No. _____

In the Supreme Court of the United States

CLARENCE FRY,
Petitioner,

v.

STATE OF OHIO
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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The Supreme Court of Ohio

State of Ohio

v.

Clarence Fry

Case No. 2019-0616

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Summit County Court of Appeals; No. 28907)

Maureen O'Connor
Chief Justice

[Cite as *State v. Fry*, 2019-Ohio-958.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. CLARENCE FRY Appellant	C.A. No. 28907 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 05 08 3007

DECISION AND JOURNAL ENTRY

Dated: March 20, 2019

TEODOSIO, Judge.

{¶1} Appellant, Clarence Fry, appeals from an order denying his petition for post-conviction relief in the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} Mr. Fry admittedly stabbed his girlfriend four times, which resulted in her death. Following a jury trial, he was convicted of aggravated murder with two death specifications, aggravated murder, murder, and other felonies. The Supreme Court of Ohio affirmed his convictions and death sentence, but remanded the matter for the imposition of post-release control on several of the felonies. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 6.

{¶3} Mr. Fry also filed a petition for post-conviction relief in the trial court, which was denied. On appeal, this Court affirmed the trial court's judgment in part, but reversed in part, concluding that the court erred in finding Mr. Fry's twelfth ground for relief—i.e., his claim that he was denied his right to testify—was barred by the doctrine of res judicata. *State v. Fry*, 9th

Dist. Summit No. 26121, 2012-Ohio-2602, ¶ 38-39, 50. Although Mr. Fry had previously raised this issue in his direct appeal and the Supreme Court stated, "[n]othing in the record suggests that [Mr.] Fry wished to testify but was denied the opportunity to do so[,]" he now supported the claim in his petition with evidence dehors the record, specifically hand-written notes taken by his attorney. *Id.* at ¶ 38. This Court remanded the matter back to the trial court to consider the evidence presented as it relates to this claim. *Id.* at ¶ 39. Upon remand, the trial court held hearings on the matter on July 14, 2016, and December 7, 2016, and ultimately issued an order denying Mr. Fry's twelfth ground for relief.

{¶4} Mr. Fry now appeals from the order denying his petition for post-conviction relief and raises two assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR ONE

> APPELLANT FRY PROVED THAT HIS TRIAL COUNSEL UNCONSTITUTIONALLY DEPRIVED HIM OF THE RIGHT TO TESTIFY IN HIS OWN DEFENSE. ACCORDINGLY, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED FRY RELIEF ON HIS TWELFTH GROUND FOR RELIEF IN HIS POST-CONVICTION PETITION.

{¶5} In his first assignment of error, Mr. Fry argues that his trial counsel deprived him of his right to testify at trial and, therefore, the trial court erred, abused its discretion, and was biased against him in denying his twelfth ground for relief in his petition for post-conviction relief. We disagree.

{¶6} R.C. 2953.21(A)(1)(a) permits anyone convicted of a criminal offense "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" to file a petition for post-conviction relief, "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." R.C. 2953.21(A)(1)(a).

{¶7} This Court generally reviews a trial court's denial of a petition for post-conviction relief for an abuse of discretion. *State v. Childs*, 9th Dist. Summit No. 25448, 2011-Ohio-913, ¶ 9. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). When applying an abuse of discretion standard, a reviewing court is precluded from simply substituting its own judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶8} In Mr. Fry's twelfth ground for relief, he argued that his "convictions and death sentence are void or voidable because he was not allowed to testify at his capital trial." He claimed his counsel knew that he wanted to testify, but did not want him to testify, so they impermissibly waived that right on his behalf, in violation of his constitutional rights. Mr. Fry's other argument under this ground for relief—i.e., that the trial court erred in failing to inquire of him as to whether he was knowingly, intelligently, and voluntarily waiving his right to testify—has already been rejected by the Supreme Court of Ohio on appeal and will not be addressed further, as the Supreme Court's decision on that issue is the law of the case. *See Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, at ¶ 119-120, citing *State v. Bey*, 85 Ohio St.3d 487, 499 (1999) ("[A] trial court is not *required* to conduct an inquiry with the defendant concerning the decision whether to testify in his defense." (Emphasis sic.)). *See also State v. Stekelenburg*, 9th Dist. Summit No. 24825, 2010-Ohio-219, ¶ 5, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984) (The doctrine of law of the case "'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.'").

{¶9} Upon remand from this Court, the trial court held two hearings to address Mr. Fry's claim that he was denied his right to testify at trial by his counsel. At the first hearing, the court heard testimony from Mr. Fry as well as his two trial attorneys, Lawrence Whitney and Kerry O'Brien. At the second hearing, the court heard testimony from private investigator Thomas Fields as well as Mr. Fry's sister and brother. The trial court reviewed all of the evidence and ultimately found no merit in Mr. Fry's twelfth ground for relief.

{¶10} The trial court found the testimony of Mr. Whitney and Mr. O'Brien to be "extremely credible[,]" but found Mr. Fry's testimony to be "totally devoid of credibility and completely self-serving." The court determined that Mr. Whitney's testimony was consistent with Mr. Fry's demeanor and disinterest toward the end of the trial proceedings and into the mitigation phase. The court further determined that Mr. O'Brien's testimony contradicted Mr. Fry's testimony, establishing that counsel met with Mr. Fry periodically and was certain that Mr. Fry had decided to not testify on June 11, 2006, the day before the defense rested its case. As the trial court judge presiding over the evidentiary hearings was in the unique position of having also presided over the trial in this matter, she recalled in her order several instances of Mr. Fry being strong-willed and outspoken during the trial, which she noted belied his claim that he suddenly "choked" at trial or was somehow incapable of informing the court of his desire to testify: e.g., chuckling during the victim's six-year-old grandson's testimony about witnessing Mr. Fry enter the home with a knife and stab his grandmother; eating candy during the proceedings; admitting to making a threatening gesture to someone in the back of the courtroom; and being so vocally disruptive during sentencing that he had to be physically removed from the courtroom by the

Sheriff's deputies. The court further found the testimony of Mr. Fields, Mr. Fry's sister, and Mr. Fry's brother all to be "largely unhelpful" to Mr. Fry, and found no evidence that counsel prevented Mr. Fry from testifying at trial. The court found that the outspoken and strong-willed Mr. Fry said nothing when the defense rested at trial and, thus, a waiver of his right to testify was presumed.

{¶11} After reviewing the record in this case, we determine that the trial court's decision was supported by competent and credible evidence. Mr. Whitney served as lead counsel in Mr. Fry's case, and he testified at the evidentiary hearing as to his extensive knowledge and experience in handling numerous capital cases throughout his career. Mr. Whitney testified that both he and Mr. O'Brien spent time discussing with Mr. Fry the decision of whether to testify because "that's his decision, not my decision." He testified that his recommendation to Mr. Fry was for him to not testify at trial, and he provided several reasons supporting his recommendation.

{¶12} According to Mr. Whitney, he did not think Mr. Fry would have made a very good witness, as he was "volatile" and "expressed a lot of anger * * *." Had Mr. Fry testified at trial, Mr. Whitney recalled his concern over some jail calls between Mr. Fry and his mother, including a call in which Mr. Fry laughed that the victim would not be stealing any more of his clothes and another call in which Mr. Fry said, "The bitch got what she deserved." Mr. Whitney also recalled the possibility of rebuttal testimony from two women regarding Mr. Fry's prior acts of domestic violence against them and Mr. Fry's involvement in burning down one of their houses. He testified that other potential evidence would have affected his recommendation as well, such as the coroner's testimony that the victim was stabbed twice in the back and Mr. Fry's

remarks to the arresting officers in West Virginia, specifically: "Remorse, I don't have any remorse for that woman. I didn't shoot her."

{¶13} When specifically asked if Mr. Fry told counsel he wanted to testify at trial, Mr. Whitney testified:

> I think there may be a point where he said he wanted to testify either early on or midway through, and then at the end - - certainly, he didn't want to testify at the end. I mean, it was clear that he had had enough and he didn't want - - particularly, during the trial. It was clear that he was - - didn't want to testify in trial. In fact, he didn't want us to offer mitigation at the trial.

Mr. Whitney further testified that Mr. Fry became "more and more disinterested in what was going on" as the trial progressed and his decision to not testify was "unequivocal" in the days leading up to his trial. He testified that, when the defense rested, he did not recall Mr. Fry saying or doing anything to either object or notify the court that he wanted to testify. According to Mr. Whitney:

> the record doesn't reflect that. I would have reacted to that in some way or another. * * * I would have asked for a recess. I would have talked to the defendant. I would have - - Kerry and I would have met with him, [found] out what's happening here, why [Mr. Fry wants] to testify. If he was adamant, I would have asked the [c]ourt to give me until tomorrow morning or whatever it would take to catch up with this issue and make sure it was done correct[ly].

{¶14} Mr. O'Brien served as Mr. Whitney's co-counsel in Mr. Fry's capital case. He also testified at the hearing as to his extensive knowledge and experience in handling capital cases throughout his own career. He did not initially recall his recommendation to Mr. Fry as to whether he should testify at trial or if Mr. Fry said he wanted to testify, but he did testify as to the normal procedures he follows in advising all of his clients on that issue. According to Mr. O'Brien, when speaking to all of his clients regarding the issue of whether to testify, he informs them of the full range of their options and penalties, along with the "pros and cons" of testifying and not testifying.

{¶15} When shown several hand-written notes while on the witness stand, Mr. O'Brien recognized them as notes he had written while representing Mr. Fry. The first note is dated December 1, 2005, and includes the statement "Trial tactics" followed by "Wants to take stand[.]" Mr. O'Brien called attention to the fact that this note was made six months prior to trial. The second note is dated June 7, 2006, and includes the statement "Trial strategy" followed by "Test.?" Mr. O'Brien testified that this statement meant Mr. Fry "doesn't know whether he wants to testify or not." The third note is dated June 11, 2006, and includes the statement "C.F. wants to testify! (Reasons given for not test.)" When explaining this particular note, he testified that Mr. Fry may have changed his mind after listening to the reasons not to testify, and he recalled: "I believe what happened was that after - - if I wrote down he wants to testify, then I gave him reasons for not testifying, then he would have told me, 'Okay, I don't want to testify,' and then I would have reported that the next morning." Mr. O'Brien testified that he would have talked to Mr. Fry about his criminal record, including his prior arson conviction and prison sentence, as well as the potentially damaging jail calls between Mr. Fry and his mother. Mr. O'Brien agreed that it would be a fair characterization to say that Mr. Fry vacillated in his desire to testify between December 1, 2005, and June 11, 2006, but he nonetheless emphasized: "My position would have been when I left the jail [on June 11, 2006], I was certain that Clarence did not want to testify." The following exchange also occurred during the prosecutor's questioning of Mr. O'Brien:

> Q: Is there any indication on this [June 11, 2006, note] that this represents the final word or final decision of Clarence Fry?
>
> A: No.
>
> Q: Do you recall what happened - - what was the conclusion of this meeting with Clarence Fry?

