

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. :  
 :  
 JERRY LAWSON, :  
 :  
 Defendant-Appellant. :

14-1692

Case No.

CAPITAL CASE

ON APPEAL FROM THE COURT OF APPEALS, TWELFTH  
APPELLATE DISTRICT, CLERMONT COUNTY, OHIO, CA 2013-12-093

APPELLANT JERRY LAWSON'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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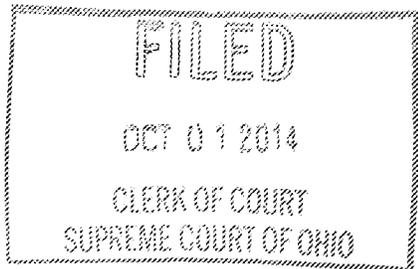
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**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS**

Three eyewitnesses saw the fatal shooting of Tim Martin: Jerry Lawson (“Lawson”), his brother Tim Lawson, and Billy Payton. The State called Tim Lawson, who was originally capitally charged, but received a substantial reduction for his testimony. In fact, Tim Lawson is now a free person having completed his reduced sentence.

During the course of his federal habeas case, Lawson learned for the first time of significant evidence that was in the possession of the prosecution that impeached Tim Lawson’s testimony. Tim Lawson testified at trial that his brother Jerry was the source of the firearm that was used to fatally shoot the victim. [T.p. 204-05, 261-62, 274]. The prosecution at the time of trial had in its possession information that Tim Lawson provided the murder weapon. [Td. 511, Exhibit 6, p. 3; Exhibit 23; Fed. Hrg. Tr. 364-67]. Tim Lawson testified that Jerry Lawson was the only individual who physically abused Martin after he was shot, but prior to his death. [T.p. 258]. The prosecution had in its possession, at the time of trial, information that impeached that testimony. Both Lawsons physically abused Martin after he was shot but prior to his death.

Neither side called Jerry Payton. Trial counsel for Jerry Lawson testified that despite their best efforts they were unable to locate Payton to interview him and decide if his testimony would be helpful. During the course of his federal habeas proceedings, Lawson learned for the first time the reasons that counsel was unable to locate Payton. The State had hidden Payton. The then-elected Prosecutor and former Assistant Prosecutor Andrews instructed Payton not to speak with anyone, including defense counsel. [Fed. Hrg. Tr. 696]. Payton heeded their advice. [Fed. Hrg. Tr. 697]. An outstanding felony warrant existed for Payton. [T.d. 511, Exhibits 10 and 11]. The prosecutor misled the court to preclude Payton’s arrest. [Fed. Hrg. Tr. 543-47; T.d. 511, Exhibits 10 and 11]. At one point, the State moved Payton to a hotel. [Fed. Hrg. Tr. 714]. Deputy Sheriffs

transported Payton to and from the courthouse on the days that he appeared for trial. [Fed. Hrg. Tr. 703, 705]. On those days, the prosecution kept Payton in a back room where he could not be accessed by defense counsel. [*Id.* at Tr. 697]. During the federal habeas proceedings, Lawson learned for the first time that Payton had helpful testimony. On September 26, 1987 Billy Payton told FBI Special Agent Larry Watson that he had witnessed the murder of Martin. [T.p. 346-47]. Payton reported that Tim Lawson provided the murder weapon to Jerry Lawson. Payton told the Special Agent that Payton lived for approximately one hour after being shot, during which both Lawsons repeatedly kicked and interrogated Martin about his activities as an informant. [T.d. 511, Exhibit 8, p. 3; Exhibit 17, pp. 52-54; Exhibits 23-24; Fed. Hrg. Tr. 364-67, 376-382].

Lawson returned to state court to pursue his federal constitutional violations, which he first learned of during federal discovery. The trial court denied Lawson's post-conviction petition without affording Lawson any factual development in the form of either a hearing or discovery. The trial court applied the standard contained in R.C. 2953.21 to deny Lawson relief, a standard that it almost impossible to meet, regardless of the seriousness of the constitutional violations.

This appeal presents this Court with three important issues. First, whether the substantive issues contained in Lawson's petition including the State's suppression of evidence and knowing use of false testimony warrant the granting of relief? Second, what evidence should a trial court require a death sentenced post-conviction to submit, to warrant the granting of discovery and/or an evidentiary hearing to prove the allegations contained in his petition? Third, does the State of Ohio successor post-conviction statute provide a petitioner due process, which provides that a petitioner cannot even proceed, let alone prevail, 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?

## STATEMENT OF THE CASE

### **A. Trial and Sentencing Phase Proceedings**

On October 6, 1987, the Clermont County Grand Jury indicted Lawson Jerry R. Lawson (“Lawson”) on two counts of aggravated murder, an unscheduled felony in violation of R.C. § 2903.01(A). Count One alleged that Lawson purposely, as a part of a course of criminal conduct, and with prior calculation and design, caused the death of Timothy Martin. Count Two alleged that Lawson purposely, as a part of a course of criminal conduct, caused the death of Timothy Martin while committing the felony of kidnapping and aggravated robbery. Both counts one and two carried five specifications, including three capital specifications and one firearm specification. The grand jury also indicted Lawson on three counts of kidnapping, all with accompanying firearm and serious physical harm specifications; one count of aggravated robbery, two counts of intimidation (one regarding Timothy Martin and one regarding Billy Payton); one count each of gross abuse of a corpse and aggravated burglary.

On March 23, 1988 the trial court commenced jury selection. At the conclusion of the State’s case, the State dismissed Specification 3 to counts one and two -- that the aggravated murder was committed during the commission of aggravated robbery; count 4 – one of the kidnapping counts; and count 6 -- aggravated robbery. The trial court granted Lawson’s Rule 29 motion as to count 9, Gross Abuse of a Corpse.

On April 28, 1986 the trial court commence the sentencing phase. On the same date the jury returned a recommendation of death.

On May 13, 1988, the trial court filed its opinion and sentence. It accepted the jury’s finding that aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt, and sentenced Lawson to death. Additionally, the trial court sentenced Lawson to 10 to

25 years on counts three and five – both kidnapping counts; four to ten years on the intimidation count; two years on the second intimidation count; and 10 to 25 years on the aggravated burglary count. The trial court sentenced Lawson to an actual three year period of imprisonment for the firearm specification. It ordered that all sentences run consecutively.

**B. Direct Appeal Proceedings**

Lawson timely appealed his convictions and sentences to the Twelfth Appellate District. He raised fifteen assignments of error. On June 4, 1990, the Twelfth District Court of Appeals affirmed Lawson's convictions and sentence of death. *State v. Lawson*, No. CA 88-05-044, 1990 WL 73845 (Clermont App. June 4, 1990).

On July 20, 1990, Lawson filed a timely notice of appeal to this Court. He raised twelve propositions therein. On August 12, 1992, this Court affirmed Lawson's convictions and sentence of death. *State v. Lawson*, 64 Ohio St.3d 336, 595 N.E.2d 902 (1992). On September 30, 1992 this Court denied Lawson's motion for rehearing. *State v. Lawson*, 65 Ohio St.3d 1421, 598 N.E.2d 1172 (1992).

On December 26, 1992, Lawson filed his Petition for Writ of Certiorari with the United States Supreme Court. He raised two issues in that petition. On March 29, 1993, the United States Supreme Court denied Lawson's Petition for Writ of Certiorari. *Lawson v. Ohio*, 507 U.S. 1007, 113 S. Ct. 1563, 123 L. Ed. 2d 273(1993).

**C. First Post-conviction Proceedings**

On December 15, 1993, Lawson filed his initial post-conviction petition with the trial court. He raised forty-claims for relief that he supported with twenty-nine exhibits. The trial court dismissed Lawson's post-conviction petition without affording him an evidentiary hearing or discovery. *State v. Lawson*, Clermont C.P. No. 87CR5488 (June 9, 1984).

On July 11, 1994, Lawson timely appealed the trial court's denial of his petition to the Twelfth Appellate District. He raised six assignments of error. On May 8, 1995 the Court of Appeals affirmed the judgment of the trial court. *State v. Lawson*, 103 Ohio App.3d 307. 659 N.E.2d 362 (1995).

Lawson appealed that decision to this Court. He raised five Propositions of Law. On October 4, 1995, this Court declined to exercise its discretionary jurisdiction to hear the appeal. *State v. Lawson*, 74 Ohio St.3d 1404, 655 N.E.2d 184(1995). On November 15, 1995, this Court denied Lawson's Motion for Reconsideration. *State v. Lawson*, 74 Ohio St.3d 1459, 659 N.E.2d 953 (1995).

**D. First Federal Habeas Corpus Proceeding**

On May 10, 1996, Lawson filed his initial habeas petition with the Federal Court, Southern District of Ohio, *Lawson v. Warden*, S.D. No. 96-CV-163. On August 1, 1996, Lawson filed his amended federal habeas petition. He raised forty-eight claims for relief.

The Federal District Court granted Lawson discovery and an evidentiary hearing. On March 29, 2002, it granted sentencing phase relief. *Lawson v. Warden*, 197 F. Supp.2d 1072 (S.D. Ohio 2002).

The Warden appealed and Lawson cross-appealed to the Sixth Circuit. *Lawson v. Warden*, Sixth Cir. Case Nos. 02-3413, and 02-3483. On August 13, 2003, the Sixth Circuit ordered that the appeals be held in abeyance pending Lawson's exhaustion of his state court remedies. *Lawson v. Warden*, Case Nos. 02-3413, and 02-3483 (Order).

**E. Second Post-Conviction Proceedings (*Atkins* proceedings).**

On June 6, 2003, Lawson filed his Second Post-Conviction Petition with the trial court. Exhibit 2. He raised four causes of action, all of which related to his intellectual disability and

pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). On March 12, 2004, Lawson amended his petition to include a Fifth Cause of Action.

The trial court granted summary judgment in favor of the State as to all but the Second Cause of Action. *State v. Lawson*, Clermont C.P. No. 87CR5488 (June 7, 2004). The trial court, after conducting an evidentiary hearing, denied relief as to the Second Cause of Action. *State v. Lawson*, Clermont C.P. No. 87CR5488 (Nov. 7, 2007).

Lawson timely appealed to the Twelfth District Court of Appeals. He raised three assignments of error in his appeal to that court. On November 24, 2008, the appellate court affirmed the judgment of the trial court. *State v. Lawson*, 12<sup>th</sup> Dist. CA2007-12-116, 2008-Ohio-6066.

On January 1, 2009, Lawson timely filed his appeal to this Court from the decision of the court of appeals. Lawson raised three propositions of law. On December 16, 2009, this Court declined to accept jurisdiction to hear the appeal. *State v. Lawson*, 123 Ohio St.3d 1523, 2009-Ohio-6487.

#### **F. Second Federal Habeas Proceedings**

On February 3, 2010 the Sixth Circuit Court of Appeals remanded Lawson's case to the District Court for consideration of his mental retardation claim. *Lawson v. Warden*, 6th Cir. Case Nos. 02-3413/02-3483 (Feb. 3, 2010).

On February 24, 2010, Lawson filed his supplemental habeas petition with the District Court. On January 25, 2011, Lawson filed a stipulation dismissing the petition. *Lawson v. Warden*, S.D. Ohio S.D. No. 96-CV-163 (Jan. 25, 2011).

### **G. Third Post-Conviction Proceedings**

On August 19, 2003, Lawson filed his third post-conviction petition with the trial court. He raised therein one ground for relief. The court summarily dismissed Lawson's post-conviction petition. *State v. Lawson*, Clermont County Clermont C.P. No. 87CR5488 (July 11, 2011)

Lawson timely filed his notice of appeal to the Clermont County Court of Appeals. [Doc. No. 503]. Lawson raised three assignments of error. On February 13, 2012, the Court of Appeals affirmed the decision of the trial court. *State v. Lawson*, 12th Dist. No. CA2011-07-056, 2012-Ohio-548.

On March 29, 2012, Lawson timely appealed to this Court. *State v. Lawson*, Ohio Supreme Court Case No. 12-0519. He raised three propositions of law. On May 8, 2013, this Court declined to exercise its discretionary jurisdiction to hear Lawson's appeal. *State v. Lawson*, 135 Ohio St.3d 1431, 2013-Ohio-1857, 986 N.E.2d 1021 (Pfeifer, J., dissenting). On July 24, 2013, this Court denied Lawson's motion for reconsideration. *State v. Lawson*, 136 Ohio St.3d 1453, 2013-Ohio-3210, 991 N.E.2d 259 (2013).

### **H. Fourth Post-Conviction Proceedings**

On April 4, 2013, Lawson filed his post-conviction petition, which he supported with twenty-six exhibits and the transcript from his eight day federal hearing. The trial court summarily denied Lawson's post-conviction petition. *State v. Lawson*, Clermont C.P. No. 87CR5488 (Nov. 14, 2013)

On December 13, 2013, Appellant timely filed his notice appeal from the trial court's November 14, 2013 Decision/Entry. He raised three assignments of error in that appeal. On

August 18, 2014, the Twelfth Appellate District affirmed the judgment of the trial court. *State v. Lawson*, 12th Dist. No. CA2013-12-093, 2014-Ohio-3554.

## STATEMENT OF THE FACTS

### Background

On January 13, 1987, and again on June 1, 1987 the residence of Cheryl and Dan Titus was burglarized. [T.p. 47, 49, 55]. In early spring 1987, Tim Martin began working as an informant for Detective Harvey of the Clermont County Sheriff's Department. [T.p. 94, 126]. Martin informed the Detective that Tim Lawson had committed the burglaries of the Titus residence. [T.p. 94].

On August 6, 1987, the Clermont County Grand Jury indicted Tim Lawson for the two separate the burglaries of the Titus residence. [T.p. 173]. Tim Lawson fled to Kentucky where he was arrested. [T.p. 167-68]. Upon his return to the State of Ohio, Tim Lawson made bond and was released pending his trial. [T.p. 151].

### The Offense

Tim Lawson became aware that Martin had provided the information that led to his indictment. [T.p. 160]. Tim Lawson made a series of statements to law enforcement authorities threatening to kill Martin. [T.d. 511, Exhibits 4 and 5].

On September 26, 1987, Billy Payton told FBI Special Agent Larry Watson that he had witnessed the murder of Martin. [T.p. 346-47]. At the time Payton had charges pending against him in the Clermont County Court. [12/31/87 T.p. 13]. Payton advised the Special Agent that Jerry Lawson drove Tim Lawson, Martin, and himself to a rural area in Highland County. Payton reported that during the trip Tim Lawson provided a gun to Jerry Lawson. Payton said that Jerry Lawson shot Martin. Payton further reported that Martin lived for approximately one hour after

being shot, during which both Lawsons repeatedly kicked and interrogated Martin about his activities as an informant. [T.d. 511, Exhibit 8, p. 3; Exhibit 17, pp. 52-54; Exhibits 23-24; Fed. Hrg. Tr. 364-67, 376-382].

### **The Pretrial Proceedings**

The Clermont County Grand Jury indicted Jerry Lawson and his brother for the capital murder of Martin, and indicted Jerry Lawson for the burglaries of the Titus resident. [T.p. 31-32].

Prior to trial, Assistant Prosecutor Breyer interviewed Payton. [T.d. 511, Exhibit 6]. Payton told him that Tim Lawson, as well as Jerry Lawson, questioned Martin after he was shot and laying on the ground. [*Id.*]. In addition, Payton told the Assistant Prosecutor that Jerry Lawson at the time of the shooting was acting like a “mad man” and that he was on a “natural high.” Then- elected Prosecutor George Pattison and former Assistant Prosecutor Andrews instructed Payton not to speak with anyone including defense counsel. [Fed. Hrg. Tr. 696]. Payton heeded their advice. [*Id.* at 697]. Assistant Prosecutor Breyer informed the court that it would not turn over Payton’s pretrial statements unless he testified. [12/8/87 Tr. 1].

Clermont County Common Pleas Court Judge Walker determined that there was an active felony case in which the defendant was listed as “Billy Payton.” [T.d. 511, Exhibit 10]. On December 14, 1987, the then-elected Prosecutor advised Judge Walker that the defendant in that case this was not the same individual as the “Billy Payton” who was scheduled to testify in Jerry Lawson’s case. [*Id.*]. Judge Walker subsequently informed the Prosecutor that he (the prosecutor) had misrepresented the facts and that the Payton for whom there was a pending criminal case was the same Payton who was to testify against Jerry Lawson. [T.d. 511, Exhibit 11; Fed. Hrg. Tr. 543-47].

The prosecution conducted several practice sessions with Payton to prepare him to testify. The prosecutors told Payton how to testify concerning Appellant's state of mind at the time of the murder. [Fed. Hrg. Tr. 575-79]. The prosecutors at these practice sessions became upset with Payton when he did not give the answers that they had instructed him to give. [*Id.* at 577, 695].

Tim Lawson, prior to the commencement of Jerry Lawson's trial, entered into a plea bargain in which he pled guilty to the lesser charge of murder. [Tr. 268]. He received a sentence of fifteen years to life. He has now been released from prison and is no longer on parole.

### The Trial

The State called Tim Lawson to testify in its case in chief. His testimony contradicted many of the specifics contained in Payton's initial statements to Special Agent Watson and subsequent statements to the prosecutors. Tim Lawson claimed to have been present for the shooting, but denied any involvement in the shooting or assault of Martin. He testified that he had no knowledge of the murder weapon prior to Appellant shooting Martin. [T.p.. 253]. The prosecution did not call Payton to testify at trial. While the State subpoenaed him, it placed him in a backroom where he could not be accessed by defense counsel. [T.d. 511, Fed. Hrg. Tr. 703-705].

The defense went forward with an insanity defense. [T.p. 601-662]. The State called Dr. Roger Fisher to rebut the defense. [T.p. 948-62]. The prosecution provided Doctor Fisher information from which to form his opinion. That information did not include the statements of Billy Payton. [Fed. Hrg. Tr. 604-09, 615-18]. Dr. Fisher has since acknowledged that the withheld Payton information would have made a difference as to his opinion, especially with respect to the sentencing phase. [*Id.* at 690].

### The Mitigation Phase

Defense counsel did not present any evidence that Lawson has a damaged brain. [T.d. 511, Fed. Hrg. Tr. 1217-18]. He does not have a normal brain. [*Id.* at p. 1219]. Furthermore, counsel did not provide any expert testimony that Lawson suffered from delusional and paranoid personality disorders. [Fed. Hrg. Tr. 807-808, 894].

### Post Trial

On July 28, 1988, the Scioto County Probate Court ordered, at the request of the state officials, that Lawson be hospitalized because his mental illness caused him to be a substantial risk of physical harm to himself and others. [T.d. 511, Exhibit 12]. He was subsequently again hospitalized for his mental illnesses. [T.d. 511, Exhibit 15]. For almost the entire twenty-six years since the trial court sentenced him to death, Appellant has been heavily medicated with drugs including Thorazine. [T.d. 511, Exhibit 13A-T]. He has been consistently diagnosed him as having a serious mental illness. [T.d. 511, Exhibit 13, D, F, G; Exhibit 20 A-M].

### **PROPOSITION OF LAW NO. I**

When a recent decision of the United States Supreme Court requires a post-conviction petitioner to file a second post-conviction petition, the petitioner, does not need to prove by clear and convincing evidence pursuant to R.C. 2929.53(A) that no reasonable fact finder would have found him guilty of the offense for which the petitioner has been convicted or eligible for a sentence of death.

On May 10, 1996, Lawson filed his habeas petition with the Federal District Court, Southern District of Ohio. *Lawson v. Warden*, S.D. Ohio No. 96-cv-163. On August 1, 1996, the Lawson filed an amended habeas petition. The parties conducted extensive discovery after which the court conducted an eight day evidentiary hearing.<sup>1</sup> At the conclusion of the evidentiary

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<sup>1</sup> Lawson filed portions of the transcripts from the federal hearing in support of his post-conviction petition.

hearing, the district court granted Lawson sentencing relief on a distinct portion of his ineffectiveness claim. *Lawson v. Warden*, 197 F. Supp.2d 1072 (S.D. Ohio). The Warden appealed and Lawson cross-appealed to the Sixth Circuit. *Lawson v. Warden*, Sixth Cir. Case Nos. 02-3413/02-3483.

On April 4, 2011, while Lawson's case was pending in the Sixth Circuit, the United States Supreme Court for the first time, declared that under most circumstances a federal court when it addresses claims contained in a habeas petition can no longer consider evidence that had not been presented to the state courts. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401, 179 L. Ed. 2d 557 (2011). On February 26, 2013, the United States Court of Appeals for the Sixth Circuit declared that the holding in *Pinholster* extended to those cases in which the warden consented to the consideration of the evidence not presented to the state court. *Moore v. Mitchell*, 708 F.3d 760, 780-784 (6th Cir. 2013).

