ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 2013-0582
	)	
Plaintiff-Appellee,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
ERIN HENDRIX	)	
	)	Court of Appeals Case No. 2012-L-080
Defendant-Appellant.	)	

MEMORANDUM IN RESPONSE OF APPELLEE STATE OF OHIO

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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST

On April 10, 2013, Defendant-Appellant Erin M. Hendrix filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court, appealing the denial by the Eleventh District Court of Appeals of her appeal in *State v. Hendrix*, 11th Dist. No. 2012-L-080, 2013-Ohio-638.

This is not a case of great public interest nor does it raise a substantial constitutional question. This appeal stems from the denial of Appellant's postconviction petition. Thus, this case presents arguments relating to already well-established and statute-based areas of the law. Moreover, Appellant's arguments are fact-specific to the unique facts of this case.

More importantly, Appellant's memorandum is filled with broad, opinionated statements and allegations that are simply unsupported by both the facts in the record and by the law. Her recitation of facts of this case is inaccurate and misleading, and the veracity of many of these statements was questioned by the trial court and was corrected by the appellate court.

Appellant raises four propositions of law related to the denial of her postconviction petition. The Court of Appeals correctly rejected these very arguments based on the doctrine of res judicata. Indeed, Appellant has had multiple bites of the apple in terms of chances to challenge her conviction. Not only did Appellant file an extensive direct appeal, she filed a motion to reopen, a postconviction petition, and an

appeal of her postconviction petition–all represented by counsel. Appellant is now seeking yet another bite of the apple.

To be sure, Appellant has been afforded a fair process and lost on appeal after the Eleventh District Court of Appeals reviewed this case. An appeal to this Court is not to be used simply because an appellant disagrees with the result below; but in this case, Appellant is displeased with the outcome of her case in the Court of Appeals and now seeks review by this Court even though the issues presented do not satisfy the applicable standard.

Appellant raises no substantial constitutional questions, nor any questions of pubic or great general interest that can be resolved from the record before the Court. As such, jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

In *Hendrix* at ¶2-5, the Eleventh District Court of Appeals set forth the relevant facts for this appeal:

> On September 29, 2010, appellant was secretly indicted on twenty-two felony charges involving the lead poisoning of her daughter, H.H. The first six counts of the indictment charged appellant with contaminating a substance with lead or lead nitrate for human consumption or use, in violation of R.C. 2927.24(B)(1), all first-degree felonies. (Counts 1 through 6) Counts 1, 3, and 5, alleged a penalty enhancement specification that the amount of lead or lead nitrate involved was sufficient to cause death. Counts 2, 4, and 6 alleged a penalty enhancement specification that the offenses resulted in serious physical harm to the victim[.]
>
> Appellant was also charged with attempted aggravated murder, in violation of R.C. 2903.01(C) and R.C. 2923.02(A), a first-degree felony (Count 7); attempted felony murder, in violation of R.C. 2903.02(B) and R.C. 2923.02(A),

a first-degree felony (Count 8); felonious assault, in violation of R.C. 2903.11(A)(1), a second-degree felony (Count 9); and two counts of endangering children, in violation of R.C. 2912.22(A) and R.C. 2912.22(B)(1), third- and second-degree felonies, respectively (Counts 10 and 11). The remaining eleven counts in the indictment were complicity charges mirroring the first eleven counts, although out of order; to wit: Count 12 alleged complicity to aggravated murder; Count 13 alleged complicity to attempted felony murder; Count 14 alleged complicity to felonious assault; Count 15 alleged complicity to endangering children; Count 16 alleged complicity to endangering children; and Counts 17 through 22 alleged complicity to contaminating a substance for human consumption or use, each setting forth the same penalty enhancement specification listed in Counts 1 through 6. Appellant pleaded "not guilty" to the charges.

On February 28, 2011, the matter proceeded to jury trial after which appellant was found guilty of felonious assault, both counts of endangering children, and 11 counts of complicity. She was acquitted of the first eight counts in the indictment alleging she was the principal offender in all crimes. The trial court merged all foregoing counts with Count 18 thereby entering a judgment of conviction on one count of complicity to contaminating a substance for human consumption or use that resulted in serious physical harm to the victim. Appellant was subsequently sentenced to life imprisonment with parole eligibility after 15 years.

