

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2007-0755  
 Appellee-Respondent, : Common Pleas Case No. CR475400  
 v. :  
 CHARLES MAXWELL, :  
 Appellant-Petitioner. : **This is a death penalty case.**

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MOTION FOR STAY OF EXECUTION OF DEATH SENTENCE PENDING  
 DISPOSITION OF AVAILABLE STATE REMEDIES

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PETITIONER

FILED  
 MAY 05 2014  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 200-0755  
Appellee-Respondent, : Common Pleas Case No. CR475400  
v. :  
CHARLES MAXWELL, :  
Appellant-Petitioner. : **This is a death penalty case.**

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**MOTION FOR STAY OF EXECUTION OF DEATH SENTENCE PENDING  
DISPOSITION OF AVAILABLE STATE REMEDIES**

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Appellant Charles Maxwell respectfully moves this Court for an Order continuing his stay of execution pending exhaustion of his available state remedies. On August 11, 2008, Mr. Maxwell timely filed a petition for postconviction relief in the Court of Common Pleas, Cuyahoga County, Ohio. Those proceedings are pending. The reasons for this motion are set forth in the attached Memorandum.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER



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RACHEL TROUTMAN (0076741)  
Supervisor, Death Penalty Division  
Counsel of Record



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SHAWN WELCH (0085399)  
Assistant State Public Defender

**Counsel for Appellant-Petitioner**

MEMORANDUM

On March 20, 2014, this Court affirmed Robert Maxwell's convictions and death sentence. (Exhibit A). Previously, this Court granted a stay of execution for Maxwell pending his direct appeal. Upon the denial of that appeal, this Court has set Tuesday, June 14, 2016 as the new execution date for Charles Maxwell. (Exhibit A).

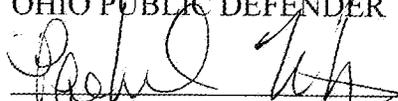
Maxwell now moves this Court for an order continuing his stay of execution pending the exhaustion of available postconviction remedies, including all appeals. Under *State v. Steffen*, 70 Ohio St. 3d 399, 639 N.E.2d 67 (1994), Maxwell is entitled to a stay of execution until he has "exhausted ... one round of postconviction relief, and one motion for delayed reconsideration ... in the court of appeals ...." 70 Ohio St.3d at 412, 639 N.E.2d at 77. See also *State v. Glenn*, 33 Ohio St. 3d 601, 514 N.E.2d 869 (1987).

On August 11, 2008, Maxwell filed his Petition for Post-Conviction Relief pursuant to Ohio Revised Code Section 2953.21 (Exhibit B). The petition and related motions are pending in the trial court. Thus, a stay is needed to ensure that the issues raised in his postconviction petition are fully resolved. This Court has granted similar motions. See, e.g., *State v. Raglin*, 85 Ohio St. 3d 1429, 707 N.E.2d 945 (1999).

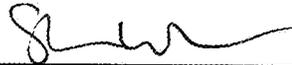
WHEREFORE, Charles Maxwell respectfully requests that this Honorable Court grant a stay of execution pending the exhaustion of available state remedies, and more specifically, his postconviction proceedings, in accordance with *State v. Steffen*, 70 Ohio St. 3d 399, 639 N.E.2d 67.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER

  
RACHEL TROUTMAN (0076741)  
Supervisor, Death Penalty Division

Counsel of Record

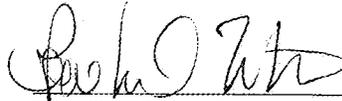


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SHAWN WELCH (0085399)  
Assistant State Public Defender

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing motion for stay of execution was forwarded by regular U.S. mail to Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, on this 5<sup>th</sup> day of May, 2014.



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Counsel for Appellant-Petitioner

# The Supreme Court of Ohio

FILED

MAR 20 2014

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

Case No. 2007-0755

v.

JUDGMENT ENTRY

Charles Maxwell

APPEAL FROM THE  
COURT OF COMMON PLEAS

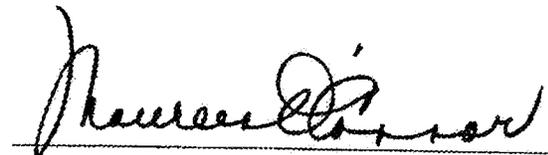
This cause, here on appeal from the Court of Common Pleas for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Common Pleas is affirmed, consistent with the opinion rendered herein.

Furthermore, it appearing to the court that the date fixed for the execution of judgment and sentence of the Court of Common Pleas has passed, it is ordered by the court that the sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Tuesday, the 14th day of June, 2016, in accordance with the statutes so provided.

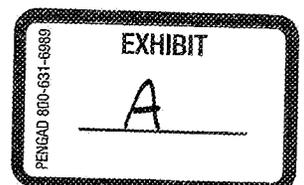
It is further ordered that a certified copy of this entry and a warrant under the seal of this court be certified to the Warden of the Southern Ohio Correctional Facility, and that the Warden shall make due return to the Clerk of the Court of Common Pleas for Cuyahoga County.

It is further ordered by the Court that a mandate be sent to the Court of Common Pleas for Cuyahoga County to carry this judgment into execution, and that a copy of this entry be certified to the Clerk of the Court of Common Pleas for Cuyahoga County for entry.

(Cuyahoga County Court of Common Pleas; No. CR475400)



Maureen O'Connor  
Chief Justice



FILED  
CRIMINAL DIVISION IN THE COURT OF COMMON PLEAS  
CUYAHOGA, OHIO

2000 AUG 11 P 3:10

STATE OF OHIO, E. FUERST  
CLERK OF COURTS  
Plaintiff-Respondent  
CUYAHOGA COUNTY

: CASE NO. CR 475400  
:  
: JUDGE DAVID T. MATIA  
:  
:  
: **Capital Case**

-vs-

CHARLES MAXWELL,  
Defendant-Petitioner.

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CHARLES MAXWELL'S PETITION FOR POST-CONVICTION RELIEF

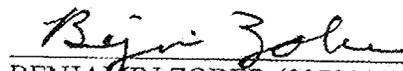
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Charles Maxwell, pursuant to R.C. 2953.21, hereby petitions the Court for relief from his conviction and sentence, as set forth in his post-conviction petition below.

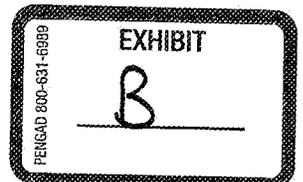
Respectfully submitted,

OFFICE OF THE  
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COUNSEL FOR PETITIONER



## I. CASE HISTORY

### TRIAL:

Charge (include specifications)	Verdict	Disposition
<b>Count I</b> Aggravated Murder 2903.01(A)(1)	Guilty	Death
Specification I: Mass Murder	Not guilty	Amended to Course of Conduct (2/7/07)
Specification II: Retaliation 2907.02(A)(2)	Guilty	
Specification III: Murder to Escape Accounting for Crime	Guilty	
Specification IV: Firearm	Guilty	3 years (consecutive)
<b>Count II</b> Aggravated Murder 2903.01(A)(1)	Dismissed	
Specification I: Course of Conduct	Dismissed	
Specification II: Retaliation 2907.02(A)(2)	Dismissed	
Specification III: Murder to Escape Accounting for Crime	Dismissed	
Specification IV: Firearm	Dismissed	
<b>Count III</b> Kidnapping 2905.01(A)(2)	Dismissed	
Specification I: Firearm	Dismissed	
<b>Count IV</b> Aggravated Burglary 2911.11(A)(1)	Dismissed	
Specification I: Firearm	Dismissed	

**Count V**

Aggravated Burglary  
2911.11(A)(1) Dismissed

Specification I: Firearm Dismissed

**Count VI**

Attempted Murder  
2923.02(A) Not Guilty

Specification I: Firearm  
2941.145 Not Guilty

**Count VII**

Retaliation  
2921.05(A) Guilty 5 years (consecutive)

Specification I: Firearm  
2941.145 Guilty 3 years (concurrent)

**Count VIII**

Having a Weapon While Under Disability  
29223.13(A) Guilty 5 years (consecutive)

**Total: Death + 8 yrs**

**Date Sentenced:** March 21, 2007

**Name of Attorneys:** John Luskin, Tom Rein

**Was this conviction the result of a:** Guilty Plea No Contest Trial

**If the conviction resulted in a trial, what was the length of the trial?** Thirteen Days

**Appeal to Court of Appeals**

Number or citation: N/A

**Appeal to Supreme Court of Ohio**

Number or citation: 07-0755

**Disposition:** Appellant's Merit Brief filed 3/31/2008.  
Appellee's Reply Brief due 8/18/2008.

Name of Attorney(s): David L. Doughten and John P. Parker

HAS A POST-CONVICTION PETITION BEEN FILED BEFORE IN THIS CASE?