A: When I left the jail he did not want to testify.

Q: Was there any question in his mind about that?

A: No.

Q: Was he sure? Was he certain?

A: In my mind he was very certain.

Q: So [the June 11, 2006, note] does not reflect the whole picture of that meeting. You would agree with that?

A: It's not the final word.

Mr. O'Brien also testified that Mr. Fry never said in open court that he wanted to testify, even though Mr. Fry had a "strong personality" and "if he wanted to testify, he would have said so."

{¶16} A partial transcript of an in-chambers conversation held on June 12, 2006, between the trial court and the attorneys was also introduced at the hearing and includes the following statements:

MR. WHITNEY: We have talked to Clarence over the last couple of weeks. I spent five or six hours invested talking to him, talking to the defendant about his testimony.

He has really not wavered. He's playing a little game, I think in my mind about it, but he has not wavered in his opinion that he would not testify today.

Kerry, I think, spent some time with him yesterday morning.

MR. O'BRIEN: Yes. Sunday morning I spent some time in the Summit County Jail with Mr. Fry, and he indicated that he did not want to testify.

MR. WHITNEY: And he was unequivocally against testifying Friday afternoon when we met with him in the courthouse upstairs.

The deputies had him available for us for an hour. We talked to him and he was unequivocally opposed to it, so.

THE COURT: All right. If there was any vacillation, the Court would ask him on the record. But you are indicating to the Court that he has decided of his own volition not to testify?

MR. WHITNEY: That's correct.

{¶17} Mr. Fry testified at the hearing that "[f]rom the beginning" he wanted to testify at trial because "[s]omebody had to tell the story." He asserted that he did not know it was his right to testify, but he nonetheless told his attorneys, the investigator, and several family members of his desire to tell his story to the jury. According to Mr. Fry: "[I]t was always said, like, not I want to testify, it was when. It was never an issue of how, it was always when because for me it was always: When I tell these people what happened, they would understand." He surmised that he told his attorneys at least 20 times about what he planned to tell the jury. He testified that Mr. Whitney disagreed with him, had a different plan for his defense, and told him, "Well, I'm sorry. The prosecutor, she'll eat you up." He further testified that Mr. O'Brien "tricked" him because Mr. O'Brien seemed to understand "where [Mr. Fry] was trying to go with it," but neither attorney actually listened to Mr. Fry's input.

{¶18} Mr. Fry admitted hearing Mr. Whitney rest for the defense when he testified: "[Defense counsel] went up to the [j]udge, I'm pretty sure, and then I think they said, 'The defense rests.' I'm not sure. I think that's how it went. Because I remember looking back at my little brother, like. (Indicating.)" Mr. Fry claimed he was unaware that Mr. Whitney resting for the defense was his last opportunity to speak up; otherwise, he would have "hollered and screamed" because "[t]hat's never been a problem for [him] to speak [his] mind." He conceded that he "should have known[,]" but instead he "messed up[,]" "dropped the ball[,]" and "sat there looking stupid." He testified that he only realized he was not going to testify "[w]hen the jury started walking out[,]" and the prosecutor asked him if he spoke up at that time:

Q: Did you say anything?

A: No.

Q: Why not?

A: What was I gonna say?

Q: "Why can't I testify, Judge?" She's sitting right there.

A: I probably should have.

* * *

Q: Why didn't you tell Judge Cosgrove when you realized that you were not going to be testifying, why didn't you say to her, "Judge, I wanted to testify?"

A: I choked.

Mr. Fry testified that he would have spoken up if the trial court had asked him about his desire to testify.

{¶19} Mr. Fields was the private investigator appointed to assist in Mr. Fry's capital case. He testified at the hearing that, in his conversations with Mr. Fry, Mr. Fry was "very animated generally" and wanted to testify at trial, but Mr. Fields could not "remember anything specific." He also could not remember saying anything specific to Mr. Whitney about Mr. Fry's desire to testify, but he testified that his usual procedure would be to do so. Mr. Fields testified on cross-examination that his last interaction with Mr. Fry was on May 15, 2006. Opening statements in the trial were not heard until June 5, 2006.

{¶20} Mr. Fry's sister testified at the hearing that during her conversations with Mr. Fry throughout the trial, the two never talked specifically about his desire to testify, but they both "just thought that is what was going to happen." She testified that Mr. Fry was upset at one point and expressed to her the possibility that he would not be allowed to testify by saying, "I don't think these crackers gonna let me say nothing." When she spoke to one of Mr. Fry's attorneys in the hallway outside of the courtroom and asked why Mr. Fry was not going to testify, the

attorney replied, "We don't think that is a good idea; that is not a good idea." She did not recall telling the attorney specifically that Mr. Fry wanted to testify, but only recalled telling him, "Well, I thought he was going to testify * * *." She instead believed that her "demeanor" communicated to counsel the idea that Mr. Fry wanted to testify and that everyone "expected to hear from him." She admitted on cross-examination that she observed Mr. Fry becoming irritated and very disinterested in the trial proceedings. When asked if she agreed that there is a difference in the conversations between her and Mr. Fry throughout the trial and the conversations between Mr. Fry and his attorneys near the end of the trial, she admitted, "All I know is what [Mr. Fry] told me. I don't know what he told his lawyers."

{¶21} Mr. Fry's brother testified at the hearing that he spoke to Mr. Fry almost daily throughout the trial. He claimed that he asked Mr. Fry if he was going to testify, and Mr. Fry told him that was his plan. Mr. Fry told his brother there was a story to be told, which he wanted to be heard. When asked on another occasion about whether he would testify, Mr. Fry told his brother, "Hell, yeah. Can't nobody tell my story better than I can." Mr. Fry's brother testified that he also spoke to Mr. Whitney once in the hallway outside of the courtroom and Mr. Whitney told him, "You know your brother wants to testify on his own behalf" and "I don't think that is a good idea." His brother testified that he did not think Mr. Fry knew it was his right to testify "[b]ecause if he knew that he could have testified, trust me, [Mr. Fry] would have testified." When asked if Mr. Fry ever changed his mind regarding testifying at trial, his brother testified, "No. At least - - if he did, he didn't express it to me."

{¶22} Assistant Prosecuting Attorney Angela Walls-Alexander was one of the prosecutors in Mr. Fry's criminal case. She testified that when exhibits were being offered for admission into evidence and defense counsel were making and renewing their Crim.R. 29 motion

for acquittal, Mr. O'Brien—on the record and in Mr. Fry's presence—said that Mr. Fry "absolutely was not going to testify." A review of the trial transcript reveals that the court denied the Crim.R. 29 motion and defense counsel then asked for a sidebar to discuss a witness who had failed to appear in court. During the sidebar, Mr. O'Brien stated, "[Inasmuch] as I can report to the [c]ourt that we were only going to have one witness for the defense, I can tell you categorically and emphatically that Mr. Fry, the [d]efendant, is not going to testify." Defense counsel then offered their exhibits for admission into evidence before the court brought the jury back into the courtroom and recessed until the following Monday morning. Although the courtroom was equipped during the trial with a device to create "white noise"—which prevents the jury from hearing what is said between the judge and attorneys during sidebars—Ms. Walls-Alexander testified that it was not activated at that time because the jury was not in the courtroom.

{¶23} Mr. Fry was then recalled to the witness stand. He testified that he did not hear Mr. O'Brien make the aforementioned statement during the sidebar, but he acknowledged that he was present in the courtroom at that time.

{¶24} The right to testify at one's own criminal trial is rooted in the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. *Rock v. Arkansas*, 483. U.S. 44, 51-53 (1987). "Generally, the defendant's right to testify is regarded both as a fundamental and a personal right that is waivable only by an accused." *Bey*, 85 Ohio St.3d at 499. The ultimate decision of whether to testify rests with the defendant, but because attorneys are presumed to follow the professional rules of conduct and presumed to render adequate assistance in advocating the defendant's cause and in consulting with the defendant on important decisions,

the defendant's assent may be presumed when a tactical decision is made to not have the defendant testify. *United States v. Webber*, 208 F.3d 545, 551 (6th Cir.2000). Barring any statements or actions from the defendant indicating either disagreement with counsel or the desire to testify, the trial court is not required to ensure that the defendant has waived the right to testify on the record. *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, ¶ 162, citing *Webber* at 551.

> A defendant who wants to testify can reject defense counsel's advice to the contrary by insisting on testifying, communicating with the trial court, or discharging counsel. At base, a defendant must "alert the trial court" that he desires to testify or that there is a disagreement with defense counsel regarding whether he should take the stand. When a defendant does not alert the trial court of a disagreement, waiver of the right to testify may be inferred from the defendant's conduct. Waiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so.

(Citations omitted.) *Webber* at 551.

{¶25} Here, witness testimony and Mr. O'Brien's notes were introduced to demonstrate that Mr. Fry initially wanted to testify and perhaps wavered on the issue at times during the pendency of his case. As Mr. Fry notes in his merit brief, a review of the trial transcript also reveals that Mr. Whitney remarked during his opening statement, "Clarence has been waiting a long time to come here and tell you what happened and why it happened, and have a jury determine his guilt and (sic) innocence." But, notwithstanding such comments by counsel during opening statements, defendants are not precluded from abandoning an initial desire to testify and, instead, deciding later not to testify at trial. *See State v. Ball*, 9th Dist. Summit No. 26537, 2013-Ohio-3506, ¶ 35-37 (noting that a defendant may still choose to not testify even after counsel makes multiple references during opening statements that he will testify).

{¶26} Even in light of the foregoing evidence highlighting Mr. Fry's initial desire to testify, he nonetheless failed to demonstrate that he was actually *denied* his right to testify. The

evidence established that Mr. Fry's counsel, on several occasions, discussed with him his right to testify and recommended that he not testify for a litany of presumably valid reasons. While conceding Mr. Fry had an initial desire to testify either early on or midway through the trial, Mr. Whitney nonetheless testified that Mr. Fry's decision to not testify was "unequivocal" in the days leading up to his trial and "certainly, he didn't want to testify at the end." Mr. O'Brien admitted that Mr. Fry sometimes vacillated in his decision of whether to testify, but he also testified that when he left the jail on June 11, 2006, after speaking to Mr. Fry and explaining to him the reasons to not testify, he was "certain" that Mr. Fry did not want to testify. Counsel relayed Mr. Fry's final decision to not testify to the trial court on the following day, and the defense rested.

