No. ______

In the Supreme Court of the United States

PHILLIP JONES,
Petitioner,

v.

STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

OFFICE OF THE OHIO PUBLIC DEFENDER

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The Supreme Court of Ohio

FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

v.

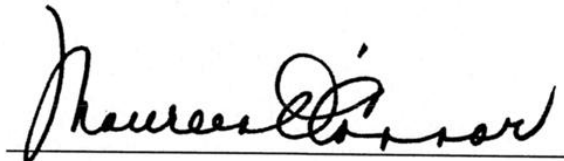
Phillip Jones

Case No. 2019-0381

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. 28063)



Maureen O'Connor
Chief Justice

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

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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 Appellee v. PHILLIP JONES Appellant	C.A. No. 28063 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2007 04 1294

DECISION AND JOURNAL ENTRY

Dated: January 30, 2019

SCHAFER, Presiding Judge.

{¶1} Defendant-Appellant, Phillip Jones, appeals the judgment of the Summit County Court of Common Pleas denying his petition for post-conviction relief. For the reasons that follow, we affirm.

I.

{¶2} Jones was sentenced to death for the rape and murder of S.Y. The Supreme Court of Ohio affirmed Jones's convictions and sentence of death in *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, ¶ 267 ("*Jones I*"). However, prior to the release of the Supreme Court's decision in *Jones I*, Jones filed a timely petition for post-conviction relief. Jones submitted multiple arguments for relief including that his trial counsel was ineffective during the mitigation phase of his trial. The trial court denied his petition without holding an evidentiary hearing.

{¶3} On a previous appeal, this Court outlined the substantive facts and relevant procedural history as follows:

On the morning of April 23, 2007, a man was jogging through a cemetery when he discovered [S.Y.]'s body lying near some headstones. According to the county medical examiner, she had bruises on her head, external and internal neck injuries, and eye and facial petechia (spots caused by the breaking of small blood vessels). She was dressed in multiple layers, including a summer dress and denim skirt. Several buttons were missing from the dress and were lying in the road. The skirt had a slit, but it had been torn apart even more from where the slit had ended. [S.Y.]'s bra was also torn between the cups and there was a small, plastic, glow-in-the-dark cross lying over one of her eyes.

The medical examiner concluded that [S.Y.]'s cause of death was asphyxia by strangulation and that the manner of her death was homicide. He also concluded that [S.Y.] had been vaginally and anally raped. A couple of days after [S.Y.]'s body was found, Mr. Jones's wife told the police that Mr. Jones was the one who killed her. Mr. Jones's semen was found on [S.Y.]'s skirt and on a vaginal swab. The cross that had been found over [S.Y.]'s eye was similar to one that Mr. Jones had given to his wife a year earlier.

The Grand Jury indicted Mr. Jones for aggravated murder, murder, and rape. He was arraigned on May 15, 2007. In August 2007, the court determined that Mr. Jones was competent to stand trial and set a trial date for December 3. On October 22, the Grand Jury issued a supplemental indictment, adding death penalty and repeat offender specifications. Mr. Jones was arraigned on the supplemental indictment two days later.

At the October 24 arraignment, Mr. Jones's lawyers acknowledged that a mitigation investigation normally "takes several months," but did not move for a continuance. Instead, they said that they had agreed with the prosecutor to keep the December 3 trial date. They also suggested scheduling two or three days in January 2008 for the penalty phase of the trial, if it proved necessary. At the hearing, Mr. Jones's lawyers also presented the court with an order allowing them to retain Dr. James Siddall, a psychologist, so that he could begin conducting interviews and testing for mitigation purposes. The court signed the proposed order that same day. According to the statement Dr. Siddall submitted after trial, between October 24, 2007, and January 8, 2008, he spent four and a half hours consulting with Mr. Jones's lawyers. His statement also indicated that on November 21 and December 12 he did a total of 7.75 hours of "[i]nterviews and testing."

On November 1, Mr. Jones's lawyers moved for appropriation of funds to hire a defense mitigation expert. At a hearing on November 15, the court granted the motion and ordered Mr. Jones's lawyers to prepare an entry appointing Thomas Hrdy as that expert. While the record does not indicate when Mr. Jones's lawyers submitted a proposed entry, the trial court entered an order appointing Mr. Hrdy on December 5. According to the invoice Mr. Hrdy submitted after trial, he began working on Mr. Jones's case on December 10.

> According to the affidavits submitted by Mr. Jones's family members, either Mr. Hrdy did not spend much time with them asking about their family background or no one from Mr. Jones's defense team attempted to speak with them at all. According to Mr. Hrdy's invoice, on December 20, he spent 3.5 hours interviewing Mr. Jones's mother and his oldest sister. On December 23, he spent 4.5 hours "[m]eeting w/ family @ [Mr. Jones's mother's] home." On January 2, he billed 2 hours for "[i]nterview w/ family, drop off records (Siddall)." Finally, on January 5, he billed 4 hours for "[m]eeting w/ family, atty." There is no additional detail in the record regarding which "family" members he met or how he divided his time between the two activities listed on each of the January dates.

State v. Jones, 9th Dist. Summit No. 25695, 2011-Ohio-6063, ¶ 2-7 (*Jones II*).

{¶4} Ultimately, this Court affirmed the trial court's decision in part but reversed and remanded for further proceedings on Jones's claim of ineffective assistance of counsel during the mitigation phase of his trial. *See id.* In so doing, we specifically determined that the trial court had "exercised improper discretion when it denied Mr. Jones's penalty phase ineffective assistance of counsel claims without holding a hearing to determine whether his lawyers began their mitigation phase investigation early enough and whether they allowed Dr. Siddall and Mr. Hrdy enough time to do a complete investigation into Mr. Jones's family life." *Id.* at ¶ 66.

{¶5} Upon remand, the trial court held an evidentiary hearing and issued a lengthy decision dismissing Jones's petition for post-conviction relief. In the trial court's decision, the court acknowledged that trial was before the court's predecessor judge, noting that the trial court read the trial transcripts from the mitigation phase and referred to the Supreme Court of Ohio's summarization of the mitigation testimony that was presented during the mitigation phase in *Jones I.* In denying Jones's petition, the trial court explicitly found that Jones's trial counsels' assistance was reasonable "[i]n light of the variety of circumstances faced by [his] trial counsel and the range of legitimate decisions regarding how best to represent him." Further, with regard to any prejudicial affect that the alleged ineffective assistance of counsel may have had, the trial

court determined that in light of all of the evidence presented, the trial court could not conclude that the decision of the jury or of the trial judge would have been different.

{¶6} Jones subsequently filed this timely appeal, raising two assignments of error for our review.

II.

Assignment of Error I

The trial court erred by concluding that Jones did not receive ineffective assistance of counsel, when Jones's attorneys conducted their investigation after the trial began, did not allow their experts enough time to fully investigate Jones's background, and failed to discover sexual abuse endured by Jones as a child. [ ]

{¶7} In his first assignment of error, Jones contends that the trial court erred when it determined that Jones did not receive ineffective assistance of counsel. Jones argues that his counsel was ineffective during the penalty mitigation phase of his trial because his attorneys conducted the mitigation investigation after Jones's trial had already begun, did not allow enough time for their experts to fully investigate Jones's background, and failed to discover sexual abuse Jones endured as a child. We disagree.

{¶8} R.C. 2953.21(A)(1)(a) provides that any person who has been convicted of a criminal offense may petition the court for post-conviction relief pursuant to a claim "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." A trial court's denial of a petition for post-conviction relief after an evidentiary hearing is held is reviewed for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Id.* at ¶ 60, quoting *State v. Adams*, 62

Ohio St.2d 151, 157. "[A] reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." *Id.* at ¶ 58. However, while reviewing the record to determine if the trial court's findings are supported by competent credible evidence, we must keep in mind that "[e]valuating evidence and assessing credibility are primarily for the trier of fact." *State v. Shue*, 97 Ohio App.3d 459, 466 (9th Dist.1994), citing *Ostendorf-Morris Co. v. Slyman*, 6 Ohio App.3d 46, 47 (8th Dist.1982).

{¶9} In this case, the trial court employed the correct legal standard in resolving Jones's claim of ineffective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, Jones must demonstrate "(1) that his counsel's performance was deficient to the extent that 'counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment' and (2) that but for his counsel's deficient performance the result of the trial would have been different." *State v. Velez*, 9th Dist. Lorain No.13CA010518, 2015-Ohio-642, ¶ 18, quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, this court need not address both prongs of the *Strickland* test if it should find Jones failed to prove either prong. *State v. Ray*, 9th Dist. No. 22459, 2005-Ohio-4941, ¶ 10.

{¶10} Moreover, in Ohio, a properly licensed attorney is presumed competent and the burden of proof is on Jones to demonstrate that counsel was ineffective. *Gondor* at ¶ 62. Counsel in a capital case has the "'obligation to conduct a thorough investigation of the defendant's background' to determine the availability of mitigating evidence." *State v. Herring*, 142 Ohio St.3d 165, 2014-Ohio-5228, ¶ 69, quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000). "Counsel's 'investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."'" (Emphasis sic.) *Herring* at ¶ 69, quoting *Wiggins v.*

Smith, 539 U.S. 510, 524, quoting ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 11.4.1(C). A trial counsel's performance will not be deemed ineffective unless it falls below an objective standard of reasonable representation. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. "[T]he deference owed to counsel's strategic judgments about mitigation is directly proportional to the adequacy of the investigations supporting such judgments." *Herring* at ¶ 69, quoting *Jells v. Mitchell*, 538 F.3d 478, 492 (6th Cir.2008). Nonetheless, the Supreme Court of Ohio has specifically recognized that "'the finding as to whether counsel was adequately prepared does not revolve solely around the amount of time counsel spends on the case or the numbers of days which he or she spends preparing for mitigation. Instead, this must be a case-by-case analysis.'" *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 227, quoting *State v. Lewis*, 838 So.2d 1102, 1114, (Fla.2002), fn. 9.

A. Timing of the Mitigation Investigation

{¶11} Jones first argues that the trial court erred when it concluded that his trial counsel were effective since his counsel had done limited mitigation investigation prior to the start of the trial and thus, could not have formed an appropriate trial or mitigation theory. We disagree for the following reasons.

{¶12} With regard to the timing of the mitigation investigation, the trial court made the following factual findings: the trial court authorized payment for defense counsel to retain Mr. Hrdy as an investigator two days after the start of jury selection; Jones's trial counsel did not ask the jurors questions pertaining to their theories of mitigation during jury selection; at the time jury selection began, Jones's trial counsel had information about Jones's background, education, family history, and mental health through competency evaluations, interviews and records;

Jones's trial counsel "had the benefit of having already received the information and points of view of two psychologists" prior to jury selection; Jones's trial counsel had Jones's statement to the arresting detective that the victim's death was an accident; during the trial phase, Jones's counsel presented a defense consistent with their client's statement to the arresting detective that the victim's death was an accident and had the defense been successful, the jury would never have considered the death penalty; defense counsel did not receive Dr. Siddall's written report until two days before the start of the mitigation phase; Jones's own mitigation expert testified that some cases are "mitigation cases right up front" and trial counsel needs the mitigation information during jury selection, but that expert did not see Jones's case as such.

{¶13} A review of the record on appeal shows that with the exception of the trial court's finding that Jones's trial counsel "had the benefit of having already received the information and points of view of two psychologists," the above findings were supported by competent credible evidence. However, as we discuss below, the trial court's unsupported finding that Jones's counsel had information and points of view of two psychologists was not determinative in this case.

1. Law of the Case

{¶14} Jones argues that "[u]nder the law of this case, defense counsel's performance was deficient." Jones bases this argument on a statement in *Jones II,* where this Court professed that "*[i]f* Mr. Jones's defense team did not do much mitigation investigation by the time the trial started, they *could not* have formed an appropriate trial or mitigation theory." (Emphasis added.) *Jones II*, 2011-Ohio-6063 at ¶ 47, citing *Williams*, 529 U.S. at 395. Jones supports this argument by pointing to the testimony of one his trial attorneys and the trial court's finding that defense counsel had not retained Mr. Hrdy until after jury selection had already begun. The testimony to

which Jones refers occurred on cross-examination during the post-conviction hearing where one of his trial attorneys agreed that "Dr. Siddall's work couldn't have really been completed in a meaningful way until Mr. Hrdy was involved in doing his role."

{¶15} "[T]he doctrine of the law of the case * * * establishes that the 'decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Hood v. Diamond Prod., Inc.*, 137 Ohio App.3d 9, 11 (9th Dist.2000), quoting *Pipe Fitters Union Local No. 392 v. Kokosing Constr. Co., Inc.*, 81 Ohio St.3d 214, 218 (1998). Consequently, "[a]n inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Id.* quoting *Nolan v. Nolan*, 11 Ohio St.3d 1 (1984), syllabus. However, Jones's argument that this Court's "if" statement is law of the case asks us to disassociate that statement not only from the rest of the paragraph in which it is contained, but also from our entire decision. The full paragraph reads as follows:

> Although Dr. Siddall's invoice indicates that he began meeting with Mr. Jones's lawyers six weeks before trial, it is troubling that he spent less than eight hours conducting interviews and tests before Mr. Jones's trial began. It is more troubling that Mr. Hrdy, the social worker who Dr. Siddall said was responsible for interviewing Mr. Jones's family members, did not begin any work on his case until a week into the trial. The American Bar Association guidelines advise lawyers to begin the mitigation investigation [ ] as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations. The guidelines also advise lawyers to devote substantial time to [ ] choosing a jury most favorable to the theories of mitigation that will be presented. Ideally, the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation. If Mr. Jones's defense team did not do much mitigation investigation by the time the trial started, they could not have formed an appropriate trial or mitigation theory.

(Internal quotations and citations excluded.) *Jones II* at ¶ 47. The use of the word "if" and the extensive application of the American Bar Association Guidelines confirm that this statement did

not create law of the case. Indeed, the United States Supreme Court had made clear "that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices" and that the ABA Guidelines "are 'only guides' to what reasonableness means, not its definition." *Bobby v. Van Hook*, 558 U.S. 4, 9 (2000) quoting *Strickland*, 466 U.S. 668 at 688.

{¶16} Moreover, the "if" statement and the entire paragraph in which it is contained are not necessary to the holding in *Jones II* wherein we concluded that the trial court had improperly denied Jones's petition for post-conviction relief without first holding a hearing. As such, the entire paragraph is dicta intended to give guidance to the trial court upon remand. "Dicta is not authoritative, and, by definition, cannot be the binding law of the case." *Gissiner v. Cincinnati*, 1st Dist. Hamilton No. C-070536, 2008-Ohio-3161, ¶ 15. Accordingly, the law of the case doctrine does not require us to conclude the defense counsel's performance was deficient.

2. Jury Selection

{¶17} Jones next argues that the trial court erred when it concluded that trial counsel's failure to ask about various mitigating factors during jury selection did not constitute ineffective assistance of counsel since counsel could not have made reasonable or strategic decisions because the mitigation investigation had barely begun.

{¶18} Regarding the information Jones's defense counsel had at the beginning of jury selection, the trial court stated that "[t]he evidence is clear that at the time voir dire began, defense counsel had information about [Jones]'s background, education, family history and mental health through competency evaluations, interviews and records. But they also had Petitioner's statement to the arresting detective that [S.Y.]'s death 'was an accident.'" The trial court further found that Jones's trial counsel "had the benefit of having already received the information and points of view of two psychologists" prior to jury selection. Although Jones

takes exception to the trial court's finding that his trial counsel had the benefit of information and opinions from two psychologists prior to jury selection, even assuming without deciding that the record does not support that finding, such a conclusion would not be determinative in this case.

{¶19} The Supreme Court of Ohio has "consistently declined to 'second-guess trial strategy decisions' or impose 'hindsight views about how current counsel might have voir dired the jury differently.'" *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶ 63, quoting *State v. Mason*, 82 Ohio St.3d 144, 157 (1998). "'Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors.'" *Id.* at ¶ 64, quoting *Miller v. Francis*, 269 F.3d 609, 620 (C.A.6, 2001). "In some cases, asking few or no questions of a prospective juror 'may be the best tactic for a number of reasons.'" *Id.* at ¶ 65. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary*." (Emphasis added.) *Strickland*, 466 U.S. at 691. The United States Supreme Court has stated the following:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland at 691, citing *United States v. Decoster*, 624 F.2d 196, 209-210 (D.C.Cir.1976).

{¶**20**} The trial court found that Jones's defense counsel had information about Jones's background, education, family history and mental health through competency evaluations interviews and records. Jones's counsel testified at the post-conviction hearing that they had incorporated information regarding Jones's family history, background, and mental health issues into the defense at both the trial and the mitigation phase. However, the trial court emphasized that during the trial phase, defense counsel presented a defense that was consistent with Jones's statement that S.Y.'s death was an accident. A review of the trial record shows that finding is supported by competent credible evidence. *See also State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677. At trial, Jones testified on his own behalf and stated that he and S.Y. had rough, but consensual sexual intercourse. He further stated that putting his hands around S.Y.'s throat was not his idea and "I guess it got too – went too far, applied too much pressure, and * * * it was an accident." Additionally, defense counsel reiterated the defense's theory of the case that S.Y.'s death was an accident during closing argument.

{¶**21**} The trial court went on to state in its journal entry that based on the defense's strategy and intention to show that S.Y.'s death was an accident, the court failed to see how the introduction of information about Jones's mental history and dysfunctional family background would assist in showing S.Y.'s death was an accident. The trial court stated this was especially true in light of the potential for "other acts" evidence the jury would hear as a result. Thus, the trial court determined that an attempt by trial counsel to limit questions focusing on the death penalty may have been a tactical decision. We note that during the post-conviction relief hearing, neither of Jones's defense counsel testified regarding the defense's strategy during jury selection nor were they asked any questions regarding that strategy on direct or cross-

examination. As the trial court applied the proper legal standard and its findings are support by competent, credible evidence, we cannot conclude that the trial court abused its discretion when it determined that asking potential jurors their views on mitigation was not essential to competent representation in this case.

{¶22} As Jones has failed to show that his trial counsel rendered deficient performance during jury selection we need not address whether Jones was prejudiced. *See Ray*, 2005-Ohio-4941 at ¶ 10.

B. The Mitigation Investigation

{¶23} Jones contends that the amount of time spent on the mitigation investigation was inadequate. First, Jones argues that because Mr. Hrdy spent fewer than 10 hours interviewing Jones's family, Mr. Hrdy did not discover Jones's family's "history of severe and pervasive dysfunction." Specifically, Jones maintains that if Mr. Hrdy and his trial counsel would have conducted an adequate investigation they would have learned of rampant sexual abuse and additional physical and emotional abuse within the family. Second, Jones contends that Dr. Siddall had neither the time nor the information necessary to do a complete a psychological evaluation and make a diagnosis for the purposes of the mitigation hearing. Thus, the extent of Jones's mental illness was not discovered.

1. The Mitigation Investigation

{¶24} The trial court concluded that Mr. Hrdy's late start was not detrimental to Jones's mitigation investigation due to the nature and quality of the mitigation facts that the defense team was able to obtain, especially in light of the lengthy time that pre-existed the death penalty specification, during which there was the production of psychological reports, the development

of a rapport between Jones and his attorneys, and significant communication and information gathering with the Jones family.

{¶25} Ample information regarding the dysfunction of the Jones family was presented during the mitigation phase of Jones's trial. *See Jones I*, 135 Ohio St.3d 10, 2012-Ohio-5677 at ¶ 226-227, 249-250 ("Dr. Siddall testified that Jones grew up in a troubled family where there was domestic violence * * * that Jones's family has a history of psychiatric, substance-abuse, and criminal-justice problems * * * Jones's father committed domestic abuse and suffered from a learning disability. * * * In an unsworn statement, Jones stated that he had an abusive childhood. He witnessed domestic violence on numerous occasions, and his family abused alcohol and drugs. Jones also watched his siblings fight. His oldest brother stole cars and gave Jones marijuana when he was seven years old. Jones's parents divorced when he was eight. His mother left home, and Jones was then raised by his aunt, his grandmother, and his father. * * * After witnessing the abuse in his family, Jones started 'acting out' as a teenager.") However, on appeal, Jones argues that the trial court erred when it determined that his trial counsel was not ineffective for failing to discover further neglect as well as physical, emotional, and sexual abuse.

__a. Witnesses for the Defense__

{¶26} At the evidentiary hearing on Jones's petition for post-conviction relief, Jones called twelve witnesses, five of whom testified as experts. Jones himself did not testify. Of the seven lay witnesses' who testified regarding Jones's history and background, the trial court found that "much of the lay-witnesses' testimony, at least that which can be corroborated and is credible, was cumulative to that which was already presented during mitigation." In support of

these conclusions, the trial court made the following observations regarding the lay-witnesses' and experts' testimony.

{¶27} Pastor Fuller, whose testimony the trial court found credible, stated that he was Jones's first cousin once removed and that he was the Jones family's pastor. As such, Jones called on him for pastoral care when Jones experienced trauma in his life. Although he did not testify at Jones's mitigation hearing, Pastor Fuller stated that a member of the defense team had questioned him about his pastoral relationship with Jones and that there "may have been other questions, but [he] did not recall." He further stated that he had been a part of a group of persons who had met with defense counsel when defense counsel defined mitigation and asked if the group had any questions about mitigation. Pastor Fuller believed he should have testified at the mitigation hearing, since he had more knowledge of the Jones's family history and dysfunction than the pastor who ultimately testified at Jones's mitigation hearing. Nonetheless, Pastor Fuller was not aware of mental illness or specific drug abuse within the family, except that he had "seen family members looking high." However, he did state that he became aware of "possible" sexual abuse in the family through Jones's sister, but that the discussion had occurred in his capacity as a pastor and privilege would have prevented him from revealing even the possibility of abuse to the mitigation team. Accordingly, the trial court determined that Pastor Fuller's testimony was merely cumulative of the testimony received at Jones's mitigation hearing.

{¶28} Pastor Hargrave testified at Jones's mitigation hearing and at the hearing on Jones's petition for post-conviction relief. The trial court found that he repeated much of the same testimony he had given during Jones's mitigation hearing. With regard to mitigation preparation, he testified that he had "at least two conversations by phone, perhaps a third. There was a large gathering, the family was there, I was there as well and I was called back into a room

individually with them * * * I talked about my role and the work that I do and my observations and I said I would like to help in any way that I could." Pastor Hargrave also testified about "significant disruption with boundaries, family boundaries, physical personal boundaries, for example bedroom space, what is borne outside the bedroom, and all of those things * * *." It was from this "boundaries" discussion with Jones's mother that Pastor Hargrave became aware of possible sexual abuse. However, he admitted that this conversation was not such that it caused him to feel compelled to make a police report under Ohio's mandatory reporting statute and that he would have been bound by privilege and not able to disclose the information to the mitigation team. The trial court found Pastor Hargrave to be credible, but noted that many of the opinions he presented regarding the dysfunction of the Jones family went beyond his role as a pastor and bordered on offering opinions and on issues beyond those for which he was qualified to testify.

{¶29} Rhonda Jones, one of Jones's sisters testified at the post-conviction relief hearing, but not during the mitigation phase. The trial court did not find Ms. Jones to be a credible witness. The trial court found that during her testimony, Ms. Jones was unfamiliar with the affidavit she executed as part of the evidence reviewed by this Court in *Jones II* and that during her testimony she denied making several of the statements contained within it. Ms. Jones did testify as to the dysfunction in the Jones family, such as having to steal food to survive, being physically and mentally abused by her parents, and of her parents' drug and alcohol abuse. However, Ms. Jones stated she was not familiar with any mental health issues in the Jones family. Ms. Jones stated that she was at her parents' house when Mr. Hrdy came for a meeting with the family, but that "he was more sitting there watching the game than talking."

{¶30} Concerning alleged sexual abuse in the Jones family, the trial court found that Ms. Jones testified that her father had tried to molest her and that there were persons dressed in skeleton costumes who fondled the Jones girls at night. In her affidavit attached to Jones's petition for post-conviction relief, Ms. Jones stated "[m]y father tried to molest me. Once when he tried to get into my bedroom, I blocked the door. My father broke in. I was 17 years old, and my boyfriend was there. My boyfriend beat up my father." Although Ms. Jones stated in her affidavit that she was 17 years old at the time of the alleged incident, she testified during the mitigation hearing that she was 16 years old, going on 17 and then subsequently testified that she was 17 years old at the time of the alleged incident. At the post-conviction hearing, the trial court found that Ms. Jones gave a vivid account of her naked, enraged father pounding on her barricaded bedroom door and trying to burst through. She escaped out the back and was kicked out of the house shortly thereafter. Although Ms. Jones characterized the incident as an attempt by her father to molest her, the trial court determined that there was no credible evidence that this event was an attempted molestation. Rather, the trial court concluded that the facts were far more consistent with a father who was enraged that his 16-year-old daughter had her boyfriend behind her locked bedroom door.

{¶31} Jones's niece, Sh'torie Harpster, did not testify during the mitigation phase, but did testify at the post-conviction relief hearing. The trial court found that she had testified that Jones was a father figure to her and that she further testified about the dysfunction in the Jones family, including mental illness and that Jones's brother had sexually abused her. Additionally, she stated that she was at the group meeting at her grandmother's house and had spoken to someone from the trial team, but thought her individual conversation with Mr. Hrdy could not have been longer than five minutes. She stated that no one from the defense team spoke to her

about sexual abuse. The trial court found Ms. Harpster's testimony to be merely cumulative of the testimony presented during Jones's mitigation hearing.

{¶32} Shain Harmel, Jones's nephew, did not testify at the mitigation hearing. The trial court found that Mr. Harmel testified during the post-conviction relief hearing that although he is not Jones's biological son, he had grown up thinking Jones was his father because Jones had treated him as such. The trial court found Mr. Harmel's testimony to be merely cumulative of the testimony presented during Jones's mitigation hearing.

{¶33} Yolanda Jones is Jones's sister. She testified at the mitigation hearing and during the post-conviction relief hearing. The trial court observed three significant points in her testimony: first, Ms. Jones testified about the abuse and dysfunction in the Jones family; second, she discussed rampant sexual abuse that she did not disclose during her mitigation testimony; and third, she testified that she had not been properly prepared for her testimony during the mitigation hearing. The trial court, however, found Ms. Jones's testimony to be "wholly unbelievable" based on her rehearsed demeanor and that her testimony was contradicted by evidence in the record.

{¶34} The trial court found that Ms. Jones's testimony concerning the dysfunction of the Jones family was the same or similar to her mitigation phase testimony. However, Ms. Jones presented some additional examples about the abuse in the family. Specifically, she added some details of her own abuse of Jones when he was a child and offered testimony which painted their mother in a poor light. The trial court found the testimony regarding alleged physical and mental abuse suffered by the Jones children at the hands of their mother contradicted the testimony Ms. Jones gave during the mitigation hearing. Although Ms. Jones claimed she was not given an opportunity to give the same detailed information during her mitigation hearing testimony, the

trial court found that during the mitigation hearing, Jones's defense counsel often guided Ms. Jones to specific subjects or instances that were helpful to mitigation and even asked her to give examples. Additionally, the trial court found that when the prosecutor asked Ms. Jones questions on cross-examination, that she asked many open-ended questions and did not cut Ms. Jones's testimony off at any point. The trial court also found that Jones's defense counsel asked questions during rebuttal that gave Ms. Jones the opportunity to clarify some of her responses during cross-examination.

{¶35} With regard to mitigation preparation, Ms. Jones stated she was never properly prepared for her testimony and that there were questions that were not asked during mitigation preparation or during the mitigation hearing. Nevertheless, Ms. Jones was not able to give any specifics of her mitigation preparation or lack thereof. Ms. Jones did admit that Mr. Hrdy had asked her about sexual abuse and that she understood at the time of Jones's mitigation hearing "that it was important to show that he came from an abusive, neglect (sic) family, where he was mistreated all his life." However, the trial court did not find her testimony about why she did not relate any of the abuse to the defense team to be credible.

{¶36} Christy Coffee testified that she was romantically involved with Mr. Jones. She testified at both the mitigation hearing and the hearing on post-conviction relief. The trial court found that her testimony at the post-conviction relief hearing was similar to the testimony she gave during the mitigation phase. However, Ms. Coffee gave additional testimony revealing that Jones's brother had raped her and that he, not Jones, was the father of her son.