The holdings in *Pinholster* and *Moore* significantly impacted Lawson's federal habeas case. The parties engaged in extensive discovery in the District Court after which had conducted an eight day evidentiary hearing. Pursuant to *Pinholster* and *Moore*, the Sixth Circuit is now precluded from considering most if not all of the evidence developed in the District Court. *Fitzpatrick v. Robinson*, 723 F.3d 624, 633 (6th Cir. 2013) ("Thus, even if a Appellant was granted an evidentiary hearing pursuant to § 2254(e), the federal court must disregard newly obtained evidence that supports a claim that was previously adjudicated on the merits before the state court.") (quoting *Hanna v. Ishee*, 694 F.3d 596, 606 (6th Cir. 2013)).

Lawson filed his most recent post-conviction petition to present that evidence that *Pinholster*, *Moore*, and *Fitzpatrick* barred the federal courts from considering until he had presented it to the state courts. Almost all of the evidence that Lawson employed to support his

recent petition consisted of the transcript from and the exhibits admitted at the federal evidentiary hearing.

Pursuant to Ohio's statutory post-conviction scheme, for a trial court to have jurisdiction over a second post-conviction, a post-conviction petitioner must demonstrate either that his petition is premised upon a new constitutional right that has been held to apply retroactively or that a factual predicate could not have been previously discovered with reasonable diligence *and* by clear and convincing proof that no reasonable fact finder would have found him guilty or eligible to receive the death penalty. R.C. 2953.23(A)(1). The trial court found that Lawson had failed to satisfy the statutory prerequisite.

This Court previously has addressed R.C. 2953.23(A), *albeit* in the context of mental retardation claims. *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, ¶¶ 13-17. This Court held that in light of the ground breaking decision of the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304, 321 122 S. Ct. 2242 153 L. Ed. 335 (1992) the clear and convincing standard contained in R.C. 2953.23(A)(2) was not applicable to claims of mental retardation raised in second post-conviction petitions. *Id.* at ¶ 17.<sup>2</sup>

Lawson's filing of his most recent post-conviction petition was necessitated by the ground-breaking decision of the United States Supreme Court in *Pinholster*. The trial court, pursuant to *Lott*, should have should not have required Lawson to meet the clear and convincing standard contained in R.C. 2953.23(A)(2)

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

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<sup>2</sup>Since this Court decided *Lott*, the Ohio Legislature amended R.C. 2953.23. Pursuant to that amendment, the former R.C. 2953.23(A)(2) is now R.C. 2953.23(A)(1)(b).

## PROPOSITION OF LAW NO. II

A trial court must grant a post-conviction petitioner relief or an evidentiary hearing when he has made a prima facie showing of the existence of one or more a constitutional violation(s) that render(s) his conviction and sentences void or voidable.

Lawson raised sixteen distinct constitutional violations in his most recent post-conviction petition. [T.d. 510, pp. 52-97]. He supported those sixteen grounds for relief with twenty-six exhibits, most of which had previously been admitted at the federal evidentiary hearing, as well as the transcripts from that hearing. The trial court erred and abused its discretion when it denied Lawson relief on each of the grounds for relief raised in his post-conviction petition.

The trial court erred regardless of the standard of proof that it applied. The trial court should applied a simple preponderance of the evidence standard. The clear and convincing standard contained in R.C. 2929.53 is inapplicable. *See* Proposition of Law No. I, *supra*. If applicable, then standard of proof was unconstitutional. *See* Proposition of Law No. III, *infra*. Even if the clear and convincing standard is applicable and constitutional, for the reasons set forth in this proposition of law, Lawson satisfied the high burden of proof.

**First Ground for Relief: Petitioner's convictions and sentences 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, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

A state appellate procedure or rule must give a plaintiff a fair and reasonable opportunity to identify all relevant claims, and to have those claims heard and decided. *Michel v. Louisiana*, 350 U.S. 91, 93, 76 S. Ct. 158, 100 L. Ed. 83 (1955); *Parker v. Illinois*, 333 U.S. 571, 574, 68 S. Ct. 708, 92 L. Ed. 886 (1948). The right to object to a federal constitution violation presupposes a reasonable opportunity to exercise that right. *Reece v. Georgia*, 350 U.S. 85, 89, 76 S. C. 167, 100 L. Ed. 77 (1955).

In *Case v. Nebraska*, 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 422 (1965), Justice Brennan, in a concurring opinion, outlined the basics for a state post-conviction system, as to when the system's procedural defaults would be honored by the federal courts:

These are similar to other suggestions of desirable attributes of a state post-conviction procedure which should reduce the necessity for exercise of federal habeas corpus jurisdiction. The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay v. Noia*, *supra*, it should eschew rigid and technical doctrines of forfeiture, waiver, or default. See *Douglas v. Alabama*, 380 U.S. 415, 422-423, 13 L.Ed.2d 934, 938, 939, 85 S. Ct. 1074; *Henry v. Mississippi*, *supra*. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. *Townsend v. Sain*, *supra*. It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts. Provision for counsel to represent prisoners, as in § 4 of the Nebraska Act, would enhance the probability of effective presentation and a proper disposition of prisoners' claims.

*Id.* at 346-347.

In capital proceedings, fact-finding procedures must meet a heightened standard of reliability. *Spaziano v. Florida*, 468 U.S. 447, 456, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 491 L. Ed. 2d 944 (1976) (plurality opinion). In competency to be executed proceedings, at a minimum, states are required to provide the following to the accused: 1) the opportunity to present evidence; 2) the opportunity to challenge or impeach the state's evidence; and 3) a decision-maker who is neutral, detached and not a member of the executive branch of government. *Ford v. Wainwright*, 477 U.S. 399, 412-417, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (plurality). A procedure providing less due process does not suffice to determine if the accused had been properly convicted or sentenced to death.

Ohio's post-conviction statutes, like many other state collateral review laws, were passed in response to the United States Supreme Court's decision in *Case v. Nebraska*. In 1965 the State of Ohio had no "adequate corrective process." The only collateral remedy, state habeas corpus, was extremely limited for purposes of pursuing constitutional rights. See *Knox v. Maxwell*, 277 F. Supp. 593, 596-597 (N.D. Ohio 1967). Put on notice by *Case* that something more than state habeas was constitutionally required, Ohio's lawmakers, in 1965, passed the Ohio Post-Conviction Act. The post-conviction statute written by the legislature provided a broad collateral remedy. R.C. 2953.21 allowed a prisoner to file a post-conviction petition in the trial court claiming "a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States. . . ." The trial court was obligated to grant an evidentiary hearing on the post-conviction claims unless the record of the case and the petition demonstrated that there was no right to relief. R.C. 2953.21(E).

The Ohio Post-Conviction Act opened the door to state collateral review. The statute as written did not erect procedural bars to post-conviction actions. Any claims which could not previously have been raised and decided could be brought in state post-conviction proceedings:

*Common sense would seem to dictate that post-conviction remedies exist to try fundamental issues of constitutional guarantees that have not been tried before. Ordinary principles of finality of judgments must apply to all questions which have been completely litigated.*

*Laugesen v. State*, 11 Ohio Misc. 10, 13, 227 N.E.2d 663 (1967) (emphasis added).

Two years after passage of the Post-Conviction Act, this Court announced a drastically restricted interpretation of the Act. *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). This Court therein determined that the doctrine of *res judicata* was applicable to post-conviction actions, no claim could be brought in a post-conviction action if it could have been raised at trial or on direct appeal:

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

*Id.* paragraph nine of the syllabus (emphasis supplied).

This Court's already interpretation of the post-conviction remedy was further restricted in subsequent years. In *State v. Nichols*, 11 Ohio St.3d 40, 463 N.E.2d 375 (1984) This Court held that Ohio's delayed appeal procedures were not applicable in a post-conviction appeal.

Little opportunity exists for factual development in the post-conviction process in the State of Ohio. An individual seeking post-conviction relief is not entitled to an evidentiary hearing until he produces sufficient documentation in the form of evidence from outside the record to demonstrate that he is entitled to relief. *State v. Kapper*, 5 Ohio St.3d 36, 38, 448 N.E.2d 823 (1983); *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982); *State v. Jackson*, 64 Ohio St.2d 107, 110-112, 413 N.E.2d 819 (1980). However, a post-conviction petitioner is not entitled to conduct discovery to obtain the necessary documentation to warrant a hearing until such time as he demonstrates that a hearing is necessary. *State v. Smith*, 30 Ohio App.3d 138, 140, 506 N.E.2d 1205 (9th Dist. 1986). Thus, post-conviction petitioners are caught in the classic "Catch 22" situation. They cannot obtain a hearing until they submit sufficient evidence of the existence of a constitutional violation, yet they cannot utilize the means to gather the proof (discovery) until they submit sufficient proof of the constitutional violations. This paradox has become the reality of Ohio's post-conviction practice.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Second Ground For Relief: Petitioner Is Currently Incompetent And Therefore These Proceedings Cannot Go Forward Until His Competency Is Restored Or Any Judgment Rendered Herein Will Be Infirm.** Fifth, Sixth, Eighth and Fourteenth Amendments, Art. I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

Lawson received a full scale IQ score of 73 on the most recent test administered to him. [MR T.p. 37, 190]. When that score is adjusted for the Flynn effect, it is below a 69. [MR T.p. 246, 308]. Lawson consistently has performed at elementary school level on the Wide Range Achievement Test. [Exhibit 14].

Lawson suffers from diffuse and global brain damage. [Fed. Hrg. Tr. 1220-1223, 1227; Exhibit 22]. His brain is inefficient; he cannot sustain attention, and performs worse when under stress. [*Id.* at Tr. 1222, 1226]. He also suffers from a delusional personality disorder that affects the manner in which he perceives his environment and himself. [*Id.* at Tr. 807-808].

Since May 1998, Lawson has been in the custody of the Ohio Department of Rehabilitation and Correction. During that time period the prison officials have: 1) twice transferred him to the psychiatric unit at the Oakwood Correctional Facility [Exhibits 12 and 15]; 2) at other times housed him in the mental health unit at the Mansfield Correctional Institutional [Exhibit 16]; 3) consistently diagnosed him as having a serious mental illness [Exhibits 13 D, F and G; 19 and 20 A-M]; and 4) prescribed anti-psychotic medications for almost the entire time period that he has been in the custody of the Department of Correction and Rehabilitation. [Exhibits 13 A-T and 19].

This Court has concluded that a post-conviction petitioner must be competent to waive his post-conviction proceedings. *State v. Berry*, 80 Ohio St.3d 371, 383, 686 N.E.2d 1097 (1997). If a petitioner must be competent to waive his post-conviction remedy, then it stands to reason that he must be competent to pursue his post-conviction remedy. This logic is consistent with the holdings from courts in other states. *Carter v. State*, 706 So.2d 873, 876 (Fla.1998);

*State v. Debra, A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727, 735-36 (Wis. 1994); *People v. Owens*, 139 Ill. 2d 351, 564 N.E.2d 1184, 1190, 151 Ill. Dec. 522 (Ill. 1990).

Lawson has proffered sufficient evidence to raise a prima facie case as to his current competency. This Court should establish a procedure to address Lawson's competency, and then remand the matter so that the trial court can conduct a competency evaluation pursuant to that procedure. This Court should hold these proceedings in abeyance pending resolution of the competency issue.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Third Ground for Relief: Petitioner's convictions and sentences are void or voidable because he was incompetent at the time of the pretrial, trial and sentencing proceedings.** U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

During all phases of his trial, Lawson lacked the ability to consult with his lawyer with a reasonable degree of understanding and did not have a rational and factual understanding of the proceedings against him.

Lawson incorporates the information set forth in the Second Ground for Relief as to his IQ, academic performance, brain impairment, and delusional personality disorder,

In the month prior to trial, Lawson exhibited delusional behavior. [Fed, Hrg. Tr. 457, 525]. He spoke in low tones because he believed that persons were listening in on his conversations. [1/25/88 Tr. 6]. Lawson believed that there was a contract on his life and that a sniper would shoot him with a high powered rifle while he was in the county jail. [3/9/88 Tr. 21].

Lawson did not comprehend the proceedings in the courtroom. When the trial court asked him if he consented to the closing of the courtroom and waived his right to a public trial, he

incoherently responded, “My wish at this point is to go and waive that right for public to go on the view.” [Tr. 190].

In the months immediately subsequent to his sentencing, the physicians at the Southern Correctional Facility prescribed Visatrial, Stelzaine, and Cogentin for Lawson due to his mental illnesses. [Exhibit 13H]. One year later, the doctors augmented these medications with Thorazine. [Exhibit 18]. Two months after the court sentenced Lawson to death, the Scioto County Common Pleas Court ordered that Lawson be transferred from Ohio’s Death Row to the Oakwood Forensic Center. [Exhibit 12]. Since his incarceration, the State’s mental health professionals have consistently diagnosed him as suffering from a serious mental illness. [Exhibits 13 D, F, G and 20 A-M].

“Fundamental to our adversarial system of justice is the due process right of a criminal defendant who is legally incompetent not to be subjected to trial.” *State v. Berry*, 72 Ohio St.3d 354, 359, 650 N.E.2d 433 (1995) citing *Pate v. Robinson* 383 U.S. 375, 86 S.Ct. 836, 15 L. Ed. 2d 215 (1966) and *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L. Ed. 103 (1975). In *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L. Ed. 824 (1960) the United States Supreme Court defined the test for competence to stand trial as whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of understanding and whether he has a rational as well as factual understanding of the proceedings against him.” *See also, State v. Were*, 94 Ohio St.3d 173, 174, 761 N.E.2d 591 (2002). Where the result of forcing the incompetent accused to trial is the imposition of the sentence of death upon him, the Eighth Amendment right against cruel and unusual punishment is violated, as well as the Fourteenth Amendment right to due process of law.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Fourth And Fifth Grounds For Relief: Petitioner's Convictions And Death Sentence Are Constitutionally Infirm Because He Did Not Have The Benefit Of Reasonable And Necessary Experts At Trial.** Fifth, Sixth, Eighth and Fourteenth Amendments, Art. I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution

For purposes of this pleading, Lawson combines the Fourth and Fifth Grounds for Relief because they both involve the failure to receive the assistance of qualified and competent experts.

**A. Lawson did not receive the benefit of the services of a competent psychologist.**

Defense counsel, during the trial phase, called Dr. John Lutz to testify with respect to the Lawson's insanity. [T.p. 601]. Because Dr. Lutz is a psychiatrist, as opposed to a psychologist, he is not qualified to conduct psychological testing.

If defense counsel would have had the benefit of a competent psychological evaluation, as opposed to a psychiatric evaluation, for purposes of the trial phase, they could have presented empirical evidence that Lawson's scores on psychological testing are consistent with: 1) brain impairment [Fed. Hrg. Tr. 753, 756-757, 767, 782]; 2) very limited intellectual functioning [*Id.* at Tr. 753-54]; 3) memory impairment [*Id.* at Tr. 776-77]; 4) limited level of adaptive skills [*Id.* at Tr. 771]; 5) impulsivity and concreteness of thought [*Id.* at 773-74]; 6) depression [*Id.* at 775-776]; 7) an individual who lets issues and emotions build up inside him and cannot control those emotions when they come to the surface [*Id.* at Tr. 774-75]; 8) delusions that are persecutory in nature [*Id.* at Tr. 774-75]; and 9) a reading comprehension level of 3.9 grade [*Id.* at Tr. 1185].<sup>3</sup>

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<sup>3</sup> The trial court did appoint a psychologist to assist counsel. However, for the reasons articulated in the Fourth and Fifth Grounds, that expert failed to perform competently.

If defense counsel had the benefit of a competent psychological evaluation, they could have presented to the jury the evidence, in the trial and mitigation phases, that Lawson's: 1) test scores were a red flag or an indicator that he may be brain damaged. [Fed. Hrg. Tr. 753-54, 756-57, 767, 771, 782]; 2) behavior was affected by his paranoia and his ability to conduct abstract thinking. [*Id.* at Tr. 894]; 3) mental illnesses included anti-social, borderline, delusional and dependency personality disorders and dysthymia. [*Id.* at Tr. 791, 807]; 4) drug usage affected his personal development and functioning including brain damage and his impulsiveness. [*Id.* at Tr. 809-8116]; and 5) consumption of alcohol and marijuana on the day of the offense reduced his already limited ability to control his impulses. [*Id.* at Tr. 818, 912-13].

**B. Lawson did not receive the benefit of the services of a competent neuropsychologist.**

Lawson's scores on the IQ testing and the Wechsler Memory Test [*Id.* at 1182-84 and Exhibit 22]; and his history of substance abuse [*Id.* at Tr. 1225, 1257, 1276-77] were red flags as to his brain impairment. However, the mental health professionals at trial failed to recommend and defense counsel failed to identify the need for a neuropsychological assessment of Lawson.

Lawson, on the Halstead-Reitan battery of tests, received scores that were above the baseline scores for brain impairment. [Fed. Hrg. Tr. 1195-99, 1203-06, 1211-16, Exhibit 22]. All four levels of inference from the his neuropsychological testing indicate that he suffers from brain damage. [Fed. Hrg. Tr. 1217-19]. Lawson's brain damage is diffuse and global. [*Id.* at Tr. 1220-23, 1227]. His brain is inefficient; he cannot sustain attention and he performs worse when under stress. [*Id.* at Tr. 1222, 1226]. That damage existed as the time of the offense. [*Id.* at Tr. 1228].

Lawson's brain damage and the resulting impact upon him fits within R.C. 2029.04(B)(3) as a mitigating factor. [*Id.* at Tr. 1223]. Because of his brain damage, he is a

follower and not a leader. [*Id.* at Tr. 1224]. He is a concrete thinker. [*Id.* at Tr. 1245-46], and he has difficulty switching sets. [*Id.* at Tr. 1245-46].

**C. The denial of psychological and neuropsychological services violated the Eighth and Fourteenth Amendments.**

When an indigent criminal defendant demonstrates that his sanity will likely be a significant factor at trial, the state "must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense at trial." *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). This holding has been expanded to other types of assistance, including psychologists, mental health experts, pathologists, hypnotists, and experts on the battered woman's syndrome. *Terry v. Rees*, 985 F.2d 283, 284-85 (6th Cir. 1993) (independent pathologist); *Starr v. Lockhart*, 23 F.3d 1280, 1290 (8th Cir. 1994) (mental health expert); *Little v. Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987) (hypnotist).

The right to the appointment of an expert subsumes the right to appointment of a qualified expert who will perform the appropriate testing. *Starr v. Lockhart*, 23 F.3d 1280, 1289 (8<sup>th</sup> Cir. 1994). A psychological or psychiatric expert for the defense must: (1) aid the defendant in determining whether a defense based upon mental condition is warranted and, if so, the type of defense and strategy that is appropriate under the circumstances; (2) assist the defendant in coherently presenting to the jury his mental illness, as well as his mental history, and explain to the jury how his mental condition affected his involvement in the offense(s); and (3) help prepare the cross-examination of psychiatric experts who testify against the defendant. *United States v. Fazzini*, 871 F.2d 635, 637 (7th Cir. 1989).

The right to the appointment of a competent mental health expert extends to cases, such as the present one, where the defendant's mental process is a significant issue during the penalty

phase. *Powell v. Collins*, 332 F.3d 376, 395 (6<sup>th</sup> Cir. 2003); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1104 (6th Cir. 1990); *Glenn v. Tate*, 71 F.3d 1204, 1206-08 (6th Cir. 1995). The defendant's interest in a fair adjudication at this stage of the proceedings is most compelling, and the state's interest in assuring "that its ultimate sanction is not erroneously imposed" is likewise profound. *Ake*, 470 U.S. at 84. "[W]here the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and assistance in preparation at the sentencing phase." *Id.* at 69.

Lawson did not have the benefit of competent psychological and neuropsychological experts. The experts appointed did not perform competently, and counsel did not seek nor did the court did not appoint a neuropsychologist.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Sixth, Seventh And Eighth Grounds For Relief: Petitioner's Convictions And Sentences Are Void Or Voidable Because The Trial Prosecutors Suppressed Exculpatory Evidence.** Fifth, Sixth, Eighth and Fourteenth Amendments, Art. I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution

Lawson combines the Sixth, Seventh and Eighth Grounds for Relief because they all involve the same constitutional error, the state's pretrial and trial suppression of favorable, material evidence.

