No.:

In the Supreme Court of the United States

Andrew Culler
Petitioner,

v.

The State of Ohio
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio

Petition for a Writ of Certiorari

Rhys B. Cartwright-Jones
Counsel of Record
42 N. Phelps St.
Youngstown, OH 44503-1130
330-757-6609, tel.
866-223-3897, fax
rhys@cartwright-jones.com
Counsel for Petitioner

Question Presented for Review

The admission of testimonial hearsay violates the Sixth Amendment's Confrontation Clause. In this case, the medical/sexual assault nurse's examination constituted testimonial hearsay. This is due to the lack of medical corroboration and reliance on victim statements for conclusions. Must this Court assume jurisdiction to address this potential Sixth Amendment violation?

Parties to the Proceeding and Rule 26.9 Statement

Petitioner and defendant-appellant below, Andrew Culler, is an individual person and United States domiciliary. The respondent, here, and the plaintiff-appellee below is the U.S. Pursuant to S.Ct.R. 26.9, both parties, the U.S. and Culler are non-corporate entities, and have no corporate disclosures to make.

List of Related Proceedings

There are no proceedings that qualify as "related proceedings" under Rule 14 of this Court's rules of practice.

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Petition for a Writ of Certiorari

Andrew Culler petitions for a writ of certiorari to review the decision of the Supreme Court of The State of Ohio, effectively affirming and declining jurisdiction over the Court of Appeals for the Seventh District's order affirming his conviction and sentence.

Opinions Below

The Ohio Supreme Court's decision, which is the final dispositive decision in the State of Ohio, dated October 24, 2023, is unreported and reproduced in Appendix A. The prior decision of the Seventh District of Ohio's Appellate System is included as Appendix B.

Jurisdiction

This Court's jurisdiction rests on 28 U.S. Code § 1257, allowing a writ to issue relative to the final decision of a state's highest court. The Supreme Court of the State of Ohio is Ohio's court of highest jurisdiction, and it issued its decision in this case on October 24, 2023.

Constitutional and Statutory Provisions

This Cause turns on the Fourth Amendment to the U.S. Constitution and the Fourteenth Amendment, attaching same to the conduct of states.

Reasons for Granting the Writ of Certiorari

Summary of Argument

This petition for a writ of certiorari challenges the admissibility of certain testimonial hearsay evidence under the Sixth Amendment's Confrontation Clause in Andrew Culler's trial. The petitioner, Andrew Culler, contends that the admission of statements made by the victim to a Sexual Assault Nurse Examiner (SANE) at trial contravened his constitutional rights, as these statements bore the characteristics of testimonial hearsay without the safeguard of cross-examination.

Culler argues that the reliance on the victim's statements in the absence of medical corroboration in the SANE's testimony does not align with the principles of a fair trial mandated by the Sixth Amendment. He maintains that this alleged constitutional breach necessitates the Court's jurisdiction to rectify a potential miscarriage of justice.

The petition further highlights procedural concerns at the trial level, specifically addressing the denial of an evidentiary hearing on the issue of ineffective assistance of counsel. Culler suggests that this denial, as it pertains to the Fourteenth Amendment's Due Process Clause, might have impaired the fairness of the legal process afforded to him.

The petitioner also raises the issue of the trial court's reliance on the contested testimonies, particularly in a bench trial context, suggesting that this reliance might have unduly influenced the trial's outcome. This aspect of the argument emphasizes the need for stringent adherence to procedural fairness to avoid any perceived injustice.

Ultimately, the petition urges the Court to clarify the permissible scope of expert testimonies in sexual assault cases, particularly in light of the Confrontation Clause.

Culler seeks to establish clearer boundaries for the use of such testimonies in criminal trials to ensure that a defendant's constitutional rights remain protected. This clarification, he argues, holds significant implications not only for his case but for the broader principles of justice and the integrity of the judicial process in criminal jurisprudence.