{¶27} If Mr. Fry changed his mind and once again wished to testify, regardless of the decision he conveyed to counsel, it was incumbent upon him, at the very minimum, to alert the trial court of either his desire to testify or of any disagreement with counsel regarding his right to testify. *See Webber* at 551. By his own admission, and as observed by several witnesses, Mr. Fry failed to do so at any point during the proceedings. Mr. Fry testified that he was present in the courtroom and heard Mr. Whitney rest for the defense, yet he said nothing to the court, choosing instead to simply make a gesture to his brother in back of the courtroom. Multiple witnesses, as well as Mr. Fry himself, testified that he undoubtedly possessed the ability and wherewithal to freely speak his mind. Mr. Fry also conceded that he "should have known" and "probably should have" said something to the trial judge. His conscious decision to remain silent instead of overtly asserting his right to testify does not comport with his present claim that he was *denied* the right to testify. Mr. Fry's decision to sit by idly in silence is further consistent with the evidence presented that he became increasingly irritated and disinterested in the trial proceedings as they progressed toward the end. A waiver of Mr. Fry's right to testify could

therefore be inferred from his conduct and presumed from his failure to alert or inform the trial court of his desire to testify. *See Webber* at 551.

{¶28} Mr. Fry also argues that the trial court judge was biased against both him and his counsel throughout the trial and post-conviction proceedings, citing various comments made by the judge on the record. This argument is misplaced, however, because "[i]f a party believes that a common-pleas-court judge is prejudiced or has exhibited bias, he may file an affidavit of disqualification [with the Supreme Court under R.C. 2701.03]." *State v. Smetana*, 9th Dist. Lorain No. 12CA010252, 2013-Ohio-2376, ¶ 10. *See also Fry*, 2012-Ohio-2602, at ¶ 49. This Court has no authority to vacate a trial court's judgment on the basis of personal bias or prejudice on the part of the trial judge. *State v. Hunter*, 151 Ohio App.3d 276, 2002-Ohio-7326, ¶ 18 (9th Dist.), citing *Beer v. Griffith*, 54 Ohio St.2d 440, 441-442 (1978). *See also Fry*, 2012-Ohio-2602, at ¶ 49.

{¶29} For the reasons set forth above, we cannot conclude that the trial court erred or abused its discretion in denying Mr. Fry's twelfth ground for relief in his petition for post-conviction relief.

{¶30} Accordingly, Mr. Fry's first assignment of error is overruled.

ASSIGNMENT OF ERROR TWO

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT FRY'S POST-CONVICTION PETITION AFTER CONDUCTING AN EVIDENTIARY HEARING. ALL PREVIOUS ISSUES PRESENTED IN THE ORIGINAL POST-CONVICTION PETITION NOT PREVIOUSLY CONSIDERED ARE NOW RIPE FOR REVIEW.

{¶31} In his second assignment of error, Mr. Fry attempts, through incorporation by reference, to re-plead his fourteenth ground for relief regarding cumulative error and his second

assignment of error from his previous appeal in *Fry*, 2012-Ohio-2602, regarding the denial of his petition without a hearing.

{¶32} We decline to address the merits of this assignment of error because Mr. Fry has failed to make an argument in accordance with App.R. 16(A)(7), which requires "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." *See also* App.R. 12(A)(2) ("The [C]ourt may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)"). Moreover, Loc.R. 7(B) "'clearly requires that an appellant argue his case before this [C]ourt in the brief, rather than simply refer the [C]ourt elsewhere.'" *In re C.M.*, 9th Dist. Summit Nos. 23606, 23608, and 23629, 2007-Ohio-3999, ¶ 53, quoting *Western Reserve Logistics v. Hunt Mach. & Mfg. Co.*, 9th Dist. Summit No. 23124, 2006-Ohio-5070, ¶ 12, citing *Cardone v. Cardone*, 9th Dist. Summit Nos. 18349 and 18673, 1998 WL 224934, *8 (May 6, 1998) ("If an argument exists that can support this assignment of error, it is not this [C]ourt's duty to root it out").

{¶33} Even assuming arguendo that we addressed this assignment of error on the merits, it would nonetheless be overruled. Mr. Fry's fourteenth ground for relief sought relief pursuant to the cumulative error doctrine. *See State v. DeMarco*, 31 Ohio St.3d 191 (1987). A claim of cumulative error requires multiple instances of harmless error, but the record here does not support a conclusion that multiple errors occurred. *See State v. Daniels*, 9th Dist. Summit No. 26406, 2013-Ohio-358, ¶ 25, citing *State v. Garner*, 74 Ohio St.3d 49, 64 (1995). Moreover, Mr. Fry's second assignment of error in his prior appeal sought relief based on a claim that the trial

court erred in dismissing his claims without holding a hearing. *See Fry*, 2012-Ohio-2602, at ¶ 42. As we previously affirmed the trial court's denial of the majority of Mr. Fry's grounds for relief for a variety of reasons and, upon remand, the trial court held two hearings on the sole remaining issue, Mr. Fry's prior second assignment of error would now be moot. *See* App.R. 12(A)(1)(c).

{¶34} Accordingly, Mr. Fry's second assignment of error is overruled.

III.

{¶35} Mr. Fry's first and second assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

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

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

Costs taxed to Appellant.

THOMAS A. TEODOSIO
FOR THE COURT

SCHAFER, P. J.
CONCURS.

CARR, J.
CONCURRING IN JUDGMENT ONLY.

{¶36} At the heart of Fry's first assignment of error is a due process argument. To the extent that Fry takes issue with the conduct of the trial judge, I read his position as part of a larger due process contention. While this Court is barred from evaluating whether it was proper for a trial judge to preside over a case, an appellate court may consider whether a party's due process rights have been violated. *State v. Payne*, 149 Ohio App.3d 368, 2002-Ohio-5180, ¶ 11 (7th Dist.). Here, though Fry indeed alleges that the trial judge was biased, he further suggests that the trial court took certain measures to prohibit Fry's attorneys from fully litigating his case at the evidentiary hearing. As this argument sounds in due process, as opposed to bias on the part of the trial judge, I would address it on the merits. Accordingly, I respectfully concur in judgment only in regard to the first assignment of error.

APPEARANCES:

RICHARD A. CLINE, Chief Counsel, KIMBERLY S. RIGBY, Supervising Attorney, and ADRIENNE M. LARIMER, Assistant Public Defender, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and JACQUENETTE S. CORGAN, Assistant Prosecuting Attorney, for Appellee.

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO	)	CASE NO. CR 2005-08-3007
	)	
Respondent,	)	
	)	
	)	JUDGE PATRICIA COSGROVE
v.	)	
	)	
CLARENCE FRY, JR.	)	
	)	ORDER
Petitioner.	)	FINAL AND APPEALABLE

This matter comes before the Court upon the following motions:

Motion for Recusal of trial judge
Motion for Discovery
Motion for Appropriation of Funds for Expert Psychological Assistance
Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits.
Motion for Post Conviction Relief

FACTS

On July 18, 2005, Clarence Fry and Tamela Hardison had an argument and a fight at their apartment in Akron, Ohio. Officers arrived and found Hardison injured and frightened and arrested Fry. Hardison filed charges against Fry for assault and aggravated menacing, both first degree misdemeanors and also sought a criminal protection order. Fry was held in Summit County Jail until his bond was modified on July 25, 2005 to a $10,000 signature bond on the condition that he would have no contact with Hardison. The next day Fry went to the Akron Police Department and wanted to report a theft of property, alleging that Hardison had stolen items from the apartment.

Hardison spent the night of July 30, 2005 at her daughter Nikita Knox's home on Ina Court in Akron. On the morning of July 31, Knox left for work while Hardison remained to babysit for her grandchildren. In the early afternoon of July 31, 2005, Fry went to the Knox home. Hardison's grandson, Jasown and his friend Marice Vinson, were playing outside and testified that they saw Fry walking through the courtyard toward the back of the Knox home. Fry was wearing a yellow sleeveless shirt and carrying an empty bowl and a long butcher knife. Jasown followed Fry into the home.

According to Jasown, Fry went into the living room where Hardison was watching TV with another grandchild on the couch. Jasown heard Fry ask Hardison, "Where are my clothes?" Jasown then saw Fry "cut" Hardison with the knife. Hardison told Jasown to call the police. Jasown tried, but Fry kept taking the phone from him. Maurice Vinson testified that he saw Fry "speed walking" as he left the home carrying the knife and the bowl. The Akron Police were called and when they arrived Hardison's body was found on the living room couch. A paramedic determined that Hardison was dead.

Fry was identified as the primary suspect in Hardison's killing. On August 3, 2005, Fry was found and arrested in Charleston, West Virginia. Fry stated during a taped interview with an Akron Detective that Hardison had stolen his belongings from the apartment and sold them at a consignment store. Fry did not deny that he killed Hardison, but stated that he was not carrying a knife when he entered the apartment. Fry stated that when he entered the apartment, that Hardison became angry and hit him in the jaw with an ashtray. Fry said that he started "seeing stars" and his "vision blurred". Fry stated that Hardison was attacking him and that he stabbed Hardison because "she was trying to kill" him.

Fry was indicted on the following charges: Count One charged Fry with the aggravated felony murder of Tamela Hardison while committing aggravated burglary and/or burglary, R.C.

2903.01(B). Count One included two death-penalty specifications: murder while committing, attempting to commit, or fleeing after committing aggravated burglary, R.C. 2929.04(A)(7), and murder to prevent Hardison's testimony in another criminal proceeding or in retaliation for her testimony in any criminal proceeding, R.C. 2929.01(A)(8). Count Two charged Fry with aggravated murder by purposely killing Hardison with prior calculation and design, R.C. 2903.01(A), and Count Three charged him with felony murder, R.C. 2903.02.

Fry was also charged with six additional counts: Count Four -- aggravated burglary, Count Five -- domestic violence on July 18, 2005, Count Six -- domestic violence on July 31, 2005, Count Seven -- tampering with evidence, Count Eight --intimidation of a crime victim, and Count Nine -- menacing by stalking. Fry was also charged in the indictment with involuntary manslaughter, aggravated menacing, and repeat violent offender specifications. During trial, these counts and specifications were dismissed, and the remaining charges were renumbered as listed herein.

Fry was found guilty by a jury of aggravated murder pursuant to R.C. 2903.01(B) with specifications of the offense being committed during an aggravated burglary, R.C. §2929.04(A)(7) and the victim was a witness to an offense who was purposefully killed to prevent her testimony in a criminal proceeding, 2929.04(A)(B). Additionally, Petitioner was found guilty of murder, R.C. §2903.02(A)(B), tampering with evidence, R.C. §2921.12, intimidation of a crime victim or witness, R.C. §2921.04(B), and menacing by stalking, R.C. §2903.211(A). Petitioner was sentenced to death under the aggravated murder count.

Petitioner appealed to the Supreme Court of Ohio on May 26, 2010, setting forth arguments in four categories: pretrial and trial issues, death penalty issues, ineffective assistance of counsel issues, and remaining issues raised. The Supreme Court of Ohio in *State v. Fry*, 2010-Ohio-1017, found that: Petitioner's assertion that the grand jury considered

favorable or exculpatory evidence in returning the indictment on aggravated murder and lesser offenses is totally speculative; there was no proof that the attorney-client relationship had deteriorated and, furthermore, there was no proof of ineffective counsel. See *State v. Fry*, 2010-Ohio-1017.

