

1788) Mrs. King's testimony concerned the behavioral indicators children of sexually abused children. Mrs. King stated that 75% of children who have been sexually abused have been found to exhibit symptoms in the form of behavior, such as sexually acting out with others, bed-wetting, excessive masturbation, and aggression. (T. 1809-1821.)

30. Mrs. King testified that she reviewed SAP Y records and the Medical Reports of Dr. Gcmill. (T. 1821.) She testified that based upon this information, the Krzywkowski children displayed behavioral indicators that were consistent with signs being displayed by children who were known to be sexually abused. (T. 1825.) She further testified that Ryan's behaviors of animal mutilation, excessive masturbation., aggression, food hoarding, bed-wetting, and not using the toilet (T. 1821-32.) These behaviors were testified to by Ryan's foster mother.

31. Mrs. King testified that Aaron was reported to be engaged in a sexual game, disclosed sexual activity among his family members in Dr. Gemill's report, which report had been admitted into evidence. (T. 1832, 1842-43.) She further testified that it was reported to her that Kristen displayed sexualized behaviors, food hoarding, nightmares about her parents. (T. 1844-46.) These behaviors were testified to by Kristen's host mother. Ms. King also testified that sexually abused children disclose in many ways and at various times and may even recant disclosures. (T. 1833-1841.) She also testified that sexual abusers are generally known to their victims and it is not uncommon for the victim to wish to maintain a relationship or to continue to love their abuse.; (t. 1848-50.)

22. In light of the foregoing testimony, it cannot be said that the result of this trial would have been different if trial counsel had employed Dr. Stinson to assist in the cross-examination of the State's witnesses.

#### Conclusions of Law

After an examination of the entire proceedings in CR 401497, the petition for post-conviction relief, and all of the files and records pertaining to the proceedings, the Court concludes that no substantial grounds for post-conviction relief exist and no hearing is warranted based on the following conclusions:

1. The Court concludes that defendant's instant petition was filed within 180 days of the filing of the trial transcript in the court of appeals in his direct appeal, and that it is, therefore, timely. R.C. 2953.21(A).

2. The Court concludes that Petitioner's claim of error is subject to dismissal because the claim is barred by the doctrine of *res judicata*. 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 *resjudiccta* bar. Petitioner never argues that Dr. Stinson 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. Stinson 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 dskors* the record and Petitioner cannot overcome the *res judicata* bar. *Lawon, supra; Greer, supra.*

3. This Court concludes that defendant has not carried his burden to satisfy an ineffective assistance of counsel claim under the standard set forth in *Strickland v. Washington* (1984), 466 U.S. 688

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

5. 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 worker\*, and medical professionals who all presented thorough and compelling evidence of sexual abuse committed by Petitioner.

Based on the foregoing findings and conclusions, this Court concludes that defendant has failed to establish sufficient grounds to believe that there was such a denial or infringement of his Constitutional right to due process, a fair trial, or the effective assistance of counsel that requires this Court to render his conviction void or voidable. R.C. 2953.21(A)(1). The petition for post-conviction relief filed by defendant Grady Krzywkowski must be and, therefore, is, dismissed without a hearing. R.C. 2953.21(C); *Jackson, supra- Calhoun*.

Date 12/11/03

Judge Shirley Strickland Saffold

Pursuant to Civ.R. 58(B), the Clerk of Courts is hereby ordered to send copies of the foregoing to the following parties and its date of entry upon the journal:

Molly J. McAnespie, Assistant State Public Defender, Office of the Ohio Public Defender, 8 East Long Street - 1<sup>st</sup> Floor, Columbus, Ohio, 43215.

Jon Oebker, Assistant County Prosecutor, 1200 Ontario Street, 8<sup>th</sup> Floor, Cleveland, Ohio 44113.

IN THE COURT OF COMMON PLEAS  
CRIMINAL DIVISION  
CUYAHOGA COUNTY, OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Respondent, : Case No. CR-401497  
v. : Judge Shirley Strickland-Saffold  
GRADY KRZYWKOWSKJ, :  
 Defendant-Petitioner. :

AFFIDAVIT OF BOB STLNSON, PSY.D.

IN THE STATE OF OHIO :  
 : SS:  
COUNTY OF FRANKLIN :

I, Bob Stinson, first being duly cautioned and sworn, state the following to be **true**:

1. I am a psychologist, licensed to practice psychology independently in Ohio. I hold a Doctor of Psychology (Psy.D.) degree from the Wright State University School of Professional Psychology (WSU-SOPP). I work full time at the Twin Valley Behavioral Healthcare Columbus Campus (TVBH-CC) where I am an Active Full Member of the Medical Staff Organization for Psychology Privileges at Level III (Full Clinical Privileges) with additional Active Forensic Evaluation Privileges. I have adjunct faculty affiliation with The Union Institute and University in Cincinnati, Ohio, and I serve as a guest lecturer and clinical adjunct supervisor to WSU-SOPP I also have a private practice, where I specialize in clinical and forensic psychology.
2. My attached Curriculum Vita (CV) is a true and accurate copy of my qualifications, and training and employment history.

3. I have been retained by Molly J. McAnespie, Assistant State Public Defender, to review available trial transcripts in reference to the above-captioned case.
  4. I have reviewed the following transcripts which were made available to me: Opening Statement on Behalf of the Defendant (pp.968-980); Direct Examination of Dr. W. David Gcmmill (pp 1461-1553, pp 1557-1561); Cross Examination of Dr. W. David Gemmill (pp. 1562-1576; pp. 1583-1588); Direct Examination of Julie Prenyman (pp. 1641-1669); Cross Examination of Julie Prettyman (pp. 1670-1693); Direct Examination of Cynthia King (pp. 1788-1851); Cross Examination of Cynthia King (pp. 1852-1932); and Closing Argument on Behalf of the Defendant (pp. 1978-2035).
  5. My review of the transcripts revealed that the Defense Attorney referred to clinical issues in his opening statement that are within the realm of expertise of psychologists (e.g., memory, child development, child behavior, clinical and forensic interviewing, etc.). In fact, the defense referred directly to "established guidelines that...the psychological community, .has developed over time scientifically" (pp. 973, lines 19-23). It was further revealed in my review of the transcripts that social workers called as experts by the prosecutor referred to psychological work and psychological experts, one of whom was described as the "leading psychologist nationally that deals with interviewing" (pp. 18(M, line 9-10). Yet, as I understand it, no psychological experts were consulted or called as **witnesses**.
- N
6. After reviewing the above records, it is my professional opinion, offered with a reasonable degree of psychological certainty, that there is a psychological literature base that bears directly on several issues in this case, including, but not necessarily limited to the following:

As it relates to evaluations:

- A. The standard of care in evaluating children of alleged sexual abuse;
- B. The standard of care in obtaining a psychosocial history;
- C. The standard of care in obtaining a sexual history;
- D. The difference between standardized and unstandardized data collection techniques and the advantages and disadvantages and strengths and limitations to each in evaluations;
  
- E. The difference between structured and unstructured data collection techniques and the advantages and disadvantages and strengths and limitations to each in evaluations;
- F. The difference between conducting joint and individualized interviews and the advantages and disadvantages and strengths and limitations to each, particularly as it relates to children and care givers;
- G. The extent to which individual parts of an evaluation (e.g., history) should be relied upon (solely or in connection with other data) in forming conclusions in evaluations;
  
- H. The importance of using collateral sources in forensic evaluations:
- I. The cognitive errors that evaluators are prone to making in evaluations (e.g., selective abstraction, overgeneralization, all-or-none thinking);
  
- J. Understanding the social psychological concept of attributional error,
- K. The likelihood of evaluators projecting non-verbal cues that serve to influence the responses of respondents, consciously and unconsciously, during evaluations;
- L. The existence and purpose of numerous guidelines as it pertains to the evaluation of children of alleged sexual abuse;
- M. The importance and expected practice that individuals separate the role of treatment provider/advocate and forensic examiner to the extent possible, the reasoning behind such an expected practice, and the pitfalls of not doing so;

As it relates to childhood behavior;

- N. Understanding normal and aberrant childhood behavior
- O. Descriptions of developmentally and age appropriate behaviors and language;
- P. Interpreting and understanding the behaviors of children;
- Q. Understanding children's testimony and the credibility of children's testimony, given various developmental considerations;
  
- R. Understanding the impressionability and suggestibility of children, particularly at various developmental levels;
- S. Understanding real versus "created" memories, or accurate versus distorted memories;

As it relates to the scientific methodology and statistical principles in citing research and data:

- T. The principle of confirmatory bias and how this impairs evaluate: objectivity;
  
  - U. The issue of falsifiability as it relates to defining something as scientific knowledge or not;
  - V. The statistical concepts of reliability and validity as it pertains to evaluations;
  - W. The very important issue of understanding base rates and presenting this information so that statistics and numbers are not misrepresented or misinterpreted.
7. It is further my opinion, offered with a reasonable degree of psychological certainty, that psychological expertise, such as consultation, could have had a material and significant effect on how the defense attorneys questioned the expert witnesses.
  
  8. Furthermore, it is my opinion, offered 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.

9. Rather than go into detail on each of the issues delineated in 6-A through 6-W above, I will provide a few examples to support my professional opinion that there is a psychological literature base that bears directly on several issues in this case; that psychological expertise, such as consultation, could have had a material and significant effect on how the defense attorneys questioned the expert witnesses, and 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.

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 it 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 are 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, or is too fearful to maintain the secret, or has found himself or herself in a

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"safe" situation within which to disclose the abuse. On the other hand, if the child "discloses" abuse some time after it 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 and/or is assumed to be scared. Recantation is described as "typical" of children who have been abused and, therefore, one cannot disprove abuse. Thus, this represents another opinion that cannot be falsified. Again, if it cannot be falsified or disproved, it is not definition, scientific evidence.
4. As yet another example from the transcripts that I reviewed, consider Dr. Gemmiirs physical examination. His physical examination did not meet the standard of falsifiability that is inherent in scientific investigations. That is, he did not prepare an examination that would allow his suspicions or hypothesis to be falsified, if his hypotheses were, in fact,

false. Consider that his testimony suggested that if the hymen is gone, this would be proof or evidence of penetration in a female, or more specifically, in a young girl. On the other hand, he testified that if the hymen is not gone, there still could have been penetration. Thus, he devised a physical examination whereby one can only conclude that there could have been sexual abuse, and penetration in particular. His hypothesis was not open to falsifiability, and does not therefore, constitute good scientific practice.

