No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

HERSIE WESSON, JR.,
***Petitioner*,**
v.

STATE OF OHIO,
***Respondent*.**

On Petition for a Writ of Certiorari to the
Ninth District Court of Appeals of Ohio

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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The Supreme Court of Ohio

FILED
JUL -5 2018
CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

Hersie Wesson

Case No. 2018-0566

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Summit County Court of Appeals; No. 28412)

TERRENCE O'DONNELL
Acting Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/

COURT OF APPEALS
SANDRA KURT
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SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	
STATE OF OHIO		C.A. No. 28412
Appellee		
v.		APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
HERSIE R. WESSON		CASE No. CR 2008-03-0710
Appellant		

DECISION AND JOURNAL ENTRY

Dated: March 7, 2018

HENSAL, Presiding Judge.

{¶1} Hersie Wesson appeals from the judgment of the Summit County Court of Common Pleas, denying his second petition for post-conviction relief. This Court affirms.

I.

{¶2} The procedural history and factual background of this capital-murder case are set forth in this Court's prior decision. *State v. Wesson*, 9th Dist. Summit No. 25874, 2012-Ohio-4495, *aff'd in part, rev'd in part*, 137 Ohio St.3d 309, 2013-Ohio-4575. Briefly, in 2009, a three-judge panel found Hersie Wesson guilty of two counts of aggravated murder with capital specifications, attempted murder, aggravated robbery, having a weapon under disability, and tampering with evidence. *Id.* at ¶ 2. The panel subsequently sentenced Mr. Wesson to death for the crime of aggravated murder. *Id.* at ¶ 3. It also imposed various prison sentences for the remaining offenses. *Id.*

{¶3} Following his sentence, Mr. Wesson filed a petition for post-conviction relief with the trial court, as well as a direct appeal to the Ohio Supreme Court. *Id.* at ¶ 3-4. The trial court denied Mr. Wesson's petition for post-conviction relief, and he appealed that decision to this Court. This Court affirmed the trial court's decision. *Id.* at ¶ 114. Mr. Wesson then appealed our decision to the Ohio Supreme Court, which declined to accept jurisdiction. *State v. Wesson*, 140 Ohio St.3d 1438, 2014-Ohio-4160.

{¶4} Approximately one year after this Court affirmed the denial of Mr. Wesson's petition for post-conviction relief, the Ohio Supreme Court issued its decision with respect to Mr. Wesson's direct appeal. *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575. Specifically, it reversed one of Mr. Wesson's convictions for aggravated murder and the specifications related thereto, as well as a specification for another count. It affirmed the remaining convictions and the imposition of the death penalty. *Id.* at ¶ 136. Mr. Wesson moved for reconsideration, which the Ohio Supreme Court denied. *State v. Wesson*, 137 Ohio St.3d 1444, 2013-Ohio-5678.

{¶5} In 2015, Mr. Wesson filed a habeas petition with the United States District Court for the Northern District of Ohio. *Wesson v. Jenkins*, N.D.Ohio No. 5:14CV2688, 2015 U.S. Dist. LEXIS 157218 (Nov. 20, 2015). That proceeding was stayed pending Mr. Wesson's exhaustion of new state-court claims. Mr. Wesson then filed a second, successive petition for post-conviction relief. More than two months later, he filed an amendment to that petition, attaching three affidavits. Mr. Wesson's petition set forth numerous grounds for relief. Most relevant to this appeal, he argued that he is intellectually disabled and, therefore, cannot be sentenced to death. Mr. Wesson's argument in that regard relied upon the United States Supreme Court's decision in *Atkins v. Virginia*, which held that the execution of "mentally retarded" persons violates the Eighth Amendment to the United States Constitution. 536 U.S.

304, 321 (2002). Relatedly, he argued that his prior counsel's ineffective assistance prevented him from presenting that argument at trial, and in his first petition for post-conviction relief.

{¶6} After considering Mr. Wesson's arguments, the trial court determined that Mr. Wesson did not meet his burden under Revised Code Section 2953.23(A)(1) and, therefore, concluded that it lacked jurisdiction to consider his successive petition for post-conviction relief. It is from that order that Mr. Wesson now appeals, raising four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED WHEN IT ADJUDICATED WESSON'S PETITION FOR POST-CONVICTION RELIEF UNDER THE MORE STRINGENT STANDARDS OF OHIO REVISED CODE § 2953.23, AS OPPOSED TO § 2953.21.

{¶7} In his first assignment of error, Mr. Wesson argues that the trial court erred when it analyzed his petition for post-conviction relief under Section 2953.23, as opposed to Section 2953.21. We disagree.

