IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHQGA COUNTY, OHIO

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STATE OF OHIO,

Plaintiff-Appellee,

vs.

Case Nos. CA 03 083599, CA 03 083842 & CA 04 084056

C.P. Case No. CR-401497

GRAB Y KRZYWKOWSKI,

Defendant-Appell ant.

ON APPEAL FROM THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MERIT BRIEF OF APPELLANT GRADY KRZYWKOWSKI

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ASSIGNMENT OF ERROR HI

The trial court erred in denying Grady Krzywkowski's petition for state post-conviction relief because Krzywkowski established that he was deprived of his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution. (Findings of Fact and Conclusions of Law, A-l).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ASSIGNMENT OF ERROR I

Does the doctrine of res judicata apply to bar Krzywkowski's claim for relief when his claim is based on an affidavit and other evidence that is dehors the record?

ASSIGNMENT OF ERROR II

When Krzywkowski presented sufficient operative facts articulating meritorious claims in his petition, which were supported by evidence dehors the record, is it appropriate for the court to deny relief and dismiss his postconviction petition without granting discovery and an evidentiary hearing?

ASSIGNMENT OF ERROR III

Is trial counsel ineffective when they fail to hire an expert witness to assist in the defense when there is a reasonable probability that the testimony of the expert witness would have changed the outcome of toe case?

PREFACE

The jury trial transcripts in this case will be referenced to by the following abbreviation (T.p. _J.

All items required to be appended pursuant to the local rules are contained in the Appendix and are referenced by the following abbreviation (A-_).

STATEMEfVT OF THE CASE

On January 25, 2001, a Cuyahoga County Grand Jury returned an eight-count indictment against Grady Krzywkowski. The indictment charged Krzywkowski with six counts of rape, violations of R.C. 2907.02, and two counts of gross sexual imposition, violations of R.C 2907.05.

Krzywkowski was convicted by a jury of four counts of rape and two counts of gross sexual imposition. Krzywkowski was acquitted of two counts of rape. The State presented eleven witnesses, while the defense did not call witnesses and (he defendant exercised his right not to testify.

Krzywkowski was sentenced to four life sentences for the rape ofTenscs and five years in pri&on and a SI 0,000 fine for each count of gross sexual imposition. The Court also adjudicated him a sexual predator.

Krzywkowski appealed, and this Court affirmed his conviction. *Slate v, Krzywkowski,* 8th Dist. No. 80392, 2002-Ohio-4438. Krzywkowski then filed an appeal with the Ohio Supreme Court. His motion for leave to appeal was denied, and his case was dismissed.

Following this Court's direct appeal decision, Krrywkowski filed an Application to Reopen his Appeal. This Court denied Krzywkowski's Application. Krzywkowski then filed an appeal with the Ohio Supreme Court. His motion for leave to appeal was denied, and his case was dismissed.

Grady Krzywkowski also filed a Petition to Vacate and Set Aside Judgment in the Cuyahoga County Court of Common Pleas. On September 2, 2003, the trial court dismissed Krzywkowski '$ petition for post-conviction relief. Krzywkowski timely appealed that decision. (Case Number CA 03 083599). Krzywkowski filed a Motion for Relief from Judgment. The

court denied thai motion. Knrywkwoski timely appealed that decision. (Case Number CA 03 083842). On December 15, 2003, the court issued its findings of fact and conclusions of law. Krzywkowski timely appealed those findings of fact and conclusion of law. (Case Number CA 04 084056). Krzywkowski's timely merit brief follows.

STATEMENT OF THE FACTS[1]

The alleged victims in this case were three of Kryzwkowski's four children, Kristin Krzywkowski, Aaron Krzywkowski, and Ryan Krzywkowski. Katie Krzywkowski, Krzywkowski's fourth child was not one of the alleged victims.

At Krzywkowski's trial, the State presented eleven witnesses. Sharon Harpel, foster parent of Kristen and Katie Krzywkowski, was the state's first witness. Harpel testified that the girls masturbated and touched themselves inappropriately while living in her home. (T.p. 999). According to Harpel, Kristin would often lie, and had accused her natural mother, aunts, uncles, and a grandfather of sexual abuse. (T.p. 1044). Harpel opined that Kristen was abused, but that Katie had not been abused. (T.p. 1016).

Kristen Krzywkowski testified next. A brief voir dire was conducted as to Kristin's competency to testify because she was six years old at trial. Kristen was then qualified as a witness and entered into a "pinky oath." (T.p. 1050). Over objections by defense counsel, Kristen testified about being locked in the attic, being nit on the head with a wrencri, being tied up with a shirt, and being thrown against a wall. (T.p. 1090, 1147,1150,1151).

Elizabeth Alexander, Ryan and Aaron Krzywkowski's foster mother, testified third. Alexander testified that Ryan and Aaron had disclosed sexual abuse to her and that she suspected the children had been abused. (T.p. 1293,1295). Defense counsel objected to this testimony.

[1] The information contained in the Sutement of the Facu was taken from Appellant's Merit Bnef filed in this Court on March 12,2002 and the transcript of the proceedings

Before Aaron Krzywkowski testified, a brief competency voir dire was conducted because he was only four years old. (T.p. 1328). The court then entered into a "pinky promise" and made him "promise real hard" to tell the truth. (T.p. 1333, 1335). Aaron testified that his father put a white substance, from a cupboard, in his private part and by his nose and it hurt. (T.p. 1363, 1366, 1371). Aaron was asked about, and described the "papoose" discipline in which he would be tied and two socks placed in his mouth. (T.p. 1375). Defense counsel again objected to the prejudicial 'other acts' testimony. (T.p. 1376).

A brief competency voir dire was conducted again before Ryan Krzywkowski testified because he was seven years old. (T.p. 1382). The court again used the "pinky promise" **to** ensure truthfulness from the juvenile witness. (T.p. 1384). Over defense objections, testimony was again heard about the "papoose" discipline as wall as the "chokey" discipline. (T.p. 1406, 1414). Testimony was also elicited that the white stuff applied on Aaron's nose and bottom was medicine to make sores go away and that cold baths were due to the gas being turned off. (T.p. 1433, 1418). Ryan denied being raped by Krzywkowski. (T.p. 1412, 1425, and 1445).

Dr. W. David Gemmill, a pcdiatric physician from Toledo, Ohio, conducted the physical examination of the Krzywkowski children. Gemmill testified that despite the fact he found no physical evidence of abuse, he felt these children were sexually abused. (T.p. 1526, 1542, 1550, 1555). Gemmill also acknowledged that Desitin is a white ointment used in the treatment of sores and rashes. (T.p. 1574).

Diane Marx, a licensed social worker, coordinated the daily needs of the Krzywkowski children while in foster care. (T.p. 1615). Marx testified to hearsay disclosures that were made to her by the foster parents. (T.p. 1618).

Julie Prettyman, an intake social worker at the Cuyahoga County Children and Family Services, investigates allegations of sexual abuse, with the goal of disposing of them as 'substantiated, unsubstantiated, or indicative of sexual abuse.' (T.p. 1641, 1648) Prcttyman testified that she interviewed the children for one to one and a half hours, three months after the children made their initial disclosures to the foster parents. (T.p. 1561). Prettyman provided hearsay descriptions from the Krzywkowski children.

Darla Vogelpohl, a clinical nurse, took the children's medical histories in preparation of Gcmmill's medical examination. (T.p. 1728). Vogelpohl testified to an injury to Kristen's head. (T.p. 1733).

Jocclyn Johnstone was an ongoing case worker for the Cuyahoga County Department of Children and Family Services, dealing with children alleged to have been neglected or abused. (T.p. 1766). Johnstone was assigned the Krzywkowski case. (T.p. 1770). She testified, over defense objections, to physical abuse and domestic violence allegations. (T.p. 1772).

Cynthia King, a social worker, was hired by the State to act as a consultant. (Tp. 1806). King never met or interviewed the Krzywkowski children regarding the sexuaJ abuse allegations. (T. p. 1821). King reviewed the records provided to her by the State. (T.p. 1852). After reviewing the reports, King testified that she found behavioral indicators exhibited by the children which may be indicative of sexual abuse. (T.p. 1825). King acknowledged the importance of corroborating a child's statement regarding abuse, but she never spoke to the children, the detective investigating the case, the children's teachers, the children's biological mother, or the children's caseworkers. (T.p. 1861, 1862, 1868). Over defense objections, King opined that the children acted consistent with behaviors of abused children. (T.p. 1929).

ASSIGNMENT OP ERROR I

The (rial court erred in applying the doctrine of res judicata to Krzywkowski's claim for relief, thus violating Krzywkowtki's constitutional rights to due process and a fair trial uader the Fifth, Sixth, and Fourteenth Amendments of the United State Constitution, and Sections 5 and 16, Article I of the Ohio Constitution. (Findings of Fact and Conclusions of Law, A-1).