5. Cynthia King's testimony was similarly replete with **testimony that would not be considered by the scientific methodology to be valid scientific evidence. Her testimony** about the disclosure process, and about wanting to return home were not falsifiable. The disclosure process was discussed in 9-A-2 and 9-A-3 above. As it relates to the issue of wanting to go home, Ms. Prettyman presented evidence that suggested whether a child wanted to go home to the alleged perpetrator or whether the child was afraid to go home to the alleged perpetrator, either would be consistent with a child who had been sexually abused. Once again, she **presented testimony that can only result in a finding** that the child's behavior was consistent with sexual abuse. It was not open to falsifiability, and as such, is not **based on the scientific methodology.**

**B. Understanding the social psychological concept of attributional error and illogical assumptions that are made in attributions, including confirmatory biases:**

1 . Attribution refers to one's efforts to understand the causes behind others<sup>1</sup> behaviors. Individuals often *assume* that certain behaviors are directly attributable to some cause even in the absence of any proof or in the absence of adequate proof. Evaluators, in particular, may *jump to conclusions* based on past experiences that have *biased* their present expectations. Such biased expectations can result in *premature foreclosure*, which means that the evaluator fails to consider other equally or even more likely causes for the behavior. They then proceed with a *confirmatory bias*, whereby they *ignore, forge, or minimize* evidence that 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. Oemmill 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 hi. 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, 'iois 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 **disomfirm 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 rehes solely on the history, which raises serious questions about the scientific nature of the evaluation, given that it is not open to faisifiability (see discussion above on faisifiability).

3. Dr. GemmilPs 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 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 or minimizing the vast majority of experiences to which the person has been exposed.

4. A confirmatory bias was further evidenced when Dr. Geminil 1 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 hypotheses 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 role 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. Among the differences between a therapist, treatment provider, and/or advocate on the one hand, and a forensic evaluator on the other are the following:

- a.. They differ in the cognitive set and evaluative attitude of each expert. Care providers and/or advocates are trained to be supportive, accepting, and empathic. Forensic evaluators are trained to be neutral, objective, and detached.
- b. They have differing areas of expertise. The care provider and/or advocates are experts in therapy techniques for treatment of the impairment. The forensic evaluator employs techniques relevant to the legal claim.
- c. They differ in the nature of the hypotheses that each tests. The care provider and/or advocates are accustomed to investigating the diagnostic criteria for the purposes of therapy and treatment. The forensic evaluator uses the psycholegal criteria for purposes of the legal **claim**.
- d. They differ markedly in the scrutiny applied to the information utilized in the process and the role of historical truth. The care provider and/or advocates routinely base their conclusions on

the information from the person being treated with little scrutiny of that information by the treatment provider or advocate. In forensic evaluations, though, litigant information is supplemented with that of collateral sources and scrutinized by the evaluator and the court.

- e. The two roles differ in the amount and control of structure in each relationship. The care provider and/or advocates allow the patient to structure the sessions and such sessions are relatively less structured than forensic sessions. The forensic evaluator, on the other hand, structures the session and makes it relatively more structured than would a treatment provider.
- f. A care provider and a forensic expert differ greatly on the degree of "adversarialness" in each relationship. A treatment provider and/or advocates generally establish a helping relationship and are rarely adversarial. A forensic examiner establishes an evaluative relationship, which frequently can be adversarial.
- g. The two roles establish different goals. A treatment provider and/or advocates attempt to benefit the patient by working within the relationship. A forensic evaluator advocates for

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the results and implications of the evaluation for\* the benefit of the court and the trier of fact.

h. Finally, there is a major difference in the impact on the critical judgment by the expert. For a care provider and/or advocates, the basis of the relationship is the therapeutic alliance and critical judgment is likely to impair that alliance. The basis of the relationship in a forensic evaluation, however, is evaluative and critical judgment is unlikely to cause serious emotional harm, and, in fact, critical judgment is expected.

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 are 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 are 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 11 -12). 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. Prenyman 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 I 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, given 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 that 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 signs 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 signs, and only 10% of the non-abused children show the signs, then there must be a higher probability that the child we are examining has been sexually abused. However, notice that 10% 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 "sexual ized 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 sexualized 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 that we will select a child from the non-abused population, as compared to the abused population, and yet 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 signs, 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 further 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 that "with sexually abused children, [masturbation] becomes an excessive behavior for some of these children. It becomes a behavior that consumes them" (pp. 1820, Unes3-6). 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. Kjng, like many others, intentionally or inadvertently present information that oftentimes results in erroneous conclusions being drawn.

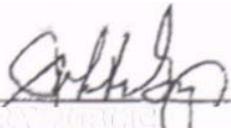
- 10.** As I have indicated, I believe that there is a psychological literature base that bears directly on several issues in this case. I believe that psychological expertise, such as consultation, could have had a material and significant effect on how the defense attorneys questioned the expert witnesses in this case. I further believe 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. Finally, it is possible that if the jury in this case had the benefit of hearing from a psychological expert, that they would have interpreted much of the expert testimony differently, they would have weighed it differently during their deliberations, and to the extent that they relied upon the expert testimony, they may have earned\* to a different conclusion through their deliberations.

Further Affiant saith naught.

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Bob Stinson, Psy.D.

Sworn to and subscribed before me. this the 5th day of July 2002.



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John M. Gozs



•JOHN M. GOZS  
NOTARY PUBLIC  
IS A-39

# BOB STINSON, PSY.D.

Psychologist

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**Primary Business Address:**

Twin Valley Behavioral Healthcare 2200 West Broad Street Columbus, OH 43223 (614) 752-0333 ext 5124

[Stinsonb@mhmail.mh.state.oh.us](mailto:Stinsonb@mhmail.mh.state.oh.us)

Doctor of Psychology

**Bachelor of Science**

**Deaf Studies**

## Education

Psy.D., September 1999 Wright State University School of Professional Psychology Full APA Accreditation Dayton, Ohio

B.S. in Psychology, June 1995

Summa Cum Laude

With Honors in Liberal Arts

With Distinction in Psychology

Minor: Criminology and Criminal Justice

The Ohio State University

Columbus, Ohio

Proficient in American Sign Language (ASL) and Deaf culture Sinclair Community College Dayton, Ohio

## Special Credentials Ohio Psychology License

\* License Number 5715, September 22, 2000 - Present

### Hospital Privileges

University- Affiliations

Twin Valley Behavioral Healthcare

Active Full Member of the Medical Staff Organization Privilege

Level III (Full Privileges)

Additional Forensic Evaluation Privileges

(Competency to Stand Trial, Sanity, Independent Risk Assessment)

Union Institute Graduate School Adjunct Professor Wright State University School of Professional Psychology-Post Doctoral Clinical Supervisor



July 1999-Present

## **Professional Experiences**

### **Twin Valley Behavioral Healthcare-Columbus Campus**

Psychologist II (Started as a Post-Doctoral Resident)

SEIU/District 1199 Union Delegate

Columbus, Ohio

Clinical Hours: 40 hours per week

#### **Population:**

Responsibilities:

Multicultural male and female adult psychiatric inpatients who present with a broad variety of problems, including legal issues and severe DSM-IV Axis I and Axis II psychopathology, civil & forensic patients

Complete psychological evaluations

Complete intellectual, neuropsychological, personality and forensic assessments

Conduct initial risk assessments and risk assessment updates

Conduct individual, group, marital, and family psychotherapy

Provide psychological training supervision to pre- and post-doctoral residents

Serve as a psychological consultant

Provide community education

Consult other disciplines including medical, nursing and social work

Fulfill various administrative responsibilities (e.g., forensic website webmaster), and serve as an elected union delegate to the union

#### **membership**

September 2000-Present

### **Forensic Private Practice**

Psychologist Westerville, Ohio

Population:

Responsibilities:

Multicultural male and female adults and children in need of forensic evaluations

Provide psychological consultations to attorneys

Complete forensic evaluations (e.g., competency to stand trial, sanity, and mitigating defense evaluations), including reviewing records, interviewing individuals, and psychologically testing and evaluating defendants

Write forensic reports

Testify in Common Pleas and Municipal Courts

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January 2001 -Present

**Bureau of Disability Determination**  
Psychological Consultant Columbus, OH

**Population:**

Multicultural male and female adults and children applying for Title U and/or Title XVI disability benefits under Social Security Act

**Responsibilities:**

Evaluate medical evidence to determine its adequacy- for making disability determinations

Assess the severity of impairments and describe the functional capacities or limitations imposed by impairments

Discuss with examiners and other staff members way: to resolve problems in getting evidence of record

Review requests for consultative examinations to assure necessity and describe alternatives as needed

Evaluate medical/psychological questions and make recommendations for improvement to obtain proper evidence

Discuss with staff members ways to improve relations with the medical profession, enlarge consultative examiner panels, and minimize processing **time**

Discuss with training staff ways to improve examiner understanding and use of medical evidence

Review consultative reports for deficiencies in content and recommend ways to avoid deficient reports

Participate in vocational rehabilitation screening and referral processes

Review determinations to assure integrity of decisions based on medical evidence

August 2001-Present

Columbus Colony Elderly **Care**  
Contract Psychologist  
Mental Health Services Supervisor  
Westerville, Ohio

Population:

Multicultural male and female deaf hearing, and hard of hearing geriatric nursing home residents

**Responsibilities:**

Complete psychological evaluations and provide individual psychotherapy

Provide consultation to nursing home staff members and administration

Develop, train, and supervise a mental health treatment team

**The Ohio School For the Deaf**  
Contract Psychologist **Columbus, Ohio**  
**BOB STINSON, PSY.D.**

PAGE 4 OF 20

October 2001-Present

**Population:**

- \* Deaf and Hard of Hearing children enrolled at the Ohio School for the Deaf or another public school throughout the state of Ohio

**Responsibilities:**

- \* Provide psychological and psychoeducational evaluations, or supervise such evaluations, as part of a multifactorial evaluation (MFE) team
- \* Provide psychological consultation to the multifactorial evaluation team.

