

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. **08-1401**  
Plaintiff-Appellee, : Appeal taken from the Franklin  
County Court of Appeals  
v. : Tenth Appellate District  
C.A. Case No. 07AP-810  
ROBERT W. BETHEL, :  
Defendant-Appellant. : This is a capital case.

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**MEMORANDUM IN SUPPORT OF JURISDICTION**

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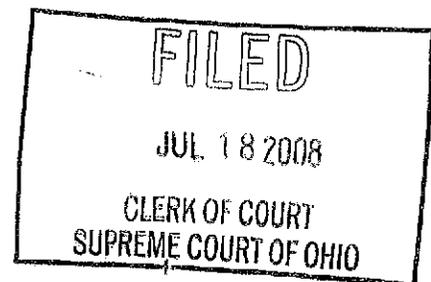
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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents critical issues for death-sentenced appellants in Ohio. Specifically, the issues are: (1) whether Appellant's rights guaranteed by the United States Constitution and the Ohio Constitution were violated by his counsel's failure to investigate trial phase issues; (2) whether Appellant's constitutional rights were violated by his counsel's failure to present mitigation testimony; (3) whether Appellant's constitutional rights were violated by the prosecutor's improper statements; (4) whether the doctrine of res judicata was erroneously applied by the lower courts; (5) whether a capital post-conviction petitioner is entitled to discovery and expert assistance to support his claims; and (6) whether the post-conviction process in Ohio affords capital petitioners an adequate corrective process with due process.

Appellant Robert W. Bethel is a death-row inmate. He now comes before this Court, in an attempt to obtain meaningful access to his statutory right to post-conviction remedies. Although his post-conviction petition alleged facts that could not have been determined from the record, some of the claims he raised were denied on the basis of res judicata.

Appellant had a statutory right to a hearing on all of the issues in the post-conviction petition based on the sufficiency of his supporting evidence. See O.R.C. §2953.21(C) and (E). The denial of an evidentiary hearing by the Court of Appeals and the trial court also violated Appellant's liberty interest under the Due Process Clause of the Fourteenth Amendment. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980); Fox v. Coyle, 271 F.3d 658, 665-666 (2001).

This Court should also review this case to resolve other constitutional due process issues Appellant has raised. The Court of Appeals upheld the trial court's denial of Appellant's discovery request. If that decision is allowed to stand, a petitioner's right to a meaningful corrective process would be rendered illusory. Case v. Nebraska, 381 U.S. 336 (1965).

Bethel requests that this Court grant jurisdiction to hear this case and reverse the decision of the Court of Appeals.

### **STATEMENT OF THE CASE AND FACTS**

#### **A. Procedural Posture**

On November 16, 2000, Appellant Robert W. Bethel was indicted on two counts of aggravated murder under Ohio Revised Code § 2903.01(A), and related charges. Each aggravated murder count included death specifications. The court appointed counsel to represent Appellant. The jury returned guilty verdicts on all counts and specifications. After the mitigation hearing, the jury returned a recommendation that the death penalty be imposed. On August 26, 2003, the trial court sentenced Appellant to death.

On February 28, 2005, Bethel filed his post-conviction petition pursuant to O.R.C. § 2953.21. He also filed a Motion for Leave to Conduct Discovery, a Motion for the Appropriation of Funds for a False/Coerced Confession Expert, a Motion for the Appropriation of Funds for a Ballistics Expert, and a Motion for the Appropriation of Funds for a Forensic Pathologist. He filed a Motion for Appropriation of Funds for an Attorney Expert on July 19, 2005. He amended the petition on April 26, 2005, and then amended again with leave of court on June 15, 2007.

On August 31, 2007, the trial court issued its Decision on Bethel's Post-Conviction Petition. It denied all of Bethel's grounds for relief, his motions for leave to conduct discovery, his motions for appropriation of expert funds, and "any remaining motions." Decision, p. 25. Its Entry Dismissing Bethel's Post-Conviction Petition, based on its previously issued decision, was issued on September 13, 2007.

The Ohio Court of Appeals for the Tenth District affirmed the trial court's decision on June 5, 2008. It denied Bethel's Application for Reconsideration on July 10, 2008.

This timely appeal follows.

**B. Statement of Facts**

The Columbus Police discovered the bodies of James Reynolds and Shannon Hawk on June 25, 1996, in a field. Tr. Vol. XI, p. 33. Reynolds and Hawk had been shot multiple times. Tr. Vol. X, p. 54. Both were found lying on their backs, with Hawk's legs draped over Reynolds. Id. at 57.

Reynolds sustained ten gunshot wounds. Five bullets recovered from his body were consistent with a nine millimeter pistol, and one was consistent with a twelve gauge shotgun slug. Tr. Vol. XII, p. 74. Based on the position of the bodies and the through-and-through nature of some of the wounds, the coroner opined that projectiles should be in the ground beneath the body. Id. at 107-08, 110. Investigators dug in the dirt beneath the body, but no projectiles were recovered. Id. at 107.

The shotgun slug wound (referred to as "wound six") was in Reynolds' back. Id. at 69. Although this wound had damaged several organs, the wound did not bleed. Id. at 69, 74, 96, 98. Three of the wounds went from the back to front, with the other seven going from the front to back. Id. at 61, 68, 69, 106. One wound to Reynolds' head (wound three) had a fairly straight downward path of travel, in what can be described as "an execution style" wound. Of the three shots striking Reynolds' legs (wounds 8, 9, and 10), two came from the front and one from the back. Id. at 106-07.

Forensic Pathologist Larry Tate observed abrasions on Hawk's lower back, left shoulder, right arm and elbow, and the back of her right leg, none of which had started to heal. Id. at 12-

13, 40. Hawk received four gunshot wounds consistent with a nine millimeter pistol. Id. at 6-7, 14, 21, 25, 30. One of the two wounds to the head was fatal. Id. at 25. Tate was unable to determine the order in which the wounds were inflicted. Id. at 42.

Four years later, Robert Bethel was indicted for two counts of aggravated murder, with two death penalty specifications on each count. Count one, the aggravated murder of Shannon Hawk, carried the O.R.C. § 2929.04(A)(3) and (A)(5) specifications. Count two, the aggravated murder of Reynolds, carried the O.R.C. § 2929.04(A)(5) and (A)(8) specifications. Both counts also contained firearms specifications. Jeremy Chavis was also indicted for their murders. Tr. Vol. IV, pp. 46-50.

The trial court appointed attorneys Joseph Edwards and Ron Janes to represent Bethel. Tr. Vol. XIII, p. 49. After four continuances, trial was set for August 30, 2001. Dkt. 14, 25, 29, 37, 40. In a letter from Bethel to the trial court dated August 27, 2001, and made part of the record on September 17, 2002, Bethel expressed his fear about the lack of preparation by his trial counsel. This letter was sent prior to Bethel's proffer and plea. Dkt. 323-325.

Bethel's fears were well-founded. Janes later admitted that they were not prepared to go to trial August 30, 2001. Tr. Vol. IV, p. 200. They had not even hired an investigator until ten days prior to the trial date. Tr. Vol. XIV, p. 6-7, 27. The investigator, Gary Phillips, testified that counsel told him they were in "a panic mode" because of their lack of investigation. Id. at 31.

Not surprisingly, defense counsel did not begin the mitigation investigation any earlier. On August 20, 2001 – ten days before the trial date – the defense got an order for the release of Bethel's records from Franklin County Children's Services to use in mitigation. Dkt. 49. Other than a Demand for Discovery (Dkt. 17) and Request for a Bill of Particulars (Dkt. 18), trial

counsel filed only one other motion – a motion requesting the appointment of a mitigation specialist. Dkt. 33.

For her own reasons, Bethel's mother hired an attorney, Sanford Cohan. Tr. Vol. IV, p. 8-10; PC Exh. 6. Janes and Edwards sought to use Cohan to help get Bethel to take a plea deal. PC Exh. 6. Without doing any investigation, they had decided that Bethel should avoid trial and plead guilty. They wanted Cohan to convince Bethel's mother that her son needed to plead guilty. Id.

In the weeks leading to trial, the attorneys and mitigation specialist visited Bethel in jail. They insisted that Bethel plead guilty. Tr. Vol. VIII, pp. 55-61. On the eve of trial, the defense team began an all-out effort to get Bethel to plead guilty. On August 29, 2001, at 3:00, Bethel was called from his cell to the courtroom.

Bethel was put in an empty courtroom, and the entire defense team was there. Bethel was immediately confronted by his mother, who was hysterical. Tr. Vol. XIII, p. 64. His mother said "I don't want you to die" and "do whatever you have to do." Id. at 65. Cohan explained the deal to him. Bethel was given the impression he could not fire these attorneys, and that no continuance would be granted. Id. at 68.

Because of the lack of investigation, Bethel believed his only choice was to plead guilty or to get the death sentence. Id. at 68-71. He knew that the deal was contingent on an agreement from him to give a statement and to testify against Chavis. Tr. Vol. IV, pp. 67, 69, 94. He also knew he would not testify against Chavis, but he was left with the impression by his attorneys that if he later refused to testify, his statement could not be used against him unless he testified at his own trial. Id. at 77-81, 113; Tr. Vol. XIII, pp. 77, 81. The plea agreement and proffer letter supported his impression. See dkt. 87, 102.

The terms of the proffer were agreed upon during plea negotiations between prosecutors, Bethel, and defense counsel. Tr. Vol. V, p. 2. The terms were memorialized in a letter-contract drafted by prosecutors. Dkt. 102. That letter included a prohibition that kept Bethel's statement from being used against him at the trial. Id. But the State reserved the right to make derivative use of the information provided, or to use it for impeachment purposes should Bethel testify at his trial. Id.

To prepare for the proffer, prosecutors provided Bethel with several videotapes of State's witnesses. Tr. Vol. IV, p. 128, 174, 176-77; Vol. X, p. 179. Bethel had also reviewed the coroners' reports, pictures, witness statements, and police summaries.

The next day, Bethel made a proffer to Franklin County prosecutors in the presence of his attorneys, federal agent, and Columbus Police Detectives. Tr. Vol. I, p.1-2; Vol. XI. p. 172-73. His statement was consistent with the evidence he had reviewed, and he implicated himself and Chavis in the murders. Tr. Vol. III, p. 2. Prosecutors told the court they were satisfied Bethel was truthful during the proffer. Tr. Vol. II, p. 3.

Right before the plea hearing, prosecutors gave Bethel's counsel the plea contract. Tr. Vol. IV, pp. 131-33. In reviewing it, Bethel discovered that the terms of the first paragraph made his statement admissible at trial, regardless of whether he testified. He brought it to the attention of his attorneys. Id. at 142. This language, which was at odds with the original terms of the proffer, was a surprise to the defense. Id.