ISSUE PRESENTED FOR REVIEW

Does the doctrine of res judicata apply to bar Krzywkowski's claim for relief when bis claim is based on an affidavit and other evidence that is debors the record?

The triaj court dismissed Krzywkowski's post-conviction claim that he was denied the effective assistance of counsel. (Findings of Fact and Conclusions of Law at A-10). The court ruled that Krzywkowski had failed to demonstrate substantive grounds for relief. The court opined that Krzywkowski's issues could have been raised in his direct appeal; thus, his petition was barred by res judicata. (Findings of Fact and Conclusions of Law at A-10)

The assertion that Krzywkowski's post-conviction petition is barred by res judicata because he did not raise the issue in his direct appeal effectively repeals R.C. 2953.21. For in fact, every direct appeal could contain an issue of ineffective assistance of counsel. But the mere possibility of an appellant raising an unsubstantiated issue on direct appeal does not foreclose that same defendant from using R.C. 2953.21 to raise a legitimate issue that is supported by off-the-record evidence, as in this case. An appellant who raises ineffective assistance of counsel in either procedure carries a heavy burden of proving counsel's deficient performance and prejudice. See *Strickland* v. *Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

The court held that Krzywkowski's claim of ineffective assistance of counsel could have been raised in his direct appeal because he was represented by different counsel at trial and on

appeal. The court cited to *State* v. *Cole* (1982), 2 Ohio St. 3d 112,443 N.E.2d 169 as support for its holding In *Cole,* the Ohio Supreme Court held,

> Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief. *(Slate v. Hester,* 45 Ohio St.2d 71 [74 O.O.2d 156], modified.)

Id at syllabus. The Supreme Court went on to hold:

> 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 iudicata.

Id. at 113-114. See also *State* v. *Mllunovich* (1975), 42 OhJo St.2d 46,325 N.E.2d 540.

In this case, the evidence that supports both prongs of the *Strickland* v. *Washington* case is outside the record. In his petition, Krzywkowski presented the court with off-the-record evidence. The affidavit of Dr. Stinson represents evidence dehors the record of a constitutional violation. (A-22).

A petition for post-conviction relief is the appropriate remedy for incffective-assistance-of-counsel claims based on facts dehors the record. When an appellate court is barred from addressing those issues on direct appeal, it would be unreasonable to require a defendant to initiate a direct appeal on issues dehors the record. *State v. Gibson* (1980), 69 Ohio App.2d 91, paragraph three of the syllabus, 430 N.E.2d 954.

The presentation of competent, relevant, and material evidence dehors the record can defeat the application of res judicata. *State v. Lawson* (1995), 103 Ohio App.3d 307, 315, 659 N.E.2d 362; *State v. Smith* (1985), 17 Ohio St.3d 98, 101, fn. 1, 477 N.E.2d 1128. "(E]vidence offered outside the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record." *State* v. *Lawson* (1995), 103

Ohio App.3d 307, 315, 659 N.E.2d 362; *State* v. *Cole* (1982), 2 Ohio St.3d 112, 113-114, 443 N.E.2d 169; *State v. Kapper(\9^3), 5* Ohio St.3d 36,38-39,448 N.E.2d 823.

Tlie failure to call an expert witness is a matter outside the record, therefore, it is not appropriately considered in a direct appeal. *State v. Madrigal* (2000), 87 Ohio St.3d 378, 2000-Ohio-448, 721 N.E.2d 52. In *Madrigal,* defense counsel did not request the appointment of an expert. The Supreme Court held that "(njothmg in the record indicates what kind of testimony an eyewitness identification expert could have provided. Establishing that would require proof outside the record, such as affidavits demonstrating the probable testimony. Such a claim is not appropriately considered on a direct appeal." Id. at 390.

In a case similar to Krzywkowski's, the trial court dismissed the petitioner's post-conviction claim of ineffective assistance of counsel, finding that res judicala barred him from raising the issue in a post-conviction petition after the petitioner had raised the issue of ineffective assistance of trial counsel in a direct appeal. *State* v. *Hickman* (July 10, 1997), 10th Dist. No. 97APA01-79. In remanding the case to the trial court for an evidentiary hearing, the court of appeals determined that when the court overruled that assignment of error in the direct appeal, the theory of ineffective assistance of counsel was decided as to all theories present in the record on direct appeal. Id. Matters outside of the record could not be considered in direct appeaJ. Id. Therefore, res judicata did not bar the defendant from raising the issue of ineffective assistance of counsel in post-conviction, when the claim relied on matters outside of the record. Id. N

KrzywkowskT* issues were neither fully litigated on direct appeal nor could have been fully litigated on direct appeal because they rely upon evidence outside the record. *State v. Perry* (1967), JO Ohio St2d 175 at paragraph seven of the syllabus, 226 N.E.2d 104; *State v. Smith* (1985), 17 Ohio St.3d 98, 101, fit 1,477 N.E.2d 1128; *State* v. *Cooperrider* (1983), 4 Ohio St.3d

226,448 N,E.2d 452, Had Krzywkowski tried, in his direct appeal, to raise the issues of counsel's failure to hire an exert witness to assist in his defense as well as to testify at his trial, this Court would have properly dismissed the issue as not being apparent on the record, and thus not the proper subject for direct appeal Because this information was not contained in the record, Krzywkowski was unable to demonstrate on direct appeal that testimony from the expert witness would have rebutted the testimony of the State's expert witnesses. Krzywkowski presented credible evidence dehors the record of trial counsel's ineffectiveness in the affidavit from Dr. Bob Stinson, an expert witness in the filed of Psychology. (A-22). As demonstrated in that affidavit, a defense expert would have greatly assisted trial counsel in his cross examination of the state's witnesses and in Krzywkowski's defense. After reviewing the transcripts, Dr. Stinson learned that social workers, called as experts by the State, referred to psychological work and psychological experts; however, no psychological experts were consulted or called as witnesses in Krzywkowski's trial. (A-23). Dr. Stinson believes, with a reasonable degree of psychological certainty, that psychological expertise, particularly in the way of expert witness testimony, could have had a significant and material impact on the way the trier of fact understood, interpreted, and weighed much of the evidence that was presented in this case. (A-25). There is a psychological literature base that bears directly on numerous issues in this case. (A-23). Defense counsel's failure to adequately confront the State's witnesses' opinions and failure to present an expert on behalf of Krzywkowski was deficient. In addition, Krzywkowski was prejudiced by this deficient performance. Dr. Stinson's affidavit regarding the testimony and evidence presented at Krzywkowski's trial serves to undermine confidence in Krzywkowski's conviction.

As Dr Stinson provided an affidavit rebutting the State's evidence, be obviously would have testified on Mr. Krzywkowski's behalf. Furthermore, Mr. Krzywkowski argued that Dr.

Stinson would have been used to rebut the State's case, not just help trial counsel with cross-examination. Mr Krzywkowski argued in his petition that cross examination of the State's expert witness was not enough, and that the statements and opinions of the State's witnesses could have only been dispelled by rebuttal expert testimony.

The trial court wanted to exclude Dr. Stinson "s testimony because he did not interview Mr. Krzywkowski or his children. However, the trial court failed to recall thai it allowed Dr. Cynthia King to testify as the State's expert witness, despite the fact that she did not interview Mr. Kr/ywkowski or his children.

For these reasons, Grady Krzywkowski's claim of ineffective assistance of trial counsel could not have been adequately appealed based only upon the trial record. Thus, Mr. Krzywkowski does present evidence dehors the record, and overcomes the res judicata bar.

ASSIGNMENT OF ERROR II

The trial court erred in dismissing Krzywkowski's petition without an evidentiary hearing because Krzywkowski provided sufficient evidence that he was denied the effective assistance of counsel. (Findings of Fact and Conclusions of Law, A-l).

ISSUE PRESENTED FOR REVIEW

When Krzywkowski presented sufficient operative facts articulating meritorious claims in his petition, which were supported by evidence dehors the record, is it appropriate for the court to deny relief and dismiss his postconviction petition without granting discovery and an evidentiary hearing?

I. Ao evidentiary hearing is warranted in post-conviction proceedings when the petition states a substantive ground for relief, and the petitioner alleges sufficient operative facts to state a claim for the ineffective assistance of counsel.

A defendant alleging ineffective assistance of counsel must be afforded a hearing if two conditions are satisfied: (1) the petition states a substantive ground for relief, and (2) the petition is supported by evidentiary materials that allege sufficient operative facts to demonstrate the ineffective assistance of counsel. R.C. 2953.21(C). Before a [post-conviction] hearing is granted, the petitioner bears the initial burden in a post-conviction proceeding to submit evidentiary documents containing sufficient operative facts to demonstrate the lack of competent counsel and *also* that the defense was prejudiced by counsel's ineffectiveness." *Slate v. Jackson* (1980), 64OhioSt.2d 107, lll,413N.E.2d 819.