YES

NO

**OTHER RELEVANT CASE HISTORY:** None.

## STATEMENT OF FACTS

### The night of the murder

On November 26, 2005, Charles Maxwell planned to spend a night out with his friends. He had been depressed and his brother thought that a boys' night out would lift his spirits. Exh. 7. He needed to pick up his shoes from Nichole's house and told his companions that he would meet up with them. He tried unsuccessfully to reach Nichole on her phone and only managed to get through just before getting to her house. As he neared the home, he saw Nichole driving away. He followed her to a bar where he saw her meet up with another man, Willie Hutchinson. Id.

After Nichole returned home from her date, she and Charles began talking. They had slept together two days earlier and were supposed to be getting back together. Willie Hutchinson had called Nichole's house after the date, and Charles picked up the phone. Hutchinson called Nichole's sister, Laretta Kenney, to report this to her, since Laretta was the one who had set up his date with Nichole.

Upon hearing this, Laretta called the house to see why Charles was there. Nichole told her that she and Charles were working things out. Exh. 9. Laretta then decided to drive over. (T.p. 889). She went to confront Charles.

A few minutes after arriving, Laretta called 911 and told the dispatchers that Charles killed her sister and attempted to kill her. According to her testimony, Charles shot at her as she jumped from the porch in an attempt to flee. (T.p. 1039). She then followed Charles down the street as she called the police and attempted to guide them to his location as he fled. (T.p. 1041).

### Charles' life before Nichole

Charles Maxwell was born on September 12, 1966 in Nashville Arkansas. Charles' father, Charles R. Maxwell, did not live with him when he was growing up. When Charles was around 10 years old, Ernestine met Thomas Brewer. T.p. 2080. Eventually the two married.

After he graduated from high school, Charles relocated to Arkansas to stay with his father. In Arkansas, Charles began working at the Tyson Chicken Company, breaking bones and removing them from the carcasses. One day, he got into a fight in the parking lot with a co-worker. During the scuffle, he fell and hit his head on a concrete parking divider. Once he was on the ground, his assailant kicked him repeatedly in the head. Following the fight, he was hospitalized for two days.

Before that head injury in 1986, Charles had had no criminal history. He had no juvenile record, and he had not even had any traffic violations. Exh. 3, ¶ 7. But then from 1988 to 1990, Charles was cited on nine occasions for traffic violations. Id. In 1989, he was arrested and then convicted of trafficking drugs. In 1993, he was convicted again of trafficking drugs. Id.

As a result of the traumatic brain injury he sustained in 1986, Charles has neurological impairment. Id., at ¶ 3. His brain impairment is significant and the injury caused "severe changes in Mr. Maxwell's day to day functioning, including legal problems, which developed only after the traumatic brain injury." Id. at ¶ 4. His impairments affect how he exercises judgment, plans, and monitors his own behavior. Id. Also affected is his regulation of emotion, particularly in stressful situations. Id. His neurological impairment results in "significant difficulty behaving adaptively and effectively in his own interest." Id.

Maxwell also has “enormous difficulty adjusting his thinking and behavior when his initial approach in solving a problem fails.” Id. Such difficulty predicts struggles in situations that require him to learn from experience.

More than simply limiting his intellectual functioning, his brain injury had an impact on his daily life. His organizational and executive impairments cause his depression and confusion; his organizational impairment causes him to become trapped and unable to resolve negative emotional experiences. Id. Stress only heightens his impairment. Id. Once he forms an initial, idea, theory or belief, he becomes locked into it and trapped, regardless that his the concept he latches onto was determined by his psychological fear rather than objective reality.

**Charles’ daily life becomes filled with stressful situations.**

Charles met Nichole McCorkle at a gas station in the winter of 1999. They eventually moved in together. On November 29, 2001 the two had a daughter, Cheyenne Maxwell.

The relationship between Charles and Nichole was tumultuous. Nichole knew how to antagonize Charles, often with physical violence as well as emotional. Once, while guests at dinner, Nichole threw a plate at Charles, hitting him in the head and breaking his glasses. Exh. 8. She retreated to the kitchen while he cleaned the mess. Id. Another time, Charles called his mother and sister to take him to the hospital. Exhs. 11, 12. When they arrived, they found him clutching himself from where Nichole had cut him on his penis. Exhs. 10, 11, 12.

On October 7, 2005, Charles and Nichole got into a fight. She hit him in the head with a frying pan. Exhs. 7. He then hit her with a meat tenderizer. Exhs. 7, 8. As a result of her injuries, Nichole was admitted to the hospital. Out of that incident, charges were filed against Charles for felonious assault.

Eventually, Charles moved out of Nichole's, yet remained in her life. He still had a key to the house that he paid for but she put in her own name. He continued to care for his daughter, and remained in contact with Nichole. The two pursued their relationship with periods of both fire and ice.

Once source of the tension between Nichole and Charles was Nichole's father, Heinz. Heinz had moved in with them and put even more strain on their relationship. Heinz had molested Nichole when she was young and Charles worried about the consequences of having this man in the same house with his young daughters. Exh. 7. When Heinz moved in, he butted heads with Charles and took advantage of him. Id.

None of this, nor tension between their families, could persuade him to give up on Nichole. He remained faithful to her despite their fighting, and despite the fact that she had given him a venereal disease. Id. He took to the role of father both to his own daughter, Cheyenne, and to Nichole's children as well. Exhs. 7, 8, 12, 14. Charles provided for all of them, including Nichole, whose training to be a nurse Charles paid for. Exhs. 7, 8. He took Derek Jr. to job sites with him and taught him how to perform home repairs. Exh. 11.

### **The trial**

The relationship of Charles and Nichole ended when he shot her on November 27, 2005. The police and prosecutors assumed he killed her because of her testimony before the grand jury for the fight on October 7, 2005. That was the basis for the retaliation charge and the R.C. § 2929.04(A)(3) and (A)(8) specifications.

The State talked about Maxwell in terms of his "bombardment of Nichole and his threatening of Nichole...." T.p. 1939. It told the jury that Nichole was "tired," "had made other plans," and was "trying to get away from Charles Maxwell." Id. The State painted the picture

of Maxwell as a “stalker,” who despite McCorkle’s supposed rejection of him, he refused to give up and watched her on a date with another man. Id. at 1939-40. Nichole’s family, obviously angry and grief-stricken, helped the State in its inaccurate, one-sided story.

A big part of the State’s case was that Nichole was killed to prevent her from testifying against Charles in the felonious assault case. The only evidence suggesting that Ms. McCorkle’s death was to silence her, was John Gregg. Gregg testified in exchange for a deal from the State. The court held a forfeiture hearing for purposes of allowing Gregg to testify to the death penalty specifications. His testimony was met with skepticism, even from this Court, which noted, “[t]here are fewer witnesses that come before Common Pleas Court that have less credibility than one John Gregg.” (T.p. 1022) The judge suggested that if “Mr. Gregg came in here and told me my name was David Matia I would first have to check my birth certificate and my driver’s license to confirm that.” (Id.) In sentencing Gregg for his perjury and insurance fraud, Judge Matia told him that he was “a weasel. You are a fraud. I find you to be one of the most despicable humans that I’ve ever seen.” (Gregg Sent. P. 16) He told Gregg “I have daughters and if I -- if one of them married someone like you I think I would be doing time for manslaughter at this point.” (Id.) Still, Gregg’s testimony was admitted and the death penalty specifications were sustained. Gregg’s testimony was the only evidence of the specifications for aggravated murder.

Gregg told Charles’ jury that he acted as intermediary between Nichole and Charles. He claimed to have facilitated three-way phone conversations with himself, Charles and Nichole. (T.p. 1674) He said he approached her about changing her testimony before the grand jury to something more benign. (T.p. 1671) He also testified that Charles admitted to him that he murdered Nichole. (T.p. 1679)

No one interviewed those who may have actually had insight into the relationship of Charles and Nichole. Andy Maxwell's testimony could have put Charles' behavior in context. Charles was not stalking and spying on a woman who had ended their relationship and tried to move on. Instead, he was caught off-guard by the sight of McCorkle going on a date when they had just slept together two days ago. Exh. 7. They had jointly decided to make the relationship work. Charles stopped by the house on 146th Street in order to get shoes to wear -- not to spy on a woman who no longer wanted him. Id.

No one used facts to challenge the version of the felonious assault or the testimony of John Gregg. Defense counsel did not call to the stand the registered nurse who saw Nichole's head injury before it was stitched up, and who did not believe it looked like a pistol-whipping. Exh. 8. Defense counsel never asked what Charles looked like after that fight, and they did not know that Andy saw Charles' head injury.

The attorneys in this case, John Luskin and Tom Rein, were court-appointed. Charles clashed with his trial counsel and was frustrated that they did not interact with him prior to trial. He claimed that they were not communicating with him. They asserted that he was not capable of assisting in his own defense. He then filed a pro se motion to disqualify his attorneys.

Based on their interactions with Charles, he was given a mental health and competency evaluation. Charles met with Dr. Aronoff of the court psychiatric clinic. Trial counsel also moved the court for a 20-day inpatient competency evaluation. He was sent to Northcoast Behavioral for evaluation. Dr. Cook observed him and expressed some concerns over his levels of competency and his mental health status. Trial counsel also filed a motion for a neurological evaluation. The motion was denied.

