorable to an accused upon request violates due process where the evidence is material, either to guilt, or to punishment, irrespective of the good faith or bad faith of the prosecution.

The Fifth Appellate District in its review of this error, had stated that Appellee's counsel had received a copy of the MEDICAL RECORDS, on June 19, 2006. A record that was not obtained by the Appellee until his incarceration. If this is to be true, then his counsel failed to competently represent his client, as he withheld evidence favorable to his client, the Appellee, evidence that would have changed the outcome. This evidence if obtained and argued appropriately would have changed the outcome of the charge of Aggravated Vehicular Assault(O.R.C. §2903.08(A)(1)(F-3). However, the prosecution, as well as it seems his own counsel, failed to disclose the medical records of the opposite driver, (ms.Crallie), whom tested positive for COCAINE; CANNABINOID; and BENZODIAZEPHINE(ANXIETY DRUG: CAUSING SLEEP). Further investigation into this evidence, as well as presentation of this evidence, would have changed the outcome of the plea bargain arranged.

On June 26, 2007, the trial Court issued an order denying the Appellee's Petition for Post-Conviction Relief, without a hearing, and pursuant to O.R.C. §2953.21, thus Appellee had not filed such a

Petition in the Trial Court, Appellee filed a Petition for Post-Conviction, pursuant to O.R.C. §2953.23(A). This was not an attempt to go through the back door, but Appellee's intension was by what the allowance is permitted under law. The new evidence did not rise to suspicion until some time thereafter.

The Fifth Appellate District Court found that since, "Appellant was convicted based on his entry of a guilty plea to charges in the indictment." No reasonable fact-finder would have found Appellee guilty of the offense. To address this as is, would actually be contradicting and misconstrued, as Appellee was before a Judge, and the Judge has the Authority to reach a fact-finding resolution. And if the Medical Records, the opposite drivers influence capabilities; with further investigation, would have changed the outcome of the Aggravated Vehicular Assault.

Again, it must be emphasized that, Appellee had filed his preceding Petition under the statute of O.R.C. §2953.23(A)(1).

Thereafter, the Appellee filed a Motion for Finding of facts and conclusion of Law, pursuant to O.R.C. §2953.21, on July 16, 2007. On July 20, 2007, the trial Court(Judge Reinbold) denied Appellee's Motion, and stated, "Petitioner's Motion for Finding of Facts and Conclusion of law is Denied, The Petitioner has appealed my June 26, 2007 and I now lack jurisdiction. Appellee had argued that Judge Reinbold's entries seemed to be more personal, than ethically Judicial.; that this process by the court violated Appellee's Due Process Clause rights, under the 14th Amendment of the United States Constitution. Since filing the Post-Conviction Petition, and his Appeal in the Fifth Appellate District he has dealt with a variety

of indifferences with the Court and the Appellate Court Clerk. A plethora of filings by the Appellee was never stamped and returned, and at one point the Clerks office misplaced Appellee's Appellate Brief, and Applee was required to forward additional copies. It began to seem that due to the Clerk of the Appellate Court; and Judge Reinbold (CLERK: NANCY REINBOLD), having relations, that the filings curiously were being delayed and misplaced. There seemed to be some type of alternative objective of work product procedure that is unfamiliar to those outside of the court atmosphere.

This Proposition of Law must be found with Constitutional question, with substantial recognition. As Appelle was denied the protection guaranteed by his 5th and 14th Amendment of the United States Constitution. In turn, this case must be remanded to the Fifth Appellate District Court for further review, Alternatively, VACATE the conviction and charge.

PROPOSITION OF LAW NO.2: TRIAL COURT ERRED AS A MATTER OF LAW, WHEN IT REFUSED TO REVIEW THE NEWLY DISCOVERED EVIDENCE IT ITS ENTIRELY. DEPRIVING APPELLEE OF HIS DUE PROCESS RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Fourteenth Amendment states in pertinent part:[N]or shall any state deprive any person life, liberty, or property, without Due Process of Law.

Evidence of Ms. Crallie(~~OPPOSITE DRIVER~~), was never introduced in open Court, at any time, when the Appellee was present for any proceeding. This evidence remained on the "BACK-BURNER" by the Prosecution, Appellee's own counsel as it seems, Trial Court; and other officials of the Court, causing Appellee's DUE PROCESS CLAUSE RIGHTS to go unprotected.

