[Cite as *State v. Lang*, 2010-Ohio-3975.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

EDWARD LEE LANG, III

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2009 CA 00187

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 2006 CR 01824(A)
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 23, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Appellant Edward L. Lang III appeals from the decision of the Court of Common Pleas, Stark County, which denied his petition for post-conviction relief pertaining to his conviction and life sentence for the aggravated murder of Jaron Burditte and conviction and death sentence for the aggravated murder of Marnell Cheek. The relevant facts leading to this appeal are as follows.

{¶2} In 2006, appellant, age eighteen at the time, moved to Canton from Baltimore, Maryland, where he had lived almost all of his life. Once in Canton, he became acquainted with Antonio Walker. In October of that year, appellant and Walker discussed the possibility of robbing Jaron "C.J." Burditte, a participant in the local drug trade. Appellant and Walker decided to pull off the robbery by calling in a fake offer to buy crack cocaine from Burditte, and then coercing money from Burditte when he arrived in his vehicle.

{¶3} On October 22, 2006, appellant proceeded to make a cell phone call to Burditte, agreeing to pay $225 for a small quantity of crack cocaine. The two men arranged to meet on Sahara Avenue NE in Canton. Burditte, along with a female passenger, Marnell Cheek, then drove a Dodge Durango to that location, where appellant and Walker were waiting. Walker stayed outside Burditte's Durango, but appellant got into the back seat. Shortly thereafter, Walker heard two gunshots emanating from inside the vehicle.

{¶4} Appellant and Walker ran from the scene. The Durango proceeded through some yard areas, finally striking a parked Dodge Intrepid. An area resident heard some of the noise and went outside to check out what had happened. The

resident saw two individuals slumped inside the Durango with apparent gunshot wounds to the head. He quickly called 911.

{¶5} After an initial police investigation, the Stark County Coroner conducted autopsies and determined that the cause of death for both Burditte and Cheek was a single gunshot to each of their heads.

{¶6} After further investigation, the Canton Police arrested appellant. At the station, appellant waived his Miranda rights and admitted to participating in the robbery of Burditte. However, he denied being the shooter and instead stated that Walker used his gun to kill Burditte and Cheek, while he waited in a nearby car.

{¶7} On December 11, 2006, the Stark County Grand Jury indicted appellant on two counts of aggravated murder, with firearm and death penalty specifications, and one count of aggravated robbery with a firearm specification. Appellant was charged alternatively as the principal offender and as the accomplice. Appellant pled not guilty to all charges and specifications. The matter proceeded to a jury trial commencing July 11, 2007.

{¶8} The jury thereafter found Lang guilty as charged, and, as part of its verdict, found that appellant was the principal offender in the two deaths.

{¶9} A separate sentencing/mitigation hearing was held subsequently. Among other things, the jury heard evidence, chiefly from appellant's mother and half-sister, about appellant's difficult and dysfunctional childhood. At the conclusion of the sentencing hearing, the jury recommended a life sentence of imprisonment without the possibility of parole for the one aggravated murder conviction (the Jaron Burditte

killing), but a sentence of death for the other aggravated murder conviction (the Marnell Cheek killing).

{¶10} The trial court then independently reviewed the evidence of the aggravating circumstances and the mitigating factors and found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. Accordingly, the court imposed a sentence of death upon appellant for the aggravated murder of Marnell Cheek. The court also imposed the mandatory three-year term of actual incarceration for the three firearm specifications, but merged them into one for purposes of sentencing, and imposed it consecutively with the death sentence. The court also sentenced appellant to a term of life imprisonment without eligibility for parole for the aggravated murder of Jaron Burditte, as well as the maximum ten-year prison term for the aggravated robbery conviction, imposing these also consecutively with each other and with appellant's death sentence.

{¶11} Appellant thereafter filed a direct appeal of his convictions and death sentence to the Ohio Supreme Court. That appeal is pending as of the date of this opinion. See *State v. Lang,* Supreme App. No. 2007-1741.

{¶12} In the meantime, on May 15, 2008, appellant filed a post-conviction petition in the trial court, pursuant to R.C. 2953.21. The majority of his claims challenged the effectiveness of trial counsel in the mitigation phase and the constitutionality of the PCR statute, particularly as it relates to discovery. The State filed a response, a motion to dismiss, and a motion for summary judgment. On June 15, 2009, the trial court issued a detailed 31-page judgment entry, sustaining the State's motion to dismiss and granting summary judgment in favor of the State of Ohio.