The sixth paragraph of the contract, however, made the entire contract null and void if the prosecutors determined that Bethel violated the terms of the contract. Bethel was led to believe that paragraph six meant what it said: that if Bethel did not testify against Chavis, the parties were returned to pre-agreement – and pre-proffer – status. Id. at 74, 80-81; Tr. Vol. XIII, p. 74.

Because he believed paragraph six and knew his attorneys were not ready for trial, Bethel signed the contract even though he knew he would not testify against Chavis. Tr. Vol. IV, pp. 72, 82. See also Tr. Vol. XIII, pp. 68-71.

The trial court reviewed the terms but did not address the conflicting provisions of paragraphs one and six. See 8-30-01 Hrng. During the plea hearing, the prosecutor stated, “if he does decide that he changes his mind and doesn’t want to plead guilty or want to testify against Jeremy Chavis, *this agreement takes us right back to where we started.*” Id. at 4. It is true that the Court told Bethel that the proffer could be used against him. But neither the prosecutor nor the Court discussed the terms of paragraph six. Bethel pled guilty to two counts of aggravated murder with three-year guns specifications on each, and the State dismissed the death specifications. Dkt. 87.

On November 13, 2001, Chavis’ trial began. Tr. Vol. III, p. 3. Bethel refused to testify, and the prosecutors moved the court to withdraw Bethel’s plea. Id. at 3-4. On December 18, 2001, the plea agreement was found to be null and void. Dkt. 114.

With new counsel appointed, Bethel moved to suppress his statement, or in the alternative, to limit its admission as involuntary and made under duress. Dkt. 158. At the suppression hearing, both Edwards and Janes testified that they specifically recalled reviewing paragraph one of the contract with Bethel, but neither specifically remembered reviewing or explaining paragraph six. Tr. Vol. IV, pp. 136, 157-58, 194, 196. Bethel testified that, based on his counsel’s advice, he believed that if he refused to testify, he would be back to square one. Id. at 74, 80-81. In other words, the original charges – including death specifications – would be reinstated. He would go to trial as originally charged, and his statement would not be admitted. Id. at 77, 79-80.

The trial court determined that the plea agreement is a contract, and characterized the conflicting contract language as “inartfully stated.” Tr. Vol. V, pp. 5, 8. It held that Bethel understood, agreed to, and then breached the plea contract. Id. at 5, 6, 8. It allowed the use of Bethel’s proffered statement at trial. Id. at 9.

Bethel’s trial began June 10, 2003. The State’s case was based on the theory that Bethel and Chavis sought to kill Reynolds to keep him from testifying against their friend, Tyrone Green. Tr. Vol. X, p. 20-22. Reynolds had witnessed Green murder a man in August of 1995, and Reynolds was listed as a witness in the discovery documents provided to Green’s counsel. Id. at 37-39, 50-51. Four years after Reynolds’ murder, police found those discovery documents in Cheveldes Chavis’ house. Id. at 72-79. The State’s witnesses included Donald Langbein and Theresa Cobb Campbell, who both testified that Bethel confessed to them his participation in the murders. Tr. Vol. XI, pp. 35-36, 149-150.

Langbein testified that Chavis and Bethel confided in him about their involvement in the murders. Id. at 35. He said that, prior to the murders, he and Bethel had talked about Tyrone Green’s case and that they had to “take steps to get rid of” the witnesses. Id. at 21. Chavis and Bethel waited until it was “a good time” with “no witnesses,” and then Bethel shot them with a nine-millimeter and Chavis used the shotgun. Id. at 35-6.

Langbein waited four years to tell the police what Bethel and Chavis had allegedly told him. Id. at 138. Upon being arrested for federal gun charges, Langbein came forward with his knowledge of the murders. Id. His new-found motivation to help the police led him to wear a wire, and he wore it on five separate meetings with Bethel in an attempt to “get a confession.” Id. at 127, 198-99. He was not successful on any of the five occasions. Id. at 130, 199.

Theresa Campbell testified that she remembered having a conversation with Bethel about the murders. Id. at 148. But she did not remember when that conversation occurred. Id. Campbell testified that she remembered meeting with police and telling them that Bethel told her of his involvement in the murders of Reynolds and Hawks. Id. at 148-49. But she admitted that she did not remember who Reynolds and Hawks were until after the prosecutor told her. Id. at 147-48. Campbell read to the jury the police report of her original statement to police, wherein she said that Bethel shot the victims while Chavis cried in the car. Id. at 164. Then she testified that she remembered this to be an accurate reflection of what she told the police in 1997. Id.

The defense theory was that someone else killed Reynolds as a result of Reynolds' involvement in drugs or in retribution for robberies and other crimes Reynolds committed. Tr. Vol. X, p. 31; Tr. Vol. XI, pp. 106-108. Langbein confirmed that he observed Reynolds in a confrontation with Joey Northrup on the evening of the shootings, and that Reynolds had displayed a pistol. Tr. Vol. XI, p. 108. Langbein also admitted that, when he witnessed that confrontation on the day of the shootings, he was in violation of his federal house arrest and was "playing the system." Id. at 104-06.

No physical evidence linked Bethel to the crime. The police had recovered 25 bags of evidence from the crime scene, yet Bethel was not linked to any of it. Tr. Vol. X, pp. 122-134. The murder weapons were never recovered.

The State's discovery documents from Green's case did not contain Bethel's fingerprints. Id. at 90-91. The police recovered them on November 19, 2000, from a house to which Bethel had no connection. Id. at 72, 82. See also Tr. Vol. XI, p. 43 (Bethel had only one brief contact with the Chavises and Langbein from 1996 until the wired conversations in 2000.)

The defense attempted to show that Bethel's proffer was a false confession motivated by Bethel's fear of conviction based on his attorneys' lack of preparation and investigation. Id. at 33-35. Both Langbein and Campbell were incredible witnesses, to whom Bethel had never confessed. Bethel had an alibi. Tr. Vol. XII, p. 129.

The jury found Bethel guilty of all charges. At the penalty phase, Bethel presented the testimony of his former supervisor, Joseph S. Burke, Sr. Tr. Vol. XV, pp. 23-35. Over objection, prosecutors were permitted to impeach Burke and present rebuttal evidence. Id. at 31-33, 37-41. Burke was the only evidence presented despite the wealth of available mitigation evidence.

During closing argument, Bethel's attorneys argued the few mitigating factors already in the record: Bethel's age (just over 18 at the time of the offense), abandonment by his father, and the positive life style changes Bethel had made. Tr. Vol. XVI, pp. 20-21. Despite the failure to present the wealth of other compelling mitigation, the jury still took three days to return a death recommendation on both counts. Tr. Vol. XVII, p. 4.

## ARGUMENT

### PROPOSITION OF LAW I

CAPITAL POST-CONVICTION PETITIONERS ARE ENTITLED TO DISCOVERY AND EXPERT ASSISTANCE WHEN THE PETITION PRESENTS SUFFICIENT OPERATIVE FACTS AND EXHIBITS IN SUPPORT OF CLAIMED VIOLATIONS OF CONSTITUTIONAL RIGHTS THAT RENDER A CAPITAL CONVICTION AND/OR DEATH SENTENCE VOID OR VOIDABLE.

Bethel filed two motions for leave of court to conduct discovery, in which he requested specific discovery to support his grounds for relief. The lower court erred in denying the discovery motions, as Bethel has the constitutional right to conduct discovery for post-conviction purposes.

Without court power to conduct discovery, a post-conviction petitioner is limited in his ability to procure the evidence needed to demonstrate that a hearing is warranted. O.R.C. § 2953.21; See State v. Cole, 2 Ohio St. 3d 112, 114 (1982); State v. Calhoun, 86 Ohio St. 3d 279, 281 (1999). The trial court, consistent with the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, cannot place this initial evidentiary burden upon a petitioner and subsequently deny him a meaningful opportunity to meet that burden. Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Evitts v. Lucey, 469 US. 387, 401 (1985); U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

Bethel also filed motions for the appropriation of funds for an expert in false/coerced confessions, a forensic pathologist, a ballistics expert, and an attorney expert. Bethel has maintained that his proffered statement is false, and that it was given under coercive circumstances. The defense theory at trial was that Bethel's confession was not accurate because he was forced to choose between going to trial with unprepared attorneys or giving a statement, pleading guilty, and "keeping [his] options open." Tr. Vol. IV, p. 19.

Bethel argued in his Third Ground for Relief in his post-conviction petition that trial counsel failed to utilize a confession expert to explain to the jury how he could be led to falsely confess. Bethel supported this Ground for Relief with an affidavit by Dr. Deborah Davis – a false/coerced confession expert. But due to budgetary issues, the Office of the Ohio Public Defender did not have sufficient funds for a full false/coerced confessions analysis, and Dr. Davis' analysis was limited.

In addition, Bethel needed a ballistics expert to show the jury that his statement did not match the physical evidence. Bethel argued in his Fifth Ground for Relief that trial counsel failed to utilize a ballistics expert to describe how Bethel's account of the shootings did not match the physical evidence. He supported this Ground for Relief with an affidavit by John R. Nixon – a ballistics expert. But due to budgetary issues, the Office of the Ohio Public Defender did not have sufficient funds for a full ballistics analysis, and Mr. Nixon's analysis was limited.

To further establish the inconsistencies between Bethel's statement and the physical evidence, Bethel moved the trial court for funding for a forensic pathologist. A forensic pathologist is necessary to rebut the coroner's testimony about the significance of the lack of bleeding in Reynolds' back wound. Bethel argued in his Sixth Ground for Relief that trial counsel was ineffective for failing to use a forensic pathologist. Bethel did not have the funding for even a limited analysis by a forensic pathologist, so he supported this Ground for Relief by establishing how such an expert was important in a similar case.

Bethel further requested that the trial court provide him with funding for an attorney expert. An attorney expert would be able to explain what a capital attorney should have done, and why it is important in a capital trial to independently investigate the case, interview witnesses, present expert witnesses, and put on a comprehensive mitigation case. In other words,

such an expert would enable Bethel to support all of his claims of ineffective assistance of counsel and establish deficient performance. The trial court erroneously denied him this funding, offering no explanation other than, “[t]he court has considered that request against the backdrop of the foregoing review of the issues presented and concludes that it should be denied.” Decision, p. 24. It also denied every one of his claims of ineffective assistance of counsel. *Id.* at 3-17, 18, 20-23.

The lower courts denied Bethel’s Third, Fifth, and Sixth Grounds for Relief without granting him the ability to hire the required experts. Without the expert analysis, Bethel is precluded from fully establishing the prejudice he suffered by his counsel’s deficient performance. Bethel’s requests for funding were not speculative nor a “fishing expedition,” and he should not be required to demonstrate he is entitled to relief without first using discovery to fully develop the facts. *See e.g. Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004) (“[A] court must provide discovery in a habeas proceeding only where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.”)