{¶37} Ms. Coffee further stated that the only time she spoke with defense counsel prior to the mitigation hearing was with the Jones family at defense counsel's office. She stated that the attorneys asked about her relationship with Jones, but did not ask if she had children by his

brothers or if a paternity test had been done. She acknowledged that Mr. Hrdy had asked her open-ended questions about sexual abuse, but that she felt it was too quick. She further stated that she knew the attorneys had asked the Jones family about sexual abuse at the meeting "[b]ecause when the family came out that is what they were talking about, they talked about."

{¶38} Dr. Howard Fradkin is a psychologist with an expertise in the area of adult survivors of child sex abuse. He did not testify at the mitigation hearing. The trial court found that at the time of his post-conviction relief testimony, Dr. Fradkin had devoted thirty-four years of his practice to the area of adult survivors of child sexual abuse. He is also an advocate of the interviewing style called the Forensic Experiential Trauma Interview (FETI) which he believes is the most appropriate when interviewing trauma survivors. This form of interviewing did not come into existence until 2013. Dr. Fradkin opined that Jones is the survivor of male child sex abuse and that from the time of Jones's alleged suicide attempt at age six and for thirty years subsequent to that, medical professionals missed the diagnosis of sexual abuse. Dr. Fradkin further testified concerning prolific sexual abuse committed against Jones by Jones's brothers, Jones's sister's boyfriend, and Jones's stepmother. He attributed the defense team's failure to discover this horrific abuse to deficient mitigation investigation and methods. However, Dr. Fradkin also testified that the disclosure of sexual abuse "varies from person to person. It could take months. It could take years" and that "[m]ost men go to their graves without ever talking about [sexual abuse]."

{¶39} While admiring Dr. Fradkin's devotion to helping survivors of child sexual abuse, the trial court gave no weight to his testimony for a number of reasons. First, the trial court found it questionable that Dr. Fradkin's FETI interview method would survive a *Daubert* challenge, but even assuming it did, the trial court found that Dr. Fradkin's opinions were based

almost entirely upon the hearsay affidavits of family members whom Dr. Fradkin had never met or personally interviewed as well the self-serving statements of Jones, which were made in a setting in which Dr. Fradkin was not treating or diagnosing Jones. Second, the trial court found that Dr. Fradkin's report was "fraught with mischaracterizations of the evidence." These mischaracterizations were partly attributable to the fact that Jones's current counsel did not provide him with all of Jones's records and partly to the fact that he simply ignored the evidence he did have. Third, the trial court noted that although Dr. Fradkin referenced Jones's prison disclosure of sexual abuse by his father, Dr. Fradkin failed to reconcile Jones's non-disclosure of that abuse during his own FETI interview with Jones when Jones was sharing memories of abuse by at least five other people. Finally, the trial court found that Dr. Fradkin had conceded that he could not have testified to sexual abuse at a time when Jones and his family were denying its occurrence.

{¶40} Dr. Bob Stinson is an expert in forensic psychology. He testified at the post-conviction relief hearing, but not during the mitigation hearing. The trial court found that Dr. Stinson testified about the dysfunction and abuse with the Jones family. He personally interviewed Jones, but did not conduct any tests. In addition to the interview, Dr. Stinson relied upon the affidavits of family members and Dr. Fradkin's report. Dr. Stinson opined during his post-conviction relief testimony, that a review of Jones's medical records and school records indicate dysfunction that is consistent with a person who is sexually abused. The trial court found that Dr. Stinson remained firm in his opinion that the mitigation investigation should have uncovered the alleged sexual abuse at the time of the mitigation hearing. However, when offering his opinion about why the abuse was now being disclosed, he stated it may be "because the main perpetrator and person who said 'we do not talk about these things' ([Jones's mother])

eventually died." The trial court noted that Jones's mother was alive at the time of the mitigation hearing.

{¶41} Dorian Hall testified at the post-conviction hearing as an expert in the area of mitigation investigation. The trial court found that she has been employed by the Ohio Public Defender's Office since 1988 as a mitigation specialist and at the time of the post-conviction relief hearing supervised that office's mitigation specialists. Ms. Hall opined that an investigator must begin at least 90 days before jury selection in order to conduct a proper investigation and was critical of Mr. Hrdy's acceptance of the engagement to do work on Jones's case after jury selection had already begun. She was also critical of the amount of time Mr. Hrdy spent on the mitigation investigation, Mr. Hrdy's method of group interviewing, and of Mr. Hrdy's note keeping and record keeping. Ms. Hall further criticized the portrayal of Jones's father as a good role model during the mitigation phase and blamed the deficient detailed mitigation for allowing that portrayal.

{¶42} The trial court found Ms. Hall to be a professional and credible witness, but acknowledged that Ms. Hall's many years of employment with the Ohio Public Defender's Office gave the trial court cause to question her objectivity regarding her criticisms of Mr. Hrdy. Additionally, Ms. Hall was not able to comment on what Mr. Hrdy specifically did or did not do with regard to his mitigation investigation nor was she able to give any support for her opinion that a mitigation investigation should begin 90 days prior to jury selection. Although the trial court acknowledged that 90 days would be optimal, Ms. Hall also testified that "[g]enerally you need to spend as much time as you need to get all the information." The trial court found that although Ms. Hall criticized the lack of detailed, anecdotal information presented during the mitigation phase, that the additional anecdotal information Ms. Hall ultimately presented was

obtained solely from affidavits of Jones's family members. Thus, since she had not personally spoken to the family members, she had not been given the opportunity to assess their credibility. The trial court noted, however, that it "had the opportunity to do so with several of the witnesses who executed the affidavits upon which Ms. Hall relied and [] found their credibility questionable."

b. Witnesses for the State

{¶43} In addition to Jones's witnesses, all four members of the defense mitigation team testified at the hearing for post-conviction relief. The trial court made the following observations about their testimony.

{¶44} Mr. Hrdy is a licensed social worker and part-time mitigation specialist. The trial court found that at the time of his testimony, Mr. Hrdy had finished his casework for his doctorate, was a member of the National Legal Defenders Association as a mitigation specialist, and has worked as a mitigation specialist since 1994. Mr. Hrdy admitted that he was engaged to work on Jones's case "late in the game." Excluding travel time, Mr. Hrdy spent approximately three hours with Jones and approximately ten additional hours with others, including family members and ministers. Mr. Hrdy spent additional time retrieving and reviewing records, meeting with Dr. Siddall and Jones's attorneys, and other casework. Mr. Hrdy stated he had no difficulty gathering information from Jones and found him to be cooperative. Mr. Hrdy also found the Jones family to be cooperative and forthcoming. Mr. Hrdy testified that he explained mitigation to the family and the fact that Jones was facing the death penalty. He felt that the family was able to provide him with information that was helpful to Jones's case. He further testified that he would not have specifically asked the family a leading question about sexual

abuse, but if anyone had indicated such, he would have noted it and provided that information to Dr. Siddall and Jones's attorneys.

{¶45} Mr. Hrdy testified that he met with many family members for four and a half hours at Jones's mother's home. He stated that he asked how the family preferred to be interviewed and that they preferred to be interviewed as a group. Mr. Hrdy acknowledged that a Cleveland Browns football game remained on the television during the interview, but with the volume turned down. Mr. Hrdy explained that he found advantages to the group interview because "a dynamic forms where someone will say something that will trigger a memory from someone else and you get a fuller interview." However, he did acknowledge that there could be some disadvantages such as someone not wanting to disclose personal information in a group setting or a stronger personality taking over, but that he always leaves his business card and asks the interviewees to call him if they remember anything else.

{¶46} Mr. Hrdy further testified that he had "enough and appropriate time to gather the records, interview the witnesses, assist the defense attorneys and Dr. Siddall in preparation of mitigation in this case." The trial court found this testimony very compelling since Mr. Hrdy had attested in an unrelated case about his mitigation investigation being substandard due to a lack of time to do an appropriate job. *See Herring*, 142 Ohio St.3d 165, 2014-Ohio-5228, ¶ 36-38. Mr. Hrdy's testimony combined with the amount and type of mitigating evidence produced during Jones's trial, together with the trial court's credibility evaluations of other witnesses, caused the trial court to accept Mr. Hrdy's statement that he had "enough and appropriate time to gather the records, interview the witnesses, assist the defense attorneys and Dr. Siddall in preparation of mitigation in this case" as true.

{¶47} Dr. Siddall is in an expert in forensic psychology and had testified as an expert in "maybe a dozen" capital mitigation hearings prior to Jones's case. The trial court found that he is licensed in both clinical and forensic psychology and also practices in the area of drug addiction. He has been licensed since 1975, is published and has received awards. At the time of his testimony, Dr. Siddall had taught graduate level courses, including courses on diagnosis. Although he is currently in private practice, Dr. Siddall has had significant experience with persons in a criminal legal setting through his work at a diagnostic clinic.

{¶48} Dr. Siddall stated that as a rule he would get records and complete his report before the start of trial, but in this case he completed his report after Jones's trial, but before the mitigation phase. Dr. Siddall visited Jones in the Summit County Jail on two occasions, spending about three and a half hours at each visit. The visits were divided equally between interviewing and testing Jones. In addition to documentary sources, Dr. Siddall relied on information from Jones and detailed family information he received from Mr. Hrdy. Dr. Siddall testified that he had enough time to complete the tasks he was assigned to do, but that he had also been aware that if he needed additional time, he would be able to ask for and receive more time. Dr. Siddall also testified that he asked Jones if he was sexually abused or if there was sexual abuse in the family. Jones denied both and Dr. Siddall testified that sex abuse would be evident in the records.

{¶49} Attorney Donald Hicks represented Jones during his trial. The trial court found that at the time of his testimony, Attorney Hicks had been practicing law for over thirty years, doing "a considerable amount of criminal defense work." When the grand jury initially indicted Jones with aggravated murder and rape, no death penalty specification was attached. Although Attorney Hicks was not certified to handle capital cases when he was appointed to Jones's case,

he was certified by the time the death penalty specification was attached to Jones's indictment. From the time of the original indictment to the time of Jones's trial, Attorney Hicks testified he had met with Jones fifty or sixty times and met with him at least a couple of times a week. He stated that some of the meetings were "face-time," as he had promised to meet with Jones any time he was at the jail. However, at other such meetings, he discussed the death penalty and mitigation with Jones. He further stated that such discussions occurred even before the death penalty specification was added because there had been ongoing discussions with the prosecutors about the possibility of the addition of the death penalty specification. The trial court further found that Attorney Hicks felt he had built a rapport and trust with Jones and during his discussions with Jones, he had gathered information that would be useful in the mitigation phase and incorporated that information into Jones's defense during both trial and the mitigation phase. Attorney Hicks testified that Jones never indicated that he had been sexually abused.

{¶59} Attorney Hicks recalled the primary family contact person was Jones's sister, Yolanda. He also recalled speaking to Yolanda "a couple of dozen times" on the phone and "eight or ten times, maybe a dozen" in person. Meetings occurred after court hearings and in his office. Attorney Hicks stated that the mitigation team "had a lot of contact with the family." However, there were never any indications from Yolanda, the Jones family, or any other contacts whose names were provided to the defense team that Jones had been subjected to sexual abuse. Although Attorney Hicks acknowledged the defense team got a late start hiring experts due to the timing of the death penalty specification, he felt he had enough time to prepare for the mitigation hearing. He stated he would have requested a continuance of the trial if he had felt they had not had enough time to prepare for mitigation and was confident the request would have

been granted as the trial court's predecessor judge had a reputation for being "exceedingly accommodating."

{¶51} Attorney Kerry O'Brien also represented Jones during his trial. The trial court found that at the time of his testimony, Attorney O'Brien had practiced law for over thirty-eight years and had been certified to handle capital cases since the mid-1980s and had defended over 30 death penalty cases. Attorney O'Brien testified that he met with Jones on average once a week and they had no communication or trust issues. He recalled speaking with Jones's mother mostly by telephone and recalled meeting with family members two or three times on Saturday or Sunday mornings at his office. The meetings included updates on the case and conferences. Attorney O'Brien testified that he explained the purpose of mitigation to the family and the goal of what they were trying to accomplish. He stated that he asks about "the complete family history from day one" and that he usually asked

> did the client have a rough upbringing, or what were the financial circumstances of the family, was there any physical abuse, did the defendant suffer any head injuries like fall off of a tree or hit by a car or hit by a baseball bat or something like that. And then I go into emotional or mental retardation. I then ask if the client had any mental evaluation. I also ask about sex abuse, whether an uncle or an aunt or something like that had molested him.

Attorney O'Brien stated that he would have absolutely used sexual abuse during mitigation if it had been mentioned. However, Jones denied any sexual abuse when Attorney O'Brien asked him about it.

C. Conclusion - Counsels Performance

{¶52} Despite the extensive amount of mitigating evidence presented during Jones's mitigation hearing, *See Jones I*, 135 Ohio St.3d 110, 2012-Ohio-5677, at ¶ 224-256, Jones contends his defense counsel were ineffective for not finding more. However, the trial court determined that much of the credible lay witness testimony at the post-conviction relief hearing

was cumulative to that which was presented during the mitigation hearing. Further, the trial court determined that "because of the nature and quality of the mitigation facts Mr. Hrdy was able to obtain, as well as the lengthy time that pre-existed the death penalty specification, during which there were psychological reports, the development of a rapport with [Jones] and his attorneys (especially Mr. Hicks), communication with the family and information gathering, the late start was not detrimental to [Jones's] mitigation investigation." As shown above, these findings were supported by competent, credible evidence.

{¶53} With specific reference to the allegations of sexual abuse in the Jones family, the trial court acknowledged that the purpose of the post-conviction relief hearing was not to determine the merits of Jones's sexual abuse or incest claims, but to determine if the defense team should have reasonably discovered the abuse. However, in so doing, the trial court necessarily had to evaluate the testimony and credibility of the witnesses. The trial court found that the credible testimony in this case showed that all four members of the mitigation team asked about sexual abuse and that they were all met with denials. Based on the trial court's observations of the testimony and evidence presented at the post-conviction relief hearing, we conclude that this determination was supported by competent credible evidence.

{¶54} "The Sixth Amendment entitles criminal defendants to the '"effective assistance of counsel"'–that is, representation that does not fall 'below an objective standard of reasonableness' in light of 'prevailing professional norms.'"" *Bobby v. Van Hook*, 588 U.S. 4 (2009), quoting *Strickland*, 466 U.S. at 686, quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Counsel's failure to reasonably investigate a defendant's background and present mitigating evidence to the jury can constitute ineffective assistance of counsel. *Wiggins*, 539 U.S. at 521-522. However, "[t]he reasonableness of counsel's actions may be determined or

substantially influenced by the defendant's own statements or actions." *Strickland* at 691, citing *Decoster*, 624 F.2d at 209-210 (D.C.Cir.1976).

{¶55} In applying the above standard, the trial court determined that in light of the variety of circumstances Jones's trial counsel faced, their investigation was reasonable and thus, counsel was not ineffective for failing to discover additional alleged abuse. First, the trial court found that the mitigation team's failure to utilize the FETI method of questioning was not unreasonable as FETI did not come into existence until 2013. Second, Dr. Fradkin testified that "most men go to their graves without ever talking about [sexual abuse]" and the disclosure of sexual abuse "varies from person to person. It could take months. It could take years." Consequently, the trial court determined that even assuming there was any truth to the allegations of sexual abuse and incest within the Jones family,

> in light of the 30 years of failure of trained medical, psychiatric, psychological and education professionals to uncover the abuse, to require his attorneys to discover such information in the limited time provided by the time constraints of a criminal trial in which the defendant is incarcerated is unreasonable and beyond any requirements of the ABA Guidelines.

Third, Dr. Stinson testified that the abuse may have been disclosed now "because main perpetrators and the main individuals who said we do not talk about this eventually died." The trial court further determined that if that was the case, Jones's defense counsel would have had no chance of obtaining any type of disclosure since Jones's mother was still alive at the time of the mitigation investigation.

{¶56} As the trial court applied the appropriate legal standard and the trial court's findings were based upon competent credible evidence, we cannot conclude that the trial court abused its discretion when it determined that Jones's trial counsel did not render deficient performance when they failed to discover alleged sexual abuse and additional alleged physical

physical and emotional abuse perpetrated against Jones during their mitigation investigation. *See Maryland v. Kulbicki*, 136 S.Ct. 2, 4-5 (2015) (recognizing that the right to effective assistance of counsel does not demand that lawyers go "looking for a needle in a haystack" when they have "reason to doubt there is any needle there.") As Jones has failed to show that his trial counsel rendered ineffective assistance during their mitigation investigation we need not address whether Jones was prejudiced. *See Ray*, 9th Dist. No. 22459, 2005-Ohio-4941 at ¶ 10.

2. Dr. Siddall's Evaluation & Diagnosis

{¶57} Jones next argues that Dr. Siddall had neither the time nor the information necessary to perform a complete a psychological evaluation and make a diagnosis for the purposes of the mitigation hearing. Thus, the extent of Jones's mental illness was not discovered and his trial counsel's assistance was ineffective due to their failure to adequately review Jones's mental health records and ensure that Dr. Siddall did so as well.

{¶58} Dr. Siddall's testimony regarding Jones's mental illness during the mitigation hearing was summarized by the Supreme Court of Ohio in the following way:

> In summary, Dr. Siddall testified that Jones has "a chronic history of mental illness which has required very expansive psychiatric treatment while he was incarcerated and in the community." Jones has been repeatedly hospitalized and been treated with antidepressants, mood-stabilizing drugs, and antipsychotic medications. Jones was also raised in a family with a long history of psychiatric problems, alcohol and drug abuse, domestic violence, and involvement with the criminal-justice system. Dr. Siddall testified that these severe problems affect most members of Jones's family and represent "a rather unusual cluster of very serious problems in a given family." He opined that "certain psychiatric problems, certain psychological problems * * * are known to be biologically based * * * [and were] genetically transmitted * * * across generations in the Jones family."
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> During cross-examination, Dr. Siddall acknowledged that a Dr. Stafford, a psychiatrist who treated Jones at the Oakwood Forensic Hospital, reported that Jones admitted that he falsely reported hearing voices. Dr. Stafford concluded, "He is not psychotic at all. His whole outlook is due to malingering and put on." Dr. Stafford's report also stated that Jones "puts on psychosis due to experience

> with mental health professionals through the years. He is difficult to differentiate because he is clever to answer vaguely."[1]

Jones I, 135 Ohio St.3d, 2012-Ohio-5677, at ¶ 236-237.

{¶59} Dr. Siddall is an expert in forensic psychology and testified as an expert in "maybe a dozen" capital mitigation hearings prior to Jones's case. He testified at Jones's post-conviction relief hearing as a witness for the State. Based on this testimony, the trial court found that he is licensed in both clinical and forensic psychology and also practices in the area of drug addiction. He has been licensed since 1975, is published and has received awards. At the time of his testimony, Dr. Siddall had taught graduate level courses, including courses on diagnosis. Although he is currently in private practice, Dr. Siddall has had significant experience with persons in a criminal legal setting through his work at a diagnostic clinic.

{¶60} Dr. Siddall stated that as a rule he would get records and complete his report before the start of trial, but in this case he completed his report after Jones's trial, but before the mitigation phase. Dr. Siddall stated that when he first became involved in the case, "[t]here was a ship load of records that came in and continued to come in." He also stated that he thought he had received some records after he had completed his report, but did not recall which ones. The trial court found that Dr. Siddall's report identified his documentary sources as Jones's educational records from Akron Public Schools (1978-1986), as well as mental health records from the Ohio Department of Rehabilitation and Corrections, Summit Psychological Associates, Portage Path Mental Health Center, and the Psycho-Diagnostic Clinic. Dr. Siddall also visited Jones in the Summit County Jail on two occasions, spending about three and a half hours at each visit. The visits were divided equally between interviewing and testing Jones. The trial court

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[1] The trial court noted in its decision that "[t]he report attributed to Dr. Stafford in the Supreme Court opinion was actually the April 18, 1996 report of Dr. Khalid Matouk."

found that Dr. Siddall's invoice documented billing for 32.75 hours of casework, which included interviews, testing, record review, and consultations with Jones's attorneys and mitigation specialist. In addition to the documentary sources, Dr. Siddall relied on information from Jones and detailed family information he received from Mr. Hrdy. Dr. Siddall testified that he had enough time to complete the tasks he was assigned to do, but that he had also been aware that if he needed additional time, he would be able to ask for and receive more time.

{¶61} Dr. Siddall diagnosed Jones with a mood disorder. Dr. Siddall testified that he was aware that other diagnoses had been made with regard to Jones that differed from the one to which he opined during mitigation. However, he testified that it would be inappropriate for him to diagnose Jones by giving him a diagnosis given by another doctor rather than making his own diagnosis. Dr. Siddall stated that "you have to understand that anybody that has been in the system for years will probably have many diagnoses" and that "[t]he important thing here is that the core of defendant's psychological problems included a depressive disorder, psychotic like features, and the history of antisocial behavior. Those are the things that needed to be represented in the diagnosis. There is various ways of labeling them."

{¶62} At the post-conviction relief hearing, Jones called three expert witnesses to testify concerning his mental health. The first was Dr. Jeffery Madden. Dr. Madden is an expert in neuropsychology. The trial court found that Dr. Madden had performed a battery of neuropsychological tests on Jones to determine if there were any signs of organic brain injury. During his post-conviction relief testimony, he opined that those results validated Jones's prior diagnosis of schizoaffetive disorder-bipolar type. However, Dr. Madden could not opine to a reasonable degree of neuropsychological certainty as to the presence or absence of neurological dysfunction or whether Jones suffered from a cognitive disorder attributable to organic brain

damage. However, Dr. Madden did opine to a reasonable degree of scientific certainty that Jones was not malingering at the time that Dr. Madden conducted his tests in January 2013.

{¶63} Jones also called Dr. Gary Beven, an expert in psychiatry and forensic psychiatry. The trial court found that Dr. Beven was the Chief Psychiatrist at the Southern Ohio Correctional Facility from 1995-2003, during which time Jones was incarcerated at the facility. Dr. Beven was the primary lead of the mental health team and provided Jones with mental health treatment. Dr. Beven had examined Jones 35 times while he was incarcerated and had diagnosed Jones with shizoaffective disorder-bipolar type with personality disorder. During the entire time of Dr. Beven's treatment of Jones, Jones remained on the mental health C.I.C. caseload, indicating serious and chronic mental illness. Dr. Beven acknowledged a discussion of malingering or exaggeration in his case notes, but that discussion did not cause him to second-guess his diagnosis of Jones. Dr. Beven's last contact with Jones was in 2003 and he could not offer any testimony about Jones after that time. Jones's original mitigation team did not contact Dr. Beven prior to Jones's capital trial.

{¶64} Jones also called Dr. Bob Stinson, an expert in forensic psychology. The trial court found that Dr. Stinson testified about the dysfunction and abuse with the Jones family. He personally interviewed Jones, but did not conduct any tests on Jones. In addition to the interview, Dr. Stinson relied upon the affidavits of family members and Dr. Fradkin's report. Dr. Stinson opined to a reasonable degree of psychological certainty that Jones suffers from schizoaffective disorder, bipolar type. During his testimony, Dr. Stinson was critical of Dr. Siddall's diagnosis of mood disorder, his testing methods, his mitigation testimony regarding Jones's malingering, and the amout of time Dr. Siddall spent with Jones. Dr. Stinson was further critical of the amount of time Dr. Siddall spent reviewing Jones's records. However, when

testifying about the difference between his diagnosis and that of Dr. Siddall's, Dr. Stinson stated that "we are actually not as far off as it may seem, but mood disorder not otherwise specified is our label for saying, I see a mood component to his illness, but I don't have enough information to tell you exactly what category it fits in." Dr. Stinson's further stated that he would not say Dr. Siddall's diagnosis was wrong, but that he did not have enough information to give a more specific diagnosis.

{¶65} Despite the extensive amount of mitigating evidence presented during Jones's mitigation hearing, *See Jones I*, 135 Ohio St.3d, 2012-Ohio-5677 at ¶ 224-256, Jones contends his defense counsel were ineffective due to their failure to adequately review Jones's mental health records and ensure that Dr. Siddall did so as well. However, even assuming without concluding that counsel was deficient, Jones is not able to show he was prejudiced by the mitigation investigation into his history of mental illness. When assessing prejudice, "'the question is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" *Herring*, 142 Ohio St.3d, 2014-Ohio-5228, at ¶ 116, quoting *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶ 163, quoting *Strickland*, 466 U.S. at 694. Accordingly, "[a]dditional mitigating evidence that is merely cumulative of that already presented does not undermine the results of sentencing." (Internal quotations omitted.) *Id.* at ¶ 117.

{¶66} In this case, the trial court determined that the testimony given about the manifestations of Jones's mental illness given by Dr. Stinson and Dr. Beven was consistent with and cumulative of the testimony presented by Dr. Siddall at Jones's mitigation hearing. Specifically, the trial court found that "[w]hile [Jones] is mentally ill, his mental illness is

inextricably wrapped around his anti-social personality disorder." The trial court based this determination on the "scores of case notes in the prison records and other documents submitted as evidence." The trial court then pointed to Dr. Siddall's mitigation testimony, in which he gave a significantly more detailed diagnosis than just the named disorder and determined that despite the differing names of the diagnoses, Dr. Stinson's and Dr. Beven's testimonies about the manifestations of Jones's mental illness and the medications used to treat him was consistent with and cumulative of testimony given by Dr. Siddall at the mitigation hearing. Such manifestations included suicide attempts, self-mutilation, depression, hallucinations, and psychiatric hospitalizations and the medications included mood stabilizing drugs for bipolar disorder and antipsychotic drugs. The trial court additionally noted that when testifying about the differences between his diagnosis and Dr. Siddall's, Dr. Stinson stated that their diagnoses were "not as far off as it may seem" and that in his own report, Dr. Stinson did not reference any of the records he suggested Dr. Siddall needed in order to have a more complete picture of Jones's mental illness. However, when forming his opinion, the trial court noted that Dr. Stinson did not have access to the 1448 pages of mental health records contained in Jones's ODRC records, was selective in his use of the information in some of Jones's other records, and did not personally conduct any tests on Jones. Accordingly, we conclude that the trial court's determination that the testimony given by Dr. Stinson and Dr. Beven was consistent with and cumulative of the testimony presented by Dr. Siddall at Jones's mitigation hearing did not constitute an abuse of discretion.

{¶67} Furthermore, the trial court determined that Jones's argument that Dr. Siddall used an inappropriate method to diagnosis Jones's malingering ignored the fact that Dr. Stafford also opined that Jones showed evidence of malingering during his competency evaluation.

During his testimony, Dr. Siddall pointed out that mental illness and malingering are not mutually exclusive. Furthermore, Dr. Siddall's testimony regarding malingering was part of the focus of the State's cross-examination on Jones's history of malingering and that Dr. Siddall addressed the malingering the most positive way possible.

{¶68} Therefore, we cannot conclude that the trial court abused its discretion when it determined that the testimony given about the manifestations of Jones's mental illness given by Dr. Stinson and Dr. Beven was consistent with and cumulative of the testimony presented by Dr. Siddall at Jones's mitigation hearing. As Jones has failed to show he was prejudiced by his counsels' actions we need not address whether counsel was deficient. *See Ray*, 2005-Ohio-4941 at ¶ 10.

C. Conclusion

{¶69} Jones has failed to demonstrate the trial court abused its discretion when it determined that Jones's trial counsel was not ineffective for failing to discover further alleged abuse during their mitigation investigation or that Jones was prejudiced by counsel's alleged failure to discover the extent of Jones's mental illness. Therefore, Jones's first assignment of error is overruled.

Assignment of Error II

The trial court erred by refusing to consider out of court statements for hearsay and nonhearsay purposes, in violation of Due Process and Ohio law. [ ]

{¶70} In his second assignment of error, Jones argues that the trial court erred by not considering out of court statements offered other than for the truth of the matter asserted or for other non-hearsay purposes. The first statements Jones argues that the trial court should have considered were made by his mother in an affidavit sworn to before her death. The second set of

statements were out of court statements made by individuals not testifying at the hearing for post-conviction relief about which Jones's sisters attempted to testify to during the hearing. Both sets of statements were made regarding alleged sexual abuse which occurred within the Jones family.