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). Favorable evidence for *Brady* purposes includes both exculpatory and impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *United States v. Bagley* (1985), 473 U.S. 667, 676, 105 S. C. 3375, 87 L. Ed. 2d 481. The prosecution's duty of

disclosure extends to evidence that rebuts or contradicts its theory of the case. *D'Ambrosio v. Bagley*, (6th Cir. 2008), 527 F.3d 489, 498; *Leka v. Portuondo* (2nd Cir. 2001), 257 F.3d 89.

The state proceeded at trial on the theory that the victim, because he was afraid of Lawson, was lured by Billy Payton into going to a rural area of Highland County. The state's theory encompassed the fact that Lawson on his own brought the murder weapon to the crime scene. Finally, the State's theory suggested that Lawson, after he shot the victim, but prior to the victim's death, single handedly kicked and beat the victim while interrogating him about his prior as an informant some of which involved Lawson's family.

**A. The State's theory: the Paytons were actively involved in the initial plan to assault the victim**

The State's case and theory that Billy Payton was involved in the initial luring of the victim was totally dependent upon the testimony of Lawson's brother, Tim Lawson. However, the State possessed, but did not provide, information that would have impeached this portion of the State's theory and Tim Lawson's testimony:

1. Tim Lawson testified that Billy Payton was either asleep or not at the residence of Sue Payton when Jerry and Tim Lawson first arrived at Sue Payton's residence. [T.p. 199, 233 ]. The prosecution, at the time of trial, possessed information that contradicted this testimony. [Exhibit 6, p. 2, Exhibit 7, 23, 24, Fed. Hrg. Tr. 337-341].
2. Tim Lawson testified that Jerry Lawson, the Paytons and he sat at the Paytons' kitchen table and concocted a plan to lure Martin to the residence of Sue Payton where he could be transported to a rural area and beaten. [T.p. 200-02, 222, 235-245]. The prosecution at the time of trial possessed information that contradicted this testimony. Neither Sue Payton nor Billy Payton told the investigating officers about a meeting at the kitchen table. [Exhibits 6, 7, 8, 9 23, 24] nor did Billy Payton testify to this allegation at the federal evidentiary hearing. [Fed. Hrg. Tr. 308-391, 550-581, 694-705, 706-711, 711-714, 714-15].
3. Tim Lawson testified that the use of subterfuge was necessary to lure the victim to Sue Payton's residence because the victim was afraid of Jerry Lawson and would have been extremely reluctant to enter a vehicle that Jerry Lawson was driving. It was for this reason, Tim Lawson testified, that Billy and Sue Payton drove Martin

to Sue Payton's residence. [T.p. 200, 202-03, 222, 242, 246, 252]. The prosecution at time of trial possessed information that contradicted this portion of Tim Lawson's testimony. The victim initially appeared at Desiree Payton's residence in Jerry Lawson's vehicle, which Jerry Lawson was operating. [Exhibit 6, p. 2; Exhibit 7, p. 3; Exhibit 8, p. 2; Exhibit 23; Exhibit 24; Fed. Hrg. Tr. 350-51].

4. Tim Lawson testified that Billy Payton arranged for the meeting with the victim by telephoning the victim and telling him that Sue Payton was again romantically interested in him and there was a pot field in a rural area of the county that they should visit. [T.p. 202-03, 241-42, 282]. Tim Lawson further testified that Sue and Billy Payton then went to Martin's residence and transported him back to Desiree Payton's residence. [T.p. 252]. The prosecution at time of trial possessed information that contradicted this portion of Tim Lawson's testimony. [Exhibit 6, pp. 2-3]. Billy Payton called the victim, but the victim was not home. [Fed. Hrg. Tr. 348]. Whoever answered the telephone informed Billy Payton that the victim had gone walking. [*Id.* at Tr. 349]. Jerry and Tim Lawson, not the Paytons then located Martin on his walk and brought him to the residence of Billy Payton's sister. [Exhibit 7, p. 3; Exhibit 8, p. 2; Exhibit 23; Exhibit 24; Fed. Hrg. Tr. 349-51].
5. Tim Lawson testified that the Paytons, when they arrived with Martin in tow at Desiree Payton's residence, were working with Jerry and Tim Lawson to lure Martin into a rural area where they would beat him. [T.p. 202-03, 241-44]. The prosecution at the time of trial possessed information that contradicted this testimony. The Paytons tried to avoid the Lawsons instead of conspiring with them. [Exhibit 8, p. 2, Exhibit 24]. Special Agent Watson told Billy Payton to avoid the Lawsons. [Fed. Hrg. Tr. 354]. Sue and Billy Payton left Sue Payton's residence and went to their sister Desiree's residence to avoid the Lawson brothers. [*Id.* at Tr. 354].

**B. The State's theory: Lawson was solely responsible for the murder weapon.**

The State told the jury that Jerry Lawson alone was responsible for the murder weapon. This portion of the State's case was again totally dependent upon the testimony of Tim Lawson. However, the State possessed, but did not provide information in discovery, that would have impeached this portion of the State's theory and Tim Lawson's testimony:

1. Tim Lawson testified that Jerry Lawson was the source of the firearm that was used to fatally shoot the victim. [T.p. 204-05, 261-62, 274]. The prosecution at the time of trial had in its possession information that Tim Lawson provided the murder weapon. [Exhibit 6, p. 3; Exhibit 23; Fed. Hrg. Tr. 364-67].

2. Tim Lawson testified that he (Tim Lawson) was unaware that Jerry Lawson possessed a firearm until he witnessed Jerry Lawson shoot Martin. [T.p. 204-05, 261-62, 274]. The prosecution had in its possession at the time of trial information that Tim Lawson was aware that Lawson possessed a gun prior to the shooting. [Exhibit 6, p. 3 Fed. Hrg. Tr. 364-67].

**C. The State's theory: Jerry Lawson was the only individual who assaulted the victim after the shooting.**

The State told the jury that only Jerry Lawson beat and kicked the victim after he was shot and lay on the ground. However, the State possessed, but did not provide, information that would have impeached this portion of the State's theory and Tim Lawson's testimony:

1. Tim Lawson testified that Jerry Lawson was the only individual who physically abused Martin after he was shot, but prior to his death. [T.p. 258]. The prosecution had in its possession at the time of trial information that impeached that testimony. Both Lawsons physically abused Martin at the crime scene. [Exhibit 8, p. 3, Exhibit 24; Fed. Hrg. Tr. 376-82].
2. Tim Lawson testified that Jerry Lawson was the only individual who interrogated Martin after he was shot, but prior to his death. [T.p. 211-16, 257]. The prosecution had in its possession at the time of trial information that impeached that testimony. Both Lawsons interrogated Martin after he was shot. [Exhibit 8, p. 3, Fed. Hrg. Tr. 376-82].
3. Tim Lawson testified that Martin had volunteered that he would tell the authorities that someone else shot him if the Lawsons would take him to the hospital for treatment for his gunshot wound. [T.p. 214]. The prosecution had in its possession at the time of trial information that impeached that testimony. Both Lawsons told Martin that they would take him to the hospital if he told them everything that they wanted to know. [Exhibit 8, p. 3].

In addition, the prosecution at the time of trial possessed the following favorable information that it did not provide defense counsel in discovery: a) Billy Payton had a pending felony charge [Exhibit 6, p. 1; Exhibits 10-11]; b) Billy Payton, the victim, and the Lawsons were smoking marijuana on the car ride to the crime scene [Exhibit 6, p. 3]; c) Jerry Lawson was "driving in circles" for purposes of disorienting the victim [Exhibit 8, p. 3]; d) Jerry Lawson got "a natural high" and acted like crazy man when he shot the victim [Exhibit 6, p. 5]; e) Greg Hall

had vowed to harm the victim [Exhibit 25]; f) the deputies had intercepted conversations between Lawson and his attorneys [Exhibit 9]; and g) Tim Lawson had made repeated threats to kill the victim. [Exhibits 4 and 5].

The prosecution did not provide defense counsel with Exhibits 4-9, 8, 9-11 23-25 or the contents of those exhibits prior to or during trial nor did the prosecution provide the information contained in Billy Payton's testimony at the federal evidentiary hearing and cited herein. [Fed. Hrg. Tr. 413, 428, 429, 431, 445, 448-49, 451].

Constitutional error results when the favorable evidence suppressed by the government results in "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 682. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" [*Id.* at 434]; *see also Strickler v. Greene*, 527 U.S. 263, 264, 119 S. Ct. 1936, 144 L. E.2d 286 (1999).

The jury did not hear that: 1) Tim Lawson had made several threats to kill the victim [Exhibits 4 and 5]; 2) Tim Lawson's description of the events prior to the trip to the crime scene was highly suspect [Exhibit 6, pp. 2-3, Exhibits 7, 8, 23-24; Fed. Hrg. Tr. 308-391]; 3) Tim Lawson provided the murder weapon [Exhibit 6, p. 3; Exhibit 23; Fed. Hrg. 364-67]; 4) Tim Lawson was an active participant in the assault and questioning of the victim while he lay dying [Exhibit 8, p. 3; Exhibit 23; Exhibit 24; Fed Hrg. Tr. 376-82] and 5) Jerry Lawson was acting in a mentally deranged manner at the time of the shooting [Exhibit 6, p. 5].

The suppressed information was both favorable and material with respect to the trial phase because it debunked the State's theory that this was a well thought out plan concocted by Jerry Lawson, who was allegedly acting rationally at the time of the shooting. Furthermore, the suppressed information impeached the State's crucial and only eyewitness who received a significant reduction in the charges against him in exchange for his testimony. The State's suppression of material, favorable evidence affected trial counsel's strategy. [Fed. Hrg. Tr. 386, 413-49, 615-18, 823-27]. If the State had disclosed the evidence identified in the Sixth through Eighth Grounds for Relief, prior to trial or even during trial, defense counsel would have been able to undermine much of the State's theory of the case that: 1) Jerry Lawson took it upon himself to kill the victim Tim Martin, 2) Tim Lawson was not involved in the procuring of the murder weapon, and 3) Tim Lawson was not involved in the beating and questioning of the victim between the time that he was shot and eventually died. [*Id.*]. A reasonable probability exists that if the jury had heard the evidence, it would not have found Jerry Lawson guilty of capital murder.

The information was also favorable and material for purposes of sentencing. It highlighted Jerry Lawson's state of mind at the time of the offense, and also showed that he was not the only person with significant culpability in the fatal shooting. Finally, the suppressed evidence demonstrated the inappropriateness of Jerry Lawson's death sentence, given the much lighter sentence that the co-defendant received. In the sentencing phase of the trial, Jerry Lawson relied on the theory that he suffered from mental illness, was of limited intelligence, and was easily manipulated. The suppressed evidence would have linked the mitigation theories to Lawson's involvement in the fatal shooting. [Fed. Hrg. Tr. 615-21, 689-90, 821-27]. A

reasonable probability exists that if the jury had heard the evidence, it would not have found Lawson guilty of capital murder.

Collectively, the depth and breadth of this suppressed evidence undermines the confidence in the verdicts. Had the State not suppressed all of the information identified in the Sixth through Eighth Grounds for Relief, a reasonable probability exists that the outcome in the trial and sentencing phases would have been different.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Ninth Ground for Relief: Petitioner's convictions and sentences are void and/or voidable because of the prosecutorial misconduct that occurred prior to and during his trial. The misconduct violated Lawson's right to due process and the effective assistance of counsel. U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.**

Billy Payton was present at the shooting of the victim, Tim Martin. [Fed. Hrg. Tr. 362-392]. He was not called to testify by either party at trial. Trial counsel perceived that he was important witness because he was the only eyewitness to the shooting who had not been charged. [*Id.* at Tr. 411, 506-07]. While the State listed Billy Payton as a potential witness in the pretrial discovery [11/2/87, Tr. 2], it did not provide his address to trial counsel. [Fed. Hrg. Tr. 449].

During the pretrial proceedings, Clermont County Corrections Officer Deputy B. Jacobson intercepted a conversation between defense counsel and Lawson. [Exhibit 9]. Deputy Jacobson heard trial counsel discussing the need to identify and interview the third person present at the crime scene (Payton). [*Id.*]. Deputy Jacobson forward that information to the then elected Prosecutor. [Fed. Hrg. Tr. 432].

The State successfully engaged in a concerted effort to preclude defense counsel from interviewing Payton:

1. Then elected Prosecutor George Pattison and former Assistant Prosecutor Andrews told Payton not to speak with anyone including defense counsel. [Fed. Hrg. Tr. 696]. Payton heeded their advice and did not speak with anyone. [Fed. Hrg. Tr. 697]. At one point prior to trial Attorney Woliver saw Payton in the hallway in the courthouse. [Fed. Hrg. Tr. 696]. Payton refused to speak with Attorney Woliver per the instructions provided by Pattison and Andrews. [*Id.* at Tr. 697, Exhibit 26].
2. There was an outstanding felony warrant for Payton. [Exhibits 10 and 11]. The prosecutor misled the court to avoid Payton being arrested, which would have made him available for interview by defense counsel. [Fed. Hrg. Tr. 543-47; Exhibits 10 and 11].
3. At one point, the State moved Payton to a hotel. [Fed. Hrg. Tr. 714].
4. Prior to trial the State served Payton with a subpoena to require his attendance. [Fed. Hrg. Tr. 704]. Deputy Sheriffs transported him to and from the courthouse on the three days that he appeared for trial. [Fed. Hrg. Tr. 703, 705]. On those days, the prosecution kept Payton in a back room where he could not be accessed by defense counsel. [*Id.* at Tr. 697].

The United States Supreme Court stated the following with respect to a prosecutor's obligations to be fair:

He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuating, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

*Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)

The prosecutor's advising Payton not to speak with defense counsel constituted additional misconduct. It is illegal for a prosecution to advise its witness not to speak with

defense counsel. *Workman v. Bell*, 178 F.3d 759, 772 (6th Cir. 1998); *United States v. Troutman*, 814 F.2d 1428, 1453 (10th Cir. 1987); *Kines v. Butterworth*, 669 F.2d 6, 9 (11th Cir. 1981).<sup>4</sup>

The State's misconduct is not harmless error. The information that Payton possessed and his potential testimony would have impeached the State's theory of the case and key witness, Tim Lawsons *See* Sixth and Seventh Grounds for Relief, *supra*.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Tenth Ground For Relief: Petitioner's Convictions And Sentences Are Void Or Voidable Because They Are Based On The Knowing Presentation Of Perjured Testimony And Inaccurate Argument.** Fifth, Sixth, Eighth and Fourteenth Amendments, Art. I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

The State's case was dependent upon a single witness, Tim Lawson. The prosecution knowingly permitted its key witness to give inaccurate and perjured testimony without correcting the same:

1. Tim Lawson testified in response to the questions of the prosecution that Jerry Lawson had made threats to kill Martin prior to the day of the murder. [T.p. 213, 218-19, 226]. The prosecution knew that Tim Lawson had made repeated threats to kill Martin and Deputy Harvey. [Exhibits 4 and 5].
2. Tim Lawson testified in response to questions posed by the prosecution that Petitioner, Jerry Payton, Sue Payton, and he had concocted a plan to lure the victim to a rural area for purposes of administering a physical beating to him. [T.p. 199-203]. The prosecution knew this testimony was false and inaccurate. Jerry Payton did not speak with the victim on the telephone and the Paytons had not been active participants in the plan to assault the victim. [Fed. Hrg. Tr. 348-51, 354, Exhibit 7, p. 3; Exhibit 8, p. 2; Exhibit 24].
3. Tim Lawson, in response to the prosecution's questions, testified that Jerry Lawson was the source of the firearm that was used to fatally shoot the victim and he (Tim Lawson) did not know that Jerry Lawson was carrying a firearm on the day of the murder. [T.p. 204-05]. The prosecution knew this information was false

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<sup>4</sup> In his third petition, Petitioner raised the issue of the state's interception of his privileged communications. Petitioner herein raises a different issue, the prosecution's interference of Petitioner's access to Payton, by advising him not to speak with defense counsel.

and inaccurate. Tim Lawson provide the murder weapon to Petitioner. [Exhibit 6, p. 3; Exhibit 23; Fed. Hrg. Tr. 364-67].

4. Tim Lawson testified in response to the defense counsel's questions that Jerry Lawson was the only individual who physically abused the victim after he was shot but prior to his death. [T.p. 258]. At the time that Tim Lawson provided this testimony, the prosecution knew that this testimony was false. [Exhibit 8, p. 3, Exhibit 23; Exhibit 24; Fed. Hrg. Tr. 376-77].
5. Tim Lawson testified in response to the prosecution's questions that Jerry Lawson was the only individual who interrogated the victim prior to his death. [T.p. 211-16]. At that time the prosecution adduced this testimony, it knew that his information was false. Both Lawsons interrogated the victim after he was shot. [Exhibit 8, p. 3, Fed. Hrg. Tr. 378].

Billy Payton has testified that he provided the prosecution prior to trial with all of the information later contained in testimony at the federal hearing. [Fed. Hrg. Tr. 564, 570, 573, 580-81, 706]. In addition, the prosecution had in his possession Exhibits 6-9, 23-25, prior to and during trial. [Exhibit 17, pp. 25, 33-34, 54-56, 65]. Payton's statements and these exhibits provided the prosecution with notice that Tim Lawson's testimony was false.

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 (1975). False argument from the prosecution also invokes the fundamental notion that abhors 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). *See also Miller v. Pate*, 386 U.S. 1, 79, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967) *Pyle v. Kansas*, 317 U.S. 213, 215-16, 63 S. Ct. 177, 87 L. Ed. 214 (1942).

Where a prosecutor knowingly fails to disclose that testimony and argument used to convict a defendant was false, a strict standard of materiality is applied. Reversal is required if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. at 103. The United States Supreme Court has treated "'reasonable likelihood' as synonymous with 'reasonable possibility' and thus ha[s] equated

materiality in the perjured testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt.” *Strickler v. Greene*, 527 U.S. 263, 299, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (citing to *United States v. Bagley*, 473 U.S. 667, 678-80, 105 S. Ct. 3375, 87 L. Ed. 2d 481(1985)).

There is a reasonable likelihood that the cumulative effect of the false testimony would have affected the judgment of the jury. Tim Lawson’s testimony was critical to the State’s case. If the jury had found his testimony incredible, it would not have found Jerry Lawson guilty of capital murder, or in the alternative, would have recommended a sentence of less than death.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Eleventh Ground for Relief: Petitioner’s convictions and sentences are void and/or voidable because the state’s expert, Roger Fisher, provided incomplete and inaccurate information during the trial phase. This testimony was the product of prosecutorial misconduct.** U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

During the trial phase, the State of Ohio called Dr. Roger Fisher to testify. [T.p. 948-962]. He testified that Lawson knew right from wrong and was not insane at the time of the offense. [T.p. 953]. On cross examination he provided very limited testimony, but concluded that Lawson was immature and dependent [T.p. 957] and was of limited intelligence [T.p. 962].

The State failed to provide Dr. Fisher with all of the information that he needed to render a competent opinion concerning Lawson. Dr. Fisher relied upon the prosecution to provide him with all of the information to reach an accurate diagnosis. [Fed. Hrg. Tr. 604]. The prosecution did not provide DR. Fisher with all of the requisite information, including Payton’s pretrial statements. [*Id.* at Tr. 605-06, 609, 615-18]. Dr. Fisher has now concluded that the prosecution’s

failure to provide him with all of the necessary information would have made a difference with respect to his diagnosis. [*Id.* at Tr. 690].

Dr. Fisher, had he been provided with all of the requisite information concerning the offense and Lawson and had he been asked appropriate questions, would have testified as to the following information, Lawson: 1) suffered from substance abuse [Fed. Hrg. Tr. 622-23]; 2) had an IQ in the low 70's, but that his cores were inflated due to the practice effect [*Id.* at 632-33]; 3) bragged to mask his limitations [*Id.* at Tr. 641]; 3) suffered from a delusional disorder [*Id.* at Tr. 642-43]; 4) suffered from borderline personality disorder and was likely to fall apart when he was under stress [*Id.* at Tr. 645, 646, 663]; 5) was highly prone to suggestion [*Id.* at Tr. 647, 648]; and 6) suffers from dysthymia, an Axis I diagnosis. [*Id.* at Tr. 662].

The State, by providing Dr. Fisher with incomplete information, not only guaranteed that Dr. Fisher's testimony would be inaccurate with respect to the trial phase, but also insured that he would not be called as a witness by Lawson in the sentencing phase.