Counsel's ineffectiveness for failing to call an expert witness has to be determined at a hearing. *State v. Chinn* (August 21, 1998), 2nd Dist. No. 16764.

> We find that trial counsel's failure to call any expert witness could rise to the level of ineffective assistance of counsel prejudicial to the rights of the defendant. Thus, we conclude that the trial court should have conducted an evidentiary hearing to determine more fully the nature of the testimony of these two witnesses... .

Id. at 3.

Contrary to the trial court's findings, KrzywkowskJ stated in his ground for relief that "Defense counsel provided ineffective assistance of counsel in failing to seek the testimony of an expert witness to rebut the testimony of the State's witnesses ." Nowhere in Krzywkowski's petition did he assert that Dr. Stinson needed to be consulted for cross-examination purposes only. As Dr. Stinson provided an affidavit rebutting the State's evidence, he obviously would have testified on Krzywkowski's behalf. Furthermore, Krzywkowski argued that Dr. Stinson would be used to rebut the State's case, not just help trial counsel with cross-examination. "Rebuttal evidence" is defined as "[ejvidencc given to explain, counteract, or disprove facts given in evidence by the opposing party. That which tends to explain or contradict or disprove evidence offered by the adverse party " Black's Law Dictionary (6 Ed.Rev.1991) 876.

Krzywkowski argued in his petition that cross-examination of the State's expert witnesses would not be enough, and that the statements and opinions of the State's witnesses could only be dispelled by rebuttal expert testimony. He argued that Dr. Stinson should have been called to assist with cross-examination and rebut that testimony with his own testimony.

Krzywkowski's trial counsel were not reasonable when they failed to consult with, and pay for the services of, an expert witness to assist with his defense. As demonstrated by Dr. Stinson's affidavit (A-25), he believes, within a reasonable degree of psychological certainty, that psychological expertise, particularly in the way of expert witness testimony, could have had a significant and material impact on the way the trier of fact understood, interpreted, and weighed much of the evidence that was presented in this case. Dr. Stinson further stated that there is a psychological literature base that bears directly on numerous issues in this case. There is a reasonable probability that this testimony could have changed the outcome of

Krzywkowski's case.

Dr. Stinson's affidavit regarding the testimony and evidence presented at Grady Krzywkowski's trial serves to undermine confidence in Krzywkowski's conviction. Defense counsels' failure to adequately confront the State's witnesses' opinions, and to present an expert on behalf of Krzywkowski was deficient. In addition. Dr. Stinson's affidavit is sufficient to show that Krzywkowski was prejudiced by this deficient performance.

Krzywkowski alleged a substantive ground for relief. "Where a claim raised by a petition for postconviction relief under R.C. 2953.21 is sufficient on its face to raise an issue that petitioner's conviction is void or voidable on constitutional grounds, and the claim is one which depends upon factual allegations that cannot be determined by examination of the files and records of the case, the petition states a substantive ground for relief." *State v. Milanovich* (1975), 42 Ohio St.2d 46, paragraph one of the syllabus, 325 N.E.2d 540. Krzywkowski's petition raised the issue of ineffective assistance of trial counsel, which, if proved, would render his conviction voidable on constitutional grounds. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 RE.2d 373. His claim depended on factual allegations that cannot be disproved by the record. Therefore, he stated a substantive ground for relief. *State v. Milanovich* (1975), 42 Ohio St.2d 46, 50, 325 N.E.2d 540.

Krzywkowski presented a claim that was sufficient on its face to raise a constitutional issue, and that was not disproved by the files and records of the case. Counsel was ineffective for failing to call an expert witness, and Krzywkowski was prejudiced by counsel's ineffectiveness Furthermore, Dr. Stinson's affidavit contains sufficient operative facts to demonstrate the claimed error Thus, Krzywkowski was entitled to an evidentiary hearing.

2* The unwarranted dismissal of a post-convictioo petition without a hearing is a denial of due process.

Revised Code Section 2953.21 provides a vehicle to challenge unreliable, unfair, and inaccurate convictions. Even if this procedure docs not emanate directly from clear constitutional provisions, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey* (1985), 469 U.S. 387, 401, 105 S.Ct. 830. Due process demands that Krzywkowski be afforded a post-conviction hearing because his petition states a substantive ground for relief and is supported by evidentiary materials that allege sufficient operative facts to demonstrate the ineffective assistance of counsel. R.C. 2953.21(C).

ASSIGNMENT OF ERROR III

The trial court erred in denying Grady Krzywkowski's petition for state post-conviction relief because Krzywkowski established that he was deprived of his right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article f of the Ohio Constitution. (Findings of Fact and Conclusions of Law,A-l).

ISSUE PRESENTED FOR REVIEW

Is trial counsel ineffective when they fail to hire an expert witness to assist in the defense when there is a reasonable probability that the testimony of the expert witness would have changed the outcome of the case?

The trial court erred in dismissing Krzywkowski's post-conviction petition. Krzywkowski raised a violation of his constitutional right to effective assistance of counsel that warranted relief. See *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

The right to counsel guaranteed by the Sixth Amendment is the right to effective assistance. *Powell v. Alabama (*1932), 287 U.S. 45, 58, 53 S.Ct. 55, (emphasis added). Both the United States and Ohio Supreme Courts have emphasized that when the accused is denied effective assistance of counsel, the fairness and reliability of the accused's trial are severely compromised. *United States v. Cronic* (1984), 466 U.S. 648, 654, 104 S.Ct. 2039; *State v. Johnson* (1986), 24 Ohio St 3d 87,494 N.E.2d 1061.

In *Strickland v. Washington,* the United States Supreme Court held that counsel is ineffective when it can be shown that "counsel's performance was deficient** and "that deficient performance prejudiced the defense." *Strickland v Washington*, 466 U.S. at 687, 104 S.Ct. 2052. See, also, *United States* v. *Cronic*, *Slate* v. *Phillips*, 74 Ohio St.3d 72, 1995-Ohio-171, 656 N.E.2d 643; *State v. Bradley (*1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

As demonstrated by the affidavit of Dr. Stinson, a defense expert would have greatly assisted trial counsel in his cross-examination of the State's witnesses and in Krzywkowski's

defense. After reviewing the transcripts, Dr. Stinson learned that social workers, called as experts by the State, referred to psychological work and psychological experts; however, no psychological experts were consulted or called as witnesses. (A-23). Dr. Stinson believes, with a reasonable degree of psychological certainty, that psychological expertise, particularly in the way of expert witness testimony, could have had a significant and material impact on the way the trier of fact understood, interpreted, and weighed much of the evidence that was presented in this case. (A-25). In his affidavit, Dr. Stinson expanded on several issues that support his professiotlal opinion (hat there is a psychological literature base which bears directly on several issues in the instant case:

> A. The issue of falsifiability as it relates to defining something as scientific knowledge or not:
>
> > 1. According to the concept of falsifiability, credible science and research studies must be capable of being falsified. This is paramount to the entire scientific methodology. If something cannot be proven to be false, then is [sic] should never be offered as a fact, and certainly it should not be offered as a fact from a scientific expert.
> >
> > 2. Most to the point arc statements by witnesses about the alleged victim that cannot be falsified. For example, the issue of immediate disclosure or delayed disclosure is equally supported. If the child "discloses" abuse immediately after the alleged abuse occurred, the child is viewed as overwhelmed by the abuse ... On the other hand, if the child "discloses" abuse some time after is [sic] has happened, the assumption is that it is typical of abused children that they will delay disclosure. As can be seen, neither one of these positions can be falsified or disproved, and as such should not be presented as credible scientific evidence. That is, anytime there is an allegation of sexual abuse, the allegation would have to be either immediate or delayed. Under the above premise, the allegation (whether immediate or delayed) is support for a finding of sexual abuse having occurred. There is no way to disprove its occurrence even in cases where sexual abuse did not occur.
> >
> > 3. Also to the point, it is said that abuse is supported when the child initially acknowledges alleged abuse, but then recants or retracts an earlier statement. Though recanted or retracted, the abuse allegations are still considered true because the child is assumed to be under pressure to recant

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would be *contrary* to their prematurely foreclosed belief, and they *selectively abstract, recall, and magnify* the evidence that confirms their bias. Frequently, this is not done intentionally, but rather is a part of the human nature. Regardless of the intent, the result is the same: an unfair, non-objective, biased evaluation occurs, despite the belief from the examiner that he or she was thorough, careful, and objectively unbiased.

