IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. _____
Plaintiff-Appellee,	:	Appeal taken from the Cuyahoga
v.	:	County Court of Appeals Eighth Appellate District
CHARLES MAXWELL	:	C.A. Case No. 107758
Defendant-Appellant.	:	**This is a death penalty case.**

Memorandum in Support of Jurisdiction

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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

"You are a weasel. You are a fraud…. I find you to be one of the most despicable humans that I've seen here for a long time….I would have to look at my own birth certificate and driver's license to confirm if you told me my name was David Matia because you are that unbelievable." Sent Tr. Gregg pp. 16-17. These are the words of the trial court. Words not about the defendant, but about a key State's witness in this case– indeed, the only witness to testify to the death specification. Yet somehow the court relied on this unbelievable man's testimony to uphold Charles Maxwell's death sentence. This is just one highly illustrative example of the magnitude of the trial court's errors in this case.

Charles Maxwell suffers from organic brain dysfunction. This impairment affects his ability to exercise judgment, plan, effectively monitor his behavior, and regulate his emotions– skills that most of us take for granted. On neuropsychological testing of executive functioning and memory, Maxwell scored in the 1st percentile. He has had this brain impairment since at least 1986. In 2007, it led to a death sentence.

Maxwell presented this evidence, and more, to the trial court in post-conviction. Yet the trial court not only denied relief, it denied even a hearing. Making matters worse, the court's denial came in a single-sentence judgment entry without findings of fact and conclusions of law. When post-conviction counsel requested that the court issue the required findings, the prosecutor offered to draft them, which the court allowed over Maxwell's objection. The court eventually "granted" the "State's findings of fact and conclusions of law" as its final opinion, without a single change.

These and other errors made by the trial court from trial throughout post-conviction require a remedy, yet the Eighth District reasoned them away. Maxwell's death sentence cannot stand on such errors, particularly given his status as someone with neurological dysfunction.

Execution of individuals whose neurological functioning is impaired is not acceptable to society. This is evidenced by the U.S. Supreme Court's decision regarding intellectual disability in *Atkins v Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), as well as recent movements in Ohio to prohibit execution of those with serious mental illness.[1] This Court also recently provided guidance in *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, establishing a clear standard for Ohio trial courts applying *Atkins* regarding what they must consider in determining whether an individual is intellectually disabled.

This Court should take this case to correct the errors made by the trial court and upheld by the Eighth District so it can provide clear guidance to lower courts that (1) individuals with organic brain dysfunction, like other diseases of the brain, cannot be executed, and therefore such individuals must be allowed to develop evidence to prove their status, (2) findings of fact and conclusions of law cannot be drafted by one side *after* the court has already issued its decision, and (3) to extend *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, to post-conviction.

In taking this case, this Court has the opportunity to right an injustice of our system. During these difficult times in which society is shedding light on several glaring issues in the criminal justice system,[2] this Court can use its discretionary power to hear this case and take one step towards repairing that system, thereby helping to repair society's faith in that system.

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[1] Laura Hancock, *Ohio House passes bill banning executions of people with 'serious mental illness' during crime*, cleveland.com (June 5, 2019) https://www.cleveland.com/open/2019/06/ohio-house-passes-bill-banning-executions-of-people-with-serious-mental-illness-during-crime.html (accessed June 30, 2020).

[2] *See e*.g., Drew Johnson, *Begin reform of justice system by ending racist, expensive death penalty*, The Columbus Dispatch, (June 25, 2020) https://www.dispatch.com/opinion/20200625/column-begin-reform-of-justice-system-by-ending-racist-expensive-death-penalty (accessed June 29, 2020); Editorial Board, cleveland.com and The Plain Dealer, *The unjust treatment of Kenta Settles exposes deep ills about our police and justice system*, cleveland.com (June 26, 2020) https://www.cleveland.com/opinion/2020/06/the-unjust-treatment-of-kenta-settles-exposes-deep-ills-about-our-police-and-justice-system.html (accessed

STATEMENT OF THE CASE AND FACTS

Charles Maxwell and Nichole McCorkle dated off and on for several years. They had a four-year-old daughter together. They did not formally live together, but Charles had a key to Nichole's house and often stayed over. In November 2005, Nichole and Charles had been in one of their "off again" periods, but they had decided to give their relationship another chance. Yet two days later, Charles learned that Nichole was on a date with another man. Charles went to the bar where the couple was on their date and waited for them to emerge. He then followed them back to the house he often shared with Nichole. He saw Nichole kiss the man goodnight. After the man left, Charles went to the house and confronted Nichole. The confrontation ended when Charles shot Nichole and left the scene.

On January 27, 2006, Maxwell was indicted under several alternative theories for the shooting death of Nichole McCorkle. Tr. 789. Maxwell entered pleas of not guilty to each count in the indictment.

Early on, Maxwell's trial counsel questioned his competency to stand trial. Dr. Michael Aronoff from the Court Psychiatric Clinic examined Maxwell and administered a Wechsler Abbreviated Scale of Intelligence test, as well as the "Basic Legal Concepts and Skills to Assist Defense" section of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). Tr. 134-35. After Dr. Aronoff was unable to render a definitive conclusion regarding competency, Maxwell was ordered to the Northcoast Behavioral Health Care Center for a 20-day evaluation regarding competency. Tr. 13-17, 148.

June 26, 2020); Sheridan Hendrix and Ceili Doyle, The Columbus Dispatch, *Rural Ohio towns join in racial equality protests despite false rumors of violence*, Newark Advocate, (June 8, 2020) https://www.newarkadvocate.com/story/news/local/2020/06/08/rural-ohio-towns-join-racial-equality-protests-despite-violence-rumors/3155493001/ (accessed June 29, 2020).

The defense requested an independent evaluation, but the doctor who was to conduct the evaluation said he could not complete a full evaluation without a neurological examination. Tr. 46-53. After a brief hearing on February 6, 2007, Maxwell was declared competent to proceed. Tr. 152. The trial court refused Maxwell's request for a neurological evaluation. Trial Journal Entry, 2/9/07. *See also* Tr. 40-61.

On that same date, the court conducted a hearing on Maxwell's motion to suppress statements due to a failure to provide Miranda warnings by the police prior to questioning. That motion was denied. Tr. 227. Beginning on February 7, 2007, Maxwell was subsequently tried for aggravated murder in connection with the shooting death of McCorkle.

At trial, the State maintained that Maxwell was guilty of capital murder based on four criteria: 1) the alleged aggravated murder was part of a course of conduct in which the offender killed McCorkle while also attempting to kill her sister, Lauretta Kenney; 2) the shooting took place while Maxwell was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping and /or aggravated burglary; 3) McCorkle was a witness to an offense and was purposely killed in retaliation for her testimony in a criminal proceeding; and 4) Maxwell purposely killed McCorkle so he could escape punishment for another offense. Tr. 1952-1954.

The State called McCorkle's younger sisters Michelle and Lauretta Kenney, both of whom claimed to have witnessed the event itself or the circumstances that led up to it. Michelle Kenney testified that McCorkle had been dating Maxwell since 1999 or 2000 and they shared a child in common. Tr. 789 During the first weekend in October 2005, Michelle was unable to reach her sister. She learned that McCorkle was at Huron Hospital recovering from a head injury. McCorkle gave a statement to police implicating Maxwell as the individual who put her there. Tr. 806-808.

Criminal charges were eventually sought against Maxwell and a judge issued a Temporary Order of Protection (TPO), which required Maxwell to stay away from McCorkle. Tr. 832-833, 1140-1141. Maxwell was never served with a copy of the TPO and there is no evidence that he was aware that there was one. Tr. 1145, 1152.

McCorkle's other sister, Lauretta Kenney, also testified about the October incident. She stayed with Lauretta for a week after the hospital released her. Tr. 886. After meeting with the police, McCorkle testified in front of the grand jury. Tr. 1424. On November 23, 2005, Maxwell was charged with felonious assault, domestic violence, and abduction based on the alleged altercation with McCorkle in October. Tr. 1174, 1344. The grand jury foreman did not sign the indictment until November 28, 2005. Tr. 1177-1180.

During the early morning of November 27, 2005, Michelle received a call from her sister, Lauretta, who advised her that Maxwell was at McCorkle's house. Tr. 840. Following that call, Michelle contacted a detective she knew who was assigned to the district where McCorkle lived. Tr. 835-836. She then called 911 and drove over to McCorkle's house herself. Tr. 841. On the way she saw McCorkle's sister, Lauretta, running down the street. Michelle picked her up and the two drove through the neighborhood looking for Maxwell. Tr. 842. When they returned to the house, the police were just arriving. Lauretta took care of McCorkle's children, while an ambulance transported McCorkle, who had been shot twice in the head, to the hospital. Tr. 843-844. McCorkle died later that morning. Tr. 845.