The State by providing Dr. Fisher with incomplete testimony, knew the testimony that it adduced from him was both incomplete and false. *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1975), *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). A reasonable likelihood exists that Dr. Fisher's false and incomplete testimony affected the jury's verdicts in the trial and sentencing phases. In the alternative, the prosecution's misconduct deprived Lawson of a fair trial.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Twelfth Ground For Relief: Petitioner's Convictions Are Void Or Voidable Because Defense Counsel Did Not Provide Him With Effective Assistance Of Counsel In The Trial Phase.** Fifth, Sixth, Eighth and Fourteenth Amendments, Art. I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution

A defendant is entitled to the effective assistance of counsel in a criminal case. The courts apply a two-part test when resolving an ineffectiveness claim:

First, the Defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the Defendant by the Sixth Amendment. Second, the Defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable.

*Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To determine whether defense counsel's performance was deficient, a court must first determine whether counsel's representation of the defendant fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688. "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 689. To determine prejudice, a court must assess whether there is a reasonable probability that the outcome would have been different, but for counsel's errors. *Id.* at 695.

Defense counsel did not file a motion to have Lawson evaluated for purposes of his competency to stand trial. This was despite the fact Lawson's competency was a "matter of concern" for defense counsel. [Fed. Hrg. Tr. 402]. The record contained several red flags as to his incompetency. [1/25/88 Tr. 6, 3/9/88 Tr. 21]. The failure to file a meritorious competency motion constitutes ineffective assistance of counsel. *Williamson v. Ward*, 110 F.3d 1508, 1516, 1520 (10<sup>th</sup> Cir. 1997); *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994).

Defense counsel failed to file a motion to suppress Petitioner's custodial statement to Detective Stemen. Lawson has brain damage, suffers from severe mental illnesses, and is of very

limited intellect. See Propositions of Law Nos. 4 and 5, *supra*. The failure to file a meritorious motion to suppress constitutes ineffective assistance of counsel. *Northop v. Trippett*, 265 F.3d 372, 383 (6<sup>th</sup> Cir. 2001); *Tice v. Johnson*, 647 F.3d 87, 106-07 (4th Cir. 2011).

Defense counsel is charged with conducting a reasonable pretrial investigation. *Sims vs. 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. Defense counsel "shall conduct a prompt investigation of the circumstances of the case and explore all avenues leading to finding relevant to the merits of the case. . . ." ABA Standards for Criminal Justice 4-4.1(a)(3rd ed. 1993). At a minimum, a reasonable pretrial investigation includes interviewing the state's witnesses, as well as identifying and interviewing potential defense witnesses. *Workman v. Tate*, 957 F.2d 1339, 1345-46 (6th Cir. 1992); *Blackburn v. Foltz*, 828 F.2d 1177, 1182-83 (6th Cir. 1987). Counsel failed to conduct a reasonable investigation in the following respects:

1. Interview Billy Payton who would have provided testimony that impeached Tim Lawson's testimony concerning the facts leading up to the murder and during the course of the murder. [Exhibits: 6, 8-9, 23, 24; Fed. Hrg. Tr. 308-91, 413-31, 438-51, 550-81, 615-18, 823-27, 694-715, 823-24]. See Propositions of Nos. 6 and 7, *supra*. At least part of counsel's failure to conduct a reasonable investigation with respect to Billy Payton is attributable to misconduct by the prosecution. See Propositions of Law Nos. 6 to 9, *supra*. The failure to interview an eyewitness can constitute ineffective assistance of counsel. *Lord v. Wright*, 184 F.3d 1083, 1095 (9<sup>th</sup> Cir. 1999); *Towns v. Smith*, 395 F.3d 251, 259 (6th Cir. 2005).
2. Conduct a reasonable investigation with respect to Tim Lawson. He had previously made threats to kill the victim. [Petition Exhibits 4 and 5]. Some or all of counsel's failure to conduct a reasonable investigation as to Tim Lawson is attributable to prosecutorial misconduct. See Propositions of Law Nos. 6 to 9, *supra*. The failure to investigate the State's key witness can constitute ineffective assistance of counsel. *Workman*, 957 F.2d at 1345; *Williams v. Washington*, 59 F.3d 673, 681 (7th Cir. 1995); *Tucker v. Ozmint*, 350 F.3d 433, 444 (4th Cir. 2003).

3. Interview Dr. Fisher, one of the experts who testified for the State. [Fed. Hrg. Tr. 614, 618, 1092]. As a result, defense counsel was unable to prepare an effective cross examination of the expert. [*Id.* at Tr. 621-22, 1092]. The failure to interview a state's expert can constitute ineffective assistance of counsel. *Driscoll v. Delo*, 71 F.3d 701, 709 (8th Cir. 1995); *Baylor v. Estelle*, 94 F.3d 1321, 1324 (9th Cir. 1996).
4. Failed to retain a competent psychologist for purposes of the trial phase. Dr. Lutz, because he was a psychiatrist, as opposed to a psychologist, could not administer any psychological tests to Lawson. See Proposition of Law No. 4, *supra*. The failure to retain a competent expert can constitute ineffective assistance of counsel. *Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007).

Defense counsel's duty to the defendant extends to the state and defense presentations of evidence. Defense counsel failed in that regard when they:

1. Unreasonably failed to object to improper evidence and procedure. "One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review." (2003 ABA Guideline 10.8 (citation omitted)). Defense counsel failed to object to the admission of the portion of the recording in which Lawson stated that he had previously killed another individual. [Fed. Hrg. Tr. 1094-96]. They also failed to object to hearsay testimony that was inadmissible pursuant to the rules of evidence and Confrontation Clauses of the Ohio and federal Constitutions. See Proposition of Fifteenth Ground for Relief, *infra*. Trial counsel's failure to object to admissible evidence constitutes deficient performance. *White v. McAninch*, 235 F.3d 988, 999 (6th Cir. 2000); *Washington v. Hofbauer*, 228 F.3d 689, 707-08 (6th Cir. 2000).
2. During the direct examination of Doctor Lutz, defense counsel stated that they did not understand the expert's testimony. [Fed. Hrg. Tr. 1078-79]. Furthermore, defense counsel did not prepare the expert to testify as evidenced by the expert's inability to answer some of trial counsel's questions. [*Id.* at 1079]. The failure to adequately prepare an expert witness to testify can constitute ineffective assistance of counsel. *Combs v. Coyle*, 205 F.3d 269, 287-88 (6th Cir. 2000); *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000).

There is a reasonable probability that if trial counsel's performance had met the prevailing standards of practice, the jury would not have found Lawson guilty of capital murder.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Thirteenth Ground for Relief: Petitioner's sentences are void and/or voidable because he was denied the effective assistance of counsel during the mitigation stage.** U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

To prevail on an ineffective assistance of counsel claim, a defendant must meet a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by that performance. *Id.* This test applies to the sentencing phase of a capital case. *Id.* at 686.

#### **A. Defense Counsel Performed Unreasonably in the Mitigation Phase**

The first prong of the *Strickland* test requires that a defendant identify those acts and omissions of trial counsel that constituted deficient or unreasonable performance. *Id.* at 690. The prevailing norms of practice for defense counsel serve as a basis to determine whether counsel's actions were deficient or unreasonable. *Id.* at 688.

Counsel must conduct a full and complete investigation of the defendant's life. When a defendant faces the prospect of being sentenced to death, the need to conduct a reasonable investigation is magnified. *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); Conducting "a partial, but ultimately incomplete, mitigation investigation does not satisfy *Strickland's* requests." *Dickerson v. Bagley*, 453 F.3d 690, 695 (6th Cir. 2006); *see also, Rompilla v. Beard*, 545 U.S. 374, 381, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (counsel was ineffective despite having consulted with three mental health experts and interviewed five family members); *Mason v. Mitchell*, 320 F.3d 604, 619-620, 622 (6th Cir. 2003) (case remanded for an evidentiary hearing on ineffectiveness claim even though defense counsel called seven witnesses, introduced twelve exhibits documenting Petitioner's life, reviewed three thousand pages of records, and consulted with mental health experts).

Counsel failed to conduct the required reasonable investigation in this case with respect to the following particulars, showing that counsel did not:

1. Commence the mitigation investigation in a timely manner. [Fed. Hrg. Tr. 1085-86]. *Williams v. Taylor*, 529 U.S. 362, 395, 120 S. Ct. 1495, 146 L. Ed. 206 (1999); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995).
2. Investigate the facts surrounding the offense. *See* Propositions of Law Nos. 6 to 8, *supra*. Counsel could have linked the facts of the case to Petitioner's deficits. *Smith v. Mullin*, 379 F.3d 919, 943 (10<sup>th</sup> Cir, 2004); *Hooks v. Workman*, 689 F.3d 1148, 1204-05 (10th Cir. 2012).
3. Interview Doctor Fisher. [Fed. Hrg. Tr. 1092, 1107]. *See* Proposition of Law No. 11, , *supra. Rompilla*, 545 U.S. at 392.
4. Request funding to retain a neuropsychologist and as a result failed to present evidence that Lawson suffered from brain impairment. [Fed. Hrg. Tr. 1114]. *See* Fifth Ground for Relief, *supra. Sears v. Upton*, 130 S. Ct. 3259, 3262-63, 177 L. Ed. 2d 1025 (2010); *Porter v. McCollum*, 558 U.S. 30, 36, 41, S. Ct. 447, 175 L. Ed. 2d 398 (2009).
5. Retain a competent psychologist who would have performed an adequate psychological evaluation for purposes of the sentencing phase. *See* Proposition of Law No. 4, *supra. Skaggs v. Parker*, 235 F.3d 261, 273 (6<sup>th</sup> Cir. 2000); *Mason v. Mitchell*, 320 F.3d 604, 627 (6<sup>th</sup> Cir. 2003).

#### **B. Counsel's Deficit Performance Prejudiced Petitioner**

In order for counsel's inadequate or deficient performance to constitute a Sixth Amendment violation, Lawson must show that counsel's performance prejudiced his defense. *Strickland*, 466 U.S. at 692. To establish prejudice, a Lawson must demonstrate that but for counsel's errors, a reasonable probability exists that the result of the sentencing proceedings would have been different. *Id.* at 694.

Counsel must present to the trier of fact "all *reasonably available* evidence in mitigation unless there are *strong* strategic reasons to forego some portion of such evidence." 1989 ABA Guideline 11.8.6. (emphasis added). The "areas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or

otherwise supports a sentence of less than death." 2003 ABA Guideline 10.11, Commentary. Mitigating evidence may alter a jury's sentencing verdict even if it does not undermine or rebut the prosecution's case of guilt. *Coleman v. Mitchell*, 268 F.3d 417, 453 (6th Cir. 2001). Because the State of Ohio is a "weighing" state, any evidence that could tip the scales, no matter how slight in favor of life, is deemed sufficient to warrant a new sentencing hearing. *Hamblin*, 354 F.3d 482, 493 (6th Cir. 2003).

Defense counsel did not present evidence that: 1) Tim Lawson played a much larger role in the offense than his testimony reflected, 2) Jerry Lawson lacked the ability to conduct any abstract thinking, 3) Jerry Lawson suffers from anti-social, borderline, delusional and dependency personality disorders and dysthymia [Fed. Hrg. Tr. 642, 645, 663, 791, 807], and that dysthymia is an Axis I disorder. [*Id.* at 662], 4) Lawson's drug usage affected his personal development and functioning [Fed. Hrg. Tr. 622-23, 812-813], 5) Lawson's consumption of alcohol and marijuana on the day of the offense reduced his already limited ability to control his impulses [*Id.* at Tr. 818, 912-13], 6) the testimony of State's expert, Dr. Fisher, who would have confirmed the existence of Lawson's significant mental deficits, 7) Lawson suffers from brain damage [Exhibit 22; Fed. Hrg. Tr. 1217-23], 8) Petitioner, because of his significant mental deficits, is a follower and not a leader. [Fed. Hrg. Tr. 1224], 9) Lawson was highly prone to suggestion. [*Id.* at Tr. 647], and 10) the victim's threats to other members of Petitioner's family impacted Lawson's state of mind given his mental limitations. [*Id.* at Tr. 863, 913-914].

A defendant is prejudiced when counsel fails to present psychological testimony to address issues of mental illness. *Rompilla*, 545 U.S. at 391; *Skaggs* 235 F.3d at 273 ("other clinical psychological conditions"); *Harries v. Bell*, 417 F.3d 631 641 (6th Cir. 2005) ("Among Harries's various conflicting diagnoses are: bipolar mood disorder, trauma-induced anxiety,

anxiety disorder not otherwise specified, post-traumatic stress disorder, and antisocial personality disorder.”); *Poindexter v. Mitchell*, 454 F.3d 564, 580 (6th Cir. 2006) (paranoid personality disorder).

When a court decides whether a defendant was prejudiced by defense counsel's deficient performance, it must assess the cumulative impact of all of defense counsel's errors. This includes both the evidence presented at trial and the evidence discovered after trial. *Williams*, 529 U.S. at 397-98; *Harries*, 417 F.3d at 641. Prejudice is based upon whether there is a reasonable likelihood that newly discovered evidence, in conjunction with the evidence presented at trial, would cause a single juror to reach a different conclusion. *Wiggins v. Smith*, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471; *Frazier v. Huffman*, 343 F.3d 780, 798 (6th Cir. 2003). A reasonable probability exists that at least one juror would have found that the aggravating circumstances did not outweigh the mitigating factors, if counsel had presented all of the evidence identified herein.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Fourteenth Ground for Relief: Petitioner’s convictions and sentences are void or voidable because the trial court permitted FBI Special Agent Watson to testify as to out of court statements made by Billy and Sue Payton, neither of whom testified in either phase of the proceedings.** Sixth and Fourteenth Amendments to the United States Constitution and Sections 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

The Confrontation Clause of the Sixth Amendment, applicable to the States through the Fourteenth Amendment, provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., amend. VI; *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The objective of the Confrontation Clause is to "advance the accuracy of the truth determining process in criminal trials." *Tennessee*

*v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985) (citing *Dutton v. Evans*, 400 U.S. 74, 89, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)). The "confrontation" between the witness and the accused at trial provides concrete and practical aids for determining the truth. *Kentucky v. Stincer*, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).

Cross-examination enables the defendant to explore inconsistencies between a witness' testimony and other evidence, probe any biases that may have led the witness to distort the truth, and open lines of inquiry that the State, for whatever reason, may have neglected. *Taylor v. Illinois*, 484 U.S. 400, 411-12, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1988). It limits the power of the government to shape witness testimony, intentionally or otherwise, by exploring only certain lines of inquiry. 3 William Blackstone, *Commentaries on the Laws of England* \*373 (1768).

Three individuals witnesses witnessed the shooting of the victim: Tim Lawson, Billy Payton, and Jerry Lawson. The State called Tim Lawson in its case in chief, but did not call Billy Payton to testify. [T.p. 195]. Prior to and during trial, the State went to great lengths to preclude trial counsel from interviewing Payton. The prosecution: 1) successfully sought a protective order during the pretrial discovery [1/2/87 T.p. 2] 2) informed Payton, not to speak with defense counsel [Proposition of Law No. 9, *supra*], and 3) secreted him in a back room at the time of trial. [*Id.*]

In the State's case in chief, the prosecution put in those portions of Payton's statement testimony that were helpful to its case through the testimony of Special Agent Watson. He testified that Payton: 1) initially told the Special Agent that the Lawsons were going to take Martin to a rural area and cut off his hands [T.p. 430-41], 2) later told the Special Agent that he witnessed a murder and that he was aware where the murder took place [T.p. 343-47], and 3) that

after Jerry Lawson shot Martin, he threw him (Payton) to the ground, put a gun to his head, and told him “to keep his mouth shut or he would face certain death.” [T.p. 468].

Special Agent Watson also testified that Sue Payton told him that Lawson “had outlined [to her] the murder, how he shot Tim Martin, and how he engaged in the entire activity.” [T.p. 469].

The admission of both of Payton’s statements permitted the prosecution to inform the jury of the information that the witnesses had provided the investigators that was only helpful to the state’s case, without having to inform the jury of the portions of their statements that were adverse to the State’s case. The jury did not hear that Payton had provided information that impeached the testimony of Tim Lawson, the State’s key witness. *See*, Propositions of Law Nos. 6 to 8, *supra*. For instance Payton told the investigating officers that Tim Lawson provided the murder weapon and that Tim Lawson had kicked and interrogated Martin after he lay on the ground bleeding. *See* Proposition of Law No. 7, *supra*.

The wrongful admission of Agent Watson’s testimony concerning the content of the statements of Sue and Jerry Payton did not constitute harmless error. The following factors are relevant with respect to harmless error analysis in the context of a violation of the right to confrontation: 1) the importance of the witness’ testimony in the prosecution’s case; 2) whether the testimony was cumulative; 3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; 4) the extent of cross-examination otherwise permitted; and, 5) the overall strength of the prosecution’s case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Special Agent’s Payton’s testimony concerning the Paytons’ statements was 1) critical, 2) not cumulative, 3) not contradicted, and 4) subjected to limited cross-examination because defense counsel had been

precluded from interviewing Payton. In addition, the prosecution's case, given that it was dependent upon the testimony of the co-defendant, was weak.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Fifteenth Ground for Relief: Petitioner's convictions and sentences are void or voidable because the trial court admitted Petitioner's October 3, 1987 custodial statement to Detective Sergeant Dennis Stemen. [T.p. 506-07].** U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. Art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

Lawson has an IQ that places him in the range of mental retardation. [M.R. T.p. 35-37, 188, 201]. In addition, he functions academically on the level of a third or fourth grader. [T.p. 1380].

At the time of his arrest, Lawson suffered from brain damage. [Exhibit 22; Fed. Hrg. Tr. 1223, 1227]. The damage is diffuse and global. [Fed. Hrg. Tr. 1220-21, 1223]. His brain is inefficient; he cannot sustain attention and he performs worse when under stress. [*Id.* at Tr. 1222, 1226]. *See* Proposition of Law No. 5, *supra*. Lawson, at the time of his trial, suffered from anti-social, borderline, delusional and dependency personality disorders and dysthymia. [Fed. Hrg. Tr. 791, 807]. His delusional personality affected the manner in which he perceived his environment and himself. [*Id.* at Tr. 807-808]. The cumulative impact of these disorders was greater than the impact of each individual disorder. [*Id.* at Tr. 836]. *See* Proposition of Law No. 4, *supra*.

**A. Lawson's Statement Was Not the Product of a Free and Unrestrained Choice.**

"[A] confession cannot be used if it is involuntary." *United States v. Macklin*, 900 F.2d 948, 951 (6<sup>th</sup> Cir. 1990) (citing *United States v. Washington*, 431 U.S. 181, 186-87, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977)). The "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its

maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 2693 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961)). An "individual's 'will is overborne' if his confession was not 'the product of a rational intellect and free will.'" *Townsend v. Sain*, 372 U.S. 293, 307, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). The prosecution bears the burden of proof to prove the voluntariness of the confession by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972), *United States v. Mahan*, 190 F.3d 416, 422 (6<sup>th</sup> Cir. 1999).

A suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion." *Colorado v. Connelly*, 479 U.S. 159, 165, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). When a suspect suffers from some mental incapacity such as mental retardation, and the incapacity is known to the officers conducting the questioning of the suspect, a "lesser quantum of coercion" is necessary to render the confession involuntary. *Hill v. Anderson*, 300 F.3d 679, 682 (6<sup>th</sup> Cir. 2002); *Murphy v. Ohio*, 551 F.3d 485, 514 (6<sup>th</sup> Cir. 2009).

Given Lawson's limited mental capacities, brain damage, mental illnesses, and the combined impact of all three, his statement to Detective Stemen was not a voluntary act on his part.

#### **B. Lawson Did Not Knowingly and Intelligently Waive His Miranda Rights.**

Lawson's custodial statements were not admissible at trial unless the interrogating officers obtained a knowing and intelligent waiver of his rights.

The Fifth Amendment provides that a defendant cannot "be compelled in any criminal case to be a witness against himself." In order to use statements obtained during custodial

interrogation of the accused, the State must warn the suspect prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation. *Miranda v. Arizona*, 384 U.S. 436, 473, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Fare v. Michael C.*, 442 U.S. 707, 717, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

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*, 384 U.S. at 444; *See also Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 82 L. Ed. 2d 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).

A court considers the totality of the circumstances to determine the validity of a waiver. *Moran*, 475 U.S. at 421. Courts examine “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Johnson*, 304 U.S. at 464; *Machacek v. Hofbauer*, 213 F.3d 947, 954 (6th Cir. 2000). 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*, 442 U.S. at 725; *Garner v. Mitchell*, 557 F.3d 257, 262 (6th Cir. 2009).