2. An example of this from the transcripts that I reviewed occurs when Dr. Gemmill admitted. The first formal thing, that happens is a history is taken. This is partly based on the knowledge of the referral information that we have sent to us by the referring agency. So we get history from that agency. We get history from whoever brings the child in. And in these cases, they were foster parents, in both instances. And on occasion we get it from the child" (pp. 1482, lines 6-14). This results in a confirmatory bias as Dr. Gemmill admitted later that neither he nor his staff went to additional sources that might have been able to disconfirm the allegations that were made through the agency and the foster parents. Furthermore, Dr. Gemmill admitted that he relied upon a single one hour or less joint interview, thereby reducing the likelihood of getting, any independent and objective history from the children that would differ from that reported by the foster parents. Dr. Gemmill then went on to report that he will use anything, that can be gleaned from the history interview to direct his physical examination. That is, he prepares a physical examination that he expects to "confirm" his suspicions. This is certainly a confirmatory bias. The procedures that are selected are fully expected to confirm his suspicions, with no attention being given to matters or procedures that might disconfirm his suspicions, which should be given equal or greater importance in scientific investigations. Interestingly, when his confirmatorily biased physical examination does not support his suspicions, he discards such findings and relies solely on the history, which raises serious questions about the scientific nature of the evaluation, given that it is not open to falsifiability (See discussion above on falsifiability).

3. Dr. Gemmill's testimony also provides an excellent example of selective abstraction as it relates to a confirmatory bias. Dr. Gemmill testified that he has evaluated between 1600 and 2000 alleged sexual abuse cases in his career (pp. 1468, lines 4-7). He goes on later to be able to recall only one example of a previous case that supported one of his opinion [sic] in the current case (pp. 1536-1537). This is an excellent example of selectively attending to a single (and in this case, a very rare) occasion or experience, and then recalling it, magnifying it, and using it as support for one's present supposition, while simultaneously ignoring and minimizing and vast majority of experiences to which the person has been exposed.

would be *contrary* to their prematurely foreclosed belief, and they *selectively abstract, recall, and magnify* the evidence that confirms their bias. Frequently, this is not done intentionally, but rather is a part of the human nature. Regardless of the intent, the result is the same: an unfair, non-objective, biased evaluation occurs, despite the belief from the examiner that he or she was thorough, careful, and objectively unbiased.

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4. A confirmatory bias was further evidenced when Dr. Gemmill admitted that he could not comment on the accuracy of the information in the histories of the children (pp. 1566), yet his diagnosis, by his own admission, was based "100 percent on history" (pp. 1575). That is, he had a hypothesis, he tested for it, and when the test that he expected to confirm his hypothesis did not, he discarded that information and relied solely on information for which he could not attest to the accuracy.

C. The importance and expected practice that individuals separate the rok of treatment provider and forensic examiner to the extent possible, and the reasoning behind such an expected practice:

1. Despite being contrary to good patient care and existing clinical and forensic practice guidelines, some individuals nevertheless engage in dual clinical and forensic roles. The importance of avoiding- such conflicts, avoiding, the inherent threat to the accuracy of judicial determinations, and avoiding, conscious or unconscious deception when providing testimony have been emphasized in the psychological literature through the presentation and discussion of several principles that underlie why combining these roles is conflicting, problematic, and should be avoided. It has been noted that the temptation to use therapists, treatment providers, and/or advocates as forensic experts on behalf of patient-litigants exists because of *erroneous* beliefs about efficiency, candor, neutrality, and expertise...

2. Engaging, in conflicting treatment provider and forensic relationships exacerbates the danger that experts will be more concerned with case outcome than the accuracy of their testimony. Treatment providers arc usually highly invested in the welfare of their patients and rightfully concerned that publicly offering, some candid opinions about the patient's deficits could seriously impair their patient's trust in them. They are often unaware of much of the factual information in the case, and much of what they know comes solely from the patient and is uncorroborated. What they do know, they know primarily if not solely, from their patient's point of view. They arc usually sympathetic to their patient's plight, and they usually want their patient to prevail. This compromises the integrity of the forensic evaluator and the forensic process.

3. As it relates to the transcripts, Julie Prettyman is an intake social worker in the sex abuse department, and readily admitted that she has "been an advocate of children and working with children for many years" (pp. 1642, lines 1112). Her bias and distortions were revealed when she indicated that the results of the protocol she used, "it was indicated, strongly indicated." Interestingly, though, as she discussed the protocol, there were no gradations to the rating of "indicated." The protocol was

described as resulting in a finding of indicated, unsubstantiated, or substantiated. But, apparently in her advocacy for the children, Ms. Prettyman distorted the finding to be "strongly indicated," a finding, that is not even an option with the protocol she used. Similarly, she claimed that in another child, the protocol was not used, but "it would have been indicated, but since 1 was unable to interview him, no." This response was objected to and sustained, but it, nonetheless, demonstrates the bias that is introduced when an advocate attempts to fulfill the role of forensic evaluator. That is, Ms. Prettyman did not even employ the protocol for one of the children, yet in her zealous advocacy she wanted to testify as to what she believed to be the case, despite not having the forensic evidence. Ms. Prettyman claimed that she can be both an investigator and an advocate at the same time (pp. 1684), but ethical guidelines discourage such a practice and for good reason. 6vcn that the research has demonstrated that combining such roles results in problems with objectivity and in fulfilling one or the other roles adequately.

D. The very important issue of understanding base rates and presenting this information so that statistics and numbers are not misrepresented or misinterpreted:

1. The best way I know of to present this information is through a recent illustration that was offered to me For illustrative purposes, assume that there is a particular state in which there are 220,000 children. Then, hypothetically assume lhat 20,000 have been shown to have been sexually abused. Take it another step further and assume that in examining the children, it is found that 75% of the abused children display symptoms of "sexualized behavior" (e.g., bed-wetting, nightmares). Notice that 75% of the 20,000 children means that 15,000 of the children have displayed this combination of sips and symptoms, the so-called "sexualized behavior." At this point, an allegedly abused child is examined and one finds the combination of signs and symptoms we refer to as "sexualized behavior." Because 75% of our abused group displayed them, we might erroneously believe that there is a 75% probability that this child we have examined was also sexually abused. However, taking it one step further, remember we are only talking about 20,000 out of the 220,000, which leaves 200,000 children who presumably were not abused. Assume that we examine these non-abused children and find that only a small 10% of these children exhibit the symptoms that we call "sexualized behavior." At first glance it appears obvious that when 75% of the abused children show such sips, and only 10% of the non-abused children show the sips, then there must be a higher probability that the child we arc examining has been sexually abused. However, notice that 1 0% of the non-abused population of 200,000 still means that 20,000 children now are in the non-abused group with the same symptoms and "sexualized behavior" as the abused group. If we take the number of children who have experienced

> the symptoms in the abused situation (which is 15,000), and add them to the number of non-abused children who show the same symptoms (which is 20,000), we now have a pool of 35,000 children with the symptom combination, or the sexuaiized behaviors, what is most important to note here is that if we now mix up this pool so that we cannot identify anyone, then randomly pick a child out of the pool, there is *a higher probability thai* we will *select a child from the non-abused population, as compared to the abused population, and vet believe that we have an abused child.* This false belief comes from a misunderstanding of statistics, and base rates, in particular, a concept often not understood and even more rarely explained by expert witnesses. The point is that while one may have a lot of information from research and clinical practice concerning rates of abused children, it is extremely important to obtain base rates from the general population of non-abused children before one can offer a firm opinion as to whether a child has or has not likely been abused. This should be kept in mind for any examiner who is looking for any sips, symptoms or syndromes in any given population.
>
> 2. In my review of the aforementioned transcripts, the issue of data distortion was introduced in Cynthia King's testimony. She provided - . some statistics, noting for example, that "About 70, according to the research, about 70 to 80 percent of sexually abused children exhibit behavioral indicators" of sexual abuse (pp. 1811, lines 22-24). She farther testified that according to the research "it is about 20 to 25 percent of sexually abused children will have physical indicators" (pp. 1814, lines 16-18). Later in her testimony, Ms. Prettyman stated "with sexually abused children, [masturbation] becomes an excessive behavior for some of these children. It becomes a behavior that consumes them" (pp. 1820, lines 3-6). She offers no data on how often this happens in the general population, nor the likelihood of falsely identifying an excessive masturbator as a sexually abused child, when he or she is, in fact, not a victim of sexual abuse. Thus, Ms. King, like many others, intentionally or inadvertantly present information that oftentimes results in erroneous conclusions being drawn.

(A-26 - A-38).

Defense counsel's failure to adequately confront the State's witnesses' opinions and failure to present an expert on behalf of Krzywkowski was deficient. Krzywkowski was prejudiced by this deficient performance. Dr. Stinson's affidavit regarding the testimony and evidence presented at Krzywkowski's trial serves to undermine confidence in Krzywkowski's conviction.

