

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 12-1383
Plaintiff-Appellee,	:	Appeal taken from the Hamilton County Court of Appeals
v.	:	First Appellate District Court Appeal No. 090569
LAMONT HUNTER,	:	
Defendant-Appellant.	:	

**APPELLANT LAMONT HUNTER'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

Joseph T. Deters
Hamilton County Prosecutor

Office of the
Ohio Public Defender

RONALD W. SPRINGMAN JR. - 0041413
Assistant Prosecuting Attorney

KIMBERLY S. RIGBY - 0078245
Assistant State Public Defender
Counsel of Record

PAMELA PRUDE-SMITHERS - 0062206
Chief, Death Penalty Division

Hamilton County Prosecutor's Office
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3052

Office of the Ohio Public Defender
250 E. Broad St., Suite 1400
Columbus, Ohio 43215
(614) 466-5394

COUNSEL FOR STATE OF OHIO

COUNSEL FOR LAMONT HUNTER

FILED
AUG 13 2012
CLERK OF COURT SUPREME COURT OF OHIO

Table of Contents

Explanation of Why This Case Is a Case of Public or Great General Interest and Involves a Substantial Constitutional Question1

Statement of the Case2

Statement of the Facts3

Argument.....16

Proposition of Law No. I16

When a Petitioner Presents Sufficient Operative Facts To Merit Relief Or, At Minimum An Evidentiary Hearing, In A Petition For Post-Conviction Relief, The Trial Court Errs In Denying Said Petition.16

Proposition of Law No. II.....40

The Doctrine of Res Judicata Does Not Bar Meritorious Post-Conviction Claims that are Supported by Sufficient Evidence Dehors the Record. U.S. Const. amend. VIII, XIV40

Proposition of Law No. III44

When a death-sentenced defendant files a post-conviction petition, due process, equal protection, the right to counsel, and the freedom from cruel and unusual punishment require that the defendant receive funding for expert assistance and discovery upon a showing of good cause. U.S. Const. amend. VI, VIII, XIV......44

Conclusion47

Certificate of Service.....48

APPENDIX:

State v. Lamont Hunter, Hamilton County Common Pleas Court, Case No. B-0600596, Findings of Facts, Conclusions of Law, and Entry Dismissing Petition to Vacate A-1

State v. Lamont Hunter, Hamilton County Court of Appeals, Case No. C-090569, Opinion and Entry dated June 27, 2012 A-9

Explanation of Why This Case Is a Case of Public or Great General Interest and Involves a Substantial Constitutional Question

Lamont Hunter is actually innocent of murdering and raping three year-old Trustin Blue. Evidence demonstrating his innocence was uncovered in post-conviction and presented in a properly-filed post-conviction petition. Even so, the lower courts have ignored this evidence in finding that “post-conviction claims of actual innocence do not involve a denial or infringement of petitioner’s rights.” State v. Hunter, No. B-0600596, Slip opin. at 2 (Hamilton C.P. July 16, 2009) [hereinafter TC op.], attached at A-1; See also State v. Hunter, 2012 Ohio 2852, 2012 Ohio App. LEXIS 2530, ¶54 (Hamilton Ct. App. June 27, 2012), attached at A-9 (finding that “the claim did not demonstrate a constitutional violation in the proceedings.”). These issues cannot be raised on direct appeal because resolution of the claims involves consideration of evidence outside of the record. State v. Ishmail, 67 Ohio St. 2d 16 (1981). The failure of Ohio to provide death row inmates an avenue to raise issues of actual innocence cannot be tolerated.

Indeed, because claims of actual innocence involve the most basic and fundamental rights to “life and liberty” under the due process clause of the Fourteenth Amendment and the Eighth Amendment of the United States Constitution, claims of actual innocence should rightfully sound in post-conviction. See Herrera v. Collins, 506 U.S. 390, 419 (1993) (O’Connor, J., joined by Kennedy, J., concurring) (“executing the innocent is inconsistent with the Constitution”); Id. (O’Connor, J., joined by Kennedy, J., concurring) (“the execution of a legally and factually innocent person would be a constitutionally intolerable event.”); Id. at 429 (White, J., concurring) (“I assume that a persuasive showing of ‘actual innocence’ made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.”); Id. at 430 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting) (“Nothing could be more

contrary to contemporary standards of decency ... than to execute a person who is actually innocent.”); Schlup v. Delo, 513 U.S. 298, 316 (1995). See also House v. Bell, 311 F.3d 767, 768 (6th Cir. 2002).

As it currently stands, a wrongfully convicted defendant, who has a colorable claim of actual innocence, has no avenue in the Ohio courts to raise that claim. This Court should accept jurisdiction in this case to establish once and for all that there is, as there should be, an avenue for relief in the Ohio courts when a defendant wishes to raise a claim of actual innocence. This is what the United States and Ohio constitutions mandate as well as what justice requires. Id.

Statement of the Case

Appellant Lamont Hunter was convicted in the Hamilton County Court of Common Pleas of one count of aggravated murder with two death specifications, one count of rape, and one count of endangering children. The jury recommended a death sentence, and Hunter was sentenced to death on September 20, 2007. Hunter appealed his conviction to the Ohio Supreme Court; on December 20, 2011, this Court affirmed Hunter’s sentence. State v. Hunter, 131 Ohio St. 3d 67, 960 N.E.2d 955 (2011).

Hunter filed a timely post-conviction petition on June 25, 2008. Hunter amended his petition for the first time on July 1, 2008 and for a second time on August 11, 2008. Hunter filed a motion for discovery on August 19, 2008. That motion was denied on September 3, 2008. In addition, Hunter petitioned the trial court below to provide funds for a substance abuse expert. The trial court denied his motion seeking funds for a substance abuse expert on October 20, 2008. The State then filed its Motion to Dismiss Petition on October 31, 2008. Hunter filed a memorandum contra the State’s response on November 24, 2008. The trial court subsequently filed its Findings of Fact and Conclusions of Law denying Hunter’s Post-conviction Petition on July 16, 2009. See TC op., attached at A-1.

Hunter timely appealed to the First District Court of Appeals. On June 27, 2012, the First District Court of Appeals affirmed the trial court's judgment without affording discovery or an evidentiary hearing. State v. Hunter, 2012 Ohio 2852, 2012 Ohio App. LEXIS 2530 (Hamilton Ct. App. June 27, 2012), attached at A-9.

Statement of the Facts

Lamont Hunter was convicted of the aggravated murder and rape of three year-old Trustin Blue. When a three-judge panel sentenced him to death, they spared no words in describing their feelings of contempt for Hunter. They described Hunter as "a savage," who "raped and devoured a three-year old child," and was "the lowest form of dehumanized individual . . . a cowardly, calculated, cold-blooded and really unremorseful kill[er]." (Tr. 831-32.)

The judges' view of Hunter and the evidence against him would have been markedly different had competent counsel presented the compelling medical evidence uncovered during post-conviction: that Trustin's death was not the result of a brutal beating and rape, but rather was caused by a fall down the basement steps, just as Hunter described. Unfortunately for Hunter, his own counsel never uncovered this evidence due to his failure to investigate.

When viewed in light of the newly discovered evidence that Trustin's death was a tragic accident rather than fatal child abuse, the circumstances that contributed to his conviction and death sentence become apparent. Trustin's previous abuse had been blamed on Hunter, but a caseworker returned Trustin to his mother, who was still living with Hunter. A public spotlight was glaring on the perceived failings of both children's services agencies and the legal system for failing to protect children from their own caregivers. And Hunter's attorney was so embroiled in his own serious legal troubles that he failed to conduct any investigation, present medical evidence corroborating Hunter's statement, or investigate or present available evidence

to save Hunter's life. The constitutional errors that arose as a result of those circumstances led to the unjust conviction and sentencing of Lamont Hunter.

A. Trustin Blue dies from head injuries

On January 19, 2006, Trustin Blue was rushed to Cincinnati's Children's Hospital. When he arrived at the hospital, Trustin was unresponsive and in a coma. Trustin was put on life support, but a day later, he was taken off of life support and died. (Tr. 311-12, 611.) Medical examiners determined that Trustin had died from severe injuries to the head. (Tr. 321). Additionally, Trustin had a tear on his anus. (Tr. 316.)

Once it was determined that Trustin's injuries were a result of trauma to the head, investigators began questioning the boyfriend of Trustin's mother, Lamont Hunter. Hunter was alone with Trustin at the time he was injured. (State's Trial Ex. 12.) Hunter told investigators and hospital personnel that Trustin had fallen down the stairs to the basement. By the time Hunter reached Trustin, he was lifeless. (Tr. 66.) Hunter's story did not satisfy the investigator because she "never saw a child who was so devastated – so injured so greatly by a fall down the stairs." (Tr. 67.) What also raised doubts about Hunter's story was the fact that January 19, 2006 was not the first time Trustin had been in the Children's Hospital emergency room. Trustin had been seen in the Children's Hospital emergency room in both January and June of 2004.

B. Trustin's previous trips to Children's Hospital

In January 2004, Trustin was brought to the emergency room by Hunter with a broken leg. (Tr. 205, 292.) Hunter, who brought Trustin in, explained that he fell up the stairs while he was holding Trustin. (Tr. 292, 445.) His explanation was consistent with the injuries, and the incident was not referred for further investigation. (Tr. 292, 446.)

In June 2004, Trustin was again seen in the emergency room, this time with a number of fractures in his body. (Tr. 295; State's Tr. Ex. 22.) Trustin had fractures on his hand, feet and on

his fifth toe. A skeletal examination determined that some of Trustin's fractures were new and some were old. (Tr. 295-96.) In addition, Trustin had swollen lips, a swollen penis, an abrasion on one of his ears, a scratch in his ear canal, hair loss, a small bruise on one side of his head, and bruising on both sides of his ears. (Tr. 300-01.) The hospital determined that Trustin's injuries were inflicted and were a result of child abuse. (Tr. 304.)

On June 9, 2004, Tiffany Bradbury, an investigative worker for Hamilton County Job and Family Services became involved with Trustin's case. (Tr. 473.) Bradbury interviewed Hunter because he was alone with Trustin when he was injured. (Tr. 478.) Hunter denied that he hurt Trustin, but based on her conversation with Hunter, Bradbury decided not to allow Trustin to go home with Hunter. (Tr. 478-79.)

Trustin was not allowed to go home with his mother Luzmilda Blue either. Job and Family Services was familiar with Luzmilda and were already involved before Trustin was born. (Ex. 28, 33). Right after Trustin was born, Luzmilda called Job and Family Services threatening to kill her children if someone did not come and get them. (Tr. 528, 532, 563; Ex. 33.)

Job and Family Services came up with a safety plan for Trustin and also for Luzmilda's other two children, Terrell and Tyree, to stay with Luzmilda's sister. (Tr. 480.) Eventually, Trustin was taken away from Luzmilda and a protective order was issued that prohibited Hunter from being around Trustin. (Tr. 207.) Job and Family Services also had concerns that Luzmilda might cause harm to Trustin, and allowed her only supervised visits. (Tr. 487, 507; Ex. 35, 36.)

Luzmilda had been diagnosed multiple times with severe depression, had previously threatened to kill her children and had been previously charged with neglect of her other children. (Exs. 33, 36.) One report noted that Luzmilda's "lack of remorse or regret for what may have occurred places all three of her children at high risk for further abuse." (Ex. 36.)

Another assessment of Luzmilda noted her lack of concern for Trustin:

“She cried often when discussing her children’s removal, but there were no tears when discussing her son’s abuse and his physical damage...Not only does she claim not to know what happened to her child, but also she doesn’t seem particularly concerned with finding out, only with getting her children back.”

(Ex. 36.) The result of Luzmilda’s Minnesota Multiphasic Personality Inventory-second edition (MMPI-2) suggested that Luzmilda may “behave in an extremely aggressive manner at times.”

(Ex. 36.) Luzmilda was also suspected of “internalizing anger and resentment that could manifest as violent tendencies. She made the odd comment at least two times during the assessment that if an individual wanted to abuse a child, they wouldn’t break a finger, a hand or a foot.” (Ex. 36).

In August 2005, Trustin, Terrell, and Tyree were returned to Luzmilda, and Job and Family Services terminated its involvement with the family. (Tr. 558; Ex. 35.) Despite the fact that it was determined that Trustin’s injuries resulted from child abuse, no one was ever prosecuted for any crimes.

C. Statements by the coroner and medical reports fueled the media’s rush to judgment

The medical report from Children’s Hospital stated that Trustin had a head injury, retinal hemorrhaging, and an injury to his anus that was still bleeding during an exam. (Def. Tr. Ex. 1.) The news media declared that “Trustin was shaken, beaten to death and raped with some sort of sharp object.” (Ex. 28.) The autopsy report confirmed what everyone already “knew”: Trustin’s death could not be an accident, but was instead a homicide caused by child abuse. (Ex. 4, 28.) The Hamilton County Coroner stated what he believed Trustin would say: “Give me justice, give me peace. And give me a legacy by not allowing this to happen to another child.” (Ex. 28.)

D. Trustin’s death viewed as yet another failure by an agency responsible for protecting children

Within a few weeks after Trustin’s death, Hamilton County Prosecutor Joe Deters launched an investigation to determine whether the system might have missed warning signs that

led to Trustin's death. (Ex. 27.) Deters noted that Trustin had been taken to Children's Hospital twice in the last two years with injuries, and that because there had been two previous injury reports, Trustin's death should have been prevented. (Id.)

The Cincinnati Enquirer turned its focus on Hunter less than two weeks before his trial was set to begin, with a lengthy "investigative report" and an extensive portion of its website dedicated to the death of Trustin Blue. (Ex. 28.) The Cincinnati Enquirer noted that "Trustin is one of seven children since 2003 who have died after the Hamilton County Department of Job and Family Services was charged with either protecting them or checking out abuse complaints." Social workers, the police department, and the courts were chastised for failing to protect Trustin. (Ex. 28.)

The evidence, as reported by the news, was that Trustin was left in the care of a known child abuser and then died. The easiest and most logical explanation was that Hunter did something to cause Trustin's injuries.

E. The wrong attorney

Initially, defense attorneys, Norm Aubin and Steve Goodin, were appointed to represent Hunter. (T.d. 16, 17.) The Hunter family believed in Hunter's innocence. Hunter's family and friends knew that Hunter regularly watched many children from the family, and all of these family members and friends were consistent in saying that Hunter never physically or sexually abused them. They contacted Clyde Bennett, a high-profile criminal defense attorney from Cincinnati, about Hunter's case. Ultimately, the Hunter family was able to secure the funds to retain Bennett, and he entered his appearance on Hunter's case just days before the trial was set to begin. (T.d. 244.) The trial was continued for several months, until June 11, 2007. (T.d. 245.)

The Hunter family knew that Bennett was a well known criminal defense attorney who worked for a large law firm. What the family did not know when Bennett accepted this case was

that Bennett had never before handled a case as serious as Hunter's – one where Hunter's life was on the line. What the family also did not know is that Bennett was under investigation by the federal government for complicity to commit murder and for structuring financial transactions. (Exs. 11, 19, 20, 21, 22, 23, 24, 25.) The Internal Revenue Service and the Drug Enforcement Agency were involved in the investigation. (Ex. 24, 25.)

Initially, Bennett's participation in Hunter's case was very reassuring to his family. Bennett was confident that he would be able to refute the medical examiner and coroner's testimony through his cross examination. In fact, Bennett advised Hunter that he had at one point been admitted to medical school and therefore was knowledgeable about the medical testimony. But, Bennett did not want to try the case to a jury. The voir dire process for a capital trial could take weeks and the media frenzy around his case was high.

Bennett spoke with Hunter about waiving his right to a jury trial. (Ex. 11.) Bennett did not advise Hunter of the many disadvantages of waiving a jury trial in a capital case. Hunter did not know that just one juror could have prevented him from receiving the death penalty. Instead, Hunter was aware of all of the negative pre-trial publicity about his case, and about other cases involving children killed by abuse. Hunter knew that there were articles about him sticking a sharp object in Trustin, about him beating Trustin, and about him being involved with Trustin's abuse prior to his death. (Ex. 11.) The decision was made to try Hunter's case to a three judge panel. (Tr. 90; T.d.. 342.)

