[Cite as *State v. Herring*, 2004-Ohio-5357.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 03 MA 12
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
WILLIE S. HERRING	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 96 CR 339
JUDGMENT:	Affirmed in part; Reversed and Remanded in part.

APPEARANCES:

For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Joseph R. Macejko Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. David H. Bodiker Ohio Public Defender Atty. David F. Hanson Assistant State Public Defender 8 East Long Street, 11th Floor Columbus, Ohio 43215-2998

JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: October 1, 2004

[Cite as *State v. Herring*, 2004-Ohio-5357.]
WAITE, P.J.

{¶1} Appellant Willie S. Herring seeks postconviction relief from his three death sentences. This appeal arises from the Mahoning County Court of Common Pleas' January 6, 2003, judgment entry and findings of fact and conclusions of law. This entry sustained the State of Ohio's motion for summary judgment and overruled Appellant's petition for postconviction relief and requests for discovery and an evidentiary hearing.

{¶2} Based on the following reasons, the trial court's award of summary judgment is overruled, and this case is remanded to the trial court for a hearing consistent with this Opinion.

{¶3} In Appellant's direct appeal from his capital convictions, the Supreme Court of Ohio described the facts of the offense:

{¶4} "Shortly after midnight on April 30, 1996, five masked gunmen intent on robbery entered the Newport Inn, a bar in Youngstown. They shot five people, robbed the till, and left. Three of the five victims died. One of the gunmen, Willie S. 'Stevie' Herring, is the appellant in this case. * * *

{¶5} "Herring's partners in crime were Adelbert Callahan, Antwan Jones, Eugene Foose, Louis Allen, and Kitwan Dalton. On the night of April 29, 1996, these five gathered at Herring's house. At one point, Callahan and Jones left the house for about fifteen minutes before returning with a stolen van.

{¶6} "Herring and the others got into the van, Callahan taking the wheel. Callahan drove to a blue house on Laclede Avenue near Hillman Street and Rosedale Avenue. Herring went inside the blue house and came back with four guns. He gave

a .38 special to Allen, a 9 mm pistol to Callahan, and a .357-caliber pistol to Jones. He did not give a gun to Foose, who was already carrying a .45, or to Dalton, who was to be the getaway driver. Herring kept a 9 mm Cobray semiautomatic for himself.

{¶7} "Herring then said to the others, 'If you all know like I know, then you all want to get paid.' It turned out that all six needed money. They therefore decided to commit a robbery. Foose suggested the Newport Inn as a target. Callahan drove the van there.

{¶8} "Everyone but Dalton got out of the van carrying a gun. They put on disguises. Herring donned a white Halloween mask, which Dalton agreed was a 'store-bought' mask similar to one seen in 'slasher' movies. No one else had such a mask; the others hid their faces with bandanas or, in Allen's case, a T-shirt. Herring, Allen, and Foose went to the back door of the Newport Inn; Callahan and Jones took the front door.

{¶9} "Ronald Marinelli, the Newport Inn's owner, was tending bar that night. He had six or eight customers, including Deborah Aziz, Herman Naze, Sr., Dennis Kotheimer, and Jimmie Lee Jones. Jones was sitting with a woman at a table in the back.

{¶10} "Sometime between 1:45 and 2:15 a.m., the robbers burst in. Hearing a sound like a gunshot, Marinelli looked and saw four armed black males in the bar. The two at the front door were disguised in dark bandanas. One carried a revolver; one had what looked to Marinelli like a 9 mm semiautomatic pistol. Marinelli saw two more at the rear. One wore a bandana, the other a 'white hockey-type mask.' Herring, in

the white mask, carried a 'very distinctive' gun, which looked like an Uzi or a MAC-10, squarish in shape, with a long clip. Allen, entering last through the back door, saw Jimmie Lee Jones already lying on the floor. At a nearby table, a woman was screaming. Allen told her to be quiet. Then he returned to the van.

{¶11} "One of the other gunmen ordered Herman Naze: 'Give me your fucking money.' 'I don't have any money,' Naze replied. The gunman immediately shot him. Then Herring shot Deborah Aziz, who fell to the floor. She managed to crawl away and hide between a cooler and a trash can. She later described her assailant's mask as 'a hard plastic, like one of those Jason masks.'

{¶12} "Now Herring walked around the end of the horseshoe bar toward Marinelli and the cash register. As he approached, he shot Marinelli four times in the stomach from about five feet away.

{¶13} "Somehow Marinelli managed to stay on his feet as Herring came closer. Herring stopped about a foot away from him. Marinelli noticed his assailant's long reddish-orange hair. Despite the mask, Marinelli could also see that his assailant had an 'odd skin pigment,' large eyes 'almost like a hazel' color, and buckteeth.

{¶14} "Herring said, 'Give me your fucking money.' Despite his wounds, Marinelli obeyed, handing over the cash in the register. But the robber screamed that Marinelli hadn't given him everything. He had guessed right: in a nearby drawer there was some cash belonging to a pool league.

{¶15} "As Herring threatened to 'blow [Marinelli's] brains out,' Marinelli gave him the money from the drawer. Herring screamed for more. Marinelli urged him to

'[b]e cool' and told him there was no more. Herring responded by leveling his gun at Marinelli's head.

{¶16} "Marinelli reached into the drawer again. This time, he pulled out a gun of his own. But by now, Marinelli was so weak that Herring easily took the gun from him. Marinelli collapsed. Herring said, 'You ain't dead yet, motherfucker,' and shot Marinelli in the legs as he lay on the floor.

{¶17} "After Herring shot Marinelli, Aziz heard Dennis Kotheimer say, 'You motherfucker.' Then she heard more shots. Marinelli saw Kotheimer get shot but did not see who shot him. Nobody saw who shot Jimmie Lee Jones.

{¶18} "* * *

{¶19} "The five shooting victims were taken to a Youngstown hospital. Herman Naze and Jimmie Lee Jones were both pronounced dead on the morning of April 30. Dennis Kotheimer died on May 1.

{¶20} "Autopsies showed that each victim died of gunshot wounds to the trunk. Jones had been shot twice; one 9 mm slug was recovered from his body. Kotheimer and Naze had each been shot once, but no bullets were recovered from either victim.

