

IN THE SUPREME COURT OF OHIO  
2008

STATE OF OHIO,

Case No. 2008-1401

Plaintiff-Appellee,

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

-vs-

ROBERT W. BETHEL,

This is a capital case.

Defendant-Appellant.

Court of Appeals  
Case No. 07AP-810

**MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION**

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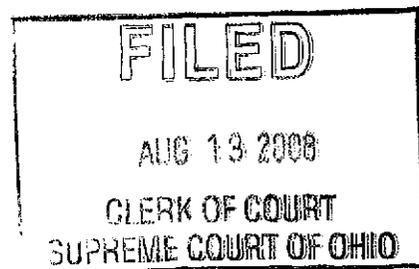
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## **EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION**

The instant case, appealing of the denial without hearing of a post-conviction petition in a capital case, does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. The appellant's direct appeal has been adjudicated by this Court, and both the trial court and the court of appeals below have observed that many of the claims in the post-conviction petition were rejected by this Court in its opinion. The claims in the petition that were not barred by res judicata were properly deemed to have been reasonable exercises in trial strategy or were simply unsupported by material de hors the record. It is well-settled that there is no right to civil discovery as an adjunct to the filing of a post-conviction petition. Finally, the appellant makes no reasonable case for invoking the cumulative error doctrine in his case. It is respectfully submitted that jurisdiction should be declined.

## STATEMENT OF THE CASE AND FACTS

This Court set forth the facts in direct appeal. *State v. Bethel*, 110 Ohio St. 3d 416, 2006-Ohio-4853, ¶¶ 1-44. The State adopts the facts set forth in that opinion. However, the State does specifically take issue with one assertion in the appellant's memorandum. The appellant states that he did not confess to Donald Langbein or to Theresa Campbell. This directly conflicts with those two persons' testimonies, and with the facts stated by this Court in its opinion.

Following direct appeal, appellant filed a petition for post-conviction relief. After amending that petition, appellant raised twenty-three claims for relief. The trial court concluded that res judicata barred certain claims, and the court also denied the claims on their merits. On appeal, appellant argued that the trial court improperly denied his petition without a hearing and improperly denied his requests for discovery and for experts. The Tenth District Court of Appeals rejected his assignments of error. *State v. Bethel*, 10<sup>th</sup> Dist. No. 07AP-810, 2008-Ohio-2697. The court of appeals denied the appellant's application for reconsideration. *State v. Bethel* (July 10, 2008), 10<sup>th</sup> Dist. No. 07AP-810 (memorandum decision).

## ARGUMENT

### RESPONSE TO FIRST AND THIRD PROPOSITIONS OF LAW

THERE IS NEITHER A RIGHT TO CIVIL DISCOVERY NOR A  
RIGHT TO EXPERT ASSISTANCE TO DEVELOP ISSUES  
FOR A POST-CONVICTION PETITION.

The Tenth District Court of appeals properly found that a defendant in a criminal case is not entitled to discovery upon the filing of a petition for post-conviction relief pursuant to R.C. 2953.21. *State v. Bethel*, 10<sup>th</sup> Dist. No. 07AP-810, 2008-Ohio-2697, ¶ 20. This appellant's right to discovery coincided with the Crim.R. 16 discovery he was provided pretrial. *State v. Twyford*, 7th Dist. No. 98-JE-56, 2001-Ohio-3241. This Court has held that "there is no requirement of

civil discovery in post-conviction proceedings.” *State ex rel. Love v. Cuyahoga Cty. Prosecutor’s Office* (1999), 87 Ohio St.3d 158, 159, certiorari denied (2000), 529 U.S. 1116, 120 S.Ct. 1197.

Moreover, appellant is not entitled to discovery to help him establish substantive grounds for relief during the initial stage of a post-conviction proceeding.

*State v. Tolliver*, 10<sup>th</sup> Dist. No. 04AP-591, 2005-Ohio-989 ¶25 (citations omitted). “Post-conviction petitions are special civil actions governed exclusively by statute.” *State v. Spirko* (1998), 127 Ohio App.3d 421, 429. “[A] petitioner receives no more rights than those granted by the statute.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281. There is no provision in R.C. 2953.21 allowing a petitioner in post-conviction relief to obtain discovery. Contrary to the appellant’s claims, a post-conviction petition does not provide a petitioner a second opportunity to litigate his conviction. *State v. Murphy* (Dec. 26, 2000), 10<sup>th</sup> Dist. No. 00AP-233.

Ohio need not even provide for post-conviction proceedings. *Pennsylvania v. Finley* (1987), 481 U.S. 551, 557. “[P]ostconviction state collateral review itself is not a constitutional right, even in capital cases.” See, *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. “State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal.” *Murray v. Giarrantano* (1989), 492 U.S. 1, 10 (plurality). The lack of discovery provisions for petitioners in post-conviction relief who have failed to assert a substantive claim for relief could not rise to the level of a due process violation. Due process does not require discovery procedures. There is no general due process right to discovery in a criminal case. *Weatherford v. Bursey* (1977), 429 U.S. 545, 559; *Midland Steel Prods. v. U.A.W. Local 486* (1991), 61 Ohio St.3d 121, 131. It is difficult to see why a convicted criminal defendant would acquire such a right for the “more limited purpose” of collateral post-conviction litigation.” *Murray*, supra.

