

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. **07-1830**  
Plaintiff-Appellee, :  
-vs- : On Appeal from the Court of Appeals,  
LARRY GAPEN, : Second Appellate District,  
 : Montgomery County, Case No. 21822  
Defendant-Appellant. : **This is a death penalty case.**

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APPELLANT LARRY GAPEN'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

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Montgomery County Prosecuting Attorney

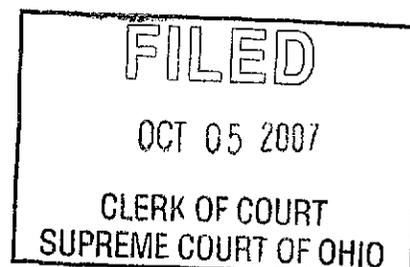
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**TABLE OF CONTENTS**

	<u>Page No.</u>
Explanation of why this case is a case of public or great general interest and involves a substantial constitutional question.....	iii
Statement of the Case and Facts .....	1
Procedural Posture .....	1
Statement of Facts.....	2
Argument .....	7
Proposition of Law No. 1 .....	7
<p>When defense counsel in a capital case fail to investigate and present compelling mitigating evidence relevant to the overriding penalty-phase issue, the only conclusion the deciding court can come to is that the defendant’s Sixth Amendment right to effective assistance of counsel was violated. Further, a trial court’s opinion that does not reasonably apply federal constitutional law, that misstates the evidence presented, and that considers evidence irrelevant to the issue to be decided is arbitrary and an abuse of discretion. U.S. Const. amends. VI, VIII, XIV.</p>	
Conclusion .....	35
Certificate of Service .....	36

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The issue presented by this case involves evaluating a capital defendant's Sixth Amendment right to effective assistance of counsel at the penalty phase of trial—an issue not new to this Court. The court of appeals in this case, however, adopted the trial court's opinion, which in effect holds that the defense's expert witness, not defense counsel, is responsible for investigating and developing mitigating evidence. This opinion conflicts with United States Supreme Court precedent, which holds that defense counsel has the duty to investigate and prepare evidence for the mitigation phase of trial. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000). See also Carter v. Bell, 218 F.3d 581, 596 (6th Cir. 2000); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995).

In reaching its decision, the trial court did not reasonably apply federal constitutional law. It misstated the evidence presented at an evidentiary hearing on the matter and considered such arbitrary factors as the trial attorney's reputation in determining whether the attorney's performance in this particular case was deficient. When a court fails to reasonably apply the relevant law and bases its decision on irrelevant and incorrect facts, its decision amounts to an abuse of discretion. A reviewing court has an obligation to correct the error.

Thus, the questions presented here entail how trial counsel's performance should be evaluated and what connotes an abuse of discretion. Defense counsel holds the duty to investigate. Rompilla v. Beard, 545 U.S. 374 (2005). A court's decision that absolves defense counsel of any responsibility to pursue critical mitigating evidence runs afoul of established federal law.

When defense counsel obtains the services of an expert and presents a question to be addressed, should the expert edit the question or answer it? The American Bar Association's

Guidelines for defense counsel in capital cases, which the United States Supreme Court and the Sixth Circuit Court of Appeals rely on as the norms of practice, see, e.g., Hamblin v. Mitchell, 354 F.3d 482, 487–88 (6th Cir. 2003), state that “lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work . . . .” *American Bar Association: Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 999, Guidelines 10.4 (Summer 2003). Thus, when information is not forthcoming from the expert, defense counsel must expand the question posed to the expert and provide direction. See Combs v. Coyle, 205 F.3d 269 (6th Cir. 2000) (defense counsel failed to ask their expert witness, prior to trial, his opinion on the defendant’s ability to form intent; court did not hold the expert responsible for coming forward with his opinion and informing defense counsel).

The issue here encompasses the relationship between defense counsel and their experts, and its impact on counsel’s duty to render effective assistance under the Sixth Amendment. In Gapen’s case, defense counsel failed to reasonably communicate his instructions and expectations to the expert witness. Counsel failed to follow up with the expert. As a result, important mitigating evidence was not developed and presented to the jury. Thus, counsel did not fulfill his duty to the client at the penalty phase.

Defense counsel is responsible for the performance of the defense team. The decisions of the courts below unreasonably hold otherwise. This Court must grant jurisdiction to hear this case and reverse the erroneous decision of the court of appeals.

## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

### A. Procedural History

On October 18, 2000, Appellant Larry Gapen was indicted with multiple counts of aggravated murder with death specifications involving three victims. The court appointed counsel to represent Gapen.

On June 5, 2001, a jury trial commenced with the State's case-in-chief. The jury returned guilty verdicts on all counts and specifications, except a count of rape.<sup>2</sup> After the mitigation hearing, the jury returned a recommendation that the death penalty be imposed on one count of aggravated murder and that life without parole be imposed for the remaining eleven counts of aggravated murder. On July 3, 2001, the trial court sentenced Gapen to death.

On October 4, 2002, Gapen filed his Ohio Revised Code § 2953.21 petition for postconviction relief. On November 4, 2002, Appellee, State of Ohio, filed an Answer. Then on December 16, 2002, the State filed a Motion for Summary Judgment. On March 11, 2004, the trial court granted the State's Motion for Summary Judgment and dismissed the petition. Gapen filed a timely notice of appeal. In a decision dated January 31, 2005, the Second Appellate District remanded the case for an evidentiary hearing on the petition's First Ground for Relief. On March 21, 2006, a hearing was held in the trial court. The parties filed post-hearing briefs.

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<sup>1</sup> References to the transcript of the trial proceedings are identified as "T.p. \_\_\_\_" and references to exhibits attached to the state postconviction petition are identified as "PC Ex. \_\_\_\_."

<sup>2</sup> In recounting the circumstances of the offense, the trial court rejected the jury's verdict acquitting Gapen of rape. (T.p. 3892) The court stated that Gapen had sexual intercourse with Martha Madewell after he killed her. (8/28/06 Decision, pp. 36, 39) That the court chose to ignore the jury's verdict does not alter the verdict acquitting Gapen of rape. (T.p. 3892) The jurors found Gapen guilty of a death specification of attempted rape.

On August 28, 2006, the trial court rendered its decision denying postconviction relief. Gapen filed a notice of appeal to the Second Appellate District. On August 24, 2007, the court of appeals issued its decision affirming the trial court's opinion, with one judge dissenting.

**B. Statement of Facts**

Nothing in Larry Gapen's history indicated that he was capable of murder. For nearly fifty-two years, he lived a responsible, unassuming life. Gapen's mother described him as a good-natured boy who understood what it was to work for what he got. (T.p. 4079) As he grew up, Gapen learned the meaning of hard work and the value of a dollar.

Gapen remained a hard worker throughout his adult life. He got married in high school and had a daughter named Holly. (T.p. 4083–84) He held several jobs and was a responsible worker. (T.p. 4079)

Gapen's first marriage ended after nine years. Although his daughter stayed for short periods of time with her mother, Gapen raised his daughter as a single parent. Gapen married a second time. Jimmy and Charity were the children born of that marriage. (T.p. 4085) Gapen was a good provider. (T.p. 4084–85) The second marriage ended when his wife died after the couple had been separated. (T.p. 4038)

Sports and community involvement were part of Gapen's life. (T.p. 4134–39) Steve Menard, a former police officer who coached with Gapen for over a decade (t.p. 4134), testified that Gapen was always "the first one to step up to the plate and volunteer . . . way above and beyond what he was supposed to be doing for the football club." (T.p. 4136) One year Gapen, his son Jimmy, stepson Daniel, and Menard put a new roof on the house of an elderly widow who had been the secretary for the football club. (T.p. 4137) Gapen would buy equipment for the boys on his teams who needed it, without expecting reimbursement. (T.p. 4139, 4100)

Gapen's life began to change when he met Martha Madewell. (T.p. 4041) Martha had four children from previous relationships: Daniel, Jesica, Brooke, and Billy. Martha and Gapen married in 1993. But as time passed, the tranquility of the melded family began to turn to conflict. Gapen and Martha's eldest son, Daniel, began to have disagreements, which sometimes led to physical altercations. During one such fight, Gapen was injured. (T.p. 4048) Gapen and Jesica had a strained relationship. (T.p. 3584, 4148) Gapen threw himself into his work in an effort to provide for Martha's increasingly extravagant lifestyle. (T.p. 3528-29, 4053) Increasing debt and difficulty with the children began to take a toll on the marriage.

In the fall of 1999, Gapen and his son Jimmy moved out. In April 2000, they moved in with Gapen's daughter Charity, who had rented a place of her own after graduating from high school. (T.p. 4049-50) Jimmy noticed that his father appeared to be deeply upset and that he began drinking heavily at that time. (T.p. 4051-52)

Gapen and Martha continued to see each other after their separation, but their relationship blew "hot and cold." (T.p. 4158, 4051) They signed a separation agreement on June 16, 2000. (State's Trial Exhibit 199A) On June 24, 2000, Gapen was arrested and charged with abduction for going over to Martha's house and tying her feet together as she lie sleeping so that he could talk to her. (T.p. 2338; State's Trial Exhibit 116; Defendant's Trial Exhibit M) Gapen was released on bond and placed on electronic home monitoring. (State's Trial Exhibits 117, 118; T.p. 3553) Even after the criminal charges were filed, Martha continued to contact Gapen. (T.p. 3567-69, 3577-80, 3600, 3602, 3635) Nonetheless, the marriage was officially dissolved on September 14, 2000. (T.p. 3030)

Gapen suspected that Martha was seeing another man. (T.p. 2576, 2504) On the evening of Sunday, September 17, 2000, Gapen had dinner at 8:00 with his son Jimmy and Jimmy's

girlfriend. (T.p. 3607–08) Earlier that evening, around 7:30, Gapen had been at Martha’s house. The evidence at trial indicated that Gapen saw Martha and an unfamiliar man lying together on a couch. (T.p. 3410)

According to the police, Gapen told them that he returned to Martha’s house at about 12:30 a.m., on Monday, September 18, 2000. (T.p. 3410) He observed Martha and her companion, Nathan Marshall, asleep on a couch in the basement. Mr. Marshall was not wearing pants. (T.p. 2340, 2806) In opening statement, the prosecutor told the jurors that Mr. Marshall was Martha’s ex-husband. (T.p. 2302, 2313–14) In a fit of rage, Gapen took a chopping maul and fatally beat Martha and Mr. Marshall. He then went upstairs and inflicted fatal injuries to Martha’s thirteen-year-old daughter, Jesica. (T.p. 3410–11)

Martha’s son Daniel was awakened by Jesica’s cries. Daniel opened the door to his bedroom and saw Gapen standing in the hallway. Gapen told Daniel to go back to sleep, which he did. (T.p. 2631–32) Gapen left the chopping maul in the upstairs bathroom. (T.p. 2706) He left the house with Martha’s youngest children, Brooke and Billy. (T.p. 3346–52, 3415)

Daniel got up again a few minutes later. He noticed that the back door was open. He turned on the lights and found his mother and Nathan dead in the basement. He ran upstairs and saw Jesica, bleeding but still alive, in her room. He called 911. (T.p. 2631–37) Paramedics took Jesica to the hospital where she died of her injuries. (T.p. 2892–93)

Police began looking for Gapen. They caught up with him later that morning when they followed his car to a donut shop in Vandalia. Officers surrounded Gapen’s car and, with guns drawn, ordered him out. Gapen was arrested without incident. He was taken to the Dayton police station to be interrogated by detectives. (T.p. 3400–419)

A detective testified at trial that Gapen said he attacked Jessica because she had “always disrespected him and that she would talk back to him.” (T.p. 3413) Gapen also mentioned that Jessica smoked and drank in the house. (T.p. 3413) He told the detectives that “she was going to turn out just like them.” (T.p. 3413) No other evidence was presented at trial or at mitigation to explain Jessica’s murder.

At trial, defense counsel readily admitted that Gapen was responsible for the deaths of Martha Madewell, Nathan Marshall, and Jessica Young. Emphasizing Gapen’s love for Martha and her confusing signals of pushing him away only to pull him back again, counsel argued that Gapen was guilty of murder rather than aggravated murder. Defense counsel also disputed the specifications and evidence of prior calculation and design. (T.p. 3493–3503, 3721, 3726, 3738–44) Defense counsel declared that this was a crime of passion. (T.p. 2340) The jury convicted Gapen of all counts and death specifications, except Count Three (rape). (T.p. 3891–3931)

Dr. Robert Smith, a clinical psychologist, testified during the mitigation phase. (T.p. 3984–4023) He found that Gapen displayed no indicia of severe psychotic disorder, no significant personality disorder, and nothing to indicate a sociopathic or anti-social personality. (T.p. 3998) There were indications of behavior consistent with alcohol addiction. (T.p. 3998, 4001) Dr. Smith testified that Gapen had obsessive personality traits. (T.p. 3999) Defense counsel did not ask Dr. Smith to explore the psychological reasons behind Gapen’s attack on Jessica. (See PC Ex. A, affidavit of Dr. Robert Smith.)

Other mitigation witnesses described Gapen as a compassionate man who never raised his voice in anger. (T.p. 4030–31) They knew Gapen to be hardworking, non-violent, calm, dependable, wonderful with children, and a great coach. (T.p. 4032, 4074, 4100, 4138, 4182–83)

Deliberations were difficult. On the second day, the jurors sent the judge a note indicating that they could not unanimously agree on a life verdict and were not able to render a sentencing verdict. (T.p. 4282) The judge asked them if the discussions were at a point where they were no longer productive, and the foreperson answered “yes.” (T.p. 4283) The judge, however, instructed the jurors to return to their deliberations. (T.p. 4283–84) Defense counsel objected, noting that the jurors had already informed the judge that they were past the point of deliberating on a death verdict. Defense counsel argued that the only issue properly before them was a verdict on one of the life sentences. (T.p. 4286) The court overruled the objection. (T.p. 4286)

The jurors continued to deliberate. (T.p. 4290–91) They eventually recommended life without parole for each of the aggravated murder counts related to the killings of Martha Madewell and Nathan Marshall. (T.p. 4295–98, 4298–01) They returned three sentences of life without parole—and the only death sentence—for the aggravated murder counts related to the killing of Jessica Young. (T.p. 4301–04) On July 3, 2001, the trial court sentenced Larry Gapen to death. (T.p. 4234)

## ARGUMENT

### PROPOSITION OF LAW NO. 1

**When defense counsel in a capital case fail to investigate and present compelling mitigating evidence relevant to the overriding penalty-phase issue, the only conclusion the deciding court can come to is that the defendant's Sixth Amendment right to effective assistance of counsel was violated. Further, a trial court's opinion that does not reasonably apply federal constitutional law, that misstates the evidence presented, and that considers evidence irrelevant to the issue to be decided is arbitrary and an abuse of discretion. U.S. Const. amends. VI, VIII, XIV.**

The question that arises in this case is whether the defense attorney has a duty under the Sixth Amendment to investigate, prepare, and present mitigating evidence relevant to the capital count that counsel acknowledges is the defining issue between a life sentence and the death penalty. Further, once the trial court has been presented with uncontradicted evidence that defense counsel did not investigate the critical penalty-phase issue, does it abuse its discretion when it denies the petitioner relief on a claim of ineffective assistance of counsel?

The trial court denied Appellant Larry Gapen's capital postconviction petition without a hearing. The court of appeals remanded the case for an evidentiary hearing because it found that Gapen had presented "sufficient evidence to demonstrate deficient performance by defense counsel and that he was prejudiced thereby." State v. Gapen, Montgomery App. No. 20454, 2005-Ohio-441, at ¶ 54 (Jan. 31, 2005). After an evidentiary hearing was held in the trial court on Gapen's claim of ineffective assistance of counsel at the penalty phase of his capital trial, the court again dismissed the petition. On appeal, a new panel of the Second Appellate District adopted the trial court's reasoning and affirmed the denial of postconviction relief. One of the judges on the panel, however, dissented, finding that Gapen had presented sufficient evidence to warrant a new sentencing hearing. State v. Gapen, Montgomery App. No. 21822 at 15-17

(Donovan, J., dissenting). The lower courts' decisions denying relief on Gapen's claim of ineffective assistance of counsel essentially lowers the bar for defense counsel in a capital case.

The trial court's decision, with the appellate court's approval, shifted the burden from defense counsel to defense experts (non-lawyers) to investigate, prepare, and present mitigating evidence at a capital trial. The lower courts' decisions upend United States Supreme Court and Sixth Circuit Court of Appeals decisions, as well as the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.

The United States Supreme Court has been consistently clear: counsel holds the affirmative duty to investigate mitigating evidence. Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984). See also Dickerson v. Bagley, 453 F.3d 690, 693–95 (6th Cir. 2006); Carter v. Bell, 218 F.3d 581, 596 (6th Cir. 2000) (counsel must investigate in order to make reasoned, informed decisions); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) (defense counsel have a duty to investigate all available mitigating factors). That duty does not fall to the defense's expert witness. And defense counsel must not consign that duty to their expert witness, especially not without direction.

In this case, defense counsel were faced with horrible crimes. There was no question that Gapen committed the homicides. This was a mitigation-phase case from the beginning. (Evid. Hrg., pp. 105, 120) Thus, defense counsel had a duty to thoroughly investigate every avenue of mitigation. The daunting hurdle was the death of Gapen's thirteen-year-old stepdaughter, Jessica Young. (Id. at 120.) But it was not insurmountable. Defense counsel had a duty to exhaustively

investigate all possible mitigating evidence pertaining to Count Thirteen of the indictment.<sup>3</sup> Counsel's failure to investigate psychological mitigating evidence relevant to the death of Jessica Young "fell below the line of reasonable practice." Rompilla, 545 U.S. at 390.

On direct appeal, this Court found that defense counsel did not address the death of Jessica Young in mitigation. Moreover, the mitigation evidence presented to the jury was deficient regarding Gapen's actions toward Jessica, leading this Court to uphold Gapen's death sentence:

Gapen argues that these offenses were crimes of passion. Gapen contends that he was obsessed with Madewell, distraught that their marriage had ended, and went into a rage when he found Madewell with another man. However, *Gapen's explanation provides no mitigating reason for murdering Jessica*. Moreover, Jessica's murder was committed with prior calculation and design. Gapen murdered an innocent child while she lay sleeping in her bed. His only explanation for killing Jessica was that she would "never give him any respect" and that she "was going to turn out just like them." Thus, we reject Gapen's claim that Jessica's murder is mitigated because it was a crime of passion.

...

We find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Gapen's murder of Jessica during the course of a burglary, robbery, and attempted rape, and his course of conduct in multiple killings are grave aggravating circumstances. In contrast, *Gapen offered no substantial mitigation* to weigh against these collective aggravating circumstances. Thus, we find that the death penalty is appropriate.