The court also denied appellant's request for funds for a neuropsychological evaluation.

{¶13} Appellant filed a notice of appeal on July 15, 2009, and herein raises the following two Assignments of Error:

{¶14} "I. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT DENIED HIM ESSENTIAL MECHANISMS FOR OFF-RECORD FACT DEVELOPMENT DESPITE SUFFICIENT OPERATIVE FACTS PRESENTED BY APPELLANT TO JUSTIFY HIS REQUESTS TO FURTHER DEVELOP THE FACTUAL BASIS FOR HIS CLAIMS.

{¶15} "II. THE TRIAL COURT ERRED IN DISMISSING LANG'S POST-CONVICTION PETITION WHEN HE PRESENTED SUFFICIENT OPERATIVE FACTS TO MERIT RELIEF OR, AT A MINIMUM, AN EVIDENTIARY HEARING."

I.

{¶16} In his First Assignment of Error, appellant contends the trial court violated his due process rights by preventing him from developing facts for his claim during the post-conviction process. We disagree.

Appellant's Post-Conviction Request for a Neuropsychological Examination

{¶17} In the case sub judice, appellant filed a motion for appropriation of funds, referencing therein a recommendation from Dr. Bob Stinson, who had conducted an evaluation, that appellant receive a neuropsychological examination. Dr. Stinson's review indicated that appellant has a history of emotional dysregulation, poor impulse control, low frustration tolerance, limited problem solving abilities, poor judgment, violence and aggression, and "strong indications of deficits in executive functioning

generally." Motion for Appropriation of Funds at 5. Furthermore, Dr. Stinson noted that "there is strong evidence of neuropsychological deficits in Edward's case. *** It would be important to have Edward evaluated by specialists in the field of neurology, neurophysiology, and neuropsychology to determine the existence of brain dysfunction and/or neuropsychological deficits that would be consistent with a learning disorder, a cognitive disorder, an impulse control disorder, a neurological or neuropsychological disorder, and/or another mental illness or mental defect." Id. at 3-4. In addition, Dr. Thomas Boyd, an expert neuropsychologist, concurred with Dr. Stinson's recommendation.

{¶18} "A petitioner in a postconviction proceeding only possesses the rights given him by statute." *State v. Bryan*, Cuyahoga App.No. 93038, 2010-Ohio-2088, ¶ 48, (citations omitted). We note R.C. 2953.21 itself does not specifically provide for a right to funding or the appointment of an expert witness in post-conviction petition proceedings. "Thus, it is not error for a trial court to deny a defendant's request for funds for expert witnesses in support of his petition for postconviction relief." *State v. Madison*, Franklin App.No. 08AP-246, 2008-Ohio-5223, ¶ 16, citing *State v. Conway*, Franklin App. No. 05AP-550, 2006-Ohio-6219, ¶ 15. We recognize the United States Supreme Court has potentially recognized a narrow exception to this funding rule where a capital defendant claims mental retardation. See *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S.Ct. 2242. However, appellant herein has not specifically raised such a claim.

{¶19} Upon review, we hold the trial court did not err in denying appellant's request for expert assistance and examination funding.

Appellant's Post-Conviction Request for Discovery

{¶20} As noted by this Court in *State v. Sherman* (Oct. 30, 2000), Licking App. No. 00CA39, 2000 WL 1634067, a petition for post-conviction relief is a civil proceeding. See, also, *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49. However, the procedure to be followed in ruling on such a petition is established by R.C. 2953.21, and the power to conduct and compel discovery under the Civil Rules is not included within the trial court's statutorily defined authority in this realm. See *State v. Lundgren* (Dec. 18, 1998), Lake App. No. 97-L-110, quoting *State v. Lott* (Nov. 3, 1994), Cuyahoga App.Nos. 66388, 66389, 66390; *State v. Muff,* Perry App. No. 06-CA-13, 2006-Ohio-6215, ¶ 21.