{¶8} The applicable version of Section 2953.21 provided, in part, that a petition for post-conviction relief in a death-penalty case must be filed within 180 days[1] after the date on which the trial transcript is filed with the Ohio Supreme Court. Section 2953.23 governs untimely and/or successive petitions, providing that a trial court may not entertain such petitions unless "the petitioner shows that [he] was unavoidably prevented from discovery of the facts upon which [he] must rely to present the claim for relief," or, subsequent to the period prescribed in Section 2953.21(A)(2), "the United States Supreme Court recognized a new federal or state

[1] The current version of R.C. 2953.21 provides for 365 days.

right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right." Section 2953.23(A)(1)(a). A petitioner challenging a death sentence must also show that, "but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence." R.C. 2953.23(A)(1)(b).

{¶9} Here, there is no dispute that the underlying petition was both successive and untimely. Notwithstanding, Mr. Wesson argues that the trial court should have analyzed it as a timely first petition under the less stringent provisions of Section 2953.21. He makes two arguments in this regard, which we will address in turn.

{¶10} First, Mr. Wesson argues that the ineffective assistance of his prior post-conviction counsel resulted in the untimely and successive petition. We reject this argument outright, as there is no constitutional right to the effective assistance of post-conviction counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1, 17 (2012) ("Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective."); *see also State v. Crowder*, 60 Ohio St.3d 151 (1991), at paragraph one of the syllabus ("[A]n indigent petitioner does not have a state or a federal constitutional right to representation by an attorney in a postconviction proceeding[.]"). To the extent that Mr. Wesson relies upon the United States Supreme Court's decisions in *Martinez v. Ryan* and *Maples v. Thomas* to support his position, those cases address ineffective assistance in the context of what may constitute cause to excuse a procedural default in federal habeas cases. 566 U.S. 1 (2012);

565 U.S. 266 (2012). They do not affect our analysis under Ohio's statutory post-conviction procedures. *See, e.g., State v. Jackson*, 149 Ohio St.3d 55, 2016-Ohio-5488, ¶ 104 ("*Martinez* is directed toward federal habeas proceedings and is intended to address issues that arise in that context."); *Kelly v. State*, 404 S.C. 365, 366-367, 745 S.E.2d 377 (2013) (collecting cases and stating that "[l]ike other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.").

{¶11} Furthermore, to the extent that Mr. Wesson's claims are based upon trial counsel's ineffective assistance, the Ohio Supreme Court has held that "[w]here defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief." *State v. Cole*, 2 Ohio St.3d 112 (1982), at syllabus. Both Mr. Wesson's direct appeal and first petition for post-conviction relief raised the issue of trial counsel's ineffective assistance, albeit on different grounds. Those claims were found to lack merit. Here, Mr. Wesson's assignment of error fails to direct this Court to any evidence outside of the record to support a claim of ineffective assistance of trial counsel. Accordingly, any argument in that regard is barred by res judicata. *Id.*

{¶12} Second, Mr. Wesson argues that, pursuant to the Ohio Supreme Court's decision in *State v. Lott*, the trial court should have treated his untimely successive petition as a timely first petition. 97 Ohio St.3d 303, 2002-Ohio-6625. In *Lott*, the Court noted that the criminal defendant's successive petition for post-conviction relief was more akin to a first petition. *Id.* at ¶ 17. It did so on the basis that – subsequent to the defendant's first petition – the United States Supreme Court decided *Atkins v. Virginia*, which held that the execution of a "mentally retarded"

person violates the Eighth Amendment. *Id.*; *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In light of *Atkins*, the *Lott* Court determined that the defendant "lacked the opportunity to fully litigate his mental retardation claim[,]" and applied the preponderance-of-the-evidence standard applicable to timely motions. *Id.* at ¶ 17, 20. Mr. Wesson argues that he also lacked the opportunity to fully litigate his intellectual-disability claim, albeit for a different reason: his counsel's ineffective assistance. He, therefore, argues that the trial court should have applied the preponderance-of-the-evidence standard.

{¶13} Mr. Wesson's reliance on *Lott* is misplaced. His argument ignores the fact that the *Lott* Court determined that the defendant satisfied the requirements of Section 2953.23(A)(1)(b) prior to determining that the successive petition was more akin to a first petition. *Id.* at ¶ 17. Despite Mr. Wesson's argument, *Lott* "did not * * * establish a new category of successive petitions that must be treated as first petitions." *State v. Hartman*, 9th Dist. Summit No. 25055, 2010-Ohio-5734, ¶ 10. Indeed, the *Lott* Court expressly limited its holding, stating that "[f]or all other defendants who have been sentenced to death, any petition for postconviction relief specifically raising an *Atkins* claim must be filed within 180 days from the date of the judgment in this case." *Id.* at ¶ 24. It further stated that "[p]etitions filed more than 180 days after this decision must meet the statutory standards for untimely and successive petitions for postconviction relief." *Id.* We, therefore, are unpersuaded by Mr. Wesson's argument.

