

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO. 07-2021  
Plaintiff-Appellee : On Appeal from the Hamilton County  
Court of Common Pleas, Case Number  
vs. : B-0600596  
LAMONT HUNTER :  
Defendant-Appellant :

**MERIT BRIEF OF PLAINTIFF-APPELLEE**

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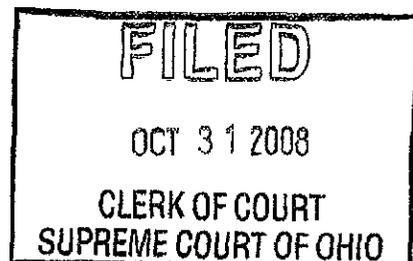


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Plaintiff-Appellee	:	
vs.	:	
LAMONT HUNTER	:	<u>MERIT BRIEF OF PLAINTIFF-</u> <u>APPELLEE</u>
Defendant-Appellant	:	

**STATEMENT OF THE CASE AND FACTS**

**a) Procedural Posture:**

A Hamilton County Grand Jury returned an indictment against defendant-appellant Lamont Hunter charging him with Aggravated Murder, Rape and Endangering Children. The Aggravated Murder charge included two death penalty specifications: (1) that Hunter committed the Aggravated Murder as a principle offender and in the course of committing or attempting to commit the crime of Rape and (2) that Hunter purposely caused the death of Trustin Blue, who was under thirteen years of age at the time of the offense.

Hunter waived his right to a jury trial in open court and in writing. (T.p. 89-95) The case proceeded to trial before a three-judge panel. The panel found Hunter guilty as charged. A mitigation hearing followed, and the panel concluded that the aggravating circumstances outweighed the mitigating factors put forth by Hunter, and recommended a sentence of death on the Aggravated Murder charge. The panel sentenced Hunter to life imprisonment on the Rape charge, to eight years

imprisonment on the Endangering Children charge, and ordered all sentences to be served consecutively to each other. This appeal as of right from the death sentence follows.

**b) Facts:**

Trustin Blue was a three-year-old child born to Luzmilda Blue, a mother of three other children named Tyree Blue, Tyrell Blue, and Trinity Hunter. Trustin was full of life and liked to play like any normal three-year-old child, and was particularly fond of dinosaurs. He energized the people that truly cared about him (among them, the Forte family) and they were proud to observe him continue to grow and reach milestones in his life. For example, Wilma Forte, observed Trustin take his first steps. Forte, whom Trustin called Nanna, and Forte's daughter, Amber White, cared for Trustin for much of his life because Luzmilda was incapable of providing him with a safe and nurturing environment. (T.p. 495-498, 516)

Luzmilda lost custody of Trustin, but regained it in 2003, the same year she met defendant Lamont Hunter. Luzmilda allowed Hunter to babysit and care for Trustin, even after Trustin was treated for severe injuries that occurred while he was in Hunter's care, and despite the fact Trustin feared Hunter and avoided him whenever possible. (T.p. 552-553)

On January 19, 2006, Luzmilda went to work leaving Hunter in charge of Trustin and their infant daughter Trinity. While in the care of Hunter, Trustin was physically abused and suffered fatal injuries. The cause of death was diffuse brain injury due to blunt impact to the head. Trustin was either whipped around like a baseball bat and his head struck a stationary object or he was forcefully struck in the head with some hard object. The deputy coroner found other severe injuries to Trustin, which included a deep penetrating anal injury.

### *A life of abuse*

In January of 2004, Trustin was in the care of Hunter when he suffered a broken leg. According to Hunter, Trustin sustained the injury when he fell while Hunter carried him up some steps. On June 9, 2004, Trustin suffered a severe injury to his penis and was taken to Children's Hospital. (T.p. 477-479) Doctors at Children's hospital evaluated Trustin and discovered injuries consistent with child abuse. Trustin was further evaluated by Dr. Kathy Makoroff, an expert in child abuse. (T.p. 287-294)

X-rays showed that Trustin suffered fractured bones to his hands and feet. Dr. Makoroff testified that these fractures were highly suspicious of child abuse because such injuries do not occur during normal child play, but usually by someone grabbing or stomping on a child's hands and feet. (T.p. 295-300) In addition to these injuries, Trustin's lips were swollen, and he had abrasions on his upper lip and ear. He also suffered a scratch to his ear canal, and there was an area of hair loss and a small bruise to the side of his head. Trustin also had bruises on the sides and the tops of both ears. Dr. Makaroff testified that these injuries, particularly those on the top of the ears, were also indicative of child abuse. (T.p. 300-301)

Trustin's penis and parts of his gland were bruised and swollen. He had an abrasion to the base of his penis. It could not be ruled out that this injury was caused by some type of child abuse. (T.p. 301-303) Based upon the nature and type of all of these injuries, Dr. Markaroff testified definitively that Trustin was a victim of child abuse. (T.p. 304)

Hamilton County Job and Family Services (JFS) conducted an investigation into the abuse. An employee of JFS interviewed Hunter. Hunter was nervous and sweating during the interview. Hunter claimed that on the day Trustin broke his leg Luzmilda awoke him and said she was going

to run errands, and was leaving the children with him. Hunter said that perhaps Trustin broke his leg when he (Hunter) carried Trustin up some steps and tripped after getting Trustin a juice cup. Hunter also claimed that Trustin might have sustained the injury from one of the older children playing too rough with Trustin. (T.p. 477-479)

After the investigation, Trustin was placed in the care of Luzmilda's sister, Latoya Gresham, for six months. (T.p. 212, 480) After that, Trustin was placed in the care of Amber White and Wilma Forte, with White being the primary caretaker of Trustin. (T.p. 214, 479, 505-506) Hunter was ordered not to have any contact with Trustin and Luzmilda only had supervised visitation rights. (T.p. 481, 506-507)

