IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

v.

DONALD LAVELL CRAIG

Appellant

Supreme Court Case No. 04-1554

On Appeal from the Summit County Common Pleas Court Case No. CR 03 06 1638

CAPITAL CASE

STATE'S RESPONSE TO APPELLANT'S APPLICATION FOR REOPENING

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Appellant filed an Application For Reopening on December 14, 2006. For the following reasons the State requests that the application be denied.

FACTS

Appellant was convicted of aggravated murder with three death penalty specifications, three counts of rape and one count of kidnapping. He was sentenced to death and sentenced to prison terms on the non-capital offenses. This Court affirmed the death sentence but remanded for re-sentencing on the non-capital offenses. *State v. Craig*, 110 Ohio St.3d 306, 2006-Ohio-4571 (*Craig*).

Appellant was convicted of murdering, raping and kidnapping twelve year old Roseanna Davenport. Investigation showed that Rosie had been strangled to death. There were many injuries inflicted on the body. Rosie was raped before she was killed. DNA samples were taken. When DNA testing became more sophisticated appellant's DNA was identified on the vaginal swab in 2002. The DNA results prove to a certainty that appellant was the source of the DNA. *Craig*, ¶8-¶10, ¶20, ¶93; testimony of Dr. Kohler, T. 12, 2231-2234.

LAW

An application for reopening under S.Ct. Prac. Rule XI, Section 6 tests whether the defendant had ineffective assistance of appellate counsel in the appeal to this Court.

Procedurally the application must contain an affidavit "stating the basis for the claim that appellate counsel's representation was ineffective with respect to the propositions of law or arguments ***and the manner in which the claimed deficiency prejudicially affected the outcome of the appeal ***." S.Ct. Prac. Rule XI(B)(4).

The defendant has the burden of showing a genuine issue that the defendant was deprived of the effective assistance of appellate counsel. Id. (E).

This Court explained the test for ineffective assistance in the context of an application for reopening in a court of appeals under App.R. 26(B) in *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987. The State believes there is no difference when an application is filed in this Court. The test follows.

> The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess whether Tenace has raised a "genuine issue" as to the ineffectiveness of appellate counsel in his request to reopen his appeal in the court of appeals under App.R. 26(B)(5). See *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696. To show ineffective assistance, Tenace must prove that his counsel were deficient for failing to raise the issues that he now presents and that there was a reasonable probability of success had they presented those claims on appeal. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.
>
> {¶ 6} Moreover, to justify reopening his appeal, Tenace "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *Spivey,* 84 Ohio St.3d at 25, 701 N.E.2d 696.
>
> {¶ 7} *Strickland* charges us to "appl[y] a heavy measure of deference to counsel's judgments," 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to "indulge a strong presumption

> that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18.

PROPOSITIONS OF LAW

As an initial matter the State does not believe that the application contains an affidavit as contemplated by the rule. The affidavit, submitted by counsel, states in relevant part that:

> 11. Based on the foregoing standards, I have identified five propositions of law that should have been presented to this Court by appellate counsel. The propositions of law identified in Craig's application for reopening were not presented to this Court.
> 13. Based on my evaluation of the record and understanding of the law, I believe that if these propositions of law had been properly presented for review, this Court would have granted relief. Also, those errors would have been preserved for federal review.
> 14. Therefore, Donald Lavell Craig was detrimentally affected by the deficient performance of his former appellate counsel.

The affidavit simply states that had defendant's propositions of law been presented on appeal they would have succeeded; moreover, having succeeded in this Court there would be no reason for appellant to seek federal review. The affidavit does not state at a minimum "the manner in which the claimed deficiency prejudicially affected the outcome of the appeal ***." S.Ct. Prac. Rule XI, Section 6(B)(4).

This Court has condemned the use of affidavits under App.R. 26(B) that are not particular in nature. *State v. Franklin*, 72 Ohio St.3d 372, 1995-Ohio-8; See *State v. Whatley*, Cuyahoga App. No. 86267, 2006-Ohio-5717, ¶3 (affidavit that states that the defendant was "wholeheartedly" denied effective assistance of counsel is deficient.) The

State contends that the instant affidavit is deficient since it is utterly conclusory in nature. Hence the application should be denied for that reason.