The evidence finally obtained through the Appellee, and other outside sources, was then presented to the trial Court (Judge: Reinbold). Obviously, the critical question would be, "WHY WASN'T THE MEDICAL RESULTS, THROUGH A URINE TEST", introduced appropriately before the Court and in open Court? Such evidence was **critical** in this case, especially when it is **credible** evidence that would have exonerated the Appellee, or any individual in a criminal action.

As it was viewed by professionally trained Medical Staff, of MERCY MEDICAL CENTER, IN CANTON, OHIO, Ms. Crallie (Opposite Driver), she had illegal drugs in her system, by and through a URINE analysis Test, ms. Crallie tested **positive** to: COCAINE; CANNABINOID; AND BENZODIAZEPHINE (ANXIETY MEDICATION: CAUSING DROWZINESS). At one point when asked if she had consumed any alcohol or illegal drugs, Ms. Crallie denied any use. Frank D. Gabrin, DO, stated, "I was afraid to medicate her in the Emergency Room, Because of all street drugs that were involved." None of this was presented in open court or discussed otherwise. Nor was Ms. Crallie cited for the collision, or even the consumption of illegal drugs.

In further, there was a passenger in Ms. Crallie's vehicle, whom at the time was 15 years of age, who after the collision was transported to AULTMAN HOSPITAL, IN CANTON, OHIO, where it was found through a URINE test too, that she herself, had illegal narcotics in her system. (Ms. Heather Frenz), Ms. Frenz, tested **positive** to: "ACETAMINOPHEN; AND CANNABINOIDS." Under the supervision of the opposite Driver Ms. Crallie, who at the time was (18) years of age.

By this reliable and critical evidence being withheld from a true defense, it has denied the Appellee to Due Process of the Law, depriving Appellee the protection under the 5th, 6th and 14th Amendment of the United States Constitution.

The Appellee's filing of the Petition for Post-Conviction Relief, pursuant to O.R.C. §2953.23(A)(A)(1), was the proper avenue to take, as he was denied and unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief. It is obvious, that if this evidence was taken into true consideration, by law, Appellee could not have been indicted for AGGRAVATED VEHICULAR ASSAULT, pursuant to O.R.C. §2903.08(A)(1), and sentenced to (2) years in a State penal Institution would not have been imposed.

Proposition of Law No.2 has explained in full, as proposition of Law No.1 of the lower Courts denying him his Due Process Rights guaranteed under the FIFTH, SIXTH, AND FOURTEENTH Amendment of the United States Constitution. To allow this evidence to go uncontested, would deny him the protection that the FIFTH, SIXTH/FOURTEENTH Amendment provides. This constitutional claim must be found well taken, ALTERNATIVELY, His conviction VACATED. In further, this case remanded to the trial Court for further proceedings.

PROPOSITION OF LAW NO.3: APPELLEE LACKED EFFECTIVE ASSISTANCE OF COUNSEL, THROUGH OUT THE JUDICIAL PROCESS, RESULTING IN AN INVALID PLEA AGREEMENT, IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION/ARTICLE I§10 OF THE OHIO CONSTITUTION.

This respectable Court follows the United States Supreme Court controlling case and decision upheld in **STRICKLAND v. WASHINGTON**, 466 U.S. 668(1984). In **STRICKLAND**, a strick standard of two analysis prongs were determined. **First**, the defendant must show that his counsel was deficient, and **Second**, the Defendant must show that the Attorney's performance was prejudice. In the same United States

Supreme Court upheld a further ruling in **UNITED STATES v. CRONIC**, 466 U.S. 648, 104 S.Ct. 2039(JUST HOURS LATER), that consists of counsels investigation duties, and counsels ineffectiveness to do so.

Attorney, CHRISTOPHER NEWLON, failed to investigate the Appellee's case in its entirety. He further failed to protect the Appellee's rights guaranteed under the Sixth Amendment of the United States Constitution, and Article I§10 of the Ohio Constitution, when Attorney Newlon neglected his ethical duties to prepare for an effective and competent defense. As evidence will show, Attorney Newlon's only intention was to have the Appellee agree to a Plea Bargain, without obtaining all the sufficient evidence in the case. If he had, Mr. Newlon would have discussed and argued the medical records, if he had knowledge of them, and should have questioned the **critical** issue of Ms.Crallie's capability to operate a motor vehicle.

