

HEAR



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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

2015 SEP 24 P 3:53

THE STATE OF OHIO  
Plaintiff

DELANO HALE  
Defendant

CLERK OF COURTS  
CUYAHOGA COUNTY

Case No: CR-04-454857-A

Judge: DICK AMBROSE

INDICT: 2903.01 AGGRAVATED MURDER /FRM /FMS  
2903.01 AGGRAVATED MURDER /FRM /FMS  
2911.01 AGGRAVATED ROBBERY /FRM  
ADDITIONAL COUNTS...

**JOURNAL ENTRY**

FINDINGS OF FACT AND CONCLUSIONS OF LAW.  
ORDER SEE JOURNAL.

09/24/2015  
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Judge Signature	Date

HEAR  
09/24/2015

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO  
CRIMINAL DIVISION

STATE OF OHIO	)	CASE NO. CR-04-454857
	)	
Plaintiff-Respondent	)	
	)	Judge Dick Ambrose
-vs-	)	
	)	
DELANO HALE	)	<u>FINDINGS OF FACT AND</u>
	)	<u>CONCLUSIONS OF LAW</u>
Defendant-Petitioner	)	

Dick Ambrose, J.:

{¶1} On June 7, 2005, a jury convicted Defendant Delano Hale of various felonies, including two counts of aggravated murder. On July 18, 2005, following the jury's recommendation, this Court sentenced the Defendant to death. On March 6, 2007, Defendant filed a Post-Conviction Petition ("Defendant's Petition") pursuant to R.C. 2953.21, which states, in pertinent part, as follows:

{¶2} "(A)(1)(a) Any person who has been convicted of a criminal offense \* \* \* and who claims 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 \* \* \* may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief."

{¶3} When the death penalty is at issue, the petition may request relief related to "the conviction of aggravated murder or the specification of an aggravating circumstance or

the sentence of death." R.C. 2953.21(A)(3). Furthermore, it is within the Court's discretion whether to grant a hearing regarding the petition. In exercising its discretion, the Court must abide by the following guidelines:

{14} "Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal."

{15} Defendant's Petition asks the Court to void his convictions, grant him a new trial, void his sentence, and grant him a new sentencing hearing. Overall, Defendant's Petition asserts 19 Grounds for Relief. To assist the reader and to aid in the understanding of its analysis, the Court addresses Defendant's arguments, where applicable, in paired groups as follows:

- I. That he was denied the effective assistance of counsel in that his attorneys failed to thoroughly investigate and present mitigating evidence, specifically, the testimony of an institutional violence expert regarding the effect that prison has on a man;
- II. That he was denied the effective assistance of counsel in that his attorneys failed to cross-examine his sister regarding threats made to her by the prosecutor to persuade her to testify on behalf of the state;

**III. That he was denied the effective assistance of counsel in that his attorneys failed to procure a crime scene expert at trial to support his case for self-defense;**

{¶6} "To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v.*

*Washington*, 466 U.S. 668 (1984) \* \* \*. In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if the defendant fails to prove the second prong of prejudicial effect. *State v. Bradley*, 42 Ohio St.3d 136 (1989). 'The object of an ineffectiveness claim is not to grade counsel's performance.' *Id.* at 143." *State v. Driggins*, 8<sup>th</sup> Dist. No. 98073, 2012-Ohio-5287, ¶125.

{¶7} "The law-of-the-case doctrine provides that the 'decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, ¶27 (citation omitted). Additionally, "[u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on appeal from that judgment." *Id.* at ¶28 (citations and emphasis omitted).

{¶8} Furthermore, the 8<sup>th</sup> District Court of Appeals has held that "[w]hen [a defendant's] ineffective assistance of counsel claim does not rely on evidence outside of the record, the claim should be filed on direct appeal or else it is barred under the doctrine of res judicata." *In re T.L.*, 8<sup>th</sup> Dist. No.100328, 2014-Ohio-1840, ¶16. An exception to this rule applies when trial counsel and appellate counsel are the same, due to an inherent conflict of interest. *See, State v. Lentz*, 70 Ohio St.3d 527 (1994).