Motion for Voluntary Recusal

R.C. §2701.03 states that if a judge of the court of common pleas allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel or otherwise disqualified to preside in the proceedings, any party to the proceeding or party's counsel can file an affidavit of disqualification with the clerk of the Supreme Court of Ohio.

As stated in R.C. §2701.03 a motion for voluntary recusal (disqualification) must be filed with the clerk of the Supreme Court. Petitioner's counsel has filed the motion for disqualification with the clerk of this Court, the Court of Common Pleas. Therefore, Petitioner's motion was not filed correctly and will not be addressed by this Court.

Motion for Discovery; Motion for Appropriation of Funds for Expert Psychological Assistance; Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits

The Ninth District Court of Appeals has consistently held that there is no right to discovery or expert assistance in post-conviction relief proceedings:

> This Court has long held that there is no right to discovery in a postconviction proceeding. An action for postconviction relief is a civil action. *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49, 325 N.E.2d 540. The procedures applicable to the action, however, are those found in R.C. 2953.21. *State v. Hiltbrand* (May 16, 1984), Summit App.No. 11550, 1984 Ohio App. LEXIS 9936, . That section does not provide for discovery.

State v. Craig, 2010 Ohio 1169.

Defendant herein has set forth no reasoning or authority under which this Court would deviate from the clear rulings from the Ninth District Court of Appeals.

Defendant's Motion for Discovery; Motion for Appropriation of Funds for Expert Psychological Assistance; Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits are DENIED.

Post-Conviction Petition

Ineffective Assistance of Counsel

Petitioner contends that his trial counsel was ineffective in assisting him in a multitude of ways. Petitioner argues: (1) the attorney-client relationship began to deteriorate from the beginning when Attorney Whitney was appointed; (2) counsel ignored Petitioner's suggestions regarding his defense and refused to allow Petitioner to testify in his own defense; (3) Petitioner believed counsel was racist and they were not interested in presenting his case; (4) counsel failed to adequately communicate the plea bargain with Petitioner; (5) counsel failed to adequately question jurors during voir dire and failed to select a jury not made up of twelve white jurors; (6) counsel failed to contact and present as witnesses individuals Petitioner wanted to be presented; (7) counsel's failure to cross-examine Jasown Bivens; and (8) counsel failed to adequately inform Petitioner about the consequences of not putting on mitigating evidence.

The test for ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668. First, defendant must show that counsel's performance was deficient. *Id.* at syllabus (2). Second, the defendant must show that the deficient performance of counsel prejudiced the defendant so as to deprive the defendant of a fair trial. *Id.*.

The standard by which an attorney's performance is judged is that of reasonably effective assistance and the defendant must show that counsel's representation fell below an

objective standard of reasonableness. *Id.* at syllabus (2)(a). Counsel's conduct will be judged from counsel's perspective at the time. *Id.*. Also in Ohio a licensed attorney is presumed to be competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289.

In order to prove prejudice the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at syllabus.. The standard by which prejudice is judged is that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at ¶5.

Additionally, a defendant that is making a claim of ineffective assistance of counsel must submit sufficient operative facts demonstrating the lack of competent counsel. *State v. Calhoun*, 86 Ohio St.3d 279, 283. Broad conclusory statements, as a matter of law, do not meet the requirements for an evidentiary hearing. *State v. Kapper*, 5 Ohio St.3d 36, 39. The defendant must also show that those particular errors of counsel actually had an adverse effect on the defense. *Strickland v. Washington*, 466 U.S. 668, 693. Defendant must show that counsel's conduct more likely than not altered the outcome of the case. *Id.*.

The doctrine of res judicata occurs when a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382.

As stated above, Petitioner has already appealed to the Supreme Court of Ohio. See *State v. Fry*, 2010-Ohio-1017. Two out of the eight arguments made by Petitioner have already been addressed by the Supreme Court of Ohio. Therefore, Petitioner's claim number one and eight are barred by res judicata.

The rest of Petitioner's arguments for ineffective assistance of counsel, while being barred by res judicata, will now be addressed.

The similarities between *Strickland* and this case are such that they will be addressed by this Court. In *Strickland* the defendant submitted, as a part of his post-conviction relief petition, fourteen affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. *Strickland v. Washington*, 466 U.S. 668, 675. The Supreme Court of the United States has held that the trial counsel could reasonably surmise that the aggravating circumstances were utterly overwhelming and presenting any further evidence as to character or psychological issues would be of little help. *Id.* at 699. Additionally, the Supreme Court stated that the testimony that would have been presented would not have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances. *Id.* 700.

Here Petitioner submitted quotes from friends and family members describing what they would have testified to had they been asked to do so. The Supreme Court of Ohio in *State v. Fry* indicated that the mitigating factors that Petitioner said his counsel should have presented, Mother, family, and friend's testimony, would not have outweighed the aggravating circumstances. *State v. Fry*, 2010-Ohio-1017, ¶232-233. Additionally, Petitioner waived his right to present mitigating evidence to the jury. Therefore, it is within counsel's professional reasonable judgment *not* to call or present any more mitigating evidence or to call the witnesses suggested by Petitioner.

The Supreme Court of Ohio in *State v. Fry* repeatedly emphasized that Petitioner's trial counsels failure to cross-examine Nikita Knox was a tactical decision. *Id.* at ¶202, 204, & 205. This Court believes it was trial counsel's tactical decision to not cross-examine Jasown Bivens or to further question the jurors during voir dire. A trial counsel's actions will be judged from

the perspective of the counsel at *that* time. Additionally, Petitioner's counsel had hired a forensic psychologist, a mitigation specialist, and had interviewed Petitioner's family members. *State v. Fry* 2010-Ohio-1017 ¶169. Petitioner's counsel was prepared to present a mitigation case, but Petitioner filed a pro se motion denying his counsel the opportunity to participate in presenting mitigating evidence. See Motion Not to Participate in Mitigation Hearing, 6-27-2006. Therefore, Petitioner's express communication that he did not wish to participate at all in the mitigation hearing cannot be a basis for ineffective assistance of counsel.

Petitioner argues that his counsel failed to adequately communicate the plea bargain offered to him by the State. Petitioner contends that had his counsel tried to convince him or have family members try and convince him to take the plea offer he would have taken it. See Petition for Post-Conviction Relief p. 39. The only evidence Petitioner presents is a self-serving affidavit. No other evidence is presented on the record that would prove that Petitioner's counsel failed to adequately communicate the State's plea offer. Petitioner is barred by res judicata from raising this issue here because he could have raised it at the trial court and with the Supreme Court of Ohio. Petitioner failed to do both.

In conclusion, Petitioner's argument for ineffective assistance of counsel is without merit and is DENIED.

Grand Jury Proceeding

Petitioner contends that the state failed to provide him with exculpatory evidence that was presented to the grand jury. Petitioner specifically argues that the grand jury, on at least two counts, found that the Petitioner entered the home of the victim with an intent less then purposeful or prior calculation and design.

However, Petitioner's argument has already been addressed by the Supreme Court of Ohio in *State v. Fry*. The Supreme Court of Ohio citing *State v. Greer* (1981), 66 Ohio St.2d

139, stated that "unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy" the accused is not entitled to review the transcript of the grand jury proceeding. *State v. Fry*, 2010-Ohio-1017 ¶ 66. The Supreme Court of Ohio determined that Petitioner's argument was "totally speculative". *Id.* ¶69. Since the Supreme Court of Ohio has already addressed this issue it falls under res judicata and will not be addressed.

Conclusion

Therefore, this Court finds that Petitioner's post-conviction petition and motion for recusal, Defendant's Motion for Discovery, Motion for Appropriation of Funds for Expert Psychological Assistance and Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits are without merit and denied.

IT IS ORDERED.

JUDGE PATRICIA A. COSGROVE

CC: Tyson Fleming, Assistant State Public Defender
Kimberly S. Rigby, Assistant State Public Defender
Richard S. Kasay, Assistant Prosecuting Attorney

The Supreme Court of Ohio

State of Ohio

v.

Clarence Fry, Jr.

Case No. 2012-1275

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Summit County Court of Appeals; No. 26121)

Maureen O'Connor
Chief Justice

[Cite as *State v. Fry*, 2012-Ohio-2602.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 26121
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CLARENCE FRY, JR.	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 2005-08-3007

DECISION AND JOURNAL ENTRY

Dated: June 13, 2012

WHITMORE, Presiding Judge.

{¶1} Defendant-Appellant, Clarence Fry, appeals from a judgment of the Summit County Court of Common Pleas, which denied his petition for post-conviction relief. We affirm in part and reverse in part.

I

{¶2} In June 2006, Fry was convicted by jury of (1) aggravated murder with two capital offense specifications, (2) aggravated murder, (3) murder, (4) aggravated burglary, (5) two counts of domestic violence, and (6) tampering with evidence. Fry was sentenced to death. In May 2007, while Fry's direct appeal was pending with the Ohio Supreme Court, he filed a petition for post-conviction relief and a motion requesting the trial judge voluntarily recuse herself. The trial court held his case in abeyance pending a resolution of his direct appeal. Fry's convictions were affirmed by the Ohio Supreme Court in March 2010.

{¶3} In January 2011, the State filed a motion to dismiss Fry's petition for post-conviction relief. Subsequently, Fry filed motions requesting funding for experts, discovery, and to amend his petition. The court denied Fry's motions and his post-conviction petition without a hearing, finding that his post-conviction claims were barred by res judicata. Fry now appeals and raises five assignments of error for our review. For ease of analysis, we consolidate several of the assignments of error.

II

Assignment of Error Number One

THE TRIAL COURT ERRED BY APPLYING THE DOCTRINE OF RES JUDICATA TO BAR FRY'S GROUNDS FOR RELIEF.

{¶4} In his first assignment of error, Fry argues that the trial court erred in finding that his claims were barred by res judicata. Specifically, Fry argues that his claims are not barred by res judicata because they are supported by evidence outside of the record.

> "Under the doctrine of res judicata, a final judgment of conviction bars a * * * 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 * * * on an appeal from that judgment." *State v. Perry*, 10 Ohio St.2d 175 (1967), paragraph nine of the syllabus. "Res judicata applies if the petition for post-conviction relief does not include any material dehors the record in support of the claim for relief." *State v. Cureton*, 9th Dist. Nos. 03CA0009-M & 03CA0010-M, 2003-Ohio-6010, ¶ 15.
>
> * * *
>
> "Presenting evidence outside the record[, however,] does not automatically defeat the doctrine of res judicata." *State v. Stallings*, 9th Dist. No. 19620, 2000 WL 422423, *1 (Apr. 19, 2000), citing *State v. Lawson*, 103 Ohio App.3d 307, 315 (12th Dist.1995). "Such evidence 'must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim[.]'" *Id.*, quoting *Lawson* at 315. Evidence outside the record "must demonstrate that the claims advanced in the petition could not have been fairly determined on direct appeal based on the original trial court record without resorting to evidence outside the record." *Id.*

State v. Dovala, 9th Dist. No. 08CA009455, 2009-Ohio-1420, ¶ 8-10.