In the midst of defense counsel's attempt to demonstrate Charles' incompetency, Charles filed the motion to disqualify them. Even after he withdrew that motion, Charles appeared to reject even the most minor of their suggestions. For example, he refused the idea of wearing civilian clothes as opposed to prison garb, and he only relented after the Judge suggested that it was in his best interest. (T.p. 161).

On February 6, 2007, the Court held a hearing to determine Charles's competency to stand trial. Dr. Aronoff and Dr. Cook testified and ultimately Charles was found competent to stand trial. (Tr. p. 152). Dr. Cook indicated that her evaluations of Charles suggested malingering. Unbeknownst to the court, Dr. McPherson had alerted counsel to the fact that, if Charles had brain damage, it may present itself as the malingering of mental health symptoms. Exhs. 4, 5. The trial court found Charles competent.

The main witness for the murder was Laretta Kenney, Nichole's sister. She testified that the night before the murder, Nichole was on a date with Willie Hutchinson. (T.p. 887). Laretta told the jury that Charles had assaulted Nichole. (T.p. 892). The defense made a motion for a mistrial, which was overruled, but the prosecutors were admonished for eliciting and allowing such statements.

At sidebar, the Judge indicated that the situation is a classic domestic violence scenario. (T.p. 915). There was no evidence of an effort to prevent testimony; Nichole's statements from the hospital indicated an unknown assailant. (T.p. 924). That statement was at odds with a later statement to police. The Prosecutors were allowed to introduce one of the statements. (T.p. 928). The jury was told to disregard Laretta's statement about the alleged beating. (T.p. 920).

As Laretta continued her testimony, she recounted how she spoke on the phone with Nichole and how "scared" she sounded. (T.p. 891.) Laretta drove over to the house and saw someone peek out of the window. (T.p. 1030).

She then testified about the shooting. In her testimony, she confronted Charles, who was talking with Nichole. Laretta testified that she jumped from the porch at the sound of gunfire. She claimed that Charles shot at her and then shot her sister. She chased him down the street and called 911. A short time later, Laretta met up with her sister, Michelle, and the two of them drove around the area before returning to Nichole's house. (T.p. 1048). A few minutes after Laretta's call to the police, Nichole's daughter Domonique found her mother's body on the ground and also called the police.

Another witness for the State was Michelle Kenney, Nichole's sister. Michelle testified that she received a call about Charles being at Nichole's. Michelle said that she was afraid for her sister's life and called 911. (T.p. 835). The Defense objected to her adding impressions. (T.p. 837). Michelle said that she drove over to Nichole's and picked up Laretta, who was on foot. (T.p. 841). She never saw Charles that night and gave no statement to the police. (T.p. 848, 852).

Charles and Nichole's daughter, Cheyenne Maxwell, also testified. On the night of the murder, she was only three years old. Prior to her testimony, the court held a competency hearing. Defense counsel pointed out that her trial testimony differed from her testimony during the examination. (T.p. 821, 865). She testified that she saw her father shoot her mom.

The defense made a Rule 29 motion and moved to dismiss the case. They cited that there was no physical evidence tying him to the crime, nor was there any evidence for prior calculation and design. The defense attorneys also pointed out that the indictment in the felonious assault

case was filed on the 28<sup>th</sup> but Nichole was killed on the 27<sup>th</sup>. (Tr. p. 1860). The counts alleging kidnapping, burglary, and trespass were dismissed. (Tr. p. 1872-74). Charles did not testify.

On February 23, 2007, the jury found Maxwell guilty of aggravated murder, retaliation, and the death specifications. The penalty phase began five days later.

### **Mitigation**

Some of Charles' family members and friends testified on his behalf. Defense counsel approached the family the morning of mitigation and asked them who wanted to testify. They spoke highly of him and his commitment to the family. They recounted his childhood. Every member of his family attested to his kindness and selflessness. There was also testimony about his skills and his work ethic. Through the testimony of family and friends, the jury also learned that Charles had been to prison before.

Dr. McPherson served as both psychologist and mitigation specialist. She met with the family once in a group. She never interviewed them individually.

In her testimony, Dr. McPherson confirmed that Charles had been in prison multiple times. She discussed his history of substance abuse, possible head injuries, and a history of blackouts. Her testing indicated that he was in the low average range of intelligence. She also testified that he might have some form of organic brain damage.

The jury began deliberating on February 22, 2007 and returned with a verdict the next day. They found him guilty of Aggravated Murder §2903.01 with retaliation for former testimony specification, murder to escape accounting for another crime specification, and a gun specification. The jury also found him guilty of retaliation §2921.05(B) with a firearm specification. He was also found not guilty of attempted murder §2923.02 with a firearm specification. The mass murder specification was amended to a course of conduct specification

and defendant was found not guilty. The remaining counts were dismissed pursuant to a granting of Rule 29.

After the mitigation phase, the jury returned a sentence of death. On March 31, 2007, the Court affirmed his death sentence and assigned counsel for direct appeal.

## GROUNDS FOR RELIEF

### **First Ground for Relief**

Petitioner Maxwell hereby incorporates all of the allegations contained elsewhere in this Petition as if fully rewritten herein. Maxwell's convictions and sentences are void or voidable because the trial court erred in not granting sufficient funds for a neuropsychologist. Ake v. Oklahoma, 470 U.S. 68 (1985); Washington v. Texas, 388 U.S. 14, 19 (1967); State v. Mason, 82 Ohio St. 3d 144, 150, 694 N.E. 2d 932, 944 (1998); U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16; 2003 ABA Guidelines 9.1(A).

Following competency and sanity evaluations, and based on their interactions with Petitioner, defense counsel moved for a neurological evaluation. Exh. 1. This Court denied the motion. Maxwell is indigent and could not afford to hire additional experts. Because he had no means to investigate, he could not discover and present to the jury that Maxwell had brain damage.

Maxwell suffered a traumatic brain injury (TBI) in 1986. Exh. 2. Dr. Layton found the TBI to be "a cause of personality change that resulted in criminal behavior." Exh. 3, ¶ 10. He is "excessively subject to behave impulsively." Id. at ¶ 9. Dr. Layton further noted that "[i]n Mr. Maxwell's history, there is no indication of any criminal behavior or record of involvement with legal authorities prior to his 1986 injury." Id. at ¶ 7. (Dr. Layton's affidavit is incorporated as if fully rewritten herein.)

Petitioner's impairment, particularly when he is under stress, affects his ability for "planning...in exercise of judgment, delay of action when appropriate, planning and effectively monitoring behavior and regulation of emotions." Id. at ¶ 10. Had the jury been given this information, it would have been able to consider it as a factor of O.R.C. § 2929.04(B)(7). Maxwell found himself facing great stress. "Under emotionally charged circumstance, when he

feels threatened or demeaned...Mr. Maxwell is trapped; he cannot consider alternatives, and acts in a manner to protect himself...his neurological dysfunction is the cause of Mr. Maxwell's neuropsychiatric decompensation under these circumstances." Id. at ¶ 9. Without this evidence, the jury could not properly consider "the nature and circumstances of the offense, the history, character, and background of the offender." O.R.C. § 2929.04(B). While the State introduced the aggravating factors, the defense was unable to present mitigating evidence of Maxwell's brain damage or "impaired ability to deploy his intellectual resources." Id. at ¶ 9.

Dr. Layton places Maxwell's thinking and reasoning abilities in context. The jury deliberated on the mitigation without knowing that Maxwell's "significant difficulty in behaving adaptively and effectively in his own interest." Id. at ¶ 4. Had the jurors heard this, they would have been able to understand the effect Maxwell's brain impairment had on his conduct and his life. It would also have enabled the jury to consider fully an O.R.C. § 2929.04(B)(3) mitigating factor. This was information that the jurors wanted and would have considered. Exh. 15.

Maxwell's underlying impairments were specifically relevant to mitigation and to the O.R.C. § 2903.01(A) specifications. Further, "corroboration of Mr. Maxwell's neurological dysfunction using independent methodology...should have been obtained prior to trial." Id. at ¶ 10 (Emphasis in original). Rompilla v. Beard, 545 U.S. 374, 392-93 (2005).

It is critical that a court provide funding for a full and effective defense. This requires funding experts, non-attorney members of the defense team, and other resources. 2003 ABA Guidelines 9.1(C). The defense team must include a "member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments[,]" often outside of defense counsel, the investigator, and the mitigation specialist. Id. at 4.1(A)(2).

Proper mitigation requires full investigation of all areas because “defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.” California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring). See also, Harries v. Bell, 417 F.3d 631 (6th Cir. 2005) (granting relief where defendant “suffered damage to the frontal lobe of his brain, . . . [damage that] can result from head injuries and can interfere with judgment and decrease a person’s ability to control impulses.”) Under Ohio law, “a brain injury and its potential medical implications” would have been relevant mitigation. Haliym v. Mitchell, 492 F.3d 680, 716 (6th Cir. 2007). A full and complete investigation of mitigating evidence includes the defendant’s “history, background and organic brain damage.” Glenn v. Tate, 71 F. 3d 1204, 1207 (6th Cir. 1995). A defendant is entitled to relief where a jury does not hear of the brain damage from a blow to the head. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003). Only a full investigation can reasonably be expected to uncover all of this evidence.