The government bears the burden of establishing that a defendant’s waiver is knowing and intelligent; the mere presence of a form indicating the defendant’s signature does not end the examination. *Tague v. Louisiana*, 444 U.S. 469, 100 S. Ct. 652, 62 L. Ed. 2d 622 (1980). “The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.” *Butler*, 441 U.S. at 373.

Lawson did not knowingly and intelligently waive his *Miranda* rights. His significant mental impairments precluded him from having a full awareness both of the nature of his *Miranda* rights and the consequences of his decision to abandon them. *Spring*, 479 U.S. at 574; *Moran*, 475 U.S. at 421.

### **C. Detective Stemen Did Not Obtain a Fresh Waiver From Lawson.**

Law enforcement officers must re-advise a defendant of his *Miranda* rights when events have transpired since the initial warning that cause the defendant’s answers to “no longer [be] voluntary, or unless he no longer was making a ‘knowing and intelligent relinquishment or abandonment of his rights.’” *Wyrick v. Fields*, 459 U.S. 42, 47, 103 S. Ct. 394, 74 L. Ed. 214 (1982), (citing *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)).

Detective Semen believed that one of the arresting officers had advised Lawson of his *Miranda* rights and did not re-advise Lawson of his constitutional rights. [T.p. 504-05]. Detective Semen was required to re-advise Lawson of his rights because the interrogation occurred in a setting different from where he was initially advised of his rights (patrol vehicle and later at the county jail), the interrogation was conducted by a different person than had

advised him of his rights, and because of Petitioner's lower intelligence, mental illnesses, and brain damage. [T.p. 504-05]. *See* Propositions of Law Nos. 4 and 5, *supra*.

#### **D. Conclusion as to the Fifteenth Ground for Relief**

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**Sixteenth Ground For Relief: Petitioner's Convictions And Sentences Are Void Or Voidable As A Result Of The Cumulative Effect Of The Errors That Occurred During The Course Of The Trial Court Proceedings.** Fifth, Sixth, Eighth and Fourteenth Amendments, Art. I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

Cumulative errors can deprive a criminal defendant of his constitutional rights. *State vs. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987). “[A] conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial.” [*Id.* at syl. 2]. The Sixth Circuit has similarly recognized that a criminal defendant can be deprived of constitutional due process based on cumulative errors: “Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.” *Walker v. Engle*, 703 F.2d 959, 963 (6<sup>th</sup> Cir. 1983). These decisions are consistent with Supreme Court precedent supporting a cumulative review of a trial to determine a trial's fundamental fairness. *Taylor vs. Kentucky*, 436 U.S. 478, 487-488 n. 15, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)

In conducting this cumulative analysis, this Court should “step back” and view the case from a global perspective. Instead of viewing the trees (the individual Grounds for Relief), this Court should look at the forest. It should ask if justice was “done” in this case. Whether this Court defines justice in terms of the procedures employed (and the resulting reliability of the outcome) or the final verdicts, its answer must be no, that justice was not done in this case.

The accumulation of errors raised in the petition tainted Lawson’s convictions and death sentence. Each of these constitutional defects show that Lawson should not have been convicted and sentenced to death. Taken together, these errors overwhelmingly establish that that Lawson was denied a constitutionally fair hearing as to his guilt and penalty. Accordingly this Court should reverse Lawson’s convictions. In the alternative, this Court should reverse Petitioner’s death sentence.

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

R.C. 2953.23 violates the Separation of Powers, Due Process of Law, and Open Courts Provisions. Article I, § 16, article II, § 32 of the Ohio Constitution, Fifth, Sixth, Eighth and Fourteenth Amendments.

On August 4, 2013, Lawson filed his post-conviction petition. He challenged therein the applicability and constitutionality of R.C. 2953.23(A). [*Id.* at ¶¶ 44-69].

#### **A. R.C. 2953.23(A) does not create a set of mandatory conditions.**

R.C. 2953.23(A) does not create a mandatory set of conditions that Lawson must satisfy for the Court to consider his 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 83 (1971).

#### **B. 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, 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. For the reasons set forth below, the requirements for entertaining successor post-conviction petitions under R.C. 2953.23(A) are unconstitutional on their face. Lawson requests that this Court declare R.C. 2953.23(A) unconstitutional.

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, and if so found, to treat it as a nullity. *Cincinnati, Wilmington & Zanesville RR. Co. v. Clinton Cty. Commrs.*, 1 Ohio St. 77, 1852 Ohio LEXIS 24 (1852), Syl. Para. 1. The appropriate judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom. *State ex rel. Bowman v. Allen Cty. Bd. of Commrs.*, 124 Ohio St. 174, 196, 177 N.E. 271 (1931). In this case, the General Assembly exceeded its legislative power when it enacted R.C. 2953.23(A), because the statute 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.

1. 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 exercises 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. Therefore, if the Ohio General

Assembly adopts a law in conflict with the Constitution, it is the constitutional responsibility of the Ohio judicial branch to declare the law unconstitutional.

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. Specifically, R.C. 2953.23(A)(2) requires a successor post-conviction petitioner to not only establish by competent evidence a violation of his federal constitutional rights, but also requires that he prove 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 [conviction].” The federal courts have already determined the standard of evidence necessary for an individual to obtain relief when constitutional rights are violated by state actors.

For example, in a total denial of counsel situation, a post-conviction petitioner only has to show a denial of counsel and prejudice will be presumed. *United States v. Cronin*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Where the prosecutor knows or should have known that he was using false evidence, a petitioner seeking relief must only establish that 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). Claims of juror bias require the state to establish that the error is harmless beyond a reasonable doubt. *Smith v. Phillips*, 455 U.S. 209, 229, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1976). For violations of the holding in *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a person need only demonstrate that the suppressed information led to a verdict that was not worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). None of these federal court decisions require a person to establish “but for constitutional error at trial, no

reasonable fact-finder would have found the petitioner guilty of the offense of conviction” before the person can obtain relief.

As a result, 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.

2. R.C. 2953.23 (A) Usurps Judicial Power In Violation Of The Doctrine Of 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 Ohio Constitution’s structural protections prohibit the General Assembly from exercising “any judicial power, not herein expressly conferred.” Section 32, Article II, Ohio Constitution. Historically, the functions of interpreting and providing remedies for violations of constitutional rights have been assigned exclusively to the judiciary. By enacting R.C. 2953.23, the General Assembly exercised power that is exclusive to the judiciary whose role is to interpret the State and Federal Constitutions. *See, Beagle v. Walden*, 78 Ohio St.3d 59, 62, 676 N.E.2d 506 (1997).

The General Assembly may not enact legislation that deprives a court of its 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 convicted individuals’ constitutional rights when they are presented in second or successive petitions for post-conviction relief. As a result, the General Assembly has declared that long established equitable principles (such as tolling), should be ignored when reviewing constitutional violations alleged in successive petitions. In short, only when a successive petitioner can establish that but

for the constitutional error no reasonable jury would have found him guilty of the offense or imposed the death sentence, may a constitutional violation be “entertained.”

R.C. 2953.23(A) runs afoul of the state and federal Constitutions because the statute deprives Ohio courts of the ability to “entertain” claims of the violation of state and federal constitutional rights. The only exception occurs when the person can establish the legislative requirement that, but for the violation, no reasonable jury would have found the person guilty of the offense of conviction. Thus, the statute imposes new and insurmountable requirements for the granting of relief for previously undiscovered violations of a convicted person’s constitutional rights. As such, the statute impermissibly infringes on the judiciary’s exclusive power to define the scope and extent of constitutional protections, and to provide a meaningful remedy. The statute violates the separation of powers doctrine.

3. R.C. 2953.23(A)(2) Violates The “Due Course Of Law” And “Open Courts” Provisions Of Section 16, Article I Of The Ohio Constitution

No rational relationship is possible between the discovery of a constitutional violation of a convicted person’s rights 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.

Many denials of a convicted person’s constitutional rights do not manifest themselves immediately. For example, judicial bias, biased jurors, *Brady* violations, and ineffective assistance of counsel all can be discovered long after a person is unjustly convicted and has

completed direct and collateral appeals. *Kimmelman v. Morrison*, 477 U.S. 365, 378, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (“\*\*\*consequently, a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults with another lawyer about his case.”).

In addition, federal Constitutional violations can require reversal even though they would not clearly and convincingly impact a jury’s decision as to the issue of guilt: 1) denials of counsel at critical stages of the proceedings; 2) denials of the right to appeal; 3) denials of the right to a speedy trial; and 4) the suppression of material and exculpatory evidence. R.C. 2953.23(A) does not permit these constitutional violations to be remedied in a successive post-conviction petition. The petitioner must establish that he was unavoidably prevented from discovering the operative facts and present clear and convincing evidence that but for the claimed error he is innocent of the offense of conviction.

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. Otherwise, the petitioner must thereafter establish by clear and convincing evidence an adverse causal relationship between the violation of his constitutional rights and his conviction to such a degree that no jury would have found him guilty. Absent such a showing, the petitioner filing a successor petition simply loses his right to relief for the constitutional violation. This result eviscerates the traditional function of the courts to provide remedies for constitutional violations

and places successive post-conviction petitioners in a position of having to establish innocence in situations where: (1) they are not innocent, or (2) they cannot establish by clear and convincing evidence that there is a casual relationship between the constitutional violation and the finding of guilt. Thus, successive post-conviction petitioners are treated as second-class litigants, even though they may be “unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief.”

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

### **C. Revised Code 2953.23(A) Is Unconstitutional As Applied To Jerry Lawson.**

On September 21, 1995, Ohio Senate Bill 4 became effective and substantially rewrote R.C. 2953.21 and R.C. 2953.23, Ohio’s post-conviction statutes. The current version of R.C. 2953.23(A), which addresses 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 division (A)(1) or (2) of this section applies:

(1) Both of the following applies:

(a) Either 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, or subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or 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 upon that right.

(b) 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 Lawson's case, the statute ignores the complex and evolving body of equitable principles established by judicial decisions. For example, Lawson'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 Lawson guilty of the capital murder or sentenced him to death. However, the documents clearly establish a substantial violation of Lawson'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, Lawson would be entitled to have his successive post-conviction petition "entertained."

In sum, R.C. 2953.23(A), as applied to Lawson, denies him the benefit of a rational and more lenient standard of review provided by federal rules of decision. Only the judiciary has the power to determine whether a person is entitled to relief for violations of his constitutional rights. R.C. 2953.21 is a legislative attempt to deprive convicted persons of the benefit of standards of review set forth by the Ohio and United States Supreme Courts. Therefore, Lawson requests that this Court declare R.C. 2953.23(A)(1) a constitutional nullity and that this Court then rule upon his grounds for relief.

This Court should accept jurisdiction to hear this issue and set the matter for full briefing and oral argument.

**CONCLUSION**

This Court should accept this case for review as to all three propositions of law including the sixteen grounds for relief contained in Proposition of Law No. 2. It should summarily grant relief and either grant Lawson a new trial or remand the matter for full factual development in the trial court including discovery and an evidentiary hearing. In the alternative, after permitting full briefing and oral argument, it should grant Lawson a new trial or remand the matter for full actual development in the trial court.

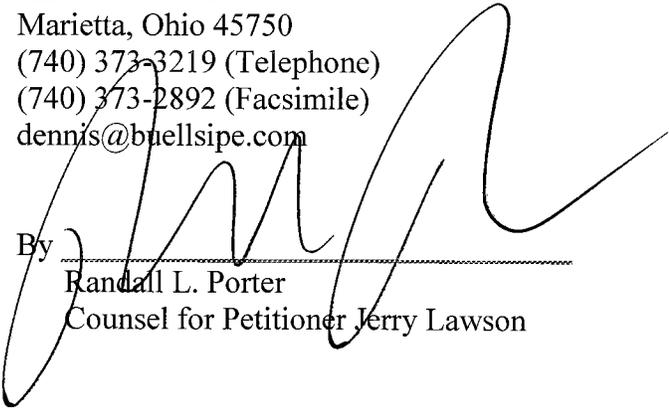
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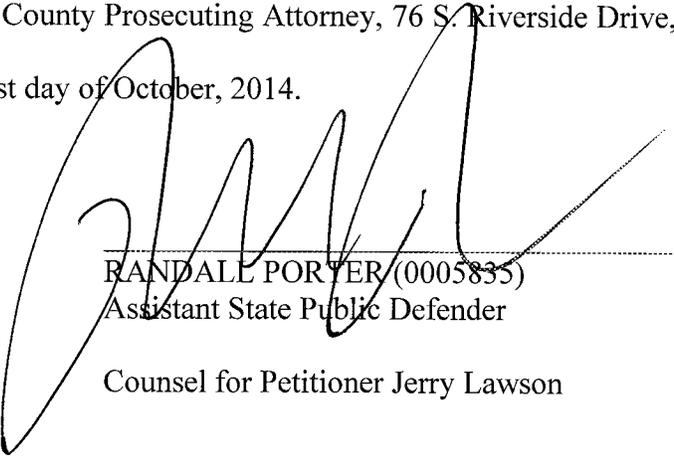
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By 

\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Appellant Jerry Lawson's Memorandum In Support Of Jurisdiction* was forwarded by both electronic and first-class U.S. Mail, postage prepaid to Judith Brant, Assistant Clermont County Prosecuting Attorney, 76 S. Riverside Drive, 2<sup>nd</sup> Floor, Batavia, Ohio 45103 on this the 1st day of October, 2014.



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Assistant State Public Defender

Counsel for Petitioner Jerry Lawson

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. :  
 : CAPITAL CASE  
 JERRY LAWSON, :  
 :  
 Defendant-Appellant. :

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**ON APPEAL FROM THE COURT OF APPEALS, TWELFTH  
APPELLATE DISTRICT, CLERMONT COUNTY, OHIO, CA 2013-12-093**

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**APPENDIX TO APPELLANT JERRY LAWSON'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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FILED

**STATE OF OHIO** :  
Plaintiff-Respondent : **CASE NO. 1987 CR 05488**  
vs. : **Judge McBride**  
**JERRY R. LAWSON** : **DECISION/ENTRY**  
Defendant-Petitioner :

Judith Brant, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2<sup>nd</sup> Floor, Batavia, Ohio 45103.

Randall L. Porter, assistant state public defender for Jerry R. Lawson, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215-9308.

This cause is before the court for consideration of a post-conviction petition filed by the defendant-petitioner Jerry Lawson and a motion to dismiss this petition filed by the respondent state of Ohio.

After the filing of the final memorandum dealing with the state's motion to dismiss on July 8, 2013, the court took both the petition and the motion to dismiss under advisement.

Upon consideration of the petition and the motion, the record of the proceeding, the evidence presented for the court's consideration, the written arguments of counsel, and the applicable law, the court now renders this written decision.

### **FACTS OF THE CASE AND PROCEDURAL BACKGROUND**

On April 28, 1988, the petitioner Jerry R. Lawson was convicted of the following offenses:

(1) Aggravated Murder in violation of R.C. 2903.01(A) with specifications for (a) murder for the purpose of escaping detection, apprehension, trial or punishment for another offense in violation of R.C. 2929.04(A)(3); (b) murder committed while committing or attempting to commit the crime of kidnapping in violation of R.C. 2929.04(A)(7); (c) murder for the purpose to prevent a witness from testifying in a criminal proceeding in violation of R.C. 2929.04(A)(8); and, (d) possessing a firearm at the time of the offense;

(2) Aggravated Murder in violation of R.C. 2903.01(B) with specifications for (a) murder for the purpose of escaping detection, apprehension, trial or punishment for another offense in violation of R.C. 2929.04(A)(3); (b) murder committed while committing or attempting to commit the crime of kidnapping in violation of R.C. 2929.04(A)(7); (c) murder for the purpose to prevent a witness from testifying in a criminal proceeding in violation of R.C. 2929.04(A)(8); and, (d) possessing a firearm at the time of the offense;

(3) Aggravated Burglary in violation of R.C. 2911.11(A)(3);

(4) Kidnapping in violation of R.C. 2905.01(A)(2) with a firearm specification;

(5) Kidnapping in violation of R.C. 2905.01(B)(1) with a firearm specification; and,

(6) two counts of Intimidation in violation of R.C. 2921.03, with firearm specifications as to both counts and a serious harm specification as to Count Seven.

Judge Robert Ringland imposed a death penalty sentence for the two counts of aggravated murder and also imposed prison sentences as to the remaining counts for which the petitioner was convicted.

The petitioner filed a direct appeal to the Twelfth District Court of Appeals and all of the assignments of error were overruled and the convictions and death sentence were affirmed.<sup>1</sup> The decision was appealed to the Ohio Supreme Court which affirmed the convictions and sentence.<sup>2</sup> The petitioner attempted to appeal to the United States Supreme Court which denied his petition for certiorari.<sup>3</sup>

On December 15, 1993, the petitioner filed his first petition for post-conviction relief with the trial court. The court dismissed that petition on June 8, 1984 and that decision was subsequently affirmed and the Ohio Supreme Court declined to accept jurisdiction.<sup>4</sup>

Thereafter, the petitioner filed a habeas petition with the United States District Court for the Southern District of Ohio, and the magistrate hearing that petition granted the petitioner discovery rights and an evidentiary hearing on his petition.<sup>5</sup> Some of the testimony and information provided at that hearing forms the basis of the petitioner's grounds for relief in the present petition and will be discussed below.

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<sup>1</sup> *State v. Lawson* (June 4, 1990), 12<sup>th</sup> Dist. No. CA88-05-044, 1990 WL 73845.

<sup>2</sup> *State v. Lawson* (1992), 64 Ohio St.3d 336, 595 N.E.2d 902.

<sup>3</sup> *Lawson v. Ohio* (1993), 507 U.S. 1007, 113 S.Ct. 1653, 123 L.Ed.2d 273.

<sup>4</sup> *State v. Lawson*, 103 Ohio App.3d 307, 659 N.E.2d 362 (Ohio App. 12<sup>th</sup> Dist., 1995); and, (1995), 74 Ohio St.3d 1404; reconsideration denied (1995), 74 Ohio St.3d 1459 .

<sup>5</sup> Transcripts of Hearings in the case of *Lawson v. Warden*, held on March 4<sup>th</sup> and December 2-4 and 8-10, 1997.

On June 6, 2003, the petitioner filed a second petition for post-conviction relief which was primarily based on claims that the petitioner was mentally retarded. This petition was amended on March 12, 2004. On June 7, 2004, summary judgment was granted on all but the second cause of action. An evidentiary hearing was held with regard to the second cause of action, which involved claims that Lawson was mentally retarded, and that cause of action was denied by entry on November 7, 2007. The decision was affirmed by the court of appeals and the Ohio Supreme Court declined jurisdiction to hear an appeal from that decision.<sup>6</sup>

The petitioner's third petition for post-conviction relief was filed on August 19, 2003. A decision was not issued on that petition by the original trial court. After a request for decision was filed by the petitioner regarding the third petition, the case was randomly assigned to this court. The court issued a written decision denying the third petition on July 1, 2011. That decision was upheld by the court of appeals and the Ohio Supreme Court declined to accept jurisdiction.<sup>7</sup>

On April 4, 2013, the petitioner filed his fourth petition for post-conviction relief, raising sixteen grounds for relief therein. The state filed a motion to dismiss the petition on April 15, 2013, arguing that the petition is without merit, is barred by the doctrine of *res judicata*, and fails to meet the burden set forth under R.C. 2953.23(A).

## LEGAL ANALYSIS

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<sup>6</sup> *State v. Lawson* (Nov. 24, 2008), 12<sup>th</sup> Dist. No. CA2007-12-116, 2008-Ohio-6066; and (2009), 123 Ohio St.3d 1523, 918 N.E.2d 525.

<sup>7</sup> *State v. Lawson* (Feb. 13, 2013), 12<sup>th</sup> Dist. No. CA2011-07-056, 2013-Ohio-548; and (2013), 135 Ohio St.3d 1431, 2013-Ohio-1857, 986 N.E.2d 1021, reconsideration denied, (2013), 136 Ohio St.3d 1453, 2013-Ohio-3210, 991 N.E.2d 259.

Pursuant to R.C. 2953.23:

**"(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 division (A)(1) or (2) of this section applies:**

**(1) Both of the following apply:**

**(a) Either 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, or, 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.**

**(b) 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 factfinder would have found the petitioner eligible for the death sentence.**

**(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.**

As used in this division, 'actual innocence' has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and "former section 2953.82 of the Revised Code" has the same meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code."