Procedural Posture and Factual Background

Dive into the intricate tapestry of judicial procedure, and you'll encounter threads that don't just dictate the course of individual destinies, but fashion the very fabric of our democratic society. We touch upon one such thread today: the quintessential balance between ensuring a fair trial and respecting the expertise of professionals. Andrew Culler's situation draws our attention, like a clarion call, to a matter of gravity that deserves our scrutiny. Why, one wonders, when an appellant offers evidence outside the record—especially on something as pivotal as ineffective assistance—would a trial court shun the call for an evidentiary hearing?

Peel back the layers, and the complexities become apparent. The issue revolves around an intricate dance of legal statutes, expert testimonies, and the interpretations of both. The very guidelines of Crim.R. 52(B) beckon us to identify three linchpins: an error, the obviousness of this error, and the significant impact of this error. But even the satisfying of these linchpins doesn't bind the court's hands—it merely nudges a Court toward rectification.

Expertise and its role in the courtroom stand at the heart of this conundrum. Yes, experts possess unique knowledge, drawing from vast reservoirs of experience and training. But when does this expertise transgress its

boundaries? Specifically, when it comes to medical experts, at what point does their narrative veer off the path of medical insight and tread into the territory of recapping a child's narrative? This subtle but crucial distinction underscores the essence of our democratic justice system.

The case of *State v. Arnold*, infra, highlights the challenges of discerning between testimonial and non-testimonial statements made at child advocacy centers as Ohio's courts have developed the issue. Can one easily demarcate the line where forensic investigation ends and medical diagnosis begins? *Arnold* pushes us to recognize the multidimensional role of child advocacy centers, whose very existence hinges on serving dual roles.

Lastly, we confront the intriguing conundrum of bench versus jury trials. The assumption lies that in a bench trial, only relevant and competent evidence influences the verdict. But what if, as in this case, the trial Court openly acknowledges its reliance on certain testimonies? The landscape of judicial review shifts.

Ineffective assistance counsel—a constitutional issue under the Sixth and Fourteenth Amendments—forms the final strand of our inquiry. The question of hearsay and its admissibility, coupled with the competence of representation, solidify the case's significance. In the end, the matter doesn't just revolve around Andrew Culler; it probes the very essence of our justice system, pushing us to ponder how we want our society to adjudicate matters of such consequence.

Law & Discussion

Standard of Review: This cause involves an issue of law rather than an issue of fact or credibility. The defense posits that this cause, therefore, merits *de novo* review.

Issue and Summary of Argument: The admission of testimonial hearsay violates the Sixth Amendment's Confrontation Clause. In this case, the medical/sexual assault nurse's examination constituted testimonial hearsay. This is due to the lack of medical corroboration and reliance on victim statements for conclusions. Must this Court assume jurisdiction to address this potential Sixth Amendment violation?

Argument

This cause invites review of the plain error and ineffective assistance issues the defense raised on direct appeal, though now through the lens of postconviction, supported by affidavits dehors the record. This cause invites a review of this Court's decisions in Boston and Sowers relative to the admissibility of medical hearsay evidence in sexual assault cases and relative to a trial attorneys' Sixth Amendment responsibility to be cognizant of applicable major points of law. As this brief proceeds to relate, this has allowed testimony by doctors who have concluded that a particular child is the victim of sexual abuse. State v. Boston (1989), 46 Ohio St.3d 108, 126, 545 N.E.2d 120; accord the Tenth Circuit's decision *infra* in the federal milieu. In *Boston*, Ohio's High Court noted that "[m]ost jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse." Id. at 128. Therefore, "an expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision

and is, therefore, admissible pursuant to Evid.R. 702 and 704." Id. Nevertheless, an expert cannot give an opinion of the veracity of the statements of a child declarant. Id. at syllabus. There is a difference "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility." State v. Stowers, 81 Ohio St. 3d 260, 262, 1998 Ohio 632, 690 N.E.2d 881. Such is the issue here.

The trial of Andrew Culler and the resulting conviction come based on medical hearsay that runs afoul of Boston and Stowers. The medical testimony at issue was, simply, recapitulations of what an adolescent related during an interview. Accordingly, it was inadmissible. Granted, trial counsel did not object. And the Seventh District's decision in the direct appeal of Culler, faced with lack of objection, indicated that it was "difficult to conclude" whether trial counsel's performance was deficient in failing to object. The defense, here, submits that error is obvious and asks for this Court to review the following proposition of law.

