IN THE SUPREME COURT OF OHIO

STATE OF OHIO Appellee, v. **TYRONE NOLING** Appellant.	Case No. 08-1289 On Appeal From the Portage County Court of Appeals, Eleventh Appellate District Court of Appeals Case No. 2007-P-0034 This is a Death Penalty Case

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

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THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION WARRANTING JURISDICTION FROM THIS

This is not a case of public or great general interest. The Eleventh District Court of Appeals recently affirmed the dismissal of Appellant's successive petition for postconviction relief. *State v. Noling* (May 19, 2008), Portage App. No. 2007-P-0034, 2008 -Ohio- 2394, at ¶114.

In the present case, the trial court was without jurisdiction to entertain the Appellant's successive postconviction petition because the Appellant failed to demonstrate that he was unavoidably prevented from discovery of the facts upon which he relied to present his claims for relief. R.C. 2953.23(A)(1)(a). As a similar requirement is imposed for obtaining a new trial based upon newly discovered evidence under Crim.R. 33, the Appellant's claims raised in his motion for a new trial also failed.

On Memorandum, the Appellant seeks jurisdiction from this Court asserting that he did satisfy the threshold requirements of a successive petition for postconviction relief and a motion for a new trial, that he was entitled to discovery, funds for an expert witness and an evidentiary hearing before the trial court decided whether to grant or dismiss his filings and that the public records law in Ohio operates to bar Capital defendants from accessing the courts via successive petitions for postconviction relief.

Contrary to the Appellant's assertions, this is not a case of public or great general interest. The rule set forth in R.C. 2953.23(A)(1), governing successive petitions for postconviction relief is a specific rule. By enacting this provision, the General Assembly intentionally created a very limited opportunity for consideration of

successive petitions for post-conviction relief. Not only must the petitioner demonstrate an excuse for the successive filing, he must also satisfy the additional requirement, which essentially requires him to prove, if not his actual innocence, at least the absence of evidence that would permit any reasonable fact finder to find him guilty. The General Assembly did not provide for discovery or funds for expert witnesses to aid a petitioner in satisfying the statutory requirements of a successive petition.

The Appellant's argument regarding the nature and process associated with successive petitions for postconviction relief are issues for the legislature not this Court. Accordingly, this is not a case in which this Court must revisit its public records decision in *State ex. rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420.

The Appellant has not presented any error with the decision of the Eleventh District Court of Appeals or any issue warranting jurisdiction from this Court.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF FACTS

On April 5, 1990, while Butch Wolcott and Joseph Dalesandro waited outside in the get-away car, the Appellant and Gary St. Clair entered the home of Bearnhardt and Cora Hartig, fired multiple shots from a .25 caliber gun and fled the scene. (Jury Trial Proceedings hereinafter "T.p." 978-979). Several days later, a neighbor's son discovered the decomposing bodies of the elderly couple lying on the kitchen floor. As the type of weapon used in the murders only held five or six shells, the killer had to stop to reload the weapon in order to fire the eight bullets detected at the scene of the crime. (T.p. 808).

Prior to the Hartigs' murders, the foursome had devised a plan to rob elderly people. (T p. 827). They agreed that the simplest approach would be to park their car outside of an elderly person's house feigning car trouble. Seeking assistance they would ask to use the phone to gain entry into the house and then rob the individual. (T.p. 827-828). Despite two previously successful robberies of elderly couples at the Hughes and Murphy residences, the plan failed at the Hartig's residence and the couple was murdered because they resisted, the Appellant explained, "the old man wouldn't stop, that he kept coming at him." (T.p. 851).

Following the murders, Wolcott confided in a friend. At trial, Jill Hall testified that Wolcott came to her house and implicated the Appellant in the murders. (T.p. 923). Wolcott said the Appellant, "had a gun, he pulled the trigger" he continued, "everything went wrong * * * we killed them." (T.p. 926).

I. STATEMENT OF PROCEDURAL HISTORY

Following a jury trial in February 1996, the Appellant was convicted on two counts of aggravated murder and the accompanying death penalty specifications, two counts of aggravated robbery and aggravated burglary. The Appellant's conviction and death sentence were affirmed on direct appeal. *State v. Noling* (2002), 98 Ohio St.3d 44, certiorari denied *Noling v. Ohio* (2003), 539 U.S. 907, 123 S.Ct. 2256, 156 L.Ed.2d 118.

On July 23, 1997, the Appellant filed his first petition for postconviction relief with the trial court. In his petition, the Appellant raised four claims: actual innocence, prosecutorial misconduct, *Brady* violations, and the ineffective assistance of counsel. In support of his actual innocence claim, the Appellant asserted that there was no

physical evidence connecting him to the murders and that his co-defendants, St. Clair, Wolcott and Dalesandro were intimidated into offering trial testimony against him. The prosecutorial misconduct claim alleged that the co-defendants were intimidated and coerced into providing trial testimony against the Appellant. The *Brady* violation asserted that the State withheld alibi information regarding the foursome being involved in a purse snatching incident in Alliance at the same time as the murders.

