[Cite as *State v. Roseborough*, 2010-Ohio-1832.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellant

-vs-

ROSE KATE ROSEBOROUGH

Defendant-Appellee

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case Nos. 09 COA 003 and 004

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 03 CRI 112
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 23, 2010

APPEARANCES:

For Plaintiff-Appellant

RAMONA F. ROGERS
PROSECUTING ATTORNEY
PAUL LANGE
ASSISTANT PROSECUTOR
307 Orange Street
Ashland, Ohio 44805

For Defendant-Appellee

GREGORY W. MEYERS
CRAIG M. JAQUITH
ASSISTANT PUBLIC DEFENDERS
250 East Broad Street
Suite 1400
Columbus, Ohio 43215

Wise, J.

{¶1} Appellant State of Ohio appeals from the decision of the Court of Common Pleas, Ashland County, which granted post-conviction relief in favor of Defendant-Appellee Rose Kate Roseborough, who was convicted and sentenced in 2004 for aggravated murder, attempted murder, and arson. The relevant facts leading to this appeal are as follows.

{¶2} On April 7, 2003, police and firefighters were called to the scene of a house fire on Edgehill Avenue in Ashland, Ohio, where appellee resided with her three daughters, her boyfriend Bob Bursley (the father of two of the girls), and boarder Jason Balough. Appellee's eleven-month old twin daughters, Julia and Lucie Bursley, who were in an upstairs bedroom, were overcome by smoke inhalation. Julia was pronounced dead at Ashland Samaritan Hospital later that afternoon. Lucie died at Akron Children's Hospital on April 10, 2003. Appellee's third daughter, four-year-old Caitlin, survived the fire.

{¶3} Appellee was subsequently indicted by the Ashland County Grand Jury on two counts of aggravated murder with death penalty specifications, one count of attempted murder, two counts of involuntary manslaughter, one count of arson, one count of felony child endangering, and one count of misdemeanor child endangering.

{¶4} The trial commenced on July 27, 2004. Testimony was completed on September 3, 2004. A critical portion of the State's evidence was the testimony of Kevin Rosser, an Ashland firefighter-paramedic, who testified that he observed large-particle soot on appellee's face at the scene. Rosser concluded to the jury that the soot on appellee would have resulted from her presence at an "earlier stage" of the fire. Trial Tr.

at 1758. The jury ultimately found appellee guilty of aggravated murder, attempted murder, and arson. Following death penalty mitigation proceedings, the jury recommended a sentence of life without parole on each aggravated murder conviction. On November 15, 2004, the trial court imposed the recommended sentences, in addition to maximum ten-year terms on the attempted murder and arson counts. All sentences were imposed consecutively.

{¶5} Appellee appealed to this Court on December 10, 2004, raising ten Assignments of Error. On May 5, 2006, we affirmed appellee's convictions and sentences. See *State v. Roseborough,* Ashland App.No. 04 COA 085, 2006-Ohio-2254. Both the Ohio Supreme Court and the United States Supreme Court thereafter declined to accept the case for further appeal.

{¶6} While the aforesaid appeal was pending, appellee filed a "motion to vacate and set aside sentence" in the trial court on August 29, 2005.[1] She contended, inter alia, that she had been deprived of the effective assistance of trial counsel. The State responded on September 30, 2005.

{¶7} The matter was assigned to a new visiting judge on March 1, 2007. On April 17, 2007, the court granted a request by appellee to conduct a deposition of Gerald Hurst, Ph.D., a fire chemistry expert. The State sought leave to appeal that decision; however, this Court denied the request for leave, for want of a final appealable order.

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[1] Although the petition's caption might suggest that only the sentence is being challenged, appellee therein asked that the entire judgment be vacated and a new trial ordered.

{¶8} On May 4, 2007, appellee filed a request for production of documents. The State filed an objection thereto on June 6, 2007. On August 13, 2007, following a hearing on the issue, the trial court directed appellee to narrow the discovery request.

{¶9} On November 26, 2007, the court ordered the State to turn over the requested discovery items, and further indicated that a hearing would go forward on appellee's petition for post-conviction relief. The State again sought leave to appeal to this Court, which we denied on February 22, 2008.

{¶10} A deposition of Dr. Hurst took place in Austin, Texas, on April 23, 2008. On August 27, 2008, the trial court conducted an evidentiary hearing on the post-conviction petition. On January 7, 2009, the court granted the petition via a written decision with findings of fact and conclusions of law.

{¶11} On January 22, 2009 (Case 09 COA 3) and January 23, 2009 (Case 09 COA 4), the State filed notices of appeal. It herein raises the following two Assignments of Error:

{¶12} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING APPELLEE'S PETITION TO VACATE OR SET ASIDE JUDGMENT AND ORDERING A NEW TRIAL.