When the right to post-conviction relief is granted by a State, “financial hurdles must not be permitted to condition its exercise.” *Smith v. Bennett*, 365 U.S. 708, 712 (1961). Bethel has due process and equal protection rights to expert funding. *Powell v. Collins*, 332 F.3d 376, 395-396 (6th Cir. 2003) (Due Process rights violated when trial court refused to fund neuropsychiatrist); *Britt v. North Carolina*, 404 U.S. 226, 227 (1992); *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985); U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

Further, this Court, through Ohio Sup. R. 20 IV(D), provides trial courts with the authority to approve funding for experts for indigent petitioners seeking post-conviction relief. Sup. R. 20 IV(D) states: “[t]he appointing court shall provide appointed ... experts ... reasonably necessary ... at every stage of the proceedings including ... disposition following conviction.” This Court should remand Bethel’s case so that he may be afforded with these necessary experts.

## **PROPOSITION OF LAW II**

CAPITAL POST-CONVICTION PETITIONERS ARE ENTITLED TO RELIEF, OR AT LEAST AN EVIDENTIARY HEARING, WHEN THE PETITION PRESENTS SUFFICIENT OPERATIVE FACTS AND EXHIBITS IN SUPPORT OF CLAIMED VIOLATIONS OF CONSTITUTIONAL RIGHTS THAT RENDER A CAPITAL CONVICTION AND/OR DEATH SENTENCE VOID OR VOIDABLE.

The lower courts erred in dismissing Bethel’s post-conviction claims. Bethel raised violations of his constitutional rights that warranted relief; and (2) the petition contained sufficient operative facts and evidence outside the record that supports the grounds for relief, requires discovery, and merits an evidentiary hearing. The trial court’s findings of facts and conclusions of law should be reversed because they are against the manifest weight of the evidence.

In all of Bethel’s grounds for relief, he specifically pled the deprivation of constitutional rights and submitted sufficient evidence demonstrating the error and prejudice.

### **A. Ineffective assistance of counsel during the trial phase.**

1. Defense counsel failed to investigate and fully inform Bethel before advising him to plead guilty. (First Ground for Relief)

Janes and Edwards failed to investigate and to inform their client of the facts before advising him to plead guilty. Faced with the prospect of going to trial with unprepared attorneys, Bethel pled guilty.

Bethel supported this claim with evidence dehors the record, but the trial court cited to this Court's direct appeal decision and found that "this argument is foreclosed by res judicata." Decision, p. 4. This was error. The fact that Bethel argued ineffective assistance of counsel on direct appeal has nothing to do with his post-conviction ineffective assistance issues.

The review performed on direct appeal is completely different from post-conviction review. On direct appeal, "appellate courts ... are left to judge from the bare record whether the assistance was effective." State v. Gondor, 112 Ohio St. 3d 377, 388-389 (2006). But in "postconviction petitions, however, the trial judge holds a hearing and receives testimony on the very issue of ineffective assistance." Id. Such grounds, by their very nature require "proof outside the record, such as affidavits demonstrating a lack of effort to contact witnesses or the availability of additional mitigating evidence." State v. Keith, 79 Ohio St. 3d 514, 536 (1997).

The trial court also erred when it found it "noteworthy that attorney [Sanford] Cohen did not state anywhere in his affidavit or in his testimony ... that [] defense counsel ... performed ineffectively." Decision, p. 6. Cohen was not an attorney expert, nor was he an expert on death penalty litigation. He was not even certified under Superintendence Rule 20 to litigate death penalty cases. Cohen was a fact witness, and that is the purpose of his affidavit. Thus, his "silence on those key points of constitutional significance" means nothing. Id.

In denying this claim, the Court of Appeals found that this Court had addressed Bethel's proffer in the direct appeal decision and that "Bethel has not presented any additional evidence (not available at trial) to support the petition." State v. Bethel, No. 07AP-810, 2008 Ohio 2697, \*P39, 2008 Ohio App. LEXIS 2322, \*\*18 (Franklin Ct. App. June 5, 2008). However, this decision is wrong for two reasons.

First, while the Court of Appeals is correct in finding that this Court had reviewed Bethel's proffer in direct appeal; that decision does not apply to Bethel's claim raised in post-conviction. The review performed on direct appeal is completely different from post-conviction review.

Here, Bethel supported this claim with evidence dehors the record, and the Court of Appeals' reliance on this Court's direct review decision is misplaced. The fact that Bethel argued ineffective assistance of counsel on direct appeal has nothing to do with his post-conviction ineffective assistance issues.

As this Court has recognized, on direct appeal, "appellate courts ... are left to judge from the bare record whether the assistance was effective." State v. Gondor, 112 Ohio St. 3d 377, 388-389 (2006). But in "postconviction petitions, however, the trial judge holds a hearing and receives testimony on the very issue of ineffective assistance." Id. Such grounds, by their very nature require "proof outside the record, such as affidavits demonstrating a lack of effort to contact witnesses or the availability of additional mitigating evidence." State v. Keith, 79 Ohio St. 3d 514, 536 (1997).

Because Bethel supported this claim with evidence dehors the record, the Court of Appeals' reliance on this Court's direct appeal decision was error. In other words, the fact that Bethel argued ineffective assistance of counsel on direct appeal has nothing to do with his post-conviction ineffective assistance issues.

Second, the Court of Appeals applied the wrong test when it found that "Bethel [had] not presented any additional evidence (not available at trial) to support the petition." See ." State v. Bethel, No. 07AP-810, 2008 Ohio 2697, \*P39, 2008 Ohio App. LEXIS 2322, \*\*18 (Franklin Ct. App. June 5, 2008). Bethel is not required to "present additional evidence (not available at trial)

to support [his] petition.” Ohio’s post-conviction is governed by Ohio Rev. Code Ann. §2953.21 (Lexis/Nexis 2008). It provides:

(A) (1) (a) Any person who has been convicted of a criminal offense ... and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, ... may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

Ohio Rev. Code Ann. §2953.21(A)(1)(a). (Emphasis added).

2. Defense counsel failed to use false/coerced confession expert. (Third Ground for Relief)

The State obtained Bethel’s statement under coercive circumstances, but counsel failed to utilize a confession expert to explain why somebody might falsely confess. The trial court erroneously found this claim to be “foreclosed by res judicata.” Decision, p. 10. It based this finding on the fact that Judge Miller (the original trial judge) had a hearing regarding the admission of Bethel’s statement, and that this claim was “of record for direct appeal.” Id.

The Court of Appeals agreed with the trial court. In denying this claim, the Court of Appeals found that because this Court had ruled on this claim, res judicata bars Bethel from raising it in post-conviction. Bethel, No. 07AP-810, 2008 Ohio 2697, 2008 Ohio App. LEXIS 2322 (Franklin Ct. App. June 5, 2008), p. 14.

Simply because a similar claim was raised on direct appeal, res judicata does not automatically bar Bethel’s post-conviction claim. In fact, this Court’s reasoning for denying Bethel’s direct appeal claim establishes that it is more appropriately raised on post-conviction review. This Court cited State v. Madrigal, 87 Ohio St. 3d 378, 390-91 (2000), wherein it denied a claim that counsel should have obtained an eyewitness identification expert. It then applied its

reasoning in Madrigal to Bethel's case, stating, "Establishing [that counsel was ineffective for not obtaining that expert] would require proof outside the record. Such a claim is not appropriately considered on a direct appeal." State v. Bethel, 110 Ohio St. 3d 416, 443 (2006). Bethel supported his post-conviction claim with evidence dehors the record.

3. Defense counsel failed to present psychological testimony during the trial phase. (Fourth Ground for Relief)

Bethel's defense included an explanation of why he gave an untrue statement. But counsel left out the key influence in Bethel's decision – his mother. Counsel failed to explain the unique relationship between Bethel and his mother and its effect on his decision.

The Court of Appeals, in addressing this claim, failed to consider that Bethel could have falsely confessed. It assumed the end result – that Bethel has been found guilty – when evaluating what defense counsel should have presented to a jury that had not yet rendered a verdict. Defense counsel surely did not dismiss the idea that their client falsely confessed, or they would not have allowed Bethel to testify under oath about how he was coerced into confessing.

4. Defense counsel failed to use a ballistics expert. (Fifth Ground for Relief)

Bethel's defense was that the proffered statement was false, given solely to avoid going to trial with unprepared attorneys. The cornerstone of this claim has always been that Bethel's statement did not match the crime scene evidence. Counsel needed to hire a ballistics expert to explain how the proffer did not match the crime scene evidence.

In denying this claim, the Court of Appeals found that "[o]ne remembers the most 'important' part – that you murdered two people – without necessarily remembering all the details about how and when one fired each shot. Thus, counsel's failure to engage the opinion of a ballistics expert did not constitute ineffective assistance of counsel." Bethel, No. 07AP-810,

2008 Ohio 2697, \*P46, 2008 Ohio App. LEXIS 2322, \*\*21-22 (Franklin Ct. App. June 5, 2008).

But the Court of Appeals' decision ignores the facts and the importance of a ballistic expert.

A ballistics expert, like Nixon, would have provided important information to the trier of fact and contradicted the State's assertions. Bethel's proffered statement perfectly matched the physical evidence. See Sims v. Livesay, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (holding that counsel was constitutionally ineffective for failing to conduct an investigation into certain physical evidence that would have undermined the prosecution's theory that the victim was shot at a distance). Showing how the proffered statement was not consistent with the physical evidence was a key part of the defense.

While it is true that Bethel included two murders in his confession, the reasoning by the Court of Appeals is erroneous and compels the conclusion that no one ever has or will falsely confess to a crime. It assumes that if a confession is false, the type of crime is the only "important part" and the rest is meaningless. An example of the only possible false confession would be one confessing to a burglary when the charge is rape. This cannot be the law.

Counsel is required to conduct a full investigation in order to make an informed, tactical decision about what information would be helpful to the client's case. See Glenn v. Tate, 71 F.3d 1204, 1209-1211 (6th Cir. 1995); Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. Strickland v. Washington, 466 U.S. 668, 690-691 (1984).

5. Defense counsel failed to use an expert in forensic pathology. (Sixth Ground for Relief)

Bethel's claim that his proffered statement was false could have been bolstered with the testimony of a forensic pathologist. Such an expert was necessary to establish that Reynolds was dead when he was shot in the back with the shotgun. Counsel's failure to hire a forensic pathologist was ineffective and prejudicial.

In denying this claim, the trial court found that favorable forensic testimony is purely speculative, and it denied Bethel the funding for an expert to fully and fairly support his Sixth Ground for Relief. The Court of Appeals took the stance that, since Bethel got the "important part" right – two people were murdered – the rest does not matter.