**Drs. Gibeau A Hrinko (Private Practice)**

Pre-Doctoral and Post-Doctoral Psychology Assistant  
Springfield, Ohio  
Clinical Hours: 8 hours per week  
September 1998-September 2000

**Population:**

Multicultural male and female children, adolescent and adult outpatients who presented with a broad variety of psychological and emotional issues

**Responsibilities:**

Completed psychological evaluations and assessments (including BVR, BDD, parental fitness, custody, and forensic evaluations)  
Completed psychoeducational assessments and served as the psychology representative on multifactorial evaluations (MFEs)  
Conducted individual and group psychotherapy  
Developed and implemented an anger management group for the Clark County Juvenile Court  
Provided community education  
Served as a psychological consultant

**Wright State University-, School of Professional Psychology Residency Program (Full A?A Accreditation)**

Pre-doctoral Psychology Resident

Dayton, Ohio

Hours: 40 hours per week; total hours = 2000

*1st Rotation: Twin Valley Psychiatric System-Dayton Campus* Rotation Hours: 40 hours per week;  
total hours - 930

September 1998-AugUil 1999

September 1998-February 3999

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Population:  
Responsibilities:

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Multicultural male and female adult psychiatric inpatients who presented with a broad variety of problems, including severe DSM-IV Axis I and Axis II psychopathology, civil and forensic patients

Completed psychology section of multidisciplinary assessments Conducted initial risk assessments and risk assessment updates Observed competency to stand trial and sanity evaluations Developed and implemented a problem solving group Participated as a member of a multidisciplinary treatment team Wrote multidisciplinary treatment plans Taught a section on psychotherapy to medical students

March 1999-August 1999

*2nd Rotation: Ellis Human Development Institute* Rotation Hours: 40 hours per week; total hours = 1000

Population:

**Responsibilities:**

- \*" Multicultural male and female children, adolescents and adults who presented with a broad variety of outpatient problems
- \* Provided individual, couples, family, and group psychotherapy
- \*" Completed cognitive, personality, and academic assessments
- \* Co-facilitated a domestic batterers group (PATH)
- \* Served as Resident On-Call
- \* Supervised graduate level trainees
- \* Participated in weekly staffing\*

September 1997-August 1998

Center for Psychological Services, Wright State University Office of Disability Services, Wright State University

Pre-doctoral Psychology Trainee

**Dayton, Ohio**

Practicum Hours: 17 hours per week; total hours = 815

Population:

**Responsibilities:**

Multicultural and diverse college students experiencing mood, anxiety, and adjustment disorders; academic difficulties and learning disabilities; drug and alcohol problems; relationship difficulties; gender identity issues; eating disorders; and or personality disorders  
Conducted short and long term psychotherapy

Completed cognitive, personality, educational, and neuropsychological assessment

Co-facilitated a stress management and relaxation group

Provided psychoeducational presentations

Served as the psychological liaison and consultant with the athletic and recreation department

On-call for crisis intervention; initial screenings and consultations

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May 1996-August 1998

**Male Responsibility Program, Dayton Urban League**

Pre-doctoral Psychology- Assistant, Student Supervisor  
Dayton, Ohio

Practicum Hours: 4 hours per week; total hours = 300

**Population:**

Responsibilities:

Adolescent males, primarily African American, experiencing behavioral problems; academic difficulties; learning disabilities; and mood, anxiety, and adjustment difficulties

Supervised first and second year graduate students who participated in the tutorial portion of the Male Responsibility Program

Consulted other professionals, including school personnel

Co-developed an behavioral incentive program

Conducted individual and group counseling

Administered academic and psychological assessments

Research assistant, having engaged in research design, data collection, and data analysis

**London Correctional Institution, State Prison**

Pre-doctoral Psychology Trainee

London, Ohio

Practicum Hours: } 7 hours per week; total hours << 860

September 1996-August 1997

**Population:**

Responsibilities:

Multicultural male inmates presenting with personality disorders, anxiety disorders, adjustment disorders, psychotic disorders, sexual disorders, and substance-related disorders Developed and facilitated a weekly anger management group Performed pre-parole evaluations and provided written reports Consulted with and participated as a member of the Local Control Committee (overseeing a disciplinary segregation unit) Assisted in forensic evaluations (e.g., competency to be executed, competency to stand trial, and juvenile bind-over cases) Conducted short and long term individual psychotherapy



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Frederick A. White Bealtb Center, W right State University      November 1996-January 1997  
Pre-doctoral Psychology Trainee  
Dayton, Ohio  
Praciicum Hours: Total hours = 25

Population:      >      University students suspected of having a learnine disability  
Responsibilities: \*"      Completed learning disability assessments and reports

Mental Health and Deafness Program      September 1995-June  
1996  
Pre-coctoral Psychology<sup>1</sup> Assistant  
Dayton, Ohio  
Practicum Hours: 5 hours per week; total hours = 230 hours

Population:      \*      Deaf children and their families; presenting problems included adjustment  
disorders, hyperactiviry, and behavioral problems Responsibilities:      \*  
Provided short and long term individual and family psychotherapy  
\*      Gained experience and supervision in working with deaf clients, their  
families, and sign language interpreters

Suicide Prevention Services, North Central Mental Health Center      September 1994-May 1995  
Undergraduate Psychology Volunteer  
Columbus, Ohio  
Service Hours: 6 hours per week; total hours = 145 hours

Population:      \*      Members of the central Ohio community who phoned in to the crisis  
intervention hotline  
Responsibilities: \*"      Completed 50 hours of instruction and training \*  
Managed a crisis intervention hot line

### Teaching Experiences

Union Institute Graduate School Adjunct Professor      April 2002 -  
Present  
Position:      Adjunct Professor  
Doctoral Committee Member  
Courses:      Social Bases of Behavior  
Consultation and Supervision Responsibilities:  
Serve as a voting member of doctoral committees

Read and respond to material presented by Union Institute learners  
Provide in-depth analysis of learner performance  
Assist in guaranteeing the use of appropriate research methodologies  
Encourage the acquisition of specific disciplinary knowledge  
Evaluate students and the Union Institute process





## Scholarly Activities

### Publications:

**Bums, K., Raia, J., Stinson, B., Coon, T., Lofton V., Toland. D. Firearms risk manaeement in**

psychiatric care: A follow-up studv. Manuscript in preparation.

Friedberg, R. D., Vjglione, D. J., Stinson, B. L., Beal, J. C. G., Fidaleo, R. A., Lovette, J., Street, G., & Yerka, E. The role of gender and social perceptions in depressed patients-ppl scores  
Manuscript in preparation.

**Bums, K, Raia, J., & Stinson, B. (2002). Firearms nsk management: In rtyly. Psychiatric Services. 53.**

Sherman, M, Bums, K., IgneuL J., Raia. J., Lofton, V., Toland, D., Stinson, B., Tilley, J. f & Coon, T. (2001). Firearms risk management in psychiatric care: Innovative approaches. Psychiatric Services. 52. 1057-106!.

**Stinson, B L., Friedberg, R. D., Cusack. M J., Page, R. A. (2000). Improving athletic performance and motivating athletes: One thought at a time. In L. VandeCreek (Ed.), Innovations ;n clinical practice: ft source book /Volume 18). Sarasota, FL: Professional Resource Press.**

Barries, A. Q., Landau, J. R., Stinson, B. L., Liau, A. K., & Gibbs, J C. (2000). Cognitive distortion and problem behaviors in adolescents. Cnminal Justice and Behavior. 27, 36-56.

Friedberg. R. D., Viglione, D. J., Stinion, B. L., Beal, K. G., Fidaleo, R A., Lovefle, J., Street, G., Ycrka, E., & Celeste, B. (1999). Perceptions of treatment helpfulness and depressive symptomology in psychiatric inpatients on a cognitive therapy unit. Journal of Rational-Emotive £ Cognitive Behavior Therapy. 17. 33-50.

Stinson. B. L. (1997). The relationship between attributional stvle. athletic performance, and dropping out in college athletes: Implications for the recruiter, coach, athlete, and sport psychologist. Doctoral dissertation, Wright Slate University School of Professional Psychology, Dayton, OH.

Stinson, B. L. (1995). Relations between cognitive distortions and externalizing ' internalizing behavioral disorders in anti-social youth. Undergraduate Honor=s Thesis, The Ohio State University, Columbus, OH.



**Presentations:**

- Stinson, B. (July, 2002). Mental impairments: Understanding the language and statistics, and applying them to disability claims. Columbus, OH. Presentation to the Bureau of Disability Determination's disability examiner class.
- Stinson, B., & Haskins, K. (April, 2002). Medical and psychological impairments: Critical disability determination issues. Columbus, OH (4.25 CLEs).
- Stinson, B. (2002, January). Mental retardation and the Social Security Administrations Bureau of Disability Determination: Problem areas and issues. Columbus, OH.
- Raia, J., Stinson, B., Pawlarczyk, D., Matyi, C., DeMuth, D., Craft, L., Casterline, V., Gozs, J., Hollander, R., Kennedy, T. M., & Johnson, K. (2001, December). Quality assurance and performance improvement: Understanding quality assurance issues and involving improvement strategies at the Bureau of Disability Determination. Columbus, OH- (5.0 MCEs).
- Stinson, B. (2001, November; 2001, January, and 2000, June). Cognitive-Behavioral Treatment of Obsessive Compulsive Disorder. Scholarly presentation to the Pre-Doctoral Residency Program at Wright State University School of Professional Psychology as part of their Empirically Validated Treatment Seminar Series, Dayton, OH.
- Raia, J., Johnson, K., Craft, L., Gozs, J., Hollander, R., Kennedy, T., Stinson, B., Demuth, D., Casterline V., & Pawlarczyk, D. (2001, May & June). Disability Evaluations for Mental Impairments: How to Accurately Assess, Test, and Report Mental Evaluation Findings. Presentation delivered to psychological consultants of the Social Security Administration's Bureau of Disability Determination, Columbus, OH (4.0 MCE Credits).
- Stinson, B. (2000, August). A forensic system emerging: Dot com, Poster presented at The Ohio Department of Mental Health's *A Forensic System Emerging: How Do We Survive In It* two day conference. Columbus, OH.
- Raia, J., Lofton, V., Toland, D., Coon, T., & Stinson, B. L. (1999, August). Firearms assessment, control and treatment process. Poster presented at The Ohio Department of Mental Health and the Northeastern Ohio Universities College of Medicine's *Working With Challenging*

*Forensic Populations* wo day conference. Cambridge, OH.