On the night of November 26, 2005, McCorkle went on a date Lauretta had arranged with her friend Will Hutchinson. Tr. 1502-1504. According to Hutchinson, the two shared a drink or two at a bar and then went their separate ways. Tr. 1505. He called her later to make sure she got home okay. Tr. 1507. When she answered the phone and said she could not talk, she seemed

evasive. Tr. 1515. Hutchinson called back and someone else answered then quickly hung up. After four or five attempts, he still could not get through, so he called Lauretta. Tr. 1516-1517. Lauretta immediately tried to reach McCorkle. Tr. 887-888, 1028. Maxwell answered the phone and gave it to McCorkle. Lauretta admonished McCorkle to get Maxwell out of the house, then she called Michelle and told her she was heading over to McCorkle's house. Tr. 889-890, 1030. Lauretta called McCorkle as she arrived at the house and asked to come inside. Tr. 1033. McCorkle opened the front door and came out on to the porch. Maxwell was standing directly behind her. Tr. 1055. When Lauretta told Maxwell he had to leave, he responded that they were just talking. Tr. 1038. According to Lauretta, they argued, Maxwell became angry, pulled out a gun, and said "if anyone was leaving it was her." Tr. 1038, 1079. Lauretta jumped off the porch and ran to some bushes. She claimed she heard two shots as she retreated and then another gunshot, saw Maxwell lean over McCorkle, grab his hat and run off. Tr. 1038-1042. Lauretta called 911, and then despite her claims of being shot at, chased after Maxwell. Tr. 1042. McCorkle's oldest daughter Dominique was asleep when she was awoken by the sound of gunfire and screaming. Tr. 1577. She went downstairs and found her mom on the floor. Her sister said, "my daddy shot my mommy." Tr. 1573. Police and an ambulance arrived. The ambulance took McCorkle to the hospital to treat her for a gunshot wound to the head, while police began to investigate what had transpired. Tr. 1062, 1111, 1113-1115.

During their investigation, police found blood in and around the front doorway. Tr. 1247. Police also found two .25 caliber metal shell casings. Tr. 1127, 1250. One of the casings was found on the stairs inside the house, the other on the floor by the front door. Tr. 1136-1137. No evidence was recovered to indicate that a third shot had been fired. Tr. 1289. An autopsy concluded that Ms. McCorkle died after sustaining two gunshot wounds to the head at fairly close range. Tr. 1478.

Police did not recover a gun, but nonetheless opined that the casings came from bullets fired by the same weapon. Tr. 1609-1612, 1620-1625.

The State relied exclusively on the testimony of John Gregg to support their theory of retaliation. Gregg had known Maxwell for several years. The two worked together doing construction for Maxwell's brother. Tr. 1647-1650. Gregg also knew McCorkle and described the couple's relationship as "love/hate." Tr. 1659.

In accordance with a plea agreement in an unrelated felony fraud case, which required his cooperation with the State in the Maxwell case, Gregg testified essentially to the following: He and Maxwell had talked about the October incident and McCorkle's trip to the hospital. Tr. 1689. Gregg recalled that Maxwell had admitted that he hit McCorkle with an iron. Tr. 1664. Gregg claimed he probed further, asking - "Oh my gosh, you pistol whipped her?" To which, according to Gregg, Maxwell responded in the affirmative. Tr. 1664-1665. Gregg testified that Maxwell was afraid that he might be prosecuted and sent to prison because of what had happened and that Maxwell he asked Gregg to talk to McCorkle on his behalf and convince her tell authorities that the incident was more of a simple domestic violence than a full blown felonious assault. Tr. 1666-1673. Gregg recalled that he, Maxwell, and McCorkle had a telephone conversation shortly after she testified in front of the grand jury in November 2005. During that conversation, McCorkle told them that she told the truth. Tr. 1674.

According to Gregg, when he and Maxwell spoke later, Maxwell was upset and suspicious that McCorkle had not told the grand jury that the incident was a simple domestic incident. Tr. 1676. Gregg testified that Maxwell said, "That bitch was going to make him kill her." *Id.* Then, despite his earlier testimony that Maxwell had pistol whipped McCorkle with a gun, Maxwell asked Gregg where he could find a gun. Tr. 1677. When Gregg found out that McCorkle had been

shot, he called Maxwell, who confessed that he shot her. Tr. 1678-1682. Shortly after the shooting, Gregg called 911 and, at that point, anonymously reported that Maxwell was the shooter. Tr. 1684.

The defense argued that the State did not meet its burden. Tr. 1977-1990.

Prior to the jury returning a verdict, the court acquitted Maxwell for lack of evidence on Counts two (aggravated murder with kidnapping and aggravated burglary specifications), three (kidnapping), four and five (aggravated burglary); and found him guilty on Count eight (having a weapon under disability). Tr. 1872-75. On February 23, 2007, the jury returned verdicts of not guilty on the course of conduct specifications, and also on the count of attempted murder of Lauretta Kenney. Tr. 2022-2023. The jury returned verdicts of guilty on Count One including the capital specifications of retaliation and escape detention. Tr. 2022-2023.

The mitigation phase of trial began February 27, 2007, and the following day, February 28, 2007 the jurors returned a verdict of death. Tr. 2260. On March 21, 2007, the trial court sentenced Maxwell to death on Count One, and 5 years on both counts seven and eight. Tr. 2264-2294.

On the same date that Maxwell received a death sentence from the jury, but prior to the court issuing its sentencing opinion on February 28, 2007, Gregg was sentenced on an amended felony indictment to one count of misdemeanor insurance fraud due to his "cooperation" in the Maxwell case. *See* Maxwell Motion for New Trial, 3/14/07, Sent Tr. Gregg. pp. 3-5 (attached to motion). It was in front of the same judge who presided over Maxwell's trial. Gregg apologized at his sentencing for having lied while under oath during some depositions related to the fraud case. Sent Tr. Gregg p. 14. Judge Matia at Gregg's sentencing found Gregg's testimony so unbelievable that he specifically told Gregg, "You are a weasel. You are a fraud. Your whole life has been about being a fraud. I find you to be one of the most despicable humans that I've seen here for a long time."Sent Tr. Gregg p. 16. The court continued, "I have daughters and if -- if one

of them married someone like you I think I would be doing time for manslaughter at this point." Sent Tr. Gregg p. 16. The court also directly referenced Gregg's testimony in the Maxwell case, stating, "You testified in the case and I went on the record in that case after voir diring some of your testimony indicating that I would have to look at my own birth certificate and driver's license to confirm if you told me my name was David Matia because you are that unbelievable." Sent Tr. Gregg p. 17. The court continued, "I bring this up so the record can fully demonstrate what an awful human being you are and how deserving of prison you are. My only regret is I'm limited to six months. I see people here on a day in and day out basis; many have redeeming qualities about them. You have gone through life, again, as a complete fraud." Sent Tr. Gregg p. 18-19.

Judge Matia then drafted his sentencing opinion in Maxwell's case. In that sentencing opinion, he found that Maxwell retaliated against McCorkle as a result of her grand jury testimony. Sentencing Entry, p. 5. The Court specifically stated that it considered the testimony of John Gregg at trial, his depositions, and his statements to police. The court acknowledged that Gregg's testimony was the only evidence against Maxwell of retaliation, and the court relied upon it in sentencing Maxwell to death. Sentencing Entry, pp. 11-13.

Maxwell originally filed his post-conviction petition and its amendments in August of 2008. In that petition, he detailed a much different picture than that presented by the State at trial.

Maxwell met McCorkle in 1999, and they eventually moved in together and had a child. Their relationship was tumultuous. Maxwell and McCorkle were both physically and emotionally violent towards each other. PC Ex. 8. One such encounter landed Maxwell in the hospital with lacerations to his penis. PC Ex. 10, 11, 12. On another occasion, McCorkle hit Maxwell in the head with a frying pan, and Maxwell responded by hitting McCorkle with a meat tenderizer. PC

Ex. 7, 8. That was the incident that was the alleged "pistol-whipping." The injuries to McCorkle's scalp were consistent with being hit with a meat tenderizer. *Id.*

The charges that stemmed from that were what the State claimed led to the murder of McCorkle. But the reality is different; there was no retaliation, no attempt to escape from charges, and no prior calculation and design to kill McCorkle. Maxwell was, quite simply, a broken man that night who acted on an impulse he lacked the brain capacity to control.

On the evening of November 26, 2005, Maxwell had planned a night out with friends. PC Ex. 7. He needed to pick up some clothing from his on-again/off-again girlfriend McCorkle's house, and he had tried to call to arrange to pick them up but hadn't been able to reach her. As he approached her house, he saw her leaving in a car with a male he did not recognize. *Id*.

Jealously, Maxwell followed them to bar to confirm that she was on a date with another man. As they had been making plans to get back together, Maxwell wanted to talk to McCorkle about what had been going on. Maxwell was caught off-guard by McCorkle going on a date when they had just slept together 2 days prior. PC Ex. 7. They had decided to get back together and Maxwell wanted to talk to McCorkle. *Id*.

McCorkle's sister Lauretta called while Maxwell was later at McCorkle's home, and McCorkle told her that she and Maxwell were working things out. PC Ex. 9. Lauretta didn't like what she heard and decided to drive to her sister's house and confront them. Tr. 889. A few minutes after arriving, Lauretta called 911 and said that Maxwell killed her sister and attempted to kill her. Tr. 1039. Maxwell was arrested and charged with McCorkle's murder.

