

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

PLAINTIFF-APPELLEE

-vs-

**BENNIE L. ADAMS**

DEFENDANT-APPELLANT

CASE NO.: **2011-1978**

ON APPEAL FROM CASE NO. **2008 MA 00246** BEFORE THE SEVENTH DISTRICT COURT OF APPEALS.

**DEATH PENALTY CASE**

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**APPELLEE-STATE OF OHIO'S ANSWER BRIEF**

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## Statements of the Case, Facts, and Introduction

### I. Trial Phase.

#### A. State's Case-in-Chief.

##### 1. Avalon Tenney.

Avalon Tenney, Gina Tenney's (victim) mother, testified that in 1985, her daughter was in her second year at Youngstown State University.<sup>1</sup> Gina lived at 2234 Ohio Avenue while she attended Youngstown State.<sup>2</sup>

The last time that Mrs. Tenney spoke to her daughter, Gina told her that she was afraid of her downstairs neighbor—Defendant-Appellant Bennie Adams.<sup>3</sup>

##### 2. Michael Valentine.

On the morning of December 30, 1985, Michael Valentine was trapping for muskrats on the Mahoning River, near the West Avenue Bridge (fka the Water Street Bridge).<sup>4</sup> The bridge was in use then, but is now closed.<sup>5</sup> Around 11:00 a.m. that morning, Mr. Valentine found a body floating in the river.<sup>6</sup> Mr. Valentine then ran and flagged someone down from the water department and had him call the police.<sup>7</sup> When the

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<sup>1</sup> Trial Transcript, October 14, 2008, before the Honorable Timothy E. Franken, (hereafter "Trial Tr."), Vol. I, at 68-69.

<sup>2</sup> *Id.* at 69.

<sup>3</sup> *Id.* at 71.

<sup>4</sup> *Id.* at 74-75.

<sup>5</sup> *Id.* at 76.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 77.

police arrived, Mr. Valentine showed the police the body.<sup>8</sup> The body was that of a female.<sup>9</sup>

Although it had snowed the night before, Mr. Valentine did not see any other footprints or tracks that morning, other than his own that he had made that morning and the day prior.<sup>10</sup>

### 3. Penny Sergeff.

Penny Sergeff was best friends with Gina since junior high (8<sup>th</sup> grade).<sup>11</sup> After high school, Gina went to YSU, while Ms. Sergeff attended art school in New Jersey.<sup>12</sup> In November of 1985, however, Ms. Sergeff moved to Youngstown to be closer to Gina.<sup>13</sup> Ms. Sergeff resided on Elm Street, near the YSU campus, about ten blocks from Gina.<sup>14</sup>

Ms. Sergeff explained that Gina's apartment building was converted from a residential house, so that the upstairs and downstairs apartments shared a common stairway.<sup>15</sup>

On Saturday, December 28, 1985, Ms. Sergeff stayed with Gina at her apartment, because Gina was afraid to be left alone there.<sup>16</sup> Between 7:00 and 8:00 p.m., the two sat

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 78.

<sup>10</sup> *Id.* at 78-79, 83.

<sup>11</sup> *Id.* at 87-88.

<sup>12</sup> *Id.* at 88.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 89.

in Gina's apartment and discussed Christmas.<sup>17</sup> A few hours later, Mark Passarello arrived.<sup>18</sup> Mark and Gina had recently ended their relationship, but wanted to be alone.<sup>19</sup> Mark then drove Ms. Sergeff back to her apartment.<sup>20</sup> After Ms. Sergeff left Gina's apartment that night, she never again saw Gina alive.<sup>21</sup>

Ms. Sergeff testified that Gina was afraid of Bennie Adams, who lived in the downstairs apartment.<sup>22</sup> Ms. Sergeff stated that every time Gina and she would arrive at Gina's apartment, Appellant would look at them out his window, and try to talk to them as they walked up the stairs to the apartment.<sup>23</sup>

In her statement to police, Ms. Sergeff stated that Gina was afraid because she had a break-in.<sup>24</sup> Ms. Sergeff also described an incident where Appellant called Gina on the phone, and she became scared because she had not given her number to him.<sup>25</sup> Gina then changed her phone number because she was scared to answer it when it rang.<sup>26</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 90.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 91.

<sup>22</sup> *Id.* at 90-91.

<sup>23</sup> *Id.* at 93.

<sup>24</sup> *Id.* at 96-97.

<sup>25</sup> *Id.* at 100.

<sup>26</sup> *Id.* at 91-92, 100.

The night that someone tried to break into Gina's apartment, Gina was home.<sup>27</sup> Gina did not hear the outside door to the apartment building open, which usually makes a loud screeching noise when it is opened or shut.<sup>28</sup>

#### 4. Mark Passarello.

Mark Passarello dated Gina Tenney in 1985.<sup>29</sup> Mark met Gina in the spring of 1985, as they were both involved in student government at YSU.<sup>30</sup> They began dating a month later.<sup>31</sup> Gina was a virgin when she started to date Mark, but the two eventually engaged in sexual intercourse during their relationship.<sup>32</sup> Though the two dated, Gina never allowed him to drive her vehicle (owned by her mother) or her ATM card.<sup>33</sup>

In the fall of 1985, Mark moved to Youngstown, and resided with Marvin Robinson.<sup>34</sup> Mark testified that he was aware that Appellant was the downstairs neighbor's boyfriend.<sup>35</sup>

Gina and Mark ended their relationship in the late fall of 1985.<sup>36</sup> After Christmas, on December 28, 1985, they, however, reconciled their relationship.<sup>37</sup> It was a day or two

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<sup>27</sup> *Id.* at 109.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 113.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 113-114.

<sup>32</sup> *Id.* at 116.

<sup>33</sup> *Id.* at 114-115.

<sup>34</sup> *Id.* at 114.

<sup>35</sup> *Id.* at 117.

before she died.<sup>38</sup> Mark, Penny, and Gina were at Gina's apartment hanging out and talking.<sup>39</sup> Mark took Penny home and then came back to Gina's apartment.<sup>40</sup> Mark and Gina spoke about their relationship, after which Mark apologized for the things he did wrong.<sup>41</sup> Mark spent the night, and the two had sexual intercourse that night.<sup>42</sup>

Gina told Mark that night that she didn't feel secure in her apartment.<sup>43</sup>

The next day, on December 29, 1985, Mark left around 1:00 p.m.<sup>44</sup> Mark and Gina both left at the same time.<sup>45</sup> Mark went home, and Gina had plans to go somewhere.<sup>46</sup> Mark wasn't feeling good, so he stayed home and slept most of the day.<sup>47</sup>

On December 30, 1985, Mark learned that Gina had been murdered.<sup>48</sup>

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<sup>36</sup> *Id.* at 118.

<sup>37</sup> *Id.* at 119.

<sup>38</sup> *Id.* at 120.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 120-121.

<sup>42</sup> *Id.* at 121.

<sup>43</sup> *Id.* at 124.

<sup>44</sup> *Id.* at 121.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 122.

<sup>48</sup> *Id.* at 122-123.

## 5. Jeff Thomas.

Jeff Thomas worked with Gina at YSU as student assistants on campus.<sup>49</sup> Their job entailed assisting incoming freshmen and transfer students.<sup>50</sup>

On December 28, 1985, Jeff came across Gina at the Eastwood Mall in Niles, Ohio.<sup>51</sup> Gina had bought a ceramic owl for her mother for Christmas.<sup>52</sup> Later, Gina purchased a sweatshirt with Pebbles Flintstone on it.<sup>53</sup> The two then made plans to get together the next day with their other co-workers (who had not gone home for the holidays) to see a movie and get some pizza.<sup>54</sup>

The next day, on December 29, 1985, Jeff met Gina at the movie theater for a 1:00 p.m. matinee to see 101 Dalmatians.<sup>55</sup> No one else showed up.<sup>56</sup> Gina was wearing blue jeans, a yellow blouse, the Flintstones sweatshirt, and a black and white checkered wool coat.<sup>57</sup>

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<sup>49</sup> *Id.* at 135.

<sup>50</sup> *Id.* at 136.

<sup>51</sup> *Id.* at 137.

<sup>52</sup> *Id.* at 137-138.

<sup>53</sup> *Id.* at 138-139.

<sup>54</sup> *Id.* at 139.

<sup>55</sup> *Id.* at 139-140.

<sup>56</sup> *Id.* at 140.

<sup>57</sup> *Id.*

After the movie, the two went to Pizza Hut.<sup>58</sup> During the conversation, Gina had mentioned that she was afraid of the man downstairs.<sup>59</sup> They left Pizza Hut around 5:00 p.m.<sup>60</sup>

**6. Det. William Blanchard.**

In 1985, Detective William Blanchard was assigned to investigate burglaries and crimes against property.<sup>61</sup>

Det. Blanchard was assigned to investigate the break-in that occurred at Gina Tenney's apartment on December 25, 1985.<sup>62</sup> He spoke to Gina the next day on December 26, 1985.<sup>63</sup>

On December 30, 1985, Det. Blanchard was notified that Gina had been murdered, and was called out to her apartment to investigate.<sup>64</sup> Det. Blanchard met Lieutenant David Campana and Detective Michael Landers at her apartment.<sup>65</sup> After knocking on the outer door, Appellant opened it and let them into the common area of the duplex.<sup>66</sup> They then knocked on Gina's apartment door, but no one answered.<sup>67</sup> They then

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<sup>58</sup> *Id.* at 141.

<sup>59</sup> *Id.* at 142.

<sup>60</sup> *Id.* at 143.

<sup>61</sup> *Id.* at 145.

<sup>62</sup> *Id.* at 146-147.

<sup>63</sup> *Id.* at 147.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 148.

<sup>66</sup> *Id.*

went down and used Appellant's phone to call the landlord so they could gain access to Gina's apartment.<sup>68</sup> Appellant indicated that he was alone in the apartment.

While in Appellant's apartment, Blanchard and Campana heard a noise from a back room. Appellant immediately stated, "I never said he wasn't here[.]"<sup>69</sup> They then found Horace Landers hiding behind a door.<sup>70</sup> Campana recognized Landers and knew that an active warrant had been issued for him.<sup>71</sup> Before the officers took Landers outside, Det. Blanchard picked up a coat that was on the ground to put on Landers because it was very cold outside and Landers did not have a shirt on.<sup>72</sup>

Before Det. Blanchard put the coat on Landers, he searched it for weapons.<sup>73</sup> Inside the coat pocket, he found Gina Tenney's ATM card from Dollar Bank and Appellant's Mahoning County Department of Human Services card.<sup>74</sup> Det. Blanchard ascertained that the jacket belonged to Appellant.<sup>75</sup> Both Appellant and Landers were arrested and transported to the County Jail.<sup>76</sup>

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<sup>67</sup> *Id.* at 149.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 149-150.

<sup>71</sup> *Id.* at 150.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 151-152.

<sup>75</sup> *Id.* at 150.

<sup>76</sup> *Id.* at 153.

The officers then contacted Adena Fidelia, who Appellant's apartment was leased to, and asked her to come down to the apartment building.<sup>77</sup> When Ms. Fidelia arrived, she signed a consent form to search the apartment.<sup>78</sup>

In the bathroom of Appellant's apartment, officers found keys with the letter "G" on the keychain.<sup>79</sup> One key belonged to Gina Tenney's apartment and another to her vehicle.<sup>80</sup> In the downstairs kitchen, in the trash can, a potholder with hairs and dirt on it was found and sent for testing.<sup>81</sup> The potholder matched another found in Gina Tenney's apartment.<sup>82</sup> A television found in Appellant's bedroom matched a box that was found in Gina Tenney's apartment.<sup>83</sup> Police also found an envelope in her apartment that was addressed "to a very sweet and confused young lady."<sup>84</sup> No card, however, was ever found.<sup>85</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 154.

<sup>79</sup> *Id.* at 155-156.

<sup>80</sup> *Id.* at 156.

<sup>81</sup> *Id.* at 156-157.

<sup>82</sup> *Id.* at 157.

<sup>83</sup> *Id.* at 158-159.

<sup>84</sup> *Id.* at 214.

<sup>85</sup> *Id.*

Horace Landers was later ruled out of being a suspect, because of the blood evidence that was later developed.<sup>86</sup> Horace Landers cooperated with police and gave a statement.<sup>87</sup>

Appellant was arrested for receiving stolen property, but the grand jury did not indict him.<sup>88</sup>

**7. Paula Ehrhart.**

Paula Ehrhart is a regional audit manager with National City Bank, formally Dollar Bank.<sup>89</sup> Ms. Ehrhart explained that ATM machines in the 1980s required pin numbers.<sup>90</sup> Ms. Ehrhart then authenticated State's Exhibit No. 56, which was a report generated for transactions through the ATM machine on Belmont Avenue.<sup>91</sup>

The report showed that there were four failed attempts to withdraw money using Gina Tenney's ATM card at 9:21 p.m. through 9:34 p.m. on December 29, 1985.<sup>92</sup>

**8. Officer Lou Ciavarella.**

In 1985, Officer Lou Ciavarella was assigned to the Youngstown Police Department's Crime Lab.<sup>93</sup> Pursuant to the investigation into Gina Tenney's murder;

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<sup>86</sup> *Id.*, Vol. II, at 241.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 235.

<sup>89</sup> *Id.* at 255.

<sup>90</sup> *Id.* at 257.

<sup>91</sup> *Id.* at 257-258.

<sup>92</sup> *Id.* at 260-261.

<sup>93</sup> *Id.* at 265-266.

Ciavarella processed two vehicles, including Gina Tenney's Red Chevy—plate number 765 HEC.<sup>94</sup> Off. Ciavarella recovered blue tissue from Gina's trunk.<sup>95</sup> Also found in her truck was a telephone cord.<sup>96</sup> There were no fingerprints, however, lifted from Gina's vehicle.<sup>97</sup> The second vehicle that was processed was a 1979 Pontiac—plate number 222 BJX.<sup>98</sup> There was a fingerprint lifted from the Pontiac.<sup>99</sup>

### 9. John Allie.

On December 29, 1985, John Allie observed Appellant at the ATM machine in front of the Giant Eagle on Belmont Avenue.<sup>100</sup> The ATM machine was enclosed in a vestibule, so that it required a person to get out of his or her vehicle to use it.<sup>101</sup>

Upon arriving at the bank, Mr. Allie parked his vehicle in front of the door, so his wife could go in and use the ATM machine.<sup>102</sup> Mr. and Mrs. Allie waited in their vehicle for about fifteen minutes because someone (Appellant) was already using the machine.<sup>103</sup>

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<sup>94</sup> *Id.* at 267-268.

<sup>95</sup> *Id.* at 269; State's Exhibit No. 44

<sup>96</sup> *Id.* at 271; see State's Exhibit No. 54; State's Exhibit No. 32 (photo of that cord). The telephone cord was not sent out to Ohio's Bureau of Criminal Identification and Investigation (BCI). *Id.* at 286.

<sup>97</sup> *Id.* at 277-278.

<sup>98</sup> *Id.* at 284.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 291.

<sup>101</sup> *Id.* at 292.

<sup>102</sup> *Id.*

Mr. Allie testified that the person using the machine appeared as if he did not know how to use it: “He was punching in numbers, punching in numbers, didn’t know how to get the computer to work. So we waited and waited and waited. And after a while he came out and my wife went in. But he didn’t know what he was doing.”<sup>104</sup>

When the person came out, he stood in front of the Allies’ vehicle and waved to them.<sup>105</sup> Mr. Allie identified that person as being Appellant Bennie Adams, who was using Gina Tenney’s ATM card at a machine that night.<sup>106</sup> Mr. Allie was familiar with Appellant, because he knew him from “around the neighborhood.”<sup>107</sup>

Appellant appeared “pissed off” when he left the ATM machine,<sup>108</sup> and “shocked to see that there was someone outside.”<sup>109</sup> Appellant then got into a vehicle and left.<sup>110</sup> Mr. Allie later identified Gina Tenney’s vehicle as the vehicle that the person who was using her ATM card was driving.<sup>111</sup>

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<sup>103</sup> *Id.* at 293. John Allie stated that it was light out when he and his wife went to the bank, that is, it was not completely dark out yet. *Id.* at 301-302.

<sup>104</sup> *Id.* at 294.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 169-170.

<sup>107</sup> *Id.* at 290.

<sup>108</sup> *Id.* at 320.

<sup>109</sup> *Id.* at 294.

<sup>110</sup> *Id.* at 294-295.

<sup>111</sup> *Id.* at 170, 217, 296; State’s Exhibit No. 29.

Mr. Allie explained that when he went to the Youngstown police station, he did not want to identify anyone because he was scared.<sup>112</sup> Mr. Allie, however, called the police shortly thereafter to indicate that he could and did identify Appellant in the line-up.<sup>113</sup> At trial, however, Mr. Allie looked at an identical photo line-up and identified Appellant from the group as the person he saw that night using Gina Tenney's ATM card.<sup>114</sup>

**10. Sandra Allie.**

On December 29, 1985, during the evening, Sandra Allie was with her husband at the ATM machine on Belmont Avenue.<sup>115</sup> Like her husband, she observed Appellant using the ATM machine for about fifteen minutes.<sup>116</sup> She stated that she was able to get a good look at him while she waited behind him at the ATM machine.<sup>117</sup>

A week later, Mrs. Allie went down to the police station to identify the person at the ATM machine, but "went to the extreme opposite and identified a short, light-skinned person[.]" because she was "terrified."<sup>118</sup> Sandra Allie had never seen the person at the ATM machine before.<sup>119</sup>

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<sup>112</sup> *Id.* at 299.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 300.

<sup>115</sup> *Id.* at 322.

<sup>116</sup> *Id.* at 330.

<sup>117</sup> *Id.* at 333.

<sup>118</sup> *Id.* at 325.

<sup>119</sup> *Id.*

Mrs. Allie, like her husband, called the police shortly after leaving the Youngstown police station in 1986. At trial, Mrs. Allie confirmed the identification of Appellant from a photo line-up used in 1986.<sup>120</sup>

11. **William Soccorsy.**

William Soccorsy is a retired law enforcement officer for the State of Ohio.<sup>121</sup> Soccorsy assisted the Youngstown Police Department in investigating Gina Tenney's homicide.<sup>122</sup>

On December 30, 1985, Soccorsy interviewed Appellant at the city jail.<sup>123</sup> Appellant waived his *Miranda* rights, but he "denied committing any crime or having knowledge of any crime being committed."<sup>124</sup>

Appellant was again interviewed on January 2, 1986, two days later.<sup>125</sup> Again, he waived his *Miranda* rights, but now admitted that Gina Tenney's ATM card was found in his coat.<sup>126</sup> According to Appellant, he found her bank card on the top step near the porch on the morning of December 30, 1985.<sup>127</sup> Appellant claimed that he rang Gina's doorbell

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<sup>120</sup> *Id.* at 326-327.

<sup>121</sup> *Id.* at 343.

<sup>122</sup> *Id.* at 344.

<sup>123</sup> *Id.* at 345.

<sup>124</sup> *Id.* at 346.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 347.

<sup>127</sup> *Id.*

but no one answered.<sup>128</sup> He stated that he then put it in his pocket so he could give it to her later.<sup>129</sup>

**12. Officer Anthony Marzullo.**

Officer Anthony Marzullo is assigned to the Youngstown Police Department's Crime Lab.<sup>130</sup> Pursuant to the Gina Tenney investigation, Marzullo "assisted in transporting some evidence that my sergeant, the commander of the crime lab, and also recovered oral swabs off of one of the suspects and Gina's ex-boyfriend."<sup>131</sup>

**13. Marvin Robinson.**

Marvin Robinson lived on Fairgreen Avenue in Youngstown in 1985.<sup>132</sup> Marvin was Gina Tenney's best friend.<sup>133</sup> They met in 1984, as both were students at Youngstown State.<sup>134</sup>

In the fall of 1985, at Gina's request, Marvin moved in with Mark Passarello, so that Mark would have a place to stay and live in Youngstown.<sup>135</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 348.

<sup>130</sup> *Id.* at 349.

<sup>131</sup> *Id.* at 351. State's Exhibit No. 53 is the oral swabs recovered from Appellant on October 4, 2007. *Id.* at 351-352. State's Exhibit No. 92 is two oral swabs obtained from Mark Passarello on October 30, 2007. *Id.* at 352-353.

<sup>132</sup> *Id.* at 359.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 360.

<sup>135</sup> *Id.* at 361.

Marvin testified that Gina was very protective of her vehicle, and never let Marvin drive it.<sup>136</sup> Gina also never let Marvin use her ATM card.<sup>137</sup>

Marvin identified State's Exhibit No. 23 as being Gina's television.<sup>138</sup>

Marvin identified Defendant as the person who lived downstairs from Gina's apartment, and lived there with Adena.<sup>139</sup>

Marvin testified that Appellant began calling Gina in late October, after she had broken up with Mark.<sup>140</sup> Appellant asked if he could come upstairs.<sup>141</sup> Gina called Marvin and told him about the calls. She was "very upset," because they would frequently occur late at night.<sup>142</sup> The calls continued until Gina had her telephone number changed in November.<sup>143</sup> The calls made Gina fearful of Appellant.<sup>144</sup>

One day, Gina found a card that had been shoved underneath her apartment door.<sup>145</sup> It was addressed "to a very sweet and confused young lady[,]” and signed "love,

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<sup>136</sup> Marvin identified State's Exhibit Nos. 29 and 30 as being photographs of Gina's vehicle, which belonged to her parents. *Id.* at 363.

<sup>137</sup> *Id.* at 363.

<sup>138</sup> *Id.* at 364-265.

<sup>139</sup> *Id.* at 366-367.

<sup>140</sup> *Id.* at 368.

<sup>141</sup> *Id.* at 368.

<sup>142</sup> *Id.* at 369-370. Appellant called Gina on a daily basis before she changed her number. *Id.* at 377.

<sup>143</sup> *Id.* at 370-371.

<sup>144</sup> *Id.* at 371.

<sup>145</sup> *Id.* at 372.

Bennie.”<sup>146</sup> This occurred after Gina had changed her telephone number.<sup>147</sup> At this time, her emotional state was more of annoyance and frustration from Appellant’s actions.<sup>148</sup> Around Christmas, Gina’s emotional state changed from frustration to fear.<sup>149</sup> Because of this, Marvin began staying over at her apartment, as she was afraid to be left alone.<sup>150</sup>

Around 1:00 a.m. on December 25, 1985, someone had opened Gina Tenney’s apartment door.<sup>151</sup> Gina put a chair against the door, but later, the person returned and opened the door and walked into her apartment.<sup>152</sup> After the break-in on December 25, Gina was “very fearful” of Appellant.<sup>153</sup> Marvin stayed with Gina the next two nights.<sup>154</sup>

Marvin last spoke to Gina on December 28, 1985.<sup>155</sup>

#### 14. Dr. Humphrey Germaniuk.

Dr. Humphrey Germaniuk is a forensic pathologist, employed with the Trumbull County Coroner’s Office.<sup>156</sup> Dr. Germaniuk did not perform the autopsy on Gina

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<sup>146</sup> *Id.* at 372-373. Marvin identified State’s Exhibit No. 48 as the envelope that the card was in. *Id.* at 373.

<sup>147</sup> *Id.* at 374.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 374-375.

<sup>151</sup> *Id.* at 386.

<sup>152</sup> *Id.* at 387.

<sup>153</sup> *Id.* at 391.

<sup>154</sup> *Id.* at 389.

<sup>155</sup> *Id.* at 375.

Tenney.<sup>157</sup> Prior to his testimony, Dr. Germaniuk reviewed “a file including photographs as well as copies of evidence, the autopsy report, the microscopic reports, and that was basically it. There was a narrative from the scene investigators.”<sup>158</sup> Dr. Germaniuk also reviewed the autopsy video before he testified.<sup>159</sup>

Dr. Germaniuk first explained the difference between manner and cause of death:

“[A] cause of death is, why did this person die? But for the massive heart attack the person would still be alive; but for the multiple blunt traumatic injuries this person would still be alive. So cause of death simply put is, but for this particular reason or that particular reason the person would still be alive.”<sup>160</sup>

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“Manner of death are the circumstances in which the cause of death took place. Let’s take a look at a contact gunshot wound to the head. But depending on the circumstances, the manner may differ.”<sup>161</sup>

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“There are five manners of death, natural, accident, homicide, suicide and undetermined.”<sup>162</sup>

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<sup>156</sup> *Id.* at 397-398.

<sup>157</sup> *Id.* at 402. Gina Tenney stood five feet, five inches, and weighed one-hundred and twenty pounds. *Id.* at 407.

<sup>158</sup> *Id.* at 403.

<sup>159</sup> *Id.* at 404; State’s Exhibit No. 91.

<sup>160</sup> *Id.* at 399-400.

<sup>161</sup> *Id.* at 400.

<sup>162</sup> *Id.*

Specific to Gina Tenney, she suffered a contusion to her upper right lip, and some abrasions or scrapes on the front part of her chin.<sup>163</sup> She also suffered abrasions to the left side of her chin; abrasions on her breast; and a faint line across her neck.<sup>164</sup> Dr. Germaniuk observed a couple of irregularly scrapes or abrasions on her abdomen,<sup>165</sup> faint bruising around her right wrist,<sup>166</sup> scrapes to her abdomen, some scrapes on her breast, and on both the left and right wrists and forearms; two bands of contusion or bruising.<sup>167</sup>

According to the death certificate, Gina Tenney's immediate cause of death was suffocation due to traumatic asphyxiation.<sup>168</sup> Dr. Germaniuk, however, testified that he would have determined the cause of death to be asphyxia.<sup>169</sup> Dr. Germaniuk explained that if a person died from drowning, the body would take in an air and water mixture from breathing the water into their lungs, and would see a foam cone.<sup>170</sup> Here, there was no foam cone detected on Gina Tenney.<sup>171</sup>

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<sup>163</sup> *Id.* at 406; State's Exhibit Nos. 9 and 10.

<sup>164</sup> *Id.*; State's Exhibit No. 11.

<sup>165</sup> *Id.*; State's Exhibit No. 12.

<sup>166</sup> *Id.*; State's Exhibit No. 13.

<sup>167</sup> *Id.* at 407; State's Exhibit No. 14.

<sup>168</sup> *Id.* at 408.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 410.

<sup>171</sup> *Id.* at 411.

“Asphyxiation is a very broad and general term which implies any process that prohibits the body from taking in oxygen and getting rid of carbon dioxide. And under asphyxia there are three broad categories.”<sup>172</sup>

“The first category is just known as entrapment. This is the classic case of Halloween or hide and seek where all the sudden you have two kids that are playing and they end up in a refrigerator that someone had thrown out. The doors lock and they can’t get out. They’re in there. They’re breathing and what happens? They consume all of the oxygen and die. So entrapment would be the first form of asphyxia.”<sup>173</sup>

“The second category is smothering. This deals with the external airways, when you either have a hand or pillow or some object across the nose and mouth prohibiting that individual from taking in air.”<sup>174</sup>

“The third category of asphyxia is choking. At a certain point I may be very, very hungry. I have taken excessive bites of steak, it gets stuck in my throat, I can’t breathe and so I block off my internal airways.”<sup>175</sup>

“The fourth category is mechanical asphyxia. If you take a look -- if four of you were to sit on my chest what happens? I can’t expand my lungs. And this we see very commonly in construction workers. This we see in people who are digging trenches and the wall of the trench collapses, half of their body is up but they really can’t breathe. We

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 411-412.

<sup>174</sup> *Id.* at 412.

<sup>175</sup> *Id.*

see this sometimes when people who are trying to repair their own cars, the jack fails, the car hits their chest, they can't expand or contract their chest."<sup>176</sup>

"The fifth category is mechanical asphyxia and smothering. What happens in those cases, if you take a look at skiers caught in an avalanche, you have hundreds of pounds, if not thousands of pounds, of snow and ice on your chest and you can't expand your chest. You have ice and snow covering your mouth and nose so you can't breathe."<sup>177</sup>

"The last category under suffocation, which would be number 1, last category being environmental and this occurs when the oxygen in the environment is displaced. If you take a look at tanker trucks that carry all sorts of stuff like coal and other gases and liquids, when those trucks empty they usually flush them out with nitrogen or another inert gas. And then they'll send a worker down to that truck, clean the rest of it out and 15 minutes go by and 20 minutes go by and the guy doesn't show up. He's dead at the bottom of the truck. Why? Because he's in an environment that doesn't contain oxygen. It is full of nitrogen or another gas."<sup>178</sup> "That's the first category of suffocation."<sup>179</sup>

The second category is strangulation. "Strangulation is basically divided up in four different categories. The first category is what is known as manual strangulation where someone takes their hands and basically throttles someone about their neck. And in strangulation we're dealing more with compression of the two arteries that carry blood to

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<sup>176</sup> *Id.* at 412-413.

<sup>177</sup> *Id.* at 413.

<sup>178</sup> *Id.* at 413-414.

<sup>179</sup> *Id.* at 414.

your brain. It doesn't take much pressure, about 10 pounds for each corroded artery. And you put your fingers here (indicating) and you can feel them. Once that is closed off we don't have much time before there's no blood flow to the brain. And when there's no blood flow to the brain there is no oxygen and you die. So the first category would be manual, where you have hands about someone's throat compressing the neck and blocking the blood flow."<sup>180</sup>

"The second category of strangulation is ligature where you have a belt, the juror badges you're wearing, you could use that to strangle someone, a neck tie, wires, rope, whatever."<sup>181</sup>

"Third category is hanging, where it is the weight of the body that allows the blockage of the blood flow. Most of the hangings we see are suicidal."<sup>182</sup>

The fourth category of strangulation is compression of the neck. "And sometimes we see this in police situations where an officer will attempt to apply a chokehold and you have a broad application of force that really doesn't leave any marks. That's based on circumstances to determine how that person dies. With a broad application of force, like an elbow or knee on someone's neck, you can have lack of blood flow to the brain. That would be strangulation."<sup>183</sup>

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<sup>180</sup> *Id.* at 414-415.

<sup>181</sup> *Id.* at 415.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 415-416.

“[T]he last category of asphyxia would be chemical asphyxiants.”<sup>184</sup> “[C]hemical asphyxiants work on a molecular level. They bind with your red blood cells prohibiting them from delivering oxygen. And the two most common ones that we see would be carbon monoxide.”<sup>185</sup> Another is cyanide.<sup>186</sup>

Here, “we have evidence of smothering. You can take a look at the contusion on the lips. If you take a look at the marks about the chin, this is certainly consistent with a hand or an object placed over the face. We certainly have what appears to be ligature strangulation with that 7-inch band by quarter-inch band about the neck. With that we can exclude mechanical[.]”<sup>187</sup>

Dr. Germaniuk testified that he would simply draw right back to asphyxia because he does not know how much of that evidence played a role in Gina Tenney’s death. He would drop back to a broad category of asphyxia.<sup>188</sup>

Dr. Germaniuk also observed blood spots in her eyes (whites of the eyes),<sup>189</sup> and ligature marks on her wrists that could have been caused from being bound or tied up.<sup>190</sup>

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<sup>184</sup> *Id.* at 416.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 417.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 418.

<sup>190</sup> *Id.* at 422.

Dr. Germaniuk stated that the telephone cord recovered from Gina's vehicle could have caused the marks on her neck,<sup>191</sup> and the bruises on her face could have been caused by someone hitting her in the face or trying to smother her.<sup>192</sup>

Concerning a sexual assault, Dr. Germaniuk stated that a sexual assault does not always produce injuries.<sup>193</sup>

Based on eyewitness testimony of when Gina last ate, somewhere between 4:30 and 5:00 p.m. would have been the earliest that she could have died.<sup>194</sup>

Dr. Germaniuk concluded that based on the evidence, the cause of death was likely a combination of smothering and the ligature.<sup>195</sup>

#### 15. Officer Joseph DeMatteo.

Officer Joseph DeMatteo was assigned to the Youngstown Police Department's Crime Lab in 1985, and on December 30, 1985, was called to the Mahoning River to investigate Gina Tenney's murder.<sup>196</sup>

DeMatteo photographed the scene at the river;<sup>197</sup> Gina Tenney's body at the city morgue;<sup>198</sup> and Gina Tenney's apartment.<sup>199</sup> DeMatteo recovered several pieces of

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<sup>191</sup> *Id.* at 423.

<sup>192</sup> *Id.* at 424.

<sup>193</sup> *Id.* at 436-437.

<sup>194</sup> *Id.* at 441-442.

<sup>195</sup> *Id.* at 445. Cause of death is asphyxia and manner of death is homicide. *Id.* at 446.

<sup>196</sup> *Id.*, Vol. III, at 448-449. State's Exhibit No. 69 is the technician report kept by DeMatteo during his investigation. *Id.* at 449-450.

<sup>197</sup> *Id.* at 450; see State's Exhibit Nos. 2-6. *Id.*

evidence, which included: Gina Tenney's clothes,<sup>200</sup> and ATM card;<sup>201</sup> Gina Tenney's television found in Appellant's apartment;<sup>202</sup> and a yellow potholder found in Appellant's apartment.<sup>203</sup> A matching yellow potholder was found in Gina Tenney's apartment on top of her refrigerator in the kitchen.<sup>204</sup>

On December 31, 1985, a blood sample, a saliva sample, and pubic hair samples were obtained from Horace Landers.<sup>205</sup> On July 13, 1986, the same samples were obtained from Mark Passarello.<sup>206</sup> And on December 31, 1985, the same samples were obtained from Appellant.<sup>207</sup>

DeMatteo further collected hair combings from Gina Tenney's body, obtained from Jack Kish, the pathologist assistant, on December 31, 1985.<sup>208</sup> Gina Tenney's

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<sup>198</sup> *Id.* at 451; see State's Exhibit Nos. 7-8; State's Exhibit Nos. 9-14 (autopsy photographs).

<sup>199</sup> *Id.* at 455-456; see State's Exhibit Nos. 15-32. *Id.*

<sup>200</sup> *Id.* at 452-454; see State's Exhibit Nos. 36-41. *Id.*

<sup>201</sup> *Id.* at 456-457; State's Exhibit No. 42.

<sup>202</sup> *Id.* at 458; State's Exhibit No. 89. The television was fingerprinted at the scene. *Id.* at 459-460; State's Exhibit No. 58. *Id.*

<sup>203</sup> *Id.* at 457; see State's Exhibit No. 47. *Id.*

<sup>204</sup> *Id.* at 457-458; State's Exhibit No. 46.

<sup>205</sup> *Id.* at 461; State's Exhibit Nos. 76-78.

<sup>206</sup> *Id.* at 462-462; State's Exhibit Nos. 79-80, 96.

<sup>207</sup> *Id.* at 463-464; State's Exhibit Nos. 74, 87, 95.

<sup>208</sup> *Id.* at 466-467; State's Exhibit No. 93.

fingerprints were taken during the autopsy.<sup>209</sup> And a rape kit was also performed during the autopsy.<sup>210</sup>

DeMatteo submitted the evidence to Ohio's Bureau of Criminal Identification and Investigation (BCI) in Richfield, Ohio on January 13, 1986,<sup>211</sup> and again on June 29, 2007.<sup>212</sup>

#### 16. Cheryl Mahan.

Cheryl Mahan does consulting work with the State's Fire Marshal's Office in regards to fingerprints.<sup>213</sup> Before that, she was employed with the Ohio Attorney General's Office, BCI, in the fingerprint department.<sup>214</sup> Before that, she was employed with the Federal Bureau of Investigation where she performed fingerprint analysis.<sup>215</sup>

In fingerprint analysis, "you make a comparison with the fingerprint you compare -- a known print to an unknown. What you're actually comparing is the friction skin or the raised portion of the skin found on the palm sides of your hand to determine if they contain the same area and position."<sup>216</sup>

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<sup>209</sup> *Id.* at 467-468; State's Exhibit No. 86.

<sup>210</sup> *Id.* at 468; State's Exhibit Nos. 49, 50, 52. Blood was drawn from Gina Tenney during the autopsy. *Id.* at 471; State's Exhibit Nos. 73 and 73A.

<sup>211</sup> *Id.* at 472-474.

<sup>212</sup> *Id.* at 476.

<sup>213</sup> *Id.* at 518.

<sup>214</sup> *Id.* at 519.

<sup>215</sup> *Id.* at 519-520.

<sup>216</sup> *Id.* at 520.

Mahan performed fingerprint analysis in regards to Gina Tenney's homicide.<sup>217</sup> Mahan examined and performed fingerprint analysis on several items submitted to BCI by the Youngstown Police Department.<sup>218</sup>

Mahan explained that a person's fingerprints are formed three months after conception and do not change unless they are purposely destroyed or surgically removed, or until a body begins to decompose after death.<sup>219</sup> They are unique to each individual person.<sup>220</sup>

Mahan generated her report on January 28, 1986.<sup>221</sup> Mahan concluded that fingerprints taken from Gina Tenney's television found in Appellant's apartment resulted in identifying Appellant's fingerprints on that television.<sup>222</sup> Mahan, however, was unable to make any identification as to the fingerprints found on a Dollar Mover deposit envelope;<sup>223</sup> the envelope (with a card) given to Gina Tenney;<sup>224</sup> and Miller High Life beer bottles found in Gina Tenney's apartment.<sup>225</sup>

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<sup>217</sup> *Id.* at 521. State's Exhibit No. 81 is the submission sheet listing items that were submitted to the laboratory for examination. *Id.* It was received by BCI on January 2, 1986, from DeMatteo. *Id.* at 522.

<sup>218</sup> *Id.* at 522.

<sup>219</sup> *Id.* at 526.

<sup>220</sup> *Id.* at 527.

<sup>221</sup> *Id.* at 528; State's Exhibit No. 60.

<sup>222</sup> *Id.* at 534-535; State's Exhibit No. 58.

<sup>223</sup> *Id.* at 532; State's Exhibit No. 57.

<sup>224</sup> *Id.* at 532-533; State's Exhibit No. 48. This was recovered in Appellant's apartment.

<sup>225</sup> *Id.* at 533; State's Exhibit No. 59.

Mahan explained that fingerprints are easily destroyed based upon the handling of the item containing the fingerprint, and can be easily rubbed off an item.<sup>226</sup>

**17. Dale Laux.**

Dale Laux is a forensic scientist, employed with Ohio's BCI, and assigned to the biology unit.<sup>227</sup> He is responsible for analyzing bodily fluids, such as blood, semen, and saliva.<sup>228</sup>

Laux performed blood type testing in regards to Gina Tenney's investigation.<sup>229</sup> Laux analyzed blood sample submitted from Appellant, Gina Tenney, Mark Passarello, and Horace Landers.<sup>230</sup>

Dale Laux concluded that the blood type from semen found on the vaginal swabs taken during Gina Tenney's autopsy was a "B non-secretor."<sup>231</sup> Both Gina Tenney and Mark Passarello were "A secretors."<sup>232</sup> And Horace Landers was a "A non-secretor."<sup>233</sup> Of those samples submitted, only Appellant was a "B non-secretor."<sup>234</sup> The blood typing analysis is not an exact match, and means that Appellant could not be eliminated as a

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<sup>226</sup> *Id.* at 531.

<sup>227</sup> *Id.* at 547.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 548-549; State's Exhibit Nos. 61 and 81.

<sup>230</sup> *Id.* at 550.

<sup>231</sup> *Id.* at 556.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 557.

<sup>234</sup> *Id.*

potential source of the semen found in Gina Tenney's vagina.<sup>235</sup> A "B non-secretor" is found in four percent of the African-American population.<sup>236</sup>

Laux also analyzed hair samples that were submitted.<sup>237</sup> Laux found "negro hair fragments, also Caucasian pubic and head hairs that were red in color," on the potholder found in Appellant's apartment.<sup>238</sup> Laux, however, was not able to do any comparisons with the negro hair fragments, because they were only fragments and too small.<sup>239</sup>

The Caucasian pubic and head hairs that were red in color were consistent with hair from Gina Tenney,<sup>240</sup> but could have come from someone else.<sup>241</sup>

#### **18. Brenda Gerardi.**

Brenda Gerardi is a forensic scientist, employed with Ohio's BCI, and assigned to the serology/DNA section.<sup>242</sup> Gerardi is responsible for analyzing "physical evidence for the identification of physiological fluids such as blood, urine, feces, semen and saliva and the subsequent DNA analysis of those samples."<sup>243</sup>

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<sup>235</sup> *Id.* at 557-558.

<sup>236</sup> *Id.* at 557-558.

<sup>237</sup> *Id.* at 561.

<sup>238</sup> *Id.* at 563; State's Exhibit No. 47. Gina Tenney had red hair.

<sup>239</sup> *Id.* at 563.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 568-569.

<sup>242</sup> *Id.* at 570.

<sup>243</sup> *Id.* at 571.

“DNA stands for deoxyribonucleic acid, and it is a long string-like molecule which contains the genetic code or the blueprint for life. It is found in all cells, with the exception of red blood cells, and it is unique to each individual, with the exception of identical twins.”<sup>244</sup>

DNA analysis is useful, because “[a] DNA comparison begins with the extraction of the DNA material from the cells. Next is quantification. That allows me to know how much DNA I have extracted. Then is amplification, which is essentially a chemical Xeroxing process that allows me to make millions of copies of a target DNA. Lastly would be the data interpretation, at which time I compare the known sample to the unknown forensic samples to either include or exclude an individual.”<sup>245</sup>

The Youngstown Police Department submitted a vaginal swab, vaginal smear, underwear, and a blood standard from Gina Tenney; saliva and blood standards from Appellant; saliva and blood standards from Horace Landers; saliva and blood standards from Mark Passarello; piece of telephone cord; a rectal swab, vaginal swabs, and nail clippings from Gina Tenney; public and head hair clippings from Gina Tenney; a potholder; DNA standard from Horace Landers; hair samples; and pubic hair samples.<sup>246</sup>

Gerardi performed the DNA analysis of the items submitted.<sup>247</sup> DNA analysis compares reference samples to the DNA at fifteen different DNA locations of a person’s genetic profile. You compare your reference sample to the DNA at each of these

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<sup>244</sup> *Id.* at 572.

<sup>245</sup> *Id.* at 572-573.

<sup>246</sup> *Id.* at 575-576.

<sup>247</sup> *Id.* at 576; State’s Exhibit No. 62.

locations. You have to match at every location to be either included or excluded as a possible source of the DNA.<sup>248</sup>

“The locations are on the chromosome. So your genetic profile, like I said, was extracted from these chromosomes in any one of your cells of your body. So you have DNA in all these cells and we extract the DNA and we compare the known DNA to that forensic profile.”<sup>249</sup>

“Ninety-nine percent of your DNA is the same as the person sitting next to you. One percent of your DNA is unique to you.”<sup>250</sup>

Gerardi excluded “Horace Landers as being a source of any of the DNA, the forensic DNA profiles from the vaginal swabs,” and from the underwear belonging to Gina Tenney.<sup>251</sup> Likewise, Mark’s DNA profile was not detected on the vaginal profile.<sup>252</sup>

“Bennie Adams cannot be excluded as the source of the semen on the vaginal swab. Based on the national database provided by the Federal Bureau of Investigation, the expected frequency of occurrence of the partial DNA profile identified in the sperm fraction of the vaginal swab is 1 in 38, 730, 000, 000, 000 unrelated individuals.”<sup>253</sup>

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<sup>248</sup> *Id.* at 582.

<sup>249</sup> *Id.* at 583.

<sup>250</sup> *Id.* at 583-584.

<sup>251</sup> *Id.* at 586-587.

<sup>252</sup> *Id.* at 590. Mark Passarello also could not be excluded as a contributor to the underwear sample. *Id.*

<sup>253</sup> *Id.* at 587.