State v. Gapen, 104 Ohio St. 3d 358, 387–88 (2004) (emphasis added).

The Second Appellate District also found that "[d]efense counsel offered the jury no independent explanation why Gapen killed Jessica Young, and did not even mention that killing in their penalty phase closing argument." State v. Gapen, Montgomery App. No. 21822 at 3

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<sup>3</sup> Count Thirteen: did purposely, and with prior calculation design, cause the death of another, to wit: Jessica Young. R.C. 2903.01(A). Specifications: committed aggravated murder while under detention, R.C. 2929.04(A)(4); course of conduct involving the purposeful killing or attempt to kill two or more persons, R.C. 2929.04(A)(5); aggravated murder committed while committing or attempting to commit aggravated burglary, R.C. 2929.04(A)(7); aggravated murder committed while committing or attempting to commit rape, R.C. 2929.04(A)(7); aggravated murder committed while committing or attempting to commit aggravated robbery, R.C. 2929.04(A)(7).

(Aug. 24, 2007) (hereafter “8/24/07 Opinion”). Yet, the court of appeals affirmed the trial court’s denial of the postconviction petition. The court recognized that “strategic choices *made after thorough investigation* of law and facts relevant to plausible options are virtually unchallengeable,” but failed to hold defense counsel accountable for not investigating a critical mitigating factor in Gapen’s case. (*Id.* at 8–9 (citing *State v. Byan*, 101 Ohio St. 3d 272 (2004)) (emphasis added).

The court of appeals found that lead defense counsel, David Greer, did not restrict the expert psychological witness, Dr. Robert Smith’s, evaluation of Gapen. *Id.* at 10. The court found that this contradicts Dr. Smith’s testimony, in which he said that defense counsel assigned him one task: “to conduct a psychological evaluation to determine if Mr. Gapen presented with any significant psychiatric illnesses.” (Evid. Hrg., p. 10) Greer never testified that he asked Dr. Smith to develop mitigating evidence pertaining to the attack on Jessica Young. When Greer was asked at the evidentiary hearing whether he had focused Dr. Smith “on one aspect of the overall case,” he answered, “No.” (*Id.* at 101.) Thus, defense counsel did not focus Dr. Smith on the part of the case involving Jessica Young’s death.

The court of appeals gave deference to the trial court’s opinion on the credibility of the witnesses at the evidentiary hearing because it “had the opportunity to see and hear witnesses at the hearing . . . .” (8/24/07 Opinion, p. 11) A videotape of the evidentiary hearing was made a part of the record on appeal. The video would have allowed the appellate court to see and hear the witnesses as well, making its reason for deferring to the trial court’s opinion less compelling.

Defense counsel presented Dr. Smith as an expert witness during the mitigation phase of Gapen’s trial. (T.p. 3983 et seq.) Greer alone consulted with Dr. Smith. Co-counsel, Bobby Joe

Cox, did not have any contact with Dr. Smith on this case. (Evid. Hrg., pp. 17, 125) Thus, Greer assumed sole responsibility for preparing and presenting the defense’s expert witness.

Greer did not ask Dr. Smith to examine specific mitigating factors beyond a psychological diagnosis. (Id. at 19.) He never discussed mitigation strategy with Dr. Smith or asked him to participate in any brainstorming sessions. (Id. at 19, 79.) If Greer had intended for Dr. Smith to provide “whatever opinions he had” (id. at 100), he should have included Dr. Smith in any defense team meetings to discuss mitigation theories.

Dr. Smith did what Greer instructed him to do—he conducted a psychological evaluation of Larry Gapen. (Id. at 11.) Greer never discussed with Dr. Smith the specific mitigation issue involving Jessica Young’s death. (Id. at 20.) He never asked Dr. Smith if he had any expert opinions regarding Jessica’s death. (Id. at 21.) And he never asked Dr. Smith to develop psychological mitigating evidence pertaining to Gapen’s actions toward Jessica. (Id.)

The trial court’s legal analysis was incongruent. The court found that the issue here “cannot be considered by this court” because it is barred by the doctrine of res judicata. State v. Gapen, Montgomery C.P. No. 2000 CR 2945 at 28 (Aug. 28, 2006) (hereafter “8/28/06 Decision”) But the court then proceeded to address the issue. Res judicata does not apply here because the issues of counsel’s ineffectiveness cannot be fully litigated on direct appeal. A direct appeal is limited to issues and evidence on the trial record. State v. Ishmail, 54 Ohio St. 2d 402 (1978). As this Court has found, claims of ineffective assistance of counsel require “proof outside the record . . . .” State v. Keith, 79 Ohio St. 3d 514, 536 (1997). See also State v. Madrigal, 87 Ohio St. 3d 378, 391 (2000) (establishing prejudice from lack of expert testimony “would require proof outside the record, such as affidavits demonstrating the probable testimony”). This Court did not have Dr. Smith’s affidavit or the transcript of the evidentiary

hearing to consider. Moreover, the fact that the court of appeals remanded this case for an evidentiary hearing shows that the issue could not be decided on direct appeal.

### **Which Comes First, the Answer or the Question?**

The trial court faulted Dr. Smith for the lack of mitigating evidence presented on Count Thirteen, thus absolving defense counsel of any responsibility. (See 8/28/06 Decision, p. 33.) The court insisted that Dr. Smith withheld his expert opinions on the matter of Jessica's death. (Id. at 33, 34, 37-38.) Dr. Smith, however, testified repeatedly at the evidentiary hearing that he never developed those opinions at the time of trial. (Evid. Hrg., pp. 21, 29, 44, 61, 63, 73) Thus, he could not withhold opinions he did not have or choose to keep such opinions to himself when he had not yet developed the opinions. (See 8/28/06 Decision, p. 38.) Further, Dr. Smith would not—could not—be “offended” that counsel did not choose a mitigation theory that he was not even directed to develop at the time. (Id. at 37.)

The court of appeals' opinion is similarly flawed. The court incorrectly found that Dr. Smith “harbor[ed] and fail[ed] to disclose unarticulated opinions or unexpressed theories . . . .” (8/24/07 Opinion, p. 13) Dr. Smith never considered the specific question of Jessica's death and did not formulate an opinion at that time, because Greer never posed the question to him. (Evid. Hrg., pp. 20, 21, 29, 42) It was only after postconviction counsel asked the question that Dr. Smith considered the matter, reviewed relevant data, and then rendered an expert opinion. (Id. at 29.)

In the course of his evaluation of Gapen, Dr. Smith did memorialize issues concerning Gapen and his stepchildren, specifically Daniel Marshal and Jessica Young. In the report

provided to defense counsel prior to trial,<sup>4</sup> Dr. Smith made several observations about Gapen in relation to his family:

He found himself struggling to please Martha. They both abused alcohol and, when intoxicated, they had disagreements and arguments. Most of these arguments surrounded Martha's children, especially Jessica and Daniel. Each of these children manipulated Martha and they would become angry with Mr. Gapen for encouraging Martha to discipline them. Martha would eventually "give in" to the children and this would lead to arguments. As the children's behavior became more disruptive and inappropriate, Martha became defensive and kept information from Mr. Gapen. He became frustrated with the children and felt that they were acting as a wedge between himself and Martha . . . He became obsessed with trying to make the marriage work.

(Psychological Report, May 19, 2001, p. 4)

The trial court found that "Dr. Smith's report of May, 2001, did not mention any of the concerns he raised in his affidavit or in his testimony at the hearing on his petition." (8/28/06 Decision, p. 33) But a review of Dr. Smith's report, his postconviction affidavit, and his evidentiary hearing testimony shows that this was not accurate. In fact, in his postconviction affidavit, Dr. Smith expressed conclusions similar to those found in his May 2001 report:

[B]ased on my evaluation of Mr. Gapen as noted in my mitigation testimony, I concluded that Mr. Gapen was obsessed with making his relationship with his wife Martha work. Dealing with Jessica was one of obstacles that led to the breakup of the marriage.

...

One of the primary areas of conflict in the marriage was Martha's children from earlier relationships. The older children did not accept Mr. Gapen as a father figure and refused to follow his direction. The children complained about him to Martha and she repeatedly took their side and confronted him as being too harsh with her children.

As the children realized that Martha would side with them against Mr. Gapen, they escalated their behavior, acting out and manipulating Martha to attain their own way. This caused repeated disagreements between Martha and Larry.

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<sup>4</sup> The psychological report Dr. Smith prepared for trial, dated May 19, 2001, was appended to the State's Pre-Hearing Memorandum Contra, which was filed in the trial court on March 3, 2006, and admitted as an exhibit at the evidentiary hearing. (Evid Hrg., pp. 42-43, 93-94)

(PC Ex. A, ¶¶ 7, 8, 11, 12)

Dr. Smith's report alerted defense counsel to Gapen's perceptions of Jessica and how those perceptions affected his state of mind. Counsel failed to follow up. Greer never asked Dr. Smith to elaborate on the subject, and he never incorporated the opinions found in Dr. Smith's report into the mitigation hearing. (Evid. Hrg., pp. 25, 40) The report was not admitted as a mitigation exhibit, hence the jurors were not privy to its contents. (Id. at 127.)

The defense attorney has the responsibility to question the expert prior to trial. Combs v. Coyle, 205 F.3d 269, 288 (6th Cir. 2000) (defense counsel's failure to question expert prior to trial on the issue of intent is "inexcusable"). In Combs, the court did not place the burden on the expert to initiate the discussion with the attorneys and come forward with an opinion that was crucial to the defense's theory of the case. The defense attorneys are in charge of the case and bear the ultimate responsibility for the investigation and presentation of the evidence. See, e.g., Rompilla v. Beard, 545 U.S. 374 (2005). Defense counsel, not the expert, must decide the direction of their case after considering all the options. Here, counsel's deficient performance left the jurors without psychological mitigating evidence to weigh and give effect.

Greer wanted a mental disease or defect to explain Gapen's actions. But when such a diagnosis was not present, he did not pursue other psychological mitigating evidence. Greer testified that he "relied simply on what [Dr. Smith] provided me." (Evid. Hrg., p. 124) Rather than initiating a discussion with the expert and instructing him to develop specific mitigating explanations, Greer placed broad expectations on Dr. Smith to "help me with whatever his expertise could provide that would help mitigate the risk that Larry would receive a death penalty." (Id. at 126.) That places a heavy burden on the expert witness to decide the mitigating evidence to be investigated and presented to persuade the jurors to spare the defendant's life.

If the expert acts too narrowly, the defense attorney must ask questions, probe, and prompt the expert to go further—the attorney owes that duty to the client. The attorney is not the conduit for the expert, but rather the advocate for the client. The attorney does not merely pass along what the expert says, but should proactively solicit needed information from the expert.

Dr. Smith understood his role as conducting “a psychological evaluation to determine if Mr. Gapen presented with any significant psychiatric illnesses.” (Id. at 10.) Greer did not suggest to Dr. Smith that he should go beyond a general psychological evaluation. (Id. at 39.) The trial court stated that Dr. Smith “claims” Greer did not specifically ask him to render an opinion on the issue of Jessica’s death, implying that Dr. Smith was not credible when he so testified. (8/28/06 Decision, p. 14) Greer, however, never testified that he in fact asked Dr. Smith to render such an opinion. (See Evid. Hrg., pp. 100, 126, 127.) Thus, Dr. Smith’s testimony is undisputed.

### **A Crime of Passion—How Far Did It Go?**

Defense counsel argued to the jurors throughout the case that this was a “crime of passion.” (See, e.g., T.p. 2337-40, 3564, 3581, 3982, 4227, 4231, 4232, 4233, 4237.) Counsel did not reserve the crime-of-passion theory exclusively for the culpability phase. They also argued it at the mitigation phase. (T.p. 3982-83, 4226, 4227, 4231, 4232, 4233, 4238) But counsel never explained to the jurors how the crime of passion extended to the attack on Jessica.

Greer testified that he was familiar with case law that holds that the nature and circumstances of the crime must be considered during the weighing process. (Evid. Hrg., p. 137) See State v. Wogenstahl, 75 Ohio St. 3d 344 (1996). See also Fox v. Coyle, 271 F.3d 658, 669 (6th Cir. 2001); R.C. 2929.04(B). Thus, he was aware that the jurors could consider (but not weigh as aggravators) those circumstances when deciding punishment. His alleged attempt to

erase the facts from the jurors' minds by avoiding the subject of Jessica was a futile bypass of established state law. Greer even admitted that the facts of Jessica's death were indelible: "[Y]ou can't erase that kind of thing from people's minds." (Evid. Hrg., p. 105)

The trial court accepted Greer's position that he wanted to avoid the facts of the crime at the sentencing phase. "The attorneys decided to avoid the facts of the crime, since they were not mitigating." (8/28/06 Decision, pp. 21–22) But the court's opinion did not account for Greer's penalty-phase closing argument, in which he reminded the jurors to consider the nature and circumstances of the offense as a mitigating factor. (T.p. 4222, 4226, 4227) Despite urging the jurors to consider the circumstances of the crimes, Greer did not explain to the jurors how the nature and circumstances of the offense were mitigating when applied to Jessica's death.

When a court instructs jurors to consider the nature and circumstances of the crimes, as in this case (t.p. 4250), and counsel also urges the jurors to consider them (t.p. 4226, 4227), but has failed to present evidence that would cast those circumstances in a mitigating light, counsel cannot be deemed to have employed a reasonable trial strategy. "The Eighth Amendment requires a jury to consider the circumstances of the crime . . . during the sentencing phase of a capital trial." Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997) (citations omitted).

The jurors would not refrain from thinking about Jessica (evid. hrg., p. 109) simply because defense counsel did not mention her name or address Gapen's actions in that regard. The failure to address the issue made the facts surrounding Jessica's death more distressing and served to overshadow the proceedings. In other words, the less said about Jessica, the more the jurors would wonder why Gapen had killed her.

Greer's testimony is mismatched to the issue. On the one hand, he recognized that the record as it stood raised a troubling question: "Just 'cause a 13-year-old sasses somebody

doesn't mean you chop her in two with a wood-splitting maul, does it?" (Evid. Hrg., pp. 132–33) On the other hand, silence from the defense did not permit the jury to give weight and effect to an available psychological explanation for Gapen's behavior under R.C. 2929.04(B)(7) and to the nature and circumstances of the offense as a mitigating factor. Gapen's actions stemmed from more than a thirteen-year-old "sassing" him. The trial court acknowledged that Greer knew "that the facts surrounding the offenses raised more questions in mitigation than they answered." (8/28/06 Decision, p. 18) That is why Greer needed to use Dr. Smith. Rather than leaving the jurors with questions, Greer should have used the expert witness to provide them with answers.

There was a nexus between the killings of Martha Madewell, Nathan Marshall, and Jessica Young that Greer did not bring out. He did not relate the crime of passion to the attack on Jessica. His failure to do so left the looming question, "Why Jessica?" unanswered. Had Greer asked Dr. Smith to address the psychological mitigating reasons for Gapen's attack on Jessica, Dr. Smith would have asked to meet with Gapen again; he would have reviewed his testing materials and notes; and he would have considered whether he could formulate an opinion in response to the specific question presented. (Evid. Hrg., p. 28)

There is an explanation for Gapen's actions toward his stepdaughter. If asked, Dr. Smith would have provided insights into Gapen's mindset leading up to and at the time of the crimes. When, in postconviction, Dr. Smith was asked specifically what conclusions he could reach as to why Gapen attacked Jessica, he reviewed the relevant data and formulated an expert opinion. (Id. at 29.) He corroborated the data by meeting again with Gapen. (Id. at 13.)

Gapen had a history of failed relationships. He was obsessed with making his marriage to Martha Madewell work. But disagreements over Martha's eldest children, Jessica and Daniel,

created a strain between Gapen and Martha. (Evid. Hrg., pp. 31, 33; PC Ex. A, ¶¶ 8, 11, 12) Gapen viewed Jessica and Daniel as a cause of the failing marriage. Gapen projected his anger at Martha onto her children. (Evid. Hrg., p. 31; PC Ex. A, ¶ 14) He ceased to be objective when it came to Martha. His emotions were tied to hers. He could not cope with the flawed relationship. (Evid. Hrg., p. 32; PC Ex. A, ¶ 15) Gapen was “enmeshed with Martha” and could not let go of the deteriorating relationship. (Evid. Hrg., p. 33; PC Ex. A ¶¶ 9, 15)

To Gapen, Jessica presented a source of frustration in his marriage to Martha. Jessica’s behavior and how to deal with it became a point of contention in the marriage. Martha took Jessica’s side during arguments about her behavior. (Evid. Hrg., p. 33; PC Ex. A, ¶ 11) The arguments escalated, with Gapen viewing Jessica as one of the reasons for the defeated marriage. (Evid. Hrg., pp. 33, 38)

Gapen also saw similarities between Martha and Jessica. From Gapen’s perspective, Jessica was the “mirror image of Martha.” (Evid. Hrg., p. 33; PC Ex. A, ¶ 14) Gapen transferred his frustration with Martha and the problems in their marriage onto Jessica. (Evid. Hrg., p. 34) When his irrational rage exploded on the night of the crimes, it exploded toward Jessica as well.

Because defense counsel did not present an explanation of why Gapen attacked Jessica, the jurors could only assume he killed her simply because he did not like her. (See T.p. 3413.) Based on what was presented at trial, there was nothing mitigating about the nature and circumstances of the offense involving Jessica. Dr. Smith, however, could have explained to the jurors that Gapen’s actions represented much more than simple dislike. Gapen was in a state of passion and rage at the time of the crime—a rage that extended toward Jessica because of how Gapen perceived her as playing a part in the breakup of his marriage. (Evid. Hrg., pp. 31, 35, 36)

The trial court believed that Dr. Smith could render expert opinions on a whim. (8/28/06 Decision, p. 14) But Dr. Smith does not automatically develop opinions on subjects defense counsel has not raised with him. He takes his direction from the defense attorney. (Evid. Hrg., pp. 77–78, 83) The court seemed to think it caught Dr. Smith in a contradiction, because he “quickly formulated an opinion” at the evidentiary hearing pertaining to the death of Nathan Marshall. (8/28/06 Decision, p. 15) The attack on Mr. Marshall, however, does not require detailed analysis to come to the conclusion that Gapen was outraged to find his former wife sleeping with another man. It is an age-old story of jealousy and emotional turmoil directed not only at the spouse, but also at the spouse’s paramour. Furthermore, the jurors did not require another explanation for the counts involving Nathan Marshall. They voted for a life sentence on those counts because they understood how Gapen’s crime of passion encompassed Mr. Marshall.