{¶5} "[A] trial court's decision granting or denying a postconviction petition filed pursuant to R.C. 2953.21 should be upheld absent an abuse of discretion * * *." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 58. An abuse of discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). A trial court's finding must be "supported by competent and credible evidence." *Gondor* at ¶ 58.

{¶6} Fry's post-conviction petition raised fourteen grounds for relief.[1] To facilitate the analysis, we will address these grounds for relief out of order.

Exculpatory Evidence

{¶7} In his fifth ground for relief, Fry argued that he was denied a fair trial because the State failed to provide exculpatory evidence that had been presented to the grand jury. This argument is the same as Fry's proposition of law XII in his appeal to the Ohio Supreme Court. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, ¶ 65-69. In that appeal, the Supreme Court held that Fry's argument was "totally speculative" and the trial court did not abuse its discretion when it denied his request for such evidence. *Id.* at ¶ 69. Because Fry's fifth ground for relief was raised on appeal and he has failed to present sufficient evidence outside of the record to show that his claim could not have been fairly determined on direct appeal, it is now barred by res judicata. The trial court did not abuse its discretion in finding Fry's fifth ground for relief was barred.

[1] Fry filed two motions to amend his petition, which sought to add three additional grounds for relief. There is no indication, however, that the trial court granted these motions. The motions to amend, therefore, are presumed to be denied. *See Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 13.

Lack of Minorities in Jury Venire

{¶8} In his third ground for relief, Fry argued that his sentence is void or voidable because the trial court failed to "ensure the inclusion of African American jurors on the panel."

{¶9} In the trial transcripts, Fry and his counsel both expressed concern about the lack of African Americans in the jury venire. The court proceeded to conduct a hearing on the matter and called the Summit County Jury Commissioner as a witness to testify about the process used in selecting the jury pool. The court provided great detail in the record to support its finding that the "methodology used to select this jury is the same random manner that has been upheld repeatedly by the courts."

{¶10} Fry's argument that his due process rights were violated when the trial court failed to ensure that there were African Americans in the jury venire does not require evidence outside of the record. The record contained sufficient evidence of the number of African Americans in the jury pool and detailed evidence of how that jury pool was selected. Because Fry's third ground for relief could have been raised on appeal based on evidence in the record, it is now barred by res judicata, and the trial court did not abuse its discretion in so holding.

Ineffective Assistance

{¶11} In ten of his grounds for relief, Fry raised claims of ineffective assistance of counsel. To facilitate our analysis, we combine several of the grounds for relief.

a. Plea

{¶12} In his eleventh ground for relief, Fry argued that his attorneys were ineffective because they did not sufficiently counsel Fry about his decision to reject the plea agreement.

{¶13} First, Fry argued that his counsel was ineffective because they did not spend enough time reviewing the State's offer with him. Fry cites to statements in the record made by

his trial counsel to support his argument. Because this argument could have been raised on appeal based on evidence in the record, it is now barred by res judicata.

{¶14} Second, Fry argued that his counsel was ineffective because they did not request assistance from outside counsel or from Fry's family members to help persuade him to accept the plea offer. The trial court found that, while the issue was barred by res judicata, the argument also failed on the merits. Because Fry's argument relies on information (i.e., personal affidavits) outside of the record, we do not agree that this issue is barred by res judicata, but do agree that the argument fails on the merits.

{¶15} Generally, a claim of ineffective assistance of counsel requires a claimant to satisfy a two-prong test. First, he or she must prove that trial counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, he or she must show that trial counsel's deficient performance caused him or her prejudice. *State v. Srock*, 9th Dist. No. 22812, 2006-Ohio-251, ¶ 21. Prejudice entails "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph three of the syllabus.

{¶16} Under certain circumstances, a person claiming ineffective assistance of counsel is presumed to have been prejudiced and need not make a showing of such. *See United States v. Cronic*, 466 U.S. 648 (1984). One such situation in which the defendant is entitled to a presumption of prejudice is "where the defendant is subject to a 'complete denial of counsel,' including those situations where a defendant was denied the presence of counsel at a 'critical stage.'" *Johnson v. Bradshaw*, 205 Fed.Appx. 426, 430 (6th Cir.2007), quoting *Cronic* at 659.

{¶17} Fry argues that *Cronic* applies because he was "constructively" denied counsel during his plea bargaining phase, which has been recognized as a critical stage. *Lafler v.*

Cooper, ___U.S.___, 132 S.Ct. 1376, 1385-1386 (2012); *Missouri v. Frye*, ___U.S.___, 132 S.Ct. 1399, 1407 (2012). It is possible that a defendant may be "constructively" denied counsel when "performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided." *Cronic* at 654, fn. 11.

{¶18} Neither the record nor the post-conviction relief exhibits support Fry's argument that he was constructively denied counsel at the plea bargaining stage. Fry was informed of the plea offer, which his counsel discussed with him for an hour one week before the start of trial. Fry confirmed his rejection of the plea offer on the record. There is no evidence that Fry was denied access to his counsel. The crux of Fry's argument is his belief that his trial counsel did not try hard enough to convince him to accept the State's plea offer. This does not rise to the level of *Cronic*, and therefore, the *Strickland* test applies. *Compare Hunt v. Mitchell*, 261 F.3d 575 (6th Cir.2001) (defendant was presumed to be prejudiced when his counsel was appointed on the day trial began and counsel's request for an additional ten minutes to consult with defendant before the start of trial was denied).

{¶19} Assuming arguendo that Fry's counsel was deficient for failing to solicit assistance from outside counsel or family members to help convince Fry to accept the plea offer, Fry has not established prejudice. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Frye* at 1409. Fry presented no evidence, except a self-serving affidavit, to show that he would have accepted the plea offer if his counsel had consulted outside counsel or his family members. *See Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

> In reviewing a petition for post-conviction 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.

State v. Calhoun, 86 Ohio St.3d 279 (1999), paragraph one of the syllabus.

{¶20} There is evidence in the record that Fry did *not* want to consult with his family members about his decisions, and that he would not likely have been persuaded by his family members even if he had met with them about the plea offer. Fry repeatedly told the court that he did not want to discuss his decision to waive mitigation with anyone. Fry did ultimately meet with his mother, but still refused to present mitigation evidence.

{¶21} Because Fry has not established prejudice, his allegation that his counsel was ineffective for failing to seek assistance to help persuade him to accept the plea is without merit.

b. Mitigating Evidence

{¶22} In his seventh, eighth, and ninth grounds for relief, Fry argued that because of a complete breakdown in his attorney-client relationship he did not present any mitigation evidence.

{¶23} In his direct appeal to the Ohio Supreme Court, Fry challenged his waiver to present mitigation evidence. *Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, at ¶ 168. The Supreme Court confirmed the trial court's finding that Fry's waiver was knowingly and intelligently made. *Id.* at ¶ 168-177. To the extent that Fry now challenges his waiver to present mitigation evidence, it is barred by res judicata.

{¶24} Fry argued that his counsel was ineffective because they did not involve the family members in trying to dissuade Fry from waiving his right to present mitigation evidence.

Fry offers affidavits from his mother and two step-brothers which contain statements that each would have talked with Fry about his decision not to present mitigating evidence.

{¶25} As discussed above, under the circumstances of this case, the *Strickland* test applies. Therefore, to prevail on his claim of ineffective assistance of counsel, Fry must show that his counsel's performance was deficient and that he was prejudiced by his counsel's deficient performance. *Strickland*, 466 U.S. at 687.

{¶26} The trial court conducted an *Ashworth* hearing to determine whether Fry's waiver of his right to present mitigating evidence was knowingly and intelligently made. *See State v. Ashworth*, 85 Ohio St.3d 56 (1999), paragraph one of the syllabus. During that hearing the court asked Fry if he wanted to talk to his mother, his brothers, or anybody else about his decision to waive his right to present mitigation evidence. Despite repeatedly responding no, Fry did meet with his mother for 30-45 minutes after which he informed the court that he still did not want to present any mitigation evidence. Moreover, because Fry knowingly and intelligently waived his right to present mitigation evidence, he cannot use this valid waiver to show that he was prejudiced.

{¶27} Because Fry has not established prejudice, his allegation that his counsel was ineffective for failing to "involve family members in trying to dissuade Fry from waiving his right to present mitigation evidence" is without merit.

c. Rejection of Plea and Decision to Forego Mitigation

{¶28} In his thirteenth ground for relief, Fry argued that because of his trial counsel's deficient performance he rejected the State's plea offer and his decision not to present mitigation evidence was uninformed.

{¶29} Having already concluded that Fry's counsel was not deficient in presenting the plea offer and Fry's decision to waive presentation of mitigation evidence was knowingly and intelligently made, this argument is without merit.

d. Failure to Impeach Witness

{¶30} In his second, fourth, and sixth grounds for relief, Fry argued that his attorneys were ineffective for failing to impeach a State's eyewitness. Specifically, Fry argues that his attorneys were ineffective for failing to point out differences in J.B.'s statements to the police and his testimony to the jury.

{¶31} The trial court found that "it was trial counsel's tactical decision not to cross-examine" J.B. about his statements to the police. Reasonable strategic decisions by trial counsel are afforded deference. *Strickland,* 466 U.S. at 681.

{¶32} J.B. was five years old when he watched his grandmother get stabbed to death. He was six years old when he testified at Fry's trial. At trial, J.B. testified that Fry was carrying a bowl and a knife when he entered the apartment and that he told Fry not to go inside. His statement to the police did not include this information. However, the police reports do show that other witnesses made statements consistent with J.B.'s testimony. Specifically, witnesses told the police that a man carrying a bowl and a knife approached 824 Ina Court. After reviewing the record, trial counsel's decision not to impeach J.B. was a reasonable tactical decision. Therefore, we cannot conclude that the trial court abused its discretion in so holding.

e. Racism

{¶33} In his first ground for relief, Fry argued that his attorneys were ineffective because issues of race resulted in a complete breakdown of the attorney-client relationship.

{¶34} The Ohio Supreme Court found that Fry failed to request that the trial court appoint an African-American attorney to represent him. Moreover, so long as an indigent defendant is adequately represented, he "does not have the constitutional right to choose the attorney who will represent him or her at state expense." *Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, at ¶ 64.

