

STATE OF OHIO                    )  
  )ss:  
COUNTY OF SUMMIT            )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.       24580

Appellee

v.

DONALD LAVELL CRAIG

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.     CR2006-01-0340

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 24, 2010

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CARR, Judge.

{¶1} Appellant, Donald Craig, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Craig was indicted on one count of aggravated murder, along with three specifications for death; one count of rape; and one count of kidnapping. At the conclusion of the guilt phase of the trial, the jury found Craig guilty on all counts and specifications. At the conclusion of the mitigation phase of trial, the jury recommended death for Craig. Upon finding that the aggravated circumstances of the case outweighed the mitigating factors by proof beyond a reasonable doubt, the trial court sentenced Craig to death for the crime of aggravated murder. The trial court further sentenced Craig to ten years in prison for each of the remaining counts. Craig was adjudicated to be a sexual predator. Craig appealed both his conviction and sentence to the Ohio Supreme Court. That appeal has not yet been disposed of.

{¶3} Craig filed a petition for post-conviction relief on May 16, 2007. The State moved to dismiss the petition and Craig replied. Craig moved for leave to conduct discovery and the State opposed his request. The trial court denied the motion to conduct discovery. On December 19, 2008, the trial court filed a judgment entry denying and dismissing the petition for post-conviction relief. Craig appealed and this Court affirmed, having to presume regularity in the proceedings below because the record did not contain the petition.

{¶4} This Court granted Craig’s motion to supplement the record with the petition for postconviction relief and granted his motion to reconsider its decision. We have now reviewed the complete record and Craig’s assignments of error, and affirm the trial court’s decision.

### **ASSIGNMENT OF ERROR I**

“THE TRIAL COURT ERRED WHEN IT DENIED THE POST-CONVICTION PETITION WITHOUT FIRST ALLOWING CRAIG TO CONDUCT DISCOVERY.”

{¶5} In his first assignment of error, Craig argues that the trial court erred when it denied his petition without first allowing Craig to conduct discovery. Although Craig asserts in his brief that he “has the constitutional right to conduct discovery for post-conviction purposes[,]” he does not support this statement with citation to any authority.

{¶6} This Court has long held that there is no right to discovery in a postconviction proceeding. An action for postconviction relief is a civil action. *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49. The procedures applicable to the action, however, are those found in R.C. 2953.21. *State v. Hiltbrand* (May 16, 1989), Summit App.No. 11550. That section does not provide for discovery. See, e.g., *State v. Smith*, Summit App.No. 24832, 2009-Ohio-1497, ¶18; *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 158-59; *State*

*v. White* (June 16, 1999), Summit App.No. 19040, at 2; *State v. Benner* (Aug. 27, 1997), Summit App.No. 18094, at 2; *State v. Ray* (July 30, 1986), Summit App.No. 12517.

{¶7} Craig had no right to conduct discovery. Accordingly, the trial court did not err in denying his request. The first assignment of error is overruled.

### **ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ERRED WHEN IT DENIED CRAIG’S MOTION FOR FUNDS TO EMPLOY EXPERTS.”

{¶8} In his second assignment of error, Craig argues that the trial court erred when it denied his motion for funds to hire expert witnesses. Because he had no right to funds for expert witnesses, the trial court did not err when it denied his motion.

{¶9} This Court has previously considered this issue and held that there is no authority

“to support [Craig’s] position that he had a right to the assistance of experts while pursuing his petition for post-conviction relief. In *State v. Crowder* (1991), 60 Ohio St.3d 151, 152, the Ohio Supreme Court held that a post-conviction petitioner has no constitutional right to counsel. Consequently, as the right to the assistance of experts stems from the right to counsel, a post-conviction petitioner has no constitutional right to the funding of experts. See *State v. Hooks* (Oct. 30, 1998), Montgomery App. Nos. 16978 and 17007, unreported, 1998 WL 754574, at \*3. Although a petitioner facing the death penalty has a statutory right to counsel to pursue post-conviction relief, see R.C. 2953.21(I), there is no corresponding statutory right to the assistance of experts.” *State v. Smith* (Mar. 15, 2000), Lorain App.No. 98CA007169, at \*3.

