No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2021

ROBERT BETHEL,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition of Certiorari to The Supreme Court of Ohio

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SLIP OPINION NO. 2022-OHIO-783

THE STATE OF OHIO, APPELLEE, *v.* BETHEL, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Bethel*, Slip Opinion No. 2022-Ohio-783.]

Criminal law—Successive postconviction motion—Suppression of evidence—R.C. 2953.23(A)(1)(b)—Defendant seeking to assert a claim under Brady v. Maryland *is not required to show that he could not have discovered suppressed evidence by exercising reasonable diligence—Defendant must establish that allegedly suppressed evidence is material—Motion for new trial—Until a trial court grants leave to file a motion for a new trial, motion for a new trial is not properly before the court—Crim.R. 33 prescribes the circumstances under which a defendant may seek leave to file a motion for a new trial alleging that he was unavoidably prevented from discovering evidence but does not give a deadline by which leave must be sought—Trial court does not have discretion to deny leave to file a motion for a new trial based on failure to seek leave within a reasonable time after discovering new evidence.*

(No. 2020-0648—Submitted September 8, 2021—Decided March 22, 2022.)
APPEAL from the Court of Appeals for Franklin County,
No. 19AP-324, 2020-Ohio-1343.

FISCHER, J.

I. INTRODUCTION

{¶ 1} In 2003, appellant, Robert W. Bethel, was sentenced to death after being convicted of the aggravated murders of James Reynolds and Shannon Hawk, who were shot to death in a secluded field in Columbus in 1996. Evidence showed that Bethel and another man, Jeremy Chavis, had killed Reynolds to prevent him from testifying in the murder trial of one of their friends. Hawk was Reynolds's girlfriend and happened to be with him at the time.

{¶ 2} In 2018, Bethel filed a motion for leave to file a motion for a new trial under Crim.R. 33(B), claiming that in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the prosecution had suppressed an investigation report that was created in 2001. In a second filing, Bethel both moved for a new trial and submitted a successive petition for postconviction relief under R.C. 2953.23. In both filings, Bethel argued that the investigation report showed that Chavis had committed the murders with Chavis's cousin, Donald Langbein.

{¶ 3} The trial court denied Bethel's motion for leave and the motion for a new trial and found that it lacked jurisdiction to consider his successive postconviction petition. The Tenth District Court of Appeals affirmed. We accepted jurisdiction over Bethel's discretionary appeal and now affirm.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Trial and direct appeal

{¶ 4} In 1995, Reynolds saw Tyrone Green shoot someone to death during a burglary. The shooting led to Green's indictment for aggravated murder with death

specifications. During discovery, Green learned that Reynolds had been identified as a potential witness against him.

{¶ 5} Green was a member of a street gang, along with Bethel, Chavis, and Langbein. Langbein testified at Bethel's trial that he and Bethel had been concerned about witnesses testifying against Green and had discussed "tak[ing] steps to get rid of them." After Reynolds was killed, Green pleaded guilty to a reduced charge of manslaughter.

{¶ 6} The main evidence tying Bethel to the murders of Reynolds and Hawk came from three sources. The most significant evidence was a confession Bethel had proffered as part of a plea deal to avoid the death penalty. In the proffer, Bethel admitted that he and Chavis had lured Reynolds and Hawk to the secluded field to kill them. He said that he used a 9 mm firearm and that Chavis used a shotgun. The plea deal was contingent on Bethel's willingness to testify against Chavis, and when Bethel later refused to do so, the deal was voided and his confession was used against him. Bethel testified at his own trial and denied killing Reynolds and Hawk. He claimed that he and Chavis were at Bethel's mother's house when Reynolds and Hawk were believed to have been killed.

{¶ 7} Next, Langbein gave testimony that was consistent with Bethel's proffered confession. When he was facing unrelated charges in 2000, Langbein told police and Bureau of Alcohol, Tobacco, and Firearms ("ATF") agents that he had information about the Reynolds and Hawk murders. At Bethel's trial, Langbein testified that on the evening of the murders, he saw Reynolds and Hawk riding with Bethel and Chavis in Bethel's car. And he testified that a couple of weeks after the murders, Bethel told him that he had shot Reynolds and Hawk multiple times with a 9 mm handgun and that Chavis had used a shotgun. Those details were consistent with the autopsies; Hawk had four bullet wounds and Reynolds had nine bullet wounds and one wound caused by a shotgun slug fired into his back.

{¶ 8} And finally, Bethel's former girlfriend, Theresa Campbell, testified that sometime after the murders, Bethel told her that he had shot Reynolds and Hawk. She testified that Bethel told her that Chavis was with him at the time of the murders but that Chavis started to cry and went to the car after he saw what Bethel had done.

{¶ 9} After finding Bethel guilty of two counts of aggravated murder with death specifications, a jury recommended the death penalty for each count, which the trial court imposed. We affirmed the convictions and death sentences on direct appeal. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150.

B. Postconviction proceedings

1. Bethel's first postconviction petition

{¶ 10} Bethel filed a timely petition for postconviction relief under R.C. 2953.21 in February 2005. The trial court dismissed the petition, and the court of appeals affirmed. *State v. Bethel*, 10th Dist. No. 07AP-810, 2008-Ohio-2697, ¶ 67. We did not accept jurisdiction over Bethel's discretionary appeal. 122 Ohio St.3d 1502, 2009-Ohio-4233, 912 N.E.2d 107.

2. Bethel's first motion for leave to file a motion for a new trial

{¶ 11} In 2009, Bethel filed a motion for leave to file a motion for a new trial, along with the new-trial motion itself. He alleged that the state had violated *Brady* by suppressing an investigation report created in 2000 containing information that an ATF agent had received about Langbein. Bethel alleged that he obtained a copy of the report in 2008 through a public-records request to the Columbus Police Department.

{¶ 12} According to the report, an inmate at the Franklin County jail, Shannon Williams, said that Langbein (who had been in the jail) told him that he had been "involved in a homicide with an individual who is now incarcerated at the Federal Penn., Ashland, KY, where the victim was shot seventeen times. Williams added that Langbein said that the other individual who was arrested was the driver following the homicide." Bethel argued that Chavis was incarcerated in a federal

prison in Kentucky in 2000, so Langbein's statement to Williams amounted to a confession that Langbein—not Bethel—had committed the murders with Chavis.

{¶ 13} The trial court denied Bethel's motions, and the court of appeals affirmed. *State v. Bethel*, 10th Dist. No. 09AP-924, 2010-Ohio-3837. The court of appeals noted, among other things, that it was "speculative as to whether Langbein's statements [were] referring to the homicides at issue" because he referred to only one victim and Reynolds and Hawks were not shot 17 times, either individually or collectively. *Id.* at ¶ 21. We did not accept jurisdiction over Bethel's discretionary appeal. 132 Ohio St.3d 1513, 2012-Ohio-4021, 974 N.E.3d 112.

3. Bethel's second motion for leave to file a motion for a new trial and successive postconviction petition

{¶ 14} In 2018, Bethel filed a second motion for leave to file a motion for a new trial along with a combined new-trial motion and successive postconviction petition. Bethel argued that the state had suppressed another investigation report—called "Summary 86"—that he said also implicated Langbein in the murders of Reynolds and Hawk. Summary 86 recounts a 2001 interview of Ronald Withers, who was incarcerated in the Franklin County jail at the time. Withers told investigators that while they were both in the jail, Chavis told him that he had been involved in a murder but that "when [Chavis] shot the individual [the victim] was already dead." Summary 86 states that "Chavis told Withers that his cousin was the other shooter, and his cousin is also incarcerated."

{¶ 15} The trial court found that it lacked jurisdiction over Bethel's successive postconviction petition and denied Bethel's motion for leave and motion for a new trial. The court of appeals affirmed. We accepted jurisdiction over Bethel's appeal. 159 Ohio St.3d 1487, 2020-Ohio-4232, 151 N.E.3d 633. Amicus curiae, the Innocence Network, has filed a merit brief urging this court to reverse the judgment of the court of appeals.

III. ANALYSIS

A. Res judicata

{¶ 16} The state argues that we need not address Bethel's propositions of law because his *Brady* claim is res judicata. The state contends that Bethel received Summary 86 in 2008 when the Columbus Police Department produced more than 1,200 pages of public records—and that Bethel therefore could have brought this *Brady* claim in 2009 when he pursued his other *Brady* claim based on Shannon Williams's allegedly suppressed jailhouse statement. Bethel has not specified when he discovered Summary 86, but his counsel leaves open the possibility that it was produced in 2008.

{¶ 17} Res judicata generally bars a convicted defendant from litigating a postconviction claim that was raised or could have been raised at trial or on direct appeal. *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus. The state does not argue that Bethel could have raised this *Brady* claim at trial or on direct appeal, but it relies on several cases in which Ohio courts of appeals applied res judicata to prevent a convicted defendant from raising postconviction issues in a piecemeal fashion. *See, e.g.*, *State v. Bene*, 11th Dist. Lake Nos. 2019-L-070, 2019-L-071, and 2019-L-072, 2020-Ohio-1560, ¶ 13-14.

{¶ 18} The state, in raising the doctrine of res judicata, has the burden of showing that Bethel could have asserted this *Brady* claim in 2009. *See In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 22. The state asserts only that it is "very likely" that Bethel received Summary 86 in 2008. And it argues that Bethel has not *disproved* that he could have presented this *Brady* claim in 2009. But Bethel is not required to make that showing. We hold that the state has not met its burden to show that res judicata bars Bethel's claim.

B. The *Brady* standard

{¶ 19} In *Brady*, the Supreme Court of the United States held that a state violates the Fourteenth Amendment to the United States Constitution when it

"withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 565 U.S. 73, 75, 132 S.Ct. 627, 181 L.Ed.2d 571 (2012) (summarizing *Brady*'s holding). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A different result is reasonably probable "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Id*. at 434, quoting *Bagley* at 678.

C. The successive postconviction petition

1. Legal standard and standard of review

{¶ 20} Bethel's petition for postconviction relief was successive and untimely under R.C. 2953.21(A). Therefore, given the substance of Bethel's allegations, for the trial court to have subject-matter jurisdiction to consider the petition, Bethel had to show (1) that he was "unavoidably prevented from discovery of the facts" upon which his claim relies and (2) by clear and convincing evidence, that no reasonable fact-finder would have found him guilty or eligible for the death sentence but for the constitutional error at trial. R.C. 2953.23(A)(1). *See State v. Apanovitch*, 155 Ohio St.3d 358, 2018-Ohio-4744, 121 N.E.3d 351, ¶ 36. We review de novo whether the trial court had subject-matter jurisdiction to entertain Bethel's petition. *Apanovitch* at ¶ 24.

2. "[U]navoidably prevented from discovery of the facts"

a. Reasonable diligence

{¶ 21} For the trial court to have jurisdiction to entertain the *Brady* claim alleged in the successive postconviction petition, Bethel first had to establish that he was "unavoidably prevented from discovery of the facts" on which he relies. R.C. 2953.23(A)(1)(a). To meet this standard, courts in Ohio have previously held that a defendant ordinarily must show that he was unaware of the evidence he is relying on and that he could not have discovered the evidence by exercising reasonable diligence. *See State v. Harrison*, 8th Dist. Cuyahoga No. 105909, 2018-Ohio-1396, ¶ 6.

{¶ 22} In concluding that Bethel did not meet his burden, the trial court found that Bethel had ample reason and opportunity to discover what Withers might have known and what Chavis might have said about the murders. The trial court first noted that there was no evidence that Withers or his attorney communicated or did not communicate with Bethel's legal team about what Chavis had said. However, based on the fact that the state had disclosed Withers as a potential witness at trial, the trial court concluded that the state had "invited Bethel's counsel to interview Withers." The court further found that Bethel and his legal team knew that Chavis would have information relevant to Bethel's case and that they "were not unavoidably prevented from discovering what [Chavis] might say." In sum, the trial court found that Bethel was not unavoidably prevented from discovering the substance of Summary 86, because his attorneys could have uncovered the information by talking to Withers or Chavis.

{¶ 23} The court of appeals used similar reasoning, holding that a "defendant cannot claim evidence was undiscoverable simply because no one made efforts to obtain the evidence sooner." 2020-Ohio-1343, ¶ 20. The court stated that "Bethel was not prevented by the state from discovering Chavis' statements to Withers." *Id.* at ¶ 25. It reasoned that Bethel should have suspected that Withers had potentially

relevant information because Withers's name was on the prosecution's pretrial witness list and Bethel and his counsel had communicated with Chavis before trial. *Id.* The court of appeals concluded, in other words, that Bethel should have conducted his own investigation to discover what Chavis had said to Withers.

{¶ 24} The lower courts placed a burden on Bethel that is inconsistent with *Brady*. In *Banks v. Dretke*, 540 U.S. 668, 695, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004), the Supreme Court of the United States explained that criminal defendants have no duty to "scavenge for hints of undisclosed *Brady* material." Since the decision in *Banks*, multiple federal circuit courts and other state supreme courts have repudiated the imposition of any due-diligence requirement on defendants in *Brady* cases. *See, e.g.*, *Dennis v. Secy., Pennsylvania Dept. of Corr.*, 834 F.3d 263, 290-293 (3d Cir.2016); *Amado v. Gonzalez*, 758 F.3d 1119, 1136-1137 (9th Cir.2014); *United States v. Tavera*, 719 F.3d 705, 711-712 (6th Cir.2013); *State v. Wayerski*, 2019 WI 11, 385 Wis.2d 344, 922 N.W.2d 468, ¶ 51; *People v. Bueno*, 218 CO 4,409 P.3d 320, ¶ 39; *State v. Reinert*, 2018 MT 111, 391 Mont. 263, 419 P.3d 662, ¶ 17, fn. 1; *People v. Chenault*, 495 Mich. 142, 152, 845 N.W.2d 731 (2014).

{¶ 25} It is well settled that a defendant is entitled to rely on the prosecution's duty to produce evidence that is favorable to the defense. *See Kyles*, 514 U.S. at 432-433, 115 S.Ct. 1555, 131 L.Ed.2d 490. A defendant seeking to assert a *Brady* claim therefore is not required to show that he could not have discovered suppressed evidence by exercising reasonable diligence. *See Strickler*, 527 U.S. at 282-285, 119 S.Ct. 1936, 144 L.Ed.2d 286. We hold that when a defendant seeks to assert a *Brady* claim in an untimely or successive petition for postconviction relief, the defendant satisfies the "unavoidably prevented" requirement contained in R.C. 2953.23(A)(1)(a) by establishing that the prosecution suppressed the evidence on which the defendant relies.

b. Satisfying Brady's second prong

{¶ 26} Although the state concedes that the holding just stated is correct, it also argues that Bethel failed to satisfy *Brady*'s second prong (i.e., suppression by the state), because he has not shown that he did not know about the evidence contained in Summary 86 at the time of his trial. The state cites *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), in which the court stated that *Brady* claims involve the discovery of information that "had been known to the prosecution *but unknown to the defense*." (Emphasis added.) The state contends that Bethel's claim fails because he "failed to provide evidentiary documentation indicating [his] actual unawareness" of the evidence he is relying on.

{¶ 27} The state exaggerates Bethel's burden. Two of Bethel's former attorneys provided affidavits stating that Bethel and his legal team did not know about Summary 86 before Bethel's trial. The state provides no support for its claim that these affidavits were insufficient or that Bethel needed additional evidence to prove that he was unaware of the report before trial.

{¶ 28} The state's argument also is problematic because it misconstrues the evidence at issue. The state argues that Bethel himself necessarily knew the extent of Langbein's involvement, because Bethel's own alibi placed Bethel with Chavis at the time of the murders and the information from Shannon Williams would have made Bethel the getaway driver. But Bethel's knowledge of Langbein's involvement is not the question; the question is whether Bethel knew about Withers's statement concerning what Chavis allegedly had said while in jail.

{¶ 29} In sum, the state argues that the prosecution did not suppress the Withers information, because Bethel "could have learned of the information through other means." The state contends that the "defense knew *something*, and the defense was not limited to being a passive receptor of whatever discovery was provided by the prosecution." (Emphasis sic.) This is the state's reasonable-diligence

requirement dressed in different clothing. We reject the state's arguments for the reasons discussed above.

{¶ 30} We conclude that the documents Bethel submitted with his successive postconviction petition establish a prima facie claim that the prosecution suppressed Summary 86.

3. No reasonable fact-finder would have found him guilty or eligible for the death sentence but for the constitutional error at trial

{¶ 31} Bethel's postconviction petition faces an additional jurisdictional hurdle: under R.C. 2953.23(A)(1)(b), he must show by clear and convincing evidence that no reasonable fact-finder would have found him guilty or eligible for the death sentence but for constitutional error at trial. This question goes to the heart of *Brady*'s third prong, which requires Bethel to show that " 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles*, 514 U.S. at 433, 115 S.Ct. 1555, 131 L.Ed.2d 490, quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375, 87 L.Ed.2d 481.

{¶ 32} The *Brady* standard does not require Bethel to show that disclosure of the Withers information would have resulted in his acquittal. *See Kyles* at 434. Nor does it require him to show that "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been [sufficient evidence] left to convict," *id*. at 434-435. Rather, Bethel must prove that "in the context of the entire record," *Agurs*, 427 U.S. at 112, 96 S.Ct. 2392, 49 L.Ed.2d 342, suppression of the Withers information " 'undermines confidence in the outcome of the trial,' " *Kyles* at 434, quoting *Bagley* at 678.

{¶ 33} The trial court found that Bethel was not prejudiced by his lack of access to the Withers information prior to trial. The court characterized Summary 86 as a "cryptic double hearsay statement" that Bethel could not have used directly at trial under the Rules of Evidence. The court concluded that "Summary 86 would not have changed anything," because Bethel had confessed to killing Reynolds and

Hawk. The court of appeals agreed that the Withers information is immaterial for *Brady* purposes. 2020-Ohio-1343 at ¶ 26-28. That court suggested that the theory Summary 86 supports—that Chavis and Langbein murdered Reynolds and Hawk—is untenable in view of Bethel's own inconsistent statements (a confession and an alibi), both of which placed Bethel with Chavis at the time of the murders. *Id*. at ¶ 27.

{¶ 34} Suppressed evidence must be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555, 131 L.Ed.2d 490. And the materiality of suppressed evidence must be viewed "in the context of the entire record." *Agurs* at 112. Therefore, in examining the materiality of the Withers information, we also must consider the pretrial statement that Shannon Williams made to investigators, which the prosecution also allegedly suppressed. The question is whether we can have confidence in the jury's verdict even assuming that the prosecution suppressed the information Williams and Withers had provided to investigators. *See Kyles* at 434. To answer that question, we must examine how Bethel might have benefited from that information at trial.

{¶ 35} To start, Bethel could not have used the Withers information as direct evidence that Langbein (and not Bethel) murdered Reynolds and Hawk. The statements in Summary 86, which report what Withers had said to investigators, are double hearsay. And although Withers affirmed his statements in an affidavit and could have testified at trial, the statements are still hearsay because Withers merely repeated what Chavis had allegedly told him. Bethel argues that the Withers information would have undermined the state's case against him, but he does not identify any hearsay exception that would have allowed Chavis's purported statements to Withers to be introduced for the truth of the matter asserted. *See* Evid.R. 801, 803, 804. And Summary 86 could not have been used to impeach Langbein, because it does not involve a prior statement made by Langbein.

{¶ 36} Bethel nevertheless argues that he could have used the Withers information in his cross-examination of one of the investigators to attack the thoroughness of the investigation. But Bethel has not shown that such questioning would have " 'seriously undermine[d],' " *Eakes v. Sexton*, 592 Fed.Appx. 422, 427-428 (6th Cir.2014), quoting *United States v. Weintraub*, 871 F.2d 1257, 1262 (5th Cir.1989), any investigator's credibility in view of the strong evidence that corroborated the conclusion reached during the investigation that the evidence—most significantly, Bethel's confession—showed that Bethel had committed the murders.

{¶ 37} Nor has Bethel shown that the information from Williams would have bolstered the significance of the Withers information or detracted from the clear evidence of Bethel's guilt. Even if Bethel had called Williams to testify in an effort to impeach Langbein, Williams would not have said that Langbein had confessed to killing Reynolds and Hawk. It was not clear in the report relaying Williams's statement that Langbein was talking to Williams about the murders of Reynolds and Hawk. Bethel's confession, in contrast, included details about the types of firearms that were used, which were consistent with the autopsies of Reynolds and Hawk. And Bethel did not talk only to Langbein and investigators about the fact that he had killed Reynolds and Hawk; he also confessed to Campbell.

{¶ 38} Bethel argues that if he had possessed the information from Withers and Williams before his trial, he would not have proffered the confession. He contends that he falsely confessed to murdering Reynolds and Hawk to avoid the death penalty only because he had no viable defense on the eve of trial. This argument invites us to stray from the main question of *Brady*'s third prong—i.e., whether Bethel received a fair trial. *See Agurs*, 427 U.S. at 108, 96 S.Ct. 2392, 49 L.Ed.2d 342. Bethel is not arguing here that the Withers and Williams information would have been useful to his defense. Instead, he is arguing that his ignorance of

the information induced him to lie about committing the murders. This tenuous theory does not support Bethel's claim that he did not receive a fair trial.

{¶ 39} Finally, Bethel argues that we must separately analyze whether the suppression of the Withers and Williams information undermines the decision sentencing him to death. Such an inquiry is appropriate. *See* R.C. 2953.23(A)(1)(b) (requiring a petitioner to show that no reasonable fact-finder would have found him guilty at trial *or* eligible for the death sentence but for constitutional error at the sentencing hearing). But Bethel fails to demonstrate how he could have used the Withers and Williams information during the sentencing phase of his trial. To the extent that he is arguing that the information would have created residual doubt about his guilt, that purpose would not have been proper under Ohio law. *See State v. McGuire*, 80 Ohio St.3d 390, 686 N.E.2d 1112 (1997), syllabus.

{¶ 40} At bottom, the Withers and Williams information has limited probative value in the context of the entire record, and Bethel's opportunities to use that information would have been limited. Bethel, again, was convicted on the weight of his own proffered confession, Langbein's testimony, and Campbell's testimony. 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, at ¶ 101. We hold that Bethel has not shown by clear and convincing evidence that no reasonable fact-finder would have found him guilty or eligible for the death sentence but for constitutional error at trial. Therefore, the trial court lacked jurisdiction to entertain Bethel's successive postconviction petition.

D. The motion for a new trial

{¶ 41} The trial court also denied Bethel's motion for a new trial and then denied his motion for leave to file that motion. That approach was incorrect: until a trial court grants leave to file a motion for a new trial, the motion for a new trial is not properly before the court. *State v. Brown*, 8th Dist. Cuyahoga No. 95253, 2011-Ohio-1080, ¶ 14. The trial court should not have purported to deny Bethel's new-

trial motion on its merits, because the court never permitted Bethel to file that motion. The merits of Bethel's new-trial motion, therefore, is not before us.

E. The motion for leave to file a motion for a new trial

1. R.C. 2953.21(K)

{¶ 42} R.C. 2953.21 authorizes a convicted person to challenge his conviction or sentence by filing a petition for postconviction relief. R.C. 2953.21(K) provides that except for an appeal, "the remedy set forth in [R.C. 2953.21] is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case." The state argues that a motion for a new trial is a "collateral challenge," so Bethel's motion for leave to file a motion for a new trial is improper and must be treated as a successive postconviction petition—which as just discussed, the trial court lacked jurisdiction to entertain.

{¶ 43} The state argues that the issue is whether a motion for a new trial filed under Crim.R. 33 is a "collateral challenge to the validity of a conviction or sentence in a criminal case," R.C. 2953.21(K). The term "collateral challenge" is not defined by statute, so we must determine what that term meant when the exclusive-remedy provision was enacted. *See State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, 30 N.E.3d 918, ¶ 39 ("In the absence of a definition of a word or phrase used in a statute, words are to be given their common, ordinary, and accepted meaning"). The exclusive-remedy provision of R.C. 2953.21 was first enacted in 1995. *See* former R.C. 2953.21(I), Am.Sub.S.B. No. 4, 146 Ohio Laws, Part IV, 7815, 7825.

{¶ 44} *Black's Law Dictionary* 261 (6th Ed.1990) defined a similar term, "collateral attack":

> With respect to a judicial proceeding, an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it. *May v. Casker*, 188 Okla. 446, 110 P.2d 287, 289. An attack on a

> judgment in any manner other than by action or proceeding, whose very purpose is to impeach or overturn the judgment; or, stated affirmatively, a collateral attack on a judgment is an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment. *Travis v. Travis' Estate*, 79 Wyo. 329, 344 P.2d 508, 510.