{¶35} To the extent that Fry's argument is not barred by res judicata, it fails on the merits. First, Fry is not entitled to the *Cronic* presumption of prejudice because he was not denied counsel, constructively or otherwise. Second, Fry has not established that his counsel's performance was deficient. We cannot conclude that there was a breakdown in the attorney-client relationship because of race merely because Fry did not heed his counsel's advice. The record reflects that Fry had adequate representation at trial.

f. Lack of Rapport

{¶36} In his tenth ground for relief, Fry argued that he was effectively denied his right to counsel because his attorneys failed to ever establish a rapport with him. The only evidence submitted in support of this argument is Fry's self-serving affidavit.

{¶37} The trial court "may * * * judge the credibility of the affidavits in determining whether to accept the affidavits as true statements of fact." *Calhoun*, 86 Ohio St.3d at paragraph one of the syllabus. After reviewing the record, we cannot conclude that the trial court abused its discretion in rejecting Fry's argument that his counsel was so deficient that he was effectively denied representation.

Fry's Testimony

{¶38} In his twelfth ground for relief, Fry argued that his sentence is void or voidable because he was not allowed to testify at trial, and because the trial court failed to obtain from Fry

a knowing, intelligent waiver of his right to testify. This argument is the same as Fry's proposition of law IX in his appeal to the Ohio Supreme Court. *Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, at ¶ 119-120. The Court held that "[n]othing in the record suggests that Fry wished to testify but was denied the opportunity to do so." *Id*. at ¶ 120. In his petition for post-conviction relief, however, Fry included evidence *outside* of the record to support his claim. Specifically, Fry submitted what he claimed to be notes taken by his attorney during a December 2005 interview. These notes support Fry's argument that he wanted to testify at trial, and should have been considered by the trial court. Given that the trial court did not ask Fry on the record whether he wanted to testify and that Fry has relied on evidence outside of the record, Fry's claim could not have been fairly determined on direct appeal. *See Dovala*, 2009-Ohio-1420, at ¶ 18. Therefore, Fry's claim that he was denied his right to testify is not barred by res judicata.

{¶39} The trial court erred when it denied Fry's claim under the doctrine of res judicata and failed to assess the credibility of the evidence presented in his petition. We remand for the court to consider the evidence presented as it relates to this claim.

Cumulative Error

{¶40} In his fourteenth, and final, ground for relief, Fry argued that even assuming the grounds asserted are not individually sufficient to warrant relief that, taken together, the cumulative effect of the errors merit relief. Having concluded that the case should be remanded, we decline to address this issue. *See* App.R.12(A)(1)(c).

{¶41} Fry's first assignment of error is overruled in part and sustained in part.

Assignment of Error Number Two

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

{¶42} In his second assignment of error, Fry argues that the trial court erred in dismissing his claims without holding a hearing.

{¶43} "[A] criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing." *Calhoun*, 86 Ohio St.3d at 282. The court need only grant a hearing if it determines that there are substantive grounds for relief. R.C. 2953.21(C).

{¶44} Having concluded that the case should be remanded for the court to consider the evidence related to Fry's twelfth ground for relief, we decline to address Fry's second assignment of error. *See* App.R. 12(A)(1)(c).

Assignment of Error Number Three

> THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT FUNDING FOR EXPERT ASSISTANCE IN VIOLATION OF FRY'[S] RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Assignment of Error Number Four

> THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW FRY TO CONDUCT DISCOVERY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶45} In his third and fourth assignments of error, Fry argues that the trial court erred in denying his request for discovery and his requests to fund psychological, neuropsychological, and substance abuse experts. We disagree.

{¶46} "[T]he standard of review of a trial court's decision in a discovery matter is whether the court abused its discretion." *Mauzy v. Kelly Services, Inc.*, 75 Ohio St.3d 578, 592 (1996). Because a post-conviction proceeding is a collateral attack on a judgment, "a petitioner receives no more rights than those granted by statute." *Calhoun*, 86 Ohio St.3d at 281. R.C.

2953.21 does not provide for discovery. *State v. Smith*, 9th Dist. No. 98CA007169, 2000 WL 277912, *3 (Mar. 15, 2000). "This Court has repeatedly held that there is no right to conduct discovery in post-conviction proceedings." *Id.* *Accord State v. Benner*, 9th Dist. No. 18094, 1997 WL 549605, *2 (Aug. 27, 1997); *State v. Cooey*, 9th Dist. Nos. 15895 & 15966, 1994 WL 201009, *17 (May 25, 1994).

{¶47} Because he was not entitled to discovery, the court did not abuse its discretion when it denied Fry's requests. Fry's third and fourth assignments of error are overruled.

Assignment of Error Number Five

> THE TRIAL COURT ERRED WHEN [IT] DENIED FRY'S MOTION FOR VOLUNTARY RECUSAL IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶48} In his fifth assignment of error, Fry argues that the trial court erred when it denied his motion for a voluntary recusal of the trial judge. Specifically, Fry argues that the judge should have voluntarily recused herself because she "made several prejudicial comments during the sentencing hearing."

{¶49} The trial court did not address Fry's motion for voluntary recusal. The court found that his motion should have been filed as an affidavit of disqualification with the Ohio Supreme Court pursuant to R.C. 2701.03. Before filing an affidavit for disqualification a party may choose to file a motion with the trial court requesting that the trial judge voluntarily recuse himself or herself. However, if that motion is denied the party seeking disqualification must comply with R.C. 2701.03.

> A party may not simply ask a trial judge to voluntarily recuse himself [or herself] and then raise the issue on appeal when the trial judge refuses.
>
> * * *

> The procedure for seeking disqualification of a judge is set forth in R.C. 2701.03. *See State v. Ramos*, 88 Ohio App.3d 394, 398 (9th Dist.1993). Matters of disqualification of trial judges lie within the exclusive jurisdiction of the chief justice of the Supreme Court of Ohio and his [or her] designees. *Kondrat v. Ralph Ingersoll Publishing Co.*, 56 Ohio App.3d 173, 174 (11th Dist.1989). This Court is without authority to review a matter involving the disqualification of a judge. *Id.*, citing *Beer v. Griffith*, 54 Ohio St.2d 440, 441-442 (1978).

State v. O'Neal, 9th Dist. No. 07CA0050-M, 2008-Ohio-1325, ¶ 15. The court's refusal to address Fry's motion for voluntary recusal was a denial. Once the court had denied his motion, Fry was required to file an affidavit of disqualification with the Ohio Supreme Court, pursuant to R.C. 2701.03. Fry failed to follow the disqualification procedures. Because we are without authority to review this matter, Fry's fifth assignment of error is overruled.

III

{¶50} Fry's first assignment of error is sustained in part, and overruled in part. His second assignment of error is not yet ripe for review, and his remaining assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

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

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

Costs taxed equally to both parties.

BETH WHITMORE
FOR THE COURT

MOORE, J.
CONCURS.

DICKINSON, J.
CONCURRING IN JUDGMENT ONLY.

{¶51} I agree with the majority's conclusion, but write separately on several issues to explain my reason for affirming the trial court's judgment. Regarding the appropriate standard of review, the Ohio Supreme Court has explained that, in post-conviction relief cases, the trial court serves a gatekeeping role. *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679, ¶ 51. "Before granting a hearing on a [post-conviction relief] petition . . . , the court shall determine whether there are substantive grounds for relief." R.C. 2953.21(C). In making that 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 the court, and the court reporter's transcript." *Id.* "[W]hether there are

substantive grounds for relief" means "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.'" *State v. Calhoun*, 86 Ohio St. 3d 279, 283 (1999) (quoting R.C. 2953.21(A)(1)).

{¶52} "[A] trial court properly denies a defendant's petition for postconviction relief without holding an evidentiary hearing [if] the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun*, 86 Ohio St. 3d 279, paragraph two of the syllabus (1999). According to the Ohio Supreme Court, it is "not unreasonable to require the defendant to show in his petition for postconviction relief that such errors resulted in prejudice before a hearing is scheduled." *Id*. at 283.

{¶53} The Supreme Court has also held that the trial court's gatekeeping role is entitled to deference. *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679, ¶ 52. This includes allowing the trial court to assess the credibility of affidavits. *Id*.

{¶54} In his fifth ground for relief, Mr. Fry noted that, although some of the offenses for which the Grand Jury indicted him required that he acted purposefully, others required a less culpable mental state. He reasoned that the Grand Jury, therefore, must have received evidence suggesting that his acts were less than purposeful, and argued that the State failed to disclose that exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The majority has correctly noted that Mr. Fry made this same argument on direct appeal to the Ohio Supreme Court. *State v. Fry*, 125 Ohio St. 3d 163, 2010-Ohio-1017, ¶ 65-69. The Supreme Court concluded that his argument was speculative. *Id*. at ¶ 69.

{¶55} The doctrine of res judicata "bars the assertion of claims against a valid, final judgment of conviction that have been raised or could have been raised on appeal." *State v. Ketterer*, 126 Ohio St. 3d 448, 2010-Ohio-3831, ¶ 59 (citing *State v. Perry*, 10 Ohio St. 2d 175, paragraph nine of the syllabus (1967)). The presentation of competent, relevant, and material evidence outside the record, however, "may defeat the application of *res judicata*." *State v. Lawson*, 103 Ohio App. 3d 307, 315 (12th Dist. 1995); *State v. Schlee*, 11th Dist. No. 97-L-121, 1998 WL 964291, *3 (Dec. 31, 1998) (concluding that appellant could make the same argument that he had made on direct appeal in his petition for post-conviction relief because he had supplemented his argument "with his affidavit containing facts outside the trial court record."). The question is whether the issue "could not fairly have been determined without resort to evidence dehors the record." *State v. Smith*, 17 Ohio St. 3d 98, 101 fn.1 (1985); *State v. Starks*, 9th Dist. No. 25617, 2011-Ohio-2772, ¶ 8.

{¶56} The only evidence that Mr. Fry submitted with his petition for post-conviction relief in support of his fifth ground for relief was a copy of the indictment. Mr. Fry acknowledged that the issue was "not fully developed" and that he would have to rely on additional discovery to support his claim. The trial court, however, denied his motion for discovery, which was within its discretion. *State v. Craig*, 9th Dist. No. 24580, 2010-Ohio-1169, ¶ 6. Mr. Fry did not present any additional evidence in support of his fifth ground for relief with his brief in opposition to the State's motion to dismiss. Accordingly, because Mr. Fry has failed to establish that his fifth ground for relief could not be fairly determined without resort to evidence outside the record, the trial court properly concluded that it was barred by the doctrine of res judicata.

{¶57} In his third ground for relief, Mr. Fry argued that the trial court deprived him of the right to due process by not ensuring that the jury panel would include African-Americans. He also argued that his trial counsel was ineffective for not ensuring that the jury panel represented a fair cross-section of the community. The trial court determined that Mr. Fry's claim was barred by the doctrine of res judicata.