Likewise, the Tenth District recently held that “R.C. 2953.21 does not provide a right to funding or appointment of expert witnesses or assistance in a postconviction petition. Thus, it is not error for a trial court to deny a defendant’s request for funds for expert witnesses in support of his petition for postconviction relief.” *State v. Madison* (Oct. 7, 2008), Franklin App.No. 08AP-246, 2008-Ohio-5223, ¶16 (citations omitted).

{¶10} The trial court did not err when it denied Craig’s motion for funds to employ expert witnesses. The second assignment of error is overruled.

### **ASSIGNMENT OF ERROR III**

“THE TRIAL COURT ERRED IN DISMISSING CRAIG’S POST-CONVICTION PETITION WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT MINIMUM, AN EVIDENTIARY HEARING.”

{¶11} Craig argues that the trial court erred by denying his petition. This Court disagrees.

{¶12} R.C. 2953.21(A)(1)(a) allows Craig to file a petition asking the trial court to vacate or set aside the judgment of conviction or sentence. The petitioner must state all grounds for relief on which he relies, and he waives all other grounds not so stated. R.C. 2953.21(A)(4). In determining whether substantive grounds for relief exist, the trial court must consider, among other things, the petition, the supporting affidavits, and the documentary evidence filed in support of the petition. R.C. 2953.21(C). If the trial court finds no grounds for granting relief, it must make findings of fact and conclusions of law supporting its denial of relief. R.C. 2953.21(G). This Court reviews the trial court’s judgment for an abuse of discretion. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶45.

{¶13} The trial court serves a gatekeeping function in postconviction relief cases – the court determines whether a defendant will even receive a hearing. *Id.* at ¶51. A trial court may dismiss a petition without a hearing “where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief.” *State v. Calhoun* (1999), 86 Ohio St.3d 279, paragraph two of the syllabus. The gatekeeping function includes the trial “court’s decision regarding the sufficiency of the facts set forth by the petitioner and the credibility of the affidavits submitted.” *Gondor* at ¶52. On appeal, “a court reviewing the trial

court's decision in regard to its gatekeeping function should apply an abuse-of-discretion standard." Id.

{¶14} The Ohio Supreme Court concluded that "a trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion; a reviewing court should not overrule the trial court's finding on a petition for postconviction relief that is supported by competent and credible evidence." Id. at ¶58. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶15} Craig presented twelve grounds for relief in his petition. The trial court determined that Craig failed to demonstrate that he was denied the effective assistance of counsel, that the death penalty was unconstitutionally applied to him, and that the cumulative effect of errors deprived him of a fair trial. The court denied his petition without a hearing. We review this decision for an abuse of discretion.

#### PRELIMINARY ARGUMENTS

{¶16} In his brief, Craig first addresses the test for ineffective assistance of counsel. He argues that the trial court applied the wrong legal standard, in two ways. First, he argues that "the standard is whether counsel completed a thorough and complete investigation under the prevailing professionals (sic.) standards of the American Bar Association" rather than the higher standard required by *Strickland v. Washington* (1984), 466 U.S. 668. Craig also complains that the trial court imposed an additional burden when it held that he must overcome the presumption that his counsel acted competently. Craig's arguments are not persuasive.

## ABA GUIDELINES

{¶17} In November 2009, the United States Supreme Court again addressed the test for ineffective assistance of counsel to be applied in a death penalty case. The Supreme Court rejected holding counsel to the standards announced by the American Bar Association. In *Bobby v. Van Hook* (Nov. 9, 2009), 130 S.Ct. 13, 16, the Supreme Court explained:

The Sixth Amendment entitles criminal defendants to the “effective assistance of counsel”—that is, representation that does not fall “below an objective standard of reasonableness” in light of “prevailing professional norms.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). That standard is necessarily a general one. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” 466 U.S., at 688-689, 104 S.Ct. 2052. Restatements of professional standards, we have recognized, can be useful as “guides” to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place. *Id.*, at 688, 104 S.Ct. 2052.