Be that as it may examination of the propositions of law shows that appellant has not shown a genuine issue that appellate counsel was ineffective. Where appellant repeats arguments made in a preceding proposition the State relies on its prior discussion. The cited portions of the record are attached as Exhibit 1.

Proposition 1

Appellant says his rights were violated when he was not present at a hearing on a motion to suppress held December 2, 2003 and when counsel waived his presence at a hearing on a motion to quash (it is unclear whether appellant is challenging counsel's waiver of his presence but the State will assume that he is).

Concerning the motion to suppress held on December 2, 2003 the record does not show that appellant was not present at the hearing. T. Suppression Hearing, 2-7. This Court has held that "the record must affirmatively indicate the absence of a defendant or his counsel during a particular stage of the trial." *State v. Chinn* (1999), 85 Ohio St.3d 548, *568. Since the record does not affirmatively show that defendant was not present at the hearing on the motion to suppress this branch of the claim goes nowhere.

Concerning the alleged hearing on a motion to quash the record shows that the trial court told the parties that it did not think that appellant had to be present and defense counsel agreed. Before stating that it did not think appellant had to be present the court remarked that it did not know if there would be time to get appellant something to eat before court adjourned. T. 8, 1585-1586.

The alleged hearing was not a hearing at all in the sense that a ruling was made or formal evidence on the motion taken. The trial court discussed with the State and defense a subpoena that the State had issued to a local newspaper reporter due to some statements made by appellant to the reporter and a motion to quash/for protective order filed by the newspaper. The reporter was present in court but was not accompanied by counsel for the newspaper. Id. There was a discussion about the matter with the upshot being that the court suggested that the State and appellant explore whether a stipulation could be worked out to solve the issue. Id. 1591-1594. The court did not rule on the newspaper's motion. Id.

It is clear that defense counsel's decision to waive appellant's presence was a tactical decision most likely born out of a desire to allow appellant to get a bite to eat. Moreover, appellant does not suggest how his absence prejudiced him. Not only may counsel waive a defendant's presence but the absence of the defendant must prevent a fair and just hearing in order to be prejudicial. See *State v. Green*, 90 Ohio St.3d 352, *371 - *372, 2000-Ohio-182. This proposition must be rejected.

Proposition 2

Appellant says counsel did not object to verdict forms that were deficient because they did not require the jury to find guilt beyond a reasonable doubt. Appellant cites no authority for this notion. The trial court properly instructed the jury on the State's burden of proof. T. 15, 2759-2760. The presumption is that the jury followed the instruction. *Pang v. Minch* (1990) 53 Ohio St.3d 186, *195. It is not ineffective assistance to make futile objections. Nor must trial counsel anticipate each and every novelty, regardless of merit, that subsequent counsel wants to bombard the federal courts with. This proposition must be rejected.

Proposition 3

Appellant says there was insufficient evidence that he kidnapped Rosie Davenport. The standard is whether construing the evidence most strongly in favor of the State any rational finder of fact could find the elements of the offense beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. This Court has already rejected this claim. In *Craig* this Court held:

> {¶ 118} On the evening of February 28, 1996, Craig abducted Davenport as she was walking home. He then took her to the empty apartment on Maple Street or some other location where he raped her. The evidence shows that Davenport was orally, anally, and vaginally raped, and then apparently allowed to dress. Only then did Craig murder her. See State v. Hill (1992), 64 Ohio St.3d 313, 332, 595 N.E.2d 884 (separate animus for kidnapping where defendant forced a 12-year-old victim from a parking lot to a wooded area where he then raped and murdered him); State v. Powell (1990), 49 Ohio St.3d 255, 261-262, 552 N.E.2d 191 (kidnapping upheld as a separate offense where defendant lured a child from her home to a nearby building where he attempted to rape her and then killed her); cf. State v. Adams, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 93 (no separate animus since victim not moved from the bedroom where she was raped and murdered). We conclude that the evidence established that a separate animus existed for the kidnapping separate and apart from the rapes.