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

Although there is language in some cases indicating that discovery may be a matter of discretion for the trial court, see *State v. Samatar* (2003), 152 Ohio App.3d 311, 2003-Ohio-1639, ¶21, other language follows *Love* and holds that there is no requirement of discovery. *Id.* at ¶23. As stated in *State v. Twyford*, *supra*:

Under his second assignment, appellant challenges the trial court's decision to deny his motion for discovery. Appellant asserts that he was entitled to conduct discovery because a postconviction proceeding under R.C. 2953.21 is considered civil in nature. He further asserts that, since a party in a civil action is entitled to complete discovery before summary judgment can be granted, he was not given a legitimate opportunity to develop his claims before judgment was entered against him.

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

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

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

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

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

(Footnote omitted).

“It bears emphasis here that claims in postconviction proceedings must be supported by some competent evidence of a constitutional violation. A mere hypothesis of a constitutional claim upon further discovery is not sufficient to warrant an evidentiary hearing.” *State v. Coleman* (March 17, 1993), 1<sup>st</sup> Dist. No. C-900811. “[T]he purpose of post-conviction proceedings is not to afford one convicted of a crime a chance to retry his case.” *Id.*

There is also no right to expert assistance in post-conviction proceedings. The Franklin County Court of Appeals properly found this issue was barred by *res judicata*, as this Court had

addressed the issue of whether trial counsel were ineffective for failing to hire such experts. *Bethel*, 2008-Ohio-2697, ¶ 30, citing *Bethel*, 110 Ohio St. 3d 416, 2006-Ohio-4853 at ¶ 168.

Upon the filing of his petition for post-conviction relief, appellant Bethel requested funds to retain John R. Nixon in the field of ballistics, Dr. Deborah Davis in the field of false and coerced confessions, Dr. Werner U. Spitz in the field of forensic pathology, and Kort Gatterdam as an attorney expert. The trial court properly denied the requests to fund these experts. There is no statutory provision that provides for a right to assistance of experts while pursuing a petition for post-conviction relief. *Tolliver*, supra ¶25, citing *State v. Hooks* (October 30, 1998), 2<sup>nd</sup> Dist. Nos. 16978 & 17007. Although a petitioner facing the death penalty has a statutory right to counsel to pursue post-conviction relief, there is no corresponding statutory right to the assistance of experts. See *State v. Smith* (March 15, 2000), 9<sup>th</sup> Dist. No. 98CA007169; *State v. Nelson* (September 21, 2000), 8<sup>th</sup> Dist. No. 77094.

R.C. 2929.024 does not provide independent grounds for funding expert and investigative assistance. R.C. 2929.024 provides for assistance “at either the guilt or sentencing phase of an aggravated murder trial \* \* \*.” Similarly, Superintendence Rule 20 does not authorize expert funding in post-conviction litigation. It is tied to the appointment of counsel under the rule, and the rule is limited to appointing counsel at trial or on direct appeal. See *Hooks*, supra.

The appellant cites *Ake v. Oklahoma* (1985), 470 U.S. 68, although it was limited to the assistance of a psychiatrist *at trial*, when the defendant’s sanity was seriously called into question. Courts have rightfully distinguished *Ake* from an indigent’s entitlement to non-psychiatric experts at trial, and again, have distinguished the right to court-appointed experts at trial as opposed to post-conviction proceedings. *Johnson v. Gibson* (C.A. 10, 1999), 169 F.3d

1239, 1247; *United States v. Kennedy* (C.A. 10, 1995), 64 F.3d 1465, 1474 n. 8. *Powell v. Collins* (C.A. 6, 2003), 332 F.3d 376, was a trial (penalty phase) case that followed *Ake*.

There are limitations on the funding of expert assistance for an indigent defendant even in the pretrial arena. Such funding is required only if such assistance would be reasonably necessary for the proper representation of defendant, as shown by a particularized showing that: (1) there exists a reasonable probability that the requested expert would aid the defense; and (2) denial of the requested expert assistance would result in an unfair trial. *State v. Mason* (1998), 82 Ohio St.3d 144, syllabus. The defense must show more than the mere possibility of assistance, and due process does not require that an indigent defendant be given all of the assistance that a wealthier counterpart might buy. *Id.* at 149. An indigent defendant is only entitled to the basic and integral tools necessary to ensure a fair trial. *Id.* at 149. A court must consider whether the availability of alternative devices would fulfill the same function as that requested in the motion for expert assistance. *State v. Campbell* (2000), 90 Ohio St.3d 320, 328. In hiring experts, “[a]ttorneys need not pursue every conceivable avenue; they are entitled to be selective.” *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶107, quoting *State v. Murphy* (2001), 91 Ohio St.3d 516, 542, 2001-Ohio-112.