{¶21} "* * * A forensic scientist at the Bureau of Criminal Identification and Investigation later determined that State's Exhibit 5 [9 mm semiautomatic firearm] had fired the 9 mm slug recovered from the body of Jimmie Lee Jones." *State v. Herring* (2002), 94 Ohio St.3d 246, 246-248, 762 N.E.2d 940, cert. denied *Herring v. Ohio* (2002), 537 U.S. 917, 123 S.Ct. 301.

{¶22} The case proceeded to jury trial on December 16, 1997, and on January 29, 1998, the jury rendered its verdict finding Appellant guilty of all counts. The jury found that Appellant was an accomplice to all three aggravated murders. It also found that Appellant was guilty of conduct involving the purposeful killing or attempt to kill two or more persons, i.e., the multiple murder specifications, and it subsequently recommended the death sentence for all three murders. On February 23, 1998, the trial court sentenced Appellant to death on each count, and the Ohio Supreme Court affirmed Appellant's convictions and death sentences.

{¶23} Appellant filed his postconviction petition in the Mahoning County Court of Common Pleas on September 17, 1999, and asserted seventeen grounds for relief. He requested the trial court to declare his convictions and death sentences void or voidable entitling him to a new trial and sentencing. He also asked that he be granted the opportunity to conduct discovery, to amend his petition, and to be granted an evidentiary hearing pursuant to R.C. §2953.21. Appellant provides 39 exhibits, including numerous affidavits, in support of his postconviction petition.

{¶24} Prior to the state's award of summary judgment, Appellant requested an appropriation of funds for neuropsychological expert assistance. He also requested leave of court to conduct discovery, or in the alternative, an order requiring disclosure of specific enumerated items.

{¶25} Thereafter, the State of Ohio filed its motion for summary judgment as to Appellant's postconviction petition. Appellant did not file a responsive motion. The Mahoning County Court of Common Pleas granted the state summary judgment and

overruled Appellant's requests for discovery and an evidentiary hearing on January 6, 2003.

{¶26} Appellant filed his timely notice of appeal from this entry, and he asserts three assignments of error on appeal.

{¶27} Pursuant to R.C. §2953.21(A)(1)(a), a person convicted of a criminal offense who asserts a violation of his or her constitutional rights may petition the court that imposed the sentence for appropriate relief. A postconviction petition is not an appeal of the underlying matter; instead, it is a civil action that collaterally attacks a criminal judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. State postconviction review is not a constitutionally protected right, even in capital cases, thus, the petitioner only receives those rights established by statute. Id.

{¶28} A criminal defendant challenging his conviction via a petition for postconviction relief is not automatically entitled to a hearing. *State v. Cole* (1982), 2 Ohio St.3d 112, 113, 443 N.E.2d 169; R.C. §2953.21(C) and (E). In fact,

{¶29} "* * * before a hearing is granted, 'the petitioner bears the initial burden to submit evidentiary documents containing *sufficient operative facts* to demonstrate the lack of competent counsel *and* that the *defense was prejudiced* by counsel's ineffectiveness.'" (Emphasis in original.) *State v. Calhoun* (1999), 86 Ohio St.3d 279, 283, 714 N.E.2d 905, citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 18 O.O.3d 348, 413 N.E.2d 819, at syllabus.

{¶30} The court must first determine, based on the petition, the supporting affidavits, and the record, if there are substantive grounds for relief, i.e., whether there

are grounds to believe that, "there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States * * *." R.C. §2953.21(A)(1)(a); Id.

{¶31} A court may deny a hearing based on R.C. §2953.21 if it concludes that the petitioner's claims do not allege a constitutional deprivation. *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph four of the syllabus.

{¶32} "[T]he pivotal concern is whether there are substantive grounds for relief which would warrant a hearing based upon the petition, the supporting affidavit and the files and records of this cause." *Jackson*, 64 Ohio St.2d 107, 110, 413 N.E.2d 819, 18 O.O.3d 348.

{¶33} "In reviewing a petition for postconviction relief * * *, a trial court should give due deference to affidavits sworn to under oath and filed in support of the petition, but may, in the sound exercise of discretion, judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905, syllabus.

{¶34} R.C. §2953.21(E) provides: "[u]nless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues[.]"

{¶35} Further, evidence outside the record must meet a minimum level of cogency in support of the claim to require a hearing. *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 652 N.E.2d 205, citing *Cole*, 2 Ohio St.3d 112, 115, 443 N.E.2d 169, 2 O.B.R. 661.

{¶36} "When the evidence passes this minimum threshold of showing a constitutional claim that could not have been raised on direct appeal, the court may still deny a hearing if it finds that based on all the files and records, there are no substantive grounds for relief. R.C. 2953.21(C). For example, a person other than the petitioner may submit an affidavit raising a claim of ineffective assistance of trial counsel based on evidence not presented at trial. If, however, that evidence is cumulative of, or alternative to, material presented at trial, the court may properly deny a hearing." *Combs*, 100 Ohio App.3d 90, 98, 652 N.E.2d 205, citing *State v. Powell* (1993), 90 Ohio App.3d 260, 270, 629 N.E.2d 13; *State v. Post* (1987), 32 Ohio St.3d 380, 387-389, 513 N.E.2d 754.

{¶37} Postconviction review provides a narrow remedy because res judicata bars any claim that was or could have been raised at trial or on direct appeal. *Perry*, 10 Ohio St.2d 175, 180, 39 O.O.2d 189, 226 N.E.2d 104; *State v. Duling* (1970), 21 Ohio St.2d 13, 254 N.E.2d 670, syllabus paragraph two. Thus, evidence outside the record does not guarantee a petitioner's right to an evidentiary hearing. Id.

{¶38} A prosecuting attorney may move for summary judgment in postconviction proceedings, and the, "right to summary judgment shall appear on the face of the record." R.C. §2953.21(D). The trial court is required to review the pleadings, affidavits, files, and other records to assess whether there is a genuine issue as to any material fact, and whether a substantial constitutional issue is established. Civ.R. 56; *State v. Milanovich* (1975), 42 Ohio St.2d 46, 51-52, 325 N.E.2d 540, paragraph two of the syllabus.