While the above was stated in the context of a merger issue it is inconceivable that this Court would have stated that there was a kidnapping if there was not sufficient evidence to support that offense. This proposition must be rejected.

Proposition 4

Appellant first says that his mitigation expert, Dr. Bendo, was not qualified to be such an expert and counsel did not properly supervise Dr. Bendo, explaining that appellant's background was not thoroughly explained to the jury. Appellant is simply speculating and has not shown that he was prejudiced by use of Dr. Bendo. Moreover,

Dr. Bendo testified that he met with two mitigation specialists, Tom Fields and Thomas Hurdley. Dr. Bendo said that the specialists came highly recommended by the defense team and that the specialists were very experienced. Dr. Bendo met with the specialists and exchanged observations about the case. T. 16, 3005-3006. Appellant does not attack the bona fides of those specialists.

Next, appellant says that counsel should have objected when the State asked Dr. Bendo the following question: "But the goal in doing the testing and doing the interviewing was to explain behavior?" Dr. Bendo's answer was: "To look at the wider picture of his life other than the crime itself. That was my goal." T. 16, 3028. Certainly appellant was not prejudiced by the State's question assuming there was anything objectionable about it. Dr. Bendo's answer was surely proper focusing as it did on appellant's life as a whole rather than on the crimes. Appellant was not prejudiced by this exchange.

Last, appellant complains that counsel did not object when it argued at the penalty phase that it must use certain photographs to prove that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Appellant goes on to say that the trial court used an incorrect standard in evaluating the admissibility of the photographs. The record shows that the State proffered certain photographs as exhibits. Appellant objected to admission of all of the photographs. T. 17, 3080. As before this Court answered this claim in *Craig*. This Court held that the trial court did not abuse its discretion in admitting photographs including at the penalty phase. Id. ¶90-¶99.

This proposition must be rejected.

Proposition 5

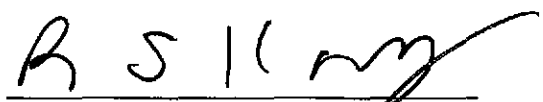
Appellant says that there was prosecutorial misconduct. These claims have been addressed above.

CONCLUSION

The application is defective due to the affidavit that does not comply with the rule. In addition, appellant has not shown a genuine issue that there was ineffective assistance of appellate counsel. Accordingly, the State respectfully requests that the application be denied.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been sent via regular U.S. mail to Robert K. Lowe and Linda E. Prucha, Assistant State Public Defenders, Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio, 43215, on this 11th day of January, 2007.

RICHARD S. KASAY
Assistant Prosecuting Attorney
Appellate Division

1 situation. Did they confer with you in
2 reference to excusing this juror?
3 THE DEFENDANT: Yes.
4 THE COURT: And are you in agreement
5 with your counsel that Juror Number 15, David
6 Martin, should have been excused?
7 THE DEFENDANT: Yes, Your Honor.
8 THE COURT: All right. Thank you.
9 All right. Now, I don't know if you can
10 get the client something to eat and have him
11 in the back of the cruiser by the time we
12 leave.
13 This other issue that we are going to
14 address very briefly here is the motion to
15 quash.
16 Do you have anybody here with you?
17 MR. TREXLER: No, Your Honor, I don't.
18 THE COURT: Well, do you want to --
19 MR. TREXLER: Can we rely on the motion
20 that was filed today?
21 THE COURT: All right. I am just saying
22 if you want to take Mr. Craig, I think this is
23 something of a legal nature that he doesn't
24 have to be here for.
25 Are you in agreement?