While it is true that Bethel included two murders in his confession, the reasoning by the Court of Appeals is erroneous and compels the conclusion that no one ever has or will falsely confess to a crime. It assumes that if a confession is false, the type of crime is the only "important part" and the rest is meaningless. An example of the only possible false confession would be one confessing to a burglary when the charge is rape. This cannot be the law.

6. Defense counsel failed to adequately investigate the witnesses against Bethel. (Seventh Ground for Relief)

Bethel was denied his right to effective assistance of counsel when counsel failed to adequately investigate Theresa Cobb Campbell. Campbell was a crucial witness against Bethel, as she claimed Bethel had confessed to her his involvement in the murders. Tr. Vol. XI, pp. 149-152. Had counsel conducted the necessary investigation, counsel would have been able to effectively cross-examine her regarding her mental health. See Ex. 4; Ex. 7.

An adequate cross examination requires that defense counsel "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences

relating to the reliability of the witness.” Davis v. Alaska, 415 U.S. 308, 318 (1974). Campbell was not a credible or reliable witness, and Bethel’s counsel attempted to impeach Campbell by pointing out her history of mental illness and the medications she takes. Tr. Vol. XI, pp. 154-57, 165-66. What counsel failed to point out, however, was that Campbell “has a habit of hearing things and then making up stories in her mind... sometimes [] makes up things that aren’t really true...[and] has delusions and makes up stories *even when she’s on her medication.*” Exh. 7 (emphasis added). Thus, Campbell’s police statement and testimony were both unreliable, regardless of the fact that she was medicated.

In denying this claim, the Court of Appeals found that Campbell’s mother’s attitude towards Campbell would not have affected the outcome in the culpability phase because Bethel’s proffer was already found to be admissible. Bethel, No. 07AP-810, 2008 Ohio 2697, \*P49, 2008 Ohio App. LEXIS 2322, \*\*23 (Franklin Ct. App. June 5, 2008). Not only does this demonstrate how important it was for counsel to attack the accuracy of the proffer, but it ignores the essential problem – counsel’s failure to investigate.

Here, the question is the adequacy of counsel’s investigation and Bethel’s right to adequately cross-examine a key state witness against him. See Wiggins, 539 U.S. 510; Williams, 529 U.S. 362; Strickland, 485 U.S. 668.

7. Defense counsel failed to impeach State's witness. (Eighth Ground for Relief)

Bethel's counsel failed to impeach State's witness, Donald Langbein. Langbein's testimony in Bethel's trial differed significantly from his testimony at Chavis' trial, as well as from his statements to detectives. Bethel's counsel failed to cross-examine Langbein on the inconsistencies.

The Court of Appeals' finding that Langbein's testimony was not prejudicial or outcome determinative is contrary to this Court's direct appeal decision. This Court specifically relied on Langbein's testimony in upholding Bethel's conviction. See Bethel, 110 Ohio St. 3d at 426, 432. It also contradicts its own statements about Langbein's testimony, as the court initially stated, "The longer Langbein testified, the more damage to Bethel's defense...." Bethel, No. 07AP-810, 2008 Ohio 2697, \*P51, 2008 Ohio App. LEXIS 2322, \*\*23 (Franklin Ct. App. June 5, 2008).

8. Defense counsel failed to investigate and introduce evidence of other suspects. (Twentieth Ground for Relief)

Counsel failed to investigate and introduce evidence of other suspects, despite being provided with police summaries that implicated other individuals. The trial court erroneously dismissed this claim, calling it "purely speculative." Decision, p. 21.

The Court of Appeals agreed with the trial court, stating, "Defense counsel was not ineffective for failing to seek that which was apparently nonexistent." Memorandum Decision on Application for Reconsideration, p. 2. But the evidence that Bethel attached to this ground for relief shows that this evidence did, in fact, exist.

But in State v. Brown, 115 Ohio St. 3d 55 (2007), this Court found similar police reports to be significant. Id. at 64. Despite the fact that "the statements contained in these reports are hearsay and might not be admissible," the court said "they are material." Id. In other words,

unlike the trial court, this Court did not just dismiss these statements as part of a routine police investigation “[in] which they write down a bunch of stuff...” 6/1/07 Hrng, p. 27.

9. Defense counsel failed to introduce into evidence the additional taped conversations between Bethel and Donald Langbein. (Twenty-second Ground for Relief)

The State was permitted to use portions of the controlled contact between Langbein and Bethel and to draw adverse inferences from those portions. Defense counsel should have both proffered the tapes into the record at that time, and introduced them into evidence later on. Due to counsel’s failure, the jury never got to evaluate why Bethel would deny knowledge of the homicides to Langbein – the same person to whom he had supposedly confessed. See Tr. Vol. XI, pp. 35-6, and Exh. 36.

The jury heard none of most significant parts of Langbein’s cross-examination. Tr. Vol. XI, p. 110. The portion of testimony that Bethel quoted in his Twenty-second Ground for Relief was defense counsel’s proffered use of the additional tapes – a cross-examination of Langbein that occurred out of the presence of the jury. Thus, the jury was without the benefit of that “vigorous cross-examination” and could not effectively evaluate Langbein’s credibility. See Crawford v. Washington, 541 U.S. 36, 63 (2004) (“Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them.”)

Bethel’s trial judge (not the same judge as his post-conviction judge) ruled that the tapes were admissible and defense counsel could use the tapes in Bethel’s case-in-chief. Tr. Vol. XI, p. 88. The prosecutor even conceded that the tapes could be used when Bethel testified. See id. at 86. Still, counsel failed to do so.

**B. Ineffective assistance of counsel during the mitigation phase.**

**1. Defense counsel failed to investigate prior to advising Bethel to plead guilty. (Second Ground for Relief)**

Janes and Edwards did not conduct a mitigation investigation prior to advising Bethel to plead guilty. Because counsel failed to conduct this crucial investigation, counsel could not have adequately advised Bethel of his options, and any such decision by Bethel to plead guilty was not an informed decision.

In denying this claim, the Court of Appeals found that this Court had addressed whether Bethel's "acted less than competent in advising Bethel during plea negotiations..." and that Bethel's evidence "is neither new, nor newly-discovered evidence for the purpose of post-conviction relief." Bethel, No. 07AP-810, 2008 Ohio 2697, \*P42, 2008 Ohio App. LEXIS 2322, \*\*20 (Franklin Ct. App. June 5, 2008).

Bethel supported this claim with evidence dehors the record, and the Court of Appeals' reliance on this Court's direct review decision is misplaced. As this Court has recognized, on direct appeal, "appellate courts ... are left to judge from the bare record whether the assistance was effective." Gondor, 112 Ohio St. 3d at 388-389. But in "postconviction petitions, however, the trial judge holds a hearing and receives testimony on the very issue of ineffective assistance." Id. Such grounds, by their very nature require "proof outside the record, such as affidavits demonstrating a lack of effort to contact witnesses or the availability of additional mitigating evidence." Keith, 79 Ohio St. 3d at 536.

Second, the Court of Appeals applied the wrong test when it found that the evidence Bethel presented "is neither new, nor newly-discovered evidence for the purpose of post-conviction relief." Bethel, No. 07AP-810, 2008 Ohio 2697, \*P42, 2008 Ohio App. LEXIS 2322,

\*\*20 (Franklin Ct. App. June 5, 2008). The standard for post-conviction is not that the evidence is new or newly discovered.

2. Defense counsel failed to present mitigating evidence (Tenth through Sixteenth Grounds for Relief)

It is not the client who dictates which witnesses will be called, as “[d]ecisions about what evidence to present and which witnesses to call are in this category and are committed to counsel's professional judgment.” State v. Williams, 99 Ohio St. 3d 493, 511 (2003). Surely trial counsel did not check with Bethel before deciding on each and every witness they would call during the *trial* phase. Thus, the responsibility for the witnesses presented during the mitigation phase must rest squarely on the shoulders of defense counsel.

This allocation of responsibility makes sense in light of this Court’s case law in the opposite situation – when defense counsel failed to present mitigation witnesses that the client *wanted* to have testify. For example, in Williams, this Court found no error when counsel disobeyed the client’s instructions to call certain witnesses, as it was counsel’s decision whether to call a witness. See id. And in Keith, 79 Ohio St. 3d at 530, the Court recognized that the omission of mitigating evidence could simply be an attorney’s decision. It cannot be, then, that Bethel’s defense counsel stood by powerless as Bethel “dictated the course and scope of mitigation.” Decision, p. 18.

Since Bethel did not completely waive mitigation, it was defense counsel’s decision not to call Dr. Jolie Brams, Dr. Jeffery Smalldon, Dr. Ruben Gur, Rosalind Ellis – Bethel’s former social worker, Janice Davis – Bethel’s maternal aunt, Linda Wendt – Bethel’s school teacher, or Anthony Mosley – Bethel’s juvenile corrections officer.

**C. Prosecutorial Misconduct (Ninth Ground for Relief).**

The State improperly misled the jury by implying that Bethel conjured an alibi at the last minute before trial. But Bethel gave the same alibi to detectives during his July 29, 1996, interview. See PC Exh. 19. The lower courts erred by denying relief on this claim.

When discussing Bethel's alibi, the State argued to the jury that Bethel never informed law enforcement about his alibi until his mother took the stand. Tr. Vol. XIV, p. 59. This is untrue; Bethel informed officers on July 29, 1996, that he had an alibi for the night Reynolds and Hawks were shot and killed. See PC Exh. 19. See also Michigan v. Jackson, 475 U.S. 625, 634 (1986) (Sixth Amendment principles require that we impute the State's knowledge from one state actor to another). It was improper for the prosecutor to suggest that Bethel's alibi was a last minute ruse to escape punishment.

The Court of Appeals denied this claim on the basis of res judicata. But this is erroneous. Bethel could not have argued this claim of prosecutorial misconduct on direct appeal because the videotape (postconviction exhibit 19) was not introduced at trial. It was evidence dehors the record.

**D. The trial court erred in excluding the additional tapes.**

The State used one of the five tapes of controlled contact between Bethel and Langbein. Tr. Vol. XI, pp. 45-79. Its purpose was to illustrate to the jury that Bethel was supposedly "concerned about the investigations" of the murders. Id. at 44. The defense sought to cross-examine Langbein on the remaining four taped conversations. Id. at pp. 82-88. The trial court denied the defense's request to play the four additional taped conversations between Langbein and Bethel to the jury. Tr. Vol. XI, pp. 46-79, 83-91, 111-116; Tr. Vol. XII, pp. 159-168; Tr. Vol. XIII, pp. 3-219; Tr. Vol. XIV, pp. 35-46, 86-87.