In his ineffective assistance of counsel claim, the Appellant alleged trial counsel failed to: file a motion for a change of venue in response to pretrial publicity; present an alibi defense; present evidence regarding other possible suspects; impeach testimony regarding the "smoking gun;" cross-examine on the murder weapon, kitchen chair or glove box search; and distinguish between the modus operandi of the Hartigs' murders and Hughes and Murphy robberies.

The trial court dismissed the Appellant's first petition for postconviction relief finding that, "there [were] no substantive grounds for relief." On September 2, 2003, this Court affirmed the decision. *State v. Noling* (Sept. 2, 2003), Portage App. No. 98-P-0049, 2003-Ohio-5008, at ¶74. The Supreme Court of Ohio denied jurisdiction. *State v. Noling* (2004), 101 Ohio St.3d 1424, 2004-Ohio-123.

The Appellant instituted a federal habeas action in the Northern District of Ohio, U.S. District Court, Case No. 5:04-cv-01232-DCN on June 30, 2004. A review of the District Court docket reveals that his petition for habeas corpus was filed on December 15, 2004. On August 29, 2005, the Appellant filed his first request for discovery in the District Case and this request was denied on November 4, 2005, holding the motion was "an effort to re-litigate his state court proceedings and require [the] Court to re-

adjudicate findings of fact." A subsequent reconsideration was also denied. The District Court also denied the Appellant's motion for an evidentiary hearing and subsequent reconsideration of the order.

Following the publication of an article in the *Cleveland Plain Dealer*, the Appellant moved the District Court to stay the case and hold in abeyance pending exhaustion in the state court on August 14, 2006. The District Court denied this motion on November 6, 2006, finding, "the Petitioner has failed to explain why he did not previously fully exhaust his actual innocence and *Brady* claims in state court." (Transcript of the docket, journal entries and original papers hereinafter "T.d." 287, Exhibit B). Specifically, the District Court held that the Appellant failed to articulate how the information raising doubt about his participation in the Hartigs' murders differed among the *Plain Dealer* article and a September 10, 2003 article in the *Cleveland Scene Magazine,* which predated the initiation of the Appellant's habeas litigation. (T.d. 287, Exhibit B). Copies of both the 2006 *Plain Dealer* article (T.d. 262, Exhibit SS) and the 2003 *Cleveland Scene Magazine* article (T.d. 267, Exhibit B), are part of the record on appeal to this Court.

On November 3, 2006, the Appellant filed a second round of actions with the trial court including a successive postconviction petition, leave to file a motion for a new trial pursuant to R.C. 2945.79(B), (F) and Crim.R. 33, a motion for a new trial pursuant to R.C. 2945.79(B), (F) and Crim.R. 33, a motion for relief from judgment pursuant to Civ.R. 60(B), a motion for discovery and a motion for funds for an expert witness. (T.d. 258, 259, 260, 261, 264).

The parties were provided the opportunity to address the trial court and present their respective legal arguments before a decision was rendered. In its opinion, the trial court reviewed the Appellant's allegations and categorized the different factual situations as: "inconsistent statements by witnesses and recorded grand jury testimony, alternative suspect evidence, inconsistent statements, prosecutorial misconduct letters from a psychologist as to the credibility of a witness and a search of a car." (T.d. 287). The trial court then dismissed the Appellant's successive petition and motion for a new trial finding that the Appellant's "new evidence presented does not meet the standards for granting a new trial or a successive petition for post conviction relief." (T.d. 287). The trial court further found that a Civ.R. 60(B) motion was an improper remedy for relief, (T.d. 287), and the Appellant's motion to appoint an expert witness and motion for additional discovery were rendered moot. (T.d. 288).

On May 19, 2008, a unanimous panel of the Eleventh District affirmed the trial court's dismissal of the Appellant's successive petition for postconviction relief. *State v. Noling* (May 19, 2008), Portage App. No. 2007-P-0034, 2008 -Ohio- 2394, at ¶114. ("*Noling Successive PCR*"). This matter is now before the Supreme Court of Ohio on the Appellant's memorandum in support of jurisdiction.

ARGUMENT OPPOSING JURISDICTION

Response to Appellant's Proposition of Law No. 1: As the Appellant failed to satisfy the requirements for a successive petition for post conviction relief under R.C. 2953.23(A)(1)(a), (b) or a motion for a New Trial pursuant to Crim.R. 33 and R.C. 2945.79, the Eleventh District Court of Appeals properly affirmed the trial court's decision dismissing both the petition and motion.

In the present case, the Eleventh District Court of Appeals unanimously held that the trial court did not abuse its discretion in dismissing the Appellants successive

petition for postconviction which raised 21 claims relief in the following areas: (1) alleged *Brady* violations, (2) alleged ineffective assistance of trial counsel, (3) alleged coercive police and trial tactics and (4) an actual innocence claim. *Noling Successive PCR*, 2008 -Ohio- 2394, at ¶114.