1 MR. O'BRIEN: Understood, Your Honor,
2 and we agree.
3 - - -
4 (The following proceedings were had out
5 of the presence of the defendant.)
6 - - -
7 THE COURT: All right. Thank you.
8 All right. I just want to treat this
9 informally, if we can. Okay.
10 It is the Court's understanding the
11 State of Ohio has subpoenaed Phil Trexler, who
12 is a reporter for the Beacon Journal
13 Publishing Company, in reference to an article
14 that he wrote on the first day of jury
15 selection.
16 We will start with Prosecutor Doherty.
17 What are the reasons you have subpoenaed
18 Mr. Trexler.
19 And also I should note that today the
20 Court received a motion to quash and/or for
21 protective order filed by the Beacon Journal
22 in reference to the subpoena.
23 MS. DOHERTY: Judge, first of all, we
24 haven't seen that motion to quash, but
25 obviously the Court has received it.

1 obtained by an alternative means other than
2 subpoenaing Mr. Trexler into court?
3 MS. DOHERTY: Your Honor, to my
4 understanding, that the telephone
5 conversations -- and, again, it is my
6 understanding that was done over the phone --
7 that the telephone conversations from the
8 Summit County Jail are taped.
9 However, as the Court is aware, that's
10 not going to be admissible on its own without
11 Mr. Trexler testifying.
12 THE COURT: I suppose one -- and in some
13 cases, there is a stipulation to certain
14 statements.
15 I am thinking of an alternative means
16 might be to stipulate that these statements
17 are accurate as they appear in the Beacon
18 Journal.
19 I wouldn't let all the defendant's
20 statements in any way. There is -- well,
21 unless the defense wanted them in.
22 But the point where he says I am
23 innocent and I intend to prove it, that
24 obviously is unconstitutionally shifting the
25 burden of proof to him. He doesn't have to

1 prove anything.
2 But with some redactions agreed to, I
3 mean, that's an alternative means other than
4 having Mr. Trexler take the witness stand.
5 I don't know if that's something --
6 All right. I would ask the defense and
7 the State to look at that option.
8 And then the last weighing point the
9 Court has to engage in, is there a compelling
10 interest in this information and what is the
11 compelling interest.
12 MS. DOHERTY: I believe, Judge, what I
13 said on the first prong, in that it is
14 significant in terms of testimony in what the
15 other witnesses are going to say, and it is
16 compelling in his conviction.
17 I suppose I don't know if I understand
18 what that means.
19 THE COURT: You are saying you are not
20 going to introduce any other testimony, any
21 other statements that are the same as what he
22 gave to the newspaper?
23 That he didn't know the victim and he's
24 not familiar with the area?
25 This is the only source of this

1 information you have?
2 MS. DOHERTY: Yes. Specifically in
3 that -- termed in that way, yes. The way that
4 he phrased it to Phil Trexler, yes.
5 THE COURT: All right.
6 At this juncture, you have until
7 tomorrow morning. The Court is going to order
8 the defense and the State to confer to see if
9 a stipulation can be worked out regarding this
10 issue.
11 And in terms of just stipulating, the
12 statements are what the statements are in the
13 article, and I would like to go down that
14 avenue first before entertaining putting Mr.
15 Phil Trexler on the witness stand.
16 MR. PIERCE: Judge, if we reach some
17 kind of agreement, how would those statements
18 be introduced to the jury?
19 THE COURT: I guess any way that we
20 agree on.
21 You know, we would have to probably use
22 the context of the newspaper or, you know, the
23 whole article can come in, or part of the
24 article redacted could come in.
25 Or it is stipulated to by both sides

1 that there was a newspaper article and that
2 Mr. Craig was interviewed and he made the
3 following statements.
4 I think that probably would be the most
5 neutral way to do it.
6 MR. PIERCE: Okay.
7 THE COURT: I need to know that by eight
8 o'clock tomorrow morning.
9 We are in recess.
10 (The jury was taken on a jury view.)
11 - - -
12 (An adjournment was taken.)
13 - - -
14
15
16
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23
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25

1 for identification.)

2 - - -

3 BY MS. DOHERTY:

4 Q. State's Exhibit Number 78?

5 A. This is on the left ankle. You see a small

6 abrasion right here, in which you can see the

7 skin has come off. You can see some flaking

8 of skin at the edge of it.

