

**IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL TRIAL DIVISION**

STATE OF OHIO, :
 :
 Plaintiff, : Case No. 2006 CR 10 0315
 :
 v. : Judge Elizabeth Thomakos
 :
 MARSHA MILLS, : **Evidentiary Hearing Requested**
 :
 Defendant. :

**PETITION TO VACATE OR SET ASIDE
JUDGMENT AND SENTENCE**

I. Introduction:

Petitioner Marsha Mills ("Ms. Mills") files this post-conviction petition to vacate and/or set aside the judgment and/or sentence imposed against her on June 22, 2007, following her convictions for two counts of murder and one count of child endangering. Ms. Mills requests an evidentiary hearing on this matter.

II. Case History:

TRIAL:

Charges:

Murder (R.C. § 2903.02(B))
Murder (R.C. § 2903.02(B))
Felony assault (R.C. § 293.11(A)(1))
Endangering Children (R.C. § 2919.22(B)(1))

Disposition:

Guilty
Guilty
Guilty
Guilty

Sentence:

Ms. Mills was sentenced to fifteen (15) years to life for the first count of murder, fifteen (15) years to life for the second count of murder, eight (8) years for Felonious Assault, and eight (8) years for Endangering Children, all sentences to be served concurrently.

Date Sentenced: June 22, 2007

Name of Trial Attorneys: Gerald Latanich and Amanda Miller

This conviction was the result of a: Guilty Plea No Contest Trial

If the conviction was the result of a trial, what was the length of the trial? 12 days

Appeal to Appellate Court: *State of Ohio v. Marsha Mills*, 2007 AP 07 0039

Disposition: Pending

Name of Appellate Attorneys: Paula Brown (0068251); William Bluth (0014617);
Richard R. Parsons (0082270)

Has a post-conviction petition been filed before in this case?

Yes No

Other Relevant Case History: None

Now comes Petitioner Marsha Mills ("Ms. Mills"), by and through counsel, and petitions this Honorable Court for an order setting aside the judgment of conviction and sentence journalized by the Court in its Judgment Entry filed on June 22, 2007.

The conviction and sentence entered against Ms. Mills are void and/or voidable as a result of the violation of her rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 2, 5, 9, 10 and 16, and Article II, Section 26 of the Ohio Constitution. The following pleading sets forth these violations in greater detail.

An evidentiary hearing is requested. This petition and request for an evidentiary hearing is supported by affidavits and other evidentiary documents. *See State v. Jackson* (1980), 64 Ohio St.2d 107; *State v. Pankey* (1981), 68 Ohio St.2d 58; *State v. Kapper* (1983), 5 Ohio St.3d 36; *see also* R.C. § 2953.21. This Court should hold the evidentiary hearing and resolve any disputed questions of fact that are outside the record of this case as it is presently constituted. *See State v. Milanovich* (1975), 42 Ohio St.2d 46; *see also* R.C. § 2953.21. After the evidentiary hearing, this Court should issue written findings of fact and conclusions of law with the judgment entry granting or denying relief. *See State v. Lester* (1975), 41 Ohio St.2d 51; *see also* R.C. § 2953.21.

Ms. Mills also requests discovery under the Ohio Rules of Civil Procedure to fully develop and pursue these claims.

JURISDICTIONAL FACTS

1. On October 6, 2006, Ms. Mills was indicted on three counts of murder, R.C. § 2903.02(B), one count of felonious assault, R.C. § 2903.11(A)(1), and two counts of endangering children, R.C. §§ 2919.22(B)(1) & (B)(3), respectively, in the death of Noah Shoup ("Shoup").
2. Ms. Mills had known Kristen Shoup, Shoup's mother, since she was a child as Kristen Shoup is friends with Ms. Mills' daughter, Leslie.
3. Ms. Mills was watching Shoup and his brother, Evan, on the day of Shoup's accident.
4. Ms. Mills was represented by Gerald Latanich and Amanda Miler, who were employed by the Tuscarawas Public Defender's office.
5. This matter was tried to a jury beginning on May 30, 2007, lasting through June 15, 2007.
6. The primary issue at trial was whether Shoup's death was an accident.

7. Petitioner has adamantly maintained that Shoup sustained the injuries that caused his death when he fell down the steps onto a cement patio.
8. After examining and measuring the stairs and talking with the Defendant, Larry Hootman, an experienced detective with the City of New Philadelphia determined that Shoup's death was a "freak accident." (Tr. 602.)
9. Dr. John Plunkett, the Defendant's forensic pathology expert, testified that Shoup's injuries were consistent with a fall.
10. One of the physicians who was called as a witness for the State testified that although children typically do not die from a three foot fall, "this is medicine you're talking about, nothing is completely impossible." (Tr. 639.)
11. Dr. Steiner, a State's witness, agreed with Dr. Plunkett's assertion that retinal hemorrhages and subdural hematomas, the symptoms used by the doctors who "diagnosed" abuse to diagnose the alleged abuse, are seen in short falls.
12. On June 15, 2007, the jury returned guilty verdicts on two counts of murder, one count of Felonious Assault, and one count of child endangering. One count of murder and one count of child endangering were dismissed.
13. On June 22, 2007, Ms. Mills was sentenced to fifteen (15) years to life for the first count of murder, fifteen (15) years to life for the second count of murder, eight (8) years for Felonious Assault, and eight (8) years for Endangering Children, all sentences to be served concurrently.
14. Ms. Mills filed a timely Notice of Appeal. Her direct appeal is pending before the Fifth District Court of Appeals at this time.

15. Trial counsel's representation of Ms. Mills throughout the pretrial and trial proceedings was unconstitutionally deficient and worked to the substantial prejudice of Ms. Mills. Absent trial counsel's deficient performance, there is a reasonable probability that the outcome at trial would have been different.
16. Ms. Mills alleges a denial or infringement of her rights as to render her conviction and/or sentence void and/or voidable under the Ohio and United States Constitutions.
17. The constitutional errors that entitle Ms. Mills to relief and that could not have been fully and completely asserted on direct appeal include the following:

FIRST CLAIM FOR RELIEF

18. Ms. Mills hereby incorporates paragraphs 1 through 17 of this petition as if fully rewritten herein.
19. Ms. Mills was denied effective assistance of counsel when trial counsel failed to move to exclude and later failed to object to the numerous autopsy photographs the State introduced, which were gruesome, irrelevant, prejudicial. (Serrott Aff. ¶¶ 12, 13(a) (Exhibit 1).)
20. For example, trial counsel failed to move to exclude, and later failed to object to, numerous pictures of Shoup's dissected tongue. These photographs were not relevant to demonstrating cause of death.
21. Trial counsel failed to move to exclude, and later failed to object to, numerous pictures of Shoup's dissected eyes, which were gruesome and unfairly prejudicial.
22. The photos were submitted only to inflame the passions of the jury. The experts could have testified regarding their findings without publishing the photos to the jury.