{¶39} "In postconviction cases, only careful adherence to the provisions of Civ.R. 56 can assure that the rights and obligations of both parties are fairly treated and respected." Id. at 52.

{¶40} Summary judgment in the state's favor in postconviction proceedings is appropriate when: (1) the state is entitled to judgment as a matter of law, (2) the state identifies affirmative evidence showing no genuine issue as to any material fact and (3) reasonable minds could come to but one conclusion, which is against the defendant, who is entitled to have the evidence construed most strongly in his favor. Civ.R. 56; *State v. DePew* (1994), 97 Ohio App.3d 111, 113, 646 N.E.2d 250; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46.

{¶41} The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." (Emphasis in original.) *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202. Instead, there must be no genuine issues of material fact. Id. A "material" fact has the potential to affect the outcome, and a dispute is "genuine" only if it allows reasonable minds to find in favor of the nonmoving party. Id.

{¶42} Appellant's first assignment of error asserts:

{¶43} "THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S POST-CONVICTION PETITION WHERE HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT AN EVIDENTIARY HEARING AND DISCOVERY IN VIOLATION

OF APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

{¶44} Appellant argues that the trial court erred in dismissing his postconviction petition since he presented sufficient evidence to warrant an evidentiary hearing and discovery on numerous constitutional issues allegedly resulting in prejudice. Most of his alleged errors assert that he was denied the effective assistance of trial counsel.

{¶45} The U.S. Supreme Court in *Strickland v. Washington,* outlined the two-part test for evaluating whether the assistance of counsel was so ineffective and contrary to the Sixth Amendment to require a reversal:

{¶46} "First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. * * *

{¶47} "* * *

{¶48} "* * * [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (Citation omitted.) *Strickland v. Washington* (1984), 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674; see also *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 514 N.E.2d 407.

{¶49} Appellant's initial claim of ineffective assistance of counsel concerns the sentencing phase of his trial. He asserts that his trial counsel were ineffective since they presented only two mitigation witnesses, Appellant's mother and sister. He claims that he was prejudiced since they did not present his extensive negative history. He also asserts prejudicial error as a result of his trial counsel's failure to secure his neuropsychological evaluation and to present corresponding expert testimony as mitigation evidence.

{¶50} R.C. §2929.04 governs the imposition of the death penalty or imprisonment for capital offenses. Initially, R.C. §2929.04(A) precludes the imposition of the death penalty unless one of ten factors are specified in the indictment and proven beyond a reasonable doubt. As set forth above, the jury found that Appellant was guilty of conduct involving the purposeful killing or attempt to kill two or more people, which is one of the ten aggravating factors. R.C. §2929.04(A)(5). Since that aggravating factor was proven beyond a reasonable doubt, R.C. §2929.04(B) requires:

{¶51} "(B) the * * * trial jury, * * shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, *the history, character, and background of the offender*, and all of the following factors:

{¶52} "* * *

{¶53} "(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the

criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

{¶54} "(4) The youth of the offender;

{¶55} "(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

{¶56} "(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

{¶57} "(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

{¶58} "(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

{¶59} "The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed * * * against the aggravating circumstances the offender was found guilty of committing." (Emphasis added.)

{¶60} In support, Appellant identifies postconviction affidavits executed by numerous family members, psychologists, three mitigation specialists, and one juror. Appellant's family affidavits provide a family history generally depicting his lack of education; lack of traditional family structure and parenting; family history in gang

membership and alcohol and drug abuse; and Appellant's personal drug abuse and gang history.

{¶61} In reviewing the mitigation portion of Appellant's sentencing hearing transcript, it reveals, consistent with Appellant's argument, that his counsel called two witnesses, Deborah Herring, Appellant's mother, and Nicole Herring, Appellant's sister. (Tr. Vol. XXIII, pp. 4754-4760.) In reviewing their testimony, it is clear that Appellant's trial counsel focused on the positive aspects of Appellant's life, which consists of six pages of testimony. Their limited testimony explains that Appellant has five younger siblings; that Appellant helped his mother with the children and the chores; and that Appellant was close with his older sister Nicole. Both Nicole and Deborah asked the jury to spare Appellant's life. (Tr. Vol. XXIII, pp. 4754-4760.)

{¶62} The only other mitigating evidence presented at Appellant's sentencing hearing were Appellant's co-defendants' verdicts and sentencing entries, which counsel used to demonstrate that Appellant's co-defendants were convicted of complicity to commit aggravated murder, but that they were not sentenced to death. (Tr. Vol. XXIII, pp. 4762-4772.)

{¶63} The Ohio Supreme Court in Appellant's direct appeal addressed the lack of mitigation evidence and dismissed it as purely speculative since: "the record before * * * [The Ohio Supreme Court did] not show how extensive counsel's investigation actually was, nor * * * [did] it show that more investigation would have developed anything useful." *Herring*, 94 Ohio St.3d 246, 262, 762 N.E.2d 940.

{¶64} In support of this assignment of error, Appellant cites *Glenn v. Tate* (6th Cir. 1995), 71 F.3d 1204, 1210. The U.S. Sixth Circuit Court of Appeals in *Glenn* reversed Glenn's Ohio death sentence on ineffective assistance of counsel grounds and remanded the case for the state to impose a new sentence. Id.

{¶65} The *Glenn* Court found that the jury was given virtually no information on Glenn's history, background, or his organic brain damage, and it concluded that the nondisclosure was *not* a result of counsel's tactical decisions but because Glenn's lawyers at trial "never took the time to develop it." Id. at 1207. Further, the *Glenn* Court noted that Glenn's trial counsel failed to timely arrange for an expert witness, who may have provided mitigating evidence relative to Glenn's brain impairment; that Glenn's attorneys never spoke with any of his siblings; that his counsel did not examine any of his school, medical, or mental health records; and that they never talked with his probation officer or examined those records. Id. at 1208. As such, the Court concluded that his counsel were, "objectively unreasonable and prejudicial." Id. at 1211.

