

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

-vs- : Case No. 13-0629

GARY HUGHBANKS, JR. : Capital Case

Defendant-Appellant. :

On Appeal From The Court Of Appeals, First Appellate District,
Hamilton County, Ohio, App. No. C-120351

Memorandum in Support of Jurisdiction of Appellant Gary Hughbanks, Jr.

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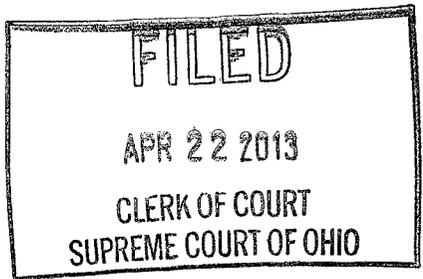


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTIONS

During the course of his federal habeas case, Appellant learned for the first time that the prosecution had suppressed exculpatory evidence. Appellant returned to the state court to present the documents and testimony (via the federal court deposition) containing the exculpatory evidence. The Court of Appeals found that Appellant was not entitled to any consideration of this newly discovered evidence because he had not met the very high burden of proof contained in R.C. 2929.23(A).

The State's case was totally dependent upon the inculpatory statement that Appellant gave to the Arizona law enforcement officers. There were no eyewitnesses to the offense. The forensic evidence, instead of linking him to the offenses, eliminated him as a suspect. Appellant's fingerprints did not match the prints recovered from the crime scene.

Appellant suffers from three mental illnesses, bipolar disorder, post-traumatic stress disorder, and substance abuse (marijuana, alcohol, and amphetamine dependence). [Tr. 1113, 1116, Memo Contra Exhibit 2]. It is also likely that he suffers from significant brain impairment. [*Id.* at 311]. Finally, Appellant, like his father had a long history of hallucinations in which he 1) sees a devil like threatening figure and 2) hears voices. [Tr. 1191-1192, 1197, 1302-04]. By the time of his arrest, Appellant had been hospitalized eight times for his mental illnesses. [Tr. 1109, 1192-96, 1396].

As a result of the federal discovery and the evidence suppressed by the State of Ohio, it is now apparent that Appellant's custodial statement is inconsistent with facts of the offenses as developed by the Ohio officers during their ten year investigation of the murders. Appellant's so called confession is not consistent with the: 1) description of the victims' residence (including the number of levels, it was a one story, not a two story home), 2) time of the homicides, 3) point

of entry into the victims' residence, 4) relationship of the assailant and victims, 5) location in the residence of the murders, 6) murder weapon, 7) items stolen, and 8) means of exit from the residence.¹

The trial court denied Appellant's post-conviction petition without affording Appellant any factual development in the form of either a hearing or discovery. The court cited to a number of reasons including that Appellant: 1) had previously raised a Brady claim (however the prior claim was not based upon the evidence developed in federal discovery) and 2) had not demonstrated on the face of his petition, by clear and convincing evidence, that no juror would have convicted him. The Court of Appeals relied on the former reason, finding that the trial court had no jurisdiction to even consider Appellant's claims based upon the evidence developed in the federal habeas proceedings because Appellant had failed to satisfy the statutory requirements, contained in R.C. 2951.23(A)

This appeal presents this Court with three important issues. First, the state's suppression of favorable material inculpatory evidence, as well as the other substantive issues raised in his petition, most of which are dependent upon the evidence developed in the federal habeas proceedings. Second, when a trial court should grant a post-conviction petitioner discovery and/or an evidentiary hearing to prove the allegations contained in his petition. Third, the related issue of when a petitioner should be afforded some minimal due process under the successor post-conviction statute, which provides that a petitioner cannot even proceed, let alone prevail, under the successor statute unless the petitioner can show on the face of the petition by clear and convincing evidence, that but for the constitutional error no reasonable juror would have found him guilty.

¹Appellant in the body of this memorandum will fully develop these and other discrepancies. Proposition of Law No. *infra*.

STATEMENT OF THE CASE

On April 10, 2010, Appellant filed his post-conviction. [T.d. 255]. On July 28, 2012, the State moved to dismiss the petition. [T.d. 259, p. 8]. On September 22, 2010, Appellant filed his response opposing the motion to dismiss. [T.d. 260].

On November 2, 2010, Appellant filed a motion for the trial court to authorize funding for Appellant to retain experts. [T.d. 264]. On November 5, 2010, Appellant filed a motion for leave of court to conduct discovery. [T.d. 265]. On November 19, 2010, the State filed its opposition to Appellant's motions for funding and discovery. [T.d. 269].

On April 13, 2012, the trial court granted the State's motion to dismiss. [T.d. 275]. The trial court did not rule on the motions for discovery or funding.

On May 14, 2012, Appellant filed his notice of appeal to the Hamilton County Court of Appeals. Both parties submitted merit briefs and Appellant submitted a reply brief. On March 6, 2013, the Court of Appeals affirmed the judgment of the trial court. The Court did not issue an opinion, but only a judgment entry. *State v. Highbanks*, 1st Dist. No. C-120351 (March 6, 2013 Judgment Entry). It found that Appellant had failed to satisfy the statutory criteria on the face of his post-conviction petition, that but for the constitutional errors alleged in the individual grounds for relief, no reasonable juror would have found him guilty of the offenses for which he was convicted or eligible for the death penalty. *Id.* at p. 3.

Statement of the Facts

On May 13, 1987, William and Juanita Leeman were killed in their home in Mount Healthy, Ohio. There were no eyewitnesses to the murders. The police eliminated burglary as the motive because the only missing item was Mr. Leeman's wallet. The residence was intact,

except for the area in which Mr. Leeman was killed. The police found a set of partial prints that were used to eliminate suspects.

Between 1987 and 1997, the police received literally hundreds of leads concerning the killings. The leads did not lead to any arrests. The investigating officers at one point questioned Appellant concerning the murders, but they did not charge him. His fingerprints did not match the prints found at the crime scene.

In August of 1997, Larry Hughbanks, Appellant's brother, Larry Hughbanks, faced a probation violation. He contacted the Springfield Police and told them that he know who killed the Leemans, but would not tell them unless they promised not to send him to prison for the violation. The law enforcement officers agreed and the brother told them that Appellant, while intoxicated, told him that he committed the crimes. The police had the brother submit to a polygraph examination. The first examination was inconclusive and the brother took a second examination in which he passed. In that examination he contended only that Appellant had told them that he had committed unidentified murders.

Arizona law enforcement officers arrested Appellant in Tucson, Arizona, where he was then living. The officers interrogated him and he denied any involvement in the murders. He submitted to a polygraph exam, but the results of the examination were inconclusive because just prior to his arrest, he had consumed methamphetamines. The officers returned the following day and Appellant informed them that he to no longer wish to be interrogated.

On September 16, 1997, the Arizona officers again interrogated Appellant, who had been incarcerated since the earlier interrogation. During the second interrogation, Appellant again denied any involvement in the killing of the Leemans. Appellant failed a polygraph examination. Subsequent to the examination Appellant repeatedly gave conflicting statements as to whether he

committed the murders or whether he even knew whether he had committed the offenses. The officers repeatedly supplied him with the facts of the offenses that the Ohio officials had provided them.

The State's case was totally dependent upon the inculpatory statement that Appellant gave to the Arizona law enforcement officers. There were no eyewitnesses to the offense. The forensic evidence, instead of linking him to the offenses, eliminated him as a suspect. The crime scene investigators were able to lift both fingerprints and palm prints from the bedroom window in which that assailants used to either enter or leave the victims' residence. The investigating officers used the prints for purposes of eliminating the suspects. Appellant's prints did not match the prints recovered from the crime scene.

As a result of the federal discovery, it is now apparent that Appellant's statement is even more problematic. It is inconsistent with the facts that the investigating officers had uncovered during their ten year investigation of the murders. However, neither defense counsel nor the jury had the ability to make this comparison because the State suppressed the evidence that demonstrated those inconsistencies. Until the time of the federal discovery the State continued to suppress that evidence. Appellant "confessed" to having burglarized a two story home, describing in detail the second floor. The victims' residence was a one story residence. Appellant "confessed" to having committed the murders while burglarizing (stealing items) from the victims' residence. Whoever entered the victims' residence on the night in question was not there for purposes of committing a theft. Appellant "confessed" to entering the residence through the bedroom window. The assailant entered the residence through the backdoor and exited the premises through the window.

Proposition of Law No. 1

A defendant's custodial statement is inadmissible in the State's case in chief unless: 1) the interrogating officers have apprised the defendant of his Miranda rights, 2) the defendant knowingly and intelligently waived those rights, 3) has not requested counsel, and 4) the statement is voluntary act on his part. Fifth, Sixth, and Fourteenth Amendments

The trial court admitted Appellant's statement in the state's case in chief. The fact that the confession was the key evidence is highlighted by the fact that until Appellant confessed, the State had not charged anyone despite ten years having elapsed from the date of the murders. The trial court's admission of Appellant's so called confession violated four separate constitutional protections and provisions.

I The Admission of Appellant's Statement Violated the State and Federal Constitutions

A. Appellant's custodial statements were not voluntary

"[A] confession cannot be used if it is involuntary." *United States v. Washington*, 431 U.S. 181, 186-87, 97 S. Ct. 1814, 52 L. Ed.2d 238 (1977). A confession is not voluntary unless it is the product of an essentially free and unconstrained choice. The admission of an involuntary confession offends due process. *Schneekloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S. Ct. 2041, 36 L. Ed.2d 854 (1973). Appellant's custodial statement was involuntary due to his significant mental impairments and the overreaching by the interrogating officers.

Appellant suffers from bipolar, post-traumatic stress, and substance abuse disorders as well as most likely significant brain impairment. [T.p. 1109, 1113, 1137-38, 1182-83, T. d, 262, Exhibit 2, ¶¶ 16, 18, 23, 30-32, 38, 39, 42, 44-45]. Appellant has a long history of hallucinations. [T.p. 1191-1192, 1197, 1302-04].

The interrogating officers fed Appellant information to which he ultimately confessed. [T.d. 260, pp. 57-69]. Appellant's statement was inconsistent with the physical evidence. [*Id.* at

pp. 47-53]. This included the description of the residence, the time of the homicides, the point of entry into the residence, the activities of the victims prior to the burglary, the appearance of the victims, the location in the residence where the murders occurred, the murder weapon, the source of the murder weapon, the items stolen from the residence, and the means of exit from the residence. [*Id.*]. Most of these inconsistencies did not become apparent until the federal discovery in which the details concerning the crime scene were initially released. [*Id.*].

