

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : 10-0827

Plaintiff-Appellee, : On Appeal from the Court of Appeals  
Ninth Appellate District

-vs- : Summit County, Case No. CA-24580

DONALD L. CRAIG, : **Capital Case**

Defendant-Appellant. :

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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 failure of counsel in a death penalty case to investigate trial phase issues and present mitigation testimony violates their client's constitutional rights to due process and effective assistance of counsel; (2) whether a capital post-conviction petitioner is entitled to discovery to support his claims; (3) and whether a capital post-conviction petitioner is entitled to the assistance of experts.

Post-conviction petitioners are denied due process when they are not afforded an evidentiary hearing on the issues raised in their petitions. Despite statutory rights to a hearing, and the presentation of evidence that could not have been determined from the trial record, petitioners are denied hearings and with them, the opportunity for a meaningful adjudication of their issues. See O.R.C § 2953.21(C) and (E). Trial courts denials of an evidentiary hearings violated petitioner's liberty interest under the Fourteenth Amendment's Due Process Clause. See Fetterly v. Paskett, 997 F.2d 1295 (9th Cir. 1993).

If post-conviction petitioners have no means of obtaining discovery, corrective process that should be meaningful will remain illusory. Case v. Nebraska, 381 U.S. 336 (1965). Without access to traditional discovery mechanisms, Ohio's post-conviction process is rendered useless for indigent petitioners. Indeed, the Sixth Circuit has commented on the inadequacy of the process. See e.g., Coley v. Alvis, 381 F.2d 870, 872 (6th Cir. 1967); Allen v. Perini, 424 F.2d 134, 139 (6th Cir. 1970); Keener v. Ridenour, 594 F.2d 581, 590 (6th Cir. 1979). This Court must grant jurisdiction to hear this case and reverse the erroneous decision of the Court of Appeals.

## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

### **PROCEDURAL POSTURE**

On May 16, 2007, Donald L. Craig filed his post-conviction petition, pursuant to O.R.C § 2953.21. Craig amended his petition on June 11, 2007. Craig subsequently filed a Motion for Leave to Conduct Discovery, Motion for the Appropriation of Funds for Neuropsychological Expert; Motion for the Appropriation of Funds for Expert Assistance, and Motion for the Appropriation of Funds for DNA expert.

The trial court denied Craig's motion for expert assistance and funds for neuropsychological expert and motion for discovery. On December 19, 2008, the trial court issued its Decision on Craig's Post-Conviction Petition. State v. Craig, Case No. 2006-01-0340 (Summit C.P. December 19, 2008). It denied all of Craig's grounds for relief.

Craig appealed the trial court's decision on January 16, 2009. On September 16, 2009, the Court of Appeals affirmed the judgment of the Court of Common Pleas. State v. Craig, Case No. 24580, 2009 Ohio App. LEXIS 4861 (Summit Ct. App. September 16, 2009). The Court detailed that the petition for post-conviction relief was missing from the record on appeal. Id. at \*2. The Court presumed the regularity of the proceedings and affirmed the trial court's decision. Id. at \*5.

Appellant filed a Motion for Reconsideration with the Court of Appeals on September 25, 2009, contemporaneously with a Motion to Supplement the Appellate Record with the Post-conviction Petition. The Court granted Appellant's Motions and on March 24, 2010, issued an

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<sup>1</sup> Unless otherwise noted, references to the transcript of the trial proceedings are identified as "T.p. \_\_\_\_" and references to exhibits attached to the State post-conviction petition are identified as "Ex. \_\_\_\_."

opinion affirming the judgment of the Court of Common Pleas. State v. Craig, Case No. 24580, 2010 Ohio App. LEXIS 975 (Summit Ct. App. March 24, 2010).

## **FACTUAL BACKGROUND**

### **Trial Phase**

Craig was indicted for the aggravated murder, kidnapping, and rape of Malissa Thomas. The indictment stated that the aggravated murder occurred on or about the 19th day of January, 1995, through, on, or about the 26th day of January, 1995.

Malissa Thomas' mother, Sonya Merchant, testified that Malissa was in the seventh grade. T.p. 1103. Merchant testified that on January 19, 1995, Malissa left the house with two girlfriends. T.p. 1104. But Malissa did not come home. Trying to find her daughter, Merchant checked with her daughter Darnella and several of Malissa's friends. T.p. 1105. Darnella had seen Malissa earlier in the evening. No one else had seen or heard from her. The next day they called the police. T.p. 1106. They gave the police information about Malissa and put up fliers around the neighborhood. On January 26, 1995, the police told Merchant that they had found Malissa's body in a vacant house. T.p. 1104-08.

John Redd found Malissa's body at a rental property owned by Annie Ricks. T.p. 1132. On January 26, 1995, the building was vacant and Redd and Bill Hodrick were cleaning it for rental. T.p. 1130. Redd found Malissa's body on the third floor. T.p. 1132. She was covered with a curtain and bound with shoelaces or yarn. T.p. 1158. The two men drove to Ms. Ricks' house and called the police. T.p. 1137. Officers and paramedics arrived at the scene. Id. Paramedics determined that Malissa was deceased. T.p. 1157.

The State called Patrick Gillespie, the forensic investigation supervisor for the Summit County Medical Examiner's Office to testify regarding Malissa's death. Gillespie testified that

vaginal, rectal, and oral swabs were obtained from Malissa Thomas and turned over to the police. T.p. 1406. William Cox performed Malissa Thomas' autopsy. T.p. 1428. According to his testimony, her hands had been tied with a green string-like material, and that it appeared that she had tried to chew through it; she died slowly. T.p. 1436, 1449. But he did not see evidence of vaginal or rectal trauma. T.p. 1452. Nor did he did not see complete spermatozoa when he examined the cavity smears; his finding for sperm was therefore negative. T.p. 1453-54. The acid phosphatase tests for sperm for the oral cavity and rectum were negative; the test on the vaginal swab was "probably positive." T.p. 1455. Dr. Cox testified that the cause of death was "cardiorespiratory arrest due to asphyxia, due to strangulation, complicated by hypothermia." The manner of death was homicide. T.p. 1457. On cross-examination, Dr. Cox testified that he found no physical evidence of sexual assault. T.p. 1488.

Most of the testimony at the trial phase in this case consisted of other acts evidence. Lavail Calhoun testified that in 1991, Craig picked her up at her grandmother's house in a gray Volvo. T.p. 1189-90. Craig said he wanted to stop by a house. After they stopped, Craig said the house had been broken into; they drove to a pay phone, and then drove back to the house to wait for police. Id. Calhoun asked to use the bathroom. Id. When they went into the house, Craig threw a sheet over her, took her upstairs, and tied her to the bed. T.p. 1192. He put duct tape over her mouth and threatened to kill her. T.p. 1193. Then he pulled her clothes off and raped her. T.p. 1189-93. Afterwards, Craig took her home; she eventually called the police. T.p. 1195. Calhoun gave the police a first name and a description. The officer who responded to the Calhoun call also testified. T.p. 1218. Craig was arrested. T.p. 1233. The case was eventually no billed. Calhoun identified Craig in the courtroom. T.p. 1202.

The State presented extensive testimony about the 1996 murder of Roseanna (Rosie) Davenport. Her father's girlfriend testified about the disappearance. Roseanna Davenport was twelve years old. T.p. 1239. On February 28, 1996, her went to her friend Esther's house and did not come home. T.p. 1240-41. Her family called the police. T.p. 1244-45. On March 5, 1996, the police informed Davenport's family that her body had been found. T.p. 1246.

Davenport's body was discovered in the basement of a vacant house, covered with old clothes. T.p. 1256. Esther's mother, Michelle Lindsey, testified that at the time, she was Craig's girlfriend. T.p. 1279. Craig was living with her then. Id. Lindsey also told the jury that Davenport had been to her house several times before and was there on the evening of February 28. T.p. 1281-82. That night, Davenport left alone on foot. T.p. 1282. Craig left some time later. T.p. 1283.

The police obtained Davenport's underwear from the Medical Examiner's office. At some point in the investigation, a blood sample was obtained from Craig. T.p. 1334-35. Per evidentiary procedure at the time, the blood sample was placed in the refrigerator. The evidence was submitted to BCI. T.p. 1336-37.

Dr. Lisa Kohler testified about Davenport's autopsy. Dr. Kohler did not perform the autopsy, but reviewed the records compiled by Dr. Ruiz, who had since retired. T.p. 1521-22. There was evidence of strangulation, rape and sodomy, and evidence that Roseanna had been bound. T.p. 1528, 1541-42. The tests for acid phosphatase were "likely positive" in the vaginal swab and borderline in the oral swab. T.p. 1545. The rectal swab was negative. Id. Cause of death was "cardiorespiratory arrest due to asphyxia due to strangulation." T.p. 1550.

James Wurster, retired employee of the Ohio Bureau of Criminal Identification (BCI) testified. According to Wurster, BCI obtained items in the Davenport case from the Akron

Police Department. T.p. 1616. Those items were examined and processed. Id. Semen was detected on the underwear. T.p. 1621-22. Davenport's blood sample and oral, rectal, and vaginal swabs were preserved. Samples from Craig were also retained. T.p. 1632.

Lynda Eveleth, of BCI, testified about the analysis of the samples from the Davenport case. The DNA profile from the sperm fraction in the panties was a mixture consistent with contributions from Davenport and Donald Craig. T.p. 1669. The partial DNA profile from the sperm fraction of the vaginal swab was a mixture. T.p. 1670. The partial major DNA profile was consistent with Donald Craig. Id. Eveleth also testified about the samples obtained in the Malissa Thomas case. The sperm profile obtained from the vaginal swab was consistent with Craig. T.p. 1682.

The defense presented four witnesses during the trial phase. One of the witnesses testified that he had smoked marijuana with Malissa Thomas. T.p. 1742. Dr. James Patrick, Lucas County Coroner, testified that he reviewed evidence from the Malissa Thomas case, including the autopsy protocol, and slides. T.p. 1800. He testified that there were no supporting photographs or microscopic slides to confirm the description of some putative or alleged injuries to the neck, and therefore he could not confirm the diagnosis of strangulation. T.p. 1802. He could not determine if injuries were consistent with hypothermia. T.p. 1803.

### **Penalty Phase**

Following Craig's conviction on all counts, defense counsel commenced the penalty phase presentation. Counsel presented only three witnesses on Craig's behalf. Lisa Griffin, Craig's sister, testified about Craig's history growing up. Lisa and Craig had the same father, but different mothers. T.p. 1948. She first met Craig when she was sixteen. T.p. 1949. She did not meet her father, Donald Craig, Sr. until she was twenty-two. T.p. 1944. Craig Sr. denied her

and her brothers. Id. He never paid child support. Id. She testified that the younger Craig never acted like a bully. T.p. 1945. He was not involved in fights. Id. She had never had any problems with him.

Craig's brother, Ray, also testified about his history. He testified that they grew up in the same house. T.p. 1958. Their mother raised them on her own; their father was not there. Id. Ray said Craig was quiet and not a bully. T.p. 1959. Ray testified that eventually, their stepfather, Charles Jones, provided them with a decent home. T.p. 1960-67.