{¶9} In the case at hand, Defendant filed a direct appeal in the Ohio Supreme Court on September 9, 2005. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426. Defendant filed this post-conviction relief petition on March 6, 2007. Defendant's trial counsel (attorneys G. Kenneth Mullin, David T. Magee, and Jillian S. Davis) were not the same as Defendant's appellate counsel (attorneys Timothy Young, Kelly L. Culshaw, Ruth L. Tkacz, and Kimberly S. Rigby). In Defendant's direct appeal, his 20<sup>th</sup> proposition of law for review alleged ineffective assistance of trial counsel in four categories: voir dire, guilt phase, penalty phase, and failures to object. The Ohio Supreme Court rejected all of Defendant's arguments relating to the effectiveness of trial counsel. *Id.* at ¶¶204-234.

{¶10} In many of the numerous Grounds for Relief suggesting ineffective assistance of counsel in Defendant's post-conviction relief petition, his specific arguments were, or could have been, addressed in his direct appeal. For example, Defendant argued in his direct appeal – as he argues in this post-conviction petition – that trial counsel was ineffective for failing to offer the testimony of a crime scene expert. The Ohio Supreme Court summarily rejected this argument as "conjectural" and "speculative" in Defendant's direct appeal. *Id.* at ¶¶221; 232. Accordingly, the Court finds that the law-of-the-case and res judicata bar Defendant from raising these arguments again.

**IV. That the Court failed to permit defense counsel to participate in the in camera inspection of witness statements under Crim.R. 16(B)(1)(g):**

{¶11} Defendant argues that Cleveland Police Detective Sergeant James Baird's written report was reviewed in camera by the Court without his counsel's participation and that this error violated his constitutional rights to due process and confrontation. Res judicata operates to bar this argument, because, in Defendant's direct appeal, the Ohio Supreme Court found that Defendant failed to preserve this issue in the trial court, thus waiving it. See *Hale, supra*, at ¶¶94-97. The Court further found no plain error, "because Hale 'has failed to identify any inconsistencies [in witness statements] that would warrant reversal.'" *Id.*, at ¶97.

**V. That he was denied the effective assistance of counsel in that his attorneys failed to present mitigating evidence in the form of testimony from witness Steven Key as evidence of facilitation and/or provocation occasioned by the victim;**

**VI. That he was denied the effective assistance of counsel in that his attorneys failed to present the testimony of witness Steven Key as evidence of provocation occasioned by the victim to bolster Defendant's statement to the police;**

{¶12} Defendant's arguments regarding mitigating evidence of provocation are also barred by the doctrines of res judicata and the law-of-the-case, as they were raised and ruled upon in his direct appeal. "Hale's claims of victim inducement and provocation are both based on his allegation that [the victim] sexually assaulted him. That allegation, we find, is not worthy of belief. Hale's version of the shooting was both internally inconsistent and inconsistent with the evidence at trial." *Id.*, at ¶266.

**VII. That he was denied the effective assistance of counsel in that his attorneys failed to present mitigating expert evidence regarding Defendant's history of substance abuse;**

{¶13} In Defendant's direct appeal, the Ohio Supreme Court evaluated Defendant's mitigation evidence, which included expert and lay testimony regarding Defendant's history, character, and background. *Id.*, at ¶¶249-266. Specifically, forensic and clinical psychologist Dr. John Fabian provided expert testimony that Defendant's mother and father both had a "drinking problem"; that Defendant was exposed to "substance abuse" while growing up; and that Defendant uses "substance abuse" to cope with "poor judgment, difficulty tolerating stress, poor impulse control, and a tendency to misperceive events." *Id.* at ¶260. In analyzing these mitigating factors on direct appeal, the Supreme Court found that the "evidence easily supports Hale's conviction" and sentence. *Id.* at ¶248. "Hale's history, character, and background have some mitigating weight. \* \* \* But we have seldom given decisive weight to this factor." *Id.* at ¶265.