{¶13} "II. THE TRIAL COURT ERRED WHEN IT GRANTED DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS."

I.

{¶14} In its First Assignment of Error, Appellant State of Ohio contends the trial court abused its discretion in granting appellee's post-conviction petition to vacate or set aside judgment. We disagree.

Opinion of Dr. Hurst

{¶15} The State first challenges the trial court's conclusion, based in large part on the post-conviction opinion of Dr. Hurst, that appellee's trial counsel was ineffective for failing to call a more suitable fire chemistry defense expert.

{¶16} The first portion of this challenge concerns whether the trial court should have allowed a hearing on appellee's petition. The Ohio Supreme Court has recognized: "In postconviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing." *State v. Gondor*, 112 Ohio St.3d 377, 388, 860 N.E.2d 77, 2006-Ohio-6679, ¶ 51. Under R.C. 2953.21(E), when a person files an R.C. 2953.21 petition, the trial court must grant a hearing unless it determines that the petitioner is not entitled to relief. To make that determination, the court must consider the petition, supporting affidavits, and files and records, including, but not limited to, the indictment, journal entries, clerk's records, and transcript of the proceedings. See R.C. 2953.21(C). Furthermore, " ' * * * when the trial court record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation. * * * ' " *State v. Radel*, Stark App.No. 2009-CA-00021, 2009-Ohio-3543, ¶ 17, quoting *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 228, 448 N.E.2d 452 (citation omitted).

{¶17} The statutory scheme thus appears to anticipate a hearing unless the trial court specifically determines that postconviction relief is not warranted. Certainly, we have recognized that "[a] post-conviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial." *State v. Johnson*, Guernsey App.No. 2006-CA-04, 2007-Ohio-1685, ¶ 107,

quoting *State v. Combs* (1994), 100 Ohio App.3d 90, 103, 652 N.E.2d 205. Furthermore, a petition for postconviction relief 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. Wilhelm*, Knox App.No. 05-CA-31, 2006-Ohio-2450, ¶ 10, citing *State v. Jackson* (1980), 64 Ohio St.2d 107, 110. A defendant is entitled to post-conviction relief only upon a showing of a violation of constitutional dimension that occurred at the time that the defendant was tried and convicted. *State v. Powell* (1993), 90 Ohio App.3d 260, 264, 629 N.E.2d 13, 16.

{¶18} However, as an appellate court reviewing a trial court's decision in regard to the "gatekeeping" function in this context, we apply an abuse-of-discretion standard. See *Gondor*, supra, at ¶ 52, citing *State v. Calhoun* (1999), 86 Ohio St.3d 279, 714 N.E.2d 905. Accord *State v. Scott*, Stark App.No. 2006CA00090, 2006-Ohio-4694, ¶ 34. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶19} In its brief, the State directs us, inter alia, to eight appellate decisions from various Ohio appellate courts, including one from this district, in support of the proposition that an affidavit from a newly located defense expert would generally fail to justify even granting a postconviction hearing. The State also cites nine Ohio appellate decisions which express caution over allowing the post-conviction mechanism to become a "battle of experts." However, in all of these cases, the appeals were brought by defendants filing for postconviction relief, who had been unsuccessful at the trial court level. In these cases, the appellate courts all concluded that the trial courts had

not erred or abused their discretion in denying the petitions. In the case sub judice, the posture is reversed, with the State appealing the granting of postconviction relief.

{¶20} The eleven-page Hurst affidavit in the record before us contains the following summary, averred to a reasonable degree of scientific certainty:

{¶21} "a. Kevin Rosser's opinion at trial regarding the soot on Ms. Roseborough's face was not based on sound scientific principles accepted in the forensic science community regarding fire chemistry;

{¶22} "b. Richard Pletcher's testimony for the defense regarding soot and soot formation fell below a minimal standard of professional competence;

{¶23} "c. Kevin Rosser's testimony, that the soot on Ms. Roseborough's face was of a type that is only generated at the beginning of a fire, is absolutely baseless; and

{¶24} "d. The soot on Ms. Roseborough's face was entirely consistent with Kim Mager's testimony that Ms. Roseborough stated that she went upstairs during the fire to attempt to rescue her children." Hurst Affidavit at 3.

{¶25} A compelling point in the affidavit, as further developed in Hurst's deposition testimony and as further discussed infra, is that even if the black material that State's witness Kevin Rosser had observed on appellee's face had been collected and scientifically analyzed, scientists "could not by the most sophisticated means have determined whether the soot or carbon char was formed early in the fire or late in the fire. It is absolutely impossible that Mr. Rosser could determine the nature, origin, or age of that amorphous substance." Id. at 8.

{¶26} Upon review of the petition and supporting affidavit, we are unpersuaded that the trial court abused its discretion in taking the initial step of allowing a postconviction hearing in this matter.