On February 28, 2007, the jury found Charles Maxwell guilty of aggravated murder with the two capital specifications of retaliation and murder to escape punishment for another offense. Maxwell was also convicted of a firearm specification, and found guilty of retaliation with a

firearm specification and having a weapon while under disability. Prior to the jury returning a verdict, the court had granted rule 29 acquittals to Maxwell on Counts two, three, four and five. The jury found Maxwell not guilty of a mass murder (amended to course of conduct) specification, along with attempted murder and the accompanying firearm specification. Maxwell was sentenced to death on March 21, 2007.

Maxwell filed his direct appeal to the Ohio Supreme Court on March 31, 2008. The Supreme Court denied Maxwell's direct appeal on March 20, 2014.

In the meantime, Maxwell filed his post-conviction petition pursuant to R.C. 2953.21 on August 11, 2008. He filed his First Amendment to Petition to Vacate or Set Aside Judgment and/or Sentence and Motion for Leave of Court to Conduct Discovery on August 13, 2008. Maxwell then filed a second amendment to his petition on August 25, 2008.

When Maxwell finally obtained a neurological examination in post-conviction, the expert discovered that Maxwell's traumatic brain injury has caused neurological impairment. PC Ex. 4, ¶ 4. This has caused changes in his ability to function on a daily basis and is directly related to his criminal activity. *Id*. Maxwell's impairment affects his judgment, plans, and ability to self-monitor his behavior, including his ability to regulate his own emotions, particularly stress. *Id*. Once he forms an initial theory or idea, he becomes focused on it and trapped in that thought unable to resolve it on his own. *Id*.

Maxwell's brain dysfunction is clear. The exact cause is not known, but it most likely resulted from injuries sustained in the mid-1980s. In 1986, during his employment with the Tyson Chicken plant in Arkansas, Maxwell was in a serious fight in the parking lot, in which he hit his head on the concrete parking space bumper and was kicked repeatedly in the head. He was hospitalized for those injuries for two days. Prior to that, Maxwell had no criminal history. PC.

Ex. 3, ¶ 7. But after that—between 1988 and 1993—he had 9 traffic violations and two drug trafficking convictions. *Id*.

On September 8, 2016, the trial court denied Maxwell's petition for post-conviction relief, without providing findings of fact and conclusions of law. On September 16, 2016, Maxwell filed a motion for the Court to draft findings of fact and conclusions of law. The State filed a motion requesting time to file proposed findings of fact and conclusions of law on September 29, 2016. Maxwell objected to the trial court allowing proposed findings of fact and conclusions of law to be newly drafted at that point, because the court had already denied the post-conviction petition. In other words, it must have already determined its reasons for rejecting Maxwell's claims for relief as the statute requires.

On September 19, 2017, the trial court denied Maxwell's motion to disregard and objection to court reliance on prosecutor's proposed findings of fact and conclusions of law. Approximately a year later, on August 31, 2018, the court "granted" the State's motion. The court granted the findings of fact and conclusions of law contemplated and drafted by the State in its entirety without changing a single word. The Journal Entry was filed on September 4, 2018.

Maxwell filed a timely notice of appeal in the Eighth District on October 4, 2018. On May 21, 2020, the Eighth District affirmed the trial court's decision.

ARGUMENT

PROPOSITION OF LAW I

When an individual presents sufficient evidence of organic brain dysfunction in post-conviction proceedings a court must hold a hearing to determine whether such dysfunction exists.[3]

Charles Maxwell was a law-abiding citizen until the age of 22 in 1988. Then he suddenly started getting into trouble. It began with minor traffic violations in the late 80s, escalated to two prison stints for drug-related crimes in the 90s, and culminated with the present crime in 2006. What brought about this dramatic shift in behavior? Organic brain dysfunction due to traumatic brain injury.

Before trial, Maxwell sought an expert to provide proof of his brain impairment. He made a "preliminary showing" that he had a neurological defect and required testing. *Ake v. Oklahoma*, 470 U.S. 68, 74, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985). Maxwell's counsel had a specific need for the expert and had in mind what they hoped to find.

Specifically, in their motion for neurological evaluation, Maxwell's attorneys alerted the trial court that:

- Maxwell had been previously referred to the Court Psychiatric Clinic for competency and sanity evaluations,
- The Clinic's report did not reach conclusions but instead referred Maxwell to Northcoast Behavioral Healthcare System
- Maxwell was evaluated at Northcoast Behavioral Healthcare System
- Maxwell had suffered past periods of unconsciousness
- Dr. Fabian had preliminarily concluded that Maxwell had mental issues and recommended neurological testing.

[3] Maxwell originally presented this claim along with several others arguing that he presented sufficient operative facts to warrant relief. Those other claims are addressed separately in Propositions of Law IV and V.

Motion for Neurological Evaluation, filed 1-19-07. During the evaluation of Maxwell's competency to stand trial, Dr. Fabian alerted counsel to the fact that Maxwell may suffer from organic brain damage. *Compare Clark v. Mitchell*, 425 F.3d 270, 285 (6th Cir. 2005) ("[I]t does not appear that either the psychologist or psychiatrist retained by the defense to evaluate Clark suggested that Clark suffered from organic brain damage. ... It was not unreasonable for Clark's counsel, untrained in the field of mental health, to rely on the opinions of these professionals.") Moreover, counsel explained in open court their reasoning for taking Dr. Fabian's recommendation and requesting the court grant neurological testing. *See* Tr. 46-48. The trial court denied his request. If Maxwell had not been indigent, he would have been able to obtain the necessary evaluation on his own.

Despite Dr. Fabian's recommendation, and despite being alerted to potential head injuries, trial counsel did not investigate those injuries. Rodney Maxwell, Charles Maxwell's cousin, was a witness to Maxwell's traumatic brain injury. PC Ex. 2. He would have told counsel about the injury he witnessed, and counsel could have followed up with Howard Hospital in Arkansas to confirm that Maxwell was admitted there, but they did not. PC Ex. 6.

In post-conviction, Maxwell raised three grounds for relief related to his brain dysfunction: (1) that the trial court erred in denying his request for a neurological evaluation, and that trial counsel were ineffective in both the (2) trial and (3) mitigation phases for failing to obtain and present evidence of the Maxwell's brain dysfunction. The trial court denied these claims on the ground of res judicata and on the merits. The Eighth District found that the trial court did not abuse its discretion.

Trial Court Error

The trial court found that Maxwell's first ground for relief was barred by res judicata. The trial court also determined that Maxwell's outside the record evidence was only marginally significant and dismissed the opinion of Maxwell's expert without a hearing. The Eighth District upheld the finding of res judicata despite the fact that it admitted that Maxwell had attached evidence *dehors* the record that was unavailable on direct appeal. *State v. Maxwell*, Eighth Dist. Cuyahoga No. 107758, 2020-Ohio-3027, ¶ 43.

The Eighth District did not state that Maxwell's outside the record evidence failed to meet a threshold standard of cogency or was only marginally significant, factors that would support a res judicata finding. Instead, relying heavily on this Court's opinion in Maxwell's direct appeal, the Eighth District merely stated that regardless of Maxwell's outside evidence, he was still attempting to relitigate an issue already decided on direct appeal. *Id.* at ¶ 41-42. That is not the standard for dismissing claims based on res judicata. The mere fact that a claim was raised in both direct appeal and post-conviction is not sufficient for dismissal based on res judicata. *State v. Adams*, 11th Dist. Trumbull No. 2003-T-0064, 2005-Ohio-348, ¶ 66. If the post-conviction claim is supported by competent evidence outside the record that was not available on direct appeal, then it is a proper claim for consideration in post-conviction and is not barred by res judicata. *State v. Dixon*, 5th Dist. Richland No. 2004-CA-90, 2005-Ohio-2846, ¶ 27.

Maxwell supported his claim with competent outside the record evidence, including the opinion of a neuropsychology expert. Dr. Layton's 12-page affidavit detailing his analysis of Maxwell's neuropsychological condition, including the results of neuropsychological testing that had never before been performed, cannot be said to be only marginally significant. Indeed, the Eighth District made no such finding. And the affidavit certainly was not available on direct

appeal. This affidavit was substantial evidence outside the record that would spare Maxwell's claim from denial based on res judicata. *See State v. Weaver*, 5th Dist. No. CT2017-0075, 2018-Ohio-2509, 114 N.E.3d 766, ¶ 23, *appeal not allowed*, 153 Ohio St.3d 1504, 2018-Ohio-4285, 109 N.E.3d 1260, ¶ 23 (2018) (court erred in finding res judicata barred claim supported by doctor's affidavit). Notably, in *State v. Osie*, the Twelfth District was presented with an almost identical situation to Maxwell's: Osie presented in post-conviction the affidavit of psychologist Dan Davis recommending that an evaluation for brain damage be conducted and the affidavit of Dr. Barry Layton finding that Osie had significant brain impairment. *State v. Osie*, 12th Dist. Butler No. CA2014-10-222, 2015-Ohio-3406, ¶¶ 17-19. The trial court denied Osie's post-conviction petition without a hearing. The Twelfth District reversed, finding that the "supporting affidavits demonstrate[ed] sufficient operative facts to establish substantive grounds for relief …. [And] that the trial court abused its discretion in denying Osie's petition without first conducting an evidentiary hearing on those issues." *Osie* at ¶ 20.