{¶66} Appellant also cites *Williams v. Taylor* (2000), 529 U.S. 362, 120 S.Ct. 1495, for the proposition that trial counsel has the duty to conduct a diligent investigation into a client's background and personal circumstances. Id. *Williams* involved a federal habeas petition arising from a Virginia death sentence. The Court concluded that Williams' counsel did not even begin to prepare for his sentencing until after his conviction and subsequently failed to, "uncover extensive records graphically describing Williams' nightmarish childhood, to introduce available evidence that

Williams was 'borderline mentally retarded' and did not advance beyond sixth grade," among other things. Id. at 363. The Supreme Court in *Williams* concluded that:

{¶67} "[T]he failure to introduce the comparatively voluminous amount of favorable evidence [for mitigation purposes] was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background [resulting in prejudice] * * * within *Strickland's* meaning." Id. at 364.

{¶68} The Supreme Court stressed that the Virginia Supreme Court failed to fully evaluate and to, "accord [the] appropriate weight to," all of the available mitigation evidence. Id.

{¶69} Williams' trial counsel failed to introduce these significant records based on his erroneous belief that they were inadmissible. Id. at 374. Thus, the Supreme Court concluded that there was a reasonable probability that Williams' sentencing would have differed, "if competent counsel had presented and explained the significance of all the available evidence." Id. at 399.

{¶70} The extended family affidavits in the instant cause reveal: Appellant had almost a lifelong involvement in gangs (9/17/99 Postconviction Petition, Appendix, Exh. 6, p. 1 ¶3.); Appellant's mother abused crack cocaine for approximately 12 years while he was growing up (9/17/99 Postconviction Petition, Appendix, Exh. 6, ¶6, 8; Exh. 12, ¶10.); Appellant's father was shot and killed, apparently in a drug dispute in 1983 when Appellant was only a toddler (9/17/99 Postconviction Petition, Appendix, Exh. 7, ¶5; Exh. 12, ¶2.); Appellant started selling drugs and carrying a gun in his early

teens (9/17/99 Postconviction Petition, Appendix, Exh. 8, ¶2, 8; Exh. 11, ¶4, 21; Exh. 31, ¶10.); growing up Appellant's stepfather was addicted to drugs (9/17/99 Postconviction Petition, Appendix, Exh. 12, ¶3.); Appellant abused alcohol and drugs almost daily since an early age (9/17/99 Postconviction Petition, Appendix, Exh. 9, ¶6; Exh. 11, ¶15; Exh. 29, ¶4; Exh. 31, ¶9.); Appellant dropped out of high school in the tenth grade, and his mother does not know if he ever graduated (9/17/99 Postconviction Petition, Appendix, Exh. 11, ¶8; Exh. 12, ¶14.); Appellant's grandmother's telephone calls and request to testify were unreturned by his trial counsel (9/17/99 Postconviction Petition, Appendix, Exh. 7, ¶2, 7.); Appellant's aunt, uncle, cousin, and grandmother would have testified had they been asked. (9/17/99 Postconviction Petition, Appendix, Exh. 6, ¶2; Exh. 7, ¶2; Exh. 29, ¶2; Exh. 31, ¶2.)

{¶71} Appellant also points to the affidavit of Thomas J. Hrdy, the trial mitigation specialist retained by his trial counsel. Hrdy concludes that he provided a substandard mitigation investigation resulting from his lack of adequate time to prepare. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶2, 5 and 7.) Hrdy states that he failed to prepare the intended and requisite psycho-social history of Appellant and his family due to time constraints. Hrdy also states that he interviewed Appellant four times and Appellant's mother once; that he met with Appellant's lawyers once; and that Hrdy had only provided mitigation services in capital cases two or three times prior to Appellant's trial. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶¶2, 5 and 7.)

{¶72} While Hrdy did not do his intended and requisite research, he is uncertain whether he advised Appellant's trial counsel of his failure. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶5.) Hrdy does not believe that he requested any of Appellant's historical documents or records, including those from the Ohio Department of Youth Services or Mahoning County Human Services. (9/17/99 Postconviction Petition, Appendix, Exh. 33, ¶8.) Attachment A to Hrdy's Affidavit sets forth his intended course of action relative to Appellant's mitigation, however, Hrdy's affidavit confirms his failure to complete most of his identified tasks. (9/17/99 Postconviction Petition, Appendix, Exh. 33.)

{¶73} Appellant also identifies that the record does not reflect that his counsel requested additional time in which to prepare the requisite mitigation investigation.

{¶74} In addition, Appellant supplied the affidavit of Jolie S. Brams, Ph.D. a psychologist in support of this claimed error. Brams was contacted in 1998, following Appellant's conviction, in order to review the quality and thoroughness of the mitigation presented at Appellant's sentencing hearing, with regard to the requisite psychological analysis. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶3.) Her affidavit states that the jury should have been provided a thorough analysis of Appellant and his family. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶5-7.) She stresses that his trial counsel did not dwell on Appellant's youth (he was 19 years old at the time of the offense) and that counsel inaccurately presented Appellant's family as caring. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶8.) Brams also stresses that the

jury was never advised of Appellant's "dysfunctional role models". (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶8.)

{¶75} Further, Brams states that, "[c]ertainly, an appropriate presentation of lay and expert witnesses would have provided the jurors with ample opportunity to render a decision in favor of sparing the life of [Appellant]." (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶9.)

{¶76} In addition to reviewing Appellant's historical documents, Brams also relied on the public defender mitigation specialist's interviews with Appellant and his family. (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶10.) Brams' 43-page affidavit states in part that Appellant:

{¶77} "* * * was not exposed to adults whose behavior placed them anywhere within the normative range of socially accepted behavior in our society. Frequent, if not daily, criminal activities, drug dealing and other illegal activities in the home, open drug and alcohol abuse, unemployment and disdain for working an honest job, and deceitfulness and manipulation, were the only adult behaviors that [Appellant] had an opportunity to emulate. * * * [Appellant] was * * * actually dissuaded from engaging in behaviors that did not fit this familiar and sociocultural norm. [Appellant] would have been an outcast of his family had he chosen to behave differently * * *.

{¶78} "* * *

{¶79} "The persons given the responsibility of supervising [Appellant throughout his childhood] were intoxicated, engaging in criminal activities on a daily

basis, or generally unconcerned with his functioning. These issues are a remarkably important part of [Appellant's] developmental history.

{¶80} "It is beyond the scope of this lengthy affidavit to detail the marked dysfunction in [Appellant's] upbringing, regarding the inappropriate behaviors to which [Appellant] was exposed, the lack of problem solving taught him in his upbringing, and the lack of supervision and stability.

