[Cite as *State v. Mack*, 2015-Ohio-2149.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101261

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLARENCE MACK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-91-262888-A

BEFORE: Celebrezze, A.J., Kilbane, J., and Keough, J.

RELEASED AND JOURNALIZED: June 4, 2015

ATTORNEYS FOR APPELLANT

John B. Gibbons
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

Timothy F. Sweeney
The 820 Building, Suite 430
820 West Superior Avenue
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
BY: Katherine Mullin
Joseph J. Ricotta
Assistant County Prosecutors
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant, Clarence Mack, seeks review of the lower court's decision denying his successive petition for postconviction relief and motion for new trial. He argues that Ohio's postconviction procedures are unconstitutional, trial counsel was constitutionally ineffective, the state improperly withheld evidence at trial, and he met all the requirements for a successful postconviction petition and motion for new trial. After a thorough review of the record and law, we affirm the lower court's determination.

I. Factual and Procedural History

{¶2} Appellant was convicted of the 1991 murder of Peter Sanelli, for which he was sentenced to death. The evidence established that appellant shot and killed Peter while he and Thomas Sowell were stealing Peter's car on Prospect Avenue in Cleveland. A detailed recitation of the evidence adduced at trial can be found in this court's opinion that resulted from appellant's direct appeal. *State v. Mack*, 8th Dist. Cuyahoga No. 62366, 1993 Ohio App. LEXIS 5758 (Dec. 2, 1993) ("*Mack I*"). In that opinion, this court affirmed appellant's convictions and sentence, overruling the following assigned errors:

> 1. [Appellant] was denied due process of law when the court denied his motion for discovery and inspection;
>
> 2. The trial court denied [appellant] due process when it overruled his motion for grand jury testimony;

3. The court denied [appellant's] right to be free from unreasonable search and seizure by overruling a motion to suppress evidence seized during a warrantless arrest;

4. The trial court denied [appellant] his right to a jury from a fair, impartial cross-section of the community, when it dismissed for cause jurors who expressed concern about the death penalty but stated they could follow the law;

5. The trial court denied [appellant's] right to a jury from a fair, impartial cross-section of the community, when it did not dismiss for cause jurors who believed death was the only proper sentence for someone convicted of felony murder;

6. [Appellant] was denied his right of confrontation when a non-examining coroner, Dr. Robert Challener, testified concerning an autopsy made by a non-testifying coroner;

7. [Appellant] was denied the right to confrontation when state witness Anthony Sanelli testified about out-of-court conversations he had with Timothy Willis;

8. [Appellant] was denied due process of law when the court permitted detective Edward Lucey to testify as an expert;

9. [Appellant] was denied his right against self-incrimination by the introduction of a statement made by [him] when he had not been advised of his constitutional rights;

10. [Appellant] was denied his right to defend himself by the exclusion of impeachment testimony against Timothy Willis;

11. [Appellant's] convictions are against the manifest weight of the evidence;

12. [Appellant's] right to life is violated by his conviction for a felony murder specification that was not supported by sufficient evidence to prove his guilt beyond a reasonable doubt;

13. [Appellant] was denied his constitutional right to a fair and impartial jury at his trial by the introduction of gruesome and inflammatory photographs;

14. The court denied [appellant] his right to a fair, impartial jury when it allowed gruesome and inflammatory photographs during the penalty phase of his trial;

15. [Appellant] was denied his right to a trial by a jury by the improper jury instructions given during his trial;

16. [Appellant] was denied due process of law by the refusal to instruct on the lesser included offenses of murder and involuntary manslaughter;

17. [Appellant] was denied his right to effective assistance of counsel by counsel's failure to preserve the record;

18. [Appellant] was denied his constitutional right to a fair trial by the cumulative effect of all the errors that occurred during his trial;

19. Repeated prosecutorial misconduct denied [appellant] a fair trial;

20. [Appellant] was denied due process of law when the court improperly instructed the jury during the penalty phase;

21. [Appellant] was denied his right to effective assistance of counsel during the penalty phase of his trial;

22. [Appellant] was denied his right to a fair tribunal as the court had prepared its sentencing memorandum prior to the sentencing hearing of the trial;

23. [Appellant] was deprived of his constitutional right to a fair trial by the cumulative effect of all the errors that occurred during his penalty phase;

24. The trial court erred and denied [appellant] his constitutional right to a fair trial, by denying his motion for a new trial;

25. [Appellant] was denied due process and equal protection of the law [sic] his conviction of a death penalty specification that does not require proof of prior calculation and design for principal offenders but does require proof of prior calculation and design for an aider and abettor;

26. [Appellant’s] death sentence has denied him due process under the law as the trial court erred in adopting the recommendation of the jury and in

> finding that the aggravating circumstances outweighed the mitigating factors;
>
> 27. Imposition of the death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 20 and 16, Article I, of the Ohio Constitution.