Both a forensic pathologist and a ballistics expert were sought at the postconviction stage to cast doubt on the appellant’s confession, apparently by testimony tending to suggest that the physical evidence did not coincide with the appellant’s confession of the double homicide. Trial counsel promised the jury that they would not dispute the causes or general circumstances of the deaths, or that Bethel was one of the last persons to see Reynolds and Hawk alive. Nevertheless, they continued to make their points throughout the trial. There were footprints around the bodies, although not photographable. Dr. Tate testified that dragging the bodies may have

caused the abrasions found on Hawk. Dr. Fardal admitted that he would have expected to find bullets in the ground beneath the bodies (if they were shot where they were found), and could not exclude the theory that the bodies had been moved post-mortem.

The appellant forthrightly claimed that a forensic pathologist was “necessary to rebut” the testimony of assistant coroner Fardal. Postconviction proceedings are not an opportunity to retry the case. The substance of coroner’s testimony was known to appellant’s trial counsel. The coroner testified that he had met with both defense attorneys before trial, and he had previously made notations on Defendant’s Exhibit 11, the Styrofoam head. Mr. Nixon, the ballistics expert, proposed to analyze the spent rounds found at the scene to determine caliber, and sought to reconstruct the crime scene to suggest that the confession was inaccurate.<sup>1</sup>

The theory that Bethel’s proffered statement was false *was* the defense theory at trial. Defense counsel properly relied upon the testimony of the appellant himself, and private investigator Phillips, in making the claim that the appellant made a false confession, rather than presenting an expert in false or coerced confessions, such as Dr. Davis. The trial defense introduced evidence as to all of the factors that Dr. Davis’s affidavit suggests can make a confession unreliable. In opening, defense counsel stated:

Nevertheless, on August 29 of the year 2000, having had virtually no benefit of the advice and counsel of his attorneys who were then on the case, having been visited a number of times at the jail by them, aware that very little investigation, if any, had been conducted on his behalf, believing that all these things were true, that his attorneys had not worked on the case substantially enough to present a reasonable and viable, vigorous defense on his behalf, being told by his counsel that if he went to trial the next day that he would be convicted of two counts of aggravated murder with death penalty specifications and that he would receive the death penalty, being told the same thing by his mother who was presented with the same type of result with these attorneys, having a conversation with his

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<sup>1</sup> Of course, Mr. Nixon states in his letter that he will need the shooter’s heights to construct scene diagrams with shooter’s positions and distances. The appellant’s argument has been that the identity (and so, the height) of the shooter(s) is still an open question.

mother in which she cried and told him, and you'll hear this because she's going to testify and Bobby's going to testify, told you in voir dire that she didn't want him to be on death row and she wanted to be able to see him, hold him.

As a last result, this young man capitulated and he agreed to enter into a plea bargain, if you will. As a last resort, he agreed to testify against his – against Mr. Chavis. As a last resort, he agreed to meet with authorities from the State on August the 30<sup>th</sup> and make an incriminating statement.

Folks, he's going to sit on this witness stand and he's going to tell you why he did that in spite of the fact that he had asserted his innocence repeatedly and over and over for four and a half years. What prompted him to make a false statement, and he's going to tell you, was untrue.

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We feel that based upon the evidence that's going to be presented, as a last resort you're going to feel that the State's witnesses are unreliable. We believe based on that estimate, as a last resort you're going to conclude there was no physical evidence that Bobby Bethel's involved in these crime's whatsoever.

The defense closing echoed the theme. Counsel suggested the proffer was made under “duress.” Bethel testified that he believed that his attorneys were not prepared for trial, and that he believed his proffered statement could not be used at trial. Substantial energy was expended toward contrasting the proffered statement from the physical evidence. The other two witnesses to whom Bethel confessed were critiqued.

Interestingly, the appellant's postconviction request for funds for Dr. Davis would have been merely enough to evaluate the “issues of coercion and the *potential* for the confession to be false.” The appellant did not apply for funds to hire an expert to determine how those theories may apply to this case.

The request for funds for an attorney expert was simply misdirected. The motion for appropriation of funds suggested that the affidavit of an attorney expert in capital litigation was necessary to support the appellant's claims that his trial-level attorneys were ineffective in particular ways. But, as the Court of Appeals for Hamilton County stated in *State v. Ballew*

(March 9, 1998), 1<sup>st</sup> Dist No. C-970313, (\*25), “affidavits from an expert reviewing *ex post facto* the performance of trial counsel is not competent evidence de hors the record in a postconviction proceeding.” (citations omitted). That court found a postconviction inquiry into the effectiveness of trial counsel to be barred by *res judicata* because this Court found that counsel was effective. More recently, the Court of Appeals for Montgomery County agreed that such an affidavit was not truly evidence de hors the record. In *State v. Franklin*, 2<sup>nd</sup> Dist. No. 19041, 2002-Ohio-2370, ¶12, the court stated, “the affidavit of an attorney giving an opinion based on facts in the record does not constitute evidence outside the record, but merely legal argument.” The court cited *State v. Zuern* (December 4, 1991), 1<sup>st</sup> Dist. Nos. C-900481 & C-910229:

We are convinced, moreover, that the affidavits of the two reviewing defense attorneys do not constitute evidence de hors the record sufficient to preclude the application of *res judicata* on these claims. Such affidavits as these are not evidence of facts; the record speaks for itself on what Zuern’s trial attorneys did or did not do in his defense. Rather, these affidavits merely stated legal arguments which could and should have been raised on direct appeal. Indeed, it would be a relatively simple matter to defeat the application of *res judicata* in postconviction proceedings if all that was required was to have new, highly-qualified counsel make arguments that could and should have been raised on direct appeal, notarize these arguments in affidavit form, and characterize such material as “evidence de hors the record.” Through such a process it would be possible to prolong forever postconviction review of the same claim based on such so-called “new” evidence or evidence de hors the record.

Such an attorney expert’s analysis is not cogent evidence. *State v. Hill* (June 19, 1998), 1<sup>st</sup> Dist. No. C-970650 (footnote omitted). It is the appellate court that is the “arbiter of the objective norms of practice.” *Id.*

The real purpose behind the funding requests was to suggest that trial counsel were ineffective for their failure to call such experts at the trial stage. Trial counsel’s decision to rely on cross-examination instead of calling an expert witness does not constitute ineffective assistance of counsel. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶118. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense

attorneys would not defend a particular client in the same way.” *Strickland v. Washington* (1984), 466 U.S. 668, 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

In assessing the competence of counsel, every effort must be made to avoid the distorting effects of hindsight. *Id.* In assessing such claims, “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101.

It was entirely predictable that the criticism of the trial raised on post-conviction is that the confession was not exposed as “false.” After all, Robert Bethel admitted in front of two prosecutors, two law enforcement officers, and his own attorney that he executed two persons in order to keep one of them from testifying at a murder trial against a gang member. Bethel was one of the last persons to be seen with the victims when they were alive, had bought matching shotguns with his co-defendant shortly before the crimes (Bethel’s mysteriously disappeared before ballistics could be compared), and also confessed to two other persons. The defense strategy at trial was to denigrate these two witnesses (a former girlfriend with admitted mental health issues and a gang member who sought a deal on his own federal charges), and to present the apparent variances between the proffered statement and the crime scene as “proof” that the confession was “false.” To this end, Bethel asked the trial court to fund a pathologist, a ballistics expert, and a psychologist in order to expose the “falsity” of Bethel’s proffered statement.

Civil discovery and the funding requests were properly denied, and the first and third propositions of law merit no further review.

## RESPONSE TO SECOND PROPOSITION OF LAW

### A POST-CONVICTION PETITION IS PROPERLY DENIED WITHOUT AN EVIDENTIARY HEARING WHEN THE PETITION DOES NOT CONTAIN A COGNIZABLE CLAIM OF A CONSTITUTIONAL ERROR.

When a defendant files a post-conviction petition, “the trial court has a statutorily imposed duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing.” *State v. Cole* (1982), 2 Ohio St.3d 112, 113. Before a defendant can obtain a hearing, the defendant must provide evidentiary documentation setting forth specific operative facts to support his claims. See *State v. Kapper* (1983), 5 Ohio St.3d 36; *State v. Pankey* (1981), 68 Ohio St.2d 58; *State v. Jackson* (1980), 64 Ohio St.2d 107. The evidentiary materials must support each element of the asserted constitutional claim. 64 Ohio St.2d at 111. “It bears emphasis here that claims in postconviction proceedings must be supported by some competent evidence of a constitutional violation. A mere hypothesis of a constitutional claim upon further discovery is not sufficient to warrant an evidentiary hearing.” *State v. Coleman* (March 17, 1993), 1<sup>st</sup> Dist. No. C-900811. “[T]he purpose of post-conviction proceedings is not to afford one convicted of a crime a chance to retry his case.” *Id.*

Post-conviction relief is allowed only for constitutional violations. R.C. 2953.21(A). Moreover, only errors occurring before the judgment of conviction can be grounds for post-conviction relief. *State v. Murnahan* (1992), 63 Ohio St.3d 60. As stated in *State v. Powell* (1993), 90 Ohio App.3d 260, the defendant must “demonstrate a constitutional violation in the proceedings that actually resulted in the conviction.” *Id.* at 265.

“Postconviction review is a narrow remedy, since res judicata bars any claim that was or could have been raised at trial or on direct appeal.” *State v. Steffen* (1994), 70 Ohio St.3d 399, 410. “Res judicata is applicable in all postconviction proceedings.” *State v. Szeftcyk* (1996), 77

Ohio St.3d 93, 95. The res judicata doctrine “underscores the importance of finality of judgments of conviction.” *Id.*

Res judicata bars any claim that a defendant could have raised in the trial court before conviction or on appeal after conviction. *State v. Perry* (1967), 10 Ohio St.2d 175.

Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal from that judgment*.