23. As a result of trial counsel's failure to move to exclude the gruesome, irrelevant, prejudicial autopsy photographs, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.
24. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
25. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different. (Exhibit 1, at ¶ 12.)
26. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

SECOND CLAIM FOR RELIEF

27. Ms. Mills hereby incorporates paragraphs 1 through 26 of this petition as if fully rewritten herein.

28. Ms. Mills was denied effective assistance of counsel when trial counsel failed to move to exclude and later failed to object to evidence of bruising on Shoup's body, which was irrelevant as to the cause of his fatal injuries.
29. The defense expert concluded that the bruising was caused by the aggressive medical care and intervention Shoup received post-injury and not by the event that led to his fatal injuries.
30. Numerous photographs of bruising on Shoup's body were admitted into evidence. The State's experts contended that some of these bruises were evidence of child abuse.
31. It is, however, well documented that Shoup was bruise free when the paramedics arrived on May 10, 2006, and bruise free when he was brought into the hospital on that day. (Tr. 526.)
32. It was not until after Shoup was declared brain dead that photographs were taken of the alleged bruising.
33. Additional photographs were shown to the jury of bruises that the State's own expert, Dr. Sterbenz, admitted predated the alleged incident or were caused during organ harvest.
34. Because the bruising occurred pre- or post-injury, all evidence of the bruising was irrelevant to establishing cause of death. It was therefore deficient performance for trial counsel to fail to move to exclude this irrelevant and unfairly prejudicial evidence under Ohio Evid. R. 401 & 403.
35. As a result of trial counsel's failure to move to exclude the irrelevant evidence of bruising, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of

the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.

36. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
37. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different.
38. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

THIRD CLAIM FOR RELIEF

39. Ms. Mills hereby incorporates paragraphs 1 through 38 of this petition as if fully rewritten herein.
40. Ms. Mills' conviction and sentence are void and/or voidable because trial counsel stipulated to 19 autopsy photographs of Shoup, introduced into evidence as joint exhibits C1-19. These photographs were never shown to the jury during the trial and were given to the jury without any explanation of what the photographs represented or their significance, or lack thereof. These photographs depicted Shoup's dissected eyes and tongue, among other disturbing scenes, which were wholly irrelevant to determining the cause of Shoup's fatal injury. (*See* Exhibit 1, at ¶ 13(b).)

41. These photographs were gruesome, irrelevant, prejudicial and their admission inured to the benefit of the prosecution, not the defense, by tending to inflame the passions of the jury.
42. Stipulating to the admission of the photographs is not a strategy that was in any way favorable to the defense, but only prejudiced it.
43. As a result of trial counsel's stipulation to these gruesome, irrelevant, prejudicial photographs, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.
44. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
45. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different. (Exhibit 1, at ¶ 12.)
46. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

FOURTH CLAIM FOR RELIEF

47. Ms. Mills hereby incorporates paragraphs 1 through 46 of this petition as if fully rewritten herein.
48. Ms. Mills' conviction and sentence are void and/or voidable because trial counsel failed to request an in camera review of the State's witnesses' statements pursuant to Ohio R. Crim. P. 16(B)(1)(g). From a review of the trial transcript, it appears that counsel may have had copies of the State's experts' reports and some of the investigative reports. It is not clear, however, that counsel had obtained all of the Ohio R. Crim. P. 16(B)(1)(g) material prior to trial and should have made such a request. (Serrott Aff. ¶¶ 12, 13(a) (Exhibit 1).)
49. It was imperative for trial counsel to request and review these statements in order for trial counsel to effectively and competently cross-examine the State's witnesses. Any and all inconsistencies between the recorded statements and the testimony given on direct examination and material omissions should have been raised and pursued on cross-examination.
50. Trial counsel's failure to request this information pursuant to Ohio R. Crim. P. 16(B)(1)(g) and to use any inconsistencies or omissions in the statements on cross-examination of the State's witnesses resulted in admittance of the State's witnesses' statements without impeachment.
51. As a result of trial counsel's failure to request the witnesses' statements pursuant to Ohio R. Crim. P. 16(B)(1)(g), Ms. Mills' rights, as guaranteed by the following provisions of the United States Constitution, were violated: (1) substantive due process and other unenumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal

protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth.

52. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
53. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different. (Exhibit 1, at ¶ 12.)
54. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

FIFTH CLAIM FOR RELIEF

55. Ms. Mills hereby incorporates paragraphs 1 through 54 of this petition as if fully rewritten herein.
56. The State put on improper testimony from Shoup's treating physicians about cause of death. The treating physicians had absolutely no training in forensic pathology and were therefore not competent to testify as to cause of death. Treating physicians testify as to cause of injury in the absence of autopsy, while the definitive method to determine cause of death is by conducting an autopsy. (Tr. 780.) The treating physicians should not have

been allowed to testify to cause of death because they testify to probability of what pathology caused death, not actuality.

57. Ms. Mills' conviction and sentence are void and/or voidable because trial counsel was ineffective for failing to move to exclude or otherwise object to the treating physicians' improper testimony because they were not qualified to give an opinion as to cause of death. (Exhibit 1, at ¶¶ 12, 13(e).)
58. As a result of trial counsel's failure to object to the treating physicians' improper testimony, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.
59. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
60. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different. (Exhibit 1, at ¶ 12.)
61. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim

would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

SIXTH CLAIM FOR RELIEF

62. Ms. Mills hereby incorporates paragraphs 1 through 61 of this petition as if fully rewritten herein.
63. Ms. Mills' conviction and sentence are void and/or voidable because trial counsel was ineffective for failing to file a motion for a change of venue.
64. New Philadelphia, Ohio, the county seat of Tuscarawas County, Ohio, and the city in which the alleged criminal act and trial took place, has a population of fewer than 19,000.
65. The Shoups are well-known in their community. They own a cleaning business in New Philadelphia.
66. In addition, Ms. Mills' trial received an incredible amount of publicity in this small community, thereby prejudicing the views of the jury pool including, but not limited to: Zach Lint, *Boy's Death a Homicide Says Summit Spokesman*, New Philadelphia Times Reporter, A1, A5 (July 26, 2006) (Exhibit 2).
67. Similarly, numerous internet posting, which were placed on the Internet prior to the selection of the jury, implied or stated that Ms. Mills was guilty, further tainting the jury pool. *See, e.g.*, Larry Kolakowski, *An open letter to the people of Tuscarawas County: Something smells in Tuscarawas County*, MySpace, (<http://blog.myspace.com/index.cfm?fuseaction=blog.view&friendID=87425069&blogID=201470009>) (Dec. 4, 2006); *Justice for Noah*, MySpace, <http://www.myspace.com/justicefornoah>) (postings dated before May 30, 2007); *Child's Death Ruled a Homicide*, 10TV News (http://www.wbns10tv.com/live/contentbe/EPIC_shim.php?story=10tv/content/pool/2006

07/1339995521.html) (July 27, 2006).

