ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	Case No.: 14-1692
	*	
Plaintiff-Appellee	*	On Appeal from the Twelfth District Court of Appeals Case No. CA2013-12-093
	*	
vs.	*	
	*	
JERRY LAWSON	*	
	*	
Defendant-Appellant	*	

****

MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

****

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II. THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS NOT OF PUBLIC AND GREAT GENERAL INTEREST

This case is Appellant's fourth postconviction petition, arguing many of the same constitutional violations that he has raised previously and based on the same set of facts; as such, no substantial constitutional question exists and there is no question of public and great general interest. Many of the constitutional issues Appellant raises are issues that Appellant has raised in past postconviction petitions. Moreover, the facts he relies on are not only those facts developed at trial, but those facts discovered during his federal habeas evidentiary hearing in 1997—over fifteen years ago. As such, his grounds for relief are barred by res judicata and not subject to the "unavoidably prevented" exception under section 2953.23, Ohio Revised Code.

Further, though Appellant has already raised the issue of the constitutionality of section 2953.23, Ohio Revised Code, he once again raises the issue. Section 2953.23, Ohio Revised Code, does not conflict with any federal law, nor does it usurp any judicial function or prohibit Appellant from "due course of law" or "open court." Appellant has had many opportunities to raise the issues he has raised in this petition and indeed has raised them on different occasions. He has not been denied process.

The new claim in Appellant's petition is the assertion that, because of the United States Supreme Court's decision in *Cullen v. Pinholster*, ____ U.S. ____, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), Appellant's petition should be treated not as a successive petition, but as an initial petition. The argument is, essentially, because *Pinholster* created a new federal right that applies to Appellant, under the authority of *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011 (2002), Appellant

satisfies the exception listed under section 2953.23(A)(1)(a), Ohio Revised Code, and does not have to prove "clear and convincing evidence" under section 2953.23(A)(1)(b), Ohio Revised Code, since the petition is considered an initial petition. Without touching the application of *Lott* to this case, Appellant's argument fails as *Pinholster* did not create a new federal right. As such, no substantial constitutional question exists and the case is not one of public or great general interest.

III. STATEMENT OF THE CASE

A. Procedural Posture

Appellant was convicted of two counts of aggravated murder, two counts of kidnapping, one count of aggravated burglary, and two counts of intimidating a witness, and was sentenced to death in 1988. His direct appeal included the issues of prosecutorial misconduct, discovery, ineffective assistance of counsel and failure to disclose a witness, William Payton. His conviction and death sentence were affirmed. *State v. Lawson,* 12th Dist. Clermont No. CA88-05-044, 1990 WL 73845 (June 4, 1990); *State v. Lawson,* 64 Ohio St.3d 336, 1992-Ohio-47, 595 N.E.2d 902; *cert denied, Lawson v. Ohio* (1993), 507 U.S. 1007, 113 S. Ct. 1653, 123 L.Ed.2d 275.

Appellant flied his first petition for post-conviction relief in 1993 and listed 41 claims for relief. The petition was dismissed, and the decision was upheld in *State v. Lawson,* 103 Ohio App.3d 307, 659 N.E.2d 362 (12th Dist. 1995). This Court declined to accept jurisdiction. *State v. Lawson* (1995), 74 Ohio St.3d 1404, 655 N.E.2d 184; *recon den*, 74 Ohio St.3d 1459, 656 N.E.2d 933.

In 1996, Defendant sought habeas corpus relief. The court granted Defendant sentencing relief based on one point of his ineffectiveness of counsel claim. *Lawson v. Warden*, 197 F. Supp.2d 1072 (S.D. Ohio 2003). Both sides appealed.

While his federal appeal was pending, Defendant filed his second petition for post-conviction relief on June 6, 2003, which alleged that he was mentally retarded, relying on *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011 (2002) and *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed.2d 1653 (1993). Testimony regarding Defendant's competency was again received at the post-conviction evidentiary hearing. The court denied relief on November 7, 2007. The Twelfth District affirmed the judgment. *State v. Lawson,* 12th Dist. Clermont No. CA2007-12-116, 2008-Ohio-6066. This Court declined to hear the appeal. *State v. Lawson,* 123 Ohio St.3d 1523, 2009-Ohio-6487, 918 N.E.2d 525.