Defense counsel was permitted to cross-examine Langbein about the tapes in order to proffer their use of the additional tapes. Tr. Vol. XI, p. 110. This was nothing more than the preservation of their objection, but the jury was deprived of that information necessary to adequately assess Langbein's truthfulness. See Davis, 415 U.S. at 316. The jury – the “sole judge of the credibility of a witness” – was unable to accurately assess the reliability of Langbein's testimony, versus Bethel's testimony. Id. at 317.

The lower courts also apparently found no violation of Ohio (and/or Federal) Evidence Rule 106 when the trial judge excluded the additional tapes. They did not even address the “misunderstanding or distortion” created by the prosecution's use of one, out-of-context portion of the tapes. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988). See Tr. Vol. XIV, pp. 57-58 (“And does [Bethel] bring it up and say ‘I don't know anything. Why are they talking to me? I don't know anything. I didn't do it. I wasn't involved.’ Nothing.”). Compare Tr. Vol. XI, pp. 115-116. The Court of Appeals merely stated that this issue should have been raised on direct appeal.

### **PROPOSITION OF LAW III**

OHIO POSTCONVICTION PROCEDURES DO NOT AFFORD AN ADEQUATE CORRECTIVE PROCESS OR COMPLY WITH DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

State post-conviction did not provide Bethel with an adequate corrective process. An adequate corrective process should be “swift and simple and easily invoked,” should “eschew rigid and technical doctrines of forfeiture, waiver, or default,” and should “provide for full fact hearings to resolve disputed factual issues.” Case v. Nebraska, 381 U.S. 336, 346-47 (1965) (Brennan, J., concurring). See also Evitts, 469 U.S. at 401 (“[W]hen a State opts to act in a field

where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”)

In denying this claim, the trial court found that “Ohio need not provide post-conviction proceedings ...” and that Ohio’s post-conviction process affords an adequate process. Decision, p. 20. However, the trial court’s findings are incorrect.

The trial court basically found that no due process or equal protection rights are violated in denying discovery of indigent criminal defendants, like Bethel, in a post-conviction proceeding because post-conviction is not a constitutional right. See Decision, p. 20 (“Ohio need not provide post-conviction proceedings...”). While it is true post-conviction is a statutory right, that does not mean a criminal defendant’s due process and equal protection rights are cut-off.

In Ohio, the right to appeal is a statutory right. See, O.R.C. § 2953.02. See also McKane v. Durston, 153 U.S. 684, 687-688 (1894) (The Constitution does not provide for the right to appeal a state criminal conviction). However, once the right to appeal is created the state must comply with due process and equal protection requirements. Griffin v. Illinois, 351 U.S. 12, 18-19 (1956). See also, Evitts, 469 U.S. at 393. Similarly, because Ohio has created a procedure called post-conviction, it must comply with due process and equal protection requirements that allow a Bethel to fully litigate his claims. See, Ohio Revised Code Section 2953.21.

In addition, the trial court noted in a footnote how it was “exceedingly liberal in allowing amendment of Bethel’s Petition.” Decision, p.20 fn. 6. It is absolutely true that the court did not have to allow Bethel to amend his petition. But the fact that the court allowed Bethel to add grounds for relief does not make up for its failure to provide him the benefit of the discovery processes available to every other civil litigant. And Bethel is unsure how the court “accept[ed]

legal arguments far exceeding the three pages in Crim. R. 35(A),” since each of Bethel’s grounds for relief were three pages or less. Id.

This Court has determined that a post-conviction action is a civil proceeding. State v. Nichols, 11 Ohio St. 3d 40, 42 (1984); State v. Milanovich, 42 Ohio St. 2d 46, 49 (1975). Consequently, the rules of civil procedure govern an action for post-conviction relief; however, capital petitioners face a serious dilemma under Ohio’s post-conviction scheme.

The text of the statute provides that a petitioner must include affidavits or evidence in support of the claims. But there is no subpoena power, no interrogatories, no depositions. Bethel is without funds, and thus he has no method of hiring the experts he needs to support his claims. It is from the face of the petition that a trial court must determine if a hearing is required. Without access to traditional discovery mechanisms, Ohio’s post-conviction process is rendered useless.

In his petition, Bethel requested discovery for every claim he raised. He filed motions for discovery with his petition on February 28, 2005, and June 7, 2005. In addition, Bethel filed the motions for experts in ballistics, confessions, and forensic pathology. He also requested the assistance of an attorney expert. The trial court denied the motions.

The importance of discovery cannot be underestimated. In the federal habeas corpus arena, expert assistance is an essential component of the *pre*-filing process. In McCleskey v. Zant, 499 U.S. 467, 498 (1991), the Supreme Court held that every habeas corpus petitioner must conduct a reasonable investigation into the facts of his case and, following such investigation, must present all claims to the district court in his initial petition for writ of habeas corpus. For a petitioner to include all claims in a single petition, the Court found that there must be reasonable access to counsel, experts, and discovery to effectively prepare a petition.

But before a habeas petitioner can present his claims to the federal district court, he must first have presented them to his state courts. Ohio's procedural limits hampered Bethel's attempts to investigate potential claims. Indigent post-conviction petitioners face the nearly insurmountable burden of collecting evidence to support valid claims prior to filing a petition, without the means to do so.

#### **PROPOSITION OF LAW IV**

CONSIDERED TOGETHER, THE CUMULATIVE ERRORS SET FORTH IN APPELLANT'S SUBSTANTIVE GROUNDS FOR RELIEF MERIT REVERSAL OR REMAND FOR A PROPER POSTCONVICTION PROCESS.

The doctrine of cumulative error is the reversal of a conviction "where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." State v. Garner, 74 Ohio St. 3d 49, 64 (1995). As Bethel raised in his Nineteenth Ground for Relief, cumulative error committed during the trial violated his rights under the United States Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as applicable provisions in the Ohio Constitution.

The appellate court erred in affirming the trial court's denial of Bethel's ground for relief nineteen. In the alternative, the appellate court should have, at minimum, remanded the proceedings with an order for the trial court to grant discovery and hold an evidentiary hearing on this evident constitutional violation and any similar violations that may have come to light had discovery been granted.

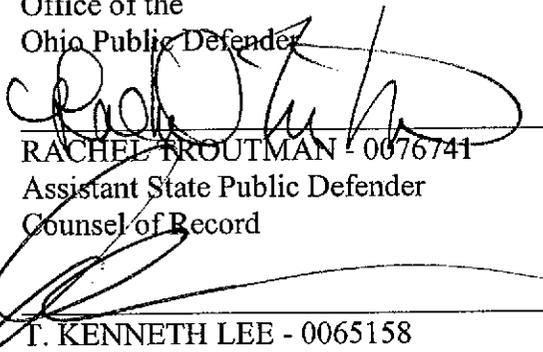
#### **CONCLUSION**

Bethel, in his post-conviction petition, raised prejudicial constitutional violations. It was error for the Court of Appeals to affirm the trial court's decision to dismiss Bethel's post-

conviction petition without discovery and an evidentiary hearing. This Court should grant jurisdiction, reverse the lower courts' dismissal of Bethel's petition and grant him a new trial. In the alternative, it should remand his post-conviction case to the trial court with instructions to allow Bethel to conduct the discovery he has requested to fully develop the issues, followed by an evidentiary hearing on the merits of his claims.

Respectfully submitted,

Office of the  
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COUNSEL FOR APPELLANT

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction was served by regular U.S. Mail to the office of Richard Termuhlen, II, and Kimberly Bond, Assistant Prosecuting Attorneys, 373 South High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215, on this 16 day of July, 2008.

A handwritten signature in black ink, appearing to read "Rachel Troutman", written over a horizontal line.

RACHEL TROUTMAN - 0076741  
Assistant State Public Defender

COUNSEL FOR APPELLANT

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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COURT OF APPEALS  
FRANKLIN CO. OHIO  
2008 JUN -5 PM 2:23  
CLERK OF COURTS

State of Ohio, :  
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 Plaintiff-Appellee, :  
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 v. : No. 07AP-810  
 : (C.P.C. No. 00CR-11-6600)  
 Robert W. Bethel, :  
 : (REGULAR CALENDAR)  
 Defendant-Appellant. :

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O P I N I O N

Rendered on June 5, 2008

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*Ron O'Brien*, Prosecuting Attorney, *Richard A. Termuhlen* and *Kimberly M. Bond*, for appellee.

*Timothy Young*, Ohio Public Defender, *Rachel Troutman* and *T. Kenneth Lee*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} Defendant-appellant, Robert W. Bethel, was sentenced to death for the 1996 murders of James Reynolds and Shannon Hawks. Because of statutory filing deadlines in Ohio's capital appeals scheme, Bethel filed his petition for post-conviction relief ("petition") with the trial court while his direct appeal was still pending before the Supreme Court of Ohio. The Supreme Court of Ohio affirmed Bethel's convictions and death sentence on October 4, 2006 and, on August 31, 2007, the trial court dismissed the

petition. This appeal is limited to the trial court's dismissal of the petition. Because of the substantial overlap of subject matter between the petition and the direct appeal, however, we are without authority to grant the relief requested.

{¶2} We are not at liberty to re-decide any issues that were already decided by the Supreme Court of Ohio unless the appellant presents some new evidence or factual information that was unavailable on direct appeal. Similarly, any argument that was previously raised, or could have been raised, is barred under the doctrine of res judicata. The record before us is void of any new evidence or factual information that would be material to the issues raised in the petition and, therefore, we must affirm the trial court's dismissal.

{¶3} The facts surrounding Bethel's arrest and conviction are set forth in detail in the Supreme Court of Ohio's decision in the direct appeal. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, at ¶1. We will therefore only restate the key elements here.

{¶4} Bethel belonged to the "Crips" street gang. In 1995, a fellow gang member and closely known associate of Bethel's shot another man during a burglary. James Reynolds witnessed that shooting and told others about it. The shooter was later indicted for aggravated murder, with death specifications, and Reynolds was the only material witness against him.

{¶5} According to Bethel's roommate, also a fellow Crips gang member, Bethel was concerned about Reynolds, and expressed intentions to get rid of him. On June 13, 1996, Bethel and another one of his other roommates, also a Crips gang member, purchased 12-gauge shotguns from a gun store in Obetz, Ohio. Thirteen days later,

Reynolds and his girlfriend, Shannon Hawks, were found dead—shot 14 times collectively, with 9mm and 12-gauge shotgun ammunition. Their bodies were discovered in a field owned by the grandfather of Bethel's roommates.

{¶6} A few weeks later, Bethel told one of his roommates that he and another roommate shot Reynolds and Hawks, using a 9mm handgun and a shotgun. Bethel later confessed his part in the murders to his girlfriend. About six months after the murders, police executed a search warrant on the trailer where Bethel and his roommates lived, but apparently did not find enough evidence to file charges.