Stinson, B. L., & AronofY, J. (1998, November) Ethical and legal responsibilities whes others are in peril. Who, when and how? Grand Rounds presentation delivered to the Wnght State University School of Professional Psychology doctoral students and staff, Dayton. OH.

Friedberg. R. D., & Stinson, B. L. (1998, April). Focusing the mind»s eve: Using cognitive strategies to enhance athletic perfonnance, Presentation to Xema City Schools faculty and staff, Xenia, OH.

**Prwntations (Continued):**

Stinson, B. L., & Page, R. (1997, November). To olav or not to plav: The relationship between causal attributional stvle and athletic performance in college athletes. Presentation delivered at the Ohio Psychological Association Fall Convention, Columbus, OH.

Stiason, B. L. ( 1997, December). Sports, school, and holidays, oh rov! How to handle all the Stress. Presentation to the Wright State University Men«s Basketball Team. Wright State University, Dayton, OH.

Stinson, B. L.. & KUomz, B. T. (1997, November). The total package- Wellness for vour body and mind! Presentation to Wright Sate Uui.ersity staff and students. Sponsored by Wright State University Center for Psychological Services and the Office of Campus Recreation, Dayton, OH.

Stinson, B. L. (1997, October). Stress and the college student: Ho\* to cope. Presentation to Wright State University Resident Services, Dayton, OH.

Stinson, B. L. (1997, September). Academics, athletics and stress: How to survive. Presentation delivered at the first annual RAIDER S.K.I.L.L.S. Student-Athlete Convention. Wright State University, Dayton, OH.

Stinsor., B. L. (1997, September). Recovering from athletic jrriuries one thought at a time. Presentation delivered at the first annual RAIDER S.K.I.L.L.S. Student-Athlete Convention Wright State University, Dayton, OH.

Stinson, B. L., & Friedberg, R. D. (1997, May). Show me the causes: The relationship between causal artributional, stvle and athletic performance in college athletes. Poster session presented at the Scholarship Recognition Conference of the Honor Society of Phi Kappa Phi. Dayton, OH.

Stinson, B. L. (1996, October). Stress: How to live with and without it! Presentation delivered to Wright State University«s varsity women»s softball team, Dayton, OH.

Friedberg, R. D., & Stinson, B. L. (1996, July). If vou build it.....Learned optimism as a mental strategy for improving athletic performance. Presentation to Vandalia High School Athletic Program Vandalia. OH

Stinson. B. L.. & Celeste, B. (1996, April). Stress management and athletics Presentation delivered to the Wright State University Athletic Department, Dayton, OH.



### **Continuing Education Programs Attended**

- Resnick, P (June, 2002). The Andrea Yates case: Murder out of love. Presentation at the Twenty Fourth Annual Continuing Education Conference: Forensic Issues, Updates, and Evaluations sponsored by the Association of Ohio Forensic Psychiatry Center Directors and The Northeastern Ohio Universities College of Medicine (1.5 MCE Credits).
- Evans, T., Sirkin, J., Konieczny, J. (June, 2002). An overview of Senate Bill 179 - Juvenile competence to stand trial: Developmental considerations and case vignette. Presentation at the Twenty Fourth Annual Continuing Education Conference: Forensic Issues, Updates, and Evaluations sponsored by the Association of Ohio Forensic Psychiatry Center Directors and The Northeastern Ohio Universities College of Medicine (1.5 MCE Credits).
- Borum, R. (June, 2002). Risk assessment and clinical judgment. Presentation at the Twenty Fourth Annual Continuing Education Conference: Forensic Issues, Updates, and Evaluations sponsored by the Association of Ohio Forensic Psychiatry Center Directors and The Northeastern Ohio Universities College of Medicine (6.0 MCE Credits).
- Young, M., Koemer, R., Neuzil, G., Harris, B., Jacobs, T., Lofton, V., & Woods, K. (May, 2002). Suicidaliry: Assessment and prevention. Sponsored by Wright State University School of Medicine with The Ohio Department of Mental Health, and Twin Valley Behavioral Healthcare (1.5 MCE Credits).
- Peterson, G., Jefries, M., & Komarek, P. (December, 2001). Forensic jgsues for community mental health providers and law enforcement personnel. Forensic workshop sponsored by the Ohio Community Forensic Association, Columbus, OH (2.0 MCE Credits).
- Schulz, S C. (November, 2001). Adolescent schizophrenia: Charact en sties and treatment. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Carpenter, L L. (November, 2001). Bipolar or borderline? Key issues in the diagnosis and treatment of mood instability and impulsivity. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Haskins, K., & Ross, R. (November, 2001). Psychology 2001 Critical Issues Update Competency to^tand Trial and Insamtv Defense, and Ohio Psychology Law 3rd Anr.ual Statewide Psychology' Conference sponsored by the Ohio Department of Mental Health, Columbus, OH (3.0 MCE Credits).
- Resnick, P., Burns, K., Gutheil, T., & Scott, C. (October, 2001). 2001 American Association of Psvchiatrv and the Law: Forensic review course. Three day intensive review course

sponsored by the American Association of Psychiatry and the Law (24.0 MCE Credits).

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### **Continuing Education Programs Attended (Continued)**

October 22, 2001:

Basic Law for Psychiatrists, Phillip Resnick MD, 1.25 hours  
Confidentiality and Tarasoff, Thomas Gutheil MD, 1.0 hours  
Violence Risk Assessment, Phillip Resnick MD, 1.25 hours  
Psychiatric Malpractice, Phillip Resnick MD, 1.25 hours  
Competence- Civil and Criminal, Kathryn Bums MD, 1.25 hours  
Detection of Malingering: Phillip Resnick MD, 1.25 hours

October 23, 2001:

Civil Commitment, Phillip Resnick MD, 1.0 hours  
Competence Video Exercise, Resnick MD & Bums MD, 1.0 hours  
Selected Landmark Cases, Phillip Resnick MD, 1.0 hours  
Report Writing, Phillip Resnick MD, 1.0 hours  
Insanity Defense, Phillip Resnick MD, 2.0 hours  
Insanity Report Writing, Phillip Resnick MD, 2.0 hours

10-24-01:

Right to Treatment, Phillip Resnick MD, 1.0 hours  
Right to Refuse Treatment, Phillip Resnick, 1.0 hours  
Correctional Psychiatry, Charles Scott MD, 1.25 hours  
Expert Witness Testimony, Phillip Resnick MD, 1.50 hours

Hogan, M. F., Saveanu, R., Russell, T. L., Thorward, S. R., Hill, J. W., Woods, J., Borcili, M. A., & Fitch, E. (October, 2001). After the terrorist strike: Getting back to mental health in Central Ohio. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

The Ohio Department of Mental Health and NASMHPD's Forensic Division (September, 2001). 2001 annual forensic conference. Sponsored jointly by The Ohio Department of Mental Health and NASMHPD's Forensic Division, Cincinnati, OH (6.0 MCE Credits).

The Ohio Department of Mental Health (July, 2001). Mental health diversification alternatives conference. Sponsored jointly by the Ohio Department of Mental Health and Northwestern Ohio Universities School of Medicine, Columbus, OH (7.5 MCE Credits).

Tilley, J. (July, 2001). Machiavellianism and sexual behavior. High-Machs' ends procurement during short-term romantic relationships. Scholarly presentation at the TVBH-CC Psychology Staff Meeting, Columbus, OH.

Haskins, K. (June, 2001). CAST-MR: Indications, contraindications, administration, scoring, and

interpretation. Lecture presented to select psychology staff at TVBH-CC, Columbus, OH.

Gordisb, L. (June, 2001). Geriatric assessment. Scholarly presentation at the TVBH-CC Psychology Staff Meeting, Columbus, OH.

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### **Continuing Education Programs Attended (Continued)**

Hall, N. (May, 2001). Stress and disease: Who gets sick and who stays well. Clinical presentation sponsored by CorText Mind Matters Educational Seminars, Reynoldsburg, OH (6.0 MCE Credits).

Armstrong, M., Sherman, M., Petty, C., Cataland, S, & Newcomer, J (May, 2001). Diversity concern: Diabetes rocllitus and new eeneration antipsychotic medication. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (2.5 MCE Credits).

The Ohio Department of Mental Health (May. 2001 V Healthcare Insurance Portability and Accountability Act (HIP AA) Training. Computerized training required for al! State of Ohio Department of Mental Health employees.

Ross-Lee, B. (May, 2001). Penny wise and pound foolish. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (1.0 MCE Credits).

Diamond, R. J. (May, 2001). Treatment of borderline personality disorder and recovery of schizophrenia. Clinical presentation for the Medical Staff Organization (MSO) of Twin Valley Behavioral Healthcare (TVBH), Dayton, OH (3.0 MCE Credits).

King, S., Kwan, J., Wooten, P., Lynch, J., Wagner, J., Wilson, S. H. (April, 2001). 2001 Humor Odvssev. Mav the Farce Be with You. Workshop sponsored jointly by the State of Ohio Department of Mental Health and Columbus State Community College, Columbus, OH.

