

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

:

Plaintiff - Appellee,

:

05-1316
CASE NO. 06-1780

v.

:

James Frazier,

:

DEATH PENALTY CASE

Defendant-Appellant.

:

:

APPLICATION FOR REOPENING
PURSUANT TO S.CT. PRAC. R. XI, SECTION 6

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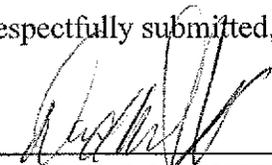
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 James Frazier, : **DEATH PENALTY CASE**
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 Defendant-Appellant. :

Appellant James Frazier moves this Court, pursuant to S.Ct. Prac. R. XI, Section 6, to reopen his direct appeal to this Court because he was denied his constitutional right to effective assistance of counsel during the direct appeal. A Memorandum in Support is attached and incorporated by reference. Frazier is requesting the granting of a delayed application for good cause shown. The required affidavit and exhibits are attached in the appendix.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

This Court in State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), and its subsequent enactment of S.Ct. Prac. R. XI, Section 6 established the procedure for raising claims of ineffective assistance of appellate counsel in this Court. This Court, pursuant to that precedent, should order that Appellant's direct appeal be reopened.

Reasons for Granting of Delayed Application

One of the central issues raised to this Court in the first direct appeal merit brief was the claim that appellant Frazier is mentally retarded. Minimally, his intelligence level is very low. Dr. Jeff Smalldon testified that he was a clinical psychologist with a specialty in neuropsychology. (T. 2014-15). Exhibit A. He stated that he administered various psychological tests to Frazier including the WAIS-III, on which Frazier scored a full-scale IQ of 72. (T. 2030, 2040) Exhibit B, C. Dr. Smalldon testified that Frazier failed the first grade, was labeled as a slow learner, was in special education classes, and dropped out of high school at the age of 19, which evidenced intellectual limitations early in life. (T.2098). Exhibit C. D. He testified that Frazier is at the "cusp of that mild mental retardation, low borderline." (T. 2064). Exhibit E. Dr. Smalldon testified that Frazier had been receiving Social Security Disability with the disability being mental retardation. (T. 2065). Exhibit F.

Direct appeal counsel did not file a request with this Court to have counsel appointed on behalf of Mr. Frazier. There is no evidence that Mr. Frazier was aware of the existence of a procedure to challenge the effectiveness of direct appeal counsel until well after the expiration of the 90 day limit. Frazier did not have the intellectual ability to waive his right to file a challenge to the effectiveness of direct appeal counsel.

I. Procedural History

On March 9, 2004, a Lucas County, Ohio, grand jury returned a three count indictment against Petitioner James Frazier charging him with aggravated murder in violation of O.R.C. §2903.01, aggravated robbery in violation of O. R.C. §2911.01 and aggravated burglary in violation of O. R.C. §2911.11. The aggravated murder count in the indictment contained two death penalty specifications enumerated in O.R.C. § 2929.04(A)(7). The prosecution alleged that the aggravated murder was committed on March 2, 2004, during the commission of aggravated robbery and aggravated burglary.

The jury was empaneled and sworn on May 10, 2005. On May 18, 2005, the jury returned a verdict of guilty of all three counts and the capital specifications.

The penalty phase of the trial began on May 20, 2005. That same day, the jury recommended a sentence of death. On June 15, 2005, the trial judge accepted the recommendation and sentenced Frazier to death.

Frazier appealed his convictions as sentence to the Ohio Supreme Court. On October 10, 2007, this Court affirmed Frazier's convictions and sentence. See State v. Frazier, 115 Ohio St. 3d 139, 2007 Ohio 5048, 873 N.E.2d 1263.

II. Appellate Counsel Failed to Raise Meritorious Issues

The issues raised in this application were not raised at all or not raised as a federal violation in the first direct appeal brief. The issues addressed below should have been raised to preserve the appellant's appellate rights. Had they been raised, there exists a reasonable possibility that the convictions would have been overturned. The failure to raise and/or preserve the following issues constitute the denial of effective assistance of appellate counsel. Evitts v.

Lucey (1985), 469 U.S. 387.