B. The interrogating officers did not advise Appellant of his constitutional rights.

The Fifth Amendment provides that a defendant cannot “be compelled in any criminal case to be a witness against himself.” But a defendant can waive this right “voluntarily, knowingly, and intelligently.” *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966) .

The interrogating officers did not obtain a waiver from Appellant of his constitutional rights. Instead, they obtained from Appellant a consent to submit to a polygraph examination. [T.d. 262, Exhibit 6]. Officer Millstone conceded that the *Miranda* rights are not contained on the polygraph consent form. [*Id.* at Exhibit 10].

C. Appellant did not knowingly and intelligently waive his constitutional rights

Assuming that the Tucson officers had adequately advised Appellant of his constitutional rights, Appellant was mentally incapable of making a valid waiver. His numerous and significant mental illnesses precluded him from knowingly and intelligently waiving his constitutional rights.

A suspect, however, can waive this right to remain silent and the presence of counsel so long as the suspect “voluntarily, knowingly, and intelligently” waives those rights. *Miranda v. Arizona*, 384 U.S. at 444; *See also Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S Ct. 1019, 82 L.

Ed. 1461, (1938). A court's inquiry into the validity of a suspect's waiver of his *Miranda* rights has two distinct components. First, the waiver must be voluntary "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (citations and quotations omitted). See also *Colorado v. Spring*, 479 U.S. 564, 573, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987). Second, the defendant must have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* The analysis under either dimension "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S. Ct. 1755, 60 L. Ed 2d 286 (1979).

That review includes the defendant's "age, experience, education, background and intelligence, and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725; 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979); *Garner v. Mitchell*, 557 F.3d 257, 262 (6th Cir. 2009). Appellant's three serious mental illnesses and possible brain impairment precluded him from having a full awareness both of the nature of his *Miranda* rights and the consequences of his decision to abandon them. *Colorado v. Spring*, 479 U.S. at 574; *Moran v. Burbine*, 475 U.S. at 421 (1986)

D. Appellant stated that he no longer wished to be questioned.

When a suspect requests that questioning cease, law enforcement officers are constitutionally obligated to stop the questioning *Miranda*, 384 U.S. at 478-479; *Michigan v. Mosley*, 423 U.S. 96, 103-104, 96 S. Ct. 321, 46 L.2d 313 (1975). On September 10, 2009, the day following Appellant's arrest, Prosecutor Deters asked Ohio Officers Fletcher and Kemper to

interview Appellant a second time prior to them returning to the State of Ohio. [T.d. 270, pp. 54-55]. Appellant became very upset and stated “I don’t want to talk anymore.” Officers Fletcher and Kemper then stopped the interview. [*Id.* at p. 53-54]. Six days later the Tucson officers resumed the interrogation and obtained Appellant’s so called confession.

II. The admission of Appellant’s statements was not harmless error.

Confessions are indisputably damning evidence. *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991). The State had little other evidence linking Appellant to the murders. The wrongful admission of the statement did not constitute harmless error.

III. The trial court erred when it failed to grant Appellant relief or an evidentiary hearing on these constitutional violations.

The Court of Appeals did not pass on this portion of the trial court ruling because it held that the trial court lacked jurisdiction to address the substantive issues contained in the post-conviction petition. *State v. Hughbanks*, 1st Dist. No. C-120351 (March 6, 2013 Judgment Entry), p. 3.

Appellant raised these constitutional violations concerning the admission of his so called confession in the first ground for relief in his post-conviction petition. [T.d. 255, First Ground for Relief, pp. 12-15]. The trial court correctly found that Appellant had raised this issue on direct appeal. [T.d. 275, pp. 2-3]. However the trial court failed to account for the fact that Appellant had supported his second post-conviction petition with evidence that he was only able to access in the discovery in the federal habeas proceedings. *See* Assignment of Error No. IV, pp. 14-16 *supra*. When a post-conviction petitioner supports a ground for relief with exhibit(s) that could not have been previously placed into the record, the ground for relief is not subject to the bar of *res judicata*. *State v. Smith*, 17 Ohio St. 3d 98, 101, n. 1, 477 N.E.2d 1128 (1985); *State v. Keith*,

79 Ohio St. 3d 514, 537, 684 N.E.2d 47 (1997).² Even if Appellant did not meet the standard for granting relief, he satisfied the standard to be entitled to factual develop including an evidentiary hearing.

This Court should accept Appellant's discretionary appeal on this constitutional violation.

Proposition of Law No. II

A defendant's right to due process is violated when the state fails to disclose to the defendant favorable material evidence that it has in its possession. Fourteenth Amendment

A state violates a defendant's right to due process when it withholds favorable evidence that is material to a defendant's guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963). A defendant asserting a *Brady* claim must satisfy three requirements: first, that "[t]he evidence at issue must be favorable to the accused"; second, that the "evidence must have been suppressed by the State"; and third, "prejudice must have ensued." *Strickler v. Greens*, 527 U.S. 263, 281-282, 119 S. Ct. 1936, 144 L. Ed.2d 286 (1999). The prosecution's duty to disclose evidence extends to exculpatory and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676-677, 105 S. Ct. 3375, 87 L.Ed.2d 481 (1985). A criminal defendant is not required to demand favorable evidence before trial; instead, the prosecution has an "affirmative duty" to disclose any such evidence "regardless of request." *Kyles v. Whitley*, 514 U.S. 419, 432-433, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995). And the rule of *Brady* encompasses evidence "known only to police investigators and not to the prosecutor,"

²Appellant filed the relevant federal habeas discovery documents with his petition. [T.d. 256]. To facilitate the access to those documents, he later separately filed them with the trial court. Springfield Township police records [T.d. 271], Hamilton County Prosecutor's records [T.d. 272], Patrick Kemper deposition [T.d. 268], William Hillard deposition [T.d. 263]. Steve Wenke deposition [T.d. 267] and William Fletcher deposition [T.d. 270].

Id. at 438, and applies "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87.

A. The State Suppressed the Evidence in Question

Appellant, in his post-conviction petition, set forth the history of his discovery of the documents that he asserted the State had suppressed. [T.d. 255, p. 14]. In its motion to dismiss, the State did not challenge Appellant's assertion that the documents in question had been suppressed. [T.d. 259, pp. 10-19]. In his response to dismiss, Appellant further detailed the manner in which the documents had been initially accessed in the federal discovery. [T.d. 262, Exhibit 1, ¶¶ 5-8].

B. The Suppressed Evidence Was Favorable

The evidence that the State suppressed can be separated into six categories. Appellant so divided the evidence in the court below, placing the various groups in different grounds for relief.

1. The State suppressed evidence that impeached the State's theory. Fifth Ground for Relief

The State developed evidence that the Mrs. Leeman knew the assailant. [T.d. 271, p. 629]. The victims did not know Appellant. *See* T.d. 260, pp. 99-100.

The State proceeded at trial on the theory that the assailant entered the residence to commit a theft offense. [T.p. 823-26, 839-40, 1028]. The state suppressed evidence that crime scene was not consistent with a theft. [T.d. 271, pp. 629, 1024-42, 1043-61, 1036, 1042, 1055, 1051, 1087]. *See* T.d. 260, pp. 100-102.

The state proceeded on a theory that the assailant had already entered the residence when the victims returned. [T.p. 823, 825]. The suppressed evidence reflected otherwise. [T.d. 268, pp. 17, 39; T.d. 271, pp. 52, 1079]. *See* T.d. 260, pp. 102-102

2. The State *suppressed evidence that impeached the State's witnesses (Sixth Ground for Relief)*

State's witness, Leonard Leeman testified that the assailant had taken Mrs. Leeman's jewelry. [T.p. 847-48, 852]. The State suppressed evidence that only a wallet was taken. [T.d. 271, p. 60]. The same witness also testified that Appellant's detailed description of the interior of the residence accurately matched the interior of the residence. [T.p. 855, 857]. This was not correct. *See* T.d. 260, p. 104.

State's witness, Detective Patrick Kemper testified that no trace evidence was recovered from the crime scene [T.p. 904]. This was incorrect. [T.d. 263, pp. 19-20, 48, 90; T.d. 268. p. 42; T.d. 270, p. 21; T.d. 271, pp. 52, 520, 1086]. Detective Kemper testified that Appellant's description of the interior of the residence accurately matched the interior of the Leeman residence. This was also incorrect. [T.d. p. 260. pp. 105-106]. Detective Kemper testified that Appellant accurately described the murder weapon and fatal wounds. Again this was incorrect. [*Id.* at pp. 106-107].

3. The State *suppressed evidence concerning Burt Leeman. (Seventh Claim for Relief)*

The victim's son, Burt Leeman, had mental problems. [T.d. 271, p. 632]. He had a financial motive to commit the offense. [*Id.*]. He was extremely calm when notified of the murder. [*Id.* at p. 629]. He manipulated the investigation including the polygraphs. [*Id.* at pp. 65, 300, 630, 631]. Mr. Leeman's wallet which contained his credit cards was taken in the burglary. [*Id.* at 630]. A female with inside information used the victim's credit cards. [*Id.* at pp. 20, 63-65, 1088]. Burt Leeman's wife worked for Mastercard. [*Id.* at 631]. The credit cards were no longer used after the investigating officers told Burt Leeman and his brother that they were suspects. [*Id.* at 631, 634]. The fatal wounds were consistent with a family member having committed the offense. [*Id.* at pp. 629, 1085, 1087]. The investigating officers had compiled a

list of thirty-one points that supported the conclusion that Burt Leeman was the assailant. [*Id.* at pp. 629-30]. See T.d. 260, pp. 107-110.

4. *The State suppressed evidence of other suspects. (Eight Ground for Relief)*

Douglas Hayes, it was reported, had confessed to committing the murders. [T.d. 271, pp. 464-67, 700-01]. It was also reported that Stacey Grisby had confessed to committing the murders. [*Id.* at 1110]. George Wambsganz had been involved in an altercation with a man and a woman that resulted in him being covered with blood. [*Id.* at p. 1110]. Michael Hensley was treated for stab wounds at Provident Hospital at about the time of the murders. [*Id.* at 59]. Hensley gave conflicting statements as to the wounds [*Id.* at 59, 190] and he later fled the area. [*Id.* at 59]. The prosecutors, in the course of the investigation, obtained photographs and fingerprints from a series of juveniles concerning the murders. [*Id.* at 455-49]. To obtain permission from the juvenile court, the prosecutors had to have demonstrated probable cause that the each of the juveniles were involved in the murders. R.C. 2151.31.3 See T.d. 260, pp. 111-113.