Turning to the procedural posture of the case, this cause involves a bench trial and a conviction on various sex crimes charges: one count of sexual battery under R.C. 2907.03(A)(5) and two counts of gross sexual imposition under 2907.05(A)(4). The trial Court heard the state's evidence from the alleged victim, E.C., and from five other witnesses: Brian Moore and Daniel Haueter, who were law enforcement officers, Chase Murray and Christina Culler, who were lay witnesses, and Tina Deal-Hendon, Courtney Wilson, Monique Malmer, who were various levels of sexual assault examiners. The basic gist of the case is that the lay, law enforcement, and professional witnesses, recapitulated the version of events that E.C. told them.

Brian Moore and Daniel Haueter both worked from East Palestine P.D., took statements from the alleged victim, and related those statements to Childrens' Services. Moore described the initial scene, the police having arrived on Culler's call relative to E.C. providing a Vape Pen to a young person, such vape pen landing the young person in the hospital. [Infra.] According to Moore, "[Culler] was agitated." Infra. Moore Continued, "He was—I approached him first and spoke to him since he was the complainant. He stated that his ex, Christina Culler, forced her way into his residence. This was prompted by a text message that he had sent to her about Emma selling a vape pen to [another young person]." The use of that device, as mentioned above, resulted in the young person's hospitalization. [Tr. at 21, 32.] In the midst of her being the subject of wrongdoing involving contraband and hospitalization and the obvious attendant punishment, E.C., according to Moore, came on the scene and indicated that she had something to say. And she proceeded to state that when she was 8 or 9 that Culler had tried to rape her. According to Moore, "She stated that he licked me down here, pointing to her vaginal area, touched me here, pointing to her breasts, and tried to kiss me." [Tr. at 22, 23.] Moore took a brief statement and forwarded the matter to Children's' Services. [Tr. at 27.] The interview lasted four or five minutes. [Tr. at 29.]

Similarly, Haueter, an officer since 1992, essentially gathered evidence and conveyed it to Children's Services. Counsel inquired, "So the information you provided was simply what was related to Sergeant Moore essentially; right?" Haueter responded, "Correct." [Tr. at 186.] Haueter proffered the information to Children's Services thereafter. According to Haueter, relating his participation in an interview with Children's Services, "I just observed." [Tr. at 187.] And without objection from the defense, Haueter

related the contents of that interview, by way of hearsay, to the bench. As part of the investigation, too, Haueter took and searched E.C.'s cellular phone. The text messages [Tr. 190 – 196] contain single syllable words and innocuous emojis apropos of nothing discernible, as is often the case with young people's text messages.

The theme of a recapitulated story continues with Chase Murray and Christina Culler. Murray and the E.C. had dated. [Tr. at 42.] Murray's testimony, without objection from the defense, began in relevant part with, "It was later on that night, I believe, she sent me a text message and told me a bunch of stuff happened at the house." [Tr. at 46.] Counsel further inquired, "What did [E.C.] tell you happened at the house?" [Id.] Murray responded, "And she told me she ran outside. I don't know how detailed she got, but told me she started exposing him, basically, saying things about what had happened to her that he had done[.]" [Id.] The state inquired further, "I want to back you up a couple days before that. Do you recall having any conversation with Emma about something that she was struggling with?" [Tr. at 47.] Murray continued to relate E.C.'s story by way of hearsay. [Id.] Murray further identified text messages between the two, himself and E.C. The text messages described, vaguely, allegations of sexual conduct, but Murray, himself, testified that he was not sure about their veracity, given that E.C. was in trouble with her father. [Tr. at 85.] Christina Culler testified to E.C.'s version of events, as E.C. related them to her. [Tr. at 113, and following.] Likewise, she provided some information that on the day that the matter came to police attention, E.C. and her father, Andrew Culler, were in a heated argument about E.C.'s distribution of the vape pen. [Tr. at 115.] She took E.C. to Children's Services for an interview.