9 There is also a small area, similar area

10 up above the label.

11 Q. Again, a linear type of injury?

12 A. Yes, a linear abrasion.

13 - - -

14 (State's Exhibit Number 79 was marked

15 for identification.)

16 - - -

17 BY MS. DOHERTY:

18 Q. State's Exhibit Number 79?

19 A. This is on the inside of the ankle. You can

20 just barely make out in this -- in this area

21 here, it's "I L y-o-u". So.

22 It is a tattoo that says essentially, I

23 love you.

24 - - -

25 (State's Exhibit Number 80 was marked

1 for identification.)

2 - - -

3 BY MS. DOHERTY:

4 Q. All right. State's Exhibit Number 80?

5 A. State's Exhibit 80 is of the lower legs.

6 And on the left leg we have this area of

7 kind of a carpet burn type abrasion.

8 You see there are some black marks

9 through that. Those are actually blood

10 vessels that are running underneath of the

11 skin there, and they show up black because the

12 blood inside of them is becoming kind of a

13 black discoloration, just due to the

14 decomposition changes.

15 - - -

16 (State's Exhibit Number 74 was marked

17 for identification.)

18 - - -

19 BY MS. DOHERTY:

20 Q. State's Exhibit Number 74?

21 A. State's Exhibit Number 74 is the left inner

22 wrist, so this is going to be about where the

23 watchband area, is just a little bit farther

24 up.

25 You can see we have got kind of a linear

1 area, again, here, showing an abrasion that's
2 much like what we saw on the ankles as well.
3 - - -
4 (State's Exhibit Number 77 was marked
5 for identification.)
6 - - -
7 BY MS. DOHERTY:
8 Q. State's Exhibit Number 77?
9 A. This is the back of the left hand. You can
10 see right here we have got a series of three
11 small abrasions or scratches on the back of
12 her hand.
13 - - -
14 (State's Exhibit Number 75 was marked
15 for identification.)
16 - - -
17 BY MS. DOHERTY:
18 Q. State's Exhibit Number 75?
19 A. State's Exhibit Number 75 is the back of the
20 right forearm.
21 You can see right here there is a small
22 abrasion or contusion.
23 - - -
24 (State's Exhibit Number 76 was marked
25 for identification.)

1 - - -

2 BY MS. DOHERTY:

3 Q. And State's Exhibit Number 76?

4 A. And that looks like it is the same injury. It

5 is a small abrasion about one inch in length,

6 linear abrasion involving the back of the

7 forearm.

8 Q. All right. The next three sets.

9 Doctor, you indicated that there were

10 contusions under the scalp that were found

11 during the autopsy, correct?

12 A. Yes.

13 - - -

14 (State's Exhibit Number 82 was marked

15 for identification.)

16 - - -

17 BY MS. DOHERTY:

18 Q. All right. I am going to show you just two

19 photographs. State's Exhibit Number 82?

20 A. This is labeled as the right occipital scalp.

21 The skin has been reflected backwards,

22 and here in this area you can see the purple

23 discoloration. That is the bruise that would

24 be right back here in this area, on the right

25 back side of the scalp.

1 one hour was for the test.
2 Q. Okay. So in terms of sitting down and talking
3 with the defendant, you maybe talked with him
4 about four hours; would that be fair to say?
5 A. Yes, that's fair.
6 Q. Okay. And then tell me what else it was that
7 you did in connection with your preparation
8 for your testimony here?
9 A. I met on several occasions with two mitigation
10 specialists.
11 Q. Tell us what a mitigation specialist is.
12 A. In this particular case, these are men who
13 gather information, find out where the reports
14 are, the school records, and do the actual
15 physical, you know, gathering of the
16 information, interview some of the family and
17 then we got together and discussed the case,
18 my interpretation, my observations, and their
19 observations.
20 Q. Okay. And who was it that you worked with in
21 this particular case?
22 A. I worked with two specialists, Tom Fields and
23 Thomas Hurdley.
24 Q. You have worked with those two individuals
25 before?