**VIII. That he was denied the effective assistance of counsel in that his attorneys failed to present evidence of the arbitrary and discriminatory manner in which the death penalty is applied in Cuyahoga County, Ohio;**

**IX. That he was denied the effective assistance of counsel in that his attorneys failed to present testimony of an institutional violence expert in support of Defendant's affirmative defense of self-defense;**

{¶14} Defendant has the burden to submit evidentiary documents in support of his substantive grounds for relief in his post-conviction petition. However, "the evidence submitted must not be cumulative of or alternative to evidence presented at trial." *State v. Brusiter*, 8<sup>th</sup> Dist. No. 101908, 2015-Ohio-1549, ¶11. Additionally, "the evidence dehors the record must not be evidence which was in existence and available for use at

the time of trial and which could and should have been submitted at trial if the defendant wished to use it." *Id.* (Citations omitted.)

{¶15} In support of his petition for post-conviction relief, Defendant submitted the affidavit of Terri L. Wilson from the Ohio Public Defender's Office. Attached to the affidavit is statistical information from an ongoing study Wilson conducted tracking pending capital indictments throughout the State of Ohio on a county-by-county basis. The information spanned from 1999 to 2005. Other than the possible exception of the 2005 information, this evidence was in existence and available for use at Defendant's trial and in his direct appeal.

{¶16} In support of his petition, Defendant also submitted the affidavit of Clemens Bartollas, PhD., who is a professor of criminology with a specialty in institutional violence. Dr. Bartollas opined that the "possibility of [prison] trauma would be a factor to be considered in the mitigation of [Defendant's] death sentence."

{¶17} In 2003, Defendant was released from prison after serving a 12-year sentence. *Hale, supra*, at ¶2. Defendant committed the offenses at issue in this case on June 21, 2004. Dr. Bartollas' affidavit referred to documents generated between 1993 and 2004 concerning Defendant's police, prison, and parole records. Additionally, Dr. Bartollas' affidavit referred to professional writings and scholarly articles authored between 1974 and 2002. In his affidavit, Dr. Bartollas states as follows: "The information contained in this affidavit, as well as the records reviewed to reach my conclusions, were available at the time of [Defendant's] trial. I would have testified to [the] contents of this affidavit, had I been retained by the trial attorneys in this case."



{¶18} The Court finds that this evidence was in existence and available for use at the time of Defendant's trial. This issue should have been raised in Defendant's direct appeal and is not properly reviewed in conjunction with a petition for post-conviction relief.

{¶19} Additionally, counsel may strategically choose not to "educate" the Court with evidence of a defendant's complete criminal history as it may do more harm than good. Decisions such as this, touching upon the trial strategy of defense counsel, do not give rise to a claim for ineffective assistance of counsel. *See, State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315 (claims of ineffective assistance involving strategic choices of counsel that fall within the realm of trial strategy and tactics will not ordinarily be disturbed on review).

**X. That his conviction and sentence are void or voidable because his death sentence was disproportionate to similarly situated capital defendants in Cuyahoga County.**

{¶20} In Hale's direct appeal, the Ohio Supreme Court conducted an independent sentence review under R.C. 2929.05. *See, State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶¶246-274.

{¶21} In conducting an appropriateness and proportionality review of a death sentence under R.C. 2929.05(A), the court "must review whether the evidence supports the jury's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether [the] death sentence is proportionate to those affirmed in similar cases." *State v. Pickens*, 141 Ohio St.3d 462, 2014-Ohio-5445, ¶235.

{¶22} In *Hale*, the Ohio Supreme Court found the following: "Hale's mitigation adds up to little. We find that the robbery-murder aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt. The death sentence is also proportionate to death sentences we have approved in robbery-murder cases." *Hale*, at ¶¶277-278.

{¶23} In his petition for post-conviction relief, Defendant claims that his "rights were violated as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and §§ 1, 2, 5, 9, 10, 16, and 20 of Article I of the Ohio [Constitution]." In *State v. Perry*, 10 Ohio St.2d 175 (1967), the Ohio Supreme Court held the following in its syllabus:

{¶24} "Constitutional issues cannot be considered in postconviction proceedings under Section 2953.21 \* \* \* where they have already been or could have been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him. The Supreme Court of Ohio will apply the doctrine of res judicata in determining whether postconviction relief should be given under Section 2953.21 \* \* \*. Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment."

