

ORIGINAL

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO

NO. 2012-1383

Plaintiff-Appellee

On Appeal from the Hamilton County
Court of Appeals, First Appellate
District

vs.

LAMONT HUNTER

Court of Appeals
Case Number C-090569

Defendant-Appellant

MEMORANDUM IN RESPONSE

Joseph T. Deters (0012084P)
Prosecuting Attorney

Ronald W. Springman (0041413P)
Chief Assistant Prosecuting Attorney

230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
(513) 946-3052
Fax No. (513) 946-3021

COUNSEL FOR PLAINTIFF-APPELLEE, STATE OF OHIO

Kimberly S. Rigby (0078245)
Assistant State Public Defender
230 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394

Pamela Prude-Smithers (0062206)
~~Chief, Death Penalty Division~~
Office of the Ohio Public Defender
230 E. Broad Street, Suite 1400
Cincinnati, Ohio 45202

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COUNSEL FOR DEFENDANT-APPELLANT, LAMONT HUNTER

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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This is an appeal from the denial of a postconviction petition filed by Lamont Hunter who was convicted of capital murder and sentenced to death. This Court previously affirmed Hunter's capital conviction and death sentence. The First District Court of Appeals affirmed the trial court's denial of postconviction relief.

The court of appeals properly applied long standing Ohio postconviction law in affirming the judgment of the trial court. Many of Hunter's postconviction claims rehashed the claims he made on direct appeal. In postconviction, Hunter continued to second guess the tactics and strategies of trial counsel, assailed him for being under federal investigation at the time he represented Hunter at trial, faulted him for not hiring an expert, and attacked him for not objecting to other acts evidence. These claims were all barred by res judicata and the fact that Hunter failed to provide outside evidence that would have altered the outcome.

Hunter again attacked trial counsel's mitigation preparation and strategy but provided no outside evidence that a better strategy would have resulted in a different outcome.

In sum, Hunter woefully failed to demonstrate a denial or infringement of his rights during trial that would have rendered his conviction or death sentence void or voidable under the Ohio or United States Constitution.

STATEMENT OF THE CASE AND FACTS

A Hamilton County Grand Jury returned an indictment against defendant-appellant Lamont Hunter charging him with Aggravated Murder, Rape and Endangering Children. The Aggravated Murder charge included two death penalty specifications: (1) that Hunter committed the Aggravated Murder as a principle offender and in the course of committing or attempting to commit the crime of Rape and (2) that Hunter purposely caused the death of Trustin Blue, who was under thirteen years of age at the time of the offense.

Hunter waived his right to a jury trial in open court and in writing. (T.p. 89-95) The case proceeded to trial before a three-judge panel. The panel found Hunter guilty as charged. A mitigation hearing followed, and the panel concluded that the aggravating circumstances outweighed the mitigating factors put forth by Hunter, and recommended a sentence of death on the Aggravated Murder charge. The panel sentenced Hunter to life imprisonment on the Rape charge, to eight years imprisonment on the Endangering Children charge, and ordered all sentences to be served consecutively to each other. Hunter appealed as of right to this Court which affirmed his conviction and sentence. *State v. Hunter*, 131, Ohio St.3d 67, 960 N.E.2d 955 (2011). On June 25, 2008, Hunter filed a petition for post-conviction relief. Hunter amended his petition two times. The trial court overruled Hunter's petition and amended petitions on July 16, 2009. Hunter appealed and the First District Court of Appeals affirmed on June 27, 2012.

Facts:

Trustin Blue was a three-year-old child born to Luzmilda Blue, a mother of three other children named Tyree Blue, Tyrell Blue, and Trinity Hunter. Trustin was full of life and liked to play like any normal three-year-old child, and was particularly fond of dinosaurs. He energized the people that truly cared about him (among them, the Forte family) and they were proud to

observe him continue to grow and reach milestones in his life. For example, Wilma Forte, observed Trustin take his first steps. Forte, whom Trustin called Nanna, and Forte's daughter, Amber White, cared for Trustin for much of his life because Luzmilda was incapable of providing him with a safe and nurturing environment. (T.p. 495-498, 516)

Luzmilda lost custody of Trustin, but regained it in 2003, the same year she met defendant Lamont Hunter. Luzmilda allowed Hunter to babysit and care for Trustin, even after Trustin was treated for severe injuries that occurred while he was in Hunter's care, and despite the fact Trustin feared Hunter and avoided him whenever possible. (T.p. 552-553)

On January 19, 2006, Luzmilda went to work leaving Hunter in charge of Trustin and their infant daughter Trinity. While in the care of Hunter, Trustin was physically abused and suffered fatal injuries. The cause of death was diffuse brain injury due to blunt impact to the head. Trustin was either whipped around like a baseball bat and his head struck a stationary object or he was forcefully struck in the head with some hard object. The deputy coroner found other severe injuries to Trustin, which included a deep penetrating anal injury.