5. *The State suppressed the results of the trace analysis. (Ninth Ground for Relief)*

The investigating officers found a number of palm and fingerprints at the scene. [T.d. 271, pp. 52, 657-59, 900, 1086]. The prints were used to eliminate suspects. [*Id.* at 355-358, 425-428]. The prints eliminated Appellant as a suspect. [T.d. 268, p. 53]. See T.d. 260, p. 113

6. *The State suppressed eyewitness statements. (Tenth Ground for Relief)*

Appellant was Caucasian, 5'8" inches in height and was twenty-one years of the age at the time of the murder. [T.d. 271, pp. 360, 361]. Jack Finn saw an African American male enter the woods near the victim's residence. [*Id.* at p. 129]. Karen and Jerry Weedington saw a teenager who was carrying a knife enter the woods approximately one hour prior to the murder.

[*Id.* at p. 605-06]. Sue and Shirley Harry saw a teenage flee the woods after dark on the night of the murder. [*Id.* at p. 119]. Between 9:00 and 9:15 Lee Suman witnessed a young Caucasian male who was six feet six to six feet seven walk between his and the Leemans' residences. [*Id.* at p. 551]. *See* T.d. 160, pp. 113-115

The State proceeded on the theory that the assailant fled on foot to a nearby school. [T.p. 861, 905]. Chris Raison saw an African American male covered with blood, flee the school at the time of the murders. [T.d. 271, pp. 360, 361, 432]. Four individuals saw a car in the immediate vicinity of the residence at the time of the murder. [*Id.* at pp. 42, 82, 84, 180]. Two individuals saw a motorcycle enter and leave the residence. [*Id.* at pp. 85, 86, 89].

The investigating officers prepared two composite drawings. The first portrayed a teenager from sixteen to eighteen years old. [*Id.* at p. 1120]. The second sketch portrayed an individual who was forty to forty-five years of age, 6'2" tall and weighing one-hundred-ninety pounds. [*Id.* at pp. 839, 840]. A psychic prepared a composite sketch that matched the appearance of one of the decedents' sons. [*Id.* at pp. 638-39, 815].

III. The Suppressed Evidence Was Material.

The suppressed evidence calls into question Appellant's confession, the state's theory of the case, the State's opening statement, the testimony of the State's witness, and the State's closing argument. Appellant's confession was often inconsistent and contradicted by the physical evidence developed during the investigation. *See* Assignment of Error No. V, pp. 18-19, *supra*. The law enforcement officers tentatively concluded that the assailant 1) knew the victims, 2) was not a burglar, and 3) entered the residence after the victims returned home. The suppressed evidence not only calls into question the state's theory, but offers an alternative suspect, Burt Leeman, whose profile and actions are consistent with the results of the ten year investigation.

There is a reasonable probability that had the prosecution met their constitutionally imposed duty of disclosure, the outcome of the trial and or sentencing phases would have been different.

IV. The trial court erred when it failed to grant Appellant relief or an evidentiary hearing on this constitutional violation.

The Court of Appeals did not pass on this portion of the trial court ruling because it held that the trial court lacked jurisdiction to address the substantive issues contained in the post-conviction petition. *State v. Hughbanks*, 1st Dist. No. C-120351 (March 6, 2013 Judgment Entry), p. 3.

The trial court was correct when it concluded that Appellant had raised a Brady issue in his first post-conviction petition. [T.d. 275, pp. 5-7, 9-11]. However, the trial court failed to acknowledge that Appellant supported his second post-conviction petition with documents and depositions that had initially become available to him in the federal discovery after the first state post-conviction proceedings had been completed. When a post-conviction petitioner supports a ground for relief with exhibits that were not and could not have been previously placed into the record in a prior appellate/post-conviction proceeding, the ground for relief is not subject to the bar of res judicata bar. *State v. Smith* (1985), 17 Ohio St. 3d 98, 101, n. 1, 477 N.E.2d 1128 (1985); *State v. Keith*, 79 Ohio St. 3d 514, 537, 684 N.E.2d 47 (1997). Even if Appellant did not meet the standard for granting relief, he satisfied the standard to be entitled to factual develop including an evidentiary hearing.

This Court should accept Appellant's discretionary appeal as to this constitutional violation.

Proposition of Law No. III

The State's knowing use of false or inaccurate testimony and argument to obtain convictions and death sentences violate the right to due process. Fourteenth Amendments

A conviction obtained by the knowing use of perjured testimony is fundamentally unfair. *United States v. Agurs*, 427 U.S. 97, 103 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976). False argument from the prosecution also invokes due process's traditional abhorrence of the use of falsehoods to secure a conviction. *Napue v. Illinois*, 360 U.S. 264, 269 79 S. Ct. 1173, 3 L. Ed.2d 1217 (1959).

In this case the prosecutors engaged in argument to the jury that they knew to be false. The prosecutors claimed that the assailant 1) did not know the victims, 2) entered the decedents' residence while they were not home, 3) with the intent to commit a theft offense, and 4) killed the victims when they surprised him upon their return to their residence. The prosecutors possessed evidence that contradicted all four elements of their theory. *See* Proposition of Law No. II, *supra*. The prosecution knowingly employed the false testimony of Burt Leeman and Detective Kemper to obtain a conviction. *Id.* The prosecution at no time corrected its misleading statements and the testimony of its witnesses. There is a reasonable likelihood that the jury verdicts would have been different if the prosecution had not adduced false testimony and made false argument. *Agurs*, 427 U.S. at 103.

Appellant raised this issue in the Twelfth Ground for Relief in his post-conviction petition. [T.d. 255, Twelfth Ground for Relief, pp. 36-38]. The Court of Appeals did not pass on this portion of the trial court ruling because it held that the trial court lacked jurisdiction to

address the substantive issues contained in the post-conviction petition. *State v. Hughbanks*, 1st Dist. No. C-120351 (March 6, 2013 Judgment Entry), p. 3

The trial court was correct when it concluded that Appellant had raised this issue on direct appeal. [T.d. 275, p. 11]. However, the trial court did not acknowledge that Appellant supported this ground for relief with documents that were initially provided to him in the federal discovery. The bar of res judicata is therefore applicable. *State v. Smith* (1985), 17 Ohio St. 3d 98, 101, n. 1, 477 N.E.2d 1128 (1985).

This Court should accept Appellant's discretionary appeal as to this constitutional violation.

Proposition of Law No. IV

The right to effective assistance of counsel includes reasonable performance in the: 1) investigation, 2) challenges to the indictment, 3) challenges to the admission of the defendant's inculpatory statements, 4) selection of the jury, 5) opening statement, 6) cross examination, 7) challenges to the State's case, 8) identification of other suspects, and 9) closing argument. Sixth and Fourteenth Amendments

A criminal defendant has the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). The courts apply a two-part test in determining ineffectiveness claims. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 89 L. Ed.2d 674. A defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A defendant must also show that the deficient performance prejudiced the defendant, *ie.* deprived him of a fair trial. *Id.*

I. Defense counsel performed deficiently

A. Defense counsel failed to conduct a reasonable investigation

To protect an accused's constitutional rights, defense counsel must conduct a reasonable pretrial investigation. *Sims v. Livesay*, 970 F.2d 1575, 1580 (6th Cir. 1992). Counsel has a duty to investigate all lines of defense or reasonably decide that a particular investigation is not necessary. *Strickland*, 466 U.S. at 691. To the extent that the evidence that Appellant asserts that the State suppressed was available to counsel if they had conducted a reasonable investigation, then counsel's performance was deficient with respect to the investigation that they conducted. See Proposition of Law No. II. *Supra*.

B. Defense counsel failed to challenge the indictment.

Debbie Mahaffey was the foreperson for the grand jury, which capitally indicted Appellant. [T.d. 262, Exhibits 12 and 35]. Ms. Mahaffey is a Caucasian female. [*Id.* at Exhibit 36].

Between 1982 and 1998, there were 87 grand juries in Hamilton County that returned a total of 134 capital indictments. [*Id.* at Exhibit 37]. Only four African American served as forepersons on these 87 grand juries. [*Id.*] There should have been eighteen or nineteen African American forepersons during this time period. [*Id.* at ¶ 3]. This under representation is statistically significant. [*Id.*]. The Hamilton County foreperson selection procedure also resulted in an underrepresentation of women as grand jury forepersons. [*Id.* at ¶ 3].

C. Defense counsel performed unreasonably with respect to the suppression of Appellant's Inculpatory statement.

Defense counsel filed a motion to suppress. [T.d. 262, Exhibit 38]. Counsel, however, failed to raise all the relevant aspects of the suppression issue and the facts supporting the same.

Defense counsel raised a voluntariness issue but failed but failed to support it by citation to the interrogating officers use of leading questions and the number of answers that Appellant gave the were inconsistent with the evidence. See Proposition of Law No. I, *supra*. Defense

counsel did not assert that 1) Appellant had requested that all questioning ceased. 2) the interrogating officers had not fully advised Appellant of his Miranda rights and 3) the Arizona courts had not appointed counsel for Appellant within forty-eight hours of his arrest in Phoenix. *Riverside County, Calif. v. McLaughlin*, 500 U.S. 44, 56 111 S. Ct. 1661, 114 L. Ed.2d 49 (1991). Finally defense counsel failed to support the motion to suppress with the testimony of an expert concerning Appellant's mental health issues as they related to his ability to intelligently waive constitution rights. Assignment of Error No. I, p. 18, *supra*.

D. Defense counsel deficiently conducted voir dire.

Defense counsel asked most prospective jurors only vague questions concerning psychiatric testimony. [T.p. 285, 315-16, 350, 367, 429, 449, 471, 510, 558, 605-06, 637, 670, 701, 767, 752, 732] and sporadically asked questions concerning the mitigating factor of youth. [T.p. 238, 286, 449, 510, 618, 637, 791, 752]. Instead of asking about mitigating factors, counsel mounted personal attacks against Appellant. [T.p. 239-240; 277-290; 309; 325-326; 336-337; 346-349; 362-364; 366; 379-381; 384; 391; 427; 448-450; 469-470; 479; 482; 496; 508; 511; 526; 543-544; 546; 548; 556-557; 559; 576-577; 578-579; 588-589; 604-605; 616-619; 634-635; 654-655; 668-669; 703-704; 720; 730; 733-734; 748-751; 770-771; 840-843].

Defense counsel did not challenge for cause Prospective Juror Betsy Boyd who indicated that she could not fairly consider a sentence of less than death and/or mitigating evidence. [T.p. 534-549].

E. Defense Counsel Performed Deficiently In Opening Statement.

Defense counsel conceded Appellant's guilt in the opening statement. [T.p. 845]. However, defense counsel went beyond confessing guilt; he informed the jury fourteen times that Appellant's entire life was a lie. [T.p. 841-45].