After denying this claim based on res judicata, both courts went on to consider the evidence Maxwell submitted on the merits. In doing so, the trial and appellate courts allowed minor, inconsequential facts to cloud the real issue in this case.

Both the trial and appellate courts mistakenly believed that a person who suffered from organic brain dysfunction would act in a manner in which it was obvious that he was neurologically impaired. *See* Trial Journal Entry, 9/4/18, p. 16 ("A review of the trial proceedings also demonstrates that contrary to Dr. Layton's opinion, Maxwell was able to effectively exercise judgment, plan, monitor his behavior, and behave adaptively and effectively in his own interest. An example of behaving adaptively and effectively in one's own interest would be malingering to escape full accountability for a murder."). *See also id.* at 17 ("Maxwell also showed significant

adaptive behavior at work and in the community"); *id.* at 18 ("This Court's observations of Maxwell support the conclusion that he could exercise judgment, plan, and monitor his own behavior."); *Maxwell*, 2020-Ohio-3027, ¶ 45-46. But the observations of a lay person are not the equivalent of an examination by an expert. And like this Court stressed with regard to the intellectually disabled, "[they] are not necessarily devoid of all adaptive skills. Indeed, they may look relatively normal in some areas and have certain significant limitations in other areas." *State v. White*, 118 Ohio St. 3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 65. This Court recently clarified that such individuals may only have deficits in any one of the three adaptive skill sets. *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 95. The lower court's conclusion is based on the erroneous assumption that every brain injury is outwardly obvious at all times. Merely because Maxwell was observed "actively reviewing exhibits," "nodding to Mr. Luskin in agreement," and "communicating before [the] court at the trial table," that does not mean he suffers no organic impairment. Trial Journal Entry, 9/4/18, p. 18. Had the trial court held a hearing and heard testimony on this issue, that misconception could have been dispelled.

The courts' assumptions also neglect to consider the fact that these other psychologists were just that: psychologists. They were not neuropsychologists trained in detecting such brain dysfunction, and they were not administering neuropsychological tests to make such a determination. These psychologists had entirely different functions: to determine Maxwell's competency to stand trial and to develop possible mitigation. The only person who administered tests to determine organic brain dysfunction and was qualified to make such a determination was Dr. Layton. However, the trial court dismissed Dr. Layton's opinion based wholly on irrelevant factors and assumptions, without the benefit of a hearing.

The trial court completely dismissed Dr. Layton's opinion based on a misinterpretation of two prior cases involving Dr. Layton's expert opinion. The court determined that the courts in those two cases found that Dr. Layton made "unconvincing" claims regarding organic brain injury. However, the cases cited by the trial court do not support the idea that Dr. Layton's findings were wrong in those cases. In one of the cited cases, *State v. Ford,* 8th Dist. Cuyahoga Nos. 88946, 88947, 2007-Ohio-5722, this Court denied the defendant relief because "[i]rresistable impulse is not an excuse for an offense by a person who does not otherwise meet the definition of insanity." *Id.* at ¶ 15. This was not a rejection of Dr. Layton's conclusion that the defendant had a brain injury. Similarly, the circumstances of *State ex rel. Keener v. Farnsworth & Assocs.*, 10th Dist. Franklin No. 05AP-963, 2006-Ohio-4233, do not support the trial court's automatic rejection of Dr. Layton, without even hearing his testimony. *See id.* at ¶ 24-25 (the court of appeals would not grant a writ of mandamus simply because the commission relied upon one expert's report and rejected other reports (including Layton's) in denying application for permanent total disability). Such a seemingly biased misinterpretation is bewildering until one remembers that the trial court's findings in this case were drafted wholesale by counsel for the State. (*See* discussion in Proposition of Law II).

The trial court violated Maxwell's constitutional rights by denying him the necessary expert funding at the time of trial. It abused its discretion in denying this post-conviction ground for relief without a hearing, and the Eighth District similarly erred in upholding the trial court's decision.

Ineffective Assistance of Counsel

Maxwell also raised grounds for relief that his counsel performed deficiently in failing to investigate and present evidence in his defense at trial and in mitigation of his sentence during the

penalty phase. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There can be "no rational trial strategy that would justify the failure of [defense] counsel to investigate and present evidence of his brain impairment." *Frazier v. Huffman*, 343 F.3d 780, 794 (6th Cir. 2003). *See also Haliym v. Mitchell*, 492 F.3d 680, 716 (6th Cir. 2007), *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995). Had they obtained evidence of Maxwell's brain dysfunction, see PC Ex. 3, defense counsel would have been able to challenge the State regarding prior calculation and design. Even if Maxwell was still convicted of capital murder, the evidence of brain dysfunction would have been a significant mitigating factor.

A proper diagnosis of Maxwell's brain impairment could have neutralized the allegations that he malingered his mental health symptoms. Counsel knew this because Dr. McPherson clearly detailed this information. *See* PC Ex. 4 ("As I noted in my report to defense counsel, if Mr. Maxwell had a brain injury, then the reported overproduction of symptoms could actually be an accurate indication of brain dysfunction. In other words, the brain injury could have shown that Mr. Maxwell was not malingering his mental illness and/or cognitive deficits, but rather he was behaving in accordance with his neurological dysfunction.") Dr. McPherson was cross-examined about Maxwell's malingering, but she could not refute the allegations since counsel never had Maxwell evaluated neurologically. Tr. 2183-86.

Both the trial court and the Eighth District found that these claims too were barred by res judicata. In rejecting these claims on the merits, both courts referred to the speculative nature of Dr. Layton's opinion, despite the very clear and specific details and findings in Dr. Layton's report. Trial Journal Entry, 9/4/18, p. 19; *Maxwell*, 2020-Ohio-3027, ¶ 63. The findings of Dr. Layton are

distinct: "To a reasonable degree of psychological certainty, Maxwell suffers from significant brain impairment." PC Ex. 3, p. 2. Dr. Layton was clear that "the examination *alone* definitively demonstrates brain impairment, particularly in the anterior of the brain (the frontal cerebrum)." (Emphasis original). *Id.* He explained in detail why he came to that conclusion.

And again, both courts erroneously suggested that a person who suffered from organic brain dysfunction would act in a manner in which it was obvious that he was impaired. *See* Trial Journal Entry, 9/4/18, p. 16 ("A review of the trial proceedings also demonstrates that contrary to Dr. Layton's opinion, Maxwell was able to effectively exercise judgment, plan, monitor his behavior, and behave adaptively and effectively in his own interest. An example of behaving adaptively and effectively in one's own interest would be malingering to escape full accountability for a murder."); *Maxwell*, 2020-Ohio-3027, ¶ 62. *See also id.* at 17 ("Maxwell also showed significant adaptive behavior at work and in the community"); *id.* at 18 (This Court's observations of Maxwell support the conclusion that he could exercise judgment, plan, and monitor his own behavior.").

The Ohio Supreme Court has specifically identified claims of ineffective assistance of counsel as most appropriately raised in post-conviction proceedings rather than on direct appeal. This is because ineffective assistance of counsel claims are best determined through evidence outside the record. *State v. Keith*, 79 Ohio St.3d 514, 536-37, 684 N.E.2d 47 (1997); *State v. Madrigal*, 87 Ohio St.3d 378, 390-91, 721 N.E.2d 52 (2000). "The introduction in a post-conviction petition of evidence dehors the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of res judicata." *State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982). Courts cannot divide ineffectiveness claims

between direct appeal and post-conviction; to properly resolve an ineffectiveness claim a court must consider "all circumstances." *Strickland*, 466 U.S. at 689.

Collateral proceedings serve the function of leaving defendants a way to challenge their convictions and sentences when direct appeal fails them. Direct appeal is not appropriate for ineffectiveness claims generally, simply because the prejudice is unknown until evidence is brought in to show what could have been before the court. *Madrigal*, 87 Ohio St.3d at 390. Maxwell's grounds for relief do rely, in part, upon the trial record, as they must for context. However, in each and every ground raised, the prejudice suffered is apparent from the strength of the post-conviction petition and attached exhibits.

It was up to defense counsel to pursue and then present evidence of Maxwell's organic impairment. After the hearing on Maxwell's competence to stand trial, counsel made no further attempts to obtain the necessary expert. Counsel also made no attempts to investigate and learn more about Maxwell's head injuries and past. The fact that Maxwell is indigent precluded him from obtaining the expert he needed, because he had to go through the trial court, which refused him the funds. He was prejudiced by that denial because the factfinder never learned that he suffers from brain impairment, that it affected his ability to think, reason, and plan, and that it affected him at the time of the murder.

The trial court erred in denying these grounds for relief, and the Eighth District erred in upholding that decision.

PROPOSITION OF LAW II

R.C. 2953.21 contemplates that the court will issue its required findings of fact and conclusions of law at the time it issues a denial of post-conviction relief.