No DNA foreign to Gina Tenney was detected on the anal smear.<sup>254</sup>

“Bennie Adams cannot be excluded as the major source of the semen on the underwear. Based on the national database provided by the Federal Bureau of Investigation, the expected frequency of occurrence of the major DNA profile identified in the sperm fraction of the underwear is 1 in 63, 490, 000, 000, 000, 000, 000 unrelated individuals.”<sup>255</sup>

There are only 6.5 billion people in the world today.<sup>256</sup>

Because Gina Tenney’s samples were taken in 1985, it was common for degradation to occur.<sup>257</sup> “So there is natural degradation process that does take place. The sample may not have been moist or continued to just break down. So we did not pick up her type at every single one of the locations but it was enough of the profile to give us that interpretation information that we needed.”<sup>258</sup>

Degradation, however, does not change the DNA profile.<sup>259</sup> “[D]egradation is essentially the normal breakdown of the cellular material, exposing the DNA and allowing us not to be able to get a complete DNA profile from that sample.”<sup>260</sup>

The State rested.<sup>261</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 588.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 589.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 592.

**B. Appellant's Case-in-Chief.**

**1. Det. William Blanchard.**

Appellant called only one witness during his case-in-chief, Det. William Blanchard. Concerning the line-up shown to the Allies on January 8, 1986, Appellant was number 3 and Horace Landers was number 5.<sup>262</sup>

Appellant stood six feet, two inches; while Horace Landers stood five feet, eight inches.<sup>263</sup> Appellant has a dark complexion, while Horace Landers has a medium complexion.<sup>264</sup>

Appellant rested.

**C. Verdict.**

Appellant was convicted of Aggravated Murder,<sup>265</sup> and the Capital Specification, being the Principal Offender.<sup>266</sup> The jurors were polled and each agreed with the verdicts, including each alternate.<sup>267</sup>

**II. Sentencing Phase.**

During the sentencing (mitigation) phase, Appellant presented the testimony of six witnesses.<sup>268</sup> At the conclusion of the evidence, the jury recommended a sentence of

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<sup>261</sup> *Id.* at 596.

<sup>262</sup> *Id.*, Vol. IV, at 610-611.

<sup>263</sup> *Id.* at 611.

<sup>264</sup> *Id.* at 612.

<sup>265</sup> *Id.* at 794; see Verdict Form No. 1.

<sup>266</sup> *Id.* at 794; see Verdict Form No. 1(A).

<sup>267</sup> *Id.* at 795-796, 803-809.

death for Appellant.<sup>269</sup> Thereafter, the trial court imposed a sentence of death upon Appellant.<sup>270</sup> Appellant timely appealed to the Seventh District Court of Appeals.

The Seventh District affirmed Appellant's conviction and death sentence.<sup>271</sup>

Appellant then timely appealed as of right to this Honorable Court. The State now responds with its answer brief, and requests that this Honorable Court Overrule Appellant-Defendant Bennie L. Adams' Propositions of Law and Deny his request for relief, allowing his conviction and sentence of death to stand.

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<sup>268</sup> See, generally, Sentencing Phase Transcript, October 28, 2008, before the Honorable Timothy E. Franken, (hereafter "Sent. Phase Tr."), at 33-122.

<sup>269</sup> *Id.* at 189.

<sup>270</sup> *Id.* at 193.

<sup>271</sup> See *State v. Adams*, 7<sup>th</sup> Dist. No. 08 MA 246, 2011 Ohio 5361.

## Law and Argument

- I. **Proposition of Law No. 1:** Failure to Permit Trial Counsel Reasonable Inquiry into Jurors' Exposure to Pretrial Publicity and Jurors' Views about the Death Penalty in a Capital Case is a Denial of Due Process, Trial by an Impartial Jury. Sixth and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, §§ 5, 10, and 16.

**State's Response to Proposition of Law No. 1:** Appellant was Afforded His Due Process Right to a Fair and Impartial Jury, as the Trial Court Allowed Both the State and Defense Counsel a Reasonable Opportunity to Inquire into the Jurors' Exposure to Pretrial Publicity and their Views on the Death Penalty.

As for Appellant's first proposition of law, he contends that the trial court deprived him of his due process right to a fair and impartial jury when the court failed to permit a reasonable inquiry into the jurors' exposure to pretrial publicity and their views on the death penalty.

“[T]he length and scope of voir dire fall within a trial court's sound discretion and vary depending on the circumstances of a given case.”<sup>272</sup> And this Court “will not find prejudicial error in how the trial court qualified venirepersons ‘as fair and impartial jurors’ unless the appellant can show ‘a clear abuse of discretion.’”<sup>273</sup>

Here, the trial court did not abuse its discretion in limiting both parties to a reasonable inquiry into the jurors' exposure to the pretrial publicity and their views on the death penalty. In fact, a thorough review of voir dire demonstrates that at no time did the trial court refuse defense counsel's requests for additional time to inquire.

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<sup>272</sup> *State v. Trimble*, 122 Ohio St.3d 297, 310 (2009), citing *State v. LaMar*, 95 Ohio St.3d 181, ¶ 40 (2002); accord *State v. Davis*, 116 Ohio St.3d 404, 411 (2008); *State v. Bedford*, 39 Ohio St.3d 122, 129 (1988).

<sup>273</sup> *LaMar*, 95 Ohio St.3d at 191, citing *State v. Cornwell*, 86 Ohio St.3d 560, 565 (1999), and *State v. Beuke*, 38 Ohio St.3d 29, 39 (1988).

A. **THE LENGTH AND SCOPE  
OF VOIR DIRE FALL WITHIN THE  
TRIAL COURT'S SOUND DISCRETION, WHICH  
INCLUDE PLACING REASONABLE LIMITATIONS  
UPON BOTH THE STATE AND DEFENSE COUNSEL.**

There is no doubt that the right to a fair and impartial jury is one of the most basic and fundamental constitutional rights that we as citizens of the United States are entitled to: "England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury."<sup>274</sup>

Accordingly, "[t]he failure to accord an accused a fair hearing violates even the minimal standards of due process."<sup>275</sup> Thus, "only the jury can strip a man of his liberty or his life."<sup>276</sup>

In Ohio, both the State and the defendant are afforded a reasonable opportunity to inquire into prospective jurors to determine whether they are qualified to serve:

Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the courts discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array or, in the alternative, to permit

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<sup>274</sup> *Irvin v. Dowd*, 366 U.S. 717, 721 (1961).

<sup>275</sup> *Id.* at 722, citing *In re Oliver*, 333 U.S. 257 (1948), and *Tumey v. Ohio*, 273 U.S. 510 (1927).

<sup>276</sup> *Irvin*, 366 U.S. 722

individual examination of each prospective juror seated on a panel, prior to any challenges for cause or peremptory challenges.<sup>277</sup>

Further, “[t]he judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel.”<sup>278</sup>

Here, Appellant takes issue with the trial court’s reasonable limitation placed upon both the State and defense counsel in inquiring into their exposure to the pretrial publicity and their views on the death penalty. But this Court has previously concluded that “the time limits on voir dire are within the trial court’s discretion,”<sup>279</sup> and it “must limit the trial to relevant and material matters with a view toward the expeditious and effective ascertainment of the truth.”<sup>280</sup>

While “R.C. 2945.27 and Crim.R. 24(B) require that counsel be afforded an opportunity to voir dire prospective jurors or supplement the court’s voir dire examination[,] \* \* \* the length and scope of voir dire fall within a trial court’s sound discretion and vary depending on the circumstances of a given case.”<sup>281</sup> And a reviewing

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<sup>277</sup> Crim.R. 24(B).

<sup>278</sup> R.C. 2945.27.

<sup>279</sup> *State v. Nields*, 93 Ohio St.3d 6, 28 (2001); accord *State v. Seiber*, 56 Ohio St.3d 4, 12 (1990) (finding a 15-minute time limit sufficient under the circumstances).

<sup>280</sup> *Cornwell*, 86 Ohio St.3d at 565 (finding that the trial court’s limitation of one-half hour for each side to examine each prospective juror was not an abuse of discretion), quoting *State v. Durr*, 58 Ohio St.3d 86, 89 (1991), citing *State v. Bridgeman*, 51 Ohio App.2d 105, 109-110 (8<sup>th</sup> Dist. 1977).

<sup>281</sup> *Trimble*, 122 Ohio St.3d at 310, citing *LaMar*, 95 Ohio St.3d at 181, ¶ 40; accord *Davis*, 116 Ohio St.3d at 411; *Bedford*, 39 Ohio St.3d at 129; see also R.C. 2945.03.

court “will not find prejudicial error in how the trial court qualified venirepersons ‘as fair and impartial jurors’ unless the appellant can show ‘a clear abuse of discretion.’”<sup>282</sup> Thus, where the limitations are reasonable and placed upon both parties, a reviewing court cannot find an abuse of discretion.<sup>283</sup>

1. **THE COURT’S LIMITATION UPON BOTH THE STATE AND DEFENSE WAS REASONABLE UNDER THE CIRCUMSTANCES, AND AT NO TIME DID COUNSEL REQUEST ADDITIONAL TIME.**

The Seventh District recognized that “voir dire lasted three days constituting nearly 800 pages of transcript. The potential jurors had completed extensive juror questionnaires.”<sup>284</sup> The Seventh District found that “[f]rom reviewing the record and reading the transcript, it can be seen that the jurors were thoroughly questioned regarding their knowledge of the case, whether they had formed any fixed opinions regarding appellant’s guilt, whether they would have difficulty imposing life instead of death, and whether they could decide the case solely on the evidence presented at trial.”<sup>285</sup>

Therefore, the trial court established a reasonable time limitation in which to question prospective jurors concerning their exposure to pretrial publicity and their views

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<sup>282</sup> *LaMar*, 95 Ohio St.3d at 191, citing *Cornwell*, 86 Ohio St.3d at 565, and *Beuke*, 38 Ohio St.3d at 39. An abuse of discretion occurs when the court acts arbitrarily, unreasonably, or unconscionably. See *State v. Adams*, 62 Ohio St.2d 151, 157 (1980), citing *Steiner v. Custer*, 137 Ohio St. 448 (1940), *Conner v. Conner*, 170 Ohio St. 85 (1959), and *Chester Township v. Geauga Co. Budget Comm.*, 48 Ohio St.2d 372 (1976); accord *State v. Xie*, 62 Ohio St.3d at 521, 527 (1992); *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

<sup>283</sup> See *Bedford*, 39 Ohio St.3d at 129.

<sup>284</sup> *Adams*, supra at ¶ 159, citing *Seiber*, 56 Ohio St.3d at 12.

<sup>285</sup> *Adams*, supra at ¶ 161.

on the death penalty. In fact, the trial court inquired into each juror's exposure to pretrial publicity; thus, both the State and defense counsel spent the remaining time inquiring into each juror's view on the death penalty.<sup>286</sup>

a.) **Juror No. 82**

Appellant contends that Juror No. 82 was "browbeaten" into answering that he could "follow the law."

In *Morgan v. Illinois*, "the United States Supreme Court held that a juror who will automatically vote for death without regard to mitigating factors is biased and may not sit on a capital case."<sup>287</sup> Thus, "[a] capital defendant may challenge for cause any prospective juror who, regardless of the evidence of aggravating and mitigating circumstances and in disregard of the jury instructions, will automatically vote for the death penalty."<sup>288</sup> And the decision to excuse a juror under *Morgan* lies with the trial court's sound discretion.<sup>289</sup>

*Morgan*-excludables are also known as "automatic death jurors," meaning they are inclined to vote for death simply upon a conviction for aggravated murder, regardless of the mitigating factors that exist.

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<sup>286</sup> See generally Transcript of Voir Dire, October 6, 2008, before the Honorable Timothy E. Franken, (hereafter "Tr. Voir Dire"), Vols. I-IV.

<sup>287</sup> *State v. Fry*, 125 Ohio St.3d 163, 198 (2010), citing *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

<sup>288</sup> *Trimble*, 122 Ohio St.3d at 307, citing *Morgan*, 504 U.S. at 729, and *State v. Williams*, 79 Ohio St.3d 1, 6 (1997).

<sup>289</sup> *Trimble*, 122 Ohio St.3d at 307, citing *State v. Wilson*, 29 Ohio St.2d 203, 211 (1972).

For example, in *State v. Trimble*, this Court found no error in allowing a juror to remain despite the fact that he initially indicated that he viewed the death penalty as an “eye for an eye,” and would impose death if convicted.<sup>290</sup> This Court reasoned that the juror was not an “automatic death juror,” because he “had assured the court that he could listen to the evidence, follow the court’s instructions, and vote for a life sentence if the State failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors.”<sup>291</sup>

Thus, where a juror states that he or she could follow the court’s instructions, consider the evidence closely, and give fair consideration to life-sentencing options, he or she would not qualify as an “automatic death juror” under *Morgan*.<sup>292</sup>

Here, the trial court questioned Juror No. 82 on whether he would be able to follow the law, despite his views for or against the death penalty. Juror No. 82 indicated that he is for the death penalty, but he himself likely could not make the decision to sentence a person to death.<sup>293</sup> The trial court informed him that everyone is entitled to his or her own opinion concerning the death penalty, but the goal of voir dire was to determine if their views, either for or against, would prohibit him or her from being fair and impartial.<sup>294</sup>

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<sup>290</sup> *Trimble*, 122 Ohio St.3d at 308.

<sup>291</sup> *Id.* at 308, citing *State v. Jackson*, 107 Ohio St.3d 53, ¶ 40 (2005).

<sup>292</sup> *Trimble*, 122 Ohio St.3d at 308.

<sup>293</sup> *Tr. Voir Dire*, Vol. II, at 370.

<sup>294</sup> *Id.* at 368-372.

After the trial court concluded its explanation, Juror No. 82 indicated that he would follow the law.<sup>295</sup> In fact, Juror No. 82 indicated that while he favored the death penalty, he may hesitate to sentence a defendant to death. The record indicates that he was more beneficial to Appellant than the State. This explains why the State moved to have him excluded.<sup>296</sup>

When questioned by defense counsel, Juror No. 82 indicated that he was unfamiliar with the law, as most jurors are, concerning when a death sentence is appropriate.<sup>297</sup> But after the trial court's explanation, he indicated that he is now familiar with what the law requires before a person can be sentenced to death.<sup>298</sup>

This is precisely what voir dire is aimed to accomplish—educate the jurors and determine whether they are qualified to serve. The trial court merely explained that there is a difference between being morally or religiously opposed to the death penalty and simply being unable or unwilling to impose the death penalty upon another human being. While a natural and expected occurrence, the trial court explained that it was imperative to know whether they were able to follow the law, or whether their views would substantially impair their ability to serve as jurors.

Juror No. 82 stated that he would follow the law, despite having reservations about imposing the death penalty upon another person. Again, nothing in the record

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<sup>295</sup> *Id.* at 372.

<sup>296</sup> *Id.* at 394.

<sup>297</sup> *Id.* at 378.

<sup>298</sup> *Id.* at 378.

demonstrates that he was excludable under *Morgan*. Further, defense counsel did not request additional time to inquire into any of the prospective jurors in this group.<sup>299</sup>

**b.) Juror No. 110**

Appellant takes exception with the trial court's questioning of Juror No. 110. While Juror No. 110 stated that she could follow the law and would not automatically vote for death upon a conviction,<sup>300</sup> a prior experience involving her brother impacted her ability to serve as a juror in this case.<sup>301</sup> In fact, Juror No. 110 stated that she could not be fair and impartial, because of her brother's case.<sup>302</sup>

The Seventh District recognized that “[a] changed viewpoint after a juror learns the proper law does not indicate coercion.” *Adams*, supra at ¶ 180. Further, Juror No. 110 was later removed for cause, and did not sit on the jury that convicted Appellant.<sup>303</sup>

Therefore, the trial court did not abuse its discretion in removing Juror No. 110, because both the court and defense counsel agreed that Juror No. 110 could not be fair and impartial.

**c.) Juror No. 81**

Appellant contends that the trial court's limitation deprived him of an adequate opportunity to question Juror No. 81. With nothing more, Appellant contends that had he had more time, the record *may* reflect that she was a “*Morgan*-excludable.”

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<sup>299</sup> *Id.* at 393.

<sup>300</sup> *Id.* at 409.

<sup>301</sup> *Id.* at 417-418.

<sup>302</sup> *Id.* at 419.

<sup>303</sup> Tr. Voir Dire, Vol. III, at 444.

But, as Appellant concedes, the record does not establish that Juror No. 81 should have been excluded under *Morgan*. In fact, defense counsel did not even move to have her excluded for cause.<sup>304</sup>

When it was later revealed that Juror No. 81's husband was related to an employee of the Mahoning County Prosecutor's Office, defense counsel made no inquiry into her potential bias to remain on the venire.<sup>305</sup> Juror No. 81 was questioned in chambers and stated that the relationship had no effect of her ability to remain fair and impartial.<sup>306</sup> Both defense counsel and the State were satisfied with her responses, and no further inquiry was made.

Furthermore, during voir dire, defense counsel did not request additional time to inquire into any of the prospective jurors in this group. Simply, nothing in the record demonstrates that Juror No. 81 was a *Morgan*-excludable. And contending that additional time *may* have shown such bias is woefully inadequate for appellate review.

**d.) Juror No. 77**

Appellant contends that the trial court's limitation deprived him of an adequate opportunity to question Juror No. 77. And with additional time, perhaps the record *may* have reflected that Juror No. 77 was a *Morgan*-excludable.

But again, the record does not establish that Juror No. 77 was a *Morgan*-excludable, and merely contending that she *may* have been falls woefully short of his burden. Further, defense counsel did not request additional time to inquire into any of the

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<sup>304</sup> See Tr. Voir Dire, Vol. II, at 344-348.

<sup>305</sup> See Trial Tr., Vol. II, at 394.

<sup>306</sup> *Id.*

prospective jurors in this group,<sup>307</sup> which the Seventh District found that there was no indication that more time was needed.<sup>308</sup>

e.) **Juror No. 239**

Like Juror No. 81, Appellant contends that the trial court's limitation deprived him of an adequate opportunity to question Juror No. 239, and to explore her attitudes concerning the role of mitigating factors at sentencing.

Defense counsel specifically inquired into whether Juror No. 239 was an "automatic death juror," and whether she could fairly consider the mitigating factors presented.

**MR. MERANTO:** Now, what I'm asking you is, I guess, well, are you saying to me, well, once I find he purposely did it, that he's getting death?

**JUROR NO 239:** No.

**MR. MERANTO:** Okay. So you could listen to the mitigation and give it whatever weight you want?

**JUROR NO. 239:** Yes.<sup>309</sup>

Satisfied with her answers, defense counsel moved on to question Juror Nos. 92, 93, and 82, without finding the need to come back to Juror No. 239.

The record unequivocally demonstrates that Juror No. 239 was not a *Morgan*-excludable. And like with Juror No. 81, defense counsel passed for cause.<sup>310</sup> Further,

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<sup>307</sup> Tr. Voir Dire, Vol. II, at 344.

<sup>308</sup> *Adams*, supra at ¶ 164.

<sup>309</sup> Tr. Voir Dire, Vol. II, at 383.

<sup>310</sup> *Id.* at 394-397.

defense counsel did not request additional time to inquire into any of the prospective jurors in this group.<sup>311</sup>

**f.) Juror No. 218**

Like Juror No. 81, Appellant contends that the trial court's limitation deprived him of an adequate opportunity to question Juror No. 218. With nothing more, Appellant contends that had he had more time, the record *may* reflect that she was a "*Morgan-excludable*."<sup>312</sup>

Juror No. 218 indicated that she would vote for the death penalty if the State established beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors.<sup>313</sup> And alternatively, she indicated that she would impose a life sentence if the State failed to establish its burden beyond a reasonable doubt.<sup>314</sup> Further, Juror No. 218 had not learned of any underlying facts of the case before walking into court.<sup>315</sup>

There is nothing in the record that demonstrates that Juror No. 218 was or *may* be a *Morgan-excludable*. In fact, Juror No. 218 specifically stated that she would impose a life sentence if the State failed to establish its burden beyond a reasonable doubt, in that, the mitigating factors did not support a death sentence.<sup>316</sup>

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<sup>311</sup> *Id.* at 393.

<sup>312</sup> *See Morgan*, 504 U.S. at 719.

<sup>313</sup> Tr. Voir Dire, Vol. I, at 105.

<sup>314</sup> *Id.* at 128-129.

<sup>315</sup> *Id.* at 97-99.

<sup>316</sup> *Id.* at 128-129.

In fact, defense counsel passed for cause with respect to Juror No. 218,<sup>317</sup> and like above, did not request any additional time to inquire into any of the prospective jurors in this group.<sup>318</sup> The Seventh District properly recognized that “[m]erely because the court then told defense counsel that he had one minute left does not suggest that the defense did not get to sufficiently ask its final question. (Tr. 131). Contrary to appellant’s argument, there is no indication of insufficient time to voir dire this juror on whether she would automatically vote for death.”<sup>319</sup>

**g.) Juror No. 18**

Appellant contends that the trial court’s limitation deprived him of an adequate opportunity to question Juror No. 18 in determining if he was a *Morgan*-excludable.

Juror No. 18 indicated that the death penalty is not appropriate in all cases, and stated that self-defense was *one* example.<sup>320</sup> Juror No. 18 further stated that it would depend upon the evidence presented and the surrounding circumstances, meaning the aggravating circumstances and mitigating factors.<sup>321</sup>

Like *Trimble*, the record demonstrates that Juror No. 18 is not a *Morgan*-excludable. While Juror No. 18 initially indicated that he would vote for death upon a conviction,<sup>322</sup> he subsequently explained that he would consider a life sentence and stated

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<sup>317</sup> *Id.* at 135.

<sup>318</sup> *Id.* at 131-132.

<sup>319</sup> *Adams*, *supra* at ¶ 167.

<sup>320</sup> Tr. Voir Dire, Vol. I, at 158.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 169.

that a death sentence would not be automatic.<sup>323</sup> Juror No. 18's answers indicated that he would listen to the evidence, follow the court's instructions, and vote for a life sentence if the evidence supported it.<sup>324</sup>

In fact, defense counsel, "on his own accord without prompting by the court, counsel moved on to question Juror Number 17 and then Juror Number 228. (Tr. 171-172). There is no indication that the defense did not have adequate time to voir dire Juror 18."<sup>325</sup>

Finally, the Seventh District properly concluded that because the trial "court had already decided (with both sides' consent) to excuse Juror 18 for medical reasons. (Tr. 61-62)[,] his appearance "on the panel thereafter does not reveal some major flaw in the proceedings. He was later re-excused from the panel. (Tr. 753-755)."<sup>326</sup>

**h.) Juror No. 228**

Like Juror Nos. 81 and 218, Appellant contends that the trial court's limitation deprived him of an adequate opportunity to question Juror No. 228 in determining if she was a *Morgan*-excludable.

Juror No. 228's questionnaire and voir dire indicated that she was generally in favor of the death penalty. Juror No. 228, however, stated that she would be fair and impartial.<sup>327</sup>

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<sup>323</sup> *Id.* at 171.

<sup>324</sup> *See Trimble*, 122 Ohio St.3d at 308.

<sup>325</sup> *Adams*, supra at ¶ 163.

<sup>326</sup> *Id.*

<sup>327</sup> *Tr. Voir Dire*, Vol. I, at 141-143.

When the State inquired into whether the death penalty should be given in all aggravated murder cases, Juror No. 228 stated that a death sentence was not warranted in all cases.<sup>328</sup> And when questioned by defense counsel, she stated that she would consider a life sentence if the evidence supported one.<sup>329</sup> Juror No. 228 held firm to her statement that she would consider a life sentence if the evidence supported one, even after she was informed that there would be no evidence of any mental illness suffered by Appellant.<sup>330</sup>

Like above, there is nothing in the record that demonstrates that Juror No. 228 was or *may* be a *Morgan*-excludable. In fact, Juror No. 228 specifically stated that she would impose a life sentence if the evidence supported it.<sup>331</sup> Further, defense counsel passed for cause with respect to Juror No. 228,<sup>332</sup> and like above, did not request any additional time to inquire into any of the prospective jurors in this group, especially Juror No. 228.<sup>333</sup>

**i.) Juror No. 24**

Appellant contends that the trial court improperly removed Juror No. 24 following the State's challenge for cause under *Witherspoon*. Again, a trial court's ruling on a challenge for cause will not be disturbed absent an abuse of discretion.<sup>334</sup>

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<sup>328</sup> *Id.* at 161.

<sup>329</sup> *Id.* at 172-173.

<sup>330</sup> *Id.* at 173-175.

<sup>331</sup> *Id.* at 172-173.

<sup>332</sup> *Id.* at 188.

<sup>333</sup> *Id.* at 185.

<sup>334</sup> *See Wilson*, 29 Ohio St.2d at 211.

In *Witherspoon*, the Court held “that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”<sup>335</sup>

Justice Stewart, however, explained that a venireman may be excluded if they are “automatic life jurors,” or their views would impair their ability to decide the defendant’s guilt:

[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s *guilt*.<sup>336</sup> (Emphasis *sic*.)

Accordingly, “[a] prospective juror may be excused for cause if his views on capital punishment ‘would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”<sup>337</sup> This follows in-line with “the State’s legitimate interest in obtaining jurors who could follow their instructions and obey their oaths.”<sup>338</sup> And nothing in R.C. §2945.25(C) requires anything more.<sup>339</sup> Thus, the

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<sup>335</sup> *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); see *Adams v. Texas*, 448 U.S. 38, 43 (1980).

<sup>336</sup> *Witherspoon*, 391 U.S. at 522-523, fn. 21.

<sup>337</sup> *Trimble*, 122 Ohio St.3d at 310, quoting *Adams*, 448 U.S. at 45, and citing *State v. Bethel*, 110 Ohio St.3d 416, ¶ 118 (2006).

<sup>338</sup> *Adams*, 448 U.S. at 44.

<sup>339</sup> R.C. 2945.25(C).

State may “insist, \* \* \* that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.”<sup>340</sup>

First, Juror No. 24 was one of those few prospective jurors who actually knew many of the details surrounding Ms. Tenney’s death. This she learned from reading *The Vindicator*.<sup>341</sup> When asked how much she knew, Juror No. 24 answered, “[t]here were a lot of details about it, about the lady that was murdered, that she was \* \* \* a student at the University. \* \* \* That she was harassed and stalked and etcetera. That’s what I read. It was in the paper.”<sup>342</sup>

Second, when questioned about her views on the death penalty, she stated that she was against the death penalty.<sup>343</sup> As Appellant correctly points out, this alone is not enough to exclude her.

**THE COURT:**

Okay. Now, please try to answer this question yes or no. Even though you have an objection to the death penalty, if you are selected as a juror in this case, will you follow my instructions as judge and fairly consider the imposition of the sentence of death if it is appropriate in this case?

**JUROR NO. 24:**

Your Honor, I’m really against the death penalty.

**THE COURT:**

Okay. I understand. So your answer would be no?

**JUROR NO. 24:**

My answer would be no.

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<sup>340</sup> *Adams*, 448 U.S. at 45.

<sup>341</sup> Tr. Voir Dire, Vol. I, at 139.

<sup>342</sup> *Id.* at 140.

<sup>343</sup> *Id.* at 145.

**THE COURT:** If I instruct you to consider the death penalty, will you be able to consider the death penalty, will you be able to follow that instruction?

**JUROR NO. 24:** Honestly, no.

**THE COURT:** You have to talk louder for me, please.

**JUROR NO. 24:** Honestly, I don't think so.

The Court further inquired: “Will your views on the death penalty *prevent you or substantially impair your ability as a juror to be fair* -- to perform your duty in accordance with your oath and the law as I give it to you? (Emphasis added.)

**JUROR NO. 24:** I've never been on a jury before. *I would have to say yes.*<sup>344</sup> (Emphasis added.)

No less than four times did Juror No. 24 indicate that she could not follow the trial court's instructions, and her views would *substantially impair her ability* to perform her duties as a juror. This is precisely the type of juror—“automatic life juror”—that Justice Stewart stated may be excluded under *Witherspoon*.<sup>345</sup>

Therefore, the trial court did not abuse its discretion in excluding Juror No. 24 for cause as an “automatic life juror.”

**j.) Juror No. 232**

Appellant contends that Juror No. 232 was a *Morgan*-excludable, and the trial court abused its discretion in overruling Appellant's challenge for cause. Again, a

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<sup>344</sup> *Id.* at 146-147.

<sup>345</sup> *See Witherspoon*, 391 U.S. at 522-523, fn. 21.

*Morgan*-excludable is “a juror who will automatically vote for death without regard to mitigating factors.”<sup>346</sup>

For example, in *State v. Trimble*, this Court found no error in allowing a juror to remain despite the fact that he initially indicated that he viewed the death penalty as an “eye for an eye,” and would impose death if convicted.<sup>347</sup> This Court reasoned that the juror was not an “automatic death juror,” because he “had assured the court that he could listen to the evidence, follow the court’s instructions, and vote for a life sentence if the State failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors.”<sup>348</sup>

Further, a juror who indicates on his questionnaire that the death penalty is appropriate in every case in which someone has been murdered is not automatically invalidated under *Morgan*.<sup>349</sup> In *Fry*, this Court found that the juror was not an “automatic death juror,” because during individual voir dire, he indicated that “he would be able to set aside his views and decide the case on only the facts, the evidence, and the court’s instructions on the law.”<sup>350</sup> Under an ineffective assistance claim, the Court concluded that trial counsel would not have succeeded in challenging him for cause.<sup>351</sup>

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<sup>346</sup> *Fry*, 125 Ohio St.3d 163, 198, citing *Morgan*, 504 U.S. at 729.

<sup>347</sup> *Trimble*, 122 Ohio St.3d at 308.

<sup>348</sup> *Id.* citing *Jackson*, 107 Ohio St.3d at 53, ¶ 40

<sup>349</sup> *See Fry*, 125 Ohio St.3d 163, 198.

<sup>350</sup> *Id.* at ¶ 211.

<sup>351</sup> *Id.* at ¶ 212, citing *State v. Mundt*, 115 Ohio St.3d 22, ¶ 82 (2007).

Like in *Fry*, Juror No. 232 initially indicated that she believed in the death penalty, and it would be appropriate if the defendant purposely took another's life.<sup>352</sup> But when questioned by the prosecutor, she answered that she would not sentence him immediately to death upon a conviction for aggravated murder.<sup>353</sup> Further, she stated on two separate occasions that she would consider the mitigating factors that the defense presented, and hold the State to its burden of proof beyond a reasonable doubt.<sup>354</sup>

In comparison to *Fry* and *Trimble*, Juror No. 232 was not an "automatic death juror." During voir dire, she indicated that she would be able to set aside her views and decide the case on only the facts and evidence presented. She stated that she would not automatically vote for the death penalty, and would consider the mitigating factors presented by the defense, while holding the State to its burden of proof beyond a reasonable doubt.

Therefore, the trial court did not abuse its discretion in overruling Appellant's challenge for cause of Juror No. 232, as she was not an "automatic death juror."

**k.) Juror Nos. 55 and 233**

Appellant contends that the trial court abused its discretion when it *sua sponte* removed Juror Nos. 55 and 233 under *Witherspoon*.

**THE COURT:** You sign a verdict form and you come into court and it's read in open court. Could you sign that form?

**JUROR NO. 55:** No.

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<sup>352</sup> Tr. Voir Dire, Vol. I, at 227.

<sup>353</sup> *Id.* at 207.

<sup>354</sup> *Id.* at 206, 235.

**THE COURT:** Okay. Why is that?

**JUROR NO. 55:** I just couldn't. It would make me a nervous wreck. I can't do it.

**THE COURT:** I'm sorry?

**JUROR NO. 55:** I just can't do it.

**THE COURT:** Why? I'm curious as to why. Actually, I have to know why.<sup>355</sup>

**JUROR NO. 55:** I couldn't sentence him to death myself. I just could not.

**THE COURT:** All right. That's what I need to know. Thank you.

Okay. Juror No. 233, same thing, you're sitting in there, and if you believe that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, you have to sign a verdict form for death. Can you sign that?

**JUROR NO. 233:** No.<sup>356</sup>

The above colloquy demonstrates that Juror Nos. 55 and 233 were precisely the type of jurors—"automatic life juror"—that Justice Stewart stated may be excluded under *Witherspoon*.<sup>357</sup>

Therefore, the trial court did not abuse its discretion in *sua sponte* excusing Juror Nos. 55 and 233 for cause as "automatic life jurors" under *Witherspoon*.

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<sup>355</sup> *Id.* at 294.

<sup>356</sup> *Id.* at 295.

<sup>357</sup> See *Witherspoon*, 391 U.S. at 522-523, fn. 21.

I.) **The Trial Court Did Not Shift the Burden of Proof for Mitigation to the Defense.**

Contrary to Appellant's contention, the trial court did not shift the burden of proof from the State to the defense in regards to whether the aggravating circumstance outweighs the mitigating factors.

The trial court properly informed the prospective jurors that while the defense has the task of presenting mitigating evidence, the State was required to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors before a sentence of death may be imposed.

Here are some examples:

**THE COURT:** Death cases are special, there are special circumstances required called aggravating circumstances. Do you understand that?

**JUROR NO. 1:** Yeah.

**THE COURT:** Okay. Unless those are present and proved beyond a reasonable doubt to outweigh any mitigating circumstances, then there's no death penalty. Do you understand that?

**JUROR NO. 1:** I understand.<sup>358</sup>

\* \* \*

**THE COURT:** Okay. Now, as I told you briefly yesterday, it is a possibility in this case that you may be -- you may have to consider the death penalty, okay?

\* \* \*

And at that stage, there will be the possibility of the death penalty in that the

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<sup>358</sup> Tr. Voir Dire, Vol. I, at 101.

jury will hear - - well, you've already found the aggravating circumstance, which is that capital specification, then the defense has a right to put on what's called mitigating evidence, and it comes down to the jurors balance the aggravating circumstance against the mitigating factors rather, and if they believe the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, then they go to the death penalty, okay? If they don't, then there's other sentences.<sup>359</sup>

Here, Appellant takes issue with the following statement: "As I said at the beginning, if found guilty of the aggravated murder and the capital specification, we get to the sentencing phase. The aggravating circumstance, they're correct, is already there. It would be the capital specification. That's the aggravating circumstances. Then the burden is on the defense to give you mitigating factors and to persuade you to believe that death is not the appropriate penalty, okay?"<sup>360</sup>

The trial court was correct in that it is the defense's duty and obligation to present mitigating evidence to the jury during the penalty phase (assuming it gets there), and that mitigating evidence presented would be used by defense to persuade the jury that death is not the appropriate penalty for Appellant. This is nothing more than a correct statement of the law and duties of defense counsel. As Appellant concedes, if defense counsel failed

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<sup>359</sup> *Id.* at 144.

<sup>360</sup> Tr. Voir Dire, Vol. II, at 293-294; see R.C. 2929.03(D)(1), stating "The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."

to present *any* mitigating evidence whatsoever, the jury would be left with no other option but to impose a death sentence.

Therefore, the trial court did not shift the burden of proof from the State to the defense in regards to whether the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.<sup>361</sup>

**m.) Juror No. 237**

Appellant contends that the trial court abused its discretion in overruling his challenge of Juror No. 237 for cause. Individual group voir dire was solely directed at determining whether their exposure to pretrial publicity and their views on the death penalty qualified them for jury service in this case.

At the point in which Appellant moved to exclude Juror No. 237, the record did not demonstrate that he was unqualified to serve as a juror in this case. Juror No. 237 stated that Appellant was innocent until proven guilty, and that Appellant's arrest would not sway his opinion.<sup>362</sup> Further, when questioned by defense counsel, Juror No. 237 stated that he could set aside his personal opinions and decide the case on the law and the evidence.<sup>363</sup> Further, he would decide the case on the law given by the trial court.<sup>364</sup>

Therefore, the trial court did not abuse its discretion in overruling his challenge of Juror No. 237 for cause, because neither his exposure to pretrial publicity nor his views on the death penalty disqualified him from jury service in this case.

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<sup>361</sup> See *Adams*, supra at ¶¶ 181-184.

<sup>362</sup> Tr. Voir Dire, Vol. II, at 316.

<sup>363</sup> *Id.* at 335-336.

<sup>364</sup> *Id.* at 337.

n.) **Juror No. 34**

Appellant contends that Juror No. 34 was a *Morgan*-excludable, and the trial court abused its discretion in overruling Appellant's challenge for cause.

When questioned about the appropriateness of the death penalty, Juror No. 34 stated that it depends upon the evidence presented and what is proven.<sup>365</sup> Juror No. 34 clearly stated that death is not the appropriate penalty for every case in which aggravated murder is committed purposely.<sup>366</sup> And while Juror No. 34 stated that it may be warranted where an aggravated murder is committed, she explained that it still depends on the evidence presented.<sup>367</sup> Further, after considering the mitigating factors, she stated that she would vote for a life sentence if one is warranted.<sup>368</sup>

The fact that she does not know what mitigating factors could be presented does not make her a *Morgan*-excludable. Like in *Fry* and *Trimble*, Juror No. 34 stated that she would follow the law and consider the mitigating factors presented.<sup>369</sup>

Therefore, the trial court did not abuse its discretion in overruling Appellant's challenge for cause of Juror No. 34, as she was not an "automatic death juror."

To conclude, the trial court did not deprive Appellant of his due process right to a fair and impartial jury. The trial court did not abuse its discretion in limiting both the State and defense counsel to a reasonable inquiry into the jurors' exposure to pretrial

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<sup>365</sup> Tr. Voir Dire, Vol. I, at 200.

<sup>366</sup> *Id.* at 227.

<sup>367</sup> *Id.* at 228.

<sup>368</sup> *Id.* at 229.

<sup>369</sup> *Id.* at 229, 234.

publicity and their views on the death penalty. In fact, a thorough review of voir dire demonstrates that at no time did the trial court refuse defense counsel's requests for additional time for inquiry.

Therefore, the Seventh District "conclude[d] that the voir dire on pretrial publicity and death penalty views was not unreasonably limited in a manner that would constitute plain error or ineffective assistance of counsel. The time limits were reasonable. If a certain situation required a bit more time, counsel could have asked for more time due to a particular circumstance that arose regarding a particular juror. Where counsel did not, we presume counsel felt satisfied with the questioning."<sup>370</sup>

Appellant's first proposition of law is meritless and must be overruled.

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<sup>370</sup> *Adams*, supra at ¶ 174, citing *State v. Calhoun*, 86 Ohio St.3d 279, 289 (1999).

II. **Proposition of Law No. 2:** The Sixth and Fourteenth Amendments to the United States Constitution and Ohio Constitution Article I, Sections 5, 10, and 16 require that if the States charges a Defendant with a “principal offender” specification under R.C. 2929.04(A)(7), a separate specification for each felony must be alleged and proved, and more than one of the felonies described in that division of the statute may not be charged in the same capital specification.

**State’s Response to Proposition of Law No. 2:** Appellant was Afforded Due Process where the Aggravating Circumstance (Felony-Murder) was Structured in the Alternative in His Indictment; Because when a Jury Reaches a Unanimous Verdict, the Individual Jurors Need Not Agree on Which of the Alternative Bases Support Their Individual Findings.

As for Appellant’s second proposition of law, he contends that he was denied due process when the trial court instructed the jury in the alternative in regards to the aggravating circumstance (felony-murder) that attached to count one of the indictment. This Court, however, previously concluded “that when the jury unanimously reaches a verdict, the individual jurors need not agree on which of the alternative bases support their individual findings.”<sup>371</sup> Therefore, no plain error resulted.

A. **DEFENSE COUNSEL FAILED TO OBJECT TO THE INDICTMENT AND VERDICT FORM; THUS, THIS COURT MUST PROCEED UNDER A PLAIN ERROR ANALYSIS.**

Because Appellant failed to object to the trial court’s instructions and verdict forms,<sup>372</sup> this Court must proceed under a plain error analysis pursuant to Criminal Rule 52(B).<sup>373</sup> “To prevail under the plain error doctrine, a defendant must demonstrate that,

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<sup>371</sup> *State v. Johnson*, 112 Ohio St.3d 210, 219 (2006), citing *State v. Skatzes*, 104 Ohio St.3d 195, ¶ 55 (2004), following *Schad v. Arizona*, 501 U.S. 624 (1991).

<sup>372</sup> *See, e.g.*, Trial Tr., Vol. I, at 22; Vol. IV, at 627.

<sup>373</sup> *See State v. Bailey*, 7<sup>th</sup> Dist. No. 06 JE 22, 2007 Ohio 4995, ¶ 8.

but for the error, the outcome of trial clearly would have been different.”<sup>374</sup> Thus, “[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”<sup>375</sup>

**B. PLAIN ERROR DID NOT RESULT FROM THE JURY’S VERDICT, BECAUSE THE INDIVIDUAL JURORS NEED NOT AGREE ON WHICH OF THE ALTERNATIVE BASES—UNDERLYING FELONY—SUPPORT THEIR INDIVIDUAL FINDINGS.**

Specific to the Felony-Murder Specification, Appellant was indicted and the jury was instructed in the alternative in regards to the underlying felonies:

The Defendant is charged with aggravated murder. Before you can find the Defendant Bennie Adams guilty, you must find beyond a reasonable doubt, that on or about December 29, 1985, in Mahoning County, Ohio, the Defendant purposely caused the death of Gina Tenney while committing, attempting to commit or fleeing immediately after committing or attempting to commit the offenses of rape, aggravated burglary, aggravated robbery or kidnapping.<sup>376</sup>

The trial court further instructed the jury on the individual definitions of each underlying felony: rape;<sup>377</sup> aggravated burglary;<sup>378</sup> aggravated robbery;<sup>379</sup> and kidnapping.<sup>380</sup>

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<sup>374</sup> *Id.*, citing *State v. Stojetz*, 84 Ohio St.3d 452, 455 (1999), citing *State v. Long*, 53 Ohio St.2d 91 (1978).

<sup>375</sup> *Long*, 53 Ohio St.2d at 97.

<sup>376</sup> Trial Tr., Vol. IV, at 749-750.

<sup>377</sup> *Id.* at 752-754.

<sup>378</sup> *Id.* at 755-758.

<sup>379</sup> *Id.* at 758-762.

<sup>380</sup> *Id.* at 762-763.

In *State v. Johnson*, the defendant was charged and convicted in a nearly identical fashion to the one here:

Both the charge and specification alleged that Johnson committed the murder “while” committing or “while” fleeing after committing other felonies. The trial court instructed the jury in this regard that the term “while” means that “the death must occur as part of acts leading up to or occurring during or immediately after the commission of kidnapping, rape, aggravated robbery and the death was directly associated with the commission of the kidnapping, rape or aggravated robbery or flight immediately after the commission of those crimes.”<sup>381</sup> (Emphasis sic.)

Like Appellant, Johnson argued that because the trial court instructed the jury in the alternative, it cannot be determined which underlying felony was associated with the aggravated murder. Also like Appellant, Johnson failed to object at trial.<sup>382</sup>

In *Johnson*, this Court stated that it rejected a similar argument in *State v. Skatzes*.<sup>383</sup> In *Skatzes*, the trial court instructed the jury on the five alternative purposes contained in the kidnapping statute, but did not instruct the jury to reach a unanimous verdict as to which of those alternative purposes was the basis for each kidnapping charge.<sup>384</sup> This Court found no error and concluded that “when the jury unanimously reaches a verdict, the individual jurors need not agree on which of the alternative bases support their individual findings.”<sup>385</sup>

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<sup>381</sup> *Johnson*, 112 Ohio St.3d at 219.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*, citing *Skatzes*, 104 Ohio St.3d at 195, ¶¶ 51-53.