The Childrens Services witnesses, in their respective parts, do an intake and an interview with E.C. and take down that information as E.C. provided it. And the Child Advocacy center did, indeed, conduct a physical examination. [Tr. at 291.] The result of the physical portion of the examination is as follows: "I did not have physical findings of sexual abuse[.]" [Tr. at 293.] And although the examination, during the interview phase, would also focus on behavioral concerns [Tr. at 283], the record is void of any behavioral evidence corroborative of child sexual abuse. Nevertheless and without objection, the following colloquy occurred:

The State inquired, "And when you are concluded with this entire process there at the CAC, do you render an opinion as to whether or not there was sexual abuse?" [Tr. at 293.]

Monique Malmer responded, "I do." [Tr. at 293.]

The state continued, "And did you render an opinion in this particular case?" [Tr. at 293.] Malmer responded, "I did render that it's highly concerning for sexual abuse." [Id.]

Following a long wind-up of hearsay testimony, E.C. testified. She testified to incidents adding up to the elements of the crimes charged. [See, e.g., Tr. at 349 – 51.] That being said, her testimony withstood remarkable impeachment. Despite, for example, by representation of the state anyway, recounting her story several times, E.C. couldn't recount or recall the first time she spoke of the occasion. [Tr. at 355.] Culler could not recount when any of the alleged events occurred. [Tr. at 960.] And all of this, of course, was during a period of time when E.C. was in serious trouble for the vape incident, which, it bears repeating, landed a young person in a hospital bed.

On the foregoing facts, the trial Court convicted and the Seventh District affirmed. The defense timely filed for postconviction relief below. Below, the defense proffered affidavits and indicated that on review of the files of trial counsel, there are no extant notes, research, or memoranda to show that trial counsel were cognizant of the issues above or that they endeavored to address the issues. an affidavit from the Culler corroborated this point, and demonstrated that counsel never addressed the issue with him. The trial Court declined to hear the motion and overruled the petition. The Seventh District affirmed. This timely appeal follows. Now, the defense urges this Court to assume jurisdiction and to reverse the conviction.

Argument

Specific to the procedural posture of postconviction, if an appellant presented, below, competent and credible evidence dehors the record of ineffective assistance, then a trial Court must hold an evidentiary hearing. And, of course, the issue here turns on an open-and-obvious confrontational hearsay problem. Assumption of jurisdiction is appropriate.

No objection under 702 having been raised, this issue proceeds under plain error review. (The defense also proffers infra that failure to object is tantamount to ineffective assistance.) Under Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the [C]ourt." By its very terms, the rule places three limitations on a reviewing Court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. State v. Hill (2001), 92 Ohio St. 3d 191, 200, 749 N.E.2d 274, 283,

observing that the "first condition to be met in noticing plain error is that there must be error[,]" citing United States v. Olano (1993), 507 U.S. 725, 732, 113 S. Ct. 1770, 1776, 123 L. Ed. 2D 508, 518, interpreting Crim.R. 52[B]'s identical federal counterpart, Fed.R.Crim.P. 52(b). Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. State v. Sanders (2001), 92 Ohio St. 3d 245, 257, 750 N.E.2d 90, 111, citing State v. Keith (1997), 79 Ohio St. 3d 514, 518, 684 N.E.2d 47, 54; see, also, Olano, 507 U.S. at 734, 113 S. Ct. at 1777, 123 L. Ed. 2d at 519, identifying that a plain error under Fed.R.Crim.P. 52(b) is clear or, equivalently, obvious under current law. Third, the error must have affected "substantial rights." Courts interpret this aspect of the rule to mean that the trial Court's error must have affected the outcome of the trial. See, e.g., Hill, 92 Ohio St. 3d at 205, 749 N.E.2d at 286; State v. Moreland (1990), 50 Ohio St. 3d 58, 62, 552 N.E.2d 894, 899; State v. Long (1978), 53 Ohio St. 2d 91, 7 Ohio Op. 3d 178, 372 N.E.2d 804, paragraph two of the syllabus.