Defendant filed his third petition for post-conviction relief on August 19, 2003, based on a claim of government interference with his right to counsel and the constitutionality of the post-conviction relief statutes. The trial court eventually denied the petition on July 1, 2011. The Twelfth District affirmed the decision, *State v. Lawson,* 12th Dist. Clermont No. CA2011-07-056, 2012-Ohio-548, and this Court declined to accept jurisdiction. *State v. Lawson,* 135 Ohio St.3d 1431, 2013-Ohio-1857, 986 N.E.2d 1021; *recon den,* 136 Ohio St.3d 1453, 2013-Ohio-3210, 991 N.E.2d 259.

Defendant filed his fourth petition for post-conviction relief on April 4, 2013, raising sixteen grounds for relief. The trial court denied relief by entry dated November 14, 2013. The Twelfth District affirmed. *State v. Lawson*, 12th Dist. Clermont No. CA2013-12-093, 2014-Ohio-3554.

B. Statement of the Facts

The facts of this case have been well developed throughout the course of Appellant's direct appeal and postconviction proceedings. The court below found the following facts relevant:

> 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. 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.
>
> 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.

Lawson, 2014-Ohio-3554, at ¶¶ 3-4.

IV. ARGUMENT

First Proposition of Law

> When filing a successive postconviction petition, a petitioner must prove with clear and convincing evidence that no reasonable fact finder would have found him guilty of the offense for which the petitioner had been convicted, in order to comply with section 2953.23(A), Ohio Revised Code.

The United States Supreme Court did not create a new state right in *Cullen v. Pinholster*, ____ U.S. ____, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), with which Appellant may use to satisfy the exceptions under section 2953.23, Ohio Revised Code. In order to overcome the procedural bars to successive postconviction petitions set out in section 2953.23, Ohio Revised Code, a petitioner must prove:

> (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.

Here, Appellant cannot prove a newly recognized right that could be applied to his claim retroactively.

Pinholster, is not a directive to state courts, but to federal courts when faced with a writ of habeas corpus. The syllabus of the Court's decision specifically states, "Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at syllabus paragraph 1. Moreover, *Pinholster* is unlike *Atkins v. Virginia*, where the United States Supreme Court did create a new federal right. 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed. 335 (1992); *see State v. Lott*, 97

Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011, 1015 ("Lott's *Atkins* claim satisfies the requirements of R.C. 2953.23(A)(1)(b) because the Supreme Court has recognized a new federal right applying retroactively to convicted defendants facing the death penalty."). *Atkins* specifically held that "executions of mentally retarded criminals are "'cruel and unusual punishments' prohibited by the Eighth Amendment." *Atkins*, 536 U.S. at syllabus. Therefore the United States Supreme Court recognized a new right under the Eighth Amendment that prohibited the execution of mentally retarded criminals. It was precisely for this reason that this Court in *Lott*, found the defendant's claim to fall under the section 2953.23(A)(1), Ohio Revised Code, exception for newly recognized federal rights. *Lott*, 779 N.E.2d at 1015. *Pinholster* creates no such federal right. Indeed, while *Pinholster* clarified a federal statute regarding habeas claims in federal court, it said nothing of any constitutional right—the very thing at the heart of the section 2953.23(A)(1)(a), Ohio Revised Code, exception. Therefore, since *Pinholster* does not apply to Appellant in that it does not grant him a newly recognized federal or state right, Appellant cannot satisfy the exceptions under section 2953.23, Ohio Revised Code, and this Court need not accept jurisdiction.

Second Proposition of Law

> The trial court is not obligated to grant a postconviction petitioner relief or an evidentiary hearing upon a prima facie showing of the existence of one or more constitutional violations that renders his conviction and sentences void or voidable.

Appellant listed sixteen grounds for relief based on perceived constitutional violations; however, each ground is without merit. For ease of discussion and for orderly delineation and identification, Appellant's headings are left unadulterated. Such headings do not reflect the conclusions of the State.