<sup>384</sup> *Johnson*, 112 Ohio St.3d at 219, citing *Skatzes*, 104 Ohio St.3d at 205.

<sup>385</sup> *Id.*, following *Schad*, 501 U.S. at 624.

In support, this Court relied upon the U.S. Supreme Court's opinion in *Schad v. Arizona*.<sup>386</sup> In *Schad*, the defendant was convicted of first-degree murder after the State presented alternative theories of premeditated murder and felony-murder to the jury.<sup>387</sup> The jury was not required (through its instructions) to unanimously find the defendant guilty on one of those alternative theories of guilt.<sup>388</sup> "The *Schad* court found that different mental states of moral and practical equivalence (premeditated and felony murder) may serve as alternative means to satisfy the mens rea element for the single offense of murder, without infringing upon the constitutional rights of the defendant."<sup>389</sup>

In *Schad*, the U.S. Court explained:

We have never suggested that in returning general verdicts in [cases proposing multiple theories] the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."<sup>390</sup>

Here, the bottom line is that the jury unanimously agreed that Appellant purposely caused the death of Gina Tenney while committing a felony—aggravated felony-murder. Thus, no plain error resulted from the trial court's instructions or subsequent verdict.

Appellant's second proposition of law is meritless and must be overruled.

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<sup>386</sup> *Skatzes*, 104 Ohio St.3d at 205, following *Schad*, 501 U.S. at 624.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> *Skatzes*, 104 Ohio St.3d at 205-206, quoting *Schad*, 501 U.S. at 631-632, quoting *McKoy v. N. Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring).

**III. Proposition of Law No. 3:** It Violates the Eighth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 9, and 16 to uphold a sentence of death when an independent weighing of the aggravating circumstance versus the mitigating factors demonstrates that the aggravating circumstance does not outweigh the mitigating factors beyond any reasonable doubt, and that death is not the appropriate sentence.

**State's Response to Proposition of Law No. 3:** This Court's Independent Review of Appellant's Sentence Demonstrates that the Aggravating Circumstance Outweighs the Mitigating Factors Beyond a Reasonable Doubt; Therefore, Appellant's Death Sentence is Appropriate.

As for Appellant's third proposition of law, he contends that an independent review of his sentence demonstrates that the aggravating circumstance does not outweigh the mitigating factors beyond a reasonable doubt. To the contrary, this Court's independent review demonstrates that the aggravating circumstance does outweigh the mitigating factors beyond a reasonable doubt. Therefore, Appellant's death sentence is appropriate and must stand.

**A. THIS COURT MUST INDEPENDENTLY REVIEW APPELLANT'S DEATH SENTENCE BY WEIGHING THE AGGRAVATING CIRCUMSTANCE AGAINST THE MITIGATING FACTORS PRESENTED.**

This Court must independently determine if Appellant's death sentence is the appropriate punishment.<sup>391</sup> Therefore, this Court must independently determine if the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt.<sup>392</sup>

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<sup>391</sup> R.C. 2929.05(A).

<sup>392</sup> See *Trimble*, 122 Ohio St.3d at 333.

1. **THE AGGRAVATING CIRCUMSTANCE (FELONY MURDER) OUTWEIGHS THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT.**

a.) **Mitigating Factors**

Against the aggravating circumstance, Appellant presented the testimony of six witnesses to establish the existence of mitigating factors pursuant to R.C. §2929.04(B).

i.) **Lula Adams**

Lula Adams, Appellant's mother, testified that Appellant was born on July 14, 1957, in Diamond, Ohio.<sup>393</sup>

Appellant's father was not active in his life, because he served overseas in Germany for the United States Army.<sup>394</sup> Later, while overseas, Appellant's father met another woman whom he later married.<sup>395</sup>

In November 1957, when Appellant's father left for overseas, Appellant and his mother moved to Tuskegee, Alabama to be with Lula Adams' family, including her parents.<sup>396</sup>

Lula Adams left Tuskegee in 1959 to take a job in New York as a live-in domestic house servant.<sup>397</sup> Appellant remained in Alabama, because she could not take him with

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<sup>393</sup> Sent. Phase Tr., at 34.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 35.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

her.<sup>398</sup> It wasn't until Appellant was nine-years-old that he joined his mother in New York.<sup>399</sup> In 1973, Appellant moved back to Ohio with his mother.<sup>400</sup>

Appellant was incarcerated from 1986 until April 21, 2004.<sup>401</sup> Ms. Adams testified that Appellant changed after he was released from prison—"He became a man."<sup>402</sup>

For instance, Appellant worked at Astro Shapes in Struthers.<sup>403</sup> Appellant helped take care of his mother, by paying some of her bills and giving her spending money.<sup>404</sup> Appellant would drive his mother to the doctors, and cared for her when she had knee surgery.<sup>405</sup> Appellant also would take his uncle to the doctor or to the store when he needed a ride.<sup>406</sup>

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<sup>398</sup> *Id.*

<sup>399</sup> *Id.* at 36.

<sup>400</sup> *Id.* at 37-38. Appellant had lived briefly in Alabama in 1972, but moved to Ohio with his mother.

<sup>401</sup> *Id.* at 38-39.

<sup>402</sup> *Id.* at 42.

<sup>403</sup> *Id.* at 40.

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 41.

ii.) Lowrine Charlton

Lowrine Charlton, had a previous relationship with Appellant, and has known Appellant for thirty-five years.<sup>407</sup> Ms. Charlton lived across the street from Appellant.<sup>408</sup>

In 1976, Appellant and Ms. Charlton had a daughter together—Trusha Taniki Charlton.<sup>409</sup>

Ms. Charlton testified that Appellant always loved his daughter, spent time with her, and was protective of her.<sup>410</sup> Appellant was in and out of trouble during those early days, but Ms. Charlton was used to it.<sup>411</sup> Before Appellant was incarcerated, he worked at one of the mills, but did not work there long.<sup>412</sup>

When Appellant was released in 2004, he stayed with Ms. Charlton, Trusha, and his grandchildren.<sup>413</sup> Ms. Charlton testified that Appellant “was a whole different person when he came home.”<sup>414</sup>

While in prison, she stated that Appellant was concerned that his only grandson stayed out of trouble and did not become a follower.<sup>415</sup> She described Appellant as a positive influence in his grandchildren’s lives.<sup>416</sup>

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<sup>407</sup> *Id.* at 49.

<sup>408</sup> *Id.* at 50.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* at 51.

<sup>411</sup> *Id.* at 52.

<sup>412</sup> *Id.* at 65.

<sup>413</sup> *Id.* at 55.

<sup>414</sup> *Id.* at 56.

iii.) Jack Mumma

Jack Mumma, an adjunct professor with Marion Technical College, taught computer classes at Marion Correctional Institution from 1989 until 2000.<sup>417</sup> Mr. Mumma met Appellant in late 1995 to early 1996.<sup>418</sup>

While incarcerated at Marion Correctional, Appellant attended the college program for nine quarters, made the Dean's List each quarter, and graduated as the class valedictorian.<sup>419</sup>

Mr. Mumma testified that a prison setting is difficult to succeed as a student because of the "pandemonium" inside.<sup>420</sup> "So a guy to excel inside as a student is either a good cheat, or he's an excellent student."<sup>421</sup> Mr. Mumma described Appellant as "an excellent student, one of the best ones I ever encountered."<sup>422</sup>

Appellant earned two one-year certificates in business management, which could be transferred to any college that Appellant would later attend.<sup>423</sup>

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<sup>415</sup> *Id.* at 57.

<sup>416</sup> *Id.* at 59.

<sup>417</sup> *Id.* at 67-68.

<sup>418</sup> *Id.* at 69.

<sup>419</sup> *Id.* at 72. To qualify for the college program, an inmate had to be scheduled for release or a Parole Board hearing within five years. *Id.* at 70-71. Class sizes averaged fourteen to sixteen students; sometimes less than ten, or more than twenty. *Id.* at 74.

<sup>420</sup> *Id.* at 72.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.* at 73.

<sup>423</sup> *Id.* at 73-74.

Mr. Mumma employed four inmates to help run the program at the institution, and this included Appellant.<sup>424</sup> Appellant worked as a tutor and helped the other instructors.<sup>425</sup>

iv.) Patricia Olsen

Patricia Olsen began teaching communication classes at Marion Correctional Institution in January 1999.<sup>426</sup> Ms. Olsen taught inmates how to read, write, and communicate.<sup>427</sup>

Ms. Olsen met Appellant when he worked as an aid in the program.<sup>428</sup> Ms. Olsen testified that of the five state institutions that she previously worked, Appellant was the best clerk (aid) she had seen.<sup>429</sup>

Appellant later became involved in the Horizon Dorm program, which was a faith-based program that allowed the inmates to live in a dormitory setting.<sup>430</sup> Appellant was chosen in the first group of the program, and upon completion, Appellant was asked to come back and serve as a mentor to new in-coming students.<sup>431</sup>

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<sup>424</sup> *Id.* at 75.

<sup>425</sup> *Id.* at 76.

<sup>426</sup> *Id.* at 90. Ms. Olsen earned a Ph.D. in interpersonal communication from Bowling Green State University, and an undergraduate degree from Bowling Green State University. *Id.* at 89-90.

<sup>427</sup> *Id.* at 90-91.

<sup>428</sup> *Id.* at 91.

<sup>429</sup> *Id.* at 92.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at 93.

On cross-examination, Ms. Olsen stated that Appellant had one infraction that involved a female employee.<sup>432</sup>

Further, Ms. Olsen admitted that she was no longer allowed to work inside any state correctional institutions, because she violated an institutional rule. The incident involved an inmate's mail that she smuggled out of the facility and mailed it to his mother.<sup>433</sup>

**v.) Robert O'Malley**

Robert O'Malley is employed by the Ohio Adult Parole Authority.<sup>434</sup>

Mr. O'Malley was Appellant's parole officer when he was released from prison in 2004. He supervised Appellant for two years, after which, Appellant was released from parole supervision. Appellant never had any problems while on parole.<sup>435</sup>

Mr. O'Malley testified that employment was a condition of Appellant's parole guidelines, and the failure to obtain and maintain employment may have been a violation of his parole.<sup>436</sup>

**vi.) Trusha Charlton**

Trusha Charlton is Appellant's thirty-one year-old daughter.<sup>437</sup> Appellant went to prison when Trusha was ten years old. While incarcerated, Appellant would call her

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<sup>432</sup> *Id.* at 102.

<sup>433</sup> *Id.* at 104-105.

<sup>434</sup> *Id.* at 108.

<sup>435</sup> *Id.* at 109.

<sup>436</sup> *Id.* at 111-112.

<sup>437</sup> *Id.* at 114.

house, and send letters and birthday cards. Appellant never missed a birthday or Christmas.<sup>438</sup>

Ms. Charlton testified that Appellant was a positive role model, as he encouraged her to graduate from high school.<sup>439</sup> After he was released, Appellant helped Ms. Charlton find and purchase a house, and aided her in that process.<sup>440</sup> Ms. Charlton lived with her father, who paid the mortgage and taxes for the house.<sup>441</sup> Appellant made sure his grandchildren got onto the bus in the morning. Appellant encouraged Antwain, Ms. Charlton's only son, to be a leader, not a follower, and to be his own person.<sup>442</sup>

**b.) Aggravating Circumstance**

Appellant was convicted of one Death Specification—R.C. §2929.04(A)(7) (Felony-Murder). Thus, the jury was to consider this as one aggravating circumstance. The Supreme Court of Ohio has previously stated that even if a jury considers multiple aggravating circumstances when it should not have, the reviewing court's independent review cures the alleged error.<sup>443</sup>

Here, the evidence at trial established beyond a reasonable doubt that on or about December 29, 1985, Appellant purposely caused the death of Gina Tenney while committing, attempting to commit or fleeing immediately after committing or attempting

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<sup>438</sup> *Id.* at 116.

<sup>439</sup> *Id.* at 117.

<sup>440</sup> *Id.* at 118-120.

<sup>441</sup> *Id.* at 121.

<sup>442</sup> *Id.* at 122.

<sup>443</sup> *See Johnson*, 112 Ohio St.3d at 215.

to commit the offenses of rape, aggravated burglary, aggravated robbery, or kidnapping; and that Appellant was the principal offender in the commission of the aggravated murder of Gina Tenney.<sup>444</sup>

Therefore, this Court's independent review must demonstrate that the aggravating circumstance does outweigh the mitigating factors beyond a reasonable doubt. Therefore, Appellant's death sentence is appropriate and must stand.<sup>445</sup>

2. **APPELLANT'S DEATH SENTENCE IS PROPORTIONATE TO OTHER CASES IN WHICH THE DEATH PENALTY WAS IMPOSED.**

The Seventh District properly concluded that Appellant's death sentence was proportionate to other cases in which the death penalty was previously imposed.<sup>446</sup>

Appellant's third proposition of law is meritless and must be overruled.

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<sup>444</sup> R.C. 2929.04(A)(7).

<sup>445</sup> See *Adams*, supra at ¶ 358.

<sup>446</sup> *Id.* at ¶¶ 362-365, citing *State v. Eley*, 77 Ohio St.3d 174 (1996), *State v. Spivey*, 81 Ohio St.3d 405 (1998), *State v. Twyford*, 94 Ohio St.3d 340 (2002), *State v. Dixon*, 101 Ohio St.3d 328 (2004), and *State v. Mason*, 82 Ohio St.3d 144 (1998).

- IV. **Proposition of Law No. 4:** Warrantless Seizure of Items without consent and when a warrant could have been obtained violates the Fourth and Fourteenth Amendments to the U.S. Constitution, Article I, Sections 2, 14, and 16.

**State's Response to Proposition of Law No. 4:** Competent and Credible Evidence Supported the Trial Court's Decision to Overrule Appellant's Motion to Suppress the Items Found in His Apartment, Because they were Searched and Seized Incident to a Lawful Arrest.

As for Appellant's fourth proposition of law, he contends that the warrantless search of his apartment violated his Fourth and Fourteenth Amendment rights prohibiting unreasonable searches and seizures. To the contrary, the items found in Appellant's coat were searched and seized incident to a lawful arrest. Therefore, competent and credible evidence supported the trial court's decision to overrule Appellant's motion to suppress.

A. **ONLY IF THIS COURT FINDS THAT  
COMPETENT AND CREDIBLE EVIDENCE DID NOT  
SUPPORT THE COURT'S DENIAL OF APPELLANT'S  
MOTION TO SUPPRESS, MAY THIS COURT REVERSE.**

In reviewing a motion to suppress, an appellate court asks whether competent, credible evidence supports the trial court's conclusion.<sup>447</sup> According to Ohio courts, this standard is appropriate because "in a hearing on a motion to suppress evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses."<sup>448</sup> Notwithstanding, once a reviewing

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<sup>447</sup> See *State v. Sharpe*, 7<sup>th</sup> Dist. No. 99 CA 510, 2000 WL 875342, \*2, citing *State v. Lloyd*, 116 Ohio App.3d 95, 100 (7<sup>th</sup> Dist. 1998); *State v. Winand*, 116 Ohio App.3d 286, 288 (7<sup>th</sup> Dist. 1996), citing *Tallmadge v. McCoy*, 96 Ohio App.3d 604, 608 (9<sup>th</sup> Dist. 1994).

<sup>448</sup> *Sharpe*, supra at \*2, quoting *State v. Hopfer*, 112 Ohio App.3d 521, 548 (2<sup>nd</sup> Dist. 1996), citing *State v. Venham*, 96 Ohio App.3d 649, 653 (4<sup>th</sup> Dist. 1994); Fourth Amendment to the U.S. Constitution.

court accepts those facts as true, it must determine independently, as a matter of law and without specific deference to the trial court's conclusion, whether the trial court met the applicable legal standard.<sup>449</sup> Further, "[a] trial court's decision on a motion to suppress will not be disturbed when it is supported by substantial credible evidence."<sup>450</sup>

**B. ABSENT A WELL-RECOGNIZED EXCEPTION, A WARRANTLESS SEARCH OR SEIZURE IS PER SE UNREASONABLE.**

"Both the Fourth Amendment to the U.S. Constitution and Section 14, Article I of the Ohio Constitution require government officials to procure a warrant based on probable cause prior to conducting searches and seizures."<sup>451</sup> Thus, warrantless searches have been held to be per se unreasonable, absent one of the well-recognized exceptions to the warrant requirement.<sup>452</sup> Accordingly, a trial court must "exclude all evidence seized in violation of the Fourth Amendment."<sup>453</sup>

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<sup>449</sup> *State v. Doss*, 8<sup>th</sup> Dist. No. 80365, 2002 Ohio 3103, ¶ 8; *see also Sharpe*, supra at \*2.

<sup>450</sup> *State v. Thomas*, 7<sup>th</sup> Dist. No. 07 JE 43, 2008 Ohio 6595, ¶ 15, citing *State v. Rice*, 129 Ohio App.3d 91, 94 (7<sup>th</sup> Dist. 1998).

<sup>451</sup> *Sharpe*, supra at \*3.

<sup>452</sup> *Id.*, citing *Katz v. United States*, 389 U.S. 347, 357 (1967); *accord State v. Blandon*, 7<sup>th</sup> Dist. No. 07 MA 3, 2008 Ohio 1064, ¶ 9.

<sup>453</sup> *State v. Walker*, 7<sup>th</sup> Dist. No. 03 MA 238, 2004 Ohio 5790, ¶ 12, citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

1. **A SEARCH INCIDENT TO A  
LAWFUL ARREST IS ONE SUCH  
EXCEPTION TO THE WARRANT REQUIREMENT.**

One such exception to the warrant requirement is a search incident to a lawful arrest.<sup>454</sup> In *Chimel v. California*, the U.S. Supreme Court defined the limitations to a search incident to arrest:

In *Chimel*, we held that a search incident to arrest may only include “the arrestee’s person and the area ‘within his immediate control’-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. (noting that searches incident to arrest are reasonable “*in order to remove any weapons [the arrestee] might seek to use*” and “*in order to prevent [the] concealment or destruction*” of evidence. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.<sup>455</sup> (Emphasis sic.)

The purpose of a search incident to an arrest is to allow law enforcement officers to discover and remove weapons, and seize evidence to prevent its destruction.<sup>456</sup> Therefore, a search incident to a lawful arrest is not only an exception to the warrant requirement, but is a reasonable search under the Fourth Amendment.<sup>457</sup>

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<sup>454</sup> *Arizona v. Gant*, 129 S.Ct. 1710, 1716 (2009), citing *Weeks v. United States*, 232 U.S. 383, 392 (1914); accord *Chimel v. California*, 395 U.S. 752 (1969); see also *State v. Matthews*, 46 Ohio St.2d 72 (1976).

<sup>455</sup> *Gant*, 129 S.Ct. at 1716, citing *Chimel*, 395 U.S. at 763, and *Preston v. United States*, 376 U.S. 364, 367-368 (1964). (Internal citations omitted.)

<sup>456</sup> *Id.*

<sup>457</sup> *United States v. Robinson*, 414 U.S. 218 (1973); see also *Matthews*, 46 Ohio St.2d at 72.

a.) **The Warrantless Search of Appellant's Coat was a Proper Search Incident to Horace Landers' Lawful Arrest.**

On December 30, 1985, following the discovery of Gina Tenney's body in the Mahoning River, Det. Blanchard and other officers responded to her apartment, 2234 Ohio Avenue, in Youngstown, Ohio.<sup>458</sup> The house was a duplex in which Gina lived in the second floor apartment. The outer door was locked, but Appellant, who lived downstairs, opened the outer door, and allowed the officers to proceed upstairs.<sup>459</sup>

Upon finding Gina's door locked, the officers proceeded back downstairs.<sup>460</sup> The officers knocked on the door to the first floor apartment and Appellant answered. The officers asked for permission to use the telephone and Appellant consented.<sup>461</sup> Appellant stated that he was home alone.<sup>462</sup> The officers entered the apartment to use the telephone.<sup>463</sup> After a few minutes, they heard noises coming from the back room. Upon

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<sup>458</sup> Motions Hearing Transcript, September 19, 2008, before the Honorable Timothy E. Franken, (hereinafter "Motions Hrg."), at 3-4.

<sup>459</sup> *Id.* at 4.

<sup>460</sup> *Id.*

<sup>461</sup> One of the officers knew the landlord, because he used to live in that duplex when he was first married. *Id.* at 4-5.

<sup>462</sup> *Id.* at 5.

<sup>463</sup> Det. Blanchard's use of the telephone was not a ruse to gain entry into the apartment. *Id.* at 10. The trial court found this to be credible and even stated so in its judgment entry. Judgment Entry, filed September 22, 2008.

hearing the noises, Appellant stated "I never said he wasn't there," even though he previously told the officers that no one else was present.<sup>464</sup>

The officers searched the back bedroom for their own safety:

**DET. BLANCHARD:** The safety issue, yeah, perhaps there was someone in that room with a firearm and they would have burst out and shot myself or Landers or Campana. You don't know. I know you've probably never been in that situation --

**MR. MERANTO:** Thank God.

**DET. BLANCHARD:** So in this case we decided to err on the side of safety. We wanted to know what was in that room, is there someone in that room, were they a threat to us.<sup>465</sup>

This is on the heels of Appellant lying to the officers that no one else was present.<sup>466</sup>

Upon searching, the officers located Horace Landers hiding in a back bedroom.<sup>467</sup>

Lander was shirtless. The officers knew Landers had an open warrant for his arrest, so

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<sup>464</sup> *Id.* at 5. The obvious conclusion is that Appellant was concealing or hiding someone from the officers.

<sup>465</sup> *Id.* at 12-13.

<sup>466</sup> Appellant claims that police "had no license to investigate" the disturbance. Appellant's Merit Brief, at 118. Actually, police do have the authority to investigate. This is especially true in light of Appellant lying to them. As evident from Detective Blanchard's testimony, they were afraid for their safety. A conclusion that the trial court apparently agreed with. Moreover, Appellant does not have standing to challenge Landers' arrest, which Appellant appears to agree with. In his brief, Appellant concedes that "Appellant may have lacked standing to challenge the legality of Landers arrest, but did have standing" to challenge the ensuing the search. Appellant's Merit Brief, at 102, fn. 28. Thus, the issue is not the legality of the arrest, but the legality of the ensuing search, which is discussed below.

<sup>467</sup> Motions Hrg. at 5. The Seventh District concluded that the officers' actions were proper under the protective sweep exception to the warrant requirement. See *Adams*, supra at ¶¶ 38-41.

they placed him under arrest.<sup>468</sup> Det. Blanchard, knowing “it was the middle of winter” and “that he would have to go outside,” picked up a shirt that was on the bed and draped it over Landers’ shoulders. Within three to four feet of where Landers was standing, was a coat on the floor.<sup>469</sup>

Det. Blanchard picked up the coat “because my intention was to drape it over his shoulders to provide a little more warmth when we took him outside.”<sup>470</sup> Prior to placing the coat on Landers’ shoulders, Det. Blanchard felt something in the pocket.<sup>471</sup> Although he did not know what he felt, Det. Blanchard thought the item could be a weapon and has, in fact, seen weapons (i.e., knives) during his career that were the size of credit cards.<sup>472</sup> He reached in the pocket and pulled out Gina’s ATM card and Appellant’s welfare card.<sup>473</sup>

As Det. Blanchard was pulling out the cards, he simultaneously asked Landers, “Is this your coat?”<sup>474</sup> Landers replied that the coat belonged to Appellant.<sup>475</sup> At the same

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<sup>468</sup> Motions Hrg. at 5.

<sup>469</sup> *Id.*

<sup>470</sup> *Id.* at 6.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.* at 29.

<sup>473</sup> *Id.* at 6.

<sup>474</sup> *Id.* at 24, 27.

<sup>475</sup> *Id.* at 30.

time, the cards were identified as belonging to Gina and Appellant. At which point, Appellant was arrested.<sup>476</sup>

Here, Appellant contends that the search of his coat was not incident to arrest because Landers was already under arrest. To the contrary, as the trial court properly concluded, "It is reasonable that a police officer search an article of clothing that he intended to place on an arrestee."<sup>477</sup> The trial court's conclusion is consistent with case law set forth in *State v. Elkins*, where the police arrested the defendant for criminal trespass.<sup>478</sup>

In *Elkins*, after the defendant was arrested and removed from the residence, one officer went back into the bedroom where he was arrested and retrieved a jacket for him to wear to the station. The officer checked the coat for weapons and/or evidence (i.e. search incident to arrest) and found a handgun. The defendant was then charged with carrying a concealed weapon and later convicted. On appeal, the Eighth District held:

The police clearly had a right to search appellant's jacket as he needed it to wear in the cold weather when the police transported him to the police station. Thus, the search of the jacket was a valid search incident to an arrest.<sup>479</sup>

The search in *Elkins* was even further removed from the search in our case, yet it was still upheld, because the search incident to the arrest extended to an article of clothing that would accompany the defendant to the police station.

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<sup>476</sup> *Id.* at 31.

<sup>477</sup> Judgment Entry, filed September 22, 2008.

<sup>478</sup> *State v. Elkins*, 8<sup>th</sup> Dist. No. 47319, 1984 WL 5453 (April 5, 1984).

<sup>479</sup> *Id.* at \*2, citing *Chimel*, 395 U.S. at 752.

Here, Det. Blanchard testified that the coat was within three to four feet of Landers and “was within his lunge area or wing-span area.”<sup>480</sup> Therefore, the officers acted accordingly in searching the coat prior to placing it on Landers.

Furthermore, the independent source rule permits the use of evidence obtained from means entirely independent of any constitutional violation.<sup>481</sup> The inevitable discovery rule permits the use of evidence that ultimately or inevitably would have been discovered by lawful means.<sup>482</sup>

Subsequent to Appellant’s arrest, the officers obtained consent to search from Adena Fidelia, the person who rented the apartment. The consent was obtained less than a half hour later.<sup>483</sup> Prior to obtaining the consent, the officers had only the ATM card and welfare card in their possession.<sup>484</sup> During the ensuing search, the officers located several other pieces of evidence.<sup>485</sup>

Therefore, the search of Appellant’s coat was incident to Horace Landers’ lawful arrest—a valid exception to the Fourth Amendment’s warrant requirement.

Appellant’s fourth proposition of law is meritless and must be overruled.

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<sup>480</sup> Motions Hrg. at 5-6.

<sup>481</sup> See *State v. Perkins*, 18 Ohio St.3d 193, 194 (1985), citing *Kastigar v. United States*, 406 U.S. 441 (1972); see also *Wong Sun v. United States*, 371 U.S. 471, 487 (1963), citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

<sup>482</sup> See *Nix v. Williams*, 467 U.S. 431, 444 (1984).

<sup>483</sup> Motions Hrg. at 34.

<sup>484</sup> *Id.* at 36.

<sup>485</sup> Appellant stipulated at the hearing that the ensuing search was proper and did not seek to suppress those items. *Id.* at 7.

- V. **Proposition of Law No. 5:** A twenty two year delay in prosecution when the state discovers no new evidence violates the freedoms protected by the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

**State's Response to Proposition of Law No. 5:** The Trial Court Properly Overruled Appellant's Motion to Dismiss for Undue Delay; Because Appellant Did Not Suffer Substantial Prejudice, and the Prosecution's Delay was not to Gain a Tactical Advantage.

As for Appellant's fifth proposition of law, he contends that the twenty-two year period between the offense and the indictment constituted an undue delay. To the contrary, Appellant was not prejudiced by the delay, and the reason for the delay was not to gain a tactical advantage over him. Therefore, the trial court properly overruled Appellant's motion to dismiss for undue delay.

A. **TO SUSTAIN A MOTION TO DISMISS FOR UNDUE DELAY, A CRIMINAL DEFENDANT MUST SHOW THAT THE DELAY CAUSED SUBSTANTIAL PREJUDICE AND WAS INTENTIONALLY DONE TO GAIN A TACTICAL ADVANTAGE OVER HIM.**

The Sixth Amendment right to a speedy trial does not occur until a defendant becomes an "accused," either by arrest, indictment, information, or some other charging instrument.<sup>486</sup> Neither the framers, the legislature, the U.S. Supreme Court, nor reviewing courts, have "reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where pre-indictment delay was involved."<sup>487</sup>

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<sup>486</sup> *United States v. Marion*, 404 U.S. 307, 313 (1971).

<sup>487</sup> *Id.* at 315-317.

Rather, the applicable statute of limitations is the primary guarantee to ensure the government brings the charges in a timely manner.<sup>488</sup>

Additionally, the possibility of prejudice at trial is not a sufficient reason to apply the Sixth Amendment to pre-indictment delay, as “[p]ossible prejudice is inherent in any delay, however short; it may also weaken the Government’s case.”<sup>489</sup>

Thus, pursuant to the Fifth Amendment’s Due Process Clause, dismissal of an indictment based on pre-indictment delay is required only if: (1) the delay caused substantial prejudice to a defendant’s right to a fair trial; and (2) the delay was an intentional device used to gain a tactical advantage over the defendant.<sup>490</sup>

1. **APPELLANT DID NOT SUFFER ANY SUBSTANTIAL PREJUDICE FROM THE DELAY.**

Under the two-prong test set forth in *Marion*, supra, Appellant must first show that he suffered “substantial prejudice.” In arguing this point, Appellant raises six specific claims to prove substantial prejudice.

a.) **The Death of Horace Landers.**

First, Appellant claims that the death of Horace Landers caused substantial prejudice because Landers was present with him when the police came to the apartment on December 30, 1985; and Sandra Allie identified Landers during the lineup as the person she saw at the ATM on the night of December 29, 1985.

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<sup>488</sup> *Id.* at 322.

<sup>489</sup> *Id.* at 321-322.

<sup>490</sup> *Id.* at 324.

To begin, “the death of a witness alone is *insufficient* to establish actual prejudice.”<sup>491</sup> (Emphasis added.) And “the mere fact that someone the defendant may have wished to call as a witness died during the delay does not establish prejudice.”<sup>492</sup> Thus, “speculation on the potential content of lost testimony is insufficient.”<sup>493</sup>

Det. Blanchard confirmed that Horace Landers was the only witness from 1985 that was deceased.<sup>494</sup> More importantly, the death of Landers did not substantially prejudice Appellant, as Landers was more likely to be a witness for the prosecution against Appellant.

At the hearing, Det. Blanchard testified that he believed Landers’ statements to police were “inculpatory” against Appellant.<sup>495</sup> Moreover, had Landers been alive at the time of trial, he would likely have testified for the prosecution as to Appellant’s coat containing Gina’s identification card and to Appellant placing Gina’s keys in the trash. There is nothing in the record, or otherwise, to show that Landers would have been helpful to Appellant.

The Seventh District recognized the damaging testimony that Landers could have given had he been alive:

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<sup>491</sup> *State v. Loomer*, 8<sup>th</sup> Dist. No. 68103, 1995 WL 572009, \*2 (Sept. 28, 1995), quoting *United States v. Valona*, 834 F.2d 1334, 1337 (7<sup>th</sup> Cir., 1987).

<sup>492</sup> *Adams*, supra at ¶ 83.

<sup>493</sup> *Id.* at ¶ 84.

<sup>494</sup> Suppression Hearing Transcript, July 17, 2008, before the Honorable Timothy E. Franken, (hereinafter “Supp. Hrg.”), at 10.

<sup>495</sup> *Id.* at 69.

In fact, the statement provided by Landers *incriminated* appellant. Landers stated that in November, appellant had disclosed that he stole keys out of the upstairs neighbor's purse. Appellant had told him that he was going to break into the upstairs neighbor's apartment with her keys to steal her belongings and that he would lock the door behind himself. On the day after the murder, he saw appellant wiping down the stairs to the victim's apartment with a potholder that was later found to contain red pubic and head hair consistent with the victim and "Negroid" pubic and head hair. Landers also stated that when the police arrived, appellant asked him to throw away the keys and hide the television. The death of Landers served to exclude his incriminating statements from evidence, a great benefit to appellant. Moreover, it was appellant's DNA that matched the semen found on the victim, whereas Landers had been excluded as a donor soon after the murder.<sup>496</sup> (Emphasis sic.)

As to Appellant's claim that Sandra Allie identified Landers, this ignores the fact that Sandra testified that it was Appellant that she saw at the ATM. It also ignores the fact that the semen/blood/DNA evidence excluded Landers as a suspect.

Thus, there is no substantial prejudice that resulted from Landers' death.

**b.) The Missing *Miranda* Waiver Form.**

Second, Appellant claims that the *Miranda* waiver signed by Appellant could not be found; thus, caused him substantial prejudice. Appellant, however, fails to allege how he was prejudiced by the misplacement of the waiver.

At the time of his arrest on December 30, 1985, Appellant was on probation and being supervised by Officer William Soccorsy. Soccorsy testified that "every time I took a statement, I had them sign a *Miranda* warning."<sup>497</sup> When Soccorsy interviewed Appellant on the day of his arrest, he advised him of his *Miranda* rights and he waived

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<sup>496</sup> *Adams*, supra at ¶ 83.

<sup>497</sup> Supp. Hrg. at 69.

those rights.<sup>498</sup> Soccorsy interviewed Appellant a second time on January 2, 1986, which was the day of the probation revocation, and was again afforded and waived his rights.<sup>499</sup> Despite obtaining a signed *Miranda* waiver, it could not be located.

To find that Appellant was substantially prejudiced by the missing *Miranda* waiver, one would have to believe that Soccorsy lied about Appellant being afforded and waiving his rights. Surely, if Soccorsy was going to lie, he could have thought of a better story than Appellant stating he found Gina's belongings on the porch/lawn. If Soccorsy was going to lie to inculcate Appellant, couldn't he simply have said that Appellant confessed? Soccorsy did not create a story to inculcate Appellant, but simply reported what Appellant said after being advised and waived his rights.

Additionally, there was neither testimony nor evidence that Appellant was not afforded his rights, or that he invoked his rights.

Lastly, the trial court overruled Appellant's motion to suppress, finding that Appellant was properly afforded and waived his rights.<sup>500</sup> So, following a hearing on the matter, in which the trial court heard testimony from Soccorsy and had the opportunity to view his credibility, the trial court found him reliable. To now claim that Appellant was substantially prejudiced in light of the trial court's ruling would be improper.

**c.) Adena Fidelia's Polygraph Results.**

Third, Appellant claims that he was substantially prejudiced because the results of Adena Fidelia's polygraph could not be located. As an initial point, polygraph results are

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<sup>498</sup> *Id.* at 72.

<sup>499</sup> *Id.* at 74.

<sup>500</sup> Judgment Entry filed July 28, 2008.

inadmissible in court, absent a stipulation by the parties.<sup>501</sup> Since there was no stipulation, it is unclear how exactly Appellant planned on using these results at trial.

Additionally, Fidelia was available throughout these proceedings. In fact, Fidelia appeared on both parties' witness lists (although neither side called her as a witness). Additionally, Det. Blanchard testified that "as far as a written report, it wasn't the practice at the time for internal polygraphs to prepare one of those," and he did not know if a report was ever generated in this case.<sup>502</sup> Even if the case were tried in 1985, the polygraph results may have not been available; thus, the passage of time has resulted in no prejudice.

**d.) Det. Michael Landers' Memory.**

Fourth, Appellant claims that he was substantially prejudiced because Det. Michael Landers "could not recall *anything* about his interaction with Appellant on December 30, 1985 and could recall none of the specifics regarding the December 31, 1985 interview." This allegation is overstated and incorrect.

Det. Landers' testimony encompasses approximately forty-seven pages of the motion hearing transcript.<sup>503</sup> Throughout his testimony, Det. Landers described the events at Appellant's apartment prior to and after the arrest, as well the attempt to interview him later that day. Det. Landers also testified about the attempt to interview Appellant the following day. Det. Landers was certain that Appellant was afforded his rights, which those waivers are part of the record.

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<sup>501</sup> See *State v. Souel*, 53 Ohio St.2d 123 (1978).

<sup>502</sup> Supp. Hrg. at 149-150.

<sup>503</sup> *Id.* at 21-67.

The only aspect that Det. Landers was unclear on was whether Appellant was handed the rights waiver to read himself or whether he read it to him; and whether Appellant said he did not want to answer any questions or whether he simply remained silent. To claim that Det. Landers could not recall anything is simply not true.

Like Soccorsy, the trial court heard Det. Landers' testimony, viewed him during the hearing, and found him to be reliable, as evidenced by the trial court overruling Appellant's motion to suppress.<sup>504</sup> Moreover, there is no evidence that Det. Landers' lack of memory on some minor aspects prejudiced Appellant in any way.

**e.) Avalon Tenney's Memory.**

Fifth, Appellant claims that Avalon (Gina's mother) Tenney's lack of memory as to Gina's date of birth and name of her college substantially prejudiced him because it denied him a meaningful opportunity to cross-examine her. Yet, Appellant fails to state how her date of birth or college name went to his guilt or innocence.

But ironically, Appellant admits that Avalon was certain of her daughter's fear of Appellant. Certainly, that would have been something to cross-examine Avalon about, since that issue was relevant to his guilt or innocence. Again, it is unclear how Appellant was substantially prejudiced because Avalon's memory on the fear issue was open for meaningful cross-examination.

**f.) Appellant's Alibi Witnesses.**

Sixth, Appellant claims that he was substantially prejudiced because of his inability to locate alibi witnesses. Of the four alibi witnesses' names, two were

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<sup>504</sup> Judgment Entry, filed July 28, 2008.

nicknames—Big Money and Man.<sup>505</sup> When questioned whether he would have been able to locate Big Money and Man in 1986, Private Investigator Neal Zoldan admitted only that he “[m]ay have been.”<sup>506</sup> “Maybe” and “possibly” does not amount to substantial prejudice.

More importantly, Appellant provided the names of these alleged alibi witnesses to Zoldan only an hour-and-a-half prior to his testimony.<sup>507</sup> Zoldan then admitted that he did “nothing” to locate these people and that he had no idea whether he could locate them or not.<sup>508</sup>

Following the hearing, Appellant filed a notice of alibi and named an additional witness, Mooney Franklin, aka Celeste Carr. Franklin was located by Det. Blanchard and stated that she did not know Appellant and that he did not attend any party with her.<sup>509</sup> Also, prior to trial, Appellant withdrew the notice of alibi as the prosecution intended to use it against him.

Consequently, there was no substantial prejudice because at least one of the alleged alibi witnesses was located and would have testified favorably for the prosecution.

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<sup>505</sup> Supp. Hrg. at 120.

<sup>506</sup> *Id.* at 124.

<sup>507</sup> *Id.* at 126.

<sup>508</sup> *Id.*

<sup>509</sup> See Motion in Limine (Alibi), filed October 9, 2008.

To conclude, Appellant's claims of substantial prejudice are meritless and the first prong of the *Marion* test cannot be met.<sup>510</sup> Thus, his claim of undue delay must fail, and analysis need not proceed any further.

2. **THE PROSECUTION'S REASON FOR DELAY WAS NOT TO GAIN A TACTICAL ADVANTAGE OVER APPELLANT.**

Assuming *arguendo* that Appellant showed substantial prejudice from the delay, the delay in prosecuting the case was not done intentionally to gain a tactical advantage over him. Therefore, Appellant cannot satisfy either prong of the Due Process test set forth in *Marion*, *supra*.

The Due Process Clause does not permit courts to dismiss criminal prosecutions because they do not agree with the prosecutor's judgment as to when to seek an indictment.<sup>511</sup> When determining what constitutes "due process," courts cannot impose their "personal and private notions" of fairness onto the prosecutor.<sup>512</sup> Moreover, "it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause."<sup>513</sup> Also, "prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied that they will be able to establish the

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<sup>510</sup> It is the State's position that no prejudice exists, but even if this Court were to find that some nominal prejudice exists, "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *United States v. Lovasco*, 431 U.S. 783, 795-796 (1977).

<sup>511</sup> *Id.* at 790.

<sup>512</sup> *Id.*

<sup>513</sup> *Id.* at 791.

suspect's guilt beyond a reasonable doubt."<sup>514</sup> "To impose such a duty 'would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.'"<sup>515</sup>

The simple fact is the county prosecutor at the time, Attorney Gary Van Brocklin, apparently felt that there was not enough evidence to sustain a conviction.<sup>516</sup> As stated above, this Court must respect Attorney Van Brocklin's opinion, as did the trial court.

The DNA evidence was crucial to the decision to indict. Although the other physical evidence and witness testimony was the same as in 1985, the semen/blood/DNA evidence was different. The blood testing in 1986 narrowed the suspect to 4% of the African American community. That is a far cry from proof beyond a reasonable doubt.

Conversely, when the DNA results became available in 2007, the chance of this DNA being found in someone other than Appellant was 1 in 38,730,000,000,000. Mathematically speaking, presuming that there are approximately 7,000,000,000 (billion) people on planet Earth, one would have to repopulate the Earth approximately 5,500 times before you found another person with this DNA. That is proof beyond a reasonable doubt. And that is why Appellant was indicted in 2007 and not in 1985.

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<sup>514</sup> *Id.*

<sup>515</sup> *Id.*, quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966).

<sup>516</sup> Supp. Hrg. at 198-199.

3. **THE CASE LAW SUPPORTS THE CONCLUSION THAT THE DELAY DID NOT SUBSTANTIALLY PREJUDICE APPELLANT, AND WAS NOT DONE INTENTIONALLY TO GAIN A TACTICAL ADVANTAGE OVER HIM.**

Appellant's reliance on *State v. Luck* is misplaced, as the current case is distinguishable.<sup>517</sup> In *Luck*, the victim was killed on October 30, 1967. The defendant was a suspect in the crime and was interviewed in 1967-1968. Although the Lakewood Police gathered evidence from the initial investigation, no new evidence was developed and the investigation stalled. Approximately fifteen years later, and "for reasons that are not entirely clear from the record," the Cuyahoga County Prosecutors Office began investigating the case.<sup>518</sup>

On March 15, 1983, the prosecutor obtained an indictment against the defendant, who was arrested the following day. Based on *Marion*, this Court held that the fifteen year delay did not violate the defendant's right to a speedy trial. The Court, however, found that the fifteen year delay violated the defendant's due process rights.

In coming to this conclusion, the Court applied the two-prong test set forth in *Marion* to determine whether the defendant's due process rights were violated by the undue delay. As to the first prong, the Court ruled that the defendant did suffer actual prejudice due to the *death of multiple witnesses*, other witnesses suffered memory failures, and *key pieces of evidence were lost*.<sup>519</sup>

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<sup>517</sup> See *State v. Luck*, 15 Ohio St.3d 150 (1984).

<sup>518</sup> *Id.*

<sup>519</sup> *Id.*

Conversely here, only one possible witness, Horace Landers, died. But, as stated previously, Landers was more likely to testify on behalf of the prosecution, not Appellant. As stated above, only Avalon Tenney and Det. Landers' memories faded. But again, the aspects of memory loss were nominal at best. Lastly, all key pieces of evidence have been properly retained by the Youngstown Police Department.

As to the second prong, the Court in *Luck* found the reasons for the delay were unreasonable because: (1) as admitted by the prosecutor, the Lakewood Police made an "error in judgment" by not submitting it to the prosecutor; and (2) no new evidence was discovered during the fifteen year delay.<sup>520</sup> Conversely here, the police submitted the case to the prosecutor, who determined (within his discretion) that there was not enough evidence to proceed. Furthermore, new evidence was discovered years later—DNA results identifying Appellant as the source of the semen found on the victim.