The failure to raise the issues tainted the reliability of the direct appeal process. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Smith v. Robbins (2000), 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756. Here, the issues counsel failed to raise are stronger than those raised.

Direct Appeal counsel failed to raise the following issues.

Proposition of Law I:

A capital defendant's right to testify and/or provide an unsworn statement is absolute. He may not be deprived of these rights without an in court hearing insuring that that defendant is waiving the rights in a knowing, intelligent and voluntary manner.

Frazier did not testify in his penalty phase hearing, nor did he provide an unsworn statement in his penalty phase hearing. He possessed a right under the United States Constitution and a right provided by a specific Ohio statute. The Ohio statute, O.R.C. 2929.03(D)(1), which allows a capital defendant to provide an unsworn statement to the jury, provided an independent federal right in addition to Frazier's Fifth Amendment right to testify. Because the statute created a liberty interest for capital defendant's, the right may not be relinquished without obtaining a knowing intelligent waiver from the defendant.

The trial court did not hold a hearing, require a written waiver, or engage in any colloquy with Frazier to ensure that he understood that he had the right to provide the jury with an unsworn statement and that he knowingly, intelligently and voluntarily waived that right. The record reflects no waiver of the right by Frazier.

Because of Frazier's low intelligence level, it was even more imperative that the court ensure the validity of his waiver. By not testifying, Frazier gave up his chance to support the testimony of Dr. Smalldon and attempt to save his own life.

A defendant's right to testify is fundamental. See Rock v. Arkansas, 483 U.S. 44, 52-53, 97 L. Ed. 2d 37, 107 S. Ct. 2704 & n.10, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) ("An accused's right to present his own version of events in his own words" is "even more fundamental to a personal defense than the right of self-representation"); see also Rogers-Bey v. Lane, 896 F.2d 279, 283 (7th Cir. 1990). The right is personal to the accused, and not capable of being waived by counsel on the defendant's behalf. See Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983).

Frazier's personal waiver of this fundamental right, which protects the fairness of the criminal proceeding, must be made in a knowing and intelligent manner to be valid. See Schneekloth v. Bustamonte, 412 U.S. 218, 241, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) ("A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial.").

Prior to the commencement of the penalty phase, the trial court asked defense counsel if Frazier intended to make a statement. Defense counsel indicated that Frazier would not make a statement. (T. 1989) Exhibit F-1. The prosecutor properly requested that the court obtain a waiver on the record. Defense counsel indicated that they would do so. (T. 1990) Exhibit G. However, the waiver did not transpire.

At the close of the trial, defense counsel merely stated that the defense rested. There was

no further inquiry of counsel or of Frazier. (T. 2147, 2155) Exhibit H, I.

O.R.C. 2929.03(D)(1) establishes a liberty interest in the defendant's right to provide an unsworn statement. Once a state has established a liberty interest, as Ohio has with the above statute, it may not be ignored. Hicks v. Oklahoma, 447 U.S. 343, 346 (1980)

In fact, Frazier should have been instructed by counsel that he could have assisted in his presentation. Ferguson v. Georgia, 365 U.S. 570 (1960)

The failure to obtain a waiver from Frazier renders the penalty phase of trial unreliable. This failure by the court was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law II

A trial court may not deprive a capital defendant of his right to allocution pursuant to Ohio Rule of Criminal Procedure 32(A)(1) without obtaining a knowing, intelligent and voluntary waiver .

Prior to the trial court's sentencing of Frazier and determination of whether to accept the jury recommendation of death, the trial court asked Frazier and his counsel whether Frazier had anything to say in regards to his sentencing. Counsel answered in the negative. (T. 2221) Exhibit J. Frazier said nothing. The trial court then pronounced sentence, without making any inquiry with Frazier whether he understood the right counsel was waiving on his behalf.

The trial court made no attempt to ensure that Frazier knowingly, intelligently, and voluntarily waived his right to allocution. Again, in view of the fact that there is strong evidence that Frazier was and is mentally retarded, it was constitutionally required that the court ensure that Frazier understood the consequences of his actions or non-actions.