In his first proposition of law, the Appellant argued he satisfied his burden of proof under either a successive petition for postconviction relief or a motion for a new trial to warrant further proceedings in the trial court. He challenged the Appellate Court's review of his evidentiary materials asserting the Court's review was piecemeal, inaccurate and incorrect. Additionally, the Appellant argued that current Ohio case law regarding public records requests prevented his discovery of the evidentiary materials relied upon in his successive petition for post conviction relief or in the alternative his motion for a new trial.

Standard of Review – Successive Petition for Postconviction Relief

An Appellate Court reviews the trial court's decision dismissing a successive petition for postconviction relief under an abuse of discretion. *State v. Gondor* (2006), 112 Ohio St.3d 377, 2006 -Ohio- 6679, at ¶ 58. An abuse of discretion is "more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

Successive petitions for post conviction relief are governed by R.C. 2953.23. The purpose behind R.C. 2953.23 is to permit trial courts to consider factual

information that may come to light after a defendant's trial, not to permit defendants to advance new legal theories using the same underlying facts. *State v. Williamitis* (June 9, 2006), Montgomery App. No. 21321, 2006-Ohio-2904, at ¶18; *State v. Hurst* (Jan 10, 2000), Stark App. No. 1999CA00171, unreported.

This statute provides that a trial court may not entertain a successive petition for similar relief unless the petitioner shows both of the following: "the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief [.]" and "by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense [or] * * * eligible for the death sentence." R.C. 2953.23(A)(1)(a) and (b). Clear and convincing evidence is evidence that produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford* (1954), 161 Ohio St.2d 469, paragraph three of the syllabus.

The doctrine of *res judicata* not only bars claims that could or should have been brought at trial or on direct appeal, but also claims that could or should have been brought in a first petition for post-conviction relief. *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 87; *State v. Sopjack* (Dec. 15, 1995), Geauga App. No. 93-G-1826, unreported.

Standard of Review – Motion for New Trial

The disposition of a motion for a new trial based on newly discovered evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Williams* (1975), 43 Ohio St.2d 88, paragraph two of the syllabus. The previously provided description of the abuse of discretion standard

applies equally to this issue. Notably, "a new trial is an extraordinary measure and should be granted only when the evidence presented weighs heavily in favor of the moving party." *State v. Williams* (Jan. 19, 2007), Lake App. Nos. 2005-L-213 and 2005-L-214, 2007-Ohio-212, at ¶60.

Crim.R. 33(A)(6) provides that a new trial may be granted when new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial, or when the prosecutor commits misconduct, Crim.R. 33(A)(2). See also R.C. 2945.79(F) and (B). Pursuant to Crim.R. 33(B), the Appellant was required to first obtain leave to file his motion upon the trial court's finding that "by clear and convincing proof that the defendant was unavoidably prevented from discovery of the evidence upon which he must rely." Crim.R. 33(B).

In order to warrant a new trial based upon newly discovered evidence, the Appellant was required to show the new evidence:

> (1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence.

State v. Petro (1947), 148 Ohio St. 505, syllabus.

ANALYSIS

The Crim.R. 33(B) prerequisite for filing a new trial is the same showing required under R.C. 2953.23(A)(1)(a) for a trial court to entertain a successive petition for postconviction relief. In the present case, the Appellant had to show he was unavoidably prevented from discovering the facts upon which he based either his successive petition or new trial motion.

The phrase, "unavoidably prevented" in this section means that a defendant was unaware of those facts and was unable to learn of them through reasonable diligence. *State v. McDonald* (Feb. 25, 2005), Erie App. No. E-04-009, 2005-Ohio-798, at ¶19. The "facts" contemplated by R.C. 2953.23(A)(1)(a), are the historical facts of the case, which occurred up to and including the time of conviction. *State v. Czaplicki* (May 29, 1998), Montgomery App. No. 16589, unreported (available online at 1998 WL 272034).

The Appellant raised 21 items he identified as "Grounds for Relief" in his successive petition for postconviction relief. In support of his successive petition, the Appellant attached basically three types of various evidentiary materials. These three types of evidence can be categorized as : Type 1 - alleged withheld exculpatory evidence, Type 2 - evidence trial counsel possessed at trial and Type 3 - post-trial affidavits. Each type of evidence will be considered separately for ease of discussion.

Type 1 Evidence

Type 1 evidence was that which the Appellant claimed that he was unavoidably prevented from discovering throughout his lengthy court proceedings in both State and Federal courts including: (1) Grand Jury testimony of Chico Garcia, Dalesandro, St. Clair, Jill Hall, Julie Mellon and Robyn Elliott; (2) a complete copy of the Hartig's phone records, (3) investigator notes regarding interviews with Doris Jones, William LeFever, Julie Mellon, St. Clair, Dalesandro and Wolcott; (4) an investigative report regarding Lehman's polygraph refusal; and (5) information regarding Officer Mucklo's search of the vehicle.