As the aforementioned facts reveal, the current case and *Luck* are distinguishable in nearly every manner. Rather, this Court should consider *State v. Walls*, which is almost exactly on point with the facts here.<sup>521</sup>

In *Walls*, the defendant, like Appellant, was convicted of Aggravated Murder in violation of R.C. §2903.01(B). On March 8, 1985, the victim was found dead in her home, having bled to death from nine stab wounds. The victim's home was forcibly entered and ransacked. Fingerprint evidence was recovered from the scene and submitted to BCI for analysis.<sup>522</sup> The comparisons revealed no match and the fingerprints remained

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<sup>520</sup> *Id.*

<sup>521</sup> *State v. Walls*, 96 Ohio St.3d 437 (2002).

<sup>522</sup> *Id.*

unidentified. In the summer of 1998, some thirteen years later, the fingerprints were entered into an on-line automated fingerprint identification system, which had just become available. This new system identified the defendant as a good match. The match was confirmed by an FBI specialist in Washington, DC. On November 13, 1998, the defendant was indicted for Aggravated Murder in violation of R.C. §2903.01(B). The defendant was convicted.<sup>523</sup>

On appeal, Walls claimed that the thirteen year delay between the offense and indictment violated his due process rights (i.e., undue delay). Specifically, the defendant claimed that evidence implicating someone else had disappeared. This Court rejected the defendant's claims and found that, although some prejudice may result from delays, the defendant's claims were speculative at best. The Court also determined that the delay was justified, as prior to the advent of the new technology; the State had no means of obtaining a match for the fingerprints. And once the technology was made available, the State diligently proceeded to have it analyzed. This Court specifically distinguished its ruling from *Luck*, as *Walls* did not involve a failure or refusal to act.<sup>524</sup>

Appellant's case and *Walls* are similar in many aspects and must be relied upon by this Court on this issue.

Therefore, Appellant failed to establish that he suffered any substantial prejudice from the delay, or that the delay was done intentionally to gain a tactical advantage over him.

Appellant's fifth proposition of law is meritless and must be overruled.

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<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

**VI. Proposition of Law No. 6:** Failure to object to testimony of a deceased victim's fear or apprehension of a criminal defendant, admitted through other witnesses, is a denial of the effective assistance of trial counsel, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1, 2, 10, and 16.

**State's Response to Proposition of Law No. 6:** The Trial Court Did Not Abuse its Discretion in Admitting Gina Tenney's Statements Concerning Her Fear and/or Apprehension of Appellant, as Her Statements ("Excited Utterances") were Relevant to Show Her "State of Mind."

As for Appellant's sixth proposition of law, he contends that the trial court erred in admitting non-testimonial hearsay statements of Gina Tenney's "state of mind" and "excited utterances" prior to her death. To the contrary, the statements were relevant to demonstrate Gina Tenney's fear and/or apprehension of Appellant. Therefore, the trial court did not abuse its discretion in admitting her statements into evidence.

**A. THE ADMISSION OR EXCLUSION OF EVIDENCE AT TRIAL LIES WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.**

The admission or exclusion of evidence at trial is within the sound discretion of the court to determine, and the reviewing court will not reverse that decision absent an abuse of discretion.<sup>525</sup> An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable."<sup>526</sup> When applying the abuse of discretion standard, an appellate court may not substitute its own discretion for that of the trial court.<sup>527</sup>

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<sup>525</sup> *State v. Jackson*, 7<sup>th</sup> Dist. No. 99 BA 9, 2001 Ohio 3222, citing *State v. Finnerty*, 45 Ohio St.3d 104, 107 (1989).

<sup>526</sup> *Adams*, 62 Ohio St.2d at 157.

<sup>527</sup> *Id.*

1. **THE TRIAL COURT DID NOT ERR IN QUESTIONING THE WITNESSES DURING AN EVIDENTIARY HEARING PURSUANT TO EVID.R. 614(B).**

Evidence Rule 614(B) provides, “The court may interrogate witnesses, in an impartial manner, whether called by itself or by a party.”<sup>528</sup> Additionally, a trial court “may, in the interest of justice, develop facts germane to a factual issue to be determined by the jury.”<sup>529</sup>

Absent any showing of bias, prejudice, or prodding to elicit partisan testimony, it is presumed that the trial court acted impartially.<sup>530</sup> Moreover, simply because the trial court’s questioning elicits damaging testimony to a defendant, does not mean it is partial.<sup>531</sup>

The mere fact that the trial court questioned witnesses during an evidentiary hearing does not constitute reversible error. Here, there is nothing in the record to show that the trial court’s questioning was not impartial. Simply because the answers were damaging to Appellant does not mean the trial court was biased or prejudiced.

Lastly, Appellant did not object to the trial court questioning witnesses during the evidentiary hearing; thus, it is waived except for plain error.

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<sup>528</sup> Evid.R. 614(B).

<sup>529</sup> *State v. Schandel*, 7<sup>th</sup> Dist. No. 07 CA 848, 2008 Ohio 6359, ¶ 71, citing *State v. Davis*, 79 Ohio App.3d 450, 454 (4<sup>th</sup> Dist. 1992).

<sup>530</sup> *State v. Baston*, 85 Ohio St.3d 418, 426 (1999), quoting *Jenkins v. Clark*, 7 Ohio App.3d 93, 98 (2<sup>nd</sup> Dist. 1982).

<sup>531</sup> *State v. Blankenship*, 102 Ohio App.3d 534, 548 (12<sup>th</sup> Dist. 1995).

Therefore, the trial court merely developed “facts germane to a factual issue to be determined by the jury.”<sup>532</sup>

a.) **The Trial Court Did Not Abuse its Discretion in Limiting Appellant’s Cross-Examination of Witnesses to Relevant Matters Within the Hearing’s Scope.**

On September 29, 2008, the trial court held an evidentiary hearing concerning the admission of several statements made by Gina Tenney. The first set of statements was classified as “excited utterances.” These statements were made by Gina to her friend Marvin Robinson. The second set of statements was classified as her “state of mind.” These statements were made by Gina to her mother, Avalon Tenney, as well as to her friends Marvin Robinson, Penney Sergeff, and Jeffrey Thomas.

The trial court permitted the State to question Marvin Robinson regarding the “excited utterances,” with the sole purpose of laying the foundation for their admission and to determine what statement, if any, was actually made. The trial court then permitted Appellant to cross-examine Robinson on the “excited utterances” issue.

With regard to the “state of mind” issue, however, the trial court only questioned the witnesses. As discussed in greater detail below, pursuant to Evidence Rule 803(3), a statement by the declarant (i.e. Gina Tenney) as to her state of mind, emotion, sensation, or physical condition, is admissible as an exception to hearsay, but the reason why the declarant had this emotion is inadmissible.<sup>533</sup>

Marvin Robinson testified as to “excited utterances” made by Gina Tenney on certain occasions. Prior to the admission of “excited utterances,” the prosecution is

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<sup>532</sup> *Schandel*, supra at ¶ 71.

<sup>533</sup> *State v. Apanovitch*, 33 Ohio St.3d 19, 21-22 (1987).

required to lay a foundation, as discussed in greater detail below. Therefore, the State was permitted to direct these witnesses on foundation and the utterances. Likewise, Appellant was afforded an opportunity to cross-examine them on the “excited utterances.”

On the separate “state of mind” issue, Avalon Tenney, Marvin Robinson, Penney Sergeff, and Jeffrey Thomas testified to Gina’s fear and/or apprehension toward Appellant. The foundation for the admission of this evidence is rather simple. In essence, only one question is needed, “What did Gina say concerning Bennie Adams?” There was no need for the State to lay a foundation, as is the case with the “excited utterances.” Nor is there a need for cross-examination. No questioning was going to undo the initial answer given. Thus, the trial court properly prohibited both parties from questioning the witnesses at the hearing.

Despite Appellant’s claim that he was prejudiced, defense counsel never objected to the trial court conducting the questioning on the “state of mind” issue. Nor did defense counsel attempt to have the court pose any questions on his behalf. Thus, the issue is waived on appeal.

Therefore, the Seventh District properly concluded that the questioning was proper: “The court’s involvement in the questioning of the witnesses did not project the appearance of impartiality. The leading nature of certain questions facilitated the process and focused the inquiry to those issues the court believed were relevant at that point in time.”<sup>534</sup>

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<sup>534</sup> *Adams*, supra at ¶ 293.

2. **GINA TENNEY’S FEAR AND/OR APPREHENSION OF APPELLANT (STATE OF MIND) WAS RELEVANT TO THE CIRCUMSTANCES OF THE CASE.**

To begin, Appellant failed to renew his objection to the witnesses’ testimony at trial; thus, he must rely on plain error.<sup>535</sup>

Appellant contends that the evidence regarding Gina Tenney’s state of mind (i.e. fear and/or apprehension) of him was irrelevant to the case. Appellant was charged with Aggravated Murder with the underlying/predicate offenses being Aggravated Robbery, Aggravated Burglary, Rape, or Kidnapping.

Pursuant to Evidence Rule 401, “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Pursuant to Evidence Rule 402, “All relevant evidence is admissible.”

With regards to the Rape, the prosecution was required to prove that Appellant “engaged in sexual conduct with Gina Tenney, and purposely compelled Gina Tenney to submit by force or threat of force.”<sup>536</sup> Gina Tenney’s fear and/or apprehension toward Appellant was relevant to show that she would not have consented to sexual conduct with Appellant and he, therefore, compelled her by force or threat of force.

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<sup>535</sup> *Id.* at ¶¶ 294-295, citing *State v. Hancock*, 108 Ohio St.3d 57 (2008), and Crim.R. 52(B).

<sup>536</sup> Trial Tr., Vol. IV, at 752.

The Seventh District recognized that “testimony on a victim’s fear of a defendant can be relevant to prove nonconsensual sex. As rape was one of the underlying felonies here, the victim’s state of mind was relevant.”<sup>537</sup>

Theft is an element of the Aggravated Robbery and Aggravated Burglary offenses. The trial court instructed the jury that an element of the theft was that Appellant “obtained or exerted control over the property without the consent of the owner.”<sup>538</sup>

The Seventh District further recognized that Gina Tenney’s fear and/or apprehension toward Appellant was relevant to show that she would not have consented to Appellant obtaining or controlling her property: “State of mind can similarly be used here to show that appellant’s entry into her apartment and his use of her ATM and her vehicle occurred without the victim’s consent.”<sup>539</sup>

With regards to the Kidnapping, the prosecution was required to prove that Appellant “by force, threat, or deception did remove Gina Tenney from the place where she was found, or restrained Gina Tenney of her liberty \* \* \*.”<sup>540</sup> Gina’s fear and/or apprehension toward Appellant was relevant to show that she would not have consented to go somewhere with Appellant; thus, he used force, threat, deception, or restraint to remove and/or restrain her.

Clearly, the evidence concerning Gina Tenney’s fear and/or apprehension of Appellant was relevant to the case.

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<sup>537</sup> *Adams*, supra at ¶ 298.

<sup>538</sup> Trial Tr., Vol. IV, at 758.

<sup>539</sup> *Adams*, supra at ¶ 298.

<sup>540</sup> Trial Tr., Vol. IV, at 762.

3. **THE TRIAL COURT DID NOT ABUSE  
ITS DISCRETION IN ADMITTING GINA  
TENNEY'S STATEMENTS CONCERNING HER  
FEAR AND/OR APPREHENSION OF APPELLANT.**

a.) **State of Mind – Evid.R. 803(3).**

Gina Tenney was in a state of fear and/or apprehension of Appellant prior to her death, as Robinson, Sergeff, and Thomas testified. In fact, Gina Tenney changed her telephone number and had additional locks installed on her apartment door. Further, she discussed with her parents future plans to buy a dog, and possibly a gun, for her protection.

Pursuant to Evidence Rule 803(3), statements “of the declarant’s then existing state of mind, emotion, sensation, or physical condition,” are exceptions to the hearsay rule. The statements must point to the future, rather than the past.<sup>541</sup> Additionally, if the declarant is made unavailable due to the defendant’s wrongdoing, the right to confrontation is forfeited.<sup>542</sup>

The law is well-settled that statements by the declarant as to his or her state of mind, emotion, sensation, or physical condition, are admissible, but the reason why the declarant had this emotion is inadmissible.<sup>543</sup>

In *State v. Apanovitch*, six witnesses testified as to the murder victim’s state of mind concerning the defendant. The testimony ranged from “the victim was fearful or apprehensive about ‘the person who was painting the house’ who had a ‘pregnant wife,’

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<sup>541</sup> *Apanovitch*, 33 Ohio St.3d at 21-22.

<sup>542</sup> *State v. Hand*, 107 Ohio St.3d 378, 395-396 (2006), citing *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

<sup>543</sup> *Apanovitch*, supra; see also Evid.R. 803(3).

‘the painter,’ ‘a big man’ with a ‘wife that was pregnant,’ and ‘the painter.’”<sup>544</sup> Only one witness, however, identified the defendant by name. Nonetheless, the Supreme Court of Ohio found these statements to be admissible.<sup>545</sup>

In *State v. Miller*, a murder victim’s coworker testified that on the day of the murder, the victim told him, “If I would come up shot in the head, that bastard [defendant] did it.”<sup>546</sup> The Court held that this statement was admissible under Evidence Rule 803(3) as an expression of the victim’s fear of the defendant and did not include details as to why she feared the defendant.<sup>547</sup>

Here, several witnesses testified as to Gina Tenney’s fear and/or apprehension of Appellant. Accordingly, these statements are admissible and the trial court properly admitted them into evidence. As stated above, the trial court did not permit testimony as to the reasons why Gina was afraid of Appellant. Therefore, the trial court did not abuse its discretion by admitting testimony concerning Gina’s then “state of mind.”

**b.) Excited Utterances – Evid.R. 803(2).**

Pursuant to Evidence Rule 801(C), hearsay is an out-of-court statement offered for the truth of the matter asserted. Pursuant to Evidence Rule 802, hearsay is generally inadmissible, except for several well-settled exceptions, such as “excited utterances.”<sup>548</sup>

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<sup>544</sup> *Id.* at 21.

<sup>545</sup> *Id.*

<sup>546</sup> *State v. Miller*, 96 Ohio St.3d 384, 391 (2002).

<sup>547</sup> *Id.* at 392.

<sup>548</sup> Evid.R. 803(2). The Sixth Amendment’s Confrontation Clause provides that, in all criminal cases, defendants enjoy the right to be confronted with the witnesses against them. To that end, in order for “testimonial” statements to be admissible into evidence, a

Pursuant to Evidence Rule 803(2), an excited utterance is a “statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” Clearly, Gina Tenney’s statements to Robinson were excited utterances. The statements were made immediately following the telephone calls from Appellant, which was a startling event, and were made while she was still under the stress of excitement caused by the event.

“The admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant’s expression of what is already the natural focus of the declarant’s thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant’s reflective faculties.”<sup>549</sup>

Marvin Robinson was the only witness to testify to Gina Tenney’s “excited utterances.” Robinson testified that Appellant’s phone calls “started about late October,” and “after she broke up with Mark.”<sup>550</sup> He further testified that Gina Tenney would call him “[i]mmediately after” the call and that her voice would fluctuate and “she was very upset.”<sup>551</sup> He testified that she was “reacting because, you know, she was stunned and

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defendant must be afforded the right to cross-examine the declarant. *Crawford*, 541 U.S. at 36. The *Crawford* rule, however, does not apply to “excited utterances,” which are deemed “non-testimonial.” *Id.* at 59, fn. 9; *see also State v. Florence*, 2<sup>nd</sup> Dist. No. 20439, 2005 Ohio 4508; *State v. Russo*, 9<sup>th</sup> Dist. No. 22768, 2006 Ohio 2172.

<sup>549</sup> *State v. Leonard*, 104 Ohio St.3d 54, 71 (2004), quoting *State v. Wallace*, 37 Ohio St.3d 87, paragraph two of the syllabus (1988).

<sup>550</sup> Trial Tr., Vol. II, at 368.

<sup>551</sup> *Id.* at 369.

upset.”<sup>552</sup> On one occasion, she told Robison, “I just got a call from Bennie. He was asking me if -- why won’t I let him come upstairs and talk to him --.”<sup>553</sup>

Then, upon receiving the card from Appellant, Gina Tenney went over to Robinson’s apartment immediately after.<sup>554</sup> As soon as Robinson got into her car, she handed him the card and said “look what I found.”<sup>555</sup>

Clearly, these statements qualify as “excited utterances,” and the trial court did not abuse its discretion by admitting them into evidence.

4.     **THE TRIAL COURT DID NOT PERMIT  
TESTIMONY OF SPECIFIC INSTANCES  
AS TO WHY GINA TENNEY WAS FEARFUL  
AND/OR APPREHENSIVE OF APPELLANT.**

Although Appellant claims that several witnesses testified as to why Gina Tenney was fearful and/or apprehensive of him, he failed to cite one single instance of when this occurred. At no point in his merit brief did Appellant cite to the record. The reason being that it did not occur.

The trial court properly admitted the “excited utterances” through the testimony of Marvin Robinson. Because the State was required to lay a foundation for the admission of these “excited utterances,” the reasons “why” the statements were made are admissible to lay a proper foundation. But, as for her “state of mind,” the trial court properly admitted the statements, but properly excluded the reasons “why,” as required by Evidence Rule 803(3).

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<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* at 372.

<sup>555</sup> *Id.*

Avalon Tenney testified as follows:

**MS. CANTALAMESSA:** Okay. Do you remember Gina telling you that she was afraid of anyone?

**MR. MERANTO:** Objection. Leading.

**THE COURT:** Overruled.

**MS. CANTALAMESSA:** Go ahead.

**AVALON TENNEY:** Yes, I did, the last time she called me.

**MS. CANTALAMESSA:** Okay. Who was she afraid of?

**AVALON TENNEY:** Bennie Adams.

**MS. CANTALAMESSA:** And who did you know that to be?

**AVALON TENNEY:** I don't understand your question.

**MS. CANTALAMESSA:** Well, was he a friend of hers, was he a neighbor?

**AVALON TENNEY:** No, I think he was a boyfriend of another girl that lived in the same apartment building.<sup>556</sup>

Clearly, Avalon only testified to Gina's "state of mind" and there is nothing in the record as to why she was afraid of Appellant.

Penney Sergeff testified that on December 28, 1985, she went over to Gina's apartment, and "[w]hen we got there she said she was afraid to be alone \* \* \*."<sup>557</sup>

**MS. CANTALAMESSA:** Okay. When she mentioned that she was afraid did she say who she was afraid of?

**MR. DEFABIO:** Objection.

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<sup>556</sup> *Id.*, Vol. I, at 71.

<sup>557</sup> *Id.* at 89.

**THE COURT:** Overruled.

**PENNY SERGEFF:** Well, she was afraid to be alone.

**MS. CANTALAMESSA:** Okay. Did she ever mention a name of who she would be afraid of?

**PENNY SERGEFF:** Well, I knew Bennie Adams lived downstairs and the whole month before --

**THE COURT:** Stop.

**MS. CANTALAMESSA:** I'm sorry.

**MS. CANTALAMESSA:** Without telling me that, is that who she was afraid of? Is that your understanding?

**PENNY SERGEFF:** Yes.<sup>558</sup>

Again, Sergeff only testified to Gina's "state of mind." Even when it appeared that Sergeff was going to state the reasons for the fear, the trial court stopped her, which is clear evidence that the trial court did not permit the reasons why to be admitted.

It was not until cross-examination that any reasons were disclosed:

**MR. MERANTO:** That's enough right there. She was afraid. She had a break-in; right?

**PENNY SERGEFF:** She was afraid because she had a break-in.

**MR. MERANTO:** Because she had a break-in?

**PENNY SERGEFF:** Yes.<sup>559</sup>

Thus, it was Appellant that sought to introduce this "why" testimony, not the State. And Appellant cannot claim prejudice because of his own questioning.

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<sup>558</sup> *Id.* at 90-91.

<sup>559</sup> *Id.* at 97.

Jeffrey Thomas and Gina went to the movie and then out for pizza on December 29, 1985. As they were eating, "it was just idle chitchat that friends would have, but she would have returned to mentioning the situation that was going on where she was living at \* \* \*" and that Gina "struck me as apprehensive."<sup>560</sup> Thomas continued:

**MS. CANTALAMESSA:** Did she ever express who she was apprehensive or fearful of?

**JEFFREY THOMAS:** The man downstairs from where she lived.<sup>561</sup>

Again, it is evident from the record that reasons why Gina was fearful were not admitted.

Marvin Robinson testified as to both Gina Tenney's "excited utterances" and her "state of mind." The excited utterances are discussed in detail below. In regards to her "state of mind," Robinson testified as follows:

**MR. DESMOND:** Okay. After Gina received this card you indicated that her emotional state was one of frustration?

**MARVIN ROBINSON:** Yes.

**MR. DESMOND:** Did that emotion ever change?

**MARVIN ROBINSON:** It changed Christmas of that year.

**MR. DESMOND:** On Christmas December 25 what was Gina's emotional state?

**MARVIN ROBINSON:** Well, she was afraid.

**MR. DESMOND:** Afraid of who?

**MARVIN ROBINSON:** Bennie.

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<sup>560</sup> *Id.* at 141.

<sup>561</sup> *Id.* at 142.

**MR. DESMOND:** Okay. Did she say that to you?

**MARVIN ROBINSON:** Yes. She did.<sup>562</sup>

Thus, according to Robinson's testimony, at the time Gina was receiving the telephone calls and the card from Appellant, she was frustrated (excited utterances). Her frustration, however, turned to fear on Christmas (state of mind). But at no time did Robinson testify as to the reasons why Gina Tenney's emotion changed. Thus, his testimony complied with Evidence Rule 803(3) because the reasons why were never mentioned; thus, the trial court properly admitted this testimony.

Simply because Robinson testified to the "excited utterances" and the reasons for them, these reasons cannot be attributed to the reasons for Gina's "state of mind." Appellant wants this Court to read the two sets of statements together, but that is not permissible.

The State laid the foundation for the "excited utterances" (which includes the reasons why). The State then asked separate questions pertaining to her "state of mind." The "excited utterances" occurred during the fall of 1985, during which time Appellant was calling Gina Tenney and sending her a card (i.e., the reasons why). Her "excited utterances" depict frustration and apprehension. On Christmas, however, her "state of mind" changed to fear. But, at no time, did Robinson state the reasons why it changed.

Therefore, the trial court did not abuse its discretion in admitting non-testimonial hearsay statements ("excited utterances") of Gina Tenney's "state of mind" prior to her death, as they were relevant to demonstrate her fear and/or apprehension of Appellant.

Appellant's sixth proposition of law is meritless and must be overruled.

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<sup>562</sup> *Id.*, Vol. II, at 374. Much of Robinson's testimony refers to his own observations, rather than what Gina Tenney told him. *See Adams*, supra at ¶ 303.

**VII. Proposition of Law No. 7:** The cumulative errors of trial counsel in failing to fulfill a litany of duties and not functioning as counsel denies a criminal defendant the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 10, and 16.

**State's Response to Proposition of Law No. 7:** Appellant was Afforded the Effective Assistance of Trial Counsel, Guaranteed to Him by the United States and Ohio Constitutions; Because Counsels' Performance was Neither Deficient Nor Prejudicial.

As for Appellant's seventh proposition of law, he contends that he was deprived of his Sixth Amendment right to effective representation. To the contrary, trial counsel provided constitutionally effective representation, as they competently and effectively represented Appellant, and he suffered no prejudice as a result.

**A. TO REVERSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL, APPELLANT MUST ESTABLISH BOTH DEFICIENT PERFORMANCE AND MUST HAVE SUFFERED PREJUDICE AS A RESULT.**

The standard of review for an ineffective assistance claim comes from the United States Supreme Court in *Strickland v. Washington*.<sup>563</sup> Under *Strickland*, to prove a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense.<sup>564</sup>

After *Strickland*, this Court adopted a two-part test for analyzing whether claims for ineffective assistance of counsel are below the constitutional standard.<sup>565</sup> In order to prove a claim of ineffective assistance of counsel, the defendant must show "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that

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<sup>563</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>564</sup> *Id.*; see also *State v. Bradley*, 42 Ohio St.3d 136 (1989).

<sup>565</sup> *State v. Mitchell*, 11<sup>th</sup> Dist. No. 2004-T-0139, 2006 Ohio 618.

counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding."<sup>566</sup>

In the first prong, a court determines whether trial counsel's assistance was actually ineffective—whether counsel's performance fell below an objective standard of reasonable advocacy or fell short of counsel's basic duties to the client.<sup>567</sup> To prove the performance was deficient, the defendant must show that counsel made errors, which were so serious that counsel was not acting in a manner guaranteed by the Sixth Amendment.<sup>568</sup>

Because of the difficulties inherent in making the evaluation, a court must indulge a **strong presumption** that counsel's conduct fell 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.<sup>569</sup> Trial strategy and tactics are left to the discretion of the individual attorney and do not constitute ineffective assistance of counsel.<sup>570</sup>

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<sup>566</sup> *Id.*, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 388-89 (2000), citing *Strickland*, 466 U.S. at 687-88.

<sup>567</sup> *Bradley*, *supra*.

<sup>568</sup> *Id.*

<sup>569</sup> *Strickland*, 466 U.S. at 689; see *State v. Vlahopoulos*, 8<sup>th</sup> Dist. App. No. 82035, 2005 Ohio 4287, at ¶ 3, citing *Jones v. Barnes*, 463 U.S. 745, 750-753 (1983); see also *State v. Spivey*, 7<sup>th</sup> Dist. App. No. 89 C.A. 172, 1998 WL 78656, \*6 (Feb. 11, 1998), stating "this court must indulge in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" citing *Bradley*, 42 Ohio St.3d at 137; accord *State v. Smith*, 17 Ohio St.3d 98 (1985); *Vaughn v. Maxwell*, 2 Ohio St.2d 299 (1965).

<sup>570</sup> *State v. Brown*, 7<sup>th</sup> Dist. No. 96 CA 56, 2001 Ohio 3175.

If a reviewing court finds ineffective assistance of counsel on those terms, the court continues to the second prong to determine whether or not the defendant's defense actually suffered prejudice due to defense counsel's shortcomings, such that the reliability of the outcome of the case should be suspect.<sup>571</sup> This requires a showing that there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have turned in favor of the defendant.<sup>572</sup>

Both prongs of this test must be established before a court can make a finding of ineffective assistance of counsel.<sup>573</sup> And if an appellant's ineffectiveness claim can be disposed of on one prong alone, it should not engage in an analysis of the other.<sup>574</sup> The defendant must affirmatively prove the prejudice occurred.<sup>575</sup> "It is not enough for the defendant [Appellant] to show that the errors had some conceivable effects on the outcome of the proceeding."<sup>576</sup> Rather, Appellant must show that there is a "reasonable probability" the results would have been different, "but for" counsel's deficient performance.<sup>577</sup>

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<sup>571</sup> *Bradley*, supra.

<sup>572</sup> *Id.*

<sup>573</sup> *Strickland*, 466 U.S. at 687.

<sup>574</sup> *Bradley*, 42 Ohio St.3d at 143, citing *Strickland*, supra.

<sup>575</sup> *Strickland*, 466 U.S. at 693.

<sup>576</sup> *Id.*

<sup>577</sup> *Id.* at 694.

“A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel.”<sup>578</sup> And the Supreme Court of Ohio “ordinarily refrains from second-guessing strategic decisions counsel makes at trial, even when counsel’s trial strategy was questionable.”<sup>579</sup>

Recently, the U.S. Supreme Court has rejected the notion of holding defense counsel to the American Bar Association standards.<sup>580</sup> Previously in *Strickland*, the Court recognized that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”<sup>581</sup>

Further, it is well established that ABA guidelines and the like are merely guides, and do not create a higher standard of representation beyond that of an objective standard of reasonableness:

*Strickland* stressed, however, that “American Bar Association standards and the like” are “only guides” to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. See *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is *a fortiori* true of standards set by private organizations: “[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively

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<sup>578</sup> *State v. Layne*, 12<sup>th</sup> Dist. No. CA2009-07-043, 2010 Ohio 2308, ¶ 47, citing *State v. Gleckler*, 12<sup>th</sup> Dist. No. CA2009-03-021, 2010 Ohio 496, ¶ 10.

<sup>579</sup> *State v. Jackson*, 107 Ohio St.3d 300, 317 (2006), citing *State v. Clayton*, 62 Ohio St.2d 45, 49 (1980).

<sup>580</sup> See *Bobby v. Van Hook*, 130 S. Ct 13, 16 (2009); recognized and followed by *Coley v. Bagley*, N.D. Ohio No. 1:02CV0457, 2010 WL 1375217, at \*55 (Apr. 5, 2010); accord *State v. Craig*, 9<sup>th</sup> Dist. No. 24580, 2010 Ohio 1169, ¶ 17.

<sup>581</sup> *Bobby*, 130 S. Ct at 16, quoting *Strickland*, 466 U.S. at 688-689.

reasonable choices.” *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).<sup>582</sup>

Thus, the Court continues to recognize that “[j]udicial scrutiny of counsel’s performance must be highly deferential.”<sup>583</sup>

1. **APPELLANT’S TRIAL COUNSEL PROVIDED CONSTITUTIONALLY EFFECTIVE ASSISTANCE, GUARANTEED TO HIM BY THE SIXTH AMENDMENT, AS THEY WERE NEITHER DEFICIENT NOR WAS APPELLANT PREJUDICED.**

Appellant was afforded constitutionally effective assistance of trial counsel throughout the proceedings below. Trial counsel’s performance went beyond the objective standard of reasonable representation, and their performance did not result in an unreliable or fundamentally unfair outcome:

- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels’ failure to file a pretrial motion to challenge the constitutionality of Ohio’s death penalty;<sup>584</sup>
- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels’ failure to file a pretrial motion to suppress identification testimony;<sup>585</sup>

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<sup>582</sup> *Bobby*, 130 S. Ct. at 17.

<sup>583</sup> *Wong v. Belmontes*, 130 S. Ct. 383, 384-385 (2009), quoting *Strickland*, 466 U.S. at 689.

<sup>584</sup> See Proposition of Law No. 20, incorporated herein by this reference.

<sup>585</sup> See Proposition of Law No. 16, incorporated herein by this reference.

- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels' failure to object to the adequate voir dire proceedings employed by the trial court within its discretion;<sup>586</sup>
- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels' failure to file a pretrial motion to change venue or to seek a change of venue following the adequate voir dire of prospective jurors;<sup>587</sup>
- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels' failure to object to the trial court's proper use of the *Witt* standard for excusing jurors;<sup>588</sup>
- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels' failure to object to the submission of a capital specification containing four separate predicate felonies;<sup>589</sup>
- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels' failure to object to the lack of proportionality review;<sup>590</sup>
- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels' failure to object at trial to the state of mind and excited utterance evidence;<sup>591</sup>

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<sup>586</sup> See Proposition of Law No. 1, incorporated herein by this reference.

<sup>587</sup> See Proposition of Law No. 8, incorporated herein by this reference.

<sup>588</sup> See Proposition of Law No. 15, incorporated herein by this reference.

<sup>589</sup> See Proposition of Law No. 2, incorporated herein by this reference.

<sup>590</sup> See Proposition of Law Nos. 3 and 20, incorporated herein by this reference.

<sup>591</sup> See Proposition of Law No. 6, incorporated herein by this reference.

- Trial counsel was neither deficient, nor was Appellant prejudiced by the trial record created through counsels' actions and/or inactions;<sup>592</sup> and
- Trial counsel was neither deficient, nor was Appellant prejudiced by counsels' failure to inquire into alleged juror misconduct.<sup>593</sup>

None of the above assignments of error demonstrate that trial counsels' performance was either deficient or prejudiced Appellant as a result.

Therefore, Appellant failed to overcome the *strong presumption* that counsels' conduct fell within the wide range of reasonable professional assistance, as trial counsel provided constitutionally effective assistance throughout the trial proceedings.

Appellant's seventh proposition of law is meritless and must be overruled.

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<sup>592</sup> See Proposition of Law No. 18, incorporated herein by this reference.

<sup>593</sup> See Proposition of Law No. 14, incorporated herein by this reference.

**VIII. Proposition of Law No. 8:** In a trial by jurors steeped with pretrial publicity, the failure to conduct meaningful and probing voir dire and the failure to file a non-spurious pretrial motion for change of venue or to develop a record to demonstrate accurately the effects of pretrial publicity, denies both trial by an impartial jury and the effective assistance of trial counsel, in contravention of the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

**State's Response to Proposition of Law No. 8:** Appellant was Afforded a Trial by a Fair and Impartial Jury, as the Community was Not Steeped in Pretrial Publicity that Prejudiced the Venire; Thus, a Change of Venue was Neither Warranted Nor Necessary.

As for Appellant's eighth proposition of law, he contends that the media coverage tainted his jury pool, thereby making it impossible for him to receive a fair trial in Mahoning County. Appellant contends that the number of newspaper articles and local television coverage prejudiced the venire. Appellant, however, failed to establish that any of the empanelled jurors were actually biased as a result of the pretrial publicity.

**A. DEFENSE COUNSEL FAILED TO FILE A MOTION FOR CHANGE OF VENUE; THUS, THIS COURT PROCEEDS UNDER A PLAIN ERROR ANALYSIS.**

Because Appellant failed to file a motion for change of venue,<sup>594</sup> this Court proceeds under a plain error analysis pursuant to Criminal Rule 52(B).<sup>595</sup> "To prevail under the plain error doctrine, a defendant must demonstrate that, but for the error, the outcome of trial clearly would have been different."<sup>596</sup> Thus, "[n]otice of plain error

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<sup>594</sup> Here, "the extent of the media coverage or number of \* \* \* news stories regarding this case is not in the trial court's record and is therefore not reviewable on appeal." *Bailey*, supra at ¶ 15, citing *State v. Ishmail*, 54 Ohio St.2d 402, paragraph one of the syllabus (1978).

<sup>595</sup> See *Bailey*, supra at ¶ 8.

<sup>596</sup> *Id.*, citing *Stojetz*, 84 Ohio St.3d at 455, citing *Long*, 53 Ohio St.2d at 91.

under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”<sup>597</sup>

**B. THE DECISION TO TRANSFER VENUE TO ANOTHER JURISDICTION RESTS IN THE SOUND DISCRETION OF THE TRIAL COURT.**

“A motion for change of venue is governed by Crim.R. 18(B), which provides that ‘[u]pon the motion of any party or upon its own motion the court may transfer an action \* \* \* when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.’”<sup>598</sup> This decision rests in the trial court’s sound discretion.<sup>599</sup>

**1. PRIOR TO A CAREFUL AND SEARCHING VOIR DIRE, THE DECISION TO GRANT A VENUE CHANGE WOULD BE BASED UPON ONE’S MERE CONJECTURE OF ITS EFFECT.**

“[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”<sup>600</sup>

In *Sheppard v. Maxwell*, the U.S. Supreme Court concluded that Dr. Sheppard’s due process right to a fair and impartial jury was violated.<sup>601</sup> The Court explained that it was not the precautions taken before trial and during voir dire that caused a violation, but the circus like atmosphere that became of the trial itself:

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<sup>597</sup> *Long*, 53 Ohio St.2d at 97.

<sup>598</sup> *State v. Gross*, 97 Ohio St.3d 121, 128 (2002), quoting *State v. Landrum*, 53 Ohio St.3d 107, 116-17 (1990).

<sup>599</sup> *Id.*; see also *State v. Coley*, 93 Ohio St.3d 253, 258 (2001).

<sup>600</sup> *Trimble*, 122 Ohio St.3d at 306, quoting *Irvin*, 366 U.S. at 722.

<sup>601</sup> *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of that 'judicial serenity and calm to which (he) was entitled.' *Estes v. State of Texas*, supra, 381 U.S., at 536, 85 S.Ct., at 1629. The fact is that *bedlam reigned at the courthouse* during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard. At a temporary table within a few feet of the jury box and counsel table sat some **20 reporters staring at Sheppard and taking notes**. The erection of a press table for reporters inside the bar is unprecedented. The bar of the court is reserved for counsel, providing them a safe place in which to keep papers and exhibits, and to confer privately with client and co-counsel. It is designed to protect the witness and the jury from any distractions, intrusions or influences, and to permit bench discussions of the judge's rulings away from the hearing of the public and the jury. **Having assigned almost all of the available seats in the courtroom to the news media the judge lost his ability to supervise that environment**. The movement of the reporters in and out of the courtroom caused frequent confusion and disruption of the trial. And the record reveals constant commotion within the bar. Moreover, the judge gave the throng of newsmen gathered in the corridors of the courthouse absolute free rein. Participants in the trial, including the jury, were forced to run a gantlet of reporters and photographers each time they entered or left the courtroom. The total lack of consideration for the privacy of the jury was demonstrated by the assignment to a broadcasting station of space next to the jury room on the floor above the courtroom, as well as the fact that **jurors were allowed to make telephone calls during their five-day deliberation**.<sup>602</sup> (Emphasis added.)

Thus, it was the trial court's actions taken in response to the extensive and suffocating publicity that occurred both before and during the trial that deprived Dr. Sheppard of due process, not the publicity itself.

Before *Sheppard*, the Court explained that due process does not require that jurors be completely ignorant of the facts and issues involved:

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to

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<sup>602</sup> *Id.* at 355.

rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.<sup>603</sup>

The Court continued this line of reasoning a decade after *Sheppard*: “extensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair.”<sup>604</sup> But “[r]ather, a defendant must show a ‘trial atmosphere \* \* \* utterly corrupted by press coverage.’”<sup>605</sup>

Thus, the mere fact “[t]hat prospective jurors have been exposed to pretrial publicity does not necessarily demonstrate prejudice requiring a change of venue.”<sup>606</sup> And pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial.”<sup>607</sup>

Accordingly, this Court’s conclusion that “a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality[,]”<sup>608</sup> falls directly in-line with the U.S. Court’s due process jurisprudence.

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<sup>603</sup> *Irvin*, 366 U.S. at 723, citing *Spies v. Illinois*, 123 U.S. 131 (1887), *Holt v. United States*, 218 U.S. 245 (1910), and *Reynolds v. United States*, 98 U.S. 145 (1878).

<sup>604</sup> *Dobbert v. Florida*, 432 U.S. 282, 303 (1977).

<sup>605</sup> *Murphy v. Florida*, 421 U.S. 794, 798 (1975).

<sup>606</sup> *State v. Cunningham*, 105 Ohio St.3d 197, 202 (2004), citing *Landrum*, 53 Ohio St.3d at 116-117; see also *Gross*, 97 Ohio St.3d at 128.

<sup>607</sup> *Cunningham*, 105 Ohio St.3d at 202, quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976).

<sup>608</sup> *Landrum*, 53 Ohio St.3d at 117.

Therefore, where “it appears that opinions as to the guilt of the defendant of those called for examination for jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, in absence of a clear showing of an abuse of discretion.”<sup>609</sup>

a.) **Appellant Was Afforded a Fair and Impartial Jury, Comprised of Mahoning County Residents, Who Were Uncorrupted by the Pretrial Publicity; Thus, a Change of Venue was Neither Warranted Nor Necessary.**

Here, Appellant argued that widespread community exposure to the pretrial publicity prohibited him from receiving a fair trial in Mahoning County. But, the extensive voir dire of fifty-seven prospective veniremen concluded that Appellant was indeed afforded due process under both the U.S. and Ohio Constitutions.

Here, **seven of the twelve** empanelled jurors indicated that they have *never heard of this case* prior to the trial court’s opening remarks.<sup>610</sup> Thus, only five of the twelve had some knowledge of this case, but stated that they could put aside any information previously obtained, and render a fair and impartial verdict based on the law and evidence.<sup>611</sup> And in regards to the entire panel summoned for jury duty, “very few” prospective jurors had heard of the case prior to August 1, 2008.<sup>612</sup>

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<sup>609</sup> *State v. Swiger*, 5 Ohio St.2d 151, paragraph one of the syllabus (1966).

<sup>610</sup> *See Adams*, supra at ¶ 199. Juror Nos. 3, 218, 220, 77, 81, 82, and 239 stated that they had not heard anything about the case prior to being summoned; while Juror Nos. 226, 17, 228, 44, and 92 stated that they were familiar with at least some of the information. And three of the four alternates stated that they had not heard anything about the case prior to being summoned.

<sup>611</sup> *See, e.g., State v. Helms*, 7<sup>th</sup> Dist. No. 08 MA 199, 2010 Ohio 4872.

<sup>612</sup> *Tr. Voir Dire*, Vol. I, at 12.

Juror No. 226 stated that he heard about the case from the television, but did not indicate that he knew any of the details surrounding the case other than Appellant was charged with rape and murder.<sup>613</sup> The fact that Appellant was charged with murder that involved a rape was disclosed to the entire panel when the indictment was read aloud by the trial court prior to voir dire.<sup>614</sup> Further, the news reported that jury selection was set to begin in two Mahoning County capital trials.<sup>615</sup> Juror No. 226 indicated that he had not formed any opinion based upon this information.<sup>616</sup>

Juror No. 17 read an article that stated that jury selection would begin on October 6, 2008.<sup>617</sup> The only detail he learned was that the offense occurred in 1985, but like Juror No. 226, this much he gained from the court's reading of the indictment. Juror No. 17 stated that he had not formed any opinion as to Appellant's guilt, because he did not "know anything."<sup>618</sup>

Juror No. 228 watched a news report the day prior that stated jury selection in Appellant's case was to begin the next day.<sup>619</sup> He stated that he did not hear any details surrounding the offense, and "really wasn't paying any attention."<sup>620</sup> Like Juror Nos. 226

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<sup>613</sup> *Id.* at 98-99.

<sup>614</sup> *Id.* at 10-11.

<sup>615</sup> *Id.* at 99.

<sup>616</sup> *Id.* at 99.

<sup>617</sup> *Id.* at 137-138.

<sup>618</sup> *Id.* at 138.

<sup>619</sup> *Id.* at 142.

<sup>620</sup> *Id.* at 142.

and 17, Juror No. 228 stated that he had not formed any opinions and would give Appellant a fair and impartial trial.<sup>621</sup>

Juror No. 44's wife read an article in *The Vindicator* and relayed the information to him.<sup>622</sup> But, like the others above, he stated that he did not know any of the facts surrounding Appellant's case.<sup>623</sup> Juror No. 44 stated that he had not formed any opinions concerning Appellant's guilt or innocence.<sup>624</sup>

Juror No. 92 read an article in *The Vindicator*, and recalled that it "specified there would be two big murder cases in the Mahoning County Courthouse. It mentioned two cases, Davis \* \* \*."<sup>625</sup> Juror No. 92 stated that he had not formed any opinion as to Appellant's guilt or innocence, and he would put aside anything he read and judge the case solely on the evidence presented.<sup>626</sup>

Thus, voir dire revealed that prejudice was neither present, nor could it be presumed in this case, as there was no evidence that the "trial atmosphere \* \* \* [was] utterly corrupted by press coverage."<sup>627</sup> Voir dire guaranteed Appellant's constitutional right to a fair and impartial jury, as "each empaneled juror confirmed that he or she had not formed an opinion about the guilt or innocence of the accused, or could put aside any

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<sup>621</sup> *Id.* at 142-143.

<sup>622</sup> *Id.* at 236.

<sup>623</sup> *Id.* at 236.

<sup>624</sup> *Id.* at 236-237.

<sup>625</sup> *Id.*, Vol. II, at 352-353.