By comparison, "direct attack" was defined as

> an attempt, for sufficient cause, to have it annulled, reversed, vacated, corrected, declared void, or enjoined, in a proceeding instituted for that specific purpose, such as an appeal, writ of error, bill of review, or injunction to restrain its execution; distinguished from a collateral attack, which is an attempt to impeach the validity or binding force of the judgment or decree as a side issue or in a proceeding instituted for some other purpose. *Ernell v. O'Fiel*, Tex.Civ.App., 441 S.W.2d 653, 655. A direct attack on a judicial proceeding is an attempt to void or correct it in some manner provided by law.

Id. at 459. These definitions show that a motion for a new trial is not a collateral challenge—a motion for a new trial is an attempt to void or correct the judgment as provided by law under Crim.R. 33. Bethel's motion for leave, which Bethel filed in his criminal case, is not prohibited under R.C. 2953.21(K) and is permitted under Crim.R. 33. *See State v. Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, ¶ 13 (stating that a motion to withdraw a plea filed under Crim.R. 32.1 is not a collateral challenge, because it is filed in the underlying criminal case and attacks the withdrawal of the plea). The state's arguments to the contrary are not persuasive.

{¶ 45} The state first suggests that Bethel's motion constitutes a collateral challenge simply because it was filed many years after his conviction and sentence. The state points to *State v. Frase*, 87 Ohio St.3d 1412, 717 N.E.2d 345 (1999), in which this court referred to a motion for leave to file an untimely motion for a new trial as "a civil, post-conviction matter." And it points to *State v. Cowan*, 8th Dist. Cuyahoga No. 108394, 2020-Ohio-666, ¶ 9, citing *State v. McConnell*, 2d Dist. Montgomery No. 24315, 2011-Ohio-5555, ¶ 18, in which the court described a delayed new-trial motion as a collateral attack. *Frase* was not a decision on the merits analyzing R.C. 2953.21(K); it was a dismissal entry explaining why an appellant had no right to seek to file a delayed appeal. And the use of the word "collateral" to describe the new-trial motion in *Cowan* was similarly unsupported. These lone references, therefore, are unpersuasive.

{¶ 46} The state next argues that we should follow *State v. Reynolds*, 79 Ohio St.3d 158, 679 N.E.2d 1131 (1997), in which this court treated a convicted defendant's motion to "Correct or Vacate Sentence" as a postconviction petition. We held that that motion—which was not filed under a specific criminal rule—should have been analyzed as a postconviction petition because it had the characteristics of a request for relief under R.C. 2953.21. *Id*. at 160. The state argues that Bethel's new-trial motion also fits the R.C. 2953.21 mold, so it too should be analyzed as a collateral challenge under the statute. But in *Bush*, 96 Ohio St.3d 235, 2002-Ohio-3993, 773 N.E.2d 522, ¶ 10, we explained that *Reynolds* was unique because it involved an "irregular 'no name' motion[]" in search of an identity. We determined that it was proper to categorize the motion as a postconviction petition in the absence of any other obvious standard for analyzing it. *Id*. at ¶ 10. We thus limited *Reynolds* to its facts. *Id*. at ¶ 10-11.

{¶ 47} The state, in turn, argues that *Bush* was wrongly decided. Primarily, the state contends that the different-proceeding/same-proceeding distinction breaks down because a postconviction petition—which clearly is a collateral challenge—

also is filed within an existing criminal case. The state misinterprets the significance of this filing practice. It is well settled that a postconviction petition initiates a separate civil proceeding notwithstanding the use of an existing criminal-case number. *See State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). *See also* former R.C. 2309.04 (when R.C. 2953.21 was enacted in 1965, a case-initiating pleading was called a "petition"); Am.H.B. 1201, 133 Ohio Laws 3017, 3020 (repealing former R.C. 2309.04 in 1971 following the adoption of the Rules of Civil Procedure).

{¶ 48} The state also relies on *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 17, in which we held that an application for reopening an appeal under App.R. 26(B) is "a distinct collateral postconviction process separate from the original appeal." Here again, the state tries to undermine the different-proceeding/same-proceeding distinction by pointing to a collateral challenge that is filed under an existing case number. But the state again overstates the significance of the filing mechanics. *Morgan* involved a special type of postconviction relief (a claim alleging ineffective assistance of appellate counsel) that does not fall under R.C. 2953.21. *Id*. at ¶ 6. *See State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). App.R. 26(B) establishes by rule what the statute does not provide. *Morgan* at ¶ 6-9. *Morgan* therefore is consistent with the above analysis: A request for postconviction relief may be filed under an existing case number and yet be a separate proceeding.

{¶ 49} Finally, the state argues that we should look to *People v. Wiedemer*, 852 P.2d 424 (Colo.1993), for guidance. But there is no need for us to do so because *Wiedemer* did not involve a motion for leave to file a motion for a new trial and it is clear that under Ohio law, a motion for leave to file a motion for a new trial is not a collateral challenge under R.C. 2953.21(K).

{¶ 50} Bethel's motion for leave to file a motion for a new trial is not barred under R.C. 2953.21(K).

2. The reasonable-time filing requirement

{¶ 51} Another preliminary issue is whether Bethel waited too long to file his motion for leave. As noted above, Bethel's counsel acknowledges that Bethel may have obtained Summary 86 in 2008. At the latest, Bethel discovered the document in May 2017, when Withers provided him with an affidavit reiterating the statement Withers had made to investigators. This means that there was a delay of at least 16 months—and perhaps much longer—between the discovery of Summary 86 and the filing of the motion for leave.

{¶ 52} The court of appeals held that it was within the trial court's discretion to deny Bethel's motion for leave because this delay was unreasonable. 2020-Ohio-1343 at ¶ 24. In so holding, the court of appeals followed a rule adopted by most other courts of appeals—that under Crim.R. 33(B), a defendant seeking leave to file a motion for a new trial must do so within a reasonable period of time after discovering the new evidence on which he relies. *Id*. at ¶ 19. *See also State v. Thomas*, 2017-Ohio-4403, 93 N.E.3d 227, ¶ 8 (1st Dist.) (collecting cases).

{¶ 53} Crim.R. 33(B) does not give a deadline by which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence. The rule states only that a defendant must show that he was "unavoidably prevented from the discovery of the evidence upon which he must rely." Courts nevertheless have concluded that a convicted defendant must file a motion for leave within a reasonable period of time after discovering the new evidence, to prevent defendants from deliberately delaying filing the motion "in the hope that witnesses would be unavailable or no longer remember the events clearly, if at all, or that evidence might disappear." *State v. Stansberry*, 8th Dist. Cuyahoga No. 71004, 1997 WL 626063, *3 (Oct. 9, 1997). Bethel offers several reasons why we should reject this rule. He argues that the rule discourages defendants from conducting full investigations before seeking a new trial, ignores the fact that defendants often lack the resources necessary to seek relief promptly after discovering new evidence, and wrongly

assumes that defendants will delay filing a motion simply to gain an evidentiary advantage at a potential new trial.

{¶ 54} We need not weigh the pros and cons of requiring defendants to seek leave to file a delayed motion for a new trial within a reasonable time after discovering new evidence. We instead must examine whether the Rules of Criminal Procedure permit trial courts to impose this additional hurdle on criminal defendants. In doing so, we apply general principles of statutory construction. *See State ex rel. Office of Montgomery Cty. Pub. Defender v. Rosencrans*, 111 Ohio St.3d 338, 2006-Ohio-5793, 856 N.E.2d 250, ¶ 23. Those principles instruct that our role is to apply the language in Crim.R. 33(B) as written "without adding criteria not supported by the text." *State v. Taylor*, 161 Ohio St. 3d 319, 2020-Ohio-3514, 163 N.E.3d 486, ¶ 9.

{¶ 55} Crim.R. 33(B), again, does not establish a timeframe in which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence. Courts have justified imposing a reasonable-time filing requirement by relying on Crim.R. 1(B) and 57(B). *See, e.g., Thomas* at ¶ 8; *State v. York*, 2d Dist. Greene No. 2000 CA 70, 2001 WL 332019, *3-4 (Apr. 6, 2001). Neither of those rules supports the imposition of a reasonable-time filing requirement.

{¶ 56} Crim.R. 1(B) provides that the Rules of Criminal Procedure "shall be construed and applied to secure the fair, impartial, speedy, and sure administration of justice, simplicity in procedure, and the elimination of unjustifiable expense and delay." Requiring a defendant to seek leave to file a motion for new trial within a reasonable period of time after discovering the new evidence could help to further some of these objectives, most notably the elimination of delay. But that does not mean that Crim.R. 1(B) authorizes a court to narrow a defendant's opportunity to seek a new trial. Crim.R. 1(B) instructs courts to *construe* Crim.R. 33(B)—that is, to explain its meaning. In requiring defendants to seek leave within a reasonable time after discovering new evidence, courts have not construed Crim.R. 33(B); they have

simply added a requirement that makes sense to them. Crim.R. 1(B) does not authorize the creation of a new requirement that has no foundation within Crim.R. 33(B) itself.

{¶ 57} Crim.R. 57(B) also does not support the creation of a reasonable-time filing requirement. Crim.R. 57(B) provides that "[i]f no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules of criminal procedure, and shall look to the rules of civil procedure and to the applicable law if no rule of criminal procedure exists." Crim.R. 33(B), of course, already prescribes the circumstances under which a defendant may seek leave to file a motion for a new trial. Crim.R. 57(B) does not authorize a court to establish a new procedure when a rule of criminal procedure already governs.

{¶ 58} We hold that the court of appeals erred when it held that it was within the trial court's discretion to deny Bethel's motion for leave based on Bethel's failure to file the motion within a reasonable time after discovering Summary 86.

3. The new-trial claim

{¶ 59} "The 'unavoidably prevented' requirement in Crim.R. 33(B) mirrors the 'unavoidably prevented' requirement in R.C. 2953.23(A)(1)." *State v. Barnes*, 5th Dist. Muskingum No. CT2017–0092, 2018-Ohio-1585, ¶ 28. As we discussed above, Bethel made a prima facie claim that he was unavoidably prevented from discovering the Withers information. But we also determined above that the Withers information is immaterial for *Brady* purposes. Thus, even assuming arguendo that Bethel would be entitled to a hearing on his motion for a new trial, the hearing would be an exercise in futility, because we have concluded that Bethel's *Brady* claim, which is the basis of his motion, is without merit. Therefore, it is unnecessary to remand Bethel's motion for leave to file a motion for a new trial under Crim.R. 33 to the trial court, because we find that the motion for a new trial would be without merit.

IV. CONCLUSION

{¶ 60} Because Bethel failed to meet his burden under R.C. 2953.23(A)(1)(b) to establish that the allegedly suppressed evidence is material, the trial court correctly dismissed Bethel's successive postconviction petition for lack of subject-matter jurisdiction. Bethel's failure to meet his burden under R.C. 2953.23(A)(1)(b) requires this court to deny his motion for leave to file a motion for a new trial. We therefore affirm the judgment of the court of appeals.

Judgment affirmed.

O'CONNOR, C.J., and KENNEDY, DEWINE, and BRUNNER, JJ., concur.

DONNELLY, J., dissents, with an opinion joined by STEWART, J.

DONNELLY, J., dissenting.

{¶ 61} While I agree with the majority that appellant Robert W. Bethel's claim pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), is not barred by res judicata, that Bethel established a prima facie claim that the prosecution suppressed the 2001 interview statements of Ronald Withers, and that the prosecution's suppression of favorable evidence in itself satisfies the "unavoidably prevented" requirement of both R.C. 2953.23(A)(1)(a) and Crim.R. 33(B), I would not be so quick to conclude that a timely disclosure of the Withers statement would have had no impact on the fairness of Bethel's criminal proceedings. I especially would not give such short shrift to Bethel's argument that he would not have proffered a confession as part of a plea agreement had the state provided timely disclosure of the 2001 Withers statements as well as the 2000 interview statements of Shannon Williams. I would hold that in his 2018 motions for a new trial and for postconviction relief, Bethel established a prima facie claim that the state's suppression of the statements undermined confidence in the outcome of Bethel's proceedings, and I would remand this case to the trial court for an evidentiary hearing to properly examine Bethel's claims.

{¶ 62} I disagree with the majority's statement that Bethel's argument regarding his proffered confession "invites us to stray from the main question of *Brady*'s third prong—i.e., whether Bethel received a fair trial." Majority opinion, ¶ 38. This notion seems to presuppose that our only consideration of the suppressed evidence must be in the context of a spontaneous attempt to admit it into evidence at trial. To the contrary, the state's duty to disclose exculpatory information, and the effect of its failure to disclose exculpatory information, extends to pretrial proceedings and trials alike. *See United States v. Nelson*, 979 F.Supp.2d 123, 129 (D.D.C.2013) (most federal courts agree that "a *Brady* violation can justify allowing a defendant to withdraw a guilty plea"); *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 48 (impact on the defense's trial-preparation and strategic decisions are relevant to the prejudice prong of the *Brady* analysis).

{¶ 63} The *Brady* rule is supposed to "ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The risk of a miscarriage of justice does not exist only during a trial. *See Brady v. United States*, 397 U.S. 742, 757-758, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (guilty pleas are "no more foolproof than full trials"). To determine whether a *Brady* violation prejudiced the defendant, a court must look at the "totality of the circumstances," including "any adverse effect that the [suppression] might have had on the preparation or presentation of the defendant's case." *Bagley* at 683.

{¶ 64} Establishing that prejudice has occurred in the context of pretrial preparations and the strategic decisions of defense counsel is not an easy task, given the "difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken," *id.* at 683, had the *Brady* violation not occurred. It is nonetheless possible to establish prejudice as long as the suppressed evidence "could reasonably be taken to put the whole case in such a different light

as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). This court's decision in *Brown* is the perfect example of prejudice being established based on the impact of matters beyond the trial itself.

{¶ 65} The defendant in *Brown* was found guilty of the aggravated murder of two people and sentenced to death. The materials suppressed by the state in *Brown* were reports from police interviews with two people who both indicated that someone else had confessed to committing the murders. One person heard the confession directly, while the other heard about it secondhand and from rumors. The man named as a shooter was one of the state's main witnesses against the defendant at trial. Although the statements in the reports were hearsay and might not have been admissible at trial, this court held that their suppression prejudiced the defendant. This court noted that "the significance and materiality of the reports are inherent in their content": the reports indicated that someone other than the defendant had committed the murders. *Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, at ¶ 50. This court also noted that the reports could have led defense counsel to call additional witnesses at trial and could have allowed counsel to better cross-examine the state's witness and impeach his credibility by implicating him in the murders. *Id*. at ¶ 46-47. Moreover, the defense had made a strategic decision not to contest the defendant's general involvement in the charged offenses, based on the paucity of evidence disclosed to them prior to trial, but "[h]ad they known that someone else had claimed to have [committed the murders], they may indeed have changed their strategy." *Id*. at ¶ 48.

{¶ 66} Bethel's case bears many similarities to *Brown*. Bethel was convicted of the aggravated murder of James Reynolds and Shannon Hawk and sentenced to death. The materials suppressed by the state were two reports of police interviews with people who indicated that Jeremy Chavis and Donald Langbein had

confessed to murdering Reynolds and Hawk and had implicated each other in their confessions. Langbein was the state's star witness against Bethel at trial.

{¶ 67} The attorneys who represented Bethel when he entered his guilty plea made a strategic decision to advise Bethel to make some monumental concessions in response to the state's plea demands—namely, to enter a guilty plea, proffer a confession, and waive any rights against admission of the confession and guilty plea, thus allowing the state to eventually use the confession and plea in its case-in-chief against Bethel. Members of Bethel's original defense team testified that they told Bethel that he should accept the terms of the state's plea offer if he wanted to save his life—advice that they thought was in his best interest in light of the evidence known at the time.

{¶ 68} In addition to the type of evidence presented in *Brown*, Bethel's 2018 motions included an affidavit from one of the original attorneys who represented Bethel—Ronald Janes—stating that he had advised Bethel to proffer a confession pursuant to the state's plea terms. Janes averred that the reports would have been "game changers" and that if the state had disclosed the two police interviews in a timely manner, he would not have advised Bethel to agree to the state's plea-agreement terms, particularly the requirement that Bethel proffer a confession. He stated, "I cannot stress enough how much I think these reports shed a whole different light on this case."

{¶ 69} If Withers's and Williams's statements had been properly disclosed at the beginning of the proceedings against Bethel, the defense might have been able to establish that Chavis and Langbein confessed to the murders to the exclusion of all others, namely, Bethel, and the state's case would have been significantly weakened. And Janes's affidavit raises the strong possibility that Bethel would not have proffered a confession and would not have waived his right under Evid.R. 410 against the admissibility of the confession and guilty plea and thereby, his right against self-incrimination at trial.

{¶ 70} Although the majority dismisses the possibility that Bethel's confession was false as a "tenuous theory," majority opinion at ¶ 38, the record shows otherwise. Throughout these proceedings, Bethel repeatedly stated that he did not want to accept the state's plea offer and that he did so in the end only because he felt immense pressure from his attorneys, as well as his mother, to make a deal with the state to avoid the death penalty. If Janes's claims are true and Bethel's defense team would have advised him *not* to accept the deal offered by the state, Bethel most likely would have rejected the state's plea terms. As a result, Bethel's confession would never have been proffered and would never have been introduced at his trial.

{¶ 71} Accordingly, the import of the suppressed evidence in this case is not limited to the hypothetical cross-examination of witnesses at trial, as discussed by the majority; the suppressed evidence might have served to deprive the state of Bethel's confession, a confession that the majority concedes was the most significant evidence of Bethel's guilt at trial. If the state would not have had a confession to use against Bethel at trial but for its suppression of Williams's and Withers's statements, then Bethel would be entitled to a new trial.

{¶ 72} A trial court should hold an evidentiary hearing when a petitioner alleges facts that are materially disputed and that, if proved, would entitle the petitioner to relief. *See Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007); *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5, 112 S.Ct. 1715, 118 L.Ed.2d 3318 (1992). The fact-finding procedures in death-penalty cases are subject to a "heightened standard of reliability," given that "execution is the most irremediable and unfathomable of penalties; * * * death is different." *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (plurality); *see also State v. Bonnell*, 159 Ohio St.3d 1413, 2020-Ohio-3276, 147 N.E.3d 647 (Donnelly, J., dissenting) (describing the extremely

problematic nature of trial courts' reluctance to conduct evidentiary hearings on postconviction petitions in death-penalty cases).

{¶ 73} The trial court denied Bethel's 2018 motions for new a trial and for postconviction relief without holding an evidentiary hearing. Because Bethel made an adequate showing that he may be entitled to a new trial, I would hold that the trial court's decision not to hold an evidentiary hearing was erroneous. Accordingly, I dissent, and I would remand the cause to the trial court for an evidentiary hearing on Bethel's claims.

STEWART, J., concurs in the foregoing opinion.

Janet A. Grubb, First Assistant Franklin County Prosecuting Attorney, and Seth L. Gilbert, Assistant Prosecuting Attorney, for appellee.

Timothy Young, Ohio Public Defender, and Rachel Troutman, Alison Swain, and Joanna Sanchez, Assistant Public Defenders, for appellant.

Jones Day, Yvette McGee Brown, and Benjamin C. Mizer, urging reversal for amicus curiae, the Innocence Network.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 19AP-324 (C.P.C. No. 00CR-6600)
Robert W. Bethel,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 7, 2020

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

On brief: *Timothy Young*, Ohio Public Defender, *Rachel Troutman*, and *Alison Swain*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

BEATTY BLUNT, J.

{¶ 1} Robert W. Bethel appeals the decision of the Franklin County Common Pleas Court denying his motion for leave to file motion for new trial and his petition for postconviction relief, which were filed on September 10, 2018 and based upon allegedly newly discovered and exculpatory evidence. The trial court denied the motion and denied the petition without a hearing.

{¶ 2} On June 25, 1996, James Reynolds and his girlfriend Shannon Hawks were shot to death. Bethel was convicted for the aggravated murders of Reynolds and Hawks and sentenced to death. Bethel's conviction and sentence were affirmed by the Supreme Court of Ohio. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853 ("*Bethel I*").

{¶ 3} The facts surrounding the homicides of Reynolds and Hawks are convoluted and involve several people—notably Bethel, his friend and co-defendant Jeremy Chavis, Bethel and Chavis' friend Tyrone Green, and Chavis' cousin Donald Langbein. The evidence presented by the state at trial indicated all were engaged in gang activity, and Bethel, Chavis, Green, and Langbein were all members of "the Crips." Bethel also lived with Chavis and Langbein. *Id.* at ¶ 1-3.

{¶ 4} At some point in 1995, Reynolds and Green were involved in a burglary, and during that burglary Green shot a man to death. Reynolds told a man named Pryor he had seen Green kill the victim, and Pryor informed the police. *Id.* at ¶ 4. Green was indicted, and during discovery Green's attorney was provided with a document stating Reynolds had told Pryor he had seen the shooting, and Pryor had informed the police. *Id.* at ¶ 5. This apparently formed the basis of the motive for Reynolds' murder. *Id.* at ¶ 6.

{¶ 5} At Bethel's trial, Langbein admitted he and Bethel had discussed "tak[ing] steps to get rid of" the witnesses against Green. *Id.* Langbein's testimony and the other evidence presented placed the blame for the shootings of Reynolds and Hawks on Bethel and Chavis.

{¶ 6} The police executed a search warrant at the trailer where Bethel, Chavis, and Langbein lived in January 1997, but the investigation remained stagnant for four years, until Bethel's arrest on November 6, 2000. *Id.* at ¶ 24. The turning point came when Langbein was arrested for unrelated federal firearms violations and informed police and ATF agents he had information about the murders of Reynolds and Hawks. Langbein agreed to wear a wire in discussions with Bethel, but he was unable to obtain any incriminating statements. *Id.* at ¶ 19-24.

{¶ 7} On August 30, 2001, the day before his scheduled trial, Bethel executed an off-the-record proffer in which he detailed his responsibility and participation in the murders of Reynolds and Hawks, and entered into an agreement to "to plead to two counts of aggravated murder with firearm specifications." *Id.* at ¶ 29, 32. He further agreed to cooperate with the investigation and to testify truthfully against Jeremy Chavis and anyone else involved in killing Reynolds and Hawks. In return, plaintiff-appellee, State of Ohio, agreed to dismiss the death specifications. *Id.* at ¶ 34. The agreement contained a specific provision dealing with Bethel's proffer, and stated Bethel and the state "agree that the

proffer taken of the defendant on August 30, 2001 will be admissible in a criminal trial against the defendant in the event that the defendant does not abide by the terms and conditions of this agreement set forth below." *Id.* at ¶ 36. The agreement also included a provision nullifying the agreement and permitting automatic reinstatement of the original charges if Bethel did not "cooperate fully" or "refused to testify * * * in any proceeding." *Id.* at ¶ 38. The terms of the agreement were then placed in the court record at a hearing, Bethel confirmed he understood them, and the trial court accepted the agreement. The trial court then accepted Bethel's plea of guilty to two counts of aggravated murder with gun specifications. *Id.* at ¶ 39.

{¶ 8} On November 13, 2001, Bethel refused to testify against Chavis. *Id.* at ¶ 40. Based on that refusal, the trial court granted the state's motion to void the plea agreement and reinstated the original charges and death specifications. Bethel attempted to have his proffer suppressed and to have his plea agreement enforced, based on the argument he had never intended to testify against Chavis and had been misled by his original counsel, but both attempts failed. *Id.* at ¶ 41. During his subsequent trial, Donald Langbein testified he and Bethel had discussed "tak[ing] steps to get rid of" the witnesses against Green. *Id.* at ¶ 6. The state was also permitted to play portions of one of the taped conversations between Bethel and Langbein, and to admit Bethel's proffered statement admitting he participated in the murders of Hawks and Reynolds. *Id.* at ¶ 96.

{¶ 9} Bethel was convicted and sentenced to death, largely on the strength of his proffer and the testimony of Langbein, as well as that of two other witnesses to whom he had made incriminating statements. The conviction and sentence were appealed and affirmed, and a subsequent application to reopen the appeal was denied without opinion. *State v. Bethel*, 114 Ohio St.3d 1503, 2007-Ohio-4285. Bethel also filed a timely postconviction petition in the trial court, asserting 23 grounds for relief. All were rejected, the petition was dismissed, and this court subsequently affirmed the dismissal of that petition. *State v. Bethel*, 10th Dist. No. 07AP-810, 2008-Ohio-2697 ("*Bethel II*").