{¶3} The Ohio Supreme Court likewise affirmed and overruled appellant's 28 propositions of law argued to that court. *State v. Mack*, 73 Ohio St.3d 502, 653 N.E.2d 329 (1995) ("*Mack II*"). There, he argued the above-claimed errors and added a claim that his appellate counsel was ineffective.

{¶4} Next, appellant filed his first postconviction relief petition on August 2, 1996. There he alleged ineffective assistance of trial counsel. The trial court denied the petition in 1996 without hearing, but that decision did not become final until 1999 when findings of fact and conclusions of law were issued. An appeal to this court followed. *State v. Mack*, 8th Dist. Cuyahoga No. 77459, 2000 Ohio App. LEXIS 4948 (Oct. 26, 2000) ("*Mack III*"). There he argued:

> (1) trial counsel should have obtained an independent ballistics test on defendant's gun when the State's evidence showed that three bullet casings at the crime scene came from his gun; (2) Mrs. Carole Mancino, one of his attorneys at trial, should have been allowed to testify regarding contradictory statements allegedly made to her by Tim Willis, the State's key witness; (3) defense counsel should have properly laid a foundation at trial for the introduction into evidence of allegedly prior inconsistent statements made by Curtis Mack and Tim Willis; and (4) defense counsel should have called four witnesses who purportedly would have called into question Willis' credibility on certain details and one witness who would have allegedly provided him with an alibi.

Id. at *3-4. This court overruled these arguments and affirmed the lower court's decision.

{¶5} After superior courts to this one declined to hear further appeals, appellant applied to reopen his appeal claiming that appellate counsel was ineffective. *State v. Mack*, 8th Dist. Cuyahoga No. 62366, 2003-Ohio-2605 ("*Mack IV*"). This court declined to reopen the appeal based, in part, on res judicata because appellant had previously argued in *Mack II* that appellate counsel was ineffective. This court found that the following arguments were barred by res judicata:

> (1) The prosecutor improperly argued that the aggravated murder was an aggravating circumstance to be considered by the jury in its weighing process.
>
> (2) The prosecutor improperly argued the victim impact statement.
>
> (3) The prosecutor misled the jury and minimized the jury's sense of duty by arguing that the sentencing verdict was only a recommendation.
>
> (4) The prosecutor improperly, illegally, and unconstitutionally withheld exculpatory, impeachment and/or mitigation evidence, Mr. Willis' statement, from the defense.
>
> (5) The trial court denied his motion for discovery and inspection of police reports, including witness statements.
>
> (6) The trial court improperly instructed the jury to reject a death sentence before considering a sentence of life in prison.
>
> (7) The trial court improperly instructed the jury on unanimity during the sentencing phase.
>
> (8) The trial court improperly instructed the jury regarding reasonable doubt at the sentencing phase.

(9) The trial court improperly instructed the jury on the aggravating circumstances in this case.

(10) The trial court improperly refused to give lesser included instructions for murder and/or manslaughter, and proper instructions for specific intent.

(11) The trial court failed to apply the correct standard during voir dire to challenges pertaining to juror's views about the death penalty.

(12) The trial court repeatedly erred by using the term "recommendation" in describing the jury's sentencing verdict.

(13) The trial court failed to prevent the admission and use of victim impact evidence during the sentencing phase.

(14) The trial court erred in admitting the autopsy photographs during the sentencing phase.

(15) The trial court improperly determined that Mr. Mack would be sentenced to death before conducting the sentencing hearing.

(16) Ohio's proportionality and appropriateness review denies a defendant due process and equal protection and fails to guard against arbitrary and capricious death sentences.

(17) The trial court erred in allowing the hearsay testimony involving Mr. Willis and Mr. Anthony Sanelli and in otherwise violating the Confrontation Clause.

(18) Trial counsel was ineffective for not calling other alibi witnesses.
(19) The trial court erred in excluding the testimony of Carol Mancino and Curtis Mack.

(20) Ohio's death penalty scheme is unconstitutional.

Mack IV at ¶ 7.

{¶6} This court also analyzed appellant's claims on the merits for those arguments that were not barred by res judicata. As it relates to the present appeal, we addressed appellant's claim that trial counsel was ineffective because he did not investigate

mitigation evidence for the penalty phase and did not thoroughly investigate the state's case. *Id*. at ¶ 36, 38. This court denied appellant's application. This decision was affirmed by the Ohio Supreme Court. *State v. Mack*, 101 Ohio St. 3d 397, 2004-Ohio-1526, 805 N.E.2d 1108 ("*Mack V*").