68. Based on the fact that the Shoups are well-known in New Philadelphia and due to the intense pretrial press coverage of the case, Ms. Mills' trial counsel should have filed a motion to change venue.
69. As a result of trial counsel's failure to request a change of venue, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.
70. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
71. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different.
72. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

SEVENTH CLAIM FOR RELIEF

73. Ms. Mills hereby incorporates paragraphs 1 through 72 of this petition as if fully

rewritten herein.

74. Ms. Mills' conviction and sentence are void and/or voidable because trial counsel was ineffective for calling Attorney Joseph Tripodi to the stand to testify as to Ms. Mills' confidential and privileged communications with him.
75. Only a client may waive the attorney-client privilege, not her attorney. R.C. § 2317.02(A), and there is nothing in the record that documents that Mills waived this privilege.
76. At trial, Ms. Miller asked Mr. Tripodi several questions which elicited responses that violated the attorney-client privilege including Mr. Tripodi's version of what he thought Mills told him about the incident. Mr. Tripodi's testimony was barred by the attorney-client privilege.
77. This testimony opened the door for the prosecution to highlight for the jury alleged inconsistencies between Mr. Tripodi's version, and other witnesses' versions of what they thought Ms. Mills told them about Shoup's accident. (Trial counsel's ineffectiveness for failing to object to all of these witnesses' testimony regarding Ms. Mills' statements to them as inadmissible hearsay is addressed below in Ms. Mills' Eleventh Claim for Relief.) Therefore, Mr. Tripodi's testimony was not only inadmissible, but was also prejudicial to Ms. Mills' case.
78. As a result of trial counsel's ineffectiveness, the attorney-client privilege was violated, and Mr. Tripodi was permitted to tell his version of what he thought Ms. Mills had told him occurred the day of the accident, which was inaccurate and highly prejudicial. Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed

by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.

79. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
80. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different.
81. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

EIGHTH CLAIM FOR RELIEF

82. Ms. Mills hereby incorporates paragraphs 1 through 81 of this petition as if fully rewritten herein.
83. Ms. Mills' conviction and sentence are void and/or voidable because trial counsel was ineffective for failing to competently cross-examine the State's expert witnesses. (Exhibit 1, at ¶¶ 12, 13(f).)
84. The defense's forensic pathology expert, Dr. John Plunkett, reviewed Shoup's medical records from Union Hospital and Children's Hospitals, his autopsy report and autopsy photographs, and some investigatory materials in order to advise trial counsel on the

complexity of the medical issues in this case. He advised counsel about the medical terminology, the current medical wisdom regarding shaken baby syndrome, deaths that have resulted from short falls, the autopsy results, and relevant medical research and literature. (Plunkett Aff. (Exhibit 3).)

85. Dr. Plunkett advised trial counsel that the State's pathologist was mistaken when he concluded that Shoup's retinal hemorrhaging proved that Shoup's death was not the result of a short fall. Dr. Plunkett also provided trial counsel with several scholarly articles that expanded upon and supported his opinion on this point. (Exhibit 3, ¶ 11.)
86. Trial counsel failed to cross-examine the State's experts using the materials provided by the expert and advice that Dr. Plunkett provided, (Exhibit 3, ¶ 16), constituting deficient performance.
87. In addition to reviewing the medical records available in the case, Dr. Plunkett also reviewed the State's experts' direct trial testimony prior to cross-examination, and suggested questions to trial counsel that needed to be posed to the State's experts. (Exhibit 3, ¶ 14.)
88. Dr. Plunkett was shocked and dismayed that trial counsel did not address these issues and questions on cross-examination, thereby allowing the State's expert testimony to go unimpeached. (Exhibit 3, ¶ 13.)
89. Trial counsel did not use Dr. Plunkett's suggestions in their cross-examination of the State's experts, thereby failing to properly test the validity of the State's experts' medical opinions, (Exhibit 3, ¶ 11–17), constituting deficient performance.

90. In addition to advising trial counsel on the issue of retinal hemorrhaging , Dr. Plunkett advised them regarding biomechanical considerations associated with falls. (Exhibit 3, ¶ 10.)
91. Trial counsel did not competently or vigorously cross-examine the State's experts on the biomechanical issues raised by the case, again failing to properly test the validity of the State's experts' medical opinions. (Exhibit 3, ¶ 13.)
92. As a result of trial counsel's failure to follow Dr. Plunkett's expert advice on how to properly cross-examine the State's medical experts, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.
93. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
94. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different. (Exhibit 1, at ¶ 12.)
95. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim

would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

NINTH CLAIM FOR RELIEF

96. Ms. Mills hereby incorporates paragraphs 1 through 95 as if fully rewritten herein.
97. Ms. Mills was denied effective assistance of counsel when trial counsel failed to familiarize themselves with the evidence rules, general trial procedure, and the admissibility and inadmissibility of certain evidence. Trial counsel was unprepared and ineffective in presenting a defense, failed to object to prosecutorial misconduct, and allowed objectionable questions and misrepresentations which prejudiced Ms. Mills. (Exhibit 1, at ¶¶ 12, 13(d).)
98. For example, trial counsel failed to object to hearsay questions posed by the prosecution. (Tr. 1073.)
99. In addition, trial counsel was aware that the State would seek to introduce the testimony of witnesses who alleged that Ms. Mills had discussed the circumstances surrounding Shoup's accident with them.
100. Such testimony was clearly inadmissible hearsay, but trial counsel failed to move to exclude this testimony and failed to object to it upon its proffer. (*See* Tr. 462 (Doug Shoup); 519, 525, 530 (James Shultz, EMS (including multiple hearsay)) 567–68, 574 (Allen Dougherty, EMS); 577–79, 584 (Charles Willet) 587–94 (Det. Larry Hootman (including multiple hearsay)) (trial counsel nowhere objecting to the admission of the preceding hearsay statements).)
101. It is deficient performance to fail to object to inadmissible hearsay. *See, e.g., State v. Butcher* (Ohio App. 11 Dist. 2007), 170 Ohio App.3d 52, 70.