No alternative device would have adequately conveyed the same information that an expert could provide Cross-examination of the expert witness, for example - although certainly necessary to refute the State's case - was not enough. This is because the jurors, when evaluating that cross-examination, would still have done so in light of the State's witnesses. The statements and opinion of the State's witnesses could only have been dispelled by rebuttal expert testimony.

Krzywkowski was denied the effective assistance of counsel. Trial counsels' failure to seek the assistance of an expert witness was deficient. That deficient performance resulted in Krzywkowski's conviction. Thus Krzywkowski*s trial counsel were ineffective for failing to obtain a crucial witness to testify at Krzywkowski's trial.

As a result of defense counsel's ineffective assistance, Krzywkowski's rights as guaranteed by the Sixth Amendment's guarantee of the effective assistance of counsel and the Fourteenth Amendment's guarantee* of equal protection, due process, and a fair trial were violated. Krzywkowski's same rights, as guaranteed by Sections 2, 10, and 16, Article 1 of the Ohio Constitution and RC. 2953.21 were violated, as was his right to expert assistance, as guaranteed by Section 39, Article II, Ohio Constitution. *State v. Haynie* (June 29, 1988), 3rd Dist No. 9-86-21, at 1; *State v. Smith* (1985), 17 Ohio St. 3d 98,100,477 N.E.2d 1128, 1131.

CONCLUSION

Kxzywkowski supported the grounds for his post-conviction petition with evidence adequate to justify relief. Therefore, the trial court erred when it failed to grant Krzywkowski's post-conviction petition, in the alternative, and at a bare minimum, Krzywkowski was entitled to discovery and an evidentiary hearing based on the substantive ground for relief and the sufficient operative facts set forth in his petition and attached affidavits. Krzywkowski respectfully requests that this Court grant his post-conviction petition or, in the alternative, remand this case for discovery and an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT GRADY KRZYWKOWSKI has been served upon Jon Oebker, Assistant Prosecutor, Cuyahoga County, 9* Floor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 2ND day of March, 2004.

r

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Assistant State Public Defender
Counsel of Record

COUNSEL FOR GRADY KRZYWKOWSKI

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee,	:	Case Nos. CA 03 083599, CA 03 083842 & CA 04 084056
GRADY KRZYWKOWSKI,	:	C.P.Case No.CR-401497
Defendant-Appellant.		

APPENDIX TO MERIT BRIEF OF APPELLANT GRADY KRZYWKOWSKI

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FILED
DEC 15, 2003

THE COURT OF COMMON PLEAS
DEC 15 2003
CUYAHOGA COUNTY, OHIO CRIMINAL DIVISION
GERALD E. FUERST
CLERK OF COURTS
cuyahoga county ohio

STATE OF OHIO	)	CASE NO. CR 401497
Plaintiff-Respondent	)	Judge Shirley Strickland Saffold
-vs-	)	
GRADY KRZYWKOWSKI	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendant-Petitioner	)	

Judge Saffold;

Defendant-petitioner, Grady Krzywkowski., filed a Petition for Post-conviction Relief pursuant to R.C. 2953.21 alleging that;

> Defense counsel provided ineffective assistance of counsel in failing to seek the testimony of an expert witness to rebut the testimony of the State's witnesses. Thus, Krzywkowski's convictions and sentences are voidable because he did not receive effective assistance of counsel at trial, and he was denied his rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I, Ohio Constitution.

Upon review of the files and records in this case, the Court makes the following Findings of Fact and Conclusions of Law;

Findings of Fact

1. On January 25,2001, Petitioner, Grady Krzywkowski, was indictee on eigh: counts by a grand Jury.

2. Counts One through Three alleged Rapt in violation of R.C. 2907.02, naming Jane Doe, a minorunder the age cf thirteen as his victim, Janes Doe being his daughter Kristcn. Count Four alleged Gross Sexual Imposition, a violation of R.C. 2907.05,

naming Jane Doe, his daughter Kristen as his victim Counts Five and Six alleged Rape naming John Doe, a minor under the age of thirteen as his victim, John Doe being his son Ryan. Count Seven alleged Rape naming Tom Doe, a minor under the age of thirteen as his victim, Tom Doc being his sen Aaron. Count Eight alleged Gross Sexual Imposition, naming Tom Doe, his son Aaron, as his victim

3. On September 17, 2001, Petitioner was found guilty of Counts One, Two, Three, Four, Seven and Eight, four counts of forcible rape of a minor under the age of thirteen and two counts of gross sexual imposition of a nine: under the age of thirteen, after a trial by jury. Petitioner was acquitted of counts Five and Six. On September 19, 2001, Petitioner was sentenced to life in prison on Counts One through Three and Seven. On Counts Four and Eight he was sentenced to five years in prison and fined 510,000.00 for each count.

4. Petitioner timely appealed to the Eighth District Court of Appeals which affirmed his conviction and sentence. *State v. Krzywkowski*, Cuyahoga App. No. 80392, 20G2-Obio-4438. Thereafter, Petitioner filed a notice of appeal and memorandum in support of jurisdiction with the Ohio Supreme Court. The Court declined to accept jurisdiction over this case. *See,* Ohio Supreme Court Case No. 02-1842. Additionally, Petitioner filed an application to reopen his direct appeal arguing that he received ineffective assistance of appellate counsel. The Eighth District denied this application. *State v. Krzywkowski* (June 12,2003), Cuyahogz App. No. 80392.

5. The State of Ohio filed a timely motion to dismiss defendant's Petition for Post-conviction Relief after this Court granted leave to file a response.

6. R.C. 2953.21 governs petitions for post-conviction relief. R.C. 2953.2HA) states that "[a]ny person who has been convicted of a criminal offsnse *** and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon ***"

7. A petition under division (A) (1) is timely filed if filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction, R.C, 2953.21(A}(2).

8. The Court finds that this is the first petition under R.C. 2953,2! filed by defendant in CR 401497.

9. If timely filed, a Court must then determine whether or not the petition provides substantive grounds for a hearing. R.C. 2953.21(C). A post-conviction petitioner bears the initial burden of submitting evidentiary documents containing sufficient operative facts to demonstrate his claims and to merit a hearing. *State v. Jackson* (1930), 64 Ohio St. 2a 107; *State v. Pankey* (1981), 68 Ohio St. 2d 58. A petition that does not present substantive grounds is subject to dismissal without a hearing. R.C. 2953.21(E); *State v, Calhoun* (1999), 86 Ohio St. 3d 279.

10. The Court adopts the Eighth District Court of Appeals statement of the facts of this case as follows:

> {p 3} At trial, the prosecution presented testimony of Sharon Harpel, the foster mother of Krister. and Katelyn ("Katie") Krzywkowski. Sharon testified that in July of 2000, the girls were placed in he: therapeutic foster home. At the time of placement, Krister. was five years old and Katie was two. Sharon testified that within weeks of being placed, Kristen frequently disclosed to Sharon incidents of sexual and physical abuse by her father.

Sharon testified thai when the girls first moved in, they would eat incessantly and hoard food. She testified that Kristen was terrified of net getting enough food,

{p 4} Sharon testified that on one occasion when the girls were playing together in the playroom, she went into the kitchen. She noticed that it had gotten very quiet in the playroom, which was quite unusual for the girls, who generally did not interact well with one another and regularly fought arid screamed while playing together. When Sharon entered the room, she found Kristen taking her hands and digging into Katie's diaper and private area £S Katie was laying on the floor with her legs spread open in a frog-like position. When Sharon questioned Katie about what she was doing to Katie and why she was doing it, Kristen allegedly responded that when her dad would gee mad at them, he would take his four fingers and stick them in Katie's private part or poke them in the butt with toys. Kristen further disclosed that on one occasion, her dad tried to put the "hard pan of his body" in her private area and that it hurt.

(p 5} Sharon also testified that Kristen had terrible nightmares every night when she first arrived at the home. When Sharon would go in to comfort Kristen, Kristen stated on one occasion that she was afraid her mother and father were in the closet "wailing to get her." Sharon testified that while Kristen still has nightmares, they are less frequent than they were when she first arrived in Sharon's home.

{p 6} Sharon testified that approximately two weeks after being placed, she took the girls to Cedar Point. She recalled an incident at the pool when Kristen, upon hearing music, went up to the bars attached to the pool used to assist people in getting in and out of the pool, and began "humping" the bars and'rubbing up against them. Sharon testified that the behavior mirrored that c f a professional dancer, When Sharon tried to redirect Kristen to the pool at that point, Kristen's behavior changed, and she began screaming and yelling while continuing to hump the bars. Eventually, Kristen calmed down at which point Kristen went into a "trance-like" state. Sharon stated that this type cf behavior happened on another occasion on the flagpole in Sharon's front yard. ^. -

(p 7} Sharon testified that Kristen exhibited behavior that was sexua'i in nature when she would bathe Kristen, She stated that Kristen would masturbate every time she took a bath, which was almost daily. Sharon further stated that after Kristen was put to bed for the evening, she would often find Kristen masturbating in bed.