"Of all the shortcomings or deficiencies that one might identify in the postconviction-review process of death-penalty cases, … 'particularly problematic: [is] … the wholesale adoption

of proposed state fact-finding instead of independent state court decision-making.'" *State v. Bonnell*, 06/17/2020 Case Announcements #2, 2020-Ohio-3276, ¶ 1 (Donnelly, J., dissenting) (quoting Steiker, Marcus & Posel, *The Problem of "Rubber-Stamping" in State Capital Habeas Proceedings: A Harris County Case Study*, 55 Hous.L.Rev. 889, 893 (2018)). This practice, also known as ghostwriting, is widespread in state post-conviction proceedings. *See* Natasha-Eileen Ulate, *The Ghost in the Courtroom: When Opinions are Adopted Verbatim from Prosecutors*, Vol. 68:807 Duke L.J. 807, 810, 813-14 (2019). Alarmingly, ghostwriting is widespread in death penalty cases. As of 2003, the Equal Justice Initiative reported that "the trial judge adopted verbatim an order denying or dismissing the Rule 32 petition which was written by the State in seventeen of the 20 most recent capital cases." *Id.* at 825. Indeed, a 2016 article published by *The Marshall Project* suggests that ghostwriting by prosecutors is "a routine part of capital practice" in several states, including Ohio. Andrew Cohen, *Letting Prosecutors Write the Law*, THE MARSHALL PROJECT (July 18, 2016) https://themarshallproject.org/2016/07/18/letting-prosecutors-write-thelaw (accessed June 26, 2020). While many courts have condemned this practice and attempted to curtail it in various ways, it still permeates the system leading to uncertainty about the impartiality of these opinions. *See* Natasha-Eileen Ulate, Vol. 68:807 Duke L.J. at 815-20.

In Ohio, Maxwell's case is the next in a long line of death penalty cases decided this way. Indeed, every appellate district to consider this issue has found no error in a court adopting the State's findings. Cuyahoga County, which has issued more death sentences over the last two years than any other county in the *country*, not just the state, is a leading offender. Marty Schladen, *Ohio saw no 2019 executions, but one county leads nation in recent death convictions*, The Columbus Dispatch, (December 17, 2019) https://www.dispatch.com/news/20191217/ohio-saw-no-2019-

executions-but-one-county-leads-nation-in-recent-death-convictions (accessed June 29, 2020); *Maxwell*, 2020-Ohio-3027, ¶ 13 (cases cited therein). This is a particularly troubling trend, especially when Ohio leads the nation in issuing new death sentences. Marty Schladen, The Columbus Dispatch.

When the trial court denied Maxwell's post-conviction petition on September 8, 2016, it failed to issue findings of fact and conclusions of law as required by R.C. 2953.21, and instead issued a one-sentence entry reading, "Defendant's motion for post-conviction relief is denied." Trial Journal Entry, 9/8/16. There is no question the court denied the petition. Equally obvious is that it must have had reasons for doing so. Even though the court neglected to provide Maxwell with those reasons, at that moment in time they had to be set, otherwise the court would not have acted. This situation is inherently different from one in which a court considers proposed findings of fact and conclusions of law from the parties *before* making its decision and *then* adopts one side when issuing its decision.

Since the court failed to issue its reasoning, Maxwell moved the court to file its findings of fact and conclusions of law. The State then moved for time for the parties to be able to file "proposed" findings of fact and conclusions of law, which the court inexplicably granted. The court had already denied Maxwell's petition so it should not have needed to consider any proposed findings. Not only was it illogical for the parties to submit proposed findings of fact and conclusions of law when the court is presumed to have already made those determinations, but it was also disingenuous to ask Maxwell to file proposed reasons why his petition should be denied. Maxwell alerted the court to this unfairness and objected to the court's reliance on the State's submission. However, the court ultimately granted the State's proposed findings and conclusions word-for-word, including typographical errors.

Consequently, Maxwell currently has no findings or conclusions demonstrating why the trial court decided to deny his petition. He does not know what the "deliberative process" was that led the court to its September 8, 2016 denial. *State v. Pickens*, 1st Dist. Hamilton No. C-170204, 2018-Ohio-4994, ¶ 24. It was a violation of R.C. 2953.21(D) and of Maxwell's due process rights for the court to deny Maxwell any of its own deliberative process.

In deciding this issue, the Eighth District overlooked a key aspect of Maxwell's argument. It held that

> [W]hen the state's submission of proposed findings of fact and conclusions of law are not based on ex parte communications, but as a result of an order by the court allowing the parties to each submit their own proposed findings of fact and conclusions of law, no due process violation occurs.

Maxwell, 2020-Ohio-3027, ¶ 17. The Eighth District was attempting to squeeze Maxwell into this Court's holding in *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, but Maxwell's case is different. The Eighth District's reasoning grossly oversimplifies what occurred in this case and completely ignores Maxwell's argument: the proposed findings of fact and conclusions of law that were submitted by the State and granted by the court came *after* the court already issued its denial of Maxwell's petition. After the deliberative process should have already taken place. Thus, by post hoc granting the State's submission, the court was substituting the State's reasoning for its own. This is unacceptable.

In coming to this conclusion, the Eighth District misconstrued the facts and seemingly ignored its own case law. First, the Eighth District conflated the 2008 and 2016 State proposed findings of fact and conclusions of law, and reasoned that Maxwell chose not to participate. However, the 2008 State filing is irrelevant to this case– it is not the filing the court granted. The 2016 filing that the court granted is the one at issue, and Maxwell could not have participated in submitting his own filing at that time because the court had already denied his petition. Maxwell

could not be expected to provide the court with reasons to deny the claims he raised. This is the crux of Maxwell's argument and it was ignored by the Eighth District.

Second, the Eighth District seems to imply that Maxwell's complaint that the court granted the State's findings after issuing its decision was essentially already cured because when the trial court neglected its duty (i.e. failed to issue findings of fact and conclusions of law with its denial) its denial wasn't a final appealable order and therefore the court could have changed its mind about the outcome. Maxwell, 2020-Ohio-3027, ¶ 19. This is clearly not the factual situation with which Maxwell was presented. The court denied Maxwell's petition. The State then requested the opportunity to file proposed findings of fact and conclusions of law to support that denial. When Maxwell objected to this highly unusual and improper process, including by pointing out the unfairness in asking him to draft reasons to deny his own petition, the court did not correct any misunderstanding about what Maxwell was being asked to do or give any indication that it might reconsider its ruling on the petition based on the filings. It is clear that the court's decision was final; the parties understood it as such, and the court did not indicate otherwise.

Finally, the Eighth District seemingly ignored its own case law when concluding that the trial court's granting of the State's submission was proper. Eighth District case law provides that for a court to adopt a party's proposed findings of fact and conclusions of law they must be completely accurate in fact and law. *See Maxwell*, 2020-Ohio-3027, ¶ 13 (citing *State v. Jester*, Eighth Dist. Cuyahoga No. 83520, 2004-Ohio-3611, 116; *State v. Thomas*, Eighth Dist. Cuyahoga No. 87666, 2006-Ohio-6588, ¶15; *State v. Williams*, Eighth Dist. Cuyahoga No. 85180, 2005-Ohio-3023, ¶35). Yet the Eighth District noted that the State's filing as granted verbatim by the trial court contained typographical errors and omissions. *Maxwell*, 2020-Ohio-3027, ¶ 20.

R.C. 2953.21 states: "If the court dismisses the [post-conviction] petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal." R.C. 2953.21(D). When a court denies a petition, logic dictates that it had reasons for doing so. It is those reasons that must be presented to the petitioner. A court cannot solicit or accept proposed findings of fact and conclusions of law from either party *after* it has already denied one party relief. Doing so not only puts one party in the impossible position of having to propose reasons why they should lose, but more importantly, it implies that the court did not have in mind specific reasons for making that denial in the first place. This implication, whether perceived or actual, stands outside the bounds of justice.

This Court has not weighed in on the delegation of drafting post-conviction opinions. It has, however, addressed the propriety of a judge delegating their judicial drafting duties to the Prosecutors Office in sentencing opinions. *Roberts,* 110 Ohio St.3d at ¶¶ 153-167. This Court therein found the judge had violated the relevant sentencing statute. "R.C. 2929.03 governs the imposition of sentences for aggravated murder. R.C. 2929.03(F) clearly contemplates that the trial court itself will draft the death-sentence opinion*: "The court* * * * when it imposes sentence of death, *shall state* in a separate opinion *its* specific findings as to the existence of any of the mitigating factors…" (Emphasis original). *Roberts*, 110 Ohio St.3d at ¶ 156. This Court further elaborated "[t]he trial court's delegation of any degree of responsibility in this sentencing opinion does not comply with R.C. 2929.03(F). Nor does it comport with our firm belief that the consideration and imposition of death are the most solemn of all the duties that are imposed on a judge, as Ohio courts have also recognized." *Id.* at ¶ 160. Finally, this Court emphasized the severity of the harm that resulted from the trial court's improper delegation of its duty, "[t]he trial court's decision to use the prosecutor in preparing the sentencing opinion constitutes a grievous

violation of the statutory deliberative process. It is so severe a violation that independent reweighing cannot serve as an adequate remedy." *Id.* at ¶ 163 (citing *State v. Green,* 90 Ohio St.3d 352, 363-364, 738 N.E.2d 1208 (2000)).