F. The State's case

During the trial, the State presented evidence that Trustin was anally raped and beaten to death. Dr. Katherine Makoroff, the attending physician at Children's Hospital testified that Trustin had bleeding subdural hemorrhages on both sides of his brain and a lot of swelling to his brain. (Tr. 319.) Trustin had the severest type of brain injury. (Tr. 321.) Trustin also had a

great deal of retinal hemorrhaging and a deep tear on his anus. Dr. Makoroff opined that neither of these conditions were consistent with falling down the stairs. (Tr. 316.) She further testified that the anal tear was consistent with penetration by a penis or an object. (Tr. 318.) Dr. Makoroff testified that although she could not provide the exact time when Trustin was injured, the severity of his injuries meant that Trustin would have been comatose within seconds of the injury, if not immediately. He would not be able to talk on the phone, run, eat or watch television after he was injured. (Tr. 322.)

Dr. Makoroff also testified about Trustin's visits in January and June of 2004 to the emergency room. Dr. Makoroff testified that the fractures seen by the hospital were not the types of fractures you would normally see in a child, but that the bruising around the ears is what is typically seen in child abuse cases. (Tr. 300-01.)

Dr. Mona Grethel Case Harlan Stephens, the coroner who performed Trustin's autopsy, testified that the head injuries sustained by Trustin were caused by impacts with a broad surface. (Tr. 593.) Dr. Stephens testified that Trustin's injuries would be hard to produce short of a major car crash, and that the amount of force to displace the vertebral disk was comparable to the amount of energy that would be required to tear off an ear. (Tr. 593, 643.) Dr. Stephens also testified about Trustin's anal injuries, noting that portions of the hemorrhage in Trustin's rectum extended to his kidney. (Tr. 595.) The prosecutor emphasized the broken vertebra and deep anal injuries when he argued that Trustin's death was a purposeful killing. (Tr. 662-64.)

G. A flawed cross-examination of the State's experts and lack of defense expert leads to Hunter's conviction

Bennett's entire defense was predicated upon the assumption that his cross-examination skills (and alleged medical knowledge) would impeach the testimony of the state's expert witnesses. Bennett relied on cross-examination rather than hiring an expert to refute both the

coroner's and physician's testimony. Bennett believed that he could convince the experts to admit that Trustin could have had a lucid interval after the injury, and therefore, he could argue that Trustin could have been injured before his time alone with Hunter. (Tr. 122, 125-27, 419-20, 422-23, 433-44; 617-18.) He also tried to show that the injuries that led to Trustin's death were actually the aggravation of an earlier injury that resulted in "rebleeding" in Trustin's brain (Tr. 126, 365-70; 391-94), and that that because Trustin's subdural hematoma was described as "acute," it could have occurred up to 24 hours before he presented at the hospital. (Tr. 378-82; 399-400; 416-17; 433-34.) These suggestions were not supported by the doctors' testimony.

When the State's experts refused to change their opinion, Bennett aggressively cross examined Dr. Makoroff and Dr. Stephens on a point that clearly had no merit and did not help Hunter's case: the fact that they could not pinpoint the exact time of Trustin's injuries. What Bennett did not seem to understand was that, based on the expert witnesses' testimony, it did not matter whether the State could determine the time of Trustin's injuries that morning. The medical evidence established that Trustin would have been in a coma after the injuries. The evidence also established that Trustin spoke on the phone with Wilma Forte at 9:00 a.m. on the day of his injuries. (Tr. 515.) And Hunter's statement verified that from the time of that telephone conversation until the time Trustin was injured, he was the only adult in the house with Trustin. (State's Tr. Ex. 12.)

The only effect of Bennett's scattered and misinformed cross-examination was that the State's experts were able to repeatedly point out the flaws in Bennett's theories and stress the severity of Trustin's injuries. With each question Bennett asked, the experts' testimony became stronger and more clear. Hunter was found guilty by the three judge panel of Trustin's rape, aggravated murder, and the attached death penalty specifications.

H. No mitigation investigation and ill-conceived mitigation theme

Although the American Bar Associations Guidelines for the Appointment and Performance of Counsel in a Death Penalty Case, which are considered guides in determining whether an attorney's performance is reasonable under the prevailing professional norms, require that a capital defense attorney begin preparing for a mitigation case before the trial phase of the case, Bennett failed to do anything before Hunter was convicted. (Exs. 9, 14, 17, 47, 48.) Even after Hunter was convicted, Bennett did little to investigate or prepare. Because of Bennett's lack of preparation, the trial court granted Hunter a continuance until July 19, 2007 to prepare for the mitigation phase of Hunter's trial. (Tr. 721-22.) Presumably because Bennett was so focused on securing his own freedom, Bennett did nothing to prepare for the mitigation phase. At some point in July 2007, Bennett was still attempting to find a mitigation specialist, and in mid-July, Bennett finally contacted Martha Phillips to request her assistance with Hunter's mitigation case. Phillips refused because of the lack of time to adequately prepare. (Ex. 17, 39.)

On July 19, 2007, the trial court granted Bennett another continuance until September 5, 2007. (Tr. 724-25.) Still, Bennett conducted no mitigation investigation of the case. Bennett's entire "investigation" consisted of reading Phillips' initial write ups, which were not even sent to Bennett until August 28, 2007. (Ex. 39.) Bennett then met with Hunter's family the day before the mitigation phase began. (Ex. 14.)

After his minimal and ineffective preparation, Bennett presented a mitigation case that was counterintuitive when considering the facts of Hunter's convictions. The mitigation case failed to present a complete and accurate picture of Hunter to the panel. Bennett argued that there was residual doubt as to the three judge panel's decision whether Hunter murdered Trustin despite the fact that residual doubt is not a mitigating factor under Ohio law, and the trial court had previously denied a motion to consider residual doubt. State v. McGuire, 80 Ohio St. 3d

390, 403, 686 N.E.2d 1112, 1123 (1997); T.d. 308. Bennett then put on a number of Hunter's family members who testified that Hunter was not violent and had good relationships with his children as well as the children of his ex-girlfriends and ex-wife. (Tr. 748, 756, 777.) Debra Barnes, one of Hunter's sister touched briefly on the fact that Hunter's father was an alcoholic who sometimes abused their mother. (Tr. 785-86.)

None of the witnesses who testified to Hunter's non-violent nature discussed the fact that Hunter had several domestic violence, drug, and DUI convictions. Instead, that information was introduced by the State during cross-examination. It made Bennett and the witnesses look, at best, like they were in denial and, at worst, that they were untruthful. (Ex. 9.) In addition, Bennett failed to provide details about Hunter witnessing violence against his mother, and Hunter's substance abuse history. This could have demonstrated that Hunter's problems were a part of a family pattern and history. (Ex. 7, 9.)

Meanwhile, the federal investigation into Bennett's activities continued; that investigation resulted in formal charges against him. A federal bill of information charging Bennett with illegal structuring of financial transactions was issued on August 15, 2007. (Ex. 20.) Bennett formally entered a guilty plea on September 26, 2007, he was later sentenced to two years in federal prison, and the Ohio Supreme Court suspended him from the practice of law pending a full disciplinary investigation. (Exs. 19, 22, 23, 25, 26.)

I. Hunter Sentenced to Death

Bennett's "good guy" mitigation did not work. The three-judge panel sentenced Hunter to death. The panel made clear that "Trustin Blue was not only a victim of Lamont Hunter, but unfortunately little Trustin was a victim of a broken and incompetent system that allowed social workers to return this little child to an abusive and eventually very deadly environment." (Tr.

832.) Less than a week after Lamont Hunter was sentenced to death, his attorney Clyde Bennett pled guilty to a serious charge and was sentenced to federal prison.

J. A different view of the evidence

During post-conviction, Hunter obtained evidence that casts the evidence against him in a completely different light. Dr. Werner Spitz, M.D.¹ reviewed the autopsy report, photos, medical records and the medical testimony offered against Hunter. In Dr. Spitz's opinion, the injuries sustained by Trustin were consistent with a fall down the stairs. Dr. Spitz points to several pieces of evidence to support his conclusion. (Ex. 1.) First, there are no injuries on Trustin's body that cannot be accounted for by a fall. A child who was shaken and beaten to death would likely have some bruises on the arms or wherever the perpetrator held the child, particularly where there was the type of force that the State's experts testified was used. The two impact marks on Trustin's head were consistent with impacts to edges of the steps.

The medical records prove that Trustin's spinal injury, the "broken neck" as the prosecutor described it, was not caused by a beating, shaking, or by anything else the State claimed happened while Trustin was alive. Trustin's spinal injury occurred during the autopsy. The attending physician never documented such an injury during her examination of Trustin. A skeletal survey and head scan that was conducted post-mortem but before Trustin's autopsy

¹ Dr. Werner U. Spitz, M.D. is one of this country's most experienced and well-respected forensic pathologists. He is a Professor of Pathology at Wayne State University School of Medicine in Detroit, Michigan, Adjunct Professor of Pathology at the University of Windsor in Canada, and a forensic pathologist and toxicologist consultant. Dr. Spitz has published more than ninety scientific articles in medical journals, as well as a textbook that is considered to be the "bible" of forensic pathology. He has testified numerous times in high-profile cases, including the wrongful death suit against O.J. Simpson, and has testified before the House of Representatives regarding the assassinations of President John F. Kennedy, Jr. and Martin Luther King, Jr. During his over 50 years as a forensic pathologist, he has either performed or supervised nearly 60,000 autopsies. (Ex. 2.)

reveals no indication of cervical injury. The autopsy report is the only place that notes such a separation in Trustin's spine, and Dr. Spitz has seen such an "autopsy artifact" before.

Dr. Spitz also disputes Dr. Makoroff and Dr. Stephens' opinions about the anal injuries. The anal laceration is consistent with an injury that could occur during a fall. Because Trustin was on a blood thinner, the anal bleeding would have been enhanced.

The State's evidence of a "purposeful killing" and "torture" as they described it during closing argument (Tr. 662-64, 711-15), was not evidence of anything except a fall down the stairs, followed by medical intervention and an autopsy examination.

K. Evidence of previous abuse of Trustin tainted the trial

The evidence that supports Hunter's version of what happened to Trustin, that he fell down the stairs, calls into question the integrity of the other evidence admitted against Hunter. When there was evidence to demonstrate that Trustin was beaten to death and anally raped while he was alone with Hunter, it supported the theory that, in hindsight, the other cases of abuse against Trustin were also caused by Hunter. The State then blamed the failure to prosecute the previous cases of abuse on Job and Family Services, as well as the investigator assigned to the case, for not doing their jobs. Trustin's case was highlighted as falling through the cracks. But if Dr. Spitz's conclusions undermine the claimed medical proof of Trustin's abuse, it also raises the question of whether what the investigator of the 2004 case said at the time was also true: that there was insufficient evidence to demonstrate that Trustin was injured by Hunter. (Ex. 37.)

A Hotline Referral Form from 2006 noted that Trustin's 2006 was his second serious injury in two years. "In 2004, he had serious injuries caused by an **unknown perpetrator**. At the time, it was believed that the perpetrator was Mr. Hunter then as well **but it was determined that he had no contact with Trustin.**" (Ex. 37) (Emphasis added). Tyree, one of Luzmilda's

other sons denied that he had ever witnessed Hunter abuse Trustin or that Hunter had ever abused him. (Ex. 37.)

Others, including those testified against Hunter at trial, felt that he was not responsible for Trustin's 2004 injuries. During an interview with a social worker on August 4, 2005, Wilma Forte, one of Trustin's main caretakers, stated that Luzmilda did not give a lot of attention to Trustin and that he never wanted to return home after being in her care. According to the report, Wilma "reported that she **continues** to believe that Lamont Hunter did not hurt Trustin." Wilma further reported that she watches Trustin and "he will say no when asked if he wants mommy or to go home to mommy." (Ex. 31) (Emphasis added).

At least some of Trustin's 2004 injuries may in fact have been the result of an allergic reaction. On July 2, 2003, Children's Hospital medical reports document that Trustin had lip swelling and hives on his face after eating fried chicken and fries at Long John Silver. The treating resident found that Trustin had experienced an allergic reaction to food. (Ex. 34.) On July 14, 2003, Trustin was again seen about his skin problems by Dr. Anith Sheth, Director and Assistant Professor of Pediatric Dermatology with Children's Hospital Division of Pediatric Dermatology. Dr. Sheath diagnosed Trustin with eczema/atopy and molluscum contagiosum. (Ex. 34.) Molluscum contagiosum is defined as lesions that can be found on different areas of the skin and that can become itchy and painful.

These facts, viewed in conjunction with Luzmilda's mental illness and history of neglect, leads to the reasonable conclusion that Trustin's previous injuries may have been caused by someone other than Hunter—in particular by Trustin's mother herself, who had at one point threatened to kill him. And at least one of the injuries may have had an innocent explanation.

L. Hunter was denied a fair trial and sentencing because of his attorney's failure to secure experts, present evidence of his innocence, and investigate and present an adequate mitigation case.

The evidence obtained during post-conviction calls into question all of the theories and evidence submitted by the State against Hunter. Although competent counsel would have secured an expert to test the State's case, Bennett did not. The serious problems with the experts' conclusions were never presented to the court. Instead, the court was left with a case where it appeared that a child suffered from a brutal beating and anal rape at a time when Hunter was the only person who could have committed them. Then, the panel was left with an incomplete, and at times inaccurate, description of Hunter's background and history.

Justice requires that Hunter's conviction and sentence be reversed. If he is granted a new trial, he can present evidence that shows a different picture than that presented by the State. Trustin's death resulted not from abuse, but from a tragic accident. It was not caused by the work of a "monster" whom the State believes must be punished by death. This Court should accept jurisdiction in this case.

Argument

Proposition of Law No. I

When a Petitioner Presents Sufficient Operative Facts To Merit Relief Or, At Minimum An Evidentiary Hearing, In A Petition For Post-Conviction Relief, The Trial Court Errs In Denying Said Petition.

I. Introduction

The First District as well as the trial court erred in dismissing Hunter's post-conviction petition for the following reasons: (1) Hunter raised violations of his constitutional rights that warranted relief; and (2) the petition contained sufficient operative facts, which supported the claims for relief, required discovery, and merited an evidentiary hearing. As such, this Court should accept jurisdiction and reverse the lower court's findings of facts and conclusions of law.

Ohio's post-conviction statute directs that a hearing shall be held "[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief." O.R.C. § 2953.21(E). The plain language of the statute *creates a presumption in favor of a hearing* in this case and against dismissal or summary judgment for the State. To receive an evidentiary hearing on post-conviction claims, Hunter must meet certain standards. He bears the initial burden of submitting evidentiary documents that contain sufficient operative facts to demonstrate a constitutional violation. State v. Jackson, 64 Ohio St. 2d 107, 111, 413 N.E.2d 819, 823 (1980); State v. Kapper, 5 Ohio St. 3d 36, 448 N.E.2d 823 (1983). In the claims argued herein, the deprivation of constitutional rights was specifically pled, and evidence demonstrating the harm was submitted.

The lower courts erred when they denied relief, discovery, and/or an evidentiary hearing on the claims for relief argued below that were raised in Hunter's original petition. This Court should accept jurisdiction to right this wrong.

II. Argument

A. Hunter is actually innocent of killing Trustin Blue (First Ground for Relief)

Hunter is actually innocent of the crimes for which he is convicted—he did not kill Trustin Blue. Hunter's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution were violated.

The trial court erred when it found that "post-conviction claims of actual innocence do not involve a denial or infringement of petitioner's rights." TC op. at 2. The First District agreed and affirmed the trial court's decision, finding that "the claim did not demonstrate a constitutional violation in the proceedings." *State v. Hunter*, 2012 Ohio 2852, 2012 Ohio App. LEXIS 2530, ¶54 (Hamilton Ct. App., June 27, 2012). The lower courts, however, were

incorrect. Indeed, claims of actual innocence involve the most basic and fundamental rights to “life and liberty” under the due process clause of the Fourteenth Amendment and the Eighth Amendment of the United States Constitution. See Herrera v. Collins, 506 U.S. 390, 419 (1993) (O’Connor, J., joined by Kennedy, J., concurring) (“executing the innocent is inconsistent with the Constitution”); Id. (O’Connor, J., joined by Kennedy, J., concurring) (“the execution of a legally and factually innocent person would be a constitutionally intolerable event.”); Id. at 429 (White, J., concurring) (“I assume that a persuasive showing of ‘actual innocence’ made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.”); Id. at 430 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting) (“Nothing could be more contrary to contemporary standards of decency ... than to execute a person who is actually innocent.”); Schlup v. Delo, 513 U.S. 298, 316 (1995). The Sixth Circuit has recognized actual innocence as a constitutional claim and reviewed a capital defendant’s claim of actual innocence. See also House v. Bell, 311 F.3d 767, 768 (6th Cir. 2002).