{p 8} Sharon testified that when Kristen first arrived at the home and would go to kiss Sharoci, she would open her mouth and attempt to stick her tongue in Sharon's mouth. Kristen told Sharon that that was the manner in which her mother and father wanted her to kiss them. Sharon stated that she had to teach Kristen how to kiss her appropriately. She had to further teach Kxister: that k was inappropriate fo: Kristen to attempt to fondle Sharon's breasts.

{p 9} Sharcn testified that when the girls were in her home, they initially reacted violently toward the dogs and cats in the house. She recounted that on occasion, Kristen actually became mad, picked the cat up and threw it across the kitchen and against the wall.

{p 10} Sharon testified that she documented Krristen's behavior by taking notes and submitted them to Specialized Alternative for Family and Youth (SAJFY), the foster care agency with whom she worked,

{p 11} On cross-examination, Sharon stated that she was testifying from her memory of events that transpired over the last year. She admitted that when the children were brought to her home, she did not observe any physical signs of abuse. She also stated that Kristen made allegations of abuse by her mother and other family members.

{p 12} After being found competent to testify, the state presented Kristen's testimony. She stated that her father did "bad stuff to her. \Vhen questioned further, Kristen testified that her mom and dad frequently locked her in the attic when **she** was bad. Kristen then stated that she was bad when she didn't listen. Kristen also testified that her father would stick his four fingers in her butt and poke her after pulling her pants down and undressing her. She stated that the first time, he stuck toys, such as play spoons and forks, in her butt and her "crack." She testified that her father stuck his fingers in her private parts on several occasions, She also recounted 2 story when she witnessed her father take off Katie's diaper and touch Katie's private parts.

{p 13} Kristen stated that her father made her watch a dirty, nasty movie in which the characters stuck their tongues in each other mouths with no clothes on. She stated that her father forced her to watch the movie by herself, She further stated that this was a "vampire" movie. Kristen testified that her father taught her to stick her tongue in somebody's mouth wh«a she kissed them, but she testified that he never kissed her in that way,

{p 14} When asked what her dad did to her that she didn't like, Kristen responded by testifying that on one occasion when she was bad, her father hit her in the head with a wrench and blood got all over her pillow. Kristen stated that she was told by her father to fabricate a story to tell her mother regarding the incident, so that her rnother'would not find out that her father hit her. Kristen also testified that as a punishment her father tied her up at night and wouldn't release her until the morning. Kristen farther testified that her father would pull down Aaron's and Ryan's pants and spank them with a belt when they were bad,

{p 15} Kristen testified that she loved.her father, but did not want to live with him again because she did not want him to do bad things to her again.

{p 16} Elizabeth Alexander, the foster mother of Aaron and Ryan, testified for the state on direct examination that when Ryan first came to her home, he was very hyperactive, did not interact well with family members, was obsessed with mutilating insects, walked around naked,

tortured kittens that were living at the home, end. on one occasion tried to suffocate one of the kittens. Elizabeth also testified that Ryan killed the family's guinea pig by taking a long stick and poking it down the guinea pig's mouth. Elizabeth and Ryan buried the guinea pig and put the dead body in the garbage. Later, Elizabeth found that Ryan had gone through the garbage to find the carcass and was playing with it by repeatedly holding it up in the air and allowing it to hit the concrete.

(p 17} While in fosier care, Ryan pulled his pants down and exposed his penis to another foster child in the home. Elizabeth testified that Ryan was physically aggressive and sometimes exhibited violent behavior, particularly when he was angered.

{p] 8} Elizabeth testified regarding other behaviors that Ryan had exhibited when he first arrived at her home. She stated that Ryan was obsessed with food, She also testified that Ryan, who very much .enjoy? drawing and frequently drew pictures of penises and penises ejaculating. Elizabeth testified that Ryan frequently masturbated while bathing and that his genitals were sore from masturbating. Further, she stated that she no longer allowed Ryan to play with toys in the tub because on one occasion, she observed him trying to put a toy in his rectum.

{p 19} Elizabeth testified that while cleaning ihe"kitchen one day, she heard Ryan say to Aaron "let's play spider and fly." A few minutes later, she heard Ryan ask Aaron "does it feel good." At that point, she went to check to see what the boys were doing and found Aaron at the end of the couch on his back with Ryan on top of him. Ryan had his penis in Aaron's mouth and Ryan was moving back and forth in a sexual manner. After Elizabeth explained that that was inappropriate behavior, she asked Ryan what he was doing. Ryan replied that he was playing spider and fly and went on to explain that this was a game he played with his father. Elizabeth then testified that Ryaa's behavior has improved significantly since he first arrived in her borne.

(p 20} Elizabeth testified with regard to Aaron's behavior in the foster home. She stated that he, too, exhibited inappropriate behavior, such as running through the house naked, bringing attention to his penis and being extremely abusive with the animals. Aaron disclosed sexual abuse to Elizabeth and or. one occasion stated that his father put his pee in his butt. Aaron further disclosed that his dad peed in his mouth and put his peanuts in his mouth. Elizabeth testified that she suspected the boys were sexually abused based on these behaviors. In particular, she found the boys hiding under a blanket fondling one another. She also noted that when Aaron would hug her, he would try to touch her breasts.

{p 21} On cross-examination, Elisabeth admitted that she never found any physical signs of abuse, that many foster children exhibit similar behaviors as the Kizywkovvski children and that not all of those foster children had been victims of sexual abuse.

{p 22} After the court determined him to be competent, Aaron testified that he knew he was in court to testify because his father had done bad

Stuff to him. When asked what his father did to him that he did not like, Aaron initially answered that he "forgot." Ke later testified that while he was living with his father and they were in the kitchen, his father put something white in his "private part that poops" and on his nose. Aaron stated that it hurt a lot and he cried a lot when his dad did that. Aaron was unable to answer why his dad put white stuff on his nose and in his butt, stating "I was being good but he just did it." (T. 1367) Aaron also testified that his dad tried to put his private part in Aaron's mouth.

{? 23} Aaron testified that a "papoose" was something that he was tied up in ones, while his father put two socks in his mouth. He was unable to state why his father did this to him. Aaron testified that he did play the spider and fly game with his father, which he did not like. He further testified mat he never played the spider and fiy game with his brother Ryan.

IP [24]1 R[van] then testified after being found competent by the trial judge. He stated that he and his father frequently played games together, including video games and "spider and fly."' Ryan described the spider and fiy game much differently than his foster mother had described it." His description was non- sexual in nature, and he stated that he enjoyed playing the game. He denied that there was another way of playing spider and fly with his dad, He further denied playing spider and fly at Elizabeth's house in the way she had described it.

(P -5} Ryan testified that his dad was a good dad and that he loved him very much. While he admitted to being disciplined once by being "papoosed" and being made to stand in the corner on several occasions, in addition to several other corporal punishment techniques testified to, he denied any allegations of sexua! abuse by his father, Ryan stated that his father never put his penis near Ryan's face, that his dad never told him to suck his penis, and that his dad never made Aaron suck on his penis. Ryan stated that he has never seen his father's penis, or any of his father's private parts, Ryan then testified that he did see his dad put white stuff on Aaron's nose and in his butt He testified that this wnue stuff was medicine. He stated that he never witnessed his father doing ar.ything bad to his brother cr sisters, and if anyone said his father did anything sexual in nature, they were lying. Ryan also stated that he would like to live with his father again.

fp 26} Ryan denied ever trying to suffocate or hurt any of the kittens at Elizabeth's house. He further denied mutilating any insects or butterflies, or drawing pictures of penises while living with Elizabeth.

(p 27} The state presented testimony of Dr. David W. Gemmili, an employes of Mercy Children's Hospital in Toledo, where the children were taken for a sexual abuse evaluation. Dr. Gemmill has specialized in sexual abuse evaluations and treatment for the last fifteen years of his forty-two years in practicing medicine. He testified in regard to the process that is employed when children are brought in for evaluation. Dr.

Gcmill explained the children are brought in for an historical evaluation, conducted by eithter Dr. Gemmill, a nurse practitioner or a trained social worker. In this interview, they collect historical information submitted by the referring agency and glean it from interviews with children and sometimes their caregivers.

(p 28} Dr. Gemmill testified that after historical information is gathered, the next step is to conduct a physical examination to detect any signs of abase. He described a! great length the process for so doing and noted that many times they are unable to detect signs of sexual abuse, unless the abuse happened v/ithin a few days prior to the visit. Dr. Gemmill explained that usually children's bodies heal relatively quick.

(p 29} Dr. Gemill and his staff conducted evaluations and examinations on the Krzywkcwski children. He thereafter prepared two reports, one regarding the girls and one regarding the boys.