The trial court should have granted the motion to fund testing, and the failure to grant funding prejudiced Maxwell. But for the denial of these funds, a qualified expert could have performed a battery of neurological tests and revealed Maxwell’s neurological deficits. Defense counsel would have been able to present these factors in mitigation and put Petitioner’s behavior in proper context with his brain damage.

Petitioner Maxwell supports his claim with evidence dehors the record sufficient to indicate a trial court error resulting in his prejudice. State v. Jackson, 64 Ohio St.2d 107, 111, 414 N.E.2d 819, 823 (1980). He must be granted a new trial, or at a minimum, discovery and an evidentiary hearing on this ground for relief.

## Second Ground for Relief

Petitioner incorporates by reference all previous paragraphs as if fully rewritten herein. Petitioner's sentence is void or voidable because his trial counsel failed to present mitigating evidence regarding Maxwell's brain dysfunction. This inaction violated Maxwell's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

On January 19, 2007, defense counsel filed a motion for neurological evaluation of Maxwell. Counsel stated that the request was based on the recommendation of Dr. John Fabian. Dr. Fabian's purpose was to evaluate Maxwell for competency to stand trial, and he required neurological testing to do so. See exh. 1.

At the time of Maxwell's competency hearing, held on February 6, 2007, the court still had not ruled on the motion for neurological evaluation. Thus, Dr. Fabian never rendered a finding regarding Maxwell's competency, and he was not called to testify. T.p. 45. The trial court ruled that the defense failed to meet their burden to establish Maxwell was incompetent. T.p. 152. It then denied the motion for neurological evaluation on February 9, 2007. Dkt. 46.

In addition to Dr. Fabian, Dr. Sandra B. McPherson also notified trial counsel about the possibility that Maxwell had brain damage. While examining Maxwell for purposes of mitigation, Dr. McPherson recognized several indicators of brain damage. Since Dr. McPherson is not trained in neuropsychology, she advised defense counsel to have Maxwell evaluated for neurological dysfunction. Exh. 4. The day before Maxwell's competency hearing, she provided defense counsel with a report delineating the symptoms that led to her suspicions. Exh. 5.

Trial counsel failed to adequately present evidence of Maxwell's brain dysfunction. They never obtained an expert to evaluate Maxwell and determine to a reasonable degree of psychological certainty whether he suffered from organic impairment. They failed to adequately

support their motion for neurological evaluation with details given to them by their mitigation expert. They did not re-raise their request to have Maxwell evaluated once the court found him competent. Despite Supreme Court case law, counsel failed to recognize the significance in mitigation of organic brain damage. See Rompilla v. Beard, 545 U.S. 374, 392-93 (2005).

Dr. McPherson testified about her suspicions that Maxwell had suffered a head injury that led to organic dysfunction. T.p. 2176-78. But unlike an expert trained in the area of neurological dysfunction, she does not have the ability to conclusively determine the existence of brain damage. While cross-examining Dr. McPherson, the State was able to use this to Maxwell's detriment: Id. at 2192. The possibility of brain damage that "can't be ruled in or out" is not persuasive testimony.

After his conviction, Maxwell was evaluated by neuropsychologist Dr. Barry Layton. Dr. Layton determined to a reasonable degree of psychological certainty that "Maxwell suffers from significant brain impairment." Exh. 3, ¶ 4. He suffered from the effects of the brain impairment at the time of the murder of Nichole McCorkle. Id. "Maxwell's impairment impacts his ability to exercise judgment, plan, and effectively monitor his behavior. It also affects his regulation of emotions, particularly under stress." Id.

There can be "no rational trial strategy that would justify the failure of [defense] counsel to investigate and present evidence of his brain impairment...." Frazier v. Huffman, 343 F.3d 780, 794 (6th Cir. 2003). See also Haliym v. Mitchell, 492 F.3d 680, 716 (6th Cir. 2007), Glenn v. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995). Maxwell's psychologists alerted counsel to the fact that he suffered from organic brain damage. Compare Clark v. Mitchell, 425 F.3d 270, 285 (6th Cir. 2005) ("[I]t does not appear that either the psychologist or psychiatrist retained by the defense to evaluate Clark suggested that Clark suffered from organic brain damage.... It was not

unreasonable for Clark's counsel, untrained in the field of mental health, to rely on the opinions of these professionals.")

Further, Maxwell's brain impairment could have neutralized the allegations that he malingered his mental health symptoms. Counsel knew this, since Dr. McPherson included it in her report. See Exh. 4 ("As I noted in my report to defense counsel, if Mr. Maxwell had a brain injury, then the reported overproduction of symptoms could actually be an accurate indication of brain dysfunction. In other words, the brain injury could have shown that Mr. Maxwell was not malingering his mental illness and/or cognitive deficits, but rather he was behaving in accordance with his neurological dysfunction.") Dr. McPherson was cross-examined about Maxwell's malingering, but she could not refute the allegations since counsel never had Maxwell evaluated neurologically. T.p. 2183-86.

Despite being alerted to potential head injuries, trial counsel did not investigate those injuries. Rodney Maxwell, Charles Maxwell's cousin, was a witness to Charles' traumatic brain injury. Exh. 2. He would have told counsel about the injury he witnessed, and counsel could have followed up with Howard Hospital in Arkansas to confirm that Maxwell was admitted there. Exh. 6. This was information that the jurors wanted and would have considered. Exh. 15.

Maxwell supports this with evidence dehors the record containing sufficient facts to demonstrate the lack of competent counsel and prejudice resulting from counsel's ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). He must be granted a new sentencing hearing or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

### **Third Ground for Relief**

Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

Petitioner's conviction is void or voidable because his trial counsel failed to investigate and present evidence during the trial phase of Maxwell's organic brain dysfunction. This inaction violated Maxwell's right to the effective assistance of counsel, and his rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

Defense counsel had a duty to investigate Maxwell's brain dysfunction. Drs. John Fabian and Sandra B. McPherson both notified counsel about the possibility that Maxwell had brain damage. And Dr. McPherson knows that frontal lobe damage "would imply potential deficits of judgment and executive control which would need to be considered as to their relationship to behavior including any perceived as relevant to the crimes charged." Exh. 4. Trial counsel failed to secure an expert who could properly evaluate Maxwell for the existence and type of brain dysfunction.

Counsel also recognized that Maxwell was inhibited his ability to consult with them and assist in the preparation of the defense. In addition to having Maxwell evaluated for competency, counsel alerted the judge to the fact that they were having communication problems with their client. T.p. 47. But despite the trial court's finding that Maxwell was competent, defense counsel's duty to engage in a "continuing interactive dialogue" was ongoing. 2003 ABA Guidelines 10.5(C). By obtaining an expert in brain impairment, counsel would have armed themselves with the necessary skills and information to appropriately communicate with their client.

Deficits such as Maxwell's are "associated with questionable capacity regarding standard legal responsibilities." Exh. 3, ¶ 9. Maxwell is limited in his ability to "hold[] in mind and manipulate[] the two to three bits of information required to make sense of simple arguments." Id. His type of impairment also leads to decompensation under stress, and the setting of his capital trial was surely a stressful situation for him. Id.

Trial counsel failed to adequately present evidence of Maxwell's brain dysfunction. An expert could have testified before the jury about Maxwell's complete absence of criminal behavior before the damage to his brain. See id., ¶ 7. An expert also could have testified about the absence of any indication of impulsive behavior in Maxwell's history, prior to the 1986 brain injury. Id. In the immediate years following the brain injury, however, Maxwell obtained nine driving citations and two felony convictions. Id. The correlation between Maxwell's brain damage and criminal behavior likely would have impacted the jurors' opinion regarding his behavior in this case.

Courts have recognized the correlation between brain injury and criminal conduct. Frazier v. Huffman, 343 F.3d 780, 794 (6th Cir. 2003) ("These reports also suggest that a correlation could exist between this injury and Frazier's criminal conduct.") Maxwell's type of brain damage impairs his ability to plan, organize, monitor, and modulate his behavior; to exercise judgment; and to behave adaptively and effectively in his own interest. Exh. 3, ¶ 9. This would have been relevant to the jury's determination regarding whether Maxwell acted with prior calculation and design.

There could not have been a strategic reason for counsel's failure to investigate and present this evidence in the trial phase. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments

support the limitations on investigation.” Strickland, 466 U.S. at 690-691. Since two different doctors alerted counsel to possibility of Maxwell’s brain damage, and counsel had difficulty even communicating with Maxwell (see t.p. 47), no reasonable professional judgment supported the limitation of that investigation.