{¶ 10} In 2008, Bethel filed a motion for new trial, based on an ATF report entitled "CHAVIS, Jeremy" that had recently been discovered in the custody of the Columbus Police Department. In the report, an ATF agent states he was contacted by Shannon Williams, an inmate at the Franklin County Jail, who stated his fellow inmate Langbein had told him

" 'he was involved in a homicide with an individual who is now incarcerated at the Federal Penn., Ashland, KY, where the victim was shot seventeen times' " and " 'the other individual who was arrested was the driver following the homicide.' " *State v. Bethel*, 10th Dist. No. 09AP-924, 2010-Ohio-3837, ¶ 10 ("*Bethel III*"). Chavis was incarcerated in the federal prison in Kentucky at this time, and Bethel's motion argued Williams' statement was essentially a "confession" Langbein, rather than Bethel, had committed the murders with Chavis. *Id*. The trial court denied that motion, and concluded the report was not "direct, substantive evidence" of Bethel's innocence and did not negate the statements Bethel made in his proffer. (Sept. 3, 2009 Decision at 8.) This court affirmed, *Bethel III* at ¶ 25, and the Supreme Court did not accept jurisdiction over his appeal of this court's decision. *State v. Bethel*, 132 Ohio St.3d 1513, 2012-Ohio-4021.

{¶ 11} Bethel has now discovered another document allegedly implicating Langbein and, as a result, has filed the motions and petition that are now before this court. The alleged new document "Summary 86" describes a May 17, 2001 interview by Columbus Police Department Homicide Detective Ed Kallay (who testified at Bethel's trial), two federal ATF officers, and a Franklin County Jail inmate named Ronald Withers. The "Firm or Victim[s]" named in the summary are the homicide victims Hawks and Reynolds, and the "place of occurrence" named is the location where the bodies of Hawks and Reynolds were discovered. During the interview, Withers claims he was in the same cell as Chavis for three weeks, and reported Chavis told him "when he shot the individual he was already dead[,] * * * that his cousin was the other shooter, and his cousin was also incarcerated." (Attachment to Sept. 10, 2018 Mot. at 16.) As noted above, Chavis' cousin is Langbein, not Bethel, and Bethel contends Summary 86 constitutes additional proof Langbein and Chavis killed Hawks and Reynolds, not Bethel and Chavis.

{¶ 12} After discovering Summary 86, Bethel's attorneys located Withers, who executed an affidavit confirming his statements in the document. Bethel also obtained an affidavit from his original trial counsel stating in part the "written reports implicate Donald Langbein and Jeremy Chavis as the principal offenders in the two murders Bethel was charged with * * *. Had these reports and phone calls been turned over, I would not have allowed the plea deal and the proffer to have taken place as they happened," and "[h]ad I

known about these reports prior to trial, I would not have allowed Bethel to give a proffer and be debriefed in the manner he was." (Ex. E, Sept. 10, 2018 Mot.)

{¶ 13} The trial court held "these applications for relief are untimely and procedurally defaulted * * * [and] no colorable constitutional violation has been shown under *Brady* and its progeny, including *Turner v. United States*, 582 U.S. ___, 137 S.Ct. 1885, 198 L.Ed.2d 443 (2017)." (Apr. 15, 2019 Decision at 2.) The trial court discounted the affidavits of Bethel's original trial counsel by noting "importantly, neither lawyer states that they were unaware of the *substance* suggested by Summary 86," and "no prejudice to Bethel is apparent from his claimed lack of access to Summary 86." (Apr. 15 2019 Decision at 7, 9.) The trial court observed "[w]here someone like Chavis is in a group or circle of people who might reasonably have been interviewed by defense counsel prior to trial, there can hardly be clear and convincing evidence that a defendant was unavoidably prevented from learning what such persons might say." (Apr. 15, 2019 Decision at 10.)

{¶ 14} In accordance with these conclusions, the trial court denied Bethel's successive postconviction petition and motion for leave to file a motion for new trial. Bethel has now appealed these rulings, and argues in his two assignments of error the court abused its discretion in finding he was not unavoidably prevented from discovering the evidence that forms the basis of his motions and the evidence did not establish a reasonable likelihood of a different result at trial.

I. Petition for Postconviction Relief

{¶ 15} R.C. 2953.21(A)(1)(a) authorizes "any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict * * * [to] 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." We have observed "[a] petition for postconviction relief is a collateral civil attack on a criminal judgment, not an appeal of the judgment." *State v. Sidibeh*, 10th Dist. No. 12AP-498, 2013-Ohio-2309, ¶ 8, citing *State v. Steffen*, 70 Ohio St.3d 399, 410 (1994). Postconviction relief " 'is a means to reach constitutional issues which would otherwise be impossible to reach because the

evidence supporting those issues is not contained in the record.' " *Sidibeh* at ¶ 8, quoting *State v. Murphy*, 10th Dist. No. 00AP-233, (Dec. 26, 2000).

{¶ 16} The doctrine of res judicata places a significant restriction on the availability of postconviction relief, since it bars a convicted defendant from presenting " 'any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment.' " *State v. Cole*, 2 Ohio St.3d 112, 113 (1982), quoting *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. We have also observed res judicata "implicitly bars a petitioner from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 27. Moreover, a petitioner is not automatically entitled to an evidentiary hearing on a postconviction petition. *Sidibeh* at ¶ 13, citing *State v. Jackson*, 64 Ohio St.2d 107, 110-13 (1980). To warrant an evidentiary hearing, the petitioner must at the outset provide evidence demonstrating a cognizable claim of constitutional error. *See Sidibeh* at ¶ 13, citing R.C. 2953.21(C). *See also Hessler* at ¶ 24. A trial court may deny a postconviction petition without an evidentiary hearing "if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief." *Sidibeh* at ¶ 13, citing *State v. Calhoun*, 86 Ohio St.3d 279 (1999), paragraph two of the syllabus.

{¶ 17} This court reviews a trial court's decision denying a postconviction petition without a hearing for an abuse of discretion. *See, e.g., State v. Howard*, 10th Dist. No. 15AP-161, 2016-Ohio-504, ¶ 15-21 (citing and quoting cases). An abuse of discretion connotes a decision that is unreasonable, arbitrary, or unconscionable. *Id.*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Further, "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." *Sidibeh* at ¶ 7, quoting *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio- 6679, ¶ 58.

{¶ 18} Because Bethel's current petition of postconviction relief is both a successive petition, *see Bethel II,* 2008-Ohio-2697, and a late petition, *see* R.C. 2953.21(A)(2) (providing that to be timely a postconviction petition must be filed "no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of

appeals in the direct appeal of the judgment of conviction or adjudication"), he must surmount a jurisdictional hurdle before the court can consider the merits of the petition. Pursuant to R.C. 2953.21, a trial court may not entertain an untimely postconviction petition unless the petitioner initially demonstrates either: (1) he was unavoidably prevented from discovering the facts necessary for the claim for relief, or (2) the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation. R.C. 2953.23(A)(1)(a). If the petitioner can satisfy one of those two conditions, he must then demonstrate but for the constitutional error at trial, no reasonable finder of fact would have found him guilty. R.C. 2953.23(A)(1)(b).

II. Motion for Leave to File Motion for New Trial and Motion for New Trial

{¶ 19} Pursuant to Crim.R. 33(B), "[m]otions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days * * * [but if] it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period." It is not uncommon for defendants to file both the motion for leave and the delayed motion for new trial at the same time, as Bethel did in this case. When faced with a request for new trial more than 120 days after the initial judgment of conviction, courts generally follow a two-step procedure—the court first determines whether the defendant was unavoidably prevented from discovering the evidence, and if so, it grants the motion for leave and addresses the new trial motion on its merits. *See, e.g.*, *State v. Cashin*, 10th Dist. No. 17AP-338, 2017-Ohio-9289, ¶ 15-19. To prevail on the merits, "the defendant must show that the newly discovered evidence upon which the motion is based: (1) discloses a strong probability that it will change the result if a new trial is granted; (2) has been discovered since the trial; (3) is such as could not in the exercise of due diligence have been discovered before the trial; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence." *State v. Dixon*, 10th Dist. No. 18AP-108, 2018-Ohio-4841, ¶ 13, citing *State v. Davis*, 10th Dist. No. 03AP-1200, 2004-Ohio-6065, ¶ 7, and *State v. Petro*, 148 Ohio St. 505 (1947), paragraph one of the syllabus. New trials should not be granted lightly. *Dixon* at ¶ 14, citing *State v. Townsend*, 10th Dist.

No. 08AP-371, 2008-Ohio-6518, ¶ 12. Further, trial courts may require a defendant to avoid any unreasonable delay in filing such a motion: "[w]hile Crim.R. 33(B) does not provide a specific time limit in which defendants must file a motion for leave to file a delayed motion for new trial, many courts have required defendants to file such a motion within a reasonable time after discovering the evidence." *See, e.g. State v. Anderson*, 10th Dist. No. 12AP-133, 2012-Ohio-4733, ¶ 17, quoting *State v. Wilson*, 7th Dist. No. 11 MA 92, 2012-Ohio-1505, ¶ 57 (adopting timeliness rule and collecting cases).

III. Discovery of the Relevant Evidence

{¶ 20} As indicated above, the trial court's initial determination under both R.C. 2953.23(A)(1)(a) and Crim.R. 33(B) must be whether the defendant was "unavoidably prevented" from discovering the evidence that forms the basis of the claim. "A defendant is unavoidably prevented from discovering the new evidence within the [120-day] time period for filing a motion for new trial when that defendant had no knowledge of the evidence supporting the motion for new trial and could not have learned of the existence of the evidence within the time prescribed for filing such a motion through the exercise of reasonable diligence." *Bethel III* at ¶ 13, citing *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244, ¶ 19. The defendant cannot claim evidence was undiscoverable simply because no one made efforts to obtain the evidence sooner. *See Cashin* at ¶ 16, citing *State v. Graggs*, 10th Dist. No. 16AP-611, 2017-Ohio-4454, ¶ 15; and *State v. Noor*, 10th Dist. No. 16AP-340, 2016-Ohio-7756, ¶ 17. Conclusory allegations are similarly insufficient to prove the defendant was unavoidably prevented from discovering the evidence he seeks to introduce as support for a new trial. *See, e.g.*, *Cashin* at ¶ 17, citing *Noor* at ¶ 17.

{¶ 21} A defendant must demonstrate to the trial court by clear and convincing evidence he was unavoidably prevented from discovering such evidence. *Cashin* at ¶ 18. Clear and convincing evidence is " 'proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *Id.*, quoting *State v. Schiebel*, 55 Ohio St.3d 71, 74 (1990). Appellate courts review the trial court's determination whether the defendant was unavoidably prevented from discovering evidence for an abuse of discretion, and a reviewing court may not determine a trial court abused its discretion simply because

it might not have reached the same conclusion. *Id.* at ¶ 19, citing *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, ¶ 14.

IV. Exculpatory Evidence

{¶ 22} "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). There are three components or essential elements of a *Brady* prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691, (2004), citing *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009), citing *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A 'reasonable probability' of a different result" is one in which the suppressed evidence " 'undermines confidence in the outcome of the trial.' " *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). *See also Turner v. United States*, 137 S. Ct. 1885, 1893 (2017).

V. Analysis

{¶ 23} In accordance with all the foregoing, Bethel has identified two crucial questions in his brief: whether the trial court abused its discretion either by concluding Bethel was not unavoidably prevented from the discovery of evidence set forth in Summary 86, or by concluding the evidence did not create a reasonable probability of a different result at trial. We are compelled to conclude the trial court did not abuse its discretion in resolving either question.

{¶ 24} First, Bethel has not clarified either in the trial court or in this court precisely when he learned of Summary 86. He asserts it was "recently discovered" and he "cannot establish through outside witnesses at what point [Summary 86] was finally disclosed to defense counsel, other than that it was post-trial and as the result of a public records request to the police station." (Sept. 10, 2018 Deft.'s Motion at 7; Nov. 23, 2018 Deft.'s Reply at 8.) In light of the ambiguity in Bethel's assertions, the state has suggested Summary 86 was

most likely provided to Bethel's counsel over a decade ago, when a public records request to the Columbus Police Department by a private investigator hired by Bethel's mother yielded over 1,200 pages of records related to the case. Bethel does not specifically reject this suggestion, but even assuming Bethel received the document from a different public records request, the trial court correctly reasoned Bethel received Summary 86 no later than May 10, 2017, when Bethel obtained an affidavit from Withers in support of the information contained in the document. Given the 16-month delay between the date Withers signed his affidavit and the date Bethel's motions were ultimately filed, as well as the uncertainty regarding the date Summary 86 itself was disclosed, it is well within the discretion of the trial court to have concluded the delay in filing these motions was unreasonable.

{¶ 25} Moreover, while Bethel and his attorneys were not provided a copy of Summary 86 prior to his trial and were not directly notified of Withers' statements, it is equally true Bethel was not prevented by the state from discovering Chavis' statements to Withers. As Bethel's co-defendant Chavis had a reason to discuss the case with Bethel and the two had corresponded about the case after they had both been indicted. Moreover, prior to executing his proffer and plea of guilty to the charges, Bethel and his attorney met and spoke privately with Chavis and his attorney, and accordingly were presented with an opportunity to evaluate the evidence that would be presented against both men at trial. And Bethel should have suspected Chavis was making statements prior to the trial—although it did not call him, the state disclosed Withers' name on its witness list and specifically identified him as being incarcerated at the Franklin County Jail. Taken in sum, all this evidence would make it difficult for us to conclude the trial court abused its discretion in finding Bethel had not met his burden to establish by clear and convincing evidence he was unavoidably prevented from discovering the information in Summary 86.

{¶ 26} But even if we presume the ambiguity regarding the date of Bethel's discovery of Summary 86 somehow establishes he was "unavoidably prevented" from discovery of Chavis' statements to Withers, and even if we assume the complete truth of the statements in Summary 86 as well as Bethel's interpretation of it as implicating Langbein, the only fact the document establishes beyond doubt is Bethel's own trial testimony was false.

{¶ 27} Bethel testified at trial both he and Chavis were at Bethel's mother's house at the time Reynolds and Hawks were shot to death. Withers' suggestion Chavis admitted to being present at the shootings would have upset that alibi defense—and that alibi defense was really all Bethel had left. He had already admitted shooting Reynolds and Hawks, he had already admitted he lied when he agreed to testify against Chavis, he testified he had "piece[d] together" a false story "that would seem reasonable to believe" in the proffered statement he made in connection with the plea, and he admitted on cross-examination he would have no trouble lying if it would it would allow him to avoid a death sentence. (Tr. Vol. XIII at 87.) All Summary 86 would have established is that he was lying yet again, about the most important evidence he had left to save his own life.

{¶ 28} As a result, we cannot say the trial court abused its discretion, either in concluding Bethel has not shown by clear and convincing evidence he was unavoidably prevented from the discovery of Summary 86, or in concluding Summary 86 fails to create a reasonable probability of a different result at Bethel's trial. Similarly, Bethel cannot show by clear and convincing evidence that, but for constitutional error at trial, no reasonable jury would have found him guilty or eligible for a death sentence. And we cannot say the state's failure to disclose this evidence prior to trial is in violation of *Brady*, because Bethel cannot demonstrate prejudice as a result of the State's failure to disclose.

{¶ 29} Accordingly, both of Bethel's assignments of error are overruled. The judgment of the trial court denying his motion for leave to file a motion for new trial and his postconviction petition is affirmed.

Judgment affirmed.

BROWN and KLATT, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-924 (C.P.C. No. 00CR-11-6600)
Robert W. Bethel,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 17, 2010

Ron O'Brien, Prosecuting Attorney, and *Kimberly Bond*, for appellee.

Timothy Young, Ohio Public Defender, and *Rachel Troutman*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Defendant-appellant, Robert W. Bethel ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas denying his motion for leave to file a delayed motion for new trial and motion for new trial.

{¶2} In August 2003, appellant was convicted of two counts of aggravated murder with three specifications[1] and sentenced to the death penalty in accordance with a jury's recommendation of the same. The convictions arose out of the 1996 shooting deaths of James Reynolds ("Reynolds"), and his girlfriend Shannon Hawks ("Hawks").

[1] Each count contained two death penalty specifications and a firearms specification.

The Supreme Court of Ohio has upheld the convictions and death sentence on direct appeal. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853. The following factual summary is taken from that decision.[2]

{¶3} Appellant, Jeremy Chavis ("Chavis"), Tyrone Green ("Green"), and Donald Langbein ("Langbein"), were members of the Crips gang. In 1995, Green killed Rodney Cain ("Cain") during a burglary. Though Reynolds and another man, Donald Pryor ("Pryor"), were also involved in the incident, Reynolds was allegedly the only eyewitness to the homicide. As a result of Cain's murder, Green was indicted for aggravated murder with death specifications. As part of the Green investigation, a search warrant was issued. The affidavit in support of the search warrant stated that Reynolds told Pryor that Green shot Cain. Discovery materials, including the search warrant and supporting affidavit, were sent to Green's attorney about four weeks prior to the murder of Reynolds and Hawks. On June 26, 1996, the bodies of Reynolds and Hawks were discovered in a field owned by Chavis's grandfather. Reynolds had been shot ten times and Hawks had been shot four times. After the murder of Reynolds, the only known eyewitness to Cain's shooting death, Green entered a plea to a reduced charge of manslaughter.

{¶4} In 2000, Langbein was charged with an unrelated federal firearms violation and told agents of the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), what he knew about the Reynolds-Hawks murders. According to Langbein, appellant and Chavis lured Reynolds and Hawks into a field owned by Chavis's grandfather, whereupon appellant and Chavis shot and killed the couple. The reason for the murders was concern that

[2] We will set forth the facts most relevant to the issue before us. However, the details surrounding appellant's arrest and conviction are set forth in the Supreme Court of Ohio's decision.

Reynolds would testify against Green. Appellant was arrested on November 6, 2000, and indicted on two counts of aggravated murder each with death specifications. Counsel were appointed and a plea agreement was reached. As part of the plea agreement, appellant made an "off-the-record" proffer of his testimony against Chavis.

{¶5} According to the proffer, killing Reynolds had been Chavis's idea, and before the murders, appellant and Chavis discussed what they were going to do. Appellant stated he and Chavis drove Reynolds and Hawks to a field belonging to Chavis's grandfather to do some shooting. After walking to a clearing, appellant, using a 9mm handgun, and Chavis, using a shotgun, fired at Reynolds and Hawks who were standing together; Reynolds with his arm around Hawks. Specifically, appellant stated that after the couple fell to the ground, he wanted to leave, but Chavis handed appellant another loaded clip and indicated he wanted to make sure the couple was dead. Appellant explained that he then emptied the other clip into the bodies at close range. After the shooting, appellant drove to an alley where he threw his shirt into a dumpster, and then the pair drove to a body of water where Chavis separated the barrel from the shotgun and disposed of it in the body of water. Appellant described that he and Chavis proceeded to Chavis's house where they changed clothes and threw their clothes in a dumpster.

{¶6} On August 30, 2001, after making the proffer, appellant pled guilty to two counts of aggravated murder, and the state agreed to dismiss the death specifications. Though agreeing to testify truthfully against Chavis as part of the plea agreement, on November 13, 2001, appellant refused to do so. Therefore, on December 18, 2001, the

state moved to have appellant's plea agreement declared void. The motion was granted, the original charges were reinstated, and appellant was assigned new counsel.

{¶7} Appellant moved to suppress his previously made proffer, and the trial court denied said motion.[3] At trial, appellant denied his guilt and testified that he lied in his proffer to obtain the benefit of a plea bargain. Langbein also testified at appellant's trial. According to Langbein, he and appellant were concerned about witnesses who would testify against Green. Langbein explained that appellant, Chavis, Reynolds, and Hawks went to do some shooting in a field owned by Chavis's grandfather, whereupon appellant shot Reynolds and Hawks.

{¶8} Also testifying at trial was Theresa Cobb Campbell ("Campbell"), appellant's girlfriend at the time of the murders. According to Campbell, after the murders, she and appellant had a conversation at her mother's house in which appellant told her he killed Reynolds and Hawks. Specifically, Campbell testified:

> He said that [he], Jeremy, and these two people went to go practice shooting guns. And he said when they got there, he said that he had a feeling to shoot, and he said, "So I did."
>
> And he said that he called Jeremy to come and look to see what he had done, and he said that Jeremy went, and he started crying.
>
> And then he said that he reloaded and – the clip and fired.

(Tr. Vol. XI 150.)

{¶9} Despite appellant's denial of involvement, the jury found appellant guilty of all charges and specifications and recommended death sentences for both killings. The

[3] The use of appellant's proffer was upheld by the Supreme Court of Ohio. See *Bethel*, supra.

trial court accepted the jury's recommendation and sentenced appellant to death. As indicated previously, the Supreme Court of Ohio has upheld appellant's convictions and death sentence on direct appeal. Thereafter, appellant requested post-conviction relief. However, the trial court denied appellant's post-conviction relief request, and this court affirmed that decision on January 5, 2008. See *State v. Bethel*, 10th Dist. No. 07AP-810, 2008-Ohio-2697, discretionary appeal not allowed, 122 Ohio St.3d 1502, 2009-Ohio-4233.

{¶10} On April 13, 2009, following a public records request[4] in 2008, appellant filed the instant motions seeking a new trial based on newly discovered evidence. The basis for the motions was a document in the public records that had been in the possession of the Columbus police. The document was a report by Agent Daniel F. Ozbolt from the ATF. In the report entitled "CHAVIS, Jeremy," Agent Ozbolt indicates he was contacted by Shannon Williams ("Williams"), an inmate at the Franklin County Jail. According to the report, Williams stated fellow inmate Langbein told Williams that "he was involved in a homicide with an individual who is now incarcerated at the Federal Penn., Ashland, KY, where the victim was shot seventeen times" and that "the other individual who was arrested was the driver following the homicide." Williams stated he knew of no other details, but would "keep his ears open for further information." Because Chavis was incarcerated in the federal prison in Kentucky at this time, appellant contends this statement amounts to a "confession" that Langbein, not appellant, was the person who committed the murders with Chavis.

[4] The public records request was filed by a private investigator hired by appellant's mother.

{¶11} On September 3, 2009, the trial court denied both of appellant's motions. This appeal followed, and appellant brings the following two assignments of error for our review:

> [1.] THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL AND FOR FAILING TO HOLD A HEARING.
>
> [2.] THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

{¶12} Crim.R. 33 provides, in relevant part:

> **(A) Grounds.**
>
> A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial.
>
> * * *
>
> **(B) Motion for new trial; form, time.**
>
> * * *
>
> Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered, or the decision of the court where trial by jury has been waived. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he was unavoidably prevented from discovering the evidence within the one hundred twenty day period.

{¶13} Crim.R. 33 contemplates a two-step procedure when a defendant seeks to file a motion for new trial more than 120 days after the conclusion of the trial. In the first step, the defendant must demonstrate that he was unavoidably prevented from discovering the evidence relied upon to support the motion for new trial. A defendant is "unavoidably prevented" from discovering the new evidence within the time period for filing a motion for new trial when that defendant had no knowledge of the evidence supporting the motion for new trial and could not have learned of the existence of the evidence within the time prescribed for filing such a motion through the exercise of reasonable diligence. *State v. Berry*, 10th Dist. No. 06AP-803, 2007-Ohio-2244. In the second step, if the defendant does establish by clear and convincing evidence that the delay in finding the new evidence was unavoidable, the defendant must file the motion for new trial within seven days from that finding. *State v. Woodward*, 10th Dist. No. 08AP-1015, 2009-Ohio-4213.

{¶14} A trial court's decision whether to grant leave to file an untimely motion for new trial is subject to review for abuse of discretion. *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518. Abuse of discretion means more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶15} In the second step, if the defendant does establish by clear and convincing evidence that the delay in finding the new evidence was unavoidable, the defendant must file the motion for new trial within seven days from that finding. *Woodward*. Once the defendant has been allowed to file a motion for new trial, the decision whether to actually

grant the new trial is left to the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *State v. Schiebel* (1990), 55 Ohio St.3d 71. In order to obtain a new trial based on newly discovered evidence, a defendant must show that the new evidence: (1) discloses a strong probability that the result of the trial would be changed if a new trial is granted; (2) has been discovered since the trial; (3) is such as could not have been discovered before the trial through the exercise of due diligence; (4) is material to the issues; (5) is not merely cumulative to former evidence; and (6) does not merely impeach or contradict the former evidence. *Berry*, citing *State v. Petro* (1947), 148 Ohio St. 505.

{¶16} In his first assignment of error, appellant contends the trial court erred in denying his motion for leave to file a motion for a new trial. However, as we have already stated, the trial court addressed not only the motion for leave to file a motion for new trial, but also the merits of the motion for new trial based on newly discovered evidence. Because, as will be explained infra, we affirm the trial court's judgment in this respect, appellant's first assignment of error is moot. See *State v. Brown*, 7th Dist. No. 10 MA 17, 2010-Ohio-405.