{¶71} "The decision to admit or exclude evidence at trial lies within the sound discretion of the trial judge, and the court's decision will not be reversed absent a showing of an abuse of discretion." *State v. Stover*, 9th Dist. Wayne No. 13CA0035, 2014-Ohio-2572, ¶ 7. An abuse of discretion is more than an error in judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying the abuse of discretion standard, this court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶72} Hearsay is inadmissible except as otherwise provided in the Ohio Rules of Evidence or other relevant constitutional or statutory provisions. Evid.R. 802. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801.

{¶73} Prior to Jones's post-conviction relief hearing, Jones filed a motion in limine requesting the trial court allow the affidavit of Jones's now deceased mother to be admitted into evidence at the hearing. The trial court denied the motion in part and granted it in part. The trial court found that part of the affidavit contains a claim "which goes to the issue of ineffective assistance of counsel" and as such went to the heart of the very issue before the trial court in the post-conviction relief hearing. The trial court further determined that the statements were not admissible as statements against interest. Thus, the statements "must be subject to cross-examination to be admissible." However, the trial court did find that statements within the

affidavit pertaining to personal or family history were admissible for the truth of the matter asserted pursuant to Evid.R. 804(B)(4). Jones reasserted the issue during his hearing and the trial court again denied Jones's request to admit those statements within the affidavit which went to the issue of ineffective assistance of counsel, thus preserving the issue for appeal.

{¶74} First, Jones argues these hearsay statements should have been admitted pursuant to *Green v. Georgia*, 442 U.S. 95 (1979). Specifically, Jones contends that the out of court statements at issue in Jones's mother's affidavit should have been admitted because they would have been admissible during the mitigation phase of Jones's capital trial. In *Green*, the Supreme Court "carved out an exception to evidentiary rules for mitigation evidence in extreme circumstances when its exclusion would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *State v. Sheppard*, 84 Ohio St.3d 230, 237 (1998), citing *Green* at 97. However, the holding in *Green* addressed the exclusion of hearsay evidence where "[t]he excluded testimony was highly relevant to a critical issue *in the punishment phase* of trial." (Emphasis added.) *Id.* The present appeal was taken after Jones's hearing on his motion for post-conviction relief, not after Jones's sentencing hearing.

{¶75} In Ohio, post-conviction relief is governed by statute and the right to file a petition for post-conviction relief is a statutory right, not a constitutional one. *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999); R.C. 2953.21. Additionally, "a postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment." *Id.* R.C. 2953.21(A)(1)(a) provides that any person who has been convicted of a criminal offense may petition the court for post-conviction relief pursuant to a claim "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." Thus, Jones's reliance on *Green* is

misplaced because the evidentiary hearing on a Jones's request for post-conviction relief is a separate and distinct proceeding from the punishment or mitigation phase of his trial.

{¶76} "R.C. 2953.21 grants a petitioner only those rights specifically enumerated in its provisions and no more." *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028, ¶ 28, citing *Calhoun* at 281. R.C. 2953.21 does not carve out any exceptions to the rules of evidence during a hearing for post-conviction relief. Thus, "[e]videntiary hearings under R.C. 2953.21 are subject to the rules of evidence." *State v. Jeffers*, 10th Dist. Franklin No. 10AP-1112, 2011-Ohio-3555, ¶ 25; *See State v. Brinkley*, 6th Dist. Lucas No. L-04-1066, 2004-Ohio-5666, ¶ 12-14; *See also State v. Morgan*, 10th Dist. Franklin No. 95APA03-382, 1995 WL 694489, at 3 (Nov. 21, 1995) (concluding that although it was necessary for appellant to submit affidavits in order for the trial court to determine whether he was entitled to a hearing, once the trial court granted that hearing, it became necessary for him to produce admissible evidence under the rules of evidence.). Accordingly, we cannot say that the trial court abused its discretion when it excluded hearsay testimony from Jones's sisters.

{¶77} Next, Jones argues that Jones's mother's affidavit was admissible pursuant to Evid.R. 804(B)(3) as a statement against interest because Jones's mother "subjected herself to possible perjury charges." That rules states that if the declarant is unavailable as a witness, the following is not excluded by the hearsay rule:

> A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

Evid.R. 804(B)(3). A witness who "is unable to be present or to testify at the hearing because of death" is considered an unavailable witness for the purposes of the hearsay exception. Evid.R. 804(A)(4). A person is guilty of perjury when, in any official proceeding, she knowingly makes a false statement under oath or affirmation, or knowingly swears or affirms the truth of a false statement previously made, when either statement is material. R.C. 2921.11(A). A falsification is material if it can affect the course or outcome of the proceeding. R.C. 2921.11(B).

{¶78} In denying the motion in limine, the trial court noted that Jones's mother's affidavit differed "somewhat" from her testimony during trial, such as portraying Jones's father as a good father and provider during trial, but calling him "mean and harsh[2]" in her affidavit and stating that "he didn't provide for the family." The trial court found the fact that Jones's mother never states in her affidavit that she lied during her trial testimony or "that she purposely held back pertinent mitigation information" to be critical as that could have subjected her to criminal perjury charges.

{¶79} On appeal, Jones points to three instances in Jones's mother's mitigation testimony which differ from the statements in her affidavit and which may have subjected her to possible perjury charges. However, a review of the record shows no explicit contradiction of any material statement. Additionally, Jones's mother makes no statement in her affidavit that she made false statements during her mitigation testimony. The first exchange Jones points to went as follows:

> Q: Throughout, all of your kids, the time they were growing up, when they were children to adults, have you always been very supportive of them?
>
> A: Yes.

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[2] We note that a review of Jones's mother's affidavit shows that Jones's mother refers to Jones's paternal grandfather as "mean and harsh" and not Jones's father. However, the affidavit does refer to Jones's father as a "violent person."

Q: What about your husband? Was your husband, would you consider him a good role model for your kids?

A: Yes.

The second exchange was as follows:

Q: Okay. And would you describe the home that you and your husband provided to your kids a stable home, at least in terms of support and providing care for them?

A: Yes.

Finally, the third exchange happened as follows:

Q: Ma'am, your husband, Mr. Jones, you said that he worked for the post office. Did he end up retiring from the post office after thirty-seven years?

A: Yes.

Q: So he retired with a pension, obviously?

A: Yes.

Q: And, ma'am, you working at least a couple of jobs, between you and your husband, you probably made a fairly good living considering you had eight children?

A: Yes.

Q: And they were always provided for?

A: Yes.

* * *

Q: All right. So Mr. Jones, Phillip Jones's father, just a good guy who took care of his kids?

A: Yes, basically.

Jones argues that the above mitigation testimony is inconsistent with statements Jones's mother made in her affidavit. Although Jones does not point to any specific statements, a review of the

affidavit shows that Jones's mother made the following statements about Jones's father that are somewhat inconsistent to her mitigation testimony and were redacted from her affidavit:

> 19. Although [Jones's father] worked, he didn't provide for the family. He spent his money on other women. He drank a lot and came home drunk. He drank bourbon and whiskey. He also smoked reefer.
>
> * * *
>
> 21. [Jones's father] cheated on me with other women. Once I followed him to the home of his mistress.
>
> 22. When my daughter Yolanda was young, someone I knew, [E.H.], had just been released from prison. My husband and I took him out. [Jones's father] brought him home with us and wanted me to have sex with [E.H.] while he watched. I said no. The two men then began to fight, and [Jones's father] grabbed an ax from the basement and began to swing it at [E.H.].
>
> * * *
>
> 26. [Jones's father] and I argued a lot. He was a violent person. During one argument, he kicked me in the eye. * * * My children, including Phillip, saw the abuse. [Jones's father] broke my nose, gave me black eyes, and hit me in the head with a frying pan. In 1979, we divorced.
>
> * * *
>
> 32. I disciplined my children with a belt. [Jones's father] also whooped the children sometimes, but he was too lenient. Once when Phillip was six or seven years old, he took money from his father's billfold while he was sleeping. [Jones's father] came to my work to tell me about it instead of disciplining Phillip. I gave Phillip a whooping.
>
> * * *
>
> 38. When I was still living with my husband, and my daughters Yolanda and Rhonda were children (Yolanda might have been 10 or 11 years old), I couldn't find the knives in the kitchen. I eventually found them in my daughters' bedroom. They said they kept the knives in their beds for protection against their father, who tried to molest them. I didn't report my husband to the authorities.
>
> * * *
>
> 41. In 1998, [Jones's father] and I married each other again.

> 42. In 2006, [Jones's father] died from cancer. Phillip took his father's death very hard.

{¶80} Although these statements seem inconsistent with Jones's mother's statement that she considered Jones's father a good role model, none of the statements in the affidavit directly contradict that opinion or suggest that Jones's mother testified falsely as to that opinion during her mitigation testimony. Likewise, Jones's mother's affidavit does not directly contradict her mitigation testimony affirming that she and Jones's father provided the Jones children with a stable home "in terms of support and providing care" and that the Jones children were "always provided for." The question posed during mitigation did not ask whether Jones's father provided for the Jones children, but rather: (1) whether Jones's *mother and father together* provided a stable home for the Jones children; and (2) whether the children were generally "always provided for." Accordingly, we cannot say that the trial court abused its discretion when it excluded hearsay statements in Jones's mother's affidavit.

{¶81} Alternatively, Jones argues that statements made by Jones's mother in her affidavit asserting abuse were admissible for the non-hearsay purpose of showing that she was willing to disclose abuse, regardless of the truth of those disclosures. However, the Supreme Court of Ohio has recognized that "'the well-worn phrase "not offered for the truth of the matter asserted" is not a talismanic incantation that opens the door to everything said outside the courtroom.'" *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, ¶ 25, quoting *State v. Richcreek*, 196 Ohio App.3d 505, 2011-Ohio-4686, ¶ 26 (6th Dist.). In this case, the trial court determined that Jones's mother's statements in her affidavit went "to the issue of ineffective assistance of counsel" and thus, went "to the very heart of the issue" before the trial court in the post-conviction relief hearing and therefore, "must be subject to cross-examination to be

admissible." Under these circumstances, we cannot say that the trial court abused its discretion when it excluded the statements.

{¶82} Therefore, Jones's second assignment of error is overruled

III.

{¶83} Jones's first and second assignments of error have been overruled. Therefore, the decision of the trial court dismissing Jones's petition for post-conviction relief is affirmed.

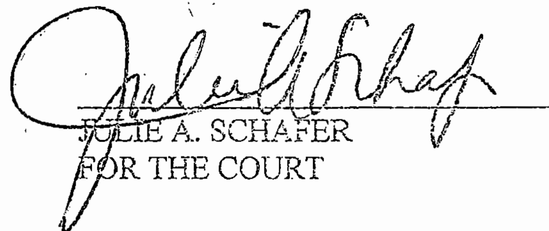
Judgment affirmed.

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.



JULIE A. SCHAFER
FOR THE COURT

TEODOSIO, J.
CONCURS.

CARR, J.
CONCURRING.

{¶84} While I am troubled by various aspects of this case, I cannot say that the trial court's decision to deny Jones' petition after a full evidentiary hearing was unreasonable, arbitrary or unconscionable. *See Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶85} The performance of trial counsel and their mitigation team is of paramount importance in capital cases. Since we decided *Jones II*, the Ohio Supreme Court convened a Task Force to review the administration of the death penalty in Ohio. Among its recommendations, the Task Force recommended the adoption of the American Bar Association's Guidelines for death penalty counsel. It also recommended adoption of the Supplementary Guidelines for the defense mitigation team. These Guidelines establish a high bar for trial counsel and the mitigation team. Although the Ohio Supreme Court has declined to formally adopt these Guidelines, they nevertheless underscore the importance of counsel's preparation for the mitigation hearing.

{¶86} In this case, Jones' defense team agreed to a timetable that resulted in a scenario where Mr. Hrdy did not begin his mitigation work until one month prior to the commencement of the sentencing hearing. Consequently, Mr. Hrdy was restricted in the amount of time he could spend on the case and he was forced to conduct interviews under less than ideal circumstances. The accelerated nature of Mr. Hrdy's efforts is particularly concerning given that he did not learn about the sexual abuse that Jones allegedly suffered. After a thorough review of the evidentiary hearing transcript in this case, however, I cannot say that the trial court's ultimate decision to deny Jones' motion constituted an abuse of discretion.

APPEARANCES:

KIMBERLY RIGBY, LISA LAGOS, AND ALLAN VENDER, Assistant State Public Defenders for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and JACQUENETTE S. CORGAN, Assistant Prosecuting Attorney, for Appellee.

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DANIEL M. HORRIGAN
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SUMMIT COUNTY
CLERK OF COURTS

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

STATE OF OHIO,	)	**CASE NO.: CR 2007 04 1294**
Plaintiff,	)	**JUDGE CALLAHAN**
v.	)	
PHILLIP L. JONES,	)	**JOURNAL ENTRY**
Defendant.	)	

This matter is before the Court upon Phillip Jones' Post-Conviction Petition, remanded for hearing by the Ninth District Court of Appeals. *State v. Jones*, 9th Dist. No. 25695, 2011-Ohio-6063, 2011 Ohio App. LEXIS 4949. An evidentiary hearing began on November 18, 2013 and concluded on November 25, 2013. Petitioner was present throughout the hearing. Petitioner filed his Post-Hearing Merit Brief on September 15, 2014. The State filed its Post-Hearing Brief on April 14, 2015. Petitioner filed his Reply Brief on May 14, 2015. For the reasons set forth as follows, the State's Motion to Dismiss is **GRANTED**. Petitioner's Petition for Post-Conviction Relief is **DISMISSED**.

I. Factual Background and Procedural History of Trial

On April 23, 2007, the body of Susan Yates was discovered by a jogger in the Mount Peace Cemetery in Akron, Summit County, Ohio. Her clothing was in disarray and a knife was found near her body. A plastic cross was placed over her right eye.

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Phillip Jones was indicted for the Aggravated Murder and Rape of Susan Yates on May 8, 2007. The original indictment did not contain the death penalty specification. The case was assigned to this Court's predecessor judge. On June 8, 2007, Jones' attorneys requested that he be referred for competency and sanity evaluations. A hearing was held on August 15, 2007. On August 17, 2007, the Court issued a Journal Entry reflecting the parties' stipulation to the report containing Dr. Stafford's opinion that Jones was competent to stand trial. Trial was scheduled for December 3, 2007.

On September 27, 2007, at the request of defense counsel via its September 5, 2007 Motion, a second competency and sanity evaluation were ordered. The evaluations were to be completed by Robert Byrnes, Ph.D., an expert chosen by the defense.

On October 22, 2007, a supplemental indictment was filed. The supplemental indictment contained the death penalty specification.

On October 24, 2007, Defendant pled not guilty to the specification. On the same date, Defendant requested and the Court authorized payment for the services of Dr. James Siddall as a mitigation specialist.

On October 25, 2007 through November 1, 2007,[1] Defendant filed a series of 27 motions including "Motion for Appropriation of Funds for a Defense Mitigation Investigator," "Motion for a Defense Investigator," and "Motion for Funds to Retain Expert." Additional motions would follow.

On December 3, 2007, jury selection began.

[1] Although some of the motions are docketed 11/1/07, their certifications show they were and hand-delivered to the State on 10/25/2007.

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On December 5, 2007, the Court authorized payment for defense counsel to retain the services of Thomas Hrdy as an investigator.

Testimony began on December 10, 2007. Jurors heard that Susan Yates had been beaten and sustained internal and external neck injuries. She also suffered injuries to her vaginal and anal areas. Initial testing on vaginal swabs confirmed the presence of spermatozoa. DNA from Yates' skirt and from vaginal swabs taken at the time of her autopsy was determined to be consistent with Jones' DNA. No semen was found on the anal swabs, but Dr. George Sterbenz opined that the injuries suffered to Susan Yates' anus and vagina were consistent with sexual assault by something long and rigid. Dr. Sterbenz determined the cause of death to be asphyxia by violent strangulation and manner of death to be a homicide.

Phillip Jones testified that he observed Susan Yates in an altercation with a male and offered her assistance. They then drove around to find crack cocaine and alcohol and ended up at the cemetery. According to Jones, Susan Yates had a knife with her that she used to prepare the crack for smoking. Jones testified to having had consensual vaginal sexual intercourse with Susan Yates, but denied engaging in anal sex with her. Jones testified that Susan Yates wanted to have "rough" sex, so during the sexual encounter, at her request, Jones put his hands around Susan Yates' throat and squeezed, a practice known as erotic asphyxiation. As he placed pressure on her throat he heard a popping sound and noticed that she was no longer moving. He attempted to perform CPR. Realizing she was dead, he panicked and fled.

On December 17, 2007, the jury found Phillip Jones guilty of Aggravated Murder, in violation of R.C. 2903.01(B), a special felony, with the Death specification and Repeat Violent Offender specification; Murder, in violation of R.C. 2903.02(B) with the Repeat Violent

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Offender specification; and two counts of Rape, in violation of R.C. 2907.02(A)(2), each with a Repeat Violent Offender specification.

The mitigation hearing was commenced on January 10, 2008. The Defense called ten witnesses, including a psychiatrist, Jones' mother, sister, and son, the family minister, and a member of the parole board. Phillip Jones made an unsworn statement. On January 11, 2008, the jury returned a recommendation of death.

On February 4, 2008, the trial court accepted the jury's recommendation and sentenced Phillip Jones to death as punishment for the Aggravated Murder of Susan Yates. The trial court also sentenced Jones on the remaining counts, merging his conviction for Murder and the accompanying Repeat Violent Offender specification with the death sentence imposed for the Aggravated Murder count.

On March 23, 2009, Jones filed a Petition for Post-Conviction Relief.[2] The Petition set forth seventeen grounds for relief, twelve of which alleged the ineffective assistance of his trial counsel. On October 25, 2010, this Court issued an opinion denying Jones' Petition without hearing, finding insufficient operative facts to necessitate a hearing. Petitioner appealed.

The Ninth District Court of Appeals found that this Court "exercised improper discretion when it denied Mr. Jones's penalty phase ineffective assistance of counsel claims without holding a hearing to determine whether his lawyers began their mitigation phase investigation

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[2] Because Petitioner's original sentencing entry did not contain post-release control language for the rape counts, the trial court held there was no final order and dismissed his original March 23, 2009 Petition as premature. Petitioner was advised of post-release control on January 27, 2010 and the corrected nunc pro tunc sentencing entry was filed on February 11, 2010, pursuant to *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶27 and R.C. 2929.191(C). Petitioner appealed that decision and, in the interim, filed a second identical Petition on April 14, 2010. The second Petition was stayed pending resolution of the appeal. The appellate court remanded the original Petition in Petitioner's favor; however, the April 14, 2010 Petition was never withdrawn.

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early enough and whether they allowed Dr. Siddall and Mr. Hrdy enough time to do a complete investigation into Mr. Jones's family life." *State v. Jones*, 2011-Ohio-6063, at ¶66.

Upon remand, an evidentiary hearing was held. The parties sought and were granted permission to file post-hearing briefs and several continuances of the proposed filing deadlines were granted. The following claims remain before this Court for consideration:

1. Petitioner's trial counsel were ineffective in their failure to present mitigating evidence about Jones' history and background;
2. Petitioner's trial counsel were ineffective in their failure to properly prepare witnesses regarding their testimony about the extent of the family's dysfunction;
3. Petitioner's trial counsel were ineffective in their failure to fully investigate the family's background;
4. Petitioner's trial counsel were ineffective in their failure to investigate and prepare witnesses regarding Jones' background;
5. Petitioner's trial counsel were ineffective in their failure to provide, through their expert, competent and accurate information about Jones' dysfunctional background;
6. Petitioner's trial counsel were ineffective in their failure to investigate potential neurological damage;
7. Petitioner's trial counsel were ineffective in their failure to seek a continuance to prepare for mitigation; and
8. Petitioner's trial counsel were ineffective in their failure to introduce hospital records during mitigation.

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II. Defense Mitigation Phase Testimony

During the mitigation phase, the Defense called ten witnesses. Petitioner also made an unsworn statement. Because the trial was before this Court's predecessor judge, this Court has read the trial transcript.

In *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶225-255, the Supreme Court summarized the mitigating testimony that was presented as follows:

> "Dr. James Siddall, a clinical and forensic psychologist, evaluated and conducted psychological testing of Jones. Dr. Siddall reviewed Jones's educational, criminal-justice, and mental-health records and submitted a written report. He noted that Jones had been incarcerated most of his life.
>
> "Jones was born May 2, 1970, and was raised in Akron. Dr. Siddall testified that Jones grew up in a troubled family where there was domestic violence, and his parents divorced when Jones was young.
>
> "Dr. Siddall testified that Jones's family has a history of psychiatric, substance-abuse, and criminal-justice problems. Dr. Siddall stated that these problems have moved across the generations and began with Jones's paternal and maternal grandparents. His paternal grandfather was an alcoholic, engaged in domestic abuse, and died of a fatal injection of poisoned heroin. Jones's maternal grandmother suffered from some form of mental instability and alcohol use. She was sent to prison for murdering her boyfriend, who had raped and killed one of her sons. Jones's father committed domestic abuse and suffered from a learning disability. His mother moved through foster care as a child and developed alcohol-related problems.
>
> "Jones attended special-education classes in the Akron public schools and did not adjust well to school. He was retained in a couple of grades and was moved between schools several times. Jones was expelled in the tenth grade because of truancy, disruptive behavior, and failing grades.
>
> "Jones was incarcerated several times as a juvenile. Between 1979 and 1988, Jones was convicted of receiving stolen property, destruction of property, and criminal damaging related to a series of auto thefts. Jones was also convicted of petty theft and disorderly conduct. Jones was depressed and made several suicide attempts during adolescence. He attempted to hang himself when he was 16 and took an overdose of pills when he was 17.
>
> "As an adult in 1989, Jones was convicted of receiving stolen property and

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violating probation. In 1990, he was convicted of two counts of attempted rape and served 14 years in prison. Dr. Siddall testified that Jones had significant psychiatric interventions in prison. His mood and behavior were very unstable, and he tried to cut himself on numerous occasions. In 2004, Jones was paroled and was classified as a sexually oriented offender.

"Jones used alcohol and marijuana during his youth. Jones resumed using alcohol after he was paroled in 2004, but denied abusing drugs.

"Jones and Delores married in November 2006. Jones is also the father of a teenage son and daughter, who were born during his relationship with a former girlfriend.

"Dr. Siddall testified that Jones's reading ability is at the eighth-grade level. Results of the Wechsler Abbreviated Scale of Intelligence test indicated that Jones has a full-scale IQ of 86, which places him in the low-average range. Results of the Brief Neuropsychological Cognitive Examination ("BNCE") were in the normal range, with the exception of one subset. Excluding this subset, the BNCE results showed no evidence of neurocognitive impairment. Dr. Siddall reported that Jones's 'cognitive functioning including attention, concentration, recent and remote memory and problem solving were intact.'

"Jones's scores on the Structured Inventory of Malingered Symptomatology ("SIMS") were 'significantly elevated' and indicated 'a level of distortion and exaggeration.' Test results on the Minnesota Multiphasic Personality Inventory-2 and the Personality Assessment Inventory showed the same level of distortion. According to Dr. Siddall, the distortion of these scores indicates that Jones may have been attempting to draw attention to his situation or seeking to derive the secondary benefit of talking to mental-health professionals and to possibly receive medication.

"Dr. Siddall diagnosed Jones with a mood disorder resulting from a 'serious history of depression and mood instability * * * [that] is associated with repeated suicidal behaviors, gestures, [and] attempts.' Jones was also diagnosed with a history of alcohol and cannabis abuse and an antisocial-personality disorder. Jones has also demonstrated psychotic behavior and has reported hallucinations.

"In summary, Dr. Siddall testified that Jones has 'a chronic history of mental illness which has required very expansive psychiatric treatment while he was incarcerated and in the community.' Jones has been repeatedly hospitalized and been treated with antidepressants, mood-stabilizing drugs, and antipsychotic medications. Jones was also raised in a family with a long history of psychiatric problems, alcohol and drug abuse, domestic violence, and involvement with the criminal-justice system. Dr. Siddall testified that these severe problems affect

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most members of Jones's family and represent 'a rather unusual cluster of very serious problems in a given family.' He opined that 'certain psychiatric problems, certain psychological problems * * * are known to be biologically based * * * [and were] genetically transmitted * * * across generations in the Jones family.'

"During cross-examination, Dr. Siddall acknowledged that a Dr. Stafford, a psychiatrist who treated Jones at the Oakwood Forensic Hospital, reported that Jones admitted that he falsely reported hearing voices. Dr. Stafford concluded, 'He is not psychotic at all. His whole outlook is due to malingering and put on.' Dr. Stafford's report also stated that Jones 'puts on psychosis due to experience with mental health professionals through the years. He is difficult to differentiate because he is clever to answer vaguely.[3]

"Henrietta Jones, the defendant's mother, testified that the defendant is the youngest of her eight children. Henrietta stated that all her children had problems with the law and substance abuse. Henrietta married Jones's father in 1959, divorced him in 1978, and remarried him in 1998.

"Jones was born with 'lazy eye.' His siblings and the neighborhood kids taunted and teased him because of it. Jones received corrective surgery when he was 12 years old. Jones was a slow learner in school and was held back in the first and third grades. Jones had mental-health problems at a young age. He drank gasoline when he was eight years old and had to have his stomach pumped. Jones later tried to hang himself and was admitted for treatment at the Mansfield Psychiatric Hospital.

"Henrietta testified that Jones's father worked at the post office for 37 years. Henrietta worked at the post office also and held a variety of other jobs. Henrietta stated that she provided a stable home for her children and provided for their needs. Jones was involved in church as a child and attended Sunday school. Henrietta has a very close relationship with Jones and stated, 'He was very concerned when I get sick. He was always there for me to take me to the doctor and things like that.' Jones also had a close relationship with his father.

"Yolanda White, Jones's oldest sister, testified that Jones was teased and picked on when he was young because of the lazy eye. Jones told White that the teasing made him feel unwanted and unloved. Jones acted out on his feelings of inadequacy by attempting suicide on a couple of occasions. White remembers that Jones said that he was hearing voices around this time. Jones also did poorly in school and repeated two grades. White does not believe that Jones received the help that he needed to do well in school. White also testified that all her siblings

[3] The report attributed to Dr. Stafford in the Supreme Court opinion was actually the April 18, 1996 report of Dr. Khalid Matouk. Petitioner's Ex. 11, Vol. V, p.1388. Dr. Stafford prepared the competency evaluation and referenced his notes in her report.

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have criminal records, as does she. White has felony convictions for possession of crack cocaine and theft and misdemeanor convictions for misrepresentation.

"Christy Harmel and Jones developed a relationship when they were both 18 years old. They have two children, Melany Harmel and Phillip Jones Jr. Before Melany's birth and when Phillip Jr. was an infant, Jones was sent to prison for 14 years. Christy took the children to visit Jones while he was in prison. Jones also wrote to his children while he was in prison and provided them with money that he made working there. Christy testified that Jones continues to touch the lives of his children by counseling them and providing them with positive attitudes.

"Melany Harmel, who was 16 years old at the time of the trial, visited her father after he went to prison in 1990. They exchanged letters and photographs, and she received gifts from him at Christmas. When he was released from prison in 2004, Jones visited her every day. Jones has provided her with fatherly advice about staying away from drugs and avoiding problems with boys. Melany stated that she would continue to see Jones if he is sent to prison for the current offenses. She expressed her love for Jones and said, 'He is a wonderful person.'

"Phillip Jones Jr., 17 years old at the time of the trial, remembered visiting Jones in prison on a couple of occasions and talking to him on the phone numerous times. After Jones's release from prison, Phillip saw Jones almost every day, and they developed a good relationship. Phillip dropped out of school in the ninth grade, but his father has encouraged him to stay in school and not do 'stupid stuff.' Phillip loves his father and will continue to be there for him.

"Joseph Dubina, the regional administrator of the Akron Regional Adult Parole Authority, testified that Senate Bill 2, passed in 1996, imposed 'truth in sentencing.' Therefore, he testified, a person sentenced to life in prison without the possibility of parole will remain in prison until he dies. Dubina stated that if Jones were sentenced to life in prison without parole eligibility for 30 years, he would not meet a parole board until 2038, when he would be 67 years old. Similarly, if Jones were sentenced to life in prison without parole eligibility for 25 years, he would not meet a parole board sooner.

"J.C. Patterson, a pastor and an employment specialist for an ex-offender program, met Jones in 2006. Patterson and Jones became best friends and studied the Bible together. Patterson was impressed with Jones's consistency and motivation. He says that Jones is a 'good person.'

