

**IN THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
TUSCARAWAS COUNTY, OHIO**

STATE OF OHIO,	:		
	:	App. Case No.	2008 AP 08 0051
Plaintiff-Appellee,	:		
	:		
vs.	:		
	:		
MARSHA MILLS,	:	C.P. Case No.	2006 CR 10 0315
	:		
Defendant-Appellant.	:		

BRIEF OF APPELLANT, MARSHA MILLS

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ASSIGNMENTS OF ERROR PRESENTED FOR REVIEW

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIMS FOR RELIEF THAT SHE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS. (Tr. 93, 94, 97, 144, 315, 462, 519, 525, 530, 577-79, 584, 587-94, 780, 813, 875, 1073; Serrott Affidavit Exhibit E, Plunkett Affidavit Exhibit G, Judgment Entry (July 22, 2008).)

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT AN EVIDENTIARY HEARING ON APPELLANT'S POST CONVICTION PETITION IN VIOLATION OF APPELLANT'S RIGHTS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS. (Judgment Entry July 22, 2008; Exhibits E & G.)

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO CONDUCT DISCOVERY. (Judgment Entry, July 22, 2008.)

FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT REFUSED TO ADMIT DR. PLUNKETT'S CURRICULUM VITAE INTO EVIDENCE. (Judgment Entry, July 22, 2008.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ASSIGNMENT OF ERROR NO. 1

Whether trial counsel's performance was deficient and fell outside the range of professional competence when counsel failed to object to the introduction of irrelevant and highly prejudice evidence.

Whether trial counsel rendered ineffective assistance of counsel by its general confusion and unawareness of the evidence rules such that counsel failed to object to the admission of hearsay evidence, and failed to object to the introduction of inflammatory and highly prejudicial, and irrelevant evidence.

Whether trial counsel was ineffective for failing to move to exclude, and later object to, the numerous gruesome and unfairly prejudicial autopsy photographs.

Whether the failure to request an in camera review of the statements of the State's witnesses pursuant to Ohio R. Crim. P. 16(B)(1)(g) is ineffective assistance of counsel.

Whether trial counsel was ineffective for failing to move or otherwise object to the treating physicians' improper testimony given they were not qualified to give an opinion as to cause of death.

Whether trial counsel was ineffective for failing to request a change of venue.

Whether trial counsel was ineffective in calling Joseph Tripodi to testify as to Mills' confidential and privileged communications.

Whether trial counsel's failure to competently cross-examine the State's expert witnesses was ineffectiveness of counsel.

Whether failure to impeach the State's witness with evidence of prior inaccurate medical opinions is ineffectiveness of counsel.

Whether failure to adequately conduct direct examination and failure to introduce exculpatory evidence is ineffectiveness of counsel.

Whether failure to move to redact the autopsy report that contained hearsay and irrelevant and prejudicial information was ineffectiveness of counsel.

Whether failure to utilize a preemptory challenge to remove a juror that admitted she could not be fair was ineffectiveness of counsel.

Whether trial counsel's failure to ask questions or to ask relevant questions of potential jurors who indicated either on their questionnaires or during the State's voir dire that they knew the prosecutor or had the same place of employment as the deceased's mother was ineffectiveness of counsel.

Whether these errors and omissions either singularly or cumulatively denied the Appellant a fair trial.

ASSIGNMENT OF ERROR NO. 2

Whether trial court erred when it did not grant an evidentiary hearing on Appellant's post-conviction petition.

Whether the trial court erred in not addressing affidavits submitted with Appellant's post conviction petition in a meaningful manner.

ASSIGNMENT OF ERROR NO. 3

Whether trial counsel erred when it denied Appellant's request to conduct discovery.

ASSIGNMENT OF ERROR NO. 4

Whether trial court erred when it refused to admit the curriculum vitae of the defense's expert.

STATEMENT OF THE CASE

On October 6, 2006, the Defendant-Appellant, Marsha Mills (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"). Mills had known Kristen Shoup, Shoup's mother, since she was a child as Kristen is a friend of Mills' daughter, Leslie. Mills was watching Shoup and his brother, Evan, on the day of Shoup's accident.

Mills was represented by Gerald Latanich and Amanda Miller, who were employed by the Tuscarawas County Public Defender's office. The matter was tried to a jury beginning on May 30, 2007, lasting through June 15, 2007. On June 15th, 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.

On June 22, 2007, Mills was sentenced to fifteen (15) years to life for the first count of murder, fifteen (15) years to life for second count of murder, eight (8) years for felonious assault, and eight years for child endangering, all sentences to run concurrently. (*See Exhibit A, Sentencing Entry.*)

On July 2, 2007, Mills filed a timely Notice of Appeal raising seven (7) assignments of error. Oral argument was held on June 17, 2008, and a decision has not been rendered, Case No. 2007 AP 07 0039.

On April 28, 2008, Mills filed a Petition to Vacate or Set Aside Judgment and Sentence (the "Petition"). On May 13, 2008, Mills filed an Amendment to the Petition. On July 22, 2008, the Court denied Mills' Petition. (*See Exhibit B, Entry.*) On August 1, 2008, Mills filed a Motion for

Reconsideration. On September 12, 2008, the Court denied Mills' Motion for Reconsideration. (See Exhibit C, Entry.)

Mills filed timely notices of appeal challenging all of the aforementioned rulings by the trial court, Case Nos. 2008 AP 08 0051 & 2008 AP 09 0061.

STATEMENT OF THE FACTS

The incompetence of Mills' counsel at trial was so severe as to border on a complete denial of counsel. The errors made by trial counsel continued throughout the proceedings, from voir dire through closing arguments. Many of trial counsel's errors would warrant reversal standing alone. Considered in their totality, the errors mandate a finding that the convictions returned against Mills do not withstand constitutional scrutiny.

During trial, counsel's performance revealed a total lack of knowledge of the rules of evidence and general trial procedures. Defense counsel permitted the prosecutor to admit irrelevant and highly prejudicial information without objection. Defense counsel permitted the State, through a PowerPoint presentation, to repeatedly show the jury fifty-three (53) autopsy photographs that were gruesome, irrelevant and highly prejudicial.

In fact, counsel rarely objected throughout the entire trial, and never objected on closing argument when the State commented on the fact that the Defendant did not testify. (Tr. 1389.) Counsel never objected to the inadmissible hearsay throughout the trial. Counsel never objected when the prosecutor called the Defendant a liar in closing argument, when the prosecutor vouched for the state's witnesses, introduced new evidence, or interjected his own beliefs that Mills was guilty. (Tr. 1355, 1365-68, 1389-90, 1392, 1396.) At a minimum, Mills is entitled to counsel who knows the rules of evidence and trial procedure; to have otherwise is equivalent to no defense at all. Not only did counsel not object to irrelevant and highly prejudicial testimony, but on cross

examination counsel asked the witnesses questions regarding this same immaterial information. By doing so, more importance was attached to the exact information that should never have been admitted in the first place.

During voir dire, counsel allowed a juror to remain on the jury who indicated that she could not be fair. (Juror Questionnaire (Exhibit D); Tr. 93-94, 97.) Although the trial court should have removed this juror for cause, once it refused to do so, counsel should have used a preemptory challenge to assure this woman did not remain on the jury panel. Not only did the juror indicate that she could not be fair, but she also told the court it would be difficult for her to look at any photographs.

The primary issue at trial was whether Shoup's death was an accident or occurred as a result of shaken baby syndrome. After examining and measuring the stairs and speaking with Mills, Larry Hootman, an experienced detective, determined that Shoup's death was a "freak accident." (Tr. 602.)

The defense's expert, Dr. Plunkett agreed with Detective Hootman's assessment that Shoup's death was an accident. Trial counsel, however did not competently prepare Dr. Plunkett for direct examination and failed to consider and failed to utilize Dr. Plunkett's expertise in preparing and conducting cross examination.

In sum, trial counsel's conduct was wholly unreasonable and not a product of strategic judgment as demonstrated by the failure to adequately prepare Mills' case, the failure to object to inadmissible evidence, the failure to object to hearsay, the failure to adequately cross-examine the State's witnesses, the failure to adequately prepare defense witnesses, and the failure to object to highly prejudicial testimony.

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIMS FOR RELIEF THAT SHE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS. (Tr. 93, 94, 97, 144, 315, 462, 519, 525, 530, 577-79,

584, 587-94, 780, 813, 875, 1073; Serrott Affidavit (Exhibit E), Plunkett Affidavit (Exhibit G), Judgment Entry (July 22, 2008.)

In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-prong test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687; *see also State v. Reed* (1996), 4 Ohio St. 3d 534; *State v. Smith* (1985), 17 Ohio St. 3d 98, 100. First, a defendant must show counsel's performance was deficient. A defendant can meet this standard by showing defense counsel's acts or omissions were not the result of reasonable judgment. While tactical or strategic errors are generally not found to constitute deficient performance, when the strategy of counsel is unreasonable or based on insufficient information or investigation and has the effect of substantially denying a legal defense, such strategy is outside existing professional norms and deprives the defendant of effective counsel. *Carter v. Bell* (6th Cir. 2000), 218 F.3d 581; *Martin v. Rose* (6th Cir. 1984), 744 F.2d 1245.

If deficient performance is shown, a defendant must show prejudice. *Strickland*, at 692. The prejudice prong requires a showing that but for counsel's unprofessional errors, the result of the proceeding would have been different, and the defendant would have had a reasonable chance of a favorable result. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. In the instant case, trial counsel made numerous errors of omission, which constitute deficient performance, that prejudiced Mills' right to a fair trial, thereby meeting both *Strickland* prongs. Further, even if this Court were to find that none of the following errors individually warranted reversal, when considered cumulatively it is clear that Appellant was denied a fair trial and the trial court's decision must be reversed.

- A. The Trial Court erred in denying the first Three Claims for Relief in Mills' Petition which set forth trial counsel's ineffectiveness for failing to move to exclude, and later failing to object to, numerous gruesome and unfairly prejudicial autopsy photographs. The photographs included 19 photographs that counsel stipulated to, as well as the**

photographs that contained bruising that was irrelevant as to cause of death, and bruising that predated his accident.

Mills was denied effective assistance of counsel when trial counsel failed to move to exclude and later failed to object to 72 gruesome, irrelevant, and prejudicial autopsy photographs of Shoup that the State introduced, including 19 photographs to which trial counsel actually stipulated. Failure to object to inadmissible evidence can constitute deficient performance, *Hodge v. Hurley* (6th Cir. 2005), 426 F.3d 368, 385–86, as it did in this case.

The photographs at issue included depictions of Shoup's dissected eyes and tongue and his retracted scalp, among other highly grotesque scenes. The probative value of these photos was greatly outweighed by the danger of unfair prejudice, making them inadmissible under Ohio R. Evid. 403. (See Appellant's Direct Appeal Brief, at 14–19.) The State's experts could have described what was documented in the photographs without showing them to the jury. Defense counsel stipulated to the admissibility of 19 of these gruesome, irrelevant, and prejudicial autopsy photographs, which is beyond comprehension and demonstrates no objectively reasonable strategy. (Tr. 875; Trial Exhibits C1–19.) It is simply not reasonable to contend that the photos' shocking nature would have been in any way heightened by objection to their admission, and any such fear could have easily been avoided by moving to exclude them *in limine*. See *Hodge*, 426 F.3d at 385–86. Trial counsel's failure to move to exclude or object to the 72 inadmissible photographs and his stipulation to a subset thereof constituted deficient performance, which prejudiced Mills' and rendered the trial “fundamentally unfair or unreliable.” See *Lockhart v. Fretwell* (1993), 506 U.S. 364, 369. As is clear from voir dire, at least one juror stated that she would be unable to render a fair verdict if presented with photographs such as the ones to which trial counsel did not object. (Tr. 93–94, 97.) Further, many of the photos depicted bruises, which the State suggested to the jury were

caused by Mills. However, Dr. Sterbenz, a witness for the State, testified that some of the bruises in the photos predated the date of Shoup's accident. (Tr. 813.)

The photographs were highly prejudicial, and given the lack of evidence introduced against Mills, the highly inflammatory, inadmissible photographic evidence must have been a determinative factor in pushing the jury toward a finding of guilt. Thus, but for counsel's unprofessional errors, the result of the proceeding would have been different.

In her Post Conviction Petition, Mills submitted the affidavit of Mark Serrott, a highly experienced criminal defense attorney, in support of her claims. Mr. Serrott attested that trial counsel's failure to move to exclude or object to the 72 photographs constituted ineffective assistance of counsel. (Serrott Aff. ¶¶ 12, 13(a)–(c).) Mr. Serrott's opinion is new evidence not contained in the trial transcript. Therefore, the trial court erred in not granting an evidentiary hearing, and in denying these claims for relief.

B. The Trial Court erred when it denied Mills' Fourth Claim for Relief regarding trial counsel's ineffectiveness in failing to request an in camera review of the State's witnesses' statements pursuant to Ohio R. Crim. P. 16(B)(1)(g).

One of the basic duties of the defendant's counsel is "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process . . ." *Strickland*, 466 U.S. at 688. For trial counsel to fulfill this duty, it was imperative for them to request and review all Crim. R. 16(B)(1)(g) statements so that they could effectively and competently cross-examine the State's witnesses.

Counsel's failure to request and review the Crim. R. 16(B)(1)(g) statements prejudiced Mills. Any and all inconsistencies between the Crim. R. 16(B)(1)(g) statements and the testimony given on direct examination should have been raised and pursued on cross-examination. The failure to raise such inconsistencies meant lost opportunities for impeachment of the State's witnesses. This failure

was especially prejudicial as the Crim. R. 16(B)(1)(g) statements could have potentially been used to impeach prosecution witnesses that testified as to the alleged "different" versions of Mills' statements as to how the child fell—one of the few bits of evidence (inadmissible in-and-of-itself) that the State used to implicate Mills.

Finally, because the trial court improperly denied Mills' request for discovery and a hearing, she has been deprived of the opportunity "to develop a record upon which [the competency of counsel] may be more effectively addressed [than it can be on direct appeal]." *See State v. Cooperrider* (1983), 4 Ohio St. 3d 226, 228–29. Without discovery and a hearing, Appellant is not able to properly determine how severe the prejudice was she experienced as a result of counsel's failure to request and review the Crim. R. 16(B)(1)(g) statements by actually obtaining those statements. In his affidavit submitted with Mills' Petition, Mr. Serrott attested that trial counsel's failure to request the Crim. R. 16(B)(1)(g) statements constituted ineffective assistance of counsel. (Serrott Aff. ¶¶ 12, 13(h).) Mr. Serrott's affidavit is new, evidence dehors the record. The trial court erred in denying an evidentiary hearing, and in denying this claim for relief.

C. The Trial Court erred in denying Mills' Fifth Claim for Relief in that 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.

The treating physicians the State called as witnesses had absolutely no training in forensic pathology and therefore were not competent or qualified to testify as to cause of death. Treating physicians testify as to cause of injury in absence of autopsy, while the definitive method to determine cause of death is by conducting an autopsy. (Tr. 780.) Counsel was deficient in failing to move to exclude or object to the treating physicians' testimony as to cause of death because they testify to probability of what pathology caused death, not actuality. Due to the lack of evidence

against Mills, tacitly permitting this inadmissible testimony in, which was some of the most damaging evidence against Mills, prejudiced the outcome of the case.

Mills has provided evidence dehors the record to establish this claim for ineffective assistance of counsel. In his affidavit, Mr. Serrott's attested that trial counsel was ineffective for failing to object to the prosecutor's questions concerning the child's cause of death by witnesses not qualified to give an opinion. (*See* Serrott Aff. ¶ 13(f)). Mr. Serrott's opinion is new evidence dehors the record. The trial court therefore erred in not granting an evidentiary hearing, and erred in denying this claim for relief.

D. The Trial Court erred in denying Mills' Sixth Claim for Relief regarding trial counsel's ineffectiveness in failing to file a motion for change of venue.

New Philadelphia is a small community with a population of fewer than 19,000. Shoup's family is very well-known within the community, as they own a business there. There were numerous news articles and internet postings that were highly prejudicial to Mills and tainted the jury pool.

For example, the New Philadelphia Times Reporter printed a story entitled *Boy's Death a Homicide Says Summit Spokesman*, which provided early publicity about the case. Zach Lint, *Boy's Death a Homicide Says Summit Spokesman*, New Philadelphia Times Reporter, A1, A5 (July 26, 2006) (Exhibit F). Numerous internet postings, placed on the internet prior to jury selection, further tainted the jury pool. These postings implied or stated that Ms. Mills was guilty. *See, e.g.*, Larry Kolakowski, *An open letter to the people of Tuscarawas County: Something smells in Tuscarawas County*, MySpace, <http://blog.myspace.com/indExhibitcfm?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/200607/1339995521.html, July 27, 2006. With such a significant amount of pretrial publicity, especially in a small, closely-knit community like New Philadelphia, it was deficient performance for trial counsel not to move for a change of venue.

Trial counsel's failure to move for a change of venue prejudiced Mills. Many of the jurors acknowledged they were familiar with the case from the press coverage it had received. While some jurors stated they would not be influenced by the media coverage, the United States Supreme Court has downplayed mitigating statements from jurors that they "would not be influenced by the news articles, that [they] could decide the case only on the evidence of record, and that [they] felt no prejudice against petitioner as a result of the articles." *Sheppard v. Maxwell* (1966), 384 U.S. 333, 351. Thus, but for counsel's failure to move for a change of venue, there is a reasonable probability that the result of the trial would have been different.

Mills provided evidence dehors the record to establish this claim for ineffective assistance of counsel as none of these news articles or internet postings described in her Petition were part of the trial record. Evidence of the pretrial publicity necessarily could not have been part of the record because no motion for change of venue was ever filed. The trial court therefore erred in not granting an evidentiary hearing and in denying this claim for relief.

E. The Trial Court erred when it denied Mills' Seventh Claim for Relief regarding the ineffectiveness of trial counsel in calling Attorney Joseph Tripodi to the stand to testify as to Mills' confidential and privileged communications to him.

At trial, defense counsel Miller asked Mr. Tripodi, an attorney who Mills initially consulted about Shoup's accident, 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. 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. Facilitating a breach of the attorney-client privilege is clearly deficient performance.

Due to the lack of evidence against Mills, permitting this inadmissible testimony in clearly prejudiced the outcome of the case. The privileged testimony elicited 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. Mr. Tripodi's testimony was not only inadmissible, but was also prejudicial to Ms. Mills' case. Without an evidentiary hearing, it was impossible for Mills' to fully develop this claim for relief. Thus, the trial court erred when it denied this claim without an evidentiary hearing.

F. The Trial Court erred when it denied Mills' Eighth Claim for Relief given that trial counsel was ineffective for failing to competently cross-examine the State's expert witnesses.

The defense's forensic pathology expert, Dr. John Plunkett, told 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. (Plunkett Aff. ¶ 11, Exhibit G) In addition, Dr. Plunkett 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. (Plunkett Aff. ¶ 14.) Trial counsel, however, failed to cross-examine the State's experts using the materials and advice that Dr. Plunkett provided. (Plunkett Aff. ¶ 16). Furthermore, 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. (Plunkett Aff. ¶ 13.) 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. (Plunkett Aff. ¶ 13.) Trial counsel's failure to properly test the validity of the State's experts' medical opinions constituted deficient performance.

If the opinions of the State's experts had been properly challenged, it would have become clear to the jury that their opinions could not withstand scrutiny. In other words, if trial counsel had properly cross-examined the State's experts, there is a reasonable probability that the jury would have accepted Dr. Plunkett's expert opinion that Shoup's death was an accident—or that it would have at least found that his opinion created a reasonable doubt. Trial counsel's deficient performance prejudiced the outcome of the case, constituting ineffective assistance of counsel. *See, e.g., In the matter of Roque* (Ohio App. 11th Dist. 2006), Case No. 2005-T-0138, 2006 WL 3833860, *2 (finding failure to properly cross-examine witnesses constituted ineffective assistance of counsel, along with other errors).

Mills provided substantial evidence dehors the record to establish this claim for ineffective assistance of counsel in Dr. Plunkett's affidavit attached to her Petition. The steps that counsel took (or did not take) to plan for cross-examination of the State's experts are not reflected in the record and needed to be developed at an evidentiary hearing. Dr. Plunkett's affidavit, which discusses the assistance that Dr. Plunkett provided counsel that was not used in cross-examination, establishes events that occurred outside the record that prove counsel's deficient performance. Therefore, the trial court erred in not conducting an evidentiary hearing and erred in denying this claim for relief.

G. The Trial Court erred when it denied Mills' Ninth Claim for Relief regarding trial counsel's ineffectiveness for failing to familiarize themselves with the rules of evidence, general trial procedure, and the admissibility of evidence.

Trial counsel failed to object to hearsay questions posed by the prosecution. (Tr. 1073.) Trial counsel was aware that the State would seek to introduce the testimony of witnesses who alleged that Mills had discussed the circumstances surrounding Shoup's accident with them. 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).) 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.

Trial counsel was unprepared and ineffective in presenting a defense, failed to object to prosecutorial misconduct, allowed the admission of evidence that was irrelevant and highly prejudicial, and allowed objectionable questions and misrepresentations which prejudiced Mills.

The case of *Wiggins v. Smith* (2003), 539 U.S. 510, demonstrates that trial counsel's actions are not entitled to any deference whatsoever. In *Wiggins*, the Supreme Court considered the degree of deference that should be afforded to an attorney's tactical decisions when claims of ineffective assistance of counsel are raised. While the Supreme Court had previously stated in *Strickland* that tactical decisions by defense counsel are "virtually unchallengeable," *Strickland*, 466 U.S. at 690–91, the *Wiggins* majority explained that this standard had never been intended to insulate unreasonable attorney conduct from appellate review. *Wiggins*, 539 U.S. at 520.

Wiggins demonstrates that the mere existence of some explanation for an attorney's actions does not automatically bring a defendant's representation within constitutionally acceptable limits. See *id.* at 522–28. A "post-hoc rationalization of counsel's conduct" is insufficient to overcome a claim of ineffectiveness made under *Strickland*. *Id.* at 526.

In *Wiggins* the Court held that in determining the appropriate degree of deference to allocate to challenged attorney conduct, the court should look to whether the attorney's decisions were based

on a reasonable degree of preparation and investigation. *Wiggins*, 539 U.S. at 522-28. If an attorney's actions were not the result of adequate preparation and investigation, deference to the attorney's tactical decisions is not appropriate. *Id.*; see also, *Bigelow v. Williams* (6th Cir. 2004), 367 F.3d 562.

It has been recognized that "under certain circumstances, defense counsel's performance will be considered deficient under the first prong in *Strickland* when inadmissible evidence prejudicial to the defendant comes to the jury due to defense counsel's neglect, ignorance or disregard of a defendant's rights, and where such conduct by counsel bears no relationship to a legitimate trial strategy." *State v. Martin* (1987), 37 Ohio App. 3d 213, 214; *State v. Barron* (Ohio Ct. App. 10th Dist. June 8, 2000), 99AP-59, 2000 WL 739427, 1.

Trial counsel's general confusion and lack of understanding of the rules of evidence led them to allow the State to introduce 53 gruesome, irrelevant and highly prejudicial autopsy photographs, and also permitted the State to introduce hearsay statements allegedly made by the Defendant without objection. The admission of this evidence meets the prejudice prong of *Strickland*. The prejudice caused by this testimony was insurmountable. Not objecting to this inflammatory, unsubstantiated testimony had the effect of substantially denying a legal defense. Denying a legal defense or allowing inadmissible testimony to negate the defense to the point that it is denial of a defense is ineffective assistance of counsel. *Carter v. Bell* (6th Cir. 2000), 218 F.3d 581; and *Groseclose v. Bell* (6th Cir. 1997), 130 F.3d 1161, 1166 (holding that trial counsel's representation was objectively unreasonable when counsel "almost entirely failed to investigate the case; he never, for example interviewed the crime incident witnesses or any family members.").

The representation afforded to Mills was so substandard as to border on a complete denial of counsel. Therefore, the trial court erred in not conducting an evidentiary hearing and erred in denying this claim for relief.

H. Trial counsel was ineffective in failing to confront the State's expert, Dr. Steiner, with evidence that he had given erroneous medical opinions in the past.

Over two months prior to the trial, it was reported that Dr. Steiner had erroneously determined that two other children had died of shaken baby syndrome. Counsel never confronted Dr. Steiner regarding these mistakes in diagnosis and therefore the jury was led to believe his medical opinions were never challenged and most importantly, that he had never been wrong in his any prior determinations.

There were two cases reported in the Scene News wherein Dr. Steiner's determination of shaken baby syndrome was found to be inaccurate. *See Denise Grollmus, Guilty Until Proven Innocent*, Scene, April 18, 2007 (Exhibit H). Defense counsel's failure to use this evidence which would have shown the jury that Dr. Steiner has made the same inaccurate diagnosis in the past, constitutes ineffectiveness of counsel. Further, the news articles presented with the Petition were outside the record, and the court erred in not conducting an evidentiary hearing and granting this claim for relief.

I. The Trial Court erred when it denied trial counsel was ineffective in his direct examination of Dr. John Plunkett, and failed to understand the issues and/or prepare the witness for trial.

Dr. Plunkett had a videotape of a short fall that was taken by a grandmother as she watched her granddaughter play on a Little Tykes slide. While the grandmother was taping this incident, her granddaughter fell off the side of the slide onto a cement floor that was thinly carpeted. The child fell a very short distance and died. This was one of the cases that Dr. Plunkett documented in his research article. And although he could have authenticated the videotape, the Court would not

permit the defense to show this most crucial evidence to the jury which clearly indicated that children can die from short falls.

The Court, however, never indicated in its decision that defense counsel could not ask Dr. Plunkett if he had viewed this video and what in his opinion it showed. Defense counsel never asked Dr. Plunkett anything about this highly exculpatory videotape. In addition, during direct examination of Dr. Plunkett, trial counsel showed the highly prejudicial and irrelevant autopsy photographs to the jury. So not only did he fail to move or exclude this evidence, he compounded the problem by introducing it on direct examination. All of these errors prejudiced the outcome of Mills' trial. Therefore, the trial court erred in not conducting an evidentiary hearing and erred in denying this claim for relief.

J. Trial counsel was ineffective for failing to move to redact the autopsy report, and failed to move to have irrelevant and prejudicial information removed from the medical records.

Trial counsel should have moved to redact the autopsy report to remove gruesome, irrelevant, and prejudicial information from the report prior to it being submitted to the jury. The report contained the following statement, "Beaten by other person(s)." (*See* Autopsy Report (State's Exhibit L).) This statement was hearsay based on Dr. Sterbenz's knowledge of the case that was derived from law enforcement officers' own hearsay statements.

Moreover, counsel failed to move to have hearsay statements removed from the medical records, which included social service reports that contained hearsay within hearsay. The social service records contained inadmissible hearsay that was highly prejudicial including, but not limited to: "Family [was] very frustrated that they ha[d] not heard from authorities." The records also included statements of Shoup's father's recollection of events when he arrived at the scene of the accident. The records also contained hearsay within hearsay wherein social services reported Mr.

Shoup's statement that Mills 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).)

It is unclear from the record if the medical examiner's Investigation Addendum was admitted with the autopsy report 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 since it contained narratives by Lisa Kohler, M.D. and Patrick Gillespie, neither of whom testified at trial. (See Autopsy Addendum, Report of Investigation (State's Exhibit M).) The Report included instances of multiple hearsay in the narrative histories obtained from law enforcement officers by Mr. Gillespie. The trial court erred in not conducting an evidentiary hearing to further develop this issue, that prejudiced Mills' trial.

Moreover, the admission of these documents without the testimony of those whose statements were included denied Mills her right to confrontation under the Sixth Amendment guaranteed by the United States Constitution, and Art. 1, Section 10 of the Ohio Constitution, and *Crawford v. Washington* (2004), 541 U.S. 36.

Therefore, the trial court erred in not conducting an evidentiary hearing and erred in denying this claim for relief.

K. The Trial Court erred when it denied Mills' Fourteenth Claim for Relief regarding trial counsel's ineffectiveness for failing to remove juror, Sandra 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.

It was clear from Ms. Rubino's responses that she had a predisposed bias against Mills. She indicated that she would have difficulty looking at any photographs, she stated that it would be "difficult for me to be real fair. I don't know, I hate to say that." (Tr. 93-94, 97) She stated that although she knew that this matter was upsetting to everyone, it was exceedingly upsetting to her. Trial counsel asked the court to remove her for cause, which the court declined to do. Given her

responses during voir dire and her responses on her questionnaire, it was an error for the Court to deny trial counsel's request for removal. However, once the Court denied this request, counsel should have removed this highly prejudicial juror from the jury panel by means of a preemptory challenge. Counsel rendered deficient performance by failing to do so, which clearly prejudiced the outcome of the trial by denying Mills her right to an unbiased jury. Therefore, the trial court erred in not conducting an evidentiary hearing and erred in denying this claim for relief.

L. The Trial Court erred in denying Mills' Fifteenth Claim for Relief regarding trial counsel's ineffectiveness during voir dire.

Trial counsel, after being notified that one of the potential jurors, Mr. Seilhamer, was the prosecutor's former gym teacher, failed to ask this juror one question. Another juror, Ms. Hall, indicated that the prosecutor's mother was her boss. (Tr. 144.) Trial counsel did not ask Ms. Hall anything about this relationship, her job description, how closely she works with this woman on a daily basis, or how long she had been in this position. Trial counsel did move to have her removed for cause; however, because he had not asked the proper foundation questions, this request was denied. Trial counsel was ineffective for not laying a proper foundation, and for failing to remove Ms. Hall with a preemptory challenge once the court denied his request to move for cause.

Another juror, Mr. Ramey, indicated on his juror questionnaire that he worked at the same company as Kristen Shoup, the deceased's mother. Defense counsel never addressed this on voir dire. The matter was in fact brought to light by the court who asked Mr. Ramey about his employment and whether he knew Kristen Shoup. (Tr. 315.) The Court asked defense counsel if they wanted to address any follow-up questions to this witness, and counsel declined. Mr. Ramey was, therefore, never asked if he had heard other employees discuss this case, or if the company had provided any type of support to the family by way of a fund or collection.

All three of these jurors were seated on the jury. Given counsel's ineffectiveness, there were two jurors that had a connection to one of the prosecutors, one juror who worked at the same place as the deceased's mother, and another juror, Ms. Rubino that openly admitted she could not be fair, that decided the fate of Mills. Therefore, the trial court erred in not conducting an evidentiary hearing and erred in denying this claim for relief.

M. Conclusion.

Trial counsel's actions were not based on a reasonable degree of preparation and general trial procedures; therefore cannot be viewed as tactical or strategic. Trial counsel did not engage in reasonable review of the admissibility of evidence, and their actions are entitled to no deference whatsoever. Trial counsel was not functioning as counsel required by the Ohio and United States Constitutions. Therefore, Mills is entitled to a new trial based upon the ineffective assistance of trial counsel. *Strickland*, 466 U.S. at 688. Thus, the trial court erred in not conducting an evidentiary hearing and erred in denying this claim for relief. Moreover, even if this Court were to find that none of the preceding errors individually warranted reversal, when considered cumulatively it is clear that Appellant was denied a fair trial and that the trial court's decision must be reversed.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT AN EVIDENTIARY HEARING ON APPELLANT'S POST CONVICTION PETITION IN VIOLATION OF APPELLANT'S RIGHTS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS. (Judgment Entry July 22, 2008; Serrott Aff. (Exhibits E); Plunkett Aff. (Exhibit G).)

The trial court denied Appellant's request for Post Conviction relief without first conducting an evidentiary hearing.

Where a claim raised by a petition for postconviction relief under R.C. 2953.21 is sufficient on its face to raise an issue that petitioner's conviction is void or voidable on constitutional grounds, and the claim is one which depends upon factual allegations that cannot be determined by examination of the files and records of the case, the petition states a substantive ground for relief.

A trial court is required to grant an evidentiary hearing in a post-conviction action when the petition and supporting documentation support the allegation that the conviction may be void or voidable and the claim cannot be determined upon examination of the files and records of the case.

State v. Milanovich (1975), 42 Ohio St.2d 46, syllabus 1; *State v. Kapper* (1983), 5 Ohio St. 3d 36.

"[A]lthough a record may contain sufficient evidence that counsel has been in fact incompetent (or competent), evidence determinative of this question is usually dehors the record and, generally, an evidentiary hearing or summary judgment procedure is required." *State v. Hester* (1976), 45 Ohio St.2d 71, 76, *modified by State v. Cole* (1982), 2 Ohio St. 3d 112, 113–14.

The trial court erred in finding that many of Petitioner's Claims were barred by *res judicata*. The issues raised were not *res judicata* because the Petition contained the affidavit of experts detailing the issues and why defense counsel was ineffective. The expert evidence was not nor could it have been on the record or part of the record and part of the direct appeal process. Mills presented additional, off the record evidence to support her claims; therefore *res judicata* does not apply.

Two affidavits were submitted with the Petition. One of the affidavits was from Mark Serrott, who has been a licensed practicing attorney since 1979. Based on his expertise, training, and review of this case, it was his professional opinion that defense counsel's performance was so deficient in representing Mills that she was deprived of a meaningful, fair trial. He believed that the defense counsel's acts and omissions were not the result of reasonable judgment, and that there was a reasonable probability that the result and outcome of the trial would have been different had Mills' counsel performed their duties in a diligent and professional manner. It was his opinion that the verdict in this case was not a reasonably reliable verdict because of defense counsel's deficient performance. (*See Serrott Aff* (Exhibit G).)

Dr. John Plunkett, who was retained by trial counsel as an expert for Mills, completed an affidavit in which he attested that he has worked with many attorneys throughout the years, and in

his opinion trial counsel was not prepared to handle this case. Dr. Plunkett reviewed all of the medical evidence in this case, explained to counsel that the State's witness was wrong when he concluded that Shoup's retinal hemorrhages proved his death was not accidental, and provided counsel with the medical research that he needed to impeach the witness. Counsel did not utilize any of these medical articles either on direct examination or on cross-examination. (*See Plunkett Aff.*)

The court erred when it held in its Entry that the affidavit of Mark Serrott was "cumulative." This was evidence outside of the record, and should have been treated as such, and it was an error to deny Mills an evidentiary hearing. The Court also erred when it found the affidavit of Dr. Plunkett was not "cogent." Dr. Plunkett worked closely with counsel, discussing this case on numerous occasions, and provided counsel with relevant medical articles and scientific research. Dr. Plunkett's affidavit is therefore a classic example of evidence dehors the record that is used to support a post-conviction petition.

In sum, the trial court erred when it did not meaningfully address the affidavits submitted by Appellant and denied her claims on the basis of *res judicata*. Mills was entitled to relief and the trial court erred in its denial of an evidentiary hearing. *Milanovich, supra; Kapper, supra.*

THIRD ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO CONDUCT DISCOVERY. (Judgment Entry, July 22, 2008.)

The trial court denied Mills' request for an evidentiary hearing and therefore denied her request to conduct discovery. Post-conviction relief is specifically designed to allow defendants who were wrongly convicted to attack their convictions using material outside of the record. Denial of discovery in a post conviction situation will therefore deny a defendant the only means by which she may obtain many of the documents and evidence that would support her claims.

In the present matter, defense counsel failed to request that prior statements of testifying witnesses be reviewed in camera for inconsistencies pursuant to Crim R. 16(B)(1)(g). It is not

known if those statements contained not only inconsistencies, but exculpatory evidence as well. Thus, Mills must be granted an evidentiary hearing (and corresponding discovery), to investigate this matter. Moreover, as outlined above, Mills must be granted discovery to determine if additional evidence exists to support her other claims. Therefore, the trial court erred in denying Mills' request to conduct discovery.

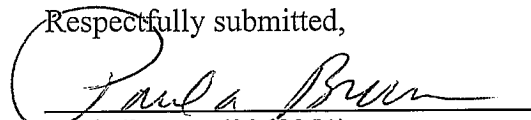
FOURTH ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED WHEN IT REFUSED TO ADMIT DR. PLUNKETT'S CURRICULUM VITAE INTO EVIDENCE. (Judgment Entry, July 22, 2008.)

Given that Dr. Plunkett's curriculum vitae ("CV") pertained to the 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 should have admitted the curriculum vitae of Dr. Plunkett, and the jury should have been given the opportunity to review his curriculum vitae during its deliberations. To disallow the admission of the CV into evidence was therefore reversible error. Finally, as Dr. Plunkett's CV was not made part of the trial record, it is evidence dehors the record that must be considered in post-conviction proceedings.

CONCLUSION

For all the foregoing reasons, Appellant, Marsha Mills, asks this Court to reverse the decision of the Tuscarawas County Common Pleas Court and either order that the charges be dismissed, order that the case be remanded for a new trial or order that the case be remanded to conduct discovery and an evidentiary hearing.

Respectfully submitted,



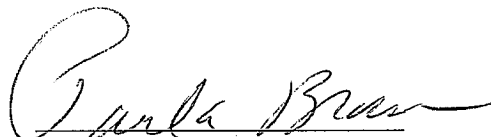
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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Brief was sent by United States Mail to Michael Ernest, Assistant County Prosecuting Attorney, Tuscarawas County Courthouse, 125 E. High Avenue, New Philadelphia, Ohio 44663 on this the 17th day of November, 2008.


Paula Brown