Christensen, D. D. (April. 2001). Advanced topics in obsessive compulsive disorder. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

Drake. S. (March, 2001). Schizophrenia: Implications for ernnlovaojlity. Consultative training provided at the Bureau of Disability Determination Rehabilitation Services Commission, Columbus, OH.

Stein, R. G. (March, 2001). Dispute resolution skill building. Service Employees International Union (SEIU), District 1199, Ohio State Advanced Delegate Training, Columbus, OH.

Ignelzi, J. (February, 2001). Recovery principles and patient perception survey. Lecture presented by Jim Ignelzi, the Chief Executive Officer of the Twin Valley Psychiatric System, Columbus, OH.

Lawson, W. B. (February, 2001 V Complexities in recognizing treatable aggression in ethnically

diverse populations. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

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### **Continuing Education Programs Attended (Continued)**

- Rodio, J. R. (February-, 2001) All defendants are not the same: Initial of State v. Sullivan. Ohio Supreme Court. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Bums, K. A. (December, 2000). Mental illness behind bars. Grand Rounds sponsored by the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Hudziak, J. J. (December, 2000). The theoretical role of dopamine and norepinephrine in human behavior. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Harris, E. (November, 2000). Legal and ethical risks and risk management in professional practice: Sequence n. risk management in specific high risk areas. Workshop sponsored jointly by the Ohio Psychological Association and the American Psychological Association Insurance Trust (6.0 MCE Credits).
- Butterfield, P. (2000, November). Understanding anger. Workshop sponsored by CorText Mind Matters Educational Seminars (6.0 MCE Credits).
- Garwood, B., Fisher, M., Coulter, D., & Raia, J. (2000, November). Ohio psychology law updates for applications for psychology practice. 2nd Annual ODMH-EBHS Statewide Psychology Meeting (2.0 MCE Credits).
- Shannon, J. (2000, November). Borderline personality disorder: Diagnosis and effective treatment interventions. 2nd Annual ODMH-I3HS Statewide Psychology Meeting (3.0 MCE Credits).
- Ignelzi, J., Short, B., Sherman, M., Raia, J. (2000, November). Strategies for intensifying & maintaining access to TVPS. Staff development and continuing education at the Twin Valley- Psychiatric System, Columbus, OH.
- Harris, M. R., Resnick, P. (2000, October). Case presentation; Erotomarc stalker. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Pallotta, M. (2000, October). EAP Referral Training. Continuing education for

administrative supervisors and union delegates at Twin Valley Psychiatric System  
Columbus Campus.

Maguire, G., Verma, S., & Glazer, W. (2000, September). Pharmacologic strategies for behavioral disturbances in the elderly patient An interactive video symposium presented by psycbJLINFc, Columbus, OH.

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### Continuing Education Programs Attended (Continued)

- A forensic system emerging: How do we survive in it? (2000, August). Ohio Department of Mental Health Annual Forensic Conference, Columbus, OH (12.25 MCE Credits).
- Folks, D. G. (2000, August). Assessment and management of depression in dementia. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Strickland, T., Speiser, M., & Elwell, M. (2000, June). Mental health courts: Therapeutic jurisprudence. The Association of Ohio Forensic Psychiatric Center Directors\* 22nd Annual Continuing Education Conference. Columbus, OH (3.25 MCE Credits).
- Heibrun, K. (2000, June). Risk assessment: approaches, populations, communication, and decision-making. The Association of Ohio Forensic Psychiatric Center Directors- 22nd Annual Continuing Education Conference, Columbus, OH (5.75 MCE Credits).
- Bradson, T. (2000, June). Crisis intervention training-Pan I. Mandatory staff development continuing education at the Twin Valley Psychiatric System. Columbus, OH.
- Glazer, W., Small, G. W., Tariot, P. N. (2000, April) Early diagnosis, improved outcomes, and long term patient management in Alzheimer's disease. An interactive video symposium presented by psychUNK, Columbus, OH.
- Knoll, J. (2000, April). Profiling serial killers. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).
- Remcr, K., & Bosley, D. (2000, April). TVPS recovery awareness training. Mandatory staff development continuing education at the Twin Valley Psychiatric System, Columbus, OH.
- Glazer, W., Smith, D. A., Meyers, B., & Roose, S. P. (April, 2000). The medical-psychiatric interface in geriatric depression. An interactive video symposium presented by psychLINK. Columbus, OH.
- Haves, L., & Wilson, R. M. (2000, March). Suicide and the Criminal Justice Population. Workshop sponsored by the Ohio Community Forensic Association (OCFA). Columbus, OH (5.0 MCE Credits)
- Smith, D. (2000, March). The history and future of inpatient psychiatry. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health. Columbus, OH (1.5 MCE Credits).

Hazelwood, R. (2000, March). The Sexually Violent Offender. A two-day workshop sponsored by Specialized Training Services, Inc. Columbus, OH (14.0 MCE Credits).

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**Continuing Education Programs Attended (Continued)**

Halaris, A. E. (2000, March). Imidazoiine receptors: Potential markers for depression. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

Brodsky, S. (2000, March). Testifying in court: Survival skills for the professional. A two-day workshop sponsored by Specialized Training Services, Inc. Columbus, OH (14.0 MCE Credits).

Sherman, L. (2000, February). Reducing violence: Community policing against gun crimes. Educational video sponsored by the National Institute of Justice, Columbus, OH.

Brady, K.. (2000, February). A difficult mi^: Bipolar disorder and substance abuse. Grand Rounds sponsored by the State of Ohio Department of Mental Health. Columbus, OH (1 .5 MCE Credits).

Soehner, D., & Resnick, P. (2000, January). Psychosis, pedophilia, or both? Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

Pollack, C. P. (2000, January). Update on insomnia and its management. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

View eg, W. V. R. (1999, December). Medical complications of antipsychotic medications. Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

Hastens, K (1999, November). Competency to stand trial and the insanity defense. Clinical presentation sponsored by the Columbus Area Community Mental Health Center, Inc., Columbus, OH.

Hernandez, A. (1999, November). Assaults on staff on psychiatric inpatient units Video conference sponsored by the Case Western Reserve University School of Medicine and the State of Ohio Department of Mental Health, Columbus, OH (1.5 MCE Credits).

Seibel, P. (1999, October). DBT in an acute care setting. Clinical presentation as part of the Combined Hospital-Department of Behavior Therapy Conference, Columbus, OH.

Clark, J.. & Brabson, D. (1999, October). Orientation to gangs Video training organized by the Twin Valley Psychiatric System Staff Education and Development Department. Columbus.

OH.

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### Continuing Education Programs Attended (Continued)

- Solkolov, H., Callahan, T., Marlow, R., Steele, N., Miller, S., Caslin, R., & Washington, K. (1999, September). Assessing and treating the sexually aberrant and offending person. First Annual ODMH-IBHS Statewide Psychology Department Meeting, Columbus, OH (5.0 MCE Credits).
- Resnick, P., Baker, D., Solkolov, H., & Baker, R. (1999, September). Duty to protect: After the Morgan case — Implications for the behavioral health community. A presentation sponsored by the Ohio Department of Mental Health and the Northeast Ohio Universities College of Medicine. Columbus, OH (5.5 MCE Credits).
- Hommell, M. (1999, September). Approach >97 For Windows. Advanced. Computer software training by The Computer Workshop, Inc., Dublin, OH.
- D»Mello, D. A. (1999, September). The elusive dream: Sleep chances associated with depression and dementia. Presentation sponsored by the Ohio Department of Mental Health and the Northcoast Behavioral Healthcare System. Columbus, OH (1.5 MCE Credits).
- Hommell, M. (1999, September). Approach >97 For Windows. Basic. Computer software training by The Computer Workshop, Inc., Dublin, OH.
- Abel, G., Resnick, P., Grisso, T., & Henggeler, S. (1999, August). Working with challenging forensic populations. Presentation sponsored by the Ohio Department of Mental Health Office of Forensic Services, Cambridge, OH (1.5 MCE Credits).
- Hams, Eric A. (1999, June) Risk management in the evolving health care market: Sequence II. A presentation sponsored by APA Insurance Trust and Wright State University's School of Professional Psychology, Dayton, OH (6.0 CE Credits).
- Resnick, P. (1999, June). Risk assessment of the mentally ill individual. A presentation sponsored by Specialized Training Services, Inc. Columbus, OH (7.0 CE Credits).
- Wright State University School of Professional Psychology (1998, November). Building the interdisciplinary forensic practice. First Annual Dr. Jimmy L. Johnson Memorial Conference, Dayton, OH.
- KJiae, B., Crossman, A., & Hockwalt, M. (1998, November) Expert; witness testimony Professional demands and networking skills. A presentation at the First Annual Dr. Jimmy L. Johnson Memorial Conference. Sponsored by Wright State University School of Professional Psychology, Dayton, OH (5.0 CE Credits).

Coon, T., Kroeger, T., & Raia, J. (1998, November). The stalking phenomenon. A presentation in conjunction with Twin Valley Psychiatric System in-service training, Columbus, OH (1.5 CE Credits).

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PSY.D.

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### **Continuing Education Programs Attended (Continued)**

Ohio Psychological Association. (1997, November). Fall Convention of the Ohio Psychological Association, Columbus, OH.

American Psychological Association. 105th Annual Convention (1997, August). Annual Convention of the American Psychological Association, Chicago, IL.

Shapiro, D. (1997, August). Mental health / lau update. A presentation at the Annual Convention of the American Psychological Association, Chicago, IL (7.0 CE Credits).

Beck, J. S. & Liese, R S. (1997, August). Cognitive therapy for difficult patients. A presentation at the Annual Convention of the American Psychological Association, Chicago, IL (7.0 CE Credits).

Hall, H. V. (1997, August). Lethal violence 2000: Fatal domestic, acquaintance and stranger aggression. A presentation at the Annual Convention of the American Psychological Association, Chicago, IL (4.0 CE Credits).

Ellis, A. (1997, May). Better, deeper, and more enduring brief therapy. A presentation sponsored by David R. Lima, ACSW, Inc., Columbus, OH (5.25 CE Credits).