"David Hargrove, the pastor of the Church of God in Akron, met Jones at a church service. Jones asked for prayer because he was troubled. Jones later said that their prayers helped him experience relief. Jones attended Hargrove's church on a regular basis for about a year, and then his attendance became sporadic.

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Hargrove testified that Jones is a 'good guy' and should not receive the death penalty.

"Larry Bradshaw, the pastor of the People's Baptist Church in Akron, met Jones at a church service in 2004. Jones became a member of the church and attended services regularly. He noted that Jones has the credentials of a clergyman. Bradshaw visited Jones after learning that he was in the county jail. When they would meet, Bradshaw and Jones spent most of their time discussing scripture. On some occasions, Jones ministered to Bradshaw and provided him with encouragement.

"In an unsworn statement, Jones stated that he had an abusive childhood. He witnessed domestic violence on numerous occasions, and his family abused alcohol and drugs. Jones also watched his siblings fight. His oldest brother stole cars and gave Jones marijuana when he was seven years old. Jones's parents divorced when he was eight. His mother left home, and Jones was then raised by his aunt, his grandmother, and his father. Jones tried to kill himself by drinking gasoline when he was eight years old. Jones was born with a lazy eye. He had corrective surgery, but he still has problems with his eyesight. Jones also had a learning disability that was not identified until he was in the sixth grade.

"After witnessing the abuse in his family, Jones started 'acting out' as a teenager. Jones spent about three years in juvenile facilities. He tried to hang himself and was sent to the Mansfield Psychiatric Hospital.

"Jones spent almost 15 years in prison as an adult and described this experience as 'hell.' Jones received 69 tickets for infractions during one year in prison. He committed assaults, flooded the cells, and disrespected staff members. In August 1998, Jones was stabbed in the neck during a feud with members of the Aryan Brotherhood and almost died. Thereafter, Jones changed his behavior, and his security status in the prisons improved. Jones tried to help other inmates with a negative attitude and prevent them from making the same mistakes that he did. He also received credentials as a minister in the Universal Church in Modesto, California.

"In 2004, Jones was paroled. He had a difficult time finding employment because of his criminal record and was on unemployment when he raped and murdered Yates. Yet Jones worked after leaving prison and was employed by JR Wheel for almost a year.

"Jones discussed his feelings about the present charges and Yates's death:

> "I can't change what I did. I wish I could. I live with it on my mind every day, my right hand in God above. I can't bring back Susan. I wish I could.

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> "I know it * * * was a bad thing. I'm sorry for what I did, and I pray for her family and her children, and really, it is out of my hands now. I did—you found me guilty, I'm convicted of it, and I am deeply sorry for my actions.
>
> "All I can do is try to continue to just keep on helping folks, like I helped my sister get off drugs, my mom when she became elderly.

"Jones said he helped his father before he died and his mother-in-law who is in a nursing home. Jones also mentioned that he still loves his wife although he no longer has any communication with her.

"Jones then made some final comments about his conviction:

> "And, lastly, I would like to say that I am sorry for what I did to Susan, and I pray for her family and her children, and I pray to God to give them the strength to get through this, and I hope that they could forgive me in time for what I did but maybe they won't.
>
> "But I don't have any harm against them even if they don't. I'm sorry for what I did. And I did help my sister, restore her life. And I found out a couple weeks ago that my sister even prayed for Susan's sister out there in the hall. And I—that made me kind of really happy because it was a positive 'seed' I 'planted.' I'm just glad it worked out like that. That's all I have to say."

III. <u>Ninth District Review</u>

The Ninth District Court of Appeals found it "troubling that [Dr. Siddall] spent less than eight hours conducting interviews and tests before Mr. Jones's trial began. *** [and] more troubling that Mr. Hrdy, the social worker who was *** responsible for interviewing Mr. Jones's family members, did not begin any work on his case until a week into the trial." *State v. Jones*, 2011-Ohio-6063, at ¶47.

It is clear that the focus of the Ninth District's decision was on the failure of the defense team to discover the alleged sexual abuse and incestuous conduct contained within the various affidavits submitted by Petitioner. According to the appellate court, "While Mr. Hrdy uncovered

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most of the potentially mitigating circumstances of Mr. Jones's childhood, he did not learn about the sexual abuse that Mr. Jones allegedly suffered or the other incestuous conduct that allegedly occurred in his home. In light of the fact that it was Mr. Jones's rape of Ms. Yates that resulted in the capital specification, details about deviant sexual conduct that Mr. Jones endured or was exposed to as a youth would have been more relevant to his defense than his parents' divorce or his abnormal eye." *State v. Jones*, 2011-Ohio-6063, at ¶49. And again, "[c]onsidering the allegations presented by Mr. Jones and his family members and our serious concerns about the timing and extent of Mr. Jones's lawyers' mitigation investigation and the reasonable probability that, if the alleged incestuous conduct had been discovered, it would have substantially changed his lawyers' mitigation strategy, we believe the trial court should have held a hearing ***. *Id.*, at ¶54.

The Ninth District also noted that this Court had not addressed Dorian Hall's opinion that a mitigation investigator should have at least 90 days to conduct the mitigation investigation before voir dire begins.

The case was remanded for an evidentiary hearing to allow this Court to determine whether Jones' lawyers "began their mitigation phase investigation early enough and whether they allowed Dr. Siddall and Mr. Hrdy enough time to do a complete investigation into Mr. Jones's family life." *State v. Jones*, 2011-Ohio-6063, at ¶66.

The State contends this Court need not address Petitioner's argument regarding Dr. Siddall's differing diagnosis because "the Court of Appeals [only] remanded on the issue of possible sexual abuse." *Post-Hearing Brief of State of Ohio*, p.26. Regarding the differences in opinion between Dr. Siddall and Dr. Stinson, the appellate court said, "[r]egarding whether Mr.

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Jones's lawyers should have investigated possible neurological damage, the trial court explained that, just because another expert had a different opinion than Dr. Siddall, it did not mean his lawyers were ineffective for relying on Dr. Siddall's opinion." *State v. Jones*, 2011-Ohio-6063, at ¶42. However, there was never a conclusion as to whether this Court's opinion on that issue was correct. Petitioner also reasserts his argument about trial counsel's failure to introduce medical records. Because the appellate court's reference to that issue[4] also failed to contain a conclusion about this Court's opinion, out of an abundance of caution, this Court will address both arguments.

IV. Post-Conviction Hearing

A. Findings of Fact

During the post-conviction hearing Petitioner called twelve witnesses, five of whom testified as experts. Of the remaining seven witnesses, three had previously testified during the mitigation phase. The State called as its witnesses Dr. Siddall, who testified during the mitigation phase, as well as the investigator and trial attorneys.

The Court will address the issue of sexual abuse in a separate section. Testimony given by any particular witness on that subject will be addressed in that section.

All references to the transcript are to the post-conviction hearing transcript unless otherwise noted.

[4] "Finally, regarding whether Mr. Jones's lawyers should have submitted his medical records, it concluded that they were merely cumulative of Dr. Siddall's testimony." *Id.* at ¶42.

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1. Witnesses for Petitioner

Keith Fuller

Keith Fuller is Petitioner's "first cousin once removed." He is also the Jones' family pastor. Pastor Fuller did not testify during the mitigation phase.

Pastor Fuller testified that Petitioner called on him for pastoral help when he experienced some traumatic event in his life. He testified that a member of the defense team approached him and questioned him about his pastoral relationship with Petitioner and that there "may have been other questions, but I do not recall." *Trans.*, p.86, ln.24. Pastor Fuller testified he was one of a group of persons who met with Attorney O'Brien in his office when he "defined mitigation for us" (*Trans.*, p.107, ln.11) and "he described [what a mitigation hearing is], and asked us if we had any questions about mitigation after he explained it." *Trans.*, p.108, ln.22-24.

Pastor Fuller felt that he should have been the one to testify during the mitigation phase rather than his son-in-law, David Hargrave, because he had lived in Akron all of his life, had known the Jones family for fifty years, and had more knowledge of the family's dysfunction. He was aware that Phillip's parents were divorced and he was aware of Phillip's brother's rape charge because he had attended the trial. He would also have been able to discuss "the family's backslide regarding church attendance." *Trans.*, p.99, ln.7.

Pastor Fuller was unaware of mental illness or drug abuse within the Jones family, except that he had sometimes observed family members who "looked high." *Trans.*, p.89, ln.11.

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David Christopher Hargrave[5]

Pastor Hargrave repeated much of the same testimony he had given during the mitigation phase. His post conviction testimony also centered on what he described as his concerns about "a lot of incongruence" in the Jones family. *Trans.*, p.428, ln.11-12.

Regarding mitigation preparation, Pastor Hargrave testified he had "at least two conversations by phone, perhaps a third.[6] There was a large gathering, the family was there, I was there as well and I was called back into a room individually with them." *Trans.*, p.432, ln.15-20. "I talked about my role and the work that I do and my observations and I said I would like to help in any way that I could." *Trans.*, p.434, ln.3-6.

Rhonda Jones

Rhonda Jones is one of Petitioner's sisters. She was not called to testify at the original trial. On February 23, 2009, she executed an affidavit that was part of the evidence reviewed by the Ninth District. During the hearing, Rhonda Jones was unfamiliar with her affidavit and denied making several of the statements that were contained within it.

Rhonda Jones testified to the dysfunction in her family. She told of having to steal food to survive, of physical and mental abuse by her parents, and of their drinking and drug abuse. She related a story of the Jones children walking to the "Children's Home" for help, to no avail. *Trans.*, p.392.

Rhonda Jones was not familiar with any mental health issues in the family.

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[5] The original trial transcript identified his surname as "Hargrove."
[6] It is unclear from his testimony whether he spoke to the attorneys, the mitigation specialist, or both.

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Rhonda Jones testified that she was at her parents' house when Mr. Hrdy came for a meeting with family members but "he was more sitting there watching the game than talking." *Trans.*, p.383, ln.22-23.

Sh'torie Jones Harpster

Sh'torie Harpster is the niece of Petitioner and daughter of Yolanda Jones. She did not testify during the mitigation phases. During the post-conviction hearing she testified to the dysfunction in the Jones family, including mental illness. Ms. Harpster testified that Phillip Jones was like a father figure to her.

Ms. Harpster testified that she was at the meeting at her grandmother's house and spoke to someone from the trial team. She thought the conversation with her could not have been more than five minutes long.

Shain Harmel

Shain Harmel is the nephew of Petitioner. He is the biological son of Christy Harmel and Marvin Jones. Shain grew up thinking Petitioner was his father because he treated Shain like his own son. He did not testify during the mitigation phase.

Yolanda Jones (White)

Yolanda Jones' post-conviction testimony was threefold. First, she testified about the abuse and dysfunction in the Jones family. Second, she discussed rampant sexual abuse that she had not previously disclosed during her mitigation testimony. Third, she testified that she had not been properly prepared for her testimony in the mitigation hearing.

Much of Ms. Jones' testimony about the dysfunction in the Jones family was the same or similar to her testimony during the mitigation phase. She presented several more detailed

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examples about the abuse in the family, specifically some details of her own abuse of Petitioner when he was a child. Ms. Jones also offered testimony that painted their mother, Henrietta Jones, in a poor light.

Ms. Jones also testified that she was never properly prepared for her testimony during mitigation by either of the defense attorneys or by Mr. Hrdy and that there were questions that were not asked during mitigation preparation or during the mitigation hearing.

Christy Coffee (Harmel)

Christy Coffee's testimony was similar to her testimony during mitigation. However, she now revealed that Petitioner's brother, Daniel Jones, fathered Phillip Jones, Jr.

Ms. Coffee testified that she was with the family at Petitioner's attorneys' office and spoke to them before the trial. That was the only time she spoke to them. The attorneys asked about her relationship with Petitioner, but did not ask if she had children by his brothers of if she had taken a paternity test.

Jeffrey Madden, Ph.D.

Dr. Jeffrey Madden is an expert in neuropsychology. Dr. Madden performed a battery of neuropsychological tests on Petitioner to determine if there were any signs of organic brain injury. He memorialized his findings in a report. Petitioner's Ex. 5.

During his testimony Dr. Madden opined that the test results validate Petitioner's prior diagnoses of Schizoaffective Disorder, Bipolar Type. However, Dr. Madden could offer no opinion to a reasonable degree of neurological certainty as to the presence or absence of neurological dysfunction. Dr. Madden was unable to opine to a reasonable degree of neuropsychological certainty as to whether Petitioner suffered from a cognitive disorder

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attributable to organic brain damage. Although Dr. Madden was concerned about his test findings in the area of "visual memory," he was unable to attribute the result to organic brain impairment.

Dr. Madden did opine to a reasonable degree of scientific certainty that Petitioner was not malingering at the time that he conducted his tests on January 29, 2013.

Howard Fradkin, Ph.D.

Dr. Howard Fradkin is a psychologist with an expertise in the area of adult survivors of child sex abuse. Because Dr. Fradkin's opinion relates to the allegations surrounding the sexual abuse of Petitioner, the Court will defer discussion of his testimony until the "Sexual Abuse" section of this opinion.

Bob Stinson, Psy.D.

Dr. Bob Stinson is an expert in forensic psychology. He first became involved in Petitioner's case in 2008 when Petitioner's attorneys retained him.

Dr. Stinson submitted a report (Petitioner's Ex. 1) that includes his 33-page affidavit executed on March 16, 2009 (Petitioner's Ex. 7)[7] and his supplemental affidavit executed in June 2013. Petitioner's Ex. 7A.

Dr. Stinson testified to dysfunction and abuse within the Jones family. He personally interviewed Petitioner, but did not conduct tests on him. He also relied upon the affidavits of family members and Dr. Fradkin's report. Dr. Stinson opined to a reasonable degree of psychological certainty that Phillip Jones suffers from Schizoaffective Disorder—Bipolar Type.

[7] Petitioner mistakenly submitted duplicate Exhibits 7: Dr. Stinson's first affidavit and the Akron Children's Hospital records. To avoid confusion, when referring to Dr. Stinson's first affidavit, it has been identified throughout this order as a part of "Petitioner's Ex. 1" with the applicable page number.

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Dr. Stinson is critical of Dr. Siddall's diagnosis of Mood Disorder. He is critical of Dr. Siddall's testing methods and of his mitigation testimony regarding Petitioner's malingering. Dr. Stinson is also critical of the time Dr. Siddall spent with Petitioner and called it "woefully inadequate." *Trans.*, p.674, ln.5-6. He is critical of the time Dr. Siddall spent reviewing the records. Referring to the ODRC records, Dr. Stinson testified "there is absolutely no way you can get through them in any meaningful way in under five hours. There is no way ***. I suspect that he did a fairly quick review of some of those records." *Trans.*, p.675.

Dr. Stinson opined that Petitioner's medical records and school records that indicate dysfunction are consistent with a person who is sexually abused. Trans., p.574, ln.25-p.575, ln.3.

<u>*Gary Beven, M.D.*</u>

Dr. Gary Beven is an expert in psychiatry and forensic psychiatry. Currently serving as the Chief of Aerospace psychiatry at NASA, Dr. Beven was the Chief Psychiatrist at the Southern Ohio Correctional Facility from 1995-2003, during which time Phillip Jones was incarcerated in that facility. Dr. Beven was the primary lead of the mental health team that provided Petitioner's mental health treatment. He had examined Petitioner 35 times. The original defense team did not contact Dr. Beven prior to Phillip Jones' capital trial.

Dr. Beven's initial diagnosis of Petitioner was schizoaffective disorder—bipolar type with antisocial personality disorder. Dr. Beven testified that Petitioner remained on the mental health C.I.C. caseload (indicating serious and chronic mental illness) during the entire time of his treatment of him.

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Dr. Beven acknowledged a discussion of malingering or exaggeration in his case notes, but testified it caused him no reason to second-guess his diagnosis of Petitioner. *Trans.*, p.339, ln.24 - p.340, ln.5. Dr. Beven did not think Petitioner had ever "fooled" him about his mental illness or "copy catted" another inmate's mental illness for personal gain. *Trans.*, p.340, ln.10.

Dr. Beven's last contact with Petitioner was in 2003. He could offer no testimony about Petitioner after that time.

Dr. Beven had not heard of "F.E.T.I" or the "Forensic Experimental Trauma Interview."

<u>*Dorian Hall*</u>

Dorian Hall testified as an expert in the area of mitigation investigation. She has been employed by the Ohio Public Defender's Office since 1988 as a mitigation specialist and currently supervises that office's mitigation specialists.

Ms. Hall executed an affidavit on March 18, 2009 in which she was critical of Thomas Hrdy's investigation. She opined, "[a] limited, superficial mitigation investigation lacking details and anecdotal evidence resulted in a superficial mitigation presentation at trial." Petitioner's Ex. 2, ¶42.

Ms. Hall was critical of Mr. Hrdy's acceptance of the engagement to work on Petitioner's case after the first phase of the trial had already begun. She opined that an investigator must have at least 90 days before voir dire to conduct a proper mitigation investigation. She was critical of the time spent by Mr. Hrdy on the mitigation investigation. Ms. Hall was also critical of Mr. Hrdy's group interview method and of his note keeping and record keeping.

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Ms. Hall also criticized the portrayal of Phillip Jones' father as a good role model and blames the deficient detailed mitigation for allowing that to occur.

2. **Witnesses for the State**

Thomas Hrdy

Thomas Hrdy is a licensed social worker and part-time mitigation specialist. His full time employment is as a rehabilitation manager for the Board of Disabilities. At the time of his testimony he had finished his casework for his doctorate degree. He is a member of the National Legal Defenders Association as a mitigation specialist. Mr. Hrdy has worked as a mitigation specialist since 1994.

Regarding the instant case, Mr. Hrdy was first contacted by Attorney O'Brien to engage as the mitigation specialist. The two had a lengthy work history. Mr. Hrdy readily admits that he was engaged "late in the game."

Mr. Hrdy had long since shredded his files and because what little notes he had remaining are in his words "pretty cryptic," (*Trans.*, p.900, ln.13) the best timeline that can be pieced together is as follows:

HRDY TIMELINE

Pre-12/05 07—assumed discussions with O'Brien regarding accepting engagement
12/05/07—Court entry appointing "Timothy" Hrdy
12/06/07—email exchanges to Dr. Siddall requesting information regarding Petitioner
12/10/07—case set up (1 hr.)
12/11/07—official engagement letter to Attorney O'Brien
12/12/07—attempt to interview Petitioner at Summit County Jail (1½ hrs.)
12/13/07—second attempt to interview Petitioner at Summit County Jail (2½ hrs.)(ftnt)
12/13/07—fax from Attorney O'Brien referencing prior phone conversations
12/15/07—first interview with Petitioner at Summit County Jail (2 hrs.)
12/20/07—interviews of Yolanda White (Jones) and Henrietta Jones (3½ hrs.)
12/22/07—meeting at Attorney O'Brien's office (3½ hrs.)
12/23/07—interviews of family at home of Henrietta Jones (4½ hrs.)

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12/26/07—meet with Dr. Siddall; pick up and review records (2 hrs.)
12/27/07—interview with Petitioner at Summit County Jail (3 hrs.)
1/2/08—telephone interview with family; records to Dr. Siddall (2 hrs.)
1/4/08—case work (3 hrs.)
1/5/08—meeting with family and attorneys (O'Brien's office) (4 hrs.)
1/8/08—meeting with Dr. Siddall and attorneys (3½ hrs.)
1/10/08—beginning of mitigation phase

The time invoiced for interviews includes approximately one hour of total travel time per interview. Mr. Hrdy did not invoice for items such as short telephone conversations. Excluding the travel time, Mr. Hrdy spent approximately three hours with Petitioner and approximately ten additional hours with various others, including family members and ministers. Additional time was spent meeting with Dr. Siddall and the defense attorneys, retrieving and reviewing records, and on casework.

Mr. Hrdy specifically recalled that he had received and reviewed the Portage Path Mental Health records, the Akron Public School records, the Akron Children's Hospital records, the Mohican Youth Camp records, the Summit Psychological records and the Ohio Department of Corrections records. *Trans.*, p.963-965. He did not recall whether he had received the Oakwood Forensic Hospital records or the Mansfield Psychiatric Hospital records. Mr. Hrdy also recalled that some of the records were already in the possession of lead counsel by the time he was engaged on the case. *Trans.*, p.966, ln.17-19.

Mr. Hrdy had no difficulty gathering information from Petitioner and found him to be cooperative. He found the family to be cooperative and forthcoming and able to provide him with information that was helpful to Petitioner's cause. Mr. Hrdy testified that he explained mitigation to the family and the fact that Petitioner was facing the death penalty.

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On December 23, 2007, Mr. Hrdy met with numerous family members in Henrietta Jones' home for four and a half hours. Mr. Hrdy testified that he asked how they preferred to be interviewed and they preferred to be interviewed as a group. The Cleveland Browns game remained on (albeit with the volume turned down) during the interviews. Mr. Hrdy explained that he found advantages to the group interview setting because "a dynamic forms where someone will say something that will trigger a memory from someone else and you get a fuller interview." *Trans.*, p.894, ln.6 - p.895, ln.4. He conceded that there could also be disadvantages to the group interview setting, e.g. someone not wanting to disclose personal information in front of the group or a stronger personality taking over. Mr. Hrdy testified that he always asks interviewees to call him if they remember anything else and he leaves them with his business card. No one from the Jones family called him.

Mr. Hrdy testified that he had "enough and appropriate time to gather the records, interview the witnesses, assist the defense attorneys and Dr. Siddall in preparation of mitigation in this case. *Trans.*, p.906, ln.17-21. He did not find it necessary to ask the attorneys to obtain more time from the Court.

Mr. Hrdy recalled that Yolanda White called him after the case to thank him for the work he did on behalf of her brother. *Trans.*, p.917, ln.10-11.

James Siddall, Ph.D.

Dr. Siddall is an expert in forensic psychology. He is licensed in both clinical and forensic psychology and also practices in the area of drug addiction. Dr. Siddall is currently in private practice, but has significant experience with persons in a criminal legal setting through his work at a diagnostic clinic. He has been licensed since 1975, is published and has received

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awards. At the time of his trial testimony, Dr. Siddall had taught graduate level courses at the university, including courses on diagnosis. He had testified as an expert in "maybe a dozen" prior capital mitigation hearings. *Trial Trans.*, p.2339, ln.9. Attorney O'Brien engaged him shortly after Petitioner was indicted with the death penalty specification.

Dr. Siddall testified, "[t]here was a ship load of records that came in and continued to come in." *Trans.*, p.981, ln.9-12. Dr. Siddall testified "as a rule" he would get records and complete his report before the trial began. In this case, he completed his report on December 27, 2007. He thought he received some records after his report was complete, but couldn't recall which ones.

A review of Dr. Siddall's report identifies his documentary sources as Petitioner's educational records from Akron Public Schools (1978-1986), as well as mental health records from the Ohio Department of Rehabilitation and Corrections, Summit Psychological Associates, Portage Path Mental Health Center, and the Psycho-Diagnostic Clinic. He testified at trial that his information came "from a variety of sources, from his educational records to his records from the criminal justice system, mental health records, etc." *Trial Trans.*, p.2341, ln.2-5. Attorney O'Brien pointed out his "suitcase" to the jury noting it was "fairly full" of records. *Trial Trans.*, p.2341, ln.11-14.

Dr. Siddall visited Petitioner in the Summit County Jail on November 21, 2007 and December 12, 2007. He spent about three and a half hours at each visit, dividing that time equally between interviewing and testing. Dr. Siddall testified that he read the records, including the ODRC records. His invoice (Petitioner's Ex. 15) documented billing for 32.75 hours,

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inclusive of interviews and testing, record reviews, consultations with attorneys and mitigation specialist.

Dr. Siddall testified he was aware that other diagnoses had been made of Petitioner that differed from the one to which he opined during mitigation. He testified that it would be inappropriate for him to give Petitioner a diagnosis given by another doctor without making his own diagnosis. When asked if the prior diagnoses were significant in making his report he stated "you have to understand that anybody that has been in the system for years will probably have many diagnoses." *Trans.*, p.993, ln.24 – p.994, ln.1. "The important thing here is that the core of defendant's psychological problems included a depressive disorder, psychotic like features, and the history of antisocial behavior. Those are the things that needed to be represented in the diagnosis. There is various ways of labeling them." *Trans.*, p.994, ln.7-14.

Dr. Siddall said there were meetings and telephone calls with the defense team. He relied on information from Petitioner and he received detailed family information from Mr. Hrdy.

Dr. Siddall testified he had enough time to complete the tasks he was assigned to do. Attorney O'Brien had made him aware that if he was unable to get the job done he would be able to ask for and receive more time.

Donald Hicks, Esq.

At the time of his testimony, Attorney Donald Hicks had practiced law for just over thirty years, doing "a considerable amount of criminal defense work." *Trans.*, p.1028, ln.16-17. Petitioner was originally indicted with Aggravated Murder and Rape with no death penalty specification. At that time, Attorney Hicks was not Rule 20 co-counsel certified; however, he was certified by the time the death penalty specification attached.

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Attorney Hicks testified that from the time of the original indictment to the time of trial he met with Petitioner "fifty or sixty times. It may have been a little more or it may have been a little less, but I met with him usually at least a couple times a week" (*Trans.*, p.1034, ln.20-24) "and I'm certain there were times I met with him perhaps three or four or five times during the course of the week." *Trans.*, p.1036, ln.10-13. Some of the meetings were "face time," keeping his promise to visit Petitioner every time he was at the jail. During other meetings discussions included the death penalty and mitigation even before the specification because there had been ongoing discussions with the prosecutors about the possibility of the death penalty specification being added. Attorney Hicks felt that he built a rapport and trust with Petitioner. He gathered information that would be useful in the mitigation phase if needed, and incorporated that information into Petitioner's defense, both during trial and during mitigation. He stated, "[w]e were looking into many aspects of his life, his childhood, his teenage years, his prior record, his work history, things that would be meaningful***." *Trans.*, p.1038, ln.6-10.

Attorney Hicks recalled the main family contact person was Petitioner's sister, Yolanda. He spoke to her "a couple dozen times" on the phone (*Trans.*, p.1040, ln.10-11) and "eight or ten times, maybe a dozen" in person. *Trans.*, p.1040, ln.20-21. Some of the in-person meetings were in court after hearings. Yolanda would also come to his office and speak to him. There were meetings during both phases of the trial. Attorney Hicks testified "we had a lot of contact with the family." *Trans.*, p.1063, ln.4-5.

Attorney Hicks admits they got a late start hiring the experts due to the timing of the death penalty specification, but he felt he had enough time to prepare for the mitigation hearing. Had he not, he would have requested a continuance of the trial and was confident it would have

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been granted based upon the judge's reputation for being "exceedingly accommodating." *Trans.*, p.1045, ln.21. He agreed that they were not done with preparing mitigation by the time Thomas Hrdy was hired or they would have had no reason to hire him. He also admitted they did not have Dr. Siddall's report at the start of voir dire, but testified that they did have other reports from psychological evaluations conducted prior to the death penalty specification.

Attorney Hicks recalled meeting with Dr. Siddall "at least three or four times" (*Trans.*, p.1043, ln.18-19) and with Mr. Hrdy "more often even than that." *Trans.*, p.1043, ln.21-22.

Kerry O'Brien, Esq.

At the time of his testimony, Attorney Kerry O'Brien had practiced law for over thirty-eight years. He became Supreme Court Rule 65/Rule 20 certified to handle capital cases in the mid 1980's and had defended over 30 death penalty cases. Attorney O'Brien was lead counsel on Petitioner's case.

Attorney O'Brien testified he met with Petitioner once a week on average. There were no communication or trust issues. He recalled dealing mostly with Petitioner's mother by telephone. He also recalled meeting with family members "at least twice, maybe three times" (*Trans.*, p.1078, ln.3) on Saturday or Sunday mornings in his office for updates and conferences. Attorney O'Brien testified he explained the purpose of mitigation to the family and the goal of what he was trying to accomplish. He testified he asks about "the complete family history from day one," (*Trans.*, p.1079, ln.20) "[u]sually I asked about, did the client have a rough upbringing, or what were the financial circumstances of the family, was there any physical abuse, did the defendant suffer any head injuries like fall out of a tree or hit by a car or hit by a baseball bat or something like that. And then I go into emotional or mental retardation. I then

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ask if the client had any mental evaluation. I also ask about sex abuse, whether an uncle or an aunt or something like that had molested him." *Trans.*, p.1079, ln.24 - p.1080, ln.12. He would absolutely have used sexual abuse during mitigation had it been mentioned. Petitioner denied sexual abuse when Attorney O'Brien asked him about it.