**XI. That his conviction and sentence are void or voidable because the death penalty statute permits the imposition of capital punishment in an arbitrary, capricious manner due to the uncontrolled discretion afforded elected county prosecutors in determining when to seek the death penalty.**

{¶25} In addition to being barred by the doctrine of res judicata, because the issue could have been raised on direct appeal, the proposition that "prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies \* \* \*" has been rejected by the United States Supreme Court. *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (J. White, concurring) ("it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts"). *See, also, State v. Jenkins*, 15 Ohio St.3d 164 (1984).

**XII. That his conviction and sentence are void or voidable because the statutory proportionality reporting system for death penalty cases in Ohio is inaccurately and ineffectively processed in Cuyahoga County, Ohio.**

{¶26} Defendant argues that "[t]he failure of the Cuyahoga County courts to accurately comply with O.R.C. §§ 2929.021 and 2929.03 violates the Due Process and Equal Protection rights of all capital defendants in the County, including Hale." However, similar to the court's opinion in *State v. Foust*, 8<sup>th</sup> Dist. No. 83771, 2005-Ohio-5331, ¶37, this Court finds that Defendant "failed to show any specific defect in the statistical reporting performed by the Clerk of Courts of Cuyahoga County, nor has he shown any actual prejudice to him." Furthermore, Defendant's arguments allege Constitutional violations and are barred at this post-conviction relief stage by the doctrine of res judicata. *See, Perry, supra*.

**XIII. That his conviction and sentence are void or voidable because the death penalty as administered by lethal injection in Ohio violates the defendant's rights to protection from cruel and unusual punishment and to due process of law;**

{¶27} In his reply brief, filed September 23, 2011, Hale withdrew this ground for relief.

**XIV. That his conviction and sentence are void or voidable because Ohio's post-conviction procedures do not provide an adequate corrective process, in violation of the U.S. and Ohio Constitutions;**

{¶28} Specifically, Defendant argues that "indigent petitioners, like [himself], face the insurmountable burden of collecting evidence in support of valid claims prior to the filing of a petition without the means to collect information critical to their claims. All this must be done without the benefit of the discovery processes available to every other civil litigant. Without access to traditional civil tools of discovery, Ohio's post-conviction process imposes an impossible pleading standard on petitioners and is rendered meaningless."

{¶29} In *State v. Lewis*, 8<sup>th</sup> Dist. No. 73736, (Dec. 3, 1998), the Court held that "[i]f a trial court does not find substantive grounds for relief with [a post-conviction relief] petition, it need not grant discovery." Furthermore, the *Lewis* Court found Ohio's post-conviction relief process "constitutionally sound." *Id.*

**XV. That his conviction and sentence are void or voidable because he was denied the effective assistance of counsel during the mitigation phase in that his attorneys failed to present the testimony of a cultural expert in mitigation to explain Defendant's familial background, personal history and cultural experiences;**

{¶30} As stated, *supra*, in relation to post-conviction relief motions, "the evidence submitted must not be cumulative of or alternative to evidence presented at trial." *State v. Brusiter*, 8<sup>th</sup> Dist. No. 101908, 2015-Ohio-1549, ¶11.

{¶31} In Defendant's trial, he failed to ask the Court to appoint a cultural expert during mitigation; thus, this argument is waived. See, e.g., *O'Neill v. Crawford*, 132 Ohio St.3d 1472, 1475, 2012-Ohio-3223 (failure to raise an issue at the trial court level constitutes a waiver of that issue).

{¶32} The defense team used Dr. John Fabian, forensic and clinical psychologist, as its mitigation specialist. In addition to his other qualifications, Dr. Fabian testified that he worked on approximately 20 prior cases as a mitigation expert. Dr. Fabian's mitigation work on this case included interviews with Defendant and his siblings. Dr. Fabian also testified that he was aware of the family background of Defendant and found that Defendant had an unstable life style with a mother who was promiscuous, left her children unattended, and was involved in inappropriate relationships. Dr. Fabian testified that Defendant was a victim of sexual abuse as a child. He also testified about an incident where Defendant threatened his father with a knife during an argument between Defendant's mother and father. Dr. Fabian concluded that these various family background factors led to Defendant being drawn into a cycle of violence. Given Dr. Fabian's testimony, it is difficult to see how an additional mitigation expert, qualified as a "cultural" expert, would have presented any different testimony regarding Defendant's familial background, personal history, and cultural experiences.