{¶7} Appellant next filed a writ of habeas corpus in federal court. The federal district court allowed discovery and an evidentiary hearing. However, after the court determined that appellant failed to exhaust certain claims, the court stayed habeas proceedings to give appellant the opportunity to raise three claims in state court.[1] As a result, appellant filed a successive petition for postconviction relief and motion for leave to file a motion for new trial on December 21, 2011. Appellant also moved to have counsel appointed for these proceedings. The Office of the Ohio Public Defender declined to represent appellant below. After that, the attorneys that represented appellant in the federal proceedings filed a motion for extraordinary fees prior to appointment in the case. The court denied that request, but the attorneys continued to represent appellant and were compensated through a federal program.

{¶8} The trial court held a hearing on appellant's petition that began on September 4, 2013, and concluded on September 16, 2013. Post-hearing briefs were submitted by both sides. On March 20, 2014, the trial court denied appellant's petition and motion

[1] These three claims are the same raised in appellant's third, fourth, and fifth assignments of error.

and issued findings of fact and conclusions of law. Appellant then appealed to this court assigning six errors for review:

> I. The trial court erred when it denied [appellant's] second-in-time petition for [postconviction] relief for not meeting the jurisdictional requirements of R.C. 2953.23, or for any other reason. All requirements for the court's jurisdiction under R.C. 2953.23 were met, and [appellant's] claims are meritorious, thereby entitling [appellant] to relief from his unconstitutional convictions and/or sentence of death.
>
> II. [Appellant's] convictions and death sentence are void or voidable because Ohio's [postconviction] procedures do not provide an adequate corrective process and violate the [C]onstitution.
>
> III. [Appellant's] convictions and/or sentence of death are void and/or voidable because [his] trial counsel rendered ineffective assistance in the guilt/innocence phase of [his] trial by unreasonably failing to investigate and pursue arguments and evidence that, even under the State's theory, [appellant] was not the principal offender and thus not eligible for death, in violation of [his] constitutional rights.
>
> IV. [Appellant's] convictions and/or sentence of death are void and/or voidable because [his] trial counsel rendered ineffective assistance in the sentencing phase of [appellant's] trial, in violation of [his] constitutional rights.
>
> V. [Appellant's] convictions and/or sentence of death are void and/or voidable because the State of Ohio suppressed material exculpatory and/or impeachment information from [appellant] during and after his trial, in violation of *Brady v. Maryland* and its progeny and [appellant's] constitutional rights.
>
> VI. The trial court erred in denying [appellant's] motion for leave to file a motion for new trial and in failing to grant a new trial.

II. Law and Analysis

A. Jurisdictional Requirements

{¶9} When dealing with successive postconviction relief petitions, the applicant has a heightened pleading requirement. R.C. 2953.23 governs successive or untimely petitions. It provides that a court may not entertain an untimely or successive petition unless the petitioner is able to demonstrate each of the following:

> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
>
> (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

R.C. 2953.23(A).

{¶10} If the court determines that a petitioner has met these jurisdictional requirements, then it may analyze the petition as set forth in R.C. 2953.21, where the petitioner must successfully show by clear and convincing evidence "actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death * * *."

{¶11} This court reviews the trial court's decision granting or denying a postconviction relief petition for an abuse of discretion. *State v. Kent*, 8th Dist.

Cuyahoga No. 94562, 2010-Ohio-6368, ¶ 8, citing *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 45.

{¶12} Appellant claims in his first assignment of error that the court erred when it denied appellant's motion because he did not meet the jurisdictional requirements of R.C. 2953.23. The court, according to its findings of fact and conclusions of law, denied the motion because appellant did not

> establish that there exists new material which he could not with reasonable diligence have discovered and produced at the trial and that, but for constitutional error at trial, no reasonable factfinder would have found him guilty of the offense of which he was convicted or that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found him eligible for the death sentence.

The trial court found that appellant did not carry his burden. Therefore, the discussion of this assigned error will include appellant's third and fourth assignments of error where he argues the merits of his petition.

1. Ineffective Assistance of Trial Counsel

{¶13} Appellant's third and fourth assignments of error both claim trial counsel was ineffective. Appellant claims his convictions and sentence are void or voidable as a result of counsel's failings in the guilt and penalty phases, in these assignments of error.