1 A. No, ma'am.
2 Q. What do you know or, if anything, about the
3 background of those two people?
4 A. I know they are widely experienced in
5 gathering information. They were highly
6 recommended by the defense team and very
7 experienced.
8 Q. And what else?
9 You reviewed records? You reviewed the
10 military records of the defendant, correct?
11 A. Yes, ma'am.
12 Q. And your purpose in doing that was what?
13 A. It was an important part of his life.
14 I had some questions about, you know,
15 his behavior during that, if there was any
16 criminal activity or drinking related events,
17 and just see how he managed in the military
18 setting.
19 Q. And what did you find in that regard?
20 A. That he was dishonorably discharged. Got into
21 some trouble more than once during his
22 experience with the military.
23 Q. It would be accurate to say, in fact, that he
24 was court-martialed three separate times,
25 correct?

1 objection.
2 Sustain means you don't answer.
3 THE WITNESS: Okay.
4 Sorry.
5 BY MS. MULLIGAN:
6 Q. But the goal in doing the testing and doing
7 the interviewing was to explain behavior?
8 A. To look at the wider picture of his life other
9 than the crime itself. That was my goal.
10 Q. Did you review anything about the crime
11 itself?
12 A. Yes.
13 Q. Okay.
14 A. Of course.
15 Q. And your explanation of his behavior is what?
16 A. I cannot explain this.
17 MS. MULLIGAN: Thank you. I don't have
18 any other questions.
19 THE COURT: Anything else?
20 MR. PIERCE: No, Judge.
21 THE COURT: All right. You are
22 excused. Thank you.
23 THE WITNESS: Thank you.
24 (Witness excused.)
25 - - -

1 which is a partial body shot which shows a
2 ligature mark on the wrist.
3 The rest of the photographs, 64, 65, 60,
4 74, 59, 76, and 78 show ligature marks on the
5 neck, arms, ankles, legs.
6 Any objection to those? Are you
7 objecting to admission of those as well?
8 MR. O'BRIEN: That is correct.
9 Your Honor, every photo we are objecting
10 to.
11 THE COURT: All right. The Court finds
12 that the probative value is outweighed by the
13 prejudice. The State of Ohio must prove --
14 prove the aggravating circumstances beyond a
15 reasonable doubt, and the Court feels that,
16 therefore, these photographs are probative.
17 They will be admitted over the objection
18 of the defendant.
19 MS. DOHERTY: Thank you, Your Honor.
20 THE COURT: What about Dr. Bendo's
21 report?
22 MR. O'BRIEN: We would have no
23 objection, Your Honor.
24 THE COURT: All right. That will come
25 in as well.

1 *****Tuesday, December 2, 2003

2 P R O C E E D I N G S

3 - - -

4 THE COURT: Let the record reflect
5 we are here in reference to criminal case
6 2003-06-1638, State of Ohio versus Donald
7 Craig. There have been numerous motions
8 filed by the defense in this death penalty
9 case. The court has scheduled the matter
10 today for an evidentiary hearing and a
11 hearing on various motions. It's the
12 court's understanding that there are two
13 motions in which the defense intends on
14 presenting evidence. There's the motion
15 to suppress and the motion to challenge
16 admission of the DNA evidence; is that
17 correct?
18 MR. O'BRIEN: That is correct, Your
19 Honor.
20 THE COURT: Attorneys Kerry O'Brien
21 and Brian Pierce are representing the
22 defendant, Donald Craig, and Assistant
23 Prosecutor Becky Doherty is here
24 representing the State of Ohio. With that
25 then the defense may proceed.