<sup>626</sup> *Id.* at 353.

<sup>627</sup> *Murphy*, 421 U.S. at 798.

opinion, and that he or she could render a fair and impartial verdict based on the law and evidence.”<sup>628</sup>

Further, of the five jurors empanelled that sentenced Appellant to death who heard of the case prior to being summoned, not one of them knew *any* specific details surrounding the offense.

b.) **The Amount of Pretrial Publicity is Minuscule when Compared to other Defendants who were Previously Sentenced to Death in Ohio.**

A comparison of Appellant’s trial to other Ohio defendants sentenced to death that involve pretrial publicity leaves no doubt that Appellant was afforded due process; therefore, defense counsel were not ineffective for failing to file a motion for change of venue.

In *State v. Gross*, this Court found that the trial court did not abuse its discretion in denying the defendant’s motion for change of venue.<sup>629</sup> In *Gross*, the trial court **excused over one hundred prospective jurors**, “often because they knew an individual involved in the case or because they had formed an opinion regarding [the defendant]’s guilt or innocence that they could not set aside.”<sup>630</sup>

In *State v. Landrum*, this Court found that a change of venue was *not* required despite the fact that “**virtually all of the prospective jurors had read or heard media**

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<sup>628</sup> *State v. Riddle*, 7<sup>th</sup> Dist. Nos. 99 CA 147, 99 CA 178, 99 CA 204, 2001 Ohio 3484, at \*10, quoting *State v. Treesh*, 90 Ohio St.3d 460, 464 (2001).

<sup>629</sup> *Gross*, 97 Ohio St.3d at 129.

<sup>630</sup> *Id.*

**reports about the case.**<sup>631</sup> But, “few jurors recalled learning specific details of the case from pretrial publicity, and none indicated that exposure to publicity would impair his or her ability to deliberate in a fair and impartial manner.”<sup>632</sup>

In *State v. Lundgren*, this Court likewise found that a change of venue was unnecessary, and the trial court did not abuse its discretion when it denied the defendant’s motion for change of venue.<sup>633</sup> The crimes being known as the “Kirtland Massacre,” the Ohio Court found that the pretrial publicity in Lake County, Ohio (with a smaller population than Mahoning County) did not violate the defendant’s constitutional right to a fair and impartial jury.

In *Lundgren*, such pretrial publicity included: two-hundred and twenty-seven (227) articles published in the Lake County Herald, with sixty-one (61) appearing on the front page; one-hundred and twenty-three (123) articles published in the Cleveland Plain Dealer (also distributed in Lake County), with thirty (30) of those articles appearing on the front page; and three-hundred and forty-seven (347) news casts concerning the case between the three Cleveland news channels.<sup>634</sup>

Appellant has cited and presented nothing that would otherwise be considered traditional media coverage of a story that certainly discusses a very serious crime and nothing short of a tragedy. And certainly, this case is not the most widely publicized case

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<sup>631</sup> *Landrum*, 53 Ohio St.3d at 116; see, also, *Riddle*, supra at \*10, quoting *Treesh*, 90 Ohio St.3d at 464.

<sup>632</sup> *Landrum*, 53 Ohio St.3d at 116-17.

<sup>633</sup> *State v. Lundgren*, 73 Ohio St.3d 474, 478-479 (1995).

<sup>634</sup> *Id.*

that Mahoning County has seen in recent decades, and it is almost certain that another will come along that will soon overshadow this one. As discussed above, the mere existence of pretrial publicity, as alleged here, does not itself rise to the level of publicity to warrant a change of venue.

Appellant was afforded a fair trial, as he failed to establish that even one juror was actually biased because of the media's coverage.<sup>635</sup>

Appellant's eighth proposition of law is meritless and must be overruled.

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<sup>635</sup> See *Trimble*, 122 Ohio St.3d at 306, citing *Treesh*, 90 Ohio St.3d at 464.

- IX. Proposition of Law No. 9:** It is an abuse of discretion for a trial court to refuse to declare a mistrial to protect the freedoms guaranteed by the Fourteenth Amendment to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, and 16.

**State's Response to Proposition of Law No. 9:** Appellant's Right to a Fair Trial was Not Violated and the Trial Court Properly Overruled Appellant's Motion for a Mistrial, Because Appellant was Not Prejudiced by Any Comments Elicited During His Trial.

As for Appellant's ninth proposition of law, he contends that Det. Blanchard's comments during trial were prejudicial and violated his right to fair trial. To the contrary, Det. Blanchard's comments were not prejudicial; thus, the trial court properly overruled Appellant's motion for a mistrial.

**A. A TRIAL COURT SHOULD GRANT A MISTRIAL ONLY WHEN A FAIR TRIAL IS NO LONGER POSSIBLE.**

A trial court should grant a mistrial "only when a fair trial is no longer possible."<sup>636</sup> And a mistrial should not be granted "merely because some error or irregularity has intervened."<sup>637</sup> Moreover, the decision to grant or deny a mistrial rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.<sup>638</sup>

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<sup>636</sup> *Treesh*, 90 Ohio St.3d at 480, citing *State v. Franklin*, 62 Ohio St.3d 118, 127 (1991); see also *State v. Breedlove*, 7<sup>th</sup> Dist. No. 05 MA 110, 2008 Ohio 1550, ¶ 18.

<sup>637</sup> *Treesh*, 90 Ohio St.3d at 480, quoting *State v. Reynolds*, 49 Ohio App.3d 27, 33 (2<sup>nd</sup> Dist. 1988).

<sup>638</sup> *Treesh*, 90 Ohio St.3d at 480, citing Crim.R. 33, and *State v. Sage*, 31 Ohio St.3d 173, 182 (1987).

1. **DET. BLANCHARD'S COMMENTS WERE NOT PREJUDICIAL; THUS, THEY DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS.**

Appellant claims that three isolated comments made by Det. Blanchard during defense counsel's cross-examination were so prejudicial that they violated his right to a fair trial. In his argument, Appellant attempts to mesh these comments to arrive at a conclusion that is speculative at best. A thorough reading, however, of Det. Blanchard's trial testimony establishes that his comments were isolated and cannot be read in conjunction with one another. Nonetheless, the comments were not prejudicial.

a.) **Suppression Hearing.**

First, the following inquiry caused Det. Blanchard to mention the suppression hearing:

**MR. DEFABIO:** Well, you've testified a couple of times already in this case; correct?

**DET. BLANCHARD:** I have.

**MR. DEFABIO:** Back in July, once in September?

**DET. BLANCHARD:** At suppression hearings, yes.<sup>639</sup>

At this point, defense counsel never objected, nor did defense counsel ask for a curative instruction.

The mere mention of "suppression hearings" is meaningless. There is nothing in the record to show that either the jury knew what a suppression hearing is or that the jury was concerned about any suppressed evidence. Furthermore, the mere mention of a suppression hearing does not infer guilt in any way.

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<sup>639</sup> Trial Tr., Vol. I, at 191-192.

b.) Adena Fidelia.

Second, the following inquiry regarded the questioning of Adena Fidelia :

**MR. DEFABIO:** So you've talked to Adena at least three times up to this point?

**DET. BLANCHARD:** Yes.

**MR. DEFABIO:** Any further conversations that you can think of?

**DET. BLANCHARD:** Not about this case.<sup>640</sup>

Again, defense counsel never objected, nor did he ask the trial court for a curative instruction.

Det. Blanchard's comment that he did not talk to Adena Fidelia about "this case" does not mean that he talked to her about another case. All it means is that he did not talk to her again about this case. He could have talked to her about a number of other topics.<sup>641</sup>

c.) Theresa Lattanzi.

Third, the following inquiry regarded who was present during the line-up:

**MR. DEFABIO:** Was anybody else present, I mean detective-wise? Was Landers there?

**DET. BLANCHARD:** Landers was there, yes.

**MR. DEFABIO:** Can you read who the witnesses were, by the way, down below? I know Patrick V. Kerrigan.

**DET. BLANCHARD:** You mean Theresa Lattanzi, the witnesses, Sandra Howard --

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<sup>640</sup> *Id.* at 221.

<sup>641</sup> *See Adams*, supra at ¶ 322.

**MR. DEFABIO:** Your Honor, once again --

**THE COURT:** I can't hear you.

**DET. BLANCHARD:** You said witnesses, Counselor.

**MR. DEFABIO:** Okay. You see Patrick V. Kerrigan?

**DET. BLANCHARD:** I see Patrick V. Kerrigan.

**MR. DEFABIO:** And underneath his name?

**DET. BLANCHARD:** Is Sam Amendolara.

**MR. DEFABIO:** That is cut-off there; correct?

**DET. BLANCHARD:** It is cut-off, yeah, on this copy.

**MR. DEFABIO:** We need to approach again.<sup>642</sup>

At this point, defense counsel moved for a mistrial and incorporated the prior comments, which was overruled.<sup>643</sup>

The mere mention of Theresa Lattanzi's name does not mean anything. The jury was voir dired on any knowledge of this case, to which each side was satisfied. There is nothing in the record to show that the jury knew Lattanzi or knew of Appellant's other rape conviction. Moreover, her name is referenced in conjunction with Patrick V. Kerrigan's name, which is mentioned immediately prior.

The Seventh District properly recognized that "the reading of the victim's name . . . was invited by defense counsel[.]" and "there is absolutely no indication that the jurors sitting in 2008 would be familiar with a 1985 rape victim's name."<sup>644</sup>

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<sup>642</sup> Trial Tr., Vol. I, at 229.

<sup>643</sup> According to defense counsel, the comment and later motion for mistrial were fifteen minutes apart. *Id.* at 230. Meaning the first comment was well before and is, thus, even further isolated.

Each of the above comments was in *response* to questions posed by Appellant during cross-examination. Appellant cannot ask questions, then when he is displeased with the response, lodge an objection, and move for a mistrial. That is why the common means of cross-examination is the use of leading questions—to control the responses. Moreover, Det. Blanchard’s responses answered the questions posed. He did not go off on a tangent and blurt out a response that had nothing to do with the question.

Further, defense counsel never requested a curative instruction, so the issue is waived. Any number of reasons exists for why defense counsel did not move for said instruction, perhaps because they did not want to draw any extra attention to the comments or perhaps because they did not feel a curative instruction was necessary. Regardless of the reason, the decision to not seek a curative instruction is trial tactic and cannot be viewed as ineffective assistance of counsel.<sup>645</sup>

As the record demonstrates, these comments were not related. Appellant, however, wants this Court to believe that based upon these comments, the jury was able to piece together the following conclusion: (1) there was another case that involved Appellant; (2) Adena Fidelia provided statements concerning Appellant’s guilt that the jury was not permitted to hear; (3) the other case involved someone by the name of Theresa Lattanzi; and (4) since there were suppression hearings, there must be other evidence of guilt that the jury was not permitted to hear. Although juries should be afforded much credit, the leaps that would have to be made to support Appellant’s conclusion are fantastical and speculative at best.

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<sup>644</sup> *Adams*, supra at ¶ 323.

<sup>645</sup> *State v. Brown*, 38 Ohio St.3d 305, 319 (1988).

To conclude, Det. Blanchard's comments were isolated and cannot be read in conjunction with one another. Therefore, nothing in the record demonstrates that they infringed on Appellant's right to a fair trial, and the trial court properly denied his motion for a mistrial.<sup>646</sup>

2. **EVEN ASSUMING THAT DET. BLANCHARD'S COMMENTS WERE ERRONEOUS, THEIR CUMULATIVE EFFECT WAS HARMLESS AND DID NOT VIOLATE APPELLANT'S DUE PROCESS RIGHTS.**

The U.S. and Ohio Constitutions provide a criminal defendant with the right to a fair trial. Neither, however, guarantees an "error-free, perfect trial."<sup>647</sup> When multiple errors occur, courts must determine the "cumulative effect" of the errors on a defendant's right to a fair trial.<sup>648</sup> Under this "cumulative error" doctrine, although individual errors may not warrant reversal, the cumulative effect of these errors may violate a defendant's right to a fair trial.<sup>649</sup>

However, the errors are still harmless if (1) there is overwhelming evidence of guilt; (2) the defendant's substantial rights are not affected; or (3) there are other indicia

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<sup>646</sup> Again, a mistrial should not be granted "merely because some error or irregularity has intervened." *Treesh*, 90 Ohio St.3d 480, quoting *Reynolds*, 49 Ohio App.3d at 33.

<sup>647</sup> *State v. Hill*, 75 Ohio St.3d 195, 212 (1996), quoting *United States v. Hasting*, 461 U.S. 499, 508-509 (1983).

<sup>648</sup> *State v. Anderson*, 7<sup>th</sup> Dist. No. 03 MA 252, 2006 Ohio 4618, ¶ 80, citing *State v. DeMarco*, 31 Ohio St.3d 191, 195 (1987).

<sup>649</sup> *Anderson*, supra at ¶ 80, citing *Madrigal*, 87 Ohio St.3d at 397.

that the errors did not contribute to guilt.<sup>650</sup> Further, harmless errors, regardless of the number, “cannot become prejudicial by sheer weight of the numbers.”<sup>651</sup>

Assuming *arguendo* that any of Det. Blanchard’s comments were erroneous, which the State does not concede, any error was still harmless.

First, there is overwhelming evidence of Appellant’s guilt, which included DNA evidence, fingerprint evidence, forensic hair evidence, witness testimony, and both direct and circumstantial evidence.<sup>652</sup>

Second, Appellant’s substantial rights were not affected.

Third, there is no evidence that these comments contributed to the jury’s finding of guilt and death, as a single comment by a police officer without any suggestion to infer guilt constitutes harmless error.<sup>653</sup>

This Court must read the entire trial record in conjunction with these comments. The trial lasted several days, which included opening and closing arguments, testimony from multiple witnesses, and numerous exhibits. Appellant’s claim that these three isolated comments outweighed all of the other testimony is simply incorrect and not supported by the record.

There is no cumulative effect present in this case, because none of the comments were prejudicial.

Appellant’s ninth proposition of law is meritless and must be overruled.

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<sup>650</sup> *Anderson*, supra at ¶ 80, citing Crim.R. 52(A), Evid.R. 103(A), and *State v. Martin*, 103 Ohio St.3d 385, ¶ 51 (2004).

<sup>651</sup> *Hill*, 75 Ohio St.3d at 212, citing *State v. Davis*, 62 Ohio St.3d 326, 348 (1991).

<sup>652</sup> See generally State’s Statement of the Case and Facts.

<sup>653</sup> *Treesh*, 90 Ohio St.3d at 480, citing *Meeks v. Havener*, 545 F.2d 9, 10 (6<sup>th</sup> Cir., 1976).

- X. **Proposition of Law No. 10:** Failure to give pertinent jury instructions that are a correct statement of law denies a capital defendant freedoms secured by Fourteenth Amendment to the U.S. Constitution and the Ohio Constitution, Article I, Sections 1 and 16.

**State's Response to Proposition of Law No. 10:** The Trial Court Did Not Err in Failing to Give Appellant the Requested Jury Instruction on the Lesser Included Offense of Involuntary Manslaughter, and the Trial Court Instructed the Jury on the Proper Definition of Circumstantial Evidence.

As for Appellant's tenth proposition of law, he contends that the trial court erred when it failed to instruct the jury on the lesser included offense of voluntary manslaughter, and further contends that the trial court gave an improper definition of circumstantial evidence.

First, there was no reasonable basis for the jury to find Appellant guilty of involuntary manslaughter. And second, the retroactive application of this Court's definition of circumstantial evidence does not violate the Ex Post Facto Clause.

Therefore, the overall jury charge did not result in a manifest miscarriage of justice, and Appellant's conviction must be affirmed.

A. **ONLY IF THE ENTIRE JURY CHARGE RESULTED IN A MANIFEST MISCARRIAGE OF JUSTICE, MAY THIS COURT REVERSE APPELLANT'S CONVICTION.**

A "criminal defendant is entitled to have the trial court give complete and accurate jury instructions on all the issues raised by the evidence."<sup>654</sup>

The jury instruction must be viewed in the context of the overall charge, rather than in light of a single instruction to the jury.<sup>655</sup> Thus, a judgment will not be reversed if

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<sup>654</sup> *State v. Sneed*, 63 Ohio St.3d 3, 9 (1990); see also *State v. Comen*, 50 Ohio St.3d 206, paragraph two of the syllabus (1990).

a portion of the general charge is improper or misleading unless the entire charge resulted in prejudicial error.<sup>656</sup> This Court has stated that “[a]n instruction results in prejudicial error when from the record it is gleaned that such an instruction resulted in a manifest miscarriage of justice.”<sup>657</sup> Further, the reviewing court “will not reverse a criminal conviction due to an erroneous jury instruction unless it is clear from the record that the jury instruction resulted in a manifest miscarriage of justice.”<sup>658</sup>

1. **AN INSTRUCTION OF A LESSER INCLUDED OFFENSE IS REQUIRED ONLY IF THE EVIDENCE WOULD REASONABLY SUPPORT BOTH AN ACQUITTAL ON THE OFFENSE CHARGED AND A CONVICTION OF THE LESSER INCLUDED.**

Here, Appellant was charged with Aggravated Murder, in violation of R.C. §2903.01(B). The trial court denied Appellant’s request for an instruction of the lesser included offense of involuntary manslaughter.<sup>659</sup>

The primary difference between aggravated murder and involuntary manslaughter is that aggravated murder requires a purpose to kill, while involuntary manslaughter

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<sup>655</sup> *State v. Price*, 60 Ohio St.2d 136, paragraph four of the syllabus (1979); *see also State v. Horton*, 10<sup>th</sup> Dist. No. 03 AP 665, 2005 Ohio 458; *State v. Moore*, 7<sup>th</sup> Dist. No. 02 CA 152, 2004 Ohio 2320, citing *State v. Noggle*, 140 Ohio App.3d 733 (3<sup>rd</sup> Dist. 2000).

<sup>656</sup> *State v. Baker*, 92 Ohio App.3d 516, 536 (8<sup>th</sup> Dist. 1968).

<sup>657</sup> *Moore*, *supra*, citing *State v. McKibbon*, 1<sup>st</sup> Dist. No. C-010145, 2002 Ohio 2041.

<sup>658</sup> *Id.*

<sup>659</sup> *See State v. Thomas*, 40 Ohio St.3d 213, paragraph one of the syllabus (1988) (holding that involuntary manslaughter is a lesser included offense of aggravated murder).

requires only that a killing occur as a proximate result of committing or attempting to commit a felony.<sup>660</sup>

This Court previously held that “a charge on such lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.”<sup>661</sup> Accordingly, “an instruction on the lesser included offense of involuntary manslaughter will be given in a murder trial only when, on the evidence presented, the jury could reasonably find against the state on the element of purposefulness and still find for the state on the defendant’s act of killing another.”<sup>662</sup> And the same is true of aggravated murder with prior calculation and design.<sup>663</sup>

Further, a defendant is not entitled to an instruction on the lesser included offense whenever there is “some evidence” that he acted in a way to satisfy the requirements of the lesser included offense.<sup>664</sup> “That clearly never has been the law in this state, nor is it the law today.”<sup>665</sup> Thus, an instruction is only required “when sufficient evidence is

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<sup>660</sup> *State v. Jenkins*, 15 Ohio St.3d 164, 218 (1984).

<sup>661</sup> *Id.* at paragraph two of the syllabus, clarifying *State v. Kidder*, 32 Ohio St.3d 279 (1987), *State v. Davis*, 6 Ohio St.3d 91 (1983), and *State v. Wilkins*, 64 Ohio St.2d 382 (1980); see also *State v. Evans*, 122 Ohio St.3d 381, 385 (2009), quoting *Shaker Hts. v. Mosley*, 113 Ohio St.3d 329, 333 (2007), citing *State v. Shane*, 63 Ohio St.3d 630, 632-633 (1992).

<sup>662</sup> *Thomas*, 40 Ohio St.3d at 216.

<sup>663</sup> See *id.*

<sup>664</sup> See *Shane*, 63 Ohio St.3d 632, citing *State v. Muscatello*, 55 Ohio St.2d 201, paragraph four of the syllabus (1978), and *State v. Tyler*, 50 Ohio St.3d 24, 37 (1990).

<sup>665</sup> *Shane*, 63 Ohio St.3d 632.

presented which would allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense.”<sup>666</sup> (Emphasis sic.)

Any less of a standard would require a trial court to give the instruction every time one is requested:

To require an instruction to be given to the jury every time “some evidence,” however minute, is presented going to a lesser included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser included (or inferior-degree) offense. Trial judges are frequently required to decide what lesser included (or inferior-degree) offenses must go to the jury and which must not. The jury would be unduly confused if it had to consider the option of guilty on a lesser included (or inferior-degree) offense when it could not reasonably return such a verdict.<sup>667</sup>

Thus, an instruction on involuntary manslaughter would only be proper if he convinced the jury that he lacked the purpose to kill required by the aggravated murder statute.

The State presented evidence that illustrated Appellant’s cold and calculated plan to murder, rape, and steal from Gina Tenney, because of her continued rejection of his attempts and desires to become more than just neighbors.<sup>668</sup>

**a.) Gina Tenney Feared Appellant.**

It began in late October of 1985 after Gina Tenney and Mark Passarello had ended their relationship.<sup>669</sup> Appellant began calling Gina on the telephone, and would ask

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<sup>666</sup> *Id.* at 632-633.

<sup>667</sup> *Id.* at 633.

<sup>668</sup> Penny Sergeff testified that every time Gina and her would arrive at the apartment, Appellant would look at them out his window, and try to talk to them as they walked up the stairs to Gina’s apartment. Trial Tr., Vol. I at 93.

<sup>669</sup> *Id.*, Vol. II, at 368.

her if he could come upstairs to her apartment.<sup>670</sup> Appellant would call Gina nearly every day, and always at night.<sup>671</sup> These calls made Gina “very upset” and fearful, because they were always late at night and she had not given her number to him.<sup>672</sup>

Appellant’s late night calls continued until Gina changed her telephone number in November.<sup>673</sup> Gina changed her telephone number because she was scared to answer it when it rang.<sup>674</sup> Thereafter, Gina found a card that had been shoved underneath her apartment door.<sup>675</sup> It was addressed “to a very sweet and confused young lady[,]” and signed “love, Bennie.”<sup>676</sup>

Gina’s fear of Appellant intensified on Christmas when her apartment was broken into.<sup>677</sup> Around 1:00 a.m. on December 25, 1985, someone had opened Gina’s apartment door. After hearing some noises, Gina put a chair against her apartment door, but later, the person returned and opened the door and walked into her apartment.<sup>678</sup> That night, Gina did not hear the outside door to the apartment building open, which usually makes a

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<sup>670</sup> *Id.* at 368.

<sup>671</sup> *Id.* at 370.

<sup>672</sup> *Id.* at 369, 371; Vol. I, at 100.

<sup>673</sup> *Id.*, Vol. II, at 370-371; Vol. I, at 91-92.

<sup>674</sup> *Id.* at 100.

<sup>675</sup> *Id.*, Vol. II, at 372, 374.

<sup>676</sup> *Id.* at 372-373; *see* State’s Exhibit No. 48.

<sup>677</sup> *Id.* at 386.

<sup>678</sup> *Id.* at 387.

loud screeching noise when it is opened or shut.<sup>679</sup> Meaning the person who broke into her apartment was already in the building. Her friend, Marvin Robinson, stayed with Gina the next two nights, because Gina was now “very fearful” of Appellant.<sup>680</sup> Gina also made her fear of Appellant known to her mother.<sup>681</sup>

On Saturday, December 28, 1985, Penny Sergeff stayed with Gina at her apartment, because Gina was still afraid to be left alone in her apartment at night, fearful of Appellant, who lived downstairs.<sup>682</sup> Later that evening, Mark Passarello came over to Gina’s apartment, and the three hung out.<sup>683</sup>

Later, Mark took Penny home but later returned to Gina’s apartment.<sup>684</sup> Mark and Gina reconciled their relationship.<sup>685</sup> Mark and Gina spoke about their relationship, and Mark apologized for the things he did wrong.<sup>686</sup> Mark spent the night, as Gina also made Mark aware of her fear and that she didn’t feel secure in her apartment.<sup>687</sup>

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<sup>679</sup> *Id.*, Vol. I, at 109.

<sup>680</sup> *Id.*, Vol. II, at 389, 391.

<sup>681</sup> *Id.*, Vol. I, at 71.

<sup>682</sup> *Id.* at 89.

<sup>683</sup> *Id.* at 120.

<sup>684</sup> *Id.* at 120.

<sup>685</sup> *Id.* at 119.

<sup>686</sup> *Id.* at 120-121.

<sup>687</sup> *Id.* at 124. That night, Mark and Gina had sexual intercourse. *Id.* at 121.

The next day, on December 29, 1985, Jeff Thomas met Gina at the movie theater for a 1:00 p.m. matinee.<sup>688</sup> After the movie, the two went to Pizza Hut.<sup>689</sup> During their conversation, Gina mentioned that she feared Appellant.<sup>690</sup> They left Pizza Hut around 5:00 p.m., and that would be the last time anyone, other than Appellant, saw Gina Tenney alive.<sup>691</sup>

b.) **The Physical Evidence.**

Michael Valentine found Gina Tenney's body in the Mahoning River, near the West Avenue Bridge (fka the Water Street Bridge), around 11:00 a.m. the next morning on December 30, 1985.<sup>692</sup>

Prior to his testimony, Dr. Humphrey Germaniuk reviewed the autopsy photographs, evidence from the case, the autopsy report, the microscopic reports, and a narrative report from the scene investigators.<sup>693</sup>

Gina Tenney suffered a contusion to her upper right lip, and some abrasions or scrapes on the front part of her chin.<sup>694</sup> She further suffered abrasions to the left side of her chin, her breast, and across her neck.<sup>695</sup> There were irregularly shaped scrapes and/or

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<sup>688</sup> *Id.* at 139.

<sup>689</sup> *Id.* at 141.

<sup>690</sup> *Id.* at 142.

<sup>691</sup> *Id.* at 143.

<sup>692</sup> *Id.* at 74-76.

<sup>693</sup> *Id.*, Vol. II, at 403.

<sup>694</sup> *Id.* at 406; State's Exhibit Nos. 9 and 10.

<sup>695</sup> *Id.* at 406; State's Exhibit Nos. 11 and 14.

abrasions on her abdomen.<sup>696</sup> Dr. Germaniuk also observed bruising around her right wrist.<sup>697</sup>

Dr. Germaniuk concluded that there was evidence of smothering:

You can take a look at the contusion on the lips. If you take a look at the marks about the chin, this is certainly consistent with a hand or an object placed over the face. We certainly have what appears to be ligature strangulation with that 7-inch band by quarter-inch band about the neck. With that we can exclude mechanical[.]”<sup>698</sup>

The ligature marks on her wrists could have been caused from being bound or tied up, and the telephone cord recovered from Gina’s vehicle could have caused the marks on her neck.<sup>699</sup>

The bruises on Gina’s face were likely caused by Appellant hitting her in the face or trying to smother her.<sup>700</sup> Based on the evidence, Dr. Germaniuk concluded that Gina’s cause of death was likely a combination of being smothered or strangled by Appellant.<sup>701</sup> Further, Gina was dead before Appellant tossed her body into the Mahoning River.<sup>702</sup>

Therefore, Dr. Germaniuk concluded that Gina’s official cause of death was asphyxia, and the manner of death was homicide.<sup>703</sup>

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<sup>696</sup> *Id.* at 406; State’s Exhibit No. 12.

<sup>697</sup> *Id.* at 406; State’s Exhibit No. 13.

<sup>698</sup> *Id.* at 417.

<sup>699</sup> *Id.* at 422-423.

<sup>700</sup> *Id.* at 424.

<sup>701</sup> *Id.* at 445.

<sup>702</sup> *Id.* at 410-411.

<sup>703</sup> *Id.* at 446.

Dale Laux concluded that the blood type from the semen found on Gina Tenney's vaginal swabs collected during her autopsy was a "B non-secretor."<sup>704</sup> Both Gina Tenney and Mark Passarello were "A secretors."<sup>705</sup> Horace Landers was an "A non-secretor."<sup>706</sup> Of those samples submitted, only Appellant was a "B non-secretor."<sup>707</sup> The blood typing analysis is not an exact match, but Appellant could not be eliminated as a potential source of the semen found in Gina Tenney's vagina.<sup>708</sup>

Brenda Gerardi, a DNA analyst from Ohio's BCI, excluded "Horace Landers as being a source of any of the DNA, the forensic DNA profiles from the vaginal swabs," and from underwear belonging to Gina Tenney.<sup>709</sup>

"Bennie Adams cannot be excluded as the source of the semen on the vaginal swab. Based on the national database provided by the Federal Bureau of Investigation, the expected frequency of occurrence of the partial DNA profile identified in the sperm fraction of the vaginal swab is 1 in 38, 730, 000, 000, 000 unrelated individuals."<sup>710</sup>

Further, "Bennie Adams cannot be excluded as the major source of the semen on the underwear. Based on the national database provided by the Federal Bureau of Investigation, the expected frequency of occurrence of the major DNA profile identified

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<sup>704</sup> *Id.*, Vol. III, at 556.

<sup>705</sup> *Id.* at 556.

<sup>706</sup> *Id.* at 557.

<sup>707</sup> *Id.*

<sup>708</sup> *Id.* at 557-558.

<sup>709</sup> *Id.* at 586-587.

<sup>710</sup> *Id.* at 587. There are only 6.5 million people in the world today. *Id.* at 588.

in the sperm fraction of the underwear is 1 in 63, 490, 000, 000, 000, 000, 000 unrelated individuals.”<sup>711</sup>

c.) **The Physical Evidence and Witness Testimony Excludes Horace Landers as a Suspect in the Murder of Gina Tenney.**

Det. Blanchard testified that Horace Landers cooperated with the Youngstown police and gave a statement shortly after his arrest.<sup>712</sup> And long before he died, Horace Landers was ruled out as being a suspect because of the blood evidence.<sup>713</sup>

Dale Laux concluded that the blood type from the semen found on Gina Tenney’s vaginal swabs collected during her autopsy was a “B non-secretor.”<sup>714</sup> Both Gina Tenney and Mark Passarello were “A secretors.”<sup>715</sup> Horace Landers was an “A non-secretor.”<sup>716</sup> Of those samples submitted, only Defendant was a “B non-secretor.”<sup>717</sup>

This is further confirmed by Brenda Gerardi’s DNA analysis that excluded “Horace Landers as being a source of any of the DNA, the forensic DNA profiles from the vaginal swabs,” and from Gina Tenney’s underwear.<sup>718</sup>

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<sup>711</sup> *Id.* at 587.

<sup>712</sup> *Id.*, Vol. II, at 241.

<sup>713</sup> *Id.* at 241.

<sup>714</sup> *Id.*, Vol. III, at 556.

<sup>715</sup> *Id.* at 556.

<sup>716</sup> *Id.* at 557.

<sup>717</sup> *Id.*

<sup>718</sup> *Id.* at 586-587.

As for Sandra Allie's identification, Mrs. Allie testified that she choose the wrong person. She testified that she went down to the police station to identify the person she saw at the ATM machine that night, but intentionally chose the wrong person, because she was terrified: I "went to the extreme opposite and identified a short, light-skinned person."<sup>719</sup>

At trial, Sandra Allie looked at a photo of the line-up from 1985, and identified Appellant as the person she saw standing at the ATM machine. Sandra Allie got a good look at Appellant while she waited behind him at the ATM machine.<sup>720</sup> And this is the same person her husband, John Allie, saw there. In fact, when Appellant came out, he stood in front of the Allies' vehicle and waved to Mr. Allie because they were familiar with each other from the neighborhood.<sup>721</sup>

Here, in viewing the evidence in a light most favorable to Appellant, there was no reasonable basis for the jury to find that the element of purposeful killing was absent. In fact, there was no evidence presented that would allow the jury to reasonably reject the aggravated murder charge (or murder) and find Appellant guilty of involuntary manslaughter: "[n]o specific evidence submitted at trial raised the issue of involuntary manslaughter."<sup>722</sup>

Therefore, the trial court properly allowed the jury to be instructed only on the lesser included offense of murder.

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<sup>719</sup> *Id.*, Vol. II, at 325.

<sup>720</sup> *Id.* at 326-327, 333.

<sup>721</sup> *Id.* at 291-294.

<sup>722</sup> *Adams*, supra at ¶ 334, quoting *State v. Smith*, 89 Ohio St.3d 323, 331 (2000).

2. **THE TRIAL COURT'S  
INSTRUCTION ON CIRCUMSTANTIAL  
EVIDENCE, AS STATED IN JENKS, DOES  
NOT VIOLATE THE EX POST FACTO CLAUSE,  
OR §28, ART. II, OF THE OHIO CONSTITUTION.**

As Appellant correctly pointed out, between December 29, 1985, and Appellant's trial in 2008, this Court altered the definition and relevance of circumstantial evidence.

In *State v. Kulig*, the Court held that “[c]ircumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt.”<sup>723</sup> Seventeen years later this Court, however, overruled *Kulig*:

Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction. Therefore, where the jury is properly and adequately instructed as to the standards for reasonable doubt a special instruction as to circumstantial evidence is not required.<sup>724</sup>

Therefore, when relying upon circumstantial evidence, the State no longer had to reconcile any reasonable theory of the defendant's innocence.

In *State v. Webb*, this Court later held that its decision in *Jenks* did not violate the Ex Post Facto Clause: “A rule changing the quantum of proof required for conviction

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<sup>723</sup> *State v. Kulig*, 37 Ohio St.2d 157, syllabus (1974).

<sup>724</sup> *State v. Jenks*, 61 Ohio St.3d 259, paragraph one of the syllabus (1991), superseded on other grounds by constitutional amendment.

may be applied to trials of crimes committed before the rule was announced without violating the *Ex Post Facto* Clause.”<sup>725</sup>

In *State v. Jones*, this Court had recognized that “a statute giving the defense the burden of persuasion as to affirmative defenses, where before it had had only the burden of going forward” \* \* \* “decrease[d] the quantum of proof required for criminal conviction.”<sup>726</sup> Thus, in applying the U.S. Supreme Court’s definition of ex post facto law in *Calder v. Bull*—“[e]very law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*”—this Court concluded that the statute in *Jones* violated the Ex Post Facto Clause.<sup>727</sup> (Emphasis *sic*.)

In *Webb*, however, this Court found that its earlier decision in *Jones* was “fatally undercut by *Collins v. Youngblood*.”<sup>728</sup> In *Collins*, the U.S. Supreme Court stated that “[t]he *Beazell* definition omits the reference \* \* \* to alterations in the ‘legal rules of evidence.’ \* \* \* [T]his language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes.”<sup>729</sup>

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<sup>725</sup> See *State v. Webb*, 70 Ohio St.3d 325, paragraph one of the syllabus (1994), overruling *State v. Jones*, 67 Ohio St.2d 244 (1981).

<sup>726</sup> *Webb*, 70 Ohio St.3d at 330, citing *Jones*, 67 Ohio St.2d at 249.

<sup>727</sup> *Webb*, 70 Ohio St.3d at 330, quoting *Jones*, 67 Ohio St.2d at 248, quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798).

<sup>728</sup> *Webb*, 70 Ohio St.3d at 331.

<sup>729</sup> *Id.*, quoting *Collins v. Youngblood*, 497 U.S. 37, 43, fn. 3 (1990).

The U.S. Supreme Court further recognized that several of its cases have concluded that procedural changes, even those that work to the disadvantage of the defendant, do not violate the Ex Post Facto Clause:

For example, in *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. *Id.*, at 589, 4 S.Ct., at 210.

In *Thompson v. Missouri*, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898), a defendant was convicted of murder solely upon circumstantial evidence. His conviction was reversed by the Missouri Supreme Court because of the inadmissibility of certain evidence. Prior to the second trial, the law was changed to make the evidence admissible and defendant was again convicted. Nonetheless, the Court held that this change was procedural and not violative of the Ex Post Facto Clause.<sup>730</sup>

And while *Jenks* works to a defendant's disadvantage, it too does not violate the Ex Post Facto Clause.

In *Webb*, this Court reasoned that the “[r]etroactive application of *Jenks* ‘does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed.’”<sup>731</sup> Because *Jenks* only changed the evidentiary standard, this Court

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<sup>730</sup> *Dobbert*, 432 U.S. at 293; see also *Beazell v. Ohio*, 269 U.S. 167, 171 (1925); and *Mallett v. North Carolina*, 181 U.S. 589, 597 (1901).

<sup>731</sup> *Webb*, 70 Ohio St.3d at 331, quoting *Collins*, 497 U.S. at 52.

held “a rule changing the quantum of proof required for conviction may be applied to trials of crimes committed before the rule was announced, without violating the *Ex Post Facto* Clause.”<sup>732</sup>

In *Webb*, this Court further rejected the defendant’s argument that Section 28, Article II of the Ohio Constitution, prohibits *Jenks* from being applied retroactively:

That provision speaks only of the General Assembly; it does not apply to judicially created rules. A decision of this court overruling a former decision “is retrospective in its operation, and the effect is not that the former [decision] was bad law, but that it never was the law.” *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 210, 57 O.O. 411, 411, 129 N.E.2d 467, 468.<sup>733</sup>

Accordingly, *Jenks* may be applied retroactively without running afoul of either the U.S. or Ohio Constitutions.

Therefore, the trial court properly denied Appellant’s request to instruct the jury that “circumstantial evidence can be relied upon only if all reasonable hypotheses of innocence are excluded.”

To summarize, there was no reasonable basis for the jury to find Appellant guilty of involuntary manslaughter. Further, the retroactive application of this Court’s definition of circumstantial evidence does not violate the *Ex Post Facto* Clause. Therefore, the overall jury charge did not in result a manifest miscarriage of justice.

Appellant’s tenth proposition of law is meritless and must be overruled.

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<sup>732</sup> *Webb*, 70 Ohio St.3d at 331, quoting *Jones*, 67 Ohio St.2d at 248.

<sup>733</sup> *Webb*, 70 Ohio St.3d at 331.

**XI. Proposition of Law No. 11:** When a person asserts his right to silence during a custodial interrogation, thereby invoking his privilege against self-incrimination, but does not specifically ask for counsel, interrogation must stop and may not be commenced again unless the person initiates the communication. Fifth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1, 2, 10, and 16 construed; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), applied.

**State's Response to Proposition of Law No. 11:** Competent and Credible Evidence Supported the Trial Court's Decision to Overrule Appellant's Motion to Suppress His Statements; Because Appellant was Properly Advised of His *Miranda* Rights, Which He Voluntarily Waived on Several Occasions, and His Right to Remain Silent was Scrupulously Honored After He Did Invoke His Right to Remain Silent Prior to Being Re-Interviewed.

As for Appellant's eleventh proposition of law, he contends that his Fifth Amendment rights to counsel and to remain silent were violated. To the contrary, Appellant was properly afforded his *Miranda* rights, and voluntarily waived those rights on several occasions. Further, after Appellant invoked his right to remain silent, law enforcement scrupulously honored that right before they re-interviewed him. Therefore, the trial court's decision to overrule the motion to suppress was supported by competent and credible evidence.

**A. ONLY IF THIS COURT FINDS THAT  
COMPETENT AND CREDIBLE EVIDENCE DID NOT  
SUPPORT THE COURT'S DENIAL OF APPELLANT'S  
MOTION TO SUPPRESS, MAY THIS COURT REVERSE.**

As stated above, in reviewing a motion to suppress, an appellate court asks whether competent, credible evidence supports the trial court's conclusion.<sup>734</sup> According to Ohio courts, this standard is appropriate because "in a hearing on a motion to suppress

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<sup>734</sup> See *Sharpe*, supra at \*2.

evidence, the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses.”<sup>735</sup> Notwithstanding, once a reviewing court accepts those facts as true, it must determine independently, as a matter of law and without specific deference to the trial court’s conclusion, whether the trial court met the applicable legal standard.<sup>736</sup> Further, “[a] trial court’s decision on a motion to suppress will not be disturbed when it is supported by substantial credible evidence.”<sup>737</sup>

**B. CUSTODIAL INTERROGATION TRIGGERS  
A LAW ENFORCEMENT OFFICER’S DUTY TO  
ADVISE A SUSPECT OF HIS CONSTITUTIONAL  
RIGHTS AS EXPLAINED IN *MIRANDA* v. *ARIZONA*.**

The prosecution may not use statements arising from custodial interrogation, unless procedural safeguards were used to secure against self-incrimination.<sup>738</sup> “A suspect in police custody ‘must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has

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<sup>735</sup> *Id.*

<sup>736</sup> *Doss*, supra at ¶ 8.

<sup>737</sup> *Thomas*, supra at ¶ 15, citing *Rice*, 129 Ohio App.3d at 94.

<sup>738</sup> *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). “Custodial interrogation” is questioning initiated by law enforcement after a person is taken into custody or otherwise deprived of freedom in a significant manner. *Id.* “Only a custodial interrogation triggers the need for a Miranda rights warning.” *State v. Mason*, 82 Ohio St.3d 144, 153 (1998), citing *Berkemer* v. *McCarty*, 468 U.S. 420 (1984). Custody entails either “‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *Mason*, 82 Ohio St.3d at 154, quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983), quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Courts must look at how a reasonable person in the suspect’s position would have understood the situation. *Mason*, 82 Ohio St.3d at 154, citing *Berkemer*, 468 U.S. at 442.

the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”<sup>739</sup>

1. **A DEFENDANT MAY RELINQUISH HIS MIRANDA RIGHTS WHEN DONE SO KNOWINGLY AND VOLUNTARILY.**

It is well established that a person may waive or relinquish any known rights:

In the context of *Miranda*, the United States Supreme Court has explained the two aspects of waiver. “First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the ‘totality of the circumstances surrounding the interrogation’ reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” *Moran v. Burbine* (1986), 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410, quoting *Fare v. Michael C.* (1979), 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197.

We have also recognized that to meet the first aspect of a voluntary waiver, the waiver must be noncoercive. “A suspect’s decision to waive his Fifth Amendment privilege against compulsory self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct.” *State v. Dailey* (1990), 53 Ohio St.3d 88, 559 N.E.2d 459, at paragraph two of the syllabus.<sup>740</sup>

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<sup>739</sup> *State v. Lather*, 110 Ohio St.3d 270, 271-272 (2006), quoting *Miranda*, 384 U.S. at 479.

<sup>740</sup> *Lather*, 110 Ohio St.3d at 272.

Thus, a defendant's relinquishment of his *Miranda* rights must be made voluntarily, knowingly, and intelligently.<sup>741</sup> The prosecution must show by a preponderance of the evidence that the waiver and the statement were obtained in compliance with *Miranda*.<sup>742</sup>

A trial "court may infer from the totality of the circumstances that a defendant voluntarily, knowingly, and intelligently waived his rights."<sup>743</sup> "The totality of the circumstances includes 'e.g., the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'"<sup>744</sup>

The Seventh District previously has recognized that "**evidence of a written waiver form signed by the accused is strong proof that the waiver is valid.**"<sup>745</sup> (Emphasis added.) Furthermore, this Court has also "held that *Miranda* warnings were proper and the confession was voluntary when a suspect was advised of his *Miranda* rights but never asked for a further explanation of them."<sup>746</sup>

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<sup>741</sup> *Miranda*, 384 U.S. at 444.

<sup>742</sup> *Colorado v. Connelly* (1986), 479 U.S. 157, 168.

<sup>743</sup> *Id.*, citing *State v. Clark* (1988), 38 Ohio St.3d 252, 261, and *State v. Gapen* (2004), 104 Ohio St.3d 358, ¶ 52.