The First District in *Pickens* attempted to differentiate the post-conviction statute from the sentencing statute, citing this Court's language in *Roberts* that because "'the consideration and imposition of death are the most solemn of all the duties that are imposed on a judge,' a trial court may not delegate any responsibility imposed by R.C. 2929.03(F) in drafting its sentencing opinion imposing death." *Pickens* at ¶ 18 (citing *Roberts* at ¶ 160). The First District is attempting to create a difference where there is none. The post-conviction statute is no different from the aggravated murder statute when it comes to who is required to draft the opinion. The post-conviction statute states: "If the court dismisses the petition, ***it*** *shall make and file* findings of fact and conclusions of law with respect to such dismissal." (Emphasis added). R.C. 2953.21(D). As this Court stated in *Roberts*, R.C. 2953 "clearly contemplates that the trial court itself will draft" the post-conviction opinion. *Roberts* at ¶ 156. Of note, at least one appellate court has found *Roberts* applicable to a domestic relations visitation dispute, holding that the magistrate committed a grievous violation of the deliberative process by asking one party to draft the opinion. *Sedlack v. Palm*, 189 Ohio App.3d 135, 2010-Ohio-3924, 937 N.E.2d 642, ¶ 12 (6th Dist.). Such an error is all the more grievous in the context of criminal cases, and exponentially so in death penalty cases.

Indeed, as with capital sentencing, a trial court in post-conviction still has the solemn duty of determining whether or not a death sentence can stand, as does an appellate court and ultimately this Court. The duty is no less solemn simply because it is removed from the immediacy of the trial. A death-sentenced individual has the right to know that the integrity of the conviction and sentence that will end his life was fully considered *by an impartial court*, not just by the

prosecution whose goal all along has been to speed up the fall of the executioner's blade. "Delegation [of this duty] deprives stakeholders and the reviewing court of a written account of the judge's decision and analysis—the very reason that written opinions are preferred at all." Natasha-Eileen Ulate, Vol. 68:807 Duke L.J. at 815.

Courts "have always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). There is no possibility of an "unbiased" opinion if it is drafted by one of the adversaries. Defendant's Motion 10/31/16. Maxwell went on further to state that moreover, "justice must satisfy the appearance of justice." *Liljeberg v. Health Services Acquisition Corp*, 486 U.S. 847, 865, n.12, 108 S. Ct. 2194, 100 L. 2d 855 (1988); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 91 S. Ct. 499, 27 L. Ed. 532 (1971). The fair administration of justice is grounded in the assumption that the judicial decisions will be based upon evidence and argument presented in court and not by any outside influences, whether of private talk or public support. *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907).

A due process violation occurs when a party assumes more than one role in the judicial process. *In re Oliver*, 333 U.S. 257, 272, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (the judge who served as a one person grand jury also served as the judge and jury); *In re Murchison*, 349 U.S. at 137 ("It would be very strange if our system of law permitted a judge to act as a grand juror and then try the person accused as a result of his investigations").

Maxwell's case is different from those other district court cases distinguishing *Roberts*. *See Pickens* at ¶ 13 (citing cases from the Second and Eleventh districts). Those cases are the standard case in which both parties had the opportunity to submit proposed findings of fact and conclusions of law *before* the court made any ruling on the post-conviction petition and subsequently adopted

one party's submission. Consequently, the courts found that there was no ex parte communication and therefore no *Roberts* violation. Maxwell's case presents a different issue. Maxwell's petition was denied, he never learned why, and then the trial court granted the prosecutor's after-the-fact opinions as its own. Even if this Court decides that a court may grant the findings of fact and conclusions of law presented by either party, "…the deliberative process mandated by R.C. 2953.21(C) may not be delegated…." *Pickens* at ¶ 24.

Maxwell maintains that the trial court has a similar statutory duty with respect to the post-conviction findings of fact, and conclusions of law. When ruling on a post-conviction petition, if "the court does not find grounds for granting relief, *it shall make and file* findings of fact and conclusions of law and shall enter judgment denying relief on the petition." (Emphasis added). R.C. 2953.21(H).

None of the deliberative process that *Roberts* requires is present in the trial court's September 8, 2016 Entry denying the petition. That judicial function was then substituted by granting the prosecutor's findings of fact and law. Trial Journal Entry, 9/4/2018. On its face, there was no judicial involvement in the process of reviewing the court record, determining the actual facts, and considering the relevant law to be applied. Nothing in the record reflects that any "deliberative process" occurred.

The trial judge had the statutory duty to deliberate then author post-conviction findings of fact and conclusions of law, and only *then* could it issue its entry of denial. Here the court denied the petition with no findings, and then delegated that duty to the prosecutor. R.C. 2953.21(D) does not grant authority for the prosecution to author, and thus *make*, the findings of fact and conclusions of law for the trial judge. The trial judge did not meet his statutorily-mandated duty in the post-conviction proceedings, and as a result, Maxwell's rights were violated.

Again, even if a jurisdiction permits a court to grant a party's proposed findings and conclusions, what happened here is distinguishable. When the court first denies the petition and **then** permits the "parties" to submit proposed findings, the trial court does not comply with his duties under the law. There can be no deliberative process in that when the court is communicating that it only wants to see the findings and conclusions from one side—the party in support of denial. This Court should vacate the judgment of the trial court and remand the matter with instructions to another judge to follow the mandates of R.C. 2953.21.

PROPOSITION OF LAW III

It is improper to deny a post-conviction petition without allowing discovery when a petitioner presented evidence *dehors* the record and discovery is necessary to support his claims.

In denying Maxwell's motion for discovery, the trial court relied upon an inaccurate representation of the law stating that "the trial court has no jurisdiction to permit discovery in a post-conviction proceeding." *State v. Bonnell*, 8th Dist. Cuyahoga Nos. 69835, 73177, 1998 WL 546589 (Aug. 27, 1998). That proposition is not, in fact, an accurate representation of the law at the time Maxwell filed his post-conviction petition. Nevertheless, the Eighth District found no abuse of discretion because it determined that Maxwell failed to present sufficient operative facts justifying additional discovery. Maxwell, 2020-Ohio-3027, ¶ 7. The Eighth District also cited the fact that Maxwell was able to support this petition with over 20 exhibits to conclude that he was not "constrained" by the trial court's denial. Maxwell, 2020-Ohio-3027, ¶ 7. Simply because Maxwell was able to find evidence with which to support his petition does not mean that the court was right in denying additional discovery that could have further supported his petition and potentially been the evidence to lead to a grant of relief.

It is true that the trial court was not required to provide Maxwell with his requested discovery. As the Supreme Court found in 1999, "there is no requirement of civil discovery in postconviction proceedings." *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159, 718 N.E.2d 426 (1999). But the trial court certainly could have, and in this case, should have.

Without court power to conduct discovery, a post-conviction petitioner is limited in his ability to procure the evidence needed to demonstrate that a hearing is warranted. R.C. 2953.21; *See State v. Cole*, 2 Ohio St.3d 112, 114, 443 N.E.2d 169 (1982); *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999). *See e.g. Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004). The trial court, consistent with the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, cannot place this initial evidentiary burden upon a petitioner and subsequently deny him a meaningful opportunity to meet that burden. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Evitts v. Lucey*, 469 US. 387, 401 (1985); U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

The trial court erred in denying Maxwell the opportunity to conduct discovery and the Eighth District erred in upholding that decision. Without leave of court to depose adversarial and potentially adversarial persons, Maxwell is unable to fully produce evidence outside of the record in support of his claims.

PROPOSITION OF LAW IV

A trial court must grant relief, or at minimum, an evidentiary hearing, where a post-conviction petitioner has presented sufficient operative facts to support claims of constitutional error during capital proceedings.

A trial court's decision to dismiss a post-conviction petition is reviewed under an abuse of discretion standard. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

Deference is due to trial courts generally in post-conviction matters, because "[t]he postconviction judge sees and hears the live postconviction witnesses, and he or she is therefore in a much better position to weigh their credibility than are the appellate judges." *Gondor*, 112 Ohio St.3d at ¶ 55. But the trial court here did not "see and hear[] the live postconviction witnesses," because he denied all of Maxwell's grounds for relief without a hearing.

Maxwell raised twelve violations of his constitutional rights that warrant relief,[4] and his petition contained sufficient operative facts and evidence outside the record that support the grounds for relief, require discovery, and merit an evidentiary hearing. The trial court erred in finding that Maxwell was not entitled to a hearing, and the Eighth District erred in upholding that result.

In all of Maxwell's grounds for relief, he specifically pled the deprivation of constitutional rights and submitted sufficient evidence demonstrating the error and prejudice, and the trial court was wrong to dismiss without a hearing. In the arguments that follow, Maxwell has grouped the grounds for relief in the manner by which the trial court addressed them.