{¶81} "* * *

{¶82} "Lastly, substance abuse seemed to be a way for [Appellant] to self-medicate a significant degree of depression. * * *

{¶83} "* * *

{¶84} "* * * Without this presentation [of Appellant's substance abuse and history], jurors * * * saw only a young drug dealer, and user [sic] not a fully humanized portrait of a young man who was faced with serious difficulties in his life, * * *

{¶85} "* * *

{¶86} "[Further,] * * * even as an adult, [Appellant's] perceptual learning skills are only those of a ten-year old.

{¶87} "* * *

{¶88} "* * * based on his specific IQ and achievement profiles, his history which is suggestive of learning disabilities, and his chronic and early on set [sic] substance abuse, a neuropsychological evaluation should have be [sic] conducted to establish whether [Appellant] suffers from organic brain impairment. Such an evaluation should have been conducted along with a general psychological evaluation at the time of the

trial. * * *" (9/17/99 Postconviction Petition, Appendix, Exh. 1, ¶15, 19, 20, 29, 31, 33, 34, 38, 46.)

{¶89} In Brams' addendum affidavit, she indicates that she since has had the opportunity to examine a letter, Exhibit 28, directed to Appellant's trial counsel from Douglas C. Darnall, Ph.D., relative to his limited pre-trial testing of Appellant. Brams states that Darnall should have required additional in-depth testing and interviews instead of simply issuing his inconclusive letter outlining potential causes for Appellant's test results. (9/17/99 Postconviction Petition, Appendix, Exh. 32, ¶5-9.) From the information before this Court, however, it is unclear how much of this information Appellant's counsel knew or what exactly their efforts were for mitigation purposes.

{¶90} Appellant also points to Exhibit 18, the affidavit of Dorian L. Hall, in support of this argument. Hall's affidavit sets forth his extensive involvement in death penalty cases and stresses the importance of a psychosocial investigation and analysis for the mitigation phase of a capital sentencing. (9/17/99 Postconviction Petition, Appendix, Exh. 18, ¶4-5, 9-13.) Hall lists the records, documents, and the interviews that should have been conducted and analyzed in Appellant's case. (9/17/99 Postconviction Petition, Appendix, Exh. 18, ¶6-7.) Hall concluded that Appellant, "should have been evaluated by a neuropsychologist to determine whether brain impairment exists." (9/17/99 Postconviction Petition, Appendix, Exh. 18, ¶8.)

{¶91} Appellant has also provided the affidavit of Darlene Moore, a juror for Appellant's trial and sentencing. Moore states that had she known about Appellant's

problematic history, including poor family life, drug abuse, family history of gang membership, etc, that, "these would have been important for me to consider as a juror when considering the penalty * * *." (9/17/99 Postconviction Petition, Appendix, Exh. 16, ¶4.)

{¶92} Despite the wealth of evidence dehors the record that Appellant presented, the trial court granted the State of Ohio summary judgment as to Appellant's postconviction petition. The trial court's judgment and findings of fact on the instant issue provide:

{¶93} "It is clear from the transcript of the sentencing phase that counsel elected to present positive evidence from the Defendant's family, and not to present negative evidence concerning the Defendant's childhood. At this point, one can only speculate as to what effect, if any, negative evidence would have had in the jury's deliberations.

{¶94} "* * *

{¶95} "In the instant case, Defendant simply suggests and speculates that trial counsels [sic] failure to present an alternative theory, specifically, negative testimony concerning his childhood, amounts to ineffective assistance of counsel. This Court does not agree, * * *." (1/6/03 Judgment Entry Findings of Fact and Conclusions of Law, pp. 2-3.)

{¶96} In support of its conclusion, the trial court cites *State v. Williams* (1991), 74 Ohio App.3d 686, 600 N.E.2d 298, for the proposition of law that:

{¶97} "it is the obligation of counsel to make reasonable investigations or to make a reasonable decision that makes specific investigations unnecessary. A particular decision not to investigate must be examined for reasonableness under the circumstances with strong measures of deference to counsel's judgments." Id. at 695.

{¶98} The *Williams* Court concluded that his trial counsel was not ineffective as a result of their failure to present additional witnesses whose postconviction affidavits, "add only additional detail to support his original mitigation theory: that he pursued a life of crime to compensate for a troubled childhood." Id.

{¶99} Unlike *Williams*, the facts herein reveal that the postconviction evidence dehors the record presents not additional evidence or detail, but a completely opposite line of evidence. The trial court judge dismissed Appellant's arguments as a tactical decision and strategy since counsel chose to present only (minimal) positive mitigation evidence. (1/6/03 Judgment Entry Findings of Fact and Conclusions of Law, pp. 2-3.)

{¶100} However, Appellant's counsel could not have made an intelligent strategic decision without the proper investigation before them. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, and *Glenn*, 71 F.3d 1204. Absent at least the psychosocial evaluation, reasonable minds could conclude that trial counsel may have been unable to make a fully informed decision.

{¶101} In Ohio, an attorney's decisions regarding which witnesses will testify at trial are within the purview of counsel's trial tactics, and judicial scrutiny of counsel's performance must be highly deferential. *State v. Coulter* (1992), 75 Ohio App.3d 219, 598 N.E.2d 1324; *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523.

{¶102} As the state points out, Darnall's letter does not recommend additional psychological evaluations but instead renders inconclusive results, and Hrdy's affidavit is inconclusive as to whether Appellant's trial counsel actually knew of Hrdy's investigation's deficiencies. (9/17/99 Postconviction Petition, Appendix, Exh. 28; Exh. 33.)

{¶103} The record also reveals that trial counsel's decision to present Appellant's Department of Youth Services commitment history may have resulted in revealing his extensive juvenile charges, including assault, aggravated menacing, and four counts of aggravated robbery, among others. (Appellee's brief, pp. 18-19, FN 8.) Appellant's mother's affidavit is consistent with this theory, which reflects that Appellant's trial counsel did not want to set her up for cross-examination relative to Appellant's juvenile record. (9/17/99 Postconviction Petition, Appendix, Exh. 14, ¶4.) Thus, reasonable minds could conclude that Appellant's trial counsel's mitigation choice may have been an informed tactical decision. *Strickland,* supra.