The trial court noted a discrepancy between Gapen’s actions toward Jesica and his stepson Daniel. (Id. at 18, 31.) Dr. Smith could have also addressed why Gapen did not attack Daniel. Dr. Smith testified at the evidentiary hearing that although Daniel was an intended target of Gapen’s rage, at that point Gapen’s emotional rage had been spent. (Evid. Hrg., p. 36) Thus, Gapen’s statement to detectives that “Danny doesn’t know how lucky he is” revealed that Daniel was an object of Gapen’s rage, but the emotional toll from his rage had depleted him by the time he encountered Daniel. (Id. at 37.) Given the turbulent history between Gapen and Daniel, the fact that Gapen attacked Jesica and not Daniel further shows his irrational state of mind. His rage was not controlled or programmed. Gapen was consumed by his rage toward Martha and then was drawn to her “mirror image”—Jesica. (PC Ex. A, ¶ 14)

The trial court questioned the timing of Gapen’s rage response to seeing Martha sleeping with another man. (8/28/06 Decision, p. 31) Dr. Smith testified that it is not uncommon for

persons to mask their feelings, as Gapen did earlier in the evening. (Evid. Hrg., p. 83) When Gapen later saw Martha sleeping with Mr. Marshall in a state of undress, he responded with rage. (Id. at 35.) Even the prosecutor made a point of stressing at the evidentiary hearing that Martha and Mr. Marshall were “fully clothed” when Gapen first arrived at the house.<sup>5</sup> (Id. at 67–68.) The evidence at trial showed that later Mr. Marshall’s pants were off; he was discovered wearing only a shirt and underwear. (T.p. 2806) The level of intimacy between Martha and Mr. Marshall as observed by Gapen when he returned to the house likely fueled his rage.

The trial court viewed Dr. Smith’s expert explanation of Gapen’s state of mind during the crimes as “blaming the victims for their deaths.” (8/28/06 Decision, p. 35) It is difficult to reconcile the court’s opinion with the fact that defense counsel’s theory was this was a crime of passion spurred by Gapen’s perceptions. The defense’s argument at trial and mitigation was essentially that Gapen was obsessed; he felt betrayed and rejected, and then he exploded. (T.p. 3722, 3726, 3732, 4231) The court implied that it would be easier for the jurors to accept *no* explanation for Gapen’s behavior rather than having the defense offer a psychological explanation of what was going on in Gapen’s mind at the time. The postconviction evidence does not blame the victims. Instead, it provides insight into Gapen’s skewed thinking when it came to his family and the explosive emotions attendant to his obsession with Martha. Moreover, the jurors were left with only the detective’s testimony during the trial regarding what Gapen allegedly had said about why he killed Jessica. (T.p. 3412–13) The detective’s testimony gave the impression that Jessica was to blame for Gapen’s actions—something Greer said he wanted to avoid. Yet, Greer presented nothing in mitigation to counter that impression.

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<sup>5</sup> At the hearing, the prosecutor tried to project that both persons were still “fully” clothed when Gapen returned to the house. (Evid. Hrg., p. 69) But the evidence the State presented at trial contradicts the prosecutor’s new theory. (T.p. 2806)

The trial court misconstrued and oversimplified the postconviction evidence. The court of appeals did not address these errors. Dr. Smith's expert opinion does not suggest that Jessica's and Martha's behavior mitigates a death sentence. (8/28/06 Decision, p. 38) Rather, Dr. Smith addressed Gapen's state of mind and his perceptions, and how they led to his irrational behavior. (Evid. Hrg., pp. 31–38; PC Ex. A) Dr. Smith did not use the victim's behavior to mitigate Gapen's actions. (8/28/06 Decision, p. 40)

Greer testified that he did not want the jurors to think he was blaming the victims. (Evid. Hrg. pp. 106, 121) But in closing argument, Greer said to the jurors, "Who was over in his house as soon as he got home with the electronic home monitor? Martha, the one who got him the detention." (T.p. 4231; see also T.p. 2335, 2336, 2338–39, 3732.) Greer said he was not blaming anyone, but his remark could certainly be construed as placing blame on Martha Madewell. The defense's crime-of-passion argument ran the risk of blaming the victims: Gapen reached the breaking point—who put him there? Martha; it was Gapen who had tried to make the marriage work. Based on what defense counsel had presented in mitigation, the prosecutor argued to the jurors that the defense was trying to place blame on the victims: "[T]he defense wants you to think that Martha and her children caused the problems in the home and the problems in the relationship . . . ." (T.p. 4218) Addressing Jessica in mitigation created no further risk—a risk counsel had already assumed.

Even though Greer recognized that the attack on Jessica was the most difficult hurdle to overcome when arguing for a life sentence, he ignored it. (Evid. Hrg., p. 120) He made no attempt to explain Gapen's actions as they related to Jessica. It was unreasonable for counsel to assume that the jurors would consider in mitigation the nature and circumstances of the attacks on Martha Madewell and Nathan Marshall (Gapen was obsessed with Martha and distraught over

the breakup of their marriage, and Mr. Marshall was now the apparent object of Martha's affection) and not wonder how Jessica fit into that picture.

In his penalty-phase opening statement, the prosecutor told the jurors that the “findings about Jessica Young are . . . *separate and distinct* from any other findings that you have made concerning” the other victims. (T.p. 3977) (Emphasis added.) Thus the need for defense counsel to independently address Gapen's actions toward his stepdaughter, but they didn't.

Defense counsel presented mitigating evidence of Gapen's good character, but that evidence supported the crime-of-passion theory. In fact, that is how it was presented—to bolster the crime-of-passion argument. (Evid. Hrg., p. 123) In that context, the good character evidence lost its impact when applied to the offense involving Jessica. That Gapen was a good person with no criminal history failed to explain why he would attack his stepdaughter who was asleep in another part of the house—do “good” people act this way? The character evidence raised more questions than it answered. Dr. Smith was available to provide answers, but Greer did not ask the relevant questions.

### **Defense Counsel's Responsibility**

Assuming *arguendo* that the courts below were correct in holding that Dr. Smith, the defense's expert witness, should have assumed responsibility for investigating mitigation theories and for developing mitigating evidence without direction from defense counsel, that does not absolve counsel from inquiring of their expert witness. See Combs, 205 F.3d at 288. The burden on defense counsel here was minimal. All Greer needed to do was to ask Dr. Smith to look into the psychological reasons behind Gapen's actions toward his stepdaughter. Whatever obligation Dr. Smith may have had, it does not supersede defense counsel's duty.

Defense counsel should be aware of the objective of the penalty phase and the kind of evidence that is important to their case. They should not wait for their expert to lead them in a certain direction. The issue of Jessica's death was apparent to Greer (evid. hrg., p. 120) and should have prompted him to direct Dr. Smith to investigate the issue. The psychologist should not be expected to assume the dual roles of expert witness and attorney. "[I]t is inconceivable that a reasonably competent attorney would have failed to know what his expert was doing . . . A lawyer cannot be deemed effective where he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what the basis for the expert's opinion is." Richey v. Bradshaw, 2007 U.S. App. LEXIS 18983, \*52, 2007 Fed. App. 0307P (6th Cir. 2007). See also Glenn, 71 F.3d at 1210 n.5 ("Defense counsel should obviously have worked closely with anyone retained as a defense expert . . .").

The court of appeals reasoned that because Greer is not a psychologist, he relied on Dr. Smith "to aid him in understanding matters beyond the knowledge and experience of lay persons." (8/24/07 Opinion, p. 13) Greer, however, could logically deduce that, at first glance, Gapen's actions toward Jessica did not fit into the defense's theory of the case and therefore needed to be explained in mitigation. Defense counsel cannot simply expect the expert to come forward with relevant opinions without prompting or suggestion and relieve them from taking charge of the investigation. Counsel have a responsibility to educate themselves on the issues. See Driscoll v. Delo, 71 F.3d 701, 709 (8th Cir. 1995) (defense counsel's performance was defective for having failed to take measures "to understand the laboratory tests performed and the inferences that one could logically draw from the results"). Greer needed to ask Dr. Smith the relevant questions.

The trial court asked whether Greer should “have been expected to have the foresight to anticipate those questions and suggest them to the expert psychologist . . . .” (8/28/06 Decision, p. 33) The answer is yes. There was nothing so complex or out of defense counsel’s capability that Greer could not have posed the obvious question to Dr. Smith: “Why Jessica?” It did not take expertise in the field of psychology for Greer to direct Dr. Smith to consider the question. The question was obvious to postconviction counsel. It was also on the mind of Detective Salyer, who asked Gapen, “Why Jessica?” (T.p. 3412) The jurors alerted counsel to the question during voir dire.

During voir dire, prospective jurors voiced their discomfort with the murder of a young girl: “I had no idea that there was a teenaged girl involved. I don’t think I could put it aside, no.” (T.p. 1882) Another prospective juror grasped for a reason why Gapen would kill his stepdaughter: “[M]aybe . . . the daughter was going to tell and that’s why she was murdered also.” (T.p. 1274) “The jury could consider none of the matters, of course, if the relevant facts were not placed before it.” Glenn, 71 F.3d at 1207. Greer was on notice at voir dire that it was necessary to address Jessica’s death.

Dr. Smith understood his role at trial as being discrete: evaluating Gapen to determine if he “presented with any significant psychiatric illnesses.” (Evid. Hrg., p. 10) Because Greer did not ask Dr. Smith to do anything more than conduct a psychological evaluation of any significant psychiatric illnesses, Dr. Smith did not expand his role. He did not take it upon himself to steer the mitigation investigation or to determine the focus of the presentation—that was defense counsel’s job.<sup>6</sup> Had Greer included Dr. Smith in brainstorming sessions and invited him to

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<sup>6</sup> See Trial Court’s Aug. 28, 2006 Decision, p. 35: “Mr. Greer did not permit Dr. Smith to develop a mitigation theory, nor did he permit Dr. Smith to steer the focus of the mitigation defense.”

participate in any strategic planning, Dr. Smith would have been prompted to recommend further mitigation investigation. But Greer had only limited contact with Dr. Smith. (*Id.* at 18, 84–85.)

The trial court took issue with Dr. Smith’s evidentiary hearing testimony that he did not consult with Greer prior to meeting with Gapen. (8/28/06 Decision, pp. 8–9) The court engaged in contortive semantics. Greer took Dr. Smith to the Montgomery County jail and introduced him to Gapen. That brief encounter did not constitute a “meeting” where Greer and Dr. Smith discussed the case or Greer’s expectations for mitigation prior to Gapen’s clinical interview. (Evid. Hrg., pp. 16, 99)

The trial court noted that “Dr. Smith’s theory, now articulated, would reasonably have been rejected by trial counsel.” (8/28/06 Decision, p. 32) Greer, though, testified to the contrary. At the evidentiary hearing, Greer testified that he *would have* presented Dr. Smith’s expert opinion on the issue. (Evid. Hrg., p. 109) So, there was no tactical decision to keep such evidence out of the mitigation presentation. Greer could not be “selective and discerning in developing a mitigation strategy” without directing Dr. Smith to develop an opinion on Jessica’s death for his consideration. (8/28/06 Decision, p. 35)

The court of appeals held that defense counsel’s mitigation strategy was “meaningful and undertaken after thorough investigation . . . .” (8/24/07 Opinion, p. 14) The court found that defense counsel focused on other mitigating factors in the absence of “any mental illnesses or psychologically impaired thinking to explain why Gapen committed these gruesome murders....” (*Id.*) Defense counsel did not have evidence of Gapen’s psychologically impaired thinking, however, because they failed to instruct Dr. Smith to develop such evidence. Counsel’s mitigation strategy was not made after a thorough investigation—their mitigation investigation was deficient; they failed to investigate a psychological explanation of Gapen’s behavior.

Reasonable strategic decisions cannot be made with a lack of information—counsel has a duty to investigate the facts, “to preserve options” before embarking on a course of mitigation. Powell v. Collins, 332 F.3d 376, 399–400 (6th Cir. 2003). Defense counsel cannot make an informed choice among possible mitigating factors without first conducting a thorough investigation. Wiggins v. Smith, 539 U.S. 510, 525 (2003).

### **Evaluating Claims of Ineffective Assistance of Counsel**

In its post-hearing brief, the State essentially argued that an attorney’s ivy-league education, class rank, and professional associations equate with effective representation in a capital case. (State’s Post-Hearing Brief, May 26, 2006, pp. 2–3) An attorney’s effectiveness under the Sixth Amendment is not determined by those factors. An experienced lawyer with a good reputation still can be found to be ineffective in any given case. See Glenn, 71 F.3d at 1207; Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988) (ineffective even though “counsel was an experienced criminal attorney who had previously argued and won capital cases”).

In its opinion, the trial court likewise touted Greer’s credentials and used his professional background as evidence of his competence in this case: “His professional experience is storied.” (8/28/06 Decision, p. 15) The court claimed that Greer “has also represented death penalty defendants [read multiple] in the past prior to his representation of Gapen.” (Id.) Greer, though, had never before conducted a penalty-phase hearing in a capital case. (Evid. Hrg., pp. 115–16) At the time of this trial, Gapen was only Greer’s second death-penalty client. Greer had not represented multiple death-penalty defendants prior to Gapen.

Although Greer has been practicing law for many years and has an extensive civil practice, his experience in capital cases is limited. (Id. at 114, 118.) The only other capital client he had represented prior to Gapen was Albert Lee Scott in 1976. (Id. at 115.) Scott was

convicted and automatically sentenced to death. (Id. at 115–16.) In a retrial in 1982, the death penalty did not exist as a sentencing option in Ohio. (Id. at 116.) Scott was convicted and given a life sentence. (Id.) Thus, nearly two decades later in Gapen’s case, Greer handled his first bifurcated death-penalty trial—an area of practice that by classification is set apart from other criminal cases. “[D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.” *American Bar Association: Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 923 (Summer 2003).

Because Greer’s capital trial experience is limited, he has not maintained his Ohio Supreme Court Rule 20 certification for appointment as counsel for indigent defendants in capital cases. (Evid. Hrg., p. 118) On October 20, 2000, when the trial court appointed Greer to represent Gapen as lead counsel, he was not certified under Rule 20. (Id. at 117.) Greer received his appointment under the “exceptional circumstances” provision of the Rule 20 application, contingent on his attendance at a death penalty seminar. (Id.) In 2003, the Ohio Supreme Court de-certified Greer because he had not kept up with the Rule 20 requirements. (Id. at 118.) Greer may be an experienced civil attorney, but those credentials do not automatically provide him with relevant capital trial experience, especially when arguing that the defendant’s life should be spared. (Id. at 114, 115.)

The court also mentioned that Greer “taught at death penalty seminars [read multiple] ....” (8/28/06 Decision, p. 16) Greer was a speaker at a death penalty seminar only once. (Evid. Hrg., p. 96) Having presented on the topic of humanizing the client, Greer should have been aware of the importance of explaining the client’s behavior to the jurors to eliminate any impression of the defendant’s actions as monstrous and gratuitous. (Id. at 119.)

Both the State's and the trial court's belaboring of Greer's professional experience as a factor indicative of effectiveness in a capital case was misplaced. In State v. Haight, 98 Ohio App. 3d 639, 661 (1994), the Tenth Appellate District discussed the higher standard placed on defense counsel in capital cases:

Because death is unique as a penalty, *more is and should be expected of attorneys who undertake the responsibility to represent individuals who face the prospect of being executed.* In Ohio, attorneys who are appointed to represent individuals facing the death penalty must receive special training and must attend continuing legal education courses devoted solely to death penalty litigation. Extra litigation experience is also required for those who are to be certified as either lead counsel or cocounsel for death penalty cases.

(Emphasis added.)

The issue is not whether Greer's "vast trial experience is unquestionable and unassailable." (8/28/06 Decision, p. 15) Rather, the issue is whether counsel provided effective assistance under the Sixth Amendment in the sentencing phase of this particular case.

Furthermore, the trial court used the wrong standard to determine effectiveness. The court held that "[t]here is no evidence that presenting Dr. Smith's testimony on this matter would have changed the outcome of the trial." (Id. at 37) The court stated again that "Petitioner has failed to demonstrate that a different outcome would have resulted, but for what he perceives as counsel's deficient performance." (Id. at 39.)

Under Strickland v. Washington, 466 U.S. 668 (1984), the Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. This right is violated when counsel's performance falls below an objective standard of reasonableness and the client is prejudiced by counsel's breach of duty. The United States Supreme Court has held "that a defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case . . . The result of a proceeding can be rendered unreliable, and hence the

proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.* at 693–94 (emphasis added). The second prong of *Strickland* requires only that the trial outcome be shown to be *unreliable*, not that it would have been different. *See State v. Murphy*, 91 Ohio St. 3d 516, 559 (2001) (Cook, J., concurring) (comparing plain-error review with *Strickland* prejudice: “the *Strickland* court expressly rejected an outcome-determinative standard for prejudice in the context of ineffective assistance of counsel claims”).

The trial court also found that Dr. Smith’s testimony would not have mitigated against the “brutal mauling of a thirteen year old girl, while she slept in her bed, with such force” that it resulted in tremendous, fatal injuries. (8/28/06 Decision, p. 39) The court, however, referred to impermissible nonstatutory aggravating circumstances.

The court stated that “it should not and will not second-guess the strategic decisions made at trial or during the mitigation phase by counsel.” (*Id.* at 40.) This implies, of course, that the attorneys are in charge of the case and make the decisions on what to present in mitigation—not the expert. Reviewing the issue of counsel’s ineffectiveness was the purpose of the evidentiary hearing. The trial court failed to assess trial counsel’s performance in light of the evidence presented and according to established legal standards.

## **Prejudice**

Prejudice from counsel’s failure to ask the expert the relevant question and to present the compelling mitigating evidence to the jurors is shown by the following facts:

- Jurors expressed their concern over the killing of a young girl; they wanted an explanation. It is reasonable to assume that the jurors needed to hear mitigating evidence on the matter. (*See* PC Exs. B ¶ 7-9 & C ¶ 4-6.) During voir dire, it became apparent that jurors would want an explanation for Gapen’s behavior. One prospective juror could not get over the killing of a teenager. (T.p. 1882) Another speculated that Gapen killed his stepdaughter because, “Maybe [she] was

going to tell . . . .” (T.p. 1274) A seated juror believed in the death penalty for “child murders,” including the death of someone thirteen years old. (T.p. 771–72)

- Of 12 capital counts, only 1 resulted in a death sentence—the aggravated murder of Gapen’s thirteen-year old stepdaughter with prior calculation and design.
- Jurors deadlocked during the second day of their sentencing deliberations. (T.p. 4281) It takes only one juror to secure a life sentence. State v. Brooks, 75 Ohio St. 3d 148, 162 (1996).