In this case at bar, Attorney Newlon was deficient by not making a significant investigation. An investigation into the collission; the opposite driver's condition, the site, and more. In further, why his client was the main target, when it was a two-party accident. Attorney Newlon's performance was severely defective to support prejudice. prejudice due to his lack of investigation and continued effort only to receive a plea agreement. However, the plea agreement was different from what counsel advised the Appellee at first stage which was (1) year. with it possibly being probation.

The test as to whether an individual has been denied effective counsel was initially set forth by the Ohio Supreme Court in **State v.Hester, supra**, at page 79, 341 N.E. 2d. 304, 45 Ohio St.2d.391(1976), and thereafter slightly revised in **State v. Lytle**(1976).48 Oh.St.2d. 391.

In *State v. Lytle*, *supra*, this Court stated at ¶396-397, 358 N.E. 2d. 623:

"WHEN CONSIDERING AN ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL, A TWO-STEP PROCESS IS USUALLY EMPLOYED. FIRST, THERE MUST BE A DETERMINATION AS TO WHETHER THERE HAS BEEN A SUBSTANTIAL VIOLATION OF ANY OF DEFENSE COUNSEL'S ESSENTIAL DUTIES TO HIS CLIENT. NEXT, AND ANALYTICALLY SEPARATE FROM THE QUESTION OF WHETHER THE DEFENDANT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED, THERE MUST BE A DETERMINATION AS TO WHETHER THE DEFENSE WAS PREJUDICED BY COUNSEL'S INEFFECTIVENESS.

In *Gideon v. Wainwright*(1963), 372 U.S. 335, *Gideon* rested on the "OBVIOUS TRUTH" that lawyers are "necessities, not luxuries" in our adversarial system of criminal justice. The defendant's liberty depends on his ability to present his case in the face of "the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 37 L.Ed. 2d. 619(1973). Also See: *Evitts v. Lucey*, 105 S.Ct. 839, @¶835.

Appellee, being a LAYMEN of the law, was able to obtain the new evidence, evidence of Medical records of the opposite driver, Ms.Crallie, through out-side sources interested in the case, and present them to the Trial Court(Judge:Reinbold), and the Fifth Appellate District Court, so how was a properly licensed Attorney not capable of presenting this evidence in open Court, and if obtained not persue the matter further. As such investigation was for the best interest of his client, the Appellee.

Following *Strickland v. Washington*(1984) 466 U.S. 668, it was addressed that:

"[C]ounsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. @2066. A lawyer has a duty to investigate "the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction.\*\*\*" A.B.A. STANDARDS FOR CRIMINAL JUSTICE(1982 SUPP.)(NO.4-4.1).

This proposition of Law presented consists of Constitutional questioning, in reference to the SIXTH and FOURTEENTH Amendment of the United States Constitution and Article I§10 of the Ohio Constitution. Proposition of Law No.3 must be found with Constitutional error, REVERSE this case, REMAND it to the Appellate Court/or trial Court for further proceedings, ALTERNATIVELY, VACATE this case and issue an ORDER for an immediate RELEASE, as he was denied effective assistance of counsel.

PROPOSITION OF LAW NO.4: INVESTIGATING TROOPER AT SCENE OF ACCIDENT, COMMITTED BIAS THROUGH STEREO-TYPING THE APPELLEE AND FAILING TO INVESTIGATE BOTH DRIVER'S, BEFORE DETERMINING THE RESULT. THIS PROCESS DENIED APPELLEE OF DUE PROCESS OF LAW, GUARANTEED UNDER THE 14th AMENDMENT OF THE UNITED STATES CONSTITUTION.

Trooper Shepherd neglected his duties, committing "DERELICTION OF DUTY". pursuant to O.R.C. §2921.44. O.R.C. §2921.44 holds:

- (A). No law enforcement officer shall negligently do any of the following:
- (B). No law enforcement, ministerial, or judicial officer shall negligently fail to perform a lawful duty in a criminal case or proceeding;
- (E). No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servants office, or recklessly do any act expressly forbidden by laws with respect to the public servants office.