A life of abuse

In January of 2004, Trustin was in the care of Hunter when he suffered a broken leg. According to Hunter, Trustin sustained the injury when he fell while Hunter carried him up some steps. On June 9, 2004, Trustin suffered a severe injury to his penis and was taken to Children's Hospital. (T.p. 477-479) Doctors at Children's hospital evaluated Trustin and discovered injuries consistent with child abuse. Trustin was further evaluated by Dr. Kathy Makoroff, an expert in child abuse. (T.p. 287-294)

X-rays showed that Trustin suffered fractured bones to his hands and feet. Dr. Makoroff testified that these fractures were highly suspicious of child abuse because such injuries do not

occur during normal child play, but usually by someone grabbing or stomping on a child's hands and feet. (T.p. 295-300) In addition to these injuries, Trustin's lips were swollen, and he had abrasions on his upper lip and ear. He also suffered a scratch to his ear canal, and there was an area of hair loss and a small bruise to the side of his head. Trustin also suffered bruises on the sides and the tops of both ears. Dr. Makaroff testified that these injuries, particularly those on the top of the ears, were also indicative of child abuse. (T.p. 300-301)

Trustin's penis and parts of his gland were bruised and swollen. He had an abrasion to the base of his penis. It could not be ruled out that this injury was caused by some type of child abuse. (T.p. 301-303) Based upon the nature and type of all of these injuries, Dr. Markaroff testified definitively that Trustin was a victim of child abuse. (T.p. 304)

Hamilton County Job and Family Services (JFS) conducted an investigation into the abuse. An employee of JFS interviewed Hunter. Hunter was nervous and sweating during the interview. Hunter claimed that on the day Trustin broke his leg Luzmilda awoke him and said she was going to run errands, and was leaving the children with him. Hunter said that perhaps Trustin broke his leg when he (Hunter) carried Trustin up some steps and tripped after getting Trustin a juice cup. Hunter also claimed that Trustin might have sustained the injury from one of the older children playing too rough with Trustin. (T.p. 477-479)

After the investigation, Trustin was placed in the care of Luzmilda's sister, Latoya Gresham, for six months. (T.p. 212, 480) After that, Trustin was placed in the care of Amber White and Wilma Forte, with White being the primary caretaker of Trustin. (T.p. 214, 479, 505-506) Hunter was ordered not to have any contact with Trustin and Luzmilda only had supervised visitation rights. (T.p. 481, 506-507)

In April of 2005, Luzmilda gave birth to Trinity. In August of 2005, for some reason, Trustin was returned to Luzmilda who was now living with Hunter, but Forte and White were still significantly involved in Trustin's life, and he spent significant time with them. (T.p. 496-497, 507, 550-551)

During this time, Trustin was terrified of Hunter and avoided him. One time, while Forte was visiting Trustin at Luzmilda's residence, Hunter came near Trustin. Trustin was so terrified of seeing Hunter that he vomited. (T.p. 510-511) Hunter reacted by repeatedly asking Trustin what was wrong with him. Trustin did not verbally respond to Hunter's repeated questions, but just froze, shaking in terror. Forte did whatever she could to keep Trustin away from Hunter. (T.p. 511-513)

The tragic death of Trustin Blue

On January 17, 2005, Trustin was with Forte. Trustin was drawing, playing and reciting the alphabet. Forte bathed Trustin, put lotion on him and dressed him. Forte did not see any visible injuries to Trustin, or any type of injury to his anus. (T.p. 513-514)

On the morning of January 19, 2005, Trustin was staying at his mother Luzmilda's residence on 16 West 68th Street where she resided with Hunter. Luzmilda went to the Speedway gas station where she worked, leaving Hunter alone watching Trustin, Trinity, Terrell, and Tyree. At 8:00 a.m., Terrell and Tyree went to school. Hunter was now supervising Trustin and Trinity. At 9:00 a.m., Forte telephoned Hunter and asked to speak with Trustin. Trustin said that he was watching dinosaurs on television. Forte said that Nanna loves you and Trustin responded, "I love you, Nanna." (T.p. 515-519) Those were the last words Forte heard from the young child.

At around 11:00 a.m., Hunter telephoned Luzmilda at work and informed her that there had been an accident involving Trustin. Luzmilda rushed home, saw Trustin, and immediately

telephoned 911. Paramedics responded within minutes. The scene was chaotic. Emotionally distraught, Luzmilda frantically waived her hands and was unable to assist paramedics. Hunter, however, appeared calm and detached, but was not helpful to paramedics. Trustin was lying on the couch, stomach swollen, very low pulse, and labored breathing. Hunter told a paramedic that Trustin fell down some steps and that he brought him upstairs and laid him on the couch. Hunter said that he thought Trustin was trying to stop Trinity from falling down the steps and instead fell himself (T.p. 132-142, 167-177)

Paramedics attempted to put Trustin on a ventilation machine, but were unable to do so because his teeth were clenched, indicating that he suffered a severe head injury. Trustin was put in a spinal stabilization device and rushed to Children's Hospital. (T.p. 173-177)

At Children's Hospital, doctors interviewed Hunter and Luzmilda to determine what caused Trustin's injuries. Hunter's account differed from what he told a paramedic. This time Hunter said that he was in the basement doing laundry and brought his nine-month old daughter Trinity with him while Trustin remained upstairs watching television. Hunter said that he heard some rumbling up above him and saw Trustin stumbling down the last few carpeted steps onto the concrete basement floor. Hunter said that Trustin was not responding so he splashed some water on his face and called Luzmilda. (T.p. 308-311)