There was momentum in the jury room toward a life sentence. Dr. Smith’s testimony would have kept that momentum going. See Powell, 332 F.3d at 401 (jury’s difficulty in reaching a sentence shows that had counsel presented the mitigating evidence, “there is a reasonable probability that the result would have been different”). Defense counsel’s failure to direct Dr. Smith to develop psychological mitigating evidence pertaining to the attack on Jesica Young and their failure to address her death in their mitigation presentation undermines confidence in Gapen’s death sentence.

### **Abuse of Discretion**

The trial court’s opinion is filled with error and contradictions. The court’s opinion stands on an unstable foundation. The court of appeals did not address the arbitrary nature of the trial court’s decision. The appellate court failed to recognize that the trial court abused its discretion when it denied relief under the circumstances of this case. See State v. Gondor, 112 Ohio St. 3d 377, 390 (2006). The trial court’s decision was “unreasonable, arbitrary or unconscionable.” See State v. Adams, 62 Ohio St. 2d 151, 157 (1980). The chart below provides examples of the unreasonableness of the trial court’s decision.

<p><b>Trial Court's Decision, Order and Entry Overruling Petition for Post-Conviction Relief, Aug. 28, 2006</b></p>	<p><b>Evidence and Argument Showing that Court's Decision is Arbitrary, an Abuse of Discretion, and Fails to Reasonably Apply Federal Constitutional Law</b></p>
<p>Dr. Smith testified that he did not meet the attorneys prior to meeting Gapen. The transcript shows that Greer introduced Dr. Smith to Gapen at the jail. (Decision pp. 8-9)</p>	<p>Greer left after introducing Dr. Smith to Gapen. This was not a "meeting" where Dr. Smith and Greer discussed the case. (Evid. Hrg., pp. 16, 99)</p>
<p>"It is undisputed that Dr. Smith <i>had not formed</i> the opinion he now holds at the time of the mitigation phase." (Decision, p. 12) (Emphasis added.)</p>	<p>Compare to the court's Law and Analysis section: Dr. Smith saved his opinion, chose not to share it with defense counsel; an "unarticulated" (not unformed) opinion. (Decision, pp. 33, 34, 36, 38) Dr. Smith could not withhold an opinion he had not yet formed.</p>
<p>Dr. Smith did not offer counsel any opinions on the issue of Martha Madewell's children. (Decision, p. 14)</p>	<p>Page four of Dr. Smith's psychological report provided to defense counsel addressed the children. (Psychological Report, May 19, 2001)</p>
<p>Dr. Smith did not consider the death of Nathan Marshall, but "quickly formulated an opinion on the witness stand." (Decision, p. 15)</p>	<p>The death of Mr. Marshall does not require detailed analysis or explanation. The reason Gapen killed him is clear. Dr. Smith acknowledged that he was forming an opinion while testifying.</p>
<p>David Greer's "professional experience is storied . . . trial experience is unquestionable and unassailable." (Decision, pp. 15-16)</p>	<p>The court used counsel's credentials as a factor in evaluating effectiveness. Further, the court's commentary was more than a factual listing of Greer's credentials.</p>
<p>Jimmy Gapen testified to troubles between Gapen and Daniel, but not Jesica. (Decision, p. 18)</p>	<p>Greer asked Jimmy about Daniel. He did not ask any questions regarding Jesica. The lack of evidence pertaining to Jesica makes the attack on her appear arbitrary. Counsel had the duty to elicit the relevant testimony.</p>
<p>Meetings between Greer and Dr. Smith: met and talked "several" times; Greer met with Dr. Smith after his report was completed; he also met with Dr. Smith the night before his</p>	<p>There was no testimony on the number of times Greer says he met or talked with Dr. Smith. There were only three substantive discussions: a one-hour meeting after Dr.</p>

mitigation-phase testimony. (Decision, p. 20)	Smith met with Gapen; a telephone call after the second meeting with Gapen; meeting at Dr. Smith's hotel the night before penalty phase. Other calls were for administrative purposes such as time of trial, etc. (Evid. Hrg., p. 18) Greer testified that he discussed the psychological report the night before the mitigation hearing. (Evid. Hrg., p. 100)
Greer wanted to avoid the facts of the crime. (Decision, p. 21)	Greer testified that he needed to underscore Jessica's death as being part of the matrix of facts; he wanted to confine it to that theory. (Evid. Hrg., p. 124)  Does Greer want to avoid the facts or explain Jessica's death within the context of the facts?
Issue is res judicata; court is barred from considering it. (Decision, p. 28)	Issue relies on evidence outside the record; remand for evidentiary hearing shows that res judicata does not apply.
In his petition, Gapen seeks a different mitigation theory in light of this Court's decision on direct appeal rejecting the mitigation presented. (Decision, p. 29)	The postconviction petition was filed on Oct. 4, 2002—two years before this Court rendered its direct-appeal decision in 2004.
"The murder of Jessica is quite different." (Decision, p. 31)	The crime-of-passion theory, as presented, did not extend to Jessica; thus, because Jessica's death was different, there was a need for mitigating evidence that related directly to it.
Gapen did not attack Daniel or the younger children. (Decision, p. 31)	Gapen did not perceive the younger children as having hurt him. Defense counsel brought out the turbulent relationship between Gapen and Daniel, but did not ask about Gapen and Jessica (only the prosecutor did; see t.p. 4148, 4160). Defense counsel made Jessica's death arbitrary and gratuitous by ignoring Jessica; if Gapen had difficulties with Daniel, all the more reason to address "Why Jessica?"
Dr. Smith's opinion would have been rejected by trial counsel. (Decision, p. 32)	Counsel said that he would have presented Dr. Smith's opinion. (Evid. Hrg., p. 109)
Dr. Smith's opinion would have to be reconciled with his opinion that Gapen did not	Gapen intended to kill Daniel—he didn't follow through because his rage was spent.

kill Daniel because his rage had been spent, even though Gapen stated it was his intent to kill Daniel. (Decision, p. 33)	Thus, there is no need to reconcile the expert's opinion.
Dr. Smith's report does not mention "any" of the concerns expressed in his affidavit. (Decision, p. 33)	Dr. Smith expressed his concerns on page 4 of his report provided to defense counsel.
Dr. Smith has credentials and experience, and should not have stood silent. (Decision, p. 34)	Greer has credentials and, thus, should have known to ask the relevant question.  Based on Greer's reputation, Dr. Smith would not presume to tell him how to run the case. If Greer wanted information, he was capable of asking for it.
Contrary to Gapen's assertions, Greer did not permit Dr. Smith to develop a mitigation theory or steer the focus of the mitigation defense. (Decision, p. 35)	Gapen has never made those assertions. The court's finding that Greer did not permit Dr. Smith to develop a mitigation theory contradicted its opinion that Dr. Smith should have developed and shared an opinion on Jessica's death. The court, in effect, said Greer placed limitations on Dr. Smith.
Expert's testimony presents an alternative theory. (Decision, p. 35)	Dr. Smith's opinion takes Greer's crime-of-passion theory and expands it to include Jessica.
Greer did not want to blame the victims. (Decision, p. 35)	Greer "blamed" Martha throughout his crime-of-passion argument (T.p. 2335, 2336, 2338-39, 3732, 4231). Prosecutor told the jurors that the defense was blaming victims (T.p. 4218). Greer had already undermined his stated goal.
Dr. Smith's opinion blames the victims. (Decision, p. 35)	Dr. Smith testified that the children were not to blame; only in Gapen's mind were they a factor. (Evid. Hrg., p. 41)  Dr. Smith's testimony allows the jurors to see the case through Gapen's eyes, as Greer wanted the jurors to do. (Evid. Hrg., p. 124)
Counsel's strategic decisions were made after a thorough investigation. (Decision, p. 36)	Counsel did not thoroughly investigate—they did not ask Dr. Smith to address the issue of Jessica. Counsel failed to consider that mitigation option.

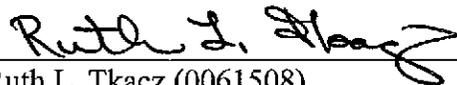
<p>Mitigation evidence is not an explanation for aggravated murder. (Decision, p. 36)</p>	<p>The nature and circumstances of the offense can be a mitigating factor. See R.C. 2929.04(B). Dr. Smith's testimony is also relevant under R.C. 2929.04 (B)(7).</p>
<p>Gapen had sexual intercourse with Martha. (Decision, pp. 36, 39)</p>	<p>Gapen was acquitted of rape (T.p. 3892).</p>
<p>Presenting Dr. Smith's testimony would not have changed the outcome of the trial. (Decision, pp. 37, 38)</p>	<p>This is not the correct standard under <u>Strickland v. Washington</u>, 466 U.S. 668 (1984). The standard for ineffective assistance of counsel claims is not outcome-determinative. The relevant inquiry asks: Is confidence in the death verdict undermined? Is the death verdict reliable? Was there a reasonable probability that at least one juror would have found the balance of aggravating circumstances and mitigating factors differently?</p>
<p>Dr. Smith appeared offended that Greer did not choose his theory. (Decision, p. 37)</p>	<p>Dr. Smith testified that he understood that the attorneys make the decision on what to present; he did not question their tactical decisions. (Evid. Hrg., pp. 76-77) Also, how could Dr. Smith be offended when he had not formulated his opinion at that time?</p>
<p>Dr. Smith suggests that Jessica's behavior in disrespecting him and disobeying house rules is mitigating. (Decision, p. 38)</p>	<p>Dr. Smith discussed Gapen's mindset and perceptions, and the deteriorating marriage and how Jessica was connected to that. His testimony extended the crime of passion to encompass Jessica, and it offered psychological explanations for Gapen's behavior.</p> <p>It was counsel's error that the evidence as presented at trial and mitigation left the impression that Gapen killed Jessica because she disrespecting him and did not follow rules.</p>
<p>Dr. Smith's testimony does not mitigate the "brutal mauling of a thirteen-year-old girl" who slept in her bed, with such force that horrible injuries resulted. (Decision, pp. 38-39)</p>	<p>The court considered impermissible non-statutory aggravating circumstances.</p>

### III. CONCLUSION

Defense counsel did not provide effective assistance of counsel under the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984). The jurors struggled to reach a sentencing decision. (T.p. 4281) Had defense counsel presented them with mitigating evidence relevant to Count Thirteen, it would have given them factors on which to support a life sentence. A solitary juror can prevent the death penalty. Brooks, 75 Ohio St. 3d at 162. If counsel had presented the relevant psychological mitigating evidence, "there is a reasonable probability that at least one juror would have struck a different balance." Wiggins, 539 U.S. at 537. The death verdict here is unreliable under the Sixth, Eighth, and Fourteenth Amendments. The lower courts' erred in dismissing Appellant Gapen's postconviction petition. This Court should grant jurisdiction and reverse the court of appeals' decision. Larry Gapen is entitled to a new sentencing hearing. See R.C. 2929.06(B).

Respectfully submitted,

David H. Bodiker  
Ohio Public Defender

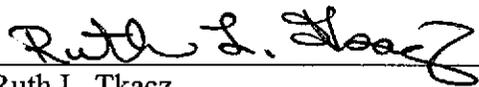


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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION was sent via regular first-class U.S. mail to Kirsten A. Brandt, Assistant Montgomery County Prosecuting Attorney, P.O. Box 972, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422, on the 5<sup>th</sup> day of October, 2007.

  
\_\_\_\_\_  
Ruth L. Tkacz  
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Hon. Mary Katherine Huffman  
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IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21822
vs.	:	T.C. CASE NO. 00CR2945
LARRY JAMES GAPEN	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

.....  
OPINION

Rendered on the 24<sup>th</sup> day of August, 2007.

.....  
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Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

.....  
FAIN, J.

Defendant-appellant Larry Gapen appeals from the trial court's judgment  
overruling his petition for post-conviction relief following a hearing.

Gapen contends that the trial court erred by rejecting his contention that his trial counsel rendered ineffective assistance during the penalty phase of his Aggravated Murder trial. Based upon our review of the record, we conclude that the evidence supports the trial court's conclusion that Gapen's trial counsel was not ineffective. Accordingly, the judgment of the trial court is Affirmed.

I

This case is before this court for the second time pursuant to post-conviction proceedings. We previously set forth a complete history of this case in *State v. Gapen* (January 31, 2005), Montgomery App. No. 20454, 2005-Ohio-441, which we need not repeat in full here.

Following a jury trial, Gapen was found guilty of several offenses including aggravated murder and attached death penalty specifications relating to the murder of Gapen's ex-wife, Martha Madewell, her male companion, Nathan Marshall, and Madewell's thirteen year old daughter, Jesica Young. The defense theory presented at trial was that Gapen did not kill the victims purposely, with prior calculation and design, but that Gapen is an average, normal person, not suffering from any mental illness, who was under extreme emotional stress as a result of his failed marriage to Madewell, and that he reached the breaking point, lost control and snapped, committing a crime of passion when he discovered Madewell lying together with Nathan Marshall, who was only partially clothed. While that theory might explain why Gapen murdered Madewell and Marshall, as evidenced by the jury's recommendation of life sentences for those killings, it does not explain why

Gapen killed his thirteen-year-old stepdaughter, Jessica Young. Defense counsel offered the jury no independent explanation why Gapen killed Jessica Young, and did not even mention that killing in their penalty phase closing argument.

During the penalty phase of the trial, Gapen presented expert psychological testimony from Dr. Robert Smith to show that Gapen is an average, normal person who does not suffer from any mental illness. That is consistent with the defense theory that these killings were a crime of passion committed by a lifelong outstanding citizen who just reached the breaking point, lost control and snapped.

Following the penalty phase of the trial, the jury recommended that Gapen be sentenced to death for the aggravated murder of Jessica Young committed with prior calculation and design. With respect to the aggravated murders of Madewell and Marshall, the jury recommended that Gapen be sentenced to life imprisonment without the possibility of parole. The trial court accepted the jury's recommendation and sentenced Gapen to death for the murder of Jessica Young, and life in prison without parole for the murders of Madewell and Marshall. The trial court also imposed additional consecutive prison terms totaling twenty-five years on the underlying felony offenses.

On direct appeal the Ohio Supreme Court dismissed the escape charge and the death-penalty specification relating thereto, but affirmed Gapen's other convictions and sentences, including the sentence of death arising from the murder of Jessica Young. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548. In affirming Gapen's death sentence, the Ohio Supreme Court noted that the jury could have found that Gapen's decision to murder Jessica Young was not mitigated

at all, and that the crime-of-passion theory used to explain the murders of Madewell and Marshall provided no mitigating reason for murdering Jessica Young. *Id.*, at ¶ 140 and 176.

Gapen filed a petition for post-conviction relief in the trial court pursuant to R.C. 2953.21. Among his grounds for relief, Gapen alleged that he had been deprived of the effective assistance of counsel at trial as a result of counsel's failure to investigate and present relevant mitigating evidence relating to the murder of Jessica Young; specifically, expert testimony by Dr. Smith explaining why Gapen murdered Jessica Young, for whose murder Gapen was sentenced to death. Gapen's petition was supported by an affidavit from Dr. Smith who averred that defense counsel did not ask him anything about Jessica Young's death, such as why Gapen might have killed her, and did not ask Dr. Smith to investigate or develop mitigating evidence pertaining to Young's murder, and therefore he did not address that issue at trial. However, had defense counsel asked Dr. Smith about Jessica Young's death, Dr. Smith would have explained that her killing was not done consciously, with prior calculation and design, but rather just like the killings of Madewell and Marshall, it was a crime of passion that resulted from Gapen projecting the anger he felt toward Martha Madewell onto her daughter, Jessica Young, whom Gapen saw as the "mirror image" of Martha Madewell. Smith Affidavit at ¶ 8 and 16.

The State filed a motion for summary judgment on Gapen's post-conviction petition which the trial court granted, dismissing the petition without holding a hearing. On appeal, we reversed the summary judgment, and remanded the matter

for a hearing on Gapen's claim that his trial counsel rendered ineffective assistance by failing to present as relevant mitigating evidence Dr. Smith's opinion testimony explaining why Defendant attacked and killed Jessica Young. *State v. Gapen* (January 21, 2005), Montgomery App. No. 20454, 2005-Ohio-441.

On remand the trial court held a hearing at which Dr. Smith and David Greer, Gapen's lead trial counsel, testified. Following the hearing the trial court rendered an extensive, forty-page opinion, once again overruling Gapen's petition for post-conviction relief. The trial court found that Gapen had failed to demonstrate either deficient performance by trial counsel or resulting prejudice.

Gapen appeals from the judgment decision overruling his petition for post-conviction relief.

## II

Gapen's sole assignment of error is as follows:

"THE TRIAL COURT ERRED BY DENYING APPELLANT'S POSTCONVICTION PETITION'S FIRST GROUND FOR RELIEF, WHERE THE EVIDENCE SHOWED THAT DEFENSE COUNSEL FAILED TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE RELEVANT TO THE OVERRIDING ISSUE IN THE CASE, RENDERING COUNSEL INEFFECTIVE AND LEADING TO APPELLANT'S SENTENCE OF DEATH."

The issue in this appeal is whether Gapen's trial counsel rendered ineffective assistance by failing to investigate and present mitigating evidence relevant to the murder of Jessica Young; specifically, Dr. Smith's opinion testimony explaining why

Gapen attacked and killed Jessica Young.

A post-conviction proceeding is not an appeal from a criminal conviction; it is a collateral civil attack on the judgment. R.C. 2953.21(J); *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905. Consequently, there is no constitutional right to post-conviction relief, except as conferred by statute. *Calhoun*, supra at 281; *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67. R.C. 2953.21(A)(1) governs a defendant's entitlement to post-conviction relief and reads in pertinent part:

"Any person who has been convicted of a criminal offense \* \* \* and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or grant other appropriate relief[.] \* \* \* ."

To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To demonstrate deficiency, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, supra. Even assuming that counsel's performance was deficient, a defendant must still show that the error had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only where a defendant demonstrates that there is a reasonable probability that, but for counsel's errors, the result of the

proceeding would have been different. *Id.*

In the recent case of *In re B.W.*, Darke App. No. 1702, 2007-Ohio-2096, at ¶¶23-25, this court observed that in *Strickland* the United States Supreme Court stated:

“Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (Internal citations omitted). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight; to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' (Internal citations omitted). There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. (Internal citations omitted).

“The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant

would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland, supra*, at 689-690. *State v. Lloyd* (March 31, 1999), Montgomery App. No. 15927."

The decision of what mitigating evidence to present during the penalty phase of a capital trial is a matter of trial strategy. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, at ¶189. Counsel's "strategic choices made after

thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* Even debatable trial tactics do not constitute ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Bradley*, at 142.