{¶14} Mr. Wesson also argues that the use of the word "may" as used in Section 2953.23(A) (i.e., "a court may not entertain" an untimely or successive petition unless the petitioner meets the requirements of that Section) indicates that trial courts have discretion when reviewing successive petitions for post-conviction relief. As the State points out, the Eleventh

District Court of Appeals addressed – and rejected – this same argument. In doing so, it stated that, "[u]pon reviewing R.C. 2953.23(A), it is evident that the General Assembly intended 'may' to have a mandatory effect by coupling it with the word 'not.'" *State v. Davie*, 11th Dist. Trumbull No. 2000-T-0104, 2001 Ohio App. LEXIS 5842, *17 (Dec. 21, 2001). We agree, and reject Mr. Wesson's argument in that regard.

{¶15} Mr. Wesson further argues that, even if Section 2953.23 applies, he met his burden thereunder. More specifically, he argues that the ineffective assistance of his prior counsel prevented him from discovering certain facts. He further argues that the United States Supreme Court has recognized a new federal or state right that applies retroactively to him. As explained below, we are unpersuaded by either argument.

{¶16} Despite asserting that he was unavoidably prevented from discovering certain facts, nowhere in his assignment of error does Mr. Wesson identify what those facts are. Additionally, Mr. Wesson fails to identify what new federal or state right the United States Supreme Court has recognized, nor does he explain how it applies retroactively to him. Instead, he simply states that the trial court erred by determining that the United States Supreme Court's decision in *Hall v. Florida* did not apply retroactively, and cites two out-of-state cases in support of that position. 134 S.Ct. 1986 (2014). To the extent that arguments exist to support Mr. Wesson's claims, "it is not this court's duty to root [them] out." *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 Ohio App. LEXIS 2028, *22 (May 6, 1998), citing App.R. 12(A)(2) and App.R. 16(A)(7).

{¶17} In light of the foregoing, Mr. Wesson's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT FAILED TO CONSIDER WESSON'S CLAIMS OF INEFFECTIVE ASSISTANCE.

{¶18} In his second assignment of error, Mr. Wesson argues that the trial court erred when it failed to consider his claim for ineffective assistance of counsel. In light of our discussion and disposition in the previous assignment of error, we reject Mr. Wesson's argument. Accordingly, Mr. Wesson's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT ERRED WHEN IT PLACED THE BURDEN OF THOROUGHLY INVESTIGATING AN *ATKINS* CLAIM ON A PETITIONER WITH AN INTELLECTUAL DISABILITY CLAIM.

{¶19} In his third assignment of error, Mr. Wesson argues that the trial court erred by placing the burden of investigating his intellectual-disability claim on him, rather than on his prior counsel. To that end, he cites the trial court's order, wherein it stated that Mr. Wesson "never pursued his present intellectual disability claim until now[.]" This argument, however, is tied to his claim that he received ineffective assistance of counsel, and Mr. Wesson has presented no independent basis for relief. In light of our discussion and disposition in Mr. Wesson's first assignment of error, we overrule his third assignment of error.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT ERRED IN DISMISSING WESSON'S POST-CONVICTION RELIEF PETITION WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT A MINIMUM, AN EVIDENTIARY HEARING.

{¶20} In his fourth assignment of error, Mr. Wesson argues that the trial court erred by dismissing his petition for post-conviction relief because he presented sufficient operative facts to merit relief, or, at a minimum, an evidentiary hearing.

{¶21} We review a trial court's determination that a criminal defendant failed to satisfy the procedural requirements of the post-conviction-relief statutes de novo. *State v. Morris*, 9th

Dist. Summit No. 24613, 2009-Ohio-3183, ¶ 5. Additionally, we review "a trial court's decision not to hold a hearing on a petition for post-conviction relief for an abuse of discretion." *State v. Stafford*, 9th Dist. Summit No. 24674, 2009-Ohio-5167, ¶ 5.

{¶22} Mr. Wesson again asserts that his prior counsel rendered ineffective assistance, and that he presented evidence outside of the record that entitles him to relief. He again fails to identify what that evidence is, and instead refers this Court to the briefing below. *See* App.R. 16(A)(7).