Attorney O'Brien testified that he reviews all records. He conceded he did not receive Dr. Siddall's report until January 8, 2008, although the defense team had had discussions about its contents beforehand. He did not ask for a continuance because he felt "we were ready." *Trans.*, p.1086, ln.12. He had no doubt a continuance would have been granted if requested.

B. Conclusions of Law

1. Legal Standard

The standard of review for ineffective assistance claims is set forth in *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ohio adopted this standard in the case of *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989). A claim of ineffective assistance of counsel requires a two-prong analysis. *Id.* at 141, quoting *State* v. *Lytle*, 48 Ohio St. 2d 391, 396-397, 358 N.E.2d 623 (1976), *vacated in part on other grounds in* 438 U.S. 910 (1978). The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to defendant. *Id.* The second prong is whether the defendant was prejudiced by counsel's ineffectiveness. *Id.* at 141-42.

In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St.3d at 142, quoting *Strickland*, 466 U.S. at 689. Because of the difficulties inherent in

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determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

With regards to the issue of counsel's ineffectiveness, the burden of proof rests with the petitioner, because in Ohio a properly licensed attorney is presumably competent. *State v. Calhoun*, 86 Ohio St.3d 279, 292, 714 N.E.2d 905 (1999).

An attorney's failure to reasonably investigate the defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel. *Wiggins v. Smith*, 539 U.S. 510, 521-522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). "Defense counsel has a duty to investigate the circumstances of his client's case and explore all matters relevant to the merits of the case and the penalty, including the defendant's background, education, employment record, mental and emotional stability, and family relationships." *Goodwin v. Johnson,* 632 F.3d 301, 318 (6th Cir.2011). Petitioner has the burden of demonstrating that his counsel rendered ineffective assistance by failing to conduct an adequate investigation into his history and background. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶104, citing *Strickland*, 466 U.S. at 687. *See State v. Herring*, 142 Ohio St.3d 165, 2014-Ohio-5228, 28 N.E.3d 1217.

In assessing counsel's investigation, an objective review of counsel's performance must be conducted in light of professional norms prevailing when the representation took place. *Bobby v. Van Hook*, 558 U.S. 4, 7, 130 S.Ct 13, 175 L.Ed.2d 255 (2009). At the time of Petitioner's trial, The American Bar Association *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Rev.Ed.2003) were guiding.

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In assessing prejudice, "the question is whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶163, quoting *Strickland* at 694.

2. Petitioner's Claims regarding Counsels' Performance

a. Neurological Damage

Petitioner contends his trial counsel were ineffective in their failure to investigate potential neurological damage.

Dr. Siddall conducted testing of Petitioner and found no reason to seek further testing for neurological problems. Dr. Siddall had over thirty years of experience in forensic psychology at the time he tested Petitioner. Dr. Kathleen Stafford also conducted tests on Petitioner as part of her competency evaluation. Her report gave no indication of any neurological damage. Trial counsel sought a second competency evaluation from Dr. Byrnes and Petitioner was deemed competent.

A significant portion of Dr. Stinson's first affidavit suggests the need for neuropsychological evaluation and criticizes Dr. Siddall for not having sought neuropsychological testing. However, Dr. Madden, Petitioner's own expert, could not testify to a reasonable degree of neuropsychological certainty that Petitioner suffered from neurological issues or organic brain damage.

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b. **Hospital Records**

Petitioner contends his trial counsel were ineffective in failing to introduce any hospital records during the mitigation phase. Petitioner did not specify to which hospital records he was referring and it is not for this Court to guess.

The only hospital records included as exhibits by Petitioner are those from Akron City Hospital (Petitioner's Ex. 6) and Akron Children's Hospital[8]. Petitioner's Ex. 7.

The Akron City Hospital records (Petitioner's Ex. 6) disclose a finger injury, a back rash, and treatment for a sexually transmitted disease at the age of 20. This Court fails to see where those records would have been helpful to mitigation.

Much of the information contained within the Akron Children's Hospital records would have been merely cumulative to Dr. Siddall's testimony. The hospital records do contain some additional or more specific information that could have been helpful to mitigation. For instance, the records would have established that Petitioner's corrective eye surgery took place when he was seventeen, not twelve as his mother had remembered or two or three as his sister had remembered.[9] They would have also established that Petitioner was actually admitted twice in 1987 for psychiatric issues, the second time for ten days.

However, the records also contain information that is by no means clearly mitigating and could have proven to be detrimental to Petitioner. For instance, Petitioner's gasoline ingestion "suicide attempt" was not documented as a suicide attempt at all. (That topic is more fully discussed in the discussion of Dr. Fradkin's testimony under the "Sexual Abuse" section.) Yolanda's testimony that Petitioner "never got the help he needed," which was reiterated by Dr.

[8]Petitioner criticizes his counsel for not "utilizing" the Ohio Department of Rehabilitation and Correction Mental Health Records (Petitioner's Ex. 11), but does not suggest that they should have been "introduced."

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Stinson, is contradicted by references to Petitioner being an active client of the Child Guidance Center. Petitioner's Ex. 7, p.12. When Petitioner expressed feelings of self-worthlessness and self-consciousness, he identified his severe acne as a cause in addition to the thick glasses he wore for his eye condition. Petitioner's Ex. 7, p.29. Dr. VanDevere described Petitioner as having "aggressive tendencies, need to control hostile motives." Petitioner's Ex. 7, p.30. Dr. Chaudhry noted, "[t]his patient is showing a significant blocking and evasiveness." Petitioner's Ex. 7, p.35.

Counsel clearly were able to present the mitigating facts contained within the Akron Children's Hospital records without admitting the records and risking their client's exposure to the negative information, or to information that the State could have used as fodder for cross-examination. "Debatable trial tactics generally do not constitute a deprivation of effective counsel." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶192, citing *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995); *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980).

c. <u>Mitigation Preparation</u>

Petitioner contends his trial counsel were ineffective in their failure to properly prepare witnesses regarding his background and in their failure to properly prepare witnesses about the extent of the family's dysfunction.

i. <u>Timing of Summit County Common Pleas Court Case</u>

On its face, Petitioner's contention that the defense team began its mitigation investigation too late to be effective seems clear-cut. The Court authorized payment for defense

[9] Petitioner actually corrected this fact during his unsworn statement.

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counsel to retain the services of Thomas Hrdy as an investigator on December 5, 2007, two days after the start of voir dire. Attorney O'Brien did not receive Dr. Siddall's written report until January 8, 2008, two days before the start of the mitigation phase. If the dates were the only relevant evidence, Petitioner need only have submitted copies of court orders and journal entries as evidence.

Petitioner's case did not take a "normal" course. Phillip Jones was indicted for the Aggravated Murder and Rape of Susan Yates on May 8, 2007. His original indictment did not carry the death penalty. It was not until October 22, 2007 that a supplemental indictment was filed that carried the death penalty specification. Two days later, on October 24, 2007, Petitioner pled not guilty. On that same day his trial counsel requested and the Court authorized payment for the services of Dr. James Siddall as a mitigation specialist. Twenty-seven motions were prepared the next day, three of which requested funds for expert assistance.

Prior to the attachment of the death penalty specification, defense counsel had already received the results of psychological evaluations. They received an eleven-page competency report dated August 13, 2007 authored by Dr. Kathleen Stafford. Court Ex. 2. There is no indication that defense counsel did not receive the additional report they requested from Dr. Byrnes.

By the time the death penalty specification indictment came about on October 22, 2007 defense counsel had already learned information about their client's family history, social history, educational history, employment history, legal history, medical history, mental health history, and substance abuse history. They received the results of psychological testing and their

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client's diagnosis. They would have had the benefit of having already received the information and points of view of two psychologists.

ii. Witness Interviews

Petitioner's contentions are based on family members' statements that mitigation was not explained to them, that they were not asked certain questions, that enough time was not spent with them, or in the case of Mr. Hrdy, that he was busy watching the football game during his interview of them. Affidavits making similar allegations led the Ninth District Court of Appeals to remand the matter for hearing. This Court has had the opportunity to access the credibility of the testimony and demeanor of the witnesses. The claims are baseless.

Pastor Fuller was a credible witness who could have offered much in the way of background information about the Jones family. That being said, he offers nothing more than that which was testified to by Pastor Hargrave and other witnesses who testified during the mitigation phase. Calling Pastor Fuller as an additional witness would have merely been cumulative. As Pastor Fuller testified, "They didn't need to use both of us." *Trans.*, p.115, ln.17-18.

Pastor Hargrave described himself as "bi-vocational"-- the Senior Pastor at the Church of God as well as a full-time Community Psychiatric Supportive Treatment worker at the Christians Children's Home of Ohio. *Trans.*, p.419, ln.8-12. He has a Bachelor's Degree in Social Work and is "a few bills away from my license." *Trans.*, p.420, ln.8. While the Court found him to be credible, his opinions regarding the family dysfunction went well beyond that of a pastor and bordered on his offering opinions in fields and on issues beyond those for which he was qualified to testify. It is also questionable whether any of his "new" testimony was as

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powerful as the anti-death penalty testimony he was permitted to give during the mitigation phase.

The Court finds the testimony of Sh'torie Jones Harpster and Shain Harpster to be cumulative of the testimony that was presented during mitigation by Melany Harmel and Phillip Jones, Jr. Additional mitigating evidence that is " 'merely cumulative' of that already presented" does not undermine the results of sentencing. *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir.2006), quoting *Clark*, 425 F.3d 270, 286 (6th Cir.2005). Instead, "the new evidence *** must differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir.2005); *see Tibbetts v. Bradshaw*, 633 F.3d 436, 444 (6th Cir.2011).

The Court did not find Rhonda Jones to be a credible witness. Her unfamiliarity with and denial of statements contained within her own affidavit casts a shadow on her credibility. However, it is Rhonda Jones' actual testimony the Court finds troubling.

Rhonda Jones' story of walking to CSB to report that she and her siblings were starving is contradicted by Children's Services Board records.[10] Further, not one of Petitioner's childhood records substantiates her claim.

Rhonda Jones' professed lack of knowledge about any mental health issues within the family would have made her a poor choice to call during mitigation.

This Court found Yolanda Jones wholly unbelievable. That assessment is based upon her rehearsed demeanor and the fact that her testimony is contradicted by evidence in the record.

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[10] The sealed February 8, 1983 CSB records contradict Rhonda Jones' claim and are not favorable to Petitioner. The records were obtained at Petitioner's request. Court Ex. 1-Sealed.

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Yolanda Jones attributed the differences between her mitigation phase testimony and her post-conviction testimony to her lack of preparation by the defense team. However, she was unable to give this Court any specifics her preparation or lack thereof. Regarding her meeting in Attorney O'Brien's office, Yolanda Jones testified, "I can't really remember the questions that he asked because it didn't really pertain to much. That's how unimportant it was because I can't remember it." *Trans.*, p.502, ln.14-18. Regarding her telephone conversations with Attorney Hicks, Yolanda Jones could only state that they were "nothing about nothing really. They were just saying when he was going back to court." *Trans.*, p.504, ln.5-7. Regarding her meeting with investigator Hrdy, Yolanda Jones testified, "it was short and he was asking silly things, nothing to do with what he was here for or how they were trying to help him." *Trans.*, p.507, ln.5-8.

Yolanda Jones eventually admitted that she understood at the time of Petitioner's mitigation hearing "that it was important to show that he came from an abusive, neglect (sic) family, where he was mistreated all his life." *Trans.*, p.520, ln.19-24.

Barring any expertise on the part of Yolanda Jones of which this Court is unaware, her opinion as to what may or may not have been important, silly, or pertain to anything relevant to mitigation carries no weight and certainly does not render the mitigation investigation deficient. To the contrary, the amount of information offered by her during her mitigation testimony leads this Court to believe that she was appropriately prepared.

Yolanda Jones' testimony about the physical and mental abuse the siblings suffered at the hands their mother contradicts her mitigation testimony. She testified she did not give the same detailed information during her mitigation testimony because she "never had a chance" to do so. *Trans.*, p.535, ln.21-22. She stated that the questions posed to her during the mitigation

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hearing "were short and to the point and *she* was through with you and that was it." (Emphasis added.) *Trans.*, p.535, ln.12-14.

The "she" would have been Assistant Summit County Prosecutor Becky Doherty, who conducted the *cross-examination* of Yolanda Jones during mitigation. However, Prosecutor Doherty asked many open-ended questions and did not cut Ms. Jones off. In fact, it was Prosecutor Doherty who elicited the testimony from Yolanda Jones about Petitioner's role in helping her to find the strength to overcome her drug addiction. *Trial Trans.*, p.2458, ln.14-25. In addition, Attorney O'Brien often guided Yolanda Jones to specific subjects or instances that were helpful to mitigation and even asked her to give examples. Attorney O'Brien also asked questions during rebuttal that gave her the opportunity to clarify some of the responses she had given during cross-examination.

Dorian Hall has been an employee of the Ohio Public Defender's Office for nearly thirty years, all of her work with that office in the mitigation field. Her expertise in the field of mitigation investigation is impressive. While this Court in no way questions Ms. Hall's professionalism or credibility, her many years of employment with the office that is providing the defense in this Petition gives cause to question her objectivity regarding her criticisms of Thomas Hrdy.

Ms. Hall was unable to comment on what Mr. Hrdy specifically did or did not do. What is left of his cryptic notes simply is not discernible. The fact that Mr. Hrdy's methods differed from Ms. Hall's methods does not render them ineffective.

Ms. Hall criticized the lack of time spent on the investigation by Mr. Hrdy, but gave no support for her "90-day" opinion. At one point she testified, "[g]enerally you need to spend as

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much time as you need to get all the information." *Trans.*, p.760, ln.16-17. The Court finds that while investigators having at least 90 days before the start of voir dire would be optimal, the requirement is not "etched in stone." In this case, because of the nature and quality of the mitigation facts Mr. Hrdy was able to obtain, as well as the lengthy time that pre-existed the death penalty specification, during which there were psychological reports, the development of a rapport with Petitioner and his attorneys (especially Mr. Hicks), communication with the family and information gathering, the late start by Mr. Hrdy was not detrimental to Petitioner's mitigation investigation. This Court also notes Dr. Siddall's mitigation testimony, "Mr. Hrdy made a rather lengthy list of each family member and the kinds of problems they had. The problems are very complicated and they are detailed" (*Trial Trans.*, p.2344, ln.11-14) and "Mr. Hrdy interviewed most of the siblings." *Trial Trans.*, p.2346, ln.12-13.

This Court also notes Ms. Hall's own testimony during cross-examination when she agreed with the prosecutor "at the end of the day the most important thing is what is ultimately presented to those twelve people in the jury box." *Trans.*, p.814, ln.21-24.

Ms. Hall was also critical of the lack of detailed, anecdotal information in the mitigation presentation. However, Ms. Hall obtained the anecdotal information solely from the affidavits of family members. She never spoke to them or had the opportunity to access their credibility. This Court has had the opportunity to do so with several of the witnesses who executed the affidavits upon which Ms. Hall relied and has found their credibility questionable.

iii. <u>Request for Continuance</u>

Petitioner contends his trial counsel were ineffective in their failure to seek a continuance to prepare for mitigation. There is no evidence that any member of the defense team felt rushed or pressured to meet the trial date.

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Attorneys O'Brien and Hicks are both experienced criminal defense attorneys. Attorney O'Brien had over thirty years of capital defense experience at the time of Petitioner's trial. Attorney Hicks and Attorney O' Brien both testified that they had enough time to prepare for mitigation. They were both certain that, had they needed a continuance their request would have been granted. They were both confident that one was not needed.

Dr. Siddall also testified he had enough time to prepare and did not find it necessary to request a continuance, although Attorney O'Brien had assured him they could obtain one if needed.

Mr. Hrdy also testified he felt he had enough time to appropriately complete his mitigation investigation. This Court found very compelling Mr. Hrdy's testimony that he had testified in an unrelated case about his mitigation investigation being substandard because he had lacked the time to do an appropriate job.[11] That is not to say that just because Mr. Hrdy testified that he *did* have enough time in *this* case this Court must accept that fact as true. But his testimony combined with the amount and type of mitigating evidence that was produced during Petitioner's trial, together with this Court's credibility evaluation of the other witnesses, causes this Court to accept his statement as true.

d. The Mitigation Hearing

i. Voir Dire

Petitioner contends that the appointment of Mr. Hrdy two days after the start of voir dire prevented his trial attorneys from asking relevant questions during voir dire. The Supreme Court already scrutinized the validity of the voir dire process as it relates to death penalty qualification

[11] *State v. Herring,* 142 Ohio St.3d 165, 2014-Ohio-5228, 28 N.E.3d 1217.

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and juror impartiality. Petitioner contends "the State does not, and cannot, address the fact that voir dire was conducted before the mitigation investigation took place in this case." Petitioner's Reply to State's Post-Hearing Brief, p.1. Petitioner relies on the language from the Ninth District stating, "[i]f Mr. Jones's defense team did not do much mitigation investigation by the time the trial started, they could not have formed an appropriate trial or mitigation theory." *State v. Jones*, 2011-Ohio-6063, at ¶47 quoting *Williams v. Taylor*, 529 U.S. 362, 395,120 S.Ct. 1495, 146 L.E.2d 389 (2000).

As Petitioner's own expert, Dorian Hall testified, some cases are "mitigation cases right up front" (*Trans*., p.767, ln.25) and the attorneys need the mitigation for voir dire. She herself did not see Petitioner's case as one of those. *Trans*., p.805, ln.19-22. Petitioner's trial counsel did not ask questions pertaining to their theories of mitigation during voir dire. They did not have to. Neither *State v. Wilson*, 74 Ohio St. 3d 381, 386, 659 N.E.2d 292 (1996) nor *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶84, require the parties to ask about specific mitigating factors during voir dire. The failure to inquire about various mitigating factors during voir dire does not constitute ineffective assistance of counsel. Asking jurors their views on mitigation is not essential to competent representation, and there is no requirement that counsel must individually question each juror about his or her views on the death penalty. Further, any attempt by trial counsel to limit questions focusing on the death penalty may be a tactical decision. Counsel is in the best position to determine whether any potential juror should be questioned and to what extent. *State v. Burke*, 10th Dist. No. 90AP-1344, 2001 Ohio App. LEXIS 5076, *11 (Nov. 15, 2001).

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The evidence is clear that at the time voir dire began, defense counsel had information about Petitioner's background, education, family history and mental health through competency evaluations, interviews and records. But they also had Petitioner's statement to the arresting detective that Susan Yates' death "was an accident."

During the trial phase defense, counsel presented a defense that was consistent with their client's statement to the arresting detective. In doing so, they were in an unenviable position because they knew the jury would hear the "other acts" evidence of their client's prior rape. This Court fails to understand how introducing information about Petitioner's mental health history and dysfunctional family background during voir dire (or at any time during the first phase) would have assisted his attorneys in defending Petitioner against the aggravated murder and rape charges that he was claiming were accidental and consensual, respectively. Had they ultimately been successful in their defense, the jury would never even have considered the death penalty.

The Supreme Court of Ohio has consistently declined to second-guess trial strategy decisions or impose hindsight views about how current counsel might have voir dired the jury differently. *Mundt*, 2007-Ohio-4836, at ¶63.

"Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on the basis of intangible factors. The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. *Mundt*, 2007-Ohio-4836, at ¶64.

ii. <u>Trial Advocacy 101: The Art of Cross Examination & Final Argument</u>

Petitioner argues his counsel failed to properly prepare witnesses about the extent of the family's dysfunction and it was that lack of preparation that led to facts that were detrimental to

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Petitioner's case during the State's cross examinations and final argument. "Through cross-examination and closing argument, the State was able to undermine any picture created of Mr. Jones as a troubled youth with a troubled background." Petitioner's Post-Hearing Merit Brief, p.6. Petitioner asserts that the fact that his trial counsel were ill-prepared allowed the State to present "factually incorrect" information to the jury and to "undermine" his case. *Id.*

Trials are adversarial proceedings. Proper trial preparation by one party and successful cross-examination by the opposing party are not mutually exclusive. During the mitigation phase the prosecutors attempted to elicit responses from defense witnesses they felt would be favorable to the State's case. That is the purpose of cross-examination. Both sides made their arguments. The jury was free to accept whatever version of the facts they found to be more believable.

Petitioner's assertions that the State presented "factually incorrect" information are highlighted by the reoccurring criticism that his trial counsel "allowed" his father to be portrayed as a good role model. His experts, relying only on the unsubstantiated claims contained in family members' affidavits and ignoring the records, jump on the same bandwagon, and point an accusatory finger at the trial mitigation team.

Petitioners current counsel and experts either did not thoroughly read the very documents they submitted as evidence (an accusation repeatedly made against trial counsel), or they hope this Court would not thoroughly read the documents, or they chose to ignore the information contained within those documents.

The September 27, 2006 "social history" note contained within Petitioner's Portage Path Mental Health records (Petitioner's Ex. 10, p.12) states:

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> Phillip was born in Akron, Ohio. He is the eighth child in a family of four boys and four girls. His parents divorced when Phillip was eight and remarried in 1996. Phillip described his parents' marriage as "I guess it was good. They argue sometimes. They both worked. Phillip described his mother as "Pretty good." She was always there for us" *He described his father as, "A role model,* somebody I was indebted to. He was a "jack of all trades." When questioned regarding Physical abuse, Phillip reported being "whipped" by both parents. He denies any sexual abuse. When asked to sum up his childhood, Phillip replied, "Pretty good, but I wish I could have changed it. I would have taken the advice and heeded it." (Emphasis added.) Petitioner's Ex. 10, p.12.

While the remaining documents usually document Petitioner's father as a strict disciplinarian, sometimes even physically abusive, and sometimes document Petitioner as having "bad feelings" toward his father, there is no documentary evidence to support the contentions now made by his family members.

e. Mental Health History

Petitioner contends his trial counsel were ineffective in their failure to provide through Dr. Siddall competent and accurate information about his dysfunctional background.

i. Diagnosis

Petitioner takes exception to Dr. Siddall's diagnosis of Mood Disorder. Petitioner correctly asserts that the overwhelming number of diagnoses for Petitioner were Schizoaffective Disorder, Bipolar Type. Dr. Beven testified that his initial diagnosis of Petitioner was Schizoaffective Disorder, Bipolar Type. He agreed that he could not have testified as an expert, only as Petitioner's treating physician. Dr. Madden also opined that his test results validate Petitioner's prior diagnoses of Schizoaffective Disorder, Bipolar Type.

That is not to say that Dr. Siddall was not entitled to form his own opinion. Dr. Siddall testified that he read Petitioner's prison mental health records and was aware that other diagnoses had been made. He testified that it would have been inappropriate for him to give

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Petitioner a diagnosis given by another doctor without making his own diagnosis. When asked if the prior diagnoses were significant in making his report he stated "you have to understand that anybody that has been in the system for years will probably have many diagnoses." *Trans.*, p.993, ln.24 - p.994, ln.1. "The important thing here is that the core of defendant's psychological problems included a depressive disorder, psychotic like features, and the history of antisocial behavior. Those are the things that needed to be represented in the diagnosis. There is various ways of labeling them." *Trans.*, p.994, ln.7-14.

Dr. Siddall's trial testimony regarding Petitioner's diagnosis was far more detailed than just the name:

> "My impression was that Mr. Jones's primary problems include significant mood disorder ***. Mood disorder is in this case a serious history of depression and mood instability. In his case it is associated with repeated suicidal behaviors, gestures, attempts.
>
> "Q: Would this have been a series beginning at a young age, all the way through self-mutilation?
>
> "Yes, ***. In addition to that, he has demonstrated off and on some psychotic behavior, reports of hallucinations, and that's usually been associated with very unstable acting out behavior while incarcerated. There are some controversy in the records whether or not all of those reports are genuine. Some of those reports are exaggerated, and so forth, but it does appear in the records over and over again, and that becomes part of this constellation of serious mood-related disorders.
>
> "It would appear the reports of psychotic symptoms have occurred during periods of high stress, usually while he is feeling very depressed when he is incarcerated or even when he is in the community." *Trial Trans.*, p.2360, ln.22 - p 2362, ln.2.

Dr. Siddall's diagnosis is consistent with Dr. Stafford's diagnosis. Both were made in 2007. Dr. Beven had not had any contact with Petitioner since he went to NASA in 2003. Dr. Madden's tests were in 2013.

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Dr. Stinson's first contact with Petitioner was September 23, 2008. He personally interviewed Petitioner, but did not conduct any of his own tests. When testifying about the difference between his diagnosis and Dr. Siddall's, Dr. Stinson said:

> "Well, we are actually perhaps not as far off as it may seem, but mood disorder not otherwise specified is our label for saying, I see a mood component to his illness, but I don't have enough information to tell you exactly what category it fits in. I can't tell you for example, if it is depression, or if it bipolar disorder, or depression bipolar disorder psychosis, or schizoaffective disorder. So it is an acknowledgement that there is a mood component to this man's illness, but I don't have enough information to put it in a specific category. So I'm not saying he was wrong with the diagnosis of mood disorder. What I would say is he didn't have enough information to give a complete picture, to give a more specific understanding of Phil's illness. In terms of antisocial personality disorder, I have no problem with that diagnosis. I think he meets the criteria, and I think there is nothing wrong with that diagnosis." *Trans.*, p.663, ln.4 - p.664, ln.4.

Despite the differing names of the diagnosis, testimony about the manifestations of Petitioner's mental illness that was given by Dr. Stinson and by Dr. Beven (including suicide attempts, self-mutilation, depression, hallucinations, and psychiatric hospitalizations) as well as the medications used to treat his mental illness (including mood stabilizing drugs for bipolar disorder and antipsychotic drugs) was consistent with and cumulative of the testimony that had already been given by Dr. Siddall during mitigation.

Dr. Stinson testified "I would say that this is one of the worse (sic) I've seen in terms of the trauma and the abuse and the dysfunction that was going on." *Trans.*, p.570, ln.21-24. During mitigation Dr. Siddall testified,

> "I would say that is one of the facts about this case. That is what is unusual. Often in a family system you will see one or two of the children may be manifesting significant problems as a result of domestic violence or abuse or whatever, but in this particular family, as you say, across generationally you see serious problems being transmitted across the generations. That's rather unusual from a statistical point of view, almost everybody has been affected." *Trial Trans.*, p.2343, ln.16 – p.2344, ln.2.

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He later testified, "[a]nd these problems are a cross-generational problem, they are severe problems and affect most members of the family *** and the fact that they seem to affect all family members is very significant to me." *Trial Trans.*, P.2365, ln.5-8 and ln.25 - p.2366, ln.2.

While conceding that their differing opinions were "not as far off as it may seem," Dr. Stinson criticized Dr. Siddall for not having records from Akron City Hospital, Akron General Medical Center, and Petitioner's employment history and suggested Dr. Siddall needed those records to give him a complete picture. *Trans.*, p.669-670. This Court has already addressed the value of the Akron City Hospital records and will not guess about the Akron General Medical Center records or Petitioner's employment history.

Yet, Dr. Stinson *did* have both the 1990 Akron City Hospital records and the 2006 Akron General Medical Center records (Petitioner's Ex. 1, p.4) and he did not make one single reference to either of those records in his 33-page report. What Dr. Stinson did *not* have when he prepared his 33-page report was the 1938 pages of ODRC records, 1448 pages of which are mental health records.

Dr. Stinson also had the Akron Children's Hospital records. Yet, relying solely on the statements of Petitioner, his family members, and Dr. Fradkin's report, he repeatedly referred to Petitioner's childhood gasoline ingestion as a "suicide attempt." Petitioner's Ex. 1, ¶39, ¶84. While Dr. Stinson specifically references other portions of the Children's Hospital records in his report, he omits reference to the record that documents the gasoline incident as an accidental ingestion.

Dr. Stinson stated in his report, "Psychological testing results from the Akron Public Schools Office of Child Study and Guidance on March 30, 1977 and April 26, 1977 suggested

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central nervous system dysfunction. As a result of that and other testing, it was recommended that Phillip repeat the 1st grade." Petitioner's Ex. 1, ¶80 of Affidavit.