{¶7} Years later, the roommate to whom Bethel had previously confessed was indicted on unrelated federal firearms charges. In an effort to work out a deal with the feds, he offered information implicating Bethel in the Reynolds-Hawks murders. Police eventually arrested Bethel on November 6, 2000, and a grand jury indicted him for two counts of aggravated murder, both with death specifications.

{¶8} Although the state's case against Bethel was strong, Bethel's court-appointed counsel ultimately convinced the prosecutors to spare Bethel's life in exchange for testimony against the other shooter. Bethel agreed to the deal, and recorded a statement at the Franklin County Sheriff's Office on August 30, 2001.<sup>1</sup> Paragraph one of the written plea agreement stated the following:

Defendant and the State agree that the proffer taken of the defendant on August 30, 2001 will be admissible in a criminal trial against the defendant in the event that the defendant does not abide by the terms and conditions of this agreement  
\* \* \*

{¶9} The agreement later contained the following contradictory statement:

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<sup>1</sup> The Supreme Court's opinion states that Bethel made the proffer on August 30, 2000, but we conclude that this should have read August 30, 2001.

\* \* \* Should it be judged by the Franklin County Prosecutor's office at any time that the defendant has failed to cooperate fully; refused to testify or testifies falsely in any proceeding(s); has intentionally given false, misleading or incomplete information or testimony; or has otherwise violated any provision of this agreement, then the Franklin County Prosecutor's Office may declare this Agreement null and void. The Franklin County Prosecutor's Office may then automatically reinstate the original charges against the defendant, as well as file any additional charges. \* \* \* In the event this Agreement becomes null and void, then the parties will be returned to the position they were in before this Agreement. \* \* \*

{¶10} The trial court held a closed hearing on the record, in which Bethel acknowledged his understanding and intent to be bound by the terms of the plea deal. Despite that agreement, on November 13, 2001, Bethel refused to testify. The state moved to declare the plea deal void, and the trial court granted the motion.

{¶11} Represented by new counsel, Bethel moved to suppress his confession, but the trial court denied the motion, and admitted it into evidence.

{¶12} Bethel testified at his trial, and denied having any involvement in the shootings. He said that although he had been in a car with the victims on the night of the murder, he dropped them off somewhere on the west side of Columbus around 9:00 p.m. Bethel's mother testified that her son and his roommate were at her house on Columbus' southside between 10:00 and 11:00 p.m., the time during which gunshots were heard in the vicinity of the murder scene.

{¶13} The jury found Bethel guilty of all charges and specifications, and recommended death sentences for both killings. The trial court imposed the

recommended sentence on September 4, 2003. The Supreme Court of Ohio found the appeal "devoid of merit," and overruled all 20 propositions of law.

{¶14} Bethel's petition comprised 23 grounds for relief (as amended June 15, 2007). The trial court determined that the gravamen of Bethel's claims for relief were res judicata, but nonetheless, in a 25 page decision, attended to each individual claim. (Record, at 609.) Ultimately, the trial court could not find any evidence presented by Bethel to warrant the relief requested, and dismissed his petition.

{¶15} Bethel filed a timely notice of appeal from that decision, and assigns three errors for our consideration:

[I.] THE TRIAL COURT ERRED WHEN IT DENIED THE POST-CONVICTION PETITION WITHOUT FIRST ALLOWING BETHEL TO CONDUCT DISCOVERY.

[II.] THE TRIAL COURT ERRED WHEN IT DENIED BETHEL'S MOTION FOR FUNDS TO EMPLOY EXPERTS.

[III.] THE TRIAL COURT ERRED IN DISMISSING BETHEL'S POST-CONVICTION PETITION WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT MINIMUM, AN EVIDENTIARY HEARING.

{¶16} The post-conviction relief process is a statutory method by which criminal defendants may bring a collateral civil attack on their convictions and sentences. R.C. 2953.21; *State v. Calhoun*, 86 Ohio St.3d. 279, 281, 1999-Ohio-102, 714 N.E.2d 905; *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67; *State v. McKinney*, Franklin App. No. 07AP-868, 2008-Ohio-1281. Again, post-conviction relief is *not* an appeal of the judgment; rather, it is intended as a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those arguments is outside of the trial court record (e.g., ineffective assistance of counsel,

prosecutorial misconduct, newly-discovered evidence). *Steffen*, supra; *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233.

{¶17} After conviction, defendants have 180 days to file a petition with the trial court. R.C. 2953.21(A)(2). The time for filing begins to run when the transcript is filed in the court of appeals, or in capital cases, from the time the transcript is filed in the Supreme Court of Ohio. *Id*; see Section 2(B)(2)(c), Article IV, Ohio Constitution (as amended Nov. 8, 1994) (eliminating intermediate appeal in capital cases, and giving death row prisoners an appeal to the Supreme Court of Ohio as a matter of right).

{¶18} In any proceeding except a direct appeal from that judgment, the doctrine of res judicata bars convicted defendants who were represented by counsel from raising or litigating any defense or alleged due process violation resulting in a conviction, where that defense or error was previously raised (or could have been raised) on direct appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169. Res judicata, thus, "implicitly bars a petitioner from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *State v. Hessler*, Franklin App. No. 01AP-1011, 2002-Ohio-3321, at ¶37.

{¶19} There is a narrow exception to this rule with regard to claims of ineffective assistance of counsel—res judicata will only bar such claims that do not rely on evidence outside the record, and defendant is represented by new counsel on appeal. *Cole*, supra, at 113-114; *Samatar v. Clarridge* (C.A.6, 2007), 225 Fed.Appx. 366.

{¶20} The first assigned error alleges that, as the petitioner in a civil matter, Bethel was entitled to discovery under the Ohio Rules of Civil Procedure. This argument is specifically refuted by mandatory case law, which prevents us from even considering it.

{¶21} To avoid the effects of res judicata, criminal appellate counsel typically attempt to develop new factual information to be considered in petitions. As in any other ordinary civil proceeding, the way attorneys do this is through discovery. This is exactly what Bethel's counsel sought to do in the post-conviction proceeding.

{¶22} Although it makes sense—since post-convictions are civil proceedings—to conduct discovery in accordance with the civil rules, the Supreme Court of Ohio has held that petitioners are not automatically entitled to civil discovery. See *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159, 1999-Ohio-314, 718 N.E.2d 426 (per curiam) certiorari denied (2000), 529 U.S. 1116, 120 S.Ct. 1977 (citing *State v. Spirko* [1998], 127 Ohio App.3d 421, 429, 713 N.E.2d 60, appeal not allowed, 83 Ohio St.3d 1430, 699 N.E.2d 946); see, also, *State v. Gulertekin* (June 8, 2000), Franklin App. No. 99AP-900 (holding that during initial stages of post-conviction relief proceedings there is no right to discovery of evidence outside the record) (quoting *State v. Wickline* [1994], 71 Ohio St.3d 1430; *State v. Fugett* [Dec. 8, 1998], Franklin App. No. 98AP-396).

{¶23} In *Love*, the petitioner was convicted of voluntary manslaughter and aggravated robbery. Years later, he filed an original action in mandamus in the court of appeals to compel the Cuyahoga County Prosecutor's Office to turn over ballistics and autopsy reports relevant to the criminal trial. He claimed that he was entitled to these records because they constituted exculpatory evidence, which supported his post-conviction relief. The court of appeals denied the writ, and the Supreme Court affirmed. This holding is based on the court's interpretation of post-conviction proceedings as a statutorily-created right, and because the statute granting the right does not specifically include the right to civil discovery, the court has concluded that none exists. See

*Calhoun*, supra, at 281 (citing *Murray v. Giarratano* [1989], 492 U.S. 1, 10, 109 S.Ct. 2765) ("State collateral review itself is not a constitutional right."); cf. *State v. Scudder* (1998), 131 Ohio App.3d 470, 481, 722 N.E.2d 1054 (Tyack, J., dissenting). The irony here is that post-conviction relief is specifically designed to allow defendants who believe they were wrongly convicted to attack their convictions using material outside of the trial court record, but if they are not entitled to discovery, there is little chance they will ever obtain any evidence or defenses that are outside of the record.

{¶24} The reason for the Supreme Court of Ohio's strong stance limiting petitioners' rights in post-conviction proceedings is summed up as follows:

It may be useful to note that cases of post-conviction relief pose difficult problems for courts, petitioners, defense counsel and prosecuting attorneys alike. Cases long considered to be fully adjudicated are reopened, although memories may be dim[,] and proof difficult. The courts justifiably fear frivolous and interminable appeals from prisoners who have their freedom to gain and comparatively little to lose.

*Calhoun*, at 282 (quoting *State v. Milanovich* [1975], 42 Ohio St.2d 46, 51, 325 N.E.2d 540).

{¶25} Bethel's counsel asserts that these limitations on discovery are inconsistent with due process and equal protection. See appellant's brief, at 10, citing *Evitts v. Lucey* (1985), 469 U.S. 387, 401, 105 S.Ct. 830 (requiring states that provide appellate review to do so in accordance with the Due Process Clause). Be that as it may, we are not the proper authority to consider the merits of this argument. If there is indeed a federal right to discovery in post-conviction proceedings, that right must either be recognized by the Supreme Court of Ohio, or forced upon them by a federal court. See, e.g., *Keener v. Ridenour* (C.A.6, 1979), 594 F.2d 581, 590 (holding that in habeas proceedings, the

federal courts may review issues not previously decided by state courts of Ohio). Until then, stare decisis prevents us from ruling in a manner that conflicts with that of the Supreme Court of Ohio. See, e.g., *Sherman v. Millhon* (June 16, 1992), Franklin App. No. 92AP-89 (citing *Battig v. Forshey* [1982], 7 Ohio App.3d 72, 74; *Thacker v. Bd. of Trustees of Ohio State Univ.* [1971], 31 Ohio App.2d 17, 23, 285 N.E.2d 380 reversed on other grounds) ("A court [of appeals] is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled."); cf. *Keener*, *ibid.* ("Interpretation of Ohio's appellate and post-conviction remedies belongs with the highest judicial tribunal of Ohio, not with the federal courts of appeal. Amendment of statutes is the prerogative of the Ohio Legislature").

{¶26} Stare decisis has two aspects: (1) that in the absence of overriding considerations courts will adhere to its own previously announced principles of law; and (2) that courts are bound by and must follow decisions of a reviewing court that has decided the same issue. *Thacker*, *ibid.*; *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444. "Under this principle, we are bound by and must follow the decisions of the Ohio Supreme Court. To do otherwise would do violence to the doctrine that ours is a government of law, not of men." *Thacker*, *ibid.*

{¶27} The Supreme Court of Ohio is, of course, free to overrule its own prior decisions, but until it does so, we have no choice but to follow the rule of law set forth in *Love*. We realize that this decision may be inimical to the concept that petitions are civil proceedings, however, the *Love* court has already decided that petitioners in post-conviction proceedings are not automatically entitled to discovery, and we are bound by that decision. *Id.* at 159.