{¶17} In his second assignment of error, appellant contends the trial court erred in denying his motion for new trial based on evidence material to his defense that was in the possession of the state prior to trial but not submitted to him until the fulfillment of the public records request. In *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, the United States Supreme Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

{¶18} Evidence suppressed by the prosecution is "material" within the meaning of *Brady* only if there exists a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense. *Kyles v. Whitley* (1995), 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1566; see also *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375. As the United States Supreme Court has stressed, "the adjective ['reasonable'] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1555; see also *Strickler v. Greene* (1999), 527 U.S. 263, 289-90, 119 S.Ct. 1936, 1952.

{¶19} Initially, we note it is not clear that the ATF report was "suppressed" by either the prosecution or the Columbus police. As noted by the trial court, there is no indication as to when this report, titled "CHAVIS, Jeremy" and making no reference whatsoever to appellant, came into the possession of the police department or when it was placed in connection with the file on appellant. However, assuming arguendo that the prosecution "suppressed" the report within the meaning of *Brady*, we find no reasonable probability of a different trial outcome had the defense received this report. Thus, we find no *Brady* violation and further find that appellant failed to meet the standard for a new trial.

{¶20} Though appellant's attorneys who ultimately tried the case stated in their affidavits that they had not heard of Williams in the context of appellant until seeing the

ATF report, we note, as did the trial court, that Williams was named on the state's witness disclosure list. Thus, it is entirely possible that appellant's previous counsel, of which there were several, did investigate Williams and found him to be of no value to the defense.

{¶21} Additionally, it is wholly speculative as to whether Langbein's statements are referring to the homicides at issue here. Williams said Langbein stated he was involved in a homicide where the victim was shot 17 times. Here, there were two victims, one shot ten times, and the other shot four times. Also, Williams said Langbein stated the other person who was arrested was the driver after the homicide; however, according to appellant, Chavis was not a driver but an actual participant in the shootings. Appellant's version of events, that he used a 9mm while Chavis used a shotgun, correlates with the evidence presented at trial that the victims suffered wounds consistent with those caused by a 9mm and a shotgun. Additionally, multiple 9mm shell casings and 12-guage shotgun casings were recovered from the scene.

{¶22} Most importantly perhaps is that the evidence presented against appellant consisted of more than just his statements made to Langbein. The evidence also consisted of appellant's statements to Campbell and his own admission as contained in his proffer. Moreover, Langbein was extensively cross-examined at trial, wherein defense counsel tried to portray Langbein as one implicating appellant only to get a better deal on his federal firearms charge. Langbein was also questioned about having a grudge against appellant and being one of the persons involved in the planning of Reynolds' murder. Additionally, Langbein was questioned about a confrontation between Reynolds and another individual, Joey Green, in which Green threatened Reynolds causing

Reynolds to expose a gun to Green. Thus, Langbein's cross-examination inferred that others, or even he, was the person who committed the homicides.

{¶23} Lastly, we note the ATF report indicates that Langbein stated he was "involved" in a homicide. Assuming Langbein was referring to the Reynolds-Hawks murders, Langbein's statement still does not amount to a "confession" of murder as appellant claims. Langbein was involved in this matter as he had been working as an informant with authorities as early as July 2000. Langbein even wore a wire on several occasions in an attempt to obtain incriminating statements from appellant, and all of these meetings occurred prior to Williams contacting Agent Ozbolt on November 9, 2000.

{¶24} In short, nothing in the ATF report "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435, 115 S.Ct. at 1555. Finding no *Brady* violation and finding the "newly discovered evidence" forming the basis of appellant's motion fails to satisfy the standard for a new trial, we find no error in the trial court's decision denying appellant's motion for a new trial. Accordingly, appellant's second assignment of error is overruled.

{¶25} For the foregoing reasons, appellant's second assignment of error is overruled, appellant's first assignment of error is moot, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

TYACK, P.J., and SADLER, J., concur.

IV

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-924 (C.P.C. No. 00CR-11-6600)
Robert W. Bethel,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on August 17, 2010, appellant's first assignment of error is moot, his second assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

McGRATH, J., TYACK, P.J., & SADLER, J.

By _____
Judge Patrick M. McGrath

THE STATE OF OHIO, APPELLEE, *v.* BETHEL, APPELLANT.

[Cite as *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853.]

Criminal law — Aggravated murder — Death penalty upheld.

(No. 2003-1766 – Submitted November 9, 2005 – Decided October 4, 2006.)

APPEAL from the Court of Common Pleas of Franklin County, No. 00CR-11-6600.

PFEIFER, J.

{¶ 1} On June 25, 1996, James Reynolds and his girlfriend, Shannon Hawks, were shot to death in an isolated field in Columbus. Appellant, Robert W. Bethel, was convicted of the aggravated murders of Reynolds and Hawks and was sentenced to death.

{¶ 2} Bethel was a member of the Crips street gang, as was Bethel's friend Jeremy Chavis. Tyrone Green and Donald Langbein were also members of the Crips gang. Jeremy's brother, Cheveldes Chavis, although a member of a different gang, "hung with" Jeremy, Langbein, Green, and Bethel. In the latter part of 1996, Bethel, Langbein, and the Chavis brothers lived together in a trailer on West Run Street in Columbus.

{¶ 3} Langbein is a cousin of the Chavis brothers; they have a grandfather in common. Their grandfather kept a garden in a field located behind 562 Stambaugh Road in Columbus ("the Stambaugh field"). Langbein and Jeremy Chavis sometimes went to that field to shoot guns.

{¶ 4} In 1995, Tyrone Green shot Rodney Cain to death during a burglary. James Reynolds and Donald Pryor were also involved in the burglary. Reynolds later told Pryor that he had seen Green shoot Cain. Pryor repeated Reynolds's story to the police.

{¶ 5} Green was subsequently indicted for aggravated murder with death specifications. During the discovery process in Green's case, the state gave Green's attorney supplemental discovery materials that included a copy of a search warrant with its supporting affidavit. The affidavit stated that Reynolds had told Pryor that Green had shot the victim. The state sent the supplemental discovery materials to Green's attorney on May 29, 1996, about four weeks before Reynolds and Hawks were murdered.

{¶ 6} Langbein testified that he and Bethel had been concerned about the witnesses against Green and that they had discussed "tak(ing) steps to get rid of them." On June 13, 1996, about two weeks before Reynolds and Hawks were murdered, Bethel and Cheveldes Chavis each bought a Maverick Model 88 12-gauge shotgun from Hamilton's Gun Shop in Obetz.

{¶ 7} According to Langbein, the day before the bodies of Reynolds and Hawks were discovered, a group of people "from the neighborhood," including Reynolds, gathered on the corner of 4th and Morrill to hang out. Langbein, Bethel, and the Chavises arrived around 2:00 p.m. in Bethel's car.

{¶ 8} When Langbein was ready to leave, he offered Reynolds a ride home, because Reynolds lived near him. But Bethel and Jeremy Chavis said they would drive Reynolds home, even though Reynolds did not live near Jeremy. Langbein saw Reynolds and Hawks with Bethel and Jeremy in Bethel's car.

{¶ 9} Traci Queen, f.k.a. Traci Jordan, was a friend of Shannon Hawks. Queen recalled Hawks's and Reynolds's visiting her sometime between 3:00 and 5:00 p.m. the day before their deaths were reported on a news broadcast. When they entered Queen's home, Reynolds looked at his pager and went into the kitchen to use the phone. Hawks told Queen that she and Reynolds were "going to go out and shoot guns." She invited Queen to come along, but Queen declined.

{¶ 10} When Reynolds emerged from the kitchen, he and Hawks left the house and got into a car waiting in front of the house next door. Queen saw two

other persons, who appeared to be male, in the front seat of that car. She never saw Hawks or Reynolds alive again.

{¶ 11} Ron Bass, who lived near the Stambaugh field, told police that sometime between 10:00 and 11:00 p.m., June 25, 1996, he heard five or six gunshots while lying in bed. Then he heard one louder gunshot, and after that another series of shots.

{¶ 12} On June 26, 1996, the bodies of Reynolds and Hawks were found lying in the Stambaugh field. They had been shot to death.

{¶ 13} Reynolds had been shot ten times, four times in the head. Reynolds also had one neck wound. One of the gunshots fired into Reynolds's head, from a distance of six inches to three feet, would have killed him at once. Five bullets were recovered from Reynolds's body, all of which could have been fired from a 9 mm firearm. Reynolds also had one wound caused by a shotgun slug fired into his back.

{¶ 14} Hawks was shot four times, twice in the head. One of the head wounds was a back-to-front wound through her brain. This wound would have incapacitated Hawks almost immediately. The other head wound entered Hawks's right cheek and exited through her left ear. Stippling indicated that this shot was fired from a distance of two to four feet.

{¶ 15} At the crime scene, police recovered twenty 9 mm shell casings and ten 12-gauge shotgun shell casings. The murder weapons were never found.

{¶ 16} Reynolds was the sole eyewitness known to the prosecuting attorney in Tyrone Green's aggravated-murder case. After Reynolds was murdered, Green was offered a plea bargain to a reduced charge of manslaughter.

{¶ 17} A couple of weeks after the murders, Bethel told Langbein that Bethel, Jeremy Chavis, "Doughboy" (Reynolds), and Hawks had been "partying" in the field where Langbein's grandfather kept a garden. Bethel told Langbein that he drew a 9 mm pistol and began firing at Reynolds and Hawks. After

emptying his clip, Bethel reloaded and continued to shoot Reynolds and Hawks. Bethel told Langbein that Jeremy Chavis shot Reynolds in the back with a shotgun. Langbein stated that in later conversations, Bethel expressed concern about being caught.

{¶ 18} Some time before January 1997, Bethel told his girlfriend Theresa Campbell, f.k.a. Theresa Cobb, about the murders. He told her that on the night of the murders, he, Jeremy Chavis, Reynolds, and Hawks went to "practice shooting guns." He said he "had a feeling to shoot" and shot Reynolds and Hawks "because he felt like it." Bethel told her that he had laughed and then called Jeremy over to "see what he had done." According to Campbell, when Jeremy Chavis saw what Bethel had done, Chavis began to cry and went back to the car. Bethel then reloaded his gun and continued to shoot. Bethel told Campbell that he "couldn't stop shooting," and that when Chavis wanted to leave, Bethel "just stood there looking."

{¶ 19} In January 1997, police executed a search warrant at the trailer on West Run Street. There they found a Maverick Model 88 12-gauge shotgun belonging to Cheveldes Chavis. Bethel's identical shotgun was never found. This type of shotgun could have fired the type of shells found at the crime scene.

{¶ 20} Also found at the trailer was a gun box with a "Ruger" logo on the lid. Although the box contained no gun, it did contain an instruction manual for a 9 mm Ruger P95 semiautomatic pistol. According to Langbein, after the trailer was searched, Bethel became nervous about being caught and "started acting real weird."

{¶ 21} In 2000, Langbein was charged with an unrelated federal firearms violation. He told police and Bureau of Alcohol, Tobacco, and Firearms ("ATF") agents what he knew about the Reynolds-Hawks murders and agreed to wear a concealed tape recorder during conversations with Bethel.

{¶ 22} On October 19, 2000, Langbein and Bethel had a conversation at the Subway restaurant where Bethel worked. Langbein wore a recorder, and the Subway was under ATF surveillance. During this conversation, Bethel talked about the investigation. He told Langbein, "I wanted to talk to Jeremy * * * 'cause I knew the [police] were going to go down and * * * try and tell him some shit." Bethel believed that detectives had "been havin' phones tapped," and he was hesitant to talk anywhere "they got anything."

{¶ 23} On November 1, 2000, police executed a search warrant at 656 East Jenkins Street, Columbus. Although the record does not show who lived at this address, some of the property seized pursuant to the warrant was later returned to Cheveldes Chavis. In a wastebasket at that site, police found papers with a cover sheet captioned "Supplemental Discovery" from the case of *State v. Tyrone Green*. Jeremy Chavis's fingerprints were found on that paper. In the same wastebasket, police found a copy of a search warrant given to Green during discovery in his case, along with its attached affidavit – the affidavit that named Reynolds as the source of Pryor's information.

{¶ 24} Bethel was arrested on November 6, 2000. He was indicted on two counts of aggravated murder under R.C. 2903.01(A) (prior calculation and design). Each count had two death specifications. The specifications for Count One, the murder of Shannon Hawks, alleged that the offense was committed to escape detection, apprehension, trial, or punishment for another offense committed by the offender, in violation of R.C. 2929.04(A)(3), and that it was part of a course of conduct involving the purposeful killing of two or more persons, in violation of R.C. 2929.04(A)(5). The specifications for Count Two, the murder of James Reynolds, were that Reynolds was killed to prevent his testimony in another criminal proceeding, in violation of R.C. 2929.04(A)(8), and that his murder was part of a course of conduct, in violation of R.C. 2929.04(A)(5).

{¶ 25} The trial court appointed Ronald B. Janes and W. Joseph Edwards as Bethel's counsel. After receiving discovery from the state, Janes and Edwards concluded that a death sentence was a strong possibility. Accordingly, they negotiated with the prosecutor's office to reach a plea bargain.

{¶ 26} At a meeting on August 29, 2000, Janes and Edwards discussed a proposed plea bargain with Bethel. Bethel's mother was also present with Sanford Cohan, an attorney she had hired. Janes and Edwards showed Bethel videotaped witness statements that they had received from the prosecution in discovery. After seeing these, Bethel softened his position and ultimately agreed to a plea bargain and to testify against Jeremy Chavis.

{¶ 27} As part of the bargain, Bethel agreed to make an "off-the-record" proffer of his testimony against Jeremy Chavis. The prosecutor prepared a proffer letter to clarify the ground rules for the proffer. The letter specifically provided that "no statements made or other information provided by your client during the 'off-the-record' proffer or discussion will be used against your client in any criminal case." The state reserved the right to make derivative use of Bethel's statement and to use it on cross-examination if his testimony was inconsistent with his proffer.

{¶ 28} On August 30, 2000, Bethel was taken to the Franklin County Sheriff's Office. There, in the presence of his attorney, Bethel signed the proffer letter. Bethel then made a statement that was tape-recorded.

{¶ 29} In his proffer, Bethel stated that killing Reynolds had been Jeremy Chavis's idea. Before the murders, Bethel said, he and Chavis discussed what they were going to do. After this conversation, they picked up Reynolds and Hawks and drove to the field belonging to Chavis's grandfather, where Bethel and others sometimes went to fire guns or to just hang out.

{¶ 30} When they got to the field, the four got out of the car and walked through some trees to a clearing. Bethel had a 9 mm handgun; Chavis had the 12-

gauge shotgun that Bethel had purchased. A few shots were fired into the air. Bethel and Chavis then turned their guns on Reynolds and Hawks.

{¶ 31} Reynolds and Hawks were standing together; Reynolds had his arm around Hawks. Bethel claimed that he and Chavis simultaneously fired their guns at Reynolds and Hawks from a distance of 30 to 40 feet. The two victims fell to the ground. Bethel emptied the clip of his handgun.

{¶ 32} According to Bethel, he thought that Reynolds and Hawks were probably dead, so he said, "Let's go." But Chavis wanted to "make sure." Chavis gave Bethel a fresh clip containing "maybe" six rounds. Bethel then walked over to the victims and emptied the second clip into them at "close range."

{¶ 33} On August 30, 2001, after making the proffer, Bethel entered into a plea agreement with the state. The agreement was embodied in a three-page document signed by Bethel, his attorneys, and the prosecutors and filed with the trial court. Bethel discussed the terms with his attorneys for 30 to 45 minutes before signing.

{¶ 34} Bethel agreed to plead to two counts of aggravated murder with firearm specifications. He further agreed to cooperate with the investigation and to testify truthfully against Jeremy Chavis and anyone else involved in killing Reynolds and Hawks. In return, the state agreed to dismiss the death specifications.

{¶ 35} The agreement contained a specific provision dealing with Bethel's proffer:

{¶ 36} "1. Defendant and the State agree that the proffer taken of the defendant on August 30, 2001 will be admissible in a criminal trial against the defendant in the event that the defendant does not abide by the terms and conditions of this agreement set forth below."

{¶ 37} The agreement also included the following provision:

{¶ 38} "6. * * * Should it be judged by the Franklin County Prosecutor's Office at any time that the defendant has failed to cooperate fully; refused to testify or testifies falsely in any proceeding(s); has intentionally given false, misleading or incomplete information or testimony; or has otherwise violated any provision of this agreement, then the Franklin County Prosecutor's Office may declare this Agreement null and void. The Franklin County Prosecutor's Office may then automatically reinstate the original charges against the defendant, as well as file any additional charges. * * * In the event this Agreement becomes null and void, then the parties will be returned to the position they were in before this Agreement."

{¶ 39} After the parties signed the agreement, the trial court held a closed hearing. The terms of the agreement were placed on record, and Bethel confirmed that he understood them. The trial court accepted the agreement and placed it in the record under seal. After a recess, and in open court, the trial court accepted Bethel's plea of guilty to two counts of aggravated murder with gun specifications.

{¶ 40} On November 13, 2001, Bethel refused to testify against Jeremy Chavis. On December 18, 2001, the state filed a motion to have the plea agreement declared void. The trial court granted the state's motion, thereby reinstating the charges. Janes and Edwards withdrew from the case on December 3, 2001, and Bethel was assigned other counsel.

{¶ 41} Bethel filed a motion to suppress his proffer. His former counsel, Janes and Edwards, testified at the motion hearing. The trial judge denied the motion and allowed the state to introduce Bethel's proffer into evidence.

{¶ 42} At trial, Bethel expressly denied his guilt. In his testimony, he repudiated the proffer, claiming that he had lied in order to obtain the benefit of the plea bargain. He admitted that he had never intended to fulfill his end of the bargain by testifying against Chavis, but claimed that he had merely wanted to

delay his trial because he felt that Janes and Edwards were unprepared. He claimed to have believed the proffer could not be used against him at trial even if he violated the agreement.

{¶ 43} Bethel admitted that Reynolds and Hawks had been in his car after the gathering at 4th and Morrill, but he claimed to have dropped them off on the west side of Columbus around 9:00 p.m. Bethel and his mother, Deborah Bibler, testified that Bethel and Chavis had been at Bibler's house on the south side of Columbus between 10:00 and 11:00 p.m., June 25, 1996, at the time that Ron Bass heard the gunshots.

{¶ 44} The jury found Bethel guilty of all charges and specifications. After a penalty hearing, the jury recommended death sentences for both killings, and the trial court sentenced Bethel to death. The cause is now before us upon an appeal as of right.

{¶ 45} In this appeal, Bethel sets forth 20 propositions of law, each devoid of merit. We overrule his propositions of law and affirm his convictions and his sentences of death.

I. *Bethel's Proffer*

A. The Plea Agreement

{¶ 46} Paragraph One of the plea agreement specifically provided that "the proffer taken of the defendant on August 30, 2001 will be admissible in a criminal trial against the defendant in the event that the defendant does not abide by the terms and conditions of this agreement * * * ." In his first proposition of law, Bethel contends that, despite the seemingly clear language of the first paragraph, once the plea agreement was declared void, the state could not use his proffer against him at trial. Thus, he contends, its introduction into evidence violated the plea agreement.

{¶ 47} According to Bethel, Paragraph One is meaningless. He argues that Paragraph Six of the agreement permitted the charges to be reinstated *only* if

the prosecutor declared the entire agreement void. And if the entire agreement was void, Bethel argues, Paragraph One was also void and could not be enforced.

{¶ 48} Bethel argues that his interpretation is supported by the following sentence in Paragraph Six: "In the event this Agreement becomes null and void, then the parties *will be returned to the position they were in before this Agreement*." According to Bethel, returning the parties to their pre-agreement position means that the proffer letter, which preceded the agreement, controlled the state's use of the proffer. And under the terms of the proffer letter, the state could have introduced Bethel's proffer only in order to impeach his testimony, if necessary.

{¶ 49} If Bethel's construction of the agreement is correct, it is clear that under no circumstances could Paragraph One ever be implemented. Bethel agrees that this is so. Indeed, his brief expressly contends that the null-and-void language of Paragraph Six renders Paragraph One meaningless.

{¶ 50} Principles of contract law are generally applicable to the interpretation and enforcement of plea agreements. See, generally, *United States v. Wells* (C.A.6, 2000), 211 F.3d 988, 995. Bethel's proposed interpretation of the agreement is at odds with a basic principle of contract law: "In the construction of a contract courts should give effect, if possible, to *every* provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction *must* obtain." (Emphasis added.) *Farmers' Natl. Bank v. Delaware Ins. Co.* (1911), 83 Ohio St. 309, 94 N.E. 834, paragraph six of the syllabus.

{¶ 51} This well-settled principle applies to plea agreements. *United States v. Rourke* (C.A.7, 1996), 74 F.3d 802, 807; see, also, *United States v. Brye* (C.A.10, 1998), 146 F.3d 1207, 1211 (rejecting interpretation that would render part of plea agreement superfluous). Thus, an interpretation that would render a

provision meaningless – as Bethel's proposed interpretation would – "is neither acceptable nor desirable under the normal rules of contract construction." *Hybud Equip. Corp. v. Sphere Drake Ins. Co.* (1992), 64 Ohio St.3d 657, 666, 597 N.E.2d 1096.

{¶ 52} Pointing out that the state drafted the plea agreement in this case, Bethel cites the well-known principle that ambiguities in a plea agreement are to be construed against the state. See *United States v. Johnson* (C.A.6, 1992), 979 F.2d 396, 399.

{¶ 53} However, the cited principle applies only to ambiguous agreements or portions of agreements. It has no application here, because there is no ambiguity in the agreement before us. An agreement is ambiguous if it is "subject to more than one reasonable interpretation." *Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1990), 52 Ohio St.3d 174, 177, 556 N.E.2d 1186. Accord *United States v. Gebbie* (C.A.3, 2002), 294 F.3d 540, 551 (plea agreement). Given the clear language of Paragraph One, and the need to ensure that the paragraph is not rendered meaningless, the agreement before us is subject to only one reasonable interpretation. The breach by Bethel voided the plea agreement and returned the parties to their previous position as stated in Paragraph Six, except that Bethel's proffer could then be used against him, as plainly provided by Paragraph One. This construction addresses the entire agreement and avoids the incorrect result of rendering Paragraph One meaningless.

{¶ 54} Bethel's plea agreement clearly provided that the state could use Bethel's proffer at trial if Bethel breached the agreement. Hence, the state did not violate the agreement by introducing the proffer. Bethel's first proposition of law is therefore overruled.

B. Evid.R. 410(A)

{¶ 55} Evid.R. 410(A)(5) provides that "any statement made in the course of plea discussions in which counsel for the prosecuting authority or for the defendant was a participant and * * * that result in a plea of guilty later withdrawn" is not admissible "against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions." In his second proposition of law, Bethel claims that the admission of his plea agreement and proffer violated Evid.R. 410(A)(5). However, since Bethel specifically agreed that his proffer could be admitted into evidence against him in the event that he breached the plea agreement, he has waived any claim under Evid.R. 410(A)(5).

{¶ 56} Evid.R. 410(A)(1) provides that a withdrawn plea of guilty is inadmissible. Evid.R. 410(A)(4) provides that any statement made during proceedings under Crim.R. 11 regarding a plea is inadmissible. Bethel claims that the state violated these rules at trial when it elicited testimony that he had previously entered a plea of guilty in this case. Columbus Police Detective Edward Kallay gave the following testimony on redirect examination:

{¶ 57} "Q. * * * After the proffer, was there a plea agreement in this case?

{¶ 58} "A. Yes, sir.

{¶ 59} "Q. Signed by the defendant?

{¶ 60} "A. Yes, sir.

{¶ 61} " * * *

{¶ 62} "Q. Plea in this case in open court?

{¶ 63} "A. Yes, sir, there was a plea."

{¶ 64} Bethel did not object to this evidence at trial. Further, defendant's attorneys first inserted the issue of the guilty plea into the case, in opening statement. This issue, raised in defendant's second proposition of law, is therefore waived.

C. Knowing and Voluntary Waiver

{¶ 65} In his 19th proposition of law, Bethel contends that when he entered into the plea agreement, he did not understand that it allowed the state to use his proffer against him if he breached the agreement. Thus, he claims that he did not knowingly, voluntarily, and intelligently waive his Fifth Amendment right against self-incrimination, and his proffer should have been suppressed.