Hunter has maintained his innocence since the day Trustin’s injuries were sustained. Trustin had a horrible accident, which Hunter witnessed—Trustin fell down the stairs, lost consciousness, and later died. Prosecutors needed someone to blame for the death of this three year-old boy. Dr. Katherine Makoroff, and the coroner, Dr. Mona Stephens, were brought in as key witnesses for the State. (Tr. 287-465; 582-647.) At trial, this medical testimony went unchallenged, and Hunter was convicted of brutally raping and killing a three year-old little boy.

During post-conviction investigation, however, Hunter obtained evidence that should cause this Court to view the evidence against him in a completely different light. Dr. Werner Spitz found that the injuries sustained by Trustin were not a result of beating or shaking, but instead were consistent with Hunter’s statement—this was a fall down the stairs. (Ex. 1, ¶¶ 9-

10.) Dr. Spitz points to several medical findings that support his conclusions. The two impact marks on his head were consistent with impacts to edges of the steps. (Ex. 1, ¶ 9.) Dr. Spitz also noted that because Trustin's cervical vertebra injury was not seen during the skeletal survey or Head C-T performed at Children's Hospital, but was noted in the autopsy report, it occurred during the autopsy. (Ex. 1, ¶¶ 13-14; Exs. 3, 4.) Because Trustin was on a blood thinner, the anal bleeding would have been enhanced. (Ex. 1, ¶ 12, Ex. 6.) Further, "symmetrical fingertip bruises of the abdomen, chest, or shoulders" would have indicated a possibility that Trustin was shaken or grabbed (Ex. 5, p. 703.) According to Dr. Spitz, Trustin had no injuries to his body that are not explainable by a fall down the steps. (Ex. 1, ¶ 10.)

Review of Dr. Spitz's report (Ex. 1) and the medical records (Exs. 3, 4, 5, and 6), dismantle the State's case against Hunter. Based upon this new evidence, at a minimum, the three-judge panel would have had serious doubts about Hunter's guilt. Hunter is actually innocent of these crimes. His convictions and death sentence violate the Eighth Amendment. See Herrera, 506 U.S. at 419 (O'Connor, J., joined by Kennedy, J., concurring); Id. (O'Connor, J., joined by Kennedy, J., concurring); Id. at 429 (White, J., concurring); Id. at 430 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting); Schlup, 513 U.S. at 316. See House, 311 F.3d at 768.

The lower courts erred in failing to find that a claim of actual innocence is cognizable as a claim in post-conviction. This Court should accept jurisdiction and reverse the lower court decisions by finding that a claim of actual innocence is indeed cognizable in the Ohio courts. This Court should then remand this case to the trial court so that it may review Hunter's claim of actual innocence on the merits.

B. Hunter was denied the ineffective assistance of counsel during both the guilt phase as well as the mitigation phase of his capital trial

1. Guilt phase Ineffectiveness (Second – Ninth Grounds for Relief)

a. Medical Evidence

Hunter's trial counsel failed to conduct a reasonable investigation of the medical evidence, including a failure to retain a forensic pathologist, reasonably cross-examine the State's medical experts, and to present relevant medical testimony from a forensic pathologist. See PC Claims 2-4. The failure to act by defense counsel violated Hunter's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution. The First District erred in denying these claims and finding that counsel's failure was a matter of trial strategy. Hunter, 2012 Ohio 2859, at ¶37.

The Sixth Amendment guarantees to the criminal defendant the right to the effective assistance of counsel. This right is violated when counsel's performance falls below an objective standard of reasonableness and the client is prejudiced by counsel's breach of duty. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984). Counsel has a duty to present evidence "that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict[.]" Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007). Here, defense counsel's failure to present medical evidence that provided more than reasonable doubt as to Hunter's guilt was unreasonable and resulted in Hunter's conviction and death sentence.

The critical issue in Hunter's trial was how Trustin Blue died. Hunter told police that Trustin fell down the basement stairs. Because there were no other witnesses to Trustin's

injuries, the State established the cause and manner of death through the testimony of the attending pediatrician in the emergency room, Dr. Makoroff, and the coroner, Dr. Stephens.

Both doctors testified that Trustin died as the result of inflicted injuries that fit the characteristics of shaken baby syndrome and included blunt force impacts. (Tr. 344, 348-49, 352, 589-93, 609, 642-43.) Both testified that based on the severity of Trustin's head injuries, he would have been comatose nearly instantly. (Tr. 322, 353, 419, 601-02.) They opined that the anal injuries were severe and most consistent with penetration. (Tr. 318, 594-95.) Their testimony that Trustin's injuries were not consistent with a fall down the stairs contradicted the version of events Hunter gave in his statement. (Tr. 316, 318, 320-21, 613, 634-35; State's Trial Ex. 12.) Dr. Stephens testified that the injury to Trustin's lower cervical vertebra "would be difficult to produce short of a major car crash." (Tr. 593.) During closing argument, the prosecutor emphasized this "uncontroverted and un rebutted" medical testimony. (Tr. 665.)

Trial counsel's approach to confronting this evidence was scattershot at best, and only bolstered the doctors' opinions by allowing them to repeatedly state their damaging conclusions. Without input or assistance from a forensic pathologist or other medical expert, trial counsel attempted to "prove" various alternate theories of Trustin's injuries, including:

- that the injuries that led to Trustin's death were actually the aggravation of an earlier injury that resulted in "rebleeding" in Trustin's brain (Tr. 126, 365-70; 391-94);
- that Trustin could have suffered from these injuries at an earlier time and been experiencing a "lucid interval" during the time that he talked to Wilma Forte on the phone (Tr. 122, 125-27, 419-20, 422-23, 433-44; 617-18);
- that because Trustin's subdural hematoma was described as "acute," it could have occurred up to 24 hours before he presented at the hospital (Tr. 378-82; 399-400; 416-17; 433-34);
- and that shaken baby syndrome occurs when a caregiver acts out of anger and is out of control, and is not a purposeful act, like stabbing, shooting, or strangling a baby would be. (Tr. 124, 344-47, 357-62, 675.)

Drs. Makoroff and Stephens did not concede that any of these theories were medically consistent with Trustin's injuries. Trial counsel offered no evidence to support any of his claims, although he boasted during closing that "I proved through their experts . . . that they did not prove this case beyond a reasonable doubt." (Tr. 707.)

The First District affirmed the trial court's decision that that trial counsel's failure to retain or call expert witnesses was a matter of trial strategy. Hunter, 2012 Ohio 2859, at ¶20. Contrary to the First District's opinion, counsel's failure to retain or call expert witnesses was not a reasonable trial strategy. Counsel's reliance on his own "medical knowledge" and cross-examination was not the result of a full investigation. (Ex. 11, ¶7.) When evaluating the reasonableness of counsel's strategy in a capital case, "a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins v. Smith, 539 U.S. 510, 521 (2003). Only after a full investigation can counsel make an informed, tactical decision about which information would be helpful in a client's case. Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995); State v. Johnson, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986).

In this case, trial counsel's lack of investigation left him unable to effectively confront the State's case and present evidence critical to Hunter's defense. Had counsel retained a forensic pathologist, such as Dr. Werner Spitz, he would have been able to effectively confront and cross-examine the State's medical testimony. (Ex. 2.) Dr. Spitz would have reviewed the medical records and advised trial counsel that Trustin's injuries, even the anal laceration, were consistent with a fall down the stairs. (Ex. 1, ¶¶ 9-10.)

However, because trial counsel did not consult Dr. Spitz, counsel engaged in unreasonable and misleading cross-examination and argument that ultimately led to Hunter's conviction and death sentence. Trial counsel did not challenge the crucial testimony of the State's medical experts, and left the three-judge panel with persuasive evidence that Trustin had

been brutally raped and murdered. (Tr. 828-32.) If trial counsel would have conducted a reasonable investigation and retained Dr. Spitz, the medical evidence that supported Hunter's statement would have been uncovered. Evidence that the victim's death resulted from an accident, rather than a criminal act, makes it likely that the outcome of the culpability and/or penalty phase would have been different. See Richey, 498 U.S. at 364.

b. Alternate suspect defense

Hunter was denied the effective assistance of counsel at his trial by counsel's failure to investigate and present evidence of other suspects in the 2004 abuse incidents to rebut the appropriateness of the prosecutor's use of the evidence as other acts under Ohio Rules of Evidence 404(B). He was further denied the effective assistance of counsel by counsel's failure to impeach State witnesses Amber White and Wilma Forte with prior inconsistent statements. As a result, Hunter was deprived of effective assistance of counsel and was thereby prejudiced by his counsel's errors. U.S. Const. amends V, VI, VIII, and XIV; Ohio Const. art. I § § 1, 2, 5, 9, 10, 16 and 20; Strickland v. Washington, 486 U.S. 668 (1984). The First District erred in finding that, "Because counsel's alleged deficiencies concerning these matters could not be said to have been outcome determinative, the common pleas court properly denied claims 5 through 7." Hunter, 2012 Ohio 2859 ¶43.

A defendant can only be convicted on evidence that he committed the act charged, not on his reputation as a criminal. State v. Jamison, 49 Ohio St. 3d 182, 184, 552 N.E.2d 180 (1990). As a general rule, evidence of acts independent of the crime for which the accused is on trial are not admissible to show that the defendant acted in conformity therewith. State v. Mann, 19 Ohio St. 3d 34, 36, 482 N.E.2d 592, 595 (1985).

An exception to this general rule is found in Evidence Rule 404(B) and O.R.C. § 2945.59. In order to be admissible under these provisions, the proponent of the other acts

evidence must offer "substantial proof" that the other act happened. State v. Broom, 40 Ohio St. 3d 277, 282, 533 N.E.2d 682, 690 (1988). The proponent's evidence must also tend to show a proper purpose. Id. Nevertheless, Rule 404(B) is to be a rule of exclusion, not inclusion, which incorporates a strict standard for admissibility of other acts evidence. Id. at syl. 1.

Sufficient evidence existed to dispute whether the State submitted the substantial proof necessary to prove that Hunter committed the 2004 abuse against Trustin and to allow the introduction of the evidence as other acts evidence. Counsel failed to present available evidence to prevent this prejudicial evidence from being admitted against Hunter.

Among the evidence counsel could have submitted was evidence that Luzmilda Blue was the individual who injured and abused Trustin. Luzmilda had been diagnosed multiple times with severe depression, and had previously threatened to kill her children and been charged with neglect. (Exs. 33, 36 at pp. 6 and 16 of Family Risk Assessment.) August 4, 2004 Job and Family Services assessment documented that Luzmilda had violent tendencies and had severe parenting skills deficiencies. The report noted that Luzmilda "does not know the identity of her 22 month old son's father and she may be internalizing anger and resentment that could manifest as violent tendencies. She made the odd comment at least two times during the assessment that if an individual wanted to abuse a child, they wouldn't break a finger, a hand or a foot." (Ex. 36.) The report concluded that Luzmilda was an "individual who has a history of aggression based on her legal history and she demonstrates poor impulse control, lack of insight and poor judgment based on her self-report. Angry feelings are difficult for her to manage and are likely to be expressed in an aggressive, violent manner." (Ex. 36.) Significantly, the report notes that Luzmilda "places her needs before the welfare of her children. The extent of her child's injuries and the client's lack of remorse or regret for what may have occurred places all three of her children at high risk for further abuse." (Ex. 36.)

Luzmilda's lack of concern for Trustin was also a recurring theme. When talking about Trustin's 2004 injuries, Luzmilda did not cry, or express remorse or regret for his injuries. "She cried often when discussing her children's removal, but there were no tears when discussing her son's abuse and his physical damage...Not only does she claim not to know what happened to her child, but also she doesn't seem particularly concerned with finding out, only with getting her children back." (Ex. 36.)

A 2006 assessment of Luzmilda reinforced the extent of her mental illness, her lack of concern for her children, and her history of taking severe measures in response to stress. She saw the problems in the parent child relationship as originating from the child. (Ex. 38.)

There was also evidence to demonstrate that at least some of Trustin's 2004 injuries were the result of an allergic reaction. On July 2, 2003, Trustin was taken to the hospital with lip swelling and hives on his face after eating fried chicken and fries from Long John Silver. The doctor found that Trustin had experienced an allergic reaction to food. (Ex. 34.) On July 14, 2003, Trustin was again seen about his skin problems, and he was diagnosed with molluscum contagiosum. (Ex. 34.) Molluscum contagiosum is described as lesions that can be found on different areas of the skin and that can become itchy and painful. Picking or scratching the bumps may lead to further infection or scarring. (Ex. 50.)

Further, a 2006 report noted that Trustin's 2006 injuries were his second serious injury in two years. "In 2004, he had serious injuries caused by an **unknown perpetrator**. At the time, it was believed that the perpetrator was Mr. Hunter then as well **but it was determined that he had no contact with Trustin.**" (Ex. 37) (Emphasis added). Tyree, one of Luzmilda's other sons denied that he had ever witnessed Hunter abuse Trustin or that Hunter had ever abused him. (Ex. 37.)

Others, including some who testified against Hunter, also felt that he was not responsible for Trustin's 2004 injuries. During an interview with a social worker in 2005, Wilma Forte, one of Trustin's main caretakers, said that Luzmilda did not give a lot of attention to Trustin and that he never wanted to return home after being in her (Wilma's) care. Wilma "reported that she **continues** to believe that Lamont Hunter did not hurt Trustin." Wilma further reported that she watched Trustin and "he will say no when asked if he wants mommy or to go home to mommy." (Exs. 31, 35.) (Emphasis added). These statements not only point to Luzmilda as the one who hurt Trustin in 2004, but they also would have been crucial to impeach Forte's testimony that that she was concerned for Trustin solely when he was around Hunter. (Tr. 499, 509, 511-12, 536, 538.) Ohio Rule of Evidence 613 allows for impeachment of a witness with a prior inconsistent statement. Once Forte testified that she believed Trustin was in fear of Hunter, counsel should have confronted Forte with a statement she made to a social worker on August, 5, 2005.

In addition, had trial counsel reviewed the records from Hamilton County Job and Family Services, counsel would have also known that in one of her interviews with a social worker, Amber White advised the social worker that her brother Orlando had previously been charged with statutory rape. (Ex. 30, p. 6.) The social worker told White that Orlando was not to be around the children. "[S]he agreed also to follow the magistrated ruling not have (sic) Orlando around the children." Id.

Again, Ohio Rule of Evidence 613 was implicated when White denied that her brother had been charged with rape. Once White made these statements, counsel should have confronted White with the statement she made to the social worker that her brother had been convicted of rape. White's answer under oath was simply untrue, and her prior statement should have been brought out at trial. The fact of whether or not White's brother was convicted of rape was not

collateral to the issues before court. Rather, it went to the heart of the defense theory of innocence coupled with the suggestion of an alternate suspect.

The Sixth Amendment's guarantee of an accused's right to confront witnesses is a fundamental right imposed on the states via the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965). This right is "essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294 (1973). The confrontation right includes both the right to face the State's witnesses and the right to cross-examine them. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).

Counsel's deficient performance prejudiced Hunter. It impacted Hunter's ability to present a defense. Counsel's failure not only deprived Hunter of the opportunity to impeach two State's witnesses, but also deprived Hunter of the ability to argue that the "other acts" evidence should not have been admitted, and that another likely suspect for the earlier abuse was Trustin's mother, Luzmilda. Hunter was also deprived of an opportunity to point to an alternate suspect for the injuries that caused Trustin's death and present evidence that there was an order that Robert Orlando Forte not be around children. (Ex.30, p. 6.)

c. Jury waiver

Hunter's counsel failed to ensure that his waiver of his constitutional right to be tried by a jury at his capital trial was knowing, voluntary and intelligent. Adams v. United States, 317 U.S. 269 (1942). Counsel allowed Hunter's waiver of a jury trial despite the fact that he did not advise Hunter of all of the repercussions of trying a capital case to a three judge panel. As a result, Hunter was deprived of effective assistance of counsel and was thereby prejudiced by his counsel's errors. U.S. Const. amends V, VI, VIII, and XIV; Ohio Const. art. I § § 1, 2, 5, 9, 10, 16 and 20; Strickland v. Washington, 486 U.S. 668 (1984).