{¶28} Accordingly, we must overrule the first assigned error.

{¶29} In the second assignment of error, Bethel argues that in post-conviction proceedings, Ohio courts are required to provide indigent petitioners with funds to retain whatever experts may be reasonable and necessary. (Appellant's brief, at 10.) The experts for whom Bethel sought funding were related to the fields of forensic pathology and psychology, ballistics, and capital criminal defense. The trial court denied Bethel's request in the same manner as the petition. (Decision, 11, 15, 16, 24.)

{¶30} Although the experts sought may have been appropriate and helpful during Bethel's trial, counsel already made this argument on direct appeal, which resulted in the Supreme Court's determination that any evidence by such experts was purely speculative. Further, the Supreme Court found that the exclusion or omission of these experts did not prejudice Bethel:

Bethel contends that his trial counsel were ineffective because they failed to obtain defense experts on false confessions, ballistics, forensics, and crime-scene reconstruction. We find that Bethel was not prejudiced by trial counsel's actions. \* \* \*

*Bethel*, at ¶168.

{¶31} We are not in a better position to know the results of such expert investigation than the Supreme Court of Ohio, trial counsel, or the trial court. Thus, we are not in a position to grant the experts Bethel seeks.

{¶32} Accordingly, the second assignment of error is overruled.

{¶33} The third assignment of error attacks the trial court's failure to conduct an evidentiary hearing before dismissing the post-conviction petition. As in the discovery issue, the law on this issue has been set forth by the Supreme Court of Ohio: Petitioners

are not automatically entitled to an evidentiary hearing. *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus. Before a trial court may grant an evidentiary hearing, the petitioner bears the burden of demonstrating a cognizable claim of a constitutional error at trial. R.C. 2953.21(C); *Jackson*, *ibid*; *Hessler*, at ¶33. A trial court may deny a defendant's petition without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *Calhoun*, at paragraph two of the syllabus.

{¶34} Nonetheless, to consider whether the trial court erred in failing to conduct an evidentiary hearing, we must address the individual grounds for relief asserted in the petition. If the evidence supporting any ground for relief demonstrates a colorable claim of constitutional error at trial, only then may we find that the trial court erred.

{¶35} As amended, the petition alleges 23 grounds for relief. Fifteen of those are ineffective assistance of counsel allegations, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

{¶36} Under *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, defendants alleging ineffective assistance of counsel must demonstrate that: (1) defense counsel's performance was so deficient that he or she was not functioning as the counsel guaranteed by the Sixth Amendment; and (2) defense counsel's errors prejudiced the defendant, depriving him of a trial whose result is reliable. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S.Ct. 3258. In post-conviction proceedings, to secure a hearing on such a claim, appellant bears the initial burden of submitting evidence demonstrating that defense

counsel was incompetent, and that the appellant was prejudiced as a result. *Cole*, at 114; *Jackson*, syllabus. "Judicial scrutiny of counsel's performance must be highly deferential [and] [a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, at 689; *Bradley*, at 142.

{¶37} The Supreme Court of Ohio devoted an entire section of its opinion to ineffective assistance of counsel allegations, which included 36 enumerated paragraphs. Again, we are without authority to re-address those issues. They are matters decided, i.e., *res judicata*.

{¶38} The petition's first ground for relief alleges that the first set of lawyers appointed to represent Bethel were ineffective because they failed to adequately investigate the case and, as a result, unduly influenced Bethel toward entering into the plea agreement. Bethel recorded a proffer statement confessing his involvement in the homicides, and he agreed to testify against a co-defendant. When Bethel refused to testify, the plea agreement fell apart, but the state used Bethel's proffer as substantive evidence of his guilt at his trial. This placed Bethel's defense lawyers in the difficult position of arguing at trial that Bethel was lying in his proffer statement—when he provided, in graphic detail, the execution-style murder of the two teenage victims.

{¶39} The Supreme Court of Ohio addressed the proffer in ¶¶160-167 of the opinion. Bethel has not presented any additional evidence (not available at trial) to support the petition. We are therefore bound by the Supreme Court's resolution of the issue. The first ground for relief has no new merit.

{¶40} The second ground for relief alleges that original counsel for Bethel failed to do a complete investigation of mitigating evidence, and therefore wrongly advised Bethel

that he either could plead guilty, or be assured of a jury verdict enabling his execution. In support of this argument, appellate counsel notes that the jury who ultimately returned the death verdict did so after only three days of deliberation, despite minimal mitigation evidence being presented.

{¶41} The Supreme Court did not address the specific language stated in the petition but, generally, rejected any notion that Bethel's attorneys acted less than competent in advising Bethel during the plea negotiations:

We reject Bethel's contention that [counsel] were unprepared for the trial and forced Bethel into a plea agreement. Bethel's claim that his attorneys would betray him in order to avoid trial is incredible and has no evidentiary support. All indications are that [counsel] sought and recommended a plea agreement because they were working in Bethel's best interest.

\* \* \*

In sum, we lack a factual basis for finding that [counsel] committed errors amounting to deficient performance. Thus, we reject Bethel's claims that [counsel] provided ineffective assistance of counsel.

*Bethel*, at ¶165, 167.

{¶42} The information about trial counsel's preparedness was available at the time the trial court ruled on Bethel's motion to suppress the proffer statement. As such, it is neither new, nor newly-discovered evidence for the purposes of post-conviction relief. The doctrine of *res judicata* again compels us to find no merit in the second ground for relief.

{¶43} The third ground for relief further attacks the plea agreement and proffered confession. The Supreme Court also addressed this argument. *Id.* at ¶¶160-167. We are therefore compelled to find no merit in this ground for relief.

{¶44} In the fourth ground for relief, Bethel alleges that trial counsel was ineffective based upon their failure to present psychological evidence in the culpability phase of the trial. The theory is that counsel was ineffective in failing to present psychological evidence as to why Bethel supposedly lied in his proffer statement (and on two other occasions in which he told friends he was the murderer). Obviously, a psychologist who concluded that Bethel told the truth in his proffer statement but was lying in submitting an alibi defense at trial would not have been a help in his defense during the culpability phase of the trial. A psychologist who could explain the complex relationship Bethel had with his mother and how her begging him to plead guilty in order to save his life might have been helpful, but not to the point that the failure of counsel to seek and find such a witness could be ineffective assistance of counsel, as required under *Strickland*. We find no merit in the fourth ground for relief.

{¶45} The fifth ground for relief alleges that trial counsel was ineffective in failing to acquire a ballistics expert who would testify that the details of the homicide provided in Bethel's proffer statement were inaccurate, and that Bethel was therefore lying when he confessed to the murders.

{¶46} Trial counsel argued, extensively, the issue of Bethel's proffered confession being inconsistent with the physical evidence. Bethel recorded the proffer years after the homicides. Thus, whether some details in Bethel's proffer did not squarely match up with evidence at the murder scene is not itself dispositive of the general reliability or

truthfulness of the statement. One remembers the most "important" part—that you murdered two people—without necessarily remembering all the details about how and when one fired each shot. Thus, counsel's failure to engage the opinion of a ballistics expert did not constitute ineffective assistance of counsel.

{¶47} The sixth ground for relief parallels the fifth in many regards. Bethel alleges that trial counsel was ineffective because counsel did not engage a forensic pathologist to highlight the differences between Bethel's proffer and the evidence at the murder scene. This ground for relief has no merit for the same reasons as the fifth.

{¶48} In the seventh ground for relief, Bethel alleges that trial counsel were ineffective by failing to adequately investigate and prepare to cross-examine his girlfriend, who testified that Bethel also confessed the murders to her. The former girlfriend apparently had documented mental-health problems, and was on medication to treat them. These were the subjects of her cross-examination.

{¶49} The former girlfriend's mother testified that her daughter was delusional at times, even when taking her medication; however, short of a showing that the witness was not competent to testify, the mother's attitude toward her daughter could not have affected the outcome of the culpability phase of the trial. Bethel's proffer statement was already found to be admissible. The seventh ground for relief has no merit.

{¶50} In the eighth ground for relief, Bethel alleges that trial counsel was ineffective by failing to adequately impeach a key state witness. The witness, Donald Langbein, who was Bethel's roommate, implicated Bethel in the murders as part of a plea negotiation on his own behalf. Langbein worked as a police informant for a period of time and, at one time, attempted to record Bethel's confession while the two were eating at a

Subway restaurant. Langbein did not succeed in capturing Bethel's confession on tape, nor did police succeed in finding the murder weapon using Langbein's assistance.

{¶51} Langbein's testimony was less than complimentary to Bethel's defense. He painted a picture of Bethel as a person comfortable with committing armed robbery, and of planning homicide. The longer Langbein testified, the more damage to Bethel's defense, whether on direct or cross-examination. Given Bethel's proffered confession, Langbein's concurring testimony about the same confession was not outcome determinative. Therefore, ineffective assistance of counsel cannot be based on the vague supposition that trial counsel could or should have cross-examined Langbein more effectively. Moreover, even if it were possible to say, objectively, that trial counsel could have cross-examined a particular witness more effectively, this does not necessarily mean that counsel was ineffective under *Strickland*, at 684. As *Strickland* made clear, our role is not to gratuitously nitpick trial counsel's performance. *Smith v. Mitchell* (C.A.6, 2003), 348 F.3d 177, 206. The first prong of the *Strickland* test asks whether counsel's actions fell below an objectively reasonable standard. Neither *Strickland*, nor the Sixth Amendment guarantee a right to perfect representation. See *id.* (citing *Strickland*, at 684) ("After all, the constitutional right at issue here is ultimately the right to a fair trial, not to perfect representation"). The eighth ground for relief has no merit.