## **(A) FIRST GROUND FOR RELIEF AND CHALLENGE TO JURISDICTIONAL STATUTE**

In his jurisdictional statement in this fourth petition for post-conviction relief, the petitioner challenges the constitutionality of R.C. 2953.23(A) on several constitutional bases. Further, in his first ground for relief, the petitioner argues that his convictions and sentences are void or voidable because Ohio's post-conviction procedures do not provide an adequate corrective process in violation of the constitutional rights afforded him.

In its decision upholding the denial of the petitioner's third petition for post-conviction relief, the Twelfth District Court of Appeals addressed the constitutionality of Ohio's post-conviction relief statutory scheme and found such to be constitutional.<sup>8</sup> Other courts have similarly upheld Ohio's post-conviction relief statutory scheme as constitutional.<sup>9</sup> The petitioner's jurisdictional argument regarding the use of "may" in R.C. 2953.23(A) has also been addressed in Ohio law and it has been held that "[a]lthough 'may' generally implies discretion to do an act, there is no meaningful

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<sup>8</sup> *State v. Lawson*, supra, 2013-Ohio-548, ¶¶ 26-33, citing, e.g., *State v. McGuire* (April 23, 2001), 12<sup>th</sup> Dist. No. CA2000-01-011, 2001 WL 409424. See, also, *State v. Cowans* (Sept. 7, 1999), 12<sup>th</sup> Dist. No. CA98-10-090, 1999 WL 699870, \*3 ("Although Civ.R. 35(A) does require brevity in arguing each individual claim, we find the page limitation constitutional.").

<sup>9</sup> See, e.g., *State v. La Mar* (March 17, 2000), 4<sup>th</sup> Dist. No. 98-CA-23, 2000 WL 297413, \*2-5; and, *State v. McGrath* (March 1, 2012), 8<sup>th</sup> Dist. No. 97207, 2012-Ohio-816, ¶¶ 12-14.

difference between 'may not' and 'shall not' as it is used in R.C. 2953.23(A).<sup>10</sup> As such, the jurisdictional requirements of R.C. 2953.23(A) are mandatory, not permissive.<sup>11</sup>

The petitioner's constitutional challenges to Ohio's post-conviction relief statutes are hereby overruled and his first ground for relief is hereby denied.

### **(B) SECOND AND THIRD GROUNDS FOR RELIEF**

In the second ground for relief, the petitioner claims that he is presently incompetent and asks this court to stay these post-conviction proceedings until he is restored to competency. In his third ground for relief, he argues that his conviction and sentence are void or voidable because he was incompetent at the time of the pretrial, trial, and sentencing proceedings.

The opinions and IQ scores given for the petitioner by Dr. Nelson and Dr. Fabian is the same evidence examined in the petitioner's second petition for post-conviction relief. The Twelfth District Court of Appeals thoroughly examined this evidence and found that the petitioner was not mentally retarded.<sup>12</sup>

The fact that the petitioner has been administered anti-psychotic medications while incarcerated<sup>13</sup> does not establish that he is currently mentally incompetent. Furthermore, the fact that the defendant has been diagnosed with a mental illness, namely major depressive disorder severe recurrent with psychotic features, does not mean that he is currently incompetent and, in fact, some of the more recent records

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<sup>10</sup> *State v. Conway* (Aug. 29, 2013), 10<sup>th</sup> Dist. No. 12AP-412, 2013-Ohio-3741, ¶ 64

<sup>11</sup> *Id.*

<sup>12</sup> *Lawson, supra*, 2008-Ohio-6066, ¶¶ 12-37.

<sup>13</sup> Petitioner's Exhibits 13A-T.

from 2008 and 2009 cited to by the petitioner indicate that he was stable.<sup>14</sup> The written notes from 2012 do not indicate any episodes of incompetency and indicate that the petitioner is still compliant with his medications.<sup>15</sup>

The court would also note that the petitioner relies heavily in his third ground for relief upon the testimony given by Dr. Jolie Brams at the federal habeas proceeding on December 3, 1997.<sup>16</sup> Therefore, this testimony has been in the petitioner's possession since that time and has been available to him for approximately fifteen years. The petitioner was not unavoidably prevented from the discovery of these facts until this time and, in fact, the petitioner's second and third post-conviction relief petitions were filed after the federal hearing, and the petitioner's second post-conviction petition specifically raised the issue of mental retardation, relying in part upon the testimony given by Dr. Brams at the federal hearing. The court would further note that Dr. Brams provided an affidavit in support of the defendant's first petition for post-conviction relief, as noted in the second petition.<sup>17</sup>

The petitioner's second and third grounds for relief are hereby denied.

### **(C) FOURTH AND FIFTH GROUNDS FOR RELIEF**

The petitioner's fourth ground for relief states that his convictions are void or voidable because he was denied effective assistance of experts during the trial and

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<sup>14</sup> See, e.g., Petitioner's Exhibits 13D and 13F

<sup>15</sup> Petitioner's Exhibits 13I and J.

<sup>16</sup> Transcript of Hearing, Volume V, pg. 831-833.

<sup>17</sup> Jerry Lawson's Mental Retardation Petition, filed June 6, 2003, pg. 6.

mitigation stages of his capital case. The petitioner argues that he did not have the benefit of a competent psychological evaluation at either phase of the trial.

In the fifth assignment of error, the petitioner argues that, prior to and during the trial and sentencing phases, defense counsel failed to identify the need for a neuropsychological interview and the mental health professionals failed to identify the need for defense counsel to request funding for a neuropsychologist to evaluate the petitioner.

The issue of defense counsel failing to present evidence regarding a mental disease or defect during trial was raised in the first post-conviction petition and denied.<sup>18</sup>

Furthermore, the defendant has had multiple opportunities on direct appeal and in the previous post-conviction petitions to raise ineffective assistance of counsel claims and claims relating to his mental state and the lack of evidence presented thereof. There is no new evidence presented in support of these arguments that has not been available to the defendant for many years. There was no demonstration that the defendant has been unavoidably prevented from discovering this information until the present time.

As such, the petitioner's fourth and fifth grounds for relief are hereby denied.

#### **(D) SIXTH, SEVENTH, AND EIGHTH GROUNDS FOR RELIEF**

In the petitioner's sixth, seventh, and eighth grounds for relief, he makes several arguments that certain information and documents were not provided to defense counsel in violation of *Brady v. Maryland*.

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<sup>18</sup> *State v. Lawson*, supra, 103 Ohio App. 3d at 313-315.

"The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution imposes upon the state a duty to disclose to the accused evidence material to his guilt or innocence."<sup>19</sup> "The duty extends to 'any favorable evidence known to the others acting on the government's behalf in the case, including the police.'<sup>20</sup> "A *Brady* violation involves the post-trial discovery of information that was known to the prosecution, but unknown to the defense."<sup>21</sup>

In *Brady v. Maryland* (1963), 373 U.S. 87, 83 S.Ct. 1194, 10 L.Ed.2d 215., the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>22</sup> "Evidence is 'material' only if there is a reasonable probability that the proceeding would have turned out differently had the evidence been disclosed to the defense."<sup>23</sup> "A successful *Brady* claim requires a three-part showing: (1) that the evidence in question be favorable; (2) that the state suppressed the relevant evidence, either purposefully or inadvertently; (3) and that the state's actions resulted in prejudice."<sup>24</sup> "Further, it is the burden of the defense to prove a *Brady* violation has risen to the level of denial of due process."<sup>25</sup>

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<sup>19</sup> *Conway*, supra, 2013-Ohio-3741, ¶ 25, citing *Brady v. Maryland* (1963), 373 U.S. 87, 83 S.Ct. 1194, 10 L.Ed.2d 215.

<sup>20</sup> *Id.*, citing, *Kyles v. Whitley* (1995), 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490.

<sup>21</sup> *Id.*, citing, *State v. Wickline* (1990), 50 Ohio St.3d 114, 116, 552 N.E.2d 913.

<sup>22</sup> *State v. Stojetz* (June 7, 2010), 12<sup>th</sup> Dist. No. CA2009-06-013, 2010-Ohio-2544, ¶ 12, quoting *Brady*, supra, 373 U.S. at 87.

<sup>23</sup> *Id.*, citing, *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375.

<sup>24</sup> *Id.*, quoting, *State v. Davis* (Dec. 23, 2008), 5<sup>th</sup> Dist. No.2008-CA-16, 2008-Ohio-6841, ¶ 53, citing *Strickler v. Greene* (1999), 527 U.S. 263, 281-282, 119 S.Ct. 1936.

<sup>25</sup> *Id.*, citing *State v. Jackson* (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549.

The petitioner's arguments in the sixth, seventh and eighth grounds for relief generally revolve around statements and evidence that would contradict the testimony given at trial by Timothy Lawson.

First, the state's failure to disclose documents containing the statements of Sue Payton and Williams S. Payton has been previously raised by the petitioner on his initial direct appeal, and the court of appeals found that they contained nothing favorable to the defense and, as such, there was no *Brady* violation.<sup>26</sup> The Ohio Supreme Court also noted that "whatever may be considered even remotely favorable to the accused had been disclosed to the defense through other means."<sup>27</sup> As this issue has been litigated previously on direct appeal and the court sees no new issues raised, consideration of the *Brady* argument with regard to Exhibits 6, 7, 8, 23, and 24 and the information contained therein is barred by the doctrine of *res judicata*.

Furthermore, the letters written by Judge William Walker to the prosecuting attorney regarding William Payton's outstanding felony warrant are not exculpatory nor would they be material to the petitioner's guilt or innocence. Therefore, any failure by the state to provide trial counsel with these letters did not constitute a *Brady* violation.

With regard to Exhibit 9, the issue of the state's failure to disclose this written statement was previously addressed by this court in its decision denying the third post-conviction petition and that decision was upheld on appeal. This court determined that the petitioner failed to establish by clear and convincing evidence that, but for this violation, no reasonable factfinder would have found him guilty of the offenses charged. The arguments presented in the present post-conviction petition offer nothing new with

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<sup>26</sup> *State v. Lawson*, supra, 64 Ohio St.3d at 342-345.

<sup>27</sup> *Id.* at 344.

regard to this issue and, as such, the court finds no *Brady* violation with regard to this exhibit or the information contained therein.

This leaves for discussion Exhibits 4 and 5 and the information contained therein.

Exhibit 4 contains notes made by Sergeant Stemen from a phone conversation with Detective Randy Harvey on October 2, 1987. In those notes, there is an indication that Tim Lawson threatened both Harvey and Tim Martin and told Martin "no Harvey no case[.]"<sup>28</sup> It also indicates that Tim Lawson told Martin that if he was the one informing on him, he would "do him in."<sup>29</sup> Timothy Martin, the victim in the present case, was in fact providing information to Detective Harvey of the Clermont County Sheriff's Office that Tim Lawson and the petitioner were involved in the burglary at the residence of Cheryl Titus.<sup>30</sup>

Exhibit 5 also contains notes made by Sergeant Stemen indicating that Timothy Lawson contacted him shortly after he was arrested on aggravated burglary warrants wanting to provide information about Martin.<sup>31</sup> The notes indicate that Timothy Lawson stated that if he found out Detective Harvey was getting information from Martin, he would kill Martin.<sup>32</sup>

These exhibits and the information provided therein is not material to guilt or punishment in that there is not a reasonable probability that the proceeding would have turned out differently had the evidence been disclosed to the defense. It was well known at trial that Timothy Lawson was part of the plan to beat the victim and that, the morning of the murder, the petitioner and his brother were heard discussing their mutual hatred

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<sup>28</sup> Petitioner's Exhibit 4.

<sup>29</sup> Id.

<sup>30</sup> *State v. Lawson*, supra, 64 Ohio St.3d at 336.

<sup>31</sup> Petitioner's Exhibit 5.

<sup>32</sup> Id.

of Martin and that they came up with a plan to severely beat Martin.<sup>33</sup> There was also testimony that a month or so earlier, Tim Lawson and the petitioner were overheard saying that Martin "needed to be taken care of" and that they needed to "get rid of him" in order to prevent him from testifying against them.<sup>34</sup>

It was no secret to the jury that Timothy Lawson hated the victim and that he had at least one prior conversation with his brother that they needed to "get rid of him." Therefore, further evidence that Tim Lawson threatened Martin's life is not material to the defendant's guilt or innocence. It further does not change the fact that the testimony offered at trial was that, while Tim Lawson, Billy Payton and the petitioner were all present, it was the petitioner who pulled the gun and shot Martin and who later kicked Martin multiple times as he begged to be taken to a hospital.<sup>35</sup>

Due to the fact that this evidence is not material under the *Brady* standard, the petitioner has not established prejudice as a result of the withholding of this evidence.

Therefore, the petitioner's sixth, seventh, and eighth grounds for relief are hereby denied.

#### **(E) NINTH GROUND FOR RELIEF**

In his ninth ground for relief, the petitioner argues that his convictions and sentences are void or voidable because of prosecutorial misconduct occurring prior to and during his trial, which violated his right to due process and effective assistance of

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<sup>33</sup> *Lawson, supra*, 64 Ohio St.3d at 336.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 337-338.

As noted by the Twelfth District Court of Appeals, this case does not present a situation where "an interview with Payton could illuminate *decisive* information to Lawson's defense."<sup>37</sup> The fact that Billy Payton has a different version of the events that transpired with regard to this incident does not make Tim Lawson's testimony false. The state is permitted to make determinations as to what witnesses it finds to be credible and is not required to restrict itself from presenting a witness's testimony simply because another witness's testimony may differ factually. The suggestion that the prosecutors presented false testimony and argument is not supported by the record of this case.

As such, the tenth ground for relief is hereby denied.

#### **(G) ELEVENTH GROUND FOR RELIEF**

In his eleventh ground for relief, the petitioner argues that his convictions and sentences are void or voidable because the state's expert, Roger Fisher, was "provided incomplete and inaccurate information during the trial phase[.]" and the petitioner argues that this testimony was the product of prosecutorial misconduct.

Dr. Fisher was the state's expert psychological witness and he testified at trial that the petitioner was not insane at the time of the offenses. He stated at the federal habeas hearing that the statements made by Billy Payton add "a new perspective with some details and information which clearly need to be assessed and weighed concerning their relevance to the issue of [the petitioner's] mental state[.]"<sup>38</sup> Dr. Fisher

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<sup>37</sup> *Lawson, supra*, 2013-Ohio-548, ¶ 47.

<sup>38</sup> Federal Habeas Hearing Transcript at pg. 689.

found the information provided by Payton to create "a new perspective" and to have a significant impact on his assessment of the petitioner's mental state.<sup>39</sup>

Dr. Fisher stated at the trial in this case that he received more information from the state than he actually needed and that "more information is interesting \* \* \* but its interest is in expanding my awareness of the person but I don't think it necessarily contributes to answering the questions."<sup>40</sup>

As discussed in the section above, the state was not required to present or believe the statement of Billy Payton, as the prosecutor is permitted to make decisions as to what information it finds to be credible. Furthermore, and more importantly, Dr. Fisher did not ask for anything specific from the state that he did not receive. The court fails to see any prosecutorial misconduct in not providing its expert with testimony that it may have not found to be credible or that it had determined would not be used in its case-in-chief.

Additionally, the testimony of Dr. Fisher, which is the basis of this ground for relief, has been available to the petitioner at least since the habeas petition in 1997. The petitioner was not unavoidably prevented from discovering this information until now and failed to include this argument in two of his prior petitions filed after the habeas hearing.

For these reasons, the petitioner's eleventh ground for relief is denied.

#### **(H) TWELFTH AND THIRTEENTH GROUNDS FOR RELIEF**

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<sup>39</sup> Id. at pgs. 690-691.

<sup>40</sup> Id. at 689-690.

The twelfth ground for relief raised by the petitioner argues that his convictions and sentences are void or voidable because he was denied effective assistance of counsel at the trial phase and the thirteenth ground for relief argues the same for the mitigation phase.

None of the arguments raised in support of these grounds for relief is new information or information which could not have been raised on direct appeal or in a previous petition for post-conviction relief. The fact that trial counsel did not file a motion to suppress, interview certain witnesses including Billy Payton, retain a psychologist and neuropsychologist, timely request the appointment of the mitigation investigation, or make certain objections to the admission of evidence, was not anything unknown the defendant at the time of his initial appeal or in the years thereafter. As such, this is not any information that the petitioner was unavoidably prevented from discovering.

Therefore, the petitioner's twelfth and thirteenth grounds for relief are hereby denied.

#### **(I) FOURTEENTH GROUND FOR RELIEF**

In his fourteenth ground for relief, the petitioner argues that his convictions and sentences are void or voidable because the trial court permitted FBI Special Agent Watson to testify to hearsay statements made by Billy Payton and Sue Payton.

There is nothing in the record suggesting that this argument regarding the admission of alleged hearsay testimony could not have been raised on direct appeal or in any of the preceding post-conviction petitions. The evidence admitted at trial was well

old information that does not meet the standard set forth by R.C. 2953.23(A) and none of the information has demonstrated that the defendant was denied his constitutional rights.

Considering all of the grounds for relief and the arguments and information set forth therein, the petitioner has failed to demonstrate a cumulative effect that establishes that he has been denied his constitutional rights.

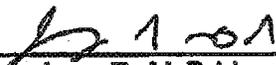
### CONCLUSION

The petitioner's fourth post-conviction petition is not well-taken and is hereby denied in its entirety for the reasons set forth above.

The state's motion to dismiss the petition is consequently rendered moot.

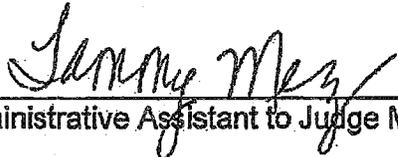
**IT IS SO ORDERED.**

DATED: 11-14-13

  
\_\_\_\_\_  
Judge Jerry R. McBride

**CERTIFICATE OF SERVICE**

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 14th day of November 2013 to all counsel of record and unrepresented parties.

  
Sammy Mez  
Administrative Assistant to Judge McBride

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

- vs -

JERRY R. LAWSON,

Defendant-Appellant.

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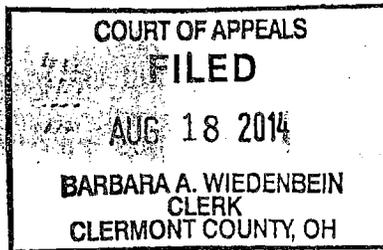
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CASE NO. CA2013-12-093

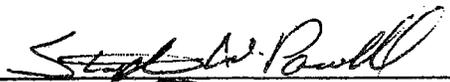
JUDGMENT ENTRY



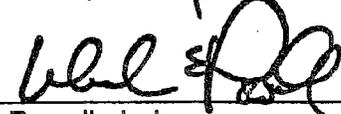
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

  
Stephen W. Powell, Presiding Judge

  
Robin N. Piper, Judge

  
Mike Powell, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

STATE OF OHIO,

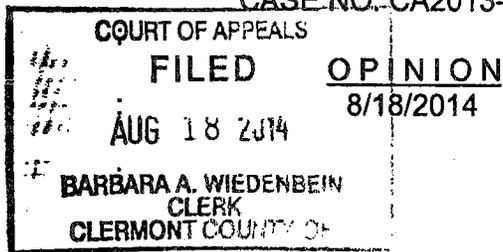
Plaintiff-Appellee,

- vs -

JERRY R. LAWSON,

Defendant-Appellant.

CASE NO. CA2013-12-093



CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 1987 CR 05488

D. Vincent Faris, Clermont County Prosecuting Attorney, Judith Brant and Nicholas Horton, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103, for plaintiff-appellee

Randall L. Porter, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 and Buell & Sipe Co., L.P.A., Randall L. Porter and Dennis L. Sipe, 322 Third Street, Marietta, Ohio 45750, for defendant-appellant

**M. POWELL, J.**

{¶ 1} Defendant-appellant, Jerry R. Lawson, appeals a decision of the Clermont County Court of Common Pleas denying his motion for postconviction relief. For the reasons discussed below, we affirm the decision of the trial court.

**I. Facts and Procedural History**

{¶ 2} This court has heard numerous appeals relating to Lawson's 1987 murder

charge, subsequent conviction and death sentence. The facts underlying Lawson's convictions are more fully discussed in *State v. Lawson*, 12th Dist. Clermont No. CA88-08-044, 1990 WL 73845 (June 4, 1990). The following facts are relevant to the current appeal.