With regards to Type 1 evidence, the Eleventh District held the Appellant was not unavoidably prevented from discovering these facts, "much of the evidence to which appellant directs our attention was either available or could have been discovered prior to the filing of his successive petition for postconviction relief" or "prior to the filing of his motion for a new trial." *Noling Successive PCR*, 2008 -Ohio- 2394, at ¶64, 90. However, even if the Appellant had been able to demonstrate "unavoidable discovery" of the materials, the Appellate Court also held with regards to the petition, "a careful review of the newly discovered evidence in its totality fails to show, by clear and convincing evidence, that but for the alleged *Brady* errors, no reasonable fact finder would have found appellant guilty." (Emphasis added). *Id.*, 2008 -Ohio- 2394, at ¶64. With regards to the Appellant's motion for a new trial, the Appellate Court found, "the evidence at issue does not meet the Petro factors." Id., 2008 -Ohio- 2394, at ¶90.

Contrary to the express findings of the Appellate Court (cited above), the Appellant presented to this Court an argument that the Eleventh District evaluated his evidence separately. On Memorandum, the Appellant alleged the Eleventh District Court of Appeals dismissed his successive petition for postconviction relief in a "disingenuous manner" and references the opinion in terms of, "inconsistent with the record," "unjustified," "utter nonsense," "absurd," and "nonsensical." (Appellant's Memorandum at p.g. 25, 30, 35, 45, 51). He also baldly asserted that "[t]hroughout its opinion, the court made inaccurate and incorrect factual findings" without providing examples or citations of the same. (Appellant's Memorandum at p.g. 46). This

analysis demonstrates that the Appellate Court properly affirmed the trial court's decision in the present case.

In the alternative, the State submits the following analysis of the evidentiary materials the Appellant relied on to support his successive petition for postconviction relief and motion for new trial.

The trial record reveals that Dalesandro, Hall, St. Clair, Garcia and Elliot were all provided on the State's witness list prior to testifying at trial. Trial counsel's failure to move the trial court upon the showing of a particularized need for the Grand Jury testimony of Dalesandro, St. Clair Hall and Garcia is an issue that was cognizable in either the Appellant's direct appeal or first postconviction petition. Therefore the Grand Jury transcripts do not satisfy the first prong of R.C. 2953.23(A) or a Crim.R. 33 threshold requirement, that the Appellant was unavoidably prevented from their discovery.

These transcripts also fail to establish by clear and convincing evidence, a constitutional error at trial or that but for this alleged constitutional error no reasonable factfinder would have found the petitioner guilty of the offense or eligible for the death sentence, the second prong of R.C. 2953.23(A). The alleged inconsistencies between the Grand Jury transcripts and the witnesses who testified at trial, do not refute the State's trial theory clearly and convincingly. Even assuming *arguendo* that the Grand Jury testimony of Robyn Elliot, Chico Garcia, Dalesandro, St. Clair and Jill Hall may have been of some assistance to the Appellant in rebutting the State's theory of the case, it cannot be said that this evidence was so compelling that no reasonable fact

finder would have found him guilty, had he had access to this evidence and elected to use it as impeachment evidence at trial.

The Appellant relies on Garcia's Grand Jury transcript as support for his *Brady* claim. Specifically, the Appellant alleges that Garcia's Grand Jury testimony reveals that he was uncertain whether Dalesandro had sold him two or three guns. A review of the trial record reveals that the jury was aware that there was inconsistencies between the number of guns used in the murders and sold to Garcia. (Trial T.p. 858, 982, 1058, 1064, 1117, 1246, 1256). As the murder weapon was not recovered and the number of guns involved in the murder was presented to the jury, Garcia's Grand Jury testimony is merely cumulative to trial evidence and fails to satisfy the second prong of R.C. 2953.23(A). Being cumulative evidence, this also fails to satisfy the *Petro* factors for a new trial. *Petro*, 148 Ohio St. at syllabus.

The Appellant relies on the Grand Jury transcripts of Dalesandro, Jill Hall, Julie Mellon and Robyn Elliot as evidence that could have been used to impeach the testimony of the State's trial witnesses by pointing out inconsistencies in testimony or attacking the witness's credibility. However, evidence in the nature of impeachment material is not sufficient to invoke the trial court's jurisdiction in a successive petition for postconviction relief. *State v. Beuke* (1998), 130 Ohio App.3d 633. Accordingly these transcripts fail both prongs of R.C. 2953.23(A), the initial threshold of Crim.R. 33 and the *Petro* factors for a new trial. *Petro*, 148 Ohio St. at syllabus.