Moreover, hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the trial. *State v. Cook* (1992), 65 Ohio St.3d 516, 524, 605 N.E.2d 70. Reviewing courts should refrain from second-guessing trial counsel in the presentation of mitigating evidence. *State v. Mason* (1998), 82 Ohio St.3d 144, 169, 694 N.E.2d 932; *State v. Post* (1987), 32 Ohio St.3d 380, 388, 513 N.E.2d 754. Attorneys are not required to pursue every conceivable avenue; they are entitled to be selective. *State v. Murphy* (2001), 91 Ohio St.3d 516, 542, 747 N.E.2d 765. Defense counsel is not deficient merely because there is another, better strategy available. *Clayton* at 49.

Gapen argues that even though his attorneys were well aware that one of the biggest hurdles they had to overcome in securing a life sentence was the brutality of the murder of Jessica Young and explaining why Gapen killed her, counsel did not ask Dr. Smith to explore or consider mitigating reasons for Gapen's attack on Jessica Young, and they did not follow up with Dr. Smith when his report alerted defense counsel to conflict between Gapen and Jessica Young and Gapen's perception that Jessica Young was one of the reasons for the marital problems between Gapen and Martha Madewell.

In short, Gapen claims that his attorneys failed in their duty to investigate mitigating evidence relevant to the murder of Jessica Young. That argument necessarily depends for its validity upon Gapen's claim that defense counsel did not ask Dr. Smith to explore or consider mitigating evidence pertaining specifically to Jessica Young's murder. Dr. Smith testified at the post-conviction hearing that defense counsel only assigned him one task: to conduct a psychological evaluation to determine if Gapen had any significant psychiatric illnesses. Dr. Smith claims that he did exactly what defense counsel asked him to do, and he did not go beyond that and explore or develop mitigating evidence pertaining to Jessica Young's death because defense counsel did not ask him to do that.

Dr. Smith's testimony at the hearing was directly contradicted by the testimony of Gapen's lead defense counsel, David Greer, who testified that he did not restrict Dr. Smith's evaluation of Gapen to simply identifying psychiatric illnesses. Rather, Greer "put Dr. Smith out like a dog in a field full of birds to find all the birds that were there." Greer testified "I engaged him as an expert in psychology to examine Larry and to give me the benefit of his expertise on whatever opinions he had that might impact the issues of guilt, innocence, or mitigation in the case. In other words, he had carte blanche to examine Larry and to focus on what we could use forensically as trial lawyers in Larry's defense and in mitigation of the crimes that were involved." Importantly, the trial court found David Greer's testimony to be "profoundly more credible" than Dr. Smith's testimony. The trial court found that Greer did not put any limitation on the scope of the inquiry or opinions to be rendered by Dr. Smith, that Dr. Smith was hired as an expert witness

to express his unlimited expert opinions, that Greer relied upon him, and that Dr. Smith did not express or share with defense counsel during the trial his opinions regarding Jessica Young's murder that are now presented in Smith's post-conviction affidavit.

The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of fact to resolve. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at ¶64; *State v. DeHass* (1967), 10 Ohio St.2d 230. Because the trial court, as factfinder, had the opportunity to see and hear the witnesses at the hearing, its decision to credit David Greer's testimony over Dr. Smith's is entitled to substantial deference, and we will not interfere with that decision. *State v. Combs* (May 14, 2004), Montgomery App.No. 19853, 2004-Ohio-2419 at ¶4.

The testimony credited by the trial court, that of David Greer, demonstrates that Greer asked Dr. Smith to examine Gapen and give him the benefit of his expertise on whatever opinions he had that might impact guilt, innocence, or mitigation in this case. "The quest was what can Dr. Smith ascertain as far as what psychiatric or psychological issues played into the facts of the case, what is there about Gapen and his makeup that could be used in mitigation to flush out facts and then to dress them up with whatever opinions came to him from his study and experience." Furthermore, Dr. Smith was well aware of the type of information that would be relevant and helpful in mitigation, and what his role would be as an expert witness in the penalty phase of a capital trial. Dr. Smith had conducted evaluations in over one hundred capital cases, and had testified many times in death penalty cases, including in post-conviction proceedings where Dr. Smith had prepared an

affidavit stating that additional evidence should have been presented to the jury during the penalty phase of the trial.

David Greer's open-ended request to Dr. Smith to examine Gapen and give him the benefit of his expertise on whatever opinions he had that might impact guilt, innocence, or mitigation in this case, was broad enough to encompass any opinions or theories Dr. Smith had to explain why Gapen attacked and killed Jessica Young. If there was something psychologically about Gapen's situation that could explain the murders, reduce Gapen's moral culpability, or diminish the appropriateness of death as a penalty, it was incumbent upon Dr. Smith to communicate that information to defense counsel because that is exactly what counsel asked Smith to do. That does not constitute improperly shifting or delegating the burden to the defense expert witness to investigate, develop, and present relevant mitigating evidence. As David Greer testified, he takes the "smorgasbord" of information he is provided by the lay witnesses, the mitigation specialist, the expert witness and other sources, and then using his professional judgment, he presents the information he finds most appropriate.

Dr. Smith acknowledged that the opinion he now offers in his post-conviction affidavit, and at the post-conviction relief hearing, explaining why Gapen murdered Jessica Young, was formulated using facts he acquired during his interview of Gapen prior to the trial. Accordingly, as Dr. Smith admitted, he could have provided defense counsel at the time of trial with his opinion concerning why Gapen killed Jessica Young, but he did not do so because counsel did not ask for that information. Instead, Dr. Smith confined his opinion to the specific question counsel asked,

whether Gapen suffered from any significant psychiatric illnesses. According to David Greer's testimony, which the trial court found to be credible, evaluating Gapen for mental illness is not the only thing Dr. Smith was asked to do by defense counsel. David Greer hired Dr. Smith to aid him in understanding matters beyond the knowledge and experience of lay persons. David Greer is an attorney, not a psychologist. Greer relied upon Dr. Smith as an expert to provide whatever opinions his expertise could offer that might impact guilt, innocence, or mitigation, in order to lessen Gapen's moral culpability for the murders and diminish the appropriateness of death as the penalty. Obviously, defense counsel could not present Dr. Smith's explanation for the murder of Jessica Young when Smith failed to articulate or share that opinion with defense counsel.

Given the broad scope of defense counsel's request to Dr. Smith to give him the benefit of his expertise on whatever opinions he had that might impact guilt, innocence, or mitigation in this case, we do not conclude that defense counsel was ineffective for having failed to foresee or anticipate that Dr. Smith would harbor and fail to disclose unarticulated opinions or unexpressed theories that counsel needed to specifically inquire about, such as whether Dr. Smith had an opinion or explanation for why Gapen killed Jessica Young. Effective representation does not require prescience by counsel. Dr. Smith did not disclose to defense counsel the opinion now expressed in his post-conviction affidavit explaining why Gapen killed Jessica Young. Defense counsel did not perform deficiently by failing to foresee or predict that unarticulated opinion from the very expert hired for the purpose of sharing with counsel his forensic opinions about anything that might impact

mitigation in this case. We agree with the trial court that defense counsel did not fail to make reasonable investigative efforts with respect to mitigation evidence in this case.

Furthermore, the evidence demonstrates that the mitigation strategy adopted and presented by defense counsel was meaningful and undertaken after thorough investigation, thoughtful analysis, and careful consideration of all the facts and circumstances. Absent any mental illnesses or psychologically impaired thinking to explain why Gapen committed these gruesome murders, counsel focused on Gapen's history, character, and background to diminish the appropriateness of death as a penalty in this case. Counsel portrayed Gapen as a perfectly normal person, a lifelong upstanding citizen who any of the jurors would have liked to have as their friend or neighbor, but a person who was pushed past the breaking point by his failing marriage and snapped, committing a crime of passion when he found his ex-wife with another man, in order to reinforce that these murders were a complete aberration, and that Gapen posed no threat to anyone else and therefore life, not death, was the appropriate sentence.

Defense counsel arrived at their mitigation strategy only after interviewing several lay witnesses and acquaintances of Gapen, and utilizing the services of an investigator, a mitigation specialist, and a psychological expert, Dr. Smith. Defense counsel made a conscious decision to avoid a separate explanation for Gapen's attack on Jessica Young because counsel wanted to stay away from the horrible facts of that brutal crime so the jurors would not inappropriately consider those facts as aggravating circumstances. Counsel elected to present a theory of mitigation

humanizing Gapen and emphasizing the lengthy history of Gapen's good character and his law-abiding life before these murders. Defense counsel's strategic choices as to what mitigation to present, made after thorough investigation of the law, the facts and circumstances, and their available options, is virtually unchallengeable and does not constitute deficient performance. *State v. Bryan, supra; State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18. Furthermore, the existence of other mitigation theories does not establish ineffective assistance of counsel. *Clayton, supra; State v. Turner* (February 21, 2006), Franklin App. No. 04AP-1143, 2006-Ohio-761; *State v. Post* (1987), 32 Ohio St.3d 380; *State v. Combs* (1994), 100 Ohio App.3d 90. Deficient performance by defense counsel in the penalty phase of the trial has not been demonstrated. Therefore, we need not address whether Gapen was prejudiced by counsel's performance. *Strickland, supra*, at 697. Ineffective assistance of counsel has not been shown.

Gapen's sole assignment of error is overruled.

III

Gapen's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

.....

BROGAN, J., concurs.

DONOVAN, J., dissenting:

I disagree. Gapen cites sufficient overlooked evidence to prejudice him under *Strickland*. It is enough to undermine confidence in the outcome, particularly

when viewed in light of the foreperson's original indication that the jury was deadlocked on all counts on life sentences. Dr. Smith's expert opinions which offer a psychological rationale for killing Jessica would have altered the profile of Gapen presented to the jury. Gapen clearly had a right to present this mitigating evidence. See *Williams v. Taylor* (2000), 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389. Ultimately, "the prejudice prong is satisfied if 'there is a reasonable probability that at least one juror would have struck a different balance.'" *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6<sup>th</sup> Cir. 2003).

The majority seems to suggest that Dr. Smith harbored or failed to disclose unarticulated opinions about Jessica's death, yet there is nothing in the record that suggests that Dr. Smith intentionally withheld mitigating evidence. In fact, defense counsel acknowledged at the post-conviction hearing that if he had been aware of such opinion(s), he would have utilized them. (Tr., p. 109, lines 18-23). It is undisputed that the most difficult hurdle for counsel at the sentencing phase was, "Why Jessica too?" As noted by the Ohio Supreme Court in addressing an assignment of error regarding inconsistent sentences herein, the court stated "the jury may have found that Gapen's decision to murder Jessica was not mitigated at all." *State v. Gapen* (2004), 104 Ohio St.3d 358, 2004-Ohio-6548 at 139. Thus, clearly an expert opinion as to why these crimes of passion carried over to Jessica was powerful mitigating evidence that should have been elicited and made available to the jury. The mitigating evidence the jury did not hear bears directly on the jury's finding of prior calculation and design in the death of Jessica.

Courts must be extremely critical in evaluating the presentation of mitigating evidence in a capital case. A capital defendant, including Gapen, has a right to present the jury with any mitigating evidence that might spare his life.

I would sustain the sole assignment of error and reverse for a new sentencing hearing.

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Hon. Mary Katherine Huffman

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

CASE NO. 2000 CR 2945

Plaintiff-Respondent,

JUDGE MARY KATHERINE HUFFMAN

v.

LARRY GAPEN,

DECISION, ORDER AND ENTRY  
OVERRULING PETITION FOR  
POST-CONVICTION RELIEF

Defendant-Petitioner.

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**I. PROCEDURAL HISTORY**

This matter is before the court on the Petition for Post Conviction Relief filed herein by the Petitioner/Defendant, Larry W. Gapen, on October 4, 2002. In his petition, Defendant alleged six separate grounds for relief, including two separate claims of ineffective assistance of counsel. The matter was briefed by counsel and on March 11, 2004 this court granted the State's Motion for Summary Judgment without hearing and dismissed Defendant's Petition. Thereafter, Defendant filed an appeal of said Decision with the Second District Court of Appeals. On January 31, 2005, the Court of Appeals rendered its Opinion and sustained in-part Defendant's First Assignment of Error relating to his ineffective assistance of counsel claim associated with the mitigation phase of the trial and remanded the matter to this court for hearing on that claim. However, the Court of Appeals overruled Defendant's remaining assignments of error and, thus, affirmed this court's decision relating to the other matters raised in Defendant's Petition for Post Conviction Relief, including his claim of ineffective assistance of counsel during the trial phase of this capital proceeding. Therefore, the only matter now pending before this court is

Defendant's Petition for Post Conviction Relief relating to his claim of ineffective assistance of counsel in the mitigation phase of these proceedings.

The directive from the Court of Appeals, in its decision is as follows: "this matter (is) remanded to the trial court for a hearing on Defendant's claim that his trial counsel rendered ineffective assistance by failing to present as relevant mitigating evidence Dr. Smith's opinion testimony explaining why Defendant attacked and killed his stepdaughter, Jesica Young." With that directive guiding the court, this matter was scheduled for hearing after the parties had been provided an opportunity to prepare for that hearing, and following this court's order, upon Petitioner's Motion, that funds be allotted for an expert witness to assist Defendant in prosecuting his petition.

The parties submitted pre-hearing Memoranda to the court. Thereafter, an evidentiary hearing was held on Defendant's Petition for Post Conviction Relief on March 21, 2006. The parties requested an opportunity to provide the court with Post-Hearing Briefs and have submitted the same. This matter is now ripe for decision.

## II. FACTS

On September 18, 2000, Martha Madewell, Nathan Marshall, and Martha's thirteen year old daughter, Jesica Young, were brutally murdered while they slept at 6255 Pheasant Hill Road, Dayton, Ohio. The confessed perpetrator of the offenses was Madewell's former husband, Larry Gapen.

Gapen and Madewell were married in 1993. Martha had four children from prior relationships, Daniel Marshall, Jesica Young, Brooke Madewell and Billy Madewell. Gapen had two children from his second marriage, Charity and Jimmy Gapen. Gapen and Martha moved in

together, with their children, in August, 1993. Charity Gapen left the home in June, 1997.

Gapen and Martha began to have difficulties and the relationship between the two families deteriorated. Following several altercations between Daniel Marshall and Gapen, Daniel was sent to live with his grandparents in the summer of 1999. Tension continued in the home, which culminated in Jimmy and Larry Gapen moving to Charity's apartment in Vandalia in April, 2000. Gapen and Martha continued to see each other periodically after their separation. However, they signed a separation agreement on June 16, 2000 in anticipation of terminating their marriage.

On June 24, 2000, Gapen broke into Martha's home. He stated that he entered the home so he could discuss their relationship with Martha. Gapen tied Martha's legs together because he was afraid she would leave. Subsequently, Gapen was charged with abduction. Gapen was released on bond, including electronic home detention at Charity's home as a condition of that bond. Also, as a condition of bond, Gapen signed documents agreeing not to leave his daughter's home except when he was working. However, Gapen regularly defied the court's direction that he not leave home except to work. He frequently left his daughter's home to visit with Martha and her children, attend sporting events and to socialize. He would also advise his electronic home detention supervisor of his work hours, when Gapen was not actually working during the times he reported. Gapen and Madewell were issued a Final Judgment and Decree of Dissolution by the Montgomery County Domestic Relations Court on September 14, 2000. Although he may have visited there, Gapen had never resided at 6255 Pheasant Hill Road.

Two days after the marriage of Martha Madewell and Larry Gapen was terminated, Heather Morgan and her sons had dinner with Larry Gapen on Saturday evening, September 16, 2000. Morgan and her children knew Gapen from the football team that Gapen coached. Gapen

appeared to Morgan to be in a good mood the evening of September 16<sup>th</sup>. He told Morgan that he knew that Martha had someone else in her life. (Tr., p. 2576). Morgan and Gapen also spoke by telephone at approximately three in the afternoon on Sunday, September 17, 2000. Gapen appeared to Morgan to be “down in the dumps.” He complained that Martha did not want to talk with him and that she had someone else that she was seeing. (Tr., p. 2589). However, Gapen did express to Heather Morgan his hope that he and Martha would get back together. (Tr., p. 2588).

Kacee Miller, Jimmy Gapen's sixteen-year-old girlfriend testified at the trial. In 2000, she had known Jimmy Gapen for approximately seven years and was acquainted with Larry Gapen. She and Jimmy met with Gapen for dinner, between approximately 8:00 and 9:00PM on September 17<sup>th</sup>. Gapen did not eat, although he did drink beer and a shot of whiskey. Kacee described Gapen as being happy. Gapen stated that he knew that Martha was seeing someone, but he was “OK with it.” He did not appear to Miller to be angry. (Tr., p. 2611). Miller also testified that Gapen knew that Martha had a boyfriend but he knew that he was going to have to adjust to that situation. (Tr., p. 2611).

Prior to having dinner with Kacee and Jimmy, Gapen had gone to Martha's home and had seen her lying on the couch with a man unfamiliar to him. Gapen later told police that he returned to Martha's house at 12:30AM on September 18, 2000. Martha and her former husband, Nathan Marshall, Daniel's father, were asleep on the couch. Gapen admitted to taking a chopping maul and beating Martha and Nathan Marshall, inflicting fatal injuries.

Martha's youngest daughter, Brooke, was asleep in her bedroom located in the basement of the home. She awoke to banging sounds coming from the next room. Nine-year-old Brooke opened her bedroom door and recognized Gapen. She saw that he had something in his hand and saw him hit something. Gapen saw Brooke and told her to go back to bed. Gapen later told

Brooke to get her clothes and go upstairs because her mother had asked him to take her and her brother, Billy, to school the next day. Brooke got dressed, packed her bag, and went upstairs.

After killing Martha and Nathan, Gapen went upstairs and killed Jessica with the maul. Martha's son Daniel, who was asleep in his room next to Jessica's, was awakened by Jessica's cries. Daniel noticed when he awoke that the time on the clock next to his bed was 1:51AM. Daniel opened his bedroom door and was met by Gapen, standing in front of the door. Gapen told Daniel to go back to sleep. Daniel went back in his bedroom. Gapen took Brooke and Billy Madewell and left the residence.

A few minutes after Daniel had encountered Gapen outside his bedroom door, Daniel arose again, concerned that something about the situation was not right. He did not see his younger brother, Billy, in bed, so he went to the basement to see if Billy had gone down to Brooke's bedroom. On his way to the basement Daniel noticed that the back door to the home was opened. Daniel discovered that Brooke was also missing. He then observed the bodies of his mother and Nathan Marshall in the basement. Daniel then went back upstairs to check on Jessica, and found her seriously injured, but still alive. Daniel then called the police. Police and paramedics arrived on scene and transported Jessica to the hospital, where she later died.