{¶ 3} On September 23, 1987, Lawson shot and killed Timothy Martin (Martin), in retaliation for Martin implicating Lawson and his brother, Timothy Lawson, in a number of residential burglaries in Owensville, Ohio. With the aid of William and Sue Payton, Martin was persuaded to meet up with the Lawson brothers and Payton.<sup>1</sup> Payton had told Martin about a fictitious marijuana field that could be raided in order to lure Martin to a secluded area. The four men drove along back roads of Clinton and Brown counties and eventually stopped near an old barn and walked a short distance into the woods. Once there, Lawson pulled out a handgun and shot Martin in the back. Martin fell to the ground and pleaded with the men to take him to the hospital. However, Lawson confronted Martin about being a "snitch" and began kicking and beating Martin in his head and ribs. Lawson continued to physically and verbally torment Martin until he died approximately 45 minutes later. The men then hid the body in a shallow hole next to a fallen tree.

{¶ 4} Two days after the shooting, Payton met with FBI Special Agent Larry Watson, and informed him of the Martin murder. Thereafter, the Paytons agreed to cooperate with police in the investigation of Martin's murder.

{¶ 5} Lawson was subsequently charged with two counts of aggravated murder, three counts of kidnapping, two counts of intimidation, aggravated robbery, aggravated burglary, and gross abuse of a corpse. All counts, except the abuse of corpse, carried specifications. After initially pleading not guilty to the charges, Lawson changed his plea to not guilty by reason of insanity. Before trial, Lawson stipulated he had shot Martin.

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1. For ease of discussion, we will refer to William Payton as "Payton" and Sue and William Payton collectively as "the Paytons."

{¶ 6} On April 26, 1988, a jury convicted Lawson of two counts of aggravated murder with capital specifications, two counts of kidnapping, one count of aggravated robbery, and two counts of intimidating a witness. After a mitigation hearing, the jury recommended the death penalty on the aggravated murder charges. The trial court approved the jury's recommendation on May 3, 1988, and sentenced Lawson to death for the aggravated murder of Martin. The trial court imposed concurrent sentences for the remaining charges.

{¶ 7} Lawson appealed his convictions and sentence to this court, and we affirmed. *State v. Lawson*, 12th Dist. Clermont No. CA88-08-044, 1990 WL 73845 (June 4, 1990) (*Lawson I*). The Ohio Supreme Court also affirmed Lawson's convictions and sentence in *State v. Lawson*, 64 Ohio St.3d 336, 1992-Ohio-47 (*Lawson II*). The United States Supreme Court denied Lawson's petition for writ of certiorari on March 29, 1993. *Lawson v. Ohio*, 507 U.S. 1007, 113 S.Ct. 1653 (1993).

{¶ 8} Lawson then sought postconviction relief. On December 15, 1993, Lawson filed his first petition, arguing 41 claims for relief. The trial court, without a hearing, dismissed Lawson's petition. Lawson appealed that decision to this court in *State v. Lawson*, 103 Ohio App.3d 307 (12th Dist.1995) (*Lawson III*). We affirmed the trial court's decision. The Ohio Supreme Court declined to accept jurisdiction of the case. *State v. Lawson*, 74 Ohio St.3d 1404 (1995).

{¶ 9} After exhausting these state remedies, Lawson filed for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. The district court conducted an eight day hearing in 1997 on Lawson's habeas petition. Ultimately, the district court granted in part and denied in part Lawson's petition, and vacated Lawson's death sentence. *Lawson v. Warren, Mansfield Correctional Institution*, 197 F.Supp.2d 1072 (S.D.Ohio 2002). Both the state and Lawson appealed that decision to the Sixth Circuit Court of Appeals.

{¶ 10} Lawson asserted before the federal habeas court that he was mentally retarded, and thus ineligible for the death penalty pursuant to the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002).<sup>2</sup> The Sixth Circuit ordered Lawson's appeal from the District Court be held in abeyance while he exhausted his claims of mental retardation and government interference of his right to counsel in the state courts. *Lawson v. Warden*, Sixth Circuit Case Nos. 02-3413, 02-3483 (Aug. 13, 2003). Accordingly, in 2003, Lawson filed another motion for postconviction relief asserting these two claims.

{¶ 11} On August 30, 2005, the trial court held a hearing and thereafter denied Lawson's motion with respect to his mental retardation claim finding he had failed to prove by a preponderance of the evidence that he is mentally retarded. On appeal, this court affirmed the trial court's decision denying his petition for postconviction relief. *State v. Lawson*, 12th Dist. Clermont No. CA2007-12-116, 2008-Ohio-6066 (*Lawson IV*). The Ohio Supreme Court declined to hear Lawson's appeal of that decision. *State v. Lawson*, 123 Ohio St.3d 1523, 2009-Ohio-6487.

{¶ 12} Lawson then pursued the other argument in his 2003 motion for postconviction relief, claiming the state had interfered with his constitutional right to counsel when a courtroom deputy overheard conversations between himself and counsel with respect to finding and interviewing William Payton. The trial court dismissed Lawson's petition. Lawson appealed to this court. In *State v. Lawson*, 12th Dist. Clermont No. CA2011-07-056, 2012-Ohio-548 (*Lawson V*), this court affirmed the trial court's decision. The Ohio Supreme Court declined to accept jurisdiction of the case. *State v. Lawson*, 135 Ohio St.3d 1431, 2013-Ohio-1857.

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2. In *Atkins*, the United States Supreme Court held that executing a mentally retarded person violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Atkins* at 304.

{¶ 13} On April 4, 2013, Lawson filed the instant petition for postconviction relief asserting 16 claims for relief. In response to Lawson's petition, the state filed a motion to dismiss. After considering Lawson's petition, the state's motion to dismiss, and the respective responses, the trial court denied the petition. In denying the petition, the trial court found that the "majority of the information relied upon in this petition is old information that does not meet the standard set forth by R.C. 2953.23(A) and none of the information has demonstrated that the defendant was denied his constitutional rights." Lawson now appeals the trial court's decision, raising three assignments of error for our review. For ease of discussion, we address the assignments of error out of order.

## II. Analysis

### A. Standard of Review for Postconviction Relief Petitions

{¶ 14} A postconviction proceeding is not an appeal of a criminal conviction, but rather, is a collateral civil attack on a criminal judgment. *State v. Dillingham*, 12th Dist. Butler Nos. CA2012-02-037 and CA2012-02-042, 2012-Ohio-5841, ¶ 8, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). R.C. 2953.21 through 2953.23 set forth the means by which a convicted defendant may seek to have the trial court's judgment or sentence vacated or set aside pursuant to a petition for postconviction relief. *State v. Hibbard*, 12th Dist. Butler No. CA2013-03-051, 2014-Ohio-442, ¶ 21. R.C. 2953.21(A)(2) sets forth the general postconviction relief protocol and provides that such motions must be filed no later than 180 days after the date on which the trial transcript is filed with the court of appeals in the direct appeal, or, if a direct appeal was not pursued, 180 days after the expiration of the time in which a direct appeal could have been filed. R.C. 2953.21; *Hibbard* at ¶ 21.

{¶ 15} Pursuant to R.C. 2953.23(A)(1), a court "may not entertain" an untimely petition or a second or successive petition unless the petitioner demonstrates both of the following requirements:

(a) Either 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, or, subsequent \* \* \* 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.

(b) 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 factfinder would have found the petitioner eligible for the death sentence.

{¶ 16} In other words, a court may entertain an untimely or successive petition for postconviction relief only if the petitioner demonstrates either: (1) he was unavoidably prevented from discovering the facts necessary for the claim for relief; or (2) the United States Supreme Court has recognized a new federal or state right that applies retroactively to persons in the petitioner's situation and the petitioner asserts a claim based on that right. R.C. 2953.23(A)(1)(a); *State v. Kent*, 12th Dist. Preble No. CA2013-05-003, 2013-Ohio-5090, ¶ 12. If the petitioner is able to satisfy one of these threshold conditions, he must then demonstrate by clear and convincing evidence that, but for the constitutional error at trial, no reasonable fact finder would have found him guilty of the offenses or found him eligible for a death sentence. R.C. 2953.23(A)(1)(b); *Hibbard* at ¶ 22.

{¶ 17} "In reviewing an appeal of postconviction relief proceedings, this court applies an abuse of discretion standard." *State v. Shead*, 12th Dist. Clermont No. CA2014-01-014, 2014-Ohio-2895, ¶ 16. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Thornton*, 12th Dist. Clermont No. CA2012-09-063, 2013-Ohio-2394, ¶ 34; *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 130.

**B. Constitutional Challenges**

{¶ 18} Assignment of Error No. 3:

{¶ 19} THE TRIAL COURT ERRED WHEN IT DID NOT DECLARE R.C. 2953.21 AND [R.C.] 2953.23(A)(2) CONSTITUTIONALLY INFIRM ON THEIR, [SIC] FACE AND AS APPLIED TO APPELLANT.

{¶ 20} In Lawson's third assignment of error, he challenges the constitutionality of the postconviction relief statutory scheme in R.C. 2953.21 and R.C. 2953.23(A). Lawson asserts R.C. 2953.23(A) is unconstitutional both on its face and as applied to him.

{¶ 21} Lawson asserts R.C. 2953.23 is unconstitutional on its face as it violates the Supremacy Clause of the U.S. Constitution, the Separation of Powers Doctrine, and the "due course of Law" and "open courts" provisions of Section 16, Article I of the Ohio Constitution. As conceded by Lawson, this court has already considered and rejected Lawson's constitutional challenges to R.C. 2953.23 in this regard. *Lawson V*, 2012-Ohio-548 at ¶ 23-33. In *Lawson V*, we relied on our decision in *State v. McGuire*, 12th Dist. Preble No. CA2000-10-001, 2001 WL 409424 (Apr. 23, 2001) and found R.C. 2953.23 is a valid exercise of legislative authority and the provisions of the statute do not violate the Supremacy Clauses of the U.S. Constitution and Ohio Constitution, the Separation of Powers Doctrine, or the "due course of law" and "open courts" provision of Article I, Section 16 of the Ohio Constitution. *Lawson V* at ¶ 26-30. We reject Lawson's invitation to revisit our holdings in *Lawson V* and *McGuire*, and we continue to find that the postconviction relief statute is constitutional on its face.

{¶ 22} Lawson has also previously argued the statute is unconstitutional as applied to him. See *Lawson V* at ¶ 30. Once again, he asserts the statute is unconstitutional as it applies to him because it denies him the benefit of a "rational and more lenient standard of review provided by federal rules and judicial decisions." We rejected this argument in

*Lawson V*, and we find no reason to revisit that decision here. *Id.* at ¶¶ 30-33. Lawson has been afforded ample opportunity to challenge his convictions. He has been afforded the right to direct appeals, and three prior petitions for postconviction relief. We also note that the clear and convincing standard found in R.C. 2953.23(A)(1) applied to Lawson's constitutional challenges *only after* he filed an unsuccessful petition for postconviction relief, and sought a second, third, and now a fourth petition for postconviction relief. The state is entitled, at some point, to the finality of the judgment, and applying a clear and convincing standard to a fourth petition for postconviction relief is not unconstitutional. *See Lawson V* at ¶ 32.

{¶ 23} Although not specifically labeled as a constitutional argument, Lawson also challenges R.C. 2953.23(A) on the basis that the phrase "may not entertain" is used as opposed to "shall not entertain." Lawson contends the trial court erred when it found the jurisdictional requirements of R.C. 2953.23(A) were mandatory because, according to Lawson, the plain language of the statute evidences the legislature's intent for trial courts to maintain discretion over whether it will hear successive postconviction relief petitions.

{¶ 24} In *State v. Johnson*, 5th Dist. Guernsey No. 12 CA 19, 2013-Ohio-1398, the Fifth District Court of Appeals considered this same argument and found: "While the word 'may' generally implies discretion to do an act, we find no distinction between 'may not' and 'shall not' when the General Assembly uses the language to prohibit actions." *Id.* at ¶ 21. We find the rationale of the *Johnson* court persuasive and likewise find there is no meaningful difference between "may not" and "shall not" as it is used in R.C. 2953.23(A). *See also State v. Conway*, 10th Dist. Franklin No. 12AP-412, 2013-Ohio-3741, ¶ 64. Moreover, it is well-established that unless a petitioner satisfies R.C. 2953.23(A), a trial court lacks jurisdiction to hear an untimely or successive petition for postconviction relief. *State v. Garcia*, 12th Dist. Butler No. CA2013-02-025, 2013-Ohio-3677, ¶ 12; *see also State v.*

*Halliwell*, 134 Ohio App.3d 730, 734 (8th Dist.1999). Accordingly, Lawson's argument is without merit.

{¶ 25} Having found R.C. 2953.23 is not unconstitutional on its face or as applied to Lawson, his third assignment of error is overruled.

### C. Standard Applied to Lawson's Postconviction Relief Motion

{¶ 26} Assignment of Error No. 1:

{¶ 27} THE TRIAL COURT ERRED WHEN IT HELD THAT APPELLANT NEEDED TO SATISFY THE REQUIREMENTS CONTAINED IN R.C. 2953.23(A) FOR IT TO GRANT APPELLANT RELIEF.

{¶ 28} In his first assignment of error, Lawson challenges the trial court's finding that his postconviction relief petition is a successive petition subject to the clear and convincing standard under R.C. 2953.23(A). Lawson asserts the instant petition should have been treated as an initial petition, and thus subject to the more lenient standard set forth in R.C. 2953.21. In support of this argument, Lawson cites the Supreme Court of Ohio's decision in *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, ¶ 17.

{¶ 29} In *Lott*, the petitioner sought postconviction relief and requested his death sentence be vacated based upon the United States Supreme Court's holding that the execution of mentally retarded criminals violates the Eighth Amendment's ban on cruel and unusual punishments. *Lott* at ¶ 4, citing *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002). The Ohio Supreme Court recognized that *Atkins* established a new federal right with respect to convicted, mentally retarded defendants, and consequently, as the petition was filed for the first time since *Atkins*, the petition was more similar to an initial petition and thus not subject to the "clear and convincing" standard under R.C. 2953.23. *Lott* at ¶ 17. The Ohio Supreme Court thereafter determined that petitioners raising the *Atkins* issue in a

postconviction relief petition must establish by a preponderance of the evidence that they are mentally retarded to be death penalty ineligible. *Id.*

{¶ 30} Lawson urges this court to similarly construe his current petition as an initial petition because the petition was prompted by the United States Supreme Court's "ground breaking" decision in *Cullen v. Pinholster*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1388 (2011). Lawson asserts, similar to the petitioner in *Lott*, that he filed the instant petition for postconviction relief for the first time since *Pinholster*, and therefore it is more akin to an initial petition, rather than successive. Lawson states that the purpose of the petition was "to preserve evidence in the state court so that the federal system would not be precluded from considering the evidence that was developed at the federal habeas trial." He further asserts that the *Pinholster* decision "held that state courts should be given the first opportunity to pass on evidence initially developed in the federal habeas proceeding." We find no merit to Lawson's arguments.

{¶ 31} In *Pinholster*, the United States Supreme Court held that where an application for a writ of habeas corpus seeks relief based upon a claim that has been "adjudicated on the merits in State court proceedings," 28 U.S.C. 2254(d) limits review "to the record that was before the State court that adjudicated the claim on the merits." *Pinholster* at 1398.<sup>3</sup> In reaching its decision, the United States Supreme Court reasoned that the purpose of the structure of federal habeas jurisdiction, including Section 2254, is to ensure "that state courts

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3. As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2254 sets several limits on a federal court's power to grant habeas relief to a state prisoner. As relevant here, if an application includes a claim that has been "adjudicated on the merits in State court proceedings," Section 2254(d) states that an application "shall not be granted with respect to [such a] claim \*\*\* unless the adjudication of the claim \*\*\* (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See also Pinholster* at 1398. In addition, Section 2254(e)(2) limits the discretion of federal habeas courts to take new evidence in an evidentiary hearing where the applicant has failed to develop the factual basis of a claim in State court proceedings. *Id.* at 1400-1401.

are the principal forum for asserting constitutional challenges to state convictions." *Pinholster* at 1401, quoting *Harrington v. Richter*, 562 U.S. \_\_\_, 131 S.Ct. 770, 787 (2011).

{¶ 32} We find no reason to treat Lawson's instant petition as anything other than a successive petition for postconviction relief. As an initial matter, we note that unlike *Atkins*, the decision in *Pinholster* did not establish a new federal right. Rather, the *Pinholster* decision clarified the evidentiary limits for state prisoners seeking habeas corpus relief in federal court. *Pinholster* at 1398. The decision did not relate to any constitutional right, but rather interpreted state prisoner's rights with regards to habeas corpus proceedings pursuant to their statutory rights under 28 U.S.C. 2254.

{¶ 33} Moreover, we do not find that *Pinholster* instructed state courts to hear evidence developed at a federal habeas proceeding in order to facilitate a prisoner's habeas corpus petition. Rather, the Supreme Court's decision provided guidelines and instructions to the federal district courts with regards to what evidence it could consider under a claim for relief that has previously been adjudicated on the merits by the state courts as contemplated under Section 2254(d)(1). Specifically, the Court held that "evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state court." *Pinholster* at 1400. As noted by the *Pinholster* Court: "Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo." *Pinholster* at 1399.<sup>4</sup>

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4. As stated by the *Pinholster* court, "[a]lthough state prisoners may sometimes submit new evidence in federal court, [the habeas] statutory scheme is designed to strongly discourage them from doing so. Provisions like §§2254(d)(2) and (e)(2) ensure that federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.* at 1401, quoting *Williams*

{¶ 34} Although the *Pinholster* decision carries out the goal of "promoting comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance," we fail to see how this decision required the trial court to consider Lawson's petition without regard to the jurisdictional and evidentiary requirements of R.C. 2953.23(A).

{¶ 35} In addition, we note that in *Lott*, the Supreme Court stated that any defendants who wanted to raise an *Atkins* claim must file such a petition within 180 days after the decision, otherwise the petitioner would be required to meet the statutory standards under R.C. 2953.23 for untimely and successive petitions for postconviction relief. *Lott* at ¶ 24. *Pinholster* was decided on April 4, 2011; therefore, even if we accepted Lawson's arguments arguendo, the time limit for an initial petition has expired. Lawson did not file the instant petition until April 4, 2013, well outside the 180 day limitation. See R.C. 2953.21. Accordingly, as he failed to meet the timing requirements under R.C. 2953.21, his petition would have still been required to meet the clear and convincing standard for untimely and successive petitions for postconviction relief under R.C. 2953.23.

{¶ 36} Based on the foregoing, we find the trial court did not err in finding Lawson was required to meet the requirements under R.C. 2953.23 in order for the court to entertain the petition. Lawson's second assignment of error is overruled.

**D. Merits of Lawson's Claims for Relief**

{¶ 37} Assignment of Error No. 2:

{¶ 38} THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT RELIEF ON EACH OF THE SIXTEEN GROUNDS FOR RELIEF CONTAINED IN HIS POST-CONVICTION PETITION.

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v. Taylor, 529 U.S. 420, 437, 120 S.Ct. 1479.

{¶ 39} In his second assignment of error, Lawson asserts that he raised 16 distinct constitutional violations within his petition for postconviction relief and supported those grounds for relief with evidence. Lawson contends that the trial court therefore erred and abused its discretion when it denied his petition as to each of the 16 grounds for relief.

{¶ 40} Before turning to each of Lawson's grounds for relief, we note that although a petition for postconviction relief permits a person to bring a collateral challenge to the validity of a conviction or sentence in a criminal case, it does not provide a petitioner a second opportunity to litigate a conviction. *State v. Rose*, 12th Dist. Butler No. CA2012-03-050, 2012-Ohio-5957, ¶ 15-16; *State v. Bush*, 96 Ohio St.3d 235, 238 (2002). Accordingly, "[i]t is well established that a trial court may dismiss a postconviction relief petition on the basis of the doctrine of res judicata." *State v. Bayless*, 12th Dist. Clinton Nos. CA2013-10-020 and CA2013-10-021, 2014-Ohio-2475, ¶ 9, quoting *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 30.

{¶ 41} Under res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment. *Kent*, 2013-Ohio-5090 at ¶ 17; *State v. Wagers*, 12th Dist. Preble No. CA2011-08-007, 2012-Ohio-2258, ¶ 10, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. This doctrine "promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." *Snead*, 2014-Ohio-2895 at ¶ 18, quoting *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 18. However, "there is an exception to the res judicata bar when the petitioner presents competent, relevant, and material evidence outside the record *that was not in existence and available to the petitioner*

*in time to support the direct appeal.*" (Emphasis sic.) *State v. Piesciuk*, 12th Dist. Butler No. CA2013-01-011, 2013-Ohio-3879, ¶ 18. Evidence outside the record, or evidence dehors the record, must demonstrate that appellant could not have appealed the constitutional claim based upon information in the original record and such evidence must not have been in existence and available to the petitioner at the time of trial. *Id.*

{¶ 42} We now consider each of the 16 grounds for relief in turn, keeping in mind the standard set forth above under R.C. 2953.23.