1 MR. PIERCE: Your Honor, I believe
2 if the court will permit the first motion,
3 we would go forward on the motion to
4 suppress the DNA. Just for chronological
5 reasons, that occurred first, prior to the
6 statements being made.
7 We would call several witnesses in
8 this matter. It's our contention that
9 there was a blood draw taken from Mr.
10 Craig in March of 1996 shortly after the
11 homicide in this case. And that that
12 blood draw was done pursuant to a motion
13 and a court order that was not supported
14 by probable cause.
15 We have, I believe, four witnesses,
16 Judge, that we would be calling that would
17 testify as to the circumstances leading up
18 to that. The first witness would be
19 Attorney Chuck Quinn.
20 MS. DOHERTY: Your Honor, if I may,
21 the motion to suppress that was filed by
22 the defense indicates that there was --
23 that the affidavit for the search warrant
24 failed to set forth probable cause.
25 There's no mention of the court order in

1 the body of the motion to suppress itself.
2 The State does have a certified copy of
3 the affidavit, the search warrant, and the
4 return that's marked as State's Exhibit 1
5 that we would like to introduce. But
6 based upon the -- the motion that we
7 received from defense counsel, probable
8 cause for the search warrant is the only
9 issue.
10 MR. PIERCE: Judge, it was after
11 the motion was filed that -- let me back
12 up.
13 Pursuant to discovery, I received
14 an affidavit and motion for a search
15 warrant or an actual search warrant that
16 was in the State's file; that was not time
17 stamped. Based on that, I assumed that
18 that motion had been filed with the court
19 and that the return and a receipt of
20 inventory had also been filed.
21 After the filing of the motion to
22 suppress, Judge, I went personally to the
23 Akron Municipal Court and pulled the
24 original search warrant file and learned
25 that the receipt of inventory and service

1 had indicated that that warrant was never
2 served upon Mr. Craig. There was no
3 receipt or inventory that was ever filed
4 with the court that contained any
5 substance to that.
6 It's my belief that the DNA, the
7 samples were taken pursuant to a motion
8 and an order that was actually
9 incorporated in that search warrant. It's
10 a one-page motion and an order that
11 Attorney Quinn did as PLA that was made a
12 part of that search warrant. I don't
13 believe the warrant was used to obtain the
14 samples because it was never served upon
15 Mr. Craig and there was no return of
16 inventory, which you will see on the
17 exhibit there that the State is giving
18 you.
19 THE COURT: Any response to that?
20 MR. CARROLL: The problem is,
21 Judge, their motion only sets forth the
22 fact that the affidavit did not set forth
23 probable cause. And there's no mention of
24 the court order or anything that led up to
25 that.

1 The State is prepared to proceed on
2 the motion that they filed. If there was
3 information that Attorney Pierce received
4 subsequent to that -- and all that
5 information was in our file and they
6 actually have copies of the whole thing --
7 but if there was additional information
8 the motion should have been amended or at
9 least a supplemental motion filed because
10 we are prepared to proceed on the fact
11 that the search warrant certainly was
12 signed based on probable cause. So we
13 don't have any information -- we aren't
14 prepared to proceed on the court order
15 issue.
16 MR. PIERCE: The court order was
17 attached to the search warrant,
18 incorporated in that warrant.
19 THE COURT: All right. The court
20 order is an attachment to the document as
21 filed in this court. The court's going to
22 allow the defense to proceed. I'm going
23 to grant you leave to file a supplemental
24 motion to exclude DNA testimony based on
25 that separate ground. And also I will

1 permit the State to respond. And if as a
2 result of raising this issue today the
3 State needs to have a supplemental hearing
4 to present additional evidence, the court
5 will also grant leave to the State at a
6 later date to furnish the court with that
7 evidence.
8 All right. With that then, is the
9 defense ready to call their first witness?
10 Raise your right hand.
11 - - -
12 CHARLES R. QUINN, ESQ.
13 a witness herein, called on behalf of the
14 Defendant, having been first duly sworn as
15 provided by law, was examined and testified as
16 follows:
17 THE WITNESS: I do.
18 - - -
19 DIRECT EXAMINATION
20 BY MR. PIERCE:
21 Q. Good morning, Attorney Quinn.
22 Attorney Quinn, would you just
23 state your full name for the record and
24 spell your last name, please.
25 A. Charles R. Quinn, Q-U-I-N-N.