

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080697
	:	TRIAL NO. B-9508499
Respondent-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
JAMES WERE, n.k.a. NAMIR ABDUL	:	
MATEEN,	:	
	:	
Petitioner-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 2, 2009

Joseph T. Deters, Hamilton County Prosecuting Attorney, *Mark E. Piepmeier*, and *William E. Breyer*, Assistant Prosecuting Attorneys, for Respondent-Appellee,

Randall Porter, Assistant Ohio Public Defender, for Petitioner-Appellant.

Per Curiam.

{¶1} Petitioner-appellant James Were appeals the Hamilton County Common Pleas Court’s judgment denying his postconviction petition. On appeal, he advances six assignments of error. We affirm the court’s judgment.

{¶2} In 1995, Were was convicted in Hamilton County of two counts of aggravated murder and a single count of kidnapping, and was sentenced to death, in connection with the slaying of Corrections Officer Robert Vallandingham during the 1993 inmate riot at the Southern Ohio Correctional Facility in Lucasville, Ohio. In 2002, the Ohio Supreme Court reversed his convictions.¹ In 2003, he was retried, again convicted of aggravated murder and kidnapping, and again sentenced to death.

{¶3} Were unsuccessfully challenged his convictions in direct appeals to this court² and to the Ohio Supreme Court.³ The United States Supreme Court denied his petition for a writ of certiorari.⁴ And the Ohio Supreme Court affirmed our decision denying Were’s App.R. 26(B) application to reopen his appeal.⁵

{¶4} In 2005, Were filed with the common pleas court an R.C. 2953.21 petition for postconviction relief. He presented in his petition, as twice amended, 23 claims for relief. The common pleas court denied the petition, and this appeal followed.

I. Findings of Fact and Conclusions of Law

{¶5} We overrule Were’s first assignment of error, challenging the

¹ *State v. Were*, 94 Ohio St.3d 173, 2002-Ohio-481, 761 N.E.2d 591.

² *State v. Were*, 1st Dist. No. C-030485, 2005-Ohio-376 and 2006-Ohio-3511.

³ *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263.

⁴ *State v. Were* (2008), ___ U.S. ___, 129 S.Ct. 606.

⁵ *State v. Were*, 120 Ohio St.3d 85, 2008-Ohio-5277, 896 N.E.2d 699.

common pleas court's adoption of the findings of fact and conclusions of law submitted by the state. The court's adoption of the state's findings of fact and conclusions of law did not alone constitute error.⁶ And we cannot say that Were was prejudiced, when the findings of fact and conclusions of law journalized in his case covered and pertained to the material and determinative issues presented in his petition and adequately apprised him and this court of the legal and evidentiary bases for the court's decision denying the petition.⁷

II. The Postconviction Claims

{¶6} In his fifth assignment of error, Were challenges the common pleas court's application of the doctrine of res judicata to bar certain postconviction claims. In his sixth assignment of error, he challenges the denial of his claims without an evidentiary hearing. We address these assignments of error together and overrule them.

{¶7} To prevail on a postconviction claim, the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction that rendered the conviction void or voidable under the Ohio Constitution or the United States Constitution.⁸ A postconviction petitioner bears the initial burden of demonstrating, through the petition, any supporting affidavits, and the trial record, "substantive grounds for relief."⁹

{¶8} A postconviction claim is subject to dismissal without a hearing if the petitioner has failed to support the claim with evidentiary material setting forth

⁶ See *State v. Poindexter* (Mar. 6, 1991), 1st Dist. No. C-890734.

⁷ See *State v. Calhoun*, 86 Ohio St.3d 279, 291-292, 1999-Ohio-102, 714 N.E.2d 905, citing *State ex rel. Carrion v. Harris* (1988), 40 Ohio St.3d 19, 530 N.E.2d 1330, and *State v. Clemmons* (1989), 58 Ohio App.3d 45, 46, 568 N.E.2d 705.

⁸ See R.C. 2953.21(A)(1).

⁹ See R.C. 2953.21(C).

sufficient operative facts to demonstrate substantive grounds for relief.¹⁰ Conversely, “the court must proceed to a prompt hearing on the issues” if “the petition and the files and records of the case show the petitioner is * * * entitled to relief.”¹¹

The Constitutionality of Postconviction Proceedings

{¶9} In his first through fifth postconviction claims, Were challenged various aspects of, and his experience with, postconviction proceedings. He contended that R.C. 2953.21 et seq. is unconstitutional because it does not provide “an adequate corrective process.” And he asserted that he had been denied meaningful postconviction review as a consequence of (1) an incomplete trial record, (2) institutional limits on his communications with postconviction counsel, (3) his incompetency, and (4) limits on his access to law-enforcement records.

{¶10} R.C. 2953.21(A)(1) requires a postconviction petitioner to demonstrate a constitutional deprivation that occurred during the proceedings resulting in his conviction, and that rendered his conviction void or voidable. The constitutional deprivations asserted by Were in his first five postconviction claims did not occur during the proceedings resulting in his convictions. And a determination that the postconviction statutes were constitutionally infirm would not have rendered his convictions void or voidable.¹² We, therefore, conclude that the common pleas court properly denied these claims.

¹⁰ See *id.*; *State v. Pankey* (1981), 68 Ohio St.2d 58, 428 N.E.2d 413; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819.

¹¹ R.C. 2953.21(E).

¹² See *State v. Fitzpatrick*, 1st Dist. No. C-030804, 2004-Ohio-5615, ¶60, appeal not accepted for review, 105 Ohio St.3d 1499, 2005-Ohio-1666, 825 N.E.2d 623.

Res Judicata

{¶11} The common pleas court applied the doctrine of res judicata to bar some of Were’s postconviction claims. “Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding[,] except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial [that] resulted in that judgment of conviction[] or on an appeal from that judgment.”¹³ Thus, res judicata bars a postconviction claim that could fairly have been determined in the direct appeal, based upon the trial record and without resort to evidence outside the record.¹⁴

{¶12} It follows that a postconviction petitioner may resist the application of res judicata to bar his postconviction claim by supporting the claim with outside evidence. But merely submitting outside evidence will not preclude the common pleas court from applying res judicata to bar a claim. The claim must depend on the outside evidence for its resolution.¹⁵ Moreover, the outside evidence must be “competent, relevant and material” to the claim; it must “meet some threshold standard of cogency,” i.e., it must be more than “marginally significant”; and it must “advance the * * * claim beyond mere hypothesis and a desire for further discovery.”¹⁶

¹³ *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus.