Even if a forfeited error satisfies these three prongs, however, Crim.R. 52(B) does not demand that an appellate Court correct it. Crim.R. 52(B) states only that a reviewing Court "may" notice plain forfeited errors; a Court is not obliged to correct them. Courts identify the discretionary aspect of Crim.R. 52(B) by admonishing Courts to notice plain error "...with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." State v. Long, 53 Ohio St. 2d 91, 7 Ohio Op. 3d 178, 372 N.E.2d 804, paragraph three of the syllabus; see, also, Olano, 507 U.S. at 736, 113 S. Ct. at 1779, 123 L. Ed. 2d at 521, suggesting that appellate Courts correct a plain error "if the error seriously affects the fairness, integrity or public reputation of judicial proceedings," quoting United

States v. Atkinson (1936), 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, 557; accord State v. Barnes, 94 Ohio St.3d 21, 27-28, 2002-Ohio-68, 759 N.E.2d 1240.

This issue turns on Evid.R. 702 and expert jurisprudence, which directs that a medical expert must testify to things medical and not, as here, to recapitulate a child's narrative. Evid.R. 702 permits the use of testimony of an expert if the testimony will aid the trier of fact in understanding the evidence or in determining a fact in issue. A person is an expert if they have knowledge, skill, experience, training or education regarding the subject matter of the testimony. Evid.R. 702(B). An expert's testimony is only needed if that testimony is "sufficiently beyond common experience." State v. Buell (1986), 22 Ohio St.3d 124, 131, 22 Ohio B. 203, 489 N.E.2d 795, quoting People v. McDonald (1984), 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709, 721; Evid.R. 702(A). Finally, an expert's testimony must be based on "reliable scientific, technical, or other specialized information." Evid.R. 702(C). The Courts have allowed testimony by doctors who have concluded that a particular child is the victim of sexual abuse. State v. Boston, supra. In *Boston*, Ohio's High Court noted that "[m]ost jurors would not be aware, in their everyday experiences, of how sexually abused children might respond to abuse." Id. at 128. Therefore, "an expert's opinion testimony on whether there was sexual abuse would aid jurors in making their decision and is, therefore, admissible pursuant to Evid.R. 702 and 704." Id. Nevertheless, an expert cannot give an opinion of the veracity of the statements of a child declarant. Id. at syllabus. There is a difference "between expert testimony that a child witness is telling the truth and evidence which bolsters a child's credibility." State v. Stowers, supras, an expert can testify that a child's behavior is consistent with the behavior of other

children who had been sexually abused. Id. But an expert cannot recapitulate a child's narrative such to be, essentially, a truth propensity witness. State v. Schewirey, 7th Dist. Mahoning No. 05 MA 155, 2006-Ohio-7054, ¶ 37-40.

The Court in *Arnold* addressed the admissibility of statements made by child-victims during interviews at child advocacy centers. The Ohio Supreme Court held:

> Statements made to interviewers at child-advocacy centers that serve primarily a forensic or investigative purpose are testimonial and are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination. Statements made to interviewers at child-advocacy centers that are made for medical diagnosis and treatment are nontestimonial and are admissible without offending the Confrontation Clause.

State v. Arnold supra at paragraphs one and two of the syllabus.

The Arnold Court recognized the dual role of child advocacy centers ("CAC"), specifically, to gather forensic information for purposes of criminal prosecution and to gather information for purposes of facilitating medical diagnosis and treatment of the victim. Id. at ¶33. The CAC interviewer acts as the agent of various types of professionals and agencies to implement an interdisciplinary response to allegations of child abuse. Id. at ¶29. Therefore, the Supreme Court adopted the "primary purpose" test to determine whether statements elicited by the interviewer were made for purposes related to medical diagnosis or treatment, in which

case they are nontestimonial and do not implicate Confrontation Clause rights, or whether the statements were made for investigative purposes in furtherance of criminal prosecution, in which case they are testimonial and violative of the Confrontation Clause. Id. at ¶28. And Courts across Ohio recognize that statements made to social workers for the purpose of facilitating medical treatment are admissible under the medical exception to hearsay even where the child has not been determined competent to testify. In re I.W., 9th Dist. Nos. 07CA0056 and 07CA0057, 2008 Ohio 2492, at ¶9 and 17; see, also, In re A.R., 9th Dist. No. 22836, 2006 Ohio 1548; State v. Major, 9th Dist. No. 21662, 2004 Ohio 1423. The Arnold Court has not delimited the qualifications of CAC interviewers to recognize only persons possessing medical training and excluding as incompetent persons merely trained in social work. That being said, the standard test applies: is it diagnostic information or is it recapitulation of a narrative. In re T.L., 9th Dist. Medina No. 09CA0018-M, 2011-Ohio-4709, ¶ 11-15.