{¶14} Appellant has previously argued ineffective assistance of trial counsel to this court at least twice. In his direct appeal, appellant claimed counsel was ineffective for objecting to a jury instruction and failing to call witnesses during the penalty phase of trial. In his first postconviction relief petition, he claimed counsel was ineffective for failing to obtain independent ballistics analysis of a firearm, failing to properly

cross-examine Willis with evidence of inconsistent statements he made, and failing to call certain witnesses. Appellant also made many of the same claims he now makes in a motion to reopen his direct appeal, which this court denied in 2003. *Mack IV*, 8th Dist. Cuyahoga No. 62366, 2003-Ohio-2605. There, he argued counsel was ineffective for failing to investigate mitigation evidence, to properly cross-examine Willis about inconsistencies in his testimony, to adequately conduct discovery, and to object to certain testimony given by Willis.

{¶15} Now, he again claims his attorney was ineffective for numerous reasons, some previously argued and some permutations of those arguments. Appellant does not adequately explain how he was previously prevented from making these arguments as many were previously argued to this court, albeit in a different context. The purported belated discovery of these claims is disingenuous where the arguments relate to a failure to make alternative arguments in the guilt and mitigation phases of trial.

{¶16} Appellant first argues that counsel was ineffective for failing to make arguments at trial that appellant was not the person that actually killed the victim — that he was not the principal offender. At trial, counsel argued that appellant was not involved, that he was somewhere else, and produced witness testimony attempting to establish an alibi for the time of the murder. The arguments made were known at the time of the first appeal and petition. This argument should have been made previously and is now barred by res judicata.

{¶17} Likewise, appellant's claims that an adequate investigation was not undertaken are not newly discovered. Appellant made these claims in 2003 in his application for reopening. Appellant argues that the application for reopening deals with the ineffectiveness of appellate counsel and did not properly raise the issue of ineffective assistance of trial counsel and is therefore not barred by res judicata. Many of the arguments made in *Mack IV* in 2003 mirror the arguments made here relative to ineffective assistance of trial counsel. Appellant waited for almost a decade before asserting these arguments in the proper forum if his arguments about res judicata are accepted as true.

{¶18} Assuming appellant's argument that res judicata does not apply to these claims, the court made a determination that based on the evidence before it, appellant did not carry his burden under R.C. 2953.23. The trial court had more evidence to consider than is currently before this court. Testimony was adduced beyond that which occurred at the federal hearings, but all the testimony we have to review is the record in the federal case. A transcript from the hearing on appellant's postconviction relief petition was not included in the record submitted to this court.

{¶19} This hearing commenced on August 27, 2013. After taking the testimony of Ryan O'Donnell, Michael J. O'Malley, Michael Barone, and Anthony Sanelli, the hearing was continued until September 4, 2013, and rescheduled to September 10, 2013. On that date, testimony was heard from trial attorney Paul Mancino and a transcript of appellant's other attorney, Carol Mancino, was admitted.

{¶20} Without a transcript documenting the testimony adduced at this hearing, it is impossible for this court to determine factual issues contrary to the court's findings of fact. We are left wondering what the witnesses who were called to testify at this hearing said. As a result, we cannot say that the trial court abused its discretion in denying appellant's petition. We also cannot compare the trial strategy employed by trial counsel with the claimed deficiencies because appellant has failed to supply this court with a transcript of the trial. Based on the above, this court cannot say that the lower court abused its discretion in denying appellant's motions based on ineffective assistance of trial counsel.

2. Withholding of Exculpatory or Impeachment Evidence

{¶21} Appellant also claims the state withheld exculpatory evidence or evidence that could have been used to impeach Willis, a key witness. During the federal habeas proceedings, the state produced material that appellant claims was not made available prior to or during trial. He argues this material would have made a difference at trial and requires the court to vacate his convictions and sentence and retry him. Specifically, appellant identifies ten items he claims the state improperly withheld.

{¶22} The state has a duty to disclose certain information to a criminal defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). This is a fundamental principle of Due Process. *Id.* at the syllabus.

> Pursuant to Crim.R. 16(B)(1)(f), a prosecutor is required "to disclose 'all evidence * * * favorable to the defendant and material either to guilt or

punishment.'" *Cleveland v. Schmidt*, 8th Dist. No. 98603, 2013-Ohio-1547, ¶ 21. In *Brady*, the United States Supreme Court "held that the state must disclose 'evidence favorable to an accused * * * where the evidence is material either to guilt or to punishment.'" *Id*., quoting *Brady* at 87. This rule, however, does not require the prosecutor "to produce the entire file to the defense. He or she is only required to produce evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *Id*. at ¶ 22, citing *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Under *Brady*, favorable evidence "includes both exculpatory and impeachment evidence, but the evidence must be both favorable and material before disclosure is required." *Id*., citing *Bagley* at 674. Evidence is material "if there exists a 'reasonable probability' that the result of the trial would have been different had the evidence been disclosed to the defense." *Id*., *citing Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), *quoting Bagley* at 682.