The report to which Dr. Stinson refers is the Akron Public Schools March 30, 1977 "Summary of Psychological Evaluation." (Petitioner's Ex. 8). According to the report, Petitioner was referred for an "evaluation of capabilities because of poor academic progress." In addition to the testing data contained within the report, one sentence reads, "Phillip's reproduction of the Bender Designs were fairly well done for a youngster of this age and ability, but did include some errors suggesting the possibility of central nervous dysfunction." Thereafter, the "Recommendations" portion of the evaluation states: "In view of Phillip's very limited academic progress, (probably due to a large extent because of his extended absences) it is felt that Phillip should be considered for retention in the first grade." Not only is there no correlation between the "possible central nervous dysfunction" and Petitioner's retention in the 1st grade, there is no mention of it again in the Akron Public School records, or the Akron Children's Hospital records.

ii. <u>Malingering</u>

Dr. Stinson testified:

> "The malingering, I take objection to that. Looking at the data that Dr. Siddall provided I would not have a problem if he said history of malingering. I wouldn't take exception to that. But the data that he has for malingering at that time, there is not support for that. There might be a suspicion, but there is not support. In fact there was data that he had that suggested that it was not malingering." *Trans.*, p.664, ln.5-15.

Dr. Stinson's position is that Dr. Siddall's testing methods were incorrect. He ignores the fact that Dr. Stafford also opined Petitioner showed evidence of malingering during his competency evaluation.

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Petitioner contends the malingering was "negatively and inaccurately highlighted by Dr. Siddall at trial." Petitioner's Post-Hearing Merit Brief, p. 33. Once again, Petitioner's criticism is based upon facts that were elicited by the State during cross-examination.

Part of the focus of the State's cross-examination was on Petitioner's history of malingering. Dr. Siddall repeatedly testified in a way that shed a less negative light on the malingering. Like Dr. Stinson, Dr. Siddall pointed out that mental illness and malingering are not mutually exclusive. i.e., one who may be malingering can still have a severe mental illness.

> "Malingering can co-exist along with legitimate mental health problems.
> "Q: And malingering itself doesn't necessarily negate those underlying mental illnesses?
> That is correct." *Trial Trans.*, p.2410, ln.10-15.

> "I don't think really anybody is saying that Mr. Jones is malingering across the board about all of his problems all of the times. They are saying on a repeated basis he tends to exaggerate, and as pointed out, that's does not necessarily negate the fact that he has legitimate psychiatric problems." *Trial Trans.*, p.2414, ln.10-18.

During cross-examination Dr. Siddall explained that malingering is a "little bit more complex concept than simply feigning illness." *Trial Trans.*, p.2381, ln.16-17. He went on to say "[m]alingering in itself does not negate some form of mental disorder. In fact, in my experience, many people with mental disorders do distort their self-report. *Trial Trans.*, p.2382, ln.4-7. He explained malingering as "trying to get attention to a person's distress." *Trial Trans.*, p.2401, ln.8-9.

iii. Antisocial Personality Disorder

No expert contradicted Dr. Siddall's Axis II diagnosis of Antisocial Personality Disorder. Dr. Stinson testified that although he did not diagnose Petitioner as antisocial, he "would not argue with someone who diagnosed him antisocial." *Trans.*, p.661, ln.3-4. He also

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testified that having antisocial traits does not negate mental illness. During trial Dr. Siddall testified "[t]he incidents of anti-social behavior associated with anti-social personality disorder drops off greatly with age, and beyond about forty years old. *Trial Trans.*, p.2388, ln.6-9. Petitioner was 37 years old at the time.

iv. ODRC Records

Petitioner contends the defense team was ineffective because they "failed to utilize" the ODRC records in their investigation. "[B]ecause the most damaging part of those records were already known to the jury[12] there was no reasonable strategy not to use the valuable mitigating information contained within. Had the members of the defense team adequately reviewed these records they would have found a wealth of mitigating evidence, including Dr. Beven." Petitioner's Post Hearing Merit Brief, p.23.

As has been the reoccurring theme throughout this Petition, the review of records by Petitioner's counsel and experts ignores the existence of any evidence or documentation that is detrimental to Petitioner. While it is true the records contain significant documentation of Petitioner's mental illness, they are by no means entirely mitigating. The records are also replete with documentation of Petitioner's manipulation, lying, unprovoked fighting, and destruction, all of which would have been fodder for cross-examination. Examples are:

> "Seen in segregation in response to kite and CO. Inmate Jones apparently just wanted attention. Was confronted with his choice of behavior." 1/22/93 M.S. Petitioner's Ex. 11, Vol. II, p.556.
>
> ***
>
> "Mr. Jones did not address his report of suicidal ideation until confronted about it. He then requested a phone call to his family saying he was having trouble getting through to them on the regular phone system. When further pressed about his claims of feeling suicidal, he denied such a problem, saying that he said that only

[12] Presumably Petitioner's incarceration for attempted rape.

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> to get the attention that he felt he needed someone to help him to get a phone call ***. Presenting problem appears to be exclusively an Axis-II manipulative and attention-seeking ploy. R.O. Shehenberger, Ph.D." Petitioner's Ex. 11, Vol. I, pp.258-259, 3/2/04.
>
> ***
>
> "Patient was disappointed that he was not schizophrenic. He said that he is bipolar and is concerned about going back to Lebanon and going to the hole." Petitioner's Ex. 11, Vol. I, p.83, 4/19/96.
>
> ***
>
> "I have problems with my life. Reportedly my son which is 9 yrs. old is not my son. 'When I get out I'll kill her because she lied to me.' I was furious. I cut myself ***." Petitioner's Ex. 11, Vol. IV., p.930, 1/9/00.

And, by Dr. Beven, himself:

> "I reviewed incident report on Jones dated 3/3/97 ***. This appears to be a predatory antisocial act by inmate Jones. I review of my own records he was personally seen by me 2/28/27(sic) (three days prior to the above incident.) In a quote from my own note 'I assess him as being currently psychiatrically stable and behavioral problems currently experienced are principally due to his personality disorder.' *** There is no evidence his attack on Hill had anything to do with a serious mental illness and should be handled purely in a disciplinary fashion in my opinion." Petitioner's Ex. 11, Vol. V., p.1096, 3/6/97.
>
> ***
>
> "The treatment team has reviewed the progress notes by Dr. Beven dated 7/15, 7/17, 7/18, and the incident report on 7/14 of Jones assaulting another inmate on the RTU. In Dr. Beven's progress notes of 7/15 he expresses concern that Jones is too predatory and violent to remain or to return to the RTU." Petitioner's Ex. 11, Vol. V., p.1313, 7/22/97.

The jury might have concluded that Petitioner was simply beyond rehabilitation. Negative mitigating evidence can be a "'two-edged sword'" that might convince a jury of the accused's future dangerousness. *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Moreover, debatable trial tactics generally do not constitute ineffective assistance of counsel. *State v. Elmore,* 111 Ohio St. 3d 515, 2006-Ohio-6207, 857 N.E.2d 547, at ¶116. "Attorneys need not pursue every conceivable avenue; they are entitled to be selective."

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State v. Murphy (2001), 91 Ohio St.3d 516, 542, 747 N.E.2d 765, quoting *United States v. Davenport*, 986 F.2d 1047, 1049 (7th Cir.1993).

v. **R.C. 2929.04(B)(3)**

Petitioner alleges his counsel's failure to conduct an adequate investigation into his mental health and psychological background led the trial judge to write in her sentencing opinion "'Mr. Jones is not considered to be mentally ill.'" Petitioner's Post-Hearing Merit Brief, p.38, quoting the trial court's January 5, 2008 "Opinion of the Court Findings of Fact and Conclusions of Law Regarding the Death Penalty."

R.C. 2929.04 sets forth a number of factors that the trier of fact "shall consider and weigh against the aggravating circumstances proved beyond a reasonable doubt." Among those factors, section (B)(3) states, "[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law."

Nowhere in the thousands of pages of documents that were submitted as evidence as part of the post-conviction hearing testimony is there even a hint that Petitioner lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Nowhere during the testimony of any of Petitioner's experts during the post-conviction hearing was there even a suggestion that Petitioner lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Petitioner admitted his role in the conduct and claimed it was accidental and consensual. The sentencing judge was addressing the R.C. 2929.04 factors, as she was required to do – as

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did the Ohio Supreme Court when it stated "[t]he R.C. 2929.04(B)(3) mitigating factor is also not applicable." *Jones*, 2012-Ohio-5677, at ¶260.

f. **Family History and Background**

Petitioner contends his trial counsel were ineffective in their failure to fully investigate and present mitigating evidence about his history and background.

The mitigating evidence that was presented during Petitioner's trial, as documented by the Ohio Supreme Court in its opinion, was previously discussed in this opinion on pages 6 through 11. With the exception of the alleged sexual abuse, Petitioner's trial counsel addressed applicable areas of information through Dr. Siddall and/or family members who testified.

The ABA guidelines are not "inexorable demands" with which all capital defense counsel must fully comply. *Bobby*, 558 U.S. at 8; *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶183. Moreover, "[a]ttorneys are not expected to present every potential mitigation theory, regardless of their relative strengths." *Fears v. Bagley*, 462 Fed.Appx. 565, 576 (6th Cir.2012). We remain mindful that "[a] defendant is entitled to a fair trial but not a perfect one." *State v. Bleigh*, 5th Dist. No. 09-CAA-03-0031, 2010-Ohio-1182, 2010 Ohio App. LEXIS 982, at ¶133, quoting *Bruton v. United States*, 391 U.S. 123, 135-136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Much of the lay witnesses' testimony, at least that which can be corroborated and is credible, was cumulative to that which was already presented during mitigation. An attorney's selection of witnesses to call at trial falls within the purview of trial tactics and generally will not constitute ineffective assistance of counsel. *State v. Coulter*, 75 Ohio App.3d 219, 230, 598 N.E.2d 1324 (1992).

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The record reflects that trial counsel investigated the case and called appropriate and helpful witnesses during the mitigation hearing. Even the Ninth District conceded, "[w]hile Mr. Hrdy uncovered most of the potentially mitigating circumstances of Mr. Jones's childhood, he did not learn about the sexual abuse that Mr. Jones allegedly suffered or the other incestuous conduct that allegedly occurred in his home." *State v. Jones*, 2011-Ohio-6063, at ¶49.

g. <u>The Sexual Abuse</u>

To say that the State is skeptical about the allegations of sexual abuse is an understatement. The skepticism is understandable. Petitioner was sentenced to death on February 4, 2008. After 30 years of non-disclosure, Felicia Crawford, the State Public Defender mitigation specialist who interviewed Petitioner in June and July 2008, and his sisters in September 2008, obtained the information, *sans* FETI method.

Without a doubt, the Jones family social history is one of the most dysfunctional family histories this Court has ever encountered—with or without the allegations of sexual abuse and incest. However, this Court's role is not to determine the merits of Petitioner's sexual abuse claim or if there was incest within the Jones family. This Court's purpose is to determine if the defense team should reasonably have discovered the abuse. However, in doing so, the evaluation of the testimony and credibility of the witnesses will necessarily play a role in this Court's evaluation.

i. <u>The Lay Witnesses for Petitioner</u>

<u>Keith Fuller</u>

Pastor Fuller testified that Yolanda Jones talked to him about the possibility of sexual abuse. "I recall it was at the time of her father's sickness and death. We were—the family was

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talking with us, and during that time the issue came up of this possible abuse." *Trans.*, p.87, ln.15-19. Pastor Fuller made a point of clarifying that the discussion had been about *possible* abuse. *Trans.*, p.87, ln.10-11. He also testified that his discussion with Yolanda Jones was in his capacity as pastor and privilege would have prevented him from revealing even the "possibility" of abuse to a member of the mitigation team. *Trans.*, p.110, ln.12-13.

David Christopher Hargrave

Pastor Hargrave testified that Henrietta Jones was open and shared quite a bit with him. Based upon his discussions with her, Pastor Hargrave testified about "significant disruption with boundaries, family boundaries, physical personal boundaries, for example bedroom space, what is borne outside the bedroom, and all of those things ***." *Trans.*, p.427, ln.25. It was from this "boundary" conversation with Henrietta Jones that Pastor Hargrove became aware of sexual abuse.

However, Pastor Hargrave admitted that the conversation was not such that it caused him to feel compelled to make a police report under Ohio's mandatory reporting statute. He also admitted he would have been bound by privilege and could not have disclosed the information to the mitigation team, debunking Petitioner's contention that had they asked him "just one more question" the sexual abuse would have been revealed. *Trans.*, p.430, ln.3-4.

This Court notes Pastor Hargrave's education in the area of social work and his many years of work with at risk teens. His level and field of education were apparent when he testified using terms such as "hallucinating visually and auditory" (*Trans.*, p.425, ln.3-4) and "grandiose thinking." *Trans.*, p.426, ln.23. Pastor Hargrave testified that he sought copies of

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Petitioner's medical and mental health records from defense counsel because he felt he could "recognize patterns that were precursors for dysfunction." *Trans.*, p.436, ln.22-25.

Pastor Hargrave told trial counsel he would like to help in any way that he could. Surely he would have been aware that an instance of sexual abuse could have been helpful to Petitioner. Apparently Pastor Hargrave's conversation with Henrietta Jones regarding sexual abuse was not significant or detailed enough that it caused him to feel the need to encourage her to disclose it to a member of the mitigation team, nor did he testify that he attempted to do so.

Rhonda Jones

Rhonda Jones testified that her father had tried to molest her and there were persons dressed in skeleton costumes who fondled the girls at night.

As to her father's attempted molestation, in ¶9 of her affidavit she stated:

> "My father tried to molest me. Once when he tried to get into my bedroom, I blocked the door. My father broke in. I was 17 years old, and my boyfriend was there. My boyfriend beat up my father."

Rhonda Jones' post-conviction testimony regarding the incident was a vivid account of her enraged, stark naked father pounding on her barricaded bedroom door and trying to bust through. She was 16 years old, going on 17 at the time. She escaped out the back—presumably with her boyfriend. She was kicked out of the house shortly thereafter.

Rhonda Jones repeatedly characterized this incident as an attempt by her father to molest her. There is no credible evidence that this was an attempted molestation. The facts (and common sense) are far more consistent with a father who was enraged that his 16-year-old daughter had her boyfriend behind her locked bedroom door.

As previously stated, this Court did not find Rhonda Jones to be a credible witness.

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Sh'torie Jones Harpster

Sh'torie Harpster testified that no one spoke to her about sexual abuse. She testified that Marvin Jones, Petitioner's brother, sexually abused her.

This Court is not convinced that the fact that Petitioner's brother is also a rapist, even if it had been presented during mitigation, would have been helpful to Petitioner, a man who had just been found guilty of rape.

Yolanda Jones White

Yolanda Jones admitted that Mr. Hrdy asked her about sexual abuse. Her testimony about why she did not relate any of the abuse to him or to the attorneys, like her testimony about her professed lack of preparation, simply was not credible.

Christy Coffee Harmel

Christy Coffee testified that her son, Phillip Jones, Jr., is the product of her rape by Petitioner's brother, Daniel. (She testified that Daniel had sex with her while she was passed out drunk.)

Ms. Coffee testified that she was with the family at Petitioner's attorney's office before the trial when the attorneys asked if there was any history of sexual abuse in the Jones family. When asked how she knew the attorneys had asked the family about sexual abuse she testified, "[b]ecause when the family came out that is what they were talking about, they talked about." *Trans.*, p.549, ln.14-16. She also acknowledged that Thomas Hrdy had asked her open-ended questions about sexual abuse but she felt it was too quick.

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Phillip Jones (Petitioner)

Petitioner did not testify during the post-conviction hearing. The Court references the only disclosure of sexual abuse made by him in the thousands of pages of documents submitted as evidence:

> "Call from R-Block status client was demanding to be 4-wayed to avoid hurting himself. Client reports difficulty started recently when he disclosed to an Officer Smith in R-Block that he had been sexually abused by his father as a child. Client states he spread the information around the block and people have accused him of having been "fucked by your father." Since that time Jones states the officers have written him up for fabricated reasons. He reports he cut himself because Sgt. Nicols would not place him in restraints as he requested. ***. He states that he would not hurt himself if he were in C Block." Petitioner's Ex.11, Vol. V., p.1142, 11/7/95.

ii. Expert Witnesses for Petitioner

Howard Fradkin, Ph.D.

Dr. Howard Fradkin is a psychologist with an expertise in the area of adult survivors of child sex abuse. At the time of his testimony Dr. Fradkin had devoted thirty-four years of his practice to that topic. Dr. Fradkin advocates an interviewing style called the "Forensic Experiential Trauma Interview" (FETI) that he believes is the most appropriate to use with trauma survivors. Dr. Fradkin opined that Petitioner is a survivor of male child sex abuse. Dr. Fradkin testified that from the time of Petitioner's suicide attempt at the age of six and for thirty years subsequent to that, medical professionals missed the diagnosis of sexual abuse.

Dr. Fradkin reports that Petitioner's sexual abuse began at the hands of his brothers, Theo and Daniel, when he was seven or eight years old. Daniel orally raped him 100 times between the ages of 8-12. Theo made him perform oral sex on him 35-50 times. When Petitioner was 8 years old he engaged in various experimental sex acts with Billy, a neighbor.

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When Petitioner was somewhere between 7-10 years of age he was subjected to oral sexual abuse at the hands of his sister Arlena's boyfriend, Eric Ashford. When Petitioner was 15 years old his stepmother Vondelise Jones molested him. He attributes the failure to discover this horrific abuse to deficient mitigation investigation and methods.

While this Court admires Dr. Fradkin's devotion to helping survivor's of sexual abuse, it gives his testimony no weight in this case for a multitude of reasons.

First, it is questionable whether Dr. Fradkin's FETI interview technique could survive a *Daubert* challenge. Assuming *arguendo* that it did for purposes of further analysis, Dr. Fradkin's opinions are based almost entirely upon the self-serving statements of Petitioner, made in a setting in which the doctor was not treating Petitioner or rendering a diagnosis. Dr. Fradkin also relied heavily upon the hearsay affidavits of family members whom he never met or personally interviewed.

Dr. Fradkin's report is fraught with mischaracterizations of the evidence, partly attributable to the fact that he was not provided all of the documents by Petitioner's current counsel and partly attributable to the fact that he sometimes simply ignored the evidence he did have.

For instance, during the post-conviction hearing Dr Fradkin testified "at Grafton I think he actually told a couple of doctors about being sexually abused then." *Trans*., p.184, ln.11-14. In ¶65 of his affidavit (Petitioner's Ex. 3) Dr. Fradkin referenced the 1993 Grafton records, stating they documented "severe abuse" and "here was an early time during his prison stay where Phillip admitted to his abuse," suggesting, of course, sexual abuse.

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However, the actual records clearly refer to severe *physical abuse*. Petitioner's Ex. 11, Volume V, p.1444, Social History Information. Physical abuse had already been presented during mitigation by Dr. Siddall.

Dr. Fradkin opined that he found Petitioner's account of the childhood sexual abuse to be "credible and very believable." *Trans.*, p.207, ln.4. However, later during his testimony, when asked if "there was any indication in any of the records that Petitioner lied when it suited his needs, Dr. Fradkin responded, 'I don't have information about that.'" *Trans.*, p.229, ln.22-25. At the time he was preparing his report, Dr. Fradkin had only been provided with selected portions of the 1,938 pages of ODRC records. Petitioner's Ex. 3, p.3. The missing records contain documented examples of Petitioner lying when it suited his needs. Three examples include:

> "Several months ago he verbalized suicidal ideation. At the time it seemed largely an attempt to be sent to Oakwood Forensic Center and to avoid the consequences of his behavior" Petitioner's Ex. 11, Vol. III, p.777, 12/28/94.
>
> "Mr. Jones did not address his report of suicidal ideation until he was confronted about it. He then requested a phone call to his family saying he was having trouble getting through to them on the regular phone system. When further pressed about his claims of feeling suicidal, he denied such a problem, saying that he said that only to get the attention that he felt he needed to get someone to help him get a phone call." Petitioner's Ex. 11, Vol. I, p.259, 3/2/04.
>
> "While Jones frequently expressed thoughts to harm himself these appear to be manipulative and goal directed to avoid the consequences for his actions or to achieve a goal such as returning to the R.T.U." Petitioner's Ex. 11, Vol. IV, p.1088, 4/2/97.

While it is unknown whether that type of information would have had any effect on Dr. Fradkin's opinion, the fact that he did not have the information when making his report casts a shadow over the entire report.

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On page 19 of his report, Dr. Fradkin stated:

"The first time Phillip was suicidal was at age 7. The abuse had already started, and his mother and father were getting into violent fights. He was dealing with the abuse, and didn't want his parents to get divorced. He thought that drinking gasoline was a way to change the family and stop what was being done to him, and to bring people together. He said at the time he hadn't told anyone about the abuse, and he described drinking the gas as 'my Einstein moment to save the family.' He believed the incident did indeed bring the family closer together because when he came home, they told him 'you know we love you.' The record from Akron Hospital dated 7/26/76 does not indicate any follow up referral to psychiatrist. However, it appears he was referred to Child Guidance Center. They concluded he was hyperactive." Petitioner's Ex. 3, p.19 §G ¶i.

Dr. Fradkin was in possession of the Akron Children's Hospital records (Petitioner's Ex. 7) that he apparently chose to disregard. A review of the Akron Children's Hospital records to which Dr. Fradkin referred in the above paragraph (Petitioner's Ex. 3, p.19, ¶i) documents Petitioner's gasoline ingestion as a result of his siphoning gasoline and not as a suicide attempt, which explains why there was no follow up referral to a psychiatrist. Petitioner was 6 years old at the time. The first recorded reference to the gasoline incident being a suicide attempt was by Petitioner during mitigation.

On that same page of Dr. Fradkin's report he refers to Petitioner's second suicide attempt at "juvi camp at Mohican" during which Petitioner tried to hang himself. Dr. Fradkin reported Petitioner "remembered they came and cut him down. He remembered his blood vessels were busting. He remembered his whole neck was swollen." Petitioner's Ex. 3, p.19, §G ¶ii.

Contrary to the memory related by Petitioner to Dr. Fradkin, was Petitioner's account given to Dr. VanDevere on September 25, 1987 during his Mental Health Status Evaluation (also contained within the Children's Hospital records.) "He gives a history of suicide attempt

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before, when he reports he tried to hang himself, but then he held onto the rope and did not let his body fall. He states this incident happened when he was at Mauhaken (sic) Youth Camp in February 1987." Petitioner's Ex. 7, p.34. This version is consistent with other admissions by Petitioner that his hanging attempts were "for attention." Petitioner's Ex. 11, Vol. V, p.1444.

This Court also finds it interesting that, although Dr. Fradkin references in his report Petitioner's November 7, 1995 prison disclosure of sexual abuse by his father, he fails to reconcile Petitioner's non-disclosure of that abuse during his own FETI interviews with Petitioner when Petitioner was sharing memories of abuse by at least five other people.

Dr. Fradkin conceded that he could not have testified to sexual abuse at a time when Petitioner and his family were denying its existence. *Trans.*, p.218, ln.6-17.

Bob Stinson, Psy.D.

In addition to his interviews with Petitioner, Dr. Stinson's opinions about the sexual abuse and incest are based upon the family affidavits and Dr. Fradkin's report. This Court has already addressed their credibility. Relying upon that information, Dr. Stinson testified, "I now know sexual abuse ***." *Trans.*, p.599, ln.1-2. "We reiterate that the Ohio Supreme Court has recognized the effect of hindsight and has warned against second-guessing as to counsel's assistance after a conviction." See *State v. Branco*, 5th Dist. No. CA-8618, 1992 Ohio App. LEXIS 2940, *11 (June 8, 1992), citing *Strickland*, 466 U.S. at 689.

Dr. Stinson remained firm in his opinion that the mitigation team should have learned the information about the sexual abuse at the time of mitigation. He then offered his opinion that the abuse was being disclosed now "because the main perpetrator and person who said 'we do

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not talk about these things' (Henrietta) eventually died." *Trans.*, p.722, ln.8-10. Henrietta Jones was alive at the time of Petitioner's trial.

Dorian Hall

Regarding the sexual abuse, Ms. Hall testified that she "assumed" that information was obtained from family members who mentioned it to post-conviction mitigation specialist Felicia Crawford, also an employee of the Ohio Public Defender's Office. Ms. Hall was unable to testify as to how much time Ms. Crawford spent interviewing family members. When asked if, in her expert opinion, "there was not enough time in this case for any mitigation specialist to likely encounter stories of sexual abuse in the family, Ms. Hall stated ' No.'" *Trans.*, p.783, ln.21-25.

iii. Witnesses for the State

Thomas Hrdy

Mr. Hrdy testified that he would not have come out and specifically asked family members a leading question about sexual abuse, but if anyone had indicated that there had been sexual abuse he "absolutely" would have noted it and provided that information to Dr. Siddall and to the attorneys. *Trans.*, p.916, ln.13-19.

James Siddall, Ph.D.

Dr. Siddall testified that he asked Petitioner if he was sexually abused or if there was any sexual abuse in the family. *Trans.*, p.990. Petitioner denied both. Dr. Siddall testified that sex abuse would be evident in the records. *Trans.*, p.999, ln.24-25.

Dr. Siddall was not questioned about the November 7, 1995 note in the ODRC records regarding Petitioner's sexual abuse by his father.

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Donald Hicks, Esq.

Attorney Hicks testified that Petitioner never indicated at any time during his discussions with him that he had been sexually abused. There were never any indications that Petitioner had been sexually abused from Yolanda Jones or any of the family members or from the other contacts whose names they were provided.

Kerry O'Brien, Esq.

Attorney O'Brien testified, "I also ask about sex abuse, whether an uncle or aunt or something like that had molested him." *Trans.*, p.1079, ln.24 - p.1080, ln.12. He would absolutely have used sexual abuse during mitigation had it been mentioned. Petitioner denied sexual abuse when Attorney O'Brien asked him about it.

3. Conclusion—Counsels' Performance

a. Trial Strategy

An analysis of Petitioner's argument is that his trial counsel should have utilized only those facts that were helpful to his theory of mitigation, ignored the facts that were less than mitigating or downright harmful (or simply bend them to suit his purpose), and hope that the State was not familiar with the evidence or counter with any cross-examination.

This Court finds that the facts suggested by Petitioner were cumulative to the evidence presented at trial, lacking in objectivity, or speculative, and that their presentation would have made no difference in the outcome of the trial.

While Petitioner is mentally ill, his mental illness is inextricably wrapped around his anti-social personality disorder. That fact is firmly documented by the scores of case notes in the prison records and other documents submitted as evidence. Dr. Siddall did his best to stress the

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fact that Petitioner was truly mentally ill. He addressed the malingering in the most positive way possible. He repeatedly stressed the dysfunction in Petitioner's family. Petitioner's attorneys presented a mitigation that blended the negative with the positive, adding facts about Petitioner's assistance to others in need.

b. The Investigation

In assessing counsels' investigation, an objective review of counsels' performance must be conducted in light of professional norms prevailing when the representation took place. *Bobby*, 558 U.S. at 7; *Strickland*, 466 U.S. at 688.

Throughout the post-conviction hearing Petitioner has claimed Attorney O'Brien Attorney Hicks, Dr. Siddall and investigator Hrdy failed to discover the sexual abuse of Petitioner and the incest/sexual dysfunction in his family.

The credible testimony in this case is that Attorney O'Brien, Attorney Hicks, Thomas Hrdy and Dr. Siddall all asked about sexual abuse. They were all met with denials. The fact that they did not utilize a method of questioning that did not come into existence until 2013 requires no further comment by this Court.

But according to Petitioner, through his experts Dr. Fradkin and Dr. Stinson, the mere asking about sexual abuse was not sufficient. The rampant sexual abuse and sexual dysfunction in Petitioner's family was not discovered because they did not ask in the "right way," and/or they did not ask "that one more question," and/or they did not provide Petitioner a safe environment in which to disclose, and/or they did not develop that rapport that is critical to eliciting such information.

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The documentary evidence identified scores of doctors, psychologists, psychiatrists, nurses, nurse practitioners, social workers, therapists, teachers, and guidance counselors, including the Chief Psychologist of the Division of Pediatric Psychology at Children's Hospital, the Chief Psychologist for the Akron Public Schools, and the Chief Psychiatrist at the Southern Ohio Correctional Facility, all of whom played a role in Petitioner's treatment or education over a period of 30 years at facilities including, but not limited to, Akron Children's Hospital, Akron Public Schools, Child Guidance Center, Fallsview Psychiatric Hospital, Mansfield Psychiatric Hospital, Portage Path, Summit Psychological Associates, the Ohio Department of Rehabilitation and Correction, Indian River, Oakwood Forensic Center, and the Summit County Psycho-Diagnostic Clinic. Every professional at every facility also failed to discover the sexual abuse.