The Appellant also relies on the Grand Jury transcripts of St. Clair and Dalesandro as support for his claim that the State coerced confessions. A review of the record reveals that the issue of allegedly coerced confessions was an issue raised

both at the Appellant's trial and to a greater extent in his first petition for postconviction relief. At trial, Dalesandro testified that the prosecutor yelled at him to coerce his cooperation (Trial T.p. 1127); Wolcott stated he lied to the prosecutor because he was scared (Trial T.p. 868); and St. Clair testified that the prosecutor's investigator Ron Craig came up with the story St. Clair eventually told and he cooperated because he was scared. (Trial T.p. 999).

As support for the Appellant's claim of prosecutorial misconduct in his first petition, the Appellant attached affidavits of Wolcott, Dalesandro, St. Clair, their parents and counsel. Wolcott averred that Investigator Craig lied about having an eye witness and physical evidence connecting him to the murder and filled Wolcott's head with memories of being at the murder. (First Amended Petition, Exhibit F). Similarly, Dalesandro's affidavit stated that he was not involved in the murder and he was coached by Investigator Craig who yelled and screamed during the interviews until Dalesandro cooperated with the prosecution's version of events. (Second Amended Petition, Exhibit Y). St. Clair averred that his testimony at trial was the product of intimidation and suggestion by Investigator Craig. (First Amended Petition, Exhibit E). As the alleged coercion was raised at the Appellant's trial and in his first petition for postconviction relief, the evidence does not satisfy the first prong of R.C. 2953.23(A) or the initial threshold of Crim.R. 33 new trial motion.

The Appellant attached copies of partial phone records from the Hartigs' residence in support of his *Brady* claim. He alleged that the State withheld a complete copy of the phone records. However, a review of the State's material reveals that only this partial record of phone calls exists.

Furthermore, the importance of the phone records in the Appellant's successive petition is to establish the existence of an alternate suspect theory, which he raised in his first petition for postconviction relief. Specifically, that Mr. Hartig had allegedly had a phone conversation with Dr. Cannone regarding re-payment of money that Mr. Hartig had allegedly loaned Lewis Lehman, an insurance agent. The record reflects that a witness at the Appellant's first postconviction proceeding testified at an evidentiary hearing that she was an investigator hired by defense counsel who reported to defense counsel that there was an insurance agent who supposedly was meeting with Mr. Hartig to discuss the $10,000 he owed to Mr. Hartig. (Oct. 20, 1997 Hearing T.p. 14). The investigator informed defense counsel about Lehman as early as March of 1993. (Oct. 20, 1997 Hearing T.p. 7).

The record further reflects that the Appellant pursued this alternate suspect theory in his first postconviction petition claim of actual innocence by relying on the alleged April 4, 1990 phone call between Mr. Hartig and Dr. Connane regarding the loan amount Lehman owed. The first postconviction petition claim of ineffective assistance of counsel alleged trial counsel failed to pursue crime scene evidence. Specifically, bullet holes in the kitchen chair, which allegedly demonstrated the shooter was a familiar person not a stranger who forcefully entered the house. The Appellant also claimed that trial counsel failed to pursue Lehman's allegedly unsatisfactory explanation of how and when he disposed of his .25 caliber gun, the same type as was used to murder the Hartigs. To the extent that the phone records evidence relates to an alternate suspect theory, a claim previously raised in the Appellant's first postconviction petition, the records fail to satisfy either prong of R.C. 2953.23(A), the

initial threshold of Crim.R. 33 and the *Petro* factors for a new trial. *Petro*, 148 Ohio St. at syllabus.

The Appellant also relies on an investigator's report that refers to Lehman's refusal to take a polygraph as support for his *Brady* claim. Assuming *arguendo* that this investigator's report contained some degree of exculpatory material, the identity of Lehman, his alleged connection to the Hartig's and the fact that he at one time owned a .25 caliber weapon was all information that was known and utilized in the Appellant's first postconviction proceedings. Furthermore, according to the defense investigator it was also information that the trial counsel possessed prior to trial. (Oct. 20, 1997 Hearing T.p. 14). Accordingly, this investigator's report fails the first prong of R.C. 2953.23(A) and the initial threshold of Crim.R. 33 new trial motion.

The Appellant relied on investigator notes regarding interviews with Doris Jones, William LeFever, Julie Mellon, St. Clair, Dalesandro and Wolcott in his successive petition. Jones, LeFever and Mellon did not testify at trial. Jones reported that Mr. Hartig told her husband at a picnic that there was money in the house that nobody would ever find. LeFever apparently fit the description that a neighbor provided regarding a white male in his thirties driving a dark blue car in the general area of the Hartigs' residence on the day of the murder. Notes regarding Jones and LeFever refer to the alternate suspect theory which the Appellant raised in his first petition for postconviction relief. These notes fail both the first and second prongs of R.C. 2953.21(A), the initial threshold of Crim.R. 33 and the *Petro* factors for a new trial. *Petro*, 148 Ohio St. at syllabus.