102. As a result of trial counsel's failure to familiarize themselves with the evidence rules, general trial procedure, and the admissibility and inadmissibility of certain evidence, Ms. Mills' rights, as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other unenumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.
103. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
104. Ms. Mills was prejudiced by these same violations of her State and Federal constitutional rights in that counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, Petitioner would have received a different sentence or would not have gone to trial. (Exhibit 1, at ¶ 12.)
105. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned State and Federal constitutional provisions.

TENTH CLAIM FOR RELIEF

106. Ms. Mills hereby incorporates paragraphs 1 through 105 as if fully rewritten herein.

107. Ms. Mills was denied effective assistance of counsel when trial counsel failed to confront the State's expert, Dr. Steiner, with evidence that he has given erroneous medical opinions in prior cases.
108. Specifically, on April 18, 2007, over two months prior to trial, the Scene News reported on two cases wherein Dr. Steiner's determination of injury as a result of shaken baby was found or implied to be incorrect. Denise Grollmus, *Guilty Until Proven Innocent*, Scene (April 18, 2007) (available at <http://www.clevescene.com/2007-04-18/news/guilty-until-proven-innocent/full>).
109. In one of those cases, Trenton, the infant son of Nathan Humrighouse, a nurse, fell to the ground after wriggling out of his father's arms. After consultation with his wife, also a nurse, and a doctor, the couple took their son to a hospital. A CAT scan reveal a subdural hematoma. The emergency room physician attending Trenton told the Humrighouses that the physician's own child had suffered a subdural hematoma from birth. Dr. Steiner, however, met with the couple the day after the accident and accused them of abuse, that this was a case of shaken baby, "100%." Nathan was eventually charged with child endangering. That charge was dismissed pursuant to a nolle prosequi, after a hearing in which the defense's expert testified that it was likely that Trenton's subdural hematoma had been caused by his mother's 22 hours labor, not shaken baby.
110. It was deficient performance for trial counsel to fail to impeach Dr. Steiner's credibility with the this, and other evidence, that Dr. Steiner had previously provided erroneous opinions regarding the presence of child abuse.

111. Dr. Steiner's credibility as a medical expert would have been called into question if trial counsel's performance had not been deficient in failing to impeach the credibility of his testimony with the erroneous medical opinions he had provided in prior cases.
112. As a result of trial counsel's failure to confront Dr. Steiner with the numerous times he had given erroneous testimony regarding cause of injury, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.
113. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
114. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different.
115. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

ELEVENTH CLAIM FOR RELIEF

116. Ms. Mills hereby incorporates paragraphs 1 through 115 of this petition as if fully

rewritten herein.

117. Ms. Mills was denied effective assistance of counsel when trial counsel conducted an ineffective direct examination of their forensic pathology expert, Dr. Plunkett, and obviously failed to properly prepare Dr. Plunkett for direct examination.
118. For example, trial counsel asked Dr. Plunkett whether certain autopsy photographs were relevant or whether he thought that the jury needed to know anything about them. Dr. Plunkett responded that the photographs had no relevance and that he had no comment for the jury regarding them. (Tr. 1196, 1202.)
119. If trial counsel had properly prepared for Dr. Plunkett's direct testimony, it would have been unnecessary to go through this string of questions, which only had the effect of again presenting the jury with Shoup's gruesome, irrelevant, prejudicial autopsy photographs.
120. In addition, trial counsel examined Dr. Plunkett using a photograph that he had not previously viewed, demonstrating poor witness preparation. (Tr. 1201-02.)
121. Further, trial counsel failed to ask Dr. Plunkett about a short fall video, which would have clearly demonstrated for the jury that young children can die from short, accidental falls.
122. While the court had erroneously ruled that the video itself was inadmissible, it never ruled that trial counsel was prohibited from asking Dr. Plunkett about the video.
123. It was therefore deficient performance not to ask Dr. Plunkett about this highly exculpatory video on direct examination.
124. As a result of trial counsel's failure to conduct an effective direct examination of Dr. Plunkett and prepare Dr. Plunkett for such an examination, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated:

(1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.

125. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.

126. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different.

127. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

TWELFTH CLAIM FOR RELIEF

128. Ms. Mills hereby incorporates paragraphs 1 through 127 of this petition as if fully rewritten herein.

129. Trial counsel should have moved to redact Shoup's autopsy to remove gruesome, irrelevant, prejudicial information from that report. Specifically, trial counsel failed to remove to redact from the autopsy report Dr. Sterbenz's conclusion that Shoup's manner of death was "Beaten by other person(s)." (*See* Autopsy Report (State's Exhibit L).) This

conclusion was itself hearsay and was prefaced on Dr. Sterbenz's knowledge of the case that was derived from law enforcement officers' hearsay statements.

130. Similarly, while trial counsel did move to redact the term "Shaken Baby Syndrome" from Shoup's medical records, they failed to move to redact other matters from the records that were irrelevant and prejudicial. For example, trial counsel failed to move to redact social services records that contained inadmissible hearsay that was unfairly prejudicial. These records, which themselves are hearsay, included such second hand statements as: the "Family [was] very frustrated that they ha[d] not heard from authorities." They also included a recounting of Shoup's father's recollection of events when he arrived at the scene of Shoup's accident. These records even contained multiple hearsay (i.e., hearsay within hearsay), wherein social services reported Mr. Shoup's statement that Ms. Mills had told him "not to do that to her," when he told her that EMS was performing CPR on Shoup. (*See Akron Children's Hospital Records, Rehabilitative Services Progress Record (Joint Exhibit B).*)
131. While it is unclear from the record whether the medical examiner's Investigation Addendum was admitted at trial, if it was, it was deficient performance not to move to exclude or object to the "Report of Investigation" portion of the Addendum, which contained narratives by Lisa J. Kohler, M.D. and Patrick Gillespie, neither of whom testified at trial. (*See Autopsy Addendum, Report of Investigation (State's Exhibit M).*) The Report of Investigation constituted instances of multiple hearsay, wherein it related narrative histories obtained by Mr. Gillespie from law enforcement officers.
132. As a result of trial counsel's failure to move to redact Shoup's autopsy report and medical records, Ms. Mills' rights as guaranteed by the following provisions of the United States

Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.

133. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
134. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different.
135. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

THIRTEENTH CLAIM FOR RELIEF

136. Ms. Mills hereby incorporates paragraphs 1 through 135 of this petition as if fully rewritten herein.
137. Because curriculum vitae pertain to an expert witness's credibility, *Seck v. McKee* (W.D. Mich. 2006), 2006 WL 2528456 at *5, and because credibility is always relevant, *State v. Curry*, (Ohio App. 11th Dist. 1993), 1993 WL 256967 at *5, the trial court erred when it refused to allow Dr. Plunkett's curriculum vitae to go to the jury during deliberations.
138. As a result of the trial court's error, Ms. Mills was denied her right to substantive and

procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution and under Article I of the Ohio Constitution.

FOURTEENTH CLAIM FOR RELIEF

139. Ms. Mills hereby incorporates paragraphs 1 through 138 of this petition as if fully rewritten herein.
140. Ms. Mills' conviction and sentence are void and/or voidable because trial counsel failed to remove Sandra Rubino ("Rubino") from the jury after the judge refused to remove her for cause, which was an error, given her responses during voir dire and her responses on the juror questionnaire. When the trial court refused to grant trial counsel's request for cause, trial counsel should have utilized a peremptory challenge.
141. As is clear from the attached juror questionnaire, Ms. Rubino demonstrated that she had a predisposed bias against Ms. Mills and that the case greatly disturbed her.
142. For example, Ms. Rubino wrote that the case was "Upsetting, sad & sickening to me." She also wrote that she had "[r]ead in the newspaper about her [Mills] involvement [sic]—Very emotional for me as parent, grandparent & woman." Rubino Juror Questionnaire, at 1 (Exhibit 4). "Noah's death is horrible, questionable & extremely emotional & upsetting to me." (Exhibit 4, at 2.)
143. As a result of trial counsel's failure to remove for cause juror Sandra Rubino, Ms. Mills' rights as guaranteed by the following provisions of the United States Constitution were violated: (1) substantive due process and other un-enumerated rights as guaranteed by the Ninth Amendment; (2) the due process and equal protection clauses of the Fourteenth Amendment; (3) the right to effective assistance of counsel guaranteed by the Sixth

Amendment; and (4) the guarantees of procedural and substantive due process protected by the Fifth Amendment.

144. The rights guaranteed to Ms. Mills in Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution were also violated.
145. Ms. Mills was prejudiced by these same violations of her rights under the Ohio and United States Constitutions in that trial counsel's actions fell below a minimal standard of professional competency and there is reasonable probability that but for the deficient performance of counsel, the result of Ms. Mills' trial would have been different. (Exhibit 1, at ¶ 12.)
146. Ms. Mills requests an evidentiary hearing as provided by R.C. § 2953.21 in order for her to fully develop this claim. Denial of the request for a hearing as it relates to this claim would amount to a denial of substantive due process as guaranteed by the aforementioned provisions of the Ohio and United States Constitutions.

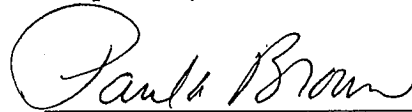
WHEREFORE Ms. Mills requests the following relief:

1. That Ms. Mills be granted adequate opportunity pursuant to the Ohio Rules of Civil Procedure to obtain discovery as to the claims contained in this petition, as well as to any other claims not contained in this petition that may be revealed by discovery which make Ms. Mills' conviction and/or sentence void or voidable.
2. That Ms. Mills be granted an evidentiary hearing pursuant to R.C. § 2953.21.
3. That Ms. Mills' conviction is determined void or voidable as to Claims 1 through 14 of this petition and for any other reason(s) which arise from the facts of her case, and that she be granted a new trial.

4. Other such relief as this Honorable Court may deem just and proper.

Ms. Mills reserves the right to supplement this petition as provided by law and to provide further evidence in support of this petition at the hearing on this petition. Ms. Mills further reserves the right to supplement this petition.

Respectfully submitted,

A handwritten signature in cursive script that reads "Paula Brown". The signature is written in black ink and is positioned above a horizontal line.

Paula Brown (0068251)

William Bluth (0014617)

Richard R. Parsons (0082270)

Kravitz, Brown & Dortch, LLC

65 East State Street, Suite 200

Columbus, Ohio 43215

Telephone: (614) 464-2000

Facsimile: (614) 464-2002

E-mail: pbrown@kravitzllc.com

COUNSEL FOR MARSHA MILLS

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Petition was sent by United States Mail to Michael Ernest, Assistant Prosecuting Attorney, Tuscarawas County Courthouse, 125 E. High Avenue, New Philadelphia, Ohio 44663 on this 28th day of April, 2008.


Paula Brown

IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL TRIAL DIVISION



STATE OF OHIO, :
 :
Plaintiff, :
 :
Vs. : Case No. 2006 CR 10 0315
 :
MARSHA J. MILLS, : JUDGE ELIZABETH THOMAKOS
 :
Defendant. :

AFFIDAVIT OF MARK A. SERROTT

STATE OF OHIO,
COUNTY OF FRANKLIN, SS:

QUALIFICATIONS

I, Mark A. Serrott, after being first duly cautioned and sworn, state the following to be true to the best of my knowledge and belief:

1. My name is Mark A. Serrott. I am an attorney licensed in the State of Ohio since 1979. My office is located at 502 South Third Street, Columbus, OH 43215.
2. A copy of my resume and trial experience is attached as Exhibit "A".
3. I am admitted to practice in the State of Ohio and admitted to practice in the Southern Federal District of Ohio and the Sixth Circuit Federal Court of Appeals.
4. In addition to my full-time practice of law since 1979, I also taught as an Adjunct Professor of Law at the Ohio State University College of Law and the Capital University College of Law.

BACKGROUND/MEMBERSHIPS

5. I am a member of the Ohio and Columbus, Ohio Bar Associations; the Franklin County Trial Lawyers; and the Central Ohio Association of Criminal Defense Lawyers. I have engaged in the full-time practice of criminal law for twenty-eight (28) years. I am listed in the Who's Who of American Professionals.

6. I have over ninety (90) jury trials in criminal cases and I have represented numerous clients charged with murder and I have represented numerous clients accused of child endangering, felonious assault, abuse, and manslaughter.

7. I have extensive experience in both trial and appellate litigation of criminal cases. I have lectured on at least twenty (20) different occasions on these related topics at seminars sponsored by the associations, law schools, and other trial lawyer's organizations.