Gapen was arrested several hours later in Vandalia, Ohio, with Billy and Brooke still with him. Gapen was interviewed by Dayton Police Detectives Salyer and Elzholz. Gapen admitted to police that he had sexual relations with Martha after killing her. When interviewed, Gapen told police that he had not felt that good in weeks. He also stated that he had attacked Jessica because she had been disrespectful to him and "would talk back to him." Gapen also told detectives that "she was going to turn out just like them."

Gapen was indicted on October 18, 2000 on one count of escape, one count of aggravated

burglary, one count of rape, one count of aggravated robbery, and twelve counts of aggravated murder; five separate aggravating circumstance specifications were attached to each of the aggravated murder counts. Two days later, on October 20, 2000, the trial court appointed attorneys David Greer and Bobby Joe Cox to represent Gapen. The matter proceeded to a jury trial on May 21, 2001. Following trial, Defendant was found guilty by the jury on all counts in the indictment, as well as the specifications, except the jury found Defendant not guilty of rape. The matter proceeded to the penalty phase and after the evidence, testimony and arguments, the jury recommended a sentence of life in prison without the possibility of parole on all counts relating to the murders of Martha Madewell and Nathan Marshall, but recommended a sentence of death on Count Thirteen, the prior calculation and design count, relating to the death of Jesica Young. The jury recommended life in prison without the possibility of parole on the other aggravated murder counts relating to Jesica. The trial court, following its review of the evidence, followed the jury's recommendation and sentenced Gapen to death on Count Thirteen, and life without the possibility of parole on the other aggravated murder counts. Defendant appealed that conviction and the death sentence, which were affirmed by the Ohio Supreme Court in *State v. Gapen*, 104 Ohio St. 3d 358 (2004). However, the Court did reverse Defendant's conviction for escape.

Dr. Kent Harshbarger, a forensic pathologist and deputy coroner performed the autopsy on Jesica Young. His testimony at trial revealed that Jesica Young, age thirteen at the time of her death, suffered at least seventeen chop wounds to her body. Those chop wounds were to her head, neck, chest and leg. She suffered eight blunt force injuries to her upper extremity and two to her leg. Jesica also suffered five blunt force injuries to her chest and chin. (Tr., p. 2365). She also had significant internal bleeding. Some of her teeth and parts of her braces were recovered

from her stomach. (Tr., p. 2361). Jessica also suffered defensive wounds to her leg. (Tr., p. 2351). Her cause of death, as determined by Dr. Harshbarger, was multiple chop injuries of the head and chest. (Tr., p. 2369). Some of the chop wounds were inflicted with enough force to chop through her scalp, fracture her skull and lacerate her brain. (Tr., p. 2356).

Dr. Robert Smith was a part of Larry Gapen's defense team at his capital trial in 2001. Dr. Smith testified on Defendant's behalf at the time of the sentencing phase of the trial and at the evidentiary hearing on his petition. Dr. Smith is a licensed clinical psychologist and a certified addiction specialist. He holds a bachelors, masters and doctorate degree in psychology from Kent State University. Dr. Smith obtained the doctorate degree in 1983. Dr. Smith has a varied background, servicing many different agencies and their clients. He also maintains a private clinical practice and teaches psychology at Case Western Reserve University. He also performs consulting services for a variety of agencies. He is a member of numerous professional organizations. Dr. Smith is also a board certified forensic examiner.

Dr. Smith has evaluated approximately two hundred capital defendants. Smith has been involved in the mitigation phase of approximately one hundred death penalty cases over the course of the past twelve years. The Gapen trial, then, was not his first involvement with the mitigation phase of a death penalty case. Smith is familiar with the process involved in death penalty cases. Dr. Smith has testified in court approximately forty times, some of those occasions being on behalf of capital defendants, including testifying on behalf of defendants in death penalty post conviction proceedings. He has testified in post conviction proceedings in Indiana, Illinois, and Missouri, as well as in Ohio. In cases where he has been involved in post conviction proceedings, Smith has prepared affidavits stating that additional evidence should have been presented to the jury in the mitigation phase of a death penalty trial. Smith is not an

attorney, nor does he have any legal training.

Dr. Smith was originally contacted by David Greer, one of Gapen's two court-appointed attorneys. Smith had not previously worked with Gapen's attorneys, David Greer and Bobby Joe Cox. Smith did not have any contact with Mr. Cox. Dr. Smith interviewed Mr. Gapen at the Montgomery County Jail on two occasions for a total of between ten and twelve hours. (Tr., p. 3994). He conducted a psychosocial history, psychological tests and a review of Gapen's background. Based upon his evaluation of Gapen, Dr. Smith found that Gapen displayed no indication of severe psychotic disorder and no significant personality or anti-social personality disorder. (Tr., p. 3998). Smith described Gapen as alcohol dependent and suffering from acute depression. (Tr., p. 3998, 4001, 4005-4006). Dr. Smith also found that Gapen had obsessive personalty traits. (Tr., p. 3999).

As previously stated, Dr. Smith had met with Gapen twice before he testified during the mitigation phase. After being contacted by Petitioner's post conviction relief counsel from the State Public Defender's Office, Dr. Smith also met with Gapen for two hours at the Mansfield Correctional Institute, to confirm the information Gapen had previously given to him prior to the preparation of his affidavit for these proceedings. His opinions stated in his post-conviction affidavit are not based upon any new evidence he has gained since his initial involvement in this matter. Dr. Smith further testified at the evidentiary hearing that he could have formulated the opinions contained in his affidavit during Gapen's trial. However, he did not formulate those opinions until after he had been contacted by Defendant's post conviction counsel and after he had been advised that Gapen had been found guilty and sentenced to death, and had been specifically directed to consider the issue by post conviction counsel.

At the evidentiary hearing, Dr. Smith stated that he did not meet with Mr. Greer or Mr.

Cox prior to meeting with Gapen. However, he did acknowledge that he had spoken with David Greer. A review of the trial transcript reveals, however, that Dr. Smith stated at trial that he was introduced to Larry Gapen in the Montgomery County Jail by David Greer. (Tr., p. 4012).

According to Dr. Smith, Greer asked him, and instructed him that his focus was "to determine if Mr. Gapen presented with any significant psychiatric illnesses." Dr. Smith met with David Greer for approximately one hour following Dr. Smith's first visit with Gapen, and then they spoke by telephone following Smith's second interview. Smith also met with Greer the day before his mitigation phase testimony. Smith did not attend any defense team meetings nor was he part of any "brainstorming" sessions associated with developing a mitigation phase strategy, nor was he asked to formulate a strategy of mitigation, particularly relating to Jessica. Dr. Smith claims that he was not asked for his suggestions regarding mitigation.

According to Dr. Smith, Gapen's attorneys did not discuss with him Jessica's death, nor did they instruct or ask Dr. Smith to assist in formulating a mitigation strategy involving Jessica's death. Smith was aware that Gapen had made statements after his arrest, but he had no specific discussion with Greer about those statements, or how they might impact mitigation evidence relating to Jessica's death. Smith suggests that Mr. Greer did not focus him on a theory or factors relating to mitigation, beyond a psychological diagnosis of Larry Gapen. Smith testified at the evidentiary hearing that it is not his practice to go beyond any request made by the attorneys. However, on cross-examination, Dr. Smith testified that he was aware that there were three victims involved in the matter and that Jessica was one of them. He also knew the relationship between Gapen and Jessica. He also was aware of the nature and extent of the injuries inflicted upon Jessica, and the instrumentality of those injuries. Smith had talked with Gapen about the viciousness of Jessica's injuries. Smith did admit that neither Greer nor Cox limited the scope of

his inquiry, nor instructed him to refrain from going beyond a determination of whether Gapen suffered from any significant psychiatric illnesses.

Dr. Smith stated that he did not talk with David Greer specifically about Jessica. He did, however, gain information from other sources prior to interviewing Gapen. He spoke with Peggy Kent, a mitigation specialist from the State Public Defender's Office, who was working on the Gapen case. Smith had previously worked with Peggy Kent on other death penalty cases. Dr. Smith obtained an overview of the case from Ms. Kent and they discussed some materials that she had gathered and then sent to Dr. Smith. They also reviewed a chronology of Gapen's life and information that Kent had gathered from her interviews with collateral sources. Dr. Smith also assumed, prior to his interviews with Gapen, that he would be testifying in the mitigation phase. He also reviewed the police reports generated as a result of the murders of Madewell, Marshall and Jessica Young.

At the evidentiary hearing Dr. Smith stated that the theory of the case was implied to him, although it was never specifically related to him by counsel. He was, however, aware of the defense theory or strategy prior to his testimony. At the evidentiary hearing Dr. Smith stated that he had diagnosed Gapen as being alcohol dependent. He also believed Gapen was experiencing sadness and depression. Smith also opined that Gapen possessed the personality traits of obsession, perfectionism, compulsion and low self-esteem. The report Smith prepared prior to the capital trial provides, at page four, information regarding Gapen's family life with Martha and his relationship with Martha's children. Of particular note is the following passage from Dr. Smith's report:

Mr. Gapen's last marriage was to Martha Madewell. This relationship was very important to him in that he wanted to have a "stable family." He found himself struggling to please Martha. They both abused alcohol and, when intoxicated, they had

disagreements and arguments. Most of these arguments surrounded Martha's children, especially Jessica and Daniel. Each of these children manipulated Martha and they would become angry with Mr. Gapen for encouraging Martha to discipline them. Martha would eventually "give in" to the children and this would lead to the arguments. As the children's behavior became more disruptive and inappropriate, Martha became defensive and kept information from Mr. Gapen. He became frustrated with the children and felt that they were acting as a wedge between himself and Martha. Gradually, Martha pulled away from Mr. Gapen and she began spending more time with a single female friend, going to bars in the evening. Mr. Gapen worried constantly that she would find another man and leave him. He became obsessed with trying to make the marriage work.

At page two of that report, Dr. Smith opined in his Clinical Summary, that "Gapen was suffering from Alcohol Dependence, Alcohol Intoxication and Acute Depression at the time of the instant offense. Mr. Gapen evidenced no sign of psychotic symptoms (i.e., hallucinations or delusions), a psychotic disorder, sociopathy or an antisocial personality disorder." At the evidentiary hearing Smith admitted that Larry Gapen had told him information that would not have been helpful to Gapen's case, including the fact that Gapen had intended to kill Daniel.

Smith's report provided to Mr. Greer and Mr. Cox offers no opinions about Jessica's death despite the information contained at page four of that report. Dr. Smith admitted at the time of the evidentiary hearing that he had other information regarding Larry Gapen that he did not include in his report provided to Gapen's trial counsel. He claims that counsel did not ask him questions pertaining to that information, and he only answered the specific question he claim was posed to him by counsel. In Smith's evidentiary hearing testimony, he indicated that he had not formulated an opinion regarding Jessica's death until after he was contacted by the State Public Defender's Office regarding post-conviction proceedings, and after he had reviewed the information that he had previously obtained from Gapen. However, he had all of the facts necessary to formulate that opinion prior to Mr. Gapen's trial. Smith personally prepared his post conviction affidavit prior to his visit to Larry Gapen at the Mansfield Correctional Institute

in 2003, approximately two years after Gapen had been sentenced to death.

As stated above, according to Dr. Smith, he chose not to go beyond the scope of the question he claims counsel presented to him. It is undisputed that Dr. Smith had not formed or expressed the opinions he now holds, and stated in his Affidavit, at the time of the mitigation phase herein, nor did he ever express those opinions, or share them in any manner with Mr. Cox or Mr. Greer during their representation of Gapen.

Of particular note is Smith's trial testimony. Smith's testimony was:

Q: Based upon your interviews and the results of your tests and based upon your experience, do you have an opinion, Dr. Smith, within a reasonable degree of psychological certainty as to whether or not Mr. Gapen was suffering from any psychological problems during the weeks immediately preceding Saturday night or Sunday night, September 17 of 2000?

A: Yes.

Q: What is that opinion?

A: My opinion is that for a significant period of time prior to September of last year, Mr. Gapen had been struggling with acute depression, and what I mean by that, not a diagnosable kind of depression like major depression but the kind of sadness or depression that we have when bad things are happening in our life, and a number of bad things had happened in his life that were very stressful and over, and he wasn't coping very well. He was very, very sad. One of the ways he was coping with that is he was increasing his use of alcohol which he had a history of abusing alcohol in the past and during this period of time his use of alcohol continued and seemed to get even worse during that period.

Q: Are there potential behavioral problems or what behavioral problems, if any, are there associated with those kinds of psychological problems?

A: The difficulty that I see for Mr. Gapen is again **not anything outside the realm of the average person**. If you took someone who has sort of a perfectionistic approach to life who obsesses and becomes sort of attached to a thought and can't let go if it, kind of ruminates and thinks about it over and over again and worries about it. They tend to agitate themselves and kind of get themselves worked up, and if they're in a very stressful time with a lot of things going wrong, that just builds on them. If you add alcohol to that, it only gets worse and what you have is you have the likelihood of someone acting impulsively, irrationally, and violently.

(Tr., p. 4006-4007)(emphasis added).

During his evidentiary hearing testimony Smith opined that Larry Gapen distorted reality in that he misinterpreted and overreacted to events such that he could no longer maintain objectivity about his relationship with Martha and he could not see that he could not save the relationship. Instead, he transferred his frustration with Martha onto Jessica and Daniel. Smith believes that Gapen killed Jessica because of a rage response. Smith acknowledged that Gapen does not suffer from a mental disease or defect or from any mental illness. He opines that Gapen did not kill Daniel, even though he intended to, because his rage had been spent at the time Gapen encountered Daniel in the upstairs hallway of the home at 6255 Pheasant Hill Road in the early morning hours of September 18, 2000. However, he also admitted at the evidentiary hearing that it was also possible that Gapen did not kill Daniel simply because Daniel was bigger than Gapen and he was awake, unlike the other victims.

On cross-examination Smith stated that while he spoke with the mitigation specialist,

Peggy Kent, most of the information he obtained in formulating his opinions was self-reported by Larry Gapen. He did not contact any collateral sources, nor did he attempt to verify any information that Gapen had given him. It was Dr. Smith's testimony at the evidentiary hearing that while he is the expert psychologist, having been involved in over one hundred death penalty mitigation cases, he only answered Mr. Greer's questions, and did not offer any opinions not specifically solicited by Mr. Greer. However, he did admit that he can formulate opinions without being asked to specifically do so. Instead, in this case, Smith chose only to consider the specific topics he claims that were raised by Mr. Greer. Smith knew the nature of Gapen's relationship with his step-children, particularly Jesica and Daniel, but since he claims he was not specifically asked to opine on that issue by Mr. Greer, he did not offer any opinions on that issue. When asked to explain how his theory that Gapen acted out of rage can be reconciled with the time lag between when Gapen first saw Madewell and Marshall together in her home in the early evening of September 17 and the murders several hours later, Smith opined that Gapen could have been calm during his dinner with Jimmy Gapen and his girlfriend because the circumstance that triggered his rage had not yet occurred. However, there is considerable argument in the fact that the triggering event for Gapen's "rage" was seeing Madewell and Marshall together earlier in the evening, after which he appeared to be calm at dinner, then hours later Gapen made the effort at obtaining a maul, gloves and a change of clothing, and then returning to Martha's home where he committed the murders. Smith also stated that Gapen's rage was building toward Martha, Jesica and Daniel.

On cross-examination, Dr. Smith did agree that his opinions which he now offers would have to be reconciled with the theory of the case and the evidence presented in order for it to be

accepted by the jury. He also acknowledged that the jury could have disregarded his opinion and found that Gapen did not act out of rage, particularly given the testimony at trial that Gapen had been in the house early in the evening and had seen Madewell and Marshall, but he did not react at that time. Dr. Smith also admitted at the evidentiary hearing that he had never previously considered how the death of Nathan Marshall fit into his theory of rage, although he quickly formulated an opinion while on the witness stand.

David Greer, one of Gapen's trial attorneys, also testified at the evidentiary hearing. Mr. Greer received his bachelor's degree and his law degree from Yale University, where he graduated with honors. He has been a licensed attorney in the State of Ohio since 1962. He is a partner with the firm of Bieser, Greer and Landis and has devoted his forty-four years of practice exclusively to trial work. His professional experience is storied. He has been a fellow in the American College of Trial Lawyers since 1979, and has chaired that organization's state association. He is a past president of the Dayton Bar Association. Mr. Greer has argued twice before the United States Supreme Court. His vast trial experience is unquestionable and unassailable. As he described his practice, Mr. Greer has tried every type of case imaginable.

Mr. Greer has been representing criminal defendants since 1962. He has represented defendants in murder cases, including several high profile murder defendants, and the defendant in the infamous Emoff capital murder-kidnapping case. Mr. Greer has also represented numerous defendants in non-capital murder cases. He has also represented death penalty defendants in the past prior to his representation of Gapen, although under previous version of Ohio's death penalty statute.

David Greer and Bobby Joe Cox were appointed to represent Larry Gapen in the trial of

the indicted charges against him, which included twelve counts of aggravated murder with aggravating circumstances specifications. Mr. Greer was not Rule 20 certified at the time he was appointed to represent Gapen. However, Mr. Greer applied for and was granted a Rule 20 exceptional circumstance waiver, which permitted him to represent Gapen. That exceptional circumstance waiver may only be granted by the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases of the Supreme Court, pursuant to Superintendence Rule 20(II)(C). During his representation of Gapen, Mr. Greer did attend the death penalty seminar and became Rule 20 certified to represent death penalty defendants. Mr. Greer has since taught at death penalty seminars, particularly on the topic of humanizing the client in a death penalty case. Following the Gapen trial Mr. Greer handled another capital case, which did not proceed to trial. Eventually he did not renew his Rule 20 certification. Bobby Joe Cox, Mr. Greer's co-counsel was presumably Rule 20 certified, although the record herein does not so reflect.

In their representation of Larry Gapen, Cox and Greer employed the services of an investigator, a mitigation specialist from the State Public Defender's Office, as well as Dr. Smith, who was recommended to Gapen's attorneys by the State Public Defender's Office. Mr. Greer and Mr. Cox had obviously educated themselves regarding capital cases prior to and during their representation of Larry Gapen. Greer was very well versed with the aggravating circumstance specifications attached to the charges in the indictment. Cox and Greer also went to Huber Heights and interviewed witnesses, particularly relating to mitigation.