The Supreme Court criticized the Sixth Circuit for treating “the ABA’s 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel ‘must fully comply.’” *Id.* at 17. The Court continued by noting that

*Strickland* stressed, however, that “American Bar Association standards and the like” are “only guides” to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. See *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is a fortiori true of standards set by private organizations: “[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

*Id.*

{¶18} Just days after deciding *Van Hook*, the Supreme Court again considered an ineffective assistance of counsel claim in the context of the death penalty sentencing hearing. The Court held that when considering whether defense counsel’s representation was reasonable, a court must do so in light of the variety of circumstances facing counsel and the range of legitimate decisions regarding how counsel could best represent his client. *Wong v. Belmontes* (2009), 130 S.Ct. 383, 384. The Court recognized that “scrutiny of counsel’s performance must be highly deferential.” *Id.* (citation omitted).

{¶19} The trial court applied the *Strickland* standard in evaluating Craig’s claims. Based on *Van Hook*, *Belmontes*, *Strickland*, and numerous Ohio Supreme Court decisions, this Court rejects Craig’s argument that the trial court applied the wrong standard to determine whether trial counsel were ineffective. We next consider Craig’s second preliminary argument.

#### PRESUMPTION OF COMPETENCE

{¶20} Craig further argues that the trial court imposed an additional burden on him because it recognized that licensed trial counsel were presumed competent. The trial court did not impose an additional burden on Craig. Instead, it properly set out the standard to be applied, as the *Gondor* Court, at ¶62, recently explained:

On the issue of counsel’s ineffectiveness, the petitioner has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *Calhoun*, 86 Ohio St.3d at 289, 714 N.E.2d 905, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 31 O.O.2d 567, 209 N.E.2d 164. In order to overcome this presumption, the petitioner must submit sufficient operative facts or evidentiary documents that demonstrate that the petitioner was prejudiced by the ineffective assistance. *State v. Davis* (1999), 133 Ohio App.3d 511, 516, 728 N.E.2d 1111. To demonstrate prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶21} The Ohio Supreme Court presumes that a licensed attorney is competent. However, the presumption does not create an additional burden. As the remainder of the quote demonstrates, the presumption is overcome by showing that counsel were ineffective, as measured by the *Strickland* test. Accordingly, this Court rejects Craig's second preliminary argument.

#### GROUND FOR RELIEF ONE THROUGH NINE

{¶22} Having rejected Craig's preliminary assertions, we turn to the merits of his argument addressing his grounds for relief. In grounds one through nine, Craig argued that he was denied the effective assistance of counsel. This Court must review the trial court's decision to determine whether its findings are supported by competent and credible evidence. *Gondor*, at ¶52. If this Court concludes that the findings are properly supported, then this Court reviews the trial court's decision in regard to its gatekeeping function for an abuse of discretion. *Id.*

##### A. FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE

{¶23} Craig has combined his first, second, and fifth grounds for relief before this Court. He has argued that he was denied the effective assistance of counsel because trial counsel did not conduct a proper mitigation investigation. The trial court held that Craig was not denied the effective assistance of counsel because Craig's brother and sister testified at the mitigation hearing, and an expert witness, Dr. Fabian, testified about mitigation factors applicable to Craig's family background and life. The trial court reviewed the affidavits Craig submitted with his petition and decided that they presented evidence cumulative to that presented at his mitigation hearing. After reviewing the record, we conclude the trial court's findings of fact are supported by competent and credible evidence.



{¶24} Based on these factual findings, the trial court concluded that Craig was not denied the effective assistance of counsel. The trial court did not abuse its discretion in reaching this conclusion. As the trial court concluded, the record shows that trial counsel presented meaningful mitigation evidence. The trial court's additional conclusion that, even if counsels' performance were deficient, Craig could not show prejudice is also supported by the evidence and, thus, not an abuse of discretion.