*Id.* at paragraph nine of the syllabus (emphasis in original). Thus, *res judicata* bars any defense that could have been raised during trial. *Id.* Res judicata will apply “if the petition for postconviction relief does not include any materials out[side] of the original record to support the claim for relief.” *Combs*, 100 Ohio App.3d at 97.

A defendant cannot avoid the res judicata bar by the simple expedient of attaching evidence *dehors* the original trial record. Some evidence will not be truly “*dehors*” the record because that evidence merely repackages factual matters that were part of trial court record. *State v. Hessler*, 10<sup>th</sup> Dist. No. 01AP-1011, 2002-Ohio-3321, at ¶27; *State v. Lawson* (1995), 103 Ohio App.3d 307, 315.

Moreover, even for supposed new factual matters, res judicata will still bar most claims because such facts *could have been raised* before conviction. To avoid the res judicata bar, evidence from outside the original trial record “must be more than that which was in existence at the time of trial and which should have and could have been submitted at trial if the defendant had desired to make use of it.” *State v. Weaver* (December 31, 1997), 9<sup>th</sup> Dist. No. 97CA006686; *Coleman supra*; see, also, *State v. Hawkins* (June 26, 1996), 1<sup>st</sup> Dist. No. C-950130.

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

**I. Ineffective Assistance of Counsel – Trial Phase.**

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

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

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

*Carver* (C.A. 10, 2002), 297 F.3d 1036, 1048-49; *Cofske v. United States* (C.A. 1, 2002), 290 F.3d 437, 444; *People v. Satterfield* (1985), 66 N.Y.2d 796, 798, 488 N.E.2d 834, 836; *State v. Kimbrough* (Wis.App. 2001), 246 Wis.2d 648, 667, 630 N.W.2d 752, 761.

It is well settled that trial attorneys exercise discretion in deciding whom to call as witnesses. *State v. Sallie* (1998), 81 Ohio St.3d 673. “Decisions regarding the calling of witnesses are within the purview of defense counsel’s trial tactics.” *State v. Coulter* (1992), 75 Ohio App.3d 219, 230. There is a strong presumption that the failure to call additional witnesses falls within the wide range of reasonable professional assistance. *Sallie*, 81 Ohio St.3d at 675.

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

**A. Guilty Plea (First claim)**

Appellant alleges that his first attorneys were unprepared to counsel him to plead guilty. The trial court properly found that this issue was barred as it was litigated during the appellant’s direct appeal. Indeed, this Court stated:

We reject Bethel's contention that Janes and Edwards were unprepared for 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 Janes and Edwards sought and recommended a plea agreement because they were working in Bethel's best interest.

*State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, ¶ 165. Attorneys Janes and Edwards testified at the June 7, 2002 hearing on Bethel’s motion to suppress his proffer. The trial court properly denied appellant’s first claim.

**B. Confession Expert (Third claim)**

In his petition, the appellant sought to re-litigate the voluntariness of his confession by arguing trial counsel were ineffective for failing to utilize a confession expert. This issue was barred as it too was litigated at trial and addressed on direct appeal:

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.

*State v. Bethel*, supra, 2006-Ohio-4853, ¶ 168.

Even if the claim had not been barred, appellant's argument failed on the merits. As found by the trial court, Dr. Davis's affidavit did not support the assertion that the appellant's proffered statement was itself unreliable. Rather, Davis only suggested that the proffered statement *might* have been made under circumstances that have been associated with unreliable statements in her studies. The theory that defendant's proffered statement was not to be believed because it was made under stressful circumstances and because it did not coincide in all particulars with the crime scene as found by the authorities was presented thoroughly to the jury for their consideration.

**C. Psychological testimony (Fourth claim)**

Similarly, trial counsel was not ineffective for failing to present psychological testimony. Such testimony would have underscored the negative relationship that the appellant had with his mother. Defense counsel strategically chose to utilize Mrs. Bibler as an alibi witness. It would have been a poor juxtaposition to have also established that the appellant was under her thumb in all important life decisions. Moreover, the appellant prohibited his attorneys from presenting mitigation evidence that would have presented her in a bad light.

**D. Ballistics expert (Fifth claim)**

As noted above, this claim was litigated on appeal. *Bethel*, supra at ¶ 168. The trial court properly found the issue barred by res judicata. Furthermore, the failure to call an expert and instead rely on cross-examination does not necessarily constitute ineffective assistance of counsel. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436. Here, appellant again speculated as to how a ballistic expert could have assisted his defense. A ballistics expert could offer absolutely no useful information by cataloguing all spent shells in the field. Mr. Nixon did not claim personal knowledge with the crime scene or the condition of the victim's bodies. Notably, the appellant testified at trial that he previously shot a shotgun in the field in which he killed Reynolds and Hawk, and Donald Langbein also testified that he has previously shot guns there.