Trustin was in grave condition and placed in the intensive care unit and put on a breathing tube. His pupils would not react to light, he had multiple retinal hemorrhages, and pooling of blood in the retina, injuries not consistent with falling down steps. Trustin also suffered a severe anal injury. Doctors discovered fresh blood and a deep tear and bruising to Trustin's anus that they determined was recently inflicted. The anal injuries could have been

caused by an adult male penis or some object that was forcefully inserted inside the anus.¹ (T.p. 312-318, 596-598)

Further medical tests showed that Trustin suffered severe brain injuries. Trustin's brain was swollen and he had multiple brain hemorrhages. These injuries were fresh and not consistent with a fall down the steps. These injuries were so severe that Trustin would have been rendered comatose immediately or within seconds of their infliction. Ultimately they caused Trustin's death. (T.p. 319-322, 586, 589-591, 601-602)

Cincinnati Police Officer Jane Noel interviewed Hunter after being informed by doctors and paramedics that Trustin's injuries were intentionally inflicted. (T.p. 192-196) Officer Noel advised Hunter of his rights under *Miranda*, and he agreed to talk to Officer Noel and her partner. A tape recording of Hunter's statements to Officer Noel was played to the three-judge panel. (T.p. 198-201)

Hunter said that Luzmilda went to work at 6:00 a.m., leaving him alone with Terrell, Tyree, Trustin and Trinity. Hunter had to get Terrell and Tyree ready for school, so he made breakfast that consisted of french toast sticks and sausage. Hunter said that Trustin put in a movie entitled the "Lost World." Terrell and Tyree left the house at 8:45 a.m. for school. Hunter then sat in the living room and started to watch the movie when he decided to do go downstairs and do laundry. According to Hunter, he took nine-month old Trinity with him to the basement, leaving Trustin upstairs alone. (State's Exhibit #12)

Hunter said that he was taking a load of laundry out of the dryer when he heard Trustin running across the floor upstairs. Hunter then heard Trustin stumbling down the steps and saw

¹Police recovered two Tiki torches from Hunter's residence at 16 West 68th Street that police believed were capable of causing the severe injury to Trustin's anus. Police were not able to get any identifiable fingerprints nor did they find blood on these two objects. (T.p. 261)

him strike the last few steps. Hunter said he picked Trustin up and noticed that his body was limp. Hunter shook Trustin gently calling out his name, but Trustin did not respond. Hunter then claimed that he threw water on Trustin's face and heard him exhale. Hunter said he then placed Trustin on the floor, removed a piece of sausage that he saw, and attempted CPR. When Trustin did not respond, he placed him on the living room couch and called Luzmilda at work. (State's Exhibit #12)

Hunter admitted that Trustin did not hit the wall at the bottom of the stairs, only the concrete floor. Hunter said one of Trustin's legs was still lying on the bottom step. He claimed this incident happened around 10:00 a.m. He said that he earlier took Trustin to the bathroom to urinate because Trustin is unable to do things for himself. (State's Exhibit #12)

Hunter was questioned about his relationship with Luzmilda and he said that she does not know who Trustin's father is. Hunter admitted that Trustin preferred being with Forte rather than with him. Hunter was asked about past incidences of abuse involving Trustin. He said that the injury to Trustin's penis that occurred in 2004 "happened before", but doctors were unable to determine a cause, though Luzmilda insisted it was a bug bite. Hunter admitted that Trustin previously fell down the steps and broke the tibia bone in his leg. (State's Exhibit #12)

In searching the residence, police did not find any blood on the stairs. The washer was empty and on top of the dryer were white dry clothes. (T.p. 259-260)

An autopsy revealed the true severity of Trustin's injuries. His head injuries involved two severe impact blows to the head that could have been caused by someone either using Trustin's body as a baseball bat and swinging it and striking a hard stationary object or his body was struck with a hard object. The blows to the head were so severe that Trustin suffered a broken bone in his neck. (T.p. 592-594, 607, 612). The anal injury extended beyond the anal cavity deep

into Trustin's body. The object used to penetrate Trustin's anus was forced in there. (T.p. 598)
The coroner opined that the official cause of Trustin's death was diffuse brain injury due to blunt impact shaking injuries to the head. The manner of death was determined to be homicide. (T.p. 601)

Hunter was arrested and charged as described.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW: A TRIAL COURT PROPERLY DISMISSES POST-CONVICTION CLAIMS WHERE THE PETITIONER FAILS TO PRESENT EVIDENTIARY DOCUMENTS THAT ARE FACTUALLY COGENT AND PERSUASIVE TO SUPPORT SUCH CLAIMS.

In Hunter's first proposition of law, he asks the court to review all of his grounds for relief as set forth in his petition and amended petitions to vacate.

In order "[t]o prevail on a post-conviction claim, the petitioner must demonstrate a denial or infringement of his rights in the proceedings resulting in his conviction that rendered the conviction void or voidable under the Ohio Constitution or the United States Constitution." *State v. Campbell* (Jan. 8, 1997), Hamilton App. No. C-950746, unreported. A petitioner is not automatically entitled to a hearing on a post-conviction claim. He must first demonstrate, through the petition, supporting affidavits, and the record, that substantive grounds for relief exists. *Id.* The filing of such supporting affidavits and documents does not always mandate a hearing on a post-conviction claim. If a petitioner's claim relies on evidence *dehors* the record, to warrant a hearing, such evidence must meet a threshold level of cogency, which this Court has described as evidence that is more than "marginally sufficient" and that advances a claim "beyond mere hypothesis and a desire for further discovery." *State v. Hill* (June 19, 1998), Hamilton App. No. C-970650, unreported.