Resnick, P. (1997, April). Clinical assessment of malingering and deception. A presentation sponsored by Specialized Training Services, Columbus, OH (7.0 CE Credits).

Rising to the challenge: Providing quality care for the growing ranks of the underserved (1997, March). American Orthopsychiatric Association, 74th Annual Meeting, Toronto, Ontario, Canada.

Shannon, J. W. (1996, November). Borderline personalities: Everything you ever wanted to know, but were afraid to ask. A presentation at the Fall Convention of the Ohio Psychological Association, Columbus, OH (6.0 CE Credits).

Greene, G. J. (1996, October). Solution-focused therapy. A presentation sponsored by the Ohio Correctional Training Academy, Orient, OH.

American Psychological Association. 104th Annual Convention (1996, August). Annual Convention of the American Psychological Association, Toronto, Ontario, Canada.  
approach. A presentation at Uie Annual Convention of tti< Association. Toronto, Ontario, Canada (4 CE Credits).

Hambacher, W. O. (1996, August). Nuts and bolts of expert witnessing: A very practical approach. A presentation at the Annual Convention of the American Psychological Association, Toronto, Ontario, Canada (6 CE Credits).

Ogles, B. M. (1996, June). Psychological assessment: Basics and innovation. A presentation sponsored by the Ohio Psychological Association, Athens, OH (6 CE Credits).

### **Continuing Education Programs Attended (Continued)**

Cantor, D. W. (1996, May). Empowering our women patients: A workshop for men and women therapists. A presentation sponsored by Wright State University School of Professional Psychology, Dayton, OH (2 CE Credits).

Ewing, C. P. (1996, March). Criminal and forensic assessment: Exculpatory and mitigating defenses. A presentation sponsored by the American Academy of Forensic Psychology, Boston, MA (6 CE Credits).

Goldstein, A. M. (1996, March). An introduction to forensic psychology practice. A presentation sponsored by the American Academy of Forensic Psychology, Boston, MA (6 CE Credits).

### **Professional Affiliations**

American Psychological Association (APA)

The Division of School Psychology, Division 16 of the APA

The Division of Psychologists in Public Service, Division 18 of the APA

The American Psychology-Law Society, Division 41 of the APA

The Division of Exercise and Sport Psychology, Division 47 of the APA

Ohio Psychological Association (OPA)

Central Ohio Psychological Association (COPA)

International Association of Cognitive Psychotherapy (TACP)

Ohio Community Forensic Association



IN THE COURT OF COMMON PLEAS  
CRIMINAL DIVISION  
CUYAHOGA COUNTY,  
OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Respondent. : Case No. CR-401497  
v. : Judge Shirley Strickland  
Saffold

GRADY KRZYWKOWSKI.

Defendant-Petitioner. :

AFFIDAVIT OF MOLLY J. MCANESPIE

IN THE STATE OF OHIO :  
 :  
 COUNTY OF FRANKLIN : SS:

The Molly J. McAnespie, first being duly cautioned and sworn, states the following to be true:

1. I spoke to Grady Krzywkowski's trial attorneys. Michael Goldberg and Michael O'Shea.
2. They were privately retained to represent Krzywkowski at trial and only given a certain amount of money.
3. They did not call a contra expert witness because they did not feel K/zywkowski had the funds to hire an expert.
4. When asked if they considered asking the Court for expert \vitness fees, they were of the opinion that would be denied.
5. They indicated that Krzywkowski's prior attorney, who was court appointed, asked for and was denied expert witness fees.
6. I spoke to Richard Ogopian, Krzywkowski's court appointed attorney.
7. He stated that he was denied funds for investigators, but not for an expert witness
8. He indicated that he felt the individual who retained Goldberg and O'Shea could afford to pay expert witness fees.
- 9» I was not informed of a strategic reason for not calling an expert witness.

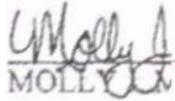
A-60

Affidavit of Molly J. McAnespie

Page 2

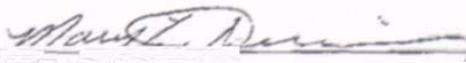
- 10 After reviewing portions of the transcript. I do not see any strategic reason for not calling an expert witness.
11. After consulting with Bob Stinson. Psy.D. and reading his affidavit. I do not see any strategic reason for not calling an expert witness.

Further Affiant saith naught.



MOLLY J. McANESPIE

1CANESPIE £0070972)  
Assistant Public Defender Office of the Ohio  
Public Defender 8 East Long Street - 11th  
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MARY L. DUNNING

**NOTARY PUBLIC**

Sworn to and subscribed before me. this the 8 ~~~ day of July 2002. MARY L. DUNNING

2 of 2 DOCUMENTS

STATE OF OHIO. Plaintiff-Appellee v. DAVEL V. CHINN, Defendant-Appellant

CA. Case No. 16764

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT,  
MONTGOMERY COUNTY

1998 Ohio App. LEXIS

3957 August 21,1998.

Rendered

**PRIOR HISTORY:** [•!] T.C. Case No. 89-CR 768. HKADNOTES - Core Concepts:

COLTSSEL: MATHIAS H. HECK, JR , Prosecuting Attorney, By: CARLEY J INGRAM. Assistant Prosecuting Attorney, Appellate Division, Fifth ROOT, 301 W, Third Street Dayton, Ohio 45422, Attorney\* for Plaintiff-Appellee.

DAVID H BODIKER, Stale Public Defender, LINDA II. PRUCHA, Assistant Public Defender. TANYA J. POTEET, Assistant Public Defender, Office of the Public Defender. 8 East Long Street 11th Floor, Columbus, Ohio 43215-2998, Attorneys for Defendant-Appellant.

JUDGES: FAIN, J. BROGAN J., concur\*. GRADY, J.. concurring and dissenting

**OPINIONBY: FAIN**

**OPINION:**

OPINION

FAIN, J.

Defendant-appellant Davel V. Chirm appeals from a decision denying his petition for post-conviction relief. In hit petition. Chirm alleges seven separate claims of error. He contends that the trial court erred by applying (he doctrine of *res judicata* to, and denying, his three claims of ineffective assistance of counsel. He further contends that the trial court erred by (ailing to: (1) conduct an evidentiary hearing; (2) vacate his sentence;

and (3) grant his motion for discovery. China also claims that the State of Ohio does not provide an adequate corrective process by which criminal [\*2] defendants may collaterally attack their convictions. Finally, he claims that the cumulative errors of the trial court mandate reversal.

We conclude that the trial court did err by failing to conduct an evidentiary hearing regarding two of Chinn's claims of ineffective assistance of counsel. However, we conclude that the trial court did not en by failing to conduct an evidentiary bearing or by denying the petition as to the remaining claims of error. Furthermore, we find that the trial court correctly overruled China's motion for discovery. We also conclude that Chinn's claim of inadequate corrective process is not ripe for review. Finally, we do not find the doctrine of cumulative error applicable to this case.

Accordingly, the judgment of the trial court denying Chinn's petition for post-conviction relief without a hearing is *Reverted*, and this cause is *Remanded* for further proceedings in accordance with this opinion.

In 1989, Chirm was tried and convicted for the Aggravated Murder of Brian Jones. Upon recommendation of the jury, the Montgomery County Court of Common Pleas imposed the sentence of death. Chinn appealed his sentence and conviction. (\*3J Upon review, we found that the trial court had not properly considered all mitigating factors, and that it had improperly weighed the aggravating circumstance. *State v Chlnn*, 1991 Ohio App. LEXIS 6497 (Dec 27, 1991), Montgomery App. No. 11835. unreported. ("Chl\*\* /"). We reversed, and remanded the matter for resentenctng.

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On December 6, 1994, the trial court again sentenced Chinn to death. China was not present when the trial court resentenced him. We vacated that sentence, rinding that the trial court had erred by sentencing Chinn outside of his presence. *Slate v. Chinn*, 1996 Ohio App. LEXIS 2530 (June 21, 1996), Montgomery App No. 15009, unreported ("*Chinn II*"). Upon remand, the trial court resentenced Chinn to death. Thereafter, Chinn filed his third appeal with tfm court based upon his claim that hi» death sentence is inappropriate We affirmed the sentence on August, 1997. *State r. Chinn*, 1997 Ohio App LEXIS 3614 (Aug 15, 1997), Montgomery App. No. 16206. unreported ("*Chinn III*"). Chinn appealed our decision in *Chinn III* to the Ohio Supreme Court, flat appeal is currently pending.

Chinn filed a petition for post-conviction relief with the trial court on March 14, 1997 In the petition, (\*4) he raised seven errors that he contended rendered ha sentence void or voidable. Along with his petition, Chinn filed a motion for discovery. The trial court denied the petition as well as the motion for discovery. It is from oV denial of his petition for post-con vicuon relief that China **appeals**.

## II

Chirm's First, Second, Third and Fifth Assignments of Error are as follows:

I. THE TRIAL COURT ERRED IN ITS APPLICATION OF THE DOCTRINE OF RES JUDJCATA TO SEVERAL OF APPELLANTS CLAIMS FOR RELIEF, THUS VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 5, 9, 10, 16 AND 20 OF THE OHIO CONSTITUTION.

II	THE	TRIAL	COURT	ERRED	IN	DENYING
APPELLANTS		CLAIMS		OF		INEFFECTIVE
ASSISTANCE		OF	COUNSEL.	(PETITIONER'S		FIRST,
SECOND	AND	THIRD	CLAIMS	FOR	RELIEF).	THE
FAILURE	BY	COUNSEL	TO	OBTAIN		NECESSARY
EXPERTS		AND	PRESENT			AVAILABLE
MITIGATING	EVIDENCE					VIOLATED
APPELLANTS	RIGHTS	AS	GUARANTEED		BY	THE
FIFTH,	SIXTH,	EIGHTH,		NINTH,		AND
FOURTEENTH	AMENDMENTS	TO		THE		UNITED
STATES	CONSTITUTION	AND		ARTICLE		I.
SECTION	I.	2,	9,	10,	16,	AND
CONSTITUTION.						20
						OF
						THE
						OHIO

III. THE TRIAL COURT ERRED WHEN IT [\*5J DENIED APPELLANT CHINN AN EVIDENTIARY HEARING ON HIS PETITION FOR POST-CONVICTION RELIEF. THUS VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 1, 2, 9, 10, 16, AND 20 OF THE OHIO CONSTITUTION.