{¶104} In viewing the additional evidence before this Court as a whole, it is persuasive against the imposition of the death penalty. Without a hearing to determine the extent of the mitigation evidence before Appellant's trial counsel and their investigative efforts, Appellant's postconviction exhibits may simply present an alternative mitigation tactic. Looking at Appellant's additional evidence in a light most favorable to him, his trial counsel may have been ineffective based on their failure to pursue additional mitigation evidence.

{¶105} As in *Glenn*, supra, the limited evidence presented at Appellant's mitigation hearing could have been the result of his trial counsel's failure, "to take the time to develop," the required comprehensive mitigation evidence in the first instance. *Glenn*, 71 F.3d 1204, 1207.

{¶106} Appellant's reply brief directs this Court's attention to *Wiggins v. Smith* (2003), 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471, which held that Wiggins' trial counsel was ineffective contrary to his Sixth Amendment right to effective counsel. *Wiggins* likewise concerned counsel's insufficient mitigation investigation. Prior to reversing the appellate court's decision that held that counsel's mitigation presentation was purely a tactical decision, the U.S. Supreme Court identified the crucial issue:

{¶107} "In evaluating petitioner's claim, this Court's principal concern is not whether counsel should have presented a mitigation case, but whether the investigation supporting their decision not to introduce mitigating evidence of Wiggins' background was *itself reasonable*." (Emphasis in original.) Id. at 2530.

{¶108} The *Wiggins* Court continued and stated:

{¶109} "The Court thus conducts an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, including a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time of that conduct. * * *

{¶110} "* * *

{¶111} "Ultimately, this Court's conclusion that counsel's investigation was inadequate does not mean that *Strickland* requires counsel to investigate every

conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require counsel to present such evidence at sentencing in every case. Rather, the conclusion is based on the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' *Strickland*, supra, at 690-691, 104 S.Ct. 2052." Id. at 2530-2531.

{¶112} Thereafter, the *Wiggins* Court weighed the aggravating evidence against all of the available mitigating evidence, and it concluded that Wiggins was prejudiced as a result. The Court noted that:

{¶113} "Wiggins experienced severe privation and abuse while in the custody of his alcoholic, absentee mother and physical torment, sexual molestation, and repeated rape while in foster care. His time spent homeless and his diminished mental capacities further augment his mitigation case. He thus has the kind of troubled history relevant to assessing a defendant's moral culpability. * * * Given the nature and extent of the abuse, there is a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing, and that a jury confronted with such mitigating evidence would have returned with a different sentence. The only significant mitigating factor the jury heard was that Wiggins had no prior convictions. Had it been able to place his excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Wiggins had no record of violent conduct that

the State could have introduced to offset this powerful mitigating narrative. Thus, the available mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of his moral culpability." Id. at 2531.

{¶114} Based on *Williams* and *Wiggins*, supra, and looking at the evidence in a light most favorable to Appellant, we must remand this case for the trial court to conduct an evidentiary hearing relative to Appellant's trial counsels' efforts in advance of their decision to present only Appellant's positive mitigation history. There is little evidence herein documenting the extent of Appellant's trial counsels' reasoning for their investigative decisions.

{¶115} This matter requires a postconviction hearing since the state's right to summary judgment does not "appear on the face of the record." R.C. §2953.21(D). As such, this Court hereby remands this case consistent with R.C. §2953.21(E) for the trial court to conduct an evidentiary hearing to assess whether, "counsel's decision to cease investigating when they did was unreasonable[,]" and if so whether Appellant was prejudiced as a result. *Wiggins* at 2530; *Strickland*, supra.

{¶116} As the dissenting opinion points out, however, counsels' decision to present only a positive history for mitigation purposes is supported by the record as a tactical decision. However, it must be confirmed that counsels' decision was a fully informed one. Specifically on remand, the trial court must assess whether Appellant's counsel were apprized of Hrdy's investigation's shortcomings. Only then could counsel have made a reasoned decision to cease investigating.

{¶117} Appellant argues three additional issues under his first assignment of error. These can be considered tactical decisions within counsel's wide discretion and they therefore lack merit. *Strickland*, supra; *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523.

{¶118} First, Appellant asserts that he was denied the effective assistance of counsel as a result of their failure to present mitigating gang cultural evidence at the sentencing hearing. In support of this argument, Appellant identifies the affidavit of C. Ronald Huff, Ph. D., who concludes in his affidavit that Appellant's learning disabilities, poor home life, including gang members as role models, and drug and alcohol abuse led to his involvement in the Folks gang and in criminal behavior. (9/17/99 Postconviction Petition, Appendix, Exh. 4, ¶19.)

{¶119} This sub-issue falls within trial counsel's wide discretion relative to trial tactics. *Strickland,* supra; *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523. In addition, Huff's affidavit does not reflect that Appellant was prejudiced by this alleged failure. Huff's affidavit focuses on the effects of gang membership on criminal behavior, but Appellant's convictions did not arise in connection with gang membership. Based on the foregoing, this sub-issue lacks merit.

{¶120} Appellant next asserts that he was denied the effective assistance of counsel as a result of his trial counsel's failure to secure and to present an eyewitness identification expert during the guilt phase of his trial.

{¶121} Appellant provides the affidavit of Harvey Shulman, Ph.D. ("Shulman") in support of this sub-issue. (9/17/99 Postconviction Petition, Appendix, Exh. 34.) The

eyewitnesses identifying Appellant at trial were two of the shooting victims of the crimes, Aziz and Marinelli. *Herring*, 94 Ohio St.3d 246, 252. Both witnesses are Caucasian whereas Appellant is African American. (9/17/99 Postconviction Petition, Appendix, Exh. 34, ¶25.)

{¶122} In his affidavit, Shulman states that a Caucasian witness identifying an African American is the least accurate of all eyewitness identifications.

{¶123} Notwithstanding, Appellant's accomplice, Dalton, testified that he saw Appellant:

{¶124} "* * * put on a white mask resembling one seen in a 'slasher' movie. [And Appellant's other accomplice] Allen testified that [Appellant's] mask was the only 'store-bought' one worn by any of the robbers." *Herring*, 94 Ohio St.3d 246, 252-253, 762 N.E.2d 940.