¹⁴ See *id.*; *State v. Cole* (1982), 2 Ohio St.3d 112, 114, 443 N.E.2d 169.

¹⁵ See *id.*

¹⁶ See *State v. Were*, 1st Dist. No. C-010372, 2003-Ohio-187, ¶13, quoting *State v. Coleman* (Mar. 17, 1993), 1st Dist. No. C-900811.

{¶13} When a postconviction claim depends for its resolution upon outside evidence, a common pleas court may not apply res judicata to dismiss the claim.¹⁷ But a reviewing court may sustain the claim’s dismissal on other grounds.¹⁸

{¶14} **Batson claim.** In his 12th postconviction claim, Were contended that the trial court erred in overruling his challenge under the United States Supreme Court’s decision in *Batson v. Kentucky*¹⁹ to the prosecution’s exercise of its peremptory challenges to exclude African American jurors. The Ohio Supreme Court rejected this challenge in his direct appeal there.²⁰

{¶15} In support of his postconviction *Batson* claim, he offered outside evidence in the form of an excerpt from a postconviction petition filed in another case. He insisted that this evidence, along with the record of the voir dire conducted in his case, “demonstrate[d] a pattern of strikes against African Americans” and thus satisfied *Batson*’s requirement that he establish a prima facie case of racial discrimination.

{¶16} But this outside evidence was not material to Were’s *Batson* claim because it was not probative of whether the prosecution in Were’s case had exercised its peremptory challenges in a racially discriminatory manner. Thus, although Were supported his 12th claim with outside evidence, the claim was barred by res judicata because it was determinable, and was fairly determined by the supreme court, in Were’s direct appeal, based upon the trial record and without resort to the outside evidence.

¹⁷ See *Perry*, paragraph nine of the syllabus; *Cole*, 2 Ohio St.3d at 114.

¹⁸ See *State v. Peagler*, 76 Ohio St.3d 496, 1996-Ohio-73, 668 N.E.2d 4897, paragraph one of the syllabus; *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119, 526 N.E.2d 816; accord *State v. Smith*, 1st Dist. No. C-060387, 2007-Ohio-2796, ¶17.

¹⁹ (1986), 476 U.S. 79, 106 S.Ct. 1712.

²⁰ See *Were*, 118 Ohio St.3d 448, at ¶58-76.

{¶17} *Venue*. In his 18th claim, Were contended that the trial court had improperly instructed the jury so as to relieve the state of its burden to prove venue. And part of his 16th claim challenged his trial counsel’s failure to timely object to the instruction. The 18th claim did not depend on, and was not supported by, evidence outside the record. And the Ohio Supreme Court fairly determined the claim in Were’s direct appeal, based upon the trial record.²¹ Therefore, the common pleas court properly dismissed Were’s challenge in his 18th claim to the instruction, along with that aspect of his 16th claim challenging counsel’s effectiveness in this regard.

Grand-Jury Bias

{¶18} Were contended in his sixth claim that he had been denied his rights to be indicted by a fair and impartial grand jury and to challenge the grand-jury array. And part of his 16th claim challenged his trial counsel’s failure to timely object to these matters.

{¶19} Were supported his sixth claim with documents filed with the Scioto County Common Pleas Court. The documents showed the state public defender’s unsuccessful efforts to demonstrate grand-jury bias in an indictment returned against another inmate for his involvement in the prison riot. The charge of grand-jury bias was based on the allegation that several grand jurors “may have signed a petition [calling for all] individuals connected with the riot [to] be prosecuted to the fullest the extent of the law.”

{¶20} But Were offered no evidence probative of his allegation of grand-jury bias affecting his indictment. Because Were failed to support his sixth claim

²¹ See id. at ¶145-150.

with evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, the common pleas court properly denied the claim, along with that aspect of his 16th claim challenging his trial counsel's effectiveness in failing to raise this matter.²²

The First-Trial Case File

{¶21} In his seventh claim, Were contends that he was denied his constitutional right to consult privately with his counsel, when, before his second trial, the attorney who had represented him in his first trial had provided the prosecution with his “entire” case file. He supported this claim with the affidavit of his postconviction counsel, who attested to first-trial counsel's statement that he had given his case file to an investigator sent by a special prosecutor, “so the special prosecutor could provide discovery in [Were's] second trial.”

{¶22} The state countered with the affidavit of the special prosecutor, who insisted that first-trial counsel had given him only the discovery materials that the state had provided to the defense in Were's first trial. The special prosecutor averred that, “as an accommodation” to Were's first-trial counsel and second-trial counsel, he had stopped in Canton, Ohio, on his way to depositions in Youngstown, Ohio, and had picked up from first-trial counsel in Canton, for delivery to second-trial counsel in Cincinnati, the “boxes of discovery * * * [the special prosecutor] had provided to [first-trial counsel] as discovery in the original * * * trial.”

{¶23} The special prosecutor, in his affidavit, attributed to first-trial counsel the statement “that he was not giving me his entire file, only the discovery material.” This statement directly contradicted Were's allegation in his

²² See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

postconviction petition that his first-trial counsel had provided the state with the “entire” case file. But it was not essentially at odds with the statement attributed to first-trial counsel, by postconviction counsel in his affidavit, that he had given the case file to the special prosecutor’s investigator “so the special prosecutor could provide discovery in [Were’s] second trial.”