Dr. John Fabian testified. He told the jury that he is a forensic and clinical psychologist. T.p. 1969. He testified that he reviewed documents and records, and interviewed four of Craig's family members, the brother, mother, sister, and stepfather. T.p. 1979. Dr. Fabian also met with Craig on four occasions, spending about twelve hours with him. T.p. 1979. He also performed some tests. Dr. Fabian viewed Craig as a sexually-oriented homicide offender. T.p. 1980. He mentioned the delivery complications of Craig's mother when Craig was born. T.p. 1984. He briefly mentioned Craig's attention problems, problems with risk-taking behaviors, sexual aggressiveness, and substance abuse. Id. He noted the lack of a father figure in Craig's life, and some evidence of poor attachment. T.p. 1984-85. In the family structure, he noted evidence of separation, a single parent home, residential mobility, and residential instability. T.p. 1985. There was some evidence of family crime and evidence of loss within the family. T.p. 1986. Craig also had a low IQ, in the borderline range of intellectual functioning, and poor verbal abilities. T.p. 1986-87. His tests indicated learning disabilities. T.p. 1987. There was evidence of attentional problems. Dr. Fabian testified that he questioned the family's commitment to school. T.p. 1988. He believed that Craig engaged in some negative relationships in the military and as an adult within the community. Id. The records and discussions with the family indicated

racial tension. T.p. 1988. He testified that Craig has a history of Cannabis abuse, a history of conduct disorder as a juvenile, and antisocial personality as an adult. T.p. 1994.

Dr. Fabian testified, “denial is a theme, and it seems to be more entrenched and thicker the more disturbed and the higher level sex offending we get into.” T.p. 1991. He testified that Craig has “paraphilias,” characterized by a “six-month period of recurrent intense sexually arousing fantasies, urges, or behaviors, generally involving nonhuman objects or the suffering or humiliation of oneself or one’s partner or children or other nonconsenting persons.” T.p. 1994-95. Within the category of paraphilias, are pedophilia and sexual sadism. T.p. 1995. Dr. Fabian testified that he arrived at these diagnoses based on the crimes and what he, Dr. Fabian, knew about them. Id. He categorized paraphilia as one of what he calls sexual deviancy disorders. Id. He believed that the type in this case was pedophilia, nonexclusive type. T.p. 1997. He testified that sexual sadism is another type of paraphilia. These “are sexual arousing fantasies, urges, or behaviors involving acts in which the psychological or physical suffering, including humiliation of the victim, is sexually arousing to the individual...” T.p. 1999. He diagnosed Craig as a homicidal pedophile, which he defined as a “compulsive type of sexual homicide, driven by sexual fantasy.” T.p. 2000.

Dr. Fabian noted that Craig had two homicide cases that were sexual in nature and that fit within the age of pedophilia, and that have qualities of sadism. T.p. 2000-01. He discussed sadistic behaviors, such as binding victims, which cause bleeding and injury and are grounded in sexual arousal. He testified that strangulation is a “real control type of method.” T.p. 2001. Controlling the time of death allows the perpetrator to engage in sexual fantasy and arousal. Id. He discussed death threats, intercourse, mutilating the victim, and prolonged periods of sexual assault and that “some of these factors are involved in this case.” T.p. 2001-02. Dr. Fabian then

proceeded to discuss fantasy, but acknowledged that “Mr. Craig is not discussing these offenses.” T.p. 2003-04.

Dr. Fabian also testified as to antisocial personality disorder. T.p. 2004-05. He testified about “burnout” among sex offenders, usually at 60 years of age. T.p. 2006-07. He testified that Craig has a low risk of future dangerousness. T.p. 2009-10.

The jury recommended that Craig be sentenced to death. T.p. 2095. The judge imposed the death penalty. T.p. 2109.

## ARGUMENT

### PROPOSITION OF LAW NO. I

WHEN A PETITIONER PRESENTS SUFFICIENT OPERATIVE FACTS IN HIS POST-CONVICTION PETITION, HE IS ENTITLED TO RELIEF OR, AT A MINIMUM, AN EVIDENTIARY HEARING ON HIS GROUNDS FOR RELIEF.

#### **Ineffective assistance**

Strickland v. Washington is part of a line of cases maintaining that counsel is critical. 466 U.S. 668, 684 (1984) (citing Powell v. Alabama, 287 U.S. 45 (1932), Johnson v. Zerbst, 304 U.S. 458 (1938) Gideon v. Wainwright, 372 U.S. 335 (1963)). The Supreme Court has identified the assistance of counsel as being of vital importance as “a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained.” Strickland, 466 U.S. at 685. Accordingly, “the right to counsel is the right to the effective assistance of counsel.” McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland,

466 U.S. at 687. The defendant must also “show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. The Strickland standard remains controlling.

Performance of defense counsel is judged with an objective standard of reasonableness. Strickland, 466 U.S. at 688. Considering an objective standard of reasonableness, counsel’s performance was deficient. Counsel must conduct a thorough investigation into their client’s background. Williams v. Taylor, 529 U.S. 362, 397 (2000) (internal citation omitted); Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997). See also ABA Guidelines, Comment 10.7.

Craig was convicted of aggravated murder and sentenced to death in an earlier case. Defense counsel in his second case planned to rely on the investigation from his first trial and did not complete their own investigation. Ex. 1. Given the evidence they had from the first trial, and the outcome and criticism of that trial, counsels’ failure to investigate was unreasonable.

Adopting an identical strategy would yield an identical result. If counsel in Craig’s first trial completed an investigation and it proved insufficient to earn a life sentence, Craig’s second counsel had an obligation to investigate and effectively present their client. But they did not even undertake their own investigation. Because counsel failed to investigate, Craig’s trial ended in the same result, he was sentenced to death. By “not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” counsel’s performance prejudiced Craig. Strickland, 466 U.S. at 687.

Judge Belfance, in her concurring opinion in the Court of Appeals, addressed the Strickland standard. She noted that “[t]he meaning of these powerful words is stripped away by the almost insurmountable standard courts must apply today to determine whether a criminal defendant was denied the effective assistance of counsel.” State v. Craig, Case No. 24580, 2010

Ohio App. LEXIS 975, \*24 (Summit Ct. App. March 24, 2010). She notes that despite Strickland's premise, "the test that has evolved no longer matches that standard." Id. Instead, "The Supreme Court's recognition that trial counsel might have acted the way he did as part of a strategy has been used to shield from review conduct that, in my opinion, should not be considered trial strategy." Id. at \*24-25. In her opinion, the prejudice prong of Strickland is also problematic as "even where counsel's conduct is clearly below any minimal standard of competence, such incompetence will go unaddressed because defendants must also demonstrate that the result of their trial would have been different but for counsel's conduct." Id. at \*25.

### **Post-conviction**

Craig supported each of his grounds for relief with specific evidence *dehors* the record. Broad assertions generally alleging that a petitioner has been denied the effective assistance of counsel, without further demonstrating prejudice, are inadequate as a matter of law. State v. Jackson, 64 Ohio St. 2d 107, 111, 413 N.E.2d 819, 822 (1980); State v. Kapper, 5 Ohio St. 3d 36, 38, 448 N.E.2d 823, 826 (1983). The evidence *dehors* the record, supporting Craig's claims, presented operative facts to support the claims and was not specious. State v. Cole, 2 Ohio St. 3d 112, 114, 443 N.E.2d 169, 171 (1982). In Cole, this Court held that "in a petition for post-conviction relief, the defendant, in order to secure a hearing on his petition, must proffer evidence which, if believed, would establish not only that his trial counsel had substantially violated at least one of a defense attorney's essential duties to his client, but also that said violation was prejudicial to the defendant." Id. "Generally the introduction in an O.R.C § 2953.21 petition of evidence *dehors* the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of *res judicata*." Id.

In enacting the post-conviction statute, the legislature made specific reference to what types of supporting evidence for post-conviction claims are appropriate: “The petitioner may file a *supporting affidavit and other documentary evidence* in support of the claim for relief.” O.R.C § 2953.21(A)(1) (emphasis added). The petitioner is not required to *prove* his claims and prejudice based solely on his petition, adopting such a position would simply read the evidentiary hearing provision out of the statute. While the petitioner is required to raise grounds and present sufficient operative facts to demonstrate prejudice, an evidentiary hearing, with proper discovery, is the proper forum for a petitioner – such as Craig – to *prove* prejudice. Jackson, 64 Ohio St. 2d at 112, 413 N.E.2d at 823; State v. Cooperrider, 4 Ohio St. 3d 226, 228, 448 N.E.2d 452, 454 (1983) (citing State v. Hester, 45 Ohio St. 2d 71, 341 N.E.2d 304 (1976)).

#### **Craig’s claims of ineffective assistance of counsel on post-conviction**

In his post-conviction petition, Craig supported his grounds for relief with operative facts and evidence dehors the record, adequate to justify relief. In each of his grounds for relief, he moved the court for discovery and an evidentiary hearing. Based on the sufficient operative facts set forth in his petition and attached exhibits, Craig was entitled to relief, or at a minimum, discovery and an evidentiary hearing.

#### **Grounds for Relief**

- A. Defense counsel failed to fully investigate and present mitigating evidence in the penalty phase of Craig’s capital trial. (First, Second, and Fifth Grounds for Relief)**

The Court of Appeals ruled that Craig’s counsel were effective because his brother, sister, and Dr. Fabian testified. State v. Craig, Case No. 24580, 2010 Ohio App. LEXIS 975, \*13 (Summit Ct. App. March 24, 2010). But simply presenting witnesses is not the same as effective assistance of counsel. Those witnesses must still present credible testimony; counsel has “a

responsibility to present meaningful mitigating evidence.” Skaggs v. Parker, 235 F.3d 261, 269 (6th Cir. 2000). Also, “‘the mere hiring of an expert is meaningless’ when counsel fails to use the expert’s knowledge to understand the nature and limits of the expert’s testimony.” Fautenberry v. Mitchell, 515 F.3d 614, 649 (6th Cir. 2008) (citing Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007)). Failing to present mitigating evidence constitutes ineffective assistance of counsel. Skaggs, 235 F.3d at 269, (citing Austin v. Bell, 126 F. 3d 843, 849 (6th Cir. 1997)).

Counsel planned to rely on the investigation from Craig’s first trial. Ex. 1. It was error for trial counsel to rely on another investigation. The first investigation proved inadequate, and Craig’s counsel had a duty to “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691. It was an abdication of counsels’ duty to the client to complete a thorough and independent investigation as commanded by the United States Supreme Court in Strickland and its progeny. While counsel is not required to turn over every stone in its investigation, the duty to conduct an investigation is well-established. Fautenberry, 515 F.3d at 646. Trial counsel knew that trial counsel in the Davenport-murder trial failed to complete a thorough investigation and failed in defense of their client. Counsel presented the same defense that was presented in the Davenport murder trial—one that was demonstrably inadequate and certain to fail as it did in the Davenport murder trial. Choosing a defense they knew would fail again was not a reasonable strategy, it was a concession.

The jury was given almost no information regarding Craig’s history, character, or background. Failure to present mitigating evidence was not a strategic decision but an “abdication of advocacy.” Austin, 126 F.3d at 849. “It was not that such information could not

be found, or that counsel made a reasoned decision to withhold the information for tactical or strategic reasons. The information was not presented to the jury because counsel never took the time to develop it.” Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995).

Because counsel did not complete a thorough and independent investigation, there was a lot of testimony that was not presented. Without adequate preparation or supervision, the mitigation witnesses did not fully develop or present to the jury issues regarding: Craig’s absent father, conflict within the family, racial tension at school and at home, early developmental delays, lack of parental supervision, mother’s racial attitudes, borderline IQ, learning disabilities, untreated Attention-Deficit Disorder, emotional distress during childhood as indicated by bedwetting and thumb sucking, bullying he experienced, lack of stability, and influence of brothers’ inappropriate or illegal activities. Exs. 3, 4, 4a, 4b, 4c, 4d, 4e. “If the defense lawyers had looked in the file on [their client’s] prior conviction...they would have found a range of mitigation leads that no other source had opened up.” Rompilla v. Beard, 545 U.S. 374, 390 (2005). Courts have recognized these issues as mitigating. State v. Rojas, 64 Ohio St. 3d 131, 143, 592 N.E.2d 1376, 1386-87 (1992) (recognizing defendant’s history and background as mitigating, also suffering from substance abuse and personality disorders); State v. McNeill, 83 Ohio St. 3d 438, 454, 700 N.E.2d 596, 611 (1998) (defendant’s Attention Deficit Hyperactivity Disorder having some weight due to its effect on impulse control lessened by the questionable reliability and testimony of expert witness); State v. Fears, 86 Ohio St. 3d 329, 349, 715 N.E.2d 136, 155 (1999) (low IQ not reaching mental retardation standards entitled to some weight.)