Appellant appealed and, in *State v. Hendrix*, 11th Dist. No.2011–L–043, 2012–Ohio–2832, this court affirmed the trial court's judgment of conviction. Appellant subsequently filed an application to reopen her appeal which was denied. Appellant also filed a timely petition for postconviction relief. The trial court denied this petition without a hearing.

In her statement of facts, Appellant suggests that Dr. Quang affirmatively and conclusively testified that the three lead nitrate samples tested by the CDC were in fact the lead nitrate found in H.H.'s blood and urine. Appellant further suggests that this testimony is contrary to the CDC's report. But Appellant's characterization of Dr. Quang's testimony in this fashion is simply inaccurate and incorrect. After reviewing Dr. Quang's

entire testimony regarding the CDC report, the State was unable to locate a single time when Dr. Quang testified definitively that the lead nitrate tested by the CDC was in fact the lead nitrate used to poison Hannah. To the contrary, Dr. Quang repeatedly testified that it was either "possible" or "probable" or "plausible" that the sources of lead nitrate were the same as the lead nitrate used to poison H.H. Furthermore, he testified over and over that he was in agreement with the conclusions of the CDC report and never made any affirmative statements such as those suggested by Appellant and her counsel. In order to properly evaluate Appellant's propositions of law, Dr. Quang's testimony must not be mischaracterized or taken out of context.

All other pertinent facts will be discussed below. Additional inaccuracies that affect the fair consideration of this memorandum will also be addressed to avoid repetition.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. I

A postconviction petition is properly denied without a hearing when the arguments asserted in the petition could fairly have been asserted and determined on direct appeal without recourse to evidence dehors the record.

In her first proposition of law, Appellant asserts that a defendant is denied ineffective assistance of counsel when counsel fails to consult with a competent, credible expert. Appellant then boldly suggests that her counsel failed to consult with an expert, that the State's expert, Dr. Quang, provided unscientific testimony beyond his expertise,

and that the defense was required to consult with an expert in chemistry. Appellant's arguments are unsupported by the law and the record, and this Court should decline to accept jurisdiction.

To begin, it is noteworthy that the affidavit from the expert, Dr. Sachleben, upon which Appellant bases her arguments, was found to be "of questionable merit" by the trial court in its denial of her postconviction petition. It is also noteworthy that the trial court questioned whether Appellant's claim that her counsel failed to hire an expert was even true as the record reflects that trial counsel did hire an expert but chose not to put him on the stand, perhaps because he found one additional instance of poisoning that was not found by the State's experts and agreed with the State's experts on multiple other instances of poisoning.

The evidence presented by Appellant does not meet the threshold standard for cogency required for consideration in a postconviction petition. Dr. Quang's opinion regarding the lead isotope ratios in H.H.'s body was the same as that of the CDC experts. All three experts explained that the sources of lead submitted for testing could not be included or excluded as sources of lead in H.H.'s body. The CDC experts are the most qualified people in the world to do the type of testing that was conducted in this case. Dr. Quang is also highly qualified to interpret lead isotope ratios. He explained in detail his expertise in isotopes to the jury; specifically, he noted that "[i]sotopes are actually an important part of my toxicology training." Dr. Quang, besides being a very experienced

medical toxicologist, treated H.H. He explained that his conclusions regarding H.H.'s blood lead isotope ratios were partially based on his knowledge of the case. Dr. Sachleben, on the other hand, did not treat H.H. Moreover, he is not a medical doctor, familiar with how lead nitrate reacts in the body, or in this particular child's body. Dr. Sachleben is not more qualified to give his opinion regarding H.H.'s lead isotope ratios than the experts at the CDC or Dr. Quang. Nor does Appellant cite any authority as to why an expert in chemistry was required in this case–other than her own chemist.

In addition, Dr. Sachleben was not provided with all of the evidence in this case when he created his report. A review of Dr. Sachleben's report indicates that he was clearly not familiar with the particular facts of this case. His report treats this case as a single instance of poisoning. Specifically, Dr. Sachleben states, "So by Dr. Quang's argument, the victim would have to have started off lead poisoned before she was given any lead nitrate. This stretches credibility." The evidence presented at trial, however, demonstrated that this is not a case of a single instance of poisoning. Indeed, Dr. Quang, as H.H.'s physician, was aware that this was a case of multiple instances of poisoning over the course of 18 months. He explained to the jury how multiple instances of poisoning affect a person's blood isotope ratio. To the contrary, Dr. Sachleben seemed to be unaware that there was a fourth missing source of lead. Dr. Quang, however, in his analysis, was aware that there was an unaccounted-for source of lead nitrate to which Appellant had access.