In April of 2005, Luzmilda gave birth to Trinity. In August of 2005, for some reason, Trustin was returned to Luzmilda who was now living with Hunter, but Forte and White were still significantly involved in Trustin's life, and he spent significant time with them. (T.p. 496-497, 507, 550-551)

During this time, Trustin was terrified of Hunter and avoided him. One time, while Forte was visiting Trustin at Luzmilda's residence, Hunter came near Trustin. Trustin was so terrified of seeing Hunter that he vomited. (T.p. 510-511) Hunter reacted by repeatedly asking Trustin what was wrong with him. Trustin did not verbally respond to Hunter's repeated questions, but just froze, shaking in terror. Forte did whatever she could to keep Trustin away from Hunter. (T.p. 511-513)

#### ***The tragic death of Trustin Blue***

On January 17, 2005, Trustin was with Forte. Trustin was drawing, playing and reciting the alphabet. Forte bathed Trustin, put lotion on him and dressed him. Forte did not see any visible injuries to Trustin, or any type of injury to his anus. (T.p. 513-514)

On the morning of January 19, 2005, Trustin was staying at his mother Luzmilda's residence on 16 West 68<sup>th</sup> Street where she resided with Hunter. Luzmilda went to the Speedway gas station where she worked, leaving Hunter alone watching Trustin, Trinity, Terrell, and Tyree. At 8:00 a.m., Terrell and Tyree went to school. Hunter was now supervising Trustin and Trinity. At 9:00 a.m., Forte telephoned Hunter and asked to speak with Trustin. Trustin said that he was watching dinosaurs on television. Forte said that Nanna loves you and Trustin responded, "I love you, Nanna." (T.p. 515-519) Those were the last words Forte heard from the young child.

At around 11:00 a.m., Hunter telephoned Luzmilda at work and informed her that there had been an accident involving Trustin. Luzmilda rushed home, saw Trustin, and immediately telephoned 911. Paramedics responded within minutes. The scene was chaotic. Emotionally distraught, Luzmilda frantically waived her hands and was unable to assist paramedics. Hunter, however, appeared calm and detached, but was not helpful to paramedics. Trustin was lying on the couch, stomach swollen, very low pulse, and labored breathing. Hunter told a paramedic that Trustin fell down some steps and that he brought him upstairs and laid him on the couch. Hunter said that he thought Trustin was trying to stop Trinity from falling down the steps and instead fell himself (T.p. 132-142, 167-177)

Paramedics attempted to put Trustin on a ventilation machine, but were unable to do so because his teeth were clenched, indicating that he suffered a severe head injury. Trustin was put in a spinal stabilization device and rushed to Children's Hospital. (T.p. 173-177)

At Children's Hospital, doctors interviewed Hunter and Luzmilda to determine what caused Trustin's injuries. Hunter's account differed from what he told a paramedic. This time Hunter said that he was in the basement doing laundry and brought his nine-month old daughter Trinity with him

while Trustin remained upstairs watching television. Hunter said that he heard some rumbling up above him and saw Trustin stumbling down the last few carpeted steps onto the concrete basement floor. Hunter said that Trustin was not responding so he splashed some water on his face and called Luzmilda. (T.p. 308-311)

Trustin was in grave condition and placed in the intensive care unit and put on a breathing tube. His pupils would not react to light, he had multiple retinal hemorrhages, and pooling of blood in the retina, injuries not consistent with falling down steps. Trustin also suffered a severe anal injury. Doctors discovered fresh blood and a deep tear and bruising to Trustin's anus that they determined was recently inflicted. The anal injuries could have been caused by an adult male penis or some object that was forcefully inserted inside the anus.<sup>1</sup> (T.p. 312-318, 596-598)

Further medical tests showed that Trustin suffered severe brain injuries. Trustin's brain was swollen and he had multiple brain hemorrhages. These injuries were fresh and not consistent with a fall down the steps. These injuries were so severe that Trustin would have been rendered comatose immediately or within seconds of their infliction. Ultimately they caused Trustin's death. (T.p. 319-322, 586, 589-591, 601-602)

Cincinnati Police Officer Jane Noel interviewed Hunter after being informed by doctors and paramedics that Trustin's injuries were intentionally inflicted. (T.p. 192-196) Officer Noel advised Hunter of his rights under *Miranda*, and he agreed to talk to Officer Noel and her partner. A tape recording of Hunter's statements to Officer Noel was played to the three-judge panel. (T.p. 198-201)

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<sup>1</sup>Police recovered two Tiki torches from Hunter's residence at 16 West 68<sup>th</sup> Street that police believed were capable of causing the severe injury to Trustin's anus. Police were not able to get any identifiable fingerprints nor did they find blood on these two objects. (T.p. 261)

Hunter said that Luzmilda went to work at 6:00 a.m., leaving him alone with Terrell, Tyree, Trustin and Trinity. Hunter had to get Terrell and Tyree ready for school, so he made breakfast that consisted of french toast sticks and sausage. Hunter said that Trustin put in a movie entitled the "Lost World." Terrell and Tyree left the house at 8:45 a.m. for school. Hunter then sat in the living room and started to watch the movie when he decided to do go downstairs and do laundry. According to Hunter, he took nine-month old Trinity with him to the basement, leaving Trustin upstairs alone. (State's Exhibit #12)

Hunter said that he was taking a load of laundry out of the dryer when he heard Trustin running across the floor upstairs. Hunter then heard Trustin stumbling down the steps and saw him strike the last few steps. Hunter said he picked Trustin up and noticed that his body was limp. Hunter shook Trustin gently calling out his name, but Trustin did not respond. Hunter then claimed that he threw water on Trustin's face and heard him exhale. Hunter said he then placed Trustin on the floor, removed a piece of sausage that he saw, and attempted CPR. When Trustin did not respond, he placed him on the living room couch and called Luzmilda at work. (State's Exhibit #12)