{¶ 66} At the suppression hearing, both Edwards and Janes testified that they explained the agreement to Bethel and that he understood it, including the first paragraph. Both attorneys understood the agreement to mean that if Bethel violated it, his proffer could be used against him at trial. Edwards specifically explained to Bethel that the proffer was no longer off the record once he signed the plea agreement. "I just specifically said to him, Bobby, if you sign this agreement, then if you back out, meaning you don't testify against Jeremy, or if you testify untruthfully, * * * not only will the deal be revoked but then they're going to have this statement to be used against you."

{¶ 67} Bethel denied that he understood that the agreement would allow the use of his proffered statements. He testified that Janes and Edwards told him that Paragraph One was meaningless and that it left him free to renege with no adverse consequences other than reinstatement of the original charges.

{¶ 68} The trial court found that Janes and Edwards were credible and that Bethel was not. The court specifically found that "Bethel understood and agreed to the plea agreement," that Janes and Edwards did not advise Bethel to lie about his willingness to testify, and that "Bethel understood the potential uses of the proffer, and [understood that] pursuant to the plea agreement the prosecution [was permitted to] use the proffer against Bethel in a trial on the original charges."

{¶ 69} "Voluntariness is a legal question for a reviewing court to determine independently. * * * However, this court must defer to the trial court's

factual findings, if those are supported by the record." (Emphasis sic.) *State v. Keene* (1998), 81 Ohio St.3d 647, 656, 693 N.E.2d 246. The testimony of Janes and Edwards amply supports the trial court's findings of fact. On the basis of those findings, we conclude that Bethel knowingly, voluntarily, and intelligently entered into the plea agreement. Bethel was represented by counsel, who advised him of the consequences of breaching the agreement, and he understood those consequences.

D. Lack of *Miranda* Warnings

{¶ 70} Bethel also claims that his proffer was inadmissible because it was not preceded by *Miranda* warnings. Bethel's claim under *Miranda* is waived, however, because he did not bring it to the attention of the trial court.

{¶ 71} In order to overcome this waiver, Bethel must show plain error under Crim.R. 52(B). An error is plain error only if it is obvious, *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, and, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus. The trial court's failure to suppress the proffer on *Miranda* grounds was not plain error, as the error, if any, was neither obvious nor outcome-determinative.

{¶ 72} The outcome of Bethel's trial would not clearly have been different had the proffer been excluded, since Bethel had admitted his guilt to two of the state's witnesses, Langbein and Cobb.

{¶ 73} Nor do we find that the trial court's admission of the proffer was an obvious error. Bethel's attorneys were present during the proffer, and there is substantial authority for the proposition that *Miranda* warnings are not necessary when counsel is present. In *Miranda* itself, the United States Supreme Court observed that "[t]he presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]."

Miranda v. Arizona (1966), 384 U.S. 436, 466, 86 S.Ct. 1602, 16 L.Ed.2d 694. Indeed, it is generally accepted that the presence of counsel during interrogation "obviates the need for the warnings." 2 LaFave, Israel & King, Criminal Procedure (1999) 573, Section 6.8(e). See *United States v. Guariglia* (S.D.N.Y.1991), 757 F.Supp. 259, 264; *Virgin Islands v. Ruiz* (D.V.I.1973), 354 F.Supp. 245, 247-248; *People v. Mounts* (Colo.1990), 784 P.2d 792, 795-796; *Collins v. State* (Del.1980), 420 A.2d 170, 176; *Baxter v. State* (1985), 254 Ga. 538, 543, 331 S.E.2d 561. Contra *State v. DeWeese* (2003), 213 W.Va. 339, 348-349, 582 S.E.2d 786; see *Sweeney v. Carter* (C.A.7, 2004), 361 F.3d 327, 331.

{¶ 74} Therefore, Bethel's 19th proposition of law is overruled.

E. Imposing Death after Bethel Breached the Agreement

{¶ 75} In his ninth proposition of law, Bethel contends that imposition of the death sentence was arbitrary, given the trial court's willingness to accept his plea of guilty to a noncapital charge as part of the plea bargain. Bethel argues that, by accepting his guilty plea to aggravated murder without death specifications, the trial court effectively determined that a sentence of life imprisonment was appropriate. Citing *Adamson v. Ricketts* (C.A.9, 1988), 865 F.2d 1011, 1022, Bethel contends that he was sentenced to death simply because he violated his plea agreement, not because he deserved a death sentence.

{¶ 76} We find *Adamson* unpersuasive. The trial court's acceptance of the plea agreement in this case did *not* necessarily imply that it considered a life sentence "appropriate." We concur in the view expressed by a different panel of the Ninth Circuit Court of Appeals in another capital case: "That the sentence imposed after trial is more severe than one the judge would have been willing to impose as part of a plea bargain does not * * * impeach the legitimacy of the sentence. * * * [T]he judge could well have approved a settlement calling for a sentence lighter than he himself would have chosen to impose." *McKenzie v. Risley* (C.A.9, 1988), 842 F.2d 1525, 1537. The reasoning of *McKenzie* is

consistent with our own reasoning in *State v. Webb* (1994), 70 Ohio St.3d 325, 336, 638 N.E.2d 1023, that a prosecutor's offer of a plea bargain to a capital defendant did not constitute a concession by the prosecutor that a death sentence was inappropriate. Bethel's ninth proposition of law is therefore overruled.

F. Prosecutorial Vindictiveness

{¶ 77} In his tenth proposition of law, Bethel claims to be a victim of "prosecutorial vindictiveness." See, generally, *Blackledge v. Perry* (1974), 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (prosecutor may not retaliate against defendant for exercising right to appeal). Bethel argues that, in refusing to testify against Chavis, he was exercising his constitutional right to remain silent. He contends that reinstatement of the original charges in response to his refusal to testify amounted to "retaliation" for his exercise of that right.

{¶ 78} Bethel's claim lacks merit. "[W]hen a plea agreement is vacated, no presumption of vindictiveness arises when the prosecutor simply reinstates the indictment that was in effect before the plea agreement was entered." *Taylor v. Kincheloe* (C.A.9, 1990), 920 F.2d 599, 606. Accord *United States v. Anderson* (C.A.7, 1975), 514 F.2d 583, 588. When a defendant goes back on his promise, "it is hardly surprising, and scarcely suggestive of vindictiveness, that the district attorney in turn withdr[aws] his consent to the reduced charge." *United States ex rel. Williams v. McMann* (C.A.2, 1970), 436 F.2d 103, 106.

{¶ 79} In essence, Bethel claims a constitutional right to renege on his plea agreement, retain the benefit of the bargain that he broke, and avoid the agreed sanction for his breach. We decline to create such a right. To do so "would encourage gamesmanship of a most offensive nature. Defendants would be rewarded for prevailing upon the prosecutor to accept a reduced charge and to recommend a lighter punishment in return for a guilty plea, when the defendant intended at the time he entered that plea to attack it at some future date. * * * This

is nothing more than a 'heads-I-win-tails-you-lose' gamble." Id. at 106-107. Bethel's tenth proposition is overruled.

II. *Nonpublic Proceeding to Determine Defendant's Understanding of Plea Agreement*

{¶ 80} In his third proposition of law, Bethel contends that he should receive a new trial because a hearing where the plea agreement was discussed was closed to the public.

A. Constitutional Issues

{¶ 81} The right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and by Section 10, Article I of the Ohio Constitution. Although Bethel did not object to the closing of the hearing, the right to a public trial under Section 10, Article I of the Ohio Constitution cannot be waived by the defendant's silence. *State v. Hensley* (1906), 75 Ohio St. 255, 266, 79 N.E. 462. Nor does anything in the record show that the defense consented to the closing of the hearing. Cf. *State v. Bayless* (1976), 48 Ohio St.2d 73, 110, 2 O.O.3d 249, 357 N.E.2d 1035 (waiver by consent of defense counsel); *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶ 64 (error invited by defense counsel).

{¶ 82} The violation of the right to a public trial is a structural error. It is not subjected to harmless-error analysis. *Waller v. Georgia* (1984), 467 U.S. 39, 49-50, 104 S.Ct. 2210, 81 L.Ed.2d 31. In *Waller*, the court held that in order to justify closure of a hearing in a criminal case, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 48, 104 S.Ct. 2210, 81 L.Ed.2d 31.

{¶ 83} The record in this case does not show that any of these requirements were addressed. Thus, it does not appear that the closing of the hearing was justified. Bethel argues that because the closing of the hearing was unjustified, he is entitled to a new trial. We disagree.

{¶ 84} In *Waller*, a suppression hearing was improperly closed. The remedy, however, was not a new trial, but a new suppression hearing: "[T]he remedy should be appropriate to the violation. * * * A new trial need be held only if a new, public suppression hearing results in the suppression of material evidence not suppressed at the first trial, or in some other material change in the positions of the parties." 467 U.S. at 49-50, 104 S.Ct. 2210, 81 L.Ed.2d 31.

{¶ 85} Therefore, the remedy for the improper closing of the hearing in this case would be a new, public *hearing*. A new trial would follow only if the new hearing resulted in some "material change in the positions of the parties."

{¶ 86} However, under the present circumstances, a new hearing could not result in any change. The purpose of the hearing was to ensure that Bethel understood the terms of the plea agreement before he entered a plea. This purpose no longer has any relevance. Bethel's guilty plea was withdrawn. The plea agreement was voided by Bethel's breach.

{¶ 87} Because a new hearing could not materially change the position of the parties, there is no need for either a new hearing or a new trial. A new hearing would be an empty formality; a new trial would be a "windfall." *Waller*, 467 U.S. at 49, 104 S.Ct. 2210, 81 L.Ed.2d 31. Accordingly, we overrule Bethel's third proposition of law.

B. Crim.R. 11(F)

{¶ 88} Crim.R. 11(F) provides that when a negotiated plea of guilty is offered in a felony case, "the underlying agreement upon which the plea is based shall be stated on the record in open court." In this case, the underlying

agreement was stated on the record, but not in "open court," as the court was closed while the plea agreement was being discussed.

{¶ 89} However, Bethel did not object to the closure of the courtroom during the discussion of the plea agreement. While Bethel's silence did not waive his constitutional right to a public trial, see *State v. Hensley* (1906), 75 Ohio St. 255, 266, 79 N.E. 462, a contemporaneous objection is necessary to preserve error for appellate review of a violation of Crim.R. 11(F).

{¶ 90} Thus, Bethel cannot prevail on his claim under Crim.R. 11(F) unless he shows plain error. To do this, he must show that the outcome of the trial clearly would have been otherwise without the alleged error. *State v. Long*, 53 Ohio St.2d at 97, 7 O.O.3d 178, 372 N.E.2d 804. Bethel does not explain how he was prejudiced by the trial court's violation of Crim.R. 11(F). Cf. *State v. Spivey* (1998), 81 Ohio St.3d 405, 418, 692 N.E.2d 151 (violation of Crim.R. 11(F) not prejudicial where terms of the plea were stated on the record in chambers). We overrule Bethel's fifth proposition of law.

III. *Evidentiary Issues*

A. Gang-Affiliation Evidence

{¶ 91} State's witness Donald Langbein testified that Bethel was a member of the Crips street gang. Langbein also identified a photograph of himself and Bethel making hand signals that, according to Langbein, were "gang signs" of the Crips. This photo was published to the jury after Langbein identified it. In his seventh and eighth propositions of law, Bethel claims that this evidence was inadmissible.

{¶ 92} Bethel did not object to the gang-affiliation testimony at trial. Nor did he object to the photo when Langbein identified it in court, even though it was published to the jury at that time. He objected only *after* the state's case had concluded, when the court was considering the admission of exhibits. Bethel's

failure to timely object to the testimony, or to the photo, waives the issues raised in his seventh and eighth propositions of law. We overrule these propositions.

B. Tape-Recorded Conversations

{¶ 93} In his 18th proposition of law, Bethel contends that the trial court erred when it refused to provide State's Exhibit T-1, the tape recording of the Bethel-Langbein conversation on October 19, 2000, to the jury.

{¶ 94} Parts of the tape were played during the state's case and during Bethel's cross-examination. However, the tape was never offered nor formally admitted into evidence. During its guilt-phase deliberations, the jury requested the tape. Before responding, the trial court consulted counsel for both parties, and they "collectively agreed that the appropriate response is [that] you have all of the evidence which has been admitted." Accordingly, the trial court told the jury: "You have everything you need. * * * [Y]ou have everything that's been admitted into evidence, and the rest you will have to rely on your collective memory for."

{¶ 95} Since the defense did not object and agreed that this was "the appropriate response" to the jury's request for the tape, the issue is waived. See *State v. Campbell* (2000), 90 Ohio St.3d 320, 324, 738 N.E.2d 1178. Neither did the trial court commit plain error. When the jury asks to see an exhibit, it is within the trial court's discretion to grant or deny that request. See *State v. McGuire* (1997), 80 Ohio St.3d 390, 396, 686 N.E.2d 1112; *State v. Clark* (1988), 38 Ohio St.3d 252, 257, 527 N.E.2d 844. "The term 'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144, citing *Steiner v. Custer* (1940), 137 Ohio St. 448, 19 O.O. 148, 31 N.E.2d 855. The trial court's refusal to send the tape to the jury was not unreasonable, arbitrary, or unconscionable.

{¶ 96} Bethel also claims that the trial court, having allowed the state to play parts of one tape, should have allowed the defense to play tapes of *other*

conversations between Bethel and Langbein during Langbein's cross-examination. Bethel argues that excluding the other tapes violated Evid.R. 106: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it."

{¶ 97} However, Bethel did not proffer the tapes he wanted the jury to hear at his trial. Because the other tapes are not in the record, we cannot determine whether they should in fairness "be considered contemporaneously with" Exhibit T-1. See *State v. Webb*, 70 Ohio St.3d at 337, 638 N.E.2d 1023. Hence, Bethel has also failed to preserve this issue.

{¶ 98} Bethel also argues that the exclusion of the other conversations violated his right to confront Langbein with statements made by Langbein during those conversations. But at trial Bethel did not argue that he was entitled to use the tapes to confront Langbein with *Langbein's* statements. Bethel argued only that the jury should hear the tapes because they contained *Bethel's* denials of involvement in the murders. Bethel's confrontation claim is waived by his failure to present it to the trial court as well as by his failure to proffer the tapes.

{¶ 99} Because the issues presented by Bethel's 18th proposition of law were not preserved at trial, we overrule that proposition.

C. Weight and Sufficiency of the Evidence

{¶ 100} In his 16th proposition of law, Bethel contends that the verdict was against the manifest weight of the evidence. See R.C. 2953.02. A court considering a manifest-weight claim "review[s] the entire record, weighs the evidence and all reasonable inferences, [and] considers the credibility of witnesses." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 20 OBR 215, 485 N.E.2d 717. The question to be determined is "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage

of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. at 175, 20 OBR 215, 485 N.E.2d 717.

{¶ 101} The key evidence supporting Bethel's conviction was his own statements to Langbein and Campbell and his proffer of August 30, 2001. On each occasion, Bethel admitted killing Reynolds and Hawks with a 9 mm handgun.

{¶ 102} Langbein also testified, and Bethel admitted, that Bethel offered to take Reynolds home on June 25, 1996. A friend of Hawks testified that the last time she saw Hawks and Reynolds, they were getting into Bethel's car. Bethel also admits that he picked up Hawks at some point on June 25, 1996, but claims that he dropped off both victims at a Kentucky Fried Chicken restaurant.

{¶ 103} Bethel had purchased a shotgun like the one used in the murders less than two weeks earlier. While police found a similar shotgun purchased by Bethel's friend during a search of Bethel's trailer, Bethel's shotgun was never located. Bethel claimed that it had been stolen.

{¶ 104} When police searched the home of Cheveldes Chavis (Jeremy's brother and Bethel's friend), they found a document captioned "Supplemental Discovery," which had Jeremy Chavis's fingerprints on it, and a copy of an affidavit in Tyrone Green's aggravated-murder case that claimed that Reynolds said that he had seen Green shoot a man.

{¶ 105} Bethel's proffer, explaining how the murders were committed, supports a finding of prior calculation and design. Bethel admitted that before picking up Reynolds and Hawks, he and Jeremy discussed what they were going to do. After Bethel fired an entire clip at Reynolds and Hawks, even though he wanted to leave, Bethel accepted a fresh clip from Jeremy, reloaded, approached the victims, and emptied a second clip into them from close range.

{¶ 106} The autopsies showed that Reynolds was shot ten times, once with a shotgun, and Hawks was shot four times. Nine mm bullets were recovered from both bodies. Reynolds had four head wounds, at least one of which was inflicted at close range. Hawks had two head wounds, at least one of which was inflicted at close range. These wounds confirm Bethel's statement in his proffer that he fired several shots at Reynolds and Hawks from a distance, approached them as they lay on the ground, and shot them again at close range.

{¶ 107} Bethel argues that the account in his proffer is inconsistent with the victims' wounds and the crime-scene evidence. However, his claims are vague and largely conjectural. Bethel claims that *some* of the victims' wounds could not have been inflicted from a distance of 30 to 40 feet. But this fact is not inconsistent with Bethel's proffer; Bethel never said he fired *all* his shots from that distance. Rather, after firing his initial fusillade, he reloaded his gun, approached the victims, and shot them at close range.

{¶ 108} Bethel's argument that his proffer is inconsistent with the physical evidence is partially based on wound angles that he claims are inconsistent with those from shots fired at a distance. However, his argument assumes that the victims were standing upright when these wounds were inflicted. Bethel fails to take into account his own admission that the victims fell to the ground when they were shot.

{¶ 109} Bethel also argues that the lack of bleeding from Reynolds's shotgun wound indicates that this wound was inflicted after Reynolds's death and that this evidence is inconsistent with the proffer, which states that Chavis fired his shotgun at the same time Bethel began firing. However, the coroner testified that the wound could have been inflicted either "*very soon before* or immediately after" Reynolds's fatal head wound. (Emphasis added.)

{¶ 110} Bethel argues in his brief that his statement to Campbell placed Chavis in the car during the shootings, thus contradicting his other statements that

Chavis fired the shotgun. But there is no contradiction. The Campbell statement does not place Chavis in the car during the *entire* crime. To the contrary, Campbell testified that Bethel told her that Chavis "started crying and *went* to the car" after the initial shooting. (Emphasis added.)

{¶ 111} This is not a case in which the evidence weighs heavily against conviction; the jury's verdict was not a manifest miscarriage of justice. *Martin*, 20 Ohio App.3d 172, 20 OBR 215, 485 N.E.2d 717. Rather, it is a case in which the defendant admitted guilt on three separate occasions, in which those admissions are fully consistent with the physical evidence, and in which the defendant had a strong motive to kill the victims. We overrule Bethel's 16th proposition of law.

{¶ 112} In his 17th proposition of law, Bethel contends that the evidence was legally insufficient to support his conviction. The test of sufficiency of the evidence is whether a rational trier of fact, viewing the evidence in the light most favorable to the state, could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 309, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 113} Bethel's statements provide legally sufficient evidence of his guilt. Bethel's 17th proposition of law is overruled.

IV. *Voir Dire*

{¶ 114} In his 15th proposition of law, Bethel identifies ten prospective jurors who were excused for cause because the trial court concluded that their difficulties with capital punishment rendered them unable to fairly consider the death penalty. Bethel contends that each of these excusals was improper. Bethel also claims that the trial court erroneously overruled his challenges of two prospective jurors for cause.

A. Prosecution Challenges for Cause

{¶ 115} In each case for which Bethel alleges that the trial court improperly excused a venireman for cause, Bethel objected to the excusal. Nevertheless, the state argues that Bethel waived all but plain error by failing to state specific grounds for his objections.

{¶ 116} Bethel based his objections as to four veniremen, Eaton, Johnston, O'Harra, and Carpenter, solely on his claim that death qualification is unconstitutional. He articulated no other objection to excusing these veniremen for cause. Bethel has thus waived any objections based on other grounds, such as the voir dire responses of the veniremen in question.

{¶ 117} The state's contention is incorrect with regard to the other six prospective jurors. In the cases of Shultz, Rhatigan, Poindexter, and Hilty, Bethel specifically objected to excusal on the grounds that the prospective juror's voir dire responses did not support a challenge for cause. Therefore, these objections were not waived.

{¶ 118} A juror may be excused for cause if his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas* (1980), 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 40. A trial court's resolution of a challenge for cause will be upheld on appeal unless it is unsupported by substantial testimony. *State v. Wilson* (1972), 29 Ohio St.2d 203, 211, 58 O.O.2d 409, 280 N.E.2d 915.

{¶ 119} Venireman Rhatigan never stated that she was categorically opposed to capital punishment. Asked whether she would give capital punishment "a fair shake," she said: "I think maybe. But it would be very difficult." She did not know whether she could sign a death verdict. She thought "maybe" she could follow the law, but "wouldn't promise" to do so. Later, she said she would try to be fair and to follow the law, but "with only two murders I

would be predisposed to weigh the mitigating factors more heavily." She reiterated that it would be very difficult to sign a death verdict, although she allowed that it was "possible" that she would do so.

{¶ 120} Rhatigan's refusal to promise to follow the law and fairly consider a death sentence supports a finding that her ability to follow the law was substantially impaired. Thus, the record supports the trial court's decision to excuse her for cause.

{¶ 121} Venireman Shultz was "completely against" capital punishment, although he believed that some people deserved it. Even though he "would do whatever [he was] charged to do legally," he did not think that he could sign a death verdict.

{¶ 122} In response to a question by defense counsel, Shultz mentioned Susan Smith and Timothy McVeigh as examples of persons who deserved the death penalty. Asked whether he could have voted for a death sentence in the Susan Smith case, Shultz said: "My mind is telling me yes *right now*." (Emphasis added.) He said he could "absolutely" follow the judge's instructions "as a civic duty" and could consider each of the possible sentences.

{¶ 123} Shultz's final statements, viewed in isolation, do not suggest impairment. "However, where a prospective juror gives contradictory answers on voir dire, the trial judge need not accept the last answer elicited by counsel as the prospective juror's definitive word. * * * Rather, 'it is for the trial court to determine which answer reflects the juror's true state of mind.' " *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, ¶ 66, quoting *State v. Jones* (2001), 91 Ohio St.3d 335, 339, 744 N.E.2d 1163. Shultz had already said that he was completely against capital punishment, even though he claimed he could follow the judge's instructions. Thus, substantial testimony supported excluding Shultz. The trial judge did not abuse his discretion by so doing. See *State v. Webb*, 70 Ohio St.3d at 339, 638 N.E.2d 1023.

{¶ 124} Poindexter and Hilty also gave contradictory answers. Poindexter was not completely against capital punishment. However, she said on voir dire that she could not and "probably wouldn't sign" a death verdict if she were the last juror to sign the verdict form. She also said that "maybe" she could do it after hearing the evidence, but that she did not know. Later she said that she could follow the trial court's instructions and "would have to" vote for a death sentence if the state proved its case. She stated that she could sign a death verdict, although she did not retract her earlier statement that she could not provide the final signature. The trial judge granted the state's challenge for cause because Poindexter "said everything on both sides of this issue."

{¶ 125} Hilty initially said she possibly could sign a death verdict, but then said: "I couldn't do it." Later, she said, "I guess I could do it."

{¶ 126} The record supports the trial judge's decision to grant these challenges. Both Poindexter and Hilty expressed severe doubts about their ability to participate in a death sentence. The record justifies a finding that their ability to perform in accordance with their instructions and oath was substantially impaired. To the extent that they contradicted themselves on this point, the trial judge's resolution of the question is entitled to deference. *Webb*, supra.

{¶ 127} Finally, although Bethel did not state specific grounds for objecting to the excusals of Hackney and Stynchula, the basis of Bethel's objections can be fairly discerned from the record. Hence, Bethel's objections to these excusals were not waived.

{¶ 128} These challenges were also properly granted under the substantial-impairment standard. Hackney believed that she could follow the law, although it would be difficult. But she said she could not actually sign a death verdict, even if that was "the right thing to do." Signing would make her feel guilty: "[M]orally, I would have a real hard time dealing with it." The only

circumstance in which she would be willing to sign would be if the defendant had committed a murder in prison.

{¶ 129} Stynchula was not challenged for cause by either party during the death-qualification voir dire. However, two days later, she disclosed, without prompting, that she did not know whether she could sign a death verdict. She said: "[T]he past two days just thinking and thinking of it just gives me a – gets me in the pit of my stomach." She even worried that she might be excommunicated from her church if she signed a death verdict.

{¶ 130} We hold that the trial court's decision to excuse these six prospective jurors for cause was supported by substantial testimony. In each case, voir dire provided a sufficient basis for the trial court to conclude that the juror's views on capital punishment would either prevent or substantially impair the performance of the juror's duties in accordance with his instructions and oath.