{¶58} During the jury selection process, Mr. Fry objected, noting that there were not many potential African-American jurors. After some discussion, the trial court continued with the selection process. At the end of the day, Mr. Fry objected to the process again, and the court told the parties that it would consider the issue the following day. The next day, the court received testimony from the Summit County Jury Commissioner regarding the method in which the potential jurors were selected. After both parties presented their arguments, the court determined that the selection process was fair and that it would not meddle with it just to ensure a certain racial composition.

{¶59} Mr. Fry submitted several articles with his petition for post-conviction relief regarding racial bias in the jury selection process. Although these articles were not part of the record, Mr. Fry did not establish that he could not have submitted them at trial. The court gave Mr. Fry the opportunity to submit materials in support of his bias allegation. Mr. Fry did not assert that he did not have enough time to adequately research the issue and he did not request a continuance. Accordingly, he failed to demonstrate that his claim could not have been fairly presented at trial or on direct appeal. While Mr. Fry also alleged ineffective assistance of counsel in his third ground for relief, he failed to develop an argument in support of his claim.

{¶60} In his eleventh ground for relief, Mr. Fry argued that his trial lawyers were ineffective because they did not spend enough time with him discussing whether he should

accept the State's plea offer. The United States Supreme Court recently confirmed that the Sixth Amendment right to counsel "extends to the plea-bargaining process." *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1384 (2012). It also confirmed that the two-part test set out in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to claims of ineffective assistance at the plea bargain stage. *Lafler*, 132 S. Ct. at 1384. It further held that, to establish prejudice in "the context of pleas[,] a defendant must show the outcome of the plea process would have been different with competent advice." *Id.*

{¶61} Although Mr. Fry presented several exhibits in support of his argument that his trial lawyers did not spend enough time discussing the plea offer with him, the only evidence that he presented to support his claim that he would have accepted the offer if his lawyers had been competent was his affidavit. The trial court noted that Mr. Fry's affidavit was "self-serving," and, apparently, determined that his claim that he would have accepted the plea offer if he had better counsel was not credible. As previously mentioned, the trial court serves a gatekeeping role regarding petitions for post-conviction relief and may assess the credibility of affidavits submitted in support of such petitions. *State v. Gondor*, 112 Ohio St. 3d 377, 2006-Ohio-6679, ¶ 52. Given Fry's assertion that the reason he stabbed Tamela Hardison was because she struck him in the head with an ashtray and told him that she was going to kill him, and given that the only witness to the event was a five-year-old boy, the trial court exercised proper discretion when it rejected Mr. Fry's contention that he would have accepted a sentence of 30 years to life if his lawyer had only explained the plea offer better. *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376, 1385 (2012) ("[A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in

light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.").

{¶62} In his seventh ground for relief, Mr. Fry argued that the breakdown in his relationship with his trial lawyers led him to decide not to put on any mitigating evidence and to rely, instead, on the appellate process to get his convictions overturned. He argued that, if his lawyers had adequately explained the effect that his failure to put on mitigating evidence would have, he could have had his mother testify about his difficult childhood. According to Mr. Fry, his mother would have been able to tell the jury about his physically abusive father, the economic struggles that his family faced, and the racism that he had endured in society.

{¶63} In his eighth ground for relief, Mr. Fry made similar claims to his seventh ground regarding the reason that he did not present any mitigating evidence. He also asserted that his brother Frank could have testified about the violence they endured as children, his struggle with drugs, and how racism had affected his life. He also presented a report from a professor of African-American studies who had reviewed his life story and explained how his personal experiences had marred his opinion of white people such that he was unable to trust his white attorneys or trust in the fairness of the trial, which was conducted by a white judge with an entirely white jury. The professor also suggested that Mr. Fry's lawyers' cultural ignorance prevented them from developing rapport with Mr. Fry and adequately representing him at trial.

{¶64} In his ninth ground for relief, Mr. Fry repeated his assertions about the reasons he did not present mitigating evidence. He also argued that his brother Lawrence could have testified about the dynamics of his family, his close attachment to his mother, and his struggles

with drug addiction. According to him, his brother could have also testified about the good things he had done with his life and how he had tried to stop using illicit drugs.

{¶65} The trial court denied Mr. Fry's seventh, eighth, and ninth grounds for relief because the Ohio Supreme Court had determined that, even if Mr. Fry had presented mitigating evidence, it would not have outweighed the aggravating circumstances beyond a reasonable doubt. *State v. Fry*, 125 Ohio St. 3d 163, 2010-Ohio-1017, ¶ 234. In its opinion, the Supreme Court noted that, although Mr. Fry had chosen not to present any mitigating evidence, his lawyers had presented the court with a copy of a psychological evaluation that his lawyers said outlined the mitigating evidence they could have presented. That report noted that Mr. Fry's father had abused his mother, that his father had died when Mr. Fry was age five, that Mr. Fry's mother was disabled, which limited her ability to supervise and financially support him, that Mr. Fry did not have appropriate role models, and that his brain development was disrupted by his early exposure to illicit drugs. The report also noted that Mr. Fry had served in the Marines and that he had been trained to act instinctively when under threat of physical harm.

{¶66} Although the affidavits of Mr. Fry's family members are more thorough than the report of the psychologist, they touch on the same subjects. The report noted his abusive father, his unstable and difficult family environment, and his struggle with drug addiction. While the report did not discuss his experience with racism, Mr. Fry presented that evidence to show why he did not trust his lawyers and chose not to present any mitigating evidence, not to establish a factor that mitigated his offenses. *See* R.C. 2929.04(B) (listing mitigating factors). Because Mr. Fry has not raised any mitigation issues that the Ohio Supreme Court has not already fairly considered, I agree that the trial court properly denied his seventh, eighth, and ninth grounds for relief.

{¶67} In his first, tenth, and thirteenth grounds for relief, Mr. Fry argued that his trial counsel's conduct led to a breakdown in the attorney-client relationship. He argued that he told his counsel that he was concerned about being represented by lawyers who were not African-American, but they failed to effectively address his concerns. Because they did not take his concerns seriously, he did not trust them, which led to him making uninformed decisions about whether to accept a plea agreement and whether to present mitigation evidence.

{¶68} Mr. Fry supported his arguments with evidence that was outside the trial record. The Ohio Supreme Court, however, has held that the "Sixth Amendment does not guarantee rapport or a meaningful relationship between client and counsel." *State v. Ketterer*, 111 Ohio St. 3d 70, 2006-Ohio-5283, at ¶ 101 (quoting *State v. Henness*, 79 Ohio St. 3d 53, 65 (1997)). Accordingly, the trial court correctly concluded that Mr. Fry was not entitled to post-conviction relief on his lack-of-trust-in-counsel claims.

{¶69} Finally, regarding Mr. Fry's counsel's cross-examination of J.B., in his second ground for relief, Mr. Fry argued that his lawyer should have inquired about the fact that J.B. told police that Mr. Fry asked Ms. Hardison about the location of his clothes before attacking her, which would have emphasized that he only attacked her out of frustration, not because she intended to testify against him in a criminal proceeding. Mr. Fry's lawyer, however, did ask J.B. several times about the fact that he heard Mr. Fry ask Ms. Hardison "[w]here are my clothes?" Mr. Fry, therefore, failed to establish that his lawyer's performance was deficient.

{¶70} In his fourth ground for relief, Mr. Fry argued that his trial lawyers were ineffective when they cross-examined J.B. because they did not emphasize the fact that Mr. Fry was a regular visitor to J.B.'s residence. According to Mr. Fry, because J.B. was used to seeing him come to the residence, it would not have made sense for J.B. to stop playing when J.B. saw

him. Mr. Fry argued that J.B.'s illogical actions could have been used to undermine his credibility.

{¶71} The fact that Mr. Fry was a regular visitor to J.B.'s residence does not mean that it was illogical for J.B. to stop playing when Mr. Fry came over on the day of the attack. It would have been normal for a child J.B.'s age to greet a familiar face, especially since it is undisputed that Mr. Fry sometimes gave J.B. candy. Moreover, J.B. testified that he told Mr. Fry, before the attack, not to go into his residence. In light of his knowledge that Mr. Fry was not allowed in his residence, it was even more appropriate for J.B. to approach Mr. Fry when he saw him that day.

{¶72} In his sixth ground for relief, Mr. Fry argued that his counsel was ineffective for not cross-examining J.B. about the fact that he did not tell police on the day of the attack that Mr. Fry was carrying a knife and bowl when he saw him before the attack. Mr. Fry argued that the fact that J.B. failed to tell police about such a significant detail undermined his credibility. J.B., however, was not the only witness who testified that they saw Mr. Fry carrying a knife and bowl to the residence. Accordingly, it is not likely that J.B.'s oversight when he spoke to police would have discredited him.

APPEARANCES:

TYSON FLEMING and KIMBERLY RIGBY, Assistant State Public Defenders, for Appellant.

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

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO	)	CASE NO. CR 2005-08-3007
	)	
Respondent,	)	
	)	
	)	JUDGE PATRICIA COSGROVE
v.	)	
	)	
CLARENCE FRY, JR.	)	
	)	ORDER
Petitioner.	)	FINAL AND APPEALABLE

This matter comes before the Court upon the following motions:

Motion for Recusal of trial judge
Motion for Discovery
Motion for Appropriation of Funds for Expert Psychological Assistance
Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits.
Motion for Post Conviction Relief

FACTS

On July 18, 2005, Clarence Fry and Tamela Hardison had an argument and a fight at their apartment in Akron, Ohio. Officers arrived and found Hardison injured and frightened and arrested Fry. Hardison filed charges against Fry for assault and aggravated menacing, both first degree misdemeanors and also sought a criminal protection order. Fry was held in Summit County Jail until his bond was modified on July 25, 2005 to a $10,000 signature bond on the condition that he would have no contact with Hardison. The next day Fry went to the Akron Police Department and wanted to report a theft of property, alleging that Hardison had stolen items from the apartment.

Hardison spent the night of July 30, 2005 at her daughter Nikita Knox's home on Ina Court in Akron. On the morning of July 31, Knox left for work while Hardison remained to babysit for her grandchildren. In the early afternoon of July 31, 2005, Fry went to the Knox home. Hardison's grandson, Jasown and his friend Marice Vinson, were playing outside and testified that they saw Fry walking through the courtyard toward the back of the Knox home. Fry was wearing a yellow sleeveless shirt and carrying an empty bowl and a long butcher knife. Jasown followed Fry into the home.

According to Jasown, Fry went into the living room where Hardison was watching TV with another grandchild on the couch. Jasown heard Fry ask Hardison, "Where are my clothes?" Jasown then saw Fry "cut" Hardison with the knife. Hardison told Jasown to call the police. Jasown tried, but Fry kept taking the phone from him. Maurice Vinson testified that he saw Fry "speed walking" as he left the home carrying the knife and the bowl. The Akron Police were called and when they arrived Hardison's body was found on the living room couch. A paramedic determined that Hardison was dead.