<sup>744</sup> *Lather*, 110 Ohio St.3d at 272, quoting *Dixon*, 101 Ohio St.3d at 328, ¶ 25, quoting *Eley*, 77 Ohio St.3d at 178.

<sup>745</sup> *State v. Shakoor* (Sept. 23, 2003), 7<sup>th</sup> Dist. No. 01 CA 121, 2003 Ohio 5140, ¶19, quoting *Eley*, 77 Ohio St.3d at 178.

<sup>746</sup> *Lather*, 110 Ohio St.3d at 272, citing *State v. Foust* (2004), 105 Ohio St.3d 137, ¶¶ 71-72.

a.) **Appellant Knowingly and Voluntarily Waived His *Miranda* Rights, Which is Evidenced by Several Waiver Forms He Signed.**

Here, Appellant knowingly and voluntarily waived his *Miranda* rights on several occasions. This is evidenced by the valid *Miranda* waiver forms that he executed prior to each interview.<sup>747</sup>

Following his arrest on December 30, 1985, Appellant was taken to the Youngstown Police Department and interviewed by Det. Landers.<sup>748</sup> Appellant was advised of his *Miranda* rights and acknowledged receipt of his rights by signing the waiver.<sup>749</sup> Appellant refused to give a statement and the interview ceased.<sup>750</sup>

Later that day, Soccorsy (Appellant's probation officer) interviewed Appellant at the Youngstown City Jail.<sup>751</sup> During the interview, Soccorsy advised Appellant of his *Miranda* rights. Appellant acknowledged receipt of his rights and executed a written waiver.<sup>752</sup> Appellant never indicated to Soccorsy that he did not understand those rights. Appellant was twenty-seven years old at the time; was able to read and write; and had a

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<sup>747</sup> See *Eley*, 77 Ohio St.3d at 178.

<sup>748</sup> Supp. Hrg. at 25.

<sup>749</sup> *Id.* at 25-26; see, also, State's Exhibit No. 1.

<sup>750</sup> *Id.* at 26-27.

<sup>751</sup> *Id.* at 71-75.

<sup>752</sup> *Id.* at 72.

lengthy prior criminal record.<sup>753</sup> Appellant described the events at the apartment from earlier that day, but did not go into detail regarding the ATM card.<sup>754</sup>

On December 31, 1985, Det. Landers again interviewed Appellant.<sup>755</sup> (Appellant's blood was obtained during this interview for comparison purposes). Appellant was again afforded his *Miranda* rights and acknowledged receipt of his rights by signing the waiver.<sup>756</sup> Appellant refused to give a statement and the interview ceased.<sup>757</sup>

On January 2, 1986, Soccorsy interviewed Appellant regarding the revocation of his probation. Although Soccorsy did not have Appellant execute a second waiver, he did advise Appellant of his *Miranda* rights, which Appellant waived.<sup>758</sup> During this interview, Appellant stated that he found the ATM card "on the top step near the porch."<sup>759</sup>

It is evident that Appellant was advised of his *Miranda* rights prior to each interview. Appellant never indicated to either Soccorsy or Det. Landers that he did not understand his *Miranda* rights. The fact that Appellant chose to speak with Soccorsy rather than Det. Landers illustrates his understanding of those rights.

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<sup>753</sup> *Id.* at 70-72.

<sup>754</sup> *Id.* at 73; see, also, State's Exhibit No. 4.

<sup>755</sup> *Id.* at 27.

<sup>756</sup> *Id.* at 27-28; see, also, State's Exhibit No. 2.

<sup>757</sup> *Id.* at 29-30.

<sup>758</sup> *Id.* at 73-75.

<sup>759</sup> Supp. Hrg., at State's Exhibit No. 4.

The Seventh District properly recognized that “a suspect who receives adequate *Miranda* warnings prior to a custodial interrogation need not be warned again before each subsequent interrogation.”<sup>760</sup> “Here, the only evidence we have is that appellant originally refused to make a statement. This does not unambiguously show that he expressed that he was invoking his right to remain silent.”<sup>761</sup>

Therefore, the record establishes that Appellant knowingly and voluntarily waived his *Miranda* rights on each occasion, which is evidenced by the *Miranda* waiver forms that he executed prior to each interview.

2. **A DEFENDANT MUST UNAMBIGUOUSLY INVOKE HIS RIGHT TO REMAIN SILENT.**

The U.S. Supreme Court held in *Michigan v. Mosely* “that once a suspect invokes his right to remain silent, police must cease to question him. The invocation does not bar further questioning altogether, but police must scrupulously honor the defendant's exercise of his right to cut off questioning.”<sup>762</sup> But, “police must honor an invocation of the right to cut off questioning only if it is *unambiguous*.”<sup>763</sup> (Emphasis added.) This

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<sup>760</sup> *Adams*, supra at ¶ 61, citing *Treesh*, 90 Ohio St.3d at 470, citing *State v. Barnes*, 25 Ohio St.3d 203, 208 (1986), and citing *State v. Brewer*, 48 Ohio St.3d 50 (1990).

<sup>761</sup> *Adams*, supra at ¶ 61, citing *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2260 (2010).

<sup>762</sup> *State v. Murphy*, 91 Ohio St.3d 516, 519 (2001), citing *Michigan v. Mosley*, 423 U.S. 96, 104 (1975), citing *Miranda*, 384 U.S. at 479.

<sup>763</sup> *Murphy*, 91 Ohio St.3d at 520. In *Murphy*, the defendant was afforded his *Miranda* rights and denied any involvement in the crime. After telling his version, the defendant then stated, “I’m ready to quit talking now and I’m ready to go home, too.” The police officer then left the interrogation room for several minutes to speak with another officer. The officer went back to the interrogation room with a crime scene technician and resumed questioning the defendant. The defendant thereafter confessed. This Court held that the defendant’s statement, “I’m ready to quit talking now and I’m ready to go home, too,” was not an unambiguous invocation of the right to remain silent. The Court then

Court has adopted the standard set forth in *Davis v. United States*<sup>764</sup> in determining whether a suspect invoked his right to remain silent.<sup>765</sup>

The suspect “must articulate his or her desire to remain silent or cut off questioning ‘sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be’ an invocation of the right to remain silent.”<sup>766</sup> Accordingly, “[i]f the suspect says something that may or may not be an invocation of the right, police may continue to question him; they need not treat the ambiguous statement as an invocation or try to clear up the ambiguity.”<sup>767</sup> “Thus, appellant’s claim turns on whether his statement was an unambiguous invocation of his right to stop talking.”<sup>768</sup>

For example, this Court has found the following statements to be ambiguous, which did not create an obligation to suspend the interrogation:

- “I’m ready to quit talking and I’m ready to go home, too[.] \* \* \* .”<sup>769</sup>

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upheld the confession and found that the police complied with the rule set forth in *Mosley*, supra. *Id.*

<sup>764</sup> *Davis v. United States*, 512 U.S. 452 (1994).

<sup>765</sup> *Murphy*, 91 Ohio St.3d at 520, citing *Bui v. DiPaolo*, 170 F.3d 232, 239 (1<sup>st</sup> Dist., 1999).

<sup>766</sup> *Murphy*, 91 Ohio St.3d at 520, quoting *State v. Ross*, 203 Wis.2d 66, 78 (1996), quoting *Davis*, 512 U.S. at 459; and citing *United States v. Mikell*, 102 F.3d 470, 476 (11<sup>th</sup> Cir., 1996).

<sup>767</sup> *Murphy*, 91 Ohio St.3d at 520, citing *Ross*, 203 Wis.2d at 75-76, fn. 4, citing *State v. Owen*, 696 So.2d 715, 717-718 (Fla.1997), and *State v. King*, 708 A.2d 1014, 1017 (Me. 1998).

<sup>768</sup> *Murphy*, 91 Ohio St.3d at 520.

<sup>769</sup> *Id.* at 521.

- “I don’t even like talking about it man \* \* \* cause you know what I mean, it’s fucked for me, man, \* \* \* I told you \* \* \* what happened, man, \* \* \* I mean, I don’t even want to, you know what I’m saying, discuss no more about it, man, you know, ‘cause it ain’t gonna, you know, it ain’t gonna to bring, ain’t gonna bring the man back.”<sup>770</sup>

And Ohio appellate courts found the following statements to also be ambiguous, which did not create an obligation to suspend the interrogation:

- The defendant’s statement that he was “done talking” was ambiguous.<sup>771</sup>
- “Yeah, yeah. You know, man, I really don’t even want to keep going through these questions and stuff, man, because you all getting ready to charge me with something. I don’t know, man. You know what I am saying?”<sup>772</sup>
- “Man, if it is like that, man, I ain’t got nothing to say, man. I ain’t got nothing to say. I ain’t got nothing to say. Evidently, you’re trying to put something on me, man. I ain’t got nothing to say. I didn’t-I didn’t do nothing. I ain’t did a thing. I ain’t did a thing. I ain’t did a thing. I ain’t did a thing.”<sup>773</sup>

Thus, the above examples illustrate that Ohio courts, including this Court, require more than a suspect merely stating that he doesn’t want to talk anymore.

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<sup>770</sup> *Jackson*, 107 Ohio St.3d at 310. This Court, however, found that Jackson’s later statement should have ended the interrogation: “I don’t even want to talk about it no more, man. I’m, I’m, I’m through with it, man,” \* \* \* “And that’s it. End of discussion, man.” *Id.*

<sup>771</sup> *See State v. Bird*, 12<sup>th</sup> Dist. No. CA2002-05-106, 2003 Ohio 2541, ¶ 29.

<sup>772</sup> *State v. Wright*, 10<sup>th</sup> Dist. No. 07AP-154, 2007 Ohio 7141, ¶ 36.

<sup>773</sup> *Id.* at ¶ 37. The Tenth District concluded that the defendant continued to offer his explanation while the officer was simply attempting to determine if the defendant was in fact invoking his right to remain silent. *Id.* at ¶ 41.

a.) **The Officers Honored Appellant's Initial Invocation of His Right to Remain Silent, But He Thereafter Knowingly and Voluntarily Relinquished His Right to Remain Silent Prior to Each Statement.**

An individual may initially waive his rights and, at any later point, invoke them.<sup>774</sup> Once an individual invokes his rights, the questioning must stop.<sup>775</sup> However, with regards to invoking the right to remain silent, police may question an individual at a later point provided "his 'right to cut off questioning' was 'scrupulously honored.'"<sup>776</sup>

When determining whether the police "scrupulously honored" an individual's right to remain silent, the U.S. Supreme Court set forth the following guidelines: (1) whether the individual was provided his *Miranda* rights prior to the first interview; (2) whether the interview ceased upon the individual's invocation of the right to remain silent, or whether the police persuaded him to reconsider; (3) the length of time between the first and second interview; and (4) whether the individual was afforded his *Miranda* rights at the second interview and waived them.<sup>777</sup> In *Mosley*, the police complied with all four (4) prongs and the U.S. Supreme Court upheld the defendant's statement from the second interview.

During the December 30, 1985, interview with Det. Landers, Appellant was afforded and waived his *Miranda* rights, but stated that he did not want to answer any

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<sup>774</sup> *Miranda*, 384 U.S. at 444-445.

<sup>775</sup> *Id.*

<sup>776</sup> *Mosley*, 423 U.S. at 104, quoting *Miranda*, 384 U.S. at 474.

<sup>777</sup> *Mosley*, 423 U.S. at 104.

questions, arguably, invoking his right to remain silent.<sup>778</sup> Later that day, during the interview with Soccorsy, Appellant was again afforded and waived his *Miranda* rights, and in fact, made a statement to Soccorsy concerning the events of that day at the apartment. Thus, Appellant never invoked his right to remain silent during the subsequent interview.<sup>779</sup>

During the December 31, 1985, interview with Det. Landers, Appellant was again afforded and waived his *Miranda* rights, but stated that he did not want to answer any questions, arguably, invoking his right to remain silent.<sup>780</sup>

During the January 2, 1985 interview with Soccorsy, Appellant was again afforded and waived his *Miranda* rights, and made a statement regarding his finding of Gina's ATM card "on the top step near the porch."<sup>781</sup>

In applying the four-prong *Mosley* test, Det. Landers and Soccorsy "scrupulously honored" Appellant's right to remain silent prior to each statement they obtained.

Under the first and fourth prongs, Appellant was provided his *Miranda* rights prior to the first (and every subsequent) interview. Although Appellant arguably invoked his right to remain silent during the two interviews with Det. Landers, Appellant never invoked his right to remain silent when interviewed by Off. Soccorsy and, in fact, gave statements during each interview.

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<sup>778</sup> Supp. Hrg. at 25-30.

<sup>779</sup> *Id.* at 70-75.

<sup>780</sup> *Id.* at 25-30.

<sup>781</sup> *Id.* at 70-75; *see also* State's Exhibit No. 4.

Under the second prong, when Appellant refused to answer Det. Landers' questions, the interviews ceased, and Det. Landers made no attempts to persuade him to reconsider.

Under the third prong, there was a substantial break between the interviews. The first interview with Det. Landers at the police station occurred earlier in the day on December 30, 1985. The second interview with Soccorsy at the city jail occurred on that same day, but several hours later. The third interview with Det. Landers at the police station occurred the following day, December 31, 1986, when the blood draw was done. The fourth interview with Soccorsy occurred at the jail two days later on January 2, 1986.

Therefore, in applying the four-prong *Mosley* test, Det. Landers and Soccorsy "scrupulously honored" Appellant's right to remain silent prior to each statement they obtained.

3. **LIKE HIS RIGHT TO REMAIN SILENT,  
A DEFENDANT'S INVOCATION OF HIS RIGHT  
TO COUNSEL MUST ALSO BE UNAMBIGUOUS.**

If an individual invokes the right to counsel, law enforcement must stop its questioning, and cannot reinitiate questioning until counsel is present or the individual initiates further communications.<sup>782</sup> With regards to the right to counsel, the Sixth Amendment right to counsel is offense specific.<sup>783</sup> "It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced \* \* \*."<sup>784</sup>

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<sup>782</sup> *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981).

<sup>783</sup> *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

<sup>784</sup> *Id.*

“Thus, under *McNeil*, appointment of counsel with respect to one offense does not bar police questioning as to a second uncharged offense.”<sup>785</sup>

Like the invocation of a defendant’s right to remain silent, a defendant must unambiguously invoke his right to counsel. The U.S. Supreme Court has held that to invoke the right to counsel, an individual “must unambiguously request counsel.”<sup>786</sup> “If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”<sup>787</sup>

Courts have held that single statements, multiple statements, and even conversations may be ambiguous:

- “Maybe I should talk to an attorney.”<sup>788</sup>
- “I think I need a lawyer \* \* \*.”<sup>789</sup>
- “I think I might want an attorney.”<sup>790</sup>
- “Should I get one [attorney]?”<sup>791</sup>
- “Where’s my lawyer?”<sup>792</sup>

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<sup>785</sup> *State v. Hill*, 73 Ohio St.3d 433, 446 (1995); see also *State v. Sapp*, 105 Ohio St.3d 104 (2004).

<sup>786</sup> *Davis*, 512 U.S. at 459.

<sup>787</sup> *Id.* at 461-462.

<sup>788</sup> *Id.* at 452.

<sup>789</sup> *State v. Henness*, 79 Ohio St.3d 53 (1997).

<sup>790</sup> *State v. Bundy*, 7<sup>th</sup> Dist. No. 02 CA 211, 2005 Ohio 3310.

<sup>791</sup> *State v. Bruhn*, 9<sup>th</sup> Dist. No. 03 CA 8364, 2004 Ohio 2119.

<sup>792</sup> *State v. Williams*, 10<sup>th</sup> Dist. No. 03 AP-4, 2003 Ohio 7160.

- “[A]sked if a lawyer was necessary.”<sup>793</sup>
- “I think I might need to talk to a lawyer.”<sup>794</sup>
- “It would be nice [to have an attorney].”<sup>795</sup>

In addition to single statements being ambiguous, courts have also held numerous statements to be ambiguous.

For instance, in *State v. Mills*, the Twelfth District Court of Appeals held the following three statements were too ambiguous to be an invocation of the right to counsel: (1) whether it would be “wise” to have an attorney; (2) “This says right here that I do not want a lawyer present as this time,” questioning the form he was signing; and (3) “I’d rather have my attorney here if you’re going to talk stuff like that.”<sup>796</sup>

Here, Det. Landers testified that Appellant never invoked his right to counsel when he was interviewed on December 30 and 31, 1985. Likewise, Soccorsy testified that Appellant never invoked his right to counsel when he was interviewed on December 30, 1985, and January 2, 1986. It is evident that at no point during any of the four interviews did Appellant invoke his right to counsel.

Therefore, the trial court properly found that Appellant never invoked his right to counsel.

Appellant’s eleventh proposition of law is meritless and must be overruled.

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<sup>793</sup> *State v. Clashman*, 7<sup>th</sup> Dist. No. 97 JE 8, 1999 WL 126432 (Feb. 26, 1999).

<sup>794</sup> *State v. Hanson*, 2<sup>nd</sup> Dist. No. 15405, 1996 WL 535297 (Sept. 13, 1996).

<sup>795</sup> *Ledbetter v. Edwards*, 35 F.3d 1062 (6<sup>th</sup> Cir., 1994).

<sup>796</sup> *State v. Mills*, 12<sup>th</sup> Dist. No. CA96-11-098, 1997 WL 727653, at \*7 (Nov. 24, 1997); see also *State v. Stover*, 9<sup>th</sup> Dist. No. 96 CA 6461, 1997 WL 193333, at \*1-2 (Apr. 16, 1997).

**XII. Proposition of Law No. 12:** Denial of a proper motion for discharge based upon speedy trial in violation of liberties secured by U.S. Const. Amend. VI and XIV, Ohio Const., Art. I, §§1, 2, 10, and 16, and Enforced Through the Speedy Trial Act of 1974, Codified in R.C. §2945.71 *et seq.*

**State's Response to Proposition of Law No. 12:** Appellant's Right to a Speedy Trial was Not Violated pursuant to the Sixth Amendment or R.C. 2945.71 *et seq.*; Because Appellant's Speedy Trial Clock Did Not Expire Before He Executed a Waiver of His Speedy Trial Rights.

As for Appellant's twelfth proposition of law, he contends that his right to a speedy trial was violated because more than two-hundred and seventy days elapsed from the time of his arrest until he executed a waiver of his speedy trial rights. To the contrary, Appellant's right to a speedy trial was not violated, because his speedy trial clock did not expire before he executed a waiver of his speedy trial rights. Therefore, the trial court properly found that his right to a speedy trial pursuant to R.C. 2945.71 was not violated.

**A. TO DETERMINE IF A DEFENDANT'S SPEEDY TRIAL HAS EXPIRED PURSUANT TO R.C. 2945.71, A REVIEWING COURT MUST SIMPLY COUNT THE DAYS ATTRIBUTABLE TO EACH PARTY.**

To provide some general background, R.C. 2945.71 provides a speedy trial timeframe for defendants based on their level of offense. According to the Code, the State shall bring a defendant to trial "within two hundred seventy days [270] after the [defendant's] arrest"—three days counting as one for the incarcerated defendant,<sup>797</sup> which "[t]he day of arrest does not count against the speedy trial time."<sup>798</sup>

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<sup>797</sup> R.C. 2945.71.

<sup>798</sup> *State v. Hart*, 7<sup>th</sup> Dist. No. 06 CO 62, 2007 Ohio 3404, citing *State v. Catlin*, 7<sup>th</sup> Dist. No. 06 BE 21, 2006 Ohio 6246, citing *State v. Turner*, 7<sup>th</sup> Dist. No. 93CA91, 2004 Ohio 1545.

In determining whether a defendant's right to speedy trial has been violated, the reviewing court must count the days of delay and decide which party they are charged to.<sup>799</sup> The court must then weigh "the length of delay, the reasons for it, the defendant's timeliness and manner of asserting this right and whether the defendant has suffered cognizable prejudice."<sup>800</sup>

1. **APPELLANT'S ARREST IN 1986  
DID NOT TRIGGER THE RUNNING  
OF HIS SPEEDY TRIAL CLOCK, BECAUSE  
THE STATE OBTAINED NEW AND ADDITIONAL  
EVIDENCE WELL AFTER THE INITIAL ARREST.**

To begin, Appellant's initial arrest in 1986 for receiving stolen property (Gina Tenney's ATM card) does not constitute the arrest date for the subsequent indictment in 2007. It was not until 2007 when new and additional evidence (i.e., DNA) was discovered that left no doubt that Appellant murdered Gina Tenney and threw her body into the Mahoning River.

In *State v. Adams*, this Court held that "[w]hen an accused waives the right to a speedy trial as to an initial charge, this waiver is not applicable to additional charges arising from the same set of circumstances that are brought subsequent to the execution of the waiver."<sup>801</sup>

Later in *State v. Baker*, this Court held that "[i]n issuing a subsequent indictment, the state is not subject to the speedy-trial timetable of the initial indictment, when

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<sup>799</sup> *State v. Green*, 11<sup>th</sup> Dist. No. 2003 A 111, 2005 Ohio 6715; *Hart*, supra.

<sup>800</sup> *State v. Burgess*, 11<sup>th</sup> Dist. No. 2003 L 69, 2004 Ohio 4395, ¶ 31, citing *State v. Broughton*, 62 Ohio St. 3d 253, 256 (1991).

<sup>801</sup> *State v. Adams*, 43 Ohio St.3d 67, syllabus (1989).

*additional criminal charges arise from facts different from the original charges, or the state did not know of these facts at the time of the initial indictment.*<sup>802</sup> (Emphasis added.)

In *Baker*, the defendant was arrested on June 10, 1993, at his home after an investigation revealed that he was illegally selling prescription drugs.<sup>803</sup> That same day, law enforcement agents seized numerous business and financial records from two pharmacies that the defendant owned, which they then began to analyze for additional criminal conduct.<sup>804</sup> The defendant was initially indicted on charges that related only to the controlled buys executed by the undercover informants.<sup>805</sup>

A second indictment, however, was issued nearly one year after his initial arrest.<sup>806</sup> The charges contained in the second indictment resulted solely from the analysis of the numerous business and financial records seized from the defendant's two pharmacies.

In *Baker*, the Court concluded that "the state was not subject to the speedy-trial time limits of the original indictment, since the subsequent charges were based on *new and additional facts* which the state had *no knowledge* of at the time of the original indictment."<sup>807</sup> (Emphasis added.) Thus, "[a]dditional crimes based on different facts

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<sup>802</sup> *State v. Baker*, 78 Ohio St.3d 108, syllabus (1997).

<sup>803</sup> *Id.* at 108.

<sup>804</sup> *Id.* at 108-109.

<sup>805</sup> *Id.* at 109.

<sup>806</sup> *Id.*

<sup>807</sup> *Id.* at 111.

should not be considered as arising from the same sequence of events for the purposes of speedy-trial computation.”<sup>808</sup>

Here, Appellant’s speedy trial clock for his subsequent indictment in 2007 should not relate back to his initial arrest in 1986, because the subsequent indictment was based upon facts that were neither known to law enforcement officers nor the prosecution in 1986. Those facts being the DNA results that excluded “Horace Landers as being a source of any of the DNA, the forensic DNA profiles from the vaginal swabs,” and from underwear belonging to Gina Tenney;<sup>809</sup> but could not exclude Appellant “as the source of the semen on the vaginal swab,” and from underwear belonging to Gina Tenney.”<sup>810</sup> The distinction between evidence known then and now concerning DNA is critical.

Further, the Seventh District recognized the new and additional information that the Youngstown Police discovered *after* Appellant was arrested for receiving stolen property:

Here, appellant was arrested on December 30, 1985 because he had a stolen ATM card in his jacket pocket. Shortly thereafter, the victim’s television and key chain were found in appellant’s apartment. Although the card belonged to a murder victim that had just been recovered from the river, this does not mean that a murder charge arises from the same facts as those supporting the receiving stolen property charge. For all the police knew at the time, appellant received the property from Mr. Landers, who was also a murder suspect, or appellant burglarized the victim’s house when she failed to return home for the night.<sup>811</sup>

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<sup>808</sup> *Id.*

<sup>809</sup> Trial Tr., Vol. III, at 586-587.

<sup>810</sup> *Id.* at 587.

<sup>811</sup> *Adams*, supra at ¶ 123.

The facts known to police that night were not as extensive as the facts developed thereafter through investigation. It was not until February of 1986 that the police had forensic evidence excluding Mr. Landers and the victim's former boyfriend as the semen donors and failing to exclude appellant as the source. It was also not until 2007 that police had state-of-the-art DNA evidence nearly conclusively establishing the appellant was the source of the semen.<sup>812</sup>

In accordance with this Court's decision in *Adams* and *Baker*, Appellant's speedy trial clock began to run upon his arrest in 2007 for aggravated murder, not his initial arrest in 1986 for receiving stolen property.

Therefore, Appellant's speedy trial clock did not expire prior to the day on which he executed a waiver of his speedy trial rights.<sup>813</sup>

But even assuming that Appellant's speedy trial clock for the subsequent arrest and indictment 2007 relates back to his arrest in 1986, numerous tolling events prevented his clock from expiring.

a.) **Appellant's Speedy Trial Clock was Tolled while He was Serving a Term of Imprisonment on an Unrelated Parole Violation.**

Here, the State had two-hundred and seventy (270) days to bring Appellant to trial because, for at least part of the time he was in custody, he was being held on other unrelated charges.

Specifically, R.C. 2941.401 provides, in relevant part:

When a person has entered upon a term of imprisonment in a correctional institution of this state, and when during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the

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<sup>812</sup> *Id.* at ¶ 124.

<sup>813</sup> Only seventy-five (75) days of the two-hundred and seventy (270) days ran. October 2, 2007 to October 29, 2007 = 25 days (multiplied by 3) = 75 days.

prisoner, he shall be brought to trial within one hundred eighty days after he causes to be delivered to the prosecuting attorney and the appropriate court in which the matter is pending, written notice of the place of his imprisonment and a request for final disposition to be made of the matter \* \* \*.<sup>814</sup>

Furthermore, “R.C. 2941.401 does not ‘requir[e] the state to exercise reasonable diligence to locate an incarcerated defendant,’ rather, ‘R.C. 2941.401 places the initial duty on the defendant to cause written notice to be delivered to the prosecuting attorney and the appropriate court advising of the place of his imprisonment and requesting final disposition.’”<sup>815</sup> Thus, the speedy trial period is tolled when a defendant is serving a term of imprisonment.<sup>816</sup>

Here, Appellant was arrested for Receiving Stolen Property on December 30, 1985. At the time of his arrest, Appellant was on shock probation for an unrelated receiving stolen property conviction in Mahoning County Common Pleas Case No. 84 CR 355.<sup>817</sup> Appellant was served with a notice of the violation on January 2, 1986.<sup>818</sup> Appellant’s shock probation was thereafter terminated and he was sentenced to a term of

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<sup>814</sup> R.C. 2941.401.

<sup>815</sup> *State v. Vasquez*, 11<sup>th</sup> Dist. No. 2006-A-0073, 2007 Ohio 2433, ¶ 21, quoting *State v. Harrison*, 101 Ohio St.3d 308, ¶ 20 (2004).

<sup>816</sup> *Id.*; see also *State v. Adams*, 7<sup>th</sup> Dist. No. 86 CA 174, 1988 WL 126723 (Nov. 23, 1988).

<sup>817</sup> Supp. Hrg. at 70.

<sup>818</sup> *Id.* at 74-75, 81-82.

imprisonment, which presumably occurred on January 14 or 15, 1986.<sup>819</sup> Appellant was also arrested on January 10, 1986, for a separate case that occurred in Boardman, Ohio.<sup>820</sup>

Appellant was arrested on December 30, 1985. The date of arrest does not count against the speedy trial period. From December 30, 1985, to January 2, 1986, Appellant was only being held on the receiving stolen property charge; thus, he is afforded the three-for-one day count, which at this point amounts to nine days.<sup>821</sup>

From January 3, 1986, until January 14, 1986, Appellant was being held on at least two separate cases. In fact, Appellant was being held on three separate cases—the probation violation, the receiving stolen property charge, and the Boardman case. Thus, he is afforded only one-for-one day count, which at this point amounts to twelve days.<sup>822</sup>

Once his probation was revoked and he began serving a term of imprisonment, Appellant's speedy trial period was tolled, and he remained at twenty-one days.<sup>823</sup>

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<sup>819</sup> Dets. Landers and Blanchard appear to have been subpoenaed for a hearing in Case No. 84 CR 355 on January 14, 1986. See "ProsecutorFile84CR355&86CR43" page 27 in the "Miscellaneous" file, as contained in the CD filed with the State's Notice of Filing (Prosecutor's File), filed November 26, 2008. Additionally, the judgment entry of revocation and sentence is dated January 15, 1986. See Journal Entry, Case No. 84 CR 355, which can be found in the docket for this case number in microfilm at the Mahoning County Common Pleas Courthouse.

<sup>820</sup> With regards to the Boardman case, Appellant was indicted in Mahoning County Common Pleas Case No. 86 CR 43. Appellant went to trial on November 17, 1986, and was convicted and sentenced. On appeal of that case (86 CA 174), Appellant argued a speedy trial violation, which was rejected because Appellant was serving a term of imprisonment from the shock probation violation. See *Adams*, supra.

<sup>821</sup> December 31, 1985 to January 2, 1986 = 3 days (multiplied by 3) = 9 days.

<sup>822</sup> January 3, 1986 to January 14, 1986 = 12 days.

<sup>823</sup> See R.C. 2941.401. 9 + 12 = 21 days.

Appellant never requested that he be brought to trial on the receiving stolen property charge pursuant to R.C. §2941.401.

The receiving stolen property charge was “No Billed” on September 12, 1986, nunc pro tunc May 2, 1986. The dismissal of the charge tolls the speedy trial period.<sup>824</sup>

Appellant’s speedy trial period restarted on arrest on October 4, 2007. Again, the speedy trial period does not include the date of arrest. On October 29, 2007, Appellant filed several discovery motions, which toll the speedy trial period.<sup>825</sup> From October 5, 2007, until October 29, 2007, Appellant was only being held on these charges and is, thus, afforded the three-for-one day count, which amounts to seventy-five (75) days of the two-hundred-and-seventy (270) days permitted.<sup>826</sup> Thus, bringing Appellant’s speedy trial period to ninety-six (96) days.<sup>827</sup> On November 2, 2007, Appellant executed a waiver of speedy trial.

In conclusion, because only ninety-six (96) days of the two-hundred-and-seventy (270) day speedy trial period ran, Appellant’s right to a speedy trial was not violated.

b.) **Even Assuming that the Term of Imprisonment Did Not Toll Appellant’s Speedy Trial Clock, Appellant’s Right to a Speedy Trial was Still Not Violated.**

Further assuming *arguendo* that Appellant’s term of imprisonment did not toll speedy trial, his right to a speedy trial was still not violated.

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<sup>824</sup> *State v. Lewis*, 70 Ohio App.3d 624, 630-631 (4<sup>th</sup> Dist. 1990), citing *Westlake v. Cougill*, 56 Ohio St.2d 230, 233 (1978).

<sup>825</sup> *State v. Brown*, 98 Ohio St.3d 121, 124 (2002).

<sup>826</sup> October 5, 2007 to October 29, 2007 = 25 days (multiplied by 3) = 75 days.

<sup>827</sup> 21 + 75 = 96 days.

Appellant was arrested for receiving stolen property on December 30, 1985. His shock probation was violated on January 2, 1986. He was arrested on the aforementioned Boardman case on January 10, 1986.

The receiving stolen property charge was bound over from Youngstown Municipal Court to the Mahoning County Common Pleas, where it was assigned Case No. 86 CR 18. On September 12, 1986, the grand jury returned a “No Bill” in Case No. 86 CR 18, nunc pro tunc May 2, 1986.

Appellant claims that the September 12, 1986, date is the proper date for purposes of speedy trial calculations. This is incorrect.

*Sua sponte* continuances beyond the speedy trial time period are “reasonable,” provided “the continuances were made by journal entry *prior* to the expiration of the time limit in R.C. 2945.71.”<sup>828</sup> A trial court that “chooses to exercise its discretion under R.C. 2945.72(H) to *sua sponte* continue a defendant’s cause should do so prior to the expiration of the statutory period prescribed in R.C. 2945.71.”<sup>829</sup> To that end, “after-the-fact” extensions are condemned.<sup>830</sup>

Nunc pro tunc entries “are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.”<sup>831</sup> The logic is that, if a nunc pro tunc entry is done prior to the speedy trial period expiring, then it properly

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<sup>828</sup> *State v. Mincy*, Ohio St.3d 6, 8-9 (1982), citing *State v. Lee*, 48 Ohio St.2d 208 (1976), and *Aurora v. Patrick*, 61 Ohio St.2d 107 (1980).

<sup>829</sup> *Id.*, quoting *State v. Montgomery* (1980), 61 Ohio St.2d 78, 81.

<sup>830</sup> *Id.*

<sup>831</sup> *State v. Macalla*, 8<sup>th</sup> Dist. No. 88825, 2008 Ohio 569, ¶ 77, quoting *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, ¶ 19 (2006).

reflects the court's decision, and was not done to somehow retroactively preserve speedy trial.

Here, Appellant was arrested on December 30, 1985, which does not count against the speedy trial period. From December 30, 1985, to January 2, 1986, Appellant was only being held on the receiving stolen property charge; thus, he is afforded the three-for-one day count, which at this point amounts to nine days.<sup>832</sup>

From January 3, 1986, until September 12, 1986, Appellant was held on at least two separate cases. In fact, Appellant was held on three separate cases—the probation violation, the receiving stolen property charge, and the Boardman case. Thus, he is afforded only one-for-one day count, which amounted to two-hundred-and-fifty-two days.<sup>833</sup> Therefore, as of September 12, 1986, Appellant's speedy trial period amounted to two-hundred-and-sixty-one days.<sup>834</sup>

Since the nunc pro tunc entry was filed on September 12, 1986, which was within the two-hundred-and-seventy day speedy trial period, the trial court was within its discretion to date back (or nunc pro tunc) the "No Bill" to May 2, 1986. Consequently, the period from May 2, 1986, to September 12, 1986, does not count against the speedy trial period.

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<sup>832</sup> December 31, 1985 to January 2, 1986 = 3 days (multiplied by 3) = 9 days.

<sup>833</sup> January 3, 1986 to September 12, 1986 = 252 days.

<sup>834</sup> 252 + 9 = 261 days.

From January 2, 1986, to May 2, 1986, one-hundred-and-twenty (120) days elapsed.<sup>835</sup> Therefore, only one-hundred and twenty-nine (129) days elapsed at the time Case No. 86 CR 18 was No Billed.<sup>836</sup>

As stated above, from the date of his arrest on October 4, 2007, until the first tolling events (i.e. discovery motions) on October 29, 2007, Appellant was incarcerated for twenty-five days solely on these charges. Since he is afforded the three-for-one provision, an additional seventy-five days is added to one-hundred-and-twenty-nine (129) days previously accumulated, which amounted to two-hundred-and-four (204) days.<sup>837</sup> (Appellant waived his speedy trial rights on November 2, 2007.)

Therefore, even assuming *arguendo* that Appellant's imprisonment on the parole violation does not toll speedy trial, only two-hundred and four (204) days of the two-hundred and seventy (270) days ran. Thus, Appellant's right to a speedy trial was still not violated.

c.) **Appellant is Not Entitled to Discharge, Because the Trial Court's Judgment Entry was Sufficient.**

On June 13, 2008, Appellant filed a Motion for Discharge/Dismissal. Appellant requested that the trial "state its essential findings of fact relating to this motion on the Record pursuant to Crim. R. 12(E)." Following a hearing on this motion on July 17, 2008, the trial court issued its opinion and judgment entry on July 28, 2008, overruling Appellant's motions.

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<sup>835</sup> January 3, 1986 to May 2, 1986 = 120 days.

<sup>836</sup> 9 + 120 = 129 days.

<sup>837</sup> 25 multiplied by 3 = 75 + 129 = 204 days.

Contrary to Appellant's position *now*, the trial court did make essential findings of fact in its judgment entry. It should be noted that this case did not proceed to trial until October 6, 2008, and to sentencing until October 30, 2008. And, at no point between the filing of the judgment entry on July 27, 2008, and the October trial/sentencing dates did Appellant raise the issue that trial court's "findings of facts" were insufficient. Thus, this issue is waived.

Further, because trial counsel failed to raise this issue, it appears from the record (or lack thereof) that they were satisfied with the trial court's judgment entry. Simply because Appellant's appellate counsel may disagree with trial counsel's decision does create an appellate issue (i.e. ineffective assistance of counsel).

Further, the Seventh District noted that an appellant cannot establish prejudice by a lack of findings if the record is sufficient to allow the court a full review of the issues that were raised on appeal.<sup>838</sup>

Here, the Seventh District's opinion regarding Appellant's right to a speedy trial encompasses twenty paragraphs of analysis; thus, the record was more than sufficient to allow this Court (or any reviewing court) a full review of Appellant's speedy trial argument.

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<sup>838</sup> See *Adams*, supra at ¶ 135, citing *Sapp*, 105 Ohio St.3d at 104, ¶ 96, and *State v. Benner*, 40 Ohio St.3d 301, 317-318 (1988).

**B. THE DELAY BETWEEN APPELLANT'S INITIAL ARREST AND PROSECUTION WAS NOT AN UNJUSTIFIABLE DELAY IN CONTRAVENTION OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”<sup>839</sup> This provision was made applicable to state criminal trials through the Fourteenth Amendment.<sup>840</sup>

In *Barker v. Wingo*, the U.S. Supreme Court identified four factors which courts should assess in determining whether a defendant’s constitutional the right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.<sup>841</sup> Thus, in a constitutional analysis, “[s]tatutory periods of limitations are not relevant to a determination of whether an individual’s constitutional right to a speedy trial has been violated by an unjustified delay in prosecution.”<sup>842</sup>

The District properly found that Appellant’s constitutional argument was meritless, because “the arrest for receiving stolen property was not based upon the same set of facts as the later indictment[.]”<sup>843</sup>

Appellant’s twelfth proposition of law is meritless and must be overruled.

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<sup>839</sup> Sixth Amendment to the U.S. Constitution; *accord* Ohio Constitution, Article I, Section 10.

<sup>840</sup> *State v. Selvage*, 80 Ohio St.3d 465, 466 (1997), citing *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

<sup>841</sup> *See Barker v. Wingo*, 407 U.S. 514, 530 (1972).

<sup>842</sup> *State v. Selvage*, 80 Ohio St.3d 465, syllabus (1997).

<sup>843</sup> *Adams*, *supra* at ¶ 132.

**XIII. Proposition of Law No. 13:** Prosecution for conduct barred by the applicable statute of limitations violates Due Process, Fourteenth Amendment to the U.S. Constitution, Ohio Constitution, Article I, Sections 1, 2, 10, and 16.

**State's Response to Proposition of Law No. 13:** The Statute of Limitations for Aggravated Murder Did Not Expire, Regardless of Whether the Statute of Limitations Expired on the Underlying (Predicate) Offenses.

As to Appellant's thirteenth proposition of law, he contends that the State could not proceed with the Aggravated Murder (and Death Penalty Specification) under the felony-murder theory because the statute of limitations expired on the underlying (predicate) offenses. To the contrary, Ohio law establishes that the State could proceed with the Aggravated Murder (and Death Penalty Specification) under the felony-murder theory. Therefore, Appellant's conviction and sentence must stand.

**A. THERE IS NO STATUTE OF LIMITATIONS FOR AGGRAVATED MURDER AND MURDER.**

Generally speaking, R.C. §2901.13(A) states that the statute of limitations for a "felony," other than Murder and Aggravated Murder, is six years. "The rationale for limiting criminal prosecutions is that they should be based on reasonably fresh, and therefore more trustworthy evidence."<sup>844</sup> There is, however, no limitation on Murder and Aggravated Murder, because "the grave nature of the offense overrides the general policy behind limiting criminal prosecution."<sup>845</sup>

In 1999 and 2006, R.C. §2901.13 was amended and the statute of limitations was extended to twenty years for several crimes, including, but not limited to: Manslaughter;

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<sup>844</sup> *State v. Hensley*, 59 Ohio St.3d 136, 138 (1991), quoting Committee Comments to Am.Sub. H.B. No. 511.

<sup>845</sup> *Id.*

Kidnapping; Rape; Aggravated Arson; Aggravated Robbery/Robbery; Aggravated Burglary/Burglary; and Felonious Assault. In order for a crime committed prior to these amendments to be eligible for the twenty year statute of limitations, the crime's original six year statute of limitations must not have run.

Nonetheless, there is no statute of limitations for Murder and Aggravated Murder.

1. **THERE IS NO STATUTE OF LIMITATIONS FOR AGGRAVATED MURDER UNDER THE FELONY-MURDER RULE.**

To begin, this is evident from the fact that Appellant cites to no case law or statutory law in support of his claim that, since the underlying (predicate) felonies were dismissed, the Aggravated Murder (and Death Penalty Specification) should be dismissed.

Additionally, pursuant to R.C. §2901.13, there is no statute of limitations on Aggravated Murder. R.C. §2901.13 specifically applies to “felonies,” not elements of a crime and not specifications (like the Death Penalty Specification). Thus, even though the statute of limitations had run on the underlying (predicate) felonies, the Aggravated Murder charge and Death Penalty Specification survive because the underlying felonies become (or remain) elements, not separate crimes.

In *State v. Walls*, the defendant was indicted for Aggravated Murder in violation of R.C. §2903.01(B), with the underlying/predicate offense of Aggravated Burglary.<sup>846</sup> (The prosecutor originally charged the defendant with Aggravated Burglary, but the

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<sup>846</sup> *Walls*, 96 Ohio St.3d at 437.

charge was *nolle prosequi*, after the defendant filed a motion to dismiss based on the statute of limitations.)<sup>847</sup>

In *Walls*, the victim was found dead in her home, having bled to death from nine stab wounds on March 8, 1985. The victim's home was forcibly entered and ransacked. Fingerprint evidence from the scene was matched to the defendant thirteen years later. Although the statute of limitations ran on the Aggravated Burglary, it did not run on the Aggravated Murder charge. The defendant was convicted of the Aggravated Murder and appealed. Although the defendant raised an undue delay (i.e. due process) argument, not a statute of limitations argument, the Supreme Court of Ohio affirmed the conviction.<sup>848</sup>

Applying *Walls* here, both Walls and Appellant were charged with Aggravated Murder in violation of R.C. §2903.01(B), which is the "felony murder" section of the statute, not the "prior calculation and design" section. In *Walls*, the Aggravated Burglary was utilized as an element of the Aggravated Murder. Such is the case here. Consequently, even though the trial court dismissed the underlying felonies, they are still applicable as elements of the Aggravated Murder and Death Penalty Specification.

Therefore, there is no statute of limitations for Aggravated Murder under the felony-murder theory.

Furthermore, R.C. §2901.13 specifically applies to "felonies," not elements of a crime and not specifications (like the Death Penalty Specification). Therefore, there is no statute of limitations for Death Penalty Specifications under the felony-murder theory.

Appellant's thirteenth proposition of law is meritless and must be overruled.

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<sup>847</sup> *Id.*

<sup>848</sup> *Id.*

**XIV. Proposition of Law No. 14:** The provisions of the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 5 and 10, which require a trial by a fair and impartial jury, require a trial court either to conduct an investigation or to permit an investigation to be conducted when there appears any indicia of juror misconduct.