Mr. Cox and Mr. Greer filed at least sixty four motions, all of which are quite standard in death penalty cases. Of particular note relating to the mitigation phase are Motions 50 and 51. The court also notes that counsel filed a Motion to Suppress. Counsel also filed proposed

instructions to the jury associated with the sentencing phase of the trial. Following the jury's sentencing recommendation, counsel also filed motions regarding those verdicts as well as a Sentencing Memorandum. The court also notes, after reviewing the entire record, that the record is replete with instances where counsel elicited mitigating evidence, even during the trial phase of the proceedings. Mr. Greer testified, after being specifically asked on cross examination, that he was familiar with the rationale of *State v. Wogenstahl*, 75 Ohio St. 3d 344 (1996), during his representation of Gapen.

Mr. Greer testified that he and Mr. Cox, from the beginning of their representation of Gapen, knew that the case would proceed to mitigation, based upon the facts presented to them. There were five aggravating circumstances attached to each count of aggravated murder in the indictment. The attorneys recognized that the more shocking the crime, the more difficult it would be for the jury to consider the legal issues presented. Greer and Cox had numerous discussions regarding the case and came to the conclusion that they had three issues to deal with:

1. The facts surrounding the offenses;
2. Mitigating factors;
3. The aggravating circumstances.

Mr. Cox and Mr. Greer were cognizant of the fact that the facts surrounding the offenses certainly were not going to help in mitigation. The attorneys were concerned that if they delved too deeply into the facts of the crime the jury would be sent the message that the theory of mitigation was that the victims had gotten what they deserved, a position that counsel as well as Defendant knew was untenable. Counsel was concerned that the jury would consider

inappropriate issues, such as the age of the victim and the horror of the crime as aggravating factors, when the nature and circumstances of the crime can only be considered in mitigation. Defendant shared that concern with his counsel and was aware of the negative impact the argument would or could have on the jury. Counsel was also aware of the fact that the facts surrounding the offenses raised more questions in mitigation than they answered.

Cox and Greer struggled with how to explain the events that had occurred on the evening of September 18, 2000. The attorneys were concerned particularly with the evidence from one of the paramedics at the scene who would testify about Jessica's face being split open below her nose, yet she was still alive. They knew it would be difficult to erase that scene from the juror's minds. Mr. Cox and Mr. Greer were also aware of the fact that the evidence was such that the jury would know what precipitated the events of September 18<sup>th</sup>, and the roles that Jessica and Daniel played in the dynamic. Another of the issues that had to be considered was why did Gapen go to Jessica and kill her, but not Daniel, particularly since Daniel was perceived as the "troublemaker" in the family? At trial, Jimmy Gapen testified that Daniel was hanging around with the wrong crowd, not coming home when he was supposed to do so, and generally was not following the house rules. Jimmy also described physical altercations between Larry and Daniel, one of which resulted in Larry being physically injured. Jimmy also testified that Daniel went to live with his grandparents in the summer of 1999, which caused a great deal of tension in the home, particularly because Martha wanted Daniel back home. He also described how he felt that he and his father, Larry, were not wanted in the home after Daniel was sent to live with his grandparents. (Tr., p. 4046 - 4048). However, Jimmy Gapen did not mention specifically any difficulties with Jessica. During the trial phase, Jimmy specifically testified as follows:

Q. What about Larry's relationship with all of the kids, you and Charity and Jessica and Billy and Brooke?

A. They were all about the same. Equal love for everybody.

(Tr., p. 3602). Jimmy also testified:

Q. Now, your dad didn't treat Jessica the same as he treated the other children; wouldn't that be fair to say?

A. I wouldn't say that. I would say they didn't get along as well as everybody else did.

During the time that the family was together, Jimmy only saw his father and Jessica hug on one occasion. (Tr., p. 3616). Yet, even up until days before the murders, Larry was transporting Jessica to and from cheerleading practice, along with Brooke.

During the mitigation phase Larry's sister, Jo Ann Fister, described Larry's relationship with Jessica as "fine." She had seen Larry playing on the floor with Jessica, Brooke and Billy on one holiday and the children and Larry were laughing. (Tr., p. 4132). Other than some conclusory statements made by Larry's mother, Elaine Gilmore, who testified that both Jessica and Daniel were problems in the home (Tr., p. 4087), there was very little testimony about Jessica. Charity Gapen testified that her father and Jessica did not have a loving relationship, but did not describe the relationship in further detail. (Tr., p. 3584). Petitioner's brother, Barry Gapen, also testified at trial that there were no problems with any of the children. (Tr., p. 4122). In Larry Gapen's own statement to the jury, he only mentioned Jessica in passing, stating that all of the children were in court, except Jessica and Billy. He did not mention any difficulties he had with Jessica. Further, of note is the fact that Larry made no apology for Jessica's death. His unsworn

statement to the jury concentrated on professing his love for Martha and his step-son, Billy. The only criticism of the children he expressed was Daniel's lack of respect for him and the rules of the household. (Tr., p. 4209).

As explained by Mr. Greer, he and Cox intended to focus on mitigation because the aggravating factors "were a thimble compared to a mountain of good things." Greer and Cox felt that it was important to draw a bright line between the good things Larry Gapen had accomplished in his life and the events of September 18, 2000. Mr. Greer believed, at the time of his representation of Gapen, that he had "wonderful" mitigating evidence. Mr. Greer testified at the evidentiary hearing that no one had anything bad to say about Larry Gapen, obviously other than the events of September 18, 2000.

Smith was hired by Cox and Greer prior to Gapen's trial. At the evidentiary hearing, Mr. Greer stated that he met with and talked with Dr. Smith on several occasions. Specifically, he spoke with Dr. Smith by telephone several times prior to Smith's first meeting with Gapen. During those phone conferences he discussed the background of the case with Dr. Smith. Mr. Greer accompanied Dr. Smith to the Montgomery County Jail, where he introduced Smith to Gapen. He also spoke with and later met with Smith following his meetings with Gapen, after his report was completed. Mr. Greer also met with Smith the night before his mitigation phase testimony.

Mr. Greer asked Smith to examine Larry Gapen and to express any opinions on guilt, innocence and mitigation. As Mr. Greer described the circumstance, he gave Dr. Smith "carte blanche" to provide any information that would be of forensic value. Smith was hired by Mr. Cox and Mr. Greer for his expertise and his experience. They did not limit his quest, nor did

they tell him to avoid any subject or area. As explained by Mr. Greer, he and Mr. Cox sought to learn all of Dr. Smith's forensic opinions and how those opinions might fit with the facts. Mr. Greer was open to all opinions Dr. Smith may have expressed and relied on Smith to give him and Mr. Cox his psychological expertise. At no time did Mr. Greer convey to Dr. Smith that he was not open to anything the doctor had to say. In fact, Mr. Greer had asked Smith to help with anything forensically that was available to assist in mitigation. In relying on Smith as an expert, Mr. Greer appropriately assumed that Dr. Smith had "given him all there was to give." Mr. Greer did not delegate to Dr. Smith the task of deciding on a mitigation strategy. As Mr. Greer testified, he takes the smorgasbord of information that he is provided and then presents the evidence that he finds appropriate.

After meeting with witnesses, the mitigation specialist, the investigator, and after talking with Dr. Smith, and reviewing Dr. Smith's report, and all other information available to them, Mr. Cox and Mr. Greer finalized a mitigation theory. They had not settled on or finalized a mitigation theory until after they received all of the evidence, including Smith's report. Given Dr. Smith's report, there was no psychological disorder to explain Gapen's actions.

Mr. Greer and Mr. Cox discussed their mitigation strategy in great length with one another. Mr. Greer explained that he and Mr. Cox were attempting to block the horror from the jury and keep them focused on what they could consider. Cox and Greer recognized that the jury might, inappropriately, consider the nature and circumstances of the crime as an aggravating factor, when it may only be considered in mitigation. Mr. Cox and Mr. Greer were concerned that, in the mitigation phase, if they discussed too deeply the facts of the crime the jury would improperly consider those facts as aggravating. The attorneys decided to avoid the facts of the

crime, since they were not mitigating. They also recognized that the brutality of Jessica's death was a huge hurdle to overcome, particularly in mitigation. Mr. Cox and Mr. Greer recognized that, particularly with Jessica's death, they would be dealing with emotion and intellect, but believed that their "best shot" was to stress the good in Mr. Gapen. As stated by Mr. Greer, the barrier that he and Mr. Cox had to overcome was "the shocking nature of the crime," and to explain to the jurors why it would not happen again.

At the time of the evidentiary hearing, Mr. Greer testified that if Dr. Smith had articulated to him the opinion that he now expresses in support of Defendant's post-conviction relief petition, it would not have changed the strategy for mitigation, although he would have permitted Dr. Smith to express those opinions during the sentencing phase of the trial.

Thus, was borne the mitigation strategy chosen by Mr. Cox and Mr. Greer - to stress the good in Larry Gapen, and to demonstrate why Larry Gapen would not be a threat to reoffend. They chose to attempt to humanize Larry Gapen, and present things through Larry Gapen's eyes. Their specific focus was to attempt to prevent the jury from considering as aggravating factors those things, such as brutality, age of the victim, and the horror of the crimes, which would have been inappropriate for the jury to consider. Mr. Greer and Mr. Cox decided, after careful study, review and consultation, to present Larry Gapen as a normal man, pushed beyond the breaking point, thus culminating in the events that occurred in the early morning hours of September 18, 2000. As Mr. Greer explained at the evidentiary hearing, he and Mr. Cox exercised their judgment and took the course that they did in mitigation based upon a conscious effort to keep the jury from thinking about the facts of the crime and the horror that was evident in the home at 6255 Pheasant Hill Road.

### III. LAW AND ANALYSIS

A petition for post conviction relief is proper when the defendant alleges some constitutional deprivation. *State v. Powell*, 90 Ohio App. 3d 260 (1993). It is a remedy available to a defendant who has either been tried and found guilty beyond a reasonable doubt, or who has pled guilty and has been convicted. *State v. Calhoun*, 86 Ohio St. 3d 279, 283 (1999). Ohio's post-conviction relief statute, codified at O.R.C. §2953.21(A)(1) provides:

Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence to support the claim for relief.

The post-conviction relief statute further provides:

A petitioner shall state in the original or amended petition filed upon Division A of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

A post conviction proceeding is not an appeal of a criminal conviction, but rather is a collateral civil attack on the judgment. *State v. Steffen*, 70 Ohio St. 3d 399, 410 (1994); *State v. Crowder*, 60 Ohio St. 3d 151 (1991). The alleged constitutional violation must be based upon facts and evidence outside of the record; any error contained in the record must be raised by direct appeal rather than in a petition for post conviction relief. *State v. Powell, supra*.

The claim before this court is limited to the ineffective assistance of counsel in the mitigation phase of the trial. The United States Supreme Court has established a two-step

process for evaluating an allegation of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. The defendant must demonstrate that counsel made errors so serious that counsel was not functioning as counsel, as the same is guaranteed to the defendant by the Constitution. Second, the defendant must show that the deficient performance prejudiced the defense. The defendant must demonstrate that counsel's errors were so serious as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Calhoun*, 86 Ohio St. 3d 279 (1999); *State v. Neeley*, 2006-Ohio-418. In considering whether any alleged deficiency in counsel's performance resulted in a deprivation of defendant's right to a fair trial, the defendant must demonstrate prejudice, that is, "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St. 3d 136 (1989); *see also State v. Cassano*, 96 Ohio St. 3d 94, 102 (2002).

In Ohio, a properly licensed attorney is presumed to be competent. *State v. Jackson*, 64 Ohio St. 2d 107, 111 (1980). Therefore, the defendant-petitioner has the burden of proof on the issue of counsel's ineffectiveness. *State v. Calhoun*, 86 Ohio St. 3d 279 (1999).

A debatable decision involving trial tactics generally does not constitute a deprivation of effective counsel. *State v. Phillips*, 74 Ohio St. 3d 72 (1995). "Judicial scrutiny of counsel's performance must be highly deferential, and reviewing courts should refrain from second-guessing tactical decisions of trial counsel." *State v. Hand*, 107 Ohio St. 3d 378, 412 (2006); *Strickland, supra* at 689. In fact, the United States Supreme Court has long held that "(a) court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland, supra* at 669. *See also State v. Conway*, 109

Ohio St. 3d 412, 430 (2006). In fact the United States Supreme Court has described decisions made by trial counsel as an art, rather than a science. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."

*Strickland, supra* at 693. See also *State v. Adams*, 103 Ohio St. 3d 508, 514 (2004). The United States Supreme Court has also held that trial counsel must be permitted wide latitude in making tactical decisions. *Strickland, supra* at 689. The Ohio Supreme Court has stated that, when considering an attorney's choice of trial strategy, "...the fact that there was another and better strategy available does not amount to a breach of an essential duty to his client." *State v. Clayton*, 62 Ohio St. 3d 45 (1980). See also *State v. Shells*, 2005-Ohio-5787. A reviewing court may not second-guess trial strategy decisions. *State v. Mason*, 82 Ohio St. 3d 144, 157 (1998); *State v. Hoop*, 2005-Ohio-1407.

In a death penalty case, mitigating factors have been described as "facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death." *State v. Scott*, 101 Ohio St. 3d 31 (2004), quoting *State v. White*, 85 Ohio St. 3d 433, 448 (1999). O.R.C. §2929.04(B) lists seven specific mitigating factors that may be considered in a death penalty case, delineated as follows:

1. Whether the victim of the offense induced or facilitated it.
2. Whether it is unlikely the offense would have been committed, but for the fact that the Defendant was under duress, coercion, or strong provocation.
3. Whether, at the time of committing the offense, the offender, because of mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law.
4. The youth of the offender.

5. The offender's lack of a significant history of prior criminal convictions and delinquency adjudications.
6. If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim.
7. Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

A jury also is required to weigh against the aggravating circumstances, as set forth in O.R.C. §2929.04(B), the nature and circumstances of the offense and the history, character and background of the offender and all of the aforementioned mitigating factors.

The presentation of mitigating evidence is a matter of trial strategy. *State v. Hand*, 107 Ohio St. 3d 378, 411 (2006); *State v. Keith*, 79 Ohio St. 3d 514, 530 (1997). "Moreover, 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *State v. Bryan*, 101 Ohio St. 3d 272 (2004), quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Further, "attorneys need not pursue every conceivable avenue; they are entitled to be selective." *State v. Murphy*, 91 Ohio St. 3d 516, 542 (2001), quoting *United States v. Davenport*, 986 Ga. 2d 1047, 1049 (1993). See also *State v. Hanna*, 95 Ohio St. 3d 285, 306 (2002).

Defendant's counsel was not required to make all investigative efforts, only reasonable ones. Ohio courts have repeatedly found that when trial counsel presents a meaningful concept of mitigation, the existence of alternative or additional mitigation theories does not establish ineffective assistance of counsel. *State v. Turner*, 2006-Ohio-761; *State v. Combs*, 100 Ohio App. 3d 90 (1994); *State v. Issa*, 2001-Ohio-3910. The scope of questioning at trial is generally

a matter left to the discretion of defense counsel. *State v. Singh*, 157 Ohio App. 3d 603 (2004).

This court is now faced with considering the representation of Mr. Cox and Mr. Greer, with the benefit of the jury's verdict, the decision of the Ohio Supreme Court, and the decision of the Second District Court of Appeals, and whether counsels' representation was ineffective. One cannot consider in hindsight the effectiveness of counsels' representation, but must consider it objectively, given the facts known by counsel, and the law, at the time of their representation. When considering the review of counsel's chosen trial tactics, numerous courts have recognized that, "nothing is seen more clearly than with hindsight.... even 'debatable trial tactics' do not 'constitute a deprivation of the effective assistance of counsel.'" See *People v. Miller*, 7 Ca. 3d 562, 573-574 (1972); see also *State v. Clayton*, 62 Ohio St. 2d 45, 49 (1980).

Petitioner's pre-evidentiary hearing brief summarized the issues before this court as "whether Petitioner Larry Gapen's trial attorneys rendered effective assistance during the penalty phase of his capital trial when they failed to prepare and present important mitigating evidence that would have assuaged the juror's concerns about the killing of a thirteen-year-old girl." (Petitioner's Pre-Evidentiary Hearing Brief, p. 7). However, the direction from the Court of Appeals specifically required that this court consider "Defendant's claim that his trial counsel rendered ineffective assistance by failing to present as relevant mitigating evidence Dr. Smith's opinion testimony explaining why Defendant attacked and killed his stepdaughter, Jessica Young."

At the outset of this discussion, the court must consider the matter of *res judicata*, despite the fact that the issue was not raised by counsel. Constitutional issues cannot be considered in post-conviction proceedings when those issues could have been raised by the petitioner on direct

appeal from that conviction. *State v. Perry*, 10 Ohio St. 2d 175 (1967); *State v. Turner*, 2006-Ohio-761. Stated more fully, “(u)nder the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment.” *State v. Szefcyk*, 77 Ohio St. 3d 93, 96 (1996), quoting *State v. Perry*, 10 Ohio St. 3d 175 (1967). The Sixth Amendment right to effective counsel must be raised on appeal and can not be relitigated in a post-conviction petition if the basis for raising the issue of ineffective counsel is drawn from the record. *State v. Lentz*, 70 Ohio St. 3d 527 (1994). The mitigation theory actually offered by Petitioner’s counsel at trial is a matter contained within the record, as is the perceived lack of a mitigation theory relating to Jessica. Therefore, any claim of ineffective assistance of counsel relating to the offered theory, or lack of evidence in the record relating to mitigation pertaining to Jessica, is a matter that could have been raised on direct appeal, and which this court is barred from considering by the doctrine of *res judicata*.

Defendant argues that missing from the mitigation phase of the trial was an explanation for Jessica’s death. During the mitigation phase, counsel had suggested that the deaths of Madewell, and by extension, Marshall, were crimes of passion. However, Defendant suggests that an explanation for Jessica’s death was missing from the trial. Defendant’s argument that counsel did not explain Jessica’s death in mitigation cannot be considered by this court, as it is a matter contained within the trial record and was, thus, required to be addressed on direct appeal. The court finds that counsel did present a meaningful concept of mitigation.