{¶27} We thus turn to the broader question of the propriety of the trial court's granting of appellee's petition and allowance of a new trial. Again, absent a showing of an abuse of discretion, a reviewing court will not overrule a trial court's findings on a petition for postconviction relief that are supported by competent and credible evidence. *State v. Jackson*, Delaware App.Nos. 04CA-A-11-078, 04CA-A-11-079, 2005-Ohio-5173, ¶ 13, citing *State v. Mitchell* (1988), 53 Ohio App.3d 117, 119, 559 N.E.2d 1370. See, also, *Gondor* at ¶ 58.

{¶28} During the postconviction hearing in this matter, appellee's counsel emphasized that the principal concern over the original trial defense expert, Rick Pletcher, a certified fire investigator, was that he ultimately agreed with the testimony of the State's expert, Kevin Rosser, concerning the import of "large particle" soot. See PCR Hearing Tr. at 78-81.

{¶29} At trial, Pletcher had testified as follows on cross-examination:

{¶30} "Q. All right. * * * [Rosser] testified early in this case. And he believes that there is a difference between the type of soot you get on yourself at the beginning of the fire and the type of smoke or soot that exists after the fire is going for a period of time.

{¶31} "And he says that at the beginning of this fire, especially with plastics, there's these large particles of soot and they'll get on you, but they're large and they don't go into your pores, necessarily. They can get on the hairs of your face, your

eyebrows or whatever. And they're easily wiped off like this or smudged, but they're large particles. Do you agree with that?

{¶32} "A. I agree with the soot.

{¶33} "Q. Pardon?

{¶34} "A. Soot in the beginning of a fire and between the fire or at the end of the fire, soot can be removed by wiping it off.

{¶35} "Q. There's no question that soot can be removed, but that's not what Rosser said. What I'm asking you, [d]o you believe there are larger particles of soot or pieces of soot in the early stages of a fire than at the later stages of the fire where it's been burning good? You agree with that, don't you?

{¶36} "A. Once again, sir, you've got to depend on what's the fire load and what's burning as far as your particles that's in the air.

{¶37} "Q. All right. Let's go there. The plastics will have a lot of soot at the beginning of the fire?

{¶38} "A. Yes.

{¶39} "Q. Large particle soot, right?

{¶40} "A. Correct.

{¶41} "Q. What they call – if there's a large carbon in the product, that will produce a lot of this black suit, (sic) right?

{¶42} "A. Yes.

{¶43} "Q. And this large black soot, as it lands on you, will lay on your hair and not penetrate your pores, necessarily, because it's too big; am I right?

{¶44} "A. Yes.

{¶45} "Q. There's a lot of petroleum products; am I right?

{¶46} "A. In today's life, yes, sir.

{¶47} "Q. In fact, even this – even this is a petroleum product? I'm saying a Styrofoam cup is a petroleum product?

{¶48} "A. Yes, sir.

{¶49} "Q. And does this have carbon in it, carbonation, carbon?

{¶50} "A. Those Styrofoam cups will basically melt and shrivel, but you do have some carbonation.

{¶51} "Q. You have carbonation at the beginning of the fire. That's when the soot really gets going, right, when it's first lit?

{¶52} "A. It depends on the stage.

{¶53} "Q. I'm talking about the stages. If the stage is – if you start this cup on fire, you're going to get a lot of black soot?

{¶54} "A. At the initial, yes, initial fire.

{¶55} "Q. But if I took this cup and I walked up to a campfire and I threw it in there, it's gone right now, isn't it –

{¶56} "A. Correct.

{¶57} "Q. – because all the soot is burned up. At the beginning of the fire, there's going to be a lot of that black soot and it's going to be big, right?

{¶58} "A. Yes, it can happen, yes.

{¶59} "Q. And that's the same principle with plastics; am I right?

{¶60} "A. Yes.

{¶61} "Q. Okay, So you would agree with me that if I lit up the piece of plastic and – I was lighting up this piece of plastic, early stages, or cup or whatever, and that black soot goes up in the air, it's going to float back down and it's going to land on me, isn't it?

{¶62} "A. Once it reaches its point in the ceiling and bends over and starts back down, yes.

{¶63} "Q. And it will land on me and I won't even know it's on me, will I?

{¶64} "A. I don't know. I've never stood in a fire to see.

{¶65} "Q. I'm sorry?

{¶66} "A. I said I've never started a fire and stood in a structure without protection to see if the soot is going to cover me.

{¶67} "Q. Well, Officer Rosser does. I mean that's what he testified to. He said that he's in there and he lights these kind of fires, and the soot that he gets on him early is the same kind of blackish soot that he saw on the defendant in this case. That's what he said.

{¶68} "A. That's one person's testing.

{¶69} "Q. But what – what I hear you saying is it's possible?