1. 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.

Ohio's postconviction statutes provide an adequate corrective process. Postconviction procedures in Ohio are collateral civil attacks on criminal judgments and not an appeal from such a criminal judgment. *State v. Steffen*, 70 Ohio St.3d 399, 1994-Ohio-111, 639 N.E.2d 67, 76. Moreover, this Court has held that "postconviction state collateral review itself is not a constitutional right, even in capital cases." *Id.* As the Twelfth District has held, multiple Ohio courts have found Ohio's postconviction statutes to afford defendants an adequate corrective process. *State v/ Davis*, 12th Dist. Butler No. CA2012-12-258, 2013-Ohio-3878, ¶ 34 (citing *State v. Trimble*, 11th Dist. Portage No. 2007-P-0098, 2008-Ohio-6409; *State v. Frazier*, 6th Dist. Lucas No. L-07-1388, 2008-Ohio-5027; *State v. Elmore*, 5th Dist. Licking No. 2005-CA-32, 2005-Ohio-5940; *State v. Hessler*, 10th Dist. Franklin No. 01AP-1011, 2002-Ohio-3321). For these reasons and for those outlined in the Third Proposition of Law, Ohio's postconviction proceedings provide an adequate corrective process and this Court need not accept jurisdiction of this issue.

2. Petitioner is currently incompetent and therefore these proceedings cannot go forward until his competency is restored or any judgment rendered herein will be infirm

Nothing in the Ohio Revised Code provides for a competency hearing or evaluation in a postconviction proceeding. As the court below noted, Ohio courts are in general agreement that a "petitioner is not entitled, statutorily or constitutionally, to a competency hearing or evaluation in connection with postconviction proceedings." *Lawson*, 2014-Ohio-3554, at ¶ 46 (citing *State v. Spivey,* 7th Dist. Mahoning No. 12 MA

75, 2014–Ohio–721; *State v. Cassano,* 5th Dist. Richland No. 12CA55, 2013–Ohio–178; *State v. Moreland,* 2d Dist. Montgomery No. 20331, 2004–Ohio–5778; *State v. Neyland,* 6th Dist. Wood No. WD–12–014, 2013–Ohio–3065).

Appellant notes that this Court requires a postconviction petitioner be competent in order to waive postconviction proceedings, citing *State v. Berry*, 80 Ohio St.3d 371, 383, 1997-Ohio-336, 686 N.E.2d 1097. However, no binding support exists to show that Appellant would be entitled to a competency hearing in general for postconviction proceedings. As noted *supra*, a petitioner is not constitutionally entitled to postconviction review. Ensuring a petitioner is competent in the singular event of "terminat[ing] further challenges to his conviction and sentence," *Berry*, 686 N.E.2d at 1098, is eminently reasonable when doing so means a subsequent execution, however that same logic does not necessarily extend to ensuring competency to proceed on a petitioner's first, second, third, or fourth, etc., postconviction petition. Therefore, this Court need not accept jurisdiction to decide this issue.

3. Petitioner's convictions and sentences are void or voidable because he was incompetent at the time of the pre-trial, trial, and sentencing proceedings.

Since Appellant could have raised the issue of competency with regard to pre-trial, trial, and sentencing, on direct appeal and did in fact raise the issue in his first motion for postconviction relief, he is now barred from bringing this claim by res judicata. As this Court noted in *State v. Perry*, res judicata:

> bars the convicted defendant 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.

10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, 108 (1967). Here, as the Twelfth District noted below, all the facts that Appellant needed to challenge his competency at the time of the pre-trial, trial, and sentencing, "existed at the time of his conviction." *Lawson*, 2014-Ohio-3554, at ¶ 45. Moreover, as the court below noted, Appellant already raised this issue in his first postconviction motion. *Id.* (citing *Lawson III*, 103 Ohio App. 3d at 316). As such, Appellant is now barred by res judicata from bringing this issue and this Court need not accept jurisdiction.