This Court strongly enforces a capital defendant's right to allocution. In Ohio v.

Campbell (2000) 90 Ohio St.3d 320 1, the Court held that pursuant to Ohio Crim.R. 32(A)(1), before imposing sentence, a trial court *must* address the defendant personally and ask whether he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

This Court has noted that the penalty phase in a capital case is not a substitute for defendant's right of allocution. Ohio v. Reynolds (1998), 80 Ohio St.3d 670, 684. In Reynolds, this court found no prejudicial error in the trial court's failure to ask the defendant whether he wished to make a statement, because the defendant had already made an unsworn statement, and presented a personal letter to the court during the mitigation phase, and had defense counsel make a statement on his behalf. Id. Unlike Reynolds, Mr. Frazier did not make an unsworn statement.

Furthermore, Frazier did not testify under oath during any penalty stage as occurred in State v. Myers (2002), 97 Ohio St.3d 335. Myer's testimony encompassed over 200 pages of the mitigation phase transcript. This enabled him to directly appeal to the judge for his life.

Although the above decisions did not directly address whether a waiver had been provided, the court did not need to address that aspect as the mere failure to ask about allocution was presumed prejudice. That alone establishes the importance of the right of allocution under Ohio law. Ohio Courts now find the denial of allocution to constitute structural error. The right of allocution has established a strong liberty interest. The failure of Ohio to follow its own liberty interest is a violation of federal due process.

The presumed prejudice addressed above is consistent with and required by established United States Supreme Court precedent. A defendant cannot be deprived of any opportunity to

provide mitigation for the sentencer. Lockett v. Ohio, 438 U.S. 586 (1978). A capital defendant in Ohio may provide the sentencing judge with additional mitigation. Therefore, a valid waiver must be obtained before a defendant may be deprived of his right to allocution by a court or counsel.

Proposition of Law III:

A capital defendant is denied his right to effective assistance of counsel when the actions of counsel or the failure of counsel to act deprive the defendant his right to a full and fair penalty phase hearing.

The failure to provide effective assistance is a fundamental constitutional error which undermines the entire adversary process. Strickland v. Washington, 466 U.S. 668 (1984).

On direct appeal to this Court, prior counsel did raise the issue of effective assistance of penalty phase counsel. See Proposition of Law Twelve of the Merit Brief of the Appellant, p. 36. However, prior counsel failed to raise additional aspects of the ineffectiveness of trial counsel. These are addressed here.

Counsel failed to request the dismissal of juror Angela Kennedy. Juror Kennedy had been improperly approached by a relative of one of the state's witnesses, Tim Gangway. The court failed to hold an under oath hearing on the issue of what had been discussed. Counsel failed to request a full Remmer hearing or move for the dismissal of the juror. Failure of trial counsel to object and request dismissal of the juror was deficient and was prejudicial to the defendant such that Mr. Frazier was deprived of a fair trial and effective assistance of counsel.

Counsel failed to object to the prosecutor arguing to the jury that its verdict should not be made up of individual verdicts and that the jury should decide in unison. (T. 2194) Exhibit K. State v. Brooks, 75 Ohio St.3d. 148 (1996); Mills v. Maryland, 486 U.S. 367, 384 (1988)

When trying to explain why the offense transpired, counsel told the jury that the effect of cocaine usage was the cause. Although this in and of itself would be a proper argument, the verbiage in making the argument tended to incite passion rather than encourage calm deliberation.

It will make you slaughter your friend in order to get five or ten bucks, which is astounding, but that's what it does.

(T. Vol. VIII at 2167) Exhibit L.