{¶24} Were thus failed to provide evidence demonstrating the allegation central to his seventh claim, that his first-trial counsel had surrendered material beyond the discovery materials that the state had provided for his first trial. Because Were failed to support his seventh claim with evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, the common pleas court properly denied the claim.²³

Judicial Bias

{¶25} Were, in his ninth claim, asserted that he had been denied his constitutional right to an impartial trial judge. He insisted that the trial judge should have recused himself or been disqualified because the judge’s experience in presiding at the trial of Were’s fellow inmate Carlos Sanders had predisposed the judge against Were in ruling on his *Batson* challenges and on his challenges to the admissibility of audiotapes (referred to as the “tunnel tapes”) of inmate conversations recorded by law enforcement during the riot. And part of his 16th claim challenged his trial counsel’s failure to timely seek the judge’s removal.

{¶26} In Were’s direct appeal, the Ohio Supreme Court rejected Were’s challenge to the trial judge’s impartiality. Were had, at trial, broached the matter of judicial bias when, during pretrial proceedings, he had personally raised the

²³ See *id.*

issue. But Were's trial counsel had not sought the trial judge's removal. The supreme court noted that a trial judge is not subject to disqualification simply because he has acquired knowledge of a case during a prior proceeding. The supreme court found no proof of judicial bias on the trial record, and it held that Were had waived his objection to the trial judge, when he had failed to timely file with the supreme court an affidavit of disqualification under R.C. 2701.03(A).²⁴

{¶27} Were supported his postconviction claim with outside evidence in the form of copies of (1) parts of the trial record in Sanders's case, and (2) a lab report that, Were insisted, "indicated irregularities, such as breaks in [a tunnel] tape indicative of editing." This evidence did not demonstrate how the trial judge's experience with *Batson* challenges in Sanders's trial had affected the judge's handling of the *Batson* challenges at Were's trial. Nor did it cast in a different light the supreme court's conclusions in Were's direct appeal that the trial judge neither had abused his discretion in admitting the tunnel tapes nor been demonstrably biased.²⁵ Because Were failed to present evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, the common pleas court properly denied his ninth claim, along with that aspect of his 16th claim challenging his trial counsel's effectiveness in failing to raise the matter at trial.²⁶

Jury View

{¶28} In his 14th claim, Were asserted that he had been denied a fair trial, because the trial court had "had impermissible contact with the jury" during a

²⁴ See *id.* at ¶54-57.

²⁵ See *id.* at ¶57 and 105-117.

²⁶ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

three-hour bus ride to view the crime scene. And part of his 16th claim challenged his trial counsel's failure to timely object to the court's decision to ride with the jury on the bus.

{¶29} The Ohio Supreme Court, in Were's direct appeal, held that the trial court's decision to ride on the bus had not constituted plain error in the absence of evidence of improper communications between the court and the jury during the bus ride or during the jury view.²⁷ Thus, Were's 14th claim depended on outside evidence demonstrating an improper communication between the court and the jury on the bus or at the view. But Were provided none. Because he failed to support his 14th claim with evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, the common pleas court properly denied Were's 14th claim, along with that aspect of his 16th claim challenging his trial counsel's failure to object to the court's decision to ride on the bus.²⁸

Stun Belt

{¶30} In his 13th postconviction claim, Were challenged the trial court's order that he be restrained throughout his trial by an electronic immobilization belt, or "stun belt," without first conducting a hearing or providing some justification for the restraint. And part of his 16th claim challenged his trial counsel's failure to object to the stun belt.

{¶31} The Ohio Supreme Court addressed and rejected this challenge in Were's direct appeal there. The court held that Were had waived any error in

²⁷ See *Were*, 118 Ohio St.3d 448, at ¶99-101.

²⁸ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

requiring the stun belt, because he did not object to the order or request a hearing on the matter, and because he could not be said to have been prejudiced in the absence of evidence “that the device caused him any physical discomfort or interfered with his ability to communicate with counsel * * * [or] that the jury knew or could see that [he] was wearing a stun belt.”²⁹

{¶32} Were supported his 13th claim with outside evidence in the form of (1) an instruction manual that the Hamilton County Sheriff’s Office had issued to its Court Service Division, outlining the stun belt’s purposes and uses, (2) a notification form, signed by a defendant in an unrelated trial, advising that defendant of the sheriff’s requirement that he wear the belt, the circumstances under which the belt might be activated, and the consequences of its activation, (3) affidavits of the other defendant’s siblings, attesting to their observations concerning their brother’s restraint by a stun belt at his trial, and (4) Were’s own affidavit, in which he asserted that the stun belt had protruded from his clothes, had discomforted him, and had caused him to be afraid to interact with his counsel.

{¶33} Of this outside evidence, only Were’s affidavit was probative of the determinative issue of whether he had been prejudiced by his restraint with a stun belt. He offered no outside evidence demonstrating that his restraint by the stun belt had been apparent to others in courtroom. And in the absence of any objection at any point in his trial to the requirement that he wear a stun belt, his self-serving declarations in his affidavit that the stun belt had discomforted him and had interfered with his ability to communicate with counsel were insufficient to compel

²⁹ See *Were*, 118 Ohio St.3d 448, at ¶103-104.

a hearing on his claim.³⁰ Because Were failed to support his 13th claim with evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, the common pleas court properly denied the claim, along with that aspect of his 16th claim challenging his trial counsel's effectiveness in failing to object to stun belt.³¹

***Prosecutorial Misconduct—“Inaccurate” Argument and
Suborning Perjury***

{¶34} ***“Inaccurate” argument and perjured testimony.*** In his 15th claim, Were asserted that the state had violated his constitutional right to a fair trial when it had persisted in its “inaccurate argument” concerning how Officer Vallandingham had been killed, and when it had knowingly presented at trial, and had failed to correct, perjured testimony by inmate witnesses.

{¶35} We address first Were's allegation that the state had violated his fair-trial right by persisting in its theory of how Officer Vallandingham had been killed, even after the coroner who had autopsied the officer had provided testimony at trial “debunk[ing]” the state's theory. This aspect of his 15th claim depended entirely upon the trial record. Thus, it was barred under the doctrine of res judicata.

{¶36} The balance of Were's 15th claim rested on his assertion that his convictions had been the product of false testimony knowingly elicited by the prosecution.³² But this aspect of his claim failed in its central premise, because the witnesses' testimony had not been demonstrably false.

³⁰ See *State v. Kapper* (1983), 5 Ohio St.3d 36, 37-38, 448 N.E.2d 823; *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 652 N.E.2d 205.