4. and 5. Petitioner's convictions and death sentence are constitutionally infirm because he did not have the benefit of reasonable and necessary experts at trial

Since Appellant could have raised the issue of whether he was denied the benefit of reasonable and necessary experts at trial on direct appeal and did in fact raise such an issue in his first postconviction motion, his claims are now barred by res judicata. As both the trial court and the Twelfth District noted, the issue regarding any potential mental defect or disease at trial has been raised by Appellant already and subsequently denied. *State v. Lawson*, 2014-Ohio-3554, at ¶ 50 (citing *Lawson III*, 103 Ohio App.3d at 314-316. As such, Appellant cannot now relitigate these claims. Moreover, all the information necessary for Appellant to raise these issues has been available to him since his federal habeas hearing in 1997. Therefore, nothing in Appellant's argument leads to the conclusion he was unavoidably prevented from discovering this information so as to overcome the procedural hurdles of section 2953.23, Ohio Revised Code, and this Court need not accept jurisdiction.

6. 7. And 8. Petitioner's convictions and sentences are void or voidable because the trial prosecutors suppressed exculpatory evidence.

Appellant has alleged three separate *Brady* violations, however, each of them are either barred by res judicata or are meritless. As the court below noted, both the Twelfth District and this Court already litigated, on direct appeal, the issue of whether a *Brady* violation occurred with respect to statements made by Billy and Sue Payton. *Lawson*, 2014-Ohio-3554, at ¶ 52 (citing *Lawson*, 1990 WL 73845, at * 9-11,and *Lawson*, 64 Ohio St. at 342-345). As such, this *Brady* claim, with respect to the statements of Sue and Billy Payton, has been litigated and is now barred by res judicata.

As to evidence that the State was in possession of information that Appellant was not solely responsible for the murder weapon, since it has been in Appellant's possession since the habeas proceeding in 1997, he could have and should have raised this issue prior to this petition. As the court noted below, Appellant brought up the issue of the deputy's notes in his third postconviction petition and should have raised this *Brady* issue in that petition. *Lawson*, 2014-Ohio-3554, at ¶ 53. Since he did not, this issue is now barred by res judicata.

Finally, as to evidence that Appellant was not the only one to assault the victim after he shot him, does not rise to the level of a *Brady* violation and therefore is without merit. In order to successfully prove a *Brady* violation, "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, that evidence must have been suppressed by the State, either willfully or inadvertently, and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Moreover, unless the evidence is material, it will not result in prejudice. *Id.* In order to prove materiality, an accused must prove a

"reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 280 (citing *United States v. Bagely*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

Even if Appellant could show that the evidence was both favorable and suppressed, it still does not amount to a *Brady* violation as Appellant cannot show a reasonable probability that had the evidence not been suppressed, the result would have been different, and therefore his claim fails. Appellant's support includes evidence that: both Lawsons physically abused the victim at the scene; both Lawsons interrogated the victim after Appellant shot him; both Lawsons told the victim they would take him to the hospital if he told them what they wanted to know; Billy Payton had a felony charge that was pending; all four men in the car were smoking marijuana; Appellant attempted to disorient the victim by driving in circles, Appellant got a "natural high" after shooting the victim; another person had threatened to harm the victim; a deputy overheard a conversation between Appellant and his trial counsel; and Appellant's brother threatened the victim. Even taken together, this does not amount to a *Brady* violation. Nothing takes away from the fact that Appellant drove the victim out into the woods, shot him, and beat him until he died—all while the victim pleaded for him to take him to a hospital. As such, the evidence is not material and this Court need not accept jurisdiction of this case.

9. 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

Since Appellant could have raised this issue of prosecutorial misconduct in his previous postconviction petition, he is barred from raising it now by res judicata. As the

court below noted, the facts supporting this ground for relief are the same facts Appellant used in his third petition for postconviction relief. *Lawson*, 2014-Ohio-3554, at ¶ 57. Appellant has already relied on the facts underlying his claim in this petition and therefore cannot be said to have been unavoidably prevented from discovering such facts. Therefore, because Appellant could have raised and did raise these issues in a previous petition, he is now barred from re-litigating them by res judicata. Moreover, because he does not fall under the section 2953.23, Ohio Revised Code, exceptions, his claim fails and this Court need not take up the issue.