There is no legal bar to using Maxwell’s brain damage to attack his ability to act with prior calculation and design. See State v. Awkal, 76 Ohio St. 3d 324, 332 (1996) (court excluded psychological testimony on issue of prior calculation and design, but reason was merely because doctor was not licensed in Ohio.) Maxwell is not suggesting his trial attorneys should have acted in contravention to State v. Cooney, 46 Ohio St. 3d 20, 26 (1989). Cooney mandates that “a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that, due to mental illness, intoxication, or any other reason, he lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime.” Id. The element of specific intent is “purposely,” not prior calculation and design. See e.g., State v. Burke, 73 Ohio St. 3d 399, 404 (1995), State v. Fox, 68 Ohio St. 2d 53, 55 (1981). Maxwell does not contend that by shooting McCorkle in the head, he did not specifically intend to kill her.

Petitioner Maxwell supports this claim with evidence dehors the record that contains sufficient operative facts to demonstrate the lack of competent counsel and the prejudice resulting from counsel’s ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). He must be granted a new trial, at a minimum, discovery and an evidentiary hearing on this ground for relief.

#### **Fourth Ground for Relief**

Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

Maxwell's conviction and sentence are void or voidable because his trial counsel failed to investigate the felonious assault that was used to prove the aggravating circumstance(s). "Counsel must...investigate prior convictions...that could be used as aggravating circumstances or otherwise come into evidence." Rompilla v. Beard, 545 U.S. 374, 387 (2005). The fact that Maxwell was never convicted of the felonious assault only compounds counsel's failure. This inaction violated Maxwell's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

The State claimed that Maxwell killed Nichole McCorkle in retaliation for her grand jury testimony, which led to his indictment for felonious assault. That alleged felonious assault occurred on October 7, 2005. Despite the fact that Maxwell was not being tried for the felonious assault, the State presented its version of the October incident to the jury.

Maxwell's defense counsel had a duty to attack the State's case regarding the felonious assault. Even if the State had proven the felonious assault beyond a reasonable doubt, counsel would have been obligated to investigate that conviction. "If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction." Rompilla, 545 U.S. at 387 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 (rev. ed. 2003)). Counsel's obligation does not *lessen* because the felonious assault – and all the horrendous details relied upon by the State – was legally unproven.

The jury heard that Maxwell hit Nichole in the head with an object – a pistol or a cell phone – and Nichole was then hospitalized. T.p. 892, 1099. The jury knew that Nichole had to get several stitches in her head from that incident. Id. at 807. The jury heard that Nichole made statements to the police, her sister, the prosecutor, and then testified in front of the grand jury. Id. at 808, 892, 1166. Nichole was presented as a helpless, “frightened” victim, who bravely stood up to her attacker and helped secure an indictment against him. Id. at 1166.

What the jury did *not* hear, however, was that Maxwell had a legitimate defense to that felonious assault charge. Maxwell’s trial counsel failed to investigate the felonious assault. Therefore, no one told the jurors that Nichole beat Maxwell in the head with a frying pan immediately before he then hit *her* in the head.

Had counsel simply interviewed Maxwell’s brother, Andy Maxwell, they would have found out what really happened that day in October 2005. Andy recalled that he saw Charles one day, and Charles had a huge knot on the back of his head. Exh. 7. Andy asked what had happened, and Charles told him that he and Nichole were arguing in the kitchen, and she hit him in the head with a frying pan. Id. Charles admitted he then hit Nichole in the head with a mallet. That was the night in October when Nichole went to the hospital and got the stitches in her head. Id.

Counsel also should have interviewed La-Tonya Kindell, since she was the one who took McCorkle to the hospital that night in October. Exh. 8. Kindell is a nurse and she took McCorkle to the hospital at which she worked; then she assisted the doctors in cleaning McCorkle’s scalp. Id. According to Kindell, “the wound on [McCorkle’s] scalp looked like two little holes, like it could have been from a meat tenderizer. Her head was not split open like

it would have been if she were pistol-whipped.” Id. Kindell’s testimony could have rebutted the testimony that McCorkle was pistol-whipped.

Defense counsel objected to the State’s presentation of evidence regarding the felonious assault. T.p. 1100. Since the State had not proven the felonious assault, it could not rely on the alleged facts. But this objection by counsel was not adequate to meet their constitutionally required duties. “Counsel’s obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out.” Rompilla, 545 U.S. at 386, fn. 5 (2005).

Defense counsel should have put on evidence that Maxwell acted in self defense. In order to establish that he acted in self defense, Maxwell would have had to prove by a preponderance of the evidence that: (A) he was not at fault in creating the situation giving rise to the felonious assault, and (B) he had reasonable grounds to believe and an honest belief, even if mistaken, that he/she was in imminent danger of bodily harm. Ohio Jury Instructions, 4-411 OJI 411.33. Maxwell could have met this burden, but even if he fell short of it, the jury then would have had more than just the State’s one-sided version of events.

Petitioner Maxwell supports this claim with evidence dehors the record that contains sufficient operative facts to demonstrate the lack of competent counsel and the prejudice resulting from counsel’s ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). He must be granted a new sentencing hearing or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

### **Fifth Ground for Relief**

Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

Maxwell's conviction is void or voidable because his trial counsel failed to investigate for the trial phase. "Barring exceptional circumstances, counsel should seek out...witnesses having purported knowledge of events surrounding the alleged offense...." American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Commentary for Guideline 10.7. This inaction violated Maxwell's right to the effective assistance of counsel, and his rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

Charles Maxwell is not guilty of killing Nichole McCorkle to prevent her from testifying against him, he is not guilty of killing her in retaliation for her grand jury testimony against him, and he did not act with prior calculation and design. Had defense counsel investigated the crime and spoken to witnesses, they would have had evidence to rebut the State's case against Maxwell. This was information that the jurors wanted and would have considered. Exh. 15.

According to Andy Maxwell, Charles Maxwell went to the house on 146th Street that night to get his shoes to go out for a night on the town with his friends. Exh. 7. He had no intentions of killing McCorkle, and in fact, they had just decided two days earlier to take another try at making their relationship work. Id. This is consistent with what McCorkle told Laurretta Kenney that night. Kenney told police that McCorkle told her "they were working out things." Exh. 9.

Andy Maxwell spoke with Charles before and after he shot McCorkle. Exh. 7. According to Andy, he and Charles had plans to go out that night with friends, and Charles stopped by the house on 146th Street in order to get shoes to wear. Id. On his way to the house, Charles called the house phone repeatedly, and it was busy. As the phone finally rang through, Charles passed Nichole driving away. He followed her to a bar and saw Nichole meet another man. Charles became very upset, since he and Nichole had just slept together two days ago, and they had decided to give their relationship another try. Id.

In the meantime, Andy and their friends were waiting on Charles to go out. Andy kept calling Charles, but there was no answer. When Andy finally spoke to him, around 2:30 or 3:00 a.m., Charles' voice "sounded weird, like he was talking way back in his throat." Id. Immediately after shooting Nichole, Charles explained to Andy that he was "sick and tired. She overran me. She gave me a disease. She just kept balling my heart up and throwing it in my face." Id. In other words, the murder had nothing to do with the grand jury testimony, and Andy Maxwell could have communicated this to the jury.

Andy Maxwell's testimony also could have established that Maxwell did not act with prior calculation and design. Like the defendant in State v. Davis, 8 Ohio App. 3d 205, 207 (1982), Maxwell did not go to the scene with the intent of shooting Nichole. In Davis, the Eighth District Court of Appeals found that "the evidence does not support a finding that defendant killed the owner of the bar with prior calculation and design."

Prior calculation and design is a "more stringent element than the 'deliberate and premeditated malice' which was required under prior law." State v. Taylor, 78 Ohio St. 3d 15, 19 (1997) (internal citations omitted). Maxwell loved McCorkle, and when he went to her house, he was still under the impression that they were going to re-establish their relationship.

Even after he saw her at the bar, he went back to her house and they discussed making their relationship work. Exh. 9 (Lauretta Kenney told police that Nichole told her “they were working out things.”) Whatever “instantaneous deliberation” led to the shooting of McCorkle “is not sufficient to constitute prior calculation and design.” Taylor, 78 Ohio St. 3d at 19.

Had trial counsel interviewed him, Andy Maxwell would have told them about his conversation with Charles. Exh. 7. Andy Maxwell’s testimony could have counteracted the testimony of John Gregg. Gregg’s testimony was the State’s evidence supporting retaliation, the death specifications, and prior calculation and design. Despite being the defendant’s brother, Andy Maxwell would have been willing to testify about his Charles’ guilt in McCorkles’s murder “because it would have shown that Charles wasn’t guilty of what *they* said he did.” Id.

There could not have been a strategic reason for counsel’s failure to investigate. Counsel has a duty “to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. Rompilla v. Beard, 545 U.S. 374, 387 (2005) (citing ABA Guidelines). “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-691.

Maxwell supports this claim with evidence dehors the record that contains sufficient operative facts to demonstrate the lack of competent counsel and the prejudice resulting from counsel’s ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). He must be granted a new trial, at a minimum, discovery and an evidentiary hearing on this ground for relief.