What—as a final point prior to looking at the facts of the cause apropos of the above law—is the impact of this cause having proceeded as a bench trial rather than a jury trial? Here, none because of the trial Court's specific findings. Granted, "[i]n a bench trial, a trial [C]ourt is presumed to have considered only the relevant, material and competent evidence." State v. Bays, 87 Ohio St.3d 15, 1999-Ohio-216, 716 N.E.2d 1126 (1999), cited in Grimes infra; accord State v. Teagarden, 5th Dist. Licking No. 08-CA-39, 2008-Ohio-6896. So typically a reviewing Court "...must presume that, even if any testimony was erroneously admitted into evidence, the trial [C]ourt did not consider it in rendering its verdict." Id., cited in State v. Grimes, 5th Dist. Richland No. 2019CA0103, 2020-Ohio-4357, ¶ 64. Here, however, the circumstances are different; that is, the trial

Court issued a written entry and specifically noted that it considered the sexual assault examiner testimony and of each of the hearsay witnesses, in rendering its decision. [Op.Tr. at pg. 9.]

Simply stated, the opinion at bar came strictly from the recapitulation of E.C.'s story. The Childrens Services witnesses, in their respective parts, testified as to their intake and their interview with E.C. They took down that information as E.C. provided it. There were no physical or behavioral findings on which to render a scientific opinion. [Supra.] The opinion, therefore—the one that Monique Malmer ultimately related, and the one upon which the Court relied [Op. Tr. at 9]—is simply an opinion based on the words of a complaining witness. No objection having been made, however, the error is obvious, given the points of Ohio law above. And given that the Court specifically relied on Malmer's opinion, the resulting prejudice is obvious. Review, therefore, is appropriate based on the postconviction standard, infra.

In Strickland v. Washington (1984), 466 U.S. 668, the United States Supreme Court crafted a two-prong test to determine whether counsel provided effective assistance to a criminal defendant. First, a reviewing Court must determine whether trial counsel's performance was deficient. State v. Brooks (1986), 25 Ohio St.3d 144, 147, citing Strickland v. Washington. Second, the Court must consider whether counsel's errors were so egregious as to deprive the defendant of a fair trial. Id.

In *State v. Lytle* (1976), 48 Ohio St.2d 391, the Ohio Supreme Court adopted its own variation of Strickland to be applied by Ohio Courts. First, a Court must determine whether trial counsel substantially violated essential duties to a defendant. State v. Brooks, 25 Ohio St.3d at 147-148, citing State v. Lytle. Second, a Court must consider whether

counsel's ineffectiveness prejudiced a defendant. Id. To be ineffective, counsel's performance must fall below an objective standard of reasonable representation, resulting in prejudice to the defendant. State v. Brown, 84 Ohio App.3d at 420, citing State v. Bradley (1989), 42 Ohio St.3d 136.

Courts recognize hearsay problems as fitting into the ambit of ineffective assistance. For example, in the matter of State v. Proffitt, the 12th District addressed circumstances in which police statement forms the the government proffered were not within the ambit of the Evid.R. 803(5) recorded recollection exception to hearsay because the wife's unbelievable testimony that the statements did not, or might not, correctly reflect her prior knowledge of the incidents, was not proof that the statements correctly reflected her prior knowledge, and left the issue unresolved. Further, Evid.R. 803(5) was not satisfied by the wife's expression of a general recognition of the importance of being truthful with the police. The Court concluded that the appellant and defendant received ineffective assistance of counsel at trial when defense counsel failed to object to the admission of the police statements into evidence because no reasonable trial strategy was apparent in defense counsel's failure to object to the admission of the statements, upon which the State's case depended and the trial court's decision relied. State v. Proffitt, 12th Dist. Butler Nos. CA2016-07-134, CA2016-07-135, 2017-Ohio-1236.