Hunter admitted that Trustin did not hit the wall at the bottom of the stairs, only the concrete floor. Hunter said one of Trustin's legs was still lying on the bottom step. He claimed this incident happened around 10:00 a.m. He said that he earlier took Trustin to the bathroom to urinate because Trustin is unable to do things for himself. (State's Exhibit #12)

Hunter was questioned about his relationship with Luzmilda and he said that she does not know who Trustin's father is. Hunter admitted that Trustin preferred being with Forte rather than with him. Hunter was asked about past incidences of abuse involving Trustin. He said that the injury to Trustin's penis that occurred in 2004 "happened before", but doctors were unable to determine

a cause, though Luzmilda insisted it was a bug bite. Hunter admitted that Trustin previously fell down the steps and broke the tibia bone in his leg. (State's Exhibit #12)

In searching the residence, police did not find any blood on the stairs. The washer was empty and on top of the dryer were white dry clothes. (T.p. 259-260)

An autopsy revealed the true severity of Trustin's injuries. His head injuries involved two severe impact blows to the head that could have been caused by someone either using Trustin's body as a baseball bat and swinging it and striking a hard stationary object or his body was struck with a hard object. The blows to the head were so severe that Trustin suffered a broken bone in his neck. (T.p. 592-594, 607, 612). The anal injury extended beyond the anal cavity deep into Trustin's body. The object used to penetrate Trustin's anus was forced in there. (T.p. 598) The coroner opined that the official cause of Trustin's death was diffuse brain injury due to blunt impact shaking injuries to the head. The manner of death was determined to be homicide. (T.p. 601)

Hunter was arrested and charged as described.

## ARGUMENT

### **PROPOSITION OF LAW I: IN ORDER TO DEMONSTRATE A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, A DEFENDANT MUST SHOW A SERIOUS BREACH OF AN ESSENTIAL DUTY OWED BY COUNSEL TO THE CLIENT, COUPLED WITH SHOWING OF RESULTANT PREJUDICE.**

Two attorneys certified to represent capitally charged defendants were appointed to represent Hunter. But Hunter, as was his right, decided to hire private counsel. Hunter hired Clyde Bennett, II.

Hunter's appellate counsel did not approve of Hunter's hiring decision. In this proposition of law, appellate counsel claim that Bennett's conviction in federal court for making illegal financial transactions adversely effected his representation of Hunter and they boastfully assert that appointed counsel, certified in death penalty cases, would have provided superior legal representation to Hunter. Finally, Hunter provides a general list of ineffective assistance of counsel allegations. As demonstrated, these claims of ineffective assistance of counsel are baseless.

Hunter's burden in making such claims requires him to make a two part showing. He must first establish a serious breach of an essential duty, and second he must show resultant prejudice. Strickland v. Washington (1984), 466 U.S. 688, 104 S.Ct. 2052; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. In State v. Frazier (1991), 61 Ohio St.3d 247, this Court discussed just how the Strickland standard should be used.

“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.’” *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

Additionally this court had held in State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph two of the syllabus, that '[counsel's performance will not be deemed ineffective unless

and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St.2d 391, 2 O.O.3d 495, 358 N.E.2d 623; *Strickland v. Washington* [1984], 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674], followed.)”

“Additionally, the *Strickland* court strongly cautioned courts considering the issue of ineffective assistance of counsel that '[j]udicial 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. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134 [102 S.Ct. 1558, 1574, 1575, 71 L.Ed.2d 783, 804] (1982). \* \* \*

In *State v. Hanna*, 95 Ohio St.3d 285, 302 2002-Ohio-2221, at ¶ 109, this court again indicated that a showing of “prejudice” is a showing that, but for the error complained of, the outcome of the trial would have been different. Accord: *State v. Bradley*, supra.

Bennett is known to be one of the most skilled criminal defense practitioners in Cincinnati and worked for one of the area's most prestigious law firms in Dinsmore & Shohl. But Bennett was apparently under federal investigation for making illegal financial transactions at the time he represented Hunter, though this fact is not part of the appellate record. Hunter suggests that the federal criminal investigation adversely effected Bennett's representation of Hunter.

This suggestion has no support in the record. Because this claim is based on matters not part of the trial record it is more appropriately raised in a post-conviction petition pursuant to R.C. 2953.21. On the record before this Court, Hunter is not able to specifically demonstrate how the federal investigation effected Bennett's performance in this case.

In *State v. Fuller*, 8<sup>th</sup> Dist. No. 52131, 2002-Ohio-4164, the court of appeals found no ineffective assistance of appellate counsel based on the fact that appellate counsel was under federal

indictment at the time of the appeal. Likewise, the appellate court in State v. Joyner, 6<sup>th</sup> Dist. No. L-84-156, 1984 WL 3686, found no ineffective assistance when Joyner's attorney was under indictment at the time of trial. In these cases, there was simply no evidence that defense counsel performed incompetently at trial or that prejudice resulted therefrom.

As the record in this case well demonstrates, Bennett provided Hunter with a well-prepared and organized defense, attempting to establish that the injuries inflicted to Trustin occurred by accident. Bennett's own extensive and expert knowledge in the field of medicine, particularly in the area of brain injury, allowed him to thoroughly and aggressively challenge the crucial medical evidence in this case, and the state's theory that the injuries to Trustin that caused his death were intentionally inflicted. Few could have represented Hunter as well as Bennett.

Hunter simply has not affirmatively demonstrated that Bennett's performance was in any way deficient because of the federal investigation, or that he suffered resulting prejudice therefrom.