The Appellant relied on investigator notes regarding Julie Mellon, St. Clair, Dalesandro and Wolcott to support his *Brady* claim and his claim that the State allowed perjured testimony. These notes allegedly reveal inconsistencies between information contained in these investigator notes and St.Clair, Dalesandro and Wolcott's testimony at trial.

These notes involve: (1) St. Clair's initial denial of involvement in the Hartig's murder, whether the Appellant put a gun in his pocket or the glove compartment and the timing of the Hartigs' murders; (2) the absence of any comments regarding the Hartigs' murder during Mellon's interview regarding only the Hughes and Murphy robberies; (3) Dalesandro's statement that the Hartigs' were murdered because they were hostile; and (4) Wolcott's statement that the Hartigs' were tied up in the kitchen. These alleged inconsistencies do not rise to the level of clear and convincing evidence that satisfies the second prong of R.C. 2953.23(A). Furthermore, St. Clair, Dalesandro and Wolcott all recanted their trial testimony in affidavits that were attached in support of the Appellant's first petition for postconviction. Therefore these notes would not satisfy the first prong of R.C. 2953.23(A) or the threshold requirement of a Crim.R. 33 new trial motion.

The Appellant also relies on information that Detective Mucklo provided to the *Cleveland Plain Dealer* Reporter in connection with her 2006 article to support his *Brady* claim. Allegedly, Detective Mucklo searched the vehicle used in the murder and found no weapon. Following the release of the vehicle, the Appellant ordered Dalesandro to recover the gun from the glove compartment and sell it to Garcia At trial, Dalesandro testified that the police did not search the car, he recovered the gun

and sold it to Garcia. (Trial T.p. 1064). As the murder weapon was never recovered and issues regarding the weapon were raised in the Appellant's first petition for postconviction relief, Mucklo's alleged statement to a reporter satisfies neither of the two requirements in R.C. 2953.23(A), the initial threshold of Crim.R. 33 or the *Petro* factors for a new trial. *Petro*, 148 Ohio St. at syllabus.

The rule set forth in R.C. 2953.23(A)(1) is a specific rule. By enacting this provision, the General Assembly has intentionally created a very limited opportunity for consideration of successive petitions for post-conviction relief. Not only must the petitioner demonstrate an excuse for the successive filing, he must also satisfy the additional requirement, which essentially requires him to prove, if not his actual innocence, at least the absence of evidence that would permit any reasonable fact finder to find him guilty. A review of the Appellant's Type 1 evidence reveals that the Appellant has not done so in this case. Similarly, the Appellant's Type 1 evidence does not meet the requirements of Crim.R. 33 or those espoused by this Court in *Petro* *Petro*, 148 Ohio St. at syllabus.

Type 2 Evidence

Type 2 evidence was documents and information that trial counsel had in their possession at the time of trial including: (1) two pretrial letters from Alfred Grzegorek, Ph.D. dated July 6, 1992 and December 21, 1995, regarding a psychological evaluation of Wolcott; (2) information regarding Lehman and LeFever's possible business relationship with Mr. Hartig; and (3) a pretrial competency report regarding St. Clair. The Appellant also provided citations to various witnesses' trial testimony to further support his claims. As these witnesses' testimony at trial were part of the

record for the Appellant's direct appeal they should be considered as Type 2 evidence.

With regards to Type 2 evidence, the Eleventh District held, "[t]hroughout his brief, appellant admits the evidence at issue was in trial counsels' possession but was simply not utilized * * * [i]f trial counsel possessed the evidence at issue at the time of trial, it was available for use at trial. Therefore, appellant was not unavoidably prevented from its discovery." *Noling Successive PCR*, 2008 -Ohio- 2394, at ¶68.

Even though the Appellant failed to satisfy the threshold requirement of either a successive petition or new trial motion with this evidence, the Appellate Court indulges the Appellant and assumes arguendo that he was unavoidable prevented from discovering the evidence (because trial counsel failed to turn over his complete trial file upon request by the Appellant's PCR attorney) and continues its review of the evidence. *Id.*, 2008 -Ohio- 2394, at ¶68-78. The Court finds, "[w]hen viewed as a whole, we do not believe the foregoing evidence meets the requirements of R.C. 2953.21(A)(1)." (Emphasis added). *Id.*, 2008 -Ohio- 2394, at ¶79.