An officer of the law holds the same obligation as a state Prosecutor, where if he has any evidence in his possession, that may cast doubt on the credibility of a witness before a grand jury, he has a duty to disclose it. See: United States v. DiBernardo, 552 F.Supp 1315

Trooper Shepherd made it an affirmative action to direct his undivided attention exclusively toward the Appellee, ALEX CLARK, thus gave no immediate observation toward the opposite driver, Ms. Angela Crallie. Trooper Shepherd did not place any concern upon Ms. Crallie. As an Officer of the Law, Trooper Shepherd is trained to observe any sight of illegal use, ect... Not until Ms. Crallie was transported to MERCY MEDICAL CENTER, and was given a complete physical, including a URINE test, which the result was positive for illegal drugs; COCAINE; CANNABINOID; AND BENZODIAZEPHINE, was it reported by the nurses/ physicians in their report, however, Officer-Trooper SHEPHERD never checked up on the situation, nor did he follow up on his own investigation. His intention was directed towards Appellee being the fault of the accident.

This was a single accident. In fact, nor was it an open and shut case. "IT WAS A TWO-VEHICLE-ACCIDENT". Trooper Shepherd had even written it in his report: "THAT THE APPELLEE'S VEHICLE WAS BLUE." When in fact, the vehicle (TRUCK) was GREEN/TAN. A fact that should have not been mistaken, especially by a trained Officer of the Law. However, if the Officer was in a rush to apprehend some one, he would have made this mistake.

This Proposition of Law consists of an Officer misuseing his Authority, without any consideration for the public servants. This clearly, supports that Appellee was denied his FOURTEENTH Amendment Rights under the United States Constitution. This case must be VACATED and the Appellee RELEASED immediately.

PROPOSITION OF LAW NO.5: THE TRIAL COURT ERRED AS A MATTER OF LAW, WHEN IT ACCEPTED A PLEA BARGAIN, WHEN THE PLEA WOULD JEOPARDIZE THE "DOUBLE JEOPARDY CLAUSE" AND WHEN THE COURT IMPOSED A SENTENCE BEYOND THE MINIMUM SENTENCE FOR A FIRST TIME OFFENDER, VIOLATING HIS DUE PROCESS RIGHTS, GUARANTEED BY THE 14TH AMENDMENT OF THE U.S. CONSTITUTION; AND THE 5th AMENDMENT OF THE U.S. CONSTITUTION.

The Fifth Amendment to the United States Constitution provides that: "[N]o person shall\*\*\*be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, Section 10, ARTICLE I, Ohio Constitution provides: "No person shall be twice put in Jeopardy for the same offense."

In *State v. Crago*(1990),53 Oh.St.3d.243,syllabus, the Court explained, "The test focuses upon the elements of the two statutory provisions, not the evidence proffered in a given case. Thus, as summarized in *United States v. Dixon*(1993),509 U.S.668,696 (in reference to *Blockburger v. U.S.*(1932),284 U.S. 299), the Blockburger test, "inquires whether each offense contains an element not contained in another;if not, they are the "same offense" and Double Jeopardy bars additional punishment and successive prosecution." Also see: *State v. Zima*(Ohio 2004),cited @806 N.E. 2d. 542.

It is clear, that driving under the influence is necessarily a lesser included offense of Aggravated vehicular Assault, under R.C. §2903.08(A)(1), which proscribes causing serious physical harm to another as a proximate result of driving under the influence. By definition a lesser included offense contains no element of proof beyond that that required for the greater offense.

Ohio Revised Code §2929.14(B) **mandated** the trial Court to impose the shortest term authorized, unless the Court found certain facts. A trial court could not impose more than the minimum sentence without making a statutory finding on the record for a first time offender, *State v. Comer*, 99 Ohio St.3d. 463,469. The minimum sentence for O.R.C. §2903.08(F3) is one year. However, this should not be even considered, as Appellee should have not been indicted, charged or convicted of AGGRAVATED VEHICULAR ASSAULT. This Proposition Law has constitutional question, and must be reviewed in further.

#### IN CONCLUSION

For the foregoing reasons, This Court must accept Jurisdiction in this case, as constitutional question exists.

Respectfully submitted,

*Alex Clark*  
ALEX CLARK #513-829  
BeCI P.O. BOX 540  
St.Clairsville, Ohio 43950  
APPELLEE, PRO SE

#### PROOF OF SERVICE

I hereby verify that a TRUE COPY OF THE FOREGOING MEMORANDUM IN SUPPORT OF JURISDICTION, HAS been sent by regular U.S. mail to the STARK COUNTY PROSECUTION OFFICE, RENEE WATSON, @110 CENTRAL PLAZA,SUITE 510,CANTON,OHIO 44702,on this 6th day of FEBRURAY, 2008