10. Petitioner's convictions and sentences are void or voidable because they are based on the knowing presentation of perjured testimony and inaccurate argument

Like most of Appellant's other claims, this one, concerning the knowing presentation of perjured testimony, is also barred by res judicata. Appellant argues that the State knowingly allowed its witness to give inaccurate and perjured testimony. However, the only support for this comes from evidence that merely conflicts with, rather than disproves, such testimony. Moreover, as the court below noted, Appellant already argued this issue in his first petition for postconviction relief which was denied and thereafter affirmed. *Lawson*, 2014-Ohio-3554, at ¶ 59. Since Appellant has already argued this issue, not only was he not unavoidably prevented from discovering the underlying facts to support his claim, but he is barred from bringing the claim altogether by res judicata. As such, this Court need not accept jurisdiction.

11. Petitioner's convictions and sentences are void and/or voidable because state's expert, Roger Fisher, provided incomplete and inaccurate information during the trial phase. This testimony was the product of prosecutorial misconduct.

Since Appellant should have raised this issue in his second postconviction petition and knew the underlying facts for more than fifteen years, his claim is barred by res judicata and does not fall under the section 2953.23, Ohio Revised Code, exceptions. As the court noted below, Appellant relied on the testimony of Dr. Fisher from the 1997 federal habeas hearing to support his claim. *Lawson*, 2014-Ohio-3554, at ¶ 61. Knowing the facts supporting his argument in the instant petition as far back as 1997, Appellant cannot say he was unavoidably prevented from discovering such facts in a timely manner. Further, Appellant's second postconviction petition, filed in the wake of *Atkins v. Virginia*, and relying on Dr. Fisher's federal habeas testimony, could have, and should have, included this claim. Since Appellant did not raise this claim in his previous postconviction motion, he is now barred by res judicata from raising the claim in this petition and this Court need not accept jurisdiction.

12. Petitioner's convictions are void or voidable because defense counsel did not provide him with effective assistance of counsel in the trial

13. Petitioner's sentences are void and/or voidable because he was denied the effective assistance of counsel during the mitigation stage

Appellant has already raised the issue of ineffective assistance of counsel and since he does not point to sufficient evidence *dehors* the record, he is now barred from bringing this claim. As the court below noted, Appellant raised the issue of ineffective assistance of counsel in his first postconviction motion and the court found that it was barred by res judicata. *Lawson*, 2014-Ohio-3554, at ¶ 63. The fact that Appellant has already raised the issue of ineffective assistance of counsel should bar him from bringing the claim again as piecemeal claims. *See Lawson*, 2014-Ohio-3554, at ¶ 53 (citing *State v. Johnson*, 5th Dist. Guernsey No. 12 CA 19, 2013-Ohio-1398); *State v.*

Sneed, 8th Dist. Cuyahoga No. 84964, 2005-Ohio-1865, ¶ 17 ("Res judicata applies to bar raising piecemeal claims in successive postconviction relief petitions or motions to withdraw a guilty plea that could have been raised, but were not, in the first postconviction relief petition or motion to withdraw a guilty plea.") (citing *State v. Kent*, 4th Dist. Jackson No. 02CA21, 2003-Ohio-6156).

More directly, Appellant did not show that he could not have made his ineffective assistance of counsel claim without resort to evidence *dehors* the record on direct appeal. Appellant cites the failures underlying his ineffective assistance claims, specifically as: a failure to file a motion to have Appellant evaluated for competency to stand trial, a failure to file a motion to suppress Appellant's statements to Detective Stemen, a failure to conduct a reasonable pretrial investigation, a failure to object to perceived improper evidence and testimony, a failure to properly prepare for the experts at trial, and a failure to conduct a proper investigation for the mitigation stage. However, all of these perceived defects could have been challenged on direct appeal. Appellant alleged ineffective assistance of counsel in his direct appeal and should have raised these claims at that time. *See State v. Lawson*, 12th Dist. Clermont No CA88-05-044, 1990 WL 73845, *2, 6-7. As such, this Court need not accept jurisdiction.