Type 3 Evidence

Type 3 evidence are affidavits from the following individuals: (1) trial counsel Keith and Cahoon; (2) first postconviction relief counsel John Gideon; and (3) Richard Ofshe. The Eleventh District held that the Appellant was not unavoidably prevented from discovery of the information presented in any of the affidavits. *Id.*, 2008 -Ohio- 2394, at ¶82-84. Specifically, trial counsels' information was available but not pursues for the appellant's first postconviction proceedings, PCR counsel's information merely demonstrated that trial counsel was in possession of the material

at the time of trial thereby failing both prongs of R.C. 2953.23(A)(1), and Ofshe's affidavit set forth facts discoverable before trial thereby failing the first prong of R.C. 2953.23(A)(1). *Id.*

The State notes that the affidavits of Attorneys George Keith and Peter Cahoon were prepared in anticipation of filing a stay of proceedings in Federal Court and this successive petition in state court. (T.d. 263, Exhibits A and B) Both attorneys were shown various documents by the Appellant's current counsel and asked to identify the documents that they did not receive during the discovery process before the Appellant's 1996 criminal trial. The only documents that both Attorney Keith and Attorney Cahoon were able to aver a belief that the information was not received during discovery were the grand jury transcripts of Robyn Elliot, Chico Garcia, Dalesandro, St. Clair, Jill Hall and Julie Mellon. (T.d. 263, Exhibits A and B).

Affidavits from Attorneys Cahoon and Keith regarding the discovery process during the Appellant's trial are affidavits that could have been pursued in support of the Appellant's first postconviction petition. In his first petition for postconviction relief, the Appellant alleged both *Brady* claims and ineffective assistance of counsel claims. The fact that the Appellant chose not to support these claims in his first petition for postconviction relief with affidavits from the trial attorneys does not convert these affidavits into material that the Appellant was unavoidably prevented from discovering in his first postconviction proceeding. These affidavits fail to satisfy the first prong of R.C. 2953.23(A) or the threshold requirement of Crim.R. 33 for a new trial motion.

Regarding Ofshe's affidavit, Ofshe is a university professor who discussed the topics of wrongful convictions and coercive interrogation tactics. (T.d. 263, Exhibit

GG). Information contained in an affidavit that establishes facts discoverable before trial fails to satisfy R.C. 2953.23(A)(1)(a). *State v. Gulertekin* (June 8, 2000), Franklin App. No. 99AP-900, unreported. Ofshe's affidavit provides that expert testimony in the field of coercive interrogation tactics was available for use at trial or expert testimony in the field of wrongful convictions was available for use in the Appellant's first petition for postconviciton relief. Although the Appellant may not have personally known Ofshe, knowledge that this type of expert testimony in these fields was available and simply not pursued by Appellant's counsel at trial or during the Appellant's first postconviction proceedings does not establish newly discovered evidence. Ofshe's affidavit does not satisfy the first prong of R.C. 2953.23(A) or the threshold requirement of Crim.R. 33 for a new trial motion.

Attorney Gideon's affidavit appears to be attached to this successive petition for the purpose of demonstrating that he was ineffective in his handling of the Appellant's first petition for postconviction relief. This circumstance, even if true, does not relieve him of the requirement, imposed by R.C. 2953.23(A) that he must demonstrate that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense of which he was convicted. The statute contains no exception to this requirement for a situation in which a second or successive petitioner for postconviction relief received ineffective assistance of counsel in connection with his first petition for post-conviction relief. R.C. 2953.23. Accordingly, this affidavit does not support the alleged claims for relief presented by the Appellant in his successive petition.

The Appellant also relied on Attorney Gideon's affidavit as support for his argument that Ohio case law on public records requests prevented his access to evidentiary materials that were necessary to challenge alleged constitutional errors that occurred at his trial. See *State ex. rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420. The Second District Court of Appeals has construed *Steckman* to mean not only that the Public Records Act cannot be employed to obtain materials for use in support of a petition for postconviction relief, but also that materials obtained through Public Records Act cannot be used in support of a petition. *State v. Walker* (1995), 102 Ohio App.3d 625. This alleged entitlement to utilize the Public Records Act, R.C. 149.43, to gather information for postconviction proceedings, has been rejected by this Court and is not applicable in the present case. *Steckman*, 70 Ohio St.3d 420.

As there was no *Brady* violation in the present case, materials presented to trial counsel in discovery but not within the Appellant's knowledge is an attorney/client issue not a public records issue. If the Appellant has claims of ineffective assistance of counsel against his first PCR counsel or additional attorney/client issues remaining from trial counsels' representation or transfer of trial files, the Appellant should follow the lower courts advisement to pursue possible ethical violation proceedings.

Contrary to the Appellant's assertions on Memorandum, the Eleventh District did address the Appellant's actual innocence claim and held:

> [a]lthough appellant alleges that all the evidence viewed cumulatively provides strong support for his assertion that he did not commit the crimes for which he was convicted, the trial court dismissed appellant's action and thus did not reach the merits of this assertion. Because our review is limited to the trial court judgment entry, which we believe properly dismissed the matter for failure to meet the jurisdictional requirements of R.C. 2953.23(A)(1), we shall not discuss the substantive effect of appellant's submissions.

Id., 2008 -Ohio- 2394, at ¶79, n. 5.

The Appellant's first proposition of law is without merit and does not present grounds warranting jurisdiction from this Court.