A capital defendant has the right to jury trial as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution. "[T]rial by jury is the normal, if not preferable,

mode of disposing of issues of fact in criminal cases and the right must be jealously preserved.” State v. Ruppert, 54 Ohio St.2d 263, 271, 375 N.E.2d 1250, 1255 (1978). Thus, a criminal defendant may not be deprived of the right without an intelligent, voluntary and knowing waiver.

On June 6, 2007, Hunter waived his right to a jury trial. (Tr. 90.) When accepting Hunter’s plea, the trial court ensured only that Hunter was aware that he had a constitutional right to trial by jury and that the sentence to be imposed in his case would be imposed by the same three judge panel who heard his case. (Tr. 90.) Hunter’s trial counsel, Clyde Bennett noted on the record that the waiver of the jury trial had been discussed at length with Hunter. (Tr. 91.) Although counsel discussed the waiver of a jury with Hunter, counsel failed to provide Hunter with the relevant information needed to ensure that Hunter’s waiver was intelligent, voluntary and knowing.

Counsel’s discussion with Hunter was limited to explaining the reasons why he should waive his right to a jury trial. Specifically, there was a significant amount of pre-trial publicity in his case that could affect Hunter’s jury. But counsel failed to advise Hunter of the negative implications of waiving his right to a jury trial and failed to advise Hunter that he could move to change the venue of his trial if after voir dire, the jury pool was found to be tainted by pre-publicity. (See Ninth Ground for Relief.) The reality was that trial counsel did not want to try the case to a jury because it would extend the time of the trial by weeks. (Ex. 11.)

Counsel also failed to explain to Hunter that, under Ohio law, just one juror can prevent the death penalty if he or she individually finds that mitigating circumstances are present in the case and does not agree that the aggravating circumstances outweigh the mitigating circumstances. State v. Brooks, 75 Ohio St. 3d 148, 161, 661 N.E.2d 1030, 1042 (1996). Ohio’s death penalty statute requires that in order for a jury to recommend a sentence of death, it must unanimously find that the aggravating circumstances outweigh any mitigating circumstances

present in the case. In the absence of a unanimous finding that death is appropriate, the jury must recommend imprisonment for a unanimously agreed-upon specified term.

Hunter's trial counsel also failed to explain how waiving a jury trial limited Hunter's right on appeal. (Ex. 11.) In State v. Post, 32 Ohio St.3d 380, 513 N.E.2d 754 (1987), the Court affirmed its position that error in the admission of evidence will be ignored when a case is tried before a judge or three judge panel because it is presumed, unless affirmatively shown otherwise, that the judge or panel ignored the evidence it chose to admit.

Here, Hunter's waiver was not intelligent, voluntary, or knowing, as he was unaware of any of the negative implications of his waiver. The lower courts erred in finding to the contrary.

d. Change of venue and pre-trial publicity

Hunter was similarly denied the effective assistance of counsel when defense counsel failed to make a motion for a change of venue. The failure to act by defense counsel violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of the Ohio Constitution. In denying this claim, the First District stated, "In the absence of evidence demonstrating actual juror bias or giving rise to a presumption of bias, Hunter's 9th claim . . . was properly denied." Hunter, 2012 Ohio 2859, at ¶26. Because Hunter indeed demonstrated prejudice stemming from his counsel's deficient performance, that court erred.

A change of venue can assist in guaranteeing that a defendant receives a fair trial. State v. Lundgren, 73 Ohio St. 3d 474, 653 N.E.2d 304 (1995), citing to State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). If there is a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," the defendant's right to due process is at risk, and a change of venue is necessary or other measures need to be taken. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966). A change of venue is a prophylactic measure designed to protect the defendant. "Every

procedure which would offer a possible temptation to the average man to forget the burden of proof required to convict the Defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.” Estes v. Texas, 381 U.S. 532, 544 (1965).

When Hunter was charged with Trustin’s death in early 2006, media reports emphasized the State’s theory that Hunter had previously abused Trustin, and that Trustin’s death was fatal child abuse. (Ex. 27.) Hamilton County Prosecutor Joe Deters was quoted as saying, “The terror this kid had toward this defendant is beyond belief. The baby was petrified of him, and for good reason.” (Id.) Deters also told the press that “Trustin was so afraid of Hunter that he urinated in his pants every time he saw him.” (Id.) The details of the previous abuse allegations, the graphic descriptions of Trustin’s “terror,” and the references to Trustin’s death as fatal child abuse, portrayed Hunter as a monster in the eyes of the jury pool.

The coverage of Hunter’s case did not exist in isolation, however. The prejudicial publicity was compounded by the media frenzy that surrounded the case of Marcus Fiesel, a toddler who had been killed by his foster parents in August 2006. (Ex. 29.) Fiesel’s foster parents, Liz and David Carroll, faced charges in Hamilton County after they falsely reported that Fiesel went missing in park there, even though they had already killed him and disposed of his body. Prosecutor Deters did not mince words in his assessment of the Carrolls: “Sometimes people are just evil.” (Id.) Media coverage of their cases lasted for months, and prompted a backlash against children’s services agencies as the foster care agency who placed Fiesel was scrutinized. (Id.)

The Cincinnati Enquirer again turned its focus on Hunter less than two weeks before his trial was set to begin, with a lengthy “investigative report” and an extensive portion of its website dedicated to the death of Trustin Blue. (Ex. 28.) An accompanying editorial invited the

readers to “think about what you have read in terms of your own child or some toddler you have known. Imagine that child suffering what Trustin suffered,” and included a reference to Fiesel’s death. (*Id.*) After the intense coverage of Fiesel’s case, the linking of Trustin’s death to a tragic pattern of child deaths at the hands of abusers, and the heightened suspiciousness of children’s services agencies, competent defense counsel would have made a motion for a change of venue to remove the case from Hamilton County and supported the motion with documentation of the prejudicial publicity. (See Exs. 27, 28, 29.)

Here, defense counsel’s failure to make a motion for change of venue, despite the extensive publicity surrounding Hunter’s case and another case involving the death of a child in the region, undermines confidence in Hunter’s waiver of a jury trial, and ultimately the outcome of Hunter’s capital trial. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).

Hunter was prejudiced when he waived his constitutional right to a jury trial based on his trial counsel’s representations that the jury would be biased. See Eighth Ground for Relief, supra. But trial counsel’s warning of the likely prejudice was not accompanied by a motion to change the venue of the trial, or even an attempt at empanelling an unbiased jury. Instead, trial counsel advised Hunter to waive his constitutional rights to a jury of twelve of his peers in favor of a trial before a three judge panel, who ultimately convicted him of aggravated murder and sentenced him to death.

The First District and trial court erred in finding that Hunter had not shown proven ineffective assistance of counsel.

e. Conclusion

This Court should accept jurisdiction and reverse the lower court’s decisions on Hunter’s Second through Ninth Grounds for Relief.

2. Mitigation Phase Ineffectiveness (Twelfth – Seventeenth Grounds for Relief)

Due to Bennett's failure to reasonably investigate and present available evidence to mitigate Hunter's death sentence, Hunter was denied his rights as guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 5, 9, 10, 16, 20 of Article I of the Ohio Constitution. See also Strickland v. Washington, 466 U.S. 668, 673 (1984); Williams v. Taylor, 529 U.S. 362, 391 (2000); Wiggins v. Smith, 539 U.S. 510, 524 (2003). The lower courts erred in finding that trial counsel presented a competent mitigation defense. Hunter, 2012 Ohio 2859, at ¶47. As proven herein, Bennett's mitigation case was anything but competent.

The Eighth Amendment requires the trier of fact to consider, during the mitigation phase of a capital trial, the circumstances of the crime and the defendant's history, background and character. Boyd v. California, 494 U.S. 370, 377-78 (1990); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Defense counsel has a duty to investigate the client's background for mitigating factors; this is "an indispensable component of the constitutional requirement of . . . effective representation and assistance from his lawyer." State v. Johnson, 24 Ohio St. 3d 87, 90 (1986); see also Williams v. Taylor, 529 U.S. 362 (2000). Such a failure to investigate is not and cannot be dismissed as reasonable trial strategy by defense counsel. Wiggins, 539 U.S. at 534.

According to the ABA Guidelines, "Counsel needs to explore: Medical history, Family and Social history, educational history, military service, employment and training history, and prior juvenile and adult correctional experience." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.7 at 77, 83 (rev. ed. 2003). And, in order to effectuate an effective defense, this investigation should begin "as quickly as possible, because it may affect the investigation of first phase defense, decisions about the need for expert evaluations, motion practice, and plea negotiations." Id.

Here, Bennett failed to conduct an adequate mitigation investigation. He never retained his own mitigation specialist, nor did he conduct an investigation himself. Hunter's sister, Debra Barnes, stated that Bennett contacted her three or four days before the mitigation phase in order to get the family together to talk about testifying for mitigation. (Ex. 14.) She recalled that "[Bennett] met with us as a group the day before the mitigation phase. We met with Clyde for about 1-2 hours." (Id.) This was the first and last time the Hunter family was ever contacted by Bennett concerning mitigation.

Had Bennett thoroughly investigated Hunter's background, a mitigation case could have been presented that included a discussion of Hunter's dysfunctional family, the domestic violence between Hunter's father and mother, and the impact of Hunter witnessing such violence. (See Ex. 9.) Failing to present this information prejudiced Hunter.

During post-conviction investigation, several of Hunter's siblings discussed the witnessing of their father's abuse of their mother. Debra Barnes (Debbie) recalled that Hunter's father was an very abusive man. (Ex. 14.) Debra could have provided information to the three judge panel about the times Leevell Sr. "blackened mother's eyes." (Id.) Debbie also could have provided information that at one point when her mother was pregnant with Leevell Jr., Leevell Sr. pushed her and she fell through a glass table. (Id.) Donna, another of Lamont's sisters also recalled that Hunter's father hit their mother. These altercations stemmed from Leevell's excessive drinking and infidelity. (Ex. 16.) Hunter's father confirmed the abuse that Hunter witnessed. (Ex. 12.) Leevell Sr. admitted that at one time he grabbed Hunter's mother by the throat and jumped on her after he asked her to iron his clothes and she refused. (Id.)

In addition to the physical abuse against Hunter's mother, Hunter's father further abused Hunter's mother by having multiple affairs and flaunting those affairs in front of the whole family. (Exs. 11, 12, 15, 16.) At one point, Marquita, one of Leevell Sr.'s mistresses, lived in

the apartment above the family. This resulted in one of Hunter's sister's getting in a physical altercation with her. (Exs. 12, 16.)

Evidence also could have been presented to demonstrate how Hunter's father's alcoholism contributed to a chaotic childhood environment. (Exs. 11, 12, 14, 16, 32.) Hunter recalled having to get in their car with his mother and look for their father when he did not return home after drinking all night. (Ex. 11.) Debbie "dreaded the weekends because [she] was aware of the predictable weekend turmoil in the household." (Ex. 14.)

A review of the family history of both Hunter's mother and father would have also provided insight into the cyclical nature of these dysfunctional habits. (Exs. 12, 13.) Leevell Sr.'s father was an alcoholic who stabbed his mother. (Ex. 12.) Harriet's mother was hospitalized in a mental institution after having a nervous breakdown and had her children removed from her care. (Ex. 13.)

In addition, trial counsel never delved into the specifics of Hunter's substance abuse issues. Hunter's excessive substance abuse issues began in the Eighth grade. (Ex. 11). Further, his family, including his mother, father, and his two sisters, Debra and Donna, all reported that Hunter had substance abuse problems. (Exs. 12, 13, 14, 16.) Information such as this should have led trial counsel to retain a substance abuse expert. Further, trial counsel could have called a counselor from the P.A.S.S.A.G.E.S. Day Reporting Program to testify to the progress made by Hunter while taking part in that program. (Ex. 18.) Failing to delve into this available mitigation through expert and family testimony was prejudicial.

Moreover, Hunter's trial counsel failed to retain a psychologist, who would have presented available, compelling psychological expert testimony at Hunter's mitigation hearing. (Ex. 9.) This failure to retain a psychologist prejudiced Hunter.

Post-conviction counsel obtained the services of Dr. Bob Stinson, an experienced clinical psychologist, to review the sentencing phase of Hunter's trial, and to conduct a psychological interview and evaluation. (Ex. 8, 9.) Because Dr. Stinson reviewed of a number of Hunter's records as well as spent several hours of contact with Hunter, he was able to note several factors relevant to the 3-Judge panel's consideration of whether to sentence Hunter to death.. (Ex. 8.) Dr. Stinson was further able to provide opinions about the mitigation that should have been presented at Hunter's trial, including but not limited to the following:

- Lamont admitted several signs of substance abuse and dependence: (1) failure to fulfill major role obligations at work, school, or home; (2) recurrent use when physically hazardous; (3) substance related legal problems; (4) tolerance for all the substances he used; (5) experiencing withdrawal symptoms for marijuana and alcohol; (6) taking larger amounts and over a longer period of time than he intended; (7) experiencing a persistent desire or unsuccessful efforts to cut down on cocaine, marijuana and alcohol; (8) spending a great deal of time obtaining, using, or recovering from substance use; (9) giving up important social, occupational, or recreational activities in favor of using substances; (10) continuing to use alcohol, marijuana, and cocaine despite having physical or psychological problems caused and/or exacerbated by their use.
- The United States Department of Justice has found that a child's environment will serve as risk factors for later violence and delinquency. several factors were present in Lamont's family and life: (1) family history of substance abuse prior to the age of 6; (2) family management problems prior to the age of 6; (3) family conflict prior to the age of 6; (4) parental involvement in and parental attitudes favorable toward substance abuse prior to the age of 6; (5) family conflict and family management problems between the age of 6 and adolescence; (6) history of parental attitudes favorable toward and involvement in substance abuse between the age of 6 and adolescence; (7) lack of commitment to school between the age of 6 and adolescence; (8) early and persistent antisocial behavior; (9) truancy and dropping out of school; and (12) (sic) delinquent siblings.
- The United States Department of Justice has further found that there was a cumulative impact, whereby the larger the number of risk factors to which the youth was exposed, the greater the probability of violent behavior in the community. As can be seen, Lamont was not exposed to just one or two risk factors, but was repeatedly exposed to several risk factors.
- Research has shown that children who are exposed to the aforementioned corruptive influences are more likely to experience psychological disorders, exhibit grief and loss reactions, have stunted moral development, show a pathological adaptation to violence, and ultimately identify with the aggressor.

- Finally, mitigating evidence could have been presented showing that one's risk of violence decreases with age. Specifically, research has shown that individuals under the age of 25 are at the highest risk of re-offending sexually; those over the age of 25 re-offend at a lower rate. More conservative measures use age 30 as the line of demarcation between higher and lower risk. Thus, the inverse relationship between age and antisocial acts / re-offending should have been presented for mitigation purposes.

(Id.).

Instead of conducting a reasonable investigation, Bennett went into Hunter's trial totally unprepared for a possibility of a mitigation phase. No complete mitigation investigation was done, nor even attempted. He was armed solely with a few summaries done by the mitigation expert hired by previous counsel before they were removed from the case. (Ex. 14, 17, 39.) It was defense counsel's responsibility to ensure that a reasonable investigation occurred. Such an investigation requires that available records are obtained and available witnesses interviewed. Wiggins, 539 U.S. at 524; Williams, 529 U.S. at 391; Austin v. Bell, 126 F.3d 843 (6th Cir. 1997); Glenn v. Tate, 71 F.2d 1204 (6th Cir. 1995). Bennett's actions do not even approach the level of work that would have been done in a reasonable investigation. Here, because Bennett failed to conduct a mitigation investigation, he failed to present a reasonable mitigation case but instead relied on residual doubt—a factor the Ohio Supreme Court has determined is not a mitigating factor under Ohio law. The failure of defense counsel to ensure that an adequate mitigation investigation occurred was unreasonable and prejudicial. This Court should accept jurisdiction on Hunter's Twelfth through Seventeenth Grounds for Relief to rectify this wrong.