Counsel also failed to use Craig’s brother and sister, who could have provided meaningful mitigation. Evidence of traumatic brain injuries and organic brain damage has a powerful mitigating effect. Under Ohio law, “a brain injury and its potential medical

implications” would have been relevant mitigation. Haliym v. Mitchell, 492 F.3d 680, 716 (6th Cir. 2007). The testimony defense counsel presented omitted a wealth of mitigating factors relevant to Craig’s brain injuries and neuropsychological deficits. Neither counsel, Craig’s siblings, nor Dr. Fabian provided details of Craig’s history of head injuries, including when at eight months, Craig fell and had his head caught, upside down, between a wall and a headboard. Ex. 4. His family was not sure how long he had been there before he was rescued. Id. They also failed to detail the time when a cabinet fell on the center of Craig’s head, resulting in bleeding from the nail that punctured it. Id. Following the injury, Craig received no formal medical attention but he suffered lingering effects, including a knot that would rise on his forehead and that his family would laugh at when it appeared. Id. Without this testimony, the jury failed to appreciate the effects of these traumas on Craig’s development and behavior. Courts have granted relief where counsel has failed to provide significant evidence of brain damage. Harries v. Bell, 417 F.3d 631, 639-40 (6th Cir. 2005) (granting relief where defendant “suffered damage to the frontal lobe of his brain, . . . [damage that] can result from head injuries and can interfere with judgment and decrease a person’s ability to control impulses”); Hamblin v. Mitchell, 354 F.3d 482, 492 (6th Cir. 2003) (a defendant is entitled to relief where a jury does not hear of the brain damage from a blow to the head). But such a presentation requires a full and complete investigation of mitigating evidence, which includes the defendant’s “history, background and organic brain damage.” Glenn, 71 F.3d at 1207. The result, was a mitigation presentation that was incomplete, while had all evidence been properly presented, the “mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of” Craig’s culpability. Wiggins v. Smith, 539 U.S. at 538 (2003) (quoting Williams, 529 U.S. at 398).

Nor did counsel elicit detailed testimony about Craig's early life—when many of the difficulties he would deal with as an adult, began. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (noting that consideration of an offender's life history is “part of the process of inflicting the penalty of death”). No one testified about how during his childhood, Craig and his siblings would gather the potatoes that were left in the fields after the harvest, and then eat nothing but French fries for dinner and grits for breakfast for several days, while their mother drank only water, because the family did not have any money. Id.

Counsel failed to present testimony regarding the family's attitudes about crime and what constituted proper social interaction. Id. Craig saw it as acceptable to swear, fight with his brothers, or even steal his mother's car; these behaviors were never discouraged from within the family. Id. Craig saw himself as “Robin Hood,” stealing from the rich and giving to the poor, invariably taking from whites to “get back what was taken from ‘us.’” Id. Courts have recognized the significant mitigating impact of disadvantaged and troubled upbringings. Wiggins, 539 U.S. 516-17 (children were forced to beg for food or else eat paint chips and garbage); Rompilla, 545 U.S. at 392-93 (the jury never heard any of the red flags from defendant's early problems including fetal alcohol syndrome to organic brain damage substantially impairing his ability to appreciate the criminality of his conduct). The mitigating effect of a family with such values is significant, especially when crime is encouraged. State v. Tenace, 109 Ohio St. 3d 255, 272, 847 N.E.2d 386, 402 (2006) (he “was doomed from the start...[his] parents were criminals, were abusive, and were neglectful substance abusers. His childhood was a ‘tutorial’ for criminal behavior.”); State v. Mack, 73 Ohio St. 3d 502, 516, 653 N.E.2d 329, 340 (1995) (a difficult and troubled childhood were entitled to some weight in mitigation); State v. Hill, 75 Ohio St. 3d 195, 213, 661 N.E.2d 1068, 1084 (1996) (Defendant

had a “difficult life growing up in an urban slum. His mother was depressed and poor, and he lacked a strong, supportive father... even his relatives, in effect, conceded that [he] never outgrew or overcame the difficult challenges present in his youth.”).

Craig’s family life was incomplete, his father never acknowledging him or participating in his development. Craig never had a regular father figure. His own father denied Craig and his brothers. During divorce proceedings, Craig Sr. alleged that Craig’s mother committed adultery, and that two of the four children were not his. Id. As a result, he was only required to pay \$29 in child support. Id. But during the marriage, Craig Sr. was seeing another woman and got her pregnant. Id. He did not come to see his son’s birth or to support Craig’s mother as she struggled through labor and nearly died. Only after Craig’s mother regained consciousness, three days later, did he come to see his son. Id. Counsel never presented these details, which would have humanized Craig and given the jury more information about his difficult upbringing. Wiggins, 539 U.S. at 535; Eddings, 455 U.S. at 112. State v. Spivey, 81 Ohio St. 3d 405, 424, 692 N.E. 2d 151, 166 (1998) (his background was entitled to some weight in mitigation because he “was plagued by physical and mental problems or deficiencies, had difficulties in school, suffered parental rejection at an early age.”).

But counsel was unaware of these details because they failed to conduct a thorough and independent investigation. Trial counsel abdicated their duty under Strickland by failing to conduct a full investigation and present mitigating evidence. Rompilla, 545 U.S. at 387; Wiggins, 539 U.S. at 522; Williams, 529 U.S. at 396-97 (2000).

The failure to present meaningful mitigation prejudiced Craig. Had defense counsel presented this evidence, it would have “undermine[d the] confidence in the outcome” of the case. Strickland, 466 U.S. at 694. Taken as a whole, the evidence “might well have influenced the

jury's appraisal" of Craig's moral culpability. Williams, 529 U.S. at 398. Without a proper presentation of evidence of Craig's head injuries and the resulting deficits, the jury was unable to evaluate his behavior. Such evidence is powerful mitigation that had it been presented, would have influenced the jury. Rompilla, 545 U.S. at 393; Harries, 417 F. 3d at 640. The failure to present evidence of Craig's absent father and turbulent upbringing also prejudiced him as it deprived the jury the opportunity to hear of the kind of troubled history that the Supreme Court has "declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. at 535. Penry v. Lynaugh, 492 U.S. 302, 319 (1989) *rev'd on other grounds* Penry v. Johnson, 532 U.S. 782 (2001). Craig was prejudiced as the jury was not given opportunity to view his whole life history as mitigation. Eddings, 455 U.S. at 112.

Craig was prejudiced by his counsel's decision to wait until after the trial phase to begin preparation for mitigation, which was "below an objective standard of reasonableness" Strickland, 466 U.S. at 687-88. Failure "to make any significant preparations for the sentencing phase until after the conclusion of the guilt phase...was objectively unreasonable." Glenn v. Tate, 71 F. 3d 1204, 1207 (6th Cir. 1995). Counsel did not build a defense team but instead intended to rely on the investigation from Craig's first capital case. Dr. Fabian was hired only after the trial phase concluded. Ex.1. The last-minute decision to hire him was not a strategic decision. Dr. Fabian did not have enough time to conduct a proper mitigation investigation. Exs. 1, 2, 18.

Instead of presenting detailed accurate mitigation, defense counsel prejudiced Craig by presenting erroneous and damaging testimony characterizing him in stigmatizing terms as a homicidal pedophile. Dr. Fabian presented unqualified and erroneous testimony regarding

Craig's sex offender status. Ex. 3. Counsel did not pursue any of the factors that he identified and instead presented his testimony.

Because of the time constraints, Dr. Fabian was only able to identify potential mitigating factors, rather than those actually present. Ex. 18. He identified possible mitigating factors in Craig's background including delivery complications, low IQ/learning disabilities, poor commitment to school, frequent school transitions, attention deficits, substance abuse, some family instability, familial mental illness, criminality, and substance abuse, racial tension and oppression, sexual deviancy disorders, and positive prison adjustment. Ex. 18. Dr. Fabian was not a cultural expert and had neither time nor training for proper neuropsychological evaluations. Ex. 1. Counsel should have devoted more time and experts to these potential factors.

Dr. Fabian did not even think that he was a member of Craig's defense team, despite defense counsel's presentation of his testimony on Craig's behalf. T.p. 1977. In addition, he supplemented his testimony, by relying on information other than what Craig told him. T.p. 2026. The bulk of Dr. Fabian's testimony was devoted to classifying Craig as a "homicidal pedophile" and a "sexual sadist." According to Dr. Monique Coleman, Psy. D., those classifications were both prejudicial and erroneous. Ex. 3. Those classifications could not have been made based on the evidence that Dr. Fabian had and he admitted as much. T.p. 2026. For a proper diagnosis of pedophilia, the very first criteria "requires evidence that over a period of at least 6 months, recurrent, intense sexual arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children...has occurred." Ex. 3. Id. There is no evidence of any such fantasies or urges in Craig's case. Id.

Dr. Fabian's diagnosis of sexual sadism was erroneous for the same reason. The evidence was not there. Dr. Coleman noted that "while it can be understood how some of the

acts indicated for this diagnosis are comparable to those that occurred in Mr. Craig's case, those similarities do not justify this diagnosis and its implications." Ex. 3. As with the homicidal pedophile diagnosis, "[t]here is no evidence based on collateral reviewed that suggests such was occurring during a 6 month period at or around that time." Id. By Dr. Fabian's own admission, no such evidence existed, and in making that diagnosis, he relied on evidence he did not have. T.p. 2026.

The appellate court's determination, that trial counsel presented meaningful mitigation evidence, was incorrect. Craig, 2010 Ohio App. LEXIS 975 at \*13. Although Dr. Fabian testified to some mitigating factors, his conclusions were spurious and incomplete—he presented misleading and prejudicial evidence, rather than meaningful mitigation. See Exs. 1, 2, 3, 4, 4a, 4b, 4c, 4d, 4e, 6, 18.

In denying this claim, the Court of Appeals found that the trial court did not err in dismissing the claims as cumulative of the evidence submitted during mitigation. Craig, 2010 Ohio App. LEXIS 975 at \*13. The Court of Appeals concluded that the trial court's decision that Craig was not denied the effective assistance of counsel was supported by competent and credible evidence. Id. The Court of Appeals also found that Craig presented these same arguments to this Court in the direct appeal and that the "arguments presented in his direct appeal rely on the same alleged shortcomings as Craig presented in this petition for postconviction relief." Id. at \*14. However, these decisions are wrong.

Craig supported his argument in his post-conviction petition with evidence dehors the record, which he could not have provided on direct appeal. State v. Ishmail, 54 Ohio St. 2d 402, 405, 377 N.E.2d 500, 501-02 (1978). In State v. Perry, 10 Ohio St. 2d 175, 180, 226 N.E.2d 104, 108 (1967), this Court held that res judicata bars post-conviction claims that are not supported by

evidence dehors the record. This Court has also recognized several situations in which res judicata does not apply. If the post-conviction claim is supported by both evidence outside the record and evidence appearing in the record, the issue is not subject to the bar of res judicata. State v. Smith, 17 Ohio St. 3d 98, 101, 477 N.E.2d 1128, 1131, fn.1 (1985); State v. Milanovich, 42 Ohio St. 2d 46, 49-50, 325 N.E.2d 540, 543-44 (1975); State v. Cooperrider, 4 Ohio St. 3d 226, 228, 448 N.E.2d 452, 454 (1983). Craig's grounds for relief are based on evidence dehors the record and cannot be barred by res judicata.