B. Defense Challenges for Cause

{¶ 131} A defendant has a constitutional right to exclude for cause any prospective juror who will automatically vote for the death penalty. *Morgan v. Illinois* (1992), 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492. Bethel challenged veniremen Ford and Collier for cause on this basis. The trial court overruled both challenges, although it sustained several other challenges for cause by Bethel.

{¶ 132} Venireman Ford said on voir dire: "I believe in capital punishment, I definitely believe that there are circumstances and factors that must be weighed out and I definitely fall in the middle" between an automatic death sentence and an automatic rejection of death. He said that if life were the appropriate sentence, he could sign a life verdict. When asked whether he would be "predisposed to the death penalty if he found that the defendant did purposely kill two people," he said, "Yes." However, he added, "I [would] totally try to do

my best to clearly accept all the evidence and factors that are presented," and "I would definitely try my very best to be open-minded about the process."

{¶ 133} Based on the totality of Ford's voir dire, the trial court could properly conclude that Ford understood the importance of considering all the evidence and the relevant factors and that he would not automatically vote for death. Thus, substantial testimony supports the trial court's decision not to exclude him for cause.

{¶ 134} As for venireman Collier, Bethel was not prejudiced by the denial of his challenge to Collier. Although Bethel's challenge for cause was denied, Collier did not sit on the jury, and Bethel was not forced to use a peremptory challenge to eliminate him. See *State v. Eaton* (1969), 19 Ohio St.2d 145, 48 O.O.2d 188, 249 N.E.2d 897, paragraph one of the syllabus.

{¶ 135} No reversible error attaches to the trial court's rulings on the defendant's challenges for cause, which were raised in Bethel's 15th proposition of law. That proposition is therefore overruled.

V. *Lesser Included Offense*

{¶ 136} In his 14th proposition of law, Bethel contends that the trial court should have granted his request for an instruction on the lesser included offense of murder. "Murder (R.C. 2903.02) is a lesser included offense of aggravated murder (R.C. 2903.01[A]). * * * The sole difference is that prior calculation and design is absent from murder." *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 36. Bethel claims that the evidence reasonably supports a finding that the killings were purposeful, and thus constituted murder, but were not committed with prior calculation and design.

{¶ 137} However, Bethel's defense was alibi; he and his mother testified that he was at his mother's house between 10:00 and 11:00 p.m., June 25, 1996 (i.e., at the time Ron Bass heard gunshots). Ordinarily, when a defendant presents a complete defense to the substantive elements of the crime, such as an alibi, an

instruction on a lesser included offense is improper. See, e.g., *State v. Strodes* (1976), 48 Ohio St.2d 113, 117, 2 O.O.3d 271, 357 N.E.2d 375.

{¶ 138} In such cases, a defendant is entitled to a lesser-included-offense instruction "only if, based on the evidence adduced by the state, the trier of fact can find for the defendant * * * on some element of the greater offense which is not required to prove the commission of the lesser offense and for the state on the elements required to prove the commission of the lesser offense." *State v. Solomon* (1981), 66 Ohio St.2d 214, 20 O.O.3d 213, 421 N.E.2d 139, paragraph two of the syllabus. "[I]f due to some ambiguity in the state's version of the events involved in a case the jury could have a reasonable doubt regarding the presence of an element required to prove the greater but not the lesser offense, an instruction on the lesser included offense is ordinarily warranted." Id. at 221, 20 O.O.3d 213, 421 N.E.2d 139. Thus, Bethel was entitled to a murder instruction only if the state's evidence was ambiguous on the element of prior calculation and design, such that a trier of fact could reasonably have found that Bethel killed the victims purposefully but without prior calculation and design.

{¶ 139} Bethel cites a portion of the testimony of one of the state's witnesses, Theresa Cobb Campbell, in support of his argument. According to Campbell, when Bethel confessed the murders to her, he told her that when he, Chavis, and the victims went to shoot guns, he "had a feeling to shoot" and that he shot the victims "because he felt like it." Bethel contends that these statements, construed in the light most favorable to him, negated the element of prior calculation and design and could have led a trier of fact to conclude that the shootings were murders rather than aggravated murders.

{¶ 140} The portion of Campbell's testimony cited by Bethel does not create an ambiguity in the state's case. In *Solomon*, "[t]he *sole evidence* of a scheme designed to implement the calculated decision to kill * * * was the passage of time" between two incidents. (Emphasis added.) 66 Ohio St.2d at 221,

20 O.O.3d 213, 421 N.E.2d 139. The court found that "[a]lthough such evidence might have provided the jury with a reasonable basis for finding prior calculation and design, it is ambiguous in nature and did not necessarily lead to that conclusion." Id.

{¶ 141} Here, Campbell's testimony was far from being the sole evidence of Bethel's prior calculation and design. The fact that each witness does not provide testimony conclusively proving every element of a crime does not mean that a defendant is entitled to instructions on every lesser included offense. The whole of the state's case should be considered in determining whether an instruction on a lesser included offense should reasonably be given. *State v. Goodwin* (1999), 84 Ohio St.3d 331, 345, 703 N.E.2d 1251.

{¶ 142} Campbell's testimony actually supports the conclusion that Bethel planned the murders. He took the victims to a secluded spot. He shot them both in quick succession from close range. He then reloaded his gun and shot some more. He expressed to Campbell no regret or confusion as to his motivation.

{¶ 143} Even when considering Campbell's testimony in a light most favorable to Bethel, we conclude that under all the evidence presented, no reasonable trier of fact could have found that Bethel killed the victims purposefully but without prior calculation and design. Hence, Bethel was not entitled to a lesser-included-offense instruction on murder. Bethel's 14th proposition is overruled.

VI. *Penalty-Phase Issues*

A. *Ashworth* Issue

{¶ 144} In his sixth proposition of law, Bethel contends that the trial court erred by allowing Bethel to waive the presentation of mitigation evidence without inquiring into the knowing and voluntary character of Bethel's decision.

See, generally, *State v. Ashworth* (1999), 85 Ohio St.3d 56, 706 N.E.2d 1231, paragraph one of the syllabus.

{¶ 145} In the penalty phase, Bethel made a brief unsworn statement in which he maintained his innocence. He expressed sympathy for the families of Reynolds and Hawks. He told the jury that he had made efforts to change and was not the same person he had been at age 18. He pointed out that at the time of his arrest, he had been working and leading "basically a normal life." Defense counsel then presented the testimony of Joseph S. Burke Jr., the manager of a Subway restaurant where Bethel had worked. Burke testified that Bethel was a good worker who had begun as a crew member and was promoted within three or four months to assistant manager.

{¶ 146} After both parties rested in the penalty phase, defense counsel explained to the judge that the evidence presented was "all that [Bethel] would let us put on." Counsel informed the court that they had performed an investigation and had prepared a mitigation case. They had planned to present several witnesses: Bethel's mother, a teacher, social workers, and a guard at a juvenile facility. Counsel had also obtained reports from Children Services and the Hannah Neil House pertaining to Bethel's childhood. They were prepared to show that parental abandonment and neglect had denied Bethel guidance and discipline, but that Bethel had behaved unusually well in juvenile detention and had qualified for early release.

{¶ 147} Because Bethel would not allow his counsel to put on the case they had prepared, counsel consulted Jeffrey Smalldon, Ph.D., a psychologist, who concluded that Bethel was competent to waive mitigation.

{¶ 148} In *State v. Ashworth*, 85 Ohio St.3d 56, 706 N.E.2d 1231, at paragraph one of the syllabus, we held: "In a capital case, when a defendant wishes to waive the presentation of *all* mitigating evidence, a trial court must conduct an inquiry of the defendant on the record to determine whether the waiver

is knowing and voluntary." (Emphasis sic.) In *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 74, we explained: "Given our emphasis in *Ashworth* on the word 'all,' it is clear that we intended to require an inquiry of a defendant only in those situations where the defendant chooses to present no mitigating evidence whatsoever."

{¶ 149} In this case, Bethel did not waive the presentation of *all* mitigating evidence. He presented mitigating evidence to the jury: his unsworn statement and the testimony of his former supervisor. Therefore, no *Ashworth* inquiry was required. Bethel's sixth proposition is overruled.

B. Instructions

{¶ 150} In his 12th proposition of law, Bethel contends that the trial court's penalty-phase instructions were inadequate and improper.

{¶ 151} The trial court admitted all the guilt-phase evidence in the penalty phase. The court instructed the jury to "consider all of the evidence, the arguments of counsel, and all the other information and reports which are relevant to the aggravating circumstances and mitigating factors." The court further instructed that "evidence" included "all of the testimony and exhibits produced at the first trial [i.e., the guilt phase] which is relevant to the aggravating circumstances and or the mitigating factors." However, by agreement of the prosecutor, none of the exhibits from the guilt-phase proceedings were ultimately provided to the jurors in their deliberations.

{¶ 152} Citing *State v. Getsy* (1998), 84 Ohio St.3d 180, 702 N.E.2d 866, Bethel contends that the trial court had the responsibility to determine what evidence was relevant rather than leaving that determination to the jury. However, the trial court in its instructions did not specifically leave it to the jury to determine what evidence was relevant, as the trial court did in *Getsy*. The trial court in *Getsy* instructed the jury to consider " 'all the evidence, including exhibits presented in the first phase of this trial which you deem to be relevant.' "

(Emphasis deleted.) *Getsy*, 84 Ohio St.3d at 201, 702 N.E.2d 866. Here, the jury understood that they would see only the evidence that the *trial judge* deemed relevant.

{¶ 153} Further, in *Getsy*, "[t]he trial court denied the defense request to exclude certain items (i.e., shotgun, ballistic reports, and blood) from the penalty-phase deliberations. The defense renewed the request after the jury instructions were given and specifically objected to the instruction regarding the exhibits." Id. Here, Bethel failed to specifically object to the trial court's instruction at trial. Absent plain error, this issue is waived.

{¶ 154} Most guilt-phase evidence is relevant to the penalty phase. See *State v. DePew* (1988), 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542. The only guilt-phase evidence Bethel sought to have removed from the consideration of the jurors in the penalty phase were the photographs. Those exhibits were not provided to the jury during their penalty-phase deliberations. Hence, Bethel fails to demonstrate plain error.

{¶ 155} Bethel also complains that the jury was not instructed to "recommend the appropriate sentence as though your recommendation will, in fact, be carried out." See *State v. Mills* (1992), 62 Ohio St.3d 357, 375, 582 N.E.2d 972 (commending such an instruction as clear and accurate). Again, Bethel never proposed such an instruction at trial, nor did he object to the trial court's failure to give it. Absent plain error, this issue is waived.

{¶ 156} No plain error exists here. Although we commended the trial court in *Mills* for giving the above instruction, we did not require that it be given. Moreover, the instructions that were actually given at trial did not misstate the jury's role in any way. See *State v. Rogers* (1986), 28 Ohio St.3d 427, 429-431, 28 OBR 480, 504 N.E.2d 52. The trial court instructed the jury as follows: "You are not to construe the use of that word [recommend] to in any way diminish your sense of responsibility in this matter." We approved such an instruction in *State*

v. Robb (2000), 88 Ohio St.3d 59, 84, 723 N.E.2d 1019. Thus, there was no "obvious" error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240.

{¶ 157} Since Bethel put on little evidence in mitigation, neither is it clear that giving the *Mills* instruction would have brought about a different outcome. Bethel's 12th proposition is overruled.

VII. *Ineffective Assistance*

{¶ 158} In his fourth proposition of law, Bethel claims that he received ineffective assistance of counsel both before and at his trial.

{¶ 159} In order to prevail on a claim of ineffective assistance of counsel, Bethel must show (1) deficient performance, i.e., performance falling below an objective standard of reasonable representation, and (2) resulting prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different. See *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Williams v. Taylor* (2000), 529 U.S. 362, 390-391, 120 S.Ct. 1495, 146 L.Ed.2d 389; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus. Bethel alleges that his original counsel, Ronald Janes and Joseph Edwards, rendered ineffective assistance before trial and that his trial counsel rendered ineffective assistance during trial.

A. Alleged Errors by Janes and Edwards

{¶ 160} Bethel claims that Janes and Edwards never prepared to try his case. This lack of preparation was prejudicial, he claims, because it compelled him to make a proffer and enter a guilty plea in order to buy time and to avoid having to go to trial with unprepared counsel.

{¶ 161} According to Bethel, Janes actually admitted at the suppression hearing that, as of August 30, 2001, the defense was not prepared for the upcoming trial. On cross-examination, Janes was asked: "Do you know if at the time of his plea agreement he [i.e., Bethel] was prepared – whether or not *he* was

prepared for trial?" Janes replied: "No, I don't believe *he* was." (Emphasis added.)

{¶ 162} This exchange does not support Bethel's interpretation of Janes's testimony as a confession that the defense was inadequately prepared. Janes may well have meant only that Bethel himself was not *willing* to go to trial when a death sentence was a possibility.

{¶ 163} Bethel also cites his own guilt-phase testimony and that of private investigator Gary Phillips to support his claim that Janes and Edwards were unprepared. Phillips testified that three weeks before the scheduled start of the trial, Janes contacted him "in somewhat of a panic mode" and asked for Phillips's assistance in investigating the case. Phillips admitted, however, that he did not know whether Janes and Edwards had sought a continuance of the scheduled trial date and said that it would have been "kind of rare" for Bethel's case to have gone to trial within a year of his indictment. Moreover, after reviewing evidence in the case, Phillips recommended to Bethel that he agree to the offered plea bargain.

{¶ 164} Bethel testified that his attorneys were unprepared, but he also testified that he never sought a continuance in the case. He had also testified that the plea agreement was "a good idea" and that his only problem with the plea agreement was that he would have to testify against Jeremy Chavis. Besides Janes, Edwards, and Phillips, Bethel's mother, Sanford Cohan, the attorney hired by Bethel's mother to monitor the case, and Jim Crites, Bethel's mitigation expert, all urged Bethel to accept the plea agreement.

{¶ 165} We reject Bethel's contention that Janes and Edwards were unprepared for trial and forced Bethel into a plea agreement. Bethel's claim that his attorneys would betray him in order to avoid trial is incredible and has no evidentiary support. All indications are that Janes and Edwards sought and

recommended a plea agreement because they were working in Bethel's best interest.

{¶ 166} Bethel also contends that Janes and Edwards were ineffective because they "fail[ed] to adequately and completely explain [the] plea agreement" to him. Janes and Edwards testified at the suppression hearing that they did not specifically recall explaining Paragraph Six of the plea agreement (the "null and void" language) to Bethel. However, the trial court found that Bethel fully understood that his proffer could be used against him if he breached the agreement. Although Bethel claimed that he was misled by counsel and confused by the alleged conflict between Paragraphs One and Six, the trial court found that his suppression-hearing testimony lacked credibility, while the testimony of Janes and Edwards was credible.

{¶ 167} In sum, we lack a factual basis for finding that Janes and Edwards committed errors amounting to deficient performance. Thus, we reject Bethel's claims that Janes and Edwards provided ineffective assistance of counsel.

B. Alleged Errors by Trial Counsel

{¶ 168} Bethel contends that his trial counsel were ineffective because they failed to obtain defense experts on false confessions, ballistics, forensics, and crime-scene reconstruction. We find that Bethel was not prejudiced by trial counsel's actions. In *State v. Madrigal* (2000), 87 Ohio St.3d 378, 721 N.E.2d 52, we rejected a similar claim that counsel should have obtained an expert on eyewitness identification: "[R]esolving this issue in Madrigal's favor would be purely speculative. Nothing in the record indicates what kind of testimony an eyewitness identification expert could have provided. Establishing that would require proof outside the record * * *. Such a claim is not appropriately considered on a direct appeal." Id. at 390-391, 721 N.E.2d 52.

{¶ 169} Bethel contends that his counsel should have objected to evidence concerning his gang membership on the ground that it was irrelevant. We reject this claim because counsel had no valid basis to object to the evidence of Bethel's gang affiliation.

{¶ 170} A defendant's gang affiliation can be relevant and is admissible in cases " 'where the interrelationship between people is a central issue.' " *United States v. Gibbs* (C.A.6, 1999), 182 F.3d 408, 430, quoting *United States v. Thomas* (C.A.7, 1996), 86 F.3d 647, 652. See, also, *United States v. Sloan* (C.A.10, 1995), 65 F.3d 149, 150-151. Here, the evidence showed that Reynolds was killed by two members of the Crips gang because he was a witness to the criminal activity of a third member. The gang affiliation of Bethel, Jeremy Chavis, and Tyrone Green strengthens Bethel's motive to commit the shootings. See *People v. Miller* (1981), 101 Ill.App.3d 1029, 1034-1035, 57 Ill.Dec. 358, 428 N.E.2d 1038 (evidence implying gang membership admissible to show defendant's motive for becoming involved in dispute between defendant's associate and victim). The gang evidence thereby makes Bethel's guilt more likely than it would be without that evidence. Thus, it was relevant under Evid.R. 401. See *Sloan*, 65 F.3d at 151.

{¶ 171} Bethel also argues that the probative value of the gang-affiliation evidence was substantially outweighed by the risk of unfair prejudice. "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice * * *." Evid.R. 403(A). The trial court has broad discretion in determining whether unfair prejudice substantially outweighs probative value under Evid.R. 403(A). A reviewing court will not interfere absent a clear abuse of that discretion. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 40.

{¶ 172} Even had there been an objection, the trial court would not have committed a clear abuse of discretion by admitting the gang evidence. It is true,

as Bethel argues, that evidence of gang membership creates some risk of unfair prejudice. See, e.g., *United States v. Jobson* (C.A.6, 1996), 102 F.3d 214, 219, fn. 4. On the other hand, the state's use of the evidence was restrained.

{¶ 173} The evidence regarding Bethel's gang membership consisted of Langbein's bare statement that Bethel was a member of the Crips and one photograph of Bethel flashing gang signs with his hands. Beyond the information that the Crips were a gang, the state introduced no evidence about the organization – for instance, about its general criminal propensities or about unrelated criminal enterprises – that might have inflamed the jury. Nor did the state discuss the Crips in its opening or closing statements. In light of the relevance of Bethel's gang affiliation and the state's minimal use of that evidence, the danger of unfair prejudice did not substantially outweigh the probative value of the gang evidence.

{¶ 174} Bethel also argues that the gang evidence constituted improper "other acts" evidence. Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive*, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (Emphasis added.) The state, however, made no attempt to use the gang evidence as proof of Bethel's character. Moreover, as already noted, the evidence was probative of Bethel's motive. Accordingly, its admission did not violate Evid.R. 404(B).

{¶ 175} Finally, Bethel argues that the gang evidence violated the First Amendment. Citing *Dawson v. Delaware* (1992), 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309, Bethel contends that gang membership is protected by the First Amendment right of association and that the state could not introduce evidence of his gang membership without showing its relevance.

{¶ 176} Bethel's First Amendment claim lacks merit. *Dawson* held that the First Amendment precludes a state "from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried." 503 U.S. at 168, 112 S.Ct. 1093, 117 L.Ed.2d 309. At Dawson's penalty phase, the jury was told that he belonged to the Aryan Brotherhood, which was described as "a white racist prison gang"; the gang's racism was not relevant to the case, and the jury was told nothing about the gang that *was* relevant. Moreover, the gang's beliefs were of a sort that the jury was apt to find "morally reprehensible." Id. at 167, 112 S.Ct. 1093, 117 L.Ed.2d 309.

{¶ 177} *Dawson*, then, is a case about using a defendant's irrelevant abstract beliefs to prejudice his sentencing proceeding. In this case, the state introduced no evidence concerning any abstract beliefs held by the Crips. Thus, evidence of Crips membership had no tendency to associate Bethel with beliefs that "the jury would find * * * morally reprehensible." Moreover, unlike Dawson's gang membership, Bethel's membership was relevant to his criminal activity.

{¶ 178} Bethel next contends that his trial counsel provided ineffective assistance because they failed to object to Detective Kallay's testimony that Bethel had initially pleaded guilty to the aggravated murders of Reynolds and Hawks. The record indicates that counsel had a reasonable strategic purpose for not objecting to this testimony. At trial, Bethel repudiated his proffer and claimed that his admission of guilt was a lie. It was therefore crucial for the defense to explain *why* Bethel had lied in his proffer. Accordingly, Bethel's trial counsel undertook to set forth in detail the course of the plea negotiations that resulted in the proffer. It was the defense that first raised the subject of the plea agreement in its opening statement ("As a last resort, this young man capitulated and he agreed to enter into a plea bargain.") and returned to this topic in closing argument. The defense also elicited Bethel's testimony that Janes and Edwards had pressured

him to plead guilty because they were unprepared for trial. Having adopted this strategy and having already informed the jury that Bethel had entered into a plea bargain with the state, the defense had no reason to object to Kallay's brief testimony concerning Bethel's guilty plea.

{¶ 179} Bethel argues that his trial counsel should have introduced Traci Queen's prior inconsistent statement under Evid.R. 613(B). On cross-examination, Queen testified that she had never heard Reynolds and Joey Northrup argue, nor had she seen them fight. Defense counsel then asked Queen whether she had told defense investigator Martha Phillips that she had seen Reynolds and Northrup fighting about two weeks before the murders. She again denied having seen them fight. Counsel asked Queen whether she had told Phillips that Reynolds had thrown a handful of rocks at Northrup's window. Queen denied telling Phillips that.

{¶ 180} Under Evid.R. 613(B), a party may introduce extrinsic evidence of a witness's prior inconsistent statement to impeach the witness's credibility. Bethel argues that counsel should have called Martha Phillips to testify to Queen's prior inconsistent statement under Evid.R. 613(B), because Queen's prior statement would have corroborated a defense theory that Northrup may have been the real killer.

{¶ 181} Bethel's argument is flawed. First, his claim that Phillips would have testified that Queen made the statements in question is pure speculation, unsupported by anything in the record.

{¶ 182} Second, Bethel's argument disregards the difference between using a prior statement *to impeach its maker* under Evid.R. 613(B) and using it as *substantive evidence* – i.e., to prove the truth of the matter asserted in the statement – under Evid.R. 801(D)(1)(a). Bethel cites Evid.R. 613(B), which permits extrinsic evidence of a prior inconsistent statement only to impeach. But

he argues that his counsel should have used the statement *substantively* to prove that Northrup and Reynolds had fought.

{¶ 183} Substantive use of a prior inconsistent statement is covered by Evid.R. 801(D)(1)(a). Under that rule, there are limited circumstances in which a prior inconsistent statement is not hearsay and may be used as substantive evidence – i.e., to prove the truth of the matter asserted in the statement. A prior inconsistent statement is not hearsay if it "was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Evid.R. 801(D)(1)(a). See *State v. Julian* (1998), 129 Ohio App.3d 828, 836, 719 N.E.2d 96, fn. 12.

{¶ 184} Queen's alleged prior inconsistent statements to Phillips meet *none* of the criteria for substantive admissibility under Evid.R. 801(D)(1)(a). They were neither under oath, subject to cross-examination, nor given at a proceeding or deposition. Hence, her statements could not have been used substantively to show that Northrup and Reynolds had fought. See *Julian*, supra. Defense counsel did not perform deficiently by failing to attempt a maneuver that the Rules of Evidence preclude.

{¶ 185} Moreover, while the defense *could* have introduced the prior statements under Evid.R. 613(B) simply to impeach Queen, failing to do so did not constitute deficient performance, nor was it prejudicial. Defense counsel impeached Queen's testimony by other means – Queen admitted on cross-examination that she had been convicted of a misdemeanor involving check forgery. Further, as Bethel concedes, Queen's credibility was not critical to the state's case, which rested principally on Bethel's having admitted three different times to committing the murders.

{¶ 186} Bethel also claims that his trial counsel's assistance was ineffective because they failed to object to the prosecutor's alleged vouching for

the credibility of Traci Queen during closing argument. However, no vouching took place, and no valid objection could have been made by Bethel's counsel to the prosecutor's remark.

{¶ 187} Bethel claims that his trial counsel should have objected to allegedly improper jury instructions. We held that the jury instructions were proper, and thus no valid objection could have been made to them.

{¶ 188} Finally, Bethel claims ineffective assistance because trial counsel failed, when making their arguments to the jury in the penalty phase, to utilize all the available mitigating evidence. He contends that trial counsel should have cited as mitigating factors (1) the state's willingness to offer a plea bargain, (2) Jeremy Chavis's life sentence, and (3) Bethel's cooperation with law enforcement.

{¶ 189} Bethel contends that the state's willingness to offer him a plea bargain was "the single most mitigating factor" in this case and that trial counsel should have argued that point to the jury. But we have held that the state's offer of a plea bargain is not a mitigating factor at all. *State v. Webb*, 70 Ohio St.3d at 336, 638 N.E.2d 1023. A plea offer does not constitute a concession by the state that death is not the appropriate penalty for a given offense. Because a plea offer is not a mitigating factor, defense counsel did not perform deficiently by failing to argue that it was.