Petitioner criticizes his trial counsel for not calling Dr. Beven as a witness, "the doctor who saw Petitioner 'for the greatest breath (sic) of time and *** individual times' during Petitioner's prison stay." Petitioner's Post-Hearing Merit Brief, p.34. But Petitioner's contention about Dr. Beven is a double-edged sword. Dr. Beven was Petitioner's treating psychiatrist from December 1995 to July 2003, yet apparently he did not establish the rapport necessary to allow Petitioner to disclose the sexual abuse to him.

An attorney's failure to *reasonably* investigate the defendant's background and present mitigating evidence to the jury at sentencing can constitute ineffective assistance of counsel. (Emphasis added.) *Wiggins*, 539 U.S. at 521-22. The exhibits are replete with documentation of Petitioner denying sexual abuse. Assuming there is any truth to the allegations of Petitioner's sexual abuse and the incest within the Jones family, in light of the 30 years of failure of trained

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medical, psychiatric, psychological and education professionals to uncover the abuse, to require his attorneys to discover such information in the limited time provided by the time constraints of a criminal trial in which the defendant is incarcerated is unreasonable and beyond any requirements of the ABA Guidelines. Further, to assume that some additional amount of time gained from a request for a continuance would have necessarily resulted in the disclosure is mere speculation. When discussing the disclosure of sexual abuse Dr. Fradkin himself testified, "It varies from person to person. It could take months. It could take years." *Trans.*, p.223, ln.24-25. "Most men go to their graves without ever talking about (sexual abuse)." Trans., p.151, ln.18-20.

Petitioner's contention about trial counsel's failure to develop a rapport with him ignores the months counsel spent meeting with Petitioner from the inception of the case. In particular, this Court notes Attorney Hick's fatherly-like demeanor and his testimony that he had met with Petitioner fifty to sixty times and that he had a good relationship with Petitioner.

This Court also notes that Dr. Stinson testified the abuse may have been disclosed now "because main perpetrators and the main individuals who said we do not talk about this eventually died." *Trans.*, p.722, ln.8-10. If that was the case, Petitioner's trial counsel had no chance of obtaining any type of disclosure as long as Henrietta Jones was alive.

In light of the variety of circumstances faced by Petitioner's trial counsel and the range of legitimate decisions regarding how best to represent him, this Court finds his trial counsel's assistance was reasonable.

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b. <u>Prejudice Inquiry</u>

Understanding that this Court's finding that counsel's conduct did not fall outside the range of reasonable professional assistance renders a prejudice inquiry unnecessary, for the sake of argument, the Court will address that issue.

In assessing prejudice, 'the question is whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Williams*, 2003-Ohio-4396, at ¶163, quoting *Strickland,* 466 U.S. at 694. "It is necessary to consider *all* the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path—not just the mitigation evidence [trial counsel] could have presented, but also [the other evidence] that almost certainly would have come in with it." (Emphasis added.) *Wong v. Belmontes*, 558 U.S. 15, 20, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009). The burden remains on Petitioner.

Yes, Dr. Siddall testified that Petitioner underwent corrective eye surgery "at some time" rather than specifically testifying that he was 17 years old at the time. And Dr. Siddall testified to Petitioner being held back in two grades without mentioning the fact that he missed 39 days of school as a first grader, a reflection on his parents' neglectfulness. And Dr. Siddall testified that Petitioner was the youngest of eight children, without testifying to what effect his placement family placement may have had on him (although he did testify that Petitioner had no role models.)

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In light of the balance of Dr. Siddall's other testimony, combined with that of the other witnesses who testified during mitigation, this Court cannot conclude that those factors would have made a difference in the outcome of the case.

Regarding the sexual abuse, assuming Petitioner could get past the hearsay hurdles, privilege problems, and *Daubert* dilemma, his testimony of sexual abuse and incest could be countered with the years of non-disclosure and denials. His experts' testimony about the "code of silence" that pervades in families that engage in incestuous behaviors (Petitioner's Ex. 1, p.8, ¶23) could be countered with the many examples of lying and manipulation that are documented in the records. Petitioner's single statement about his father's sexual abuse contained in the ODRC records is immediately preceded and followed by his attempts to be moved to a different cellblock. Petitioner's Ex. 11, Vol. V., p.1140-1144. Although holding firm to his opinion about Petitioner's sexual abuse, even Dr. Fradkin, admitted, when discussing factors such as the documentation of Petitioner's bedwetting, self-mutilation, and suicidal gestures, "there are certainly other explanations" to describe the "big picture" of Phillip Jones. *Trans.*, p.192, ln.3-4.

In light of all of the evidence, this Court cannot conclude that the decision of the jury or of the trial judge would have been different.

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V. **Conclusion**

After evidentiary hearing and upon due consideration, the State's Motion to Dismiss is **GRANTED**.

Phillip Jones' March 23, 2009 Petition for Post-Conviction Relief is **DISMISSED**. Phillip Jones' April 14, 2010 Petitioner for Post-Conviction Relief is **DISMISSED** for the same evidentiary reasons and as being duplicative.

IT IS SO ORDERED.

JUDGE LYNNE S. CALLAHAN

cc: Assistant Prosecuting Attorney Richard S. Kasay
Assistant State Public Defender Kimberly Rigby
Assistant State Public Defender Lisa Lagos
Assistant State Public Defender Allen Vender

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THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

DANIEL M. HORRIGAN
2013 JUL 24 PM 1:39
SUMMIT COUNTY
CLERK OF COURTS

THE STATE OF OHIO) Case No. CR 07 04 1294

vs.

PHILLIP L. JONES **JOURNAL ENTRY**

This matter is before the Court upon the Petitioner's Motion in Limine for Admission of Affidavit of Unavailable Witness [redacted] The State orally objected to the Petitioner's Motion during the July 10, 2013 status hearing.

The Petitioner first contends that the rules of evidence should not apply to a hearing granted on claims raised in a post-conviction hearing. The Petitioner correctly points out that Evid.R. 101(A) and (C) exempt certain criminal proceedings from governance by the Rules of Evidence. Although many of the exempted proceedings are proceedings that take place post conviction, the rule does not exempt petitions for post-conviction relief.

A petition for post-conviction relief, although designed to address claimed constitutional violations, is a *civil* collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Davis*, 2008 Ohio 6841 (Ohio Ct. App., Licking County Dec. 23, 2008.) (Emphasis added.) A petition for post-conviction relief is purely statutory in nature and R.C. § 2953.21 controls the procedure to be applied. That statute does not carve out exceptions to the Ohio Rules of Evidence.

The Petitioner further argues that due process requires the admission of hearsay that is highly relevant to the punishment phase of a capital case. The cases cited by the Petitioner, including *Sears v. Upton*, 130 S. Ct. 3259 (U.S. 2010), address the exclusion of hearsay testimony during the penalty phase of the trial. In that regard, the Petitioner's assertion that the circumstances are the same in the instant case is incorrect.

The Petitioner also contends that the affidavit of Henrietta Jones is admissible as a statement against interest. The State counters that [redacted] is now deceased and cannot be subject to criminal liability. Upon reviewing [redacted] affidavit, the Court finds that neither position is convincing.

Mrs. Jones' affidavit differs somewhat from her testimony during trial. The affidavit details facts to which she did not testify during trial. Contrary to her trial testimony, which portrayed the Petitioner's father as a good father and provider, in her affidavit [redacted] calls him "mean and harsh," and states that "he didn't provide for the family." What is crucial here is the fact that [redacted] never states in her affidavit that she lied during her trial

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COPY testimony, a fact that could have subjected her to criminal perjury charges. Nor does she state that she purposely held back pertinent mitigation information. Instead she states that "Phillip's trial attorneys didn't explain mitigation to me too well. I didn't feel prepared to testify. They didn't ask me about the information in this affidavit. If I had been asked to testify about these matters at Phillip's mitigation hearing, I would have done so." Thus, the affidavit is not a statement against interest, but an attestation to what she states was her son's attorneys' failure to adequately prepare her for her trial testimony. Hence, this claim, which goes to the issue of ineffective assistance of counsel, goes to the very heart of the issue before this Court in the upcoming hearing and must be subject to cross-examination to be admissible.

The Petitioner also claims that statements within [redacted] affidavit pertaining to personal or family history are admissible for the truth of the matter asserted. In accordance with Evid.R. 804(B)(4), statements regarding the declarant's or her family's history of birth, adoption, marriage, divorce, legitimacy, or other similar fact of personal or family history are admissible. [redacted] clearly had personal knowledge of many of those types of facts and referred to them in her affidavit. As such, the Court will not exclude the hearsay portions of [redacted] affidavit that fall under Evid.R. 804(B)(4). The Court has reviewed the affidavit pursuant to Evid.R. 804(B)(4) and has made redactions. A copy of the redacted/admissible affidavit is attached to this order.

IT IS SO ORDERED.

APPROVED:
July 23, 2013
jam

LYNNE S. CALLAHAN, Judge
Court of Common Pleas
County of Summit, Ohio

cc: Prosecutor Richard Kasay
Prosecutor Kevin Mayer
Attorney Gregory Meyers
Attorney Kimberly Rigby
Attorney Allen Vender
Attorney Lisa Lagos

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

State of Ohio,	:	
Plaintiff,	:	Case No. 07 04 1294
v.	:	
Phillip Jones,	:	
Defendant.	:	**This is a death penalty case.**

Affidavit of Henrietta Jones

State of Ohio)
) ss:
County of Summit)

I, [redacted] hereby state as follows:

1. I'm Phillip Jones's mother.
2. I was born in 1940 in Akron, Ohio. My parents were Ethel Mae Johnson and Willis Smith. They never married.
3. I was the youngest of three children. My siblings had different fathers.
4.
5.
6. My half-sister, Maude, was a lot older than me. She was of mixed race—her father was white.
7.

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8. My father died about five or six years after my mother went to prison.

9. My brother and I were placed with Reverend Lacey and Lucy Anderson.

10. When Jeremiah was about 12 years old, he went swimming with older boys and drowned. We were living with the Andersons at the time.

11.

12. I was sent to the Children's Home for two weeks and then transferred to the Counsel Home for Negro Women in Akron. After nine months there, I moved in with a friend from school, Barbara Tibbs, and her mother, Hattie Reynolds. I was about 14 or 15 years old. I lived with them until I got married at age 19.

13.

14.

15. After dating for about five months, Theophilus and I got married.

16.

17.

18. Theophilus and I had eight children. Phillip was the youngest.

19.

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20.

21.

22.

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24.

25. Theophilus had a daughter named Darlene from a prior relationship.

26.

27.

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34.

35.

36. My daughter Arlena (who's deceased) had a child when she was a teenager.

37.

38.

39. Phillip's father remarried after we divorced

40.

41. In 1998, Theophilus and I married each other again.

42. In 2006, Theophilus died from cancer.

43.

Henrietta Jones

Sworn to and subscribed in my presence on the 13th day of January, 2009.

Notary Public

FELICIA C. CRAWFORD
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 1/13/2013

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COURT OF APPEALS
DANIEL M. HORRIGAN
2011 NOV 23 AM 8:41
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. PHILLIP L. JONES Appellant	C.A. No. 25695 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 2007 04 1294

DECISION AND JOURNAL ENTRY

Dated: November 23, 2011

DICKINSON, Judge.

INTRODUCTION

{¶1} Phillip Jones has been sentenced to die for raping and strangling Susan Yates. While Mr. Jones admitted killing Ms. Yates, he claimed it was an accident that happened when she asked him to choke her as they were having consensual sex. Following his trial, Mr. Jones petitioned for post-conviction relief, arguing that the trial court incorrectly admitted other acts evidence, that jurors committed misconduct, and that his trial lawyers were ineffective at the guilt and penalty stages of his trial. He also moved for discovery and the appropriation of funds so that he could obtain neurological testing. The trial court denied his petition, determining that his other acts claims are barred because he also raised them on direct appeal, that the evidence submitted in support of his juror misconduct claims was incompetent, and that his lawyers were not ineffective. It also denied his motions for discovery and testing funds. Mr. Jones has appealed, assigning three errors. We affirm the trial court's decision in part because Mr. Jones

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did not receive ineffective assistance during the guilt phase of his trial, the court properly rejected his other acts and juror misconduct claims, and the court correctly denied his motions for discovery and testing funds. We vacate its determination that Mr. Jones's lawyers were not ineffective regarding the penalty phase of his trial and remand for an evidentiary hearing on that issue.

BACKGROUND

{¶2} On the morning of April 23, 2007, a man was jogging through a cemetery when he discovered Ms. Yates's body lying near some headstones. According to the county medical examiner, she had bruises on her head, external and internal neck injuries, and eye and facial petechia (spots caused by the breaking of small blood vessels). She was dressed in multiple layers, including a summer dress and denim skirt. Several buttons were missing from the dress and were lying in the road. The skirt had a slit, but it had been torn apart even more from where the slit had ended. Ms. Yates's bra was also torn between the cups and there was a small, plastic, glow-in-the-dark cross lying over one of her eyes.

{¶3} The medical examiner concluded that Ms. Yates's cause of death was asphyxia by strangulation and that the manner of her death was homicide. He also concluded that Ms. Yates had been vaginally and anally raped. A couple of days after Ms. Yates's body was found, Mr. Jones's wife told the police that Mr. Jones was the one who killed her. Mr. Jones's semen was found on Ms. Yates's skirt and on a vaginal swab. The cross that had been found over Ms. Yates's eye was similar to one that Mr. Jones had given to his wife a year earlier.

{¶4} The Grand Jury indicted Mr. Jones for aggravated murder, murder, and rape. He was arraigned on May 15, 2007. In August 2007, the court determined that Mr. Jones was competent to stand trial and set a trial date for December 3. On October 22, the Grand

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Jury issued a supplemental indictment, adding death penalty and repeat offender specifications. Mr. Jones was arraigned on the supplemental indictment two days later.

{¶5} At the October 24 arraignment, Mr. Jones's lawyers acknowledged that a mitigation investigation normally "takes several months," but did not move for a continuance. Instead, they said that they had agreed with the prosecutor to keep the December 3 trial date. They also suggested scheduling two or three days in January 2008 for the penalty phase of the trial, if it proved necessary. At the hearing, Mr. Jones's lawyers also presented the court with an order allowing them to retain Dr. James Siddall, a psychologist, so that he could begin conducting interviews and testing for mitigation purposes. The court signed the proposed order that same day. According to the statement Dr. Siddall submitted after trial, between October 24, 2007, and January 8, 2008, he spent four and a half hours consulting with Mr. Jones's lawyers. His statement also indicated that on November 21 and December 12 he did a total of 7.75 hours of "[i]nterviews and testing."

{¶6} On November 1, Mr. Jones's lawyers moved for appropriation of funds to hire a defense mitigation expert. At a hearing on November 15, the court granted the motion and ordered Mr. Jones's lawyers to prepare an entry appointing Thomas Hrdy as that expert. While the record does not indicate when Mr. Jones's lawyers submitted a proposed entry, the trial court entered an order appointing Mr. Hrdy on December 5. According to the invoice Mr. Hrdy submitted after trial, he began working on Mr. Jones's case on December 10.

{¶7} According to the affidavits submitted by Mr. Jones's family members, either Mr. Hrdy did not spend much time with them asking about their family background or no one from Mr. Jones's defense team attempted to speak with them at all. According to Mr. Hrdy's invoice, on December 20, he spent 3.5 hours interviewing Mr. Jones's mother and his oldest sister.

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On December 23, he spent 4.5 hours "[m]eeting w/ family @ [Mr. Jones's mother's] home." On January 2, he billed 2 hours for "[i]nterview w/ family, drop off records (Siddall)." Finally, on January 5, he billed 4 hours for "[m]eeting w/ family, atty." There is no additional detail in the record regarding which "family" members he met or how he divided his time between the two activities listed on each of the January dates.

POST-CONVICTION RELIEF

{¶8} Mr. Jones's first assignment of error is that the trial court incorrectly dismissed his petition for post-conviction relief even though he presented sufficient operative facts to merit relief or, at a minimum, an evidentiary hearing. Under Section 2953.21(A)(1)(a) of the Ohio Revised Code, "[a]ny 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 file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

{¶9} "In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing." *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679, at ¶51. "Before granting a hearing on a [post-conviction relief] petition . . . , the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript." R.C. 2953.21(C). "[W]hether there are substantive grounds for relief" under Section 2953.21(C) means "whether there are grounds to

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believe 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.'" *State v. Calhoun*, 86 Ohio St. 3d 279, 283 (1999) (quoting R.C. 2953.21(A)(1)). "[A] trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing [if] 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." *Id.* at paragraph two of the syllabus. It is "not unreasonable to require the defendant to show in his petition for postconviction relief that such errors resulted in prejudice before a hearing is scheduled." *Id.* at 283.

{¶10} The Ohio Supreme Court has held that the trial court's gatekeeping role is entitled to deference. *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679, at ¶52. This includes the trial court's assessment of the credibility of affidavits. *Id.* "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion[.]" *Id.* at ¶58.

{¶11} Mr. Jones asserted 17 grounds for relief in his petition, which the trial court separated into three categories: arguments that his lawyers were ineffective during the guilt phase of his trial, arguments that his lawyers were ineffective during the penalty phase of his trial, and arguments not involving ineffective assistance of counsel. We will address Mr. Jones's arguments using those same categories.

GUILT-PHASE INEFFECTIVE ASSISTANCE

A. Consensual Sex Expert

{¶12} Mr. Jones's first ground for relief was that his trial lawyers should have called an expert witness to establish that the sex he had with Ms. Yates was consensual. He argued that

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there were alternative explanations for the trauma to Ms. Yates's genitalia and that, if it was not rape, the murder charge would not have been a capital offense.

{¶13} To establish ineffective assistance of counsel, Mr. Jones "must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the proceeding's result would have been different." *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶204; *State v. Bradley*, 42 Ohio St. 3d 136, paragraph two of the syllabus (1989)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

{¶14} The state medical examiner testified that Ms. Yates was sexually assaulted, pointing to bruising of the walls of her vagina and rectum and a small twig that was recovered from fecal matter in her rectum. He opined that the bruising was deeper inside Ms. Yates than a penis could cause and was consistent with something long and inflexible like a tool handle. He also testified that he found a wad of tissues or toilet paper inside Ms. Yates's vagina. The State's theory was that Mr. Jones attempted to clean his semen out of Ms. Jones's vagina and rectum and used a stick to insert and retrieve the paper. While he was able to retrieve the paper from her rectum, leaving the small twig, he was unable to get it out of her vagina.

{¶15} In support of his petition, Mr. Jones presented an affidavit by Dr. Werner Spitz, a forensic pathologist, who asserted that it is likely that any bruising to Ms. Yates's perivaginal, perianal, and perirectal soft tissues was actually the result of pulling and tugging associated with the process used to extract pelvic organs from the body during an autopsy. He wrote that, "[i]n the absence of actual organ injury and damage to the overlying skin, including the perineum, it is my opinion that the pelvic hemorrhage described in the autopsy report was the result of

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art[i]fact." Dr. Spitz also asserted that, because there were no perforations to Ms. Yates's rectum, she was not wearing any underwear, and there was dirt and debris found in her hair and on the back of her clothing, the small twig likely entered her rectum while Mr. Jones was attempting to resuscitate her. Dr. Spitz further opined that the fact that there was a small wad of paper in Ms. Yates's vagina suggests that the sex was consensual. According the Dr. Spitz, some women use paper as a contraceptive, and this would be consistent with Mr. Jones's testimony that Ms. Yates excused herself to urinate shortly before they engaged in sex. Dr. Spitz opined that Ms. Yates likely told Mr. Jones that she had to go to the bathroom so that she had an excuse to leave to place the paper wad.

{¶16} The trial court wrote that, except for the testimony of the people engaged in a sex act, it was unaware of any testimony, expert or otherwise, that can conclusively determine whether sex is consensual. It also noted that Dr. Spitz's affidavit did not account for the trauma that the medical examiner said had been inflicted to Ms. Yates's head. It further noted that Mr. Jones's lawyer had thoroughly cross-examined the medical examiner about his conclusions. It concluded that the lawyers' decision not to obtain an expert was a matter of trial strategy that did not constitute ineffective assistance, similar to *State v. Thompson*, 33 Ohio St. 3d 1, 10-11 (1987) (concluding that trial counsel was not ineffective for not obtaining the appointment of a forensic pathologist in rebutting state's witness on issue of rape).

{¶17} In his brief, Mr. Jones has argued that his trial lawyers were ineffective because they failed to retain an expert to refute the medical examiner's rape findings. He has argued that, under the American Bar Association's guidelines for the appointment and performance of counsel in death penalty cases, his lawyers had a duty to conduct a thorough examination of his

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guilt. He has also argued that, because Ms. Yates's rape was the only capital specification in his trial, if he had not been found guilty of rape, he could not have been sentenced to death.

{¶18} We conclude that Mr. Jones has failed to demonstrate that the outcome of his trial would have been different if Dr. Spitz had testified. The state medical examiner testified that, at a certain point, the rectum curves and connects to the colon. He said that, if something is inserted into the rectum that is inflexible, it will eventually bump into tissue at that curve, which is where Ms. Yates had contusions. Dr. Spitz failed to explain in his affidavit why, if something was inserted so far into the rectum to cause such a contusion, he would expect "actual organ injury" or "damage to the overlying skin, including the perineum." We also note, as the trial court did, that Dr. Spitz did not attempt to explain how the abrasions and contusions that Ms. Yates suffered to her head are consistent with consensual sex. Furthermore, while Dr. Spitz's paper as contraception explanation makes sense in theory, Mr. Jones testified that Ms. Yates urinated in the road in front of him while he watched. While he said that she wiped herself, he did not say anything about her placing paper in her vagina. Finally, while it may have been possible for a small twig to become slightly embedded in Ms. Yates's rectum if Mr. Jones was moving her around while trying to revive her, Dr. Spitz did not offer an adequate explanation for the fact that the medical examiner discovered the twig four to six inches inside of her rectum. We, therefore, conclude that the trial court exercised proper discretion when it determined that Dr. Spitz's affidavit was insufficient to establish that Mr. Jones's trial lawyers were ineffective for not calling a sexual assault expert.

B. Erotic Asphyxiation Expert

{¶19} Mr. Jones also argued in his petition that his trial lawyers were ineffective during the guilt phase of his trial because they failed to call an expert on erotic asphyxiation. He

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submitted the affidavit of Jay Wiseman, who claimed to be an expert on alternative sexual practices. According to Mr. Wiseman, he could have bolstered Mr. Jones's testimony regarding Ms. Yates's request to be choked during sex by explaining to the jury what erotic asphyxiation is, its prevalence, and its risks. In particular, Mr. Wiseman asserted that he would have testified that it is impossible to know when erotic asphyxiation is about to go too far and that death can occur within only a few seconds.

{¶20} The trial court determined that Mr. Wiseman's affidavit failed to demonstrate ineffective assistance because he did not opine that he had reviewed the autopsy findings and found them consistent with erotic asphyxiation. In his appellate brief, Mr. Jones has repeated the arguments he made in his petition, asserting that his trial lawyers failed to conduct a complete examination into his defense.

{¶21} The trial court properly determined that Mr. Wiseman's testimony would not have undermined the medical examiner's conclusions about the circumstances of Ms. Yates's death. While Mr. Wiseman asserted that the he could have convinced the jury that people actually do engage in erotic asphyxiation, that fact was not contested by the medical examiner. The medical examiner agreed that some people engage in such acts, but testified that Ms. Yates's injuries were inconsistent with anything he had ever seen or seen reported as erotic asphyxia. According to the medical examiner, Ms. Yates's injuries were consistent with a violent act, not a recreational act. He testified that, contrary to Mr. Jones's testimony that he heard a popping sound followed by Ms. Yates's immediate death, the medical evidence showed that her death was the result of the slow increase of blood in her skull. He testified that, because of the compression of Ms. Yates's neck, blood was able to enter her head but not exit. The increased pressure caused small blood vessels in her face to break, causing the petechia that was on her

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face. After 10 to 20 minutes, the blood in the head would have been depleted of oxygen, causing death by asphyxia. The medical examiner also explained that, although some of the cartilage in Ms. Yates's neck was fractured, it would not have made a popping sound as it fractured. Mr. Wiseman did not point to any medical evidence that was consistent with Mr. Jones's erotic asphyxiation story. We, therefore, conclude that the trial court exercised proper discretion when it determined that Mr. Jones failed to show that his lawyers were ineffective for not calling an expert in erotic asphyxiation.

C. Victim Photograph

{¶22} Mr. Jones also argued in his petition that his trial lawyers were ineffective during the guilt phase of his trial because they did not show a photograph of Ms. Yates to Deitra Snodgrass, who testified that Mr. Jones came to her house one evening with a woman matching Ms. Yates's description and that the woman already had a number of bruises. Ms. Snodgrass's testimony was consistent with Mr. Jones's testimony that, on the night of the incident, he came upon Ms. Yates involved in a fight with a man, broke up the fight, and drove Ms. Yates to Ms. Snodgrass's house because he thought Ms. Snodgrass might know someone who could sell her cocaine.

{¶23} Although Ms. Snodgrass initially testified that the woman who was with Mr. Jones when he was at her house had a similar build and was wearing clothes that matched the clothes Ms. Yates was found in, on cross-examination she testified that she did not think it was Ms. Yates who was in her apartment that evening. In his petition, Mr. Jones argued that, if his lawyers had shown a picture of Ms. Yates to Ms. Snodgrass, Ms. Snodgrass could have positively identified her as the woman she saw with Mr. Jones. The trial court inferred that Mr.

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Jones's lawyers' failure to show Ms. Snodgrass Ms. Yates's picture was a tactical decision, which did not constitute ineffective assistance.

{¶24} Mr. Jones submitted an affidavit by Ms. Snodgrass that asserted that, if she had been shown a picture of Ms. Yates, she could have identified Ms. Yates as the person she saw in her apartment with Mr. Jones. In his brief, Mr. Jones has argued that the only reason the prosecution was able to cast doubt on her testimony was because she did not see a picture and, therefore, could not say that she was certain it was Ms. Yates she saw.

{¶25} Even if Ms. Snodgrass had been shown Ms. Yates's picture, Mr. Jones has not demonstrated that it is reasonably probable that the outcome of his trial would have been different. The medical examiner testified that Ms. Yates's neck had abrasions that were consistent with fabric being twisted against it and small gouges, which were consistent with Ms. Yates digging at her neck in resistance to the act. This was inconsistent with Mr. Jones's story that he only applied steady pressure in one spot with his hands.

{¶26} On cross-examination, the medical examiner conceded that, if there were two strangulation events close in time, he might not be able to determine that from the autopsy. According to Ms. Snodgrass, the woman with Mr. Jones had bumps and bruises to her face. That was consistent with Mr. Jones's testimony about her having been in a fight. She did not say, however, whether the woman had any injuries to her neck. Accordingly, even if she had been unequivocal in her testimony that Ms. Yates was the woman who had been at her house, her testimony would not have supported Mr. Jones's theory that Ms. Yates experienced a strangulation event before having sex with him. The trial court exercised proper discretion when it denied Mr. Jones's petition regarding this ground for relief.

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D. Photographs of Mr. Jones's Hands

{¶27} Mr. Jones further argued in his petition that his trial lawyers were ineffective during the guilt phase of his trial because they did not submit photographs showing that his hands were uninjured at the time he was arrested. He argued that, if he had violently strangled Ms. Yates, she would have resisted, inflicting scratch marks or other injuries to his hands. The trial court noted that the inference that Mr. Jones, apparently, would have wanted the jury to draw was that, since there were no injuries to his hands, the sex and choking must have been consensual. The court, however, rejected his argument as speculative.

{¶28} The detective who arrested Mr. Jones testified that Mr. Jones's hands were uninjured. Accordingly, photographs of Mr. Jones's hands would have been merely cumulative. In addition, the fact that Mr. Jones's hands were uninjured is not inconsistent with the medical examiner's explanation of Ms. Yates's death. As noted earlier, the medical examiner testified that the abrasions he saw were consistent with someone twisting clothing tight against Ms. Yates's neck. If that was the method Mr. Jones used to restrict the blood flow from Ms. Yates's head, it is possible that she would have pulled at the fabric instead of his hands as she resisted.