The evidence Craig introduced was also distinct from his mitigation evidence and not cumulative. Craig, 2010 Ohio App. LEXIS 975 at \*13. Given the inaccuracies and omissions in defense counsel's mitigation phase presentation, the evidence submitted in post-conviction was separate and distinct. Exs. 3, 4. A wealth of information presented in post-conviction was not a part of the mitigation presentation, including evidence of Craig's family attitudes encouraging crime and racial attitudes. Ex. 4.

Craig's counsel failed to provide effective assistance under Strickland. The failure to investigate the mitigating factors and evidence left them unable to make a reasonable professional decision regarding the presentation of evidence. Because they did not investigate the relevant mitigation evidence, they were unable to present it to the jury, and Craig was prejudiced.

**B. Defense counsel failed to use an expert for neurological and neuropsychological tests. (Third Ground for Relief)**

Craig argued ineffective assistance of counsel because "trial counsel failed to obtain all necessary experts, and as a result, crucial mitigating evidence was not presented to the jury." PC Pct. ¶ 40. Dr. John Fabian testified at the mitigation hearing, but his testimony was incomplete and unqualified. Because Dr. Fabian was hired after Craig's conviction and only days before the

mitigation phase, he only had time to do a limited investigation, only designed to identify “*potential* mitigating factors.” Ex. 18. (Emphasis added.) Additionally, Dr. Fabian was not qualified to provide neuropsychological testimony, nor did he perform neuropsychological tests. Ex. 1. Among the few things he could definitively state was that further testing was warranted. Ex. 1. While the actual outcome of that testing was uncertain, the need was not speculative. Had Dr. Fabian been able to opine with any greater specificity, no further testing would have been necessary.

Dr. Monique Coleman also confirmed in her qualified, professional judgment, that given Craig’s history of head injuries and prematurity, a neuropsychological evaluation could yield positive findings. Ex. 4. The substance of Craig’s claim is that based on Dr. Fabian’s testimony and the affidavits of Dr. Coleman, trial counsel was ineffective because they failed to investigate this issue. Testimony as to this organic defect has resulted in relief; failure to present evidence of Craig’s organic brain damage “was both objectively unreasonable and prejudicial.” Glenn v. Tate, 71 F. 3d 1204, 1211 (1995).

The Court of Appeals erred in affirming the trial court’s conclusion that it was only speculative that neuropsychological testing would have revealed evidence that could have been presented during mitigation. Craig, 2010 Ohio App. LEXIS 975 at \*15. The Court stood on trial counsel’s decision and refused to question the trial tactics. Craig, 2010 Ohio App. LEXIS 975 at \*15-16. In part, the evidence dehors the record attached to this Ground for Relief was evidence that counsels’ decision was not reasonable. First, counsel believed it could rely on the mitigation investigation done for Craig’s first trial. Ex. 1. Strickland mandates that counsel “make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” 466 U.S. at 691. Investigations into mitigating evidence “should comprise efforts

to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” Wiggins, 539 U.S. at 524 (citing ABA Guidelines 11.4.1(C)). The Sixth Circuit has found ineffective assistance of counsel where defendant’s counsel never consulted a mental health expert, despite being told there was a potential mental-health issue. Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005). Despite evidence of mental and neuropsychological issues, counsel did not investigate or present expert testimony. They did so despite their duty to investigate and the favorable results of other similar mitigation presentations. Strickland, 466 U.S. at 691; Glenn, 71 F.3d at 1211. As a result, the extent of Craig’s mental-health mitigation was not revealed to the jury and they were unable to give it proper consideration.

**C. Defense counsel failed to obtain and present a cultural expert. (Fourth Ground for Relief)**

Craig’s counsel were ineffective for failing to investigate and present cultural mitigation evidence. The Court of Appeals held that Craig’s use of Dr. Fabian and presentation of family members at mitigation was sufficient to apprise the jury of his difficult life. Craig, 2010 Ohio App. LEXIS 975 at \*16-17. The Court of Appeals’ decision was incorrect for two reasons. First, the mitigating evidence that was presented at trial was incomplete. Second the claim was for failure to obtain expert assistance, and in presenting only family members and the testimony of Dr. Fabian, counsel failed to present a cultural mitigation expert who could have put the other testimony in context, something none of the other witnesses could do.

Witnesses did testify generally that Craig had a difficult childhood, but their testimony was incomplete. Race had an effect on Craig’s family for a number of generations, including Craig’s mother. “Views of race strongly influenced Mrs. Jones from early on in her life. It is clear that these views also were established with Mr. Craig, with him incorporating some of

these ideas into his experiences.” Ex. 4. In addition, the time and places where Craig matured were significant as “cultural and racial factors were further solidified given the zeitgeist of the times (late 1960s) where racial upheaval was occurring in the country.” Id. Craig reported “experiencing racial tension in the schools he attended and being singled out because of his race. The negative experiences ultimately affected his later life choices, experiences in the military, and his general frame of reference in interacting.” Id. In the army, Craig had a violent altercation with a colonel, who punished him because he was black; he then struck the colonel after he grabbed Craig and called him a “nigger.” Id.

Counsel’s failure to investigate cultural mitigation was ineffective assistance of counsel. Strickland, 466 U.S. at 691. Counsel failed to investigate the relevant issues in Craig’s background. Id. Although trial counsel presented limited testimony about Craig’s life, it was not a product of an investigation sufficient to make reasonable decisions about further inquiries. Id. See Wiggins, 539 U.S. at 524 (“investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.’”) (quoting ABA Guidelines 11.4.1(C)); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989).

Counsels’ ineffectiveness was the result of more than failing to present evidence. The jury was free to consider “evidence about the difficult times Craig experienced as a young man” but without an expert, the jury could not understand the full mitigating effect of that upbringing. Craig, 2010 Ohio App. Lexis 975 at \*17. Dr. Fabian admitted that he was not qualified as a cultural expert and that defense counsel should have obtained the services of a cultural expert to explain the racial tensions that Craig and his family experienced. Ex. 1. The United States Supreme Court “has often reaffirmed that fundamental fairness entitles indigent defendants to

‘an adequate opportunity to present their claims fairly within the adversary system.’” Ake v. Oklahoma, 470 U.S. 68, 77 (1985)(citing Ross v. Moffitt, 417 U.S. 600, 612 (1974)). To fulfill this principle, Craig required the “basic tools of an adequate defense or appeal,” expert assistance from a cultural mitigation expert. Britt v. North Carolina, 404 U.S. 226, 227 (1971). Trial counsel abdicated their duty under Strickland by failing to conduct a full investigation and present mitigating evidence. Rompilla, 545 U.S. at 387; Wiggins, 539 U.S. at 522; Williams, 529 U.S. at 396-97 (2000).

**D. Trial counsel was ineffective for failing to present mitigating evidence and failing to disclose a conflict of interest. (Sixth and Seventh Grounds for Relief)**

Counsel was ineffective for failing to investigate and present mitigating evidence. Counsel failed to disclose to Craig a conflict of interest that impaired his representation. The Court of Appeals cited trial counsels’ presentation of mitigating evidence as proof that attorney Donald Walker’s conduct was not deficient. Craig, 2010 Ohio App. Lexis 975 at \*18. Trial counsel was ineffective—failing to present mitigating evidence and attempting to defend Craig while under a conflict of interest.

Attorney Walker’s disciplinary problems led to a conflict of interest. Walker’s substance abuse problem was well documented. Disciplinary Counsel v. Walker, 119 Ohio St. 3d 47 891 N.E.2d 740 (2008). His “significant substance abuse problem” and his failure to retain a mitigation specialist should not be shielded by the principle of trial strategy. Craig, 2010 Ohio App. LEXIS 975 at \*23 (Belfance, J., concurring). Shielding Walker’s conduct behind “the almost insurmountable standard” of professional conduct deprives Craig of his right to effective counsel. Id. at \*24. Condoning a defense lawyer abusing drugs while in trial as reasonable conduct is contrary to common sense; “the right to counsel is more than mere presence at the

counsel table.” Id. at \*25. In addition, Walker’s claim to have contacted Dan Krane for purposes of DNA analysis proved unfounded. This is virtually identical to the first count of disciplinary sanctions against Walker, when he represented that he had consulted with a client and ultimately forged his signatures, having not actually met with alleged signatories. Walker, 119 Ohio St. 3d 47 at ¶¶ 4-7, 891 N.E.2d at 741.

There was a conflict; “a lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable possibility that they will, affect adversely the advice to be given or services to be rendered the prospective client.” United States v. McLain, 823 F.2d 1457, 1463-64 (11th Cir. 1987). Attorney Walker’s personal, professional, and legal interests adversely affected his performance. The conflict prejudiced Craig because Walker failed to timely hire a mitigation expert and failed to conduct a proper mitigation investigation under constitutional standards. Wiggins, 539 U.S. 510; Williams, 529 U.S. 362; ABA Guidelines 4.1; 10.7; 11.4.1(C).

The effect of the conflict was evident in Walker’s performance. Walker intended to present mitigation evidence, relying only on the investigation and the evidence that was presented in Craig’s first trial. He did not engage Dr. Fabian until after Craig’s conviction. Exs. 1, 2. By his own admission, Dr. Fabian did not have enough time to prepare. Exs. 1, 18. In addition, co-counsel Scott Riley filed for a continuance, proof that they needed more time to prepare. Ex. 2. Dr. Fabian told counsel additional experts and tests were necessary, but they did not pursue those leads. Ex. 18. Lead counsel Walker’s deficient performance is proof that he was impaired during the trial. Counsel was ineffective for failing to disclose the conflict of interest. As a result, they were “not functioning as the ‘counsel’ guaranteed the defendant by the

Sixth Amendment.” Strickland, 466 U.S. at 687. Craig was prejudiced by counsel’s conflict and their resulting failure to present mitigating evidence.

**E. Defense counsel failed to investigate DNA evidence. (Eighth Ground for Relief)**

The Court of Appeals erred in affirming the trial court’s conclusion that the failure to retain a DNA expert was not ineffective assistance of counsel. Craig, 2010 Ohio App. Lexis 975 at \*19. The Court of Appeals cited the lack of evidence suggesting a DNA expert would have given favorable testimony. Id. Counsel were in no position to forgo use of an expert and instead rely on cross-examination. They did not conduct the reasonable investigation required before determining that further investigation is unnecessary. “Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-691.

Trial counsel never investigated the DNA evidence. Counsel filed a motion seeking to make the State’s DNA evidence available for testing and inspection by a defense expert. The trial court never ruled on the motion and counsel never sought funds for independent testing. Counsel did tell Craig that they consulted Dan Krane of Forensic Bioinformatics. Ex. 11. But counsel never actually contacted Dan Krane regarding this case; neither Krane nor his company ever discussed the validity of Craig’s DNA test and there was no record of any contact between the parties. Id. DNA was the only physical evidence that linked Craig to the victim. Counsel could not have been adequately prepared for trial without investigating it. Counsel’s failure to investigate the physical evidence and prepare for trial violated Craig’s right to effective assistance of counsel. Counsel knew that the DNA was critical to the State’s case; investigating the DNA evidence was part of counsel’s duty to “make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691; Glenn, 71 F.3d at 1209-11; Austin, 126 F.3d at 848; see also ABA Guidelines 10.7.

Counsel were ineffective for failing to investigate. In order to make an informed, tactical decision about what information would be helpful to the case, counsel is required to conduct a full investigation. See Strickland, 466 U.S. at 691; Glenn, 71 F.3d at 1209-11; Austin, 126 F.3d at 848. Counsel was ineffective for failing to investigate the DNA evidence. Because of that failure, counsel was in no position to determine that hiring a DNA expert would not have helped. Nor were they properly prepared to rely only on cross-examination. Without an adequate investigation, counsel could not have effectively cross-examined the State’s witness.