{p 30} With regard to the girls, Dr. Gemmill testified that Daria Vogelpohl, a nurse practitioner, took the history cf Kristen while Sharon was present. Immediately after the history was taken, Darla met with Dr. Gemmill for a briefing prior to Kristen's medical examination. After conducting a medical examination. Dr. Gemmill noted that he did not detect any abnormalities that would indicate physical signs of sexual abuse. After reviewing her historical information ar.d conducting a medical examination, Dr. Gemmill opined that there had been inappropriate contact with Kristen which would indicate sexual molestation and physical abuse. He further testified seventy-five percent of his diagnosis was based on the history that was given to them.

{p 31} With regard to the evaluations and examinations of the boys, Dr. Gemmill testified that after conducting a physical examination, during which he did not find physical signs cf sexual abuse, he opined that there was "inappropriate stuff going on, probably more physical abuse than sexual abuse.

{p 32} Dr. Gemmill testified that Ryan did not offer much in the way of historical information, nor did Elizabeth, who was present at the time of the interview. Dr. Gemmili testified that he conduced the medical examination of Ryan and found foliiculitis across his buttocks, which could have been explained by his bed-wetting problem. He further testified that after completing the process with Ryan, there was sufficient information indicating sexual molestation.

{p 33} Dr. Gemmill testified that it is quite common for children to recant allegations of sexual abuse, especially when there is no support coming from the family. He stated that there exists a variety of reasons for a child to recant an earlier allegation of abuse, including when there is little family support or where the child feels as if his "world is tumbling down" because of his or her disclosures.

{p 34} On cross-exarr.inaticn, Dr. Gemmill testified that at the time of his evaluations of the children, he did not have access to any previous medical records of any of the children. He stated that since then, he has not seen

any other reports, other than one report from a consultant who examined Kristen for an eye condition. Dr. GenrniH admitted on cross-examination that white medicine called Desitin is frequently used to treat a child who *has a* rash from bed-wetting, which could possibly explain the testimony that the defendant put white stuff in Aaron's buttocks and his nose.

(p 35} The state then presented the testimony of Diane Marx, an employee of SAFY at the time the Krzywkowski children were placed in foster care. She was assigned to monitor the progress of the children in the foster homes. She stated that certain behaviors of the children were brought to her attention, such **as** Kristen biting herself, that she was masturbating daily, and that she was having night terrors, and disclosing information indicating that her father had physically and sexually abused her. Upon learning this information, Ms. Marx contacted the county social worker and called the child abuse hotline, at which time the children were taken in for an interview with Julie Prettyman a social worker for the county in the intake department.

(p 36} The state presented the testimony of Julie Prettyman. Ms. Prettyrnan stated that her role in the intake department was to investigate specific allegations of sexual abuse of children arid to interview the children to assess a child's needs in terns of safety and whether the child will need medical treatment and/or counseling. She testified that she interviewed Kristen and Aaron to assess the need for safety requirements, to assess the allegations, and to determine if any follow-up treatment was necessary for them. Ms. Prettyman stated that during the interview, Kristen disclosed instances of abuse to her by her father. She told Ms. Prettyman that he had locked her in a room, made her sit, stand, squat, clean the walls, end that he had at times penetrated her anus and private part with his fingers. Kristen also told Ms. Prettyman that her dad made her watch dirty rnoviej that were disgusting, he kissed her inappropriately by putting his tongue in her mouth, and that there were times when she saw her parents have sex. Kristcn further disclosed that she had witnessed her dad touching her siblings in the same way that she was touched. She disclosed that she had been penetrated and stated "Dad stuck his private in my butt, in my private, and it hurt and it was red and it was hard and it srnelled like poop." (T. 1655) At this time, Ms. Prettyman. recommended an immediate evaluation of the children, {p 37} Ms. Prettyman stated that Aaron did not make any disclosures to her regarding sexual abuse when she interviewed him. He did, however, make disclosures regarding physical abuse. Ms. Prettynan testified that, after interviewing both children, she noted that sexual abuse was "indicated." [FNl]

FN1. Cuyahoga County Department of Children and Family Services rr.akes determinations in cases that allegations of sexual and

physical abuse are either "substantiated," "unsubstantiated," or "indicated."

{p 38} Darla Vogelpohl was called as a state's witness. She testified that, upon taking a history of Kristen, Kristen disclosed several instances of

sexual abuse by her father, all of which had been testified to at this point in the trial. {p 39} The state also presented testimony of expert social worker Cynthia King. Ms. King never interviewed the Krzyw'xowski children, nor had she ever met them. She testified that there are recognized behavior indicators of children that have been sexually abused, including: bed-wetting, acting out a sexual act with a doil or stuff animal, excessive rnasrurbation, fondhng other children, Ms King also testified that physical sigrvs of sexual abuse are generally only found in twenty to twenty-five percent of children. {p 40} Ms. King opined that the behaviors exhibited by the Krzywkowski children were consistent with those behaviors that are indicative of sexual abuse. She testified to specific incidents of sexual abuse that had already been testified to at trial by other witnesses for the state.

Krzywkowski, supra at paragraphs 3 - 40.

Findings Relative to Res Judicata

11. Under Ohio law, it is fundamental that a petitioner nay not raise in a post-conviction proceeding issues which were, or could have been, raised or. direct appeal. *State* v. *Perry* (1967), 10 Ohio St. 2d 175; *State* v. *Reynolds* (1997). 79 Ohio St. 3d 158; *State* v. *Povell* (1993), 90 Ohio Ap?. 3d 260. Under the doctrine of *rexjudieata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from rassing and litigating in any proceeding, except appeal from that judgment, any claim that was raised or could have been raised by the defendant at tria'., or on appf »1 from that conviction. *Perry, supra; State* v. *Szefcyk* (1596), 77 Ohio St. 3d 93.

12. Petitioner's claim that defense counsel was ineffective could have been raised in his direct appeal since he was represented by different counsel at trial and or* appeal. See *State v. Cole* (1982), 2 Ohio St. 3d \\2. As such, the issye of defense counsel's alleged ineffectiveness is r« *j:<dica:a* for the purposes of th* instant petition. ***Id.***

13. The only exception to the applicability of the *res judicata* bar is where the petitioner presents competerit, relevant and material evidence *dehors* the record that was not in existence and available to petitioner in time to support the direct appeal. *State* v. *Lwsor.* (1995), 103 Ohio App. 3d 307, 315; *State* v. *Greer* (October 23, 1992), Summit App. No. 15217, unreported; *State v. Calcano* (January 14, 1998), Lorain App. No. 97CA006851, unreported. Essentially, a petitioner is required to present evidence demonstrating that he could not have advanced the claims or. appeal based upon the information contained in the original trial record. *Side v. Combs* (1994), 100 Ohio App 3d 90, 97. Tne evidence must be genuinely material and relevant. See *Stale* v. *Coleman* (March 17, 1993), Hamilton App. No. C-900811.

14. In the case at bar, Petitioner presents no evidence *dehors* the record. Herein, Petitioner attempts to overcome the *res judicata* hurdle by attaching an expert report of Dr. Stinson. Merely attaching this report does not overcome the *res judicata* bar. Petitioner never argues that Dr. Siinsan would have been able to present any testimony on behalf of petitioner. Dr. Stinson did not evaluate petitioner or any of the victims of this case. Rather, Petitioner's only argument is that Dr. Stirson would have helped trial counsel in. the cross-examination of the State's witnesses. Petitioner does state that he would have tried to call Dr. Stinson as a witness. Thus, the petition does not present and *evidence dehors* the record and Petitioner cannot overcome the *res judicata* bar *Lawson, supra; Greer; supra.*

Findings Rclative The Merits of Petitioner's Claim

15. Separate and independent from this Court's holding that Petitioner's claim is barred by the doctrine of *res jitdtcaia,* this Court also finds that the Petitioner's claim for relief lacks merit.

16. In order to substantiate a claim cf Ineffectiveness of counsel, a petitioner is required to demonstrate that (1) the performanvce of defense counsel was seriously flawed and deficient, and (2) the result of petitioner's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 688; accord, *State* v. *Bradley* (1989), 42 Ohio St. 3c 136, at syllabus, cert, denied (1990), 497 U.S. 1011; *State* v. *Jackson* (5/2/96), Cuy. App. No. 69501, unreported. The Ohio Supreme Court requires a petitioner to demonstrate that defense counsel substantially violated one or more of his essential duties to his client and that the violation prejudiced the defense. *Stale* v. *Hester* (1976(, 45 Ohio St. 2d 71; accord, *State* v. *Lytle* (1976), 48 Ohio St. 3d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910. Lastly, the relevant inquiry is not what counsel should have done, but rather, whether the choices that were made were reasonable. *Siripongs* v. *Catdcrone* (9* Cir.1998), 133 F.3d 732,736.