## Sixth Ground for Relief

Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

Maxwell's conviction and sentence are void or voidable because he is actually innocent of the aggravating circumstances. His convictions and death sentence violate the Eighth and Fourteenth Amendments to the United States Constitution. See Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., joined by Kennedy, J., concurring); Id. (O'Connor, J., joined by Kennedy, J., concurring); Id. at 429 (White, J., concurring); Id. at 430 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting); Schlup v. Delo, 513 U.S. 298, 316 (1995). See House v. Bell, 311 F.3d 767, 768 (6th Cir. 2002).

The State claimed that Maxwell killed Nichole McCorkle in retaliation for her grand jury testimony, which led to his indictment for felonious assault. That alleged felonious assault occurred on October 7, 2005. It also claimed that Maxwell committed aggravated murder for the purpose of escaping punishment for felonious assault. The jury convicted Maxwell of both specifications.

The State never proved that Maxwell was guilty of felonious assault. In fact, the trial court told the State that it did not have to prove the elements of the felonious assault, and the State agreed. T.p. 934. But according to State v. Jones, 91 Ohio St. 3d 335 (2001), the State must prove beyond a reasonable doubt that the defendant committed the offense for which he sought to avoid apprehension. Id. at 347-348. Since this was not done, Maxwell is not guilty of committing aggravated murder for the purpose of escaping punishment for felonious assault.

Despite the fact that Maxwell was not being tried for the felonious assault, the State presented its version of the October incident to the jury. It attempted to show that Maxwell

killed McCorkle in retaliation for her grand jury testimony about that incident. But Maxwell had no reason to retaliate against McCorkle, since he knew he had a legitimate defense to the accusations of felonious assault. Maxwell is not guilty of committing aggravated murder in retaliation for McCorkle's grand jury testimony.

On October 7, 2005, Nichole beat Maxwell in the head with a frying pan immediately before he then hit *her* in the head. Exh. 7. In other words, Maxwell reacted in self-defense. In order to establish that he acted in self defense, Maxwell would have had to prove by a preponderance of the evidence that: (A) he was not at fault in creating the situation giving rise to the felonious assault, and (B) he had reasonable grounds to believe and an honest belief, even if mistaken, that he was in imminent danger of bodily harm. Ohio Jury Instructions, 4-411 OJI 411.33.

Maxwell had many reasons to believe that he was in imminent danger of bodily harm, since he had experienced many injuries at the hands of McCorkle. For example, on one occasion, Maxwell had to call his mother and sister to take him to the hospital for injuries McCorkle had inflicted upon his penis. See exhs 10, 11, 12. On another occasion, McCorkle threw her plate at Maxwell's head and hit him in the face with it. The impact of the plate broke his glasses. Exh. 8. Another time, McCorkle kicked and punched Maxwell for wanting to go to the home they shared. Exh. 12. And McCorkle had informed Maxwell's mother that she planned on slitting his throat as soon as she finished nursing school. Exh. 11.

Furthermore, Andy Maxwell spoke with Charles before and after he shot McCorkle. Exh. 7. According to Andy, he and Charles had plans to go out that night with friends, and Charles stopped by the house on 146th Street in order to get shoes to wear. Id. On his way to the house, he called the house phone repeatedly and it was busy. As the phone finally rang

through, and Charles saw Nichole driving away. Id. He followed her to the bar and saw Nichole with a man. Id. Charles was really upset, since he and Nichole had just slept together two days ago, and they had decided to give their relationship another try. Id.

In the meantime, Andy and their friends were waiting on Charles to go out. Andy kept calling Charles, but there was no answer. Id. When he finally spoke to him, around 2:30 or 3:00 a.m., Charles' voice "sounded weird, like he was talking way back in his throat." Id. Charles said he was "sick and tired. She overran me. She gave me a disease. She just kept balling my heart up and throwing it in my face." Id. His state of mind had nothing to do with the grand jury testimony.

This was information that the jurors wanted and would have considered. Exh. 15. Maxwell supports this claim with evidence dehors the record that contains sufficient operative facts to demonstrate his innocence of the aggravating circumstances. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). He must be granted a new trial or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

### Seventh Ground for Relief

Petitioner Maxwell hereby incorporates all of the allegations contained elsewhere in this Petition as if fully rewritten herein. Maxwell's convictions and sentences are void or voidable because defense counsel had Dr. Sandra McPherson act as both investigator and mitigation specialist. Performing both support roles of a defense team, Dr. McPherson could fill neither role sufficiently. As a result, counsel was unable to provide adequate mitigation.

Dr. McPherson did not perform much of an investigation into mitigation witnesses. She met with everyone at once. Exh. 7. The large-group meeting did not give anyone an opportunity to share privately, any concerns or information. Nor did it allow the most reticent relatives to speak comfortably. Further evidence of her inadequate preparation appeared during trial, when even with the benefit of her notes, she erroneously said that Maxwell dropped out of school to move to Arizona to live with his father. T.p. 2160. He did move, but after he graduated and to Arkansas, where many of his family members lived at some point.

Dr. McPherson also gave him an IQ test, well aware that he had taken one 6 months earlier. T. p. 134. She testified to the results, even though repeated use of IQ tests within a short time period yields unreliable results (the practice effect). She presented this inaccurate evidence to the jury. Id. at 2165.

Working independently, a mitigation specialist builds rapport with the defendant's family. Having only one cursory meeting with the family made this impossible. She further prevented herself from building trust and forming an open relationship with the family by having her husband accompany her. Exh. 12. Dr. McPherson's efforts were too late and too impersonal to form a relationship with the family and help with the mitigation. Because of her faulty investigation, "the jury was given virtually no information on [the defendant's] history,

character, background and organic brain damage -- at least no information of a sort calculated to raise reasonable doubt as to whether this...man ought to be put to death.” Glenn v. Tate, 71 F. 3d 1204, 1207 (6th Cir. 1995).<sup>1</sup> Had she fully investigated, she would have obtained his cousin Rodney’s account of the TBI and of Maxwell’s subsequent “posttraumatic amnesia...a sufficient criterion for diagnosis of traumatic brain injury.” Exh. 3, ¶ 6.

Defense counsel placed all of their investigation in Dr. McPherson’s hands, and then abandoned all oversight. Counsel only met with the family at the courthouse, before they were to testify. Exh. 12. “A lawyer cannot be deemed effective where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing.” Richey v. Bradshaw, 498 F. 3d 344, 362-63 (6th Cir. 2007). Failure to properly prepare an expert is counsel’s fault and is constitutionally deficient. Richey v. Mitchell, 395 F. 3d 660, 683 (6th Cir. 2005). See also 2003 ABA Guidelines 10.7(A).

While the presentation of evidence is a tactical decision, it must still be an informed one. Counsel’s decision to limit investigation must be based on “informed strategic choices made by the defendant and on information supplied by the defendant.” Strickland, 466 U.S. at 691. The paltry amount Dr. McPherson collected “illustrates the utter lack of informed, calculated decision-making on the part of counsel.” State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E. 2d 1061, 1065 (1986).

The roles of the defense team are clearly delineated. In addition to counsel, the team must consist of both an investigator and a mitigation specialist. 2003 ABA Guidelines 4.1(A)(1). Defense counsel is discouraged, if not fully forbidden, from engaging as the primary investigators. Id. Defense counsel relies on the mitigation specialist for elements critical to the penalty phase and particular types of data and information. The mitigation specialist also

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<sup>1</sup>Failure to investigate and present evidence of organic brain damage is argued elsewhere.

ensures that counsel integrates the mitigation into the preparation of the entire case, rather than adding it as a desperate afterthought following a conviction.

Serving dual roles, Dr. McPherson deprived Mr. Maxwell of proper mitigation. Maxwell supports his claim with evidence dehors the record sufficient to indicate ineffective representation resulting in his prejudice. State v. Jackson, 64 Ohio St. 2d 107, 111, 414 N.E. 2d 819, 823 (1980). It is “only *after* a full investigation of *all* the mitigating circumstances that counsel can make an informed, tactical decision about which information would be most helpful to the client’s case.” Johnson, 24 Ohio St. 3d at 90, 494 N.E. 2d at 1064. (Emphasis in original). In this case, that was never done. The Petitioner must be granted a new sentencing hearing, or at a minimum, discovery and an evidentiary hearing on this ground for relief.

### **Ninth Ground for Relief**

Petitioner hereby incorporates by reference all previous paragraphs as if fully rewritten herein.

Maxwell's convictions and sentences are void and/or voidable because he was denied effective assistance of counsel during the trial phase of his capital trial. His constitutional rights, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, were violated. Strickland v. Washington, 466 U.S. 668 (1984). As a result, he was prejudiced.

Maxwell's trial attorneys failed to investigate and present several necessary witnesses in his defense. "Barring exceptional circumstances, counsel should seek out...witnesses having purported knowledge of events surrounding the alleged offense...." American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Commentary for Guideline 10.7. Defense counsel has a duty to make reasonable investigations. Wiggins v. Smith, 539 U.S. 510, 522 (2003).