**F. Defense counsel failed to present evidence of arbitrary application of the death penalty. (Ninth Ground for Relief)**

The Court of Appeals affirmed the dismissal of Craig’s Ninth Ground for Relief, without discussion. In its Summary of Grounds One Through Nine, the Court could not “conclude that the trial court abused its discretion when it dismissed the petition without a hearing on these grounds for relief.” Craig, 2010 Ohio App. Lexis 975 at \*19-20. Also, the Court found that the trial court used the proper standard and applied the facts to that standard to conclude Craig’s claims failed. Id. Finally, it affirmed that the trial court did not abuse its discretion. Id.

The death penalty has been applied arbitrarily in Summit County. The trial court dismissed, pointing to similar arguments that “have been rejected, and the evidence sought to be introduced deemed irrelevant, or too confusing, to present to a jury.” State v. Craig, Case No. 2006-01-0340, p. 9 (Summit C.P. December 19, 2008). But the information Craig presented was intended for the judge, not the jury. The trial court never saw the statistical evidence that proved the arbitrary and capricious implementation of the death penalty in Summit County. Counsel

failed to present this evidence regarding the disparate treatment of African-Americans prejudiced Craig.

The trial court also refused to second guess counsel's decision, citing to trial strategy. Craig, Case No. 2006-01-0340, p. 9. But counsel had not conducted an independent investigation consistent with its duty to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. The statistical information about the death penalty was available through the Ohio Public Defender's Office. Exs. 12, 14. Only after a full investigation can counsel make an informed, tactical decision about what information would be helpful to the case and a full investigation would have included this information. Strickland, 466 U.S. at 690; Glenn, 71 F.3d at 1209-11; Austin, 126 F.3d at 848. The failure to investigate prejudiced Craig; statistical evidence that demonstrated the arbitrary and capricious manner in which the death penalty is applied in Summit County was never presented to the trial court.

Because the Court of Appeals failed to issue a reasoned opinion on Craig's Ninth Ground for Relief, this Court should accept jurisdiction and remand the case. In dismissing this Claim without a detailed opinion, the court has not addressed the trial court errors alleged in Craig's Appellate Brief. Craig alleged errors in the trial court's decision. Consistent with App. R. 12(A) and Criss v. Springfield Township, 43 Ohio St. 3d 83, 83-84, 538, N.E.2d 406, 407 (1989), a court of appeals shall "decide each assignment of error and give reasons in writing for its decision." App. R. 12(A)(1)(C), see also State v. Evans, 113 Ohio St. 3d 100, 105, 863 N.E.2d 113, 117 (2007). Without a reasoned opinion, there will be nothing for Federal Courts to review. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

**G. Constitutionality of Death Penalty as applied to Craig (Tenth and Eleventh Grounds for Relief).**

The Court of Appeals affirmed dismissal of Craig's tenth and eleventh grounds for relief. The Court ruled that there was ample evidence in the record to support the conclusion that "Craig failed to present 'cogent evidence' to support his claim that the death penalty was applied arbitrarily to him." Craig, 2010 Ohio App. LEXIS 975 at \*20. The Court also affirmed the trial court's use of "Ohio Supreme Court decisions that rejected identical legal arguments." Id. In doing so, the Court of Appeals overlooked evidence Craig submitted and the substance of his claims.

Craig specifically presented evidence showing that Summit County has applied the death penalty disproportionately to capital defendants similarly situated and that the prosecutor abused its indictment discretion. See Exs. 12-17. The post-conviction petition and exhibit 12 detail several instances of white defendants who were able to plead guilty to lesser charges to avoid the death penalty. Furthermore, Craig's petition and exhibits 12-17 show how unfettered prosecutorial discretion has led to the arbitrary, capricious, and discriminatory way the death penalty is sought in Summit County. Craig submitted evidence dehors the record with sufficient operative facts to demonstrate the death penalty in Summit County violated his due process and equal protection rights.

In addition, the lower courts relied on the Ohio Supreme Court decisions rejecting similar arguments. Craig, 2010 Ohio App. Lexis 975 at \*20. Craig's claim is not intended as "an indictment of our entire criminal justice system" but it points to flaws in Summit County. Jenkins, 15 Ohio St. 3d at 170, 473 N.E.2d at 274. Craig supported his argument with evidence dehors the record. Exs. 12-17.

#### **H. Cumulative error. (Twelfth Ground for Relief)**

The Court of Appeals rejected Craig's claim of cumulative error on the grounds that because there were no errors in the previous 11 grounds, they also had no cumulative effect. Craig, 2010 Ohio App. LEXIS 975 at \*21. 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, 656 N.E.2d. 623, 637 (1995). As Craig raised in his Twelfth 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.

Craig has supported all of his post-conviction grounds for relief with evidence dehors the record. Craig relies on the foregoing memorandum, his post-conviction petition, and the exhibits to his petition to contradict the lower court's finding that there were no errors in this case to maintain that this claim is inapplicable.

#### **PROPOSITION OF LAW NO. II**

A TRIAL COURT MUST PROVIDE A POST-CONVICTION PETITIONER WITH THE OPPORTUNITY TO CONDUCT DISCOVERY PURSUANT TO THE RULES OF CIVIL PROCEDURE.

Craig filed a motion for leave of court to conduct discovery, in which he requested specific discovery to support his twelve grounds for relief. The trial court simply stated "that there is no right to conduct discovery in post-conviction relief proceedings." State v. Craig, Case No. 2006-01-0340, Judgment Entry (Summit C.P. March 6, 2008). The court erred in denying the discovery motion, as Craig has the constitutional right to due process in his post-conviction proceedings.

The appellate court maintained that there is no right to discovery in a post-conviction proceeding and dismissed all of the claims for discovery at once. State v. Craig, Case No. 24580, 2010 Ohio App. LEXIS 975, \*3 (Summit. Ct. App. March 24, 2010). The requests for discovery were based on motions that were before the appellate court. The court did not address the requests for discovery and an evidentiary hearing, raised with each ground for relief. The lower courts erred in denying the discovery requests, as Craig has the constitutional right to due process as a necessary part of his post-conviction rights.

When a state establishes a program or procedure, that program or procedure must be operated within the confines of the Due Process Clause of the Fourteenth Amendment. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). When a state creates a right to appellate review—even though not required to do so—that system of appellate review must meet the requirements of due process. Evitts v. Lucey, 469 U.S. 387, 401 (1985). Accordingly, Ohio’s post-conviction system, pursuant to Evitts and Goldberg, must meet the requirements of due process. Judge Belfance, in her concurrence, also recognized the need for and utility of discovery. “The simple fact that there are recent examples of wrongful convictions throughout this state suggests not only the necessity for postconviction relief but the need for *access* to the means of pursuing such relief.” Craig, 2010 Ohio App. LEXIS 975 at \*27. (Emphasis in original.) But she recognized the bar that post-conviction petitioners face, lamenting that “the sweeping nature of these decisions leaves little room for the exceptional case where there is a compelling reason for greater inquiry.” Id. at \*26. Likewise, she was “troubled by the sweeping language of judicial decisions that suggest that these remedies are foreclosed in every case.” Id. at \*27.

A petitioner in a post-conviction proceeding has the initial burden of submitting documentation *de hors* the record to demonstrate that a hearing is warranted as to the

constitutional violations alleged in the petition. State v. Kapper, 5 Ohio St. 3d 36, 38, 448 N.E.2d 823, 826 (1983); State v. Cole, 2 Ohio St. 3d 112, 114, 443 N.E.2d 169, 171 (1982); State v. Pankey, 68 Ohio St. 2d 58, 59, 428 N.E.2d 413, 414 (1981); State v. Jackson, 64 Ohio St. 2d 107, 111, 413 N.E.2d 819, 822 (1980). The State, consistent with the Due Process Clause of the Fourteenth Amendment, cannot place this initial evidentiary burden upon a petitioner and subsequently deny the petitioner a meaningful opportunity to meet that burden. To deny a petitioner the opportunity to meet the burden placed upon him is to annihilate his right to pursue his post-conviction remedies and to make a sham of the process.

In addressing the Fed. R. Civ. P. 6 standard of “good cause” for discovery, the United States Supreme Court imposes the duty to permit the “necessary facilities and procedures for an adequate inquiry” when the petition presents “specific allegations” that “show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is... entitled to relief[.]” Bracy v. Gramley, 520 U.S. 899 (1997) (quoting Harris v. Nelson, 394 U.S. 286 (1969)). Bracy’s claim was only a theory, but whether the petitioner will ultimately prevail on his claim is not relevant to whether discovery should be granted. Id. at 908. Discovery is even more deserved in this case because Craig presented evidence, rather than mere speculation, to support his claims. McDaniel v. United States Dist. Court, 127 F.3d 886 (9th Cir. 1997).

“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” Hickman v. Taylor, 329 U.S. 495, 507 (1947). “The purpose of the liberal discovery policy contemplated by the Ohio Rules of Civil Procedure is the narrowing and sharpening of the issues to be litigated.” State ex rel. Daggett v. Gessaman, 34 Ohio St. 2d 55, 56, 295 N.E.2d 659, 660 (1973). This is particularly relevant here as postconviction relief is a civil proceeding. See State v. Milanovich, 42 Ohio St. 2d 46, 325 N.E.2d 540 (1975). See also State v. Harvey, 68

Ohio App. 2d 170, 171, 428 N.E.2d 437, 438 (1980). Resultantly, the civil rules apply. Milanovich, 42 Ohio St. 2d at 52, 325 N.E.2d at 544. See also Ohio R. Civ. P. 1(A); State v. Nichols, 11 Ohio St. 3d 40, 43, 463 N.E.2d 375, 377 (1984).

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 Cole, 2 Ohio St. 3d at 114, 443 N.E.2d at 171; State v. Calhoun, 86 Ohio St. 3d 279, 281, 714 N.E.2d 905, 909 (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, 397 U.S. at 267; Evitts, 469 U.S. at 401; Fifth, Sixth, Eighth, and Fourteenth Amendment to the U.S. Constitution and Article I, Sections 1, 2, 5, 9, 10, 16, and 20 to the Ohio Constitution.

This Court should vacate the judgment of the lower courts and remand the matter with instructions that Craig be permitted to conduct discovery.

### **PROPOSITION OF LAW NO. III**

WHERE A PETITIONER SUPPORTS HIS POST-CONVICTION PETITION WITH EVIDENCE DEHORS THE RECORD, THAT PETITION SHOULD NOT BE DISMISSED WITHOUT GRANTING DISCOVERY.

Craig filed motions for the appropriation of funds for expert assistance, neuropsychological testing, and a DNA expert. The trial court specifically denied the expert assistance motion on March 6, 2008, but never specifically denied the other two motions. They are deemed denied since the trial court denied Craig's post-conviction petition and dismissed the matter. State v. Craig, Case No. 2006-01-0340 p. 11 (Summit C.P. December 19, 2008) The appellate court affirmed, restating that Craig has no right to funds for expert witnesses, or their

appointment. State v. Craig, Case No. 24580, 2010 Ohio App. LEXIS 975, \*4-5 (Summit Ct. App. March 24, 2010).

Trial counsel never sought funds for independent testing or an expert to challenge the only piece of physical evidence linking Craig to the victim—evidence that he has maintained is invalid. Craig argued in his Eighth Ground for Relief in his post-conviction petition that counsel was ineffective for failing to challenge the DNA evidence. Craig supported his claim with the letter from Dan Krane stating that Krane was never contacted by trial counsel for consultation as to the validity of the State’s DNA testing results. Trial counsel told Craig that they conferred with Dan Krane of Forensic Bioinformatics, but Mr. Krane notes that it does not appear that Craig’s trial counsel ever contacted him. Ex. 11.

Craig also needed a cultural expert to explain to the jury the racial tensions the Craig family experienced. A cultural expert would have provided insight into the cultural and environmental influences bearing on Craig’s behavior. Dr. Fabian was not a cultural expert and could not “explain the racial tensions as experienced by the Craig family.” Ex. 1. A proper expert would have also provided an explanation of Craig’s behavior and would have provided mitigating evidence to the sentencing jury. Craig argued in his Fourth Ground for Relief that counsel was ineffective for failing to use a cultural expert. Craig did not have the funding for even a limited investigation by a cultural expert.