{¶23} As discussed in our disposition of Mr. Wesson's first assignment of error, Mr. Wesson has not established that the trial court erred by rejecting his successive and untimely petition for post-conviction relief on the basis that it lacked jurisdiction. Absent jurisdiction to consider a petition for post-conviction relief, a trial court is not required to hold an evidentiary hearing. *State v. Price*, 9th Dist. Wayne No. 03CA0046, 2004-Ohio-961, ¶ 10 ("As the trial court lacked jurisdiction to consider [the post-conviction-relief] petition, it was not required to hold an evidentiary hearing."). We, therefore, cannot say that the trial court erred by denying Mr. Wesson's petition, or that it abused its discretion by not holding an evidentiary hearing. Mr. Wesson's fourth assignment of error is overruled.

III.

{¶24} Mr. Wesson's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

CARR, J.
SCHAFER, J.
CONCUR.

APPEARANCES:

RACHEL TROUTMAN, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and NORA BYRAN, Assistant Prosecuting Attorney, for Appellee.

SANDRA KURT

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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. CR 2008-03-0710
	)	
Plaintiff,	)	JUDGE THOMAS A. TEODOSIO
	)	
vs.	)	
	)	
HERSIE R. WESSON,	)	**ORDER**
	)	
Defendant.	)	

*****

This matter came before the Court upon Petitioner Hersie Wesson's Post-Conviction Petition, filed on December 11, 2015, and First Amendment to Post-Conviction Petition, filed on February 29, 2016. The State of Ohio filed a Motion to Dismiss on April 11, 2016, and the Petitioner filed a Memorandum in Opposition to State's Motion to Dismiss on May 25, 2016.

The Ninth District Court of Appeals concisely stated the underlying facts of this case as follows:

> Wesson was indicted in 2008 on 13 counts related to his murder of Emil Varhola, his attempted murder of Mary Varhola, and his robbery of their home. He waived his right to a jury trial and was tried by a three-judge panel. The panel granted Wesson's Crim.R. 29 motion as to one count of aggravated murder and also dismissed three counts of attempted aggravated murder. The panel found him guilty of two counts of aggravated murder and the capital specifications, attempted murder, aggravated robbery, having a weapon under disability, and tampering with evidence.
>
> At the conclusion of the mitigation phase of trial, the panel sentenced Wesson to death for the crime of aggravated murder. It further sentenced Wesson to various prison sentences for the remaining offenses.

State v. Wesson, 9th Dist. No. 25874, 2012-Ohio-4495, at ¶2-3.

Petitioner filed his initial petition for post-conviction relief on February 17, 2010, and an amendment to that petition on February 22, 2010; both were denied on March 2, 2011. The Ninth District Court of Appeals affirmed the decision. *Id.* The Supreme Court of Ohio declined

to accept jurisdiction of the appeal of the Ninth District's decision. *State v. Wesson*, No. 2012-1901 (Sep. 24, 2014).

In a direct appeal of the judgment, the Supreme Court of Ohio:

> [R]everse[d] Wesson's conviction for aggravated murder in Count Three, the specifications related to that count, and the specification to Count Two alleging that he committed the murder while under detention[, but] affirm[ed] the remaining convictions, the imposition of capital punishment on Count Two, and the imposition of consecutive terms of imprisonment on the noncapital offense convictions.

State v. Wesson, 137 Ohio St.3d 309, 336, 2013-Ohio-4575, 999 N.E.2d 557 (French, J., concurring in part and dissenting in part) (Lanzinger, J., dissenting). The Supreme Court denied Petitioner's Motion for Reconsideration and Application for Reopening. *State v. Wesson*, No. 2009-0739, Dec. 23, 2013, and Oct. 8, 2014.

In Petitioner's capital habeas case, the United States District Court for the Northern District of Ohio granted a Motion to Stay Habeas Case and Hold it in Abeyance for Exhaustion of New Claims in State Court. *Wesson v. Jenkins*, N.D.Ohio No. 5:14 CV 2688, 2015 U.S. Dist. LEXIS 157218 (Nov. 20, 2015). The court found that "none of the claims are plainly meritless, particularly in light of a potentially meritorious *Atkins* claim." *Id.* at 3; *see also Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335.

Petitioner claims that he has never had an *Atkins* hearing and that his prior attorneys failed to properly litigate his intellectual disability and related claims. Petition, at 2. In *Atkins*, the U.S. Supreme Court held that the punishment of death "is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, at 321; *quoting Ford v. Wainright* (1986), 477 U.S. 399, 405, 106 S.Ct. 2595, 91 L.Ed.2d 335.

Petitioner requests a new trial, a new penalty phase hearing, or that this Court vacate his

death sentence and impose a life sentence. Petition, at 71. In the alternative, he requests an *Atkins* hearing to prove his intellectual disability. *Id.* at 72.