While critical of Dr. Quang, Dr. Sachleben's report is actually consistent with that of the CDC and Dr. Quang. His report is thus cumulative of evidence presented at trial. Dr. Sachleben indicates in his report that he believes that up to 35% of the lead found in H.H.'s blood could have come from the three sources tested by the CDC. This is consistent with Dr. Quang's testimony, and the CDC's report, that these three samples of lead could be contributing sources to H.H.'s blood lead isotope ratio. It seems to be Dr. Sachleben's lack of knowledge of the facts of the case that affected his ultimate conclusion. If Dr. Sachleben was aware that there was a missing source of lead and that there were multiple instances of poisoning, perhaps his conclusion would mirror that of the CDC and Dr. Quang. Regardless, his report certainly does not contain sufficient operative facts to demonstrate that Appellant's trial counsel was ineffective.

When reviewing Appellant's petition, the trial court found that, even if the truth of Dr. Sachleben's affidavit is assumed, it is both cumulative to evidence presented at trial and an alternate theory to the one proposed by Dr. Quang. For these reasons, the trial court discounted Dr. Sachleben's affidavit and found that Appellant did not present the court with substantive grounds for relief:

> First, even if one assumes the truth of Dr. Sachleben's affidavit, it merely presents an alternative theory to the one proposed by Dr. Quang. * * *. Further, the affidavit is cumulative to both the CDC's and Dr. Quang's findings. * * *. It admits the CDC report shows the lead nitrate seized from the defendant may have caused as much as 35% of the lead in the victim's body, which concurs with the CDC's finding that the samples could not be ruled out as the source of H.H.'s poisoning, and also with Dr. Quang's

> testimony. For both reasons, therefore, the affidavit does not present the court with substantive grounds for relief, and the court need not consider it. Further, even if defense counsel had hired Dr. Sachleben himself to review the CDC report, it is entirely conceivable they would not have allowed him to testify in light of his finding that lead nitrate from the seized samples could have caused some of the victim's poisoning. Defense counsel may have determined that such an admission would be crushing to their client. Therefore, even assuming the truth of Dr. Sachleben's affidavit, it does not support the defendant's contention that her attorneys were ineffective.

Appellant also suggests that defense counsel's failure to object to Dr. Quang's testimony allowed samples of lead nitrate that were found by detectives to be introduced into evidence. This contention was rejected by the trial court:

> Although the defendant tries to claim that the only reason the lead was considered relevant was because of Dr. Quang's allegedly invalid testimony, this is patently false. Obviously lead nitrate found in the possession of, or at one time under the control of, the mother of a lead-poisoned child is relevant in a police investigation. Furthermore, this claim is not supported by evidence outside of the record (Dr. Sachelben's affidavit), and is thus properly barred by res judicata. It could and should have been raised by the defendant at trial or in her direct appeal. Also, the claim is not supported by the case record. The defendant's attorneys filed a motion in limine to preclude evidence of the lead nitrate seized from her home for exactly the reasons listed above.

Like the trial court, the Eleventh District Court of Appeals found Appellant's arguments to be without merit. The appellate court first found that the arguments were barred by the doctrine of res judicata. Specifically, the court held that although Appellant attached an affidavit that was outside the record, the issue of whether or not trial counsel was ineffective for failing to employ an expert could have been determined without the

affidavit. *Hendrix* at ¶10. Additionally, the appellate court found that trial counsel's decision not to use an outside expert was reasonable and strategic. *Id.* at ¶20.

Therefore, Appellants arguments are without merit. Because this appeal stems from the denial of a postconviction petition that was properly rejected based on res judicata and because the record does not support her factual assertions, this Court should decline to address Appellant's first proposition of law.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. II

A postconviction petition is properly denied without a hearing when the arguments asserted in the petition could fairly have been asserted and determined on direct appeal without recourse to evidence dehors the record.

In her second proposition of law, Appellant seems to aver that an expert cannot testify to his own scientific conclusions based on a report that he did not create. She also contends that defense counsel is ineffective for failing to object to such testimony. The Eleventh District Court of Appeals properly rejected this very argument, and this Court should decline jurisdiction.