Craig further requested that the trial court provide him with funding for neuropsychological testing. Neuropsychological testing would have addressed Craig’s history, consisting of premature birth, low birth weight, developmental problems, head injuries, learning disabilities, borderline IQ, the large span between the verbal and performance IQ scores, poor functioning and poor verbal skills as to whether there is a negative impact on the neurological

controlled aspects such as behavior, reactions to situations, thought process, decision making and cognitive abilities in general. Dr. Fabian indicated that such an evaluation was required in this case. Ex. 1. Craig argued in his Third Ground for Relief that trial counsel was ineffective for failing to seek a neuropsychological evaluation.

The trial court denied Craig's Third, Fourth, and Eighth Grounds for Relief, without granting him the funds to hire the required experts. Without the expert analysis, Craig was precluded from bolstering the prejudice he suffered by his counsel's deficient performance. Craig demonstrated evidence supporting the need for expert assistance; his requests for funding were neither speculative nor a "fishing expedition." 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.").

The courts have long recognized that a defendant may not be denied access to the courts due to his indigency status. Griffin v. Illinois, 351 U.S. 12, 18 (1956); Burns v. Ohio, 360 U.S. 252 (1959). This right of access of impoverished defendants to the courts extends to post-conviction proceedings. Smith v. Bennett, 365 U.S. 708, 712 (1961); Long v. District Court of Iowa, 385 U.S. 192, 194 (1966). Craig has due process and equal protection rights to expert funding. Powell v. Collins, 332 F.3d 376, 395-96 (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.

Moreover, trial courts in Ohio have the authority to appoint experts during post-conviction proceedings. State v. Lott, 97 Ohio St. 3d 303, 306, 779 N.E.2d 1011, 1015 (2002) (“The trial court should . . . consider expert testimony, appointing experts if necessary, in deciding this [postconviction] matter.”). 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.”

Judge Belfance’s concurrence also concerns the problems with limiting access to experts. She recognizes that “there may be some cases where access to such remedies is compelling and indeed can implicate other constitutional concerns” and is “troubled by the sweeping language of judicial decisions that suggest these remedies are foreclosed as a possibility in every case.” Craig, 2010 Ohio App. Lexis 975 at \*26-27. As a result, “relief in the exceptional case may be precluded, notwithstanding the presence of clearly compelling and meritorious reasons to grant access to discovery or an expert.” Id. at \*27.

As an indigent defendant, Craig is dependent on the courts to grant him the necessary resources for adequate access to discovery. Craig has provided evidence outside the record for each of his claims, but without discovery, Craig will be unable to further support his claims and constitutional violations.

### **CONCLUSION**

Craig was denied his rights to due process, equal protection, a fair trial, and the effective assistance of counsel at his trial, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio

Constitution. Craig was denied the effective assistance of counsel whereby he was deprived of a fair and just mitigation hearing.

Craig is seeking this Court to grant jurisdiction, reverse the lower courts' denials of his post-conviction petition and remand this case for a new trial or sentencing hearing. In the alternative, Craig should be granted discovery, funding for expert assistance, and an evidentiary hearing.

Respectfully submitted,

Office of the  
Ohio Public Defender

By:   
Robert K. Lowe (0072264)  
Assistant State Public Defender  
Counsel of Record

By:   
Benjamin Zober (0079118)  
Assistant State Public Defender

Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0708

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION** was forwarded by regular U.S. Mail to Richard Kasay, Assistance Prosecuting Attorney, Summit County, 53 University Avenue, Akron, Ohio 44308 on this 10th day of May, 2010.

By: 

Robert K. Lowe (0072264)

Counsel for Craig



3 of 5 DOCUMENTS

STATE OF OHIO, Appellee v. DONALD LAVELL CRAIG, Appellant

C.A. No. 24580

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT  
COUNTY

2009 Ohio 4861; 2009 Ohio App. LEXIS 4119

September 16, 2009, Decided

**SUBSEQUENT HISTORY:** Later proceeding at *State v. Craig*, 123 Ohio St. 3d 1527, 2009 Ohio 6668, 918 N.E.2d 528, 2009 Ohio LEXIS 3592 (2009)

Post-conviction proceeding at, Decision reached on appeal by *State v. Craig*, 2010 Ohio 1169, 2010 Ohio App. LEXIS 975 (Ohio Ct. App., Summit County, Mar. 24, 2010)

**PRIOR HISTORY:** [\*\*1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR 2006-01-0340.

*State v. Craig*, 110 Ohio St. 3d 306, 2006 Ohio 4571, 853 N.E.2d 621, 2006 Ohio LEXIS 2622 (2006)

**DISPOSITION:** Judgment affirmed.

**COUNSEL:** ROBERT K. LOWE and BENJAMIN ZOBBER, Assistant State Public Defenders, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.

**JUDGES:** DONNA J. CARR, Judge. DICKINSON, P.J., BELFANCE, J., CONCUR.

**OPINION BY:** DONNA J. CARR

**OPINION**

## DECISION AND JOURNAL ENTRY

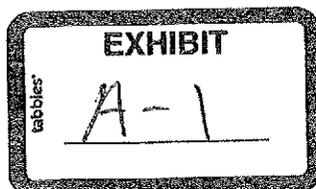
CARR, Judge.

[\*P1] Appellant, Donald Craig, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

[\*P2] Craig was indicted on one count of aggravated murder, along with three specifications for death; one count of rape; and one count of kidnapping. At the conclusion of the guilt phase of the trial, the jury found Craig guilty on all counts and specifications. At the conclusion of the mitigation phase of trial, the jury recommended "death" for Craig. Upon finding that the aggravating circumstances of the case outweighed the mitigating factors by proof beyond a reasonable doubt, the trial court sentenced Craig to death for the crime of aggravated murder. The trial court further sentenced Craig to ten years in prison for each of the remaining counts. Craig [\*\*2] was adjudicated to be a sexual predator. Craig appealed both his conviction and sentence to the Ohio Supreme Court. That appeal has not yet been disposed.

[\*P3] The clerk's official transcript of docket and journal entries indicates that Craig filed a petition for post-conviction relief on May 16, 2007. The petition, however, is not contained in the record. On June 11, 2007, Craig filed an amendment to the petition to add "Exhibit 18" in support of seven of his purported grounds for relief. The State filed a memorandum in opposition and a motion to dismiss the petition. Craig filed a memorandum contra the State's motion to dismiss. On January 18, 2008, Craig filed a motion for leave to conduct discovery, with the intent to subsequently amend his petition for post-conviction relief "to include all such potential claims for which he discovers a sufficient basis." The



State opposed the motion for leave to conduct discovery. The trial court denied the motion to conduct discovery. On December 19, 2008, the trial court issued a judgment entry denying and dismissing the petition for post-conviction relief.

[\*P4] Craig filed a timely appeal, raising three assignments of error for review. As all of Craig's [\*\*3] assignments of error implicate the trial court's treatment of issues in regard to his petition for post-conviction relief, this Court consolidates them for ease of discussion.

#### ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED WHEN IT DENIED THE POST-CONVICTION PETITION WITHOUT FIRST ALLOWING CRAIG TO CONDUCT DISCOVERY."

#### ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED WHEN IT DENIED CRAIG'S MOTION FOR FUNDS TO EMPLOY EXPERTS."

#### ASSIGNMENT OF ERROR III

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

[\*P5] Craig argues that the trial court erred by denying his motion to conduct discovery for the purpose of supplementing his petition for post-conviction relief. He argues that the trial court erred by denying his motion for funds to employ experts in furtherance of the grounds he purportedly alleged in his petition for post-conviction relief. Finally, Craig argues that the trial court erred by denying his petition. This Court disagrees.

[\*P6] *R.C. 2953.21(A)(1)(a)* allows anyone convicted of a criminal offense to file a petition, asking the trial court to vacate or set aside the judgment of [\*\*4] conviction or sentence. The petitioner must state all grounds for relief on which he relies, and he waives all other grounds not so stated. *R.C. 2953.21(A)(4)*. In determining whether substantive grounds for relief exist,

the trial court must consider, among other things, the petition, the supporting affidavits, and the documentary evidence filed in support of the petition. *R.C. 2953.21(C)*. If the trial court finds no grounds for granting relief, it must make findings of fact and conclusions of law supporting its denial of relief. *R.C. 2953.21(G)*. The trial court's judgment entry denying relief complies with these requirements.

[\*P7] The official record on appeal consists of double-sided copies of the majority of the documents and other materials filed in this case. Missing from the record, however, is Craig's petition for post-conviction relief. This Court has repeatedly held that "[i]t is the duty of the appellant to ensure that the record on appeal is complete." *State v. Daniels, 9th Dist. No. 08CA009488, 2009 Ohio 1712, at P22*, quoting *Lunato v. Stevens Pain-ton Corp., 9th Dist. No. 08CA009318, 2008 Ohio 3206, at P11*. "Where the record is incomplete because of appellant's failure to meet [\*\*5] his burden of providing the necessary record, this Court must presume regularity of the proceedings and affirm the decision of the trial court." *State v. Jones, 9th Dist. No. 22701, 2006 Ohio 2278, at P39*, citing *State v. Vonnjorsson (July 5, 2001), 9th Dist. No. 20368, 2001 Ohio App. LEXIS 3008*. Because the petition for post-conviction relief is necessary to this Court's determination of these assignments of error, this Court must presume regularity in the trial court's proceedings and affirm the judgment of the trial court. See *Jones at P39*. Craig's assignments of error are overruled.

#### III.

[\*P8] Craig's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review [\*\*6] shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellant.

DONNA J. CARR  
FOR THE COURT  
DICKINSON, P. J.

BELFANCE, J.  
CONCUR



2 of 5 DOCUMENTS

STATE OF OHIO, Appellec v. DONALD LAVELL CRAIG, Appellant

C.A. No. 24580

COURT OF APPEALS OF OHIO, NINTH JUDICIAL DISTRICT, SUMMIT  
COUNTY

2010 Ohio 1169; 2010 Ohio App. LEXIS 975

March 24, 2010, Decided

**PRIOR HISTORY:** [\*\*1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS, COUNTY OF SUMMIT, OHIO. CASE No. CR2006-01-0340.

*State v. Craig, 2009 Ohio 4861, 2009 Ohio App. LEXIS 4119 (Ohio Ct. App., Summit County, Sept. 16, 2009)*

**DISPOSITION:** Judgment affirmed.**COUNSEL:** ROBERT K. LOWE and BENJAMIN ZOBBER, Assistant State Public Defenders, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellec.

**JUDGES:** CARR, Judge. DICKINSON, P. J., CONCURS. BELFANCE, J., CONCURS IN THE JUDGMENT ONLY SAYING.**OPINION BY:** DONNA J. CARR**OPINION**

## DECISION AND JOURNAL ENTRY

CARR, Judge.

[\*P1] Appellant, Donald Craig, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

[\*P2] Craig was indicted on one count of aggravated murder, along with three specifications for death;

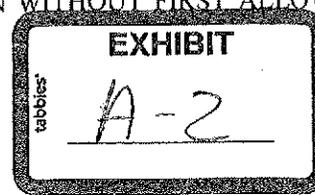
one count of rape; and one count of kidnapping. At the conclusion of the guilt phase of the trial, the jury found Craig guilty on all counts and specifications. At the conclusion of the mitigation phase of trial, the jury recommended death for Craig. Upon finding that the aggravated circumstances of the case outweighed the mitigating factors by proof beyond a reasonable doubt, the trial court sentenced Craig to death for the crime of aggravated murder. The trial court further sentenced Craig to ten years in prison for each of [\*\*2] the remaining counts. Craig was adjudicated to be a sexual predator. Craig appealed both his conviction and sentence to the Ohio Supreme Court. That appeal has not yet been disposed of.