{¶21} Thus, petitioners do not have a right to discovery in PCR proceedings, even in death penalty cases, and we find no merit in appellant's claim that he was erroneously denied post-conviction discovery in the case sub judice.

Appellant's Post-Conviction Request for an Evidentiary Hearing

{¶22} Appellant next challenges the trial court's decision to rule on his post-conviction petition without holding an evidentiary hearing.

{¶23} The Ohio Supreme Court has recognized: "In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing." *State v. Gondor*, 112 Ohio St.3d 377, 388, 860 N.E.2d 77, 2006-Ohio-6679, ¶ 51. Under R.C. 2953.21(E), when a person files an R.C. 2953.21 petition, the trial court must grant a hearing unless it determines that the petitioner is not entitled to relief. To make that determination, the court must consider the petition, supporting affidavits, and files and records, including, but not limited to, the indictment, journal entries, clerk's

records, and transcript of the proceedings. See R.C. 2953.21(C). Furthermore, " '*** when the trial court record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation. ***' " *State v. Radel*, Stark App.No. 2009-CA-00021, 2009-Ohio-3543, ¶ 17, quoting *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452 (citation omitted).

{¶24} Nonetheless, a petition for postconviction relief does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. *State v. Wilhelm*, Knox App.No. 05-CA-31, 2006-Ohio-2450, ¶ 10, citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 110. A defendant is entitled to post-conviction relief only upon a showing of a violation of constitutional dimension that occurred at the time that the defendant was tried and convicted. *State v. Powell* (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13, 16. As an appellate court reviewing a trial court's decision in regard to the "gatekeeping" function in this context, we apply an abuse-of-discretion standard. See *Gondor*, supra, at ¶ 52, citing *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905. Accord *State v. Scott*, Stark App.No. 2006CA00090, 2006-Ohio-4694, ¶ 34. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶25} Appellant's PCR petition included, inter alia, the following documentation: (1) the trial court's order for release of records from the Baltimore Department of Social Services, dated June 13, 2007 (about one month before trial); (2) affidavit of Tracie Carter (appellant's mother); (3) affidavit of Dorian Hall, LSW, a mitigation specialist for

the Ohio Public Defender (4) affidavit of Abigail Duncan, LCPC, one of appellant's former counselors; (5) affidavit and curriculum vitae of Dr. Bob Stinson, a psychologist; (6) a 2002 letter from Ms. Duncan; (7) memoranda and reports from the Maryland Child Welfare Services; (8) Baltimore school records; (9) hospital records; (10) a 2003 psychological diagnosis letter from Deborah H. Drummer, Ph.D.; (11) additional evaluation notes from Maryland; (12) various SSI records; (13) the 1999 Report of the Ohio Commission on Racial Fairness; and (14) additional notes and scientific articles.

{¶26} Appellant maintains he presented sufficient operative facts dehors the record entitling him to an evidentiary hearing. However, as we will more thoroughly discuss in addressing appellant's Second Assignment of Error, infra, the judgment entry sub judice reveals the trial court fully reviewed and analyzed the dehors facts suggested by appellant and determined they were cumulative, alternative to evidence presented at trial, lacking in objectivity, or speculative, and that their presentation would have made no difference in the outcome of the trial. As the Ohio Supreme Court noted in *Calhoun*, supra, the trial court has the discretion to review the credibility and weight of any supporting evidentiary materials: "In reviewing a petition for postconviction relief filed pursuant to R.C. 2953.21, 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." Id., paragraph one of the syllabus.

{¶27} Upon review, we are unpersuaded that the trial court abused its discretion in declining to allow a postconviction evidentiary hearing in this matter.

{¶28} Appellant's First Assignment of Error is therefore overruled.

II.

{¶29} In his Second Assignment of Error, appellant argues the trial court erred in denying his PCR petition. We disagree.

Standard of Review

{¶30} It is well settled that a petition for postconviction relief brought pursuant to R.C. 2953.21 will be granted only where the denial or infringement of constitutional rights is so substantial as to render the judgment void or voidable. *State v. Jackson*, Delaware App.Nos. 04CA-A-11-078, 04CA-A-11-079, 2005-Ohio-5173, ¶ 13, citing *State v. Walden* (1984), 19 Ohio App.3d 141, 146, 483 N.E.2d 859. In reviewing a trial court's denial of appellant's petition for postconviction relief, absent a showing of abuse of discretion, we will not overrule the trial court's finding if it is supported by competent and credible evidence. *State v. Delgado* (May 14, 1998), Cuyahoga App. No. 72288, citing *State v. Mitchell* (1988), 53 Ohio App.3d 117, 559 N.E.2d 1370. An abuse of discretion connotes more than an error of law or judgment, it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore*, supra.