{¶25} We also note that the facts that support the first, second, and fifth grounds for relief appear on the record. Craig has presented these same arguments to the Ohio Supreme Court on his direct appeal from his conviction. *State v. Craig*, Supreme Court Case No. 2006-1806. In his first and fourteenth propositions of law, he argues he was denied the effective assistance of counsel at his mitigation hearing. The arguments presented in his direct appeal rely on the same alleged shortcomings as Craig presented in his petition for postconviction relief. Where an alleged error appears on the record, the error must be raised on direct appeal and res judicata bars the defendant from raising and litigating the claimed error in postconviction relief. *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. Accordingly, because the facts supporting these grounds appear on the record, they were properly raised on direct appeal.

{¶26} The trial court did not err in its decision as it relates to Craig's first, second, and fifth grounds for relief.

#### B. NEUROLOGICAL TESTING AND EXPERT TESTIMONY

{¶27} In his third ground for relief, Craig has argued that the trial court erred by finding that counsel were not ineffective for failing to obtain neurological testing and presenting a neurological expert. The trial court held he was not denied the effective assistance of counsel

because Dr. Fabian testified at the mitigation hearing, provided a report, and testified about mitigating factors that countered aggravating factors. The trial court's factual conclusions are supported by competent and credible evidence. In his petition, Craig focused on his medical and social problems to support his argument that neurological testing was necessary. That foundational evidence was presented during the mitigation hearing and it addressed mitigation factors, as discussed by the trial court.

{¶28} Craig presented affidavits that argued neurological testing should have been performed, testing that could have provided additional mitigation evidence to present to the jury. The trial court concluded that it was speculative whether the tests would have revealed any evidence that could have been presented in mitigation. As the Ohio Supreme Court has recognized, "many trial tactics may be questioned after an unfavorable result. A fair assessment of attorney performance requires us to eliminate the distorting effect of hindsight." *State v. Post* (1987), 32 Ohio St.3d 380, 388. The trial court recognized that counsel presented as mitigation evidence the facts that Craig now argues should have resulted in neurological testing being completed. Craig suggests that trial counsel should have used a different trial tactic, but, considered at the time, the approach trial counsel used was not unreasonable. The court's conclusion that Craig was not denied the effective assistance of counsel was not an abuse of discretion.

### C. CULTURAL EXPERT

{¶29} In his fourth ground for relief, Craig has argued that the trial court erred by finding that counsel were not ineffective for failing to retain a cultural expert. The trial court held Craig was not denied the effective assistance of counsel because Dr. Fabian, although not a cultural expert, testified at the mitigation hearing about the racial tension, including prejudice

and threats, that Craig experienced. Craig argues a cultural expert was necessary to humanize him for the jury.

{¶30} Notwithstanding Craig’s argument, however, his siblings and Dr. Fabian testified about Craig’s life experiences. The trial court recognized that the jury heard evidence about the difficult times Craig experienced as a young man growing up during turbulent times and the prejudice he experienced. The jury could consider that evidence to develop an understanding of Craig and how his life experiences shaped him. Finally, this Court notes that trial counsels’ decision “whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court.” *State v. Treesh* (2001), 90 Ohio St.3d 460, 490.

{¶31} The trial court’s factual conclusions are supported by competent and credible evidence. The court’s conclusion that Craig was not denied the effective assistance of counsel because counsel did not retain a cultural expert was not an abuse of discretion.

#### D. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

{¶32} In his sixth and seventh grounds for relief, Craig has argued that he was denied the effective assistance of counsel, and, on appeal, he has argued that the trial court erred by finding that counsel was not ineffective. In both grounds for relief, Craig points to his lead counsel’s substance abuse, disciplinary investigation, and, ultimately, his arrest, to demonstrate that his lead trial counsel had a conflict of interest with Craig. The trial court held Craig was not denied the effective assistance of counsel. It recognized that there is a distinction between violating an ethical rule and a duty to a client. The trial court found no evidence that Craig’s lead counsel was impaired during the proceedings or provided inadequate representation.

{¶33} No court would condone substance abuse by an attorney. However, the facts do not support Craig’s argument that his attorney’s conduct was deficient as a result of his

substance abuse. Trial counsel presented mitigation evidence. As discussed elsewhere in this decision, trial counsel were not deficient or unreasonable in their presentation of mitigation evidence.