[\*P3] Craig filed a petition for post-conviction relief on May 16, 2007. The State moved to dismiss the petition and Craig replied. Craig moved for leave to conduct discovery and the State opposed his request. The trial court denied the motion to conduct discovery. On December 19, 2008, the trial court filed a judgment entry denying and dismissing the petition for post-conviction relief. Craig appealed and this Court affirmed, having to presume regularity in the proceedings below because the record did not contain the petition.

[\*P4] This Court granted Craig's motion to supplement the record with the petition for postconviction relief and granted his motion to reconsider its decision. We have now reviewed the complete record and Craig's assignments of error, and affirm the trial court's decision.

**ASSIGNMENT OF ERROR I**

"THE TRIAL COURT ERRED WHEN IT DENIED THE POST-CONVICTION PETITION WITHOUT FIRST ALLOW-



ING CRAIG TO CONDUCT DISCOVERY."

[\*P5] In his first assignment of error, Craig argues that the trial court erred when [\*\*3] it denied his petition without first allowing Craig to conduct discovery. Although Craig asserts in his brief that he "has the constitutional right to conduct discovery for post-conviction purposes[.]" he does not support this statement with citation to any authority.

[\*P6] This Court has long held that there is no right to discovery in a postconviction proceeding. An action for postconviction relief is a civil action. *State v. Milovich* (1975), 42 Ohio St.2d 46, 49, 325 N.E.2d 540. The procedures applicable to the action, however, are those found in R.C. 2953.21. *State v. Hiltbrand* (May 16, 1984), Summit App.No. 11550, 1984 Ohio App. LEXIS 9936. That section does not provide for discovery. See, e.g., *State v. Smith*, Summit App.No. 24832, 2009 Ohio 1497, P18; *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 158-59, 1999 Ohio 314, 718 N.E.2d 426; *State v. White* (June 16, 1999), Summit App.No. 19040, at 2, 1999 Ohio App. LEXIS 2721; *State v. Benner* (Aug. 27, 1997), Summit App.No. 18094, at 2, 1997 Ohio App. LEXIS 3794; *State v. Ray* (July 30, 1986), Summit App.No. 12517, 1986 Ohio App. LEXIS 7790.

[\*P7] Craig had no right to conduct discovery. Accordingly, the trial court did not err in denying his request. The first assignment of error is overruled.

#### ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED WHEN IT DENIED CRAIG'S [\*\*4] MOTION FOR FUNDS TO EMPLOY EXPERTS."

[\*P8] In his second assignment of error, Craig argues that the trial court erred when it denied his motion for funds to hire expert witnesses. Because he had no right to funds for expert witnesses, the trial court did not err when it denied his motion.

[\*P9] This Court has previously considered this issue and held that there is no authority

"to support [Craig's] position that he had a right to the assistance of experts while pursuing his petition for post-conviction relief. In *State v. Crowder* (1991), 60 Ohio St.3d 151, 152, 573 N.E.2d 652, the Ohio Supreme Court held that a post-

conviction petitioner has no constitutional right to counsel. Consequently, as the right to the assistance of experts stems from the right to counsel, a post-conviction petitioner has no constitutional right to the funding of experts. See *State v. Hooks* (Oct. 30, 1998), *Montgomery App. Nos. 16978 and 17007*, 1998 Ohio App. LEXIS 5044, unreported, 1998 WL 754574, at \*3. Although a petitioner facing the death penalty has a statutory right to counsel to pursue post-conviction relief, see R.C. 2953.21(f), there is no corresponding statutory right to the assistance of experts." *State v. Smith* (Mar. 15, 2000), *Lorain App.No. 98CA007169*, 2000 Ohio App. LEXIS 972, [WL] at \*3 [\*\*5].

Likewise, the Tenth District recently held that "R.C. 2953.21 does not provide a right to funding or appointment of expert witnesses or assistance in a postconviction petition. Thus, it is not error for a trial court to deny a defendant's request for funds for expert witnesses in support of his petition for postconviction relief." *State v. Madison* (Oct. 7, 2008), *Franklin App.No. 08AP-246*, 2008 Ohio 5223, P16 (citations omitted).

[\*P10] The trial court did not err when it denied Craig's motion for funds to employ expert witnesses. The second assignment of error is overruled.

#### ASSIGNMENT OF ERROR III

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

[\*P11] Craig argues that the trial court erred by denying his petition. This Court disagrees.

[\*P12] R.C. 2953.21(A)(1)(a) allows Craig to file a petition asking the trial court to vacate or set aside the judgment of conviction or sentence. The petitioner must state all grounds for relief on which he relies, and he waives all other grounds not so stated. R.C. 2953.21(A)(4). In determining whether substantive grounds for relief exist, the [\*\*6] trial court must consider, among other things, the petition, the supporting affidavits, and the documentary evidence filed in support

of the petition. *R.C. 2953.21(C)*. If the trial court finds no grounds for granting relief, it must make findings of fact and conclusions of law supporting its denial of relief. *R.C. 2953.21(G)*. This Court reviews the trial court's judgment for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006 Ohio 6679, P45, 860 N.E.2d 77.

[\*P13] The trial court serves a gatekeeping function in postconviction relief cases -- the court determines whether a defendant will even receive a hearing. *Id. at P51*. A trial court may dismiss a petition without a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun* (1999), 86 Ohio St.3d 279, 1999 Ohio 102, 714 N.E.2d 905, paragraph two of the syllabus. The gatekeeping function includes the trial "court's decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted." *Gondor at P52*. On appeal, "a court reviewing the trial [\*7] court's decision in regard to its gatekeeping function should apply an abuse-of-discretion standard." *Id.*

[\*P14] The Ohio Supreme Court concluded that "a trial court's decision granting or denying a postconviction petition filed pursuant to *R.C. 2953.21* should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Id. at P58*. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

[\*P15] Craig presented twelve grounds for relief in his petition. The trial court determined that Craig failed to demonstrate that he was denied the effective assistance of counsel, that the death penalty was unconstitutionally applied to him, and that the cumulative effect of errors deprived him of a fair trial. The court denied his petition without a hearing. We review this decision for an abuse of discretion.

#### PRELIMINARY ARGUMENTS

[\*P16] In his brief, Craig first addresses the test for ineffective assistance of counsel. He argues [\*8] that the trial court applied the wrong legal standard, in two ways. First, he argues that "the standard is whether counsel completed a thorough and complete investigation under the prevailing professionals (sic.) standards of the American Bar Association" rather than the higher standard required by *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674. Craig also complains that the trial court imposed an additional burden when it held that he must overcome the presumption

that his counsel acted competently. Craig's arguments are not persuasive.

#### ABA GUIDELINES

[\*P17] In November 2009, the United States Supreme Court again addressed the test for ineffective assistance of counsel to be applied in a death penalty case. The Supreme Court rejected holding counsel to the standards announced by the American Bar Association. In *Bobby v. Van Hook* (Nov. 9, 2009), 130 S.Ct. 13, 16, 175 L. Ed. 2d 255, the Supreme Court explained:

The *Sixth Amendment* entitles criminal defendants to the "effective assistance of counsel"-that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) [\*9] (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). That standard is necessarily a general one. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." 466 U.S., at 688-689, 104 S.Ct. 2052. Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place. *Id.*, at 688, 104 S.Ct. 2052.

The Supreme Court criticized the Sixth Circuit for treating "the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply.'" *Id. at 17*. The Court continued by noting that

*Id.*

*Strickland* stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S. at 688, 104 S.Ct. 2052. We have since regarded them as such. See *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). [\*10]

What we have said of state requirements is a fortiori true of standards set by private organizations: "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

[\*P18] Just days after deciding *Van Hook*, the Supreme Court again considered an ineffective assistance of counsel claim in the context of the death penalty sentencing hearing. The Court held that when considering whether defense counsel's representation was reasonable, a court must do so in light of the variety of circumstances facing counsel and the range of legitimate decisions regarding how counsel could best represent his client. *Wong v. Belmontes* (2009), 130 S.Ct. 383, 384, 175 L. Ed. 2d 328. The Court recognized that "scrutiny of counsel's performance must be highly deferential." *Id.* (citation omitted).

[\*P19] The trial court applied the *Strickland* standard in evaluating Craig's claims. Based on *Van Hook*, *Belmontes*, *Strickland*, and numerous Ohio Supreme Court decisions, this Court [\*\*11] rejects Craig's argument that the trial court applied the wrong standard to determine whether trial counsel were ineffective. We next consider Craig's second preliminary argument.

#### PRESUMPTION OF COMPETENCE

[\*P20] Craig further argues that the trial court imposed an additional burden on him because it recognized that licensed trial counsel were presumed competent. The trial court did not impose an additional burden on Craig. Instead, it properly set out the standard to be applied, as the *Gondor* Court, at P62, recently explained:

On the issue of counsel's ineffectiveness, the petitioner has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *Calhoun*, 86 Ohio St.3d at 289, 714 N.E.2d 905, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 31 O.O.2d 567, 209 N.E.2d 164. In order to overcome this presumption, the petitioner must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance. *State v. Davis* (1999), 133 Ohio App.3d

511, 516, 728 N.E.2d 1111. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional [\*\*12] errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

[\*P21] The Ohio Supreme Court presumes that a licensed attorney is competent. However, the presumption does not create an additional burden. As the remainder of the quote demonstrates, the presumption is overcome by showing that counsel were ineffective, as measured by the *Strickland* test. Accordingly, this Court rejects Craig's second preliminary argument.

#### GROUND FOR RELIEF ONE THROUGH NINE

[\*P22] Having rejected Craig's preliminary assertions, we turn to the merits of his argument addressing his grounds for relief. In grounds one through nine, Craig argued that he was denied the effective assistance of counsel. This Court must review the trial court's decision to determine whether its findings are supported by competent and credible evidence. *Gondor*, at P52. If this Court concludes that the findings are properly supported, then this Court reviews the trial court's decision in regard to its gatekeeping function for an abuse of discretion. *Id.*

#### A. FAILURE TO INVESTIGATE AND PRESENT [\*\*13] MITIGATING EVIDENCE

[\*P23] Craig has combined his first, second, and fifth grounds for relief before this Court. He has argued that he was denied the effective assistance of counsel because trial counsel did not conduct a proper mitigation investigation. The trial court held that Craig was not denied the effective assistance of counsel because Craig's brother and sister testified at the mitigation hearing, and an expert witness, Dr. Fabian, testified about mitigation factors applicable to Craig's family background and life. The trial court reviewed the affidavits Craig submitted with his petition and decided that they presented evidence cumulative to that presented at his mitigation hearing. After reviewing the record, we conclude the trial court's findings of fact are supported by competent and credible evidence.

[\*P24] Based on these factual findings, the trial court concluded that Craig was not denied the effective assistance of counsel. The trial court did not abuse its discretion in reaching this conclusion. As the trial court concluded, the record shows that trial counsel presented

meaningful mitigation evidence. The trial court's additional conclusion that, even if counsels' performance were [\*\*14] deficient, Craig could not show prejudice is also supported by the evidence and, thus, not an abuse of discretion.

[\*P25] We also note that the facts that support the first, second, and fifth grounds for relief appear on the record. Craig has presented these same arguments to the Ohio Supreme Court on his direct appeal from his conviction. *State v. Craig*, Supreme Court Case No. 2006-1806. In his first and fourteenth propositions of law, he argues he was denied the effective assistance of counsel at his mitigation hearing. The arguments presented in his direct appeal rely on the same alleged shortcomings as Craig presented in his petition for postconviction relief. Where an alleged error appears on the record, the error must be raised on direct appeal and res judicata bars the defendant from raising and litigating the claimed error in postconviction relief. *State v. Perry (1967)*, 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. Accordingly, because the facts supporting these grounds appear on the record, they were properly raised on direct appeal.