{¶70} "A. Well, you're going to get soot when you light a fire. There's no doubt about that." Trial Tr. at 3650-3654.

{¶71} As we noted in our decision in *Roseborough I*, the prosecutor at trial twice referred to the type of soot on appellee's face as the evidentiary equivalent of the classic "cherry pie" on the face of a child who has denied eating any pie. See Trial Tr. at 4144, 4145. Appellee presently responds that it is unreasonable for a defense attorney,

after an incomplete investigation, to put forward a defense expert who will "directly contradict the sole defense theory." See Appellee's Brief at 9, citing *Combs v. Coyle* (U.S.C.A. 6, 2000), 205 F.3d 269, 288.

{¶72} During the postconviction proceedings, Dr. Hurst, via deposition, opined that large particle soot, via an increase in the rate of agglomeration, increasingly forms as a close-compartment fire burns. Deposition Tr. at 20-21. Conversely, at the beginning stages of a close-compartment fire, when oxygen is richer, soot begins to develop at the microscopic level. Id. at 18-19. Hurst also opined that it is impossible to visually ascertain from which point in time in a fire the soot on a person's skin had developed. Id. at 30, 102. He labeled Rosser's trial theory regarding the soot as "junk science," and was quite blunt about the problems with it: "[The theory is] outrageously inept. It's wrong. It's contrary to everything we know about soot formation. It vastly oversimplifies a very complex area and, as far as soot particle size is concerned, it is directly contrary to what we know to be true." Deposition Tr. at 27-28. Hurst also asserted that agglomeration is demonstrable by scientific experimentation. Id. at 21-22.

{¶73} In our decision on direct appeal, we acknowledged that arson prosecutions, by their nature, often rely upon circumstantial evidence. *Roseborough I* at ¶ 35. While we were not inclined to reverse the conviction on direct appeal in *Roseborough I*, and while we continue to recognize that circumstantial evidence is of equal weight with direct evidence, we are mindful that a significant amount of the State's evidence in the original trial was in the form of corroborative testimony pertaining to appellee's unusual actions after the fire. Id. at ¶ 22-¶ 25, ¶ 149, ¶ 151. In this setting, and in light of the somewhat limited forensic evidence at trial, the import of Rosser's

potentially flawed scientific theory looms much larger given Dr. Hurst's recent opinions. Moreover, at the PCR hearing, both of appellee's trial attorneys testified that they had no strategic reason not to utilize an expert other than Pletcher on the fire chemistry question. PCR Tr. at 91, 103-104. Here, the trial court, having reviewed a lengthy record and having conducted a full post-conviction hearing, ruled that appellee had established the substantive grounds entitling her to fundamental post-conviction relief. Judgment Entry at 3-4. See *Strickland v. Washington* (1984), 466 U.S. 668. While concerns over the effect of hindsight in post-conviction proceedings are fair, the judgment entry at issue provides sufficient indicia that the court duly considered both prongs of the *Strickland* test. Upon review, we are unable to conclude, under the *Blakemore* standard, that it was unreasonable, arbitrary, or unconscionable for the trial court to make its determination that defense counsel's performance at trial fell below an objective standard of reasonable representation and that the defense was prejudiced by such ineffectiveness. While great caution certainly should be exercised against arbitrary post-conviction "battles of experts," the trial court herein was vested with significant discretion under Ohio law to interpret appellee's scientifically-based post-conviction challenge, and we do not find an abuse of that discretion has been demonstrated by the State in this appeal.

Daubert Hearing

{¶74} Appellant State of Ohio secondly argues the trial court erred in finding ineffective assistance of trial counsel regarding the court's original decision to deny a *Daubert* hearing. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469.

{¶75} Although the State presents a compelling argument that the *Daubert* issue is res judicata or law of the case, we find the issue moot in light of our above holding.[2]

{¶76} The State's First Assignment of Error is overruled.

II.

{¶77} In its Second Assignment of Error, the State maintains the trial court erred when it granted appellee's request for discovery.

{¶78} As noted by this Court in *State v. Sherman* (Oct. 30, 2000), Licking App. No. 00CA39, 2000 WL 1634067, a petition for post-conviction relief is a civil proceeding. See, also, *State v. Milanovich* (1975), 42 Ohio St.2d 46, 49. However, the procedure to be followed in ruling on such a petition is established by R.C. 2953.21, and the power to conduct and compel discovery under the Civil Rules is not included within the trial court's statutorily defined authority in this realm. See *State v. Lundgren* (Dec. 18, 1998), Lake App. No. 97-L-110, quoting *State v. Lott* (Nov. 3, 1994), Cuyahoga App.Nos. 66388, 66389, 66390; *State v. Muff*, Perry App.No. 06-CA-13, 2006-Ohio-6215, ¶ 21.