17. In reviewing a claim of ineffective assistance of counsel, it must be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St. 3d 98. A petitioner who claims ineffective assistance of counsel must, in. order to overcome the presumption that his counsel was effective, submit sufficient evidentiary facts which, if proven, would show

that petitioner was prejudiced by ineffective counsel *State* v. *Pierce* (June 26, 1997), Cuy. App. Nos. 71462 & 71263, citing to *Smith, supra* at 163. A petitioner bears the initial burden of submitting evidentiary documents containing sufficient operative facts to demonstrate his claim and to warrant a hearing. *State v Jackson* (59780), *6** Ohio St. 2d 107; *State* v. *Pankey* (1981). 68 Ohio St. 2d 58.

18. Petitioner's only claim is that an expert would have "greatly assisted trial counsel in his cross-examination of the State's witnesses and in Petitioner's defense." Petition at 7. Thus, Petitioner is not arguing that trial counsel was ineffective for failing to hire an expert to testify at trial. Rather Petitioner merely argues that trial counsel was ineffective for failing to hire an expert to help trial counsel prepare for cross-examination. Undoubtedly, defense counsel could have hired an expert to help prepare for cross-examination, but petitioner fails to explain to this court how such assistance would have made a difference at his trial, i.e., how such cross-examination preparation would have changed the outcome. Clearly the decision not to hire an expert to prepare for cross-examination is within the purview of a competent attorney that are not properly the subject of second-guessing by reviewing courts. *State* v. *Hester* (1976), 45 Ohio St. 2d 71; *State* v. *Peoples* (1971), 23 Ohio App. 2d 162.

> Indeed, it is mere speculation to assert an expert to assist in cross-examination would have been crucial to Petitioner's defense. See, e.g *State* v. *Kelly* (July 12, 2001), Cuyahoga App. No. 78422, unreported. Given the fact that Ohio law is clear that failure to call an expert witness is not a per se violation of counsel's duty to a client, See *State* v. *Nicholas* (1993), 66 Ohio St.3d 431, it necessarily follows that the failure to hire an expert to assist in cross-examination is not a per se violation of counsel's duty to a client. Ir. *State* v. *Thompson* (1987), 33 Ohio St.3d 1, 10-11, 514 N.E.2d 4Q7, the Ohio Supreme Court explained that a defense counsel's failure to call an expert witness and reliance on cross-examination does not constitute ineffective assistance of counsel. See, also, *State* v. *Nicholas, supra.*

19. In order to substantiate a claim of ineffectiveness of counsel, a petitioner ii required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of petitioner's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 688; accord, *State v. Bradley* (1985), 42 Ohio St. 3d 136, a! syllabus, cert, denied (1990), 497 U.S. 1011; *State* v. *Jackson* (5/2/96), Cuy. App. No. 69501, unreported. The Ohio Supreme Court requires a petitioner to demonstrate that defense counsel substantially violated ore or more of his_essential duties to his client and that the violation prejudiced the defense. *State v. Hester* (1976(, 45 Ohio St. 2d 71; accord, *State* v. *Lytle* (1976), 48 Ohio St. 3d 391, 396-397, vacated in part on other grounds (1978), 438 U.S. 910. Lastly, the relevant inquiry is not what counsel should have cone, but rather whether the choices that were made were reasonable. *Siripongs v. Calderone* (9* Cir.1998), 133 F.3d 732, 736.

20. The record indicates that defense counsel did conduct lengthy cross-examinations of ail the State's witnesses. Thus, Petition cannot establish the deficient performance prong of the Strickland **test.** Moreover, the result of this trial would not have been different had defense counsel enlisted Dr. Stinson to prepare for cross-examination. Thus, Petitioner cannot establish the prejudice prong of the Strickland test.

21. Petitioner speculates that the services of an expert would have "assisted trial counsel in his cross-examination of the state's witnesses." Petition at 7. Petitioner goes on to generally state that this cross-examination would have had a material impact

on the way the trier of fact understood the facts of this case. Petitioner does not, and cannot explain how services of Dr. Stinson would have possibly changed the outcome of this case in light of the extensive testimony from victims, foster parents, social workers, end medical professionals who all presented thorough and compelling evidence of sexual abuse committed by Petitioner.

22. Sharon Harpel the foster parent to Kristen and Katelyn Krzywkowski testified that when the children came to her home in July. 2000, Kristen was not potty trained, would soil herself and wet the bed nightly for the first 7-8 months she was in her home. (T. 990.) She testified that the children exhibited highly sexualized behaviors. Specifically, Kristen frequently masturbated in both her_bed and the bathtub, emulated erotic dancers in public, and "frcnch-kissed" Sharon. (T. 995-1010). Sharon also testified that she observed Kristen fondling her younger sister's vaginal area. *Id.* Sharon also testified that Kristen had frequent nightmares and would wake abruptly, fearing that her parents were in the room. (T. 995.) Sharor. testified that Kristen would become agitated and upset and would then disclose incidents of sexual abuse to her, abuse perpetrated by Petitioner. (T. 1010-14) Specifically, Sharon recalled incidents where Kristen told her that her dad inserted his fingers and toys in her and her siblings private area. *Id.* She further testified that she did not question Kristen about these incidents, but would note them in reports to the foster agency, Specialized Alternatives for Family and Youth, hereinafter SAFV. *Id.*

23. Kristen testified that her father had placed four fingers Into her bun, that he had placed toys is her butt and that he had dons so many times. (T. 1096, 1104-11, 1236.) Kristen described En encounter in the bathroom where her father pulled down her

pants and stuck his fingers in her butt. *Id.* Kristen also testified that she would be locked in the attic, tied up, or hit by her father when disciplined. (T. 1088-1090, 1147,1153-55)

24. Elizabeth Alexander testified that she was the foster mother to Ryan and Aaron Krzywkowski and that the boys would horde food, Ryan mistreated and abused animals, that both boys constantly masturbated, that Ryan would draw pictures of ejaculating penises. that Ryan would expose himself to other children, and that she observed Ryan straddling Aaron with his penis near Aaron's mouth, a game described by Ryan as "the spider and the fly." (T. 1260-70,1273, 1278,1280-81. 1286-87.) Elizabeth testified that Ryan and Aaron disclosed incidents of sexual abuse to her. (T 1293.) She also testified that the boys would fondle each other and that Aaron would inappropriately touch her breast. (T. 1297-98.)

25. Julie Pretryman testified that she is a social worker for Cuyahoga County Children and Family Services and that she investigates allegations of sexual abuse to determine the welfare and safety of the child and to assess need for medical treatment (T. 1641-42, 43, 1651-52, 1653.) Ms. Prettyman explained her role in interviewing the children and how the interviews were recorded (T. 1643-50.) She interviewed Kristen and Aaron in September, 2000. (T. 1650-51, 53.) During the course of the interviews Ms. Prettyman testified that Kristen disclosed that her father kissed her and put his tongue in her mouth, that he touched her siblings in the same way her siblings were touched, and that Kristen said "Dad stuck his private in my butt, and it hurt and it was red and it was hard and it smelled like poop," and that when dad was penetrating her he would moan and groan, moan and groan, andsay the words "mother fucker." (T. 1654-55,

1664.) *In* light of these disclosures and the interviews, she immediately referred the children for medical examinations and to begin treatment. (T. 1655.)

26. Dr. Gemill, a pediatric physician at Mercy Hospital in Toledo testified that he physically examined the children ir. September, 2000 and November, 2000. He has been treating sexually abused children 1985. (T. 1467.) He testified that the children did not exhibit physical signs of sexual abuse, but that was not uncommon and that children's bodies would have had sufficient time to heal and show no abnormal findings. Dr. Gemmill also testified that a clinical history was taken by the staff at the hospital and that given the disclosures of abuse made by the children to the foster parents and the clinical staff, as well as the sexualized behaviors observed by the children that it was his opinion that the children were sexually abused. Dr. Gemmill's reports on this were admitted into evidence.

27. Darla Vogelpohl an Assistant Professor at the Medical College of Ohio testified that she was the clinical nurse who examined the Krzywkowski children along with Dr. Gemmill. (T. 1703, 1728.) She described the clinical process in general prior to describing her specific exams of the children. (T. 1715-1728.) She testified that Kristen disclosed that "Both mommy and daddy would poke me with :heir finger in my private area and my butt," and that "it hurt." (T. 1731.)

28. Darla Vogelpohl further testified that Aaron disclosed that "He (his father) put his private part in my mouth and ears," and that his dad did touch the area where he pooped with his private parts and that it hurt. (T. 1746.)

29. Cynthia King, Deputy Director of Jefferson County Children's Services Board, and serves as a consultant and trainer for child abuse workers in three states. (T.