³¹ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

³² See *State v. Iacona*, 93 Ohio St.3d 83, 97, 2001-Ohio-1292, 752 N.E.2d 937.

{¶37} Were sought to prove the falsity of inmate witness Sherman Sims's testimony by showing (1) that Sims had, over the years, offered various and varying statements concerning what he had seen and done during Officer Vallandingham's murder, and (2) that inmate Kenneth Law, who had "buttressed" Sims's testimony in Were's first trial, but did not testify in his second trial, had, after the first trial, recanted. But the record showed that the matter of Sims's inconsistent statements had been thoroughly explored during his direct and cross-examination at trial. And Law's affidavit recanting his first-trial testimony implicating Were was not probative of whether Sims's second-trial testimony implicating Were had been false.

{¶38} Were sought to prove the falsity of inmate witness Steve Macko's testimony by pointing out alleged inconsistencies between his trial testimony and his earlier statements to state investigators and at Sanders's trial concerning Were's role in kidnapping Officer Vallandingham. As with Sims, the record showed that the matter of Macko's inconsistent statements had been thoroughly explored at trial.

{¶39} Were sought to prove the falsity of inmate witness Anthony Thomas Taylor's testimony. He offered evidence to show that Taylor had had an extensive history of criminal conduct and mental illness, and that Taylor's trial testimony had downplayed the extent of his criminal record and had been inconsistent with his statement to state investigators concerning who had escorted Officer Vallandingham from his cell on the morning that the officer had been killed.

{¶40} Although Taylor had attempted to downplay his criminal record, the state had elicited from Taylor testimony showing him to have been less than a

model citizen or inmate. During his direct examination, Taylor conceded that he had been confined at Lucasville on a 20-to-50-year sentence for rape, kidnapping, and aggravated robbery, and that he was then serving a ten-to-25-year sentence for manslaughter for his part in the inmate riot. Moreover, defense counsel had, during Taylor's cross-examination, thoroughly explored the inconsistencies between Taylor's trial testimony and his statement to the investigators.

{¶41} Finally, Were sought to prove the falsity of inmate witness Rodger Snodgrass's trial testimony concerning the inmate meeting that had preceded Officer Vallandingham's murder. He asserted that Snodgrass "has now admitted that he lied when he testified in the Lucasville prosecutions."

{¶42} The outside evidence offered by Were to support his assertion that Snodgrass "has now admitted that he lied" was wholly irrelevant to that assertion. But support for that assertion may fairly be said to have been provided by outside evidence, offered in support of related postconviction claims, in the form of the affidavits of inmate Emanuel "Buddy" Newell. Newell averred in his affidavits that in 2006, while both men were incarcerated at the Toledo Correctional Institution, Snodgrass had confessed to him that, upon threats by and as instructed by the state's investigators and prosecuting attorneys, Snodgrass had testified falsely concerning inmate George Skatzes's involvement in the murder of another inmate.

{¶43} The state countered Newell's affidavit with Snodgrass's affidavit. Snodgrass admitted that he had had "problems" with Newell before and during the riot, and that he had tried to make amends in Toledo in 2006. But Snodgrass denied speaking with Newell about the riot or his testimony in the riot trials. And Snodgrass denied that his trial testimony had been prompted by the state's threats

or promises, other than its promise to notify the parole board about his cooperation. Snodgrass pointed out that after he had agreed to testify, he had been denied parole eight times, that he had not been paroled until late 2006, and that in early 2006, when he had allegedly recanted his trial testimony, he would not have been inclined to recant because he had been just a few months away from going before the parole board again.

{¶44} The state also offered two affidavits of the lead special prosecutor. With his second affidavit, he provided a copy of a letter he had received, unsolicited, from Newell in October 2007. In the letter, Newell referred to “the affidavit[s] [he had] signed * * * involving the SOCF uprising in April 19993” and asked the special prosecutor if he would “be attentive to the topic of having those affidavits recanted in lieu of affidavits indicating that they were drafted as a result of coercion by attorneys affiliated with this matter.” The special prosecutor averred that he had then met with Newell in Toledo. He stated that Newell had confirmed that he had written the letter, and that the letter accurately reflected that his prior affidavit had been false and had been solicited by “attorneys” who had promised help in gaining his release from prison, and by anti-death-penalty “crusade[rs]” who had promised to pay him \$1000 from the proceeds from their book.

{¶45} The common pleas court, in denying Were’s tenth postconviction claim, discounted the credibility of Newell’s affidavit. We cannot say that the court abused its discretion in doing so.

{¶46} The judge who reviewed Were’s postconviction petition had also presided at his trial. The material statement contained in Newell’s affidavit—that Snodgrass had testified falsely—constituted hearsay, was denied by Snodgrass in his

affidavit, and was essentially recanted by Newell in his letter and during his conversation with the special prosecutor. And Newell's letter, along with the special prosecutor's affidavit attesting to their subsequent conversation, suggested that the promise of payment and of help in gaining his release from prison had provided Newell with a personal interest in the success of Were's petition for postconviction relief.³³

{¶47} In sum, the alleged inconsistencies between the inmate witnesses' trial testimony and their prior statements, even if demonstrated, did not prove that their trial testimony had been false. The proved inconsistencies were probative of the witnesses' veracity. But Were's jury had, for the most part, been made aware of the matters that he claimed, in his petition, had impeached the witnesses's credibility. And the jury had, nevertheless, returned verdicts suggesting that they had believed the witnesses' testimony implicating Were in Officer Vallandingham's kidnapping and murder.

{¶48} Were failed to support his 15th claim with evidentiary material setting forth sufficient operative facts to demonstrate the falsity of the inmate witnesses' testimony. Because the inmate witnesses' testimony was not demonstrably false, Were could not show that his convictions had been the product of the prosecution's knowing use of perjured testimony. Therefore, the common pleas court properly denied his 15th claim.³⁴

{¶49} ***Suborning perjury.*** In his 11th claim, Were asserted that the state had violated his right to due process, when it had housed its inmate witnesses

³³ See *State v. Calhoun*, 86 Ohio St.3d 279, 284-285, 1999-Ohio-102, 714 N.E.2d 905.