{¶79} Nonetheless, in light of our conclusions in regard to the State's first assigned error, based on Hurst's post-conviction testimony regarding Rosser's "soot" theory, which was not primarily the result of any discovery processes, we find any error concerning the discovery issue to be harmless.

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[2] We nonetheless note the trial court erroneously utilized an "abuse of discretion" standard on this issue. See Judgment Entry at 4.

{¶80} The State's Second Assignment of Error is overruled.

{¶81} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Ashland County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, concurs.

Gwin, P. J., dissents.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

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JUDGES

JWW/d 0226

Gwin, P.J., dissenting

{¶82} I respectfully dissent from the majority's disposition of the appellant's first assignment of error.

{¶83} The State called thirty-two witnesses in its case-in-chief. Defense counsel in turn called sixteen witnesses; appellant exercised her constitutional right not to testify. Several witnesses were called to testify concerning what they considered appellant's unusual behavior and statements during the period shortly after the fire. A number of witnesses were also called to testify regarding appellant's actions during the period of Caitlin and Julia's treatment at Akron Children's Hospital. The State also presented testimony on the issue of appellant's parenting habits as proof of her motive to rid herself of the burden of parenting. A complete summary of the witnesses was presented in our opinion on direct appeal. See, *State v. Roseborough*, Ashland Appellate No. 04 COA 085, 2006-Ohio-2254 at ¶18-34. We previously found upon review of the voluminous record in this case as summarized above, the jury did not clearly lose its way and create a manifest miscarriage of justice requiring that appellant's conviction be reversed and a new trial ordered.

{¶84} The soot evidence was in reality a miniscule portion of the evidence that the state presented. The complained of statements were made in isolation, during closing argument after a lengthy trial. (11 T. at 4113-4114; 4144; 4222-4223).[3]

{¶85} I find no constitutional error in the presentation of evidence concerning the origins of the fire, the formation of soot or the argument of the prosecutor. Additionally I find no reasonable fact finder would have found the petitioner not guilty of the offense of

[3] The opening portion of the state's closing argument covers 62 pages; the rebuttal portion covers 11 pages.

which the petitioner was convicted had the testimony of Dr. Hurst been admitted at trial. In addition, I find that the trial court abused its discretion by improperly applying the law and basing its decision on an erroneous legal standard.

{¶86} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet *both* the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance* (2009), --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251[4]. In the case at bar, there was no evidence presented concerning the first prong of the *Strickland* test. Thus, for the reasons that follow, I would find that the trial court did abuse its discretion by granting the appellee's post-conviction relief petition.

{¶87} To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. at 2064. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington* 466 U.S. at 687, 104 S.Ct. at 2064. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington* 466 U.S. at 688, 104 S.Ct. 2052 at 2065.

{¶88} "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function'), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can

[4] Contrary to our Supreme Court, we note that the federal courts have found "Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact entitled to *de novo* review." *Combs v. Coyle* (6th Cir 2000), 205 F.3d 269, 278.

satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland v. Washington* 466 U.S. at 688-689, 104 S.Ct. 2052 at 2065. (Citing United *States v. Decoster* (1984), 199 U.S.App.D.C., at 371, 624 F.2d, at 20).

{¶89} "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *Strickland v. Washington* 466 U.S. 668 at 689, 104 S.Ct. at 2065. (Citations omitted).

{¶90} "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not

to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington,* 466 U.S. 668 at 689,104 S.Ct. at 2064

{¶91} In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington,* 466 U.S. 668 at 689,104 S.Ct. at 2064. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington,* 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶92} Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. at 2066. However, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 2588. (Quoting *Strickland v. Washington* 466 U.S. 668 at 691, 104 S.Ct. 2052 at 2066).

{¶93} In the case at bar, appellee's trial counsel did not have access to the investigative reports or the opinions of the state's expert witnesses prior to trial. (PCR. T. at 73; 85). Further, defense counsel asked for expert reports, opinions or results of tests that the state would present at trial, but the state refused to turn over that evidence prior trial. (Id. at 85 – 86; 97; 6T. at 2346-2348). Trial counsel had no way of discovering prior to the testimony of Mr. Rosser that soot formation was ever an issue in this case. Trial counsel vigorously objected to Mr. Rosser's attempt to testify concerning "large particle soot" under the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* (1993), 509 U.S. 579, 589, 113 S.Ct. 2786. (5T. at 1758-1759). Further, during the trial counsel contacted Mr. Pletcher and reviewed the state's evidence with him before calling him as a witness at trial. Additionally, counsel was limited in hiring an expert, and was unable to have an expert witness sit in the courtroom during the state's presentation of expert testimony, by the amount of money the trial court had allocated to them to hire an expert or experts to assist in the preparation of the defense. (Id. at 2348-2349).