Appellate counsel is also critical of Bennett because he was not certified to represent capitolly charged defendants. Appellate counsel is particularly critical of Bennett's mitigation defense, arguing that Bennett should have hired a psychologist or psychiatrist to better inform the panel of Hunter's background and to evaluate Hunter's character and potential dangerousness in prison.

A capitolly charged defendant is permitted to privately retain counsel of his choice, and no presumption of ineffective assistance of counsel is created where private counsel is not certified in death penalty cases. State v. Leonard (2004), 104 Ohio St.3d 54, 81, 818 N.E.2d 229, 263; State v. Keith (1997), 79 Ohio St.3d 514, 534, 684 N.E.2d 47.

At bar, the record shows that Bennett developed a sound mitigation strategy. He presented the testimony of seven of Hunter's friends and family members in seeking the life sentencing option

with potential parole after 25 years imprisonment. They testified that Hunter was a productive member of society for most of his life, that he was courteous and helpful to people, that he spent considerable quality time with his children, that he had a significant potential for rehabilitation, that he could adjust well to prison life, that he was a peaceful, non-violent person, and that he was remorseful for what happened to Trustin. (T.p. 742-749, 752-757, 762-766, 773-778, 784-790, 792-794, 795-797) Bennett aggressively sought a life sentence.

These mitigation witnesses knew Hunter well and provided evidence that he is a peaceful, non-violent person and would be able to adjust well to prison life. It is mere speculation to suggest that an expert in the psychiatric field would have been more effective in getting this point across to the panel.

Hunter also claims that Bennett should have been involved in his defense from the beginning. The fact that Bennett was not hired immediately is not Bennett's fault. Bennett was privately retained on February 1, 2007, just before trial was to begin. When he was hired the first thing Bennett did was to request a continuance to more fully prepare Hunter's defense. (T.p. 81-83) That continuance was granted and the trial was continued to June 11, 2007, giving Bennett four additional months of preparation time. Bennett did not request further continuances, and there is nothing in the record indicating that Bennett was not fully prepared to go to trial on that date. Hunter has failed to show, or even attempt to show, how he was prejudiced in not retaining Bennett from the beginning.

Hunter also second-guesses Bennett's strategy to waive a jury, claiming that statistical data supports the conclusion that a three-judge panel is more likely to impose death. The accusation that judges are incapable of being fair and impartial in death penalty cases is unfounded. Hunter does not cite to any statistical data suggesting that a jury is more impartial than a three-judge panel.

Courts do not second-guess defense counsel's motivation or judgmental exercise in waiving a jury trial in a capital case, particularly in gruesome factual scenarios or where a child has been murdered, as a panel of judges is less apt to be influenced emotionally. State v. Hill, 8<sup>th</sup> Dist. Nos. 3720, 3745, 1989 WL 142761; State v. Fitzpatrick, 102 Ohio St.3d 321, 810 N.E.2d 927, 2004-Ohio-3167; State v. Moreland, 2<sup>nd</sup> Dist. No. 17557, 2000 WL 5933; State v. Kinley (1999), 136 Ohio App.3d 1, 11, 735 N.E.2d 921, 929; State v. Brewer, 2<sup>nd</sup> Dist. No. 93-CA-62, 1994 WL 527749.

Here, Hunter signed a written jury waiver. In open court, Hunter affirmed that his decision was voluntary and affirmed that counsel reviewed and discussed the waiver form with him. Bennett indicated to the trial court that he and Hunter discussed the issue at length for quite some time and that this was not a "fly by night" decision. The trial court determined that the waiver was knowing, intelligent, and voluntary before accepting it. (T.p. 89-92) Hunter does not challenge the voluntariness of the waiver in this appeal.

The voluntary jury waiver and the extensive discussions Bennett had with Hunter about it belies Hunter's claim that the strategy to waive a jury amounted to ineffective assistance of counsel or was a "fly by night" decision. In closing argument, Bennett provided a glimpse of the thought process that went into waiving the jury. Bennett tried to persuade the panel not to be influenced by the emotion of the case like a jury would, and argued that as a matter of law the state's evidence was not sufficient to convict. (T.p. 689) Based on the emotional circumstances involving the horrific death of a young toddler, Bennett's belief that judges would be less apt to be influenced by emotion and would more fairly try this case was within the realm of sound professional practice. This claim lacks merit.

Hunter also claims that Bennett was ineffective because he failed to object in the penalty-phase when the prosecution referenced on cross-examination two prior drug trafficking convictions and three violent incidents involving Hunter's ex-wife.

Hunter's father testified on direct examination that he had an idea Hunter was on drugs, but said that he never confronted Hunter about it. (T.p. 754) On cross-examination, the prosecutor asked if Hunter's father knew that Hunter had been to prison for two prior drug trafficking convictions, and Hunter's father said yes. (T.p. 758) Hunter's ex-wife testified that he is not an abusive person. (T.p. 777) On cross-examination, she was asked about prior domestic violence incidences she was involved in with Hunter. (T.p. 781-782)

Bennett opened the door to this other act testimony and had no basis to object. State v. Hughbanks (2003), 99 Ohio St.3d. 365, 381, 792 N.E.2d 1081, 1098. Bennett apparently believed that this other act evidence was not apt to be as inflammatory to a three-judge panel as it would be to a jury. Instead, he elected to have these witnesses personally vouch for Hunter's positive qualities, at the risk of exposing his prior convictions to the panel. This strategy under the circumstances involved reasonable professional judgment and is not a basis to support an ineffective assistance of counsel claim.