An argument drawing an analogy to the client's conduct as a "slaughter," feeds directly into the prosecutor's argument which cleverly categorized the nature and circumstances as non-statutory aggravators

Counsel failed to object to the prosecutor's improper addressing of the nature and circumstances of the case. Knowing that he could not come straight out and argue that the nature and circumstances were not aggravators, the prosecutor deftly addressed them by mentioning that Frazier strangled the victim before cutting her throat, engaged in predatory behavior, had no remorse, failed to take responsibility for what he did, tried to throw off the police and told lies to do so. He concluded with "There's very little weight, due to the nature and the circumstances of this offense, *that go on the mitigation side of the scale.*" (T. Vol. VIII at 2188-2189) (Emphasis added) Exhibit M. The less than subtle implication is that the weight should be added to the *other side of the scale*, which is, of course, aggravation. Zant v. Stephens, 462 U.S. 862 (1983)

Counsel rested without ensuring that his client had properly waived his right to speak in the penalty phase of the argument. (T. Vol. VIII at 2147, 2155) Exhibit H, I. As the defense

presented only one witness, Dr. Smalldon, at the penalty phase, it was extremely important for Frazier to have the opportunity to testify. If he chose to waive it, constitutionally, the record must show that Frazier did so knowingly, intelligently and voluntarily. His low intelligence level required even greater care be taken by counsel and the court to ensure Frazier understood the proceeding. There is no evidence in the record that counsel properly explained and/or had the court take the time to ensure that Frazier truly wished to give up his right to provide an unsworn or sworn statement.

Counsel failed to object to or request a hearing to address the trial court's improperly discussing the case with a juror while the court itself had not determined whether to accept the recommendation. The jury returned its death recommendation on May 20, 2005. The verdict was read, the jury was polled, and the verdict received by the court and ordered filed. The court then thanked the jury, released them from the requirement of secrecy, and released them from jury service. At that point, Juror Number 8, in response to the remarks of the trial court, said: "Thank you, Your Honor." The trial court then replied: "I'll come back and talk to you for a couple of minutes." No objection was lodged by defense counsel to this procedure. (T. Vol. VIII at 2220) Exhibit N.

Frazier did not allocute to the sentencing judge before he was sentenced. Ohio provides capitally convicted defendant's an absolute right to allocution. Counsel did not ensure that Frazier understood his right and the ability to present additional mitigation for the consideration for the actual sentencer.

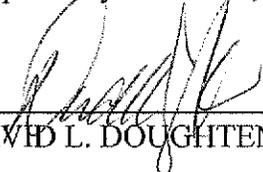
It is the cumulative effect of the above conduct that rendered the representation of Frazier by defense counsel to be deficient. Strickland.

The failure of appellate counsel to raise these additional aspects of the ineffectiveness of trial counsel deprived Frazier his right to the effective assistance of trial counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Pursuant to the preceding Propositions of Law, the defendant-appellant, James Frazier, respectfully requests that this Honorable Court reopen the direct appeal and address the issues on the merits. Based upon the merits review, it is requested that this court reverse his sentence of death and order a new sentencing hearing.

Respectfully submitted,

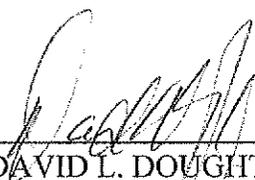


DAVID L. DOUGHTEN

Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing was served by regular U.S. mail upon Julia Bates, Lucas County Prosecutor's Office, or a member of her staff, Lucas County Courthouse, 800 Adams Street, Suite 250, Toledo, Ohio 43624 this 12 day of April, 2010.



DAVID L. DOUGHTEN

Counsel for Appellant

STATE OF OHIO :
 :SS.
COUNTY OF CUYAHOGA :

A F F I D A V I T

NOW COMES DAVID L. DOUGHTEN, being first duly sworn

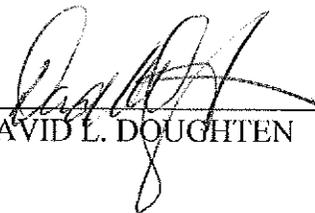
according to law, and states the following:

1. I am a licensed attorney in good standing in the State of Ohio. My registration number is 0002847. I have been licenced since 1982. I am certified under Sup. R. 20 as lead counsel at trial and appellate counsel in capital cases.
2. Due to my focused practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed or recommended.
3. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. Evitts v. Lucey, 469 U.S. 587 (1985).
4. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with this Court. Appellate counsel has a fundamental duty in every criminal case to ensure that the entire record is before the reviewing courts on appeal. Ohio R. App. P. 9(B); Ohio Rev. Code Ann. § 2929.05 (Anderson 1995); State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986).
5. After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the pleadings and exhibits.
6. For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.
7. Since the reintroduction of capital punishment in response to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out

by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.

8. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues, unique to the case, that impinge on federal constitutional rights.
9. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.
10. I have identified three propositions of law that should have been presented to this Court by appellate counsel. The propositions of law identified in this application for reopening were not presented to this Court.
11. Based on my evaluation of the record and understanding of the law, I believe that the proposed propositions of law are meritorious. Also, the errors would have been preserved for federal review.
12. Therefore, James Frazier, was prejudiced as a direct result of the deficient performance of his appellate counsel on his direct appeal to this Court.

FURTHER AFFIANT SAYETH NAUGHT.



DAVID L. DOUGHTEN

SWORN TO AND SUBSCRIBED in my
presence this 12th day of April, 2010.



NOTARY PUBLIC
Commission Expires:

LAURENCE A. TURBOW, ATTY.
NOTARY PUBLIC • STATE OF OHIO
My Commission Has No Expiration Date
Section 147.03 O.R.C.

APPENDIX

1 After receiving my master's degree in health
2 services administration in June of 1982, I remained
3 at Riverside on a full-time basis for about three
4 years, for the last two of those years serving there
5 as the vice president for mental health and alcohol
6 services. In 1985, while still working part time at
7 Riverside, I began work at Ohio State toward my
8 Ph.D. in psychology. I finished that degree in 1989
9 and was then licensed for independent practice the
10 next year, 1990.

11 Q Is it appropriate to describe you as a
12 clinical psychologist?

13 A Yes, it is.

14 Q Is it accurate to say that the majority of
15 your professional time is spent in the assessment
16 and treatment of individuals rather than in research
17 or other forms of more academic activity?

18 A Yes.

19 Q Are there areas of specialization within your
20 clinical psychology practice?

21 A My main area of specialization always has
22 been, and I knew going into graduate school that it
23 was what I was most interested in, is forensic

1 psychological consultation. In my field, the word
2 forensic just refers to applications of psychology
3 to both the criminal and the civil justice systems.

4 Q Are there areas where you've obtained
5 specialized knowledge, training and experience
6 beyond that which will typically be obtained in the
7 course of completing requirements for your Ph.D.?

8 A There are. The main one of those would be
9 forensic psychology; but I've also obtained a lot of
10 additional training beyond what typically is
11 provided in graduate school, in neuropsychological
12 assessment.

13 Q Are you currently licensed to practice
14 psychology in the State of Ohio?

15 A Yes, I am.

16 Q And have you obtained board certification in
17 any specialty area within the field of psychology?

18 A Yes.

19 Q Would you please describe the process that
20 leads to board certification and provide an estimate
21 of the number of forensic psychologists who have
22 achieved that status.

23 A Yes. I'm board certified in forensic

1 psychological tests.

2 Q What tests were administered?

3 A I administered something called the Wide Range
4 Achievement Test-3, another test called the Weschler
5 Adult Intelligence Scale, Third Revision. That's
6 usually abbreviated as the WAIS, WAIS-III. I
7 administered the Bender Visual Motor Gestalt,
8 G-E-S-T-A-L-T, Test. The Trail Making Test, Parts A
9 and B. The Aphasia, A-P-H-A-S-I-A, Screening Test.
10 And I attempted to administer with very minimal
11 success something called the Rotter, R-O-T-T-E-R,
12 Incomplete Sentences Blank, which is actually not a
13 test at all but it's -- it's an information-
14 gathering device that psychologists frequently use
15 where the individual is given sentence stems and
16 then is asked to complete those sentences. In Mr.
17 Frazier's case, he quickly became very frustrated
18 with it. He has very limited written language
19 skills. He completed about three of the items and
20 said, "I really can't do this," So that was never
21 completed.

22 Q Were there other tests that you considered
23 giving him but did not?

Exhibit B

1 his intelligence quotient, his IQ and the testing
2 that you specifically administered in order to get
3 the answer to that question. Would you describe
4 that process and your clinical findings.