The Ohio Revised Code addresses petitions for post-conviction relief in R.C. 2953.21, et seq. Pursuant to R.C. 2953.21, "Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States" may petition the Court for post-conviction relief. The Court shall determine whether there are substantive grounds for relief and whether a hearing is necessary. R.C. 2953.21(C).

Former R.C. 2953.21(A)(2) provided, in part:

> Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days[1] after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court.

Here, the trial transcript was filed in the Supreme Court of Ohio on August 21, 2009. *State v. Wesson*, No. 2009-0739, Aug. 21, 2009. Petitioner filed his initial petition for post-conviction relief on February 17, 2010, and an amendment to the petition on February 22, 2010, which were both denied on March 2, 2011, and later affirmed on appeal. *Wesson*, 2012-Ohio-4495, at ¶114.

The Court may not entertain untimely, second, or successive petitions for post-conviction relief unless the Petitioner satisfies the requirements under R.C. 2953.23. *See State v. Smith*, 9th Dist. 04CA0088546, 2005-Ohio-2571, at ¶13. R.C. 2953.23(A)(1) requires both of the following criteria to be met:

> (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

[1] The current version of R.C. 2953.21(A)(2), effective March 23, 2015, now provides for three hundred sixty-five days.

> 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.

"For purposes of R.C. 2953.23(A)(1), Ohio courts have defined 'unavoidably prevented' as meaning 'a defendant was unaware of those facts and was unable to learn of them through reasonable diligence.'" *State v. Creech*, 4th Dist. No. 12CA3500, 2013-Ohio-3791, at ¶18, *citing* *State v. Pianowski*, 2nd Dist. No. 25369, 2013-Ohio-2764, at ¶17; *State v. Brown*, 5th Dist. No. 2007-CA-00220, 2008 Ohio 39, at ¶21.

Petitioner states that his alleged intellectual disability "began before birth." Petition, at 1, 11, 27, 29. He specifically relies on two recent evaluations in 2015 from Dr. Daniel Grant (Exhibit 1) and Dr. Stephen Greenspan (Exhibit 2) to support his intellectual disability claim. He has further submitted an affidavit from Dr. Jeffrey Smalldon (Exhibit 3), the mitigation phase expert witness in this case, who now avers that he should not have testified that he "didn't believe [Petitioner] would have qualified for an automatic exemption from the death penalty due to mental retardation." Exhibit 3, at ¶5. Petitioner also submitted numerous additional exhibits to support his claims.

The Court finds that Petitioner has not shown the Court how he was unavoidably prevented from discovery of the facts upon which he must rely to present his claim for relief. In his initial petition for post-conviction relief in 2010, he argued ineffective assistance of counsel and stressed an alleged failure of counsel and experts to focus more on a diagnosis of antisocial personality disorder. He further challenged the assembly of a three-judge panel. But he never

pursued his present intellectual disability claim until now, although he claims to have had the intellectual disability since before birth. This omission does not somehow transform his exhibits into material he was unavoidably prevented from discovering. *See State v. Noling*, 11th Dist. No. 2007-P-0034, 2008-Ohio-2394, at ¶82.

Petitioner cites to multiple U.S. Supreme Court cases decided after February 22, 2010, to support his claim that the Supreme Court has recognized a new federal or state right that applies retroactively to him and, thus, that he has met his burden under R.C. 2953.23(A)(1)(a). Petition, at 12-13; *citing Hall v. Florida* (2014), 572 U.S. ___, 134 S.Ct. 1986, 188 L.Ed.2d 1007; *Brumfield v. Cain* (2015), 576 U.S. ___, 135 S.Ct. 2269, 192 L.Ed.2d 356; *Missouri v. Frye* (2012), 566 U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379; *Lafler v.Cooper* (2012), 566 U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398; *Martinez v. Ryan* (2012), 566 U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272.

The *Hall* Court struck down a Florida law that required an IQ score of 70 for an intellectual disability claim because it failed to take into account the standard error of measurement in IQ testing. *Hall*, at 2001. But *Hall* contained no express language as to retroactivity and has not been made retroactive. *See In re Henry*, 757 F.3d 1151 (11th Cir.2014), at 1153; *see also In re Hill*, 777 F.3d 1214 (11th Cir.2015), at 1223-1225; *see also Goodwin v. Steele*, 814 F.3d 901 (8th Cir.2014), at 904.