In disposing of a post conviction action the trial courts are entitled to rely on the doctrine of res judicata. In essence that doctrine provides that if an issue was raised on direct appeal or could have been raised on direct appeal, then that issue cannot be considered in post-conviction. *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104.

Res judicata bars a hearing on the petition even where a claim relies on evidence *dehors* the record, unless the evidence shows that the petitioner could not have appealed the constitutional claim based upon information in the original trial record. The evidence *dehors* the record must be more than that evidence which was in existence at the time of trial and which should and could have been submitted at trial if the defendant wished to make use of it. *State v. Hill* (June 19, 1998), Hamilton App. No. C-970650, unreported; *State v. Jones* (Dec. 29, 2000), Hamilton App. No. C-990813, unreported, at pp. 3-4.

FIRST GROUND FOR RELIEF

In his first claim for relief, Hunter argued 'actual innocence.' Hunter supported this claim primarily with an affidavit from Dr. Werner Spitz. According to Spitz's view of the medical evidence, Trustin's injuries were caused by an accidental fall down the steps.

In order to obtain post-conviction relief, petitioner must claim that "there was such a denial or infringement of his right as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States." R.C. 2953.21(A)(1). In claiming 'actual innocence,' Hunter claimed that his rights under the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fifth and Fourteenth Amendments Due Process Clauses were violated.

In *Herrera v. Collins*, (1993), 506 U.S. 390, 113 S.Ct. 853, the United States Supreme Court held that "a claim of 'actual innocence' does not constitute a constitutional claim." *Id.* at

404, 113 S.Ct. at 862. This court has similarly held that a “claim of ‘actual innocence’ does not constitute a substantive ground for post-conviction relief.” *State v. Campbell* (Jan. 8, 1997), Hamilton App. No. C-950746, at p.13, 1997 WL 5182, appeal dismissed (1997), 78 Ohio St.3d 1491, 678 N.E.2d 1228. See, also, *State v. Combs*_(1994), 100 Ohio App.3d 90, 652 N.E.2d 205; *State v. Powell*_(1993), 90 Ohio App.3d 260, 629 N.E.2d 13; *State v. Reeves* (Nov. 19, 1997), Hamilton App. No. C-961003. In *Campbell*, this court interpreted the Supreme Court’s holding in *Herrera* and held that a claim of ‘actual innocence’ based on newly discovered evidence does not constitute a substantive ground for post-conviction relief, reasoning that a petitioner is not entitled to post-conviction relief unless he shows a violation of rights that were constitutional in dimension.

Because this claim fails to raise “a denial or infringement of petitioner’s rights under the Ohio Constitution or the Constitution of the United States” as required by R.C. 2953.21, it was properly overruled.

SECOND THROUGH FOURTH GROUNDS FOR RELIEF

In his second through fourth grounds for relief, Hunter alleged ineffective assistance of counsel in the guilt phase. Hunter argued that his attorney failed to present evidence to demonstrate Hunter’s innocence. Specifically, Hunter points to the affidavit of Dr. Werner Spitz, a forensic pathologist. According to Hunter, Dr. Spitz would have testified, after reviewing Trustin’s medical records, that Trustin’s injuries were consistent with an accidental fall down the steps. Additionally, Hunter claimed that trial counsel did not do an effective job cross-examining the state’s medical experts.

Counsel’s failure to call a forensic expert does not establish ineffective assistance of counsel. Debatable strategic and tactical decisions may not form the basis of an ineffective

assistance of counsel claim, even if a better strategy had been available. *State v. Phillips* (1995), 74 Ohio St.3d 72, 85, 656 N.E.2d 643. The decision whether to call a witness is generally a matter of trial strategy, and, absent a showing of prejudice, does not deprive a defendant of effective assistance of counsel. *State v. Williams* (1991), 74 Ohio App.3d 686, 695, 600 N.E.2d 298. Additionally, the failure to call an expert witness and, to instead, rely on cross-examination does not necessarily constitute ineffective assistance of counsel. *State v. Nicholas* (1993), 66 Ohio St.3d 431, 436, 613 N.E.2d 225.

In *State v. Thompson* (1987), 33 Ohio St.3d 1, 10-11, 514 N.E.2d 407, the court concluded that trial counsel was not ineffective when counsel chose not to hire a forensic pathologist and, instead, relied upon cross-examination of the state's expert to rebut evidence of the crime.