{¶52} The tenth ground for relief alleges that trial counsel was ineffective for failing to present mitigating evidence at the penalty phase of the trial. The Supreme Court addressed this issue, and determined that trial counsel had, in fact, prepared a bona fide mitigation case. They planned to present several witnesses, including Bethel's mother, a teacher, social workers, and a guard at a juvenile facility. Bethel, at ¶146. Counsel was

also prepared to show that Bethel's parents abandoned him as a child and, as a result, he lacked discipline and guidance. *Id.* But it was Bethel who instructed his attorneys not to put on this evidence. *Id.* at ¶147. This prompted Bethel's attorneys to consult with a psychologist to determine whether Bethel was competent to make that decision. Jeffrey Smalldon, Ph.D., determined that he was. *Id.*

{¶53} The Supreme Court of Ohio has held that a defendant may waive the right to present mitigating evidence during the penalty phase of a death case, so long as the defendant is mentally competent. *State v. Ashworth*, 85 Ohio St.3d 56, 1999-Ohio-204, 706 N.E.2d 1231, paragraph two of the syllabus. The court also held that a defendant is mentally competent to do so "if he has mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of evidence." *Id.*

{¶54} As the Supreme Court noted in Bethel's direct appeal, the issue of the defendant's mental competency only arises when he decides to waive the presentation of *all* mitigating evidence. *Bethel*, at ¶148 (quoting *Ashworth*, *supra*; *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶74). Here, Bethel did allow his attorneys to present some mitigating evidence—his own unsworn statement, and the testimony of his former supervisor at Subway restaurant—therefore, the Supreme Court determined that no inquiry into Bethel's mental competence was even necessary. *Bethel*, at ¶149.

{¶55} Given the fact that Bethel's attorneys went one step further, and sought the advice of a clinical professional to determine whether Bethel's decision was made with a competent mind, it would be very difficult for us to now say that counsel was ineffective.

Bethel had the right to decide to risk execution at the cost of protecting his relationship with his mother. Counsel are not ineffective simply because they accede to their client's wishes. See, e.g., *Coleman v. Mitchell* (C.A.6, 2001), 244 F.3d 533, 545-546 (citing *Jones v. Barnes* [1983], 463 U.S. 745, 751-752, 103 S.Ct. 3308). Consequently, the tenth ground for relief has no merit.

{¶56} The eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth grounds for relief all mirror the tenth. Each of these additional grounds for relief alleges that it would have been beneficial to Bethel's case to present additional testimony at the mitigation hearing. Again, Bethel had the right to limit the evidence presented at the hearing, and chose to exercise that right. Counsel was not ineffective for failing to dissuade Bethel from his feelings about what should be presented and from acceding to his desires once counsels' efforts to dissuade him failed.

{¶57} In the ninth ground for relief, Bethel claims that the state improperly misled the jury by implying that Bethel "conjured an alibi at the last minute before trial," when he had actually given that same alibi to the detectives who interviewed him on July 29, 1996. (Appellant's brief, at 25.)

{¶58} Bethel also alleged prosecutorial misconduct before the Supreme Court of Ohio, albeit using different statements as the alleged prosecutorial misconduct. *Bethel*, at ¶194. The Supreme Court determined, however, that "Bethel failed to object to this statement at trial, thereby waiving any objection. The prosecutor's comment did not amount to plain error." *Id.* at ¶195.

{¶59} The court did not have the specific allegations before it, however, the exhibits appended to the petition do not provide any new or independent support for an

allegation that Bethel told police years before that he was home with his mother and not at the scene of the homicides. Bethel alleges that exhibit No. 19 supports this claim; however, no exhibit No. 19 exists—the exhibits jump from number 18 to 20.

{¶60} Without some factual basis to support it, we cannot find any new merit in the ninth ground for relief.

{¶61} The seventeenth ground for relief alleges that execution by lethal injection is cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments of the United States Constitution. Not only has the Supreme Court of Ohio systematically rejected this facial challenge to our state's current capital punishment method, but more recently, the United States Supreme Court decided this very issue, holding that lethal injection is not per se cruel and unusual. See *Baze v. Rees* (Apr. 16, 2008), No. 07–5439, 128 S.Ct. 1520 (recognizing the consensus that lethal injection is the human method of execution to date).

Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable. \* \* \*

Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. The risks of maladministration they have suggested—such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel—cannot remotely be characterized as "objectively intolerable."

Id. at 23.

{¶62} The lethal injection procedure used in Ohio is substantially similar to the one affirmed by the United States Supreme Court in *Baze*. Alan Johnson, Lethal Injection

Gets Legal Go-Ahead: Capital Cases in Ohio, 34 Other States Affected, Columbus Dispatch (Ohio) (Apr. 17, 2008). Therefore, we cannot find that Ohio's method of lethal injection violates the Eighth Amendment. The seventeenth ground for relief has no merit.

{¶63} In the eighteenth ground for relief, petitioner challenges the constitutionality of Ohio's post-conviction relief statutory scheme, again pointing to the alleged deficiencies in not allowing discovery, and not providing for an evidentiary hearing as of right. As an intermediate appellate court, we are bound by the Ohio Constitution, and the Revised Code, as interpreted by the Supreme Court of Ohio. To date, the Supreme Court has not held Ohio's post-conviction relief process to be unconstitutional. Therefore, under the doctrine of stare decisis, we must also not find it to be so. Furthermore, legislative acts are presumed constitutional. *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 1999-Ohio-368, 706 N.E.2d 323. Bethel has not cited to any binding authority supporting his argument that R.C. 2953.02 is unconstitutional.

{¶64} In the nineteenth ground for relief, Bethel argues that the cumulative effect of the errors and deficiencies alleged in the foregoing grounds are sufficient to constitute an independent ground for relief, even if no individual ground for relief justifies reversal on its own. See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus (recognizing the doctrine of cumulative error).

{¶65} The Supreme Court also addressed this argument, and found no substance to it. *Bethel*, at ¶197 (quoting *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, at ¶103). "[I]t is not enough simply to intone the phrase 'cumulative error.' " *Id.* As before, Bethel offers this court no further evidence in support of his claim that he was denied a fair trial because of cumulative errors. We do not find that the accumulation

of the minor deficiencies, if any, demonstrate a sufficient ground to overturn the result, judgment, or sentence in Bethel's case. We, therefore, find no new merit in the nineteenth ground for relief.

{¶66} Based on all of the above, the third assignment of error is overruled.

{¶67} Having overruled all three assignments of error, we affirm the judgment the Franklin County Court of Common Pleas.

*Judgment affirmed.*

MCGRATH, P.J., and BROWN, J. concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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State of Ohio, :  
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 Plaintiff-Appellee, :  
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 v. : No. 07AP-810  
 : (C.P.C. No. 00CR-11-6600)  
 Robert W. Bethel, :  
 : (REGULAR CALENDAR)  
 Defendant-Appellant. :

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MEMORANDUM DECISION

Rendered on July 10, 2008

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*Ron O'Brien*, Prosecuting Attorney, *Richard A. Termuhlen* and *Kimberly M. Bond*, for appellee.

*Timothy Young*, Ohio Public Defender, *Rachel Troutman* and *T. Kenneth Lee*, for appellant.

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ON APPLICATION FOR RECONSIDERATION

TYACK, J.

{¶1} Counsel for Robert W. Bethel ("Bethel") has filed a timely application for reconsideration of our opinion issued June 5, 2008. Counsel raises four issues which counsel asserts were not addressed in our opinion:

- 1) Ineffective assistance of trial counsel for failing to investigate and introduce evidence of other suspects;
- 2) Ineffective assistance of trial counsel for failing to introduce into evidence a taped conversation between Robert W. Bethel and Donald Langbein;

3) A claim regarding failure of the trial court to admit the Langbein tapes into evidence identified by reference to the merit brief by page numbers 26-27; and

4) A failure to address the merit of a theory of prosecutorial misconduct because an exhibit ("Exhibit 19") could not be found in the record at the time our opinion was drafted.

{¶2} As to the first issue, Bethel confessed, at length, to his involvement in the homicide. He gave a detailed proffer as a part of his plea bargain before he failed to live up to his part of the plea bargain and testify at the trial of another man involved in the homicide. He also acknowledged his involvement in the homicides to others. Given his admitted involvement in the homicides, defense counsel could have consulted with Bethel directly about what occurred. Nothing in the record before us establishes a basis for placing evidence before a jury which would have accused unknown third parties of committing the homicide to which Bethel confessed and which he described in graphic detail. Defense counsel was not ineffective for failing to seek that which was apparently nonexistent.

{¶3} The first issue raised in the application for reconsideration has no merit.

{¶4} The second issue addresses tape recordings between Bethel and Donald Langbein. As acknowledged by counsel on appeal, trial counsel sought to cross-examine Langbein about all the conversations between Bethel and Langbein and sought to play four tapes over and above the tape which the state of Ohio had used in the direct examination of Langbein. Since trial counsel sought to place the contents of the four tapes before the jury and was prevented from doing so by the trial judge's rulings, trial counsel cannot be considered as having rendered ineffective assistance. An attorney

does not render ineffective assistance merely because the trial judge makes adverse evidentiary rulings.

{¶5} The second issue raised in the application for reconsideration has no merit.

{¶6} As to the third issue, if the trial court erred in refusing to admit the tapes into evidence and in refusing additional cross-examination, the merits of those rulings were or should have been addressed on direct appeal and are barred from consideration now by way of post-conviction relief. The third issue has no merit.

{¶7} As to the fourth issue, a court order to supplement the record with exhibit No. 19 was issued in 2007. The original petition for post-conviction relief had appended exhibits, but the exhibits jump from exhibit No. 18 to exhibit No. 20. The exhibits appended are clearly the original exhibits, as demonstrated by the fact that parts of the documents are written in blue ink. An amendment to the petition for post-conviction relief has exhibits No. 27 and higher, but no exhibit No. 19. A later filing included exhibit Nos. 34 through 37.

{¶8} Assuming exhibit No. 19 is a videotape in which Bethel claimed he was not involved in the homicide when he was first arrested, the issue was before the Supreme Court of Ohio on direct appeal or could have been presented along with the other suggestions of prosecutorial misconduct. Therefore, this issue is also meritless based upon the doctrine of res judicata.

{¶9} As a result of the foregoing, the application for reconsideration is denied.

*Application for  
reconsideration denied.*

BROWN, J., and McGRATH, P.J., concur.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

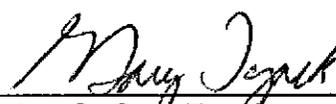
State of Ohio, :  
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 Plaintiff-Appellee, :  
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 v. :  
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 Robert W. Bethel, :  
 :  
 Defendant-Appellant. :

No. 07AP-810  
(C.P.C. No. 00CR-11-6600)  
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on June 5, 2008, appellant's assignments of error are overruled. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs are assessed against appellant.

TYACK, J., McGRATH, P.J., & BROWN, J.

By   
Judge G. Gary Tyack

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2008 JUL 10 PM 2: 58  
CLERK OF COURTS

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 07AP-810  
 : (C.P.C. No. 00CR-11-6600)  
 Robert W. Bethel, :  
 : (REGULAR CALENDAR)  
 Defendant-Appellant. :

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on July 10, 2008, it is the order of this court that appellant's application for reconsideration is denied.

TYACK, J., BROWN, J., & McGRATH, P.J.

By *Gary Tyack*  
Judge G. Gary Tyack