[\*P26] The trial court did not err in its decision as it relates to Craig's first, second, and fifth grounds for relief.

#### B. NEUROLOGICAL TESTING AND EXPERT [\*\*15] TESTIMONY

[\*P27] In his third ground for relief, Craig has argued that the trial court erred by finding that counsel were not ineffective for failing to obtain neurological testing and presenting a neurological expert. The trial court held he was not denied the effective assistance of counsel because Dr. Fabian testified at the mitigation hearing, provided a report, and testified about mitigating factors that countered aggravating factors. The trial court's factual conclusions are supported by competent and credible evidence. In his petition, Craig focused on his medical and social problems to support his argument that neurological testing was necessary. That foundational evidence was presented during the mitigation hearing and it addressed mitigation factors, as discussed by the trial court.

[\*P28] Craig presented affidavits that argued neurological testing should have been performed, testing that could have provided additional mitigation evidence to present to the jury. The trial court concluded that it was speculative whether the tests would have revealed any evidence that could have been presented in mitigation. As the Ohio Supreme Court has recognized, "many trial tactics may be questioned [\*\*16] after an unfavorable result. A fair assessment of attorney performance re-

quires us to eliminate the distorting effect of hindsight." *State v. Post (1987)*, 32 Ohio St.3d 380, 388, 513 N.E.2d 754. The trial court recognized that counsel presented as mitigation evidence the facts that Craig now argues should have resulted in neurological testing being completed. Craig suggests that trial counsel should have used a different trial tactic, but, considered at the time, the approach trial counsel used was not unreasonable. The court's conclusion that Craig was not denied the effective assistance of counsel was not an abuse of discretion.

#### C. CULTURAL EXPERT

[\*P29] In his fourth ground for relief, Craig has argued that the trial court erred by finding that counsel were not ineffective for failing to retain a cultural expert. The trial court held Craig was not denied the effective assistance of counsel because Dr. Fabian, although not a cultural expert, testified at the mitigation hearing about the racial tension, including prejudice and threats, that Craig experienced. Craig argues a cultural expert was necessary to humanize him for the jury.

[\*P30] Notwithstanding Craig's argument, however, his siblings and Dr. Fabian testified [\*\*17] about Craig's life experiences. The trial court recognized that the jury heard evidence about the difficult times Craig experienced as a young man growing up during turbulent times and the prejudice he experienced. The jury could consider that evidence to develop an understanding of Craig and how his life experiences shaped him. Finally, this Court notes that trial counsels' decision "whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh (2001)*, 90 Ohio St.3d 460, 490, 2001 Ohio 4, 739 N.E.2d 749.

[\*P31] The trial court's factual conclusions are supported by competent and credible evidence. The court's conclusion that Craig was not denied the effective assistance of counsel because counsel did not retain a cultural expert was not an abuse of discretion.

#### D. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

[\*P32] In his sixth and seventh grounds for relief, Craig has argued that he was denied the effective assistance of counsel, and, on appeal, he has argued that the trial court erred by finding that counsel was not ineffective. In both grounds for relief, Craig points to his lead counsel's substance abuse, disciplinary investigation, and, ultimately, his [\*\*18] arrest, to demonstrate that his lead trial counsel had a conflict of interest with Craig. The trial court held Craig was not denied the effective assistance of counsel. It recognized that there is a distinction between violating an ethical rule and a duty to a

client. The trial court found no evidence that Craig's lead counsel was impaired during the proceedings or provided inadequate representation.

[\*P33] No court would condone substance abuse by an attorney. However, the facts do not support Craig's argument that his attorney's conduct was deficient as a result of his substance abuse. Trial counsel presented mitigation evidence. As discussed elsewhere in this decision, trial counsel were not deficient or unreasonable in their presentation of mitigation evidence.

[\*P34] The trial court's factual findings are supported by competent and credible evidence. Further, the trial court's conclusion that Craig did not receive ineffective assistance of counsel because of lead counsel's ethical or legal issues was not an abuse of discretion.

#### E. DNA EXPERT

[\*P35] In his eighth ground for relief, Craig has argued that the trial court erred by finding that counsel were not ineffective for failing to retain a DNA expert. [\*\*19] The trial court held Craig was not denied the effective assistance of counsel because there was no evidence that a defense DNA expert would have given favorable testimony and trial counsel's decision to rely on cross examination of the State's expert witness was not unreasonable. The trial court's factual conclusions are supported by competent and credible evidence.

[\*P36] The trial court noted that the Supreme Court has held that trial counsel's decision to rely on cross examination of DNA evidence instead of calling an expert witness does not establish ineffective assistance of counsel. See *State v. Mundt*, 115 Ohio St.3d, 22, 2007 Ohio 4836, P118, 873 N.E.2d 828. The trial court's conclusion that Craig was not denied the effective assistance of counsel because counsel did not retain a DNA expert was not an abuse of discretion.

#### F. SUMMARY OF GROUNDS ONE THROUGH NINE

[\*P37] The *Strickland* test guided the trial court's resolution of Craig's first nine grounds for relief. After reviewing the trial court's decision, we cannot conclude that the trial court abused its discretion when it dismissed the petition without a hearing on these grounds for relief. The trial court used the proper *Strickland* standard for determining [\*\*20] whether Craig received ineffective assistance of counsel. The trial court applied the facts to the correct legal standards and concluded that Craig failed to demonstrate ineffective assistance of counsel. We have reviewed the record and conclude that the trial court's findings are supported by competent and credible evidence. Accordingly, we conclude that the trial court did not abuse its discretion when it denied relief on Craig's first nine grounds for relief.

#### GROUNDS FOR RELIEF TEN THROUGH TWELVE

[\*P38] In his tenth and eleventh grounds for relief, Craig has argued that the State arbitrarily and capriciously applied the death penalty to him. The trial court concluded that Craig failed to present "cogent evidence" to support his claim that the death penalty was applied arbitrarily to him, and there is competent and credible evidence in the record to support this conclusion. The trial court also relied on Ohio Supreme Court decisions that rejected identical legal arguments. Based on the facts and law before the trial court, we cannot conclude that the trial court abused its discretion when it rejected Craig's tenth and eleventh grounds for relief.

[\*P39] Finally, in his twelfth ground for relief, [\*\*21] Craig argued that the cumulative effect of the errors asserted in the first eleven grounds for relief deprived him of his constitutional right to a fair hearing. The Ohio Supreme Court has recognized the cumulative error doctrine. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 Ohio B. 390, 509 N.E.2d 1256, paragraph two of the syllabus. According to this doctrine, "errors during trial, singularly, may not rise to the level of prejudicial error, [but] a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *Id. at 196-97*. "[E]ven to consider whether 'cumulative' error is present, [the court] would first have to find that multiple errors were committed in this case." *State v. Madrigal* (2000), 87 Ohio St.3d 378, 398, 2000 Ohio 448, 721 N.E.2d 52. The trial court, having found no error in the eleven grounds for relief, rejected Craig's twelfth ground for relief. After our review of the grounds for relief, we conclude that the trial court did not abuse its discretion in so concluding.

#### CONCLUSION

[\*P40] The trial court did not abuse its discretion in rejecting Craig's twelve grounds for relief. Accordingly, the third assignment of error is overruled.

#### III.

[\*P41] Craig's assignments of [\*\*22] error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellant.

DONNA J. CARR

FOR THE COURT

DICKINSON, P. J.

CONCURS

**CONCUR BY: BELFANCE**

**CONCUR**

BELFANCE, J.

CONCURS IN THE JUDGMENT ONLY SAYING:

[\*P42] I concur in this Court's judgment. This Court's legal analysis is technically correct, however, I write separately to express several concerns.

[\*P43] Mr. Craig has argued that he was denied the effective assistance of his counsel. He has pointed in part [\*\*23] to the fact that one of his attorneys had the responsibility of retaining a mitigation specialist and this was never done. This same attorney was discovered to have a significant substance abuse problem. In addressing this and Mr. Craig's other ineffective assistance of counsel arguments, this Court has properly cited to *Strickland* as well as *Van Hook* and *Belmontes*. It was 50 years earlier that the Supreme Court recognized the importance of counsel:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires

the guiding hand of counsel at every step in the proceedings [\*\*24] against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

*Powell v. Alabama* (1932), 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158. The meaning of these powerful words is stripped away by the almost insurmountable standard courts must apply today to determine whether a criminal defendant was denied the effective assistance of counsel. Although *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, begins with the premise that "the proper standard for attorney performance is that of reasonably effective assistance[.]" the test that has evolved no longer matches that standard.

[\*P44] *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83, recognized that a "defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" The Supreme Court's recognition that trial counsel might have acted the way he did as part of a strategy has been used to shield from review conduct that, in my opinion, should not be considered trial [\*\*25] strategy. Likewise, even where counsel's conduct is clearly below any minimal standard of competence, such incompetence will go unaddressed because defendants must also demonstrate that the result of their trial would have been different but for counsel's conduct. This burden, for example, prevented one convicted defendant from demonstrating that he was denied the effective assistance of counsel when his attorney fell asleep during his trial. *State v. Rosado*, 8th Dist. No. 83694, 2005 Ohio 6626, P14. Common sense dictates that no person would find sleeping to be remotely reasonable conduct for one's counsel during a trial. The right to counsel is more than the mere presence of counsel at the trial table. Unfortunately, the manner in which these tests have developed and are applied has contravened the Supreme Court's declaration that the right to counsel is a fundamental right. *Gideon v. Wainwright* (1963), 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799. Implicit within the statement is the notion that counsel be effective.

[\*P45] Mr. Craig also argues that in light of the issues he raise in his request for postconviction relief, he should have been allowed to conduct discovery and should have been provided funds to hire [\*\*26] an expert witness. In keeping with established precedent, this

Court concludes that the trial court did not err in denying these requests because there is no right to either in a postconviction case. I recognize that the law in this area is well-settled. However, the sweeping nature of these decisions leaves little room for the exceptional case where there is a compelling reason for greater inquiry.

[\*P46] The laudable goal of postconviction relief is to allow a person convicted of a crime a method to argue that he was denied his constitutional rights. *Young v. Ragen* (1949), 337 U.S. 235, 239, 69 S. Ct. 1073, 93 L. Ed. 1333. The underlying concern is that due to the denial of such rights, an innocent person may have been convicted of the crime, while the guilty person is still at large ready to victimize others.

[\*P47] In this case, this Court has properly cited to precedent holding that a person has no right to discovery in post-conviction proceedings and has no right to funds for an expert witness. However, the fact that a person convicted of a crime may not have a constitutional right to these remedies begs the question. There may be some cases where access to such remedies is compelling and indeed can implicate other constitutional [\*\*27] concerns. I am troubled by the sweeping language of judicial decisions that suggest that these remedies are foreclosed as a possibility in every case. The simple fact that there are recent examples of wrongful convictions throughout

this state suggests not only the necessity for postconviction relief but the need for *access* to the means of pursuing such relief. The precedent cited by this Court's opinion broadly pronounces that a criminal defendant has no rights and by implication no access whatsoever to these remedies. Thus, relief in the exceptional case may be precluded, notwithstanding the presence of clearly compelling and meritorious reasons to grant access to discovery or an expert.

[\*P48] I concur with the result reached by the Court in this case. I understand that the interests in finality of judgments and protecting scarce judicial resources are central concerns in considering postconviction relief. However, I hope we do not lose sight of the important rights that should be protected in the postconviction relief process. When a final judgment is overturned through this process because an innocent person's conviction is vacated, the courts are protecting the rights of both the individual [\*\*28] and the people; this is so because when the wrong person is incarcerated or even worse, executed for the commission of a crime of which he was innocent, it means that a guilty person has not been punished and is free to inflict further harm upon others while an innocent person will wrongfully suffer an irreversible fate.