5 A Yeah. To jump to the bottom line first and
6 then I'll go back, say, a little more detail. On
7 that standardized IQ test that I mentioned before
8 that yields the three different estimates, he
9 obtained a verbal IQ estimate of 77, a performance
10 or non-verbal IQ estimate of 72, and a full scale IQ
11 estimate of 72.

12 Now, just to give you a frame of reference --
13 and based on everything that I've learned about Mr.
14 Frazier, I believe that those numbers are pretty
15 good numbers, that those are pretty accurate
16 numbers. They're numbers very close to what Dr.
17 Forgac of the local court clinic obtained when he
18 administered the same test that I administered.
19 They're consistent with the fact that he failed
20 first grade. He was designated a slow learner in
21 school. He was in special classes before he left
22 school after the tenth grade. So I think those are
23 pretty good numbers. And he appeared motivated

Exhibit C

1 A It can.

2 Q You're not shocked that a man doing hard
3 physical labor when he gets home doesn't want to
4 deal with the kids, are you?

5 A I wouldn't use the word shocked.

6 Q No. And so the only other records we have
7 about James Frazier occur when he's in high school;
8 isn't that fair?

9 A I think that's true.

10 Q And in fact we got a summary of his letter
11 grades from high school; correct?

12 A Yes.

13 Q And he dropped out of high school when he was
14 19 years old?

15 A That's my recollection, yes.

16 Q Basically, he was a D student; right?

17 A I recall a C or two, a couple Ds and a couple
18 Fs.

19 Q Averaged out to about a D student?

20 A Yes.

21 Q Passed, but barely?

22 A I think that's correct.

23 Q About what you'd expect for somebody of his IQ

Exhibit D

1 IQ scores. You know, the person is actually
2 achieving at about the level you would predict that
3 they could, you know, as a result of their IQ
4 scores. You know, if a person has got a mid average
5 IQ of a hundred but then their achievement scores
6 are 70, you know, you have ask, what's the problem?
7 Are they that unmotivated that they've got mid
8 average intelligence but they're performing at the
9 range that's associated with mild retardation? Or
10 is there a learning disability that accounts for
11 that gap?

12 Now, in Mr. Frazier's case there isn't that
13 kind of broad gap. His actual ability levels are,
14 roughly speaking, what you would predict in his IQ
15 estimates. As I said before, that test consists of
16 three sub tests: word recognition, spelling, and
17 arithmetic. His word recognition score was a 71;
18 spelling, 64; and word recognition, 74. So again,
19 they're all clustering at around the cusp of that
20 mild mental retardation, low borderline.

21 Just as an example of the limitations in his
22 expressive language skills, he can't spell words
23 like circle -- I want to make sure that I'm quoting

Exhibit E

1 this correctly. He wasn't able to spell words like
2 circle, enter, advice, surprise, believe. He wasn't
3 able to read off the page correctly words like lame,
4 split. When he was given simple arithmetic skills
5 he faltered. Even when trying to do simple two-
6 and three-column subtraction problems, he correctly
7 divided 15 by 3 but he incorrectly divided 16 by 4.
8 So very inconsistent even in very simple division,
9 and the same goes for multiplication problems.

10 Q Prior to being incarcerated at the Lucas
11 County jail as a result of this offense, how did Jim
12 Frazier support himself?

13 A In 19 -- well, his work history was erratic.
14 Seldom sustained employment for very long. Most of
15 the jobs that he had were unskilled or very
16 marginally-skilled jobs. I asked him at one point
17 whether he'd ever been fired from jobs that he had,
18 and his response was, "Yeah, I'd get fired because I
19 drink." So he was not a reliable employee. He
20 didn't sustain employment.