C. Hunter's trial counsel was operating under a conflict of interest during both phases of his capital trial. (Tenth Ground for Relief)

As Hunter claimed in his Tenth Ground for Relief, trial counsel's representation of Hunter while counsel was being investigated for and ultimately indicted on serious federal offenses violated Hunter's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 2, 5, 9, 10, 16, and 20 of

the Ohio Constitution; see also Strickland v. Washington, 466 U.S. 668 (1984). The First District determined that nothing in the evidentiary material supported a causative link between the alleged conflict of interest and an inadequacy in Hunter's counsel's representation. Hunter, 1st Dist, C.A. No. 090569, 2012-Ohio-2859, at ¶53. Contrary to the First District's opinion, Hunter submitted evidence advancing this claim beyond mere hypothesis; trial counsel suffered from an "actual conflict of interest."

An "actual conflict of interest" is a "division of loyalties that affect[s] counsel's performance." Mickens v. Taylor, 535 U.S. 162, 171-72 (2002). "A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). Here, Hunter presented evidence to demonstrate that his attorney's ability to properly represent him was materially limited by his focus on his own criminal case. Prejudice from counsel's ineffectiveness is presumed because trial counsel suffered from an actual conflict of interest.

The Ohio Rules of Professional Conduct recognize that "A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if . . . there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited . . . by the lawyer's own personal interests." Prof. Cond. Rule 1.7(a). Trial counsel's representation of Hunter in a capital murder trial and mitigation hearing while he was simultaneously being investigated and charged with serious offenses created an actual conflict of interest and was per se ineffective.

Bennett first entered his appearance on Hunter's case on February 5, 2007. (T.d. 244.) The trial was continued until June 11, 2007. (T.d. 245.) By March 2007, there were rumors that Bennett was being investigated by the FBI. (Ex. 48.) Bennett informed Hunter that he was being investigated for conspiracy to commit murder, and asked Hunter what it was like to go to

federal prison. (Ex. 11, ¶ 8.) Bennett told Hunter that he was “fighting for his [Bennett’s] life too,” and that the investigation was causing him a lot of stress. (*Id.*, at ¶ 9.)

A federal bill of information charging Bennett with illegal structuring of financial transactions was issued on August 15, 2007. (Ex. 20.) The Internal Revenue Service and the Drug Enforcement Administration had both been investigating Bennett. (Exs. 24, 25.) Bennett pled guilty on September 26, 2007. (Ex. 19, 21, 23.) After agreeing to withdraw a motion for a downward departure from the sentencing guidelines if the United States agreed not to present live aggravating testimony, Bennett was sentenced to 24 months incarceration. (Exs. 19, 22, 23, 25.) During sentencing, Federal District Court Judge Thomas M. Rose found that at least some of the money at issue had come from criminal activity. (Ex. 25.) On February 15, 2008, Bennett was suspended from the practice of law, and the matter was referred to the “Disciplinary Counsel for investigation and commencement of disciplinary proceedings.” (Ex. 26.)

Contrary to the First District’s conclusions, Hunter’s evidence demonstrates that Bennett’s conflict affected his performance. In particular, while Bennett was being investigated and his charges were pending, he essentially abandoned Hunter. When discussing a possible jury waiver, Bennett told Hunter that he did not really want to go through the capital voir dire process because “it was long and drawn out.” (Ex. 11, ¶ 6.) Bennett did not hire any experts or an investigator. He did not pick-up the trial file from former trial counsel until four weeks before Hunter’s trial was to begin, and never asked former counsel about their investigation. (Ex. 48.) Bennett did not call any witnesses during the culpability phase. (Tr. 653-54.) His cross-examinations of key witnesses were severely hampered by his lack of investigation and failure to consult qualified experts, and he failed to present medical evidence that corroborated Hunter’s statement. (See Second, Third, and Fourth Grounds for Relief, supra.)

Bennett similarly abandoned Hunter during the mitigation phase. His mitigation investigation “fell short of the standards for capital defense work articulated by the American Bar Association . . . standards to which we have long referred as ‘guides to determining what is reasonable.’” Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003). After Hunter was convicted, Bennett asked for an almost five-week continuance, until July 19, to prepare for mitigation. (Tr. 721.) On July 19, Bennett asked for another continuance, and the mitigation hearing was moved to September 5. (Tr. 724-26.) In the 11 weeks Bennett had to prepare for mitigation after Hunter was convicted, he never retained a mitigation specialist, psychologist, investigator, or any other expert. (Ex. 11, ¶ 7; Exs. 17, 47.) He did not contact the mitigation specialist from the previous trial team, Martha Phillips, until the middle of July. (Ex. 17.) She told him that she would not conduct the mitigation investigation for him, and Bennett never engaged any other mitigation specialist or expert. (Exs. 17, 47.) Bennett contacted Hunter’s family members just a few days before the mitigation hearing and met with them as a group for an hour or two. (Ex. 14, ¶ 29.)

As a result of trial counsel’s conflict of interest and the impact it had on his performance, Hunter’s rights guaranteed by the United States Constitution’s Fifth, Sixth, Eighth, and Fourteenth Amendments were violated. The First District as well as the trial court erred in denying this ground for relief. This Court should grant jurisdiction on the Ground for Relief.

D. Other Errors: Hunter’s death sentence is disproportionate and prosecutorial misconduct occurred at Hunter’s trial.

As argued herein in Proposition of Law II, Hunter’s Eleventh and Eighteen through Twenty-first grounds for relief were all supported with credible evidence dehors the record and were not barred by *res judicata*. In addition, Hunter raised violations of his constitutional rights that warranted relief, or that, at least, required discovery and merited an evidentiary hearing. The

trial court as well as the First District Court of Appeals erred in alternatively dismissing Hunter's grounds for relief on the merits. TC Op. at 3-5; Hunter, 2012 Ohio 2859, ¶¶14, 57-61. This Court should grant jurisdiction and reverse and remand the decisions of the lower courts as to these grounds for relief.

E. Cumulative Error (Twenty-third Ground for Relief)

Hunter finally asserted that, assuming *arguendo* none of the grounds for relief in his post-conviction petition individually warrant relief, the cumulative effects of the errors and omissions as presented in the petition prejudged Hunter and violated his constitutional rights. U.S. Const. amends. IV, V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 9, 10, 16 and 20; State v. DeMarco, 31 Ohio St. 3d 191, syl. 2, 509 N.E.2d 1256 (1987); *see also* State v. Bunch, 62 Ohio App. 3d 801, 577 N.E.2d 681 (1989). The lower courts erred in finding that the cumulative effects of the error discussed herein did not entitle Hunter to relief and/or discovery and an evidentiary hearing. This Court should accept jurisdiction and reverse and remand this case to the trial court for further consideration.

III. Conclusion

For the reasons outlined above, this Court should grant jurisdiction and reverse the First District's decision as well as the trial court's decision regarding Hunter's grounds for relief. Hunter presented sufficient operative facts to merit relief or, at minimum, an evidentiary hearing.

Proposition of Law No. II

The Doctrine of Res Judicata Does Not Bar Meritorious Post-Conviction Claims that are Supported by Sufficient Evidence Dehors the Record. U.S. Const. amend. VIII, XIV

I. Introduction

The trial court denied relief on Hunter's Fifth through Ninth, Eleventh, and Eighteenth through Twenty-First grounds for relief on basis of *res judicata*. *See State v. Hunter*, Entry, No.

B-0600596 (July 16, 2008). The First District Court of Appeals reviewed each of the claims for merit, yet ultimately affirmed the decision of the trial court essentially finding that the issues raised by Hunter were issues that should have been raised in direct appeal. Hunter, 2012 Ohio 2859, at ¶5. This Court should accept jurisdiction for two reasons: 1) to correct the misjustice that occurred in this specific case and 2) to guide the lower courts on when the applicability of res judicata in cases such as Hunter's is, or is not, appropriate.

II. Argument

As this Court has stated repeatedly, the doctrine of *res judicata* does not apply if a post-conviction claim is supported by evidence outside the record, as well as evidence appearing in the record. State v. Smith, 17 Ohio St. 3d 98, 101 n.1, 477 N.E.2d 1128, 1131 n.1 (1985); State v. Milanovich, 42 Ohio St. 2d 46, 325 N.E.2d 540 (1975); State v. Cooperrider, 4 Ohio St. 3d 226, 448 N.E.2d 452 (1984). When evidence is outside the record, it could not have been raised by counsel on direct appeal. State v. Ishmail, 54 Ohio St. 2d 402, 406, 377 N.E.2d 500, 502 (1978) (A reviewing court cannot add matter to record before it, which was not a part of trial court's proceedings).

While it is true Hunter could have raised certain claims in his appeal based on information in the record, Hunter needed to and did rely on evidence outside the record to support his post-conviction petition claim. "The presentation of competent, relevant, and material evidence *dehors* the record may defeat the application of *res judicata*." State v. Lawson, 103 Ohio App. 3d 307, 315 (1995)(citing State v. Smith, 17 Ohio St. 3d 98, 101, fn. 1. (1985). "To overcome the res judicata bar, evidence offered *dehors* the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record." Id. See also Greer v. Mitchell, 264 F.3d 663, 675 (6th Cir. 2001)("Although counsel could certainly have raised an ineffective assistance of counsel claim on direct appeal,

the precise arguments advanced in his petition for post-conviction relief require significant supplementation of the trial court record.”)

The First District affirmed the trial court’s decision to dismiss several of Hunter’s grounds for relief, stating that these claims could have and/or should have been raised on direct appeal. Hunter, 2012 Ohio 2859, at ¶14. However, the grounds for relief argued herein are all supported by credible evidence dehors the record, and as such, they could not have been adjudicated on direct appeal. The evidence dehors the record attached to these claims includes but is not limited to: 1) numerous Hamilton County Children’s Services records and reports 2) journal and newspaper articles, 3) affidavits, and 4) statistical reports.

Hunter supported these grounds for relief with these attached exhibits, and, in addition, requested discovery in support of all of these grounds for relief; he was denied that request. See Assignment of Error No. III. Thus, Hunter’s petition contained specific “factual allegations that cannot be determined by an examination of the files and records of the case,” the precise definition and requirement for evidence dehors the record. State v. McNeill, 137 Ohio App.3d 34, 41, 738 N.E.2d 23, 28 (2000) (citing Milanovich, infra). An evidentiary hearing is now the proper forum to evaluate that evidence.

In addition, Hunter’s Fifth through Ninth and Eighteenth grounds for relief, which are all supported by credible evidence dehors the record, specifically relate to trial counsel’s ineffectiveness during his trial. This Court has specifically identified claims of ineffective assistance of counsel as being most appropriately raised in post-conviction proceedings, rather than on direct appeal. This is because ineffective assistance of counsel claims are best determined through evidence that lies outside the record at trial. State v. Keith, 79 Ohio St. 3d 514, 536-37, 684 N.E.2d 47, 67 (1997); State v. Madrigal, 87 Ohio St. 3d 378, 390-91, 721 N.E.2d 52, 65 (2000). “The introduction in a post-conviction 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.” State v. Cole, 2 Ohio St. 3d 112, 114, 443 N.E.2d 169, 171 (1982). Courts cannot divide ineffectiveness claims between direct appeal and post-conviction; to properly resolve an ineffectiveness claim a court must consider “all circumstances.” Strickland v. Washington, 466 U.S. 668, 689 (1984).

The State has also recognized in this specific case that Hunter’s claims of ineffective assistance, which are supported by evidence dehors the record, such as the claims argued herein, are more appropriately raised in a post-conviction petition. In the State’s Merit Brief filed in this Court as part of Hunter’s direct appeal, the State alleged that “because this claim is based on matters raised outside of the trial record it is more appropriately raised in a post-conviction petition pursuant to R.C. 2953.21.” Appellee’s Merit Brief at 10.

This Court’s position on the issue of the proper forum for claims of ineffectiveness is further in harmony with that taken by the United States Supreme Court acting in federal habeas. See Williams v. Taylor, 529 U.S. 362, 395 (2000). Collateral proceedings serve the function of leaving defendants a way to challenge their convictions and sentences when direct appeal fails them. Direct appeal is not appropriate for ineffectiveness claims generally, simply because the prejudice is unknown until evidence is brought in to show what could have been before the court. Madrigal, 87 Ohio St. 3d at 390, 721 N.E.2d at 65.

Exactly that situation is present here. Hunter’s Fifth through Ninth, Eleventh, and Eighteenth Grounds for Relief do indeed rely, in part, upon the trial record—one must look to the trial record to observe the defects in the trial record and to understand counsel’s deficiency. However, the prejudice suffered is apparent from the strength of the post-conviction petition and attached exhibits.

Ohio's post-conviction procedures must comport with due process. Evitts v. Lucey, 469 U.S. 387 (1985) (violates due process to deny state-created rights or procedures). By denying Hunter's claims for relief argued herein on the improper basis of *res judicata*, the First District violated his due process guarantees. U.S. Const. amend. XIV; Ohio Const. art. I, §§ 1, 10, 16.

III. Conclusion

For the above reasons, this court should grant jurisdiction Hunter and reverse the First District's decision in applying *res judicata* to dismiss Hunter's Fifth through Ninth, Eleventh, and Eighteenth through Twenty-first grounds for relief. In the alternative, Hunter requests that this Court remand these same grounds for relief for discovery and an evidentiary hearing.

Proposition of Law No. III

When a death-sentenced defendant files a post-conviction petition, due process, equal protection, the right to counsel, and the freedom from cruel and unusual punishment require that the defendant receive funding for expert assistance and discovery upon a showing of good cause. U.S. Const. amend. VI, VIII, XIV.

I. Introduction

The trial court denied Hunters' request discovery for and a substance abuse expert because it found that he did not have the right to funding or discovery under Ohio's post-conviction statute. The First District agreed. Hunter, 2012 Ohio 2859, at ¶66. The lower courts' decisions cannot stand as a matter of Ohio law and federal constitutional requirements.

II. Argument

A. Ohio's post-conviction statute requires that death-sentenced petitioners receive an opportunity for discovery upon a showing of good cause.

Hunter filed a motion for discovery on August 19, 2008. He requested leave to conduct discovery to support all of his grounds for relief. That motion was denied about two weeks later on September 3, 2008, before the State had even filed a response to Hunter's Petition.

Post-conviction actions are civil proceedings; the Ohio Rules of Civil Procedure apply. State v. Milanovich, 42 Ohio St. 2d 46, 52, 325 N.E.2d 540, 544 (1975) (Civil Rules of Procedure apply to summary judgment in post-conviction actions); See also State v. Nichols, 11 Ohio St. 3d 40, 42-43, 463 N.E.2d 375, 377 (1984) (civil remedy of Res Judicata applied to post-conviction actions); Ohio R. Civ. P. 1(A). Thus, Hunter should possess the same rights as an appellant in any civil case.

Ohio has chosen to establish a post-conviction procedure to effectuate constitutional rights for those defendants sentenced to death, and that procedure must comport with due process. Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 838-39 (1985); See also Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 282-83, 118 S. Ct. 1244, 1250-51 (1998) (Appellant's life interest protected by due process clause); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991 (1976) (Death is different and requires heightened due process).

Capital appellants face a serious dilemma under Ohio's post-conviction scheme. The text of the statute provides that a Appellant must include affidavits or evidence dehors the record in support of the claims in a petition. O.R.C. § 2953.21(A). It is from the face of the petition that a trial court must determine if a hearing is required. All this must be done without any benefit of the discovery processes available to every other civil litigant. Without access to traditional civil tools of discovery, Ohio's post-conviction process imposes an impossible pleading standard on Appellants and is rendered meaningless. The concern over Ohio's inadequate, excessively narrow, and ineffectual post-conviction scheme is shared by the Sixth Circuit Court of Appeals. Keener v. Ridenour, 594 F.2d 581, 590 (6th Cir. 1979). The Ohio Supreme Court has never addressed this issue. Hunter asks this Court to accept jurisdiction and vacate the judgment of the trial court and remand the matter with instructions that he be permitted an opportunity to conduct discovery.

Hunter requested an evidentiary hearing on the claims in his petition. The First District abused its discretion when it denied that request. Hunter pleaded “sufficient operative facts” supported by credible evidence de hors the record in his post-conviction grounds to entitle him to an evidentiary hearing. See State v. Calhoun, 86 Ohio St. 3d 279, 283, 714 N.E.2d 905, 910 (1999) (quoting State v. Jackson, 64 Ohio St. 2d 107, 112, 413 N.E.2d 819, 823 (1980)). The First District erred to Hunter’s prejudice because it dismissed his petition without affording him a hearing to resolve factual disputes created by the supporting exhibits. See Mason v. Mitchell, 320 F.3d 604, 620-21 (6th Cir. 2003).