The *Brumfield* Court held that the district court in a federal habeas claim, "based on an unreasonable determination of the facts in light of the evidence presented[,]" erred in its rejection of an *Atkins* claim and its denial of an evidentiary hearing when the petitioner satisfied the requirements under 28 U.S.C. 2254(d)(2). *Brumfield*, at 2273. "The Supreme Court limited its holding in *Brumfield* to an application of Louisiana law to the evidence presented in that case. The Court did not purport to alter its prior teachings about intellectual disability, procedural

default, or the actual innocence exception." *Prieto v. Zook*, 791 F.3d 465 (4th Cir.2015), fn. 6. *Brumfield* also does not contain any express language as to retroactivity. *See Perez-Mejias v. United States*, P.R.No. 12-1462 (PG), 2013 U.S.Dist. LEXIS 156520 (Oct. 30, 2013), at 8, *citing Gallagher v. United States*, 711 F.3d 315 (2nd Cir.2013), at 316.

The *Frye* Court held that "[t]he Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected." *Frye*, at syllabus. But *Frye* did not establish a newly recognized right; it "merely applied the Sixth Amendment right to effective assistance of counsel according to the test first articulated in [*Strickland*], and established in the plea-bargaining context in [*Hill*]." *Hare v. United States*, 688 F.3d 878 (7th Cir.2012), at 879, *citing Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674, and *Hill v. Lockhart* (1985), 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203; *see also State v. Thomas*, 8th Dist. No. 99972, 2014-Ohio-1512, at ¶10; *see also State v. Vinson*, 11th Dist. No 2013-L-015, 2013-Ohio-5826, at ¶23; *see also State v. Hicks*, 8th Dist. No. 99119, 2013-Ohio-1904, at ¶14. *Frye* also contains no express language as to retroactivity. *Niblack v. Brighthaupt*, Conn. No. 3:12cv1740(AWT), 2016 U.S.Dist. LEXIS 35931 (Mar. 21, 2016), at 11, citing *Gallagher*.

The *Lafler* Court held as follows:

> Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed.

Lafler, at syllabus. But "[*Lafler*] does not establish a newly recognized right to effective assistance of counsel" and "does not contain any express language as to retroactivity." (Internal citations omitted.) *Watkins v. United States*, E.D.Mo. No. 4:11CV1118 HEA, 2014 U.S. Dist.

LEXIS 89054 (June 30, 2014), at 30-31; *see also Thomas*, at ¶10; *see also Vinson*, at ¶23; *see also Hicks*, at ¶14.

The *Martinez* Court held:

> Where, under state law, ineffective-assistance-of-trial-counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

But, "*Martinez* did not establish a new right enabling [petitioners] to file an untimely petition." *State v. Stephens*, 9th Dist. No. 27957, 2016-Ohio-4942, at ¶10, *citing State v. Glover*, 8th Dist. Nos. 100330 and 100331, 2014-Ohio-3228; *see also Bennett v. Link*, E.D.Pa. No. 15-4144, 2016 U.S. Dist. LEXIS 70265 (May 26, 2016), at 9. "Rather, *Martinez* simply 'established an equitable doctrine for overcoming procedural default in certain limited circumstances.'" *State v. Waddy*, 10th Dist. No. 15AP-397, 2016-Ohio-4911, at ¶61, *citing Glover*, at ¶28. "The [*Martinez*] Court expressly stated that its holding does not apply to successive collateral proceedings." *Waddy*, at ¶61, *citing Martinez*, at 1320.

Clearly, federal and state courts alike have consistently found that the cases relied upon by Petitioner do not recognize a new right or do not apply retroactively. Consequently, the Court finds that the Petitioner's claims are not based on a new federal or state right recognized by the U.S. Supreme Court that applies retroactively to him.

Petitioner mistakenly claims the criteria in R.C. 2953.23(A) are not jurisdictional. Yet, the Ninth District Court of Appeals has stated that "the statutory requirements set forth in R.C. 2953.23(A)(1) ***are jurisdictional*** in nature." (Emphasis added.) *State v. Phillips*, 9th Dist. No. 27733, 2016-Ohio-1198, at ¶17, *citing State v. Taylor*, 9th Dist. No. 14CA010549, 2014-Ohio-5738, at ¶9. "A defendant's failure to * * * meet his burden under R.C. 2953.23(A)(1) deprives a trial court of jurisdiction to entertain the petition." *Id.* at ¶8, *citing Taylor*, at ¶9.