Defendant argues that his trial counsel ignored the murder of Jessica in the mitigation phase, and relies upon, essentially, one line in the decision by the Ohio Supreme Court affirming his conviction, wherein the court stated, "Gapen's explanation provides no mitigating reason for murdering Jessica." The Supreme Court also found, as to Jessica's death, that there was "nothing in the nature and circumstances of these offenses to be mitigating." *State v. Gapen*, 104 Ohio St. 3d 358, 387 (2004). However, counsel did offer an explanation for Jessica's death, the same explanation offered for the deaths of Martha Madewell and Nathan Marshall - that Gapen is a normal person but he just snapped and his "emotional explosion" resulted in the murders of his three victims, including Jessica. The Ohio Supreme Court rejected the argument that Jessica's murder was a crime of passion. It is quite arguable, and supportable as a trial tactic, however, to suggest that not mentioning Jessica, any more than necessary, was important because to draw more attention to her murder was to attempt to explain the unexplainable. Instead, counsel chose to stress the good in Larry Gapen, and not to emphasize Jessica's murder. Defendant, in his petition, appears to seek a different theory for Jessica's death, in light of the rejection by the Supreme Court of the articulated theory at trial

The court must consider Petitioner's theory that counsel was ineffective in not making certain inquiries of Dr. Smith and offering the opinion that he now expresses, as Petitioner suggests, and as directed by the Court of Appeals. However, the court must consider the facts and theory presented by counsel in order to consider whether it was ineffective not to offer Dr. Smith's now-articulated opinions, and whether those opinions could be reconciled with the facts presented at trial.

At trial, counsel stated their theory to be presented in mitigation: "the conduct that you

are here about is not the Larry Gapen of the fifty-two prior years. You were told before he's one of us. He's not a monster. He's just a human being." (Tr., p 3980). Counsel's chosen trial tactic was to emphasize the positive traits of and efforts of Larry Gapen for the first fifty-two years of his life and prior to the events of September 18, 2000. In his opening statement in the mitigation phase, Mr. Cox summarized the chosen mitigation strategy:

You're going to hear Larry's family, his mother, his children, his brother and his sisters.

You're going to hear the life of Larry Gapen because that's what it's all about. That's what it's all about. That's what these mitigating factors that you're going to be hearing is the life, August of 1948, all the way up to the incidents that you are here about.

You're going to hear that Larry has been a model citizen his entire life, 52 years.

(Tr., p. 3979).

The intention of counsel was to tell the story of Larry Gapen. The testimony revealed that Gapen was very hard-working, rather quiet and mild-mannered, he had no criminal record to note and he tried to take care of those around him. However, he had failed three times at marriage and was having a difficult time letting go of his third wife, Martha Madewell. The mitigation strategy adopted by counsel was not the product of shoddy or ineffective representation, but instead was undertaken after thoughtful analysis and careful consideration of all of the facts, the circumstances and the law.

The court must also consider the facts which counsel was faced with at trial and how those facts could be reconciled with a mitigation theory. In examining the evidence, the record reveals that the murders of Madewell and Marshall were opportunistic. Gapen entered Madewell's home and found his former wife and Marshall asleep on the couch and then

murdered them. Gapen then, by his own admission, had sex with Martha Madewell. He then had the presence of mind to cover the bodies because Brooke Madewell had come out of her bedroom, which was next to the room in which the bodies of Martha Madewell and Nathan Marshall lay, in an effort to keep Brooke from observing the horror that had occurred in that basement. He also told Brooke to go back to her room and then later told her to go upstairs so that he could take her and Billy to school. However, the murder of Jessica is quite different. After murdering Martha and Nathan in the basement, Gapen then made the journey up two flights of stairs, past the kitchen door from which he could have fled, to the bedroom of his thirteen year old stepdaughter, Jessica, and bludgeoned her to death, in her sleep, with a maul. Gapen then calmly left Daniel in the hallway after he had the presence of mind to lie to Daniel about the noise coming from Jessica's room.

Dr. Smith's testimony begs a particularly relevant question - if Dr. Smith believes, and would have opined at trial if asked, that Martha's children were an extension of Martha in Gapen's mind, and if, by Gapen's own admission, he had significant issues with Daniel and his behavior, why did Gapen tell Daniel to go back to bed after the two encountered one another in the upstairs hallway? Further, why did Gapen protect Billy and Brooke and take them with him following the murders? Would the time frame associated with the offenses support Gapen's argument of rage, particularly in light of the fact that he observed Madewell and Marshall hours earlier, presented himself as calm at dinner with his son and Kacee Miller, then obtained a change of clothing, gloves and a maul, and then traveled to Madewell's home and committed the murders. In Petitioner's Pre-Hearing Brief in support of his rage argument, he points out that the trial record indicated that he and Martha's eldest son, Daniel, had disagreements, which

sometimes resulted in physical altercations, including an altercation which resulted in injury to Gapen (Tr., p. 4048)(Petitioner's Pre-Evidentiary Hearing Brief at p. 3). Daniel testified at trial that he left the family home in June or July, 1999, for one year to reside with his grandparents in Highland County. (Tr., p. 2620). Daniel had no contact with Larry Gapen during the year he was with his grandparents. (Tr., p. 2621). However, Gapen and Martha were still living together when Daniel returned back to the family home. (Tr., p. 2621). Approximately one month later, Martha and her children moved to the Pheasant Hill address where she and Jessica were killed a short time later. Larry Gapen did not move with Martha to that address. (Tr., p 2622). The evening of the murders, Daniel awoke at 1:51AM to sounds of his sister, Jessica, crying in her bedroom. He got up and went to his door, opened the door, and encountered Larry Gapen standing in front of the door. Daniel testified at trial that Larry "said my mother was taking care of my sister. She'd gotten in some trouble in her room, and he was sorry for waking me up. To go ahead and go back to sleep." (Tr., p. 2631). Gapen was calm during his encounter with Daniel outside of his bedroom and lied to him. In describing Gapen, Daniel stated at trial, "I didn't see anything out of the ordinary." (Tr., p. 2633). The jury would have had to accept that Jessica's murder was a product of rage, and accept Gapen's explanation for that rage, when there was very little evidence in the record to support his statements regarding Jessica's behavior, and reconcile that with the evidence of prior calculation and design.

As the state points out, Dr. Smith's theory, now articulated, would reasonably have been rejected by trial counsel, if it had been revealed to them, as well as by the jury, because his theory was easily rebutted on cross-examination. That is, Gapen told Daniel to go back to bed and did him no harm, and he took Brooke and Billy and ostensibly protected them after the murder of

their mother and sister. The jury could have found that Smith's opinion was unworkable by the evidence in light of the fact that Daniel was sent to live with his grandfather, and thereafter Martha became very upset and, in Jimmy Gapen's eyes, he and his father were no longer wanted in Martha's household. (Tr., p. 4048-49). Dr. Smith's theory is difficult to reconcile with Gapen's statement to the police, following his arrest that "Danny doesn't know how lucky he is." (Tr., p. 3412). Of importance is the fact that Dr. Smith admitted at the evidentiary hearing that Gapen's explanation for the murders could have been rejected as self-serving. Dr. Smith's opinion would also have to have been reconciled with his opinion that Gapen did not kill Daniel because his rage was spent, even though Gapen had stated that it was his intent to kill Daniel.

Petitioner suggests that defense counsel "missed" the opportunity to have Dr. Smith address the nature and circumstances of the crimes as a mitigating factor. However, Dr. Smith appears to have "saved" much of his concerns about the death of Jessica for post-conviction proceedings, choosing not to share those issues with trial counsel or present those issues in his report to counsel. Smith specifically discussed the murder of Jessica with Gapen in his interview. However, Smith chose to remain silent regarding any opinion he had relating to Jessica's murder. The court notes that Dr. Smith's report of May, 2001, does not mention any of the concerns he raised in his affidavit or in his testimony at the hearing on his petition. Defendant essentially suggests that Mr. Greer and Mr. Cox should have known what questions to ask him, or the unexpressed theories to which he now subscribes. If Smith did not express opinions to Gapen's attorneys, should they have been expected to have the foresight to anticipate those opinions and suggest them to the expert psychologist that they hired to assist in the mitigation phase?

Dr. Smith's affidavit is also of note. He expresses many opinions in the affidavit. He

also notes, at paragraphs 6 and 7:

6. The attorneys never discussed with me the issue of Jessica's murder - Mr. Gapen's thirteen-year-old stepdaughter- before I evaluated Mr. Gapen. I was never specifically instructed to focus my evaluation on the psychological basis for Jessica's death. Conversely, I was never told to avoid the subject.
7. Had Mr. Gapen's trial attorneys asked me to testify specifically about Jessica's death, I would have requested the opportunity to meet with Mr. Gapen again so that I could further investigate this topic.

Dr. Smith's affidavit and his evidentiary hearing testimony are troubling. He states in his affidavit that Jessica's murder was not discussed with him by counsel prior to his interview with Gapen. However, Dr. Smith is not a neophyte to the mitigation phase of a capital trial, or expert testimony in the mitigation phase. As stated above, Dr. Smith received his Ph.D. in psychology in 1983. He is a practicing clinical psychologist and a certified addiction specialist. Smith is also a board certified forensic examiner and he teaches psychology at Case Western Reserve University. Smith has examined approximately two hundred defendants in capital cases. He was hired for his expertise, and not to stand silent in the face of what he now claims was relevant mitigating evidence.

The court finds the testimony of Mr. Greer to be profoundly more credible than that of Dr. Smith. The court finds that Mr. Greer did not put any limitation on the scope of inquiry or the scope of opinions to be rendered by Dr. Smith. The court is more inclined to accept Mr. Greer's statement that Smith was hired as an expert witness, to express his unlimited expert opinions, that counsel relied upon him, and that Dr. Smith chose to withhold opinions from counsel. Effective representation does not require nor contemplate prescience by counsel.

Contrary to the assertions of Petitioner, this court finds that counsel did not fail to make

reasonable investigative efforts. Counsel investigated this matter thoroughly and utilized appropriate resources, including a mitigation specialist, an investigator and an expert psychologist. They also personally interviewed witnesses, including mitigation witnesses. Also contrary to Petitioner's assertions, Mr. Greer did not permit Dr. Smith to develop a mitigation theory, nor did he permit Dr. Smith to steer the focus of the mitigation defense. Instead, Mr. Greer and Mr. Cox gathered all of the evidence, listened to all of the "experts" they employed, including the mitigation specialist, Dr. Smith, and the investigator, and then exercised their expert legal opinions in developing a mitigation theory. As evidenced by the testimony of David Greer, defense counsel wrestled with how to explain Jessica's death, in light of all of the evidence. He and co-counsel, Bobby Joe Cox, gave particular attention to the troubling issue of Jessica's murder and how to mitigate that offense. They were selective and discerning in developing a mitigation strategy. There is no evidence that their tactical decision was inappropriate, nor unsupportable given the evidence they faced.

Petitioner's alternative mitigation theory, as now opined by Dr. Smith, is simply an alternative theory, that would have essentially blamed Jessica and her behavior for her own death. That theory could have been rejected by counsel as one that would have been difficult for a jury to accept. As indicated by Mr. Greer in his testimony, counsel and the Defendant specifically intended to avoid blaming the victims for their deaths, yet that is what Dr. Smith's theory would have done. Dr. Smith offered the opinion at the evidentiary hearing that if Mr. Greer had directed him to consider Jessica's murder, he would have developed the theory that Jessica was an extension of Martha and that he killed her as part of his rage response, but he did not kill Daniel, the real "troublemaker" in the family, because his rage was spent. Dr. Smith's now-articulated

opinion may have been rejected as inconsistent with Larry Gapen's admissions to the police that after he killed Martha and Nathan Marshall, he had sexual intercourse with Martha. The fact that the jury found Defendant not guilty of rape does not erase the event from the time sequence of the crime or help fit Dr. Smith's theory into the facts faced by counsel. After having sexual intercourse with Martha, Petitioner then, by his own admission, walked upstairs and into Jessica's room, where he murdered her. While there may have been another theory or strategy available to counsel, if it had been articulated to them, which was different from the theory adopted by counsel, but that does not equate to a better theory, nor does it render the adopted theory the product of ineffective counsel. Not every trial tactic works; simply because the chosen course does not end in the desired result does not render it ineffective. The strategic decisions of counsel were made after a thorough investigation of the law and facts, and after considering the plausible options counsel made a reasonable choice of mitigation theories. It must be recognized here that counsel did not choose between the mitigation theory they utilized and that now proposed by Dr. Smith. Instead, Dr. Smith did not articulate the opinions he now offers to trial counsel. The court finds that Dr. Smith did not articulate to counsel during the trial or mitigation phases of this capital case the opinions that he expressed in his affidavit appended to Petitioner's Post Conviction Relief Petition. Counsel cannot be considered ineffective for failing to foresee the expert witness' unarticulated opinions. Mr. Cox and Mr. Greer are attorneys, not prognosticators. The court further finds that the mitigation theory presented by counsel was a strategic trial decision. Further, contrary to the assertions of Petitioner, mitigation evidence is not an explanation for aggravated murder, but "evidence that may call for a penalty less than death."

Since counsel made a “strategic trial decision” in presenting the defense theory of mitigation, such decision “cannot be the basis for an ineffectiveness claim.” *State v. Hand, supra; State v. Bryan*, 101 Ohio St. 3d 272 (2004); *State v. Mason*, 82 Ohio St. 3d 144, 169 (1998). The court notes that, in its decision affirming Defendant’s conviction herein, the Ohio Supreme Court stated, “overwhelming evidence properly admitted during the penalty phase supports the jury’s findings that the aggravating circumstances outweighed the mitigating factors as to the aggravated murder of Young.” *State v. Gapen*, 104 Ohio St. 3d 358, 376 (2004).

Petitioner also states in his Memorandum that Mr. Greer’s capital trial experience is limited, thereby somehow suggesting that Mr. Greer’s representation was ineffective. Mr. Greer’s trial experience, whether civil or criminal, speaks volumes about his abilities. What he may have lacked in specific experience in a capital case is more than compensated for by his intelligence and overall experience. Counsel received an exceptional circumstance waiver from the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases of the Supreme Court. No further qualifications are required. To further question counsels’ qualifications lacks merit. The court has reviewed the record and finds the preparation of counsel was obviously thorough and that counsel were very familiar with the law and the facts. Their representation may very well have exceeded in competence that of counsel that had much more experience in capital cases.

There is no evidence that presenting Dr. Smith’s testimony on this matter would have changed the outcome of the trial. In addition, a “psychological” theory of mitigation is only one possibility that could have been offered to explain the three murders. Dr. Smith, in his testimony, appeared offended that Gapen’s trial counsel did not chose his theory, one he also

chose not to express to counsel, but instead arrived at after he had been contacted by Defendant's post conviction counsel. On the contrary, Dr. Smith's theory, now articulated, would have placed blame on Jessica Young for her own death, a tactic counsel and Defendant specifically sought to avoid, and which would not have reasonably been accepted by the jury, and which would have been highly offensive to the jury. Nothing in the law requires that counsel explain everything in mitigation. Here, counsel chose to offer for the jury's consideration the positive qualities about Larry Gapen. Counsel was not required to offer every possible mitigation theory that may have been available. They were required to use their professional judgment in deciding what was an appropriate theory, given the facts before them. However, there is nothing ineffective in Mr. Cox and Mr. Greer failing to present testimony that Dr. Smith kept to himself and chose, as an expert, not to share with counsel who hired him for the very purpose of sharing with them his expert forensic opinions. The court finds that counsel presented a meaningful concept of mitigation, one that was accepted by the jury on all the aggravated murders, except the prior calculation and design count related to Jessica. The court finds that Petitioner has failed to show that counsel's performance was deficient.

Petitioner has failed to demonstrate that a different outcome would have resulted, but for what he perceives as counsel's deficient performance. Defendant and Dr. Smith suggest that Jessica's behavior in disrespecting him and his rules, and Martha's behavior, mitigate against the death sentence relating to Jessica's murder. However, step-parents are disrespected by step-children every day; the complexities of blended families also result in the break-up of marriages every day. It would be a difficult argument for a jury to accept that Martha's behavior, transferred to Jessica, and Jessica's behavior toward Petitioner would serve to mitigate against his

brutal mauling of a thirteen year old girl, while she slept in her bed, with such force that her braces and teeth were in her stomach, and other teeth, including their roots, were found on the bed and on the floor, and with such force that her skull was cracked and her brain lacerated.

Further, counsel had numerous factual issues that would have first had to have been ignored for the jury to accept Dr. Smith's theory. For instance, Gapen took a change of clothing, gloves and a maul with him to the house prior to the murders, he calmly told Brooke to go back to her room, apparently at about the same time he was either murdering Martha or Nathan Marshall and/or he was having sex with Martha, and that he had the presence of mind to cover up the bodies so that Brooke would not see what Gapen described as a "gruesome sight." (Tr., p. 3411). Gapen also made up a story to "protect" Brooke in that he calmly told her that her mother had called him and told him that she needed rest and for him to take her and Billy to school. (Tr., p. 3346-3347). Gapen also kept Brooke from going into Jessica's room. (Tr., p. 3349). Counsel also would have had to overcome Gapen's statement to Detectives Salyer and Elzholz "she'd been playing him and he said, 'I wasn't going to take it any more.'" (Tr. p. 3409). Also problematic to the defense was Gapen's statements to the detectives that "I'm not sorry," and "Danny doesn't know how lucky he is." (Tr., p. 3412).

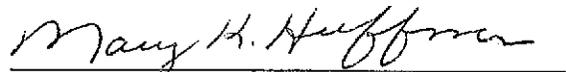
In indulging the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, as provided for in *Strickland*, the court finds that Gapen has failed to demonstrate a reasonable probability that, were it not for perceived errors on behalf of his counsel, the result of the trial would have been different. The theory of mitigation now suggested by Petitioner's witness, Dr. Smith, could reasonably be perceived by the jury to be inconsistent with the facts and could have been rejected by the jury. If that theory had been

articulated, it cannot be assumed that the jury would have accepted the theory, particularly to mitigate against the murder of a thirteen year old girl, when there was little evidence in the record to support the victim's behavior as an explanation for Gapen's actions.

The court concludes that Defendant's claim of ineffective assistance of counsel lacks merit. Defendant has failed to demonstrate deficient performance by trial counsel. This court should not and will not second-guess the strategic decisions made at trial or during the mitigation phase by counsel. Defendant has also failed to demonstrate a reasonable probability that, were it not for perceived errors on behalf of his counsel, the result of the trial would have been different.

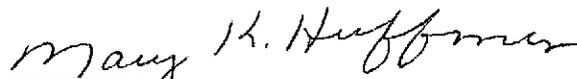
Petitioner's Petition for Post Conviction Relief is OVERRULED.

IT IS SO ORDERED.

  
JUDGE MARY KATHERINE HUFFMAN

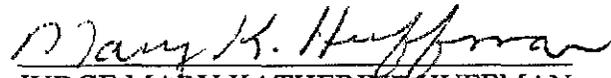
**THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.**

SO ORDERED.

  
JUDGE MARY KATHERINE HUFFMAN

**To the Clerk of Courts:**

**Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.**

  
JUDGE MARY KATHERINE HUFFMAN

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

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