B. The trial court abused its discretion when it denied Hunter’s motion for a substance abuse expert.

The trial court abused its discretion and it violated Hunter’s due process rights when it denied his request for a substance abuse expert. A substance abuse expert was necessary based on the uncontested opinion of Dr. Stinson. Cf. State v. White, 118 Ohio St. 3d. 12, 23, 885 N.E.2d. 905, 915 (2008) (trial court abused its discretion when it denied capital defendant’s mental retardation claim supported by uncontradicted expert opinions). Moreover, the record shows that Hunter’s trial counsel did not investigate or and present any mitigation evidence of the type that would be discovered by a substance abuse expert.

The trial court failed to recognize that providing such an expert might well have led to the discovery of compelling evidence to support Hunter’s Sixth Amendment ineffective counsel claims. Counsel’s failure to discover and present mitigation evidence can prejudice a capital defendant’s constitutional rights. See Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005); Skaggs v. Parker, 235 F.3d 261, 269 (6th Cir. 2000); Stallings v. Bagley, 561 F. Supp.2d 821, 888 (N.D. Ohio 2008).

III. Conclusion

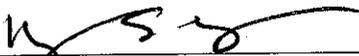
For the reasons outlined above, this Court should grant jurisdiction and reverse the First District's decision as well as the trial court's regarding Hunter's need for discovery and expert funding. See Britt v. North Carolina, 404 U.S. 226, 227 (1991); Ake v. Oklahoma, 470 U.S. 68, 76-77 (1985); State v. Mason, 82 Ohio St.3d 144, 149, 694 N.E.2d 932, 943 (1998).

Conclusion

Appellant Lamont Hunter's post-conviction petition raised constitutional violations that occurred at his trial and mitigation hearing and is supported by evidence dehors the record that provide sufficient operative facts to warrant relief. This Court should accept jurisdiction, reverse the First District's decision as well as the trial court's decision, and remand this case for a new trial and sentencing hearing, or, alternatively, for discovery and an evidentiary hearing on Hunter's post-conviction claims.

Respectfully submitted,

Office of the Ohio Public Defender

By: 

KIMBERLY S. RIGBY-0078245

Assistant State Public Defender

Counsel of Record

PAMELA J. PRUDE-SMITHERS-0062206

Chief Counsel, Death Penalty Division

Office of the Ohio Public Defender

250 E. Broad Street, Suite 1400

Columbus, OH 43215

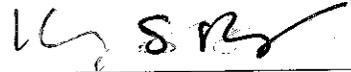
(614) 466-5394

(614) 644-0708

Counsel for Appellant

Certificate of Service

I hereby certify that a true copy of the foregoing APPELLANT LAMONT HUNTER'S MEMORANDUM IN SUPPORT OF JURISDICTION was forwarded by regular U.S. Mail to Ronald W. Springman, Assistant Prosecutor, Hamilton County, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this 13th day of August, 2012.

By: 

Kimberly S. Rigby – 0078245

Counsel for Appellant

In The Supreme Court Of Ohio

State Of Ohio,

Appellee,

-vs-

Lamont Hunter,

Appellant.

:

Case No.

:

Appeal taken from Court of Appeals
of Hamilton County, First Appellate
District, C Appeal No. 090569

:

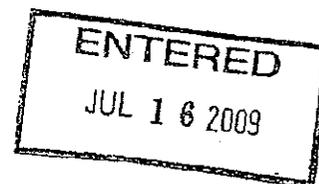
:

Death Penalty Case

:

**Appendix to
Appellant Lamont Hunter's Memorandum in Support of Jurisdiction**

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
CRIMINAL DIVISION



STATE OF OHIO : CASE NO. B-0600596
Plaintiff-Respondent :
vs. : FINDINGS OF FACT,
: CONCLUSIONS OF LAW, AND
LAMONT HUNTER : ENTRY DISMISSING PETITION
Defendant-Petitioner : TO VACATE

This matter came before the court on the post-conviction petition and amended post-conviction petition, the exhibits appended thereto, the entire record in case B-0600596 and related appeals, the motion to dismiss petition to vacate and/or set aside judgment filed by the State of Ohio, and any other pleadings of the parties.

Based upon the above, the court makes the following Findings of Fact, which are applicable to all causes of action.

- (1) Defendant was represented by attorney Clyde Bennett, II at trial.
- (2) Defendant is represented on direct appeal by Bruce K. Hust and Herbert E. Freeman.
- (3) Defendant is represented in this petition to vacate by the Ohio Public Defender's Office.

The court makes the following specific findings as to each of defendant's twenty-three grounds for relief raised in his post-conviction petition:

FIRST GROUND FOR RELIEF

Defendant's first ground for relief is predicated on a claim of 'actual innocence.' In support of this claim, defendant offers the numerous exhibits appended to his petition. Defendant, however, primarily relies on the affidavit of Dr. Werner Spitz who, if called to testify at trial, would have refuted the state's medical experts and said that Trustin's injuries were caused by an accidental fall down the steps. The court makes the following Conclusion of Law:

Post-conviction claims of 'actual innocence' do not involve a denial or infringement of a petitioner's rights under the Ohio Constitution or the Constitution of the United States, and have been held not to constitute a substantive ground for post-conviction relief. State v. Campbell (Jan. 8, 1997), Hamilton App. No. C-950746, at p. 13; See, also State v. Combs (1994), 100 Ohio App.3d 90, 652 N.E.2d 205.

SECOND THROUGH FOURTH GROUNDS FOR RELIEF

Defendant's second through fourth grounds for relief allege that trial counsel was ineffective in the guilt phase for not adequately challenging the medical findings of the state's expert witnesses that Trustin's injuries were intentionally inflicted. Specifically, defendant claims that trial counsel failed (1) to retain a medical expert or a forensic pathologist to rebut the testimony of the state's expert witnesses, (2) to present the testimony of Dr. Spitz, a forensic pathologist, who would have testified that Trustin died from an accidental fall, and (3) to adequately cross-examine the state's expert witnesses. The court makes the following Conclusions of Law:

Trial counsel's failure to retain or call expert witnesses is a matter of trial strategy. State v. Williams (1991), 74 Ohio App.3d 686, 695. Trial counsel's reliance on cross-examination of the state's expert witnesses does not in itself constitute ineffective assistance of counsel. State v. Madrigal (2000), 87 Ohio St.3d 378, 400; State v. Thompson (1987), 33 Ohio St.3d 1, 10-11.

Defendant has not established that trial counsel failed to effectively cross-examine the state's expert witnesses.

Defendant has failed to provide sufficient operative facts to establish that trial counsel violated an essential duty to him or that there was a reasonable probability that, but for counsel's omissions, the guilt phase results of the trial would have been different. State v. Bradley (1989), 42 Ohio St.3d 136.

FIFTH AND SIXTH GROUNDS FOR RELIEF

In his fifth and sixth grounds for relief, defendant claims that trial counsel did not effectively rebut other acts evidence that was admitted against him. At trial, over trial counsel's objection, the state admitted other act evidence that Trustin was the possible victim of child abuse two times in 2004. The record shows that defense counsel did rebut such evidence and established through cross-examination that someone other than defendant could have inflicted these injuries. Trial counsel also established that one of the injuries was not considered child abuse by the treating physician and that another injury could have been caused by a bug bite. The court makes the following Conclusions of Law:

Defendant has failed to show that he could not have raised this claim on direct appeal. Thus it is barred by *res judicata*. State v. Perry (1967), 10 Ohio St.2d 175, 266 N.E.2d 104, paragraph nine of the syllabus.

Defendant has also failed to submit evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief. State v. Pankey (1980), 68 Ohio St.2d 58, 428 N.E.2d 413.

Finally, defendant did not provide sufficient operative facts to show that trial counsel was ineffective in rebutting other act evidence or that the outcome of the trial would have been different had counsel adopted a different approach. State v. Bradley, supra.

SEVENTH GROUND FOR RELIEF

Defendant's seventh ground for relief is another claim of ineffective assistance of trial counsel in the guilt phase. Defendant claims that trial counsel was ineffective for not impeaching Amber White with testimony that her brother was charged with statutory rape after she testified that her brother was not convicted of statutory rape. The court makes the following Conclusions of Law:

This evidence was available at the time of trial and defendant could have raised this claim on direct appeal. It is therefore barred by *res judicata*. State v Coleman (Mar. 17, 1993), 1st Dist. No. C-900811; State v. Perry, supra.

Defendant has failed to demonstrate that trial counsel's failure to impeach White with evidence that her brother was charged with statutory rape would have effected the outcome of the trial. State v. Bradley, supra.

EIGHTH GROUND FOR RELIEF

In his eighth ground for relief, defendant alleges that trial counsel was ineffective for not ensuring that defendant knowingly, intelligently, and voluntarily waived a trial by jury. Defendant supports this claim with his own affidavit in which he claims that the only reason trial counsel

wanted to waive a jury was to shorten the trial time. The court makes the following Conclusions of Law:

This evidence was available at the time of trial and defendant could have raised this claim on direct appeal and therefore it is barred by *res judicata*. State v. Coleman (Mar. 17, 1993), 1st Dist. No. C-900811; State v. Perry, supra.

Defendant's affidavit conflicts with the trial record where defendant affirmed that he voluntarily waived a jury trial. (T.p. 90) Accordingly, the court finds that defendant's affidavit does not advance his claim beyond mere hypothesis and a desire for further discovery. State v. Coleman, supra; State v. Calhoun (1999), 86 Ohio St.3d 279, 714 N.E.2d 905.

NINTH GROUND FOR RELIEF

Defendant alleges in his ninth ground for relief that counsel was ineffective for failing to make a motion for change of venue. The court makes the following Conclusion of Law:

The evidence defendant relies on to support this claim was available at the time of trial and defendant could have raised this claim on direct appeal. Thus, it is barred by *res judicata*. State v. Coleman (Mar. 17, 1993), 1st Dist. No. C-900811; State v. Perry, supra.

TENTH GROUND FOR RELIEF

Defendant's tenth ground for relief is a general allegation that trial counsel was ineffective because, at the time of trial, he was under a federal criminal investigation that eventually led to counsel pleading guilty to federal offenses. Defendant supports this claim with pleadings from federal court that document the convictions, news releases and newspaper articles referencing the convictions, and the order from the Supreme Court of Ohio suspending trial counsel from the practice of law because of the conviction. Trial counsel was not under suspension at the time of

defendant's trial. Defendant also submits his own affidavit, the affidavit from his half-sister, the affidavit from a Public Defender, and the affidavit of a mitigation specialist.

Defendant does not raise specific claims of ineffective assistance of counsel that occurred on the record, but merely makes a general allegation that the federal investigation adversely effected trial counsel's performance. The court makes the following Conclusions of Law:

The fact that trial counsel was under federal criminal investigation by itself does not establish ineffective assistance of counsel. State v. Fuller, 8th Dist. No. 52131, 2002-Ohio-4164; State v. Joyner, 6th Dist. No. L-84-156, 1984 WL 3686.

Defendant has failed to submit evidence to advance his claim beyond mere hypothesis and a desire for further discovery. State v. Coleman, supra; State v. Calhoun (1999), 86 Ohio St.3d 279, 714 N.E.2d 905.

In this claim, defendant has failed to reference any specific instances of trial counsel's performance that effected the outcome of the trial. State v. Bradley, supra.

ELEVENTH GROUND FOR RELIEF

Defendant's eleventh ground for relief alleges that the Hamilton County Prosecutor's Office failed to provide defense counsel with exculpatory evidence. The court makes the following Conclusion of Law:

This claim is overruled on the authority of State v. Leonard, 157 Ohio St.3d 653, 813 N.E.2d 50, 2004-Ohio-3323 at ¶35 and State v. Lynch 1st Dist. No. C-010209, unreported at pp. 8-9.

TWELFTH THROUGH SEVENTEENTH GROUNDS FOR RELIEF

In defendant's twelfth through seventeenth grounds for relief, he alleges that trial counsel was

ineffective in the mitigation phase of the trial. Generally, defendant claims that trial counsel did not conduct an adequate mitigation investigation. Specifically, defendant claims that trial counsel should have hired a mitigation specialist, an expert in psychology, and a substance abuse expert. Defendant also claims that counsel should have done a better job in presenting defendant's family and social history and should have presented evidence concerning defendant's history of drug abuse. The court makes the following Conclusion of Law:

The evidentiary material submitted in support of these claims merely support alternative theories of mitigation. Since counsel presented a competent mitigation defense, such material does not provide proof of counsel's ineffectiveness. State v. Leonard, supra at ¶20; State v. Post (1987), 32 Ohio St.3d 380, 388-389, 513 N.E.2d 754; State v. Pankey, supra.

EIGHTEENTH THROUGH TWENTY-FIRST GROUNDS FOR RELIEF

In his eighteenth through twenty-first grounds for relief, defendant raises constitutional challenges to Ohio's death penalty statutory scheme. Defendant first claims that trial counsel should have presented evidence that the death penalty is applied in an arbitrary and discriminating manner. Defendant then claims that his death sentence was disproportionate to similarly situated defendants in Hamilton County, and that the death penalty is unconstitutional because prosecutors have too much charging discretion. The court makes the following Conclusion of Law:

All of these claims could have been raised at trial or on direct appeal and are therefore barred by *res judicata*. State v. Perry, supra; State Bies 1st Dist. No. C-980688, at pp. 14-15; State v. Moore 1st Dist. No. C-970353, 1998 WL 638353; State v. Jones 1st Dist. No. 990813, at pp. 5-6.

TWENTY-SECOND GROUND FOR RELIEF

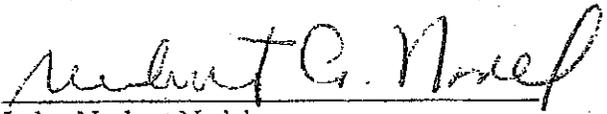
Defendant's claim that death by lethal injection is unconstitutional is overruled on the authority of State v. Ashworth (1995), 85 Ohio St.3d 56, 71, 706 N.E.2d 1231, 1242-1243 and State v. Leonard, supra at ¶37.

TWENTY-THIRD GROUND FOR RELIEF

Defendant's final ground for relief that the cumulative effect of the claims raised here entitle him to post-conviction relief is overruled. The court finds that defendant has failed to demonstrate that any of his separately raised post-conviction claims entitle him to relief. See State v. Fitzpatrick, 1st Dist. No. C-030804 at pp. 22-23.

CONCLUSION

For all the foregoing Findings of Fact and Conclusions of Law, the court hereby denies the defendant's post-conviction petition for relief, amended petition for relief, and all requests for discovery contained herein. The defendant's request for an evidentiary hearing is therefore denied. The court hereby grants the state's motion and dismisses defendant's post-conviction petition.


Judge Norbert Nadel
Hamilton County Court of Common Pleas

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

**ENTERED
JUN 27 2012**

STATE OF OHIO,

Respondent-Appellee,

vs.

LAMONT HUNTER,

Petitioner-Appellant.

APPEAL NO. C-090569
TRIAL NO. B-0600596

JUDGMENT ENTRY.

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

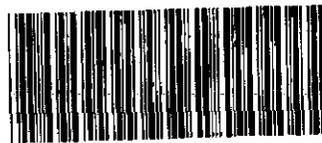
The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To the clerk:

Enter upon the journal of the court on June 27, 2012 per order of the court.

By: _____

Presiding Judge



D98170422

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Respondent-Appellee,

vs.

LAMONT HUNTER,

Petitioner-Appellant.

APPEAL NO. C-090569
TRIAL NO. B-0600596

OPINION.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

JUN 27 2012

COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 27, 2012

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Respondent-Appellee,

Office of the Ohio Public Defender, Pamela Prude-Smithers, Chief, Death Penalty Division, and *Kimberly S. Rigby*, Assistant State Public Defender, for Petitioner-Appellant.

Per Curiam.

{¶1} Petitioner-appellant Lamont Hunter appeals the Hamilton County Common Pleas Court's judgment denying his R.C. 2953.21 petition for postconviction relief. We affirm the court's judgment.

{¶2} In 2007, a three-judge panel convicted Hunter of aggravated murder, rape, and endangering children in connection with the death of his girlfriend's three-year-old son, Trustin Blue. For aggravated murder, the panel sentenced Hunter to death based on two death-penalty specifications: aggravated murder while committing or attempting to commit rape, and aggravated murder of a child under the age of 13. See R.C. 2929.04(A)(7) and (A)(9).