R.C. 2953.23(A) states in part that "a court ***may not*** entertain [an untimely] petition or a second petition or successive petitions for similar relief on behalf of a petitioner unless" the petitioner meets his burden under R.C. 2953.23(A)(1) or (A)(2). (Emphasis added.) Here, the Petitioner argues that the presence of the word "may" instead of the word "shall" demonstrates the legislature's intent to give the trial court discretion to entertain successive petitions. But he fails to acknowledge that the word "may" is clearly coupled with the word "not" in the statute. The phrase "may not" should be construed to impose a prohibition and is synonymous with "shall not." *See Waite v. Cage (In re Moye)*, 458 Fed.Appx. 385 (5th Cir. 2012), fn. 7. The Eleventh District Court of Appeals has dealt with this issue directly and held:

> The statutory use of the word "may" is generally construed to make the provision in which it is contained optional, permissive, or discretionary. However, the word "may" can be construed to have the ordinary meaning of "shall," in the mandatory sense of the term. In order to construe the term "may" to have the unusual application of a mandatory term, it must clearly appear that the General Assembly intended that it be so construed, from a general view of the statute under consideration.
>
> Upon reviewing R.C. 2953.23(A), it is evident that the General Assembly intended "may" to have a mandatory effect by coupling it with the word "not." In typical statutes, the word may is coupled with a verb, such as "may borrow" and, consequently, is considered to grant discretion. On the other hand, the phrase "may not" does not evince any discretion and, in fact, is generally understood to be a mandatory direction. We conclude the criteria set forth in R.C. 2953.23 are mandatory, and the trial court does not have the discretion to consider a second, successive petition for postconviction relief that does not meet those requirements.

(Internal citations omitted.) *State v. Davie*, 11th Dist. No. 2000-T-0104, 2001-Ohio-8813, at 16-17.

Petitioner also claims that R.C. 2953.23(A) is unconstitutional on its face because it violates the Supremacy Clause of the United States Constitution, the doctrine of separation of powers, and the "due course of law" and "open courts" provisions of the Ohio Constitution. However, Ohio courts have consistently held that R.C. 2953.23 is constitutional and does not

violate the Supremacy Clause, separation of powers, or the "due course of law" or "open courts" provisions of the Ohio Constitution. *State v. Smith*, 9th Dist. No. 04CA008546, 2005-Ohio-2571, at ¶8, *citing State v. Taylor*, 8th Dist. No. 80271, 2002-Ohio-2742, at ¶13; *see also State v. Cleveland*, 9th Dist. No. 08CA009406, 2009-Ohio-397, at ¶30; *see also Davie*, at 14; *see also State v. Byrd* (Aug. 21, 2001), 1st Dist. No. C-010379; *see also State v. McGuire* (Apr. 23, 2001), 12th Dist. No. CA2000-10-011, at 25; *see also State v. Robinson*, 8th Dist. No. 100077, 2014-Ohio-397, at ¶11.

Petitioner then claims that his successive petition should be reviewed under the preponderance of the evidence standard (not a clear and convincing threshold) set forth by the Supreme Court of Ohio in *Stave v. Lott* for successive petitions that raise an *Atkins* claims for the first time. *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625, 779 N.E.2d 1011. Although the Court found Lott's successive petition to be more akin to a first petition, it "did not * * * establish a new category of successive petitions that must be treated as first petitions." *State v. Hartman*, 9th Dist. No. 25055, 2010-Ohio-5734, at ¶10.

In *Lott*, the petitioner met his burden under R.C. 2953.23(A)(1) because the U.S. Supreme Court had "recognized a new federal right applying retroactively to convicted defendants facing the death penalty" recently in *Atkins*, which had been decided less than six months prior to *Lott*. *Lott*, at 306. But, the *Lott* Court expressly held:

> For all other defendants who have been sentenced to death, any petition for postconviction relief specifically raising an *Atkins* claim must be filed within 180 days from the date of the judgment in this case. Petitions filed more than 180 days after this decision must meet the statutory standards for untimely and successive petitions for postconviction relief.

Id. at 307; *see also State v. Murphy*, 3rd Dist. No. 9-04-36, 2005-Ohio-423, at ¶20. Here, however, we are well beyond the 180-day period stated in *Lott*. Petitioner was indicted in this case over five years after *Lott* was decided. His first petition for post-conviction relief was filed

over seven years after *Lott* and the pending petition was filed over thirteen years after *Lott*.

Petitioner further claims that he was denied effective assistance of counsel. In *Strickland v. Washington*, the U.S. Supreme Court defined the two-step process used to determine whether the right to effective counsel has been violated: The defendant must show that (1) Counsel's performance was deficient, and (2) The deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.E.2d 674. The petitioner has the burden of proof on the issue of counsel's ineffectiveness since properly licensed attorneys in Ohio are presumably competent. *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301, 209 N.E.2d 164, 31 O.O.2d 567. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Johnson* (2006), 112 Ohio St.3d 210, 232, 2006-Ohio-6404, 858 N.E.2d 1144.