Here, Hunter's counsel strongly challenged the state's medical experts during cross-examination. Dr. Katherine Makoroff, an expert in child abuse, was subjected to a brutal cross-examination challenging her findings. Trial counsel questioned her qualifications (T.p. 328-342), vigorously challenged the timing of when the injuries were inflicted on Trustin (T.p. 352-355), and confronted her with medical literature about injuries occurring to young children who fall down the steps. (T.p. 365, 383-391)

Dr. Mona Stephens, the deputy coroner who performed the autopsy, was also subjected to a vigorous cross-examination. Hunter's trial counsel again challenged the timing of the injuries and confronted Dr. Stephens with medical literature about injuries that occur from a fall down the stairs. (T.p. 610-613)

Trial counsel's strategy was sound and obvious. He was attempting to show that the medical evidence could not pinpoint an exact time of Trustin's death, and that perhaps Trustin's

injuries occurred while he was in the care of someone other than Hunter. (T.p. 428-432, 635)
Trial counsel also attempted to show that the medical findings supported Hunter's version that Trustin was injured when he fell down the steps. (T.p. 674)

Counsel may have thought it strategically advantageous to rely on cross-examination of the state's medical experts rather than rely on testimony from Dr. Spitz. Dr. Spitz did not perform the autopsy on Trustin, nor did he personally examine Trustin's body or consult with the state's experts who had done so. Instead, Dr. Spitz merely reviewed the medical records of Trustin's injuries. Certainly, this would have been exposed on cross-examination. Moreover, Dr. Spitz testified as an expert to rebut medical evidence in another case, but his testimony was rejected by the jury and defendant was convicted. *State v. Moore*, 3rd Dist. Nos. 1-06-89, 1-06-96, 2007-Ohio-3600. It is pure speculation to argue that Dr. Spitz would have been helpful in this case.

Further, Hunter's claim that trial counsel did not effectively cross-examine the state's expert witnesses could have been raised on direct appeal and is barred by *res judicata*. *State v. Perry*, *supra*.

Hunter's second through fourth grounds for relief were properly overruled.

FIFTH THROUGH NINTH GROUNDS FOR RELIEF

In his fifth through ninth grounds for relief, Hunter alleged ineffective assistance of trial counsel at the guilt phase. All of these claims were based on matters in the record and were properly dismissed on the basis of *res judicata*.

At trial, the state, over trial counsel's objection, admitted other act evidence that Trustin was the possible victim of child abuse two times in 2004. In his fifth and sixth claims for relief, Hunter argued that trial counsel failed to properly rebut this other act evidence with evidence that

it was possibly Luzmilda Blue or Trustin's other care-givers who abused him on these occasions. This claim is completely feckless.

In January, 2004 Trustin suffered a broken leg while he was in the care of Hunter. During cross-examination of Dr. Makoroff, trial counsel got her to admit that the emergency room doctor who treated Trustin for this injury did not think it was caused by child abuse, but, rather, believed what Hunter said, i.e. that Trustin broke his leg when Hunter tripped while carrying Trustin up the steps. (T.p. 445-447)

On June 9, 2004, Trustin was taken to Children's hospital with a severe injury to his penis. While being medically examined for that injury, doctors discovered other injuries to Trustin consistent with child abuse. These injuries led to an investigation in which Luzmilda lost custody of Trustin. Trial counsel did an effective job in limiting the impact of this evidence against Hunter. In cross-examining Dr. Makoroff, trial counsel established that there was no evidence whatsoever to indicate that Hunter was involved in inflicting these injuries to Trustin, and that the injury to Trustin's penis could have been caused by a bug bite. (T.p. 446-450) Contrary to Hunter's assertions, trial counsel did imply that Luzmilda was the possible abuser. Trial counsel elicited information that Luzmilda was depressed and previously threatened to kill her children. (T.p. 528-529, 563-564) Trial counsel also questioned why Job and Family Services removed Trustin from Luzmilda's care, insinuating that she did not provide proper care to Trustin. (T.p. 487)

Trial counsel vigorously objected to other act evidence. Once it was admitted, counsel, as described above, effectively shielded his client from the impact of this other act evidence. Hunter has failed to demonstrate that trial counsel was ineffective, and that prejudice resulted therefrom.

Further, this issue is based on matters available at trial. Thus, it could have been raised at trial or on direct appeal and is now barred by *res judicata*. *State v. Perry*, supra.

In his seventh ground for relief, Hunter again attacked trial counsel. During counsel's cross-examination of Amber White, he asked White if her brother had previously been **convicted** of statutory rape, and she said no. Hunter claims counsel was ineffective for not impeaching White with records from Hamilton County Job and Family Services that shows that Forte's brother was **charged** with statutory rape.

The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 22, 514 N.E.2d 394. It is highly questionable whether a prior statutory rape charge of a witness' brother was relevant here. Even if White was impeached with this information, the impact was de minimus at best, and certainly was not outcome determinative to the trial.

Further, this issue is based on matters available at trial. Thus, it could have been raised at trial or on direct appeal and was properly dismissed under the doctrine of *res judicata*. *State v. Perry*, supra.

In his eighth ground for relief, Hunter claimed that trial counsel was ineffective for not ensuring that Hunter's jury waiver was knowing, intelligent and voluntary. This claim could have been raised on direct appeal and is barred by *res judicata*. *State v. Perry*, supra. Further, in support of this claim, Hunter provides only his self-serving affidavit, wherein he claims that trial counsel did not want to try the case to a jury because it would extend the time of the trial by weeks. There is no merit in this claim, and it was properly overruled.

Here, Hunter signed a written jury waiver. In open court, Hunter affirmed that his decision was voluntary and that counsel had reviewed and discussed the waiver form with him.