21 In 1994 he was granted Social Security
22 disability. The condition that was cited as the
23 foundation for him getting benefits was mental

Exhibit F

1 THE COURT: All right. That's
2 the issue; right?

3 MR. BERLING: Yes, ma'am.

4 MR. BRAUN: Yes.

5 THE COURT: Now, what about
6 statement of the defendant? Is he going to
7 make a statement?

8 MR. BERLING: He will not.

9 THE COURT: Do you want me to
10 make any reference to that?

11 MR. BERLING: Not in front of
12 the jury.

13 MR. BRAUN: There's not going
14 to be an unsworn statement?

15 MS. JENNINGS: No, there won't
16 be.

17 MR. BRAUN: Can we have a
18 waiver of that fact on record from him?

19 MR. BERLING: Yes. When we get
20 to that point, yes, absolutely.

21 THE COURT: I just want to
22 make sure that any references aren't in here.

23 All right. Thank you. Mr. Berling.

1 MR. BERLING: Yes.

2 THE COURT: Okay. It just
3 references that the defendant does not have to
4 take the stand.

5 (End of discussion at the Bench.)

6 THE COURT: Sorry for that
7 little delay. We had a few procedural matters
8 we had to clear up before we began this
9 morning. First of all, I want to thank you
10 again for being so prompt, and I do appreciate
11 all the attention that you've given to this
12 case. You were released from your
13 sequestration on Wednesday evening until
14 today, and so I have to ask you some
15 questions. First question I have, and maybe
16 the only question, is have any of you
17 discussed this case either amongst yourselves
18 since you rendered your verdict or with anyone
19 else since we were last in court?

20 (Jurors indicating)

21 THE COURT: Have you read or
22 listened to or observed any reports relative
23 to this case either in the newspaper, on the

Exhibit G

1 teams because you have no money, you know you're at
2 the bottom of the heap, don't you?

3 A Yeah.

4 MR. BERLING: Thank you.

5 THE COURT: Anything else from
6 the State?

7 MR. BRAUN: No, Your Honor.
8 Thank you.

9 THE COURT: Thank you. All
10 right. Doctor, thank you. You may step
11 down.

12 THE WITNESS: Thank you.

13 THE COURT: All right. Mr.
14 Berling, does the defense have any other
15 witnesses to call?

16 MR. BERLING: No, Your Honor.
17 At this time the defense rests on this phase
18 of the case. Thank you.

19 THE COURT: Is there anything
20 from the State in rebuttal?

21 MR. BRAUN: Your Honor, not in
22 the matter of rebuttal? But may we approach
23 the Bench?

1 finished here. That's all I wanted to put on
2 the record. Just wanted to --

3 MR. BERLING: It may take more
4 than a half hour to get him over there and get
5 him something to eat and get him back.

6 THE COURT: Court will be in
7 recess until 1:45.

8 (Recess was taken at 1:13 p.m.)

9
10 1:50 p.m.

11 (Court resumed as follows:)

12 THE COURT: All right. You
13 may be seated. Everybody have a good lunch?
14 I know it was a long morning and there was
15 serious listening that everybody had to engage
16 in, so I think that break was a good thing.

17 We're now -- both the defense and
18 State have rested; correct?

19 MR. BRAUN: Correct.

20 MR. BERLING: Yes.

21 THE COURT: It's time for
22 closing argument.

23 Miss Donovan, are you going to make

Exhibit I

1 Lucas County Courthouse
2 Courtroom No. 5
3 Toledo, Ohio
4 Wednesday, June 15, 2005
5 9:04 a.m.

6 (The following proceedings were
7 had in open court:)

8 THE COURT: Good morning. You
9 may be seated. All right. The case on the
10 Court's docket this morning is State of Ohio
11 versus James P. Frazier. The matter is before
12 the Court for sentencing. I am prepared to go
13 forward with sentencing, and before I do so,
14 first I would like to know whether the defense
15 would like to make a sentencing statement or
16 whether the defendant would like to make a
17 sentencing statement?

18 MR. BERLING: We do not. Thank
19 you.

20 THE COURT: And the defendant
21 does not as well?

22 MR. BERLING: That's correct.

23 THE COURT: All right. Are
there any victim statements or anything from
the State of Ohio?

Exhibit J

1 you have to answer.

2 I told you before, when you go back
3 there, no one one sits over your shoulder and
4 tells you how to do it. But there's a very
5 simple principle I want you to think about
6 which is this: If you all go back there and
7 just vote individual opinions, we haven't
8 accomplished anything through the course of
9 this trial. You need to go back there and
10 talk about the weight of things and agree
11 among the 12 of you what they weigh, and when
12 you do that, ultimately we've reached the
13 right verdict here. And it's the State's
14 belief that when you do that process, and it's
15 the hard process, you're going to conclude
16 death is the appropriate sentence. Thank
17 you.