F. Defense counsel performed deficiently in cross examination.

Detective Kemper testified for the state that the criminalists were not able to recover any trace evidence from the residence for purposes of identifying the assailant. [*Id.*]. Defense counsel on cross examination failed to cross examine Detective Kemper concerning this incorrect testimony. *See* Proposition of Law No. II, *supra*. The criminalists recovered prints that eliminated Appellant as a suspect.

Defense counsel permitted Detective Kemper and Investigator John Jay to testify as that Appellant had confessed to his father and brother. [T.p. 912-914, 927-932]. The brother and father have not provided affidavits regarding Appellant's statements.

Leonard Leeman ("Leonard"), one of the decedent's sons, testified concerning his mother's jewelry and rendered an opinion that the interior of the victims' residence was consistent with the description that Appellant provided in his inculpatory statement. [T.p. 850-864]. Defense failed to call to the jury's attention the evidence contradicted this testimony. *See* Proposition of Law No. II pp. 24-15, *supra*.

Officer Millstone and Detective Filippelli testified concerning the inculpatory statement that they obtained from Appellant. [T.p. 934-940; 945-954]. Defense counsel on cross examination did not address the officers' extensive knowledge of the murders, their direct examination to the contrary and their use of leading questions to suggest or inform Appellant of the answers that they wanted him to give. *See* Proposition of Law No. I, *supra*. Finally, defense counsel did not develop on cross examination the fact that Appellant's answers were often inconsistent with the evidence. *Id.*

G. Defense counsel deficiently failed to challenge the State's case.

The prosecutor told the jury in opening statement that when the victims arrived home, they encountered an unknown individual who had earlier entered the residence for purposes of committing a theft offense. [T.p. 822-830]. This theory is inaccurate given the information obtained during the federal discovery. *See* Proposition of Law No. II, *supra*.

H. Defense counsel deficiently failed to identify the other suspects.

Defense counsel could have offered the jury an alternative suspect, Burt Leeman ("Burt"), one of the decedent's other sons. *See* Proposition of Law No. I *supra*. In addition, there were other suspects which defense counsel should have brought to the attention of the jury. *Id.* at p. 26.

I. Defense Counsel Performed Deficiently In Closing Argument.

Defense counsel's closing argument consisted of one page and three lines. [T.p. 1037-38]. In that one page and three lines defense counsel told the jury three times that he expected the jury to return a guilty verdict.

II. Defense Counsel's Deficient Performance Prejudiced Appellant.

The fact that Appellant made an inculpatory statement to the investigating officers did not preclude counsel from pursuing a defense that offered another suspect. [T.d. 267, pp. 35, 40-41]. Defense counsel have tentatively concluded that much of the suppressed information would have been helpful or at least important to pursue. [*Id.* at pp. 96-101]. Defense counsel may have challenged Appellant's statement in the trial phase (employed a false confession expert) if they had a legitimate additional suspect to offer the jury. [*Id.* at 108-111; 113].

There is a reasonable probability that counsel's deficient performance affected the verdicts in the trial phase. *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2524, 156 L.Ed2d. 471 (2003).

III. The trial court erred when it failed to grant Appellant relief or an evidentiary hearing on this constitutional violation.

The Court of Appeals did not pass on this portion of the trial court ruling because it held that the trial court lacked jurisdiction to address the substantive issues contained in the post-conviction petition. *State v. Highbanks*, 1st Dist. No. C-120351 (March 6, 2013 Judgment Entry), p. 3

Appellant raised this constitutional violation in the Thirteenth and Fourteenth Grounds for Relief in his post-conviction petition of counsel. [T.d. 255, Thirteenth and Fourteenth Grounds for Relief, pp. 38-44]. The trial court was correct when it concluded that Appellant had raised this issue on direct appeal. [T.d. 275, p. 12]. However, the trial court did not account for the fact that Appellant supported these two grounds with exhibits developed in the federal discovery. Even if Appellant did not meet the standard for granting relief, he satisfied the standard to be entitled to factual develop including an evidentiary hearing.

This Court should accept Appellant's discretionary appeal as to this constitutional violation.

Proposition of Law No. V

A trial court must excuse those prospective jurors who prior life experiences or views on capital punishment preclude them from fairly and impartially considering guilt and punishment. Sixth and Fourteenth Amendments.

The Constitution guarantees a defendant a fair trial by a panel of impartial, indifferent jurors. *Turner v. Louisiana*, 379 U.S. 466, 47285 S. Ct. 546, 13 L. Ed.2d 424 (1965). A juror

whose evaluation of the evidence is likely to be jaundiced by prejudgment cannot be impartial. *See Reynolds v. United States*, 98 U.S. 145, 146, 25 L. Ed 244 (1878). Mr. Allen could not be fair and impartial.

Prospective Juror Samuel Allen had “a very close friend,” who was killed “around” 1980 [T.p. 486-487]. Mr. Lane’s death “had an effect on a whole lot of kids at that time.” [T.p. 487]. When asked if this would affect his ability to sit on the jury in the present case, Mr. Allen responded that his serving on the jury “would represent him [Darrell Lane] in a way that he would be respected.” [T.p. 495].

Prospective juror Ms. Van Nuis stated that she started with a predisposition in favor of the death penalty. [T.p. 373-74, 381, 382, 387]. She later admitted that “I would try to be fair, but I would probably as I said, I would probably indicate...lean toward the [death] penalty.” [T.p. 385]. Jurors who would automatically impose the death penalty should not serve on a sentencing jury. *Ross v. Oklahoma*, 487 U.S. 81, 83, 108 S. Ct. 2273, 101 L. Ed.2d 80 (1988).

Appellant raised this issue in his post-conviction petition. [T.d. 255, Second Ground for Relief, pp. 15-18]. To the extent that prior collateral counsel could have raised this issue in the state courts; counsel was ineffective. *Martinez v. Ryan*, 132 S. Ct. 1309, 1316, 182 L. Ed.2d 272 (2012). This Court should also reach the merits of this issue because Appellant is factually innocent of both capital murder and the death penalty. *Schlup v. Delo*, 513 U.S. 298, 324, 327-29, 115 S. Ct. 851 (1995)

This Court should accept Appellant’s discretionary appeal on this constitutional violation.

Proposition of Law No. VI

A trial court cannot close a criminal trial to the public absent findings concerning the need for closure and the alternatives to closure. First, Fifth, Sixth, and Fourteenth Amendments.

The trial court ordered that the courtroom doors be closed during both the trial and mitigation jury charges. [T.p. 1038-1039, 1479]. The court's orders violated Appellant's right to a public trial. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 379-81, 99 S. Ct. 2898, 61 L. Ed.2d 608 (1979); *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed.2d 31 (1984). The right of access to criminal proceedings plays a significant structural role in the functioning of the entire judicial process. *Globe Newspapers Superior Court*, 457 U.S. 596, 606, 102 S. Ct. 2613, 73 L.2d 248 (1982).

Appellant raised this constitutional violation in this Third Ground for Relief in his post-conviction. [T.d. 255, Third Ground for Relief, pp. 18-19]. To the extent that prior collateral counsel could have raised this issue in the state courts, then counsel was ineffective. *Martinez v. Ryan*, 132 S. Ct. 1309, 1316, 182 L. Ed. 2d 272 (2012). This Court should also reach the issue because Appellant is factually innocent of both capital murder and the death penalty. *Schlup v. Delo*, 513 U.S. 298, 324, 327, 115 S. Ct. 851 (1995)

This Court should accept Appellant's discretionary appeal as to this constitutional violation.

Proposition of Law No. VII

A trial court must provide a post-conviction petitioner the opportunity to conduct discovery pursuant to the Ohio Civil Rules prior to ruling on a state's dispositive motion. Eighth and Fourteenth Amendments To The United States Constitution; Ohio R. Civ. P. 56.

On November 4, 2010, Appellant filed a motion for leave of court to conduct discovery. [T.d. 265]. On November 19, 2010, the State filed its response in which it opposed Appellant's motion. [T.d. 269]. The trial court, when it denied Appellant's post-conviction petition, did not rule on the discovery motion. [T.d. 275]. The denial of the post-conviction petition constituted an implicit denial of the outstanding motion for discovery. *State v. Bies*, 1st Dist. No. C-020302, 2003-Ohio-442, ¶ 9, n. 1.

I. Appellant's discovery requests were tailored to access only relevant information.

If the trial court had permitted discovery to go forward, Appellant could have factually developed the following information:

First Ground for Relief

Appellant asserted that trial court violated his rights by admitting his custodial statements. [T.d. 255, pp. 12-15]. He based that assertion on the following: 1) he had not been properly advised of his Miranda rights, 2) he had not knowingly and intelligently waived his rights 3) the officers had not honored his right to counsel, and 4) his statement was involuntary. [*Id.*]. If the trial court had granted discovery on this issue, Appellant could have developed facts concerning:

- His September 10, 1997 statement in which he informed the officers that they he no longer wanted to be interrogated,

- The telephone calls that members of the Cincinnati Police Department made to Appellant between September 10 and 16, 1997,
- The telephone calls between members of the Hamilton County Prosecutor and Sheriff's Offices and Tucson Detective Fillippelli and Officer Millstone between September 10 and 16, 1997.

These were relevant issues, given the allegations contained in the post-conviction petition. [T.d. 255, pp. 12-15].

Fifth through Eleventh Grounds for Relief

Appellant asserted that the State suppressed evidence that was material to his convictions and death sentences. [T.d. 255. pp. 20-36]. The prosecution has a constitutional obligation to disclose evidence favorable to the accused. *Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L. Ed.2d 215 (1963). If the trial court had granted Appellant leave to conduct discovery, he could have factually developed the following issues:

- The identity and contents of all documents generated by the law enforcement agencies during their investigation of the Leman homicides
- The information that the trial prosecutors provided to defense counsel during prior to trial.

Twelfth Ground for Relief

Appellant asserted that the State knowingly employed false testimony and argument to obtain Appellant's convictions for capital murder and death sentences. [T.d. 255. pp. 36-38]. A conviction obtained by the knowing use of perjured testimony is fundamentally unfair. *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L. Ed.2d 1217 (1959). If the trial court had granted discovery, Appellant could have developed the following factual issues:

- The falsity of the testimony of Burt Leeman and Detective Patrick Kemper
- The knowledge of the prosecutors at the time of trial concerning the inaccurate testimony of Leeman and Kemper

Thirteenth and Fourteenth Grounds for Relief

Appellant asserted that trial counsel performed deficiently in the trial phase of the proceedings. [T.d. 255, pp. 38-44]. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 674 (1984). If the trial court had granted leave to conduct discovery, Appellant could have factually developed the following issues:

- The scope of the investigation conducted by the two investigators who worked on the case,
- Counsel's failure to contest the composition of the grand jury,
- Counsel's failure to adequately develop the facts and constitutional issues surrounding Appellant's custodial statements,
- Counsel's failures to reasonably cross examine the State's witnesses.