The Court of Appeals for Franklin County had previously found that the affidavit of the witness at issue, John Nixon, was not sufficient to warrant an evidentiary hearing in *State v. Conway*, 10<sup>th</sup> Dist. No. 05AP-76, 2005-Ohio-6377. In that case, the expert's opinions that a .45 weapon had poor penetration power and a particular trigger pull were dismissed as irrelevant and cumulative, respectively. *Id.* at ¶ 18-26 (noting at ¶ 22 that a "decision by defense counsel not to call an expert witness generally will not sustain an ineffective assistance of counsel claim.")

**E. Forensic pathologist (Sixth claim)**

As the trial court found, appellant's claim that a forensic pathologist would have aided his trial was purely speculative. Dr. Spitz did not claim personal knowledge with the crime scene or the condition of the victim's bodies. Appellant could only speculate as to how the expert would have assisted his defense. Given its speculative nature, the affidavit of the doctor did not constitute evidence to support a hearing on his petition. In *State v. Wright*, 4<sup>th</sup> Dist. No. 06CA18, 2006-Ohio-7100, ¶ 22, a postconviction hearing was properly denied when the medical

evidentiary documentation spoke to the defendant's condition generally, and not to the defendant specifically. As noted above, this claim was litigated on appeal. *Bethel*, supra at ¶ 168.

**F. Failure to investigate Campbell (Seventh claim)**

Appellant argued that his counsel was ineffective for failing to investigate Mrs. Campbell's mental health. But, Mrs. Campbell spoke to two defense investigators prior to her testimony. Campbell testified at trial to her diagnoses, her medications, her hospitalizations, and her memory loss. The jury was given every opportunity to disbelieve Mrs. Campbell. The appellant assails his attorney's decision to not seek out her family and friends for further impeachment material. The scope of investigation is considered within the realm of trial strategy, and is "virtually unchallengeable." *Strickland*, 466 U.S. at 690-691. Review of the credibility of her testimony is barred by res judicata. Appellant's claim that investigators could have pursued more leads is speculative. Appellant's evidentiary documentation provided to support this claim was merely cumulative. Furthermore, his documentation did not establish that trial counsel was ineffective for failing to further cross-examine the witness.

**G. Failure to impeach Langbein (Eighth claim)**

Appellant is unable to show he received ineffective assistance of trial counsel. The record shows that Langbein was thoroughly impeached. The claim is barred by res judicata. In his Application for Reopening filed January 2, 2007 in the Supreme Court of Ohio, the appellant asserted that his counsel were ineffective in not further cross-examining Langbein. The appellant fails to link the alleged logical inconsistency in Langbein's testimony to the claim of ineffective assistance of counsel. He also fails to establish how the failure of the police to find the murder weapon, and the failure of Langbein to get the appellant to incriminate himself on tape was ineffective assistance of counsel. The court of appeals properly observed:

Therefore, ineffective assistance of counsel cannot be based upon 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.

*State v. Bethel*, supra, (10<sup>th</sup> Dist. No. 07AP-810), 2008-Ohio-2697, ¶51.

**H. Failure to investigate and introduce evidence of other suspects** (Twentieth claim, as amended)

The attorneys made a reasonable strategic decision to pursue the theory that the murders were committed by Donald Langbein and Cheveldes Chavis, especially given Langbein's knowledge of the crime scene and Cheveldes Chavis' access to the weapons and to the living quarters where the Tyrone Green discovery materials were found. Debatable trial tactics do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Counsel were not ineffective in narrowing the defense focus.

**I. Failure to introduce tapes** (Twenty-second claim)

The tapes that memorialize the appellant's conversations with Donald Langbein were not proffered to the record. This Court so found in the direct appeal. *Bethel*, supra at ¶97. Further litigation of this particular issue is barred by res judicata and the law of the case doctrine. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1.

Appellant argues that his trial counsel were ineffective for failing to introduce additional tapes at the trial. However, he does not indicate how his attorney's actions were actually deficient, or how he was prejudiced. The trial court properly rejected this claim.

During trial, the court indicated that the defense would be permitted to use the tapes if the appellant testified. Appellant did testify. The decision to not use the Langbein tapes was a matter of trial strategy. The strategy may have been as simple as a decision to not dilute the

emotional impact of the appellant's testimony with hours of small talk about mutual acquaintances or the fast food business. The defense may have decided that the tapes did not present the appellant in the best light, because of jargon or terms he interjected into the conversation. The defense may reasonably have concluded that the tapes did not advance his cause.

## **II. Ineffective Assistance of Counsel – mitigation phase**

The strong presumption of effectiveness also applies in assessing mitigation strategies in capital sentencing proceedings. “[W]hen \* \* \* counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance.” *Combs*, 100 Ohio App.3d at 105; *Hessler*, 2002-Ohio-3321, at ¶32; *State v. Murphy* (December 26, 2000), 10<sup>th</sup> Dist. No. 00AP-233.