³⁴ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

together in Oakwood Correctional Facility in Lima, Ohio, had permitted them to interact, and had provided favorable treatment and “handlers” to “coach[]” them, all with the purpose to “encourage [the witnesses] explicitly or implicitly * * * to tailor their testimony.” And part of his 16th claim challenged his trial counsel’s failure to timely object to housing the inmate witnesses together at Oakwood.

{¶50} Were supported his claim with outside evidence in the form of depositions, testimony in other proceedings, and affidavits attesting to the importance of the inmates’ testimony in the absence of physical evidence incriminating him, the favorable conditions under which the inmate witnesses had been housed, the favorable treatment they had received, their interactions, and their stated determination to say at trial what they needed to say “to help themselves.”

{¶51} To the extent that Were’s 11th claim challenged the state’s “handl[ing]” of the inmate witnesses, it was subject to dismissal without a hearing, because the alleged constitutional deprivation did not occur during the proceedings resulting in Were’s convictions.³⁵ To the extent that the claim may be read to have charged prosecutorial misconduct in obtaining Were’s convictions through the knowing use of perjured testimony, it failed, as his 15th claim failed, in its central premise.

{¶52} Were’s 11th claim, like his 15th claim, depended on the affidavits of Emanuel “Buddy” Newell. Newell, in his affidavits and in his testimony in the trial of another inmate, stated that he also had been housed with, and had received the favorable treatment conferred upon, the inmate witnesses at Oakwood Correctional

³⁵ See R.C. 2953.21(A)(1).

Facility. He insisted that his refusal to provide testimony falsely incriminating inmates George Skatzes and Carlos Sanders had provoked the inmates' "handlers" to make promises and then threats, and to eventually revoke the favorable treatment, transfer him to another correctional institution, and oppose his parole.

{¶53} Again, the common pleas court legitimately discounted Newell's credibility. Moreover, Newell's allegation in his affidavit that the state had attempted to suborn perjury concerned falsely incriminating inmates George Skatzes and Carlos Sanders, not Were.

{¶54} More significantly, and dispositive here, the outside evidence provided no support for Were's claim that he had been convicted upon perjured testimony. Because Were failed to demonstrate that the state had secured his convictions by suborning perjured testimony, the common pleas court properly denied his 11th claim, along with that aspect of his 16th claim challenging his trial counsel's effectiveness in failing to object to the state's housing the inmate witnesses together.³⁶

Prosecutorial Misconduct—Withholding Material Evidence

{¶55} In his tenth claim, Were contended that he had been denied a fair trial by the prosecution's failure to disclose to the defense evidence material to his guilt or innocence. The fair-trial guarantee of the Due Process Clause imposes upon the prosecution an obligation to disclose to a criminal accused evidence material to the accused's guilt or innocence.³⁷ Such evidence is "material" only if there is a "reasonable probability" that its disclosure would have changed the

³⁶ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

³⁷ See *Brady v. Maryland* (1963), 373 U.S. 87, 83 S.Ct. 1194.

outcome of the trial.³⁸ The determination of that probability entails an inquiry not into whether a trial with the undisclosed evidence would have yielded a different verdict, but into whether the evidence, “considered collectively,” “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”³⁹

{¶56} Were asserted that the state had violated its duty to disclose exculpatory evidence, when it had permitted Ohio Highway Patrol investigators to choose the evidence to disclose. He supported this assertion with the deposition testimony of Highway Patrol Officer Howard Hudson. The state denied the assertion through the deposition testimony of the lead special prosecutor. But the state’s alleged delegation of its duty to select the evidence to be disclosed, even if proved, was not “material” because it would not, by itself, have been outcome-determinative.

{¶57} Thus, the crux of Were’s argument in his tenth claim was his contention that the state had violated its duty to disclose material evidence, when it had failed to disclose (1) reports, contained in the investigators’ computer database, of interviews with inmate witnesses who later testified at Were’s trial, along with information concerning prison disciplinary charges that had been, or could have been, filed against inmate witnesses who testified against Were, (2) the state’s “guarantee[]” to inmate Rodger Snodgrass that he would be paroled in exchange for his testimony against Were, and (3) information concerning the benefits provided to inmate witnesses who testified against Were.

³⁸ See *United States v. Bagley* (1985), 473 U.S. 667, 682, 105 S.Ct. 3375.

³⁹ *Kyles v. Whitley* (1995), 514 U.S. 419, 434-436, 115 S.Ct. 1555.

{¶58} **Database reports and disciplinary charges.** Officer Hudson testified in a deposition about the creation and the contents of the investigators' database. And he confirmed that, in the wake of the inmate riot, 150 inmates had been referred for discipline. But Were offered no evidentiary support for his assertion in his tenth claim that "Officer Hudson ha[d] recently disclosed that the database contain[ed] exculpatory information."

{¶59} To illustrate what the investigators' database might have yielded in the way of exculpatory evidence, Were could point only to the alleged inconsistencies between the trial testimony of inmate witnesses Macko, Sims, Snodgrass, Taylor, and Reginald Williams and the interview statements that the defense had used at trial to impeach the witnesses. And Were candidly conceded in his petition that, to the extent that his tenth claim was based on the state's alleged failure to disclose database reports and information concerning disciplinary charges, he "require[d] discovery to fully factually develop" the claim.

{¶60} A postconviction petitioner is not entitled to discovery to develop a claim if the claim and its supporting evidentiary material do not demonstrate substantive grounds for relief.⁴⁰ And Were failed to support his tenth claim with evidence that the database or the disciplinary records contained undisclosed evidence material to his guilt or innocence.

{¶61} **Parole "guarantee[]."** Were also challenged the state's failure to disclose its alleged "guarantee[]" to Snodgrass of parole in exchange for his testimony implicating Were in Officer Vallandingham's murder. This challenge also depended on Newell's affidavit. But again, the common pleas court, in denying

⁴⁰ See *State v. Issa*, 1st Dist. No. C-000793, 2001-Ohio-3910.