II. Appellant pled sufficient facts to warrant discovery.

Once a post-conviction petitioner attaches sufficient documents to his petition, he is entitled to conduct discovery pursuant to the Ohio Civil Rules. *State v. Smith*, 30 Ohio App.3d 138, 140, 506 N.E.2d 1205 (1986). This Court has reached the same conclusion. *State v. Leonard*, 157 Ohio App.3d 653, 2004-Ohio-3323, ¶ 10. Appellant submitted sufficient documentation with his post-conviction petition to be afforded discovery.

III. Due Process entitled Appellant to conduct the limited discovery requested.

When a state establishes a program or procedure, the state must operate that program or procedure within the confines of the due process clause of the Fourteenth Amendment. *Goldberg v. Kelly*, 397 U.S. 254, 26290 S. Ct. 1011, 25 L. Ed.2d 287 (1970). This requirement extends to appellate review procedures. *Evitts v. Lucey*, 469 US. 387, 393, 105 S.Ct. 830, 83 L. Ed.2d 821 (1985). A petitioner in a post-conviction proceeding has the initial burden of submitting documentation *de hors* the record to demonstrate that a hearing is warranted. *State v. Kapper*, 5

Ohio St.3d 36, 38, 448 N.E.2d 823 (1983). If the petitioner fails to meet this burden, the petition is subject to summary dismissal. *State v. Milanovich*, 42 Ohio St.2d 46, 51, 325 N.E.2d 540 (1975). The State, consistent with the Due Process Clause of the Fourteenth Amendment, cannot place this initial evidentiary burden upon a petitioner and subsequently deny him a meaningful opportunity to meet that burden.

IV. This discovery issue arises in almost all capital post-conviction cases.

Neither the trial court, nor court of appeals addressed this issue. Death sentenced petitioners typically request discovery in capital cases. Those requests are always denied, unless the court awards the petitioner an evidentiary hearing. Since trial courts deny most petitioners an evidentiary hearing, they also deny most petitioners discovery.

This case exemplifies the impact of a trial court's denial of discovery. The post-conviction petitioner completes the entire post-conviction process and then seeks federal habeas relief. The federal court often grants the petitioner leave to conduct discovery. The federal courts in most cases can no longer consider evidence not presented to the state courts. If the petitioner develops substantial evidence supporting the claims raised in the federal discovery, the federal court in its discretion must hold the proceedings before it abeyance to permit the petitioner to again seek post-conviction review if the federal court is to consider the evidence developed in the federal discovery.

This scenario is in fact what occurred in this case. Appellant developed significant evidence in the federal discovery. Those proceedings are now on hold while Appellant again pursues post-conviction relief. The necessary review required in this case would have been much quicker if the trial court had granted discovery in the first instance. Such a ruling would have achieved a much more reliable result. If the federal court had not granted discovery, Appellant

would have been most likely executed without the evidence supporting his most recent petition seeing the light of day.

This Court should accept Appellant's discretionary appeal as to this Proposition of Law.

Proposition of Law No. VIII

A trial court in a post-conviction proceeding, prior to considering a dispositive motion filed by the State, must provide an indigent petitioner with adequate funding to retain all reasonable and necessary experts. Fifth, Sixth, Eighth and Fourteenth Amendments.

On November 2, 2010, Appellant filed a motion requesting that the trial court authorize funding for him to retain the experts. [T.d. 264, pp. 3-9]. On November 19, 2010, the state filed its response opposing the motion. [T.d. 269]. When the court dismissed Appellant's petition, it did not rule on his motion for funding. [T.d. 275]. The trial court's denial of the petition constituted an implicit denial of the motion for discovery. *State v. Bies*, 1st Dist. No. C-020302, 2003-Ohio-442, ¶ 9, n. 1.

I. Appellant requested funding for reasonable and necessary experts.

Appellant, in his motion requested that the trial court authorize funding for him to retain a forensic psychologist and a legal expert. [T.d. 264, pp. 3-9]. Appellant will separately address each request.

A. A forensic psychologist

Appellant asserted that his September 16, 1997 custodial statement to the Tucson Police was not voluntary and obtained in violation of his Miranda rights. [T.d. 259, pp. 12-15]. Appellant also asserted that trial counsel performed deficiently at the motion to suppress hearing because then did not present the testimony from a mental health expert. [*Id.* at pp. 39-40].

Appellant's mental condition is a critical component of these two grounds for Relief. Appellant suffers from three mental illnesses: bipolar disorder, post-traumatic stress disorder, and substance abuse. [T.p. 1113, 1116, T.d. 262, Exhibit 2]. It is likely that he also suffers from significant brain impairment that affects his cognitive processes, emotions, and reasoning ability. [T.p. 1113].

The Officers interrogated Appellant for a period of four hours during which he continually equivocated between denying, admitting, and claiming lack of memory as to the homicides. The inculpatory portions of his statement are for the most part inconsistent with the results of the police investigation. [T.d. 260, pp. 47-52].

Defense counsel at the evidentiary hearing did not call a mental health expert who could have explained the effect of the overreaching by the interrogating officers on Appellant's limited mental faculties. A qualified mental expert could have also addressed Appellant's mental infirmities as they impacted upon his inability to make a voluntary, knowing, and intelligent waiver of his constitutional rights.

B. An attorney versed in the prevailing norms for defense counsel in capital cases.

Appellant asserted that the two attorneys who represented him at trial did not provide him with effective assistance of counsel. [T.d. 255, pp. 38-41, 41-44]. Appellant's claim can be analogized to a legal malpractice claim. Expert testimony is generally required in a malpractice action to establish professional standards of practice. *McInnis v. Hyatt Legal Clinics*, 10 Ohio St. 3d 112, 113, 461 N.E.2d 1295 (1984). There are a prevailing norms for the trial of a capital case. National Legal Aid and Defender Association (1988), *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 9.1 (Commentary). See also, C.P. Ohio Sup. R. 20. Courts have received testimony from attorneys concerning the prevailing

standards of practice. *Demarest v. Price*, 130 F.3d 922, 933 (10th Cir. 1997); *Lewis v. Alexander*, 11 F.3d 1349, 1351 (6th Cir. 1993).

II. The trial court had the authority to grant the two funding requests.

The Fourteenth Amendment entitles indigent persons to an adequate opportunity to present their claims within the adversary system. This includes the right to court-appropriated funding when the retention of experts is necessary. *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L. Ed.2d 372 (1992). Likewise, the courts have recognized that a defendant may not be denied access to the court due to his indigency status. *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Burns v. Ohio*, 360 U.S. 252, 79 S Ct. 1164, 3 L. Ed.2d 1209 (1959).

Trial courts in the State of Ohio have the authority to appoint experts during post-conviction proceedings. *State v. Lott*, 97 Ohio St. 3d 303, 306, 2002-Ohio-6625 (2002) Similarly, the Ohio Supreme Court provides for the appointment of experts in capital cases. Ohio C.P. Supt. R. 20 IV(D)

III. Appellant sufficiently documented his claims to be entitled to the requested funding.

This Court has held that a petitioner is entitled to the benefit of appointed experts if his petition and documentary evidence contain substantive grounds for relief. *State v. Hughbanks*, 159 Ohio App.3d 257, 2004-Ohio-6429, ¶ 16. Appellant's petition contained substantive grounds for relief. See, Assignments of Error, Nos. V through IV, *infra*.IV

IV. The trial court's failure to authorized funding prejudiced Appellant.

A post-conviction petitioner has the burden of proof to demonstrate the violation of a constitutional right. R.C. § 2953.21. The State, consistent with the Due Process Clause of the Fourteenth Amendment cannot place this initial evidentiary burden upon a petitioner and

subsequently deny him a meaningful opportunity to meet that burden by denying his access to funding. *Evitts v. Lucey*, 469 US. 387, 401, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985).

V. The denial of funding for experts is an issue in most capital post-conviction cases

Like the discovery issue, this denial of funding becomes an issue that follows the post-conviction petitioner throughout the review process. Trial courts generally do not grant funding during the post-conviction proceedings. The petitioner then raises the issue throughout his post-conviction appeals. If the petitioner is fortunate enough to have one of the federal public defender offices represent him in federal habeas, those offices will have the necessary resources to provide the funding for experts that the state courts denied. If not, the federal district court has the authority to provide funding for experts. If those experts provide substantial documentation or opinions that support the habeas petitioner's claims, again in many cases, the federal proceedings will be held in abeyance while the petitioner returns to state courts.

The state court's refusal of funding in many cases will not result in the petitioner being denied funding. It will however, in many cases extend the review process by several years.

This Court should accept Appellant's discretionary appeal as to this proposition of law.

Proposition of Law No. IX

R.C. § 2953.23 violates the separation of powers, due course of law and open courts provisions of the State and Federal Constitutions. Article I, § 16, Article II, § 32 of the Ohio Constitution, Fifth, Sixth, Eighth and Fourteenth Amendments.

On July 28, 2010, the State moved to dismiss Appellant's post-conviction petition. [T.d. 259]. The State claimed that Appellant had failed to satisfy the criteria contained in R.C. § 2953.23. [*Id.* at pp. 6-7]. On September 22, 2010, Appellant filed his response to the State's motion to dismiss. [T.d. 260]. He asserted therein the R.C. § 2953.23 was unconstitutional. [*Id.* at

pp. 27-37]. The trial court, when it granted the State's motion to dismiss, did not rule on the constitutionality of the statute. [T.d. 275]. It however, found that Appellant had failed to satisfy the R.C. § 2953.23 statutory criteria as to each of the grounds for relief contained in his petition. [Id. at pp. 2-13]. The trial court erred when it failed to declare the statute unconstitutional.

I. R.C. § 2953.23(A) does not create a set of mandatory conditions.

The trial court found that Appellant must meet the conditions contained in R.C. § 2953.23(A) for it to consider the merits of his pending petition. [T.d. 275, pp. 2-13]. R.C. § 2953.23(A) does not create a mandatory set of conditions that a post-conviction petitioner must satisfy for the court to consider the merits of the petition. R.C. § 2953.23(A) provides:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court **may** not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless both of the following apply. (emphasis added.)