State v. Sullivan, 10th Dist. Franklin No. 13AP-861, 2014-Ohio-1260, ¶ 18.

{¶23} The Supreme Court has recognized that three situations exist where *Brady* claims may arise:

> [W]here previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured; * * * where the Government failed to accede to a defense request for

> disclosure of some specific kind of exculpatory evidence; * * * where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way.

Kyles at 433.

{¶24} The state asserts that it shared some of this information with appellant by reading certain reports to appellant's attorneys or allowing them to read the reports. Trial counsel's notes establish that certain police reports were read to him or summarized during pretrials. This was apparently the policy based on the Ohio criminal rules in place at the time. *See State v. Williams*, 8th Dist. Cuyahoga No. 99136, 2013-Ohio-1905, ¶ 11. The state indicates that one of appellant's attorneys testified that he viewed or was read certain reports during discovery. This attorney testified at both the evidentiary hearing below and the federal proceedings, but only the federal hearing transcripts are in the record. We do not have before us the full testimony of this witness and others. Some of this information is covered in the federal hearings and is analyzed below.

a. Notes of Willis's First Meeting With the Family of the Victim

{¶25} Willis met with the family of the victim on January 23, 1991, shortly after the murder. The victim's son-in-law, Mike Barone, took notes of this conversation. It was the state's argument that these notes were not turned over to police. However, appellant was able to show that police were given the notes shortly after the meeting.

Appellant argues that his name does not appear in the notes memorializing the conversation, although the name of the codefendant, Sowell, does.

{¶26} The trial prosecutor, Richard Bombik, testified that these notes were not disclosed to him and were not in his file at trial. He appears to assert that he had no duty to turn over items not in his possession. However, the *Kyles* court specifically rejected this argument. *Kyles*, 514 U.S. at 438, 115 S.Ct. 1555, 131 L.Ed.2d 490. But these notes were cumulative of evidence gathered by appellant in preparation for trial. One of appellant's trial attorneys, Carol Mancino, interviewed members of the Sanelli family and was aware that Willis met with the family soon after the murder. The state argues that at least one family member testified about this meeting at trial, but we have no trial transcript to assess the testimony to determine if it was similar to the notes. From the federal hearing, we know the notes do not include appellant's name, but they indicate that two people were involved and specifically mention the codefendant. The notes are not exculpatory and are cumulative of other evidence known to appellant prior to trial. The notes do not provide an effective means of impeaching Willis's testimony as they indicate two people were involved in the shooting of Peter even though only Sowell was named in this initial conversation.

b. Willis's First Report to Police

{¶27} In the first police report documenting Willis's statements to police, he stated that Sowell was the person that shot Peter. But he also indicated appellant and Reginald Germany were involved. The statement also indicates that Willis was taken to view

Peter's vehicle prior to giving a statement. Appellant claims this is all information that could have been used to impeach Willis's testimony.

{¶28} However, testimony from the federal proceedings indicates police reports were read to appellant's counsel. Trial counsel's notes indicate that reports were read to him, but are unclear on this specific report. Without a transcript of testimony from the lower court, we are unable to properly address this claim and determine whether this report was indeed withheld.

c. Willis's January 23, 1991 Written Statement

{¶29} Appellant claims a written statement taken by police on January 23, 1991, was also not disclosed. However, the transcript from the federal proceedings indicates trial counsel's notes include the disclosure or summary of Willis's written statement. This court has also previously found the trial record indicates disclosure of this statement during trial. *Mack I*, 8th Dist. Cuyahoga No. 62366, 1993 Ohio App. Lexis 5758, *18. Appellant raised this in an assignment of error taking issue with the court's denial of a motion for discovery and inspection. This court found a lack of prejudice. *Id*. This also indicates that a lack of disclosure was not newly discovered and appellant does not explain why this claimed *Brady* violation was not addressed in his previous appeals.

d. Oral Statement Given by Willis to Prosecutors

{¶30} According to Bombik's testimony in the federal proceedings, he met with Willis within one month of trial to discuss his trial testimony. Appellant argues the

notes indicate that, for the first time, Willis remembered that appellant stated, "I shot because you [Sowell] shot." No prior statement contains this line Willis claimed was uttered by appellant when appellant, Sowell, and Willis were discussing the murder shortly after it happened. Appellant argues the changing nature of Willis's story as trial approached means this is relevant impeachment evidence that should have been disclosed prior to trial. Appellant also argues that Bombik made note of Willis's pending burglary case. Appellant asserts these notes should also have been disclosed because they could be used to infer that an undisclosed deal had been struck between Willis and the state.