The State left the jury with the impression that Nichole McCorkle was the target of a madman, and her only fault was loving Charles Maxwell and believing she could change his violent ways. Through one-sided stories and inaccurate witness testimony, it painted a picture of a scared victim who bravely told the truth to the grand jury, despite the pressure from Maxwell to lie and cover up the abuse he inflicted upon her. T.p. 769, 1166. The jury heard that Maxwell pistol-whipped Nichole in the head, causing her to be hospitalized and to receive stitches. Id. at 1663-67. Defense counsel not only failed to present the other side of *this* story, but they did nothing to correct the misperception as a whole left by the State.

The relationship between Maxwell and McCorkle was tumultuous, and Maxwell was *at least* just as much a victim as McCorkle. Maxwell had experienced many injuries at the hands of

McCorkle. For example, on one occasion, Maxwell had to call his mother and sister to take him to the hospital for injuries McCorkle had inflicted upon his penis. See exhs 10, 11, 12. On another occasion, McCorkle threw her plate at Maxwell's head and hit him in the face with it. The impact of the plate broke his glasses. Exh. 8. Another time, McCorkle kicked and punched Maxwell for wanting to go to the home they shared. Exh. 12. And McCorkle had informed Maxwell's mother that she planned on slitting his throat as soon as she finished nursing school. Exh. 11.

Had counsel simply interviewed Maxwell's brother, Andy Maxwell, they would have found out what really happened that day in October 2005. Andy recalled that he saw Charles one day, and Charles had a huge knot on the back of his head. Exh. 7. Andy asked what had happened, and Charles told him that he and Nichole were arguing in the kitchen, and she hit him in the head with a frying pan. Id. Charles admitted he then hit Nichole in the head with a meat tenderizer. Id. That was the night in October when Nichole went to the hospital and got the stitches in her head. Id.

Counsel also should have interviewed La-Tonya Kindell. Kindell is a registered nurse, and she took McCorkle to the hospital at which she worked; then, she assisted the doctors in cleaning McCorkle's scalp. Exh. 8. According to Kindell, "the wound on [McCorkle's] scalp looked like two little holes, like it could have been from a meat tenderizer. Her head was not split open like it would have been if she were pistol-whipped." Id. Kindell's testimony could have rebutted the testimony that McCorkle was pistol-whipped.

The State talked about Maxwell in terms of his "bombardment of Nichole and his threatening of Nichole...." T.p. 1939. It told the jury that Nichole was "tired," "had made other plans," and was "trying to get away from Charles Maxwell." Id. The State painted the picture

of Maxwell as a “stalker,” who despite McCorkle’s supposed rejection of him, he refused to give up and watched her on a date with another man. Id. at 1939-40. But several witnesses were available to confirm that, while this was a tumultuous relationship, it was not Charles the Predator versus Nichole the prey. This was information that the jurors wanted and would have considered. Exh. 15.

Further, Andy Maxwell’s testimony could have put Charles’ behavior in context. Charles was not stalking and spying on a woman who had ended their relationship and tried to move on. Instead, he was caught off-guard by the sight of McCorkle going on a date when they had just slept together two days ago. Exh. 7. They had jointly decided to make the relationship work. Id.

Charles stopped by the house on 146th Street in order to get shoes to wear – not to spy on a woman who no longer wanted him. Id. On his way to the house, Charles called the house phone repeatedly, and it was busy. As the phone finally rang through, and Charles saw Nichole driving away. He followed her to a bar and saw Nichole with a man. Charles became very upset, since he and Nichole had just slept together two days ago, and they had decided to give their relationship another try. Id.

Maxwell’s trial attorneys failed to investigate and present several necessary witnesses in his defense. They failed to correct the misperception left by the State. Maxwell’s constitutional rights, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, were violated. Strickland v. Washington, 466 U.S. 668 (1984). As a result, he was prejudiced.

Maxwell supports this claim with evidence dehors the record that contains sufficient operative facts to demonstrate the lack of competent counsel and the prejudice resulting from counsel’s ineffectiveness. State v. Jackson, 64 Ohio St. 2d 107, 111 (1980). He must be granted a new trial or, at a minimum, discovery and an evidentiary hearing on this ground for relief.

### **Tenth Ground for Relief**

Petitioner Maxwell hereby incorporates all of the allegations contained elsewhere in this Petition as if fully rewritten herein. Maxwell's sentence is void or voidable because his defense team did not provide effective assistance during the mitigation phase of his trial. Insufficient preparation of mitigation witnesses denied Maxwell his guaranteed Sixth and Fourteenth Amendment rights. Strickland v. Washington, 466 U.S. 668 (1994).

Counsel failed to present evidence that Maxwell was a good father and provider. Witnesses with knowledge of these matters testified, but did not talk about them to the jury. T.p. 2115, 2136. In this case, it was particularly important that an accurate portrayal of Maxwell be presented. Such mitigation evidence would have been particularly helpful to the jury.

This Court's findings demonstrate that trial counsel's failure to investigate and ultimately present this evidence prejudiced Petitioner. In the Opinion of the Court Findings of Fact and Conclusions of Law Regarding Imposition of the Death Penalty, Maxwell's level of support is found to be lacking as a mitigating factor. In this Court's opinion, the "evidence did not demonstrate that he was a regular provider for his family, including his daughter Cheyenne and the victim, Nichole McCorkle." Sentencing Op. p. 11. Had counsel investigated and properly prepared the witnesses, the evidence would have demonstrated how well Maxwell provided for his entire family.

Failure to conduct a reasonable investigation and present mitigating evidence amounts to ineffective assistance of counsel. Wiggins v. Smith, 539 U.S. 510 (2003). Counsel cannot make reasonable, informed trial strategy decisions without first conducting a thorough investigation. Hamblin v. Mitchell, 354 F.3d 482, 492 (6<sup>th</sup> Cir. 2003). "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice

among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." Wiggins, 539 U.S. at 525. Evidence existed and witnesses were willing to swear to it. Not presenting such individuals was ineffective assistance.

Without investigating, counsel did not learn that Maxwell's family had testimony to offer about his abilities as a parent. The family had no way of knowing that information was the type of evidence they needed to present at trial. Counsel did not instruct them to provide testimony about Maxwell's good relationship with his and Nichole's children. Had the family known, they could have provided mitigating evidence of Maxwell as a good and regular provider.

Testimony would have revealed how well Maxwell provided for his entire family, and he treated all the children as if they were his own. Exhs. 7, 12. He supported Nichole as though they were married. He paid for her books and materials for nursing school. Exh. 12. Because she was in school and he worked, he paid her utilities and covered living expenses. He paid for a house that Nichole put in her own name. Id. Maxwell gave more than just financial support: he regularly cooked, cleaned, cared for the whole family and even did the shopping. Id.

Maxwell doted on his daughter, Cheyenne. He looked after Nichole's other kids. . . . During breaks from work, he would stop to check in on the kids. Exh. 7. Cheyenne was over a great deal of the time and Charles was happy to be her caregiver. Id.

Maxwell provided for his own family and for Nichole's; he fed and clothed them. Id. He looked after Nichole's son, Derek, trying to guide him. He took Derek to jobsites and taught him to do home repairs, hoping to help him learn a trade and self-reliance. Exh. 11. He even took care of Nichole's father, despite his reluctance to have her father move in with them in the first place. Exh. 7.

Maxwell was very uncomfortable having Nichole's father living in the house with Domonique and Cheyenne because Nichole had told him that her father had sexually abused Nichole and her sisters. Id. Still, Charles agreed to let him move in. To reward him for his generosity, Nichole's father was mean and demanding, and he would do things like wear Charles' underwear. Id. Charles still would buy all kinds of supplies for him that he needed, like medication and gauze wrapping. Id.

Because defense counsel did not investigate and did not prepare the witnesses, they did not present proof that Maxwell supported his family. They spoke well of him but offered no proof. This left this Court and the jury with no mitigating evidence as to what kind of provider Maxwell was. Sentencing Op. p. 11. The evidence would have also humanized Maxwell. The jury could have used it to distance him from the "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). That the evidence existed and counsel neither investigated nor presented it was below the objective standard of reasonable performance. Strickland, 466 U.S. at 688.

Petitioner Maxwell supports this ground with evidence dehors the record sufficient to demonstrate ineffective assistance of counsel. Counsel's failure to instruct witnesses to present mitigating evidence was prejudicial. State v. Jackson, 64 Ohio St.2d 107, 111, 414 N.E.2d 819, 823 (1980). He must be granted a new sentencing hearing, or at a minimum, discovery and an evidentiary hearing on this ground for relief.

### Eleventh Ground for Relief

Petitioner Maxwell hereby incorporates all of the allegations contained elsewhere in this Petition as if fully rewritten herein. Maxwell's sentence is void or voidable because his defense team did not provide him with effective assistance during the mitigation phase of trial. Failure to provide evidence that he held a job amounted to ineffective assistance of counsel and he was accordingly prejudiced. Strickland v. Washington, 466 U.S. 668 (1994).

Defense counsel failed to present adequate evidence of Maxwell's work history. That evidence would have established that he held down regular and structured employment. His attorneys did not render effective assistance of counsel, failing to present this evidence, and compromising his rights guaranteed in the Sixth and Fourteenth Amendments and Article I, § 10 of the Ohio Constitution, C.P. Sup. R. 20 (IV)(D), Strickland, 466 U.S. at 668.