{¶125} Based on the record, Appellant's identification as the shooter was corroborated. It is not conceivable that this expert testimony would have affected the outcome of the trial. As such, Appellant's assertion that his trial counsel was ineffective as a result of their failure to secure an eyewitness expert to testify is unfounded.

{¶126} Appellant also alleges that he was denied the effective assistance of counsel as a result of his trial counsel's failure to impeach the eyewitnesses' testimony. Appellant claims that Marinelli's identification of Appellant as the man in the white mask was false. This argument is based on what Appellant's sister Nicole allegedly overheard prior to Marinelli's trial testimony.

{¶127} Nicole heard Marinelli state:

{¶128} "* * * he [Marinelli] didn't care who did it [the crime], but that someone was going to get the death penalty for it. [And she assumed that since] Willie was the last one to go to trial, * * * [Marinelli] must have been talking about Willie." (9/17/99 Postconviction Petition, Appendix, Exh.10.)

{¶129} However, Appellant's trial counsel may have chosen not to cross-examine Marinelli on this issue to avoid strengthening his testimony since he would have likely denied falsifying his testimony. In addition, Appellant's trial counsel may have chosen not to address this to avoid the appearance of attacking the victim, which also may have resulted in supporting Marinelli's testimony via sympathy and resulted in dislike for Appellant's counsel. Finally, counsel may not have believed Nicole.

{¶130} Based on the foregoing, Appellant's trial counsel's decision not to address this issue at trial was a purely tactical decision and does not constitute the ineffective assistance of counsel contrary to the Sixth Amendment. As such, it is overruled.

{¶131} Appellant's final four sub-issues under his first assignment of error are barred by res judicata since each could have been addressed in his direct appeal. *Perry*, 10 Ohio St.2d 175, 180, 226 N.E.2d 104.

{¶132} First, Appellant asserts that the death penalty via lethal injection constitutes cruel and unusual punishment in violation of his Eighth Amendment rights and contrary to his constitutional guarantee to due process of law under the Fourteenth Amendment.

{¶133} However, the Ohio Supreme Court has specifically found that the imposition of the death penalty via lethal injection does not constitute cruel and unusual punishment. *State v. Carter* (2000), 89 Ohio St.3d 593, 608, 734 N.E.2d 345.

{¶134} In addition, this is not a constitutional question that finds its support dehors the record. This issue could and should have been properly raised in Appellant's direct appeal, and therefore it is not properly addressed under postconviction relief. *Perry*, 10 Ohio St.2d 175, 180, 39 O.O.2d 189, 226 N.E.2d 104. In fact, this issue was addressed in Appellant's direct appeal to the Ohio Supreme Court, and it was summarily overruled. *Herring*, 94 Ohio St.3d 246, 252-253, 762 N.E.2d 940.

{¶135} Appellant next contends that the trial court erred in that the jury instructions misled the jury creating a presumption in favor of death. Appellant presents the 36-page affidavit of Dr. Michael L. Geis ("Geis"), a linguistics professor, in support of this assertion. (9/17/99 Postconviction Petition, Appendix, Exh. 33.) Geis concludes that the jury instructions improperly encourage jurors to consider nonstatutory aggravating factors and information that should not be considered.

{¶136} The Ohio Supreme Court has previously addressed a very similar issue in *State v. Stallings* (2000), 89 Ohio St.3d 280, 731 N.E.2d 159. The defendant in *Stallings* asserted that the R.C. §2929.04(B)(7) "catch-all" mitigation factor was unconstitutionally vague and that jurors would misunderstand it as reason in favor of imposing the death sentence. Id. at 297. The Supreme Court overruled this assertion.

{¶137} In addition, this issue is not properly before this Court since it could and should have been presented during Appellant's direct appeal. *Perry*, 10 Ohio St.2d 175, 180, 39 O.O.2d 189, 226 N.E.2d 104.

{¶138} Appellant also contends that the trial court instructed the jury that they could only consider a life sentence after they had determined that they were unable to impose a death sentence. We must assume that Appellant is referring to the trial court's statement during the instructions that provides:

{¶139} "* * * and you will now decide whether you will recommend to the Court that the sentence of death shall be imposed upon the defendant, or if not, whether you will recommend that the defendant be sentenced to life imprisonment * * *." (Trial Tr., Vol. XXIII of XXIII, pp. 4818- 4819.)

{¶140} Notwithstanding this statement by the trial court, there is no evidence dehors the record relative to this assertion. This sub-issue is also barred under the principles of res judicata.

{¶141} Appellant also alleges that the trial court committed error and that he was denied the effective assistance of counsel as a result of the jury's consideration of the death penalty even though Appellant was convicted of complicity to commit aggravated murder. Appellant asserts that his trial counsel was ineffective since one cannot be eligible for the death penalty as an aider and abettor on an aggravating circumstance.

{¶142} Appellant presents the affidavit of Joseph Bodine ("Bodine") in support of this claimed error. (9/17/99 Postconviction Petition, Appendix, Exh. 35.)

{¶143} This exact issue, absent Bodine's affidavit, was addressed in Appellant's direct appeal to the Ohio Supreme Court, and it concluded that, "[u]nder R.C. 2929.04(A)(5), an aggravating circumstance exists if 'the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons *by the offender*.' (Emphasis added.)" *Herring*, 94 Ohio St.3d 246, 252, 762 N.E.2d 940. The Supreme Court concluded that the use of the word "offender" absent the modifier "principal" clearly sets forth that the statute does not require that a multiple murder offender be the actual killer. Id.

{¶144} As such, this issue is barred via res judicata and is overruled.

{¶145} Appellant's final argument under his first assignment of error asserts that the jury may have failed to follow the court's instructions regarding a sustained objection. Specifically, Appellant points to the use of a photograph of Appellant that was used to assist Marinelli's identification of Appellant's distinct hairstyle at the time of the offense. (Trial Tr., Vol. XIX of XXIII, pp. 4131, 4154.) After describing the features of the man in the mask, and upon being presented a photograph of Appellant with a different hairstyle, Marinelli blurted out: "I don't have to look at it more than a second. I saw it through my eyes and was shot five times by this guy, and it is him." (Trial Tr., Vol. XIX of XXIII, pp. 4131.)