The Legislature's use of the word "may" as opposed to the word "shall" demonstrates that a trial court has discretion when deciding successor post-conviction petitions. *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834 (1971). The trial court erred when it held that lacked discretion to address the merits of Appellant's grounds for relief.

II. R.C. § 2953.23(A) Is Unconstitutional On Its Face.

R.C. § 2953.23(A)(1) violates the Supremacy Clause of the United States Constitution, the doctrine of separation of powers, the "due course of law" and "open courts" provisions of Section 16, Article I of the Ohio Constitution. For the reasons set forth below, the requirements contained in R.C. § 2953.23(A) are unconstitutional on their face.

It is the right and duty of judicial tribunals to determine whether a legislative act drawn into question in a suit pending before them violates the constitutions of the United States, and the

State of Ohio. *Cincinnati, Wilmington & Zanesville RR. Co. v. Clinton Cty. Commrs.*, 1 Ohio St 77, 1852 Ohio LEXIS 24, (1852), Syl. Para. 1. R.C. § 2953.23(A) violates the Supremacy Clause of the United States Constitution, usurps the judicial power of Ohio Courts in violation of the doctrine of separation of powers, and violates the “due course of law” and “open courts” provisions of Section 16, Article I of the Ohio Constitution.

A. R.C. § 2953.23(A) Violates The Supremacy Clause.

The Supremacy Clause, Art. VI, cl. 2 of the United States Constitution, provides that “the Laws of the United States . . . shall be the supreme Law of the Land; the Judges in every State shall be bound thereby.” The Supremacy Clause dictates that federal law prevails over competing state exercise of power unless the state law affords greater constitutional protections than the federal law. State courts cannot refuse to apply federal law. *Testa v. Katt*, 330 U.S. 386, 389, 67 S.Ct. 810, 91 L. Ed. 967(1947). In effect, the federal courts’ interpretation of the federal constitution is part of the supreme law of the land.

R.C. § 2953.23(A)(2) is an attempt by the General Assembly to establish a judicial standard of review for the granting of relief for violations of federal constitutional rights. However, the federal courts have already determined the standards for an individual to obtain relief when his constitutional rights have been violated by state actors. For example, when the prosecutor knows or should have known that he was using false evidence, a petitioner to obtain relief only has to establish that there is a reasonable likelihood that the false evidence could have affected the outcome. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L. Ed.2d 342 (1976).

R.C. § 2953.23(A)(2) is a legislative enactment that subverts the binding precedent of the United States Supreme Court for claims arising under the United States Constitution. It therefore violates of the Supremacy Clause.

B. R.C. § 2953.23 (A) violates the separation of powers

A statute that violates the doctrine of separation of powers is unconstitutional. *State, ex rel OATL v. Sheward*, 86 Ohio St.3d 451, 475, 715 N.E.2d 1062 (1999). The General Assembly may not enact legislation that deprives a court of jurisdiction to enforce a constitutional right because “[w]hat the constitution grants, no statute may take away.” *State ex rel. Hoel v. Brown*, 105 Ohio St. 479, 138 N.E. 230 (1922) syllabus. In this case, the use of the terms “may not entertain” in R.C § 2953.23(A) denotes the General Assembly’s intention to deprive the state courts of the opportunity to hear and remedy violations of constitutional rights.

C. R.C. § 2953.23(A)(2) violates the “Due Course Of Law” And “Open Courts” provisions f Section 16, Article I Of The Ohio Constitution

There is no rational relationship between the discovery of a constitutional violation and clear and convincing evidence that the person is not guilty of the offense of conviction. Nor is there a rational relationship between the retroactive application of a newly recognized federal or state right, and clear and convincing evidence that the person is not guilty of the offense of conviction. The absence of such a rational relationship constitutes a violation of the Federal and State Constitutional rights to due process and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

The statute denies successive post-conviction petitioners their right to “due course of law” and “open courts” because it conditions the right to obtaining relief for a constitutional violation upon the establishment by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of

conviction. The operative effect is that a convicted person must discover a constitutional violation and successfully adjudicate the claim in his initial petition for post-conviction relief.

As a result, R.C. § 2953.23(A)(1) is arbitrary, unreasonable and denies Appellant his rights under Section 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the federal Constitution.

III. R.C. § 2953.23(A) Is Unconstitutional As Applied To Appellant.

On September 21, 1995, Ohio Senate Bill 4 became effective and substantially rewrote R.C. § 2953.21, Ohio's post-conviction statute. Specifically, R.C. § 2953.23(A), which deals with the filing of successor post-conviction petitions, was substantively amended as follows:

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

(1) Either of the following applies:

(a) The petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.

(b) Subsequent to the period prescribed in division (A) (2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable fact finder would have found the petitioner eligible for the death sentence.

As applied to Appellant's case, the statute ignores the complex and evolving body of equitable principles established by judicial decisions. For example, Appellant's evidentiary documents presented in support of his pending petition might not establish by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found Appellant guilty of the capital murder or sentenced him to death. However, the documents clearly establish a substantial violation of Appellant's rights as to render his conviction and sentence void and/or voidable under the United States Constitution. *See*, R.C. § 2953.21(A)(1). Thus, under the federal standard of review, unencumbered by any need to show that no jury would have convicted him, Appellant would be entitled to have his successive post-conviction petition "entertained."

IV. The constitutionality of R.C. § 2953.23(A) is an issue in most successor capital post-conviction cases

Because the standard contained in R.C. § 2953.23(A) is so high and difficult to meet, capital post-conviction petitioners rarely can meet the standard regardless of the strength of their claims. As result, the petitioners in successor cases repeatedly raise this issue. This Court has yet to address the issue.

The post-conviction courts steadfast reliance on the R.C. § 2953.23(A) results in those courts passing on the merits of most, if not all claims raised in successor petitions. The courts should not consistently eschew their duty to review constitutional claims in capital cases. This is especially true because most often the failure of petitioners to have previously raised the claims is directly attributable to those courts having in prior proceedings denied the petitioners the necessary resources (funds and factual development) to adequately identify the claims contained in the successor petition. Often the petitioners will not be denied review of his claims contained in his post-conviction petition. Instead, the review will simply be postponed until the petitioner

returns to the federal court. Because the standards contained in R.C. 2953.23(A) are constitutionally infirm for the reasons stated herein, the federal courts will not honor the default findings made and affirmed by the trial and appellate courts of this state.

This Court should accept Appellant's discretionary appeal as to this proposition of law.

Proposition of Law No. X

A trial court is required to address the merits of the grounds for relief contain in a second post-conviction petition if the petitioner satisfies the criteria contained R.C. § 2953.23(A)(1)

Appellant had previously unsuccessfully sought post-conviction relief. *See State v. Hughbanks*, Ham. C.P. No. B-970671 (May 8, 2001, Findings of Fact, Conclusions of Law and Entry Dismissing Post-Conviction Petition), *affirmed State v. Hughbanks*, 1st Dist. No. 010372, 2003-Ohio-187, *jurisdiction denied State v. Hughbanks*, 100 Ohio St.3d 1484, 2003-Ohio-5992.

On April 1, 2010, Appellant filed his second post-conviction. [T.d. 255]. Because it was not his first petition, the Court of Appeals held that he was required to meet the requirements contained in R.C. § 2953.23(A). The Court of Appeals erred when it held that Appellant had not satisfied the statutory requirements.

I. Appellant's petition is dependent upon documents that he could not have previously accessed with reasonable diligence.

A defendant to obtain a merits review of his grounds for relief must demonstrate that the second petition is premised upon fact(s) that he could not have previously discovered with reasonable diligence or a new rule of constitutional law that is to be retroactively applied. R.C. § 2953.23(A)(1). Appellant is proceeding on the former.

Appellant's filing of his second post-conviction was prompted by the documents that he received in the federal discovery. He could not have previously accessed those documents. He sought access to the documents in question in his first post-conviction case and the state courts

denied his requests. *State v. Hughbanks*, 1st Dist. No. C-010372, 2003-Ohio-187, ¶ 63 *juris denied*. *State v. Hughbanks*, 100 Ohio St.3d 1484, 2003-Ohio-5992.

After completing his direct and post-conviction appeals, Appellant sought federal habeas relief. *Hughbanks v. Hudson*, S.D. Ohio Case No, 1:07-cv-111. The Federal Court granted him leave to conduct discovery. *Hughbanks v. Hudson*, S.D. Ohio 1:07-cv-111 (May 4, 2007 Decision and Order Granting Petitioner's Motion for Discovery). The Federal Court permitted him to conduct records depositions of the Hamilton County Prosecutor's Office and the Springfield Township Police Department. [*Id.*]. The Court also granted him leave to conduct the depositions of Pat Kemper of the Springfield Township Police Department and William Fletcher of the Hamilton County Prosecutor's Office. After discovery was completed, the Federal Court ordered the proceedings be held in abeyance to permit Appellant to return to state court. *Hughbanks v. Hudson*, S.D. Ohio 1:07-cv-111 (Jan. 29, 2010 Decision and Order Granting Petitioner's Motion to Stay Proceedings Pending Exhaustion).

On April 1, 2010, Appellant filed his second post-conviction petition in which he set forth the history concerning the discovery of the documents supporting the second petition. [T.d. 255, p. 14]. In its motion to dismiss, the State did not claim that it had provided the documents attached to the petition in discovery at or during trial. [T.d. 259]. In his response to the State's motion to dismiss, undersigned counsel in an affidavit declared that the documents submitted in supported of the petition where first obtained during the federal discovery. [T.d. 262, Exhibit A ¶¶ 5-8]. The discovery pleadings from the time of trial verify that Appellant did not receive the documents supporting the April 1, 2010 post-conviction petition until the federal habeas proceedings. [*Id.* at Exhibits 9, 16-34].

Other federal habeas petitioners like Appellant have returned to state court to present the documentation and other materials that were initially identified or accessed in the federal habeas proceedings. In those cases, the courts have assumed that the petitioners met the first prong of the test for successor petitions, but found that the petitioners could not satisfy the second prong of the statute, that no reasonable juror would have found him guilty. *State v. Gumm*, Case Nos. C-050647, C-050704, C-050752, 169 Ohio App.3d 650, 2006-Ohio-6451, ¶ 36; *State v. Lawson*, 12th Dist. No. CA2011-07-056, 2012-Ohio-548, ¶ 37.

Appellant could have earlier raised the grounds for relief contained in his 2010 petition in his direct appeals and initial post-conviction proceedings.

II. No Reasonable Juror Would Have Convicted Appellant of Capital Murder and/or Found Him Death Eligible But For The Constitutional Errors In The Petition.