"[A] party filing a successive petition for postconviction relief must meet the jurisdictional requirements of R.C. 2953.23(A)(1) before the merits of the ineffectiveness claim can be entertained." *State v. Noling*, 11th Dist. No. 2007-P-0034, 2008-Ohio-2394, at ¶67. Here, Petitioner has failed to meet his burden under R.C. 2953.23(A)(1) and the Court cannot entertain his ineffective assistance of counsel claims.

Nonetheless, Petitioner's exhibits include recent reports from Dr. Grant and Dr. Greenspan opining that Petitioner has intellectual disability. Exhibit 1, at 12; Exhibit 2, at 11. Exhibit 3 is an affidavit from Dr. Smalldon averring that intellectual disability is not his primary area of expertise, and had someone with "advanced expertise" been consulted Dr. Smalldon "might very well have arrived at a different conclusion on the mental retardation issue than the one [he] stated when [he] appeared as an expert witness at the mitigation hearing." Exhibit 3, at ¶8-10. Even assuming *arguendo* that Petitioner had met his burden under R.C. 2953.23(A)(1), "a postconviction petition does not show ineffective assistance merely because it presents a new

expert opinion that is different from the theory used at trial." *State v. Reynolds* (Oct. 27, 1999), 9th Dist. No. 19062, at 11; *see also State v. Dovala*, 9th Dist. No. 10CA009896, 2011-Ohio-3110, at ¶21. When "counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance." *State v. Combs* (Aug. 24, 1994), 1st Dist. No. C-930498, at 105.

"[T]he doctrine of res judicata bars a petitioner from raising issues in a petition for postconviction relief that could have been raised at trial or on direct appeal." *State v. Hall* (Mar. 13, 1996), 9th Dist. No. 95CA006065, at 5. The Supreme Court of Ohio has stated that in no event is a petition for post-conviction relief a method to appeal a judgment of conviction. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. "[B]ecause an appeal from the judgment of a conviction is limited to the trial court record, a petition for post-conviction relief may defeat the res judicata bar if its claims are based on evidence outside the record. When a petitioner offers evidence *dehors* the record, he must show that the claim could not have been raised on appeal, based on evidence in the record." (Internal citation omitted.) *Reynolds*, at 7. The Supreme Court of Ohio has also held that, absent plain error, failure to raise an *Atkins* claim constitutes a waiver of the claim. *State v. Frazier*, 115 Ohio St.3d 139, 161, 2007-Ohio-5048, 873 N.E.2d 1263.

Here, Petitioner's claims could have been raised at trial, on appeal, or in his timely first petition for post-conviction relief, and he has not shown how he has been unavoidably prevented from raising them before now. Therefore, the Court finds that Petitioner's claims are barred by the doctrine of res judicata.

The Defendant is not entitled to a hearing as a matter of right. *See State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819. In *State v. Kartman*, the Court held that R.C. 2953.21(A) and (E) did not require the trial court to hold a hearing because the issues raised in

the inmate's petition should have been raised on direct appeal and the inmate, therefore, had no grounds for relief from the conviction. *State v. Kartman*, 7th Dist. No. 04-BE-13, 2005-Ohio-6441, at ¶31. When res judicata bars a claim an inmate makes in his petition for post-conviction relief, it is not error for the trial court to decline to hold a hearing on the petition. *See State v. Hicks*, 8th Dist. No. 86334, 2006-Ohio-798, at ¶9; *see also State v. Pryor*, 5th Dist. No. 05-CA-52, 2005-Ohio-6656, at ¶31. "[T]he trial court need only conduct an evidentiary hearing where the petition, its supporting documents and the record reveal the petitioner has set forth sufficient operative facts to establish substantive grounds for relief." *State v. Harrington*, 4th Dist. No. 06CA3093, 2007-Ohio-3796, at ¶12. The Court finds that Petitioner has not set forth sufficient operative facts to establish substantive grounds for relief and a hearing is not necessary in this matter.

The Court finds that the Petitioner has not met his burden under R.C. 2953.23(A)(1). Therefore, the Court lacks jurisdiction to consider Petitioner's second (or successive) petition for post-conviction relief and is not required to prepare findings of fact and conclusions of law. *See State v. Robinson*, 9th Dist. No. 27480, 2015-Ohio-2376, at ¶7; *see also State v. Powell*, 9th Dist. No. 14CA010565, 2015-Ohio-145, at ¶7.

Accordingly, the Court finds the Petitioner's Post-Conviction Petition and First Amendment to Post-Conviction Petition not well taken and **DENIES** the same.

IT IS SO ORDERED.

JUDGE THOMAS A. TEODOSIO

cc: Richard S. Kasay, Assistant Prosecutor
Shawn P. Welch, Assistant State Public Defender
Rachel Troutman, Assistant State Public Defender
Jessica L. Carrico, Assistant State Public Defender