*Alex Clark*  
ALEX CLARK  
APPELLEE, PRO SE

NANCY S. REINHOLD  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

08 JAN 22 PM 2:43

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ALEX J. CLARK

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2007 CA 00206

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. 2006 CR 00493

JUDGMENT:

Affirmed

(R)

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Plaintiff-Appellee

JOHN D. FERRERO  
PROSECUTING ATTORNEY  
RENEE M. WATSON  
ASSISTANT PROSECUTOR  
110 Central Plaza South, Suite 510  
Canton, Ohio 44702

For Defendant-Appellant

ALEX J. CLARK, PRO SE  
BELMONT CORRECTIONAL INSTITUTE  
Post Office Box 540  
St. Clairsville, Ohio 43950

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*Wise, J.*

{¶1} Appellant Alex J. Clark appeals from the denial of his request for postconviction relief in the Stark County Court of Common Pleas. The relevant facts leading to this appeal are as follows.

{¶2} As a result of a two-vehicle collision on February 18, 2006, appellant was indicted on one count of aggravated vehicular assault and one count of operating under the influence of alcohol. Appellant initially pled not guilty and obtained counsel. On September 11, 2006, appellant changed his plea to guilty as to both counts.

{¶3} On October 20, 2006, following a presentence investigation, the trial court sentenced appellant to two years in prison on count one, and six months on count two, to be served concurrently.

{¶4} On June 20, 2007, appellant filed a petition for post-conviction relief. The trial court reviewed the petition and issued a judgment entry on June 26, 2007, denying same.

{¶5} On July 18, 2007, appellant filed a notice of appeal of the judgment entry denying his postconviction petition. The case was thereafter placed on this Court's accelerated docket. He herein raises the following six Assignments of Error:

{¶6} "I. TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING APPELLANT'S POST-CONVICTION (SIC), PURSUANT TO O.R.C. §2953.23(A)(a) (SIC). DENYING APPELLANT DUE PROCESS OF LAW, IN VIOLATION OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶7} "II. TRIAL COURT ERRED AS A MATTER OF LAW, WHEN IT REFUSED TO REVIEW THE NEWLY DISCOVERED EVIDENCE IN ITS ENTIRELY

(SIC). DEPRIVING THE APPELLANT OF HIS DUE PROCESS RIGHTS, GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶8} "III. APPELLANT LACKED EFFECTIVE ASSISTANCE OF COUNSEL, THROUGH OUT THE JUDICIAL PROCESS, RESULTING IN AN IN AN (SIC) INVALID PLEA AGREEMENT, IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE I § 10 OF THE OHIO CONSTITUTION.

{¶9} "IV. THE INVESTIGATING TROOPER AT THE SCENE OF THE ACCIDENT, COMMITTED BIAS THROUGH STEREO-TYPING (SIC) THE APPELLANT, AND FAILING TO INVESTIGATE BOTH DRIVER'S (SIC), BEFORE DETERMING (SIC) THE RESULTS, THIS PROCESS DENYING THE APPELLANT OF THE DUE PROCESS OF THE LAW, GUARANTEED UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶10} "V. APPELLANT WAS DEPRIVED OF HIS 14TH AMENDMENT, DENYING HIM DUE PROCESS OF THE LAW, WHEN HE WAS INDICTED UPON INSUFFICIENT EVIDENCE, AS THE GRAND JURY DID NOT HAVE ENOUGH OR SIGNIFICANT EVIDENCE, AND WITHHELD FROM REVIEWING CREDIBLE EVIDENCE.

{¶11} "VI. THE TRIAL COURT ERRED AS A MATTER OF LAW, WHEN IT ACCEPTED A PLEA BARGAIN, WHEN THE PLEA WOULD JEOPARDIZE THE 'DOUBLE JEOPARDY CLAUSE'; AND WHEN THE COURT IMPOSED A SENTENCE BEYOND THE MINIMUM SENTENCE FOR A FIRST TIME OFFENDER, VIOLATING HIS DUE PROCESS RIGHTS, GUARANTEED BY THE 14TH AMENDMENT OF THE

UNITED STATES CONSTITUTION: AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

I., II., III., V.

{¶12} In his First, Second, Third, and Fifth Assignments of Error, appellant argues the trial court erred by denying his petition for post-conviction relief, where appellant had alleged he was denied pre-trial access to medical evidence about the accident victim. We disagree.

{¶13} As an initial matter, we note the pertinent jurisdictional time requirements for a postconviction petition are set forth in R.C. 2953.21(A)(2) as follows: "Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication \* \* \*. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal."