{¶3} Hunter unsuccessfully challenged his convictions in his direct appeal to the Ohio Supreme Court, *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, and in his 2008 postconviction petition. In this appeal from the denial of his postconviction petition, he advances three assignments of error.

I. The Evidence

{¶4} Hunter was convicted upon evidence that Trustin had died as a consequence of a brain injury sustained while in Hunter's care. When questioned by emergency medical personnel and then law enforcement concerning the cause of the injury, Hunter maintained that Trustin had fallen down his home's basement steps. But at trial, the emergency-room physician who had examined Trustin when he was brought to the hospital and the deputy coroner who had conducted Trustin's autopsy testified that Trustin's injuries were not consistent with a fall down carpeted steps. And the deputy coroner offered her opinion that the cause of death had been a "diffuse brain injury due to blunt impact/shaking injuries to the head."

II. The Postconviction Claims

{¶5} In his first assignment of error, Hunter challenges the common pleas court's denial of his postconviction claims without an evidentiary hearing. In his

second assignment of error, he assails the court's application of the doctrine of res judicata to bar certain claims. We address these assignments of error together, and we overrule them.

{¶6} To prevail on a postconviction claim, the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction that rendered the conviction void or voidable under the Ohio Constitution or the United States Constitution. R.C. 2953.21(A)(1). A postconviction petitioner bears the initial burden of demonstrating "substantive grounds for relief," through the petition, with its supporting affidavits and other documentary evidence, and the trial record. R.C. 2953.21(C).

{¶7} A postconviction claim is subject to dismissal without a hearing if the petitioner has failed to support the claim with evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief. *Id.*; *State v. Pankey*, 68 Ohio St.2d 58, 59, 428 N.E.2d 413 (1981); *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980), syllabus. Conversely, "the court must proceed to a prompt hearing on the issues" if "the petition and the files and records of the case show the petitioner is * * * entitled to relief." R.C. 2953.21(E).

{¶8} The common pleas court applied the doctrine of res judicata to bar some of Hunter's postconviction claims. Under the doctrine of res judicata, a judgment of conviction bars a defendant from raising in any proceeding, other than a direct appeal from that judgment, any claim "that was raised or could have been raised" in the direct appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. Thus, res judicata bars a postconviction claim that could fairly have been determined in the direct appeal, based upon the trial record and without resort to evidence outside the record. *Id.*; *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982).

{¶9} A postconviction petitioner may resist the application of res judicata to bar his postconviction claim by supporting the claim with outside evidence. But merely submitting outside evidence will not preclude the common pleas court from applying res judicata to bar a claim. The claim must depend on the outside evidence for its resolution. *Id.* Moreover, the outside evidence must be “competent, relevant and material” to the claim; it must “meet some threshold standard of cogency,” i.e., it must be more than “marginally significant”; and it must “advance the * * * claim beyond mere hypothesis and a desire for further discovery.” *State v. Coleman*, 1st Dist. No. C-900811, 1993 Ohio App. LEXIS 1486 (Mar. 17, 1993).

{¶10} When a postconviction claim depends for its resolution upon outside evidence, a common pleas court may not apply res judicata to dismiss the claim. *Perry* at paragraph nine of the syllabus; *Cole* at 114. But a reviewing court may sustain the claim’s dismissal on other grounds. *State v. Peagler*, 76 Ohio St.3d 496, 668 N.E.2d 4897, paragraph one of the syllabus; *State v. Blankenship*, 38 Ohio St.3d 116, 119, 526 N.E.2d 816 (1988). *Accord State v. Gipson*, 1st Dist. Nos. C-960867 and C-960881 (Sept. 26, 1997).

A. Prosecutorial Misconduct—Withholding Material Evidence

{¶11} In his 11th postconviction claim, Hunter contended that he had been denied a fair trial by the state’s failure to disclose exculpatory evidence. He asserted that the state had violated its duty to disclose exculpatory evidence in its possession, and that the trial court had abetted the state’s violation of its duty by overruling eight of his 14 pretrial motions for discovery and his motion asking the court to review, and then seal for appellate review, a copy of the prosecutor’s file in his case.

{¶12} The fair-trial guarantee of the Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes upon the state an obligation to disclose to a criminal accused evidence material to the accused’s guilt or innocence. *Brady v. Maryland*, 373 U.S. 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Such evidence is

“material” only if there is a “reasonable probability” that its disclosure would have changed the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The determination of this probability entails an inquiry into not whether a trial with the undisclosed evidence would have yielded a different verdict, but whether the evidence, “considered collectively,” “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. 419, 434-436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). *Accord State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 23-24; *State v. Hughbanks*, 1st Dist. No. C-010372, 2003-Ohio-187, ¶ 57.

{¶13} In Hunter’s direct appeal, the Ohio Supreme Court rejected his challenge to the overruling of his pretrial motion for disclosure of the state’s rebuttal witnesses and his motion to seal the prosecutor’s file. *Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, at ¶ 133-136. His postconviction challenge fared no better. Hunter neither specified the undisclosed exculpatory evidence nor supported his claim with evidence outside the record. He instead cited successful nondisclosure challenges advanced in this and other courts that, he insisted, demonstrate “an ongoing systemic problem concerning the [non]disclosure of exculpatory evidence by the Hamilton County Prosecutor’s Office” and “warrant[ed] the granting of discovery to demonstrate that the chronic problem continued in [his] case.”

{¶14} But a postconviction petitioner is not entitled to discovery to develop his claims unless the petition and its supporting evidentiary material demonstrate substantive grounds for relief. *State v. Issa*, 1st Dist. No. C-000793, 2001 Ohio App. LEXIS 5762 (Dec. 21, 2001): Because Hunter failed to support his claim with evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, he was not entitled to discovery to develop the claim, *see id.*, and the claim was subject to dismissal without a hearing. *See* R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59, 428 N.E.2d 413; *Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus.

Therefore, the common pleas court properly dismissed Hunter's 11th postconviction claim.

B. Ineffective Assistance of Counsel

{¶15} In claims 2 through 10 and 12 through 17, Hunter contended that he had been denied the effective assistance of counsel by his trial counsel's inadequate preparation and presentation of his case during the guilt and penalty phases of his trial. We hold that the common pleas court properly denied these claims without an evidentiary hearing.

{¶16} To prevail on a claim of ineffective assistance of counsel, a postconviction petitioner must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). To establish prejudice, the petitioner must demonstrate that counsel's deficient performance "so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result." *State v. Powell*, 90 Ohio App.3d 260, 266, 629 N.E.2d 13 (1993) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L. Ed. 2d 180 [1993], and *Strickland*).

{¶17} ***Jury waiver.*** In his 8th claim, Hunter contended that his trial counsel had been ineffective in counseling him to waive a jury trial and to proceed instead to a trial before a three-judge panel. A jury waiver must be voluntary, knowing, and intelligent. Crim.R. 23; *State v. Ruppert*, 54 Ohio St.2d 263, 271, 375 N.E.2d 1250 (1978). And a waiver is presumptively so if it was executed and filed in conformity with R.C. 2945.05 et seq. *State v. Bays*, 87 Ohio St.3d 15, 19, 716 N.E.2d 1126 (1999) (citing *United States v. Sammons*, 918 F.2d 592, 597 [6th Cir.1990]).

{¶18} The Ohio Supreme Court rejected Hunter's challenge in his direct appeal to counsel's effectiveness in counseling his jury waiver. The court found nothing in the

trial record to rebut the presumption that the waiver had been voluntary. And it concluded that “[u]nder the circumstances, [the jury waiver] appear[ed] to have been a reasonable tactical decision.” *Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, at ¶ 48-55.

{¶19} In support of his postconviction challenge, Hunter offered his own affidavit. He averred that he had waived a jury trial because his counsel had convinced him that a jury would be biased by substantial pretrial publicity and that voir dire would be “long and drawn out,” and because he did not know, because counsel had failed to advise him, that he could move for a change of venue, that his jury waiver would limit his challenges on appeal, or that the vote of a single juror would prevent the imposition of the death penalty.

{¶20} In evaluating counsel’s performance, a reviewing court “must indulge a strong presumption that counsel’s conduct f[ell] within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 67 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 [1955]). *Accord Bradley*, 42 Ohio St. 3d at 142, 538 N.E.2d 373. We perceive nothing in Hunter’s affidavit that could fairly be said to have overcome that presumption, or that might have altered the supreme court’s conclusion, based on the trial record, that counseling the waiver was sound trial strategy. Thus, the common pleas court properly denied Hunter’s challenge, in his 8th claim, to his counsel’s effectiveness in that regard.

{¶21} **Change of venue.** In his 9th claim, Hunter asserted that counsel had been ineffective in failing to request a change of venue on the ground of “extensive” and “prejudicial” pretrial publicity. He supported the claim with copies of press releases and news articles dating from Trustin’s January 2006 death through Hunter’s June 2007 trial. The media reports, he insisted, portrayed him as a child-abuser and linked

him to the "media frenzy" surrounding the August 2006 murder, in an adjacent county, of a three-year-old boy by his foster parents.

{¶22} Due process demands that a criminal accused be afforded "[a] fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). *Accord State v. Weiner*, 37 Ohio St.2d 11, 15, 305 N.E.2d 794 (1974). And the right to a jury trial secures to the accused the right to a fair trial by impartial jurors. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). *Accord State v. Zuern*, 32 Ohio St.3d 56, 68, 512 N.E.2d 585 (1987). When pretrial publicity threatens to deny these rights, a trial court may grant a change of venue. Crim.R. 18(B); R.C. 2901.12(K).

{¶23} The decision to grant a change of venue is committed to the sound discretion of the trial court. *State v. Maurer*, 15 Ohio St.3d 239, 251, 473 N.E.2d 768 (1984). Ordinarily, proof of pretrial publicity will not, alone, compel a change of venue. *State v. Landrum*, 53 Ohio St. 3d 107, 116-117, 559 N.E.2d 710 (1990). An accused seeking a change of venue on the ground of pretrial publicity must demonstrate that a juror was "actually biased" by exposure to that publicity. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, ¶ 29. And the "best test" of juror bias is voir dire. *State v. Bayless*, 48 Ohio St.2d 73, 98, 357 N.E.2d 1035 (1976). But proof of actual juror bias is not required, and juror bias may be presumed, in the rare case when "inflammatory, prejudicial pretrial publicity * * * so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community." *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir.1980). *Accord State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 86.

{¶24} Hunter waived his right to a jury trial. His jury waiver was not demonstrably unknowing, involuntary, or unintelligent. And because it preceded jury selection, it preempted any voir dire examination of prospective jurors for his case. Thus, the trial record does not demonstrate actual juror bias.

{¶25} Nor did the evidence of pretrial publicity offered in support of Hunter's postconviction challenge give rise to a presumption of juror bias. That publicity, while not insubstantial, could not fairly be said to have been so pervasive as to preclude any possibility of empanelling an impartial jury.

{¶26} In the absence of evidence demonstrating actual juror bias or giving rise to a presumption of bias, Hunter's 9th claim, challenging counsel's effectiveness in failing to seek a change of venue, was properly denied.

{¶27} *Investigation, preparation, and presentation—medical evidence.* In claims 2 through 4, Hunter challenged his trial counsel's effectiveness in countering the medical evidence presented by the state during the guilt phase of his capital trial. Hunter complained that counsel had engaged in "ill-informed and argumentative cross-examination" that had allowed the state's medical experts "to repeatedly state their damaging conclusions" concerning the cause and manner of Trustin's death. He further contended that counsel, instead of relying exclusively on his own medical knowledge and his cross-examination of the state's medical experts, should have retained the services of a forensic pathologist to provide expert assistance in preparing and presenting at trial his defense that Trustin had died from injuries sustained in a fall down the basement steps.

{¶28} In support of his claims, Hunter offered his own affidavit, in which he averred that counsel had cited "his own medical knowledge," along with the fact that he had been admitted to medical school, to explain his decision to rely on cross-examination of the state's medical experts in lieu of calling a defense expert. Hunter also offered outside evidence in the form of an opinion letter from forensic pathologist Werner U. Spitz, M.D., and copies of the materials used by Dr. Spitz in arriving at his opinion.

{¶29} Dr. Spitz disagreed with the state's experts concerning the cause and manner of Trustin's death. The emergency-room physician and the deputy coroner

testified at trial that Trustin's injuries were not consistent with a fall down the stairs. The deputy coroner determined that the cause of death had been a "diffuse brain injury due to blunt impact/shaking injuries to the head," and that "[t]he manner of death [had been] homicide." *Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, at ¶ 29 and 122 (quoting the deputy coroner's trial testimony). Dr. Spitz's review of the autopsy report, medical records, and trial testimony of the state's experts led him to the contrary opinion, that "the death of [Trustin was] consistent with head injuries sustained in a fall down a flight of stairs onto a concrete floor."

{¶30} The deputy coroner testified at length concerning the bases of her opinion. She testified that her postmortem examination had disclosed two separate areas of broad impact on Trustin's head and a serious neck injury, where the cartilage had been pulled loose from the thoracic vertebra. From the two distinct impact sites, the deputy coroner concluded that Trustin had been struck in the head with "something" or that "his body had been slammed against something." *Id.* at ¶ 26, 27, and 122.

{¶31} The postmortem examination also revealed "a 1.9 centimeter laceration of Trustin's anus[,] a hemorrhage along the rectum's lining[,] a hemorrhage going into both sides of the pelvis[, and] three areas of perforation of the rectal mucosa." The deputy coroner found those perforations to be "similar to what you could produce with something like a pencil, jammed with a pencil or something sharp like that, or could even be from an angled insertion of something." *Id.* at ¶ 26-28 (quoting the deputy coroner's trial testimony).

{¶32} Concerning the defense theory that Trustin's death had been accidental, the deputy coroner stated that she could "only * * * conceive of this being partially caused by a fall down 11 carpeted steps * * * if he had fallen off the side of the stairs and landed on his head twice." But, she insisted, a fall down the stairs "still wouldn't have explained the anal injuries." *Id.* at ¶ 29 (quoting the deputy coroner's trial testimony).

{¶33} Dr. Spitz found, to the contrary, “no injuries on the body surface that [were] not explainable by a fall down the steps, including the anal laceration and associated hemorrhage with the soft tissues in the pelves.” The autopsy photographs, he insisted, showed “two, parallel, horizontal, sharply demarcated, impacts to the head, which by their shape and pattern are consistent with bruises from impacts on the edges of the steps.” He found that the “anal orifice show[ed] no evidence of abrasion, bruising or the typical tearing as would have occurred from adult penile penetration.” And he concluded that, because the “skeletal survey postmortem, after organ donation,” showed no evidence of injury to the cervical spine, “the separation of the lower cervical spine * * * [was] an autopsy artifact.”

{¶34} The Sixth Amendment to the United States Constitution imposes upon criminal defense counsel a duty to investigate the defendant’s case. *Strickland*, 466 U.S. at 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 67. To discharge that duty, counsel must either conduct a “reasonable investigation[]” or “make a reasonable decision that makes [a] particular investigation[] unnecessary.” *Id.* at 691. *Accord State v. Johnson*, 24 Ohio St.3d 87, 89, 494 N.E.2d 1061 (1986).

{¶35} In Hunter’s direct appeal, the supreme court rejected his challenge to his counsel’s effectiveness in relying exclusively on cross-examination to undermine the testimony of the state’s medical experts. The court noted that counsel’s decision to rely on cross-examination of the state’s experts in lieu of presenting defense experts did not, in and of itself, constitute ineffective assistance of counsel. *Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, at ¶ 66 (citing *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 [1993], and *State v. Thompson*, 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407 [1987]). And the court found that, in the absence of evidence in the trial record of expert medical testimony that could and should have been presented, counsel’s decision to rely exclusively on cross-examination “appear[ed] to have been a legitimate

'tactical decision.' ” *Id.* (quoting *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 97).

{¶36} The supreme court also rejected Hunter’s challenges in his direct appeal to the sufficiency of the evidence and to the balance struck by the three-judge panel in weighing the evidence presented at trial. In the process, the court determined that the testimony of the state’s witnesses had been “neither inherently unreliable nor unbelievable,” and that Hunter’s was not the “exceptional case in which the evidence weigh[ed] heavily against the conviction.” *Id.* at ¶ 128-129 (quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 [1997], quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 [1983]).