**State's Response to Proposition of Law No. 14:** Appellant was Afforded a Fair and Impartial Jury After the Trial Court Conducted a Thorough Investigation into the Potentially Compromising Situation Involving Juror No. 175's Statements.

As for Appellant's fourteenth proposition of law, he contends that the trial court erred in failing to conduct an investigation or permit an investigation into jurors who were "potentially guilty" of misconduct. First, the trial court conducted a thorough investigation into the statements made by Juror No. 175, after which, the court concluded the statements did not affect the remaining juror—Juror No. 176. And second, defense counsel failed to request any further investigation into the situation. Therefore, the trial court did not abuse its discretion in allowing Juror No. 176 to remain on the venire following the *potentially* compromising situation.

A. **ONLY IF THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING A BIASED JUROR TO REMAIN AFTER HE COMMUNICATED WITH OTHERS JURORS WOULD APPELLANT BE ENTITLED TO A NEW TRIAL.**

The Due Process Clause demands that a person accused of a criminal violation be tried before a panel of fair and impartial jurors.<sup>849</sup> As Justice Holmes stated, "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by

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<sup>849</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968); see also Ohio Constitution, Article I, Section 10.

evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”<sup>850</sup>

Thus, the Court “has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove *actual bias*.”<sup>851</sup> (Emphasis added.) In accordance, this Court has previously stated that “[w]hen a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror.”<sup>852</sup> Such communication is presumptively prejudicial, which the State must establish was harmless:

In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.<sup>853</sup>

But the Court recognized that a new trial is not required every time a juror has been subjected to a “potentially compromising situation:”

These cases demonstrate that due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality,

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<sup>850</sup> *Patterson v. Colorado, ex rel. Attorney General*, 205 U.S. 454, 462 (1907).

<sup>851</sup> *Smith v. Phillips*, 455 U.S. 209, 215 (1982).

<sup>852</sup> *State v. Phillips*, 74 Ohio St.3d 72, 88 (1995), citing *Smith*, 455 U.S. at 215-216, and *Remmer v. United States*, 347 U.S. 227, 229-230 (1954).

<sup>853</sup> *Remmer*, 347 U.S. at 229, citing *Mattox v. United States*, 146 U.S. 140, 148-150 (1892), and *Wheaton v. United States*, 133 F.2d 522, 527 (8<sup>th</sup> Cir., 1943).

such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.<sup>854</sup>

Therefore, “[i]n cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror.”<sup>855</sup> And it is well established that unless actual prejudice is shown, a defendant’s conviction is left undisturbed.<sup>856</sup>

1. **THE COURT’S INVESTIGATION ESTABLISHED THAT JUROR NO. 176 WAS NOT BIASED FROM STATEMENTS MADE BY JUROR NO. 175; THUS, APPELLANT WAS AFFORDED A FAIR AND IMPARTIAL JURY.**

Here, much to the chagrin of defense counsel, the trial court held the required hearing, after which it determined that Juror No. 176 was not biased from the statements, and properly allowed the juror to remain.

To begin, the Seventh District found that “the court did place the fact of excusal on the record. (Tr. 600). The fact that the court used the terminology ‘he’s been removed’ rather than ‘he is being removed’ does not necessarily mean some significant unrecorded

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<sup>854</sup> *Smith*, 455 U.S. at 217; see also *State v. King*, 10 Ohio App.3d 161, 165 (1<sup>st</sup> Dist. 1983) (stating, “Not every instance of juror misconduct requires reversal. The misconduct must be prejudicial.”).

<sup>855</sup> *Phillips*, 74 Ohio St.3d at 89, citing *United States v. Daniels*, 528 F.2d 705, 709-710 (6<sup>th</sup> Cir., 1976), and *United States v. Williams*, 822 F.2d 1174, 1189 (D.C. Cir., 1987).

<sup>856</sup> See *State v. Kehn*, 50 Ohio St.2d 11, 19 (1977); accord *Armleder v. Lieberman*, 33 Ohio St. 77 (1877); see also *State v. Hipkins*, 69 Ohio St.2d 80, 83 (1982) (stating, “A new trial may be granted for the misconduct of the jury where the substantial rights of the defendant have been materially affected.”).

event took place. The fact that the court did not personally tell Juror Number 175 that he was being excused on the record is not dispositive.”<sup>857</sup> It further recognized that “[a] juror’s removal is often placed upon the record outside of their presence, and they are then administratively told, by being given a card, that they are excused.”<sup>858</sup>

The facts relevant to this issue are simple. On Tuesday, October 7, 2008, the trial court began individual-group voir dire of the remaining venire. As the record illustrates, the trial court allowed both the State and defense counsel ample time to examine several jurors within a one-hour time period. The groups ranged from five to as many as seven or eight, depending on the circumstances.

The relevant group here was the ninth group of prospective jurors, which was questioned on Wednesday, October 8, 2008.<sup>859</sup> This group consisted of Juror Nos. 254, 278, 273, 173, 175, and 176.<sup>860</sup> During individual-group voir dire, Juror Nos. 254 and 273 were removed *sua sponte* by the trial court, after an in-chambers discussion, because each had been exposed to pretrial publicity.<sup>861</sup> Juror No. 278 was also removed *sua sponte* by the trial court, without objection from either the State or trial counsel, because he appeared “slow” and “bewildered.”<sup>862</sup>

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<sup>857</sup> *Adams*, supra at ¶ 221.

<sup>858</sup> *Id.*

<sup>859</sup> *Tr. Voir Dire*, Vol. III, at 494.

<sup>860</sup> *See generally id.* at 494-543.

<sup>861</sup> *Id.* at 495-501.

<sup>862</sup> *Id.* at 501-505.

Following the trial court's examination of the prospective jurors concerning pretrial publicity, only Juror Nos. 173, 175, and 176 remained.<sup>863</sup> The State and trial counsel then examined the three jurors on their views of the death penalty.<sup>864</sup> At the conclusion of their examination, the State successfully challenged Juror No. 173 for cause, without objection from Appellant.<sup>865</sup> Appellant then unsuccessfully challenged Juror No. 175 for cause.<sup>866</sup> Thus, only Juror Nos. 175 and 176 remained from the ninth group, as all others were previously excused.<sup>867</sup>

The following morning, Thursday, October 9, 2008, it was brought to the trial court's attention that Juror No. 175 had made statements concerning the victim in this case, Gina Tenney, which were overheard by Juror Nos. 176 and 173.<sup>868</sup> The trial court conducted a hearing, as required by *Smith* and *Phillips*, supra. Juror No. 176 stated that the statements had "no effect" on him, and that he would remain "fair and impartial."<sup>869</sup> Following the trial court's examination, both the State and trial counsel passed on any

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<sup>863</sup> *Id.* at 505.

<sup>864</sup> *See generally id.* at 505-537.

<sup>865</sup> *Id.* at 538. Juror No. 173 stated that she was against the death penalty, and could not make a decision. *Id.* at 511. She stated that her views would substantially impair her ability to serve as a juror in this case. *Id.* at 512-513. Further, she could not set aside her opinions concerning the death penalty, stating, she was "having a hard enough time just sitting here now." *Id.* at 535-536.

<sup>866</sup> *Id.* at 538-542.

<sup>867</sup> *Id.* at 542.

<sup>868</sup> *Id.*, Vol. IV, at 599-600.

<sup>869</sup> *Id.* at 600.

further inquiry.<sup>870</sup> Further, the record is clear that because of these statements, Juror No. 175 was removed from the venire.<sup>871</sup> Thus, only Juror No. 176 remained from the ninth prospective group.

Thus, when the trial court learned of the improper statements made by Juror No. 175, which were overheard by Juror Nos. 173 and 176, the trial court conducted the required hearing to determine whether the statements biased Juror No. 176—the remaining juror.<sup>872</sup> Nothing more was required.

For example, in *State v. Phillips*, this Court found that the trial court did not abuse its discretion in retaining the affected jurors.<sup>873</sup> In *Phillips*, a grand juror approached five jurors outside and questioned them about the case.<sup>874</sup> The trial court then examined the jurors.<sup>875</sup> All five jurors stated that the statements did not influence their decision in the

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<sup>870</sup> *Id.* at 600-601.

<sup>871</sup> *Id.* at 600.

<sup>872</sup> *See Phillips*, 74 Ohio St.3d at 88, citing *Smith*, 455 U.S. at 215-216, and *Remmer*, 347 U.S. at 229-230.

<sup>873</sup> *Phillips*, 74 Ohio St.3d at 89.

<sup>874</sup> *Id.* at 88. “During a trial recess, four jurors and one alternate left the courthouse to smoke. Eleanore Crowe, a member of a grand jury panel that was also in recess, was already outside when the jurors in the instant action approached. Crowe chatted with some of the jurors, mentioned that she was a grand juror, and then said something about the Phillips case. All five jurors immediately returned to the courthouse and reported the comments to the bailiff.” *Id.*

<sup>875</sup> *Id.* “Two jurors heard Crowe say that she hoped appellant ‘gets it’ or ‘gets whatever he deserves.’ One thought she said: ‘[T]he worst case that I was on was the Sheila Marie Evans case.’ One juror heard only the words ‘Sheila Marie Evans,’ while another heard ‘Sheila Marie’ and ‘Goddamn. Jurors described Crowe’s tone as ‘heated’ or ‘agitated.’”

case.<sup>876</sup> After the examination, the trial court stated that he was “satisfied that they put it out of their minds, they’re not going to consider it.”<sup>877</sup> The Ohio Court concluded that the defendant failed to demonstrate an abuse of discretion in retaining the jurors, as all “five jurors stated without hesitation that he or she would disregard Crowe’s comments.”<sup>878</sup>

Likewise here, upon learning of the statements made by Juror No. 175, the trial court removed him from the venire.<sup>879</sup> Juror No. 176 was then questioned about the statements made by Juror No. 175.<sup>880</sup> Juror No. 176 unequivocally stated that the statements had “no effect” on him, and that he would remain “fair and impartial.”<sup>881</sup> And defense counsel passed on any further inquiry, and did not request any further investigation into Juror No. 175’s statements.<sup>882</sup>

Furthermore, none of the prospective jurors sat on the jury that convicted and sentenced Appellant to death; thus, no prejudice could be established.<sup>883</sup>

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<sup>876</sup> *Id.*

<sup>877</sup> *Id.*

<sup>878</sup> *Id.* at 89.

<sup>879</sup> Tr. Voir Dire, Vol. IV, at 600. Defense counsel appears unsatisfied with the trial court’s statement that Juror No. 175 had been removed, and suggests that there is doubt as to the accuracy of this statement. The record, however, is crystal clear that Juror No. 175 was removed, never to be heard from again. *See generally id.* at 612-749.

<sup>880</sup> *Id.* at 599-601.

<sup>881</sup> *Id.* at 600.

<sup>882</sup> *Id.* at 600-601.

<sup>883</sup> Juror No. 176 was removed by a State’s peremptory challenge. *Id.* at 760. *See State v. Grant*, 7<sup>th</sup> Dist. No. 83 CA 144, 1990 WL 176825, \*30 (Nov. 9, 1990), citing *King*, 10 Ohio App.3d at 165-166.

The trial court conducted a thorough investigation into the statements made by Juror No. 175, after which, the court concluded the statements did not affect the remaining juror—Juror No. 176. Further, defense counsel failed to request any further investigation into the situation. This Court cannot presume that the entire panel was tainted because one offending juror spoke to two others.

Therefore, the trial court did not abuse its discretion in allowing Juror No. 176 to remain on the venire following the potentially compromising situation.

Appellant's fourteenth proposition of law is meritless and must be overruled.

**XV. Proposition of Law No. 15:** Application of the *Witt* standard for the excusal of prospective capital jurors is a denial of an impartial jury reflecting a that represented a fair cross-section of the community and violates Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16, and R.C. 2945.25(C).

**State's Response to Proposition of Law No. 15:** Appellant was Afforded His Due Process Right to a Fair and Impartial Jury when the Trial Court Properly Excluded Juror Nos. 55 and 233; Because the Record Unambiguously Demonstrated that Both Jurors Would Not Follow the Trial Court's Instructions, and Would Automatically Vote Against the Imposition of a Death Sentence.

As for Appellant's fifteenth proposition of law, he contends that the trial court deprived him of his due process right to a fair and impartial jury when the trial court employed an improper standard of excusing "automatic life jurors" for cause. But, both Juror Nos. 55 and 233 stated that they would not follow the trial court's instructions. Thus, the trial court did not *assume* that they were "automatic life jurors," but the record unambiguously demonstrated that they were properly excluded from the venire as "automatic life jurors" under *Witherspoon* and *Witt*.

**A. THE COURT HAS HELD THAT JURORS  
MAY BE EXCLUDED FROM THE VENIRE  
IF THEIR VIEWS ON CAPITAL PUNISHMENT  
WOULD PREVENT OR SUBSTANTIALLY IMPAIR  
THE PERFORMANCE OF THEIR DUTIES AS JURORS.**

At issue in *Witherspoon v. Illinois* was an Illinois statute that read: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the

same.”<sup>884</sup> With this standard in place, the prosecution was able to excuse for cause those jurors who “might hesitate to return a verdict inflicting (death).”<sup>885</sup>

The issue before the U.S. Court was a narrow one:

It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant’s guilt. Nor does it involve the State’s assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them.<sup>886</sup>

Witherspoon argued that a jury composed in a manner consistent with the Illinois statute is one biased in favor of conviction:

He maintains that such a jury, unlike one chosen at random from a crosssection of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant’s innocence, accept the prosecution’s version of the facts, and return a verdict of guilt.<sup>887</sup>

The U.S. Court, however, was “not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.”<sup>888</sup>

The Court recognized that one “who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus

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<sup>884</sup> *Witherspoon*, 391 U.S. at 512.

<sup>885</sup> *Id.* at 513, quoting *People v. Carpenter*, 13 Ill.2d 470, 476 (1958).

<sup>886</sup> *Witherspoon*, 391 U.S. at 513-514.

<sup>887</sup> *Id.* at 516-517.

<sup>888</sup> *Id.* at 518.

obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it.”<sup>889</sup>

The Court held “that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”<sup>890</sup>

But the U.S. Court explained that a venireman may be excluded if they are “automatic life jurors,” or their views would impair their ability to decide the defendant’s guilt:

The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

\* \* \*

We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.<sup>891</sup>

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<sup>889</sup> *Id.* at 519.

<sup>890</sup> *Id.* at 522; *see Adams*, 448 U.S. at 43.

<sup>891</sup> *Witherspoon*, 391 U.S. at 522-523, fn. 21.

Thus, the State has a legitimate interest in excluding those who are “automatic life jurors.” In fact, the Court’s subsequent opinions referred to this language above as setting the standard for excluding veniremen who were opposed to capital punishment.<sup>892</sup>

For instance, in *Lockett v. Ohio*, the U.S. Court concluded that the veniremen were properly excluded under *Witherspoon*, where “[e]ach \* \* \* made it ‘unmistakably clear’ that they could not be trusted to ‘abide by existing law’ and ‘to follow conscientiously the instructions’ of the trial judge.”<sup>893</sup>

In *Adams v. Texas*, the U.S. Court recognized that its line of cases that followed *Witherspoon*, “establishe[d] the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.”<sup>894</sup>

Following *Adams*, the U.S. Court determined that the test set forth in *Adams* was preferable over that in *Witherspoon*.<sup>895</sup> The Court explained,

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<sup>892</sup> See *Wainwright v. Witt*, 469 U.S. 412, 418-419 (1985), citing *Maxwell v. Bishop*, 398 U.S. 262, 265 (1970), and *Boulden v. Holman*, 394 U.S. 478, 482 (1969).

<sup>893</sup> *Lockett v. Ohio*, 438 U.S. 586, 596 (1978), quoting *Boulden*, 394 U.S. at 484. In *Lockett*, the following question was asked: “[D]o you feel that you could take an oath to well and truly (*sic*) try this case \* \* \* and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?” Each excluded veniremen stated that they would not “take the oath.” *Lockett*, 438 U.S. at 595-596.

<sup>894</sup> *Adams*, 448 U.S. at 45.

<sup>895</sup> *Witt*, 469 U.S. at 421.

First, although given *Witherspoon*'s facts a court applying the general principles of *Adams* could have arrived at the "automatically" language of *Witherspoon*'s footnote 21, we do not believe that language can be squared with the duties of present-day capital sentencing juries. In *Witherspoon* the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to *consider* the death penalty arguably was able to "follow the law and abide by his oath" in choosing the "proper" sentence. Nothing more was required. Under this understanding the only veniremembers who could be deemed excludable were those who would never vote for the death sentence or who could not impartially judge guilt.<sup>896</sup> (Emphasis sic.)

Thus, "the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a venireman to sit despite the fact that he will be unable to view the case impartially."<sup>897</sup>

Further, the ultimate goal of seating a fair and impartial jury, guaranteed to the accused by the Sixth Amendment, consists of those "who will conscientiously apply the law and find the facts."<sup>898</sup> A juror's impartiality must be demonstrated through questioning.<sup>899</sup> And it is then the trial court's duty to judge the validity of the challenge, as outlined in *Adams*.<sup>900</sup>

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<sup>896</sup> *Id.* at 421-422.

<sup>897</sup> *Id.* at 422.

<sup>898</sup> *Id.* at 423.

<sup>899</sup> *Id.*, citing *Reynolds*, 98 U.S. at 157.

<sup>900</sup> *Witt*, 469 U.S. at 423.

In *Witt*, the U.S. Court held that the test set forth in *Adams* is the proper standard for challenging for cause prospective jurors because of their views on capital punishment.<sup>901</sup> “That standard is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”<sup>902</sup>

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<sup>901</sup> *Id.* at 424. The Court concluded that Juror Colby was properly excluded:

“[Q. Prosecutor:] Now, let me ask you a question, ma’am. Do you have any religious beliefs or personal beliefs against the death penalty?”

“[A. Colby:] I am afraid personally but not-

“[Q:] Speak up, please.

“[A:] I am afraid of being a little personal, but definitely not religious.

“[Q:] Now, would that interfere with you sitting as a juror in this case?”

“[A:] I am afraid it would.

“[Q:] You are afraid it would?”

“[A:] Yes, Sir.

“[Q:] Would it interfere with judging the guilt or innocence of the Defendant in this case?”

“[A:] I think so.

“[Q:] You think it would.

“[A:] I think it would.

“[Q:] Your honor, I would move for cause at this point.

“THE COURT: All right. Step down.” Tr. 266-267. *Id.* at 415-416, 430.

<sup>902</sup> *Id.* The Court emphasized that a juror’s bias need not be proved with “unmistakable clarity,” and great deference is given to the trial court to determine whether the prospective juror is in fact biased one way or the other:

1. **THIS COURT HAS CONSISTENTLY FOLLOWED AND APPLIED THE STANDARD SET FORTH IN WITT FOR EXCLUDING “AUTOMATIC LIFE JURORS.”**

Here, Appellant takes issue with this Court’s application of R.C. §2945.25(C) following the U.S. Court’s decisions in *Adams* and *Witt*.

The Ohio General Assembly enacted R.C. §2945.25(C) to codify *Witherspoon*’s minimum constitutional standard for excusing “automatic life jurors.”<sup>903</sup> Specific to capital offenses, R.C. §2945.25(C) states a venireman may be challenged “[i]n the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror’s conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause.”<sup>904</sup>

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We note that, in addition to dispensing with *Witherspoon*’s reference to “automatic” decisionmaking, this standard likewise does not require that a juror’s bias be proved with “unmistakable clarity.” This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made “unmistakably clear”; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully *infra*, this is why deference must be paid to the trial judge who sees and hears the juror. *Id.* at 424-426.

<sup>903</sup> See *State v. Herring*, 7<sup>th</sup> Dist. No. 00 JE 37, 2002 Ohio 2786, ¶ 24.

<sup>904</sup> R.C. 2945.25(C).

In *State v. Rogers*, this Court, however, followed *Witt* and held that “[t]he proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.”<sup>905</sup>

In *Rogers*, the defendant argued that his due process right to a fair and impartial jury was violated by the trial court’s use of general questions about their opinions on the death penalty. This Court concluded that the trial court’s general questions were proper.<sup>906</sup> This Court explained that the prospective jurors’ responses determined if they were able to follow the trial court’s instructions and fairly consider the death penalty as required by law.<sup>907</sup> Thus, the general questions satisfied *Witt*’s standard.

In *Rogers* and its subsequent cases, this Court recognized that *Witherspoon* had been modified by the U.S. Court’s opinion in *Witt*, and concluded that *Witt* was now applicable to Ohio courts.<sup>908</sup> Accordingly, “[a] prospective juror may be excused for

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<sup>905</sup> *State v. Rogers*, 17 Ohio St.3d 174, ¶ 3 of the syllabus (1985), following *Witt*, supra.

<sup>906</sup> *Id.* 178. The trial court asked the following:

In the event that you are selected as a juror in this case, and in the event that a finding of guilt is made, one of the penalties you may be asked to consider is the death penalty. As you sit here now are there any circumstances that you can foresee that will preclude you from following the Court’s instructions and fairly considering the imposition of the death penalty in this case? *Id.*

<sup>907</sup> *Id.*

<sup>908</sup> See *State v. Scott*, 26 Ohio St.3d 92, 97 (1986) (stating, “[t]he *Rogers* court concluded that the *Witt* standard was applicable to this jurisdiction.”); *State v. Moore*, 81 Ohio St.3d 22, 27 (1998) (stating, *Witherspoon* was “substantially altered” by *Witt*).

cause if his views on capital punishment ‘would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”<sup>909</sup>

Furthermore, the Seventh District properly recognized that it “is not required to hold the trial court to a higher standard than is required by statute and as affirmed by the Ohio State Supreme Court. R.C. 2945.25(C) does not set a higher standard than is outlined in *Witt, supra*.”<sup>910</sup> This follows in-line with “the State’s legitimate interest in obtaining jurors who could follow their instructions and obey their oaths.”<sup>911</sup> Thus, the State may “insist, \* \* \* that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.”<sup>912</sup>

a.) **Juror Nos. 55 and 233 Were Properly Excluded, As Both Unambiguously Stated That They Would Not Follow the Trial Court’s Instructions and Sign a Verdict Form for Death.**

Appellant contends that the trial court abused its discretion when it *sua sponte* removed Juror-Nos. 55 and 233. The record unambiguously demonstrates that Juror Nos.

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<sup>909</sup> *Trimble*, 122 Ohio St.3d at 310, quoting *Adams*, 448 U.S. at 45, and citing *Bethel*, 110 Ohio St.3d 416, at ¶ 118; accord *State v. Wilson*, 74 Ohio St.3d 381, 388 (1996); *State v. Frazier*, 73 Ohio St.3d 323, 328 (1995); *State v. Lorraine*, 66 Ohio St.3d 414, 424 (1993); *Davis*, 62 Ohio St.3d at 345; *State v. Roe*, 41 Ohio St.3d 18, 21 (1989); *Beuke*, 38 Ohio St.3d at 38.

<sup>910</sup> *State v. Reynolds*, 7<sup>th</sup> Dist. No. 95 CO 30, 2001 Ohio 3156, at \*6, citing *Roe*, 41 Ohio St.3d at 18; accord *Herring*, supra at ¶ 26; see also *State v. Myers*, 2<sup>nd</sup> Dist. No. 96 CA 38, 1999 WL 94917, at \*34 (Feb. 12, 1999); *State v. Goff*, 12<sup>th</sup> Dist. No. CA95-09-026, 1997 WL 194898, at \*22 (Apr. 21, 1997); *State v. Moore*, 1<sup>st</sup> Dist. No. No. C-950009, unreported, 1996 WL 348193, at \*8 (June 26, 1996).

<sup>911</sup> *Adams*, 448 U.S. at 44.

<sup>912</sup> *Id.* at 45.

55 and 233 unequivocally stated that they would not follow the trial court's instructions and sign a verdict form for death:

**THE COURT:** You sign a verdict form and you come into court and it's read in open court. Could you sign that form?

**JUROR NO. 55:** No.

**THE COURT:** Okay. Why is that?

**JUROR NO. 55:** I just couldn't. It would make me a nervous wreck. I can't do it.

**THE COURT:** I'm sorry?

**JUROR NO. 55:** I just can't do it.

**THE COURT:** Why? I'm curious as to why. Actually, I have to know why.<sup>913</sup>

**JUROR NO. 55:** I couldn't sentence him to death myself. I just could not.

**THE COURT:** All right. That's what I need to know. Thank you.

Okay. Juror No. 233, same thing, you're sitting in there, and if you believe that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, you have to sign a verdict form for death. Can you sign that?

**JUROR NO. 233:** No.<sup>914</sup>

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<sup>913</sup> Tr. Voir Dire, Vol. II, at 294.

<sup>914</sup> *Id.* at 295.

The above colloquy demonstrates that Juror Nos. 55 and 233 were precisely the type of jurors—“automatic life”—that Justice Stewart stated may be excluded under *Witherspoon*.<sup>915</sup>

Similarly, in *State v. Moore*, this Court concluded that two prospective jurors were properly excluded under *Witt*: Warren “said repeatedly that she would not sign a verdict imposing the death penalty, stating that her views were ‘religiously based.’ \* \* \* Savage stated that she could not vote for the death penalty, and indicated that her views against the death penalty would substantially impair her ability to follow her oath and the judge’s instructions.”<sup>916</sup>

“The fact that the defense counsel was able to elicit somewhat contradictory viewpoints from these jurors during his examination does not, in and of itself, render the court’s judgment erroneous.”<sup>917</sup> “The *Witt* court noted that ‘\* \* \* there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. \* \* \* [T]his is why deference must be paid to the trial judge who sees and hears the juror.’”<sup>918</sup>

Therefore, the trial court did not abuse its discretion in *sua sponte* excusing Juror Nos. 55 and 233, because the record unambiguously demonstrates that their views on capital punishment would not allow them to perform their duties as jurors.

Appellant’s fifteenth assignment of error is meritless and must be overruled.

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<sup>915</sup> See *Witherspoon*, 391 U.S. at 522-523, fn. 21.

<sup>916</sup> *Moore*, 81 Ohio St.3d at 27.

<sup>917</sup> *Scott*, 26 Ohio St.3d at 98.

<sup>918</sup> *Id.* at 98-99, quoting *Witt*, 469 U.S. at 425-426; accord *Frazier*, 73 Ohio St.3d at 328, citing *Beuke*, 38 Ohio St.3d at 38.

**XVI. Proposition of Law No. 16:** Failure to File a Motion to Suppress Evidence When There is a Colorable Basis to Exclude, Prior to Trial, Eyewitness Testimony Violates the Essential Duties of Counsel Under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1, 10 and 16.

**State's Response to Proposition of Law No. 16:** Defense Counsel was Not Constitutionally Ineffective for Failing to File a Motion to Suppress the Eyewitness Identification; Because There was No Possibility that the Procedures Employed by the Youngstown Police Department were Unduly Suggestive, or that the Identification Itself was Unreliable.

As for Appellant's sixteenth proposition of law, he contends that defense counsel was constitutionally ineffective because they failed to file a motion to suppress the identification of Appellant by John and Sandra (Howard) Allie. To the contrary, the identification procedures were not unduly suggestive and the identifications were reliable; therefore, the motion to suppress would not have been granted. Accordingly, defense counsel was constitutionally effective.

**A. TO REVERSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL, APPELLANT MUST ESTABLISH BOTH DEFICIENT PERFORMANCE AND MUST HAVE SUFFERED PREJUDICE AS A RESULT.**

The standard of review for an ineffective assistance claim comes from the United States Supreme Court in *Strickland v. Washington*.<sup>919</sup> Under *Strickland*, to prove a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense.<sup>920</sup>

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<sup>919</sup> *Strickland*, 466 U.S. at 668.

<sup>920</sup> *Id.*; see also *Bradley*, 42 Ohio St.3d at 136.

After *Strickland*, this Court adopted a two-part test for analyzing whether claims for ineffective assistance of counsel are below the constitutional standard.<sup>921</sup> In order to prove a claim of ineffective assistance of counsel, the defendant must show “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.”<sup>922</sup>

In the first prong, a court determines whether trial counsel’s assistance was actually ineffective—whether counsel’s performance fell below an objective standard of reasonable advocacy or fell short of counsel’s basic duties to the client.<sup>923</sup> To prove the performance was deficient, the defendant must show that counsel made errors, which were so serious that counsel was not acting in a manner guaranteed by the Sixth Amendment.<sup>924</sup>

If a reviewing court finds ineffective assistance of counsel on those terms, the court continues to the second prong to determine whether or not the defendant’s defense actually suffered prejudice due to defense counsel’s shortcomings, such that the reliability of the outcome of the case should be suspect.<sup>925</sup> This requires a showing that

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<sup>921</sup> *State v. Mitchell*, 11<sup>th</sup> Dist. No. 2004-T-0139, 2006 Ohio 618.

<sup>922</sup> *Id.*, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 388-89 (2000), citing *Strickland*, 466 U.S. at 687-88.

<sup>923</sup> *Bradley*, *supra*.

<sup>924</sup> *Id.*

<sup>925</sup> *Id.*

there is a reasonable probability that but for counsel's unprofessional error, the outcome of the proceeding would have turned in favor of the defendant.<sup>926</sup>

1. **THE FAILURE TO FILE A MOTION TO SUPPRESS ONLY CONSTITUTES INEFFECTIVE ASSISTANCE IF THE MOTION WOULD HAVE BEEN GRANTED.**

It is well settled that "the failure to file a motion to suppress may constitute ineffective assistance of counsel when the record demonstrates that the motion would have been granted."<sup>927</sup>

2. **TO SUPPRESS AN EYEWITNESS IDENTIFICATION, A DEFENDANT MUST SHOW THAT THE PROCEDURES WERE UNDULY SUGGESTIVE AND THE IDENTIFICATION ITSELF WAS UNRELIABLE.**

"Convictions based on eyewitness identifications at trial following pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive so as to give rise to a very substantial likelihood of irreparable misidentification."<sup>928</sup>

"[R]eliability is the linchpin in determining the admissibility of identification testimony."<sup>929</sup> Moreover, the focus is on the reliability of the identification, not the

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<sup>926</sup> *Id.*

<sup>927</sup> *State v. McGee*, 7<sup>th</sup> Dist. No. 07 MA 137, 2009 Ohio 6397, ¶ 17, citing *State v. Barnett*, 7<sup>th</sup> Dist. No. 06 JE 23, 2008 Ohio 1546, ¶ 31.

<sup>928</sup> *McGee*, supra at ¶ 18, citing *State v. Perryman*, 49 Ohio St.2d 14, 22 (1976), vacated in part on other grounds subnom, *Perryman v. Ohio*, 438 U.S. 911 (1978); accord *Neil v. Biggers*, 409 U.S. 188, 198 (1972), quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968).

<sup>929</sup> *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

identification procedures themselves.<sup>930</sup> So, “even if the procedure was unnecessarily suggestive, the identification need not be suppressed if it is reliable under the totality of circumstances.”<sup>931</sup>

Consequently, the test, under the totality of the circumstances, is whether “the identification was reliable even though the confrontation procedure was suggestive.”<sup>932</sup> This test considers the following factors: (1) the opportunity of the witness to view the criminal during the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the witness’s level of certainty at the confrontation; and (5) the length of time between the crime and the confrontation.<sup>933</sup> These factors are then weighed against “the corrupting effect of the suggestive identification itself.”<sup>934</sup>

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<sup>930</sup> *State v. Kimble*, 7<sup>th</sup> Dist. No. 95 CO 11, 1998 WL 30077, \*2, citing *State v. Lott*, 51 Ohio St.3d 160, 175 (1990); see also *State v. Moody*, 55 Ohio St.2d 64, 67 (1978).

<sup>931</sup> *McGee*, supra at ¶ 19, citing *State v. Waddy*, 63 Ohio St.3d 424, 438 (1992); see also *Neil*, 409 U.S. at 188.

<sup>932</sup> *Neil*, 409 U.S. at 199.

<sup>933</sup> *Id.* at 199-200; see also *Manson*, 432 U.S. at 114.

<sup>934</sup> *Id.*

a.) **Defense Counsel’s Failure to File a Motion to Suppress the Eyewitness Identification Did Not Constitute Ineffective Assistance, Because There is No Likelihood of Irreparable Misidentification.**

To begin, the Seventh District properly concluded that Appellant’s argument on “reliability was not a matter for suppression here but was instead a matter of weight and credibility for trial.”<sup>935</sup> The Seventh District recognized that “if the procedure was not unduly suggestive, then the reliability prong of the test never arises.”<sup>936</sup> Here, Appellant makes no argument concerning the police procedures except, and points to nowhere in the record where this Court could find such suggestive procedures.

Thus, the eyewitnesses’ reliability is not a matter for suppression, but instead a matter of weight and credibility for trial. The State will nevertheless establish that the eyewitness identifications were reliable.

i.) **John Allie’s Identification.**

Here, John Allie testified that he was familiar with Appellant, because he knew him from “around the neighborhood.”<sup>937</sup> Mr. Allie testified that when he and his wife pulled into the bank parking lot, there was a male using the ATM machine.<sup>938</sup> When the male came out, after approximately fifteen minutes, he put his hand on the hood of Mr. Allie’s vehicle:

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<sup>935</sup> *Adams*, supra at ¶ 24.

<sup>936</sup> *Id.* at ¶ 23.

<sup>937</sup> Trial Tr., Vol. II, at 290.

<sup>938</sup> *Id.* at 291-292.

**MS. CANTALAMESSA:** And when he looked at you when he put his hands on your -- the hood of your car, is that when you recognized him?

**MR. ALLIE:** From the neighborhood, yeah.

**MS. CANTALAMESSA:** So you knew it was Bennie Adams?

**MR. ALLIE:** Yeah.<sup>939</sup>

Mr. Allie saw "the forehead, eyes, nose, and the gray hooded sweatshirt."<sup>940</sup> Appellant even waved to Mr. Allie.<sup>941</sup>

When Det. Blanchard interviewed Mr. Allie, he indicated that he knew who the person at the ATM was and could identify him. During the line-up, however, Mr. Allie did not identify Appellant but later explained why:

**MS. CANTALAMESSA:** Did you pick him out?

**MR. ALLIE:** I spoke to the officer and told the officer there was too many -- there was really too many people in there. There was people that -- too many young people was in there. I didn't like that. I wasn't comfortable with that many people being in there. So I spoke to the officer in charge. I called him and I spoke to him before I left and he said he would take care of it. Because I didn't -- at that time I wouldn't do it because there was too many people in there. You know, I didn't know them from a bag of beans. I thought I was going to go there and be there with him and a prosecutor or, you know -- no, no, not a room of other people. So I spoke to the officer.

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<sup>939</sup> *Id.* at 295.

<sup>940</sup> *Id.*

<sup>941</sup> *Id.*

**MS. CANTALAMESSA:** Were you afraid those other people might identify you?

**MR. ALLIE:** Yeah.

**MS. CANTALAMESSA:** But you did call the police later and told them that that's who it was?

**MR. ALLIE:** Oh, yeah. No doubt I did that.<sup>942</sup>

On cross-examine, Mr. Allie reiterated that it was Appellant that he saw at the ATM machine, but was afraid to identify him at the line-up:

**MR. MERANTO:** Did you say anything else about who it was or anything?

**MR. ALLIE:** Yeah, I told him I was able to pick him out third from the row. I could pick him out. That wouldn't have been no problem. The thing was I didn't like -- I wasn't -- I wasn't very comfortable with all those people there; all right? I don't know where they live at or who they live with or where they might find me at.<sup>943</sup>

First, there was nothing unduly suggestive about the line-up. This Court must then review the "reliability" of Mr. Allie's identification under the totality of the circumstances. As stated above, there are five factors to be weighed.<sup>944</sup>

Under the first factor of the *Neil v. Biggers* test, Mr. Allie had approximately fifteen minutes to view Appellant at the ATM machine. Mr. Allie watched Appellant as he attempted to use the ATM, after which he put his hands on the hood of Mr. Allie's vehicle, then sat in Gina Tenney's vehicle and attempted to start it.

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<sup>942</sup> *Id.* at 298-299.

<sup>943</sup> *Id.* at 316-317.

<sup>944</sup> *See Neil*, *supra*.

Under the second, third, and fourth factors, Mr. Allie was certain that it was Appellant because he knew him from the neighborhood and recognized him immediately. Under the fifth factor, Mr. Allie saw Appellant on December 28, 1985, and the line-up was conducted on January 8, 1986.

Under the totality of the circumstances, it is evident that Mr. Allie's identification of Appellant was reliable; and thus, would have been admissible, even if defense counsel had filed a motion to suppress. Mr. Allie knew Appellant prior to seeing him at the ATM machine. The only reason he did not identify Appellant at the line-up was because he was afraid for safety. But immediately upon leaving the line-up, Mr. Allie contacted Det. Blanchard and identified Appellant. Clearly, this is reliable.

**ii.) Sandra Allie's Identification.**

Likewise, Sandra (Howard) Allie's identification of Appellant was reliable. Mrs. Allie had the same opportunity to view Appellant as he used the ATM machine. Mrs. Allie was even in the vestibule with Appellant for a few minutes, at which time she was face-to-face with him.<sup>945</sup> Mrs. Allie could see Appellant's eyes, nose, and forehead.<sup>946</sup> During the line-up, she too was afraid.

**MS. CANTALAMESSA:** And what did you do while you were down there?

**MRS. ALLIE:** We were told we were going to a lineup, which is nothing like you see on television. I was scared. It was a regular office room setting, police room setting. Other people -- I expected it to be a dark room. It's nothing like that. When asked if I could identify the

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<sup>945</sup> Trial Tr., Vol. II, at 323.

<sup>946</sup> *Id.* at 333.

person who was in the ATM I was just terrified, went to the extreme opposite and identified a short, light-skinned person.

**MS. CANTALAMESSA:** Why did you do that?

**MRS. ALLIE:** I was terrified. It was 22 years ago. I was 23, naive and never been in any situation like that and just scared.<sup>947</sup>

Mrs. Allie, like her husband, contacted the police afterwards and identified Appellant as the person using the ATM machine that night.

Like with Mr. Allie, under the totality of the circumstances, Mrs. Allie's identification is reliable. Under the first factor of the *Neil v. Biggers* test, Mrs. Allie also had approximately fifteen minutes to view Appellant at the ATM machine. Mrs. Allie watched Appellant as he attempted to use the ATM, and was face-to-face with him in the vestibule of the ATM.

Under the second, third, and fourth factors, Mrs. Allie was certain it was Appellant, as she described his clothing and gave a general description of him.<sup>948</sup> Under the fifth factor, Mrs. Allie saw Appellant on December 28, 1985, and the line-up was conducted on January 8, 1986.

Appellant is attempting to hang his hat on the fact that Mr. and Mrs. Allie spoke to each other following the line-up, but prior to calling Det. Blanchard and making their identifications. While it is true that they spoke during this period, there is nothing in the record that one convinced the other to identify Appellant. Nor is there any evidence that

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<sup>947</sup> *Id.* at 325.

<sup>948</sup> Even though Mrs. Allie identified Horace Landers during the line-up, she said she did so only because she wanted to pick the exact opposite of the person she saw that night. As anyone can see from the photo-array of the line-up, Appellant and Landers are different heights, weights, complexions, ages, and hair types.

one was uncertain and wanted to be reassured by the other that he or she was picking the correct person. The simple fact that they spoke is irrelevant.

What can be gleaned from the record is that both Mr. Allie and Mrs. Allie were able to identify Appellant as the person using the ATM. And the only reason they did not identify him during the line-up was they feared for their safety. Taking this into account, presumably they discussed being afraid and decided to do the right thing, which was to identify the person they saw using the ATM machine—Appellant.

To conclude, the Allies' identifications of Appellant were reliable. Therefore, because Appellant failed to demonstrate that the motion to suppress would have been granted, defense counsel cannot be deemed to have been ineffective for failing to file the motion.

Appellant's sixteenth proposition of law is meritless and must be overruled.

**XVII. Proposition of Law No. 17:** Racially discriminatory challenges made by the state and approved by the trial court deny a defendant a Jury Composed of a fair cross-section of the community, a fair and impartial jury, and Equal Protection of the Laws When His Due to in Violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

**State's Response to Proposition of Law No. 17:** Appellant was Afforded a Fair and Impartial Jury; as the Jury was Composed of a Fair Cross-Section of the Community, and the State did Not Use Its Peremptory Challenges to Racially Discriminate in Violation of the Equal Protection Clause.

As for Appellant's seventeenth proposition of law, he contends that the State violated his right to a fair and impartial jury and equal protection of the laws when it excused Juror Nos. 11 and 31 through its peremptory challenges. But the State demonstrated race-neutral explanations for its decisions to excuse Juror Nos. 11 and 31; therefore, Appellant failed to show purposeful racial discrimination by the State in violation of *Batson*.<sup>949</sup>

**A. ONLY IF APPELLANT DEMONSTRATES THE PROSECUTION'S PURPOSEFUL INTENT OF RACIAL DISCRIMINATION IN EXERCISING ITS PEREMPTORY CHALLENGES, MAY A REVIEWING COURT REVERSE PURSUANT TO *BATSON* v. *KENTUCKY*.**

The Equal Protection Clause of the United States Constitution precludes purposeful discrimination by the prosecution in the exercise of its peremptory challenges

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<sup>949</sup> Juror No. 301 was challenged for cause, but the trial court overruled the State's challenge. Juror No. 301 sat as an alternate.

so as to exclude racial minorities from service on petit juries.<sup>950</sup> To determine if purposeful discrimination is present, a three-step analysis must be employed.<sup>951</sup>

First, a party opposing a peremptory challenge must demonstrate a prima facie case of racial discrimination in the use of the strike.<sup>952</sup> To establish a prima facie case, the opponent must first show that he is a member of a cognizable racial group and that the peremptory challenge will remove a member of the opponent's race from the venire.<sup>953</sup> The opponent must then show an inference of racial discrimination by the proponent of the challenge.<sup>954</sup> Furthermore, it should be noted that once a prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot.<sup>955</sup>

In the second step, the striking party must then assert a race-neutral explanation for the challenge.<sup>956</sup> A simple affirmation of general good faith is not sufficient. The explanation, however, need not rise to the level justifying an exercise of a challenge for

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<sup>950</sup> *State v. Franklin*, 7<sup>th</sup> Dist. No. 06 MA 79, 2008 Ohio 2264, ¶ 62, citing *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986).

<sup>951</sup> *State v. Lanier*, 7<sup>th</sup> Dist. No. 06 MA 94, 2007 Ohio 3172, ¶ 65, citing *State v. Bryan*, 101 Ohio St.3d 272, ¶ 106 (2004); accord *Purkett v. Elem*, 514 U.S. 765, 767 (1995).

<sup>952</sup> *Batson*, 476 U.S. at 96.

<sup>953</sup> *State v. Hernandez*, 63 Ohio St. 3d 577, 582 (1992).

<sup>954</sup> *Hicks v. Westinghouse Materials Co.*, 78 Ohio St. 3d 95, 98 (1997).

<sup>955</sup> *State v. White*, 85 Ohio St. 3d 433, 437 (1999).