### **A. Failure to conduct mitigation investigation before plea (Second claim)**

The appellant's claim that his original attorneys conducted a cursory mitigation investigation would be significant if he had received the death penalty after they represented him at trial. However, they supervised a plea agreement that took the death penalty, and the need to weigh mitigation against aggravating circumstances, off the table.<sup>2</sup> The appellant's attempt to show prejudice is far-fetched, insinuating that his relationship with Janes and Edwards had a negative effect on his relationships with subsequent sets of attorneys. Again, true or not, this is irrelevant. The appellant had no right to a meaningful relationship with counsel. Trial attorneys Ketcham and McVay had prepared a meaningful mitigation presentation. Appellant torpedoed the work done on his behalf. Defense counsel stated to the court:

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<sup>2</sup> The State does not concede that the investigation was inadequate, but merely urges that a review of it is irrelevant.

As you know from the very beginning, our client and his family said he didn't want mitigation done. We did our investigation anyway, as the Supreme Court says is our duty, and we had it ready to go [.]

Bethel's misgivings about his mitigation presentation were raised on direct appeal, and therefore were not cognizable in a post-conviction proceeding under *State v. Perry*, supra.

**B. Failure to present mitigating evidence (Tenth through sixteenth claims)**

The trial court properly found that the issues in appellant's tenth through sixteenth claims were fully reviewed by this Court in appellant's direct appeal. The court of appeals observed: "The Supreme Court addressed this issue, and determined that trial counsel had, in fact, prepared a bona fide mitigation case." *State v. Bethel*, supra, (10<sup>th</sup> Dist. No. 07AP-810), 2008-Ohio-2697, at ¶52. Appellant seems to overlook that *he* chose to end his mitigation presentation after the testimony of Mr. Burke and his own unsworn statement. Outside the hearing of the jury, defense counsel stated:

He wouldn't let us put his mother on. He didn't want to talk about issues that we wanted to raise such as parental abandonment, the fact that – a little more detail about his father leaving, and then his mother lapsing into alcoholism shortly after he left and leaving Bobby at home alone to fend for himself, gone for days at a time, no structure, no discipline.

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

In *Schriro v. Landrigan* (May 14, 2007), \_\_\_ U.S. \_\_\_, 127 S. Ct. 1933, the defendant affirmatively refused to allow his attorneys to put on mitigation evidence by his birth mother and

his ex-wife, relative to fetal alcohol syndrome and a history of drug and alcohol use. The court found that the district court acted well within its discretion when it concluded that the defendant was unentitled to an evidentiary hearing on his habeas petition. The district court properly concluded that the defendant would be unable to develop a factual record that would establish ineffective assistance of trial counsel. If there was error in the failure to call such witnesses for testimony, the defendant affirmatively invited the error. The court of appeals aptly stated, “Bethel had the right to risk execution at the cost of protecting his relationship with his mother.” *State v. Bethel*, supra, ¶55.

In *State v. Keith* (1997), 79 Ohio St.3d 514, this Court held that “the ultimate decision to introduce additional mitigating evidence is not a fundamental right which needs to be personally waived by the defendant.” *Id.* 530. The failure to present mitigating evidence does not itself constitute ineffective assistance of counsel because “. . . the omission of such evidence in an appropriate case could be. . . the result of a tactical, informed decision by counsel, completely consonant with his duties to represent the accused effectively.” *State v. Johnson* (1986), 24 Ohio St.3d 87, 91.

Affidavits from experts establishing additional evidence of a defendant's theory of mitigation or establishing alternative theories of mitigation fail to show ineffective assistance of counsel. *State v. Combs*, supra; see also, *State v. Landrum* (January 11, 1999), 4<sup>th</sup> Dist. No. 98 CA 2401. “A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial.” *Combs*, supra at 103. The trial court properly denied appellant's mitigation claims.

### III. Prosecutorial misconduct (Ninth claim)

*State v. Perry*, supra, bars the ninth ground for relief, because it is entirely dependent upon the trial transcript. Appellant alleges that his pretrial statement to the police notified the authorities of his intention to claim alibi. As such, the issue could have been raised before or during trial or on direct appeal. There was no objection to the prosecutor's statement in closing argument. The prosecutor accurately stated when the notice of alibi was filed. A prosecutor's conduct cannot be grounds for error unless such conduct deprived the defendant of a fair trial. *State v. Evans* (1992), 63 Ohio St.3d 231, 240. Absent the deprivation of a fair trial, no constitutional error occurs. *Darden v. Wainwright* (1986), 477 U.S. 168, 183 n. 15. The test for prosecutorial misconduct is whether the conduct was improper, and, if so, whether it prejudicially affected substantial rights of the defendant. *State v. Lott* (1990), 51 Ohio St.3d 160, 165. Issues of prosecutorial misconduct must be addressed in the context of the entire trial. See *State v. Keenan* (1993), 66 Ohio St.3d 402, 410. The record shows that the appellant was not deprived a fair trial.

A closing argument must be viewed in its entirety to determine prejudice. *State v. Hill* (1996), 75 Ohio St.3d 195, 204, citing *State v. Byrd* (1987), 32 Ohio St. 3d 79, 82. In the case at bar, the prosecutor's comments neither materially prejudiced the appellant nor denied him a fair trial. Furthermore, the jury was instructed that closing arguments were not evidence. The jury is presumed to follow the court's instructions. *State v. Loza* (1994), 71 Ohio St.3d 61, 79, 1994-Ohio-409. Appellant failed to show he was deprived of a fair trial and the trial court properly denied this claim.