{¶31} Our standard of review for ineffective assistance claims is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Ohio adopted this standard in the case of *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel. First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and was violative of any of his essential duties

to the client. If we find ineffective assistance of counsel, we must then determine whether or not the defense was actually prejudiced by counsel's ineffectiveness such that the reliability of the outcome of the trial is suspect. This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the trial would have been different. *Id.*

{¶32} As an initial matter, we note that shortly after appellant was indicted in December 2006, death penalty-qualified counsel was retained and/or appointed to represent him. That same month, counsel filed a request for discovery and a motion for funds to hire a defense investigator, a psychological expert and a mitigation expert. According to the court's docket, before the month of January 2007 was over, defense counsel had filed thirty seven motions on appellant's behalf. In all, counsel filed over eighty-two motions, including a motion to permit defense to admit all relevant mitigating evidence.

Mitigation Evidence Issues

{¶33} The focus of appellant's present argument pertains to his representation at his mitigation hearing. At that time, appellant's counsel called two witnesses, appellant's mother and half-sister, to relate the harsh circumstances of appellant's childhood. Appellant's mother, Tracie Carter, first described how she met Edward "Coffee" Lang, Sr., appellant's father, who was her landlord when she was a 19-year-old single mother of a two-year-old. Unable to afford the rent, she exchanged sex with Lang, Sr. (hereinafter "Coffee") for being able to stay in her apartment. According to Carter, she maintained a relationship with Coffee, even though he was physically abusive to her and abused heroin, cocaine, and alcohol. Carter, as well as his half-

sister Yahnena, proceeded at the mitigation hearing to portray appellant's abuse-filled childhood. See Mitig. Tr. at 46-78.

{¶34} As part of his PCR petition, appellant provided additional documentation of his troubled life. Evidence was supplied that Coffee was around appellant for part of his toddler years, before Coffee went to prison. But during this period of time, according to a 1991 report, Coffee sexually abused appellant. PC Exh. 14, at 8-10. During that same time period, appellant and his siblings also "witnessed Coffee tying their mother up [for] 3-4 days, ordering her to perform fellatio, stabbing her in [the] chest with a pair of scissors, shooting her in the back of her leg, shooting windows out, cursing at her, beating her up, and attempting to set the house on fire with them in it." PC Exh. 18, at 18.1. In addition, the children reportedly had "witnessed Coffee raping [their mother] on several occasions." PC Exh. 14, at 5.

{¶35} Furthermore, appellant's older brother began acting out towards his siblings and mother. When the brother was 6 years old, he reportedly attempted to smother his mother to death (PC Exh. 18) and "brutally beat his siblings" (PC Exh. 14), including pushing his half-sister Yahnena Robinson down the stairs and hitting appellant (then 3 years old) in the head with a baseball bat. PC Exh. 18. He also reportedly acted out sexually towards appellant and Yahnena, ordering them to perform oral sex on him. Id., at 18-19; PC Exh. 14. The brother was eventually admitted to a psychiatric hospital. Id.

{¶36} This phase of appellant's childhood ended when he was about ten years old. Because of court-ordered parenting time, Coffee took appellant from Maryland at that time on what was supposed to be a two-week visitation in Delaware. However,

Coffee did not return appellant to his mother, Tracie Carter, for nearly two years. During the time appellant lived with his father, he endured physical, sexual, and emotional abuse. PC Exh. 6, 38. Appellant was forced to stay in his bedroom for days at a time, and he was repeatedly beaten with "anything in reach." PC Exh. 6, at 17. In addition to enduring the physical abuse, appellant was falsely told by Coffee that his mother was dead. PC Exh. 6, at 21. Appellant, at this young age, began using drugs. Id. at 38.