8. I have been appellate counsel in over sixty (60) cases with eighteen (18) of my cases having been reported by the Ohio Official Reporter of Opinions.

9. I was lead counsel in a child endangering, felonious assault (alleged baby shaking case), that resulted in an acquittal.

10. I have previously qualified as an expert witness.

11. I have reviewed the transcript of the trial, including voir dire, closing arguments, jury instructions and all the testimony; I have also reviewed exhibits and the Appellate Brief of the Defendant.

12. Based on my expertise, training and review of the above materials in the above styled case, it is my professional opinion that defense counsel's performance was so deficient in representing the Defendant that the Defendant was deprived of a meaningful fair trial. I believe defense counsel's acts and omissions were not the result of reasonable judgment. I also believe a reasonable probability exists that the result and outcome of the trial would have been different had the Defendant's counsel performed his duties in a diligent and professional manner. In my opinion, the verdict in this case is not a reasonably reliable verdict because of defense's counsel deficient performance.

13. Defense counsel's trial performance in the above styled case was substandard and deficient and fell below the standard expected of a reasonably competent criminal defense attorney in the following ways:

a. Defense counsel's failure to object to the 53 gruesome, irrelevant, prejudicial photographs of the child at the time of death and during autopsy.

b. Defense counsel's failure to object to the photographs of bruising on the child, which had been established to be not related to the injuries that caused the child's death, but which rather predated the fatal injury or were caused by organ harvesting.

c. Defense counsel's inexcusable stipulation to the admission of 19 gruesome, irrelevant, prejudicial autopsy photographs. There was no conceivable strategic reason to stipulate to the admission of these photographs.

e. Defense counsel's failure to ensure that all the proceedings of the trial, including sidebars and objections and rulings on objections, were recorded so an accurate record could be made by defense counsel.

e. Defense counsel's failure to object, or to make a request, for a mistrial for improper remarks made by the Prosecutor in closing arguments. Counsel failed to object when the Prosecutor injected his personal beliefs into the case, (Tr. 1365-68; 1396), and counsel failed to object when the Prosecutor by inference commented on the Defendant's failure to testify. (Tr. 1389.)

f. Defense counsel's failure to object to the Prosecution's questions concerning the child's cause of death of witnesses not qualified to give an opinion.

g. Defense counsel's failure to effectively cross-examine the State's experts using the defense experts' conclusions.

h. Defense counsel's failure to request and obtain witness statements after their direct examination testimony pursuant to Ohio Crim. Rule 16(B)(1)(g). From a review of the trial transcript, it appears that counsel may have obtained copies of the State's experts' reports and some of the investigative reports. It is not clear, however, that counsel had obtained all of the Ohio R. Crim. P. 16(B)(1)(g) material prior to trial and should have made a request to obtain

any additional 16(B)(1)(g) material that may have existed. This failure was especially critical as it related to the prosecution witnesses that testified as to the alleged "different" versions of the Defendant's statements as to how the child fell. The witnesses' statements could have contained information to impeach their recollections or contradict their testimony.


i. Defense counsel's failure to object to the statements made by the defendant in that the statements were arguably self serving hearsay and then by allowing the prosecution to claim inconsistencies in the statements as evidence of guilt. Defense counsel should have objected to the statements and/or called the Defendant as a witness to either explain or deny the statements.

FURTHER AFFIANT SAYETH NAUGHT.



MARK A. SERROTT

SWORN to and SUBSCRIBED before me in my presence, this 28th of April, 2008.



NOTARY PUBLIC



DEBORAH L. GILLESPIE
Notary Public, State of Ohio
My Comm. Expires 9-19-10

MARK A. SERROTT

PERMANENT ADDRESSES

Home

789-A Northwest Blvd.
Columbus, Ohio 43212
(614) 297-9903

Office

502 South Third Street
Columbus, Ohio 43215
(614) 221-3311
(614) 832-2699

PERSONAL DATA

Age: 53
Single - 2 children
4 grandchildren

EDUCATION

The Ohio State University, College of Law, Columbus, Ohio
J.D. 1979, Upper 20% of Graduating Class. (Worked full-time as Franklin County Deputy Clerk of Court while attending law school.)

The Ohio State University, Columbus, Ohio
B.A. 1975
Major: Political Science
Minor: Sociology
Grade point average: 3.44/4.0
Honors: Dean's List 1973-1975

WORK EXPERIENCE

August, 1972 - September, 1978. Clerk of Courts, Criminal Division, Franklin County Municipal Court, 120 West Gay Street, Room 210, Columbus, Ohio 43215. Deputy Clerk. Duties: General filing, collecting bails and fines, and processing arrest and search warrants.

June, 1978 - November, 1979. Tyack, Scott, Grossman & Wiseman, 536 South High Street, Columbus, Ohio 43215. Law Clerk. Duties: Legal research, brief writing, drafting of complaints, motions, and a wide variety of other civil and criminal pleadings.

November, 1979 - February, 1990. Thomas M. Tyack and Associates, 536 South High Street, Columbus, Ohio 43215. Trial attorney. Extensive litigation experience in criminal and traffic matters, employment litigation, personal injury cases, and business litigation.

1987 - 1994. Adjunct Assistant Professor of Law, Legal Writing, Ohio State University College of Law, Columbus, Ohio. My duties included correcting written assignments, individual meetings with students, and classroom teaching.

February, 1990 — December, 1998. Mark A. Serrott Co., L.P.A. 502 South Third Street, Columbus, Ohio 43215. Practice focused on litigation of criminal, traffic, domestic, personal injury, business matters, administrative hearings, and appeals.

1994 — 1997. Professor of Law, Legal Writing, Capital Law University, Columbus, Ohio. My duties included correcting written assignments, individual meetings with students, and classroom teaching.

1998 — 2003. Madison & Serrott, LLP, Partner, 502 South Third Street, Columbus, Ohio 43215, and from 1990 – current Mark A. Serrott Co., L.P.A.

January, 2006 – present. Ohio State Racing Commission, Columbus, Ohio. My duties include conducting fact finding hearings, ruling on evidentiary matters, writing reports and legal recommendations for the Ohio State Racing Commission. Have presided over 20 hearings in the last 18 months. Samples of written decisions available on request.

LITIGATION EXPERIENCE

Extensive litigation and appellate practice. Over ninety (90) jury trials in civil and criminal cases. Hundreds of court trials in all branches of the Common Pleas and Municipal Courts. Litigated over sixty (60) appellate cases, including four (4) cases in the Ohio Supreme Court, and argued in the 6th Circuit Federal Court. More than twenty (20) of these decisions have been published in the Ohio Official Reports. A number of the cases litigated have received extensive media coverage. Lead and/or co-counsel in a number of homicide prosecutions.

Trial and Appellant Attorney in *Mers v. Dispatch Printing Co.*, (1985), 19 Ohio St.3d 100; (1988), 39 Ohio App.3d 99. A leading case on employment discharge law that resulted in dramatic new law in Ohio.

PROFESSIONAL SPEAKING EXPERIENCE

Lecturer, OACDL, Death Penalty Seminar, 2001

Lecturer, Lorman Educational Services, DUI Law, 1999 – 2001

Lecturer, Ohio State Bar Association, DUI Law, 1999 – 2001

Lecturer, Columbus Bar Association, Employment Seminars, "Wrongful Discharge", 1989, 1990, 1991-1992, 1996

Lecturer, Columbus Bar Association, "OMVI" Seminars, 1989-1990, 1992

Guest Lecturer Franklin University Business Law, 1997 – 2001

Guest Lecturer O.S.U. Law School Trial Advocacy, 2001 – 2003

Lecturer, OMVI Seminar, Ohio Academy of Trial Lawyers, 1995

Lecturer, Employment Law Seminar, Ohio Academy of Trial Lawyers, 1992

MISCELLANEOUS

Member Ohio State Bar Association and Columbus Bar Association

Selected as Member of International Who's Who of Professionals, 1995.

Coach of O.S.U. Law School A.T.L.A Trial Teams, 1995 – 1998. In 1998, the Team, by winning the Regional Competition, qualified for the National Competition and finished in the top twelve teams in the country.

Judge Moot Court, O.S.U. and Capital Law Schools numerous times.

RELIGIOUS AFFILIATION

20-year Member Worthington Grace Brethren Church

VOLUNTEER EFFORTS

Volunteered as Monthly Speaker Nursing Homes, 1996 – 2003

Pro Bono Representation

Volunteer Coach for Ohio State University A.T.L.A. trial teams

REFERENCES

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(614) 292-5919

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Columbus, Ohio 43215
(614) 462-3612

Judge Michael Watson
Court of Appeal, Tenth District
373 South High Street, 26th Floor
Columbus, Ohio 43215
(614) 462-3580

Richard Pfeiffer
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G. Gary Tyack, Esquire
7100 North High Street, Suite 307
Worthington, OH 43085

**IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL TRIAL DIVISION**

STATE OF OHIO, :
 :
 Plaintiff, :
 :
 v. : Case No. 2007 AP 07 0039
 :
 MARSHA MILLS, :
 :
 Defendant. :

County of Dakota)
) ss
 State of Minnesota)

I, Dr. John Plunkett, being duly sworn according to law, state the following to be true to the best of my recollection:

1. I am a doctor, licensed to practice in the State of Minnesota and the State of Wisconsin. I have been a licensed physician since 1972.
2. I am a board certified by the American Board of Pathology in anatomic pathology, clinical pathology, and forensic pathology.
3. I am currently self-employed as a consultant in issues regarding infant injury.
4. I was the Coroner for the Minnesota Regional Coroner's Office from 1980 to 1998, and the Assistant Coroner from 1999 to 2004.
5. I was the Laboratory and Medical Education Director at Regina Hospital in Hastings, Minnesota from 1978 through December of 2004.
6. I have written numerous medical articles that have been peer reviewed and subsequently published, including, *Fatal Pediatric Head Injuries Caused by Short-Distance Falls*, Am. Journal Forensic Medical Pathology, 2001; 22:1-12.
7. The majority of my publications have been in the area of infant injury evaluation and most of those have been in the area of infant head injury evaluation.

Therefore, I am familiar with the injuries children can sustain from a fall down the stairs and acceleration/deceleration type injuries.

8. I was asked by Gerald Latanich, the Public Defender in Tuscarawas County, to review the case of *State v. Marsha Mills*. I reviewed the following documents prior to my testimony at the trial: The medical records of Noah Shoup ("Shoup") from Union Hospital and Akron Children's Hospital; the New Philadelphia Police Reports; Shoup's autopsy report, the autopsy photographs, the autopsy microscopic slides, and the paramedic/EMT reports.
9. At Ms. Mills' trial I rendered an expert opinion that Shoup's death was consistent with an accidental fall, and that the State's experts were incorrect when they stated that a fall could not have caused his injuries.
10. In addition to providing testimony at the trial, I explained the biomechanical considerations associated with falls to Mr. Latanich, and the issues that he needed to address with the State's expert witnesses.
11. I explained to Mr. Latanich that the State's witness, Dr. Sterbenz, was mistaken when he concluded that Shoup's retinal hemorrhaging proved that Shoup's death was not accidental. I also provided Mr. Latanich with medical research to support my opinions in order that he could utilize this material in the cross examination of the State's witnesses.
12. I provided Mr. Latanich numerous medical articles and scientific research prior to trial which he did not utilize during either direct examination or during cross examination.
13. I was shocked and dismayed that Mr. Latanich failed to cross-examine the State's experts using the peer-reviewed publications, other materials, and advice that I provided.
14. In addition to reviewing the medical records available in the case, I also reviewed the State's experts' direct trial testimony before Mr. Latanich cross-examined the State's medical experts. I advised Mr. Latanich on how best to cross-examine the State's medical experts based on my review of the information provided.
15. Again, Mr. Latanich did not use my suggestions in his cross-examination of the State's experts, and in my opinion, failed to properly test the validity of the State's experts' medical opinions.
16. In my opinion, Mr. Latanich's failure to use these articles to competently cross-examine the State's experts demonstrates his total failure to properly test the validity of the State's experts' medical opinions, and his confusion regarding the issues presented in this case.

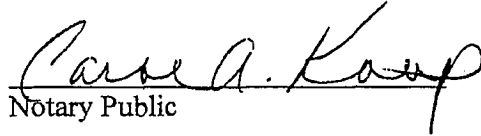
17. I discussed this case with Mr. Latanich on numerous occasions prior to the trial. However, it was not until just prior to my trial testimony that I realized Mr. Latanich did not understand the issues in this case.
18. Throughout my career I have worked with many attorneys and it is my opinion that Mr. Latanich was not prepared to handle this matter.

Further, affiant sayeth naught.