Bennett indicated to the trial court that he and Hunter discussed the issue at length for quite some time and that this was not a "fly by night" decision. The trial court determined that the waiver was knowing, intelligent, and voluntary before accepting it. (T.p. 89-92) In closing argument, Bennett provided a glimpse of the thought process that went into waiving the jury. Bennett tried to persuade the panel not to be influenced by the emotion of the case like a jury would, and argued that as a matter of law the state's evidence was not sufficient to convict. (T.p. 689)

In sum, Hunter has failed to put forth sufficient operative facts that his jury waiver was not knowing, intelligent, or voluntary to warrant post-conviction relief. See, *State v. Kapper* (1983), 5 Ohio St.3d 36, 448 N.E.2d 823; and *State v. Moore*, supra.

In his ninth ground for relief, Hunter claimed counsel was ineffective for failing to make a motion for a change of venue. This claim could have been raised on direct appeal and was properly barred by *res judicata*. *State v. Perry*, supra.

Further, Motions for change of venue are very rarely granted. The law in Ohio is clear that change of venue motions are properly ruled on after the voir dire. *State v. Fairbanks* (1972), 32 Ohio St.2d 34, 289 N.E.2d 352; *State v. Montgomery* (1991), 61 Ohio St.3d 410, 575 N.E.2d 167; *State v. Mills* (1992), 62 Ohio St.3d 357, 582 N.E.2d 972.

Here, of course, since Hunter waived a jury, the issue of a venue change was moot.

For the reasons stated, Hunter's fifth through ninth claims were properly overruled.

TENTH GROUND FOR RELIEF

Hunter's tenth claim for relief alleged ineffective assistance of counsel because counsel was under federal investigation at the time he represented Hunter. Hunter claims that because of the federal investigation, his trial counsel was under a conflict of interest while he represented

him. Hunter also claims that the federal investigation caused counsel to abandon him. The record does not support this.

In *State v. Fuller*, 8th Dist. No. 52131, 2002-Ohio-4164, the court of appeals found no ineffective assistance of appellate counsel based on the fact that appellate counsel was under federal indictment at the time of the appeal. Likewise, the appellate court in *State v. Joyner*, 6th Dist. No. L-84-156, 1984 WL 3686, found no ineffective assistance when Joyner's attorney was under indictment at the time of trial. In these cases, there was simply no evidence that defense counsel performed incompetently at trial or that prejudice resulted therefrom.

As the record in this case well demonstrates, trial counsel provided Hunter with a well-prepared and organized defense, attempting to establish that the injuries inflicted to Trustin occurred by accident. Trial counsel's own extensive and expert knowledge in the field of medicine, particularly in the area of brain injury, allowed him to thoroughly and aggressively challenge the crucial medical evidence in this case, and the state's theory that the injuries to Trustin that caused his death were intentionally inflicted. Few could have represented Hunter as well.

Hunter simply has not affirmatively demonstrated that trial counsel's performance was in any way deficient because of the federal investigation, or that he suffered resulting prejudice therefrom.

It also should be noted that counsel raised this issue in his direct appeal under his first proposition of law, and thus this claim was also properly barred by *res judicata*. *State v. Perry*, *supra*.

ELEVENTH GROUND FOR RELIEF

In his eleventh ground for relief, Hunter alleged that the Hamilton County Prosecutor's Office failed to provide counsel with exculpatory evidence.

Hunter does not cite to any specific instance where the state failed to turn over favorable evidence but requests discovery to develop this spurious claim. Hunter, however, is not entitled to discovery in the initial stages of post-conviction proceedings. *State v. Lynch*, 1st Dist. No. C-010209, 2001-Ohio-3914. In *Lynch*, this court rejected an identical claim. See, also *State v. Leonard*, 157 Ohio App.3d 653, 813 N.E.2d 50, 2004-Ohio-3323, at ¶35.

TWELFTH THROUGH SEVENTEENTH GROUNDS FOR RELIEF

In Hunter's twelfth through seventeenth grounds for relief, Hunter claimed that trial counsel was ineffective in the mitigation phase of the trial. Hunter claims that trial counsel (1) failed to conduct an adequate mitigation investigation, (2) failed to hire a mitigation specialist, (3) failed to present a competent expert in psychology, (4) failed to present Hunter's family and social history, (5) failed to hire a competent substance abuse expert, and (6) failed to present Hunter's extensive history of substance abuse.

These claims were all raised or could have been raised on direct appeal and are barred by res judicata. *State v. Perry*, supra. Further, these claims simply offer alternative theories of mitigation. Courts have uniformly rejected second-guessing counsel's mitigation strategies. *State v. Post* (1987), 32 Ohio St.3d 380, 513 N.E.2d 754; *State v. Leonard*, supra at ¶20. In *State v. Bryan*, 101 Ohio St.3d 272, 804 N.E.2d 433, 2004-Ohio-971, at ¶190, counsel considered voluminous mitigation information from a mitigation specialist, and decided not to use it. The Ohio Supreme Court held that such a decision is a strategic choice and not a basis for ineffective assistance of counsel. See also, *State v. Davis*, 116 Ohio St.3d 404, 880 N.E.2d 31, at

¶'s 349-354. Likewise, the decision not to hire or call a mitigation or other expert to assist in the mitigation phase does not form the basis of an ineffective assistance of counsel claim. See *State v. Combs* (1994), 100 Ohio App.3d 90, 652 N.E.2d 205; *State v. Clemons*, 1st Dist. No. C-980456, 1999 WL 252655.