{¶37} When he was reunited with his mother, appellant was wearing the same clothes that he had been wearing when he left two years before. Mitig. Tr. at 62. Tracie Carter described him at that time as "fragile" and undernourished. Id. He was covered in bruises, had a cigarette burn on his back, and he had a gash on his hand. Id. at 63. Emotionally, he was withdrawn, moody, and defiant. PC Exh. 6, at 21.

{¶38} The years that followed appellant's stay with his father included numerous psychiatric hospitalizations and more than one suicide attempt. Id. at p. 22, 25. During those years, appellant described to his counselors the abuse he suffered at the hands of his father, and he acknowledged anger and hatred toward him. Id. See also PC Exh. 38. Appellant's counselors observed his ongoing fear that his mother would abandon him, and they observed his inability to restrain himself from "'acting first' as a defense." PC Exh. 6, p.23. See also PC Exh. 38.

{¶39} Apparently, appellant did experience frequent periods of abandonment by his mother. Appellant's psychiatric therapist, Abigail Duncan, who worked with appellant when he was approximately fourteen years old, recalled in her affidavit a time when Tracie Carter moved out of the family home with her boyfriend and appellant's

youngest brother. PC Exh. 5. She left appellant alone with his older brother and his sister Yahnena, "and would return just to check on them." Id. See also PC Exh. 10, 1/14/03 rpt. According to Duncan, appellant's life lacked structure and consistent treatment. PC Exh. 5.

{¶40} Despite this, appellant later performed "well in school… when he was living in a group home receiving proper medication for his mood disorder." See PC Exh. 10. When he received needed psychotropic medication, "[h]e attended all his classes and performed above average academically." Id.,1/14/03 report. But as soon as "[h]e ceased taking his medication, his emotional and behavioral status quickly deteriorated." Id.

{¶41} In September 2004, appellant completed a residential treatment program at Woodbourne Residential Treatment Center in Maryland. He was returned to his mother's care with instructions that he needed to deal with the trauma from his early childhood, but he never really did. Furthermore, appellant never finished high school, but he got a job with the census department. Mitig. Tr. at. 76. He moved in with his baby daughter and the child's mother. Id. at 75-76. But that potential for stability didn't last long, as appellant left the area he'd known his whole life and moved to Ohio.

{¶42} Appellant's chief challenge under the *Strickland* standard for allegations of ineffective assistance is that his defense counsel allegedly waited until the last minute to gather mitigating evidence; thus, "compelling evidence was not available at the time of his mitigation hearing." Appellant's Brief at 11. Appellant points to an order from the trial court, filed June 13, 2007, ordering release of records from Baltimore Social Services as proof of counsel's delay in seeking mitigation evidence. Appellant also

faults the allegedly brief time trial counsel spent with his mother, Tracie Carter, as another example of failing to fully investigate his background. As evidence dehors the record to document these assertions, appellant submitted the affidavit of Dorian Hall, LSW, a mitigation specialist employed by the Ohio Public Defender. In support, appellant directs us to *Rompilla v. Beard* (2005), 545 U.S. 374, 387, wherein the United States Supreme Court, quoting the 1982 version of the ABA Standards for Criminal Justice, recognized: "It is the duty of the lawyer 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 in the event of conviction."

{¶43} Nonetheless, our review of the additional documentation at issue leads us to conclude that the impact thereof is largely speculative. Appellant's trial counsel had already presented mitigation evidence about appellant's youth and the horrors of his life growing up. The record further does little to persuasively show a lack of investigation by trial counsel of appellant's background. Regarding the release of records order, few conclusions can be reached therefrom as to what records were provided in 2007 based on appellant's authorization and what value, if any, the records provided to appellant's mitigation team. Finally, in regard to the Ohio Public Defender affidavit, the evidence therein was given minimal weight because of the interest of the employee in the outcome of the litigation and because she had no direct knowledge of the conversations between Tracie Carter and the mitigation attorneys. See Judgment Entry at 13-14.

{¶44} Furthermore, as the State correctly notes, appellant's mother and half-sister presented a detailed picture of his youth and development. They testified to his

various excursions into the mental health system and his treatment at the hands of his biological father. Appellant does not deny that his trial counsel interviewed various members of his family. Although Tracie Carter was able to recall that appellant had been in a psychiatric facility more than twenty-eight times, appellant points out that his mother was unable to articulate the identity of his mental health disorders, other than in lay terms, and he calls into question trial counsel's decision not to utilize a psychologist or mental health counselor at mitigation.