{¶94} In the case at bar, defense counsel vigorously cross-examined Mr. Rosser with regard to the "soot testimony,"

{¶95} "[DEFENSE COUNSEL]: When did you first report your opinion that the kind of soot on Katie Roseborough was inconsistent with the story that you claim she told you?

{¶96} "[KEVIN ROSSER]: Within the next day or two when we started to figure out that there was other things going on other than whatever they had thought of the first time they started asking what had happened and things like that.

{¶97} "[DEFENSE COUNSEL]: To whom did you make a report?

{¶98} "[KEVIN ROSSER]: I didn't make a report ever.

{¶99} "[DEFENSE COUNSEL]: Who did you tell?

{¶100} "[KEVIN ROSSER]: I talked to Captain Smith about it. Then I think the next time I talked to -- about it was with the prosecutor.

{¶101} "[DEFENSE COUNSEL]: When did you talk to Captain Smith about your concern that, in your opinion, the kind of soot that was on her didn't match her story?

{¶102} "[KEVIN ROSSER]: I don't recall having that exact conversation of that particular incident. I don't recall that.

{¶103} "[DEFENSE COUNSEL]: Tell me the conversation you did have.

{¶104} "[KEVIN ROSSER]: I don't recall the exact details of a conversation 15 months ago with Captain Smith.

{¶105} "[DEFENSE COUNSEL]: Mr. Rosser, can you cite us -- you testified at great length about the kind of training you have. Can you cite us to any article or any other writing that describes this theory or reports this theory that you've described here about the large particle versus small-particle soot?

{¶106} "[KEVIN ROSSER]: I'm going strictly off of my experience that I've used throughout my training.

{¶107} "* * *"

{¶108} (5T. AT 1781-1782).Thus, the jury was aware by Mr. Rosser's own admission that there was no science behind his testimony concerning large particle soot formation[5].

{¶109} The expert presented by the defense challenged the state's testimony concerning the origin of the fire, the improper investigation of the fire scene by the state's witnesses, his belief that the chief investigator should not have conducted the investigation of this case because of his relationship to the family, and the state's failure to preserve evidence and the crime scene.

{¶110} I believe that it is important to stress that the defense expert's testimony during appellee's jury trial has been mischaracterized by appellee in the PCR proceedings. At trial, Mr. Pletcher testified,

{¶111} "[DEFENSE COUNSEL]: There was some testimony about whether soot would smudge on somebody's face, depending on whether it was big soot or little soot. Did you read that?

{¶112} "[RICK PLETCHER]: Yes, sir, I did read that.

{¶113} "[DEFENSE COUNSEL]: Have you in all of your training and education and in all of your experience and all of your reading of the literature, have you ever read anything or any theory that suggests that soot will only smudge depending on whether it was big soot or little soot?

{¶114} "[RICK PLETCHER]: No, sir, I have not.

{¶115} "[DEFENSE COUNSEL]: Will any kind of soot smudge on an individual's face?

[5] In reality then, the post-conviction testimony of Dr. Hurst in merely cumulative of the evidence presented during the appellee's jury trial.

{¶116} "[RICK PLETCHER]: Yes, sir, it will. Soot is soot.

{¶117} "* * *

{¶118} "[RICK PLETCHER]: Whether it came from upstairs, downstairs, wherever.

{¶119} "[DEFENSE COUNSEL]: So if somebody rubbed their hands on their face, wherever they got the soot, it would smudge?

{¶120} "[RICK PLETCHER]: It would smudge, yes, it would."

{¶121} (9T. at 3541-3542). The context of Mr. Pletcher's testimony on cross-examination concerned large particles of soot forming *when petroleum based products, such as Styrofoam cups,* are set ablaze. (9T. at 3650- 3653). At the hearing on the petition for post-conviction relief, Dr. Gerald Hurst testified, that large particle soot, or soot-strings can indeed be formed at the initial stages of a fire when you burn a petroleum-based product such as a Styrofoam cup. (PCR T. at 33-34). He adds that "that's not a 'Yes' or 'No' question because it's 'Yes, you can, and you can also get it in the other stages of the fire." (Id.).

{¶122} On cross-examination during appellee's trial, the following exchange occurred:

{¶123} "[RICK PLETCHER]: Soot in the beginning of a fire and between the fire or at the end of the fire, soot can be removed by wiping it off.

{¶124} "[PROSECUTOR]: There's no question that soot can be removed, but that's not what Rosser said. What I'm asking you, do you believe there are larger particles of soot or pieces of soot in the early stages of a fire than at the later stages of the fire where it's been burning good? You agree with that, don't you?

{¶125} "[RICK PLETCHER]: Once again, sir, you've got to depend on what's the fire load and what's burning as far as your particles that's in the air."