The second prong with respect to the test for second petitions is whether any reasonable fact finder would have found the post-conviction petitioner guilty of the offense for which he was convicted or eligible for the death penalty. R.C. § 2953.23(A)(2). This necessarily involves an assessment of the strength of each constitutional claim pled in the petition. Appellant has addressed the merits of each ground for relief in Propositions of Law Nos. I through V, *supra*. Appellant incorporates in herein in arguments analysis contained in Proposition of Law Nos. I through V.

III. The lower courts erred when it found that Appellant had not met his burden of proof.

The Court of Appeals provided no analysis or review of any facts when it determined that Appellant had failed to meet the requisite statutory criteria. *State v. Highbanks*, 1st Dist. No. C-120351 (March 6, 2013 Judgment Entry), p. 3

On April 13, 2012, the trial court rendered its decision and entry denying the post-conviction petition. [T.d. 275]. As to many of the grounds for relief, the trial court found “This

Court does not have jurisdiction to consider this claim because Appellant has failed to meet the prerequisites of a successive petition to vacate. [*Id.* at pp. 2-13]. The trial court did not state the reasons that it had reached this conclusion. [*Id.*].

The trial court may have reached its conclusion based upon its findings that many of the grounds for relief “could have been raised at trial and/or direct appeal and is barred by res judicata. *State v. Perry, supra.*” [T.d 275, pp. 2-13]. However, the trial court in reaching those conclusions did not address the fact that Appellant had not received the documents supporting the grounds until federal habeas. [T.d. 262, Exhibit 1, ¶¶ 5-8]. Appellant did raise many of the grounds contained in the April 1, 2010 petition on direct appeal or in his initial round of post-conviction or both. However, Appellant when he earlier raised those claims did not have the facts contained in the documents obtained in federal discovery to support those claims.

For the reason stated in this Proposition the trial court erred to the degree that it found that Appellant did or could have raised the claims prior to the completion of federal discovery. To the degree that the trial court relied upon the second prong of the test, it erred for the reasons set forth in Propositions of Law Nos. I to VI.

This Court should accept Appellant’s discretionary appeal as to this Proposition of Law.

CONCLUSION

This Court should accept this case for review as to all ten of the propositions of law contained herein. It should summarily grant relief and either grant Appellant a new trial/sentencing hearing or remand the matter with the instructions that the trial court address the merits of all of the grounds for relief contained in the petition after permitting full factual development. In the alternative, this Court, after permitting full briefing and oral argument, should grant Appellant a new trial/sentencing hearing or remand the matter to the trial court with the instructions that it address the merits of the grounds for relief, after permitting full factual development.

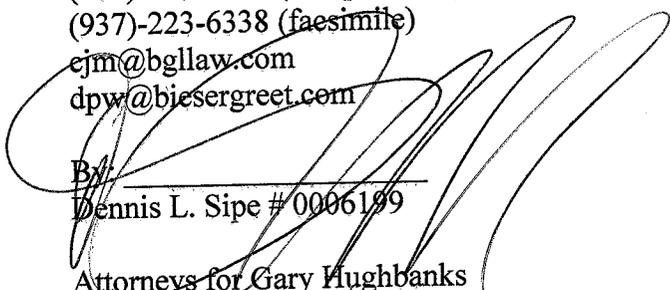
Respectfully submitted,

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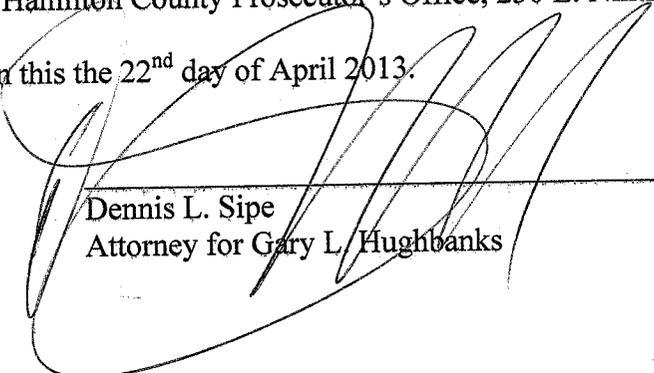
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By _____
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Attorneys for Gary Hughbanks

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Memorandum in Support of Jurisdiction Of Appellant Gary Hughbanks, Jr.* was forwarded by regular U.S. Mail to Ronald W. Springman, Chief Assistant Prosecuting Attorney, Hamilton County Prosecutor's Office, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202, on this the 22nd day of April 2013.



Dennis L. Sipe
Attorney for Gary L. Hughbanks

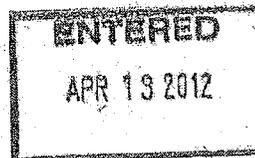
IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
-vs-	:	Case No.
GARY HUGHBANKS, JR.	:	Capital Case
Defendant-Appellant.	:	

Appendix To

Memorandum in Support of Jurisdiction Of Appellant Gary Hughbanks, Jr.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



STATE OF OHIO	:	Case No. B9706761
	:	
Plaintiff	:	Judge MARSH
	:	
vs	:	
	:	
	:	FINDINGS OF FACT, CONCLUSIONS
GARY HUGHBANKS	:	OF LAW AND ENTRY DISMISSING
	:	GARY L. HUGHBANKS, JR.'S POST-
Defendant	:	CONVICTION PETITION

This matter came before the court on the successive post-conviction petition filed by defendant-petitioner Gary L. Hughbanks, Jr on April 10, 2010, the exhibits appended thereto, the entire record in case B-9706761 and related appeals, the motion to dismiss the post-conviction petition 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) Hughbanks was represented by attorneys Dale Schmidt and Stephen Wenke at trial.
- (2) Hughbanks was represented on direct appeal by attorneys A. Norman Aubin and Herbert E. Freeman.
- (3) Hughbanks was represented by attorney Lori Leon in his first post-conviction petition.

(4) Hughbanks is represented by attorneys Dennis Sipe and Thomas Kraemer in this successive post conviction-conviction petition.

The court makes the following specific findings as to each of defendant's fourteen (14) grounds for relief raised in his successive post-conviction petition that was filed on April 8, 2010. Each of the **Conclusions of Law** can serve as independent basis for denying Hughbanks post-conviction relief.

(1) Hughbanks' first ground of relief alleges that the statements he made to police confessing to the Leeman murders should not have been admitted at trial because the statements were not voluntarily made because he was addicted to drugs, had a history of severe mental illness and was not taking his prescribed medications for his mental illness. The court makes the following **Conclusions of Law**:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) Issues surrounding the voluntariness of Hughbanks's confession could have been raised at trial and/or direct appeal and are barred by res judicata. State v. Perry (1967), 10 Ohio St. 2d 175, 226 N.E.

2d 104. Hughbanks did raise issues surrounding the voluntariness of his confession in his direct appeal. State v. Hughbanks, 99 Ohio St. 3d 365, 792 N.E. 2d 1081, 2003-Ohio-4121 at ¶'s 50-66.

(2) Hughbanks' second ground for relief alleges that the trial court should have excused two jurors for cause Hughbanks claimed could not be fair and impartial. The court finds that both jurors indicated in questioning that they could be fair and impartial. The court makes the following **Conclusions of Law**:

- (a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)
- (b) This claim could have been raised at trial and/or direct appeal and is barred by res judicata. State v. Perry, supra.

(3) Hughbanks' third ground for relief alleges that his constitutional right to a public trial was violated when the court informed courtroom spectators that the door to the courtroom would be locked while the court charged the jury during the guilt and mitigation phases of the proceedings. The court makes the following **Conclusions of Law**:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) This claim could have been raised at trial and/or direct appeal and is barred by res judicata. State v. Perry, supra.

(4) Hughbanks' fourth ground for relief alleges that the jury verdict forms, coupled with a jury instruction that the jury could consider one of the life sentencing options without unanimously rejecting a death sentence violated his rights under the Eighth Amendment. The court makes the following Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)

(b) This claim could have been raised at trial and/or direct appeal and is barred by res judicata. State v. Perry, supra.

(5) Hughbanks' fifth ground for relief alleges that the prosecution suppressed favorable evidence that impeached its theory of the case. Specifically, Hughbanks argues that the prosecution was in possession

of certain reports that contradicted the facts and the theory of the case as presented by the prosecution. As such, Hughbanks contends that these reports included exculpatory information that the prosecution should have disclosed to the defense under Brady v. Maryland. The court makes the following **Conclusions of Law**:

- (a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23(A)
- (b) Similar issues were raised in Hughbanks' first petition for post-conviction relief. State v. Hughbanks, 1st Dist. No. C-010372, 2003-Ohio-187 at ¶s 56-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App 3d 709, 880 N. E. 2d 143, 2007-Ohio-6217, ¶ 10.
- (c) The information contained in these reports was not exculpatory and the failure to disclose such information was not "material" in that it could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict. United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also

State v. Davis, 116 Ohio St. 3d 404, 880 N.E. 2d 31, 2008-Ohio-2
at ¶s 338-339.

(6) Hughbanks' sixth ground for relief is again predicated on the failure of the prosecutor to disclose certain evidence. This time, Hughbanks argues that the prosecution suppressed information from reports that impeached the testimony of Leonard Leeman and Detective Pat Kemper. Specifically, Hughbanks contends that the prosecution left the impression with Leonard Leeman that his mother's jewelry had been stolen when, in fact, prosecutors knew that only Leonard Leeman's father's wallet had been stolen. Hughbanks argues that Detective Kemper testified at trial that criminalists did not recover evidence at the Leeman house that could identify the assailant. But, according to Hughbanks, reports and later deposition testimony of the investigative officers established that fingerprints and a palm print were recovered near the bedroom window of the Leeman's home. These prints were used by police to eliminate other suspects. The court makes the following **Conclusions of Law**:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

- (b) Similar issues were raised in Hughbanks' first petition for post-conviction relief. State v. Hughbanks, 1st Dist, No. C-010372, 2003-Ohio-187 at ¶'s 56-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E.2d 143, 2007-Ohio-6217, ¶ 10.
- (c) The prosecution questioned Leonard Leeman only about the location of his mother's jewelry, not whether it was missing or stolen (T.p. 852-853). Accordingly, the prosecution did not leave the impression that Mrs. Leeman's jewelry was stolen. Accordingly, the prosecution did not suppress exculpatory information that impeached Leonard Leeman's testimony about his mother's jewelry.
- (d) The failure to disclose the recovery of fingerprints at the Leeman home was not exculpatory because police could not identify who the fingerprints belonged to and only used them to eliminate suspects.
- (e) Any alleged failure to disclose information impeaching the testimony of Leonard Leeman or Detective Pat Kemper or the recovery of fingerprint evidence was not "material" in that it could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict. United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also State v. Davis, 116 Ohio St. 3d 404, 880 N.E.2d 31, 2008-Ohio-2 at ¶'s 338-339.
- (7) Hughbanks' seventh ground for relief alleges that prosecutors were obligated to provide Hughbanks with information that Mr. and Mrs. Leeman's son, Burt Leeman, was a suspect in their murders. The court

makes the following **Conclusions of Law**:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) A defendant does not have the right to the names or information of those persons who the State at one time may have considered to be suspects. State v. Ayers, 8th Dist. No. 79134, 2002-Ohio-4773, at ¶ 26, citing State v. Spirko (1991), 59 Ohio St. 3d 352, 372; 26 N.E. 2d 1208. See also, State of Ohio ex rel. Steckman v. Jackson (1994), 70 Ohio St. 3d 420.