Maxwell's family presented some evidence of his work ethic but the lack of evidentiary support undermined it. The resulting prejudice was that the mitigation fell short both the Court and jury discounted it. This Court expressed admiration for some aspects of Maxwell's life, but discounted them as, "lacking in depth." Id. The defense failed to present enough mitigating evidence in this area to outweigh the aggravating factors. The evidence presented fell so far short that this Court could not cite any evidence of employment; his criticism was that "Mr. Maxwell never held a job of any regular structure or duration." Id. Ultimately, as presented, the "mitigatory factors of Mr. Maxwell's educational attainment and work ethic" were "without significant weight to tilt the scales against the weight of the aggravating circumstance." Id.

A defense is only as strong as the evidence it presents. But offering a mitigating factor without supporting it with available evidence is below the objective standard of performance. The failure to conduct a reasonable investigation and present mitigating evidence has been held

to amount to ineffective assistance of counsel. Wiggins v. Smith, 539 U.S. 510 (2003); State v. Johnson, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986).

“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 690-91. When counsel has not made a thorough investigation of the defendant’s background, failing to find and present mitigating evidence cannot “be justified as a tactical decision.” Wiggins, 539 U.S. 522. Counsel never made a reasonable investigation into the mitigation. Evidence of Maxwell’s work history could have been investigated and presented and would have been entitled to weight in mitigation. State v. Group, 98 Ohio St. 3d 248, 274, 781 N.E. 2d 980, 1006 (2002) “Group’s history as a hard-working family man who has earned the love of those closest to him clearly deserves weight.”

Maxwell’s family members and friends have provided affidavits detailing the extent of his employment. Exh. 7, 14. These affidavits also indicate that trial counsel never made an effort to contact the witnesses. Id. Further evidence of employment would have been admissible and helpful. Considering the allusions that were made to its existence, the witnesses would have offered more had they been so instructed. More investigation would only have strengthened the mitigation. Wiggins, 539 U.S. at 525.

Maxwell’s brother, Andy, testified but did not say anything about his record of employment. Andy knew Charles’ employment history. Andy employed him in his construction business. Exh. 7. Also, he could have provided testimony about his brother working so hard to support McCorkle and the children. Id.

This evidence was important because Charles Maxwell had a reputation in the community as a hard worker. Neighbor Clifford Powers remembered that he knew Charles

always to be working. Exh. 14. He recalled that Maxwell was always working on something and as a result, was always in his work clothes, coming from or going to work. Id. And Maxwell worked to support his children and McCorkle. Exhs. 7, 8, 12, 14.

For the jury to reach an informed decision, it is imperative that defense counsel fully present the mitigating evidence. Without it, the jury's determination lacks reliability. Having been denied critical evidence of Maxwell's background, they did not make an informed decision. The defense team did not even investigate his work history and did not direct their witnesses to provide this information. Exh. 7. The prejudice was evident in this Court's opinion. He indicated that this evidence was not disregarded, but as it was presented, it lacked the weight to change the decision. Sentencing Op. p.11.

Maxwell supports his claim with evidence dehors the record sufficient to indicate ineffective representation resulting in his prejudice. State v. Jackson, 64 Ohio St.2d 107, 111, 414 N.E.2d 819, 823 (1980). He must be granted a new sentencing hearing, or at a minimum, discovery and an evidentiary hearing on this ground for relief.

## Twelfth Ground for Relief

Maxwell incorporates by reference all previous paragraphs as if rewritten fully herein. Maxwell's judgment and sentence are void or voidable because Ohio's post-conviction procedures do not provide an adequate corrective process, in violation of the constitution. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 10, 16, and 20.

In theory, post-conviction offers Maxwell an opportunity to test the constitutional validity of his conviction and sentence. Ohio's post-conviction procedures do not provide an adequate corrective process. An adequate corrective process should be "swift and simple and easily invoked," should "eschew rigid and technical doctrines of forfeiture, waiver, or default," and should "provide for full fact hearings to resolve disputed factual issues." Case v. Nebraska, 381 U.S. 336, 346-47 (1965) (Brennan, J., concurring). See also Evitts, 469 U.S. at 401 ("[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.")

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

The text of the statute provides that a petitioner must include affidavits or evidence dehors the record in support of the claims in a petition. R.C. 2953.21(A). It is from the face of

the petition that a trial court must determine if a hearing is required. State v. Cooperrider, 4 Ohio St. 3d 226, 448 N.E.2d 452 (1984). Therefore, indigent petitioners, like Maxwell, face the insurmountable burden of collecting evidence in support of valid claims prior to the filing of a petition without the means to collect information critical to their claims.

The Supreme Court has determined that a post-conviction action is actually a civil proceeding. State v. Nichols, 11 Ohio St. 3d 40, 42, 463 N.E.2d 375, 377 (1984); State v. Milanovich, 42 Ohio St. 2d 46, 49, 325 N.E.2d 540, 542 (1975). Consequently, the Rules of Civil Procedure should govern an action for post-conviction relief. And without access to traditional civil tools of discovery, Ohio's post-conviction process imposes an impossible pleading standard on petitioners and is rendered meaningless.

Despite its civil status, the outlined procedures for post conviction petitions are contained in the Ohio Criminal Rules of Procedure. Ohio R. Crim. P. 35(A) demands that each ground for relief contained in a post-conviction petition not exceed three pages. Petitioners must effectively plead and support their claims -- again, without discovery -- in a mere three pages.

The Staff Notes to Rule 35 state that the purpose of this limitation is "introduce some uniformity in post-conviction relief proceedings and aid in the administration of justice." Ohio R. Crim. P. 35. Uniformity in the post-conviction process may be a rational goal, but it cannot be achieved at the expense of criminal defendants who are now facing death. If the need for uniformity in post-conviction cases is balanced against the requirement that capital cases be afforded the highest degree of due process, the only acceptable, and constitutionally sound, resolution is to protect due process rights.

The concern over Ohio's inadequate, excessively narrow, and ineffectual post-conviction scheme is shared by the Sixth Circuit Court of Appeals. Keener v. Ridenour, 594 F.2d 581, 590

(6th Cir. 1979). The basis for the Sixth Circuit's dissatisfaction with Ohio's lack of process can be traced to State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). After the Perry decision, the Sixth Circuit immediately recognized that "[b]ecause of the narrow limits placed on the Ohio post-conviction statute, there is no longer any effective State remedy open to the Appellant to exhaust. The Perry decision has rendered such process ineffective to protect the rights of the Appellant." Coley v. Alvis, 381 F.2d 870, 872 (6th Cir. 1967).

Ohio established a post-conviction procedure to effectuate constitutional rights for those sentenced to death. This procedure includes the right of appellate review. Assuming *arguendo* that these procedures do not emanate directly from clear constitutional provisions, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause." Evitts v. Lucey, 469 U.S. 387, 401 (1985). This is all the more so when a petitioner's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998). Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Ohio's procedures for post-conviction review must comport with the constitutional requirements of due process.

Maxwell is entitled to an adequate post-conviction remedy in order to vindicate his Ohio and Federal constitutional rights to effective assistance of counsel, due process of law, equal protection of the law, confrontation of the State's evidence against him, and freedom from cruel and unusual punishment. Due to the unconstitutionality of Ohio's post-conviction procedures, Maxwell must be granted a new trial or, at minimum, discovery and an evidentiary hearing.

#### IV. CONCLUSION

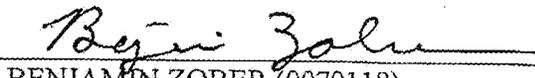
**WHEREFORE**, Petitioner Charles Maxwell requests the following relief:

- A. That this Court declare Charles Maxwell's judgment to be void or voidable and grant him a new trial;
- B. In the alternative, that this Court declare Charles Maxwell's death sentence to be void or voidable and grant him a new sentencing hearing before a jury;
- C. If this Court is not inclined to grant Charles Maxwell relief based on the matters raised in this petition and supported by the attached exhibits, then he requests that this Court grant him leave to pursue discovery to more fully develop the factual basis demonstrating the constitutional violations that render his conviction and death sentence void or voidable;
- D. If this Court is not inclined to grant Charles Maxwell relief based on the matters raised in this post-conviction petition and supported by the attached exhibits, then he requests that, after permitting him to pursue discovery, that this Court conduct an evidentiary hearing pursuant to Ohio Revised Code Ann. § 2953.21;
- E. That this Court grant any further relief to which Charles Maxwell might be entitled.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER

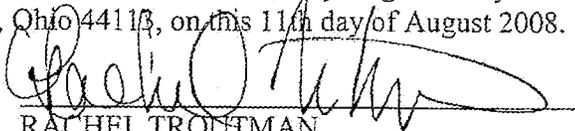
  
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **POST CONVICTION PETITION** was forwarded by first-class, postage prepaid U.S. Mail to Bill Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario, Cleveland, Ohio 44113, on this 11<sup>th</sup> day of August 2008.

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

RACHEL TROUTMAN  
COUNSEL FOR PETITIONER