{¶31} The notes do not contain an "I shot because you shot" reference. A statement contained in the notes indicates that Willis told Bombik that Sowell said he shot because Peter was uncooperative: "'I told the fool to get out, instead he got in & locked the door. I shot him.'" This is consistent with Willis's prior written statement. Bombik's testimony in the federal proceedings indicates that he did not remember taking notes of the meeting. However, when asked about the "I shot because you shot" statement appellant allegedly made to Willis, Bombik said he likely learned about the statement at that meeting. His answer was "I imagine I did. Yes. I would imagine I did, sure." The notes of the conversation that we now know exist do not indicate such a statement was made by Willis at the meeting.

e. Notes From Willis's Second Meeting With the Victim's Family

{¶32} Appellant argues this meeting furthers his arguments that Willis was testifying in order to collect the rewards offered in this case, one offered by the family

and another offered by Crime Stoppers. However, appellant's counsel testified at the federal hearing he knew of the rewards. He also admitted under questioning from the state that he used the reward motive to explain Willis's testimony in his opening statement at trial. Trial counsel also admitted he cross-examined Willis extensively about his motives for testifying, including the reward. This does not constitute a *Brady* violation as it was cumulative of other evidence used at trial.

f. Reports Generated From the Crash of the Victim's Vehicle

{¶33} A witness reported seeing a man fitting Sowell's description crash Peter's car on Holton Avenue. A police report also indicated that someone was seen entering the stolen vehicle after it had been crashed into a utility pole and abandoned. The individual moved the car some distance and took the keys.

{¶34} Appellant argues that the fact that Sowell was seen driving the car after the murder indicates that it was he, rather than appellant, who shot Peter. Appellant also argues that the individual seen moving the car could have returned to the vehicle to retrieve evidence rather than being an individual who happened upon an abandoned vehicle.

{¶35} This evidence is not exculpatory or readily used for impeachment. Witnesses who observed the crash testified that a person matching Sowell's description exited the vehicle after crashing it and fled the scene. Simply because Sowell was driving the car does not conflict with the evidence adduced or the state's theory of the case. Appellant claims that it only makes sense that if Sowell was seen driving the car,

he must have been the person on the driver's side of the vehicle when the car was stolen. Therefore, he must have been the one who actually shot Peter to death. The fact that Sowell was driving the car does not lead to the conclusion that Sowell was the person that killed Peter. This post hoc ergo propter hoc argument does not cast doubt on appellant's conviction. It is also possible that Sowell wanted to drive the car and appellant let him, or that as appellant was pulling Peter from the vehicle after shooting and searching him, Sowell came around to the driver's side of the car and got in so the two could make a quick escape.

{¶36} All this evidence tends to establish is that Sowell was the person who was driving the car after the murder. This does not mean that Sowell, rather than appellant, was the person that caused Peter's death. This evidence is not exculpatory nor does it contradict Willis's statements at trial as set forth in the federal hearings. Willis testified that Sowell was the driver of the vehicle when he encountered him and appellant soon after the murder. The accident reports that were not turned over do not amount to a *Brady* violation.

g. Reports of Searches of Willis's Property by Police

{¶37} Appellant argues that he should have been informed that Willis's house had been searched four times by police.

{¶38} Assistant prosecutor Bombik testified during the federal proceedings that the searches were consensual searches conducted at Willis's request. Bombik also testified he did disclose the police reports indicating police searched Willis's home and

property, although the notes taken by appellant's attorney do not include disclosure of that fact. Further, notes taken by one of appellant's attorneys indicate she was aware that property was recovered from Willis's home that tied appellant to other robberies. Appellant was identified by the victims of those robberies as the person who stole the items. This further casts doubts on appellant's arguments that Willis was setting appellant up to escape his own responsibility in the murder. This is not beneficial to appellant such that it deprived appellant of an opportunity to properly cross-examine Willis and does not constitute a *Brady* violation.

h. Reports of a Police Task Force Investigating Robberies Committed by Individuals Wearing Ski Masks

{¶39} Appellant argues that Willis was a person of interest in several aggravated robberies and homicides being investigated by a Cleveland Police task force, dubbed the "Ski-Mask Task Force."

{¶40} The testimony of assistant prosecutor Bombik indicated that these task force records were not a part of his file and no charges were pending or about to be filed before or during trial relating to this investigation. Willis did have a pending criminal indictment at the time of trial, but appellant's attorney testified he knew that. The evidence in the task force investigation goes only so far to name Willis as a person of interest. This is not exculpatory evidence in the case of Peter's murder and does not contradict any of Willis's testimony in this case. Therefore, the failure to turn over any of these records does not amount to a *Brady* violation.

i. Evidence That Willis Testified Pursuant to a Plea Agreement

{¶41} In the weeks preceding appellant's trial, it was disclosed to appellant's counsel that Willis was charged with the robbery of Robert Burgess. The charges in this case were ultimately dismissed. Appellant points to a note in the state's file of this prosecution that Bombik called the prosecutor assigned to Willis's case and asked him to hold the case to investigate it further soon after Willis finished testifying against appellant and his co-conspirator.