> **Response to Appellant's Proposition of Law No. 2:** As the Appellant was not entitled to an evidentiary hearing, the trial court did not abuse its discretion in dismissing the Appellant's successive petition for postconviction relief and motion for a new trial without first conducting an evidentiary hearing.

In his second proposition of law, the Appellant contends that he was entitled to a hearing before the trial court dismissed his successive petition for postconviction relief and his motion for a new trial.

Standard of Review

In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing. This Court held, that a trial court could dismiss a petition for postconviction relief without a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun* (1999), 86 Ohio St.3d 279, paragraph two of the syllabus. The *Calhoun* Court held that "the trial court *did not abuse its discretion* in dismissing the credibility of [the] affidavits," which served as the basis for a postconviction relief petition. (Emphasis added.) *Id.* at 286.

In *Calhoun*, this Court determined that the trial court's gatekeeping function in the postconviction relief process was entitled to deference, including the court's decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted. A court reviewing the trial court's decision in

regard to its gatekeeping function should apply an abuse-of-discretion standard. *Calhoun*, 86 Ohio St.3d at 286.

It is also well established that a trial court has broad discretion to determine whether it is necessary to hold an evidentiary hearing on a motion for a new trial. *State v. Smith* (1986), 30 Ohio App.3d 138, 139.

Analysis

As the Eleventh District found no error with the trial court's finding that it lacked jurisdiction under R.C. 2953.23(A)(1), "it follows that the trial court did not err in failing to conduct a hearing." *Noling Successive PCR,* 2008 -Ohio- 2394, at ¶102.

Under R.C. 2953.21, a petitioner seeking postconviction relief is not automatically entitled to an evidentiary hearing. *Calhoun*, 86 Ohio St.3d at 282. Significantly, this Court has held that proper basis for dismissing a petition for postconviction relief without holding an evidentiary hearing include: 1) the failure of the petitioner to set forth sufficient operative facts to establish substantive grounds for relief, and 2) the operation of *res judicata* to bar the constitutional claims raised in the petition. *Calhoun,* 86 Ohio St.3d at paragraph two of the syllabus; *State v. Lentz* (1994), 70 Ohio St.3d 527, 530.

The above listed statutory and case law references regarding whether an evidentiary hearing is necessary prior to dismissing a postconviction petition refer to the petitioner's first petition for postconviction relief. However, in the present case, the petition sought an evidentiary hearing for a successive petition for postconviction relief. Therefore, another proper basis upon which to deny a petition for post conviction relief without holding an evidentiary hearing is when the petitioner files a

successive petition and fails to meet the criteria under R.C. 2953.23(A) to have his successor postconviction petition entertained by the trial court.

The Appellant's argument that the trial court erred when denying him an evidentiary hearing is without merit. As noted under the State's discussion of the first proposition of law, the Appellant failed to meet the criteria under R.C. 2953.23(A) to have his successor postconviction petition entertained by the trial court. Accordingly, the trial court lacked jurisdiction to hold an evidentiary hearing on his petition. Having previously discussed the flaws in the Appellant's motion for a new trial under the first proposition of law, the trial court did not abuse its discretion in dismissing this motion without first conducting a hearing. The Appellant's second proposition of law is without merit and does not present grounds warranting jurisdiction from this Court.

> **Response to Appellant's Proposition of Law No. 3**: As there are no statutory provisions in the Revised Code that allow a postconviction petitioner to obtain discovery or funds for expert witnesses, the appellate court properly found the trial court did not abuse its discretion in dismissing these two motions.

In his third proposition of law, the Appellant contended that he was entitled to conduct discovery and further entitled to funds for an expert witness.

Analysis

With regards to the Appellant's motions for discovery and funding for an expert witness, the Eleventh District held, ""[w]hile R.C. 2953.23 sets forth the requirements enabling a court to entertain a successive postconviction relief petition, it does not afford a petitioner the luxury of discovery of funds for an expert in attempting to meet these requirements." *Noling Successive PCR,* 2008 -Ohio- 2394, at ¶96.

The Appellant's argument for discovery and funds for an expert are without merit. Postconviction petitions are special civil actions governed exclusively by statute. R.C. 2953.21 and 2953.23. "Therefore, a petitioner receives no more rights than those granted by the statute." *Calhoun*, 86 Ohio St.3d at 281. There are no provisions in the statute for a postconviction petitioner to obtain normal discovery or funding for experts. *State v. Smith* (1986), 30 Ohio App.3d 138. Therefore, the trial court did not need to try any question of fact in order to rule on the Appellant's discovery or expert funds motions. Accordingly, the trial court appropriately denied the Appellant's request for discovery and funds for an expert.

The Appellant's third proposition of law is without merit and does not present grounds warranting jurisdiction from this Court.

CONCLUSION

For the foregoing reasons, this State of Ohio respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent via regular U.S mail to the following on this 2nd day of August 2008:

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