14. 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

Appellant's claim that the trial court erred in allowing Agent Watson to testify to statements made by Billy and Sue Payton should have been raised in the direct appeal and therefore he is now barred from bringing this claim by res judicata. As Appellant notes, Agent Watson testified at trial and testified to statements made by both Billy and

Sue Payton. Appellant should have raised this issue on direct appeal. His argument does not rely on any newly discovered facts; indeed, everything needed to raise this claim existed at the time of Appellant's direct appeal. Appellant did not raise this claim and therefore is now barred from raising it in this postconviction petition. As such, this Court need not accept jurisdiction.

> 15. 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.

Much like Appellant's Fourteenth Ground for Relief, this Fifteenth Ground for Relief is barred by res judicata as Appellant could have, and should have, raised the issue of his custodial statements on direct appeal. Appellant's Fifteenth Ground for Relief alleges that his statements to Detective Stemen were involuntary based on Appellant's mental condition. However, as noted even on direct appeal, Appellant's mental condition was at issue in trial and therefore, this argument could have been and should have been made on direct appeal. *See Lawson*, 64 Ohio St.3d at 341 ("Since appellant stipulated that he shot Martin, the only issue contested at trial was his mental state."). It was not and therefore should be barred by res judicata. Moreover, as the court below noted, Appellant already raised the alleged *Miranda* violations in his first postconviction petition which was denied and subsequently affirmed. *Lawson*, 2014-3554, at ¶ 67. As such, since res judicata bars relief here, this Court need not accept jurisdiction.

> 16. 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

Since there were no errors during the course of the trial court proceedings, there could be no cumulative effect that would render Appellant's convictions and sentences void or voidable. As such, this Court need not accept jurisdiction.

Third Proposition of Law

> Section 2953.23, Ohio Revised Code, is not unconstitutional on its face and is not unconstitutional as applied to Petitioner.

Since section 2953.23, Ohio Revised Code, does create a set of mandatory conditions and since it is neither facially unconstitutional nor unconstitutional as applied, Appellant's Third Proposition of Law is without merit. Appellant first alleges that section 2953.23 does not create a set of mandatory conditions, based on the language of the section that states the court "may not entertain." Appellant focuses on the word "may", which generally connotes discretion. However, the word "may," must be read in context. As the court below found, Ohio courts have determined that the phrase "may not", particularly in the context of section 2953.23, Ohio Revised Code, does not provide for a court's discretion. *Lawson*, 2014-Ohio-3554, at 24 (citing *Johnson*, 2013-Ohio-1398, ¶ 21; *State v. Conway*, 10th Dist. Franklin No. 12AP-412, 2013-Ohio-3741, ¶ 64). As such, section 2953.23, Ohio Revised Code, does create a set of mandatory conditions.

Since section 2953.23, Ohio Revised Code, is not in conflict with any federal law, it does not violate the Supremacy Clause. The Twelfth District set out the test for violations of the Supremacy Clause in its opinion in *State v. McGuire*, 12th Dist. Preble No. CA2001-10-011, 2001 WL 409424 (Apr. 23, 2001). In that case, the court noted that the Supremacy Clause does not invalidate a state law unless the state law is either expressly or impliedly in conflict with a federal law. *Id.* at *5. In order to expressly conflict, there must be: 1) a federal law that explicitly provides for preemption of a state

law; 2) specific wording or legislative history of a federal law that indicates congressional intent to exclusively regulate in a specific area; or 3) conflict with a federal regulatory scheme. *Id.* Here, there is no question that there is no federal statute on point, no indication Congress intended exclusive federal regulation, and no federal regulatory scheme; therefore, if a conflict did exist, it would be implied. As the *McGuire* court noted, implied conflict occurs where: 1) "it is impossible to comply with both state and federal requirements; or 2) where state law obstructs congressional objectives." *Id.* Here, it is not impossible to comply with both state and federal requirements and state law does nothing to obstruct congressional objectives.