### **1. First Ground for Relief**

{¶ 43} In his first ground for relief, Lawson argues Ohio's statutory scheme for postconviction relief is unconstitutional because it does not provide an "adequate corrective process." As recognized in our resolution of Lawson's third assignment of error, this court has already addressed the constitutionality of Ohio's postconviction relief statutory scheme and found such to be constitutional. *See also Lawson V*, 2012-Ohio-548 at ¶ 26. Moreover, "this court has already determined that 'the statutory procedure for postconviction relief constitutes an adequate corrective process.'" *State v. Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 34, quoting *State v. Lindsey*, 12th Dist. Brown No. CA2002-02-002, 2003-Ohio-811, ¶ 23. We see no reason to deviate from this prior precedent. Accordingly, the trial court did not err when it denied Lawson's first ground for relief.

### **2. Second and Third Grounds for Relief**

{¶ 44} In his second and third grounds for relief, Lawson challenged his competency. Specifically, Lawson asserted he was incompetent at the time of pretrial, trial, and at sentencing. He further argued that he is presently incompetent, and therefore all proceedings must cease until his competency is restored.

{¶ 45} We find Lawson's claims regarding his incompetency during pretrial, trial, and sentencing are barred by the doctrine of res judicata. All of the facts necessary to challenge

Lawson's competency during these proceedings existed at the time of his conviction. Accordingly, Lawson could have and should have raised this issue at the time of the direct appeal. See *Kent*, 2013-Ohio-5090 at ¶ 19. Moreover, it appears Lawson previously raised these same claims for relief in his first postconviction relief petition which the trial court denied, and we affirmed. See *Lawson III*, 103 Ohio App.3d at 316. Lawson has failed to demonstrate that there is any new evidence that he was unavoidably prevented from discovering which would establish this claim of relief. Accordingly, we find no reason to revisit our holding in *Lawson III*.

{¶ 46} As to his current competency, Lawson argued that he is presently incompetent and therefore the postconviction proceedings should have been stayed until his competency is restored. Alternatively, Lawson argued the trial court erred in failing to order a competency evaluation. Several Ohio courts have previously considered the argument now raised by Lawson and have concluded that a petitioner is not entitled, statutorily or constitutionally, to a competency hearing or evaluation in connection with postconviction proceedings. *State v. Spivey*, 7th Dist. Mahoning No. 12 MA 75, 2014-Ohio-721, ¶ 42; *State v. Cassano*, 5th Dist. Richland No. 12CA55, 2013-Ohio-1783, ¶ 42; *State v. Moreland*, 2d Dist. Montgomery No. 20331, 2004-Ohio-5778, ¶ 30; *State v. Neyland*, 6th Dist. Wood No. WD-12-014, 2013-Ohio-3065, ¶ 52. As aptly stated by Seventh District Court of Appeals:

Other than a competency hearing to ensure that a capital defendant is competent to make the decision to forego postconviction proceedings and submit to his execution, a capital defendant is not entitled to a competency evaluation and hearing to determine whether he is competent to assist in the postconviction proceedings.

*Spivey* at ¶ 42. We agree with the conclusion reached by these courts. As noted above, a postconviction proceeding is a collateral civil attack on a criminal judgment. *Dillingham*, 2012-Ohio-5841 at ¶ 8. Although the petitioner's life is at stake in postconviction proceedings

for capital defendants, we must acknowledge that postconviction review is not a constitutional right, and accordingly a petitioner receives no more rights than those granted by statute. *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994); *State v. Calhoun*, 86 Ohio St.3d 279 (1999). Consequently, because the postconviction relief statute does not provide for a competency hearing at this stage, we conclude the trial court did not err in refusing Lawson a competency hearing and evaluation.

{¶ 47} Moreover, even if we had found Lawson was entitled to a competency hearing and evaluation, Lawson failed to present sufficient evidence which would have required the trial court to order such a hearing. Much of the evidence presented by Lawson about his alleged current incompetency relates to his psychiatric treatment while in prison and his consistent diagnosis of suffering from a "serious mental illness." However, "[h]aving a mental illness is not necessarily equivalent to being legally incompetent to stand trial." *State v. Blankenship*, 115 Ohio App.3d 512, 518 (12th Dist.1996), quoting *State v. Berry*, 72 Ohio St.3d 354 (1995), syllabus.

{¶ 48} Based on the foregoing, the trial court did not err in denying Lawson's second and third grounds for relief.

### 3. Fourth and Fifth Grounds for Relief

{¶ 49} In his fourth and fifth grounds for relief, Lawson argued his convictions are void or voidable because he was denied the effective assistance of experts during the trial and mitigation stages of his capital case. Specifically, he claimed he should have been interviewed and evaluated by a psychologist and a neuropsychologist. In the alternative, Lawson asserts his trial counsel was ineffective for failing to employ such competent experts. According to Lawson, if he had been evaluated by these mental health professionals they would have provided additional information to the jury regarding Lawson's state of mind at

the time of the murder, and thus such testimony would have impacted both the trial and sentencing phases.

{¶ 50} Again, we find these arguments are barred by res judicata as Lawson could have raised his ineffective assistance of counsel claims and his claims relating to the lack of evidence presented at trial and at mitigation about his mental state during his direct appeal. See *Wagers*, 2012-Ohio-2258 at ¶ 10. In addition, Lawson asserted these same arguments within his first petition for postconviction relief which the trial court denied, and we affirmed on appeal. See *Lawson III* at 314-316. Lawson has not set forth any new evidence in support of these arguments which has not been available to him for several years. The evidence Lawson submitted in support of these claims consisted of an exhibit and the hearing transcript from the federal habeas proceedings in 1997. Lawson has failed to demonstrate that he was unavoidably prevented from discovering this information as required by R.C. 2953.23. Therefore, the trial court did not err in denying Lawson's fourth and fifth grounds for relief.

#### 4. Sixth, Seventh, and Eighth Grounds for Relief

{¶ 51} In his sixth, seventh, and eighth claims for relief, Lawson asserted several violations under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194. In *Brady*, the United States Supreme Court held, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *State v. Stojetz*, 12th Dist. Madison No. CA 009-06-013, 2010-Ohio-2544, ¶ 12, quoting *Brady* at 87. Evidence is "material" if there is a reasonable probability that the proceeding would have turned out differently had the evidence been disclosed. *Stojetz* at ¶ 12.

{¶ 52} Many of the *Brady* violations Lawson raised in the instant petition have been fully litigated. Specifically, Lawson's claim that the state committed a *Brady* violation when it

failed to disclose the statements of the Paytons and any related notes made by the prosecutor during such interviews was fully litigated in *Lawson I* and *Lawson II*. This court and the Ohio Supreme Court reviewed the materials and found no *Brady* violation. *Lawson I*, 1990 WL 73845 at \*9-11; *Lawson II*, 64 Ohio St.3d at 342-345.<sup>5</sup> Similarly, Lawson's claims regarding the state's failure to disclose the FBI reports with respect to William Payton were fully litigated in *Lawson II*. There, the Supreme Court held that because "the FBI reports were not in the state's possession, they were not subject to *Brady*." *Lawson II* at 344-345. Furthermore, Lawson raised substantially these same arguments in his first postconviction relief petition and each was rejected by the trial court and subsequently affirmed by this court. See *Lawson III*, 103 Ohio App.3d at 316. Accordingly, as these particular *Brady* violations have been fully litigated, Lawson's arguments are without merit based on the doctrine of res judicata. See *Snead*, 2014-Ohio-2895 at ¶ 19.

{¶ 53} Although Lawson did not specifically argue a *Brady* violation, he asserted in his third petition for postconviction relief that his constitutional rights were violated when a deputy overheard a conversation between Lawson and his attorney regarding the need to find and interview Payton. The deputy documented the conversation and shared the document with the prosecutor. In *Lawson V*, we found that Lawson was unavoidably prevented from discovering the deputy's report. *Lawson V*, 2012-Ohio-548 at ¶ 53. However, we affirmed the trial court's decision that Lawson was not entitled to relief as he failed to fulfill the second requirement of R.C. 2953.23(A)(2), demonstrating a constitutional violation or that absent the alleged violation, he would not have been convicted. *Id.* Lawson could have and should have raised his *Brady* argument regarding the deputy's report at that time. "Res judicata

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5. The Supreme Court found that the prosecutor's notes regarding the interviews with the Paytons "did not contain any additional evidence material to appellant's guilt or punishment." *Lawson II* at 344. The court also found that "whatever may be considered even remotely favorable to the accused had been disclosed to the defense through other means." *Id.*

applies to bar raising piecemeal claims in successive postconviction relief petitions \* \* \* that could have been raised, but were not, in the first postconviction relief petition." *State v. Johnson*, 5th Dist. Guernsey No. 12 CA 19, 2013-Ohio-1398, ¶ 47; see also *State v. Ballard*, 12th Dist. Warren No. CA92-10-091, 1993 WL 106147, \*2 (Apr. 12, 1993). Accordingly, we find this argument, too, is barred by the doctrine of res judicata.

{¶ 54} Lawsons' remaining arguments relate to other statements and evidence that he alleged was favorable to him or would have at least contradicted the trial testimony given by his brother, Timothy Lawson. Essentially, Lawson argued the state's suppression of evidence, particularly, the testimony of William Payton violated his rights as it "debunked the [s]tate's theory" of the case. Specifically, Lawson argued that the state should have disclosed letters written by Clermont County Judge William Walker which indicated Payton had an outstanding felony warrant. In addition, Lawson argued that the state should have disclosed notes from officers within the Clermont County Sheriff's Office which indicated Timothy Lawson had previously threatened to kill Martin. The trial court found that the above exhibits and the related information was not material to guilt or punishment such that there was not a reasonable probability that the proceeding would have turned out differently. Upon review, we agree. Moreover, we note that the evidence relied upon by Lawson within each of these claims for relief has been in existence since the time of the federal hearing in 1997. Accordingly, Lawson has failed to show that he was unavoidably prevented from discovering the facts with which to support these claims. See R.C. 2953.23.

{¶ 55} Based on the foregoing, we find the trial court did not err in denying relief on Lawson's sixth, seventh, and eighth grounds for relief.

#### **5. Ninth Ground for Relief**

{¶ 56} In Lawson's ninth ground for relief, he asserted his convictions and sentences are void or voidable due to prosecutorial misconduct that occurred prior to and during his

trial. Lawson argued the prosecutor acted inappropriately by advising Payton not to speak with defense counsel. This argument appears to merely be a repackaging of Lawson's arguments from his third petition for postconviction relief.

{¶ 57} In *Lawson V*, this court found that there was no indication in the record that the state "hid Payton." *Id.* at ¶ 50. Rather the record "merely establishes that, on one occasion, an assistant prosecutor advised Payton not to speak with defense counsel in a hallway of the courthouse." *Id.* Accordingly, we affirmed the trial court's decision denying postconviction relief. As the factual basis for Lawson's ninth ground for relief is the same as that which he relied in his third petition for postconviction relief, we find Lawson could have and should have asserted this argument in that petition. See *Johnson* at ¶ 47. Lawson has not set forth any new set of facts which would support this claim. As such, this argument is also barred by res judicata. The trial court did not err in denying Lawson's ninth ground for relief.

#### 6. Tenth Ground for Relief

{¶ 58} In his tenth ground for relief, Lawson argued that the state permitted its key witness, Timothy Lawson, to give inaccurate and perjured testimony. Essentially, Lawson asserts once more that Timothy Lawson's testimony was false and the state was aware that it was false as his testimony differed from Payton's version of events.

{¶ 59} Once again, we find this argument is barred by res judicata as Lawson raised this argument within his first petition for postconviction relief. As noted previously, the trial court denied the motion, and we affirmed that decision in *Lawson III*, 103 Ohio App.3d at 316. Moreover, Lawson has not set forth any new evidence in support of this argument which has not been available to him for several years. The evidence Lawson submitted in support of these claims included the hearing transcript from his federal habeas proceedings in 1997 as well as Payton's 1993 affidavit. Lawson has further failed to demonstrate that he

was unavoidably prevented from discovering this information as required by R.C. 2953.23. Therefore, we find the trial court did not err in denying Lawson's tenth ground for relief.

### 7. Eleventh Ground for Relief

{¶ 60} In Lawson's eleventh ground for relief, he argued that his convictions and sentences are void or voidable because the state failed to provide its expert, Dr. Roger Fisher, with all of the information that he needed to render a competent opinion concerning Lawson's mental state. At trial, Dr. Fisher testified that Lawson knew right from wrong and was not insane at the time of the offense. In the petition, Lawson asserted that Dr. Fisher, after being provided with all the requisite information, including Payton's pretrial statements, "has now concluded" that had he been provided all this information, it "would have made a difference with respect to his diagnosis." Lawson further argued that the state's failure to provide all relevant information to Dr. Fisher constituted prosecutorial misconduct.

{¶ 61} In this ground for relief, Lawson relied upon the testimony of Dr. Fisher that was taken during the federal habeas proceedings in 1997. Accordingly, the facts which form the basis for this ground of relief have been available to Lawson since that time. Lawson has therefore failed to show that he was unavoidably prevented from discovering this information. See R.C. 2953.23. Moreover, Lawson relied upon this same testimony in his second postconviction relief petition wherein he asserted he was ineligible for the death penalty as he is mentally retarded. Consequently, Lawson could have and should raised this claim as to Dr. Fisher's "new" opinion regarding Lawson's insanity in his second petition for postconviction relief. As mentioned above, res judicata also bars piecemeal postconviction relief petitions. See *Johnson*, 2013-Ohio-1398, ¶ 48. Accordingly, we find the trial court did not err in denying this claim for relief.

## 8. Twelfth and Thirteenth Grounds for Relief

{¶ 62} In his twelfth and thirteenth grounds for relief, Lawson asserted he was denied effective assistance of counsel during trial and at mitigation. Specifically, Lawson argues his trial counsel was ineffective in failing to: (1) have Lawson's competency to stand trial evaluated; (2) file a motion to suppress; (3) interview certain witnesses, including Payton; (4) retain a psychologist and neuropsychologist; (5) conduct a reasonable and complete mitigation investigation; and (6) make certain objections to the admission of evidence.

{¶ 63} Again, we find these claims are barred by the doctrine of res judicata as Lawson could have raised these ineffective assistance of counsel claims during his direct appeal. See *Wagers*, 2012-Ohio-2258 at ¶ 10; *Kent*, 2013-Ohio-5090 at ¶ 19. These issues could have been determined without resort to evidence outside the record. See *Lawson III* at 313-316. In fact, in *Lawson III*, we affirmed the trial court's finding that Lawson's claims of ineffective assistance of counsel were barred by res judicata. *Lawson III* at 316. Lawson has failed to present any new evidence outside the record which he was unavoidably prevented from discovering which would now support his claims for relief. See R.C. 2953.23. Accordingly, the trial court did not err in denying Lawson's petition as to his twelfth and thirteenth grounds for relief.

## 9. Fourteenth Ground for Relief

{¶ 64} In his fourteenth ground for relief, Lawson argued his convictions and sentences are void or voidable because the trial court permitted FBI Special Agent Watson to testify regarding the out of court statements made by the Paytons in violation of his rights under the confrontation clause.

{¶ 65} This claim for relief also has no merit as it is barred by the doctrine of res judicata. The evidence admitted at trial, including Agent Watson's testimony as to the statements made by the Paytons was well known to Lawson and his appellate counsel.

Therefore, he could have and should have appealed this issue during his direct appeal. *Kent* at ¶ 19. Moreover, as it was well known to both Lawson and his various attorneys that this evidence was admitted at trial, Lawson has also failed to demonstrate, as required under R.C. 2953.23 that he was unavoidably prevented from discovering the facts upon which he relies to present this claim for relief. Accordingly, the trial court did not err in denying relief as to Lawson's fourteenth ground for relief.

#### 10. Fifteenth Ground for Relief

{¶ 66} In his fifteenth ground for relief, Lawson asserts that his convictions and sentences are void or voidable because the trial court admitted into evidence custodial statements that were taken in violation of his Fifth Amendment *Miranda* rights.

{¶ 67} Again, the fact that trial counsel failed to file a motion to suppress these statements and that the statements were later admitted at Lawson's trial is not new evidence; rather, it was well known to Lawson and his appellate counsel. As the evidence necessary to challenge this alleged constitutional right violation existed based on the original record at trial, we find this argument also is barred by *res judicata*. See *Lawson III*, 103 Ohio App.3d at 315. Lawson should have and could have challenged the admission of his custodial statements on direct appeal. Moreover, it appears Lawson indeed asserted *Miranda* violations within his first petition for postconviction relief. Again, the trial court denied the petition, and we affirmed. *Lawson III*, 103 Ohio App.3d at 316. Lawson has failed to provide any new evidence outside the original trial record or further show that he was unavoidably prevented from discovering such evidence. See R.C. 2953.23. Based on the foregoing, the trial court did not err in denying Lawson relief as to his fifteenth ground for relief.

#### 11. Sixteenth Ground for Relief

{¶ 68} In his final ground for relief, Lawson argues that that the cumulative effect of all the grounds for relief contained in the instant petition and the facts relied upon for those

grounds for relief demonstrate that his constitutional rights have been violated. According to the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Hoop*, 12th Dist. Brown No. CA2011-07-015, 2012-Ohio-992, ¶ 58, quoting *State v. Garner*, 74 Ohio St.3d 49, 64 (1995). The doctrine of cumulative error is not applicable unless there are multiple instances of harmless error. *Garner* at 64.

{¶ 69} Having previously found no error as set forth in Lawson's substantive grounds for relief, we find no cumulative error. Accordingly, the trial court did not err in denying Lawson's sixteenth ground for relief.

#### **E. Evidentiary Hearing**

{¶ 70} Within his second through sixteenth grounds for relief, Lawson alternatively argued that the trial court erred by not granting him an evidentiary hearing to develop the facts related to each of his claims for relief. We find no merit to this argument.

{¶ 71} "An evidentiary hearing is not automatically guaranteed each time a defendant makes a petition for postconviction relief." *State v. Piesciuk*, 12th Dist. Butler No. CA2013-01-011, 2013-Ohio-3879, ¶ 63. In order to be entitled to a hearing, "the petitioner must show that there are substantive grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits, and the files and records in the case." *State v. Vore*, 12th Dist. Warren Nos. CA2012-06-049 and CA2012-10-106, 2013-Ohio-1490, ¶ 11; see also R.C. 2953.21(C). The burden is on the petitioner to show that the claimed errors resulted in prejudice before a hearing on a postconviction relief petition is warranted. *State v. Widmer*, 12th Dist. Warren No. CA2012-02-068, 2013-Ohio-62, ¶ 164.

{¶ 72} After reviewing the trial court's 19-page opinion, it is apparent that the trial court was thorough in its analysis and did not abuse its discretion in denying Lawson's

postconviction petition without holding a hearing. The trial court did not find substantive facts supporting a claim for relief on constitutional grounds. For the reasons set forth above, we find that the record supports the trial court's conclusions. Accordingly, the trial court did not err in denying the petition without first holding a hearing.

{¶ 73} In conclusion, we find no error in the trial court's denial of each of the grounds for relief in Lawson's successive petition for postconviction relief, and further find no abuse of discretion in the trial court's denial of a hearing thereon. Lawson's second assignment of error is therefore overruled.

### **III. Conclusion**

{¶ 74} After reviewing each of the claimed grounds for relief, we conclude Lawson's petition failed to satisfy the jurisdictional requirements of R.C. 2953.23. The petition does not rely on new evidence and Lawson does not argue that he was unavoidably prevented from discovering the facts upon which he had to rely to present his current claims for relief. Lawson also did not demonstrate that the petition was based on a new federal or state right that has been recognized by the United States Supreme Court. Moreover, Lawson failed to show by clear and convincing evidence that, but for any of the alleged constitutional errors at trial, no reasonable fact-finder would have found him guilty of aggravated murder, or found him eligible for a death sentence. R.C. 2953.23(A)(2). Thus, Lawson failed to demonstrate the criteria set forth in R.C. 2953.23, such that the trial court should have entertained his petition for postconviction relief. Based on the foregoing, we find the trial court did not err in denying his fourth petition for postconviction relief.

{¶ 75} Judgment affirmed.

S. POWELL, P.J., and PIPER, J., concur.