Hunter also claims that Bennett should have had sidebar conferences recorded. But Hunter does not cite to any instances in the record where sidebar conferences were not recorded. In State v. Goodwin (1999), 84 Ohio St.3d 331, 340, 703 N.E.2d 1251, this Court wrote:

“In proposition of law five, Goodwin asserts that the trial transcript is inadequate for appellate review because of eight unrecorded pretrials and twenty-seven unrecorded bench conferences. We held in *State v. Palmer* (1997), 80 Ohio St.3d 543, 687 N.E.2d 685, syllabus, that “[t]he requirement of a complete, full, and unabridged

transcript in capital trials does not mean that the trial record must be perfect for purposes of appellate review.” In *Palmer*, we determined that reversal will not occur because of unrecorded pretrials or sidebars where the defendant has failed to demonstrate that a request was made at trial or objections were made, that an effort under App. R. 9 was made to reconstruct what occurred, and that material prejudice resulted. *Id.* at 554, 687 N.E.2d at 696.”

Hunter has failed to show that there was a failure to record sidebar conferences or that the trial transcript is somehow inadequate for appellate review.

Hunter claims that Bennett should have forced Dr. Makoroff, a pediatrician and expert in child abuse, and Dr. Stephens, a deputy coroner, to put forward their credentials. But the record shows that both doctors did state their credentials for the record. (T.p. 287-289, 582-584) Besides, Bennett’s strategy was to attack their medical findings. Making sure the prosecutor meticulously set out each expert’s credentials, would have been counterproductive to Bennet’s strategy of casting doubt on their medical expertise. This claim has no merit.

Lastly, Hunter argues that Bennett violated an affirmative duty to seek a verdict that does not result in the death penalty. Bennett abided by such a duty, if indeed the law recognizes one, and fought hard for a life sentence. There is no basis in the record to support such an abstract claim.

None of Hunter’s claims of ineffective assistance of counsel has merit, and this proposition of law is properly overruled.

**PROPOSITION OF LAW II: PRIVATELY RETAINED COUNSEL IS NOT PRESUMED INEFFECTIVE BECAUSE OF LACK OF DEATH PENALTY CERTIFICATION.**

Hunter contends that his counsel must be presumed to have rendered him ineffective assistance of counsel because he was not certified to represent capital defendants pursuant to Ohio Rule of Superintendence 20. Hunter admits that this issue has been settled adversely to him, but raises this point to preserve it for federal appellate review.

Appellee concurs that this issue is well settled and should be rejected on the authority of State v. Keith, *supra*, and State v. Leonard, *supra*.

**PROPOSITION OF LAW III: THE DECISION TO CALL A MITIGATION SPECIALIST IS COMMITTED TO THE SOUND DISCRETION OF DEFENSE COUNSEL.**

Hunter again claims ineffective assistance of counsel. This time he blames counsel for not calling a mitigation specialist in the penalty-phase of the trial. Again, Hunter acknowledges that the law does not support his proposition, but he raises this issue to preserve it for federal appellate review.

Appellee concurs with Hunter that the decision of whether to call a mitigation specialist is committed to the sound judgment of defense counsel and is not a basis to support an ineffective assistance of counsel claim. In State v. Bryan, 101 Ohio St.3d 272, 804 N.E.2d 433, 2004-Ohio-971, at ¶190, counsel considered voluminous mitigation information from a mitigation specialist, and decided not to use it. This Court held that such a decision is a strategic choice and not a basis for ineffective assistance of counsel. See also, State v. Davis, 116 Ohio St.3d 404, 880 N.E.2d 31, at ¶'s 349-354.

This proposition of law lacks merit.

**PROPOSITION OF LAW IV: OTHER ACT EVIDENCE IS ADMISSIBLE TO PROVE ABSENCE OF MISTAKE OR ACCIDENT.**

In his fourth proposition of law, Hunter questions the admissibility of other act evidence. The evidence in question involves injuries suffered by Trustin in 2004. In January 2004, Trustin was treated for a broken leg while in the care of Hunter. On June 9, 2004, Trustin was taken to the hospital with a severe injury to his penis. At that time, tests and x-rays at the hospital showed that Trustin suffered fractured bones and was the victim of child abuse. When Hunter was questioned by authorities he claimed that Trustin might have sustained the broken leg when Hunter *accidentally* tripped while carrying him up the steps.

Hunter admits that the panel did not abuse its discretion in admitting this evidence, but that he raises this issue in an effort to preserve it for federal appellate review.

Hunter is correct that the admission or exclusion of evidence is a matter committed to the sound discretion of the trial court. State v. Apanovitch (1987), 33 Ohio St.3d 19, 22, 514 N.E.2d 394, 401. An abuse of discretion is more than an error of law or judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, 149.

Evidence of Trustin's broken leg , the injury to his penis, and the bone fractures discovered by doctors leading them to suspect Trustin was a victim of child abuse was properly admitted. Evidence Rule 404 (B) permits "other acts" evidence to be admitted for "other purposes," including proof of the absence of mistake or accident. See State v. Smith (1990), 49 Ohio St.3d 137, 140, 551 N.E.2d 190, 193.

In this case, Hunter claimed the fatal injuries sustained by Trustin occurred by an accidental fall down the basement steps. Hunter's statements to Officer Noel to this effect were admitted into evidence. Through vigorous cross-examination of one of the treating physicians and of the deputy coroner, Hunter attempted to demonstrate that Trustin's injuries were inflicted accidentally as he claimed in his statements.

The medical evidence showed that such injuries could not have occurred from an accidental fall down steps.

"Other act" evidence that Trustin suffered prior injuries, particularly from a fall on steps, while in Hunter's care was relevant evidence to show that Trustin's fatal injuries were not accidentally inflicted, and was within the scope of Evid.R. 404(B). See State v. Craig, 4<sup>th</sup> Dist. No. 01CA8, 2002-Ohio-1433 (evidence that defendant routinely whipped stepchildren relevant to show that bruises sustained by children not accidentally inflicted); State v. Liton, 10<sup>th</sup> Dist. No. 94APA03-300, 1994 WL 694980 (testimony from witnesses who observed unexplained bruises on child victim prior to his death admissible); and State v. Patton, 12<sup>th</sup> Dist. No. CA91-06-102, 1992 WL 9534 (prior act incident that defendant struck six-year-old stepdaughter in head and picked her up and dropped her admissible to show absence of accident in charged offense). The panel was correct in allowing such evidence to be admitted.