{¶45} However, we remain mindful that "[a] defendant is entitled to a fair trial but not a perfect one." *State v. Bleigh*, Delaware App.No. 09-CAA-03-0031, 2010-Ohio-1182, ¶133, quoting *Bruton v. United States* (1968), 391 U.S. 123, 135-136, 88 S.Ct. 1620, 20 L.Ed.2d 476. Likewise, trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie* (1998), 81 Ohio St.3d 673, 675, 693 N.E.2d 267. In the case sub judice, the trial court determined that the strategy of trial counsel was to treat appellant's mother as a sympathetic character and not to portray her in a negative light, a strategy that easily could have been derailed with excessive information about her role in appellant's unfortunate upbringing. It is also not unreasonable to surmise that additional records may have also damaged appellant himself. As the trial court aptly noted, trial counsel's approach at mitigation was to "humanize" appellant's difficulties, rather than present them in detailed scientific terms. Judgment Entry at 24, 29.. Trial counsel thus developed a mitigation strategy which allowed the jury to adequately weigh the mitigation evidence against the evidence of dual murder produced at the guilt phase of the trial. We reiterate that the Ohio Supreme Court has recognized the effect of

hindsight and has warned against second-guessing as to counsel's assistance after a conviction. See *State v. Branco* (June 8, 1992), Stark App.No. CA-8618, 1992 WL 147437, citing *Strickland*, supra, at 689.

{¶46} Furthermore, considering the second prong of *Strickland*, we note that after reviewing the evidence presented by appellant in his PCR appendix, the trial court consistently reached the conclusion throughout its written decision that even if more evidence would have been presented at mitigation, the outcome would not have been different. We are unable to conclude the trial court's conclusions in this regard were unreasonable, arbitrary, or unconscionable. The record clearly indicates that appellant's mental illness and childhood were presented to the jury through the mitigation witnesses, which the jury most likely credited given its recommendation of a life sentence for the Burditte killing. We are unpersuaded that additional and more detailed evidence about appellant's upbringing and mental health issues would have created a reasonable probability that the jury would have recommended a life sentence, rather than the death penalty, for the Marnell Cheek killing.

Jury Pool Issue

{¶47} Appellant secondly directs his claim of ineffective assistance to the entire capital trial and alleges ineffectiveness for failing to object to use of voter registration to select the jury pool. As the trial court found, however, this claim is barred by the doctrine of res judicata. Appellant counters that the trial court erred in its finding of res judicata because he presented evidence dehors the record, namely, the Report of the Ohio Commission on Racial Fairness commissioned by the Supreme Court of Ohio. See PCR Exh. 32. We note this 1999 report was prepared well before appellant's

aggravated murder trial, and appellant points to no part of the report that would have made a difference in his case. Moreover, the Ohio Supreme Court has held that use of voter registration rolls to select the petit jury pool is not unconstitutional. See, e.g. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 103-106.

Cumulative Error Claim

{¶48} Appellant lastly maintains that cumulative errors during the trial resulted in reversible error. Appellant's Brief at 20. The doctrine of cumulative error provides that a conviction will be reversed where the cumulative effect of evidentiary 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 singularly constitute cause for reversal. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus. Appellant does not clearly tie the doctrine to his ineffective assistance claims in this instance; however, notwithstanding this Court's past reluctance to embrace cumulative error as grounds for reversal (see *State v. Mascarella* (July 6, 1995), Tuscarawas App.No. 93AP100075), we find reversible error has not been demonstrated regarding appellant's mitigation hearing. See, also, *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (holding that the doctrine of cumulative error by which a conviction will be reversed does not apply absent multiple instances of harmless error).

Conclusion

{¶49} Upon review of the record and judgment entry in the case sub judice, we hold the trial court did not abuse its discretion in denying appellant's petition for post-conviction relief.

{¶50} Appellant's Second Assignment of Error is therefore overruled.

{¶51} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

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JUDGES

JWW/d 0804

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
EDWARD LEE LANG, III	:	
Defendant-Appellant	:	Case No. 2009 CA 00187

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES