[Cite as *State v. Mills*, 2009-Ohio-5654.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008 AP 08 0051
MARSHA J. MILLS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Tuscarawas County Court of Common Pleas, Case No. 2006 CR 10 0315
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 20, 2009

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant Marsha Mills appeals from the July 18, 2008 Judgment Entry of the Tuscarawas County Court of Common Pleas overruling her Petition to Vacate or Set Aside Judgment and Sentence and her Amended Petition to Vacate or Set Aside Judgment and Sentence [hereafter referred to as "PCR petition"] and granting the plaintiff-appellee State of Ohio's motion to dismiss.

STATEMENT OF FACTS IN THE CASE

{¶2} This appeal stems from the death of two-year-old Noah Shoup while in appellant's care.

{¶3} Appellant was indicted by the Tuscarawas County Grand Jury on three counts of murder in violation of R.C. 2903.02(B), one count of felonious assault in violation of R.C. 2903.11(A)(1), and two counts of child endangering in violation of R.C. 2919.22(B)(1) and (3). The State voluntarily dismissed one count of murder and one count of child endangering. After considering the evidence presented the jury found the appellant guilty on the remaining charges. Appellant was sentenced to serve an aggregate prison term of fifteen years to life. For a complete statement of the underlying facts see *State v. Mills*, Tuscarawas App. No. 2007 AP 07 0039, 2009-Ohio-1849.

{¶4} On April 15, 2009, this Court upheld appellant's convictions and sentence. *State v. Mills*, supra. The Ohio Supreme Court denied jurisdiction over the case. *State v. Mills*, --- Ohio St.3d ----, --- N.E.2d ----, 2009-Ohio-4233 (Ohio Aug 26, 2009) (Table, NO. 2009-0996).

{¶5} Appellant filed her post-conviction petition pursuant to R.C. 2953.21 on April 28, 2008; she filed an amended petition on May 13, 2008. The state filed a motion

to dismiss the petition on May 22, 2008. Appellant filed a reply to the state's motion on May 30, 2008.

{¶6} By Judgment Entry filed July 18, 2008, the trial court denied appellant's petition, amended petition, and granted the state's motion to dismiss.

{¶7} On August 1, 2009 appellant filed a motion to reconsider. The state filed its opposition to the motion on August 8, 2008. By Judgment Entry filed September 12, 2008, the trial court denied appellant's motion to reconsider.[1]

{¶8} It is from the trial court's Judgment Entry filed July 18, 2008 denying her PCR petition that appellant timely appeals, raising the following four assignment of error for our consideration:

{¶9} "I. 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 CONSTITUTION.

{¶10} "II. 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.

{¶11} "III. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST TO CONDUCT DISCOVERY.

{¶12} "IV. THE TRIAL COURT ERRED WHEN IT REFUSED TO ADMIT DR. PLUNKETT' S CURRICULUM VITAE INTO EVIDENCE."

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[1] Appellant has filed a separate appeal of the trial court's denial of her motion to reconsider. See, *State v. Mills*, Tuscarawas App. No. 2008 AP 09 0061.

Standard of Review

{¶13} R.C. 2953.21(A) states, in part, as follows: "(1) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief."

{¶14} A petition for post-conviction relief is a means to reach constitutional issues that would otherwise be impossible to reach because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction. *State v. Murphy* (Dec. 26, 2000), Franklin App. No. 00AP-233. Although designed to address claimed constitutional violations, the post-conviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905; *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. A petition for post-conviction relief, thus, does not provide a petitioner a second opportunity to litigate his or her conviction, nor is the petitioner automatically entitled to an evidentiary hearing on the petition. *State v. Jackson* (1980), 64 Ohio St.2d 107, 110, 413 N.E.2d 819. *State v. Lewis,* Stark App. No.2007CA00358, 2008-Ohio-3113 at ¶ 8.

a. Right to Evidentiary Hearing.

{¶15} In determining whether a hearing is required, the Ohio Supreme Court in *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, stated the pivotal concern

is whether there are substantive grounds for relief which would warrant a hearing based upon the petition, the supporting affidavits, and the files and records of the case.

{¶16} As the Supreme Court further explained in *Jackson,* supra, "[b]road assertions without a further demonstration of prejudice do not warrant a hearing...." Id. at 111, 413 N.E.2d 819. Accordingly, "a trial court properly denies a defendant's petition for post-conviction relief without holding an evidentiary hearing where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *Calhoun,* 86 Ohio St .3d at paragraph two of the syllabus; see R.C. 2953.21(C).

{¶17} Evidence submitted in support of the petition "'must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *[State v. Perry* (1967), 10 Ohio St.2d 175] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.'"(Citation omitted.); *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362. Thus, the evidence must not be merely cumulative of or alternative to evidence presented at trial. *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 652 N.E.2d 205.

{¶18} Additionally, "where a petitioner relies upon affidavit testimony as the basis of entitlement to post-conviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential." *State v. Calhoun* (1999), 86 Ohio St.3d 279, 284, 714 N.E.2d 905.

{¶19} In order for an indigent petitioner to be entitled to an evidentiary hearing in a post-conviction relief proceeding on a claim that he was denied effective assistance of counsel, the two-part *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052 test is to be applied. *Hill v. Lockhart* (1985), 474 U.S. 52, 58, 106 S.Ct. 366; *State v. Lytle* (1976), 48 Ohio St.2d 391, 358 N.E.2d 623; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373; *State v. Cole,* supra*,* 2 Ohio St.3d at 114, 443 N.E.2d 169. The petitioner must therefore prove that: 1). counsel's performance fell below an objective standard of reasonable representation; and 2). there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. Id.

{¶20} Furthermore, before a hearing is granted in proceedings for post conviction relief upon a claim of ineffective assistance of trial counsel, the petitioner bears the initial burden to submit evidentiary material containing sufficient operative facts that demonstrate a substantial violation of any of defense counsel's essential duties to his client and prejudice arising from counsel's ineffectiveness. *Calhoun,* 86 Ohio St.3d at 289, 714 N.E.2d 905; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus; see, also *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693; *State v. Phillips,* supra.

B. *Res Judicata.*

{¶21} Another proper basis upon which to deny a petition for post-conviction relief without holding an evidentiary hearing is *res judicata. Lentz,* 70 Ohio St.3d at 530; *State v. Lawson,* supra.

{¶22} Under the doctrine of *res judicata,* a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any

proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *State v. Szefcyk* (1996), 77 Ohio St.3d 93, 671 N.E.2d 233, syllabus, approving and following *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104, paragraph nine of the syllabus. It is well settled that, "pursuant to *res judicata,* a defendant cannot raise an issue in a [petition] for post conviction relief if he or she could have raised the issue on direct appeal." *State v. Reynolds* (1997), 79 Ohio St.3d 158, 161, 679 N.E.2d 1131. Accordingly, "[t]o survive preclusion by *res judicata,* a petitioner must produce new evidence that would render the judgment void or voidable and must also show that he could not have appealed the claim based upon information contained in the original record." *State v. Nemchik* (Mar. 8, 2000), Lorain App. No. 98CA007279, unreported, at 3; see, also, *State v. Ferko* (Oct. 3, 2001), Summit App. No. 20608, unreported, at 5; *State v. Lawson,* supra 103 Ohio App.3d at 313, 659 N.E.2d at 366.

{¶23} Similarly, regarding claims of ineffective assistance of trial counsel in post-conviction proceedings, the Ohio Supreme Court has stated that where a defendant, represented by different counsel on direct appeal, "fails to raise [in the direct appeal] the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for post conviction relief." *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, syllabus; see, also, *Lentz,* 70 Ohio St.3d at 530, 639 N.E.2d 784.

C. Substantive Claims

I & II.

{¶24} Because we find the issues raised in appellant's first and second assignments of error are closely related, for ease of discussion we shall address the assignments of error together.

{¶25} In the first assignment of error, appellant claims she was denied the effective assistance of trial counsel[2]. In her second assignment of error appellant contends that the trial court erred in dismissing her petition without conducting an evidentiary hearing.

First, Second and Third Ground for Relief.

{¶26} Because we find the issues raised in appellant's first, second and third grounds for relief are closely related, for ease of discussion we shall address the grounds for relief together.

{¶27} In her first ground for relief, appellant contends that she was denied effective assistance of trial counsel because of trial counsels' failure to move to exclude and to object to numerous autopsy photographs. In her second ground for relief, appellant contends that she was denied effective assistance of trial counsel because of trial counsels' failure to move to exclude and to object to photographic evidence of bruising on the decedent's body. In her third ground for relief appellant contends that she was denied effective assistance of trial counsel because of trial counsels' stipulation to the admission of autopsy photographs as a joint exhibit.

[2] Appellant raises fourteen (14) claims within her first assignment of error. For clarity, this Court will address each ground raised in the amended PCR petition in the order they were raised in the petition.

{¶28} The admissibility of the photographic evidence was thoroughly discussed in appellant's direct appeal. *See, State v. Mills,* supra, 2009-Ohio-1849 at ¶ 128-139. Appellant was represented by different counsel on that appeal. In her direct appeal this Court noted, "Upon review, we find that 53 of the autopsy photographs were introduced to illustrate the coroner's testimony and provide his perspective on the pattern of injuries which Noah suffered. Furthermore, the appellant's expert, Dr. Plunkett, used many of the same 53 autopsy photographs to explain his interpretation of the injuries which caused Noah's death and to bolster his own conclusions that the injuries resulted from an accidental fall.

{¶29} "The additional 19 photographs, taken during the autopsy appear to be repetitive of the first 53 photographs. Furthermore, appellant stipulated to the admission of the 19 photographs…

{¶30} " * * *

{¶31} "For these reasons, we do not find that the introduction of the autopsy photographs was an obvious defect in trial proceedings, nor do we find that the introduction of the photographs affected the defendant's substantial rights. In fact, we find that the introduction of the photographs was, in part, a tactical decision by the defense to support the appellant's theory as to the cause of Noah's death." 2009-Ohio-1849 at ¶ 136-138.

{¶32} Clearly, the issue of trial counsels' effectiveness with respect to the photographs is an issue that could have been raised by the appellant on her direct appeal. It appears to this Court that appellant did in fact raise this issue in her direct appeal. See, *Mills*, supra at ¶182-183. Therefore, to survive preclusion by *res judicata,*

appellant must produce new evidence that would render the judgment void or voidable and must show that she could not have appealed the constitutional claim based upon information contained in the original record. *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367.

{¶33} In support of this claim for relief appellant cites the affidavit of attorney Mark A. Serrott. However, in *State v. Davis*, Licking App. No. 2008-CA-16, 2008-Ohio-6841, this Court noted that many courts have found, "'Attorney's affidavits explaining prevailing norms do not constitute evidence *dehors* the record and are akin to a notarized legal argument.' *State v. Hill* (Nov. 21, 1997), Hamilton App. No. C961052.

{¶34} "It would seem that in most cases a more objective standard than simply a countervailing opinion of another attorney is a more appropriate standard by which to determine whether counsel's performance fell 'below an objective standard of reasonableness,' 'under prevailing professional norms.' *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶35} "The United States Supreme Court has suggested that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provide the 'guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases.' *Rompilla v. Beard* (2005), 545 U.S. 374, 387, 125 S.Ct. 2456, 162 L.Ed.2d 360; *Wiggins v. Smith* (2003), 539 U.S. 510, 524-525, 123 S.Ct. 2527, 2536-2537, 156 L.Ed.2d 471; *Van Hook v. Anderson* (6th Cir.2008), 535 F.3d 458, 462." *Davis*, supra, 2008-Ohio-6841 at ¶ 161-163.

{¶36} Nothing in Attorney Serrott's affidavit suggests appellant's trial counsel violated any objectively established standards or guidelines, such as ABA Guidelines.

{¶37} Accordingly, appellant has failed to submit evidentiary material containing sufficient operative facts that demonstrate a substantial violation of any of defense counsel's essential duties to his client and prejudice arising from counsel's ineffectiveness. *Calhoun,* 86 Ohio St.3d at 289, 714 N.E.2d 905; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus; see, also *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693; *State v. Phillips,* supra. There is no showing that the result of the appellant's trial would have been different had less photographs of the deceased child been admitted at her trial. *State v. Johnson,* supra, 112 Ohio St.3d at 229, 2006-Ohio-6404 at ¶ 135, 858 N.E.2d at 1167. [“Moreover, in light of the evidence against him, Johnson cannot demonstrate how the concession caused him prejudice or might have altered the trial's outcome. See *Goodwin,* 84 Ohio St.3d at 338, 703 N.E.2d 1251.”].

{¶38} As appellant was able to raise and fully litigated the effectiveness of counsel with respect to the photographic evidence on her direct appeal, this court concludes that the trial court did not err in finding that the issue was barred by *res judicata* and dismissing these grounds without an evidentiary hearing. *State v. Johnson,* supra, 112 Ohio St.3d at 229, 2006-Ohio-6404 at ¶ 136-138, 858 N.E.2d at 1167-78.

{¶39} Accordingly, we overrule appellant’s first, second and third grounds for relief.

Fourth Ground for Relief.

{¶40} In her fourth ground for relief, appellant claims that her trial counsel was ineffective because, although they had copies of the state experts’ reports and some of

the investigative reports, counsel failed to obtain all of the Crim. R. 16(B) (1)(g) material. We disagree.

{¶41} Appellant raised the issue of trial counsels' ineffectiveness for failing to request an in camera inspection of witnesses' statements in her direct appeal. See, *Mills,* supra at ¶ 189-190. In that opinion, we noted "[t]he record does not reflect that such statements were available. As such, appellant has failed to establish that such statements existed or that the appellant suffered any prejudice."

{¶42} Therefore, to survive preclusion by *res judicata,* appellant must produce new evidence that would render the judgment void or voidable and must show that she could not have appealed the constitutional claim based upon information contained in the original record. *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367. Appellant has failed in this burden.

In support of this claim for relief appellant cites the affidavit of attorney Mark A. Serrott. However, as we have previously noted "[E]vidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery." *State v*. *Coleman* (March 17, 1993), 1st Dist. No. C-900811, at 7; *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 653 N.E.2d 205, 209; *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367.

{¶43} Nothing in attorney Serrott's affidavit suggests appellant's trial counsel violated any objectively established standards or guidelines, such as ABA Guidelines.

{¶44} We note a reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason. *State v. Lozier* (2004), 101 Ohio St.3d 161, 166, 2004-Ohio-732 at ¶46, 803 N.E.2d 770, 775. [Citing State *ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.* (1998), 81 Ohio St.3d 283, 290, 690 N.E.2d 1273]; *Helvering v. Gowranus* (1937), 302 U.S. 238, 245, 58 S.Ct. 154, 158.

{¶45} Accordingly, appellant has failed to submit evidentiary material containing sufficient operative facts that demonstrate a substantial violation of any of defense counsel's essential duties to his client and prejudice arising from counsel's ineffectiveness. *Calhoun,* 86 Ohio St.3d at 289, 714 N.E.2d 905; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus; see, also *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693; *State v. Phillips,* supra.[3] Accordingly, the trial court did not err in dismissing these claims without an evidentiary hearing.

{¶46} Accordingly, appellant's fourth ground for relief is overruled.

Fifth Ground for Relief.

{¶47} In her fifth ground for relief, appellant argues that trial counsel was ineffective because they failed to move to exclude, or otherwise object to, testimony from treating physician's concerning the cause of the child's death. We disagree.

{¶48} Appellant raised the issue of trial counsel's ineffectiveness for failing to move to exclude, or otherwise object to, testimony from treating physician's concerning the cause of the child's death in her direct appeal. *Mills*, supra at ¶ 186-187. In that opinion, we stated, "[w]e do not believe that counsel erred in failing to object to these

[3] We will address appellant's argument that the trial court erred by refusing to permit discovery separately.

conclusions, because experts may testify as to whether or not the findings from the expert's physical examination are consistent with abuse and/or whether the injuries are consistent with the patient's medical history….”(Citations omitted).

{¶49} Therefore, to survive preclusion by *res judicata,* appellant must produce new evidence that would render the judgment void or voidable and must show that she could not have appealed the constitutional claim based upon information contained in the original record. *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367. Appellant has failed in this burden.

{¶50} In support of this claim for relief appellant cites the affidavit of attorney Mark A. Serrott. However, as we have previously noted, “Attorney's affidavits explaining prevailing norms do not constitute evidence *dehors* the record and are akin to a notarized legal argument.’ *State v. Hill* (Nov. 21, 1997), Hamilton App. No. C961052.” *State v. Davis*, supra.

{¶51} Nothing in Attorney Serrott's affidavit suggests appellant's trial counsel violated any objectively established standards or guidelines, such as ABA Guidelines.

{¶52} As appellant was able to raise and fully litigated the effectiveness of counsel with respect to the treating physician’s testimony on her direct appeal, this court concludes that the trial court did not err in finding that the issue was barred by *res judicata. State v. Johnson,* supra, 112 Ohio St.3d at 229, 2006-Ohio-6404 at ¶ 136-138, 858 N.E.2d at 1167-78. Accordingly, the trial court did not err in dismissing these claims without an evidentiary hearing.

{¶53} Accordingly, we overrule appellant’s fifth ground for relief.

Sixth Ground for Relief.

{¶54} In her sixth ground for relief, appellant contends that her trial counsel were ineffective because they failed to move for a change of venue. We disagree.

{¶55} The trial court was well aware of the extent of pretrial publicity because many prospective jurors acknowledged that they had heard something about the case. Both in the jury questionnaires and during voir dire the prospective jurors were asked whether any of them knew about the case through firsthand information or media coverage. The prospective jurors who had indicated some familiarity with the case were asked whether they could lay aside what they had heard and decide the case solely upon the evidence presented at trial. Counsel was given the opportunity to fully question the prospective jurors about their exposure to pretrial publicity. Following thorough questioning, the trial court excused members of the venire who had formed fixed opinions due to pretrial publicity or were otherwise unsuitable. (See, e.g. 1T. at 1-65).

{¶56} "[I]n extraordinary cases, where the trial atmosphere has been utterly corrupted by press coverage, a court must presume that pre-trial publicity has engendered prejudice in the members of the venire." *Williams v. Bagley* (6th Cir 2004), 380 F.3d 932, 945 (internal citation and quotation marks omitted). However, "mere prior knowledge of the existence of the case, or familiarity with the issues involved, or even some preexisting opinion as to the merits, does not in and of itself raise a presumption of jury taint." *DeLisle v. Rivers* (6th Cir 1998) (en banc), 161 F.3d 370, 382.

{¶57} Appellant cites *Sheppard v. Maxwell* (1966), 384 U.S. 333, 86 Sup. Ct. 1507 for the proposition that the statements of the jurors that they would not be influenced by media coverage are entitled to little weight. (Appellant's Brief at 9).

{¶58} We contrast the situation presented here with that present in *Sheppard*, a case where the Supreme Court found that the defendant had been denied a fair trial due to the "massive, pervasive and prejudicial publicity that attended his prosecution." Id. at 335, 86 S.Ct. 1507. In that case, significant publicity pre-dated the defendant's arrest. After the trial began, the jury was not sequestered, and the judge made no effort to restrict the jurors' access to media coverage of the trial. Id. at 357, 86 S.Ct. 1507. The Supreme Court described the commotion caused within the courtroom by the media as "unprecedented," indicating that the circumstances surrounding the trial in that case were truly extraordinary. Appellant has made no such argument, nor does our review of the record indicate such an unusual environment surrounded appellant's trial.

{¶59} "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd* (1961), 366 U.S. 717, 723, 81 S.Ct. 1639, 1643. See also, *DeLisle v. Rivers* (6th Cir 1998), 161 F.3d 370, 382.

{¶60} Upon our review of the voir dire transcript, we do not find actual prejudice due to pretrial publicity. Accordingly, we find no prejudice to appellant as a result of trial counsel's failure to move for a change of venue.

{¶61} The trial court did not err in dismissing this claim without an evidentiary hearing.

{¶62} Appellant's sixth ground for relief is overruled.

Seventh Ground for Relief.

{¶63} In her seventh ground for relief appellant argues that her trial counsels were ineffective because they called appellant's previous counsel Joseph Tripodi as a witness. We disagree.

{¶64} An attorney's selection of witnesses to call at trial falls within the purview of trial tactics and generally will not constitute ineffective assistance of counsel. See, e.g., *State v. Coulter* (1992), 75 Ohio App.3d 219, 598 N.E.2d 1324. The record is devoid of any evidence that appellant refused to waive any attorney-client privilege.

{¶65} Appellant contends that the testimony from attorney Tripodi allowed the prosecutor to "highlight for the jury alleged inconsistencies between Mr. Tripodi's version and other witnesses' versions of what they thought [appellant] told them about Shoups' accident." (Appellant's Brief at 10).

{¶66} App.R. 16(A)(7) states that appellant shall include in his brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies. The argument may be preceded by a summary."

{¶67} However, appellant does not cite any portion of attorney Tripodi's testimony, or the trial court record, that she claims demonstrates prejudice. "The omission of page references to the relevant portions of the record that support the brief's factual assertions is most troubling. Appellate attorneys should not expect the court 'to peruse the record without the help of pinpoint citations' to the record. *Day v. N. Indiana Pub. Serv. Corp.* (C.A.7, 1999), 164 F.3d 382, 384 (imposing a public reprimand

and a $500 fine on an attorney for repeated noncompliance with court rules). In the absence of the page references that S.Ct.Prac.R. VI(2)(B)(3) requires, the court is forced to spend much more time hunting through the record to confirm even the most minor factual details to decide the case and prepare an opinion. That burden ought to fall on the parties rather than the court, for the parties are presumably familiar with the record and should be able to readily identify in their briefs where each relevant fact can be verified." *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, at ¶ 13; See also*, State v. Davis*, Licking App. No. 2007-CA-00104, 2008-Ohio-2418 at ¶ 91.

{¶68} As the testimony of Mr. Tripodi and the other witnesses are part of the trial court record, appellant could have raised and fully litigated the effectiveness of counsel with respect to calling Mr. Tripodi as a witness during her direct appeal.

Therefore, to survive preclusion by *res judicata,* appellant must produce new evidence that would render the judgment void or voidable and must show that she could not have appealed the constitutional claim based upon information contained in the original record. *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367. Appellant has failed in this burden.

{¶69} Appellant has not submitted any affidavits or other evidentiary material to support her claim that this issue could not be raised in her direct appeal.

{¶70} Accordingly, this court concludes that the trial court did not err in finding that the issue was barred by *res judicata* and dismissing the claim without an evidentiary hearing.

{¶71} Appellant's seventh ground for relief is overruled.

Eighth Ground for Relief.

{¶72} In her eighth ground for relief, appellant maintains that her trial counsel were ineffective for failing to properly cross-examine the state's expert witnesses with the defense's expert's conclusions and materials. We disagree.

{¶73} This argument was raised in appellant's direct appeal wherein this court noted, "Counsel could have had a reason for this particular trial strategy. For example, counsel may have chosen not to cross-examine the State's witness with the defense's expert's opinion so that the State's expert would not have an opportunity to directly refute the defense expert's conclusions. In addition, the State's witnesses did address whether a fall and/or emergency lifesaving treatments could have cause Noah's injuries. Therefore, appellant has failed to establish that but for counsel's decision not to confront these witnesses with another expert's conclusion there was a reasonable probability the results of the trial would have been different. Appellant's argument is not well taken." *Mills*, supra at ¶ 187.

{¶74} Therefore, to survive preclusion by *res judicata,* appellant must produce new evidence that would render the judgment void or voidable and must show that she could not have appealed the constitutional claim based upon information contained in the original record. *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367. Appellant has failed in this burden.

{¶75} In support of this ground for relief appellant cites the affidavit of the Dr. John Plunkett. Dr. Plunkett opines that trial counsel's failure to utilize materials and advice supplied by him to challenge the state's expert witnesses' rendered appellant's trial counsel ineffective. Dr. Plunkett does not attach the "scholarly articles" or the

"proposed questions" that he suggested counsel ask of the state's witnesses to his affidavit.

{¶76} Dr. Plunkett testified to "scholarly articles" and the flaws in the opinions of the state's witnesses at appellant's trial. (4T. at 1163-1293). Nothing in his affidavit suggests that the experts for the state would have answered any question in a different manner if cross-examined in the method suggest by Dr. Plunkett.

{¶77} To prove an allegation of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. Second, appellant must demonstrate that she was prejudiced by counsel's performance. Id. To show that she has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley,* 42 Ohio St.3d at paragraph three of the syllabus.

{¶78} Here, appellant's trial counsels' performance did not fall below an objective standard of reasonable representation. A decision regarding which defense to pursue at trial is a matter of trial strategy "within the exclusive province of defense counsel to make after consultation with his client." *State v. Murphy,* 91 Ohio St.3d 516, 524, 2001-Ohio-0112. This court can only find that counsel's performance regarding matters of trial strategy is deficient if counsel's strategy was so "outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff." 'State *v. Woullard,* 158 Ohio App.3d 31, 813 N.E.2d 964, 2004-Ohio-3395, ¶ 39, quoting *State v. Yarber* (1995),

102 Ohio App.3d 185, 188, 656 N.E.2d 1322. Further, the Ohio Supreme Court has recognized that if counsel, for strategic reasons, decides not to pursue every possible trial strategy, defendant is not denied effective assistance of counsel. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523. When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189, citing *People v. Miller* (1972), 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089; *State v. Wiley,* 10th Dist. No. 03AP-340, 2004-Ohio-1008 at ¶ 21.

{¶79} "Debatable trial tactics do not establish ineffective assistance of counsel." *State v. Hoffner* (2004), 102 Ohio St.3d 358, 365, 2004-Ohio-3430, ¶ 45. Trial counsel's failure to request an expert is a "debatable trial tactic," and does not amount to ineffective assistance of counsel. See *State v. Thompson* (1987), 33 Ohio St.3d 1, 9 (trial counsel's failure to obtain a forensic pathologist to "rebut" issue of rape was not ineffective assistance of counsel); *State v. Foust,* 105 Ohio St.3d 137, 153-154, 2004-Ohio-7006, ¶ 97- 99 (trial counsel's failure to request funds for a DNA expert, an alcohol and substance-abuse expert, a fingerprint expert, and an arson expert did not amount to ineffective assistance of counsel because appellant's need for experts was "highly speculative" and counsel's choice "to rely on cross-examination" of prosecution's expert was a "legitimate tactical decision"); *State v. Yarger* (May 1, 1998), 6th Dist. No. H-97-014 (trial counsel's failure to hire an expert medical doctor to rebut state's expert witness was not ineffective assistance of trial counsel); *State v. Rutter,* 4th Dist. No.

02CA17, 2003-Ohio-373, ¶ 19, 28 (trial counsel's failure to hire an accident reconstructionist did not amount to ineffective assistance of counsel).

{¶80} In the case at bar, the jury heard Dr. Plunkett's testimony concerning the cause of the child's death. They further heard Dr. Plunkett's criticism of the state's experts' methodology and conclusions. Thus, the information Dr. Plunkett refers to in his affidavit was presented to the jury. In the case at bar, trial counsels' approach of not attempting to cross-examine the state's witnesses with this information was clearly within the purview of reasonable representation and accepted trial tactics.

{¶81} The jury heard both sides of the expert's arguments during trial; they chose to believe the state's theory on the cause of the child's death rather than appellant's theory. There is nothing in the record to show the jury would have found the appellant not guilty had counsel followed Dr. Plunkett's advice. *State v. Benge,* 75 Ohio St.3d 136, 141, 1996-Ohio-227.

{¶82} We conclude that the evidence outside the record is only cumulative of the evidence that was presented to the jury. *State v. Madrigal* (Nov. 17, 2000), 6th Dist. No. L-00-1006 at 7; *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367.

{¶83} The petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that appellant set forth sufficient operative facts to establish substantive grounds for relief. *Calhoun,* 86 Ohio St.3d at paragraph two of the syllabus; see R.C. 2953.21(C). Accordingly, the trial court did not err in dismissing this ground without an evidentiary hearing.

{¶84} Appellant's eighth ground for relief is overruled.

Ninth Ground for Relief.

{¶85} In her ninth ground for relief appellant argues that her trial counsels were unprepared because they failed to familiarize themselves with the rules of evidence, general trial procedure, and the admissibility of evidence. We disagree.

{¶86} The underlying basis for appellant's claims was raised in her direct appeal. See, *Mills* at ¶ 172 ("Counsel failed to object to the gruesome, irrelevant, prejudicial photos, and counsel stipulated to 19 photographs about which there was no testimony, but [the exhibits] were marked exhibits and given to the jury."); ¶ 173 ("Counsel failed to object to prosecutor's closing arguments".); ¶ 175 ("Counsel failed to object to hearsay when the State's witnesses testified as to what they believed Mills told them regarding Shoup's accident".); ¶ 178 (""7. Counsel permitted the State's experts who [are] non-pathologist[s] to testify to cause of death without objection.").

{¶87} As to any remaining allegations, appellant failed to cite to the place in the trial court record where the alleged errors were to have occurred. "It is the duty of the appellant, not this court, to demonstrate [her] assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A) (7). "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60. Pursuant to App.R. 12(A) and 16(A) (7), an appellate court "may disregard an assignment of error 'if the party raising it fails to identify in the record the error on which the assignment of error is based *** as required under App.R. 16(A).'" *Courie v. ALCOA*, 162 Ohio App.3d 133,

2005-Ohio-3483, at ¶17, quoting App.R. 12(B) (2), now App.R. 12(A) (2). See, also, *Smith v. Akron Appeals Bd. of Dept. of Public Health*, 9th Dist. No. 21103, 2003-Ohio-93, at ¶26-27. An appellant bears the burden of affirmatively demonstrating the error on appeal, and substantiating his or her arguments in support. *Angle v. Western Reserve Mut. Ins. Co.* (Sept. 16, 1998), 9th Dist. No. 2729-M, at *1; *Frecska v. Frecska* (Oct. 1, 1997), 9th Dist. No. 96CA0086, at *2. See, also, App.R. 16(A) (7).

{¶88} Therefore, to survive preclusion by *res judicata,* appellant must produce new evidence that would render the judgment void or voidable and must show that she could not have appealed the constitutional claim based upon information contained in the original record. *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367. Appellant has failed in this burden.

{¶89} As appellant was able to raise and fully litigate this issue on direct appeal, this court concludes that the trial court did not err in finding that the issue was barred by *res judicata* and dismissing this claim without an evidentiary hearing.

{¶90} Appellant's ninth ground for relief is overruled.

Tenth Ground for Relief

{¶91} In her tenth assignment of error appellant contends that her trial counsel were ineffective because they did not confront the State's expert witness, Dr. Darryl Steiner with evidence that he had given erroneous medical opinions in prior cases. We disagree.

{¶92} In support of the claim, appellant cites to an article printed two months before appellant's trial commenced in *Scene Magazine*[4].

[4] http://www.clevescene.com/2007-04-18/news/guilty-until-proven-innocent/full. The article was reprinted and attached to appellant's reply brief as Exhibit D.

{¶93} Initially we note that evidence offered *de hors* the record must be more than evidence which was in existence and available to the appellant at the time of the trial and which could and should have been submitted at trial if the appellant wished to make use of it. Simply put, the purpose of post conviction proceedings is not to afford one convicted of a crime a chance to retry his case.

{¶94} In the case at bar, appellant has failed to make any showing that the articles submitted were properly identified and authenticated and shown to be recognized as standard authorities on the subjects to which they relate. The magazine article was not admissible to prove the truth of the matters contained therein and is therefore only marginally relevant to appellant's petition. *State v. Elmore*, Licking App. No. 2005-CA-32, 2005-Ohio-5940 at ¶84; 102.

{¶95} "[E]vidence presented outside the record must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of *Perry* by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery." *State v. Coleman* (March 17, 1993), 1st Dist. No. C-900811, at 7; *State v. Combs* (1994), 100 Ohio App.3d 90, 98, 653 N.E.2d 205, 209. “For example, evidence in the form of magazine articles that are irrelevant to the issues in the petition will not overcome res judicata.” *Combs* at 98, 652 N.E.2d 205.

{¶96} Even if we were to consider the article as admissible, we would find that it is only marginally significant. The article was fraught with hearsay[5]. There is little, if any, discussion concerning how or why Dr. Steiner’s opinion was discounted. The cases

[5] Appellant did not submit an affidavit from counsel in those cases, a transcript of any court proceedings, a ruling by a court finding Dr. Steiner’s opinion inadmissible or striking the same, or the expert witnesses referred to within the article.

cited therein dealt with two instances where newborns were shown to have suffered traumatic birth injuries, not abuse. The article does not discuss any aspect of appellant or the specific medical evidence introduced at appellant's trial. The fact that Dr. Steiner may have been mistaken in other cases that are factually dissimilar to appellant's case is of little relevance. The appellant vigorously sought to impeach Dr. Steiner with article from medical journals that disagreed with Dr. Steiner's methodology and conclusions. (2T. at 703; 704; 726; 734). Additionally, trial counsel sought to exclude Dr. Steiner's testimony in a pre-trial motion. (Transcript of Motion Hearing, April 17, 2007 at 16-122). The trial court ruled that Dr. Steiner could "not opine that the victim was diagnosed with Shaken Baby Syndrome as a term, may not testify that the defendant shook the victim or that she is guilty of the crime and cannot comment on whether the defendant was truthful in the history given. However, I'm not at this point prohibiting the state's expert from identifying the characteristics of the child or of a child whose mechanism of injury is believed to be rotational acceleration of deceleration injury." (Motion Hearing, April 30, 2007 at 149.

{¶97} The exhibit, therefore, does not pass the minimum threshold of cogency required to raise a constitutional claim. The magazine or Internet articles about cases in general or about another case factually distinguishable from that of the appellant are irrelevant to appellant's petition for post conviction relief. *State v. Coleman,* supra*; State v. Combs,* supra.

{¶98} Appellant failed in her initial burden to submit evidentiary material containing sufficient operative facts that demonstrate a substantial violation of any of defense counsel's essential duties to his client and prejudice arising from counsel's

ineffectiveness. *Calhoun,* 86 Ohio St.3d at 289, 714 N.E.2d 905; *State v. Jackson* (1980), 64 Ohio St.2d 107, 413 N.E.2d 819, syllabus; see, also *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, 693; *State v. Lawson,* supra, 103 Ohio App.3d at 315, 659 N.E.2d at 367.

{¶99} Appellant has further failed to demonstrate that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus.

{¶100} Accordingly, the trial court did not err in dismissing this ground without an evidentiary hearing.

{¶101} Appellant's tenth assignment of error is overruled.

Eleventh Ground for Relief

{¶102} In her eleventh ground for relief, appellant contends that her trial counsel were ineffective because they failed to properly prepare their expert witness for trial. We disagree.

{¶103} Dr. Plunkett sought to introduce a videotape of a child falling from playground equipment. He sought to introduce the video to bolster his opinion that children can suffer fatal injuries from short falls. Dr. Plunkett sought to introduce photographs to show that children suffer injuries from cervical collars. Appellee objected arguing the video and photographs could not be properly authenticated. The trial court sustained the objection. Appellant now argues that her trial counsels were ineffective because they did not ask Dr. Plunkett if he viewed the video tape and what in his opinion it showed. (Appellant's Brief at 15).

{¶104} We find that appellant raised the issue of the admissibility of the videotape during her direct appeal. In that opinion, we noted, "[f]inally, although Dr. Plunkett was unable to authenticate the videotape and photographs, he was permitted to explain how the videotape and photographs contributed to his conclusions regarding the manner in which Noah's injuries and death occurred." *Mills* at ¶ 60.

{¶105} Therefore, to survive preclusion by *res judicata,* appellant must produce new evidence that would render the judgment void or voidable and must show that she could not have appealed the constitutional claim based upon information contained in the original record. *State v. Phillips,* supra. Appellant has failed in this burden. Appellant has not submitted any affidavits or other evidentiary material to support her claim that this issue could not be raised in her direct appeal.

{¶106} As appellant was able to raise and fully litigate this issue on direct appeal, this court concludes that the trial court did not err in finding that the issue was barred by *res judicata* and dismissing this ground without an evidentiary hearing.

{¶107} Appellant's eleventh ground for relief is overruled.

Twelfth Ground for Relief

{¶108} In her twelfth ground for relief, appellant maintains that her trial counsels were ineffective because they failed to redact the autopsy report and failed to move to have irrelevant and prejudicial information removed from the medical records before they were given to the jury. We disagree.

{¶109} The exhibits appellant references are part of the trial court record. In *State v. Cole* (1982), 2 Ohio St.3d 112, 443 N.E.2d 169, the Ohio Supreme Court stated: "[h]erein, as appellant, upon direct appeal, was represented by new counsel who

was in no way enjoined from asserting the ineffectiveness of appellant's trial counsel and as such question of effective counsel could fairly be determined without examining evidence outside the record, none of the qualifications engrafted upon the *Perry* decision is apposite. Moreover, to the extent paragraph two of the syllabus in *State v. Hester, supra,* precludes the application of the doctrine of *res judicata* to a claim which reasonably could have been raised upon direct appeal, said paragraph of the syllabus is hereby modified to comport with out [sic.] ruling of today". Id. at 113-14, 443 N.E.2d 169, 443 N.E.2d at 171.

{¶110} In the case at bar, appellant was represented in her direct appeal by new counsel. Counsel in that appeal could cite to the records contained in the court file to support a claim of ineffective assistance of counsel. To overcome the *res judicata* bar, the evidence must show that the petitioner could not have appealed the constitutional claim based on the information in the original trial record. *Cole,* syllabus. Appellant has failed in this burden. Appellant has not submitted any affidavits or other evidentiary material to support her claim that this issue could not be raised in her direct appeal.

{¶111} As appellant was able to raise and fully litigate this issue on direct appeal, this court concludes that the trial court did not err in finding that the issue was barred by *res judicata* dismissing this ground without an evidentiary hearing.

{¶112} Appellant's twelfth ground for relief is overruled.

Fourteenth and Fifteenth Ground for Relief[6]

{¶113} In her fourteenth ground for relief appellant argues that her trial counsels were ineffective because they failed to exercise a peremptory challenge to remove Sandra Rubino as a juror. In her fifteenth ground, for relief appellant argues that her

[6] Appellant's Thirteenth Ground for Relief is raised separately as Assignment of Error IV, infra.

trial counsels were ineffective because they failed to exercise peremptory challenges to remove Juror Seilhamer, Juror Hall and Juror Ramey. For the first time in her reply brief appellant also contends that that her trial counsel were ineffective because they failed to exercise a peremptory challenge to remove Juror Fitch.[7] We disagree.

{¶114} We begin with the principle that voir dire is largely a matter of strategy and tactics. *State v. Keith* (1997), 79 Ohio St.3d 514, 521, 684 N.E.2d 47, certiorari denied (1998), 523 U.S. 1063, 118 S.Ct. 1393. Most important here, decisions on the exercise of peremptory challenges are a part of that strategy. *State v. Goodwin* (1999), 84 Ohio St.3d 331, 341, 703 N.E.2d 1251, certiorari denied, 528 U.S. 846, 120 S.Ct. 118. Trial counsel, who observe the jurors firsthand, are in a much better position to determine whether a prospective juror is qualified to be on the panel. *Keith* at 521, 684 N.E.2d 47.

{¶115} Counsel's failure to exercise peremptory challenges is not ineffective assistance where jurors indicate they can put their personal feelings aside and judge the case on the merits. *State v. Davis* (1991), 62 Ohio St.3d 326, 350, 581 N.E.2d 1362, 1381-1382.

{¶116} Juror Rubino indicated that she would have difficulty looking at any photographs, and she stated that it would be "difficult for me to be real fair. I don't know, I hate to say that." (1T. at 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; the court declined.

[7] As this argument was first presented in the appellant's reply brief, we note that the state did not have an opportunity to address the argument concerning Juror Fitch in its brief.

{¶117} When questioned about these situations, Ms. Rubino indicated that she had not formed an opinion as to whether or not the appellant was guilty or not guilty; she would follow the trial court's instructions; and that she would not let her emotions keep her from basing a decision on the evidence presented in the case. (1T. at 99-100).

{¶118} Juror Seilhamer was the prosecutor's former gym teacher. Appellant contends that her trial counsel failed to ask him any questions during voir dire.

{¶119} Juror Hall indicated that the prosecutor's mother was her boss. (1T. at 144.) Appellant argues that her trial counsel did not ask Juror 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.

{¶120} Juror Ramey indicated on his juror questionnaire that he worked at the same company as Kristen Shoup, the deceased's mother. (1T. at 315-316). Appellant contends that her trial counsel never addressed this on voir dire.

{¶121} Appellant argues that Juror Fitch failed to disclose that he had a family member in law enforcement.

{¶122} The voir dire of each of these jurors is contained in the trial court record. In the case at bar, appellant is represented in her direct appeal by new counsel. Counsel in that appeal could have cited to the transcript contained in the court file to support a claim of ineffective assistance of trial counsel in failing to challenge the jurors. Therefore to overcome the barrier of res judicata, a petitioner must attach evidence dehors the record that is "competent, relevant and material" and that was not in existence or available for use at the time of the trial. *State v. Jackson,* 10th Dist. No. 01AP-808, 2002-Ohio-3330, ¶ 45, citing *State v. Gipson* (Sept. 26, 1997), 1st Dist. Nos.

C-960867, C-960881, 1997 WL 598397, *6. "Significantly, evidence outside the record alone will not guarantee the right to an evidentiary hearing. *State v. Combs* (1994), 100 Ohio App.3d 90, 97, 652 N.E.2d 205. Such evidence 'must meet some threshold standard of cogency; otherwise it would be too easy to defeat the holding of [*State v. Perry* (1967), 10 Ohio St.2d 175] by simply attaching as exhibits evidence which is only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery.'"(Citation omitted.) *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362. Thus, the evidence must not be merely cumulative of or alternative to evidence presented at trial. *Combs,* 100 Ohio App.3d at 98, 652 N.E.2d 205". Appellant has failed in this burden.

{¶123} In support of the claim, appellant has attached the juror questionnaire of Juror Rubino. We conclude that the evidence outside the record is only cumulative of the evidence contained in the trial court record. Ms. Rubino's juror questionnaire was referred to by counsel during voir dire. (1T. at 95-96).

{¶124} Appellant failed to present evidence outside of the record to support her claims concerning Jurors Seilhamer, Juror Hall and Juror Ramey. These claims could have been raised on direct appeal, because they could have fairly been determined without resorting to evidence outside of the trial record. As these claims were evident and part of the record at the time of the direct appeal it is barred from consideration at this time based on the doctrine of *res judicata*.

{¶125} Although appellant contends she presented evidence outside the trial court record to support her claim concerning Juror Fitch, we note that the evidence upon which she relies to establish that Juror Fitch failed to disclose that he had a family

member in law enforcement was not supplied to the trial court in appellant's initial or amended petition. Rather the evidence *de hors* the record was submitted in appellant's Motion to Reconsider, filed after the trial court had denied her PCR petition.

{¶126} In any event, Ohio courts "have recognized that counsel is in the best position to determine whether any potential juror should be questioned and to what extent." *State v. Murphy,* 91 Ohio St.3d 516, 539, 2001-Ohio-112, 747 N.E.2d 765, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 143-144, 538 N.E.2d 373. A prospective juror is not automatically disqualified by the fact that he or she is related to a law enforcement officer. *State v. Murphy*, 91 Ohio St.3d 516, 528, 2001-Ohio-112, 747 N.E.2d 765, 785. See, also Crim. R. 24(B) (Listing ground for challenge for cause).

{¶127} Juror Fitch indicated that he could be fair and impartial to both sides. (1T. at 232-235). Based upon our review of the record of the voir dire conducted, we find the record does not support the conclusion that, because he may have been related to a law enforcement officer, counsel's failure to discover this fact fell below an objective standard of reasonableness. Appellant has also failed to show that the outcome of her trial would have been different had counsel been aware of this information.

{¶128} Appellant has not supported this ground with evidence dehors the record that contains sufficient operative facts to demonstrate she was prejudiced because of ineffective assistance of counsel. We, therefore, hold that the trial court did not err in dismissing appellant's fourteenth and fifteenth grounds for relief without an evidentiary hearing.

{¶129} Appellant's fourteenth and fifteenth grounds for relief are overruled.

{¶130} Accordingly, based upon the foregoing we overrule appellant's first and second assignments of error.

III.

{¶131} In her third assignment of error, the appellant claims that she was entitled to conduct discovery during the PCR proceeding.

{¶132} We have previously rejected this argument. *State v. Davis*, Licking App. No. 2008-CA-16, 2008-Ohio-6841 at ¶ 28; *State v. Elmore,* 5th Dist. No.2005-CA-32, 2005-Ohio-5940 at ¶ 25. There is no provision for conducting discovery in the post-conviction process. *State ex Rel. Love v. Cuyahoga County Prosecutor's Office,* 86 Ohio St.3d 279, 281, 714 N.E.2d 905, 1999-Ohio-102. The power to conduct and compel discovery in post-conviction is not included within a trial court's statutorily defined authority. *State v. Sherman,* (Oct. 30, 2000), Licking App. No. 00CA39. See, also, *State v. Dean* (2002), 149 Ohio App.3d 93, 776 N.E.2d 116; *State v. White* (Aug. 7, 1998), Ashland App. No. 97COA01229.

{¶133} "Because there is no federal constitutional right to a post-conviction review process, Ohio's post-conviction proceedings afford only a narrow remedy strictly defined by statute and granting no rights to a petitioner beyond those spelled out in R.C. 2953.21. *State v. Campbell,* Franklin App. No. 03AP-147, 2003-Ohio-6305, at ¶ 13. While the statute explicitly provides for appointment of counsel in post-conviction proceedings when the petitioner has been sentenced to death, the statute nowhere provides a right to funding or appointment of expert witnesses or assistance in a post-conviction petition. *State v. Tolliver,* Franklin App. No. 04AP-591, 2005-Ohio-989, at ¶ 25, citing *State v. Smith* (2000), Ninth Dist. App. 98CA-007169, and *State v. Hooks*

(1998), Second Dist. App. No. CA 16978." *State v. Conway,* Franklin App. No. 05AP550, 2006-Ohio-6219 at ¶ 15. A petitioner in a post conviction proceeding is not entitled to the appointment of an expert witness to assist in discovery. *State v. Garner* (Dec. 19, 1997), Hamilton App. No. C-960995, 1997 WL 778982, citing *Ake v. Oklahoma* (1985), 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53; *State v. Crowder* (1991), 60 Ohio St.3d 151, 573 N.E.2d 652; *See State v. Yost* (May 4, 2001), Licking App. No. 00CA104, See, also, *State v. Dean,* Delaware App. No. 01 CA-A-10-055, 2002-Ohio-4203 at ¶ 13.

{¶134} "Further, appellant has not demonstrated any prejudice by the court's failure to grant him discovery. Appellant submitted hundreds of pages in support of his petition for post-conviction relief. It does not appear that appellant's presentation of materials in support of his petition was hampered in any way by the court's failure to allow him to conduct discovery." *State v. Ashworth* (Nov. 8, 1999), 5th Dist. No. 99-CA60; See also, *Williams v. Bagley* (6th Cir.2004), 380 F.3d 932, 967.

{¶135} Appellant's third assignment of error is denied.

IV.

{¶136} In her fourth assignment of error appellant argues that the trial court erred when it refused to allow Dr. John Plunkett's *curriculum vitae* to be submitted to the jury. We disagree.

{¶137} Dr. Plunkett testified at trial concerning his qualifications. (4T. at 1163-1177). In the case at bar, appellant was represented in her direct appeal by new counsel. Counsel in that appeal could cite to the records contained in the court file to support a claim of ineffective assistance of counsel. To overcome the *res judicata* bar,

the evidence must show that the petitioner could not have appealed the constitutional claim based on the information in the original trial record. *Cole,* syllabus. Appellant has failed in this burden.

{¶138} We conclude that the evidence outside the record is only cumulative of the evidence that was presented to the jury. *State v. Madrigal* (Nov. 17, 2000), 6th Dist. No. L-00-1006 at 7. The petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that appellant set forth sufficient operative facts to establish substantive grounds for relief. *Calhoun,* 86 Ohio St.3d at paragraph two of the syllabus; see R.C. 2953.21(C). Accordingly, the trial court did not err in dismissing this claim without an evidentiary hearing.

{¶139} However, even if the trial court erred in excluding the *curriculum vitae* from the jury we must review the exclusion of this evidence under the plain error standard of Crim. R. 52(A). *State v. Ahmed*, Stark App. No. 2007-CA-00049, 2008-Ohio-309. Crim.R. 52(A), which governs the criminal appeal of a non-forfeited error, provides that "[a]ny *error* * * * which does not *affect substantial rights* shall be disregarded." (Emphasis added.) Thus, Crim.R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an "error"-i.e., a "[d]eviation from a legal rule." *United States v. Olano* (1993), 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508. Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called "harmless error" inquiry-to determine whether the error "affect[ed] substantial rights" of the criminal defendant. In *U.S. v. Dominguez Benitez* (June 14, 2004), 542 U.S. 74, 124 S.Ct. 2333, 159 L.Ed.2d 157, the Court defined the

prejudice prong of the plain error analysis. “It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake’s effect on the proceeding. See *Arizona v. Fulminante*, 499 U. S. 279, 309–310 (1991) (giving examples). “Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as ‘error that affects substantial rights,’ used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos v. United States*, 328 U. S. 750 (1946). To affect “substantial rights,” see 28 U. S. C. §2111, an error must have “substantial and injurious effect or influence in determining the . . . verdict.” *Kotteakos*, supra, at 776.” 124 S.Ct. at 2339. See, also, *State v. Barnes* (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240. See, also, *State v. Fisher*, 99 Ohio St.3d 127, 129, 2003-Ohio-2761 at ¶7, 789 N.E.2d 222, 224-225. Thus, a so-called “[t]rial error” is “error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” *Fulminante,* 499 U.S. at 307-308, 111 S.Ct. 1246, 113 L.Ed.2d 302.

{¶140} We find no reasonable possibility that had the jury been permitted to review the *curriculum vitae* during deliberations it would have swayed the jury to find appellant not guilty. Therefore, any error committed was harmless beyond a reasonable doubt. *State v. Lytle* (1976), 48 Ohio St.2d 391, 403, 358 N.E.2d 623, 630-631, vacated on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154.

{¶141} Appellant's fourth assignment of error is overruled.

{¶142} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

WSG:clw 0910

[Cite as *State v. Mills*, 2009-Ohio-5654.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
MARSHA J. MILLS	:	
Defendant-Appellant	:	CASE NO. 2008 AP 08 0051

For the reasons stated in our accompanying Memorandum-Opinion, The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

_____
HON. PATRICIA A. DELANEY