V. THE TRIAL COURT ERRED IN DENYING APPELLANT'S PETITION TO VACATE OR SET ASIDE SENTENCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH. AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I. SECTIONS 1, 2, 9, 10. AND 16 OF THE OHIO CONSTITUTION.

Chinn contends that the tnal court erred by applying the doctrine of *res judtcaia* as a basis for denying four of the seven claims set forth in his petition for post-conviction relief He also claims that the trial court erred by denying his three claim\* of ineffective assistance of counsel Finally, he contends that the trial court erred by failing to conduct an evidentiary bearing on all of his claims, and by denying his petition.

The issues raised m these four assignments of error are inextricably interwoven. Therefore, our discussion will be facilitated by separately considering each claim for relief as raised in Chirm's petition (\*6) for postconviction relief, and by then analyzing each of the assigned errors as they relate to the petition.

We begin with a review of the post-conviction relief statute. " R.C. 2953.21 provides that a person convicted of a crime may petition the court lo set aside that conviction on grounds that the defendant's constitutional rights were violated, thereby rendering that conviction void or voidable." *State v. McDaniel*, 1997 Ohio App. LEXIS 5029 (Oct.

24. 1997), Miami App. No. 97-CA-7, unreported Under the statute, the criminal defendant bears the initial burden to submit evidentiary documents containing sufficient, operative facts which demonstrate substantive grounds for relief. R.C. 2953.21(C); *State v. Kmffer* (1983), 5 Ohio St 3d 36. 448 N.E.2d 823. A hearing is not required absent a showing that substantive grounds for relief exist. *Stttte v. Str\*tto\** (1988). 62 Ohio App. 3d 248, 251. 575 N.E.2d 466.

The first two claims raised in Cbinn's petition for post-conviction relief involve the issue of ineffective assistance of counsel based upon the failure of counsel to present expert testimony at tnaL Specifically, Chinn contends that trial counsel should have presented an expert on [\*7] eyewitness identification and an expert to present evidence that "Marvin Washington's [a witness for the State who identified Chinn as the perpetrator of the crime] mental retardation impacted on his ability to testify as to the facts m tbn case." In support of his

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petition, Chinn supplied the affidavits of Solomon M. Fulero, Ph.D., J.D., and Caroline Evcrington. Ph.D.

The trio! court overruled these two claims, concluding that they were barred by the doctrine of *res judicata* on the basis that "appellate counsel could have and should have raised" these issues in his first direct appeal. Chino argues that the trial court erred because the evidence of these claims was outside the record.

This court has stated that a claim of ineffective assistance of counsel based upon the failure to present expert testimony is a matter "which must be determined *debars* the record." *State v. McDaittel*, supra. We thus held that such a claim is not barred by *res judicata*, 14. This holding is in accord with the decision of the Tenth District Court of Appeals in *Slate v. Afk*, 1997 Ohio App. LEXIS 5600 (Dec. 11, 1997), Franklin App. No. 97APA05-601, unreported. wherein that court (•◀) stated that when "a post-conviction relief petitioner alleges ineffective assistance of counsel through affidavits naming uncalled witnesses whose testimony may have demonstrated evidence significant to the defendant, an evidentiary hearing should be held."

In his affidavit, Mr. Fulero stated that he is a psychologist. The affidavit stated that in his opinion, based upon "a reasonable degree of psychological certainty," "a number of factors that have been found to impair eyewitness accuracy and to affect juror decision-making were present in this case and raise strong concerns both about verdict and sentencing." The affidavit listed numerous factors which the psychologist stated raised "significant concerns" regarding the identification of Chinn as the perpetrator of the crime. The affidavit related to the identification of Chinn by the State's three eyewitnesses, specifically, Marvin Washington, Shirtey Cox and Chris Ward.

The affidavit of Ms. Evermngton identified her as in "Associate Professor of Special Education and Educational Psychology" who has "researched and published extensively in the field of mentally retarded offenders in the criminal justice system." Ms. [\*9] Everington stated in her affidavit that she had reviewed the trial court record, as well as Marvin Washington's juvenik court file and his public school records. She stated mat the juvenile court file contained a psychological report, neuropsychological assessment and chemical abuse assessment Based upon her review, she opined that Marvin Washington's identification of Chinn as the perpetrator of the crime is of "questionable reliability" and "questionable accuracy."

Given the information contained within these affidavits, we find that trial counsel's failure to call any expert witnesses could rise to the level of ineffective assistance of counsel prejudicial to the rights of the defendant. Thus, we conclude that the tnaJ court should have conducted an evidentiary hearing to determine more fully the nature of the testimony of these two witnesses, as well as the strategical reasoning of trial counsel for not presenting this expert testimony

The third and fourth claims raised by Chinn in his petition for post-conviction relief involve his contention that his conviction and sentence are void or voidable because: (1) his trial attorney rendered ineffective assistance of counsel [\*10] by failing to investigate and present mitigating evidence; and (2) the one aggravating circumstance present in his case does not outweigh the mitigating factors. Specifically, Chinn argued that trial counsel failed to present evidence of his good conduct in prison while awaiting trial, and failed to present "additional evidence of residual doubt." He also argued that the death sentence was inappropriate because the aggravating circumstance did not outweigh all of the mitigating factors; *i.e.*, both those factors presented to the judge and jury and those not presented.

The trial court denied both of these claims under the doctrine of *res judicata*. The court stated that the claim of ineffective assistance of counsel could have been raised on direct appeal. The court further stated that the mitigating factors had been considered by this court in a prior direct appeal.

We find that although we had previously weighed the aggravating circumstance and mitigating factor\* in the prior direct appeals, the post-conviction petition claims involve mitigating factors that were not raised in those appeals. Furthermore, all of the mitigating evidence that Chinn referred to in support of [\*11 ] this claim is *dehors* the record, and was therefore no: capable of being presented on direct appeal. We conclude that the thai court did err by ruling that the claim of ineffective assistance of counsel was barred by the doctrine of *res judicata*. However, we must affirm the trial court's decision on other grounds.

In the prior direct appeals, we addressed, and independently weighed, the aggravating circumstance and mitigating factors present in this case. Indeed, we concluded that the aggravating circumstance outweighs the

mitigating factors presented at sentencing. Therefore, we must now determine whether our assessment of the mitigating factors and aggravating circumstance would change based upon the additional evidence.

In Ohio, good behavior while in jail awaiting trial has been recognized as a mitigating factor. See e.g., *Stmtt v. Mordant* (1990), 30 Ohio St. 3d 58, 70, 552 N.E.2d 894. Therefore, we will presume for the sake of argument that the failure to present this evidence did constitute ineffective assistance of counsel. In order to

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prevail on this issue, Chinn must show a "reasonable probability that the outcome would have been different but for the [\*12] ineffective assistance of counsel." *State v. Lascolt* (1988), 61 Ohio App. 3d 228, 236, 572 N.E.2d 717. Evidence of good conduct in jail is entitled to very little weight in mitigation. *Martin*, at 70. We cannot conclude that the requested evidence would have changed the outcome of the sentencing hearing. Therefore, we find that Chinn's claim of ineffective assistance prejudicial to his rights is not well-taken.

Likewise, we find that Chinn's claim that trial counsel should have presented additional evidence of residual doubt is not well-taken. The Ohio Supreme Court has clearly stated that residual doubt "is not an acceptable mitigating factor under R.C. 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death." *State v. McGuire* (1997), 80 Ohio St. 3d 390, 686 N.E.2d 1112, paragraph I of the syllabus. Therefore, since any evidence regarding residual doubt would not be relevant to the sentence imposed, we cannot say that counsel was ineffective for failing to present such evidence.

Accordingly, we find that the trial court's denial of Chinn's claim of ineffective assistance of counsel for failure to present [\*13] mitigating evidence, as well as his claim that the aggravating circumstance did not outweigh the available mitigating factors was correct, albeit for reasons differing from those relied upon by the court. Since we conclude that Chinn's claim is not meritorious, we further find that the trial court did not err by failing to conduct an evidentiary hearing on this issue.

The fifth claim for relief raised in Chinn's petition was his contention that his sentence was void or voidable because his resentencing was conducted by a biased judge. In support of his claim, he presented the affidavit of appellate counsel. According to the affidavit, the trial judge exhibited bias toward Chinn during a pre-trial conference that was held directly in response to our decision in *Chinn I*, wherein we remanded the case for resentencing. From the affidavit we conclude that the claim of bias is based on the judge's refusal to conduct a new hearing for resentencing and his refusal to allow the presentation of additional mitigation evidence.

The trial court, in overruling this claim, found that Chinn failed to present sufficient evidence to support a claim of bias.

We first note that there [\*14] is no evidence contained in the record, or even presented *dehonor* the record, to indicate that Chinn requested the trial judge to recuse or disqualify himself from presiding over the resentencing. It does not even appear that appellate counsel ever voiced any such concern with the trial court. "Absent extraordinary circumstances, an allegation of judicial bias must be raised at the earliest available opportunity." *Siue v. D'Ambrosio* (1993), 67 Ohio St. 3d 185, 188, 616 N.E.2d 909, citations omitted. Chinn could have, but did not, file an affidavit of bias and prejudice with the Ohio Supreme Court pursuant to R.C. 2701.03 to disqualify the trial judge.

In any event, we agree with the trial court that this claim must fail on its merits. From our reading of the affidavit, it merely appears that the trial judge was conducting a conversation with both appellate counsel and the prosecutor regarding the reasons for the remand of the case in *Chinn I*. It appears that, while the trial court may have disagreed with this court's reasoning in that opinion, the court was merely attempting to take steps to conform with our mandate. Thus, we cannot say that the affidavit contains [\*15] any evidence that would support a finding of bias, and we conclude that the trial court did not err by failing to conduct an evidentiary hearing on this issue.