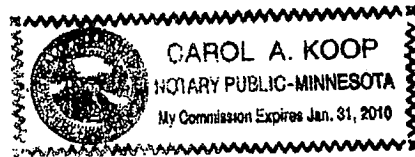


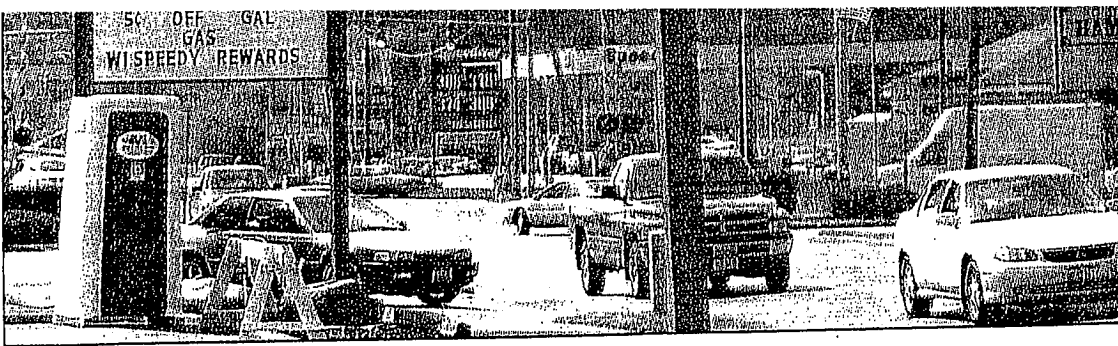
Dr. John Plunkett

The foregoing affidavit was executed in my presence by John Plunkett, M.D. this ^{25th} day of April, 2008.



Notary Public





Gas prices top \$3.08 at a station near the I-77 interchange at Dover Tuesday.

Boy's death a homicide, says Summit spokesman

By ZACH LINT
T-R Staff Writer

The death of 2-year-old Noah A. Shoup of New Philadelphia has been ruled a homicide, a Summit County medical examiner spokesman said Tuesday.

Firefighters were called May 9 to the New Philadelphia residence of the boy's baby sitter where the boy was reported to have fallen. He was treated initially in Union Hospital at Dover and transferred to Akron Children's Hospital by helicopter where he was pronounced dead May 10.

The medical examiner's spokesman said the boy died from craniocerebral and cervical blunt force trauma. The spokesman refused to comment further.

New Philadelphia police Detective Capt. Mike Goodwin said he has yet to receive anything official from Summit County's medical examiner.

"The medical examiner has ruled the death

■ See HOMICIDE ... A-5

Fire rips thro

No injuries, families r



This triplex in Wilkshire Hills sustained heavy d

Today's forecast:
Chance storms

High 87
Page A-6



Deaths

- Ronald Andreas
- Ronald L. Bercaw
- Wayne Burger
- Virgil C. Harlan
- Shirley A. Haynes
- Jack W. Lumley
- Raymond C. Phillips

20 page

- Area / C-1, C-3
- Business / D-1
- Classified / C-3 to C-6
- Comics / D-2, D-3
- FYI / A-6

ily by visiting the funeral home's Web site.

Sandra was passionate about the care she received and gave to others through the work of the Singles Ministry at First United Methodist Church. In gratitude for the well-lived life she led, her family requests that memorial contributions be made to the Singles Ministry, in care of FUMC, 201 W. High Ave., New Philadelphia, O. 44663 or Hospice of Tuscarawas County, 201 W. 3rd St., Dover, O. 44622.

Linn-Hart-Gelb
(330) 343-5506
www.gelbfuneral.com

From A-1

Homicide

a homicide, but our investigation will continue until we can get something official to forward on to the prosecutor for review," Goodwin said.

He said he doesn't want to rush the medical examiner's office for a full report because its findings likely will be the foundation for any case he may build against an unidentified "person of interest."

Since his investigation start-

below-ground characteristics that are attractive for an energy plant. Third, there are other opportunities for this site that we will continue to pursue now that we know the initial FutureGen plant will be located elsewhere."

Because the final FutureGen selection will not be made for a year, Lauber said, "It's actually better to find out now than to make the final four and lose at the end. Now, we have a year's head start on finding an alternative tenant for that location, compared to finding out a year from now that we aren't getting the initial site. We've already had interest expressed from

ed in May, Goodwin said he has been in contact with the child's parents, Douglas and Kristen Shoup of New Philadelphia, on a weekly basis to keep them up to date on where things stand.

"It's unfortunate in a case like this that things seem to drag out," Goodwin said. "It makes it grueling on the family. It happened in May, and here it's almost August and we're still waiting."

Blues

government doesn't move fast. But huge amounts of money are flowing out of the pockets of taxpayers into other people's coffers, and I think they should get with it."

The Associated Press reported Tuesday that oil prices climbed as traders awaited developments in the Mideast conflict in Lebanon. A barrel of

light crude dropped \$1.30 to \$73.75 on the New York Mercantile Exchange.

Drain Problems?
CALL
JASCO
SEWER & DRAIN CLEANING
330-343-7146

JUROR NO. 1016
NAME: Sandra Rubinov

You are not to discuss these questions or your answers with anyone else including your fellow jurors. Do not let anyone except the Jury Commissioners read your answers to these questions.

1. In the space provided, please print or write, in your own words, what you may know of your own personal knowledge, concerning the death of Noah Shoup which occurred in May 2006.

None

2. In the space provided, please print or write, in your own words, the substance of any discussion you have had with anyone concerning the death of Noah Shoup in May 2006.

Upsetting, sad & sickening to me

3. In the space provided, please print or write, in your own words, what you have read, heard or discussed about the life, personality or statements of Marsha Mills.

Read in the newspaper about her involvement -
Very emotional for me as parent, grandparent & woman

4. Do you have a personal acquaintance or relationship to the family of Noah Shoup? No
If yes, please describe.

5. Do you have a personal acquaintance or relationship to Marsha Mills, formerly Marsha Vaughn? No
If yes, please describe.

6. In the space provided, please print or write, in your own words, what you have heard, read, discussed or seen concerning the death of Noah Shoup which occurred in May 2006. Please include information obtained from any source, including, but not limited to, newspapers, radio, television, internet, police scanners, friends, neighbors, relatives, co-workers or family.

I have heard the reports on the radio, also.
Speaking with neighbors or relatives, Noah's death
is horrible, questionable & extremely emotional &
upsetting to me.

Certification

My answers to these questions are given to the best of my ability. Those questions not applicable to me have been so indicated. I certify I have given full and truthful answers.

Name Sandra Rubini

Juror No. 66