{¶126} The prosecution specifically asked the questions concerning large particle soot forming at the beginning stages of a fire in the context of petroleum products in general and specifically a Styrofoam cup. (9T. at 3650-3653). Even Dr. Hurst concedes that these types of products will produce large particle or soot-streams. (PCR T. at 50-51; 104; 112; 116). Dr. Hurst's testimony is almost identical to the substance of Mr. Pletcher's trial testimony. In closing argument the prosecutor specifically refers to this testimony about the Styrofoam cup and argues that Pletcher testified, "plastic and carbacious materials will—especially carbon and plastic materials will cause that pre-ignition soot or pre-fire soot or early fire soot and it will be large particle. (11T. at 4145; 4159-60).

{¶127} This case is a classic example of the distorting effects of hindsight. Trial counsel conducted a reasonable investigation of this issue, and further mounted an extensive attack on the theory advanced by the state. Clearly, the jury was aware of both sides of the issue as to how and when appellee could have gotten soot on her face. Accordingly, the first prong of the *Strickland* test has not been met.

{¶128} Challenging the competency of fire investigation experts who testified at trial with post-conviction experts does not invoke any constitutional issue and will turn post-conviction proceedings into a never-ending battle of experts. See *State v. Clemons* (Aug. 30, 1999), Hamilton App. No. C-980456 (refusing the report of a newly found psychiatrist attached to a post-conviction petition to challenge the trial testimony of the court-appointed psychological expert to avoid a never-ending battle of experts);

State v. Jamison (Nov. 10, 1992), Hamilton App. No. C-910736 (refusing to consider the affidavit of a psychologist presented with a post-conviction petition to discredit the court-appointed psychologist used at trial); *State v. Holloway* (Jan. 29, 1992), Hamilton App. No. C-900805 (refusing to consider the post-conviction affidavits of three reviewing psychologists who discussed numerous alleged inadequacies in the evaluations performed by the defendant's court-appointed experts); *State v. Bedford* (Sept. 11, 1991), Hamilton App. No. C-900412 (same). Moreover, it is my view that to rule otherwise in this case is to elevate a defense counsel's duty of representation to an untenable standard, subject to the second-guessing and twenty-twenty hindsight of post-trial scientific experts *in every major criminal case*[6]*.*

{¶129} Defense attorneys are not obligated to shop for "the best experts" who will testify in the most advantageous way possible. *Johnson v. Bagley* (6th Cir 2008), 544 F.3d 592, 605-605; *Reynolds v. Bagley* (6th Cir 2007)*,* 498 F.3d 549, 557. Indeed, the Ohio Supreme Court has previously declined to hold that a defense attorney rendered ineffective assistance when the attorney allegedly failed to ensure that an expert witness adequately obtained all requisite information to make an expert opinion. *State v. McGuire* (1997), 80 Ohio St.3d 390, 399, 686 N.E.2d 1112. In *McGuire,* a defendant argued that an expert witness did not adequately obtain requisite information when preparing to testify on the defendant's behalf. Id. As an example, the defendant claimed that the expert should have performed certain routine tests. Id. Noting that the

[6] Of course, this says nothing of the financial burden that such a rule will place on trial courts, counties and the State who will be required to fund an indigent defendant's world-wide, never-ending search for experts who will contradict a witness presented by the prosecution. For example, in the case at bar, Dr. Hurst was deposed by the parties in Austin, Texas some four (4) years after the jury return a verdict.

defendant "appear[ed] to blame defense counsel for this," the Ohio Supreme Court held that it was nonetheless reasonable for defense counsel to defer to the expert's professional judgment, and the court concluded that the defense counsel did not otherwise render ineffective assistance. Id.

{¶130} The record before the trial court on the PCR petition contained no evidence to establish that trial counsels' assistance was not reasonable considering all the circumstances. *Strickland* requires a reviewing court to "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id*.,* at 690, 104 S.Ct. at 2066. It will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the "identified acts or omissions" overcome the presumption that a counsel rendered reasonable professional assistance. Since "[t]here are countless ways to provide effective assistance in any given case," Id*.,* at 689, 104 S.Ct., at 2065, unless consideration is given to counsel's overall performance, before and at trial, it will be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Ibid. Kimmelman v. Morrison,* supra 477 U.S. at 386, 106 S.Ct. at 2588-2589. I believe that this is especially true when, as in the case at bar, the judge who presides over the PCR proceedings is not the same trial judge who was involved in the lengthy pre-trial and trial of the underlying case.

{¶131} The record in the case at bar is devoid of any evidence of the prevailing norms of practice. Nor did the trial court review counsel's overall performance throughout the case in order to determine whether the "identified acts or omissions"

overcome the presumption that a counsel rendered reasonable professional assistance. We should not succumb "to the very temptation that *Strickland* warned against." *Rompilla v. Beard,* 545 U.S. 374, 408, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (Kennedy, J., dissenting).