At bar, the record shows that trial counsel developed a sound mitigation strategy. He presented the testimony of seven of Hunter's friends and family members in seeking the life sentencing option with potential parole after 25 years imprisonment. They testified that Hunter was a productive member of society for most of his life, that he was courteous and helpful to people, that he spent considerable quality time with his children, that he had a significant potential for rehabilitation, that he could adjust well to prison life, that he was a peaceful, non-violent person, and that he was remorseful for what happened to Trustin. (T.p. 742-749, 752-757, 762-766, 773-778, 784-790, 792-794, 795-797)

Despite these efforts, Hunter offers an affidavit from an attorney in the Ohio Public Defender's Office who avers that Hunter's counsel should have approached mitigation in a different manner. Such affidavits are uniformly rejected because they simply posit alternative or different theories of mitigation. *State v. Hoffner*, 6th Dist. No. L-01-1281, 2002-Ohio-5201, ¶19; *State v. Leonard*, supra at ¶24 (affidavit of licensed psychologist highlighting deficiencies in mitigation phase prepared at behest of Ohio Public Defender's Office merely supports alternative mitigation theory) *State v. Jones*, 1st Dist. No. C-990813, unreported at p. 22.

Hunters twelfth through seventeenth grounds for relief were properly overruled.

EIGHTEENTH THROUGH TWENTY-FIRST GROUNDS FOR RELIEF

In his eighteenth ground for relief, Hunter claimed trial counsel should have presented evidence that the death penalty is applied in an arbitrary and discriminating manner. This claim

could have been raised at trial or on direct appeal and is barred by res judicata. *State v. Perry*, supra. This identical claim has been previously rejected. See *State v. Bies*, 1st Dist. No. C-980688, at pages 14-15, citing *State v. Roberts* (1982) 1 Ohio St.3d 36, 39, 437 N.E.2d 598.

In his nineteenth claim for relief, Hunter claims that his convictions are void or voidable because his death sentence was disproportionate to similarly situated defendants in Hamilton County. This claim could have been raised at trial or on direct appeal and is barred by res judicata. *State v. Perry*, supra. The First District Court of Appeals has consistently rejected this argument. See, *State v. Hughbanks*, 1st Dist. No. C-010372, 2003 WL 131937; *State v. Moore*, 1st Dist. No. C-970353, 1998 WL 638353.

In his twentieth and twenty-first grounds for relief, Hunter argues that the death penalty is unconstitutional because prosecutors are afforded too much discretion in determining who to charge with death eligible aggravated murder. Hunter also claims that Hamilton County does not accurately report information on capital defendants as required by law. Hunter claims that this prevents adequate appellate review. These claims could have been raised at trial or on direct appeal and are barred by res judicata. *State v. Perry*, supra. The First District has also rejected post-conviction arguments on the constitutionality of Ohio's death penalty statutes. *State v. Jones*, 1st Dist. No. 990813, unreported at pages 5-6.

TWENTY-THIRD GROUND FOR RELIEF

Hunter's allegation that the cumulative effect of the claims raised in his petition entitled him to relief was properly rejected. Hunter failed to demonstrate that any of his separately raised post-conviction claims entitled him to relief. See, *State v. Fitzpatrick*, supra at p. 25.

For the above reasons, Hunter's first proposition of law is properly overruled.

SECOND PROPOSITION OF LAW: IN DISPOSING OF POST-CONVICTION CLAIMS A TRIAL COURT IS PERMITTED TO RELY ON THE DOCTRINE OF RES JUDICATA.

Hunter argues the trial court erred in concluding the doctrine of *res judicata* barred some of his claims because he supported his claims with evidence outside the record. Hunter is incorrect. The trial court properly applied the doctrine of *res judicata* because the very nature of the claims demand that they be addressed at trial or on direct appeal.

In disposing of a post conviction action the trial courts are entitled to rely on the doctrine of *res judicata*. In essence that doctrine provides that if an issue was raised on direct appeal or could have been raised on direct appeal, then that issue cannot be considered in post conviction. The Ohio Supreme Court discussed post conviction actions and the doctrine of *res judicata* at length in *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967), paragraph nine of the syllabus:

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."

Many of the claims Hunter cites to here involve ineffective assistance of counsel. When such a claim is raised the petitioner's burden is as follows:

"Where ineffective assistance of counsel is alleged in a petition for post conviction relief, the defendant, in order to secure a hearing on his petition, must proffer evidence which, if believed, would establish not only that his trial counsel had substantially violated at least one of a defense attorney's essential duties to his client but also that said violation was prejudicial to the defendant. *State v. Jackson, supra*; *State v. Lytle* (1976), 48 Ohio St.2d 391 [2 Ohio Op.3d 495]; see *State v. Hester, supra*. Generally, the introduction in an R.C. 2953.21 petition of evidence **dehors** the record of ineffective assistance of counsel is sufficient, if not to mandate a hearing, at least to avoid dismissal on the basis of **res judicata**. In the case at bar, however, the allegations outside the record upon which appellant relies appear so contrived, when measured against the overwhelming evidence in the record of trial counsel's competence, as to constitute no credible evidence and,

thus, to justify the trial court's application of the principles of **res judicata**." *State v. Cole*, 2 Ohio St.3d 112, 444 N.E.2d 169 (1982). See also *State v. Jackson*, 64 Ohio St.2d 107, 413 N.E.2d 819 (1980).