Were's tenth claim, discounted the credibility of Newell's affidavit. And as we have concluded in upholding the dismissal of Were's 15th claim, the court cannot be said to have abused its discretion in doing so.

{¶62} *Inmate witnesses' favorable treatment.* Finally, Were challenged the state's failure to disclose information concerning the favorable treatment provided to the inmate witnesses who had agreed to testify against him. But in the absence of proof of a causative link between the alleged favorable treatment and an inmate witness's false testimony at Were's trial, information concerning the favorable treatment was not "material" in the sense that its disclosure would have changed the outcome of the trial.

{¶63} Thus, Were failed to demonstrate that the state had failed to disclose evidence that, "considered collectively," "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."⁴¹ Accordingly, we hold that the common pleas court properly denied Were's tenth claim.

Audiotape and Cultural Experts

{¶64} In his 20th claim, Were contended that the trial court denied him equal protection when it failed to provide him with an audiotape expert to review the tunnel tapes for alteration and a "cultural" expert to aid trial counsel in presenting mitigation. And part of his 17th claim challenged his trial counsel's failure to request these experts.

{¶65} Were's trial counsel requested neither an audiotape expert nor a "cultural" expert. And in Were's direct appeal, the Ohio Supreme Court held that

⁴¹ *Kyles*, 514 U.S. at 434-436.

the record did not support his claim that his trial counsel had been ineffective in failing to do so, in the absence of evidence that the tunnel tapes had been altered or evidence of “what a cultural witness would have said on his behalf.”⁴²

{¶66} In support of his claims that the court should have appointed, and that trial counsel should have requested, an audiotape expert and a cultural expert, Were offered outside evidence in the form of (1) Newell’s affidavit attesting to Snodgrass’s “admi[ssion] to having lied to investigating officers concerning the identity of the persons on the tunnel tapes,” and (2) a report of a “preliminary review” of an unspecified tunnel tape that, Were insisted, “indicated irregularities, including breaks in the tape, which are indicative of editing,” and (3) the affidavit of a “prison culture expert” retained by Skatzes’s postconviction counsel. But Newell’s affidavit could have reasonably been discounted. The audiotape report, on its face, was not specific as to what portions of the tunnel tapes had been “edit[ed].” And the prison culture expert’s affidavit, which was specific in its relevant portions only to Skatzes’s case, could not be said to have compelled relief or a hearing on Were’s claims, when the affidavit did not even succeed in gaining Skatzes a hearing or relief on his postconviction claim that his trial counsel had been ineffective in failing to call the expert.⁴³

{¶67} Because Were failed to support his 20th claim with evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief, the common pleas court properly denied the claim, along with that aspect of his 17th claim challenging his trial counsel’s effectiveness in this regard.⁴⁴

⁴² *Were*, 118 Ohio St.3d 448, at ¶230 and 243.

⁴³ See *State v. Skatzes*, 2d Dist. Nos. 22322 and 22484, 2008-Ohio-5387, ¶76, discretionary appeal not allowed, 121 Ohio St.3d 1439, 2009-Ohio-1638, 903 N.E.2d 1222

⁴⁴ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

Ineffective Assistance of Counsel

{¶68} In his 16th, 17th, and 21st claims, Were contended that he had been denied the effective assistance of counsel by his trial counsel’s inadequate preparation and presentation of his case during the guilt and penalty phases of his trial. We find no merit to these challenges.

{¶69} To prevail on a claim of ineffective assistance of counsel, a postconviction petitioner must demonstrate (1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced him.⁴⁵ To establish prejudice, the petitioner must demonstrate that counsel’s deficient performance “so undermined the proper functioning of the adversarial process that the trial could not have reliably produced a just result.”⁴⁶

{¶70} ***Inadequate preparation and cross-examination.*** In support of his allegation in his 16th claim that his trial counsel had failed to conduct a reasonable pretrial investigation, Were offered outside evidence demonstrating that counsel in his second trial had gathered only eight boxes of trial-preparation materials, while counsel in Sanders’s trial had gathered 26 boxes. The common pleas court found, and we agree, that the quantity of trial-preparation material assembled by Were’s trial counsel, and how that quantity stacked up against the quantity of material assembled for the trial in which Sanders had been convicted, was irrelevant to an assessment of counsel’s preparation for Were’s trial.

⁴⁵ See *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

⁴⁶ *State v. Powell* (1993), 90 Ohio App.3d 260, 266, 629 N.E.2d 13 (citing *Lockhart v. Fretwell* [1993], 506 U.S. 364, 113 S.Ct. 838, and *Strickland*, supra).

{¶71} Were also offered outside evidence to support his allegations in his 16th claim that inmate witnesses Macko, Williams, Taylor, and Sims had provided testimony at his trial that had been inconsistent with their testimony at Sanders’s trial and/or their statements to investigators, and that inmate witness Charles Austin’s testimony did not conform with the state’s theories of Were’s involvement in Officer Vallandingham’s murder. In Were’s direct appeal, the Ohio Supreme Court addressed this precise challenge to his counsel’s effectiveness and concluded that counsel had not been ineffective in their “strategic” or “tactical” decisions not to pursue the lines of cross-examination that Were had proposed.⁴⁷ Nothing in the outside evidence offered by Were in support of his 16th claim could have led the common pleas court to conclude otherwise.

{¶72} Because Were’s 16th claim was determinable, and was determined by the supreme court, in his direct appeal, the claim was barred under the doctrine of res judicata.⁴⁸ Therefore, the common pleas court properly denied the claim.

{¶73} ***Failure to advance alternative-killer defenses.*** In his 17th claim, Were challenged his counsel’s failure to present witnesses to bolster the defense that Anthony Lavelle, and not he, had killed Officer Vallandingham, and to develop the defenses that the officer had been killed either by George Skatzes and George Cummings or by Stacey Gordon. Were offered in support of his claim the first-trial testimony of Sterling Barnes, Sean Davis, Leroy Elmore, and Willie Johnson.

⁴⁷ See *Were*, 118 Ohio St.3d 448, at ¶216-221.

⁴⁸ See *Perry*, paragraph nine of the syllabus; *Cole*, 2 Ohio St.3d at 114.