{¶29} In his brief, Mr. Jones has acknowledged that there was no dispute over the detective's testimony that his hands were uninjured, but has argued that the court should have held a hearing to determine why his lawyers did not introduce "obvious evidence at their own disposal." We conclude, however, that the trial court exercised proper discretion when it denied Mr. Jones's petition on this ground. To the extent that Mr. Jones's first assignment of error is that the trial court should have held a hearing to determine whether his lawyers were ineffective during the guilt-phase of his trial, it is overruled.

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PENALTY-PHASE INEFFECTIVE ASSISTANCE

{¶30} Mr. Jones next argued in his petition that his trial lawyers were ineffective during the penalty phase of his trial. Specifically, he argued that they should have sought a continuance so that they would have had a reasonable amount of time to conduct a proper mitigation investigation, that they failed to conduct a reasonable investigation into his background, that they failed to present available, relevant, and compelling mitigating evidence from his family members, that they failed to adequately prepare witnesses to testify, that they failed to present sufficient psychological mitigating evidence, that they failed to present evidence of his neurological damage, and that they failed to present his hospital records.

{¶31} During the penalty phase, Dr. James Siddall, a psychologist, testified that psychiatric, substance abuse, and criminal justice problems go back in Mr. Jones's family for generations. Regarding Mr. Jones's childhood, he explained that domestic violence led to the divorce of Mr. Jones's parents, that Mr. Jones was subject to some of the abuse, and that Mr. Jones's siblings abused drugs and had psychiatric conditions such as bipolar disorder and schizophrenia. In light of those issues, none of his family members could be considered good role models. Dr. Siddall explained that Mr. Jones also had a wandering eye as a child, which caused him to be bullied and harassed. He also explained that Mr. Jones had learning disabilities which, combined with instability from moving to different schools, caused him to be held back a couple times. He further explained that Mr. Jones had a long history of depression and other mental illness, leading him to attempt suicide several times, including drinking gasoline when he was eight, overdosing on pills and trying to hang himself as a teen, and engaging in self-mutilation while incarcerated for a previous offense. Dr. Siddall diagnosed Mr. Jones as having mood and anti-social personality disorders.

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{¶32} Mr. Jones's mother testified that she grew up in foster homes, that she fought with her husband, and that all eight of her children have faced substance abuse problems. Regarding Mr. Jones, she talked about the fact that he bounced around in custody, that he was picked on because of his eye, that he had problems in school, and that he attempted to commit suicide a couple of times. On cross-examination, however, she explained that her husband and she had worked hard to provide for their children, that they took steps to correct Mr. Jones's eye problems, that, despite their problems, they eventually reconciled and remarried, and that Mr. Jones's father was a good role model. She described Mr. Jones as a typical kid, who developed a close bond to his siblings that continued to the present day.

{¶33} Mr. Jones's oldest sister also testified about his childhood. She confirmed that he was picked on a lot because of his eye, that he had learning difficulties that led to low self-esteem, and that he attempted to commit suicide by drinking gasoline when he was seven or eight. She also confirmed that there was domestic violence between her parents and that she and her siblings used drugs and got involved in criminal activity, which Mr. Jones was exposed to from a young age. She testified, however, that Mr. Jones's eye was corrected when he was only two or three. She also testified that their parents took good care of them, took them to church, and taught them right from wrong and that all of the siblings have remained close and supportive of each other over the years.

{¶34} Besides calling witnesses to testify about his childhood, Mr. Jones's lawyers also called his children, the mother of his children, a close friend, and two of his former ministers to describe the positive effect Mr. Jones has had on others. Mr. Jones also made an unsworn statement reiterating many of the facts recounted by the other witnesses.

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{¶35} In his petition, Mr. Jones argued that, if his lawyers had done a more thorough investigation of his childhood, they would have discovered that the challenges he faced were more serious than divorced parents, domestic violence, and teasing over a wandering eye. Mr. Jones submitted a report by Dr. Bob Stinson, a psychologist, in which he criticized Mr. Jones's defense team for not discovering that he had been sexually abused by two of his brothers. That abuse allegedly lasted from before he was old enough to go to school until he was 12 years old. It began with his brothers fondling him, progressed to them performing oral sex on him, and eventually to him performing oral sex on them. Mr. Jones submitted an affidavit from his oldest sister who partially substantiated those claims, asserting that, when their oldest brother was released from prison, he confronted Mr. Jones and another brother in the attic and tried to have anal sex with them. While Mr. Jones was able to elude capture, the other brother was not. According to Mr. Jones's sister, Mr. Jones was in the attic with his brothers while the oldest one raped the other one.

{¶36} In her affidavit, Mr. Jones's oldest sister described other incestuous conduct that occurred in their childhood home that was not presented at Mr. Jones's trial. According to her, their father attempted to molest one of her sisters and her and put his penis inside another sister's mouth while the sister was sleeping. She asserted that, even though Mr. Jones was the youngest in the family, he was aware of the sexual contact between his father and sisters. Mr. Jones submitted affidavits from the two other sisters that his father molested or attempted to molest, verifying the oldest sister's claims. Mr. Jones's mother also submitted an affidavit, asserting that she discovered that her husband had molested her daughters when she went looking for missing kitchen knives and found them under her daughters' pillows. Although the daughters explained

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to her that they had the knives to protect themselves from her husband, she did not contact the police.

{¶37} Dr. Stinson also criticized Mr. Jones's lawyers for not eliciting details about the domestic violence that had occurred in Mr. Jones's childhood home. While Dr. Siddall testified that Mr. Jones's parents fought, he did not describe any incidents in detail. Dr. Stinson said that he learned that the father broke Mr. Jones's mother's shoulder and nose, hit her in the head with a frying pan, gave her black eyes, kicked her in the face, and swung an ax at a man with whom she was having an affair. He also learned that several of the children got "whoopings" that resulted in welts and bruises, that Mr. Jones's mother called Mr. Jones "stupid," and that, after Mr. Jones was discovered having sex with a boy from the neighborhood, admonished him that he was not allowed to become a "faggot."

{¶38} Dr. Stinson also criticized Mr. Jones's lawyers for allowing Mr. Jones's father to be portrayed as a decent role model, even though he was emotionally, physically, and sexually abusive to his wife and children, squandered family assets, and abused illicit drugs. He criticized Dr. Siddall for not accurately portraying Mr. Jones's mental health history and improperly conceding that Mr. Jones only made suicide attempts after he got in trouble for something. He also criticized Mr. Jones's lawyers for not submitting Mr. Jones's medical records, which would have documented Mr. Jones's long struggle with mental illness and verified that those issues began well before he came into contact with the criminal justice system. According to Dr. Stinson, this would have rebutted the State's implication that Mr. Jones exaggerated his symptoms in order to receive attention and enjoy more favorable treatment. The records would also have established that Mr. Jones's corrective eye surgery occurred when he was 17, not 12 as his mother had remembered or 2 or 3 as his sister had remembered. Dr. Stinson further criticized

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Mr. Jones's defense team for not recognizing that he has possible neurological or neuropsychological deficits that should have lead to an appropriate evaluation and for not using published psychological research to illustrate a connection between Mr. Jones's history and his anti-social behavior. According to Dr. Stinson, Mr. Jones's diagnosis should be schizoaffective disorder. Finally, he criticized Dr. Siddall for not spending enough time with family members or reviewing Mr. Jones's case. Dr. Stinson opined that it can take time for family members to become comfortable enough with an investigator to divulge deep family secrets such as sexual abuse.

{¶39} Although Dr. Siddall testified about Mr. Jones's background, he was not the primary investigator of Mr. Jones's family history. According to Dr. Siddall, that task was performed by Thomas Hrdy, a social worker. In his petition, Mr. Jones submitted an affidavit of a mitigation specialist, who asserted that Mr. Hrdy's mitigation investigation was inadequate. She criticized Mr. Hrdy for not spending much time with Mr. Jones's family members and for not meeting them in appropriate settings. According to the specialist, it is important to speak with family members separately, but some of the few hours Mr. Hrdy spent with Mr. Jones's family were while the family was watching football together. While Mr. Hrdy met individually with Mr. Jones's family members that day for 20-30 minutes each in an adjacent room, the specialist explained that it usually takes that much time just to describe to family members the role of a mitigation investigator and the purpose of the investigation. She also criticized Mr. Jones's defense team for not seeking appointment of a mitigation expert earlier, noting that Mr. Hrdy was not appointed till after voir dire had begun and did not begin any work on Mr. Jones's case until a week into the trial, preventing Mr. Jones's lawyers from asking relevant questions during jury selection. The specialist further noted that, while she usually spends 100 to 500

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hours conducting an investigation, Mr. Hrdy billed for only 38 hours and that only 10 of those were spent interviewing family members. According to the specialist, 10 hours is not enough time to gather specific anecdotal evidence for trial.

{¶40} The trial court rejected Mr. Jones's petition, finding that his lawyers presented a meaningful concept of mitigation even if Dr. Siddall and Mr. Hrdy failed to obtain all the information necessary for their evaluation. It noted that, except for the incest allegations, the affidavits of Mr. Jones's family members were merely cumulative of evidence that was presented at trial. It also noted that there were no allegations that Mr. Jones's father made sexual advances toward him and that Mr. Jones's sisters did not indicate how they knew that Mr. Jones was aware of his advances toward them. It further noted that Mr. Jones did not mention incest while making his unsworn statement to the jury and that, if anyone could have informed his defense team about that history, it was Mr. Jones.

{¶41} Regarding Dr. Siddall and Mr. Hrdy's investigation, the trial court determined that, contrary to the social worker's allegations that Mr. Hrdy did not spend enough time building a rapport with Mr. Jones's family members, the depth and detail of Dr. Siddall's testimony, which included intimate and potentially embarrassing facts about their family life, demonstrated that he and Mr. Hrdy had thoroughly interviewed Mr. Jones's family. It determined that Mr. Jones's lawyers were not ineffective just because his family members did not disclose the incest in his family until more than two years after his trial. It further determined that it was speculative to assume that the incest testimony would have had an effect on the jury's decision.

{¶42} Regarding whether Mr. Jones's lawyers should have investigated possible neurological damage, the trial court explained that, just because another expert had a different

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opinion than Dr. Siddall, it did not mean his lawyers were ineffective for relying on Dr. Siddall's opinion. Regarding whether Mr. Jones's lawyers should have requested a continuance to prepare for the mitigation phase, the court noted that, except for the allegations of incest, the investigators uncovered all of the potentially mitigating family history details. Finally, regarding whether Mr. Jones's lawyers should have submitted his medical records, it concluded that they were merely cumulative of Dr. Siddall's testimony.

{¶43} In his appellate brief, Mr. Jones has argued that his lawyers were ineffective because they failed to discover the history of incest and sexual abuse in his family, presented an incomplete psychological assessment, failed to secure enough time to discover such information, and did not discover or present documents corroborating his life history. Citing the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, he has argued that their mitigation investigation was deficient under prevailing professional standards.

{¶44} In *Strickland v. Washington*, 466 U.S. 668, 691 (1984), the United States Supreme Court held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." It explained that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* Accordingly, to the extent that Mr. Jones has argued that his lawyers' mitigation investigation was deficient; our focus is on whether it was reasonable under prevailing professional norms. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); see *State v. Herring*, 7th Dist. No. 08-MA-213, 2011-Ohio-662, at ¶83 ("Without a full picture of appellant's upbringing and family life, counsel could not have made an informed, strategic decision about what mitigation evidence to present to the jury.").

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{¶45} In *Wiggins*, the United States Supreme Court noted that it had long referred to the American Bar Association standards as "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). It also noted that, under the American Bar Association's guidelines for capital defense work, a lawyer should make efforts to discover all reasonably available mitigating evidence. *Id.* It characterized that rule as a "well-defined norm[]." *Id.*

{¶46} In *Bobby v. Van Hook*, __ U.S. __, 130 S. Ct. 13 (2009), the United States Supreme Court clarified that the American Bar Association standards are "'only guides' to what reasonableness means, not its definition." *Id.* at 17 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). It held that the Sixth Circuit incorrectly applied the American Bar Association's 2003 guidelines to evaluate whether Mr. Van Hook's lawyers acted reasonably in 1985 and incorrectly treated those guidelines as "inexorable commands." It left open the possibility that the 2003 guidelines could be applied more categorically regarding post-2003 representation so long as they reflected prevailing norms of practice and were not "so detailed that they would 'interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.'" *Id.* at ¶17 n.1 (quoting *Strickland*, 466 U.S. at 689); see also *id.* at 16 ("Restatements of professional standards . . . can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.") (quoting *Strickland*, 466 U.S. at 688).

{¶47} Although Dr. Siddall's invoice indicates that he began meeting with Mr. Jones's lawyers six weeks before trial, it is troubling that he spent less than eight hours conducting interviews and tests before Mr. Jones's trial began. It is more troubling that Mr. Hrdy, the social

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worker who Dr. Siddall said was responsible for interviewing Mr. Jones's family members, did not begin any work on his case until a week into the trial. The American Bar Association guidelines advise lawyers to begin "[t]he mitigation investigation . . . as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1023 (Summer 2003). The guidelines also advise lawyers to "devote substantial time to . . . choosing a jury most favorable to the theories of mitigation that will be presented." *Id.* at 1051. "Ideally, 'the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation." *Id.* at 1059 (quoting Andrea D. Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L. Rev. 695, 711 (1990)). If Mr. Jones's defense team did not do much mitigation investigation by the time the trial started, they could not have formed an appropriate trial or mitigation theory. See *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (concluding that counsel's sentencing phase representation fell short of professional standards, in part, because they "did not begin to prepare for that phase of the proceeding until a week before the trial.").

{¶48} In *State v. Herring*, 7th Dist. No. 08-MA-213, 2011-Ohio-662, Mr. Herring's lawyers failed to secure a mitigation specialist until two weeks before the trial, meaning that "no investigation was complete by the time counsel were choosing a jury." *Id.* at ¶50. At an evidentiary hearing on Mr. Herring's petition for post-conviction relief, his lawyers "conceded that they should have had an idea of what their mitigation theme would be before starting voir dire." *Id.* Their failure to form a mitigation theme before starting voir dire was one of the

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grounds that the Seventh District relied on in concluding that Mr. Herring's petition for post-conviction relief should have been granted. *Id.* at ¶90, 94. In this case, the trial court did not address the mitigation specialist's opinion, which Mr. Jones incorporated into his petition, that a mitigation expert should have at least three months to conduct an investigation before voir dire begins.

{¶49} This Court is also concerned about the amount of time Mr. Hrdy spent investigating Mr. Jones's background. While Mr. Hrdy uncovered most of the potentially mitigating circumstances of Mr. Jones's childhood, he did not learn about the sexual abuse that Mr. Jones allegedly suffered or the other incestuous conduct that allegedly occurred in his home. In light of the fact that it was Mr. Jones's rape of Ms. Yates that resulted in the capital specification, details about deviant sexual conduct that Mr. Jones endured or was exposed to as a youth would have been more relevant to his defense than his parent's divorce or his abnormal eye. The trial court failed to consider whether the weight the jury would have given to such facts was more significant than the weight they gave to the mitigating evidence that was presented.

{¶50} The trial court discounted the mitigation specialist's opinion that Mr. Hrdy did not spend enough time to build a rapport with Mr. Jones's family because Dr. Siddall's testimony was able to provide "many intimate and potentially embarrassing details about [Mr.] Jones's family life." In addition to details about Mr. Jones's grandparents and his deceased father, those details were that Mr. Jones's mother was separated from her sister as a child, that she grew up in foster care, that she had some history of alcohol abuse, that Mr. Jones's siblings battled drug and alcohol addictions, that his siblings had serious psychiatric disorders such as bipolar disorder and schizophrenia, and that there was domestic violence in their family home. The question, however, is not whether Dr. Siddall and Mr. Hrdy uncovered some intimate details of Mr.

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Jones's family life, but whether the investigation conducted by Mr. Jones's defense team was "extensive and generally unparalleled." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1022 (Summer 2003) (quoting Russell Stotler, Mitigation Evidence in Death Penalty Cases, The Champion, Jan./Feb. 1999, at 35).

{¶51} Mr. Hrdy began work on Mr. Jones's case on December 10, 2007. Mr. Jones's sentencing hearing began on January 10, 2008. Accordingly, by the time Mr. Hrdy began his investigation, he had only one month to review Mr. Jones's records, set up appointments with Mr. Jones and his family members, conduct interviews, and report his findings to Dr. Siddall and Mr. Jones's lawyers in enough time for them to prepare for trial. The American Bar Association guidelines recognize that it is "the role of lead counsel . . . to direct the work of the defense team in such a way that, overall, it provides high quality legal representation in accordance with . . . professional standards." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1002 (Summer 2003). The fact that Mr. Hrdy was able to spend only 10 hours interviewing Mr. Jones's family members and had to conduct some of those interviews while the family was gathered to watch football, therefore, can be attributed to Mr. Jones's lawyers' failure to have him begin working on the case earlier and their failure to request a continuance before the sentencing phase of the trial.

{¶52} The American Bar Association guidelines emphasize that counsel has a duty to thoroughly investigate a defendant's background "regardless of the expressed desires of a client." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1021 (Summer 2003). The fact that

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Mr. Jones, himself, could have told his lawyers about the sexual abuse he suffered as a child does not excuse their failure to conduct a complete investigation into "anything in the life of [the] defendant which might militate against the appropriateness of the death penalty for that defendant." *Id.* at 1022 (quoting *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988)). The Guidelines specifically note that "[f]amily and social history (including physical, sexual, or emotional abuse . . .)" is a topic that "[c]ounsel needs to explore." *Id.*

{¶53} Mr. Jones's oldest sister asserted that the mitigation investigator did not spend much time with her and did not ask her much about the family's background or for details about incidents. The sister who had been molested by Mr. Jones's father asserted that no one from Mr. Jones's defense team ever contacted her. Similarly, a nephew of Mr. Jones asserted in an affidavit that no one asked him about the family, even though one of the lawyers who represented Mr. Jones also represented him regarding an aggravated robbery charge. Mr. Jones's mother asserted that Mr. Jones's lawyers did not explain mitigation well and did not prepare her to testify.

{¶54} Considering the allegations presented by Mr. Jones and his family members and our serious concerns about the timing and extent of Mr. Jones's lawyers' mitigation investigation and the reasonable probability that, if the alleged incestuous conduct had been discovered, it would have substantially changed his lawyers' mitigation strategy, we believe that the trial court should have held a hearing on Mr. Jones's penalty-phase ineffective assistance of counsel claims. *State v. Calhoun*, 86 Ohio St. 3d 279, 283 (1999) ("[B]efore a hearing is granted, 'the petitioner bears the initial burden to submit evidentiary documents containing *sufficient operative facts* to demonstrate the lack of competent counsel *and* that the *defense was prejudiced* by counsel's ineffectiveness.'") (quoting *State v. Jackson*, 64 Ohio St. 2d 107, 112 (1980)); see *State v.*

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Tenace, 109 Ohio St. 3d 255, 2006-Ohio-2417, at ¶102-06 (explaining that evidence that defendant was made to watch the sexual abuse of his sister and that he was sexually abused himself were among the other factors that led the Court to conclude that death penalty was not appropriate). To the extent that Mr. Jones's first assignment of error is that the trial court should have held a hearing to determine whether his lawyers were ineffective regarding the penalty-phase of this trial, it is sustained.

JUROR MISCONDUCT

{¶55} Mr. Jones also argued in his petition that he was deprived of his right to a fair trial because the jury failed to follow the instructions of the trial court. He noted that the court told the jury that the only aggravating circumstance that it could consider in determining whether to recommend death was the rape of Ms. Yates. He submitted an affidavit from a lawyer who interviewed one of the jurors after the trial, asserting that the juror told him that the aggravating circumstances that compelled him to vote for death were the testimony of a woman who Mr. Jones previously raped and the fact that he thought Mr. Jones had lied about the crime. The juror also reportedly said that he had talked to his wife about the case, in violation of the court's instructions.

{¶56} Mr. Jones argued in his petition that the juror's statements demonstrate that the jury did not understand the concept of aggravating circumstances and the process of weighing them with mitigating circumstances. He further argued that they demonstrate that Ohio's death penalty scheme is defective and unconstitutional.

{¶57} The trial court rejected the lawyer's affidavit as hearsay. It also noted that, under Rule 606(B) of the Ohio Rules of Evidence, a juror may not testify "as to any matter or statement occurring during the course of the jury deliberations or to the effect of anything upon that or any

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other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . or concerning the juror's mental processes in connection therewith."

{¶58} In his appellate brief, Mr. Jones has acknowledged that Evidence Rule 606(B) sets forth Ohio's aliunde rule. *State v. Hessler*, 90 Ohio St. 3d 108, 123 (2000). The purpose of the rule is "to maintain the sanctity of the jury room and the deliberations therein." *Id.* The Ohio Supreme Court has explained that the rule "requires a foundation from nonjuror sources" and that the "information [alleging misconduct] must be from a source which possesses firsthand knowledge of the improper conduct." *Id.* (quoting *State v. Schiebel*, 55 Ohio St. 3d 71, 75 (1990)). Applying the rule, it has held that a criminal defendant "does not have a constitutional right to know the nature of jury discussions during deliberations." *State v. Mason*, 82 Ohio St. 3d 144, 167-68 (1998). While Mr. Jones has asked that we reconsider whether the aliunde rule violates his constitutional rights, we have no power to reconsider a decision of the Supreme Court. We conclude that the trial court correctly determined that Evidence Rule 606(B) prohibits Mr. Jones from relying on hearsay statements of a juror to support his claims for relief.

RES JUDICATA

{¶59} Mr. Jones also argued in his petition that the trial court incorrectly allowed a woman he raped in 1990 to testify about that incident. According to Mr. Jones, her testimony persuaded the jurors to convict him of rape and aggravated murder and to favor the death penalty. The trial court denied his claim because he had raised a similar one in his direct appeal.

{¶60} In his brief, Mr. Jones has argued that the claims are different because the one he made in his petition relied on evidence outside the record. The evidence Mr. Jones relied on were statements that a juror allegedly made after the trial about the effect the victim's testimony

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had on the jury. Mr. Jones has argued that the juror's statements overcome the presumption that the jury followed the trial court's instructions.

{¶61} As discussed above, the evidence that Mr. Jones submitted in support of his other acts claims is prohibited under Rule 606(B) of the Ohio Rules of Evidence. *State v. Hessler*, 90 Ohio St. 3d 108, 123 (2000). Under that rule, "any statement by the juror concerning a matter about which the juror would be precluded from testifying will not be received[.]" Evid. R. 606(B). We conclude that, because the trial court was prohibited from considering the affidavit submitted by Mr. Jones, it correctly determined that his other acts claims are barred by res judicata. *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967); *State v. McKnight*, 4th Dist. No. 07CA665, 2008-Ohio-2435, at ¶51 (concluding aliunde rule prohibited trial court from considering affidavit when evaluating defendant's post-conviction relief petition); *State v. Johnson*, 5th Dist. No. 2006-CA-04, 2007-Ohio-1685, at ¶59 (noting that incompetent evidence is not properly considered in post-conviction relief petition). To the extent that Mr. Jones's first assignment of error is that the trial court incorrectly denied his petition for post-conviction relief because it incorrectly allowed other acts evidence to be presented and because of juror misconduct, it is overruled.

NEUROLOGICAL TESTING

{¶62} Mr. Jones's second assignment of error is that the trial court incorrectly refused to grant him funds to hire a neurological expert. Mr. Jones moved for the funds because the mitigation specialist noted several factors from his background that suggested neuropsychological defects. He argued in his motion that Dr. Siddall's conclusion that he did not have any neuropsychological problems was unreasonable. He also argued that neurological testing is needed to support his post-conviction relief petition. The trial court denied his motion

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because Section 2953.21 does not provide a right to expert funding and because the psychological testing Dr. Siddall previously conducted did not suggest that Mr. Jones is mentally retarded.

{¶63} Mr. Jones has argued that, since Dr. Stinson recommended that he receive a neuropsychological evaluation, it is a violation of his constitutional rights to deny him funds to receive such testing. He has argued that he should have an equal right to present his post-conviction relief claims, even though he can not afford the tests himself.

{¶64} In *State v. Smith*, 9th Dist. No. 98CA007169, 2000 WL 277912 (Mar. 15, 2000), this Court reasoned that, because "the right to the assistance of experts stems from the right to counsel" and "a post-conviction petitioner has no constitutional right to counsel," "a post-conviction relief petitioner has no constitutional right to the funding of experts." *Id.* at *3. Mr. Jones has not persuaded us to reconsider our precedent. Accordingly, since Mr. Jones does not have a constitutional right to the post-conviction funding of experts, we conclude the trial court did not err when it denied his motion for neurological testing. Mr. Jones's second assignment of error is overruled.

DISCOVERY

{¶65} Mr. Jones's third assignment of error is that the trial court incorrectly denied his motion for discovery. This Court has repeatedly held that a petitioner does not have a right to discovery in a post-conviction relief proceeding under Section 2953.21 of the Ohio Revised Code, most recently in *State v. Craig*, 9th Dist. No. 24580, 2010-Ohio-1169, at ¶6. See also *State v. Smith,* 9th Dist. No. 24382, 2009-Ohio-1497, ¶18; *State v. Smith*, 9th Dist. No. 04CA008546, 2005-Ohio-2571, at ¶20; *State v. McNeill*, 9th Dist. No. 01CA007800, 2001 WL 948717 at *5 (Aug. 22, 2001). Mr. Jones has argued that the denial of discovery violates his

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constitutional rights. State collateral review, however, is not a constitutional right. *State v. Calhoun*, 86 Ohio St. 3d 279, 281 (1999). "Therefore, a petitioner receives no more rights than those granted by statute." *Id.* Mr. Jones's third assignment of error is overruled.

CONCLUSION

{¶66} The trial court correctly denied Mr. Jones's petition for post-conviction relief regarding his guilt-phase ineffective assistance of counsel claims, his other acts evidence claims, and his juror misconduct claims. It also correctly denied his motions for discovery and neurological testing. The court exercised improper discretion when it denied Mr. Jones's penalty phase ineffective assistance of counsel claims without holding a hearing to determine whether his lawyers began their mitigation phase investigation early enough and whether they allowed Dr. Siddall and Mr. Hrdy enough time to do a complete investigation into Mr. Jones's family life. The judgment of the Summit County Common Pleas Court is affirmed in part and reversed in part, and this matter is remanded to the trial court for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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(E). The Clerk of the Court of Appeals is

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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 equally to both parties.

CLAIR E. DICKINSON
FOR THE COURT

CARR, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶67} I concur in the judgment and most of the opinion. I write separately because I disagree with the extensive application of the American Bar Association Guidelines in the discussion of penalty-phase ineffective assistance of counsel.

{¶68} The majority correctly sets forth the standard this Court must apply – did the trial court abuse its discretion when it denied the petition without a hearing? I agree with the majority that the trial court abused its discretion in denying the petition without a hearing because Jones "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. In support of this conclusion, however, the majority relies exclusively on the ABA Guidelines in evaluating the conduct of defense counsel. The United States Supreme Court has made clear that the Guidelines "are 'only guides' to what reasonableness means, not its definition." *Bobby v. Van Hook* (2009), 130 S.Ct. 13, 17. The Court concluded "that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." Id. The majority's analysis of this issue, however, gives greater weight to the Guidelines than they are due.

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{¶69} Because Jones set forth sufficient operative facts to establish substantive grounds for relief, I agree with the majority's conclusion that the trial court abused its discretion in denying the petition without a hearing. The detailed analysis of this claim should be done in the first instance by the trial court, after a hearing, and without exclusive reliance on the ABA Guidelines, or any other guide for that matter, but rather on the requirement imposed by the United States Constitution – did trial counsel make objectively reasonable choices? *Van Hook*, 130 S.Ct. at 17.

WHITMORE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶70} I concur in judgment only. Although I agree with the outcome reached in the lead opinion, I agree with Judge Carr's position that it relies too heavily upon the American Bar Association Guidelines. In my view, reliance upon the Guidelines should be restricted to those few cases where there is little or no primary authority available. As such, I concur in the judgment only.

APPEARANCES:

KIMBERLY RIGBY and ROBERT BARNHART, Assistant State Public Defenders, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.