{¶146} Appellant's trial counsel's subsequent request for a mistrial was overruled, but the court granted the request for a precautionary instruction. (Trial Tr., Vol. XIX of XXIII, p. 4169.)

{¶147} In support of his claims, Appellant provides the affidavit of Matt Franklin ("Franklin"), a public defender criminal investigator, who avers that two of Appellant's jurors stated that Marinelli's identification of Appellant, "as the man who shot him was the most important evidence presented at * * * trial." (9/17/99 Postconviction Petition, Appendix, Exh. 37, ¶4.) Appellant asserts that he needs to obtain further discovery and he requests a hearing to pursue this ground for postconviction relief.

{¶148} The Ohio Supreme Court addressed this very issue in Appellant's direct appeal, and it concluded:

{¶149} "* * * jurors are generally presumed to follow the trial court's instructions, including instructions to disregard testimony. * * *

{¶150} "Herring argues that eyewitness identification is unusually difficult to disregard. That may be, but '[j]uries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.' * * * Testimony like this—positively identifying a criminal who was wearing a mask—is not necessarily persuasive, and its impact on the jury is highly uncertain. Moreover, the state did not elicit Marinelli's identification * * *. Nor did the prosecutors refer to that identification during trial or in argument.

{¶151} "* * * Marinelli's remark did not render a fair trial impossible. * * *" *Herring*, 94 Ohio St.3d 246, 254-255, 762 N.E.2d 940, cert. denied *Herring v. Ohio* (2002), 537 U.S. 917, 123 S.Ct. 301.

{¶152} Further, a petitioner has no statutory right to discovery in a postconviction proceeding. *State v. Doan*, 12th Dist. No. CA2001-09-030, 2002-Ohio-

3351, at ¶56. In addition, it has been held that a postconviction defendant is not entitled to unlimited discovery. Instead, a postconviction defendant, "who has availed himself of a public records request has received all the discovery he is entitled to receive." *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 97, 667 N.E.2d 1041.

{¶153} Notwithstanding, Evid.R. 606, competency of juror as witness, provides in part:

{¶154} "Upon an inquiry into the validity of a verdict * * *, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. * * * His affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying will not be received for these purposes."

{¶155} Based on Evid.R. 606(B), both the juror's statements and hearsay testimony concerning the juror's statements provided in Franklin's affidavit are inadmissible unless there exists distinct and independent evidence, other than a juror's testimony, impeaching the jury's verdict. *State v. Gleason* (1996), 110 Ohio App.3d 240, 673 N.E.2d 985, cert. denied 77 Ohio St.3d 1416, 670 N.E.2d 1004. Since there is no other evidence impeaching the verdict in this case, Franklin's affidavit cannot be considered.

{¶156} Based on the foregoing, the trial court did not err in denying Appellant discovery and an evidentiary hearing on this issue. This sub-issue is overruled.

Herring, 94 Ohio St.3d 246, 254-255, 762 N.E.2d 940, cert. denied *Herring v. Ohio* (2002), 537 U.S. 917, 123 S.Ct. 301.

{¶157} Appellant's second assignment of error asserts:

{¶158} "IN APPELLANT'S CASE OHIO'S POST-CONVICTION PROCEDURES AFFORDED NEITHER AN ADEQUATE CORRECTIVE PROCESS NOR COMPLIED WITH DUE PROCESS AND EQUAL PROTECTION."

{¶159} Appellant claims in this assignment of error that he adequately fulfilled his obligation to provide evidentiary support outside the record of his claimed constitutional violations, and, in spite of this, he was denied a hearing. As such, Appellant contends that the state postconviction process failed to provide him an adequate corrective process in violation of his due process and equal protection rights.

{¶160} In addition, Appellant contends that since his case concerns the death penalty, that the courts must afford him more "process," not less.

{¶161} Based on this Court's decision under Appellant's first assignment of error, this alleged error is moot.

{¶162} Appellant's third and final assignment of error asserts:

{¶163} "THE EFFECT OF THE CUMULATIVE ERROR DERIVED FROM APPELLANT'S SUBSTANTIVE CLAIMS MERIT REVERSAL OR REMAND FOR A NEW TRIAL AND SENTENCING HEARING OR AN ADEQUATE POSTCONVICTION PROCESS PURSUANT."

{¶164} Appellant contends that the multiple constitutional violations that he laid out in his first assignment of error require this Court, at a minimum, to reverse and

remand this matter for his re-sentencing. In support of this proposition, Appellant cites *State v. Garner* (1995), 74 Ohio St.3d 49, 656 N.E.2d 623, which acknowledged that:

{¶165} "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." Id. at 64.

{¶166} However, *Garner* is inapplicable to the instant cause since this Court has not identified multiple instances of harmless error. As such, this assignment of error lacks merit and is overruled.

{¶167} In conclusion, Appellant's first assignment of error is sustained in part, his second assignment of error is moot, and his third assignment of error is overruled. This cause is remanded to the trial court for an evidentiary hearing on the limited basis contained in this Court's Opinion.

Donofrio, J., concurs.

Vukovich, J., dissents in part; see dissenting in part opinion.

VUKOVICH, J., dissenting in part:

{168} As I would affirm the well reasoned judgment of the trial court, I respectfully dissent from that portion of the opinion of my colleagues that remands the case back to the trial court for an evidentiary hearing to determine whether appellant's trial counsel was ineffective as contemplated by *Wiggins v. Smith* (2003), 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471.

{169} Here, appellant had an extensive juvenile record including four counts of aggravated robbery (see ¶103 of majority opinion). That factor alone constitutes sufficient reasonableness to justify the tactical decision of trial counsel to present only positive testimony as one could conclude that an alternative tactic as now advocated by appellant could bring in such incendiary and negative factors to make a death sentence more likely.

{170} Accordingly, I cannot find fault or error in the conclusion of the trial court that "one can only speculate as to what effect, if any, negative evidence would have had in the jury's deliberations." (01/06/03 J.E. – Findings of Fact and Conclusions of Law, p. 2). When a reasonable basis for the decision of trial counsel is evident, that should be sufficient to negate any speculative assertion of an alternative tactic. Therefore, I would affirm the trial court's decision to summarily deny appellant's petition for post-conviction relief.