18 THE COURT: Thank you, Mr.
19 Braun.

20 Members of the jury, you have heard
21 the evidence and the arguments of counsel.
22 And it is now my duty to instruct you on the
23 law that is applicable to this proceeding.

Exhibit K

1 cocaine will do to you. It will make you
2 slaughter your friend in order to get that
3 five or ten bucks, which is astounding, but
4 that's what it does.

5 My guess is that things -- he wanted
6 the money. She didn't have it or wouldn't
7 give it to him, and that there was an
8 altercation and he strangled her to get the
9 money, and then not knowing what to do -- I
10 mean this wasn't a plan that he went down
11 there with -- I don't know what the reason is,
12 but for whatever reason her throat was now
13 cut. That's all I'm going to say about the
14 actual facts of the case. You heard all the
15 testimony. You've seen the exhibits. I don't
16 need to go over and over and over again. I
17 just want you to remember that it was not his
18 knife. It was not his intent to go down there
19 to kill her.

20 Legally, of course, those facts are
21 sufficient, more than sufficient to convict
22 someone of aggravated murder. We know that.
23 But it was not his intent when he went down

Exhibit L

1 evidence we presented. His client's been
2 doing crack cocaine since at least 1995.
3 That's what those records indicate. When he
4 went in the hospital in 1997 to have his
5 shoulder checked because he fell down, he was
6 still high on drugs. He was still doing
7 alcohol. We have no doubt the night before he
8 killed Mary Lou Stevenson he was high on crack
9 cocaine.

10 Here's the point. He chose to be a
11 drug addict. That was a lifestyle he actively
12 sought. It was a lifestyle he lived for at
13 least 10 years.

14 Let's look at the other nature and
15 circumstances of this offense. Let's talk
16 about the victim for a second. He chose
17 somebody who was more helpless than him. Sure
18 he didn't bring the knife with him, but he
19 brought his hands and he used those hands on
20 her neck until she was this close to being
21 dead and then he cut her throat. This is
22 predatory behavior. That fits in with the
23 lack of remorse, the failure to take

Exhibit M

1 responsibility for what he did, the efforts to
2 throw off the police and all the lies he's
3 told about this case. There's very little
4 weight, due to the nature and circumstances of
5 this offense, that go on the mitigation side
6 of the scale.

7 What else do we have? He's one
8 short step above mental retardation. He is.
9 Probably the most critical question I asked
10 Dr. Smalldon this morning was, What's the
11 relationship between his IQ and committing
12 death penalty murder offense? And Dr.
13 Smalldon answered honestly, there is no
14 correlation. Some coldblooded killers have
15 IQs of 120, some have IQs of 72 or 74.

16 What's the point I'm making here?
17 He still had the ability to make other choices
18 throughout his long life, and he chose not to
19 make them. That's the point. Yeah, he may
20 not have had a lot of tools to start out with,
21 but he threw all that away with every decision
22 he made in his life all the way through.

23 And his IQ was not really a factor

1 Honor.

2 THE COURT: And the jury, you
3 are now excused. As I indicated to you oh so
4 many times before, you are also now excused
5 from any of the restrictions that were placed
6 upon you. You may express yourselves to
7 anyone. You may choose not to do that, and
8 that's fine too. It's completely up to you.

9 Again, on behalf of the Court and on
10 behalf of the citizens of Lucas County, I want
11 to thank you for your time and your
12 consideration. I know you've put in a great
13 deal today. I know this has been a very long
14 day for you. You deliberated almost nonstop
15 since three o'clock this afternoon. So I do
16 appreciate it. And we'll be in recess now.
17 Thank you.

18 JUROR NO. 8: Thank you, Your
19 Honor.

20 THE COURT: I'll come back and
21 talk with you for a couple of minutes.

22 (Court adjourned at 8:13 p.m.)

23 CONTINUED IN VOLUME IX

Exhibit N