{¶42} The evidence adduced at the federal evidentiary hearing indicates Willis received no deal from the state for his testimony. Prosecutor Bombik testified that no consideration with other criminal matters was ever exchanged with Willis for his testimony against appellant. Willis's attorney testified that he was unaware of any deal. There is no evidence of the terms of any deal between the state and Willis in the record before this court.

{¶43} However, there is an inference that can be made based on the sequence of events that took place in Willis's criminal matter. Notes contained in the prosecutor's file from Willis's case indicated that Bombik called the prosecutor handling Willis's criminal prosecution for aggravated robbery — after Willis testified in appellant's and Sowell's cases — and asked that prosecution be held for further investigation. The case was held for further investigation and eventually dismissed. A detective involved with appellant's case also testified that he assumed a deal was reached between the prosecutor

and Willis. Bombik testified he asked the other prosecutor to reinvestigate the case because, according to Willis, people were trying to set him up to discredit him.

{¶44} This evidence is troubling given the crucial nature of Willis's testimony, but all that exists in the record is speculation that Willis received a deal in exchange for his testimony. Without a sufficient record to further analyze these allegations, it is impossible for this court to hold that the trial court abused its discretion in denying appellant's motions.

j. Evidence of Perjury Committed by Willis.

{¶45} Appellant claims the state withheld evidence that indicated Willis was lying or that his story changed over time.

{¶46} Although we do not have the full content of Willis's trial testimony, from the transcript in the federal proceedings, we know that Willis testified that he was waiting outside of a recreation center while his son was inside. He saw Sowell and appellant in a car, and they stopped to talk. Willis apparently testified that he asked the two where they got the car, and appellant said they got it on Prospect Avenue. This is where Peter's business was located and where he was murdered. During the federal proceedings, appellant introduced testimony from a city of Cleveland employee that on the day Willis testified he saw appellant and Sowell in the car, the recreation center was actually closed as it was Martin Luther King, Jr. Day. However, the fact that a public facility is open or closed is not in the exclusive control of the state and is discoverable through diligent investigation. Further, the fact that Willis's testimony differed

somewhat from his previous statements to police does not indicate the state knew or should have known that Willis's testimony was untrue. Willis's testimony was substantially similar to his prior statements. This does not amount to a *Brady* violation.

3. Materiality

{¶47} Assuming the evidence appellant claims to have been wrongly withheld should have been disclosed prior to trial, the evidence must be material to the convictions in order to warrant a new trial. "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. 1555, 131 L.Ed.2d 490. The Court goes on to set forth that a reasonable probability of a different result is shown "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.*, quoting *Bagley*, 473 U.S. at 678, 87 L.Ed.2d 481, 105 S.Ct. 3375.

{¶48} While this court does not engage in a sufficiency analysis, the review required for materiality necessarily involves an examination of the trial court record to determine how the evidence affected or would have affected trial. However, that analysis is frustrated in this case based on the lack of a sufficient record. This court is presented with only a narrow view of the evidence unnecessarily focused by appellant's choice to provide this court with only limited materials. We are unable to conduct the appropriate analysis, and therefore, must presume that the trial court conducted that

analysis and determined, based on the record of the evidentiary hearing and the federal proceedings, that its confidence in the verdicts reached in appellant's case was not shaken.

B. Adequacy of Postconviction Proceedings

{¶49} Appellant claims in his second assignment of error that Ohio's postconviction procedures do not provide for adequate review and relief from trial error, and this makes his conviction and sentence void or voidable.

{¶50} Appellant claims, like every other civil litigant, he should be afforded discovery before the court makes a determination whether a hearing is required. He claims this is an unfair burden because he is required to demonstrate the merits of his case prior to any additional discovery. However, postconviction relief is not like a newly filed civil case. It comes after lengthy proceedings and discovery. It is a civil, collateral attack on a valid criminal judgment. Additional discovery is not required in such a situation. *Kent*, 8th Dist. Cuyahoga No. 94562, 2010-Ohio-6368, at ¶ 17. Discovery is, however, allowed where a proper showing is made via motion. The trial court has discretion to allow additional discovery. *State v. Lawson*, 12th Dist. Clermont No. CA2011-07-056, 2012-Ohio-548, ¶ 16.

{¶51} Here, there is no indication further discovery was required based on the extensive discovery that took place in appellant's federal hearings. Further, the trial court granted appellant a hearing on his motion for postconviction relief, so there is no indication of any as-applied constitutional violations.