{¶14} In order for a trial court to recognize an untimely or successive postconviction petition pursuant to R.C. 2953.23(A)(1), both of the following requirements must apply:

{¶15} "(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States

Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

{¶16} "(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted \* \* \*."

{¶17} A court has no jurisdiction to hear an untimely petition for postconviction relief unless the movant meets the requirements in R.C. 2953.23(A). *State v. Demastry*, Fairfield App. No. 05CA14, 2005-Ohio-4962, ¶ 15. Here, appellant filed his postconviction petition on June 20, 2007, pertaining to his guilty plea and sentence of October 20, 2006. His petition is thus facially untimely; however, appellant appears to argue that he was "unavoidably prevented" from discovery of hospital drug test records of the driver of the other automobile. See R.C. 2953.23(A)(1)(a), *supra*.

{¶18} The record reveals the State filed a "receipt of discovery" with the trial court on June 19, 2006, which had been signed by appellant's trial counsel, showing that medical records for the accident victim had been provided to the defense. Appellant's attempt to meet R.C. 2953.23(A)(1)(a) is thus not supported by the record. Furthermore, under the circumstances of this case, appellant cannot satisfy the additional requirement found in R.C. 2953.23(A)(1)(b), *supra*, (i.e., " \*\*\* but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense \*\*\*"), because appellant was convicted based on his entry of a guilty plea to the charges in the indictment. See, e.g., *State v. Smith*, Washington App.No. 04CA47, 2005-Ohio-4910, ¶ 25, citing *State v. Halliwell* (1999), 134 Ohio App.3d 730, 735, 732 N.E.2d 405.

{¶19} Accordingly, appellant's First, Second, Third, and Fifth Assignments of Error are overruled.

IV., VI.

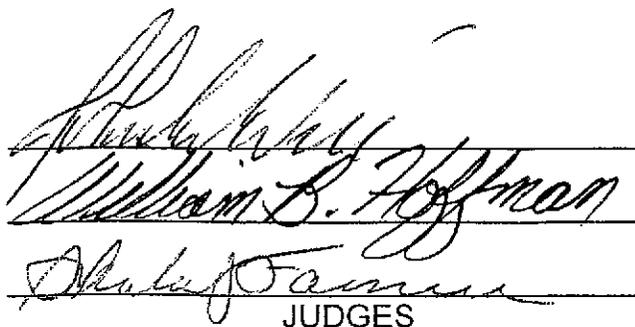
{¶20} In his Fourth and Sixth Assignments of Error, appellant appears to argue that postconviction relief should have been granted on the grounds that the investigating trooper was biased and that appellant's plea bargain and sentence violated his constitutional rights. We disagree.

{¶21} We note appellant's petition failed to provide any additional materials in support of these claims. "When a defendant fails to append to his postconviction relief petition evidence dehors the record, his motion may be barred on res judicata grounds, because the issue could be fully determined by evidence on the record, which is appropriately brought by virtue of a direct or delayed appeal." *State v. Williams*, Cuyahoga App.No. 85858, 2005-Ohio-4422, ¶ 10, citing *State v. Combs* (1994), 100 Ohio App.3d 90, 97, 652 N.E.2d 205.

{¶22} Appellant's Fourth and Sixth Assignments of Error are therefore overruled based on res judicata.

{¶23} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.  
Hoffman, P. J., and  
Farmer, J., concur.



JUDGES

NANCY S. REINHOLD  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

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IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

ALEX J. CLARK

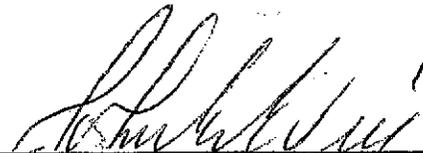
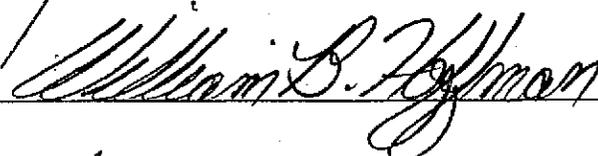
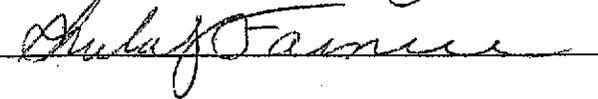
Defendant-Appellant

JUDGMENT ENTRY

Case No. 2007 CA 00206

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

  
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JUDGES