<sup>956</sup> *Batson*, 476 U.S. at 96-98.

cause.<sup>957</sup> The critical issue is whether discriminatory intent is inherent in counsel's explanation for her use of the strike; intent is present if the explanation is merely a pretext for exclusion on the basis of race.<sup>958</sup>

As the U.S. Court explained, “[t]he second step of this process does not demand an explanation that is persuasive, or even plausible[,]”<sup>959</sup> and the “legitimate reason” required by the prosecution “is not a reason that makes sense, but a reason that does not deny equal protection.”<sup>960</sup>

In the third step, once the proponent puts forth a race-neutral reason, the trial court must decide based on all the circumstances, whether the opponent has demonstrated purposeful racial discrimination.<sup>961</sup>

The burden of persuasion is on, and never shifts from, the opponent of the challenge.<sup>962</sup> The findings of the trial court must be afforded great deference since that determination rests largely upon the trial court's evaluation of the prosecutor's credibility.<sup>963</sup> As Justice Breyer explained, reviewing courts must give trial courts considerable leeway in determining the prosecutor's credibility:

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<sup>957</sup> *Id.* at 97.

<sup>958</sup> *Hernandez v. New York*, 500 U.S. 352, 363 (1991).

<sup>959</sup> *Purkett*, 514 U.S. at 768.

<sup>960</sup> *Id.* at 769.

<sup>961</sup> *Batson*, 476 U.S. at 98.

<sup>962</sup> *Purkett*, 514 U.S. at 768; *accord Rice v. Collins*, 546 U.S. 333 (2006).

<sup>963</sup> *Batson*, 476 U.S. at 98-99.

The trial judge is best placed to consider the factors that underlie credibility: demeanor, context, and atmosphere. And the trial judge is best placed to determine whether, in a borderline case, a prosecutor's hesitation or contradiction reflect (a) deception, or (b) the difficulty of providing a rational reason for an instinctive decision. Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation. These circumstances mean that appellate courts will, and must, grant the trial courts considerable leeway in applying *Batson*.<sup>964</sup>

Accordingly, this Court has held that a trial court's finding of no discriminatory intent will not be reversed on appeal **unless clearly erroneous**.<sup>965</sup>

Therefore, unless this Court concludes that the trial court's finding that the State did not exercise its peremptory challenge with intent to purposefully discriminate because of the jurors' race was clearly erroneous, Appellant's conviction must be affirmed.

1. **THE STATE OFFERED RACE  
NEUTRAL EXPLANATIONS FOR  
EXERCISING ITS PEREMPTORY  
CHALLENGES ON JUROR NOS. 11,  
31, AND 301; THUS, THE TRIAL COURT  
PROPERLY FOUND THE STATE LACKED  
THE INTENT TO RACIALLY DISCRIMINATE.**

Here, Appellant satisfied the first step of demonstrating a prima facie case in respect to Juror Nos. 11 and 31. The State, however, did not exercise a peremptory challenge on Juror No. 301. Juror No. 301 was later empanelled as Alternative No. 2.<sup>966</sup>

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<sup>964</sup> *Rice*, 546 U.S. at 343-344 (Breyer, J., concurring), citing *Hernandez*, supra.

<sup>965</sup> *Lanier*, supra at ¶ 67, citing *Bryan*, 101 Ohio St.3d at ¶ 106; *Franklin*, supra at ¶ 66, citing *Hernandez*, 500 U.S. at 583.

<sup>966</sup> Tr. Voir Dire, Vol. IV, at 767.

a.) **Juror No. 11**

As for Juror No. 11, Appellant contends that the State racially discriminated against Juror No. 11 when it exercised a peremptory challenge following general voir dire.

Following its exclusion of Juror No. 11, the State explained:

Your Honor, throughout the entire interview, I don't feel that Juror No. 11 liked what I had to say. She wasn't listening to certain portions of me. She liked court shows, she mentioned hearing both sides of the story during one portion, and when I explained to her that it was just our burden, she agreed with that, but, however, she always talked about motive, and she seemed very disappointed to us that we didn't have to prove why someone did something.<sup>967</sup>

The trial court found this to be a race-neutral explanation, and no intent to purposely discriminate on the basis of race.<sup>968</sup>

As the U.S. Court has continually stated, the findings of the trial court must be afforded great deference.<sup>969</sup> And “[t]he second step of this process does not demand an explanation that is persuasive, or even plausible.”<sup>970</sup> Further, the “legitimate reason” required by the prosecution “is not a reason that makes sense, but a reason that does not deny equal protection.”<sup>971</sup>

Here, the State's two main contentions with Juror No. 11 were her failure to listen to the prosecutor and her interest in the State proving Appellant's motive. First, the fact

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<sup>967</sup> *Id.* at 758-759.

<sup>968</sup> *Id.* at 759.

<sup>969</sup> *Batson*, 476 U.S. at 98-99; *accord Rice*, 546 U.S. at 343-344 (Breyer, J., concurring).

<sup>970</sup> *Purkett*, 514 U.S. at 768.

<sup>971</sup> *Id.* at 769.

that Juror No. 11 did not pay full attention to the prosecutor is clearly an observation made by the prosecutor during voir dire proceedings, and could not be disproved by the record before this Court. It was the trial court's responsibility to judge the prosecutor's credibility when she set forth her reasoning, and the trial court found no such discriminatory intent. Further, defense counsel failed to offer anything to the contrary.

Second, Juror No. 11 illustrated her interest in knowing a defendant's motive for committing the offense:

Okay. You know, some people, like they're kind of slow or they had a problem ever since they were born, or maybe they might have snapped. **It all depends on what the circumstances was to do the murder** -- do you know what I'm saying -- ? -- but it might be self-defense also, you know what I'm saying? You might have seen somebody doing something to your child and you all of a sudden snapped and shot them. Your mind wasn't thinking right at the time.<sup>972</sup>

Thus, the record corroborated the prosecutor's reasoning. And simply because Juror No. 11 agreed with the prosecutor that the State did not have to prove a motive, it is the prosecutor's duty to assess her credibility during voir dire. This could only be done by examining her gestures, voice inflections, and demeanor in open court, not by simply reading through the transcript.

Therefore, after excusing Juror No. 11, the prosecutor asserted a race-neutral explanation based upon her failure to pay attention and her interest in knowing a defendant's motive for committing the offense. *Batson* requires nothing more.

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<sup>972</sup> Tr. Voir Dire, Vol. I, at 106.

b.) Juror No. 31

As for Juror No. 31, Appellant contends that the State also racially discriminated against Juror No. 31 when it exercised a peremptory challenge following general voir dire.

Following its exclusion of Juror No. 31, the State explained: “Your Honor, I’ve stated numerous reasons in both my causes, and I would reiterate those, and those being that she was confused and she’s also had a nephew killed and they’re still under investigation.”<sup>973</sup> Like with Juror No. 11, the trial court found this to be a race-neutral explanation, and no intent to purposely discriminate on the basis of race.<sup>974</sup>

First, Juror No. 31 made contradictory statements regarding her belief in capital punishment. On her questionnaire, Juror No. 31 indicated that she did not believe in capital punishment, but also indicated that the proper punishment for every person convicted of murder was the death penalty.<sup>975</sup> In fact, Juror No. 31 acknowledged the conflicting answers.<sup>976</sup> Finally, when questioned by the trial court, she settled on being opposed to capital punishment.<sup>977</sup>

Juror No. 31 continued to illustrate her opposition to the death penalty and unwillingness to sign a death verdict:

**MRS. CANTALAMESSA:** What kind of cases do you think the death penalty would be appropriate in?

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<sup>973</sup> *Id.*, Vol. IV, at 762.

<sup>974</sup> *Id.* at 763.

<sup>975</sup> *Id.*, Vol. I, at 191-192.

<sup>976</sup> *Id.* at 192.

<sup>977</sup> *Id.*

**JUROR NO. 31:** I believe that appropriate if someone just up and just murdered you without cause.

**MRS. CANTALAMESSA:** Okay. Could you yourself sign a verdict form that states the death penalty? Could you yourself give someone the death penalty?

**JUROR NO. 31:** No.

**MRS. CANTALAMESSA:** Okay. And why not?

**JUROR NO. 31:** Because really, I don't believe in it.

**MRS. CANTALAMESSA:** Okay. You believe in it as a concept, but you yourself wouldn't do it?

**JUROR NO. 31:** No.<sup>978</sup>

**MRS. CANTALAMESSA:** That's what I'm trying to get to, and I think the judge was trying to ask you that as well.

Do you think that you could ever, if you were instructed to and the judge gave you the law, that you could follow the law, and if you found that the aggravating circumstances outweighed the mitigating factors, you could impose the death sentence?

**JUROR NO. 31:** I could.

**MRS. CANTALAMESSA:** Okay. Could you sign a death verdict, though, that states the death penalty?

**JUROR NO. 31:** Yeah, probably.

**MRS. CANTALAMESSA:** Okay. Cause you just told me you couldn't, so how do you explain?

**JUROR NO. 31:** Oh, if I would -- you ask me to sign, could I do it?

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<sup>978</sup> *Id.* at 196.

**MRS. CANTALAMESSA:** Yeah, could you yourself sign that verdict?

**JUROR NO. 31:** No, no.

**MRS. CANTALAMESSA:** I want to make sure it's clear, okay?

**JUROR NO. 31:** No, no.<sup>979</sup>

**MRS. CANTALAMESSA:** Okay. Now, do you think that this -- this view you have about the death penalty would impair your ability to sit on this case cause you don't believe in the death penalty?

**JUROR NO. 31:** Yes.

Juror No. 31's confusion continued, even when questioned by defense counsel. Despite stating that she would follow the law, Juror No. 31 indicated an unwillingness to impose a lesser life option as well:

**MR. DEFABIO:** Okay. And if you felt beyond a reasonable doubt -- strike that. If you felt the state did not prove beyond a reasonable doubt that death was appropriate, could you sign a verdict imposing one of these life options?

**JUROR NO. 31:** No.

**MR. DEFABIO:** Why not?

**JUROR NO. 31:** Because if you go to prison and some time you -- you change, we look at that, and they bring you out, maybe a few years, you do the same thing over again.

Even defense counsel is confused at this point.

**MR. DEFABIO:** Okay. And again, I guess I'm confused then. Are you in favor of capital punishment or no?<sup>980</sup>

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<sup>979</sup> *Id.* at 197.

**JUROR NO. 31:** Yes, I don't believe in it.<sup>981</sup>

After further prompting by defense counsel, Juror No. 31 states that she would follow the law, and sign a death verdict if the evidence supported it.<sup>982</sup>

The record clearly demonstrated that Juror No. 31 appeared often confused and continued to offer contradictory answers, regardless of whether she was being questioned by the State or defense counsel. Despite denying the State's challenge for cause of Juror No. 31, the trial court observed that "[o]ne time she couldn't give any penalty, couldn't sign any verdict, \* \* \* I don't know if it's confusion or it's just starting to -- cause her -- **she looks puzzled**, let's put it this way, **her answers are everywhere, including her questionnaire.**"<sup>983</sup>

Second, the prosecutor stated that she excused Juror No. 31 because her nephew had been murdered.<sup>984</sup> This too was a race-neutral explanation, free from any racial discrimination. The record demonstrates that a similarly situated juror, Juror No. 173, had also been excused by the State.

Juror No. 173 first indicated that she was confused when the trial court explained to them the process in which they must determine whether a death sentence is appropriate

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<sup>980</sup> *Id.* at 219.

<sup>981</sup> *Id.* at 220.

<sup>982</sup> *Id.* at 221; 232-233.

<sup>983</sup> *Id.* at 238-239.

<sup>984</sup> *Id.*, Vol. IV, at 762.

or not.<sup>985</sup> Juror No. 173 then stated that she would not be able to decide whether a person should live or die.<sup>986</sup> She further stated that she did not believe in the death penalty.<sup>987</sup>

When questioned about the fact that her family member had been murdered, Juror No. 173 indicated that this fact would impair her ability to judge the evidence and sit as a juror.<sup>988</sup> Juror No. 173 was later successfully challenged for cause.<sup>989</sup>

Thus, the record demonstrates that the State sought to excuse two similarly situated jurors, Juror Nos. 31 and 173, both of whom had relatives who were murdered.

Therefore, after excusing Juror No. 31, the prosecutor asserted a race-neutral explanation based upon her confusion and conflicting answers, and the fact that her nephew had been murdered. Again, *Batson* requires nothing more.

c.) **Juror No. 301**

As for Juror No. 301, Appellant contends that the State racially discriminated against Juror No. 301 when it exercised a challenge for cause following individual group voir dire.

To begin, this Court previously concluded that “the United States Supreme Court case of *Batson v. Kentucky* applies to peremptory challenges, not challenges for

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<sup>985</sup> *Id.*, Vol. III, at 505-511.

<sup>986</sup> *Id.* at 511.

<sup>987</sup> *Id.* at 512.

<sup>988</sup> *Id.* at 517.

<sup>989</sup> *Id.* at 538.

cause.”<sup>990</sup> The Seventh District previously explained that a challenge for cause has its own test, separate and apart from that which *Batson* requires.<sup>991</sup> Like the appellant in *Lewis*, Appellant here “does not focus on this test since he is preoccupied with the *Batson* holding.”<sup>992</sup>

Second, defense counsel failed to object under *Batson*; therefore, it would nevertheless be reviewed for plain error.<sup>993</sup> “To prevail under the plain error doctrine, a defendant must demonstrate that, but for the error, the outcome of trial clearly would have been different.”<sup>994</sup> Thus, “[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.”<sup>995</sup>

Here, no such error could be established, because the State challenged Juror No. 301 for cause, in which the prosecutor set forth several race-neutral reasons.<sup>996</sup> Further, the trial court denied the State’s challenge, and Juror No. 301 sat as an alternate; thus, no prejudice resulted.

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<sup>990</sup> *State v. Lewis*, 7<sup>th</sup> Dist. No. 03 MA 36, 2005 Ohio 2699, ¶ 60, citing *Batson*, supra, and *State v. Herring* (2002), 94 Ohio St.3d 246, 256.

<sup>991</sup> *Lewis*, supra at ¶ 61.

<sup>992</sup> *Id.*

<sup>993</sup> Tr. Voir Dire, Vol. II, at 442.

<sup>994</sup> *Bailey*, supra at ¶ 8, citing *Stojetz*, 84 Ohio St.3d at 455, citing *Long*, supra; Crim.R. 52(B).

<sup>995</sup> *Long*, 53 Ohio St.2d at 97.

<sup>996</sup> Tr. Voir Dire, Vol. II, at 442-443.

Therefore, the record demonstrates that the State set forth race-neutral explanations for its decisions to excuse both Juror Nos. 11 and 31. While Appellant takes exception to the prosecutor's explanations, Appellant has utterly failed to show purposeful racial discrimination by the State in violation of *Batson*.

Appellant's seventeenth proposition of law is meritless and must be overruled.

**XVIII. Proposition of Law No. 18:** Failure to make an adequate and accurate record of all proceedings in a capital murder case denies effective appellate review and deprives the capital defendant of due process of law, the ability to effectively defend life, and meaningful access to the courts. Fourteenth Amendment to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1 and 16, construed.

**State's Response to Proposition of Law No. 18:** The Appellate Record is an Adequate and Accurate Record of the Trial Proceedings; Therefore, Appellant was Not Deprived of His Constitutional Right to a Fair Trial.

As for Appellant's eighteenth proposition of law, he contends that "the trial judge's venturesome system of using juror numbers, coupled with a confusing and woefully inadequate appellate record," deprived him of a fair trial, and the ability to have a "meaningful appellate review of his capital trial." To the contrary, the trial court created an extensive trial record; therefore, Appellant was afforded an adequate and meaningful appellate review of his capital trial.

A. **THE REQUIREMENT OF A COMPLETE AND UNABRIDGED TRANSCRIPT IN CAPITAL TRIALS DOES NOT MEAN THAT THE TRIAL RECORD MUST BE PERFECT FOR PURPOSES OF APPELLATE REVIEW.**

This Court has previously held that "a capital defendant is entitled to a 'complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal.'"<sup>997</sup> This Court later clarified its holding and held "that the 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."<sup>998</sup>

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<sup>997</sup> *State v. Palmer*, 80 Ohio St.3d 543, 553 (1997), quoting *State ex rel. Spirko v. Court of Appeals*, 27 Ohio St.3d 13, 18 (1986).

<sup>998</sup> *Palmer*, 80 Ohio St.3d at 553.

1. **THE TRIAL COURT DID NOT EMPLOY AN ANONYMOUS JURY, AND WAS WELL WITHIN ITS DISCRETION TO ADDRESS THE JURORS BY THEIR JUROR NUMBERS RATHER THAN THEIR REAL NAMES.**

The Seventh District has previously recognized that the “trial court has discretion over the scope, length, and *manner* of voir dire[.]”<sup>999</sup> (Emphasis added.) Its discretion will then vary from case to case depending on the given circumstances.<sup>1000</sup> Further, a reviewing court “will not find prejudicial error in how the trial court qualified venirepersons ‘as fair and impartial jurors’ unless the appellant can show ‘a clear abuse of discretion.’”<sup>1001</sup>

Appellant complains that that trial court should have used the jurors’ names instead of referring to them by their juror number. Appellant refers to this numbering system as the trial court’s “experiment” and “innovation.” But this is hardly the first time that such a method was employed in this State; as it has been employed previously in the Third District (Allen County),<sup>1002</sup> Fifth District (Fairfield County)<sup>1003</sup> and (Stark County),<sup>1004</sup> Seventh District (Mahoning County),<sup>1005</sup> and the Eighth District (Cuyahoga County).<sup>1006</sup>

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<sup>999</sup> *State v. Irwin*, 184 Ohio App.3d 764, 777 (7<sup>th</sup> Dist. 2009).

<sup>1000</sup> *See Trimble*, 122 Ohio St.3d at 310.

<sup>1001</sup> *LaMar*, 95 Ohio St.3d at 191, citing *Cornwell*, 86 Ohio St.3d at 565, and *Beuke*, 38 Ohio St.3d at 39.

<sup>1002</sup> *State v. Glenn*, 3<sup>rd</sup> Dist. No. 1-06-12, 2008 Ohio 3058, ¶ 21, fn. 2.

<sup>1003</sup> *State v. Hill*, 92 Ohio St.3d 191 (2001).

<sup>1004</sup> *State v. Conley*, 5<sup>th</sup> Dist. No. 2000CA00188, 2001 WL 289861, at \*2 (Mar. 19, 2001).

Here, the trial court referred to each juror by their juror identification number, not their name. Both the State and defense counsel had the jurors' personal information, which included their full names and addresses, available to them during voir dire.<sup>1007</sup> In fact, Attorney DeFabio remarked that this system would save the embarrassment of pronouncing the jurors' names.<sup>1008</sup>

The Fifth District has previously upheld a similar numbering system used in Stark County.<sup>1009</sup> And such a numbering system does not constitute an "anonymous jury."<sup>1010</sup>

Therefore, the trial court's use of the numbering system was well within its sound discretion, and did not prejudice Appellant.

2. **THE APPELLATE RECORD  
CONTAINS SUFFICIENT INFORMATION  
REGARDING JUROR NO. 175'S REMOVAL.**

More specifically, Appellant contends that the trial court failed to adequately record the removal of Juror No. 175.

First, the trial court adequately explained his discussion with Juror No. 175 concerning his use of alcohol.<sup>1011</sup> Defense counsel also noted that Juror No. 175 smelled

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<sup>1005</sup> *State v. Mock*, 7<sup>th</sup> Dist. No. 08 MA 94, 2010 Ohio 2747, ¶ 20; *Helms*, supra.

<sup>1006</sup> *State v. Bradley*, 8<sup>th</sup> Dist. No. 70354, 2002 Ohio 3895, ¶ 43.

<sup>1007</sup> *Tr. Voir Dire*, Vol. I, at 23. This information was submitted to the parties through the extensive questionnaires submitted by each juror.

<sup>1008</sup> *Id.* at 23-24.

<sup>1009</sup> *Conley*, supra at \*2; *State v. Blackmon*, 5<sup>th</sup> Dist. No. 2000CA00151, 2001 WL 1782902, at \*1-2 (Mar. 5, 2001); *State v. Givens*, 5<sup>th</sup> Dist. No. 2000CA00142, 2001 WL 1782886, at \*1 (Feb. 20, 2001).

<sup>1010</sup> *See id.*

of alcohol.<sup>1012</sup> The record is clear that Juror No. 175 smelled of alcohol, the trial court admonished him on this problem, and subsequently, nothing more came about this issue during voir dire. Simply, Appellant failed to establish that he was prejudiced by the trial court's failure to record his discussion with Juror No. 175.<sup>1013</sup>

Second, as stated in response to Appellant's fourteenth assignment of error, the record adequately explains Juror No. 175's removal and the trial court's subsequent investigation into the potential effect that his comments had on Juror No. 176. In fact, the record clearly demonstrates that Juror No. 176 was not biased from Juror No. 175's statements.

The relevant group was the ninth group of prospective jurors, which was questioned on Wednesday, October 8, 2008.<sup>1014</sup> This group consisted of Juror Nos. 254, 278, 273, 173, 175, and 176.<sup>1015</sup> During individual-group voir dire, Juror Nos. 254 and 273 were removed *sua sponte* by the trial court, after an in-chambers discussion, because each had been exposed to pretrial publicity.<sup>1016</sup> Juror No. 278 was also removed *sua*

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<sup>1011</sup> See Tr. Voir Dire, Vol. III, at 538-542.

<sup>1012</sup> See *id.*, at 539.

<sup>1013</sup> See, e.g., *State v. DePew*, 38 Ohio St.3d 275, 279 (1988) ("Given the fact that appellant has not demonstrated that he was prejudiced by the alleged inadequacy of the record, this proposition of law is rejected.").

<sup>1014</sup> Tr. Voir Dire, Vol. III, at 494.

<sup>1015</sup> See generally *id.* at 494-543.

<sup>1016</sup> *Id.* at 495-501.

*sponte* by the trial court, without objection from either the State or trial counsel, because he appeared “slow” and “bewildered.”<sup>1017</sup>

Following the trial court’s examination of the prospective jurors concerning pretrial publicity, only Juror Nos. 173, 175, and 176 remained.<sup>1018</sup> The State and trial counsel then examined the three jurors on their views of the death penalty.<sup>1019</sup> At the conclusion of their examination, the State successfully challenged Juror No. 173 for cause, without objection from Appellant.<sup>1020</sup> Appellant then unsuccessfully challenged Juror No. 175 for cause.<sup>1021</sup> Thus, only Juror Nos. 175 and 176 remained from the ninth group, as all others were previously excused.<sup>1022</sup>

The following morning, Thursday, October 9, 2008, it was brought to the trial court’s attention that Juror No. 175 had made statements concerning the victim in this case, Gina Tenney, which were overheard by Juror Nos. 176 and 173.<sup>1023</sup> The trial court

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<sup>1017</sup> *Id.* at 501-505.

<sup>1018</sup> *Id.* at 505.

<sup>1019</sup> *See generally id.* at 505-537.

<sup>1020</sup> *Id.* at 538. Juror No. 173 stated that she was against the death penalty, and could not make a decision. *Id.* at 511. She stated that her views would substantially impair her ability to serve as a juror in this case. *Id.* at 512-513. Further, she could not set aside her opinions concerning the death penalty, stating, she was “having a hard enough time just sitting here now.” *Id.* at 535-536.

<sup>1021</sup> *Id.* at 538-542.

<sup>1022</sup> *Id.* at 542.

<sup>1023</sup> *Id.*, Vol. IV, at 599-600.

conducted a hearing, as required by *Smith* and *Phillips*.<sup>1024</sup> Juror No. 176 stated that the statements had “no effect” on him, and that he would remain “fair and impartial.”<sup>1025</sup> Following the trial court’s examination, **both the State and trial counsel passed on any further inquiry.**<sup>1026</sup> Further, the record is clear that the trial court removed Juror No. 175 because of the statements he made concerning Gina Tenney.<sup>1027</sup> Thus, only Juror No. 176 remained from the ninth prospective group.

Furthermore, **none of the prospective jurors in the ninth group sat on the jury that convicted and sentenced Appellant to death; thus, no prejudice could be established.**<sup>1028</sup>

The trial court conducted a thorough investigation into the statements made by Juror No. 175, after which, the court concluded the statements did not affect the remaining juror—Juror No. 176. Furthermore, Appellant failed to establish that he was prejudiced, as none of the prospective jurors in the ninth group sat on the jury that convicted and sentenced him to death.

Appellant’s eighteenth proposition of law is meritless and must be overruled.

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<sup>1024</sup> See *Phillips*, 74 Ohio St.3d at 88, citing *Smith*, 455 U.S. at 215-216, and *Remmer*, 347 U.S. at 229-230.

<sup>1025</sup> Tr. Voir Dire, Vol. IV, at 600.

<sup>1026</sup> *Id.* at 600-601.

<sup>1027</sup> *Id.* at 600.

<sup>1028</sup> Juror No. 176 was removed by a State’s peremptory challenge. *Id.* at 760. See *Grant*, supra at \*30, citing *King*, 10 Ohio App.3d at 165-166.

**XIX. Proposition of Law No. 19:** Due process and the ability to remain free from cruel and unusual punishment requires a “mercy” instruction when requested. See, the Eighth and Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 2, 9, and 16.

**State’s Response to Proposition of Law No. 19:** Appellant was Afforded His Right to Due Process, Which was Free From Cruel and Unusual Punishment, as the Trial Court was Not Required to Give the Jury a “Mercy” Instruction.

As for Appellant’s nineteenth proposition of law, he contends that the trial court erred when it refused to give the jury a limited instruction on “mercy.” This Court, however, has previously held that the failure to give the jury a limited instruction on “mercy” is consistent with the Eighth Amendment, because it “would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner.”<sup>1029</sup>

**A. A TRIAL COURT’S DECISION TO GIVE  
A REQUESTED JURY INSTRUCTION LIES  
WITHIN THE COURT’S SOUND DISCRETION.**

Where a trial court has refused to give a requested jury instruction, a reviewing court must determine whether the court abused its discretion given the facts and circumstances of the case.<sup>1030</sup>

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<sup>1029</sup> *Lorraine*, 66 Ohio St.3d at 417, citing *California v. Brown*, 479 U.S. 538, 541 (1987), *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>1030</sup> See *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989).

1. **THE TRIAL COURT DID NOT ABUSE  
ITS DISCRETION WHEN IT REFUSED  
TO INSTRUCT THE JURY ON “MERCY.”**

The U.S. Supreme Court’s Eighth Amendment jurisprudence establishes two separate prerequisites to a valid death sentence. “First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.”<sup>1031</sup>

“Second, even though the sentencer’s discretion must be restricted, the capital defendant generally must be allowed to introduce any relevant mitigating evidence regarding his ‘character or record and any of the circumstances of the offense.’”<sup>1032</sup> “Consideration of such evidence is a ‘constitutionally indispensable part of the process of inflicting the penalty of death.’”<sup>1033</sup>

In *Brown*, the jury was instructed not to be persuaded by “mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.”<sup>1034</sup> The U.S. Court concluded that the instruction was proper.<sup>1035</sup>

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<sup>1031</sup> *Brown*, 479 U.S. at 541, citing *Gregg*, 428 U.S. at 153, and *Furman*, 408 U.S. at 238.

<sup>1032</sup> *Brown*, 479 U.S. at 541, quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett*, 438 U.S. at 604.

<sup>1033</sup> *Brown*, 479 U.S. at 541, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

<sup>1034</sup> *Brown*, 479 U.S. at 542.

<sup>1035</sup> *Id.* at 543. Prior to *Brown*, this Court held that “[t]he instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror’s personal biases or sympathies.” *Jenkins*, 15 Ohio St.3d at 164, ¶ 3 of the syllabus.

The U.S. Court reasoned that the instruction was consistent with the Eighth Amendment's need for reliability, and provides a safeguard to ensure that reliability is present in the sentencing process:

An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him. And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S., at 305, 96 S.Ct., at 2991. Indeed, by limiting the jury's sentencing considerations to record evidence, the State also ensures the availability of meaningful judicial review, another safeguard that improves the reliability of the sentencing process. See *Roberts v. Louisiana*, 428 U.S. 325, 335, and n. 11, 96 S.Ct. 3001, 3007, and n. 11, 49 L.Ed.2d 974 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

While the trial court's instructions may admonish the jury to "ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase[.]" the instructions, however, "must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime."<sup>1036</sup>

Subsequently, this Court likened the Court's analysis of "sympathy" in *Brown* to that of "mercy."<sup>1037</sup> "Mercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors."<sup>1038</sup>

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<sup>1036</sup> *Brown*, 479 U.S. at 544-545 (O'Connor, J., concurring).

<sup>1037</sup> *Lorraine*, 66 Ohio St.3d at 417.

“Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner.”

<sup>1039</sup> And “[t]he arbitrary result which may occur from a jury’s consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio.”<sup>1040</sup>

Here, Appellant contends that the trial court’s refusal to give the limited mercy instruction violated his Eighth and Fourteenth Amendments right to be free from cruel and unusual punishment.

But this is precisely what the General Assembly commands: “If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury *shall* recommend to the court that the sentence of death be imposed on the offender.”<sup>1041</sup> (Emphasis added.)

“This statutory requirement eliminates the subjective state of mind the issue of mercy generally adds to a jury’s deliberation.”<sup>1042</sup>

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<sup>1038</sup> *State v. Clark*, 8<sup>th</sup> Dist. No. 89371, 2008 Ohio 1404, ¶ 57, quoting *Lorraine*, 66 Ohio St.3d at 418. This Court previously found “[m]ercy is not a mitigating factor.” *State v. O’Neal*, 87 Ohio St.3d 402, 416 (2000).

<sup>1039</sup> *Lorraine*, 66 Ohio St.3d at 417, citing *Brown*, 479 U.S. at 541, *Gregg*, 428 U.S. at 153, and *Furman*, 408 U.S. at 238.

<sup>1040</sup> *Lorraine*, 66 Ohio St.3d at 417.

<sup>1041</sup> R.C. 2929.03(D)(2); accord *Lorraine*, 66 Ohio St.3d at 417-418.

<sup>1042</sup> *Lorraine*, 66 Ohio St.3d at 418.

While the trial court's instructions did not instruct the jury to consider "mercy" the instructions nevertheless clearly informed the jury that they were to consider any relevant mitigating evidence about Appellant's background and character, or about the circumstances of the crime:

Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that lessen the moral culpability of the defendant or diminish the appropriateness of a death sentence. You must consider all the mitigating factors presented to you. Mitigating factors include, but are not limited to, the history, character, and background of the defendant, specifically his rehabilitative efforts during his prior incarceration, his education, his employment in prison and out, his love and support for his family and their love and support for him, and any other factors that weigh in favor of a sentence other than death. This means you are not limited to the specific mitigating factors that have been described to you. You should consider any other mitigating factors that weigh in favor of a sentence other than death.<sup>1043</sup>

Therefore, it cannot be said that the trial court erred by refusing Appellant's request to include an instruction on "mercy." This decision was consistent with both the U.S. and Ohio Constitutions, and the trial court's instruction to the jury was precisely what due process commands.<sup>1044</sup>

Appellant's nineteenth proposition of law is meritless and must be overruled.

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<sup>1043</sup> See *Brown*, 479 U.S. at 544-545 (O'Connor, J., concurring).

<sup>1044</sup> See *State v. Davis*, 116 Ohio St.3d 404 (2008); *State v. Carter*, 89 Ohio St.3d 593 (2000).

**XX. Proposition of Law No. 20:** Failure to file motions to challenge the constitutionality of Ohio's death penalty is a denial of the effective assistance of counsel in a capital case. Ohio Constitution, Article I, Sections 1, 2, 10, and 16, and the Sixth and Fourteenth Amendments to the U.S. Constitution.

**State's Response to Proposition of Law No. 20:** Defense Counsel was Constitutionally Effective, Because it is Well Settled that Ohio's Death Penalty is Constitutional under Both the U.S. and Ohio Constitutions.

As for Appellant's twentieth proposition of law, he contends that defense counsel was constitutionally ineffective because they failed to challenge the constitutionality of the death penalty in Ohio. To the contrary, it is well established that the death penalty is constitutional in Ohio. Therefore, defense counsel was constitutionally effective.

**A. TO REVERSE FOR INEFFECTIVE ASSISTANCE OF COUNSEL, APPELLANT MUST ESTABLISH BOTH DEFICIENT PERFORMANCE AND MUST HAVE SUFFERED PREJUDICE AS A RESULT.**

The standard of review for an ineffective assistance claim comes from the United States Supreme Court in *Strickland v. Washington*.<sup>1045</sup> Under *Strickland*, to prove a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense.<sup>1046</sup>

After *Strickland*, this Court adopted a two-part test for analyzing whether claims for ineffective assistance of counsel are below the constitutional standard.<sup>1047</sup> In order to prove a claim of ineffective assistance of counsel, the defendant must show "(1) that counsel's performance fell below an objective standard of reasonableness, and (2) that

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<sup>1045</sup> *Strickland*, 466 U.S. at 668.

<sup>1046</sup> *Id.*; see also *Bradley*, 42 Ohio St.3d at 136.

<sup>1047</sup> *Mitchell*, supra.

counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.”<sup>1048</sup>

Furthermore, because defense counsel failed to argue this motion before the trial court, the record here *must* demonstrate that such a “motion would have been granted[]” had one been filed.<sup>1049</sup>

1. **DEFENSE COUNSEL  
WAS CONSTITUTIONALLY  
EFFECTIVE, BECAUSE THE TRIAL COURT  
WOULD NOT HAVE FOUND THAT THE DEATH  
PENALTY IN OHIO WAS UNCONSTITUTIONAL.**

To begin, defense trial counsel did challenge the constitutionality of the death penalty in Ohio. On February 28, 2008, trial counsel file a motion entitled “Defendant’s Motion to Dismiss Death Penalty Specifications Because Method of Execution is Unconstitutional.” In the motion, although defense counsel did not challenge the constitutionality of the death penalty as a whole, they did challenge the form, or imposition, of the death penalty via the three-drug protocol. The State filed its response on March 7, 2008. On March 13, 2008, the trial court held a hearing on the motion and overruled it via judgment entry filed that day.<sup>1050</sup>

A challenge to the three-drug protocol is now moot, because Ohio has since amended its lethal injection protocol to a one-drug procedure.<sup>1051</sup>

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<sup>1048</sup> *Id.*, quoting *Madrigal*, 87 Ohio St.3d at 388-89, citing *Strickland*, 466 U.S. at 687-88.

<sup>1049</sup> *McGee*, supra at ¶ 17, citing *Barnett*, supra at ¶ 31.

<sup>1050</sup> *See* Pretrial, March 13, 2008, before the Honorable R. Scott Krichbaum.

<sup>1051</sup> *See Cooney v. Strickland*, 588 F.3d 921, 923 (6<sup>th</sup> Cir., 2009).

Appellant now claims that trial counsel was ineffective because they did not file a motion challenging the constitutionality of the death penalty in Ohio, in its entirety.

In the United States, capital punishment has been a facet of the law since the birth of this County.<sup>1052</sup> Over time, the death penalty has been refined and even halted, but never found per se unconstitutional.

In 1972, the U.S. Supreme Court's decision in *Furman v. Georgia*, temporarily halted executions.<sup>1053</sup> The Court ruled that the statutes in question were discretionary in nature, which led to the discriminatory and random imposition of the death penalty, thereby violating the Eighth (cruel and unusual) and Fourteenth (equal protection) Amendments.<sup>1054</sup> Although the Court held that the death penalty statutes were unconstitutional, the Court did not find the death penalty per se unconstitutional.

In 1976, the U.S. Supreme Court concluded in *Gregg v. Georgia* that "the punishment of death does not invariably violate the Constitution."<sup>1055</sup> To be neither cruel nor unusual, the punishment must not involve "unnecessary and wanton infliction of pain," nor "be grossly out of proportion to the severity of the crime."<sup>1056</sup> The Court ruled the death penalty is an appropriate penalty for murder:

[T]he death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless

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<sup>1052</sup> See Fifth Amendment to the U.S. Constitution.

<sup>1053</sup> *Furman*, 408 U.S. at 238.

<sup>1054</sup> *Id.*

<sup>1055</sup> *Gregg*, 428 U.S. at 169.

<sup>1056</sup> *Id.* at 173.

of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.<sup>1057</sup>

The U.S. Court concluded that a carefully crafted statute (which provides for, among other things, guidance to the sentencing authority, bifurcated trials, specific jury findings, and automatic appeals to the state supreme court) would help reduce the discriminatory and random imposition of the death penalty, as raised in the *Furman* decision.<sup>1058</sup> The Court thereafter affirmed the Georgia death penalty statute, upheld the death sentence, and in essence reinstated the death penalty.

Following the *Gregg* decision, the Ohio General Assembly imposed its new death penalty statute. In 1978, however, the U.S. Court struck down the Ohio statute as being unconstitutional.<sup>1059</sup> The U.S. Court found that the Ohio statute “does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.”<sup>1060</sup> Specifically, the Ohio statute failed to permit the sentencer to consider, as mitigation, “any aspect of the defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”<sup>1061</sup>

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<sup>1057</sup> *Id.* at 187.

<sup>1058</sup> *Id.* at 195-198.

<sup>1059</sup> *Lockett*, 438 U.S. at 586.

<sup>1060</sup> *Id.* at 606.

<sup>1061</sup> *Id.* at 604-605.

On October 19, 1981, the Ohio General Assembly enacted a revised death penalty statute. The statute was soon challenged and found to be constitutional.<sup>1062</sup>

At the time, the statute permitted the defendant to elect death by electrocution or lethal injection. And despite challenges, this Court concluded that “Ohio’s death penalty statute is constitutional ‘*in all respects.*’”<sup>1063</sup> (Emphasis added.) This Court specifically held that death by electrocution and/or lethal injection was not unconstitutional.<sup>1064</sup>

Nonetheless, in 2001, the Ohio General Assembly revised the death penalty statute, by eliminating the electrocution option but retaining lethal injection.<sup>1065</sup> Although electrocution was eliminated, the statute reserved the right to re-impose death by electrocution if lethal injection was later found to be unconstitutional.

Because it is well established that the death penalty and Ohio’s lethal injection protocol is constitutional, even if trial counsel filed a motion challenging the death penalty in its entirety, the motion would have been overruled. Therefore, the record is clear that the motion would not have been granted and no prejudice exists.<sup>1066</sup>

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<sup>1062</sup> *Jenkins*, 15 Ohio St.3d at 164; cert. denied, *Jenkins v. Ohio*, 472 U.S. 1032 (1985).

<sup>1063</sup> *State v. Bey*, 85 Ohio St.3d 487, 502 (1999), quoting *State v. Evans*, 63 Ohio St.3d 231, 253 (1992).

<sup>1064</sup> *State v. Carter*, 89 Ohio St.3d 593 (2000).

<sup>1065</sup> R.C. 2949.22.

<sup>1066</sup> See *McGee*, supra at ¶ 16.

Furthermore, Appellant raises several additional issues, which he contends should have been raised by trial counsel. The Seventh District properly concluded that this Court has previously found each one to be meritless.<sup>1067</sup>

Therefore, it is well established that Ohio's death penalty is constitutional. Accordingly, defense counsel was constitutionally effective.

Appellant's twentieth proposition of law is meritless and must be overruled.

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<sup>1067</sup> See *Adams*, supra at ¶¶ 381-388.

**XXI. Proposition of Law No. 21:** Appellant Was Denied Due Process and Equal Protection of the Laws, and Liberties Protected by the Ohio Constitution, Article I, Sections 1, 2, and 16; And, in the Death Sentence Imposed upon Appellant Is Cruel and Unusual in Violation of U.S. Constitution, Amendments III and XIV and Ohio Constitution, Article I, Sections 9 and 16, Because Ohio's Death Penalty Law as Implemented Generally and in Particular by the Trial Court Denied Appellant a Proportionality Review.

**State's Response to Proposition of Law No. 21:** Appellant's Death Sentence Does Not Violate His Rights to Due Process and Equal Protection of the Laws; Because His Sentence is Subjected to a Proportionality Review by this Court.

As for Appellant's twenty-proposition of law, he contends that his rights to due process and equal protection of the law are violated when his death sentence is not compared to other sentences (death or otherwise) for all defendants charged with similar crimes. But, as Appellant concedes in his merit brief, Ohio law does not require this type of review for which he seeks. Ohio law, however, only requires proportionality review when a death sentence is *actually* imposed. Therefore, Appellant's rights to due process and equal protection of the law were not violated.

**A. OHIO LAW DOES NOT REQUIRE  
A PROPORTIONALITY REVIEW OF CASES  
IN WHICH THE DEATH PENALTY WAS NOT IMPOSED.**

Revised Code 2929.05(A) states, in pertinent part, that this Court:

[S]hall review and independently weigh all of the facts and other evidence disclosed in the record in this case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in this case, and whether the sentence of death is appropriate.<sup>1068</sup>

In determining whether the death sentence is "appropriate," R.C. 2929.05(A) requires this Court to "consider whether the sentence is excessive or disproportionate to the penalty

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<sup>1068</sup> R.C. 2929.05(A).

imposed in similar cases.”<sup>1069</sup> In addition to this “independent” review and weighing, R.C. §2929.05(A) further requires this Court to determine whether the evidence supports the trier of fact’s findings with regards to the aggravating circumstances, and to determine whether the sentencing court properly weighed the aggravating circumstances against the mitigating factors.

Thus, the issue raised here is what is meant by “similar cases.” Appellant argues that “similar cases” should mean *every* defendant who is either (1) sentenced to death; (2) charged with a death specification(s), convicted of the death specification(s), but sentenced to a sentence other than death; (3) charged with a death specification(s), not convicted of the death specification(s), and thus sentenced to a sentence other than death; (4) charged with crimes for which a death specification could be sought, is sought but not indicted, and thus sentenced to a sentence less than death; or (5) charged with crimes for which a death specification could be sought, but is not sought, and thus a sentence less than death is imposed.

In support of this notion, Appellant cites to two cases that fall under the fifth category above. This Court, however, has previously rejected this argument.<sup>1070</sup> Thus, Appellant’s argument is not recognized under Ohio law.

Appellant’s twenty-first proposition of law is meritless and must be overruled.

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<sup>1069</sup> *Id.*

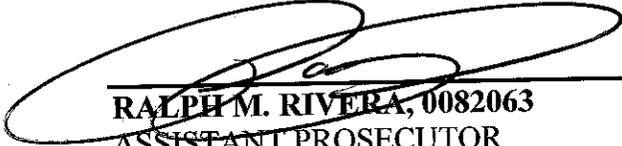
<sup>1070</sup> See *State v. Perez*, 124 Ohio St.3d 122, 147-148 (2009); *State v. Hutton*, 100 Ohio St.3d 176, 191 (2003); *State v. Green*, 66 Ohio St.3d 141 (1993); *State v. Davis*, 63 Ohio St.3d 44 (1992).

**Conclusion**

**WHEREFORE**, Appellee-State of Ohio hereby requests that this Honorable Court Overrule Defendant-Appellant Bennie L. Adams' Propositions of Law and Deny his request for relief, allowing his conviction and sentence of death to stand.

Respectfully Submitted,

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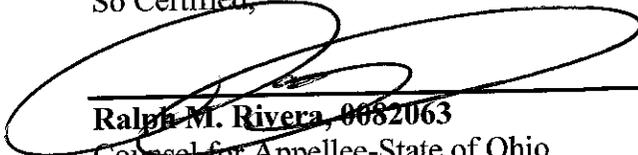
  
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**Certificate of Service**

I certify that a copy of the State of Ohio's Answer Brief was **hand delivered** to counsel for Appellant, **John B. Juhasz, Esq.**, and **Lynn Maro, Esq.**, at 7081 West Boulevard, Suite 4, Youngstown, OH 44512, on March 6, 2012.

So Certified,

  
\_\_\_\_\_  
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