{¶ 190} In 2001, Jeremy Chavis was convicted of the aggravated murders of Reynolds and Hawks and was sentenced to 30 years to life in prison, plus three years for a firearm specification. See *State v. Chavis*, Franklin App. Nos. 01AP-1456 and 01AP-1466, 2003-Ohio-512, 2003 WL 231265, ¶ 17 (affirming conviction). Bethel argues that Chavis's life sentence was a mitigating factor that counsel should have presented in the penalty phase. However, since Chavis was not yet 18 years old at the time of the murders, he was not even eligible for the death penalty. R.C. 2929.02(A). Bethel's counsel could not have credibly

attempted to essentially use the age of Bethel's accomplice as mitigation. Further, we have held that a codefendant's life sentence is not a mitigating factor. *State v. Berry* (1995), 72 Ohio St.3d 354, 366, 650 N.E.2d 433.

{¶ 191} Bethel also argues that his trial counsel should have presented as a mitigating factor the fact that he gave a proffer confessing to the murders. A defendant's confession and cooperation with law enforcement are mitigating factors. *State v. Stallings* (2000), 89 Ohio St.3d 280, 300, 731 N.E.2d 159; *State v. Bays* (1999), 87 Ohio St.3d 15, 34, 716 N.E.2d 1126.

{¶ 192} However, defense counsel could have reasonably thought it inadvisable to present "cooperation with law enforcement" as a mitigating factor. First, Bethel's "cooperation" says little about his character, because it was obtained only as the result of a plea bargain. Cf. *Ashworth*, 85 Ohio St.3d at 72, 706 N.E.2d 1231 (willingness to plead guilty without offer of leniency indicates remorse). Second, Bethel claimed at trial that his proffer was involuntary. Finally, given Bethel's adamant refusal to testify against Chavis, a claim of "cooperation" would have rung hollow.

{¶ 193} Bethel's claims of ineffective assistance of counsel lack merit. We overrule his fourth proposition of law.

VIII. *Prosecutorial Misconduct*

{¶ 194} In his 20th proposition of law, Bethel claims prosecutorial misconduct. Bethel contends that the prosecutor improperly vouched for Traci Queen's credibility when he said: "And Traci Queen, there is absolutely no reason that the defense can come up with, that I can conceive, that she would come in here and lie."

{¶ 195} Bethel failed to object to this statement at trial, thereby waiving any objection. The prosecutor's comment did not amount to plain error. He did not vouch for Queen's credibility; he merely pointed out that the defense had not cited any reason why she would lie. Moreover, Queen was not a crucial witness.

{¶ 196} Bethel also contends that the introduction of gang evidence by the prosecution was misconduct. This claim lacks merit, as the evidence was not objected to and was admissible. (See discussion of fourth proposition of law.) Bethel's 20th proposition of law is overruled.

IX. *Cumulative Error*

{¶ 197} In his 11th proposition, Bethel claims that the cumulative effect of the alleged errors denied him a fair trial. We have recognized the doctrine of cumulative error. See *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 48. However, it is not enough simply to intone the phrase "cumulative error." "As [Bethel] offers no further analysis, this proposition lacks substance * * *." *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, ¶ 103. Bethel fails to show that the alleged errors denied him a fair trial. This proposition is overruled.

X. *Settled Issue*

{¶ 198} In his 13th proposition, Bethel contends that Ohio's death-penalty statutes are unconstitutional. We summarily overrule this proposition. See *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568.

XI. *Independent Sentence Review*

{¶ 199} Under R.C. 2929.05(A), we must independently review the death sentence on each count of aggravated murder. As to each count, we must determine whether the evidence supports the jury's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether the death sentence is proportionate to those affirmed in similar cases.

{¶ 200} **Aggravating circumstances.** The jury found Bethel guilty of two aggravating circumstances as to each murder. The aggravating circumstances of Reynolds's murder were (1) that the aggravated murder was part of a course of conduct involving two or more intentional killings, R.C. 2929.04(A)(5), and (2)

that the victim was a witness to another offense and was purposely killed to prevent his testimony, R.C. 2929.04(A)(8). The aggravating circumstances of Hawks's murder were (1) that the murder was part of a course of conduct involving two or more intentional killings, R.C. 2929.04(A)(5), and (2) that the defendant committed the murder to escape detection, apprehension, trial, or punishment for another offense, R.C. 2929.04(A)(3).

{¶ 201} The evidence supports each of these aggravating circumstances. Bethel's simultaneous killing of two victims in a single incident clearly established the course-of-conduct specifications. See, generally, *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239. Moreover, the evidence shows that Reynolds was purposely killed to prevent him from testifying in Tyrone Green's aggravated murder trial, thus establishing the specification under R.C. 2929.04(A)(8). Near the end of May 1996, Green learned that Reynolds had told Pryor that he had seen Green commit murder; at some point, Jeremy Chavis came into possession of Green's discovery materials; Bethel and Langbein had discussed that they were going to "take steps to get rid of" Reynolds and Pryor; in mid-June, Bethel and Chavis's brother bought guns; before June had ended, Bethel and Chavis killed Reynolds.

{¶ 202} Finally, the evidence supports the specification under R.C. 2929.04(A)(3) attached to Hawks's murder. Hawks was the sole nonparticipating witness to the murder of Reynolds. That supports a finding that Bethel and Jeremy Chavis killed her to hide the commission of Reynolds's murder. *State v. Jester* (1987), 32 Ohio St.3d 147, 149, 512 N.E.2d 962.

{¶ 203} **Mitigating factors.** Bethel was born on March 23, 1978. Thus, he was only a few months over 18 when he committed these murders. Under R.C. 2929.04(B)(4), the youth of the offender is a mitigating factor. "This factor is entitled to some weight, especially since eighteen is the minimum age for death penalty eligibility." *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776

N.E.2d 26, ¶ 98. See, also, *State v. Hill* (1992), 64 Ohio St.3d 313, 335, 595 N.E.2d 884. However, there is no evidence to support any of the other statutory mitigating factors. Nor do the nature and circumstances of these crimes offer anything in mitigation. To the contrary, this was a coldly calculated double murder.

{¶ 204} Bethel's history and background reflect some minimal mitigating factors, although his character does not. The record shows that Bethel's parents separated when he was about nine and divorced when he was 11. We give this factor little weight.

{¶ 205} In the penalty phase, Bethel made a brief unsworn statement in which he continued to claim innocence. He expressed sympathy for the families of Reynolds and Hawks. He told the jury that he had made efforts to change and was not the same person he had been at age 18. He pointed out that, at the time of his arrest, he had been working and leading "basically a normal life."

{¶ 206} The record shows that Bethel was employed at a BP gas station at the time of the murders. Bethel also worked for about a year at a Subway restaurant in Columbus. Bethel testified in the guilt phase that he had worked 40 to 50 hours a week at the BP station and 60 hours a week at the Subway. In the interim, he had held a variety of other jobs, often holding two jobs at a time and putting in 70 to 80 hours a week.

{¶ 207} In late 1999 or early 2000, Joseph S. Burke Jr. hired Bethel to work at the Subway restaurant that Burke managed. Three or four months later, Burke promoted him to assistant manager because Bethel was a good worker and "worked the hours an assistant manager would work."

{¶ 208} Bethel's work record is entitled to slight weight. At the very time that Bethel was employed at BP, he murdered two people. However, in the year prior to his arrest, Bethel appeared to be a reliable worker.

{¶ 209} In the penalty phase, Bethel introduced evidence about his disciplinary record during his pretrial incarceration in the Franklin County Jail. See, generally, *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1; *State v. Smith* (1997), 80 Ohio St.3d 89, 121-122, 684 N.E.2d 668. Jail records show that between November 6, 2000, and July 7, 2003, Bethel was given two "disciplinary write-ups." On April 28, 2001, he received a written warning for manufacturing an item without permission and possessing contraband. On September 27, 2002, he received a five-day "disciplinary lockdown" for smoking in a prohibited area and possessing contraband.

{¶ 210} Bethel argued at trial that this was a good disciplinary record. According to Bethel, his commission of only two nonviolent, relatively minor infractions during two years and nine months in jail indicated a growing maturity and ability to follow rules. While this factor is entitled to weight, we do not regard this as an impressive record and give it only "slight weight." *Smith*, 80 Ohio St.3d at 121-122, 684 N.E.2d 668. See, also, *State v. Wiles* (1991), 59 Ohio St.3d 71, 95, 571 N.E.2d 97.

{¶ 211} The aggravating circumstances of multiple murder and witness murder outweigh the totality of Bethel's mitigating factors beyond a reasonable doubt. Thus, his death sentence for Reynolds's murder is appropriate. The aggravating circumstances of multiple murder and murder to escape detection, apprehension, trial, or punishment for another offense also outweigh the mitigating circumstances beyond a reasonable doubt. Thus, his death sentence for Hawks's murder is appropriate as well.

{¶ 212} Finally, the death sentences here are proportionate to other sentences that we have approved. We have approved death sentences in cases presenting a course of conduct involving two murders. See *State v. Awkal* (1996), 76 Ohio St.3d 324, 667 N.E.2d 960; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439; *State v. Combs* (1991), 62 Ohio St.3d 278, 581

N.E.2d 1071. Moreover, we "have approved death sentences in cases where the witness-murder specification was present alone or in combination with one other specification, even when substantial mitigation existed." *State v. Turner*, 105 Ohio St.3d 331, 2005-Ohio-1938, 826 N.E.2d 266, ¶ 101. See *State v. Coleman* (1999), 85 Ohio St.3d 129, 707 N.E.2d 476; *State v. Smith* (2000), 87 Ohio St.3d 424, 721 N.E.2d 93. Finally, we upheld the death sentence in *State v. White* (1999), 85 Ohio St.3d 433, 709 N.E.2d 140, which combined the same aggravating circumstances involved in Hawks's murder: course of conduct and murder to escape detection, apprehension, trial, or punishment for another offense. Thus, we hold that Bethel's death sentences are not disproportionate to death sentences approved in similar cases.

{¶ 213} We affirm Bethel's convictions and sentences of death.

Judgment affirmed.

MOYER, C.J., RESNICK, LUNDBERG STRATTON, O'CONNOR, O'DONNELL and LANZINGER, JJ., concur.

Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor and Richard Termuhlen II, Assistant Prosecuting Attorneys, for appellee.

Ravert J. Clark, for appellant.

State v. Bethel

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

June 5, 2008, Rendered

No. 07AP-810

Reporter
2008-Ohio-2697 *; 2008 Ohio App. LEXIS 2322 **

State of Ohio, Plaintiff-Appellee, v. Robert W. Bethel, Defendant-appellant.

Subsequent History: Discretionary appeal not allowed by State v. Bethel, 122 Ohio St. 3d 1502, 2009-Ohio-4233, 912 N.E.2d 107, 2009 Ohio LEXIS 2350 (Aug. 26, 2009)

Subsequent appeal at State v. Bethel, 2010-Ohio-3837, 2010 Ohio App. LEXIS 3242 (Ohio Ct. App., Franklin County, Aug. 17, 2010)

Prior History: [**1] APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 00CR-11-6600).

State v. Bethel, 110 Ohio St. 3d 416, 2006-Ohio-4853, 854 N.E.2d 150, 2006 Ohio LEXIS 2660 (Oct. 4, 2006)

Disposition: Judgment affirmed.

Core Terms

grounds for relief, post-conviction, trial court, murder, alleges, proffer, ineffective, confession, discovery, trial counsel, direct appeal, proceedings, roommate, ineffective assistance of counsel, no merit, mitigating, evidentiary hearing, assigned error, res judicata, courts, lethal injection, plea agreement, convicted, sentence, appeals, cross-examination, ballistics, girlfriend, homicides, charges

Case Summary

Procedural Posture
Before petitioner inmate's murder convictions and death sentence were affirmed, he sought post-conviction relief in the Franklin County Court of Common Pleas (Ohio), which dismissed his petition without a hearing. The inmate appealed.

Overview
The appellate court held it could not grant relief due to an overlap of subject matter between the inmate's petition and his direct appeal. It could not re-decide issues ruled on by the Ohio Supreme Court on direct appeal absent new evidence unavailable on direct appeal. Res judicata barred any claim that was raised, or could have been raised, on direct appeal. No new evidence was presented. His claim that he could seek civil discovery was generally disposed of by the Ohio Supreme Court's ruling that such discovery was unavailable. The appellate court could not re-address ineffective assistance claims denied by the Ohio Supreme Court, which also denied claims regarding his proffered confession admitted when he did not comply with his plea bargain. Information on counsel's trial preparedness was available when a motion to suppress the proffer was denied, so it was not new, for post-conviction purposes. Res judicata barred a claim that counsel did not present certain mitigating evidence at the penalty phase, as the Ohio Supreme Court found he validly waived presenting this evidence. Since he let counsel present some mitigating evidence, no inquiry into his competence was needed.

Outcome
The trial court's judgment was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN1 **Criminal Law & Procedure, Postconviction Proceedings**

The post-conviction relief process is a statutory method by which criminal defendants may bring a collateral civil

attack on their convictions and sentences. R.C. 2953.21. Post-conviction relief is not an appeal of the judgment; rather, it is intended as a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those arguments is outside of the trial court record (e.g., ineffective assistance of counsel, prosecutorial misconduct, newly-discovered evidence).

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

HN2 **Appeals, Capital Punishment**

After a criminal conviction, defendants have 180 days to file a petition for post-conviction relief with the trial court. R.C. 2953.21(A)(2). The time for filing begins to run when the transcript is filed in the court of appeals, or in capital cases, from the time the transcript is filed in the Supreme Court of Ohio, as Ohio Const. art. IV, § 2(B)(2)(c) eliminates intermediate appeal in capital cases, giving death row prisoners an appeal to the Supreme Court of Ohio as a matter of right.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Double Jeopardy > Res Judicata

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Reviewability

HN3 **Criminal Law & Procedure, Postconviction Proceedings**

In any proceeding except a direct appeal from that judgment, the doctrine of res judicata bars convicted defendants who were represented by counsel from raising or litigating any defense or alleged due process violation resulting in a conviction, where that defense or error was previously raised (or could have been raised) on direct appeal. Res judicata, thus, implicitly bars a post-conviction relief petitioner from "re-packaging" evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal. There is a narrow exception to this rule with regard to claims of ineffective assistance of counsel - res judicata will only bar such claims that do not rely on evidence outside the record.

Civil Procedure > Discovery & Disclosure > General Overview

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN4 **Civil Procedure, Discovery & Disclosure**

Post-conviction relief petitioners are not automatically entitled to civil discovery.

Civil Procedure > Discovery & Disclosure > General Overview

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN5 **Civil Procedure, Discovery & Disclosure**

Post-conviction proceedings are a statutorily-created right, and the statute granting the right does not specifically include the right to civil discovery.

Civil Procedure > Discovery & Disclosure > General Overview

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Governments > Courts > Judicial Precedent

HN6 **Civil Procedure, Discovery & Disclosure**

If there is a federal right to discovery in post-conviction proceedings, that right must either be recognized by the Supreme Court of Ohio, or forced upon them by a federal court. Until then, stare decisis prevents an Ohio court of appeals from ruling in a manner that conflicts with that of the Supreme Court of Ohio.

Governments > Courts > Judicial Precedent

HN7[] **Courts, Judicial Precedent**

Stare decisis has two aspects: (1) that in the absence of overriding considerations courts will adhere to their own previously announced principles of law; and (2) that courts are bound by and must follow decisions of a reviewing court that has decided the same issue. Under this principle, an Ohio court of appeals is bound by and must follow the decisions of the Ohio Supreme Court. To do otherwise would do violence to the doctrine that the government is a government of law, not of men.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

HN8[] **Criminal Law & Procedure, Postconviction Proceedings**

Post-conviction relief petitioners are not automatically entitled to an evidentiary hearing. Before a trial court may grant an evidentiary hearing, the petitioner bears the burden of demonstrating a cognizable claim of a constitutional error at trial. R.C. 2953.21(C). A trial court may deny a petition without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief.

Criminal Law & Procedure > Postconviction Proceedings > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

HN9[] **Criminal Law & Procedure, Postconviction Proceedings**

Under Strickland v. Washington, defendants alleging ineffective assistance of counsel must demonstrate that: (1) defense counsel's performance was so deficient that he or she was not functioning as the counsel guaranteed by the Sixth Amendment; and (2) defense counsel's errors prejudiced the defendant, depriving him of a trial whose result is reliable. In post-conviction proceedings, to secure a hearing on such a claim, a petitioner bears the initial burden of submitting evidence demonstrating that defense counsel was incompetent, and that the petitioner was prejudiced as a result. Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Evidence > ... > Examination > Cross-Examinations > General Overview

HN10[] **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

Even if it is possible to say, objectively, that trial counsel could have cross-examined a particular witness more effectively, this does not necessarily mean that counsel was ineffective under Strickland. As Strickland made clear, a reviewing court's role is not to gratuitously nitpick trial counsel's performance. The first prong of the Strickland test asks whether counsel's actions fell below an objectively reasonable standard. Neither Strickland, nor the Sixth Amendment guarantee a right to perfect representation.

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

HN11[] **Capital Punishment, Mitigating Circumstances**

A defendant may waive the right to present mitigating evidence during the penalty phase of a death case, so long as the defendant is mentally competent. A defendant is mentally competent to do so if he has mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of evidence. The issue of the defendant's mental competency only arises when he decides to waive the presentation of all mitigating evidence.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > General Overview

HN12[] **Counsel, Effective Assistance of Counsel**

Counsel are not ineffective simply because they accede to their client's wishes.

Constitutional Law > ... > Case or Controversy > Constitutionality of Legislation > Inferences & Presumptions

HN13[] **Constitutionality of Legislation, Inferences & Presumptions**

Legislative acts are presumed constitutional.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN14[] **Harmless & Invited Error, Harmless Error**

It is not enough simply to intone the phrase "cumulative error."

Counsel: Ron O'Brien, Prosecuting Attorney, Richard A. Termuhlen and Kimberly M. Bond, for appellee.

Timothy Young, Ohio Public Defender, Rachel Troutman and T. Kenneth Lee, for appellant.

Judges: TYACK, J. MCGRATH, PJ., and BROWN, J. concur.

Opinion by: TYACK

Opinion

(REGULAR CALENDAR)

OPINION

TYACK, J.

[*P1] Defendant-appellant, Robert W. Bethel, was sentenced to death for the 1996 murders of James Reynolds and Shannon Hawks. Because of statutory filing deadlines in Ohio's capital appeals scheme, Bethel filed his petition for post-conviction relief ("petition") with the trial court while his direct appeal was still pending before the Supreme Court of Ohio. The Supreme Court of Ohio affirmed Bethel's convictions and death sentence on October 4, 2006 and, on August 31, 2007, the trial court dismissed the petition. This appeal is limited to the trial court's dismissal of the petition. Because of the substantial overlap of subject matter between the petition and the direct appeal, however, we are without authority to grant the relief requested.

[*P2] We are not at liberty to re-decide any issues that were already decided by the Supreme Court [**2] of Ohio unless the appellant presents some new evidence or factual information that was unavailable on direct appeal. Similarly, any argument that was previously raised, or could have been raised, is barred under the doctrine of res judicata. The record before us is void of any new evidence or factual information that would be material to the issues raised in the petition and, therefore, we must affirm the trial court's dismissal.

[*P3] The facts surrounding Bethel's arrest and conviction are set forth in detail in the Supreme Court of Ohio's decision in the direct appeal. *State v. Bethel,* 110 Ohio St.3d 416, 2006 Ohio 4853, 854 N.E.2d 150, at P1. We will therefore only restate the key elements here.

[*P4] Bethel belonged to the "Crips" street gang. In 1995, a fellow gang member and closely known associate of Bethel's shot another man during a burglary. James Reynolds witnessed that shooting and told others about it. The shooter was later indicted for aggravated murder, with death specifications, and Reynolds was the only material witness against him.

[*P5] According to Bethel's roommate, also a fellow Crips gang member, Bethel was concerned about Reynolds, and expressed intentions to get rid of him. [**3] On June 13, 1996, Bethel and another one of his other roommates, also a Crips gang member, purchased 12-gauge shotguns from a gun store in Obetz, Ohio. Thirteen days later, Reynolds and his girlfriend, Shannon Hawks, were found dead--shot 14 times collectively, with 9mm and 12-gauge shotgun ammunition. Their bodies were discovered in a field owned by the grandfather of Bethel's roommates.

[*P6] A few weeks later, Bethel told one of his roommates that he and another roommate shot Reynolds and Hawks, using a 9mm handgun and a shotgun. Bethel later confessed his part in the murders to his girlfriend. About six months after the murders, police executed a search warrant on the trailer where Bethel and his roommates lived, but apparently did not find enough evidence to file charges.

[*P7] Years later, the roommate to whom Bethel had

previously confessed was indicted on unrelated federal firearms charges. In an effort to work out a deal with the feds, he offered information implicating Bethel in the Reynolds-Hawks murders. Police eventually arrested Bethel on November 6, 2000, and a grand jury indicted him for two counts of aggravated murder, both with death specifications.

[*P8] Although the state's case [**4] against Bethel was strong, Bethel's court-appointed counsel ultimately convinced the prosecutors to spare Bethel's life in exchange for testimony against the other shooter. Bethel agreed to the deal, and recorded a statement at the Franklin County Sheriff's Office on August 30, 2001. [1] Paragraph one of the written plea agreement stated the following:

> Defendant and the State agree that the proffer taken of the defendant on August 30, 2001 will be admissible in a criminal trial against the defendant in the event that the defendant does not abide by the terms and conditions of this agreement * * *.

[*P9] The agreement later contained the following contradictory statement:

> * * * Should it be judged by the Franklin County Prosecutor's office at any time that the defendant has failed to cooperate fully; refused to testify or testifies falsely in any proceeding(s); has intentionally given false, misleading or incomplete information or testimony; or has otherwise violated any provision of this agreement, then the Franklin County Prosecutor's Office may declare [**5] this Agreement null and void. The Franklin County Prosecutor's Office may then automatically reinstate the original charges against the defendant, as well as file any additional charges. * * * In the event this Agreement becomes null and void, then the parties will be returned to the position they were in before this Agreement. * * *

[*P10] The trial court held a closed hearing on the record, in which Bethel acknowledged his understanding and intent to be bound by the terms of the plea deal. Despite that agreement, on November 13, 2001, Bethel refused to testify. The state moved to declare the plea deal void, and the trial court granted the motion.

[*P11] Represented by new counsel, Bethel moved to suppress his confession, but the trial court denied the motion, and admitted it into evidence.

[*P12] Bethel testified at his trial, and denied having any involvement in the shootings. He said that although he had been in a car with the victims on the night of the murder, he dropped them off somewhere on the west side of Columbus around 9:00 p.m. Bethel's mother testified that her son and his roommate were at her house on Columbus' southside between 10:00 and 11:00 p.m., the time during which gunshots were heard [**6] in the vicinity of the murder scene.

[*P13] The jury found Bethel guilty of all charges and specifications, and recommended death sentences for both killings. The trial court imposed the recommended sentence on September 4, 2003. The Supreme Court of Ohio found the appeal "devoid of merit," and overruled all 20 propositions of law.

[*P14] Bethel's petition comprised 23 grounds for relief (as amended June 15, 2007). The trial court determined that the gravamen of Bethel's claims for relief were res judicata, but nonetheless, in a 25 page decision, attended to each individual claim. (Record, at 609.) Ultimately, the trial court could not find any evidence presented by Bethel to warrant the relief requested, and dismissed his petition.

[*P15] Bethel filed a timely notice of appeal from that decision, and assigns three errors for our consideration:

> [I.] THE TRIAL COURT ERRED WHEN IT DENIED THE POST-CONVICTION PETITION WITHOUT FIRST ALLOWING BETHEL TO CONDUCT DISCOVERY.
>
> [II.] THE TRIAL COURT ERRED WHEN IT DENIED BETHEL'S MOTION FOR FUNDS TO EMPLOY EXPERTS.
>
> [III.] THE TRIAL COURT ERRED IN DISMISSING BETHEL'S POST-CONVICTION PETITION WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT MINIMUM, AN [**7] EVIDENTIARY HEARING.