Moreover, "other acts" testimony is admissible if the other acts form the immediate background of the alleged act which forms the foundation of the crime charged in the indictment, and are inextricably related to the alleged act. State v. Wilkinson (1980), 64 Ohio St.2d 308, 415 N.E.2d 261; State v. Mardis (1999), 134 Ohio App.3d 6, 729 N.E.2d 1272.

The prior injuries informed the panel of Trustin's custody status and explained the reason why Hunter was caring for Trustin on the day the fatal injuries were inflicted. Trustin's mother lost custody of Trustin in large part because she allowed Hunter to watch Trustin, and Trustin sustained severe injuries while in Hunter's care. For some reason, Trustin's mother regained custody of Trustin, and because of her relationship with Hunter, Trustin was again exposed to Hunter, who was in charge of caring for Trustin the morning Trustin was fatally injured. This information was related to and formed the immediate background of the crimes charged in the indictment and was thus admissible other acts evidence.

For these reasons, appellee agrees with Hunter that the panel did not abuse its discretion in admitting other acts evidence. Hunter's fourth proposition of law is properly overruled.

**PROPOSITION OF LAW V: OHIO'S DEATH PENALTY STATUTE IS CONSTITUTIONAL.**

In his fifth proposition of law, Hunter challenges the constitutionality of Ohio's death penalty statute. Hunter raises several claims, all of which have been previously rejected by this Court. Therefore, appellee will limit its response to a reference to the controlling decision of this Court.

(1) First, Hunter claims that Ohio's death penalty is arbitrary and imposes unequal punishment. Hunter cites to prosecutorial discretion, racial discrimination and a claim that the death penalty is not the "least restrictive" or "most effective" punishment.

These claims have been rejected in State v. Jenkins (1984), 15 Ohio St.3d 164, 473 N.E.2d 264; State v. Rojas (1992), 64 Ohio St.3d 131, 592 N.E.2d 1376; State v. Issa, 93 Ohio St.3d 68-69.

(2) Hunter next argues that the Ohio sentencing procedures are unreliable in that they run afoul of due process and equal protection guaranties. This claim was rejected in State v. Issa, 93 Ohio St.3d at 69; State v. Lawson (1992), 64 Ohio St.3d 336, 595 N.E.2d 902; State v. Hook (1988), 39 Ohio St.3d 67, 529 N.E.2d 429.

(3) Third, Hunter argues that Ohio's capital punishment scheme is unconstitutional because it requires mandatory submission of presentence investigation reports and mental evaluations. Hunter contends that this requirement of R.C. 2929.03 (D)(1) violates the right to effective assistance of counsel and prevents him from presenting an effective case in mitigation. This claim has already been rejected in State v. Buell (1986), 22 Ohio St.3d 124, 138, 489 N.E.2d 795.

(4) Next, Hunter claims that R.C. 2929.04(A)(7) is constitutionally invalid when used to aggravate R.C. 2903.01(B) to aggravated murder. Hunter argues that this scheme fails to genuinely narrow the class of individuals eligible for the death penalty. This claim has been repeatedly rejected

by this Court. State v. Broom (1988), 40 Ohio St.3d 277, 533 N.E.2d 682; State v. Mills (1992), 62 Ohio St.3d 357, 582 N.E.2d 972; State v. Grant (1993), 67 Ohio St.3d 465, 620 N.E.2d 50.

(5) Hunter next challenges the scope of the proportionality and appropriateness review provided for by the Ohio statutes. R.C. 2929.021, 2929.03, 2929.05. This claim was rejected in State v. Steffen (1987), 31 Ohio St.3d 111, 509 N.E.2d 383.

(6) Hunter next claims that death by lethal injection is cruel and unusual punishment. This claim has been rejected. State v. Frazier, 115 Ohio St.3d 139, 873 N.E.2d 1263, 2007-Ohio-5048, at ¶245; Baze v. Rees (Apr. 16, 2008), No. 07-5439, 128 S.Ct. 1520.

(7) Lastly, Hunter claims that Ohio's death penalty statutes violate international law and Treaties to which the United States is a party. Such arguments have been summarily rejected. State v. Davis, 116 Ohio St.3d 404, 880 N.E.2d 31, 2008-Ohio-2, at ¶383; State v. Phillips (1995), 74 Ohio St.3d 72, 103-104, 656 N.E.2d 643.

(8) In sum, Hunter's constitutional challenges to Ohio's death penalty scheme are not new. All of his challenges have been summarily rejected by this Court. Hunter's fifth proposition of law lacks merit.

**PROPOSITION OF LAW VI: IT IS PERMISSIBLE TO IMPOSE A PRISON SENTENCE CONSECUTIVE TO A DEATH SENTENCE.**

Hunter claims the panel erred when it imposed prison sentences on the rape and child endangerment offenses, and then ran those sentences consecutively to the death sentence. This claim has been consistently rejected. It is legal and permissible to impose a term of imprisonment consecutive to a death sentence. State v. Bies, 74 Ohio St.3d 320, 325, 658 N.E.2d 754, 760, 1996-Ohio-276; State v. Campbell (1994), 69 Ohio St.3d 38, 52, 630 N.E.2d 339, 352. Hunter's sixth proposition of law must fail.