Here, all the problem above sounds likewise under ineffective assistance. The concept of "hearsay" shows up once in one objection completely unrelated to any of the above concerns. [See Tr. at pg. 156, showing a hearsay objection relative to the appointment of a guardian ad litem in an unrelated proceeding.] At the very least, the ABA Standards for defense attorneys establishes this obligation. Standard 4-1.5 directs that—

At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

With any of these norms in mind, review of the verdict here is appropriate.

Turning, finally, to the standard for postconviction relief, hearings, and perpetuation of discovery, Ohio law, of course, addresses these points. According to the Courts, "[a] post[-]conviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment." State v. Steffen, 70 Ohio St. 3d 399, 410, 1994 Ohio 111, 639 N.E.2d 67 (1994); State v. Gondor, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶48. And to prevail on a petition for post-conviction relief, the defendant must establish a violation of his constitutional rights which renders the judgment of conviction void or voidable. R.C. 2953.21. The post-conviction relief statutes do "not expressly mandate a hearing for every post-conviction relief petition and, therefore, a hearing is not automatically required." State v. Jackson, 64 Ohio St.2d 107, 110, 413 N.E.2d 819 (1980). Rather, in addressing a petition for post-conviction relief, a trial court plays a gatekeeping role as to whether a defendant will receive a hearing. Gondor at ¶51. A trial court may only dismiss a petition for post-conviction relief without a hearing or a discovery period "...where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner

set forth sufficient operative facts to establish substantive grounds for relief." State v. Calhoun, 86 Ohio St.3d 279, 1999 Ohio 102, 714 N.E. 2d 905 (1999), paragraph two of the syllabus; Gondor at ¶51.

Here, of course, the defense posits that the evidentiary material dehors the record supports relief rather clearly. Culler's Court of first review, the Seventh District, notably, had a hard time in its own words—found it "difficult to conclude"—that there was any strategic purpose to not addressing an open-and-obvious evidentiary issue. The accompanying affidavits—i.e. those accompanying the petition to the trial court—indicate that the error was, in fact, a matter of negligence rather than of strategy; that is: counsel never thought about the issue and never discussed it with the defendant. [Exh. 4, 6 below.] Accordingly, it is respectfully requested that this Court assume jurisdiction and overrule the trial court's denial of the petition and direct that the trial court hold a hearing on this matter, preceded by a brief discovery period allowing, at least, for depositions of prior counsel.

For one looking to guidance from the Federal Circuits, the topic of SANE nurses and testimonial hearsay appears to be a rare question in the Circuits and a question of first impression before this Court. The defense posits that there is an easy bright line test: whether or not there is any physical evidence or treatment. The most recent Circuit decision on this issue backs that up. The cause of *Plater v. Harpe*, though finding a trial attorney other-than-ineffective for not challenging SANE nurse testimony, provides an apt reverse analogy, insofar as the *Plater* case involved diagnosis, treatment, and even a prescription of a run of antibiotics following a sexual assault.

Turning to the specifics of the case, in *Plater v. Harpe*, 2023 U.S. Dist. LEXIS 86560, infra, the United

States District Court for the Western District of Oklahoma addressed Raheem La'Monze Plater's petition for habeas corpus under 28 U.S.C. § 2254. The court recommended denial of the petition on all grounds. This case primarily revolved around Plater's challenge to the admissibility of testimonial hearsay and violations of the Confrontation Clause, among other grounds.

Firstly, the court examined Plater's contention that the statements made by the victim to the Sexual Assault Nurse Examiner (SANE) were inadmissible hearsay and violated his Confrontation Clause rights. The court, referencing the "primary purpose" test from Crawford v. Washington and related cases, determined that the statements made to the SANE nurse were for the primary purpose of medical treatment and were thus non-testimonial. Consequently, their admission at trial did not violate Plater's right to confrontation.