{¶34} The trial court's factual findings are supported by competent and credible evidence. Further, the trial court's conclusion that Craig did not receive ineffective assistance of counsel because of lead counsel's ethical or legal issues was not an abuse of discretion.

#### E. DNA EXPERT

{¶35} In his eighth ground for relief, Craig has argued that the trial court erred by finding that counsel were not ineffective for failing to retain a DNA expert. The trial court held Craig was not denied the effective assistance of counsel because there was no evidence that a defense DNA expert would have given favorable testimony and trial counsel's decision to rely on cross examination of the State's expert witness was not unreasonable. The trial court's factual conclusions are supported by competent and credible evidence.

{¶36} The trial court noted that the Supreme Court has held that trial counsel's decision to rely on cross examination of DNA evidence instead of calling an expert witness does not establish ineffective assistance of counsel. See *State v. Mundi*, 115 Ohio St.3d, 22, 2007-Ohio-4836, ¶118. The trial court's conclusion that Craig was not denied the effective assistance of counsel because counsel did not retain a DNA expert was not an abuse of discretion.

#### F. SUMMARY OF GROUNDS ONE THROUGH NINE

{¶37} The *Strickland* test guided the trial court's resolution of Craig's first nine grounds for relief. After reviewing the trial court's decision, we cannot conclude that the trial court abused its discretion when it dismissed the petition without a hearing on these grounds for relief. The trial court used the proper *Strickland* standard for determining whether Craig received

ineffective assistance of counsel. The trial court applied the facts to the correct legal standards and concluded that Craig failed to demonstrate ineffective assistance of counsel. We have reviewed the record and conclude that the trial court's findings are supported by competent and credible evidence. Accordingly, we conclude that the trial court did not abuse its discretion when it denied relief on Craig's first nine grounds for relief.

#### **GROUND S FOR RELIEF TEN THROUGH TWELVE**

{¶38} In his tenth and eleventh grounds for relief, Craig has argued that the State arbitrarily and capriciously applied the death penalty to him. The trial court concluded that Craig failed to present "cogent evidence" to support his claim that the death penalty was applied arbitrarily to him, and there is competent and credible evidence in the record to support this conclusion. The trial court also relied on Ohio Supreme Court decisions that rejected identical legal arguments. Based on the facts and law before the trial court, we cannot conclude that the trial court abused its discretion when it rejected Craig's tenth and eleventh grounds for relief.

{¶39} Finally, in his twelfth ground for relief, Craig argued that the cumulative effect of the errors asserted in the first eleven grounds for relief deprived him of his constitutional right to a fair hearing. The Ohio Supreme Court has recognized the cumulative error doctrine. *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. According to this doctrine, "errors during trial, singularly, may not rise to the level of prejudicial error, [but] a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *Id.* at 196-97. "[E]ven to consider whether 'cumulative' error is present, [the court] would first have to find that multiple errors were committed in this case." *State v. Madrigal* (2000), 87 Ohio St.3d 378, 398. The trial court, having found no error in the

eleven grounds for relief, rejected Craig's twelfth ground for relief. After our review of the grounds for relief, we conclude that the trial court did not abuse its discretion in so concluding.

### CONCLUSION

{¶40} The trial court did not abuse its discretion in rejecting Craig's twelve grounds for relief. Accordingly, the third assignment of error is overruled.

### III.

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

Judgment affirmed.

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There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellant.

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DONNA J. CARR  
FOR THE COURT

DICKINSON, P. J.  
CONCURS

BELFANCE, J.  
CONCURS IN THE JUDGMENT ONLY SAYING:

{¶42} I concur in this Court’s judgment. This Court’s legal analysis is technically correct, however, I write separately to express several concerns.