**XVI. That his conviction and sentence are void or voidable because trial counsel failed to retain a neurologist or neuropsychiatrist to investigate whether a neurological defect might have affected Defendant's personality and/or behavior;**

{¶33} In the instant case, Defendant's mitigation expert agreed that Defendant had no mental illness or diminished capacity, and no evidence presented at trial indicated that Defendant suffered from a neurological deficit.

{¶34} Defendant submits with his petition for post-conviction relief an affidavit from Dorain L. Hall, who is a mitigation specialist and a licensed social worker. Hall states that Defendant's "potential neurological impairment caused by his substance abuse" was "mentioned but never fully addressed or explained during the sentencing phase of the trial." Hall concludes that, had this issue been "explored and explained, it would have humanized [Defendant] to the sentence and provided the sentence with a more complete portrait of [his] background \* \* \*."

{¶35} The Court finds that Defendant could have, but failed to, raise this issue in his direct appeal; therefore, it is barred by the doctrine of res judicata. Additionally, this evidence is based on speculation and conjecture. Nothing indicates that Defendant has or might have a neurological defect, and, as a result, Defendant fails to show prejudicial effect.

**XVII. That the death sentence imposed on the defendant is void or voidable because his attorneys failed to retain the assistance of a substance abuse expert to investigate, prepare and present mitigation evidence regarding the Defendant's history of substance abuse;**

{¶36} Dr. Fabian testified as to how substance abuse is a "risk factor" examined in mitigation during a capital case and he noted Defendant's drug use in his evaluation. Accordingly, the Court finds that the testimony of a substance abuse expert would have been cumulative of, or alternative to, the evidence presented at trial. See, *Brusiter*, *supra*, at ¶11.

**XVIII. That the death sentence imposed on the defendant is void or voidable because his attorneys failed to retain a qualified psychologist or social worker with training in grief/loss counseling to investigate how the loss of important influences in his life shaped the Defendant;**

{¶37} Dr. Fabian is a psychologist and as mentioned above, examined Defendant's background, experiences, and familial influences. There is no indication that the death of Defendant's mother affected him in a way that was not accounted for at trial by Defendant's retained mitigation expert.

**XIX. That the death sentence imposed on the defendant is void or voidable because the cumulative effects of the errors and omissions stated above prejudiced the defendant to the extent that he has been denied his rights under the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. and corresponding sections of the Ohio Constitution.**


{¶38} Inasmuch as this ground for relief alleges Constitutional violations, it is barred by the doctrine of res judicata. In addition, the Ohio Supreme Court rejected Defendant's cumulative error argument, finding that "of the alleged errors Hale cites, two were not errors at all, and the third was waived." *Hale, supra*, at ¶¶ 235-239. Nevertheless, in Defendant's post-conviction petition, none of his grounds for relief are meritorious and Defendant has failed to show that the cumulative effect of any of his allegations amounted to prejudicial error or deprived him of his right to a fair trial. See, e.g. *State v. DeMarco*, 31 Ohio St.3d 191, 196-197 (1987).

{¶39} Upon review of Defendant's Petition, the State's opposition, Defendant's Reply, supporting affidavits, and other documentary evidence, the Court finds that there are not substantive grounds for relief. Thus, Defendant is not entitled to a hearing. See, *State v. Kapper*, 5 Ohio St.3d 36, 38 (1983) ("a petition for post-conviction relief is subject to

dismissal without a hearing when the record \* \* \* indicates that the petitioner is not entitled to relief and that the petitioner failed to submit evidentiary documents containing sufficient operative facts to demonstrate" substantive grounds for relief); *State v. Jackson*, 64 Ohio St.2d 107, 111 (1980) ("[b]road assertions without a further demonstration of prejudice do not warrant a hearing for all post-conviction petitions").

Accordingly, Defendant's petition is dismissed.

9/23/2015  
Date

  
DICK AMBROSE, JUDGE  
COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO


Pursuant to Civ.R. 58(B), the Clerk of Courts is hereby ordered to send copies of the foregoing to the following parties and its date of entry upon the journal:

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PLAINTIFF – RESPONDENT

  
DICK AMBROSE, JUDGE