Secondly, regarding Plater's claim of ineffective assistance of counsel, the court held that his allegations were conclusory and did not demonstrate a strong possibility that trial counsel's performance fell below an objective standard of reasonable representation. The court found no grounds for an evidentiary hearing on this issue, as the claims did not show a likelihood of altering the trial's outcome.

Lastly, the court addressed various procedural aspects, including claims that were procedurally barred or unexhausted, and thus not eligible for federal habeas review. The court concluded that Plater did not demonstrate cause and prejudice or a fundamental miscarriage of justice to overcome these procedural bars.

The *Plater* case, however, involved actual physical evidence, diagnosis, and treatment. According to the Court:

> The SANE nurse in this case testified that she was a registered nurse, having been so for 30 years. She said she had been a SANE nurse for the past 3 1/2 years. She was employed by the Help Advocacy Center for Southwest Oklahoma in Lawton and testified that the primary purpose of the Center was to treat sexual assault victims. She explained that the sexual assault examination of A.C. contained both an interview and a physical examination. The nurse testified that she asked A.C. a series of questions and then allowed A.C. to describe in her own words the circumstances which resulted in her being at the Center. The physical examination consisted of a "head to toe assessment" of injuries as well as a pelvic examination and the taking of blood, urine, and DNA samples.
>
> **Based upon the information given to her by A.C., and the results of her physical examinations, the nurse prescribed antibiotics in case A.C. had been exposed to any sexually transmitted diseases and emergency contraceptive medication. She also testified that she always recommended that the patient follow up with their primary care physician.**

Plater v. Harpe, W.D.Okla. No. CIV-21-1092-HE, 2023 U.S. Dist. LEXIS 86560, at *16-17 (Apr. 6, 2023), emphasis added.

Conclusion

Given the foregoing discussion, the decisions below raise significant constitutional concerns. While the court upheld the trial court's denial of post-conviction relief for Andrew Culler, there are grounds to argue that this decision may have overlooked or inadequately addressed certain constitutional rights. Particularly, issues pertaining to the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause are at the forefront.

A key constitutional issue in this case revolves around the Sixth Amendment, which guarantees the right of an accused to be confronted with the witnesses against them. The appellate court's affirmation that the trial court did not err in admitting hearsay testimony potentially conflicts with this constitutional right. The Confrontation Clause is designed to ensure the reliability of evidence through the opportunity for cross-examination. In Culler's case, the admission of hearsay testimony where witnesses relayed statements made by the victim could be seen as a violation of this fundamental right, as it deprived Culler of the opportunity to challenge the credibility of those statements directly.

Moreover, the Fourteenth Amendment's Due Process Clause may also be implicated in this decision. The appellate court's endorsement of the trial court's procedural handling of the case, specifically the denial of an evidentiary hearing in the post-conviction relief process, could be viewed as a failure to provide a fair and just legal process. The Due Process Clause requires that legal proceedings be conducted with fairness and equity, and denying an evidentiary hearing could be seen as a hindrance to Culler's ability to fully present his case and challenge the evidence against him.

The appellate court's reliance on the doctrine of res

judicata to affirm the denial of post-conviction relief is also potentially problematic from a constitutional perspective. While res judicata is a valid legal principle meant to prevent litigation redundancy, its application must not infringe upon an individual's constitutional rights. In this case, the court's broad application of res judicata may have inadvertently barred a substantive review of potential constitutional violations, including issues related to ineffective assistance of counsel and the admissibility of evidence, which are crucial to ensuring a fair trial.

Finally, this cause presents several constitutional concerns that warrant further scrutiny. The potential infringement of the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause, coupled with the questionable application of the doctrine of res judicata, suggest that the decision may not fully align with constitutional protections. It is crucial for the legal system to vigilantly uphold constitutional rights, and as such, a reconsideration of this case in light of these constitutional issues is advisable.

The Petitioner urges this Court to assume jurisdiction over this cause and to hear it on its merits.

Respectfully Submitted,

Rhys B. Cartwright-Jones
42 N. Phelps St.
Youngstown, OH 44503-1130
330-757-6609, tel.
866-223-3897, fax
rhys@cartwright-jones.com
Counsel for Petitioner