#### IV. Exclusion of the additional tapes (Twenty-third Claim)

Appellant alleges that the trial court erred in refusing to allow him to introduce the additional tapes during the cross-examination of Langbein. This claim was addressed by this Court on direct appeal. As such, *res judicata* bars further litigation of the issue.

Appellant sought to introduce his own self-serving denials of homicides (or at least, failures to admit the crimes). This Court supplied the missing steps:

Bethel also argues that the exclusion of the other conversations violated his right to confront Langbein with statements made by Langbein during those conversations. But at trial Bethel did not argue that he was entitled to use the tapes to confront Langbein with Langbein's statements. Bethel argued only that the jury should hear the tapes because they contained Bethel's denials of involvement in the murders.

*Bethel*, supra at ¶98.

Appellant argues that the jury was left with a one-sided view of the Bethel/Langbein conversations, and was able to conclude only that the appellant was “concerned” about the police investigation. Appellant should have been concerned. Bethel was aware that he was a suspect, and had already been interviewed by the police.

Appellant seems to suggest that the jury was left with the impression that he never denied committing the murders when he conversed with Langbein, and further suggests that this misconception could only have been remedied by playing the entire four tapes. He neglects to mention that his attorneys cross-examined Langbein and elicited this exact information. Langbein admitted that he went to see Bethel five times in the fall of 2000, each time “wearing the wire at the request of the detectives and the ATF [.]” The objective was to “go get a confession.” Langbein admitted that, despite coaching by the police, he was unable to get Bethel to confess.

The appellant asserts nothing beyond the excerpt of cross-examination proffered outside the hearing of the jury to suggest that the four tapes would in any way be useful to him, much less an error of constitutional dimensions. To the extent that his claim is premised upon the record, it is barred by res judicata. If, instead, the appellant is claiming that something specific is on the tapes that would have led a jury to disregard the evidence and his own confession, then the appellant is simply making conclusory allegations. “General conclusory allegations to the effect that a defendant has been denied effective assistance of counsel are inadequate as a matter of law to impose an evidentiary hearing.” *State v. Walker*, 10<sup>th</sup> Dist. No. 04AP-179, 2005-Ohio-461, ¶8.

Appellant does not point to anything in the tapes that is not also a part of the record on direct appeal which would lead to the conclusion that Evid.R. 106 was violated. The doctrine of completeness does not legitimize the admission of otherwise inadmissible exculpatory hearsay. *United States v. Shaver* (C.A.6, 2004), 89 Fed. Appx. 529, 533. Similarly, the Ohio Eighth District Court of Appeals has held that neither the doctrine of completeness nor Evid.R. 106 permit the introduction of otherwise inadmissible hearsay. In *State v. House* (October 18, 2001), 8<sup>th</sup> Dist. No. 78239, the State’s objection to the appellant’s efforts to have a police officer read an immaterial portion of a police report after the officer read from it was properly sustained.

The defense counsel admitted that the recordings had been made on four separate days. An Ohio appellate court has held that the doctrine of completeness does not require “completing” a statement with another that was made hours later. *State v. Watkins* (1981), 2 Ohio App.3d 402, 405.

Appellant’s second proposition of law merits no further review.

## RESPONSE TO FOURTH PROPOSITION OF LAW

THE CUMULATIVE ERROR DOCTRINE HAS NO APPLICATION WHEN A DEFENDANT HAS RECEIVED A FAIR TRIAL AND ERRORS, IF ANY, WERE INDIVIDUALLY AND CUMULATIVELY HARMLESS OR NONPREJUDICIAL.

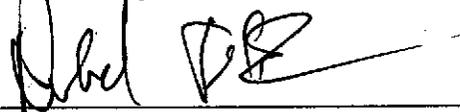
This Court has recognized that “multiple errors that are separately harmless may, when considered together, violate a person's right to a fair trial in the appropriate situation.” *State v. Goff* (1998), 82 Ohio St.3d 123, 140, citing *State v. DeMarco* (1987), 31 Ohio St. 3d 191, paragraph two of the syllabus. However, a finding of cumulative error presupposes a finding that error was committed in the first instance. *Goff*, supra at 140. Moreover, the doctrine may not be invoked when errors, if any, were individually and cumulatively harmless or nonprejudicial. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, ¶185, citing *Goff*. The appellant has not cited this Court to errors which cumulatively compel the conclusion that he did not have a fair trial. The fourth proposition of law merits no further review.

## CONCLUSION

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

Respectfully submitted,

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## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was forwarded via regular U.S. Mail, postage prepaid this day, August 13, 2008, to RACHEL TROUTMAN, Office of the Ohio Public Defender, 8 East Long Street, Eleventh Floor, Columbus, Ohio 43215; Counsel for Defendant-Appellant.



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