{¶132} "Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *Taylor v. United States Parole Commission* (6th Cir. 1984), 734 F.2d 1152, 1155. (Citing *Balani v. Immigration and Naturalization Service* (6th Cir. 1982), 669 F.2d 1157, 1160; *McBee v. Bomar* (6th Cir. 1961), 296 F.2d 235, 237).

{¶133} A court abuses its discretion when it relies on clearly erroneous findings of fact, *Brandeis Machinery & Supply Corp. v. Barber-Greene Co.,* 503 F.2d 503, 505 (6th Cir. 1974), or when it improperly applies the law or uses an erroneous legal standard. *United States v. School Dist. of Ferndale,* 577 F.2d 1339, 1351 (6th Cir. 1978). See, also Motor *Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.* (1983), 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-2877.

{¶134} After the briefs were filed in this case, the Unites States Supreme Court reiterated that, under *Strickland,* a reviewing court must "first determine whether counsel's representation fell below an objective standard of reasonableness." *Padilla v. Kentucky* (March 31, 2010), U.S. Supreme Ct. Case No. 08-651, 201011WL1222274 In *Padilla*, the appellant argued that his attorney was ineffective in misadvising him about

potential for deportation as consequence of his guilty plea. In finding that counsel's performance was deficit, the Supreme Court reviewed the first prong of the *Strickland* test,

{¶135} "The first prong-constitutional deficiency-is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' *Strickland,* at 688, 104 S.Ct. 2052. We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ....' *Ibid.; Bobby v. Van Hook,* 558 U.S. ----, ----, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) *(per curiam)*; *Florida v. Nixon,* 543 U.S. 175, 191, and n. 6, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004); *Wiggins v. Smith,* 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Williams v. Taylor,* 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Although they are 'only guides,' *Strickland,* 466 U.S., at 688, 104 S.Ct. 2052, and not 'inexorable commands,' *Bobby,* 558 U.S., at ----, 130 S.Ct., at 17, these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law". *Padilla* at *7.

{¶136} The Court made the following observation concerning the "prevailing norms,"

{¶137} "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation § 6.2 (1995); G.

Herman, Plea Bargaining § 3.03, pp. 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L.Rev. 697, 713-718 (2002); A. Campbell, Law of Sentencing § 13:23, pp. 555, 560 (3d ed.2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed.1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed.1999). '[A]uthorities of every stripe-including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications-universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients ... .' Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12-14 (footnotes omitted) (citing, *inter alia,* National Legal Aid and Defender Assn., Guidelines, *supra,* §§ 6.2-6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./Feb.2007); N. Tooby, Criminal Defense of Immigrants § 1.3 (3d ed.2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (2009)).

{¶138} "We too have previously recognized that [p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence. *St. Cyr,* 533 U.S., at 323, 121 S.Ct. 2271 (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02 [2] (1999)). Likewise, we have recognized that 'preserving the possibility of' discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, 'would have been one of the

principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.' *St. Cyr,* 533 U.S., at 323, 121 S.Ct. 2271. We expected that counsel who were unaware of the discretionary relief measures would 'follo[w] the advice of numerous practice guides' to advise themselves of the importance of this particular form of discretionary relief. *Ibid.,* n. 50."

{¶139} *Padilla*, supra at *7. Unlike the majority, I do not find that the trial court record contains any evidence concerning the "prevailing professional norms" in the retention of an expert witness in an arson case, in general, or under the facts presented to defense counsel in this case. No practice guides, testimony of experienced trial counsel, citations to authority, or even Bar or Trial association Standards were even entered into evidence. Nor does the trial court record contain any evidence that the trial court ever even considered the "weight of prevailing professional norms" before reaching its conclusion. Accordingly, because the trial court improperly applied the law and used an erroneous legal standard, I would find that the lower court abused its direction in granting the petition of post-conviction relief.

{¶140} The expert presented by the defense at trial simply did not directly contradict the defense theory, nor did he lend credence to the prosecution's theory that appellee had started the fire. Viewing counsel's action's from their perspective at the time they decided to hire Mr. Pletcher as an expert witness and applying a "heavy measure of deference," to their judgment, I would find that the record contains no evidence that trial counsel's choice of experts was unreasonable, nor contrary to prevailing professional norms. I would further find that the record contains no evidence that the trial court properly analyzed or applied both prongs of the *Strickland* test.

{¶141} As the trial court failed to properly apply the two-part *Strickland* test, I would find that the trial court abused its discretion in granting the petition for post conviction relief. Accordingly, I would affirm the appellant's first assignment of error and reverse the decision of the Ashland County Court of Common Pleas.

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HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
ROSE KATE ROSEBOROUGH	:	
	:	
Defendant-Appellee	:	Case Nos. 09 COA 003 and 004

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Ashland County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ WILLIAM B. HOFFMAN_____

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JUDGES