{¶74} In Were’s direct appeal, the Ohio Supreme Court addressed and rejected his challenge to his trial counsel’s “tactical” decision not to call these inmates as witnesses at his second trial to bolster the inmate testimony supporting his Lavelle defense. The court found that Barnes’s first-trial testimony would have conflicted with, and that the first-trial testimony of Davis and Johnson would have been cumulative of, the testimony presented at the second trial implicating Lavelle. And the court found that Elmore’s proffered-but-rejected first-trial testimony would have been of “questionable relevance” to the matter of Were’s innocence.⁴⁹

{¶75} Equally unpersuasive was the evidence offered in support of Were’s contention that his trial counsel had been ineffective in failing to develop the defenses that either George Skatzes and George Cummings or Stacey Gordon had killed Officer Vallandingham. One inmate testified at Sanders’s trial that he had heard Cummings assure Sanders that “he would make sure [the corrections-officer murder that Sanders had ordered] got done,” and that he had heard Skatzes say “something to th[e] effect” of “F*** the CO[“] or [“]I’ll kill the f***in’ CO.” In an affidavit filed in Sanders’s case, another inmate attested to Gordon’s leadership role in Officer Vallandingham’s murder, but he also implicated Were.

{¶76} In light of the evidence implicating Were in the murder, his trial counsel’s failure to adduce the proposed testimony implicating Skatzes, Cummings, and Gordon could not be said to have been outcome-determinative. Accordingly, Were was not thereby prejudiced.

{¶77} ***Failure to call lay witnesses at mental-retardation hearing.*** Were also contended that his trial counsel were ineffective in presenting

⁴⁹ See *Were*, 118 Ohio St.3d 448, at ¶222-227.

his mental-retardation claim. He supported this contention with the guilt-phase testimony of inmate Thomas Blackmon and the affidavits of three other inmates who had, over the years, assisted Were in preparing documents and in communicating with his counsel. Trial counsel, Were insisted, should have presented these lay witnesses at his mental-retardation hearing to testify concerning his limited reasoning, comprehension, communication, and literacy skills, along with the effect of these limitations on his ability to take a leadership role during the inmate riot. Specifically, Were targeted the trial court's finding that he had "wr[itten] and presented numerous motions," and that he had risen to "leadership positions in prison."

{¶78} In Were's direct appeal, the Ohio Supreme Court rejected his challenges to the balance struck by the trial court in weighing the mental-retardation evidence and to his trial counsel's failure to have Blackmon and another lay witness testify at his mental-retardation hearing. In deciding these matters, the supreme court, like the court below, considered Blackmon's trial testimony and other lay-witness testimony that had been elicited at Were's competency hearing and that had been submitted in transcript form at his mental-retardation hearing.⁵⁰ These witnesses testified that other inmates had drafted Were's legal documents for him to copy,⁵¹ and that Were's "illiteracy" had precluded him from a leadership role among the other Muslim inmates.⁵²

{¶79} Were's proposed lay-witness testimony would thus have been cumulative of the testimony provided by Blackmon and the competency-hearing

⁵⁰ See *Were*, 118 Ohio St.3d 448, at ¶163-183 and 232-233.

⁵¹ See *id.* at ¶164.

⁵² See *id.* at ¶233.

lay witnesses. Accordingly, his trial counsel could not be said to have been ineffective in failing to present the proposed testimony at his mental-retardation hearing.

{¶80} ***Failure to challenge expert’s qualifications.*** In his final challenge in his 17th claim, Were contended that his trial counsel had been ineffective in failing to challenge the qualifications of the state’s mental-retardation expert. Res judicata barred this challenge because it did not depend on, and was not supported by, evidence outside the record, and because the Ohio Supreme Court fairly determined the challenge in Were’s direct appeal, based upon the record.⁵³

{¶81} ***Failure to adequately present mitigation evidence.*** Were directed his 21st claim against the adequacy and effectiveness of his trial counsel’s preparation for and presentation of his case in mitigation. In support of this claim, he offered outside evidence in the form of inmate affidavits, prison records, and testimony from other trials. This evidence, he insisted, demonstrated that he had, during the riot, protected some inmates and that he had effectively performed his prison jobs, but that he had suffered from low intellectual functioning, causing him to require assistance in preparing court documents and in communicating with his counsel, and from a “dependent personality,” causing him to follow the lead of the more intellectually gifted Carlos Sanders. In support of his contention that trial counsel should have retained a cultural expert and a prison expert, he offered, again, the affidavit of Skatzes’s “prison culture expert” and a transcript of a “prison expert” who had testified during Sanders’s trial. In support of his assertion that

⁵³ See id. at ¶234-236.

trial counsel should have requested and presented at trial a clinical psychological evaluation, he offered prison health records that, he insisted, showed “that [he] may suffer from organicity (brain damage).” And he asserted that counsel should have called family members to demonstrate that he had family who did not want him to be executed.

{¶82} In Were’s direct appeal, the Ohio Supreme Court rejected his challenge to trial counsel’s effectiveness in presenting his case in mitigation. Specifically, the court deemed “legitimate tactical decisions” counsel’s decisions not to provide lay testimony about Were’s subservient role or his prison-job performance. The court also examined counsel’s decision not to present testimony by a “cultural expert” or a clinical psychologist or to show that Were had protected fellow inmates during the riot, and found that the decisions had not been outcome-determinative. And the court determined that counsel had employed an alternative device to fulfill the same function as the proposed “prison expert,” when counsel had reminded the jury, during penalty-phase opening statements, about guilt-phase evidence concerning prison conditions.⁵⁴ The outside evidence submitted by Were in support of his 21st claim would not have compelled the common pleas court to conclude otherwise.