In his sixth claim for relief in the petition, Chinn contends that he was "denied a meaningful proportionality review by the Ohio courts." In support of this claim, Chinn argues that the courts "typically limit comparison to cases in which the death sentence was imposed." He further argues that the courts make "no meaningful comparison of those cases." The trial court overruled this claim as being an issue for the appellate court to decide.

We note that Chinn has previously raised the issue of the proportionality of his sentence in both *Chinn II* and *Chinn III*. In both of those opinions, we overruled his claim that his sentence was disproportionate when compared with other cases this court has decided. We also ruled that "Chinn's death sentence is appropriate, proportionate and not excessive." *Chinn III*, supra. In his third attempt to revisit this issue, Chinn expands his argument to include a claim that his sentence is disproportionate when compared with cases decided in *all* Ohio courts, [\*16] rather than just this court's cases. However, we find that this issue, regardless of the expanded scope presented by Chinn, has been adequately raised and disposed of in the direct appeals. Thus the trial court did not err by overruling this claim as it is barred by *res judicata*.

Finally, in his seventh claim for relief, Chinn argued that "death by electrocution constitutes a blatant disregard for the value of human life, entails unnecessary and wanton infliction of pain and diminishes the dignity of man." His argument centers on the contention that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. In overruling this claim, the trial court stated that "this argument has been presented,

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argued and rejected by Supreme Court of Ohio." We, likewise, conclude that this argument has no merit.

The Ohio Supreme Court has held that death by electrocution does not violate the constitutional prohibition against cruel and unusual punishment. See *State v. Coleman* (1989), 45 Ohio St 3d 298, 544 N.E.2d 622; *State v. Brooks* (1986), 25 Ohio St. 3d 144, 495 N.E.2d 407. Moreover, Gum may [•17] opt to be put to death by lethal injection, pursuant to his statutory right set forth in R.C. 2949.22(8). Therefore, the issue of whether death by electrocution is cruel and unusual punishment is moot. Thus, we conclude that the trial court did not err by overruling this claim for relief.

We conclude that the trial court did err by failing to conduct an evidentiary hearing in regard to the first and second claims raised in Chinn's petition for postconviction relief; i.e., ineffective assistance of counsel for failure to present expert testimony. However, we conclude that the trial court correctly overruled the remaining claims without conducting an evidentiary hearing. Accordingly, Chinn's First, Second, Third and Fifth Assignments of Error are overruled in part and

lined in part.

Chinn's Fourth Assignment of Error reads as follows.

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT GRANTING APPELLANT'S MOTION FOR DISCOVERY TO SUPPORT THE CLAIMS CONTAINED IN THE PETITION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, NINTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 1, 2, 9, 10, 16, [•18] AND 20 OF THE OHIO CONSTITUTION, AND OHIO R. CIV. P. 26.

Chinn contends that the trial court erred by failing to allow him to conduct discovery. He argues that discovery was necessary in order to "more completely substantiate his claims". In support, he argues that petitions for postconviction relief are civil in nature, and thus should be subject to the traditional discovery methods permitted by the Ohio Rules of Civil Procedure. He also cites this court's opinion in *State v. Ottot*, 1989 Ohio App. LEXIS 753 (Mar. 7, 1989), 25 App No. 2500, unreported, as support for this proposition. Finally, Chinn cites several decisions by courts in other states which he contends have "recognized a postconviction petitioner's right to conduct discovery before a decision is made on whether (he claim has met the threshold burden necessary for a hearing."

Although Chinn has cited several cases that he claims support his argument, we note that we are not bound by the decisions of other states. Furthermore, in light of our holding below, we decline to follow *ottot* decision in *State v. Ottot*, supra.

According to Civ. R. 1(A), the rules of civil procedure are to be applied in all civil actions subject to the 1\*19) exceptions set forth in Civ R 1(Q). Civ. R. 1(C) provides, in pertinent part, as follows:

These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure ••• in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

Clearly, petitions for post-conviction relief are special statutory proceedings. R.C. 2953.21(C) states that in determining whether to grant a hearing on the petition for post-conviction relief, a trial court must determine whether there are substantive grounds for relief. In making such a determination, the court must consider the " ••• petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript." R.C. 2953.21(C). The statute, which clearly sets forth the items to be considered in determining [\*20] whether a hearing is mandated, makes no provision for the application of the Ohio Rules of Civil Procedure to the proceedings. Therefore, we must conclude that the Rules of Civil Procedure are not applicable to post-conviction relief proceedings, except to the extent that R.C. 2953.21 expressly provides. We note that our holding today is in accord with the decisions of several other appellate districts. See, e.g., *State v. Webb*, 1997 Ohio App. LEXIS 4670 (Oct. 20, 1997), Clermont App. No. CA 96-12-108, unreported; *State v. HU*, 1995 Ohio App. LEXIS 2684 (June 16, 1995), Tmmbull App. No. 94-T-5116, unreported; *State v. Dennts* (Nov. 11, 1997), Summit App. No. 18410, unreported; *State v. HUI* (Nov. 21, 1997), Hamilton App. No. C-961052, unreported.

Accordingly, Chinn's Fourth Assignment of Error is overruled.

**IV**

Chinn's Sixth Assignment of Error is as follows:

OHIO DOES NOT PROVIDE AN ADEQUATE CORRECTIVE PROCESS FN VIOLATION OF THE DUE  
PROCESS, THE EQUAL PROTECTION, AND

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THE SUPREMACY CLAUSES OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2, 10 AND 16 OF THE OHIO CONSTITUTION.

Chinn contends that Ohio's statutory scheme for postconviction relief is inadequate. In support, [\*21] he argues that the Ohio Supreme Court's decision in *State v. Perry* (1967), 10 Ohio St. 2d 115, 226 N.E.2d 104, applying the doctrine of *res judicata* to actions brought pursuant to R.C. 2953.21 severely limits the opportunity to raise collateral attacks on wrongful convictions. He argues that "this is best illustrated by the fact that only one individual who has been sentenced to death since Ohio re-enacted its death penalty has received post-conviction relief."

We must overrule this assignment of error because this case is being remanded for an evidentiary hearing. Until this hearing is held, we cannot determine whether Chinn will receive the relief requested. If he does, then his claim will be rendered moot. Therefore, we conclude that this issue is not ripe for review.

Furthermore, we note that Chinn failed to raise this issue at the trial court level. "Generally, the law in Ohio is that the failure to raise the issue of a statute's constitutionality at the trial level constitutes a waiver of such issue." *State v. Zuent* (1987), 32 Ohio St. 3d 56, 63, 512 N.E.2d 585. "However, because of the... exacting review necessary where the death penalty is involved, (courts [\*22] may) reserve the right to consider the constitutional challenges in particular cases." *Id.*

Regardless of whether Chinn agrees with its decision to apply the doctrine of *res judicata*, we must overrule this issue on its merits. This court is bound to follow the law according to the Supreme Court. *Consolidated Kail Corp. v. Forest Cartage Co.* (1990), 68 Ohio App. 3d 333, 341, 588 N.E.2d 263. The Ohio Supreme Court obviously believes, based upon its continued use of the doctrine, that the post-conviction relief statute provides adequate constitutional safeguards despite any limitations created by the use of the doctrine of *res judicata*. See e.g., *State v. Reynolds* (1997), 79 Ohio St. 3d 158, 679 N.E.2d 1131. Furthermore, Chinn fails to provide more than mere conclusory allegations that the utilization of the doctrine renders the statute unconstitutional. We do not find the statute violative of Chinn's constitutional rights. Instead, we agree that "the implementation of the doctrine of *res judicata* does not act to deprive litigants of constitutional rights, but rather conserves judicial resources while still permitting a defendant to have his day [\*23] in court." *State v. Sklenar* (1991), 71 Ohio App. 3d 444, 449, 594 N.E.2d 88.

Since Chinn has failed to present more than conclusory allegations in support of his argument, and since we find that the use of the doctrine of *res judicata* in postconviction proceedings does not render the statute unconstitutional, we conclude that Chinn's argument is not well-taken.

Accordingly, Chinn's Sixth Assignment of Error is overruled.

Chinn's Seventh Assignment of Error is as follows:

THE CUMULATIVE ERROR OF APPELLANT'S SUBSTANTIVE CLAIMS MERITS REVERSAL OR A REMAND FOR A PROPER POST-CONVICTION PROCESS.

Chinn contends that this court must determine whether the cumulative effect of the claimed errors merit reversal of his conviction and sentence. In support, he cites *State v. Garner* (1995), 74 Ohio St. 3d 49, 656 N.E.2d 623. The State contends that this assignment of error must fail because "there are no errors to accumulate."

The Ohio Supreme Court recognized the doctrine of cumulative error in *State v. DeMarco* (1987), 31 Ohio St. 3d 191, 509 N.E.2d 1256. "Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives [\*24] a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *Ganter*, supra, at 64. The doctrine is not applicable unless there are multiple instances of harmless error. *Id.*

Chinn did not raise this issue in any of the three prior direct appeals. Therefore, we need not consider the doctrine in relation to any errors previously raised. As for the appeal presently before us, we conclude that the doctrine is not applicable. During the course of our review, we only noted two errors committed by the trial court. The first two, based upon the trial court's failure to conduct an evidentiary hearing on the issue of ineffective assistance of counsel regarding the presentation of expert testimony, are being remanded for hearing. Without benefit of a hearing, we cannot determine whether Chinn has been prejudiced. The only other error we noted, which we ruled

harmless, relates to counsel's ineffectiveness for failing to present evidence of good conduct while in Jail. Thus, since we found only one instance of harmless error, and we have reversed and remanded based upon J\*25] the remaining errors, we cannot say that the doctrine of cumulative error is applicable. Accordingly, Chinn's Seventh Assignment of Error is overruled.

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