Appellant raised this very argument in her petition for postconviction relief and her application to reopen her direct appeal. For this reason, as well as the fact that this issue could have been resolved on her direct appeal without the use of evidence outside of the record, the court of appeals rejected Appellant's argument on the basis of res judicata. Thus, this Court should decline jurisdiction to review this proposition of law.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. III

A postconviction petition is properly denied without a hearing when the arguments asserted in the petition could fairly have been asserted and determined on direct appeal without recourse to evidence dehors the record.

Next, Appellant argues that she was denied due process because she claims that the State failed to comply with Crim.R. 16(K). Again, the court of appeals found that this argument was barred by the doctrine of res judicata. Specifically, the appellate court stated that it "fail[ed] to perceive, and appellant does not argue, that these issues could not have been determined on direct appeal without utilizing evidence dehors the record." *Hendrix* at ¶23. In addition to being barred by the doctrine of res judicata, the veracity of the facts underlying this argument was questioned by the trial court in its judgment entry denying her postconviction petition:

> [T]he defendant claims that her counsel should have objected when Dr. Quang began testifying as an expert witness. She further claims that she was given no notice that he planned to testify in such a manner. First, the court questions the truth of this latter statement. The state provided defense counsel with a Notice and Supplement to Bill of Particulars, docketed February 10, 2011 in which they specifically stated Dr. Quang would interpret the CDC report. Even though this was supplied very shortly before the trial began, it strains credulity now to argue that the defense was unaware this would be part of his testimony.

Therefore, while the State does not disagree with the sentiment of Appellant's third proposition of law, her arguments are inapplicable in this case. Because this appeal stems from the denial of a postconviction petition that was properly rejected based on res judicata

and because the record does not support her factual assertions, this Court should decline to address Appellant's third proposition of law.

APPELLEE'S POSITION REGARDING PROPOSITION OF LAW NO. IV

A postconviction petition is properly denied without a hearing when the arguments asserted in the petition could fairly have been asserted and determined on direct appeal without recourse to evidence dehors the record.

Lastly, Appellant contends that she should have been entitled to a hearing on her postconviction petition. But as the Eleventh District Court of Appeals correctly noted, "[a] defendant attempting to challenge a conviction or sentence through a petition for postconviction relief under R.C. 2953.21 is not automatically entitled to a hearing." *Hendrix* at ¶7, citing *State v. Calhoun*, 86 Ohio St.3d 279, 282, 1999-Ohio-102, 714 N.E.2d 905. To be sure, "[a] court is not required to hold a hearing unless the petitioner puts forth evidence demonstrating a cognizable claim of constitutional error." *Id., citing* R.C. 2953.21(C). " 'Pursuant to R.C. 2953.21(C), a defendant's petition may be denied without a hearing when the petition, supporting affidavits, documentary evidence, files, and records do not demonstrate that the petitioner set forth sufficient operative facts to establish substantive grounds for relief.' " *Id*, quoting *State v. Adams*, 11th Dist. No. 2003-T-0064, 2005-Ohio-348, at ¶36. Res judicata is a proper basis for dismissing a petition for postconviction relief. *Id.* at ¶8, citing *State v. Cole*, 2 Ohio St.3d 112 (1982), at syllabus. As discussed above, the court of appeals properly held that Appellant's arguments were barred by the doctrine of res

judicata, thus, Appellant's petition was properly denied without a hearing. Moreover, the law regarding postconviction petitions is well-settled. Therefore, this Court should decline to address Appellant's final proposition of law.

CONCLUSION

For the foregoing reasons, the State of Ohio, Appellee herein, respectfully requests that this Honorable Court deny jurisdiction.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

By: _____

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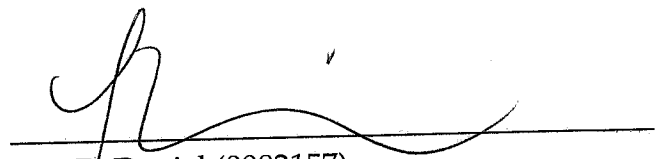
PROOF OF SERVICE

A copy of the foregoing Memorandum in Response of Appellee, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to counsel for the appellant, Stephen A. Goldmeier, Esquire, Assistant Public Defender, Office of Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215, on this 6th day of May, 2013.



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