[*P16] ***HN1***[⬆] The post-conviction relief process is a statutory method by which criminal defendants may bring a collateral civil attack on their convictions and sentences. R.C. 2953.21; *State v. Calhoun,* 86 Ohio St.3d. 279, 281, 1999 Ohio 102, 714 N.E.2d 905; *State v. Steffen,* 70 Ohio St.3d 399, 410, 1994 Ohio 111, 639 N.E.2d 67; *State v. McKinney,* Franklin App. No. 07AP-868, 2008 Ohio 1281. Again, post-conviction relief is *not* an appeal of the judgment; rather, it is intended as a

[1] The Supreme Court's opinion states that Bethel made the proffer on August 30, 2000, but we conclude that this should have read August 30, 2001.

means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those arguments is outside of the trial court record (e.g., ineffective assistance of counsel, prosecutorial misconduct, newly-discovered evidence). *Steffen,* supra; *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233, 2000 Ohio App. LEXIS 6129.

[*P17] ***HN2***[⬆] After conviction, defendants have 180 days to file a petition with the trial court. R.C. 2953.21(A)(2). The time for filing begins to run when the transcript is filed in the court of appeals, or in capital cases, from the time the transcript is filed in the Supreme Court of Ohio. Id; see Section 2(B)(2)(c), Article IV, Ohio Constitution (as amended Nov. 8, 1994) (eliminating [**8] intermediate appeal in capital cases, and giving death row prisoners an appeal to the Supreme Court of Ohio as a matter of right).

[*P18] ***HN3***[⬆] In any proceeding except a direct appeal from that judgment, the doctrine of res judicata bars convicted defendants who were represented by counsel from raising or litigating any defense or alleged due process violation resulting in a conviction, where that defense or error was previously raised (or could have been raised) on direct appeal. *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 2 Ohio B. 661, 443 N.E.2d 169. Res judicata, thus, "implicitly bars a petitioner from 're-packaging' evidence or issues which either were, or could have been, raised in the context of the petitioner's trial or direct appeal." *State v. Hessler,* Franklin App. No. 01AP-1011, 2002 Ohio 3321, at P37.

[*P19] There is a narrow exception to this rule with regard to claims of ineffective assistance of counsel-res judicata will only bar such claims that do not rely on evidence outside the record, and defendant is represented by new counsel on appeal. *Cole,* supra, at 113-114; *Samatar v. Clarridge (C.A.6,* 2007),

[*P20] The first assigned error alleges that, as the petitioner in a civil matter, Bethel was entitled [**9] to discovery under the Ohio Rules of Civil Procedure. This argument is specifically refuted by mandatory case law, which prevents us from even considering it.

[*P21] To avoid the effects of res judicata, criminal appellate counsel typically attempt to develop new factual information to be considered in petitions. As in any other ordinary civil proceeding, the way attorneys do this is through discovery. This is exactly what Bethel's counsel sought to do in the post-conviction proceeding.

[*P22] Although it makes sense--since post-convictions are civil proceedings--to conduct discovery in accordance with the civil rules, the Supreme Court of Ohio has held that ***HN4***[⬆] petitioners are not automatically entitled to civil discovery. See *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office,* 87 Ohio St.3d 158, 159, 1999 Ohio 314, 718 N.E.2d 426 (per curiam) certiorari denied (2000), 529 U.S. 1116, 120 S. Ct. 1977, 146 L. Ed. 2d 806 (citing *State v. Spirko* [1998], 127 Ohio App.3d 421, 429, 713 N.E.2d 60, appeal not allowed, 83 Ohio St. 3d 1430, 699 N.E.2d 946); see, also, *State v. Gulertekin* (June 8, 2000), Franklin App. No. 99AP-900, 2000 Ohio App. LEXIS 2412 (holding that during initial stages of post-conviction relief proceedings there is no right to discovery [**10] of evidence outside the record) (quoting *State v. Wickline* [1994], 71 Ohio St.3d 1430, 642 N.E.2d 637; *State v. Fugett* [Dec. 8, 1998], Franklin App. No. 98AP-396, 1998 Ohio App. LEXIS 5950).

[*P23] In *Love,* the petitioner was convicted of voluntary manslaughter and aggravated robbery. Years later, he filed an original action in mandamus in the court of appeals to compel the Cuyahoga County Prosecutor's Office to turn over ballistics and autopsy reports relevant to the criminal trial. He claimed that he was entitled to these records because they constituted exculpatory evidence, which supported his post-conviction relief. The court of appeals denied the writ, and the Supreme Court affirmed. This holding is based on the court's interpretation of ***HN5***[⬆] post-conviction proceedings as a statutorily-created right, and because the statute granting the right does not specifically include the right to civil discovery, the court has concluded *Calhoun,* supra, at 281 (citing *Murray v. Giarratano* [1989], 492 U.S. 1, 10, 109 S.Ct. 2765, 106 L. Ed. 2d 1) ("State collateral review itself is not a constitutional right."); cf. *State v. Scudder* (1998), 131 Ohio App.3d 470, 481, 722 N.E.2d 1054 (Tyack, J., dissenting). The irony here is that post-conviction relief is specifically [**11] designed to allow defendants who believe they were wrongly convicted to attack their convictions using material outside of the trial court record, but if they are not entitled to discovery, there is little chance they will ever obtain any evidence or defenses that are outside of the record.

[*P24] The reason for the Supreme Court of Ohio's strong stance limiting petitioners' rights in post-conviction proceedings is summed up as follows:

> It may be useful to note that cases of post-conviction relief pose difficult problems for courts, petitioners, defense counsel and prosecuting

> attorneys alike. Cases long considered to be fully adjudicated are reopened, although memories may be dim[,] and proof difficult. The courts justifiably fear frivolous and interminable appeals from prisoners who have their freedom to gain and comparatively little to lose.

Calhoun, at 282 (quoting *State v. Milanovich* [1975], 42 Ohio St.2d 46, 51, 325 N.E.2d 540).

[*P25] Bethel's counsel asserts that these limitations on discovery are inconsistent with due process and equal protection. See appellant's brief, at 10, citing *Evitts v. Lucey* (1985), 469 U.S. 387, 401, 105 S.Ct. 830, 83 L. Ed. 2d 821 (requiring states that provide appellate review to [**12] do so in accordance with the Due Process Clause). Be that as it may, we are not the proper authority to consider the merits of this argument. ***HN6***[⬆] If there is indeed a federal right to discovery in post-conviction proceedings, that right must either be recognized by the Supreme Court of Ohio, or forced upon them by a federal court. See, e.g., *Keener v. Ridenour (C.A.6,* 1979), 594 F.2d 581, 590 (holding that in habeas proceedings, the federal courts may review issues not previously decided by state courts of Ohio). Until then, stare decisis prevents us from ruling in a manner that conflicts with that of the Supreme Court of Ohio. See, e.g., *Sherman v. Millhon* (June 16, 1992), Franklin App. No. 92AP-89, 1992 Ohio App. LEXIS 3171 (citing *Battig v. Forshey* [1982], 7 Ohio App.3d 72, 74, 7 Ohio B. 85, 454 N.E.2d 168; *Thacker v. Bd. of Trustees of Ohio State Univ.* [1971], 31 Ohio App.2d 17, 23, 285 N.E.2d 380 reversed on other grounds) ("A court [of appeals] is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled."); cf. *Keener,* ibid. ("Interpretation of Ohio's appellate and post-conviction remedies belongs with the highest judicial tribunal of Ohio, not with the federal courts [**13] of appeal. Amendment of statutes is the prerogative of the Ohio Legislature").

[*P26] ***HN7***[⬆] Stare decisis has two aspects: (1) that in the absence of overriding considerations courts will adhere to its own previously announced principles of law; and (2) that courts are bound by and must follow decisions of a reviewing court that has decided the same issue. *Thacker,* ibid; *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444, 84 L. Ed. 604, 1940-1 C.B. 223. "Under this principle, we are bound by and must follow the decisions of the Ohio Supreme Court. To do otherwise would do violence to the doctrine that ours is a government of law, not of men." *Thacker,* ibid.

[*P27] The Supreme Court of Ohio is, of course, free to overrule its own prior decisions, but until it does so, we have no choice but to follow the rule of law set forth in *Love.* We realize that this decision may be inimical to the concept that petitions are civil proceedings, however, the *Love* court has already decided that petitioners in post-conviction proceedings are not automatically entitled to discovery, and we are bound by that decision. Id. at 159.

[*P28] Accordingly, we must overrule the first assigned error.

[*P29] In the second assignment of error, Bethel argues that in post-conviction [**14] proceedings, Ohio courts are required to provide indigent petitioners with funds to retain whatever experts may be reasonable and necessary. (Appellant's brief, at 10.) The experts for whom Bethel sought funding were related to the fields of forensic pathology and psychology, ballistics, and capital criminal defense. The trial court denied Bethel's request in the same manner as the petition. (Decision, 11, 15, 16, 24.)

[*P30] Although the experts sought may have been appropriate and helpful during Bethel's trial, counsel already made this argument on direct appeal, which resulted in the Supreme Court's determination that any evidence by such experts was purely speculative. Further, the Supreme Court found that the exclusion or omission of these experts did not prejudice Bethel:

> Bethel contends that his trial counsel were ineffective because they failed to obtain defense experts on false confessions, ballistics, forensics, and crime-scene reconstruction. We find that Bethel was not prejudiced by trial counsel's actions.* * *

Bethel, at P168.

[*P31] We are not in a better position to know the results of such expert investigation than the Supreme Court of Ohio, trial counsel, or the trial court. Thus, [**15] we are not in a position to grant the experts Bethel seeks.

[*P32] Accordingly, the second assignment of error is overruled.

[*P33] The third assignment of error attacks the trial court's failure to conduct an evidentiary hearing before dismissing the post-conviction petition. As in the discovery issue, the law on this issue has been set forth by the Supreme Court of Ohio: ***HN8***[⬆] Petitioners are not automatically entitled to an evidentiary hearing.

State v. Jackson (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus. Before a trial court may grant an evidentiary hearing, the petitioner bears the burden of demonstrating a cognizable claim of a constitutional error at trial. R.C. 2953.21(C); *Jackson,* ibid; *Hessler,* at P33. A trial court may deny a defendant's petition without an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate sufficient operative facts to establish substantive grounds for relief. *Calhoun,* at paragraph two of the syllabus.

[*P34] Nonetheless, to consider whether the trial court erred in failing to conduct an evidentiary hearing, we must address the individual grounds for relief asserted in the petition. If the evidence supporting [**16] any ground for relief demonstrates a colorable claim of constitutional error at trial, only then may we find that the trial court erred.

[*P35] As amended, the petition alleges 23 grounds for relief. Fifteen of those are ineffective assistance of counsel allegations, in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

[*P36] ***HN9***[⬆] Under *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674, defendants alleging ineffective assistance of counsel must demonstrate that: (1) defense counsel's performance was so deficient that he or she was not functioning as the counsel guaranteed by the Sixth Amendment; and (2) defense counsel's errors prejudiced the defendant, depriving him of a trial whose result is reliable. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus, certiorari denied (1990), 497 U.S. 1011, 110 S. Ct. 3258, 111 L. Ed. 2d 768. In post-conviction proceedings, to secure a hearing on such a claim, appellant bears the initial burden of submitting evidence demonstrating that defense counsel was incompetent, and that the appellant was prejudiced as a result. *Cole,* at 114; *Jackson,* syllabus. "Judicial scrutiny of counsel's performance must be highly deferential [**17] [and] [a] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* at 689; *Bradley,* at 142.

[*P37] The Supreme Court of Ohio devoted an entire section of its opinion to ineffective assistance of counsel allegations, which included 36 enumerated paragraphs. Again, we are without authority to re-address those issues. They are matters decided, i.e., res judicata.

[*P38] The [**18] petition's first ground for relief alleges that the first set of lawyers appointed to represent Bethel were ineffective because they failed to adequately investigate the case and, as a result, unduly influenced Bethel toward entering into the plea agreement. Bethel recorded a proffer statement confessing his involvement in the homicides, and he agreed to testify against a co-defendant. When Bethel refused to testify, the plea agreement fell apart, but the state used Bethel's proffer as substantive evidence of his guilt at his trial. This placed Bethel's defense lawyers in the difficult position of arguing at trial that Bethel was lying in his proffer statement--when he provided, in graphic detail, the execution-style murder of the two teenage victims.

[*P39] The Supreme Court of Ohio addressed the proffer in P160-167 of the opinion. Bethel has not presented any additional evidence (not available at trial) to support the petition. We are therefore bound by the Supreme Court's resolution of the issue. The first ground for relief has no new merit.

[*P40] The second ground for relief alleges that original counsel for Bethel failed to do a complete investigation of mitigating evidence, and therefore [**19] wrongly advised Bethel that he either could plead guilty, or be assured of a jury verdict enabling his execution. In support of this argument, appellate counsel notes that the jury who ultimately returned the death verdict did so after only three days of deliberation, despite minimal mitigation evidence being presented.

[*P41] The Supreme Court did not address the specific language stated in the petition but, generally, rejected any notion that Bethel's attorneys acted less than competent in advising Bethel during the plea negotiations:

> We reject Bethel's contention that [counsel] were unprepared for the trial and forced Bethel into a plea agreement. Bethel's claim that his attorneys would betray him in order to avoid trial is incredible and has no evidentiary support. All indications are that [counsel] sought and recommended a plea agreement because they were working in Bethel's best interest.
>
> * * *
>
> In sum, we lack a factual basis for finding that [counsel] committed errors amounting to deficient performance. Thus, we reject Bethel's claims that [counsel] provided ineffective assistance of

counsel.

Bethel, at P165, 167.

[*P42] The information about trial counsel's preparedness was available at the [**20] time the trial court ruled on Bethel's motion to suppress the proffer statement. As such, it is neither new, nor newly-discovered evidence for the purposes of post-conviction relief. The doctrine of res judicata again compels us to find no merit in the second ground for relief.

[*P43] The third ground for relief further attacks the plea agreement and proffered confession. The Supreme Court also addressed this argument. Id. at P160-167. We are therefore compelled to find no merit in this ground for relief.

[*P44] In the fourth ground for relief, Bethel alleges that trial counsel was ineffective based upon their failure to present psychological evidence in the culpability phase of the trial. The theory is that counsel was ineffective in failing to present psychological evidence as to why Bethel supposedly lied in his proffer statement (and on two other occasions in which he told friends he was the murderer). Obviously, a psychologist who concluded that Bethel told the truth in his proffer statement but was lying in submitting an alibi defense at trial would not have been a help in his defense during the culpability phase of the trial. A psychologist who could explain the complex relationship Bethel [**21] had with his mother and how her begging him to plead guilty in order to save his life might have been helpful, but not to the point that the failure of counsel to seek and find such a witness could be ineffective assistance of counsel, as required under *Strickland.* We find no merit in the fourth ground for relief.

[*P45] The fifth ground for relief alleges that trial counsel was ineffective in failing to acquire a ballistics expert who would testify that the details of the homicide provided in Bethel's proffer statement were inaccurate, and that Bethel was therefore lying when he confessed to the murders.

[*P46] Trial counsel argued, extensively, the issue of Bethel's proffered confession being inconsistent with the physical evidence. Bethel recorded the proffer years after the homicides. Thus, whether some details in Bethel's proffer did not squarely match up with evidence at the murder scene is not itself dispositive of the general reliability or truthfulness of the statement. One remembers the most "important" part--that you murdered two people--without necessarily remembering all the details about how and when one fired each shot. Thus, counsel's failure to engage the opinion of a ballistics [**22] expert did not constitute ineffective assistance of counsel.

[*P47] The sixth ground for relief parallels the fifth in many regards. Bethel alleges that trial counsel was ineffective because counsel did not engage a forensic pathologist to highlight the differences between Bethel's proffer and the evidence at the murder scene. This ground for relief has no merit for the same reasons as the fifth.

[*P48] In the seventh ground for relief, Bethel alleges that trial counsel were ineffective by failing to adequately investigate and prepare to cross-examine his girlfriend, who testified that Bethel also confessed the murders to her. The former girlfriend apparently had documented mental-health problems, and was on medication to treat them. These were the subjects of her cross-examination.

[*P49] The former girlfriend's mother testified that her daughter was delusional at times, even when taking her medication; however, short of a showing that the witness was not competent to testify, the mother's attitude toward her daughter could not have affected the outcome of the culpability phase of the trial. Bethel's proffer statement was already found to be admissible. The seventh ground for relief has no merit.

[*P50] In the [**23] eighth ground for relief, Bethel alleges that trial counsel was ineffective by failing to adequately impeach a key state witness. The witness, Donald Langbein, who was Bethel's roommate, implicated Bethel in the murders as part of a plea negotiation on his own behalf. Langbein worked as a police informant for a period of time and, at one time, attempted to record Bethel's confession while the two were eating at a Subway restaurant. Langbein did not succeed in capturing Bethel's confession on tape, nor did police succeed in finding the murder weapon using Langbein's assistance.

[*P51] Langbein's testimony was less than complimentary to Bethel's defense. He painted a picture of Bethel as a person comfortable with committing armed robbery, and of planning homicide. The longer Langbein testified, the more damage to Bethel's defense, whether on direct or cross-examination. Given Bethel's proffered confession, Langbein's concurring testimony about the same confession was not outcome determinative. Therefore, ineffective assistance of counsel cannot be based on the vague supposition that

trial counsel could or should have cross-examined Langbein more effectively. Moreover, ***HN10***[⬆] even if it were possible [**24] to say, objectively, that trial counsel could have cross-examined a particular witness more effectively, this does not necessarily mean that counsel was ineffective under *Strickland,* at 684. As *Strickland* made clear, our role is not to gratuitously nitpick trial counsel's performance. *Smith v. Mitchell* (C.A.6, 2003), 348 F.3d 177, 206. The first prong of the *Strickland* test asks whether counsel's actions fell below an objectively reasonable standard. Neither *Strickland,* nor the Sixth Amendment guarantee a right to perfect representation. See id. (citing *Strickland,* at 684) ("After all, the constitutional right at issue here is ultimately the right to a fair trial, not to perfect representation"). The eighth ground for relief has no merit.

[*P52] The tenth ground for relief alleges that trial counsel was ineffective for failing to present mitigating evidence at the penalty phase of the trial. The Supreme Court addressed this issue, and determined that trial counsel had, in fact, prepared a bona fide mitigation case. They planned to present several witnesses, including Bethel's mother, a teacher, social workers, and a guard at a juvenile facility. Bethel, at P146. Counsel was also prepared [**25] to show that Bethel's parents abandoned him as a child and, as a result, he lacked discipline and guidance. Id. But it was Bethel who instructed his attorneys not to put on this evidence. Id. at P147. This prompted Bethel's attorneys to consult with a psychologist to determine whether Bethel was competent to make that decision. Jeffrey Smalldon, Ph.D., determined that he was. Id.

[*P53] The Supreme Court of Ohio has held that ***HN11***[⬆] a defendant may waive the right to present mitigating evidence during the penalty phase of a death case, so long as the defendant is mentally competent. *State v. Ashworth,* 85 Ohio St.3d 56, 1999 Ohio 204, 706 N.E.2d 1231, paragraph two of the syllabus. The court also held that a defendant is mentally competent to do so "if he has mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of evidence." Id.

[*P54] As the Supreme Court noted in Bethel's direct appeal, the issue of the defendant's mental competency only arises when he decides to waive the presentation of *all* mitigating evidence. *Bethel,* at P148 (quoting *Ashworth,* supra; *State v. Monroe,* 105 Ohio St.3d 384, 2005 Ohio 2282, 827 N.E.2d 285, P74). [**26] Here, Bethel did allow his attorneys to present some mitigating evidence--his own unsworn statement, and the testimony of his former supervisor at Subway restaurant--therefore, the Supreme Court determined that no inquiry into Bethel's mental competence was even necessary. *Bethel,* at P149.

[*P55] Given the fact that Bethel's attorneys went one step further, and sought the advice of a clinical professional to determine whether Bethel's decision was made with a competent mind, it would be very difficult for us to now say that counsel was ineffective. Bethel had the right to decide to risk execution at the cost of protecting his relationship with his mother. ***HN12***[⬆] Counsel are not ineffective simply because they accede to their client's wishes. See, e.g., *Coleman v. Mitchell* (C.A.6, 2001), 244 F.3d 533, 545-546 (citing *Jones v. Barnes* [1983], 463 U.S. 745, 751-752, 103 S.Ct. 3308, 77 L. Ed. 2d 987). Consequently, the tenth ground for relief has no merit.

[*P56] The eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth grounds for relief all mirror the tenth. Each of these additional grounds for relief alleges that it would have been beneficial to Bethel's case to present additional testimony at the mitigation [**27] hearing. Again, Bethel had the right to limit the evidence presented at the hearing, and chose to exercise that right. Counsel was not ineffective for failing to dissuade Bethel from his feelings about what should be presented and from acceding to his desires once counsels' efforts to dissuade him failed.

[*P57] In the ninth ground for relief, Bethel claims that the state improperly misled the jury by implying that Bethel "conjured an alibi at the last minute before trial," when he had actually given that same alibi to the detectives who interviewed him on July 29, 1996. (Appellant's brief, at 25.)

[*P58] Bethel also alleged prosecutorial misconduct before the Supreme Court of Ohio, albeit using different statements as the alleged prosecutorial misconduct. *Bethel,* at P194. The Supreme Court determined, however, that "Bethel failed to object to this statement at trial, thereby waiving any objection. The prosecutor's comment did not amount to plain error." Id. at P195.

[*P59] The court did not have the specific allegations before it, however, the exhibits appended to the petition do not provide any new or independent support for an allegation that Bethel told police years before that he was home with his [**28] mother and not at the scene of the homicides. Bethel alleges that exhibit No. 19 supports this claim; however, no exhibit No. 19 exists--

the exhibits jump from number 18 to 20.

[*P60] Without some factual basis to support it, we cannot find any new merit in the ninth ground for relief.

[*P61] The seventeenth ground for relief alleges that execution by lethal injection is cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments of the United States Constitution. Not only has the Supreme Court of Ohio systematically rejected this facial challenge to our state's current capital punishment method, but more recently, the United States Supreme Court decided this very issue, holding that lethal injection is not per se cruel and unusual. See *Baze v. Rees* (Apr. 16, 2008), No. 07-5439, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (recognizing the consensus that lethal injection is the human method of execution to date).

> Reasonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable. * * *
>
> Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. [**29] Petitioners agree that, if administered as intended, that procedure will result in a painless death. The risks of maladministration they have suggested-such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel-cannot remotely be characterized as "objectively intolerable."

Id. at 23.

[*P62] The lethal injection procedure used in Ohio is substantially similar to the one affirmed by the United States Supreme Court in *Baze.* Alan Johnson, Lethal Injection Gets Legal Go-Ahead: Capital Cases in Ohio, 34 Other States Affected, Columbus Dispatch (Ohio) (Apr. 17, 2008). Therefore, we cannot find that Ohio's method of lethal injection violates the Eighth Amendment. The seventeenth ground for relief has no merit.

[*P63] In the eighteenth ground for relief, petitioner challenges the constitutionality of Ohio's post-conviction relief statutory scheme, again pointing to the alleged deficiencies in not allowing discovery, and not providing for an evidentiary hearing as of right. As an intermediate appellate court, we are bound by the Ohio Constitution, and the Revised Code, as interpreted by the Supreme Court of Ohio. To date, the Supreme Court has not held Ohio's post-conviction [**30] relief process to be unconstitutional. Therefore, under the doctrine of stare decisis, we must also not find it to be so. Furthermore, ***HN13***[↑] legislative acts are presumed constitutional. *Desenco, Inc. v. Akron,* 84 Ohio St.3d 535, 538, 1999 Ohio 368, 706 N.E.2d 323. Bethel has not cited to any binding authority supporting his argument that R.C. 2953.02 is unconstitutional.

[*P64] In the nineteenth ground for relief, Bethel argues that the cumulative effect of the errors and deficiencies alleged in the foregoing grounds are sufficient to constitute an independent ground for relief, even if no individual ground for relief justifies reversal on its own. See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 Ohio B. 390, 509 N.E.2d 1256, paragraph two of the syllabus (recognizing the doctrine of cumulative error).

[*P65] The Supreme Court also addressed this argument, and found no substance to it. *Bethel,* at P197 (quoting *State v. Sapp,* 105 Ohio St.3d 104, 2004 Ohio 7008, 822 N.E.2d 1239, at P103). ***HN14***[↑] "[I]t is not enough simply to intone the phrase 'cumulative error.'" Id. As before, Bethel offers this court no further evidence in support of his claim that he was denied a fair trial because of cumulative errors. We do not find that [**31] the accumulation of the minor deficiencies, if any, demonstrate a sufficient ground to overturn the result, judgment, or sentence in Bethel's case. We, therefore, find no new merit in the nineteenth ground for relief.

[*P66] Based on all of the above, the third assignment of error is overruled.

[*P67] Having overruled all three assignments of error, we affirm the judgment the Franklin County Court of Common Pleas.

Judgment affirmed.

MCGRATH, PJ., and BROWN, J. concur.

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