**PROPOSITION OF LAW VII: THE DENIAL OF DEFENSE PROCEDURAL MOTIONS WAS NOT REVERSIBLE ERROR.**

In proposition of law seven, Hunter claims that the cumulative effect of the trial court's denial of defense procedural motions amounts to reversible error. The presiding judge of the panel properly ruled on Hunter's procedural motions.

(1) Hunter first claims it was procedurally unsound for the trial court to overrule his motion to have the prosecution disclose rebuttal witnesses and his motion directing a complete copy of the prosecutor's file be made available to defense counsel for discovery.

Hunter was not prejudiced by the prosecution's failure to disclose rebuttal witnesses before trial because the prosecution did not call any rebuttal witnesses. Further, the prosecution is not under a duty to disclose rebuttal witnesses before trial. State v. Finnerty (1989), 45 Ohio St.3d 104, 543 N.E.2d 1233.

Nor is the prosecution under any obligation to turn its complete file over to defense counsel for discovery. In the criminal proceeding itself, a defendant may use only Crim.R.16 to obtain discovery. State ex rel. Steckman v. Jackson (1994), 70 Ohio St.3d 420, 639 N.E.2d 83. In fact, many items that the prosecution may have in its file are not subject to discovery, such as internal documents and other work related products. Steckman, supra.

At bar, the court did grant Hunter's motion to compel law enforcement to disclose all known information to the prosecution acquired during the course of the investigation. (T.p. 17-18) There is no evidence that the prosecution did not fully comply with this order. Nor is there any evidence that the prosecution did not fully comply with discovery under Crim.R.16, or that it failed to disclose favorable evidence, or that Hunter was prejudiced by the prosecution's failure to disclose evidence

that it relied on at trial. Hunter has failed to show any demonstrable prejudice in the discovery process.

(2) Hunter next complains about the denial of his pre-trial motion in limine, which moved the court to prohibit victim-impact evidence during the guilt and mitigation phases of the trial. (T.p. 32) Defense counsel must renew his motion at trial in order to preserve the issue for appellate review. State v. McKnight, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005-Ohio-6046, at ¶97. Since Hunter did not renew this motion, he has waived all but plain error. McKnight, supra.

Victim-impact evidence is admissible at trial if such evidence relates to the facts. State v. Fautenberry (1995), 72 Ohio St.3d 435, 440, 650 N.E.2d 878. Hunter does not reference any victim-impact evidence that was improperly admitted at either the guilt or mitigation phases of the trial. Hunter has thus failed to demonstrate plain error or prejudice.

(3) Next, Hunter claims the trial court erred in denying his pre-trial motion for disclosure of grand jury material in which he hoped to discover impeaching information. (T.p. 24-25) Hunter is incorrect.

A generalized request to review grand jury testimony material is not the “particularized need” the law requires of a defendant before access to grand jury testimony is to be granted. As a matter of law, this Court has held that a generalized non-specific request to search grand jury transcripts for potentially impeaching information is not a “particularized need.”

Grand jury proceedings in Ohio are secret. In State v. Greer (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus, this Court was clear in stating that an accused is not entitled to inspect grand jury transcripts either before or during trial unless the ends of justice require it and there is a showing by defense that a particularized need for disclosure exists

which outweighs the need for secrecy. Only after defense counsel establishes a particularized need for certain grand jury testimony should a trial court examine the grand jury transcripts in camera and give defendant those portions relevant to the State's witness' testimony at trial. State v. Greer, supra.

Indeed, this principle was recently reaffirmed by this Court in State v. Hancock, 108 Ohio St.3d 57; 840 N.E.2d 1032; 2006-Ohio-160, at ¶'s 69-72, wherein this Court again rejected a claim that general non-specific requests for grand jury transcripts was enough for a particularized need:

“ \* \* \* In his 11<sup>th</sup> proposition of law, Hancock contends that he was entitled to review a transcript of the grand jury proceedings.

\* \* \*

Hancock was not entitled to inspect grand jury transcripts without showing 'a particularized need for disclosure \* \* \* which outweighed the need for secrecy.' State v. Greer (1981), 66 Ohio St.2d 139, 20 O.O.3d 157, 420 N.E.2d 982, paragraph two of the syllabus. Hancock's vague and speculative motion did not constitute such a showing. His motion asserted that 'it seems apparent' that grand jury witnesses made statements to law enforcement officers that 'may' have been inconsistent with their other statements or 'may' have contained other unspecified 'exculpatory or impeachment information.' The motion failed to identify the witnesses, officers, or statements to which it referred.

Greer and its progeny clearly contemplate that a defendant be required to show a specific particularized need before a trial court agrees to consider a review of grand jury testimony in camera. An automatic review of grand jury testimony, merely upon a defendant's request, is improper. The trial court did not commit error when it overruled Hunter's pre-trial motion to request disclosure of grand jury proceedings without showing a particularized need.

(4) Lastly, Hunter lists all the pre-trial motions denied by the trial court, and claims that the cumulative denial of all these motions deprived him of a fair trial. Hunter admits that the decision on

each motion was right, so the cumulative denial of each motion did not deprive Hunter of a fair trial.

Hunter simply raises this claim to preserve further appellate review.

For the above reasons, Hunter's seventh proposition of law is properly overruled.

**PROPOSITION OF LAW VIII: A CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE FAILS WHERE REASONABLE MINDS CAN REACH DIFFERENT CONCLUSIONS ON WHETHER EACH ELEMENT OF THE OFFENSE IS PROVED BEYOND A REASONABLE DOUBT.**

**PROPOSITION OF LAW IX: A CHALLENGE TO THE WEIGHT OF THE EVIDENCE MUST FAIL WHERE IT CAN BE DETERMINED THAT THE JURY DID NOT LOSE ITS WAY OR CREATE A MANIFEST MISCARRIAGE OF JUSTICE.**

In his eighth and ninth propositions of law, Hunter challenges the sufficiency and weight of the evidence to support his convictions for aggravated murder, rape and child endangering.