{¶52} Appellant also argues his convictions are void or voidable based on constitutional violations because the standard of review for a successive postconviction relief petition is greater than the standards of proof for claims of ineffective assistance of counsel or that the state withheld exculpatory evidence. But, "[p]ostconviction relief is not a constitutional right, and it affords a petitioner no rights beyond those granted by the controlling statute, R.C. 2953.23." *Lawson* at ¶ 16, citing, among others, *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989).

{¶53} The *Lawson* court addressed a very similar argument to the one raised here. It held that the statutory scheme was not unconstitutional and the standard of review was a validly enacted procedural hurdle:

> We also note that the R.C. 2953.23(A)(2)'s clear and convincing standard did not become applicable until Lawson was afforded a full trial and mitigation hearing, and then appealed the decision of the jury and trial court to this court, the Ohio Supreme Court, as well as the federal courts. The clear and convincing standard applied only after Lawson filed an unsuccessful petition for postconviction relief and sought a second, and now a third petition for postconviction relief. As we stated in *McGuire*, the legislators created a "reasonable procedural hurdle" when it promulgated R.C. 2953.23(A)(2), when balancing the need for final judgment against a petitioner's right to challenge his conviction on the basis of constitutional violations. [*State v.*] *McGuire*, 12th Dist. No. CA2000-10-011, 2001 Ohio App. LEXIS 1826, at *8. The state is entitled at some point to the finality of the judgment, and applying a clear and convincing standard to a third petition for postconviction relief is not unconstitutional.

Id. at ¶ 32.

{¶54} The Eighth District has come to same conclusions regarding the constitutionality of R.C. 2953.23 for successive petitions for postconviction relief. *State v. Taylor*, 8th Dist. Cuyahoga No. 80271, 2002-Ohio-2742, ¶ 13. The statute is not

unconstitutional on its face or as applied as this court and others have repeatedly held. *See State v. Cook*, 1st Dist. Hamilton No. C-140118, 2014-Ohio-4900.

{¶55} Appellant's claim that the system of compensation for attorneys in postconviction relief deprived him of meaningful review is similarly without merit. The right to counsel in civil, collateral attacks on valid criminal judgments is not constitutionally required. *State v. Mapson*, 41 Ohio App.3d 390, 391, 535 N.E.2d 729 (8th Dist.1987).

{¶56} Further, appellant was afforded counsel, albeit through federal procedures. In this case, counsel sought extraordinary fees prior to being appointed. That motion sought between $25,000 and $50,000 for representation in the filing of a motion for new trial/postconviction relief petition. Here, appellants did not offer substantial reasons to justify such extraordinary fees.

C. Motion for New Trial

{¶57} Finally, appellant claims the court erred in denying his motion for a new trial. Crim.R. 33 provides criminal defendants the opportunity to have errors that affected a substantial right corrected. It states in relevant part,

> [a] new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> * * *
>
> (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
>
> * * *

> (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. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

{¶58} The statute also sets forth a period of time within which the motion must be filed. As it relates to motions based on newly discovered evidence, the statute provides,

> [m]otions 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.

Crim.R. 33(B). Here, appellant filed a motion for leave along with his motion for new trial, and the court conducted a hearing.

{¶59} In order to be successful, a motion for new trial must establish that the movant was unavoidably preventing from the discovery of new, material evidence that could not, with reasonable diligence, have been adduced at trial.

> Evidence is "material" if there is a "reasonable probability" that its disclosure would have changed the outcome of the trial. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). In this context, the determination of this probability entails an inquiry into not whether a trial with the undisclosed evidence would have yielded a different verdict, but whether the evidence, "considered collectively," "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, 434-436, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); accord *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶ 23-24; *State v. Hughbanks*, 1st Dist. No. C-010372, 2003-Ohio-187, ¶ 57.

State v. Carusone, 1st Dist. Hamilton No. C-130003, 2013-Ohio-5034, ¶ 36.

{¶60} Again, the "touchstone of materiality is a 'reasonable probability' of a different result * * *." *Kyles* at 434, quoting *Bagley*. And again, this court is prevented from engaging in the proper analysis through the failure to provide an adequate record for review.

III. Conclusion

{¶61} Here the evidence adduced does not undermine the confidence in the verdicts of guilt because we presume the trial court arrived at the appropriate outcome based on the lack of a sufficient record for review. The system of representation in postconviction proceedings is not unconstitutional. Based on the record before this

court, the trial court did not err in overruling appellant's motions for postconviction relief or motion for a new trial.

{¶62} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
KATHLEEN ANN KEOUGH, J., CONCUR