{¶43} Mr. Craig has argued that he was denied the effective assistance of his counsel. He has pointed in part to the fact that one of his attorneys had the responsibility of retaining a mitigation specialist and this was never done. This same attorney was discovered to have a significant substance abuse problem. In addressing this and Mr. Craig’s other ineffective assistance of counsel arguments, this Court has properly cited to *Strickland* as well as *Van Hook* and *Belmontes*. It was 50 years earlier that the Supreme Court recognized the importance of counsel:

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.”

*Powell v. Alabama* (1932), 287 U.S. 45, 68-69. The meaning of these powerful words is stripped away by the almost insurmountable standard courts must apply today to determine whether a criminal defendant was denied the effective assistance of counsel. Although *Strickland v. Washington* (1984), 466 U.S. 668, 687, begins with the premise that “the proper standard for

attorney performance is that of reasonably effective assistance[,]” the test that has evolved no longer matches that standard.

{¶44} *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, recognized that a “defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” The Supreme Court’s recognition that trial counsel might have acted the way he did as part of a strategy has been used to shield from review conduct that, in my opinion, should not be considered trial strategy. Likewise, even where counsel’s conduct is clearly below any minimal standard of competence, such incompetence will go unaddressed because defendants must also demonstrate that the result of their trial would have been different but for counsel’s conduct. This burden, for example, prevented one convicted defendant from demonstrating that he was denied the effective assistance of counsel when his attorney fell asleep during his trial. *State v. Rosado*, 8th Dist. No. 83694, 2005-Ohio-6626, ¶14. Common sense dictates that no person would find sleeping to be remotely reasonable conduct for one’s counsel during a trial. The right to counsel is more than the mere presence of counsel at the trial table. Unfortunately, the manner in which these tests have developed and are applied has contravened the Supreme Court’s declaration that the right to counsel is a fundamental right. *Gideon v. Wainwright* (1963), 372 U.S. 335, 344. Implicit within the statement is the notion that counsel be effective.

{¶45} Mr. Craig also argues that in light of the issues he raise in his request for postconviction relief, he should have been allowed to conduct discovery and should have been provided funds to hire an expert witness. In keeping with established precedent, this Court concludes that the trial court did not err in denying these requests because there is no right to either in a postconviction case. I recognize that the law in this area is well-settled. However, the



sweeping nature of these decisions leaves little room for the exceptional case where there is a compelling reason for greater inquiry.

{¶46} The laudable goal of postconviction relief is to allow a person convicted of a crime a method to argue that he was denied his constitutional rights. *Young v. Ragen* (1949), 337 U.S. 235, 239. The underlying concern is that due to the denial of such rights, an innocent person may have been convicted of the crime, while the guilty person is still at large ready to victimize others.

{¶47} In this case, this Court has properly cited to precedent holding that a person has no right to discovery in post-conviction proceedings and has no right to funds for an expert witness. However, the fact that a person convicted of a crime may not have a constitutional right to these remedies begs the question. There may be some cases where access to such remedies is compelling and indeed can implicate other constitutional concerns. I am troubled by the sweeping language of judicial decisions that suggest that these remedies are foreclosed as a possibility in every case. The simple fact that there are recent examples of wrongful convictions throughout this state suggests not only the necessity for postconviction relief but the need for *access* to the means of pursuing such relief. The precedent cited by this Court's opinion broadly pronounces that a criminal defendant has no rights and by implication no access whatsoever to these remedies. Thus, relief in the exceptional case may be precluded, notwithstanding the presence of clearly compelling and meritorious reasons to grant access to discovery or an expert.

{¶48} I concur with the result reached by the Court in this case. I understand that the interests in finality of judgments and protecting scarce judicial resources are central concerns in considering postconviction relief. However, I hope we do not lose sight of the important rights that should be protected in the postconviction relief process. When a final judgment is

overturned through this process because an innocent person's conviction is vacated, the courts are protecting the rights of both the individual and the people; this is so because when the wrong person is incarcerated or even worse, executed for the commission of a crime of which he was innocent, it means that a guilty person has not been punished and is free to inflict further harm upon others while an innocent person will wrongfully suffer an irreversible fate.

APPEARANCES:

ROBERT K. LOWE and BENJAMIN ZOBEL, Assistant State Public Defenders, for Appellant.

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