In most situations a claim of ineffective counsel can be resolved from the existing record and the evidentiary documents filed with the pleadings. *State v. Cole*, supra; *State v. Jackson*, supra; *State v. Clay*, C-820434 (1st Dist., C/A, 3-30-83). In *Clay*, this court specifically rejected the petitioner's claim that an evidentiary hearing is required when a claim of ineffective counsel, raising matters dehors the record, is put before the Court in a post conviction proceeding.

Hunter claims that his fifth through ninth and eighteenth through twenty-first claims were improperly barred by *res judicata*. Hunter's fifth and sixth claims alleged that defense counsel should have more effectively rebutted other acts evidence. But the record shows that defense counsel did effectively rebut these claims. Nothing prevented Hunter from raising this claim in his direct appeal. The trial court properly relied on the existing record in disposing of this claim.

Hunter's seventh claim alleged that counsel was ineffective for not impeaching Amber White with evidence that her brother was previously charged with statutory rape. That claim can be disposed of from the existing record. White's brother was charged with statutory rape, but not convicted. Even if White was impeached with this information, that would not have affected the outcome of the trial. The trial court properly disposed of this claim based on the existing evidence.

Hunter's eighth claim for relief was that counsel did not ensure that Hunter voluntarily waived a jury trial. The only support for this was Hunter's self-serving affidavit, which is not sufficient to grant post-conviction relief. *State v. Kapper* (1983), 5 Ohio St.3d 36, 448 N.E.2d 823.

Hunter's ninth claim alleged ineffective assistance of counsel based on counsel's failure to move for a change of venue. This claim was properly disposed of from the existing record. Venue is not changed until voir dire discloses that a fair jury can not be seated. Here, that issue was moot because Hunter waived a jury. Again the trial court was correct in overruling this claim under the doctrine of *res judicata*.

Hunter's eighth through twenty-first claims for relief involved constitutional challenges to the death penalty and how it is administered. These post-conviction claims have all been made and rejected by this court in the past. The trial court relied on this prior authority in disposing of these claims. Hunter has failed to demonstrate that the trial court erred in overruling these claims on well settled court authority.

Hunter's second proposition of law lacks merit.

THIRD PROPOSITION OF LAW: A POST-CONVICTION PETITIONER IS NOT ENTITLED TO DISCOVERY IN THE INITIAL STAGES OF POST-CONVICTION RELIEF.

In this proposition of law, Hunter claims the trial court erred when it overruled his motion for discovery and motion to appoint a substance abuse expert.

But the long-standing law of Ohio is that a post-conviction petitioner is not entitled to discovery in the initial stages of post-conviction relief. *State v. Keith*, 176 Ohio App.3d 260, 891 N.E.2d 1191, 2008-Ohio-741; *State v. Byrd* (2001), 145 Ohio App.3d 318, 332, 762 N.E.2d 1043; *State ex. rel. Love v. Cuyahoga Cty. Prosecutor's Office* (1999), 87 Ohio St.3d 158, 718 N.E.2d 426.

Along with this principle of law, the court has consistently denied funds for experts during the initial stages of post-conviction relief. *State v. Fitzpatrick*, 1st Dist. No. C-030804,

2004-Ohio-5615. In *State v. Fitzpatrick*, this court affirmed the denial of funds requested by petitioner for an expert in substance abuse.

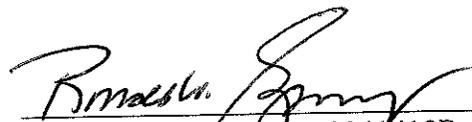
Based on this authority, Hunter's third proposition of law lacks merit.

CONCLUSION

Appellee submits that the judgment below must be affirmed.

Respectfully,

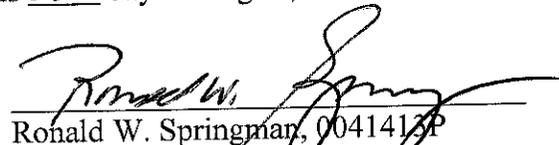
Joseph T. Deters, 0012084P
Prosecuting Attorney



Ronald W. Springman, 0041413P
Chief Assistant Prosecuting Attorney
230 East Ninth Street, Suite 4000
Cincinnati, Ohio 45202
Phone: 946-3052
Attorneys for Plaintiff-Appellee, State of
Ohio

PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Kimberly S. Rigby (0078245), Assistant State Public Defender, 230 E. Broad Street, Suite 1400, Columbus, Ohio 43215 and Pamela Prude-Smithers (0062206), Chief, Death Penalty Division, Office of the Ohio Public Defender, 230 E. Broad Street, Suite 1400, Cincinnati, Ohio 45202, counsel of record, this 30th day of August, 2012.



Ronald W. Springman, 0041413P
Chief Assistant Prosecuting Attorney