Fourth ground for relief: A defendant receives the ineffective assistance of counsel during the trial phase of his capital trial when his attorneys fail to investigate and present evidence in defense of felonious assault allegations.

Fifth ground for relief: A defendant receives the ineffective assistance of counsel during the trial phase of his capital trial when his attorneys fail to investigate and present available evidence to contradict the State's evidence of Maxwell's demeanor and intent the night of the crime.

Eighth Ground for Relief: A defendant receives the ineffective assistance of counsel during the trial phase of his capital trial when his attorneys fail to investigate and present several necessary witnesses to support the 2929.04(B)(1) and (B)(2) mitigating factors.

Ninth ground for relief: A defendant receives the ineffective assistance of counsel during the trial phase of his capital trial when his attorneys fail to investigate and present several necessary witnesses to contradict the State's portrayal of Maxwell as a predator.

[4] Grounds 1-3 were addressed above in Proposition of Law I. Ground 6 is addressed below in Proposition of Law V.

The State's case was that Maxwell killed McCorkle in retaliation for her testimony to the grand jury. Its version of events was: McCorkle testified at the grand jury and then told Maxwell about it; Maxwell became angry and stated his intention to kill McCorkle; Maxwell wanted to avoid prison time for felonious assault; Maxwell went out and got a gun; McCorkle was trying to get away from Maxwell; Maxwell repeatedly called and threatened McCorkle through phone calls, then stalked her on November 27, 2005 and sat and waited outside her house for her to return home so he could kill her. *See* Tr. 1937-41. But this was not the truth. Defense counsel failed to investigate and present the evidence that would have undercut the State's case.

John Gregg's testimony was the sole evidence the State presented to prove the capital specification. *See* Tr. 2292 (According to the trial judge, "The jury found beyond a reasonable doubt that Mr. Maxwell's purposeful murder was in retaliation for the victim's testimony. That finding was based upon the testimony of John Gregg."). His credibility issues should have been obvious to defense counsel. Regardless, defense counsel owed Maxwell a duty to investigate the allegations against him.

Story of felonious assault

Despite the fact that Maxwell was not being tried for the felonious assault, the State presented its version of the October 2005 felonious assault allegation to the jury. The jury heard that Maxwell hit McCorkle in the head with an object – a pistol or a cell phone – and McCorkle was then hospitalized. Tr. 892, 1099. The jury knew that McCorkle had to get several stitches in her head from that incident. *Id*. at 807.

Maxwell's defense counsel had a duty to respond with available evidence undercutting the State's allegations regarding the felonious assault. Had counsel simply interviewed Maxwell's brother, Andy, they would have found out what happened that day in October 2005:

Maxwell and McCorkle were arguing in the kitchen, McCorkle hit Maxwell in the head with a frying pan, Maxwell then hit McCorkle in the head with a mallet. PC Ex. 7. *See also* PC Ex. 8 (La-Tonya Kindell—a nurse who also took McCorkle to the hospital—assisted the doctors in cleaning McCorkle's scalp and noted that "the wound on [McCorkle's] scalp looked like two little holes, like it could have been from a meat tenderizer.")

Defense counsel never interviewed these witnesses, and thus, the prosecutor's version was all the jury heard.

The events of November 27, 2005

Gregg painted a terrifying and wholly inaccurate picture of what led up to McCorkle's murder. Maxwell was not angry; had not obtained a gun; did not stalk and threaten McCorkle. He had no intentions of killing McCorkle, and in fact, they had just decided two days earlier to take another try at making their relationship work. PC Ex. 7. This is consistent with what McCorkle told her sister Lauretta Kenney that night. Kenney told police that McCorkle told her "they were working out things." PC Ex. 9.

The night of the murder, Maxwell and his brother were going out for the evening when Maxwell spotted McCorkle out with another man. PC Ex. 7. Maxwell became very upset, because he and McCorkle had just slept together recently and determined to give their relationship another try. *Id*. When Maxwell's brother finally reached him that evening, around 2:30 or 3:00 a.m., Maxwell's voice "sounded weird, like he was talking way back in his throat." *Id*. Immediately after shooting McCorkle, Maxwell explained that he was "sick and tired. She overran me. She gave me a disease. She just kept balling my heart up and throwing it in my face." *Id.* In other words, the murder had nothing to do with the grand jury testimony, and Andy Maxwell could have communicated this to the jury.

Maxwell was not terrorizing McCorkle

The relationship between Maxwell and McCorkle was tumultuous, and Maxwell had experienced many injuries at the hands of McCorkle. For example, on one occasion, Maxwell had to call his mother and sister to take him to the hospital for injuries McCorkle had inflicted upon his penis. *See* PC Ex. 10, 11, 12 On another occasion, McCorkle threw her plate at Maxwell's head and hit him in the face with it, and the impact of the plate broke his glasses. PC Ex. 8. Another time, McCorkle kicked and punched Maxwell for wanting to go to the home they shared. PC Ex. 12. And McCorkle had informed Maxwell's mother that she planned on slitting his throat as soon as she finished nursing school. PC Ex. 11.

Everything the jury heard mattered in this case. The outcome was by no means a foregone conclusion, especially in light of the fact that the State's key witness—John Gregg—had significant credibility problems. And, again, Gregg's testimony was the sole evidence the State presented to prove the capital specification. *See* Tr. 2292.

At the time of the trial, the trial judge acknowledged Gregg was not credible: "There are fewer witnesses that come before Common Pleas Court that have less credibility than one John Gregg." Tr. 1022. But in its post-conviction findings, the trial court still relied upon Gregg to deny Maxwell relief. *See* Trial Journal Entry, 9/4/18, p. 22.

The trial court also blamed Andy Maxwell for his own failure to offer up information to defense counsel during his one meeting with them at the courthouse. Even aside from the fact that lay witnesses are not trained—nor are they constitutionally obligated—to recall and relay all relevant information without being asked, a brief conversation in the courthouse is not enough of a defense investigation. The United States Supreme Court requires a "thorough investigation" in order to render counsel's decision "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91.

Moreover, counsel's strategy to maintain Maxwell's innocence does not absolve them of the duty to investigate. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id*. at 691. Counsel chose to argue Maxwell's complete innocence, despite the evidence connecting him to the crime. Counsel's choice of strategy is only reasonable if they fully investigated or had reason to limit that investigation. They did not.

The trial court erroneously denied these grounds for relief without a hearing. Regarding claims four, five, and nine, the Eighth District erred when it found that Maxwell did not present sufficient operative facts to establish trial counsel's ineffectiveness and that the claims were barred by res judicata. Regarding claim eight, the Eighth District erred by finding that counsel's failure to introduce evidence of provocation was strategy. Maxwell, 2020-Ohio-3027, ¶ 97.

Seventh ground for relief: A defendant receives the ineffective assistance of counsel during both phases of his capital trial when his attorneys fail to obtain a separate investigator and mitigation specialist.

Trial counsel had Dr. McPherson serve as both the investigator and as mitigation specialist. In filling both positions, she was unable to dedicate ample time to either task. In addition, her actual performance was below the professional standard and further prevented her from competently performing her duties.

The 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) support Maxwell's contention that Dr. McPherson acting as both investigator and mitigation specialist was inappropriate. Guideline 4.1(A)(1) specifically requires that "[t]he defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, **and** a mitigation specialist." (Emphasis added.)

The Guidelines also note that a mitigation specialist is capable of "maintaining close contact with the client and his family." *Id.* at Commentary. "The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death." *Id.* Dr. McPherson's performance made this impossible. Dr. McPherson did not meet with the family until the night before the mitigation phase. PC Ex. 11. She could not build a rapport with the family in time to convince Maxwell to take a deal, having not met with them until after the guilty verdict. It also foreclosed the possibility that she could elicit any information for trial; at that point, she could not provide any useful exculpatory evidence, no matter how well she connected with the family. Failure of "trial counsel to begin mitigation preparations prior to the end of the culpability phase of [the defendant's] trial was objectively unreasonable." *Jells v. Mitchell*, 538 F. 3d 478, 493 (6th Cir. 2008).

The group meeting that Dr. McPherson and her husband held with the family also was inadequate. Even if the family wanted to open up completely, the amount of time she devoted to the meeting, one night, lasting a few hours or less, was insufficient. PC Ex. 12. The family had more to tell. Dr. McPherson's group session failed to produce all of the evidence in the family's affidavits and those of Maxwell's friends and acquaintances. Notably, her investigational methods failed to uncover:

- McCorkle assaulted Maxwell on other occasions, including throwing a plate at his face
- That Maxwell would check in on his and McCorkle's kids throughout the day when he was working
- Andy Maxwell's account of the night McCorkle went into the hospital, that Maxwell had injuries to his head from where McCorkle hit him with a frying pan
- Andy's account of the night of the murder, how he had planned to go out with Maxwell who stopped to get shoes from McCorkle's
- Andy's account of the phone call with Maxwell that night indicating that Maxwell saw McCorkle out with another man shortly after they had agreed to reunite
- Andy's recollections of Maxwell's proof of familial and financial responsibilities
- All of the information Rodney Maxwell provided in his affidavit

- All of the information La-Tonya Kindell provided in her affidavit, including her recollections of McCorkle assaulting Maxwell
- La-Tonya's recollection of the McCorkle's hospital intake and treatment in October 2005
- All of the information Teresa McNear provided in her affidavit
- Teresa's account of Maxwell going to the hospital for wounds McCorkle inflicted on Maxwell's penis
- Teresa's memory of Maxwell often volunteering to take Earnestine shopping
- All of the information Clifford Powers provided in his affidavit
- All of the information Earnestine Brewer provided in her affidavit
- Earnestine's recollection that Maxwell was a parent to all of McCorkle's children
- Earnestine's recollection that Maxwell took McCorkle's son to jobsites and taught him how to perform household repairs
- McCorkle threatening to kill Maxwell
- All of the information Kelvin Parker provided in his affidavit, including his recollections of interactions between McCorkle and Maxwell
- All of the information Richard H. Lymon, Sr. provided in his affidavit.