{¶83} Nor could Were be said to have been prejudiced by counsel’s failure to present the proposed evidence of “organicity” or the proposed testimony by family members. When, as here, counsel presented the case in mitigation competently in view of the facts available to them, evidence offered to prove the existence of mitigation evidence that counsel had failed to present at trial, and that

⁵⁴ See *id.* at ¶237-243.

supported an alternative theory of mitigation, did not provide proof of counsel's ineffectiveness.⁵⁵ Because Were failed to demonstrate substantive grounds for relief, the common pleas court properly denied his 21st claim.⁵⁶

{¶84} ***Trial counsel's alleged ineffectiveness was not outcome-determinative.*** Thus, the evidence offered in support of Were's challenges, in his 16th, 17th, and 21st claims, to his counsel's competence did not demonstrate a reasonable probability that, but for the alleged omissions of counsel, either independently or collectively, the results of his trial would have been different.⁵⁷ Because Were failed to demonstrate substantive grounds for relief, the common pleas court properly denied these claims without a hearing.⁵⁸

Actual Innocence

{¶85} In his 19th claim, Were contended that outside evidence offered in support of his other claims demonstrated that he had not been involved in Officer Vallandingham's murder. This claim of actual innocence predicated on evidence outside the trial record was subject to dismissal without a hearing because it did not demonstrate a constitutional violation in the proceedings leading to Were's convictions.⁵⁹

Administrative Sanctions

{¶86} In his eighth postconviction claim, Were asserted that administrative sanctions imposed on him by the Ohio Department of Rehabilitation constituted further punishment for his alleged involvement in the

⁵⁵ See *State v. Post* (1987), 32 Ohio St.3d 380, 388-389, 513 N.E.2d 754.

⁵⁶ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

⁵⁷ See *Strickland*, 466 U.S. at 697; *Bradley*, 42 Ohio St.3d at 143.

⁵⁸ See R.C. 2953.21(C); *Pankey*, 68 Ohio St.2d at 59; *Jackson*, 64 Ohio St.2d 107, syllabus.

⁵⁹ See *id.*; accord *State v. Byrd* (2001), 145 Ohio App.3d 318, 331, 762 N.E.2d 1043; see, also, *State v. Campbell* (Jan. 8, 1997), 1st Dist. No. C-950746.

prison riot and thus violated the double jeopardy clauses of the state and federal constitutions. Because the alleged constitutional deprivation asserted in this claim did not occur during the proceedings resulting in Were's convictions, the common pleas court properly denied the claim.⁶⁰

The Constitutionality of Lethal Injection

{¶87} Were's 22nd claim, challenging the constitutionality of the state's use of lethal injection as a means of execution, was also subject to dismissal without a hearing. The Ohio Supreme Court has determined that execution by lethal injection does not run afoul of the Eighth Amendment's proscription against cruel and unusual punishment.⁶¹

Cumulative Error

{¶88} In his 23rd, and final, claim, Were contended that the cumulative effect of the constitutional deprivations alleged in the petition's other claims had denied him a fair trial. A judgment of conviction may be reversed if the cumulative effect of errors deemed separately harmless is to deny the defendant a fair trial.⁶² But by its terms, the doctrine of "cumulative error" will not provide a basis for reversal in the absence of multiple errors.⁶³ Therefore, this claim depended upon, and fell with, the petition's other claims.

III. The Trial Judge's Affidavit

{¶89} In his fourth assignment of error, Were challenges the trial judge's journalization, during postconviction proceedings, of his own affidavit attesting to

⁶⁰ See R.C. 2953.21(A)(1).

⁶¹ See *State v. Carter*, 89 Ohio St.3d 593, 608, 2000-Ohio-172, 734 N.E.2d 345.

⁶² See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256, paragraph two of the syllabus.

⁶³ See *State v. Madrigal* (2000), 87 Ohio St.3d 378, 398, 721 N.E.2d 52.

the fact that he had not carried out his intention, stated on the trial record, to ride on the jury's bus to the crime-scene view. The judge averred that he had instead driven his own car to and from the view, and that he had not communicated with any juror during the view. This challenge is feckless.

{¶90} The trial judge filed his affidavit in opposition to Were's assertion in his 14th postconviction claim that the judge had "had impermissible contact with the jury" during the three-hour bus ride to the crime-scene view. But in affirming the dismissal of the 14th claim, we did not consider the trial judge's affidavit. We instead examined the claim in light of the Ohio Supreme Court's disposition of the same challenge in Were's direct appeal. And we held that the claim had been subject to dismissal without a hearing because it depended on, but had not been supported by, outside evidence demonstrating an improper communication between the judge and the jury on the bus or at the view.

{¶91} Because the judge's affidavit was not material to the disposition of his 14th claim, Were could not be said to have been prejudiced by its submission. Accordingly, we overrule the fourth assignment of error.

IV. Discovery

{¶92} Finally, in his second and third assignments of error, Were challenges the common pleas court's refusal to afford him discovery and the funds to retain experts to aid him in developing his postconviction claims. These challenges are untenable.

{¶93} The postconviction statutes do not contemplate discovery in the

initial stages of a postconviction proceeding.⁶⁴ And the failure of the statutes to so provide does not contravene any state or federal constitutional right.⁶⁵ Thus, a postconviction petitioner is entitled to discovery to develop his claims, and to experts to aid in that discovery, only if the petition and its supporting evidentiary material demonstrate substantive grounds for relief.⁶⁶

{¶94} Because Were's postconviction claims were subject to dismissal without an evidentiary hearing, the court properly declined to afford him discovery or the funding for experts to aid in discovery. Accordingly, we overrule the second and third assignments of error.

We Affirm

{¶95} Finding no merit to any of the challenges advanced on appeal, we affirm the judgment of the common pleas court.

Judgment affirmed.

PAINTER, P.J., SUNDERMANN and DINKELACKER, JJ.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

⁶⁴ See *State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159, 1999-Ohio-314, 718 N.E.2d 426, certiorari denied (2000), 529 U.S. 1116, 120 S.Ct. 1977; *State v. Zuern* (Dec. 4, 1991), 1st Dist. Nos. C-900481 and C-910229, citing *State v. Buerger* (Dec. 20, 1989), 1st Dist. No. C-880664; accord *State v. Leonard*, 157 Ohio App.3d 653, 2004-Ohio-3323, 813 N.E.2d 50.

⁶⁵ See *State v. Jones* (Dec. 29, 2000), 1st Dist. No. C-990813; accord *Leonard* at ¶10.

⁶⁶ See *Issa*, supra; accord *Leonard* at ¶10.