(8) Hughbanks alleges in his eighth ground for relief that prosecutors were obligated to provide Hughbanks with information that other individuals may have been involved in the Leeman murders. The court makes the following **Conclusions of Law**:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) A defendant does not have the right to the names or information of those persons who the State at one time may have considered to be suspects. State v. Ayers, 8th Dist. No. 79134, 2002-Ohio-4773, at ¶ 26, citing State v. Spirko (1991), 59 Ohio St. 3d 352, 372; 26 N.E. 2d 1208. See also, State of Ohio ex rel. Steckman v. Jackson (1994), 70 Ohio St. 3d 420.

(9) In his ninth ground for relief, Hughbanks claims that the prosecutors suppressed evidence that tests of fingerprints found at the Leeman home did not match Hughbanks. The court makes the following

Conclusions of Law:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).

(b) Hughbanks already raised issues with respect to the recovery of fingerprints in the Leeman home in his first post-conviction petition. Hughbanks, supra at ¶'s 59-61. As such, as the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E.2d 143, 2007-Ohio-6217, ¶ 10.

(c) Any alleged failure to disclose fingerprint test results was not "material" in that it could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict. United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also State v. Davis, 116 Ohio St. 3d 404, 880 N.E.2d 31, 2008-Ohio-2 at ¶'s 338-339.

(10) In his tenth ground for relief, Hughbanks contends that the prosecutor suppressed, in violation of Brady, statements of several witnesses who described to police other individuals they saw near the Leeman home at the time of the murders that did not match Hughbanks' physical characteristics. The court makes the following

Conclusions of Law:

- (a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).
- (b) This claim is similar to claims Hughbanks made in his first petition for post-conviction relief. Hughbanks, supra at ¶'s 59-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E. 2d 143, 2007-Ohio-6217, ¶ 10.
- (c) There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Moore v. Illinois (1972), 408 U.S. 786, 795; 92 S. Ct. 2562; United States v. Mullins (6th Cir. 1994), 22 F. 3d 1365, 1372. Information gathered from witnesses about persons seen near the Leeman home near or around the time of their murders merely amounted to information gathered as part of the investigation and was not Brady material.
- (d) Any alleged failure to disclose investigative information gathered from witness reports was not "material" in that such information could not reasonably be taken to put the whole case in a different light as to undermine confidence in the verdict. United States v. Bagley (1985), 473 U.S. 66, 105 S. Ct. 3375; See also State v. Davis, 116 Ohio St. 3d 404, 880 N.E. 2d 31, 2008-Ohio-2 at ¶'s 338-339.

11. Hughbanks argues in his eleventh ground for relief that the cumulative effect of the allegedly suppressed exculpatory evidence entitles him to post-conviction relief. The court makes the following **Conclusions of Law**:

- (a) This court does not have the jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).
- (b) None of Hughbanks' claims for relief warrant post-conviction relief. Accordingly, there is no cumulative effect which would entitle him to a post-conviction relief. State v. Mills, 1st Dist. No. C-930817, 1995 WL 109127; State v. Gau, 11th Dist. No. 2004-L-020, 2005-Ohio-4906.

12. Hughbanks' twelfth ground for relief alleges that the prosecution committed misconduct by knowingly using false testimony and making false statements to the jury. The court makes the following **Conclusions of Law**:

- (a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).
- (b) Hughbanks has failed to establish that prosecutors knowingly used false testimony or made false statements to the jury.
- (c) Hughbanks made a similar allegation in his first petition for post-conviction relief. Hughbanks, supra at ¶'s 56-61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v.

Akemon, 173 Ohio App 3d 709, 880 N.E. 2d 143, 2007-Ohio-6217, page 10.

13. Hughbanks' thirteenth ground for relief alleges ineffective assistance of counsel. Hughbanks contends that defense counsel was deficient during the trial phase for failing to present certain evidence, deficient for failing to challenge the constitution of the grand jury, and deficient at the motion to suppress hearing. The court makes the following **Conclusions of Law**:

(a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A)

(b) Hughbanks made similar allegations of ineffective counsel in his first post-conviction petition. Hughbanks, supra at ¶ 61. As such, the law of the case doctrine and/or res judicata bars Hughbanks from raising this claim again. State v. Perry, supra; State v. Akemon, 173 Ohio App. 3d 709, 880 N.E. 2d 143, 2007-Ohio-6217, ¶ 10.

(c) Hughbanks has failed to show that trial counsel violated an essential duty that resulted in prejudice. Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052.

14. Hughbanks' fourteenth ground for relief alleges that trial counsel conducted ineffective cross-examination of many state witnesses. The court makes the following **Conclusion of Law**:

- (a) This court does not have jurisdiction to consider this claim because Hughbanks has failed to meet the prerequisites of a successive petition to vacate under R.C. 2953.23 (A).
- (b) This claim could have been raised at trial and/or appeal and is barred by res judicata. State v. Perry, supra.
- (c) Hughbanks has failed to show that trial counsel violated an essential duty that resulted in prejudice. Strickland v. Washington (1984), 466 U.S. 668, 104 S. Ct. 2052.

For all the foregoing Findings and Fact and Conclusions of Law, the court hereby denies the Defendant's post-conviction petition for relief, and all requests for discovery contained therein. The Defendant's request for an evidentiary hearing is therefore denied. The court hereby grants the State of Ohio's Motion and dismisses Defendant's post-conviction petition.



Melba D. Marsh
Judge, Court of Common Pleas

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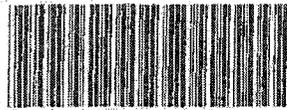
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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
MAR - 6 2013

STATE OF OHIO, : APPEAL NO. C-120351
Respondent-Appellee, : TRIAL NO. B-9706761
vs. : JUDGMENT ENTRY.
GARY L. HUGHBANKS, JR., :
Petitioner-Appellant. :



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We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Petitioner-appellant Gary L. Hughbanks, Jr., appeals from the Hamilton County Common Pleas Court's judgment dismissing his petition seeking postconviction relief pursuant to R.C. 2953.21 et seq. We affirm the court's judgment.

Hughbanks was convicted in 1998 upon jury verdicts finding him guilty of two counts of aggravated murder and a single count of aggravated burglary. For each aggravated murder, he was sentenced to death. He unsuccessfully challenged his convictions in direct appeals to this court and to the Ohio Supreme Court, *State v. Hughbanks*, 1st Dist. No. C-980595 (Dec. 3, 1999), *aff'd*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, and in postconviction petitions filed in 2000, 2003, and 2010. See *State v. Hughbanks*, 1st Dist. No. C-010372, 2003-Ohio-187, *appeal not accepted*, 100 Ohio St.3d 1484, 2003-Ohio-5992, 798 N.E.2d 1093; *State v. Hughbanks*, 159 Ohio App.3d 257, 2004-Ohio-6429, 823 N.E.2d 544, *appeal not*

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accepted, 105 Ohio St.3d 1500, 2005-Ohio-1666, 825 N.E.2d 623; *State v. Highbanks*, 1st Dist. No. C-070773 (Sept. 3, 2008), appeal not accepted, 121 Ohio St.3d 1425, 2009-Ohio-1296, 903 N.E.2d 325. In this appeal from the dismissal of his 2010 postconviction petition, Highbanks presents ten assignments of error.

We overrule the first assignment of error, challenging the common pleas court's refusal to declare the postconviction statutes unconstitutional. We have long held that the postconviction statutes comport with the dictates of due process as guaranteed under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Supremacy Clause of the federal constitution, the doctrine of separation of powers embodied in the state and federal constitutions, and the "due course of law" and "open courts" provisions contained in Article I, Section 16 of the Ohio Constitution. See *State v. Bies*, 1st Dist. No. C-020306, 2003-Ohio-442, at ¶ 12-15; *State v. Fautenberry*, 1st Dist. No. C-971017, 1998 Ohio App. LEXIS 6415 (Dec. 31, 1998).

The balance of the assignments of error challenge the common pleas court's dismissal of Highbanks's postconviction petition, the consequent denial of the relief sought in each of his postconviction claims, and the court's refusal to permit the "factual development" of his claims by affording him discovery or the funding for experts. We overrule the assignments of error upon our determination that the common pleas court had no jurisdiction to entertain Highbanks's postconviction claims.

The postconviction statutes did not confer upon on the common pleas court jurisdiction to entertain Highbanks's postconviction petition, because he did not satisfy either the time restrictions of R.C. 2953.21(A)(2) or the jurisdictional requirements of R.C. 2953.23. His 2010 petition represented his third request for postconviction relief and was filed well after the time afforded under R.C.

2953.21(A)(2) had expired. And R.C. 2953.23 precluded the common pleas court from entertaining Hughbanks's tardy and successive petition, when he failed to demonstrate by clear and convincing evidence that, "but for" the claimed constitutional errors, "no reasonable factfinder would have found [him] guilty of the offense[s] of which [he] was convicted or * * * would have found [him] eligible for the death sentence." See R.C. 2953.23(A)(1)(b).

A trial court retains jurisdiction to correct a void judgment. See *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 18-19. But the claimed constitutional deprivations, even if demonstrated, would not have rendered Hughbanks's judgment of conviction void.

Because the common pleas court had no jurisdiction to entertain Hughbanks's postconviction claims, his petition was subject to dismissal. See R.C. 2953.21(C) and 2953.23(A). Because his petition was subject to dismissal, Hughbanks was not entitled to discovery or to the funding for experts to develop his postconviction claims. See *Bies*, 1st Dist. No. C-020306, 2003-Ohio-442, at ¶ 9-11.

We, therefore, hold that the common pleas court did not err in declining to hold the postconviction statutes unconstitutional, in dismissing Hughbanks's postconviction petition, or in refusing to afford him discovery. Accordingly, we affirm the court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on March 6, 2013

per order of the court


Presiding Judge