Fry was identified as the primary suspect in Hardison's killing. On August 3, 2005, Fry was found and arrested in Charleston, West Virginia. Fry stated during a taped interview with an Akron Detective that Hardison had stolen his belongings from the apartment and sold them at a consignment store. Fry did not deny that he killed Hardison, but stated that he was not carrying a knife when he entered the apartment. Fry stated that when he entered the apartment, that Hardison became angry and hit him in the jaw with an ashtray. Fry said that he started "seeing stars" and his "vision blurred". Fry stated that Hardison was attacking him and that he stabbed Hardison because "she was trying to kill" him.

Fry was indicted on the following charges: Count One charged Fry with the aggravated felony murder of Tamela Hardison while committing aggravated burglary and/or burglary, R.C.

2903.01(B). Count One included two death-penalty specifications: murder while committing, attempting to commit, or fleeing after committing aggravated burglary, R.C. 2929.04(A)(7), and murder to prevent Hardison's testimony in another criminal proceeding or in retaliation for her testimony in any criminal proceeding, R.C. 2929.01(A)(8). Count Two charged Fry with aggravated murder by purposely killing Hardison with prior calculation and design, R.C. 2903.01(A), and Count Three charged him with felony murder, R.C. 2903.02.

Fry was also charged with six additional counts: Count Four -- aggravated burglary, Count Five -- domestic violence on July 18, 2005, Count Six -- domestic violence on July 31, 2005, Count Seven -- tampering with evidence, Count Eight --intimidation of a crime victim, and Count Nine -- menacing by stalking. Fry was also charged in the indictment with involuntary manslaughter, aggravated menacing, and repeat violent offender specifications. During trial, these counts and specifications were dismissed, and the remaining charges were renumbered as listed herein.

Fry was found guilty by a jury of aggravated murder pursuant to R.C. 2903.01(B) with specifications of the offense being committed during an aggravated burglary, R.C. §2929.04(A)(7) and the victim was a witness to an offense who was purposefully killed to prevent her testimony in a criminal proceeding, 2929.04(A)(B). Additionally, Petitioner was found guilty of murder, R.C. §2903.02(A)(B), tampering with evidence, R.C. §2921.12, intimidation of a crime victim or witness, R.C. §2921.04(B), and menacing by stalking, R.C. §2903.211(A). Petitioner was sentenced to death under the aggravated murder count.

Petitioner appealed to the Supreme Court of Ohio on May 26, 2010, setting forth arguments in four categories: pretrial and trial issues, death penalty issues, ineffective assistance of counsel issues, and remaining issues raised. The Supreme Court of Ohio in *State v. Fry*, 2010-Ohio-1017, found that: Petitioner's assertion that the grand jury considered

favorable or exculpatory evidence in returning the indictment on aggravated murder and lesser offenses is totally speculative; there was no proof that the attorney-client relationship had deteriorated and, furthermore, there was no proof of ineffective counsel. See *State v. Fry*, 2010-Ohio-1017.

Motion for Voluntary Recusal

R.C. §2701.03 states that if a judge of the court of common pleas allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel or otherwise disqualified to preside in the proceedings, any party to the proceeding or party's counsel can file an affidavit of disqualification with the clerk of the Supreme Court of Ohio.

As stated in R.C. §2701.03 a motion for voluntary recusal (disqualification) must be filed with the clerk of the Supreme Court. Petitioner's counsel has filed the motion for disqualification with the clerk of this Court, the Court of Common Pleas. Therefore, Petitioner's motion was not filed correctly and will not be addressed by this Court.

Motion for Discovery; Motion for Appropriation of Funds for Expert Psychological Assistance; Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits

The Ninth District Court of Appeals has consistently held that there is no right to discovery or expert assistance in post-conviction relief proceedings:

> This Court has long held that there is no right to discovery in a postconviction proceeding. An action for postconviction relief is a civil action. *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49, 325 N.E.2d 540. The procedures applicable to the action, however, are those found in R.C. 2953.21. *State v. Hiltbrand* (May 16, 1984), Summit App.No. 11550, 1984 Ohio App. LEXIS 9936, . That section does not provide for discovery.

State v. Craig, 2010 Ohio 1169.

Defendant herein has set forth no reasoning or authority under which this Court would deviate from the clear rulings from the Ninth District Court of Appeals.

Defendant's Motion for Discovery; Motion for Appropriation of Funds for Expert Psychological Assistance; Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits are DENIED.

Post-Conviction Petition

Ineffective Assistance of Counsel

Petitioner contends that his trial counsel was ineffective in assisting him in a multitude of ways. Petitioner argues: (1) the attorney-client relationship began to deteriorate from the beginning when Attorney Whitney was appointed; (2) counsel ignored Petitioner's suggestions regarding his defense and refused to allow Petitioner to testify in his own defense; (3) Petitioner believed counsel was racist and they were not interested in presenting his case; (4) counsel failed to adequately communicate the plea bargain with Petitioner; (5) counsel failed to adequately question jurors during voir dire and failed to select a jury not made up of twelve white jurors; (6) counsel failed to contact and present as witnesses individuals Petitioner wanted to be presented; (7) counsel's failure to cross-examine Jasown Bivens; and (8) counsel failed to adequately inform Petitioner about the consequences of not putting on mitigating evidence.

The test for ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668. First, defendant must show that counsel's performance was deficient. *Id.* at syllabus (2). Second, the defendant must show that the deficient performance of counsel prejudiced the defendant so as to deprive the defendant of a fair trial. *Id.*.

The standard by which an attorney's performance is judged is that of reasonably effective assistance and the defendant must show that counsel's representation fell below an

objective standard of reasonableness. *Id.* at syllabus (2)(a). Counsel's conduct will be judged from counsel's perspective at the time. *Id.*. Also in Ohio a licensed attorney is presumed to be competent. *State v. Calhoun*, 86 Ohio St.3d 279, 289.

In order to prove prejudice the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at syllabus.. The standard by which prejudice is judged is that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at ¶5.

Additionally, a defendant that is making a claim of ineffective assistance of counsel must submit sufficient operative facts demonstrating the lack of competent counsel. *State v. Calhoun*, 86 Ohio St.3d 279, 283. Broad conclusory statements, as a matter of law, do not meet the requirements for an evidentiary hearing. *State v. Kapper*, 5 Ohio St.3d 36, 39. The defendant must also show that those particular errors of counsel actually had an adverse effect on the defense. *Strickland v. Washington*, 466 U.S. 668, 693. Defendant must show that counsel's conduct more likely than not altered the outcome of the case. *Id.*.

The doctrine of res judicata occurs when a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 382.

As stated above, Petitioner has already appealed to the Supreme Court of Ohio. See *State v. Fry*, 2010-Ohio-1017. Two out of the eight arguments made by Petitioner have already been addressed by the Supreme Court of Ohio. Therefore, Petitioner's claim number one and eight are barred by res judicata.

The rest of Petitioner's arguments for ineffective assistance of counsel, while being barred by res judicata, will now be addressed.

The similarities between *Strickland* and this case are such that they will be addressed by this Court. In *Strickland* the defendant submitted, as a part of his post-conviction relief petition, fourteen affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. *Strickland v. Washington*, 466 U.S. 668, 675. The Supreme Court of the United States has held that the trial counsel could reasonably surmise that the aggravating circumstances were utterly overwhelming and presenting any further evidence as to character or psychological issues would be of little help. *Id.* at 699. Additionally, the Supreme Court stated that the testimony that would have been presented would not have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances. *Id.* 700.

Here Petitioner submitted quotes from friends and family members describing what they would have testified to had they been asked to do so. The Supreme Court of Ohio in *State v. Fry* indicated that the mitigating factors that Petitioner said his counsel should have presented, Mother, family, and friend's testimony, would not have outweighed the aggravating circumstances. *State v. Fry*, 2010-Ohio-1017, ¶232-233. Additionally, Petitioner waived his right to present mitigating evidence to the jury. Therefore, it is within counsel's professional reasonable judgment *not* to call or present any more mitigating evidence or to call the witnesses suggested by Petitioner.

The Supreme Court of Ohio in *State v. Fry* repeatedly emphasized that Petitioner's trial counsels failure to cross-examine Nikita Knox was a tactical decision. *Id.* at ¶202, 204, & 205. This Court believes it was trial counsel's tactical decision to not cross-examine Jasown Bivens or to further question the jurors during voir dire. A trial counsel's actions will be judged from

the perspective of the counsel at *that* time. Additionally, Petitioner's counsel had hired a forensic psychologist, a mitigation specialist, and had interviewed Petitioner's family members. *State v. Fry* 2010-Ohio-1017 ¶169. Petitioner's counsel was prepared to present a mitigation case, but Petitioner filed a pro se motion denying his counsel the opportunity to participate in presenting mitigating evidence. See Motion Not to Participate in Mitigation Hearing, 6-27-2006. Therefore, Petitioner's express communication that he did not wish to participate at all in the mitigation hearing cannot be a basis for ineffective assistance of counsel.

Petitioner argues that his counsel failed to adequately communicate the plea bargain offered to him by the State. Petitioner contends that had his counsel tried to convince him or have family members try and convince him to take the plea offer he would have taken it. See Petition for Post-Conviction Relief p. 39. The only evidence Petitioner presents is a self-serving affidavit. No other evidence is presented on the record that would prove that Petitioner's counsel failed to adequately communicate the State's plea offer. Petitioner is barred by res judicata from raising this issue here because he could have raised it at the trial court and with the Supreme Court of Ohio. Petitioner failed to do both.

In conclusion, Petitioner's argument for ineffective assistance of counsel is without merit and is DENIED.

Grand Jury Proceeding

Petitioner contends that the state failed to provide him with exculpatory evidence that was presented to the grand jury. Petitioner specifically argues that the grand jury, on at least two counts, found that the Petitioner entered the home of the victim with an intent less then purposeful or prior calculation and design.

However, Petitioner's argument has already been addressed by the Supreme Court of Ohio in *State v. Fry*. The Supreme Court of Ohio citing *State v. Greer* (1981), 66 Ohio St.2d

139, stated that "unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy" the accused is not entitled to review the transcript of the grand jury proceeding. *State v. Fry*, 2010-Ohio-1017 ¶ 66. The Supreme Court of Ohio determined that Petitioner's argument was "totally speculative". *Id.* ¶69. Since the Supreme Court of Ohio has already addressed this issue it falls under res judicata and will not be addressed.

Conclusion

Therefore, this Court finds that Petitioner's post-conviction petition and motion for recusal, Defendant's Motion for Discovery, Motion for Appropriation of Funds for Expert Psychological Assistance and Motion for Appropriation of Funds for expert on substance abuse and neuropsychological deficits are without merit and denied.

IT IS ORDERED.

JUDGE PATRICIA A. COSGROVE

CC: Tyson Fleming, Assistant State Public Defender
Kimberly S. Rigby, Assistant State Public Defender
Richard S. Kasay, Assistant Prosecuting Attorney