PC Ex. 2, 7, 8, 11, 12, 14, 17, 18.

These interviews produced mitigation and trial evidence that could have been presented. Instead, "the jury was given virtually no information on [the defendant's] history, character, background and organic brain damage – at least no information of a sort calculated to raise reasonable doubt as to whether this…man ought to be put to death." *Glenn v. Tate*, 71 F. 3d 1204, 1207 (6th Cir. 1995). Because the mitigation and other evidence was not developed or investigated, Maxwell's attorneys could not form an adequate trial strategy, the jury did not hear exculpatory evidence regarding the October 2005 assault, and it deprived Maxwell of the opportunity to present mitigation evidence. Counsel's failure "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty" was contrary to the professional judgments standards of *Strickland*. *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (citing ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp.)).

The trial court ignored all of this, and again reiterated its opinion that Dr. Layton's report "was based on inference and speculation." Trial Journal Entry, 9/4/18, p. 26. The trial court's

findings are not supported by the record, and this Court should find it abused its discretion. The Eighth District viewed this claim as inconsistent with his trial strategy of actual innocence and erred in determining that contrary to Maxwell's argument the jury heard ample evidence of his background, character, history, and mental deficiencies. Maxwell, 2020-Ohio-3027, ¶ 92-94.

Tenth ground for relief: A defendant receives the ineffective assistance of counsel during the penalty phase of his capital trial when his attorneys fail to obtain and present evidence that the defendant was a good father.

Counsel's failure "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty" was contrary to the professional judgments standards of *Strickland*. *Rompilla*, 545 U.S. at 387.

In its sentencing opinion, the trial court noted that testimony had been offered on the topic of Maxwell as a father and provider, but insufficiently as to overcome the aggravating factor. Sentencing Entry p. 11. The evidence existed and trial counsel was ineffective for failing to investigate and present it. *State v. Drummond*, 111 Ohio St.3d 14, 51, 2006-Ohio-5084, 854 N.E.2d 1038 (the love and support that Drummond shares with his family deserve some weight in mitigation); *see also State v. Fox*, 69 Ohio St. 3d 183, 194-95, 631 N.E.2d 124 (1994) (love and care of his daughter, support of family and friends entitled so some weight).

The cited lack of mitigation concerned Maxwell's role as "regular provider for his family." Sentencing Entry. p. 11. The evidence, dehors the record, showed that he not only supported his daughter and Ms. McCorkle, but Ms. McCorkle's other daughter, son, and father as well. PC Ex. 2, 7, 8, 12, 17. The mitigation that could have been uncovered demonstrated that Maxwell financially supported Cheyenne, Ms. McCorkle, and her family. It would have also shown that he was a caregiver for his mother, siblings, and the entire family and even the community, much beyond the testimony offered at trial. PC Ex. 7, 8, 11, 12, 14, 17.

It appears that the trial court addressed this claim (*See* Trial Journal Entry, 9/4/18, p. 27) but it is difficult to discern what the findings are. The trial court essentially just cited to the Ohio Supreme Court's statement that "the defense thoroughly prepared for the penalty phase." *Id.* But because the Supreme Court did not have the *dehors* the record evidence, it is unclear what bearing that statement has on these proceedings. Accordingly, the trial court abused its discretion. The Eighth District found that while the trial court acknowledged this ground for relief it did not make an actual finding. Maxwell, 2020-Ohio-3027, ¶ 100. Nevertheless, the Eighth District found that the trial court did not err in denying relief on this claim because the evidence presented was cumulative. Maxwell, 2020-Ohio-3027, ¶ 102.

Eleventh ground for relief: A defendant receives the ineffective assistance of counsel during the penalty phase of his capital trial when his attorneys fail to obtain and present evidence of the defendant's work history.

During the mitigation phase, trial counsel presented testimony that Maxwell was a hard worker. But they did not press their witnesses for details and the contention lacked the full mitigation strength that it could have had. Counsel failed to fully investigate and did not instruct the mitigation witnesses to elaborate on this issue. Instead, it came across as an unsubstantiated assertion, rather than a strong mitigating factor. Trial counsel should have obtained and presented evidence like that in the affidavits in the post-conviction petition.

The trial court erroneously failed to credit any of the information in the affidavits. Instead, it just credited the testimony that was provided at trial. Especially in a case like this one, any additional information could have made the difference between life and death. It only takes one juror, and trial counsel had a duty to fully investigate. The Eighth District found that the trial court did not err because Maxwell's evidence was cumulative. Maxwell, 2020-Ohio-3027, ¶ 106.

Twelfth ground for relief: Ohio's post-conviction procedures do not provide an adequate corrective process.

"When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). This is all the more so when a petitioner's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. *Ohio Adult Parole Authority v. W*oodard, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998). Death is different; for that reason more process is due, not less. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d.973 (1978); *Woodson v. North Carolina*, 428 U.S.280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Ohio's procedures for post-conviction review must comport with the constitutional requirements of due process.

The trial court rejected this ground for relief, as did the Eighth District, but this court should remand for a full exploration of the downfalls of the post-conviction process in Ohio.

This Court should sustain this Assignment of Error in its entirety or in part and remand Maxwell's case with instructions that the trial court address the merits of all of Maxwell's claims after granting him discovery and an evidentiary hearing.

PROPOSITION OF LAW V

A death sentence cannot be upheld when a person is actually innocent of the death specification.

The trial court erred when it denied Maxwell's sixth ground for relief on the basis of res judicata. Trial Journal Entry, 9/4/18, pp. 12, 14, 16, 23-25. The doctrine of res judicata does not apply if a post-conviction claim is supported by evidence outside the record. *State v. Smith*, 17 Ohio St.3d 98, 101 n.1, 477 N.E.2d 1128 (1985); *State v. Cooperrider*, 4 Ohio St.3d 226, 448 N.E.2d 452 (1984); *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978); *State v.*

Milanovich, 42 Ohio St.2d 46, 325 N.E.2d 540 (1975). Maxwell's petition contained specific "factual allegations that cannot be determined by an examination of the files and records of the case." *State v. McNeill*, 137 Ohio App. 3d 34, 41, 738 N.E.2d 23 (9th Dist.2000) (citing *Milanovich, supra*). In addition, Maxwell supported these specific factual allegations with credible evidence dehors the record.

Once again, the Eighth District admits that Maxwell presented evidence outside the record but denied relief because actual innocence is not a constitutional claim. Maxwell, 2020-Ohio-3027, ¶ 74. Maxwell is actually innocent of the aggravating circumstance, and thus not guilty of capital murder. John Gregg's testimony was the sole evidence the State presented to prove the capital specification. At the time of the trial, the trial judge acknowledged Gregg was not credible: "There are fewer witnesses that come before Common Pleas Court that have less credibility than one John Gregg." Tr. 1022. Even beyond that, according to trial counsel's second new trial motion, the prosecutors did not disclose all of the statements of the co-defendant – John Gregg. Moreover, the State did not disclose the fact that Gregg was given **immunity** in exchange for his testimony. *See* Second New Trial Motion, p. 8-9. "That immunity apparently included Conspiracy to Commit Aggravated Murder." *Id.* at 9. The State had a duty to disclose this. *See Kyles v. Whitley*, 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

The evidence collected and presented in Maxwell's Fourth, Fifth, Eighth, and Ninth Grounds for relief (see discussion *supra*), coupled with Gregg's complete lack of credibility, casts serious doubt on the State's case against Maxwell. Maxwell did not kill McCorkle in retaliation for her grand jury testimony, and the trial court erred by rejecting this ground for relief out of hand.

Maxwell respectfully requests that this Court find that the trial court improperly applied res judicata to dismiss his grounds for relief.

CONCLUSION

Charles Maxwell moves this Court to accept jurisdiction to correct the injustices in his case, and to provide guidance to the lower courts. Maxwell requests that, after permitting him to pursue discovery and funding for expert witnesses, the trial court be ordered to conduct an evidentiary hearing pursuant to R.C. 2953.21; and that this Court grant any further relief to which Maxwell might be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION** has been delivered electronically to Katherine Mullin, Assistant Cuyahoga County Prosecutor via email at kemullin@prosecutor.cuyahogacounty.us, on this 2nd day of July, 2020.

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