Appellant cites numerous cases that develop certain standards of review for certain constitutional violations, however, these cases do not develop a general constitutional standard that applies across the board to all constitutional claims. Indeed, Appellant's own cases show a lack of uniformity. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10L.Ed.2d 215 (1963), demands a showing of prejudice in certain types of prosecutorial misconduct cases, specifically requiring a showing of a "reasonable probability" of a different result. *Strickler*, 527 U.S. at 280. *United States v. Cronic*, on the other hand, notes "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively prejudicial." 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Even between these two cases a different standard exists. Moreover, nothing about section 2953.23, Ohio Revised Code, or how it is applied, indicates a discord between its requirements and any federally created standard of review when dealing with constitutional violations. Appellant has not shown

how exactly section 2953.23, Ohio Revised Code, has been applied so as to prevent compliance with both state and federal law. Moreover, as the *McGuire* court noted, section 2953.23, Ohio Revised Code, actually provides more rights than those afforded by the Constitution, as states are not required to provide postconviction relief. *McGuire*, 2001 WL 409424, *6. In addition, it is well recognized that states may erect procedural bars to postconviction motions to deter "repeated returns to state court." *Id.* Section 2953.23's clear and convincing standard is merely a procedural bar to deter repeated returns and therefore, it does not frustrate congressional objectives.

Since section 2953.23, Ohio Revised Code, does not infringe on the judiciary's power to provide remedies for constitutional violations, it does not violate the Doctrine of Separation of Powers. As the *McGuire* court noted—and as is well recognized—postconviction petitions are civil, collateral attacks on a judgment. *Id.* at *6. While it is true that the function of the judiciary is to "declare what the law is and to determine the rights of parties with respect to the law", *id.* at *7, nothing about section 2953.23, Ohio Revised Code, frustrates that purpose. *See id.* Therefore, section 2953.23, Ohio Revised Code, does not violate the Supremacy Clause.

Section 2953.23, Ohio Revised Code bears a rational relationship to a legitimate state concern and provides a reasonable amount of time to seek redress and as such, does not violate the constitutional provisions of "due course of law" or "open courts". The state certainly has legitimate concerns with petitioners repeatedly filing in state courts. Placing procedural barriers on successive petitions, such as those found in section 2953.23, Ohio Revised Code, helps facilitate the just and efficient disposition of these types of cases. Moreover, as the *McGuire* court noted, the "'open courts' and 'due

course of law' provisions only require that individuals have a reasonable time to investigate his or her case, preserve all defenses and objections, and present all cognizable claims in court." *Id.* at *8 (citing *State v. Gulertekin*, 10th Dist. Franklin No. 99AP-900, 2000 WL 739431 (June 8, 2000)). Appellant had plenty of opportunities to bring his claims through either his direct appeal, first postconviction petition, or even in his successive postconviction petitions. As such, section 2953.23, Ohio Revised Code, does not violate the constitutional "due course of law" or "open court" provisions.

Finally, section 2953.23, Ohio Revised Code, has not prevented Appellant from raising his constitutional arguments and therefore is not unconstitutional as applied. Appellant has raised numerous perceived constitutional violations in his direct appeal and in each of his four postconviction petitions. He has had ample opportunity to bring any and all claims he had in state court and in fact did raise many of those constitutional issues—the reason for the application of res judicata to many of his grounds for relief. As such, section 2953.23, Ohio Revised Code, is not unconstitutional as applied. Since section 2953.23, Ohio Revised Code, is not unconstitutional on its face or as applied, this Court need not accept jurisdiction.

V. CONCLUSION

This case does not contain a substantial constitutional question nor does it contain a question of public or great general interest. As such, the State respectfully requests this Court to deny jurisdiction.

Respectfully submitted,

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VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing State's Memorandum in Response, was served upon Randall L. Porter, Office of the Ohio Public Defender, 250 E. Broad St, Suite 1400, Columbus, Ohio 43215, and Dennis L. Sipe, Buell & Sipe Co., L.P.A., 322 Third Street, Marietta, Ohio 45750, by ordinary mail on this 30th day of October, 2014.

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