{¶37} The outside evidence offered in support of claims 2 through 4 would not have compelled a contrary assessment. Neither counsel’s investigation of Hunter’s defense nor his cross-examination of the state’s medical experts was demonstrably ineffective. And Dr. Spitz’s opinion concerning the cause and manner of Trustin’s death could not be said to have cast the state’s experts’ opinions in such a different light as to undermine any confidence in the outcome of Hunter’s trial. Thus, Hunter failed to demonstrate a reasonable probability that, but for counsel’s alleged deficiencies in investigating and presenting the medical evidence, the results of his trial would have been different. Therefore, the common pleas court properly denied the claims.

{¶38} *Investigation, preparation, and presentation—alternative-killer defense.* In claims 5 through 7, Hunter assailed his counsel’s effectiveness in investigating and in presenting at trial evidence that others might have caused Trustin’s death. He asserted that counsel had failed to rebut the state’s evidence pointing to him as the perpetrator of physical abuse that had twice sent Trustin to the hospital in 2004, and that counsel had failed to impeach with prior inconsistent statements the testimony of state’s witnesses Amber White and Wilma Forte.

{¶39} The state presented at trial evidence that Trustin had previously been injured while in Hunter's care. An emergency-room visit in January 2004 revealed a broken tibia; a visit in June 2004 disclosed old and new fractures on Trustin's hand and foot, swollen lips, ear injuries, hair loss, bruises on his head, and swelling and abrasions on his penis. In each instance, Hunter claimed that the injuries had been caused by a fall while carrying Trustin down steps.

{¶40} After the June 2004 incident, Trustin was removed from his mother's custody and placed in the custody of Amber White. White and her daughter Wilma Forte testified at trial that, beginning in 2003, Trustin had evinced a fear of Hunter in the form of crying, shaking, and vomiting. Forte further testified that, two days before his death, Trustin had told her that he feared Hunter, and that Hunter had hurt him.

{¶41} At trial, the three-judge panel rejected defense counsel's challenge under Evid.R. 404(B) to the admission of evidence concerning the January and June 2004 incidents. On appeal, the supreme court upheld the panel's ruling, finding these "other acts" to be so "eerily similar" to the charged offenses that they were relevant to the truthfulness of Hunter's claim that Trustin had died as a consequence of an accidental fall. *Id.* at ¶ 114.

{¶42} In support of his postconviction claims, Hunter offered outside evidence in the form of agency reports, interviews, and assessments. He argued that this evidence, had it been presented at trial, would have suggested that some of Trustin's 2004 injuries had been caused by an allergic reaction, and that Trustin's mother, who suffered from mental-health problems, "violent tendencies," and "severe parenting skills deficiencies," had been the person who in 2004 had injured Trustin. The evidence would also, he insisted, have provided proof that White had lied when, on cross-examination by defense counsel, she denied that her brother, who sometimes stayed with her, had been previously charged with rape, and that Forte had lied when,

on cross-examination, she stated that her concern for Trustin's safety had only extended to situations involving Hunter.

{¶43} In addition to the evidence provided by White and Forte and the evidence concerning the 2004 incidents, the state adduced at trial substantial evidence implicating Hunter in Trustin's death. And again, Hunter's was not the "exceptional case in which the evidence weigh[ed] heavily against the conviction." *Id.* at ¶ 128-129. Because counsel's alleged deficiencies concerning these matters could not be said to have been outcome determinative, the common pleas court properly denied claims 5 through 7.

{¶44} *Investigation, preparation, and presentation—mitigation evidence.* Hunter directed claims 12 through 17 against the adequacy and effectiveness of counsel's preparation for and presentation of his case in mitigation. These claims were also properly denied without an evidentiary hearing.

{¶45} Hunter argued that his counsel had been ineffective in failing to reasonably investigate, or to retain mitigation, psychological, and substance-abuse experts to aid in preparing and presenting, mitigating evidence concerning Hunter's family history, background, and character. In support of these claims, he offered outside evidence in the form of documents showing his criminal record and history of substance abuse and the affidavits of family members, a clinical psychologist, and several mitigation specialists. This evidence, Hunter insisted, demonstrated his counsel's "fail[ure] to present a complete picture of who Lamont Hunter was."

{¶46} In Hunter's direct appeal, the supreme court rejected his challenges to trial counsel's effectiveness in presenting his case in mitigation. The court noted that counsel initially appointed to represent Hunter had employed a mitigation specialist and a psychiatrist, and that retained counsel had also requested a mitigation specialist, had secured two continuances to prepare the case in mitigation, and had presented "detailed" and "extensive" mitigating evidence. *Id.* at ¶ 65 and 70. The court found

nothing in the trial record to show that counsel's mitigation investigation had been inadequate, or that counsel had been ineffective in failing to present the testimony of a psychologist or mitigation specialist.

{¶47} In evaluating Hunter's death sentence, the court noted that counsel had presented in mitigation testimony by five family members and two other witnesses concerning Hunter's alcohol and drug abuse and dependence, his father's alcoholism, his family's history of domestic violence, and his criminal record, which included convictions for drug trafficking and domestic violence. Of the statutory mitigating factors, the court found only the R.C. 2929.04(B)(7) "catchall" provision applicable. The court gave "some weight" to the evidence of Hunter's love and care for his children and his family's love and support. But the court gave "little weight" to the evidence concerning Hunter's history of substance abuse, in the absence of some evidence of a connection between his substance abuse and Trustin's death. And the court gave no weight to Hunter's expressions of remorse and sorrow, because Hunter had continued to deny any role in Trustin's death.

{¶48} Weighing that evidence, the court found that the aggravating factors clearly outweighed the mitigating factors beyond a reasonable doubt. The outside evidence submitted by Hunter in support of claims 12 through 17 would not have compelled a contrary conclusion. Thus, because Hunter failed to demonstrate substantive grounds for relief, the common pleas court properly denied the claims.

{¶49} **Conflict of interest.** In his 10th postconviction claim, Hunter contended that he had been denied his constitutional right to the assistance of counsel free from conflicts of interest. He argued, and offered outside evidence demonstrating, that counsel had represented him while laboring under a federal investigation that, soon after Hunter's conviction, had culminated in counsel's conviction and incarceration and the suspension of his license to practice law. Hunter asserted that counsel's representation of him while under investigation had "created a conflict of

interest” that had materially affected counsel’s performance at trial, as evidenced by the instances of counsel’s ineffectiveness alleged in Hunter’s other postconviction claims.

{¶50} The Sixth Amendment right to the effective assistance of counsel secures to a criminal defendant both the right to competent representation and the right to representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942). To prevail on a claim that he was denied his right to conflict-free counsel, a defendant must demonstrate “an actual conflict of interest.” *Wood* at 273. An “actual conflict of interest,” for purposes of the Sixth Amendment, is “a conflict of interest that adversely affects counsel’s performance.” *Mickens v. Taylor*, 535 U.S. 162, 172, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), fn. 5. Thus, to prove an “actual conflict of interest,” the defendant must show that his counsel “actively represented conflicting interests,” and that the conflict “actually affected the adequacy of his representation.” *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349-350, 100 S.Ct. 1708, 64 L.Ed.2d 333 [1980]).

{¶51} In Hunter’s direct appeal, the supreme court rejected his contention that his counsel had been ineffective because of his pending federal charges. The court noted that “[p]ending criminal charges against an attorney are, without more, insufficient to support a claim of ineffective assistance of counsel.” *Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, at ¶ 44-45 (quoting *State v. Williams*, 52 Ohio App.3d 19, 556 N.E.2d 221 [1989], paragraph two of the syllabus). And the court held that Hunter had failed to satisfy the *Strickland* standard of outcome-determinative ineffectiveness, because the trial record was devoid of evidence concerning the pending charges or supporting Hunter’s claims that counsel’s need for cash had prompted him to undertake Hunter’s representation and that counsel’s own legal issues had affected the quality of that representation.

{¶52} While Hunter had based his challenge on direct appeal upon his Sixth Amendment right to competent counsel, he predicated his 10th postconviction claim upon the guarantee of conflict-free counsel. A “conflict of interest” arises when regard for one duty leads to disregard of another duty. Thus, the right to conflict-free counsel is implicated when an attorney represents multiple clients with competing interests. *State v. Manross*, 40 Ohio St.3d 180, 182, 532 N.E.2d 735 (1988) (holding that a conflict of interest arises when counsel incurs a duty on behalf of one client “to contend for that which [his] duty to another client requires him to oppose”).

{¶53} The right to conflict-free counsel may also be implicated when counsel’s representation of the defendant is adversely affected by counsel’s personal or financial interests. *Mickens* at 174; *see, e.g., State v. Bryant*, 6th Dist. No. L-84-249 (Oct. 18, 1985) (finding a conflict of interest when retained counsel was indicted for drug trafficking for accepting as his fee cocaine alleged to have been stolen by defendant from his murder victims). But, again, the right protects against “‘an actual conflict of interest’ * * * as opposed to a mere theoretical division of loyalties.” *Mickens*, 535 U.S. at 172, 122 S.Ct. 1237, 152 L.Ed.2d 291 (quoting *Wood*, 450 U.S. at 273, 101 S.Ct. 1097, 67 L.Ed. 2d 220). Thus, Hunter was required to demonstrate not only that his counsel had actively represented conflicting interests, but also that the conflict had actually affected the adequacy of counsel’s representation. *See id.* (quoting *Cuyler*, 446 U.S. at 349-350, 100 S.Ct. 1708, 64 L.Ed.2d 333). Nothing in the evidentiary material submitted by Hunter in support of his claim could fairly be said to demonstrate a causative link between the alleged conflict of interest and an inadequacy in his counsel’s representation. Therefore, the common pleas court properly denied his 10th claim.

C. Actual Innocence

{¶54} In his 1st claim, Hunter contended that outside evidence offered in support of his other claims demonstrated his innocence of the charges. The common pleas court properly denied this claim of actual innocence, because the claim did not

demonstrate a constitutional violation in the proceedings leading to Hunter's convictions. See *State v. Campbell*, 1st Dist. No. C-950746, 1996 Ohio App. LEXIS 5114 (Nov. 20, 1996). Accord *State v. Byrd*, 145 Ohio App.3d 318, 331, 762 N.E.2d 1043 (1st Dist. 2001).

D. Constitutionality of Death Sentence

{¶55} In claims 18 through 22, Hunter advanced various challenges to the constitutionality of his death sentence. These claims were also properly denied without a hearing.

{¶56} **Proportionality.** In his 19th claim, Hunter contended that his death sentence violated the Due Process and Equal Protection Clauses of the state and federal constitutions because the sentence was disproportionately more severe than sentences imposed on similarly-situated capital defendants in Hamilton County. As proof of the county's "arbitrary and capricious" application of the death-penalty law, he provided a list of cases since 1998 in which the death penalty had been sought but had not been imposed.

{¶57} In Hunter's direct appeal, the Ohio Supreme Court conducted the proportionality review mandated by R.C. 2929.05 and concluded that the death penalty imposed in his case was "appropriate and proportionate when compared to death sentences imposed for other child-murders * * * [and] when compared with death sentences approved for other rape-murders." *Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, at ¶ 206-207. Proportionality review is not constitutionally mandated. *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *State v. Jenkins*, 15 Ohio St.3d 164, 175, 473 N.E.2d 264 (1984). Thus, the scope of the proportionality review conducted under R.C. 2929.05 is for the courts to determine. *State v. Steffen*, 31 Ohio St.3d 111, 123, 509 N.E.2d 383 (1987). The Ohio Supreme Court has determined that a reviewing court "need [not] consider any case where the

death penalty was sought but not obtained.” *Steffen* at 124. Therefore, the court properly denied Hunter’s 19th claim.

{¶58} *Prosecutorial discretion.* In his 20th claim, Hunter also invoked the state and federal constitutional due-process and equal-protection guarantees, along with the Eighth Amendment’s protection against cruel and unusual punishment, to argue that the “uncontrolled discretion” afforded the Hamilton County Prosecuting Attorney in seeking the death penalty permits the death penalty to be imposed arbitrarily, capriciously, and discriminatorily.

{¶59} In support of these claims, Hunter offered a statistical “breakdown by disposition” of capital cases prosecuted in Hamilton County that, he insisted, “demonstrates the erratic method of charging and prosecuting [the county’s] capital cases.” But both the United States Supreme Court and the Ohio Supreme Court have rejected constitutional challenges to the death penalty predicated on the mere fact of prosecutorial discretion, *Gregg v. Georgia*, 428 U.S. 153, 199-200, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Jenkins* at 169-170, or based upon statistics that purport to show a racial disparity in the imposition of the death penalty. *McCleskey v. Kemp*, 481 U.S. 279, 297, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Steffen* at 124. Because Hunter failed to support his claim with outside evidence demonstrating racial discrimination in the imposition of the death penalty in his case, the common pleas court properly denied his 20th claim. *See Steffen* at 125.

{¶60} *Ineffective counsel.* In his 18th claim, Hunter asserted that his counsel had been ineffective in failing to offer at trial evidence supporting the argument that the death penalty is applied in an unconstitutionally arbitrary and discriminatory manner. This claim depended upon the success of, and thus logically fell with, Hunter’s 19th and 20th claims. Therefore, the common pleas court properly denied Hunter’s 18th claim.

{¶61} *Reporting for proportionality review.* In his 21st claim, Hunter contended that his due-process and equal-protection rights were violated by

inadequacies in the reporting system mandated by R.C. 2929.021 and 2929.03 for appellate proportionality review, as that system is administered by Hamilton County. The common pleas court properly denied this claim, because Hunter failed to demonstrate that the alleged inadequacies in the county's reporting system prejudiced the proportionality review conducted by the supreme court in his case.

{¶62} **Lethal injection.** And the court properly denied Hunter's challenge in his 22nd claim to the constitutionality of the state's use of lethal injection as a means of execution. The Ohio Supreme Court has determined that execution by lethal injection does not run afoul of the Eighth Amendment's proscription against cruel and unusual punishment. *State v. Carter*, 89 Ohio St.3d 593, 608, 2000-Ohio-172, 734 N.E.2d 345.

E. Cumulative Error

{¶63} In his 23rd and final postconviction claim, Hunter contended that the cumulative effect of the constitutional deprivations alleged in his petition's other claims was to deny him a fair trial. A judgment of conviction may be reversed if the cumulative effect of errors deemed separately harmless is to deny the defendant a fair trial. *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. But by its terms, the doctrine of "cumulative error" will not provide a basis for reversal in the absence of multiple errors. *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). Because Hunter failed to support his postconviction petition with evidence demonstrating multiple constitutional deprivations, the common pleas court properly denied the cumulative-error challenge advanced in his 23rd claim. See *State v. Van Hook*, 1st Dist. No. C-910505, 1992 Ohio App. LEXIS 5350 (Oct. 21, 1992).

III. Discovery

{¶64} In his third and final assignment of error, Hunter contends that he was denied due process by the common pleas court's failure to afford him the "essential mechanisms of off-record fact development," that is, discovery and the funds to retain experts to aid him in developing his postconviction claims. This challenge is untenable.

{¶65} The postconviction statutes do not contemplate discovery in the initial stages of a postconviction proceeding. *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159, 718 N.E.2d 426 (1999); *State v. Zuern*, 1st Dist. Nos. C-900481 and C-910229, 1991 Ohio App. LEXIS 5733 (Dec. 4, 1991). And the failure of the statutes to so provide does not contravene any state or federal constitutional right. *State v. Jones*, 1st Dist. No. C-990813, 2000 Ohio App. LEXIS 6197 (Dec. 29, 2000). Thus, a postconviction petitioner is entitled to discovery to develop his claims, and to experts to aid in that discovery, only if the petition and its supporting evidentiary material demonstrate substantive grounds for relief. *Issa*, 1st Dist. No. C-000793, 2001 Ohio App. LEXIS 5762.

{¶66} Because Hunter's postconviction claims were properly denied without an evidentiary hearing, he was not entitled to discovery or the funding for experts to aid in discovery. Accordingly, we overrule the third assignment of error.

IV. We Affirm

{¶67} Finding no merit to any of the challenges advanced on appeal, we affirm the judgment of the common pleas court.

Judgment affirmed.

HILDEBRANDT, P.J., SUNDERMANN and HENDON, JJ.

Please note:

The court has recorded its own entry on the date of the release of this opinion.