A challenge to the "sufficiency" of the evidence is not well made where the evidence, viewed in a light most favorable to the State, is such that reasonable minds can reach different conclusions on the question of whether each element of the offense is proved beyond a reasonable doubt. State v. Eley (1978), 56 Ohio St.2d 169, 383 N.E.2d 132; State v. Jenks (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

In resolving a criminal appeal that challenges a conviction on the basis of the weight of the evidence, the role of an appellate court is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. State v. Tinch (1992), 84 Ohio App.3d 111, 616 N.E.2d 529. State v. Barger (1992), 84 Ohio App.3d 409, 616 N.E.2d 1176. An examination of the entire record is made to determine whether the jury lost its way and created a manifest miscarriage of justice requiring a reversal for new trial. State v. Thompkins (1997), 78 Ohio St.3d 380, 678 N.E.2d 541.

In Tibbs v. Florida (1982), 47 U.S. 31, 102 S.Ct. 2211, Justice O'Connor distinguished between the "sufficiency" of the evidence and the "weight" of the evidence. The former refers to the

minimal amount of evidence necessary to support a guilty verdict; the latter to a re-weighing of the evidence by the appellate court, a role reserved to the jury.

Young Trustin Blue lived in utter fear of Hunter and was so frightened by him that he vomited when Hunter was near him. (T.p. 510-513, 551-554) On previous occasions, while in the care of Hunter, Trustin suffered severe injuries, which included broken bones in his feet and hands and injuries to his head and ear. (T.p. 295-304) Hunter claimed that a broken leg Trustin suffered may have been caused when Hunter tripped on some steps while carrying Trustin. (T.p. 477-479)

The evidence strongly shows that Hunter inflicted the cruel and atrocious injuries that resulted in Trustin's death. Hunter's own statements establish that he was responsible for watching Trustin when Trustin was fatally injured. The only other person present was his ninth-month old daughter Trinity. (State's Exhibit #12)

Two days before he suffered his fatal injuries, Wilma Forte bathed Trustin and did not see any injuries to Trustin, including any injury to his anus. (T.p. 513-514) At 9:00 a.m., on the day Trustin was rushed to Children's Hospital, Forte telephoned Hunter and spoke with Trustin. Trustin at that time was able to communicate and told Forte that he was watching dinosaurs on television. (T.p. 515-519) Two hours later, Trustin was unconscious and rushed to Children's Hospital.

At the hospital, medical tests and x-rays revealed what happened to Trustin between the hours of 9:00 a.m. and 11:00 a.m. while he was in the care of Hunter. Trustin suffered two mortal blows to the head delivered with such force that he would have been immediately rendered unconscious. (T.p. 601-602) Trustin's body was either swung like a baseball bat and hit a stationary object or he was forcefully struck by a hard, stationary object. These forceful blows were intentionally inflicted and were delivered with such force that Trustin broke a bone in his neck. (T.p. 592-594, 607, 612)

Trustin also suffered a deep penetrating injury to his anus. This injury could have been caused by an adult male penis or a sharp object that was forced inside Trustin's anus. (T.p. 312-318, 596-598)

When questioned, Hunter lied to police about how Trustin sustained his injuries. Hunter said that Trustin fell down the basement steps, but the medical evidence of Trustin's injuries showed that Trustin could not have suffered the injuries he did from a fall down steps.

The evidence was strong and convincing to the panel. Trustin feared Hunter and suffered horrifying injuries while in his care. Trustin was in the care of Hunter when he suffered the fatal blows to his head, anus, and other areas of his body. Hunter's story that the fatal injuries occurred from a fall down some stairs was refuted by overwhelming medical evidence that proved Hunter was lying. Hunter's version of events relative to what happened to Trustin was inconsistent, which further demonstrates he was lying. Hunter was distant and detached when paramedics arrived on the scene, behavior that is inconsistent with his innocence. (T.p. 135, 150)

In sum, the state produced overwhelming evidence to support Hunter's convictions for aggravated murder, rape and child endangerment.

**PROPOSITION OF LAW X: CLAIMS OF MULTIPLE ERROR WHICH ARE NOT SUBSTANTIATED BY THE RECORD MUST BE SUMMARILY REJECTED.**

In his final proposition of law, Hunter contends that cumulative errors deprived him of a fair trial.

The claim is non-specific, referring to previously raised claims in general terms. Appellee submits that there are no significant errors in this case. In State v. Goff (1998), 82 Ohio St.3d 123, 694 N.E.2d 916, this Court wrote as follows on this topic:

"Appellant argues in his tenth proposition of law that the cumulative effect of all the errors he has presented violated his right to a fair trial. This Court has found in the past that multiple errors that are separately harmless may, when considered together, violate a person's right to a fair trial in the appropriate situation. See *State v. DeMarco* (1987), 31 Ohio St.3d 191, 31 Ohio b. Rep. 390, 509 N.E.2d 1256, paragraph two of the syllabus. However, in order even to consider whether 'cumulative' error is present, we would first have to find that multiple errors were committed in this case. Appellant received a fair trial, and any errors were harmless or non-prejudicial, cumulatively as well as individually. [\*\*930] Appellant's tenth proposition of law is overruled."

Appellee submits that the same rationale applies here.

**CONCLUSION**

Appellee submits that the judgment and sentence below must be affirmed.

Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to Bruce K. Hust (0037009), Attorney at Law, The Nathaniel Ropes Building, 917 Main Street, Second Floor, Cincinnati, Ohio 45202, and Herbert E. Freeman (0005364), Attorney at Law, The Citadel, 114 East 8<sup>th</sup> Street, Cincinnati, Ohio 45202, this 29<sup>th</sup> day of October, 2008.

  
\_\_\_\_\_  
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